IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE: 19.07.2019
CORAM
THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.20869 of 2019
&
W.M.P.Nos.20075 and 20076 of 2019

Tvl.Sri Murugan Agencies
Rep. By M.Murugaiyan (Proprietor)
No.6/92-A South Street
Nagapattinam - 611 111 ... Petitioner

Vs.

The Commercial Tax Officer
Nagapattinam Assessment Circle
Commercial Taxes Building
Court Campus, Veliyapalayam
Nagapattinam ... Respondent

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus calling for the records pertaining to the impugned order passed by the Respondent vide impugned notice dated 12.04.2018 for assessment year of 2013-14 in TIN No.33813903508/2013-14 and culminating in the consequential order dated 11.05.2018 and quash the same as erroneous, illegal and consequently direct the respondent to conduct fresh enquiry by affording personal hearing to the petitioner.

For Petitioner : Mr.K.Kulandai Velu

For Respondent : Ms.G.Dhanamadhri
Government Advocate

O R D E R

Mr.K.Kulandai Velu, learned counsel on record for the writ petitioner is before this Court. Ms.G.Dhanamadhri, learned Government Advocate, who accepts notice on behalf of the lone official respondent is before this Court.

2.With consent of learned counsel on both sides, main writ petition itself is taken up, heard out and is being disposed of.

3.Main writ petition arises under 'Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006)', hereinafter referred to as 'TNVAT Act' for brevity.

4. Instant writ petition pertains to 'Assessment Year 2013-14', which shall hereinafter be referred to as 'said AY' for the sake of convenience and clarity.

5. It is not in dispute that the writ petitioner is a dealer under TNVAT Act.

6.On verification of returns filed by the writ petitioner, particularly Form WW, certain discrepancies were found, particularly it was noticed that writ petitioner has effected purchases to the tune of little over 1.63 Crores, but on verification by Department it turned out that numerical values were different. Therefore, a revisional notice dated 12.04.2018 was issued specifically calling upon the writ petitioner to file objections, if any, inter-alia setting out the details of purchases. To be noted, revisional notice was issued by the Commercial Tax Officer and this is not a case of inspection by the Enforcement Wing.

7. Writ petitioner did not respond to the revisional notice and therefore, the respondent proceeded with the revisional assessment and passed a revised Assessment Order dated 11.05.2018 bearing reference TIN No.33813903508/2013-14 (hereinafter 'impugned order' for the sake of convenience and clarity).

8. Impugned order being a revised Assessment Order has been passed under Section 27 of TNVAT Act.

9. Assailing the impugned order instant writ petition has been filed.

10. Notwithstanding the various averments made in the affidavit filed in support of the writ petition as well as the grounds raised therein, learned counsel for writ petitioner, confined his submissions to one pivotal aspect of the matter and that pivotal aspect of the matter is writ petitioner assessee not responding to the revisional notice (which has been described as 'show-cause notice' in the instant case file) cannot be the sole ground for revised assessment being made. To be noted, 'show-cause notice' shall hereinafter be referred to as 'SCN' for the sake of brevity, convenience and clarity.

11. In support of the pivotal submission, it is seen from the case file placed before this Court that writ petitioner has enclosed as many as four judgments / orders in the typed-set of papers. One is a judgment of Hon'ble Supreme Court and the

other three are orders made by Hon'ble single Judges of this Court.

12.This Court now proceeds to deal with the judgements placed as part of the typed-set of papers.

13. To be noted, learned counsel very fairly submitted that he is not projecting judgment/orders other than M/s.Girdhari Lal Nannelal Vs. The Sales Tax Commissioner M.P reported in (1976) 3 SCC 701 and learned counsel submitted that Girdharilal judgment is being pressed into service for the limited purpose of buttressing the principle that a noticee not sending objections cannot be the sole ground for a revised assessment.

14. A careful perusal of Girdhari Lal case reveals that it is clearly distinguishable on facts. Girdhari Lal case on facts is a matter where there was a cash credit entry in the Account Books of the assessee wherein the name of wife of one of the partners of the assessee was shown and a sum of Rs.10,000/- had been shown as credit. Noticee responded to the notice and contended that this sum was paid in lieu of consent given by her for second marriage. This was found to be completely unacceptable and therefore, Hon'ble Supreme Court came to the conclusion that this cannot be the sole ground for an assessment.

15. Therefore, in the considered view of this Court, Girdhari Lal case is clearly distinguishable on facts. In this case, before proceeding further, this Court reminds itself of the time honoured Padma Sundara Rao principle [Padma Sundara Rao Vs. State of Tamil Nadu reported in (2002) 3 SCC 533]. Padma Sundara Rao principle is to the effect that a case is an authority for the factual setting of that particular matter in which the decision is rendered and most relevant paragraph is Paragraph 9, which reads as follows:

> '9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

16. As already alluded to supra, though learned counsel for writ petitioner pressed into service Girdhari Lal case alone, as three other judgments/orders have been annexed to the typed-set of papers, this Court deems it appropriate to deal with the same also.

17. The next judgment is, what has now come to stay as M/s.JKM Graphics Solutions Private Limited Vs.The Commercial Tax Officer, Vepery Assessment Circle, Chennai reported in 2017 SCC Online Mad 665: (2017) 99 VST 343. A perusal of JKM Graphics Solutions case would reveal that it deals with cases where objections were raised by the Assessee. Notwithstanding the objections, Annexure II of the sellers of the assessee were made the sole basis for testing the purchases. In this view of the matter, more particularly in Paragraph 56, a Hon'ble single Judge of this Court in a recommendatory tone held that referring to Maharashtra mode of a centralized mechanism is more acceptable. Therefore, the writ petitioner, who has admittedly not chosen to respond to the revisional notice (it has been described as 'SCN' as mentioned supra) cannot press into service JKM principle. In other words, JKM Graphic Solutions principle does not come to the aid of the writ petitioner in the instant case.

18. The third judgment is an order dated 30.07.2018 made by a Hon'ble single Judge of this Court. That again is a case where petitioner has submitted detailed objections and to be noted, in Paragraph 4 of this judgment in M/s. Indian Marine Shop Vs. The State Tax Officer, it is clearly held that the objections are dated 09.05.2018

19. Last judgment is by another Hon'ble single Judge being order dated 29.03.2019 made in W.P.No.5728 and 5732 of 2019. It is referred to as Usman Brother Agencies Case (Usman Brother Agencies Vs. the Deputy Commercial Tax Officer). In Usman Brother Agencies Case a perusal of the same, particularly Paragraph 8 reveals that this is a case where the entire tax as well as penalty has been paid by the Assessee. Paragraph 8 reads as follows:

> ' 8. In the light of the aforesaid discussion, there being no dispute that the issue on merits is covered by the order of this Court in J.K.M.Graphics Solutions Pvt. Ltd., Vs. C.T.O., Vepery Assessment Circle, Chennai (supra) and also the fact that the petitioner paid the entire tax as well as penalty and in the interests of justice, the impugned order is set aside and the Assessing authority is directed to take the proceedings denovo and in accordance with law, after affording an

opportunity of hearing to the petitioner.'

20. Learned single Judge has articulated that this is what has impelled the learned single Judge to direct re-assessment to be done denovo.

21. Therefore, the four judgments/orders annexed to the typed-set of papers in the considered opinion of this Court do not come to the aid of the writ petitioner in the instant case. Underling common aspect in terms of facts in all these four cases is that the Assessee have sent objections to revisional notice.

22. Be that as it may, one other striking distinguishable fact noticed by this Court on a perusal of the impugned order is that writ petitioner not responding to the revisional notice is not the sole basis on which revised assessment has been made under Section 27 in the instant case. The fact that writ petitioner has not sent objection has no doubt been articulated in the impugned order and the relevant paragraph in the impugned order reads as follows:

> 'Accordingly a Notice dated 12.04.2018 was issued to the dealers calling them to file their objections if any to the above proposals. The dealers who received the notice by RPAD on 18.04.2018 neither filed objection nor any letter till the date of order. I have no other alternative except to confirm the proposal and order passed is detailed below'

However, this is not the basis for passing of the impugned order.

23. It is also seen from the case file that the writ petitioner has chosen to send objections after the impugned order. While the impugned order is dated 11.05.2018, objections have been sent on 16.05.2018. In Usman Brother Agencies Case, which is placed before this Court as part of case file, entire tax and penalty have been paid by the Assessee. In the instant case in the light of the narrative thus far, this Court deems it appropriate to relegate the petitioner to alternate remedy of an appeal to the jurisdictional Appellate Deputy Commissioner. There is no disputation before this Court that an appeal lies to the jurisdictional Appellate Deputy Commissioner under Section 51 TNVAT Act. If the writ petitioner chooses to avail the alternate remedy, condition of pre-deposit as well as exclusion of time frame for filing the appeal will operate. In terms of time frame it is open to the writ petitioner to seek condonation of delay as well as exclusion of time spent in the instant writ

petition by placing reliance on Section 14 of Limitation Act. If the writ petitioner chooses to do so, Appellate Deputy Commissioner shall decide the same on its own merits.

24. Be that as it may, before parting with this case it is necessary for this Court to mention about alternate remedy and exercise of writ jurisdiction. With regard to exercise of writ jurisdiction on the teeth of alternate remedy, this Court reminds itself that alternate remedy is a rule of discretion. In other words, alternate remedy is not an absolute rule and is, therefore, not a rule of compulsion, but it is a rule of discretion. This Court also reminds itself that alternate remedy rule is a self-imposed restraint as far as this Court exercising writ jurisdiction is concerned. Notwithstanding the obtaining position that alternate remedy rule is a rule of discretion and that it is a self-imposed restraint, Hon'ble Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] has held that when it comes to cases pertaining to taxes, cess etc., i.e., fiscal laws in general, rule of alternate remedy has to be applied with utmost rigour. Satyawati Tandon Case was reiterated by Hon'ble Supreme Court in K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85]. Relevant paragraph in K.C.Mathew case is paragraph 10 and the same reads as follows:

> '10. In Satyawati Tondon the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)
>
> > “43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of

the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.'

(Underlining made by Court to supply emphasis and highlight)

25. In the light of the obtaining position of law and in the light of the factual setting in the instant case, which has been alluded to supra, this Court is convinced that as mentioned supra this is a fit case to relegate the writ petitioner to alternate remedy of appeal to the jurisdictional Appellate Deputy Commissioner inter alia under Section 51 of TNVAT Act. In other words, this Court does not interfere with the impugned order in writ jurisdiction.

This writ petition is disposed of with the above observation. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

gpa

To

The Commercial Tax Officer
Nagapattinam Assessment Circle
Commercial Taxes Building
Court Campus, Veliyapalayam
Nagapattinam.

+1cc to Mr.K.Kulandai Velu, Advocate sr.62543
+1cc to Special Government Pleader sr.62436

W.P.No.20869 of 2019 &
W.M.P.Nos.20075 and 20076 of 2019

cp(co)
nr 29/08/2019