
(2005) 05 GAU CK 0066
In the Gauhati High Court
Case No : C.R. No. 427 of 1995

Uma Bricks industries and Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 25-05-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 9(3)
Constitution of India, 1950 — Article 226, 227
Tripura Sales Tax Act, 1976 — Section 11, 12, 13, 14, 19(1)

Citation : (2006) 3 GLT 504

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee and P.K. Ghos, for the Appellant; U.B. Saha and A. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.—In this petition, a prayer has been made for quashing/cancelling the demand notice dated 2.8.1995 consequent upon the assessment order issued by Sales Tax Organisation Govt. of Tripura (Annexure-13 to the writ petition).

2. I have heard Mr. P.K. Ghosh, the learned Counsel for the Petitioner and Mr. U.B. Saha, the learned senior Govt. Advocate, assisted by Mr. A. Ghosh, the learned Counsel for the Respondents.

3. The sole question for consideration is whether High Court could invoke its discretionary jurisdiction under Article 226 of Constitution to upset the assessment order where the dealer has challenged same facts on quantum, mode and modalities of assessment when specific provisions of statutory alternative including the remedy of revision are available in the "Act"?

4. It appears that the Petitioner was a registered dealer doing business of brick manufacturing and was filing sales tax return under the Tripura Sales Tax Act, 1976 (hereinafter referred to "the Act" for short). Notice for the purpose of

assessment for the year 1991-92 was issued to the Petitioner on 26.9.1992 fixing the date on 19.11.1992 followed by subsequent several dates for assessment but when on the dates fixed, the Petitioner did not appear, therefore, a best judgment assessment was passed by the Assessing Authority and demand notice dated 2.8.1995 issued along with the best judgment assessment has been challenged in this writ petition contending, inter alia, that the facts, quantum, material evidences indicated in the Petitioner's return were not properly appreciated and the best judgment assessment order was not passed without intimation to the Petitioner.

5. Section 6 of the "Act" deals with registration, Section 7 deals with certificate of registration, Section 8 deals with submission of returns, Section 9 deals with the assessment by the Assessing Authority, Section 11 deals with assessment in case of evasion and escape, Section 12 deals with rectification of orders, Section 13 deals with penalty for concealment of turnover and evasion of tax, Section 14 deals with assessment not to bar prosecutions or penalties, Section 20 deals with the provision of appeal, Section 21 deals with revision by Commissioner, Section 22 deals with appeal by the Tribunal and Section 23 deals with notice of demand.

6. According to the learned Counsel for the Respondents in reference to Section 20 of the "Act" any dealer may prefer an appeal where the Appellate Authority in exercise of its power u/s 20(4)(a) may confirm, reduce, enhance or annul the assessment order and u/s 20(4)(b) of "Act" the Appellate Authority may even set aside the assessment order and relegate for a fresh assessment after making inquiry and u/s 20(4)(c) may confirm reduce or annul the order of penalty, however, such appeal could be preferred by the dealer against the order of assessment or penalty passed under the "Act", within thirty days from the date of service of such order, subject to the conditions prescribed in Section 20 of the "Act". Being aggrieved against the order of the Appellate Authority, the Commissioner suo moto may consider a revision u/s 21(1) of the "Act" or at the instance of the aggrieved party may entertain the revision u/s 21(2) subject to the conditions prescribed in Section 21 of the "Act". The specific provisions have also been provided for appeal before the "Tribunal" u/s 22 of the "Act" against order of Appellate authority passed in Section 20 or against the revisional order of Commissioner passed in Section 21(2) of "Act". In case of non-compliance or acting in derogations to different provisions of Act" Section 29 deals with the offences and penalties, therefore, in order to carry out the provisions of the "Act", the State Government in exercise of power conferred u/s 44 of the Act has framed "The Tripura Sales Tax Rules, 1976".

7. According to the learned Counsel for the Respondents the controversy as involved in the present case had already been set at rest in *Fatik Cherra Tea Estate v. State of Tripura and Ors.*, 1996 (3) GLT 661, where this High Court has held that Section 20(1) and 21(2) are still valid and the same have statutory force of law. The High Court should not entertain any writ petition against the assessment order as specific provision of appeal against the assessment order

under the "Act" is available.

8. In *Joharmal Murlidhar and Co. Vs. Agricultural Income Tax Officer, Assam and Others*, , the remedy against the best judgment assessment order in question without preferring appeal as provided in the "Act" challenged by dealer in the writ Petitioner before the High Court was denied by the High Court on the ground of alternative remedy and the Supreme Court has observed that the High Court was justified in refusing to grant any relief in writ jurisdiction as the remedy of appeal was provided in particular "Act".

9. It is necessary to refer paragraph 13 at page 666 & paragraph 15 at page 667 of *M/S. Fatik Cherra Tea Estate* (supra):

13. On the other hand in support of his arguments Shri U.B. Saha, learned Counsel for the Respondents also relied upon a decision of the Apex Court rendered in a case between *Commissioner of Sales Tax, Madhya Pradesh v. H.M. Esuf Ali, H.M. Abdul Ali* reported in XXXII Sales Tax Cases page 77 wherein the Apex Court held thus:

Prima facie, the assessing authority is the best judge of the situation. It is his "best judgment" and not of any one else. The High Court could not substitute its "best judgment" that of the assessing authority. In the case of "best judgment" assessments, the Courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable.

In the said case viz. between *Commissioner of Sales Tax, Madhya Pradesh v. H.M. Eusuf Ali, H.M. Abdul Ali* (supra), a reference was made by the Board of Revenue, Guwalior, partly at the instance of the assessee and partly at the instance of the Commissioner of Sales Tax Madhya Pradesh, Four questions of law were referred to the High Court for its decision. They are:

(1) Whether on the facts and circumstances of the case, the revised assessment enhancing the taxable turnover under the State law by Rs. 2,50,000 and the taxable turnover under the Central law by Rs. 1,00,000 on the basis of the undisputed escape in the amount of Rs. 31,171.28 by adopting the said amount of escape turnover as the measure for determining the quantum of enhancement for the whole year was illegal, unjustified or excessive?

(2) Whether a best judgment assessment could at all be made u/s 19 (1) of the Act or whether revision of the assessment should be confined to the quantum of proved or admitted escaped turnover?

(3) If the answer to the previous question is that the revision in the assessment should be confined only to the quantum of proved or admitted escaped turnover, was the penalty of Rs, 2,000 imposed on the footing of the revision of the assessment for the whole year legal and justified? And

(4) Whether on the facts and circumstances of the case, the imposition of a penalty u/s 19 (1) of the Madhya Pradesh General Sales Tax Act, 1958, read with

Section 9(3) of the Central Sales Tax Act was not legal?

The first three questions were referred to the High Court at instance of the assessee and the last one was referred at the instance of the Commissioner.

The High Court answered the 1st and 3rd questions in favour of the assessee and the second and the fourth questions in favour of the department.

15. According to Shri U.B. Saha, learned Counsel for the Respondents the second proviso to Sub-section (1) of Section 20 as well as the proviso to Sub-section (2) of Section 21 of the Tripura Sales Tax Act, 1976 is still valid and the same has statutory force of law in view of the stay order by the Apex Court as discussed above. I am in full agreement with this contention of Shri U.B. Saha. Another contention has been made by Shri U.B. Saha, learned Counsel for the Respondents that relying upon a Madras High Court decision in a case between State of Tamil Nadu v. E.P. Nawab Marakkadai, reported in 100 Sales Tax Cases page 1 in which the Madras High Court upheld the statutory provisions of law u/s 31 of the Tamil Nadu General Sales Tax Act, 1959 by which particularly the second proviso to Section 31 of the Act places an embargo on the appeal being entertained unless it is accompanied by satisfactory proof of the payment of the tax admitted by the Appellant; if there is no payment of the admitted tax within the period allowed for filing the appeal or within the extended period as specified in the Act for condonation of delay in preferring an appeal, no appeal can be said to have been filed. In other words, the prerequisite deposits are required before admitting an appeal under the said Tamil Nadu General Sales Tax Act, 1959, Shri Saha contended.

10. A Constitution Bench of the Supreme Court, in Veerappa Pillai Vs. Raman and Raman Ltd. and Others, , held that as the Motor Vehicles Act is a self contained code and itself provides for appealable/revisable forum, the writ jurisdiction should not be invoked in matters relating to its provision.

11. Similar view has been reiterated in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, ; Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; and Shivgonda Anna Patil and Others Vs. State of Maharashtra and Others, .

12. In C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, H. B. Gandhi v. Gopi Nath and Sons , the Supreme Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

13. The Constitution Bench of the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, , considered the Privy Council judgment in Raleigh Investment Co. Ltd. v. Governor General in Council AIR 1947 PC 78 and has held that the writ court can entertain the petition provided the order under challenge is alleged to be without jurisdiction or has been passed in flagrant violation of the principles of natural justice, or against the provisions of the Act/Rules.

14. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , the Supreme Court refused to extend the ratio of its earlier judgment in *State of U.P. v. Mohammed Nooh* AIR 1958 SC 86, wherein the Court had held that prerogative writ can be issued to correct the error of the Court or Tribunal below even if an appeal is provided under the statute under certain circumstances, i.e., the order is without jurisdiction, or principles of natural justice have not been followed, and held that in case of assessment under the Taxing Statute, the principle laid down by the Privy Council in *Raleigh Investment Co. Ltd.* (Supra) would be applicable for the reason that "the use of the machinery provided by the Act, not the result of that use, is the test."

15. While deciding the said case, the Supreme Court placed reliance on large number of judgments, particularly *New Water Works Co. v. Hawkes Ford*, (1859) 6 CBNS 336, *Neville v. London Express Newspapers Ltd.*, 1919 AC 368 and *Attorney General of Trinidad and Tabpco v. Gordon Grant and Co.* 1935 A C 532 and *Secretary of State v. Mask and Co.* AIR 1949 PC 105, wherein it had consistently been emphasized that the remedy provided by the statute must be followed and writ should not generally be entertained unless the statutory remedies are exhausted.

16. In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, ; and *Tin Plate Co. of India Ltd. Vs. State of Bihar and Others*, the Supreme Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it has been admitted, case should be relegated to the appellate forum.

17. In *Sheela Devi Vs. Jaspal Singh*, , the Supreme Court has held that if the statute itself provides for a remedy of revision, writ jurisdiction cannot be invoked.

18. In *Punjab National Bank v. O.C. Krishnan and Ors.* AIR 2001 SCW 2993, the Supreme Court while considering the issue of alternative remedy observed as under:

The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast track procedure cannot be allowed to be detailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the Respondent to take recourse to the appeal mechanism provided by the Act.

19. A Constitution Bench of the Hon'ble Supreme Court, in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, has held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. The said power is limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, , holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion. However, the power can be exercised alone with recognized line and not arbitrarily and the Court must keep in mind that the power shall not be exercised unless substantial injustice has ensued or is likely to ensue and in other cases the parties must be relegated to the courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

20. Again a Constitution Bench of the Supreme Court, in *Union of India (UOI) Vs. T.R. Varma*, has held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Supreme Court held that existence of an another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such remedy is exhausted, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds therefor.

21. Another Constitution Bench of the Supreme Court in *State of U.P. and Ors. v. Mohammed Nooh* AIR 1958 SC 86, considered the scope of exercise of writ jurisdiction when remedy of appeal was there and has held that the Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of fundamental principles of justice. Therefore, in a proper case, powers of writ can be exercised, but should not be exercised generally where other adequate legal remedy is available though it may not be, per se, a bar to issue a writ of prerogative. The Supreme Court held that the remedy, being discretionary, cannot be asked as a matter of right, even if the order is a nullity, on the ground that it was passed by disregarding the rules of natural justice. The Court held as under:

...Save in exceptional cases, the courts will not interfere under Article 226 until all normal remedies available to a Petitioner have been exhausted. The normal remedies in a case of this kind are appeal or revision. It is true that on a matter of jurisdiction or on a question that goes to the root of the case, the High Courts can entertain a petition at an early stage but they are not bound to do so and a petition would not be thrown out because the Petitioner had done that which the Courts usually ask him to do, namely, to exhaust his normal remedies before

invoking an extraordinary jurisdiction....The Petitioner would have been expected to pursue the remedies of appeal or revision and could not have come to the High Court in the ordinary way until he had exhausted them.

22. In *N.T. Veluswami Thevar Vs. G. Raja Nainar and Others*, , the Supreme Court held that the jurisdiction of the High Court to issue writs against the orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court must properly exercise its discretion in declining to interfere under Article 226 of the Constitution.

23. Another Constitution Bench of the Supreme Court, in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , has held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a Civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, .

24. In *Siliguri Municipality and Others Vs. Amalendu Das and Others*, , the Supreme Court has held that the High Court must exercise its power under Article 226 with circumspection and while considering the matter of recovery of tax etc. it should not interfere save under very exceptional circumstances.

25. In *S.T. Muthusami Vs. K. Natarajan and Others*, , the Supreme Court held that the High Court cannot be justified to exercise the power in writ jurisdiction if an effective alternative remedy is available to the party.

26. In *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, , while dealing with similar issue, the Supreme Court held that the writ petition should not be entertained unless the party exhausted the alternative/statutory efficacious remedy.

27. In *A. Venkatasubbiah Naidu Vs. S. Challappan and Others*, , the Supreme Court deprecated the practice of exercising the writ jurisdiction when efficacious alternative remedy is available. The Court observed as under:

Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognized principle which gives judicial recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he resorts to a Constitutional remedy.

28. Similar view has been reiterated in *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, , *L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others*, , *Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others*, , *G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors.* (2003) 1 SCC 72 and *Pratap Singh and Anr. v. State of Haryana*, (2002) 7 SCC 481.

29. In *State of Himachal Pradesh Vs. Raja Mahendra Pal and Others*, , while dealing with a similar issue the Supreme Court has held as under:

It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature and can be invoked for the enforcement of any fundamental right or legal right. The constitutional Court should insist upon the party (to avail of the efficacious alternative remedy) instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the court from granting the appropriate relief to a citizen in peculiar and special facts notwithstanding the existence of alternative efficacious remedy. The existence of special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article.

30. In *Govt. of A.P. and Others Vs. J. Sridevi and Others*, , the Supreme Court has held that where an authority is competent to determine the issue, "the High Court in a writ jurisdiction should have directed the authority only to take an appropriate decision. When the statutory authority is vested with the power to determine the question as to the applicability of the provisions of the Act, it is ordinarily desirable to leave the question to be decided by such authority. The aggrieved party can file appeal against the decision within the framework provided under the statute and the ultimate decision also could be challenged under judicial review, if permitted in law.

31. In *the State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.*, , the Supreme Court has held that existence of alternative remedy does not affect the jurisdiction of the writ court but it could be a good ground for not entertaining the petition.

32. In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged., While deciding the said case, the Supreme Court placed reliance upon its earlier judgment in *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.* AIR 1998 SC 22.

33. Thus, the law can be summarized that rule of exclusion of the writ jurisdiction is not a law but discretion to be exercised by the Court considering the facts and circumstances of the case and if the case requires any kind of evidence etc. the writ court may not exercise its extraordinary jurisdiction at all.

34. In the facts and circumstances, I find that against the best judgment or against the order passed by the Assessing Authority, the dealer or a person aggrieved has to avail the remedy available in "Act". This Court cannot entertain the present writ petition to exercise its power under Article 226 of the

Constitution as an Appellate authority to appreciate facts, quantum and resolve disputed question of facts and to make reappraisal of entries of account books and return and test the validity of assessment order. In these circumstances, this Court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution. The question in present writ petition is dealt with accordingly. The writ petition is dismissed. The interim order, if any passed earlier, stands vacated after dismissal of the present writ petition.