

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2021

CORAM :

THE HONOURABLE MR. JUSTICE S.M. SUBRAMANIAM

W.P.Nos.3144, 3308, 3417, 3418, 4263, 11044, 11045, 11389,
11390, 11891, 13850, 13851, 13852, 13853, 15588, 15589 & 15590
of 2016

and

W.M.P.Nos.2581, 2712, 2790, 2791, 3607, 9613, 9614, 9849, 9850,
10270, 12143, 12144, 35344, 12145, 35345, 12146, 35346, 12147,
35347, 13557, 13558 & 13559 of 2016

W.P.No.3144 of 2016 :

M/s.Sri Sathya Jewellery,
Shop No.8 (Basement), Dhanalakshmi
Complex, No.130, N.S.C. Bose Road,
Chennai - 600 079, represented by its
Proprietor Shri C. Ravisankar ... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII, New Custom House,
Meenambakkam, Chennai - 600 016. ... Respondent

Prayer : Writ Petition filed under Article 226 of the
Constitution of India for issuance of a Writ of Certiorari
calling for the records of the respondent in and connected with
Order-in-Original No.914/2015-AIR dated 28.11.2015, quash the
same, as being without any legal or factual basis, besides being
violation of the principles of Natural justice and the statutory
provisions.

W.P.No.3308 of 2016 :

M/s.G.R.Thangamaligai (Firm),
Represented by its Partner
Mr.G.R.Ananthapadmanabhan,
No.136, Usman Road,
T.Nagar, Chennai - 600 017.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order No.910/2015-AIR dated 26.11.2015 issued from F.No.CAU/DRI(CH)/21/2013-AIR and quash the same.

W.P.No.3417 of 2016 :

1.M/s.Shree Vigneshkumar Jewellers,
No.43-B, N.S.C. Bose Road,
Chennai - 600 079, Represented by its
Partner Shri N.S. Chengalvarayan

2.Shri. N.S. Chengalvarayan, Partner
No.3/2, Thiruvengadam Apartments,
Thiruvengadam Street, Adayar,
Chennai - 600 020.

... Petitioners

Vs.

The Principal Commissioner of Customs,
Chennai - VII, New Custom House,
Meenambakkam, Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the Respondent in and connected with Order-In-Original No.909/2015-AIR dated 26.11.2015, quash the same, as being without any legal or factual basis besides being violation of the principles of Natural Justice and the Statutory Provisions.

W.P.No.3418 of 2016 :

1. M/s.Sri Vasavi Gold & Bullion Pvt. Ltd.,
No.137, N.S.C. Bose Road,
Chennai - 600 079, Represented by its
Partner Shri P. Giri Babu

2. Shri. P. Seetharam (Erstwhile Director),
No.59, N.S.C. Bose Road,
Chennai - 600 079.

... Petitioners

Vs.

The Principal Commissioner of Customs,
Chennai - VII, New Custom House,
Meenambakkam, Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the Respondent in and connected with Order-In-Original No.915/2015-AIR dated 28.11.2015, quash the same, as being without any legal or factual basis besides being violation of the principles of Natural Justice and the Statutory Provisions.

W.P.No.4263 of 2016 :

1. M/s.Royal India Gems and Jewels Pvt. Ltd.,
AVK Towers, R 7/1, North Main Road,
Anna Nagar, West Extension,
Chennai - 600 101, represented by its
Chairman Shri K. Umapathy
2. Shri K. Umapathy, Chairman,
Old No.14, New No.15, Crescent Road,
Shenoy Nagar, Chennai - 600 030.

... Petitioners

Vs.

The Principal Commissioner of Customs,
Chennai - VII, New Custom House,
Meenambakkam, Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent in and connected with Order in Original No.912/2015-AIR dt 27.11.2015, quash the same, as being without any legal or factual basis, besides being violation of the Principles of Natural Justice and the statutory provisions.

W.P.No.11044 of 2016 :

M/s.Thangamayil Jewellery Limited,
Represented by its General Manager, Mr.Rajesh Kanna,
25/6, Palaami Centre II Floor,
Narayanapuram, New Natham Road,
Madurai - 625 014.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned order No.913/2015 -AIR dated 27.11.2015 issued from F.No. CAU/DRI/(CH)/ 10/ 2013-AIR and quash the same.

W.P.No.11045 of 2016 :

M/s.Jaipur Gems,
Represented by its Authorised Signatory,
Mr.Mithun Sacheti,
50/1, Cathedral Road (Opp. to Agarwal Eye Clinic)
Chennai - 600 086.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned order No.916/2015 -AIR dated 28.11.2015 issued from F.No. CAU/SIIB/32/ 2013-AIR and quash the same.

W.P.No.11389 of 2016 :

M/s.International Exim Agency,
Represented by its Partner Mr.K.Kuppusami,
New No.137, Old No.68, 3rd Floor,
Thambu Chetty Street,
Chennai - 600 001.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No.911/2015-AIR dt 27.11.2015 issued from File No.CAU/DRI/(CH)/31/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.11390 of 2016 :

Mr.A.M.Mariappan, Proprietor,
M/s.BSM Freight Forwarders,
No.7, V.O.C. Street,
Meenambakkam,
Chennai - 600 016.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No.911/2015-AIR dt 27.11.2015 issued from File No.CAU/DRI/(CH)/31/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.11891 of 2016 :

Shri. Sandeep Surana, formerly Executive Director,
M/s.Surana Corporation Limited,
New No.29, Old No.16,
Whites Road, II Floor, Royapettah,
Chennai - 600 014.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari

calling for the records of the respondent culminating in the impugned Order-in-Original No.911/2015-AIR dated 27.11.2015 issued from file No. CAU/DRI(CH)/31/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.13850 of 2016 :

M/s.G.R.Thangamaligai & Sons,
Represented by its Partner
Shri G.R.Radhakrishnan,
No.39 (Old No.50/1),
North Usman Road,
T.Nagar, Chennai - 600 017.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No. 910/2015-AIR dt 26.11.2015 issued from File No. CAU/DRI(CH)/21/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.13851 of 2016 :

Shri G. Rajendran,
Partner, M/s.G.R.Thangamaligai (Firm),
No.29, Ramanathan Street,
T. Nagar,
Chennai - 600 017.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No. 910/2015-AIR dt 26.11.2015 issued

from File No. CAU/DRI(CH)/21/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.13852 of 2016 :

Shri G.R.Radhakrishnan,
Partner, M/s.G.R.Thangamaligai (Firm),
No.29, Ramanathan Street,
T. Nagar,
Chennai - 600 017.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No. 910/2015-AIR dt 26.11.2015 issued from File No. CAU/DRI(CH)/21/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.13853 of 2016 :

Shri G.R.Padmanabhan,
Partner, M/s.G.R.Thangamaligai (Firm),
No.29, Ramanathan Street,
T. Nagar,
Chennai - 600 017.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No. 910/2015-AIR dt 26.11.2015 issued from File No. CAU/DRI(CH)/21/2013-AIR and quash the same in so far as it is related to the petitioner.

W.P.No.15588 of 2016 :

Shri. Mithun Sacheti,
Director, M/s.Starfire Gems Pvt. Ltd.,
50/1, Cathedral Road,
Chennai - 600 086.

... Petitioner

Vs.

The Joint Commissioner of Customs,
Chennai - VII Commissionerate (Air Cargo),
Office of the Principal Commissioner of Customs,
Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original NO.131/2016 (ACC) dated 22.2.2016 issued from File No.S.Misc.340/2014-Gr.1&4 ACC and quash the same in so far as it is related to the petitioner.

W.P.No.15589 of 2016 :

M/s.Starfire Gems Pvt. Ltd.,
Represented by its Director Mr.Mithun Sacheti,
50/1, Cathedral Road,
Chennai - 600 086.

... Petitioner

Vs.

The Joint Commissioner of Customs,
Chennai - VII Commissionerate (Air Cargo),
Office of the Principal Commissioner of Customs,
Meenambakkam,
Chennai - 600 027.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No.131/2016 (ACC) dated 22.2.2016 issued from File No.S.Misc.340/2014-Gr.1&4 ACC and quash the same in so far as it is related to the petitioner.

W.P.No.15590 of 2016 :

M/s.Surana Corporation Limited,
Represented by its Director Mr.K.E.Devarajan,
New No.29, Old No.16,
Whites Road, II Floor,
Royapettah, Chennai - 600 014.

... Petitioner

Vs.

The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 016.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent culminating in the impugned Order-in-Original No.911/2015-AIR dated 27.11.2015 issued from F.No.CAU/DRI(CH)/31/2013-AIR and quash the same.

For Petitioner(s): Mr.B.Kumar
Senior Counsel
for Mr.B.Sathish Sundar
in W.P.No.3144, 3417, 3418,
and 4263 of 2016
:
Mr.S.Murugappan
in W.P.No.3308, 11044, 11045,
11389, 11390, 11891, 13850,
13851, 13852, 13853, 15588,
15589 and 15590 of 2016

For Respondent : Mr.Umesh Rao. K
Senior Standing Counsel
in W.P.No.3144, 3308, 3417,
3418, 4263, 11044, 11045,
11389, 11390 and
11891 of 2016
:
Mr.V.Sundareswaran
Senior Panel Counsel
in W.P.No.13850, 13851, 13852
and 13853 of 2016

: Mr.A.P.Srinivas
Senior Standing Counsel
in W.P.No.15588, 15589,
and 15590 of 2016

C O M M O N O R D E R

All these writ petitions have been filed challenging the Order-in-Original passed by the concerned adjudicatory authorities. It is an admitted fact that the show cause notices were issued to the writ petitioners and the writ petitioners responded by submitting their objections/defence and participated in the process of adjudication and the concerned adjudicatory authorities in the respective writ petitions passed final orders and those final orders passed by the concerned adjudicatory authorities are under challenge in all these writ petitions.

2. The preliminary ground of attack raised on behalf of the writ petitioners by the learned Senior Counsel is that the show cause notice itself was issued by an incompetent authority, not having jurisdiction under the provisions of the Customs Act, 1962, and therefore, the entire proceedings are liable to be set aside. The learned Senior Counsel solicited the attention of this Court with reference to the show cause notice issued by the improper authority. The language employed in the Statute is "The Proper Officer". "The Proper Officer" being the language adopted, only such authority is empowered to issue show cause notice, and neither the higher authority nor any other authority has jurisdiction to issue any further orders regarding review or otherwise. In this regard, the original authority in certain cases are Appraisers or Assistant Commissioners or Deputy Commissioners of Customs, as the case may be. However, the re-assessment has been undertaken by the Customs and the show cause notices were issued by the Directorate of Revenue Intelligence in some cases, and in other cases, Special Investigation Intelligence Branch for Customs. However, the point raised is that the Directorate of Revenue Intelligence is not the proper authority as contemplated under Section 28(4) of the Customs Act. Section 28(4) contemplates as follows :

"28. ... (4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper office shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount

specified in the notice."

3.Relying on the said provision, it is contended that, once the jurisdiction point is raised, then the entire proceedings are liable to be quashed, and therefore, the question of exhausting the appellate remedy does not arise at all. In support of the contention raised by the learned Senior Counsel appearing on behalf of the writ petitioners, the other learned counsel appearing for some of the writ petitioners also reiterated that the Hon'ble Supreme Court of India, in clear terms, held that, once re-assessment is done by an improper authority, then the entire proceedings are liable to be quashed. In this regard, on behalf of the petitioners, the judgment of the Hon'ble Supreme Court of India in the case of M/s.Canon India Private Limited v. Commissioner of Customs [Civil Appeal No.1827 of 2018, dated 09.03.2021] is relied upon.

4.The Hon'ble Apex Court of India categorically dealt with the jurisdiction aspect with reference to the provisions of the Statute. Para Nos.9, 12, 13 and 15 are relevant, which are all extracted hereunder :

"9.The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore has held:-

"14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd. has held:-

"9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

...

12.The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

13.Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

...

15.It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside."

5.Relying on the above findings of the Hon'ble Apex Court of India, it is contended that the order impugned in these writ petitions are liable to be quashed.

6.The respective learned Senior Standing Counsels appearing on behalf of the respondents objected the said contentions by stating that the respondents have already filed review petitions in Review Petition (Diary) Nos.9580, 9584, 9587, 9591 of 2021 before the Hon'ble Supreme Court of India on 07.04.2021. Their contention is that, certain notifications issued were not brought to the notice of the Hon'ble Supreme Court of India and further, it is a regular appeal filed after exhausting the statutory remedies provided under the Act, and the writ petitioners cannot rely on the said judgment in view of the fact that the petitioners have not exhausted the statutory appellate remedy provided under Sections 128 and 129 of the Customs Act. The case before the Hon'ble Supreme Court of India was decided in regular appeal, and thus, the appellants had exhausted the appellate remedy provided under the Act, whereas, the petitioners in these writ petitions have not exhausted the alternate remedy and they have filed the writ petitions in order to avoid the Pre-Deposit as contemplated under the Statute. Therefore, the petitioners are not entitled for any relief.

7.In order to avoid the Pre-Deposit, which is contemplated under the Statute, the practice of filing writ petitions is prevailing in the High Court and the High Court cannot encourage such practice and the appellate remedy contemplated under the Act is to be exhausted in all circumstances and only under extraordinary circumstances, in order to mitigate injustice, the High Court can intervene and not otherwise. Such power of dispensing with the appeal remedy is to be exercised sparingly and not in a routine manner. The learned Senior Standing Counsels reiterated that, in respect of the writ petitions on hand, the original assessment order has been passed either by the Joint Commissioner or by the Commissioner of Customs. Against such original orders passed by the original authorities under the provisions of the Customs Act, an appeal is contemplated under Sections 128 and 129 of the Customs Act,

respectively. Without exhausting the appellate remedy, the writ petitioners have filed these writ petitions, and therefore, the writ petitions are liable to be dismissed.

8. With reference to the appellate remedy, the Hon'ble Division Bench of this Court in W.A.No.640 of 2021 [M/s.Fourceess Diamond Pvt. Ltd. and another v. The Joint Commissioner of Customs (Air Cargo), Meenambakkam, Chennai] delivered a judgment on 25.02.2021 and the relevant paragraphs are extracted hereunder :

"8. After elaborately hearing the learned counsel for the appellants and the learned Senior Standing Counsel appearing for the respondent, we are of the view that the issues raised in the writ petition are not purely questions of law, but mixed questions of fact, which would require a process of adjudication. Such matters cannot be decided by a Writ Court based on affidavits. Therefore, we do agree with the ultimate conclusion of the learned Writ Court that the appellant should avail the alternate remedy available under the Act.

9. For the reasons, which we have assigned in the preceding paragraph, the Writ Appeal stands dismissed and the appellants are granted 60 days time from the date of receipt of a copy of this judgment to file an appeal before the Commissioner of Customs (Appeals) and if the same is filed, the Commissioner of Customs (Appeals) shall entertain the appeal, without reference to the limitation as the writ petition was filed before this Court in the year 2016, which is well within the period of limitation, had the appellants filed appeals before the Commissioner of Customs (Appeals) at the relevant point of time.

10. Since the learned counsel for the appellants submitted that the certified copy of the impugned order was filed in the writ petition, the Registry is directed to return the impugned original order filed in the writ petition, after retaining a photostat copy. No costs. Consequently, connected miscellaneous petition is closed."

9. Relying on the judgment of the Hon'ble Division Bench, the learned Senior Standing Counsels reiterated that the petitioners are bound to prefer the appeal, and liberty is also granted by the Hon'ble Division Bench and they are at liberty to exhaust the remedy by putting forth all the contentions raised in these writ petitions, before the appellate authority.

10.The learned counsel appearing for the petitioners, by way of reply, submitted that the certificates issued by the foreign countries were not taken into consideration in right perspective while issuing the show cause notice itself.

11.This Court is of the considered opinion that all such grounds raised on merits are to be adjudicated with reference to the documents and evidences to be produced and the scope of the writ petition under Article 226 of the Constitution of India cannot be expanded so as to exercise the powers of the appellate authority in the matter of examination or scrutiny of original documents and evidences produced by the respective parties. The very purpose of the statutory appeal is to scrutinize the orders passed by the original authorities, and therefore, the legislative intention in this regard is to be scrupulously followed in the matter of adjudication of merits with reference to the documents and evidences.

12.In common parlance, Statutes contain appeal provisions. In some of the Statutes, there are two-tier appeal provisions in order to ensure that the facts, grounds, evidences are appreciated and the grievances are redressed in the manner known to law. Such appeal provisions are provided with the legislative intention to provide remedy to the aggrieved persons. The High Court, in normal circumstances, would not interfere nor dispense with the appellate remedy.

13.The High Court cannot adjudicate the facts and merits with reference to documents and evidences. Trial is not entertainable under Article 226 of the Constitution of India. All such procedural aspects are to be followed by complete adjudication/trial by the original authorities as well as by the appellate authorities under the provisions of the Statute and the powers under Article 226 of the Constitution of India is limited to find out whether the processes contemplated under the Statutes and the procedural aspects are followed by the competent authorities as well as the appellate authorities or not. The High Court, under Article 226 of the Constitution of India, is not expected to usurp the powers of the appellate authorities by adjudicating the merits of the matter on certain documents and evidences. In the event of adjudication of merits under Article 226 of the Constitution of India in the absence of complete trial with reference to the documents and evidences, there is a possibility of miscarriage of justice, and therefore, the High Court is expected to be cautious, while entering into the venture of adjudication of certain merits with reference to the original documents and evidences produced by the respective parties to the lis. This being the legislative intention, High Court is expected to trust the institutional

authorities as well as the hierarchy of institutions contemplated under the Statutes. Institutional respects are of paramount importance for providing complete justice to the parties and the various stages of adjudication are important for the purpose of correcting omissions, commissions, errors in appreciation of evidence, etc. Powers of the High Court under Article 226 of the Constitution of India cannot be extended nor widened so as to allow lay hands on the facts and circumstances by conducting the trial, nor certain facts and circumstances with reference to documents and evidences can be assumed or presumed or inference can be drawn, which is not preferable.

14. This Court elaborately discussed the importance of exhausting the appellate remedy in the case of *M/s. Hyundai Motor India Limited v. The Deputy Commissioner of Income Tax, Chennai* and another [W.P.No.22508 of 2017 dated 16.07.2018], from which, the following paragraphs are extracted :

"19. Unnecessary or routine invasion into the statutory powers of the competent authorities under a statute should be restrained by the Constitutional Courts. Frequent or unnecessary invasions in the executive power will defeat the constitutional perspectives enshrined under the Constitution of India. Undoubtedly, the separation of powers under the Indian Constitution has been narrated and settled in umpteen number of judgments. Separation of powers demarcated in the Constitution of India is also to be considered, while exercising the powers of judicial review in the matter of dispensing with the appeal remedy provided for an aggrieved person under a statute. If the High Courts started interfering with such Appellate powers without any valid and substantiated reasons, then the very purpose and object of the statute and provision of appeal under the statute became an empty formality and the High Courts also should see that the provisions of appeal contemplated under the statutes are implemented in its real spirit and in accordance with the procedures contemplated under the rules constituted thereon. While entertaining a writ petition as narrated by the Apex Court, the provision of efficacious alternative remedy under the statute also to be considered. If the writ petitions are entertained in a routine manner, by not allowing the competent Appellate authority to exercise their powers under the provisions of the statute, then this Court is of an opinion that the power of judicial review has not exercised in a proper manner. Thus, it is necessary for this Court to elaborate the legal principle settled in respect of

the separation of powers under the Constitution of India.

1. Madras Bar Association vs. Union of India (UOI) (25.09.2014 - SC) : MANU/SC/0875/2014

If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

- (1) The supremacy of the Constitution.
- (2) Republican and Democratic form of government and sovereignty of the country.
- (3) Secular and federal character of the Constitution.
- (4) Demarcation of power between the Legislature, the executive and the judiciary.
- (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
- (6) The unity and the integrity of the Nation.

2. Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. [MANU/SC/0445/1973] : (1973) 4 SCC 225].

That separation of powers between the legislature, the executive and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J.

3. P. Kannadasan and Ors. v. State of T.N. and Ors. [MANU/SC/0650/1996 : (1996) 5 SCC 670] the Supreme Court noted that the Constitution of India recognised the doctrine of separation of powers between the three organs of the State, namely, the legislature, the executive and the judiciary. The Court said:

It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.

4. State of Tamil Nadu and Ors. vs. State of Kerala and Ors. (07.05.2014 - SC) : MANU/SC/0425/2014

121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:

(i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India.

The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law.

In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs- legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution.

Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs-- legislature, executive and judiciary--is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality Under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality Under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed

the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aligned.

In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law."

20. This Court is of a strong opinion that institutional respects are to be maintained by the constitutional Courts. Whenever there is a provision for an appeal under the statute, without exhausting the remedies available under the statute, no writ petition can be entertained in a routine manner. Only on exceptional circumstances, the remedy of appeal can be waived, if there is a gross injustice or if there is a violation of fundamental rights ensured under the Constitution of India. Otherwise, all the aggrieved persons from and out of the order passed by the original authority is bound to approach the Appellate Authority. The Constitutional Courts cannot make an appeal provision as an empty formality. Every Appellate Authority created under the statute to be trusted in normal circumstances unless there is a specific allegation, which is substantiated in a writ proceedings. Thus, the institutional functions and exhausting the appeal remedies by the aggrieved persons, are to be enforced in all circumstances and writ proceedings can be entertained only on exceptional circumstances. Rule is to prefer an appeal and entertaining a writ is only an exception. This being the legal principles to be followed, this Court cannot entertain the writ petitions in a routine manner by waiving the remedy of appeal provided under the statute.

21. Now, let us look into the legal principles settled by the Apex Court for exhausting the efficacious alternative remedy provided under the statute.

22. When an effective alternative remedy is available, a writ petition cannot be maintained

1. In *City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwalla and Ors.* MANU/SC/8250/2008 : (2009) 1 SCC 168, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

2. *Kanaiyalal Lalchand Sachdev and Ors. vs. State of Maharashtra and Ors.* (07.02.2011 - SC) : MANU/SC/0103/2011

It is well settled that ordinarily relief Under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh v. National Insurance Co. Ltd.*; *Surya Dev Rai v. Ram Chander Rai* and *SBI v. Allied Chemical Laboratories.*)

3. *Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal*, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

Para 15. 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 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.

4. Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. (30.01.2018 - SC) : MANU/SC/0054/2018

The petitioner argued that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Iqbal and others, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same. The Supreme Court agreed to the arguments and held the same also noted that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum.

5. State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd. reported at AIR 2005 SC 3856, the Supreme Court explained the rule of 'alternate remedy' in the following terms Considering the plea regarding

alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089,

Constitution Benches of the Supreme Court held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

7. First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724.

There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is

when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

15.As far as the judgment of the Hon'ble Supreme Court of India in the case of M/s.Canon India Private Limited (supra) is concerned, as rightly pointed out by the learned Senior Standing Counsels appearing on behalf of the respondents that the matter went to the Hon'ble Apex Court by way of regular appeal and the Hon'ble Supreme Court of India, while adjudicating the final orders passed by the Appellate Tribunal, formed an opinion that the issuance of show cause notice itself was by an improper authority. Thus, by citing the said finding, the appellate remedy otherwise provided under the Statute cannot be dispensed with, and in the event of accepting the said contention, in all such cases, every litigant will approach the High Court by way of writ petition bypassing the appellate remedy, which is not desirable and cannot be accepted. As observed earlier, Institutional respect is of paramount importance. Even the point of jurisdiction, limitation, error apparent on the face of the record, are on merits and all are to be adjudicated before the appellate authority and the appellate authority, more specifically, the Appellate Tribunal or the Commissioner (Appeals), as the case may be, is empowered to adjudicate all such legal grounds raised by the respective parties and make a finding on merits. Thus, usurping the powers of the appellate authorities by the High Court by invoking its powers under Article 226 of the Constitution of India is certainly unwarranted. The parties must be provided an opportunity to approach the appropriate authorities for redressal of their grievances in the manner known to law. In the event of entertaining all such writ petitions, the High Court will not only be over-burdened, but usurping the powers of the appellate authority is certainly not desirable.

16.Jurisdictional error should not result in exoneration of liability. Jurisdictional error, if any committed, is technical, and thus, rectifiable. In such circumstances, the Courts are expected to quash the order passed by an incompetent authority and remand the matter back for fresh adjudication. Contrarily, if an assessee is exonerated from liability, undoubtedly, the purpose and object of the Act is defeated.

17. The growing practice in the High Court is to file writ petitions under Article 226 of the Constitution of India without exhausting the statutory remedies provided under the Act. The point raised in this regard are statutory violations. However, even such statutory violations can be dealt with by the Appellate authorities or the Appellate Tribunals. This apart, in a writ petition, if such orders passed with jurisdictional errors and quashed without any remand, then an injustice would be caused to the very spirit of the Statute enacted for the benefit of the public at large. Thus, Courts are expected to be cautious, while granting exoneration of liability merely on the ground of jurisdictional errors, if any committed by the authorities competent. On some occasions, jurisdictional errors are committed wantonly or in collusion with the assessee, knowingly that there is a possibility of escaping from the clutches of law. Thus, the higher authorities of the Department are expected to be watchful and review the orders passed by the Subordinate authorities and in the event of any negligence, dereliction of duty, collusion or corrupt activities, then such officials are liable to be prosecuted apart from initiation of departmental disciplinary proceedings. The procedures to be followed in the department for assessment is well settled. Thus, the authorities competent are not expected to commit such jurisdictional errors in a routine manner. In these circumstances, review of such orders by the higher authorities are imminent to form an opinion that there is any willful or intentional act for commission of such jurisdictional errors, enabling the assessee to get exonerated from the liability. Liability and jurisdictional errors are distinct factors, and therefore, Courts are expected to provide an opportunity to the Department to decide the liability on merits and in accordance with law with reference to the provisions of the Act and Rules and guidelines issued by the Department.

18. Large number of writ petitions are filed without exhausting the statutory appeal remedies and High Court is also entertaining such writ petitions in a routine manner. Keeping such writ petitions pending for long time would cause prejudice to the interest of the assessee also. Thus, such statutory provisions regarding the appeal are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions are filed may be on the ground of jurisdiction or otherwise. However, the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained. In the absence of exhausting such remedies, High Court is losing the benefit of deciding the matter on merits as the High Court cannot

conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India. Thus, the Courts shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground on jurisdictional error, which is rectifiable.

19.This being the facts and circumstances established, this Court has no hesitation in arriving at a conclusion that the petitioners are bound to exhaust the appellate remedy, either under Section 128 or Section 129 of the Customs Act, respectively. Thus, the petitioners are at liberty to approach the appellate authority and file an appeal by following the procedures contemplated and by complying with the conditions to prefer the appeal, within a period of 60 days from the date of receipt of a copy of this order, and in the event of filing of appeal(s) by the writ petitioners within a period of 60 days, all such appeals are directed to be entertained without reference to the period of limitation, and the matters are to be adjudicated on merits and in accordance with law and by affording opportunity to all the parties, and the appeals are to be disposed of as expeditiously as possible.

20.With these observations, all the writ petitions stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

21.Registry is directed to return the original impugned orders to the respective learned counsels on record, who filed the writ petitions.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

सत्यमेव जयते

To

1.The Principal Commissioner of Customs,
Chennai - VII, New Custom House,
Meenambakkam, Chennai - 600 016.

2.The Principal Commissioner of Customs,
Chennai - VII Commissionerate,
Aircargo Complex, Meenambakkam,
Chennai - 600 027.

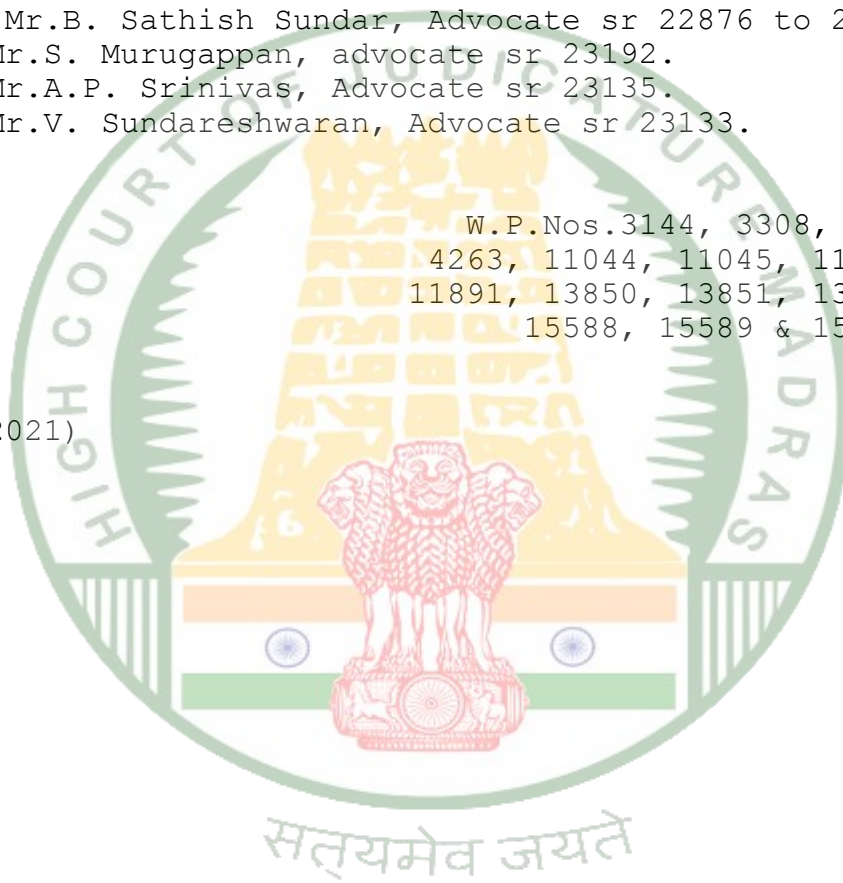
3.The Joint Commissioner of Customs
Chennai VII Commissionerate (Aircargo)
Office of the Principal Commissioner of Customs
Meenambakkam, Chennai 27.

Copy to
The Section Officer
E.R. Section(Writ)
High Court, Madras 104.

+8 Ccs to Mr. Umesh Rao.K, Advocate sr 22933 to 22940.
+4 Ccs to Mr.B. Sathish Sundar, Advocate sr 22876 to 22879.
+1 CC to Mr.S. Murugappan, advocate sr 23192.
+1 CC to Mr.A.P. Srinivas, Advocate sr 23135.
+1 CC to Mr.V. Sundareshwaran, Advocate sr 23133.

W.P.Nos.3144, 3308, 3417, 3418,
4263, 11044, 11045, 11389, 11390,
11891, 13850, 13851, 13852, 13853,
15588, 15589 & 15590 of 2016

SKY (CO)
SP(30/06/2021)



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