IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 812 OF 2017

Konkan Railway Corporations Ltd. .. Petitioner
v/s.
Union of India & Anr. .. Respondents

Mr. Vikram Nankani, Senior Advocate, a/w. Mr. Jitendra Motwani and Ms. Nehal Parekh, i/b. Economic Laws Practice, for the Petitioner.

Mr. M. Dwivedi, a/w. Mr. J.B. Mishra, for the Respondents.

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CORAM: M.S.SANKLECHA, &
S.C.GUPTE, JJ.

DATE : 1 AUGUST, 2019.

P.C:-

1. On 27 June 2019, we passed the following order:

> "On 21st September, 2018, we passed the following order:-
>
> 1. This Petition under Article 226 of the Constitution of India challenges the order dated 21st December, 2016 passed by the Commissioner, Service Tax, Mumbai. The impugned order dated 21st December, 2016 is passed for recovery of Service Tax under the Finance Act, 1994 (Act).
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> 2. We pointed out to Mr. Nankani, that learned Senior Counsel that there is an alternative remedy available under the Act to challenge the impugned order dated 21st December, 2016 before the

Customs, Excise and Service Tax Appellate Tribunal (Tribunal). Therefore, prima facie, we are not inclined to interfere with the impugned order dated 21st December, 2016 in our writ jurisdiction.

3. In response, Mr. Nankani, learned Senior Counsel appearing in support of the petition points out that other Railway Corporations similarly constituted in the manner similar to the petitioner and involved in the same activity as the petitioner herein, notices issued by the Service Tax Authorities for recovery of service tax stood withdrawn. In particular our attention is invited to order dated 25th January, 2016 passed by the Commissioner of Service Tax, Delhi Commissionerate in respect of M/s. Bharuch Dahej Railway Co. Ltd. as annexed to the Additional Affidavit dated 6th September, 2018 filed by the petitioner.

4. In the above view, we enquired of Mr. Dwivedi, learned Counsel for the Revenue whether the respondent Revenue has accepted the order dated 25th January, 2016 passed by the Delhi Commissionerate on an identical activity as carried out by the petitioner as not being subject to Service Tax under the Act. We informed him that if the activity carried out by the petitioner is identical to M/s. Bharuch Dahej Railway Co. Ltd. and the Revenue has accepted the order dated 25th January, 2016, then there is no reason to treat the petitioner differently.

5. At this, Mr. Dwivedi, learned Counsel appearing in support seeks four weeks time to take instructions and to file an affidavit, if necessary.

6. Stand over to 19th October, 2018."

2. Thereafter, on the last occasion i.e. on 21st June, 2019 we were informed that the order of the Delhi Commissioner

in the case of M/s. Bharuch Dahej Railway Co. Ltd. was challenged before the Customs, Excise and Services Tax Ltd. Appellate Tribunal (Tribunal) by the Revenue. However, the Revenue's appeal came to be dismissed on 25th March, 2019 by the Tribunal.

3. As pointed out above, it is the case of the petitioners that it is identically placed in facts and law to that of M/s. Bharuch Dahej Railway Co. Ltd. which has been decided by the Commissioner of Service Tax, Delhi. Therefore, it is submitted that in view of the Revenue's appeal being dismissed on 25th March, 2019 and not further challenged by the Revenue, the impugned order also be set aside. This on the premise that persons similarly situated be treated equally is fundamental requirement of Rule of law.

4. At this, we asked learned counsel appearing for the Revenue whether the order of the Tribunal dated 25th March, 2019 has been challenged by the Revenue before a higher forum.

5. Mr. Dwivedi, learned counsel for the Revenue states that the challenge to order of the Tribunal dated 25th March, 2019 is under active consideration of the Revenue. Mr. Dwivedi on instructions states that if an adjournment of four weeks is given, he will be in a position to inform the court whether the order dated 25th March, 2019 of the Tribunal in respect of M/s. Bharuch Dahej Railway Co. Ltd. has been accepted by the Revenue or not.

6. At the request of Mr. Dwivedi this petition is adjourned to 1st August, 2019."

2. Today, Mr. Dwivedi, learned Counsel appearing for the Respondents, tenders an affidavit of Mr. Shibi Singh Gaharwar, Assistant Commissioner of CGST & CE, Division-I, Belapur, dated 30 July 2019. The above affidavit states that the Revenue is in the process of challenging the order of the Tribunal dated 25 March 2019 in the case of **M/s. Bharuch**

Dahej Railway Co. Ltd. Besides, our attention is also drawn to the additional affidavit filed by the Petitioner's Deputy Finance & Accounts Officer, Mr. Arun D. Patankar, dated 19 June 2019, to which has been annexed a copy of the order dated 25 March 2019 of the Tribunal in the case of **Commissioner Service Tax, Delhi-III, New Delhi vs. Bharuch Dahej Railway Co. Ltd.** [2019-TIOL-1175-CESTAT-DEL]. We note that the above order is a common order in respect of **Bharuch Dahej Railway Co. Ltd.** and **Krishnapatnam Railway Co.** dated 25 March 2019, which dismissed the Revenue's two appeals by following the tribunal's earlier decision in **Mudra Port & Special Economic Zone Ltd. vs. CCE**, **Rajkot** [2019-TIOL-1175-CESTAT-DEL]. The Tribunal, in its order dated 25 March 2019, while dismissing the Revenue's appeal recorded the fact that the decision of the Tribunal in the case of **Mudra Port & Special Economic Zone Ltd.** (supra) was now pending consideration in appeal before the Supreme Court on identical issues, after the Revenue's appeal was admitted. This dismissal of the two appeals of the Revenue, by order dated 25 March 2019, was in view of the fact that in the absence of the Apex Court granting stay to the decision of the Tribunal, the decision in **Mudra Port & Special Economic Zone Ltd.** (supra) continued to be binding.

3. In the light of the above facts, particularly the Revenue not accepting the decision of the Tribunal in **Bharuch Dahej Railway Co. Ltd.** (supra) and **Krishnapatnam Railway Co.** (supra) of the Tribunal and being in the process of filing an appeal, we were of the view that the Petitioner should approach the appellate authority by filing a statutory appeal under the Act. We, therefore, informed the Petitioner that we were

not inclined to entertain the petition.

4. At this, Mr. Nankani, learned Senior Counsel appearing in support of the petition, insists that the peculiar facts of this case requires a consideration by this Court and the Petitioner should not be relegated to the alternative remedy of statutory appeal under the Act. In support, he urged the following contentions:

(a) The status of the Petitioner, namely, shareholding pattern of the Petitioner, is distributed entirely between the Central and four State Governments. This coupled with it acting under the directions and control of the Ministry of Railways. Thus it is submitted that the unique status of the Petitioner would warrant the petition being entertained;

(b) The Commissioners of Service Tax, on identical issues, had dropped show cause notices issued to two other assessees, **Bharuch Dahej Railway Co. Ltd.** (supra) and **Krishnapatnam Railway Co.** (supra) similarly situated. Besides, the Tribunal, in both the above two cases, dismissed the Revenue's appeal. While in the case of **M/s. Mudra Port & Special Economic Zone Ltd.** (supra), though the Commissioner of Service Tax had confirmed the demand notice, the Tribunal had set aside the demand. Thus the issue pending consideration with the Apex Court (in the absence of stay) is coupled with the fact that on merits, the Revenue has already collected the tax on the entire freight and is now seeking to again collect tax on a part of the same amount. This, it is submitted, should invite interference by this Court, to the extent of setting aside the impugned order dated 21 December 2016 and restoring it to the

Commissioner, so as to enable him to follow the Master Circular dated 10 March 2017, issued by the Central Board of Central Excise (CBEC) which obliges him to keep the show cause notice in abeyance, till the Supreme Court decides the issue;

(c) In similar circumstances, where a party is being discriminated against, writ ought to be entertained even if a statutory remedy of appeal is available, as held by the Gujarat High Court in **Darshan Boardlam Ltd. vs. Union of India** [2013 (287) E.L.T. 401 (Guj.)];

(d) On merits, he submits that on the entire freight amount, tax has been discharged by the Railways and/or the Petitioner. By the impugned order the Revenue is now seeking to charge a part of the aforesaid amount as a consideration received by the Petitioner from the Railways for rendering of services. Thus this action would also require interference by the Court in its writ jurisdiction.

5. It is an undisputed position before us that the impugned order dated 21 December 2016 is appealable to the Tribunal under Section 129A of the Act. However, the case of the Petitioner is that on these facts, the Petitioner should not be relegated to the alternative remedy provided under the Act. It is true that availability of an alternative remedy would not by itself bar this Court from entering a writ petition in its writ jurisdiction under Article 226 of the Constitution of India. However, the exercise of this writ jurisdiction is discretionary and it is not exercised only because it can be exercised. Therefore, the Courts have refused to exercise discretion under Article 226 of the Constitution of India, where an efficacious alternative remedy to obtain the same relief

is available, as a self imposed limitation. Therefore, we now examine the submission on behalf of the Petitioner to decide whether this is a fit case to exercise our discretion, even though an efficacious alternative remedy of appeal under the Act from the impugned order dated 21 December 2016 to the Tribunal is available.

6. The first submission is that in view of the status of the Petitioner, the Writ Court should exercise its discretion and entertain this petition. The status of a party can never be the basis of exercising discretion to entertain a writ. In fact, the discretion is exercised on the basis of the action of the authority being without jurisdiction and not on the basis of the status of the party moving the Court. To decide on the basis of the status of the party would be the very antithesis of the rule of law, viz. equality before the law, in the absence of any statutory distinction. The fact that the Petitioner is a Limited Company, has shares distributed in their entirety between the Central and State Governments does not warrant a different treatment under the Act.

7. It is next submitted that two other Commissioners of Service Tax had occasion to consider an identical issue, as raised herein, i.e. in cases of **Bharuch Dahej Railway Co. Ltd.** (supra) and **Krishnapatnam Railway Co.** (supra). In both these cases, the show cause notices issued were dropped; thus the same should have been done in this case. It is pointed out that in case of **Mudra Port & Special Economic Zone Ltd.** (supra), the Commissioner, having jurisdiction over it, had confirmed the show cause notice but on appeal the Tribunal held in favour of **Mudra Port & Special Economic Zone Ltd.** (supra) by setting aside the order of the Commissioner. It is further pointed out that although the Apex Court

has admitted the appeal of the Revenue in the case of **Mudra Port & Special Economic Zone Ltd.** (supra), it had not granted any stay. Thus, it is submitted that as of now, the issue stands settled in favour of the Petitioner. Therefore, the prayer is for issuance of a writ to set aside the impugned order dated 21 December 2016 and restore it to the Commissioner for a fresh adjudication. At this stage, it is submitted that the Commissioner would, in view of the Master Circular dated 10 March 2017, keep the notice in the call book, to await the decision of the Supreme Court in the case **Mudra Port & Special Economic Zone Ltd.** (supra). Two things are very clear, one the Revenue has neither accepted the view of the Tribunal in the case of **Mudra Port & Special Economic Zone Ltd.** (supra) nor of the Tribunal in the case of **Bharuch Dahej Railway Co. Ltd.** (supra) and **Krishnapatnam Railway Co.** (supra), as it is in the process of filing an appeal. Secondly, the Apex Court found the issue debatable and has admitted the appeal. It is, therefore, a matter, which is still not finally concluded and, therefore, mere absence of a stay being granted in the earlier orders, would not justify this Court interfering with the impugned order dated 16 December 2016 of the Commissioner of Service Tax under the Finance Act, 1994. When the relief sought before us is something which could be sought before the Tribunal, then there is no reason for us to exercise our discretion to entertain the writ. It is not the case of the Petitioner that the impugned order is without jurisdiction. In this case, we find that the order has already been passed. There is no reason, at this stage, to set aside the order of the Commissioner and restore the show cause notice to Commissioner so as to only compel the Revenue to follow the Master Circular and keep the show cause notice in abeyance and await the decision of the Supreme Court in the case of **Mudra Port & Special Economic Zone Ltd.** (supra).

8. The reliance upon the decision of the Gujarat High Court in **Darshan Boardlam** (supra) is inappropriate in the present facts. In fact, in para 67 thereof, the Gujarat High Court noted as under:-

> "67. We are of the view that on the facts of the present case, the preliminary contention or objection as raised by the Revenue deserves to be rejected as it cannot be said that exercise of writ jurisdiction in the present case is unwarranted. As rightly pointed out by the learned counsel appearing for the petitioner that the controversy in the instant case centres around the issue, that if the goods in question are chargeable to nil duty in other States of the country and if such a decision has been accepted by the department, then whether the petitioner who is a businessman carrying on business within the State of Gujarat could be asked to pay duty @ 8% ad valorem on the same goods."

From the above, it is clear that discretion was exercised by the Gujarat High Court in the above case as the Revenue had accepted the decision of in other States that the goods were chargeable to nil rate of duty and was only contesting in Gujarat. This led the Gujarat High Court to exercise its extra ordinary jurisdiction and entertain the petition. It is pertinent to note that this petition was adjourned from time to time only with a view to ensure that the Revenue takes a uniform stand across the board. It is clear now that the Revenue is contesting the issue, arising herein as an appeal has already been pending before the Supreme Court in the case of **Mudra Port & Special Economic Zone Ltd.** (supra) and the Revenue also proposes to file appeals from orders of Tribunal in **Bharuch Dahej Railway Co. Ltd.** (supra) and **Krishnapatnam Railway Co.** (supra). Thus, the stand of the Revenue is consistent and there is no difference in treatment by the Revenue in respect of different assessees on the same issue.

9. So far as the last submission, viz. question of tax on the entire freight having been collected, is concerned, it is not open to the Revenue to collect again a part of the consideration as service tax. This is an issue, which is best left to the appellate authority to deal with. It is an issue on merits. Therefore, no occasion to entertain this petition can arise.

10. In these circumstances, we are not exercising our extra-ordinary jurisdiction to entertain this petition. Thus, petition dismissed. However, we make it clear that as stated on instructions by Mr. Nankani for the Petitioner, in case the Petitioner does file an appeal within a period of four weeks from today, then the Tribunal would consider the appeal on merits, without taking up the issue of limitation. This is so as we condone the delay in filing the appeal, if filed within a period of four weeks from today, as the Petitioner was bonafide prosecuting this petition, challenging the impugned order dated 16 December 2016. This in terms of the Apex Court judgment in the case of **M.P. Steel Corporation vs. Commissioner of Central Excise** [(2015) 7 SCC 58].

11. Petition disposed of in above terms.

(S.C. GUPTE, J.) **(M.S. SANKLECHA, J.)**