Vijaya Home Makers Pvt. Ltd Vs Union Of India And Ors

Writ Petition (c) No. 5723 Of 2010

Court: Jharkhand High Court

Date of Decision: Jan. 3, 2019

Acts Referred:
Finance Act, 1994 â€" Section 65(105)(zzzh), 65(105)(zzq), 65(105)(zzzzu), 75, 77(i)(a), 77(ii), 78#Constitution Of India, 1950 â€" Article 226

Hon'ble Judges: D.N. Patel, J; Amitav K. Gupta, J

Bench: Division Bench

Advocate: Sumeet Gadodia, Ranjeet Kushwaha, Ritesh Kumar Gupta, Ratnesh Kumar

Final Decision: Disposed Of

Judgement

D.N. Patel, J

1. This writ petition was preferred initially challenging the vires of Section 65 (105) (zzq) as well as vires of explanation attached to Section 65 (105)

(zzzh) and also challenging the vires of Section 65 (105) (zzzzu).

2. All these amendments are about the service tax upon commercial or industrial construction work as well as for the residential construction and for

grant of preferential locations to the customers.

3. Learned counsel appearing for the petitioner is not pressing the vires of aforesaid sections and the provisions.

4. Learned counsel for the petitioner has submitted that looking to the stay granted by other High Courts of this country, this Court had also granted

stay vide order dated 20.11.2010. The said order reads as under:

Ã¢â‚¬Å“This case was not on the list. The file was called by us upon a mention being made by the learned counsel for the petitioner about extreme

urgency in the matter.

We have heard learned counsel for the petitioner and learned counsel for the respondents no. 4 ,5 and 6.

As prayed by learned counsel for the respondents no. 4, 5 and 6, three weeks time is allowed to file counter affidavit.

List this case immediately after three weeks.

In the mean time, the petitioner will comply with all requirements of law but he will not be compelled to pay Service Tax.Ã¢â‚¬â€¹

(Emphasis supplied)

5. Counsel appearing for the petitioner has further submitted that voluntarily this petitioner has paid Rs.4,00,00,000/- on 09.03.2013 for the service

rendered for the period running from July, 2010 to 09.03.2013, without any show cause notice and without adjudication of any show cause notice,

further amount of Rs.30,0000/- were also paid on 30.03.2013. Thus, the total amount paid is Rs.4,30,00,000/- towards service tax for the service

rendered for the period running from July, 2010 to 31.03.2013. Thus, it is submitted by the counsel for the petitioner that later on when the show cause

notice was given on 15.05.2015, the respondent had adjudicated the same and penalty has been imposed under Section 77 (i) (a) of the Finance Act,

1994. Similarly under Section 78 of the very same Act, further penalty has also been imposed. Similarly under Section 77 (ii) of the said Act the

penalty has been imposed and huge amount of interest has been imposed under Section 75 thereof, ignoring the fact that without adjudication also the

service tax was already paid at Rs.4,30,00,000/- for the month of March 2013. On the contrary the excess amount was paid which is required to be

refunded.

6. Counsel for the petitioner has tried to argue out under the varieties of provisions of Finance Act, 1994, how no penalty and no interest can be

imposed.

7. It is also submitted by the counsel for the petitioner that:

(a) Rs.98,65,745/-

(b) Rs.1,90,000/-

(c) Rs.10,000/- towards the penalty has been paid on 10.08.2016

8. Moreover, this petitioner has also paid amount towards interest which is at Rs.79,82,858/-.

9. Be that as it may, there is efficacious alternative remedy available to this petitioner, hence, appeal can be preferred before Central Excise and

Service Tax Appellate Tribunal, Kolkata against the order-in-original passed by respondent on 13.07.2016 (Annexure-17 to the memo of this writ

petition).

10. It has been held by HonÃ¢â‚¬â„¢ble the Supreme Court in the case of Thansingh Nathmal v. Supdt. of Taxes reported in AIR 1964 SC 1419 in para-7

which reads as under:

Ã¢â‚¬Å“7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High

Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed,

the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the

extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the Taxing Authorities on question of fact. The

jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions

except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised

merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed

limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be ogbtained in a suit or other mode prescribed by

statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without

being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which

demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a

court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon

an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in

another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under

Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the

machinery so set up.Ã¢â‚¬â€‹

(Emphasis supplied)

11. It has been held by HonÃ¢â‚¬â„¢ble the Supreme Court in the case of Nivedita Sharma vs. Cellular Operators Assn. of India reported in(2011) 14 SC

C 337 in para 11 which reads as under:

Ã¢â‚¬Å“11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions,

orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution

is a basic feature of the Constitution and cannot be curtailed by parliamentary legislationÃ¢â‚¬"L. Chandra Kumar v. Union of India. However, it is one

thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any

order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority,

and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High

Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a

statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.Ã¢â‚¬‹

(Emphasis supplied)

12. It has been held by HonÃ¢â‚¬â„¢ble the Supreme Court in the case of Rajasthan State Industrial Development & Investment Corpn. v. Diamond &

Gem Development Corpn. Ltd. reported in (2013) 5 SCC 470 in para 39 which reads as under:

Ã¢â‚¬Å“39. The cancellation of allotment was made by appellant RIICO in exercise of its power under Rule 24 of the 1979 Rules read with the terms of

the lease agreement. Such an order of cancellation could have been challenged by filing a review application before the competent authority under

Rule 24(aa) and, in the alternative, the respondent Company could have preferred an appeal under Rule 24(bb)(ii) before the Infrastructure

Development Committee of the Board. The respondent Company ought to have resorted to the arbitration clause provided in the lease deed in the

event of a dispute, and the District Collector, Jaipur would have then decided the case. However, the respondent Company did not resort to either of

the statutory remedy, rather preferred a writ petition which could not have been entertained by the High Court. It is a settled law that writ does not lie

merely because it is lawful to do so. A person may be asked to exhaust the statutory/alternative remedy available to him in lawÃ¢â‚¬‹.

(Emphasis supplied)

13. It has been held by HonÃ¢â‚¬â„¢ble the Supreme Court in the case of CIT v. Chhabil Dass Agarwal reported in (2014) 1 SCC 603 in para-15 which

reads as under:

Ã¢â‚¬Å“15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority

has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has

resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the

proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a

petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the

action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is

created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.Ã¢â‚¬‹

(Emphasis supplied)

14. In view of the aforesaid decisions, we are not inclined to interfere with this writ petition. Liberty is reserved with this petitioner to challenge the

order in original before Central Excise and Service Tax Appellate Tribunal, Kolkata. As and when such appeal is preferred, the question of delay

condonation will come which will be appreciated by the Central Excise and Service Tax Appellate Tribunal, Kolkata because writ petition was pending

before this Court right from 18.11.2010 onwards till today. As and when the appeal is preferred, the same will be decided as early as possible and

practicable, preferably within a period of six months from the date of filing of such appeal.

15. The amount has already been deposited by this petitioner even prior to the issuance of show cause notice and even prior to the adjudication of the

show cause notice. The stay granted by this Court, as quoted hereinabove, shall also be appreciated by the Central Excise and Service Tax Appellate

Tribunal, Kolkata.

16. The payment of the aforesaid amount towards penalty and interest shall also be kept in mind by Central Excise and Service Tax Appellate

Tribunal, Kolkata. The aforesaid amounts paid by this petitioner under protest shall be appreciated by the Central Excise and Service Tax Appellate

Tribunal, Kolkata while deciding the appeal.

17. With these observations, this writ petition is disposed of.

18. Stay granted by this Court stands vacated.