



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.[MD]No.2387 of 2020

and

W.M.P(MD).No.2043 of 2020

WEB COPY

Amjathkhan Sharmila Siraj

: Petitioner

Vs.

1. The Income Tax Officer,
Income Tax Department,
Office of the Income Tax Officer,
Non Corp. Ward 3 (3) MDU,
No.2, V.P.Rathinasamy Nadar Road,
CR Building, Bibikulam,
Madurai - 625 002.

2. The Union of India,
Rep. by the Secretary to the Government,
Ministry of Finance,
Income Tax Department,
New Delhi.

: Respondents

PRAYER: Writ Petitions filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the records relating to the impugned Assessment Order No.ITBA/ASTS/S/144/2019-20/1021992420(1) issued by the first respondent and quash the same.Consequential notice of demand dated 09.12.2019 in Notice No.ITBA/AST/S/156/2019-20/1021992539(1) .

For Petitioner : Mr.V.Veerapandian

For Respondents : Mr.N.Dilip Kumar,
Senior Standing Counsel for Income Tax
for R1

Ms.S.Ragaventhre,
Junior Standing Counsel for Central
Excise and Customs

O R D E R

In the captioned main writ petition an 'assessment order dated 09.12.2019 bearing reference No.ITBA / ASTS / S /144 / 2019-20 / 1021992420(1)' and a consequential 'demand notice which has also dated 09.12.2019 bearing reference No. ITBA / AST / S / 156 / 2019-20 / 1021992539(1)' have been assailed and the same shall be collectively referred to as 'impugned orders' for the sake of convenience and clarity.



2. Mr.V.Veerapandian, learned counsel for writ petitioner notwithstanding very many averments made in the writ affidavit and very many grounds raised in the writ affidavit, in the hearing, made one focussed submission qua his campaign against the impugned orders and that one point is the writ petitioner was served with a show cause notice dated 23.11.2019 fixing hearing date and time on 29.11.2019 at 10:30 AM qua assessment order 2017-18, writ petitioner went over to the Office of the first respondent but she was informed that the first respondent is on leave. Thereafter, the impugned orders came to be issued and therefore it would only be appropriate that one opportunity is given to the writ petitioner to explain her stand as the matter pertains to cash deposits made by the writ petitioner during demonetisation period.

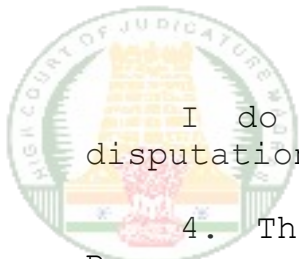
3. In response to the aforementioned focussed submission made by learned counsel for writ petitioner, Mr.N.Dilip Kumar, learned Revenue counsel advertng to the counter-affidavit submitted that the averment of the writ petitioner that she went over to the Office of the first respondent has been specifically denied. To be noted, the averment that the writ petitioner went over to the Office of the first respondent has been made in paragraph 6 of the writ petitioner's affidavit and the same has been refuted in paragraph 6 of the counter-affidavit of the Revenue.

A scanned reproduction of Paragraph 6 of the writ petitioner's affidavit is as follows:

6. It is submitted that the petitioner personally went to the office of the 1st respondent to submit her explanations but the assessing officer was on leave and hence she was informed that further communication will be sent to her fixing another date of hearing. The petitioner made her signature on the register maintained by the 1st respondent office.

A scanned reproduction of Paragraph 6 of first respondent's counter-affidavit is as follows:

6. I respectfully submit that the assessee further stated in the affidavit that the petitioner had received only the show cause notice dated 23.11.2019, for which she went personally to the office to submit her explanation but the assessing officer was on leave and hence she was informed that further communication will be sent to her fixing another date of hearing and she made signature on the register maintained by the office of assessing officer. In this regard it is submitted that the petitioner has not stated on which day and time the petitioner had visited the office of the assessing officer. It is pertinent to state that the then assessing officer was very much available on the date of hearing i.e. on 29.11.2019 and the then assessing officer was not on leave at all.



I do not propose to enter upon the aforementioned factual disputation in writ jurisdiction.

4. This takes us to the other submissions made by learned Revenue counsel. Learned Revenue counsel submits that the 23.11.2019 show cause notice is not the first and lone notice which the writ petitioner was served with. Adverting to typed set of papers filed along with the counter-affidavit, learned Revenue counsel submitted that a notice under Section 143(2) of 'the Income Tax Act, 1961' [hereinafter 'IT Act' for the sake of convenience and brevity] dated 10.08.2018 was issued followed by another notice under Section 143 (2) of IT Act dated 28.09.2018. Both these notices did not evoke any reply is learned Revenue counsel's say. Thereafter, a notice dated 14.01.2019 under Section 142(1) of IT Act was issued and it is only after all of these that aforementioned 23.11.2019 show cause notice was issued is learned Revenue counsel's emphatic say.

5. Learned counsel for writ petitioner, by way of reply arguments submitted that at the time of inception of captioned writ petition, an interim order was made on 07.02.2020 saying that there shall be an order of interim stay subject to payment of 25% of the amount demanded and this payment of 25% of the amount demanded has since been made. There is no disputation on this aspect of the matter.

6. In the light of the narrative thus far, the matter on hand, in my considered opinion now hinges on one argument of learned Revenue counsel and that argument is alternate remedy available to the writ petitioner by way of an appeal under Section 246A of IT Act. Learned Revenue counsel also points out that it is well open to the writ petitioner to avail the alternate remedy and also make a prayer before the appellate authority to not to treat the writ petitioner as 'Assessee-in-default' and under normal circumstances, such an interim prayer is acceded to on condition that 20% of the demand should be deposited. To be noted, in the case on hand 25% of the demand has already been paid.

7. Alternate remedy rule is no doubt not an absolute rule. It is a rule of discretion. It is not only a rule of discretion, it is a self-imposed restraint qua writ jurisdiction. However, Hon'ble Supreme Court in a long line of authorities 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] ; ***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], has repeatedly held that when it comes to fiscal law Statutes, alternate remedy rule has to be applied with utmost rigour. Relevant paragraph in ***Dunlop*** case law 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.'

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

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)

"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.

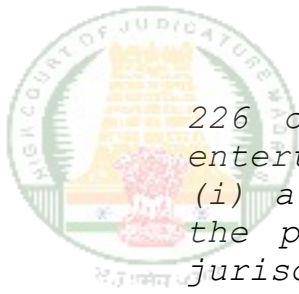
55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on 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 highlight and for ease of reference)

Paragraph 10 of **K.C.Mathew** case extracts **Satyawati Tandon** principle i.e., portions of case law from **Satyawati Tandon** and the same has been reproduced. Therefore, I deem it appropriate to not to burden this order with extracts from **Satyawati Tandon** case.

8. In this regard, this Court deems it appropriate to refer to a recent judgment which was rendered by a three Member Bench of the Hon'ble Supreme Court on 03.09.2021 i.e., **Commercial Steel Limited case [The Assistant Commissioner of State Tax and others Vs. M/s.Commercial Steel Limited in Civil Appeal No.5121 of 2021]** . Three Member Hon'ble Bench had culled out the exceptions to the alternate remedy rule and had clearly held that interference in writ jurisdiction will arise only in exceptional cases where the exception adumbrated therein are attracted. Relevant paragraphs in **Commercial Steel case** law are paragraph Nos.11, 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



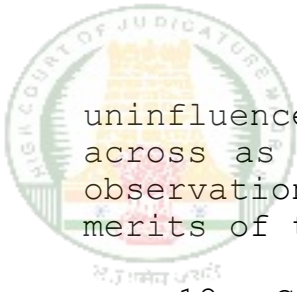
226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is: (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation.

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.'

9. To be noted, the exceptions qua alternate remedy rule are well settled vide **Whirlpool principle** [**Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others** reported in (1998) 8 SCC 1]. These exceptions are so well settled that it has come to stay as 'Whirlpool exceptions' in litigation parlance. In the case on hand, the writ petitioner's case does not fall in any one of the exceptions, i.e., there is no violation of NJP (Natural Justice Principles) owing to the series of notices prior to 29.11.2019 show cause notice the details of which have been captured supra.

10. A careful perusal of the narrative thus far will make it clear that the writ petitioner has been given adequate and ample opportunities but the writ petitioner has not availed the same. The argument that the notice dated 10.08.2018 itself makes it clear that it is a e-process also weighs in the mind of this Court. In the light of the alternate remedy being not only efficacious and effective but also a highly tenable option in the case on hand owing to 25% of demand having been already deposited by the writ petitioner, I deem it appropriate to relegate the writ petitioner to the alternate remedy of an appeal under Section 246A of IT Act.

11. In the light of the narrative, discussion and dispositive reasoning set out supra, I find no reason to interfere qua impugned orders i.e., impugned assessment order dated 09.12.2019 and impugned demand notice dated 09.12.2019, but it is made clear that if the writ petitioner chooses to approach the appellate authority under Section 246A of IT Act, it is well open to the appellate authority to consider the appeal on its own merits and in accordance with law



uninfluenced by any observation made in this order which may come across as an observation on merits or which may come across as an observation having the trappings of an expression of opinion on merits of the matter.

12. Captioned writ petition is disposed of on above terms. Consequently, captioned W.M.P is disposed of as closed. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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To

1. The Income Tax Officer,
Income Tax Department,
Office of the Income Tax Officer,
Non Corp. Ward 3 (3) MDU,
No.2, V.P.Rathinasamy Nadar Road,
CR Building, Bibikulam,
Madurai - 625 002.

2. The Secretary,
Union of India,
Ministry of Finance,
Income Tax Department,
New Delhi.

+1 CC to M/s.VASTLAW ASSOCIATES, Advocate (SR-276[F] dated 05/01/2022)

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-502[F] dated 05/01/2022)

W.P. [MD]No.2387 of 2020

04.01.2022

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