

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No. 2448/2010**

% **Date of Decision:** August 4, 2011

M/S BAFNA HEALTHCARE PVT. LTD. & ORS. Petitioner
Through Mr. A.P. Sinha, Advocate.

VERSUS

COMMISSIONER OF CENTRAL EXCISE DELHI IV.....Respondents
Through Mr. Mukesh Anand, Mr. R.C.S.
Bhadoria and Mr. Shailesh Tiwari,
Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

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SANJIV KHANNA, J.

Petitioner No.1, M/s. Bafna Healthcare Pvt. Ltd., a company incorporated under the Companies Act, 1956 has its registered office in Mumbai. On 20th November, 2009, Central Excise, Faridabad conducted a search at their factory at Faridabad and documents and records like sale invoices, purchase invoices, balance sheets etc. were seized for further investigation.

2. The allegation of the Central Excise Department, Faridabad is that the petitioner No.1 is manufacturing ambulances after receiving base vehicles/delivery vans at Faridabad and earlier they were manufacturing

ambulances at Gurgaon. It is alleged that this “manufacturing activity” is exciseable and the petitioner No.1 is guilty of evasion of excise duty of Rs.3.30 crores tentatively.

3. The case of the petitioner No.1 is that the conversion of vehicles into ambulances is not manufacturing and, therefore, no excise duty is payable. It is stated that the petitioner No.1 has an office at N-114, Panchsheel Park, New Delhi and is registered with the service tax authorities in Delhi and the centralized registration for service tax was granted vide certificate of registration dated 28th April, 2008.

4. In the writ petition, the following prayers have been made:-

“(i) to issue writ of certiorari or other appropriate writ to quash the illegal Search Warrant, Seizure, Memo, Panchnama/Superdaganama, Summons, Statements, Orders, Directions, Registration Certificates, Letters etc issued by the Respondents No.1 to 4 and declared the same to be unconstitutional without jurisdiction, without justification, violative of natural justice and arbitrary as well as discriminatory and hence liable to be quashed and declared non est in law.

(ii) to issue writ of prohibition or other appropriate writ restraining the respondents from discriminating the Petitioners from discriminating the Petitioners arbitrarily, irrationally and unjustifiably for a hostile treatment wholly unauthorized by law and violative of Articles 14,19, 21, 265 and 300A of the Constitution of India.

(iii) to issue writ or mandamus to the respondents No.1 to 4 to return forthwith all the moneys illegally collected under coercion, duress,

extortion and blackmail besides collection as ransom money all of which are violative of Articles 265 and 300A and to order cancellation and return of the bonds and undertaking coercively taken under duress in the most illegal and atrocious manner.

(iv) to hold that no central excise duty liability is attracted no can and duty be levied once again on the duty paid motor vehicle when it is prepared subsequently by making suitable internal changes for use thereof as Ambulance by the owner/user for transport of patients in emergency and such activity does not constitute manufacture of new motor vehicle to attract duty liability again.

(v) to hold that no levy or central excise duty is permissible on what is already subjected to service tax as taxable service.

(vi) to hold that the petitioner having centralized service tax registration in Delhi cannot be called upon to get registered in Faridabad both for Central Excise and for service tax by the CCE, Delhi-IV and the registrations, orders and action for the same are liable to be cancelled.

(vii) to summon the records of lower authorities.

(viii) to pass ad interim exparte orders of stay of collection and recovery of Central Excise duty illegally sought to be demanded.

(ix) to award exemplary costs to the Petitioners and to pass such orders to proceed against the erring respondents No.1 to 4 for their vexatious and malicious action to harass the petitioners.

(x) to pass such other order or orders as this Hon'ble Court may deem fit and proper having regard to the facts and circumstances of the case.”

5. It is stated in the writ petition that on 20th November, 2009, 116 vehicles were found by the Superintendent of Central Excise (Anti-evasion), Faridabad. Four vehicles which were already duty paid were

allowed to be cleared, but the remaining 13 vehicles in finished condition were directed to be treated as dutiable and seized vide panchnama dated 20th November, 2009. Remaining 99 vehicles were not in a fit/finished condition to be taken and were not seized, but an oral direction was given that these vehicles should not be cleared without payment of excise duty. The seized vehicles were subsequently released on conditions/payment. Statement of employees/directors of the petitioner No.1 company was recorded and Manu Jain, a director of the company was arrested.

6. In the writ petition various factual details of how the matter has proceeded and the respective stands of the petitioner No.1 and Excise Department have been stated.

7. The whole edifice of the case built by the petitioner No.1 is that the process of conversion of the base vehicle unit, on which excise duty has already been paid, into ambulances equipped with requisite medical appliances, fittings etc. does not amount to manufacture and, therefore, no central excise duty is payable. It is submitted that the petitioner is undertaking an activity which is classified as service and, therefore, the entire action including search operations and proceedings thereafter are illegal.

8. On the other hand, the case of the respondent is that the base vehicles are classified as goods delivery vans under CETSH 8704 2190 and the ambulances after fabrication or conversion are classified under CETSH 8703 3392 of the Central Excise Act, 1944. They rely upon Section 2(f) of the Central Excise Act, 1944. The said section defines the term “manufacture” which includes; (i) any process incidental or ancillary to the completion of a manufactured product; (ii) which is specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture. They also rely upon Note-6 of Section XVII of the Central Excise Tariff Act, 1985, which stipulates that “in respect of goods covered by this Section, conversion of an article which is incomplete or unfinished but having the essential character of the complete or finished articles (.....)into complete or finished articles shall amount to manufacture.”

9. It is clear from the aforesaid facts that two conflicting positions have been adopted by the petitioner No.1 company and the Excise Department, Faridabad on the question whether or not the activities of the petitioner No.1 company at Faridabad amount to manufacture within the Central Excise Act, 1944 and the excise duty is payable or not. These questions and issues cannot be possibly and appropriately decided in a

writ petition as this requires examination of various aspects and factual matrix including what is exact nature of the activity undertaken by the petitioner No.1, company. It may also require examination or consideration on case to case basis. The factum that the petitioner No.1 has been paying service tax is an aspect which will have to be examined, but this alone cannot be a ground to foreclose the proceedings initiated by the Excise Department, Faridabad at the very initial stage. It will not be proper and correct to pronounce a judgment and decide the question whether or not the activities undertaken by the petitioner No.1 company at Faridabad amount to manufacture at the very initial stage. It will not be correct to say that the present case is one where there is ex-facie inherent lack of jurisdiction. The respondent-Excise Department, Faridabad is entitled to examine and go into the question whether or not activities undertaken by the petitioner No.1 company amount to manufacture or not. The Act confers jurisdiction on the said authority to decide the said question.

10. It may be noticed that the respondent has raised the question of territorial jurisdiction as the search operations were conducted at Faridabad and the factory premises of the petitioner No.1 company are also located at Faridabad. However, the case made by the petitioner No.1

is that they have office at Delhi and the billing is done from Delhi. It is noticed that in the writ petition it has been stated that the respondent Nos.1 to 4 function under the supervision of the Chief Commissioner, Central Excise, C.R. Building, I.P. Estate, New Delhi and the petitioner No.1 had approached the said authority. This, by itself, may not confer jurisdiction on this Court to entertain this writ petition, unless there was involvement and their role is material and a part of cause of action. However, since the writ petition has been pending since 2010, we are not inclined to examine this aspect in further detail. The respondents are, though, not precluded from raising the issue of jurisdiction if the petitioners come again by way of writ petition to this Court.

11. The Supreme Court in *Whirpool Corporation vs. Registrar of Trade Marks* (1998) 8 SCC 1 has held that the remedy of writ may be resorted to where the order or proceedings have been wholly without jurisdiction. In *Union of India vs. Hindalco Industries*, (2003) 5 SCC 194, the Supreme Court has cautioned that it is not for the High Court to interfere in exercise of jurisdiction at the show cause stage in taxation matters where an adequate alternative remedy is more appropriate. It was observed:-

“12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of

the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.”

12. In *Special Director v. Mohd. Ghulam Ghouse*, (2004) 3 SCC 440,

it has been observed:-

“5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are

not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.”

13. In *U.P. State Spg. Co. Ltd. v. R.S. Pandey*, (2005) 8 SCC 264, it has been explained that the High Court should not entertain writ petitions unless something in the case goes to the root of the jurisdiction. When and in what circumstances writ jurisdiction should be exercised at the initial stage was examined and it was held as follows:-

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

18. At this juncture, it would be appropriate to take note of the few expressions in *R. v. Hillington, London Borough Council* which seem to bring out the position

well. Lord Widgery, C.J. stated in this case: (All ER pp. 648f-649b)

“It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

* * *

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these ... whereas of course an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

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An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used ... I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law.”

19. After all the above discussion, the following observations of Roskill, L.J. in *Hanson v. Church Commrs.* may not be welcomed but it should not be forgotten also:

“There are a number of shoals and very little safe water in the unchartered seas which divide the line

between prerogative orders and statutory appeals, and I do not propose to plunge into those seas....”

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In *U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh* it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in.....”.

14. In another case, *Union of India v. Kunisetty Satyanarayana*, (2006) 12 SCC 28, the Supreme court has held:

“**13.** It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh, Special Director v. Mohd. Ghulam Ghouse, Ulagappa v. Divisional Commr., Mysore, State of U.P. v. Brahm Datt Sharma*, etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been

issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.”

15. Recently in *Raj Kumar Shivhare v. Directorate of Enforcement*, (2010) 4 SCC 772, it has been observed:

“**31.** When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

33. Reference may be made to the Constitution Bench decision of this Court rendered in *Thansingh Nathmal v. Supdt. of Taxes*, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain:

“7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. *Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.*” (emphasis added)

The decision in *Thansingh* is still holding the field.

34. Again in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down:

“11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage:

‘... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.’

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.* and *Secy. of State v. Mask and Co.* It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.”

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

36. Again another Constitution Bench of this Court in *Mafatlal Industries Ltd. v. Union of India* speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held:

“77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.”

In the concluding portion of the judgment it was further held: (*Mafatlal Industries Ltd. case*,)

“(x) ... The power under Article 226 is conceived to serve the ends of law and not to transgress them.”

37. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if the High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.”

16. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed. It is clarified that this Court has not expressed any opinion on whether or not activities undertaken by the petitioner No.1 company amount to manufacture and excise duty is payable on the said activities. This aspect will be decided by the respondent authorities during the course of proceedings under the Act. In case the petitioner No.1 is not satisfied, it will be open to him to avail appropriate remedy in accordance with law.

SANJIV KHANNA, J.

CHIEF JUSTICE

August 04, 2011
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