**(2014) 07 AP CK 0110**

**In the Andhra Pradesh High Court**

**Case No :** Writ Petition No. 18823 of 2014

S.V. Rubber Co. Pvt. Ltd. APPELLANT

Vs

C.C., C. EX. and S.T. (Appeals-II) RESPONDENT

**Date of Decision :** 08-07-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11, 35
Constitution of India, 1950 — Article 226, 227

**Citation :** (2014) 307 ELT 872

**Hon'ble Judges :** Kalyan Jyoti Sengupta, C.J;Sanjay Kumar, J

**Bench :** Division Bench

**Advocate :** S. Ravi, Senior Counsel, Advocate for the Appellant

## Judgement

Kalyan Jyoti Sengupta, C.J.—Learned counsel for the Revenue submits that he does not want to file any counter-affidavit. We also feel that in the matter of this nature, no counter-affidavit is required. This Writ Petition has been filed challenging the order, dated 18-6-2014 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad (hereinafter referred to as ''the Commissioner'').

2. This case has got a bit interesting background. The writ petitioner approached this Court earlier in 2013 by way of filing Writ Petition No. 28600 of 2013 for the following relief:

"to issue an appropriate writ, order or direction more particularly one in the nature of Writ of Mandamus: (a) declaring as arbitrary, illegal, indiscrete, high-handed, discriminatory and affront to doctrine of legitimate expectations as well as doctrine of equity, fairness & reasonableness (i) the Notice C. No. V/04/01/CE/Arrears, dated 10-1-2013 addressed to the Petitioner Company; (ii) the Notice vide C. No. V/04/01/CE/Arrears/2012, dated 13-9-2013 addressed to M/s. Deepak Transport Agency; (iii) the Notice vide C. No. V/04/01/CE/Arrears/2012, dated 13-9-2013 addressed to M/s. Rajkamal Transport; (iv) the Notice vide C. No. V/04/01/CE/Arrears/2012, dated 13-9-2013 addressed to M/s. Vijayanagar

Gas Company; (v) the Notice vide C. No. V/04/01/CE/Arrears/2012, dated 13-9-2013 addressed to M/s. Galada Industrial & Infrastructure Consultancy Private Ltd. and (vi) the Notice vide C. No. V/04/01/CE/Arrears/2012, dated 13-9-2013 addressed to M/s. Techno Economic Consultants and issued by the Deputy Commissioner of Customs & Central Excise, M Division, D. No. 8-2-77/3 & 4 Plot No. 16 & 21, Aditya Towers, Sri Sai Enclave, Old Bowenpally, Secunderabad-500011; (b) consequently set aside the above Notices."

The aforesaid Writ Petition was disposed of by a Division Bench of this Court by judgment and order, dated 7-10-2013, relevant portion of which is as follows:

"That apart, under Section 35 of the Central Excise Act, 1944 (for short ''the Act'') an efficacious remedy of appeal is provided which can be pursued by any person aggrieved by any decision passed under the Act. Therefore, without exhausting the alternative remedy of appeal provided under the Act the petitioner cannot straight away invoke the jurisdiction of this Court under Article 226 of the Constitution of India."

Accepting the aforesaid judgment and order, the writ petitioner filed a regular appeal under the aforesaid Section before the Commissioner. It is also stated that the appellate authority is reluctant, rather refused, to accept the appeal. Then, necessary application was made for registering the appeal. That application was not disposed of. Then, the petitioner again, approached this Court by filing Writ Petition No. 8090 of 2014 for consideration of the aforesaid application for resubmission. This Court in that Writ Petition passed order, dated 19-3-2014, which is as follows:

"At this stage, we think that no order should be passed on merit, except directing respondent No. 1 - Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad, to deal with and dispose of the application, dated 7-12-2013 made on behalf of the petitioner, a copy of which is annexed to the Writ Petition at page 116, within one month from the date of communication of this order."

3. In the aforesaid background, the writ petitioner requested the Commissioner to decide the application, and without deciding the same on merit, the Commissioner passed an order dismissing the appeal holding the appeal does not lie. It is appropriate to record relevant portion of the findings of the Commissioner as follows:

"The department''s counsel opined that, "no appeal lies against notices issued under Section 11 of the Central Excise Act since it is not an order as contemplated under Section 35 of the Central Excise Act"."

4. Mr. S. Ravi, learned Senior Counsel appearing for the writ petitioner contends that the aforesaid impugned order is not only contrary to what has been observed by this Court but also a gross breach of quasi-judicial discipline. In an unchallenged decision, the Division Bench of this Court opined that appeal is

 

alternative remedy. The aforesaid Commissioner being an authority subordinate to this Court within the meaning of Article 227 of the Constitution of India, has not rendered any decision independently at all rather accepted the opinion of the department and dismissed the appeal holding the same being non-maintainable.

5. On the other hand, learned counsel for the Revenue says that perhaps, the Commissioner was of the view that statutory provision does not permit such appeal and hence, he dismissed the same.

6. Taking note of the contentions of Sri S. Ravi and also the counter submissions of the learned counsel for the Revenue on the aforesaid admitted fact, while agreeing with the submissions of Mr. Ravi, we are of the view that the Commissioner should not have expressed the opinion differently to that of the opinion given by this Court. When the High Court has in clear terms ruled that appeal lies, the Commissioner under Article 227 of the Constitution of India, had no option, but to proceed with the hearing of the appeal on merit. According to us, perhaps, this aspect escaped the notice of Commissioner. He simply accepted misplaced opinion of Department''s Representative.

7. We thus, set aside the judgment and order and restore the appeal for hearing on merit provided question of pre-deposit element is not involved in this matter. If pre-deposit element is required to be complied with, this has to be done in accordance with law. We direct that the appeal should be heard out without wasting time in dealing with the matter, and be disposed of within a period of two months from the date of communication of this order. All points are kept open.

8. Compliance report is to be submitted to the Registry concerned after expiry of two months.

9. The Writ Petition is accordingly allowed. No order as to costs. Consequently, miscellaneous petitions, if any pending, shall stand disposed of.