
(2019) 05 UK CK 0078
In the Uttarakhand High Court
Case No : Special Appeal No. 395 Of 2019

Shree Cement Limited

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 02-05-2019

Acts Referred:

Uttarakhand Value Added Tax Act, 2005 — Section 4(4), 65
Uttar Pradesh General Clauses Act, 1904 — Section 21
Uttarakhand Value Added Tax Rules, 2005 — Rule 4(1), 4(2)
Constitution Of India, 1950 — Article 226

Citation : (2019) 05 UK CK 0078

Hon'ble Judges : Ramesh Ranganathan, CJ; N.S. Dhanik, J

Bench : Division Bench

Advocate : M.P.Devanath, P.R. Mullick, Vikas Pande

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. Heard Mr. M.P. Devanath, learned counsel for the appellant and Mr. Vikas Pande, learned Standing Counsel for the State, and, with their consent, this appeal is being disposed of at the stage of admission.

2. The jurisdiction of this Court was invoked by the appellant-writ petitioner-a cement manufacturing unit-seeking a writ of certiorari to quash the Circular dated 02.01.2018; a writ of mandamus to quash the conditions imposed at Sl. Nos.12 and 13 of the Circular dated 02.01.2018 by holding that they are not in line with the sole condition flowing from the notification dated 29.12.2017; a writ of mandamus reading down the conditions imposed at Sl. Nos.12 and 13 of the Circular dated 02.01.2018 in line with the sole condition flowing from the notification dated 29.12.2017; a writ of certiorari to quash the notice dated 28.04.2018 holding that the same is ex-facie perverse, illegal and arbitrary; and a writ of mandamus prohibiting the respondents from taking any coercive steps, in furtherance of the notice dated 28.04.2018 and Circular dated 01.02.2018.

3. In the order under appeal, the learned Single Judge noted the submission, urged on behalf of the appellant-writ petitioner, that clauses 12 and 13 of the Circular dated 02.01.2018 ran contrary to the notification dated 29.12.2017; the Commissioner, by way of a circular, could not put an embargo to the concession provided in the notification; and clause 'D' of the relief clause was against the show-cause notice dated 28.04.2018, calling for the appellant-writ petitioner's explanation. The learned Single Judge observed that, without venturing into the merits of the matter and without answering any question which had been posed by the appellant-writ petitioner, the Writ Petition should be dismissed, leaving it open to the appellant-writ petitioner to approach the authorities, and file its reply to the show-cause notice dated 28.04.2018; and if the reply was filed, to the show-cause notice, within six weeks from the date of the order, the same would be considered by the Deputy Commissioner within two months thereafter. Aggrieved thereby, the present appeal.

4. Mr. M.P. Devanath, learned counsel for the appellant-writ petitioner, would draw our attention to the notification dated 29.12.2017 to submit that the subsequent circular, issued by the Commissioner, State Tax Uttarakhand dated 02.01.2018, restricts the scope of the notification dated 29.12.2017; while diesel sold to an industrial unit of a dealer, registered under the Uttarakhand GST Act, for the use in the process of manufacture of taxable goods, pursuant to such manner, and against such certificate, as may be prescribed by the Commissioner, is what is stipulated in the notification dated 29.12.2017, Para 12 of the said circular restricts the benefits granted by the notification only to units which uses diesel in the manufacture of goods, though the notification stipulates that the concessional rate of tax @5% is available for industrial units which use diesel for the purpose of manufacturing taxable goods, and not merely its use in the manufacture of goods. According to the learned counsel for the appellant-writ petitioner, use of diesel by the petitioner in its vehicles, used for transportation of raw materials, from their source plant to their grinding unit in the State of Uttarkhand, would also fall within the ambit of the notification; and since the power, conferred on the Commissioner under the Act, does not extend to placing any restrictions on a notification issued by the Government, and in as much as the Assessing Authority is bound by the Circular issued by the Commissioner, no useful purpose would be served in submitting a reply to the show-cause notice, more so as the Assessing Authority has already made up his mind, as is evident from a bare reading of the contents of the show-cause notice. Learned counsel for the appellant-writ petitioner would rely on Deputy Commissioner of Central Excise vs. Sushil & Company 2016 (42) S.T.R. 625 (SC), and Siemens Ltd. vs. State of Maharashtra & others (2006) 12 SCC 33.

5. The complaint of the appellant-writ petitioner, in short, is that the Assessing Authority has chosen not to rely on the notification issued by the State of Uttarakhand dated 29.12.2017; and is, instead, relying on the directions issued by the Commissioner in the Circular dated 02.01.2018; and the impugned show-cause notice is, therefore, illegal.

6. The scope of interference, in proceedings under Article 226 of the Constitution, against a show-cause notice is extremely limited. In *Sushil & Company 2016 (42) S.T.R. 625 (SC)*, on which reliance is placed on behalf of the appellant-assessee, a show-cause notice was issued, to the respondent therein, alleging that they were service providers, they had raised two separate bills for the same work, and they were liable to pay service tax. On this show-cause notice being subjected to challenge, the High Court, accepted the plea of the assessee and quashed the show-cause notice. On the revenue carrying the matter in appeal, the Supreme Court observed:-

"..... Before coming to the issue at hand, we may record the statement of Mr. A.K. Sanghi, learned Senior Counsel appearing for the Appellant-Department, that it was not appropriate for the High Court to deal with the said writ petition, bypassing the adjudicatory machinery provided under the Act, more so when the statutory appeals against the adjudication orders are also provided. However, we find that the High Court has simply gone by the contract in question, which was entered into between the Respondent and M/s Birla Corporation Ltd. and taking into consideration all the averments, which were made in the show cause notice, on the basis of admitted facts, it has come to a conclusion that even when the allegations in the show cause notice are accepted, the said contract does not amount to providing any 'Cargo Handling Service' as defined under Entry 23 of Section 65 of the Act. Therefore, we are of the opinion that the High Court did not commit any mistake or illegality in entertaining the writ petition when no disputed questions of fact were involved and the legal issue was to be decided on the basis of the facts, as admitted by the parties, which were so specifically recorded by the High Court itself....." (emphasis supplied)

7. The law laid down in *Sushil & Company 2016 (42) S.T.R. 625 (SC)* is that a Writ Petition can be entertained where no disputed questions of fact are involved, and the legal issue is to be decided on the basis of facts admitted by the parties.

8. In *Siemens Ltd. (2006) 12 SCC 33*, the question which arose for consideration before the Supreme Court was whether the High Court, in the exercise of its jurisdiction under Article 226 of the Constitution of India, would interfere with the demand directing payment of cess. The factory and the office of the appellant therein were outside the city limits of Navi Mumbai, and outside the territorial jurisdiction of the Bombay Municipal Corporation. However, the appellant's establishment was directed to pay tax which the assessee had disputed on the ground that no jurisdictional fact was in existence. The Supreme Court, while holding that the question, whether jurisdictional facts existed for issuance of notice, was in issue in the said Writ Petition, observed:-

"..... 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 as has been held by this Court in some decisions including *State of Uttar Pradesh v. Brahm Datt Sharma and Anr: [1987] 2 SCR 444* , *Special Director and Anr. v. Mohd.*

Ghulam Ghouse and Anr.: 2004 (164) ELT 141 (SC) and Union of India and Anr. v. Kunisetty Satyanarayana: AIR 2007 SC 906, but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Ors. v. Union of India and Ors.: (1988) ILLJ 162 SC]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.

..... The said principle has been followed by this Court in V.C. Banaras Hindu University and Ors. v. Shrikant: AIR 2006 SC 2304, stating:

A post decisional hearing given by the High Court was illusory in this case.

In K.I. Shephard and Ors. etc. etc. v. Union of India and Ors.: (1988) ILLJ 162 SC, this Court held:

...It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose.

[See also Shri Shekhar Ghosh v. Union of India and Anr.: (2007) 1 SCC 331 and Rajesh Kumar and Ors. v. D.C.I.T. and Ors.: [2006] 287 ITR 91 (SC)]....." (emphasis supplied)

9. In Seimens Ltd. (2006) 12 SCC 33, the Supreme Court held that a bare perusal of the order impugned before the High Court, as also the statements made before it in the counter-affidavit filed by the revenue, showed that the statutory authority had already formed an opinion as regards the liability or otherwise of the assessee; and since the Assessing Authority had already determined the liability, and the only question which remained for its consideration was its quantification, it did not remain in the realm of a show-cause notice.

10. Issuance of a show-cause notice contemplates that the response shall be considered and only thereafter will the matter be decided. The person asked to show cause has, therefore, full opportunity to satisfy the authorities that no action should be taken against him. (Union of India v. Jain Shudh Vanaspati Ltd. (1996) 10 SCC 520). The purpose of issuing a show-cause notice is to afford an opportunity of hearing and, once cause is shown, it is open to the authority to consider the matter in the light of the facts and submissions placed, and only thereafter can a final decision be taken in the matter. Interference by the court before that stage would be premature. (State of U.P. v. Brahm Datt Sharma AIR 1987 SC 943; Divisional Forest Officer v. M. Ramalinga Reddy (2007) 9 SCC 286).

11. Ordinarily, a writ court would not exercise its discretionary jurisdiction to entertain a writ petition questioning a notice to show cause unless the same, inter alia, appears to have been issued without jurisdiction, (Brahm Datt Sharma

AIR 1987 SC 943, *Special Director v. Mohd. Ghulam Ghouse* (2004)3 SCC 440, *Union of India v. Kunisetty Satyanarayana* (2006)12 SCC 28, *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh* (1996)1 SCC 327, *Ulagappa v. Divisional Commr., Mysore* (2001) 10 SCC 639 and *Siemens Ltd. (2006) 12 SCC 33*), particularly when the petitioner has an effective remedy under the Act itself. (*State of Punjab v. Bhatinda District Coop. Milk Producers Union Ltd.*, (2007) 11 SCC 363). But these are limitations imposed by the Courts on themselves in the exercise of their jurisdiction, and are not matters of jurisdictional factors. (*Union of India v. Hindalco Industries* (2003) 5 SCC 194). It would, ordinarily, not be proper or appropriate that the initial jurisdiction of the authority/Tribunal to deal with jurisdictional facts should be circumvented and the decision, on such a preliminary issue, sought before a High Court in its writ jurisdiction. (*Express Newspapers (P) Ltd. v. Workers* AIR 1963 SC 569, *M. Ramalinga Reddy* (2007) 9 SCC 286). However, the self-imposed restrictions on the High Court not to entertain a writ petition, if another effective and efficacious remedy is available, will not operate as a bar where the order or proceedings are wholly without jurisdiction. (*Whirlpool Corpn. v. Registrar of Trade Marks* (1998) 8 SCC 1).

12. In very rare and exceptional cases, the High Court can quash a show-cause notice if it is found to be wholly without jurisdiction. A showcause notice does not give rise to any cause of action as it does not amount to an adverse order which affects the rights of any party. It is quite possible that, after considering the reply to the show-cause notice, the authority concerned may drop the proceedings and/or hold that the allegations are not established. A show-cause notice does not infringe the rights of anyone. It is only when a final order imposing some punishment, or otherwise adversely affecting a party, is passed that the said party can be said to have any grievance. (*Kunisetty Satyanarayana* (2006)12 SCC 28).

13. On the other hand, where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the court's protection. If, however, the authority had the power in law to issue the show cause notice it would not be open to the person, asked to show cause, to approach the Court under Article 226 of the Constitution at the stage of notice. (*Chief of Army Staff v. Major Dharam Pal Kukrety* (1985) 2 SCC 412).

14. The jurisdiction of the High Court, under Article 226 of the Constitution, should not be permitted to be invoked in order to challenge a show-cause notice unless, accepting the facts in the show-cause notice to be correct, the show-cause notice is, *ex facie*, without jurisdiction, (*State of U.P. v. Anil Kumar Ramesh Chandra Glass Works* (2005) 11 SCC 451) , i.e., the notice is *ex facie* a 'nullity' or *non est* in the eye of the law for absolute want of jurisdiction of the authority to even investigate into the facts or totally "without jurisdiction" in the traditional sense of that expression i.e., even the commencement or initiation of the

proceedings, on the face of it and without anything more, is totally unauthorised. In all other cases, it is only appropriate that the party shows cause before the authority concerned and takes up the objection regarding jurisdiction therein. (Ramesh Kumar Singh (2004)3 SCC 440, Mohd. Ghulam Ghouse (2004)3 SCC 440, M. Ramalinga Reddy (2007) 9 SCC 286).

15. Mere assertion by the petitioner that a notice is without jurisdiction would not suffice. It should, prima facie, be established to be so. Where factual adjudication is necessary interference is, ordinarily, ruled out. (Union of India v.VICCO Laboratories (2007) 13 SCC 270). Whether the show-cause notice is founded on any legal premise is a jurisdictional issue which can be urged by the recipient of the notice and such issues can also be, initially, adjudicated by the authority issuing the very notice before the aggrieved can approach the court. (Mohd. Ghulam Ghouse (2004)3 SCC 440; M. Ramalinga Reddy (2007) 9 SCC 286).

16. In the light of law declared in the aforesaid judgments, it is only if the show-cause notice is without jurisdiction, or if the authority issuing the show-cause notice has already made up his mind and has determined the issue, or where facts are admitted or are not in dispute, would the High Court be justified in entertaining the Writ Petition.

17. The dispute, in the present case, is whether the circular issued by the Commissioner, Commercial Tax dated 02.01.2018 falls foul of notification dated 29.12.2017. The learned Single Judge has, in the order under appeal, observed that all these contentions can be urged in reply to the show-cause notice.

18. In this context it is necessary to briefly refer to the statutory provisions conferring power on the Government to issue the notification, and the provision whereby the Commissioner has been conferred the power to issue orders, instructions and directions to his subordinates.

19. Section 4(4) of the Uttarakhand Value Added Tax Act, 2005 (hereinafter referred to as the "Act") enables the State Government, by notification in the official gazette, to declare different rates in respect of different goods, or add or remove any schedules, or add to, amend or alter any Schedule of the Act. In the exercise of its power under Section 4(4) of the Act, the State Government issued notification dated 29.12.2017, adding Entry-3(A) to Schedule-III to the 2005 Act. The said amendment reads as under:-

"Government of Uttarakhand

Finance Section-8

No. 1000/2017/146(120)/XXVII(8)/2008

Dehradun:: Dated:: 29 December, 2017

Notification

WHEREAS the State Government is satisfied that it is expedient so to do in public interest,

NOW THEREFORE, in exercise of the powers under sub-section (4) of Section 4 of the Uttarakhand Value Added Tax Act, 2005 (Act No.27 of 2005) read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No.01 of 1904) (as applicable to the State of Uttarakhand), the Governor is pleased to allow to make the following amendment, with effect from the date of issuance of the Notification, in Schedule III of the Uttarakhand Value Added Tax Act, 2005,:

AMENDMENT

In Schedule III, after the existing entry at serial no.3, the following new entry shall be inserted; namely

(Radha Raturi)

Principal Secretary"

20. Rule 4(1) of the Uttarakhand VAT Rules, 2005 confers jurisdiction on the Commissioner over the whole of the State and, thereunder, the Commissioner shall exercise all the powers conferred, and perform all the duties imposed, upon him by or under the Act or the Rules. In terms of Rule 4(2), the Commissioner shall have superintendence over all officers and persons employed in the execution of the Act and the Rules, and the Commissioner may, from time to time, issue such orders, instructions and directions as he may deem fit for the proper administration of the Act, and for regulating the procedure to be followed in carrying out the provisions of the Act and the Rules.

21. The Commissioner issued Circular dated 02.01.2018 informing all Joint Commissioners in the State that Entry-3(A), Schedule III to the Uttarakhand VAT Act was amended by notification dated 29.12.2017; it provided for payment of tax @5% on the sale of diesel oil and natural gas to a dealer registered under the Uttarkhand GST Act, and against such certificate and procedure to be prescribed by the Commissioner. The Circular, thereafter, details the procedure of upkeep and use of Form-D. Para 12 of the said circular stipulates that such manufacturing units, which are using diesel oil as fuel in manufacturing, shall submit, before the tax assessing officer, details of consumption of diesel as fuel in manufacturing during previous year 2016-17 at the first time for authentication of Form-D, and a certificate declaring the capacity of the generator used in manufacturing; and, in case of any change in the relevant capacity of the generator, then details of such change shall be intimated within three working days from such change to the respective tax assessing officer. Para 13 requires manufacturing units to maintain a log-book pertaining to the generator, and to keep details of the stock of diesel oil. Para 15 stipulates that, if it is found that Form-D issued to any manufacturing unit is misused, then the facilities provided under notification dated 29.12.2017 would not be allowed to that unit.

22. In examining the submission of Mr. M.P. Devanath, learned counsel for the appellant-writ petitioner, the question which necessitates examination is whether Para 12 of the said circular restricts the concessional rate of tax provided in terms of the notification dated 29.12.2017. In the present case, the claim of the appellant-writ petitioner, is not regarding use of diesel oil in its generators, but its use in vehicles to transport raw material from its source plant to its grinding unit. The contention, urged on behalf of the assessee, is that the words "for use in the process of manufacture of taxable goods", in the notification dated 29.12.2017, would include the use of diesel oil in transportation of raw material to the factory, and is not confined only to its actual use in the manufacture of goods; Para 12 of the Circular excludes consumption of diesel as fuel for any purposes other than in a generator used in the manufacture of goods; and, consequently, this circular restricts the scope of the notification dated 29.12.2017 which is beyond the powers of the Commissioner.

23. All that Para 12 specifically states is that manufacturing units, which use diesel oil as fuel in manufacture, shall declare the capacity of the generator used in the manufacture of goods. The said circular does not explicitly prohibit concessional rate of tax @5% being extended for other purposes. It is difficult for us, therefore, to hold that, on a plain reading of the circular, it is evident that it runs foul of the notification issued by the government. We hasten to add that we may not be understood to have held that use of diesel oil by the assessee, in transportation of goods from its source plant to its grinding unit, would fall within the ambit of the notification dated 29.12.2017, for these are all matters for the Assessing Authority to examine. Questions whether use of diesel oil, in the transportation of goods by a dealer from one of his units to another, would fall within the ambit of the words "for use in the process of manufacture of taxable goods" referred to in the notification dated 29.12.2017; or whether these words, used in the notification, are confined only to its use in the actual manufacture of goods are again matters for the Assessing Authority to examine. It would be wholly inappropriate for this Court, even before the matter is considered by the Assessing Authority in the first instance, to adjudicate these issues in writ proceedings under Article 226 of the Constitution of India. Suffice it to observe that, since the circular dated 02.01.2018 does not explicitly exclude use of diesel oil for other purposes, from the ambit of the notification dated 29.12.2017, the submission that the Commissioner has already held that the notification should be confined only to the actual manufacture, and no useful purpose would therefore be served in approaching the Assessing Authority, does not merit acceptance.

24. The other contention, urged by Mr. M.P. Devanath, learned counsel for the appellant-writ petitioner, is that the Assessing Authority has already made up his mind and no useful purpose would, therefore, be served in submitting a reply to the show-cause notice. All that the Assessing Authority has observed, in the show-cause notice, is that the assessee had used Form-D in procuring diesel which is also used as fuel in transportation of raw material, though Para 12 of the

Circular dated 02.01.2018 stipulates that diesel used in the manufacture, and as fuel in generators used in manufacture, would alone be entitled for a concessional rate of tax @5%. It is only if the Assessing Authority indicates his mind, would the assessee be in a position to submit its reply thereto. Since the Deputy Commissioner has asked the assessee to show-cause, and submit his explanation as to why the facilities of Form-D should not be discontinued, it is evident that the opinion expressed by him is only tentative, and it is always open to the assessee to show-cause and satisfy the Deputy Commissioner that his tentative opinion, in the show-cause notice dated 28.04.2018, is not justified; and the appellant-writ petitioner's use of diesel oil would also fall within the ambit of the notification dated 29.12.2017.

25. The learned Single Judge has relegated the assessee to file its reply to the show-cause notice issued by the Deputy Commissioner. In an intra-court appeal, the jurisdiction which the Appellate Court exercises is extremely limited. As the learned Single Judge is not a court subordinate, interference by a Division Bench, in an intra-court appeal, would be justified only if the order under appeal suffers from a patent illegality. The order passed by the learned Single Judge, in our opinion, does not suffer from any such infirmity warranting interference in an intra-court appeal.

26. The appeal fails and is, accordingly, dismissed.

27. Mr. M.P. Devanath, learned counsel for the appellant-writ petitioner, would submit that the time stipulated by the learned Single Judge, to file a reply to the show-cause notice, expired on 29.04.2019; and further time be granted. Suffice it to modify the order of the learned Single Judge to the limited extent that, in case the appellant submits its reply to the show-cause within two weeks from today, the Deputy Commissioner shall examine the appellant-writ petitioner's claim on its merits and in accordance with law.

28. Needless to state that it is always open to the appellant herein to avail its judicial remedies, after an order is passed by the Deputy Commissioner. No costs.