

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (T) No.27 of 2013**

1. Shree Mahalakshmi Structures Pvt. Ltd., Ring Road No. 2, Gogaon, Raipur (CG).
2. Sitaram Agrawal, Director, Shree Mahalakshmi Structures Pvt. Ltd., Ring Road No. 2, Gogaon, Raipur (CG).

---- Petitioners**Versus**

Union of India Through the Commissioner, Customs, Central Excise & Service Tax, Central Excise Hqrs., Tikrapara, Dhamtari Road, Raipur (CG).

---- Respondent**Writ Petition (T) No.28 of 2013**

1. Jai Ambey Metal Works (P) Ltd. Rawanbhata, Industrial Area, Raipur (CG).
2. Nirmal Agrawal, Director, Jai Ambey Metal Works (P) Ltd. Rawanbhata, Industrial Area, Raipur (CG).

---- Petitioners**Versus**

Union of India Through the Commissioner, Customs, Central Excise & Service Tax, Central Excise Hqrs., Tikrapara, Dhamtari Road, Raipur (CG).

---- Respondent**Writ Petition (T) No.29 of 2013**

1. Alankar Steels (P) Ltd. GE Road, Tatibandh, Raipur (CG).
2. Purushottam Das Agrawal, Director, Alankar Steels (P) Ltd. GE Road, Tatibandh, Raipur (CG).

---- Petitioners**Versus**

Union of India Through the Commissioner, Customs, Central Excise & Service Tax, Central Excise Hqrs., Tikrapara, Dhamtari Road, Raipur (CG).

---- Respondent**&****Writ Petition (T) No.30 of 2013**

1. M/s Ispat India, Plot No.4 & 9, Phase-II, Industrial Area, Siltara, Raipur (CG)
2. Nirmal Agrawal, Partner, M/s Ispat India, Plot No.4 & 9, Phase-II, Industrial Area, Siltara, Raipur (CG)

---- Petitioners**Versus**

Union of India Through the Commissioner, Customs, Central Excise

& Service Tax, Central Excise Hqrs., Tikrapara, Dhamtari Road,
Raipur (CG).

---- Respondent

For Appellants	:	Shri Ashish Surana, Advocate.
For Respondent	:	Shri Vinay Pandey, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy

Order On Board

05/07/2017

1. The grievance of the petitioners in each of the petitions and the subject matter being identical and similar, this court proceeds to decide all these petitions analogously and in the process is passing a common order for all the writ petitions.
2. For the sake of convenience, this court is taking Writ Petition (T) No.27 of 2013 (Shri Mahalakshmi Structures Pvt. Ltd. and Another Vs. Union of India) to be the lead case so far as reference to the facts of the case are concerned.
3. The sole ground for filing these petitions was the rejection of application moved by the petitioners seeking for calling upon on Shri SK Pansari, Proprietor of M/s Monu Steels for cross examination and also seeking for author of the expert technical opinion report dated 06.05.2009 of the department of Metallurgy, National Institute of Technology, Raipur (in short, NIT) for cross examining.
4. Thus, the moot question for consideration is, whether the department was justified in refusing to call upon the aforesaid two persons for cross examination or not?

5. Facts in brief is that, the Central Excise Department conducted a raid on the premises of one M/s Monu Steels on 15.01.2007. The said establishment was engaged in the business of facilitating Sale and purchase of iron and steel products on behalf of the seller and purchaser of iron and steel products. Pursuant to the raid, the Excise Department prepared a Panchnama on the same day. The statement of proprietor of said establishment namely Shri SK Pansari was recorded on different dates since 15.01.2007 to 02.06.2008 under Section 14 of the Central Excise Act. Subsequently, based on the statement of said SK Pansari, an expert's opinion was called upon from the NIT. The said expert technical opinion report was obtained on 06.08.2009. Based upon the said report and the statement of SK Pansari, the Central Excise Department alleging the clandestine clearance/sale, issued show cause notice to each of the petitioners. So far as M/s Minakshi Traders are concerned, the show cause notice was issued on 05.05.2010 seeking an explanation as to why penalty under Rule 26 of the Central Excise Act, 2002 should not be imposed for acts of omission and commission leading to evasion of dues.
6. Immediately the petitioners approached the office of the respondents for providing copies of the document which have been relied upon in the show cause notice and also requested for permission to cross examine firstly Shri SK Pansari on whose statement the entire proceedings have been initiated against the petitioners and secondly the person who has given the expert technical opinion on 06.08.2009

from the NIT which also has been relied upon to corroborate the statement of SK Pansari while issuing the show cause notice. However, in spite of reminders being sent in this regard, no decision was taken and finally a communication dated 02.01.2013 was received whereby the superintendent (ADJ) of the respondent department communicated that the request of the petitioners seeking for the presence of SK Pansari and also calling upon the expert who has given the opinion on 06.08.2009 cannot be acceded upon.

7. The contentions of the petitioners are that, denial of cross examination of these two persons would clearly amount to violation of the basic principles of natural justice. According to petitioners, in the event if the petitioners are not granted an opportunity to cross examine these two persons, their defence would get seriously prejudiced, inasmuch as the petitioners would not be able to bring out the truth or rebut the allegations or contentions of SK Pansari which would otherwise be possible through a proper cross examination. It is also contended by the petitioners that infact the entire show cause notice has been based only on the statement made by SK Pansari as also the report received from the NIT. Unless it is properly rebutted, the respondent authorities would automatically make the assessment which would ultimately be detrimental to the interest of the petitioners. Even the contents of the show cause notice also reveal that it is not just a statement, but is the alleged recovery of scrape document, diaries, entry in the account book etc. written by SK Pansari which were taken as an evidence against the petitioners.

Therefore, it becomes all the more necessary to rebut those material to establish that it has no nexus with any transaction with M/s Monu Steels for the purpose of managing his business.

8. It was also contended by the petitioners that except for the alleged statement of SK Pansari and materials collected from him, there is no other piece of evidence in possession of the respondents to prove the alleged clandestine removal of goods.
9. Learned counsel for the department, however, opposes the writ petitions on more than one grounds. Firstly it was submitted that the petitions as such are too premature as it is not the stage wherein this court in exercise of its writ jurisdiction would exercise the power of judicial review as at this juncture no prejudice has been caused to the petitioners. It is further contended by the counsel for the department that these petitions have been filed at the stage of show cause notice. They have right to submit detailed explanation to the show cause notice and thereafter only if the proceeding culminates against the interest of the petitioners, they should have approached before this court for exercise of writ jurisdiction. Even though, there is a provision of appeal thereafter also under the statute.
10. It was also the contention of the Department that in fact the demand of the petitioners is unsustainable for the reason that the petitioners are also noticee and the person who they want to be called upon i.e. proprietor of M/s Monu Steels also is a co-noticee and the law does not permit for production of co-noticee as a witness to be cross examined to prove and establish the case of another co-noticee

who has also been show caused.

11. Further submission of the department was that the procedure does not prescribe for permission of cross examination inasmuch as the procedure applied under the Code of Criminal Procedure applicable in a criminal case would not be strictly applicable in the present case. So far as calling upon the expert from the NIT is concerned, counsel for the department opposes the same on the ground that it is settled law that the report of technical expert is a public document issued by an expert in the field and who is not a witness to the proceeding but has only given a report so far as the specific technical examination that he has made on the basis of his expertise. Therefore, such report should not be doubted and such officer cannot be put to cross examination.
12. In support of his contention, counsel for the department has relied upon the judgment of Supreme Court in case of Union of India Vs. GTC Industries Ltd., decided on 27.03.2003 and also the judgment of Madras High Court dated 30.09.2016 passed in WP No.33741/2016 (M/s Vishal Lubetech Corporation Vs. the Additional Commissioner of Customs, Coimbatore) and other connected matters.
13. Having heard the counsel appearing on either side and on perusal of records particularly the contents of show cause notice dated 05.05.2010, it clearly reflects that the proprietor of M/s Monu Steels SK Pansari has also been made a noticee in this case along with the petitioners. Further, similar show cause notice have also been issued to all the petitioners. In all the show cause notice, SK Pansari has

been made a noticee. There is specific averment made by each of the petitioners that they are not directly or indirectly associated with the business of M/s Monu Steels. It is also the categorical avement by the petitioners that SK Pansari is not a partner or associate in the business of each of the petitioners.

14. Further, on perusal of contents of show cause notice it clearly reflects that the entire case of the respondent is based upon the statement of SK Pansari and the alleged document and materials seized from his premises and in addition, the report of technical expert opinion.
15. Now if we look at some of the judicial pronouncement in this regard, the Supreme Court in a recently decided matter reported in 2016(15)SCC 785, Andaman Timber Industries Vs. Commissioner of Central Excise, Kolkata-II, in paragraph 6 has held as under :

“6. According to us not allowing the assessee to cross examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which assessee was adversely affected. It is to be borne in mind that the order of Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statement and wanted to cross examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee.....”

In paragraph-8 of the same judgment, the Supreme Court has further observed as under :

“8.In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of aforesaid two

witnesses was the only basis of issuing the show cause notice.”

16. This is precisely the case of the petitioners in hand as the sole contention of the petitioners is that the entire show cause notice is based on the statement of SK Pansari, the material collected from his premises during the course of raid. There are two further judgments of the Supreme Court in the cases of *Lakshman Exports Limited Vs. Collector of Central Excise*, 2002(143) ELT 21 (SC) and the other being *Arya Abhushan Bhandar Vs. Union of India*, 2002 (143) ELT 25 (SC), in which also it has been held by the Supreme Court that non granting of an opportunity to cross examine the person on whose statement the entire proceeding have been initiated would amount to breach of natural justice.
17. Similar view has also been taken by the Supreme Court in *Manu/SC/0585/1987, Kalra Glue Factory Vs. Sales Tax Tribunal and Others*, wherein the Supreme Court had set aside the order passed by the Sales Tax Tribunal, Meerut, only on the ground that the statement of one Bankelal, a partner of the firm, whose statement was relied upon by the department for prosecuting the petitioner's journey was not tested by cross examining before reaching to the conclusion of the transaction being inter state sale.
18. The Hon'ble Supreme Court in the case of *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. & Others*, AIR 1985 SC 330, has observed as follows:

“Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary

situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. The Supreme Court can take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and there after prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.”

19. The Hon’ble Supreme Court particularly in the field of taxation on more than a couple of occasion has held that at the show cause stage the writ Court should not entertain the writ petition unless there is a grave error committed by the authorities concerned in exercise of its jurisdiction. The Apex Court in the case of *Union of India v. M/s Hindalco Industries*, 2003 (5) SCC 194, in para 12, in a very categorical term has held as under:

“**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.”

20. Ordinarily High Court should not embark to decide the factual disputes but relegate the party to submit the reply before the authority

concerned who is obliged to decide the same. In *Union of India v. Vicco Laboratories*, 2007 (13) SCC 270, the Hon'ble Supreme Court has held that:

"31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out."

21. Thus, the objection of the petitions being premature, as stated by the respondents is concerned, the same is overruled in the light of the decisions of the Supreme Court which have categorically held that in a given circumstances, the writ court can exercise the writ jurisdiction while exercising the power of judicial review.
22. In view of the aforesaid judicial pronouncement and, in addition, taking note of the pleading that SK Pansari is neither a partner nor has got any role to play in the business of the petitioners nor is he directly or indirectly related or associated to the respective petitioners and their business and when his statement is being treated as the basis for the proceedings drawn against the petitioners, it would be

justified if the department allows that persons to be subjected to cross examine.

23. This court is further inclined to allow these petitions on the basis of contents made in paragraph 8.15 of Writ Petition (T) 27 of 2013 wherein it has been held that when an identical proceeding initiated based upon the statement of SK Pansari against one M/s Hanuman Ispat Pvt. Ltd., the very same respondent has allowed the application moved by said M/s Hanuman Ispat Pvt. Ltd. seeking cross examination of SK Pansari, but when it came to the case of the petitioners, the same relief sought for was denied. This action on the part of respondents clearly amounts to discrimination to the extent that an identical application being filed in identical proceedings, but the authority concerned allows the application in one proceeding and disallowed the application in other proceedings. The same would thus be hit by Article 14 of the Constitution of India.
24. What is also surprising from the development that has taken place is the fact that order of rejection of their applications for cross examination was issued as early as on 02.01.2013, however, till date surprisingly the department has not proceeded further and it stands at the same stage as it was in January, 2013, though more than 4 and ½ years have passed. This, all the more, has strengthened the case of the petitioners.
25. However, as far as the need for calling the technical expert from the NIT is concerned, in the opinion of this court, the same is not required for the reason that it is a public document and the report of expert

who has no association with the proceeding drawn by the respondents, but a report was sought by the respondents considering expertise that he has on the field, it is not required for calling upon the said expert to be put in dock for cross examination. Thus, the said request of the petitioners does not have any force and the same is therefore liable to be and is accordingly turned down.

26. As a consequence, all the writ petitions are allowed to the extent that their applications for calling upon SK Pansari, proprietor of M/s Monu Steels, is allowed. Let necessary steps be taken by the authority to call for the presence of the said person before the authorities concerned so that the petitioners herein can avail the facility of cross examining the said witness.

Sd/-
(P.Sam Koshy)
Judge

inder