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Union of India (UOI) and CCE Vs Balrampur Chini Mills Ltd. and CEGAT

Court: Allahabad High Court

Date of Decision: May 23, 2003

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 35H
Constitution of India, 1950 â€" Article 226

Citation: (2003) 88 ECC 466 : (2004) 177 ELT 71

Hon'ble Judges: R.B. Misra, J

Bench: Single Bench

Advocate: S.N. Srivastava, S.C. and Subodh Kumar, for the Appellant; Bharat Ji Agrawal and Piyush Agrawal, for the Respondent

Final Decision: Dismissed

Judgement

R.B. Misra, J.
This Writ petition has been preferred under Article 226 of the Constitution of India against the judgment and order dated

5.12.2001 passed by respondent No. 2 The Customs, Excise & Cold (Control) Appellant Tribunal, New Delhi u/s 35(c)(1) of the Central Excise

Act 1945 (in short called "Act") allowing the appeal directing both the divisions for a common central registration or transfer of the credit from

distillery division to the Sugar Division by setting aside the order passed by the Commissioner Central Excise.

Heard Sri Subodh Kumar, learned counsel for the petitioner as well as Sri Bharat Ji Agrawal, learned Senior Advocate alongwith Sri Piyush

Agrawal, learned counsel for the respondents.

2. The facts necessary for adjudication of the present writ petition are that the appellant company has two manufacturing Divisions, one of them

manufacturing Sugar and Molasses and the other manufacturing Industrial and potable Alcohol. The Sugar Division and the Chemical (Distillery)

Division are located across a public road. They have separate Central Excise registration and are maintaining separate statutory records. The

respondent wanted to have a common registration for the two divisions and, accordingly, applied to the jurisdictional commissioner of Central

Excise. The Commissioner, after enquiries conducted through his subordinate officers, rejected the application. The decision of the Commissioner

was ultimately communicated to the respondent company by the jurisdictional Assistant Commissioner by letter dated 24.8.2001 which was

accompanied by a copy of letter dated 22.8.2001 of the Additional Commissioner (Tech). of Central Excise addressed to the Assistant

Commissioner. The two letters, read together, communicated to the respondent comp. That their application for common registration had been

rejected by the commissioner on the ground that the appellants'' two divisions could not be considered to be situated in the same place of business

and, therefore, a common registration would not be granted in view of the decision of the Bombay High Court in the case of Jenson & Nicholson

(India) Ltd. v. Union of India (1981) ELT 128.

3. The appeal before the Tribunal was preferred against the above order dated 24.8.2001.

4. In the appeal of memorandum, the respondent Company have stated that the Sugar Division and the Chemical (Distillery) division are two parts

of the same factory situate in the same place. The two are separated only by a road. The by-products of the Sugar Division, which are inputs for

the Chemicals Division, are supplied from the former division to the latter directly through overhead conveyor belts. Common balance sheet and

other accounting records are maintained for the two divisions. The Income Tax assessment and the sales tax assessment are also common for the

divisions. It was for avoiding the inconvenience of maintaining voluminous separate records and of filing separate returns for Central Excise

purposes that the appellants applied for a single registration for the two Divisions. The respondent company have further stated that the Assistant

Commissioner forwarded their application to the Commissioner suggesting in his covering letter that the request of the party was liable to be

rejected in view of an earlier order passed in a similar case of M/s K.M. Sugar Mills, Moti Nagar, The respondent has further pointed out that the

said order of the Commissioner rejecting the request of M/s K.M. Sugar Mills for single registration has been set aside by the Tribunal as per

order dated 3.9.2001. The respondent company also relied on Notification No. 35/2001-CE (NT) dated 26.6.2001 issued by the CBEC under

Rule 9(2) of the Central Excise (No. 2) Rules 2001, where under the Board has provided that if two or more premises of the same factory are

separated by public road, railway line or canal, the commissioner of Central Excise may, subject to proper accountal of the movement of goods

from one premises to the other and such other conditions and limitations, allow single registration. They have also contended that they are entitled

to single registration for their two Divisions in terms of Trade Notice No. 98-CE/94 dated 28.9.94. On these grounds, the appellants may for

setting aside the Commissioner''s order and directing him to grant single registration for their two divisions.

5. By order dated 5.12.2001, learned Tribunal has set aside the proceedings and has allowed the appeal and have directed the Commissioner

Central Excise to issue central registration to the respondent company in respect of the Sugar Division and Distillery division under reference.

6. In the order dated 5.12.2001 the learned Tribunal had noted that in case of M/s Jenson and Nicholson (India) Ltd. (Supra) the factories were

situated at different and distant places one at Panvel (near Bombay) and other at Calcutta. The company in that case had claimed SS exemption

benefits by showing the clearances of the two factories separately and the department proposed to club the clearances and deny exemption

benefits. That dispute ultimately arose before the High Court. The court held that the exemption benefit had to be computed on the consolidated

clearances of both the factories belonging to the same manufacturer. While dealing with the issue, the High Court referred to Rule 175 and

observed, inter alia, if the same person wanted licences for carrying on business in more than one capacity, he had to submit separate applications

and that, under Sub-rule 3, where the applicant had more than one place of business, he should obtain a separate licence in respect of each place

of business. The court held that if the same manufacturer had to carry on business at more than one place he must have separate licences. Learned

Tribunal has also noted the submissions of the learned counsel for the respondent that it was the part of the judgment of the High Court that the

Commissioner has relied on for holding that even if the same manufacturer has two factories situate in the same area enclosed by a single

compound wall with common exit gate as also common profit and loss account, it cannot be said that the factories are at the same place of

business and therefore, a person who desires to have registration in more than one capacity or at more than one place of business will be granted

separate registration for each place of business.

7. Learned Tribunal has observed in the order dated 5.12.2001 as below:

It is not disputed that the Sugar Division and Distillery Division of the appellant-company are situate in the same area, separated only by a road.

There is also no dispute of the fact that the two divisions are maintaining common records for purposes of Income Tax and Sales Tax assessments.

Obviously, the two Divisions are administered by a common Board of Directors, if at all there is anything separate, that is only the Central Excise

registration coupled with maintenance of Central Excise records. I find that the application of the company for single Central Excise registration has

been rejected by the Commissioner in a manner which is glaringly erroneous in law. He has no at all adverted to the provisions of the relevant

Trade Notice. On the other hand, be recorded a finding to the effect that even if the same manufacturer had two factories situate in the same

premises enclosed by a single compound wall with common exit gate, it might not be said that the factories were at the same place of business and

therefore, the two factories would be granted only separate registration for Central Excise purposes. I observe that this finding of the

Commissioner fell into gross error by applying the ratio of the High Court''s decision to the case on hand. As rightly pointed out by learned senior

Advocate, the High Court was seized of a case in which the same manufacturer had two different factories situate at far flung places. In the instant

case, the two Divisions of the same manufacture are situate in the same premises, separated only by a road. There is no comparison between the

two cases. The High Court''s decision is not applicable to this case. The Trade Notice which has been ignored by the lower authority, clearly lays

down that two Sections or Departments of the same manufacturer. In the same premises separated only by a road, are entitled to single Central

excise registration, The term ''Division'' is only synonymous with either of the terms ''section'' and ''department''. Therefore, the provisions of the

Trade Notice are clearly applicable to the appellants'' case and their application for single registration ought to have been allowed.

8. The respondents had raised the preliminary objection of alternative remedy for filing reference u/s 35H of the Central Excise Act as such

according to the respondents, the present writ petition is not maintainable.

9. The following submissions have been made on behalf of respondents:

(a) During the pendency of the present writ petition, the petitioner has also filed a Central Excise Reference Application No. 13 of 2002 on

16.5.2002 u/s 35H of the Central Excise Act, Since the petitioner is already pursuing an alternative remedy in respect of the same subject matter

for which the present writ petition has been filed, hence the petitioner cannot pursue two parallel remedies in respect of the same matter at the

same time and the writ petition is liable to be dismissed.

Section 35H(1) provides as follows:

Section 35H. Application to High Court (1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of

the date upon which he is served with notice of an order u/s 35C passed on or after 1st day of July, 1999 (Not being an order relating, among

other things, to the determination of any question having a relation to the rate of duty excise or to the value of goods for purposes of assessment),

by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the

High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

Thus admittedly, against the order dated 5.12.2001 of the Appellate Tribunal, the petitioner has an alternative remedy of reference u/s 35H which

the petitioner has also availed of as an alternative remedy by filing a reference application on 16.5.2002.

(b) Section 256 of the Income Tax Act, 1961 also provides for filing of a reference Application u/s 256 against the order of the Income Tax

Appellate Tribunal Section 256(1) of the Income Tax Act provides as follows:

256(1) The assessee or the Commissioner may, within sixty days of the date upon which he is served with notice of an order (passed before the

1st day of October, 1998), u/s 254, by application in the prescribed form, accompanied where the application is made by the assessee by a fee of

two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and subject to the

other provisions contained in this section, the appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw

up a statement of the case and refer it to the High Court. Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented

by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not

exceeding thirty days.

10. Learned Standing Counsel for the petitioners has submitted that plea of alternative remedy could not be persuaded for the following reasons:

(i) The High Court cannot quash the order of the Tribunal.

(ii) The High Court cannot grant stay order.

(iii) The High Court cannot go into the factual aspects of the matter.

(iv) The merits and demerits of the case cannot be gone into in reference u/s 35H.

11. (A) The High Court cannot quash the order of the Tribunal:

In this respect as submitted by the respondent that in a reference u/s 35H the High Court cannot quash the order of the Tribunal is wholly

misconceived. Section 35H(4) provides that the High Court will direct the Appellate tribunal to refer the question (s) of law which shall be heard

by a Bench by not less than two judges u/s 35J. Section 35H(4) and 35J(1) are reproduced below:-

35H (4): If, on an application made under Sub-section (1), the High Court directs the Appellate Tribunal to refer the question of law raised in the

application, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such direction, draw up a statement of the case and

refer it to the High Court.

35J(1): When any case has been referred by the High Court u/s 35G or Section 35H, it shall be heard by a Bench of not less than two judges of

the High Court and shall be decided in accordance with the opinion of such judges or of the majority, if any, of such judges.

Under Section 35K the High Court shall decide the question of law and shall deliver its judgment and decision which shall be sent to the Tribunal

who will pass the consequential order to dispose of the appeal in conformity with such judgment. Section 35(K) is reproduced below:

35K(1): The High Court or the Supreme Court hearing any such case shall decide the question of law raised therein and shall deliver its judgment

thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the

signature of the Registrar to the Appellate Tribunal which shall pass such order as are necessary to dispose of the case in conformity with such

judgment.

In view of the fact that the appeal has to be decided by the Appellate Tribunal in accordance with the judgment of the High Court and the

consequential order has to be passed by CEGAT in accordance with the decision of the High Court, hence the order of the Tribunal will either be

confirmed in accordance with the judgment of the High Court or shall be modified or quashed as per the decision of the High Court in view of the

clear and categorical language of Section 35K(1) quoted above.

Section 35H of the Central Excise Act is analogous to Section 256 of the Income Tax Act Section 35-I of the Central Excise Act is analogous to

Section 260(1) of the Income Tax Act, which specifically provides that the consequential order has to be passed by the Tribunal in accordance

with the decision and judgment of the High Court given u/s 35H of the Central Excise Act or u/s 256 of the Income Tax Act.

Hence, in view of the judgment of the Division Bench of this Hon''ble Court in the case of Chemicals & Allied Products v. Income Tax Appellate

Tribunal, 1988 U.P.TC. 212, in view of the alternative remedy of reference (which in this case has been availed by the petitioners by filing a

reference u/s 35H(1) of the Central Excise Act), the writ petition of the petitioner is no longer maintainable.

11(B). High Court cannot grant stay order in a reference: but the stay order can be granted only in a writ petition under Article 226 of the

Constitution of India. It was argued on behalf of the respondent that even though a Constitution Bench of the Supreme Court of India in the case of

The State of Orissa Vs. Madan Gopal Rungta, has held that no writ petition is maintainable only for the purpose of stay order when the writ

petition which was entertained by the High Court under Article 226 for the purpose of interim relief, as the suit could not have been filed in view of

section 80 C.P.C. and unavoidable delay might result in irreparable loss to the petitioner, was found to be not justiable by the Supreme Court.

Even though the High Court had granted a stay order in a writ petition, since no stay order could have been obtained immediately in a suit unless

the statutory period u/s 80 C.P.C. expired, but the Constitution Bench of the Court has held, at page 14, as follows:

In our opinion, Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court

has purported to do. The directions have been given here only to circumvent the provisions of Section 80 C.P.C. and in our opinion that is not

within the scope of Article 226"".

The counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax v. Banshidar 1986

(1) SCC 526, for the proposition that the High Court has no power to grant stay in a reference.

In para 15 at page 530, the Supreme Court of India has held as follows:

15. After the High Court and in cases of appeals to the Supreme Court, the courts answer the question in any manner or give certain opinion. The

appellate tribunals would dispose of the appeals in accordance with the opinions expressed or answers given by the High Court or the Supreme

Court. Therefore, under the Scheme, the appeal is kept pending before the Tribunal and the Appellate jurisdiction is retained by the Tribunal, but

the High Court exercises an advisory or consultative jurisdiction.

However, in the same judgment, it has been held at page 539 in paragraph 39 by the Supreme Court as follows:

In an appropriate case, if the assessee feels that a stay of recovery pending disposal of the reference is necessary or is in the interest of justice,

then the assessee is entitled to apply before the appellate authority to grant a stay until disposal of reference by the High Court or until such time as

the appellate authority though fit.....

Even though the High Court does not have the power to grant stay in a reference proceedings, but in view of the ''aforesaid clear and categorical

observation of the Supreme Court in paragraph 15 and 39, quoted above, the petitioners can apply for stay before the Tribunal and writ petition

cannot be entertained for the purpose of grant of stay when the reference is pending before the High Court u/s 35H.

A Division Bench of this Hon''ble Court in the case of Madho Saran v. Inspecting Assistant Commissioner Income Tax, Bareilly, 1986 U.P.T.C.,

page 959, has dismissed the writ petition under Article 226 of the Constitution of India on the ground that the petitioner can approach the

Appellate Tribunal for the purpose of stay during the pendency of the reference proceedings in the High Court, and the writ petition under Article

226 is not an appropriate forum or remedy.

11(C). High Court cannot go into the factual aspects of the matter. According to the respondents this contention of the petitioners is also not

tenable, as even in a writ petition under Article 226 of the constitution, the High Court cannot go into the questions of facts and the findings of fact

recorded by the Tribunal. In the case of P.G. I. of Medical Education and Research, Chandigarh v. Raj Kumar, 2001 2 SCC 54, paragraph 9, the

Supreme Court has held as follows:

It is not for the High Court to go into the factual aspect of the matter and there is an existing limitation to that effect....The law is well settled to the

effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material

evidence adduced before the labour Court was insufficient or inadequate through, however, perversity of the order would warrant intervention of

the High Court. The observation, as above, stands well settled since the decision of this Court in Syed Yakoob v. K.S. Radhakrishanan.

In the case of Ashok Kumar and Others Vs. Sita Ram, , paragraph 10, the Supreme Court has took the similar view.

In a reference proceeding even the mixed questions of fact and law can be gone into and the factual aspects can be gone into in a reference by the

High Court, as held by the Supreme Court of India in the case of C. Vasantlal and Co. Vs. Commissioner of Income Tax, Bombay City, , in which

the High Court has held as follows:

It is true that a finding of fact which is not supported by any evidence or is unreasonable and perverse may be open to challenge on the ground

that it is not supported by any material on record, but, as we have already observed, there was material on which the Income Tax Appellate

Tribunal could reasonably arrive at the conclusion which it did.

In Commissioner of Wealth Tax and Commissioner of Income Tax Vs. Smt. Indirabai and Others, , while dealing with the scope of reference u/s

256 of the Income Tax Act, it was held as follows:

Whether there is any legally admissible material in reaching a finding can be regarded as a question of law. The Tribunal was in a serious error in

refusing to state a case for consideration of the Hon''ble High Court.

In these circumstances, in a reference proceeding factual aspects can be gone into u/s 35H but not in a writ petition under Article 226 of the

Constitution, hence, even the third contention of the petitioners is also not correct.

11(D). Merits and demerits of the case cannot be gone into in reference:

This argument of the counsel for the petitioner is also not legally sustainable in view of the decision of this Court (D.B.) in Rain Natli Mehrotra v.

Commissioner of Income Tax, 117 ITR, Page 714 at Pages 716 & 717, where the High Court has directed in a reference proceeding to the

Tribunal to rehear the appeal, it was held, at page 217, as follows:

We, therefore, return the reference unanswered with a direction that the Tribunal will re-hear the appeal and decide it in the light of above

observation and in accordance with law.

Thus the High Court has the power to remand the case also in reference proceedings.

The Supreme Court in the case of Satlaj Cotton Mills Ltd. v. Commissioner of Income Tax, Volume 116 ITR page-1, and page 14 after

considering the merits and demerits of the case and the factual aspects of the matter, has observed as follows:

The question whether the loss suffered by the assessee was a trading loss or capital loss cannot, therefore, be answered unless it is first

determined whether these two amounts were held by the assessee on capital account or on revenue account or, to put it differently, as part of fixed

capital or of circulating capital. We would have ordinarily, in these circumstances, called for a supplementary statement of case from the Tribunal

giving its finding on this question, but both the parties agreed before us that their attention was not directed to this aspect of the matter when the

case was heard before the revenue authorities and the Tribunal and hence it would be desirable that the matter should go back to the Tribunal with

a direction to the Tribunal either to take additional evidence itself or to direct the ITO to take additional evidence and make a report to it, on the

question whether the sums of Rs. 25 lakhs and Rs. 12,50,000 were held in West Pakistan as capital asset or as trading asset or, in other words, as

part of fixed capital or part of circulating capital in the business. The Tribunal, will, on the basis of this additional evidence and in the light of the law

laid down by us in this judgment, determine whether the loss suffered by the assessee on remittance of the two sums of Rs. 25 lakhs and Rs.

12,50,000 was a trading loss or a capital loss.

Thus, the High Court in a reference proceeding u/s 35H of the Central Excise Act or u/s 256 of the Income Tax Act has powers to go into the

merits and demerits of the case and can direct the Tribunal to rehear the appeal.

11(E). The reference is not an alternative remedy.:

The petitioners have relied upon the decision in the case of Feldohf Auto and Gas Industries Ltd. and Another Vs. Union of India (UOI) and

Another, , in support of this proposition. In this case, the validity of the Notification No. 174 of 1989 dated 1st September, 1989 was challenged.

Since the validity of the notification cannot be challenged before an authority constituted under the ''Act,'' hence the alternative remedy is not a bar.

In the present case, neither the validity of any provision of the ''Act'' not the validity of any notification has been challenged, hence, this case has no

application for the contention that reference is not an alternative remedy.

12. The Supreme Court in the case of Union of India (UOI) and Others Vs. Charles David and Others, , has held that instead of challenging the

order of the Tribunal by filing the statutory alternative remedy of reference the writ petition was filed and the Apex Court has held as follows:

The High Court simply said that the appellant had a statutory alternative remedy and the appellant had to avail that statutory remedy instead of

filing writ petition, Accordingly, the High Court dismissed the writ petition. The appellant instead of challenging the order of the tribunal by availing

the statutory alternative remedy has filed this appeal by special leave challenging the order of the High Court. We are of the view that the High

Court (was) right in dismissing the writ petition directing the appellant to avail the statutory alternative remedy.

13. In the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, the Supreme Court has held in para 11 at page 607

as follows:

If the petitioners are dissatisfied with the decision in appeal they can prefer a further appeal to the Tribunal under Sub-section (3) of Section 23 of

the Act and then ask for a case to be stated upon a question of law for the opinion of the High Court u/s 24 of the Act.....'''' Act provides for a

complete measure to challenge an order of assessment.....by mode prescribed by the Act and not by a petition under Article 226 of the

Constitution.

14. The said decision has been followed in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,

as follows:

In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , A.P. Sen, E.S. Venkataramiah and R.B. Misra JJ held that where

the state itself provided the petitioner with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to

the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extra, ordinary jurisdiction under

Article 226 of the Constitution ignoring as it were.....become necessary, even now, for us to repeat admonition is indeed a matter of tragic

concern to us. Article 220 is not meant to short circuit or circumvent statutory procedures.....We can also take judicial notice of the fact

that the vast majority of the petitioners under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and

thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

As mentioned earlier, (reference u/s 256 of the Income Tax Act is maintainable against the order of the Income Tax Appellate Tribunal, like a

Reference against the order of the CEGAT u/s 35H of the Act.)

15. The Supreme Court has depicted the practice of filing a writ petition under Article 226 of the Constitution instead of filing a reference u/s 256

of the Income Tax Act in the case of Commissioner Income Tax, Lucknow v. U.P. Forest Corporation, 1998 (3) Supreme Court Cases, page

530 at page 533 para 5, which is reproduced below:

5. Instead of following the procedure prescribed by the Act by way of a reference u/s 256 of the Income Tax Act, the respondent chose to file

three writ petitions in the Allahabad High Court challenging the orders of the Tribunal in respect to the Assessment Year 1984-85 which had been

made by it. These writ petitions were entertained by the High Court which allowed the same by coming to the conclusion that the respondent was a

local authority and therefore, its income was exempt from tax.

Taking note of the aforesaid fact in para 5 quoted above, the Supreme Court has observed as follows in para 14 at page 539 and 540:

Before concluding, we would like to observe that the High Court ought not to have entertained the writ petitions when adequate alternative

remedy was available to the respondent..... We, however, emphasise that the petitioners should not normally short-circuit the procedure

provided by the taking statute and seek redress by filing a petition under Article 226 of the Constitution of India

16. Admittedly the petitioner have filed recently Excise Reference Application No. 13 of 2002 on 16.5.2002 u/s 35H of the Act, hence he is suing

a parallel proceedings in respect of the same subject-matter arising out of the same order of the Tribunal in view of the judgment of the Supreme

Court in the case of Jai Singh Vs. Union of India and Others, in which the Supreme Court has held as follows:

.....the appellant has filed a writ, in which he has agiated (sic) the same question which is the subject matter of the writ petition. In our opinion the

appellant cannot pursue two parallel remedies in respect of the same matter at the same time.

17. In the case of CL Jain Woollen Mills 1996 (84) ELT 17, the Supreme Court has observed as follows:

While we agree with Mr. A Subba Rao, the learned counsel for the petitioner that when the appeal before the Tribunal, preferred by the assessee

himself, was pending, the High Court ought not to have interfered in the matter by way of a writ petition, in the facts and circumstances of the case,

we are not inclined to interfere in the matter.

18. A Division Bench of the Andhra Pradesh High Court in the case of P. Vasu Babu Vs. CEGAT, Chennai, , has dismissed the writ petition

under Article 226 of the Constitution only on the question that the petitioner has remedy of Reference u/s 35G and 35-11 of the Act.

19. A constitution Bench of the Supreme Court, in Veerappa Pillai Vs. Raman and Raman Ltd. and Others, , held that as the Motor Vehicles Act

is a self contained code and itself provides for appealable/revisable forum, the writ jurisdiction should not be involved in matters relating to its

provisions.

20. Similar view has been reiterated in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, :

Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; and Shivgonda Anna Patil and Others Vs. State of Maharashtra and

Others,

21. In C.A. Ibraham v. ITO, AIR 1961 and H.B. Gandhi v. Gopinath & Sons, 1992 (Suppl).2 SCC 312, the Supreme Court held that where

hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

22. The Constitution Bench of the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, , considered the Privy Council, AIR 1947

PC 78 and held that the writ court can entertain the petition provided the order is alleged to be without jurisdiction or has been passed in flagrant

violation of the principles of natural justice, or the provisions of the Act/Rules is under challenge.

23. In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , the Supreme Court refused to extend the ratio of its earlier

judgment in Mazagaon Dock Ltd. Vs. The Commissioner of Income Tax and Excess Profits Tax, wherein the Court had held that prerogative writ

can be issued to correct the error of the Court or Tribunal below even if an appeal is provided under the statute under certain circumstances, i.e.

the order is without jurisdiction, or principles of natural justice have not been followed, and held that in case of assessment under the Taxing

Statute, the principle laid down by the Privy Council in Raleigh Investment Co. Ltd. (supra) would be applicable for the reason that ""the use of the

machinery provided by the Act, not the result of that us, is the test.

24. While deciding the said case, the Supreme Court placed reliance on large number of judgments, particularly New Water Works Co. v.

Nawkes Ford (1859) 6 CBNS 336 Neville v. London Express Newspapers, Ltd. 1919 AC 368, the Attorney General of Trinidad Tobago v.

Corodon Craft & Co. 1935 AC 532 and Secretary of State v. Mask & Co. AIR 1949 PC 105, wherein it had consistently been emphasised that

the remedy provided by the statute must be followed and writ should not generally be entertained unless the statutory remedies are exhausted.

25. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; and Tin Plate Co. of India Ltd. Vs. State of Bihar and Others,

the Supreme Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it has

been admitted, parties should be relegated to the appellate forum.

26. In Sheela Devi Vs. Jaspal Singh, , the Hon''ble Supreme Court has held that if the statute itself provides for a remedy of revision, writ

jurisdiction cannot be invoked.

27. In Punjab National Bank v. O.C. Krishnan and Ors. AIR 2001 SCW 2993, the Supreme Court while considering the issue of alternative

remedy observed as under:

The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is

hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast tract procedure cannot be allowed to be derailed either by

taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a

provisions under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there

is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional

provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have

directed the respondent to take recourse to the appeal mechanism provided by the Act.

28. A Constitution Bench of the Supreme Court, in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., , held that Article

226 of the Constitution confers on all the High Court a very wide power in the matter of issuing writs. The said power is limited. However, the

remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the

aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Supreme Court in Sangram Singh Vs.

Election Tribunal, Kotah, Bhurey Lal Baya, , holding that the power of issuing writs are purely discretionary and no limit can be placed upon that

discretion. However, the power can be exercised a lone with recognised line and not arbitrarily and the Court must keep in mind that the power

shall not be exercised unless substantial injustice has ensued or is likely to ensue and in other cases the parties must be relegated to the courts of

appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

29. Again a Constitution Bench of the Supreme Court, in Union of India (UOI) Vs. T.R. Varma, , held that it is well settled that when an

alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction

of the High Court to issue a prerogative writ. The Supreme Court held that existence of an another remedy does not affect the jurisdiction of the

Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and

where such remedy is exhausted, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution

unless there are good grounds therefor.

30. Yet another Constitution Bench of the Supreme Court in State of U.P. and Ors. v. Mohammad Nooh AIR 1958 SC 86, considered the scope

of exercise of writ jurisdiction when remedy of appeal was there and held that writ would like provided there is no other equally effective remedy.

The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of fundamental

principles of justice. Therefore, in a proper case, powers of writ can be exercised, but should not be exercised generally where other adequate

legal remedy is available though it may not be, per so, a bar to issue a writ of prerogative. The Supreme Court held that the remedy, being

discretionary, cannot be asked as a matter of right, even if the order is a nullity, on the ground that it was passed by disregarding the rules of natural

justice. The Court held as under:

.....save in exceptional cases, the courts will not interfere under Article 226 until all normal remedies available to a petitioners have been

exhausted. The normal remedies in a case of this kind are appeal or revision. It is true that on a matter of jurisdiction or on a question that goes to

the root of the case, the High Courts can entertain a petition at an early stage but they are not bound to do so and a petition would not be thrown

but because the petitioner had done that which the Courts usually ask him to do, namely, to exhaust his normal remedies before invoking an

extraordinary jurisdiction.....The petitioner would have been expected to pursue the remedies of appeal or revision and could not have come to

the High Court in the ordinary way until he had exhausted them.

31. In NT. Veluswami Thevar v. G. Taja Nainar and Ors. AIR 1959 SC 442, the Supreme Court held that the jurisdiction of the High Court to

issue writs against the Orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court must

properly exercise its discretion in declining to interfere under Article 226 of the Constitution.

32. Another Constitution Bench of the Supreme Court, in State of Madhya Pradesh Vs. Bhailal Bhai and Others, , held that the remedy provided

in a writ jurisdiction is not intended to supersede completely the mode of obtaining relief by an action in a civil court or to a deny defence

legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discreionary power. Similar view has been

reiterated in Municipal Council, Khurai and Another Vs. Kamal Kumar and Another,

33. In Siliguri Municipality and Others Vs. Amalendu Das and Others, , the Supreme Court held that the High Court must exercise its power under

Article 226 with circumspection and while considering the matter of recovery of tax etc., it should not interfere save under very exceptional

circumstances.

34. In S.T. Muthusami Vs. K. Natarajan and Others, , the Supreme Court held that the High Court cannot be justified to exercise the power in

writ jurisdiction if an effective alternative remedy is available to the party.

35. In Kerala State Electricity Board and Anr. v. Kurien E. Kolathi and Ors. 2000 SCC 293, while dealing with a similar issue, the Supreme

Court held that the writ petition should not be entertained unless the party exhausted the alternative/statutory efficacious remedy.

36. In A. Venkatasubbiah Naidu Vs. S. Challappan and Others, , the Supreme Court deprecated the practice of exercising the writ jurisdiction

when efficacious alternative remedy is available. The Court observed as under:

Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognised principle which gives judicial

recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he reasons to a Constitutional remedy.

37. Similar view has been reiterated in Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, ; L.L. Sudhakar

Reddy and Others Vs. State of A.P. and Others, ; Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha

and Another Vs. State of Maharashtra and Others, ; G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors. 2003 (1) SCC 72 and

Pratap Singh and Anr. v. State of Haryana 2002 (7) SCC 481.

38. In the State of Himachal Pradesh Vs. Raja Mahendra Pal and Others, while dealing witha similar issue the Supreme Court has held as under:-

It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature and can be invoked for

the enforcement of any fundamenal right or legal right. The constitutional Court should insist upon the party (to avail of the efficacious alternative

remedy) instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the court from granting the appropriate

relief to a citizen in peculiar and special facts notwithstanding the existence of alternative efficacious remedy. The existence of special circumstances

are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article.

39. In Govt. of A.P. and Others Vs. J. Sridevi and Others, the Supreme Court held that where an authority is competent to determine the issue,

the High Court in a writ jurisdiction should have directed the authority only to take an appropriate decision. When the statutory authority is vested

with the power to determine the question as to the applicability of the provisions of the Act, it is ordinarily desirable to leave the question to be

decided by such authority. The aggrieved party can file appeal against the decision within the frame work provided under the statute and the

ultimate decision also could be challanged under judicial review, if permitted in law.

40. In the State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., the Supreme Court held that existence of alternative remedy does not

affect the jurisdiction of the writ court but it could be a good ground for not entertaining the petition.

41. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the Supreme Court held that the rule of exclusion of writ

jurisdiction by availability of alterative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of

the case and then may interfere if it comes to the conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure

of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged. While deciding

the said case, the Supreme Court placed reliance upon its earlier judgment in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and

Others, .

42. This Court in Pradeep Kumar Singh Vs. Uttar Pradesh State Sugar Corporation and Another, Pradeep Kumar Singh v. U.P. State Sugar

Corporation and Anr. has referred in its judgment, the following cases (1991) 2 UPLBEC 898 L. Hirday Narain Vs. Income Tax Officer, Bareilly,

(Hridya Narain v. Income Tax Officer, Bareilly, 1995 All LJ 454 (Dr. Bal Krishna Agrawal v. State of U.P. and Ors. (1990) 1 UPLBEC 699

New India Assurance Co. Ltd. Vs. Economic Transport Corporation, (Whirlpool Corporation v. Registrar of Trade Markets, Mumbai and Ors.)

2000 (1) ESC 504 (Satya Ram Yadav v. Deputy Managing Director, U.P. State Warehousing Corporation Lucknow, 2001 (2) ESC 619 Dr

(Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, (Dr. Suit.) Kanta Gupta v. Management of

Hindu Kanya Mahavidyalaya Sitapur (U.P.) and Ors. 2000 (89) FLR 1112 Sunil Kumar Pathak v. Chairman, Indian Oil Corporation, New Delhi

and Ors. 1997 (76) FLR 372 Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh, Delhi Cloth and General Mills Co. v. Ludh Budh Singh

AIR 1975 SC 1990 Aligarh Muslim University and Others Vs. Mansoor Ali Khan, Rajasthan State Road Transport Corporation and Another Vs.

Krishna Kant and Others, (Rajasthan State Transport Corporation v. Krishna Kant) and has arrived at the conclusion as below:

Thus, from the various decisions referred to above the following principles emerge regarding maintainability of a petition under Article 226 of the

Constitution of India:

(1) While exercising its writ jurisdiction under Article 226 of the Constitution of India, the High Court may decline to grant relief unit (sic) (until)

such statutory remedy is exhausted. However, this rule is a rule of policy, convenience and discretion and not a rule of law nor it bars the

jurisdiction of the High Court under Article 226 of the Constitution in granting relief in appropriate case and exceptional circumstances;

(ii) Alternative remedy is not a bar where a writ petition has been filed for enforcement of any fundamental rights; or where there is violation of

principles of natural justice; or where the order of the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

43. In my respectful consideration since in Pradeep Kumar Singh (supra) the question of violation of principal of natural justice was being tested in

writ petition and therefore, in reference to the maintainability of the writ petition without resorting to alternative remedy available in the Industrial

Disputes Act, therefore, this court has taken above view. However the present petitioner Union of India cannot take protection of the decision of

this Court (D.B.) in Pradeep Kumar Singh (supra) more so in view of the law laid down by the Supreme Court in reference to the alternative

remedy.

44. Thus, the law can be summarised that rule of exclusion of the writ jurisdiction is not a law but discretion to be exercised by the Court

considering the facts and circumstances of the case, and if the case requires any kind of evidence etc. the writ court may not exercise its

extraordinary jurisdiction at all.

45. In view of the above observations it becomes clear that the contentions raised by the petitioner are not legal. The petitioner cannot be

permitted to pursue the two remedies simultaneously, one under Article 226 of the Constitution of India and other u/s 35H of the Central Excise

Act, filed on 16.5.2002 and after objection was taken by the respondent regarding the maintainability of the present writ petition.

In these circumstances, present writ petition is liable to be dismissed.

Therefore, the writ petition is dismissed accordingly.