

(2010) 01 KL CK 0134

In the High Court Of Kerala

Case No : Writ Petition (C) No. 37168 of 2009 (M)

Aiswarya Associates

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227, 265
Finance Act, 1994 — Section 76, 78, 8(1), 85, 85(3)
Limitation Act, 1963 — Section 5

Citation : (2012) 49 VST 387

Hon'ble Judges : P.S. Gopinathan, J;P.R. Raman, J

Bench : Division Bench

Advocate : E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai, P. Benny Thomas, Anil D. Nair, P. Gopinath and Raja Kannan, for the Appellant; John Varghese and Tojan J. Vathikulam, Standing Counsel, Central Board of Excise, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Raman, J.

When W. P. (C) No. 35318 of 2008 was taken up for hearing, W. P. (C) No. 37168 of 2009, though not listed today, on agreement between the parties, was called up, since the question raised in both the writ petitions is one and the same. For the purpose of appreciation of question of law arising for consideration, it will be sufficient to refer to the facts relating to W. P. (C) No. 35318 of 2008.

2. The petitioner is a partnership firm, registered as a service provider. The petitioner submits that the petitioner has been providing clearing and forwarding agent's service to Abbot India Ltd., in terms of specific agreement between the parties. Exhibit P1 produced for identification. Exhibit P2 is another agreement. According to the petitioner, service tax is not payable on the reimbursed amount and the service tax on the entire commission was paid by the petitioner. The

authorities did not accept this contention and exhibit P3 show-cause notice was issued as to why the alleged difference in service tax should not be demanded from him. The petitioner submitted exhibit P4 reply. The adjudicating authority rejected the contention in exhibit P4 and confirmed the demand. The petitioner was also imposed a penalty u/s 78 of the Finance Act, 1994. Separate penalty u/s 76 of the Finance Act was also imposed. A copy of the order is produced as exhibit P5. The order was received at the office of the petitioner on April 24, 2008. Though the petitioner is entitled to prefer a statutory appeal against the said order before the third respondent within three months, as prescribed u/s 85 of the Finance Act, he did not invoke the appellate remedy within time. Obviously, for the reason that power to condone the delay by the appellate authority is limited for a period of three months which also expired on October 24, 2008. Since the petitioner could not file a statutory appeal, the petitioner has approached this Court by filing this writ petition.

3. According to the petitioner, the person in charge of the affairs and dealing with the tax matters had left the service without intimating the fact of receipt of exhibit P5. Only later when the petitioner was served with notice dated November 3, 2008, which was received on November 7, 2008, he came to know about exhibit P5 order.

4. When the matter came up before the learned single judge of this Court, the respondents relying on a Division Bench decision of this Court in Assistant Commissioner of Central Excise Vs. Krishna Poduval, contended that once the period of limitation has run out for filing the appeal and when the authority had no power to condone the delay beyond the maximum period prescribed thereunder, the remedy of the petitioner has come to an end and no cause survives thereafter to entertain the writ petition. But, according to the Learned Counsel for the petitioner, the principle laid down in the above decision may not be correct and power under article 226 of the Constitution of India still would be available, even if statutory remedy is not available. The learned single judge doubting the correctness of the decision reported in Assistant Commissioner of Central Excise Vs. Krishna Poduval, , adjourned the case to be considered by a Division Bench. Accordingly, we heard the matter.

5. W. P. (C) No. 37168 of 2009 was also filed in similar circumstances.

6. The Learned Counsel Sri Jayasankar appearing on behalf of the petitioner submits that an alternate remedy by way of an appeal is not a bar for entertaining a writ petition under article 226 of the Constitution of India. According to him, at least when situation warrants and there are exceptional circumstances, remedy by way of writ petition under article 226 of the Constitution of India is still available. The petitioner placed reliance on a decision of the Madras High Court in Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others, and two decisions of the Supreme Court in K. Venkatachalam Vs. A Swamickan and Another, and Deputy Commercial Tax Officer, Madras v. Rayalaseema Constructions (1966) 17 STC 505

(SC). Per contra, learned senior standing counsel Sri John Varghese would contend that it is now well-settled that though the alternate remedy by itself may not be a bar for invoking the power under article 226 of the Constitution of India it has been held by catena of decisions that by way of self-imposed restriction, this Court will not entertain any writ petition when such effective appellate remedy is available to the aggrieved party. He placed reliance on a decision of the apex court in *Surya Dev Rai Vs. Ram Chander Rai and Others*, . He also contended that when the statutory remedy available to the petitioner under law is barred by law of limitation, his remedy has come to an end just like in the case of a time-barred suit and he cannot resurrect his unenforceable cause of action. Reliance is also placed on two decisions of this Court in *Kerala Motor Transport W. F. Board v. Government of Kerala* (2001) 1 KLT 608 and *T. Krishnan v. State of Kerala* (2007) 1 ILR 233 (Ker).

7. Heard both sides.

8. In *Rayalseema Constructions case* (1959) 10 STC 345 (Mad) the Madras High Court held that the finality of an assessment under the terms of a statute is not always or necessarily conclusive of the legality of the assessment and an assessment made without jurisdiction, or in pursuance of a provision which is found to be ultra vires continues to be unlawful, and nothing less than a validating provision properly enacted would alter that fact. In relation to a tax, where an assessing officer acts outside the boundaries of his jurisdiction, his acts would to that extent be null and void. If any authority seeks to collect a tax so imposed, a citizen can call in aid article 265 and seek the assistance of this Court. In *Deputy Commercial Tax Officer, Madras case* (1966) 17 STC 505 (SC), the apex court held that although when there was an alternative remedy, the High Court would not normally entertain an application under article 226 of the Constitution of India but where the High Court had chosen to exercise its jurisdiction to grant relief to the petitioner the Supreme Court would not interfere with the jurisdiction exercised by the High Court. There is a clear finding in that case that the sales tax authorities had acted outside the Act in making an assessment under the relevant part of the charging section which was declared ultra vires by the Supreme Court. Though it was contended by the appellant therein that the High Court was in error in issuing a writ of mandamus when the proper remedy was to file a suit, answering the said contention it was held that no doubt true that when there was an alternate remedy, the High Court will not normally entertain an application under article 226 of the Constitution of India, but where the High Court has chosen to exercise its jurisdiction the apex court will not interfere with the jurisdiction by the High Court.

9. In *K. Venkatachalam's case* [1999] 4 SCC 526, the apex court held that the High Court's jurisdiction under article 226 of the Constitution of India, unless barred, is wide and covers all violations of the law or the Constitution when recourse cannot be had to other remedies provided by law. The apex court in *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and*

Another, , held that the income tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the income tax authorities, and a person who is aggrieved by an order of the Appellate Assistant Commissioner imposing a penalty, cannot be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under article 226 when he had adequate remedy open to him by way of an appeal to the Tribunal.

10. The apex court in *Surya Dev Rai Vs. Ram Chander Rai and Others*, , after scanning various decisions rendered by the apex court, summed up the principles as to when and at what circumstances the constitutional remedy under articles 226 and 227 of the Constitution of India could be invoked by a party. In paragraph 38 the apex court held that :

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder :

(1) Amendment by Act 46 of 1999 with effect from July 1, 2002 in section 115 of the CPC cannot and does not affect in any manner the jurisdiction of the High Court under articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction--by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction--by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has

occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

11. The apex court has enunciated the principles as above that a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. At the same time, the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation or evaluation

of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character. A party aggrieved has necessarily to choose that remedy available under the statute rather than abandon the same to invoke the extraordinary jurisdiction under article 226 of the Constitution. Though an alternate remedy may not be a bar for interference under article 226 of the Constitution, being a constitutional remedy, the High Court will sparingly exercise the jurisdiction by way of self-imposed restriction.

12. In the case on hand there is no dispute that the petitioner had the right to file an appeal against the order impugned in this writ petition. But, the period prescribed under the statute in filing the appeal has expired even beyond the period within which the authority could condone the delay. So, when his remedy of filing an appeal is thus barred, can he invoke the extraordinary jurisdiction under article 226 of the Constitution of India is a real question that arises for consideration ?

13. this Court in *Prasad v. State of Kerala* (1999) 2 KLT 531 considered similar circumstances arising under the Toddy Workers Welfare Fund Contribution Act. An order was passed by the Welfare Fund Inspector u/s 8(1) of the Act and it provides an appellate remedy to the Government within 60 days from the date of receipt of the order. The appeal was preferred after a long delay. The said appeal was rejected by the Government, which was challenged before this Court. It was held that when the special statute does not contain a provision making the provisions of section 5 of the Limitation Act applicable, the question of condonation of delay invoking that provision does not arise. The period prescribed under the statute has already expired. In the circumstances, when there was no power to condone the delay to entertain an appeal filed beyond the time prescribed under the Act, the delay cannot be condoned by invoking the provisions of the Limitation Act. The writ petition in such circumstances though the appellate remedy was barred and rejected without being entertained, was not entertained by this Court under article 226 of the Constitution of India. The Division Bench confirmed the decision of the learned single Judge and dismissed the appeal.

14. In *T. Krishnan v. State of Kerala* (2007) 1 ILR 233 (Ker), the same issue, arising under the Motor Transport Workers Welfare Fund Act, was considered by this Court. There also the power of the appellate authority to condone the delay was prescribed by the statute and further provided the maximum of which the period could be extended, when that period has also expired and the appellate remedy thus could not be invoked by a party by efflux of time. It was held that the provisions under article 226 of the Constitution of India cannot be invoked by such person to by-pass statutory remedy when the appeal is not preferred within time.

15. This view was reiterated in the decision in *Kerala Motor Transport W. W. F. Board v. Government of Kerala* (2001) 1 KLT 608. There the question arose for consideration was as to whether in the absence of any specific statutory

provision to condone the delay, can an appellate authority be compelled to entertain an appeal filed beyond the prescribed period and when a right of appeal is provided, has the appellate authority got an inherent power or implied power to condone the delay in filing an appeal and under the provisions of the Kerala Motor Transport Workers' Welfare Fund Act, 1985, can a time-barred appeal be directed to be entertained treating it as an appeal within time ? These were the questions sought for consideration as referred to in paragraph 1 of the judgment. After referring to the relevant provision of the statute, it was held that an appeal cannot be entertained beyond the prescribed period and there is no inherent right of appeal under the Act and the Government has no power, express or implied, to condone the delay and entertain an appeal.

16. Yet in another case, Assistant Commissioner of Central Excise Vs. Krishna Poduval, , where also a similar question arose for consideration under the Finance Act, 1994. That also relates to the payment of service tax, interest and penalty under the Finance Act, 1994. When notices were issued to the parties as to why service tax quantified thereunder along with interest and penalty should not be recovered and ultimately, show-cause notice culminated in demand of service tax. The same was challenged in an appeal filed before the Commissioner of Central Excise. That was dismissed, since the appeal itself was filed beyond the period prescribed under the Act and even the time within which to condone the delay had expired. Therefore, the appellate authority had no power to condone the delay in filing the appeal beyond the maximum period prescribed under the Act and that appeal was preferred beyond the maximum period within which it should condone the delay. Consequently, the appeal was rejected by the appellate authority without the same being entertained. Thus, the matter could not be considered on merits. Challenging the order the writ petitions were preferred before this Court. In paragraph 7 of the judgment it was held as follows (page 24 in 3 VST) :

...in so far as the respondents have not taken up the original orders imposing penalty in appeals before the appellate authority within the maximum period prescribed u/s 85(3) of the Finance Act, 1994 they cannot get the appeals revived and heard on the merits by resorting to the discretionary remedy before this Court under article 226 of the Constitution of India. Once the period of limitation has run itself out and the appellate authority does not have power to condone the delay in filing the appeals beyond the maximum period prescribed under the Act, the remedies of the appellants come to an end just like in the case of a time-barred suit and the respondents cannot, by invoking the discretionary remedy under the extraordinary jurisdiction of this Court under article 226 of the Constitution of India, resurrect their unenforceable cause of action and require this Court to consider their contentions against the original orders on merit. That would amount to defeating the very law of limitation which we are not expected to do under article 226. If we are to entertain the contentions of the respondents on the merits, that would amount to negating the law of limitation which we have no jurisdiction to do under article 226 and which

may even lead to anomalous results. We are not satisfied that the jurisdiction of this Court under article 226 of the Constitution of India is so wide as to resurrect a cause of action which has become unenforceable on account of the law of limitation. Further, we are of the firm opinion that the jurisdiction under article 226 of the Constitution of India cannot be invoked against express statutory provisions, however harsh the effect of the provisions may be on an assessee or litigant.

17. The above principle is supported by various decisions of the apex court. Reference was made to *Maheswari Fireworks Industries v. Commercial Tax Officer* (2001) 121 STC 272 (Mad) and *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, which eloquently makes the position clear that a person whose remedy provided under the statute has expired, there is no provision for invoking the extraordinary jurisdiction under article 226 of the Constitution of India as it would amount to resurrect a cause of action.

18. We may even say that even if writ petition was filed under article 226 of the Constitution of India at a time when an appellate remedy is not barred, this Court could certainly say it would not entertain a writ petition, if the reliefs sought for in the writ petition are available to be granted by invoking the statutory remedy provided under the statute. If that be so, the case of a person who failed to invoke statutory remedy cannot be better placed so as to invoke the extraordinary jurisdiction.

19. In paragraph 8 of the decision reported in *Assistant Commissioner of Central Excise Vs. Krishna Poduval*, , the Division Bench of this Court, after referring to the decision in *Maheswari Fireworks Industries Vs. Commercial Tax Officer and Others*, , held that the power to condone the delay of 30 days provided under the statute cannot be made applicable to the High Court while exercising jurisdiction under article 226 of the Constitution was not acceptable as it did not contain any reason. This Court also held that all the remedies of the respondents have come to an end when their appeals were dismissed by the Commissioner of Central Excise (Appeals) on the ground of limitation. Even the further appellate authority or this Court does not have the jurisdiction to entertain the claim on merits disregarding the limitation or condoning the delay.

20. In *Maheswari Fireworks Industries Vs. Commercial Tax Officer and Others*, , it was stated that the period prescribed under the statute and the limitation prescribed cannot be made applicable to the High Court under article 226 of the Constitution. True that there is no limitation prescribed for invoking the remedy under article 226 of the Constitution. So, however, if the writ petition is filed with undue delay, the High Court would not be inclined to exercise jurisdiction for that reason alone. It cannot be said that when the statutory remedy available under law is barred by the Law of Limitation prescribed under the statute, it is then open to the party to seek extraordinary remedy under article 226 of the Constitution. The question that arises for consideration would be whether the person who invoked extraordinary jurisdiction has or had a remedy by way of an

appeal provided under the statute. If such a remedy is available and the reliefs which he claim in the petition filed under article 226 of the Constitution are reliefs which can be granted by that statutory authority then necessarily failure on his part to invoke remedy available under the statute is no reason to entertain writ petition under article 226 of the Constitution. Suppose he invokes the remedy under article 226 of the Constitution, even at a time when statutory remedy is not barred, the point to be examined then would be as to whether there was exigencies pointed out by the apex court, namely, whether there is any statutory violation or whether the order impugned is against the principles of natural justice or there arises an infringement of constitutional right or whether the very provision is impugned as ultra vires of the provision of the Constitution, etc. So, if a writ petition is filed on any of the above grounds and found sustainable certainly alternate remedy by way of an appeal will not be a bar for entertaining a writ petition under article 226 of the Constitution. Admittedly, in the first two contingencies there is a violation of statute or there is infringement of the fundamental right, relief could be granted only under article 226 of the Constitution and not by the statutory authority. In the same case if writ petition is filed though the appellate remedy is barred by the law of limitation then it is inconsequential for the reason as stated above. But as we could see the observation of the Division Bench in the contextual situation arising for consideration was only whether the party whose right is barred because it was filed beyond the period prescribed under the statute and whether that right can be resurrected by invoking the jurisdiction under article 226 of the Constitution. The above decision when understood in the above context, we find the same is supported by the various pronouncements of the apex court and of this Court. The decision has to be read as a whole and in the context in which it arose for consideration.

21. In *Collector of Central Excise, Calcutta v. Alnoori Tobacco Products* (2004) 5 JT SC 593, it was held that courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision on which reliance is placed. Observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes.

22. When we read the entire judgment we have no doubt in our mind that the principles stated in the said decisions is in conformity with the earlier decisions of this Court as also that of the Supreme Court referred to therein. That a party whose remedy by way of an appeal under the statute is barred by the period prescribed thereunder is no reason by itself to invoke the extraordinary jurisdiction under article 226 of the Constitution of India. If the writ petition raises issues on which ordinarily relief could not be given by that statutory authority then the fact that a writ petition is filed beyond the period prescribed under the statute is not liable to be dismissed on that ground. In other words, he

will be similarly placed with the person who invoke the remedy under article 226 even where the period of limitation as prescribed under the statute is not over. So, the question is whether there exists such circumstances warranting interference in a writ petition, either because a statutory remedy is not effective or because there is a violation of the statute or principles of natural justice or when there is an infringement of the fundamental right. In such situation, it cannot be said that article 226 remedy is ousted. Coming to the facts of this case, we find the reliefs as sought for in the writ petition are reliefs which ordinarily could be granted by the appellate authority. Therefore, there is no extraordinary situation for invoking the power under article 226 of the Constitution of India, even if this writ petition is filed within the period of limitation. this Court would have declined to exercise jurisdiction under article 226 of the Constitution. If that be so, there is an added ground as to why it will not entertain the writ petition. When admittedly such remedy is available, but not availed. Resultantly, the writ petitions fail and are accordingly dismissed.