

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 02.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.342 of 2016

and

CMP No. 5121 of 2016

1. The Commissioner of Service Tax
Service Tax III Division
"Newry Towers", Ground Floor
Plot No. 2054-I, 1st Block
2nd Avenue, 2nd Main Road
Anna Nagar,
Chennai - 600 040.
2. The Assistant Commissioner of
Service Tax, Service Tax III Division
"Newry Towers", Ground Floor
Plot No. 2054-I, 1st Block
2nd Avenue, 2nd Main Road
Anna Nagar,
Chennai - 600 040. Appellants/Respondents

-vs-

M/s. Shapoorji Pallonji
Infrastructure Capital Co.Pvt.Ltd.,
Sreyas Virat, No.14, I Floor
III Cross Street, Raja Annamalaipuram
Chennai - 600 028

Rep. by Mr. K. Venkata Rao. Respondent/Petitioner

Writ Appeal filed under Clause 15 of the Letters Patent, against the order dated 04.02.2016 in W.P.No. 36494 of 2015.writ Petition filed u/a 226 of the constitution of India praying this court to issue a writ of certiorari to call for the records comprised in the impugned notice bearing Ref. C.No. IV/09/103/2015-ST III ADJ dated 12.10.2015 issued by the Respondent No.1 and quash the same as illegal arbitrary and violative of Articles 14 19(1)(g) and 300A of the Constitution of India and in light of the order of this Honourable Court dated 02.04.2014 passed in W.P.9496 of 2014

For Appellants : Mr.Sundareswaran
Senior Panel Counsel
Mr. Sajith Ghosh for

For Respondent : Mr. Sujith Ghosh
for Mr.Arun Karthik Mohan

JUDGMENT

[Judgment of the Court was made by D. KRISHNAKUMAR, J.]

Before the Writ Court, the respondent herein challenged the impugned notice bearing Ref. C.No.IV/09/103/2015/ST-III ADJ dated 12.10.2015 issued by the Commissioner of Service Tax, Service Tax III Division, the first appellant herein and sought to quash the same, in the light of the order of this Court dated 02.04.2014 passed in W.P. No. 9496 of 2014.

2. Facts of the case are as follows :-

The respondent Company is a service provider, registered with the Appellant Department, under 'maintenance or repair services'. The respondent company was paying service tax from 01.07.2012 to 31.12.2013 under protest, and thereafter the respondent company stopped payment of service tax to the department. Hence, the Assistant Commissioner of Service Tax/ 2nd appellant herein sent a communication vide C.No. IV/16/13/2014/Gr.VI dated 28.03.2014, directing the respondent company to remit service tax for the months from January 2014 to March 2014, for the reasons stated in the notice, failing which, appropriate action would be initiated for recovery. On receipt of the aforesaid notice dated 28.03.2014, the respondent company filed W.P. No. 9496 of 2014 before this Court, challenging the notice. By order dated 02.04.2014, the writ petition was allowed.

3. Pursuant to the orders passed by the Writ Court, the respondent company filed a reply on 17.04.2014, to the second appellant, by raising various objections to the said notice. On receipt of particulars received from the respondent company, the second appellant fixed the quantum of service tax payable by the appellant, was ascertained as Rs.65,35,796/-. As per the Circular No.80/1/ 2005-ST dated 10.08.2005 of the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, powers of adjudication on various authorities have been specified, depending upon the monetary limit. Since the quantum of service tax payable by the respondent company was above Rs.50,00,000/-, the notice for demand should be issued only by the first appellant. As soon as the appellant came to know of the said circular dated 10.08.2005, the department filed a Miscellaneous Petition in

W.P. No. 9496 of 2014 on 09.10.2015, seeking modification of the order dated 02.04.2014. However, on 12.10.2015 a Show cause notice No.65/2015 in C. No. IV/09/103/2015-ST.III Adj., was issued by the first appellant, calling upon the respondent company, as to why service tax amounting to Rs.65,35,796/- should not be demanded from them, for the period January 2014 to March 2014. Aggrieved by the said show cause notice, the respondent company filed W.P. No.36494 of 2015. During the course of hearing of the said writ petition, the appellant requested the Court to list M.P. No.1 of 2015 in W.P. No.9496 of 2014, for hearing, but the same was not done, due to paucity of time. On 04.02.2016, after hearing both sides, Writ Court allowed W.P.No.36494 of 2015 and set aside the show cause notice dated 12.10.2015. Challenging the same, department has filed the instant appeal before this Court.

4. Learned Senior Standing Counsel for the appellants submitted that Section 73 of Chapter V of Finance Act, 1994, authorises the Central Excise officers to issue notice, demanding specified amount of service tax. Depending upon the monetary limit and vide paragraph 2.2 of Circular No. 80/1/2005-ST dated 10.08.2005, based upon the Notification No.30/05-ST dated 10.08.2005 and the subsequent Circular No.130/12/2010-ST dated 20.09.2010, Central Excise Officers, namely, Assistant Commissioner, Deputy Commissioner, Joint Commissioner, Additional Deputy Commissioner, as the case may be, are authorised by the Board to decide the issuances of notices. He further submitted that Section 2(a) of Central Excise Act, 1944, defines "Adjudicating authority" as an authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, Commissioner of Central Excise (Appeals) or Appellate Tribunal. The Government of India, Ministry of Finance, Central Board of Excise and Customs have issued Circular in F.No.341/31/2005-TRU, prescribing monetary limits, in the matter of exercising adjudicating powers, by Central Excise Officers. In the meantime, a Show cause notice No.65/2015 in C.No. IV/09/103/2015-ST.III Adj. dated 12.10.2015, was issued by the first appellant, calling upon the respondent company, as to why service tax amounting to Rs.65,35,796/- should not be demanded from them, for the period January 2014 to March 2014. Challenging the said show cause notice, W.P.No.36494 of 2015 has been filed by the respondent company.

1. Learned counsel further submitted that the impugned show cause notice issued by the first appellant is in accordance with the provisions of the Circular No. 80/1/2005-ST dated 10.08.2005 based upon.
2. In the Notification No.30/05-ST dated 10.08.2005 and the subsequent Circular No.130/12/2010-ST dated 20.09.2010. In

support of the above submissions, learned counsel for the appellant relied on the judgments of the Hon'ble Supreme Court, in the case of Metal Forgings vs. Union of India, reported in 2002 (146) ELT 24 SC and of the Delhi High Court, in the case of J.K. Synthetics Limited vs. Union of India, reported in 2009 (234) ELT 417 (Delhi), etc. Hence, he prayed to set aside the order dated 04.02.2016 passed by the Writ Court in W.P. No.36494 of of 2015.

6. Per contra, learned counsel for the respondent company submitted that the contention of the department is not correct and raised a preliminary objection that the jurisdiction of the appellate Court is confined only to adjudication of the correctness of the order impugned therein. Since the order impugned in this appeal, is an order passed by the learned Single Judge of the Writ Court in W.P. No. 36494 of 2015 on 04.02.2016, this Court does not possess any jurisdiction to annul or modify or invalidate or overturn the earlier decision of the Writ Court in W.P. No. 9496 of 2014 dated 02.04.2014, which is not the subject matter of the present writ appeal and hence challenging the correctness of the subsequent order passed by the Writ Court, is beyond the scope of the present appeal.

7. Heard Mr.Sundareswaran, learned Senior Panel Counsel for the appellant department and Mr.Arun Karthik Mohan, learned counsel for the respondent company and perused the material on record.

8. The present Appeal has been filed against the order passed by the Writ Court, in W.P. No. 36494 of 2015 dated 04.02.2016. Writ Petition has been filed challenging the show cause notice in C.No.IV/09/103/ 2015/ST-III ADJ dated 12.10.2015 issued by the first appellant. The respondent company is engaged in generation of 105.66 MW electricity in the power plant of M/s. Samalpatti Power Company Private Limited, situated at Parandapalli Village, Pochampalli Taluk of Krishnagiri District. During the month of March 2014, a demand letter dated 28.03.2014 was issued by the 2nd appellant, requiring the respondent to deposit service tax, for the period from January to March 2014, for generating electricity. The aforesaid demand letter dated 28.03.2014 has been challenged before this Court in W.P. No. 9496 of 2014 on the ground that coercive measures to recover service tax cannot be taken, without issuing a formal show cause notice. With the consent of both the parties, W.P.No.9496 of 2014, has been taken up for hearing on 02.04.2014. After hearing the submissions of the learned counsel for both sides and at the stage of admission itself, the following order has been passed :-

"7. It is the case of the petitioner company that they are not liable to pay

service tax as the activity done by them amounts to the process of manufacture. But it is the contention of the respondent that the petitioner company has not even submit their objections that they are not entitled to pay service tax.

8. In such view of the matter, the petitioner company is directed to submit their objections as to how they are not liable to pay the service tax, by treating the impugned proceedings as a show cause notice, within a period of three weeks from the date of receipt of a copy of this order. Thereafter, the respondent shall consider the same and pass orders in accordance with law, after giving an opportunity of personal hearing to the petitioner company. The respondent shall not take any coercive steps to recover the service tax till the final orders are passed.

9. The writ petition is disposed of, with the above direction. No costs. Consequently, connected Miscellaneous Petitions are closed. "

9. Pursuant to the above order passed in W.P.9496 of 2014, the second appellant sought for details from the respondent company, on various dates. On receipt of the said particulars, the appellant department fixed the quantum of service tax to be payable by the respondent company as Rs.65,35,796/-. Since the quantum of service tax payable by the respondent company exceeded Rs.50,00,000/-, in terms of Circular No.80/1/2005-S.T dated 10.08.2005, the department was of the view that the notice for demand ought to have been issued only, by the first appellant. Hence, the department filed a Miscellaneous Petition before this Court, in M.P. No.1 of 2015 on 09.10.2015, seeking to modify the order dated 02.04.2014 passed in W.P. No. 9496 of 2014. In the meanwhile, the first appellant issued a show cause notice No.65/2015 on 12.10.2015 in C.No. IV/09/103/2015-ST.III Adj. Assailing the impugned show cause notice, the respondent company filed W.P. No. 36494 of 2015 before the writ Court. The department filed the counter affidavit in the writ petition. While the writ petition was taken up for hearing on 27.01.2016, learned counsel for the department has requested the Court to list the Miscellaneous petition filed by them, for modifying the order made in W.P. No. 9496 of 2014, to be heard along with the present writ case. The aforesaid Miscellaneous petition was not listed on 04.02.2016. However, the Writ Court allowed the Writ Petition No.36494 of 2015, on 04.02.2016, observing as follows :-

"9. When the respondent is bound by the directions given by this Court and when this Court had directed the petitioner to submit their objections by treating the impugned proceedings as show cause notice and when this Court directed the respondent to consider the same and pass orders in accordance with law, after giving an opportunity of personal hearing to the petitioner company, the issuance of the 2nd show cause notice, contrary to the direction of this Court in W.P. No. 9496 of 2014, is liable to be set aside.

10. It is also brought to the notice of this Court that the respondents have not filed any appeal, as against the order passed in W.P. No.9496 of 2014. Even the application for modification of the order was filed after a lapse of one and half years from the date of passing of the order in W.P. No. 9496 of 2014.

11. The respondent cannot violate the orders of this Court on the guise of filing an application for modification. If the respondents are really aggrieved over the order passed by this Court in the earlier Writ Petition in W.P. No. 9496 of 2014, they should have filed modification petition in the earliest point of time. As already stated, even the modification petition has not yet been numbered and brought before the Court for hearing."

10. In the abovesaid circumstances, the appellants have prayed to provide them, an opportunity, to establish their case, as stated supra, in the modification petition filed in W.P. No. 9496 of 2014, before the Writ Court, as the subsequent order passed by the writ court in W.P. No. 36494 of 2015 is contrary to the notification and the decisions of the Hon'ble Supreme Court. Learned counsel for the respondent has objected to the above contentions.

11. Learned counsel for both the parties made submissions on the merits of the case, without prejudice to the above preliminary objection. However in the notification of the department, it is clearly stated that depending upon the monetary limit, Central Excise Officers have been authorised by the Board to issue notices under Section 73 of the Finance Act, 1994. Circular No. 80/1/2005-ST dated 10.08.2005, based upon the Notification No.30/05-ST dated 10.08.2005, has been

subsequently modified vide Circular No.130/ 12/2010-ST dated 20.09.2010. Section 73 of the Finance Act, 1994, mandates determination of specific amount in the notice. In support of his submission, learned counsel for the department relied on paragraph 10 of the judgment in Metal Forgings vs. Union of India, reported in 2002 (146) ELT 24 SC, which reads as follows :-

"10. It is an admitted fact that a show cause notice as required in law has not been issued by the revenue. The first contention of the revenue in this regard is that since the necessary information required to be given in the show cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned counsel for the revenue. Herein we may also notice that the learned Technical Member of the tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show cause notices by the appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act. Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the revenue must fail. "

12. Since, the quantum of demand has not been specified in the notice dated 28.03.2014, subsequent to the orders of this Court in W.P. No.9496 of 2014, particulars have been called for, from the respondent company. Based on the information furnished by the respondent company, the quantum of service tax has been arrived at and the first appellant has issued the show cause notice on 12.10.2015. It is the contention of the department that the Miscellaneous petition filed to modify the order passed by the writ court has to be considered on merits.

13. In the decision of the Hon'ble Supreme Court in the case of State of Kerala vs. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (Dead) & Ors., reported in (1996) 1 SCC 435, wherein, at paragraph 8, it is observed as follows :-

..... "It is well settled that if a Ct. acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the Ct. to which it would lie if its order was with jurisdiction."

14. In Hon'ble Supreme Court in the case of State of West Bengal vs. Karan Singh Binayak, reported in (2002) 4 SCC 188, it is held that inherent power under Section 151 of the CPC cannot be invoked, to re-open settled matters. At paragraph 17, the Hon'ble Apex Court held as follows :-

"17. ...It can, thus, be seen that after the preparation of record-of-rights, not only the appellants did not take any steps and slept over the matter but various steps as above were taken by the respondents in respect of the land in question. The argument that the proceedings under the ULC Act or the preparation of record-of-rights were ultra vires and the acts without jurisdiction and, therefore, those proceedings would not operate as a bar in appellants invoking inherent jurisdiction under Section 151 CPC by virtue of conferment of such power under Section 57A of the Act is wholly misconceived and misplaced. The inherent powers cannot be used to reopen the settled matters. These powers cannot be resorted to when there are specific provisions of the Act to deal with the situation. It would be an abuse to allow the reopening of the settled matter after nearly four

decades in the purported exercise of inherent powers. It has not even been suggested that there was any collusion or fraud on behalf of the writ petitioners or the erstwhile owners. There is no explanation much less satisfactory explanation for total inaction on the part of the appellants for all these years."

The respondent also relied on the following decisions:-

1. Paledugu Nagar Atnamma v. Kogani Seetharamamma, (AIR 1952 Mad. 237), wherein it has been held that the Court has to be approached by way of a review or by way of an appeal, to set right the omission.
2. Hindustan Aluminium Corporation Ltd., vs. Superintendent, Central Excise, Marzapur, reported in 1981 (8) ELT 642 (Del.).
3. Gwalior Rayon Mfg. (Weaving) Co. vs. Union of India, reported in 1982 (10) ELT 844 MP.
4. Grafton Isaacs v. Emery Robertson [(1984) 3 WLR 705], this decision has been adopted and applied, with the approval of seven Judges of the Constitution Bench of the Hon'ble Supreme Court, on the preposition that an order made by a Court of unlimited jurisdiction must be obeyed, unless and until it has been set aside by an Appellate Court.
5. Bihari Silk and Rayon Processing Mills (P) Ltd., vs. Collector of Central Excise, Baroda, reported in 2000 (121) ELT 617 (Tribunal - LB) .

15. In view of the grounds raised in the appeal and the objection of the learned counsel for the respondent company, we are inclined to decide the matter, without advertting to the merits of the case. Since, the order impugned in this Appeal is an order passed by the Writ Court in W.P. No. 36494 of 2015 on 04.02.2016, this Court does not possess any jurisdiction to annul or modify or invalidate or overturn the earlier decision of the Writ Court in W.P. No. 9496 of 2014 dated 02.04.2014, which is not the subject matter of the present Writ Appeal.

16. Earlier in the foregoing paragraphs, we have recorded the objections of the learned counsel for the respondent, on the maintainability of the modification petition. At this stage, we are not deciding the question of maintainability of the modification petition. However, as pointed out by the learned counsel for the respondent company, unless the order in W.P. No. 9496 of 2014 is modified, the appellant department cannot question the earlier order passed in the present appeal, which is not the subject matter before this Court. At the same time, we cannot ignore the plea made by the

appellants that the modification petition was not taken up for hearing.

17. In view of the above said facts and circumstances, in the light of the decisions cited supra and in the interest of justice, we deem it fit that an opportunity should be given to the appellant department, to put forth their contention on merits before the Writ Court, along with the Miscellaneous Petition. Therefore, the matter is remitted back to the writ court, to reconsider the matter afresh, along with M.P. No. 1 of 2015 in W.P. No. 9496 of 2014 and W.P. No.36494 of 2015 and decide the same on merits, uninfluenced by the order passed in the above appeal.

18. In the light of the above discussion and decisions, the Writ Appeal is allowed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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+1cc to Mr.Arunkarthik Mohan, Advocate, S.R.No.50104

RP(CO)
md(23/11/2016)

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