

GAHC010057302022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No: WP(C)/3967/2022

SASHREEK CONSTRUCTORS PRIVATE LIMITED
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT
2013
HAVING ITS OFFICE AT H.NO-14
MEGHMALLER RAJ APARTMENTS
BELTOLA
GUWAHATI-781028
ASSAM
INDIA
AND REP. BY LT. COL (RETD) SITA SHARAN DIKSHIT
THE MANAGING DIRECTOR OF THE PETITIONER COMPANY

VERSUS

THE UNION OF INDIA AND ANR
THROUGH THE SECRETARY
MINISTRY OF FINANCE
NORTH BLOCK
NEW DELHI-110001

2:PRINCIPAL COMMISSIONER
GST AND CENTRAL EXCISE COMMISSIONERATE
GUWAHATI GST BHAWAN
KEDAR ROAD
MACHKHOWA
GUWAHATI-781001
ASSAM
INDIA

Advocate for : MR A JAIN
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND ANR

BEFORE**HON'BLE MR. JUSTICE KALYAN RAI SURANA**

For the petitioner	: Mr. A. Jain, Advocate.
For State respondents	: Mr. S.C. Keyal, standing counsel.
Date of hearing	: 25.05.2023.
Date of judgment	: 22.06.2023.

ORDER

Heard Mr. A. Jain, learned counsel for the petitioner and Mr. S.C. Keyal, learned standing counsel for the CGST & Central Excise Commissionerate, appearing for all the respondents.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the validity of the demand -cum- show-cause notice dated 23.04.2021 as well as the order-in-original dated 14.03.2022, passed by the Principal Commissioner, CGST & Central Excise, Guwahati (respondent no.2). By the impugned order-in-original dated 14.03.2022, the respondent no. 2 had (i) confirmed the service tax demand of Rs.2,17,50,747/- under Section 73(2) of the Finance Act, 1994, (ii) interest under section 75 of the Finance Act, 1994, (iii) penalty of Rs.10,000/- under section 77(1) of the Finance Act, 1994, (iv) penalty of Rs.10,000/- under Section 77(2) of the Finance Act, 1994, and (v) penalty of Rs.2,17,50,747/- under section 78 of the Finance Act, 1994.

3. The learned counsel for the respondents had raised preliminary issue on the point of maintainability by submitting that alternative and efficacious remedy is available to the petitioner by filing an appeal before the

appellate authority. It was submitted that the departmental authorities had issued a demand-cum- show cause notice dated 23.04.2021 to the petitioner, wherein the respondent had provided all necessary particulars including the data shared by the CBDT. It was also mentioned that the petitioner had not filed ST-3 return for the financial year 2015-16 and had not paid service tax on the receipts against taxable service. The said notice also contained (i) computation of service tax liability, (ii) details of contravention of provisions of the Finance Act, 1994 and rules framed thereunder, (iii) invoking of extended period of limitation, and (iv) penal provisions, and (v) break-up of nature of demand. However, the petitioner had provided only a three page reply dated 17.02.2022, wherein a mention was made of a work order dated 05.10.2015 purportedly for construction of bailey bridges in the State of Mizoram and it was stated that the services during financial year 2015-16 were covered under Mega Exemption notification no. 25/2012 dated 20.06.2012 of Service Tax.

4. It was submitted that in this writ petition, the petitioner has suppressed material facts that he was served with notice dated 08.09.2020 and reminder dated 16.09.2020 to furnish certain documents, but the petitioner had failed to submit the same, which has been mentioned in the said demand –cum- show cause notice. It was submitted that the contract work otherwise carries an incidence of service tax and therefore, if any service fell in the exempted category, the assessee had to disclose those relevant facts and then claim exemption from service tax liability. Thus, it is submitted that the petitioner has not been able to make out a case that the demand- cum- show-cause notice dated 23.04.2021 or the impugned order-in-original dated 14.03.2022 was vitiated by any reason whatsoever. In support of his submissions, the learned standing counsel for the respondents has placed reliance on the case of *Magadh*

Sugar & Energy Ltd. v. State of Bihar & Ors., (2021) 0 Supreme(SC) 517 (para-19): 2021 SCC OnLine SC 801.

5. Per contra, the learned counsel for the petitioner, while opposing the preliminary issue of maintainability, has submitted that in this case, the petitioner had provided construction service to Engineering Projects (India) Ltd. for construction of 5 (five) numbers of bailey bridge, which were exempted from service tax liability. In this regard, it was submitted that the said contention was negated on the ground that supporting documents such as bills, bank statement or any other document to substantiate the same was not provided.

6. However, in this regard, the learned counsel for the petitioner had produced a copy of the letter no. 11013/37/2011-BM.III dated 08.07.2015, issued by the Under Secretary to the Govt. of India, Ministry of Home Affairs, Department of Border Management, New Delhi, wherein it was clarified that 10 (ten) bailey bridges constructed along IBB Mizoram were not liable for service tax.

7. It was submitted that against the bills issued by the petitioner, the authorities of the Engineering Projects (India) Ltd. had deducted income tax at source while releasing payment, which is reflected in Form 26AS. It was submitted that the contract works for construction of bailey bridges qualify as "works contract" and that on such works contract, the incidence of service tax is exempted vide Mega Exemption notification no. 25/2012-ST dated 20.06.2012. It was accordingly, submitted that the petitioner had not taken service tax registration and also did not pay service tax on the payment received for service portion. It was submitted that in respect of the goods component, the

concerned authorities have deducted VAT, as applicable. It was also submitted that existence of alternative remedy is always not a ground for the writ Court to relegate the parties to avail such remedy. In support of his submissions, the following cases have been relied upon, viz., (i) *Godrej Sara Lee Ltd. v. Excise and Taxation Officer- cum- Assessing Authority & Ors.*, 2023 SCC OnLine 95, (ii) *Magadh Sugar (supra)*, (iii) *Assistant Commissioner of State Tax v. Commercial Steel Ltd.*, 2021 (52) GSTL 385 (SC), (iv) *M.P. State Agro Industries Development Corpn. Ltd. & Anr. v. Jahan Khan*, (2007) 10 SCC 88, (v) *J.M. Baxi & Co. v. Commissioner of Customs, New Kandla & Anr.*, (2001) 9 SCC 275, (vi) *State of Tripura v. Manoranjan Chakraborty & Ors.*, (2001) 10 SCC 740, (vii) *M/s. N.E. Logistics & Anr. v. Union of India & Ors.*, W.P.(C) 1870/2022, decided on 23.03.2022, (viii) *Anup Trade and Transport Pvt. Ltd. v. Union of India & Anr.*, W.P.(C) 3106/2022, decided on 14.02.2023, (ix) *G.B. Chowdhury Holdings Pvt. Ltd. v. Union of India & Anr.*, W.P.(C) 2382/2022, decided on 04.04.2022.

8. In this case, admittedly, the petitioner had not registered himself under the Central Goods and Service Tax Act, 2017. The petitioner claims that his receipts were from Engineering Projects (India) Ltd., in respect of construction works undertaken for construction of 10 nos. of bailey bridges and the petitioner claims that the service component of those receipts do not fall into the taxable category service.

9. Admittedly, the petitioner had not filed his service tax return and also did not disclose his gross contractual dues receipt or disclosed service tax component which is exempt from the incidence of service tax.

10. The learned standing counsel for the respondents has demonstrated that on receipt of notices dated 08.09.2020 and reminder dated

16.09.2020, referred to in the "demand-cum-show cause notice" dated 23.04.2021, the petitioner had not submitted any reply and did not produce any relevant documents.

11. The learned standing counsel for the respondents has also shown that after receipt of demand- cum- show-cause notice dated 23.04.2021, the petitioner had only produced the following, viz., (1) *adjournment of hearing*, (2) *written submission*, (3) *MCA Master data and PAN of Director*, (4) *26AS*, (5) *Work order*, (6) *notification no. 25/2012-ST dated 20.06.2012*, (7) *Profit and loss account and balance sheet*, (8) *authorization*, (9) *memorandum of appearance*, (10) *photo ID of CMA Arun Kumar*.

12. The learned counsel for the petitioner contends that all the payments received by him are from Engineering Projects (India) Ltd., in respect of construction works undertaken for construction of 10 nos. of bailey bridges and that such receipts are covered by Mega Exemption notification no. 25/2012-ST dated 20.06.2012. If the said contention is true, then perhaps the petitioner can make out a case that the State cannot enrich itself by claiming service tax on service component of contractual receipts, which are otherwise exempt from the incidence of service tax.

13. Unfortunately, the materials available in this writ petition is insufficient for the Court to *prima facie* satisfy itself that the petitioner had produced the proof before the respondent no. 2 that all receipts for which TDS is shown to have been deducted as per Form 26AS was against contractual dues received from Engineering Projects (India) Ltd., in respect of construction works undertaken for construction of 10 nos. of bailey bridges and that service component is exempt from incidence of service tax.

14. It would be relevant to refer to the decision of the Supreme Court of India in the case of *The State of Maharashtra & Ors. v. Greatship (India) Ltd.*, AIR 2022 SC 4408: (2022) 0 Supreme(SC) 948, wherein it has been observed and held as under:-

6. *We have heard the learned counsel for the respective parties at length.*

*At the outset, it is required to be noted that against the assessment order passed by the Assessing Officer under the provisions of the MVAT Act and CST Act, the assessee straightway preferred writ petition under Article 226 of the Constitution of India. It is not in dispute that the statutes provide for the right of appeal against the assessment order passed by the Assessing Officer and against the order passed by the first appellate authority, an appeal/revision before the Tribunal. In that view of the matter, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India challenging the assessment order in view of the availability of statutory remedy under the Act. At this stage, the decision of this Court in the case of *United Bank of India v. Satyawati Tondon*, (2010) 8 SCC 110 in which this Court had an occasion to consider the entertain ability of a writ petition under Article 226 of the Constitution of India by by-passing the statutory remedies, is required to be referred to. After considering the earlier decisions of this Court, in paragraphs 49 to 52, it was observed and held as under:*

*"49. The views expressed in *Titaghur Paper Mills Co. Ltd. vs. State of Orissa*, (1983) 2 SCC 433 were echoed in *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260 in the following words: (SCC p. 264, para 3)*

"3. ... 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."

50. *In Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569* this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed: (SCC p. 570, paras 5-6)

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. 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 a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed 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."

51. *In CCT v. Indian Explosives Ltd., (2008) 3 SCC 688*, the Court reversed an order passed by the Division Bench of the Orissa High Court quashing the show-cause notice issued to the respondent under the Orissa Sales Tax Act by observing that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

52. *In City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwalla, (2009) 1 SCC 168*, the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paras 29 and 30 of that judgment which contain the views of this Court read as under: (SCC pp. 175-76)

"29. In our opinion, the High Court while exercising its extraordinary

jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;*
- (b) the petition reveals all material facts;*
- (c) the petitioner has any alternative or effective remedy for the resolution of the dispute;*
- (d) person invoking the jurisdiction is guilty of unexplained delay and laches;*
- (e) ex facie barred by any laws of limitation;*
- (f) grant of relief is against public policy or barred by any valid law; and host of other factors.*

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

53. In Raj Kumar Shivhare v. Directorate of Enforcement, (2010) 4 SCC 772, the Court was dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 can be bypassed and jurisdiction under Article 226 of the Constitution could be

invoked. After examining the scheme of the Act, the Court observed: (SCC p. 781, paras 31-32)

"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-bye 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.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum."

7. *Applying the law laid down by this Court in the aforesaid decision, the High Court has seriously erred in entertaining the writ petition under Article 226 of the Constitution of India against the assessment order, bypassing the statutory remedies.*

8. *Now so far as the reliance placed upon the decisions of this Court by the learned Senior Advocate appearing on behalf of the respondent, referred to hereinabove, are concerned, the question is not about the maintainability of the writ petition under Article 226 of the Constitution, but the question is about the entertainability of the writ petition against the order of assessment by-passing the statutory remedy of appeal. There are serious disputes on facts as to whether the assessment order was passed on 20.03.2020 or 14.07.2020 (as alleged by the assessee). No valid reasons have been shown by the assessee to by-pass the statutory remedy of appeal. This Court has consistently taken the view that when there is an alternate remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under constitutional provisions.*

9. *In view of the above and in the facts and circumstances of the case, the High Court has seriously erred in entertaining the writ petition against the assessment order. The High Court ought to have relegated the writ petitioner - assessee to avail the statutory remedy of appeal and thereafter to avail other remedies provided under the statute. (emphasis supplied by us)*

10. *Under the circumstances, the impugned judgment and order passed by the High Court is hereby quashed and set aside. The writ petition filed before the High Court challenging the assessment order and consequential notice of demand of tax is hereby dismissed. The respondent - assessee is relegated to avail the statutory remedy of appeal and other remedies available under the MVAT Act and CST Act.*

It is directed that if such a remedy is availed within a period of four weeks from today, the appellate authority shall decide and dispose of the same on its own merits in accordance with law without raising any question of limitation, however, subject to fulfilling the other conditions, if any, under the statute. It is made clear that we have not expressed any opinion on the merits of the case in favour of either of the parties and it is for the appellate authority and/or appropriate authority to consider the appeal/proceedings on its/their own merits and without being influenced in any way by any of the observations made by the High Court which otherwise have been set aside by the present order. The present appeal is allowed in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

15. Therefore, in the light of the observations made by the Supreme Court of India in the herein before referred case of *Greatship (India) Ltd. (supra)*, the existence of an alternative relief would dissuade the Court from entertaining the writ petition. Therefore, the cases cited by the learned counsel for the petitioner is not found to help the petitioner. Hence, the Court finds no reason to burden this order with the discussion on the same because reliance has been placed on the case of *Greatship (India) Ltd. (supra)*.

16. The Court is of the considered opinion that as the writ petition does not disclose any documents by which *prima facie* satisfaction can be recorded that all receipts for which TDS was deducted which is reflected in Form 26AS are entitled for exemption, hence, the decisions cited by the petitioner cannot be applied under the facts unique to this case.

17. The direction to relegate a tax payer to avail statutory remedy, which is more efficacious is the principle of self-restrain adopted by the Constitutional Courts. Therefore, as alternative and efficacious remedy is available to the petitioner, this Court is not inclined to entertain this writ petition and therefore, this writ petition challenging the legality of the impugned order-

in-original no. 30/Pr.Commr./ST/GHY/2021-22 dated 14.03.2022 stands dismissed at the motion stage without issuance of notice upon the respondents.

18. It is provided that if the petitioner is advised to seek alternative and efficacious remedy by filing a statutory appeal, the period spent from 10.06.2022 i.e. the date of filing this writ petition till delivery of order date, i.e. 22.06.2022, would be entitled to be excluded from computation of limitation.

19. There shall be no order as to costs.

JUDGE

Comparing Assistant