IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.Nos.1240 & 1241 of 2018
and
CMP Nos.10216 & 10217 of 2018

M/s.Rajalakshmi Textile Processors Pvt Ltd.,
Rep. by its General Manager
N.Duraisamy .. Appellant in both Was.

versus

The Commercial Tax Officer,
Periya Agraharam Circle,
Erode, Erode District. .. Respondent in both WAs.

Writ Appeals filed against the common order dated 12.10.2017 in W.P.Nos.25132 and 25133 of 2017.

Petition filed U/A 226 of the Constitution of India praying for issuance of a writ of Certiorari to call for the records on the file of the respondent in his impugned proceedings made in TNGST 3075094 /2002-03 dated 27.07.2017 and TNGST 3075094/2005-06 dated 11/8/2017.

For Appellant in both WAs. : Mr.Adithya Reddy

For Respondent in both WAs. : Mr.V.Haribabu Additional Government Pleader (Taxes)

COMMON JUDGMENT

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

Writ Appeals are directed against the common order dated 12.10.2017 made in W.P.Nos.25132 & 25133, filed to quash the assessment orders, for the years 2002-03 and 2005-06, respectively, in TNGST 3075094/2002-03 dated 27.07.2017 and

3075094/2005-06 dated 11.08.2017, on the file of the Commercial Tax Officer, Periya Agraharam Circle, Erode, Erode District.

2. Short facts leading to the appeals are that the appellant/petitioner is engaged in dyeing works contracts purchasing dyes and chemicals, both intra state as well as inter State. They claimed exemption on the value of dyes and chemicals used in the process of works contract. Appellant has reported a total and taxable turn over of Rs.34,75,535/- and Rs.34,70,870/- for the Assessment Year 2002-03 and Rs.42,625/- for the Assessment Year 2005-06, respectively under the erstwhile Tamilnadu General Sales Tax Act, 1954. Verification of the accounts revealed that local purchase of dyes and chemicals were used in the process. Assessment were made under Section 3H and levied tax at 1%, under the abovesaid Section.

3. Placing reliance on a decision of this Court in State of Tamil Nadu Vs. SSM Processing Mills reported in 69 VST 445 (Madras), Commercial Tax Officer, Periya Agraharam Circle, Erode, Erode District, 2nd respondent herein issued notices dated 07.09.2004 and 02.06.2017, respectively.

4. Responding to the same, assessee contended that in the said decision, it was held that chemicals used in execution of Works Contract for dyeing cloth, would not at attract sales tax, in view of the fact that the chemicals used for bleaching were washed away in the process. Rejecting the said contention, respondent passed orders dated 02.06.2017 & 27.07.2017, respectively, under Section 16(1) of the Tamilnadu General Sales Tax Act, 1959 in TNGST No.3075094/02-03. Similar order was passed for the assessment year 2005-06 in TNGST No.3075094/05-06 dated 11.08.2017.

5. Being aggrieved by the above said orders dated 27.07.2017 and 11.08.2017, for the assessment years 2002-03 and 2005-06 respectively, assessee filed W.P.Nos.21532 and 21533 of 2017, to quash the same.

6. After hearing the learned counsel for the parties and following a decision of this Court in State of Tamil Nadu Vs. SSM Processing Mills reported in 69 VST 445 (Madras), writ Court dismissed both the writ petitions and granted liberty to the assessee to file appeals before the appellate authority. For brevity, paragraph Nos.4 to 6 of the order made in W.P.Nos.21532 & 21533 of 2017, are extracted hereunder:

> "4. The aggrieved dealer vsi., S.S.M. Processing Mills Preferred and appeal before the Hon'ble Supreme Court in Special Leave to Appeal (C) Nos.10166-10168 of 2014. These appeals were dismissed as withdrawn by

order dated 11.08.2014 giving liberty to the petitioner to raise other additional queries before the appropriate forum. Though such liberty was granted, the Hon'ble Supreme Court made it clear that they have not expressed any opinion with regard the the contention of the dealer that they wish to raise additional queries before the appropriate forum.

5. The learned counsel for the petitioner would submit that after the withdrawal of the Special Leave Petition, the dealer in the said case has filed additional grounds in Tax Case (Revision) No.69 of 2009 and 80 and 81 of 2011 and the same is pending. Firstly, the said decision does not relate to the petitioner, but concerns some other dealer. Furthermore, there is nothing placed on record to show that the said additional grounds have been entertained by the Hon'ble Division Bench in the case of S.S.M.Processing Mills. Even assuming it was entertained, unless the decision is rendered on those additional grounds and if the same is in favour of the dealer, then alone the petitioner would be entitled to convass those grounds challenging the impugned orders. Thus, as on date, the judgment of the Divisional Bench in the case of S.S.M. Processing Mills has attained finality and holds the field. Therefore, the present attempt of the petitioner to argue contrary to the decision is clear attempt to reopen a settled issue in an indirect manner, which cannot be permitted.

6. For the above reasons, these writ petitions are dismissed. However, liberty is granted to the petitioner to file appeals against the impugned orders if so advised. In the event of such appeals being filed, the appellate authority shall exclude the period from 18.09.2017 till the receipt of the certified copy of this order while computing limitation. No costs. Consequently, connected Miscellaneous Petitions are closed."

7. Aggrieved by the abovesaid orders, instant writ appeals are filed on the following grounds.

(i) The learned Single Judge ought to have seen that the petitioner was assessed by the respondent by taxing the turnover of the petitioner involving dyes and chemicals which are used in the processing of textile products. The petitioner had objected to the proposal as far back as 2004 itself. However, the respondent proceeded to raise demand on the petitioner holding that the law regarding the taxability of such turnover was settled by the Hon'ble High Court in State of Tamil Nadu Vs. SSM Processing Mills 2014 69 VST 455.

The petitioner only recently came to know that the assess in the said case has preferred a Special Leave Petition against the judgment of this Hon'ble Court in SLP Nos.10166 to 10168 of 2014 and the said SLPs were withdrawn by the assesses with the liberty to raise additional queries before the appropriate forum. The same was recorded by the Hon'ble Supreme Court in order dated 11.08.2014. Pursuant to the said liberty, the assessee has filed additional grounds in the relevant tax cases and the were pending before this Hon'ble Court. The same assesse has filed Tax Case (revisions) with respect to the very, same issue for other assessment years viz., 1990-1991, 1993-94, 1997-1998, 1998-1999, 1999-2000, 2000-2001 and 2001-2002. The relevant case numbers are TC 17 to 23 of 2016. Hence, the issue that is subject matter of present assessment is already seized of by this Hon'ble Court and is pending consideration.

(ii). The learned single Judge points out that the decision in the case of Tax Case (Revision) Nos.69 of 2009 etc. do not pertain to the petitioner. However, the learned single judge ought to have seen that it was on the basis of the said decision that the petitioner has been assessed and therefore, the pendency of the said case is directly relevant for the present proceedings.

(iii). The learned single judge has held that only if the additional grounds filed by M/s.S.S.M. Processing Mills pursuant to the liberty granted by the Hon'ble Supreme Court are entertained and allowed by this Hon'ble Court, will the petitioner be entitled to raise those grounds. This premise is not correct in as much as any alternative remedy availed by the petitioner during the pendency of the additional grounds filed by M/s.S.S.M. Processing Mills would only be an empty formality. The appellate authority would be bound to follow the judgment of this Hon'ble Court in the case of M/s.S.S.M. Processing Mills when this Hon'ble Court is seized of additional grounds raised by the said assesse. It is not the case of the petitioner that the judgment reported in 69 VST 455 has not attained finality but the petitioner only seeks to pray that this Hon'ble Court exercise its discretion and hold that alternative remedy is not a bar to the petitioner approaching this Hon'ble Court since the Hon'ble Court is already seized of the identical questions of law. The Hon'ble Supreme Court in identical circumstances in the case of H.L.Poultry

Farms Vs. State of Haryana AIR 1977 SCC 685, held that an alternative remedy is not a bar for this Hon'ble Court to entertain writ petition under Article 226 of the Constitution of India.

(iv). Further, the learned single judge failed to see that the respondent's assessment order suffers from non application of mind. While it is true that this Hon'ble Court in the case of M/s.S.S.M. Processing Mills held that material involved in dyeing and bleaching are taxable under Section 3(B) of the TNGST Act. It is not stated in the judgment as to how the turnover involved in such processes should be computed. It is not permissible to take the entire turnover and tax the same as has been done by the respondent. The turnover will have to be computed in terms of Section 3 (B)(2)(E) of the TNGST Act. More importantly, the respondent has levied penalty on the petitioner for failure to pay tax on its turnover involved in dyeing and bleaching. However, this Hon'ble Court in the very same judgment in M/s.S.S.M.Processing Mills in [2014] 69 VST 445 (Mad.) has held that no penalty is leviable since there is no suppression of turnover and the entire issue is only turns on the interpretation of the statutory provision. Hence, the issue of levying penalty is covered by the law laid down by this Hon'ble Court and there was no necessity of the learned single judge to relegate the petitioner to avail alternative remedy.

(v). The learned single judge ought to have seen that petitioner is now constrained to pay large sums of pre deposit money for availing appellate remedy when this Hon'ble Court is already seized of the questions of law involved in the writ petition. This will cause irreparable harm and prejudice to the petitioner.

8. On this day, when the matter came up for hearing, placing reliance on the decision of the Hon'ble Supreme Court in Special Leave to Appeal (C) No.10166 to 10168 of 2014, in the matter of M/s.SSM Process Mills Limited, Vs. State of Tamilnadu, Mr.Adithya Reddy, learned counsel for the appellant/assessee submitted that when M/s.SSM Process Mills Limited, preferred appeals to the Hon'ble Supreme Court, the same were permitted to be withdrawn, with liberty to the assessee/appellant therein to raise additional grounds before the appropriate forum. He further submitted that thereafter, Tax Case (Revision) have been permitted and pending on the file of this Court. He further submitted that details of the component viz., dyes used in bleaching / works contract, and quantum of tax liable to be

paid, for the said component, are not set out in both the assessment orders.

9. Attention of this Court was also brought to a recent decision in State of Tamilnadu Vs. Vanavil Colours, reported in (2017) 104 VST 309 (Madras) wherein a Hon'ble Division Bench of this Court, while confirming the liability to pay tax, set aside the penalty, following a decision of this Court in State of Tamilnadu Vs. Jansons Textiles Process, reported in (2014) 69 VST 443 (Madras).

10. Considering the challenge, Mr.V.Haribabu, learned Additional Government Pleader (Taxex) was put on notice.

11. Heard the learned counsel for the parties and perused the materials available on record.

12. The issue as to whether the respondent in the assessment orders, for the years 2002-03 and 2005-06, has to specifically give the details, of the extent of dyes used in bleaching / works contract and consequently, the quantum of liability to pay tax, in the case of works contract, is a matter to be decided by the appellate authority, on consideration of material available on record, for the reason that it is the turnover, which is assessed.

13. Further from the perusal of the judgment of State of Tamilnadu Vs. Vanavil Colours, reported in (2017) 104 VST 309 (Madras), it could be seen that levy of tax has been sustained, but, penalty alone has been cancelled, following a decision in Jansons Textile Process case.

14. Vide common order in W.P.No.21532 and 21533 of 2017 dated 12.10.2017 impugned in the instant appeals, while dismissing the writ petitions, writ Court has granted liberty to the assessee / appellant to file appeals against the assessment orders, if so advised and in such an event, while computing limitation directed the appellate authority to exclude the period from 18.09.2017, till the receipt of the certified copy of the common order made in the writ petitions.

15. Now that a Hon'ble Division Bench of this Court in Vanavil Colours case, has confirmed liability to pay tax. However, deleted penalty.

16. Statute provides for an appeal. On more than one occasion, the Hon'ble Supreme Court, as well as this court, held that, ordinarily, writ petitions should not be entertained, when statutes provide for an effective and alternative remedy. 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, 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.
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> 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 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."

(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 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.)"

(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}, the Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

17. Though, the appellant/assessee has sought for reversal of the common order, impugned before us in the light of the above decisions and discussion, we are not inclined to interfere with the same. It is always open to the appellant, to prefer statutory appeals as directed by the writ Court.

18. While sustaining the orders impugned, we permit the assessee to prefer statutory appeals to the appellate authority, if so advised. Time spent from 18.09.2017, till the receipt of the copy of this order, be excluded for computing limitation. Writ Appeals are dismissed. No costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

The Commercial Tax Officer,
Periya Agraharam Circle,
Erode, Erode District.

+1cc to Mr.Adithya Reddy, Advocate Sr.38796
+1cc to the Special Government Pleader Sr.39084

W.A.Nos.1240 & 1241 of 2018
and
CMP Nos.10216 & 10217 of 2018

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