(2018) 05 CAL CK 0031

In the Calcutta High Court

Case No : GA 1161 of 2016 In APO 97 of 2018, WP 13 of 2008

ESAB INDIA LIMITED APPELLANT

Vs

UNION OF INDIA & ANR. RESPONDENT

Date of Decision : 08-05-2018

Acts Referred:
Constitution of India — Article 226

Citation : (2018) 05 CAL CK 0031

Hon'ble Judges : SANJIB BANERJEE, ABHIJIT GANGOPADHYAY J

Bench : Division Bench

Advocate : U. Sridharan, R. K. Chowdhary, Ravi Raghavan, Deepro Sen, Somnath Ganguly, Manasi Mukherjee, S. Ghosh

Final Decision : Allowed

Judgement

The Court : The short ground which is canvassed by the appellant is that the Court of the first instance failed to appreciate the extent of the breach of

the principles of natural justice in course of the Commissioner, Central Excise, Kolkata â?" III Commissionarate passing the order that was challenged

by way of a petition under Article 226 of the Constitution.

It is elementary that an order in respect whereof some other remedy lies may not be amenable to a challenge under Article 226 of the Constitution of

India unless the challenger can demonstrate gross violation of the principles of natural justice or the order being absurd to the meanest mind. Even

though such grounds are also available by way of a regular remedy of appeal or revision or the like, these are the exceptions to the self-imposed

restriction exercised by the writ Court not ordinarily entertaining a challenge by way of a petition under Article 226 of the Constitution when an

efficacious, alternative remedy is available to the petitioner.

It is not necessary to go into the elaborate facts that culminated in the order of the said Commissioner being passed or in the writ petition being carried

therefrom. It may only be noticed that there is a dispute between the excise authorities and the appellant-assessee as to the quantam of excise duty

that ought to have been paid by the assessee for several assessment years only on the question of whether the freight or delivery charges for reaching

the manufactured goods by the assessee to its clients had been charged by the assessee from the clients. After dwelling on the facts and towards end

of the order passed by the said Commissioner on September 21, 2007, the following paragraph appears:

â??Records reveal that the declaration was not correct. The Noticee suppressed material facts on the issue. This is because as per records, they had

realized freight charges from their customers/buyers during the period under demand. The jurisdictional Asstt. Commissioner of CE, examined the

matter and confirmed such realization under his report C. No. V(1)15/KDH/IR/2001/3381 dated 21-11-2001. Clearly, this was not submitted by the

assessee to revenue and was unearthed from so far non-submitted records. In the above back drop, the Notice was issued with allegations of

suppression of facts with intent to evade payment of appropriate duty and the amount of duty, calculated on such freight charges, which remained

short-paid for such under-valuation was proposed for recovery in terms of Section 11A(1). The Noticee during P.H. said that the freight charges, on

which the demand is raised is not acceptable, however they did not come forward with any figure/calculation of their own to justify their stand. The

Noticee has made no submission either as to merit of the case during the present proceedings.â??

It is plain to see from the passage quoted above that the said Commissioner relied mainly on the report of the jurisdictional Assistant Commissioner of

Central Excise and the adverse observations or remarks therein qua the asssessee and the assesseeâ??s conduct. The said Commissioner was

persuaded by the contents of the report to render a finding that the assessee had suppressed material facts from the authorities which the jurisdictional

Assistant Commissioner could unearth in course of the exercise undertaken by such officer.

It is not in dispute that the relevant report of the jurisdictional Assistant Commissioner dated November 21, 2001 was not made available to the assessee at any point of time before or after the passing of the order of the said Commissioner. It is also not in dispute that such report was not

referred to in the show-cause notice that culminated in the process of adjudication resulting in the order dated September 21, 2007 being passed by the

said Commissioner.

It is elementary that when some matter is used against a person to condemn such person, such person must be afforded an opportunity to look into

such matter and furnish any explanation in such regard. At any rate, an opportunity to furnish an explanation must always be afforded. If such

opportunity is not afforded but the matter is relied upon to render an adverse finding against such person, it would amount to the breach of the

fundamental canons of natural justice.

In the present case, it is evident that the finding rendered by the said Commissioner in the order dated September 21, 2007 is almost exclusively based

on the adverse report of the jurisdictional Assistant Commissioner and such report was never made available to the petitioner nor was the same

alluded to in the show-cause notice that culminated in the hearing afforded by the said Commissioner. Accordingly, the order of the Commissioner in

such regard cannot be upheld.

Â In the judgment and order of the single Bench dated March 17, 2016 impugned in the present appeal, the ground canvassed by the writ petitioner

was dealt with in the following paragraphs:

â??The contention on behalf of the petitioner that the principles of natural justice have been breached by the adjudicating authority in passing the

impugned order is without any basis. Admittedly, the petitioner was afforded adequate opportunity of hearing. The petitioner was duly represented

before the adjudicating officer. The adjudicating officer heard both the parties. The adjudicating authority has given reasons in the impugned order.

â??The contention on behalf of the petitioner that documents sought to be relied upon by the department was (sic, were) not supplied to the petitioner

is also without basis. The petitioner has not established that in spite of request for the documents in course of such hearing, the same was not made

over. The documents sought to be relied upon are the documents of the petitioner itself. The petitioner has not placed any material to suggest that the

petitioner did not receive the freight during the period concerned. The petitioner is aware of the period under consideration. In view of the period being

specified in the show-cause notice, the plea of the breach of principles of natural justice is an afterthought and without any basis.â??

Â A contention that an action or a decision is contrary to the principles of natural justice can come in many hues and forms. Merely because a person

is represented before an adjudicating authority does not imply that there was no breach of the principles of natural justice. A person may be

represented before an adjudicating authority on a particular issue but the adjudicating authority may render a decision on a completely different issue.

The mere presence or representation in such an event does not cure the breach. Again, when a document is referred to in an order of adjudication or

the like, it is for the party in whose favour the decision was rendered to demonstrate that such document was available to the adversary and the

adversary had due opportunity to deal with the same. There is no onus on the party who had not been favoured with a document to seek the document

for there to be a breach of the principles of natural justice. It appears that erroneous aspects of the principles of natural justice were adverted to in the

relevant paragraphs in the order impugned and the answers rendered were not apposite in the context.

Nothing in this order should be construed to be a pronouncement on the merits of the claim against the assessee. The judgment and order impugned of

the single Bench is not sustained since it failed to take into consideration the nature of the breach of the principles of natural justice that had been

carried to it by the writ petitioner. The order dated September 21, 2007 passed by the said Commissioner cannot be sustained since it relied on a report

of November 21, 2001 without ensuring that a copy of such report was made available to the assessee.

Accordingly, APO 97 of 2018 and GA 1161 of 2016 succeed. The judgment and order impugned in the appeal dated March 17, 2016 are set aside.

WP 13 of 2008 is allowed by setting aside the order dated September 21, 2007 passed by the said Commissioner with the observation that the matter

will be considered afresh in accordance with law by the said Commissioner and a fresh decision rendered within four months from date. In the event

the said Commissioner is desirous of relying on the jurisdictional Assistant Commissionerâ??s report of November 21, 2001 a copy thereof should be made available to the appellant assessee prior to the commencement of the hearing. There will be no order as to costs.

