AFR

HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 8492 of 2022

(in the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

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MITAMBINI MISHRA ... ***Petitioner***

Mr. Tushar Kanti Satapathy,
Advocate for the petitioner

-versus-

UNION OF INDIA & OTHERS ... ***Opposite Parties***

Mr. Radheshyam Chimanka,
Senior Standing Counsel
(GST, Central Excise & Customs)
for opposite party Nos.2 & 3
And
Mr. Sushant Kumar Pradhan,
Additional Standing Counsel (CT&GST)
for opposite party Nos.4 & 5

Date of Hearing and Judgment: 26.07.2022

CORAM:

MR. JUSTICE JASWANT SINGH

AND

MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

MURAHARI SRI RAMAN, J.—

This matter is taken up by virtual/physical mode.

P.T.O.

2. The petitioner by way of writ petition sought to question the propriety of the Demand-*cum*-Show Cause Notice dated 17.02.2022 *vide* Annexure-1 issued under Section 63 of the Odisha Goods Services Tax Act, 2017 (for brevity hereinafter referred to as "OGST Act") in Form GST ASMT-14 prescribed under Rule 100(2) of the Odisha Goods and Services Tax Rules, 2017 (for short hereinafter be referred to as "OGST Rules") enclosing therewith Form GST DRC-01 prescribed under Rule 142(1) indicating demand to the tune of Rs.2,88,706/- comprising Tax of Rs.1,34,318/- + Interest of Rs.20,070/- + penalty of Rs.1,34,318/- pertaining to tax periods from 01.04.2020 to 31.03.2021 [Financial Year 2020-21] *inter alia* on the following fact and grounds:

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1.3. That upon examination of the registration data pool available with the GSTN, it is found that the noticee has failed to register itself, though liable to be registered under Section 24(iii) of the Act and also failed to discharge its obligations to pay tax, by way of filing of returns in GSTR-1 and GSTR-3B in accordance with the provisions under Sections 37 and 39 of the Act.

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2.1. That the leased rights enjoyed by the noticee for mining and quarrying activities of 'sand', has been granted by the Government for which it pays 'royalty' to the lessor, i.e., the Government in this case.

2.2. That those leased rights, i.e., Licensing Services for right to use of minerals (in this case SAND) including its exploitation and evaluation is covered under HSN Code 997337 and attracts 18% GST under Sl. No.17(viii) of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017. Such tax

is to be paid on 'reverse charge' basis, i.e., by lessees @18% of the value of such supply of services which includes Royalty, DMF and NMET contributions.

2.3. Further, in accordance with clause (iii) of Section 24 of the Act, the noticee is required to be compulsorily register itself, being liable to pay tax under the OGST/CGST Act, the noticee is liable both for compulsory registration and payment of tax @18% GST, as discussed above."

3. It is the contention of the counsel for the petitioner that since royalty is collected by the Government under the provisions of the Odisha Minor Minerals Concession Rules, 2016, the impugned impost on the "royalty" treating the same as "service" is impermissible in law. Therefore, the petitioner has made the following prayers:

"In view of the facts and circumstances of the case, it is respectfully prayed that this Hon'ble Court may be pleased to—

Issue rule nisi calling upon the opposite parties to show cause as to why impugned show cause notice Annexure-1 shall not be quashed;

And if the opposite parties fail to show cause or file insufficient cause the rule may be made absolute;

And, your Lordships may further be pleased to—

(A) Issue a writ in the nature of certiorari quashing the impugned show cause notice;

(B) Issue any such other writ(s) or pass such other order(s) in, as may be deemed just and proper in the interest of justice;

And for this act of your kindness, the petitioner shall as in duty bound ever pray."

3.1. In furtherance to the above, the counsel for the petitioner has urged that royalty is a price of winning minerals from the land and

represents the State's share in such minerals and that there is no element or provision of any service by the State in this respect. Mr. Tushar Kanti Satapathy, learned Advocate for the petitioner referred to decision rendered by seven-Judges Bench of the Hon'ble Supreme Court in the case of *India Cement Ltd. Vrs. State of Tamil Nadu, (1990) 1 SCC 12*, wherein it has been opined that "royalty" is a "tax", and as such a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature and cited that the Hon'ble Supreme Court in the case of *Mineral Area Development Authority Vrs. Steel Authority of India, (2011) 4 SCC 450* observed as follows:

> *"2. Before concluding, we may clarify that normally the Bench of five learned Judges in case of doubt has to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger coram than the Bench whose decision has come up for consideration (see Central Board of Dawoodi Bohra Community Vrs. State of Maharashtra [(2005) 2 SCC 673 : 2005 SCC (L&S) 246 : 2005 SCC (Cri) 546]). However, in the present case, since prima facie there appears to be some conflict between the decision of this Court in State of W.B. Vrs. Kesoram Industries Ltd. [(2004) 10 SCC 201] which decision has been delivered by a Bench of five Judges of this Court and the decision delivered by a seven-Judge Bench of this Court in India Cement Ltd. Vrs. State of T.N. [(1990) 1 SCC 12], reference to the Bench of nine-Judges is requested. The office is directed to place the matter on the administrative side before the Chief Justice for appropriate orders.*

3.2. Sri Satapathy, therefore, argued that in view of interim order of stay of payment of service tax under Chapter-V of the Finance Act, 1994 for grant of mining lease/royalty being granted by the

Hon'ble Supreme Court *vide* Order dated 11.01.2018 in the cases of *Udaipur Chambers of Commerce & Industry & Others, S.L.P.(C) No.37326 of 2017,* this Court is required to pass necessary orders granting stay of further proceeding (which is at the stage of Show Cause only) by the Proper Officer-Joint Commissioner of State Tax, CT&GST Circle, Jajpur, Jajpur Road who has exercised power to determine the tax liability in respect of unregistered person under Section 63 of the OGST/CGST Act.

3.3. The counsel for the petitioner, Sri Tushar Kanti Satapathy, has further placed reliance on interim Orders passed by different High Courts more particularly Order dated 20.04.2022 passed in *Mandhan Minerals Corporation Vrs. Union of India, W.P.(T) No. 432 of 2021 & batch of matters* pending adjudication before the Hon'ble High Court of Jharkhand at Ranchi.

3.4. Therefore, the counsel for the petitioner submitted that parity may be maintained by extending the similar protection.

4. Against the aforesaid submissions of the counsel for the petitioner, the learned Additional Standing Counsel for the CT&GST Organisation submitted that no demand has yet been raised and/or finalised as is apparent from the following narration finds mentioned in the impugned Demand-*cum*-Show Cause Notice dated 17.02.2022:

> *"3.3. That as revealed from the Table and discussed on the grounds mentioned herein above, you are now liable to pay the tax, interest and penalty amounting to a sum total of Rs.2,88,706.00 under OGST/CGST Act. Now, therefore, you are hereby called upon to show-cause as to why the stated*

tax liability along with interest shall not be created against you for conducting business without registration, despite being liable for registration/failure to discharge the stated liability under the Act and why penalty as tabulated herein above under Section 122(1)(xi) should not be imposed for violation of the provisions of the Act or the rules made thereunder. You are hereby granted opportunity to personally appear or cause appearance through any authorized person and clarify the defects/show cause on the points noted herein above in the date and time mentioned in the notice appended herewith.

3.4. Please be further informed that in the event of non-response to the statutory notice and/or responding by way of relevant books of accounts within the stipulated date and time, the undersigned shall be constrained to pass an order in Form GST ASMT-15 and demand/recover the tax along with interest and penalty on the basis of information available with the department, without any further reference to you in this regard."

4.1. The petitioner is supposed to respond to said Demand-*cum*-Show Cause Notice and participate in the proceeding under Section 63 of the OGST/CGST Act to avail the opportunity of being heard and place relevant material to facilitate adjudication of the issue raised and/or proposition made by the Joint Commissioner of State Tax, CT&GST Circle, Jajpur-Proper Officer. As it would be unwarranted for this Court to have indulgence in the matter of calling for reply to show cause, entertainment of the writ petition, at this stage, would be premature.

5. Before proceeding to consider the rival contentions, it is apt to notice that the petitioner has remained unregistered person carrying on her business. Reading of provision contained in Section 63 clearly establishes that the proceeding under said

provision is initiated by the proper officer to assess the tax liability of taxable person:

i. who failed to obtain registration even though liable to do so, or

ii. whose registration has been cancelled under sub-section (2) of Section 29.

5.1. Reading of impugned Show Cause Notice dated 17.02.2022 would reveal that in terms of Section 24(iii) of the CGST/OGST Act notwithstanding the fact that the petitioner was liable for compulsorily registered inasmuch as it is required to discharge tax liability on reverse charge mechanism, it has not acted in consonance with statutory mandate.

5.2. This Court is not persuaded by the explanation of the counsel for the petitioner that the petitioner would not come within the fold of Section 24(iii) as it is not liable to pay GST @18% on the amount of royalty paid to the Government in respect of its licensing services for right to use of mineral, *i.e.,* sand in view of the fact that the Hon'ble Supreme Court of India has been pleased to refer the issue whether "royalty" is "tax" to a Bench of nine-Judges in the matters of *Mineral Area Development Authority Vrs. Steel Authority of India, (2011) 4 SCC 450.*

5.3. It is ascertained by visiting the web-portal of the Supreme Court of India that the following Order has been passed on 31.08.2021 in *M/s. Mateshwari Minerals & Anr. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) No(s).13066/2021*

(Arising out of impugned final judgment and order dated 26-07-2021 in DBCWP No. 7650/2021 passed by the High Court of Judicature for Rajasthan at Jaipur) which is directed to be tagged to *S.L.P.(C) No.37326 of 2017 (Udaipur Chambers of Commerce & Industry & Others)*:

"1 Issue notice.

2 Tag with SLP(C) No 37326 of 2017.

3 While there shall be no stay of the impugned order but the payments made shall be subject to the final directions of this Court."

5.4. Similar is the case of *M/s. MW Mines Private Limited Vrs. Union of India & Anr., Special Leave Petition (Civil) Diary No(s).4399/2022 (Arising out of impugned final judgment and order dated 24-10-2017 in DBCWP No. 4162/2017 passed by the High Court of Judicature for Rajasthan at Jodhpur)* wherein the following Order has been passed on 28.02.2022:

"1 Issue notice on the application for condonation of delay and on the Special Leave Petition.

2 Tag with SLP(C) No 37326 of 2017.

3 The petitioner shall pay the demand raised by the Revenue, which shall abide by the final result of the proceedings before this Court."

5.5. This Court is not inclined to accede to the prayer of the counsel for the petitioner to grant stay of proceeding under Section 63 of the CGST/OGST Act in terms of Order dated 18.01.2018 *[Udaipur Chambers of Commerce and Industry & Ors. Vrs. Union of India & Ors., Petition(s) for Special Leave to Appeal (C) No(s).*

37326/2017 (Arising out of impugned final judgment and order dated 24-10-2017 in DBCWP No. 14578/2016 passed by the High Court of Judicature for Rajasthan at Jodhpur)] in view of subsequent interim Orders being passed by said Hon'ble Supreme Court in the cases tagged to *SLP(C) No 37326 of 2017.*

5.6. It may not be out of place to refer to the Order dated 20th April, 2022 passed in the case of *Mandhan Minerals Corporation Vrs. Union of India, W.P.(T) No. 432 of 2021 & batch of matters* pending adjudication before the Hon'ble High Court of Jharkhand at Ranchi which has been pressed into service by the counsel for the petitioner for the purpose of restraining the Proper Officer from finalizing assessment. Minute reading of said Order would reveal the following:

> *"9. Following the interim order passed by the Apex Court in the case of M/s Lakhwinder Singh (supra) [Writ Petition (Civil) No.1076 of 2021] dated 04.10.2021, this Court had been pleased to grant interim protection on levy of GST on mining lease/ royalty/DMF. In the background of the legal position that royalty has been considered to be a tax or profit pendre and the issue is pending before the 9 Judge Constitution Bench, we are of the considered view that the petitioners have made out a case for interim protection.* ***As such, there shall be stay of recovery of GST for grant of mining lease/royalty/DMF from the petitioners till further orders.*** *However, the Revenue is not restrained from conducting and completing the assessment proceedings. Since interim protection has been granted earlier in the case of Sunita Ganguly and others Vrs. Union of India & others vide order dated 02.03.2021 passed in W.P.(T) No. 3878 of 2020 and other analogous cases on levy of service tax on royalty/DMF, similar interim protection is being granted in W.P.(T) No. 897 of 2022, W.P.(T) No. 903 of 2022, W.P.(T) No. 926 of 2022, W.P.(T) No. 927 of 2022*

where the levy of service tax on royalty/DMF is under challenge. As such, interim order dated 02.03.2021 shall govern the case of said writ petitioners also."

[Emphasis supplied]

5.7. In the case of *Sunita Ganguly and others Vrs. Union of India & others vide order dated 02.03.2021 passed in W.P.(T) No. 3878 of 2020,* the Hon'ble Jharkhand High Court taking note of Order dated 11.01.2018 passed in *Udaipur Chambers of Commerce & Industry & Others, S.L.P.(C) No.37326 of 2017,* by the Hon'ble Supreme Court passed the following Order:

"15. Having regard to the legal issues raised in respect of the levy of service tax on royalty in the respective writ petitions, we are inclined to pass similar interim order in respect thereof. ***While the revenue is not restrained from conducting and completing the assessment proceedings, until further orders recovery of service tax for grant of mining lease/royalty from the petitioners shall remain stayed. However, we are not satisfied at this stage that any case for granting interim protection is made out so far as the levy of CGST and/or JGST is concerned."***

[Emphasis supplied]

5.8. Both the interim orders as referred to and extracted herein above would show that the Hon'ble Jharkhand High Court has not restrained the Revenue Authority from proceeding with the assessment. Furthermore, it transpires from the interim Order dated 20th April, 2022 of the Jharkhand High Court passed in the case of *Mandhan Minerals Corporation Vrs. Union of India, W.P.(T) No. 432 of 2021 & batch of matters* that the interim order dated 28.02.2022 passed by the Hon'ble Supreme Court in the cases of *MW Mines Private Limited Vrs. Union of India & Anr.,*

Special Leave Petition (Civil) Diary No(s).4399/2022 and interim order dated 31.08.2021 in *M/s. Mateshwari Minerals & Anr. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) No(s).13066/2021* subsequent to passing of interim Order dated 11.01.2018 in *Udaipur Chambers of Commerce and Industry & Ors. Vrs. Union of India & Ors., Petition(s) for Special Leave to Appeal (C) No(s). 37326/2017* and interim Order dated 05.02.2018 passed in *Tamanna Begum, etc. etc. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) Nos. 3150-3155/2018* were not brought to its notice.

5.9. Mr. Tushar Kanti Satapathy, counsel for the petitioner urged that the Hon'ble High Court of Andhra Pradesh at Amaravati in the case of *Karthika Mines and Minerals Private Limited Vrs. The Assistant Commissioner (ST) and Ors., Writ Petition No.10929 of 2022* and the Hon'ble High Court of Meghalaya at Shillong in the case of *M/s. Hills Cement Company Limited Vrs. The Union of India & Ors., WP(C) No.177 of 2022* have granted interim protection to the assesses against levy of GST on grant of mining lease/payment of royalty and, therefore, he prayed that this Court may follow suit. Perusal of Order dated 19.04.2022 of High Court of Andhra Pradesh in *Karthika Mines and Minerals Private Limited Vrs. The Assistant Commissioner (ST) and Ors., Writ Petition No.10929 of 2022* and Order dated 13.05.2022 of High Court of Meghalaya passed in *M/s. Hills Cement Company Limited Vrs. The Union of India & Ors., WP(C) No.177 of 2022* indicates that the interim protection to the petitioners therein were granted taking into account the interim relief *vide* Order

04.10.2021 of the Hon'ble Supreme Court in the case of *Lakhwinder Singh Vrs. Union of India & Ors., W.P.(C) No.1076 of 2021.* Noteworthy to point out that said writ petition stands dismissed by the Supreme Court *vide* Order dated 04.01.2022 *"leaving it open to the petitioners to pursue their remedies in accordance with law"*. Both the High Courts were not, it seems, apprised about current position of said interim orders passed in *Lakhwinder Singh Vrs. Union of India & Ors., W.P.(C) No.1076 of 2021.* Therefore, this Court is not inclined to agree with the submission of the learned counsel for the petitioner as regards aspect of maintaining parity *qua* interim orders passed by different High Courts.

5.10. Law on the point of binding precedent of Judgments and interim orders of other High Courts has been fairly settled.

5.11. In *Valliamma Champaka Pillai Vrs. Sivathanu Pillai, (1979) 4 SCC 429,* it has been laid down that the decision of one High Court is not a binding precedent on another High Court. The Hon'ble Court ruled that such a decision can at best have persuasive value and such a decision does not enjoy the force of a binding precedent. The Bombay High Court in *Commissioner of Income Tax Vrs. Thana Electric Supply Ltd., 1993 SCC OnLine Bom 591 = (1994) 206 ITR 727 = (1993) 112 CTR 356* observed as follows:

> *"6. On a careful consideration of the submissions of learned counsel for the assessee, we find that before taking up the issue involved in the question of law referred to us in this case for consideration, it is necessary to first decide the last*

submission of learned counsel that this court, while interpreting an all-India statute like the Income-tax Act, is bound to follow the decision of any other High Court and to decide accordingly even if its own view is contrary thereto, in view of the practice followed by this court in such matters. Because, if we are to accept this submission, it will be an exercise in futility to examine the real controversy before us with a view to decide the issue, as in that case in view of the Calcutta decision whatever may be our decision on the question of law referred to us, we would be bound to follow the decision of the Calcutta High Court and answer the question accordingly. This submission, in our opinion, is not tenable as it goes counter not only to the powers of this court to hear the reference and decide the questions of law raised therein and to deliver its judgment thereon but also to the doctrine of binding precedent known as stare decisis. We shall deal with the reasons for the same at some length a little later.

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20. From the foregoing discussion, the following propositions emerge:

(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows:

(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see Food Corporation of India Vrs. Yadav Engineer and Contractor, (1982) 2 SCC 499 : AIR 1982 SC 1302).

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or Courts or Tribunals within their territorial jurisdiction are concerned. Any such

> *attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of article 141 of the Constitution."*

5.12. Following principles discussed in *Commissioner of Income Tax Vrs. Thana Electricity Supply Ltd., (1994) 206 ITR 727 (Bom)* and *Consolidated Pneumatic Tool Co. (India) Ltd. Vrs. Commissioner of Income Tax, (1994) 209 ITR 277 (Bom)*, in *Geoffrey Manners & Co. Ltd. Vrs. Commissioner of Income Tax, (1996) 221 ITR 695 (Bom)* it has been observed that the decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own territorial jurisdiction. The decision of a High Court will have the force of binding precedent only in the State or territories on which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court, it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of *stare decisis* can judgments of one High Court be given the status of a binding precedent so far as High Courts or Courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of *stare decisis* and also the various decisions of the Supreme Court which have interpreted the scope and ambit

thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate Courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all Courts in the country by virtue of Article 141 of the Constitution.

5.13. Reference may also be had to *Commissioner of Income Tax Vrs. Ved Prakash, (1989) 178 ITR 332 (P&H); State of Andhra Pradesh Vrs. Commercial Tax Officer, (1988) 169 ITR 564 (AP) = (1988) 68 STC 177 (AP); Commissioner of Income Tax Vrs. Mohan Lal Kansal, (1978) 114 ITR 583 (P&H); Raja Benoy Kumar Sahas Roy Vrs. Commissioner Income Tax, (1953) 24 ITR 70 (Cal).*

5.14. In *Taylor Instrument Co. (India) Ltd. Vrs. Commissioner of Income Tax, (1998) 232 ITR 771 (Del)* the Hon'ble Delhi High Court held that merely because the provisions of Section 140A(3) of the Income-tax Act, 1961, have been held to be *ultra vires* the Constitution by the High Court of Madras, the Tribunal deciding the case arising out of an assessment made by an income tax authority situated within the jurisdiction of the Delhi High Court, could not have proceeded on the assumption that the said provision was *ultra vires* the Constitution. Doing so would be tantamount to the Tribunal declaring the provision to be *ultra*

vires the Constitution for the purpose of assessments lying within the jurisdiction of the authorities situated within the territory of the Delhi High Court. This is precisely not permissible.

5.15. As regards binding effect of interim orders are concerned, the Hon'ble Supreme Court of India in the case of *Empire Industries Ltd. Vrs. Union of India, (1985) 3 SCC 314 = 1985 SCC (Tax) 416* succinctly laid down as follows:

> "*59. Good deal of arguments were canvassed before us for variation or vacation of the interim orders passed in these cases. Different courts sometimes pass different interim orders as the courts think fit. It is a matter of common knowledge that the interim orders passed by particular courts on certain considerations are not precedents for other cases which may be on similar facts. An argument is being built up nowadays that once an interim order has been passed by this Court on certain factors specially in fiscal matters, in subsequent matters on more or less similar facts, there should not be a different order passed nor should there be any variation with that kind of interim order passed.* ***It is submitted at the Bar that such variance creates discrimination. This is an unfortunate approach. Every Bench hearing a matter on the facts and circumstances of each case should have the right to grant interim orders on such terms as it considers fit and proper and if it had granted interim order at one stage, it should have the right to vary or alter such interim orders.*** *We venture to suggest, however, that a consensus should be developed in the matter of interim orders.*
>
> *60. If we may venture to suggest, in fiscal matters specially in cases involving indirect taxes where normally taxes have been realised from the consumers but have not been paid over to the exchequer or where taxes are to be realised from consumers by the dealers or others who are parties before the court, interim orders staying the payment of such taxes until final disposal of the matters should not be*

passed. It is a matter of balance of public convenience. Large amounts of taxes are involved in these types of litigations. Final disposal of matters unfortunately in the present state of affairs in our courts takes enormously long time and non-realisation of taxes for long time creates an upsetting effect on industry and economic life causing great inconvenience to ordinary people. Governments are run on public funds and if large amounts all over the country are held up during the pendency of litigations, it becomes difficult for the governments to run and it becomes oppressive to the people. Governments' expenditures cannot be made on bank guarantees or securities. In that view of the matter as we said before, if we may venture to suggest for consideration by our learned brethren that this Court should refrain from passing any interim orders staying the realisations of indirect taxes. This will be healthy for the economy of the country and for courts."

5.16. Suffice it to observe bearing in mind aforesaid propositions of settled factors to weigh the scales of balance that the specious plea of the petitioner that when the issue whether "royalty" is a "tax" is pending before the Hon'ble Supreme Court, the assessment proceeding in respect of unregistered person under the GST regime deserves to be kept in abeyance is misconceived.

5.17. It is pertinent to say that even going by the Order dated 20th April, 2022 passed in the case of *Mandhan Minerals Corporation Vrs. Union of India, W.P.(T) No. 432 of 2021 & batch of matters* wherein Order dated 02.03.2021 passed in the case of *Sunita Ganguly & Ors. Vrs. Union of India & Ors., W.P.(T) No. 3878 of 2020* has been referred to by the Hon'ble High Court of Jharkhand at Ranchi it is manifest that said Court neither placed any restriction nor did it restrain assessment proceeding to be continued and completed.

5.18. In view of above discussions the petitioner has failed to persuade this Court to maintain parity having regard to consistency in approach by passing interim order(s) as that are passed by different High Courts. Needless to make an observation that assessment proceeding commenced by issue of notice is required to be culminated in passing of final adjudication order within the period stipulated under the statute. Hence, this Court is not inclined to grant stay of proceeding initiated by issue of Demand-*cum*-Show Cause Notice under Section 63 of the CGST/OGST Act regard being had to the fact of non-registration of the petitioner who deals in sand (mineral) being allotted with lease of quarry at Mukundapur Baitarani River Sand Quarry *vide* Sairat Lease Case No.03/2015-16, in terms of the Odisha Minor Minerals Concession Rules, 2016, lease deed in respect of which is stated to have been executed on 30.06.2020.

6. On the challenge being made to Demand-*cum*-Show Cause Notice dated 17.02.2022 *vis-a-vis* entertainment of writ petition, it is only to be rejected at the threshold.

6.1. The statutory scheme requires issue of show cause notice by the Adjudicating Authority, response by the person served with the show cause notice and final determination by the order in original. Issue of show cause notice is a condition precedent to raising an enforceable demand. Reference may be had to *Commissioner of Central Excise, Vishakhapatnam Vrs. Mehta & Co., (2011) 4 SCC 435; Union of India Vrs. Madhumilan Syntex Pvt. Ltd., (1988) 3*

SCC 348; Golak Patel Volkart Limited Vrs. Collector of Central Excise, Belgaum (1987) 2 SCC 93.

6.2. In the present writ petition, the Petitioner has challenged Demand-*cum*-Show Cause Notice under Section 63 of the CGST/OGST Act whereby the Proper Officer has asked the assessee to participate in the proceeding by furnishing appropriate explanation in order to determine the correct tax liability. The said Authority also in order to afford opportunity called for explanation/objection and has disclosed proposed actions by specifying components of tax, interest and penalty. Such a Show Cause Notice having clearly spelt out reasons, no prejudice possibly be caused to the Petitioner in the event it is relegated to avail such opportunity by placing relevant material fact including its stance regarding legal issue. While deciding, the Authority would be obligated to take into consideration any representation or submission made by the Petitioner-assessee.

6.3. Self-imposed restriction for entertainment of writ jurisdiction has been succinctly enunciated by the Hon'ble Supreme Court in *Star Paper Mills Ltd. Vrs. State of U.P., (2006) 10 SCC 201 = 2006 SCC OnLine SC 979* which is to the following effect:

> *"4. In response, learned counsel for the respondents submitted that on factual adjudication it was to be established by the appellant that its case is covered by the ratio of this Court's decision in Krishi Utpadan Mandi Samiti case [1995 Supp (3) SCC 433].*
>
> > *"10. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in State of*

H.P. Vrs. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499].

11. *Except for a period when Article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.*

12. *Constitution Benches of this Court in K.S. Rashid and Son Vrs. Income Tax Investigation Commission [1954 SCR 738 = AIR 1954 SC 207], Sangram Singh Vrs. Election Tribunal, Kotah [(1955) 2 SCR 1 = AIR 1955 SC 425], Union of India Vrs. T.R. Varma [1958 SCR 499 = AIR 1957 SC 882], State of U.P. Vrs. Mohd. Nooh [1958 SCR 595 = AIR 1958 SC 86] and Venkataraman and Co. Vrs. State of Madras [(1966) 2 SCR 229 = AIR 1966 SC 1089] held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a*

breach of principles of natural justice or procedure required for decision has not been adopted.

13. *Another Constitution Bench of this Court in State of M.P. Vrs. Bhailal Bhai [(1964) 6 SCR 261 = AIR 1964 SC 1006] held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T. Veluswami Thevar Vrs. G. Raja Nainar [1959 Supp (1) SCR 623 = AIR 1959 SC 422], Municipal Council, Khurai Vrs. Kamal Kumar [(1965) 2 SCR 653 = AIR 1965 SC 1321], Siliguri Municipality Vrs. Amalendu Das [(1984) 2 SCC 436 = 1984 SCC (Tax) 133 = AIR 1984 SC 653], S.T. Muthusami Vrs. K. Natarajan [(1988) 1 SCC 572 = AIR 1998 SC 616], Rajasthan SRTC Vrs. Krishna Kant [(1995) 5 SCC 75 = 1995 SCC (L&S) 1207 = (1995) 31 ATC 110 = AIR 1995 SC 1715], Kerala SEB Vrs. Kurien E. Kalathil [(2000) 6 SCC 293 = AIR 2000 SC 2573], A. Venkatasubbiah Naidu Vrs. S. Chellappan [(2000) 7 SCC 695], L.L. Sudhakar Reddy Vrs. State of A.P. [(2001) 6 SCC 634], Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha Vrs. State of Maharashtra [(2001) 8 SCC 509], Pratap Singh Vrs. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1 SCC 72].*

14. *In Harbanslal Sahnia Vrs. Indian Oil Corporation Ltd. [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the Petitioner seeks enforcement of any of the fundamental rights; where*

there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. *In Veerappa Pillai Vrs. Raman & Raman Ltd. [1952 SCR 583 = AIR 1952 SC 192], CCE Vrs. Dunlop India Ltd. [(1985) 1 SCC 260 = 1985 SCC (Tax) 75 = AIR 1985 SC 330], Ramendra Kishore Biswas Vrs. State of Tripura [(1999) 1 SCC 472 = 1999 SCC (L&S) 295 = AIR 1999 SC 294], Shivgonda Anna Patil Vrs. State of Maharashtra [(1999) 3 SCC 5 = AIR 1999 SC 2281], C.A. Abraham Vrs. ITO [(1961) 2 SCR 765 = AIR 1961 SC 609], Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa [(1983) 2 SCC 433 = 1983 SCC (Tax) 131 = AIR 1983 SC 603], H.B. Gandhi Vrs. Gopi Nath & Sons [1992 Supp (2) SCC 312], Whirlpool Corporation Vrs. Registrar of Trade Marks [(1998) 8 SCC 1 = AIR 1999 SC 22], Tin Plate Co. of India Ltd. Vrs. State of Bihar [(1998) 8 SCC 272 = AIR 1999 SC 74], Sheela Devi Vrs. Jaspal Singh [(1999) 1 SCC 209] and Punjab National Bank Vrs. O.C. Krishnan [(2001) 6 SCC 569] this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.*

16. *If, as was noted in Ram and Shyam Co. Vrs. State of Haryana [(1985) 3 SCC 267 = AIR 1985 SC 1147] the appeal is from 'Caesar to Caesar's wife' the existence of alternative remedy would be a mirage and an exercise in futility. ... There are two well-recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order*

has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

The above position was recently highlighted in U.P. State Spinning Co. Ltd. Vrs. R.S. Pandey [(2005) 8 SCC 264 = 2005 SCC (L&S) 78], SCC pp. 270-72, paras 10-16."

6.4. In a case where assessment order being challenged, the High Court quashed the same invoking writ jurisdiction; however, the Hon'ble Supreme Court in the matter of *Commissioner of Income Tax Vrs. Chhabil Dass Agarwal, (2014) 1 SCC 603 = 2013 SCC OnLine SC 717 = (2013) 357 ITR 357 (SC)* reiterated the scope and purport of exercise of power under Article 226 of the Constitution of India and re-stated the self-imposed restrictions *qua* entertainment of writ petition:

"12. The Constitution Benches of this Court in K.S. Rashid and Son Vrs. Income Tax Investigation Commission [AIR 1954 SC 207], Sangram Singh Vrs. Election Tribunal [AIR 1955 SC 425], Union of India Vrs. T.R. Varma [AIR 1957 SC 882] , State of U.P. Vrs. Mohd. Nooh [AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. Vrs. State of Madras [AIR 1966 SC 1089] have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See N.T. Veluswami Thevar Vrs. G. Raja Nainar [AIR 1959 SC 422], MunicipalCouncil, Khurai Vrs. Kamal Kumar [AIR 1965 SC 1321 = (1965) 2 SCR 653], Siliguri Municipality Vrs.

Amalendu Das [(1984) 2 SCC 436 = 1984 SCC (Tax) 133], S.T. Muthusami Vrs. K. Natarajan [(1988) 1 SCC 572], Rajasthan SRTC Vrs. Krishna Kant [(1995) 5 SCC 75 = 1995 SCC (L&S) 1207 = (1995) 31 ATC 110], Kerala SEB Vrs. Kurien E. Kalathil [(2000) 6 SCC 293], A. Venkatasubbiah Naidu Vrs. S. Chellappan [(2000) 7 SCC 695], L.L. Sudhakar Reddy Vrs. State of A.P. [(2001) 6 SCC 634], Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha Vrs. State of Maharashtra [(2001) 8 SCC 509], Pratap Singh Vrs. State of Haryana [(2002) 7 SCC 484 = 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. Vrs. ITO [(2003) 1 SCC 72] .]

*** *** *** ***

15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419], Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. Vrs. State of Orissa, (1983) 2 SCC 433 = 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

6.5. This Court in the case of *National Aluminium Company Ltd. Vrs. Employees State Insurance Corporation, 2012 SCC OnLine Ori 90* has observed as follows:

"24. This Court in the case of Rohit Kumar Behera Vrs. State of Orissa, 2012 (II) ILR-CUT 395, held as under:

> *'21. Law is well settled that unless it is shown that the notice to show cause has been issued palpably without any authority of law, the show cause notice cannot be quashed in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution.' "*

6.6. Bearing in mind the above principles, the scope of alternative remedy *vis-à-vis* entertainment of writ petition for exercising extraordinary jurisdiction under Article 226 of the Constitution of India *qua* the Demand-*cum*-Show Cause Notice (Annexure-1) issued by the Joint Commissioner of State Tax, CT&GST Circle, Jajpur, it may be apt to refer to *Union of India Vrs. Coastal Container Transporters Association, (2019) 20 SCC 446* wherein it has been laid down by the Hon'ble Supreme Court as follows:

"30. On the other hand, we find force in the contention of the learned senior counsel, Sri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of Constitution of India at the stage of show cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show cause notice, but it is settled by number of decisions of this Court, where writ petitions can be entertained at the show cause notice stage. Neither it is a case of lack of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court. The judgment of this Court in the case of Union of India Vrs. Guwahati Carbon Ltd., (2012) 11 SCC 651 = 2012 SCC OnLine SC 210 relied on by the learned senior counsel for the appellants also supports their case. In the aforesaid judgment, arising out of Central Excise Act, 1944, this Court has held that excise law is a complete code in order

to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show cause notices. Further, as held by the High Court, it cannot be said that even from the contents of show cause notices there are no factual disputes. Further, the judgment of this Court in the case of Malladi Drugs & Pharma Ltd. Vrs. Union of India, (2020) 12 SCC 808 = 2004 SCC OnLine SC 358, relied on by the learned senior counsel for the appellants also supports their case where this Court has upheld the judgment of the High Court which refused to interfere at show cause notice stage."

6.7. The Supreme Court of India in *South India Tanners & Dealers Association Vrs. Deputy Commissioner of Commercial Taxes, (2008) 23 VST 8 (SC)* expressed displeasure in entertainment of writ petition against the Show Cause Notice. The Hon'ble Supreme Court in the said case laid down the modality for the Authority in the following terms:

"2. We have repeatedly stated that as far as possible the High Courts should not interfere in matters at show cause notice stage.

3. Without reply to the show cause notice the appellants herein preferred Original Petitions before the Tamil Nadu Taxation Special Tribunal which decided the matters against the assessees. The assessees filed writ petitions against the order passed by the Special Tribunal in the High Court of Madras in which impugned judgments have been delivered, against which these Civil Appeals have been filed. We find that the assessees have never replied to the show cause notices till date.

4. We are of the view that in such circumstances the Special Tribunal/High Court ought not to have interfered and they ought to have directed the assesse to reply to the show cause notice and exhaust the statutory remedy under the Act, which they have not done till date.

5. In the circumstances, to put an end to this controversy we, first of all, grant liberty to the Department to amend the show cause notices and take up additional grounds, if so advised, within a period of eight weeks from today. They will accordingly give an opportunity to the assessees to reply to the amended show cause notice as well as the original show cause notice within a period of six weeks from the date of the assesses receiving the amended show cause notice.

6. On receiving replies from the assessees the Assessing Authority shall hear and dispose of the matters as expeditiously as possible in accordance with law and in accordance with the directions given hereinabove.

7. We make it clear that the Assessing Authority will decide the matters uninfluenced by any observations made by the High Court/Tribunal in the earlier round of litigation.

8. All contentions on both sides are expressly kept open. At this stage we do not wish to express any opinion on the merits of the case."

6.8. In an identical case relating to writ petition questioning the Show Cause Notice relating to service tax under the Chapter-V of the Finance Act, 1994, *viz.* *Bhubaneswar Development Authority Vrs. Commissioner of Central Excise*, *2015 SCC OnLine Ori 53* this Court observed as follows:

"5. After hearing the learned counsel for the respective parties, it would be relevant herein to take note that the judgment of the Hon'ble Supreme Court in the case of Collector of Central Excise, Hyderabad Vrs. M/s. Chemphar Drugs and

Liniments, Hyderabad, (1989) 2 SCC 127 and in particular, Para-9 thereof is quoted as hereunder:

> *"9. *** In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."*

6. *Hon'ble Single Judge of Calcutta High Court in the case of Infinity Infotech Parks Ltd., (2015) 85 VST 465 (Cal) appears to have placed reliance on the judgment of Hon'ble Supreme Court as noted hereinabove in Para-66 which admittedly, is a leading judgment on the issue raised in the present case. In the said case, the Hon'ble Supreme Court came to conclude that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. But most importantly, the Hon'ble Supreme Court has noted thereafter that 'Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of*

fact depending upon the facts and circumstances of a particular case.

7. On perusal of the aforesaid judgment of the Hon'ble Supreme Court, it is clear therefrom that Hon'ble Supreme Court in the said case was dealing with an appeal filed by the Collector of Central Excise, Hyderabad against an order passed by the Tribunal. In the facts and circumstances of the said case, Hon'ble Supreme Court came to hold that this finding of fact having been ultimately held against the revenue by the Tribunal which is the final fact forum and dismissed the appeal filed by the revenue on the basis that it did not want to interfere the facts determined by the Tribunal in the said case.

*8. In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the Petitioner-BDA or the Service Tax Authority. ***"*

6.9. In *Supreme Paper Mills Limited Vrs. Assistant Commissioner of Commercial Taxes, (2010) 11 SCC 593 = (2010) 31 VST 1 (SC),* the Hon'ble Supreme Court after taking note of earlier case being *Sales Tax Officer, Ganjam Vrs. Uttareswari Rice Mills, (1973) 3 SCC 171 = 1973 SCC (Tax) 123 = AIR 1972 SC 2617 = (1972) 30 STC 567 (SC) = (1973) 89 ITR 6 (SC),* wherein challenge was made to Show Cause Notice, has been pleased to make the following observation:

"14. In our considered opinion, the ratio of the aforesaid decision in Uttareswari Rice Mills case [(1973) 3 SCC 171 = 1973 SCC (Tax) 123] of this Court is squarely applicable to the facts of the present case. The expression used in Section 11-E of the Act is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A Show Cause Notice is issued to the dealer with the purpose of informing him that the Department proposes to reopen

the assessment because the Commissioner himself is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show-cause notice as to why the said power vested in the Commissioner should not be exercised.

15. A notice was issued in order to provide an opportunity of natural justice to the dealer. There is nothing in the language of the aforesaid provision which either expressly or impliedly mandates the recording of any reasons. The provision of the Act nowhere postulates that the reasons which led to the issue of the said notice should be incorporated in the notice itself, and that in case of failure to do so, the same would invalidate the notice.

16. The aforesaid provision is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. It is a well-settled principle in law that the court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute."

6.10. Challenge being made to the Show Cause Notice, the Hon'ble Supreme Court in the case of *CCE Vrs. Krishna Wax (P) Ltd., (2020) 12 SCC 572 = 2019 SCC OnLine SC 1470* at Paragraphs 7 and 10 discussed thus:

"7. Section 11-A thus deals with various facets including non-levy and non-payment of excise duty and contemplates issuance of a show-cause notice by the Central Excise Officer requiring the "person chargeable with duty" to show cause why "he should not pay the amount specified in the notice". In terms of sub-section (10) of said Section 11-

A, the person concerned has to be afforded opportunity of being heard and after considering his representation, if any, the amount of duty of excise due from such person has to be determined by the Central Excise Officer. Without going into other details regarding the period of limitations and the circumstances under which show-cause notice can be issued, the crux of the matter is that such determination is after the issuance of show-cause notice followed by affording of opportunity and consideration of representation, if any, made by the person concerned.

***

10. The issuance of show-cause notice under Section 11-A also has some significance in the eye of the law. The day the show-cause notice is issued, becomes the reckoning date for various issues including the issue of limitation. If we accept the submission of the respondent that a prima facie view entertained by the department whether the matter requires to be proceeded with or not is to be taken as a decision or determination, it will create an imbalance in the working of various provisions of Section 11-A of the Act including periods of limitation. It will be difficult to reckon as to from which date the limitation has to be counted.

***

13. It must be noted that while issuing a show-cause notice under Section 11-A of the Act, what is entertained by the Department is only a prima facie view, on the basis of which the show-cause notice is issued. The determination comes only after a response or representation is preferred by the person to whom the show-cause notice is addressed. As a part of his response, the person concerned may present his view point on all possible issues and only thereafter the determination or decision is arrived at. In the present case even before the response could be made by the respondent and the determination could be arrived at, the matter was carried in appeal against the said internal order. The appellant was therefore, justified in submitting that the appeal itself was premature."

6.11. In *Union of India Vrs. Bajaj Tempo Ltd., (1998) 9 SCC 281 = 1997 (94) ELT 285 SC = JT 1998 (9) SC 138* it is advised that the appropriate course for the assessee in each case was to reply to the show cause notice enabling the authorities to record their findings of fact in each case and then if necessary, the matter could be proceeded to the Tribunal and thereafter to the High Court.

6.12. The Hon'ble Supreme Court in *Union of India Vrs. Guwahati Carbon Ltd., (2012) 11 SCC 651* has held as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram vs. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).*
>
> > *"23. ... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking remedy are excluded."*

6.13. Clear proposition with reasons are found mentioned in the impugned Demand-*cum*-Show Cause Notice as to why the Proper Officer has sought to invoke the provisions of Section 63 of the CGST/OGST Act which essentially relates to the facts and circumstances of the case. Of course, the petitioner has the fullest opportunity to refute and rebut the same during the course of proceeding. It is possible for the petitioner to seek for further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable her to collect further material. It cannot, therefore, be said that the Demand-

cum-Show Cause Notice would be rendered invalid. Reference is made to *GKN Driveshafts (India) Ltd. Vrs. ITO, (2003) 1 SCC 72 = 2002 SCC OnLine SC 1116* as the guiding rule for the Adjudicating Authorities as enunciated by the Hon'ble Apex Court. Paragraph 5 of said Judgment speaks as follows:

> *"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."*

6.14. The present case seems neither to be a case of lack of jurisdiction nor is there any allegation of violation of principles of natural justice. The petitioner has ample opportunity to agitate issue before the Proper Officer. Therefore, this Court feels entertainment of the writ petition at the stage of Demand-*cum*-Show Cause Notice would be premature. Doing so would frustrate the tax administration and adjudication process. This Court is alive to the fact that the statute under consideration, *viz.*, the CGST/OGST Act(s) and rules framed thereunder provide sufficient safeguard for the assessee-petitioner, more so, when against the final orders of adjudication, appeal lies.

6.15. The learned counsel for the petitioner, Sri Tushar Kanti Satapathy, urged that the petitioner is not required to be registered under the OGST/CGST Act and, thereby she is not required to pay GST on the amount of royalty paid to the Government in respect of quarry lease of sand being allotted to her in view of the fact that the Hon'ble Supreme Court has been pleased to refer the conflict in the decisions between *India Cement Ltd. Vrs. State of Tamil Nadu, (1990) 1 SCC 12* and *State of W.B. Vrs. Kesoram Industries Ltd., (2004) 10 SCC 201* to a Bench of nine-Judges for resolution in *Mineral Area Development Authority Vrs. Steel Authority of India, (2011) 4 SCC 450*. Such a contention is only to be rejected inasmuch as the Proper Officer is competent to decide whether at all any tax liability arises in terms of the charging provisions of necessitating compulsory registration as provided under Section 24 so as to exercise power under Section 63 of the OGST/CGST Act.

6.16. Section 63 of the OGST Act reads as follows:

> *"63. Assessment of unregistered persons.—*
>
> *Notwithstanding anything to the contrary contained in Section 73 or Section 74, where a taxable person fails to obtain registration even though liable to do so or whose registration has been cancelled under sub-section (2) of Section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgement for the relevant tax periods and issue an assessment order within a period of five years from the date specified under Section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:*

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard."

6.17. It is, therefore, necessary for the Proper Officer to examine on the basis of materials available on record and that are furnished by the petitioner-assessee whether he is required to proceed to assess the tax liability of the taxable person on account of failure to obtain registration. In order to conduct the assessment envisaged under Section 63, the Proper Officer is required to follow *inter alia* the mandate of Rule 100(2) of the OGST Rules which is as follows:

"The Proper Officer shall issue a notice to a taxable person in accordance with the provisions of Section 63 in Form GST ASMT-14 containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in Form GST DRC-01, and after allowing a time fifteen days to such person to furnish his reply, if any, pass an order in Form GST ASMT-15 and summary thereof shall be uploaded electronically in Form GST DRC-07."

6.18. Glance at Annexure-1 which is impugned in the instant writ petition indicates that the Proper Officer has issued Form GST ASMT-14 [Show Cause Notice for assessment under Section 63] and Form GST DRC-01 [Summary of Show Cause Notice]. Annexure to Show Cause Notice in Form GST ASMT-14 as made part of writ petition shows that the Proper Officer enumerated fact and grounds for the proceeding. Thereby, this Court finds compliance of mandate of Rule 100 of the OGST Rules.

6.19. The enquiry/process of assessment requires factual determination with reference to liability and requirement of obtaining registration. Having not found illegality, irrationality, procedural impropriety and proportionality in issue of Demand-*cum*-Show

Cause Notice by the Proper Officer, this Court does not, therefore, deem it expedient to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India, and the petitioner is, therefore, relegated to place appropriate material before the Proper Officer for arriving at just determination of liability.

7. The corollary to the aforesaid discussions ends with a conclusion that the petitioner, who remained unregistered person under the CGST/OGST Act, cannot be entitled to the benefit of exemption from being undergone the statutory process of determination of liability or otherwise inasmuch as:

i. The Hon'ble Supreme Court did not show indulgence by restraining statutory authorities from proceeding with assessment while passing interim Order dated 31.08.2021 in *M/s. Mateshwari Minerals & Anr. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) No(s).13066/2021* and Order dated 28.02.2022 in *M/s. MW Mines Private Limited Vrs. Union of India & Anr., Special Leave Petition (Civil) Diary No(s).4399/2022*, which were passed after the Order dated 11.01.2018 in *Udaipur Chambers of Commerce and Industry & Ors. Vrs. Union of India & Ors., Petition(s) for Special Leave to Appeal (C) No(s). 37326/2017* and interim Order dated 05.02.2018 in *Tamanna Begum, etc. etc. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) Nos. 3150-3155/2018*;

ii. Order dated 19.04.2022 of High Court of Andhra Pradesh in *Karthika Mines and Minerals Private Limited Vrs. The Assistant Commissioner (ST) and Ors., Writ Petition No.10929 of 2022* and Order dated 13.05.2022 of High Court of Meghalaya passed in *M/s. Hills Cement Company Limited Vrs. The Union of India & Ors., WP(C) No.177 of 2022* does not reveal that the said High Courts have noticed Order dated 31.08.2021 in *M/s. Mateshwari Minerals & Anr. Vrs. Union of India & Anr., Petition(s) for Special Leave to Appeal (C) No(s).13066/2021* and Order dated 28.02.2022 in *M/s. MW Mines Private Limited Vrs. Union of India & Anr., Special Leave Petition (Civil) Diary No(s).4399/2022* passed by the Hon'ble Supreme Court*;*

iii. Order dated 20.04.2022 has been passed in *Mandhan Minerals Corporation Vrs. Union of India, W.P.(T) No. 432 of 2021 & batch of matters* by of the High Court of Jharkhand at Ranchi by taking note of the Order dated *04.10.2021* passed by Hon'ble Supreme Court in *M/s Lakhwinder Singh Vrs. Union of India & Ors., Writ Petition (Civil) No.1076 of 2021,* which has been dismissed by the Supreme Court on 04.01.2022;

iv. Orders, much less interim orders, of other High Courts have no binding effect on the High Court having jurisdiction over the impugned subject-matter;

v. Writ petition challenging Show Cause Notice is not entertainable in view of ratio laid down in very many cases discussed *supra*.

vi. Entertainment of writ petition with prayer to quash Show Cause Notice without allowing statutory authority to determine the tax liability (even prior to submission of reply to such notice) would be premature.

8. In fine, for the reasons stated above, this Court does not wish to entertain the writ petition challenging Demand-*cum*-Show Cause Notice issued under Section 63 of the OGST Act/the CGST Act and, therefore, the writ petition stands dismissed.

9. However, in case the proceeding still remains incomplete before the Joint Commissioner of State Tax, CT&GST Circle, Jajpur, Jajpur Road, the petitioner may within a period of fifteen days file reply/objection to the Demand-*cum*-Show Cause Notice bearing Reference No.ZD2102220102966, dated 17.02.2022 and she is at liberty to participate in the proceeding raising all such contentions which shall be dealt with by the Proper Officer in accordance with law.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE

AKS July 26, 2022
Cuttack