Apollo Tyres Limited Vs Commissioner Of Central Taxes And Central Excise

Court: High Court Of Kerala

Date of Decision: Feb. 12, 2025

Acts Referred: Constitution of India. 1950 â€" Article 226
Central Excise Act, 1944 â€" Section 3A, 11A(1), 11A(4), 11A(11), 37B
Rajasthan Sales Tax Act, 1994 â€" Section 4A

Hon'ble Judges: Harisankar V. Menon, J

Bench: Single Bench

Advocate: Joseph Kodianthara, V.Abraham Markos, Abraham Joseph Markos, Isaac Thomas, P.G.Chandapillai Abraham, Vipin Anto H.M., Alexander Joseph Markos, Sharad Joseph Kodanthara, Sreelal N. Warrier

Final Decision: Allowed

Judgement

Harisankar V. Menon, J

[WP(C) Nos.11633/2019, 11717/2019 and 16115/2019]

1. These three writ petitions essentially seek to challenge the show cause notices issued by the Assessing Authority under the Central Excise Act,

1944 (for short, the Ã¢â‚¬ËœActÃ¢â‚¬â„¢) on the ground of limitation.

2. The short facts as culled out from W.P(C)No.16115 of 2019 are as under:

The petitioner is stated to be engaged in the manufacture of MS/TMT Bars and Rods, out of MS Ingots. It is on the final products like MS/TMT Rods

and Bars that excise duty is exigible. They contend that Ext.P1 show cause notice dated 28.04.2015 was issued by the 1st respondent noticing the

consumption of raw materials during the years 2010-11 onwards and the actual production carried out. The notice states, with reference to the raw

materials used and the actual production, that the output was only 91.74% of the raw materials. It further states that as per the norms fixed by

M/s.Steel Authority of India Ltd. (for short, Ã¢â‚¬ËœSAILÃ¢â‚¬â„¢) the output should be 95%. With reference to the afore, the notice states that there was a

short production of 6698.703 MT and the said quantity ought to be assessed to duty. The petitioner states that it submitted Ext.P2 reply to the 1st

respondent herein seeking a copy of the audit report of CERA, referred to in the show cause notice, a copy of input/output norms fixed by SAIL, copy

of the statutory authority which adopts the norms fixed by SAIL to be observed by companies like the petitioner. Ext.P3 is stated to be issued

thereafter for the period from December 2014 to October 2015 on the very same basis. Though the petitioner states that it sent various

communications seeking the documents already sought, Ext.P9 notice was issued for the period from November 2015 to June 2017, repeating the

same allegations. It is stated that the petitioners are served with Ext.P14 letter dated 06.06.2019 from the 3rd respondent herein enclosing the copy of

the tender instructions of SAIL as the evidence for the input-output norms as also the observation of CERA.

3. It is in the afore circumstances that the captioned writ petition is filed challenging Exts.P1, P3 and P9 notices on the ground that they are time-

barred under Section 11A(11) of the Act, apart from contending that the very basis of the initiation of adjudication steps was flawed.

4. W.P(C) No.11633 of 2019 and 11717 of 2019 are filed by another company engaged in the manufacture of Pneumatic Tyres challenging show

cause notices issued during 2009 and 2012, respectively, on the ground of limitation under Section 11A (11) of the Act.

5. I have heard Sri.Aravind P. Datar, the learned senior counsel instructed by Sri. Sajeev Kumar the learned counsel for the petitioner in W.P(C)

No.16115 of 2019 and Sri.Joseph Kodianthara, the learned senior counsel for the petitioner in the other two cases. I have also heard Sri.Sreelal N.

Warrier, the learned counsel for the respondents in W.P(C) Nos.11717 and 11633 of 2019 and Sri.P.R.Sreejith, the learned counsel for the

respondents in W.P(C)No.16115 of 2019.

6. Sri.Datar, the learned senior counsel, would contend that:

i. The show cause notices were issued against the petitioner solely on the basis of the audit of the petitioner's records by CERA, which in turn relied

on some Ã¢â‚¬Å“normsÃ¢â‚¬ fixed by the SAIL. The afore details were not provided to the petitioner originally, and it is only pursuant to Ext.P14 dated

06.06.2019 that they have been served on the petitioner.

ii. The details so served in 2019, cannot be the basis for assuming jurisdiction over the petitioner under the provisions of the Central Excise Act.

iii. Unless and until the statutory basis for the adoption of the so-called norms fixed by SAIL is made known by the respondent, no adjudication is

possible against the petitioner.

iv. He relied on the provisions of Section 3A of the Act to contend that the insistence of a particular output to be maintained by the manufacturer can

only be with reference to the afore provision and no adjudication on the basis of the norms fixed by SAIL is possible.

v. In the light of the afore, he contends that the very basis for issuance of the notices was flawed and hence, the show cause notices are to be set

aside.

vi. He relied on the provisions of Section 11A(11) of the Act to contend that the show cause notices may be quashed in view of the period of limitation

prescribed therein.

vii. He relied on various orders of CESTAT in support of the afore contention.

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7. Sri.Kodianthara, the learned senior counsel, would contend that:

i. The show cause notices challenged in W.P(C)No.11633 of 2019 were issued during 2009/2010/2011, and insofar as the period prescribed under

Section 11A(11) of the Act is over, there cannot be any further proceedings against the petitioner. As regards W.P(C) No.11717 of 2019, the show

cause notices were issued from 2008 to 2018 and the adjudication cannot be carried out for the very same reasons.

ii. He would rely on the judgment of the Gujarat High Court in Siddhi Vinayak Syntex Pvt. Ltd. v. Union of India [2017 (352) E.L.T 455 (Guj.)] and

that of the Bombay High Court in W.P(C) No.3671 of 2021.

8. Sri.Sreelal N. Warrier, the learned counsel, would contend that:

i. The show cause notices were issued on the basis of the observation on audit and there is no irregularity.

ii. The fact that the notices were kept in the call book does not attract the provisions of Section 11A(11).

9. Sri.P.R.Sreejith, the learned counsel for the respondents, apart from adopting the submissions made by Sri.Sreelal N. Warrier, would contend that:

i. The petitioners are challenging the show cause notices alone. Therefore, no writ petition can be filed against the show cause notices and it is for the

petitioner to file replies to the said notices.

ii. He would point out that the reliance placed on the norms fixed by SAIL cannot be found fault with, when those details have been provided to the

petitioner.

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10. I have considered the rival submissions and the connected records.

11. The following issues arise for consideration in these writ petitions.

i. Can the petitioners challenge the show cause notices in a writ petition filed under Article 226 of the Constitution of India?

ii. Can the adjudicating authority initiate proceedings solely on the basis of the Ã¢â‚¬Å“normsÃ¢â‚¬ fixed by SAIL as seen from the show cause notices challenged in W.P(C)

No.16115 of 2019?

iii. Are the impugned show cause notices barred by limitation under Section 11A (11) of the Act?

12. The first issue arising for consideration, as noticed above, is with reference to the maintainability of the writ petitions so far as they seek to

challenge the show cause notices issued under the Act. It is settled principle that as against show cause notices, it is the duty of the assessee to file

objections to the proposals contained therein. The learned Standing Counsel for the respondents would rely on a series of judgments of the Apex Court

as well as various High Courts including this Court, in support of the afore contention.

13. In the case at hand, the petitioners essentially contend that the notices issued are barred by limitation under Section 11A(11) of the Act. As

regards the question of limitation, there cannot be any dispute that a writ petition is maintainable against show cause notices which have been issued

beyond the period prescribed by the statute. Similarly, a writ petition against show cause notices on the basis of the admitted facts can also be

challenged under Article 226 of the Constitution of India. Here, as already noticed, the show cause notices have been issued on the basis of the norms

fixed by the SAIL. The question as to whether there can be an adjudication on the basis of such alleged Ã¢â‚¬Å“normsÃ¢â‚¬ without statutory backing,

strikes at the very root of the assessment proceedings, even questioning the jurisdiction of the adjudicating authority. This Court notices that the

petitioners have sought to quash the show cause notices both on the ground of the limitation as well as on the ground of the jurisdiction of the

adjudicating authority. Therefore, a writ petition at the show cause stage is maintainable as held by the Apex Court in Union of India and Others v.

Coastal Container Transport Association and Others [(2019) 20 SCC 446].

14. In the light of the afore, I am of the opinion that the petitioners are justified in challenging the show cause notices through the afore writ petitions.

15. The second issue arising for consideration is the power of the adjudicating authority to rely Ã¢â‚¬Å“on the norms fixed by SAILÃ¢â‚¬. The show cause

notices have been issued with reference to the provisions of Section 11A(1) and (4) of the Act, which reads as under:

Ã¢â‚¬Å“(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of

fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent

to evade payment of duty.

.....

(4) Where any duty of excise has not been levied or paid or has been short-levied short-paid or erroneously refunded, by the reason of-

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty,

the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount

specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.Ã¢â‚¬â€‹

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True, the statute empowers the adjudicating authority to proceed against the assessee in situations where the duty of excise has been Ã¢â‚¬Å“short-

leviedÃ¢â‚¬â€‹ or Ã¢â‚¬Å“short-paidÃ¢â‚¬â€‹.

16. A reading of the show cause notices challenged in W.P(C) No.16115 of 2019 would show that the petitioner therein was engaged in the

manufacture of MS Bars/TMT Bars from Billets/Ingots and the ratio of such manufacture in comparison to raw materials was 91.74%. The show

cause notices proceed on the basis of the audit of the petitionerÃ¢â‚¬â„¢s records in comparison with the norms fixed by SAIL. The show cause notice

alleges that SAIL has fixed such ratio of production of MS Bars/TMT Bars at 95% of the consumption. It is with reference to the afore that the show

cause notices allege suppressed production to the extent of the difference between the afore percentages. Here, this Court notices that the difference

noticed is hardly 3.26%.

17. The norms of SAIL have also been forwarded to the petitioner along with Ext.P14 letter dated 06.06.2019. A reading of the document attached

along with the afore letter would show that the same applies only as against those manufacturers agreeing to act as Ã¢â‚¬Å“conversion agentsÃ¢â‚¬ for

SAIL. It is as against such work of conversion being entrusted by SAIL to private manufacturers, norms have been fixed by SAIL to the effect that

even though the raw materials are supplied by SAIL, they would tolerate wastage to the extent of 5% alone. That does not mean that there cannot be

more than 5% wastage. It is only that as regards the job works entrusted by SAIL pursuant to the afore tender, SAIL would tolerate wastage to the

extent of 5% alone. Apart from this, there is no statutory backing for such adoption of the conversion ratio fixed by SAIL for adjudication purposes.

The liability to excise duty under the provisions of the Act is with reference to the provisions of Section 3 on the Ã¢â‚¬Å“production/manufactureÃ¢â‚¬ within

the country. In the case at hand, apart from making reference to the norms fixed by the SAIL, no reasons are seen mentioned under the show cause

notices.

18. In State of Rajasthan and Another v. Rajasthan Chemists Assn. [(2006) 6 SCC 773], the Apex Court considered the question as to whether a

Ã¢â‚¬Å“notional valueÃ¢â‚¬ can be the basis for taxation than the Ã¢â‚¬Å“actual valueÃ¢â‚¬ with reference to the provisions of Section 4A of the Rajasthan Sales

Tax Act, 1994. Considering the afore issue, the Apex Court found as under:

Ã¢â‚¬Å“50. Ã¢â‚¬Â¦Ã¢â‚¬Â¦..By substituting the assumed quantity of goods or a price which is not the subject-matter of that contract of completed sale for the purpose of

measuring tax, the legislature assumes existence of contract of sale of drugs by legal fiction which has not taken place and which cannot be considered to be a sale in

the manner stated in the Sales Act, which alone can be the subject of tax under Entry 54 in List II. Substitution of assumed price or the assumed quantity in place of

actual price/quantity in a completed sale transaction, for the purpose of levy of tax on the subject-matter of tax results in taking away from it the character of Ã¢â‚¬Å“sale

of goodsÃ¢â‚¬â€‹ as envisaged under the Sales Act.

53. By devising a methodology in the matter of levy of tax on sale of goods, law prohibits taxing of a transaction which is not a completed sale and also confines sale

of goods to mean sale as defined under the Act. This cannot be overridden by devising a measure of tax which relates to an event which has not come into existence

when tax is ex hypothesi determined, much less which can be said to be a completed sale and which cannot be the subject of legislation providing tax on Ã¢â‚¬Å“sale of

goodsÃ¢â‚¬ by transplanting a sum related to as Ã¢â‚¬Å“likely priceÃ¢â‚¬ to be charged for subsequent sale to be taxed by the devise of measuring tax for the completed

transaction which has become subject of tax.Ã¢â‚¬â€‹

The afore principles would apply to the case at hand also, insofar as the show cause notices have been issued by notionally refixing the quantity

manufactured by the petitioner which attracts duty under the Act, by deviating from the procedure prescribed under the statute.

19. Again, a Division Bench of this Court in U.K.Monu Timbers (M/s.) v. State of Kerala [2012 (3) KHC 111 (DB)], was called upon to consider the

legality of the steps taken for refixing the output tax liability by adopting certain price for the commodity fixed by certain Circulars for a different

purpose. Considering the issue, this Court found as under:

Ã¢â‚¬Å“20. The value so prescribed by the Commissioner, as contended by the Government Pleader, might have been after taking into consideration the market

conditions and also after holding discussions with the dealers' association. This, however, does not create a prohibition insofar as the dealers are concerned to sell

the goods at a rate in variance with the rates so prescribed. The actual sale price may be lesser or greater than that prescribed by the circular. When it is lesser, the

dealer definitely gets a right to claim a refund of the tax paid in advance, but however, subject to any incriminating material as to under - valuation detected and

established by the assessing authority. When the price is higher, it goes without saying that the tax liability also gets increased and the dealer is obliged to pay the

amounts in excess of that paid as advance, at the time of filing of returns as prescribed by the Act. The circular is only for the purpose of collecting tax in advance

and cannot be considered as an unassailable document of universal application with respect to the price at which the goods are to be sold. There can be no other

interpretation possible and the second question raised by us is also answered against the Revenue and in favour of the assessee.

21. In the instant case, there were no discrepancies in the books of accounts, the stock found on inspection and the other documents indicating the sale of goods

within the State...Ã¢â‚¬â€‹

The case at hand also seeks only to refix the quantity manufactured, which attracts an excise duty, without suggesting any discrepancy in the

petitioner's returns/books of accounts.

20. Another Division Bench of this Court in U.Manikandan v. Assistant Commissioner of State Tax, State GST Department and Ors.

[MANU/KE/2522/2020] considered a case where a dealer in Ã¢â‚¬Å“day-old chicksÃ¢â‚¬ sold at a particular price was sought to be proceeded against on

the basis of the higher price at which a Government Agency sold the very same commodity. This Court noticing the fallacy in adopting the price fixed

by the PSU for the purpose of assessment of an individual assessee found as under:

Ã¢â‚¬Å“14. The grounds raised against rejection of returns and consequential best judgment, were rejected by the Assessing Officer on the finding that the assessee had

not proved the same, i.e.: the distinctive nature of the same goods based on the source, the quality, the expense incurred on procurement or production, the end

consumer and so on and so forth. In this context we have to emphasize that the assessee's books of accounts were not found to be doctored in any manner. The sale

price as asserted by the assessee was available from their invoices and there was no material detected that the assessee had in fact made sales for higher prices than

that disclosed in the invoices. It was the Assessing Officer on the basis of the Audit Report and the details of the sale price available from KEPCO, who sought to

reject the returns and the books of accounts. The assessee has the initial burden to prove that the returns filed are in accordance with the provisions of the tax

enactment and the books of accounts kept truly and correctly in the course of business. The Assessing Officer having not found anything to discredit the returns

filed by the assessee or the books of accounts maintained, and relied on the turnover of another dealer that too a PSU, who incidentally also has the same business,

to resort to a best judgment assessment. The onus shifts to the Assessing Officer, to prove that the operations carried on by the two dealers are similar and identical.

The mere fact that both are dealing in the same product cannot lead to any irrefutable conclusion that the sale price would be the same.

16Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦We garner support from Gujarat Ambuja Cements Ltd to find that the proceedings itself is an abuse of process of law for reason of the Assessing Officer

having rejected the books of accounts merely on the ground that a PSU sells day-old chicks at a price higher than that of the assessee. The estimation made is on the

basis of the books of accounts of the PSU and there was no defect, omission or suppression detected from the books of accounts maintained by the assessee. We

find that the rejection of books of accounts of the assessee was not justified and the basis adopted, being the sale price of another dealer, that too a PSU, has no

reasonable nexus with the estimation made. We hence set aside the assessment only to the extent the additions were made based on the sale price of day-old chicks

of KEPCO, on the particular facts of this case.Ã¢â‚¬â€‹

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The afore principles laid down by this Court would show that the show cause notices issued solely on the basis of the so-called Ã¢â‚¬Å“normsÃ¢â‚¬Â fixed by

SAIL were without any justification.

21. As already noticed, a reading of the show cause notices do not disclose any discrepancy regarding the petitioner's books of accounts and other

records. In such circumstances, I am of the opinion that the initiation of the adjudication steps under the provisions of the Act in the case at hand was

without any justification. This Court also notices the provision under Section 3A of the Act providing for fixation of the annual capacity of a unit

engaged in manufacturing process. The respondents have no case that any such determination has been carried out in the case at hand.

22. The last issue arising for consideration, which is common for all three writ petitions is regarding the application of the provisions of Section

11A(11) of the Act. The show cause notices regarding W.P(C) No.11633 of 2019 were issued prior to 2011. The show cause notice regarding

W.P(C) No.11717 of 2019, Ext.P3(a) was issued in 2008. In W.P(C) No.16115 of 2019, objections were also filed to the show cause notice(s).

However, in none of these cases, final adjudication under the statute has taken place.

23. In this connection, provisions of Section 11A(11) assume significance and the same provides as under:

Ã¢â‚¬Å“(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10).

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within two years from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4)Ã¢â‚¬â€‹

The afore provision requires the adjudicating authority to determine the amount of excise duty payable within a period of Ã¢â‚¬Å“six monthsÃ¢â‚¬Â as regards

show cause notices issued under Section 11A(1). As regards the cases where show cause notices are issued under Section 11A(4), the statute

requires finalization of proceedings within Ã¢â‚¬Å“2 yearsÃ¢â‚¬. In the cases at hand, the show cause notices have been issued under Section 11A(4). The

statute requires the final determination to be carried out within the period prescribed therein. True, as rightly contended by the learned counsel for the

respondents, the statute visualizes such final determination Ã¢â‚¬Å“where it is possible to do so.Ã¢â‚¬ However, that does not mean that the revenue can

keep the matters pending indefinitely. Furthermore, no plausible explanations have been provided for the delay in finalization of the proceedings as

above.

24. In this connection, I notice the judgment in Siddhi Vinayak Syntex (supra). In the said case, the Gujarat High Court considered the question as

regards the proposed adjudication of show cause notices after inordinate delay, which will actually amount to the revival of the proceedings after a

long gap without disclosing any valid reason for the delay. Considering the said issue, after making reference to the provisions of Section 11A(11), a

Division Bench of the Gujarat High Court has found as under:

Ã, Ã¢â‚¬Å“24. Thus, with effect from the year 2011 a time limit has been prescribed for determining the amount of duty of excise where it is possible. It cannot be gainsaid

that when the legislature prescribes a time limit, it is incumbent upon the authority to abide by the same. While it is true that the legislature has provided for such

abiding by the time limit where it is possible to do so, sub-section (11) of Section 11A of the Act gives an indication as to the legislative intent, namely that as far as

may be possible the amount of duty should be determined within the above time frame, viz. six months from the date of the notice in respect of cases falling under

sub-section (1) and one year from the date of the notice in respect of cases falling under sub-section (4) or sub-section (5) When the legislature has used the

expression ""where it is possible to do so"", it means that if in the ordinary course it is possible to determine the amount of duty within the specified time frame, it

should be so done. The legislature has wisely not prescribed a time limit and has specified such time limit where it is possible to do so, for the reason that the

adjudicating authority for several reasons may not be in a position to decide the matter within the specified time frame, namely, a large number of witnesses may have

to be examined, the record of the case may be very bulky, huge workload, non-availability of an officer, etc. which are genuine reasons for not being able to determine

the amount of duty within the stipulated time frame. However, when a matter is consigned to the call book and kept in cold storage for years together, it is not on

account of it not being possible for the authority to decide the case, but on grounds which are extraneous to the proceedings. In the opinion of this Court, when the

legislature in its wisdom has prescribed a particular time limit, the C.B.E. & C. has no power or authority to extend such time limit for years on end merely to await a

decision in another case. The adjudicatory authority is required to decide each case as it comes, unless restrained by an order of a higher forum. This Court is of the

view that the concept of call book created by the C.B.E. & C.. which provides for transferring pending cases to the call book, is contrary to the statutory mandate,

namely, that the adjudicating authority is required to determine the duty within the time frame specified by the legislature as far as possible. Moreover, as discussed

hereinabove, there is no power vested in the C.B.E. & C. to issue such instructions under any statutory provision, inasmuch as, neither Section 37B of the Central

Excise Act nor Rule 31 of the rules, envisage issuance of such directions. The concept of call book is, therefore, contrary to the provisions of the Central Excise Act

and such instructions are beyond the scope of the authority of the C.B.E. & C. Transferring matters to the call book being contrary to the provisions of law, the

explanation put forth by the respondents for the delay in concluding the proceedings pursuant to the show cause notice 3-8-1998 cannot be said to be a plausible

explanation for not adjudicating upon the show cause notice within a reasonable time. In view of the settled legal position, as propounded by various High Courts,

with which this Court is in full agreement, the revival of proceedings after a long gap of ten to fifteen years without disclosing any reason for the delay, would be

unlawful and arbitrary and would vitiate the entire proceedings.Ã¢â‚¬â€‹

Thus, the court found that the expression Ã¢â‚¬Å“where it is possible to do soÃ¢â‚¬ does not clothe the Department to sleep over the adjudication proceedings

indefinitely. Though the afore judgment is challenged by the revenue before the Apex Court by filing SLP(C) No.18214 of 2017, notice has been

issued only to a limited extent as regards certain circulars issued alone. Thus, the other findings of the Gujarat High Court have become final. This

Court also notices that even in cases where no period of limitation is prescribed for exercising a power, the Apex Court in State of Punjab v. Bhatinda

District Cooperative Milk Producers Union Ltd. [(2007) 11 SCC 363] has held that the action has to be taken within a reasonable period of time.

When the afore principles are applied to the facts of the present case, I notice that the adjudication is not finalized within a reasonable period of time

and hence, the proceedings cannot be permitted to be continued any further. The judgment of the Gujarat High Court has been followed by the Punjab

and Haryana High Court also in Shree Baba Exports v. Commissioner [2022 (381) E.L.T 53(P & H)] and GPI Textiles Limited v. Union of India

[2018 (362) E.L.T 388(P & H).

25. On the whole, I am of the opinion that the impugned notices are not to be sustained on account of the limitation prescribed under Section 11A (11)

of the Act.

26. This Court also notices the judgment of the Apex Court in Babu Verghese and Others v. Bar Council of Kerala and Others [(1999) 3 SCC 422]

following the judgment in Taylor v. Taylor [(1875) 1 Ch.D. 426] holding that when a statute requires a thing to be done in a particular manner, the

authorities are duty bound to follow that course. Therefore, the time limit prescribed under Section 11A(11) ought to have been followed mandatorily

and so far as that is not done, the impugned show cause notices are only to be quashed.

On the whole, I am of the opinion that the petitioners are entitled to succeed. Hence, these writ petitions would stand allowed by quashing Exts.P1(a)

to P1(c) in W.P(C) No.11633 of 2019, Exts.P1, P3 and P9 in W.P(C) No.16115 of 2019 and Exts.P3(a) to P3(j) in W.P(C) No.11717 of 2019.