IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.18828 of 2016
and
W.M.P.No.16435 of 2016

M/s.A.K.Paper Products Pvt Ltd,
Represented by its Director,
Shri.Mohit Jain,
3-1-763, 'A.K.HOUSE' Ambepet Road
Kacheguda, Hyderabad - 500 027 ..Petitioner

Versus

1.The Chairman,
Central Board of Excise & Customs
Department of Revenue
Ministry of Finance
North Block, New Delhi - 110 001.

2.The Commissioner of Customs(Appeals-II)
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

3.The Deputy Commissioner of Customs(Group 2),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ..Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, to call for the records of the 2nd respondent pertaining to the impugned order-in-appeal C. Cus. II No.212-215/2015 dated 27.02.2015 confirming the order-in-original No.3 of 2014 dated 26.11.2014 passed by the 3rd respondent and quash the same.

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For Petitioner : M/s.Hari Radhakrishnan

For Respondents : Mr.V.Sundareswaran

ORDER

The order in Appeal issued by the 2nd respondent in C.Cus.II No.212-215 dated 27.02.2015, confirming the order-in-original No.3 of 2014 dated 26.11.2014 passed by the 3rd respondent are

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under challenge in this writ petition.

2.The grievance of the writ petitioner is that the petitioner is a regular importer of "Carbonless Paper Black Image" and the same is classifiable under customs tariff heading 4809. In the course of their business, the petitioner filed bill of entry Nos.6445028 dated 03.04.2012, 8072900 dated 28.09.2012 and 7141127 dated 18.06.2012 for clearance of the goods. The petitioner claimed the benefit of serial number 553 of Notification No.46 /2011 – Cus dated 01.06.2011, which provided for a concessional rate of basic customs duty for all goods classifiable under heading 480830 to 480990. The benefit of exemption notification was extended to the goods at the time of import and the goods were accordingly cleared by the Proper Officer of Customs, for home consumption.

3.The learned counsel for the petitioner states that the benefits already granted through the Notification No.46 of 2011 had been withdrawn mistakenly. Thus, the petitioner is constrained to move the present writ petition.

4.It is contended that withdrawal of the exemption granted is improper and not in accordance with the agreements entered into between the Countries. Thus, the benefits already granted is to be extended to the writ petitioner in respect of grant of concessional rate of basic customs duty.

5.The learned counsel appearing on behalf of the respondents opposed the contention by stating that the concessional rate of basic customs duty initially granted under the Notification No.46 of 2011 was withdrawn by way of a decision and not by mistake. Thus, the writ petitioner is not eligible for the concession as such claimed in the present writ petition.

6.The learned counsel for the respondents further urged this Court by stating that the writ petitioner is bound to exhaust the statutory remedies available under the provisions of the Customs Act. It is stated that Section 128 of the Customs Act, 1962 provides Appeals, the first appeal lies before the Commissioner under Section 128 of the Act. Thereafter, the aggrieved person shall approach the Appellate Tribunal constituted under the provisions of the Act under Section 129 (A). This being the statutory provisions, the present writ petition cannot be entertained as the writ petitioner has not exhausted the statutory remedies provided under the Customs Act.

7.This Court is of an opinion that the Appellate Tribunal constituted under the said Act is empowered to adjudicate all the legal grounds raised by the writ petitioner in the present writ petition and also the factual disputes. Such being the powers of the Appellate Tribunal, the writ petitioner has to

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approach the Tribunal for an appropriate adjudication to resolve the issues and redress his grievances.

8.Usurping the powers of such Appellate Tribunals created under the Act cannot be done in a routine manner by the Constitutional Courts. Institutional respects are to be maintained in respect of taking decisions by the competent authorities. The institutions created under the statutes must be allowed to exercise their powers and functions in the manner known to law. Intermittent Interventions frequently by the Courts will create unnecessary complications and will pave way for conflicts and the decisions in such issues. Thus, it is always preferable that the aggrieved persons must be allowed to exhaust the remedies and the institutions created under the statutes shall be allowed to adjudicate the matters by following the procedures and take a decision in accordance with law.

9.In this view of the matter, this Court is of an opinion that the issues raised by the writ petitioner in the writ petition cannot be adjudicated as the Appellate Tribunal is empowered to adjudicate all such disputes.

10.Unnecessary or routine invasion into the statutory powers of the competent authorities under a statute should be restrained by the Constitutional Courts. Frequent or unnecessary invasions in the executive power will defeat the constitutional perspectives enshrined under the Constitution of India. Undoubtedly, the separation of powers under the Indian Constitution has been narrated and settled in umpteen number of judgments. Separation of powers demarcated in the Constitution of India is also to be considered, while exercising the powers of judicial review in the matter of dispensing with the appeal remedy provided for an aggrieved person under a statute. If the High Courts started interfering with such Appellate powers without any valid and substantiated reasons, then the very purpose and object of the statute and provision of appeal under the statute became an empty formality and the High Courts also should see that the provisions of appeal contemplated under the statutes are implemented in its real spirit and in accordance with the procedures contemplated under the rules constituted thereon. While entertaining a writ petition as narrated by the Apex Court, the provision of efficacious alternative remedy under the statute also to be considered. If the writ petitions are entertained in a routine manner, by not allowing the competent Appellate authority to exercise their powers under the provisions of the statute, then this Court is of an opinion that the power of judicial review has not exercised in a proper manner. Thus, it is necessary for this Court to elaborate the legal principle settled in respect of the separation of powers under the Constitution of India.

1. Madras Bar Association vs. Union of India (UOI)

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(25.09.2014 - SC) : MANU/SC/0875/2014

If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

(1) The supremacy of the Constitution.

(2) Republican and Democratic form of government and sovereignty of the country.

(3) Secular and federal character of the Constitution.

(4) Demarcation of power between the Legislature, the executive and the judiciary.

(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

(6) The unity and the integrity of the Nation.

2. Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. [MANU/SC/0445/1973 : (1973) 4 SCC 225].

That separation of powers between the legislature, the executive and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J.

3. P. Kannadasan and Ors. v. State of T.N. and Ors. [MANU/SC/0650/1996 : (1996) 5 SCC 670] the Supreme Court noted that the Constitution of India recognised the doctrine of separation of powers between the three organs of the State, namely, the legislature, the executive and the judiciary. The Court said:

It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.

4. State of Tamil Nadu and Ors. vs. State of Kerala and Ors. (07.05.2014 - SC) : MANU/SC/0425/2014

121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation

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of powers between legislature, executive and judiciary may, in brief, be summarized thus:

(i) Even without express provision of the separation of powers,the doctrine of separation of powers is an entrenched principle in the Constitution of India.

The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law.

In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs- legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution.

Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs--legislature, executive and judiciary--is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality Under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality Under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on

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coming to know of it aligned.

In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law."

11.This Court is of a strong opinion that institutional respects are to be maintained by the constitutional Courts. Whenever there is a provision for an appeal under the statute, without exhausting the remedies available under the statute, no writ petition can be entertained in a routine manner. Only on exceptional circumstances, the remedy of appeal can be waived, if there is a gross injustice or if there is a violation of fundamental rights ensured under the Constitution of India. Otherwise, all the aggrieved persons from and out of the order passed by the original authority is bound to approach the Appellate Authority. The Constitutional Courts cannot make an appeal provision as an empty formality. Every Appellate Authority created under the statute to be trusted in normal circumstances unless there is a specific allegation, which is substantiated in a writ proceedings. Thus, the institutional functions and exhausting the appeal remedies by the aggrieved persons, are to be enforced in all circumstances and writ proceedings can be entertained only on exceptional circumstances. Rule is to prefer an appeal and entertaining a writ is only an exception. This being the legal principles to be followed, this Court cannot entertain the writ petitions in a routine manner by waiving the remedy of appeal provided under the statute.

12.Now, let us look into the legal principles settled by the Apex Court for exhausting the efficacious alternative remedy provided under the statute.

13.When an effective alternative remedy is available, a writ petition cannot be maintained

1. In City and Industrial Development Corporation v. DosuAardeshirBhiwandiwala and Ors. MANU/SC/8250/2008 : (2009) 1 SCC 168, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

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(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

2. KanaiyalalLalchand Sachdev and Ors. vs. State of Maharashtra and Ors. (07.02.2011 - SC) : MANU/SC/0103/2011

It is well settled that ordinarily relief Under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd.; Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)

3. Commissioner of Income Tax and Ors. v. ChhabilDass Agarwal, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

Para 15. 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 ThansinghNathmal case, Titaghur Paper Mills case 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 created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

4. Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. (30.01.2018 - SC) : MANU/SC/0054/2018

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The petitioner argued that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Ikbal and others, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same. The Supreme Court agreed to the arguments and held the same also noted that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum.

5. State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd. reported at AIR 2005 SC 3856, the Supreme Court explained the rule of 'alternate remedy' in the following terms

Considering the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd 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 of 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

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jurisdiction.

6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089,

Constitution Benches of the Supreme Court 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.

7. First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724.

There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

14.In view of the legal principles settled by the Apex Court, the writ petitioner is at liberty to approach the appropriate Appellate authorities and thereafter, before the Appellate Tribunal constituted under Section 129(A) of the Customs Act,1972 for the purpose of redressing his grievances in the manner known to law.

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15.With these observations, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1.The Chairman,
Central Board of Excise & Customs
Department of Revenue
Ministry of Finance
North Block, New Delhi - 110 001.

2.The Commissioner of Customs(Appeals-II)
Custom House, No.60, Rajaji Salai,
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+1cc to Mr.V.Sundareswaran, Advocate sr.no.63187

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