
(2013) 05 AHC CK 0405
In the Allahabad High Court
Case No : Writ Tax No. 530 of 2013

Shree Cement Ltd.

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 24-05-2013

Acts Referred:

Citation : (2014) 70 VST 433

Hon'ble Judges : Prakash Krishna, J; Manoj Kumar Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—By means of the present petition, the petitioner has challenged the assessment order framed by the assessing authority under the provisions of the U.P. Trade Tax Act as being barred by time. The petitioner, a public limited company, has its factories at various places and is engaged in the manufacture of cement. It has regional office in the State of U.P. at Ghaziabad. The State of U.P. enacted a legislation known as the U.P. Tax on Entry of Goods Act, 2000 levying tax on entry of goods into the local area from outside the local area. The petitioner had filed a writ petition challenging the constitutional validity of the said legislation.

2. A Division Bench of this court in *Indian Oil Corporation v. State of U.P.* [2012] 48 NTN 1 has upheld the constitutional validity of the said legislation. Suffice it to say that the present petitioner had also filed a Writ Petition No. 154 of 2007 which was dismissed on 23rd of December, 2011. Thereafter, an application to recall the said order and to restore the writ petition was filed which was dismissed on 6th of April, 2012. It may also be placed on record that admittedly, the petitioner had obtained a stay order in the aforesaid Writ Petition No. 154 of 2007. After the dismissal of the restoration application, notice for assessment was given. In reply thereof, besides the other things, the petitioner raised a point of limitation on the ground that the assessment proceedings are barred in view of section 21(6) of the U.P. Trade Tax Act. The petitioner did file another Writ

Petition No. 443 of 2013 before this court seeking a direction directing the assessing officer to decide the question of limitation first. But it could not get the desired relief and the petition was disposed of with the observations that all the questions shall be decided simultaneously while framing the assessment order. Now, the impugned assessment order has been passed. Hence the present writ petition challenging the assessment order as barred by time has been filed.

3. Heard Sri Bharat Ji Agrawal, learned senior counsel along with Sri Shubham Agrawal, for the petitioner and Sri C.B. Tripathi, learned special counsel for the respondents.

4. At the very outset a preliminary question with regard to the maintainability of the present writ petition in view of availability of the alternative statutory remedy by way of appeal was put forward.

5. The learned senior counsel for the petitioner submitted that on the facts of the present case, the alternative remedy by way of statutory appeal will not bar the present writ petition as the impugned order is totally without jurisdiction and at least it is erroneous.

6. Considered the respective submissions of the learned counsel for the parties and perused the record.

7. The court was taken through the relevant portions of the assessment order to show that the question of limitation has been wrongly decided by the assessing authority. The submission is that the assessing authority has wrongly assumed that the period of limitation will commence from the date of rejection of the restoration application. Elaborating the argument, it was submitted that after dismissal of the Writ Petition No. 154 of 2007, no interim order was operative. The period of limitation will commence from the date of communication of the dismissal order dismissing the writ petition to the authority concerned.

8. On the question of alternative remedy, the learned senior counsel, submitted that in view of the decision relied upon by him, the petition is not liable to be thrown on the ground of alternative remedy.

9. A bare perusal of the assessment order would show that undoubtedly, it finds mention therein that in the present case, the period of limitation would commence from the date of rejection of the restoration application. But that is not the end of the matter. It is not in dispute that section 21(6) of the U.P. Trade Tax Act would govern the period of limitation. It provides that the period of limitation in a case where stay order was granted by a court or authority will commence from the date when the order vacating the stay order is communicated to the authority concerned. It is very important to note that in the present case, there is no such finding as to when the information with regard to the dismissal of the Writ Petition No. 154 of 2007 was received by the assessing authority. The assessment order is completely silent on this point. However, the learned senior counsel for the petitioner submitted that the assessing authority

had knowledge of the dismissal of the writ petition, an inference should be drawn from its various overt acts, such as encashment of the bank guarantee which was furnished in pursuance of the interim order, etc. Reference was also made to some other documents to buttress the above argument. However, in reply, the attention of the court was drawn towards the paragraph 54 of the writ petition and it was contended that a departmental circular was issued informing the authorities that a large number of writ petitions challenging the validity of entry tax have been dismissed, directing them to invoke the bank guarantees. In other words, the learned standing counsel submitted that the mere fact that the bank guarantee was encashed by the assessing authority is not an indicative of the fact as to when the judgment of the writ court was served on him. For the sake of convenience, section 21(6) is reproduced below:

21. (6) Where the proceedings for assessment or reassessment for any assessment year remain stayed under the orders of any court or authority, the period commencing on the date of stay order and ending with the date of receipt by the assessing authority concerned of the order vacating the stay, shall be excluded in computing the period of limitation provided in this section:

Provided that if in so computing, the period of limitation comes to less than six months, such assessment or reassessment may be made within six months from the date of receipt by the assessing authority of the order vacating the stay.

10. On a careful consideration of the matter, we find that the statutory requirement is the date of receipt of the order by the assessing authority concerned and not mere knowledge of the order. The leaned counsel for the petitioner could not refer any iota of evidence to show on what date the judgment of writ court was received by the assessing authority. He wants this court to draw inference about the date of the service of judgment which is not possible. What we mean to say is that complicated and disputed question of fact with regard to the date of communication of the judgment of writ court is involved. This can more properly be examined and addressed by the authority having the complete record including the assessment file and the receipt register, etc. In the case of *United Bank of India Vs. Satyawati Tondon and Others*, , the apex court has laid down that before exercise of jurisdiction under article 226 of the Constitution of India, the court should have recorded as to whether adjudication of writ petition involves any complicated and disputed question of fact and whether they can satisfactorily be resolved. On the facts of the present case, we are not in a position to arrive at a definite conclusion or finding in terms of section 21(6) of the U.P. Trade Tax Act to uphold the submission of learned counsel for the petitioner.

11. The learned counsel for the petitioner has placed reliance on *State of Punjab and Others Vs. Bhatinda District Coop. Milk P. Union Ltd.*, in particular. The opening paragraphs of the said judgment would show that the question posed therein was--what should be the reasonable period for opening an order of assessment under the Punjab General Sales Tax Act, was the question involved

therein. There the impugned notice was issued after lapse of one and half years without assigning any reason. In that connection, it was observed that the question of limitation being jurisdictional question, the writ petition was maintainable. Paragraphs 23 and 24 relied by the petitioner are reproduced below (paras. 24 and 25, page 187 in 10 VST):

23. Question of limitation being a jurisdictional question, the writ petition was maintainable.

24. We are, however, not oblivious of the fact that ordinarily the writ court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The revisional authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the reasonable period for exercising the revisional jurisdiction in terms of section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment.

12. Then, reliance was placed on ITW Signode India Ltd. Vs. Collector of Central Excise, , which is reproduced below:

The question of limitation involves a question of jurisdiction. The findings of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, willful mis-statement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of rule 10 could have been issued.

13. The above quoted paragraph is not applicable to the issue on hand, viz., the maintainability of the writ petition in the face of availability of alternative remedy by way of appeal. Moreover, the assessing officer has determined the said question of limitation, may be, rightly or wrongly.

14. In the case of State of Jharkhand and Others Vs. Voltas Ltd., East Singhbhum, , the question of limitation was decided by the Supreme Court on the facts of that case and is not of much assistance to the petitioner.

15. The apex court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , has laid down certain exceptions for exercise of writ jurisdiction on the face of availability of alternative remedy. They are--(1) When the order passed by the authority is without jurisdiction; (2) When the impugned order has been passed in violation of principles of natural justice; and (3) When

the vires of the statute is under challenge.

16. None of the exceptions in the present case are present. The apex court time and again has held that in fiscal matters writ court should not exercise its jurisdiction when it has been invoked specially against the assessment order and the assessment order is appealable.

17. Reference can be made to a decision of the apex court in the case of United Bank of India Vs. Satyawati Tondon and Others, , the relevant paragraphs are reproduced below (paras. 27, 28, pages 268 and 269 in 158 Comp. Cas.):

20. In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , a three-Judge Bench considered the question whether a petition under article 226 of the Constitution should be entertained in a matter involving challenge to the order of the assessment passed by the competent authority under the Central Sales Tax Act, 1956 and corresponding law enacted by the State Legislature and answered the same in negative by making the following observations (page in 142 ITR 671):

Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court u/s 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under article 226 of the Constitution. 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 Co. v. Hawkesford* [1859] 6 CB (NS) 336 at page 356, in the following passage:

There are three classes of cases in which a liability may be established founded upon 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 Newspaper Ltd.* [1919] AC 368 (HL) and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* [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 limine.

21. The views expressed in *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, were echoed in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, in the following words (page 149 in 58 Comp. Cas.):

Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations as, for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to article 226 of the Constitution. But then the court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

18. Having regard to what has been said above, in view of the fact that the disputed questions of fact are involved and statutory forum by way of appeal is available to the petitioner, we decline to interfere in the present writ petition. Reference can be made to the following cases:

- (1) *Gopinath Anandghan, Meerut v. Sales Tax Officer* [1997] UPTC 494;
- (2) *Bashir Ahmad Misbaul Haq v. State of U.P.* [1992] UPTC 418;
- (3) *State of Jharkhand and Others Vs. Voltas Ltd., East Singhbhum, ;*
- (4) *DSR Steel (P) Ltd. Vs. State of Rajasthan and Others, ; and*
- (5) *Gopal Traders Vs. State of U.P. through its Prin. Secy. Tax and Registration, .*

19. The question of limitation in a given case may arise under different circumstances. In a particular case, the facts may not be disputed and the applicability of the relevant article or provision with regard to the limitation may be involved. But when the question of limitation is dependent upon the adjudication of certain facts, then, it cannot be said that it is related to the jurisdiction of the authority or is a jurisdictional issue, as in the present case. The factual aspect of the case should be decided by the statutory forum first, in such matters. In view of the above, the writ petition is dismissed on the ground of availability of alternative remedy of appeal.