

bdv

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 12297 OF 2021

M/s Mestra A.G. Switzerland
a company incorporated under the
laws of Switzerland and having its
registered office at Kagenstrasse 2,
CH-4153 Reinach, Switzerland
Through Special POA Holder
Mrs. Smita Lokesh Bhartiya
Age: 44 Yrs., occ. Service,
Add. M-171 to 176, MIDC Waluj
Industrial Area, Aurangabad 431001 .. **PETITIONER**

VERSUS

1. The State of Maharashtra
2. The Commissioner of Sales Tax
having its office at GST Bhavan,
8th floor, Mazgaon, Mumbai.
3. The Deputy Commissioner of
Sales Tax, AUR-VAT-E-002,
THIRD FLOOR, Goods and Service
Tax Bhavan, Opp. Railway Station,
Aurangabad.
4. The Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001 .. **RESPONDENTS**

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Mr. Shriram Sridharan, Senior Advocate a/w Mr. Rakesh N. Jain, Advocate a/w Advocate V. Sridharan a/w Advocate Sahail Parghi, for the Petitioner,

Mr. R. V. Dasalkar, A. G. P. for Respondent Nos. 1 to 3,

Mr. Bhushan B. Kulkarni, Standing Counsel for Respondent No.4.

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**CORAM : DIPANKAR DATTA, CJ &
N. B. SURYAWANSHI, J.**

DATE : FEBRUARY 16, 2022.

ORAL JUDGMENT (Dipankar Datta, CJ) :

1. The petitioner is a company incorporated under the laws of Switzerland, and having its registered office at Kagenstrasse 2, CH-4153 Reinach, Switzerland. It has no direct presence in India but operates in India through its subsidiaries and affiliated companies.

2. By this writ petition dated 25th August, 2020, the petitioner calls in question an assessment order dated 24th March, 2020 passed by the Deputy Commissioner of Sales Tax, Aurangabad, respondent no.3, for the assessment year 2011-2012, levying tax under the Maharashtra Value Added Tax Act, 2002 (hereafter "the MVAT Act") on payments of royalty made by the subsidiary companies to the petitioner on the allegation that such royalty amounts to consideration for transfer of right to use of trademarks and technical

know-how. It is evident from the impugned order that it was preceded by a show-cause notice, whereupon the petitioner duly submitted its response disputing its liability and was thereafter afforded an opportunity of hearing. Ultimately, the respondent no.3 held the subject transaction to be a sale transaction which is taxable under the MVAT Act, relying upon a judgment passed by the Maharashtra Sales Tax Tribunal, constituted under section 11 of the MVAT Act, in the case of **M/s. Merk KGaA, Germany Vs. The State of Maharashtra**. The penultimate paragraph in the impugned order captures the liability and reads as under: -

“Gross turnover of sales and net sales is determined at Rs.38168775/-. MVAT is levied @ 5 per cent being the goods covered by Sch C-39 of MVAT Act 2002. MVAT payable comes at Rs.1908439. Interest under section 30 (1) is levied at Rs.1908439. Total Dues payable by dealer are determined at Rs.3816878.”

3. The writ petition was considered by us on 14th February, 2022. Mr. R. K. Jain, learned advocate representing the petitioner had prayed for time on the ground that Mr. Sridharan, learned senior advocate had been engaged by the petitioner and that Mr. Sridharan

would like to address us from Mumbai using the hybrid platform. We, accordingly, adjourned hearing of the writ petition till today. However, while so adjourning, we recorded our *prima facie* view in the relevant order as to why we felt disinclined to entertain this writ petition so that Mr. Sridharan could adequately respond. Such view was based on twin reasons, reading as follows: -

“(I) Sub-section (4) of section 26 of the Act provides for a limitation period of 60 days for filing appeals before the appellate authority/Tribunal. Evidently, this writ petition has been instituted by the petitioner on 27th August 2020, months beyond expiry of the period of limitation. Having regard to the decision of the Supreme Court reported in **AIR 1961 SC 1506 [A.V. Venkateswaran, Collector of Customs, Bombay V. Ramchand Sobhraj Wadhwani & anr.]**, the petitioner was required to explain what prevented it from approaching the Court before expiry of the limitation period of 60 days to avail the appellate remedy. That has not been explained, and hence the writ petition is not entertainable having been instituted beyond the period of limitation prescribed for preferring an appeal under section 26 of the Act.

(II) As has been noted above, section 27 of the Act provides a remedy of appeal to the High Court against the order of the Tribunal. Ordinarily, when the High Court can be approached by an aggrieved litigant in a different jurisdiction, the writ jurisdiction cannot be invoked. This is the law laid down by the

Supreme Court in its decision reported in **AIR 1964 SC 1419 [Thansingh Nathmal & ors. Vs. A. Mazid, Superintendent of Taxes]**. Hence, on this count too, the writ petition is not liable to be entertained."

4. We have heard Mr. Sridharan at considerable length today in support of his contention that although the remedy under Article 226 of the Constitution of India is undoubtedly discretionary, this writ petition deserves to be entertained by this Court.

5. First, Mr. Sridharan contends that the order dated 24th March, 2020 having been passed by the Deputy Commissioner relying on the decision of the Tribunal in the case of **M/s. Merk KGaA** (supra), exploring the remedy of first appeal provided by section 26(1) of the MVAT Act to the Joint Commissioner, being the first appellate authority, would be a mere ritual inasmuch as the Joint Commissioner being bound by the aforesaid decision of the Tribunal, confirmation of the order of the Deputy Commissioner is a foregone conclusion.

6. Our attention has been invited by Mr. Sridharan to the decisions of the Supreme Court reported in **(1980) 4 SCC**

451 [M/s. Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax] and (1985) 4 SCC 404 [M/s Onkarlal Nandlal Vs. State of Rajasthan and Another], where the Supreme Court entertained special leave petitions filed under Article 136 of the Constitution of India directly from orders passed by the taxing authorities, without the party aggrieved approaching the relevant high courts on the ground that the point in issue had been decided by such high courts. The decision in **(2009) 8 SCC 209 [Assistant Commissioner (CT) LTU Vs. Amara Raja Batteries Ltd.]** was also placed before us where the Supreme Court upheld the decision of the relevant high court on writ petitions filed by aggrieved parties against orders of assessment without exhausting the remedy of an appeal provided by the Andhra Pradesh General Sales Tax Act before the Sales Tax Appellate Tribunal. While overruling the contention of the appellant in this regard, it was held that since the Appellate Tribunal had expressed its mind in some other matter, it would be an idle formality for the party aggrieved to approach the said tribunal.

7. Mr. Sridharan next submits that law is well settled that if an authority passes an order, which is contrary to a

decision of the highest court of the State, and such an order is sought to be challenged before the same high court in a petition under Article 226 of the Constitution of India, the writ petition would be maintainable because an administrative tribunal cannot ignore the law declared by the highest court in the State and initiate proceedings and/or pass orders in direct violation of the law, as declared by such court. Support has been sought to be drawn from the decision of the Supreme Court reported in **1983 (13) E. L. T. 1342 (S.C.) [East India Commercial Company Ltd. Vs. Collector of Customs, Calcutta]**. In this connection, Mr. Sridharan contends that a decision of a coordinate Bench of this Court reported in **2016 SCC OnLine Bom 5274 [Mahyco Monsanto Biotech (India) Pvt. Ltd Vs. The Union of India & Ors.]** had been referred to in the petitioner's response to the show cause notice. Relying on such decision, it was submitted in the response that the headquarters of the petitioner is outside India and hence the situs of the intangibles owned by the petitioner would be outside India; hence, following the said decision of this Court, the income was not liable to tax in India. However, ignoring the law declared in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra), the respondent no.3 proceeded

to pass the impugned order, which is absolutely contrary to such declared law; and having regard to the dictum in **East India Commercial Company Ltd.** (supra), this Court instead of relegating the petitioner to the appellate forum ought to determine the questions raised in the writ petition.

8. Our attention was further invited by Mr. Sridharan to the decision of the Supreme Court reported in **AIR 1961 SC 65 [Tata Iron and Steel Co. Ltd., Bombay Vs. S. R. Sarkar and others]**. Referring to paragraph 5 of such decision, he contends that a Constitutional point of grave importance having been raised in the writ petition with regard to the jurisdiction of the State of Maharashtra to levy tax in the light of Article 286 of the Constitution, the present writ petition is not one calling for a dismissal *in limine* on the ground that the petitioner ought to avail the statutory remedy first.

9. Responding to the twin reasons indicated in our order dated 14th February, 2022, Mr. Sridharan spared no effort to distinguish the decisions in **A.V. Venkateswaran, Collector of Customs, Bombay** (supra) and **Thansingh Nathmal** (supra). We propose to deal with this part of his

address a little later.

10. In conclusion, Mr. Sridharan submits that the rule of exhaustion of alternative remedy is a rule of convenience and discretion rather than a rule of law. Since it does not oust the jurisdiction of the high court exercising writ jurisdiction and having regard to the peculiar facts of this case, this Court may exercise discretion and entertain the writ petition, particularly when other writ petitions have been entertained and are pending.

11. Learned counsel for the respondents are not called upon to answer the contentions of Mr. Sridharan, for the view we propose to take.

12. We wish to place on record that the erudite arguments advanced by Mr. Sridharan have been heard by us with due attention and the authorities cited by him perused, without being in any manner prejudiced by our order dated 14th February, 2022 where a *prima facie* view was expressed against entertainability of this writ petition.

13. At the outset, we may note the scheme of the MVAT

Act. As has been noted in our order dated 14th February, 2022, the MVAT Act provides several fora of appeal to the petitioner. A first appeal is available under section 26(1) of the Act from the order of the Deputy Commissioner, respondent no.3, to the Joint Commissioner. Sub-section (2) of section 26 provides an avenue of a second appeal before the Tribunal. Any party aggrieved by an order of the Tribunal has the option of presenting an appeal to the High Court under sub-section (1) of section 27 and such appeal may be entertained, if the High Court is satisfied that the case involves a substantial question of law. Sections 26 and 27 of the MVAT Act, therefore, comprise a complete code providing for a hierarchy of appeals before different fora, which can look into the grievances that are raised before the concerned forum for justice being administered to the aggrieved appellant.

14. In the present case, the machinery providing appeal is sought to be bye-passed by the petitioner on the ground that the Tribunal having already pronounced its decision in a similar matter, substantial justice cannot be expected from the first appellate authority as well as from the second appellate authority. This is the crux of Mr. Sridharan's

argument. It is now time to examine the contentions raised by him.

15. Mr. Sridharan is right that the impugned order was passed on the very day the hitherto before unknown lockdown was announced to ward off the pandemic. On account thereof, most of the courts in the country were rendered non-functional and the Supreme Court had to intervene to pass orders from time to time extending the period of limitation for institution of proceedings either under the Limitation Act, 1963 or other relevant statutes. In view thereof, the limitation of 60 (sixty) days to prefer an appeal under section 26(1) of the MVAT Act necessarily stood extended. In these circumstances, we do not propose to hold that the ratio of the decision in **A.V. Venkateswaran, Collector of Customs, Bombay** (supra) ought to be applied to turn the petitioner off at the threshold. We, thus, accept the argument of Mr. Sridharan and hold that the writ petition does not suffer from such delay and/or laches so as to warrant a dismissal on the ground of its institution after expiry of the period of limitation to approach the first appellate authority.

16. Mr. Sridharan sought to distinguish **Thansingh Nathmal** (supra) by contending that the Supreme Court was seized of a case, where the party aggrieved despite having an opportunity to seek a reference against the order of the Commissioner had approached the relevant high court directly to re-open the decision of the taxing authorities on questions of fact (emphasis supplied by Mr. Sridharan). According to him, the law laid down in paragraph 7 of the decision must be read bearing this feature in mind that disputed questions of fact were sought to be raised.

17. Mr. Sridharan is again right, but only partially. Notwithstanding that questions of fact emerged for decision in **Thansingh Nathmal** (supra), the Supreme Court had the occasion to lay down therein a principle of law which is salutary and not to be found in any other previous decision rendered by it. The principle, plainly is that, if a remedy is available to a party before the high court in another jurisdiction, the writ jurisdiction should not normally be exercised on a petition under Article 226, for, that would and allow the machinery set up by the concerned statute to be bye-passed. The relevant passage from the decision

reads as follows:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit, by entertaining a petition under [Article 226](#) of the Constitution, the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up."

(emphasis supplied)

18. Echo of the aforesaid view is found in a later decision of the Supreme Court reported in **(1983) SCC 2 433 [Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of Orissa and Ors.]**, arising out of the Orissa Sales Tax Act, 1947. Such enactment, quite similar to the MVAT Act, provided a hierarchy of authorities who could be approached for redress. Instead of pursuing the remedy thereunder, the writ jurisdiction of the Orissa High Court was invoked challenging orders of assessment. The law laid down therein is in the following terms:

"6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. ... "

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article

226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. ...”

19. Drawing guidance from the aforesaid dicta, rendered in connection with matters relating to tax and not any other subject, we are of the considered opinion that since the petitioner has the option of approaching this Court in a different jurisdiction at an appropriate stage, if at all the decision of the Tribunal is adverse to its interest, it would not be prudent in the judicious exercise of discretion to derail the procedure ignoring the law contained in the MVAT Act.

20. We have read the decisions in **M/s. Anand Swarup Mahesh Kumar** (supra), **M/s. Onkarlal Nandlal** (supra) and **Amara Raja Batteries Ltd.** (supra). The appellant in **M/s. Anand Swarup Mahesh Kumar** (supra) was granted leave to file the appeal directly against the order of the Assistant Commissioner (Judicial), since the question involved in that case had already been decided by the High Court of Allahabad. In **M/s. Onkarlal Nandlal**, the Supreme Court made it clear that ordinarily it does not entertain an appeal directly against an order made by an

officer in the hierarchy when there are other remedies under a statute; however, since the Rajasthan High Court had taken a view in respect of the dispute and it was argued that it would be futile to drive the assessee to the procedure of appeal and revision and then a writ petition, the Court had granted special leave and entertained the appeal. The decision in **Amara Raja Batteries Ltd.** (supra) arose out of the impugned judgment of the Andhra Pradesh High Court, which had entertained a writ petition notwithstanding that the petitioners had not availed the alternative remedy.

21. There can hardly be any dispute on the score that facts and circumstances of two cases are seldom alike. The Supreme Court in its decision reported in **(1976) 3 SCC 334 [Regional Manager Vs. Pawan Kumar Dubey]** has laid down the law that it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar, and that one different or additional fact can make a world of difference between conclusions in two cases even

when the same principles are applied in each case to similar facts.

22. We do not find any law having been declared in the aforesaid three decisions that whenever a situation of like nature arises, i.e., a dispute having been decided either by a high court or by a tribunal/appellate authority taking a particular view of the matter and such decision is binding on the lower authority in the hierarchy, in cases which are similar in nature, the writ jurisdiction of the high court or the jurisdiction of the Supreme Court under Article 136 of the Constitution could be invoked by the aggrieved party straightaway without exhausting the procedure of redressal of grievances provided by the statute and such jurisdiction must invariably be exercised. The courts have not laid down such a proposition of law for reasons, which need not fall for discussion here; suffice it to note, in all the cited decisions, the Supreme Court had exercised its discretion having regard to the demands of each particular case. After all, the remedy that Article 226 offers is discretionary too although there can be no gainsaying that the discretion has to be exercised on sound principles of law and not whimsically.

23. We are fully conscious of the law laid down in **East India Commercial Company Ltd.** (supra), upon which reliance is placed by Mr. Sridharan. Indeed, the law laid down by this Court has to be followed by any court subordinate to it or any authority exercising judicial or quasi-judicial functions amenable to the jurisdiction of this Court. It is true that the petitioner had referred to the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) in its response to the show cause notice and such decision was not referred to by the Deputy Commissioner in the impugned order. However, absence of any reference to the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) though might render the order dated 24th March, 2022 erroneous, but it has to be treated as an error committed by the Deputy Commissioner in the exercise of his jurisdiction and without having the effect of placing the order beyond jurisdiction. The distinction is fine but real. We, therefore, do not propose to entertain the challenge to the impugned order of the Deputy Commissioner accepting the argument of Mr. Sridharan that the said order being contrary to the law laid down by the coordinate Bench of this Court, the writ petition ought to be heard on merits.

24. However, what militates against the contentions raised by Mr. Sridharan and additionally dissuades us to entertain the writ petition is the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) itself. Without any doubt, the said decision is binding on all the authorities under the MVAT Act including the Tribunal. Once an appeal against the impugned order is heard on merits by the appellate authority ~ either the first or the second ~ and such authority is satisfied that the ratio of the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) does have application on facts and in the circumstances and clinches the issue that the subject transactions do not satisfy the relevant provisions of the statute in question and hence not liable to VAT, or for any other reason that might commend to such authority for acceptance, this could form the primary ground for setting aside the impugned order. Since the order of the Tribunal in the case of **M/s. Merk KGaA** (supra) is prior in point of time to the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) and if at all the latter decision has any application in the facts and circumstances of the case, it would always be open to the petitioner to persuade the Tribunal to reverse its view.

It goes without saying that the first appellate authority or the second appellate authority (the Tribunal), being bound by the dicta of this Court has to ignore the decision given by the Tribunal earlier in the case of **M/s. Merk KGaA** (supra) if a view has been expressed therein which is inconsistent with that expressed by this Court in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra). We are, thus, not *ad idem* with Mr. Sridharan that the appellate remedy available under the MVAT Act is not an effective remedy or that the petitioner may not be asked to complete a ritual before approaching this Court under section 27 of the MVAT Act.

25. We are left to consider the decision in **S. R. Sarkar** (supra), more particularly paragraph 5 thereof which has been referred to by Mr. Sridharan. The Court held that an attempt to levy tax without the authority of law would amount to infringement of the Fundamental Right guaranteed to a citizen by Article 19(1)(g) of the Constitution. The petitioner is not a citizen of India and hence, there can be no infringement of Article 19 rights. Rightly so, no pleading to that effect is discerned in the writ petition.

26. To sum up, we are loath to entertain this writ petition by exercising our discretion because (i) the petitioner can approach this Court in its appellate jurisdiction under section 27 of the MVAT Act at the appropriate time; and (ii) the petitioner is free to rely on the decision in **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra) before the appellate authority to have the impugned order reversed since such decision will prevail, if it is applicable, over any previous contra decision of the Tribunal.

27. However, in the peculiar facts and circumstances, viz. pendency of this writ petition on the file of this Court for quite some time and that a Constitutional issue touching Article 286 of the Constitution is sought to be raised, we are inclined not to relegate the petitioner to the first appellate remedy but to give it opportunity to prefer an appeal before the Tribunal directly, if it so chooses, so that any infirmity in the impugned order can be brought to its notice, including the decision of this Court in the case of **Mahyco Monsanto Biotech (India) Pvt. Ltd.** (supra), for its correction. It is ordered accordingly.

28. We make it clear that such appeal may not be entertained unless the requisite pre-deposit is made by the petitioner for preferring an appeal before the Tribunal. There is a statement in the writ petition that the requisite pre-deposit for approaching the first appellate authority has already been made. If indeed that is so, it would constitute half of the pre-deposit for filing an appeal before the Tribunal. The balance pre-deposit together with an acknowledgment of the amount of pre-deposit that has been made, may be filed along with any appeal that the petitioner may wish to prefer before the Tribunal. In the event the petitioner prefers an appeal before the Tribunal within six weeks from today, as prayed by Mr. Sridharan, limitation shall not be a bar for entertaining and trying such appeal on merits.

29. With these observations, the writ petition stands disposed of. No costs. All contentions are left open for being urged by the parties before the Tribunal.

(N. B. SURYAWANSHI, J.)

(CHIEF JUSTICE)