
(1992) 12 AP CK 0025

In the Andhra Pradesh High Court

Case No : Writ Petition No. 17814 of 1990

Procter and Gamble India Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-12-1992

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1994) 46 ECC 166 : (1994) 69 ELT 442

Hon'ble Judges : S.S. Mohammed Quadri, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : Ashok Desai, for C.R. Sridharan, for the Appellant; P. Innayya Reddy, Senior Standing Counsel for the Central Government, for the Respondent

Judgement

Syed Shah Mohammed Quadri, J.—In this petition filed under Article 226 of the Constitution of India, the petitioner seeks a writ of Mandamus praying to quash the decision of the Assistant Collector, Central Excise, Hyderabad, in C. No. V/30/17/19/89. V.C.I. dated 12-4-1990 after declaring that the petitioner's products Vicks Vaporub and Vicks Inhaler (hereinafter referred to as "the products") fall under sub-heading 3003.30 of the Central Excise Tariff Act, 1985 (for short CETA) and for consequential direction restraining the respondents, their servants, officers and agents from levying and recovering duty of excise under sub-heading 3003.10 with immediate effect and for a further direction quashing the proceedings before the Collector (Appeals) including the order for refund of the duty paid by the petitioner from 15th April, 1985 and for costs.

2. It would be appropriate to note the relevant facts which led to filing of this Writ Petition.

3. The petitioner is a company registered under the Companies Act. It manufactures and sells, inter alia, Ayurvedic drug products known as Vicks Vaporub and Vicks Inhaler and Vicks cough products. The first two mentioned drugs are manufactured at its factory in Medak District of Andhra Pradesh. The controversy in this Writ Petition relates to classification of the said two drugs viz.

Vicks Vaporub and Vicks Inhaler (the products) under the CETA. The petitioner claims that they fall under sub-heading 3000.30 whereas the Excise authorities classified them under sub-heading 3000.10. If the said products are classified as contended by the petitioner it need not pay any excise duty, but if the contention of the department is accepted, the rate of excise duty payable is 15%. The petitioner obtained a letter of registration from the Directorate General of Technical Development, Government of India for manufacture of Ayurvedic drugs including the said products in Andhra Pradesh on 6-9-1984. One of the conditions of the said letter is that it should obtain permission from the State Drug Controller before starting production of the items under reference. Under Rule 153 of the Drugs and Cosmetics Rules, 1945 (for short "the Rules") made by the Central Government under Sections 6(2), 12 and 33 of the Drugs and Cosmetics Act, 1940 (for short "the Drugs Act"), the petitioner applied for a licence for manufacture of the Ayurvedic drugs, which was granted under Rule 154 of the Rules. Thus the petitioner has been manufacturing the said products. Initially the products were classified under the then sub-heading 3000.19 but latter the petitioner's company filed fresh classification lists with the Assistant Collector, Central Excise, Hyderabad, the 4th respondent herein, classifying the said products as Ayurvedic medicaments liable to duty under sub-heading 3000.30 of CET on 15-4-1986. The 4th respondent rejected the classification lists filed by the petitioner on 15-4-1986, confirming the earlier classification. The petitioner carried the matter in appeal before the Collector (Appeals), Central Excise, Hyderabad, the 2nd respondent. That appeal was decided ex parte rejecting the contention of the petitioner on 10-1-1987. The petitioner filed a further appeal before the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the CEGAT") against the said order of the 2nd respondent. On 10-2-1988 the CEGAT set aside the order of the 2nd respondent dated 10-1-1987, remanded the matter to the 4th respondent for de novo enquiry, inter alia holding that Vicks Vaporub is known as Ayurvedic medicament in common parlance, to determine whether the ingredients of Vicks Vaporub and Vicks Inhaler are mentioned in the authoritative text book and thus allowed the appeal. Special leave application filed by the 4th respondent against the said order of CEGAT was dismissed by the Supreme Court. After remand the 4th respondent, by order dated 12-4-1990, held that Vicks Vaporub and Vicks Inhaler were not Ayurvedic medicaments and as such could not be classified under sub-heading 3000.30. Dissatisfied with the said order of the 4th respondent dated 12-4-1990, the petitioner filed an appeal before the 2nd respondent on 9-7-1990 u/s 35 of the Central Excises and Salt Act, 1944 (for short "the Central Excise Act"). That appeal is pending. While so the petitioner approached this Court challenging the order of the 4th respondent, on the grounds among others, that the 4th respondent gravely erred in going behind the order of remand and in not accepting the licence granted under the Drugs Act and the Rules made thereunder as conclusive evidence of the fact that the products are Ayurvedic medicaments and committed error of jurisdiction and violated the principles of natural justice in accepting the evidence of the department behind the back of the petitioner.

4. The 4th respondent filed a counter-affidavit. It is stated that originally the assessee filed the classification lists for the products on 7-3-1986 classifying them under sub-heading 3000.19, which was approved by the 4th respondent on 31-3-1986. Again it filed lists on 15-4-1986 classifying them under sub-heading 3000.30 as Ayurvedic medicaments at Nil rate of duty. The ingredients used in the said products are synthetically prepared and are not natural extracts, so they are not the ingredients mentioned in Ayurvedic books, as in those books only natural extracts of herbs and plants are dealt with. Hence the classification filed by the petitioner under sub-heading 3000.30 is not correct. The registration letter of D.G.T.D. relied upon by the petitioner cannot be taken into consideration for Central Excise classification under the CET and the provisions of Drugs Act are not relevant for the classification of the products which is done on the basis of the definition given in CET and the products have been correctly classified. Since there is no notification or rule or any provision in CETA or the Central Excise Act directing reference to Drugs Act for classification of drugs as Ayurvedic under Chapter 30 and as there is no other binding authority on the quasi-judicial authority under CETA to follow the provisions of the Drugs Act while classifying the goods under Chapter 30 of CETA, the classification made, is correct. The petitioner was given personal hearing and was asked to show Ayurvedic pharmacopoeia wherein their products' specifications are mentioned as Ayurvedic products. But they failed to substantiate the same. Hence the 4th respondent did not agree for the change of the classification. It is further stated that the CEGAT remanded the matter for de novo enquiry into two aspects viz. (1) whether the product is known as Ayurvedic medicine in common parlance and (2) to examine the ingredients of the products as mentioned in the authoritative Ayurvedic books. The department produced additional evidence to discredit the view that in common parlance Vicks Vaporub is regarded as Ayurvedic medicine and as the CEGAT has not forbidden admission of such additional evidence, it was admitted. The 4th respondent had not acted beyond the order of remand. After verifying every aspect, the 4th respondent correctly classified the goods as no conclusive evidence was produced to show that the products are Ayurvedic medicaments. It is added that during the pendency of its appeal before the 2nd respondent, the petitioner approached the High Court by filing the Writ Petition and for these reasons it is prayed that the Writ Petition may be dismissed.

5. A reply affidavit has been filed by the petitioner denying the contentions raised and the allegations made in the counter-affidavit and reiterating and amplifying the contentions raised in the Writ Petition.

6. Mr. Ashok Desai, the learned Senior Counsel appearing for the petitioner, contends that the Drugs Act contains comprehensive provisions regarding manufacturing, labelling, stocking and sale of drugs including in particular Ayurvedic drugs and has provided detailed machinery and set up expert body to scrutinize, issue and renew licenses for manufacture of Ayurvedic drugs under the rules therefore when a competent authority had decided a particular drug as

Ayurvedic drug, in the absence of definition of Ayurvedic drug in the CETA, the same is binding on the authorities under the CETA. In the alternative, submits the learned counsel, the impugned order of the 4th respondent is without jurisdiction as it disregarded the relevant fact of decisiveness of the licence under the Drugs Act and the Rules and has gone beyond the scope of the remand and acted in violation of the principles of natural justice. He further contends that the order of the 4th respondent is a nullity as the order of the CEGAT that Vicks Vaporub was Ayurvedic medicine in common parlance was disregarded and the material presented by the Department after the date of hearing was relied upon in violation of principles of natural justice. It is also contended that the rule of exhaustion of alternative remedy would not apply to a case like the present one, where the principles of natural justice are violated and where an identical matter has been decided by the Madhya Pradesh High Court holding that the alternative remedy is not a bar and as the hierarchy of appeals under the alternative remedy have made up their mind.

7. The learned Central Government Standing Counsel for the respondents, on the other hand, contends that the petitioner cannot be permitted to pursue two parallel remedies, the appeal before the 2nd respondent and the Writ Petition under Article 226 of the Constitution of India in the High Court, and as the petitioner has already filed an appeal before the 2nd respondent which is pending, this Writ Petition is not maintainable. He further contends that the Drugs Act, the Central Excise Act and the CETA are entirely different enactments with different objects so the provisions of one Act cannot be read into another Act. The definitions contained in the Drugs Act have no relevancy for purposes of classification under the CETA and that in any event the petitioner can urge all these contentions before the appellate authority.

8. On the above contentions of the learned counsel, the following two points arise for consideration :

(1) Whether on the facts and in the circumstances of the case, the petitioner can be permitted to pursue two parallel proceedings - an appeal u/s 35 of the Central Excise Act before the 2nd respondent and the Writ Petition under Article 226 of the Constitution of India.

(2) Whether for the purposes of classifying a drug under Chapter 30 of CETA, the licence issued under the Drugs Act and the Rules to manufacture Ayurvedic drugs, is conclusive of the drugs named in the licence being Ayurvedic drugs.

9. We shall deal with the first point.

10. The 4th respondent passed order dated 12-4-1990, impugned in the Writ Petition, on remand of the case by the CEGAT. The petitioner filed an appeal against the said order of the 4th respondent before the 2nd respondent u/s 35 of the Central Excise Act and the same is pending. While so, the petitioner filed this writ petition also challenging the validity of the said order of the 4th respondent. Now can the petitioner be permitted to pursue two parallel proceedings ? - the

appeal already filed by him before the 2nd respondent and the present Writ Petition.

11. It may be observed here that the jurisdiction of this Court under Article 226 of the Constitution of India to issue appropriate writs is as wide as the language of Article 226 of the Constitution. The limitations, if any, are those which are contained in the said Article or in any other provisions of the Constitution. That a person invoking the jurisdiction of the High Court under Article 226 should exhaust any alternative remedy is not to be found either under Article 226 or any other provisions of the Constitution. It may also be observed that the jurisdiction of the Court under Article 226 is a discretionary jurisdiction and that the discretion has to be exercised by the Court not arbitrarily or capriciously, but on sound judicial principles. For the exercise of the discretionary power by the High Courts to issue prerogative writs the Courts have laid down certain limitations. One among them is that where an adequate alternative remedy is available to the petitioner, the High Court will normally decline to issue the Writ. This is a rule of convenience and discretion rather than a rule of law. It does not create a bar on the exercise of jurisdiction, but is a factor to be taken into consideration in the exercise of jurisdiction under Article 226. The rule that judicial review should not be granted where an alternative remedy is available, is applicable in U.S.A. (See *Macauley v. Waterman*, 1946 327 US 540) in England (See *R.V. Inland Revenue Commissioner Ex. P. Praslar*, (1985 A.C. 835 at 852) as well as in India (See *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, ; *G. Sarana Vs. University of Lucknow and Others*, .

12. There are well recognised exceptions to this rule. Among them are complaints of violation of fundamental rights; of action taken under ultra vires law; of action taken without jurisdiction or in excess of jurisdiction and of violation of principles of natural justice.

13. While considering the applicability of the rule of exhaustion of alternative remedy and the exceptions thereto, it would be necessary to consider the relevant provisions of the Act dealing with creation of rights and providing remedies to an aggrieved person. Here we are concerned with the Central Excise Act. u/s 35 of this Act an aggrieved person may file an appeal to the Collector (Appeals) against any decision or order passed under this Act by a Central Excise Officer lower in rank than a Collector of Central Excise. Against the orders of Collector (Appeals) specified in Section 35B, a further appeal is provided to the Appellate Tribunal. An aggrieved party is also provided a right to have the case stated to the High Court on any question of law arising out of such order by the Tribunal u/s 35G. The Tribunal is then bound to draw up a statement of case and refer the question of law to the High Court. However, if the Tribunal is of the opinion that there are conflicting decisions of the High Courts in respect of any particular question of law and it is expedient that a reference should be made to the Supreme Court, the Tribunal may draw up a statement of case and refer it direct to the Supreme Court. If however the Tribunal refuses to state the case on

the ground that no question of law arises, the party seeking reference of the case is given a right to approach the High Court, within six months from the date of service of such refusal, to apply to the High Court requiring the Appellate Tribunal to state the case and to refer it under sub-section (3) of Section 35G. The High Court and the Supreme Court are given power u/s 35I to refer back the case to the Tribunal to make additions thereto or alteration therein as the High Court or the Supreme Court may direct if it is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby. Section 35J requires that the case referred to it be heard by a Bench of not less than two judges of the High Court. From any judgment of the High Court delivered on a reference made u/s 35G an appeal is provided to the Supreme Court if the High Court certifies it to be a fit one for appeal to the Supreme Court. Further power of revision is conferred in certain cases mentioned in Section 35EA on the Board or the Collector of Central Excise and on the Central Government u/s 35EE. Thus it is seen that the parliament has created hierarchy of authorities for adjudication of disputes under the Act; it has also provided a remedy of having the case stated to the High Court on questions of law and if the Tribunal declines to refer the question, the aggrieved party is also given a right to approach the High Court to require the Tribunal to state the case and refer the question to the High Court. Against the judgment of the High Court passed on reference, an appeal is also provided to the Supreme Court. If an aggrieved party is allowed to approach the High Court by invoking its power under Article 226 of the Constitution challenging the validity of the order of the original authority by passing the hierarchy of the authorities under the Act, the whole scheme enacted by the parliament in creating hierarchy of authorities and referring the case to the High Court on question of law and an appeal to the Supreme Court therefrom, would be stultified. The High Court will normally be too reluctant to exercise its discretionary jurisdiction under Article 226, which would have such an effect unless very strong case is made out under one of the exceptions to the rule and, borrowing the expression of Krishna Iyyer, J. "manifest injustice cries for the order of the Court".

14. Mr. Ashok Desai contended that the rule of exhaustion of alternative remedy would not apply to this case for the following reasons -

(a) as in an identical matter the Madhya Pradesh High Court has rejected the contention that the alternative remedy exists;

(b) as the highest authority in the hierarchy of appeals has made up its mind and determined the issue;

(c) as the principles of natural justice are violated; and

(d) as at least three High Courts viz. the High Courts of Bombay, Calcutta and Madhya Pradesh accepted the plea canvassed in the writ petitions viz. that the licence issued under the Drugs Act and the Rules, is decisive of the nature of the drug permitted to be manufactured under the licence and the same is binding on

the authority under CETA for classification thereunder, which is in accord with the judgments of the Supreme Court, but this approach is still being disregarded by the Tribunal.

15. So far as contentions (a) and (d) are concerned neither do they fall under any of the recognised exceptions to the rule, nor do we think them of such a nature as to be treated as exceptions to the rule. We shall, however, consider contentions (b) and (c).

16. Now we shall refer to the cases relied upon by Mr. Ashok Desai in support of his contention "b" that is where the highest authority in the hierarchy of alternative remedies has made up its mind the alternative remedy is not a bar.

17. In *Mysore Agarbathi Works v. Union of India* [1978 (2) E.L.T. (196)] a learned Single Judge of this Court held that when the Government of India had already given an opinion on a point and the Collector of Central Excise had also adopted the same view, the manufacturer could not be said to be having any effective alternative remedy as no useful purpose would be served by asking the manufacturer to file an appeal or revision as such an appeal would be an appeal from Caesar to Caesar and thus alternative remedy in such cases was rendered nugatory. In that case against the impugned order of the Assistant Collector a statutory appeal was provided to the Collector. The opinion of the Collector was expressed in the circular and the impugned order of the Assistant Collector of withdrawal of exemption was based on that circular.

18. In *Etikoppaka Co-Operative Agricultural Society Ltd. and Others Vs. Union of India (UOI) and Others*, Chinnappa Reddi, J. (as he then was) held that the highest authority constituted under the Act, having already predetermined the question and having directed all the subordinate tribunals to interpret the notification in a particular manner, the statutory remedy of appeal and revision ceased to be a remedy. In that case the petitioners were manufacturers of sugar. One of the incentives was exemption from levy of excise duty on sugar produced during certain period. Pursuant to the clarification issued by the Central Government interpreting its earlier notification the rebate already allowed was found to be inadmissible and the manufacturers of sugar were given notice for recovery of the rebate. It was in those circumstances that the learned Judge held that the alternative remedy of appeal u/s 34 was not a remedy.

19. In *Kalaivani Fabrics Vs. Collector of Customs (Appeals)*, a learned single Judge of the Madras High Court held that as the Tribunal had already come to a conclusion in a similar matter, so there was no purpose in filing a further appeal before the Tribunal and that availability of alternative remedy was not an absolute bar to maintainability of a writ petition under Article 226 of the Constitution of India and that it was a matter of discretion rather than jurisdiction and the writ petition already admitted, was not liable to be interfered with.

20. All these cases relate to not availability of alternative remedy of appeal but

approaching the High Court by invoking writ jurisdiction on the ground that the highest authority in the hierarchy has predetermined the issue against the petitioner and recourse to alternative remedy will be an exercise in futility. But in this case no binding decision of CEGAT or revisional authority is placed before us to justify applicability of ratio in the above-said judgments.

21. In support of contention "c", Mr. Desai relied upon the judgment of the Supreme Court in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, . In that case the Zilla Parishad levied property tax on the petitioner under Sections 108 and 114 of the U.P. District Boards Act, 1922. One of the main contentions of the appellant was that the taxing officer passed the assessment order for 1961-62 in respect of property tax without giving notice to or inviting objections from the appellant. He challenged the validity of the order of assessment in the Writ Petition. On the ground that there was an alternative remedy of appeal, the writ petition was dismissed by the Division Bench of the Allahabad High Court. On appeal to the Supreme Court by special leave it was held that it was a well established proposition of law that when an alternative and equally efficacious remedy was open to a litigant he should be required to pursue the remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ and that the existence of statutory remedy did not affect the jurisdiction of the High Court to issue a writ, but that the existence of an adequate legal remedy was a thing to be taken into consideration in the matter of granting writs and where such a remedy existed it would be sound exercise of discretion to refuse to interfere in a writ petition unless there were good grounds therefor. It has also been observed that it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted. It is pointed out that there are well recognised exceptions to the doctrine with regard to exhaustion of statutory remedies, (1) where proceedings are taken before a Tribunal under a provision of law which is ultra vires; (2) where the impugned order has been made in violation of principles of natural justice. We may point out here that "the rules of natural justice are not rigid norms of unchanging content and their ambit may vary according to the context (Smith's "Judicial Review of Administrative Action" 4th Edition, page 163).

22. In the instant case the petitioner was given personal hearing before passing the impugned order. The violation of principles of natural justice pointed out is that after hearing of the case, the 4th respondent received additional evidence or material to show that Vicks Vaporub was not treated as Ayurvedic medicament in the common parlance. In the view we have taken we do not propose to express any opinion whether the action of acceptance of the additional evidence or additional material after the hearing would vitiate the order of the 4th respondent. Suffice it to say that the violation pointed out by the learned

counsel, in our view, would not fall within the exception to the rule of exhaustion of alternative remedy.

23. Here it would also be necessary to point out that there is difference between not exhausting an alternative remedy but approaching the High Court and having recourse to the alternative remedy provided under the law and also invoking the jurisdiction of the High Court under Article 226 of the Constitution and thus pursuing two parallel proceedings. In a case where the petitioner is prosecuting parallel proceedings, the High Court will not exercise its discretionary jurisdiction under Article 226 of the Constitution and will direct the party to have the matter adjudicated by the concerned authority under the relevant Act whom the party has already approached by postponing the judicial review. We have support for this view in the judgments of the other High Courts and the Supreme Court as well as eminent writers of Constitutional law.

24. In *Ajit Kumar Chakravarty Vs. Sm. Sarba Mangala Devi and Another*, the petitioner had availed himself of alternative remedy by way of suit. The issue in the civil suit was the question of jurisdiction of the House Controller and of the Commissioner in appeal. The same question was raised before the High Court in the writ petition. A Division Bench of the Patna High Court held that the application for a writ under Article 226 of the Constitution or for interference by the High Court under Article 227 of the Constitution could not be entertained and that the petitioner must prosecute his remedy in the civil court where he had already instituted a suit for precisely the same relief.

25. In *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, the dispute arose under the Taxation of Income (Investigation Commission) Act. Proceedings were taken against the petitioners under that Act. A writ petition was filed in the High Court of Punjab challenging the validity of the proceedings initiated under the said Act. One of the contentions raised before the High Court was that the Act being of a special nature which created new rights and liability and the remedies, so for any breach of violation thereof the only remedies which could be pursued by the aggrieved party are those provided under the Act and that Article 226 or 227 of the Constitution would not be available. This among other contentions was accepted by the High Court. On appeal to the Supreme Court, the Supreme Court held as follows :

"For purposes of this case it is enough to state that the remedy provided for in Article 226 is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in Section 8(5) of the Taxation of Income (Investigation Commission) Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances we think that it would not be proper to allow the appellants to invoke the discretionary remedy under Article 226 of the

Constitution at the present stage and on this ground alone we would refuse to interfere with the orders made by the High Court."

26. In *Radha Kissen More and Others Vs. E. Rajaram Rao and Another*, the Collector of Customs imposed penalty under the Sea Customs Act. The petitioner filed an appeal against that order u/s 188 of the Sea Customs Act. While that appeal was pending he moved the High Court under Article 226 challenging the validity of the order of the Collector of Customs imposing penalty. A Division Bench of the Calcutta High Court held that it was quite true when there was an alternative remedy, the mere existence of such remedy was not an absolute bar to the entertainment of an application under Article 226, but far different was the case when the party moving the Court under Article 226 had already availed himself of the alternative remedy and while that appeal was pending the party could not be allowed to move the High Court under Article 226 of the Constitution of India.

27. In *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax (Central Range) and Others*, one of the questions before the Full Bench of Calcutta High Court was whether a party should be refused the relief under Article 226 in a case where he was pursuing the alternative remedy of appeal. There against the order of the Income Tax Officer initiating proceedings against the petitioner u/s 34(1-A) of the Income Tax Act, he filed an appeal before the Appellate Assistant Commissioner. The appellate authority called for elucidation of certain points. The petitioner challenged the validity of those points in the Writ Petition. It was held by the Full Bench that because the applicant had appealed to the Assistant Appellate Commissioner and was actively pursuing it so he should not be allowed to pursue the application in the writ jurisdiction. It was contended that in a case of writ of Certiorari or prohibition mere existence of alternative remedy was not bar to a writ petition particularly where the question of initial jurisdiction or violation of rule of natural justice were concerned. Observing that that proposition was not disputed, the Full Bench held that distinction was to be made between cases where one was considering mere existence of alternative remedy and cases where there existed alternative remedy in law and that remedy was being actively pursued giving rise to parallel proceedings.

28. We may also observe here that having thus decided the Full Bench proceeded to consider the point raised therein on merits. On appeal to the Supreme Court in *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, it was held that in a petition under Article 226 the correct course for the High Court after sustaining the preliminary objection of the respondent was not to proceed to decide the question on merits but to dismiss the writ petition. But as the High Court has dealt with the case on merit, the Supreme Court considered the finding of the Calcutta High Court and reversed the same.

29. H.M. Seervai in his treatise on Constitutional Law of India, Third Edition, in para 16.255 at page 1353 states -

"However, where the petitioner applying for a writ of certiorari or prohibition was actually pursuing an alternative legal remedy, he should not be allowed to continue two parallel proceedings and the writ petition should be dismissed."

30. Durga Das Basu in Administrative Law, Second Edition, at page 440 writes -

"The bar of statutory remedy is, therefore, applicable in the case of these two writs only where the defect of jurisdiction is not patent on the face of the record, or where the petitioner had already taken resort to the statutory machinery and that proceeding is pending."

31. From the above discussion it follows that a case of existence of alternative remedy or not exhausting alternative remedy has to be distinguished from a case where the party has had recourse to the alternative remedy and while pursuing the same, has also invoked extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. In the case where alternative remedy is being pursued the High Court will not allow the parallel proceedings under Article 226 to be pursued and will reject the petition.

32. For the above reasons, on the first point we hold that the petitioner cannot be permitted to pursue two parallel proceedings and therefore the Writ Petition is liable to be dismissed.

33. In view of our finding on the first point and in view of the observations of the Supreme Court in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, that having found that the writ petition is not maintainable, the High Court ought not to have decided the question on merits, we do not consider it necessary to express any opinion on the second point.

34. Having regard to the fact that the appeal filed by the petitioner is pending before the 2nd respondent from 9-7-1990, we consider it appropriate to direct the 2nd respondent to dispose of the appeal on merits within two months from the date of receipt of this judgment.

35. The Writ Petition is accordingly dismissed with costs.