

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

W.A.No.1356 of 2017
and CMP No.18738 of 2017

Tvl.KSM Earth Movers,
Rep. by its Partner P.Kandavel

... Appellant

versus

The Deputy Commissioner of Central Excise,
Erode-II Division,
O/o. The Deputy Commissioner of Central Excise &
Service Tax, Erode-II Division,
No.81, Bharathi Nagar,
Soolai Road, Erode- 638 004.

... Respondent

Writ Appeal filed against the order dated 16.08.2017 in W.P.No.19626
of 2017.

For Appellant : Mr.M.Hariharan

For Respondent: Mr.Sundareswaran

JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J.)

Being aggrieved by the order in original No.03/2017 (DC-S-Tax) dated
31.01.2017 of the Deputy Commissioner of Central Excise, Erode-II Division,
Erode, writ petition has been filed on the grounds inter alia that action
taken by the respondent is barred by limitation. Respondent a quasi

judicial authority, has failed to give reasons. There is also a denial of

opportunity. Adverting the pleadings and submissions, vide order dated 16.08.2017 in W.P.No.19626 of 2017, the writ Court, at paragraph Nos. 4 to 7, ordered as hereunder.

"4. The first hurdle, the petitioner has to cross is to satisfy this Court the Writ Petition is maintainable, despite existence of an alternate remedy. In a long line of decisions, the Hon'ble Supreme Court has deprecated the practice of Writ Courts interfering in matters, where there are efficacious alternate remedy provided under the relevant statute, especially in Revenue matters.

5. It is true that the Hon'ble Supreme Court has carved out exceptions and permitted parties to bypass the remedy provided under the statute and maintain a challenge by filing a Writ Petition under Article 226 of the Constitution of India. Thus the petitioner should be able to bring his case under any one of the exceptions, which have been carved out to maintain this Writ Petition despite of existence of an appellate remedy.

6. Admittedly, the petitioner does not question the jurisdiction of the respondent to issue the show cause notice and pass the impugned order. Infact, the petitioner submitted to the jurisdiction and filed their reply to the show cause notice and participated in the adjudication. Secondly, the plea that there has been violation of principles of natural justice as the respondent had afforded an opportunity of personal hearing to the petitioner after receiving the reply to the show cause notice. Whether such opportunity is to the satisfaction of the petitioner or not and whether it can be construed as denial of reasonable opportunity is again a pure

question of fact. Thirdly, there is no allegation of mala fides against the third respondent to justify the challenge to the impugned order invoking the extraordinary remedy of this Court.

7. Thus, when there is no challenge to the impugned proceedings on the grounds of lack of jurisdiction and the respondent having afforded an opportunity of personal hearing to the petitioner and whether it is to the satisfaction of the petitioner or not being a factual issue and in the absence of plea of malafide, the petitioner has to necessarily avail the alternative remedy provided. Further more, the nature of transaction and the documents which were relied on for the purpose of availment of CENVAT Credit are factual matters. This again has to be agitated before an authority, which is the fact finding authority, which can re-appreciate all the documents and records and can take a decision in the matter. Thus, there are no justifiable grounds to entertain the Writ Petition as against the impugned order. "

2. While dismissing, writ Court has granted permission to file an appeal before the appellate authority, if so advised. Being aggrieved, instant appeal is filed on the grounds inter alia

"a) Writ Court has come to an erroneous conclusion that the petitioner had not questioned the jurisdiction of the respondent to issue show cause notice and pass impugned Order, per contra, the appellant had specifically raised the contention that the impugned proceedings have been passed without authority and that the respondent had gone beyond the

scope of the notice issued.

b). Writ Court has erred in holding that there was no plea of malafide. The appellant had specifically contended that the invocation of extended period of limitation under Section 73(1) of the Finance Act was unwarranted and a mere change of opinion cannot be the basis for invoking the same.

c) Writ Court has failed to consider that the extended period cannot be invoked in the present case, as the appellant had filed returns in ST-3 and claimed exemption. Having regard to the statutory limit within which the Appropriate Authority has to act and his failure to act in conformity with the principles of natural justice, writ Court ought to have set aside the impugned proceeding as held in ***Sona Builders Vs. Union of India***, reported in (2001) 10 SCC 280.

d) Writ Court has failed to consider that, the extended period of limitation under Section 73(1) of the Finance Act can be invoked only in cases of deliberate intention to suppress material facts or to cause fraud or misrepresentation and not on mere omission [***Sourav Ganguly Vs. Union of India***, reported in 2016 SCC Online Cal 3234]. The appellant had already given all the copies of invoices and records pertaining to the credit availed and therefore the question of omission does not arise at all.

e). Writ Court has failed to note that the High Court under Article 226 may still exercise its writ jurisdiction when there is failure of natural justice or where the orders of proceedings are wholly without jurisdiction, as held in ***Harbanslal Sahnia vs. IOC Ltd.*** reported in 2003 (2) SCC 107. In the instant case, both the contentions were raised, however the writ Court has failed to consider the same.

f). Writ Court has erred in holding that opportunity of being heard was given to the appellant. The respondent had not even given reasons for rejecting the contentions and judgments relied on by the appellant. Further, after the hearing, without putting the appellant on notice, for the first time, judgments irrelevant to the issue were relied upon, in the Order. The Order passed by the respondent is a non-speaking Order and only provision has been repeated. Writ Court has failed to consider the above submission.

g). Writ Court has erred in holding that the question of opportunity of personal hearing to the satisfaction of the appellant is a question of fact. On the other hand, rejection of contentions of the appellant without adducing any reason was apparent on the face of the record.

h) The appellant had filed all the relevant invoices, certificates and records relating to the excavator and the credit availed and there is no suppression of facts or fraud or misrepresentation by the appellant to warrant the issue of show cause notice under the extended limitation period under proviso to Section 73(1) of the Finance Act.

i) Writ Court has failed to consider that the respondent has failed to prove that the appellant had deliberately suppressed facts or committed fraud with an intent to evade tax payment and therefore, the recovery of credit availed along with exorbitant interest and penalty is not sustainable in law.

j). Writ Court has failed to consider that the invoices were raised by the agent Tvl.SSS equipments, who also issued certificate to the effect that excise duty under Rule 8 of the Central Excise Rules 2002 was paid by the Manufacturer, Hyundai Construction Equipment India Pvt. Ltd. The invoices so

given and even supplementary invoices given by such agent are valid as per Rule 9 of the CENVAT Credit Rules, 2004. Therefore, the respondent has erred in holding that the agent was a distinct dealer and the same is untenable.

k). The respondent has failed to consider that the tax invoice can be raised by the manufacturer or even by his agent/dealer. The ground that the invoice is not raised in a particular manner cannot be a valid ground. If it can be ascertained that the excise duty is paid and there is no other claim of credit by any other party, then the claim of the Appellant has to be accepted.

l) Writ Court has failed to consider that the respondent had merely reproduced the contents of the show cause notice without going into the merits of the case or the contentions of the appellant, thereby the respondent had not applied his mind in passing the order in the impugned proceedings.

m) Writ Court has failed to take note that the respondent exercises quasi judicial function and that he has a duty to act in a judicial and independent manner and in the instant case, the respondent had not applied his mind, in concluding that the CENVAT Credit was wrongly availed, as no reasons for arriving at the same were elucidated in the impugned proceedings.

n) The respondent has failed to consider that there is no specific provision in the CENVAT Credit Rules that credit can be availed only on purchases from registered dealers, as held by the Hon'ble Division Benches of the Hon'ble Karnataka High Court in Judgments reported in ***Commissioner of Service Tax Vs. Tanvant Technologies India P Ltd.*** reported in (2016) 94 VST 254 and ***MPortal India Wireless Solutions P. Ltd., Vs. Commissioner of Service Tax***, reported in (2013) 63 VST 168.

o) Writ Court has failed to consider the contention of the appellant that the judgments relied on by the respondent in the impugned proceedings have no relevance to the issue at hand.

p). Writ Court has failed to consider that as held in a catena of decisions, the rule of exclusion of writ jurisdiction by availability of alternate remedy is a rule of discretion and not one of compulsion and it is not an absolute bar, as confirmed by the Hon'ble Apex Court in *State of HP Vs. Gujarat Ambuja Cement Limited*, reported in (2005) 142 STC 1. As held by the Hon'ble Supreme Court in *Union of India Vs. Tania Constructions (P) Limited*, reported in [2011] 5 SCC 697, the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

q). In *Travancore Rayon Limited Vs. Union of India*, reported in AIR 1971 SC 862, the Hon'ble Apex Court held that when judicial power is exercised by an authority, performing executive or administrative functions, Court would require to be satisfied that the decision has been reached, after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. Writ Court has failed to consider that no reasons were adduced by the respondent for rejecting the contentions of the appellant and the proceedings ought to have been quashed."

3. Though, Mr.M.Hariharan, learned counsel for the appellant sought

for reversal of the order made in W.P.No.19626 of 2017 dated 16.08.2017,

on the grounds stated supra, we are not inclined to delve into the merits of the same, for the reason that the Hon'ble Supreme Court, as well as this Court, have consistently held that in matter relating to revenue, when there is an effective and alternative remedy, writ is not ordinarily maintainable. Reference can be made to few decisions, in this regard.

(i). In *Union of India v. T.R.Verma*, AIR 1957 SC 882, the Hon'ble Supreme Court held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution, unless there are good grounds to do, otherwise.

(ii) In *C.A.Ibrahim v. ITO*, AIR 1961 SC 609, *H.B.Gandhi v. M/s. Gopinath & sons*, 1992 (Suppl) 2 SCC 312 and in *Karnataka Chemical Industries v. Union of India*, 1999 (113) E.L.T. 17(SC) = 2000 (10) SCC 13, the Hon'ble Supreme Court held that where there is a hierarchy of appeals provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

(iii) The general principles of law to be followed while entertaining a writ petition, when an alternative remedy is available, as per the decision

of the Hon'ble Apex Court in **U.P.State Spinning Co. Ltd. Vs. R.S.Pandey and Another (2005) 8 SCC 264**, at para No.11 are as follows:

"Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the high Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction."

(iv) In **United Bank of India Vs. Satyawati Tondon and Others {(2010) 8 SCC 110}**, the Hon'ble Apex Court, at paragraph Nos.43 to 45,

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they do not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the high Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be

oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision etc., and the particular legislation contains a detailed mechanism for redressal of his grievance.”

(v) In **Nivedita Sharma Vs. Cellular Operators Association of India and Others** {(2011) 14 Supreme Court Cases 337}, the Honourable Apex Court held that,

“An alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute are under challenge. The Court has recognised some exceptions to the rule of alternative remedy. However, 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 or grievance still holds the field.”

(vi) The Hon'ble Apex Court, after considering a catena of cases, in **Shauntlabai Derkar and Another Vs. Maroti Dewaji Wadaskar {(2014) 1 Supreme Court Cases 602}**, at para Nos.15 to 18, held as follows:-

"15. Thus, while it can be said that this Court has recognised 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 {Thansigh Nathmal Vs. Supt. of Taxes, AIR 1964 SC 1419}**, **Titaghur Paper Mills Case {Titaghur Paper Mills Co. Ltd Vs. State of Orissa (1983) 2 SCC 433}** 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/reassessment 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 writ petitioner assessee 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 the 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 reassessment orders passed and the consequential demand notices issued thereon.

18. In view of the above, we allow this appeal and set aside the judgment and order passed by the High Court in Chhabil Dass Agarwal Vs. Union of India {W.P.(c) No.44 of 2009, decided on 5/10/2010}. We grant liberty to the respondent, if he so desires, to file an appropriate petition/appeal against the orders of reassessment passed under Section 148 of the Act within four weeks' time from today. If the petition is filed before the appellate authority within the time granted by this Court, the appellate authority shall consider the petition only on merits without any reference to the period of limitation. However, it is clarified that the appellate authority shall not be influenced by any observation made by the High Court while disposing of Writ Petition (Civil) No.44 of 2009, in its judgment and order dated 5/10/2010."

(vii) After considering a plethora of judgments, in **Union of India and Others Vs. Major General Shri Kant Sharma and Another** {(2015) 6 SCC 773}, at para36, the Hon'ble Apex Court held as follows:-

"The aforesaid decisions rendered by this Court can be summarised as follows:-

(i). The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including

the Armed Forces Tribunal Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India (Refer: L.Chandrakumar Vs. Union of India (1997) 3 SCC 261 and S.N.Mukherjee Vs. Union of India (1990) 4 SCC 594.

(ii). The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act (Refer: Mafatlal Industries Ltd., Vs. Union of India (1997) 5 SC 536.

(iii). When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma Vs. Cellular Operators Assn. of India (2011) 14 SCC 337. सत्यमेव जयते

(iv). 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. (Refer: Nivedita Sharma Vs. Cellular Operators Assn. of India (2011) 14 SCC 337.)"

(viii) In **Veerappa Pillai Vs. Raman & Raman Ltd** {1952 SCR 583}, **CCE Vs. Dunlop India Ltd** {(1985) 1 SCC 260}, **Ramendra Kishore Biswas Vs. State of Tripura** {(1999) 1 SCC 472}, **Shivgonda Anna Patil Vs. State of Maharashtra** {(1999) 3 SCC 5}, **C.A.Abraham Vs. ITO** {(1961) 2 SCR 765}, **Titaghur Paper Mills Co Ltd., Vs. State of Orissa** {(1983) 2 SCC 433}, **H.B.Gandhi Vs. Gopi Nath & Sons** {1992 Supp (2) SCC 312}, **Whirlpool Corpn Vs. Registrar of Trade Marks** {(1998) 8 SCC 1}, **Tin Plate Co. of India Ltd., Vs. State of Bihar** {(1998) 8 SCC 272}, **Sheela Devi Vs. Jaspal Singh** {(1999) 1 SCC 209} and **Punjab National Bank Vs. O.C.Krishnan** {(2001) 6 SCC 569}, this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

4. In the case on hand, question as to whether action was taken within the time provided under Section 73(1) of the Finance Act, or under the extended period and violation of natural justice, also can be urged before the appellate authority.

5. In the light of the decisions stated supra, and discussion, we are not inclined to entertain the appeal. Order of the writ Court is sustained. Appellant/Writ petitioner is permitted to move the appellate forum. Time

granted by the writ Court is extended by two weeks from the date of receipt of a copy of this order.

6. Writ Appeal is dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is dismissed.

[S.M.K., J.] [R.P.A., J.]
07.12.2017

Index : Yes.
Internet : Yes
Speaking/Non-speaking orders

Note to office:

(i) Registry is directed to return the original order impugned in the writ petition, after obtaining an attested copy of the same from the learned counsel for the writ petitioner.

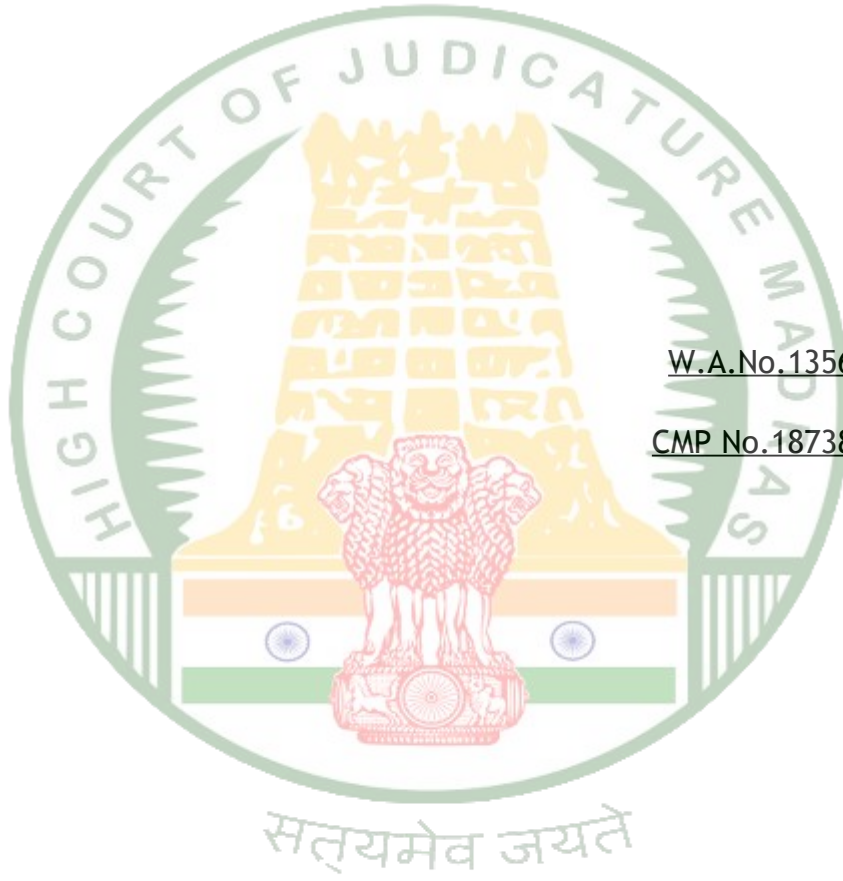
(ii) Issue order copy by 12.12.2017.
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To

The Deputy Commissioner of Central Excise,
Erode-II Division,
O/o. The Deputy Commissioner of Central Excise &
Service Tax, Erode-II Division,
No.81, Bharathi Nagar,
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