M/S. Magadh Sugar And Energy Ltd. vs The State Of Bihar on 24 September, 2021

Author: D.Y. Chandrachud

Bench: Bv Nagarathna, Vikram Nath, Dhananjaya Y Chandrachud

REPORTA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 5728 of 2021

M/s Magadh Sugar & Energy Ltd. ...Appel

Versus

The State of Bihar & Ors. ...Resp

JUDGMENT

Dr Dhananjaya Y Chandrachud, J 1 Leave granted.

2 This appeal arises out of the judgment of a Division Bench of the Patna High Court dated 18 September 2017. The High Court declined to entertain the writ petition instituted by the appellant on the ground that the dispute between the parties is factual in nature and is suitable for adjudication in terms of the statutory remedy provided in the Bihar Electricity Duty Act 1948 1. The appellant had invoked the writ jurisdiction of the High Court to challenge the imposition of "Bihar Electricity Act" or "the Act" electricity duty and penalty on the electricity that it was supplying to Bihar State Electricity Board 2.

Facts of the case 3 The appellant is a sugar mill company operating in Narkatiaganj, Bihar. It is engaged in the business of manufacture and sale of white crystal sugar. The waste of sugarcane (bagasse) produced in the process of manufacturing sugar is used for the production of electricity for its own consumption and the surplus energy is supplied to BSEB. The appellant has been

supplying electricity to BSEB since 6 March 2008.

4 The Bihar Electricity Duty Act 1948 3 in its initial form empowered the State Government (the first respondent) to levy electricity duty under Section 3 (1) on the units of energy consumed or sold, excluding the losses of energy in transmission and transformation at the rates specified by the first respondent. Rates of duty were specified in the Schedule to the Act. The Bihar Electricity Act was amended in 2002 which led to the deletion of the Schedule and amendment of Section 3(1). The amendment allowed the first respondent to levy tax on the basis of the units or the value of energy consumed or sold at rates specified by the State Government by a notification. Section 3 (1) in its current form provides as follows:

> "3. Incidence of duty-(1) Subject to the provisions of sub- section (2), there shall be levied and paid to the State Government, either on the units or on the value of energy consumed or sold, excluding losses of energy in "BSEB" "The Act" transmission and transformation, a duty at the rate or rates to be specified by the State Government in a notification. Provided that, the State Government may, by notification, specify different rates of duty in respect of different categories of consumption or sale of energy.
>
> Provided further that, the rate of duty shall not exceed twenty paise per unit in case the duty is levied on the basis of units consumed or sold and ten percentum of the value of the energy consumed or sold in case the duty is levied on the basis of the value of energy.
>
> (2) No duty shall be leviable on units of energy-
>
> (a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government.
>
> (b) consumed in the construction, maintenance, or operation of any railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway.
>
> (c) consumed by the licensee in the construction, maintenance and operation of his electrical undertaking.
>
> (d) consumed by or sold by any class of persons exempted from payment of duty under section 9.
>
> (e) consumed by the Damodar Valley Corporation for the generation, transmission or distribution of electricity by that Corporation.
>
> (f) consumed for any purpose which the state Government may, by notification, in this behalf declare to be a public purpose and such exemptions may be subject to

such conditions and exemptions if any, as may be mentioned in the said notification.

(3) when a licensee holds more than one licence, duty shall be payable separately in respect of each license." (emphasis supplied)

5 In pursuance of its power under Section 3(1) of the Act, the first respondent issued a notification dated 21 October 2002 4 which stipulated that the rate of duty applicable on the consumption or sale of electricity would be fixed at six per cent of the value of energy consumed or sold for any other purposes other than irrigation. The notification was amended by another notification dated 4 March 2005 5 which provided that the rate of duty to be levied on consumption of electrical energy generated by captive power plants would be six per cent of the SO 137 SO 14 value of energy, which shall be equivalent to the energy tariff as fixed by the BSEB. It is also relevant to note that a notification dated 14 January 2011 6 was issued by the first respondent exercising its powers under Section 9 of the Act 7 granting a blanket exemption from payment of electricity duty on electricity generated by captive plants for self-consumption.

6 The appellant through the Bihar Sugar Mills Association challenged the notifications dated 21 October 2002 and 4 March 2005 in the High Court by filing a writ petition 8. The High Court by its judgement dated 16 September 2009 struck down the notifications and the amendment to Section 3 (1) of the Bihar Electricity Act on the ground that there were no guidelines in the statute or the notifications for construing the expression 'value of energy'. The relevant extract of the judgment is reproduced below:

"19. In view of the above discussion, the amendment of Section 3 (1), so far as it provides for payment of duty "on the value of energy" is liable to be struck down as there is no guideline provided in the statute as to in which case the duty will payable calculated on the basis of the value of energy consumed or sold. Similarly the notification dated 21.10.2002 providing for payment of duty at 6 per centum of the value of energy is liable to be quashed as there is no guidelines provided for the ascertaining the value of energy. The subsequent Notification SO no. 14 dated 04.03.2005 is also liable to be struck down on the self-same ground. Since the amendment as the notification is found to be inoperative, it is obvious that the duty will be payable as per the schedule which was in vogue by virtue of the Bihar Electricity (Amendment) Act, 1993." SO 1 Power of the State Government to grant exemption from the duty payable under this Act.

CWJC No 13614 of 2006

7 The first respondent aggrieved by judgment of the High Court filed a special leave petition 9 before this Court. While the matter was pending before this Court, the first respondent amended the Act through the Bihar Finance Act 2012 with retrospective effect from 17 October 2002 for defining the term 'value of energy'. Consequent to the insertion of Section 2 (ee) in the Act, the expression reads as follows:

"(ee) 'value of energy' –

(i) in case of energy sold to a consumer by a licensee or by any person who generates energy, means the charges payable by the consumer, to the licensee or to any person who generates such energy, for the energy supplied by such licensee or person, as the case may be; but it shall not include the following charges, namely --

1) Meter charges (2) Interest on delayed payment (3) Fuse-off call charges and reconnection charges:

Provided that where no energy has been consumed by a consumer, minimum charges payable by him shall not deemed to be the value of energy:

Provided further that where the units of energy actually consumed by a consumer are less than the units of energy for which prescribed minimum charges are payable, the value of energy shall, in the case of such consumer, mean the charges for the units of energy actually consumed by him and not the prescribed minimum charges:

(ii) in case of energy consumed by the person generating such energy, means the charges payable by any other consumer for such quantum of power to the Bihar State Electricity Board constituted under section 5 of the Electricity (Supply) Act, 1948 (Act 54 of 1948) in respect of energy supplied by the Bihar State Electricity Board within the area where the consumer is located;" (emphasis supplied) The appellant challenged the amendment by invoking the writ jurisdiction 10 of the High Court. The petition is pending.

Consequent to the grant of special leave, it was converted to Civil Appeal No 2570 of 2010. CWJC No 11126 of 2012 8 On 3 January 2015, the fourth respondent issued a notice to the appellant for its failure to file returns under Section 6B (1) of the Act, concealment of the sale of electricity of approximately Rs 56 crores and for raising a demand of electricity duty and penalty of about Rs 67 crores. The notice was issued on the basis of the report dated 24 December 2014 of the Accountant General (Audit) Bihar. In its reply dated 5 February 2015, the appellant contended that no tax can be levied on the supply of electricity by the appellant to BSEB for the following reasons:

(i) Under Section 3 of the Act, tax is levied on the 'value of energy'.

Section 2(ee) only brings the sale to a consumer within the ambit of the phrase 'value of energy';

(ii) BSEB is a 'licensee' and not a 'consumer' in view of the definition of 'licensee' provided under Section 2(d) of the Act; and

(iii) The resolution dated 12 September 2006 issued by the first respondent announced various incentives for establishment and development of sugar and other allied industries including exemption from payment of electricity duty for cogeneration for five years.

9 The definition of the term 'consumer' has a bearing on the present appeal since the appellant has argued that the term 'value of energy' used in Section 3 for the levy of tax is not applicable to it because the definition of 'consumer' excludes a licensee. The term 'consumer' has been defined in Section 2 (b) of the Bihar Electricity Act in the following terms:

> "(b) 'consumer' means any person who is supplied with energy but does not include either a licensee or the 'distributing licensee' as described in clause 1 (a) of clause IX of the Schedule to the [3] Indian Electricity Act, 1910 (9 of 1910), or a person who obtained sanction under section 28 of the said Act." (emphasis supplied) The appellant supplies electricity to BSEB which is undertaking the business of distributing electricity. The appellant is not supplying electricity to any other person. Thus, the appellant has submitted that it cannot be charged electricity duty under Section 3 (1) of the Bihar Electricity Act for supplying electricity to a licensee.

10 On 8 February 2015, the Assistant Commissioner of Commercial Tax, Bettial rejected the objection raised by the appellant and passed an assessment order confirming the demand of electricity duty and penalty of about Rs 67 crores on the following grounds:

> (i) It has been conceded by the appellant that it sells electricity in excess of its consumption. Duty is levied on every sale of electricity; and
>
> (ii) The notification dated 14 January 2011 only exempts the energy generated by a Generator or Captive Power Plant for self-consumption.

11 Notices of demand dated 14 February 2015 were issued to the appellant demanding electricity duty and penalty for 2010-11, 2011-12 and 2012-13. Challenging the notices, the appellant filed a writ petition11 before the High Court praying for the following reliefs:

> "For quashing the notices dated 14.2.2015 issued to the Petitioner raising demand for payment of duty and further that the Petitioner is not liable to file return as the provision of CWJC No 4300 of 2015 Section 6B(1) and 5A of the Act is not attracted in the case of the Petitioner and was not liable to pay electricity duty on supply of electricity to the Bihar State Electricity Board."

12 In the meantime, National Thermal Power Corporation Limited 12 had filed a writ petition 13 before the High Court challenging the imposition of electricity duty on its supply of electricity to various electricity boards including BSEB. NTPC was supplying electricity exclusively to the Electricity Boards. On 2 December 2015, the High Court passed an order tagging the writ petitions filed by the appellant and NTPC on the ground that the issue raised in both the petitions was substantially similar. Thereafter, on 20 October 2016, the High Court de-tagged the writ petitions holding that the matters are not similar since NTPC is a power generation company, while the appellant is a company which runs a sugar mill and also generates electricity from molasses. The relevant portion of the order is extracted below:

> "On an examination of the facts of the present matter as also of the other two writ petitioners in the batch of cases it is found that the other writ petitioners are power generating companies, whereas the petitioner is a Sugar Mill Company which also generates electricity from molasses. Moreover, the case of the petitioner along with the association of Bihar Sugar Mills Association was allowed by this Court by a judgment dated 16.09.2009, by which certain amendments in the Bihar Electricity Duty Act have been struck down but subsequently on an appeal filed by the State of Bihar in the Supreme Court, the Supreme Court has remanded the matter to this Court.
>
> For the aforesaid reasons, the present matter shall not be heard along with the other writ petitions."

13 On 14 December 2016, the High Court rendered its decision in the writ proceedings instituted by NTPC, holding that electricity duty cannot be imposed NTPC CWJC No 17306 of 2014 under Section 3 (1) of the Bihar Electricity Act on a power generation company supplying electricity to a licensee like the Electricity Board. The High Court's decision was premised on two reasons. First, it relied on the judgment of this Court in State of AP v. National Thermal Power Corporation Ltd 14 to arrive at the conclusion that it is beyond the legislative competence of the State to impose a tax on the sale of electricity which is not a sale for consumption. In this regard, the High Court observed that:

> "...the Apex Court has interpreted Entry 53 [of List II of the Constitution] to be read as taxation on the consumption or sale for consumption of electricity. That being the position whether the tax levied is under Entry 53 of List II as a tax on consumption or sale for consumption of electricity, or under Entry 54 of List II as taxes on sale or purchase of goods, it will make no difference since the goods which are to be taxed, that is, 'electricity' remains the same under both the circumstances and the levy can only be on the consumption or sale for consumption of electricity in terms of what has been laid down by the Apex Court in the NTPC's case (supra). The distinction between the two entries in respect of electricity has been clarified in para 23 of the said judgment where it has been said that if the State Legislature chooses to impose tax on consumption of electricity it will not be possible to do so under Entry 54, because it does not provide for taxes on consumption whereas Entry 53 permits the same.

Thus, the charging Section 3(1) of the Act when it speaks of levy of duty on either units or on the value of energy consumed or sold, has to be similarly read as the Constitutional Entry 53 providing the power to the State Legislature, to levy electricity duty either on the unit or on the value of energy consumed or sold for consumption. In the said circumstances, any sale of electricity which is not a sale for consumption would be beyond the purview of the State Legislature to enact and thus the charging Section 3(1) of the Act has to be read in the said light as levy of electricity duty for consumption or sale for consumption of electricity." (2002) 5 SCC 203; referred to as "State of AP" Second, the High Court observed that in terms of the provisions of the Bihar Electricity Act, a power generation company is liable to pay duty only if it is selling electricity to the consumer, as defined in

the legislation. The High Court held that:

> "We are also in agreement with the submission of learned counsel for the petitioners on the basis of the provisions of Section 3(1) read with Section 2(b),(d) and (ee) of the Act. It is evident from the definition of value of energy in Section 2(ee) which is the computation provision brought in by amendment, after the earlier provisions and notifications had been struck down by the Court as providing no guidelines, that it provides for only two type of cases under sub-clause (i) that is, firstly, energy sold to a consumer by a licensee and, secondly, energy sold to a consumer by a person who generates energy. Since we are not concerned with the 2nd type of case mentioned in sub-clause (ii) with regard to the person generating energy consuming the same, the only circumstance under which a generation company like the petitioners or any other person who generates energy would be liable for payment of electricity duty would be when it sells the energy, to the consumer itself. The petitioners are evidently not a licensee in the matters in hand, they are certainly not selling energy to the consumer; rather they are selling it to the BSEB, which is a licensee under Section 2(d) and which in turn sells the energy for ultimate consumption. ... Therefore, even on the ground of the applicability of the charging provision it has to be held that the charging provision under Section 3(I) read with the definition of 'consumer', 'licensee' and 'value of energy' as provided in the Act cannot be used to levy any tax on a generating company supplying energy to a licensee like the Electricity Board as in the present matter, as no tax can be computed in their cases." Aggrieved by the judgement of the High Court, the respondents filed special leave petitions 15 before this Court. By an order dated 3 July 2017, the special leave petitions were summarily dismissed by a two-judge Bench of this Court.

14 By its judgement dated 18 September 2017, the High Court dismissed the writ petition instituted by the appellant, holding that the liability of the appellant to SLP (C) No 17231-17238 of 2017 file returns would require a factual determination on the nature of the supply of electricity made to BSEB. It further observed that the appellant should exercise the alternative statutory remedy provided in the Act. The High Court observed:

> "Having considered the contentions we find the question as to whether the petitioner itself liable to file the return and what is the nature of supply made by the petitioner to the Bihar State Electricity Board and the nature of transaction is a dispute which warrants consideration based on enquiry of facts and once there is a statutory remedy available to the petitioner we are not inclined to allow this petition. However, granting liberty to the petitioner to take recourse to the remedy of appeal we dispose of the writ petition." The judgment of the High Court has given rise to the present appeal. Notice was issued on 4 January 2018.

Submissions of the Parties

15 We have heard Mr SK Bagaria, learned Counsel appearing on behalf of the appellant sugar mill and Mr Saket Singh, learned Senior Counsel appearing on behalf of the respondent State.

On behalf of the appellant, the following submissions have been urged:

(i) On a combined reading of Section 3 with Sections 2(b), 2(d) and 2(ee) of the Act, the sale of electricity by a generator to a licensee would not attract the levy of tax for the following reasons:

(a) Section 3 of the Act is the charging provision of the statute which states that tax shall be levied either on the units or on the value of the energy consumed or sold;

(b) Section 2(ee) defines the phrase 'value of energy' as the charge payable by the consumer to the licensee or by the consumer to the person who generates the energy;

(c) Section 2(d) defines the term 'licensee' to include the Bihar Electricity Board;

(d) The phrase 'value of energy' states that it is the charge payable by the consumer to either the licensee or the generator. Since the BSEB is a 'licensee' under Section 2(d) of the Act and not a consumer, the sale by the generator of the electricity (the appellant) to the licensee (BSEB) is not covered in the phrase 'value of energy' and is not taxable under Section 3 of the Act;

(ii) BSEB pays electricity duty for the electricity sold by it to consumers, including the electricity supplied by the company to the Board. The levy of tax on the electricity supplied by the company would thus amount to double taxation;

(iii) The question of filing a return under Sections 6B(1) and 5A of the Act does not arise when the appellant is not liable to pay the tax;

(iv) Without prejudice to the above submissions, even if it is conceded that the State has the power to levy tax on the supply of electricity by the generator to the licensee under Section 3 of the Act, the Government of Bihar has not exercised its power since under Section 3, a notification must be issued for specifying the rate of charge. The notification issued on 21 October 2002 by the State Government is the only notification providing the rate of duty on 'consumption or sale of electricity'. The notification states that for the electricity energy that is consumed or sold for any purpose other than irrigation, the rate of duty shall be six per centum of the 'value of energy'. However, the definition of the term value of energy only includes supply to the consumer;

(v) There is no dispute on facts. BSEB is a licensee and not a consumer. If power is exercised without jurisdiction, then the rule of alternate remedy will not apply (relied on Raza Textiles Ltd. v. ITO 16, State Trade Corporation of India Ltd. v. State of

Mysore 17 and Radha Kishan Industries v. State of Himachal Pradesh 18). Since the power exercised by the State under Section 3 of the Act to levy electricity duty on sale of electricity by the appellant to BSEB is a jurisdictional issue, the rule of alternate remedy would not apply;

(vi) A Constitution Bench of this court in State of AP (supra) held that Entry 53 of List II of the Seventh Schedule which deals with 'Taxes on consumption or the sale of electricity' must be read as 'Taxes on consumption or sale for consumption of electricity'. Since the appellant does not sell the electricity to BSEB for consumption but rather for distribution, such sale cannot be taxed in view of the interpretation of Entry 53 rendered in State of AP (supra). Thus, the State does not have the legislative competence to enact a law that levies tax on the supply of electricity by the generator to the licensee; and (1973) 1 SCC 633 AIR 1963 SC 548 2021 SCC OnLine SC 334

(vii) The facts of the decision in NTPC and the facts giving rise to the writ petition filed by the appellant before the High Court were substantially similar. The High Court erroneously de-tagged the writ petitions and then dismissed the appellant's writ petition while entertaining the writ petition filed by NTPC.

16 On behalf of the respondent, the following submissions have been urged referring to the scheme of the statute:

(i) Section 3 has two parts (i) levy of tax on the 'value of energy' consumed; and (ii) levy of tax on the 'units' of energy sold. Under Section 2(ee) which defines the phrase 'value of energy', only a sale to the consumer is included. Though the sale to a licensee is not covered by the first part, it is covered by the second portion of Section 3, which refers to the 'units' of energy sold;

(ii) Section 3(2)(c) provides that no duty shall be leviable on the units of energy consumed by the licensee in the construction, maintenance and operation of its electrical undertaking. Section 4 provides that every licensee shall pay duty to the State Government on the 'units of energy consumed or sold by him'. Section 4A provides that duty shall be leviable 'at each point in a series of sales of energy'. If Section 3 is read in a restricted manner by excluding the 'units' of energy sold in the definition, then it would render Sections 3(2)(c), 4 and 4A of the Act redundant;

(iii) Section 4A(2) states that the amount of duty paid at 'each preceding stage of sale' shall be adjusted at the subsequent stage. Therefore, levy of tax on the sale by the generator to the licensee would not amount to double taxation;

(iv) The Patna High Court in the judgement rendered in NTPC interpreted Section 3 only with reference to the definition clauses and the statute was not read as a whole. The judgement constrained itself to the interpretation of the phrase 'value of energy' and no reference was made to the phrase 'unit of energy'; and

(v) The Constitution Bench of this Court in State of AP (supra) read Entry 53 of List II to include 'Tax on sale' to mean 'Tax on sale for consumption' on the ground that the electricity can neither be stored nor preserved, and thus, there can be no sale except for its consumption. In view of the above reasoning, Entry 53 must purposively be construed to include the sale by the generator to a licensee for eventual consumption. The judgment does not exclude the sale to the 'intermediary distributor' for eventual consumption.

Analysis 17 The rival submissions fall for our consideration. The High Court in the judgement impugned in the appeal declined to entertain the writ petition on two counts: (i) the appellant has an alternate statutory remedy under Section 9A of the Act; and (ii) the dispute involves questions of fact which are not amenable to the writ jurisdiction of the High Court.

18 The appellant has challenged the imposition of electricity duty and penalty, inter alia, on primarily two grounds:

(i) The first respondent is only empowered to levy tax on the value of energy consumed or sold under Section 3(1). Section 2(ee) defines 'value of energy' as the energy sold to a consumer by a licensee or by any other person. The definition of consumer under Section 2(b) specifically excludes a licensee while Section 2(d) defines a licensee to include the BSEB. Since, the appellant is supplying electricity to the licensee which is not the consumer, tax cannot be levied under Section 3(1) of the Act; and

(ii) Entry 53 of List II of the Seventh Schedule of the Constitution provides for taxes on consumption or sale of electricity. In terms of the judgement of this Court in State of AP (supra), the meaning assigned to the word 'sale' and 'consumption' would be the same since the very act of sale of electricity means that it is being consumed because electricity can neither be preserved nor stored. Entry 54 of List II dealt (at the material time) with the levy of taxes on the sale or purchase of goods including electricity but excluding newspapers and was subject to provisions of Entry 92-A of List I. The meaning of 'sale' of electricity under Entry 54 would mean the sale for consumption of electricity in view of the decision of this Court in State of AP (supra). Thus, irrespective of the provisions of the Bihar Electricity Act, the first respondent does not have the legislative competence to levy a tax on the sale of electricity that is not for consumption. The appellant is not selling electricity to BSEB for the consumption of BSEB; rather it is BSEB which is distributing electricity for the consumption of the end users.

19 While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirpool Corporation v. Registrar of Trademarks, Mumbai 19 and Harbanslal Sahni v. Indian Oil Corporation Ltd 20.

Recently, in Radha Krishan Industries v. State of Himachal Pradesh & Ors 21 a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

> "28. The principles of law which emerge are that:
>
> (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
>
> (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
>
> (iii) Exceptions to the rule of alternate remedy arise where
>
> (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;
>
> (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
>
> (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
>
> (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and (1998) 8 SCC 1 (2003) 2 SCC 107 2021 SCC OnLine SC 334
>
> (vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with." (emphasis supplied) The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax v. M/s Commercial Steel Limited 22. In State of HP v. Gujarat Ambuja Cement Ltd 23 this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

> "23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

20 The above principle was reiterated by a three-judge Bench of this Court in Executive Engineer v. Seetaram Rice Mill 24. In that case, a show cause notice/provisional assessment order was issued to the assessee on the ground of (2005) 6 SCC 499 (2012) 2 SCC 108 an unauthorized use of electricity under Section 126 (1) of the Electricity Act 2003 and a demand for payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the taxing authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgement of the High Court was appealed before this Court, it held that the High Court did not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the revenue authorities. This Court made the following observations:

> "81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.
>
> 82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, lex nil frustra facit, nor to enforce one which would be frivolous—lex neminem cogit ad vana seu inutilia—the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility

> for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail..." (emphasis supplied)

21 In Union of India v State of Haryana 25 the assessing authorities imposed sales tax on the rentals charged for supply of telephones. Writ petitions were filed in the High Court challenging the levy. The writ petitions were dismissed on the ground that an alternative remedy of a statutory appeal was available. An appeal against these orders was filed before this Court. The appeal was allowed and the matter was remanded back to the High Court for determination since it involved a question of law on whether the supply of telephones amounted to sale. 22 It is not the case of the appellant that the respondents have miscalculated the duty and penalty imposed on it. The appellant contends that the State Government does not have the power to levy tax on its sale of electricity to BSEB. Thus, the plea strikes at the exercise of jurisdiction by the Government. In view of the law discussed above on the rule of alternate remedy, the High Court can exercise its writ jurisdiction if the order of the authority is challenged for want of authority and jurisdiction, which is a pure question of law 23 The appellant is admittedly a sugar mill producing electricity from bagasse (a by-product of sugar production). The electricity that is produced is used for running the mill and the excess is sold to BSEB. There is no dispute about the nature of the transaction between the appellant and BSEB. The petition before the High Court was initially tagged with the petition filed by NTPC since it involved similar issues. However, it was subsequently de-tagged and heard separately on the ground that the appellant in this case is a sugar mill that also produces electricity, while NTPC is a power generation company. The writ (2000) 10 SCC 482 petition filed by the appellant was dismissed by the impugned judgment. Both the petitions - filed by the appellant and NTPC before the High Court challenged the power of the State Government to levy tax on sale of electricity to Electricity Boards. A three judge Bench of this court in Sree Meenakshi Mills Ltd. v Commissioner of Income Tax 26 succinctly explained the tests for the identification of questions of fact, questions of law and mixed questions of law and facts. Justice T. L. Venkatarama Aiyar writing for the Bench observed that:

> "9. [..] To take an illustration, let us suppose that in a suit on a promissory note the defence taken is one of denial of execution. The court finds that the disputed signature is unlike the admitted signatures of the defendant. It also finds that the attesting witnesses who speak to execution were not, in fact, present at the time of the alleged execution. On a consideration of these facts, the court comes to the conclusion that the promissory note is not genuine, Here, there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact.
>
> 10. In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts

> ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site that the defendant is the owner of the adjacent. residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession the court has firstly to find on an appreciation of the evidence what the facts are. So AIR 1957 SC 49 far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law." The test that is to be applied for the determination of a question of law is whether the rights of the parties before the court can be determined without reference to the factual scenario. In this case, the High Court was entrusted with the determination of the meaning of the phrases used in Section 3 of the Act to determine if the supply of electricity by the appellant would fall within its ambit.

Unlike a dispute on the execution of a promissory note or a plea of adverse possession, there is no adjudication on facts required here. There is also no dispute on the nature of the transaction involved.

24 The issues raised by the appellant are questions of law which require, upon a comprehensive reading of the Bihar Electricity Act, a determination of whether tax can be levied on the supply of electricity by a power generator (which also manufactures sugar) supplying electricity to a distributor; and whether the first respondent has the legislative competence to levy duty on the sale of electricity to an intermediary distributor in view of the decision of this Court in State of AP (supra). The question of whether the appellant is liable to file returns under Sections 6B(1) and 5A of the Act is directly related to the issue of whether the sale of electricity by the appellant to BSEB falls under the charging provisions of Section 3(1). The questions raised by the appellant can be adjudicated without delving into any factual dispute. Thus, the present matter is amenable to the writ jurisdiction of the High Court.

25 We are of the considered view that the High Court made an error in declining to entertain the writ petition and it would be appropriate to restore the proceedings back to the High Court for a fresh disposal. In order to facilitate the decision on remand, we have recorded the broad submissions of the parties on merits but leave the matter open for a fresh evaluation by the High Court. We accordingly allow the appeal and set aside the judgement of the High Court dated 18 September 2017 arising out of CWJC No 4300 of 2015. The writ petition is restored to the file of the High Court for fresh determination. The appeal is disposed of in the above terms with no order as to costs. 26 The appellant had filed an application27 for amendment of the cause title since pursuant to a merger the right to contest the appeal survived with Magadh Sugar and Energy Ltd, the application is allowed.

27 Pending application, if any, are disposed of.

… . … … … … . . … … … … … … … … … … … . . J [Dr Dhananjaya Y Chandrachud] .……..……..……J [Vikram Nath] ….…..…….…..……..……J [BV Nagarathna] New Delhi;

September 24, 2021 IA No 75651 of 2021