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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 20.10.2020

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W.P.(C) 6293/2020 & CM APPL. 22386/2020

M/S AMBRANE INDIA PVT LTD

..... Petitioner

Through: Mr. Rajesh Rawal, Advocate

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Asheesh Jain, Advocate for R-1

Mr. Harpreet Singh, Advocate for R-2

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

: D.N. PATEL, Chief Justice (Oral)

Proceedings of the matter have been conducted through video conferencing.

1. This writ petition has been preferred with the following prayers:-

“(a) issue writ of certiorari or any other appropriate writ, order or direction while setting aside the Order in Original dated 30.6.2020 and remand the matter back to Respondent No. 2 while directing Respondent No. 2 to permit the Petitioner to file its detailed reply duly supported by documents and decide the show cause notice 31.7.2019 afresh after giving opportunity of hearing to the Petitioner;

(b) pass any further order(s) as may be deemed fit and necessary in the facts and circumstances of the instant case. It is prayed accordingly.”

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2. Looking to the facts and circumstances of the case, it appears from this writ petition that a detailed Show Cause Notice dated 31st July, 2019 (Annexure P-5 to the memo of this petition) was issued to the petitioner for the alleged breach of the Customs Act, 1962 and the Notification referred to in the Show Cause Notice. Thereafter Show Cause Notice was adjudicated and Order-in-Original was passed on 30th June, 2020. (Annexure P-7 to the memo of this petition).

3. In this writ petition, the petitioner has challenged an Order-in-Original dated 30th June, 2020, **which is an appealable order under Section 129-A of the Customs Act, 1962.**

4. As an efficacious alternative remedy is available to the petitioner, we are not inclined to go into the fine niceties of the facts, which have been narrated by the counsel for the petitioner. Counsel for the respondents has also taken this Court through paragraphs 1, 2, 5, and 21 of the Order-in-Original dated 30th June, 2020 (Annexure P-7).

5. Learned counsel for the petitioner submitted that without giving a hearing to the petitioner, the Order-in-Original dated 30.06.2020 was passed. He further submitted that the notice of hearing was never served upon the petitioner. Moreover, in absence of any reply filed by the petitioner to the show cause notice, there will be nothing to argue before the appellate authority, being the Customs Excise and Service Tax Appellate Tribunal. Hence, instead of preferring an appeal, they have preferred this writ petition.

6. We are not inclined to accept the aforesaid submissions for the following reasons:-

a. The Order-in-Original dated 30th June, 2020 is an appealable order under Section 129-A of the Customs Act, 1962, whereby an efficacious

remedy is available to the petitioner. The contentions sought to be taken by the petitioner in this writ petition can also be taken in appeal filed against the Order-in-Original.

b. In *Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal*, (2014) 1 SCC 603, the Hon'ble Supreme Court has held as under:

“13. In *Nivedita Sharma v. Cellular Operators Assn. of India* [(2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp. 343-45, paras 12-14)

“12. In *Thansingh Nathmal v. Supt. of Taxes* [AIR 1964 SC 1419] this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7)

‘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 the 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.’

13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa* [*Titaghur Paper Mills Co. Ltd. v. State of Orissa*,

(1983) 2 SCC 433 : 1983 SCC (Tax) 131] this Court observed: (SCC pp. 440-41, para 11)

‘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* [(1859) 6 CBNS 336 : 141 ER 486] in the following passage: (ER p. 495)

“... 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 Newspaper Ltd.* [1919 AC 368 : (1918-19) All ER Rep 61 (HL)] and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.* [1935 AC 532 (PC)] and *Secy. of State v. Mask and Co.* [(1939-40) 67 IA 222 : (1940) 52 LW 1 : AIR 1940 PC 105] 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.’

14. In *Mafatlal Industries Ltd. v. Union of India* [(1997) 5 SCC 536] B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

‘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.....’

(emphasis supplied)

c. It has been held in judgment of Hon’ble the Supreme Court in ***Assistant Commissioner (CT) LTU v. Glaxo Smith Kline Consumer Health Care Ltd.***, **2020 SCC OnLine SC 440**:

“11. In the backdrop of these facts, the central question is: whether the High Court ought to have entertained the writ petition filed by the respondent? As regards the power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under Article 226 of the Constitution of India, the same is no more *res integra*. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar* and also *Nivedita Sharma v. Cellular Operators Association of India*). In *Thansingh Nathmal v. Superintendent of Taxes, Dhubri*, the Constitution Bench of this Court made it amply clear that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self-imposed

restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person....."

(emphasis supplied)

d. It also appears from the facts of the case that even though Show Cause Notice dated 31st July, 2019 (Annexure P-5) was served upon the petitioner, no reply has been filed. Paragraph 20 of the Order-in-Original reads as under:-

"20. (i) As per record, the noticee was informed vide office letter C. No. VIII/ DLI/CusPrev/Adj/EPC/Roh/Ambrane/86/2019 dated 03.09.2019 that the personal hearing was fixed for 19.09.2019 in the instant case but neither the noticee nor any authorised representative on behalf of the noticee appeared for personal hearing.

(ii) The noticee was informed vide office letter C. No. VIII/DLI/CusPrev/Adj/EPC/Roh/Ambrane/86/2019 dated 23.09.2019 that the personal hearing was again fixed for 10.10.2019 in the instant case but neither the noticee nor any authorised representative on behalf of the noticee appeared for personal hearing.

(iii) Further, the noticee was informed vide office letter C. No. VIII/ DLI/CusPrev/Adj/EPC/Roh/Ambrane/86/2019 dated 15.10.2019 that the personal hearing was again fixed for 06.11.2019 in the instant case but neither the noticee nor any authorised representative on behalf of the noticee appeared for personal hearing."

(emphasis supplied)

e. The petition appears to involve **highly disputed question of fact regarding the service of the notice of personal hearing to the petitioner.**

It is alleged by the petitioner that no notice of hearing was given whereas it is alleged by the respondents that adequate chances were given to the

petitioner to reply to the show cause notice as well as to avail the opportunity of being heard by the respondent-authorities who had passed the Order-in-Original.

f. In view of the aforesaid disputed question of facts about the personal hearing, we are not inclined to pass any order or direction or writ in the present writ petition upon the respondents. **The Tribunal is the final fact finding authority.** The Appellate Tribunal in this case is CESTAT, under Section 129-A of the Customs Act, 1962.

7. In view of the aforesaid reasons, facts and judgment of the Hon'ble Supreme Court, we are not inclined to grant any relief to this petitioner in the present petition.

8. The petitioner is permitted to prefer an appeal under the Customs Act, 1962 against the Order-in-Original dated 30th June, 2020 (Annexure P-7) which is under challenge in this writ petition and raise all the points which are agitated in this writ petition as well as to agitate all the grounds on the merits of the case as well. It is made clear that we have not considered any of these points on merits, and they will be decided by the Tribunal in accordance with law.

9. With these observations, this writ petition is dismissed.

CHIEF JUSTICE

PRATEEK JALAN, J

OCTOBER 20, 2020

‘j’

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