

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 3092 of 2024

With

IA CAN 1 of 2024

With

IA CAN 2 of 2024

**Pioneer Co-operative Car Parking Servicing
And Constructions Society Limited
Versus
Senior Joint Commissioner, Burrabazar,
Office of the Circle Officer, B B Circle**

For the petitioner : Mr. Vinay Kr. Sharaff,
Ms. Priya Sarah Paul,
Mr. Dev Kr. Agarwal,
Ms. S. Poddar,

For the respondents : Mr. A. Ray,
Mr. T. M. Siddiqui,
Mr. T. Charkraborty,
Mr. S. Sanyal,

Heard on : 01.03.2024

Judgment on : 01.03.2024

Raja Basu Chowdhury, J:

In Re: CAN 1 of 2024:-

1. This is an application, *inter alia*, for impleading the Assistant Commissioner of State Tax, NS Road, and MR Charge, Office of Senior Joint Commissioner, N.S. Road, 6th Floor, Annex Building-II, 14 Beliaghata Road, Kolkata - 700015 as respondent no. 2.

Having heard learned Advocates appearing for the respective parties and having considered the materials on record, I am of the view that the petitioner should be permitted to implead the Assistant Commissioner of State Tax, NS Road, and MR Charge, Office of Senior Joint Commissioner, N.S. Road, 6th Floor, Annex Building-II, 14 Beliaghata Road, Kolkata 700015 as respondent no.2.

2. Mr. Chakraborty learned advocate, who is present in Court enters appearance on behalf of the respondent no.2.
3. The Department is directed to carry out the aforesaid amendment.
4. CAN 1 of 2024 is accordingly disposed of.

IN Re: WPA 3092 of 2024 and IA CAN 2 of 2024

5. Considering the nature of urgency involved the writ petition is taken up for consideration.
6. The present petition has been filed, *inter alia*, challenging the order dated 6th November, 2023 passed by the respondent no. 1 forming Annexure P-1 to the present petition. The petitioner claims to be a Cooperative Society registered under the West Bengal Cooperative Societies Act, 1973, and claims to be carrying out cooperative business for under privileged people. Approximately, there are 250 members. It is the case of the petitioner that it is registered under the CGST and WBGST Act, 2017 (hereinafter referred to as the "said Act") and is engaged in

the business rendering service of collecting parking fees. The petitioner contends that the respondents had alleged discrepancy on scrutiny of the petitioner's returns, and had intimated the petitioner by issuing a notice in Form GST ASMT-10 on 16th May, 2023. Since, according to the respondents, the petitioner could not afford any satisfactory explanation, an intimation under Section 73(5) of the said Act was issued on 29th August, 2023. The same was subsequently followed up by a show cause notice issued under Section 73(1) of the said Act dated 12th September, 2023.

7. According to the petitioner, the petitioner had duly within the time for providing its response to the aforesaid show cause notice, had sought for an extension by its response dated 11th October, 2023. The same was duly uploaded in the official portal of the respondents. Unfortunately, the respondent no. 1 without affording the petitioner an opportunity of hearing or to respond to the show cause by extending the time, had purported to pass the final order dated 6th November, 2023, thereby determining liability under Section 73(9) of the said Act.
8. Mr. Sharaff, learned Advocate, representing the petitioner by drawing attention of this Court to the provisions of Sections 61, 66 and 73 of the said Act submits that each of the aforesaid sections provides for different procedures. By placing reliance on Section 75(4) of the said Act, it is submitted that whenever the

proper officer under the said Act proposes to pass an adverse decision or whenever an adverse decision is contemplated as in this case under Section 73 and its Sub-Sections, or a request is made seeking opportunity to respond, no such decision can be taken without affording such person with a reasonable opportunity of hearing. Admittedly, in this case the petitioner had sought for an extension for filing its response to the show cause issued under Section 73(1) of the said Act. By referring the said Act and in particular to Section 75(5) he submits that the proper officer is authorized to grant up to three extensions. The petitioner had only sought for one extension on the ground that at the relevant point proper professional was not available for the petitioner to prepare its response. The procedure being highly technical, the respondent no.1 ought to have granted the extension.

9. In the present case, the respondent no. 1 without even formally rejecting the application for extension had passed the final order dated 6th November, 2023. By referring to the relevant portion of the order dated 6th November 2023, he submits that the proper officer had irregularly recorded that he had given more than six opportunities to the petitioner, for the petitioner to respond. Admittedly, in this case, only one extension was sought for which was denied. Mr. Sharaff submits that the proper officer had confused the scope and ambit of the provisions of Sections 61 and 73 of the said Act while Section 61 of the said Act provides for a

procedure for offering an opportunity to respond at the stage of scrutiny, the same cannot and does not contemplate an opportunity to respond to the show cause under Section 73 of the said Act. In any event, when the notice dated 16th May, 2023 was issued, the show cause notice dated 12th September, 2023 did not even see the light of the day. He submits that the said order cannot be sustained the same stands vitiated on the ground of violation of principles of natural justice. He submits that the respondents had proceeded further on the basis of the aforesaid order and had since, by a recovery notice dated 15th February, 2024 sought implementation of the aforesaid order notwithstanding the primary challenge to the aforesaid order remains pending. It is stated that until and unless this Court interferes with the order dated 6th November, 2023 passed by the respondent no. 1, and quashes the demand dated 15th February, 2024 the petitioner shall suffer irreparable loss and injury.

10. Mr. Siddiqui, learned Advocate representing the respondents, on the other hand, submits that the petitioner had been provided with repeated opportunities. By drawing attention of this Court to the notice dated 16th May, 2023, it is submitted that despite being offered with several opportunities, the petitioner did not respond to the same. Ultimately, the respondents were compelled to issue notice under Section 73(5) of the said Act intimating the amount of tax along with interest required to be paid by the petitioner.

The same was subsequently followed up by a notice to show cause issued under Section 73(1) of the said Act. By referring to the documents which are on record, it is submitted that the petitioner had sought for several adjournments and as such there is no irregularity on the part of the proper officer in denying further adjournment to the petitioner. He submits that there is also no irregularity on the part of the proper officer in recording in his order dated 6th November, 2023 that more than six adjournments had been granted. It is further submitted that the petitioner has an alternative efficacious remedy in the form of an appeal and this Court in the given facts ought not to exercise jurisdiction.

11. I have heard the learned Advocates appearing for the respective parties and have considered the materials on record. Admittedly, in this case it is noticed that the petitioner was served with an intimation under Section 61 vide notice dated 16th May, 2023, the same was followed up by a further notice of intimation under Section 73(5) of the said Act. None of the aforesaid notices are, however, a notice to show cause under section 73(1) of the said Act. As correctly pointed out by the learned Advocate for the petitioner that the statute provides for an opportunity to respond when the department contemplates passing of any adverse decision under Section 73(9) of the said Act. Admittedly, in this case the show cause notice under Section 73(1) of the said Act

had been issued on 12th September, 2023. Although, the petitioner had duly applied before the respondents seeking for an adjournment on the ground noted therein, on 11th October, 2023 within the due date to respond, the proper officer had purportedly rejected the same on the consideration that more than six adjournments had been granted. In this context, it may be relevant to consider the general provisions as regards grant of an opportunity to respond, to a show cause notice issued under section 73(1) of the said Act. To morefully appreciate the above the provisions of Section 75(5) of the said Act are extracted hereinbelow:-

“75.(5). The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted for more than three times to a person during the proceeding.”

12. Having regard to the aforesaid, I am of the view that once, the petitioner had sought for an extension, the respondent no. 1 was obliged to consider the application for extension and ought not to have passed the final order holding that more than six adjournments had been granted to the petitioner. There is no finding on the part of the respondent no.1 that the petitioner did not make out sufficient cause for being denied the extension. Consideration for rejection of an application for extension was that more than six adjournments were granted. I am afraid

and am unable to accept the reasoning provided for rejection of the extension application. The adjournments granted to the petitioner in respect of proceeding under Section 61 of the said Act read with Rule 99 of the CGST Rules, 2017, initiated vide notice dated 16th May 2023, cannot be clubbed together for the purpose of holding that the petitioner was afforded with ample opportunity to respond to the show cause issued under section 73(1) of the said Act.

13. Admittedly, the provisions of Section 73 and its sub sections are independent provisions. Having regard to the aforesaid, the manner in which the respondent no. 1 had proceeded to pass the final order without granting extension to the petitioner to file its response or to be offered personal hearing, despite the petitioner showing sufficient cause, appears to be a colourable exercise of power by the said authority.
14. Although, it has been argued by the respondents that the petitioner has an alternative remedy in the form of an appeal, I am of the view that an appeal is no substitute for revisiting of an *ex parte* order, especially when the defense of the petitioner is not on record. Further since, the order stands vitiated on the ground of violation of the principles of natural justice, alternative remedy in the form of an appeal is no bar for exercise of extraordinary writ jurisdiction.

15. Consequently, directions issued for recovery of tax by the respondent no.2, vide communication dated 15th February 2024 also cannot be sustained. The same is accordingly, quashed. The petitioner is directed to file its response to the show cause notice under section 73(1) of the said Act on or before 15th March, 2024. The respondents are also directed to communicate to the petitioner the date of personal hearing, immediately after 15th March, 2024. If the petitioner does not file any response, the respondent no. 1 shall be entitled to proceed further in the matter and pass necessary order/s, as it may deem fit and proper. It is made clear that the petitioner shall not be entitled to any further extension/adjournment or opportunity, nor shall be entitled to seek any further documents from the respondents.
16. With the above observations and directions, the writ petition stands partly allowed and the connected application being IA CAN 2 of 2024 stands **disposed of**.
Urgent photostat certified copy of this order, if applied for, be made available to the parties, upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)