

Cesc Ltd. and Another Vs. the State of West Bengal and Others

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Court : Kolkata

Decided On : Apr-04-1996

Reported in : AIR1996Cal384

Judge : Arun Kumar Dutta, J.

Acts : [Constitution of India](#) - Articles 25, 26, 32, 36, 36B, 136, 226, 227, 323-B and 368;; West Bengal Taxation Tribunal Act, 1987 - Sections 5, 6 and 14;; [Constitution of India](#) (Amendment Act), 1976

Appeal No. : W.P. No. 79 of 1996

Appellant : Cesc Ltd. and Another

Respondent : The State of West Bengal and Others

Judgement :

ORDER

1. By this Writ Application under Article 226 of the [Constitution of India](#) the Writ Petitioners, C.E.S.C. Limited and another (hereinafter referred to as petitioners), have prayed the Court for an order 'that Sections 5, 6 and 14 of the West Bengal. Taxation Tribunal Act, 1987 in so far as it takes away the jurisdiction of this Hon'ble Court under Article 226 of the [Constitution of India](#) and confers jurisdiction upon the said, Tribunal to decide the constitutional points are violative of basic structure of the [Constitution of India](#) and void to the said-extent' and issue of a writ in the nature of Mandamus commanding the respondent to act in accordance with law

and to cancel and/or rescind and/or withdraw the judgment and order dated 22nd March, 1995 passed by the respondent No. 6 in cases Nos. R.N. 481(T) of 1989 and 241(T) of 1992, the Memo No. 4130 dated 26th September, 1995 and Memo No. 4285 dated 19th October, 1995 both issued by the respondent No. 2 and the memo No. 22967 CT dated 9th December, 1995 written by the respondent No. 5 and the verbal threat made by the respondent No. 2 as contained in paragraph 24 of the petition and all proceedings thereunder and/or in pursuance thereof,' along with the other reliefs prayed for therein, for the reasons stated and on the grounds made out therein.

2. On the writ application (hereinafter referred to as application) being moved, the learned Counsel for the contending respondents had raised a preliminary point of law as to the maintainability of the writ application and jurisdiction of this Court to entertain the same on the submissions made. It had been submitted by the learned Counsel that the question of maintainability and jurisdiction of this Court to entertain the application may first be decided before entertaining the same and issuing any direction therein. The aforesaid point having been seriously urged on the submissions made, I had proposed to take up and hear the aforesaid question of maintainability and jurisdiction before entertaining the application. I had accordingly heard the submissions of the learned Advocates for both sides at length on different dates on the points so raised.

3. It was submitted by the learned Counsel for the contending respondents that the writ application is mainly and inevitably directed against the judgment and order dated 22nd March, 1995 passed by the respondent No. 6-The West Bengal Taxation Tribunal (forshort Taxation Tribunal), being Annexure 'E' to the writ application, on an earlier writ application filed by the petitioner No. 1 herein. The prayer (a) to the instant-writ application challenging the constitutional validity of Sections 5, 6 and 14 of the West Bengal Taxation Tribunal Act, 1987 (hereinafter referred to as Act of 1987) on the ground stated in ground No. VIII thereof is only an endeavour to, bring the matter within the jurisdiction of this Court. It was submitted that the petitioner had duly participated in the earlier writ application under Article 226 of the [Constitution of India](#), after being transferred to the Taxation Tribunal from the High Court, and had allowed the same to be disposed

of. No such plea regarding the constitutional validity of Sections 5, 6 and 14 of the Act of 1987 had been raised by the petitioner herein. The said plea is taken herein for the first time by the petitioners after being unsuccessful in the aforesaid earlier writ application only as a device to avoid the aforesaid impugned judgment and order dated 22-3-1995 passed by the Taxation Tribunal, which is clearly barred by the principles of constructive res judicata. The aforesaid impugned judgment and order of the Taxation Tribunal is thus sought to be challenged by the petitioners in the instant writ application in this round about way by sadly seeking to clothe the High Court with the jurisdiction to entertain the instant writ application in view of the prayer(s) thereof on the ground stated in ground VIII thereto.

4. In the present case, the impugned Act of 1987 has been enacted by the State Legislature in exercise of the powers conferred by clause (1) of Article 323-B which was introduced in the Constitution by the Constitution (42nd Amendment) Act, 1976. Clause 3(d) of the said Article provides that a law made by the appropriate Legislature under clause (1) may exclude the jurisdiction of all Courts, except the jurisdiction of the Supreme Court under Article 136, with respect to all or any of the matters falling within the jurisdiction of the said Tribunals, as indicated in clause (2) thereof. It had been urged on behalf of the contending respondents that the exclusion of the jurisdiction of the High Court under Articles 226 and 227 of the Constitution by any law made by the appropriate Legislature under clause (1) of the aforesaid Article 323-B is specifically authorised by the constitutional amendment enacted in clause (3)(d) of that Article. As held by the Supreme Court in the decision in *S.P. Sampath Kumar v. Union of India, etc. etc.*, AIR 1987 SC 386, the aforesaid constitutional amendment authorising exclusion of the jurisdiction of the High Court under Articles 226 and 227 postulates in its validity that the law made under clause (1) of Article 323-B excluding the jurisdiction of the High Court under Articles 226 and 227 must provide for an effective alternative institutional mechanism or authority for judicial review. It has further been held therein that judicial review by the Supreme Court is left wholly unaffected thereunder and thus there is a forum where matters of importance and great injustice can be brought for determination or rectification. Thus the exclusion of the jurisdiction of the High Court does not totally bar the judicial review. The Supreme Court in the case of *Minerva Mills Limited v. Union of India*, :

[1981]1SCR206 had pointed out that effective alternative institutional mechanism or arrangements for judicial review can be made by the Parliament. It is thus possible to set up an alternative institutional mechanism in place of the High Court for providing judicial review. It was further held that establishment of Tribunal under the Act taking away the jurisdiction and power of the High Court to interfere in such matters is not violative of the doctrine of judicial review which is a fundamental aspect of the basic structure of our Constitution because the relevant provision of the Act which bars the jurisdiction of the High Court under Articles 226 and 227 of the Constitution preserves the jurisdiction and power of the Supreme Court under Articles 32 and 136 of the Constitution. The Supreme Court has further held in *Union of India v. Paramananda* : (1989)11LLJ57SC that in the case of a proceedings transferred to the Tribunal or a Civil Court or High Court, the Tribunal has the jurisdiction to exercise all the powers which the Civil Court could in a suit or the High Court in a writ proceeding would have respectively exercised. The Tribunal can thus exercise any of the powers of Civil Court or High Court by way of judicial review. It is neither more nor less because the Tribunal is not just a substitute to the Civil Court and the High Court and the High Court following the decision in the case of *S. P. Sampath Kumar* that the Tribunal has to be contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. The Supreme Court in *Union of India v. S. L. Abbas* has as well held that such a Tribunal is akin to the High Court under Article 226. In view of the decision of the Supreme Court in *Union of India v. Deep Chand Pandey*, : AIR 1993 SC382 , the expression 'all Courts' mentioned in clause (3)(d) of Article 323-B of the [Constitution of India](#) and the relevant provisions of the Act of 1987 is comprehensive enough to include the High Court if the matter in question falls within the jurisdiction of the Tribunal, and the High Court shall not be left with any jurisdiction to deal with the same.

5. It had been submitted on behalf of the respondents that in view of the aforesaid decisions that the Taxation Tribunal, set up in pursuance of the provisions of Article 323-B of the Constitution, must be contemplated as a substitute of the High Court and not supplemental thereto. The Tribunal must be held to be at par with the High Court in respect of matters falling within the jurisdiction in terms of the provisions of clause (3)(d) of the aforesaid Article of the Constitution, read with the

provisions of Sections 5, 6 and 14 of the Act of 1987, read together, such as they are. That being so, the decision of the Taxation Tribunal in respect of matters falling within its jurisdiction cannot clearly be subject to judicial review by the High Court. As observed by the Supreme Court in the decision in *S. P. Sampath Kumar v. Union of India*, (AIR 1987 SC 396) (supra) the Tribunal under the scheme of the relevant Act would take over a part of the existing backlog and the share of the normal load of the High Court. To reiterate, the Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. To provide the Tribunal as an additional Forum from where the parties would go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet for which the innovation has been brought about. Thus barring of the jurisdiction of the High Court cannot be a valid ground of attack. It had thus being submitted by the learned Advocate for the contending respondents that the Taxation Tribunal must be held to be a substitute of the High Court and at par with it, being an alternative institutional mechanism/ arrangement for judicial review in the scheme of administration of justice and impugned judgment and Order of the Taxation Tribunal dated 28-3-1993 cannot be challenged by the petitioners before this Court. The instant writ application to that extent is, therefore, clearly not maintainable, and the High Court has no jurisdiction to entertain the same.

6. As against that the learned Advocate for the petitioners had submitted that the observations made and the decisions in *Sampath Kumar's case* (AIR' 1987 SC 386) (supra) cannot be said to be binding in view of the fact that the correctness of the observations in *Sampath Kumar case* has been doubted by a three Judge Bench of -the Supreme Court in *L. Chandra Kumar v. Union of India* : (1995)IILLJ640SC . It had been submitted that a note discordant to that of *Sampat Kumar* (AIR 1987. SC 386) was struck by a three Judge Bench of this Court in *M. B. Majumder v. Union of India*, : (1991)IILLJ585b SC homing that the Administrative Tribunals (set up under Article 323-A of the Constitution) cannot be equated with the High Courts in all respects and they are not deemed High Courts. It had also been submitted that a three Judge Bench of the Supreme Court in *State of Orissa v. Bhagwan Sarangi*, : (1995)1SCC399 has made it clear that the Tribunal is nonetheless a Tribunal and is bound by the decision of the High Court

of the State. It is incorrect to side-track or by-pass the decision of the High Court by the Tribunal. Another three Judge Bench of the Supreme Court in *R. K. Jain v. Union of India*, : 1993(65)ELT305(SC) has opined that the Tribunals being creature of statute can in no case claim status of the High Court or parity or as substitutes, in the facts and circumstances therein. The three Judge Bench of the Supreme Court in *L. Chandra Kumar v. Union of India* : (1995)IILLJ640SC (supra) has accordingly doubted the correctness of the observations in *Sampath Kumar's* case (AIR 1987 SC 386) in view of the aforesaid post-*Sampath Kumar* cases and was of the view that a fresh look by a larger Bench over all the issues adjudicated in *Sampath Kumar* case is required. The matter was accordingly to be referred to a larger Bench for reconsideration of the decision in *Sampath Kumar* case. It was thus submitted by the learned Advocate for the petitioners that the observations made and the decisions in *Sampath Kumar's* case could not be relied upon. The learned Advocate had also referred to the decision of a Division Bench of this Court in the *Century Spinning Manufacturing Company v. State of West Bengal*, (1989) 73 STC 277 (Cal), wherein it has been held that when the High Court is faced with the decisions of the Supreme Court taking contrary view on the same point it has no choice but to follow the decision of the larger Bench. But this holds good only where a Bench with a lesser strength had not taken notice of or was not aware of the decision of the larger Bench. But when such a Bench is not only aware of the decision of the larger Bench, but, in fact, explains or distinguishes or identifies the correct ratio of the judgment of the larger Bench, then the High Court and Court below have no choice but to follow the latter decision, though rendered by a Bench of lesser strength than the one opposed to it.

7. But unhappily for the petitioners, the three Judge Bench of the Supreme Court in the case of *L; Chandra Kumar v. Union of India* : (1995)IILLJ640SC (supra) has not taken a view contrary to the view taken by the Constitution Bench of five Judges of the Supreme Court in the case of *Sampath Kumar*. The three Judge Bench in the case of *L. Chandra Kumar v. Union of India* had neither explained nor distinguished nor identified the correct ratio of the judgment of the case of *Sampath Kumar*. The correctness of the observations in *Sampath Kumar's* case have merely been doubted by a Bench of lesser strength in the case of *L. Chandra Kumar*, and thus referred to a larger Bench in keeping with the observations of the

Supreme Court in M/s. Ujagar Prints v. Union of India, : [1987]167ITR904(SC) observing therein that judicial discipline requires that a Bench of two Judges should not disregard the decision of a Bench of 3 Judges; but if the Bench of two Judges is inclined to disagree with what has been held by a Bench of 3 Judges on the ground that it does not represent the correct law on the subject, the case should be referred by the Bench of two Judges to a larger Bench. A Division Bench of the Orissa High Court in Basudev Khadarga v. Union of India, : AIR1973 Ori136 has held that the decision of the Supreme Court till it is altered by it is binding and its effect cannot be whittled down because the matter is under consideration before the Supreme Court. Another Division Bench of the Andhra Pradesh High Court has as well held in Md. Abdul Khader v. A.P. State Road Transport Corporation, 1984 Lab 1C 90 that merely because a particular view taken by the Supreme Court which constitutes the law of the land under Article 141 of the Constitution is sought to be examined again in some cases, and the same is referred to a larger Bench, the law as laid down does not cease to be binding on the High Court. There is little reason to differ from the views so taken by the Division Benches of Orissa and Andhra Pradesh High Courts on the proposition of law laid down in the aforesaid decisions. That being so, the decision and observations made by the Supreme Court in Sampath Kumar's case (AIR 1987 SC 386) (supra) cannot be said to be not binding upon the High Court. It was thus submitted on behalf of the respondents that the impugned Judgment and Order of the Taxation Tribunal dated 22nd March, 1995 could not therefore be challenged by the petitioners before this Court even if the same suffer from the infirmities, alleged by them.

8. In view of the aforesaid submissions made on behalf of the contending respondents, the petitioners in their belated second supplementary affidavit, affirmed on 4th March, 1996, have taken certain new grounds in support of their plea as to the maintainability of the instant writ application in paragraph 3 thereof, including the ground made out in sub-para (b) thereof; which reads as follows:

'For that in the event of it being contended that Article 323-B of the [Constitution of India](#) empowers and/or authorises the appropriate Legislature to make laws abrogating or taking away the power of judicial review conferred upon the High

Courts of each State under Articles 226 and 227 of the [Constitution of India](#) it affects and/or alters the basic structure or framework of the Constitution and the same is ultra vires Article 368 of the [Constitution of India](#) and void beyond the constituent power of Parliament.

9. Upon hearing the submissions of the learned Advocates for both sides quite at length and perusal of the relevant provisions of the [Constitution of India](#), more particularly, Arts. 323-B and 368 thereof, and the various decisions referred to by both sides, it seems to me that the writ petition, in view of the grounds made out therein and in the second supplementary affidavit filed by the petitioners involved substantial arguable question of law which requires detailed consideration of the Court. Suffice it to recall for the present, the majority view of the 13th Judge Bench of the Supreme Court in *His Holiness Kesavananda Bharati Sripadayaalvaru v. State of Kerala*, : AIR 1973 SC1461, inter alia is that Article 36B does not enable parliament to alter the basic structure or framework of the [Constitution of India](#), which is still the law of the land. It is submitted by the learned Advocate for the petitioners that Article 26 of the Constitution is a basic structure and framework of the Constitution, which cannot be taken away from the High Court and vested in any other mechanism.

10. The following observations of P. N. Bhagwati, J. in the case of *Minerva Mills Limited v. Union of India* (supra) also seems worth bearing in mind in this context:

'The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution.'

11. Speaking about the draft Article 25, corresponding to the present Article 32 of the Constitution, Dr. Ambedkar, Principal Architect of our Constitution, had stated the following in the Constituent Assembly on December 9, 1948:--

'If I was asked to name any particular Article in this Constitution as the most important - an article without which this Constitution would be as nullity, I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance (CAB Vol. VII, p. 953)'.

12. It is needless to mention that the power of the High Court under Article 226 is wider than the power of the Supreme Court under Article 36 of the Constitution. The aforesaid observations made by Dr. Ambedkar would accordingly apply with much stronger force to Article 226 of the Constitution. It may as well presently be recalled, that the Supreme Court in the case -of Minerva Mills Limited (supra) had observed the following with more than usual clarity:--

'Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament weregranted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become Supreme over it, because it would have power to alter the entire Constitution, including its basic structure and even to put an end to it by totally changing its identity. It will therefore be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.'

Bhagwati, J. in his minority view had also expressed as follows:

'I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. 'But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution.'

13. Bhagwati, J. had observed the following in the case of *Sampath Kumar v. Union of India* (AIR 1987 SC 386) (supra) in this context:

'It is undoubtedly true that my judgment in *Minerva Mills Ltd.* case was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential features of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanisms or arrangement for judicial review, provided it is no less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanisms or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the Rule of Law. Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would be not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, viz., that the alternative institutional mechanism or authority set up by the Parliamentary amendment is no less effective than the High Court.'

14. The aforesaid observation was- made by Bhagwati, J. in the case of Sampath Kumar v. Union of India (AIR 1987 SC 386) (supra) following his own minority view in the case of Minerva Mills Limited v. Union of India (supra) which, in turn, was followed by the Supreme Court in some other subsequent cases. But the Full Bench of Andhra Pradesh High Court in Sakinala Harinath v. State of Andhra Pradesh, (1994) 1 AP LJ 1 has held that the theory of alternative institutional mechanism as propounded by Bhagwati, J. in the minority judgment in Minerva Mills case, which subsequently found favour in the majority judgments in S. P. Sampath Kumar's case (AIR 1987 SC 386) (supra) and Sambamurthy's case, reported in AIR 1987 663, is contrary to the ratio decidendi of the earlier decisions of the larger Benches of the Supreme Court in Kesavananda Bharati's Case : AIR 1973 SC1461 (supra), Privileges-Case reported in : AIR 1965 SC745 , and Indira Gandhi's Case. The Full Bench of the Andhra Pradesh High Court has held in the aforesaid decision that the Supreme Court in the aforesaid cases has laid down the principle that the Constitutional Courts, viz. the Supreme Court and the High Courts alone have the power of judicial review. The said decision in Sakinala's Case has been assailed before the Supreme Court in C.A. No. 169 of 1994, which has been referred to a Constitution Bench, as appearing from the decision in L. Chandra Kumar's Case : (1995)IILLJ640SC (supra).

15. As already indicated above, a more discordant to that of Sampath Kumar (AIR 1987 SC 386) was struck by a three Judge Bench of the Supreme Court in the case of M. B. Majumder v. Union of India : (1991)IILLJ585b SC (supra). The Supreme Court in State of Orissa v. Bhagwan Saranji : (1995)1SCC399 (supra) has also subsequently held that a Tribunal established under the Act is nonetheless a Tribunal, and cannot side-track a decision of the High Court concerned. In the case in R.K. Jain v. Union of India : 1993(65)ELT305(SC) (supra) Ramaswamy, J. has also opined that Tribunals being creatures of Statutes can in no case claim status of the High Court or parity or substitute. As already stated above, a three Judge Bench of the Supreme Court in L. Chandra Kumar's Case : (1995)IILLJ640SC (supra) doubted the correctness of the observations in Sampath Kumar's Case (AIR 1987 SC 386) (supra) in view of the aforesaid post Sampath Kumar Cases, and was of the view that a fresh look by a larger Bench over all the issues adjudicated in Sampath Kumar's Case is required. The matter

was accordingly referred to a larger Bench for reconsideration of the decision in Sampath Kumar's Case. The decision of the larger Bench of the Supreme Court on a fresh look is still awaited. In the aforesaid circumstances, the question whether the theory of alternative institutional mechanism/ arrangement, as propounded by Bhagwati, J. in the minority judgment in Minerva Mill's Case, which subsequently found favour in the majority judgments in Sampath Kumar Case and some other subsequent cases, referred to above, is contrary to the ratio decidendi of the earlier decisions of the larger Benches of the Supreme Court in Keshavananda Bharati's Case : AIR 1973 SC1461 , Privileges' Case, and Indira Gandhi's Case, yet to be answered, is indeed very much arguable in view of the foregoing discussions.

16. In the aforesaid circumstances, I do not feel inclined to summarily reject the instant writ application on the ground that it is not maintainable and that the High Court has no jurisdiction to entertain the same, as contended by the learned Advocate for the contending respondents. The instant writ application be accordingly entertained and admitted. The respondents are hereby allowed four weeks' time from date for filing affidavit-in-opposition in the matter. The petitioner shall be at liberty to file affidavit-in-reply there against, if any, within two weeks thereof. Let the matter appear seven weeks, hence.

17. In the meantime, having regard to the submissions made by the learned Advocate for the petitioners, the materials on record, and the relevant statutory provisions/orders in connection with the relevant matter, let there be an interim order in terms of prayer (g) and (c) to the writ application, which shall remain in force until further orders. There shall also be an interim order in terms of prayer (h) to the writ application which shall also remain in force until further orders on condition that the petitioner shall comply with all requirements therefor, as may be required under the relevant statute and the rules made thereunder.

18. All parties are to act on the signed copy of the minutes of the operative portion of the judgment and order on the usual undertaking.

19. Order accordingly.

