(2017) 03 GUJ CK 0173

In the Gujarat High Court

Case No : 6189 of 2016

SAVINO MICRON (INDIA) PVT LTD. APPELLANT

Vs

UNION OF INDIA & ORS. RESPONDENT

Date of Decision : 22-03-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Citation : (2017) 03 GUJ CK 0173

Hon'ble Judges : Harsha Devani, A.S. Supehia

Bench : Division Bench

Advocate : SN THAKKAR, DHAVAL D VYAS

Judgement

1. RULE. Mr. Dhaval Vyas, learned Senior Standing Counsel waives service of rule on behalf of respondents No.2 and 3. Having regard to the controversy involved in the present petition, which lies in a very narrow compass and with the consent of the learned advocates appearing on behalf of the respective parties, the matter was taken up for final hearing.

2. By this petition under Article 226 of the Constitution of India, the petitioner has called in question the OrderInOriginal dated 19.02.2016 (AnnexureQ to the petition) passed by the second respondent Commissioner of Central Excise, AhmedabadIII (hereinafter referred to as the "adjudicating authority") on the ground that the same is in breach of principles of natural justice.

3. Shorn of all the unnecessary facts, the case of the petitioner is that in the proceedings before the adjudicating authority, a report of the Central Revenues Control Laboratory (CRCL) was called for. In the meanwhile, the adjudication proceedings had proceeded further and the stage of personal hearing was over. Subsequently, the report of the Director (Revenue Laboratories), CRCL dated 30.12.2015 came to be received by the adjudicating authority and a copy thereof was provided to the petitioner. Upon receipt of the copy of the report, the petitioner addressed a communication dated 10.02.2016 to the adjudicating

authority making various submissions and requested for an opportunity of crossexamining Dr. Y.K.S. Rathore, Director (Revenue Laboratories), under whose signature the CRCL report had been forwarded and also sought for opportunity of personal hearing in connection with the said report. The adjudicating authority, however, without affording any opportunity of crossexamining the Director (Revenue Laboratories) or affording any opportunity of hearing in respect of the subsequent report, passed the impugned OrderInOriginal, classifying the product Calcite Powder under CH No.38249090 and the Product Calcium Carbonate under CH No.28365000 of the first schedule to the Central Excise Tariff Act, 1944 and confirming the duty demanded with interest and penalties. Being aggrieved, the petitioner has filed the present petition.

4. Mr. Devan Parikh, Senior Advocate, learned counsel with Mr. S.N. Thakkar, learned advocate for the petitioner, submitted that the adjudicating authority had obtained the report of the Director (Revenue Laboratories), CRCL, dated 30.12.2015, after the personal hearing was over and that a copy of such report was supplied to the petitioner under letter dated 25.01.2016, pursuant to which the petitioner had immediately addressed a letter dated 10.02.2016 to the adjudicating authority and in addition to disputing the contents of the report, had requested for crossexamination of the concerned chemical analyzer and had also requested the authorities to visit the factory of the petitioner to verify the manufacturing process and to grant a further opportunity of personal hearing. It was submitted that without responding to such request, the adjudicating authority passed the final order of adjudication, confirming the huge demand of excise duties with interest and penalties. It was argued that insofar as the adjudicating authority has not granted an opportunity to crossexamine the chemical analyzer and has not granted any opportunity of personal hearing to deal with the report of the chemical analyzer, the impugned order is violative of the principles of natural justice, warranting interference by this court in exercise of powers under article 226 of the Constitution of India. To bolster his contention, the learned counsel placed reliance upon the decision of the Bombay High Court in the case of Kellogg India Private Limited & Anr. v. Union of India & Ors., 2005 SCC Online Bom 1221, wherein the court has held that the opportunity to crossexamine involves not only notice of the adverse material but also a sufficient interval of time to prepare for crossexamination. The notice of the adverse material and opportunity of crossexamination is necessary because wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that testimony could not or need not be disputed at all or be shaken by crossexamination. The court held that in this view of the matter, right to crossexamine or to have opportunity to effectively exercise that right is an essential part of principles of natural justice.

5. Vehemently opposing the petition Mr. Dhaval Vyas, learned Senior Standing Counsel for second and third respondents, submitted that merely because an opportunity of crossexamining the chemical analyzer or affording an opportunity of hearing after receipt of the report of the chemical analyzer has not been

granted, the same would not amount to a breach of principles of natural justice, unless a case of prejudice is made out. It was submitted that in the communication dated 10.02.2016 the petitioner has requested for an opportunity to crossexamine the chemical analyzer on the inferences drawn in the report. The attention of the court was invited to the findings recorded by the adjudicating authority in the impugned OrderInOriginal to submit that the adjudicating authority has only relied upon the findings contained in the report and not on the inferences drawn therein. It was submitted that since, in the impugned order, the adjudicating authority has relied only upon the findings recorded by the Director (Revenue Laboratories), which the petitioner has not disputed and has not relied upon not the inferences drawn in connection therewith, it cannot be said that any prejudice has been caused to the petitioner warranting interference in exercise of powers under article 226 of the Constitution of India. (5.1) It was next submitted that the petitioner has challenged an OrderInOriginal passed by the adjudicating authority, against which a statutory appeal lies to the Customs, Excise and Service Tax Tribunal (hereinafter referred to as the "Tribunal"). It was further submitted that the dispute involved in the case before the adjudicating authority relates to a classification dispute and that against any order that may have been passed by the Tribunal in an appeal preferred against the OrderInOriginal, an appeal would lie to the Supreme Court and not to the High Court and therefore, the petition deserves to be dismissed on the ground of maintainability alone. In support of his submissions, the learned counsel has placed reliance upon the decision of the Bombay High Court in the case of Patel Engineering Limited V. Union of India, 2014 (307) E.L.T. 862 (Bom.) wherein the court, did not accept the argument on behalf of the appellant therein that any prejudice had been caused to the assessee by not permitting the panel members to be crossexamined. The court observed that the assessee could have in the teeth of the material, which was placed by it before the department, was in a position to defend itself effectively on the basis of the material placed. The court further observed that 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 therein to make submissions with regard to the findings of the report of the expert panel that refusal to permit crossexamination of some of the panel members was justified. The court, accordingly, did not see any violation of the principles of natural justice and also did not find that the assessee was prejudiced by refusal of the authorities to permit crossexamination of other panel members.

6. The question of maintainability of the petition being a jurisdictional issue is required to be addressed at the outset. In this regard it may be apposite to refer to the decision of this court in Manek Chemicals Pvt. Ltd.v. Union of India, 2016 (334) ELT 302, wherein this court was called upon to decide similar issues as have arisen in the present case. The court held thus: "18. At this juncture, reference may be made to the following decisions: 18.1 In Lachhman Das,

Tobacco Dealers v. Union of India, (supra), the Delhi High Court held thus: " 4. The main attack of the learned Counsel was based on denial of natural justice as discussed in the earlier part of the judgment. In my opinion, denial of an opportunity to examine the Chemical Examiner constitutes such violation of natural justice as will entail the setting aside of the impugned orders. The petitioner was entitled to examine the Chemical Examiner to find out the basis of his report and also the treatment according to the sample between the period it was taken and analysed. For this reason, the three main orders have to be quashed." 18.2 In Mahek Glazes Pvt. Ltd. v. Union of India (supra), this Court has held thus: " 6. Having heard learned counsel for the parties, we are inclined to interfere on the short ground of serious breach of principles of natural justice in the process of passing final order of adjudication. We say so because the adjudicating authority, though categorically informed by the representative of the petitioners that the petitioners are serious about exercise of their right to crossexamination and further that any meaningful participation in the adjudication proceedings can take place only after such crossexamination is granted, the authority proceeded to decide such request only along with the final order of adjudication. Whether the petitioners had a right to seek crossexamination in the facts of the present case, is not our brief at the moment. We, therefore, refuse to comment on the petitioners? insistence for crossexamination or authority?s reluctance to grant it. What we, however, find is that the petitioners had at least a right to be told whether such application is being granted or refused before final order was passed. When the petitioners prayed for crossexamination and reasonably expected that the same would be granted, they cannot be expected to participate in the adjudication proceedings up to the final stage. In other words, without dealing with and disposing of the petitioners? application for crossexamination, the adjudicating authority could not have finally adjudicated the issues. If he was of the opinion that the request for crossexamination was not tenable, by giving reasons, he could have rejected it. We wonder what would have happened, if he was inclined to accept such a request. In such a situation, he himself could not have finally disposed of the show cause notice proceedings. In either case, the petitioners had a right to know the outcome of their application.

7. Merely because the Commissioner was of the opinion that the petitioners had made such a request somewhat belatedly, would not permit him to, in the facts of the present case, deal with such an application only in the final order itself. Sum total of this discussion is that we are inclined to set aside the impugned order and request the adjudicating authority to pass a separate order on the petitioners? application/ request letter for granting crossexamination of the named witnesses. We are conscious that the Commissioner has already decided such an issue, however, since we are quashing the order, this part of the order would also not survive and hence, the requirement of a fresh order. We are informed that the same officer continues to hold the office of the Commissioner of Customs & Central Excise, SuratII. It would therefore, be not necessary to

separately hear the petition once again before passing any such order. This would, however, not preclude the Commissioner from requiring the petitioners to show relevance for seeking crossexamination of the witnesses. "18.3 The Supreme Court in the case of Ayaaubkhan Noorkhan Pathan v. State of Maharashtra and Others, (2013) 4 SCC 465, has held thus:"

24. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Waishampayan held that the rules of natural justice require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of crossexamining the witnesses examined by that party. Not providing the said opportunity to crossexamine witnesses, would violate the principles of natural justice. (See also Union of India v. T.R. Varma, Meenglas Tea Estate v. Workmen, Kesoram Cotton Mills Ltd. v. Gangadhar, New India Assurance Co. Ltd. v. Nusli Neville Wadia, Rachpal Singh v. Gurmit Kaur, Biecco Lawrie Ltd. v. State of W.B. and State of U.P. v. Saroj Kumar Sinha.)

25. In Lakshman Exports Ltd. v. CCE, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue, i.e., permission with respect to the crossexamination of a witness. In the said case, the assessee had specifically asked to be allowed to crossexamine the representatives of the firms concerned, to establish that the goods in question had been accounted for in their books of account, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to crossexamine, would amount to a denial of the right to be heard, i.e., audi alteram partem.

26. In New India Assurance Co. Ltd. v. Nusli Neville Wadia, this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows:

"45. If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to crossexamine. The witness who intends to prove the said fact has the right to crossexamine the witness.

This may not be provided by under the statute, but it being a part of the principles of natural justice should be held to be indefeasible right." In view of the above, we are of the considered opinion that the right of crossexamination is an integral part of the principles of natural justice.

27. In K.L. Tripathi v. SBI, this Court held that, in order to sustain a complaint of the violation of the principles of natural justice on the ground of absence of opportunity of crossexamination, it must be established that some prejudice has been caused to the appellant by the procedure followed. A party, who does not want to controvert the veracity of the evidence on record, or of the testimony gathered behind his back, cannot expect to succeed in any subsequent grievance raised by him, stating that no opportunity of crossexamination was provided to

him, specially when the same was not requested, and there was no dispute regarding the veracity of the statement. (See also Union of India v. P.K. Roy and Channabasappa Basappa Happali v. State of Mysore.) In Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill, this Court held:

"9. In order to establish that the crossexamination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilised for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to crossexamine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an adjudication being concluded, it shall be certainly open to the consumer to establish before the appellate authority as to how he has been prejudiced by the refusal to grant an opportunity to crossexamine any official."

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the Government, is that the Government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can, therefore, do so by crossexamining the witnesses produced against him. The object of supplying statements is that, the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the Government servant, he will not be able to conduct an effective and useful crossexamination.

29. In Rajiv Arora v. Union of India, this Court held :

"13. ... Effective crossexamination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for crossexamination or similar situation.

14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such nonexamination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

30. The aforesaid discussion makes it evident that, not only should the opportunity of crossexamination be made available, but it should be one of effective crossexamination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as crossexamination is an

integral part and parcel of the principles of natural justice."

19. On a conspectus of the above decisions, it clearly emerges that crossexamination is an integral part and parcel of the principles of natural justice. In State of U.P. v. Mohd. Nooh, AIR 1958 SCR 86, the Supreme Court after referring to various authorities in this regard, has held that if an inferior Court or Tribunal at first instance acts wholly without jurisdiction or patently in excess of jurisdiction, or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice, and all accepted rules or procedure and which offends the superior Court?s sense of fair play, the superior Court may quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or the Tribunal at first instance, even if an appeal to another inferior Court or Tribunal was available and recourse was not had to it. In C.I.T. v. Chhabil Dass Agarwal (supra) on which reliance had been placed by the learned counsel for the respondent, the Supreme Court held thus:" 15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(20) Thus, breach of principles of natural justice and defiance of fundamental principles of judicial procedure falls within the exceptions noticed by the Supreme Court in the above decision, wherein the availability of an alternative remedy will not act as a bar in exercising writ jurisdiction under Article 226 of the Constitution of India.

7. In the opinion of this court, the above decision would be squarely applicable to the facts of the present case inasmuch as the twopronged attack against the impugned OrderinOriginal is based upon the breach of principles of natural justice, firstly on the ground of nongrant of opportunity to cross examine the signatory of the CRCL report, and secondly on the ground of nongrant of any opportunity of personal hearing to deal with the contents of the CRCL report. In the facts of the present case, while it is true that the central issue involved in the case before the adjudicating authority relates to a classification dispute, however, it is equally true that none of the questions raised before this court relate to classification of the subject goods. The questions before this court relate only to the breach of principles of natural justice and hence, the availability of an

alternative statutory remedy will not act as a bar in exercising writ jurisdiction under Article 226 of the Constitution of India.

8. Examining the merits of the rival contentions, a perusal of the record of the case reveals that initially the adjudicating authority had not thought it fit to call for a test report from the CRCL. However, subsequently, with a view to put the matter at rest, the report of the CRCL was called for and ultimately a report dated 30.12.2015, under the signature of Dr. Y.K.S. Rathore, Director (Revenue Laboratories), CRCL, was forwarded to the adjudicating authority. In the meanwhile, the adjudication proceedings had proceeded further and stage of personal hearing was concluded. Upon receipt of the report, a copy thereof was furnished to the petitioner under a letter dated 25.01.2016, who immediately addressed a letter to the adjudicating authority requesting for an opportunity to crossexamine the Director (Revenue Laboratories) as well as sought for an opportunity of personal hearing to deal with the contents of the report. However, without affording any opportunity to crossexamine the Director (Revenue Laboratories), CRCL, or granting an opportunity of personal hearing to respond to the said report, the adjudicating authority has proceeded further and passed the impugned OrderInOriginal.

9. A close reading of the communication dated

10. 02.2016, addressed by the petitioner to the adjudicating authority, reveals that the petitioner has set out detailed reasons as to why the inferences drawn in the CRCL report are incorrect and has also stated the reasons as to why it seeks to crossexamine the signatory of the said CRCL report viz. Dr. Y.K.S. Rathore, Director (Revenue Laboratories). The petitioner has further requested for personal hearing in the matter. However, in the impugned OrderInOriginal there is no reference whatsoever to the above communication dated 10.02.2016 of the petitioner as to why the opportunity of crossexamination should not be granted and as to why the submissions made in the said communication did not merit acceptance. No reasons have been assigned as to why an opportunity of personal hearing was not granted. Resultantly, while the adjudicating authority has based its finding on the CRCL report dated 30.12.2015, no opportunity of hearing whatsoever, has been granted to the petitioner to deal with the contents thereof. 10. On behalf of the respondents a contention has been advanced that the adjudicating authority has merely placed reliance on the findings recorded in the said report and not on the inferences drawn therein and hence, nongrant of an opportunity of personal hearing does not cause any prejudice to the petitioner and that the petitioner should be relegated to the alternative remedy of filing an appeal before the Customs, Excise and Service Tax Tribunal.

11. A perusal of the impugned order reveals that the adjudicating authority in Paragraph No.23.5 of its order has recorded that it has mainly relied on the test result of Dr. Y.K.S. Rathore, Director (Revenue Laboratories) wherein the actual chemical composition of the product under consideration has been analyzed. Thus, it is evident that conclusions arrived at by the adjudicating authority are

based upon the findings recorded in the report submitted by Dr. Y.K.S. Rathore, Director (Revenue Laboratories), CRCL, but no opportunity of hearing has been granted to the petitioner to deal with the said report nor has the petitioner been granted an opportunity to crossexamine the signatory of the report. Moreover, none of the grounds stated in the letter dated 10.02.2016 have even been considered by the adjudicating authority in the impugned order.

12. In the light of the fact that the adjudicating authority has placed reliance upon the report of the CRCL in respect of which the petitioner was not granted any opportunity of hearing, it is manifest that there is a breach of principles of natural justice warranting interference by this court. Additionally, the petitioner has set out several grounds in the communication dated 10.02.2016 stating the reasons as to why it seeks to crossexamine the signatory of the CRCL report. However, the request has fallen on deaf ears. It is settled legal position that the right to crossexamine ought or to have opportunity to effectively exercise that right is an essential part of principles of natural justice. Under the circumstances, the adjudicating authority was required to give fair opportunity to the petitioner to not only deal with the report of the CRCL, which was received subsequently but also to give an opportunity to the petitioner to crossexamine the Director (Revenue Laboratories) in respect of the contents of the report and the inferences drawn therein. Nongrant of opportunity to crossexamine the Director (Revenue Laboratories) in respect of the report on which reliance has been placed by the adjudicating authority, also amounts to breach of principles of natural justice. Insofar as the decision of the Bombay High Court in Patel Engineering Limited v. Union of India (supra) on which reliance has been placed on behalf of the respondents, this court is of the view that the same does not in any manner further the case of the respondents, inasmuch as, in the facts of the said case the several opportunities were granted to the assessee to make submissions with regard to the findings of the report of the expert committee and the court upon considering the overall facts of the case was satisfied that refusal to permit cross examination of some of the panel members was justified. In the light of the above discussion, the petitioner has made out a clear case of gross violation of the principles of natural justice warranting interference by this court in exercise of powers under Article 226 of the Constitution of India.

13. The petition, therefore, succeeds and is accordingly allowed. The impugned order dated 19.02.2016 (AnnexureQ to the petition) is hereby quashed and set aside and the matter is restored to the file of the adjudicating authority from the stage of furnishing of the report of the chemical analyzer to the petitioner, to decide the same afresh in accordance with law, after affording the petitioner an opportunity to crossexamine the Director (Revenue Laboratories), CRCL as well as an opportunity of personal hearing. RULE is made absolute to the aforesaid extent. Direct service is permitted.

