

(2002) 02 BOM CK 0126

Bombay High Court

Case No: Writ Petition No's. 5974 of 2001 and 303 of 2002

Union of India (UOI)

APPELLANT

Vs

Auto Ignation Ltd. and Another

RESPONDENT

Date of Decision: Feb. 20, 2002

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35L
- Constitution of India, 1950 - Article 226

Citation: (2003) 1 BomCR 305 : (2002) 2 MhLj 730

Hon'ble Judges: V.C. Daga, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: M.I. Sethna and R. Asokan, for the Appellant; S.N. Kantawala, instructed by Kantawala and Co., B.H. Patil, A.H. Mehta and Neta Mamaria, for the Respondent

Final Decision: Dismissed

Judgement

V.C. Daga, J.

Rule.

By consent of the parties rule returnable forthwith.

2. These 2 petitions filed at the instance of the Revenue under Articles 226 and 227 of the Constitution of India, are directed against the order passed by the Customs Excise and Gold Control Tribunal (CEGAT for short), Mumbai. Parties are different, but issue for consideration is identical so this common order will dispose of both writ petitions. Facts in brief :--

3. Factual matrix giving rise to writ petition No. 303 of 2002 reveals that the respondent is M/s Mahila Griha Udyog Lijjat Papad Ltd. (the respondent/assessee for short) having its registered office at 3, Kamal Apartments 149/150 S. V. Road, Bandra, Mumbai (W) and manufacturing Units having their addresses as follows : (i)

Unit A - Plot No. 91, near Dahisar Checknaka, Near Lion Pencil, P. O. Mira, Dist. Thane (ii) Unit B - Gautam Complex, Western Express Highway, Mira Road, Dist., Thane, (iii) Unit C and D-C-3- Mira Industrial Estate. P. O. Mira, District Thane: (iv) Unit E - Ajmera Estate, Western Express Highway, Near Richhi Rich P. Ltd., Versova Village, Ghod Bunder Road, Dist. Thane, had taken out a Central Excise Licence bearing No. I/CH-34/R. IX/Th-III/1989, dated 12-1-1989 for the period 1989 to 1993. The Assessee filed a classification List classifying the subject product as "synthetic detergent" manufactured by the asses see-respondent.

The dispute between the respondent/assessee and the department started when the said product viz. synthetic detergent were cleared without payment of central excise duty on the basis of the Exemption Notification No. 88/88-CE, dated 1-3-1988 on the basis of rural status.

4. A show cause notice dated 29-10-1997 being the first show cause notice was issued by the Central Excise Department to the respondent/assessee for the period 1-10-1992 to 30-9-1997 demanding central excise duty in the sum of Rs. 19,31,30,535.61. Three more show cause notices also came to be issued to the respondent-asses see for the subsequent periods based on the identical grounds as were disclosed in the first show cause notice dated 29-10-1997. The contents thereof are not necessary for the present, as such no, details thereof are referred to herein.

5. The aforesaid first show cause notice came to be adjudicated upon by the Commissioner of Central Excise, vide adjudication order dated 12-11-1998, consequently demand in the sum of Rs. 19,31,30,535.61 came to be confirmed. Penalty of equal amount also came to be imposed on the respondent/assessee. In the adjudication order, it was also held that considering location of the Industrial units of the respondent-assessee in the municipal area of Mira Bhynder, the respondent/assessee was not entitled to claim exemption on the basis of rural area status. One more adjudication order came to be passed on 10-1-2000 disposing of of other show cause notices and confirming duty demand in the sum of Rs. 3,03,06,897.28 based on identical reasons and levying equal amount of penalty.

6. The respondent-assessee challenged the said two adjudicating orders before the CEGAT based on the contention that factory units of the respondent/assessee located in the rural area, entitled to claim exemption in terms of the Exemption Notification No. 88/88-CE dated 1-3-1988. Appeal was also preferred at the instance of the petitioner's Central Excise Department; inter alia, seeking modification of the second adjudication order dated 10-1-2000 seeking to claim interest on the amount of duty demanded under the Central Excise Act and the Rules.

7. The CEGAT after hearing the parties vide its order dated 23-10-2001 disposed of both the appeals holding that locality of village; Mira is a rural area, the manufacturing units being in the rural area are entitled to claim rural status as such entitled to claim exemption. Alternatively, it was held that even if the question of

rural area is decided against the assessee, the product manufactured by the respondent-assessee is a "Laundry soap" and not "synthetic detergent", as such the respondent/assessee was entitled to claim complete exemption from payment of duty, irrespective of the fact whether or not the respondent assessee was entitled to claim rural status.

8. The petitioners considering negative impact of the judgment of the CEGAT have invoked writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India to challenge the orders of the CEGAT on various grounds as raised in the petition, reference to which is not necessary at this stage of the judgment.

9. One more writ petition came to be tagged with the present writ petition No. 303 of 2002 being Writ Petition No. 5974 of 2001.

10. The factual matrix drawn from the said second writ petition in narrow compass reveals that the assessee respondent - M/s Auto Ignation Ltd. was served with 2 show cause notices based on common allegations that the respondent No. 1 (the respondent/assessee for short) has imported goods without payment of customs duty in terms of exemption contained in Notification No. 203/1992 - Cus. dated 19-5-1992 though such duty free clearance were not permissible as the same were in breach of the condition V(a) of the said Notification and had also violated the provisions contained in para 126 of the Handbook of Procedure of Exim. Policy 92-1997.

11. Both the petitions were on our board for admission. Both were called out for hearing one after another, in both the petitions, objection to the maintainability thereof on the ground mentioned in the subsequent para came to be raised at the instance of the respondent/assessee. Considering the identical nature of the preliminary objection raised by the learned Counsel for the respondent/assessee, in both petitions, they were allowed to be tagged together. The petitioners, in view of preliminary objection, sought leave to amend writ petition No. 303 of 2002. Accordingly, leave was granted. In pursuance of the said leave to amend, writ petition No. 303 of 2002 was amended to meet the challenge posed by way of preliminary objection. However, no such leave to amend writ petition No. 5974 of 2001 was sought nor any attempt was made to amend the said petition. The Arguments.

12. The learned counsel appearing for the respondent/assessee in both writ petitions having entered the appearance raised preliminary objection to the maintainability of petitions under Articles 226 and 227 of the Constitution of India, on the ground that u/s 35-L of the Central Excise and Salt Act, 1944 ("Act" for short) appeal has been provided to the Supreme Court against the orders in question. According to the learned Counsel for the respondent/assessee, in view of the specific provision providing for appeal to the Supreme Court against the order of the CEGAT, no challenge to the impugned orders can be allowed to be set up in this Court by

way of writ petitions. Reliance is placed on the judgment of the Division Bench of this Court in the case of [Colour-chem. Ltd. Vs. Union Of India](#), . In addition to the said judgments reliance is also placed on various judgments of different High Courts including that of the Supreme Court in support of the preliminary objection, which we propose to refer to at the appropriate stage of this judgment.

13. Per contra, Shri M.I. Sethna, learned Senior Counsel for the Revenue petitioners contended that the statutory remedy of appeal as contemplated u/s 35-L of the Act provides for an appeal to the Supreme Court in the matter of disputes mainly connected with rates and valuation. In his submission, so far as writ petition No. 303/2002 is concerned, dispute involved concerns the correctness or otherwise of the interpretation of statutory expression and in the light of constitutional provisions viz. the expression "rural areas" and the expression "village", the interpretation adopted by the CEGAT if held to be legally correct, then, the petitioners have no dispute with regard to the rates or valuation. The petitioners, therefore, submitted that the said dispute cannot be said to be within the sweep of the appellate remedy as provided u/s 35-L of the Act.

14. The learned Senior Counsel for the petitioners urged that the expression "among other things" has not been interpreted by any Court so as to assume mandatory inclusion of dispute such as; the present one, as such, it would not be proper to contend that the dispute raised in the petition is within the scope of the appellate remedy provided u/s 35-L. The petitioners, therefore, contend that the said remedy cannot be construed as an efficacious remedy or at any rate, an alternate remedy, alternate to the writ jurisdiction of this Court.

15. Learned Counsel Shri Sethna further submitted that the second limb of the dispute raised by the petitioners in the present writ petition relates to the jurisdiction of CEGAT to deal with the question, not raised in the appeal filed by the assessee. In his submission, CEGAT acted totally without jurisdiction as an appellate body. The challenge to the order without jurisdiction may not be within the four corners of Section 35-L of the Act.

16. The learned Senior Counsel for the petitioners alternatively, submitted that existence of the alternate remedy u/s 35-L of the Act could not be a bar for entertaining writ petition under Articles 226 and 227 of the Constitution of India as the petitions involve pure questions of law. No factual dispute is being raised in the petition. Adjudication would be that of legal issues only since the petitioners are not challenging the orders on merits. Strong reliance is placed on the judgment of the Apex Court in the case of [L. Chandra Kumar Vs. Union of India and others](#), and a decision of the M. P. High Court in the case of [Neo Sacks Limited Vs. CEGAT](#), . Learned Counsel for the petitioners pressed into service the observations of the Apex Court in para 90 of the said judgment in the case of L Chandra Kumar (cited supra) which reads as follows:--

"We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution, but, instead the aggrieved party will be entitled to move the High Court under Article 226/ 227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution."

The learned Senior Counsel for the petitioners took us through the judgment of the M. P. High Court in the case of Neo Sacks Ltd. (supra) wherein it has been held that the appeal provided in Section 35-L is restrictive and not an efficacious remedy. The following observations of the M. P. High Court were also relied upon by the learned Counsel in support of his submissions. They are :

"In the ultimate analysis and all things considered we overrule preliminary objection taken by the respondents and hold that CEGAT is much amenable to the writ jurisdiction and supervisory jurisdiction of the Division Bench of the High Court under Article 226/227 of the Constitution in terms of the Supreme Court judgment in Chandra Kumar's case as any of the Tribunal and that this High Court was competent to entertain a Writ Petition against any order/decision of Tribunal even though passed at its Delhi Headquarters. It is further held that alternative statutory remedy of appeal to Supreme Court provided in section 35-L of the Central Excise Act against the order of CEGAT would not operate as a bar to the maintainability of such petition." In rejoinder, the learned counsel for the respondent/assessee refuted all the submissions pressed into service on behalf of the petitioners and went on to reiterate that questions relating to the rate of duty and value of goods for the purposes of assessment are the only questions squarely falls within the four corners of Section 35-L of the Act. He placed reliance on the judgment of the Supreme Court in the case of [Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs](#), . In this case, in his submission, the Supreme Court was dealing with the dispute with respect to the classification of the goods and the question was whether or not the assesseees were covered under exemption notification and the said question was held to be directly and proximately related to the rate of duty and value of goods for purposes of assessment. The following observations made in the same judgment were sought to be relied upon by the learned Counsel for the respondent-assessee. (SCC page 326, para 11). "A dispute as to whether classification of goods and as to whether or not they are covered by an exemption Notification relates directly and proximately to the rate of duty applicable, thereto for the purposes of assessment."

17. Based on this dicta, a contention is advanced that question as to rate of duty is very much involved in this case, as such the appellate remedy u/s 35-L of the Act is

very much available to the petitioners. At the cost of repetition, he urged that Division Bench of this Court in the case of Colour Chem Ltd. (supra) has ruled that the order of the Tribunal with regard to the determination of the rate of duty of excise, can very well be gone into in an appeal provided before the Supreme Court u/s 35-L of the Act. Therefore, writ jurisdiction of this High Court should not be allowed to be invoked. This Court further ruled that even if appeal is barred by limitation, remedy available is to move Supreme Court for condonation of delay, if there are sufficient grounds to do so.

18. The learned Counsel for the respondent/assessee also brought to our notice the judgment of the High Court of Delhi in the case of Raipur Grinding Industries Corporation v. Enjoin of India, 2000 (93) ECR 214 . The Delhi High Court in this judgment relied upon its own decision in the case of Shalimar Rubber Industries v. Union of India (CWP No. 1885 of 1997, decided on 6-5-1997) and [Perfect Electric Concern Pvt. Ltd. Vs. Assistant Collector/Commissioner, Central Excise](#), , and held that existence of statutory remedy u/s 35-L of the Act, is a bar for entertaining writ petition under Articles 226 and 227 of the Constitution of India it was also brought to our notice that SLP filed by Raipur Grinding Industries against the very judgment of the Delhi High Court has been dismissed by the Supreme Court on merits on 23-9-2001. While dismissing the Special Leave Petition, the Supreme Court passed the following order;--

"We find no merits in this SLP and dismiss the same. However, it will not preclude the petitioner from filing a statutory appeal."

[See 2001 (131) ELT 159]

The learned counsel for the respondent based on the aforesaid judgment of the Supreme Court went on to contend that the view taken by the Delhi High Court has been confirmed by the Supreme Court.

18-A. The learned Counsel for the respondents also placed reliance on one more judgment of the Supreme Court in the case of [Chanan Singh and Sons Vs. Collector Central Excise and Others](#), , wherein the Supreme Court while dealing with similar question observed as under:--

"This appeal by special leave is preferred against order of the Punjab and Haryana High Court in CWP No. 5781/1986, dated February 6, 1987. The appellant challenged before the High Court an order of the Tribunal allowing the appeal of the Revenue. 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 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."

The learned Counsel for the respondent/assessee on the above backdrop prayed for rejection of these petitions filed by Revenue. Consideration.

19. The position regarding the course to be adopted by the Courts when alternate remedy is available is fairly well-settled. If a show cause notice is issued by a statutory authority relying upon some facts, the said notice can be challenged before the writ Court only on the ground that even if the facts are assumed to be correct, no case has been made out against the noticee. If a prima facie case has been made out in the show cause notice, it is for the adjudicating authority to finally decide all the questions including the questions of fact. But the disputed questions of fact cannot be agitated in writ Court even before the questions have been gone into and finally decided by the adjudicating authority. It has been laid down in series of cases by the Supreme Court that the High Court should not interfere at the stage of show cause notice to take over the fact finding investigation which is to be resolved by fact finding authorities constituted under the relevant statute. In a series of recent cases, the Supreme Court has taken the aforesaid view. Some reported cases are: [State of Goa and others Vs. Leukoplast \(India\) Ltd. etc.](#), ; Union of India v. Polar Marmo Agglomerates Ltd., 1997 (96) ELT 21 ; and [Union of India \(UOI\) Vs. Bajaj Tempo Limited and Others](#), . In [State of U.P. and another Vs. Labh Chand](#), , the Supreme Court befittingly illuminated the power as under:--

"When a statutory Forum or Tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Article 226 of the Constitution is a legal position which is too well settled....."

In [State of Andhra Pradesh Vs. M/s. T.G. Lakshmaiah Setty and Sons](#), , the decision was reiterated by the Supreme Court and it was observed that the orders of assessment rendered under tax laws should be tested under the relevant Act and in no other way. In [Shyam Kishore and others Vs. Municipal Corporation of Delhi and another](#), , it was observed that recourse to writ petition is not proper, when more satisfactory solution is available on the terms of the statute itself. The position is, therefore, clear that extraordinary and discretionary power under writ jurisdiction should be exercised with caution when statutory remedy is sought to be by passed.

In [Rashid Ahmed Vs. The Municipal Board, Kairana](#), , the Apex Court laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed in another case, namely, [K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.](#), , which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition under Article 226 could still be entertained

in exceptional circumstances.

Specific and clear rule was laid down in [The State of Uttar Pradesh Vs. Mohammad Nooh](#), as under :--

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

20. The above proposition was considered by a Constitution Bench of the Apex Court in [A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another](#), and was affirmed and followed in the following words :-

"The passage in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to effect of the existence of adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if were, it would not be desirable by lay down flexible rules which should be applied with rigidity in every case which comes up before the Court." Another Constitution Bench decision in [Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another](#), laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting (1) On application without jurisdiction u/s 34 I. T. Act." These decisions were taken note of by the Apex Court on [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others](#).

21. So far as decision in L. Chandra Kumar's case is concerned, the question before the Supreme Court was whether decision of the Tribunal under Article 323A or 323 of the Constitution can be subject to the High Court's writ jurisdiction under Article 226/227 of the Constitution. It was held that it could be questioned before a Division Bench of the High Court within whose territorial jurisdiction the particular

Tribunal/Bench fell. Earlier decision in [S.P. Sampath Kumar and Others Vs. Union of India \(UOI\) and Others](#), was held to be not laying down correct law. The Supreme Court in L Chandra Kumar's case (supra) was not considering a question of exercise of power under Articles 226/227 of the Constitution when a specific statutory remedy under a statute is provided. In fact,, as stated above, the position of the Tribunal constituted under the Tribunals Act vis-a-vis the High Court was under consideration. Under the system that existed prior to L. Chandra Kumar's case (supra) matters were directly brought before the Supreme Court under Article 136 of the Constitution. It was observed by the Supreme Court that the situation was to stand modified in the sense that no appeal from the decision of a Tribunal will directly lie to the Supreme Court under Article 136 of the Constitution, but instead the aggrieved party will be entitled to move High Court under Articles 226/227 of the Constitution and from a decision of a Division Bench of the High Court, an aggrieved party could move the Apex Court under Article 136 of the Constitution. In the case at hand, there is statutory remedy provided u/s 35-L of the Excise Act and not under Article 136 of the Constitution which is conceptually different. A decision is a determination arrived at after consideration of facts, and in the legal context, law related to the facts of a particular case. It is an authority for what is decided and not consequentially or incidentally flows from the conclusions. The said decision must be read in its proper perspective.

22. So far as the judgment of the M. P. High Court in Neo Sacks Limited (supra) is concerned, with due respect, we are unable agree with the observations made in para 15 of the said judgment, in view of the judgment in the case of L. Chandra Kumar's case (supra). Nowhere in that judgment, it has been stated that though statutory remedy is provided in the statute by way of an appeal to the Supreme Court, the same is to be bypassed and a writ petition can be filed under Articles 226/227 of the Constitution of India. The observation of the M. P. High Court that the provision was rendered redundant does not appeal to be correct proposition of law.

23. Having heard the parties at length, it is not possible to accept the contention raised by the learned counsel for the Revenue. In the light of the findings recorded in the case of Navin Chemicals Mfg. and Trading Co. (supra) and looking to the text of Section 35-L of the Act, it is not possible for us to accept the contention of the Revenue that the question of rate of duty is not an issue involved in the present case. The Supreme Court clearly laid down that the dispute as to the classification of goods and as to whether or not they are covered by the exemption Notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Applying the said dicta, the question whether or not the respondent-assessee is well within exemption notification is a question directly involved in this dispute relates directly and proximately to the rate of duty of excise for the purposes of assessment. In other words, the issue raised in these petitions directly relates to dispute whether or not they are covered by the exemption

notification, which can conveniently be gone into in an appeal filed u/s 35-L of the Act.

24. On the above canvass, we are clearly of the opinion that remedy provided u/s 35-L of the Act is very much available to the petitioners. At any rate, we are of the opinion that the view taken by the Division Bench of this Court in case of Colour Chem Ltd. (supra) is a proper view and we respectfully follow the same,

25. The CEGAT has recorded reasons in support of its conclusions. Certain factual aspects have also been highlighted in the order. The correctness of factual position and the conclusions drawn, based on factual aspects, can only be appropriately gone into and tested by the appellate authority. We do not think it appropriate to express our opinion about merits since the petitioners have to avail the alternate remedy. In [Tin Plate Co. of India Ltd. Vs. State of Bihar and Others](#), Supreme Court observed that when an alternate and equally efficacious remedy is open to a person, he should be required to pursue the remedy and not to invoke extraordinary jurisdiction of the High Court under Article 226 of the Constitution, and where such a remedy is available, it would be sound exercise of discretion to refuse entertain the writ petition under Article 226 of the Constitution. While dismissing the writ petition on the ground of alternative remedy, High Court is not required to express any opinion on merits of the case, which is to be pursued before the alternative forum. In our opinion, this is a fit case where the petitioner Union of India should be asked to avail the statutory remedy of appeal.

26. In the above view of the matter, we do not see any reason to invoke our writ jurisdiction under Articles 226 and 227 of the Constitution of India. We sustain the preliminary objection raised by the Assessee Respondent and dismiss both the Writ petitions for the reasons stated hereinabove. Without expressing our opinion on the merits of the issue involved in these petitions as already expressed.

27. The petitioners shall be at liberty to invoke appellate jurisdiction of the Supreme Court u/s 35-L of the Act, if so, advised. All rival contentions are kept open. Rule stands discharged in both the petitions with no order as to costs.