(2013) 02 RAJ CK 0056

In the Rajasthan High Court

Case No : Civil Writ Petition No. 16577 of 2012

BGR Energy Systems Ltd. — APPELLANT

Vs

State of Rajasthan and Others — RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Value Added Tax Act, 2003 — Section 24, 25, 34, 55, 61

Citation : (2013) 62 VST 413

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Advocate : R.K. Agarwal, assisted by Prateek Kasliwal, for the Appellant; R.B. Mathur, for the Respondent

Judgement

Ajay Rastogi, J.—Instant writ petition is directed against the order dated September 28, 2012 passed by the assessing authority for assessment year 2009-10. The petitioner is public limited company incorporated under the Companies Act, 1956 and has been registered as a dealer with the Department of Commercial Taxes.

2. It has been alleged in the petition that respondent No. 4 issued three separate purchase orders all dated October 13, 2008 to petitioner--firstly bearing No. 3832 for off-shore supplies of material and equipment; secondly bearing No. 3833 for on-shore supplies; and thirdly bearing No. 3834 for civil, erection, testing and commissioning works and services. C forms were issued by the buyer, respondent No. 4, in course of inter-State sale transactions. As regards entry tax on the entry of goods under the abovementioned purchase orders dated October 13, 2008, is being paid by respondent No. 4 through the petitioner and for the said entry tax, the requisite return is being filed by respondent No. 4 and assessed by respondent No. 1. As regards, purchase order No. 3834 dated October 13, 2008 which relates to work order for civil, erection, testing and commissioning works and services, for the work executed under the said

purchase order, as alleged, the petitioner has filed its quarterly returns within the respective due dates and the audit report for assessment year 2009-10 was filed in January, 2011 and audit report, including the turnover mentioned therein, has been accepted by the Department.

3. The assessment, as provided under the Rajasthan Value Added Tax Act, 2003 (hereinafter referred to as "the RVAT Act, 2003"), is to be made u/s 24, however, the stipulation is contained under sub-section (5) that no assessment order under this section (section 24) shall be passed after expiry of two years from the end of the relevant year, however, the Commissioner holds competence for reasons to be recorded in writing, to extend such time-limit by a period not exceeding six months. However, sub-section (6) which starts with non obstantive clause stipulates that where an assessment order is passed in consequence of or to give effect to any order of an appellate or revisional authority or a competent court, it shall be completed within two years of communication of such order to the assessing authority and the Commissioner further holds competence for reasons to be recorded in writing, to extend such time-limit by a period not exceeding six months.

4. In the instant case, when two years period to complete the assessment, as regards assessment year 2009-10, was going to expire, the Commissioner before expiry of stipulated period vide letter dated March 20, 2012 extended the period by three months till June 30, 2012 and since the assessing authority failed to make assessment within the extended period of three months, further order was passed by the Commissioner on May 29, 2012 extending the period by another three months till September 30, 2012.

5. As it reveals from the record, while the regular assessment was pending with the assessing authority u/s 24 of the RVAT Act, 2003, the Anti-Evasion Wing i.e., Commercial Taxes Officer, Anti-Evasion, respondent No. 3, issued a show-cause notice under sections 24, 25, 55, 61 and 65 of the RVAT Act, 2003 dated July 27, 2012 placing reliance upon survey report dated July 26, 2012 holding as to why the inter-State sale made by the petitioner be not assessed as local sale relating to the contracts/purchase orders awarded by respondent No. 4, which was served upon the petitioner on August 1, 2012 and was called upon to appear before the assessing authority in terms of show-cause notice on August 9, 2012.

6. Pursuant to the show-cause notice, representative of the petitioner-company appeared before respondent No. 3 and sought adjournment as the matter involves serious legal questions and the matter was posted for August 21, 2012, however, before the next date of hearing, on August 17, 2012, the petitioner addressed a letter to respondent No. 3 requesting him to furnish complete set of documents relied upon by the authority while taking its decision to serve the notice dated July 27, 2012. In response to letter dated August 17, 2012, respondent No. 3 furnished to the petitioner a bundle of documents running into 6,600 pages on September 10, 2012. The representative of the petitioner-company appeared on the date fixed before the assessing authority on

September 17, 2012 and requested to grant time to study the voluminous documents supplied on September 10, 2012. Respondent No. 3 issued a notice to representative of the petitioner-company to appear on September 24, 2012, however, with the said notice, respondent No. 3 furnished additional set of documents running into more than 800 pages to representative of the petitioner-company which contained survey report dated July 26, 2012 prepared on the survey conducted at the project site way back on January 19, 2012. Prior to the date of hearing, which was September 24, 2012, the petitioner addressed a letter to respondent No. 2 dated September 20, 2012 stating, inter alia, that the time granted till September 24, 2012 for personal appearance is insufficient as voluminous documents including the survey report needs time to be examined but the assessing authority fixed the matter on September 26, 2012 and since the petitioner was unable to examine the voluminous record made available to him at the last moment, a request was made for adjournment and the case was fixed for September 28, 2012, however, when representative of the petitioner-company appeared and requested to grant time, since the documents which were made available were voluminous and running into almost 7,000 pages, the request made on behalf of petitioner-company was declined and the assessing authority passed order of assessment impugned on September 28, 2012. It may be relevant to record that September 28, 2012 was the date fixed for hearing and after the request of the petitioner seeking adjournment stood declined on that day itself, the assessing authority, whose efforts deserve to be appreciated, passed the order of assessment running into 946 pages and that came to be assailed in the instant petition.

7. Counsel for the petitioner has not addressed this court, as regard merits of the assessment order passed by the assessing authority, however, the only objection is that he has not been afforded a reasonable opportunity of hearing to address and put his defence before the assessing authority in absence whereof the impugned action of the assessing authority was in violation of principles of natural justice.

8. Counsel submits that in such matters of peculiar nature where reasonable opportunity of being heard has not been afforded, the availability of alternative remedy of appeal u/s 82 of the RVAT Act, 2003 may not be construed as absolute bar for exercising equitable jurisdiction of this court under article 226 of the Constitution.

9. Reply has been filed by the respondents and raised a preliminary objection that once the order of assessment has been passed by the assessing authority, the statutory remedy of appeal is available to the assessee u/s 82 of the RVAT Act, 2003 and if the petitioner considers it to be ex parte proceeding initiated against him, he can also invoke the remedy available to him u/s 34 of the RVAT Act, 2003 for reassessment.

10. Counsel submits that in view of effective remedy of appeal available to the petitioner under the statute, the writ petition is not maintainable and in this

regard he placed reliance on the judgments of the apex court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and United Bank of India Vs. Satyawati Tondon and Others, and taking assistance therefrom, counsel submits that ordinarily the petition under article 226 of the Constitution has not to be entertained where effective remedy is available to the aggrieved person and this rule applies with greater rigour in the matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. As regards, objection raised by the petitioner that September 28, 2012 was the last date fixed for hearing on which request for adjournment was declined and order of assessment impugned came to be passed by the assessing authority running into more than 900 pages being dictated which is humanly not possible. It has been averred by respondents in para 11 of the reply that assessment order is a detailed conclusion of systematic enquiry and it covers the proceedings from January 19, 2012 till September 27, 2012 and the documents relating to this period were ready and scanned before the final proceedings on September 28, 2012 on which date the decisive part of the order was prepared and after integrating it with rest of the order, final assessment order was passed by the assessing authority and to justify its action, counsel for the respondent submits that as the mandate of law provided u/s 24 of the RVAT Act, 2003 read with the period extended by Commissioner was up to September 30, 2012 and September 29 and September 30, 2012 being Saturday and Sunday the last day available for passing order of assessment with the assessment authority was none-less than September 28, 2012, as such the request made by the petitioner seeking adjournment was declined and since there was no other option left with the assessing authority, the order came to be passed simultaneously on September 28, 2012.

11. At the outset this court would like to record that merits of matter have not been looked into and either party also have not addressed this court on merits and the only pivotal question which arises in the instant case is as to whether in the facts and circumstances of the case, opportunity of being heard afforded to the petitioner could be considered to be reasonable which is the cardinal principle of law for fulfillment of principles of audi alteram partem and when the mandate of law provides that affected party must be afforded with reasonable opportunity of hearing before taking any decision against the person affected causing adverse consequences.

12. Section 24 of the RVAT Act, 2003 provides a mechanism for holding regular assessment and the outer-limit for assessment to be finalized under sub-section (5) of section 24 of the RVAT Act, 2003 is two years, however, the Commissioner holds competence for reasons to be recorded in writing, to extend the time-limit by a period not exceeding six months. At the same time, in case assessment is of avoidance or evasion of tax, section 25 of the RVAT Act, 2003 could be invoked by the assessing authority where he has reasons to believe that a dealer has avoided or evaded tax or has not paid tax in accordance with law or has availed of input-tax credit wrongly, he would be under obligation to afford reasonable

opportunity of being heard to the dealer-assessee, determining time and period, the taxable turnover of such dealer on which tax has been avoided or evaded and the assessment under sub-section (1) has to be made within a period of six months from the date of making out the case, however, the Commissioner holds competence for reasons to be recorded in writing, to extend the time-limit by a further period not exceeding six months.

13. In the instant case, show-cause notice under sections 24, 25, 55, 61 and 65 of the RVAT Act, 2003 dated July 27, 2012, indisputably was served upon the petitioner on August 1, 2012 and if this court takes note of sub-section (3) of section 25 of the RVAT Act, 2003 indeed the time was available with the assessing authority to make assessment under sub-section (1) of section 25 of the RVAT Act, 2003 and the Commissioner holds competence to extend time-limit by a further period of six months. However, u/s 24 of the RVAT Act, 2003 for assessment year 2009-10 indisputably after the extension of time granted by the Commissioner was going to expire on September 30, 2012 but this fact cannot be ruled out that when the petitioner was served with the notice under sections 24 and 25 of the RVAT Act, 2003 in case of avoidance or evasion of tax, the mechanism which has been provided by the Legislature u/s 25 of the Act could have been invoked to provide effective opportunity of hearing to the dealer and these being quasi-judicial proceedings, reasonable opportunity of being heard is a sine qua non and imperative for the assessing authority to be afforded to the dealer affected before passing of the order of assessment and an order of assessment impugned herein could not be construed as an ex parte proceedings after the notice being served and the representative appeared in the proceedings availing recourse to section 34 of the RVAT Act, 2003 for reopening of ex parte assessment, as alleged.

14. This court finds substance that if the statute provides a mechanism of appeal to the Deputy Commissioner (Appeals) of the Tax Board, this court ordinarily was not supposed to exercise its equitable jurisdiction under article 226 of the Constitution and this is what has been held in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, wherein the apex court has laid down certain guidelines for invoking jurisdiction of this court, while alternative remedy of law is available. The relevant observations made in para 15 read as infra:

15. Under article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on

this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

15. There cannot be any dispute on principle that remedy which the law contemplates has to be availed of by the incumbent ordinarily prior to invoking equitable jurisdiction of this court under article 226 of the Constitution and it is also equally true that it an appeal is being preferred, the appellate authority on re-examination of entire material available on record may annul, reverse, modify or quash the order impugned in the facts and circumstances of a given case but the remedy of appeal could be said to be effective if reasonable opportunity of hearing has been afforded to the incumbent and the defence has come on record and considered by the assessing authority which can certainly be re-looked on the appeal being preferred by the assessee for appreciation of his defence.

16. In the instant case, there was no defence on record of the petitioner-company before the assessing authority, as it manifests from the record that for the first time notice u/s 25 read with other provisions of the RVAT Act, 2003 dated July 27, 2012 was served on August 1, 2012 and the voluminous record running into more than 7,000 pages was made available to the petitioner on September 10, 2012 and the proceedings before the assessing authority, were going on day-to-day basis and the matter came to be listed on 17th September where the survey report dated July 26, 2012 which was the basis for issuance of notice dated July 27, 2012 running into 112 pages was supplied and next date was September 24, 2012 and September 26, 2012 and finally on September 28, 2012 when the authorized representative of the petitioner-company appeared before the assessing authority and requested for time to enable him to consult and submit his defence the assessing authority declined the request and passed the order of assessment dated September 28, 2012 running into 900 and odd pages. The pre-determinative view of the assessing authority, as averred in para 11 of the reply that the assessment order is a detailed conclusion of a systematic enquiry covers the proceedings from January 19, 2012 to September 28, 2012 and proceedings from January 19, 2012 to September 27, 2012 were ready and documents were scanned and decisive part was prepared on September 28, 2012 integrating it with the rest of the order of assessment dated September 28, 2012 and in these facts and circumstances, the pre-decisional hearing, which was the requirement of law, remains an empty formality.

17. There might be a compulsion, as placed before the court, contemplated u/s 24 of the RVAT Act, 2003 but that compulsion in no manner could take away rights of the petitioner which is available under the law of being afforded a reasonable opportunity of hearing which is a sine qua non and imperative for the assessing authority to afford before passing the order of assessment, as that would determine rights of the parties but in a given case where the assessing authority failed to afford a reasonable opportunity to the party affected to place his defence on record for consideration, availability of remedy of appeal loses its

legal significance.

18. In the considered view of this court, in the facts of the instant case, the petitioner has been indisputably deprived of a reasonable opportunity of hearing which was a sine qua non for compliance of principles of natural justice and was expected from the assessing authority before taking its decision which may have an adverse consequences and the remedy of appeal available to the petitioner-assessee, in the opinion of this court, cannot be held to be effective remedy in the eye of law. The honourable Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, has carved out three exceptions where the equitable jurisdiction of this court under article 226 of the Constitution could be invoked and one of the contingency referred to is the violation of principles of natural justice.

19. If the assessing authority, who was exercising quasi-judicial powers, failed to afford reasonable opportunity of hearing, which is expected from it, this court must come to the rescue of the incumbent whose rights provided under the law have been curtailed in an arbitrary manner only on the premise that the order of assessment has to be passed before the deadline and if was at all the requirement, it was expected from the authority to initiate the proceedings prior thereto so that reasonable opportunity could be afforded to the petitioner in coming out with his defence but if the notice itself was issued on the deadline, as being noticed by the assessing authority, was September 30, 2012 at least the assessee cannot be blamed for inaction on the part of the Revenue.

20 Consequently, the writ petition succeeds and is hereby allowed. The order of the assessing authority dated September 28, 2012 is quashed and set aside and the matter is remanded back to the assessing authority. The parties are directed to appear before the assessing authority on March 11, 2013. However, it is made clear that the assessing authority may not be inhibited or influenced by the observations made hereinabove at the same time. The petitioner may submit his defence before the assessing authority within one month of its appearance and the assessing authority may decide the matter afresh within a period of three months thereafter in accordance with law. No costs.