

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP (C) No.157/2022 with
MC (WPC) No.76/2022

Date of Order: 10.05.2023

Ramona Massar

Vs.

Union of India & ors

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner : Dr. A. Saraf, Sr.Adv with
Mr. L. Khyriem, Adv
Mr. W. Jyrwa, Adv

For the Respondents : Dr. N. Mozika, DSGI with
Ms. A. Pradhan, Adv

- i) Whether approved for reporting in Law journals etc.: Yes
- ii) Whether approved for publication in press: No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The writ petition in this case questions the propriety of several orders passed against the writ petitioner under Section 147 of the Income-Tax Act, 1961 pertaining to several assessment years beginning AY 2013-14.

2. The impugned orders were passed around the same time, in or about March, 2022. This petition under Article 226 of the Constitution was carried to this Court shortly thereafter by the end of April, 2022.

3. The principal issue raised by the writ petitioner is that the writ petitioner being a member of a scheduled tribe and deriving income exclusively within a notified area was entitled to the full exemption of income under Section 10(26) of the Act and, as such, not obliged to file any return of income under Section 139(1) of the Act or her income be charged to tax.

4. Some essential facts need to be noticed for the limited purpose of the adjudication involved herein.

5. The petitioner received a notice under Section 148 of the Act dated March 27, 2021 by which the assessing officer informed the petitioner that he had reason to believe that the huge income of the petitioner had escaped assessment upon the petitioner not having been filed the return of income for AY 2013-14 within the stipulated time.

6. The reasons recorded under Section 148(2) of the Act indicated that information gathered by the assessing officer revealed that the writ petitioner had paid in excess of Rs.7.74 crore as investment in mutual funds and had high-value banking transactions or deposits in excess of Rs.30 lakh, totaling to transactions in excess of Rs.8.05 crore during the relevant year. The assessing officer went on to record that despite such huge transactions, the writ petitioner had not filed any return of income and the assessing officer had reason to believe that the income of the writ

petitioner chargeable to tax had escaped assessment for the relevant assessment year. The assessing officer asserted that the escapement was on account of the omission or failure on the part of the writ petitioner herein to fully disclose material facts necessary for the purpose of assessment.

7. The writ petitioner did not respond to the notice of March 27, 2021 and the matter was taken up for scrutiny assessment in terms of Section 147 of the Act read with Section 144 thereof. A further notice was issued under Section 142(1) of the Act on July 12, 2021 requiring the petitioner to submit her response with supporting documents on or before July 28, 2021. Despite due receipt of such further notice, no response emanated from the writ petitioner.

8. The matter was thereafter transferred to the Regional Faceless Assessment Centre (RFAC) under the Faceless Assessment Scheme, 2019 and a detailed questionnaire was issued to the petitioner in December, 2021. Despite due receipt of such questionnaire, the writ petitioner did not respond thereto. A further notice was issued under Section 142(1) on January 5, 2022 and served on the petitioner, but the petitioner ignored the same.

9. It was only after a subsequent notice was physically served on the petitioner and a show-cause notice under Section 144 of the Act was

issued that the petitioner furnished, on February 2, 2022, a copy of an Indian Oil Corporation Limited LPG distributorship letter of intent of June 16, 1999, a certificate of importer-exporter code, a caste-cum-residency certificate and nothing else. A further notice followed under Section 142(1) of the Act which expressly provided the following:

“Your eligibility for exemption of income can be considered only on filing your return of income and other relevant information along with supporting evidences to justifying (*sic*) your claim.”

10. The writ petitioner then responded by informing the assessing officer that investments in mutual funds had been made from a certain ICICI bank account. She also indicated that she was an authorised distributor of LPG gas cylinders functioning in Nongstoin and, in addition, dealt with coal and limestone export at Borsora in Meghalaya. The petitioner also furnished details of five bank accounts that she maintained. In addition, the writ petitioner claimed that she belonged to the Khasi scheduled tribe and was a resident of Shillong and her income arose only in Meghalaya which is a Sixth Schedule State. She asserted that she did not file any return of income for AY 2013-14 “as the same is exempted from income-tax under Section 10(26)”. She forwarded her scheduled tribe certificate along with her reply and indicated that she did not maintain any books of accounts. She, however, offered to furnish her

bank account statements but suggested that since such records were voluminous, it was not convenient to append the same with her reply.

11. On the basis of such material before the relevant authority, an order came to be made on March 22, 2022 finding that the writ petitioner herein was liable to pay a huge amount by way of income-tax.

12. In similar circumstances, the incomes of the petitioner for several other assessment years were also taken up for consideration and orders passed under Section 147 of the Act on similar lines.

13. At the outset, when this writ petition was received and even at the time that several adjournments were obtained by the petitioner, a submission had been consistently made on behalf of the Department to the effect that the orders impugned were amenable to appeal and, as such, this Court should not entertain the petition under Article 226 of the Constitution. However, since it was submitted on behalf of the petitioner that a pure question of law was involved, the matter languished and was ultimately taken up for consideration of the relevant question of law.

14. According to the petitioner, the orders impugned are liable to be set aside as being completely without jurisdiction. The petitioner asserts that in view of the definition of “total income” in Section 10(45) of the Act and the wording of Section 10(26) of the Act, once a person perceived his total income in a year to be exempted under Section 10(26)

of the Act, such person was not obliged to file any return of income under Section 139 of the Act. It is pointed out on behalf of the petitioner that at the relevant point of time, Section 139 had not undergone the change by which, notwithstanding any exemption under Section 10 of the Act, when certain parameters were met, a person was obliged to file a return of income and claim exemption. It is also pointed out on behalf of the petitioner that Section 139(4C) of the Act makes a distinction between persons entitled to certain kinds of exemption under Section 10 of the Act and other persons also entitled to exemption. The petitioner submits that it is only in the cases of the persons specified in Section 139(4C) of the Act that when the total income is taken into account, notionally the exemption under Section 10 of the Act provided to such person is not taken into consideration and the requirement of filing a return of income is without the exemption being considered.

15. The point that the petitioner seeks to make is that since only certain classes of exemptees under Section 10 of the Act are obliged to file a return of income, subject to the total income exceeding the limit not chargeable to tax and without taking into account the exemption granted under Section 10, other persons who are beneficiaries of the exemption provisions are not required to file any return of income as long as they can bona fide maintain that the entirety of their total income stood exempted,

whether under Section 10(26) of the Act or any like provision. The logical question that such argument throws up is that, without any return of income being filed, how can it be verified that the entirety of the total income earned in the year was liable to be exempted or not.

16. A fundamental issue is raised, but it may not be necessary in the present context to look into the same. If the petitioner is understood correctly, the petitioner must be seen to suggest that where an exemptee under Section 10(26) of the Act perceives the entire income accrued to such person in an assessment year to be exempt by virtue of Section 10(26) of the Act, Section 139(1) of the Act would not come into play for such person to be required to file a return of income. In a sense, the petitioner seeks to suggest that as long as the relevant person is satisfied that he is not liable to pay any income-tax by virtue of his total income being exempted as per his perception, he cannot be touched.

17. As a continuation of such line of reasoning, it is submitted on behalf of the petitioner that if there is any lacuna in a taxing statute, it is not for the Court to bridge the same or read words into a provision that do not exist. The petitioner insists that since the expression “total income” used in Section 139(1) of the Act has to be given the same meaning as such expression has been defined in Section 10(45) of the Act, the perception of a person that his income is exempt is enough to not require

such person to file any return of income. Though the Department seeks to suggest that a person cannot be both the judge and the jury in his own cause and once the total income exceeds the income that is not chargeable to tax, such person should file a return under Section 139(1) of the Act and claim the entirety of the income to be exempted, so that the Department can verify the claim, the greater emphasis laid by the Department is on the alternative remedy which is available to the petitioner since a regular appeal in this case could have been carried under Section 246A of the Act.

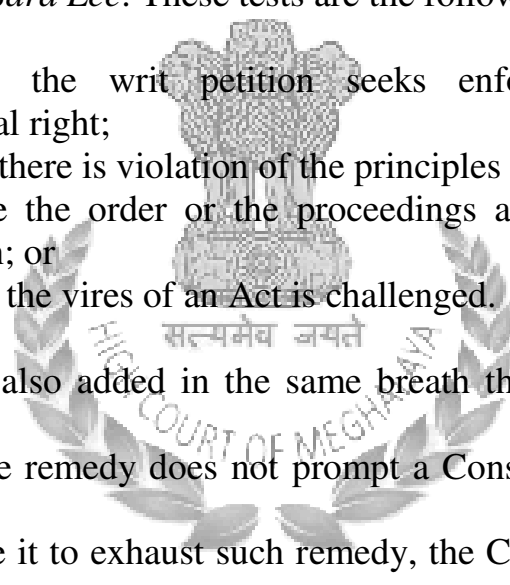
18. At this stage, two objections are taken on behalf of the writ petitioner to the effect that, ordinarily, if a preliminary issue as to whether the matter should remain in this Court or the petitioner be required to pursue any other alternative remedy arises, such issue should be decided at the initial stage and within a few days of the institution of the matter in Court and not be a consideration available at the final hearing. The second point made on behalf of the petitioner in such regard is by referring to a recent judgment of the Supreme Court reported at 2023 SCC Online SC 95 (*Godrej Sara Lee v. Excise and Taxation Officer*) where a distinction is made between a petition not being entertained on the ground of there being an alternative remedy and a petition not being maintainable.

19. It is elementary that when a petition is not maintainable, the merits of the matter, despite the highest case in equity that may be brought by the petitioner, cannot be gone into. However, when a defence of alternative remedy is raised, the Court exercises a kind of self-restraint on itself and leaves the parties to work their remedies out before the regular forum rather than allow its extraordinary jurisdiction, particularly under Article 226 of the Constitution, to be invoked in an everyday case. Thus, it is apparent that when a plea of alternative remedy is taken to resist a petition under Article 226 of the Constitution, it cannot be said that the petition is not maintainable; however, it is a mistake that is committed by courts across the country by referring to petitions which could have been carried to an alternative forum to be described as not maintainable, in a manner of loose speaking, under Article 226 of the Constitution. By the very use of the expression “alternative remedy” it implies that there could be two forms of the similar remedy available to the petitioner; whereupon the writ court exercises self-restraint and nudges the petitioner to approach the regular forum, unless there are some classical exceptions.

20. There are certain cardinal tests which are to be applied in course of the court exercising self-restraint and requiring the parties to go to the regular forum. These tests have been noticed in several decisions

and, quite akin to a situation under Order VII Rule 11 of the Code of Civil Procedure, 1908 and in cases where a first information report may be quashed for it not indicating the ingredients of any offence or a show-cause notice being challenged as without jurisdiction, the tests have been comprehensively noticed in the judgment reported at (1998) 8 SCC 1 (*Whirlpool Corporation v. Registrar of Trade Marks*).

21. Indeed, the four criteria from *Whirlpool* have been set out in the judgment of *Godrej Sara Lee*. These tests are the following:

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- (i) Where the writ petition seeks enforcement of any fundamental right;
 - (ii) Where there is violation of the principles of natural justice;
 - (iii) Where the order or the proceedings are wholly without jurisdiction; or
 - (iv) Where the vires of an Act is challenged.

22. It may be also added in the same breath that merely because there is an alternative remedy does not prompt a Constitutional Court to ask the parties before it to exhaust such remedy, the Court must consider whether the remedy is also efficacious.

23. In a manner of speaking, every matter carried to a Court is for the assertion of some kind of fundamental right. For example, the moment a petitioner asserts any impugned action or order to be unfair or unreasonable, Article 14 of the Constitution is immediately invoked. However, merely because a person asserts a fundamental right, it is no ground for such person bypassing the usual process or procedure and

invoking the extraordinary jurisdiction of a High Court under Article 226 of the Constitution. On the other hand, when a Constitutional Court finds that an order has been made which is contrary to all canons of natural justice or when an order is made wholly without jurisdiction, the Constitutional Court would not allow the suffering of the party complaining before it to continue by sending such party to the regular forum. But the nature of the fault complained of must be obvious and apparent, not merely an arguable case or a possible point of view. The error of jurisdiction or erroneous procedure adopted must be palpable and inexcusable and going to the root of the matter.

24. Indeed, it is the nature of the challenge which is of importance. In the present case, the rather elongated narration at the outset was necessary to demonstrate that this cannot be a case of violation of any principle of natural justice. This is a case where an arrogant petitioner refused to comply with every request of the Department and only suggest that since she was a member of scheduled tribe, she was willy-nilly above the law.

25. It is also not a case of authority having been exercised without jurisdiction. Notices were issued by referring to the relevant provisions. On the face of it, such provisions permitted the exercise to be carried out in the way it was sought to be. At any rate, if the writ petitioner perceived

the very notices to be without jurisdiction, the writ petitioner ought to have challenged the authority to issue such notice at a much earlier stage than taking a chance to participate in the proceedings and seeking to challenge only the outcome thereafter.

26. This case also does not involve any challenge to the vires of any provision. There is a huge chasm between the interpretation of a provision and the challenge to the legality of a provision. When it is a challenge to a provision, a Constitutional Court, if prima facie satisfied of an element of merit in the challenge, may not relegate the parties to the usual forum since, if the alternative forum is a tribunal, it may not have the authority even to go into the question of vires. However, by merely challenging the vires of a provision without there being any element of substance therein, no disingenuous knave can bypass the regular procedure and insist on the Constitutional Court to adjudicate the lis carried by him.

27. In the present case, a regular appeal is maintainable and the submission on behalf of the writ petitioner to the effect that such regular appeal will be confined only to the order passed under Section 147 of the Act and cannot be enlarged to look into the factual aspects going into the making of the order, cannot be countenanced. Indeed, when an appeal is of limited scope, the appellate provision will expressly provide therefor as

in cases where appeals are limited to questions of law and facts are excluded. There is no expression in the entirety of Section 246A of the Act to construe the power of the appellate authority to be limited only to Section 147 and not take up the fundamental issue that is sought to be raised in the present proceedings.

28. Finally, the writ petitioner appeals to the Court to exercise its discretion since the primary premise of the argument falls within a narrow campus. The petitioner appeals that it would be better if the legal question raised were to be decided and the matter left to the Department for the Department's further consideration.

29. Ordinarily, there is an element of bona fides which is taken into consideration by a writ court, particularly when allowing its discretion to be exercised in an extraordinary manner. Quite frankly, the conduct of the writ petitioner herein does not inspire any confidence and does not merit any discretion to be exercised in her favour. Her income during the relevant assessment year of 2013-14 referred to above was in excess of Rs.8 crore. All that was required of her upon receiving the several notices was to demonstrate that such income, in its entirety, was exempted under Section 10(26) of the Act. Yet, notice after notice went unheeded till the petitioner furnished the details of her bank accounts, claimed that she had invested and reinvested in mutual funds and glibly submitted that she

maintained no accounts despite maintaining that she was an authorised distributor of LPG gas cylinder and an exporter of coal and limestone and the like. Such conduct on the part of a citizen would not excite to a Constitutional Court to exercise any discretion in her favour. Indeed, the interpretation of a provision of the statute and the considerations going into allowing an extraordinary remedy to be pursued may sometimes depend primarily the conduct of a party approaching the Court or an element of prejudice suffered by such party. In this case, neither the conduct nor the alleged prejudice suffered by the petitioner herein prompts the Court to exercise any discretion to receive the matter and adjudicate the same without leaving the petitioner free to approach the regular remedy in accordance with law.

30. It is, however, recorded that since the matter had been pending in this Court for a substantial period of time, whatever may have been the reasons therefor, the Department should not take point of limitation before the appellate forum; or else, even if such objection is taken, the appellate forum deals with the objection with a degree of latitude towards the petitioner herein.

31. It is made clear that the legal issues raised on merits have not been gone into and it will be open to the appellate forum to decide the same in accordance with law.

32. WP (C) No.157 of 2022 is disposed of without going into the merits thereof as aforesaid and by leaving the petitioner free to approach the appellate forum. The latitude on the ground of delay will be exercised in the petitioner's favour if the appeal is carried within four weeks from date.

33. MC (WPC) No.76 of 2022 is disposed of.

34. There will be no order as to costs.

(W. Diengdoh)
Judge

Meghalaya
10.05.2023
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(Sanjib Banerjee)
Chief Justice

