IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 20/3/2018
C O R A M
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal Nos.619 to 621 of 2018

Anil Jain. ... Appellant in W.A.No. 619 of 2018/Petitioner

M/s. Refex Industries Ltd
rep. By Ms.Anitha ... Appellant in W.A.No. 620 of 2018/Petitioner

M/s. Sherisha Technologies Pvt Ltd
rep. By S.Sarath Kumar
Senior Executive - Accounts
67 Bazullah Road
Chennai 600 017. ... Appellant in W.A.No. 621 of 2018/Petitioner

Vs

1. The Chief Commissioner of Customs
Office of the Chief Commissioner of Customs
Customs House
No.60 Rajaji Salai
Chennai 600 001.

2. The Commissioner of Customs (Chennai - II)
Office of the Commissioner of Customs (Chennai - II)
Customs House
No.60 Rajaji Salai
Chennai 600 001. ... Respondents in all the appeals.

Civil Miscellaneous Appeals filed under Clause 15 of Letters Patent to set aside the impugned order dated 20/12/2017 passed in W.P.Nos.33074, 33077 and 33078 of 2017.

WP.No.33074,33077 & 33078/17:Petitions under article 226 of the Constitution of India praying for the issuance of a Writ of Declaration that issuance of the 2nd Show Cause Notice in F.No.DRI/CZU/ VIII/48/ ENQ-01/(INT-05)/2015 dated 23.1.2016 issued in pursuance of the Order-in-Original No.40007/ 2015 in F.No.CAU/DRI/ CHE/19/2015 passed by the Commissioner of Customs (Chennai II) and the consequential passing of the Order-in-

Original No.50231/ 2016 in F.No.CAU/ DRI/ CHE/32/2016 dated 23.9. 2016 passed by the 2nd respondent with reference to this petitioner company is concerned as ultra vires and against the provisions of the Customs Act 1962 and hence illegal invalid and non est in the eyes of law

For appellants ... Mr.Velayutham Pichaiya

For respondents ... Mr.M.Santhanaraman

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C O M M O N J U D G M E N T

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

Material on record discloses that appellants Anil Jain, M/s. Refex Industries Ltd., Chennai and M/s. Sherisha Technologies Pvt Ltd, Chennai, along with two others, viz., Lalitha, Deputy General Manager, M/s. Sherisha Technologies Pvt Ltd., and A.Ravi, Production-in-charge, M/s. Refex Industries Ltd., have filed W.P.Nos.33074 to 33078 of 2017, praying for a writ of declaration, to declare that issuance of the second show cause notice, in F.No.DRI/CZU/VIII/48/ENQ-01/(INT-05)/2015, dated 23/1/2016, issued in pursuance of the order-in-original No.40007/2015, in F.No.CAU/DRI/CHE/19/2015, passed by the Commissioner of Customs (Chennai II) and the consequential proceedings No.50231/2016 in F.No.CAU/DRI/CHE/32/2016, dated 23/9/2016, passed by the second respondent, with reference to the petitioners companies as ultra vires and against the provisions of the Customs Act, 1962 and hence illegal, invalid and non est in the eye of law.

2. By observing that the petitioners therein have an effective and alternative remedy, by way of an appeal, before the CESTAT and that such a prayer cannot be entertained, writ Court, vide, common order, dated 20/12/2017, in W.P.Nos.33074 to 33078 of 2017, dismissed the writ petitions and further observed that dismissal of the same would not prevent the petitioners therein from working out their remedies, in accordance with law, under the provisions of the Customs Act, 1962, if so advised.

3. Mr.Velayutham Pichaiya, learned counsel for the appellants submitted that Lalitha, Deputy General Manager, M/s. Sherisha Technologies Pvt Ltd and A.Ravi, Production-in-charge, M/s. Refex Industries Ltd., (writ petitioners in W.P.Nos.33075 and 33076 of 2017) have filed appeals before the CESTAT, Madras. Placing reliance on the decision of the High Court of Hyderabad, in Syed Irfan Mohammed Vs. Union of India, reported in {2017 (349) ELT.462 (AP), learned counsel for the appellants

submitted that second show cause notice is impermissible.

4. Submission of the learned counsel is placed on record.

5. Perusal of the common order, dated 20/12/2017, made in W.P.Nos.33074 to 33078 of 2017, shows that the Department has issued a show cause notices, dated 23/1/2016 and proposed to seize R-22 gas, allegedly imported by mis-declaring the same as R-410a. Apart from other proposals, Department has also proposed to impose penalty. Show cause notices, issued to the above culminated in order-in-original, dated 23/9/2016. After the common order made in the writ petitions, when two of the writ petitioners therein, viz., Lalitha, Deputy General Manager, M/s. Sherisha Technologies Pvt Ltd and A.Ravi, Production-in-charge, M/s. Refex Industries Ltd., have already approached the Tribunal, the remaining three, Mr.Anil Jai, Refex Industries Ltd., and Sherisha Technologies Pvt Ltd., have filed Writ Appeals before this Court. Let us consider few decisions on alternative remedy.

6. 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.

7. 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.

8. 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."

9. 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."

10. 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."

11. 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."

12. 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."

13. 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.”

14. 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."

15. 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.)"

16. 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 Apex 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. There cannot be two parallel proceedings assailing the correctness of the very same order-in-original, dated 23/9/2016. One before the Tribunal, by way of appeal, and another, by way of writ petitions, which may give rise to conflicting decisions. That apart, there is alternative remedy. Though the learned counsel for the appellants placed reliance on the above cited decision, the same can be placed before the CESTAT, Madras, if any appeal is filed by the appellants before this Court.

18. In such a view of the matter, instant Writ Appeals are dismissed. Appellants are at liberty to approach, CESTAT, Madras and pray for a joint hearing. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mvs

To

1.The CESTAT, South Zone Bench, Chennai.

2.The Chief Commissioner of Customs
O/o.The chief Commissioner of Customs
Customs House
No.60 Rajaji Salai
Chennai-1

3.The Commissioner of Customs (Chennai-II)
O/o.The Commissioner of Customs (Chennai-II)
Customs House,
No.60 Rajaji Salai Chennai-1

+1 cc to M/s.Velayutham Pichaiya Advocate sr 20986 07/06/2018

Writ Appeal Nos.619 to 621 of 2018

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