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WP-5692-2025

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

ON THE 18th OF FEBRUARY, 2025

WRIT PETITION No. 5692 of 2025

*M/S SHREE KISHNA CHEMICALS THROUGH ITS PROPRIETOR
PANKAJ CHITTLANGIA*

Versus

UNION OF INDIA THROUGH SECRETARY AND OTHERS

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Appearance:

Shri L.C.Patne - Advocate for the petitioner.

*Shri Prasanna Prasad - Advocate appearing on behalf of Deputy
Solicitor General.*

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ORDER

Per. Justice Vivek Rusia

Petitioner has filed this present petition under Article 226 of the Constitution of India challenging the show-cause notice dated 31.12.2024 issued by the Additional Commissioner, CGST & Central Excise/respondent No. 2. Petitioner is also challenging the constitutional validity of Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST of Act') as unconstitutional and *ultra vires* of Articles 14, 19(1)(g) and 20 of the Constitution of India.

2. Petitioner is a proprietorship firm engaged in trading of Iso Propyl Alcohol, Hydrazine Hydrate, Acetone Hydrogen Peroxide, Alpha Olefine



Sulphonate Liquid, Iso Nicotinic Acid, Caustic Soda Flaxes, Soda Ash, D-Glucitol (Sorbitol), Phosphoric Acid, Acetic Acid situated at 165-B, Sector-E, Sanwer Road, Indore. The CGST and Central Excise, Indore Commissionerate received information that the petitioner and 11 others had availed fraudulent Input Tax Credit (ITC) on the invoices issued by respondent No.3 for the Financial Year 2019-20 and 2020-21. So far as the petitioner is concerned, an amount of Rs. 27,22,284/- was availed as ITC during the aforesaid two financial years. In the enquiry it was also revealed that the business of petitioner is in sale and purchase of Industrial Chemical whereas respondent No.3 is the supplier of FMCG Goods. A summon was issued and subsequently inspection was carried out in the business premises of the petitioner on 20.10.2023. Petitioner has submitted a detailed representation on 01.11.2023 and 23.11.2023. Now, the impugned show-cause notice 31.12.2024 has been issued to the petitioner and 11 others who availed the ITC. Respondent No. 3 has also been served with a show-cause notice as to why penalty should not be imposed under Sections 122(1)(ii) along with 122(1)(x), (xii), (xvi) and (xvii) read with Sections 127 and 122(3)(d) of the CGST Act.

3. Petitioner has approached this Court challenging the said show-cause notice as well as the validity of Section 16(2)(c) of the CGST Act on the ground that it cast unwarranted and uncalled obligation on the innocent purchaser which is beyond its control and almost impossible to ensure deposit of tax discharged by the supplier i.e. respondent No. 3 with public exchequer in order to avail the Input Tax Credit against the supply. On



account of failure on part of respondent No.3, the petitioner who is an innocent purchaser is being made to suffer unnecessarily by participating in the proceeding initiated vide the impugned show-cause notice.

4. In support of his contention, Shri Patne learned counsel for the petitioner has placed reliance on the judgment passed by the Division Bench of the High Court of Delhi *On Quest Merchandising India Pvt. Ltd, vs. Government of NCT Delhi & Ors. reported in 2017 SCC Online Del 11286* wherein similar provision of the Delhi Value Added Tax Act, 2004 has been declared *ultra vires*. Shri Patne, learned counsel submits that Section 16(2) (c) of the CGST Act being *pari materia* also deserves to be 'read down' in the manner that its non-compliance by the supplier does not entail tax liability upon an innocent purchaser who has made all possible efforts and complied with all the rigors of law to avail Input Tax Credit against the supply.

5. On the other hand, Shri Prasanna Prasad, learned counsel appearing for the respondents No. 1 and 2 on advance notice submits that the validity of Section 16 has been upheld by various High Courts such as the High Court of Judicature at Patna in case of *Gobinda Construction and others v. Union of India & Ors. [CWC No. 9108 of 2021]* and High Court of Kerala in case of *M.Trade Links vs. Union of India & Ors., 2024 SCC OnLine Ker 2744*. He further submits that the petitioner has challenged the validity of Section 16(2)(c) of the CGST Act in order to avoid participation in the joint enquiry initiated under Section 74(1) of the CGST Act, 2017 and 142(1) of the CGST Rules, 2017. Therefore, the petition is liable to be dismissed.



We have heard the rival contentions.

6. As per the contents of the show-cause notice, a specific intelligence was gathered by the officers of the CGST and Central Excise, Indore Commissionerate that as many as 12 noticees are indulged in issuance of fake invoices to various manufacturers without actual supply of goods. The investigation further revealed that the noticees had shown supply of various commodities to their recipients despite the fact that their supply pertains to FMCG goods. A detailed show-cause notice which runs into 82 pages has been issued to the petitioner and 11 other purchasers as well as respondent No. 3/supplier. Therefore, only on the instance of the petitioner the entire show-cause notice cannot be quashed. Petitioner is required to establish its defence by producing documents before the competent authority, who shall examine the invoices and bills generated by all the noticees during the enquiry. It appears that in order to avoid the participation in the enquiry, petitioner is challenging the constitutional validity by placing reliance on the judgment passed by the Delhi High Court in case of *On Quest Merchandising India Pvt. (supra)* in respect of Delhi Value Added Tax Act, 2004 in which the *pari materia* provision was 'read down'. But the High Court of Judicature at Patna and High Court of Kerala have considered the validity of Section 16(2)(c) and upheld the same.

7. The operative paragraphs of the judgment passed by the High Court of Kerala in case of *M.Trade Links (supra)* is reproduced below :

"90. Thus, the non-obstante clause in the negative sentence in Section 16(2) restricts the eligibility under Section 16(1) for entitlement to claim ITC. Section 16(2) is the restriction on eligibility and Section 16(4) is the restriction on the time for availing ITC. These provisions cannot be read to restrict other restrictive provisions, i.e., Section 16(3) and 16(4). If Section 16(2) is read in the manner as contended by the



learned counsel for the petitioners, i.e., once the conditions under Section 16(2) are met, the timeline provided for availing the input tax credit under Section 16(4) is arbitrary and unsustainable and cannot be accepted.

91. x x x

92. Section 16(1) is subject to Section 49 and Section 16(2)(c) is subject to Section 41. Eligible ITC is self-assessed in the GSTR 3B return, and only then it is credited to the electronic credit ledger, which can be utilised for payment of tax. The Supreme Court in *Union of India v. Bharati Airtel and others [(2022 4 SCC 328)]* has explained the procedure for availing the input tax credit under the GST laws. [As has been extracted in paragraph 86 of this judgment].

93. The Patna High Court in *Gobinda Construction and others v. Union of India and others [2023 SCC OnLine Pat 6463]*, after placing reliance on the judgment in Jayam, ALD (supra) has upheld the constitutional validity of Section 16(4) and held that the concession/claim to ITC is not an absolute legal right. Paragraphs 22 to 30 of the said judgment are extracted hereunder:-

"22. In the background of the above noted discussions, we need to examine first as to whether or not, the language of Section 16 of the CGST/BGST Act suffers from any ambiguity. Sub-section (1) of Section 16, which provides for ITC, states that every registered person shall be entitled to take credit of input tax charged on any supply of goods or services or both to them, which are used or intended to be used in accordance with the furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. This entitlement of ITC is, however, subject to :-

- (a) such conditions and restrictions as may be prescribed and,
- (b) in the manner specified in Section 49

23. Sub-section (2) of Section 16 is a non obstante clause and clearly states that no registered person shall be entitled to the credit of input tax in respect of any supply of goods or services or both unless he fulfills the requirements and satisfies the existence of other conditions prescribed in Clauses (a) to (d) thereof.

24. Sub-section (3) of Section 16 contemplates yet another circumstance when ITC on tax component cannot be allowed, i.e., where the registered person has claimed depreciation on the tax component of cost of capital goods and plant and machinery under the provisions of the Income Tax Act, 1961.

25. Lastly comes the offending clause which is under challenge i.e. sub-section (4) of Section 16 of the CGST/BGST Act, which, in no unambiguous terms, provides that a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after 30th day of November (post amendment), following the end of financial year to which such invoices or debit note pertain or furnishing of the relevant annual return, whichever is earlier. The language of Section 16 of the CGST/BGST Act suffers from no ambiguity and clearly stipulates grant of ITC subject to the conditions and restrictions put thereunder.

26. At the cost of repetition, we note here that ITC is not unconditional and a registered person becomes entitled to ITC only if the requisite conditions stipulated therein are fulfilled and the restrictions contemplated under sub-section (2) of Section 16 do not apply. One of the conditions to make a registered person entitled to take ITC is prescribed under sub-section (4) of Section 16. The right of a registered



person to take ITC under sub-section (1) of Section 16 of the Act becomes a vested right only if the conditions to take it are fulfilled, free of restrictions prescribed under subsection (2) thereof. In order to invoke Article 300-A of the Constitution by a person, two circumstances must jointly exist:-

- (i) Deprivation of property of a person
- (ii) Without sanction of law

27. We have briefly dealt with what the expression 'property' connotes as explained in case of *Jilubhai Nanbhai Khachar vs. State of Gujarat & Anr. reported in AIR 1995 SC 142*, paragraph 42 of which reads thus :-

"42. Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. In Ramanatha Aiyar's *The Law Lexicon*, Reprint Edn., 1987, at p. 1031, it is stated that the property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. The term property has a most extensive signification, and, according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. In *Dwarkadas Shrinivas case [1950 SCC 833 : 1950 SCR 869 : AIR 1951 SC 41]* this Court gave extended meaning to the word property. Mines, minerals and quarries are property attracting Article 300-A.

28. Upon close reading of sub-section (1) of Section 16 of the CGST/ BGST Act, we are of the view that the provision under sub-section (4) of Section 16 is one of the conditions which makes a registered person entitled to take ITC and by no means sub-section (4) can be said to be violative of Article 300-A of the Constitution of India.

29. We are not convinced with the submissions advanced on behalf of the petitioners to read down the provision of sub- section (4) of Section 16 of the CGST/ BGST Act since we see neither any reason nor a necessity to do it. We have mentioned in the beginning, the situations which may require reading down a statutory provision. There is always a presumption of constitutional validity of a legislation, with the burden of showing the contrary, lying heavily upon someone who challenges its validity.

30. Submissions have been advanced on behalf of the petitioners that



sub-section (4) of Section 16 imposes unreasonable and disproportionate restriction on the right to freedom of trade and profession guaranteed under Article 19(1)(g) of the Constitution and is, therefore, violative of Article 302 of the Constitution and is in teeth of Article 13 of the Constitution. This argument is founded on the ground of absence of any rationale behind fixation of a cut-off-date for filing of return. We do not find any merit in the submissions so advanced, which deserves to be outrightly rejected."

98. In *Willowood Chemicals vs. Union of India [2018 (58) GSTR 310 (Guj)]*, in Paragraphs 30 and 35, it has been held that conditions restrictions and time limit are crucial for granting ITC and collection of tax of each financial year, otherwise, it would impact revenue collection, budgetary allocation and in rem revenue deficite. [Paragraphs 30 and 35 of the said judgment are extracted in paragraph 79 of this judgment.]

Conclusion:

99. The Government had realized the difficulty in the initial roll out of the GST regime under the CGST/SGST Act and considered that GSTR 2A was not available initially in the Finance years, 2017-2018 and 2018-2019, during the implimentation of GST. In order to resolve all bona fide claims and mistakes, Circular No.183/15/2022- GST dated 27.12.2022 and Circular No. 193/05/2023- GST dated 17.07.2023 have been issued. Circulars cover the period from the introduction of GST till Section 16(2)(aa) was introduced with effect from 01.01.2022. The ITC can be availed by the recipient for the bona fide scenarios listed in those Circulars on submitting proof of payment to the Government by the supplier. Therefore, if, during the pendency of these writ petitions, the petitioners who could have got the benefits of these Circulars and could not avail the benefits within the time limit prescribed, may approach the appropriate GST authority within a period of thirty days from today to avail the benefit of the aforesaid Circulars, if the same is/are applicable to their case. The GST authorities will examine the claim of the individual dealer by applying the provisions of the Circulars, and it will grant applicable relief to eligible dealers."

8. In view of the above, we do not find any ground for entertaining this petition.

Petition stands dismissed accordingly.

(VIVEK RUSIA)
JUDGE

(GAJENDRA SINGH)
JUDGE