IN THE HIGH COURT OF KARNATAKA AT BENGALURU

ON THE 3RD DAY OF FEBRUARY, 2020

BEFORE

THE HON'BLE MR. JUSTICE RAVI MALIMATH

AND

THE HON'BLE MR. JUSTICE M.I.ARUN

WRIT APPEAL No.991 OF 2018 (T-IT)

BETWEEN:

M/S TELEKOM MALAYSIA BERHAD
LEVEL 11, NORTH WING
MENARA TM, JALAN PANTAI BAHARU
50672 KUALA LUMPUR, MALAYSIA
REPRESENTED BY ITS MANAGING DIRECTOR
NOW MOHAMMED SHAZALLI BIN RAMLY
... APPELLANT

(BY SRI. TUSHAR JARWAL, ADVOCATE FOR
SRI. C.K. NANDA KUMAR, ADVOCATE)

AND:

1. UNION OF INDIA
MINISTRY OF FINANCE
THROUGH ITS SECRETARY
NORTH BLOCK, NEW DELHI – 110 001

2. DEPUTY DIRECTOR OF INCOME TAX
(INTERNATIONAL TAXATION)
CIRCLE 2(1), BENGALURU
BMTC BUILDING, ROOM NO.440
4TH FLOOR, 80 FEET ROAD
KORAMANGALA
BENGALURU – 560 095

3. COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION), BENGALURU
BMTC BUILDING, 80 FEET ROAD
6TH BLOCK, KORAMANGALA
BENGALURU – 560 095

... RESPONDENTS

(ASG FOR R1;
SRI. E.I. SANMATHI, ADVOCATE FOR R2 AND R3)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE IMPUGNED ORDER OF THE LEARNED SINGLE JUDGE OF THIS COURT DATED 12.02.2018 IN WRIT PETITION NO.5914 OF 2018 (T-IT) AND ALLOW WRIT PETITION NO.5914 OF 2018 (T-IT).

THIS WRIT APPEAL COMING ON FOR ADMISSION, THIS DAY, RAVI MALIMATH J., DELIVERED THE FOLLOWING:

JUDGMENT

Aggrieved by the order dated 12.02.2018 passed by the learned Single Judge, in dismissing writ petition No.5914 of 2018, the writ petitioner is in appeal.

2. The case of the petitioner is that it is a Malaysian company incorporated under the laws of Malaysia and has its registered office in Kuala Lumpur, Malaysia. It does not have any office or presence in India. Respondent no.2-Deputy Commissioner of Income Tax

for the assessment year 2009-10 raised a demand dated 18.12.2017 for a sum of Rs.20,84,448/- against the petitioner-company. The reassessment order was sought to be challenged before the learned Single Judge of this Court on the ground that the alleged breach of principles of natural justice by the respondent-assessing authority namely, non-service of the statutory notice under Section 148 of the Income Tax Act ('the Act' for short) and non-grant of adequate opportunity to raise objections. It was contended before the learned Single Judge that the petitioner has not received any notice under Section 147/148 of the Act at the Malaysian address. The first notice received by them is dated 01.12.2017 and the same was received by them on 08.12.2017. Immediately thereafter, a communication was sent by Email to respondent no.2-Deputy Commissioner on 15.12.2017 asking for time. Thereafter, three notices were issued under Section 142(1) of the Act requiring attendance of the Company before the tax authorities. It would

appear that the petitioner-Company did not respond to any of the communications. Therefore, the learned Single Judge was of the view that, there is no reason to disbelieve that despite categorical averments in the impugned order that right from the notice dated 29.03.2016, at least three more notices were served on the petitioner-company, the petitioner-company was not aware of the pending proceedings.

3. The learned Single Judge also noticed that in terms of the letter dated 28.12.2017 vide Annexure-D to the writ petition, the same would indicate the attitude and non-cooperation of the petitioner-company in the tax proceedings initiated by the Income Tax Department. That if a foreign company was ignorant of even the basic requirements of obtaining a PAN number from the Income Tax Department, it has to blame itself rather than the respondent-authorities. That the proceedings having been initiated from the month of March 2016 followed by various notices on 29.03.2016, 02.06.2017,

12.07.2017, 11.10.2017 and 16.10.2017 followed by letter dated 07.11.2017 which would all indicate that there is no violation of the principles of natural justice. That the petitioner has deliberately avoided to approach the concerned authorities. Notwithstanding the same, in view of the fact that the assessee has an alternative and efficacious remedy of filing an appeal, the learned Single Judge was of the view that exercise of a writ jurisdiction under Article 226 of the Constitution of India was uncalled for. Hence, the writ petition was dismissed.

4. Sri Tushar Jarwal, learned counsel appearing for the appellant's counsel contends that the order passed by the learned Single Judge is incorrect. He relies on the judgment of the Hon'ble Supreme Court in the case of Calcutta Discount Co. Ltd. vs. Income-Tax Officer, Companies District I, Calcutta and another reported in (1961) 41 ITR 191. He contends that in terms of the judgment of the Hon'ble Supreme Court, since the question of jurisdiction has been questioned, the writ

court should have entertained this plea. That the plea of the petitioner is that the authorities do not have any jurisdiction to issue a notice under Section 147 of the Act. Therefore, the said judgment covers the issue on hand. We have considered the judgment at length. We asked a question to the appellant as to why the order of the learned Single Judge is erroneous in view of the availability of an alternative and efficacious remedy. His reliance placed on Calcutta Discount Co.Ltd. case reported in (1961) 41 ITR 191, in our considered view, is misplaced. In spite of repeatedly asking the learned counsel, he is unable to point out that portion of the order wherein the alternative remedy has been discussed by the Hon'ble Supreme Court. As we understand, the issue therein was with regard to the jurisdiction in issuing a notice under the erstwhile Section 34 of the Act. The Hon'ble Supreme Court went into the merits of the matter and came to the conclusion on the question regarding the jurisdiction of the authority to issue the

impugned notice. However, the question for consideration is not the question of jurisdiction. Initially, the burden which the appellant would have to overcome is on the issue of an alternative and efficacious remedy. When such a remedy is available, necessarily the writ court would relegate the petitioner to the alternative remedy. Therefore, we do not find anything in the said judgment that affects the question of an alternative or efficacious remedy. The consideration on the issue as to whether the notice under the erstwhile Section 34 of the Act lacks jurisdiction or not is a question of fact and appreciation. Such appreciation can be done provided the learned Single Judge exercising his jurisdiction under Article 226 of the Constitution of India would hold that, even though there is an alternative and efficacious remedy, the same is not useful to the petitioner and therefore, a writ jurisdiction requires to be exercised. It is only when such a reasoning is assigned by the learned Single Judge that the

availability of an alternative and efficacious remedy becomes secondary. However, if there is no finding recorded as to why the writ jurisdiction is being exercised then necessarily the alternative and efficacious remedy would have to be undergone. We do not find that was the law declared by the Hon'ble Supreme Court in Calcutta Discount Co. Ltd. case. The issue pertained therein was with regard to the jurisdiction in issuing a notice and not the availability of an alternative and efficacious remedy. Hence, the said judgment is of no avail to the appellant's counsel.

5. The second judgment relied upon is that of the Hon'ble Supreme Court in the case of Madhya Pradesh Industries Ltd. vs. Income-Tax Officer reported in (1965) 56 ITR (Sh.N.) 18. Reliance therein is placed at the last paragraphs of pages 640 and 641 to contend that a writ jurisdiction can be entertained even though there is an alternative and efficacious remedy. We have considered the judgment at length. The facts therein would indicate that the High Court dismissed

the writ petition *in limine*. The Hon'ble Supreme Court held in last paragraph at page 642 as follows:

> *"We may add that we do not desire to fetter the discretion of the High Court to deal with the petition according to law and in the light of the well-recognised principles relating to the exercise of its jurisdiction, after an opportunity is given to the Income-tax Officer to meet the allegations made in the petition. We may also observe that we are constrained to set aside the order because we have no indication as to the grounds on which the High Court has rejected the petition which, prima facie, makes out a case which may require investigation and trial."*

It is on this ground that the Hon'ble Supreme Court even though there is an alternative and efficacious remedy entertained the writ petition and remitted the matter to the Income Tax Officer. This was a case where the High Court dismissed the writ petition without giving any reasons and the Hon'ble Supreme Court observed that they have no indication at all as to the ground on which the High Court dismissed the writ petition. That is not the fact situation herein. Hence, the said judgment is not applicable.

6. Reliance is placed on the Division Bench judgment of this Court in the case of Jeans Knit P. Ltd. vs. Deputy Commissioner of Income-Tax and Others reported in [2014] 367 ITR 773 wherein the appellant therein was relegated to the remedy of an alternative and efficacious remedy. The said matter along with other cases was challenged before the Hon'ble Supreme Court in Civil Appeal No.11189 of 2016 wherein the Hon'ble Supreme Court set aside the impugned orders and remitted the cases to the respective High Courts to decide the writ petitions on merits by holding that the view taken by various High Courts is contrary to the law laid down by the Hon'ble Supreme Court in Calcutta Discount Co. Ltd. vs. Income-Tax Officer, Companies District I, Calcutta and another reported in (1961) 41 ITR 191. The Hon'ble Supreme Court therein also noted the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income-Tax and Others v. Chhabil Dass Agarwal reported in [2013] 357 ITR 357 wherein

it was held that in the availability of an alternative and efficacious remedy, the writ Court should normaliy not interfere. We have considered the said judgment at length. The question of considering the matter on merits would arise after a finding is recorded that the alternative remedy is not an efficacious remedy. However, as held herein above, the said issue was not considered by the Hon'ble Supreme Court in Calcutta Discount Co.Ltd. case reported in (1961) 41 ITR 191. Therefore, we are of the view that the said judgment would be of no avail to the appellant.

7. Reliance is also placed on yet another judgment of the Division Bench of this Court in the case of Joint Commissioner of Income-Tax (LTU) and another v. Dell India Pvt.Ltd. reported in [2016] 382 ITR 310 wherein it was held that in the facts of the present case, the view of the learned Single Judge that the writ petition is maintainable on the question of jurisdiction of issuance of notice under Section 148 of the Income Tax Act was upheld. It is needless to state that the

judgment has been rendered on the facts and circumstances of the case involved therein. The same is not applicable to the present case on hand.

8. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of Godrej Sara Lee Limited vs. Assistant Commissioner (AA) and another reported in (2009)14 SCC 338 to contend that the High Court can exercise its writ jurisdiction when the action of authority is questioned on the ground of lack of jurisdiction. Therefore, the alternative remedy may not be a bar. We have considered the judgment at length. Petition therein involved the validity of the impugned notifications issued by the State under the Kerala Value Added Tax Act, 2003. However, that is not the case herein. What is being contended on the merits of the matter is with regard to the jurisdiction of the authority. There is no question involved regarding the availability of an alternative and efficacious remedy in the said order. Hence, the said judgment is not applicable.

9. On the other hand, counsel for respondent nos.2 and 3 relies upon the judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. v. Income Tax Officer and Others reported in (2003)1 SCC 72 wherein the Hon'ble Supreme Court held that the proper course of action to question the notice issued under Section 147 of the Act is for the assesee to file a return. Therefore, a writ court should restrain itself from entertaining such matters. Reliance is also placed on the judgment of the Hon'ble Supreme Court in Commissioner of Income-Tax and Others vs. Chhabil Dass Agarwal reported in [2013] 357 ITR 357 (SC) wherein the Hon'ble Supreme Court held at paragraph 19 as follows:

> "*Thus, while it can be said that this court has recognized 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's case, Titagarh 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."*

10. On considering the said judgments as cited herein above, we are of the view that in the existence of an alternative and efficacious remedy, it would be improper for a writ court to exercise its jurisdiction. The question of whether the notice issued under Section 147 of the Act is justified or not is once again a question of fact. As questions of fact cannot be gone into by a writ court, it would necessarily have to be done by the concerned authorities. Even assuming that the learned Single Judge exercised the writ jurisdiction, then a reference as to why the alternative remedy is not an efficacious remedy would have to

spelt out. Even on considering the alternative and efficacious remedy, we do not find that the rights of the petitioner are infringed only because he has to file an appeal against the said order.

11. For all these reasons, we are of the view that there is no reason to interfere with the well considered order passed by the learned Single Judge. Hence, the writ appeal is dismissed.

The amount said to have been deposited in terms of the order dated 10.04.2018 shall be dealt with by the authorities in the manner known to law.

Pending I.As. stand rejected.

Sd/-
JUDGE

Sd/-
JUDGE

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