

(1999) 01 OHC CK 0038

In the Orissa High Court

Case No : Original Jurisdiction Case No. 6581 of 1993

Indian Charge Chrome Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-01-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 124, 129E
Income Tax Act, 1961 — Section 34

Citation : (2000) 119 ELT 12

Hon'ble Judges : S.N. Phukan, C.J;A. Pasayat, J

Bench : Division Bench

Advocate : P. Chidambaram, S.S. Das, V.L. Menon and A. Dutta, for the Appellant; S.B. Mukherjee, Addl. Solicitor General and D.C. Mohanty, Senior Standing Counsel, Central Government, for the Respondent

Judgement

A. Pasayat, J.—Direction issued by the Assistant Collector of Central Excise and Customs, Cuttack, prohibiting transmission of electricity by Indian Charge Chrome Limited ("ICCL", shortly), petitioner No. 1, to Indian Metals and Ferro Alloys Limited ("IMFA", shortly), petitioner No. 3, and the show cause notice issued in terms of Section 124 of the Customs Act, 1962 ("the Act" hereinafter) have been challenged in this writ petition.

2. Sequence of facts leading to filing of present writ petition is as hereunder:

A letter of intent was issued by Ministry of Industry, Department of Industrial Development, permitting IMFA to set up a 100% Export Oriented Unit ("EOU" for short). Said letter of intent related to manufacture of 50,000 MTPY of High Carbon Ferro Chrome/Charge Chrome at Talcher. The first letter of intent is dated 13-5-1981. Subsequently, another letter of intent dated 22-10-1982 was issued and direction was given to surrender the first letter of intent. The second letter of intent was amended transferring the same in the name of ICCL, petitioner No. 1. Commercial production was started by IMFA in its EOU some time thereafter. The

second letter of intent was again amended for transfer of location of the project to Choudwar. Again, it was amended on 26-11-1984 permitting import of Captive Power Plant as capital goods for 100% EOU for manufacture of Charge Chrome. There was dispute as to whether the benefit of Customs Notification No. 13/81-Cus., dated 9-2-1981 for import of Captive Power Plant machineries and equipments is applicable to petitioner No. 1's case. It is relevant to note that the Industrial Development Bank of India "IDBI" in short) while dealing with the application for financial assistance made by the ICCL vide its communication dated 27-10-1984 imposed a condition that approval of the Central Board of Excise and Customs for exemption from payment of customs duty on equipments and building and other materials proposed to be imported for building the power plant, was necessary. The Government of India in the Ministry of Industry vide letter dated 26-11-1984 indicated about the permission to import the captive power generation equipment as capital goods for the 100% EOU to be set up at Choudwar for the manufacture of charge chrome etc. covered by the letter of intent dated 22-10-1982. On 1-6-1985 the Ministry of Finance in the Department of Revenue wrote to ICCL that the captive power plant being not amenable to the discipline of bonding, could not be given the benefit of exemption under 100% EOU scheme, and that so far as exemption outside the scheme is concerned the ICCL was advised to approach the concerned Administrative Ministry. Challenging the stipulation of conditions of disbursement referred to in Clause 15 of Special terms and conditions contained in the Appendix appended to the communication dated 27-10-1984 to which reference has been made earlier and the views of the Ministry of Finance that the captive power plant being not amenable to the discipline of bonding could not be given the benefit of exemption under 100% EOU scheme, Writ Petition Nos. 5218 and 5219 of 1985 were filed before the Apex Court and by order dated 5-6-1985 the petitions were disposed of. As a major part of the dispute involved in the present writ petition revolves round the effect of said order of the Apex Court, it needs to be quoted in full, and reads as follows :-

"The Industrial Development Bank of India (IDBI) is hereby directed to make disbursement prior to 15th June, 1985 of the first down payment of 15% of the loan amount and issue the guarantee referred to in the letter of intent of October 27, 1984. It is also hereby declared that notwithstanding the non-compliance or defect in compliance of any of the conditions of disbursement referred to in Clause 15 of the said letter of intent of October 27, 1984, the validity, legality and recoverability of the IDBI's investment, loans and advances shall not in any manner be prejudiced or affected and IDBI shall be in the same position as if such consents or approvals had been obtained. The petitioners should expeditiously approach the Government and other statutory authorities for the requisite permissions/approvals as per the aforesaid letter of intent. These authorities are directed to consider the applications expeditiously. As regards the approval of the Central Board of Excise & Customs for exemption from payment of Customs Duty, the Petitioners contend that Notification No. 13/81 dated 8th

February, 1981 as applicable and is adequate for compliance of condition 15(f) of the IDBI's letter of intent dated 27th October, 1984. We declare and direct that the said Notification applies to the present case. In respect of conditions 15(b), 15(i) and 15(m) all concerned parties viz., IDBI, IOB, IB and the Petitioners will discuss and amicably resolve the issues involved prior to the first down payment by IDBI and in any event prior to 12th June, 1985. In the meantime, the Petitioners will on or before 12th June 1985 also execute the necessary loan agreements, documentation and other usual undertakings required by the IDBI and/or other financial institutions in accordance with their normal practice. It is also hereby expressly declared that this order has been passed having special regard to the facts of this case and will not constitute or form a precedent for any other case or matter. This order shall be binding upon all parties concerned and also all shareholders, creditors, depositors, liquidators and all other persons concerned with the company, including authorities and bodies including the Indian Overseas Bank, Indian Bank, Reserve Bank of India, the Central Electrical Authority, Controller of Capital Issues, Central Government and its Departments, State Government of Orissa and its departments, the Orissa State Electricity Board, Company Law Board, Customs Department, Excise Department etc."

Civil Miscellaneous Petition Nos. 23090-91 of 1985 were filed for modification of order dated 5-6-1985. The prayer was rejected by order dated 17-6-1985. The said order is also of significance. Same reads as follows :-

"After hearing both the sides we see no reason to modify the order passed by this Court on 5th June, 1985. The period fixed in that order for down payment of 15% of the loan amount and issuance of the guarantee referred to in the letter of intent dated October 27, 1984 both of which are to be carried out by the I.D.B.I. has subsequently been extended till 21st June, 1985. It is hereby directed that the down payment of 15% of the loan amount and the issuance of the guarantee should be carried out by the I.D.B.I. before the said extended date. The guarantee may state that it is being issued in accordance with the directions issued by this Court and that the consents etc. required from the statutory authorities which have been applied for and are being awaited, shall be deemed to have been granted in view of the directions of this Court. The requisite loan agreements to be executed between the I.D.B.I. and the second petitioner shall be executed within three days from today incorporating the amendments set out in the letter dated 10th June, 1985 addressed by the I.D.B.I. to the second petitioner, a copy of which is available at page 179 of the paper book. This will be the only condition precedent in the matter of disbursement of the first down payment of 15% and the issuance of the guarantee referred to in the letter of intent. Within two weeks from today, the first petitioner I.M.F.A. shall execute a guarantee in favour of the I.D.B.I. in terms of Clause 15(m) of the letter of intent as well as the counter guarantee referred to in the said clause. Within the same period, the shares of I.M.F.A. and Dr. Panda, in I.C.C.L. shall be pledged in favour of I.D.B.I. by way of security liable to be proceeded against in the event of any default being committed by them in terms of the loan transaction. Counsel

appearing for the petitioners Nos. 1 to 4 undertake to Court that these will be duly done.

In the event of any problem arising by reason of any of the requisite consents not being obtained from the concerned authorities, it will be open to the parties to move this Court after the re-opening of the Court and not earlier for appropriate directions. This however, shall not hold up the disbursement of the 15% down payment and the execution of the letter of guarantee by the I.D.B.I.

Counsel appearing for the I.D.B.I. states before the Court that his client will make available to the petitioner, tomorrow morning at the office of Miss Bina Gupta, Advocate on record, the agreement papers to be signed by the petitioner Nos. 1 and 2 and Counsel appearing for petitioners Nos. 1 and 2 states that petitioners Nos. 1 and 2 will execute the agreement tomorrow itself."

An application was filed for modification of the orders dated 5-6-1985 and 17-6-1985. In the application for modification filed by respondents in the writ petitions before the Apex Court, it was indicated that even though the power plant may be installed within the bonded premises, the distribution system will lie outside the bonded premises as the supply of electricity will be through the Orissa State Electricity Board (in short OSEB). The working of the captive power plant and the distribution system do not lend themselves to operation within the bonded area, which is a basic requirement of Customs Notification. It was further submitted that the power generated from one 100% EOU would be fed into a distribution system which would be located outside the bonded area thereby transgressing a specific condition of the notification. It was, therefore, contended that Notification No. 13/81-Cus., only covers the items specified in it and does not extend to all the items mentioned in Para 15(f) of the IDBI's letter dated 27-10-1984. Specific stand was that Notification No. 13/81-Cus. applies, subject to the fulfilment of the conditions specified in the Notification, namely, conditions (1) to (6). Conditions specified in the notification stipulate that the importer should carry out the manufacturing operation in Customs Bond and subject to such other conditions as may be specified by the Assistant Collector of Customs in this behalf. The company has not complied with aforesaid conditions for carrying out their operations in Customs. The Apex Court observed that the application is in truth and effect for review of the Court's orders dated 5-6-1985 and 17-6-1985 in the guise of seeking a modification of orders which can not be permitted. Thereafter several correspondences were made to various departments of the Central Government and the OSEB. So far as utilization of surplus power generated at Choudwar is concerned a tripartite agreement was entered into on 14-2-1989 between OSEB, ICCL and IMFA regarding wheeling of power. It was stipulated that the surplus power generated at Choudwar power plant would be fed to the OSEB grid at Choudwar and that IMFA would be allowed to draw equivalent quantum of power from the OSEB grid sub-station at Therubali. The Government of Orissa in the Irrigation and Power Department intimated ICCL that it has no objection in principle to the proposal submitted by

the ICCL in this regard subject to the condition that the proposal is technically feasible and mutually acceptable and also subject to the finalization of commercial terms to the satisfaction of the OSEB and the State Government. Subsequently, another tripartite agreement was executed on 24-4-1991. On 8-12-1988 the Superintendent of Central Excise and Customs, Choudwar, informed the ICCL that its power plant was going to start generating electricity and the electricity generated as also any intermediary or finished product obtained in the course of generation should not be removed outside the bonded area without prior permission of the competent authority. ICCL wrote to the Director (Customs) of the Central Board of Excise and Customs in the Ministry of Finance of the Government of India about the directions given by the Superintendent of Central Excise and Customs, Choudwar. In response to notice dated 8-12-1988 the ICCL requested Assistant Collector of Central Excise and Customs, Cuttack, by letter dated 28-1-1989 to take note of the actual position. The Assistant Collector by his letter dated 30-1-1989 intimated ICCL that it was allowed to clear electricity generated in its captive power plant at Choudwar to be transferred to the 100% EOU at Therubali through OSEB grid subject to furnishing of the undertaking as was contained in the letter dated 28-1-1989 of the ICCL further subject to the condition that the ICCL shall furnish monthly statement of quantity, of electricity transmitted from Choudwar unit and quantity received at Therubali unit. The Government of India in the Ministry of Industry in its letter dated 3-7-1989 intimated the ICCL that its application for grant of an Industrial Licence under the I.D.R. Act, 1951 for manufacture of High Carbon Ferro Chrome/Charge Chrome was considered and the licence was issued subject to certain conditions. On 3-7-1989 the Ministry of Finance required the ICCL to indicate whether the approval for sale of electricity to units in D.T.A. has been obtained from the Board of Approvals for 100% EOUs. and, if so, a copy of the same be furnished to the Ministry. At this stage the impugned direction to stop transmission of electricity, and later the show cause notices were issued.

3. Initially the direction was challenged and subsequently by way of amendment the show cause notice was incorporated in the writ petition, and prayer to quash it v/as also inserted.

4. According to petitioners, the show cause notice is nothing but an attempt to get over the orders passed by the Apex Court. Having failed in their attempts to get the orders dated 5-6-1985 and 17-6-1985 varied, with mala fide intent and oblique motive the show cause notice has been issued. The notice is vague and does not specifically state as to which of the conditions contained in Notification No. 13/81-Cus. have been violated. The allegation that there has been violation thereby rendering the subject goods liable to confiscation u/s 111(o) of the Act. The I.C.C.L. and I.M.F.A. and their Chairman and Managing Director Dr. B.D. Panda were called upon to explain as to why the captive power plant shall not be confiscated u/s 111(o) of the Act. It is submitted that the notice is vague and does not contain the basic materials which would have shown application of mind and the reasons for initiating the proceedings. Merely saying that there was

violation of the terms and conditions of the notification is not sufficient. Mr. S.B. Mukherjee, learned Additional Solicitor General, raised a preliminary objection as regards maintainability of the writ petition. According to him, originally the direction prohibiting transmission of electricity was challenged, and subsequently by way of amendment, the show cause notice was brought into the fold of dispute. During the pendency of the writ petition, pursuant to the direction given by this court, the petitioners were permitted to file reply to the show cause notice before the adjudicating authority, which was done. The reply was considered in detail and an elaborate reasoned order of adjudication has been passed, which is not subject-matter of challenge in the writ petition. Further, the writ petition is not maintainable as effective, efficacious and statutory alternative remedy is available. Learned Counsel for the petitioners, however, submitted that the validity of the notice itself is under challenge and as attempt is being made to get over effect of the orders passed by the Apex Court, the existence of alternative remedy should not be considered to be a bar to entertain the writ petition.

So far as the plea of existence of alternative remedy is concerned, it is further submitted that this Court is a Court of equity and should apply the principles of justice, equity and good conscience. The petitioners relied and acted upon the statutory provisions, the actual terms and conditions contained in Notification No. 13/81-Cus. the orders of the Apex Court dated 5-6-1985, 17-6-1985 and 12-3-1986 dismissing the Revenue's miscellaneous petition. The respondents therein accepted the orders of the Apex Court and allowed the ICCL to feed the surplus power into the OSEB grid. It was for the first time, in February, 1995, that the respondents changed their stand and issued the impugned show cause notice. The principles of promissory estoppel and equitable estoppel are clearly applicable. As early as 1986, the Customs Department was aware that ICCL would feed surplus power to the OSEB grid. By order dated 30-1-1989 the Assistant Collector allowed the ICCL to feed surplus power into the grid. Therefore, the Department is bound by the principles of promissory estoppel, equitable estoppel and estoppel by conduct. In that background, it cannot take any action alleging that feeding of surplus power into the OSEB grid was in violation of the terms and conditions of Notification No. 13/81-Cus. The Department of Customs cannot be allowed to flout the orders of the Apex Court and after having failed in their earlier attempts, impugned action has been taken with ulterior motive by distorting the factual and legal aspects to over-reach and circumvent the orders of the Apex Court. It is not that a show cause notice cannot be questioned in a writ petition. Reliance has been placed on a decision of the Punjab and Haryana High Court in *Oswal Agro Furane Ltd. v. Union of India* - 1989 ECR 533 (P&H) wherein it was held, inter alia, that licence having been granted with full knowledge of material facts, it has to be presumed that it was done with application of mind. Validity of an order can be judged by the wordings of the order, not by importing new points. In any event, the remedy now available after passing of the order of adjudication is to go before the Customs,

Excise and Gold (Control) Appellate Tribunal (CEGAT), Eastern Bench. The demand raised on adjudication is a staggering sum of more than Rupees one hundred crores, and considering the unsound financial condition of the ICCL/IMFA, it would not be in a position to comply with the requirements of Section 129E of the Act which postulates deposit of duty demanded or penalty levied pending appeal. The balance-sheets of the concerns for last few years have been submitted to show that the financial condition of the ICCL/IMFA is not very sound. By way of reply, learned Additional Solicitor General submitted that it is open to the petitioners to move the Tribunal for relaxation of the terms of deposit and that cannot be a ground to by pass the statutory remedy.

5. By way of reply to the submission made by the learned Counsel for the petitioners that the notice does not show as to which condition or term has been violated, it has been submitted that the Customs Authorities have the jurisdiction to take action u/s 111(o) of the Act when the condition of exemption is violated and the exempted goods are diverted to non-permitted activity. Breach of the terms of exemption also amounts to breach of the conditions of the import licence.

6. The position regarding the course to be adopted by Courts when alternative remedy is available is fairly well-settled. If a show cause notice is issued by a statutory authority relying upon some facts, the said notice can be challenged before the writ court only on the ground that even if the facts are assumed to be correct, no case has been made out against the noticee. If a prima facie case has been made out in the show cause notice, it is for the adjudicating authority to finally decide all the questions including the questions of fact. But the disputed questions of fact cannot be agitated in writ court even before the questions have been gone into and finally decided by the adjudicating authority. It has been laid down in a series of cases by the Apex Court that High Court should not interfere at the stage of show cause notice to take over the fact-finding investigation which is to be resolved by fact-finding authorities constituted under the relevant statute. In a series of recent cases, the Apex Court has taken the aforesaid view. See *State of Goa and others Vs. Leukoplast (India) Ltd. etc.*, , *Union of India v. Polar Marmo Agglomerates Ltd.* - 1997 (96) E.L.T. 21 (S.C.) and *Union of India (UOI) Vs. Bajaj Tempo Limited and Others*, . In *State of U.P. and another Vs. Labh Chand*, the Apex Court befittingly illuminated the power is under :-

"When a Statutory Forum or Tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Article 226 of the Constitution is a legal position which is too well settled...."

In *State of Andhra Pradesh Vs. M/s. T.G. Lakshmaiah Setty and Sons*, the decision was reiterated by the Apex Court and it was observed that orders of assessment rendered under tax laws should be tested under the relevant Act and in no other way. In *Shyam Kishore and others Vs. Municipal Corporation of Delhi*

and another, it was observed that recourse to writ jurisdiction is not proper, when more satisfactory solution is available on the terms of the statute itself. The position is, therefore, clear that extraordinary and discretionary power under writ jurisdiction should be exercised with caution when statutory remedy is sought to be by-passed.

Rashid Ahmed Vs. The Municipal Board, Kairana, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another case, namely, K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition under Article 226 could still be entertained in exceptional circumstances.

Specific and clear rule was laid down in The State of Uttar Pradesh Vs. Mohammad Nooh, as under :

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

This proposition was considered by a Constitution Bench of the Apex Court in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, and was affirmed and followed in the following words :

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

Another Constitution Bench decision in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting

an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting (1) On application without jurisdiction u/s 34 I.T. Act."

These decisions were taken note of by the Apex Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai 1998 (8) Supreme 176.

7. We do not think it appropriate to go into the factual aspects in detail. A few peculiar features exist in this case which need to be noted. As has been noted above, several correspondences were exchanged. Petitioners, letter dated 18th October, 1988 is significant in this regard. It was stated therein as follows :-

"It would be noted from the above that the company in the initial production run of the CPP would have a large surplus power available which cannot be fully utilized by them directly in their manufacturing unit or in the 100% EOU of the promoter company, IMFA. Electricity on its own cannot be exported and it will be definitely not in the national interest to either cut down the production or ground the surplus power.

xxx xxx xxx xxx xxx In view of the above, we shall be highly obliged if you kindly accord your approval to transfer the surplus power, after meeting the power requirements of the company as well as 100% EOU of our promoter Company, IMF A, for utilization by other industrial units in the domestic tariff area including domestic units of promoter company (IMFA), in the State of Orissa which is today starved of power (presently the units are facing 75% power-cut in the State). An early permission would enable us to approach OSEB and other authorities accordingly."

Subsequently, in the letter dated 31-10-1988 addressed to the Collector, Central Excise and Customs, it was stated as follows :-

xxx xxx xxx xxx xxx The aforesaid transmission loss " 20% of the energy fed into the OSEB grid requires your kind approval as under the Provisions of the Customs Act under which our 100% EOU will be operating, this may amount to transit loss.

xxx xxx xxx xxx xxx The CPP being put up by us is to meet the power requirements of the 100% EOU being set up by us as well as the 100% EOU of our promoter company, IMFA at Therubali. As you will kindly appreciate, for every manufacturing activity, occasional break-downs are a common phenomena and any breakdown, irrespective of its duration, would result in some surplus power which cannot be utilized for reasons of break-downs.

It is, therefore, proposed that the power generated from the CPP, when fed into the grid, will also be banked with OSEB for adjustment during certain period, say over a year.

The banking of energy with OSEB would mean that the company will feed the excess power generated by the CPP from day-to-day to the OSEB Grid and draw the same power thus banked with OSEB on a later date.

The arrangement for banking of the energy with OSEB and adjustment over a fixed period would also require your kind approval.

xxx xxx xxx xxx xxx"

The policy for direct sale of power by the Captive Power Plants to other industries was also under consideration of the State Government in the Department of Energy. By letter dated 13-9-1993 certain guidelines have been formulated. On 15-9-1993 a telegram was sent to the Chairman, Board of Approvals for 100% EOUs. in the matter of permission for transfer/sale of surplus power to industrial units in Domestic Tariff Area (in short, D.T.A.). As referred to above, the Ministry of Steel and Mines asked the ICCL to supply the reasons justifying their claim for sale of surplus power in D.T.A. units, which was done. Finally on 9-12-1993 Ministry of Commerce, Govt. of India, informed that the matter regarding sale of surplus power by ICCL in D.T.A. was under consideration. On 9-2-1994, order was passed u/s 110 of the Act seizing the Captive Power Plant. On 28-8-1997 a meeting was held under the Chairmanship of Mr. N. Mishra, Additional Secretary, Ministry of Commerce, regarding sale of surplus power generated by EOUs. Some of the decisions need to be noted. They read as follows :-

"Observing that the generation of surplus power would normally result from two sources (a) through installation of captive power plant, which has been set up by EOU/EPZ unit for their own use or as stand by arrangement, and (b) through DG sets, though this would be in exceptional circumstances because DG sets are imported by EOU/EPZ units normally on the basis of their own actual requirements. Chairman emphasized the need to have a simple and implementable arrangement for the sale of such surplus power as legitimately entitled, keeping in mind the fact that energy is a scarce resource, and its sharing for the purpose of industrial production would naturally be in the national interest. The concurrence of the Deptt. of Revenue to the sale of surplus power generated by one EOU to another EOU and by one unit in EPZ to any other unit/units in EPZ was a welcome step in this direction. In such cases, the transfer of power by sale was envisaged only where the wheeling/transmission of power is not contemplated as this would involve State Electricity Boards. Director, Ministry of Power, however, observed that it may be necessary to first confirm whether such inter-unit sale of power under the EOU/EPZ Scheme is permissible under the Electricity Act without involving the SEB's even where the wheeling or transmission of power over distances, is not involved. It was agreed that there would be no objection to this confirmation being done by Ministry of Power and wherever the SEB approval in a statutory requirement, it would need to be complied with by the concerned units seeking to avail the facility.

4. The proposal of the Deptt. of Revenue to examine whether additional export

obligation may be fixed on EOU/EPZ wishing to sell power to a unit in the DTA, was then discussed. It was felt that additional export obligation need not be imposed on the EOU/EPZ Unit selling the power since the investment on the duty free capital goods, is taken into account for maintaining value addition and export obligation commitments by the EOU/EPZ. As far as use of duty free raw materials in the generation of power is concerned, it was suggested that since an estimate of the raw material used in the generation of power is possible on the basis of standard consumption norms, duty can be assessed and recovered to the extent of raw material used in the surplus power sold to the DTA unit since this power is not being used for export production. In addition the sale of surplus power by EOU/EPZ to DTA may be adjusted against the DTA entitlement of the unit in terms of value and to this extent, the EOU/EPZ unit will be obliged to export a higher percentage of his manufactured product in lieu of selling in DTA against his entitlement.

xxx xxx xxx xxx xxx"

8. Keeping all these aspects in view and since the Ministry of Commerce had indicated that the matter was under consideration, direction was given to petitioners to appear before the Adjudicating Authority, submit reply to the show cause notice and the Adjudicating Authority was directed to pass an order of adjudication. It was made clear to all concerned that the pendency of the writ petition should not be construed as a bar for a decision on merits. Pursuant to the direction given, the petitioner ICCL submitted its reply; the matter was heard and ultimately the order of adjudication has been passed. As has been rightly contended by the learned Additional Solicitor General, the adjudication order is not under challenge in the present writ petition. It is also not in dispute that the same can be challenged in an appeal as provided in the statute. Learned Counsel for the petitioner Mr, Chidambaram submitted that though the petitioner - ICCL appeared before the Adjudicating Authority pursuant to the direction given by this Court the scope of challenge to the legality of the show cause notice was not given up, and the matter was kept alive. There can be no dispute so far as that aspect is concerned. But at the same time it cannot be said that no factual dispute is involved in the present case. Effect of the orders of the Apex Court in the background of the factual position highlighted by the opposite parties has to be considered. We do not accept the contention that there is no factual aspect involved and there is no scope for any further adjudication. The stand of the petitioners vis-a-vis orders of the Apex Court and its applicability to the factual position as highlighted by the petitioners and the Revenue in their respective stands has to be adjudicated. The prima facie view of opposite parties is contained in paragraph 19 of the show cause notice. The Adjudicating Authority has recorded reasons for coming to the conclusion that there has been contravention. Certain factual aspects have been highlighted. The correctness of the conclusions can be appropriately tested by the appellate authority. We do not think it appropriate to express any opinion about merits since the petitioners have to avail the alternate remedy. In Tin Plate Co. of India Ltd. Vs. State of

Bihar and Others, Apex Court observed that when an alternative and equally efficacious remedy is open to a person, he should be required to pursue the remedy and not to invoke extraordinary jurisdiction of the High Court under Article 226 of the Constitution, and where such a remedy is available, it would be sound exercise of discretion to refuse to entertain the writ petition under Article 226 of the Constitution. While dismissing the writ petition on the ground of alternative remedy. High Court is not required to express any opinion on merits of the case, which is to be pursued before the alternative forum. This is a fit case where the petitioner - ICCL should be asked to avail the statutory remedy of appeal.

9. At this juncture, it is necessary to take note of the plea of petitioners about the statutory requirement of deposit of duty demanded or penalty levied, pending appeal, u/s 129E of the Act. Though deposit of duty is a pre-requisite for entertaining appeal in terms of the provision, deposit can be dispensed with subject to such conditions as the Appellate Tribunal may deem fit to impose so as to safeguard the interests of the Revenue. It is not incumbent upon the Appellate Authority to dispense with the requirement of entire deposit. It could take into consideration all the circumstances of the case and the means of the appellant to pass an order either dispensing with the deposit of the entire disputed amount or a part of it. It may be with or without any condition. Discretion has been given to the Appellate Authority to either waive the deposit of the entire amount of penalty or duty or reduce the quantum to be so deposited if the Appellate Authority is of the opinion that the requirement regarding the deposit of the full amount of penalty or duty will cause undue hardship to an appellant. The object underlying the provision would be clearly served if a finding is recorded that the requirement regarding deposit of duty demanded or penalty levied would cause undue hardship to the appellant. The Appellate Authority is required to take a realistic view of the matter and dispense with the deposit in appropriate cases. If the financial position of the appellant is precarious and it is not possible for it to comply with the requirement regarding deposit of the disputed amount or it may do so by irreparable loss, it cannot be said that the balance of convenience is against the grant of relief. Thus, the concept of balance of convenience would cover most of the criterion relevant to the question.

10. The appellant before the Tribunal has no absolute right of stay. He obtains stay of realization of tax levied or penalty imposed in an appeal subject to limitations of Section 129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardship". That discretion must be exercised on relevant materials honestly, bona fide and objectively. As observed in *Vijay Prakash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Prevention), Bombay* - AIR 1968 S.C. 2010 it is a discretion vested in an obligation to act judicially and properly.

Normally we would have asked the petitioner to move the Appellate Authority for dealing with the question of dispensing with the requirement of deposit of duty

or penalty. But keeping in view the fact that the writ petition is pending for more than five years in this Court, and the nature of controversy involved, we think it appropriate to give direction in that regard. This is certainly an unusual procedure but we make it clear that it shall have no precedent value, having been passed in the peculiar background of the case.

11. The consolidated balance-sheet and the financial statements of ICCL filed show that the loss during the financial year 1997-98 is in the neighborhood of Rs. 272 crores and the brought-forward loss from the previous period was about Rs. 586 crores, making a total of about Rs. 858 crores. The details of expenditure for the aforesaid financial year 1997-98 show that the interest and financial expenses are in the neighbourhood of Rs. 208 crores which far exceeds the income which is around Rs. 80 crores. That being the position, prima facie it can, certainly be observed that the financial condition of the ICCL is precarious. We, therefore, direct the Tribunal to entertain the appeal if filed by the petitioner within a month from today without insisting upon pre-deposit. However, the Captive Power Plant which was seized on 9-2-1994 shall continue to be under attachment of the Customs Department till disposal of the appeal by the Tribunal.

12. The writ petition is disposed of with the above directions and observations.

There shall be no order as to costs.

S.N. Phukan, C.J.

I agree.