



2. **The Commissioner of State Tax,**  
GST Bhavan, 8th Floor,  
Mazgaon, Mumbai-400 010.
  3. **The Deputy Commissioner of Sales Tax,**  
PUN-VAT-E-622,  
GST Bhavan, Airport Road, Yerwada,  
Pune-411006, Maharashtra ...Respondents
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**APPEARANCES-**

**Mr Rohan Shah, Senior Advocate,** *a/w Mr Sandeep Sachdeva  
a/w Ms Surabhi Prabhudesai a/w Ms Renita Alex, i/b. India  
Law Alliance, for the Petitioners.*

**Ms S. D. Vyas, Addl.G.P.,** *a/w Ms P. N. Diwan, AGP, for the  
Respondent-State.*

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**CORAM : M.S.Sonak &  
Jitendra Jain, JJ.**

**RESERVED ON : 15 October 2024**

**PRONOUNCED ON : 17 October 2024**

**JUDGMENT (Per MS Sonak J):-**

1. Heard learned Counsel for the parties.
2. Rule. The rule is made returnable immediately at the request and with the consent of the learned Counsel for the parties.
3. The Petitioners challenge the impugned order dated 19 March 2022 and the impugned demand notice of the same date on the grounds of failure of natural justice, non-application of mind and legal mala fides.

4. Petitioners 1 and 2 are established per Luxembourgian Laws. Petitioner No.3 is a company incorporated under the Indian Companies Act of 1956.

5. Petitioners 1 and 2 had, inter alia, granted the 3rd Petitioner the right to use their IPR in India. In that sense, Petitioners Nos.1, 2, and 3 are group companies. By a product license agreement effective from 1 April 2013, the right to use such IPR in India was also extended to M/s. Imsofer Manufacturing India Pvt Ltd. A product license agreement effective from 1 January 2013 was also entered into between the 2nd Petitioner and MPG Multi Production Group India Pvt Ltd concerning IPRs.

6. On 5 May 2023, the Petitioner No. 3 in Pune, India, received a notice dated 3 May 2023 in Form 301 for assessment for FY 2015-2016, addressed to the 1st and 2nd Petitioners seeking to levy VAT on the value of 'royalty' payments made by the 3rd Petitioner against the license to use IPRs and technical know-how granted by 1st and 2nd Petitioner by treating the same as a 'sale of goods'.

7. The Petitioners have pleaded that Form 301, dated 3 May 2023, was the first time that any of the Petitioners had received an intimation as to the assessment of the 1st and 2nd Petitioners under the Maharashtra Value Added Tax Act, 2002n ("**MVAT Act**") for any period.

8. Under the notice dated 3 May 2023 (served upon the 3rd Petitioner) on 5 May 2023, Petitioners 1 and 2 were required to remain present before the 3rd Respondent on 23 May 2023 concerning the assessment of royalty payments for

FY 2015-2016. Since the Petitioners Nos.1 and 2 were incorporated in Luxembourg and considering the short notice, Mr Vikas Gattani, Assistant General Manager of the 3rd Petitioner, appeared before the 3rd Respondent on 23 May 2023 and applied for an extension of time to obtain appropriate authorisation from 1st and 2nd Petitioners and to file a detailed response to the notice dated 3 May 2023.

9. The Petitioners have pleaded that the 3rd Respondent granted the oral extension as prayed for by Mr Gattani and Mr Gattani was informed that the next date for appearance would be notified to the Petitioners.

10. The Petitioners have pleaded that on 1 July 2023, the third Petitioner was shocked to receive an assessment order dated 24 May 2023 from the third Respondent confirming the demand for VAT on royalty payments for FY 2015-2016.

11. The Petitioners have pleaded that in addition to the assessment order dated 24 May 2023, the 3rd Petitioner was also served with the following:-

“(a) Assessment Order, purported to be dated 14.03.2022, confirming the demand of VAT on Petitioners No. 1 and 2 for FY 2013-14 [**Impugned Order**]; and

(b) Assessment Order, purported to be dated 20.03.2023, confirming the demand of VAT on Petitioners No. 1 and 2 for FY 2014-15.”

12. The Petitioners have categorically pleaded that they were never served with any notice or granted any opportunity of personal hearing in respect of FY 2013-2014 and FY 2014-2015. They have pleaded that until the receipt of the above assessment orders, the Petitioners were completely in the dark

about any assessment proceedings initiated by the Respondents under the MVAT Act.

**13.** Accordingly, the present Petition challenges the assessment order dated 14 March 2022 confirming the VAT demand on the first and second Petitioners for FY 2013-2014.

**14.** Mr Rohan Shah learned Senior Advocate for the Petitioners, submits that the impugned assessment order was made in flagrant breach of the principles of natural justice and fair play. He submitted that neither was any show cause notice issued to the Petitioners nor were the Petitioners granted any opportunity to be heard in the matter. He submitted that the failure to issue a show cause notice and grant an opportunity of hearing infringes Section 23(4) of the MVAT Act and Rule 21 of the MVAT Rules. Accordingly, he submitted that the impugned assessment order dated 14 March 2022 was null and void and ought to be so declared by this Court.

**15.** Mr Shah submitted that the impugned assessment order dated 14 March 2022 refers to some show cause notice and replies on behalf of the Petitioners. He pointed out that the impugned assessment order also refers to Shri Vikas Gattani attending the personal hearing, making submissions, furnishing the balance sheet and agreement copy, etc. However, Mr Shah pointed out that since no show cause notice was ever served upon the Petitioners, the Petitioners did not file any reply. Similarly, since no notice of any personal hearing was served upon the Petitioners, there was no question of the Petitioners or any of their representatives attending any personal hearing. Accordingly, Mr Shah

submitted that this was a complete non-application of mind and legal mala fides.

**16.** Mr Shah then referred to the impugned assessment order and pointed out that the same relates to agreements or some circumstances concerning some unrelated entity. He submitted that the impugned assessment order appears to have been issued verbatim, replicating an assessment order regarding some unrelated entity. He pointed out several glaring and apparent errors in describing the parties, their agreements, their transactions, etc. He submitted that all these indicate non-application of mind and legal mala fides.

**17.** Mr Shah submitted that the impugned assessment order is a common assessment order concerning the 1st and 2nd Petitioner, two distinct and separate legal entities. He submitted that neither the MVAT Act nor the Rules provide for making such a common assessment order for two distinct and separate legal entities. He submitted that issuing such a common order amounts to an exercise of powers not vested in the Respondents, apart from such exercise being arbitrary, perverse and ultra vires.

**18.** Mr Shah submitted that the impugned assessment order dated 14 March 2022 had been made beyond the statutorily prescribed period under Section 23(4) of the MVAT Act, which is a maximum of eight years. He submitted that for FY 2013-2014, this limitation period expires on 31 March 2022. He submitted that the impugned assessment order had been backdated and was served upon the 3rd Petitioner only on 1 July 2023, viz., after the delay of 15 months and beyond the statutory limitation period.

19. Mr Shah submitted that the impugned order dated 14 March 2022 surprisingly refers to Vikas Gattani appearing and attending the hearing before the 3rd Respondent on 23 May 2023. He submitted that in the impugned order purportedly made on 14 March 2022, there could have been no reference to Vikas Gattani attending the hearing on 23 May 2022. He submitted that this constitutes clinching evidence about the impugned assessment order dated 14 March 2022 being backdated and made to appear as having been issued within the statutory limitation period. Mr Shah submitted that no greater evidence could exist on legal mala fides.

20. Mr Shah submitted that the impugned assessment order suffers from perversity, even regards the findings on merits. He submitted that the reasoning conflicts with the settled law regarding the interpretation of the phrase 'transfer of right to use' as declared by the Hon'ble Supreme Court, which was binding on the 3rd Respondent.

21. Mr Shah relied on some decisions, some of which will be considered during this judgment and order.

22. Mr Shah submitted that the impugned assessment order dated 14 March 2022 ought to be set aside on all the above grounds that were urged without prejudice to one another.

23. Ms Vyas learned that the Additional Government Pleader referred to the Affidavit in Reply of Rajendra D Adsul (R3) and submitted that since the 1st and 2nd Petitioners were not based in India, the notices issued to them remained unserved. She submitted that the impugned assessment order was made to protect the interest of revenue by following best

judgment assessment principles. She submitted that the impugned assessment order was issued on 14 March 2022, and the statutory limitation period for FY 2013-2014 ended on 31 March 2022. Therefore, the impugned assessment order was issued within the statutory limitation period.

**24.** Ms Vyas submitted that the errors in the impugned assessment order or the issuance of the common assessment order were careless mistakes on the part of the assessing officer. She submitted that departmental proceedings have already been ordered to be initiated against the assessing officer. She submitted that those mistakes cannot be rectified or reviewed under the provisions of the MVAT Act. Therefore, she urged that the matter be remanded to the assessing officer for fresh assessment following the law to protect the interest of the revenue.

**25.** Ms Vyas submitted that the MVAT levy issue on royalty is pending consideration before this Court, the lead matter being *Sita Information Networking India Pvt Ltd (Writ Petition No. 1885 of 2021)*. Accordingly, she submitted that there was no error in the view the assessing officer took in the impugned assessment order. She submitted that this is an additional ground for remanding the matter to the assessing officer, who could then decide on the matter afresh after giving the Petitioners a full opportunity.

**26.** For all the above reasons, Ms Vyas submitted that this Petition be either dismissed or, after setting aside the impugned assessment order, the matter could be remanded to the assessing officer for fresh adjudication following and after giving the Petitioners full opportunity of being heard.

27. Mr Rohan Shah submitted that a remand would not be appropriate in the present case's gross facts. He submitted that upon remand, the Respondents would secure an enhanced period of 36 months to make an assessment, which, in fact, was barred, but for the subterfuge adopted by the 3rd Respondent of backdating the impugned order. He submitted that the officials of the Respondents are aware of the legal provisions regarding service of notice, compliance with natural justice, and the compulsion to complete the assessments within the statutorily prescribed periods of limitation. He submitted that for the breach of all such legal provisions, the Respondents should not get some premium by enhancing the limitation period.

28. Mr Shah submitted that remand, in the gross facts and circumstances of the present case, would operate harshly upon the Petitioners, mainly since the assessment was in respect of FY 2013-2014. He relied on *Sona Builders Vs Union of India & Ors.*<sup>1</sup>, *Andaman Timber Industries Vs Commissioner of Central Excise, Kolkata-II*<sup>2</sup>, *Mohit Trading Pvt Ltd Vs Union of India & Ors.*<sup>3</sup> and *Chetak Technology Ltd Vs Union of India*<sup>4</sup> to urge why, after setting aside the impugned assessment order dated 14 March 2022, no remand should be ordered.

29. The rival contentions now fall for our determination.

30. As noted above, the challenge is to the impugned assessment order dated 14 March 2022, which confirmed the VAT demand on the 1st and 2nd Petitioners for FY 2013-2014.

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<sup>1</sup> 2001 10 SCC 280

<sup>2</sup> 2016 15 SCC 785

<sup>3</sup> 2023 (7) TMI 911 (BOM)

<sup>4</sup> WP No. 8768 of 2023 decided on 17 July 2023

**31.** In the gross facts of the present case, there is no question of relegating the Petitioners to the alternate remedy of appeal under the provisions of the MVAT Act. In a case where the violation of the principles of natural justice is apparent, the objection based upon the non-exhaustion of alternate remedies is rarely entertained. In this case, the Respondents did not even raise or, in any event, press the objection based upon the non-exhaustion of the alternate remedies.

**32.** Though the impugned assessment order is dated 14 March 2022, the same was served upon the 3rd Petitioner (though it relates to the 1st and 2nd Petitioners) only on 1 July 2023, after 15 months. In the Affidavit filed on behalf of the 3rd Respondent, there is no explanation for this inordinate delay in communicating or serving the impugned assessment order dated 14 March 2022.

**33.** In *Bachhittar Singh Vs State of Punjab & Anr.*<sup>5</sup>, the Constitutional Bench of the Hon'ble Supreme Court has held that to make the opinion of any government official amount to a decision of the government, it must be communicated to the person concerned. The Court held that it is of the essence that the order has to be communicated who would be affected by that order before the state and that order can bind the person. Until the order is communicated to the person affected by it, it would be open to the decision maker to consider the matter over and over again; therefore, until its communication, the order cannot be regarded as anything more than provisional in character.

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<sup>5</sup> 1962 SCC OnLine SC 11

**34.** Be that as it may, the impugned assessment order refers to notice being served upon the Petitioners and the Petitioners filing their reply to the show cause notice. However, in the Affidavit, it is admitted that no show cause notice was ever served upon the Petitioners, and therefore, the Petitioners had no opportunity to file any reply. Section 23(4) of the MVAT Act provides for the issue of a notice followed by a reasonable opportunity to be heard before assessing any assessee to the best of his judgment. Since neither any notice was issued to the Petitioners nor that the Petitioners granted any opportunity of being heard, the impugned assessment order is liable to be set aside for failure of natural justice and breach of the provisions of Section 23(4) of the MVAT Act.

**35.** The impugned assessment order refers to and records the contentions of Mr Vikas Gattani, an officer of the 3rd Petitioner who is alleged to have appeared before the 3rd Respondent for the oral hearing on 23 May 2023. How Mr Gattani's alleged contentions made on 23 May 2023 could be recorded in the impugned assessment order made on 14 March 2022 has not been explained by the Respondents in their Affidavit. This cannot be regarded as some inadvertent or innocent mistake. In any event, the Petitioners' contentions about them or their representative not being offered any opportunity of being heard before the impugned assessment order on 14 March 2022 was made have not been denied by the Respondent in the Affidavit filed by them or on their behalf.

**36.** Mr Shah contended that the impugned assessment order, though dated 14 March 2022, was made much beyond 31 March 2022, the expiry of the statutorily prescribed period

of limitation, but it was backdated and made to appear as issued within that period.

**37.** At least prima facie, we cannot lightly reject Mr Shah's contention. Firstly, the impugned assessment order dated 14 March refers to allegedly hearing Mr Gattani, an employee of the 3rd Petitioner, on 23 May 2023. This is not a slip, but prima facie appears to be an attempt at manipulation. Secondly, the impugned assessment order dated 14 March 2022, if indeed made on 14 March 2022, was admittedly communicated to the 3rd Petitioner only on 1 July 2023, 15 months from the date of its alleged issue.

**38.** In the two affidavits filed on behalf of the 3rd Respondent, there is no explanation on the aspect of Mr Gattani being heard on 23 May 2023, and yet such hearing finding reference in the impugned assessment order dated 14 March 2022 and the unreasonable delay of about 15 months in communicating the impugned assessment order to the 3rd Petitioner.

**39.** In *R S Garg vs State of UP & Ors.*<sup>6</sup>, the Hon'ble Supreme Court explained the differences between "malice in law" and "malice in fact". Any action resorted to for an unauthorised purpose would constitute malice in law. The Court explained that 'malice' in its legal sense means malice such as may be assumed for a wrongful act done intentionally but without just cause or excuse or for one of the reasonable or probable causes. The term 'malice on fact' would come within the purview of such a definition. Even, however, in the absence of any malicious intention, the principle of malice in law can be

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<sup>6</sup> 2006 6 SCC 430

invoked as has been described by Viscount Haldane in **Shearer Vs Shields** in the following terms:-

“A person who inflicts in injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently.”

40. The principle has also been narrated briefly in **S R Ventakram Vs Union of India**<sup>7</sup> in the following terms:-

“Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.”

41. The impugned assessment order is vitiated by legal malafides. Since Ms Vyas submitted that the disciplinary proceedings are contemplated against the officer who made the impugned assessment order dated 14 March 2023, we refrain from making any observations on the conduct of such officer so as not to prejudice him or his interest.

42. However, we are satisfied that the impugned assessment order dated 14 March 2022 is entirely unsustainable and is required to be quashed and set aside for gross failure to comply with the statutory provisions in Section 23(4) of the MVAT Act and the principles of natural justice and fair play, non-application of mind and legal malafides.

43. The impugned order contains several glaring factual errors. It mis-describes the parties. It mis-describes the transactions between the parties. It relies on some agreements

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<sup>7</sup> 1979 2 SCC 491

that have nothing to do with the Petitioners. Accordingly, there is substance in the contentions of Mr Shah that the impugned assessment order pertains to the facts of some other case which have, without any application of mind, been imported in the impugned assessment order. From the perusal of the impugned assessment order, we are satisfied that the same has been issued without any application of mind. This is also grounds for setting aside the impugned assessment order.

**44.** At least prima facie, we are satisfied that the impugned assessment order was made and issued beyond the statutorily prescribed limitation period. The proviso to Section 23(4) of the MVAT Act provides that no assessment under this subsection shall be made after the expiry of eight years from the end of the said financial year containing the said period.

**45.** Since the impugned assessment order concerns FY 2013-2014, this eight-year period would expire on 31 March 2022. The impugned assessment order is dated 14 March 2022 but refers to some alleged personal hearing of 23 May 2023. Besides, the impugned assessment order was served on the 3rd Petitioner only on 1 July 2023, viz, 15 months after the date of its alleged making. These two circumstances strongly suggest that the impugned assessment order was not made before 31 March 2022, though an attempt is made to show that it was made on 14 March 2022. Therefore, a strong prima facie case suggests the impugned assessment order was made beyond the statutorily prescribed period under the proviso to Section 23(4) of the MVAT Act.

**46.** In this Petition, we do not propose to address Mr Shah's contention about the impugned assessment order being

vulnerable on merits because, according to him, the view taken by the assessing officer conflicts with law and precedents on the subjects. Admittedly, the issue on merits is pending consideration *Sita Information Networking India Pvt Ltd (Writ Petition No. 1885 of 2021)*.

47. In any event, while exercising powers of judicial review, we are more concerned with the decision-making process than the decision itself. The decision-making process was entirely flawed in the present case, thereby vitiating the impugned assessment order. Therefore, we clarify that we have not gone into the merits of the impugned assessment order.

48. For all the above reasons, we are satisfied that the impugned assessment order needs to be quashed and set aside on the grounds of breach of Section 23(4) of the MVAT Act, violation of the principles of natural justice and fair play, non-application of mind, and legal malafides.

49. The next question is whether we should, in the facts of the present case, accede to Ms Vyas's submission about remanding the matter to the assessing officer for fresh adjudication after granting full opportunity to the Petitioners of being heard in the matter.

50. Usually, where an order is set aside for failure of natural justice, the matter is remanded with liberty to make a fresh order following the law after giving full opportunity to the parties likely to be affected. However, in the gross facts of the present case, we agree with Mr Shah that adopting such a course of action would not be appropriate and would amount to granting the third respondent a premium for its gross

illegalities. This is not a case of mere breach of the principles of natural justice or breach of procedural safeguards.

**51.** As noted above, the Petitioners have made out the strong prima facie case that the impugned assessment order dated 14 March 2022 was, in fact, not made on the said date but made beyond 31 March 2022, on which date the statutorily prescribed period for making an assessment order expired given the proviso to Section 23(4) of the MVAT Act. Under the proviso, the Assessing Officer had eight years to assess the Petitioners and make the assessment order.

**52.** Section 24(7) of the MVAT Act, however, provides that the fresh assessment has to be made under Section 24 to give effect to any finding or direction contained in any order made under this Act, including an order made by the Tribunal or the High Court or the Supreme Court, then, notwithstanding anything contend in this Section, such assessment shall be made within 24 months if the said order is made by the Appellate Authority in the First Appeal and in any other case, within 36 months from the date of communication of such finding or direction contend in the said order to the Assessing Authority or, as the case may be, to the Commissioner.

**53.** This is a matter where the Respondents flagrantly breached the statutory provisions in Section 23(4). Principles of natural justice and fair play were also observed only in breach. The impugned order is vitiated by total non-application of mind. As if all this was insufficient, a strong prima facie case is made out about manipulating the date of the impugned assessment order. The manipulation was to create an impression that the order was made within the

prescribed statutory period of limitation, which ended on 31 March 2022. In such gross circumstances, an order of demand thereby extending the statutorily prescribed period of 8 years to 11 years would not be appropriate. A remand in this case's gross facts would grant the third respondent a premium for its gross illegalities.

**54.** Ms Vyas, referring to the affidavit of Dhananjay Akhade, Additional Commissioner of State Tax, Pune, filed on 12 February 2024 in this Court, submitted that the errors in the impugned assessment order cannot be rectified or reviewed under the provisions of the MVAT Act. Considering the enormous amount of tax quantum, she submitted that the matter may be remanded for fresh assessment to protect revenue interests.

**55.** The above affidavit admits that there are several mistakes in the impugned assessment order. It states that in the instant matter, if on enquiry, the assessment orders passed by the assessing officer are found to be vexatious or under-assessed, proceedings can be initiated against such officer under Section 12 of the MVAT Act. This affidavit states that proceedings are also being initiated against Mr Babasaheb Shedge, the assessing officer who made the impugned order for breach of duty and negligence. Though Ms Vyas assured us that disciplinary proceedings are being initiated and would be taken to their logical conclusion against Mr B. K. Shedge, we do not think this is a matter where we should remand the assessment issue to the assessing officer for fresh determination.

56. The facts and circumstances, in this case, are pretty gross. Though the interest of revenue is vital, such interest cannot override considerations of probity and fairness in tax governance. A fair tax regime where no assessee is harassed is equally crucial. Here, we are concerned with the FY 2013-2014 assessment proceedings. If the tax quantum is huge as alleged, steps can always be taken to recover such amounts from the officials due to whose lapse such tax liability, if any, remained to be determined and recovered following the law.

57. In *Sona Builders (supra)* the Hon'ble Supreme Court was concerned with a case of failure of natural justice because hardly two to three effective days were granted to the Appellant to respond to a notice of compulsory purchase under Section 269UD of the Income Tax Act. The appropriate authority had two months to act from the end of the month in which the 37(I) form was filed. However, the appropriate authority did not act until only one week from the last available date. Then, the appropriate authority gave the appellant, in reality, only three days to respond. The Court held that this was, plainly, most inadequate. The Court noted that no documents or sale instances were furnished by the appropriate authority to the appellant, nor was any sufficient time granted to reasonably enable the appellant to oppose the notice of compulsory purchase.

58. The Hon'ble Supreme Court held that there was a gross breach of principles of natural justice because no adequate opportunity to meet the case out in the notice was granted to the appellant. Further, no remand was ordered having regard to the statutory limit within which the appropriate authority had failed to act and its failure to act in conformity with the

principles of natural justice. Only the impugned order was set aside.

59. The facts in the present case are much more egregious than those before the Hon'ble Supreme Court. Any indulgence by way of remand would not only reward the respondents with an enhanced limitation period to complete the FY 2013-2014 assessment proceedings but embolden unscrupulous tax officials to manipulate orders or otherwise mistreat the assesseees.

60. For all the above reasons, and in the peculiar facts and circumstances of the present case, we decline to remand the matter to the assessing authority after quashing and setting aside the impugned assessment order purportedly made out on 14 March 2022.

61. This Petition is accordingly allowed. The impugned assessment order, purportedly made on 14 March 2022, is quashed and set aside. The rule is made absolute in the above terms with costs assessed at Rs 50,000/- to be paid by the Respondents to the Petitioners within two months.

62. All concerned must act on an authenticated copy of this order.

**(Jitendra Jain, J)**

**(M. S. Sonak, J)**