
(2006) 03 GAU CK 0039
In the Gauhati High Court

Kitply Industries Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-03-2006

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A
Constitution of India, 1950 — Article 226

Citation : (2006) 2 GLT 641 : (2008) 11 STR 323

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—All the three writ petitions by and between the same parties, being based on same set of facts and the issue involved in all the three writ petitions being the same, they have been heard analogously and are being disposed of by this common judgment and order.

2. Amidst the writ proceedings initiated by the petitioners one after another, the first one being of 1987, the notices to show cause issued against the petitioner under Rule 233A of the Central Excise Rules, 1944 and the actions initiated thereunder including the passing of the final order dated 31-10-2001 are yet to attain the finality.

3. The petitioner, a company registered under the Companies Act, 1956, represented by the petitioner No. 2 is engaged in the business of manufacture and sale of plywood products. Formerly the company was known as Sudarsan Plywood Industries Ltd. (SPI) This company was merged with another company namely Himalayan Plywood Industries (P) Ltd. (HPI) with effect from 1-9-85 and in terms of the scheme of amalgamation, all assets, rights and liabilities of the Himalayan Plywood Industries (P) Ltd. stood transferred to Sudarsan Plywood Industries Ltd. with the renaming of the company as Kitply Industries Ltd. Which is the petitioner No. 1 in the present proceedings.

4. On or about 24-2-84 the officers of the Directorate of Revenue and Intelligence, along with officers of the respondents searched the business premises of the then HPI and SPI and the Directors and seized large number of documents in exercise of powers under the provisions of the Central Excise Act, 1944 and the Rules framed thereunder.

5. Pursuant to such search and seizure, the respondents issued show cause notices dated 9-10-85, 9-4-87 and 9-10-85 with which the present writ proceedings are concerned. According to the show cause notices, the petitioner has contravened the provisions of Rule 9(1), read with 173F, 173B, 173C, 173G(1) and (4) read with Rule 53 and Rule 226 of Central Excise Rules, 1944 attracting the proviso of sub-section (1) of Section 11A as regards recovery of duties short levied and short paid. According to the show cause notices, the petitioner in each of the cases evaded Central Excise duty to the extent of Rs. 2,41,45,194/-; Rs. 41,35,714/- and Rs. 2,51,58,639/- respectively for the periods from June, 1980 to 24-2-84; 1-3-84 to 31-3-85 and June, 1980 to 24-2-84 respectively.

6. Being aggrieved by issuance of such show cause notices, three writ petitions were filed and the same were registered and numbered as Civil Rule Nos. 650/1987; 856/1987 and 1072/1987 respectively. In Paragraph 7 of each of the present writ petitions, the petitioner has stated that in and around the filing of the writ petitions, they by their Annexures-1, 2 and 3 letters dated 24-3-87, 8-5-87 and 19-9-88 requested the respondents for furnishing copies of the 34 documents out of the voluminous documents seized from the petitioner. According to the petitioner, although they were allowed inspection of voluminous records seized by the respondents, but the required 34 documents were not made available to them. It will be pertinent to mention here that no such plea was raised in the earlier writ proceedings, although the show cause notices were assailed on various grounds including the very jurisdiction of the authority to issue the same. This has been revealed on perusal of the records of the earlier writ proceedings.

7. The aforesaid show cause notices and the consequential action could not be finalized by the respondents in view of the interim order passed in the aforesaid writ proceedings to the effect that while the reassessment proceedings pursuant to the show cause notices could go on, but no final order would be passed. Such an interim order was passed on the basis of the Miscellaneous Applications filed by the petitioner in the respective writ petitions.

8. The said three writ petitions were heard analogously and by judgment and order dated 3-1-95, as reported in 1995 (2) GLT 01, all the three writ petitions were allowed by setting aside and quashing the show cause notices. Being aggrieved the respondents preferred writ appeals being W.A. Nos. 168, 169 and 170 of 1995 and the writ appeals were allowed by judgment and order dated 9-4-1997 as reported in 1997(2) GLT 1.

9. Pursuant to such dismissal of the writ petitions, the respondents by their communications dated 5-6-97 and 6-6-97 (Annexures-4 and 5) requested the petitioner to furnish their reply to the show cause notices. In reply thereto, the petitioner by their Annexure-6 letter dated 28-6-97 took the stand that in absence of the required documents, they were handicapped from submitting their effective and proper reply in defence. The respondents by their communication, dated 2-12-97 once again requested the petitioner to submit their show cause reply. It was intimated that upon failure of the petitioner to do so, decision would be taken ex parte. In response to this communication, the petitioner by their Annex-ure-8 letter dated 12-12-97 once again reiterated their stand of purported non-receipt of the documents and requested for supply of those documents. In the meantime, they also approached this Court once again by filing a writ petition being Civil Rule No. 5976/197 and the same was disposed by order dated 19-12-97, of with the following orders:

Within a period of 10 days from the date of receipt of the order, the Department shall do the needful to furnish the photocopies of the documents as asked for vide Annexures-4, 5 and 6, if not already given and within 10 days thereafter the show cause reply shall be filed. For this period, the authority shall not proceed ex-parte with regard to the matter. But after that the authority may do the needful to proceed with the matter exparte.

(Emphasis added)

10. It is the case of the petitioner that after the aforesaid order passed by this Court, they made a request to the respondents by their Annexure 10 letter 19-12-97 made a request for providing them with the documents as mentioned in their earlier letters dated 24-3-87, 8-5-87 and 19-9-88. It is their further case that when the documents sought for were not furnished, the petitioner by its letter dated 24-2-98 (Annexure-11) made a further request to furnish the documents. It is also their case that, apart from these communications, they also made enquiries in the office from time to time for getting the documents and eventually by their letter dated 11-12-2000 enquired about the status of the proceeding. In the communication, they also stated that due to long lapse of time (15 years), the proceedings should be dropped and the chapter be closed being barred for adjudication.

11. The petitioner reiterated their contention by appearing before the respondent No. 2 on 14-3-2001 and the respondent No. 2 i.e. the Commissioner, Central Excise recorded the proceeding vide Annexure-13 record of personal hearing to the effect that all the three cases mentioned above could be dealt with together since they relate to the same issue of similar nature. He also recorded the plea of the petitioner that it would not be possible to submit reply to the show cause notices in absence of the documents and that the proceedings be dropped since more than 15 years had elapsed. The prayer of the petitioner for a final decision in the matter was also recorded in the order.

12. After the aforesaid developments, the petitioner was communicated vide letters dated 31-10-2001, the orders dated 31-10-2001 passed by the Commissioner of Central Excise in respect of all the three cases. By the said orders, the petitioner in all the three cases, have been made liable, upon confirmation of the demand, the amount of Rs. 2,41,45,194/- with penalty of Rs. 2,00,000/- and Rs. 1,00,000/- (first case); Rs. 41,35,714.07 with penalty of Rs. 5,00,000/- and Rs. 1,00,000/- (second case) and Rs. 2,51,58,639.30 with penalty of Rs. 20,00,000/- (third case) respectively. The orders have been passed in terms of the provisions of Section 11A of the Central Excise Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944. The penalty has been imposed in terms of the provisions of Rule 173(q) of Central Excise Rules, 1944.

13. While forwarding the aforesaid impugned orders by letters, dated 31-10-2001, it was intimated that the petitioner would be entitled to prefer appeals against the orders before the East Regional Branch of the Appellate Tribunal located at Kolkata. The requirements for preferring the appeals were also indicated in the letters.

14. On receipt of the impugned orders, the petitioner filed the instant writ petitions on 12-12-2001 and this Court, while issuing notices by orders dated 14-12-2001, kept open the question as to whether the writ petition should at all be entertained when a statutory remedy of appeal is available to the petitioner. It is on the strength of the interim orders passed by this Court, the impugned orders have not been implemented till date.

15. The only ground urged in the writ petitions is that the petitioner in all the three cases having not been supplied with copies of the 34 documents indicated in Annexures-1 and 2 letters dated 24-3-87 and 8-5-87, the petitioner could not submit their show cause replies, which resulted in passing the impugned orders ex parte against them. According to the petitioner non-supply of the copies of the said documents deprived them of filing the effective show cause replies and the respondents could not have passed the impugned orders without providing the petitioner the reasonable opportunity of being heard.

16. The respondents have filed their counter affidavits. At the very outset they have stated about the alleged illegalities committed by the petitioner. The respondents carried out the search and seizure operations in the business premises of the petitioner at Kolkata and Assam on the basis of the information collected by the Directorate of Anti-Evasion that the company of the petitioner resorted to dubious method of realizing additional amount from the wholesale buyers over and above the price declared to the Department through under valuation and clearance of prime quality of plywood ex-factory in the garb of defective grades having lower rate of duty and subsequently sold under different nomenclatures of much higher price. Simultaneous search were also conducted at the Factories, Registered Office, Central Office/Head Office, Godowns and residences of the Directors, Managers and Branch Offices/Consignment Sale Agents" offices at Kolkata, Bombay, Nagpur, Ahmedabad, Delhi, Kanpur,

Hyderabad, Madras, Bangalore, Tinsukia and Margherita and records and documents relating to evasion of duty were seized.

17. According to the respondents upon examinations of the records and documents so seized, revealed large scale illegalities committed by the petitioner's company and its Directors etc. towards evasion of huge amount of duty were detected and on the basis of the same, the show cause notices were issued. Be it stated here that although the petitioner have not enclosed any one of the show cause notices to the writ petitions, the learned Counsel for the petitioner produced one of the show cause notices dated 9-10-85 addressed to the company and the Group Chairman. The other two show cause notices are stated to be in the same line with the variations in respect of the demand and penalty.

18. As regards the plea of non-furnishing of the copies of the 34 documents (26+8), the respondents have stated that in response to the request for supply of copies of the documents, the petitioner-company was allowed to obtain the copies of replied upon documents. The petitioner through its representative made Xerox copies of the documents seized by installing their own Xerox machine and the task of Xeroxing the documents had begun in June, 1986. On the plea of developing mechanical defects in the Xerox machine, the petitioner requested for further time and the same was granted. Once again in July, 1986, a further request for allowing more time was made on ground of the operator having fallen sick and there being power shortage. In September, 1986 also the petitioner made request for further time on grounds of continuous rain in Calcutta and Durga Puja festival. Such prayers made, were granted.

19. The petitioner made further request for granting more time permitting them to make the Xeroxing of the documents at the end of February, 1987 on the plea that the climatic condition of Shillong is not suitable in December and January. In the meantime, the respondents by their letter dated 3-12-86 asked the petitioner to examine the records immediately and filed their reply within 10 days. The petitioner did not comply with the same and informed the respondents by their telegram, dated 12-2-87 that the person concerned had fallen sick. However, the petitioner assured of completion of examination of documents by 25-2-87 and furnishing of replies to the show cause notices by 7-3-87. The petitioner by their letter, dated 11-2-87 informed the respondents that they would be sending their person to attend the office of the respondents on 18-2-87 for examination of the records. However, this time they made a further request for granting three months time for furnishing the replies to the show cause notices on completion of the examination of records.

20. The respondents in their counter affidavit have also stated as to how, in response to the said letter of the petitioner, the Additional Collector, Customs & Central Excise, Shillong, by his letter, dated 2-3-87 informed the petitioner that they should complete their examination of records within one week and thereafter should submit reply within 15 days. Significantly, in this letter, the

respondents indicated that the petitioner had already completed Xeroxing of documents on the basis of which the show cause notices had been issued. However, the petitioner again inspected and took copies of the documents on 18-12-87 and 29-1-88. Thereafter, the Additional Collector directed the petitioner to submit their reply on 25-9-88 without fail. When the matter rested thus, the petitioner approached this Court by filing the aforesaid writ petitions being Civil Rule Nos. 650/1987, 856/1987 and 1072/1987 questioning the very authority and jurisdiction of the respondents to issue the show cause notices. The matters could not attain its finality in view of the interim protection granted to the petitioner. However, it was provided in the interim order that the proceedings would go on, but no final order should be passed.

21. As to what transpired thereafter, has already been noticed above. At the first instance, the writ petitions were allowed by the learned Single Judge. However, the same were dismissed on appeal. In the writ appeals the finding recorded by the learned Single Judge that the impugned show cause notices were without jurisdiction was held to be an error. It was only thereafter, the petitioner started to agitate for supply of the 34 documents in reference to their earlier letters mentioned above.

22. After the judgment in the writ appeal delivered on 9-4-97, the petitioner once again approached this Court by way of filing the writ petition being Civil Rule No. 5976/1997 and the same was disposed of by the above quoted order dated 19-12-97. As per the requirement of the said order, the petitioner was to be supplied with the photocopies of the documents, if not already supplied, and within 10 days thereafter the petitioner was to furnish the replies. The petitioner made the aforesaid representations dated 19-12-97 and 24-2-98 asking for the documents and thereafter maintained silence in the matter till the personal hearing was given to them on 14-3-2001 in which proceeding their submission to finalise the proceedings without keeping the same pending any longer was also recorded.

23. Amidst the aforesaid developments, the show cause notices issued during 1985-87 and the impugned orders dated 31-10-2001 have not attained its finality till date. At the first instance, the petitioners unsuccessfully contended that the show cause notices were without any jurisdiction and now has called in question, the impugned orders dated 31-10-2001 confirming the demand made to the petitioner. In between, they also initiated the writ proceeding against purported non-supply of documents. Thus, the proceedings initiated during 1985-87 by way of issuance of the three show cause notices are yet to take the final shape, evenafter elapse of long 20 years, out of which, long 15 years have consumed in legal proceedings initiated by the petitioner.

24. Mr. H. Roy, learned Sr. Counsel assisted by Mr. K. Goswami, learned Counsel appearing for the petitioner in all the three writ petitions in his painstaking arguments attacked the action of the respondents, which resulted in the impugned orders dated 31-10-2001. Placing reliance on the various decisions, he

submitted that the impugned orders could not have been issued without first complying with the minimum requirement of providing the party concerned the documents on the basis of which the formation of opinion towards passing the impugned orders was based. The decisions on which Mr. Roy, learned Sr. Counsel for the petitioner placed reliance are primarily on the principle of prejudice being caused to the party against whom an adverse order is passed without furnishing the documents forming the basis of the order and the alternative remedy being not a bar to invoke the writ jurisdiction. The decisions are as follows:

AIR 1961 S.C. 1623 (State of M.P. v. Chintaman Sadashiva Vaishampayan)

1987 SCC 518 (Chandrama Tewari v. Union of India)

Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others,

(2005) 6 SCC 499 (State of H.P. v. Gujarat Ambuja Cement Ltd.)

Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,

1979 (4) E.L.T. (613) (Collector of Central Excise v. Sanawarmal Purohit)

Nuwood Private Limited, Madras Vs. Superintendent of Central Excise,

25. Mr. B. Sarma, learned Central Government Standing Counsel supporting the impugned action and the orders passed by the respondents submitted that the petitioner having been provided with all reasonable opportunity to get the documents either examined or to take copies of the same, the plea of non-supply of the documents is just to make out a case so as to absolve the petitioner from the liability to pay huge excise duty. He submitted that going by the sequence of events, the petitioner all along made all out efforts to escape from the liability. Emphasizing the need for substantial justice and not to give too much of credence to technical pleas of the like nature, Mr. Sarma, submitted that the petitioner having installed its own Xerox machine in the office premises of the respondents only to get the copies of the documents, it does not lie on their mouth to say that they were not supplied with the documents.

26. Mr. Sarma, learned CGSC, apart from the aforesaid submissions also seriously argued and raised the question of very maintainability of the writ petitions in view of there being alternative remedy by way of an appeal against the impugned orders. Referring to the earlier decision in the writ appeals, he submitted that after the matter attained its finality by way of dismissal of the writ petitions; it was incumbent on the part of the petitioner to respond to the show cause notices instead of dillydallying with the matter. He also placed reliance on the two decisions, which are Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others,]

27. As noticed above, the writ petitions were entertained, keeping the question of maintainability open, in view of the alternative remedy available to the petitioner. Thus, the rule that even if an alternative remedy is available to a

party, but once the writ petition is admitted and pending for a considerable period of time, the plea of alternative remedy available to the party may get somewhat diluted is not available in the instant case. The question of maintainability of the writ petitions in view of the statutory remedy of appeal being available to the petitioner, was specifically kept open by orders dated 14-12-2001, by which notices were issued in all the three writ petitions.

28. There is no dispute at the bar that alternative statutory remedy by way of preferring appeals against the impugned orders was available to the petitioner under the provisions of the Central Excise Act, 1944. In the first round of litigation, which resulted in the decision reported in 1995 (2) GLT 01, in favour of the petitioner but reversed by the Division Bench by its judgment reported in 1997 (2) GLT 01, the petitioner never raised any grievance regarding alleged non-supply of documents. The records of the said cases were called for and upon verification of the same, what has transpired is that there was no whisper about the alleged non-supply of the documents and as to whether the same caused any prejudice to the petitioner. Upon a reading of the writ petitions in the said proceeding, what has transpired is that the petitioner clearly understood the show cause notices including the materials thereof on the basis of which they called in question the very jurisdiction of the authority to issue the show cause notices. The plea now being raised was never the plea in the said proceeding. The question necessarily arises as to whether the petitioner can make challenge to the action of the respondents on piecemeal basis.

29. As per the principles underlying *res judicata* and/or constructive *res judicata*, any matter, which might and ought to have been made ground of defence or attack in the former proceeding shall be deemed to have been a matter directly and substantially in issue in the former proceeding. As noticed above, in the first proceeding the petitioner effectively dealt with the show cause notices so as to question the very jurisdiction of the same and having failed to succeed on that occasion, resorted to the second proceeding alleging non-supply of 34 documents out of the voluminous documents seized from them. In the writ petitions pertaining to the first proceeding, there was no whisper about non-supply of any document, rather from the revelations made in the counter affidavit, they were given enough opportunities even to the extent of installing their own Xerox machine in the office premises of the respondents enabling them to get copies of the same which necessarily included the opportunity to examine the records.

30. The above revelations give an impression that the petitioner all along wanted to delay the proceeding on this or that pretext and they are successful also inasmuch as the show cause notices issued during 1985-87 have not attained its finality, because of the writ proceedings initiated by the petitioner way back in 1987. Thus, on the basis of the materials on record, I am of the considered opinion that the petitioner cannot take the plea of non-supply of documents by initiating further proceedings after conclusion of the first proceeding referred to

above. In this connection, the relevant note, dated 16-11-90 of the Additional Collector, by which representative of the petitioner was authorized to bring their own Xerox machine and to take photocopies of the documents is quoted below:

Customs & Central Excise: Shillong ***

Dated 16-11-90

Shri S.K. Dheer of M/s. Kitply Industries Limited requested for taking photocopies of certain documents seized in connection with various show cause notices issued to them in the past to enable them to reply to the said show cause notices. Since the Department is not in a position to make photocopies these voluminous documents, I have allowed the party to bring their own machine and take photocopies of these documents in the presence of an Inspector at their cost either in the new building or old building, wherever facilities are available from 26th November onwards.

Sd/- (L.R. Mithran) Additional Collector (TECH) Customs & Central Excise, Shillong

To : 1. Shri S.K. Dheer, M/s. Kitply Industries Ltd.

2. Superintendent (Anti-Evasion)/(Adjudication). They will depute suitable officers for this and ensure that the documents are taken and replaced by the officer who will be responsible for its safe custody.

3. A.C. (Legal).

31. At the first instance the petitioner on the basis of the materials on record and with their clear understanding of the matter questioned the very jurisdiction of the authority to issue the show cause notices. Having failed in that round of litigation from 1987 to 1997, they took recourse to the second round of litigation in which direction was issued for supplying the documents with the rider that if not already supplied. A specific direction was issued to submit the show cause replies within 10 days thereafter. However, the petitioner instead of complying with the said direction, submitted two more letters dated 19-12-97 and 24-2-98 asking for the copies of the 34 documents and thereafter maintained silence in the matter. It was only on 14-3-2001, the representative of the petitioner appeared before the Commissioner, Central Excise and the proceedings thereof as recorded in Annexure-13 order sheet, inter alia included the prayer of the petitioner for a final decision in the matter. It was only thereafter the impugned order dated 31-10-2001 was passed.

32. The specific plea of the respondents in Paragraph 22 of the counter affidavit that by letter dated 2-3-87, the petitioner was intimated about completion of taking Xerox copies of the seized documents on the basis of which the show cause notices had been issued; that the petitioner again inspected and took copies of the records on 18-12-87 and 29-1-88 and accordingly Additional Collector directed them to file reply on 25-9-88; that the petitioner took photocopies/Xerox copies of the documents from 4-12-90 to 7-12-90 and again

from 20-2-91 to 22-2-91; that they were asked to file reply within October, 1991 and again by 7-2-92 and once again by 6-6-97 have not been denied by the petitioner.

33. The petitioner have also not denied the specific averment made in the counter affidavit that the representatives of the petitioners on a number of occasions visited the office of the respondents and made inspection of all the seized documents and obtained copies thereof. The respondents in their counter affidavit have also specifically stated that all the relied upon documents were made available to the petitioner and they were allowed to operate their Xerox machine and take copies as per their own convenience. The respondents have also stated that if the petitioner lost the particular documents, the respondents are in no way responsible for the same. It is significant to note the specific plea of the respondents that the petitioner at the time of taking copies of the documents never lodged any complaint of non-production of relied upon documents. There is no denial of the same on the part of the petitioner.

34. The respondents have also stated that as per the direction of this Court contained in the order dated 19-12-97 passed in the second round of litigation i.e. Civil Rule No. 5976/1997, since the petitioner had already inspected and obtained the documents, there was no question of further supplying the same. As per the said direction of this Court, the petitioner was entitled to the copies of the said documents only if the same had not been supplied to them. The specific case of the respondents is that the documents were already furnished. There is no denial of the fact that the petitioner installed their own Xerox machine in the office of the respondents for the purpose of getting the copies of the documents. Their umpteen numbers of prayers for granting more time for inspection of documents were granted by the respondents.

35. The petitioner also has not denied the letters by which the petitioner was requested to submit show cause replies about which a mention has been made in the counter affidavit. In such a situation, it cannot be said that the petitioner and for that matter their representatives could not examine the relied upon documents or could not take copies thereof. When the respondents allowed the petitioner to install their own Xerox machine in their office premises facilitating Xeroxing of the copies, it is hard to believe that they would have denied supply of only 34 documents out of the huge and voluminous records and documents.

36. Coming to the question as to whether the writ petitions are maintainable in view of the alternative remedy being available to the petitioner, as observed above, the question was left open to be decided, while issuing notice on the writ petitions. Learned Counsel for the petitioner as well as the respondents have placed reliance on the decision of the Apex Court in Harbanslal Sangia (supra). Noticing the fact that the petitioners' dealership came to be terminated for an irrelevant and non-existent cause, the Apex Court in that case observed that the rule of exclusion of writ jurisdiction on availability of an alternative remedy is a rule of discretion and not compulsion and that in an appropriate case the High

Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental right; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an act is challenged.

37. In the instant case, learned Counsel for the petitioner emphasized on the principle No. (ii). Apart from the fact that to attract this principle in the given fact situation of the present case, the petitioner will have to show that prejudice was caused due to non-supply of the particular documents, it has been held above that the petitioner and for that matter their representatives were given enough opportunity to examine the records and to take Xerox copy of the documents as per their desire. Furnishing of documents also includes examination of records and taking extracts of the same if the records are voluminous. The petitioner by installing their own Xerox machine took the copies of the documents and at no point of time raised any objection regarding non-availability of any document. It was only after their unsuccessful first round of litigation, they came up with the plea before this Court. However, in the process they have conveniently ignored the stand of the respondents in their counter affidavit. Thus, I am of the considered opinion that there was no violation of the principles of natural justice.

38. In the case of Whirlpool Corporation (supra), the Apex Court while reminding that the High Court exercising its power under Article 226 of the Constitution of India, has a discretion to entertain or not to entertain a writ petition and that the High Court has imposed upon itself certain restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction, held that a writ petition can be maintained on the three principles mentioned in the case of Harbanslal Sangia (supra). In view of the discussions made above, this case is also of no help to the case of the petitioner, rather would answer the question about the maintainability of the writ petition in the negative.

39. In the case of Gujarat Ambuja Cement (supra), on which the learned Counsel for the petitioner placed reliance, the Apex Court while observing that the power relating to alternative remedy has been considered to be a rule of self imposed limitation and that it is essentially a rule of policy, convenience and discretion and never rule of law, it is within the discretion of jurisdiction of the High Court to grant relief under Article 226 of the Constitution. The Apex Court further observed 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 and that if some body 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. In the instant case, the position has been explained above. I am of the considered opinion that to exercise the writ jurisdiction in the given facts and circumstances of the case instead of augmenting the cause of justice, it will be a failure of justice and the

abuse in the process of the court.

40. The other decisions on which the learned Counsel for the petitioner placed reliance are all on the question of violation of the principles of natural justice. The decisions have been pressed into service to bring home the point of argument that because of non-furnishing of the particular documents, there was violation of the principles of natural justice and consequently the respondents could not have passed the impugned order ex parte. Suffice is to say that when there is no quarrel with the proposition of law laid down in the said cases, in view of the findings recorded above, the said cases are of no assistance to the case of the petitioner.

41. In the case of Ajit Kumar Nag (supra), on which the learned Counsel for the respondents placed reliance, the Apex Court dealing with the rule of audi alteram partem, observed thus:

44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing is better and should always be preferred to from Laws of Med, Laws of God also observed the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden threat. (See R.V. University of Cambridge 18.) But we are also aware that the principles of natural justice are not rigid of immutable and hence they cannot be imprisoned in a straight-jacket. They must yield to and change with existence of situation. They must be confined within their limit and cannot be allowed to run wild. It has been stated "to do a great right" after all, it is permissible some time "to do a little wrong" (Per Mukherjee C.J. in Charan Lal Sahu v. Union of India 19 Bhupal Gas Disaster) SCC 9705 124). While interpreting legal provisions a court of law cannot be unmindful of the hard realities of life. In your opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than "precedential".

42. I may also gainfully quote the observation of the Apex Court in Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another, .

12. Mr. Sunil Gupta, learned Counsel appearing for the petitioner, contended that the remedy before the tribunal under the U.P. Public Service Tribunal Act is wholly illusory inasmuch as the tribunal has no power to grant an interim order. Therefore, he contends that the High Court ought not to have relegated the petitioner to a fresh proceeding before the said tribunal. We do not agree with these arguments of the learned Counsel. When the statute has provided for the Constitution of a tribunal for adjudicating the disputes of a Government servant,

the fact that the Tribunal has no authority to grant an interim order is no ground to by pass the said tribunal. In an appropriate case after entertaining the petitions by and aggrieved party if the tribunal declines an interim order on the ground that it has no such power then it is possible that such aggrieved party can seek remedy under Article 226 of the Constitution but that is no ground to bypass the said tribunal in the first instance itself. Having perused the impugned order, we find no infirmity whatsoever in the said order and the High Court was justified in directing the petitioner to approach the Tribunal. In the said view of the matter, the appeals are dismissed. No costs.

43. The above principle has been reiterated by the Apex Court in the case of Transmission Corporation of A.P. Vs. Ch. Prabhakar and Others, and so also in the case of Rajureshwar Associates Vs. State of Maharashtra and Others, . The Apex Court observed that the proceedings under Article 226 are not a substitute for an appeal.

44. In the instant case in spite of receipt of the show cause notices and understanding the same so as to question the very jurisdiction towards issuance of the same, the petitioner has raised the issue relating to violation the principles of natural justice. The issue has been discussed in detail above. In the case of Bar Council of India v. High Court of Kerala, the Apex Court observed:

24. The principles of natural justice, it is well settled, cannot be put into a straight-jacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in Sohan Lal Gupta v. Asha Devi Gupta of which two of us (V.N. Khare, C.J. and Sinha, J) are parties wherein upon noticing a large number of decisions it was held:

29. The principles of natural justice, it is trite, cannot be put in a straightjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.

25. The principles of natural justice, it is well settled, must not be stretched too far.

45. In Union of India and Another Vs. Tulsiram Patel and Others, , the Apex Court held "though the two rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straight-jacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules

and also by the Constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is Governed."

46. The Apex Court in the case of State Bank of Patiala and others Vs. S.K. Sharma, observed thus:

32. Now, coming back to the illustration given by us in the preceding para, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of Sub-clause (iii) be in the interest of justice or would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities, which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be counter-productive exercise.

47. In view of the entire facts and circumstances of the case discussed above, the plea of violation of principles of natural justice is not available to the petitioner. Thus, both on merit of the contentions raised in the writ petition as well as on ground of there being alternative remedy by way of appeals against the impugned orders, all the writ petitions fail.

Writ petitions are dismissed, leaving the parties to bear their own costs.