



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2019

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.(MD)No.17873 of 2019

and

W.M.P.(MD)No.14344 of 2019

Tamil Nadu Mercantile Bank Limited,
Door No.57, V.E. Road,
Tuticorin-628 002,
(Represented by General Manager,
P.Suriaraj)

... Petitioner

-Vs-

The Assistant Commissioner, (CT)-II,
(Commercial Tax),
282A, New Commercial Tax Department Building,
Beach Road, Tuticorin-628 002.

... Respondent

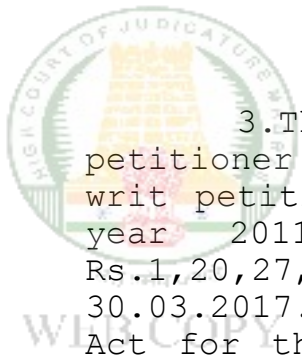
PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records of the impugned assessment order TIN:33836300270/2015-16, dated 19.06.2019 of the respondent and quash the same with the consequent directions directing the respondent to have a fresh adjudication confining the assessment to the turnover pertaining to Tamil Nadu only.

For Petitioner : Mr.S.Jaikumar
For Respondent : Mr.A.Thiyagarajan,
Government Advocate.

ORDER

The assessment order passed by the competent authority / Assistant Commissioner (ST)-II in proceeding dated 19.06.2019 is under challenge in the present Writ Petition.

2.The writ petitioner is a banking and financial institution, head quartered at Tuticorin, Tamil Nadu. The writ petitioner banking institution is having 509 branches across the country. Out of which 369 branches are functioning within the State of Tamil Nadu. The writ petitioner is registered under Section 32 of Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as 'the Act') with effect from 20.04.2015.



3.The learned counsel appearing on behalf of the writ petitioner states that an audit was conducted at the premises of the writ petitioner banking institution at Tuticorin for the financial year 2011-12 to 2015-16 and a demand was raised for Rs.1,20,27,688/-. The writ petitioner also paid VAT demand on 30.03.2017. Thereafter, a notice was issued under Section 82 of the Act for the assessment year 2015-16, calling for information and details as trading accounts and other particulars including sale of repossessed vehicles, sale of gold coins and sale of moving assets etc. The writ petitioner requested for time and they finally submitted all relevant details. The respondent / Assistant Commissioner, CT-II assessed their liability for VAT payment for the relevant year at Rs.16,92,656/- and thereafter, the writ petitioner was issued with pre-assessment notice on 06.02.2018 under the provisions of Section 22(4) of the Act for the period from 2007-08 to 2016-17. The notice proposed various additions to taxable turnover of the writ petitioner. The pre-assessment notice dated 06.02.2018 had been proposed, rejecting the turnover disclosed by the writ petitioner and assessed the writ petitioner under Section 22(4) of the Act.

4.The learned counsel appearing on behalf of the writ petitioner also states that the turnover is on all India basis, since the writ petitioner is a banking institution having branches in all over country. Thus, an objection is raised in respect of such assessment made by the respondent. This apart, the ground regarding the competency and jurisdiction also has been raised by the writ petitioner before the competent authority.

5.The grievance of the writ petitioner is that none of the legal grounds, including jurisdiction raised by the writ petitioner were not considered and the impugned order is passed. Mainly, the learned counsel appearing on behalf of the writ petitioner contended that in view of the violation of principles of natural justice and the layman approach adopted by the tax authorities, the present Writ Petition is filed. The writ petitioner has chosen to file the present Writ Petition, in view of the fact that the writ petitioner may not get an efficacious remedy before the appellate authority, since the competent authority had a layman approach as well as not considered the grounds raised by the writ petitioner, regarding the violation of principles of natural justice and the auditor's certificate issued by the auditor of the writ petitioner banking institution.

6.The grievance of the writ petitioner is that all such documents and the information provided by the writ petitioner had not been considered by the respondent competent authority, which resulted denial of proper assessment and therefore, the present Writ Petition is filed.



7.This Court is of the considered opinion that undoubtedly, violation of principles of natural justice is a ground to entertain a Writ Petition. However, it cannot be a routine affair and only on exceptional circumstances, statutory appeal remedy can be dispensed with. Simply because the ground regarding the violation of principles of natural justice is raised, the same would not constitute a ground for entertaining all Writ Petitions.

8.It is pertinent to note that the appellate authorities are also exercising quasi judicial powers under the Act. Therefore, all such appellate authorities or the Special Tribunals constituted under the Act are empowered to adjudicate all the legal grounds including the ground regarding the violation of principles of natural justice as well as the jurisdiction. The Hon'ble Apex Court also time and again reiterated that all the legal grounds including violations of principles of natural justice as well as jurisdiction can be raised before the appellate authority. The appellate authorities, who are all exercising the quasi judicial powers, are empowered to adjudicate all such legal issues and decide the matters on merits and in accordance with law.

9.This being the statutory powers conferred on such appellate authorities, the High Court need not undermine the institutions and its powers conferred under the Act itself. All institutions created under the statutes are to be respected. Those institutions must be allowed to exercise their powers in the manner prescribed under law. In the event of bypassing the alternative remedy, the High Court would not be benefited from considering the findings of facts and the original issues as well as the disputed issues. The High Court under Article 226 of Constitution of India cannot adjudicate certain disputed issues, facts and various other circumstances, arising on account of intricacies involved in tax matters. However, all such intricacies with reference to all the original files as well as the evidences available can only be adjudicated effectively by the authorities competent and thereafter, by the appellate authorities. Such an opportunity is not only provided to the benefit of the litigant concerned, but undoubtedly, will be a guiding factor for the higher Courts to decide the matter under Article 226 of Constitution of India. Thus, the adjudication of certain original facts by the competent authorities as well as by the appellate authorities are of paramount importance. The aggrieved persons must approach the competent authority at the first instance. Thus, dispensing with the alternative remedy being an exception cannot be exercised by the High Courts in a routine manner by exercising the power of judicial review under Article 226 of Constitution of India.

10.This being the principles to be followed, this Court is of the considered opinion that all such original issues now raised by the writ petitioner regarding the particulars, details and documents given to the tax authorities, are to be adjudicated by the appellate



authorities by calling for the original files, evidences and other particulars produced by the writ petitioner at the time of enquiry and decide the matter on merits and in accordance with law by affording opportunity to the writ petitioner.

11. The Principal Seat of this Court has also considered the issues in respect of exhausting alternative remedy in the case of M/s. Hyundai Motor India Limited vs. The Deputy Commissioner of Income Tax and another, in W.P.No.22508 of 2017 by order dated 16.07.2018. The relevant paragraphs of the said order 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. Ikbali 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.

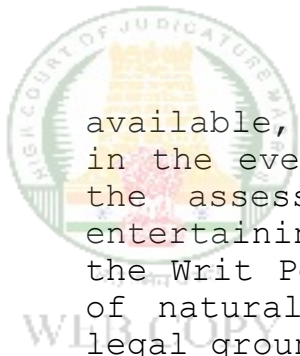
6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (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.'

12. Yet another aspect is to be considered by this Court in such circumstances, which is also an important factor. Mostly, assesses are approaching the High Court under Article 226 of Constitution of India, directly without exhausting the appeal remedy



available, in view of the fact that they have to deposit some amount in the event of preferring an appeal. In the present case, 25% of the assessment amount is to be deposited for the purpose of entertaining an appeal. In order to avoid such deposits, sometimes the Writ Petitions are filed. The ground raised is that principles of natural justice has been violated. Under the guise of these legal grounds alone, the Writ Petition cannot be entertained and the aggrieved persons are bypassing the appeal remedy in order to avoid the deposit of 25% of the assessment amount before the appellate authority for the purpose of entertaining an appeal.

13.The learned counsel appearing on behalf of the writ petitioner states that the writ petitioner has not avoided these aspects. However, the auditor's certificate was not considered by the competent authorities which amounts to negligence. However, non-consideration of the auditor's certificate is also an issue to be adjudicated and a finding is to be arrived by the appellate authorities. The nature of the auditor's certificate, the particulars provided in the auditor's certificates are also to be scrutinized and to be adjudicated with reference to the issues raised and findings are to be arrived by the appellate authorities also. Only in such events, the High Court would be in a position to exercise the power of judicial review nor understand the complete facts and circumstances as well as the definite grievances raised by the aggrieved persons. Contrarily, if those provisions are not exercised, the High Court would not be in a position to come to the definite conclusion with reference to the disputed issues, facts, and various circumstances leading to an order of assessment passed by the original authorities as well as by the appellate authorities. Thus, importance of exhausting the appeal remedy is to be considered and emphasized in all circumstances and the Writ Petition can be entertained only by way of an exceptional circumstances. The principles in this regard are well settled by the Hon'ble Apex Court in many judgements, which was considered by this Court in the case of M/s.Hyundai Motor India Limited as stated supra.

14.This being the factum, Section 51 of the Act, 2006 provides an appeal before the Appellate Deputy Commissioner. The impugned order itself states that the writ petitioner is at liberty to prefer an appeal before the Appellate Deputy Commissioner, Commercial Taxes Building, A.R.Line Road, Palayamkottai, Tirunelveli-627 002, within 30 days from the date of receipt of a copy of the impugned order as per Section 51 of the Act, 2006.

15.This being the principles to be considered, the writ petitioner is at liberty to prefer an appeal before the Appellate Deputy Commissioner under Section 51 of the Act.

16.The learned counsel appearing on behalf of the writ petitioner made a submission that the period of 30 days had already



been expired.

17. This Court is inclined to condone the delay, so as to entertain the appeal, if any filed by the writ petitioner before the appellate authorities. Accordingly, the following orders are passed:-

- I. The relief sought for in the present Writ Petition stands rejected.
- II. The writ petitioner is at liberty to prefer a statutory appeal in the prescribed format along with all the documents within a period of eight (8) weeks from the date of receipt of a copy of this order.
- III. In the event of receiving any such appeal from the writ petitioner, the appellate authority, namely, Deputy Commissioner Commercial Taxes is directed to entertain the appeal and decide the same on merits and in accordance with law as expeditiously as possible.

18. With these directions, this Writ Petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To
The Assistant Commissioner, (CT)-II,
(Commercial Tax),
282A, New Commercial Tax Department Building,
Beach Road, Tuticorin-628 002.

COPY TO:

The section Officer, ER section,
Madurai Bench Of Madras High Court,
Madurai.

W.P. (MD) No. 17873 of 2019
16.08.2019

Myr
MS/04.09.2019/12P.3C