



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 17TH DAY OF DECEMBER 2024 / 26TH AGRAHAYANA, 1946

WP(C) NO. 26732 OF 2024

PETITIONER:

NISHAD K.U. ,
AGED 42 YEARS,
PROP. M/S. WOODTUNES ENTERPRISES,
KUPPIYAN HOUSE,
OKKAL P.O., CHELAMATTAM,
PERUMBAVOOR, ERNAKULAM,
KERALA, PIN - 683550

BY ADVS.
SRI.S.JAIKUMAR
SMT.MARIA ANCY V.J.
SRI.ABHIJITH HARINDRAN

RESPONDENTS:

- 1 THE JOINT COMMISSIONER,
CENTRAL TAX AND CENTRAL EXCISE,
CGST KOCHI COMMISSIONERATE,
C.R. BUILDING, I.S. PRESS ROAD,
KOCHI, PIN - 682018
- 2 THE ADDITIONAL DIRECTOR,
DGGI, KOCHI ZONAL UNIT,
CENTRAL EXCISE BHAVAN,
KATHRIKADAVU, KALoor P.O.,
KOCHI, PIN - 682017
- 3 THE ADDITIONAL COMMISSIONER OF CENTRAL
TAX AND CENTRAL EXCISE,
C.R. BUILDING, I.S. PRESS ROAD,
COCHIN, PIN - 682017



4 CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS,
 REPRESENTED BY THE PRINCIPAL COMMISSIONER (GST) ,
 GST POLICY WING, NORTH BLOCK,
 NEW DELHI, PIN - 110001

5 UNION OF INDIA,
 REPRESENTED BY THE SECRETARY TO GOVERNMENT,
 MINISTRY OF FINANCE (DEPARTMENT OF REVENUE) ,
 NORTH BLOCK,
 NEW DELHI, PIN - 110001

BY ADVS.
SRI.R.HARISHANKAR
SRI.SREELAL N.WARRIER, SC, GST INTELLIGENCE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
06.12.2024, THE COURT ON 17.12.2024 DELIVERED THE FOLLOWING:

**"C.R."****BECHU KURIAN THOMAS, J.****-----
W.P.(C) No.26732 of 2024
-----**Dated this the 17th day of December, 2024**JUDGMENT**

Petitioner is a registered taxpayer under the laws relating to Goods and Services Tax. He challenges an order imposing a penalty of more than Rs.9.40 Crores, under section 74(9) of the Central Goods & Services Tax Act, 2017 (for short 'CGST Act') apart from a further amount of Rs.9.40 Crores under section 122(1) of the State Goods & Services Tax Act, 2017 (for short 'SGST Act') and consequential interest and other penalties. Though an appeal is available to the petitioner under section 107 of the CGST/SGST Act, the jurisdiction under Article 226 of the Constitution of India has been invoked, alleging that the principles of natural justice have been violated while issuing the impugned order.

2. Petitioner is the proprietor of a plywood business by name 'M/s.Wood Tunes Enterprises'. As per Ext.P1 show cause notice, petitioner was called upon to explain why the penalty proposed therein ought not to be imposed for alleged willful misstatements and suppression of facts with intent to evade payment of GST. It was stated therein that the statements of 20 different persons were taken, indicating that the petitioner had indulged in fake registrations and suppression of sales for the purpose of deriving undue benefit from the input tax credit.



3. In the reply submitted on 16.01.2024, apart from denying all the allegations, petitioner specifically requested for an opportunity for cross-examination of those persons from whom the statements were allegedly obtained and also stated that those statements were all retracted and were even obtained by coercion. In the meantime, on 31.01.2024 petitioner was heard and later, by a communication dated 07.02.2024 petitioner's request for cross-examination was refused. Immediately, petitioner filed Ext.P5 additional reply producing three affidavits of retractions filed by persons who had allegedly given statements and requested to withdraw the proceedings initiated and again requested to provide an opportunity for cross-examination. Disregarding the request for cross-examination, the first respondent proceeded to pass the final order dated 29-05-2024 produced as Ext.P8, imposing a huge liability on the petitioner. Petitioner challenges the said order.

4. A counter affidavit has been filed by respondents 1 to 4 stating that petitioner had indulged in a fraudulent activity by utilising the Aadhar Card details and PAN Card details of other persons who are referred to as 'goalies' in local trade parlance. It is alleged that petitioner had misused the invoices and e-way bills to facilitate clandestine supply of plywood in the name of goalies who were mere name lenders in the transaction and that those persons were serviced by other goalies, thereby creating a carousel of input tax credits across several States. Subsequent to the information, the Directorate General of GST Intelligence searched the office and residential premises of the petitioner and gathered documentary evidence and statements of his accomplices from which the adjudicating authority came to the conclusion that



the petitioner had indulged in serious fraud. The respondents also stated that even though show-cause notices were issued in 2022, till 31.01.2024, there was no reply notice and when a personal hearing was granted on 31.01.2024, a reply notice was filed, requesting for cross-examination of the individuals who were named in the reply notice. After referring to various details it is stated that the request for cross-examination was only for the purpose of protracting the proceedings and there was no purpose in the said demand.

5. I have heard Sri. Jaikumar S. learned counsel for the petitioner and Sri. R. Harishankar, learned Standing Counsel for the respondents.

6. The only issue that requires consideration is whether the impugned order ought to be interfered with under Article 226 of the Constitution of India when the remedy of an appeal is available under section 107 of the Act.

7. On a reading of section 107(11) of the Act, it is evident that the Appellate Authority does not possess the power to remand the case, if in case any anomaly is detected in the impugned order, or even when there is any violation of the principles of natural justice. The Appellate Authority can only confirm, modify or annul the order appealed against. The aforesaid provision has specifically curtailed the right of the appellate authority to remand the case. Hence, in cases of violation of principles of natural justice, resorting to the remedy under Article 226 of the Constitution of India is legally justified.

8. Petitioner contends that there is a failure to abide by the principles of natural justice by not granting an opportunity to cross-examine the persons from whom statements have been recorded by the tax authorities. In this context, it is necessary to observe that as per section 75(4) of the Act, an



opportunity for cross-examination of the witnesses is not specifically mentioned and instead only an opportunity of hearing alone is required to be given.

9. Normally when a statement of a third party is relied upon in an adjudication proceedings, and a request for cross-examination is made, unless it is found that the request is frivolous or it is impossible to procure the presence of the person, such cross-examination ought to be permitted. Cross-examination is the mode in which the veracity of the alleged statement can be tested. Fairness demands that the reliability and credibility of the statement of a third party be tested upon cross-examination. This is all the more so when there is a request for cross-examination. As long as the request is not impractical or facetious, the grant of such an opportunity is rudimentary. The frivolous nature of the request for cross-examination is dependent upon the nature and circumstances of the person who is sought to be cross-examined. If the statements obtained during the course of an investigation are relied upon to issue a show cause notice and if a request is made to grant an opportunity for cross-examination, those statements can be relied upon against a party only if an opportunity as requested is granted, unless, of course, the person is unavailable due to death or otherwise.

10. In the instant case, statements of about 20 persons have been relied upon to pass an order imposing a penalty upon the petitioner. The request put forth by the petitioner in the reply notice dated 16.01.2024 for cross-examination of the witnesses was refused on 07.02.2024. Once again the petitioner made a request as per Ext.P5 final reply notice pointing out that



failure to grant an opportunity for cross-examination amounts to a violation of the principles of natural justice. It was also requested to accept the affidavits produced by him along with the final reply notice if in case the cross-examination is not permitted. Without granting an opportunity to cross-examine the persons who gave statements against the petitioner, the impugned order was issued imposing huge penalties and other fines on the petitioner.

11. The Adjudicating Authority in the impugned order has mentioned that cross-examination is not required to be granted to the petitioner as the same will not in any way affect the bonafides of evidence collected in the form of statements of those witnesses already on record. After referring to various judgments and after making the observations, the Adjudicating Authority came to the conclusion that there was no merit in the demand for cross-examination. The following observations in the impugned order are relevant :

"43.8 In the instant case, I find that in all the statements it has been specifically stated that they were being given voluntarily and the averments therein were true and correct. Any retraction in the future through cross examination or otherwise will fail due to the long delay, as has been consistently held by the various Courts in decisions on delayed retractions. Therefore, in my considered opinion any cross examination of these persons will not, in any way, affect the bonafides of evidence already on record. After all, the decision as to whose statements are to be recorded for establishing the facts of a case is the prerogative of the investigating agency and it is upto the adjudicating authority to weigh such evidence as brought forth, which may or may not include statements, and decide whether any demand would sustain or not."

12. The aforesaid observations indicate that the Adjudicating Authority



went on a wrong tangent in assuming that cross-examination will not affect the credibility of the statement. Such a foregone conclusion is legally impermissible as it reflects a predilection. The Adjudicating Authority cannot presuppose or presume what could be the subject matter of the cross-examination, or what benefit would be derived by the person proceeded against, through such cross-examination.

13. In **Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II** (2016) 15 SCC 785 the Supreme Court while dealing with the challenge against a penalty imposed under the Central Excise Act, 1944 held that refusing cross-examination of witnesses whose statements were made the basis of the impugned order was a serious flaw which makes the order itself a nullity as it amounted to violation of the principles of natural justice. In the said case, similar to the case on hand, statements of two witnesses were recorded during the investigation which were relied upon in the show cause notice and in the order of adjudication to impose a penalty, after refusing to grant an opportunity of cross-examination. The following observations in the said judgment are relevant.

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that



such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.”

14. In an earlier decision of the Supreme Court in **State of Kerala v. K.T. Shaduli Yusuff Grocery Dealer etc.** [(1977) 2 SCC 777], while considering a question arising under the Kerala General Sales Tax Act, 1963 it was observed that even though the tax proceedings are quasi-judicial in nature and the Sales Tax authorities are not strictly bound by the rules of evidence, still, they are bound by the principles of natural justice. It was held that when circumstances clearly justify the grant of an opportunity for cross-examination, especially when the statements become an integral part of the materials on the basis of which the order by the Taxing Authority is passed, an opportunity to rebut the same should be granted to the assessee.

15. In the decision of the High Court of Calcutta in **Roshan Sharma v. Assistant Commissioner of Revenue, State Tax, West Bengal and Others** (M.A.T. No.854 of 2024) which arose under the CGST Act, the court held that despite the specific request for cross-examination of all witnesses who had given statements to the Adjudicating Authority, refusal to grant such an opportunity led the court to remand the case for fresh consideration.

16. Yet again in **Mohammed Fariz and Co. v. Commissioner of**



Customs (2019 (1) KLT 229) this Court observed that when a person is called upon to answer accusations made against him, it is his right to defend himself reasonably and it will not in any way prejudice the department, if the request for cross-examination is allowed. The court went on to hold that waiting till the adjudication process is over and then deciding upon whether any prejudice would be caused to the appellant for not affording him an opportunity to cross-examine the witnesses whose statements were relied on is not legally proper. The court also observed that if the party is permitted to cross-examine the witnesses at an earlier stage, it would only help the department to arrive at the right conclusion as to whether the statements of those witnesses, who had withstood the rigour of cross-examination, are to be relied upon in the adjudication process.

17. In the instant case, as mentioned earlier, statements of 20 witnesses were relied upon by the Adjudicating Authority for the purpose of entering findings against the petitioner and consequentially imposing penalty. The basic requirement of the rule of law is to grant an opportunity of hearing to the person against whom proceedings have been initiated. When statements of third parties are relied upon, it is one of the fundamental requirements that the party against whom such statements have been relied upon is granted an opportunity to question the person who gave such statements. This requirement flows from the opportunity of hearing required to be given as per section 75(4) of the CGST Act. Unilateral statements behind the back of a person cannot under any circumstances be justified under the rule of law, even if the proceedings are quasi judicial in nature.



18. Considering the nature of the order issued against the petitioner which is impugned in this writ petition, this Court is of the view that failure to grant an opportunity to the petitioner for cross-examination and relying upon the statements of persons to impose penalty have violated the principles of natural justice.

19. The decisions referred to in the impugned order regarding the justification for not granting an opportunity for cross-examination are all cases where the facts justified such denial. In the instant case, the circumstances compel this Court to observe that an opportunity for cross-examination was a necessity. This Court is also compelled to observe that failure to grant an opportunity to cross-examine the person whose statements were relied upon is in effect delaying the whole proceeding.

20. In the result, the impugned order dated 29-05-2024 is set aside and the first respondent is directed to consider the matter afresh, after granting an opportunity for cross-examination of the persons whose statements had been taken during the investigation. Appropriate orders thereon shall be passed in accordance with law, as expeditiously as possible, at any rate, within a period of six months from the date of receipt of a copy of this judgment.

The writ petition is allowed.

Sd/-
BECHU KURIAN THOMAS
JUDGE

vps



APPENDIX OF WP(C) 26732/2024

PETITIONER'S/S' EXHIBITS

- Exhibit P1** TRUE COPY OF SCN NO-14/2022-23 (GST) DATED 28.04.2022 ISSUED BY 2ND RESPONDENT.
- Exhibit P2** TRUE COPY OF THE INTERIM REPLY DATED 16.01.2024 SUBMITTED BEFORE THE 3RD RESPONDENT.
- Exhibit P3** TRUE COPY OF RETRACTIONS STATEMENT OF THE PETITIONER DATED 23.08.2018 AND 10.05.2019 SUBMITTED BEFORE THE 2ND RESPONDENT.
- Exhibit P4** TRUE COPY OF THE COMMUNICATION FROM THE 1ST RESPONDENT DATED 07.02.2024.
- Exhibit P5** TRUE COPY OF THE FINAL REPLY DATED 11.03.2024 SUBMITTED BEFORE THE 3RD RESPONDENT.
- Exhibit P6** TRUE COPIES OF AFFIDAVITS OF THE RETRACTIONS STATEMENT SUBMITTED BEFORE THE 3RD RESPONDENT DATED 11.03.2024
- Exhibit P7** TRUE COPY OF THE SCN NO. 14/2023-24/GST (AC)/DIV DATED 09.10.2023 ISSUED BY THE ASSISTANT COMMISSIONER, KOLLAM DIVISION.
- Exhibit P8** TRUE COPY OF THE ORDER-IN-ORIGINAL NO.48/2023-24/GST (JC) DATED 29.05.2024 ISSUED BY THE 1ST RESPONDENT.
- Exhibit P9** TRUE COPY OF THE EXTRACTED RELEVANT GST PROVISIONS
- Exhibit P10** TRUE COPY OF CIRCULAR NO.171/03/2022-GST DATED 06.05.2022 ISSUED BY THE 4TH RESPONDENT.
- Exhibit P11** TRUE COPY OF CIRCULAR NO. 1053/02/2017-CX DATED 10.03.2017 ISSUED BY THE 4TH RESPONDENT.