IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 5 OF 2019

JSW Energy Limited .. Petitioner
VS.
Union of India and ors. .. Respondents

Mr. Rafique Dada, Senior Advocate a/w. Mr. Harsh Shah and Farhad D. and Mr. Chirag Shetty I/b Economic Laws Practice for the Petitioner.
Mr. Pradeep S. Jetly a/w. J.B. Mishra for Respondent No.1.
Mr. H.B. Takke, AGP for Respondent No.2/State.

CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 07 JUNE 2019.

ORAL JUDGMENT (PER M.S.SONAK, J.)

1] Heard learned counsel for the parties.

2] Rule. At the request of and with the consent of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the orders dated 5 March 2018 and 2 July 2018 made by the Maharashtra Authority for Advance Ruling for Goods and Service Tax (Advance Ruling Authority) and order dated 2 July 2018 made by the Maharashtra Appellate Authority for Advance Ruling for Goods and Service Tax (Appellate Authority) constituted under the Maharashtra Goods and Services Tax Act, 2017 (MGST Act).

4] The petitioner, JSW Energy Limited (JEL), which is engaged in the business of generation and sale of electricity proposed to enter into an arrangement with JSW Steel Limited

(JSL) involving *inter alia* conversion *of* coal and other inputs into electricity and conversion of electricity into Steel on job work basis. In order to ascertain whether, the proposed arrangement, indeed qualifies as "*job work*" as defined under section 2(68) of the Central Goods and Services Tax Act, 2017 (CGST Act) and consequently whether the petitioner is entitled to benefits under the CGST and MGST, the petitioner, vide application dated 7 December 2017, in the prescribed format, applied to the Advance Ruling Authority seeking Advance Ruling on the applicability of GST to the proposed arrangement.

5] In particular, the petitioner, in its application dated 7th December 2017, after giving a gist of the proposed arrangement, sought for ruling of the Advance Ruling Authority upon applicability of GST to the following:

a] Supply of coal or any other inputs on a job work basis by JSL to JEL;
b] Supply of power by JEL to JSL;
c) Job work charges payable to JEL by JSL.

6] The Advance Ruling Authority vide order dated 5 March 2018 ruled that the proposed arrangement did not qualify as '*job work*' primarily because the same amounted to '*manufacture*' as defined under Section 2(72) of the CGST Act. On this basis, the Advance Ruling Authority ruled that the proposed arrangement attracted GST. The operative portion of the Advance Ruling Authority's order dated 5th March 2018 reads thus:

"ORDER
(under section 98 of the Central Goods and Services Tax

Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO. GST-ARA-05/2017/B-08 Mumbai,dt.05/03/18

For reasons as discussed in the body of the order, the questions are answered thus-

Q.1 Applicability of GST on supply of coal or any other inputs on a job work basis by JSL to JEL

A. This question pertains to supply JSL and not JEL, the applicant. In view thereof, the same is not entertained.

Q.2 Applicability of GST on supply of power by JEL to JSL.

A. This question is answered in the affirmative

Q.3 Applicability of GST on job work charges payable to JEL by JSL.

A. The transaction between JEL and JSL is a transaction of supply of goods and not a 'job work' and therefore, the question does not survive."

7] Aggrieved, the petitioner appealed to the Appellate Authority, emphasizing that an arrangement, including the proposed arrangement can amount to '*job work*' even though there may arise an element of '*manufacture*' therein. The perusal of the appeal memo substantially indicates that the entire emphasis of the petitioner was on this aspect, since, this was the primary ground on which the Advance Ruling Authority had held against the petitioner.

8] The Appellate Authority, vide its order dated 2nd July 2018 disagreed with the reasoning of Advance Ruling Authority that the proposed arrangement did not amount to '*job work*' because the same amounted to '*manufacture*'. However, the Appellate Authority, upheld the ultimate conclusion of Advance Ruling Authority relying upon two different and distinct

grounds, namely,

> *"(i) That Coal, which is used for manufacture of electricity and thereafter Steel, is not covered as an input under the Standard Input Output Norms (SIO) for Steel products under the Foreign Trade Policy;*
>
> *(ii) That in the proposed arrangement, Coal would stand consumed and therefore, was irretrievable in the same form after the conclusion of the job work. Therefore, the proposed arrangement did not fulfill the conditions prescribed in the Section 143 of the CGST Act in relation to bringing back the same inputs by the principal."*

*[*The aforesaid two grounds, are hereafter referred to as the *'new grounds']*

9] The operative portion of the Appellate Authority's impugned order dated 2nd July 2018 reads thus :

> *"ORDER*
>
> *In view of the above discussions and in terms of Section 101(1) of the CGST Act 2017 and MGST Act 2017, we hold that-*
>
> *The processing undertaken by a person on the goods belonging to another registered person qualifies as job work even if it amounts to manufacture provided all the requirements under the CGST/MGST Act in this behalf, are met with.*
>
> *The transaction between the Appellant and M/s. JSL does not qualify for Job Work under Section 2(68) and Section 143 of the Said Act.*
>
> *The order of AAR stands modified in terms of the above order.*
>
> *The Appeal filed by M/s. JEL stands dismissed with above order."*

10] Mr. Rafique Dada, the learned Senior Advocate for the petitioner, at the outset submits that since the Statute has

provided for no further appeal against the orders of Appellate Authority, this Court, should examine the impugned orders on the basis of substantive merits, as otherwise, the impugned orders would bind the petitioner *qua* the proposed arrangement, for all times. He submits in other States, the proposed arrangement is treated as '*job work*' by the concerned authorities. He submits that the reasoning of the Appellate Authority in the context of new grounds is contrary to statutory provisions as well as judicial precedents. He submits that the Appellate Authority has failed to appreciate the proper scope of proposed arrangement and consequently misdirected itself both on facts as well as on law. He submits that Appellate Authority, in any case, clearly exceeded jurisdiction in introducing or relying upon '*new grounds*', which were never raised before Advance Ruling Authority by the Revenue. He submits that such exercise of introducing or relying upon '*new grounds*' was *ex facie* in excess of jurisdiction. He relies on the decision of the Supreme Court in ***Reckitt & Colman of India Ltd. vs. Collector of Central Excise - 1996 (88) ELT-641 (SC),*** in support of this proposition.

11] Mr. Dada, without prejudice to the challenge on merits, submits that there was violation of principles of natural justice before the Appellate Authority, thereby vitiating the decision making process. He submits that at no stage was the petitioner put to notice regards the '*new grounds*'. He submits that the petitioner was not offered any opportunity to place documentary evidences with regard to the '*new grounds*'. He

submits that despite this, the Appellate Authority, has ruled against the petitioner by observing that it is the petitioner which failed to produce the documentary evidences in relation to the '*new grounds*'. He submits that all this clearly amounts to violation of principles of natural justice and on this ground, Appellate Authority's impugned order dated 2nd July 2018 is required to be set aside and the matter remanded to Appellate Authority for reconsideration by adherence to the principles of natural justice.

12] Mr. Pradeep Jetly, the learned Counsel for respondent No.1, defends the impugned orders by submitting that there is neither any scope for challenge on merits nor is this a case involving violation of principles of natural justice. He submits that there is a clear distinction between orders made in adjudicatory proceedings and orders made by Advance Ruling Authority, at the invitation of a potential assessee. He submits that in the later case, it is for the proposed assessee to place all material on record before the Advance Ruling Authority and there is really no element of adjudication, as such involved. He submits that the jurisdiction of the Appellate Authority is quite wide and there can obviously be no bar to the Appellate Authority upholding the conclusion of Advance Ruling Authority albeit, on different grounds. He submits that on the facts of the present case, the view taken by the two authorities is sustainable both on facts as well as on law. He submits that there was no violation of principles of natural justice and no such complaint of violation was ever made in the course of proceedings before the Appellate Authority. He submits that no

opportunity was applied for by the petitioner to produce any additional material before the Appellate Authority and therefore, it is not open for the petitioner to now complain about denial of opportunity. For all these reasons, Mr. Jetly submits that this petition warrants dismissal.

13] Mr. H.B. Takke, the learned AGP for the State, supported the submissions made by Mr. Jetly and defended the impugned orders on the basis of the reasoning reflected therein.

14] The rival contentions now fall for our determination.

15] At the outset, we make it clear that we do not propose to examine the impugned orders on their substantive merits or de-merits, merely because Statutes in question have not provided for any further appeal against the decision of the Appellate Authority. Any such attempt, would virtually amount to converting these proceedings under Article 226/227 of the Constitution of India, which are essentially proceedings seeking judicial review, into appellate proceedings.

16] The circumstance that the Statutes in question have provided for no further appeal against the decision of the Appellate Authority, will have to to be respected and the validity or otherwise of the impugned orders will have to be examined by applying the principles of judicial review and not the principles which apply in case of an appeal.

17] In ***Appropriate Authority and another vs. Smt. Sudha Patil and anr. - (1999) 235 ITR 118 (SC),*** the Supreme Court has held that merely because no appeal is provided for, against the order of appropriate authority directing compulsory acquisition by the Government, the supervisory power of the High Court does not get enlarged nor can the High Court exercise an appellate power.

18] The principles of judicial review, normally do not concern themselves with the decision itself, but are mostly confined to the decision making process. Such proceedings are not an appeal against the decision in question, but a review of the manner in which such decision may have been made. In judicial review, the Court sits in judgment over correctness of the decision making process and not on the correctness of the decision itself. In exercise of powers of judicial review, the Court is mainly concerned with issues like the decision making authority exceeding its jurisdictional limits, committing errors of law, acting in breach of principles of natural justice or otherwise arriving at a decision which is *ex-facie* unreasonable or vitiated by perversity.

19] In ***M/s. R.B. Shreeram Durga Prasad and Fatehchand Nursing Das vs. Settlement Commission (IT & WT) and anr. - (1989) 1 SCC 628,*** the Supreme Court was concerned with judicial review of the orders of Settlement Commission, which were alleged to have been made in breach of the principles of natural justice. The Supreme Court emphasized that principles

of natural justice would certainly apply in such matters and the Settlement Commission was duty bound to adopt procedure consistent with such principles. The Supreme Court, also held that in exercise of powers of judicial review of the decision of the Settlement Commission, the Court ought to be concerned with the legality of the procedure validity and not with the validity of the order itself. The Supreme Court referred to observations of *Lord Hailsham* **in *Chief Constable of the North Wales Police vs. Evans – (1982) 1 WLR 1155,*** in which it is held that judicial review is concerned not with the decision but with the decision making process.

20] Therefore, in view of the aforesaid, we decline the invitation of Mr. Dada to go into the merits of the impugned orders, merely because the Statutes in question have not provided any further appeals in such matters. The challenge in this petition, will have to be examined by confining ourselves to the principles of judicial review, which, *inter alia,* will include the issue as to whether there has been a failure of natural justice at the appeal stage, thereby vitiating the decision making process leading to making of the impugned order dated 2nd July 2018.

21] As noted earlier, the perusal of the impugned order dated 5th March 2018 made by Advance Ruling Authority indicates that the primary basis for holding that the petitioner's proposed arrangement attracts GST was that the expressions "*job work*" and *"manufacture"* are mutually exclusive. The Advance Ruling

Authority had in fact held that since the proposed arrangement results in "*manufacture*", the same cannot qualify as '*job work*'. The Advance Ruling Authority, on such basis, did not even advert to the issues as to whether Coal constitutes '*input or manufacture of electricity or steel etc.*'. Naturally, therefore, the petitioner, in its appeal memo questioning the impugned order dated 5th March 2018, emphasized on its contention that the expressions '*job work*' and '*manufacture*' are not mutually exclusive.

22] The perusal of impugned order dated 2nd July 2018 made by the Appellate Authority, in fact indicates that the Appellate Authority accepted the petitioner's contention that the expressions '*job work*' and '*manufacture*' are not mutually exclusive. On this issue, the Appellate Authority has, in the impugned order dated 2nd July 2018, expressly observed as follows:

> "*.....the processing undertaken by a person on the goods belonging to another registered person qualifies as a job work even if it amounts to manufacture provided all the requirement under CGST/MGST Act in this behalf, are met with.....*"

23] However, as noted earlier, the Appellate Authority upheld the conclusion recorded by Advance Ruling Authority on the basis of '*new grounds*'. The Appellate Authority has reasoned that Coal cannot be treated as an input for manufacture of electricity and steel. The Appellate Authority has also reasoned that since coal would stand consumed in the process and was irretrievable in the same form after the conclusion of job work,

the condition under Section 143 of the CGST Act *qua* bringing back the same inputs by the principal, would not stand fulfilled. In paragraphs 52 and 56 of the impugned order dated 2nd July 2018, the Appellate Authority has faulted the petitioner for failure to produce agreements with JSL and documentary evidences in the context of the '*new grounds*' appearing in the impugned order.

24] Mr. Dada's contention that the Appellate Authority ought to have confined itself to the issue as to whether the primary ground relied upon by the Advance Ruling Authority was right or not, does not appeal to us. Looking to the scheme of the provisions dealing with advance rulings, such wider proposition urged by Mr. Dada cannot be accepted. The Appellate Authority, in a given case, may be entitled to uphold the conclusion of Advance Ruling Authority, albeit, for reasons other than reasons which prompted the Advance Ruling Authority to base its decision. Ultimately, the Appellate Authority is required to give its ruling on the question posed by taking into account the relevant circumstances and eschewing irrelevant ones. Therefore, if the Advance Ruling Authority may have missed a particular point, it is not as if the Appellate Authority is precluded from adverting to such point and basing its ruling on the same.

25] In *Reckitt & Colman of India Ltd (supra),* the Supreme Court was concerned with adjudicatory proceedings, which, to a great extent, are adversarial in nature. It is in that context that the Supreme Court observed that an Appellate Tribunal is

not competent to make out in favour of the Revenue, a case which the Revenue never canvassed or which the assessee was never required to meet. Such observations therefore, will have to be read in the context of adjudicatory proceedings, the scope of which is not quite the same as the scope of proceedings where an assessee or a potential assessee seeks advance ruling.

26] Therefore, we are unable to accept Mr. Dada's contention that the Appellate Authority exceeded jurisdiction in adverting to '*new grounds*', in support of its decision as reflected in the impugned order dated 2nd July 2018. However, the moot question which arises in this matter is whether the Appellate Authority, in relying upon the '*new grounds*', has violated the principles of natural justice, by not putting the petitioner to any notice that such '*new grounds*' were proposed to be considered or by not affording the petitioner opportunity to place on record the documentary evidences or clarifications in order to meet such '*new grounds*' ?

27] On the moot issue as aforesaid, in the facts and circumstances as presented from the record, we are satisfied that the ground of failure of natural justice and the consequent vitiation of the decision making process, has been made out.

28] Since the Appellate Authority, in the present case, agreed with the petitioner's contention emphasized in the appeal memo that the expressions '*job work*' and '*manufacture*' are not mutually exclusive, the Appellate Authority, should have atleast

put the petitioner to notice that '*new grounds*' were proposed to be considered for nevertheless upholding the conclusion of the Advance Ruling Authority. This is particularly so, because the Appellate Authority has actually faulted the petitioner for its alleged failure to submit certain agreements and documentary evidences, having a direct bearing upon the '*new grounds*', upon which the Appellate Authority has finally based its decision. The absence of any indication by the Appellate Authority that it proposed to take into consideration the '*new grounds*' or the failure on the part of the Appellate Authority to afford the petitioner an opportunity to produce documents or documentary evidences having direct bearing on the '*new grounds*', in our opinion, amounts to failure on the part of the Appellate Authority to adhere to the principles of natural justice. Such failure, vitiates the decision making process and affords a good ground for interference in the exercise of powers of judicial review. The prejudice to the petitioner is quite evident in the facts and circumstances of the present case.

29] For example, in paragraph 52 of the impugned order dated 2nd July 2018, the Appellate Authority has observed thus:

> "*52. In the matter before us, the appellant have not submitted the following:*
> *(i) The agreement or proposed agreement between M/s. JSL and M/s. JEL for the process of job work to understand about the quantity and value of the inputs being supplied by the principal and the amount and quantity of the inputs/material being used by the job worker to the inputs supplied by the principal to carry out the job work process.*
> *(ii) The detail manufacturing process of M/s JEL for production of Electricity mentioning the name, quantity*

and value of the inputs.
(iii) The procedure/process for accounting for the inputs received from M/s. JSL by M/s. JEL and co-relation thereof with the goods supplied after job work.

Though it is not possible to ascertain the quantity and value of the material being utilized by the job worker in the conversion of coal provided by the principal into electricity accurately in absence of data before us, it can nevertheless be seen from the details provided by the appellant that coal is not the only input used for the production of electricity. There is large quantity of water and air being utilized in the process. The other materials being used by the job worker are not minor additions to the inputs and all inputs are not provided by the principal. Accordingly it is seen that the process cannot be considered as Job work following the ratio of the above judgment."

30] The aforesaid means that the Appellate Authority has faulted the petitioner for failure to produce on record the documents/materials referred to in sub-clauses (i),(ii)) and (iii) above. There is no dispute that the Appellate Authority, at no stage, called upon the petitioner to produce such materials and the petitioner failed to produce the same. The petitioner had no opportunity to seek time to produce such documents or complain about failure of natural justice because the Appellate Authority did not even put the petitioner to notice that '*new grounds*' were proposed to be considered at appeal stage. This, according to us, amounts to denial of reasonable opportunity to the petitioner to make good its case or to at least respond to the '*new grounds*' proposed to be relied upon by the Appellate Authority.

31] Similarly, in paragraph 56 of the impugned order dated 2nd July 2018, the Appellate Authority has observed thus:

> *"56. Thus, the Appellant has not provided documentary evidences, during these appeal proceedings, that-*
>
> *(i) How can the steam coal, which is prime raw material of the job worker, be considered as inputs for the Principal as they are utilizing coal other than steam coal?*
> *(ii) How would the Principal, M/s. JSL be able to bring back the inputs (after processing the same by job worker) under Section 143(1)(a) without being regulated by a third party ?*
> *(iii) What are the other inputs/materials, their quantity and value, being procured/purchased by the job worker, M/s. JEL, which need to be added to the inputs supplied by the Principal for converting the same into electricity, as the Principal is not supplying all the inputs and in terms of the Judgment of Apex Court, as referred above, the job worker can not make substantial addition to the inputs of the Principal to qualify for the process as job work.*
>
> *In light of above, we have no doubt to conclude that the activity undertaken by M/s. JEL to convert Coal, to be supplied by M/s. JSL, in electricity is not covered under the definition of Job work in terms of the CGST Act. Since goods supplied by M/s. JSL will be utilized by M/s. JEL in manufacture of new commodity i.e. electricity (though attracting NIL rate of duty), the process is manufacture and the same will be considered as supply of goods and not service."*

32] Again, from the aforesaid it is apparent that the petitioner has been faulted for not providing documentary evidences during the appeal proceedings, on the aspects set out in clauses (i),(ii) and (iii) above. There is again, no dispute, that the petitioner was never called upon to produce such documentary evidences in the course of appeal proceedings. In effect, this means that an order adverse to the interests of the

petitioner has been made by the Appellate Authority, even after agreeing the petitioner that the primary reasoning of the Advance Ruling Authority was not proper, without affording the petitioner opportunity to meet with or to clarify or to produce materials or documentary evidences which might have had a bearing on the '*new grounds*' ultimately relied upon by the Appellate Authority. This, according to us, involves failure of natural justice, thereby vitiating the decision making process leading to the making of the impugned order dated 2nd July 2018.

33] The fact that the proceedings before the Appellate Authority *partake* a judicial or a quasi judicial character was not seriously disputed at the bar. Accordingly, there can be no serious dispute that the Appellate Authority was required to adhere to the principles of natural justice in arriving at its decision. This requirement of adhering to the principles of natural justice is in fact required to be read into, in the absence of any specific stipulations in the Statute to the contrary.

34] In the context of the provisions of Section 100 of CPC, the Supreme Court in case of ***Kshitish C. Purkait vs. Santosh Kumar Purkait and ors. – 1997 (5) SCC 438***, has held that though the second Appellate Court has ample powers to formulate substantial questions of law, other than those already formulated at the stage of admission of the appeal, the second Appellate court, before proceeding to decide the second appeal on the basis of such other and further substantial

questions of law, must afford a fair opportunity to the opposite party to meet the same. This means that the second Appeal Court must not, in the course of final hearing of the second appeal formulate other and further substantial question of law and thereafter straightway proceed to dispose of the second appeal without putting the parties to notice and affording the parties reasonable opportunity to respond to such other and further substantial questions of law. All this is despite the fact that the provisions of Section 100 of CPC do not make any express stipulation regards compliance with principles of natural justice at the stage of formulation of other and further substantial questions of law and disposal of the second appeal on the basis of the same.

35] Similarly, in ***U.R. Virupakshappa vs. Sarvamangala and anr. - 2009 (2) SCC 177,*** the High Court, at the time of dictating the judgment in the second appeal framed a new question of law as to whether the Courts below were justified in holding that there existed a joint family and the suit properties were joint family properties. No sufficient opportunity was granted to the parties to make their submissions on this new question framed at the stage of disposal of the second appeal. In such circumstances, the Supreme Court ruled that the procedure adopted by the High Court was improper and the High Court was duty bound to give a reasonable opportunity of hearing the parties on the new question of law formulated in the second appeal. The Supreme Court held that the High Court was duty bound to put the parties to notice that the new

question of law was proposed to be considered and grant time to the parties to respond such question of law so formulated. The Supreme Court held that failure to do so would constitute failure of natural justice and therefore, remand to the second Appellate Court, was in order.

36] Applying the aforesaid principles to the facts and circumstances of the present case, we are satisfied that the Appellate Authority should have at least indicated to the petitioner that it proposed to take into consideration the '*new grounds*' and further, afford an opportunity to the petitioner to place on record agreements or other documentary evidences referred to in paragraphs 52 and 56 of the impugned order dated 2nd July 2018, in order to meet these '*new grounds*'. The failure to do so has not only resulted in violation of principles of natural justice, but also occasioned serious prejudice to the petitioner.

37] Accordingly, on the aforesaid ground, we set aside the impugned order dated 2 July 2018 made by the Appellate Authority and remand the petitioner's appeal to the Appellate Authority for reconsideration on its own merits and in accordance with law. On this occasion, however, we grant the petitioner liberty to produce before the Appellate Authority additional material or documentary evidences which might have bearing upon the new or additional grounds relied upon by the Appellate Authority whilst making the impugned order dated 2 July 2018.

38] The petitioner may produce such additional material or documentary evidences within a period of one month from today. The petitioner may also place on record further submissions or clarifications particularly in the context of new or additional grounds. The Revenue is also at liberty to place on record additional material or submissions or responses.

39] The Appellate Authority is requested to dispose of the petitioner's appeal as expeditiously as possible and in any case, within a period of six months from today. As matter of abundant caution, we clarify that we have not gone into the merits of the rival contentions on the issue as to whether the petitioner's proposed arrangement attracts GST or not and therefore, all such contentions are left open for the Appellate Authority to decide.

40] The petitioner is granted the liberty to place on record of the Appellate Authority, an authenticated copy of this order so as to enable the Appellate Authority to fix a time schedule for disposal of the appeal, which is now remanded to it.

41] The Rule is made absolute in the aforesaid terms. In the facts and circumstances of the case, there shall be no order as to costs.

42] All concerned to act on the basis of authenticated copy of this order.

(M.S.SONAK, J.) **(M.S.SANKLECHA, J.)**