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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 5991 of 2022

Arup Kumar Ghosh
-vs.-
West Bengal State Electricity
Distribution Company Limited & Ors.

Mr. Debasish Ghosh,
Mr. Nilanjan Adhikari,
Mr. Subhajit Roy
...for the petitioner

Mr. Srijan Nayak,
Ms. Rituparna Maitra
...for the WBSEDCL

Mr. Susanta Pal,
Mr. Ananda Dulal Sarkar
...for the State

The present challenge has been preferred against a final order of assessment made on the allegation of pilferage of electricity against the petitioner.

Learned counsel appearing for the petitioner contends that it is public knowledge that due to the Covid-19 pandemic, at least for a period of eight months, all factories were closed, including the stone crusher operated by the petitioner, in respect of which the electricity was allegedly consumed.

That apart, learned counsel submits that a meeting was held in the year 2010 between the District

Magistrate concerned and all other stakeholders, where it was decided by the District Magistrate that no stone crusher shall operate more than eight hours a day.

Even in the teeth of the above factors, it is argued, a final assessment was raised on the premise that the stone crusher machine was used by the petitioner for twenty hours per day, which was impossible during the pandemic period. That apart, it is contended that there is a variance between the provisional assessment bill (annexed at page 42 of the writ petition) and the final assessment bill (annexed at page 64 of the writ petition), insofar as the working hours are concerned; the former discloses that the machine was used for 24 hours, while the latter says that it was used for 20 hours, per day. In view of such patent discrepancies, it is contended, this Court ought to interfere and set aside the final order of assessment.

As regards the availability of an alternative remedy in the form of an appeal under Section 127 of the Electricity Act, 2003, learned counsel for the petitioner submits that such alternative remedy, being onerous, is not an absolute bar to this Court for exercising its writ jurisdiction under Article 226 of the Constitution of India, particularly since no reasons have been provided in the assessment for such discrepancies.

Learned counsel appearing for the Distribution Licensee contends that, since Section 127 of the 2003

Act clearly stipulates and provides for an appeal against the final order of assessment, which also contemplates deposit of fifty per cent of the assessed amount as a pre-condition for preferring such appeal, the present writ petition ought not to be entertained.

It is further contended that there was a serious allegation of pilferage against the petitioner, on which ground the provisional and, thereafter, the final assessment order was passed. Hence, premium ought not to be given to the petitioner by granting relief in the present writ petition.

Learned counsel appearing for the petitioner, in support of his contention, places reliance on a judgment of the Supreme Court, reported at *AIR 1954 Supreme Court 403 (Himmatlal Harilal Mehta vs. State of M.P. & Ors.).*

Learned counsel reiterates the proposition as contended to be laid down in the said Supreme Court judgment and relied on by a Division Bench judgment of this Court, reported at *AIR 2013 Calcutta 194 (Narbada Devi Harlalka & Ors. Vs. Kolkata Municipal Corporation & Ors.).* The proposition is that in view of the alternative remedy being onerous, there is no bar to the High Court entertaining an application under Article 226 of the Constitution despite the availability of an alternative remedy by way of an appeal.

Upon hearing learned counsel for the parties, it appears from the records that the present challenge is squarely directed against the final order of assessment on the charge of pilferage.

Section 127(1) of the Electricity Act, 2003 clearly provides that any person aggrieved by the final order made under Section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

Sub-section (2) of Section 127 further stipulates that no appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to half of the assessed amount is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

Sub-section (6) of Section 127 further provides that when a person defaults in making payment of assessed amount, he, in addition to the assessed amount, shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent per annum compounded every six months.

In so far as the judgment of the Supreme Court, cited by the petitioner, is concerned, the same dealt with a challenge to the *vires* of certain provisions of the Central Provinces and Berar Sales Tax Act, 1947. The Supreme Court, upon the discussions made in the said judgment, ultimately came to the conclusion that the High Court therein, having held that Explanation II to Section 2(g) of the said Act was *ultra vires*, was in error in dismissing the writ petition on the ground that it was not entitled to grant relief under the provisions of Article 226 of the Constitution of India.

While coming to the said finding, the Supreme Court discussed the order of the High Court and it was observed, inter alia, that it was held by the Supreme Court in a previous judgment, reported at *AIR 1953 SC 252*, that the principle that a court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party has came to the Court with an allegation that his fundamental right had been infringed and sought relief under Article 226 of the Constitution. Moreover, the remedy provided by the Act was of an onerous and burdensome character as, before the assessee can avail of it, he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy, it was held.

As opposed to the cited judgment, in the present case, the *vires* of Section 126 and/or Section 127 of the 2003 Act have not been challenged.

As such, the entire factual scenario changes insofar as the provisions under which an appeal has to be preferred upon deposit of fifty per cent of the assessed amount, remains in the statute book and is *intra vires.*

In the reported judgment, the High Court, even after holding that the discussed provision was *ultra vires*, refused to entertain an application under Article 226 of the Constitution. In the present case, the writ petitioner deliberately, to by-pass the mandatory provision of depositing fifty percent of the assessed amount as a pre-condition for filing an appeal under Section 127 of the 2003 Act, has chosen the writ jurisdiction of this Court.

A bare perusal of sub-section (2) of Section 127 of the 2003 Act clearly indicates that the said provision is couched in a negative language.

Since it has been specifically stated that "No appeal against an order of assessment under sub-section (1) shall be entertained……." the said provision is mandatory and cannot be deemed to be a directory one. Moreover, as opposed to the cited Supreme Court judgment, the said provision stipulates only fifty percent of the amount to be deposited, whereas the whole amount of the tax was to be deposited under the impugned provisions of the 1947 Act.

As far as the Division Bench judgment cited by the petitioner is concerned, in the said judgment, the Division Bench, upon discussing the proposition laid down in *Himmatlal Harilal Mehta* (supra), specifically observed that " For the reasons discussed hereinabove, we are of the opinion that the writ court is entitled to decide the writ petition filed by the appellants herein on merits in order to adjudicate the issues raised by the appellants with regard to the validity and/or legality of the determination of the annual valuation by the Hearing Officer." The Division Bench held that it was observed thereinbefore that adequate equally efficacious alternative remedy was not available to the appellants therein specially when filing of appeals before the learned Tribunal under Section 189(5) of the Calcutta Municipal Corporation Act, 1980 could not be held to be equally efficacious alternative remedy "in the facts of the present case" due to the precondition imposed by sub-section (6) of Section 189 of the 1980 Act.

In paragraph 30 of the said judgment, the Division Bench held that the appellants cannot be remediless when they had challenged the determination made by the Hearing Officer with regard to the annual valuation in respect of the premises-in-question on the ground that the said Hearing Officer did not furnish any reason for determining the annual valuation ignoring the objections raised by the appellants therein.

In the present case, however, there was no scope of the appellate authority or the first forum to consider the objection of the writ petitioner at all, since the petitioner had not filed any written objection before any of the forums.

Moreover, with utmost respect to the said observations made in the facts of the case before the Division Bench in respect of a different Act, a parallel analogy cannot be drawn with the Electricity Act, 2003, which specifically stipulates under Section 127(2) that no appeal against an order shall be entertained unless an amount equal to half of the assessed amount is deposited in cash or by way of bank draft.

Hence the said judgments do not come to the support of the proposition contended by learned counsel for the petitioner.

However, since the petitioner has been pursuing the writ petition, it ought to be deemed that the date of passing this order, that is, today, is the date of commencement of the limitation for preferring an appeal under Section 127 of the 2003 Act. Yet, it should be reiterated that the petitioner's contention that the petitioner will be unable to deposit half of the assessed amount, as contemplated under Section 127 of the 2003 Act, cannot be a valid ground for refusal to deposit such amount as a precondition for preferring an appeal, since, in such a situation, all defaulters will flood the courts with applications for restoration without complying with the specific mandatory provisions of the statute.

In such view of the matter, W.P.A. No. 5991 of 2022 is disposed of with liberty to the petitioner to approach the appellate authority, as envisaged under Section 127 of the Electricity Act, 2003, challenging the final order of assessment, which has been impugned in the present writ petition, upon compliance of all formalities, including the stipulation in sub-section (2) of Section 127 of the 2003 Act.

If so approached within the limitation period, calculating the limitation from today, the appellate authority will decide the said appeal in accordance with law upon giving adequate opportunity of hearing to all concerned.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)