

GAHC020006032023

2024:GAU-NL:594



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
KOHIMA BENCH

Case No. : WP(C)/255/2023

MR. VIZOVOLIE NYEKHA
S/O KROSAI NYEKHA
PRESENT R/O LIRIE COLONY, KOHIMA-797001, NAGALAND

VERSUS

UNION OF INDIA AND 4 ORS
REPRESENTED BY THE FINANCE AND REVENUE,128-A/NORTH
BLOCK, NEW DELHI-110001

2:THE CHIEF COMMISSIONER OF INCOME TAX
N.E. REGION
AAYAKAR BHAVAN
G.S. ROAD
CHRISTIAN BASTI GUWAHATI-781005-ASSAM

3:THE ASSESSING OFFICER
INCOME TAX DEPARTMENT
NATIONAL FACELESS ASSESSMENT CENTRE
JAWAHARLAL NEHRU STADIUM
PRAGATI VIHAR
NEW DELHI-110003

4:INCOME TAX OFFICER(ITO)
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
GOVT. OF INDIA
DIMAPUR WARD
AYAKAR BHAVAN
PURANA BAZAAR
NEW COLONY

DIMAPUR-797112
NAGALAND

5:COMMISSIONER OF INCOME TAX (APPEALS)
MINISTRY OF FINANCE
INCOME TAX DEPT. GOVT. OF INDIA
AAYAKAR BHAVAN
G.S ROAD
CHRISTIAN BASTI
GUWAHATI-ASSA

Advocate for the Petitioner : NEITEO KOZA, K ARKHA ACHUMI, L B
JUNGIO, LIMIKA KINIMI

Advocate for the Respondent : CGSC,

Date of Hearing and Judgment : **13.11.2024**

BEFORE
HON'BLE MR. JUSTICE SOUMITRA SAIKIA
JUDGMENT & ORDER (ORAL)

Heard Ms. Neiteo Koza, learned counsel for the petitioner and Mr. S. Chetia, learned Senior Standing Counsel appearing for the Income Tax Department who appeared before this Court through the Video Conferencing facility made available by the Registry of this Court, assisted by Mr. K. Nagi, learned counsel. Ms. Asi Kire, learned counsel appears on behalf of Mr. Yangerwati, learned CGC.

2. This writ petition is directed against the Assessment Order dated 31.03.2022, whereby for the Assessment Year 2015-2016, proceedings initiated under Section 147 pursuant to issuance of notice under Section 148 of the Income Tax Act the assessment was completed by the Assessment Officer in respect of the petitioner and a total amount of

Rs. 5,28,13,970/- (Rupees Five Crore Twenty-eight Lakhs Thirteen Thousand Nine Hundred and Seventy) including tax, interest and penalty and arrears were found to be chargeable against the writ petitioner and a Demand Notice to that effect was raised.

3. The petitioner, aggrieved by the Assessment Order filed an appeal before the Commissioner's Office and the counsel for the petitioner states that the appeal is presently pending but no effective order has been passed thereon. Under such circumstances, the writ petition has been filed praying for setting aside the Assessment Order dated 31.03.2022 as well as the consequential Demand Notice.

4. Learned Senior Standing Counsel for the Income Tax Department, Mr. S. Chetia, submits that since there is already an appeal which is preferred against the Assessment Order and the same is presently pending, the writ petition ought not to have been filed by the petitioner as he had already taken recourse to the statutory alternative remedy prescribed. Under such circumstances it is submitted that during the currency of the appeal where no order has been passed, writ petition is not maintainable and the same should, therefore, be dismissed as it is devoid of any merit.

5. Learned counsels for the parties have been heard and pleadings have been carefully perused.

6. The Department has also filed the affidavit and submitted that the appeal is pending and during the pendency of the appeal the writ petition ought not be entertained.

7. Learned counsel for the petitioner on the other hand also urges before the Court that the petitioner is an indigenous person belonging to a declared Scheduled Tribe of the State of Nagaland, namely Chakhesang (Naga) Tribe. He submits that the petitioner is a permanent resident of Chesezu Village who is a registered Electrical Contractor Class-I with registration No. CEI/CON/54, registered under the Nagaland Electrical Licensing Board, Electrical Inspectorate, Nagaland, Kohima. The learned counsel for the petitioner has also referred to the certificate of Scheduled Tribe issued by the Additional Deputy Commissioner, Phek. It is submitted that the petitioner is exempted from payment of Income Tax under Section 10(26) of the Income Tax Act. Learned counsel, therefore, submits that the assessment in the first place ought not to have been proceeded against the petitioner as he is a member of a Scheduled Tribe belonging to the State of Nagaland and which fact is not disputed by the respondents. He, therefore, submits that under such circumstances he has challenged the Assessment Order dated 31.03.2022, whereby the Assessing Officer completed assessment under Section 148 of the Income Tax Act read with Section 144B.

8. Be that as it may, learned counsel for the petitioner does not dispute his averments made in the writ petition that the petitioner has already availed of the statutory remedy of preferring an appeal before the Statutory Authority, namely the Commissioner (Appeals) of the Department and the present appeal is still pending. Such averments and contentions raised before the Court by the petitioner are also not disputed by the learned Senior Standing Counsel appearing for the Income Tax Department.

9. The Income Tax Act, 1961 is a complete code in itself against the Assessment Orders passed by the appropriate Assessing Authority. There is a provision for filing an appeal before the Appellate Authority, namely the jurisdictional Commissioner (Appeals). As is evident from the pleadings and also from the submissions of the learned counsels for the parties against the Assessment Order 31.03.2022 passed by the jurisdictional Assessing Officer, the petitioner has already approached the statutory authority, namely Commissioner (Appeals) by filing an appeal against the said Order. The appeal is still pending disposal before the Appellate Authority. While there is no quarrel with the proposition that extraordinary powers of High Court under Article 226/227 cannot be girdled by statutes, however, the powers exercised by the Courts are subject to such restrictions which are self imposed by the constitutional courts where there is a prescribed statutory forum for redressal of the grievance of a litigant, then the constitutional court will not exercise its jurisdiction to redress the grievance of the petitioner, more particularly where the litigant has already approached the said statutory prescribed forum and the matter is presently pending disposal there. It has been the consistent view of the Apex Court and followed by several High Courts in the country including this Court that where there are statutory remedies prescribed originally the constitutional court will not exercise its jurisdiction to interfere in such matters. A reference in this case may be made to the Judgment of the Apex Court rendered in ***Chhabil Dass Agarwal***, reported in **(2014) 1 SCC 603**. In this case the Apex Court, while dealing with a judgment of a High Court interfering with the Assessment Order instead of filing the statutory remedy of a statutory

appeal before the prescribed Appellate Authority in the appeal preferred by the Department, the Apex Court after referring to the earlier judgments of the Apex Court had authoritatively held 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 constitution under which the action complained of has been taken itself contains the mechanism for redressal of grievance. The Apex Court held that a remedy before the constitutional court in the form of a writ is certainly available if the available alternative remedy is ineffectual and none efficacious. The relevant paragraphs of the Judgment are extracted below:-

11. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under [Article 226](#) despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under [Article 226](#). (See: [State of U.P. vs. Mohammad Nooh](#), AIR 1958 SC 86; [Titaghur Paper Mills Co. Ltd. vs. State of Orissa](#), (1983) 2 SCC 433; [Harbanslal Sahnia vs. Indian Oil Corpn. Ltd.](#), (2003) 2 SCC 107; [State of H.P. vs. Gujarat Ambuja Cement Ltd.](#), (2005) 6 SCC 499).

12. The Constitution Benches of this Court in [K.S. Rashid and Sons vs. Income Tax Investigation Commission](#), AIR 1954 SC 207; [Sangram Singh vs. Election Tribunal, Kotah](#), AIR 1955 SC 425; [Union of India vs. T.R. Varma](#), AIR 1957 SC 882; [State of U.P. vs. Mohd. Nooh](#), AIR 1958 SC 86 and [K.S. Venkataraman and Co. \(P\) Ltd. vs. State of Madras](#), AIR 1966 SC 1089 have held that though [Article 226](#) confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ 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 principles of natural justice or procedure required for decision has not been adopted.

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

“12. In [Thansingh Nathmal v. Supdt. of Taxes](#), AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

“7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under [Article 226](#) trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under [Article 226](#) of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.”

13. In [Titaghur Paper Mills Co. Ltd. v. State of Orissa](#), (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

“11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in [Wolverhampton New Waterworks Co. v. Hawkesford](#), 141 ER 486 in the following passage: (ER p. 495)

‘... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.’

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In [*Mafatlal Industries Ltd. v. Union of India*](#), (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

"77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

14. In [*Union of India vs. Guwahati Carbon Ltd.*](#), (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed:

*"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in [*Munshi Ram v. 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."

15. Thus, while it can be said that this Court has recognized 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, [*Titagarh Paper Mills*](#) case 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.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under [Article 226](#) of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In [Ram and Shyam Co. vs. State of Haryana](#), (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under [Section 148](#) of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

10. Under such circumstances, the petitioner having availed all the statutory remedy, this Court, without the said appeal being disposed of and more particularly when the said appeal was filed prior to filing of the present writ petition, this Court is disinclined to accept the contention of the writ petitioner. The petitioner has not raised this contention before the Court by referring to the relevant provisions and/or the orders passed by the departmental authorities that the appeal before the Appellate Authority is not efficacious and will not provide adequate relief as prayed

for by that forum. It appears from the facts urged that the only reason for approaching this Court is to evade payment of the statutory deposit which is prescribed under the Act while preferring the appeal. Such attempt may be made by the petitioner cannot be permitted, more particularly in the manner sought to be done by taking recourse to filing a writ petition before this Court during the pendency of the statutory appeal already filed by the petitioner. Section 249(4) prescribes that where an appeal is filed before the Appellate Authority it shall not be entertained unless the Assessee has paid the tax due on the income return by him wherein return is filed and where no returns are filed the Assessee shall pay an amount equal to the amount of tax payable by him. However, there is a proviso that upon an application made by the appellant before the Joint Commissioner (Appeals) or the Commissioner (Appeals) as the case may be for any good and sufficient reasons be recorded he may be exempted from the operation of the provisions of that case. As such, the statute provides for filing an application for exemption of payment of tax before the appeal can be heard. The petitioner is entitled to take recourse to that if so advised. Any application that may be filed by the petitioner will necessarily be required to be considered appropriately in terms of the proviso to Section 249(4) of the Income Tax Act and pass appropriate orders. The contentions raised by the writ petitioner before this Court can also be raised before the Appellate Authority which is presently in seisin of the matter. The petitioner is granted liberty to file necessary applications before the Commissioner, Income Tax Appeal, raising all grounds to assail the Assessment Order dated 31.03.2022 before the Commissioner (Appeals). The Commissioner (Appeals) in its turn will proceed to hear

and dispose of the appeal filed by the petitioner and pending before the said authority as per the provision of law. The petitioner is permitted 2 (two) weeks' time to file all necessary papers as may be advised before the Commissioner (Appeals) in support of its contentions assailing the Assessment Order dated 31.03.2022. The Commissioner (Appeals) will thereafter proceed to hear the matter as per the provision of law and pass appropriate orders thereon.

10. Writ petition accordingly stands disposed of in terms of the above.

11. The interim order passed earlier will continue for a further period of 3 (three) weeks from today to enable the petitioner to file necessary application/documents before the Commissioner (Appeals) seeking exemption from the statutory deposit for filing the appeal.

JUDGE

Comparing Assistant