

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE SETHILKUMAR RAMAMOORTHY

W.A.No.996 of 2020

M/s.Sri Vigneswara Steels (P) Ltd.,
rep. by the Managing Director,
SF 110/1-A-1, Mavelipalayam Privu Road,
Akkamapet Post, Sankari Taluk,
Salem District - 637 301. ... Appellant/Petitioner

Vs.

- 1.The State of Tamil Nadu,
rep. by the Secretary,
Department of Energy,
Fort St. George,
Chennai - 600 009.
- 2.The Tamil Nadu Electricity Board,
rep. by the Chairman,
800, Anna Salai,
Chennai - 600 002.
- 3.The Superintendent Engineer,
TNEB-Mettur Electricity Distribution Circle,
Mettur Dam. ... Respondents

Prayer: Appeal filed under Clause 15 of the Letters Patent against the order dated 13.6.2019 made in W.P.No.13998 of 2009.

Prayer in WP.No.13998/09: Writ petition praying to issue writ of mandamus or any other writ of direction directing the respondents one to three to follow the Supreme Court decision in Civil Application 2551/2007 etc., batch cases dated 15-5-2007 batch reported in 2007(3) CTC 273 and refund the electricity tax collected on Maximum Demand charges in HT SC No.135 from petitioners for the period from June 98 till 15-6-2003 with BPSC collected with 18% interest from the date of collection till the date of refund.

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For Appellant : Mr.S.Rajesh

For Respondents : Mr.V.Jayaprakash Narayanan
State Government Pleader
for respondent No.1

JUDGMENT

(Delivered by The Hon'ble Chief Justice)

The appellant has come up contending that in answer to the query raised by us vide our order dated 9.9.2020, there is a judgment in favour of the appellant, which he has cited in the case of State of Maharashtra v. M/s.National Construction Company, Bombay, MANU/SC/0597/1996 : CDJ 1996 SC 411.

2. Learned counsel for the appellant contends that there is no prohibition to raise the plea, which has been raised by the appellant in the writ petition giving rise to this appeal, keeping in view the fact that the question of any refund being claimed for the period prior to 16.6.2003 was never adjudicated nor any finality has been attached to that. Learned counsel submits that the appellant, therefore, cannot be prevented from filing a fresh writ petition with regard to the said claim in respect of the refund prior to 16.6.2003.

3. We are extracting the order passed by us on 9.9.2020, which is to the following effect:

"The petitioner / appellant has come up contending that the learned single Judge has not appreciated the real issue of challenge raised in the writ petition giving rise to this appeal inasmuch as the petitioner/appellant had claimed refund in respect of the period prior to 15.06.2003, in the light of the judgment of the Apex Court in the case of Southern Petrochemicals Industries Co. Ltd. vs. Electricity Inspector and Others, (2007) 3 CTC 273 (SC).

2.Prima facie, we find from the record that this issue of mandamus relating to electricity tax on demand charges was challenged in another batch of writ petitions subsequent to the judgment in the case of Southern Petrochemicals (supra) in Writ Petition No.31272 of 2007 and other writ petitions in which the writ petition filed by the present petitioner/appellant is W.P.No.23296 of 2007. The

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said plea was, therefore, clearly with regard to a similar nature of relief as prayed in the writ petition giving rise to this appeal. It is not understood as to whether the petitioner/appellant had raised this issue in the said writ petitions for the period prior to 15.06.2003 or had not raised it when this could have been done and ought to have been done by the petitioner/appellant in the said proceedings. For such a relief which was in respect of a period prior to the filing of the earlier writ petition, prima facie we find that a writ petition subsequently in the year 2009 in respect of the same relief may not be maintainable.

3.Learned counsel for the petitioner/appellant prays for time to study the matter and respond to the same.

List on 02.11.2020."

4. We have also perused the pleadings and have gone through the judgment of the Division Bench of this Court dated 23.12.2008 in Writ Appeal Nos.341 and 342 of 2008 (Sri Vinayaga Alloys (P) Limited, rep. by the Managing Director and another v. The State of Tamil Nadu, rep. by the Secretary to Government, Department of Energy, Fort St. George, Chennai and others), which is extracted herein under:

"The correctness of the order of the learned single Judge dated 2.1.2008 made in a batch of writ petitions in W.P.No.31272 of 2007 is put in issue. The issue involved in the present writ appeals is covered by the judgment of the Supreme Court in Southern Petrochemical Industries Co. Ltd., v. Electricity Inspector and E.T.I.O. [2007 (3) CTC 273 (SC)].

2. However, Mr.Sivanandam, the learned counsel appearing for the appellants contended that it is true that the validity of the Act has been upheld by the Supreme Court in the above said decision; but, in respect of demand charges, the Supreme Court has categorically held that such charges cannot be construed as a sale and as such, the demand charges demanded from the appellants has not been approved by the Supreme Court in the above said decision. Even the amendment brought by the respondent for the purpose of validating the invalid demand under Act 38 of 2007 would not also

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cover the period for which refund has been sought for by the appellants. That point has not been considered by the writ Court and on that premise, argument has been advanced before this Court.

3. The Act 38 of 2007 is an Act amending the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003. Sub-clause 2 of Section 1 of the Act provides that all sections except Section 6 shall be deemed to have come into force on the 16th day of June 2003. Section 6 came into force immediately. It is the contention of the learned counsel for the appellants that the relief sought for by the appellants is in respect of the period prior to 16.6.2003, which is manifest from paragraphs 7 and 22 of the order impugned.

4. We have perused the impugned order with reference to the contention made by the learned counsel. In the order, the contention of the learned counsel has been stated that as per the judgment of the Supreme Court, the demand charges could not be construed as a sale and therefore, relying upon the judgment of the Supreme Court in Gujarat Ambuja Cements Ltd. and Another v. Union of India and another [2005 (4) SCC 214], stating that the object of the validating Act would in effect nullify the decision of the Supreme Court rendered in Southern Petrochemicals Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. [2007 (3) CTC 273 (SC)] and the same is not permissible. It is further stated that according to the learned counsel, there is no legislative competency on the State Government to make such law. This submission has been further explained to the effect that in spite of the validating Act having come into existence, it is still open to the petitioners to maintain the writ petitions without challenging the vires of the validating Act.

5. From paragraph 22 of the order impugned also, we are not able to find anything as contended by Mr.Sivanandam, learned counsel for the appellant, because the said paragraph proceeds that the contention of the learned counsel that despite the amending Act 38 of 2007, in effect, there was no change in the charging section, has been rejected by the learned Judge.

6. But, the precise contention as put forth by the learned counsel for the appellants, is that the refund they claimed in the writ petitions was for the period prior to 16.6.2003. On the entire reading of the order of the writ Court, we are not able to find that such contention has been raised before the writ Court for its determination. Of course, it is contended by the learned counsel that such point has very much been raised in the affidavit and the prayer is also to that effect. In such circumstances, what would be the appropriate course to be adopted has been held by the Division Bench of this Court in 2005 (3) CTC 241 (AYYAMUTHU AND OTHERS VS. THE STATE OF TAMIL NADU and the Supreme Court in 2007 (8) Supreme Court 581 (MOHD. AKRAM ANSARI VS. CHIEF ELECTION OFFICER AND OTHERS).

7. The Division Bench of this Court in Ayyamuthu's case, observed as follows:

"...4. It is well settled that the presumption in law is that a Judge deals with all the points which are pressed before him. It often happens that, say, ten points are taken in the memorandum of petition or appeal but only three of those points are pressed before the Judge. Naturally in this situation the Judge will deal with only those three points which were pressed before him and the presumption will be that the other seven points were never pressed before him. This is, however, a rebuttable presumption, and if the learned counsel contends that in fact he pressed other points also although they have not been dealt with in the judgment by the learned single Judge, then the party should move an application before the same Judge who delivered the judgment and try to satisfy him that he had in fact pressed that point though it has not been considered in his judgment, vide C. Shanmugham v. Tamil Nadu Housing Board, 2005(1) CTC 555, in which reliance has been placed on the Supreme Court decisions in Ram Bali v. State of Uttar Pradesh, 2004 (10) SCC 598 and Bhavnagar University v. Palitana Sugar Mills

(P) Ltd., and others, 2003(2) SCC 111."

8. The Honourable Apex Court in the case of Mohd. Akram Ansari's case, referred supra, held thus:

".....14. In this connection we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned Judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with....."

9. In view of the facts stated above and in the light of the above two decisions, the writ appeals are dismissed in terms of the above said decisions. It is well open to the appellants to move the

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appropriate forum in terms of the above said decisions. No costs."

5. While dealing with this very issue as has been raised by the appellant by filing a fresh writ petition contending that he has a separate cause of action, we may point out that the forum which was made available to the appellant was clearly laid down in paragraphs (6) to (8) of the said decision, which is gainfully re-produced herein under:

"6. But, the precise contention as put forth by the learned counsel for the appellants, is that the refund they claimed in the writ petitions was for the period prior to 16.6.2003. On the entire reading of the order of the writ Court, we are not able to find that such contention has been raised before the writ Court for its determination. Of course, it is contended by the learned counsel that such point has very much been raised in the affidavit and the prayer is also to that effect. In such circumstances, what would be the appropriate course to be adopted has been held by the Division Bench of this Court in 2005 (3)CTC 241 (AYYAMUTHU AND OTHERS VS. THE STATE OF TAMIL NADU and the Supreme Court in 2007 (8) Supreme Court 581 (MOHD. AKRAM ANSARI VS. CHIEF ELECTION OFFICER AND OTHERS).

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Court which passed the judgment, and urge that the other points were pressed but not dealt with....."

6. Learned counsel for the appellant has vehemently urged that the judgment in the case of State of Maharashtra (supra), particularly, the finding with regard to the Supreme Court in paragraph (6) of the said judgment comes to the aid of the appellant and the issue having not been decided and left open, the appellant was justified in filing a fresh writ petition.

7. We have considered the said submission and we find that the aforesaid argument has to be rejected, in view of the specific indication of the forum which may be availed of by the appellant in paragraphs (6) to (8) of the judgment dated 23.12.2008 in respect of any refund being claimed prior to 16.6.2003.

8. The contention raised by learned counsel for the appellant is that the learned Single Judge has not taken this objection and therefore the dismissal of the writ petition has to be viewed on the basis of the merits of the writ petition, which obviously includes no adjudication on the cause of refund prior to 16.6.2003.

9. We have considered the submissions raised on this ground as well and we find that the said judgment in no way improves upon the issue, which has been raised by us and could not be successfully answered by learned counsel for the appellant.

In the light of what we have said herein above, this appeal is, accordingly, dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar

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To

1. The Secretary,
State of Tamil Nadu,
Department of Energy,
Fort St. George, Chennai - 600 009.

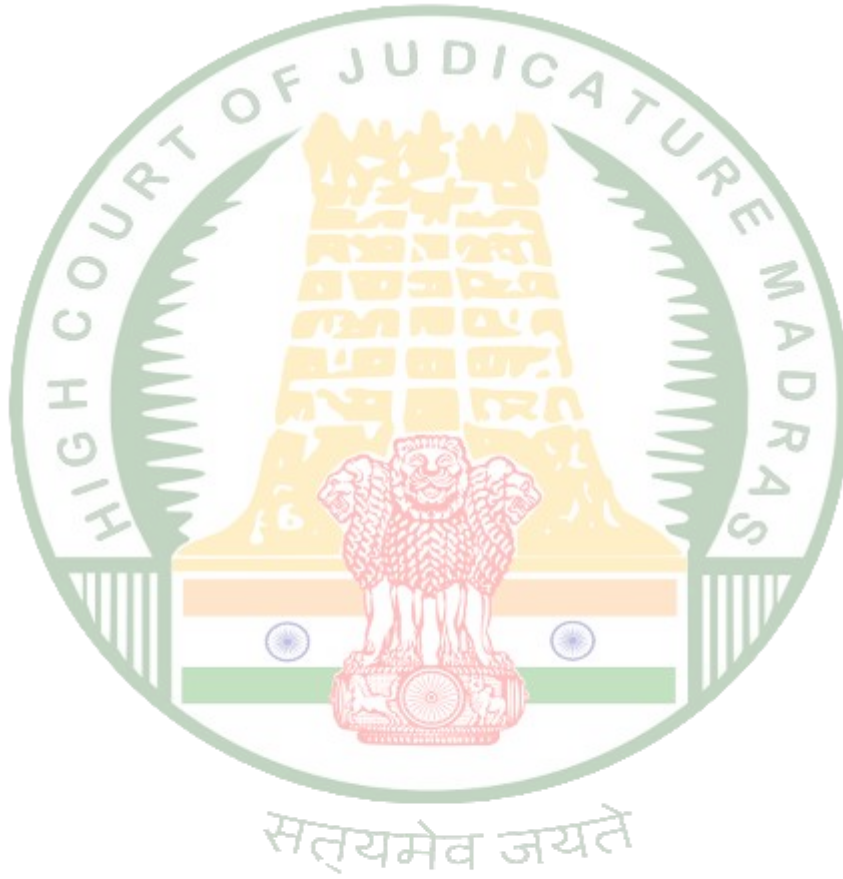
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2.The Chairman,
Tamil Nadu Electricity Board,
800, Anna Salai,
Chennai - 600 002.

3.The Superintendent Engineer,
TNEB-Mettur Electricity Distribution Circle,
Mettur Dam.

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