A.F.R.

Court No. - 03

Case :- WRIT TAX No. - 96 of 2022

Petitioner :- M/S Apex Leather
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Rahul Agarwal
Counsel for Respondent :- Amit Mahajan,Bhanu Pratap Singh Kachhawah,C.S.C.,Krishna Agarawal,Shashi Prakash Singh

Hon'ble Surya Prakash Kesarwani,J.
Hon'ble Jayant Banerji,J.

1. On oral request of learned counsel for the petitioner, the GST Council, New Delhi through its Member Secretary is allowed to be impleaded as respondent No.5.

2. Notice on behalf of respondent No.5 has been accepted by the office of learned Additional Solicitor General.

3. Heard Sri Rahul Agarwal, learned counsel for the petitioner, Sri B.P. Singh Kachhwah, learned Standing Counsel for the State-respondents. Sri Amit Mahajan, learned Senior Standing Counsel - (Indirect Taxes) for the respondent Nos.2 and 3 and Sri S.P. Singh, learned Additional Solicitor General for the respondent Nos.4 and 5.

4. Briefly stated facts of the present case are that the petitioner filed refund application under Section 54 of the Central Goods and Service Tax Act, 2017/ U.P. Goods and Service Tax Act, 2017 (hereinafter referred to as 'the Acts, 2017') in form GST-RFD-01 on 31.03.2020 for which an acknowledge receipt in RFD-02 was issued by the respondents on 09.04.2020. The refund application of the petitioner was rejected by the proper officer by order dated 29.04.2020 in form GST-RFD-06. Aggrieved with the aforesaid order dated 29.04.2020, the petitioner filed an appeal before the respondent No.2, i.e. the First Appellate Authority under the Act, 2017, which was partly allowed by order dated 29.06.2021. Against the order of the First Appellate Authority, the petitioner has a right of appeal under Section 112 of the Act, 2017 but since GST Tribunal has not been constituted so far in the State of Uttar Pradesh, therefore, the petitioner has filed

the present writ petition under Article 226 of the Constitution of India praying to quash the impugned order dated 29.06.2021 passed by the respondent No.2 in so far as it rejects the application for refund of the petitioner for the months prior to March, 2018 to the extent of Rs.7,92,739/-.

Preliminary objection raised by the Respondents:-

5. Learned standing counsel and the learned counsel for Indirect Taxes have raised a preliminary objection as to maintainability of the writ petition on the ground that the petitioner has a remedy of appeal under Section 112 of the Act, 2017. They along with the learned Additional Solicitor General of India, jointly submit that the matter of constitution of State Bench of Tribunal at Prayagraj and 4 Area Benches in other parts of Uttar Pradesh is pending before the respondent No.4 but on account of interim order dated 04.03.2021 passed by the Division Bench in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), neither State Bench nor Area Benches under Section 109 of the Act, 2017 could be notified. Therefore, as and when the State Bench and Area Benches are notified, the petitioner may avail the statutory remedy of appeal under Section 112 of the Act, 2017. It is further submitted that disputed questions of fact are involved in the case, which cannot be decided in writ jurisdiction under Article 226 of the Constitution of India.

6. Learned standing counsel for the State of U.P. has also produced copy of instructions dated 08.03.2021 sent by Joint Commissioner (GST) Commercial Tax, Headquarter Lucknow.

7. Learned Additional Solicitor General of India has stated on the basis of instructions that Government of India wants to establish State Bench and Area Benches of GST Appellate Tribunal in the State of Uttar Pradesh but on account of interim order dated 04.03.2021 in PIL CIVIL No.6024 of 2021

(Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), the State Bench and Area Benches of GST Appellate Tribunal cannot be established in the State of Uttar Pradesh without leave of the court. He further submits that against the judgment dated 31.05.2019 in PIL CIVIL No.6800 of 2019 (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr vs. U.O.I. Thru Secy. Ministry Of Finance & Ors.), the respondent Nos.4 and 5 have filed S.L.P. on 04.09.2020 being Dairy No.18877 of 2020 (Union of India vs. Oudh Bar Association, High Court Lucknow, U.P.), which is still pending and notices have not yet been issued. Learned Additional Solicitor General of India further states that the judgment dated 09.02.2021 in Writ Tax No.655 of 2018 (M/S Torque Pharmaceuticals Pvt. Ltd. vs. Union Of India And 5 Others) and other 29 connected writ petitions, has not been challenged so far by the respondent Nos.4 and 5 before the Hon'ble Supreme Court.

Submission on behalf of the petitioner:-

8. Learned counsel for the petitioner has referred to the provisions of Section 109 of the Act, 2017, judgment of Lucknow Bench of this Court **dated 31.05.2019 in PIL CIVIL No.6800 of 2019** (Oudh Bar Asso. High Court, Lko. Thru General Secretary & Anr vs. U.O.I. Thru Secy. Ministry Of Finance & Ors.), the judgment dated **09.02.2021 in Writ Tax No.655 of 2018** (M/S Torque Pharmaceuticals Pvt. Ltd. vs. Union Of India And 5 Others) and 29 other connected writ petitions and the interim order dated **04.03.2021 in PIL CIVIL No.6024 of 2021** (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.). He submits that ***firstly,*** interim order dated 04.03.2021 passed in PIL CIVIL No.6024 of 2021 is wholly without jurisdiction inasmuch as by the aforesaid interim order, the effect and operation of the division Bench judgment in the case of M/S Torque Pharmaceuticals Pvt. Ltd. (supra) has been suspended by

another Division Bench, which is wholly impermissible, ***secondly,*** large number of dealers under the Act, 2017 have been left remediless due to non-creation of GST Tribunal in the State of Uttar Pradesh despite statutory provision of appeal under Section 112 and this situation has arisen at the instance of a Bar Association which has no locus standi to oppose to the constitution of Tribunal or to render remediless lacs and lacs of dealers in the garb of the aforesaid PIL, ***thirdly,*** no public interest can be said to be involved in the aforesaid two PILs filed by a Bar Association and ***fourthly,*** that on one hand, the respondent No.5 has failed to carry out the legislative mandate of Section 109 of the Act, 2017 and thus, dealers have been left remediless and on the other hand, the respondent Nos.1, 2 and 3 have raised a preliminary objection as to maintainability of the writ petition on the ground of statutory remedy of appeal, which is impermissible.

9. We have carefully considered the submissions of learned counsels for the parties and perused the records and instructions.

Discussion:-

10. As per **copy of letter of Additional Chief Secretary, Tax and Registration dated 21.02.2019** annexed with the instructions of the State-respondents, the number of registered dealers under the Act, 2017 were about 14 lacs as against the 7.5 lacs total dealers registered under the U.P. VAT Act. As per instructions, **the number of appeals expected to be filed before the GST Tribunal would be between 12,000 to 15,000 per year, i.e. 1000 to 1250 appeals per month**. These, figures were determined by the State of U.P. prior to issuance of the aforesaid D.O. letter dated 21.02.2019 addressed to the Secretary/ GST Council, Government of India, New Delhi. It was also mentioned in the letter that due to non-creation of Tribunal, 320 writ petitions have been filed in the High Court against the orders of the First Appellate Authority. **Thus, from the facts as stated by the State of U.P. in its own letter**

dated 21.02.2019, about 15,000 appeals per year are likely to be filed before the Tribunal, which is the last fact finding authority. **However, due to interim order dated 04.03.2021 passed by a Division Bench in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), the GST Tribunal could not be notified by the respondent No.5.** For ready reference the order dated 04.03.2021 passed in PIL CIVIL No.6024 of 2021, is reproduced below:

> *"At the threshold, it is stated by learned Additional Solicitor General of India that respondent nos. 1 and 2 have taken a decision to file a Special Leave Petition to assail correctness of the judgment dated 09.02.2021 in Writ Tax No. 655 of 2018 passed by a coordinate Bench of this Court at Allahabad.*
>
> *This petition for writ is preferred on behalf of Awadh Bar Association High Court, Lucknow and Sri Sharad Pathak, Secretary of the Awadh Bar Association High Court, Lucknow.*
>
> *Grievance of the petitioners is with regard to decision of the Goods and Services Tax Council on Agenda Item No. 6 undertaken in its 39th meeting held on 14.03.2020.*
>
> *Several contentions have been raised by learned counsel for the petitioners while questioning correctness of the decision aforesaid. Having considered the same, we deem it appropriate to admit this petition for writ and to hear the same finally at earliest.*
>
> *Accordingly, the writ petition is admitted for hearing. No post admission notice be issued as the parties are already represented by their counsels.*
>
> ***Having considered the arguments advanced and also the instructions communicated to us on behalf of respondent nos. 1 and 2, we deem it appropriate to direct respondent nos. 1 and 2 for not establishing Goods and Services Tax Appellate Tribunal for the State of Uttar Pradesh without leave of this Court.***
>
> *Let this petition for writ be listed for final disposal on 15.03.2021.*
>
> *In the meanwhile, respondents, if desire, may file counter affidavit to the petition for writ."*

11. Section 109 of the CGST Act, 2017 has conferred power upon the Central Government to constitute Goods and Service Tax Appellate Tribunal by notification, on the recommendation of the GST Council. As per scheme of the Act, the GST Tribunal would be the last fact finding authority. **Non-constitution of Tribunal has left remediless lacs and lacs dealers under the Act, 2017 in the State of Uttar Pradesh since the year 2017, particularly small and**

medium class dealers who are not able to afford to file writ petitions against orders of the First Appellate Authority for variety of reasons including high cost of litigation in High Court.

12. The High Court under Article 226 of the Constitution of India has undoubtedly very wide powers but such powers cannot be said to be limitless. That apart, a coordinate bench cannot sit in appeal over the final judgment of another coordinate bench of equal strength and cannot pass an interim order in such manner which may result either in staying or directly diluting the effect and operation of a final judgment which *prima facie* appears to have been done by the interim order dated 04.03.2021 in PIL Civil No.6024 of 2021.

On the point of Interim Order:-

13. In the case of **Jaishri Laxmanrao Patil vs. State of Maharashtra, (2021) 2 SCC 785 (para-11)**, Hon'ble Supreme Court held as under:

> *"11. It is no doubt true that the Act providing reservations has been upheld by the High Court and the interim relief sought by the Appellants would be contrary to the provisions of the Act. This Court in Health for Millions v. Union of India, (2014) 14 SCC 496 held that courts should be extremely loath to pass interim orders in matters involving challenge to the constitutionality of a legislation. However, if the Court is convinced that the statute is ex facie unconstitutional and the factors like balance of convenience, irreparable injury and Public Interest are in favour of passing an interim order, the Court can grant interim relief. There is always a presumption in favour of the constitutional validity of a legislation. Unless the provision is manifestly unjust or glaringly unconstitutional, the courts do show judicial restraint in staying the applicability of the same.* ***It is evident from a perusal of the above judgment that normally an interim order is not passed to stultify statutory provisions.*** *However, there is no absolute rule to restrain interim orders being passed when an enactment is ex facie unconstitutional or contrary to the law laid down by this Court. "*
>
> *(Emphasis supplied by us)*

14. In **Union of India vs. Cipla Ltd., (2017) 5 SCC 262 (para-168)**, Hon'ble Supreme Court considered the question of grant of interim relief **where public interest is involved** and held as under:

> *"168. Under these circumstances, we are clearly of the view that in matters* ***where***

public interest is involved, the Court ought to be circumspect in granting any interim relief. The consequence of an interim order might be quite serious to society and consumers and might cause damage to public interest and have a long term impact*. We make it clear that it is not our intention to suggest to any Court how and in what circumstances interim orders should or should not be passed but it is certainly our intention to make it known to the Courts that the* ***time has come when it is necessary to be somewhat more circumspect while granting an interim order in matters having financial or economic implications.****"*

(Emphasis supplied by us)

15. In **Union Of India & Anr vs Cynamide India Ltd. & Anr, (1987) 2 SCC 720 (para-37)**, Hon'ble Supreme Court **considered the stay of implementation of the notifications** and held as under:

'37. We notice that in all these matters, the High Court granted stay of implementation of the notifications fixing the maximum prices of bulk drugs and the retail prices of formulations. We think that in matter of this nature, where prices of essential commodities are fixed in order to maintain or increase supply of the commodities or for securing the equitable distribution and availability at fair prices of the commodity, ***it is not right that the court should make any interim order staying the implementation of the notification fixing the prices. We consider that such orders are against the public interest and ought not to be made by a court unless the court is satisfied that no public interest is going to be served.*** *"*

(Emphasis supplied by us)

16. In **Bihar Public Service Commissioner Vs. Shiv Jatan Thakur (Dr.), (1994) Suppl. 3 SCC 220 (para-38)**, Hon'ble Supreme Court considered the **validity of interim order passed by the High Court interfering with the normal functioning** of Bihar Public Service Commission and held as under:

"38. It is the said interim orders which are the impugned in the Special Leave Petitions. ***We are really unable to see how the Writ Jurisdiction of the High Court under Article 226 of the Constitution of India could have been availed of to make the said interim orders which interfered with the normal functioning of the BPSC by the constitutional functionaries****, even if the High Court desired to have the views of the BPSC as regards the writ petition filed by Dr. Thakur against the BPSC and the functioning of its Chairman. We are indeed unable to understand now such interim orders could be regarded as those which have been made in aid of the final relief, if any, required to be granted in the Writ Petition or required to maintain status quo pending final disposal of the writ petition. When the nature of the interim order is seen, it becomes obvious that the High Court has sought to take over responsibility of carrying on the functions of the BPSC by appointing its own chairman for conducting a meeting of the BPSC. It is no doubt open to the Court to reject the affidavit filed on behalf of the BPSC by the Chairman on its view that it*

cannot be regarded as the opinion of the BPSC. But, in a case, even where such decision of the Commission as a body had been called for, the High Court was not enabled, in the purported exercise of its jurisdiction under Article 226 of the Constitution, ***to make such interim orders which would have made the functioning of the BPSC, a constitutional institution, a mockery in the eyes of the general public and exposed its constitutional functionaries to ridicule.*** *It is true that Article 226 of the Constitution, empowers the High court to exercise it discretionary jurisdiction to issue directions, orders or writs, including writs in the nature of habeas corpus, certiorari, quo warranto and mandamus or any of them for the enforcement of the rights conferred under the Constitution or for an other purpose, but such discretion to issue directions or writs on orders conferred on the High Court under Article 226 being a judicial discretion to be exercised on the basis of well-established judicial norms, could not have been used by the High Court to make the said interim orders which could not have any way helped or aided the Court in granting the main relief sought in the writ petition. The said interim orders, therefore, not being those made to maintain the status quo or undo an order, the review of which is sought, so that the ultimate relief to be granted to the party approaching it, may not become futile, they become wholly unsustainable.* ***Such interim orders are made by the High Court, to say the least, without realisation that they had the effect of putting the Chairman and its Members to ridicule in the eyes of the general public and making a constitutional institution of the BPSC a mockery.*** *For the said reasons, the interim orders impugned in the S.L.P.s cannot be sustained and are liable to be set aside."*

(Emphasis supplied by us)

17. In the case of **Morgan Stanley Mutual Fund vs Kartick Das, (1994) 4 SCC 225 (para-36),** Hon'ble Supreme Court laid down certain **factors which should weigh with the court in grant of ex parte injunctions**, as under:

"6. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are-

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court."

When a public interest litigation is usually entertained?

18. In the case of **Malik Brothers vs Narendra Dadhich & Ors, (1999) 6 SCC 552 (para-2)**, Hon'ble Supreme Court considered the question when a public interest litigation may be entertained by a court and held as under:-

> *"2.……Before embarking upon an inquiry into the legality of the impugned judgment of the High Court, it is necessary to bear in mind that* ***a public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in a public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual,s interest is sought to be carried out or protected, it would be the bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of down- trodden mass for the redressal of their grievance****…..."*
>
> *(Emphasis supplied by us)*

19. In the case of **Sachidananda Pandey vs State Of West Bengal & Ors, (1987) 2 SCC 295 (para-61)**, Hon'ble Supreme Court held as under:

> *"****61. It is only when courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the under-dog and the neglected****……..."*
>
> *(Emphasis supplied by us)*

20. In the case of **Bombay Dyeing & Manufacturing Co. Ltd vs Bombay Environmental Action Group and others, (2005) 5 SCC 1961 (para-22),** Hon'ble Supreme Court **explained that when an interim order may be passed in a public interest litigation** and held as under:

> *"22.……But, there cannot be doubt or dispute whatsoever that* ***before an interim order is passed and in particular*** *a* ***public interest litigation****, the court must consider*

the question as regard ***existence of a prima facie case****, balance of convenience as also the question as to whether t****he writ petitioners*** *shall suffer* ***an irreparable injury****, if the injunction sought for is refused. The courts normally do not pass an interlocutory order which would affect a person without giving an opportunity of hearing to him. Only in extreme cases, an ad interim order can be passed but even therefor, the following parameters as laid down by this Court in Morgan Stanley Mutual Fund etc. vs. Kartick Das etc. [(1994) 4 SCC 225] are required to be complied with:….."* *(Emphasis supplied by us)*

21. In view of alarming situation created due to non-establishing of State Bench and Area Benches of GST Tribunal in the State of Uttar Pradesh, rendering the entire class of dealers remediless under the Act, 2017 from availing statutory remedy of appeal under Section 112 of the Act, 2017, we are of the view that under the facts and circumstances and prevailing situation, the matter with regard to the following questions are referred to Larger Bench:-

(i) Whether by interim order dated 04.03.2021 in PIL CIVIL No.6024 of 2021 (Awadh Bar Association High Court, Lko Thru Gen.Secy. & Anr. vs. U.O.I.Thru Secy. Finance Ministry, New Delhi & Ors.), directing for not establishing GST Appellate Tribunal for State of Uttar Pradesh without leave of the court, could be passed in conflict with the final judgment dated 09.02.2021 in Writ Tax No.655 of 2018 passed by the Division Bench?

(ii) Whether under the facts and circumstances of the case and in the interest of dealers in State of Uttar Pradesh under the CGST Act/ U.P.GST Act, 2017, a direction needs to be issued immediately to the respondent No.4 to notify the State Bench and Area Benches of GST Appellate Tribunal in the State of Uttar Pradesh, within a time bound period so that persons/ dealers may avail statutory remedy of appeal under Section 112 of the CGST Act/ U.P. GST Act, 2017 and they may not suffer further?

(iii) Establishment of the State Bench of GST Appellate Tribunal at Prayagraj and its four Area Benches in the State of Uttar Pradesh in terms of the final judgment of the Division Bench dated 09.02.2021 in Writ Tax No.655 of 2018 (M/s Torque Pharmaceuticals Pvt. Ltd.

vs. Union of India and 5 others) and other 29 connected writ petitions?

22. Let this order alongwith the records of the writ petition be placed before Hon'ble the Chief Justice for constitution of a Larger Bench so that people in the State of Uttar Pradesh having right to avail remedy of appeal under Section 112 of the CGST/ U.P. GST Act, 2017 may avail the statutory remedy and may not remain remediless.

Order Date :- 09.03.2022
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