
(2013) 09 CAL CK 0121
In the Calcutta High Court
Case No : Writ Petition No. 24939 (w) of 2012

Reliance Infrastructure Ltd. and Another	APPELLANT
Vs	
Dy. Commissioner Sales Tax and Another	RESPONDENT

Date of Decision : 09-09-2013

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 15, 16, 226
West Bengal Value Added Tax Act, 2003 — Section 28, 46, 5(6), 6(2)

Citation : (2014) 1 CHN 211 : (2013) 200 ECR 297

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Biswajit Bhattacharjee, Mr. Sushil Verma, Mr. C. Bhattacharya and Mr. Partha Basu, for the Appellant; Abhratosh Majumdar and Mr. Soumitra Mukherjee, for the Respondent

Judgement

Harish Tandon, J.—The order passed u/s 46 of the West Bengal Value Added Tax Act, 2003 by the Deputy Commissioner, Sales Tax, Park street Charge, the respondent No. 1 herein is a subject matter of this writ petition. Although the relief claimed in the writ petition concerns the quashing and setting aside of the assessment order dated 16th August, 2012 passed by the respondent No. 1 but the petitioner restricts its challenge on the ground of non-affording the opportunity of hearing which could be culled out from the averments made in Paragraph 3 of the writ petition; excerpts of which is reproduced below:

3. The petitioners are, therefore, in the present Writ Petition, not raising any ground, submission or contention whatsoever with regard to the merits of the impugned order even though the Petitioner is in a position to demonstrate and establish, beyond a shadow of doubt, that the impugned assessment order made by the assessing officer is patently erroneous and contrary to law. The petitioners are, in the present writ petition, specifically confining himself only to the basic and fundamental jurisdictional issue whether the assessing officer could create such legally untenable demand without following even a semblance of due process of law and create tax liabilities when no such liability could be created

had he given a chance to the petitioner to make submissions in defence of the presumptions raised by the Respondent No. 1 to bring turnovers to tax that he could not in view of the settled law-more so the sale in the course of import and interstate sales effected by the petition as per law.

The facts leading to this Civil Writ Petitioner are as follows:

X) The petitioners are, therefore, through this Writ petition, challenging the order of assessing authority, predominantly on the ground that the Ld. Dy Commissioner framed the assessment in gross violation of principles of natural justice, when he failed to give any pre-assessment show cause notice to the petitioner showing the basis on which the turnovers mentioned therein were sought to be taxed and that, as a result, the petitioner has been denied an opportunity of effectively putting forward its defense. The petitioner says and submits that in the absence of such a show cause notice, the petitioner could neither submit an effective reply to the Assessing Authority nor place the documentary evidence necessary to establish that the said turnover was not liable to any tax under the provisions of West Bengal VAT Act. In short, the petitioner says and submits that the whole issue was pre-judged by the Ld. Dy. CST and the petitioner has been subjected to this illegal tax demand without being heard.

XI) The unilateral actions on the part of the assessing authority have caused tremendous prejudice to the Petitioner who has been dragged into this onerous litigation for no fault of his. The assessing officer grossly and flagrantly flouted the due process of law:

(a) By not giving effective opportunity of being heard to the petitioner.

(b) By not disclosing his basis that he intended to adopt to create such illegal demands against the petitioner i.e. his intention to treat the divisible contracts as turnkey or indivisible contract.

(c) By not informing the petitioner about the BOI Report dated 23.6.12 or by not letting the Petitioner inspect the same or by not giving a copy of the same and seeking defense of the Petitioner to the findings that are contained in the BOI Report.

(d) By not following the statutory procedure that require notice to be given to the petitioner as per provisions Section 46 and Rule 57 of WB VAT Act and Rules.

(e) By not confronting the petitioner about the two judgments that he heavily relied in the assessment order and which, it is respectfully submitted, are not

relevant as the factual and legal matrix in those judgments are totally at variance with the facts of the case.

2. The genesis of the said assessment order as deduced from the facts pleaded in the writ petition originates from the contracts awarded by the Damodar Valley Corporation for supply of plant and machinery from abroad, supply of equipments from various domestic sources by transferring the property by way of interstate sale and rendition of such certain services by way of installation, commission and testing of the plants and equipments at Raghunathpur within the State of West Bengal. Indisputably three contract agreements of the even date were entered into between the petitioner and the said Damodar Valley Corporation and the petitioner successfully performed its obligation under the aforesaid contracts. The Bureau of Investigation (hereinafter referred to as BOI) seized some of the books of the petitioner pertaining to the Financial year 2009-2010 and asked the petitioner to appear before the investigating officer. The petitioner submitted its written submission and took a defence that no work contract activity was undertaken within the State and pleads no liability to pay tax under the Vat Act. The petitioner further stated that the entire work was entrusted upon the sub-contractors and, therefore, there is no liability foisted upon the petitioner for payment of the tax under the Vat Act.

3. What emanates from the assessment order on its meaningful reading can be illustrated hereunder:

(i) The contracts are individual and inseparable as the intention of the parties were to set up a complete operative plant which not only requires the erection and construction of a buildings, plants and machineries but also the delivery and supply of accessories and articles both from abroad and from the territory of this country.

(ii) The supply of materials was an integral part of the work contract and, therefore, the supply of materials for civil work cannot be treated as a self-simpliciter.

(iii) There is no parity in purchase and sale price and the rate of profit is so high which distinctly indicates that the sales made u/s 6(2) of the said Act could never be of the same goods in very same form.

4. It does not emanate from the said assessment order that the notice u/s 46 of the Vat Act was served upon the petitioner which is one of the ground taken in the writ petition touching the plea of violation of principle of natural justice but there is a specific denial of the said fact in the affidavit-in-opposition by the respondents by asserting categorically that the show cause notice in Form 25 as prescribed under 46 of the Vat Act was issued and served upon the petitioner. It would be pertinent to record that the main thrust to the impugned assessment order on the ground of violation of principle of natural justice is the non-supply of the report prepared and submitted by the BOI which forms the basis of the said assessment order. The respondents in the opposition also did not dispute the

aforesaid fact and rather admitted that the said report of BOI was considered by the assessing authority. As indicated above, the challenge to the assessment order is basically founded on the non-supply of the report of the BOI which forms the very basis of the assessment order. The petitioner contends that the non-supply of the said report not only violates the principle of natural justice but have a serious impact of evil consequences thereby causing prejudice.

5. Although the learned Advocate for the petitioner addressed on the merit of the assessment order in contending that the respondent No. 1 could not have treated the three independent and separate contracts to be a composite one but I have already indicated hereinabove, the writ petition is restricted on the point that the order is an outcome of the violation of the principle of natural justice and, therefore, I do not delve to go into the nitty-gritty and/or sustainability of the assessment order on merit.

6. Mr. Bhattacharjee, the learned Advocate appearing for the petitioner submits that the order which is passed in gross violation of the principle of natural justice cannot be sustained as the said rule is end to secure justice or to prevent the miscarriage of justice and placed reliance upon a judgment of the Supreme Court in case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, He further submits that although the authority is competent to make an inquiry but if it does in flagrant violation and/or disregard of the rule of procedure, it is violative of the principle of natural justice and placed reliance upon a judgment of the Supreme Court in case of T.C. Basappa Vs. T. Nagappa and Another, State of U.P. Vs. Shatrughan Lal and Another, He audaciously submits that non-supply of the copy of the documents which is foundation of the decision violates the principles of natural justice and placed reliance upon a judgment of the Supreme Court in case of High Court of Punjab and Haryana Vs. Amrik Singh, On the plea of alternative remedy, Mr. Bhattacharjee submits that it is not an absolute rule of exclusion but the High Court in exercise of jurisdiction under Article 226 of the Constitution of India can entertain the writ petition for enforcement of fundamental rights or there is a violation of the principles of natural justice or the order is wholly without jurisdiction or the constitutionality of the Act is challenged and placed reliance upon a judgment of the Supreme Court in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

7. According to Mr. Bhattacharjee even prior to the judgment rendered in case of Whirlpool Corporation, the Apex Court in case of Rashid Ahmed Vs. The Municipal Board, Kairana, , K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., The State of Uttar Pradesh Vs. Mohammad Nooh, and the constitution bench of the Supreme Court in case of A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another, held that though the normal rule is that the existence of adequate alternative remedy may be one of the facet for invocation of the judicial review under Article 226 of the Constitution of India but the same does not operate as an absolute bar and the High Court can exercise the power of judicial review in an exceptional deserving

cases where the authority is acting without jurisdiction or in flagrant violation of the principles of natural justice.

8. Mr. Majumdar, the learned Advocate appearing for the respondents, however, submits that although the BOI report was considered by the assessing authority but the non-supply thereof could not be said to be in gross violation of the principles of natural justice. Mr. Majumdar also address the Court on the merit of the said order but as have been indicated above, the writ petition is restricted on the plea of violation of principles of natural justice and, therefore, I am not adverting to the submissions made in this regard. He further submits that the written submission was filed by the petitioner before the assessing authority which was taken note of, as could be reflected from the assessment order, and, therefore, it cannot be said that the said order is an outcome of violation of principles of natural justice. Factually he maintained his stand that the notice u/s 46 of the Vat Act was served on the petitioner and the contention of the petitioner that it was not issued is in correct. Maintaining the aforesaid submissions, Mr. Majumdar alternatively contends that even if, there is an infraction of the principles of natural justice, the remedy of the petitioner is before the Tribunal constituted under Article 323B of the Constitution of India and not before the single bench of the High Court and placed reliance upon a judgment of the constitutional bench rendered in case of L. Chandra Kumar Vs. Union of India and others, . He further submits that the petitioner cannot jump the competent forum in directly approaching the single bench of the High Court when there is already other remedy provided.

9. Having considered the respective submissions, the point evolved from the respective submissions is whether the writ petition could be maintained, even if, it is found that there has been a violation of the principles of natural justice before approaching the tribunal constituted under Article 323B of the Constitution of India.

10. The contracts awarded to the petitioner are the composite one and be treated as a single contract or distinct and separate is a matter relates to the merit of the assessment order. Whether the contracts are so intertwined to make it composite and single contract or can be segregated and/or separated to make it a distinct and independent contracts requires a details scrutiny affecting the merit of the assessment order. The petitioner has not assailed the order on merit being conscious of the proposition of law that there is efficacious alternative remedy for the same. The shelter is taken to invoke the jurisdiction of this Court by passing the form of tribunal is on the ground of violation of principles of natural justice as alternative remedy, even if available, is not an absolute bar.

11. The Apex Court in case of Rasid Ahmed and K.S. Rashid and Son; Case held that the existence of an adequate legal remedy is one of the factor to be taken into account while entertaining the writ petition under Article 226 of the Constitution of India but the same is not free from an exception. In case of Md. Nooh (supra), the Apex Court held that the exhaustion of alternative remedy is

one of the facet of rule of policy convenience and discretion but the High Court can issue the writ of certiorari in a deserving and appropriate case. Two exceptions were laid down by the Apex Court in case of A.V. Venkateswaran (supra) to invoke the jurisdiction of High Court under Article 226 of the Constitution where the existence of alternative remedy is not exhaustive and not an inflexible rule; the High Court certainly have the discretion to entertain in an appropriate case despite existence of alternative remedy.

12. Most illustrative decision in the above perspective rendered by the Supreme Court is in case of Whirlpool Corporation (supra) in the following:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

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.

13. The principles laid down in the Whirlpool Corporation (supra) are consistently followed in umpteen number of judgments, some of which can be referred as follows:

(1 Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumanon Division, Nainital, U.P. and Others,

(2) Fiayez Ali v. Secretray Law reported in 2011 (1) CLT 137 (HC)

(3) Canara Bank Vs. V.K. Awasthy,

(4) State of U.P. and Others Vs. Saroj Kumar Sinha,

(5) The Government of Andhra Pradesh and Others Vs. A. Venkata Rayudu,

14. There is no quarrel to the proposition as laid down in the above noted decisions that the alternative remedy is not an absolute bar though may be one of the grounds for which the High Court can refuse to exercise the discretion. The

power of judicial review can be exercised if there is a flagrant violation of the principles of natural justice or non-adherence of the prescribed and recognized procedures or without jurisdiction or contrary to law.

15. The matter could have been rested and the power of judicial review could have been invoked by this Court if the judgment of the constitutional bench rendered in case of *L. Chandra Kumar* is unnoticed. In *L. Chandra Kumar* (supra), the constitutional bench was considering the following broad issues:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323-A or by sub-clause (d) of clause (3) of Article 323-B of the Constitution, to totally exclude the jurisdiction of "all courts", except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323-A or with regard to all or any of the matters specified in clause (2) of Article 323-B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/ 227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

16. While considering the power of judicial review vested in the High Courts and Supreme Court under Article 226 and 32 of the Constitution of India respectively, the Apex Court held that those are the integral part of the basic structure of the constitution in the following words:

78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior Courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts

have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

17. The Apex Court was also considering the constitutional validity of the exclusion provisions contained in the various administrative Acts enacted under the aegis of the Article 323A and 323B of the Constitution of India and held the same to be unconstitutional. The bench found that the jurisdiction conferred upon the High Courts under Article 226 and 227 of the Constitution and upon the Supreme Court under Article 32 of the Constitution is a part of inviolable basic structure of the constitution and the tribunal performs the supplemental role in discharging their performs in these words:

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/ 227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/ 227 of the Constitution

before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/ 227 of the Constitution., it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

18. In paragraph 93 of the said judgment, the Supreme Court held that the tribunal should act as a Court of first instance and the decision rendered by it is amenable to be tested by the Division Bench of the respective High Courts in these words:

93. Before moving on to other aspects, we may summarize our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

19. The Tribunal, therefore, are vested to consider the matter to test the constitutional validity of the statutory provisions and the rules subject, however, to a further scrutiny before the Division Bench of the High Court and it is relevant to quote Paragraph 99 of the said judgment which is reproduced below:

99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/ 227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis

of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/ 227 and upon the Supreme court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/ 227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the Constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

20. The West Bengal Taxation Tribunal is constituted in pursuance of Article 323B of the Constitution of India upon enacting the West Bengal Taxation Tribunal Act, 1987. Section 5 of the said Tribunal Act bestowed the Taxation Tribunal to exercise jurisdiction, powers and authority in relation to all matters of adjudication or concerning of any disputes, complaints or offences with respect to levy assessment and collection or enforcement of any tax under any specified State Act and all matters connected therewith or incidental thereto.

21. Though Section 5 and 6 of the Taxation Tribunal Act excludes the jurisdiction of the High Court but the Apex Court in case of *L. Chandra Kumar* (supra) have declared the said exclusion clause to be unconstitutional and retained the power of the High Court under Article 226/ 227 of the Constitution of India but to be exercised by the Division Bench of the respective High Courts.

22. The schedule appended to the Taxation Tribunal Act includes the West Bengal Value Added Tax Act, 2003 to come within the ambit of the specified State Act and, therefore, any matter touching Section 5 and 6 of the Tribunal Taxation Act can be assailed before the Tribunal on all point including the point relating to violation of principles of natural justice. The single bench of the High Court, therefore, does not retain the jurisdiction to entertain the writ petition which is the exclusive domain of the Taxation Tribunal but the Division Bench of the High Court can certainly entertain the writ petition after exhausting the remedy available to be aggrieved person after approaching the tribunal.

23. This writ petition is, therefore, not maintainable. The same is hereby dismissed.

24. It is once again made clear that this Court has neither gone into the merit of the assessment order nor this order should be construed to have made on the

point of violation of principles of natural justice but should be restricted to the maintainability because of the law enunciated by the Apex Court in case of L. Chandra Kumar (supra).

25. However, there shall be no order as to costs. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.