

Form No. J.(2)

Item No. 05

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON : 21.12.2022

DELIVERED ON : 21.12.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYA**

M.A.T. No. 1931 of 2022

With

IA No.CAN 1 of 2022

Joyous Blocks & Panels Private Limited & Anr.

Vs.

**Assistant Commissioner, Commercial Taxes, Ballygunge Charge
& Anr.**

Appearance:-

Mr. Vinay Kr. Shraff

Ms. Priya Sarah Paul

Ms. Priyanka Sharma

.....for the appellants

Mr. T.M. Siddique

Mr. Debasis Ghosh

Mr. N. Chatterjee

Mr. V. Kothari

..... for the State

Mr. K.K. Maiti

Mr. Tapan Bhanja

.....for the respondent no. 2

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNAM, J.)

1. This intra-Court appeal filed by the writ petitioners is directed against the order dated 1st December, 2022 passed in W.P.A. No. 26092 of 2022. In the said writ petition the appellants had challenged a show cause notice issued by the authority dated 26th September, 2022 with regard to classification of the product manufactured by the appellants. The preliminary ground on which the show cause notice was challenged is by contending that the authority has pre-decided the issue and the show cause notice is pre-meditated and it is not a show cause notice and consequently no useful purpose would be served in giving reply by the appellants. The learned Single Bench was of the view that a writ against a show cause notice is not maintainable. Challenging the said order the appellants have preferred the instant appeal.

2. We have heard Mr. Vinay Kr. Shraff, learned counsel for the appellants, Mr. T.M. Siddique, learned senior standing counsel for the State and Mr. Maiti, learned advocate for the respondent no. 2.

3. The view taken by the learned single Bench that a writ petition against the show cause notice is not maintainable is well settled. Equally well-settled is the legal principle that there are exceptions to this self-imposed restriction by the Constitutional courts. If a show cause notice suffers from the vice of lack of jurisdiction, Courts are entitled to interfere with the same. If the show cause notice is an order by itself and not a show cause notice and it is pre-meditated then the Courts are entitled to interfere with the said order. In **Siemens India vs. State of Maharashtra** reported at **2007 (207) ELT 168 (SC)** a challenge was made to a show cause notice and the Hon'ble Supreme Court held that although ordinarily a writ Court may not exercise its discretionary jurisdiction in

entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction. When a notice is issued with premeditation a writ petition may not be maintainable, in such an event even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. In the instant case it is seen that the show cause notice is elaborate and reason for such elaborate notice is on account of the fact that at the first instance soon after the inspection of the business premises of the appellants was completed by the authority, a query was raised by the officer by proceedings dated 8th July, 2022 calling upon the appellants to state as to why HSN Code of Concrete Masonry Units-AAAC Blocks will not fall under the broad heading 6810 with applicable tax rate 18%. as the appellants are not making fly ash blocks/bricks as per the standard mentioned in BIS Product Code. The appellants had submitted an elaborate reply for such a query and the authority while issuing the show cause notice has dealt with the reply under the heading “Rebuttal on the factual points” and proceeded to reject all the contentions which were raised by the appellants and ultimately the authority would state that he has no other option but to proceed to take action under Section 74(1) of the WBGST Act /CGST Act, 2017 read with rule 142(1) of WBGST/CGST Rules 2017 and the summary of the show cause notice will be issued electronically in FORM GST DRC-01, specifying therein the amount of tax, interest and penalty payable by the appellants.

4. On going through the proceedings of the assessing officer dated 26th September, 2022 it prima facie appears to be an order and the manner of issuing show cause notice has not been rightly understood by the authority. Partly the

appellants have to be blamed because the appellants for the query raised by the authority has misconstrued the scope of the query and proceeded to make elaborate factual submissions as well as relied upon several decisions of the Hon'ble Supreme Court and the High Courts. If the appellants had restricted their reply only to the extent query raised, this problem could have been averted. Thus, not only the authority committed a mistake in proceeding to reject all the contentions and then issued the show cause notice, equally the appellants also committed a mistake in mentioning facts which were not required to be done pursuant the query raised by the authority.

5. Thus we are of the view that the entire proceedings have to be redone in an opposite manner. We are conscious of the fact that if the matter is remanded back it will be dealt with by the very same officer but, however, we are confident that the very same officer will have an open mind and issue a show cause notice in a proper manner giving adequate opportunity to the appellants to submit their reply and it is thereafter the show cause notice has to be adjudicated. The manner in which the authority has proceeded to issue the notice dated 26th September, 2022 does not satisfy the legal requirements.

6. For the above reasons the appeal is allowed application and the order passed in the writ petition is set aside. Consequently the show cause notices impugned in the writ petitions are quashed and the matter is remanded back to the authority with a direction to issue a fresh show cause notice with an open mind without pre-deciding any issue and give adequate opportunity to the appellants to submit their reply and thereafter the case shall be adjudicated in accordance with law.

7. We further direct that the adjudicating authority shall in no manner be guided by its order dated 26th September, 2022 though termed it a show cause notice, which has been set aside by us in this order. A fresh show cause notice shall be issued within a period of three weeks from the date of receipt of the server copy of this order.
8. We make it clear that the appellants are precluded from raising the issue of limitation when a fresh show cause is issued.
9. There shall be no order as to costs.
10. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J.)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

RAJA/Pallab, AR(Ct.)