THE HON'BLE SMT JUSTICE V. SUJATHA

Writ Petition No.20580 of 2023

ORDER:

This writ petition came to be filed under Article 226 of the Constitution of India seeking the following relief:

> *"...to issue an appropriate writ, order or direction more particularly one in the nature of Mandamus declaring the Assessment Order Rc.No.B2B&OCW/1669/2018 dated 10.05.2023 Impugned Order issued by the Respondent No.3 seeking to recover differential Building and Other Construction Workers Cess ("BOCW Cess") amounting to INR 5,12,31,210(INR 5.12 Crores) under the Building and Other Constructions Workers Welfare Cess Act, 1996 Cess Act from the Petitioner as violative of Article 14 and 265 of Constitution of India and consequently to set aside the same and to pass...."*

2. The petitioner is a company registered under the Companies Act, 1956 and is having its registered office at Bengaluru and its principal place of business in Chittoor, Andhra Pradesh. The petitioner company is engaged in the business of manufacture of recyclable beverage cans and ends and is a part of Ball Corporation which is one of the world's leading suppliers of aluminium packaging for beverage, personal care and household products. Previously, the petitioner company's name was Rexam HTW Beverage Can (India) Limited and was

subsequently changed to M/s Ball Beverage Packaging (India) Private Limited.

3. On 09th February, 2015, the petitioner company submitted an application to Andhra Pradesh Industrial Infrastructure Corporation Limited (APIICL) seeking approval for construction of its factory at Plot No.2545, Peepul Boulevard, Sri City, Satyavedu Mandal, Cherivi Village, Chittoor District, duly enclosing the building plans, building estimate, drawing, registration certificates etc., and the estimated cost of factory works i.e., civil works construction of the factory to a tune of Rs.33,86,79,008/-. Basing on the documentations submitted by the petitioner, vide letter dated 11.03.2015, APIICL demanded the petitioner company to pay an amount of Rs.50,51,221/- as fees for according permission for construction of industrial buildings. The calculation sheet for the aforementioned fees included Building and Other Construction Workers Cess (BOCW Cess) of Rs.33,86,790 i.e., 1% of the cost of construction of Rs.33,86,79,008/-. As such, the petitioner has submitted the fees for approval vide receipt No.2136, dated 24.03.2015.

4. Subsequent to submission of the aforesaid fees, vide proceedings dated 30.03.2015, APIICL has approved the petitioner's building plans on the land situated in Sri City. The petitioner has also applied to the Government of Andhra Pradesh

to avail incentives for setting up of its factory as per Industrial Development Policy 2015-2020 and the same was granted to the petitioner vide order dated 23.12.2015. In the application form submitted by the petitioner for sanction of incentives, the petitioner has furnished the project details including the total project cost, cost of land and the cost of supply equipment, as per which, the total project cost was estimated to be INR 532.10 crores out of which, the cost of supply of equipment was estimated at INR 350.6 Crores, the land cost was estimated to be INR 16.45 crores and cost of civil construction was estimated at INR 165.13 crores.

5. While so, the 3rd respondent has issued a notice dated 04.09.2018 demanding payment of BOCW Cess at 1% of the cost of construction from the petitioner and the said notice contained an internal communique of the Regional Vigilance and Enforcement Officer, Tirupati to the 3rd respondent wherein the total project cost was specified as INR 546.18 crores. In pursuance of the said notice, the petitioner submitted letter dated 21.09.2018 intimating the respondents that its construction plans were approved subject to payment of Rs.50,51,221/- to APIIC. After a lapse of 2 years, the 3rd respondent issued another demand notice dated 06.04.2021 stating that the total cost of construction was provisionally estimated to be INR 546.18 crores

and the cess payable was provisionally assessed to be INR 5,46,18,000/- and since an amount of Rs.33,86,790/- has already been paid towards cess by the petitioner, the petitioner was directed to pay balance cess amount of Rs.5,12,31,210/- and was also directed to appear before the 3rd respondent. In pursuance to the same, the petitioner vide letter dated 15.04.2021 reiterated its earlier stand informing that the building permission was approved by APIIC subject to payment of Rs.50,51,221/- which included BOCW Cess amount of Rs.33,86,790/-. The petitioner has also intimated that basing on all payments and personal inspection by government officials, occupancy certificate was issued to the petitioner's company vide letter dated 31.08.2019.

6. Vide the impugned order dated 10.05.2023, the petitioner was called upon to pay cess at the rate of 1% on the cost of construction of project and was also intimated that the petitioner company has failed to submit the return in Form-I to the Officer/Authority under Section 4 of the Cess Act. Further, the cess payable by the petitioner was provisionally assessed to be Rs.5,46,18,000/- (1% of Rs.5,46,17,00,000/-) and after adjustment, an amount of Rs.33,86,790 that was paid earlier as cess , the petitioner was directed to pay balance cess amount of Rs.5,12,31,210/- within 7 days of receipt of the impugned order.

Aggrieved by the same, the petitioner has filed the present writ petition.

7. Heard learned counsel for the petitioner, Sri. N. Harinath, learned Deputy Solicitor General of India and learned Government Pleader for Labour.

8. Learned Government Pleader for Labour submitted furnished a copy of the written instructions received from the Joint Commissioner of Labour, Zone-IV, Kurnool, vide Lr.No.A/W.P.No.20580/2023, dated 11.08.2023, wherein it is specifically stated as follows:

> *"It is submitted that as per Section 4 of Welfare Cess Act, every employer has to furnish return but the Petitioner failed to furnish the return within the stipulated time in-spite of receipt of notice and therefore, the 3rd respondent in exercise of powers under Sec.5(2) of the Welfare Cess Act proceeded in the matter and issued Assessment Order directing the Petitioner to pay the balance cess amount of Rs.5,12,31,210/-. It is submitted that it is also mentioned in the said Order that failure to deposit the cess attracts the provisions of Sec.8 of Welfare Cess Act which provides interest payable on delay in payment of cess and also Penalty under Sec.9 of the Welfare Cess Act. It is submitted that as the Petitioner failed to comply the assessment order, this respondent has no option but to proceed under Sec.10 of the Welfare Cess Act for recovery of amount due under the Act.*
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> *It is humbly submitted that Section 11 of the Act provides an opportunity to the employer to prefer appeal against the order of assessment but the Petitioner did not avail the same but directly approached the Hon'ble High Court. It is humbly submitted that the action Initiated by the 3rd respondent is basing on the report of Vigilance & Enforcement and after duly following the provisions of the Building and Other Construction Workers Welfare Cess Act, 1996 (Cess Act), issued notices to the Petitioner and as the Petitioner did not justify the estimated cost arrived by the Vigilance & Enforcement Department and*

> *also not submitted any relevant records as called for by the 3rd respondent. It is submitted that as the Petitioner management failed to remit the Cess, the 3rd respondent issued Assessment Order requiring to pay the balance cess of Rs.5,12,31,210/-."*

9. Learned counsel for the petitioner contended that the petitioner has already deposited the applicable cess, as such the impugned assessment order issued by the respondents without any cogent reasons cannot be sustained. The cess must be levied on the cost of construction and not on the cost incurred towards the supply of equipment/materials/goods. Therefore the imposition of cess on the supply of equipment/material/goods is not in accordance with the provisions of the Act. He further contended that the cost of the land has to be excluded from the cess as per the Rule 3(1) of the Building and Other Construction Workers Welfare Cess Rules, 1998. He further contended that the availability of alternative remedy is not a bar to entertain the writ petition, if there is violation of principles of natural justice and requested to set-aside the impugned assessment order.

10. Learned Government Pleader for Labour contended that the respondents issued the impugned assessment order by following the provisions of law and that every employer has to furnish return but the petitioner failed to furnish the return within the stipulated time in spite of notice issued by the respondents. He further contended that if the petitioner

aggrieved by the assessment order issued by the respondents he has to prefer an appeal under Section 11 of the Act, but without availing the alternative remedy of appeal, he directly approached this Court, as such, the writ petition is not maintainable and requested to dismiss the writ petition.

11. It is not in dispute that the petitioner is engaged in the business of manufacture of recyclable beverage cans. In February, 2015 the petitioner submitted an application to Andhra Pradesh Industrial Infrastructure Corporation Limited, for construction of its factory. As per the details furnished by the petitioner, the total project cost was estimated to be INR 532.10 crores out of which, the cost of supply of equipment was estimated at INR 350.6 Crores. Vide notice dated 04.09.2018, respondent No.3 demanded payment of BOCW Cess at 1% of the cost of construction, to which the petitioner submitted reply on 21.09.2018. After exchange of correspondence between the petitioner and the respondent, the respondent issued impugned assessment order dated 10.05.2023 directing the petitioner to pay an amount of Rs.5,12,31,210/-, which is under challenge before this Court.

12. As can be seen from the written instructions produced before this Court, if the petitioner is aggrieved by the assessment order issued by the respondents, he has to prefer an

appeal under Section 11 of the Act. But, it appears that the petitioner approached this Court without availing alternative remedy of revision or review as available under Section 11 of the Act.

13. No doubt, when an effective, efficacious, statutory remedy is available, normally the Courts would not entertain writ petition under Article 226 of the Constitution of India.

14. In "***Genpact India Private Limited v. Deputy Commissioner of Income Tax and another***[1]**"** the Division Bench of the Apex Court held that, "when a statutory remedy is available under the statute, the Court would not normally entertain the writ petition against assessment order. The Apex Court finally concluded that, if the submission is accepted, every time the dispute will be required to be taken up in proceedings such as a petition under Article 226 of the Constitution, which normally would not be entertained in case of any disputed questions of fact or concerning factual aspects of the matter. The assessee may thus, not only lose a remedy of having the matter considered on factual facets of the matter but would also stand deprived of regular channels of challenges available to it under the hierarchy of fora available under the Act."

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[1] (2019) 311 CTR (SC) 737

15. In "***Commissioner of Income Tax and others v. Chhabil Dass Agarwal***[2]**"** the Apex Court held as follows:

> "Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See **State of U.P. v. Mohd. Nooh**[3]**, Titaghur Paper Mills Co. Ltd. v. State of Orissa**[4]**, Harbanslal Sahnia v. Indian Oil Corpn. Ltd**[5] **and State of H.P. v. Gujarat Ambuja Cement Ltd**[6])

16. Learned counsel for the petitioner strenuously contended that availability of alternative remedy is not a bar to entertain the writ petition filed under Article 226 of the Constitution of India if there is illegality in the impugned order or incompetency in passing the same or the impugned order was passed without jurisdiction. In support of his contention, he relied on "***Whirlpool Corporation Vs. Respondent: Registrar of***

[2] (2014) 1 SCC 603
[3] AIR 1958 SC 86
[4] (1983) 2 SCC 433
[5] (2003) 2 SCC 107
[6] (2005) 6 SCC 499

Trade Marks, Mumbai and Others[7]" wherein the Apex Court, while dealing with the power to issue writs under Article 226 of the Constitution, held as follows:

> "Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.
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> Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

17. The law laid down in the said judgment is not in dispute. In the present facts of the case, it is to be seen from the impugned notice that the respondents issued notice to the

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[7] AIR 1999 SC 22,

petitioner on 04.09.2018, 06.04.2021, 19.06.2021, 19.09.2021 and 07.02.2023 to which, the petitioner submitted reply on 21.09.2018, 15.04.2021, 01.07.2021, 07.10.2021, 24.02.2023. Therefore, the petitioner availed the opportunity of ventilating his grievance before the concerned authorities. After considering the response submitted by the petitioner on various dates, the impugned order has been passed by the respondents. Therefore, this Court feels that there is no violation of principles of natural justice as sufficient opportunity was given to the petitioner to offer his explanation to the notices issued by the authorities. Even if the petitioner is aggrieved by the impugned assessment order, there is effective and efficacious alternative remedy by way of appeal under Section 11 of the Act.

18. In view of the law declared by the Apex Court in "***Genpact India Private Limited v. Deputy Commissioner of Income Tax and another"*** and ***"Commissioner of Income Tax and others v. Chhabil Dass Agarwal***"(referred supra) when a statutory remedy is available, the Court may not normally entertain petition under Article 226 of the Constitution of India which is purely discretionary in nature.

19. Accordingly, writ petition is disposed of permitting the petitioner to prefer an appeal under Section 11 of the Act before appropriate forum within a period of four (4) weeks from the date of receipt of a copy of this order. On filing such appeal,

the concerned appellate authority shall deal with the same, in accordance with law, but without raising the issue of limitation.

20. Accordingly, with the above direction, writ petition is disposed of. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions if any, shall stand closed.

SMT. JUSTICE V. SUJATHA

GSS
17.08.2023