

(2009) 03 OHC CK 0086
In the Orissa High Court
Case No : OJC No. 15211 of 2001

Progressive Aluminium Industries

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 14

Citation : (2009) CLT 85 Supp

Hon'ble Judges : B.S. Chauhan, C.J.; I. Mahanty, J

Bench : Division Bench

Advocate : Jagabandhu Sahoo and S.K. Mohanty, for the Appellant; Addl. Standing Counsel (C.T.), for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ petition has been filed challenging the assessment order dated 30.9.2001 (Annex.-10) on the ground that the Petitioner was entitled for tax exemption under the Industrial Policy Resolution, 1986. The writ petition was filed in 2001 and came up for hearing today.

2. Learned Counsel for the Revenue has raised objection that the writ petition has been filed without exhausting the statutory remedy of appeal as provided under the Orissa Sales Tax Act, 1947. Therefore, the Petitioner should be relegated to the appellate forum.

3. On the contrary, Mr. Jagabandhu Sahoo, learned Counsel for the Petitioner has submitted, that the writ petition was filed in 2001 and vide order dated 5.12.2001 interim relief had been granted restraining the Revenue to make recovery as per the assessment order for the assessment year 1998-99 (Annex.-10). More so, vide order dated 13.9.2001 while considering OJC No. 11672 of 2001 this Court granted liberty to the Petitioner to challenge the assessment order directly in a writ petition (Annex.- 6). Therefore, as the Division Bench of this Court had earlier granted liberty to the Petitioner to

approach this Court against the assessment order directly, this Court has power to decide the case on merit. In case the Petitioner is relegated to the appellate forum, the appeal may be rejected being time-barred. Therefore, the objection raised by the learned Counsel for the Revenue is to be overruled.

4. We have considered the rival submissions of the learned Counsel for the parties as to whether the writ petition should be heard on merit or the Petitioner should be relegated to the appellate forum without entering into the merit of the case.

5. The issue of exhausting statutory remedy has been considered time and again by the Supreme Court.

6. The Constitution Benches of the Supreme Court, in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, ; *Union of India (UOI) Vs. T.R. Varma*, ; and *State of U.P. v. Mohammed Nooh* AIR 1958 SC 86, held that Article 226 of the Constitution of India on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely 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. Similar view has been reiterated by the Apex Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, , holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion. However, the power can be exercised within recognised line and not arbitrarily and the Court must keep in mind that the power shall not be exercised unless substantial injustice has ensued or is likely to ensue and in other cases the parties must be relegated to the courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

7. The Constitution Bench of the Supreme Court, in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in *N.T. Veluswami Thevar Vs. G. Raja Nainar and Others*, and *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, .

8. In *Siliguri Municipality and Others Vs. Amalendu Das and Others*, and *S.T. Muthusami Vs. K. Natarajan and Others*, , the Apex Court held that the High court must exercise its power under Article 226 with circumspection and while considering the matter of recovery of tax etc., it should not interfere save under very exceptional circumstances.

9. In *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, , and *A. Venkatasubbiah Naidu Vs. S. Challappan and Others*, the Supreme Court deprecated the practice of exercising the writ jurisdiction when

efficacious alternative remedy is available. The Court observed as under:

Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognised principle which gives judicial recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he resorts to a Constitutional remedy.

10. Similar view has been reiterated in Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, ; L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others, ; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and Ors. (2007) 8 SCC 509; GKN Driveshafts (India) Ltd. v. Income Tax Officer and Ors. (2003) 1 SCC 72; and Pratap Singh Vs. State of Haryana and Others and Shri Bhajan Lal and Others, .

11. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule Of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

12. A Constitution Bench of the Supreme Court, in Veerappa Pillai Vs. Raman and Raman Ltd. and Others, , held that as the Motor Vehicles Act is a self contained code and itself provides for appealable/revisable forum, the writ jurisdiction should not be invoked generally in matters relating to its provision.

13. Similar view has been reiterated in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, ; Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; and Shivgonda Anna Patil and Others Vs. State of Maharashtra and Others, .

14. In C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, and H.B. Gandhi, Excise and Taxation Officer-cum Assessing Authority, Karnal and Ors. v. Gopinath and Sons and Ors. 1992 (Suppl.) 2 SCC 312 the Apex court held that where a hierarchy of appeals is provided by the statute, a party must exhaust the statutory remedies before resorting to writ jurisdiction.

15. The Constitution Bench of the Supreme Court, in K.S. Venkataraman and Co. Vs. State of Madras, , considered the Privy Council judgment in Raleigh Investment Co. Ltd. v. The Governor-General in Council AIR 1947 PC 78 and held that the writ court can entertain the petition provided the order is alleged to be without jurisdiction or has been passed in flagrant violation of the principles of

natural justice, or the provisions of the Act/Rules is under challenge.

16. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , the Supreme Court refused to extend the ratio of its earlier judgment in *State of U.P. v. Mohammad Nooh* (supra), wherein the Court had held that prerogative writ can be issued to correct the error of the Court or Tribunal below even if an appeal is provided under the statute under certain circumstances, i.e. the order is without jurisdiction, or principles of natural justice have not been followed, and held that in case of assessment under the Taxing Statute, the principle laid down by the Privy Council in *Raleigh Investment Co. Ltd.* (supra) would be applicable for the reason that "the use of the machinery provided by the Act, not the result of that use, is the test."

17. In *Tin Plate Co. of India Ltd. Vs. State of Bihar and Others*, ; and *Punjab National Bank Vs. O.C. Krishnan and Others*, , the Apex Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it has been admitted, parties should be relegated to the appellate forum.

18. In *Sheela Devi Vs. Jaspal Singh*, , the Apex Court has held that if the statute itself provides for a remedy of revision, writ jurisdiction cannot be invoked.

19. In *State of Himachal Pradesh v. Raja Mahendra Pal and Ors.* AIR 1999 SC 7786 while dealing with a similar issue the Hon"ble Apex Court has held as under:

The constitutional Court should insist upon the party (to avail of the efficacious alternative remedy) instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the Court from granting the appropriate relief to a citizen in peculiar and special facts notwithstanding the existence of alternative efficacious remedy. The existence of special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article.

(Emphasis added)

20. In *Govt. of A.P. and Others Vs. J. Sridevi and Others*, , the Apex Court held that where a authority is competent to determine the issue, "the High Court in a writ jurisdiction should have directed the authority only to take an appropriate decision. When the statutory authority is vested with the power to determine the question as to the applicability of the provisions of the Act, it is ordinarily desirable to leave the question to be decided by such authority. The aggrieved party can file an appeal against the decision within the framework provided under the statute and the ultimate decision also could be challenged under judicial review, if permitted in law.

21. In the *State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.*, , the Apex Court held that existence of alternative remedy does not affect the jurisdiction of the writ court but it could be a good ground for not entertaining the petition.

22. In *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, , the Court observed as under:

In our judgment, no adequate ground was made out for entertaining the petition. A writ of certiorari is discretionary; it is not used merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy, the High Court would be slow to entertain a petition challenging an order of a taxing authority which is *ex facie* with jurisdiction.

(Emphasis added)

23. In *U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another*, , the Supreme Court re-considered almost all of its earlier judgments on issue and came to the conclusion as under.

In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out. By deciding the said case, the Apex Court placed reliance upon the judgment in *R v. London Borough of Hillington, Council* (1974) 2 All ER 643, wherein it had been held as under.

"It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy".

24. Similar view has been reiterated in *Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others*, ; *U.P. State Bridge Corporation Ltd. and Others Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh*, ; *Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another*, ; *Tirupati Balaji Developers Pvt. Ltd. and Others Vs. State of Bihar and Others*, ; *Y.A. Ajit Vs. Sofana Ajit*, ; and *Rajasthan State Electricity Board Vs. Union of India (UOI) and Others*, .

25. In view of the above, the law can be summarized that exhaustion of statutory remedy or availability of alternative remedy is not an absolute bar for maintaining the writ petition. Exclusion of writ jurisdiction due to availability of alternative remedy is a rule of discretion and not one of compulsion. The powers of judicial review can be exercised in exceptional circumstances, particularly, for the purpose of enforcing the fundamental rights or where there is a failure of natural justice or where the impugned orders or proceedings are wholly without jurisdiction.

26. In the instant case a special status seems to have been conferred upon the Petitioner - Assessee by a judicial order of this Court dated 13.9.2001 in O.J.C. No. 11672 of 2001, whereby the present Petitioner was granted liberty to approach this Court directly, if the assessment order raised any demand against

the Petitioner. A question that arises for consideration is as to whether in law, this Court in writ jurisdiction can pass any order in contravention of the statute and further whether this kind of order amounts to amending the legislation itself only for giving benefit to an individual person. No reason has been noted in the order as to why the Court conferred such "special status" on a particular Assessee, as it clearly exhibits -hostile discrimination to similarly situated Assesseees who had not been given similar opportunity to approach this Court directly against the assessment order without approaching the appellate forum provided under the statute.

27. No cogent reason could be given by Mr. Sahoo, learned Counsel for the Petitioner as to under what circumstances such special status has been conferred on the Petitioner-Assessee by this Court. It seems to be an inadvertent mistake committed by this Court.

28. The Courts are not to perpetuate an illegality, rather it is the duty of the Court to rectify the mistakes" While dealing with a similar issue the Apex Court in *Hotel Balaji and Ors. v. State of A.P. and Ors.* AIR 1993 SC 7048 observed as under:

To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* (A.M.Y. at page 18): "a Judge ought to be wise enough to know that he is fallible and therefore, ever ready to learn great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead and courageous enough to acknowledge his errors".

(Emphasis added)

29. Mr. J. Sahoo, learned Counsel appearing for the Petitioner has raised his apprehension that the first appeal, may be rejected being time barred. The apprehension is without any foundation for the reason that this Court does not lack its inherent jurisdiction to entertain the petition, but it does not want to entertain the same. Therefore, the appellate authority can be asked to entertain the appeal, if filed within the stipulated time.

30. In *Danda Rajeshwari v. Bodavula Hanumayamma and Ors.* (1996) 6 SCC 799; the Supreme Court has held that in case writ Court has the power to entertain a petition but does not want to decide the same itself and relegates the party to some other statutory forum, the Court can prescribe a particular time during which the party may file/present a petition before the said statutory authority. Therefore, the Court may, in exceptional circumstances, pass an order that in case the statutory authority is approached within the stipulated period, the authority can be requested to decide the case on merit without entering into the issue of limitation.

31. In *Virendra Kumar Rai v. Union of India* (2004) 13 SCC 463; the Supreme Court held that where a party has approached the High Court or Supreme Court

without approaching the statutory forum, in a bona fide manner, he may be entitled to the benefit of provisions of Section 14 of the Limitation Act. A similar order has been passed by the Supreme Court in *Trai Foods Ltd. v. National Insurance Co.* (2004) 13 SCC 656; relegating the party to the civil Court, giving him the benefit of Section 14 of the Limitation Act. In such a case, the period for which petition remained pending before the writ Court, can be excluded therefrom.

32. Thus, in view of the above, we are not inclined to entertain this petition on merit. It is dismissed. The Petitioner is given liberty to approach the appellate forum within a period of three weeks from today and if such appeal is presented, the appellate authority shall decide it on merit expeditiously, preferably within a period of three months from the date of filing the appeal along with the certified copy of this order before the appellate authority.

I. Mahanty, J.

33. I agree.