**(2019) 03 MP CK 0114**

**In the Madhya Pradesh High Court**

**Case No :** Writ Petition No. 24164 Of 2018

Kirit Shrimankar APPELLANT

Vs

Commissioner Of CGST & Central Excise RESPONDENT

**Date of Decision :** 27-03-2019

**Acts Referred:**
Customs Act, 1962 — Section 2(20), 108, 114(i), 114(iii), 138B, 144AA

**Citation :** (2019) 03 MP CK 0114

**Hon'ble Judges :** S.C. Sharma, J

**Bench :** Single Bench

**Advocate :** Alok Barthwal, Prasanna Prasad

**Final Decision :** Dismissed

## Judgement

The petitioner before this Court has filed this present petition 1being aggrieved by impugned order No.01/COMMR/CUS/IND/CAA/ 2018 dated 24/05/2018 passed by Commissioner, CGST and Central Excise, Indore under the provisions of Central Excise Act, 1944 and Customs Act, 1962.

02- The facts, as stated in the writ petition, reveals that a show cause notice-cum-demand notice was issued under the provisions of Customs Act, 1962 to the petitioner alleging that the petitioner in association with others has exported the fabrics and ready-made garments by inflating the export value so as to avail undue and otherwise inadmissible export benefits advantage. It was also alleged that said exports were made in proxy dummy i.e. Code for Inland Container Deport, Dhannad and Kheda, District Dhar. The petitioner was the actual exporter of the same.

03- In the show cause notice it was proposed to reject the declared FOB value of such exports and to redetermine the same and to hold the petitioner as exporter of said goods in terms of Section 2(20) of the Customs Act and to recover exports benefits i.e. duty drawback granted towards the past exports as well as to impose penalty.

 

04- The show cause notice was issued on 12/08/2014 and the petitioner filed a reply denying the allegations and made a request for summoning the witnesses for their examination under Section 138-B of the Customs Act, 1962. The petitioner submitted various letters and again wrote a letter on 05/04/2016 reiterating the request made earlier. The petitioner, thereafter, vide communication dated 11/04/2016, 22/08/2016 and 19/09/2016 informed the Department that the he has not received any reply of his preliminary reply wherein a request was made to examine the witnesses. Hence, he is unable to file his final submission in the matter.

05- The petitioner further stated that he has filed a writ petition before the Bombay High Court and the same was informed vide communication dated 19/09/2016 informing the Department that a Writ Petition No.3815/2015 has been filed before the Bombay High Court challenging the entire investigation and the statement recorded under Section 108 of the Customs Act, 1962 and the same is pending before the Bombay High Court. He requested the Department to treat the submissions made therein as part and parcel of the submissions of the petitioner in the adjudication proceedings. The petitioner vide communication dated 28/09/2016 again requested for a decision on his preliminary request for examining the witnesses.

06- The petitioner's contention is that without passing a formal order and communicating it to the petitioner and without complying Section 138-B of the Customs Act, 1962, the respondents have passed the impugned order on 24/05/2018 received by the petitioner on 13/07/2018.

07- The petitioner raised various grounds before this Court and it has been stated that examination-in-chief and right of cross-examination is integral part of judicial process and any deviation from the same would render judicial proceeding void. It has also been argued that the order in original is neither sustainable on facts nor in law. It has been argued that in spite of repeated letters of request dated 23/02/2016, 05/04/2016, 11/04/2016, 22/08/2016, 19/09/2016, 28/09/2016 and 29/11/2017, the respondents have not permitted the petitioner to cross-examine the witnesses and therefore, the demand confirmed against the petitioner and the penalty imposed by discarding the procedure stipulated under Section 138-B of the Customs Act, 1962 amounting to denial of reasonable opportunity and therefore, the impugned order deserves to be quashed.

08- It has also been stated that the petitioner had no conscious knowledge of any over valuation / valuation of the export goods nor he has contravened any provision of the Customs Act, 1962. Thus, the question of making demand against the petitioner and imposition of penalty on the petitioner under Section 114(i) and (iii) and Section 144-AA of the Customs Act, 1962 does not arise.

09- It has also been argued that there is no tangible evidence to saddle the petitioner with any demand of penal liability that too without examination of the persons whose statement are considered relevant and used against the petitioner. Learned counsel for the petitioner has stated that impugned order without applying the provision of Section 138-B of the Customs Act is void ab initio. It has also been argued that the statement of witnesses could have been relevant only in cases of eventuality as stated under Section 108 of the Customs Act, 1962 without there being cross-examination and therefore, as no eventuality has taken place denial of right of cross-examination vitiates the order passed by the respondent. A prayer has been made for quashment of the impugned order.

10- Learned counsel for the petitioner to bolster his submissions has placed reliance upon the judgments delivered in the case of J & K Cigarettes Ltd. Vs. Collector of Central Excise reported in 2009 (242) E.L.T. 189 (Del.), Commissioner of Central Excise, Meerut-I Vs. Parmarth Iron Pvt. Ltd. reported in 2010 (260) E.L.T. 514 (All.), Kirit Shrimankar Vs. The Commissioner, CGST & Cenral Excise & Anr. passed by this Court in Writ Petition No.14380/2018 decided on 05/07/2018, Principal Commissioner, Customs, Central Excise & Service Tax Vs. M.S.S. Foods Processors delivered by this Court in the case of Central Excise Appeal No.33/2016 decided on 18/05/2017, Skyrise Overseas Pvt. Ltd. Vs. Commissioner of Customs (Port) reported in 2017 (353) E.L.T. 421 (Cal.), Swiber Offshore Construction Pvt. Ltd. Vs. Commr. Of Cus., Kandla reported in 2014 (301) E.L.T. 119 (Tri.-Ahmd.), Sukhwant Singh Vs. State of Punjab reported in 1995 AIR 1380, Savino Micron (India) Pvt. Ltd. Vs. Union of India reported in 2017 (351) E.L.T. 250 (Guj.), Manek Chemicals Pvt. Ltd. Vs. Union of India reported in 2016 (224) E.L.T. 302 (Guj.), Soumendu Saha Vs. Union of India reported in 2015 (322) E.L.T. 462 (Cal.), Swagat Synthetics Vs. Union of India reported in 2018 (360) E.L.T. 900 (Guj.), Mahek Glazes Pvt. Ltd. Vs. Union of India reported in 2014 (300) E.L.T. 25 (Guj.), M. P. State Agro Industries Development Corporation Ltd. & Ors. Vs. Jahan Khan reported in AIR 2007 SC 3153 and Commissioner of Central Excise, Delhi-I Vs. Kuber Tobacco India Ltd. reported in 2016 (338) E.L.T. 113 (Tri.-Del.).

11- On the other hand, learned counsel appearing on behalf of Excise Department has argued before this Court that after issuing proper show cause notice, they have extended the opportunity of hearing to the petitioner and the petitioner has appeared before the authorities and an appropriate order in accordance with law has been passed.

12- It has been further stated that demand of summoning all the witnesses before the adjudicating authority for their examination under Section 138-B of the Customs Act, 1962 and cross-examination of all such witnesses and also putting a condition for submission of detailed reply to the show cause notice was neither legal nor supported by practice / precedent in the departmental adjudication proceedings. It has been stated that there were as many as 10 Panchnamas, 47 statements and 38 operations / visit reports on record and the number of total witnesses comes to 263 persons required to be summoned as prayed by the petitioner. There was no justification for making such a demand.

 

13- Respondents have placed reliance upon the judgments delivered in the case of M/s. Kanungo & Company Vs. Collector of Customs and Others reported in (1973) 2 SCC 438, Surjeet Singh Chhabra Vs. Union of India and Others reported in (1997) 1 SCC 508, Telstar Travels Pvt. Ltd. & Others Vs. Enforcement Directorate reported in (2013) 9 SCC 549, Naresh J. Sukhawani Vs. Union of India reported in 1995 Supp (4) SCC 663, Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Union of India & Others reported in (2014) 15 SCC 44, M/s. R. S. Company Vs. Commissioner of Central Excise passed by this Court in Central Excise Appeal No.24/2012 on 08/02/2017 and G. Bassi Reddy Vs. International Crops Research Institute and Another reported in (2003) 4 SCC 225.

14- Heard learned counsel for the parties at length and perused the record.

15- This Court has also gone through all the judgments relied upon by the learned counsel for the parties. The petitioner was served with a show cause notice-cum-demand notice under the provisions of Customs Act, 1962. The material on the basis of which the custom authorities have relied was set out and it was also given to the petitioner to give a suitable explanation. It is nobody's case that the petitioner was not permitted to participate in the proceedings. He has appeared before the authorities on numerous occasions. All his objections have been considered and thereafter, a very exhaustive order has been passed in the matter.

16- Learned counsel for the petitioner has vehemently argued before this Court that principles of natural justice and fair play have not been followed and his contention is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. The apex Court in the case of M/s. Kanungo & Company (Supra) has dealt with a similar controversy and paragraph No.12 of the aforesaid judgment reads as under:-

"12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our-opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed lo be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

The judgment delivered by the apex Court has not been overruled till date nor it has been brought to the notice of this Court by the parties that it has been overruled. In the considered opinion of this Court, the principles of natural justice do not require in a matter like this that the persons who have been given information should be examined in presence of the petitioner or should be allowed to be cross-examined.

17- Learned counsel for the petitioner has placed reliance upon a judgment delivered in the case of akshman Exports Limited Vs. Collector of Central Excise reported in (2005) 10 SCC 634 and his contention is that in the aforesaid case the apex Court has remanded the matter back to the Additional Collector, Okhla to permit the assessee to cross-examine the representatives of the two concerns to show that the goods in question had been accounted for in their books of account and appropriate duty had been paid. It is true that the aforesaid issue was relating to principles of natural justice and fair play, however, the judgment delivered in the case of M/s. Kanungo & Company (Supra) has not been considered by the apex Court nor the judgment delivered in the case of M/s. Kanungo & Company, which is prior in time has been overruled.

18- Resultantly, there is no force in the arguments canvassed by the learned counsel for the petitioner. It is true that in some of the judgments delivered by the Delhi High Court and other High Courts, the order passed by the adjudicating authority has been set aside on this ground or the matter has been remanded back on this Court, but the fact remains that the judgment delivered in the case of M/s. Kanungo & Company (Supra) holds the field good as on date.

19- The Commissioner, Customs, Central Excise and Service Tax has dealt with the issue of summoning all the witnesses before the adjudicating authority and he has assigned cogent reasons in the matter. The petitioner wanted to examine as many as 263 individuals from the different parts of the country and by a detailed reasoning assigned by the Commissioner, he has justified his action in not summoning the witnesses as prayed by the petitioner.

20- This Court is not commenting upon the aforesaid issue and upon the findings given by the learned Commissioner, as the petitioner is having an alternative remedy of preferring an appeal before the Customs, Excise & Service Tax Appellate Tribunal. This Court is of the opinion that as the order has been passed by an authority competent under the statute to pass an order and as the order has been passed after hearing the petitioner in detail, the present petition deserves to be dismissed on the ground of availability of alternative equally efficacious remedy. No case for interference is made out in the matter. Accordingly, the writ petition stands dismissed.

21- It is also clarified that any observation made by this Court while deciding writ petition will not come in way of the petitioner in case an appeal is preferred before the appellate Tribunal and the appellate Tribunal shall be free to decide the matter in accordance with law.

22- In the present case, the petitioner has referred to a writ petition filed before the Bombay High Court and the respondent while submitting reply has not commented upon the writ petition preferred by the petitioner before the Bombay

High Court. It was the petitioner's counsel, who has later on, when a specific order was passed, has shown copy of the writ petition as well as the order passed by the Bombay High Court. The reply of the Central Excise Department was silent in respect of the petition filed before the Bombay High Court and in fact no parawise reply has been filed by the Department in a matter like this involving hundred and hundred crores of rupees. Only a skeleton reply has been filed by the Department.

23- Resultantly, the respondents are directed to ensure in future, the complete parawise reply is filed in all the matters in respect of the specific allegations and averments made in the writ petition.

24- With the aforesaid, writ petition stands dismissed.

Certified copy as per rules.

 