(2015) 02 MAD CK 0128

In the Madras High Court

Case No : Writ Petition (MD) No. 1409 of 2015 and M.P. (MD) No. 1 of 2015

Sesa Sterlite Ltd. APPELLANT

Vs

The Union of India and Others RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 02 MAD CK 0128

Hon'ble Judges : K. Ravichandra Babu, J.

Bench : Single Bench

Advocate : R. Gandhi, Senior Counsel for Y. Prakash, for the Appellant; R. Aravindan, Advocates for the Respondent

Judgement

K. Ravichandra Babu, J.—This writ petition is filed challenging the order in Original No. 03/CE/COMMR/2014 dated 21.11.2014 passed by the third respondent herein.

2. Heard Mr.R.Gandhi, learned Senior Counsel appearing for Mr.Y.Prakash, learned Counsel for the petitioner and Mr.R.Aravindan, learned Standing Counsel for the respondents and perused the materials placed before this Court.

3. Admittedly, as against the order of adjudication passed by the third respondent, an statutory remedy of filing the appeal is available to the petitioner before the Customs and Central Excise Appellate Tribunal, Southern Bench, Chennai-6.

4. The learned Senior Counsel appearing for the petitioner, however, submitted that the writ petition is maintainable since the order impugned in this writ petition is passed without any jurisdiction. He further submitted that the authorities having jurisdiction over the unit availing credit can not question the correctness of the duty payment made by the supplier of the said goods and that recipient unit is entitled to avail CENVAT credit. Thus, according to the learned Senior Counsel, the third respondent has passed the impugned order without

considering the above aspect and therefore the same is passed without jurisdiction.

5. It is further contended by the petitioner that the impugned order also violates principles of natural justice.

6. I am unable to accept the above contentions of the petitioner for the simple reason that it is an admitted fact that the disputed transactions have been taken place within the jurisdiction of the authority who passed the impugned order. If that being the factual position, it cannot be contended that the authority who passed the impugned order does not have jurisdiction. Further, it is seen that before passing the impugned order, the petitioner was issued with a show cause notice and they also filed their reply to the same. Thereafter, personal hearing was also given to the petitioner which was attended through their Counsel. Therefore, it is clear that there is no violation of principles of natural justice as contended by the petitioner.

7. Whether the petitioner is entitled to avail MODVAT/CENVAT credit on the duty paid and not payable, is the mixed question of law and fact that has to be considered and decided only by the appellate Tribunal and not by this Court by exercising the jurisdiction under Article 226 of the Constitution of India. Further under the statute, as against the order passed by the Tribunal, an appellate remedy is available before the Division Bench of the High Court, that too by raising questions of law. Therefore, the petitioner cannot short circuit the procedure and straightaway file this writ petition.

8. The learned Senior Counsel appearing for the petitioner relied upon the decision of the Honourable Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , to contend that the jurisdiction of this Court under Article 226 of the Constitution of India, is not ousted when the authorities had passed the order without jurisdiction. There is no quarrel about the said preposition. But, in this case it can not be said that the authority has passed the order without jurisdiction. Further it is to be noted at this juncture, that the petitioner on receipt of show cause notice, filed their reply to the show cause notice; participated in the adjudication proceedings and finally suffered with the order passed on merits. Therefore, the petitioner cannot now contended that the third respondent is not having jurisdiction. Moreover, it is well settled that in cases involving fiscal nature, availing of statutory appellate remedy has to be first exhausted and the party cannot come directly to this Court and file a petition under Article 226 of the Constitution of India. At this juncture, it is useful to refer to the following decisions:-

1) Nivaram Pharma Pvt. Ltd. Vs. The customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, The Commissioner of Central Excise (Appeals) and The Assistant Commissioner of Central Excise, Madras IV Division,

2) United Bank of India Vs. Satyawati Tondon and Others,

3) Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, .

4) M/s. Metal Weld Electrodes and Metro Trading Company (Electrodes) P. Ltd. Vs. The Customs, Excise and Service Tax and The Commissioner of Central Excise, .

9. It is held in those decisions that when an alternative remedy is available, more particularly, in the cases of fiscal nature, invoking of the jurisdiction under Article 226 of the Constitution of India, is not permissible. In fact this Court on 03.02.2015 after referring to the above decisions has dismissed a writ petition in W.P(MD)No. 19328 of 2014 on the very same ground.

10. Accordingly, I find that the writ petition is not maintainable and consequently, the same is dismissed with liberty to the petitioner to file an appeal before the appellate Tribunal. Consequently, the connected Miscellaneous petition is also dismissed. No costs.

