

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :02.01.2019

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.29368 of 2003

and

W.P.M.P.No.35859 of 2003 & W.V.M.P.No.2310 of 2004

M/s.Williamson Magor & Co Ltd.,
C/o.Eveready Industries India Limited
New No.4/8, Old No.35/8, Eldams Road
Sri Balavinayagar Building
ARK Colony, Alwarpet, Chennai - 600 018.
Rep.by its Constituted Attorney
(Pl-Amended as per order dt.19.09.2017 in
W.M.P.No.24739/2017 in W.P.No.29368/2003)

...Petitioner

vs

1.Union of India
Rep.by its Secretary
Department of Revenue, Ministry of Finance
North Block, Raisina Hill, New Delhi.

2.Commissioner of Central Excise
Chennai - II,
473, MHU Complex, Mount Road
Nandanam, Chennai - 600 035.

3.Superintendent of Central Excise,
Range-III-D, Chennai-III Division
7th floor, 473, MHU Complex, Mount Road
Nandanam, Chennai - 600 035.

..Respondents

Prayer: Writ Petition filed under Article 226 of the
Constitution of India praying to issue a Writ of Certiorari,
calling for the records of 3rd Respondent ending with the demand
in O.C.No.256/2003 dated 14.08.2003 and quash the same.

For Petitioner : Mr.K.Krishnamoorthy

For Respondents : Mr.A.P.Srinivas, Senior standing counsel

O R D E R

The demand raised by the 3rd respondent in O.C.No.256 of 2003 dated 14.08.2003 is sought to be quashed in the present writ petition.

2.The learned counsel for the writ petitioner states that the order impugned in the present writ petition is prima-facie without jurisdiction and the liability in respect of the writ petitioners were exempted and therefore, the petitioner is not liable to pay the penalty demanded by the authorities competent. The learned counsel for the petitioner further is of an opinion that the 3rd respondent has no jurisdiction to issue such an order of demand, claiming recovery of arrears by way of an interest in view of the fact that the impugned order was issued without jurisdiction, the writ petitioner is constrained to move the present writ petition.

3.The learned senior standing counsel appearing on behalf of the respondents opposed the contentions by stating that the 3rd respondent has got jurisdiction to issue such an order of demand with reference to Section 11-AA and 11-AB of the Central Excise Act, 1944. In this regard, paragraph 11 of the counter affidavit filed by the respondents states as under:-

"11) The allegations made in para(7) of the affidavit are denied and the petitioner is put to strict proof of the same. It is submitted that in response to the letter dated 08.07.2003 cited supra, the petitioner vide their letter dated 11.07.2003 replied stating that they regretted that they will not be able to accede to the Department's request since they do not have the expertise to examine the Benson & Hedges cigarettes. Subsequently, after a period of two months, a letter dated 12.09.2003 of the petitioner through their Counsel was received wherein the Counsel was received wherein the Counsel had inter-alia stated that his clients have an exclusive licence agreement with Benson & Hedges(Overseas) Ltd., to manufacture, market and distribute Benson & Hedges Cigarettes amounts to infringement of his client's copyright; that as per the copyright law of the country his clients are entitled to possession of the infringing goods irrespective of whether they have been legally or illegally imported; and on behalf of his clients has called upon the department to destroy the said illegally imported goods in the presence of the representative of his clients as the subject consignment cannot be allowed to be cleared or sold by the department."

4. This Court is of an opinion that the appeal provision is available under Section 35 of the Central Excise Act. Against the order passed by the Sub Ordinate authorities, the aggrieved person is bound to prefer an appeal under Section 35 before the Commissioner, Central Excise. The Commissioner, Central Excise, who is the Appellate Authority is exercising the quasi-judicial powers and therefore, he is bound to conduct an enquiry by following the principles of natural justice. Even legal ground of jurisdiction, limitation or other legal grounds can be adjudicated by the Appellate Authority with reference to the facts and circumstances of the case. Contrarily, the Hon'ble High Court cannot adjudicate such complex facts and circumstances arising on account of certain files or otherwise. Such complex facts and circumstances are to be adjudicated by verifying the original documents / files and by adducing evidences and obtaining statements from the persons concerned, if required at the time of conduct of enquiry by the competent authorities. Such an exercise can never be done in a writ proceedings under Article 226 of the Constitution of India. Mere pleadings in the affidavit filed in support of the writ petition may not be sufficient for this Court to arrive a finding in respect of all such factual aspects. Only in the event of a clear finding in respect of facts, it may not be possible for the High Court to arrive a conclusion with reference to the legal grounds and the factual circumstances raised in the writ proceedings.

5. This being the principles to be followed by the High Court, this Court is of an opinion that whenever a statutory appeal is provided under the Act, the aggrieved person has to prefer an appeal and adjudicate all the factual and legal grounds before the Appellate authorities by producing documents and by adducing evidences. In other words, exhausting the Appellate remedy is an important factor to be considered by the High Court in all circumstances. A writ petition can be entertained only on exceptional circumstances, whether it is brought to the notice of this Court that there is a gross injustice caused to a person concerned. Thus, entertaining a writ petition without exhausting the appeal remedy is an exception and can never be followed as a routine affair. Rule is to prefer an appeal. Entertaining a writ is an exception. This being the principles, this Court is of an opinion that the temptation of the aggrieved persons, who approach the High Court, get an order of Stay and kept the matter pending for years together and avoid payment of statutory liability, can never be encouraged by the Courts. In all circumstances, aggrieved persons are bound to exhaust the remedies provided under the statute.

6. In the present case on hand, the learned counsel for the petitioner states that there are judgments in respect of the point of jurisdiction and therefore, the present writ petition is also to be considered as the impugned order has been passed without any jurisdiction. In contra, the learned senior standing counsel for the respondents pointed out that the order was passed with reference to the provisions of the Central Excise Act. When such a dispute is raised, this Court is of an opinion that the same is to be verified through the original files and accordingly, the petitioner has to file an appeal before the Commissioner, Central Excise under Section 35 of the Act.

7. This Court, in respect of exhausting the alternate remedy has settled the legal principles in the case of M/s. Hyundai Motor India Limited Vs. The Deputy Commissioner of Income Tax in W.P.No.22508 of 2017 dated 16.07.2018 and the relevant paragraphs are extracted hereunder:

"19. 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) (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 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 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."

20. 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.

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

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

1. In *City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwalla 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:

(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. *Kanaiyalal Lalchand 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. Chhabil Dass 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 Thansingh Nathmal 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

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. Iqbal 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 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."

8. The learned counsel for the writ petitioner states that the impugned order passed on 14.08.2003 and the writ petition is pending for the past about 15 years.

9. Considering the facts and circumstances, this Court is of an opinion that the Commissioner, Central Excise, is to be directed to entertain the statutory appeal without referring to the point of limitation in the present case is an exceptional one. Accordingly, the following orders are passed:-

(i) The relief as such sought for in the present writ petition stands rejected.

(ii) The Commissioner (Appeals), Central Excise is directed to entertain the appeal, if any filed by the writ petitioner against the impugned order dated 14.08.2003 within a period of four weeks from the date of receipt of a copy of this order. In the event of preferring an appeal by the writ petitioner, the same shall be adjudicated by affording an opportunity to all the parties concerned and a decision shall be taken on merits and in accordance with law within a reasonable period of time.

10. With this direction, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar

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To

1.The Secretary
Union of India,
Department of Revenue, Ministry of Finance
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+1cc to Mr.K.Krishnamoorthy, Advocate SR.No.137

W.P.No.29368 of 2003

NM(CO)
GMY (31/01/2019)



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