

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED : 21.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.2792 of 2012
and
M.P. No. 1 of 2012

Touch India Telemarketing Pvt. Ltd.,
Rep. by its Authorised Signatory
Mr. J. Sridharan

... Appellant

-Vs-

1. Commercial Tax Officer (FAC)
Roving Squad, Kancheepuram
Enforcement (South)
Chennai - 600 006.
2. Deputy Commercial Tax Officer
Roving Squad, Kancheepuram
O/o. The Deputy Commissioner (CT)
Enforcement (South)
Chennai - 600 006.

... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent, to
set aside the order dated 05.12.2012 in W.P.No.32565 of 2012.

W.P.No.32565 of 2012 : Writ Petition filed under Article 226 of
the Constitution of India for issuance of a Writ of
Certiorarified Mandamus, calling for the records of the
respondents culminated in GD. No.17/2012 dated 26.11.2012 passed
by the 1st respondent and quash the same and consequently direct
the respondents to release the goods detained under goods
detention Notice No. 17/dated 26.10.2012.

For Appellant : Mr.D.Vijayakumar

For Respondents : Mr.Kanmani Annamalai,
Government Advocate (Taxes)

JUDGMENT

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

Before the Writ Court, the appellant filed a writ petition to issue a Writ of Certiorarified Mandamus, calling for the records of the respondents culminated in GD No.17/2012 dated 26.11.2012 passed by the first respondent and to quash the same, and consequently direct the respondents to release the goods detained under goods detention notice No.17 dated 26.10.2012.

2. Brief facts of the case is as follows :-

The appellant is a registered company under the Delhi Value Added Tax Act and Central Sales Tax Authority. The appellant, on the basis of the purchase order supplied 80 Nos. of Samsung P-3100 Table Phones to M/s. RTL Mobiles Private Limited, Chennai. The said goods were despatched on 25.10.2012, through M/s. Instant Delivery Systems Pvt. Ltd., (Courier Agent) along with CST Bill No.4 dated 25.10.2012 for a sum of Rs.13,52,000/-. When the aforesaid Clearing Agent was carrying on the goods, officers of the 2nd respondent inspected the consignment and issued goods detention Notice No.17 dated 26.10.2012 to M/s. RTL Mobiles, directing them to pay a sum of Rs.7,30,800/- as tax and penalty under TNVAT Act. Subsequently, M/s. RTL Mobiles Private Limited terminated the Purchase Order, along with a copy of the communication dated 03.11.2012 and the said termination order was communicated to the 2nd respondent department. It was also informed to the 2nd respondent that since they did not receive the goods on time, they have cancelled the purchase order, and therefore all the detained goods be returned to the appellant. In spite of the request made by the appellant, the 2nd respondent did not return the goods. Hence, narrating the facts, a representation dated 05.11.2012 was sent to the 2nd respondent by the appellant. The appellant specifically stated that the 2nd respondent has no jurisdiction to detain the consignment, since it was an interstate sale, where the appellant had already paid the Central Sales Tax.

3. Aggrieved by the inaction of the respondents, the appellant filed W.P.No.30767 of 2012 before this Court. Pursuant to the order of this Court dated 20.11.2012, the 1st respondent passed an order on 26.11.2012, directing M/s. RTL Mobiles to pay a compounding fee (penalty) of Rs.7,30,800/- to release the goods. Challenging the said order, the petitioner filed W.P. No.32565 of 2012, This Court, by its order dated 05.12.2012 directed the appellant to pay the tax amount of Rs.2,43,200/- and to provide appropriate security for the compounding fee/ penalty of Rs.4,87,200/- and to release the goods. Further, liberty was given to the appellant to prefer an

appeal under the TNVAT Act, 2006. Challenging the aforesaid order dated 05.12.2012, the appellant has preferred this appeal .

4. By order dated 08.02.2013, a Hon'ble Division Bench of this Court has granted interim stay, on condition that the appellant furnishes a Bank Guarantee for a sum of Rs.7,30,800/- to the credit of the Writ Appeal, within a period of one week from that date and on furnishing the same, the respondents were directed to release the goods detained under goods detention Notice dated 26.10.2012.

5. Learned counsel for the appellant would submit that the 2nd respondent has no jurisdiction to detain the consignment, as it is an interstate sale, for which the appellant had already paid the Central Sales Tax. Since there is no jurisdiction for demanding the tax and imposing penalty against the appellant, Writ Petition was filed under Article 226 of the Constitution of India, without exhausting the alternative remedy.

6. Learned counsel for the respondents would submit that the said factum raised by the appellant, is a jurisdictional fact. The grounds raised in the present writ appeal cannot be agitated before this Court and that the same can be raised only before the Appellate Authority. He further submitted that when there is an efficacious alternate remedy available, the appellant has to file an appeal before the appellate authority and hence the writ petition itself is not maintainable. However, the Writ Court has passed an order to protect the interest of the parties. For the above said reasons, he submitted that the appeal is liable to be dismissed.

7. Heard learned counsel for the appellant and the learned counsel for the respondents and perused the material available on records.

8. The appellant has filed W.P. No. 32565 of 2012, challenging the impugned order passed by the 1st respondent in GD No. 17/2012 dated 26.11.2012. This Court has passed an order directing the appellant to pay the disputed tax of Rs.2,43,600/- under protest, for release of the detained goods and permitted the petitioner to file an appeal within 30 days time, from the date of receipt of the said order. Further, the appellant was directed to furnish appropriate security for the compounding fee levied to a sum of Rs.4,87,200/- at the time of release of goods and an order of interim stay, in so far as the composition fee is concerned, pending disposal of the appeal, was granted by this Court. Challenging the said order, the appellant has filed the present appeal. By order dated 08.02.2013, in M.P. No.1 of 2012, this Court has modified the order and permitted the appellant to furnish a Bank Guarantee for a sum of

Rs.7,30,800/- to the credit of the Writ Appeal, within a period of one week from that date and on furnishing the same, the respondents were directed to release the goods

9. As stated by the learned Special Government Pleader, under Section 54 of the Tamil Nadu Value Added Tax Act, 2006, there is provision to file an appeal before the Joint Commissioner of the 2nd respondent department. But, the appellant is challenging the very jurisdiction of the 1st respondent, demanding payment of tax and imposing penalty for release of goods. According to the appellant, the RTL Mobiles have cancelled their purchase order and therefore the appellant is not liable to pay the tax and penalty. According to the appellant, the said fact was not considered by the 1st respondent. But, in the impugned order it is stated that the aforesaid cancellation has been done with an intention to avoid payment of tax and penalty only, after knowing that the consignment has been retained. It is seen from the materials that the aforesaid contention is a disputed fact. As rightly pointed out by learned Special Government Pleader, the appellant has to challenge the same before the Appellate Authority under the Tamil Nadu Value Added Tax Act. In the light of the principle of law, laid by the Hon'ble Supreme Court, a Division Bench of this Court in Writ Appeal No. 258 of 2016 dated 20.06.2016, has passed the following order.

"16. The burden of proof is on the petitioner under Section 17 of the TNVAT Act to disprove the findings of the Enforcement Wing Officials regarding stock verification. This burden can only be discharged before the assessing officer or the appellate authority. As the disputed facts are involved in the case for decision, the same can be decided by the appellate authority going into the facts of the case. This Court cannot go into the alleged facts. Therefore, there are disputed facts involved in the Writ Petition. In the facts and circumstances of the case, we are first to deal with the maintainability of the Writ Petition under Article 226 of the Constitution in the light of the following decisions:-

(a) In Karnataka Chemical Industries & vs. Union of India & Others reported in 1999 (113) ELT 17 SC : (2000) 10 SCC 13, the Hon'ble Supreme Court has held that there is no reason why the Writ Petition has been filed bypassing the alternative remedy which is provided under the statute. Therefore, the party must exhaust statutory remedy before resorting to the writ jurisdiction.

(b) In C.A.Abraham, Uppoottil, Kottayam vs. The Income Tax Officer, Kottayam reported in 1961 AIR 609 : 1961 SCR (2) 765, the Hon'ble Supreme Court has held that the appellant could not be permitted to invoke the jurisdiction of High Court under Article 226 of the Constitution of India when he had adequate remedy open to him by way of appeal to the Tribunal.

(c) In Punjab National Bank vs. O.C.Krishnan and others reported in 2001 Supp (1) SCR 466, the Hon'ble Supreme Court has held that the Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under section 20 and this last track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

(d) A Hon'ble Division Bench of this Court in Nivaram Pharma Pvt.Ltd., v. CEGAT, Madras reported in (2005) 2 MLJ 246 : 2006 (205) ELT 9 (Mad), considered similar issue of bypassing alternative remedy in Paragraphs 5 and 6:-

"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 Pape Mills Co.Ltd., v. State of Orissa - AIR 1983 SC 603, Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited, 1985 (19) E.L.T 22 (SC) = AIR 1985 SC 330 etc.,.

6. It is well settled that when there is an alternative remedy ordinarily writ jurisdiction of this Court under Article 226 of the Constitution should not be invoked. This

principle applies with greater force regarding tax proceedings. As observed by the Supreme Court in *Titaghur Paper Mills Co.Ltd., v. State of Orissa* - AIR 1983 SC 603: "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.

(e) In the case of *Sadhana Lodh vs. National Insurance Co.Ltd.*, and another reported in (2003) 3 Supreme Court Cases 524, it has been held that "the right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149 (2) of the Act.

(f) In the case of *Commissioner of Income Tax and others vs. Chhabil Dass Agarwal* reported in (2014) 1 Supreme Court Cases 603 following the proposition laid down in *Thansingh Nathmal v. Superintendent of Taxes* reported in AIR 1964 SC 1419 and as also in *Titaghur Paper Mills Co.Ltd., v. State of Orissa* reported in (1983) 2 SCC 433 and other similar judgments

"15.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).

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 the 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.

(g) In the case of Union of India (UOI) vs. Rubber Products Ltd., reported in MANU/SC/1481/2015, it has been held as follows:-

"3. We are of the opinion that the aforesaid view taken by the High Court is unsustainable on two grounds. In the first instance, writ petition itself was not maintainable when there was alternate remedy available to the Assessee under the provisions of the Central Excise Tariff Act and the Assessee should have exhausted those statutory appeals."

17. It is clear from the aforesaid judgments of the Honourable Supreme Court that 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 principles of natural justice, the High Court will not entertain a petition under 226 of the Constitution of India, 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.

18. Therefore, in the light of the aforesaid decisions, we are of the considered view that where there is a mechanism for redressal by way of filing an appeal before the appellate authority, especially, in the case of assessment or re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper order passed by the revenue authority, the assessee could not be permitted to abandon the machinery and invoke the jurisdiction of High Court under Article 226 of the Constitution of India. The assessee can very well approach the appellate authority and raise all the grounds urged before this Hon'ble Court. Therefore, there is no warranting circumstances requiring interference with the order passed by the Writ Court and hence, the same is confirmed. Since we find that the Writ Petition itself is not maintainable, before this Court, the appellant may agitate the issue in question before the appellate authority.

19. In the result, the Writ Appeal fails and the same is dismissed. Liberty is granted to the appellant to file an appeal if so advised within a period of four weeks from today. In the event of filing an appeal by the assessee, the appellate authority shall consider the same only on merits and independently without being influenced by any observations of this Court. No order as to costs. The connected Civil Miscellaneous Petition is closed."

10. The appellant has not invoked the provision under Article 269 of the Constitution of India, in the grounds stated in the writ petition. The said fact has to be urged before the Appellate Authority. By an interim order passed by this Court in M.P. No. 1 of 2012 on 08.02.2013, the appellant's interest has been safeguarded, as an interim measure. Therefore, it is open to the appellant to prefer an appeal as per Section 54 of the TNVAT Act. Since the appellant has got the benefit of the interim orders for release of goods, by furnishing bank guarantee as security, no prejudice would be caused for the appellant to file an appeal, before the appellate authority, by raising all the grounds.

11. In the light of the above facts and the decision cited supra, the Writ Appeal is dismissed, with liberty to the appellant to file revision, before the appropriate forum, if so

advised, within a period of three weeks from the date of receipt of a copy of this order. In the meantime, the interim orders already granted by this Court, shall be in force till filing of the appeal. If the appeal is not filed in time, the respondents are permitted to proceed in accordance with law.

12. Accordingly, the Writ Appeal is dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

avr

To

1. The Commercial Tax Officer (FAC)
Roving Squad, Kancheepuram
Enforcement (South)
Chennai - 600 006.
2. The Deputy Commercial Tax Officer
Roving Squad, Kancheepuram
O/o. The Deputy Commissioner (CT)
Enforcement (South)
Chennai - 600 006.

+lcc to Mr.D.Vijayakumar, Advocate, S.R.No.59821

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M.P. No. 1 of 2012

SS(CO)
CA(13/09/2017)

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