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IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4349 of 2023

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Purushottam Stores a proprietary concern having its place of business at Subash Chawk, Darbhanga through its present proprietor namely Deenanath Gami male aged about 43 years son of Late Mohan Gami resident of Shivaji Nagar, Basant Ganj, P.O. - Lal Bagh, District - Darbhanga, Bihar - 846004.

... ... Petitioner/s

Versus

1. The State of Bihar through the Commissioner, Department of State Taxes, Government of Bihar, Patna.
2. The Additional Commissioner of State Taxes (Appeal) Darbhanga Division, Darbhanga.
3. The Deputy Commissioner of State Taxes Darbhanga Circle, Darbhanga. (2020-2021)

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Gautam Kumar Kejriwal, Advocate
For the Respondent/s : Mr.Vivek Prasad, GP 7

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 25-04-2023

The petitioner, an assessee, under the Bihar Goods and Services Tax Act, 2017, challenged the appellate order dated 15.02.2023 passed by the 3rd Respondent under Section 74 of the Act. The short ground, on which the challenge is raised, is that the Appellate Authority has dismissed the appeal for reason of non-prosecution of the same when even in the context of non-appearance of the appellant, the Appellate Authority was statutorily obliged to dispose of the appeal on

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merits. Learned counsel appearing for the petitioner also relies on the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax, Madras vs. S.Chenniappa Mudaliar, Madurai;(1969)1SCC591**.

2. The learned Government Pleader, in support of the order, points out the grounds raised by the appellant having been dealt with by the Assessing Officer and reiterated by the Appellate Authority, in its order produced as Annexure-9. It is also pointed out that the appellant had consistently not appeared before the Appellate Authority in which circumstance, the said fact was also noticed by the Appellate Authority, which was an additional reason cited by the Appellate Authority to reject the appeal. It is pointed out that there is provided an appeal before the GST Tribunal and since the Tribunal has not yet been constituted, this Court in similar matters grants liberty to the assessee to approach the Tribunal as and when it is constituted and keeps in abeyance the recovery proceedings on deposit of 20% of the tax amount disputed. There is no cause for invocation of the extraordinary remedy under Article 226 of the Constitution of India, is the compelling submission; but for the above limited relief.

3. The appellate order dated 15.02.2023 is in an

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appeal filed against the order dated 01.11.2021, produced by the petitioner which is at Annexure-9, the operative portion of which, in the vernacular, was translated to English and produced before us across the bar, with copy served on the learned State Counsel.

4. Before we look at the order, we have carefully read the decision of the Hon'ble Supreme Court cited before us, which dealt with Sections 33 (4) and 66 of the Income Tax Act 1922 and Rule 24 of the Appellate Tribunal Rules, 1946. Rule 24 empowered the Appellate Tribunal, subject to the provisions of the Act, to regulate its own procedure and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the places at which the Benches shall hold their sittings. The Appellate Tribunal first had a set of rules which provided that the Tribunal shall determine the appeal on merits, notwithstanding the absence of the appellant and it was also empowered to restore an appeal which was disposed of without hearing the appellant. The substituted rules contained Rule 24A, which empowered the Tribunal to dismiss the appeal for default if the appellant does not appear on the day fixed for hearing and on any day to which the appeal is adjourned; without any provision for restoration of

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the appeal dismissed for default.

5. The Hon'ble Supreme Court found that the scheme of the Act, especially Section 33 (4) was to dispose of an appeal by making such orders as the Tribunal thinks fit, on the merits. The Hon'ble Supreme Court specifically emphasized the word 'thereon' in sub-section (4) of Section 33, which required the Tribunal to afford an opportunity of hearing to both parties and make such orders 'thereon' as it thinks fit. The word 'thereon', according to the Hon'ble Supreme Court, clearly indicated that the Tribunal ought to go into the correctness or otherwise or the points decided by the departmental authorities in the light of the submissions made by the appellant. '*This exercise can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear'* (sic). The decisions in **Hukumchand Mills Ltd. v. CIT; 63ITR 232**, **CIT v. Mtt. Ar. S. Ar. Arunachalam Chettiar; 23ITR 180** and **CIT v. Scindia Steam Navigation Co. Ltd.; 42ITR 589**, were also noticed, all of which, considering the very same provision held that there is a statutory mandate that the Appellate Tribunal dispose of the appeal on merits.

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6. With the above principle in mind, we have looked at Section 107 of the BGST Act. Sub-section (8) of Section 107 requires the Appellate Authority to give an opportunity of hearing to the appellant and sub-section (9) also empowers the Appellate Authority to adjourn the hearing at the request of the appellant, if sufficient cause is shown for the prayer made. The proviso to sub-section (9) ensures that the Appellate Authority has sufficient powers to refuse such adjournment, if it has been granted three times previously. Sub-section(10) empowers the Appellate Authority to permit the appellant to argue any ground, not set forth in the grounds of appeal, if the omission was not willful or unreasonable. We specifically extract sub-section (11) and (12) of Section 107, without the two provisos under sub-section(11):-

> "(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:
>
> xxx xxx
>
> xxx xxx
>
> (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."

7. The specific statutory mandate is that after hearing the appellant, the Appellate Authority is to make further

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enquiry, if found necessary and pass such orders as it thinks just and proper, *confirming, modifying or annulling the decision or order appealed against.* Such affirmation, modification or annulment shall not be an empty formality nor can it be mechanical, without the consideration of the grounds of appeal. We observe so, specifically when the Appellate Authority is empowered to refuse the prayer for adjournment made by an appellant, if on three prior occasions, such adjournment has been allowed, in which case also the Appellate Authority cannot absolve itself from the obligation to conduct such further enquiry as is mandated under sub-section (11) of Section 107. Sub-section (12), it has to be further emphasized, also requires the order of the Appellate Authority disposing of the appeal to be in writing and specifically stating the points for determination, the decision thereon and the reasons for such decision. When an appeal is dismissed for reason only of absence of the appellant or lack of effective prosecution, then the Tribunal should be found to have abdicated its powers and not followed the statutory mandate.

8. It is in the teeth of the above interpretation of the provisions in the statute that the impugned order has to be examined specially in the light of the ground raised, of a

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peremptory dismissal for non-prosecution or absence of a counsel. We see from the order that the Appellate Authority has extracted the grounds of appeal and the grounds on which the Assessing Officer has proceeded. The operative portion of the order reads as follows, as found in the translated copy produced across the bar, with a copy served on the learned Government Advocate:-

> "The departmental representative gave his attendance and apprised of the facts of this case and also requested to confirm the order passed by the court below. Whereas the appellant/tax payer remained absent today the date of hearing being 15.02.2023 and there is no action on his part.
>
> The submissions and arguments of the departmental representative have been heard by me. The grounds of appeal furnished by the appellant ear5lier have been perused. A serious consideration has been given to the same. The concerned appellant has been given several opportunities of hearing but there has been no action on his part towards disposal of this case. Earlier also the dates of hearing fixed in this case were 22.12.2021, 08.01.2022, 12.01.2023 and 15.02.2023 in ordder to afford opportunity to the appellant but the appellant intermittently filed time petitions. The matter is getting older. The appellant did not furnish the relevant evidence, documents, accounts etc nor did he appear and clarify this matter. This clearly shows that the appellant/taxpayer intends to keep this matter pending. In these circumstances, I do not find a need to interfere with the order passed by the lower court. The order passed by the lower court is confirmed.
>
> Consequently, matter is dismissed."

9. There is little consideration on merits and due compliance of the requirement under Section 107 in the impugned order is totally absent. It is trite that in exceptional

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circumstances, one of which is a clear abuse of process of law, the invocation of Article 226 Constitution of India, despite the existence of an efficacious alternate remedy is permissible as has been held in **State of H.P & Ors. v. Gujarat Ambuja Cement Limited & Anr.; (2005) 6 SCC 499**. Here is a case where the Appellate Authority failed to follow the mandate in the statute for disposal of an appeal, which has to be on merits, even if the assessee/appellant had failed to appear before the Authority. We also notice that there is no efficacious alternate remedy available as of now, against the appellate order, since the Tribunal, to which a further appeal is provided, has not been constituted. Leaving the Assessee/petitioner to the appellate remedy as and when the Tribunal is constituted, that too with a further direction to pay 20% of the disputed tax amount would unnecessarily prejudice the assessee.

10. On the above reasoning, we deem it appropriate that the appellate order is set aside for the reasons stated above, without any observation on merit. We direct the Appellate Authority to restore the appeal to its files and the appellant shall appear before the authority on 04.05.2023. The Appellate Authority or its office shall fix a date of hearing on the said date, with due acknowledgment taken from the

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appellant; if the date of hearing is issued from the office, proceed with the hearing on the date fixed and dispose of the appeal on merits within two months from the date of last hearing. We also direct the petitioner to cooperate in the hearing of the appeal and even if there is absence of the appellant or his authorized representative on the date of hearing, the Appellate Authority shall consider the appeal on merits and pass a speaking order. The writ petition stands allowed with the above direction.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

Sujit/-

AFR/NAFR	AFR
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