(2011) 08 MAD CK 0073

In the Madras High Court

Case No : W.A. (MD) No. 336 to 339 of 2011 and M.P. (MD) No. 1 of 2011

Rayalseema Concrete Sleepers (P) Ltd. APPELLANT

Vs

The Assistant Commissioner (CT) RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Foreign Exchange Management Act, 1999 — Section 35

Citation : (2011) 08 MAD CK 0073

Hon'ble Judges : P. Jyothimani, J;M.M. Sundresh, J

Bench : Division Bench

Advocate : Venkataraman, for the Appellant; R. Karthikeyan, Addl. Gov. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Sundresh, J.—Considering the fact that the Assesses in all these Writ Appeals is one and the same and the assessment orders have

been passed by the same Respondent, coupled with the further fact that very same reasoning has been given while dismissing the Writ Petitions, a

common order is passed.

2. The Assesses, who is the Appellant in all these Writ Appeals is a registered dealer under the Tamil Nadu Value Added Tax as per Central Tax

Act, 1956. The Assesses is the manufacture in Concrete Sleepers and supplies the same to the Indian Railways, outside the State.

3. In pursuant to the inspection made by the Enforcement Wing Officers on 01.07.2010, proceedings have been initiated against the Assesses for

the assessment years 2007-2008 to 2010-2011. Accordingly, pre-assessment notices were issued stating that the Assesses is liable to pay tax at

12.5% for the sales of Concrete Sleepers made by it to the Southern Railways in other states instead of 4% paid already. Accordingly, it was

asked to show cause as to why the difference in tax with penal interest shall not be recovered. After the receipt of the reply given by the Assesses,

final assessment orders have been passed by the Respondent herein. Challenging the same, the Assesses filed the Writ Petitions before this Court

in W.P.(MD) Nos. 13485 to 13488 of 2010.

4. The learned Single Judge of this Court in and by the orders dated 10.11.2010, was pleased to set aside the assessment order on the sole

ground that the Assesses will have to be given a personal hearing. Thereafter, the Assesses was given a personal hearing and final assessment

orders were passed on 20.01.2011. The Assesses filed the Writ Petitions once again challenging the final assessment orders.

5. Orders passed by the learned Single Judge:

5.1. The impugned assessment orders have been passed on the ground that the sale of Concrete Sleepers having been made for Southern

Railways in other states and as per the clarifications issued by the Principal Secretary and Commissioner of Commercial Tax, Chepauk, Chennai,

the Assesses will have to pay tax at 12.5%, which is the tax payable at local VAT rates in the other states. Accordingly, the Assessing Officer

confirmed the proposals for the assessment for the period from 2007-2008 to 2010-2011.

5.2. The Assesses contended before the learned Single Judge that the principle of natural justice has been violated in as much as the request of the

Assesses for further hearing was not granted. As the earlier order of assessment was set aside, the Assessing Officer ought to have initiated fresh

proceedings instead of merely hearing the Assesses in person. The alternative remedy is not a bar and the Assesses has in fact charged only 4%

tax towards sale of Concrete Sleepers and therefore, it cannot be asked to pay more. It has been further stated that the objections were not

considered properly and no reasons have been assigned and the Assessing Officer has confirmed the proposals merely based upon certain

clarifications, which were not applicable to the case on hand.

5.3. The Writ Petitions have been dismissed by the learned Single Judge by holding that the earlier Writ Petitions have been allowed only on the ground of want of personal hearing and therefore, there is no necessity to redo the entire exercise. The Assesses having already submitted its

objections and it having been heard as per the orders of this Court, it cannot have any grievance. The learned Single Judge has further observed

that considering the fact that the assessment orders are appealable, the Writ Petitions will have to be dismissed. It is also seen from the orders of

the learned Single Judge, after the passing of the said orders a representation was made by theLearned Counsel appearing for the Assesses that as

the Assesses intents to prefer appeals before the appellate authority, original orders will have to be returned. Hence, considering the said

submissions, orders have been passed by the learned Single Judge directing the registry to return the original orders to the Assesses after

substituting the photo copies with the same. Challenging the orders passed by the learned Single Judge, the present Writ Appeals have been filed.

6. Submissions of the Assesses:

Shri. Venkatraman, learned Senior Counsel for the Assesses vehemently contended that the assessment orders are bereft of particulars and as

reasoning is the heart beat and soul of any order having civil consequences, the assessment orders are liable to be set aside. The Assesses was not

given a proper opportunity. The circulars made in the year 1981 and thereafter in the year 2002 have not been looked into by the Assessing

Officer. The circulars issued by the Commissioner are binding on the assessing Officer as a subordinate officer as held by this Court on various

occasions. The orders impugned are liable to be set aside for non-application of mind as the Assessing Officer has merely followed the audit

proposals. The learned Senior Counsel further submitted that until and unless the circulars governing the field are set aside, varied or modified they

are binding on the Assessing Officer. Merely because, there is alternative remedy, the same cannot be a bar for exercising the powers under

Article 226 of the Constitution of India. The orders passed by the Assessing Officer are one without jurisdiction as he has coupled two enactments

into one. Finally, the learned Senior Counsel submitted that the request was made by theLearned Counsel appearing for the Assesses before the

learned Single Judge only for the issuance of copies of the orders so as to file Writ Appeals and not for preferring appeals. The submissions made by theLearned Counsel were misconstrued by the learned Single Judge and there is no bar for deciding the appeals on merits. Therefore, it is

submitted that the Writ Appeals will have to be allowed.

7. In support of his contentions, the learned Senior Counsel has relied number of judgments and some of them referred to hereunder:

(i) Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad, .

(ii) Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, .

(iii)Commr. of Sales Tax U.P. v. Indra Industries 122 STC 100.

(iv) Tin Box Company Vs. Commissioner of Income Tax, .

(v) J.T. (India) Exports v. U.O.I. (Delhi)(F.B.) 257 ITR 269.

(vi) Cemento Corporation Ltd. Vs. Collector Central Excise, .

8. Submissions of the Respondent:

Per contra, the learned Additional Government Pleader appearing for the Respondent submitted that the Assesses has not raised the contentions in

the Writ Petitions, which are raised in these Writ Appeals. Therefore, it is not open to the Assesses to raise them at this stage. Another round of

Writ Petitions were also filed during the pendency of the assessment proceedings contending that before passing final orders of assessment, fresh

tax assessment notice will have to be given and the said contention was rejected by this Court. The judgments and circulars relied upon by the

Assesses are not applicable to the present case on hand as it involves inter-state sales and therefore, the Assessing Officer was justified in levying

the tax at 12.5%, which is local VAT rate of the State in which the purchaser is situated. Therefore, the learned Additional Government Pleader

submitted that the Writ Appeals will have to be dismissed.

9. Findings:

Even though we heard the persuasive arguments of the learned Senior Counsel for the Appellant, we are afraid we cannot go into the merits in the

appeals. Admittedly, the orders impugned are appealable orders and there is no proper explanation given as to why the factual aspects cannot be

decided by the appellate authority. We have also perused the grounds raised in the Writ Petitions and also in the Writ Appeals. As rightly

contended by the learned Additional Government Pleader, in a Writ Appeal filed against the order of the learned Single Judge, a party cannot be

permitted to raise new grounds. We are in respectful agreement with the reasoning of the learned Single Judge in holding that the Writ Petitions

filed by the Assesses were allowed earlier only with a view to give an opportunity of being heard in person. The Appellant was given an

opportunity in compliance of the directions of the Court. Therefore, the facts narrated above would clearly show that the only course open to the

Assesses is to file appeals against the orders of assessment. The Assessing Officer has given reasons in support of the assessment orders. It is one

thing to say that an order having civil consequences does not have any reasons and another thing to say the reasons are not proper. If it is a case of

the Appellant, the reasons are not proper, the only course open is to file appeals against the assessment orders. The assessment orders have been

passed taking note of the circulars issued by the Principal Secretary and Commissioner of Commercial Tax, Chepauk, Chennai. A specific finding

has been given by the Assessing Officer considering the fact that the sales are inter-state and hence, the Assesses is liable to pay tax at 12.5%,

which is the tax payable in that State. Another finding has been given as there are no specific entries for Concrete Sleepers and TANVAT Act,

2006, it falls under the residual item 80 of the first schedule. Whether the said reasoning of the Assigning Officer is correct or not can only be

adjudicated by the appellate authority.

10. Alternative remedy in fiscal matters: The power under Article 226 of the Constitution of India is both extra-ordinary and discretionary in

nature. When a statute specifically provides for an appeal by the legislature, then such a remedy cannot be bye-passed for a mere asking. this

Court cannot act as a substitute for an appellate authority constituted under the statute. Such a self-imposed restriction has to be followed more

particularly in a fiscal Statute. The appellate authority constituted is well versed in the field of taxation and therefore, this Court should desist itself

from exercising its power under Article 226 of the Constitution of India.

11. Considering the very same issue, it has been held in Raj Kumar Shivhare v. Assistant Director Directorate of Enforcement and Anr. 2010 4

L.W.1 in the following manner:

34. When a statutory forum is created by law for redresses of grievance and that

too in a fiscal statute, a writ petition should not be entertained

ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated

and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great

respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of

territorial jurisdiction.

35. No reason could be assigned by the Appellant''s counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA

does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

36. Reference may be made to the Constitution Bench decision of this Court rendered in Thansingh Nathmal and Others Vs. A. Mazid,

Superintendent of Taxes, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article

226, subject to self-imposed limitation, this Court went on to explain:

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 bypassed, and

will leave the party applying to it to seek resort to the machinerysosetup.

(Emphasis added)

37. The decision in Thansingh (supra) is still holding the field.

38. Again in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, in the background of taxation laws, a three-Judge Bench

of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honored self imposed limitations, focused on another

legal principle on right and remedies. In paragraph 11, at page 607 of the Report, this Court laid down:

It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by

that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Company v.

Hawkesford (1859) 6 C.B. (NS) 336 at page 356 in the following passage:

There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not

existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy

provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The

form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. (1919) AC 368 and has

been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Company (1935) AC 532 and AIR 1940

105 (Privy Council) . It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The

High Court was therefore justified in dismissing the writ petitions in liming.

39. In this case, liability of the Appellant is not created under any common law principle but, it is clearly a statutory liability and for which the

statutory remedy is an appeal u/s 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore

clearly not maintainable. Again another Constitution Bench of this Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and

Others, speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held:

So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is

obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under

Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their

jurisdiction consistent with the provisions of the enactment.

40. In the concluding portion of the judgment it was further held:

The power under Article 226 is conceived to serve the ends of law and not to transgress them."" (Para 108 (x), p.635).

41. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if the High Court had territorial

jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is

appealable before the High Court u/s 35 of FEMA.

Hence, for the reasons stated above and taking note of the legal principle enunciated by the Hon''ble Apex Court, we are of the considered view

that the orders passed by the learned Single Judge do not warrant interference.

12. Writ Court is a Court of Record:

During the course of the arguments, an additional ground was sought to be raised by the Appellant trying to explain the circumstances under which

a request was made by theLearned Counsel appearing for it before the learned Single Judge and it has been stated that the learned Single Judge

has misconstrued the representation made. TheLearned Counsel submitted that it was made only expressing the intention to file Writ Appeals and

not to file Appeals before the appellate authority. We are afraid we cannot accept the said contention raised by way of an additional ground at the

time of hearing the appeals. This ground has been raised only during the course of arguments when we expressed our inability to decide the

appeals on merit and hence, it is a mere after thought. Absolutely, no effort has been made to go before the learned Single Judge and get the order

reviewed. It is trite law that a statement of fact recorded by a Court in the presence of parties and counsels will have to be accepted as true.

Therefore, merely based upon an additional ground is raised at the time of hearing the appeal filed we cannot accept the contention that the request

made by theLearned Counsel for the Appellant was only for the purpose of getting orders to file Writ Appeals. In fact a perusal of the orders

passed by the learned Single Judge would clearly show that specific directions have been given for the return of the original orders impugned

passed by the Assessing Officer. Further, as discussed above, such a contention cannot be raised and decided before this Court as the Appellant

for the reason known to it has not chosen to file any review. In this connection we deem it proper to refer to the following passage of the decision of the Hon''ble Apex Court in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, :

4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for

the State of Maharashtra before the High Court and led the arguments for the Respondents there and who appeared for Shri Antulay before us

intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court.

We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial

decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena.

Judgments cannot be treated as mere counters in the game of litigation. (Per Lord Atkinson in Somasundaran v. Subramanian AIR 1926 PC 136.

We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of

the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was

done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what

transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by

affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party,

while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the

statement made with regard to his conduct was a statement that had been made in error (Per Lord Buck master in Madhusudan v. Chandrabati

AIR 1917 PC 30. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. of course a

party may resale and an appellate court may permit him in rare and appropriate cases to resale from a concession on the ground that the

concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the

concession as recorded in the judgment.

4-A. In R v. Mellor (1858) 7 Cox CC 454 Martin, B. was reported to have said:

We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the

same manner as on a record of Court which of itself implies an absolute verity.

5. In The King Emperor Vs. Barendra Kumar Ghose, Page, J. said:

... these proceedings emphasize the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the

course of a trial before him is final and decisive: It is not to be criticized or circumvented; much less is it to be exposed to animadversion.

6. In Sarat Chandra Maiti and Others Vs. Bibhabati Debi and Others, , Sir Asutosh Mookerjee explained what had to be done:

... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most

convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the

judgment.

7. So the Judge''s record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.

13. Therefore, we do not find any reason to interfere with the orders passed by the learned Single Judge. However, considering the fact that the

Appellant has been agitating its right by way of filing the Writ Petitions and Writ Appeals, we deem it fit in the interest of justice that the Appellant

will have to be given four weeks time from the date of receipt of a copy of this order to file appeals before the statutory authority. It is also to be

seen from the records that this Court in an by the order dated 10.03.2011 has directed the Appellant to deposit Rs. 50,00,000/- (Rupees Fifty

Lakhs only), which has been complied with. Since the said amount has been paid pending these Writ Appeals, the appellate authority is directed to

take note of the same at the time of entertaining of the appeals. It is also made clear that liberty is given to the Appellant to raise all the contentions

before the appellate authority and the appellate authority shall decide the appeals on their own merits without being influenced by any of the

observation made in the Writ Petitions or in the Writ Appeals.

14. With these observations, these Writ Appeals are dismissed. Consequently, connected M. Ps.(MD) No. 1, 1, 1 and 1 of 2011 are dismissed.

No costs.

