

(2014) 10 KL CK 0022
In the High Court Of Kerala
Case No : W.A. No. 1951 of 2010

Bharath Sanchar Nigam Ltd.

APPELLANT

Vs

Assistant Commissioner

RESPONDENT

Date of Decision : 14-10-2014

Acts Referred:

Citation : (2014) 4 KHC 391

Hon'ble Judges : Mr. Antony Dominic and Mr. Dama Seshadri Naid, JJ.

Bench : Division Bench

Advocate : Sri. Premjit Nagendran, Standing Counsel, BSNL, for the Petitioner;
Sri. S. Sudheesh Kumar, Senior Government Pleader, for the Respondent Nos. 1 to 3

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J. - Having suffered an adverse Judgment on 04.10.2010 In W.P.(C)no.23286/2010, Bharat Sanchar Nigam Ltd., ("BSNL"), being the petitioner therein, filed the present Writ Appeal assailing the findings of the learned single judge that the appellant has an efficacious alternative remedy.

2. The facts in brief are that the appellant, a public sector undertaking, was a dealer registered under the provisions of the Kerala General Sales Tax Act, 1963, ("the Act" for brevity) on the rolls of the first respondent, namely Assistant Commissioner (Assessment), Commercial Taxes, Special Circle, Thiruvananthapuram. When the second respondent, the Deputy Commissioner, intended to assess the appellant to tax for the years 2003-04 and 2004-05 under Section 17D of the Act, complaining that it had not been preceded by a public hearing, the appellant approached this Court by filing W.P.(C)No. 9206/2010.

3. Through judgement dated 05.04.2010, this Court allowed the writ petition directing the second respondent to pass fresh orders within a stipulated time frame, by fully complying with the statutory requirements. In compliance with the directions of this Court, the second respondent duly notified through print

media that it would be holding a hearing on 28.05.2010. It also required the appellant to produce the books of accounts on that day. The representatives of the appellant appeared before the 2nd respondent and represented that, in the light of the decentralisation of the accounting procedure spreading along numerous branches across the length and breadth of Kerala, the records are too voluminous to be carried and that necessary explanation with reference to the audit report had already been submitted before the first respondent. Despite the said representation, the second respondent insisted on the authorities of the appellant that they produce the details of particular receipts shown under Schedules N and O to the balance sheet.

4. On the failure of the appellant to produce the desired records, the first respondent issued Exhibits P2 and P3 notices dated 07.06.2010 to complete the assessment for the said years to the best of his judgement. In response thereto, the appellant submitted Exhibit P4 petition dated 14.06.2010 to the Commissioner of Commercial Taxes, the third respondent. In Exhibit P4, the appellant has requested the third respondent to instruct the assessing authority not to fasten them with what is said to be an arbitrary and illegal demand.

5. The record further reveals that the officials of the appellant submitted Exhibits P5 and P6 representations dated 14.06.2010, requesting the first respondent to make arrangements to verify the accounts at the office of each Secondary Switching Area, after giving them sufficient notice and also allow them to file reply to Exhibits P2 and P3.

6. On the initiative of the first respondent, certain top officials of the appellant appeared before him and explained the whole transaction concerning the Interconnection Usage Charges, apart from producing a note of explanation in Exhibit P7. Eventually, based on the explanation submitted by the officials of the appellant and also the audited statements of account produced by it earlier, the first respondent assessed the appellant and served orders through Exhibits P8 and P9 dated 06.07.2010. For the assessment year 2003-04 tax assessed is ` 10,81,25,630/- and interest is ` 9,08,25,529/- and for the year 2004-05, tax assessed is ` 19,48,75,477/- and the interest is ` 12,27,71,551/-.

7. Aggrieved by the orders of assessment in Exhibits P8 and P9, the appellant filed W.P.(C)No.23286/2010; a learned Single Judge of this Court dismissed the said writ petition through judgement dated 04.10.2010. Under those circumstances, the appellant filed the present intra-court appeal.

8. In the above factual back drop, the learned Standing Counsel for the appellant has contended that major portion of the amounts additionally proposed to be assessed for tax under the Act are the revenue received by the appellant from other service providers as interconnection charges. According to the learned Standing Counsel, since the said amounts represent the charges realised from other service providers for allowing their calls to pass through the appellant's network, the very transaction falls outside the purview of the Act. In other

words, the income received does not come under the definition of the term "turnover", as defined under the Act.

9. Placing reliance on certain decisions of the Honourable Supreme Court and also of this Court, the learned Standing Counsel has contended that the assessing authority has no jurisdiction to subject the appellant to fresh assessment based on the amounts received by it on its extending the service of interconnection facility to other service providers.

10. Making strenuous efforts to surmount the hurdle of alternative remedy, the learned Standing Counsel has vehemently contended that since the assessment is without jurisdiction on the part of the assessing authority, it is essentially a matter of lack of jurisdiction and ipso facto, the very assessment proceedings are ultra vires the assessing authorities. Expatiating on his submissions, the learned Standing Counsel has submitted that it is too well known to be restated that when a proposed act of an authority is ultra vires, the principle of alternative remedy cannot come in the way of adjudication by this Court under Article 226 of Constitution of India.

11. Laying specific emphasis on the volume of records, the learned Standing Counsel has submitted that the basic records maintained by all the units of the appellant throughout the State run to lorry-loads and that it is not practicable to bring all those records to the office of the first respondent. Hitherto, the practise, according to the learned counsel, was to produce only the audited statement of accounts. Wherever the assessing authority requires any information regarding a particular transaction, that would be additionally furnished to the assessing authority.

12. The learned Standing Counsel has painstakingly explained the technical nature of Interconnection Charges and has contended that there is an element of neither goods nor sale, to make the same exigible to tax. The learned Standing Counsel has also strenuously contended that without affording the appellant further opportunity of being heard in the matter, the first respondent served the orders of assessment for the years 2003-2004 and 2004-2005.

13. The assessing authorities ought to have, contends the learned Standing Counsel, kept in mind that the appellant is a Public Sector Undertaking, having no intention of evading tax, provided it is liable to pay one. The learned Standing Counsel has also submitted that the given the exorbitant amount of tax sought to be imposed on the appellant, the assessing authorities ought to have been wary of the consequences involving a public sector undertaking, and a fortiori, ought not have completed the whole exercise ex parte, so to say.

14. The learned Standing Counsel has also submitted that the respondent authorities have selectively chosen only the appellant to impose tax on interconnection charges, leaving aside all other service providers, who are essentially private operators doing the same business. He has also stated that even in the case of the appellant, the respondent authorities have not assessed it

for any years other than two years in question, that is, 2003-04 and 2004-05.

15. Yet again, adverting to the issue of alternative remedy, the learned Standing Counsel has made strenuous efforts to convince this Court by submitting that an expeditious decision on the issue of exigibility of interconnection charges is warranted, since it will have a huge impact on the services being provided by the appellant to the general public at large. As such, instead of adjudicating on its own, this Court, contends the learned Standing Counsel, cannot throw out the case on a mere technicality.

16. The learned Standing Counsel, to his credit, has made several other submissions essentially on the merits of the matter, including the issue of tax situs, thereby questioning the territorial jurisdiction of the respondent authorities.

17. Per contra, the learned Government Pleader representing the respondents, having drawn our attention to Section 34 of the Act, has strenuously resisted the submission of the learned Standing Counsel that given the importance of the issue, this Court alone should decide the matter. According to him, Section 34 of the Act provides an elaborate mechanism to assail the orders of the assessing authority. In his submissions, it is not a mere alternative remedy, but certainly an efficacious one, too.

18. The learned Government Pleader for the respondent, taking us through the records, further submitted that the appellant, either in the pleadings or during making oral submissions before this Court, has not established any valid reason to ignore the alternative remedy of appeal and take recourse to judicial review, the scope of which, in the words of the learned Government Pleader, is severely restricted. He has also stated that just because the appellant is a Public Sector Undertaking, there could not be any different approach either in assessing it or in adjudicating the issue before any judicial forum.

19. Eventually, referring to the judgement impugned, the learned Government Pleader has submitted that no prejudice has been caused to the appellant, the remedy of which has been preserved by the learned single Judge, by leaving it open for the appellant to lay a proper challenge against Exhibits P8 and P9 before the Appellate Authority. It is also the contention of the learned Government Pleader that, acknowledging the fact that the appellant is a public sector undertaking, the learned Single Judge directed the respondents to keep in abeyance the recovery of tax in dispute till the appeal is disposed of, thereby ensuring that no public interest suffers.

20. Summing up his submissions, the learned Government Pleader for the respondent has submitted that in the light of the definitive finding of the learned Single Judge that the appellant has an efficacious alternative remedy, there is no need to go into the merits of the matter, more particularly when the judgement impugned does not suffer from any legal infirmity. Accordingly, he has urged this Court to dismiss the writ appeal.

21. It is axiomatic that when an objection is raised regarding the very maintainability of the proceedings, the said issue, as it goes to the root of the matter, shall be decided first. Any positive finding on the issue renders the whole exercise of adjudication on the merits of the matter an exercise in futility. It only serves, conversely, the avoidable purpose of clipping the adjudicatory wings of the lower forum, which ought, *ex debito justitiae*, to decide the *lis* untrammelled by any observations at higher judicial echelons. Further, the objection as to the maintainability is to be decided as a preliminary issue, even if it were a mixed question of law and fact, in summary proceedings of judicial review. It is, however, true that in a proceedings where trial is to take place, by recording the evidence, only pure questions of law can be decided as a preliminary issue, leaving the issues of mixed questions of fact and law to be decided in the end, but before considering the merits of the matter.

22. Under almost identical circumstances as we have presently, the Hon'ble Supreme Court in *Tin Plate Co. of India Ltd. v. State of Bihar* ((1998) 8 SCC 272 (at p.274)) has observed that when an alternative and efficacious remedy is open to a person, he should be required to pursue that remedy and not to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution. It is emphasised that where such a remedy is available, it would be a sound exercise of discretion to refuse entertainment of the writ petition under Article 226 of the Constitution. It is further observed that if the writ petition under Article 226 is to be dismissed on the ground of alternative remedy, the Court is not required to express any opinion on the merits of the case which is to be pursued before an alternative forum.

23. Though the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 are the statutes that govern the telecommunications and radio frequencies in India, it is the New Telecom Policy, 1999, which replaced the National Telecom Policy of 1994, that takes care of the nuances of the technical issues. In fact, the Telecom Regulatory Authority of India (TRAI), a statutory body under Telecom Regulatory Authority of India Act, 1997, regulates the network-to-network interconnection service between different service providers. Providing such a service is a pre-condition in the Unified Access Service license granted by the Department of Telecommunications.

24. It is the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 1999 that regulates the arrangements among service providers for interconnection charges and revenue sharing for all Telecommunication Services throughout the territory of India, as well as those originating in India and terminating outside India.

25. Given the complexity of interconnection services and the *modus operandi* involved therein, an issue such as providing interconnection charges under statutory compulsion involves any sale of goods or services cannot, in our considered opinion, be decided in a summary manner, especially in a judicial review under Article 226 of Constitution of India. Accordingly, we refrain from

making any reference to the case law cited at the Bar by the learned Standing Counsel for the appellant, inasmuch as, for the reasons stated *infra*, any reference to merits is obviated.

26. Indeed, the learned Standing Counsel has contended that subjecting the interconnection charges to tax is patently erroneous and that the exercise of the respondents in taxing the appellant is without jurisdiction. At this juncture, it is apt to observe that an erroneous exercise of power is entirely different from lacking the necessary power. It is only the lack of power that gives rise to jurisdictional error, thereby rendering every act of an authority achieved through the exercise of the said non-existing power *ultra vires*. In other words, there is a clear and definable distinction between error of jurisdiction and error within jurisdiction. It is only the error of jurisdiction or inherent lack of power that entails a person or an entity to seek judicial redressal by invoking the public law remedy, for instance, under Article 226 of Constitution of India.

27. Admittedly, the appellant has been a dealer registered under the Act, 1963; it is equally indisputable that the respondents are the competent authorities under the Act. The only issue that requires to be adjudicated upon is whether it is correct for the assessing authorities to subject a particular source of income to tax within the statutory framework of the Kerala General Sales Tax Act, 1963. Thus, the question boils down to whether it is a proper or improper exercise of taxing power on the part of the respondents. It bears reiteration, if not repetition, that it is the inherent lack of power, as is not the case presently, that could give rise to the necessary cause of action for the appellant to knock at the doors of this Court, notwithstanding the availability of an alternative remedy.

28. The learned Standing Counsel has also submitted that the appellant was not provided with sufficient opportunity before passing the assessment orders. Without quibbling over semantic niceties, it can be stated that there is difference between denial of opportunity and lack of sufficient opportunity.

29. A perusal of the impugned judgement reveals that the learned Single Judge has ruled on two aspects. In the first place, it is observed that there is an efficacious alternative remedy and accordingly, necessary directions were also given in that regard. Secondly, the learned single Judge has also observed that the appellant has been provided with sufficient opportunity, including that of personal hearing, before passing the Exhibits P8 and P9 assessment orders.

30. It is settled law that refusal to entertain a petition under the writ jurisdiction by the High Court when an efficacious alternative remedy is available to the party is a self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 of the Constitution despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same, unless he has

made out an exceptional case warranting such interference or there exists sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution (See CIT v. Chhabil Dass Agarwal ((2014) 1 SCC 603, at p.608)).

31. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (1983) 2 SCC 433, p.440), the Hon'ble Supreme Court has observed that where a right or liability is created by a statute which gives special remedy for enforcing it, one must avail oneself of only the remedy provided by that statute. In this regard, the Court has quoted with approval the opinion of Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* (141 ER 46), which is as follows:

"? There are three classes of cases in which a liability may be established founded upon a statute. ? But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ? The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

32. In fact, through a catena of judgements, it has been held that the rule of alternative remedy is a self imposed restriction on a judicial review under Article 226 of Constitution of India. It is, however, equally well established that (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged, an alternative remedy does not operate as a bar.

33. Regrettably, we do not see any of the above contingencies in the present case to dispense with the rule of alternative remedy, more particularly under Section 34 of the Act. It is a statutory appellate body that has been created for a specific purpose. Thus, the remedy available to the appellant is not only alternative, but also efficacious. As such, we could not persuade ourselves to accept the contention of the learned Standing Counsel that the alternative remedy is not a bar. Neither the urgency of adjudication, nor the gravity of the issue, leave alone the status of the appellant being a public sector undertaking, can be judicially acknowledged as an exception to the rule of alternative remedy.

34. We shall now address the other aspect of the matter. As has already been adverted to, there shall be no discussion on the merits of the matter if the issue is to be decided primarily on the question of maintainability. At the same time, it has to be stated that if an issue, seemingly one concerning the merits of a matter, is inextricably linked to the question of maintainability, it is inevitable that to that extent the issue has to be adjudicated upon. To be more specific, if we examine the present case, the writ petition is essentially refused to be entertained on the ground that there is an efficacious alternative remedy. Usually, the bar of alternative remedy would not be available in the face of infraction of the principle of *audi alteram partem*. Accordingly, it was indeed

necessary for the learned Single Judge to address the issue of the lack of opportunity of being heard as had been raised by the appellant herein. Thus, the observations of the learned Single Judge on the issue of opportunity of being heard do not call for any interference.

In the facts and circumstances, without disturbing the direction of the learned single Judge to the appellant to avail itself of the alternative of remedy of appeal and the protective measure of deferment of collection of tax provided thereby, we dismiss the writ appeal as devoid of any merit. It is, however, made clear that the deferment of collection of tax shall be on the precondition of the appellant's filing the appeal within two weeks from the date of receipt of a copy of the judgement. No order as to costs.