

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

THE ACTING CHIEF JUSTICE SHRI SANJAYA KUMAR MISHRA
AND
JUSTICE SHRI RAMESH CHANDRA KHULBE

SPECIAL APPEAL NO. 123 OF 2022

20th JUNE, 2022

Between:

Vinod Kumar Appellant

And

Commissioner Uttarakhand
State GST and others Respondents

Counsel for the appellant : Mr. S.K. Posti, learned Senior
Counsel assisted by Mr. Ashutosh
Posti, learned counsel

Counsel for the respondent : Mr. Tarun Lakhera, learned Brief
Holder for the State of
Uttarakhand

Upon hearing the learned Counsel, the Court made the following

JUDGMENT: (per the Acting Chief Justice Shri Sanjaya Kumar Mishra)

In this intra-court appeal, the appellant, being a mason / painting professional, having GST Registration in the State of Uttarakhand has assailed the order passed by the learned Single Judge in Writ Petition (M/S) No. 1553 of 2021, on dated 30.09.2021, on the ground that the writ petition is not maintainable in view of the fact that there is

an alternative and efficacious remedy available to the petitioner/appellant under Section 107 of the Uttarakhand Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Uttarakhand Act', for brevity).

2) The facts of the case, leading to filing of this Special Appeal, are that the petitioner/appellant is working as a mason / painting professional. He had applied for GST registration, and was allotted GST Registration No. GSTIN 05AGMPK8182B3ZC. It is apparent from the records that the petitioner/appellant failed to file his return for a continuous period of six months, which was mandatory under the Uttarakhand Act. Hence, his registration was cancelled on 21.09.2019. He preferred an appeal before the First Appellate Authority, but the same was dismissed on the ground of delay. Thereafter, the petitioner/appellant filed a writ petition before the Court, as stated above, which was also dismissed as not maintainable.

3) The learned Senior Counsel appearing for the petitioner/appellant would argue that high prerogative writs belong to the absolute discretion of the High Court, and even in cases where alternative and efficacious remedy is available, then also in appropriate cases the High Court can exercise its jurisdiction. We take note of

the oft quoted and celebrated judgment of *Whirlpool Corporation Vs Registrar of Trade Marks, (1998) 8 Supreme Court Cases 1*, wherein the Hon'ble Supreme Court has held that even if there is an alternative, efficacious remedy, a writ petition can be entertained, if the writ petition filed by the petitioner is for enforcement of fundamental rights; when the *vires* of an Act is challenged; where there has been a violation of principles of natural justice; and where the order or the proceedings are wholly without jurisdiction.

4) Thus it is apparent that the Statute does not provide any prohibition against exercise of the writ jurisdiction under Article 226 of the Constitution by the High Court. The practice of not entertaining the writ petition, except in the cases accepted above by the Hon'ble High Court, in a case where an alternative and efficacious remedy is available, is an internal mechanism, which the Court has imposed upon themselves.

5) Moreover, this issue whether a writ petition is maintainable when the limitation provided for filing an appeal is not extendable, as in this case, was considered by the Full Bench of the Gujarat High Court in the case of *Panoli Intermediate (India) Pvt. Ltd. Vs Union of India and others, 2016 0 AIR(Guj) 97*, where the case was referred

to the larger Bench for determining three questions. The third question is important for this case, which is quoted below:

- (3) When if the statutory remedy or appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merit?

6) The answer was given by the Hon'ble Full Bench of the Gujarat High Court in paragraph 31 of the said judgment, especially, in sub-paragraph (3). The Full Bench of the Hon'ble Gujarat High Court held that on the third question the answer is in affirmative, but with the clarification that –

- A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that :
- A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none
- A.2) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.
- B) Resultantly, there is failure of justice or it has resulted into gross injustice. We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial

experience and practical wisdom of the judge.

7) It is apparent from the record that a notice was given on the website, which in our considered opinion, is not sufficient, and a personal notice has to be given before cancellation of the registration. Therefore, the Court can invoke its jurisdiction under Article 226 of the Constitution and hold that the orders passed by the learned Commissioner can be interfered in a writ jurisdiction.

8) Viewing from another angle, it is apparent that the law made by the Parliament as well as the Legislature with regard to the appeals is very strict, insofar as, that it does not provide an unlimited jurisdiction on the First Appellate Authority to extend the limitation beyond one month after the expiry of the prescribed limitation. In such case, the petitioner/appellant is put to hardship and is left without remedy. In such cases, the party concerned may face starvation because of denial of livelihood for want of GST Registration. In this case, the petitioner/appellant is a semi-skilled labourer working as a painter doing painting on doors, windows of the houses. Now-a-days bills for any work executed for a private player or, even for the Government agency, are drawn on-line. In most cases, the payments are made direct to the bank on

production of the bill with the GST registration number. In the absence of GST registration number, a professional cannot raise a bill. So, if the petitioner is denied a GST registration number, it affects his chances of getting employment or executing works. Such denial of registration of GST number, therefore, affects his right to livelihood. If he is denied his right to livelihood because of the fact that his GST Registration number has been cancelled, and that he has no remedy to appeal, then it shall be violative of Article 21 of the Constitution as right to livelihood springs from the right to life as enshrined in Article 21 of the Constitution of India. In this case, if we allow the situation so prevailing to continue, then it will amount to violation of Article 21 of the Constitution, and right to life of a citizen of this country.

9) In that view of the matter, we are of the opinion that the writ petition is maintainable, and the learned Single Judge should have acted upon his judicial conscience enriched by judicial experience and practical wisdom, and held that the writ petition should be entertained.

10) Viewing from another angle, it is seen that Section 107 of the Uttarakhand Act provides for an appeal.

Section 107 of the Uttarakhand Goods and Services Tax Act, 2017, is extracted hereunder:

"107. Appeals to Appellate Authority.-(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of Central tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the Central Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed which may extend maximum upto twenty five crore rupees.

[Provided that no appeal shall be filed against an order under sub-section (3) of Section 129, unless a sum

equal to twenty-five per cent of the penalty has been paid by the appellant.]

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

(8) The Appellate Authority shall give an opportunity to the appellant of being heard.

(9) The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(10) The Appellate Authority may, at the time of hearing of an appeal, allow an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:

Provided that an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under [section 73](#) or [section 74](#).

(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.

(13) The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed:

Provided that where the issuance of order is stayed by an order of a court or Tribunal, the period of such stay shall be excluded in computing the period of one year.

(14) On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.

(15) A copy of the order passed by the Appellate Authority shall also be sent to the Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of Central tax or an authority designated by him in this behalf.

(16) Every order passed under this section shall, subject to the provisions of [section 108](#) or [section 113](#) or [section 117](#) or [section 118](#) be final and binding on the parties."

11) It is apparent from Sub-Section (1) of Section 107 of the Uttarakhand Act that any person aggrieved by any decision under the Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within the time frame. Now the question is - whether the Assistant Commissioner of GST, whose order is challenged in this case, is an adjudicating authority, or not? This question came before the Hon'ble Supreme Court in the case of *Radha Krishan Industries Vs State of Himachal Pradesh and others*, (2021) 6 Supreme Court Cases 771, wherein the power to levy a provisional attachment of the bank accounts by the Commissioner of GST was questioned. Upon such challenge before the Hon'ble High Court of Himachal Pradesh, the said writ petition was dismissed. Thereafter, the matter went to the Supreme Court in a Special Leave Petition. The Hon'ble Supreme Court took into consideration the provision of Section 107

of the Himachal Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as 'the H.P. Act') as well as Section 2(4) of the H.P. Act, which defines adjudicating authority, and gave a finding. It is appropriate to take note of the fact that Sub-Section (1) of Section 107 of the H.P. Act, which is almost *pari materia* with the Sub-Section (1) of the Section 107 of the Uttarakhand Act, which provides a forum for appeal against an order passed by an adjudicating authority. Section 2(4) of the H.P. Act provides that "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Commissioner, Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal.

12) Section 2(4) of the Uttarakhand Act defines "adjudicating authority" to mean any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Commissioner, Revisional Authority etc. The provisions of the Uttarakhand Act is *pari materia* with the definition of "adjudicating authority" provided in the H.P. Act. At paragraph 66 of the said judgment, the Hon'ble Supreme Court held that from the above definition, it is evident that the expression

“adjudicating authority” does not include among other authorities, the Commissioner. In this case, the order has not been passed by the Commissioner, but it has been passed by the Assistant Commissioner of GST.

13) Section 3 of the Uttarakhand Act provides for the appointment of the class of officers which includes the Principal Commissioner of State Tax, Special Commissioner of State Tax, Commissioner of State Tax, and also the Assistant Commissioner of State Tax.

14) Section 5 provides for powers of officers.

Section 5 of the Uttarakhand Act reads as under:

5. Powers of officers. –(1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of State tax who is subordinate to him.,

(3) The Commissioner, may subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of State tax.

15) Sub-Section (91) of Section 2 provides for the “proper officer” in relation to any function to be performed

under this Act, means the Commissioner or the officer of the State tax who is assigned that functions by the Commissioner. Thus, it is apparent that the office of the Assistant Commissioner acts under the aegis and control of the Commissioner, and nowhere in the Uttarakhand Act, it is provided that he shall act independently to the duties assigned to him by the Commissioner. Therefore, the observation of the Hon'ble Supreme Court, i.e., the Commissioner is not an adjudicating authority, hence an appeal will not lie against the orders passed by him under Section 107 of the Uttarakhand Act shall also be applicable to any orders passed by the Assistant Commissioner, be it attachment of property or cancellation of GST registration number.

16) In that view of the matter, we are of the view that the learned Single Judge has committed error by holding that the writ petition is not maintainable, and, therefore, the same requires to be set aside. However, we are also aware of the fact that the learned Single Judge has not given any findings about the merits on the claim of the petitioner/appellant so far as the cancellation of his GST Registration number is concerned. Hence, the matter has to be remanded.

17) In the result, the Special Appeal is allowed. The judgment and order dated 30.09.2021 is, hereby, set aside. The matter is remanded back to the learned Single Judge for consideration on merits holding that the writ petition is maintainable.

18) The matter be listed before the assigned Single Bench.

SANJAYA KUMAR MISHRA, A.C.J.

RAMESH CHANDRA KHULBE, J.

Dated: 20th JUNE, 2022
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