IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.252 OF 2020

M/s Pernod Ricard India Private Limited
A company incorporated under the
Companies Act, 1956 having one of
its offices at Plot No. 99 & 100
Bicholim Industrial Estate
Bicholim, Goa and registered office
at 5th floor, D-3 District Centre,
Saket, New Delhi - 110017
Represented through its
Manager-Manufacturing and
Duly Constituted attorney
Mr. Manoj Mishra. … Petitioner

Versus

1. State of Goa
through the Secretary
Department of Finance Revenue
and Control Division Secretariat
Porvorim Panaji, Goa.

2. Commissioner of Commercial Taxes
Department of Commercial Taxes
Commercial Tax Office
Panaji Ward, Serra Building,
1st Floor Near All India Radio,
Altinho, Panaji, Goa

3. Additional Commissioner of Commercial
Taxes, Department of Commercial Taxes

Commercial Tax Office Panaji Ward,
Serra Building, 1st Floor,
Near All India Radio, Altinho
Panaji, Goa.

4. Assistant Commissioner of Commercial Taxes
Office of Commercial Tax Officer
Bicholim Ward. ... Respondents

Mr. Tarun Gulati, Senior Advocate with Mr. Rony John and Kaif Noorani, Advocates for the Petitioner.
Mr. D. Pangam, Advocate General with Ms. S. Mordekar, Additional Government Advocate for the Respondents.

Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.

Date:- 5th April 2021

JUDGMENT (Per M. S. Sonak, J.):

Heard Mr. Tarun Gulati learned Senior Advocate who appears along with Mr. Rony John and Kaif Noorani for the Petitioner and Mr. D. Pangam, the learned Advocate General who appears along with Ms. S. Mordekar, learned Additional Government Advocate for the Respondents.

2. The petitioner, by instituting the present petition seeks the following substantive reliefs:

(a) That this Hon'ble Court be pleased to issue an appropriate Writ, Order or Direction and declare that the levy of tax under Section 3 of the Entry Tax Act, the machinery provisions contained in Chapter IV and the levy of penalty under Section 19 of the Entry Tax Act are ultra vires Articles 265 and 300A of the Constitution with respect to the entry of all goods (other than motor vehicles) into a local area within the state of Goa;

(b) That this Hon'ble Court be pleased to issue an appropriate Writ, Order or Direction and declare that the Petitioner is not liable to pay tax or penalty in respect of the import of CAB into the State of Goa under the Entry Tax Act;

(c) That this Hon'ble Court be pleased to issue a issue an appropriate Writ, Order or Direction striking down the provisions of Section 3 of the Entry Tax Act insofar as it is invoked as a charging provision for the levy of tax on entry of goods into a local area within the State of Goa, for the reason that it does not provide for a measure or value on which the rate of tax is sought to be applied;

(d) That this Hon'ble Court be pleased to issue a writ of Certiorari or a Writ in the nature of Certiorari under Article 226 of the Constitution of India or any other Writ, Order or Direction, calling for the records and proceedings pertaining to the Impugned Order dated 27.02.2020 passed by the Goa Administrative Tribunal in Entry of Goods Appeal No. 1/2020, and after examining the validity, legality and propriety thereof, to be pleased to quash and set aside the same;"

3. Mr. Gulati, the learned Senior Advocate for the petitioner, to begin with, submitted that the order dated 27.03.2020 made by the Goa Administrative Tribunal (Tribunal) in Appeal No.1/2020 warrants interference, because, the Tribunal, applied incorrect principles whilst

considering the issue of bias raised by the petitioner, in the context of the order dated 14.01.2019, made by Shri Ashok Rane, the Additional Commissioner of Commercial Taxes (First Appellate Authority). He submits that the correct test is not actual bias but the reasonable apprehension of the bias or reasonable likelihood of bias. He submits that Shri Ashok Rane, as assessing officer, had already made an adverse order against the petitioner on 27.03.2012 for the Assessment Year 2008-09. The appeal against the order dated 27.03.2012 and the appeal against order dated 29.03.2014 for the Assessment Year 2010-11, came up for consideration before Shri Ashok Rane, who, by then, had become the Appellate Authority. Shri Rane recused from hearing the appeal for the Assessment Year 2008-09 but despite the protest of the petitioner, proceeded to hear and dispose of the appeal for the Assessment Year 2010-11. Mr. Gulati submits that the petitioner had expressed reasonable apprehension of bias and such concerns could not have been brushed aside by Shri Rane or for that matter the Tribunal. Mr. Gulati submits that in this manner, the petitioner was deprived of the right of an effective appeal and on this ground along relief is due to the petitioner in terms of prayer clause (d) to the petition. He relied on ***Mohd. Chand and another v. State of U.P., through Secretary, Stamp and Registration, Lucknow and others – 2012 SCC OnLine All 967, Narinder Singh Arora v. State (Govt. of NCT of Delhi), - (2012) 1 SCC 561, State of Punjab v. Davinder Pal Singh Bhullar – (2011) 14 SCC 770*** and

ICAI v. LK Ratna – (1968) 4 SCC 537 in support of his submissions.

4. Mr. Gulati also submitted that before 20.05.2013 the goods on which entry tax was imposed were neither specified in the schedule nor was any rate of tax prescribed for the same. He submits that it is only w.e.f. 20.05.2013 that the Goa Tax on Entry of Goods Act, 2000 was amended to specify the foods and rates of tax of such goods. He submits that even the amended schedule does not refer to the goods with which the petitioner was concerned. He submits that in any case, the amendment of 2013 will not apply to the assessment years before 2013, which is the subject matter of the present petition. He, therefore, submits that the assessment orders and the demands made based thereof are liable to be set aside.

5. Mr. Gulati submits that in any case the provisions of Section 3 of the Entry Tax Act, the machinery provisions contained in Chapter 4, and penalty provisions in Article 19 are *ultra vires* Articles 265 and 300A of the Constitution of India and are liable to be declared as such.

6. After having heard Mr. Gulati for some time, we found *prima facie* merit in the contention based on the Doctrine of Bias, and therefore, we called upon the learned Advocate General to address us on the said issue. If this issue was to be decided in favor of the petitioner, then, there would arise no necessity of going into other

issues raised by Mr. Gulati, including, in particular, the issue of the *vires* of the provisions of the Goa Entry Tax Act, 2000. In such cases, if the matter can be disposed of on some other point, then, it would not be appropriate to go into the issue of *vires*. The issue of *vires* is required to be decided only if the same is necessary and not merely because we have the powers to decide the same.

7. Mr. Pangam, the learned Advocate General submitted that there was no question of bias involved because Shri Ashok Rane was concerned with a question of law. He submitted that merely because Mr. Rane had taken a particular view on the law, as an Assessment Officer, that did not preclude him from deciding an appeal involving a similar question of law. He submits that Shri Ashok Rane had recused himself in the appeal against the order dated 27.03.2012 for the Assessment Year 2008-09, because, he was the one, who made the order dated 27.03.2012 and could not have heard an appeal against his own order. Mr. Pangam however submitted that the order dated 29.03.2014 for the Assessment Year 2010-11 was not made by Shri Ashok Rane and therefore, there was no bias involved in Mr. Rane entertaining the appeal against the order dated 29.03.2014. He, therefore, urged that the contention of Mr. Gulati on the issue of bias may not be accepted.

8. Mr. Pangam submitted that this was not at all a case of

retrospective application of tax legislations or this was also not a case where the taxing authorities lacked powers or jurisdiction to impose entry tax on the goods of the petitioner. He submitted that the provisions of the Entry Tax Act were *intra vires* and there was no merit in the challenges raised in this petition.

9. According to us, there is no necessity to go into the various issues raised by the learned counsel for the parties, including the issue of *vires* because we are satisfied that in the peculiar facts and circumstances of the present case, Shri Ashok Rane should not have taken up and disposed of the petitioner's appeal against the order dated 29.03.2014 for the Assessment Year 2010-11 but followed the same course of action, which he quite correctly followed concerning the connected appeal of this very petitioner for the Assessment Year 2008-09.

10. Now the record, makes it very clear that for the Assessment Year 2008-09, Shri Ashok Rane, who was then the Assessment Officer, held against the petitioner by rejecting the very contention which the petitioner eventually raised in respect of the assessment for the year 2010-11. The appeals against the orders made for both the assessment years came up for consideration before Shri Ashok Rane, who by then, was promoted and became the First Appellate Authority.

11. Shri Ashok Rane, quite correctly recused himself when it came to consideration of appeal against the order dated 27.03.2012 concerning Assessment Year 2008-09 because this order dated 27.03.2012 was made by Shri Ashok Rane himself. Obviously, Shri Rane, could not have sat in an appeal against his own order thereby rendering the provisions for appeal, a useless formality.

12. Though, in the connected appeal, the order dated 29.03.2014 for the Assessment Year 2010-11, may not have been made by Shri Ashok Rane, the facts, as well as the issue of law involved in the said appeal, was virtually identical to the facts and issue of law involved in the appeal against the order dated 27.03.2012 for the Assessment Year 2008-09. The apprehension which the petitioner entertained that Shri Ashok Rane will not be in a position to objectively decide the appeal for the Assessment Year 2010-11, was, in the peculiar facts of the present case, quite a reasonable apprehension. In such matters, the question is not whether Shri Ashok Rane was actually or factually bias in the matter. The question is whether the petitioner had a reasonable apprehension that Shri Ashok Rane will be biased while deciding the connected appeal for the Assessment Year 2010-11.

13. This is not a case where any distinguishing features existed or were pointed out by Shri Ashok Rane when it came to deciding the appeal for the Assessment Year 2010-11. For the Assessment Year

2008-09, had held against the petitioner, virtually on the identical issue of both fact and law. The apprehension of bias entertained by the petitioner, in such circumstances, can hardly be said to be unreasonable or fanciful.

14. This issue of bias was specifically raised by the petitioner before the Tribunal. In the appeal memo, it was specifically stated that Shri Ashok Rane at the time of his recusal to hear the appeal for the Assessment Year 2008-09 had even agreed not to hear the appeal for the Assessment Year 2010-11. There was no denial on this aspect. However, the Tribunal, relying on the decision of this Court in ***Ganesh v. Parvatibai – (2018) 3 ALL MR 285*** rejected the contention based on Doctrine of Bias, by simply observing that it is for the judge concerned to decide whether to recuse or not.

15. According to us, the Tribunal, completely misconstrued the ratio of the decision in *Ganesh (supra)* the issue involved in *Ganesh (supra)* was not in the least comparable to the issue involved in the present matter. Even the facts and circumstances in *Ganesh (supra)* bore no comparison to the peculiar facts and circumstances in the present case. According to us, therefore, the Tribunal was not justified in brushing aside the ground of bias raised by the petitioner, in the peculiar facts and circumstances in the present case.

16. In *Mohd. Chand (supra)*, the learned Single Judge of the

Allahabad High Court has held that the officer who had based the order as the Court of the first instance cannot legally test the correctness of his own decision while exercising powers as First Appellate Authority. In the event the appeal against the authority of the first instance is allowed to be heard by the same officer who passed the order impugned in appeal, it would make the appeal illusory and nugatory frustrating the purpose of its filing. The learned Single Judge explained that there is a conceptual difference between appeal and review and allowing the appeal to be heard by the same officer who had passed the basic order, would amount to reducing the appellate jurisdiction into a review jurisdiction. The learned Single Judge held that one of the fundamental principles of natural justice is that no man can be a judge in his own cause. The above principle is not confined to its literal interpretation to mean that if a person is a party in litigation he cannot sit and decide the same as a Judge but may also be extended in cases where he has some interest in the litigation or any party to the litigation and even to cases where he happens to be a witness of one of the parties. The said principle would also be attracted in a case where a Judge may not be a party to the cause of action in any manner aforesaid but has delivered the order/judgment which is to be tested in appeal. The learned Single Judge quoted the dictum of Lord Hewart, C.J., which says *"Justice should not only be done but should manifestly and undoubtedly be seen to be done"*.

17. Technically, Mr. Pangam may be right in submitting that Shri

Ashok Rane had not made the order dated 29.03.2014 for the Assessment Year 2010-11 and therefore, was not barred from entertaining the petitioner's appeal against the said order. However, the facts bear out that Shri Ashok Rane had made virtually an identical order, in identical facts and circumstances concerning this very petitioner for the Assessment Year 2008-09, which was the connected appeal before him. Having quite correctly recused himself from hearing the appeal for the Assessment Year 2008-09, the principles of natural justice required that Shri Ashok Rane recuses himself from hearing the appeal for the Assessment Year 2010-11 as well, in the absence of any distinguishing features for the said assessment year.

18. In *Narinder Singh Arora (supra)* the Hon'ble Apex Court held that it is well settled that a person who tries a cause should be able to deal with the matter placed before him objectively, fairly, and impartially. No one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind or impartially. The broad principle evolved by this Court is that a person, trying a cause, must not only act fairly but must be able to act above suspicion of unfairness and bias. The Hon'ble Apex Court referred to its earlier decision in ***Manak Lal v. Prem Chand Singhvi - AIR 1957 SC 425*** and held that in such cases the test is not whether, in fact, a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable

to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.

19. In ***G. Sarana v. University of Lucknow – (1976) 3 SCC 585*** the Hon'ble Supreme Court held that the real question is not whether a member of an Administrative Board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to prove the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration.

20. In ***Ranjit Thakur v. Union of India – (1987) 4 SCC 611***, the Hon'ble Supreme Court held that as to the test of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, '*Am I biased*?'; but to look at the mind of the party before him.

21. Applying the aforesaid principles to the facts and circumstances of the present case, we are satisfied that Shri Ashok Rane, ought not to have taken up and disposed of the petitioner's appeal against the order dated 29.03.2014 for the Assessment Year 2010-11. The Tribunal, with respect, erred or rather failed to exercise jurisdiction vested in it,

in not upholding the petitioner's contention based on the Doctrine of Bias, in the peculiar facts and circumstances of the present case.

22. As a result, the impugned orders dated 14.01.2019 made by Shri Ashok Rane as the First Appellate Authority and the order of the Tribunal dated 27.02.2020 upholding the same, are liable to be set aside and are hereby set aside. The petitioner's appeal against the order dated 29.03.2014 is now restored to the file of the First Appellate Authority, which shall dispose of such appeal on its own merits and in accordance with law as expeditiously as possible and in any case within two months from the date of production of an authenticated copy of this order.

23. All contentions of all parties are expressly left open. In case, the petitioner is aggrieved by the orders made by the First Appellate Authority and thereafter the Tribunal, liberty is granted to the petitioner to raise all contentions, including, the contention that the provisions of the Goa Entry Tax Act are *ultra vires* the Constitution. All defenses of the respondents are also kept open.

24. In this case interim relief was declined. Therefore if the Respondents have encashed the bank guarantees or the petitioner has paid the tax, the same shall abide by the orders that may be made by the First Appellate Authority.

25. The parties to appear before the First Appellate Authority (other than Shri Ashok Rane) on 26.04.2021 at 11.00 a.m. and file the authenticated copy of this order. The First Appellate Authority to dispose of both the appeals i.e. appeals against assessment orders for 2008-09 and 2010-11 since common issues of law and fact are involved.

26. The Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

27. All concerned to act based on the authenticated copy of this order.

SMT. M. S. JAWALKAR, J. ***M. S. SONAK, J.***

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