

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/7/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR
and
The Honourable Mrs.JUSTICE V. BHAVANI SUBBAROYAN

Writ Appeal No.341 of 2017

M/s. Hypertherm (India) Thermal
Cutting Private Limited
rep. By its Director
Mr.Kotagiri Pramod Kumar
New No.83, Old No.52 Bazullah Road
T. Nagar
Chennai 600 017. Appellant/Petitioner

Vs

The Deputy Commissioner of Service Tax
III Division
Service Tax II Commissionerate
Plot No.2054, I Block, 12th Main Road
II Avenue
Anna Nagar
Chennai 600 040. Respondents/Respondents

For appellant ... Mr.Joseph Prabakar

WP.32277/16 Prayer:Writ petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records relating to the Order in original No. 36 to 48/2016 (R) dated 28.06.2016 passed by the Respondent quash the same as arbitrary and illegal and to direct the Respondent to refund the amount

J U D G M E N T

(Judgment of the Court was made by S.Manikumar,J)

Being aggrieved by the order, in Original Nos.36 to 48/2016 (R1), dated 28/6/2016, passed by the Deputy Commissioner of Service Tax, III Division, Service Tax II Commissionerate, Chennai, petitioner has filed W.P.No.32277 of 2016, praying for

the issuance a writ of certiorarified mandamus, to quash the above said order and consequently, to direct the respondent therein to refund the amount.

2. Adverting to the averments and submissions, the writ Court, vide, order, dated 15/12/2016, declined to entertain the writ petition, on the grounds that there is an effective and alternate remedy. Writ Court, has further observed that if the writ petitioner were to take recourse to an alternative remedy, the concerned appellate authority, to decide the appeal with due expedition, uninfluenced by the fact that the writ Court has not interfered with the impugned order.

3. Being aggrieved, instant appeal has been field.

4. Though Mr. Joseph Prabakar, learned counsel for the appellant submitted that order in Original Nos.36 to 48/2016 (R1), dated 28/6/2016, passed by the Deputy Commissioner of Service Tax, III Division, Service Tax II Commissionerate, Chennai, is patently illegal and that the authority has invoked some other rule, referred to in the counter affidavit, which does not form part of the show cause notice, dated 15/6/2015 and also placed reliance on the decision of the Hon'ble Apex Court in TATA ENGINEERING & LOCOMOTIVE CO. LTD., Vs. COLLECTOR OF C.EX., PUNE, reported in 2006 (203) ELT 360 (SC) and further contended that when the order in Original Nos.36 to 48/2016 (R1), dated 28/6/2016, is a non-speaking order, a writ petition can be entertained and more particularly, when there is a violation of principles of natural Justice, this Court is not inclined to accept the same, for the reason that time and again, the Hon'ble Supreme Court, in a catena of decisions, held that when there is an effective and alternative remedy, recourse to a writ petition, should not ordinarily be entertained. Reference can be made to the following decisions.

5. 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.

6. 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.

7. In *Munshi Ram v. Municipal Committee, Chheharta*, (AIR 1979 SC - 1250), the Hon'ble Apex Court observed that,

"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."

8. The Hon'ble Apex Court in *Titaghur Paper Mills Co. Ltd., v. State of Orissa*, reported in 1983 (2) SCC - 433, held as follows:

"11. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. 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."

9. The Hon'ble Division Bench of this court in a decision reported in 2005 (2) MLJ 246 (M/s.Nivaram Pharma Private Limited Vs. The Customs, Excise and Gold (Control), Appellate Tribunal, South Regional Bench, Madras and Others), has observed that a writ petition is not maintainable when there is a statutory remedy of appeal available more particularly in fiscal matters. Relevant paragraphs are extracted hereunder:

"4. We are surprised that this writ petition was entertained at all. There was a clear alternative remedy against the order of the CEGAT dated 09.07.1997 by means of filing a Reference Application before the CEGAT under Section 35G(1) of the Central Excise Act (hereinafter referred to as the Act) and if that application was rejected by the CEGAT there was a second alternative remedy of approaching this Court under Section 35G(3) of the Act seeking a direction to the CEGAT to make a reference to this Court.

5. It is well settled by a series of decisions of the Supreme Court that particularly in tax matters there should be no short circuiting of the statutory

remedies, vide Titaghur Paper Mills Co. Ltd. Vs. State of Orissa, AIR 1983 SC 603, Assistant Collector of Central Excise, Chandan Nagar Vs. Dunlop India Limited, AIR 1985 SC 330, etc.

7. A Constitution Bench of the Supreme Court in G.Veerappa Pillai Vs. Raman and Raman Ltd., AIR 1952 SC 192 held that as the Motor Vehicles Act is a self contained code and itself provides for a forum for appeal/revision, the writ jurisdiction should not be invoked in matters relating to its provisions. A similar view was taken in Assistant Collector of Central Excise Chandan Nagar Vs. Dunlop India Limited, AIR 1985 SC 330.

15. There are well settled principles of writ jurisdiction and Judges also must exercise self-discipline. It has been repeatedly held by the Supreme Court that in tax matters there should be no short circuiting the statutory remedies of appeal, revision, etc. We are therefore surprised that in this case the learned single Judge did not observe this well settled principle of self-discipline and entertained the writ petition despite existence of statutory remedies."

10. 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."

11. 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, held as follows:-

"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."

12. 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."

13. 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 crated 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 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."

14. 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.

(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.)"

15. 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.

16. Violation of principles of natural justice can be urged before the appellate authority. If the original authority has taken note of some other provision, not stated in the show cause notice, the same also can be urged before the appellate forum.

17. Perusal of TATA Engineering & Locomotive Co. Ltd's case, relied on by the learned counsel for the appellant shows that the Tribunal in one line, concluded the matter. For brevity, paragraph No.4 of the judgment of the Hon'ble Apex Court is extracted hereunder:-

"The Tribunal with one line concluded the matter against the appellant-assessee by observing "while it is not the case of the assessee that the goods were so used". The Tribunal has not recorded a clear finding that the production was not being carried out by the assessee in the workshop situated within the factory or that the goods were being used for repair or maintenance of the machinery installed therein. By cryptic and non-speaking order, the Tribunal has upheld the order passed by the Commissioner by applying the ratio of the decision of the Larger Bench in TISCO LTD (supra) without recording a finding of fact that the production carried out by the appellant was not the workshop situated within the factory or that the goods produced by it were not used for repair or maintenance of the machinery installed therein. It is not sufficient in a judgment to give conclusions alone but it is necessary to give reasons in support of the conclusions arrived at. The finding recorded by the Tribunal, being cryptic and non-speaking, is set aside and the case is remitted back to the Tribunal for a fresh decision by a speaking order in accordance with law after affording due opportunity to both the parties."

18. Even taking for granted that the original authority has passed a cryptic order or a non-speaking order, as contended by Mr. Joseph Prabakar, learned counsel for the petitioner/appellant, if any appeal is preferred by the writ petitioner, the appellate authority is bound to advert to the said submission. At this juncture, it could be seen that even in Tata Engineering case, relied on by the

appellant herein, the procedure of approaching the forums constituted under the Act has been followed.

19. Writ petitioner can always raise, tenable grounds before the appellate authority, and as rightly observed by the writ Court that, if any appeal is preferred, the concerned appellate forum has to look into the substance of the reasoning and then to decide as to whether the order impugned, in the writ petition, has to be sustained or not.

20. In the light of the decisions and discussion, we do not find that the petitioner has made out a strong case to entertain a writ petition, de hors the alternative remedy available.

21. In the result, this Writ Appeal is dismissed. No costs.

22. Mr. Joseph Prabakar, learned counsel for the appellant submitted that within four weeks from today, statutory appeal would be filed to the Commissioner of Appeals and hence requests this Court that the time consumed in the litigation be condoned.

23. If any appeal is filed, time consumed in litigating before this Court be condoned. On the filing of the appeal, Commissioner of appeals, is directed to dispose of the same, within a period of two months.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

The Deputy Commissioner of Service Tax
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Service Tax II Commissionerate
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+lcc to Mr. Joseph Prabakar, Advocate sr.52657
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W.A.No.341 of 2017

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ss (28/8/2017)