
(2014) 06 BOM CK 0159

In the Bombay High Court

Case No : Customs Appeal No. 43 of 2013 and Notice of Motion (L) No. 1064 of 2013

Patel Engineering Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 30-06-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 108, 111(d), 111(m), 112(a), 28

Citation : (2014) 307 ELT 862 : (2015) 30 GSTR 443

Hon'ble Judges : S.C. Dharmadhikari, J; B.P. Colabawalla, J

Bench : Division Bench

Advocate : S.N. Kantawala and i/b Brijesh Pathak, Advocate for the Appellant;
Pradeep S. Jetly, Advocate for the Respondent

Judgement

1. This Appeal is preferred by the unsuccessful Assessee. The Appellant impugns the concurrent findings rendered by the Adjudicating Authority and equally by the Customs Excise and Service Tax Appellate Tribunal in the impugned order dated 17th January/20th February 2013 and submits that the order passed by the Adjudicating Authority and equally by the Customs Excise Service Tax Appellate Tribunal raises substantial questions of law.

2. On conclusion of the investigation, a show cause notice dated 18.08.2004 was issued to the Appellant, wherein it was proposed to confiscate the goods valued at Rs. 2,06,70,660/- under the provisions of Sections 111(d) and (m) of the Customs Act, 1962 and to impose penalty u/s 112(a) of the Customs Act and also proposing to deny duty exemption contained in Notification No. 55/2003-Cus dated 01.04.2003 in respect of the subject goods and to assess the goods on merit rate of duty and also demanding interest thereon. The notice also proposed to impose penalties on Shri. D.M. Pradhan, Chartered Engineer u/s 112(a), on Shri Rakesh Handa, of the CHA firm M/s. Shobha Prompt Services Pvt. Ltd., M/s. Liebherr Export AG India Office and Shri Pulok Gupta, Manager, Shri Mani Shankar Singh, Asstt. Chief Engineer of M/s. Patel Engineering Ltd. and Shri B.K.

Chakraborty, Vice President of M/s. Patel Engineering Ltd. u/s 112(a) of the Customs Act. The case was adjudicated by the impugned order. The goods were confiscated u/s 111(d) and (m) of the Customs Act, 1962 with an option to redeem the same on payment of fine of Rs. 40 lakhs. The benefit of Notification No. 55/03-Cus was denied and the goods were ordered to be assessed on merits and differential duty was demanded u/s 28 along with interest thereon u/s 28AB. A personal penalty of Rs. 10 lakhs each was imposed on the appellant firm M/s. Patel Engineering Ltd. and M/s. Liebherr Export AG India office u/s 112(a). Penalty of Rs. 5 lakhs each was imposed on Shri B.K. Chakraborty, Vice President of the appellant firm, Shri Pulok Gupta, Manager of the supplier's India Office and Shri D.M. Pradhan, Chartered Engineer. A penalty of Rs. 3 lakhs was imposed on Shri Rakesh Handa, the proprietor of CHA firm. A penalty of Rs. 1 lakh was imposed on Shri Mani Shankar Singh Asst. Chief Engineer of the appellant firm. It is against this order, the appellants are before us.

3. Mr. Kantawala appearing in support of this Appeal firstly submits that in compliance with the order passed by the Adjudicating Authority duty amount has been deposited. The only sum which has not been deposited is redemption fine and amount of penalty.

4. It is then submitted that grave and serious prejudice has been caused on account of the approach of the Tribunal and prior to that of the Adjudicating Authority. The report of experts, rather a panel which was set up, was placed before these authorities. The request of the Appellant was to permit cross examination of the members of the expert panel so as to demonstrate that the findings in the report are erroneous. This request, which was reasonable, has been denied. In these circumstances, the entire procedure was faulty, erroneous in law and has resulted in serious miscarriage of justice. Therefore, breach of principles of natural justice and equally the refusal of the authorities to abide by the law laid down by this Court in the case of Kellogg India Private Limited. and Madhukar Patil Vs. Union of India (UOI), Asst. Commission, Central Excise and Customs and Commissioner of Central Excise, would enable this Court to entertain this Appeal. A copy of the judgment in the case of M/s. Kellogg India Pvt. Ltd. is placed on record. Equally, reliance is placed upon the judgment of the Gujrat High Court in the case of Mahek Glazes Pvt. Ltd. Vs. Union of India, and of the Division Bench of the Delhi High Court in the case of Basudev Garg Vs. Commissioner of Customs,

5. On the other hand, Mr. Jetly, appearing on behalf of the Revenue submits that there is absolutely no merit in this Appeal. It is not involving any substantial question of law. The attempt is to reappraise and re-appreciate the factual materials based on which the impugned order has been passed. Mr. Jetly submits that the arguments before this Court are purely technical. There is no breach of the principles of natural justice considering that both the authorities have relied on the undisputed factual position. In these circumstances and when the expert panel comprised of one of the officers of the assessee/Appellant before us, then,

all the more there is no prejudice caused. The attempt was to get over and escape the consequences of a patently illegal and wrongful act. The contravention of law was deliberate inasmuch as the parties desire to claim benefit of a scheme under which there were certain conditions imposed. These conditions were not fulfilled by the Appellant, and hence, the benefit thereof was denied. In these circumstances, the order under challenge does not require any interference in this Court's appellate jurisdiction. The Appeal, therefore, must be dismissed.

6. We have, with the assistance of Mr. Kantawala and Mr. Jetly, perused the order under challenge. We have noted the factual position emerging from the record. We have carefully perused the entire paper-book and the decisions brought to our notice.

7. At the out set, the decision of the Division Bench of this Court in the case of M/s. Kellogg was rendered in the backdrop of the facts in which the samples of the product of said Kellogg known as "Chocos" were analyzed by the Deputy Chief Chemist, Central Excise, Mumbai. The test report revealed amongst other findings that the content of Cocoa therein exceeded the minimum limit of 6% as stipulated in note (2) of Chapter 19 of the Tariff Act. That is how the department formed prima facie opinion that the subject product needed to be classified under a separate Chapter subheading and not under chapter or subheading relied upon by M/s. Kellogg.

8. That is how the show cause notice was issued and adjudication was held. During the adjudication, the petitioner/assessee sought copies of the test report so as to enable them to understand the findings therein and thereafter also requested for cross examination of the Deputy Chief Chemist.

9. It is in these circumstances that this Court held that denial of such a request which in the opinion of this Court was reasonable, amounted to serious violation of the principles of natural justice. It is in that regard the observations relied upon by Shri Kantawala have been made.

10. We must, at the out set and from a perusal of the Division Bench Judgment itself, note that initially the Hon'ble Supreme Court in series of judgments including the judgment delivered in the case of S.L. Kapoor Vs. Jagmohan and Others, held that breach of principles of natural justice by itself amounts to denial of fair hearing and causes prejudice. An independent proof of prejudice is, therefore, not necessary. Further, the Hon'ble Supreme Court, thereafter, has in repeated judgments emphasized that alleging such breach by itself is not enough and independent proof of prejudice must be produced. No party can get any advantage by merely alleging some technical violation or breach, if there is no prejudice by such breach and there is no dispute raised about the factual position. Further, the judgment holds that if undisputed facts lead to only one conclusion or penalty, then, the Court will not insist on compliance with principles of natural justice not because the Court upholds it, but because it does not issue

a futile writ. This was the rule laid down by the Constitution Bench of the Hon''ble Supreme Court in S.L. Kapoor v/s Jagmohan's case (supra). However, it has been thereafter consistently held that this rule is not inflexible. No technical breach can be advantageous, provided the prejudice because of such breach is not established. The attention of the Division Bench was not drawn to further judgments of the Hon''ble Supreme Court which are equally binding. That apart, the Division Bench Judgment can be distinguished by pointing out that every time such a breach is alleged, it does not mean that the Court will not insist on the proof which we have emphasized as above. Further, it can be distinguished because in the peculiar facts and circumstances of that case serious consequences on the petitioner/assessee would have followed if classification was not done as urged but under different subheading may be of the same Chapter. That would have economic liability and equally on the aspect of any exemption from payment of duty. The consequences being so serious that the Division Bench quashed and set aside the proceedings and directed that the matter should be determined afresh by the Adjudicating Authority.

11. Therefore, this judgment, apart from the above is distinguishable.

12. The above position applies even to the Division Bench judgment of Gujrat High Court, where a statutory appeal could have filed before the Tribunal against the order passed by the Adjudicating Authority. The Writ Petition was directed against the order of the Commissioner of Customs and Central Excise, Surat against which an Appeal lies to the Tribunal. However, the Tribunal was not approached and a Writ Petition was filed complaining about breach of principles of natural justice at the hands of the Adjudicating Authority. The argument was that there was no order passed on the request of the Petitioner for cross examination of certain witnesses. The Division Bench in the peculiar facts, therefore, held that such an order was required and should have been passed, thereafter, the matter could have been dealt with on other issues on merits. We do not find that any principle of law or a general rule has been laid down. On the other hand, the matter has been decided in the light of the facts. Similarly, in the case of Basudev Garg v/s Commissioner of Customs (supra), the Delhi High Court found that imported Ball Bearings of Chinese origin were showed by the Assessee as having been imported from Sri Lanka in order to evade anti-dumping duty. Show cause notices were issued to the Appellants before the Delhi High Court and which contained reference to various statements. One of the statement was of Mr. Anil Goel. The Appellants made request to summon the persons who made the statement including the Customs Officers for cross examination. That is how, the allegation was made that principles of natural justice have been violated. Equally, the materials relied upon by the Commissioner of Customs included a subsequent report. The report was after an investigation/enquiry conducted by the Revenue. This was conducted after the conclusion of the hearing on 14th October 2004. That report contains allegedly incriminating material and hence non supply of that report and reliance thereon without giving the Appellant an opportunity to meet the contents thereof was

held to be a prejudicial act and violative of the principles of natural justice. Once again the decision is clearly distinguishable.

13. In the facts of the present case, we find that the Tribunal's order does not refer to anything except the material produced by the assessee itself. The assessee filed a bill of entry for clearance of two tower cranes under EPCG license claiming benefit of Notification No. 055 of 2003 dated 1st April 2003. As per the declaration, the tower cranes were shown as of 1995 make and of German Origin whereas the port of loading was declared as Belgium and as per the licence bills it was permitted to import two second-hand Liebherr Tower Cranes. The importers submitted a Chartered Engineer's certificate issued by one Shri D.M. Pradhan of Mumbai. As per the certificate, the date of inspection was 01.01.2004 and both the cranes were subjected to regular maintenance, they were furbished with new moving parts and there was no major repair work done and both were in good condition. The examination of the goods revealed lot of discrepancies and which were put across to the assessee. Thereafter, the Assistant Chief Engineer of the assessee was called and goods were shown to him and his statements were recorded on 01.01.2004 u/s 108 of the Customs Act, 1962 wherein he admitted that certain parts might be of 1988 origin but he could give a clear cut opinion later-on after further examination. There was a contradiction in the Chartered Engineer's Certificate and contents of bill of entry. There was suspicion that the inspection appears to have been done even before the containers were opened. Even the Chartered Engineer was summoned. His statement was recorded and he admitted that he had issued the Chartered Engineer's Certificate without inspecting the machines. He gave conflicting opinion. Later on, the officers such as of the rank of Vice President of the assessee, the suppliers were also summoned, their statements were recorded and show cause notices were issued and adjudicated.

14. It is in these circumstances and when the dispute was raised with regard to the other material and contents of these certificates relied upon that it was decided by the department to form an expert panel. That also included the representatives of the assessee. The opinion of the expert panel, after examination, was taken on record. After conclusion of this, show cause notice was issued and impugned order was passed.

15. In these circumstances, we are unable to accept the argument of Mr. Kantawala that any prejudice has been caused to the assessee by not permitting the panel members to be cross examined. The Tribunal did not commit any error in holding that right to defend the proceedings which are inherent in such adjudication are in no way prejudiced, leave alone the conclusion of the department. The assessee could have in the teeth of this material and which was placed by it before the department was in a position to defend itself effectively. It had in its possession several documents including from the suppliers abroad. It is in these circumstances and where several opportunities were given to the assessee/appellant to make submissions with regard to the findings of the report

of the expert panel that refusal to permit cross examination of some of the panel members was justified.

16. We do not see any violation of the principles of natural justice. We do not see that the assessee was prejudiced by refusal of the authorities to permit cross-examination of other panel members. In the light of the admitted factual position and finding that imported cranes were not within the permissible time limit but were more than 10 years old that the benefit of the license and of the notification was rightly denied.

17. We have not been addressed anything on the merits of the matter, save and except urging that the orders under challenge are vitiated for non compliance with the principles of natural justice.

18. Once we have found that they are not so vitiated and these are the only questions projected as substantial questions of law, then we have no alternative but to dismiss this Appeal. It is, accordingly, dismissed. No costs.

19. Before parting, we would like to invite the attention of all the parties concerned to the pertinent observations of the Hon''ble Supreme Court in the case of Canara Bank and Others Vs. Shri Debasis Das and Others, on the content of the principles of natural justice, their compliance not only in administrative but quasi-judicial matters and element of prejudice that is required to be shown, established and proved. The Hon''ble Supreme Court in the SCC report held thus:-

10. It is to be further noted that in the appeal before the Appellate Authority findings of the inquiry officer were challenged and, therefore, the question of any prejudice does not arise. Since the employee had the opportunity to meet the stand of the Bank, it was to his advantage, and opportunity for personal hearing was also granted, though Regulation 6(18) does not even speak of granting such an opportunity. Keeping in view what was observed in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., there was no question of violation of principles of natural justice.

13. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

14. The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from

unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of *Cooper v. Wandsworth Board of Works* [(1863) 143 ER 414; 14 CBNS 180; (1861-73) All ER Rep Ext 1554] the principle was thus stated: (ER p. 420)

Even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (says God), "where art thou? Hast thou not eaten of the tree whereof, I commanded thee that thou shouldest not eat?" "

Since then the principle has been chiseled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

16. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act

and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

21. How then have the principles of natural justice been interpreted in the courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" as stated in Earl of Derby's case [(1605) 12 Co. Rep 114: 77 ER 1390] that is, "no man shall be a judge in his own cause". Coke used the form "aliquis non debet esse judex in propria causa, quia non potest esse judex et pars" (Co. Litt. 1418), that is, "no man ought to be a judge in his own case, because he cannot act as judge and at the same time be a party". The form "nemo potest esse simul actor et judex", that is, "no one can be at once suitor and judge" is also at times used. The second rule is "audi alteram partem", that is, "hear the other side". At times and particularly in continental countries, the form "audietur et altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely "qui aliquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit" that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" [see Boswel's case [(1605) 6 Co. Rep 48b: 77 ER 326] (Co. Rep at p. 52-a)] or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon (sic open). All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

20. Prior to this decision in the case of Aligarh Muslim University and Others Vs. Mansoor Ali Khan, held as under:-

21. As pointed recently in M.C. Mehta Vs. Union of India (UOI) and Others, there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, it

is not necessary to quash the order merely because of violation of principles of natural justice.

22. In *M.C. Mehta Vs. Union of India (UOI) and Others*, it was pointed out that at one time, it was held in *Ridge v. Baldwin* [1964 AC 40: (1963) 2 All ER 66 (HL)] that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In *Juwarsingh and Others Vs. State of Madhya Pradesh, Chinnappa Reddy, J.* followed *Ridge v. Baldwin* [1964 AC 40: (1963) 2 All ER 66 (HL)] and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. *S.L. Kapoor Vs. Jagmohan and Others*, laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K.L. Tripathi Vs. State Bank of India and Others, Sabyasachi Mukharji, J.* (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting *Wade's Administrative Law* (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent..... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala and others Vs. S.K. Sharma*, In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in *Rajendra Singh Vs. State of Madhya Pradesh and others*,

21. Thus, the consistent view is that may be and only in case of want of Notice to the affected party in all other cases it is not enough to allege breach of principles

of natural justice but also demonstrate that prejudice is caused by such breach. This is for the simple reason that any departure or every breach does not necessarily result in miscarriage of justice or gross failure of justice. Further, the principles of natural justice are not a strait-jacket formula. Which principles of natural justice or which facet of the same is applicable, depends upon the nature of the lis, the statute under which an adjudication is undertaken and several other factors. This has been now firmly established in the decision of Bar Council of India Vs. High Court of Kerala, In that case, in the SCC report, this is what is held:-

49. In N.K. Prasada Vs. Government of India and Others, this Court observed: (SCC p. 308, paras 24-25)

24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in Sohan Lal Gupta (Dead) thr. L.Rs. and Others Vs. Smt. Asha Devi Gupta and Others, of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held: (SCC p. 506, para 29)

29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.

25. The principles of natural justice, it is well settled, must not be stretched too far.

(See also Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and Canara Bank and Others Vs. Shri Debasis Das and Others,

50. In Union of India and Another Vs. Tulsiram Patel and Others, whereupon reliance has been placed by Mr. Reddy, this Court held: (SCC p. 477, para 97)

97. Though the two rules of natural justice, namely, *nemo iudex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed.

22. The Hon''ble Supreme Court followed and applied this rule in the case of Ajit

Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others,

23. Therefore, we are of the opinion that it will not be correct to hold that irrespective of the facts and circumstances and in all inquiries, the right of cross examination can be asserted. Further, as held above which rule or principle of natural justice must be applied and followed depends upon several factors and as enumerated above. Even if there is denial of the request to cross examine the witnesses in a inquiry, without anything more, by such denial alone, it will not be enough to conclude that principles of natural justice have been violated. Therefore, the judgments relied upon by Shri Kantawala must be seen in the factual backdrop and peculiar circumstances of the assessee's case before this Court.

24. The Appeal is accordingly dismissed.

25. In view of dismissal of appeal, the above Notice of Motion does not survive and it is also disposed of.