IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 24.08.2021

CORAM:

THE HON'BLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.39695, 39696, 35418, 30376 & 30377 of 2016 and
W.M.P.Nos.33967 & 33968 of 2016 and
W.M.P.No.30486 of 2016 and
W.M.P.No.26343 & 26344 of 2016 and
W.M.P.Nos.2252 & 2253 of 2017
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W.P.Nos.39695, 39696 & 35418 of 2016:

K.Ramadoss ... Petitioner in WP.No.39695/2016

R.Thangaraj ... Petitioner in WP.No.39696/2016

M/s.K.S.Kannan & Co.
Represented by its Partner J.R.Sathiamoorthy
Alamin Arcade, Old No.80, New No.161,
Thambuchetty Street,
Chennai - 600 001. ... Petitioner in W.P.No.35418/2016

Vs.

1. The Commissioner of Customs,
   Chennai - II
   No.60, Rajaji Salai,
   Chennai - 600 001.

2. Additional Director General,
   Directorate of Revenue Intelligence
   T Nagar, Chennai - 600 017.

... Respondents in all three WPs.

Common Prayer : Petitions filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorari to call for the records pertaining to the Order in Original No.48273/2016 dated 29.06.2016 issued on 13.07.2016 passed by the first respondent and quash the same.

In WP.Nos.39695 & 39696/2016:

For Petitioner : Mr.J.Shankarraman

For Respondents : Mr.V.Sundareswaran
Senior Standing Counsel

In WP.No.35418 of 2016:

For Petitioner : Mr.J.V.Niranjan

For Respondents : Mr.Pramodkumar Chopda for R1
Senior Standing Counsel

For Respondents : Mr.V.Sundareswaran for R2
Senior Standing Counsel

W.P.Nos.30376 & 30377 of 2016:

1. M/s.High Regards International
No.94, Sydenhams Lane, Periamet,
Chennai - 600 003, Represented by its
Partner Shri Vijay G Budhrani

2. Vijay Budhrani

3. Mahesh Budhrani ... Petitioners in WP.No.30376/2016

1. M/s.Shahi Foods, 52, Ankur Plaza,
G.N.Chetty Road, T.Nagar,
Chennai - 600 017, represented by its Partner
Shri Vijay G. Budhrani

2. Vijay Budhrani

3. Mahesh Budhrani
... Petitioners in WP.No.30377/2016

Vs.

The Commissioner of Customs,
Chennai II,
Commissionerate, Custom House,
No.60, Rajaji Salai, Chennai 600 001.
... Respondent in both WPs.

Common Prayer : Petitions filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the respondent in and connected with F.No.CAU/D.R.I/CHE/18/2014 leading to issuance of Order-In-Original No.48273/2016 dated 29.06.2016, quash the same and as the Show Cause Notice leading to issuance of the order in original, was without jurisdiction and order passed is contrary to settled law and blatant defiance of the Judgment of the Hon'ble High Court of Delhi in the case of Mangali Impex and also one passed in violation of the instructions of the CBEC in F.No.276/104/2016-C.X.8A(Pt.) dated 29.06.2016.

In WP.Nos.30376 & 30377/2016:

For Petitioners : Mr.S.Krishnanandh

For Respondent : Mrs.Hema Murali Krishnan
Senior Standing Counsel

COMMON ORDER

All these writ petitions are filed challenging the order-in-original dated 29.06.2016 passed by the respondent.

2. The preamble of the order impugned reveals that under Section 129A(1) of the Customs Act, 1962, any person aggrieved by this order to prefer an appeal to (a) the Special Bench of the Customs, Excise and Service Tax Appellate Tribunal having its Registry at West Block, No.2, R.K.Puram, New Delhi - 110 022 in matters pertaining to the rate of duty (Classification) and value of the goods for the purposes of assessment of duty (Valuation) / Jurisdictional CESTAT; (b) South Regional Bench of the Tribunal having its Registry at Shastri Bhavan, Annexe Building, 1st Floor, 26, Haddows Road, Chennai - 600 006 in matters pertaining to cases other than those mentioned at para 2 (a) in the preamble to the order impugned / Jurisdictional CESTAT.

3. The procedures for filing an appeal is also enumerated in the order impugned itself.

4. The petitioners admittedly have not preferred any appeal as contemplated under the provisions of the Act. They have chosen to file the present writ petitions raising several grounds both factually and on certain legal grounds. However, the disputed facts and the mixed question of law and facts are to be adjudicated before the competent appellate authority based on the original documents and evidences. The appellate authority is the final fact finding authority. The importance attached to the appellate remedy, as contemplated under the provisions of the Act, at no circumstances, be undermined by the Courts. Thus,

dispensing with an appeal in a routine manner is not preferable and the valuable right of appeal conferred on the aggrieved person under the statute need not be taken away unnecessarily.

5. The respective learned counsels appearing in writ petitions on behalf of the petitioners contended that, some of the matters are pending before the Hon'ble Division Bench on the same issue. The High Court of Delhi in the case of Mangali Impex Limited Vs. Union of India reported in 2016 (335) E.L.T. 605 (Delhi), quashed the show cause notice on the basis of the ground raised that an improper officer issued the show cause notices. The relevant provisions of the Customs Act states the proper officer must issue the notice. The Delhi High Court allowed the writ petitions filed by the assessees. The Customs Department filed an appeal before the Hon'ble Supreme Court of India and admittedly, the judgment of the Delhi High Court is stayed by the Hon'ble Apex Court of India and the matter is pending.

6. This Court is of the considered opinion that the judgment of the Delhi High Court rendered in favour of the assessees is stayed by the Hon'ble Supreme Court, thus, there is no impediment for this Court to decide the issues. The Courts are always expected to dispose of the matters on merits and based on the facts and circumstances placed by the respective parties. Application of law with reference to the principles are to be adopted undoubtedly with reference to the facts especially in a particular case. Thus, mere pendency of a case before the Hon'ble Supreme Court of India cannot be taken as a ground for the purpose of keeping the matters pending before the High Courts. Many such issues are pending before various High Courts across the Country and before the Hon'ble Supreme Court of India. Once the facts are placed and relevant judgments are considered, it is sufficient for the disposal of a case on merits and in accordance with law. This being the principles to be followed. By citing the pendency of a case, the litigants may not be permitted to prolong the litigation, which may result in unjust gain to such litigants. All these adverse effects of long pendency of litigations are to be borne in mind by the Courts also. Adjournments are sought for on many grounds. The truthfulness of grounds are to be considered by the Courts, so also the necessity of adjournments. Adjournments are always enemy to justice and therefore, even while granting adjournments, the Courts are expected to be cautious and ensure that the matters taken up once must be heard and disposed of in the manner known to law. This being the principles which is to be followed in the interest of Justice Delivery System, this Court is of the opinion that, by citing a pendency of one case before the High Court or the Hon'ble Supreme Court, adjournments cannot be granted in a routine manner and the implications

involved on the issues raised as well as the facts established are to be taken into consideration for the purpose of disposing of the matters.

7. As far as the present writ petitions are concerned, the order-in-original is under challenge. Admittedly, the appellate remedy is available and the petitioners have not chosen to file the appeal. Regarding the term 'Proper Officer' who is competent to issue proceedings, this Court considered the principles in the case of M/s.RKKR Steel Joseph Philip Vs. The Central Board of Excise and Customs reported in 2021-TIOL-1599-HC-Madras-Customs [W.P.Nos.10276 to 10281 of 2011 dated 09.07.2021]. In the said judgment, this Court has considered the recent judgment of the Hon'ble Supreme Court in the case of M/s.Canon India Private Limited Vs. Commissioner of Customs reported in 2021 (3) TMI 384 (SC) wherein, the interpretation for the words 'proper officer' ruled by the Hon'ble Supreme Court in the case of Commissioner of Customs Vs. Syed Ali reported in 2011 (265) E.L.T. 17 (SC) was followed and affirmed. The Hon'ble Supreme Court, by referring to the decision in the case of Syed Ali (cited supra) held that the 'proper officer' is the officer having jurisdiction over the person concerned and therefore, the law regarding the interpretation 'Proper Officer' is settled by the Hon'ble Supreme Court and this Court has made a finding in paragraphs 15 to 18 of the said judgment in W.P.Nos.10276 to 10281 of 2011 dated 09.07.2021, which reads as under:

> "15.In this backdrop, let us now consider the definition for -proper officer- enumerated under Section 2(34) of the Act. The proper officer is defined as ?in relation to any functions to be performed under the Act, means the Officer of Customs, who is assigned those functions by the Board or the Commissioner of Customs. Thus, the proper officer is defined so as to include the officer of customs, who is assigned those functions by the Board. In the present case, by invoking the powers under Section 4 (1) of the Act, the Board conferred powers to the Commissioner of Central Excise, Goa and authorises him to exercise the powers and discharge the duties conferred or imposed on the Commissioner of Customs, Port Imports, Chennai for the purposes of adjudicating the matters relating to show cause notice. Therefore, it is unambiguous that the Board appointed the Commissioner of Central Excise, Goa as a proper officer under Section 4(1) and the said Commissioner of Central Excise, Goa is empowered to exercise powers of the officers of customs under Section 5 and with reference to the definition of proper officer under Section 2(34) of the Act. Therefore, there is no

ambiguity in respect of the powers exercised in the present case. The judgments cited by the learned counsel for the petitioner were not related to the conferment of powers by the Board under Section 4(1) and 5 of the Act. The Hon-ble Supreme Court interpreted the word -proper officer- and as per the definition under Section 2(34) of the Act, -proper officer- means the officer having jurisdiction over the concerned person. However, in the event of exercising the powers under Section 4(1), if the Board appoints any other officer as an officer of customs, then such an officer becomes the proper officer within the definition under Section 2(34) of the Act, who in turn is empowered to exercise the powers of officers of customs under Section 5 of the Act.

16.This being the constructive interpretation of the provisions of the Act, this Court is of the considered opinion that the judgments cited by the petitioners are not with reference to Sections 4 and 5 of the Act and thus, the interpretation offered by the learned counsel for the petitioners stands rejected.

17.As far as the show cause notices are concerned, the merits are to be adjudicated by the competent authority/the respondent. High Court cannot adjudicate the disputed facts with reference to the documents and evidences to be produced by the respective parties. Thus, the petitioner has to submit their explanations/objections, if any, along with the documents and evidences to the respondents enabling them to consider the same and pass orders by following the procedures as contemplated and by affording opportunity to the writ petitioners. Such an exercise is to be done as expeditiously as possible. In view of the fact that the jurisdiction point raised by the petitioner fails, as the facts and circumstances of the case decided by the Hon-ble Supreme Court are not connected with the grounds raised in the present writ petition by the respondents, this Court has no hesitation in forming an opinion that the petitioners have not established the ground of jurisdiction and thus, the petitioners are bound to respond to the show cause notices and on receipt of any such objections/explanations, the respondents are bound to continue the proceedings, conclude the same as expeditiously as possible.

18.In fine, all the writ petitions stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed"

8. However, the grounds raised in this regard are to be raised before the appellate authority by the petitioners and the appellate authority is bound to consider facts and circumstances as well as the legal grounds, including the ground of principles of natural justice as raised by the petitioners with reference to the provisions of the Act and based on the judgments rendered by the High Courts and Hon'ble Supreme Court of India.

9. The preliminary issue regarding the entertainability of a writ petition in the presence of an appellate remedy are elaborately considered by this Court in a batch of writ petitions in W.P.No.3144 of 2016 etc. batch dated 15.04.2021 [M/s.Sri Sathya Jewellery Vs. The Principal Commissioner of Customs] and the relevant paragraphs are extracted hereunder.

> "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.
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> 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 :
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> "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.?

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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 mater 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.

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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.

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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 loosing 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."

10. Therefore, following the decision referred to above, in these writ petitions also, the petitioners are granted liberty to approach the appellate authority and file an appeal by following the procedures as 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 by the writ petitioners within a period of 60 days, such appeal is directed to be entertained without reference to the period of limitation, and the matter has to be adjudicated on merits and in accordance with law and by affording opportunity to the parties concerned, and the appeal has to be disposed of, as expeditiously as possible.

11. With these observations, all these Writ Petitions stand disposed of. No Costs. Consequently, connected miscellaneous

petitions are closed.

12. Registry is directed to return the original impugned order to the learned counsel on record, who filed the writ petitions.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

Sgl

To

1. The Commissioner of Customs,
   Chennai - II
   No.60, Rajaji Salai,
   Chennai - 600 001.

2. Additional Director General,
   Directorate of Revenue Intelligence
   T Nagar, Chennai - 600 017.

Copy to:-

The Section Officer,
ER Section High Court Madras.

(With a direction to return the original impugned order as directed by the Court)

+1cc to Mr.V.Sundareswaran, Advocate , S.R.No.42494
+4cc to Mr.B.Sathish Sundar Advocate , S.R.No.42506
+1cc to Mr.Pramodkumar Chopda, Advocate , S.R.No.42543
+1cc to Mrs.Hema Murali Krishnan, Advocate , S.R.No.42596
(15/02/2022)

W.P.Nos.39695, 39696, 35418,
30376 & 30377 of 2016

SS(CO)
CT(27/09/2021)