
(2004) 04 RAJ CK 0081

In the Rajasthan High Court

Case No : Civil Writ Petition No. 161 of 2004 9 April 2004

D.D. Shah and Bros.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-04-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 246, 246A, 252, 253, 254

Citation : (2005) 143 TAXMAN 292

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Assessee K.K. Bissa, for the Revenue, for the Appellant;

Judgement

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner on 8-1-2004 against the respondents with a prayer that by an appropriate writ order or direction the assessment order dated 4-12-2003 (Annex 4) passed by the Income Tax Officer, Banswara (respondent No.2) for the assessment year 2001-2002 by which the respondent No.2 (Income Tax Officer, Banswara) disallowed the deduction u/s 80IB of the Income Tax Act, 1961 and brought entire business income to tax be quashed and set aside.

2. The facts of the case put forward by the petitioner are as under:

(i) The petitioner-firm was engaged in the business of running an industrial undertaking of blending of various types of tea leaves as per the procedure and is duly registered as a manufacturing unit with the District Industries Centre, Banswara vide certificate (Annex 1).

(ii) Further case of the petitioner is that even the Department of Industries in Central Government vide its circular dated 20-11-1996 (Annex 2) clarified that the process of blending tea leaves amounts to manufacture and therefore, such units should be so registered.

(iii) Further case of the petitioner is that the petitioner-firm prepares samples of tea as suggested by blend master and mixing process is also instructed by the blend master and this blending process is a continuous process and it is an important function as to maintain the similar blend of tea.

(iv) Further case of the petitioner is that tea leaf is not perfect for consumption independently and after preparation,. the blended tea is packed in own brand name in pouches, bags and containers for marketing and thereafter the unit supplies the packet for marketing through marketers.

(v) Further case of the petitioner is that process of blending of tea amounts to manufacture and under the Sales Tax law, this court in the case of Dhunseri Tea Industries v. State of Rajasthan 2001 (1) Tax Up 235, has held that process of blending of tea amounted to manufacture and thus, benefit of exemption under the new Sales Tax Incentive Scheme, 1989 under the Sales Tax Act was granted.

(vi) Further case of the petitioner is that since this judgment of this court in the case of Dhunseri Tea Industries (supra) was binding on the authorities, the respondent No. 2 (Income Tax Officer, Banswara) should have also followed the judgment while passing the impugned assessment order dated 4-12-2003 (Annex 4) and the respondent No. 2 (Income Tax Officer, Banswara) should have allowed the claim of deduction of the petitioner-assessee u/s 80IB of the Income Tax Act.

(vii) Further case of the Petitioner is that through impugned order dated 4-12-2002 (Annex,4) the respondent No. 2 (Income Tax Officer, Banswara) disallowed the said deduction u/s 80IB of the Income Tax Act and brouhgt entire business income to tax, inter alia, holding that:

(a) That the petitioner claimed deduction u/s 80IB of the Income Tax Act to the tune of Rs. 2,46,943 ie., 100 per cent of the profit earned from the industrial undertaking.

(b) That the case law in the case of Dhunseri Tea Industries(supra) was not applicable in the present case as the said judgment relates to exemption under the Sales Tax Act.

(c) The language in the Sales Tax Act is different from the Incometax Act and they are not akin to the language in section 80IA/ 80IB of the Income Tax Act.

(d) That deduction u/s 80IA/80IB is available only when the industry is engaged in manufacturing of producing article or thing, but under the Sales Tax Act, the proceeding has also been treated as manufacturing.

(e) The respondent No. 2 (Income Tax Officer, Banswara) has placed reliance on judgment of Calcutta High Court in the case of Appeejay Pvt. Ltd. Vs. Commissioner of Income Tax, which specifically dealt with section 80I and the Calcutta High Court observed that assessee of the case was merely mixing up and blending tea and sold them in the market and that processing of tea did not

involve manufacturing of any article or thing and the Calcutta High Court did not allow deduction as claimed by the assessee of that case u/s 80I

(vii) Aggrieved from the assessment order dated 4-12-2003 (Annex 4) passed by respondent No. 2 (Income Tax Officer, Banswara), this writ petition has been filed by the petitioner.

3. In this writ petition, the main submission of the learned counsel for the petitioner is that when this court in the case of Dhunseri Tea Industries (supra) has held that process of blending of tea amounts to manufacture and therefore, the impugned assessment order dated 4-12-2003 (Annex 4) passed by the respondent No. 2 (Income Tax Officer, Banswara) is per se illegal and without jurisdiction and deserves to be set aside.

4. Reply to the writ petition was filed by the respondents and their case is that since the impugned assessment order dated 4-12-2003 (Annex 4) is applicable order and appeal lies u/s 246(1) of the 1961 Act before the CIT(A) and the petitioner has already filed appeal (Annex R/ 1) which is pending before the CIT(A), Udaipur and therefore, when the petitioner has already availed the alternative remedy of appeal, the present writ petition filed by the petitioner is not maintainable and should be dismissed on this ground alone.

5. Heard and perused the record.

6. There is no dispute on the point that the impugned assessment order dated 4-12-2003 (Annex 4) passed by the respondent No. 2 (Income Tax Officer, Banswara) is an appealable order and the petitioner has already filed appeal (Annex R/ 1) u/s 246 of the 1961 Act and same is pending before the CIT(A), Udaipur.

7. There is also no dispute on the point that in the assessment order (Annex 4) dated 4-12-2003, the Income Tax Officer, Banswara (respondent No. 2) considered all the contentions raised by the petitioner and had answered the same in the impugned assessment order dated 4-12-2003 (Annex 4) and even he had distinguished the judgment (Annex 3) delivered in the case of Dhunseri Tea Industries (supra) from the fact of the present case by giving cogent reasons.

8. Not only this, the learned Income Tax Officer (respondent No. 2) has placed reliance on judgment of Calcutta High Court in the case of Appeejay (P) Ltd (supra) and after considering all the points, he came to the conclusion that the blending of tea is not a manufacturing process and thus he disallowed the claim of the petitioner claimed by him u/s 80IB of the Income Tax Act.

9. In the facts and circumstances just mentioned above, the question that arises for consideration is whether in view of the fact that there is alternative remedy of appeal available to the petitioner and the same has been availed by the petitioner through no final adjudication has taken place in that appeal, the present writ petition is maintainable or not.

10. In my opinion where an alternative and equally efficacious remedy is available to a litigant, he should pursue that remedy and may not invoke special jurisdiction of the High Court to issue a prerogative writ.

11. The remedy under Article 226 being, in general, discretionary, the High Court may refuse to grant it where there exists an alternative remedy, equally efficient and adequate, unless there are good grounds therefor, but where a party complaining of fraud had no other alternative remedy available, he could avail writ remedy and for that following authorities may be referred to:

- (i) Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes,
- (ii) Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others,
- (iii) United India Insurance Co. Ltd. Vs. Rajendra Singh and Others,
- (iv) K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.,

12. The question whether the alternative remedy is equally efficacious or adequate or not is a question of fact to be decided in each case and the onus lies on the petitioner to show that it is not adequate.

13. Where the petitioner had already availed remedy of appeal under the ordinary law, no petition under article 226, will ordinarily be entertained on the same questions, atleast so long as those proceedings of appeal are not disposed of.

14. In my opinion, the petitioner cannot be allowed to pursue two parallel remedies at the same time as in the present case not only that the alternative remedy is available to the petitioner, the petitioner had already availed that remedy by filing appeal before the Commissioner and that appeal is still pending and simply because the appeal has not been decided, it would not give a cause to the petitioner to file writ petition under article 226 of the Constitution of India.

15. The High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not, therefore, act as a court of Appeal against the decision of a court or Tribunal, to correct errors of fact and does not by assuming jurisdiction under article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another Tribunal, or even, itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under article 226 of the Constitution, the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up.

16. In the present case, following questions of facts including mixed questions of facts and law may arise:

- (i) Whether the facts of the present case are covered by the judgment (Annex 3)

delivered in the case of Dhunseri Tea Industries (supra) or not?

(ii) Whether law laid down in Calcutta High Court in the case of Appeejay (P) Ltd. (supra) was correctly laid down or not and whether the same is applicable to the facts of the present case or not?

(iii) Whether process undertaken by the petitioner comes within the manufacture or not?

(iv) Whether while passing the impugned assessment order dated 4-12-2003 (Annex 4), the Income Tax Officer, Banswara (respondent No. 2) has correctly followed the relevant laws or not?

17. In my opinion, the above questions are question of facts or mixed question of facts and law which should not be decided for the first time in writ jurisdiction under article 226 of the Constitution of India and they should be left to be decided by the statutory forum. From this point of view also, the writ petition is not maintainable.

18. The Hon"ble Supreme Court in the case of K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., has observed as under:

"The remedy provided for in article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Where the petitioners have already availed themselves of the remedy provided for in section 8(5) of the Taxation of Income (Investigation Commission) Act and a reference has been made to the High Court in terms of that provision which is awaiting decision, it would not be proper to allow the petitioners to invoke the discretionary jurisdiction under article 226 of the Constitution at this stage (p. 208)

19. The case of K.S. Rashid & Sons (supra) clearly covers the point in dispute as the petitioner has already availed the remedy of appeal by filing appeal before the Appellate Authority. Hence, jurisdiction under article 226 of the Constitution of India should not be exercised in favour of the petitioner.

20. Similarly, in the case of Shriram Refrigeration Industries Ltd. and another Vs. Commercial Tax Officer and others, the Hon"ble Supreme Court has held that when the appeal is pending before the Appellate Authority on the similar issue by same party, the writ petition cannot be entertained. This authority also goes to the very root of the maintainability of the present writ petition.

21. The Hon"ble Supreme Court in the case of Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others, has held that when alternative remedy is available, the matter cannot be considered under article 226 of the Constitution of India. In this regard, the following authorities may also be referred to:

(i) R.K. Panda v. Steel Authority of India DNJ (SC) 2000,465

(ii) Gopichand Teli v. State RLW 1995 (1) Raj. 1

(iii) Laxman Singh Verma v. State of Rajasthan RLW 2000 (1) Raj. 449

22. Similar view has been taken by the Hon"ble Supreme Court in the recent judgments Sheela Devi Vs. Jaspal Singh, and Sadhana Lodh Vs. National Insurance Company Ltd. and Another,

23. It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ.

24. When an alternative and equally efficacious remedy exists, it will be sound exercise of discretion to refuse to interfere in a petition under article 226 of the Constitution of India, unless there are good grounds therefor.

25. It may further be stated that the right of appeal is substantive right and not a matter of mere procedure.

26. In my considered opinion, a right to appeal may be an "adequate remedy" to bar the issue of a writ. In this regard, the following authority of Hon"ble Supreme Court may be referred to Bhopal Sugar Industries Ltd. v. D.B. Dube, STO AIR 1967 SC 549.

27. In the case of Union of India (UOI) and Others Vs. S.J. Thanawalla and Another, , the Hon"ble Supreme Court has held that when the appeal against the impugned order was pending, the High Court was justified in not going into that question and relegating the parties to the decision of the appellate Tribunal.

When alternative remedy does not bar relief

28. It should not, however, be forgotten that the existence of an alternative remedy is not an absolute bar to the granting of a writ under Article 226 but "is a thing to be taken into consideration in the matter of granting writs." in other words, the existence of an alternative remedy is a rule of policy, practice and discretion and not a rule of law. It is a self imposed limitation and cannot oust the jurisdiction of the court. In exceptional circumstances, the High Court may grant relief under article 226, even if an alternative remedy is available to the aggrieved person.

29. The existence of an alternative remedy is no ground for refusing prohibition or certiorari where

(a) the absence or excess of jurisdiction is patent and the application is made by the party aggrieved, or

(b) there is an error apparent on the face of record,

(c) there has been violation of the rules of natural justice,

(d) where there has been a contravention of fundamental rights,

(e) where the Tribunal acted under a provision of law which is ultra vires

30. Apart from this, when there is infringement of fundamental rights, where remedy cannot be said to be alternative and where remedy cannot be said to be adequate or equally efficacious and where the order is ultra vires, without jurisdiction or violative of natural justice, writ petition under article 226 of the Constitution of India can be entertained.

31. The rule requiring the exhaustion of alternative remedies before the grant of writ is a rule of policy, convenience and discretion for the guidance of court rather than a rule of law meaning thereby that in exceptional cases, though there is alternative remedy, still the writ jurisdiction lies. -

32. In the present case, none of the abovementioned conditions are present and there is remedy available to the petitioner which is not only alternative but same is adequate and equally efficacious. Apart from this, this remedy has been availed by the petitioner by way of filing appeal before the CIT(A). From this point of view also, the present case is not that case where in spite of availability of alternative remedy, relief can be granted to the petitioner under article 226 of the Constitution of India at this stage atleast so long as the appeal is disposed of.

33. Apart from this, there is Division Bench judgment of this court in the case of State Bank of Bikaner & Jaipur v. Union of India (2003) 270 ITR 271 which pertains to the Income Tax Act and it has been held by this court that when the petitioner of that case had already preferred an appeal against the assessment order, the writ petition is not maintainable. The present case is squarely covered by the judgment of this court in the case of State Bank of Bikaner & Jaipur (supra) and from this point of view also, the present writ petition is not maintainable.

34. On hierarchy of appeal, it may be stated here that under the Act of 1961 appellate hierarchy is as under

(i) The appeal against the order of the assessing officer lies with the CIT(A) (Section 246A to c. 251)

(ii) Appeal against the order of the CIT(A) can be preferred by the assessee or the Income Tax Department and such appeal lies with the Appellate Tribunal which is the final fact finding authority (Section 252 to 255)

(iii) Appeal against the order of the Appellate Tribunal can be preferred by the assessee or the Income Tax Department and such appeal lies to the High Court on a substantial question of law (Section 260A and 260B).

(iv) Appeal can be preferred against the order of the High Court either by the assessee or by the Income Tax Department to the Supreme Court which is the final Appellate Authority (Section 261 & 262)

35. Thus, against the assessment order, the appeal lies to the CIT(A) and against the order of CIT(A), the appeal lies to the Appellate Tribunal and against the

order of the Appellate Tribunal, appeal lies to this court on question of law and thus, still the 3 petitioner has to cross two stages and without exhausting the above two stages, the petitioner has directly approached this court under article 226 of the Constitution of India. For the above reason also the petitioner would not be permitted to approach the High Court without exhausting the other alternative remedies available to it.

36. Hence, it is held that the present writ petition is not maintainable as the petitioner has already availed alternative remedy before the CIT(A) by way of filing appeal and the same is still pending.

37. That apart, if the respondent No. 2 (Income Tax Officer, Banswara) in passing the order dated 4-12-2003 (Annex 4) has distinguished the law laid down in the judgment (Annex 3) in the case of Dhunseri Tea Industries (supra), it cannot be said that there was error apparent on the face of record and therefore, the argument of the learned counsel for the petitioner by not following the Judgment (Annex 3) in the case of Dhunseri Tea Industries (supra) illegality has been committed by the respondent No. 2 (Income Tax Officer, Banswara), cannot be accepted at this stage because this aspect has to be thrashed out first by the Appellate forum and other forum available and thereafter if the matter comes to this court this court would consider that matter under article 226 of the Constitution of India and at this stage, it is premature to say that the respondent No, 2 (Income Tax Officer, Banswara) has committed illegality in not following the judgment (Annex 3) delivered in the case of Dhunseri Tea Industries (supra).

38. The argument raised by the learned counsel for the petitioner the impugned assessment order dated 4-12-2003 (Annex 4) passed by the respondent No. 2 (Income Tax Officer, Banswara) is without jurisdiction cannot be appreciated and hence, the impugned assessment order dated 4-12-2003 (Annex 4) which is an appealable order cannot be interfered by this court under article 226 of the Constitution of India, In this respect, it is made clear that if the statutory authority has jurisdiction to decide a particular question and if the same is decided by the statutory authority, in such a situation if the order is even wrong one, it cannot be said that the statutory authority had no jurisdiction and propriety and legality of that wrong decision can be adjudged by appropriate forum. The question of jurisdiction gets importance only when statutory authority passes an order, for which he had no jurisdiction, but if he passes wrong order it does not mean that it lacks jurisdiction. From this point of view also, it cannot be said that the impugned assessment order dated 4-12-2003 (Annex 4) passed by the respondent No. 2 (Income Tax Officer, Banswara) is without jurisdiction and this argument raised by the Learned counsel for the petitioner stands rejected.

39. In view of the law just discussed above, the authority of this court in the case of Guljag Industries Ltd. v. State of Rajasthan (2002) 13 Sales Tax Today 11, would not be helpful to the learned counsel for the petitioner and this aspect has already been considered by this court under the heading "When alternative remedy does not bar relief."

40. For the reasons mentioned above, the present writ petition is treated as not maintainable as the petitioner has alternative remedy and the petitioner has already availed that remedy by way of filing appeal before the CIT(A) which is still pending and, hence the writ petition is liable to be dismissed as not maintainable. Thus, it is held that the present writ will not be entertained straightway against the assessment order until all avenues of appeal under the Income Tax Act, 1961 are availed.

For the reasons mentioned above, the present writ petition is dismissed.

Cost made easy.