

* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
And
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

+ W.P.No.43024 of 2015

%Date: 24-01-2018

Between:

M/s. Vijaya Mining & Infra Corporation Private Limited,
D.No.20/1073, Opp: Soujanya Nursing Home,
R.K. Colony, Kadapa, rep. by its authorized
Signatory Mr. S. Srikanth Reddy.

... Petitioner

Vs.

1. The Commercial Tax Officer-I, Kadapa, Kadapa District.
2. The Assistant Commissioner (CT)-III, Enforcement Wing, O/o. The Commissioner of Commercial Taxes, Government of Andhra Pradesh, Hyderabad.
3. The Appellate Deputy Commissioner (CT), Kurnool Division.
4. The Commissioner of Commercial Taxes, Government of Andhra Pradesh, Hyderabad.
5. The State of Andhra Pradesh, Rep. by its Secretary, Revenue (CT) Department Secretariat Buildings, Hyderabad.

... Respondents

! For the Petitioner

: Mr. V. Bhaskar Reddy

^ For the Respondents

: G.P. for Commercial Taxes (A.P)

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? Cases referred

1. (2011) 53 APSTJ 1

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

W.P.No.43024 of 2015

ORDER: (per VRS,J)

The petitioner has come up with the above writ petition challenging an order of assessment passed under the A.P. VAT Act, 2005 dated 04.02.2015 and the rejection of an appeal filed by them on the ground that the pre-deposit condition was not satisfied.

2. Heard Mr. V. Bhaskar Reddy, learned counsel for the petitioner and learned Government Pleader for Commercial Taxes, A.P.

3. The petitioner is carrying on the business of execution of civil works contracts, both within and outside the State of Andhra Pradesh. The petitioner is registered as a dealer in the office of the 1st respondent.

4. The petitioner filed monthly returns during the year 2012-13 and had reported exempted purchases to the tune of Rs.56,03,70,515/- and exempted sales to the tune of Rs.294,03,22,541/- in the returns filed in Form-200.

5. Pursuant to an audit conducted by the 2nd respondent and on the strength of the authorization granted by the Joint Commissioner, Enforcement, a notice dated 13.11.2014 was issued in Form VAT-305A proposing to assess the petitioner and levy tax to the tune of Rs.9,58,20,937/-. Out of the proposed tax, the 2nd Respondent treated an amount of Rs.5,12,88,948/- as liability under Section 4(8), treating the works contract receipts, as receipts towards hire charges for transfer of right to use goods in respect of the works executed for two companies by name AMR Constructions and Sushee Infratech Private Limited. The

balance amount of Rs.4,45,31,989/- was treated as liability under Section 4(7) not covered by documentary evidence.

6. In response to the notice, the petitioner filed detailed objections on 16.01.2015. Apart from raising issues on merits, the petitioner also contended that the works pertaining to other States are not liable to tax in Andhra Pradesh and requested the 2nd respondent to grant time to produce relevant agreement copies.

7. But the 2nd respondent passed an order dated 04.02.2015 confirming the levy and raising a demand for Rs.9,58,20,937/-.

8. Pursuant to the assessment order, a notice dated 21.02.2015 was also issued in Form VAT-203A, proposing to levy penalty under Section 53(1) (ii) of the A.P VAT Act, 2005. The petitioner filed objections on 14.05.2015, but the proposal was confirmed by order dated 12.08.2015.

9. In the meantime, the petitioner filed a statutory appeal on 04.04.2015 before the 3rd respondent, as against the order of assessment dated 04.02.2015. But the appeal was not accompanied by a deposit of 12.5% of the disputed tax. The petitioner claims that they were unable to make the deposit due to financial crisis. Therefore, the appeal was rejected by an order dated 07.10.2015, on the basis of a judgment of this Court in *Ankamma Trading Company v. The Appellate Deputy Commissioner (CT), Guntur*¹.

10. Thereafter, the petitioner has come up with the above writ petition challenging the original order of assessment dated 04.02.2015 and the order of rejection of the appeal dated 07.10.2015, on the short ground that the judgment of this Court in *Ankamma Trading Company* has

¹ (2011) 53 APSTJ 1

already been suspended by the Supreme Court on a Special Leave Petition.

11. The main grievance of the petitioner is two fold, viz., (a) that the original order of assessment was without jurisdiction, as it included the turnover relating to works executed in other States; and (b) that in any case, the decision of this Court in *Ankamma Trading Company* has been suspended by the Supreme Court.

12. The 1st respondent has filed a counter affidavit contending *inter alia* that pursuant to the authorization issued by the Joint Commissioner, the 2nd respondent conducted an audit on 02.01.2014 and issued a show cause notice on 13.11.2014; that the petitioner filed its objections on 16.01.2015 and participated in the personal hearing held on 19.01.2015; that thereafter the order of assessment was passed on 04.02.2015; that the petitioner filed a statutory appeal without complying with the pre-deposit condition and hence the appeal was rejected; that the appeal was rejected only after giving lot of time for the petitioner to make pre-deposit; that the law is settled by this Court in the decision in *Ankamma Trading Company* to the effect that bar for entertaining an appeal without proof of payment of 12.5% of the deposited tax, is mandatory; that the decision in *Ankamma Trading Company* was also reiterated in *Vatti Sundari v. State of A.P.* (W.P.Nos.35523 & 35540 of 2016, dated 26.10.2016); and that even on merits, the impugned orders cannot be assailed.

13. We have carefully considered the rival submissions.

14. Since the controversy raised in this writ petition revolves around the decision of a Bench of this Court in *Ankamma Trading Company*, it is necessary to have a look at it first. In *Ankamma Trading*

company, what was under challenge before the Bench of this Court was the orders passed by the Appellate Deputy Commissioners, rejecting the appeals for non-compliance with the statutory requirement of deposit of 12.5% of the disputed tax. The questions that the Bench of this Court framed for its consideration included among others, the following:

1. Does the second proviso to Section 19(1) and Section 31 of the APGST and APVAT Acts permit payment of admitted tax and 12.5% of the disputed tax and production of its proof, within a reasonable time beyond sixty days?
2. Is the defect in payment of the tax stipulated in the second proviso, curable?
3. Is the time limit for the payment of admitted tax and 12.5% of the disputed tax is mandatory or directory?

15. After analyzing the statutory provisions and the entire case law on the point, the Division Bench came to the conclusion in *Ankamma Trading Company* that even the payment of admitted tax and 12.5% of the disputed tax beyond the period of 60 days, from the date of receipt of a copy of the order of assessment, would disable the appellate authority from admitting the appeal and that the prescription was mandatory and not directory.

16. The decision in *Ankamma Trading Company*, appears to have been taken on appeal to the Supreme Court and it is claimed across the bar that an interim suspension on the said decision has been granted.

17. It appears that after the decision in *Ankamma Trading Company*, a Division Bench of this Court had an occasion to consider in *Ideal Industrial Explosives Limited v. Government of A.P.*, (W.P.No.13617 of 2014 dated 31.10.2014), a claim that wherever appeals are rejected for non-compliance with statutory prescriptions and those orders are challenged by way of writ petitions, it was open to this Court to grant stay of recovery. But this Court held that the decision in *Ankamma Trading Company* is binding upon a Coordinate Bench.

18. The decision in *Ideal Industrial Explosives* dated 31.10.2014 was carried on appeal in S.L.P.(Civil).No.4675 of 2015 to the Supreme Court. In the Special Leave Petition, the petitioner sought interim reliefs to the following effect:

- i) Grant ad interim ex parte stay of the operation of the final order and judgment dated 31.10.2014 passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in W.P.No.13617 of 2014.
- ii) To grant suspension of the operation of the judgment in 53 APSTJ page 1; and
- iii) To stay all further proceedings in pursuance of the assessment order dated 07.10.2013 vide TIN 28190122893/ 2012-13 issued by the Assistant Commissioner (CT) –IX, Enforcement Wing, Hyderabad; and
- iv) Grant such relief or reliefs as are deemed fit and proper in the interest of justice.

19. On 16.02.2015 the Supreme Court granted leave and also granted ad interim relief as prayed for in the Special Leave Petition. The order passed by the Supreme Court on 16.02.2015 in S.L.P.(Civil).No.4675 of 2015 is as follows:

“Leave granted.
Tag with Civil Appeal No.7574 of 2014.
Ad-interim relief, as prayed for in the Special Leave
Petition, is granted.”

20. Therefore, it is contended by the learned counsel for the petitioner that as on date, the decision in *Ankamma Trading Company* cannot be taken to be a binding precedent and that it is always open to this Court to be allowed to be persuaded to come to a different conclusion.

21. But we are unable to agree. On first principles, there cannot normally be an interim suspension of a principle of law enunciated in a decision. At the most, the interim relief granted by the Supreme Court in the Special Leave Petition filed by the *Ideal Industrial Explosives Limited*, can be taken to be an interim suspension of the consequences that flowed

out of the judgment of this Court. By way of an interim order, the *ratio decidendi* of a judgment cannot be kept in suspended animation or in a state of limbo. Therefore, we do not agree with the contention that the ratio of the decision in *Ankamma Trading Company* stands suspended.

22. Let us assume for a minute that we are today entitled to independently deal with the issue. Even then we find no reason to take a different view than the view taken in *Ankamma Trading Company*. All revenue statutes invariably contain a provision for making a pre-deposit, as a condition for entertaining an appeal. Some of the statutes like the Central Excise Act even enable the appellate authorities to order waiver of pre-deposit condition either in whole or in part. But after August, 2014, the element of discretion stands removed from some of the statutes. The amount quantified as pre-deposit condition, is normally determined by the law makers, to ensure that a balance is struck between the interests of the revenue and the rights of the assessee. Therefore, a prescription regarding pre-deposit condition cannot be made a dead letter. Hence we see no reason to take a different view than the one taken in *Ankamma Trading Company*, at least until the decision in *Ankamma Trading Company* is reversed or modified by the Supreme Court.

23. The above conclusion of ours would dispose of the challenge of the petitioner to the order of the Appellate Deputy Commissioner dated 07.10.2015. But the petitioner has also challenged the original order of assessment dated 04.02.2015. Therefore, the next question that arises for consideration is as to whether it will be open to an assessee to challenge the original order of assessment, after getting their statutory appeal rejected for failure to comply with the statutory prescription?

24. Generally an order of the original authority merges with the order passed on an appeal. Once the appeal is disposed of, there is no original order available in the eye of law, to enable the assessee to challenge the original order.

25. But in cases where a statutory appeal is rejected for non-compliance with the statutory prescription or on account of delay in filing the appeal beyond the condonable period, merger does not take place. The reason for this is that if an appeal is filed beyond the period of limitation and beyond the period up to which the appellate authority is competent to condone the delay, there is virtually no appeal in the eye of law. Similarly, if an appeal is filed without complying with the condition for making a pre-deposit, then there is no appeal in the eye of law. Where appeals of this nature are rejected, the orders of rejection do not become the orders passed on the appeal and hence no merger takes place.

26. Therefore, in cases where a statutory appeal is rejected for failure to comply with a statutory prescription or on account of the delay in filing the appeal beyond the condonable period, an assessee may be entitled to challenge the original order of assessment.

27. But in cases where the assessee chooses to challenge the original order of assessment by way of a writ petition under Article 226, after his attempts to file a statutory appeal got aborted, this Court would exercise extreme caution in entertaining the same. The power of the Court to entertain a writ petition under Article 226, in cases where the assessee seeks to bypass the alternative remedy of appeal, is circumscribed only by two conditions, viz., (a) that there is a gross violation of the principles of natural justice; and/or (b) that the order of assessment was without jurisdiction.

28. In cases where an assessee chooses to challenge the original order of assessment, after his appeal is rejected for non-compliance with the statutory prescription, this Court will also see whether the assessee is guilty of delay and laches. In other words, the assessee falling under this category should satisfy this Court not only on the parameters of violation of natural justice or lack of jurisdiction but also on the parameters of delay and laches. Wherever it is found by this Court that an assessee has come up with a writ petition at the earliest point of time, without being guilty of delay and laches, this Court can certainly examine whether the original order of assessment was vitiated by a violation of the principles of natural justice or lack of jurisdiction on the part of the assessing authority.

29. Keeping the above parameters in mind we shall now take a look at the original order of assessment and the grounds on which it is challenged.

30. The first contention of the petitioner is that the request made by them on 16.01.2015 in response to the show cause notice dated 13.11.2014 to grant some time to produce proof was not accepted and that therefore there was a violation of principles of natural justice.

31. In the third last paragraph of their objections dated 16.01.2015 to the show cause notice dated 13.11.2014 the petitioner stated the following:

“The connected records are with site in-charge officials, and we could not be able to get the same in spite of efforts taken by us. We therefore, request the Assessing Authority, kindly give us one more opportunity up to the end of this month for all the required evidence to prove that the above works were executed in other states and purely earth works and there is no involvement of material liable to tax under Section 4(7)(a) of the APVAT Act.”

32. According to the petitioner, the failure of the 2nd respondent to grant time upto the end of the month (January 2015) tantamounted to a violation of principles of natural justice.

33. But we are unable to agree. While dealing with the question of violation of natural justice, this Court will normally go by broad parameters. If a show cause notice has been served, if sufficient opportunity has been granted to file objections and if a personal hearing had been granted, then the Court cannot go beyond. This is especially so in cases where the assessee chooses to challenge the original orders of assessment, without availing the alternative remedy of appeal.

34. In the case on hand, the show cause notice was issued on 13.11.2014. The date on which the show cause notice was received by the petitioner is not known. However, the dealer was issued VAT 310 on 10.10.2014 calling upon them to furnish pending agreement copies. The petitioner sought time of one month. Though time was granted, they failed to submit pending agreement copies. It was only thereafter that the show cause notice dated 13.11.2014 was issued.

35. After the petitioner submitted their objections on 16.01.2015, a personal hearing was held on 19.01.2015. It is only thereafter that the impugned order of assessment dated 04.02.2015 was passed. From the date of service of VAT-310 on 10.10.2014, the petitioner had about three months time to collect the records. Therefore, we do not agree that the failure to grant time to produce the records tantamounted to violation of the principles of natural justice.

36. The second objection to the original order of assessment is that in respect of the works carried out outside the State, the 2nd respondent had no jurisdiction. But in support of this contention the petitioner ought

to have produced pending agreement copies. The other contention that the works executed by the petitioner for AMR Constructions and Sushee Infratech Private Limited are in the nature of civil contracts for removal of overburden and that therefore the receipts cannot be considered as hire charges, is an argument that does not go to the root of the issue of jurisdiction.

37. Therefore, this is not a case where we would have entertained a writ petition as against the original order of assessment, even if the petitioner had come up before the filing of a statutory appeal.

38. In view of the above, the writ petition fails and it is dismissed. As a sequel, the miscellaneous petitions pending in this writ petition, if any, shall stand closed. There shall be no order as to costs.



V. RAMASUBRAMANIAN, J.

ABHINAND KUMAR SHAVILI, J.

24th January, 2017-
Js.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

W.P.No.43024 of 2015
(Per VRSJ)



24th January, 2018

Js.