IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF JANUARY, 2019

BEFORE:

THE HON'BLE MRS. JUSTICE S.SUJATHA

WRIT PETITION Nos.56586 – 56588/2018 (T – TAR)

BETWEEN:

M/s GLOBAL ASSOCIATES
ASSOCIATION OF PERSONS,
NO.14, CUNNINGHAM ROAD,
BANGALORE-560 052,
REP. BY Mr. H.J.SIWANI,
AGED ABOUT 59 YEARS,
S/O JUSAB KASAB SIWANI ... PETITIONER

[BY SRI V.RAGHURAMAN, ADV.]

AND:

1. UNION OF INDIA
MINISTRY OF FINANCE,
REP. BY SECRETARY,
NORTH BLOCK, NEW DELHI-110 001.

2. STATE OF KARNATAKA
REP. BY SECRETARY,
FINANCE DEPARTMENT,
VIDHANA SOUDHA, BANGALORE-560 001.

3. CENTRAL BOARD OF INDIRECT
TAXES AND CUSTOMS
ROOM NO.227-B,
DEPARTMENT OF REVENUE,
NORTH BLOCK, NEW DELHI-110 001,
REP. BY ITS SECRETARY.

4. COMMISSIONER OF CENTRAL TAX
BENGALURU NORTH GST COMMISSIONERATE,
NO.59, HMT BHAWAN,

GROUND FLOOR,
BELLARY ROAD,
BENGALURU-560 032.

5. COMMISSIONER OF STATE TAX
LGSTO 020, DIVISIONA DGSTO-1,
BENGALURU-560 034. ...RESPONDENTS

[BY SRI AMIT DESHPANDE, SENIOR STANDING COUNSEL FOR R-1 & R-3;
SRI T.K.VEDAMURTHY, AGA FOR R-2, R-4 & R-5.)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE ENTRY 5(b) OF SCHEDULE II TO THE CGST ACT, 2017 (ENCLOSED AS ANENXURE-A) AS UNCONSTITUTIONAL BEING VIOLATIVE OF ARTICLE 366(29A) OF THE CONSTITUTION DECLARE ENTRY 5(B) OF SCHEDULE II TO THE CGST ACT, 2017 (ENCLOSED AS ANNEXURE-A) BEING UNCONSTITUTIONAL LACKING LEGISLATIVE COMPETENCE AND VIOLATIVE OF ARTICLE 246A AND 265 OF THE CONSTITUTION AND ETC.

THESE PETITIONS COMING ON FOR PRELIMINARY HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is claiming the following reliefs in the writ petition filed under Articles 226 and 227 of the Constitution of India:-

(A) Writ of declaration or any other appropriate writ, order or direction to declare entry 5(b) of Schedule II to the GST Act, 2017 (enclosed as Annexure-A) as unconstitutional

being violative of Article 366(29A) of the Constitution.

(B) Writ of declaration or any other appropriate writ, order or direction to declare entry 5(b) of Schedule II to the CGST Act, 2017 (enclosed as Annexure-A) being unconstitutional lacking legislative competence and violative of Article 246A and 265 of the Constitution.

(C) Writ or direction in the nature of a Writ of Certiorari or any other writ or direction to quash the provisions of entry 3(i) read with para 2 of the Notification No.11/2017-CT(R) dt. 28.06.2017 to the extent it covers entry 3(i) (enclosed as Annexure-B) as unconstitutional being violative of Article 14, 19(1)(g), 246A, 265, 366(12A) and 366(29A) of the Constitution.

(D) Writ or direction in the nature of a Writ of Certiorari or any other writ or direction to quash the provisions of entry 3(i) read with para 2 of the Notification No.11/2017-CT(R) dt. 28.06.2017 to the extent it covers entry 3(i) (enclosed as Annexure-B) as being illegal and ultra vires the provisions of Section 15 of CGST

Act, 2017; In the alternative to 'read down' the said provisions of paragraph 2 as not being mandatory and the petitioner is allowed to value the land on the basis of actual amounts received towards the transfer of land/undivided share in the land;

(E) Writ of certiorari or any other appropriate writ, order or direction to quash the clarification dated 09.01.2018 enclosed in Annexure-C issued by the respondent No.3 as ultra vires and beyond the provisions of CGST Act, 2017 and as being violative of Articles 14 and 19(1)(g) of the Constitution of India and are therefore illegal, ultra vires and unenforceable.

2. Learned AGA appearing for the revenue has raised the preliminary objection regarding the maintainability of the writ petition. It was contended that no cause of action has emerged to the petitioner to challenge the vires of the statutory provisions as well as the Notification and Circular issued by the competent authorities. This court cannot adjudicate upon the

correctness and legality of the Notification and Circular as well as the provisions impugned, in vacuum.

3. Learned AGA placed reliance on the judgment of the Hon'ble Apex Court reported in ***(2004)6 SCC 254*** in the case of ***Kusum Ingots & Alloys Limited Vs. Union of India and another.***

4. Learned Counsel for the petitioner, placing reliance on the judgments of the Hon'ble Apex Court as well as other High Courts, submitted that the petitioner is aggrieved by the Notification and Circular issued by the respondent-authorities pursuant to Entry 5(b) of Schedule II to the Central Goods and Services Tax Act, 2017 ('Act' for short) which envisages levy of tax on construction activities and deeming the value of the land at one-third of the total amount charged. Learned Counsel argued that irrespective of any action initiated or not by the respondent-authorities, the petitioner is entitled to challenge the same and hence the writ

petition is maintainable. Host of cases are referred to, and the same are discussed infra.

5. I have carefully considered the rival submissions of the learned counsel appearing for the parties.

6. It is not in dispute that the provisions of the Act, and the Notification and Circular issued by the respondent authorities have been challenged without there being any cause of action.

7. To answer the preliminary objections raised, it is apt to collate the legal propositions holding the field with reference to the judgments cited by the learned counsel for the parties. The Hon'ble Apex Court in the case of ***Kusum Ingots*** (supra), has observed that passing of a legislation by itself does not confer any such right to file the writ petition unless a cause of action arises therefor. However, it is observed that a

distinction between a legislation and executive action should be borne in mind while determining the said question. A writ Court would not determine a constitutional question in a vacuum.

8. In ***Ambica Industries Vs Commissioner of Central Excise reported in (2007)6 SCC 769***, the Hon'ble Apex Court considering the case of ***Nasiruddin (Nasiruddin Vs. State Transport Appellate Tribunal reported in 1975(2) SCC 671) and Kusum Ingots & Alloys Limited*** observed that, keeping in view the expression "cause of action" used in Clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of *forum* conveniens may also have to be considered. The jurisdiction of the High Court based on the cause of action doctrine was the subject matter adjudicated upon.

9. In the case of ***Namit Sharma Vs. Union of India reported in (2013) 1 SCC 745*** the Hon'ble Apex Court observed that no prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void.

10. In ***Dr.Md.Rezaul Karim Vs. State of West Bengal reported in 2017 SCC OnLine Cal 11712***, the High Court of Calcutta held that the issue as to whether the fundamental right of a doctor to carry on practice in medical profession stands violated by the provisions of the West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act of 2017 or not is required to be considered. It is observed that the petitioners therein have canvassed a point of view which makes out a case to go to trial. Therefore, the petition discloses a cause of action.

11. In ***Torrent Power Limited Vs. Union of India reported in 2019-TIOL-15-HC-AHM-GST*** on which much emphasis was placed by the learned counsel for the petitioner, the Hon'ble High Court of Gujarat was considering the challenge made to summons issued based upon clarificatory circular, the subject matter of challenge in the writ petition. The contention that the challenge made to the summons is not maintainable was negated for the reason that the summons per se was not the subject matter of challenge, but the basis thereof, be that as it may, the clarificatory circular was also the subject matter of challenge.

12. In the case of ***Collector, District Magistrate, Allahabad Vs. Raja Ram Jaiswal reported in 1985 (3) SCC 1***, the Hon'ble Apex Court while examining the challenge made to the preliminary Notification issued under Section 4(1) of the Land

Acquisition Act, 1894, held that a Notification under Section 4(1) initiates the proceedings for acquisition of land and uses the expression 'shall', the mandate of the legislature becomes clear and therefore, the infirmities therein cannot be wholly overlooked on the specious plea that the courts do not interdict at the stage of a mere proposal. It is needless to observe that in the land acquisition proceedings, at the time of issuance of preliminary Notification, lands proposed to be acquired are identified along with the respective land owners and a cause of action has emerged.

13. In ***Kshama Sahakari Avas Samiti Limited Vs. State of U.P. 2006 SCC Online All 1443***, the High Court of Allahabad dealing with the preliminary objection raised that the petition is premature and is not maintainable with respect to the challenge to the Notification issued under Section 4 of the Act, 1994, observed that even though the Notification issued under

Section 4 of the Act is merely a proposal and is not a conclusive proof of acquisition, the Court may exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India to quash the same if the Notification is per se illegal. The said judgment dealing with the provisions of the Land Acquisition Act, where the lands and the respective land owners are identified as aforesaid, would not be of any assistance to the petitioner while dealing with the taxing statute.

14. In the case of ***Star India Private Limited Vs. Department of Industrial Policy and Promotion***, the High Court of Madras held that the writ petitioners therein were broadcasters owning several television channels in as many as eight languages which are indisputably being beamed within the territorial jurisdiction of that Court. The impugned clauses in the regulations challenged and the tariff order impact their content creation, generation, exploitation of content,

licensing terms and broadcast reproduction rights. In that context, the plea that the writ petitions have to be dismissed on the ground of lack of cause of action was over-ruled.

15. Hence, the judgments relied upon by the learned counsel for the petitioner are not applicable to the facts of the present case. Whereas the dictum laid down by the Hon'ble Apex Court in the case of Kusum Ingots and Alloys Ltd., has a bearing in the fact situation.

16. Enacting a legislation or issuing Notification/Circular could not confer a right to challenge unless the litigant is affected by the action initiated by the executive in furtherance of such legislation/administrative Circular/Notification more particularly, in taxing statutes. Cause of action is sine qua non for challenging such legislation/ Notification/Circular. The writ Court cannot adjudicate

upon such matters in vacuum. Adjudication of such issues sans any cause of action would be merely academic, consuming public time *de hors* the litigants waiting in serpentine queue seeking justice before the courts for the relief/s sought for, arising out of the cause of action. The petitioner involved in construction activity or works contract would not be suffice to examine the constitutional vires of the Act and the related Notification/Circular unless the cause of action emerges.

For the aforesaid discussion and observations, this Court is of the considered view that the writ petitions at this stage are premature and deserve to be dismissed as not maintainable. Ordered accordingly.

Sd/-
JUDGE

Dvr/PMR