

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

Writ Petition No.35336 of 2017

DATED:01-11-2017

Between:

M/s. Varun Tech Industries
Plot No.176C, IDA Kondapalli,
Ibrahimpattanam (M)
Krishna District
Rep. by its Proprietrix,
Smt. M. Lakshmi ... Petitioner

And

The State of Andhra Pradesh
Rep. by its Principal Secretary
Revenue (CT), Secretariat
Velagapudi
Guntur District
and others ... Respondents

COUNSEL FOR THE PETITIONER: Mr. P. Balaji Varma

COUNSEL FOR THE RESPONDENTS: Mr. Shaik Jeelani Basha,
Special Standing Counsel
for Commercial Taxes
(AP)

THE COURT MADE THE FOLLOWING:

ORDER: (*per the Hon'ble Sri Justice C.V. Nagarjuna Reddy*)

This writ petition is filed to declare the order in A.O. No.1690, dt.31.3.2017, of respondent No.2, confirming assessment order dt.18.3.2015 of respondent No.3, as illegal, arbitrary, barred by limitation and without jurisdiction, and consequently to set aside the same.

2. Brief facts giving rise to the filing of this writ petition are stated hereunder. In pursuance of the authorisation issued by the Deputy Commissioner (CT) No.I Division, Vijayawada, respondent No.4 has inspected the business premises of the petitioner on 24.3.2012, verified the records and issued assessment proceedings in form VAT 305 dt.6.5.2013, assessing tax of Rs.16,43,611/- for the period from 1.9.2005 to 31.3.2012 on best judgment basis. The petitioner filed an appeal before respondent No.2, which was partly allowed, partly remanded and partly dismissed by order dt.24.3.2014. In the process, respondent No.2 has directed respondent No.3 to examine the record in respect of the tax of Rs.11,22,885/- while permitting the petitioner to produce evidence before the said respondent. In pursuance of the remand, respondent No.3 has issued a show cause notice dt.19.01.2015 proposing to levy tax of Rs.11,22,885/-. After considering the objections filed by the

petitioner on 20.3.2015, respondent No.3 has passed a fresh assessment order on 18.3.2015 confirming the levy of tax of Rs.11,22,885/-. Assailing the said assessment order, the petitioner again filed an appeal before respondent No.2. On considering the appeal on merits, respondent No.2 has dismissed the same on 31.3.2017.

3. At this stage, it needs to be noted that against every order passed by the Appellate Deputy Commissioner (CT), there is a remedy of appeal before the A.P. VAT Tribunal under Section 33 of the A.P. Value Added Tax Act, 2005. The petitioner, however, bypassed the said remedy and straightaway filed this writ petition with the plea that out of the block period of 1.9.2005 to 31.3.2012, the period of 1.9.2005 to March 2009 falls beyond the limitation period of four years, that therefore respondent No.4 had no jurisdiction to pass such an order and that, as the power exercised by respondent No.4 is without jurisdiction, the petitioner has a constitutional right to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

4. Mr. Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes (AP), strenuously opposed the writ petition contending (i) that the writ petition was filed bypassing

the effective alternative remedy of appeal before the A.P. VAT Tribunal and that therefore the same is liable to be dismissed *in limine* and (ii) that as the petitioner has not raised the aspect of limitation in both the rounds of litigation before the Assessing Officer as well as the Deputy Commissioner, it is barred from raising such plea in the present writ petition.

5. Let us first deal with the aspect of alternative remedy. The rule of alternative remedy is not a rule of law, but a self imposed restriction by the Constitutional Courts. When a statute created efficacious remedies, a litigant cannot insist on entertaining the writ petition without availing such remedies. Though availability of an alternative remedy is not an absolute bar for entertaining the writ petition, ordinarily this Court would not allow a litigant to bypass an alternative remedy except in exceptional situations.

6. The entitlement of a litigant to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India bypassing the alternative remedy fell for consideration of a Constitution Bench of the Supreme Court in *Thansingh Nathmal v. Superintendent of Taxes*¹ and it was held as under:

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

¹ AIR 1964 SC 1419

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.”

A three-Judge Bench of the Supreme Court in *Titagbur Paper Mills Co. Ltd.*² held:

*“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* [(1859) 6 CBNS 336 : 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 : (1918-19) All ER Rep 61 (HL)] and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.* [1935 AC 532] and *Secy. of State v. Mask and Co.* [(1939-40) 67 LA 222 : 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.”*

7. In *Raj Kumar Shivhare v. Directorate of Enforcement*³ the Supreme Court, while taking note of the fact of the decision in *Thansingh Nathmal* (1 supra) is still holding the field, referred to the recognized exceptions to the doctrine of alternative remedy, which are -- (a) where there is a complete lack of jurisdiction of the Tribunal to take action; (b) there has been a violation of

² (1983) 2 SCC 433

³ (2010) 4 SCC 772

rights of natural justice and (c) where the Tribunal acted under a provision of law which is declared ultra vires.

8. In *State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.*⁴ a three-Judge Bench of the Supreme Court exhaustively dealt with the case law on the rule of alternative remedy. Paragraphs 18 to 21 of the judgment, which are relevant, read as under:

“18. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission [1954 SCR 738 : AIR 1954 SC 207] ; Sangram Singh v. Election Tribunal, Kotah [(1955) 2 SCR 1 : AIR 1955 SC 425] ; Union of India v. T.R. Varma [1958 SCR 499 : AIR 1957 SC 882] ; State of U.P. v. Mohd. Nooh [1958 SCR 595 : AIR 1958 SC 86] and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras [(1966) 2 SCR 229 : AIR 1966 SC 1089] held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. 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.

19. Another Constitution Bench of this Court in State of M.P. v. Bhailal Bhai [(1964) 6 SCR 261 : AIR 1964 SC 1006] held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in N.T. Veluswami Thevar v. G. Raja Nainar [1959 Supp (1) SCR 623 : AIR 1959 SC 422] ; Municipal Council, Khurai v. Kamal Kumar [(1965) 2 SCR 653 : AIR 1965 SC 1321] ; Siliguri Municipality v. Amalendu Das [(1984) 2 SCC 436 : 1984 SCC (Tax) 133 : AIR 1984 SC 653] ; S.T. Muthusami v. K. Natarajan [(1988) 1 SCC 572 : AIR 1988 SC 616] ; Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110 : AIR 1995 SC 1715] ; Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293 : AIR 2000 SC 2573] ; A. Venkatasubbiah Naidu v. S. Chellappan [(2000) 7 SCC 695] ; L.L. Sudhakar Reddy v. State of A.P. [(2001) 6 SCC 634] ; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sabakari Dugdha Utpadak Sanstha v. State of Maharashtra [(2001) 8 SCC 509] ; Pratap Singh v. State of Haryana [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and GKN Driveshafts (India) Ltd. v. ITO [(2003) 1 SCC 72] .

20. In Harbanslal Sabnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of

⁴ (2005) 6 SCC 499

alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

21. In *G. Veerappa Pillai v. Raman & Raman Ltd.* [1952 SCR 583 : AIR 1952 SC 192] ; *CCE v. Dunlop India Ltd.* [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : AIR 1985 SC 330] ; *Ramendra Kishore Biswas v. State of Tripura* [(1999) 1 SCC 472 : 1999 SCC (L&S) 295 : AIR 1999 SC 294] ; *Shivgonda Anna Patil v. State of Maharashtra* [(1999) 3 SCC 5 : AIR 1999 SC 2281] ; *C.A. Abraham v. ITO* [(1961) 2 SCR 765 : AIR 1961 SC 609] ; *Titagbur Paper Mills Co. Ltd. v. State of Orissa* [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : AIR 1983 SC 603] ; *H.B. Gandhi v. Gopi Nath and Sons* [1992 Supp (2) SCC 312] ; *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1 : AIR 1999 SC 22] ; *Tin Plate Co. of India Ltd. v. State of Bihar* [(1998) 8 SCC 272 : AIR 1999 SC 74] ; *Sheela Devi v. Jaspal Singh* [(1999) 1 SCC 209] and *Punjab National Bank v. O.C. Krishnan* [(2001) 6 SCC 569] , this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

9. After considering a slew of case law as noted above, the Supreme Court has carved out the following exceptions to the rule of alternative remedy under which the High Court may entertain the writ petition without insisting on alternative remedy. They are – (a) when the proceedings are taken before the forum under a provision of law which is ultra vires, (b) when the impugned order has been made in violation of the principles of natural justice; (c) where an allegation of infringement of fundamental rights is made and (d) when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess.

10. In *Union of India v. Major General Shri Kant Sharma*,⁵ a three-Judge Bench of the Supreme Court, upon copious reference to the judicial precedents, summarised the law in paragraph 36 of the report, as under:

(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. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] and S.N. Mukherjee v. Union of India [(1990) 4 SCC 594 : 1990 SCC (Cri) 669]).

(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. [(1997) 5 SCC 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 v. Cellular Operators Association of India [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] .

(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 (supra)].

11. It is not the pleaded case of the petitioner that its case falls in any of the exceptions recognized by the Supreme Court as discussed above or that the issue raised in this writ petition cannot be adjudicated by the A.P. VAT Tribunal presided by no less an officer of a Special Grade District Judge.

12. In the light of the above discussion, the petitioner is not entitled to invoke the jurisdiction of this Court without availing the statutory remedy of appeal before the Tribunal.

⁵ (2015) 6 SCC 773

13. As regards the second submission of the learned Standing Counsel, the learned counsel for the petitioner conceded that the issue of limitation was not raised in the objections filed by the petitioner before respondent No.4 either initially, or after the remand before respondent No.3. He has also admitted that the said issue was not raised in the appeal both in the first round and also in the second round. The learned counsel, however, insists that since the assessment order in respect of the period which is beyond four years is without jurisdiction, this Court is bound to entertain the writ petition and adjudicate the same on merits. In support of this submission, he relied upon the nine-Judge Bench judgment of the Supreme Court in *Mafatlal Industries v. Union of India*⁶.

14. In our opinion, the counsel for the petitioner is labouring under a misconception that this Court has duty and obligation to entertain writ petitions in order to set aside every wrong or illegal order. The law is well settled that the jurisdiction under Article 226 of the Constitution of India is discretionary and this Court would not be compelled to adjudicate upon the merits of a case merely because a case is made out that the order challenged before it is illegal. While exercising the jurisdiction under Article 226 of the Constitution, this Court would

⁶ (1997) 5 SCC 536

consider the conduct of the party and the facts and circumstances of the case, before adjudicating the case on merits.

15. Vivian Bose, J, in *Sangram Singh v. Election Tribunal*⁷ speaking for the Court stated:

“14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.”

In *State of Maharashtra v. Digambar*⁸ it was held:

“19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.”

In *Satya Pal Anand v. State of M.P.*⁹ it was held:

“25. It is a well-established position that the remedy of writ under Article 226 of the Constitution of India is extraordinary and discretionary. In exercise of writ jurisdiction, the High Court cannot be oblivious to the conduct of the party invoking that remedy. The fact that the party may have several remedies for the same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions. The exercise of discretion to issue a writ is a matter of granting equitable relief. It is a remedy in equity. In the present case, the High Court declined to interfere at the instance of the appellant having noticed the above clinching facts. No fault can be found with the approach of the High Court in refusing to exercise its writ jurisdiction because of the conduct of the appellant in pursuing multiple proceedings for

⁷ AIR 1955 SC 425

⁸ (1995) 4 SCC 683

⁹ (2016) 10 SCC 767

the same relief and also because the appellant had an alternative and efficacious statutory remedy to which he has already resorted to. This view of the High Court has found favour with Dipak Misra, J. We respectfully agree with that view."

16. In *Mafatlal Industries* (6 supra), on which the learned counsel for the petitioner placed reliance, the Supreme Court held as under:

"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."

In the concluding portion of the judgment it was further held:

"(x) ... The power under Article 226 is conceived to serve the ends of law and not to transgress them."

The ratio that could be culled out from the judgment referred to above is that when an Act provided for remedies and created fora for availing such remedies, a litigant cannot be permitted to frustrate the legislative intent of providing alternative remedies under Article 226 of the Constitution of India. This judgment is therefore not of any help to the petitioner.

17. Here is a case where the petitioner has never raised a whisper about the lack of jurisdiction on the part of respondent No.4 for passing an assessment order for the period between 1.9.2005 and March, 2009. Not only in its objections filed before the Assessing Officer before passing of the initial

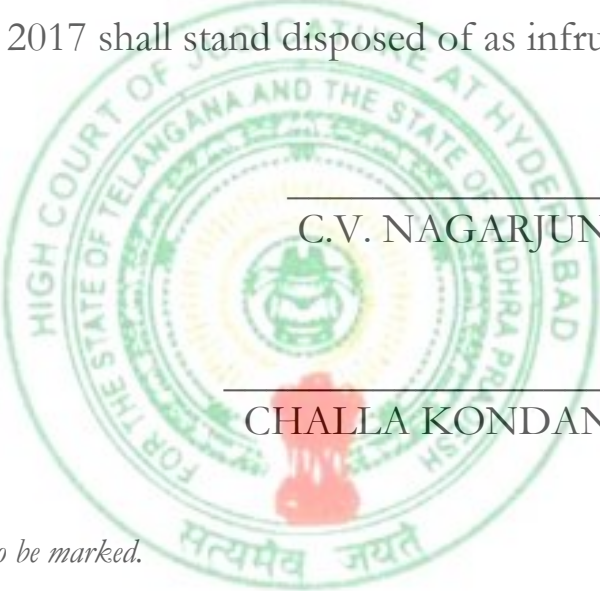
assessment order, but also in the first round of appeal filed by it, before respondent No.3 and in the second round of appeal filed before respondent No.2 after the remand, the petitioner has failed to raise the plea of limitation. Limitation being a mixed question of law and fact, has to be necessarily raised by a party in order that the adjudicating authority applies its mind and renders a finding thereon. The petitioner has not offered any semblance of explanation as to why and for what reason it has failed to raise the issue of limitation. In our opinion, the conduct of the petitioner shows that there is lack of diligence in raising necessary plea which ought to be raised by it and a decision invited thereon. The absence of explanation on the part of the petitioner for not raising the objection in spite of repeated opportunities to raise such objection, both before the original and the appellate authority, would give rise to a presumption that it has deliberately not raised the issue in order to avoid a finding from the jurisdictional hierarchical authorities.

18. Before parting with this case, we clarify that the observations regarding the failure of the petitioner to raise the plea of limitation before the primary and the appellate authorities are in the context of dealing with this writ petition.

These observations shall not preclude the petitioner from raising the said plea before the A.P. VAT Tribunal. If such plea is raised, the A.P. VAT Tribunal shall deal with the same on merits uninfluenced by the observations made in this order.

19. For the aforementioned reasons, the writ petition is dismissed with costs of Rs.10,000/- (Rupees Ten Thousand only).

As a sequel to dismissal of the writ petition, W.P.M.P. No.43913 of 2017 shall stand disposed of as infructuous.



C.V. NAGARJUNA REDDY, J

CHALLA KONDANDA RAM, J

01-11-2017

Note: LR copies to be marked.
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