
(2006) 07 GAU CK 0059
In the Gauhati High Court

Akhil Kumar Nikhil Kumar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 31-07-2006

Acts Referred:

Central Sales Tax Act, 1956 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2006) 3 GLR 731 : (2006) 3 GLT 690 : (2007) 9 VST 79

Hon'ble Judges : B. Sudershan Reddy, C.J;B.P. Katakey, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—The writ appellants filed the writ petitions challenging the fresh assessment orders made u/s 18 of Assam General Sales Tax Act, 1993 ("the 1993 Act") read with Section 9(2) of the Central Sales Tax Act, 1956 ("the 1956 Act") by the Superintendent of Taxes, Assam, cancelling original assessment orders as well as the demand notes issued pursuant to such order of fresh assessment. The learned Single Judge upon hearing the learned Counsel for the parties by the common judgment and order dated 10.5.2006 dismissed the writ petitions refusing to exercise the writ jurisdiction under Article 226 of the Constitution of India on the ground of availability of alternative remedy by way of statutory appeal provided u/s 33(6) of the 1993 Act as well as under the provision of the 1956 Act, making it clear that the dismissal of the writ petitions shall not stand on the way of the writ petitioners/appellants to approach the appellate forum if so advised. The present appeals have been filed by the writ petitioners challenging the said common judgment and order passed by the learned Single Judge refusing to exercise the writ jurisdiction in view of existence of statutory alternative remedy by way of appeal under the provisions of the said Act.

2. The facts in brief necessary for the purpose of the present appeals is that the appellants/writ petitioners, who are registered dealers registered under the

provision of the 1993 Act as well as the 1956 Act and dealing with the purchase of Tea from Guwahati Tea Auction Centre and selling the same in course of inter-State trade and commerce to the registered dealers having their business outside the State of Assam submitted their returns for various assessment years under the 1993 Act. The Superintendent of Taxes after going through the books of account and documents submitted by the assesseees completed the assessment u/s 17(4) of the 1993 Act read with Section 9(2) of the 1956 Act by different order and determined the tax as Nil, on the ground that the sales were made outside the State to the registered dealers in course of inter-State sale. The Superintendent of Taxes thereafter on the basis of the information available to him that fake "C" Forms have been submitted by the appellants/writ petitioners issued show cause notices asking them to show cause as to why the C-Form mentioned in such show cause notices should not be treated as take/obsolete. The assesseees/ writ petitioners thereafter appeared before the Superintendent of Taxes and filed the show cause replies intimating the said authority that the "C" Form mentioned in the show cause notices were made to genuine parties giving full details of such sales to the authority at the time of assessment and such "C" Forms sent by the purchasers were accepted by the assesseees/writ petitioners on good faith as there is no mechanism to verify the genuineness of such "C" Form received by the petitioners. The petitioners/assesseees in the said reply to the show cause notices requested the assessing authority, namely, the Superintendent of Taxes to make available all the materials/evidences in his possession on the basis of which the show cause notices were issued, so as to enable them to meet the case that might be made against them on the basis of such materials/evidences. The assessing authority thereafter passed the order u/s 18 of the 1993 Act read with Section 9(2) of the 1956 Act making a fresh assessment of taxes by holding that the "C" Forms submitted by the assesseees/writ petitioners during the relevant periods were not genuine and the same were fake and fictitious. The assessing authority by the said orders recorded the reasons for not furnishing the information as well as the materials/evidences on the basis of which the show cause notices were issued, as those are purely of secret nature and there may be scope for manipulation. The said orders of fresh assessment were challenged by the present appellants in different writ petitions before the learned Single Judge.

3. We have heard Mr. D.K. Mishra, learned senior counsel appearing on behalf of the appellants as well as Mr. K.N. Chowdhury, learned Additional Advocate General appearing on behalf of the respondents.

4. Mr. Mishra, the learned senior counsel appearing on behalf of the appellants has submitted that there is no bar in exercising the jurisdiction by the writ court under Article 226 of the Constitution of India even if alternative remedy is available to the writ petitioners and it is only the self-imposed restriction. The learned senior counsel has submitted that writ court can exercise its jurisdiction even if alternative remedy by way of statutory appeal is available to the writ petitioners if the order impugned in the writ petition has been passed by an

authority without having any jurisdiction or for enforcement of a fundamental right or if there has been violation of the principle of natural justice or where virus of the Act is in question. According to the learned senior counsel the learned Single Judge ought not to have dismissed the writ petitions on the ground of availability of the alternative remedy by way of statutory appeal under the provision of the 1993 Act as the writ petitioners have challenged the orders of fresh assessment passed by the assessing authority on the ground of violation of the principle of natural justice, in as much as the petitioners/appellants were not supplied with the materials/evidences on the basis of which the assessing authority formed the opinion that the "C" Forms were fake/obsolete and on which basis the show cause notices were issued to them. Mr. Mishra, has further submitted that without furnishing such materials/evidences it is not possible on the part of the appellants/writ petitioners to submit the show cause effectively and completely and mere mention of the "C" Forms number in the show cause notices is not sufficient, as the petitioners have to accept the "C" Forms submitted by the purchaser as genuine having no alternative in that regard. It has further been submitted that the show cause notices which were required to be issued before passing the orders u/s 18(2) of the said Act is not an empty formality and the persons to whom such show cause notices were issued, have to be given ineffective opportunity of showing cause and such requirement shall not be fulfilled unless the materials/ evidences on the basis of which such show cause notices were issued are made available to the appellants/writ petitioners. Mr. Mishra, learned senior counsel, therefore, submits that the learned Single Judge ought not to have dismissed the writ petitions on the ground of availability of alternative remedy when the principle of natural justice has been violated by the assessing authority in passing the orders impugned in the writ petitions. The learned senior counsel therefore submits that the writ petitions may be directed to be heard on merit by setting aside the judgment passed by the learned Single Judge.

5. Mr. Mishra, learned sr. counsel in support of his contention that the writ court can exercise the jurisdiction under Article 226 of the Constitution of India even if there is an alternative remedy available, in case there is violation of principle of natural justice, has placed reliance on the decision of the Apex Court in State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr. reported in (2005) 6 SCC 499 as well as in L.K. Verma Vs. H.M.T. Ltd. and Another, In support of the contention that the authority is bound to supply the materials/evidences on the basis of which show cause notices were issued, before passing the fresh order of assessment under the provision of the 1993 Act and in the event of failure to do so the final order of fresh assessment shall be bad in law being in violation of the principle of natural justice, the learned sr. counsel has placed reliance on decisions of the Apex Court in C. Vasantlal and Co. Vs. Commissioner of Income Tax, Bombay City, as well as State of Assam and Another Vs. Mahendra Kumar Das and Others,

6. The learned Additional Advocate General on the other hand supporting the

judgment passed by the learned Single Judge dismissing the writ petitions on the ground of having alternative remedy by way of statutory appeal, has submitted that the writ court has the discretion not to entertain the writ petition in the event of availability of the alternative remedy by way of statutory appeal and such discretion has been exercised by the learned Single Judge in not entertaining the writ petition. According to the learned Additional Advocate General admittedly there is a provision of statutory appeal under the 1993 Act and it is always open to the appellants/writ petitioners to raise the question of violation of principle of natural justice while passing the order of fresh assessment before the appellate forum. It has further been contended that no doubt the writ court can exercise the writ jurisdiction in case of the violation of the principle of the natural justice even if there is an alternative remedy but the discretion lies with the court whether to exercise such jurisdiction or not and in the instant case according to the learned Additional Advocate General no error has been committed by the learned Single Judge in exercising its discretion not to entertain the writ petition. The learned Additional Advocate General has further contended that in fact in the present case the principle of natural justice was not violated as the appellants/writ petitioners were issued with the notice as required under the provision of the 1993 Act, before passing the order u/s 18(2) of the said Act making a fresh assessment. According to the learned Additional Advocate General it is not that the assessing authority is bound to disclose the materials/evidences to the noticees on the basis of which the prima-facie opinion was formed by the said authority and on which basis the show cause notices were issued as those materials/evidences were gathered by the assessing authority for the purpose of satisfying itself whether any show cause notice is required to be issued. The assessing authority having satisfied about the existence of the grounds for issuance of show cause notices, such notices were issued and the final order of fresh assessment was passed after the show cause replies were filed and therefore, according to the learned Additional Advocate General there is no violation of the principle of natural justice requiring this Court to entertain the writ petition. The Additional Advocate General in support of his contention that the liability is on the writ petitioners/ appellant to furnish the genuine "C" Form so as to pay tax at a lower rate has placed reliance on State of Madras Vs. R. Nand Lal and Co., The learned Additional Advocate General has also placed reliance on H. B. Gandhi v. Gopi Nath and Sons in support of the contention that where the hierarchy of appeals are provided by the statute itself such statutory remedy must be exhausted first before approaching the writ court to exercise the jurisdiction under Article 226 of the Constitution of India.

7. There is no doubt that there cannot be any bar on the High Court to exercise the jurisdiction under Article 226 of the Constitution of India. The High Court has definitely the jurisdiction to entertain a writ petition in appropriate cases even when the alternative remedy is available to the writ petitioners, though High Court normally do not exercise such jurisdiction when an alternative remedy is available. Such restriction in entertaining the writ petition is nothing but a self

imposed restriction/ fetter or self imposed limitation and it is essentially a rule of policy, convenience and discretion and never a rule of law. It is by now settled that the High Court can exercise the writ jurisdiction, even if there is an alternative remedy available to the person approaching the High Court, by way of appeal, in the event the authority who passed the order under challenge lacks inherent jurisdiction to pass such order or for the enforcement of the fundamental right or where the virus of the Act is in challenge or where there has been violation of the principle of natural justice.

8. The Apex Court in *State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.* (supra) has held that normally the High Court should not interfere with an order in exercise of the Jurisdiction under Article 226 of the Constitution of India if there is an adequate efficacious alternative remedy available, unless the person who approached the High Court without availing such alternative remedy made a strong case or that there exist good grounds to invoke the extra ordinary jurisdiction. It has further been held that where under a statute there is an allegation of infringement of fundamental rights, when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which though do not possess, the High Court may entertain the writ petition, even if there is an alternative remedy available. But normally the High Court should not entertain such writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the petitioner to force him to adopt remedies provided by the statute. However, once the writ petition is entertained despite availability of such alternative remedy and the High Court heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the writ petition on the ground of non-exhaustion of statutory remedies, unless the High Court finds that the factual disputes are involved and it would not be desirable to deal with them in the writ petition, held by the Apex Court.

9. Relying on the said decision in *Gujarat Ambuja Cement Ltd.* as well as various earlier decisions the Apex Court in *L.K. Verma* (supra) has also held that the rule of not entertaining the writ petition under Article 226 of the Constitution of India on the ground of availability of an alternative remedy cannot be said to be of universal application and the writ court may exercise its discretionary jurisdiction of judicial review in cases where the authority who passes the order lacks inherent jurisdiction or for enforcement of fundamental rights or if there has been a violation of principle of natural justice or where vires of the Act is in question. In *H.B. Gandhi* (supra) the Apex Court has held that when an hierarchy of appeals is envisaged by a taxing statute it is generally to be insisted that an assessee must go through the statutory proceeding before approaching the High Court under Article 226 of the Constitution of India.

10. Though the writ court can exercise its jurisdiction under Article 226 of the Constitution of India, even when an adequate efficacious alternative remedy is

available, on the ground of violation of the principle of natural justice, the writ court may entertain such writ petition on that ground only when the violation of the principle of natural justice writ large on the face of the order impugned in the writ petition. In a case where it requires the examination of the factual aspect even to find out whether the natural justice has been violated, it should left to be decided to such statutory or other authority before whom the appeal is provided under the statute, as such authority can go into the factual aspect of the matter, more so when the writ court in dealing with an application u/s 226 of the Constitution of India cannot decide a disputed question of fact.

11. In the instant case according to the learned senior counsel for the appellants/writ petitioners there is violation of the principle of natural justice in passing the order impugned in the writ petitions and therefore the writ court has the jurisdiction to entertain such writ petitions and the learned Single Judge has erred in law in not entertaining the same on the ground of availability of the statutory appeal before the statutory authority. According to the learned senior counsel the materials on the basis of which the Superintendent of taxes satisfied himself for issuance of the show cause notices asking the writ petitioners/appellants to show cause as to why the "C" Form should not be treated as fake/obsolete have not been supplied to them in spite of asking and, therefore, the final order of re-assessment made u/s 18 of the Act is violative of the principle of natural justice as in the absence of such materials no effective reply could be submitted by the appellants/writ petitioners. The question whether such materials on the basis of which the authority has recorded the satisfaction for issuance of the show cause notices are required to be supplied to assessees and in case of non-supply of such materials whether it will amounts to violation of the principle of natural justice, in our view, is left to be decided by the statutory authority, which point can also very well be raised by the appellants/writ petitioners before such statutory authority, as it requires factual adjudication before coming to any finding regarding the violation of the principle of natural justice. It is not the case of the appellants/writ petitioners that no show cause notice was ever issued before passing the reassessment orders impugned in the writ petitions. In our view the appellants/writ petitioners could not make out any exceptional case for the purpose of exercising the writ jurisdiction even though there is existence of the efficacious alternative remedy by way of statutory appeal before the statutory authority.

12. That apart the writ appeal being an intra court appeal, the writ appellate writ normally do not interfere with each and every order passed by the learned Single Judge in exercise of its discretion, and differs from the finding recorded by the learned Single Judge unless there exist cogent reason. The learned Single Judge by the impugned order refused to exercise the writ jurisdiction on the ground of availability equally efficacious alternative remedy by way of statutory appeal and exercise of such discretion cannot be interfered with in an intra court appeal, unless of course it is shown that such order is contrary to the provision of law or discretion has not been exercised by the learned Single Judge judiciously or

there exist cogent reason, which the appellants have failed to do. In the instant case as discussed above, the learned Single Judge has rightly refused to entertain the writ petitions on the ground of availability of an efficacious alternative remedy, which in pur considered opinion does not suffer from any illegality requiring interference in the hands of this Court.

13. The learned senior counsel for the appellants/writ petitioner has also placed reliance on the decision of the Apex Court in *C. Vasantlal and Co. (supra)* and *State of Assam and Anr. v. Mahendra Kumar Das and Ors. (supra)* in support of his contention that the appellants are entitled to get the materials on the basis of which the superintendent of taxes has issued the show cause notices. Since we have decided not to enter into that question in the present proceeding and left it open to be decided by the statutory authority in the appeal that may be filed by the appellants/writ petitioners, we are not expressing our view on that point. We have also not expressed any opinion regarding the contention of the learned Additional Advocate General that the as duty is cast on the assessee to furnish the genuine "C" Form so as to pay tax at a lower rate and therefore the burden is also on the assessee to prove that the "C" Forms are genuine, for which except for issuance of a show cause notice no further materials is required to be supplied to such assessee, and therefore we have not discussed the decision in *State of Madras v. R. Nandlal and Co. (supra)*, on which the learned Additional Advocate General has placed reliance.

14. In view of the aforesaid discussions, we are of the considered view that the order passed by the learned Single Judge does not suffer from any infirmity requiring interference of this Court.

15. The Writ Appeals are accordingly dismissed being devoid of merit. No costs.