

(2014) 11 DEL CK 0200
In the Delhi High Court
Case No : Writ Petition (Civil) No. 2844/2014

Dinkar Kumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:

Advocates Act, 1961 — Section 38
Armed Forces Tribunals Act, 2007 — Section 30, 31
Companies Act, 2013 — Section 423
Competition Act, 2002 — Section 53T
Constitution Of India, 1950 — Article 141, 226, 227
Consumer Protection Act, 1986 — Section 23
Electricity Act, 2003 — Section 125
Monopolies And Restrictive Trade Practices Act, 1969 — Section 55
National Greens Tribunal Act, 2010 — Section 22
Securities And Exchange Board Of India Act, 1992 — Section 15Z
Telecom Regulatory Authority Of India Act, 1997 — Section 18
National Tax Tribunal Act, 2005 — Section 6, 6(2)(b), 7, 24

Citation : (2014) 146 DRJ 350

Hon'ble Judges : G. Rohini, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Praveen Agarwal and R.R. Singh, Advocate for the Appellant; Sanjay Jain, ASG, Sanjeev Narula, Pallavi Shali and Rajshekhar Rao, Advocate for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This petition under Article 226 of the Constitution of India, filed by three Advocates as a Public Interest Litigation, impugns:-

- (1) Section 23 of the Consumer Protection Act, 1986;
- (2) Section 38 of the Advocates Act, 1961;
- (3) Section 18 of the Telecom Regulatory Authority of India Act, 1997;
- (4) Section 15Z of the Securities and Exchange Board of India Act, 1992;
- (5) Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969;

- (6) Section 53T of the Competition Act, 2002;
- (7) Section 30 and 31 of the Armed Forces Tribunal Act, 2007;
- (8) Section 22 of the National Green Tribunals Act, 2010;
- (9) Section 125 of the Electricity Act, 2003; and
- (10) Section 423 of the Companies Act, 2013

all providing for statutory appeal, against the order of the apex adjudicatory fora constituted under each of the said legislations, to the Supreme Court, on the ground of the same violating the basic structure of the Constitution of India by overriding powers of judicial review conferred upon the High Courts by Articles 226 and 227 of the Constitution.

2. The petition came up before us first on 7th May, 2014 when we, referring to Guruvayur Devaswom Managing Commit. and Another Vs. C.K. Rajan and Others, holding that ordinarily the High Court should not entertain a writ petition by way of a PIL, questioning the constitutionality or validity of a statute or a statutory rule, enquired the locus of the petitioners to maintain the challenge. On request of the counsel for the petitioners the matter was adjourned to 27th August, 2014.

3. The counsel for the petitioners on 27th August, 2014, on the aspect of maintainability of the petition relied on paras 24, 141 and 609 of S.P. Gupta Vs. President of India and Others, . We, besides entertaining doubts as to the locus of the petitioners to maintain the petition, having also entertained doubts as to the merits of the petition, particularly in the light of our recent judgment in Bela Rani Bhattacharyya Vs. Union of India, holding that writ petition under Article 226 of the Constitution though not barred by the Competition Act, 2002, was not maintainable in view of the remedy of appeal to the Supreme Court provided vide Section 53T of the Act, heard the counsel for the petitioners on the aspect of admission and reserved judgment.

4. However on deeper consideration of the matter while dictating judgment, we felt that:-

(a) the proposition, that the power of judicial review conferred on the High Courts under Articles 226 and 227 is a part of the basic structure of the Constitution is no longer res integra in the light of the judgment of the Constitution Bench in L. Chandra Kumar Vs. Union of India and others, ;

(b) in the light of the aforesaid though the Supreme Court in Nivedita Sharma Vs. Cellular Operators Assn. of India and Others, has held that Article 226 being a basic feature of the Constitution cannot be curtailed by Parliamentary legislation but nevertheless further held that it is one thing to say that in exercise of power vested in it under Article 226 the High Court can entertain a writ petition and it is an altogether different thing to say that each and every petition filed under Article 226 must be entertained by the High Court as a

matter of course, ignoring the fact that the aggrieved person has an effective alternative remedy, it was further held that inspite of availability of alternative remedy, the petition under Article 226 can be entertained where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge;

(c) however applying the aforesaid proposition, the Supreme Court in Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, held that the High Court will not entertain a petition under Article 226 of the Constitution on the said exceptional grounds also if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance and that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation;

(d) applying the aforesaid law, this Court, as noted in Bela Rani Bhattacharyya (supra), has been taking a view that if in the alternative remedy provided, the grounds of violation of principles of natural justice and jurisdiction can also be taken, writ petition under Article 226 would still not be available; and,

(e) thus effectively, by providing for statutory appeals to the Supreme Court, with/without any limitations, against the orders of the Bodies constituted under the statutes above mentioned, the power of judicial review under Article 226 though not de jure prohibited / curtailed has been de facto prohibited / curtailed, thereby doing indirectly what cannot be done directly.

5. While we were still mulling the aforesaid propositions, a Constitution Bench of the Supreme Court vide judgment dated 25th September, 2014 in Madras Bar Association Vs. Union of India reported as 2014 SCC Online SC 771, while dealing with the Constitutional validity of the National Tax Tribunal Act, 2005, held as under:-

"86. It was not disputed, that the NTT has been created to handle matters which were earlier within the appellate purview of the jurisdictional High Courts. We are accordingly satisfied, that the appointment of Accountant Members and Technical Members of the Appellate Tribunals to the NTT, would be in clear violation of the constitutional conventions recognized by courts, the world over. References on questions of law (under the three legislative enactments in question), were by a legislative mandate, required to be adjudicated by a bench of at least two judges of the jurisdictional High Court. When the remedy of reference (before the High Court) was converted into an appellate remedy (under the three legislative enactments in question), again by a legislative mandate, the appeal was to be heard by a bench of at least two judges, of the jurisdictional High Court. One cannot lose sight of the fact, that hitherto before, the issues which will vest in the jurisdiction of the NTT, were being decided by a bench of at least two judges of the High Court. The onerous and complicated nature of the adjudicatory process is clear. We may also simultaneously notice, that the power of "judicial

review" vested in the High Courts under Articles 226 and 227 of the Constitution has not been expressly taken away by the NTT Act. During the course of hearing, we had expressed our opinion in respect of the power of "judicial review" vested in the High Courts under Articles 226 and 227 of the Constitution. In our view, the power stood denuded, on account of the fact that, Section 24 of the NTT Act vested with an aggrieved party, a remedy of appeal against an order passed by the NTT, directly to the Supreme Court. Section 24 aforementioned is being extracted hereunder :

"24. Appeal to Supreme Court.-Any person including any department of the Government aggrieved by any decision or order of the National Tax Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the National Tax Tribunal to him :

Provided that the Supreme Court may, if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within such time as it may deem fit."

In view of the aforesaid appellate remedy, from an order passed by the NTT directly to the Supreme Court, there would hardly be any occasion, to raise a challenge on a tax matter, arising out of the provisions of the Income Tax Act, the Customs Act and the Excise Act, before a jurisdictional High Court. Even though the learned Attorney General pointed out, that the power of "judicial review" Under Articles 226 and 227 of the Constitution had not been taken away, yet he acknowledged, that there would be implicit limitations where such power would be exercisable. Therefore, all the more, the composition of the NTT would have to be on the same parameters as judges of the High Courts. Since the appointments of the Chairperson/Members of the NTT are not on the parameters expressed hereinabove, the same are unsustainable under the declared law. A perusal of Section 6 of the NTT Act leaves no room for any doubt, that none of the above parameters is satisfied insofar as the appointment of Chairperson and other Members of the NTT is concerned. In the above view of the matter, Section 6(2)(b) of the NTT Act is liable to be declared unconstitutional. We declare it to be so.

87. We would now deal with the submissions advanced by the learned Counsel for the Petitioners in respect of Section 7 of the NTT Act. It seems to us, that Section 7 has been styled in terms of the decision rendered by this Court in L. Chandra Kumar case (supra) . Following the above judgment for determining the manner of selection of the Chairperson and Members of the NTT, is obviously a clear misunderstanding of the legal position declared by this Court. It should not have been forgotten, that under the provisions of the Administrative Tribunals Act, 1985, which came up for consideration in L. Chandra Kumar case (supra), the tribunals constituted under the said Act, are to act like courts of first instance. All decisions of the tribunal are amenable to challenge Under Articles 226/ 227 of the Constitution before, a division bench of the jurisdictional High Court. In such circumstances it is apparent, that tribunals under the

Administrative Tribunals Act, 1985, were subservient to the jurisdictional High Courts. The manner of selection, as suggested in L. Chandra Kumar case (supra) cannot therefore be adopted for a tribunal of the nature as the NTT. Herein the acknowledged position is, that the NTT has been constituted as a replacement of High Courts. The NTT is, therefore, in the real sense a tribunal substituting the High Courts. The manner of appointment of Chairperson/Members to the NTT will have to be, by the same procedure (or by a similar procedure), to that which is prevalent for appointment of judges of High Courts. Insofar as the instant aspect of the matter is concerned, the above proposition was declared by this Court in Union of India v. Madras Bar Association case (supra), wherein it was held, that the stature of the Members who would constitute the tribunal, would depend on the jurisdiction which was being transferred to the tribunal. Accordingly, if the jurisdiction of the High Courts is being transferred to the NTT, the stature of the Members of the tribunal had to be akin to that of the judges of High Courts. So also the conditions of service of its Chairperson/Members. And the manner of their appointment and removal, including transfers. Including, the tenure of their appointments."

(emphasis added)

Justice R.F. Nariman in his concurring opinion in the said judgment also held:-

"32. In fact, it is a little surprising that the National Tax Tribunal is interposed between the appellate Tribunal and the Supreme Court for the very good reason that ultimately it will only be the Supreme Court that will declare the law to be followed in future. As the appellate tribunal is already a second appellate court, it would be wholly unnecessary to have a National Tax Tribunal decide substantial questions of law in case of conflicting decisions of High Courts and Appellate Tribunals as these would ultimately be decided by the Supreme Court itself, which decision would Under Article 141 be binding on all tax authorities and tribunals. Secondly, in all tax matters, the State is invariably a party and the High Court is ideally situated to decide substantial questions of law which arise between the State and private persons, being constitutionally completely independent of executive control. The same cannot be said of tribunals which, as L. Chandra Kumar states, will have to be under a nodal ministry as tribunals are not under the supervisory jurisdiction of the High Courts.

41. Chandra Kumar and R. Gandhi have allowed tribunalization at the original stage subject to certain safeguards. The boundary has finally been crossed in this case. I would, therefore, hold that the National Tax Tribunals Act is unconstitutional, being the ultimate encroachment on the exclusive domain of the superior Courts of Record in India."

(emphasis added)

6. The foras constituted under each of the legislations (supra) and against orders whereof appeal directly to the Supreme Court has been provided, do not have the power of judicial review as vested in the High Court by the Constitution of

India. Interposing even of the appellate fora under some of the aforesaid legislations between the original stage and the Supreme Court is of no avail; the law laid down by the Supreme Court would in any case be binding, as held by Justice Nariman in the judgment supra. The net effect is of exclusion of power of judicial review under Article 226.

7. We are thus of the opinion that the matter is not such which can be dismissed in limine.

8. As far as the aspect of locus of the petitioners is concerned, while leaving the same also open for decision at the final stage, we may only observe that the petition in the judgment (supra) also was of the Bar Association and was entertained. Moreover the question has to be looked holistically with respect to all the provisions aforesaid and which occasion is unlikely to arise in a private lis which may be concerned with one of the aforesaid statutes only.

9. Though the learned ASG had appeared on advance notice and we had heard him also but still the question being of considerable importance, we do not deem it appropriate to, without further hearing, decide the same.

10. Accordingly, admit. Hearing expedited.

11. Notice be sent to the unserved / non appearing respondents. Counter affidavits be filed within four weeks. Rejoinder within two weeks thereafter.

12. List on 12th January, 2015 in the category of "After Notice Miscellaneous Matters" for final disposal.