
(2010) 11 AHC CK 0393
In the Allahabad High Court
Case No : Special Appeal No. 741 of 2010

Commissioner of Central Excise

APPELLANT

Vs

Parmarth Iron Pvt. Ltd.

RESPONDENT

Date of Decision : 29-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 33, 9D
CENVAT (Credit) Rules, 2004 — Rule 14

Citation : (2011) 2 ADJ 83 : (2010) 260 ELT 514

Hon'ble Judges : Ferdino I. Rebello, C.J.;A.P. Sahi, J

Bench : Division Bench

Judgement

Ferdino I. Rebello, C.J.—This is an appeal by the Revenue against the orders dated 15-6-2010 [2010 (255) E.L.T. 496 (All.)] and 9-7-2010 passed by the learned Single Judge. The learned Single Judge was pleased to issue a direction that it is obligatory on the part of the Revenue to return the non-relied documents to the Assessee. Further the relied documents or copies thereof must also be furnished to enable the Petitioner (Respondent herein) to plead its case effectively and defend itself. Consequently, a direction was issued to return the original and non-relied documents and to furnish the copies (hard/photo copies) of the relied upon documents to the Petitioner. The Petitioner was also permitted to inspect the original documents and the materials sought to be used against him during the proceedings. The learned Single Judge further directed that the Petitioner shall also be allowed an opportunity of cross-examining the persons whose statements have been relied upon and referred to in the show cause notice. The learned Single Judge held that it is natural that a person facing such an enquiry must have opportunity to cross-examine an author of a document or a person who has deposed against him during the course of an enquiry and, therefore, the Appellants herein shall give to the Respondent-Petitioner the aforesaid opportunity.

2. Revenue has raised the following questions for consideration before this Court :

(1) Whether before the reply is filed to the show cause notice, is an Assessee entitled to cross-examine the witnesses whose statements were recorded, relied upon and referred to in the show cause notice?

(2) Would giving a CD containing documents relied upon by the Department be sufficient or is it mandatory that hard copies be given and/or the copies printed by Respondent at the cost of the Appellants?

3. A few facts may now be set out. Search and seizure operations were carried out at various places including the factory and office premises of the Respondent. Several documents and records were seized and statements were recorded of the witnesses including the supplier of raw material and the buyers of the finished products.

The Director General of Central Excise Intelligence asked the Respondent, vide letter dated 21-1-2008 to make their own arrangements for the photocopies of the statutory records and soft copy of the data in computers concerning accounted sale and purchase seized on 10-7-2007. The Respondent by letter dated 21-1-2008 requested for being supplied the photocopies.

4. A show cause notice came to be issued on 7-7-2008, wherein it was alleged that there was evasion of central excise duty by the Respondent to the tune of Rs. 65,47,51,765/- under the proviso to Sub-section (1) of Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the Act") and further Rs. 10,11,890/- under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A of the Act. The show cause notice contained a list of 293 documents relied upon by the Department.

5. The Respondent on 20-1-2009 moved an application before the Commissioner of Central Excise, Meerut-1 submitting that the physical form/hard copies of the relied upon documents to the show cause notice dated 7-7-2008 were not supplied to them in spite of the specific requests and that the same were essential for offering their reply to the show cause notice. A specific prayer was also made for providing the copies of the relied upon documents and return of non-relied upon documents. It is pointed out that the Appellants were bound to allow the application of the Respondent in view of various Circulars dated 25-4-1988, 10-6-1988 and 8-9-2006. According to the Respondent, on 27-2-2009, the Commissioner of Central Excise passed an order where it was observed that the Respondent had a right to be provided with copies of the relied upon documents to make proper representation and that had been met by providing a CD containing the said documents. The Commissioner further observed that in these circumstances, the request for supply of hard copies of all the voluminous documents appears to be unreasonable and made only with an intention of delaying the adjudication proceedings. The Respondent thereafter filed two applications, one of supply of documents and another for seeking cross-examination of the persons, whose statements have been relied upon by the Department. According to the Respondent, Appellant No. 1 by letter dated

8-3-2010, has supplied the copies of the various documents to the various persons and has fixed the date for final hearing on 10-6-2010. However, neither the copies of the documents were provided, nor the Respondent was allowed to cross-examine the persons as mentioned in the application dated 23-11-2009. The Respondent had appeared in the office of Respondent No. 1 on 10-6-2010. However, Appellant No. 1 was not there and the Respondent was asked to file reply within one week, but neither cross-examination had been allowed, nor the photocopies of the documents were supplied.

With the writ petition, the Respondent had annexed the show cause notice and in paragraph 61 of the show cause notice, it was specifically set out that all the documents/records were available with the Director General of Central Excise Intelligence and could be inspected on any working day during office hours. It is also an admitted position that the Appellants have given to the Respondent a CD. containing the documents.

6. At the hearing of this appeal, on behalf of the Respondent, learned Counsel has relied upon the Adjudication Manual and more specifically paragraph 9A, which reads as under :

9A. Supply of copies of documents in departmental proceedings. - The adjudicating authorities should supply to the party copies of all the documents referred to in the show-cause notice without charging the party for these copies, no matter what these documents are if there is a request for the same. As regards other documents, the party would have to pay for the copies of the documents which he wants to rely upon in putting up his defence (See also para 260 of Basic Manual).

7. Reliance was also placed on the judgment of the Supreme Court in the case of Sanghi Textile Processors (P) Ltd. v. Collector of Central Excise [1993 (65) E.L.T. 357 (S.C.)] wherein the question arose was "who is to bear the expenses involved in taking out photostats". The Supreme Court held that reasonable expenditure for copying whatever document the Petitioner would ultimately find it reasonably necessary to take copies of, shall be reimbursed by the department to the Petitioners and relied upon Para 9(a) of the Departmental Instructions.

8. Reference is also made to the Circular dated 27-7-2000 and most specifically paragraph 3 thereof, which reads as under :

3. The observance of Principles of Natural Justice by Departmental adjudicating authorities will result in avoidance of frequent remand of cases on the ground of non-observance of the same. The Departmental Adjudication manual contains detailed instructions/guidelines about the Principles of Natural Justice which much be followed in letter and spirit by each Departmental adjudicating authority

Learned Counsel relied upon a large number of judgments to which we shall advert to to the extent necessary.

9. Section 9D of the Act would be relevant and it reads as under: "9-D.

Relevancy of statements under certain circumstances :

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of providing, in any prosecution for an offence under this Act, the truth of the facts which it contains :

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of Sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

10. We may mention here that as per the record, the adjudication proceedings have not yet commenced. It is in that context, that we shall first consider the issue raised on behalf of the Appellants herein.

11. In *International Electron Devices Ltd. v. Union of India* [2010 (252) E.L.T. 352 (All)], a learned Division Bench of this Court was considering an issue of cross-examination of witnesses. The submission there was that the Petitioner therein was entitled to cross-examine the witnesses, who participated in the weighment process during the search operation. The learned Bench declined to interfere at that stage by holding that if the Department fails to produce material witnesses, an adverse inference as permissible under law would be drawn against it and it is the choice of the Department to produce or not to produce the material witnesses. The learned Bench further observed that if the parties are not interested to produce a witness, the Court cannot compel them to do so.

Reliance was then placed on the judgment in *Prestige Paints Vs. CC and CE and Another*, There also a show cause notice was issued and the Petitioner had filed reply thereof. The matter was pending for adjudication u/s 33 of the Central Excise Act. The Petitioner thereafter had prayed for cross-examining of the witnesses whose statements have been recorded and referred to the show cause notice. In that case, the learned Bench was pleased to hold that for the various reasons set out therein, even if in that case the Court held that the petition was premature, though it was open to challenge the denial of request for cross-examination.

12. In *J and K Cigarettes Ltd. and Others Vs. Collector of Central Excise and Others*, the issue was a challenge to the constitutional validity of Section 9D of the Central Excise Act. The learned Bench of the Delhi High Court was pleased to

hold that only in some exceptional circumstances, the right to cross-examination could be taken away. There also, it appears that the cross-examination was sought at the stage of adjudication of proceedings. The challenge to the constitutional validity of the provision was upheld.

13. We may also refer to some other judgments relied upon by the learned Counsel for the Respondent. In *Kellogg India Private Limited. and Madhukar Patil Vs. Union of India (UOI)*, Asst. Commission, Central Excise and Customs and Commissioner of Central Excise, a Division Bench of the Bombay High Court was pleased to hold that the authority cannot refuse to produce documents only on the perception that the documents are not relevant. The matter was remanded back to enable the Petitioner for cross-examining the witnesses. Non-production of witnesses for cross-examination it was held is violative of principles of natural justice and fair play and need no judgments. We may gainfully refer to the judgment in *Arya Abhushan Bhandar Vs. Union of India (UOI)*, In *Sunder Ispat Limited Vs. Commissioner of Cus. and C. Ex., Hyderabad*, a learned Division Bench of the Andhra Pradesh High Court held that the witnesses examined on behalf of the Department had to be produced for cross-examination in accordance with the principles of natural justice. We may also refer to the judgment of the Supreme Court in *Lakshman Exports Limited Vs. Collector of Central Excise*, . This also was in respect of proceedings in adjudication proceeding. That cross-examination at the stage of adjudication cannot be denied, is rectified in a large number of judgments. See: *Gyan Chand Sant Lal Jain v. Union of India* [2001 (136) E.L.T. 9 (Bom.)], *Swadeshi Polytex Ltd. v. Collector of Central Excise, Meerut* [2000 (122) E.L.T. 641 (S.C.)], *Prayagdas Tushnial v. Collector of C. Ex. & Land Customs, Shillong* [2000 (125) E.L.T. 377 (Gau.)] , *Lachmandas Tobacco Dealer Vs. Union of India (UOI) and Others*, and *Kalra Glue Factory v. Sales Tax Tribunal and Ors.* [1987 (66) STC 292].

14. All these judgments in the matter of cross-examination are at the stage of adjudication. The law, therefore, at that stage, need not be elaborated, as it is the right of an Assessee in the event the Revenue seeks to rely on the statements of witnesses recorded by it and whose statements are sought to be relied upon at the stage of adjudication to make available the said witnesses for cross-examination so that it could be established whether the statements recorded from the said witnesses have been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like. The object, being that a Tribunal or Court conducting a proceeding either before the Court or quasi judicial tribunal in adjudication, must have the true evidence and shift the evidence to weed out the chaff from the grain. Another reason being to satisfy itself that the person whose statement was recorded had made it voluntarily and based on his personal knowledge or legal records which can come out in cross-examination. This is to ensure the Court or Tribunal or the authority conducting the proceeding arrives at the correct conclusion based on tested evidence before it. The issue also is no longer *res integra* in view of the large number of judgments of the Supreme Court.

15. The question, however, before us is, does the Respondent have a right to call upon the Appellants to make available the witnesses for cross-examination even before they being examined or their statements relied upon by the Department in proceedings in adjudication. None of the judgments cited above were on the issue of making available the witnesses for cross-examination in order to reply to a show cause notice. Those judgments as already explained were in the course of adjudicating proceedings.

Is, therefore, an Assessee entitled to cross examine the witnesses at the stage of filing a reply to the show cause notice? A show cause notice is issued on the basis of uncontested material available before the Assessing Authority, who based thereon, has arrived at a prima facie finding whether a show cause notice ought to be issued or not. The material, thus, which has to be considered is, untested and uncorroborated. A party is called upon to reply to the said show cause notice in order to enable the Revenue to know the stand of the Assessee, in the context of the material produced as to whether the proceedings should be further proceeded with. It is an opportunity to the party being proceeded against to disclose any material that the party may have to rebut the prima facie opinion. Even if, the Assessee fails to reply to the show cause notice, that does not amount to an "admission" of the contents of the show cause notice in the absence of any statutory provision and it is always open to an Assessee to cross-examine the witnesses whose statements are relied upon or sought to be examined on behalf of the Revenue.

At the stage of show cause notice, there is no adjudication. It is only a step in the process of adjudication. The show cause notice by itself is not an order of assessment. The order of assessment will be passed only after considering the evidence and the material, which is placed before the quasi judicial authority/tribunal. Therefore, as the show cause notice is based on prima facie material and constitutes a prima facie opinion, that does not result into an order of adjudication. The question, therefore, of an Assessee being entitled to cross-examination, even before the adjudication has commenced, in our opinion, surely would not arise. It is only after the adjudication proceedings have commenced pursuant to the show cause notice and if the Revenue seeks to rely upon the statements or documents, then the principles of natural justice would require in the absence of any statutory provision, that the person whose statement was recorded is made available for cross-examination to test the veracity of the statement.

16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon

have to be made available for cross-examination for the evidence or statement to be considered.

17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross-examination before the reply to the show cause notice is filed and before adjudication commences. The exercise of cross-examination commences only after the proceedings for adjudication have commenced.

Having said so, in our opinion, the first question is answered accordingly.

18. Considering the second contention, it is true that in view of the Adjudication Manual as also the judgment in Sanghi Textile Processors (P) Ltd. (supra), the Assessee is entitled to the reasonable cost incurred for getting the copies of the documents. In the instant case, there is no dispute that a soft copy containing the documents has been made available. The grievance of the Respondent was that he must be given hard copies of the documents as some of the documents are ineligible as shown from the soft copies. Considering the fact that the documents have been made available in the form of a CD., one can read the same. In our opinion, that would amount to sufficient compliance though may not be strict compliance. In case, there are any documents, which are not clear, then in that event, if the Respondent applies for those documents, then the Department shall, within 15 days of the receipt of the letter in respect of those copies, make them available to the Respondent herein at the Department's cost.

19. Having said so, in our opinion, the impugned order insofar as the cross-examination is concerned, is liable to be set aside. Accordingly, it is set aside. Insofar as providing the documents is concerned, it shall be in terms of what has been stated above.

20. The appeal is disposed of, accordingly.