THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T. AMARNATH GOUD

WRIT PETITION No. 11475 of 2018

ORDER: *(per Hon'ble Sri Justice Sanjay Kumar)*

The prayer of the petitioner in this case reads as under:

> "For the reasons stated in the accompanying affidavit it is therefore prayed that this Hon'ble Court may be pleased to issue a Writ of mandamus or any other appropriate Writ, Order or Orders, Direction or Directions to declare the proceedings of the 3rd respondent in O.R.No.115/2016-ST DIV-II, dated 29.12.2016, being the order-in-original No.15/2016-17 ST DVN-II, as illegal, arbitrary and unconstitutional and to set aside the same and to issue a consequential direction to the 3rd respondent to cause the assessment for the period 2011-12 to 2014-15 against the petitioner afresh in respect of the liability of service tax on the commission received on sale of used cars in accordance with law, and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

It is relevant to note that in para 6 of the affidavit filed in support of the writ petition, the petitioner claimed as follows:

> "It is submitted that the impugned order dated 29.12.2016 was received by the petitioner on 17.01.2017. It is appealable U/s.85 of the Finance Act, 1994 to the Commissioner within a period of three months and within a further period of three months subject to condonation of delay. After the expiry of the said period of six months, the appeal does not lie. Unfortunately, the order of the 3rd respondent is not subjected to any appeal due to lack of proper advice and by oversight. The deponent herein is not aware of the availability of the appellate remedy under the Act and also the prescribed period of limitation. There was no negligence in not availing the appellate remedy by the petitioner nor it was done wantonly. The failure to file an appeal against the impugned order before the Commissioner (Appeals), may not result in mulcting the petitioner with an illegal demand arising out of the order of the 3rd respondent. There is immense pressure

> from the officials of the Department to recover the amount from the petitioner and hence the petitioner is constrained to approach this Hon'ble Court.

While so, Smt. T. Vanalatha Reddy, learned counsel for the respondents, brought it to our notice that the petitioner did, in fact, file an appeal before the Commissioner of Customs and Central Tax (Appeals-I), Hyderabad, in Appeal No.HYD-SVTAX-RRC-APP-122-17-18 (APP-I) and the same was dismissed by the Commissioner *vide* order dated 27.11.2017.

A copy of the said order is placed on record. Perusal thereof reflects that the said appeal was filed by the petitioner against the very same Order-in-Original dated 29.12.2016 which is sought to be challenged presently. The appeal was dismissed by the Commissioner on the ground of limitation.

However, para 6 of the writ affidavit, extracted supra, clearly indicates that the petitioner did not choose to disclose the fact that it filed the aforestated appeal and on the other hand, claimed that it was not aware of the availability of the appellate remedy under the Finance Act, 1994 (for short 'the Act of 1994'), and also the prescribed period of limitation.

Sri Vedula Srinivas, learned counsel for the petitioner, would seek time to file an additional affidavit explaining the failure on the part of the petitioner to disclose the factum of it having filed a statutory appeal.

We are of the opinion that any attempt on the part of the petitioner to do so at this stage would only be an afterthought, given the clear averment in the writ affidavit that it was unaware of the appellate remedy under the Act of 1994, which is disproved by the fact that it did, in fact, avail such statutory appellate remedy. The writ petition is liable to be dismissed on the ground of wilful suppression of material facts.

In *K.D. Sharma vs. Steel Authority of India Limited*[1], the Supreme Court observed that a prerogative writ is not a matter of course and if the applicant suppresses any material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone.

In the light of the aforestated legal principle, we are of the opinion that the writ petition does not deserve to be entertained at all as the petitioner approached this Court with unclean hands.

On this short ground, the writ petition is dismissed at the threshold. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

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JUSTICE SANJAY KUMAR

Date: 07.06.2018

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JUSTICE T. AMARNATH GOUD

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[1] (2008) 12 SCC 481