

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2539 OF 2020

Raju Laxman Pachhapure,
a national and citizen of India,
Age 42, Occ. Agriculturist & Business,
residing at 13/1330, Near Durga Mandir,
Old Chembur Marg, Ichalkaranji, Kolhapur ... Petitioner

Versus

1. Union of India
through the Joint Secretary,
Department of Revenue, Ministry of Finance,
having its office at Udyog Bhavan, New Delhi

2. The Commissioner of Central GST,
Kolhapur Commissionerate,
having its office at Vasant Plaza Commercial
Complex, 4th & 5th Floor, C.S. No. 100/2 KH
Rajaram Raod, Bengal Chowk, Kolhapur 416 001 ... Respondents

**WITH
WRIT PETITION NO. 2540 OF 2020**

Amit Pramod Minache,
a national and citizen of India,
Age 33, Occ. Business,
residing at Samrat Ashok Nagar,
Ichalkaranji, Kolhapur ... Petitioner

Versus

1. Union of India
through the Joint Secretary,

Department of Revenue, Ministry of Finance,
having its office at Udyog Bhavan, New Delhi

2. The Commissioner of Central GST,
Kolhapur Commissionerate,
having its office at Vasant Plaza Commercial
Complex, 4th & 5th Floor, C.S. No. 100/2 KH
Rajaram Raod, Bengal Chowk, Kolhapur 416 001 ... Respondents

**ALONG WITH
INTERIM APPLICATION NO. 93481 OF 2020
IN
WRIT PETITION NO. 2539 OF 2020**

Raju Laxman Pachhapure,
a national and citizen of India,
Age 42, Occ. Agriculturist & Business,
residing at 13/1330, Near Durga Mandir,
Old Chembur Marg, Ichalkaranji, Kolhapur ... Applicant

Versus

1. Union of India
through the Joint Secretary,
Department of Revenue, Ministry of Finance,
having its office at Udyog Bhavan, New Delhi

2. The Commissioner of Central GST,
Kolhapur Commissionerate,
having its office at Vasant Plaza Commercial
Complex, 4th & 5th Floor, C.S. No. 100/2 KH
Rajaram Road, Bengal Chowk, Kolhapur 416 001 ... Respondents

Dr. Sujay Kantawala i/by Mr. Kedar Patil Advocate for the Applicant
Petitioner in Interim Application (I) No. 93481 of 2020 in Writ
Petition No. 2539 of 2020.

Mr. Kedar Patil, Advocate for the Petitioner in Writ Petition No. 2540 of 2020.

Mr. Pradeep S. Jetly, Senior Advocate with Mr. J.B. Mishra, Advocates for the Respondents in both the writ petitions.

**CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.**

**RESERVED ON : 24.11.2020
PRONOUNCED ON : 08.12.2020
(THROUGH VIDEO CONFERENCING)**

ORAL ORDER (Per Abhay Ahuja, J.):

Heard. Since the two petitions involve similar facts and issues and the counsel in Writ Petition No.2540 of 2020 in the case of Amit Pramod Minache Vs. Union of India and Others has submitted that he will adopt the arguments of the counsel in Writ Petition No.2539 of 2020, we are disposing of both the petitions by this order. For the sake of convenience, we will advert to the facts in Writ Petition No. 2539 of 2020 in the case of Raju Laxman Pachhapure.

2. The Petitioner has filed this Petition under Article 226 of the Constitution of India, 1950 for the following reliefs:

(a) This Hon'ble Court be pleased to declare that the provisions of

Rule 17(2) of the Pan Masala Packing Machines (Capacity, Determination and Collection of Duty) Rules, 2008 (the “Pan Masala Rules”) is ultra vires the provisions of Section 3A of the Central Excise Act, 1944 and is unconstitutional;

(b) This Hon’ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction for calling for the records of the present case and after going through the legality and validity thereof be pleased to quash and set aside the impugned Order dated 21.08.2019 issued by the Respondent No.2.

(c) This Hon’ble Court be pleased to issue a writ of mandamus or any other writ in the nature of mandamus or any other appropriate Writ, Order or direction under Article 226 of the Constitution of India restraining the Respondents themselves, their officers, subordinates, servants and agents from taking any further action or adopting any coercive measures to recover the duty, interest or penalty confirmed vide the impugned Order dated 21.08.2019 issued by the Respondent No.2.

(d) This Hon’ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or

direction for calling for the records of the present case and after going through the legality and validity thereof be pleased to quash and set aside the impugned Rejection Letter dated 15.07.2019 issued by the Respondent No.2;

(e) that pending the hearing and final disposal of this Petition, that this Hon'ble Court be pleased to

- i. stay the operation of the Impugned Order dated 21.08.2019; and
- ii. direct the Respondents by themselves, their officers, subordinates, servants and agents to refrain from taking any coercive steps to recover the amount of Excise Duty, interest or penalty confirmed under the impugned Order dated 21.08.2019;

(f) for ad-interim reliefs in terms of prayer clause (d) above;

(g) for costs of this Petition and the Orders made thereon, and

(h) for such further and other reliefs as this Hon'ble Court may deem fit in the facts and circumstances of the case.

Facts-

3. Petitioner is engaged in the activity of cultivation of land in Ichalkaranji, Kolhapur and has been alleged to be the manufacturer of

Aryan Gutka. Search and seizure action was conducted by the officers of the Food and Drugs Authority (FDA) under Food Safety and Standards Act, 2006 (the “Food Safety Act”) in unregistered gutka manufacturing factories in the area of Ichalkaranji, Kolhapur which included the premises of the Petitioner and raw material, processed gutka/supari, pouch, gunny bags, packing machines were recovered. Finished packed pouches of Aryan Gutka said to have been manufactured by the petitioner were recovered at the shop of Balaji Supari Centre. Panchanamas dated 15.9.2014, 16.9.2014, 19.8.2015 and 20.8.2015 were drawn up with respect to the recoveries thus made, which panchanamas along with other information were forwarded to the office of the 2nd respondent. The 2nd Respondent after carrying out investigation, recorded statements, obtained further necessary information and on conclusion of the investigation, issued a show cause notice dated 4.4.2018 (“SCN”) to the petitioners demanding the payment of excise duty from the petitioners, jointly and severally for the period February, 2013 to September, 2014 and from April, 2015 to August, 2015 under the provisions of Rule 17(2) of the Pan Masala Rules read with section 3A of the Central Excise Act, 1944.

4. Petitioner replied to the SCN vide reply dated 10.7.2019, where a specific request for cross examination of the FDA Officers and the police officers who had drawn the above referred panchanamas was made, which was rejected by the 2nd respondent vide its letter dated 15.7.2019.

5. Petitioner submits that parallel criminal proceedings were initiated against the petitioner under the Food Safety Act where the petitioner has been discharged in respect of the complaints made pursuant to panchanama dated 15.9.2014, 16.9.2014 and 20.8.2015 and in respect of panchanama dated 19.8.2015 this court has granted stay.

6. Subsequently on 21.8.2019, Respondent no.2 passed the impugned order in original whereby demand of excise duty to the tune of Rs.59,60,53,224 was confirmed against the petitioners along with equivalent penalty under Rule 26 of the Central Excise Rules, 2002.

7. It is the case of the petitioner that the impugned order has been passed without affording an opportunity to the petitioners to cross

examine the Investigating Officers which is in contravention of the provisions of the Excise Act, besides being arbitrary, illegal, perverse, without and/or in excess of jurisdiction and in gross violation of the principles of natural justice.

8. On the other hand, respondent no. 2 Commissioner of Central GST Kolhapur has filed reply dated 30.12.2019 submitting that in this case there are no exceptional circumstances of lack of jurisdiction, breach of fundamental rights, violation of the principles of natural justice, or non availability of alternate efficacious remedy explained by the Petitioners to justify filing of the writ petition. It is submitted that the alternate remedy of filing appeal before the tribunal was available with the petitioner and therefore the writ petitions ought to be dismissed.

Counsel submissions-

9. We have heard Dr. Kantawalla, learned counsel for the petitioner and Mr. Jetly, learned Senior Counsel for the respondents.

10. Dr. Kantawalla would firstly submit that the show cause notice is

bad in law in as much as the basis of the same are news items published in the daily newspapers viz. Pudhari, Lokmat, Tarun Bharat and Maharashtra Times on 17.9.2014 about the raid and seizure of pan masala containing tobacco, packing machines and other raw materials in the gutka manufacturing factories in Ichalkaranji and not on the basis of any independent investigation done by the GST authorities. He would further submit that the demand of central excise duty of Rs.59,60,53,224 referred to in the show cause notice is not based on any concrete investigation and therefore, the same is bad in law. Dr. Kantawalla has taken us through the show cause notice and refers to paragraph 19 of the said SCN to submit that the petitioners should be permitted to cross examine the persons whose names are contained therein. He has taken us through the request of the petitioner dated 10.7.2019 where the demand for cross examination of some witnesses, panchas, Food Safety Officers and Police Officers were made and for issuance of summons to the witnesses for their examination. He has also taken us through the letter dated 15.7.2019 rejecting the petitioner's request for seeking cross examination. He submits that the 2nd respondent had gone ahead and passed the impugned order in original

dated 21.8.2019 without allowing the petitioner to cross examine the witnesses even though the said order has set out in detail the contentions with respect to the petitioners' said request and despite the petitioners' request vide letter dated 31.7.2019 to adjourn the personal hearing by a month for allowing the petitioner to file appeal before the tribunal against the respondents decision rejecting the petitioner's request to cross examine witnesses. Dr. Kantawalla submits that the impugned order in original is also bad in as much as no personal hearing was granted to the petitioner and relies upon paragraph 21 of the said order, which is quoted as under:

“C] PERSONAL HEARING

21. The personal hearing in the matter was fixed on 27.12.2018, 30.01.2018, 19.03.2019, 28.03.2019, 11.04.2019, 16.04.2019, 30.04.2019, 30.05.2019 and 31.07.2019. Noticee No.1 and 2 did not attend personal hearing on any of the scheduled dates and sought adjournments on one or other ground. I observe that for nine times personal hearing was fixed in the matter in hand. After filing reply.

21.1 Noticee No.3 neither attend personal hearing nor made any communication in this regard.”

10.1 He further submits that although there is a statutory remedy of appeal available against the order and though the petitioners are

desirous of filing the same but because a pre-deposit would be necessary for filing an appeal which would be burdensome on the petitioners, therefore this petition.

11. On a query from the court whether the rejection of request for cross examination dated 15.7.2019 is appealable, Dr. Kantawalla answered in the affirmative submitting that all orders are appealable.

12. Mr. Jetly, learned senior counsel appearing on behalf of the respondents would submit that the order-in-original has been passed on 21.8.2019 after considering the materials on record, the written reply of the petitioner dated 10.7.2019 and after giving several opportunities of personal hearing to the petitioner on 27.12.2018, 30.1.2019, 19.3.2019, 28.3.2019, 11.4.2019, 16.4.2019, 30.4.2019, 30.5.2019 and 31.3.2019. He would submit that earlier petitioners had also been granted sufficient opportunity by the 2nd respondent during the various stages of the proceedings right upto the passing of the impugned order-in- original dated 21.8.2019. He would therefore submit that this is not a case where no opportunity was granted to the

petitioners. He would further submit that as the facts suggest this is also not a case where the authorities have acted without jurisdiction or contrary to the procedure prescribed under law. He submits that there has been no violation of the principles of natural justice and clearly the alternate remedy by way of appeal should have been availed of by the petitioners. Regarding the submission that though the petitioners are desirous of filing an appeal but since pre-deposit would be necessary and because that would be burdensome on the petitioners they have approached this court, Mr. Jetly would submit that the same is untenable as the right of appeal is a statutory right and not an absolute right and can be circumscribed by the conditions in the grant. He would also submit that all the contentions and grounds taken up by the petitioners in the writ petitions can be taken up by them in the appeal provided under the Central Goods and Services Tax Act, 2017 (the “CGST Act”) and therefore, these petitions ought to be dismissed.

Consideration By Court-

13. Having heard the learned counsel for the parties for some time and also having perused the papers and proceedings, we are not

persuaded to invoke our writ jurisdiction at this stage. We are of the considered opinion that the alternative remedy of appeal is efficacious and the reason given for not invoking the same i.e. pre-deposit being burdensome does not appeal to us. Accordingly, we relegate the petitioners to the remedy available under the CGST Act by way of appeal. In this context, it would be relevant to refer to the decision of the Supreme Court in the case of *Titaghur Paper Mills Co. Ltd. Vs. State of Orissa, AIR 1983 SC 603*, where the Hon'ble Supreme Court observed as under :

“11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under subsection (3) of section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under article 226 of the Constitution. It is now well recognised that 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. This rule was stated with great clarity by Willes, J. in Wolverhampton New Water Works Co. v. Hawkesford [1859] 6 CB (NS) 336 at page 356 in the following passage:

There are three classes of cases in which a liability may be established founded upon statute.....But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd. [1919] AC 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. [1935] AC 532 and Secretary of State v. Mask & Co. MANU / PR / 0022 / 1940MANU / PR / 0022/ 1940 : AIR 1940 PC 105. . .”

14. We also observe that in the facts of the case, challenge to the vires of Rule 17(2) of the Pan Masala Rules is rather without substance and therefore we do not consider it necessary to deal with the same in this case.

15. Accordingly, we dismiss both the petitions leaving all contentions open to be agitated before the appellate forum. There shall, however, be no costs in the matter. Interim Application (I) No.93481 of 2020 does

not survive and the same also stands disposed off.

16. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(ABHAY AHUJA, J.)

(UJJAL BHUYAN, J.)