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FMA 558 of 2018
With
I.A. No.CAN 1 of 2018 (Old CAN 623 of 2018)

Malabar Gold Private Limited.
Vs.
State of West Bengal & Ors.

Mr. Abhijit Chatterjee, Sr. Adv.,
Mr. Somak Basu,
Mr. Vinayak Mathur ... for the appellant.

Mr. Soumitra Mukherje,
Mr. Debasish Ghosh ... . for the respondents/ State

This intra-Court mandamus appeal is directed against the order dated 13th December, 2017 passed in W.P. No.25402(W) of 2017 filed by the appellant. The said writ petition was filed for issuance of writ of certiorari to quash the assessment orders and notices of demand as being without jurisdiction and in gross violation of principles of natural justice. In the alternate, it was prayed to quash the deemed assessment orders and notices of demand dated 9th September, 2017 and 14th September, 2017 as well as corresponding final audit report and computation sheets and to direct the respondents to decide the matter afresh and finalise the audit report after giving a reasonable opportunity. The writ petition was dismissed at the admission stage on the ground that there is existence of appellate procedure under the relevant statute, viz. the West Bengal Value Added Tax Act, 2003 and therefore, the appellant cannot invoke the writ jurisdiction avoiding the rigours of the appeal. To be noted that since the writ petition was dismissed at the admission stage, no affidavits were exchanged. Nevertheless, the Court proceeds to make an observation to the effect that no infraction of jurisdiction nor of statutory procedure and of natural justice is noticed. In our considered view, that observation would definitely stand in the way of the appellant exercising the statutory appellate procedure in the event they do so. Because the Court has recorded a finding that there is no violation of statutory procedure and there is no violation of principles of natural justice. Such a finding could have been recorded as a final finding of fact after the affidavits are exchanged or after the parties are heard in full. In any event, if the Court is of the opinion that the matter should be relegated to the appellate procedure, then all issues, both factual and legal, should be left open and no opinion should be recorded by the Court or else directing the appellant to avail the statutory remedy would be a fait accompli. This would be sufficient for us to set aside the order passed in the writ petition. In fact, the learned senior counsel appearing for the appellant has placed before us a compilation of case laws for the proposition that the deemed assessment orders, which were impugned in the writ petition were passed beyond limitation and hence, are barred and without jurisdiction. Further, it is contended that the deemed fiction in Section 43(5A) of the Act ought to be given full effect. Further, on the question of jurisdiction, it is stated that the appellant / assessee could not have been proceeded with after it had merged with M/s. MGPL.

The orders are questioned on the ground that reasons ought to have been recorded while extending the time for audit and assuming the appellant / assessee had agreed for such an extension, there can be no estoppel against law. The impugned deemed assessment orders are also challenged on the ground that no reasonable opportunity was granted to the company / M/s. MGPL to which the assessee was merged, that is prior to finalisation of the audit report and no hearing was provided prior to deeming the audit report to be assessment orders. These are broadly the grounds on which the appellant seeks to challenge the orders of deemed assessment.

The learned counsel appearing for the respondents/ State would submit that all issues including that of jurisdiction can very well be canvassed before the appellate authority and there is no valid ground to bypass the appellate remedy especially, when the appellant has to effect a pre-deposit to be entitled to pursue the appeal.

After having elaborately heard the learned counsels for the parties, we are of the considered view that the arguments, which are put forth before us on either side cannot be considered in this appeal for the simple reason that these arguments have not been noted in the writ petition as the writ petition was thrown out on the ground of availability of alternative remedy. Therefore, we will not be justified in testing the correctness of the order in the writ petition for reasons, which are not found to be recorded in the order. That apart, as observed earlier, the learned writ Court has rendered a finding that there is no infraction of procedural aspect or no violation of principles of natural justice. We have already held that such an observation could not have been made and it could have been made only after recording sufficient reasons.

Thus, in the light of the above finding, we have no hesitation to interfere with the order passed in the writ petition and we are inclined to restore the writ petition to the file of the learned Single Bench to be heard and decided on merits on all issues.

In the result, this appeal and the application are allowed. Order passed in the writ petition is set aside. Consequently, the writ petition is restored to the file of the learned Single Bench to be heard and decided afresh. It is submitted by the learned counsel appearing for the appellant that already affidavits have been exchanged in this appeal.

In our considered view, those affidavits may not touch upon the entire merit of the matter.

Mr. Chatterjee, learned senior counsel appearing for the appellant submitted that leave may be granted to the appellant to file a short supplementary affidavit crystalising the legal submissions, which in his opinion, has not been clearly brought out in the writ petition. If the submissions stem out of the pleadings already there, there can be no difficulty. Therefore, we grant liberty to the appellant / writ petitioner to file a supplementary affidavit in the writ petition crystalising the legal submissions based on the facts, which are already on record. This supplementary affidavit be filed within one week from date with copies served on all the respondents. On receipt of the supplementary affidavit, affidavit-in-opposition to the main writ petition as well as the supplementary affidavit be filed by the respondents within four weeks from the date of receipt of the supplementary affidavit. Reply, if any, by the appellant be filed within two weeks thereafter.

Registry is directed to list the writ petition before the appropriate Bench after seven weeks.

It is made clear that all findings rendered by the learned Single Bench are set aside and we also make it clear that we have not made any observation on the merits of the matter and it will be well open to both sides to canvas all points including the issue relating to availability of alternate remedy as against the order of deemed assessment.

Urgent photostat certified copy of this order, if applied for, be given to the parties expeditiously upon compliance of all legal formalities.

(T. S. Sivagnanam, J.)

(Ananda Kumar Mukherjee, J.)