

HIGH COURT OF ORISSA; CUTTACK

W.P.(C) No.1996 of 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

M/s. Classic Air Products,
represented through its Partner
Md. Abid.

... Petitioner

Versus

Managing Director,
Western Electricity Supply Company
of Odisha Ltd. and another

... Opposite Parties

For Petitioner : M/s. B.K.Nayak.

For opposite parties : M/s. P. Mohanty.

P R E S E N T :

THE HONOURABLE MR. JUSTICE S.K.MISHRA

Date of hearing: 11.4.2012 : Date of judgment: 27.4.2012.

S.K.Mishra,J. In this writ petition, the petitioner, a Partnership Firm, assails the provisional assessment dated 28.11.2011 and final assessment dated 23.12.2011.

2. The petitioner has a unit at Mandiakudar, Kansbahal and is producing commercial oxygen. For such production the petitioner has taken power supply for a Contract Demand of 190 KVA Load and has been categorized as a large industrial

consumer under the opposite parties vide Consumer No.L-271. From the date of power supply, the consumer is paying the dues regularly.

3. On 28.11.2011 the petitioner was communicated with a provisional order of assessment issued under Section 126(1) and 126(2) of Electricity Act, 2003(hereinafter referred to as “the Act” for brevity) for unauthorized use of electricity by hooking 11 KV line passing over adjacent premises by utilizing transformer. It has been alleged in the said provisional order of assessment that on an inspection of the aforementioned installation, unauthorized use of electricity was detected on 28.11.2011 in presence of MRT and distribution personnel and intimation was issued in that behalf on the said date. By reason of such unauthorized use of electricity, the supply engineer being the Assessing Officer has assessed the liability under Section 126(2) of the Act and directed the petitioner to appear before the Assessing Officer-cum-Executive Engineer on or before 9.12.2011.

4. On 28.11.2011 the adjacent premises of the Mill of the petitioner was inspected by the WESCO officials with the help of local police and the following observations were made.

“(i) The unused premises belongs to Sri Pramod Jindal was opened by him and it was found that a patch 6 feet x 4 feet of the said premises beneath the 11 KV line was with sluggish having transformer oil. It is ascertained that the said oil leaked from transformer having fresh smell.

(ii) It is also found that the said premises seem to be occupied by some person as the bath room found used and some vegetable plants are there which are being watered recently.

(iii) From the physical evidence, it is clear that the consumer has used electricity unauthorizedly by way of hooking 11 KV line passing over adjacent premises by utilizing transformer. xxx xxx xxx xxx. The said act of consumer is coming under the purview of section 126 of the Electricity Act, 2003.”

5. On the basis of the inventory report, a provisional order of assessment was made making assessment to the tune of Rs.14,28,600/-. The said assessment has been assailed in this writ petition.

6. The opposite parties have entered appearance and filed counter affidavit, inter alia, pleading that the writ petition is not maintainable as the assessment made under Section 126 of the Act is appealable under Section 127 of the Act. Furthermore, it is submitted by the WESCO that the pattern of consumption of electricity during different periods indicate that for certain period, there has been low consumption of electricity whereas the Mill was running and it was expected that the Mill was consuming electricity. Thus on circumstantial evidence, the WESCO has built up a case for assessment under Section 126 of the Act.

7. At the outset the question regarding maintainability of the writ application is taken up. It is not disputed that the assessment impugned is appealable under Section 127 of the Act. Learned counsel for the petitioners company submitted that in spite of availability such alternative remedy, this case comes within the purview of the exceptions to such self-imposed restraint by the Court. It is contended that the assessment is without jurisdiction and, therefore, the same is amenable to writ jurisdiction.

8. The Supreme Court in ***Harbanslal Sahnia and another v. Indian Oil Corpn. Ltd. and others***; AIR 2003 SUPREME COURT 2120 has held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is rule of discretion and not one of compulsion. In an appropriate case in spite of availability of alternative remedy the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

9. Similar view has been taken in ***U.P. State Spining Co. Ltd. Vrs. R.S. Pandey & another***; 101(2006) CLT 160 (SC), wherein the Supreme Court held that not exercising the power in case of availability of alternative remedy is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case of that there exist good grounds to invoke the extraordinary jurisdiction.

10. The Supreme Court, in an unreported case of ***NIVEDITA SHARMA VS. CELLULAR OPERATORS ASSN. OF INDIA & ORS.***; CIVIL APPEAL NO.10706 OF 2011, has examined the question of maintainability of a writ petition before the High Court under Articles 226 and 227 of the Constitution in spite of

existence of a statutory remedy of appeal available to the parties under Section 19 of the Consumer Protection Act, 1986. The Supreme Court held as follows:-

“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 legislation – *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261. 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.”

Thus, the Supreme Court further held that the existence of alternative remedy is not a bar to entertain a writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge. Holding thus, the Supreme Court has set aside the order passed by the Delhi High Court.

11. In ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others***; AIR 1999 SUPREME COURT 22, it has been laid down that the jurisdiction of the High Court in entertaining a Writ Petition under Art.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. Thus, the Supreme Court has held that the High Court was not justified in dismissing the Writ Petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction. The Supreme Court has further held that in view of pendency of these proceedings in the High Court and specially in view of Section 107 of the Trade and Merchandise Marks Act, 1958, the Registrar could not legally issue any suo motu notice to the appellant under section 56(4) of the Act for cancellation of the Certificate of Registration/Renewal already granted. In view of Section 56(4), the Registrar has not jurisdiction to issue such a notice.

12. Coming to the case at hand, it is not contended by the learned counsel for the petitioner that the Assessing Officer has no jurisdiction to make the assessment under Section 126 of the Act. Neither it is pleaded nor asserted that there has been violation of principles of natural justice. It is also not the case where the petitioner seeks to enforce any fundamental rights. The only ground of challenge in this writ petition is that the evidence collected is insufficient to come to the conclusion that the petitioner has resorted to illegal means of using electricity for his industry. In that view of the matter, it is appropriate for the petitioner to approach the appellate authority as envisaged under Section 127 of the Act.

13. Therefore, this Court comes to the conclusion that the writ petition is not maintainable. However, the petitioner company is at liberty to file an appeal before the appellate authority and agitate all grounds taken in the writ petition. Keeping in view the peculiar facts of the case, no costs.

Sd/-
S.K.Mishra, J

Orissa High Court, Cuttack
Dated 27th April, 2012/A.K.Behera.

True Copy
Secretary