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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

W.P.No.19189 of 2021

and

W.M.P.No.20485 of 2021

M/s.Cholan Super Market,
Represented by its Managing Partner
S.Hajanajubudeen
No.92/1, Thiruvarur Main Road,
Lakshmangudi,
Thiruvarur - 614 102.

...Petitioner

-Vs.-

The Superintendent of GST & Central Excise,
Thiruvarur Range,
No.12-A, Kumaran Kovil Street,
Thiruvarur - 610 002.

...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent in Order-in-Original No.01/2021-GST OC.No.393/2021 (DIN 20210659XN 030600EB37 dated 18.06.2021 and quash the same as illegal, arbitrary and against the principles of natural justice.

For Petitioner : Mr.K.Soundararajan

O R D E R

Captioned main writ petition and 'Writ Miscellaneous Petition' ['WMP'] are listed in the Admission Board.

2. An 'order dated 18.06.2021 bearing reference No.O.C.No.393/2021 (DIN:20210659XN030600EB37)' [hereinafter 'impugned order' for the sake of convenience and clarity] made by sole respondent has been called in question. To be noted, the impugned order is qua 'The Central Goods and Services Tax Act, 2017' [hereinafter 'CGST Act' for the sake of convenience and clarity] and 'The Tamil Nadu Goods and Services Tax Act, 2017 (Tamil Nadu Act 19 of 2017)' [hereinafter 'TN Goods ST Act' for the sake of convenience and clarity] and it pertains to alleged wrong availment of 'Input Tax Credit' [hereinafter 'ITC' for the sake of brevity, convenience and clarity].



3. Mr.K.Soundararajan, learned counsel on record for writ petitioner who is before this Virtual Court submits that the dealer in the case on hand is a Super Market. As already alluded to supra, the matter pertains to alleged wrong availment of ITC.

4. Notwithstanding very many averments and very many grounds raised in the writ affidavit, learned counsel made a focused submission on one point and that one point is, the seller is responsible in this case and Revenue should recover from the seller. In support of his contention, learned counsel drew the attention of this Court to Sections 42(3) and 42(5) of CGST Act, which read as follows:

'42(3). Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the tax declared by the supplier for the same supply or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated to both such persons in such manner as may be prescribed.

42(5). The amount in respect of which any discrepancy is communicated under sub-section (3) and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the recipient, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.'

5. This Court wanted to know from the learned counsel as to whether a Statutory appeal is available as against the impugned order. The answer was in the affirmative. In other words, there is no disputation or disagreement that a Statutory appeal is available. This Court also put it to the learned counsel as to the reason why alternate remedy cannot be availed.

6. The aforementioned submissions turning on Sections 42(3) and 42(5) were reiterated in response to this query (from the Court) also. In my considered view, it is not necessary to delve into merits or dilate on facts as principles pertaining to alternate remedy qua writ jurisdiction, more particularly in fiscal law/Statutes and exceptions thereto, are well settled. In other words, delving into facts and embarking upon an exercise of discussion on merits turning on Sections 42(3) and 42(5) of CGST Act will become necessary only if the writ petitioner crosses the alternate remedy barrier. To be noted, there shall be little more elaboration infra in this order.



7. Be that as it may, learned counsel pressed into service two orders, one made by a Hon'ble learned single Judge dated 24.02.2021 in WP.(MD)No.2127 of 2021 and other being order of Chhattisgarh High Court made in WPT.No.94 of 2021 dated 24.06.2021 [M/s.Bharat Aluminium Company Limited Versus Union of India and others]. The order made by Hon'ble single Judge of this Court is clearly distinguishable on facts as it was the specific case of the petitioners therein that a substantial portion of the sale consideration was paid only through banking channels, payments made by petitioners therein to one Charles and his wife included the tax component also, Charles and his wife are also said to be dealers registered with the very same assessment circle, but they were not examined. Therefore, the order of the other Hon'ble single Judge is clearly distinguishable on facts and it does not help or aid the writ petitioner in the case on hand. There is a more important reason as to why the other order does not come to the aid of writ petitioner in the case on hand and that is, alternate remedy and exceptions thereto has not been raised in that matter. In other words, the alternate remedy principle was not put in issue and therefore, not gone into in the other matter by the Hon'ble Judge. Therefore, to that extent the case is clearly on a different footing and therefore, it does not help the writ petitioner in the case on hand. As far as Chhattisgarh High Court's case is concerned, no elaboration is required to say that it has only persuasive value, but there is nothing in that order to show that personal hearing was given. In the case on hand, personal hearing has been given. The principle laid down by the Chhattisgarh High Court that recovery shall be made from the seller and only in exceptional circumstances, it can be from the recipient qua ITC turns on merits and I refrain myself from expressing any opinion on the same. Suffice to say that the Chhattisgarh High Court order also does not discuss anything about the alternate remedy and exceptions thereto and therefore, it does not come to the aid of the writ petitioner in the instant case.

8. As already alluded to supra, there is no dispute or disagreement that Statutory appeal is available to the writ petitioner. This is set out in the preamble portion of the impugned order itself and relevant part of the preamble portion reads as follows:

'Any person deeming himself aggrieved by this order may appeal against the same to the Commissioner of Customs & Central Excise (Appeals), Office of the Commissioner of Customs & Central Excise, No.1, Williams Road, Cantonment, Tiruchirapalli 620 001 (Circuit office).'



9. The above does not mention the provision of law qua Statutory appeal but it is not necessary to burden this order with elaboration on that as learned counsel does not dispute the availability of alternate remedy i.e., a Statutory appeal.

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10. This Court also notices from the impugned order that the writ petitioner has been given a personal hearing. This is articulated in paragraph No.7 of the impugned order which reads as follows:

'7.....Consequently, a personal hearing has been fixed and attended by Shri.M.Paavendan, GST Consultant, Mannargudi on 23.03.2021 on behalf of M/s.Cholan Super Market on which they have produced authorisation letter, produced the copies of GSTR-3B and GSTR-2A and requesting to consider the points in the written submission letter dated 01.03.2021 and drop the proceedings.'

11. There is nothing to demonstrate that the writ petitioner insisted on seller being examined in the personal hearing. This also goes against the writ petitioner.

12. As I am of the considered view that the writ petitioner has not got past the threshold barrier qua alternate remedy, I refrain myself from expressing further opinion or view on this aspect of the matter as that may impact the Statutory appeal, if the writ petitioner is so advised and if the writ petitioner chooses to file a Statutory appeal.

13. Reverting to alternate remedy, alternate remedy no doubt is not an absolute rule. In other words, alternate remedy rule is discretionary and it is a self imposed restraint qua writ jurisdiction. However, Hon'ble Supreme Court starting from Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd., and others reported in (1985) 1 SCC 260] in a long line of authorities has repeatedly held that the alternate remedy rule has to be very strictly enforced with utmost rigour when it comes to fiscal Statute. The other authorities are Satyawati Tandon [United Bank of India Vs. Satyawati Tandon and others reported in (2010) 8 SCC 110] and K.C.Mathew [Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. reported in (2018) 3 SCC 85]. Relevant paragraph in Dunlop case is paragraph No.3 and relevant portion of the same reads as follows:

'3. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited



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to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.'

(Underlining made by this Court to supply emphasis and highlight)

14. Satyawati Tandon principle was reiterated by Hon'ble Supreme Court in K.C.Mathew case. Relevant paragraph in K.C.Mathew case is paragraph 10 and the same reads as follows:

'10. In Satyawati Tandon 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



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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 this Court to supply emphasis and highlight)

15. Exceptions to the above, if at all and if that be so are clearly reiterated in Whirlpool principle [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others reported in (1998) 8 SCC 1] and Harbanslal principle [Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd., and others reported in (2003) 2 SCC 107]. In the case on hand, there is nothing to demonstrate that the matter falls within these exceptions which have come to the stay and have come to known as Whirlpool exceptions in this arena of jurisprudence. It is also not a case where the reply of writ petitioner has not been considered. The above mentioned extracted portion of impugned order will make it clear that the reply has been considered and personal hearing has been given to writ petitioner. Therefore, there is no violation of 'Natural Justice Principles' ['NJP'] more so as personal hearing also has been given.

16. Relevant paragraphs in Whirlpool and Harbanslal are paragraph Nos. 15 and 7 respectively and the same read as follows:
Paragraph No. 15 of Whirlpool principle:

'15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case,

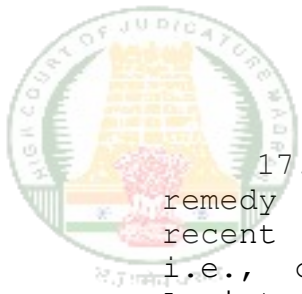


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has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.'

Paragraph No.7 of Harbanslal principle:

'7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.'



17. The above obtaining position of law regarding alternate remedy and exceptions is nicely and neatly reflected in a very recent order of Hon'ble Supreme Court made about 10 days ago i.e., on 03.09.2021 in Civil Appeal No 5121 of 2021 [The Assistant Commissioner of State Tax and Others Vs. M/s Commercial Steel Limited]. Relevant paragraph Nos. are 11 and 12 and the same read as follows:

'11 The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is: (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation.

12 In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was CA 5121/2021 7 not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section 107, this Court makes no observation on the merits of the case of the respondent.'

18. In the light of the above, this Court deems it appropriate to hold that the captioned writ petition does not deserve to be entertained and deserve to be dismissed primarily on the ground that the alternate remedy i.e., Statutory appeal is available to writ petitioner.

19. If the writ petitioner is so advised and if the writ petitioner chooses to file Statutory appeal, the same shall be heard by the Appellate Authority on its own merits and in accordance with law, uninfluenced by any tertiary or traces of opinion or view on merits that may appear to have been expressed



in this order. The above draws the curtains on the captioned writ petition.

20. Captioned Writ Petition is dismissed. Consequently, connected WMP is also dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

mk

To

The Superintendent of GST & Central Excise,
Thiruvarur Range, No.12-A,
Kumaran Kovil Street,
Thiruvarur - 610 002.

+1cc to Mr.K.Soundararajan, Advocate, S.R.No.46950

W.P.No.19189 of 2021

and

W.M.P.No.20485 of 2021

SRA[co]

NSK 28/09/2021