

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(T) No. 1071 of 2022

With

W.P.(T) No. 1091 of 2022

M/s. Sidhi Vinayak Enterprises, through its Proprietor Mr. Mithilesh
Pandey Petitioner

Versus

- 1.The State of Jharkhand.
- 2.The Commissioner of State Taxes, having its office at Project Bhawan,
Dhurwa, P.O.-Dhurwa, P.S.Jagarnathpur, District-Ranchi.
- 3.Joint Commissioner of State Taxes (Admin), Jamshedpur Division,
Jamshedpur having its office at Near Old Civil Court, Tr. Old Gandhak
Road, Subarnrekha Link Road, Sakchi, P.O. & P.S.Sakchi Town,
Jamshedpur-1, District-East Singhbhum.
- 4.State Taxes Officer, Jamshedpur Circle, having his office at, Near Old
Civil Court, P.O. & P.S. Sakchi, Town-Jamshedpur-1, District-East
Singhbhum. Respondents

CORAM : HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Petitioner : Mr. N.K.Pasari, Adv.
For the Respondents : Mr. Rahul Saboo, G.P.-II.

09/31.01.2023 Heard learned counsel for the parties.

2. Both the writ applications relate to the same Assesse for different periods and the nature of the challenge is also same. Therefore, they are being disposed of by the common order.

3. In W.P.(T) No. 1071 of 2022 which relates to tax period July, 2017 to March, 2018 the impugned summary of the show cause notice in Form GST DRC-01 (Annexure-4) dated 12.09.2018 and the summary of the order in GST DRC-07 (Annexure-7) dated 14th May, 2019 are under challenge as being in teeth of the provisions of Section 74 of the JGST Act, 2017 and Rule 142 (1)(a) of the JGST Act, 2017 as also the decision rendered by this Court in the case of *M/S NKAS Services Pvt. Ltd. vs. State of Jharkhand & Ors.*, passed in W.P.(T) No. 2444 of 2021 judgment dated 06.10.2021

4. In W.P.(T) No. 1091 of 2022 which relates to tax period April 2018 to June 2018 the summary of the show cause notice dated 12.09.2018 (Annexure-4) and the summary of the order contained in the

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GST DRC-07 dated 14th May, 2019 (Annexure-7) are under challenge on the same grounds. The proceedings against the petitioner in both the writ petitions were initiated on the basis of an inspection carried under Section 67 of the JGST Act for irregular availment of Input Tax Credit mainly on the ground that several consignment pertaining to invert supply as well as outward supply, were either shown to have been transported through vehicle bearing no registration number, or registration number bearing to car and 2 wheeler. Therefore they were in violation of Section 16(2)(b) of the JGST Act and CGST Act. Petitioner did submit a reply in DRC-06 in both the cases explaining that the ITC have been properly claimed and goods have been physically received by them. However, rejecting their reply the impugned summary of the order dated 14th May, 2019 has been passed under Section 74 (9) of the JGST Act imposing the demand of tax, interest and penalty upon them. The rectification applications preferred by the petitioner before respondent No.2 under Section 161 of the JGST Act was also dismissed by two separate orders both dated 18th October, 2021. Petitioners have assailed the summary of the show cause notice and the summary of the order on the ground that they are in teeth of the provisions of Section 74 of the JGST Act. Summary of the show cause notice in Form GST DRC-01 is not a substitute of the proper show cause notice. Participation in the proceedings will not cure the material irregularity in the foundation of the proceedings. Petitioners contend that principles of natural justice have been violated. These proceedings are therefore in teeth of the ratio rendered by this court in the case of ***M/S NKAS Services Pvt. Ltd*** (Supra).

5. Mr. Rahul Saboo, learned G.P.-II appearing on behalf of the State submits that the impugned proceedings an issuance of summary of show cause notice and summary of the order in GST DRC-07 have been defended *inter alia* on the ground that petitioner did participate in the proceedings by furnishing a reply in Form GST DRC-06 before the adjudicating authority. Therefore, there is no denial of principles of natural justice. The entire records including the relied upon documents were also supplied to the petitioner. The prayer for application for

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rectification of the error against the impugned order in both the cases as well as Form GST DRC-07 was rejected as being without any merit.

6. Having heard learned counsel for the parties and after going through the documents available on record and the averments made in the respective affidavit, it appears that pursuant to the search conducted by the respondents in the premises of the petitioner-company under Section 67 of the JGST Act two summary of show cause notice in Form DRC-01 were issued, one for the period from 01.07.2017 to 13.8.2018 and another for the period from April, 2018 to June, 2018 under Section 74(1) of the JGST Act. It further transpires that the petitioner submitted a concise reply for both the DRC-01 vide its letter dated 03.10.2018 and finally two separate orders, both dated 14.05.2019, were passed. Subsequently, the petitioner also filed rectification application for both the period and fresh rectified orders were passed in respect of both these tax periods.

7. Now the law is no more *res-integra*, inasmuch as, Rule 142(1)(a) of the JGST Rules provides that the summary of show cause notice in Form DRC-01 should be issued “along with” the show cause notice under Section 74(1). The word “along with” clearly indicates that in a given case show cause notice as well as summary thereof both have to be issued. As per Rule 142(1)(a) of the JGST Rules, the summary of show cause notice has to be issued electronically to keep track of the proceeding initiated against the registered persona whereas a show cause notice need not necessarily be issued electronically.

8. This Court in the case of ***M/S NKAS Services Pvt. Ltd. vs. State of Jharkhand & Ors.***, passed in W.P.(T) No. 2444 of 2021 in which one of us (Aparesh Kumar Singh J.) was the member, has taken note of the said position of law and has categorically held that Summary of Show Cause Notice in Form DRC-01 is not a substitute of show cause notice under Section 74(1). The relevant portion of the judgment is set out below-

“13. A bare perusal of the provision indicates that in a case where it appears to a proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with

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tax, which has not been paid or has been short paid or to whom refund has been erroneously made or who has wrongly availed or utilised input tax credit requiring him to show cause as to why he should not pay the amount specified in the notice along with the interest payable thereupon under Section 50 and a penalty equivalent to the tax specified in the notice. In contradistinction to the provision under Section 73 of the Act under the same Chapter-XIV relating to 'Demands and Recovery', the ingredients of Section 74 of the Act require either of the following ingredients to be satisfied for proceeding thereunder i.e. that the tax in question has not been paid or short paid or erroneously refunded or the ITC has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax.

14. A bare perusal of the impugned show-case notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether its actuated by reason of fraud or any willful misstatement or suppression of facts in order to evade tax. Needless to say that the proceedings under Section 74 have a serious connotation as they allege punitive consequences on account of fraud or any willful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy. In this regard, it is profitable to quote the opinion of the Apex Court in the case of **Oryx Fisheries P. Ltd.** (supra) at para 24 to 27 wherein the opinion of the Constitution Bench of the Apex Court in the case of **Khem Chand versus Union of India (AIR 1958 SC 300)** has been relied upon as well :

“24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like “a reasonable opportunity of making objection” or “a reasonable opportunity of defence” have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in Khem Chand v. Union of India, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

26. S.R. Das, C.J. speaking for the unanimous Constitution Bench in Khem Chand held that the concept of “reasonable opportunity” includes various safeguards and one of them, in the words of the learned Chief Justice, is:

“(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;”

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.”

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15. The Apex Court has held that the concept of reasonable opportunity includes various safeguards and one of them is to afford opportunity to the person to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based.

16. It is also true that acts of fraud or suppression are to be specifically pleaded so that it is clear and explicit to the noticee to reply thereto effectively [See *Larsen & Toubro Ltd. Vs. CCE*, (2007) 9 SCC 617 (para 14)]. Further in the case of *CCE Vs. Brindavan Beverages (P) Ltd.* reported in (2007) 5 SCC 388 relied upon by the petitioner, the Apex Court at para- 14 of the judgment has held that if the allegations in the show-cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible i.e. its sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. We do not agree with the contention of the respondent that the notice ought not to be struck down if in substance it contains the matters which a notice must contain. In order to proceed under the provisions of Section 74 of the Act, the specific ingredients enumerated thereunder have to be clearly asserted in the notice so that the noticee has an opportunity to explain and defend himself.

17. As observed herein above, the impugned notice completely lacks in fulfilling the ingredients of a proper show-cause notice under Section 74 of the Act. Proceedings under Section 74 of the Act have to be preceded by a proper show-cause notice. A summary of show-cause notice as issued in Form GST DRC-01 in terms of Rule 142(1) of the JGST Rules, 2017 (Annexure-2 impugned herein) cannot substitute the requirement of a proper show-cause notice. This court, however, is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of deciding the instant case. This Court finds that upon perusal of Annexure-2 which is the statutory form GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague.

18. Since we are of the considered view that the impugned show cause notice as contained in Annexure-1 does not fulfill the ingredients of a proper show-cause notice and thus amounts to violation of principles of natural justice, the challenge is entertainable in exercise of writ jurisdiction of this Court. Accordingly, the impugned notice at Annexure-1 and the summary of show-cause notice at Annexure- 2 in Form GST DRC-01 are quashed. However, since this Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks from today.”

9. In view of the aforesaid facts and the settled preposition of law, the foundation of the proceeding in both the cases suffers from material irregularity and hence not sustainable being contrary to Section 74(1) of the JGST Act; thus, the subsequent proceedings/impugned Orders cannot sanctify the same. Though, the petitioner submitted their concise reply vide letter dated 03-10-2018; the respondent State cannot take benefit of the said action as summary of show cause notice cannot be considered as a show cause notice as mandated under Section 74(1) of the Act.

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10. As we are of the considered view that the impugned show cause notice in both the cases does not fulfill the ingredients of a proper show-cause notice and thus amounts to violation of principles of natural justice, the challenge is maintainable in exercise of writ jurisdiction of this Court. Accordingly, the summary of show-cause notices dated 12.09.2018 issued in Form GST DRC-01 at Annexure-4 (in both cases), the orders dated 14.05.2019 issued under section 74(9) of JGST Act (in both cases) and also the final orders dated 18.10.2021 passed after rectification at Annexure-09 (in both cases), are hereby quashed and set aside.

However, since this Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law.

11. Consequently both these applications stands allowed. The matter is remanded to the adjudicating authority to pass a fresh order in accordance with law from the stage of issuance of proper show cause notice under Section 74 (1) of the JGST Act.

(Aparesh Kumar Singh, A.C.J.)

(Deepak Roshan, J.)