

(2012) 01 GAU CK 0101

In the Gauhati High Court

Case No : Writ Petition (C) No. 5388 of 2011, WP (C) No. 5389 of 2011 and WP (C) No. 5620 of 2011

Dharampal Satyapal Ltd. and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 06-01-2012

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 40, 79
Constitution of India, 1950 — Article 136, 226

Citation : (2012) 1 GLD 883 : (2012) 47 VST 431

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : Ashok Saraf and Ms. N. Hawelia, for the Appellant; K.N. Choudhury, A.A.G., Ms. R. Kakoti and Mr. R. Dubey, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—All the writ petitions by and between the same parties, with the same relief prayed for, have been heard together. As agreed to by the learned counsel for the parties, the writ petition being W.P.(C) No. 5389/2011 is taken as the base case and the learned counsel for the parties have exclusively referred to the pleadings therein and the documents annexed. Dr. A.K. Saraf, learned Sr. counsel assisted by Ms. N. Hawelia, learned counsel for the petitioners referring to the impugned show-cause notice dated 20.06.2011; order of reassessment dated 18.07.2011 and the notice of demand issued pursuant thereto, has submitted that there being no reason for invoking the power u/s 40 of the Assam Value Added Tax Act, 2003 coupled with lack of bonafide exercise of power towards issuance of the impugned show-cause notice and the assessment order; same are liable to be interfered with. He submits that since there are no material to form a belief of any turn over as escaped in the assessment, the impugned orders are illegal and without jurisdiction. He also submitted that there being no reason for reopening of the completed assessment and that full disclosure having been made by the petitioner, company of all the materials facts necessary for

completion of the assessment, the impugned orders are illegal, without jurisdiction and not tenable in law.

2. In paragraph-22 of the writ petition, it has been stated thus :

22. That there is no alternative, efficacious remedy available to the petitioner and the very jurisdiction not the Assistant commissioner of Taxes in issuing the impugned show-cause notice as well as in completing the order of reassessment and in issuing notice of the demand having been challenged in the present writ application before this Hon"ble Court; the present writ application filed under Article 226 of the Constitution of India is maintainable.

3. Mr. K.N. Choudhury, learned Addl. Advocate General, Assam assisted by Ms. R. Kakoti, learned counsel for the respondents on the other hand referring to the counter affidavit filed questioning the very maintainability of the writ petitions, submits that there being alternative and equally efficacious remedy u/s 79 of the Act, the petitioners are first to avail the said remedy instead of invoking the writ jurisdiction of this Court. He submits that the petitioner having already submitted to the jurisdiction of the Assessing Authority pursuant to the impugned show cause notice, it should pursue statutory remedy instead of invoking the writ jurisdiction. According to him, the impugned assessment order having not suffered from the vice of jurisdictional error and also not being violative of the principles of natural justice, there is no justification for the petitioners to bypass the statutory remedy available in law. He submits that the bonafide belief and opinion formed by the Assessing Officer that all part of the turn over representing import value of tobacco, perfume, menthe, saffron and lime escaped the assessment, the impugned orders cannot be called in question by means of the writ petitions.

4. Since the matter has been primarily argued on the question of maintainability of the writ petition in view of alternative remedy available under the Act, the same has been considered for admission hearing taking note of the said arguments in support of which learned counsel for the parties have also placed reliance on certain decisions.

5. Dr. Saraf, learned Sr. counsel for the petitioner in support of his argument about the maintainability of the writ petitions has placed reliance on the following decisions :

(i) Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur, ;

(ii) STATE OF TRIPURA v. MANORANJAN CHAKRABORTY AND OTHERS, (2001) 10 SCC 740 ;

(iii) Ram and Shyam Company Vs. State of Haryana and Others,

6. On the other hand, Mr. K.N. Choudhury, learned Addl. Advocate General has placed reliance on the decision reported in Sheo Nath Singh Vs. Appellate

Assistant Commissioner of Income Tax, Calcutta,).

7. In *Madhya Pradesh Industries Ltd. (supra)*, the Apex Court dealing with the question of power and jurisdiction of the High Court under Article 226 of the Constitution of India, held that the jurisdiction is discretionary and the High Court is not bound to issue a writ merely because it is lawful to do so. It is also not intended thereby to supersede the authority and jurisdiction conferred upon the Taxing Authorities who are invested with the power to deal with the merits of the contentions raised before them. It was observed that High Court is to consider whether the act or omission complained of has resulted or is likely to result in grave injustice and whether the party approaching it has another adequate remedy which is equally efficacious. In the said case, the High Court rejected the writ petition without indicating the considerations which persuaded it to do so. Considering the jurisdictional error of the Income Tax officer as was alleged and that there was no indication as to the grounds on which the High Court had rejected the petition, the Apex Court was inclined to set aside the order rejecting the petition.

8. In *Manoranjan Chakraborty and Ors. (supra)* also the High Court dealing with the question of maintainability of the writ petition on the ground of alternative remedy being available, held that the citizen has a right to invoke the writ jurisdiction against the high handed or palpable illegal order which may be passed by the Assessing Authority.

9. In *Ram and Shyam Company (supra)* also the Apex Court dealing with rejecting of the writ petition by the High Court, observed that rule which requires exhaustion of alternative remedy is a rule of convenience and discretion rather than rule of law and that the same does not oust the jurisdiction of the Court under Article 226 of the Constitution of India. It was observed that a statutory appeal in all cases cannot be said to provide in all situation an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. In the said case the Apex Court was concerned with the power exercised formally by the authorities set up under the Rules to grant contract but effectively and for all practical purpose by the Chief Minister of the State. It was in such circumstances posing a question as to whom the appeal is to be preferred in a State administration against the decision of the Chief Minister, it was observed that while rejecting the writ petition the High Court did not pose to itself the question and accordingly the order of rejection of the writ petition was set aside.

10. In *Union of India (UOI) Vs. Hindalco Industries, ,* the Apex Court observed thus :

12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the

case may be, is available but these are the limitations imposed by the Courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.

13. The second contention urged by Mr. T.I.V. Iyer is that u/s 11A, the authority did have power and the High Court had itself found in regard to paras (1) to (13) and directed inquiry in respect of the clandestine removal of the matters concerning to incorrect valuation and the High Court ought not to have interfered. We are unable to accept the contention of the learned counsel for reasons more than one. First, as submitted by Mr. K.K. Venugopal, if an authority which has jurisdiction in regard to one aspect takes upon itself to make enquiry into a matter in respect of which it has no jurisdiction then merely because in regard to one aspect it has jurisdiction, the Court cannot ignore the fact of lack of jurisdiction and allow the Tribunal to proceed with the matter in respect of which it has no jurisdiction to make inquiry. Secondly, the position, stated above, namely, that valuation once accepted under clause (a) and there being no vitiating factor, no recourse can be had to valuation under clause (b) is a settled position of law. Therefore, at this stage, if the party is directed to go back to the authority, it would be directing it to undergo a futile exercise.

11. In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , the Apex Court made the following observation :

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

12. In *Sheo Nath Singh (supra)*, the Apex Court dealing with the expression "reason to believe" observed that belief must be that of an honest and reasonable person based upon reasonable ground. This decision has been pressed into service by Mr. K.N. Choudhury, learned Addl. Advocate General to emphasise that the impugned order reasonably depicts formation of a belief of an

honest and reasonable person.

13. I have given my anxious consideration to the submission made by the learned counsel for the parties panel have also perused the materials on record. Needless to say that the proceedings under Article 226 of the Constitution of India are not a substitute for a proceeding initiated under the Act. The only inquiry which this Court can make under Article 226 of the Constitution of India at this stage, is whether there is prima facie material to sustain the impugned orders.

14. The petitioner was issued with show-cause notice on the premises that purchase and consumption of tobacco in the manufacturing of tobacco products are unreasonable and disproportionate to the extent of its maximum consumption limit. Moreover, an opinion was formed on examination of accounts, audit reports and the audited balance sheet that the petitioner company did not separately show the consumption of tobacco although other elements of raw materials had been disclosed separately with quantity and value in the audited balance sheet. It was also found that the petitioner company has been operating 14 units of different products but is maintaining a consolidated manufacturing accounts from where actual consumption of tobacco and other materials are not identified.

15. In response to the said show-cause notice, the petitioner filed its reply in consideration of which the Assessing Authority passed the impugned assessment order in which it has been recorded that on verification of return and all relevant records it has been found that there is escapement of assessment to tax under the Act. Regarding production pattern of the dealer in between tobacco and non-tobacco and consumption of tobacco products as detailed in the table indicated in the order, the Assessing Authority has recorded its findings that although purchase of tobacco in 2005-2006 was 1.2% in value terms, but in quantitative analysis, consumption of tobacco in manufacturing process was found to be 8.53%. Regarding physical verification, the assessment order says that approximately 15% tobacco are used with other raw materials and accordingly consumption is found less than 15% in quantitative terms and thus import value of tobacco and quantity consumed as claimed by the dealer is liable to be rejected.

16. The assessment order has detailed each and every aspect of the matter in support of the tax liability under various items under the Act. The opinion which the Assessing Authority has found in passing the impugned assessment order cannot be said to be not based on any materials on record. It is also not arbitrary, capricious and/or whimsical. The belief and opinion formed in the impugned order are ex facie on good faith and cannot be said to be merely on presence. In my considered opinion, the reasons recorded in the impugned orders have rational connection and have bearing to the formation of the belief and are not extraneous or irrelevant so as to warrant invocation of the writ jurisdiction under Article 226 of the Constitution of India.

17. Section 79 of the Act provides for alternative and efficacious remedy by way of an appeal to the appellate authority which the petitioner is entitled to prefer against the impugned assessment order. Although the learned counsel for the petitioner has argued that the impugned assessment order is *ex facie* illegal, arbitrary and without jurisdiction, but as noted above, there is *prima facie* materials to sustain the same. From the scrutiny of the impugned orders as reflected above, it cannot be said to be a proceeding against the petitioner with misconceived notion. If the authority which has issued the impugned orders has derived a decision on the basis of the materials on record, it is none of the business of the writ Court to sit on appeal on such decision exercising its power of judicial review under Article 226 of the Constitution of India. While it is true that no hurdle can be put against exercise of the constitutional power of the High Court, it is a well recognised principle which has gain judicial recognition that it should direct the parties to avail itself of such remedies one or other before it resorts constitutional remedy.

18. The allegations contained in the impugned orders require adjudication on investigation of the disputed facts. The materials on record cannot lead to an interference that the allegations in the show-cause notices are wholly non-existent and that there is no foundation or basis of the allegations. In the writ petitions there is no challenge as to the vires of the statutory provisions governing the matter nor there is any question regarding violation of fundamental rights involved in the said proceedings. On examination of the materials on record, it cannot be said that the impugned orders are *ex-facie* nullity and without jurisdiction. The basic facts on the basis of which the authority has assumed jurisdiction on the subject matter, in my considered view, cannot be said to be on non-existent. The impugned orders, under the circumstances, cannot be said to be unauthorised and without jurisdiction.

19. In *Union of India (UOI) and Others Vs. Metal Box Co. of India Ltd. and Others*, , the Supreme Court made the following scathing observations in the matter of entertaining of the writ petition in such matter :

We find it difficult to sustain the judgment of the learned Single Judge and of the Division Bench, for more than one reason. But first the must mention that the filing of, and entertaining, we the writ petition straightaway against a notice of demand issued by a Central Excise Officer (Superintendent of Central Excise) in a matter involving valuation was inadvisable. It has been repeatedly deprecated by this Court the latest decision being in *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh*, which decision refers to and confirms the ratio of the earlier decisions of this Court.

20. The Apex Court in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, observed thus :

3.... Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of

extra-ordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

21. For all the aforesaid reasons, I am not inclined to admit the writ petitions. The petitioners shall pursue their remedy under the Act urging all the grounds as has been urged in the writ petitions. We need not be presumptive that the authority dealing with the matter will be oblivious of the grounds which might be urged by the petitioner against the impugned assessment orders taking note of the totality of the facts and circumstances. It will be a sound discretion not to stall the in-built proceeding under the Act. In view of the above, the writ petitions are dismissed without being admitted upholding the plea of non-maintainability of the writ petitions as has been raised by the respondents. I hasten to add that the matter having not been dealt with on merit, the appeals, if preferred by the petitioners as per the provision of the Act against the impugned orders of assessment, will be dealt with by appellate authority on their own merit without being guided by any of the observations made above.