IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

W.P.No.20508 of 2021
and
W.M.P.No.21761 of 2021

Tvl. SGS Marketings,
Rep.by its Partner Mr.G,.Sandeep Das,
No.294, Purasawalkam High Road,
Kellys,
Chennai 600 010. ...Petitioner

-Vs.-

The Assistant Commissioner [CT],
Aynavaram Assessment Circle,
F-50, IIIrd Floor, Ist Avenue,
Anna Nagar,
Chennai 600 102. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records on the files of the respondent proceedings in TIN/33821003639/2014-15 dated 23.07.2021 and quash the same being illegal invalid without authority of law and violated the principles natural justice and also law laid down by this Hon'ble Court.

For Petitioner : Mr.D.Vijayakumar

For Respondent : Ms.Amirta Dinakaran,
Government Advocate

O R D E R

Captioned writ petition and writ miscellaneous petition No.21761 of 2021 therein are in the Admission Board.

2. An 'order dated 23.07.2021 bearing reference No.TIN/33821003639/2014-15' [hereinafter 'impugned order' for the sake of convenience and clarity] made by the sole respondent under 'the Tamil Nadu Value Added Tax Act, 2006, (Tamil Nadu Act No.32 of 2006)' [hereinafter 'TNVAT' for the sake of convenience and clarity] has been called in question in the captioned writ petition.

3. To be noted, this is the second round of litigation, as when the revisional order/re-assessment was made earlier, the same was assailed by the writ petitioner before this Court vide WP.No.25293 of 2015 which came to be disposed of on 16.06.2017 by another Hon'ble learned single Judge directing the respondent to pass final assessment order. It is not necessary to dilate further on the same as it is not imperative for appreciating this Order. Suffice to say that pursuant to the order made in the earlier writ petition, the impugned order has been made by the sole respondent.

4. Notwithstanding very many averments in the writ affidavit and very many grounds raised in the writ affidavit, Mr.D.Vijayakumar, learned counsel for writ petitioner makes one focused submission and that one focused submission is proper personal hearing has not been given to the writ petitioner. Elaborating his submission on this, learned counsel drew the attention of this Court to a notice dated 28.06.2017, wherein the writ petitioner was given an opportunity of personal hearing post aforementioned earlier writ order. Writ petitioner responded to the aforementioned notice vide communication dated 25.07.2017 requesting 15 days time to file detailed objections. This notice for personal hearing and response from writ petitioner are not captured in the impugned order, but the learned counsel for writ petitioner very fairly submits that post 25.07.2017 the writ petitioner did go before respondent and furnished books of accounts. This Court places on record its appreciation qua the fair approach of the learned counsel for writ petitioner.

5. Be that as it may, learned counsel for writ petitioner submits that the notice talks about the sales turn over qua E-Commerce and little over at Rs.2.22 crores, whereas the opening paragraph in the impugned order talks about Taxable turnover of Rs.18.30 Lakhs. Learned counsel submits that the notice for personal hearing and the basis on which the impugned order has been been made do not have correlation.

6. Ms.Amirta Dinakaran, learned Revenue counsel, accepts notice on behalf of the sole respondent, with the consent of both sides, main writ petition is taken up, as the matter turns on a narrow compass.

7. This Court in State Bank of India officers case law, [State Bank of India Officer's Association (CC) - SBIOA Vs. The Assistant Commisioner, Chennai-1 in W.P.No.22634 of 2019 order dated 01.08.2019] has held that the expression 'giving reasonable opportunity to show cause' does not mean personal hearing. This order was upheld by a Hon'ble Division Bench of

this Court vide order dated 16.12.2019 in W.A.No.4073 of 2019. However, in the case on hand, the respondent has chosen to give personal hearing to the writ petitioner. If the respondent/Assessing Authority had at its discretion decided to give personal hearing, that falls in a different category. Therefore, we have to now look at whether reasonable opportunity to show cause has been given to the writ petitioner. In the light of the aforementioned 28.06.2017 notice, writ petitioner's response and the stated position of writ petitioner that post response of writ petitioner dated 25.07.2017, writ petitioner went before Assessing Authority and produced books of accounts, the answer is in the affirmative. It is the case of writ petitioner that the Assessing Authority has made an error in appreciating books of accounts and has proceeded on a wrong basis and that is clearly a ground of appeal.

8. This takes us to alternate remedy. In the case on hand, there is no disputation or disagreement that alternate remedy is available to writ petitioner vide Section 51 of TNVAT Act which reads as follows:

> '51 .Appeal to [Appellate Deputy Commissioner].-- (1) Any person objecting to an order passed by the appropriate authority under section 22, section 24, section 26, sub-sections (1), (2), (3) and (4) of section 27, section 28, section 29, section 34 or sub-section (2) of section 40 other than an order passed by an [Deputy] Commissioner (Assessment) may, within a period of thirty days from the date on which the order was served on him, in the manner prescribed, appeal to the Appellate [Deputy] Commissioner having jurisdiction:
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> Provided that the [Appellate Deputy Commissioner] may, within a further period of thirty days admit an appeal presented after the expiration of the first mentioned period of thirty days if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the first mentioned period:
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> Provided further that in the case of an order under section 22, section 24, section 26, subsections (1), (2), (3) and (4) of section 27, section 28 or section 29, no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be, and twenty-five per cent of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant.

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by such fee not exceeding one hundred rupees as may be prescribed.

(3) In disposing of an appeal, the [Appellate Deputy Commissioner] may, after giving the appellant a reasonable opportunity of being heard, and for the sufficient reasons to be recorded in writing -

(a) in the case of an order of assessment --

(i) confirm, reduce, enhance or annul the assessment or the penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed; or

(iii) pass such other orders as he may think fit; or

b) in the case of any other order, confirm, cancel or vary such order:

at the hearing of any appeal, the appropriate authority shall have the right to be heard either in person or by a representative.

(4) Notwithstanding that an appeal has been preferred under sub-section (1), the tax shall be paid in accordance with the order of assessment against which the appeal has been preferred:

Provided that the [Appellate Deputy Commissioner] may, in his discretion, give such directions as he thinks fit in regard to the payment of the tax before the disposal of the appeal, if the appellant furnishes sufficient security to his satisfaction, in such form and in such manner as may be prescribed:

Provided further that the directions given under the first proviso shall stand vacated, if no order is passed under sub-section (3) within a period of one hundred and eighty days of the issue of order under the said proviso.'

9. On alternate remedy, in a long line of authorities Hon'ble Supreme Court i.e., from Dunlop India case law [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd., and others reported in (1985) 1 SCC 260], Satyawati Tandon case law [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] and K.C.Mathew case law [Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. reported in (2018) 3 SCC 85] has held that 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. What is of significance is, vide these case laws, it has been repeatedly

held that alternate remedy rule has to be applied with utmost rigour when it comes to fiscal Statutes.

10. 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 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.'
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> (Underlining made by this Court to supply emphasis and highlight)

11. 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 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)
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> > "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 this Court to supply emphasis and highlight)

12. Be that as it may, most recent pronouncement of Hon'ble Supreme Court in Commercial Steel Limited case [Civil Appeal No 5121 of 2021, The Assistant Commissioner of State Tax and Others Vs. M/s Commercial Steel Limited] was rendered on 03.09.2021. Relevant paragraphs are Paragraph Nos.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.'

13. In the aforementioned Commercial Steel Limited case penned by Hon'ble Justice Dr.Dhananjaya Y Chandrachud, exceptions qua alternate remedy have been adumberated, such enumeration even, if it is to be construed to be illustrative 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] operate. This is such an oft quoted case law that it has come to stay as 'Whirlpool exceptions' in litigation parlance.

14. Relevant paragraphs in Whirlpool and Harbanslal case laws 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, 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.'

15. In the case on hand, the matter does not fall under any of the exceptions. Therefore, the alternate remedy would certainly apply to the case on hand and the writ petitioner may very well avail alternate remedy under Section 51 of TNVAT Act, if the writ petitioner chooses to file a statutory appeal. In other words, grounds are not good enough to compel this Court to persuade itself to exercise writ jurisdiction on the teeth of alternate remedy in a fiscal law Statute.

16. Learned Revenue counsel pointed out that personal hearing has been given to the writ petitioner and therefore, it cannot be gainsaid that the provision only requires reasonable opportunity to show cause.

17. In the light of the narrative thus far, captioned Writ Petition fails and the same is dismissed albeit preserving rights of the writ petitioner to prefer a statutory appeal under Section 51 of TNVAT Act, if the writ petitioner chooses to do so and if the writ petitioner is so advised. Consequently, connected miscellaneous petition is also dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

mk

To

The Assistant Commissioner [CT],
Aynavaram Assessment Circle,
F-50, IIIrd Floor, Ist Avenue,
Anna Nagar, Chennai 600 102.

+1 cc to Mr.D.Vijayakumar,Advocate Sr.No. 49995
+1 cc to the Government Pleader, Sr.No.50251

W.P.No.20508 of 2021
and
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PMK[co]
NSK 25/10/2021