
(1960) 11 KL CK 0042
In the High Court Of Kerala
Case No : O. P. No. 719 of 1960

Tayabally	Vs	APPELLANT
Sales Tax Officer, Kozhikode and Another		RESPONDENT

Date of Decision : 04-11-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1961) KLJ 300

Hon'ble Judges : M.A. Ansari, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer, for the Appellant;

Final Decision : Dismissed

Judgement

M. Madhavan Nair, J.—This is a petition to transfer Ext. A order of the 1st respondent, the Sales Tax Officer, Special Circle, Kozhikode, to this Court to be quashed by a writ of certiorari and for the issuance of a writ of prohibition restraining the 1st respondent from collecting the tax as per the impugned order. It is stated in paragraph 11 of the affidavit filed in support of the petition:

I have filed an appeal on 1-6-1960 against the assessment order before the Appellate Assistant Commissioner and also applied for stay of enforcement of the demand pending decision in the said appeal: but the Appellate Assistant Commissioner has not yet passed order on my application.

The appellate Assistant Commissioner referred to therein is not made a party to this petition.

The question now is whether a party who has preferred an appeal from the impugned order can be allowed to move the High Court to quash the order under Article 226 of the Constitution.

2. We have held in Kunjahammad Haji Petitioner Vs. State of Kerala and Others, :
But the party complaining must not invoke the extraordinary jurisdiction of this

Court, and at the same time exercise his statutory right of appeal; for, where such a right of appeal has been availed of, the appellate authority becomes vested with the legal jurisdiction of adjudicating on the complaint, and the authority should not, by our issuing certiorari, be divested of its jurisdiction of adjudication on the order, which becomes the subject-matter of appeal before it ... Our jurisdiction under Article 226 is not concurrent and the petitioners having appealed, must not get the benefit of the Article until the final stages of the relief under the Act are reached.

3. When the petitioner has instituted the appeal before the Appellate Assistant Commissioner, the latter became seized of the matter. Admittedly he is the statutory appellate authority entitled, and bound to exercise appellate powers on the impugned order. Under the Statute the High Court is vested with a revisional jurisdiction over any order of the Appellate Tribunal which is the Second Appellate Authority in cases of assessments by a Sales Tax Officer; and such revisional jurisdiction extends to any question of law arising in the case. The direct approach to the High Court by the party as soon as the assessment was made by the Sales Tax Officer is therefore a short cut in the process. Nonetheless the High Court will entertain a petition under Article 226 of the Constitution to quash the assessment in cases when it is convinced of a grave miscarriage of justice in the order impugned. But, the extraordinary jurisdiction of this Court should not be brought in conflict with the statutory jurisdiction of any authority over the matter concerned. The extraordinary jurisdiction of the High Court has always to be kept as a high prerogative above the jurisdiction of all the other authorities on the matter. It follows therefore that when the matter has been seized by a statutory authority in appeal at the instance of the aggrieved party, the extraordinary jurisdiction of this Court cannot be invoked by him as a concurrent remedy for the same relief's that he has sought in the appeal before the aforesaid authority.

4. The Learned Counsel for the petitioner argued vehemently that the ruling in *Kunhammed Haji v. State of Kerala* is not applicable to the facts of this case since the invocation of the jurisdiction under Article 226 was made there on ground of violation of natural justice whereas the complaint in the instant case is one of infringement of the fundamental right to carry on a profession. This distinction has no substance. It is the fact of invocation of the appellate powers of the Appellate Assistant Commissioner that disentitles the petitioner from invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution as a proceeding concurrent with that appeal. In that regard, the exact ground urged for moving the extraordinary jurisdiction of this Court has no relevance. If the petitioner has not preferred the regular appeal against the assessment order, this Court could have considered the challenge of his fundamental right complained of by him in this petition. But the principle that once he has canvassed the correctness of the order before another authority who has jurisdiction in the matter the High Court will not exercise its discretion under Article 226 of the Constitution has nothing to do with the merits of the

application before the High Court.

5. The Learned Counsel for the petitioner has invited our attention to the ruling in *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, to the effect that the Sales tax Appellate Authorities not being competent to stay the collection of the tax under the illegal assessment made by the taxing officer, an appeal will not be an adequate alternative remedy in the case and therefore this Court must entertain the petition and grant the relief prayed for. The case before the Supreme Court was not one in which the appellate power of the authority provided by the Sales Tax had been invoked by the applicant for the writ. Existence of an alternative remedy is different from the invocation of an alternative remedy. What we have in this case is the fact of invocation of the statutory remedy provided for him, as also the fact that that proceeding is still pending decision by the authority concerned, In the circumstances the dictum in *Himmatlal Harilal Mehta v. State of Madhya Pradesh* does not apply to the instant case.

6. On the processual aspect also there is an obstacle for the consideration of this petition on its merits. The prayer in a petition for certiorari is to call up the impugned order to the Superior Court to see why it should not be quashed on the grounds complained of by the petitioner. Now that an appeal has been instituted by the petitioner before the appellate authority under the statute, that authority is seized of the order impugned, and admittedly it has the jurisdiction to seize the order to exercise its powers thereon. It is not for this Court to deprive that authority of its powers under the statute. Further, the appellate authority not having been made a party to this petition, this Court should not call up the records of its file to be transferred to this Court for purposes of Article 226 of the Constitution.

7. The second respondent in this petition is the State of Kerala. No ground has been made out before us for impleading the State in this case. In the result, the petition fails in limine, and it is dismissed with costs.