**(2011) 01 KAR CK 0209**

**In the Karnataka High Court**

**Case No :** Writ Petition No''s. 35223-234 and 35950 of 2010 etc.

Bharti Airtel Ltd. APPELLANT

Vs

State of Karnataka and Others RESPONDENT

**Date of Decision :** 07-01-2011

**Acts Referred:**

Constitution of India, 1950 — Article 14, 32
Karnataka Sales Tax Act, 1957 — Section 12 A, 20
Karnataka Value Added Tax Act, 2003 — Section 39 (1), 62

**Citation :** (2011) ILR (Kar) 1240 : (2011) 2 KCCR 866

**Hon'ble Judges :** Ashok B. Hinchigeri, J

**Bench :** Single Bench

**Advocate :** N. Venkataraman for Harish and Co, for the Appellant; K.G. Raghavan for K.J. Kamath, Special Government Advocate for Respondents-1 and 3 and N.R. Bhakar, Sr. Central Government Standing Counsel for Respondent-2, for the Respondent

**Final Decision :** Dismissed

## Judgement

Ashok B. Hinchigeri, J.—The Petitioners have raised the challenge to the reassessment orders passed by the Deputy Commissioner of Commercial Taxes u/s 39(1) of the Karnataka Value Added Tax Act (for short ''VAT Act'') and/or 12A of the Karnataka Sales Tax Act, 1957 (for short ''KST Act'') holding that the Artificially Created Light Energy (for short ''ACLE'') is taxable at the rate of 12.5%.

2. Sri K.G. Raghavan, the learned Senior Counsel appearing for Sri K.J. Kamath, the Special Government Advocate appearing for the Respondents has raised the threshold bar to the maintainability of these writ petitions. He submits that these petitions are to be rejected relegating the Petitioners to the statutory appeal remedy provided by Section 62 of the VAT Act and/or by Section 20 of the KST Act.

3. Sri N. Venkataraman, the learned Senior Counsel appearing for M/s. Harish

and Company for the Petitioners (M/s. Bharati Airtel Limited) in W.P. Nos. 35223-34/2010 and other connected petitions has strenuously argued how and why these petitions are required to be considered and disposed of on merits notwithstanding the availability of the alternative remedy. He submits that the ACLE is not goods. As it has no attributes of goods, the question of buying it and selling it would not arise at all. According to him, equating ACLE with electricity is tantamount to overlooking the subtle between ACLE and electricity. He submits that there cannot be any sale of property in goods, of whose existence the buyer is unaware. He submits that as the impugned reassessment orders are without the authority of law and without jurisdiction, the writ petitions are entertainable. He submits that the levy of tax on transactions falling outside the competence of the State Legislature is without jurisdiction. He would contend that the imposition of the sales tax is in sharp contrast to the considered view taken by the Apex Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . He read out para 34 of the said judgment, which is extracted hereinbelow:

34. The second objection was that the writ petitions under Article 32 were not maintainable. The writ petitions raised questions relating to the competence of the States to levy sales tax on telecommunication service. This is not an issue which could have been raised and decided by the assessing authorities. If the State Legislatures are incompetent to levy the tax, it would not only be an arbitrary exercise of power by the State authorities in 870 Karnataka Civil & Criminal Reporter 2011(2) violation of Article 14, it would also constitute an unreasonable restriction upon the right of the service providers to carry on trade under Article 19(1)(g). (See Bengal Immunity Company v. State of Bihar; Himmatlal Harilal Mehta v. State of M.P.) We are consequently unable to accept either of these contentions of the Respondents.

4. Nextly, he sought to draw support from the Hon''ble Supreme Court''s judgment in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, . The relevant paragraph of the said judgment is extracted hereinbelow:

26. Mr Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

5. The learned Senior Counsel brought to my notice, the Hon''ble Supreme Court''s judgment in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, to advance the contention that the alternative

 

remedy would not operate as a bar in atleast 3 contingencies--

i) where the writ petition seeks the enforcement of any of the fundamental rights,

ii) where there is violation of the principles of natural justice,

iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

He read out paras 18 and 19 of the said judgment. The said paragraphs are extracted hereinbelow:

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani and was affirmed and followed in the following words:

The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the Petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Courts should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus preeminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.

19. Another Constitution Bench decision in Calcutta Discount Co. Ltd. v. ITO, Companies Distt. I laid down:

Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority from acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate order or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction u/s 34, Income Tax Act.

6. Sri Venkataraman has also relied on the Apex Court''s judgment in the case of Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, to buttress his submission that if the authorities wrongfully confer upon themselves the jurisdiction, the matter can be examined by the High Court in the proceedings under Article 226 of the Constitution of India. It is impermissible for the quasi judicial authority like the Income Tax Officer to erroneously decide the jurisdictional matter and thereafter proceed to impose a levy on the citizen. He submits that when the jurisdiction of

 

the State Government itself is in dispute, it is necessary that these petitions be considered on merits.

7. Sri Venkataraman submits that these petitions do not involve the resolution of the disputed facts. What is involved is a pure and simple question of law. In this regard, he relied on the Hon''ble Supreme Court''s judgment in the case of Bachan Singh and Others Vs. State of Punjab and Others, , wherein it is held that if the important questions of law based on undisputed facts are raised, the same could properly be determined by the High Court in exercise of its special jurisdiction under Article 226 of the Constitution of India.

8. The learned Senior Counsel submits that the Petitioner cannot be relegated to the appeal remedy and thereby made to languish for years and years. Where the statutory remedy is not efficacious, the petition under Article 226 of the Constitution of India may have to be allowed, so contends Sri Venkataraman. In this regard, he cites the decision of the Apex Court in the case of State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr. reported in (2005) 6 SCC 499.

9. Just because the Petitioner Bharati Airtel was relegated to the appeal remedy for the previous assessment years, it does not mean that for the subsequent assessment years also, it should be asked to file the appeals because the evidence and the fact finding thereon are already available on the record of the Appellate Authority. That there is nothing like constructive res judicata in tax matters is the emphatic submission of Sri Venkataraman. In this regard, he relied on paras 11 to 13 of the Hon''ble Supreme Court''s judgment in the case of BSNL (supra). The same are extracted hereinbelow:

11. In Amalgamated Coalfields Ltd. v. Janapada Sabha tax was claimed in respect of coal by the Respondents therein. Notices of demand were sent to the Appellant. The validity of these notices was challenged by the Appellant by filing a writ petition before this Court. The writ petition was dismissed and it was held that the notices served on the Appellant were valid. Notices of demand were again served on the Appellant in respect of a subsequent period. The Appellant filed another writ petition this time before the High Court, challenging the validity of these notices. The High Court held that the Appellant''s claims were barred by res judicata by reason of the earlier decision of this Court. Challenging the decision of the High Court the Appellants approached this Court under Article 136. In Amalgamated Coalfields Ltd. v. Janapada Sabha [referred to hereafter as Amalgamated Coalfields No. (2)] the issue was whether the doctrine of res judicata applied to writ petitions filed under Article 226 or to petitions under Article 32. The Court noted that the judicial view was that even petitions filed under Article 32 were subject to the general principle of res judicata. The Court then considered whether the principle would apply to tax cases when the earlier decision was in respect of a different period and said: (Amalgamated Coalfields No. 2), SCR p. 184)

In a sense, the liability to pay tax from year to year is a separate and distinct liability; it is based on a different cause of action from year to year, and if any points of fact or law are considered in determining the liability for a given year, they can generally be deemed to have been considered and decided in a collateral and incidental way.

12, After considering various earlier authorities on the issue, it was held that: (SCR p. 188)

If, for instance, the validity of a taxing statute is impeached by an Assessee who is called upon to pay a tax for a particular year and the matter is taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the Assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case. In this connection, it would be relevant to add that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, under Article 141, have a binding effect not only on the parties to it, but also on all Courts in India as a precedent in which the law is declared by this Court. The question about the applicability of res judicata to such a decision would thus be a matter of merely academic significance.

13. After refraining from expressing any final opinion on the applicability of res judicata to assessment orders for successive years, the Court was quite unequivocal in expressing an opinion on the applicability of the principles of constructive res judicata: (SCR p. 189)

In our opinion, constructive res judicata which is a special and artificial form of res judicata enacted by Section 11 of the CPC should not generally be applied to writ petition filed under Article 32 or Article 226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years.

10. Sri Venkataraman complains of transgression/ encroachment on the exclusive domain of the Union Legislature, which has held the telecom service as taxable service under the Finance Act, 1994. He submits that the Petitioners want to know as to which authority, the tax is to be paid -Central Government or State Government. He submits that the Respondents have virtually massacred and murdered the sales tax law.

11. Relying on the Division Bench judgment of the Patna High Court in the case of Pest Control India Ltd. v. Union of India and Ors. reported in (1989) 075 STC 0188, he would contend that there can be no transfer of property in goods unless the goods themselves exist. Para 3 of the said judgment relied upon by the leaned Senior Counsel is reproduced hereinbelow:

3. According to the Petitioner, it is a company engaged in the business of rendering services such as anti-termite treatment, rodent control, general pest

 

control, household disinfection, etc. For this purpose, the Petitioner-company has been engaged by M/s. Tata Iron & Steel Co. Ltd. for treating the existing building including wooden and other furniture with pest control and anti-termite treatment. The activity or the Petitioner-company is only in the nature of service and no sale of goods is involved in any form whatsoever. According to it, the entire transaction is for rendering service only and, in fact, no goods are transferred in any form whatsoever. The treatment or service rendered by the Petitioner is mainly curative or prophylactic/preventive in nature and there is no supply of goods to the client. The chemicals used by the Petitioner are in the form of treatment against pests and are consumed in the process of rendering services. The chemicals used are not identifiable in any way as goods and hence there is no transfer of property in goods by the Petitioner in the course of pest control services for their clients. The application of chemicals to protect property against attack by pests does not in any way add to the value of the property nor does it add any ornamental or additional quality to the buildings, godowns or any place which is treated with chemicals. In other words, it is a pure contract for rendering services and no question of transfer of property in goods in any form is involved. Since the Petitioner is not selling or supplying any material, commodities or articles, its job is purely to render a service in the form of treatment against pests which cannot even be classified as a works contract.

12. The learned Senior Counsel would contend that the law laid down by the Apex Court is binding on all the Courts. For urging these submissions, he relied on the Hon''ble Supreme Court''s judgment in the case of East India Commercial Co. Ltd.,Calcutta and Another Vs. The Collector of Customs, Calcutta, As the Supreme Court has held in the case of BSNL (supra) that similar transaction does not amount to the sale of goods, the reassessment orders are unsupportable and unsustainable.

13. He submits, with reference to the judgment in BSNL case, that the electromagnetic waves are merely the medium of communication. They are not delivered, stored or possessed. Hence, they are not marketable. If they are not deliverable goods in existence, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a tollgate. The electromagnetic waves are not capable of being brought and sold. Therefore there cannot be any contract of the sale and purchase of the electromagnetic waves. Neither they are deliverable nor their price is determinable. It is trite position in law that a data transfer is only a telecommunication service.

14. Sri Mohan Parasaran, the learned Additional Solicitor General of India appearing for Sri P.S. Dinesh Kumar for the Petitioners (M/s. BSNL in W.P. No. 21836/2010 and other connected petitions) submits that the alternative remedy of filing the statutory appeal is not efficacious; but it is onerous and burdensome because of the prescribed precondition of deposing 50% of the demanded

 

amounts.

15. Sri Parasaran submits that if the statutory remedy is not adequate or is onerous or tardier, there is no impediment for an aggrieved party in filing the writ petition. In support of his submissions, he has relied on the following authorities:

i) Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others,

ii) Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another,

iii) M.G. Abrol Vs. Shantilal Chhotalal and Co.,

iv) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,

16. Sri Mohan Parasarn submits that as the impugned orders are wholly without jurisdiction, there is full justification for the recourse of filing the writ petition in the instant cases. What is challenged is the competence of the State Legislature to levy sales tax on the telecommunication service.

17. Sri Mohan Parasaran comes down heavily on the conduct of the Deputy Commissioner of Commercial Taxes for passing the impugned orders in total disregard of the Hon''ble Supreme Court''s judgment in the case of BSNL (supra). He read out the relevant paragraphs of the BSNL case (supra) to buttress his submission that the electromagnetic waves do not constitute the goods. Therefore no element of sale is discernible in the transactions in question. The Petitioner is a mere facilitator for the transmission of voice/data. Nothing is transferred and nothing is delivered. Therefore the Deputy Commissioner of Commercial Tax has committed a fundamental error apparent on the face of the record by choosing to impose the sales tax on the radio frequencies or the electromagnetic waves.

18. He relied on para 112 of the said judgment, which is extracted hereinbelow:

112. The licence clearly manifests that it is one for providing telecommunication service and not for supply of any goods or transfer of right to use any goods. It expressly prohibits transfer or assignment. The integrity of the licence cannot be broken into pieces nor can the telecommunication service rendered by them be so mutilated. Not only does this position flow from the terms of contract, this also flows from Section 4 of the Telegraph Act which provides for grant of licence on such conditions and in consideration of such payments as it thinks fit, to any person "to establish, maintain or work a telegraph. The integrity of establishing, maintaining and working is not to be mutilated.

19. The learned Additional Solicitor General refers to the Deputy Commissioner''s opinion, which is to the effect that the Hon''ble Supreme Court judgment is coming in the way of the Department levying tax on the transaction involving electromagnetic waves. He submits that the facts of Writ Petition No. 21836/2010 (BSNL) are different from the facts of W.P. No. 35223-34/2010

 

(Bharti Airtel). In BSNL case, bias is alleged. Despite admitting that the Hon''ble Supreme Court''s judgment in the BSNL''s earlier case is coming in the way of imposing the sales tax on the transactions in question and despite the Government''s filing the review petition and the Hon''ble Supreme Court dismissing the review petition both on the ground of delay and on merits, the Deputy Commissioner has passed the orders. The learned Senior Counsel attributes institutional bias to the Deputy Commissioner who has acted in the two capacities of a Nodal Officer for filing the review petition and as a reassessment officer for passing the impugned orders. Once the Deputy Commissioner has formed the view that the transaction in question is taxable even before his passing of the impugned order, he ought not to have been entrusted with the reassessment work in respect of the Petitioner BSNL.

20. Complaining of the legal bias, Sri Dinesh Kumar, the learned Counsel for the Petitioners submits that the passing of the impugned reassessment orders may not be an act done by ill feeling or spite but it is an act done willfully and wrongfully without the reasonable or probable cause. In this regard, he cites the decision of the Apex Court in the case of Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others, . The relevant paragraph is extracted hereinbelow:

25. The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide ADM, Jabalpur v. Shivakant Shukla, S.R. Venkataraman v. Union of India, State of A.P. v. Goverdhanlal Pitti; BPL Ltd. v. S. P. Gururaja and W. B. SEB v. Dilip Kumar Ray).

21. The learned Senior Counsel Sri Mohan Parasaran submits that there is yet another aspect of the matter, which makes it impossible for the Deputy Commissioner to exonerate himself from the bias. He has been attending the meetings of the Committee on Sub-ordinate Legislation before whom he has been agitating the power of the Government to levy the sales tax on the transactions in question. The issue is pre-decided, when the Deputy Commissioner took part in the meetings and the deliberations of the Committee on Sub-ordinate Legislation.

22. Nextly, the learned Senior Counsel brings to my notice the judgment dated 03.09.2010 passed by the Division Bench in W.A. No. 3282/2010 and other connected appeals. The said appeals came to be filed aggrieved by the

 

imposition of the condition of depositing Rs. 550 Crores at the time of granting an interim order of stay. He also brings to my notice the observation made by the Division Bench that the learned Single Judge shall hear the case on merits. Based on these observations of the Division Bench, the Senior Counsel submits that these petitions be considered and disposed of on merits.

23. Sri Mohan Parasaran submits that what the reassessment authority (Deputy Commissioner) has done is tantamount to a complaint being entrusted with the task of holding the enquiry. This is impermissible, so contends Sri Parasaran. He read out head note D of the Hon''ble Supreme Court''s decision in the case of Naren Chandra Naskar Vs. Arun Bhattacharya and Others, It is extracted hereinbelow:

D. Administrative Law - Natural justice - Bias/Nemo debet esse judex in propria sua causa - Applicability - Enquiry into facts entrusted to public officer who had filed FIR--High Court entrusting District Registrar, who had lodged an FIR against Appellant under Sections 471/420 IPC and formed an opinion that a prima facie case had been made out, to enquire about the genuineness of Appellant''s deed along with the deed of Respondent 1 (which was missing) as both the deeds had the same registration details - On facts, held, the District Registrar concerned, who was the complainant and found a prima facie case, should not have been entrusted by the High Court with the enquiry - Therefore, the enquiry was entrusted to Inspector General of Registration - Registration Act, 1908. Sections 69 and 83.

24. The learned Senior Counsel submits that on the similar set of facts when the Hon''ble Supreme Court has not approved of imposing the sales tax on electromagnetic waves, the passing of the impugned reassessment orders shocks the judicial conscience of the Court. The reassessment orders are passed in total defiance of the Hon''ble Supreme Court''s order in the earlier BSNL case (supra). He relies on the Apex Court''s judgment in the case of Union of India and Anr. v. Vicco Laboratories reported in (2007) 13 SCC 270, wherein it is held that if a case stands concluded by the decision of the Hon''ble Supreme Court, the issue cannot be reopened; otherwise it would be an abuse of the process of law. The learned Counsel would submit that the impugned reassessment orders are virtually in the nature of re-opening the case concluded by the Hon''ble Supreme Court in the earlier case of BSNL (supra).

25. He submits that the optical fibre cables and optical fibres are one and the same. As the facts are not at all in dispute, these petitions involve the resolution of pure questions of law. Coming down on the conduct of the reassessing authority, Sri Parasaran would contend that the Deputy Commissioner has virtually violated Article 144 of the Constitution of India.

26. The learned Senior Counsel emphatically submits that change of opinion cannot be a ground for seeking the review of the Apex Court''s order or for taking a different view in defiance of what the Apex Court has held. He alleges

 

the colourable exercise of power. He submits that the schematic interpretation has to be given to ''grounds to believe'' and ''has reason to believe'' as found in Section 39(1) of the VAT Act and 12-A of the 1957 Act respectively. Otherwise the Assessing Officer would reopen the assessment on the basis of mere change of opinion which cannot be per se the reason to reopen. In support of these submissions, he relies on the Apex Court''s judgment in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, .

27. Sri Parasaran cites the decision of the Hon''ble Supreme Court in the case of Paradip Port Trust Vs. Sales Tax Officer and Others, , wherein it felt that if a question relates to the interpretation of Sub-clause (d) of Clause (29-A) of Article 366 of the Constitution of India and the taxability of the transaction, the High Court ought to have entertained the writ petition.

28. The learned Senior Counsel brings to my notice the Hon''ble Supreme Court''s decision in the case of Arun Kumar and Ors. v. Union of India and Ors. reported in (2007) 1 SCC 732, wherein it is held that no authority can confer upon itself the jurisdiction which it otherwise does not possess and if an authority wrongly assumes the existence of such jurisdictional fact, the order can be questioned by filing a writ of certiorari. The learned Senior Counsel submits, drawing support from the Apex Court''s judgment in the case of Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, that an Assessee cannot be driven to file an appeal to get rid of an obviously illegal order.

29. When the impugned reassessment orders are passed at the instance of the Legislative Sub-Committee, no purpose would be served by filing an appeal to the next higher authority of the Deputy Commissioner i.e. the Joint Commissioner of Commercial Taxes. For advancing this contention Sri Parasaran has relied on the second part of para 9 of the Hon''ble Supreme Court''s judgment in the case of Ram and Shyam Company Vs. State of Haryana and Others, The relevant paragraph is extracted hereinbelow:

9. ...An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. Look at the fact situation in this case. Power was exercised formally by the authority set up under the Rules to grant contract but effectively and for all practical purposes by the Chief Minister of State. To whom do you appeal in a State administration against the decision of the Chief Minister? The cliche of appeal from Caesar to Caesar''s wife can only be bettered by appeal from one''s own order to oneself. Therefore this is a case in which the High Court was not at all justified in throwing out the petition on the untenable ground that the Appellant had an effective alternative remedy. The High Court did not pose to itself the question, who would grant relief when the impugned order is passed at the instance of the Chief Minister of the State. To whom did the High Court want the appeal to be filed over the decision of the Chief Minister? There was no answer and that by itself without anything more would be sufficient to set aside the judgment of the High Court.

 

30. As held by the Hon''ble Supreme Court in the case of Dhampur Sugar Mills Ltd. Vs. State of U.P. and Others, , the statutory remedy, jilt is not an alternative or an equally efficacious remedy, there would not be an}'' bar to the maintainability of the writ petition, so contends Sri Parasaran. The relevant paragraph of the said judgment is extracted hereinbelow:

10. The High Court, after hearing the parties, held that preliminary objection raised by the Respondents was not well founded. Considering the totality of facts and circumstances and the decisions taken by the Respondents, the High Court held that approaching the appellate authority would be a ''futile attempt''. The High Court, considering various decisions of this Court on the point, held that it would not be justified in dismissing the petition on the ground of alternative remedy and the said objection was not well founded.

31. Sri N.R. Bhaskar, the learned Senior Standing Counsel for the Central Government submits that the elements of sale, if any, are to be discerned in a transaction. It is more a matter of perception. He submits that the application of sales tax and service tax is not mutually exclusive. The same transaction can have both sales and service element embedded to it subject to the State Government qualifying the tests laid down by the Hon''ble Supreme Court. In this regard, a precious sentence from para-88 of the earlier BSNL case (supra) read by Sri Bhaskar is as follows:

88. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction.

32. Sri Bhaskar brings to my notice the Apex Court''s judgment in the case of Association of Leasing and Financial Service Companies v. Union of India and Ors. reported in 2010 TIOL 87 SC, wherein it is held:

...Today with the technological advancement there is a very thin line which divides a ''sale" from "service".

33. Based on the above referred judgments, Sri Bhaskar would submit that each transaction need to be examined in the light of the principles laid down by the Hon''ble Supreme Court. It is the nature of transaction that will determine the taxability in each case. He brings to my notice that there is no challenge in these petitions either to the legislative competence of the Union Legislature or the validity of any Union Legislation providing for the levy of service tax.

34. Sri K.G. Raghavan, the learned Senior Counsel appearing for Sri K.J. Kamath, the Special Government Advocate for the Respondents submits that in the case of United Bank of India Vs. Satyawati Tondon and Others, the Apex Court has held that there can be no reason as to why the High Court should entertain a writ petition, when a particular legislation contains a detailed mechanism for the redressal of an aggrieved party''s grievance. This applies with greater vigour in matters involving public money.

 

35. He submits the ACLE is the data carrier. It has all the attributes of goods, namely, abstraction, possession, delivery and use. According, to him, it is practically impossible to split the data transfer collected into two components of goods and service.

36. Sri Raghavan refers to the technical opinion given by Dr. Reji Philip of Raman Research Institute, Bangalore to the Petitioner to the effect and ACLE/Light Carrier is capable of being transferred. Based on the said opinion, Sri Raghavan would contend that the data carrier energy has all the attributes of goods within the meaning of Article 366(12) of the Constitution of India and this energy is taxable at 12.5% u/s 4(1)(b) of the VAT Act.

37. On the application of the earlier BSNL case (supra) for the cases on hand, it is his emphatic submission that the verdict in the earlier BSNL case (supra) was rendered in connection with mobile telephones involving radio frequency waves. He submits that the judgment in the said case was rendered in the absence of the arguments on properties of the electromagnetic waves. In this regard, he read out para 65 of the judgment in the said case, which reads as follows:

65. We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are capable of delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the Counsel for the Respondents), does not fulfil the parameters applied by the Supreme Court in Tata Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d).

38. Sri Raghavan submits that the Hon''ble Supreme Court has held in the earlier BSNL case that we have to go by the dominant intention in a composite contract to determine whether it is one for sale of goods or rendition of service. The relevant paragraphs of the said judgment read out by him are as follows:

44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first the third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in Sub-clauses (b) and (f) of Clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A)(d) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Author/ties tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

 

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract fall into one category or the other is to as what is "the substance of the contract''. We will, for the want of a better phrase, call this the dominant nature test.

39. The learned Senior Counsel contends that merely because the same transaction is treated as service for the purpose of service tax, it cannot in any way hinder the power of the State to levy the VAT on telecom contracts for data transfer when they fulfill the concomitants of a sale. The tax levied are in harmony with the legislative power conferred on the State by the Constitution. Levying of the tax in question is based on the well established scientific rules supported by the technical opinion taken by both the parties from the technical bodies/persons.

40. Sri Raghavan brings to my notice, the learned Single Judge''s order in the case of Bharti Airtel Ltd. (Formerly Bharti Tele Ventures Ltd.) Vs. State of Karnataka and Others, dismissing the writ petition on the ground of availability of the statutory remedy of appeal. This order was challenged by Bharti Airtel Limited before the Division Bench in W.A. No. 629/2007. The Division Bench set aside the Single Judge''s order but by upholding the reassessing authority''s order imposing the sales tax Bharti Airtel Ltd. (Formerly Bharti Tele Ventures Ltd.) Vs. State of Karnataka and Others, j. The said order of the Division Bench was taken to the Hon''ble Supreme Court by Bharti Airtel Limited. The Hon''ble Supreme Court set aside the Division Bench''s order, restored the learned Single Judge''s order by directing the Assessee (Bharti Airtel) to file the statutory appeals (2010) 32 VST 432 (SC).

41. Nextly, Sri Raghavan brought to my notice, the learned Single Judge''s order in the case of SAP India Private Limited Vs. State of Karnataka and Others, The paragraphs read out by him are extracted hereinbelow:

11. While it may be true that all these writ petitions may involve even complicated questions of law for a satisfactory resolve of all such questions of law factual matrix of the cases will have to be examined whether by this Court or by the authorities. Particularly, the law on this aspect being in a formative stage and in respect of new activities, as a result of advancement and developments in Science and Technology and their applications in the commercial field, for

 

resolving questions of law arising in such context and even questions arising in the context of taxation statute, it will be very to avail the appeal remedies and necessary all aspects of their development in the field of Science & Technology, the commercial application, the nature of the activities and as to under what area they can be classified in the background of either the Sales Tax Enactment of the State Legislature or if there is a overlapping area in the context of the provisions of the Finance Act, 1994 seeking to levy tax on service, are all matters which are to be essentially examined by the authorities in the first instance, that such matters are required to be go through the hierarchy of the various authorities provided under the respective enactment and can reach this Court in a manner provided under the respective enactment.

12. An exam/nation of such question even at the threshold by this Court by-passing the statutory authorities, in my view will not be a satisfactory examination of the questions involved and it may result in an inadequate examination. An examination on assuming certain facts even before it is fully settled or finalised could also lead to the possibility of law being not developed in a satisfactory manner.

13. When the statutory provisions provide for appellate authority and ultimately an avenue is provided by the statute itself to bring the questions to this Court also, when the question of law is still required to be resolved, in a proper manner by this Court, it is not at all desirable to examine these questions under the writ jurisdiction of Articles 226 & 227 of the Constitution of India. It is for this reason, I am not inclined to examine these matters in writ jurisdiction, but would relegate the Petitioners to avail the statutory remedies and pursue their relief before the statutory authorities.

16. This again is a question, which is mixed up with facts and law and insofar as the law under the Karnataka Value Added Tax Act is concerned, it is essentially a matter to be examined by the authorities has to be resolved.

42. Sri Raghavan submits that the Petitioners apprehension that the Appellate Authority would act in a prejudicial manner is absolutely fanciful. To allay the misgivings of the Petitioners, Sri Raghavan submits, on instructions, that one Sri S.M. Bhandekar, the Joint Commissioner of Commercial Taxes is the Appellate Authority and that he was in no way associated with the Committee on Sub-ordinate Legislation or with the filing of the review petition. He further submits that to lend the comfort level to the Petitioners the assigning of the appeal, if the Petitioners file the appeal, would be to an Officer who has not associated himself with the resolution of a issue involving the taxability of ACLE. He makes this submission without prejudice to his submission that the Deputy Commissioner has passed the objective and correct order. He poses a question, if the legislature or the top executive has expressed some opinion, then no Officer of the Department can be assigned with the reassessment work. He submits that the vice of bias is raised only to cross over the first hurdle.

 

43. Sri Raghavan submits that if an Assessee is asked to file the statutory appeal for some years and to file the writ petitions for some years on the same issue, it creates an anomalous situation. In the matter of the levy of the tax on the transaction involving the ACLE, the Apex Court has relegated the Assessee to the statutory remedy. The reassessment orders are not without jurisdiction.

44. He denies that these petitions involve only pure and simple questions of law; on the other hand, they involve pure question of facts. Whether the electromagnetic waves are goods, whether the data transfer has the attributes of sale, etc. are pure questions of facts. These questions are to be answered depending upon the situation of each transaction, so contends Sri Raghavan. He would therefore contend that there are no special or extraordinary circumstances warranting the entertaining of the writ petition in the first instance bypassing the alternative remedies.

45. Sri Raghavan submits that the customers are charged on the basis of the transfer of the carrier energy, which is directly related to the quantity of data, which is digitally measurable. As the ACLE has all the stipulated attributes of goods like abstraction, possession and transfer, use and delivery as held by the Hon''ble Supreme Court in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, and earlier BSNL case (supra), he would submit that if the electricity can be regarded as goods, ACLE also has to be regarded as the goods because electrical energy is a flow of electrons while ACLE is a flow of protons. If the flow of electrons can be held as goods, there is no reason as to why the flow of protons cannot be held as goods. Even when there is no physical transfer of goods, as traditionally understood, the moment the data of the particular customer is embedded to ACLE, there is appropriation, which constitutes symbolic delivery. He brings to my notice, the Apex Court''s judgment in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, , wherein it is held that electrical energy can be transmitted, transferred, delivered, stored and possessed in the same way as any other property and hence, it is goods. He relied on the Hon''ble Supreme Court''s decision in the case of Tata Consultancy Services (supra), wherein it is held that the sale of goods may involve tangible, intangible or incorporeal property.

46. Sri Raghavan submits with reference to the provisions contained in Section 23(1) of the Sale of Goods Act, 1930 that the appropriation of goods to the contract can take place in any way as desired by the buyer or the seller. Delivery can be actual or symbolic. In the instant case, the subscriber is not going to the OF Cs in the network for taking the delivery of the data carrier energy. He reads out the decisions in the case of Maradugula Venkataratnam and Ors. v. Kotala Ramanna and Ors. reported in 21 The Madras Law Journal Reports, 413, wherein it is held that a law does not require any particular mode or form of appropriation. He submits that the consumption-cum-transfer of ACLE is digitally measurable. There is transfer of property in goods, i.e. the light energy for a

 

consideration in the course of business pursuant to the contracts entered into between the Petitioners and their customers. The data transfers carried out by the Petitioners satisfy all the tests of o sale. The transactions are purely of commercial nature done with a profit motive. The transfer of property in goods is invariably taking place in the data carrying transactions.

47. He submits that the reply filed by the Petitioners to the proposition notice is adequately considered. If the Petitioners think that their reply is not considered properly or that an illegal order is passed by the reassessing authority, the Petitioners'' remedy is only to file the statutory appeals. He submits that the Petitioners'' contention that the issue is covered by the Hon''ble Supreme Court''s verdict in the BSNL''s case (supra) is incorrect, because the verdict in the said case is in the context of mobile telephone connections; it has nothing to do with OFC connectivity.

48. Relying on the Hon''ble Supreme Court''s judgment in the case of Gullapalli Nageswara Rao etc. Vs. The State of Andhra Pradesh and Others, Sri Raghavan submits that the principles governing the doctrine of bias vis-a-vis judicial tribunals are well settled. They are: a) no man should be a judge in his own cause; b) justice should not only be done, but it should also appear to have been done.

49. Sri Raghavan contends that if the preference is unaccompanied by considerations of personal interest, it would not vitiate an act. In support of his submission, he relied on the Apex Court''s judgment in the case of G.N. Nayak Vs. Goa University and Others, The relevant paragraphs of the said judgment are extracted hereinbelow:

33. Bias may he generally defined as partiality or preference, it is true that any person or authority required to act in a judicial or quasi judicial matter must act impartially. ''If however, ''bias'' and partiality'' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices.

34. It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self interest whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principle of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the Courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

36. As we have noted, every'' preference does not vitiate an action. If it is

 

rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. For example, if a senior officer expresses appreciation of the work of a junior in the Confidential Report, it would not amount to bias nor would it preclude that senior officer from being part of the Departmental Promotion Committee to consider such junior officer along with others for promotion.

50. Sri Raghavan submits that the Petitioners cannot skip the appeal and revision layers and directly come to this Court under Article 226 of the Constitution with the expression of the apprehension that they are not likely to get justice at the hands of the Appellate Authority. They have approached this Court with an absolutely baseless apprehension. He read out para ''8'' of the Supreme Court''s judgment in the case of State of Punjab v. V.K. Khanna and Ors. reported in AIR 2001 SC 343, which reads as follows:

8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefore would not arise.

51. Sri K.J. Kamath, the learned Special Government Advocate appearing for the Respondent submits that the impugned reassessment orders are by and large on the same lines on which the reassessment orders were passed on 31.7.2006 and 12.1.2007 for different assessment years. The reassessment orders, dated 31.7.2006 and 12.1.2007 came to be passed long before the Deputy Commissioner participated in the proceedings of the Committee on Sub-ordinate Legislation.

52. Sri Kamath further submits that the 33rd report, dated 27.3.12007 of the Committee on Sub-ordinate Legislation involved the using of the ACLE whereas, the 35th report, dated 25.7.2007 of the said Committee involved the use of the radio frequency waves. He further submits that the filing of the review petition was recommended in respect of the tax on transactions involving radio frequency waves.

53. In the course of his rejoinder submissions, Sri P.S. Dinesh Kumar, the learned Counsel for the Petitioners (BSNL) submits that the review petition was filed taking the specific ground that ACLE in OFC network attracts the levy of VAT.

54. On hearing the marathon arguments raised by the learned advocates, I formulate the following questions for my determination.

i) Whether these petitions are to be considered on merits notwithstanding the availability of the statutory remedy of filing the appeal?

 

ii) Do the impugned orders suffer from the vice of bias? is the approach of the appellate authority likely to be biased in favour of the revenue?

55. The basis of the demand for considering these petitions on merits is that nothing is in the grey area. That the transaction in question does not attract the levy of the sales tax or VAT is squarely covered by the judgment of the Hon''ble Supreme Court in the case of BSNL (supra).

56. I find it hard to give acceptability to the submissions urged on behalf of the Petitioners that the issue in question is squarely covered by the Hon''ble Supreme Court''s judgment in the case of BSNL (supra). The verdict in the BSNL case is indeed open-ended. In para 65 of the said judgment, the Hon''ble Supreme Court has held that what may be achieved by scientific and technological advances in future cannot be anticipated. It has further said that no one at present has argued that the electromagnetic waves are abstracted or are capable of being delivered. Now it is being argued whether or not the ACLE carrying the data to the customers'' desired destinations in the network could be held as goods: this is to be established. It involves phenomenal scientific investigation and research.

57. I am afraid, the Courts are not well equipped to go into the scientific and technological aspects of the matter. It is therefore desirable that the Petitioners file the statutory appeals. The Appellate Authority has to consider the case of the Petitioners and the Respondents by taking into account the materials placed on record. Given the nature of the subject, it may also be necessary for the Appellate Authority to embark on a fresh enquiry, perhaps by taking the assistance of the technical persons and technical bodies in the matter.

58. Thus, it cannot be said with any rate of success that these petitions involve pure and simple questions of law. They involve complicated, scientific and technological questions, which certainly fall within the realm of factual controversies. As held by the Apex Court in the case of Vicco Laboratories (supra), the writ Court''s interference is ruled out where factual adjudication is necessary.

59. The Apex Court''s judgment in the case of United Bank of India (supra) is of immense value for deciding the issue of maintainability of these petitions. The Apex Court in the said case has taken the considered view that the statutory remedies must be exhausted before resorting to the remedy under Article 226 of the Constitution of India. The Apex Court has also emphasized the need for circumspection, caution and care by the High Courts to ensure that the statutory schemes are not defeated by exercise of writ jurisdiction. The relevant paragraphs of the said judgment are extracted hereinbelow:

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

 

to 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. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but. at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

60. In the case of Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, , the Supreme Court has observed that the High Court would not act as the Court of appeal against the decision of a Court or Tribunal to correct the errors of facts and does not by assuming the jurisdiction under Article 226 of the Constitution trench upon an alternative remedy provided by statute for obtaining the relief. Under Article 226 the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence. In the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , the Apex Court has held that in the matters involving the revenue, the alternative remedy provided by the statute is not to be bypassed.

61. It is also beneficial to refer to the Apex Court''s judgment in the case of State of Madhya Pradesh Vs. Nerbudda Valley Refrigerated Products Company Pvt. Ltd. and Others, , wherein it is held that even if the order of the first authority requires interference, it is for the Appellate Authorit to look into it and take a decision one way or the other; it is not an extraordinary case which warrants direct interference under Article 226 of the Constitution.

62. It is also profitable to refer to this Court''s decision in the case of MRF Limited Vs. Commissioner of Commercial Taxes and Another, , wherein it is held that even if an Assessee feels that he has a good case on merits, that by itself is not a justification for the Court to entertain the writ petition by-passing the appellate remedies. In tax matters, it is not desirable for the Court to exercise the writ jurisdiction at the threshold. The relevant paragraphs of this Court''s decision are extracted hereinbelow:

 

9. That question is dependant on the nature of the product and as to whether the product would fall under one entry or the other, figuring in the notification issued under the Karnataka Value Added Tax Act, 2003 or even under the Central Excise Tariff Act, 2003 which is a mixed question of fact and law. Such questions are best resolved by the authorities and matters can always be brought to this Court in the manner provided under the very statute, as provided u/s 65 of the Karnataka Value Added Tax Act, 2003. after going through the appellate authorities, at different levels, namely, the first appeal to the Joint Commissioner u/s 62 and second appeal to the Tribunal u/s 63 of the Act. Assuming that the Petitioner contends that the appeal to the Joint Commissioner is not efficacious that argument does not hold good for the further appeal to the Tribunal which is undoubtedly a superior forum even to the Commissioner.

10. As observed by the Honourable Supreme Court in the case of M/s. Serai Kella Glass Works Pvt. Ltd. Vs. Collector of Central Excise, Patna, (para 1), in tax matters it is not desirable that the High Courts exercise jurisdiction under Articles 226 and 227 at the threshold but allow the Assessee to go through the normal remedies provided under the Act.

11. Just because the Assessee feels it has a very good case on the merits, that by itself is not a justification for this Court to entertain a writ petition by-passing the appellate remedies. If that were to be so, then all merited matters should be examined under Articles 226 and 227 and not by way of appeals and can lead to unnecessary burdening of the High Court.

63. I am nextly left with the bias aspect of the matter. That the Deputy Commissioner has taken part in the proceedings of the Committee on the Sub-ordinate Legislation or is instrumental in filing the review petition are no grounds for alleging the bias. In the instant case, the Deputy Commissioner has passed the similar reassessment orders for different assessment periods on 31.7.2006 and 12.1.2007 long before the meeting of the Committee on Sub-ordinate Legislation. On the similar set of facts, the Deputy Commissioner has passed the similar orders. Therefore he cannot be held to be at fault for passing the impugned orders.

64. That apart, that the Deputy Commissioner has already expressed some opinion at the time of filing the review petition or in the deliberations of some committees are not enough to doubt the taking of an independent view by him. There have been cases where the decisions taken by the Courts on the administrative side are set aside, when they are challenged on the judicial side.

65. That an adjudicator is pro-revenue or pro-assessee, pro-management or pro-worker, pro-capitalist or pro-socialist, etc. are no grounds to allege that he has passed a biased order. As held by the Apex Court in G.N. Navak''s case (supra), if the meaning of bias is taken as the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one will ever have it also. The Hon''ble Supreme Court has observed that we are born with certain

 

predispositions and that our attitudes are formed based on our formal and informal education. It has further held that every preference does not vitiate an action. If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate the decision.

66. The Hon''ble Supreme Court in the case of Gullappalli Nageswararao (supra) has held that in the absence of any proof that the Chief Minister has expressed his bias for the scheme in his public speeches (as alleged), it cannot be said that by hearing the objections to the scheme, the Chief Minister violated the principles of natural justice by being a Judge in his own cause.

67, All that the reassessing authority is required to do is to act justly and fairly and not arbitrarily or capriciously. If the authority acts with a mind Open to persuasion and fairness, then the allegation of bias cannot be accepted at all. If a decision is given objectively based on the evidence and materials on record, it is subject to scrutiny by the authority and/or by revisional authorities. If the tests of bias--real likelihood, real danger, reasonable suspicion and real possibility--are applied and if the fair-minded and informed observer finds that the decision is fair, objective and based on the materials placed on the record, then fanciful and unmeritorious allegation of bias is to be discouraged.

68. As held by this Court in the case of MRF (supra), even assuming that the appeal to the Joint Commissioner of Commercial taxes is not efficacious, the argument does not hold good for the second appeal to the Tribunal. There is also scope for the Tribunal''s orders passed in the second appeals being brought before this Court in the form of the revisions.

69. I do not find any special, exceptional, extraordinary circumstances for the Assessee not going through the normal remedies provided under the statute. The skipping or bypassing of the statutory remedy in a case of this nature is not permissible. Thus, answering both the questions in the negative, I dismiss these petitions.

70. It is made clear that no opinion whatsoever is expressed on the merits or otherwise of the impugned reassessment orders. Liberty is expressly reserved to the Petitioners to avail of the appeal remedy. If the Petitioners file the appeals within 4 weeks from today with the necessary application for the condonation of delay, the Appellate Authority is directed to consider the appeals on merits and not to reject them on the ground of delay. It is for the Petitioners to seek the stay of the reassessment orders after complying with the provisions contained in Section 62(4) of the VAT Act and Section 20 of the 1957 Act, as the case may be.

71. In the fitness of the things, this Court directs the Respondents not to resort to the coercive recovery of the amounts pursuant to the impugned reassessment orders, from the Petitioners for a period of 4 weeks.

72. These petitions are accordingly disposed of. No order as to costs.

 