

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Ms. Justice Krishna Debnath

CIVIL PETITION FOR LEAVE TO APPEAL NO.140 of 2019.

(From the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.1649 of 2012).

Commissioner, Customs, Excise and VAT :
Commissionerate, Jassore and others.Petitioners.

-Versus-

M/S. Perfect Tobacco Company Ltd., :Respondent.
represented by its Managing Director.

For the Petitioners. : Mr. Sk. Md. Morshed, Additional
Attorney General instructed by Mr.
Haridas Paul, Advocate-on-Record.

For the Respondent : Mr. Raziuddin Ahmed, Advocate
instructed by Mr. Mohammad Abdul
Hai, Advocate-on-Record.

Date of Hearing : The 4th April, 2022.

J U D G M E N T

Borhanuddin, J: Delay of 982 days in filing this civil
petition for leave to appeal is hereby condoned.

Challenging the judgment and order dated 05.05.2016
passed by the High Court Division in Writ Petition
No.1649 of 2012, present petitioners preferred instant
civil petition for leave to appeal.

Brief facts are that M/S. Perfect Tobacco Company Limited being petitioner filed Writ Petition No.1649 of 2012 stating interalia that the petitioner company used to produce different brands of lower-segment and mid-segment cigarettes but due to lack of demand and financial losses the management closed its production from 17.05.2006 and subsequently transferred shares of the company to the present owners complying all legal formalities under the companies act; The new management of the petitioner company filed an application on 26.02.2011 before the writ-respondent no.3, Divisional Officer, Customs, Excise and VAT Division, Kushtia, to amend the address of the company and type of business in the Value Added Tax (hereinafter referred as 'VAT') registration certificate; On 11.04.2011 the petitioner company received a letter from the Revenue Officer, Customs, Excise and VAT Circle, Kushtia, to the effect that only after receipt of the outstanding dues the VAT registration certificate can be amended; Then the petitioner company came to know that on the basis of a report submitted by the VAT registration officer a show

cause notice dated 31.05.2006 was issued upon the company demanding evaded VAT of Tk.25,02,464/-; The petitioner company replied the notice denying the allegation and prayed for withdrawal of the demand but writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia, without considering the documents submitted by the petitioner most arbitrarily passed the impugned order (Annexure 'E' to the writ petition) directing the petitioner to deposit an amount of Tk.69,02,464/-. The present owner of the petitioner company filed an application on 03.05.2011 before the writ-respondent no.3 stating interalia that there was a huge amount of bank liabilities and the present owner purchased the company on the basis of a tri-partite agreement by paying all the bank liabilities but received no response from the respondents and as such constrained to invoke writ jurisdiction.

A Division Bench of the High Court Division issued Rule Nisi upon the respondents and by an interim order stayed operation of the impugned order.

The writ-respondent no.1 contested the rule by filing an affidavit-in-opposition denying the averments made by the petitioner and stating interalia that the investigation team of the VAT authority found evasion of VAT by the Petitioner Company and representative of the company's Managing Director was present at the time of hearing on 11.06.2007 who admitted company's liability as detected by the investigation team. After hearing representative of the company, respondent no.2 passed the adjudication order on 15.08.2007, which is impugned in the writ petition.

Upon hearing the parties a Division Bench of the High Court Division made the Rule absolute declaring the impugned adjudication order dated 15.08.2007 as illegal and of no effect.

Feeling aggrieved, the writ-respondents as petitioners preferred instant civil petition for leave to appeal before this Division.

Mr. Sk. Md. Morshed, learned Additional Attorney General appearing for the present petitioners at the very

outset submits that the writ petition against the impugned adjudication order is not maintainable inasmuch as the adjudication order is an appealable order under section 42 of the VAT Act.

On the other hand Mr. Raziuddin Ahmed, learned Advocate for the respondent submits that though the evaded VAT was determined at Tk.25,02,464/- but by the adjudication order the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Circle, Kushtia imposed penalty arbitrarily and illegally for the evaded VAT at Tk.43,00,000/- and as such the petitioner had no other alternative but to avail writ jurisdiction against the impugned adjudication order.

Heard the learned Additional Attorney General for the petitioners and learned Advocate for the respondent. Perused the papers/documents contained in the paper book.

Our apex court in the case of TaeHung Packaging (BD) Limited and others Vs. Bangladesh and others, reported in 18 BLC (AD) (2013) 144, held:

"When the question of maintainability of a writ petition is raised by the contesting

respondents, it is the first and foremost duty of the learned judges to decide the said question first. If the writ petitions are found not maintainable, then it will be sheer wastage of court's valuable time to consider and discuss the merit of the case."

Section 42 of the VAT Act provides forum for statutory appeal which runs as follows:

৪২। আপীল-(১) “যে কোন মূল্য সংযোজন কর কর্মকর্তা বা যে কোন ব্যক্তি মূল্য সংযোজন কর কর্মকর্তার এই আইন বা কোন বিধির অধীন প্রদত্ত কোন সিদ্ধান্ত বা আদেশ দ্বারা সংক্ষুব্ধ হইলে তিনি উক্ত সিদ্ধান্ত বা আদেশের বিরুদ্ধে, পণ্যের সরবরাহ বা প্রদত্ত সেবার ক্ষেত্রে ধারা ৫৬ এর অধীন প্রদত্ত কোন আটক বা বিক্রয় আদেশ অথবা পণ্য আমদানির ক্ষেত্রে Customs Act এর section 82 বা section 98 এর অধীন কোন আদেশ ব্যতীত, উক্ত সিদ্ধান্ত বা [আদেশ প্রদানের বা, ক্ষেত্রমত, আদেশ জারির] [নব্বই দিনের] মধ্যে,

- (ক) উক্ত সিদ্ধান্ত বা আদেশ অতিরিক্ত কমিশনার বা তন্নিম্নের কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, কমিশনার (আপিল) এর নিকট;
- (খ) উক্ত সিদ্ধান্ত বা আদেশ কমিশনার, কমিশনার (আপিল) বা তাঁহার সমমর্যাদার কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, Customs Act এর section 196 এর অধীন গঠিত [Customs, Excise and মূল্য সংযোজন কর Appellate Tribunal, অতঃপর Appellate Tribunal বলিয়া উল্লিখিত, এর নিকট; এবং
- (গ) উক্ত সিদ্ধান্ত বা আদেশ Appellate Tribunal কর্তৃক প্রদত্ত হইয়া থাকিলে, বাংলাদেশ সুপ্রীম কোর্টের হাইকোর্ট বিভাগের নিকট;]

আপিল করিতে পারিবেন।

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- (২) যদি কোন ব্যক্তি কোন পণ্য বা সেবার উপর প্রদেয় মূল্য সংযোজন করের দাবী সম্পর্কিত অথবা এই আইনের অধীন আরোপিত কোন অর্থদণ্ড সম্পর্কিত কোন সিদ্ধান্ত বা আদেশের বিরুদ্ধে উপ-ধারা (১) এর অধীন আপিল করার ইচ্ছা করেন, তাহা হইলে তাহাকে, তাহার আপিল দায়ের করার কালে [আপিলটি-

- [(ক) কমিশনার (আপিল) এর নিকট দায়ের করা হইলে, দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদণ্ডের দশ শতাংশ]; [এবং]

(খ) কমিশনার বা তাঁহার সমমর্যাদার কোনো মূল্য সংযোজন কর কর্মকর্তার আদেশের বিরুদ্ধে Appellate Tribunal এ দায়ের করা হইলে, [দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদন্ডের দশ শতাংশ] ;”

From the above provision of law it is evident that any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed in the section.

In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal.

When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum created under the law is not maintainable.

Article 102 of the constitution provides as under:

"102. (1) *The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.*

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

*.....
....."*

It is apparent from Article 102 (2) of the constitution that the High Court Division may give directions or orders under Article 102 (1) of the constitution where there is no other equally efficacious remedy provided by law.

Our Apex Court in the case of *TaeHung Packaging (BD) Limited and others Vs. Bangladesh and others*, reported in 18 BLC (AD) (2013) 144, held:

"The consistent views of this Division are that if any alternative remedy is available, the judicial review by the High Court Division in writ jurisdiction is not available with the exception that where the vires of a statutory provision is challenged or where the

alternative remedy is not efficacious exercise of such power may be justified."

It is also held:

"In exercising the power of judicial review the High Court Division does not assume the function of an appellate authority."

Section 42(4) of the VAT Act provides that:

“(৪) উপ-ধারা (১) বা, ক্ষেত্রমত, উপ-ধারা (১ক) এর অধীন আপীল দায়ের হইবার পর [১(এক) বৎসরের মধ্যে] কমিশনার (আপিল) বা, ক্ষেত্রমত, [২(দুই) বৎসরের মধ্যে] Appellate Tribunal কর্তৃক আপিল নিষ্পত্তি করিতে হইবে:

তবে শর্ত থাকে যে, উক্ত সময়সীমার মধ্যে আপিলটি নিষ্পত্তিক্রমে সিদ্ধান্ত প্রদান করা না হইলে উহা কমিশনার (আপিল) বা, ক্ষেত্রমত, Appellate Tribunal কর্তৃক মঞ্জুর করা হইয়াছে বলিয়া গণ্য হইবে।”

In view of the time frame prescribed by section 42(4) of the VAT Act it cannot be said that the remedy under section 42 of the Act is not efficacious.

The respondent had an adequate remedy under the VAT Act which he could avail of. The respondent did not avail the appellate forum under the statute which was competent to decide all questions of fact and law.

It is pertinent to mention here that Clause (2) of Article 102 of our Constitution empowers the High Court Division to interfere with any proceeding if satisfied that there is 'no other equally efficacious remedy is provided by law.' But though Article 226 of the

Constitution of India provides no such restrictions for the High Courts in India to invoke writ jurisdiction even in presence of equally efficacious remedy in any case of violation of fundamental rights and the Supreme Court of India has also been given similar power with the exception that under Article 32 the sole object is the enforcement of the fundamental rights guaranteed by the Constitution whereas, under Article 226 of the High Courts have been invested with a wider power relating to the enforcement of fundamental rights as well as ordinary legal rights, still Indian Supreme Court is very cautious in exercising the right where there is an alternative remedy.

In the case of *Champalal Binani Vs. the Commissioner of Income Tax, West Bengal & others*, reported in AIR 1970 (SC) 645, the Indian Supreme Court observed that:

"Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is ex-facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it

erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petition."

From the reasons stated above, we are of the view that the writ petition is not maintainable without exhausting the statutory forum of appeal provides under section 42 of the VAT Act.

However, the respondent can still avail the statutory forum of appeal under section 42 of the VAT Act taking recourse of section 14 of the Limitation Act. Since we are already held that the writ petition is not maintainable as such refrained from going into merit of the case.

Accordingly, the civil petition for leave to appeal is disposed of.

Judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.1649 of 2012 is set aside.

No order as to cost.

J.

J.

J.