

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPT No. 79 of 2016**

Order Reserved on : 27.06.2016

Order passed on : 19.09.2016

1. Raghupati Ispat House No. 204, Netaji Kanhaiyalal Banjari Ward, Raipur, District Raipur Chhattisgarh
2. Arun Goenka, S/o Shri Ram Avtar Goenka, Aged About 41 Years R/o Goenka House Gudhiyari Raipur, District Raipur, Authorized Signatory, Raghupati Ispat, House No. 204 Netaji Kanhaiyalal Banzari Ward, Raipur, District Raipur Chhattisgarh

---- **Petitioner****Versus**

- Union Of India Through The Joint Commissioner Customs & Central Excise, Central Excise Building, Dhamtari Road, Raipur Chhattisgarh 492001

---- **Respondent****And****WPT No. 80 Of 2016**

1. M/s Raghunath Rolling Mills (Wrongly Mentioned In Impugned Order As M/s Raghunath Mills Ispat) House No. 204 Netaji Kanhaiyalal, Banjari Ward, Raipur District Raipur Chhattisgarh
2. Arun Goenka, S/o Shri Ram Avtar Goenka, Aged About 41 Years R/o Goenka House Gudhiyari Raipur, District Raipur, Authorized Signatory, M/s Raghupath Rolling Mills (Wrongly Mentioned In The Impugned Order As M/s Raghupati Ispat) House No. 204 Netaji Kanhaiyalal Banzari Ward, Raipur, District Raipur Chhattisgarh

---- **Petitioner****Vs**

- Union Of India Through The Joint Commissioner, Customs & Central Excise, Central Excise Building, Dhamtari Road, Raipur Chhattisgarh 492001

For Petitioners : Shri Ashish Surana, Advocate.
For Respondent : Shri Maneesh Sharma, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

1. In both the writ petitions, the petitioners have assailed the original order passed by the Joint Commissioner, Central Excise, Raipur imposing the following excise duty, interest, penalty etc. against the petitioners:-

(A) **WPT No.79/2016:-**

- (i) Central Excise Duty – Rs.23,13,659/-
- (ii) Penalty – Rs.23,13,659/-
- (iii) Penalty of Rs.2,50,000/- under Rule 26 of Central Excise Rules, 2002.

(B) **WPT No.80/2016:-**

- (i) Central Excise Duty – Rs.28,45,158/-.
- (ii) Cenvat credit of Rs.62,440/-.
- (iii) Penalty of Rs.28,45,158/-.
- (iv) Penalty of Rs.62,440/- under the Cenvat Credit Rules, 2004.
- (v) Penalty of Rs.3 lakhs.
- (vi) statutory interest on the above said amount.

2. The writ petitions have been preferred without exhausting alternative remedy of appeal under Section 35-B of the Central Excise Act, 1944,

therefore, the writ petitions were heard on the question of maintainability.

3. Facts of the case, as projected in the writ petitions, are that the petitioners are manufacturer of hot re-rolled and are holding central excise registration. The officers of Director General of Central Excise Intelligence (in short 'DGCEI'), Regional Unit Raipur searched the factory premises and the residence cum city office of the petitioners on 18.6.2013 and seized documents like invoice book, files containing loose papers, sale bills purchase, invoice, ER-1 returns, file containing computer print out under the Panchanama. Physical verification was conducted on which shortage of finished goods was found and thereafter statements of the petitioners in each of the petitions were recorded on 19.6.2013. Show cause notices were issued to the petitioners which could not be received, followed by other communications from the department on 8.12.2015 and 7.1.2016. The petitioners were also informed about the date of hearing of show cause notices on 22.12.2015 and 15.1.2016. The petitioners replied to these communications but denied to have received show cause notice, therefore, the respondents again supplied show cause notice and fixed the hearing on 10.2.2016. The petitioners prayed for extension of time which was granted by the department and the hearing was fixed on 4.3.2016 on which date the petitioners submitted their reply and also appeared for personal hearing. These facts are mentioned in para-8.4 to

8.11 of the writ petitions. Thus, receipt of show cause notice, filing of reply and personal hearing are not denied by the petitioners.

4. Despite the above, the writ petitions have been preferred without availing alternative remedy on submission that the Joint Commissioner did not provide opportunity to the petitioners to conduct cross-examination which is in violation of principles of natural justice, therefore, the petitioners have directly invoked this Court's jurisdiction under Article 226 of the Constitution of India. Learned counsel for the petitioners has referred to judgments mentioned in different paragraphs of the writ petitions.
5. On the other hand, learned counsel for the Revenue has referred to the judgments in the matters of **Surjeet Singh Chhabra Vs. Union of India and Others** {(1997) 1 SCC 508} and **Kanungo & Co. Vs. Collector of Customs, Calcutta and Others** {1983 (13) ELT 1486 (SC)} to contend that in the facts and circumstances of the case, there was no necessity of providing opportunity to the petitioners to cross-examine the department's witnesses because the entire case of the Department is based on the papers seized from the petitioners' premises during search operation.
6. In the matter of **Kanungo & Co.** (Supra), the Supreme Court held in para-12 thus:-

12. We may first deal with the question of breach of natural justice. On the material on record, in our

opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.”

7. In **Surjeet Singh Chhabra** (Supra), the following has been held in paras-2 & 3: -

2. It is contended by the learned counsel for the petitioner that the petitioner is entitled to cross-examine the panch witnesses and the Seizing Officer for the goods seized in contravention of the FERA and Customs Duty Act and that the opportunity has not been given. Therefore, it is violative of natural justice.

3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a *kara*. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-

examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.”

8. Yet again, in **Commissioner of Income Tax and Others Vs. Chhabil**

Dass Agarwal {(2014) 1 SCC 603}, the Supreme Court held in paras-

11, 12, 15, 16 & 17 thus:-

11. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See *State of U.P. v. Mohd. Nooh*¹, *Titaghur Paper Mills Co. Ltd. v. State of Orissa*², *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*³ and *State of H.P. v. Gujarat Ambuja Cement Ltd.*⁴)

12. The Constitution Benches of this Court in *K.S. Rashid and Son v. Income Tax Investigation Commission*⁵, *Sangram Singh v. Election Tribunal*⁶, *Union of India v. T.R. Varma*⁷ *State of U.P. v. Mohd. Nooh* (Supra) and *K.S. Venkataraman and Co. (P)*

1 AIR 1958 SC 86

2 (1983) 2 SCC 433

3 (2003) 2 SCC 107

4 (2005) 6 SCC 499

5 AIR 1954 SC 207

6 AIR 1955 SC 425

7 AIR 1957 SC 882

Ltd. v. State of Madras⁸ have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See ***N.T. Veluswami Thevar v. G. Raja Nainar***⁹, ***Municipal Council, Khurai v. Kamal Kumar***¹⁰, ***Siliguri Municipality v. Amalendu Das***¹¹, ***S.T. Muthusami v. K. Natarajan***¹², ***Rajasthan SRTC v. Krishna Kant***¹³, ***Kerala SEB v. Kurien E. Kalathil***¹⁴, ***A. Venkatasubbiah Naidu v. S. Chellappan***¹⁵, ***L.L. Sudhakar Reddy v. State of A.P.***¹⁶, ***Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra***¹⁷, ***Pratap Singh v. State of Haryana***¹⁸ and ***GKN Driveshafts (India) Ltd. v. ITO***¹⁹.]

15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case*, *Titaghur Paper Mills case* and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a

8 AIR 1966 SC 1089

9 AIR 1959 SC 422

10 AIR 1965 SC 1321

11 (1984) 2 SCC 436

12 (1988) 1 SCC 572

13 (1995) 5 SCC 75

14 (2000) 6 SCC 293

15 (2000) 7 SCC 695

16 (2001) 6 SCC 634

17 (2001) 8 SCC 509

18 (2002) 7 SCC 484

19 (2003) 1 SCC 72

mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. v. State of Haryana*²⁰ this Court has noticed that if an appeal is from “Caesar to Caesar’s wife” the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the instant case. In light of the same, we are of the considered opinion that the writ court ought not to have entertained the writ petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the reassessment orders passed and the consequential demand notices issued thereon.”

9. When the settled principles, as above, are applied in the facts and circumstances of the case, it is to be seen that the Joint Commissioner has passed an elaborate order running into 22 pages. It has dealt with each and every defence raised by the petitioners like (i) show cause notice has been issued on the basis of assumption and presumptions; (ii)

²⁰ (1985) 3 SCC 267

show cause notice has been issued without detailed investigation and the statements of the petitioners were recorded under duress and coercion; (iii) no evidence has been adduced in the show cause notice to prove clandestine removal by the petitioners; (iv) adjudicating authority should not pre-judge the issue; (v) opportunity to cross-examine the witnesses/persons whose presence or statements have been relied upon in the show cause notice is not provided; (vi) no interest is payable and no penalty is imposable.

10. After recording of the statements, the Joint Commissioner has referred to plethora of decisions to deal with each of the statement and concluded that the petitioners are dragging the proceedings wherein stock verification was recorded under Panchanama in the presence of authorized signatory of the firm/company who accepted the discrepancies/shortage of finished goods and raw materials as also seizure of documents from the premises. It is also concluded that the authorized signatory has not retracted from his statement at the later point and the same was given voluntarily and not under any coercion, duress, threat or allurement.
11. The Joint Commissioner has referred to the judgment in the matter of **K.I. Pavunny Vs. Asstt. Collr. (HQ.) C.Ex. Collectorate, Cochin** {1997 (90) ELT 241 (SC)} wherein it has been held that confessional statement of an accused, if found to be voluntary, is a substantial piece of evidence and such statement before the officer of the Revenue is

admissible in evidence. Thus, in the facts and circumstances of the case, there is no such violation of principles of natural justice which would vitiate the impugned order on this count. Therefore, the petitioners should avail alternative remedy of appeal.

12. For the foregoing, the Writ Petitions are dismissed as not maintainable on the ground of non-exhaustion of alternative remedy. The petitioners may avail alternative remedy within a period of 30 days from today.

Sd/-
Judge
(Prashant Kumar Mishra)

Barve