

(2009) 08 MAD CK 0101

In the Madras High Court

Case No : Writ Petition No. 9934 of 2009

S. Ram Kumar

APPELLANT

Vs

Union of India (UOI) and Hansum India

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 226(2), 227
Customs Act, 1962 — Section 111, 128, 128A, 128A(4A), 129
Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 — Rule 10,
11, 11(1), 3, 3(2)
National Tax Tribunal Act, 2005 — Section 15

Citation : (2009) 6 MLJ 990 : (2010) 44 PTC 785

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

Advocate : P.S. Raman for BFS Legal and P.V. Balasubramanian, for the Appellant; T.R. Senthilkumar for Respondents 1 and 2 in W.P. No. 9934/2009 and Respondents 1, 2 and 4 in W.P. Nos. 9935, 10264, 10432 and 10730/2009, P. Saravanan, for 3rd Respondent in W.P. No. 9934/2009, Arvind P. Dattar, Vijay Narayan, Sr. Counsels for Anand and Anand, M.S. Bharath, Premchander and Gowri Tirumurti for 3rd Respondent in W.P. Nos. 9935 and 10730/2009, M. Venkatachalapathy for G.K. Muthukumar, for 3rd Respondent in W.P. No. 10264/2009 and A. Rameshkumar, for 3rd Respondent in W.P. No. 10432/2009, for the Respondent

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, J.—The prayer in these writ petitions are to quash the orders dated 18.5.2009 and 20.5.2009, passed by the

Assistant Commissioner of Customs, Chennai, insofar as W.P. Nos. 9934 and 9935 of 2009 are concerned; the order dated 20.5.2009 passed

by the Commissioner of Customs, Mumbai, insofar as W.P. No. 10264 of 2009; and the orders dated 30.5.2009 and 8.6.2009 passed by the

Assistant Commissioner of Customs, New Delhi, insofar as W.P. Nos. 10432 and

10730 of 2009 are concerned.

2. The case of the petitioner as could be seen from the affidavit filed in support of W.P. No. 9935 of 2009 is as follows:

(a) The petitioner is an Electronics Engineer by vocation and he invented Plurality of Subscriber Identity Module (SIM) and Plurality of Blue Tooth

Technology and its viability using switch circuit technology. According to petitioner, due to his invention, multiple sims can be used at the same time in one instrument.

(b) It is claimed by the petitioner that by changing the entire circutory of the existing mobile phone, Plurality of Blue Tooth Devices can be fitted,

which would help to operate simultaneously, the mobile phones in different communication networks, which avoid multiplicity of phones and also

radicalises the concept of mobile phones across the globe, by which the cost of manufacturing is reduced.

(c) According to the petitioner, it is his original Intellectual Property and in the year 2002 he applied for patent of his technology, which includes

mobile phones with dual sims. After scrutiny of his application, the Patent Registry granted Patent Certificate vide Patent No. 214388 on

11.2.2008 in his favour from the date of application in respect of eight technologies including Plurality of Simcards as well as Plurality of Blue

Tooth devices, which work simultaneously. The petitioner claims that he being the patent holder, is vested with the right to prevent infringement of

his patent right in any form or manner.

(d) Petitioner states, the Government of India issued notification No. 49/2007 and prohibited the import of any product obtained directly by the

process made or produced beyond the limits of India and intended for sale, where patent for such process is in force under the Patents Act, 1970

(Act 39 of 1970), except in cases, where the consent from the Patentee in India has been obtained.

(e) The petitioner was directed to comply with certain procedures to protect his Intellectual Property rights as per the Intellectual Property Rights

(Imported Goods) Enforcement Rules, 2007. The petitioner was allotted Unique Permanent Registration Number (UPRN No.

A0167INMAA4PR) as per the rules, which would guarantee that the customs authority across India prevent the entry of any infringement of

goods. According to the petitioner, the Commissioner of Customs, Chennai Airport and Air Cargo Complex, Chennai-27, is thereby bound to

inform all other customs offices throughout India and prevent the entry of any goods that infringe his patent rights.

(f) The petitioner filed W.P. No. 1570 of 2009 before this Court for issuing a writ of mandamus directing the Union of India, Chief Commissioner

of Customs, Commissioner of Customs (Air), Chennai-27, and Commissioner of Customs (Sea), Chennai, to take all appropriate steps to prevent

infringement of his registered patent No. 214388 by detecting illegal imports and accessing of mobile phones having technology with use of two sim

cards (dual sim) at the point of entry itself. In the said writ petition counter affidavit was filed by the respondents stating that the approval of the

registration of patent holder notice was made on 19.1.2009 and thereafter action had been taken by the Commissioner of Customs (Air), Airport,

Air Cargo, Chennai, Chennai-27, from 27.1.2009 onwards. This Court disposed of the writ petition on 23.2.2009 by observing as follows:

3. Paragraphs 21 of the counter affidavit is usefully extracted hereunder:

21. I further submit that there are no imports of dual SIM phones through Chennai Seaport i.e., by the 4th respondent and therefore no action has

been taken in this regard by the Sea Commissionerate. As regards imports made through the Air Commissionerate i.e., the 3rd respondent from

27.1.2009 onwards i.e., on the day immediately after completion of the registration with UPR No. A0167INMAA4PR and there after, around

250 clearances were permitted only with the consent of the Patent Holder, namely the petitioner herein and cleared from the Customs frontier.

Other Customs houses in India have also been informed about the registration and necessary protection is given to the petitioner.

4. Taking into account the counter affidavit filed by the respondents and since the action had already been initiated by the third respondent after the

registration of the Patent Holder notice on 19.1.2009, the respondents shall continue to take action till the certificate is valid as per law. The writ

petition is ordered accordingly. Consequently, connected M.P.No.1 of 2009 is closed. No costs.

(g) According to the petitioner, he also filed Civil Suit in C.S.No.221 of 2009 before this Court and prayed for injunction to prevent any illegal

manufacture of mobile phones that may infringe his rights. In the said suit, petitioner also filed interim application to restrain the respondents, who are manufacturing dual simcard mobile phones in India. In O.A. No. 193 of 2009, this Court granted interim order on 23.3.2009 and the said order is still in force.

(h) It is the case of the petitioner that since he was given Unique Permanent Registration Number, he gets full protection as Patent Holder and the

Customs authorities are duty bound to ensure that infringing goods are prevented from being imported and the Customs officials may allow import

of dual sims only by obtaining petitioner's consent i.e, obtaining NOC.

(i) The third respondent in these writ petitions claimed clearance of their imported sim cards by their respective bill of entry. The respective

Assistant Commissioners of Customs/Commissioner of Customs suspended clearance under Rule 7 of the Intellectual Property Rights (Imported

Goods) Enforcement Rules, 2007, instead of directing the third respondents in these writ petitions to obtain orders from the appropriate

authorities.

(j) The second respondents in these writ petitions called for hearing to determine the infringement of the goods imported. The second respondent

called for examination of the goods and also decided to hear the matter on merits. The petitioner was called upon to demonstrate his patent right

and also called upon for hearing on 13.3.2009 insofar as W.P. Nos. 9934, 9935 of 2009; on 5.5.2009, 18.5.2009 and 6.5.2009 insofar as W.P.

Nos. 10264, 10432 and 10730 of 2009 are concerned. Petitioner submitted detailed explanation and demonstrated and according to the

petitioner his patent was infringed by the third respondent concerned by the imported goods.

(k) The petitioner claims that he explained to the second respondent that the term simultaneous use which was contested was proved by the fact

that both sims were activated and were communicating to their respective towers. The importers contended that as simultaneous voice

communication was not possible in his product, the same did not amount to infringement of the patent right of the petitioner.

(l) The second respondent sought for written submissions clarifying the technical aspect of the petitioner's patent. According to the petitioner, the

second respondent in these writ petitions viz., Assistant Commissioners of Customs/Commissioner of Customs have no technical expertise and

they sought for written submissions clarifying the technical aspect of the petitioner's patent. The petitioner also submitted written submissions.

(m) The grievance of the petitioner is that in spite of the above written submissions, the second respondent held that the Patentee had made

misdeclaration to the Customs Department as to the existence of genuine products, and by the impugned orders, ordered release of the goods. The

said orders are challenged in these writ petitions raising various grounds.

3. The respondents 1 and 2 and third respondent in each of the writ petitions filed separate counter affidavits and raised preliminary objections viz.,

the writ petitions are not maintainable due to the availability of effective alternate remedy to the petitioner by filing appeal against the impugned

orders. Insofar as W.P. No. 10264 of 2009, W.P. No. 10432 of 2009 and W.P. No. 10730 of 2009 are concerned, since the orders were

passed by the Commissioner of Customs, Mumbai, and Assistant Commissioner of Customs, New Delhi, respectively, the respondents also

questioned the territorial jurisdiction of this Court in entertaining the said writ petitions.

4. (i) The respondents 1 and 2 in their counter affidavit have stated that the impugned orders are passed by the Assistant Commissioner of

Customs, Chennai, in respect of two cases; Commissioner of Customs, Mumbai, in respect of one case; and Assistant Commissioner of Customs,

New Delhi, in respect of two cases and the remedy of statutory appeal u/s 128 of the Customs Act, 1962, is available before the Commissioner of

Customs (Appeals) and sixty days time is granted to file such appeals.

(ii) Insofar as the order passed by the Commissioner of Customs, Mumbai, in W.P. No. 10264 of 2009 is concerned, statutory appeal is provided

u/s 129A of the Customs Act, 1962, before the Customs, Excise and Service Tax Appellate Tribunal, Mumbai, and three months time is given to

file such appeal. It is also reiterated in the counter affidavit that when the statute itself provides to the petitioner the efficacious alternate remedy by

way of filing appeal before the Appellate Authority/Tribunal, this Court need not exercise its extraordinary jurisdiction under Article 226 of the

Constitution of India.

(iii) Insofar as the objection with regard to the territorial jurisdiction is concerned, it is contended that the impugned orders passed are not by the

Assistant Commissioner of Customs, Chennai, and hence the petitioner can file writ petition only before the concerned High Courts within whose

territorial jurisdiction the impugned orders are passed viz., Bombay High Court and Delhi High Court, particularly when no cause of action has

arisen at Chennai to file these writ petitions before this Court.

(iv) It is also specifically stated in the counter affidavit that in all the above cases personal hearing was given to the petitioner/his representative and

insofar as W.P. No. 10730 of 2009 is concerned, neither the petitioner nor the authorised representative appeared for hearing nor sought for

extension of time and also failed to file any written submissions. Eventhough personal hearing was originally proposed on 6.4.2009 it was

subsequently postponed to two weeks and finally personal hearing was fixed on 6.5.2009 and in spite of service of notice sent through E-mail to

the petitioner.

5. The third respondents in these writ petitions filed counter affidavits and raised the above said preliminary objections, apart from the merits of the

cases. In the counter affidavit filed in W.P. No. 10730 of 2009 the third respondent stated that as against the order of the Assistant Commissioner

of Customs, New Delhi, appeal lies before the Commissioner of Customs (Appeals), New Delhi, under Sections 128 and 128A of the Customs

Act, 1962 and appeal against the order of Commissioner of Customs, Mumbai, lies before CESTAT under Sections 129 and 129A of the

Customs Act, 1962. Against the order of the CESTAT, appeal would lie to the National Tax Tribunal u/s 15 of the National Tax Tribunal Act,

2005, and thereafter appeal would lie to the Supreme Court. Insofar as the territorial jurisdiction is concerned it is contended that even if the

petitioner has registered his patent before the Commissioner of Customs, Chennai Airport & Air Cargo, Chennai-27, orders having been passed

by the respondents at New Delhi and Mumbai, petitioner cannot challenge the said orders before this Court. Filing of C.S.No.221 of 2009 on the

file of this Court will not enable the petitioner to challenge the order passed at Mumbai and New Delhi and even if the writ is maintainable against

the orders passed by the Customs Authorities at Mumbai and New Delhi,

petitioner can file the writ petitions only before the concerned High Court viz., Bombay High Court or Delhi High Court. It is also stated in the counter affidavit that as per the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, the Deputy Commissioner of Customs or Assistant Commissioner of Customs on the notice given by the Right Holder has a reason to believe that the imported goods are suspected to be the goods infringing the intellectual property right, he shall suspend clearance of the goods and under Rule 8, the said authority is empowered to determine whether the goods actually infringe the Intellectual Property Rights of the Patent Right Holder, after allowing opportunity to the Patent Right Holder and the Importer or their duly authorised representatives to examine the goods, the clearance of which has to be suspended.

6. In view of the above two preliminary issues raised with regard to the maintainability of the writ petitions, more particularly for not availing alternate remedy in all these cases and the non-maintainability of the writ petition before this Court since the impugned orders in three cases are passed at Mumbai and New Delhi, arguments were advanced for the above said two issues by the learned Senior Counsel for the petitioner as well as learned Senior Counsels for the respective third respondents in each of these writ petitions and other respective counsels.

7. Mr. P.S. Raman, learned Senior Counsel appearing for the petitioner submitted that as there are violations of principles of natural justice while passing the impugned orders, the petitioner is entitled to challenge the same in these writ petitions, without availing alternate remedy of filing appeal.

The learned Senior Counsel submitted that the above referred five orders are passed by three different authorities viz., two at Chennai, two at

New Delhi and one at Mumbai, and by filing appeal against the said orders in three different places, the petitioner would be put to serious

difficulties. The learned Senior Counsel also submitted that the authorities, who passed the impugned orders have no jurisdiction to interpret the

patent rights of the petitioner. It is further submitted that in W.P. No. 10730 of 2009, without hearing the petitioner, the impugned order was

passed and insofar as other cases are concerned there is violation of principles of natural justice and once the petitioner establishes the fact of

violation of principles of natural justice and also the lack of jurisdiction to decide

the violation of patent right, the writ petitions filed challenging the impugned orders are maintainable. The learned Senior Counsel also cited the decisions of the Supreme Court and of this Court in support of his contention with regard to the maintainability of the writ petitions. The learned Senior Counsel further submitted that insofar as the orders passed by the customs authorities at Mumbai and New Delhi are concerned, part of the cause of action having arisen within the State of Tamil Nadu, this Court has got territorial jurisdiction to entertain the writ petitions, on the ground that the patent rights of the petitioner is registered at Chennai. The petitioner has filed civil suit and obtained interim order of injunction against the respondents in C.S. No. 221 of 2009 from this Court on 23.3.2009. The UPR number was assigned to the petitioner by the Commissioner of Customs, Chennai Airport and the said patent right registered at Chennai is infringed by the third respondent in W.P. No. 10264 of 2009 at Mumbai and in W.P. No. 10432 and 10730 of 2009 at New Delhi. The learned Senior Counsel therefore submitted that part of the cause of action having arisen within the territory of the State of Tamil Nadu the petitioner is entitled to challenge the orders passed by the authorities at Mumbai and New Delhi before this Court under Article 226 of the Constitution of India, particularly with reference to Article 226(2) and if the petitioner is not permitted to file these writ petitions before this Court, he will be forced to approach the Bombay High Court and Delhi High Court and this Court for challenging five different orders and the same will cause great hardships to the petitioner. On this aspect, the learned Senior Counsel cited certain judgments in support of his contention.

8. (i) Mr. Arvind P. Dattar, learned Senior Counsel submitted that whether the third respondent in these cases have violated the patent right of the petitioner due to their import of sim cards is a question of fact, as the petitioner is contending that his patent right is infringed. The third respondents in these writ petitions have demonstrated before the statutory authorities that their imported articles have not in any manner infringed the patent rights of the petitioner and the competent authority factually found that there is no infringement of the petitioner's patent rights in respect of the imported goods. The learned Senior Counsel submitted that if the facts are in dispute, the writ Court is not the appropriate Court to seek remedy

to the petitioner and normally this Court under Article 226 of the Constitution will not go into the disputed facts. In support of his contention he

produced several decisions. The learned Senior Counsel also submitted that the authority, who passed the impugned orders, followed the

principles of natural justice. Insofar as W.P. No. 10730 of 2009 is concerned, the petitioner failed to appear in person or through his

representative in spite of providing personal hearing, for which the petitioner alone can be blamed. Since the principles of natural justice is followed

while passing the impugned orders by the authorities concerned, the petitioner is bound to file appeal before the Statutory Authority as

contemplated under the provisions of the Customs Act, 1962, where the hierarchy of the officers are mentioned to file appeal. On the above said

two grounds viz., disputed facts cannot be decided in writ jurisdiction and when the statute provides for alternate remedy, the party should avail the

same before approaching the High Court under Article 226 of the Constitution of India was emphasised.

(ii) The learned Senior Counsel further submitted that insofar as the territorial jurisdiction in entertaining the writ petition with regard to the orders

passed at Mumbai and New Delhi, the petitioner is not entitled to file writ petitions before this Court since the imported goods arrived at Mumbai

and New Delhi; the petitioner executed bond at Mumbai and New Delhi; appeared for personal hearing at Mumbai and New Delhi; and orders

were also passed by the authorities at Mumbai and New Delhi respectively. Merely because the petitioner registered his patent rights through E-

Filing at Chennai, the same will not confer any cause of action to challenge the orders passed by the authorities at Mumbai and New Delhi and

therefore even assuming the writ petitions are maintainable against the orders passed by the authorities in Mumbai and New Delhi, petitioner can

file writ petitions only before Bombay High Court and New Delhi High Court respectively.

(iii) The learned Senior Counsel also submitted that merely because C.S. No. 221 of 2009 is pending before this Court i.e., with regard to the

manufacture of sim cards, the petitioner cannot contend that goods imported at Mumbai and New Delhi airports against which orders are passed,

can be challenged before this Court in the above writ petitions. The learned Senior Counsel also submitted that passing an order gives rise to cause

of action and the officers at Mumbai and New Delhi are not within the supervisory jurisdiction of this Court. There is no extraordinary

circumstance, pointed out by the petitioner, to entertain the writ petitions and any fraction of cause of action cannot be treated as cause of action

giving rise to jurisdiction. The petitioner/his representative having chosen to appear before the Mumbai/New Delhi Customs authorities, is not right

in contending that he will face hardships in approaching the Bombay High Court and Delhi High Court.

9. Mr. M. Venkatachalapathy, learned Senior Counsel submitted that the subjective satisfaction of the authority is recorded in the impugned orders

and mere registration of patent at Chennai will not confer jurisdiction to this Court to entertain the writ petitions.

10. Mr. P. Saravanan, learned Counsel appearing for the third respondent in W.P. No. 9934 of 2009 submitted that the impugned order was

passed by the Assistant Commissioner, in exercise of the powers conferred under Rule 11(1) of the Rules, after getting expert opinion and the

petitioner having not challenged the Rules, can challenge the impugned order only before the appropriate appellate authority.

11. Mr. T.R. Senthilkumar, learned Standing Counsel appearing for the Central Board of Excise & Customs, submitted that whether the

petitioner's patent right is infringed or not can be decided by the appellate authority and there is no extraordinary circumstance to file the writ

petitions before this Court, without availing the alternate remedy, in these cases. The learned Counsel submitted that as per Rule 7, decision has to

be taken with regard to perishable goods within three days and insofar as non-perishable goods are concerned, decision has to be taken by the

authorities within ten days. The learned Counsel also relied upon the judgment of this Court reported in Nivaram Pharma Pvt. Ltd. Vs. The

customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, The Commissioner of Central Excise (Appeals) and The Assistant

Commissioner of Central Excise, Madras IV Division, and contended that when effective alternate remedy is available, the writ petitions

challenging the impugned orders cannot be entertained. He has also submitted that insofar as the orders passed by the authorities at Mumbai and

New Delhi are concerned, this Court is not having territorial jurisdiction. The learned Counsel also submitted that the appellate authority has got

powers to grant stay and it is for the petitioner to make out a case by filing appeal for the grant of stay.

12. In reply to the said submission, Mr. P.S. Raman, learned Senior Counsel for the petitioner submitted that even though by virtue of the

impugned orders the imported goods were released, unless the said orders are stayed, the petitioner cannot prevent the further import of similar

goods and therefore the appeal remedy provided under the Customs Act, 1962, is not an effective alternate remedy and the writ petitions are

maintainable, though there is an alternate remedy available.

13. I have considered the rival submissions made by the learned Senior Counsel appearing for the petitioner, respective learned Senior Counsels

and other Counsels for the third respondents as well as the learned Standing Counsel for the Central Board of Excise and Customs.

14. On the basis of the pleadings and arguments advanced with regard to the maintainability of the writ petitions as well as territorial jurisdiction to

entertain W.P. Nos. 10264, 10432 and 10730 of 2009, following issues arise for consideration as preliminary issues:

(1) Whether the petitioner is entitled to maintain these writ petitions without availing the alternate remedy of filing appeal under the Customs Act,

1962, on the facts and circumstance of these cases?

(2) Whether the petitioner can invoke the territorial jurisdiction of this Court in challenging the order dated 20.5.2009 passed by the Commissioner

of Customs (Imports), Mumbai, as well as the orders dated 30.5.2009 and 8.6.2009 passed by the Assistant Commissioner of Customs (Imports

and General), New Delhi?

15. Issue No. (1): The claim of the petitioner is that he is a Patent Right Holder as per Patent No. 214388 dated 11.2.2008 from the date of

application i.e., from 2002 in respect of eight technologies including plurality of sim cards as well as plurality of blue tooth devices, which works

simultaneously and he is vested with the right to prevent infringement of his patent in any form or manner. Petitioner is allotted Unique Permanent

Registration Number (UPRN A0167INMAA4PR) and the case of the petitioner is that the Commissioner of Customs Chennai, Airport Air

Cargo, Chennai-27, is statutorily bound to inform the other Customs Officers throughout India and prevent the entry of any goods that infringe his

patent. The petitioner has also filed C.S. No. 221 of 2009 before this Court, in which he has obtained interim order on 23.3.2009.

16. It is the case of the petitioner that anybody imports any goods, which likely to infringe his patent rights, shall get clearance from the Customs

Officer of the respective area as required under Notification No. 47/2007-Customs(NT), issued by the Government of India, Ministry of Finance,

Department of Revenue, New Delhi dated 8.5.2007, in and by which the Government of India issued Intellectual Property Right (Imported

Goods) Enforcement Rules, 2007. Under Rule 3 notice can be issued, which reads as follows:

3. Notice by the right holder:

(1) A right holder may give notice in writing to the Commissioner of Customs or any Customs Officer authorised in this behalf by the

Commissioner, at the port of import of goods infringing intellectual property rights in accordance with the procedures and under the conditions as

set out in these Rules, requesting for suspension of clearance of goods suspected to be infringing intellectual property right.

(2) The notice in respect of goods infringing intellectual property rights shall be given in the format prescribed in the Annexure to these Rules.

(3) Every such notice shall be accompanied by a document as specified by the Commissioner, evidencing payment of application fee of Rs. 2000

(two thousand rupees only).

(4) If any of the information as required in the format under Sub-rule (2) is not provided, the Deputy Commissioner of Customs or Assistant

Commissioner of Customs may, as the case may be, ask the right holder or his authorised representative to provide the same within 15 days,

which may be extended on sufficient reasons being shown.

(5) The right holder shall inform customs authority when his intellectual property ceases to be valid or if he ceases to be the owner of such

intellectual property right.

Rule 4 contemplates registration of notice by the Commissioner. Rule 6 prohibits import of goods infringing Intellectual Property Right, which reads

as follows:

6. Prohibition for import of goods infringing intellectual property rights.- After the grant of the registration of the notice by the Commissioner on due

examination, the import of allegedly infringing goods into India shall be deemed as prohibited within the meaning of Section 111 of the Customs

Act, 1962.

Rule 7 deals with suspension of clearance of imported goods. Rule 8 deals with examination of goods by right holder, which reads as follows:

8. Examination of goods by right holder.- The Commissioner or the officer duly authorised in this behalf shall allow a right holder and the importer

or their duly authorised representatives to examine the goods, the clearance of which has been suspended, and may provide representative samples

for examination, testing and analysis to assist in determining whether the goods are pirated, counterfeit or otherwise infringe an intellectual property

right, without prejudice to the protection of confidential information.

Rules 9 and 10 deal with supply of information to the right holder as well as to the importer. Rule 11 deals with disposal of infringing goods, which

reads as follows:

11. Disposal of infringing goods.-

(1) Where upon determination by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, it is found

that the goods detained or seized have infringed intellectual property rights, and have been confiscated u/s 111(d) of the Customs Act, 1962 and

no legal proceedings are pending in relation to such determination, the Deputy Commissioner of Customs or Assistant Commissioner of Customs,

as the case may be, shall, destroy the goods under official supervision or dispose them outside the normal channels of commerce after obtaining

"no objection" or concurrence of the right holder or his authorised representative:

Provided that if the right holder or his authorised representative does not oppose or react to the mode of disposal as proposed by the Deputy

Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within twenty working days after having been informed, or

within such extended period as may have been granted by the Commissioner at the request of the right holder, not exceeding another twenty

working days, he shall be deemed to have concurred with the mode of disposal as proposed by the Deputy Commissioner of Customs or

Assistant Commissioner of Customs, as the case may be:

Provided further that the costs toward destruction, demurrage and detention charges incurred till the time of destruction or disposal, as the case may be, shall be borne by the right holder.

(2) There shall not be allowed the re-exportation of the goods infringing intellectual property rights in an unaltered state.

(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may on his own, or at the request of the right holder, retain samples of goods infringing intellectual property rights prior to their destruction or disposal and provide the same to the right holder or importer if such samples are needed as evidence in pending or future litigations.

17. Circular No. 41/2007 dated 29.10.2007 was issued by the Government of India by giving instructions for implementation. The petitioner, in accordance with his registration of patent rights as a Right-Holder, was informed by the respective Assistant Commissioners of

Customs/Commissioner of Customs, about the import of goods by the contesting respondents in accordance with the said rules. Admittedly, the

petitioner executed personal bond and joined in the proceedings as required under the rules at Chennai, Mumbai and New Delhi. The petitioner as

well as the importer of the respective goods were given opportunity to putforth their submissions and except in W.P. No. 10730 of 2009,

petitioner participated and contested his claim against the contesting respondents. Insofar as W.P. No. 10730 of 2009 is concerned, the petitioner

was served with notice of hearing, who prayed for adjournment, which was granted and subsequently he failed to appear and thereafter the order

was passed by the second respondent in the said writ petition. Though the learned Senior Counsel for the petitioner submitted that the concerned

Customs Officer failed to follow the principles of natural justice, it is the case of the department as well as the contesting respondent that full

opportunity was given to the petitioner in respect of four cases and in respect of the impugned order dated 8.6.2009, petitioner failed to avail the

opportunity given and therefore there is no violation of principles of natural justice.

18. Thus, there is admittedly dispute with regard to the compliance of natural justice in these cases. The competent authority to decide the issue as

to whether the imported goods infringed the patent right of the petitioner, is the respective third respondent in these writ petitions, who have passed

the impugned orders. Therefore it cannot be contended by the petitioner that the impugned orders are without jurisdiction. The said rules are not

challenged by the petitioner.

19. Whether the third respondent in these cases have infringed the patent rights of the petitioner is the disputed question of fact. The second

respondent in these writ petitions have given a finding that the importers have not infringed the patent rights of the petitioner and allowed the

clearance of the goods. It is not in dispute that the impugned orders passed by the department are appealable orders u/s 128 and 129A of the

Customs Act, 1962. It is the admitted case of the petitioner as well as respondents that as against the impugned orders passed in W.P. No. 9934

and 9935 of 2009, statutory appeal is provided u/s 128 of the Customs Act, 1962, before the Commissioner of Customs (Appeals), Customs

House, Chennai -1. Insofar as W.P. No. 10264 of 2009 is concerned, statutory appeal is provided u/s 129A of the Customs Act, 1962, before

the Customs, Excise, Service Tax Appellate Tribunal, Mumbai. With regard to W.P. Nos. 10432 of 2009 and 10730 of 2009 are concerned,

statutory appeal is maintainable u/s 128 of the Customs Act, 1962, before the Commissioner of Customs (Appeals), New Delhi. Section 128 of

the Customs Act, 1962 reads as follows:

128. Appeals to Commissioner (Appeals).- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs

lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication

to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal

within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1-A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the

parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf.

Section 128A deals with procedures in disposal of the appeal. Time limit is also fixed for the disposal of the appeal u/s 128A(4A). Section 129A

deals with filing of appeal before the Tribunal insofar as Mumbai is concerned. The Tribunal is also vested with the power of granting stay, pending

appeal. Detailed procedure is contemplated to dispose of the appeals by the Tribunal and the appellate authorities. Even for granting adjournment,

reasons should be recorded in writing and adjournment shall not be given beyond three times. Sufficient safeguard for expeditious disposal of the

appeal is given. Thus, it is evident that effective statutory remedy is provided under the Customs Act, 1962, against the orders passed by the

original authority.

20. The learned Senior Counsel appearing for the petitioner admitted that pursuant to the impugned orders the goods were already released and

his only apprehension is by virtue of the impugned orders the contesting respondents may further import goods, which may further infringe the

patent rights of the petitioner. Any import made by any person will be verified every time by the concerned Customs officials and petitioner will be

given notice to establish his rights.

21. As rightly contended by the learned Counsel for the respondents, not only the facts are in dispute in these cases, but also the alleged violation

of principles of natural justice itself is disputed by the petitioner as well as the respondents. It is well settled in law that the disputed facts cannot be

decided in a writ petition under Article 226 of the Constitution of India.

22. Whether the High Court is entitled to go into the disputed questions of fact in a writ petition filed under Article 226 of the Constitution of India,

is already decided by the Honourable Supreme Court.

(a) In *Arya Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious Institutions and Endowments, Hyderabad and*

Others, the view taken by the High Court that disputed questions of fact are to be left open to be decided before the Civil Court was upheld by the

Supreme Court.

(b) In the decision reported in Rourkela Shramik Sangh Vs. Steel Authority of India Ltd. and Another, it is held that the disputed questions of fact

could not be entertained in the writ proceedings. In paragraph 19, the Supreme Court held as follows:

19. The question as to whether the workmen concerned had been continuously working for a period of ten years so as to enable them to derive

benefit of the judgment of this Court in R.K. Panda and Others Vs. Steel Authority of India and Others, was essentially a question of fact....

In paragraph 22, the Honourable Supreme Court further held as follows:

22. ...a disputed question of fact normally would not be entertained in a writ proceeding. This aspect of the matter has also been considered by a

Constitution Bench of this Court in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc.

etc.,

(c) In Himmat Singh Vs. State of Haryana and Others, , the Honourable Supreme Court held that "the statement of the appellant or the 5th

respondent was correct or not could not ordinarily be tested in writ proceedings and it is well known that in writ petition ordinarily such a disputed

question of fact could not be entertained".

(d) In yet another decision reported in (2007) 7 MLJ 687 (Food Corporation of India v. Harmesh Chand), the Supreme Court held as follows:

Since the facts were seriously disputed by the appellant and no factual finding could be recorded without consideration of evidence adduced by the

parties, it was not an appropriate case in which the High Court ought to have exercised its writ jurisdiction. The parties could have approached a

civil court of competent jurisdiction to adjudicate the matter.

(e) The Supreme Court in the decision reported in 2009 (1) Supreme 52 (Ranjit Singh v. State of Punjab and Ors.) also taken a similar view.

(f) Following the above said decisions, I have dismissed a writ petition on the said ground and the same is reported in 2009 CIJ 649 Mad (B.C.

Krishnan v. Government of Tamil Nadu).

23. The Honourable Supreme Court in the decision reported in (2006) 9 SCC 252 (State Bank of India v. Allied Chemical Laboratories) held that

even if there is alleged violation of principles of natural justice, still the High Court can decline to entertain the writ petition. In paragraph 6, the

Supreme Court held thus,

6. We have heard Counsel for the parties. We fail to understand how the High Court could have exercised its jurisdiction under Articles 226 and

227 of the Constitution to set aside a decree/final order passed by the DRT on 9-4-2003, in a collateral proceeding wherein the decree/final order

was challenged indirectly on the ground that the application of the respondent for cross-examining the deponent had earlier been wrongly rejected.

We have no hesitation in holding that when the DRT did not accede to the request of the respondent to cross-examine the deponent, it could have,

in the appeal preferred by it, assailed the decree/final order on that ground and the Appellate Authority would have passed appropriate orders.

The mere fact that the respondent had not been given an opportunity to cross-examine the deponent did not enable the respondent to bypass the

provision for appeal and approach the High Court directly by a writ petition under Articles 226 and 227 of the Constitution, challenging the

decree/final order on the ground that the order earlier passed, refusing to permit the cross-examination of the deponent, was erroneous.

(Emphasis Supplied)

The Said view is reiterated by the Supreme Court in the decision reported in 2008 (8) Supreme 453 (State of U.P. and Anr. v. U.P. Rajya Khanij

Vikas Nigam S.S. and Ors.).

24. When appealable order is passed, particularly when the facts are in dispute, writ petition filed under Article 226 of the Constitution of India

without availing the alternate remedy is not maintainable is the consistent view taken by the Supreme Court and by this Court.

(a) In the decision reported in 2008 AIR SCW 1815 (C.C.T. Orissa v. Indian Explosives Ltd.) the Supreme Court set aside the order passed in a

tax matter and in paragraph 7 held thus,

7. The High Court seems to have completely lost sight of the parameters highlighted by this Court in a large number of Cases relating to exhaustion

of alternative remedy. Additionally the High Court did not even refer to the judgment of another Division Bench for the assessment years, 1997-98

and assessment years 1998-99 in respect of ICI India Ltd. In any event the High Court ought to have referred to the ratio of the decision in the

said case. That judicial discipline has not been adhered to. Looked at from any

angle, the High Court's judgment is indefensible and is set aside.

(b) A Division Bench of this Court in the decision reported in *Nivaram Pharma Pvt. Ltd. Vs. The customs, Excise and Gold (Control) Appellate*

Tribunal, South Regional Bench, The Commissioner of Central Excise (Appeals) and The Assistant Commissioner of Central Excise, Madras IV

Division, considered similar issue of by-passing alternate remedy. In paragraphs 5 to 14 the Division Bench held as follows:

5. It is well settled by a series of decisions of the Supreme Court that particularly in tax matters there should be no short circuiting of the statutory

remedies, vide *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , Assistant Collector of Central Excise, Chandan*

Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , etc.

6. It is well settled that when there is an alternative remedy ordinarily writ jurisdiction of this Court under Article 226 of the Constitution should not

be invoked. This principle applies with greater force regarding tax proceedings. As observed by the Supreme Court in *Titaghur Paper Mills Co.*

Ltd. and Another Vs. State of Orissa and Others, :

Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be

availed of.

7. A Constitution Bench of the Supreme Court in *Veerappa Pillai Vs. Raman and Raman Ltd. and Others*, held that as the Motor Vehicles Act is a

self contained code and itself provides for a forum for appeal/revision, the writ jurisdiction should not be invoked in matters relating to its

provisions. A similar view was taken in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .*

8. In *Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited (supra)* the Supreme Court observed:

In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ. held that where

the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal

to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction

under Article 226 of the Constitution ignoring as it were, the complete statutory

machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But, then the Court must have good and sufficient reason to by pass the alternative remedy provided by statute. Surely, matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

9. In C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, , H. B. Gandhi v. Gopi Nath and Sons and in

Karnataka Chemical Industries and Others Vs. Union of India and Others, the Supreme Court held that where there is a hierarchy of appeals

provided by the statute the party must exhaust the statutory remedies before resorting to writ jurisdiction. All these decisions are related to taxing

statutes, and are hence apposite to the present context.

10. In Sheela Devi Vs. Jaspal Singh, and Punjab National Bank Vs. O.C. Krishnan and Others, the Supreme Court held that if the statute

provides for remedy of revision or appeal, writ jurisdiction should not be invoked.

11. In Union of India (UOI) Vs. T.R. Varma, the Supreme Court held that it is well settled that when an alternative and equally efficacious remedy

is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative

writ. It will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds

to do otherwise.

12. In A. Venkatasubbiah Naidu Vs. S. Challappan and Others, the Supreme Court deprecated the practice of exercising the writ jurisdiction

when an efficacious alternative remedy is available.

13. In W.P. No. 981 of 2003 (Tax) (Khandelwal Soya Industries Ltd. v. State of U.P. and Ors.) decided on 27.8.2003 a Division Bench of the

Allahabad High Court dismissed a writ petition challenging the provisional assessment orders under the U.P. Trade Tax Act on the ground of

alternative remedy u/s 9 of that Act. Against the aforesaid judgment, SLP was filed before the Supreme Court which has been dismissed. We

respectfully agree with the view taken by the Allahabad High Court in the aforesaid decision.

14. We are therefore surprised that the writ petition was entertained at all by this Court.

(c) Same is the view taken by Division Benches of this Court in W.A. No. 1555 to 1557 of 2007 dated 10.12.2007; W.A. Nos. 749 & 750 of

2006 dated 22.6.2006 and W.A. Nos. 590 & 591 of 2008 dated 11.6.2008. In W.A.No.590 & 591 of 2008 the First Bench of this Court by

order dated 11.6.2008 held as follows:

2. These writ appeals have been filed challenging an order passed by the learned single Judge, dated 17.9.2007. Subject matter of the challenge

was an order passed by the Assessing Authority under the Tamil Nadu General Sales Tax Act. We need to consider the merits of the case, as in

view of the admitted position against the order of the Assessment Officer, statutory appeal is provided. We just remind ourselves of the repeated

directions given by the Apex Court that in the Revenue matters, the Taxing Statute itself is a complete Code and the writ court should not ordinarily

interfere unless the assessee had exhausted all his statutory remedies.

3. In view of this well settled principle, we direct the appellant to file an appeal within a period of three weeks from today before the Appellate

Authority....

25. In the decision reported in (2009) 2 SCC 630 (Mumtaz Post Graduate Degree College v. Vice Chancellor) it is held that availability of

alternate remedy by itself may not be a ground for the High Court to refuse the exercise of its jurisdiction and it may exercise its writ jurisdiction if

the alternate remedy would not be an efficacious one and the order passed is in violation of the principles of natural justice or without jurisdiction.

26. Here in this case, as stated supra the appellate Tribunal is empowered to

pass interim orders and time limit is prescribed for the disposal of the appeals. Thus, the alternate remedy provided for these cases are not only effective but also efficacious. No interpretation of any statute arises in these cases and the jurisdiction of the authority, who passed the impugned orders is not questioned.

27. The decision cited by the learned Senior Counsel for the petitioner made in W.P. No. 22671 of 1993 dated 15.3.2007 of the Division Bench

will not help the petitioner as on the facts of the said case this Court found that the writ petition having been filed in the year 1993 and admitted in

the year 1993, ought not to be dismissed in the year 2007, i.e., after 14 years. In the decision reported in Whirlpool Corporation Vs. Registrar of

Trade Marks, Mumbai and Others, in paragraph 10 it is held that for enforcement of any of the fundamental rights, or where there has been

violation of principles of natural justice, or the authority who passed the order is without jurisdiction, or the vires of the Act is challenged, alternate

remedy may not be a bar to entertain writ petition.

28. Here in this case, even the violations of principles of natural justice is disputed by the respondents. In fact, in W.P. No. 10730 of 2009, notice

of personal hearing to hear the matter on 6.5.2009 was issued on 30.4.2009 and final date for demonstration of the patented goods was fixed on

18.5.2009, which was intimated to the petitioner on 14.5.2009. Copies of the above notices were produced before me and the petitioner failed to

avail the said opportunity of personal hearing/demonstration. The appellate authority is vested with the power to appreciate the factual aspects and

the petitioner can very well establish his right of patent before the appellate authority.

29. In the light of the above finding that in these cases the petitioner is having effective and efficacious alternate remedy and the violation of

principles of natural justice itself are in dispute and the factual controversy with regard to the infringement of the patent rights of the petitioner, I am

of the view that these writ petitions filed challenging the impugned orders, without availing the alternate remedy provided under Sections 128 and

129A respectively of the Customs Act, 1962, cannot be maintained and the writ petitions are liable to be dismissed granting liberty to the petitioner

to avail the statutory remedy provided under the Customs Act, 1962.

30. In view of the above said findings, the issue raised by the contesting respondents in W.P. Nos. 10264, 10432 and 10730 of 2009 with regard to the territorial jurisdiction of this Court to entertain the writ petitions need not be decided in these cases.

The writ petitions are dismissed. No costs. Connected miscellaneous petitions are also dismissed.