

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:27.07.2017

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
24.07.2017	27.07.2017

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P.Nos.28582 to 28587 of 2016
and W.M.P.Nos.24657 to 24662 of 2016

W.P.No.28582 of 2016

M/s.Ankit Ispat (P) Ltd., (Unit I)
Rep., by its Director Mr.Ajay Agarwal,
No.57/2-C, Nainikattalai Road,
T.R.Pattinam,
Karaikal - 609 606

.. Petitioner

vs

The Commissioner of Central Excise,
No.1, Williams Road,
Cantonment,
Tiruchirappalli - 620 001.

.. Respondent

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari and Mandamus, to call for the records of the impugned order-in-original No.TCP/EXCUS/001/2016(CEx.), dated 05.01.2016, passed by the respondent and quash the same and direct the respondent to re-fix personal hearing in the show cause notice No.26/2014-CEx. Dated 16.06.2014, bearing reference No.V/Ch.72/15/38/2013-CEx.Adj., issued by the respondent against the petitioner(Unit I).

For Petitioner : Mr.C.Saravanan in all W.Ps.,

For Respondent : Mrs.R.Hemalatha, CGSC

COMMON ORDER

The petitioner in these Writ Petitions are Units, which are engaged in manufacture of MS Ignots. Due to poor demand for the products, the petitioner has been declared as a 'sick company' and was referred to the BIFR. On 25.07.2012, the officers of the Central Excise Division, Karaikal, conducted a search operation in the factory of the petitioner, and stated that there is a shortage of MS Ignots in both the Units, owing to difference between the book stock and the physical stock. The Officers seized the documents from the petitioner's premises and proceeded with the investigation.

2. The assessable value of the short quantity was arrived at and the duty payable thereon was worked out. It appears a statement was recorded from the General Manager of the petitioner admitting shortage, which according to the General Manager was obtained by force. The petitioner on 27.07.2012 and 01.08.2012, remitted certain amounts towards duty. Subsequently, the respondent issued six show cause notices to the petitioner for varied periods by invoking the extended period of limitation. It appears

that the petitioner requested the respondent to furnish copies of the relied on documents and return unrelieved on documents in respect of both the Units. The petitioner was informed by the respondent vide letter dated 11.09.2015, to collect the photocopies of the relied on documents on any working day between 21.09.2015 and 25.09.2015.

3. The Accountant of the petitioner received the copies of all the relied on documents on 25.09.2015 which are stated to have been sent to their Corporate office at Chennai during October 2015. Since Chennai city faced heavy floods during November-December 2015, the photocopies of the documents kept in Chennai office were damaged and therefore, the petitioner would state that they were unable to file a reply immediately. The respondent, by notice dated 03.11.2015, fixed the personal hearing on 16.11.2015. The petitioner is stated to have sent a fax message requesting to fix another date for personal hearing. Thereafter, the personal hearing was fixed on 07.12.2015 and it appears that this intimation was sent to the petitioner's Units, which were closed and to the Corporate Office at Chennai. The petitioner on 05.12.2015, requested the respondent to re-fix the personal hearing to 15.01.2016, stating that all the documents were soaked in rain water due to floods. The respondent received the request made by the

petitioner vide letter dated 05.12.2015, and once again refixed the personal hearing on 16.12.2015 and/or alternatively to 21.12.2015. The petitioner's counsel sent a letter on 19.12.2015, which was received by the respondent on 21.12.2015, requesting for re-fixing the personal hearing to last week of January 2016. The petitioner also filed their reply to the show cause notice during February 2016. Accordingly to the petitioner, without giving opportunity of personal hearing, the respondent passed the impugned Order-in-Original, dated 05.01.2016, which is challenged in these Writ Petitions.

4. The learned counsel appearing for the petitioner submitted that the petitioner has not challenged the impugned Order-in-Original on merits, but has challenged it on the ground that it is in violation of principles of natural justice and the respondent has not followed the principles of *audi alteram partem*. That the respondent did not consider the petitioner's letter dated 15.12.2015, and the representation sent by their counsel, dated 19.12.2015. Further, in the impugned show cause notice, the payment effected by the petitioner to the tune of Rs.1,22,28,880/-, which was excess of Rs.2,72,092/- for Unit-I and Rs.1,05,11,957/-, which was excess of Rs.6,23,709/-, for Unit No.II and the duty imposed again on the shortage of raw material vide the said show cause notices means, the double duty payable on the same shortage of

raw materials, which is in violation of principles of natural justice. Further, it is submitted that if the petitioner is directed to file an appeal, it has to mandatory pre-deposit 7.5% of the duty, which would put undue hardship of the petitioner. Therefore, the petitioner is before this Court by way of these Writ Petitions.

5. The respondent, in their counter affidavit after narrating the facts of the case, have submitted that the petitioner vide their letters, dated 24.07.2014 and 02.02.2015, requested for supply of copies of relied upon documents attached with the show cause notice and also seized document copies seized from their premises on 24th and 25th of July 2012. The petitioner was informed, vide letter dated 05.12.2012, that the petitioner may collect the copies of the documents from the office of the respondent during working hours on any working day. However, the petitioner did not respond to the communication and failed to turn up for inspecting and collecting the copies of the relied documents. Further, with regard to the averments made by the petitioner in ground (iv), it is submitted that the petitioner was informed, vide letter dated 08.12.2015, sent to both their registered office address at Chennai and their factory address at Karaikal by Speed Post, wherein they were informed that considering their request made by them vide their letter dated

05.12.2015, the personal hearing in the case is again fixed on 16.12.2015, and alternatively, they were required to appear for personal hearing on 21.12.2015 and they were required to file their reply to the show cause notices issued to them, on or before the date of personal hearing. They were further informed that no further request for postponement or extension of time citing any reasons whatsoever will be entertained and if they fail to appear for the personal hearing on the stipulated date and time or if they fail to file their reply to the show cause notices on or before the date of personal hearing, the cases will be considered for decision as provided for in the respective show cause notices. However, the petitioner failed to appear for the personal hearing on both the above dates i.e., on 16.12.2015 and 21.12.2015 and they also did not file their reply to the show cause notices issued to them. However, a letter dated 19.12.2015, was received from the counsel for the petitioner, which was received in the office of the respondent on 21.12.2015, but he did not contain any authorisation to represent the petitioner with regard to the subject show cause notices. Therefore, it is contended that the petitioner having failed to file a reply to the show cause notices and having not turned up for the personal hearing inspite of ample opportunity, the Adjudicating Authority was constrained to decide the case *ex parte* based on the evidence available on record. Thus, it is submitted that chronology of

events clearly proves that the petitioner was deliberately not co-operating with the adjudication proceedings. Reference was made to Section 33A of the Central Excise Act, 1944, and it is submitted that no adjournment shall be granted more than three times to a party during the proceedings. Reliance was placed on the decision of the Delhi High Court in the case of **Saketh India Ltd., vs. UOI** reported in **2002 (143) ELT 274 (Del)**. Further, it is submitted that when enough and effective opportunity was granted to the petitioner and the petitioner having not availed the same, an *ex parte* decision will not amount to violation of principles of natural justice. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **F N Roy vs. CC, Calcutta**, reported in **1983 (13) ELT 1296 (SC)**. Further, it is submitted that the petitioner ought to have preferred a statutory appeal before the Tribunal, but has failed to do so and when there is an effective alternative remedy, this Court will not permit the petitioner to bypass the same.

6. Heard Mr.C.Saravanan, learned counsel appearing for the petitioner and Mrs.R.Hemalatha, learned Senior Central Standing counsel appearing for the respondent.

7. The short question, which falls for consideration is whether the petitioner should be granted an opportunity to go before the respondent by directing a *de-novo* proceedings to be conducted on the ground that they did not file their reply to the show cause notices and were not afforded an opportunity of personal hearing. The principles of natural justice and adherence thereof, cannot be put in a straight jacket formula. It revolves around the factual aspects in each case and has to be tested on the anvil of the conduct of parties.

8. It may not be necessary for this Court to repeat the dates and events, which have been set out in the preceding paragraphs and it would suffice to note the following dates and events. The show cause notice was issued on 16.06.2014, in respect of Unit No.I and on 20.06.2014, in respect of Unit No.II. On 24.07.2014, the petitioner requested for copies of relied on documents, which request was reiterated by four other communications, dated 24.07.2014, 02.02.2015, 27.02.2015 and 11.04.2015. On 04.09.2015, the petitioner received the intimation from the respondent for collecting the photocopies of the relied on documents for both Units I & II. This letter is stated to be received by the petitioner on 10.09.2015. Though the petitioner

had been repeatedly sending written communications to the respondent seeking relied on documents, when the same are directed to be collected, the petitioner did not do so immediately, but sent a letter on 11.09.2015, seeking extension for collecting photocopies of the relied on documents. The respondent appears to have obliged such request and sent another letter on 18.09.2015, intimating the date for collecting photocopies. It is thereafter by notice dated 23.10.2015, personal hearing was fixed on 03.11.2015. One day prior to the hearing date on 02.11.2015, the petitioner sent a letter to re-fix the personal hearing to 3rd week of January 2016. However, such indulgence was not granted, but the personal hearing was re-scheduled to 16.11.2015. Once again, the petitioner requested for re-fixing the personal hearing for which they received a notice from the respondent fixing their personal hearing on 07.12.2015, which was also intimated to the Director of the petitioner over phone. On 05.12.2015, the petitioner addressed the respondent that the documents were soaked in the rain water and requested to re-fix the personal hearing to 15th January, 2016. On 08.12.2015, a notice was sent fixing the personal hearing on 21.12.2015. Once again, the petitioner sent a letter on 19.12.2015, requesting for adjournment. The respondent did not entertain the request, but proceeded to pass the Order-in-Original.

9. The above facts would clearly demonstrate that this is not a case, where the petitioner has not been afforded reasonable opportunity to put forth their submission, but it is a case of deliberate failure on the part of the petitioner to avail the opportunity granted to them. The petitioner places much reliance on the floods, which affected the Chennai City in December 2015. However, the record of proceedings show that the proceedings commenced much earlier and all the documents were taken from the factory of the petitioner, which was not at Chennai, but at Karaikal and the respondent Commissionerate functioned from Trichirappalli and the request made by the petitioner were complied with. However, it is alleged by the petitioner, the documents collected from the respondent, were sent to the head office at Chennai. It appears that this stand has not been substantiated before the respondent nor before this Court by way of any documents.

10. The learned counsel for the petitioner would contend that the demand has been raised in such an arbitrary manner by adopting the electricity consumption charges etc., and therefore, it is a fit case, where the matter should be remanded to the respondent for fresh consideration after affording an opportunity of personal hearing.

11. As noticed above, the facts would lead to irresistible conclusion that the petitioner, despite having knowledge of the proceedings, did not choose to submit their reply to the show cause notices, inspite of sufficient indulgence granted to them. Thus, the fault lies with the petitioner and they cannot claim that it is a case of violation of principles of natural justice. The other contentions, which were raised during the course of argument, which largely touch upon merits of the matter are best left to be agitated before the Appellate Tribunal, which remedy provided under Section 35G of the Central Excise Act is not only effective, but efficacious as well.

12. Thus, for the above reasons, this Court is not inclined to entertain the Writ Petitions challenging the Order-in-Original on the ground that the petitioner has an effective alternate remedy before the CESTAT under Section 35G of the Central Excise Act, 1944.

13. For all the above reasons, the Writ Petitions are dismissed as not maintainable. However, the petitioner is at liberty to move the CESTAT by way of appeal. In the event, the petitioner moves the Tribunal by way of appeal, the period during which, the Writ Petitions were pending i.e., from

03.08.2016 till the date of receipt of certified copy of this order, shall be excluded while computing limitation and for a period of 30 days from the date of receipt of a copy of this order, the respondent shall not initiate any coercive action against the petitioner for recovering the duty or penalty as computed in the impugned orders, leaving it open to the petitioner to move for an appropriate interim orders before the Tribunal. No costs. Consequently, connected Miscellaneous Petitions are closed.

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Index :Yes/No

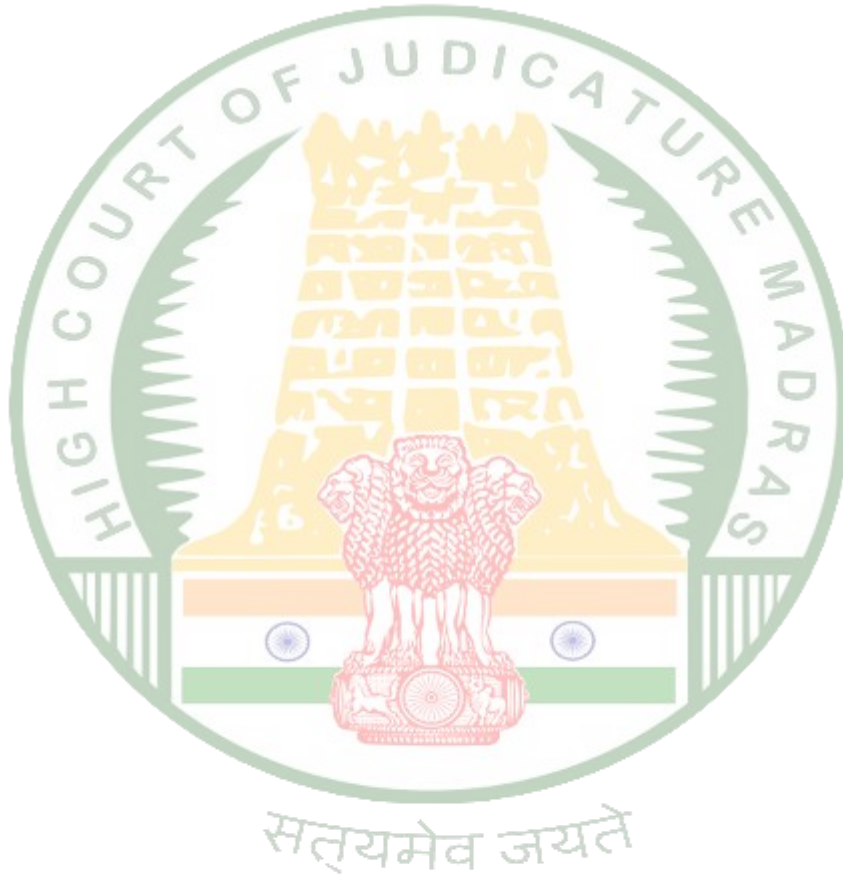
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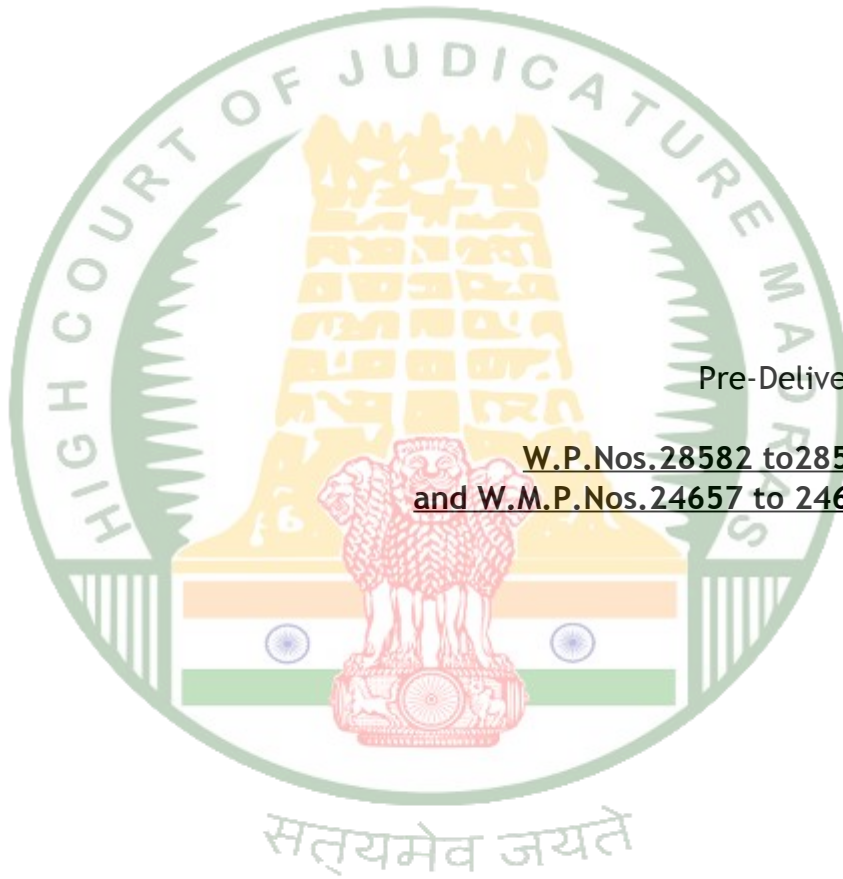
The Commissioner of Central Excise,
No.1, Williams Road,
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T.S.SIVAGNANAM, J.

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Pre-Delivery Order in

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