

(2011) 12 MAD CK 0106

Madras High Court (Madurai Bench)

Case No: Writ Petition (MD) No. 1611 of 2004

G.K. Steel and Allied Industries
Pvt., Ltd.

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision: Dec. 7, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226, 226A(2), 32
- Family Courts Act, 1984 - Section 19

Hon'ble Judges: K. Chzandru, J

Bench: Single Bench

Advocate: V. Ramachandran, For Mr. Radha Krishnan, for the Appellant; M. Govindan, Spl. Govt. Pleader for R1 and R2, Mr. R. Govindarajan for R3 and R7, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Honourable Mr. Justice K. Chzandru

1. The petitioner in all these eight writ petitions is M/s, G.K.Steel & Allied Industries Pvt., Ltd., having their Headquarters at Coimbatore. The writ petitions arose out of the orders passed under the Central Sales Tax Act.

2. In the first writ petition (W.P.(MD)No.1611 of 2004) the challenge is to an passed by the second respondent Commercial Tax Officer, P.N.Palayam, Coimbatore, dated 26.03.1998 and for a further direction from treating the subject stock transfers as inter-state sales.

3. In the 2nd writ petition (W.P.(MD)No.1612 of 2004) the challenge is to an passed by the second respondent Commercial Tax Officer, P.N.Palayam, Coimbatore, dated 29.06.2001 as modified in appellate order in appeal CST No.56/2001, dated 14.08.2003. The modification was done by the Appellate Assistant Commissioner,

Coimbatore.

4. In the 3rd writ petition (W.P.(MD)No.1613 of 2004), the challenge is to an order, dated 29.06.2001, passed by the Commercial Tax Officer, P.N.Palayam, Coimbatore and modified by the Appellate Assistant Commissioner, Coimbatore, dated 14.08.2003 in appeal CST No.55 of 2001.

5. In the 4th Writ Petition (W.P(MD)No.1630 of 2004) the challenge is to an order of the Commercial Tax officer, P.N.Palayam, Coimbatore, dated 08.01.2001 and a further relief of restraining him to subject the stock transfers as inter-state sales.

6. In the 5th Writ Petition (W.P(MD)No.1647 of 2004) the challenge is to the order of the 4th respondent viz., the Assistant Commissioner (Assessment), Sales Tax Office, Special Circle, Kozhicode, Kerala State, dated 18.09.1999, passed under the Kerala General Sales Tax Act and for a further direction to the said officer at Kerala to refund the sales tax to the petitioner.

7. In the 6th Writ Petition (W.P(MD)No.1648 of 2004) the prayer of the petitioner is for challenging the order of the 6th respondent viz., the Assistant Commissioner (Assessment), Sales Tax Office, Special Circle, Kozhicode, Kerala State, dated 25.01.1993 and after seeking to set aside the same, seeks for a refund.

8. In the 7th Writ Petition (W.P(MD)No.1649 of 2004) once again the prayer is to set aside the order of the 6th respondent in the writ petition viz., the Assistant Commissioner (Assessment), Sales Tax Office, Special Circle, Kozhicode, Kerala State, dated 02.04.1993 and after setting aside the same, seeks for refund of sales tax.

9. In the 8th Writ Petition (W.P(MD)No.1650 of 2004) is for setting aside the order of the 4th respondent in the writ petition viz., the Assistant Commissioner (Assessment), Sales Tax Office, Special Circle, Kozhicode, Kerala State, dated 31.07.1999 and after setting aside the Assessment Order of General Sales Tax, seeks for refund of sales tax amount collected.

10. Admittedly, all the eight writ petitions came to be filed before this Court on 22.09.2004. It is well known that the Madurai Bench was inaugurated on 24th July 2004. The petitioner thought that he can try the new Bench by filing not only the cases, which are not maintainable before this Court but also resurrect old claim, which could have never be admitted by any Court. In fact, in W.P.(MD)No.1630 of 2004, the Assessment Order is sought to be challenged, which is dated 08.01.2001 and no explanation was forthcoming for not filing any appeal before the appellate authority in the Kerala State, especially, when the order passed by the officials under Kerala General Sales Tax Act.

11. Similarly, in W.P.(MD)No.1647 of 2004, the challenge is an order dated 18.09.1999, which is against the assessment order and in W.P.(MD)No.1648 of 2004 the challenge is to an order dated 25.01.1993 and W.P.(MD)No.1649 of 2004 the order dated 02.04.1993 and in W.P.(MD)No.1650 of 2004, the order dated

31.07.1999. The Kerala Sales Tax Act provides for an appeal and a further appeal to the Tribunal. The petitioner has chosen to a venue, which is convenient for him to file therebeing no jurisdiction either for the Principal Bench or for the Madurai Bench to deal with such matters, where the cause of action exclusively arose in the State of Kerala and the petitioner was involved in the Assessment Order being passed the authority under the Kerala Sales Tax Act. The petitioner in the affidavit filed in support of those four writ petitions have not even stated as to why he has chosen to avail the Forum at Chennai. Even in the affidavit, which is more or less a stereo type affidavit, it is only stated that the Factory is situated at Thamaraipadi, Dindigul, within the jurisdiction of this Court. But, whereas he himself has stated that in some of the other cases that he had a remedy to go before the Commercial Tax Officer at Coimbatore and followed by a Sales Tax Appellate Tribunal, Additional Bench at Coimbatore.

12. In fact, the same petitioner had filed an appeal in CST.No.55 of 2001 and C.S.T.No.56 of 2001 before the Appellate Assistant Commissioner, Coimbatore and when he got an adverse order on 14.08.2003 in respect of assessment year 1991-92 and 1990-91, he filed appeal before the Tamil Nadu Sales Tax Appellate Tribunal, Additional Bench, Coimbatore. For reasons best known he moved the Tribunal showing the pendency of the proceedings and also his inclination to move the Madurai Bench, withdrew those appeals in Coimbatore Tribunal Appeal Nos.179 of 2004 and 180 of 2004 and the same were allowed to be withdrawn as dismissed on 29.11.2004 by the Additional Bench at Coimbatore. The petitioner is yet to explain the circumstances under which he moved the Madurai Bench, when there is no jurisdiction in terms of under Article 226 2(A) of the Constitution. The mere fact that he is running the factory at Dindigul that is not even create a remote cause of action. Assuming that the authorities treating the stock sales transfer, as interstate-sales and the Transaction having taken place in the border of Coimbatore District, he has a remedy by way of an appeal before the appellate Commissioner as well as the Tribunal before the Coimbatore Additional Bench. The Coimbatore District has not been brought under one of the District within the jurisdiction of the Madurai Bench. Under the presidential order in constituting the Madurai Bench in terms of Section 51(A) of the State Re-organization Act, it is only 13 Districts have been allotted and Coimbatore continues to come under the Principal Bench of the Madras High court. Therefore, the attempt by the petitioner is nothing but forum shopping and the petitioner even till now has not explained as to how he could have moved the Madurai Bench with such a writ petition.

13. In the other three writ petitions viz., W.P.(MD)Nos.1611 to 1613 of 2004 once again the orders challenged are relating to the orders passed by the Commercial Tax Officer at Coimbatore, which is an appealable order and in W.P.(MD)No.1612 of 2004, he has challenged the Appellate Assistant Commissioner's order Coimbatore. But, curiously he made even the Sales Tax Appellate Tribunal, Additional Bench, as a party/respondent. Similarly, in W.P.(MD)No.1613 of 2004 the challenge is to an order

as noted already, the order of appellate Assistant Commissioner, Coimbatore, which is modified the order of the Assistant Assessment Officer and it relates to CST.No.55 of 2001, dated 14.08.2003. The very same matter was challenged before the Additional Bench in Coimbatore Tribunal Appeal No.179 of 2004 and 180 of 2004 and the petitioner has withdrawn those appeals for reasons best known to him.

14. It is not clear as to how the petitioner can bye-pass an appellate Tribunal, when there is an effective remedy provided by way of an appeal to the Tribunal, which is provided by the judicial authority. In such circumstances, if he took treat that some portion of the cause of action arose was in Coimbatore District, then the Principal Bench is the only Bench he could have filed such a writ petition.

15. In all these matters, the Commercial Tax Officer P.N.Palayam Circle, Coimbatore, has filed a common counter affidavit claiming that the appellate Assistant Commissioner, on verification of the records, found that it is not a stock transfer and it was a sale to the dealers at Kerala State and therefore, treating that as a first sale. The second transaction was treated as inter-state sale liable for assessment of tax under the CST Act. It is also found that it is only a camouflage done by the petitioner, as a branch transfer but in actual fact of the matter was, the first sales was in Kerala, which was assessable tax and he has also sought for refund of tax from those authorities, which is evident from W.P.No.1630 of 2004 and W.P.No.1647 to 1650 of 2004.

16. A reliance was also placed upon the Judgment of the Supreme Court relying on principle of such matters relating to Ashok Leyland Ltd., Vs. Union of India reported in [1997] 105 STC 152 (SC). Since the petitioner has not proved by producing the records before the Assessing Officer and the fact that some of the lorries carrying goods from Coimbatore to the ultimate buyers the assessee receiving the prior orders and advance payment, evidencing the movement of books pursuant to the interstate-sales was known only when the Kerala Bank account were recovered from them.

17. Therefore, it is a clear case of mis-representation, fraud and collusion and falling within the exemption provided by the Guidelines issued by the Supreme Court in the Ashok Leyland case. It is unfortunate that the petitioner should indulge in such forum shopping, when there is not even a remote cause of action that is arisen for the petitioner to move either in the first three writ petitions or subsequent five writ petitions.

18. The question relating to jurisdiction of the Madurai Bench in entertaining the matters came up for consideration before this Court in A.J.K. Fernandez Vs. The Secretary-Finance, Reserve Bank of India and others reported in (2010 (6) CTC 745). In that case, this Court dealing with the similar attempt made by a litigant referred to the various judgments of the Supreme Court. In paragraphs 20,21,22 and 23, it has been held as follows:-

27. Even on the question whether this Court has discretionary power to entertain any writ petition notwithstanding the alternative remedy, it is necessary to refer to the recent judgment of the Supreme Court in [Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another](#), . In that case, on the question of appellate remedy, the Supreme Court in paragraphs 29 to 31 had observed as follows:

29. By referring to the aforesaid schemes under different statutes, this Court wants to underline that the right of appeal, being always a creature of a statute, its nature, ambit and width has to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same.

30. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in L.Chandra Kumar v. Union of India. However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre- deposit of penalty by the Appellate Tribunal.

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

28. In the very same case, on the question of discretion under Article 226 it has been held in paragraphs 34, 36 and 38, which are as follows:

34. Again in Titaghur Paper Mills Company Ltd. v. State of Orissa in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p.607 of the Report, this Court laid down: (SCC pp.440-41, para 11)

11..... It is now well recognised 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 Company v. Hawkesford in the following passage: (ER p.495)

".... There are three classes of cases in which a liability may be established founded upon a 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 Newspapers Ltd.* 1919 AC 368 and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Company 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.

36. Again another Constitution Bench of this Court in *Mafatla Industries Ltd., v. Union of India* speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held: (SCC p.607e-f, para 77)

77..... So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32- is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

In the concluding portion of the judgment it was further held: (*Mafatlal Industries Ltd. case*14, SCC p.635c, para 108)

(x).... The power under Article 226 is conceived to serve the ends of law and not to transgress them.....

38.The Learned Counsel for the respondents relied on a judgment of this Court in [Seth Chand Ratan Vs. Pandit Durga Prasad \(D\) by Lrs. and Others](#), . The Learned Counsel relied on para 13 of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief.

19. Therefore, having found that such attempts are made, this Court dismissed the writ petition with a cost on the litigant in that writ petition. In fact, this Court after referring to the judgment of the Supreme Court [Mafatlal Industries Ltd. Vs. Union of India \(UOI\)](#), the power under Article 226 was conceived to serve the ends of law and not to transgress them. Even on the question of not availing the remedies provided under the statutory enactment, the Court referred to the judgment of the Supreme Court in Rajkumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another reported in (2010 (4) SC 772) and in paragraph 27, it was observed as follows:

27. In a case where right of appeal is limited only from a final order or judgment and not from interlocutory order, the statute creating such right makes it clear (see Section 19 of the Family Courts Act, 1984) which is set out below:

19. Appeal.-(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

20. In view of the above, the writ petitions are thoroughly misconceived and blatant attempt to invite the jurisdiction of this Court, it lacks both in terms of territorial jurisdiction as well as presidential allocation of work. No worthwhile explanation was forthcoming in not availing the Appellate remedy even before the Tribunal. Even in two cases, the appeals have been withdrawn from the Tribunal without therebeing any justification. Having availed such a remedy before the Tribunal, the reasons for coming to this Court is also not satisfactorily explained. Hence, all the writ petitions stand dismissed with a cost of Rs.50,000/- (Rupees Fifty Thousand Only) payable to the Commercial Tax Department. Consequently, connected miscellaneous petition is also dismissed.