
(2011) 03 RAJ CK 0121
In the Rajasthan High Court
Case No : Civil Writ Petition No. 16296 of 2010

ABB Limited

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Central Service Tax Act — Section 13(4), 14, 17, 3, 6(2)
Constitution of India, 1950 — Article 226, 227, 366
Rajasthan Value Added Tax Act, 2003 — Section 20(3), 23(2), 24(5), 26(2), 36

Citation : (2011) 3 RLW 2629

Hon'ble Judges : Mahesh Bhagwati, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mahesh Bhagwati, J.—By way of the instant writ petition, the Petitioner has sought the following relief:

(i) Quash and set aside the impugned assessment order dated 30.9.2010 (Annexure-33) passed by the Respondent No.

3.

(ii) Quash and set aside the extension order of the Commissioner, Commercial Tax Department, Rajasthan dated 29.3.2010 (Annexure-34).

(iii) Restrain the Respondents not to recover any demand in pursuance of the impugned order dated 30.9.2010 and also to restrain further similar proceedings.

(iv) Any other appropriate writ, order or direction which may be considered just and proper in the facts and circumstances of the case may kindly also be issued in favour of the Petitioner.

2. Contextual facts of the case, in nub, depict that the Petitioner M/s. ABB LIMITED is a company registered under the Companies Act and engaged in the business of sale and supply of electronic and electrical goods used in all type of

industries including power generation and transmission. It is also undertaking contracts regarding the electrical and electronic installations. The Petitioner - company has invoked the writ jurisdiction of this Court as huge demand of Rs. 113,82,18,740/- has been created by Respondent No. 3 against the company without jurisdiction and by an order, which is ante dated and time barred. It is averred that the Petitioner received contracts from various companies for supply of goods in the course of inter-state trade and commerce. Pursuant to the said contracts, the Petitioner company made sales in the course of subsequent inter-state trade and commerce being covered u/s 3(b) and Section 6(2) of CST Act to the said companies disclosing sale in the VAT/CST returns filed under the provisions claiming exemption in accordance with the provisions of CST Act. He submitted all the required documents, declaration forms, WCT, TDS Certificate, input tax, verification certificate and the replies before the Assessing Officer, but despite there being all documents and law in his favour, the Respondent No. 3 sans considering them passed an arbitrary order disallowing the exemption claimed on the subsequent inter-state sale by converting it to a local sale transaction and led additional tax, interest and penalty vide impugned order dated 30th September, 2010. Being aggrieved by the said assessment order, the Petitioner has assailed the impugned order dated 30th September, 2010 passed by the Respondent No. 3 on the following grounds:

(i) That the impugned order dated 30th September, 2010 is without jurisdiction and time barred. It was stated before the Assessing Authority that proceedings were already pending before the regular Assessing Authority, hence in the same matter, the anti evasion and Respondent No. 3 had no jurisdiction to raise the demand.

(ii) Learned Counsel for the Petitioner took me through the provisions of Section 24(5) of the Rajasthan Value Added Tax Act and canvassed that no assessment order under this Section could be passed after the expiry of two years from the end of the relevant year, however, the Commissioner could for the reasons to be recorded in writing, extend in a particular case such time limit by a period not exceeding six months. A period of two years, in-fact, expired on 31st March, 2010 and the Commissioner extended the period by six months. Thus, the Assessment Order was required to be passed latest by 30th September, 2010, but the same was communicated to the Petitioner on 23rd November, 2010, which cannot be said to be an order in the eye of law. Learned Counsel further canvassed that the order was not an order unless it was served upon the person concerned. The order dated 30th September, 2010 for the assessment year 2007-08 passed by the Respondent No. 3 is ante dated as it was served upon him on 23rd November, 2010, hence it was intelligibly time barred and void ab-initio.

iii) For the assessment year 2006-2007 dated 29th September, 2009, the assessment order was passed by the Commercial Tax Officer, Circle-B, Jaipur, where subsequent inter-state sale transactions and other transactions were

considered and exemption was allowed in relation to the same contracts. Prior to that also the exemption was being granted on similar transactions and similar contracts by the concerned authorities, but this time the authorities have taken the conflicting view, which is contrary to the provisions of law. The Assessing Authority - Respondent No. 2 did not consider the individual transaction, but considered all the transactions in general and passed the impugned order. The Assessing Authority also failed to distinguish the present case from the earlier assessment years and no cogent reason was assigned to take the contrary view. Albeit, the Petitioner filed the reply before the Assessing Authority, but the same did not afford the Petitioner an opportunity of being heard and the impugned order was passed sans giving any opportunity of proper hearing. The impugned assessment order is fundamentally bad in the eye of law and erroneous.

3. Learned Counsel for the Petitioner in support of the afore-stated arguments has cited the following judgments rendered by Hon''ble Apex Court from time to time:

- i) Whirlpool Corporation v. Registrar of Trade Marks, Mumbai reported in (1998) 8 Supreme Court Cases I;
- ii) Mariamma Roy v. Indian Bank and Ors. reported in (2009) 16 Supreme Court Cases 187;
- iii) Godrej Sara Lee Limited v. Assistant Commissioner (AA) And Anr. reported in (2009) 14 Supreme Court Cases 338;
- iv) M/s. Paradip Port Trust v. Sales Tax Officer and Ors. reported in AIR 1999 Supreme Court 552;
- v) Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes and Ors. reported in Sales Tax Cases Volume XXVI 1970 page 354.

4. Presuming that the argument of availing the alternate efficacious remedy shall be raised by the learned Counsel for the Respondents, learned Counsel canvassed that under Article 226 of the Constitution, the High Court 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 the effective efficacious remedy is available, the High Court would not normally exercise its jurisdiction, but the Hon''ble Apex Court in umpteen cases has repeatedly held that if the principle of natural justice is found to have taken place or the order is wholly without jurisdiction or the vires of the Act are challenged or the fundamental right of the Petitioner is infringed, then the High Court should not dismiss the writ petition in limine and admit the petition for its adjudication.

5. A bird''s eye view of some of the decisions of Hon''ble Apex Court throwing light on this issue needs to be taken into consideration.

6. In the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai

reported in (1998) 8 Supreme Court Cases I, the Hon''ble Apex Court held thus:

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.

7. Similarly, in the case of Mariamma Roy v. Indian Bank and Ors. reported in (2009) 16 Supreme Court Cases 187, the Hon''ble Apex Court observed as under:

In our view, the High Court was not justified in passing the impugned order on the aforesaid ground. It is well settled that even if an alternative remedy was available to an aggrieved party against a particular order, but if it was open to such party to move a writ application and the court has the power to entertain the same if it finds that while passing the order there has been a violation of the principle of natural justice. That being the position, in the present case the Appellant was not served with any notice before passing the impugned order.

8. Further, relying upon the judgment of Whirlpool Corporation (supra), the Hon''ble Apex Court in the case of Godrej Sara Lee Limited v. Assistant Commissioner (AA) And Anr. reported in (2009) 14 Supreme Court Cases 338, observed as under:

13. Even otherwise, in our opinion, the question as to whether the said notification could have a retrospective effect or retroactive operation being a jurisdictional fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar.

9. Learned Counsel referred one more judgment rendered in the case of M/s. Paradip Port Trust v. Sales Tax Officer and Ors. reported in AIR 1999 Supreme Court 552, wherein the Full Bench of the Hon''ble Apex Court held thus:

2. By the impugned judgment, the High Court has dismissed the writ petitions filed by the Appellant on the view that the alternative remedy of an appeal against order of assessment, is available under the Sales Tax law and since the said remedy is available the writ petitions could not be entertained. Having regard to the question that was involved in the writ petitions related to interpretation of Sub-clause (d) of Clause 29 A of Article 366 of the Constitution and the taxability of the transactions in respect of which sales tax has been assessed by the Sales Tax Officer. We are of the view that the High Court should have entertained the writ petitions and should have considered the said question

instead of requiring the Appellant to avail the remedy of appeal under the Sales Tax Act.

10. Learned Counsel for the Petitioner cited one more judgment of Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes and Ors. reported in Salex Tax Cases Volume XXVI 1970 page 354 and contended that the facts of this case are akin to the facts of the case on hand and in this case also, the Division Bench of Patna High Court dismissed the writ petition in limine on the ground that efficacious alternative remedy was available to the Petitioner. The Hon'ble Apex Court set-aside the judgment of the Patna High Court and allowed the appeals. Learned Counsel canvassed that it is a unique type of case, wherein neither the opportunity of proper hearing was afforded to the Petitioner nor the relevant documents and reply furnished by them were taken care of nor the impugned order was passed within the period under limitation nor each transaction was taken into consideration and the impugned order was passed on mere generalities. Since the very material and substantial questions of law are involved in the case on hand, the writ petition deserves to be admitted and the operation of the impugned order dated 30th September 2010 as also 3rd March 2011 need to be stayed.

11. E Converse, the learned Counsel for the Respondents vehemently opposed the submissions put forth by the learned Counsel for the Petitioner and contended that initially the demand of Rs. 113,82,18,740/- was raised by the Assessing Authority, but on an application being filed for rectification of the assessment, the Assessing Authority having afforded an opportunity of being heard to the Petitioner, passed the order dated 3rd March, 2011 correcting the amount of additional tax, interest and penalty and reduced the demand by 34,15,34,195/-. Learned Counsel further canvassed that since the order dated 30th September, 2010 has merged in the order dated 3th March, 2011, hence nothing survives in the writ petition and the same deserves to be dismissed. Adverting to the argument of availability of alternate efficacious remedy, learned Counsel Mr. R.B. Mathur took me through the provisions of Section 82 and 83 of the Rajasthan Value Added Tax Act, 2003 and contended that against the order of the Assessing Officer, the right to file an appeal was available to the Petitioner and he could file an appeal before the Appellate Authority.

12. Section 82 of the Rajasthan Value Added Tax, 2003 reads thus:

Appeal to the appellate authority.- (1) Subject to the provisions of Section 86, an appeal against any order of an Assistant Commissioner, a Commercial Taxes Officer, an Assistant Commercial Taxes Officer or Junior Commercial Taxes Officer or In charge of a check-post or barrier shall lie to the appellate authority.

(2) The appeal shall be presented within sixty days of the date on which the order sought to be appealed against is communicated; but the appellate authority may admit an appeal even after the said period of sixty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal

within the said period.

(3)....

(4)....

(5)....

(6)....

(7)....

(8)....

13. Mr. Mathur further submitted that even if the Petitioner was aggrieved with the decision of the Appellate Authority, he had one more right to file an appeal to the Tax Board u/s 83 of Rajasthan Value Added Tax Act, 2003.

14. Section 83 of the Act reads thus:

83. Appeal to the Tax Board.-(1) An appeal shall lie to the Tax Board against -

(a) an order passed by the Commissioner under Sub-section (2) of Section 26, Section 36, Section 77 or Section 85;

(b) an order passed under the Act by the Deputy Commissioner (Administration);

(c) an order passed by an "appellate authority; and

(d) an order of the State Level Screening Committee or the District Level Screening Committee passed under the Incentive, Exemption or Deferment Schemes notified u/s 8 or under Sub-section (3) of Section 20 of the Act.

(2) Any person aggrieved by any order referred to in "xxx" Sub-section (1), may file an appeal before the Tax Board within ninety days of the date on which the order sought to be appealed against is communicated to him in writing.

(3)....

(4)....

(5)....

(6)....

(7)....

(8)....

(9)....

(10)....

15. Learned Counsel canvassed that in the event of availability of alternative or effective efficacious statutory remedy, the Petitioner is barred to invoke the extraordinary jurisdiction under Article 226 of the Constitution and the Hon"ble

Apex Court has repeatedly deprecated this practice in catena of judgments. He has placed reliance on the judgment of United Bank of India Vs. Satyawati Tondon and Others, . In the case of United Bank of India (supra), the Hon''ble Apex Court has held thus:

42. There is another reason why the impugned order should be set aside. If Respondent No. 1 had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expression `any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken u/s 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

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.

44.....

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

Emphasis supplied

16. The Hon''ble Apex Court in para 46 of the judgment has cautioned the High Court and observed thus:

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from

discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters.

Emphasis supplied

17. In the case of *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and Anr.* reported in (2010) 4 Supreme Court Cases 772, the Hon''ble Apex Court observed that when the right to appeal under a statute was available to the person, he was required to first avail that remedy only. Referring the schemes, as enumerated in the judgment, the Hon''ble Apex Court held that the right of appeal being always a creature of a statute, its nature, ambit and width had to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal had been conferred was clear, no statutory interpretation was warranted either to widen or restrict the same.

18. In para 31 of the said judgment, the Hon''ble Apex Court held thus:

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

19. Learned Counsel for the Respondents cited one more judgment of *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited and Ors.* reported in (1985) 2 Supreme Court Reports page 190, wherein the Hon''ble Apex Court held that Article 226 was not meant to short circuit or circumvent statutory procedures. It was only where statutory remedies were entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute was in question or where private or public wrongs were to inextricably mix up and the prevention of public injury and the vindication of public justice required it, that recourse may be had to Article 226. The Court must also have good and sufficient reason to by-pass the alternative remedy provided by statute. Matters involving the revenue where statutory remedies are available are not such matters. The vast majority of the petitions under Article 226 were filed solely for the purpose of obtaining interim orders and thereafter to prolong the proceedings by one device or the other. This practice needed to be strongly discouraged.

20. In the case of Teetaghur Paper Mills Company v. State of Orissa, the Hon''ble Apex Court held thus:

Under the scheme of the Act, there is hierarchy of authorities before which the Petitioners can get adequate redress against the wrongful act complained of. They have the right to prefer an appeal before the prescribed authority under Sub-section (1) of Section 23 of the Act. If they 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 on a question of law for the opinion of the High Court u/s 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.

Emphasis supplied

21. In plethora of judgments, the Hon''ble Apex Court has reiterated the well settled principle of law that ordinary relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. In the latest judgment pronounced by the Hon''ble Supreme Court Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, not only the settled principle was upheld but was further strengthened as the Hon''ble Apex Court dismissed the appeals with costs quantified at Rs. 20,000/-

22. Having reflected over the submissions made by the learned Counsels for the parties and carefully scanned and weighed the relevant material on record including the afore-stated judgments rendered by the Hon''ble Apex Court on the subject, it may safely be inferred that the Hon''ble Apex Court, by and large, has deprecated the practice of invoking extraordinary jurisdiction under Article 226 in the matters of recovery of taxes, cess, fees etc. as stay granted in such matters may impede the execution of projects of public importance and cast serious adverse impact on the financial health of State, which may ultimately prove detrimental to the economy of nation. Merely because of the fact that demand of huge amount has been raised by the Assessing Authority, the Petitioner cannot be permitted to invoke the extraordinary jurisdiction under Article 226 of the Constitution. Albeit, the learned Counsel for the Petitioner endeavored to make out his case in his favour and get it covered by the judgments of the Hon''ble Apex Court cited by him as afore-stated but the arguments put forth by him are not found to be tenable in the facts and circumstances of the instant case.

23. Placing reliance on the cases of United Bank of India v. Satyawati Tondon (supra); Raj Kumar Shivhare v. Assistant Director (supra); Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited (supra); Teetaghur Paper Mills Company v. State of Orissa (supra); and Kanhaiya Lal Sachdev and Ors. (supra), I am of the view that the alternate efficacious statutory remedy is very well available to the Petitioner and he can file an appeal

against the impugned order before the appellate forum and it is not a case, wherein the Petitioner may be allowed to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India and thus, the writ petition deserves to be dismissed.

24. For the reasons stated above, the writ petition being bereft of any merits stands dismissed accordingly.

S.B. Civil Misc. Stay Application No. 8701/2010 In S.B. Civil Writ Petition No. 16296/2010

25. Consequent upon the dismissal of writ petition, the stay application, filed therewith, does not survive and the same stands disposed of accordingly.

26. Heard learned Counsel for the parties on an application No. 12110 dated 9th March, 2011 and carefully perused the contents recorded therein.

27. Learned Counsel for the Respondents submits that pursuant to the order dated 23.2.2011 of this Court, the Assessing Authority has decided the application for rectification and correctly quantified the amount and demand has been reduced by Rs. 34,15,34,195/-, which occurred on account of certain errors, hence the rectified order dated 3rd March, 2011 may be taken on record. Learned Counsel further canvassed that after passing the said rectification order dated 3rd March, 2011, nothing has survived in the writ petition and the assessment order dated 30th September, 2010 has merged into the rectified order dated 3rd March, 2011, hence the writ petition deserves to be dismissed at the very stage of admission.

28. Having heard both the parties, the rectification of Assessment Order dated 3rd March, 2011 is ordered to be taken on record.

29. As per order dated 9th March, 2011, the matter is listed today for admission also. Hence, heard the learned Counsel for both the parties for admission.

30. In the result, the writ petition is dismissed. The operative part of the order reads as under:

For the reasons stated above, the writ petition being bereft of any merits stands dismissed accordingly.

(See separate order).