
(2017) 10 AP CK 0055
In the Andhra Pradesh High Court
Case No : 5917 of 2017

Manidhari Stainless Wire Pvt. Ltd. & Anr.	APPELLANT
Vs	
Union of India & Anr.	RESPONDENT

Date of Decision : 31-10-2017

Acts Referred:

Central Excise Act, 1944, Section 14, Section 11A(4) - Power to summon persons to give evidence and produce documents in inquiries under this Act - Recovery of duties not levied or not paid or

Citation : (2017) 10 AP CK 0055

Hon'ble Judges : V.Ramasubramanian, Abhinand Kumar Shavili

Bench : DIVISON BENCH

Advocate : Madhava Sham Murthy, Srikanth Kaveti, B.Narayana Reddy

Final Decision : Disposed oFF

Judgement

1. The petitioner has come up with the above writ petition challenging an Order-in-Original passed by the Commissioner of Central Excise and Service Tax (the 3rd respondent herein), in terms of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944, confirming a demand of Rs.4,52,24,794/- towards CENVAT/ CVD, of Rs.67,03,377/- towards Additional duty of import, of Rs.9,04,283/- towards Education Cess, of Rs.4,21,568/- towards Secondary and Higher Education Cess, in all totalling to Rs.5,32,54,022/-, purportedly towards recovery of the CENVAT Credit improperly availed.
2. We have heard Mr. Madhava Sham Murthy, learned counsel appearing for the petitioner and Mr. B.Narayana Reddy, learned Senior Standing Counsel for the respondents.
3. The petitioner is engaged in the manufacture of various stainless steel items, such as S.S. Wire, S.S. Flat, S.S. Wire Rod, S.S. Angle etc., classifiable under Ch.72 of the Schedule to the Central Excise Tariff Act, 1985. Search operations

were conducted at the factory premises of the petitioner, the residential premises of its Directors and other related premises, on 24-6-2009, on the ground that the officers of the Directorate of Central Excise Intelligence had specific information that the petitioner was irregularly availing CENVAT Credit of duty paid on certain goods claiming them as inputs without actually using the same in or in relation to the manufacture of their dutiable finished goods.

4. After the search and after recording the statements of a few persons including a consultant of the petitioner, a show cause notice was issued on 01-3-2012, calling upon the petitioner to show cause as to why CENVAT Credit amounting to Rs.4,50,52,629/-, for the period from 01-02-2007 to 02-10-2011 should not be demanded and recovered under Section 11A(1). This show cause notice resulted in an ex parte Order-in-Original being passed on 20-5-2013.

5. As against the Order-in-Original dated 20-5-2013, the petitioner filed an appeal before the CESTAT. The CESTAT allowed the appeal by an order dated 08-9-2014 and remanded the matter back to the Adjudicating Authority.

6. In the de novo proceedings, held on 20-10-2015, the authorised representative of the petitioner seems to have requested for cross-examination of some persons. The petitioner also requested permission to inspect the documents.

7. But the request was rejected and hence the petitioner filed a reply to the show cause notice. Thereafter, a personal hearing took place on 18-3-2016. It appears that the petitioner reiterated their demand for cross-examination. However, by the order impugned in the writ petition dated 31-3-2016, which was later modified by a corrigendum dated 24-8-2016, the 3rd respondent confirmed the demand. Therefore, aggrieved by the same, the petitioner has come up with the above writ petition.

8. Admittedly, the petitioner has an effective alternative remedy of appeal as against the impugned order. But the petitioner seeks to bypass the alternative remedy on two grounds viz., (a) that there was a violation of the principles of natural justice, inasmuch as the request of the petitioner to cross-examine the witnesses whose statements were relied upon, was turned down arbitrarily and

(b) that the rejection of the request for cross-examination was also contrary to the order of remand passed by the CESTAT, on 08-9-2014.

9. For the purpose of convenience, let us take up the second ground for consideration first. It is the contention of the learned counsel for the petitioner that the refusal of the Adjudicating Authority to permit the petitioner to cross-examine those persons whose statements were relied upon, was contrary to the order of remand passed by the CESTAT in the first round. Therefore, it is necessary to look at the order passed by the CESTAT in the first round of litigation.

10. It is seen from the order of CESTAT dated 8-9-2014 that the same was

passed in common on three appeals, one filed by the petitioner/Company and the other two filed by the Directors of the petitioner/Company. Paragraph-3 of the order of CESTAT shows that two grounds were urged viz., (a) that the request for cross-examination was denied and

(b) that the request for furnishing the documents, properly paginated and indexed was not considered.

In paragraph-4 of the order, the Tribunal recorded its displeasure that though the petitioner was responsible for protracting the proceedings by not filing a reply to the show cause notice, there was substantial contribution from the Commissioner, forcing the Tribunal to reluctantly interfere with the order. In paragraph-5, the Tribunal, after recording the contents of the letter of the counsel for the petitioner seeking cross-examination of the persons cited therein, went on to examine how the request for certain documents was not properly considered. Paragraph-5 of the order of the Tribunal reads as follows: 5. In this case on 29-3-2013, the advocate for the appellant submitted a letter to the Commissioner wherein he gave the name of the persons whom he would like to cross-examine and also cited several decisions to support his submissions relating to cross-examination. Further in paragraph 5 of his letter, he submits that documents from C1 to C8, C13, C15 to C18, C20, C22, C24 to C28 and C1.4 are not available in the relied upon documents. This submission has been simply brushed aside without proper discussion and without taking note of the fact which was brought out by the learned AR today during the hearing that till then correspondence was being undertaken by the appellants and they had been provided documents on two occasions and this specific complaint about specific documents not being received had not been made till that date.

11. In paragraph-6 also, the discussion revolved only around the non-furnishing of the documents. In paragraph-7 of its order (penultimate paragraph), the Tribunal recorded its findings and in paragraph-8, the Tribunal recorded the result of the appeals. Paragraphs-7 and 8 of the order of the Tribunal read as follows: 7. From the above it can be seen that it was the Commissioners office who directed the assessee to go to DGCEI office and also required the Additional Director to conduct verification and send a confirmation. That being the position, it was not proper for the Commissioner to simply adjudicate the matter ignoring his own office request to the Additional Director for a report and ignoring the fact that learned counsel for the appellants had stated that the DGCEI office had asked the appellants to come after 15th April for the purpose of verification of documents/ supply of documents. Having written to the Additional Director to verify and confirm and having written to the assessee to go to the DGCEI office, passing an adjudication order without getting the complete reply/proper reply and without giving an opportunity to the appellants to go through the process of verification with DGCEI was not proper.

8. In view of the above observations very reluctantly we set aside the impugned order and remand the matter for fresh adjudication to the learned Commissioner

with a hope that a proper well reasoned order will be passed. Needless to say we hope that appellants shall also extend cooperation. Then again we find that the appellants have been asking for paginated index and frankly we could not understand what exactly was the paginated index they wanted. However while the appellants want every page to be numbered, the Revenue seems to think that if annexure numbers have been given that would be enough. This is another confusion that has arisen. We hope there will be no such confusions in future.

12. From a careful look at the order of CESTAT dated 08- 9-2014 in its entirety, it can be easily deduced that the Tribunal set aside the order of adjudication and remanded the matter back, solely on the ground that certain documents were not made available. Even in the operative portion of the order, the Tribunal directed the Adjudicating Authority only to pass a well reasoned order, after furnishing to the petitioner, the documents with a paginated index (whatever it meant). Two things follow from the order of the Tribunal dated 08-9-2014. They are: (a) that though the ground relating to denial of opportunity to cross-examine witnesses was specifically raised, the Tribunal did not record any finding in paragraphs-7 and 8 of its order on this issue and

(b) that in any case there was no positive direction by the Tribunal in its order dated 08-9-2014 to give an opportunity to the petitioner to cross-examine the witnesses. Therefore, the first contention of the petitioner that the Adjudicating Authority failed to comply with the directions issued by the CESTAT in the order of remand, is wholly misconceived. Unless the Tribunal has recorded a categorical finding that the refusal of the Adjudicating Authority to permit cross-examination was illegal or unless the Tribunal has directed the Adjudicating Authority to allow cross-examination, it is not open to the petitioner to contend that the order of the Tribunal was not complied with.

13. In any case if the petitioner thinks that the Adjudicating Authority failed to comply with the order of the CESTAT, they should have gone again before the CESTAT. After all, the order impugned in the writ petition is liable to be appealed against, to the very same CESTAT. Without going to the Tribunal and complaining that its order of remand was violated, the petitioner has chosen to come to this Court to complain that the order of the CESTAT was violated. Therefore, we have no hesitation in rejecting the second contention.

14. The first contention revolves around the refusal of the adjudicating authority to permit cross-examination. In order to understand and appreciate the scope and reach of this contention, it is necessary to look into the nature of the allegations against the petitioner, which lead to the adjudication. The allegations against the petitioner are (a) that they availed CENVAT Credit of duty paid on the consignments of S.S. Sheet/S.S. Coils as detailed in the annexure, without actually using the same in or in relation to the manufacture of dutiable finished goods,

(b) that they showed certain portions of S.S. Sheets/S.S. Coils to have been sent

to job workers, for the conversion of the same into S.S. Billets, without actually sending them (c) that the petitioner declared the description of goods on the job work challans as Scrap/Steel Scrap/S.S. Scrap even in cases where S.S. Sheet/Coil was shown as sent for job work in their Raw Material Stock Register and

(d) that the petitioner had procured unaccounted S.S. Scrap from the market and supplied the same to job workers.

15. The persons whom the petitioner wanted to summon for cross-examination and the reasons for making such a request were given by the petitioner in a letter dated 03-11- 2015 sent by the counsel for the petitioner to the Commissioner. For the purpose of easy appreciation, we present in a tabular form, the names, their identities and the reasons given by the petitioner for making a request for cross-examining them:

Name	Status	Reasons
1. Pradeep Das	General Manager (Production) of the petitioner/Company	He stated before the Investigating Officers that he was not aware of the purpose of receipt of consignments of S.S. Sheets, S.S. Strips and S.S. Flats into the factory. He claimed that there was no use for the same and that he was also not aware as to why those goods were sent outside the factory. The petitioner wanted to cross-examine him on the ground that this person deliberately kept quiet and failed in his duty to portray the correct position in the factory, despite being Production-in- Charge and despite being fully aware of the nature of the activities in the factory
2. Virender Kumar Pandey	Proprietor of M/s. Akshat Steel Traders	He claimed in his statement to have supplied M.S. Scrap to the company. The petitioner claimed that this person should be called upon to produce all records such as Sale Registers, Sales Invoices, Delivery Challans, Monthly VAT Returns and Income Tax Returns, evidencing the supply of goods to the petitioner.
3.N.M. Bhandari	AGM (Accounts) of M/s. Stainless India Ltd.	He claimed that his company did not receive any S.S. Coils from the petitioner and that S.S. Coils could not be used in their induction furnace for melting purposes. The petitioner claims that being an accounts person, this person was not competent to speak about the aspects of production. At the same time, the petitioner claim that Sri Bhandari was correct in stating that M.S. Patti was not received. But the petitioner claims that Bhandari failed to disclose that what was received by the company was M.S. Patti Scrap ignited in the factory and not supplied by Akshat Traders. Therefore, the petitioner wanted to cross-examine him to cull out the actual nature of material that was sent for conversion.
4. Ashok Fulvalia	Director, M/s. Harrison Steels Pvt. Ltd.	This witness stated that M.S. Patti was not received but M.S. Scrap was received. The petitioner wanted this witness to come with all the factory records showing the receipt of M.S. Patti from their factory.

16. The request for cross-examination of the above four witnesses was rejected by the Adjudicating Authority in paragraph-22 of the impugned order, for the reasons stated therein. It will be useful to extract the reasons stated by the Adjudicating Authority as follows: (i) the deposition of Shri Pradeep Das regarding the usage or otherwise of SS sheets, SS strips and SS flats in the factory has also been corroborated by the statements of Shri Uma Shankar Gupta, Ex-employee, Shri Naveen Chandra Upadaya, Logistics in-charge Shri Mukesh Pathak, former Excise Manager (Para 5.3, 5.6 and 5.11.5 respectively of SCN);

(ii) the statements of S/Shri N.M. Bhandari, Ashok Fulvalia, were shown to Shri Babulal Doshi, Director during the course of his statement on 01-02-2012 and after perusing the said statements, Shri Doshi admitted that he is in agreement with the contents of the same. (Para 6.9 of SCN);

(iii) the statements of job workers were shown to Shri Pavan Raj Kanugo during the course of recording his statement dated 12-12-2011 under Section 14 of Central Excise Act, 1944 and after going through the said statements, Shri Kanugo stated that he had nothing to differ or add in that regard (Para 6.8.2 of SCN);

(iv) the depositions of S/Shri Virender Kumar Pandey, N.M. Bhandari, Ashok Fulvalia, are also supported by the records maintained by their respective firms/companies and the Show cause notice relies on such records (Annexure C-16, C-18 and C-21 respectively) and the relevant details in the said records are extracted in Annexure E-3.1, E-3.3 and E-4 to the show cause notice;

17. Apart from the above factual grounds of rejection, the Adjudicating Authority also took a legal ground for rejection of the request for cross-examination. The legal ground was that as per the decision of the Supreme Court in *Telestar Travels Pvt. Ltd. V. Special Director of Enforcement*, the rejection of the request for cross-examination need not always tantamount to violation of the principles of natural justice. The decision of the Supreme Court in *Telestar Travels Pvt. Ltd.* followed two earlier decisions, one in *M/s. Kanungo & Co. v. Collector of Customs, Calcutta* [1983 (13) E.L.T. 1486 (S.C.)] and the other in *Surjeet Singh Chhabra v. Union of India* [1997 (89) E.L.T. 646 (S.C.)].

18. Assailing the factual as well as the legal grounds on which the Adjudicating Authority denied permission for cross-examination, it was contended by Mr. Madhava Sham Murthy, learned counsel for the petitioner, that in *Telestar*, the Supreme Court was dealing with proceedings under the Foreign Exchange Regulation Act, 1973. Since Rule 3 of the Adjudication Rules made it clear that the rules of procedure do not apply to adjudication proceedings, the Supreme Court came to a particular conclusion in *Telestar* and hence, according to the learned counsel for the petitioner, the said decision cannot be relied upon in the proceedings under the Central Excise Act. In support of this contention, the learned counsel places heavy reliance upon the decision of a Division Bench of

the Bombay High Court in Nirmal Seeds Pvt. Ltd. v. Union of India .

19. We have carefully considered the reasons stated in paragraph-22.1 of the impugned order and the contentions of the learned counsel for the petitioner. We have already tabulated the details of the persons whom the petitioner wanted to cross-examine and the reasons for the petitioner making such a request. The first witness whom the petitioner wanted to cross-examine, was their own General Manager (Production). Admittedly he was an employee of the petitioner. The petitioner has made an allegation that though he was fully aware of the nature of the activities in the factory and especially the manufacturing process, he deliberately kept quiet and failed in his duty to portray the correct position in the factory.

20. We do not know how, if one of the employees of a company facing adjudication failed to perform his duties, it would be a ground to seek his cross-examination. The petitioner never filed any statement or sworn affidavit of Mr. Pradeep Das, either retracting his earlier statement or attempting to explain the same. In fact all that Sri Pradeep Das said was that he was not aware about the purpose of receipt as well as despatch of certain consignments. We do not know how a cross-examination can be permitted in respect of something that a witness claimed to be unaware of.

21. Insofar as the remaining three witnesses whom the petitioner wanted to summon for cross-examination are concerned, the Adjudicating Authority has recorded categorically that their statements were supported by records maintained by their firms/companies and that the details of such records were also indicated in Annexures C-16, C-18 and C-21 to the show cause notice. The relevant details from the said records were also extracted in Annexures E-3.1, E-3.3 and E-4 to the show cause notice.

22. Therefore, we are of the considered view that the factual grounds on which the Adjudicating Authority rejected the request for cross-examination, are cogent and convincing. The statements of third party witnesses were in fact shown to one of the Directors of the petitioner/Company by name Babulal Doshi and he is stated to have confirmed those statements.

23. It may be of interest to note that before the Adjudicating Authority, the petitioner/Company as well as the other Director of the Company viz., Sri Pavan Raj Kanugo alone were represented by counsel. It is recorded in paragraph-18.1 of the impugned order that Sri Madhava Sham Murthy, learned counsel, appeared only for M/s. Manidhari Stainless Wire Pvt. Ltd. and its Director Pavan Raj Kanugo and that the advocate was not appearing for Sri Babulal Doshi, the other Director who was also a noticee. In other words, Babulal Doshi, one of the Directors of the petitioner/Company, who confirmed the statements of the third party witnesses, failed even to appear before the Adjudicating Authority despite the fact that the Company as well as the other Director were represented before the Adjudicating Authority. Therefore, the reasons stated by the Adjudicating

Authority cannot be found fault with.

24. Coming to the legal grounds, it is seen that in *Kanugo & Co. v. Collector of Customs*, the Supreme Court held categorically that the principles of natural justice do not require that in matters of this nature, persons who gave information should be allowed to be cross-examined. In *Kanugo & Co.*, what was in challenge was an order of confiscation of goods under Section 167(8) of the Sea Customs Act, 1878 read with Section 3(2) of the Imports and Exports (Control) Act, 1947. In paragraph-12 of its judgment, the Supreme Court held in *Kanugo & Co.* as follows: 12. 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 to 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.

25. In *Surjeet Singh Chhabra v. Union of India*, the Supreme Court was concerned with a case arising under the Foreign Exchange Regulation Act and the Customs Act. Though the decision in *Surjeet Singh Chhabra* was a very brief order, the Supreme Court rejected the contention that the denial of cross-examination tantamounted to the violation of the principles of natural justice.

26. In *Telestar Travels Pvt. Ltd.*, the Supreme Court was concerned with a set of proceedings under the Foreign Exchange Regulation Act, 1973. In paragraph-18 of its decision, the Supreme Court dealt with this issue as follows: 18. There is, in our opinion, to merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross-examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross-examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case.

27. In paragraph-19, the Supreme Court extracted paragraph-12 of the decision in *Kanugo & Co.* Eventually the Court held in paragraph-20 as follows: 20. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the

search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross-examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected.

28. Therefore, it is clear that the right to cross-examine is not absolute at least insofar as the cases of this nature are concerned. If there are factual grounds to show that the denial of cross-examination was based upon the sound logic, then the order of adjudication cannot be interfered with.

29. It is true that in Nirmal Seeds Pvt. Ltd., a Division Bench of the Bombay High Court distinguished the decision in Telestar Travels. But the reasons for doing so in that particular case are indicated in paragraph-12 of the decision, which read as follows: 12. In the present case, we do not think that we are allowing the petitioners a liberty to prolong or delay the adjudication proceedings. The petitioners in their communication dated 23-11-2016, copy of which is at Page 108 of the paper book, expressly brought to the notice of the authorities that in the show cause notice the statements of Dinesh J. Gunjal, Accountant of Nigal Krushi Seva Kendra, Nashik, Dilip Sampat Dhikale and Aditya Keshavsingh Pardeshi are referred and relied upon.

The justification for cross-examination of each of these persons is provided by the petitioners. They state that Dinesh Gunjal is an Accountant but he has given the statement as if he is a technical person and without knowing the chemical composition and applications. He has deposited that the products Bio Power and Bio Force are growth stimulants/regulators and that is why his technical capabilities have to be adjudged. His cross-examination, therefore, is crucial. Dilip Sampat Dhikale is an undergraduate, yet, he deposes on identical lines and claims that the above products are not ordinary fertilizers. Therefore, in order to ascertain whether he is technically equipped to differentiate between plant growth regulator and plant growth promoter and also to know the difference between ordinary fertilizer and stimulants/regulators that his cross-examination is necessary. The third person also agrees with Mr. Gunjal.

30. We do not find in this case, the presence of any of those or similar reasons.

Therefore, we are not convinced that the impugned order could be set aside solely on the ground of denial of permission to cross-examine the witnesses.

31. In view of the above, the writ petition is dismissed. However, it will be open to the petitioner to avail the alternative remedy of appeal before the appropriate authority. The order impugned in the writ petition was passed on 18-3-2016 and a corrigendum was issued on 24-8-2016. The petitioner filed the above writ petition on 24-11-2016. Therefore, if the petitioner files an appeal as against the impugned orders, the period from 24-11-2016 up to the date of issue of the copy of this order shall be excluded for computing either the period of limitation or the period of delay. The Registry shall return the original impugned order to enable the petitioner to file an appeal. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.