

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.613 of 2014

M/S Pinax Steel Industries Pvt. Ltd., A Company Incorporated Under The Provisions Of Companies Act, 1956 Having Its Office At Unit - Ii, Deokuli, Bihta, P.S. Bihita, Disst. Patna Through One Of Its Director, Sanjay Kumar Khemka S/O Late Murlidhar Khemka Resident Of 3b And C, Savita Apartment, (Alpana Market), Patliputra, P.S. Patlipura And District - Patna

.... Petitioner/s

Versus

1. The Union Of India, Through The Secretary, Ministry Of Finance, Department Of Revenue, North Block, New Delhi
2. The Member (Cx), Central Board of Excise and Customs, North Block, New Delhi
3. Director General, Directorate General of Central Excise Intelligence, West Block, R K Puram, New Delhi
4. The Additional Director General of Central Excise, Dgcel, Kolkota Zonal Unit, Kolkota
5. The Addl. Director of Central Excise Intelligence, Jamshedpur Regional Unit, 1st Floor, New Kalimati Road, Sakshi, Jamshedpur
6. Commissioner of Central Excise, Central Revenue Building, Bir Chand Patel Path, Patna
7. The Assistant Commissioner of Central Excise, Gaya Division, Bihta, Patna

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. S.D. Sanjay &
Mr. Alok Kumar Agrawal, Advocates
For the Respondent/s : Ms. Nivedita Nirvikar, Sr. Standing Counsel
Ms. Archana Sinha, Jr. Standing Counsel

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CORAM: HONOURABLE THE CHIEF JUSTICE
And
HONOURABLE MR. JUSTICE GOPAL PRASAD
C.A.V. JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 24-02-2015

The petitioner is a manufacturer of Steel, having one of its unit at Bihta, District- Patna, State of Bihar. It is also extended the facility of CENVAT Credit under the CENVAT Credit Rules framed by the Government of India, in the context of clearing the manufactured goods.

The Assistant Director of Central Excise, Gaya Division, the 7th respondent herein, issued a show cause notice in terms of the notification dated 12.03.2012. The purport thereof was that a search was conducted on 05.12.2012 by the officers of Director General of Central Excise Intelligence, and the discoveries made during the investigation revealed that the petitioner was indulging in evasion of central excise duty by removing finished product i.e. Non-Alloy Steel Ingots without issuing statutory invoice and without payment of central excise duty. Reference was made to the material that was discovered from the search. The notification dated 12.03.2012 contemplates imposition of certain restrictions as to the availment of CENVAT credit facility pending initiation of the punitive proceedings in accordance with law. The petitioner was required to explain

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within seven days, as to why the restrictions contemplated in para 4 of the notification, be not imposed.

The petitioner submitted a detailed representation, dated 23.05.2013, stating that it is only preliminary in nature. Several contentions were urged, and a complaint was made as to the non-furnishing of certain documents. At the end, it was mentioned that the concerned authority must reply pointwise to that representation, to enable the petitioner to submit objections through a detailed representation. This was followed by another letter, dated 29.05.2013, stating that, till the request made by the petitioner is complied with, no further steps be taken.

On 09.07.2013, the Deputy Director Investigations, office of the Director General i.e. the 3rd respondent, informed the petitioner that all the documents, relied upon by them in the proceedings, are furnished, and that a personal hearing is arranged on 23.07.2012. The petitioner submitted another representation, dated 20.07.2013, stating, inter alia, that in view of the reasons mentioned therein, the proposed hearing, fixed on 23.07.2013, is unwarranted, and needs to be avoided by withdrawing the show cause notice dated 14.05.2013.

Thereafter, the Member, Central Board of Excise

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and Customs, the 2nd respondent herein, passed an order, dated 09.12.2013, directing that the facility of monthly payment of excise duty for the petitioner is withdrawn for four months, and the facility of availing the CENVAT credit be denied for the same period. The said order is challenged in this writ petition. In that very context, the petitioner has challenged Rule 12 AAA of the CENVAT Credit Rules, 2004 (for short '2004 rules') and Rule 12 CCC of the Central Excise Rules, 2002 (for short '2002 rules') as being ultra virus the provisions of the Central Excise Act and the Constitution of India.

The contention of the petitioner is that the above mentioned rules and the consequential notifications, insofar as they enable the hearing of the matter arising out of the show cause notice, by one authority and passing of the order by another, cannot be sustained in law. It is also urged that the order impugned in the writ petition is violative of principles of natural justice since the relevant documents were not furnished, and adequate opportunity was not given. Certain other contentions are also urged.

On behalf of the respondents, a counter affidavit is filed. It is stated that the rules do not suffer from any legal infirmity, and the petitioner, who did not participate in

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the proceedings at all, does not have the locus to challenge the rules. It is pleaded that the authority, which issued the show cause notice, alone would hear the matter, and come to a conclusion. They submit that it is only in the interest of the assessee that the conclusions, arrived at by the authority which heard the matter, are submitted to the Central Board in the form of recommendations, only to ensure that no misuse of process of law is resorted to. According to the respondents, making of recommendations after hearing the matter by adjudicating authority, to the Central Board, is a step for protection of the manufacturer, and not the one for formation of opinion or taking a decision. It is also urged that over the period, circulars were issued clarifying the matter and removing the apprehension of the manufacturers in this regard. It is also stated that the measures, which are ordered against the petitioner, are in the form of restrictions, without imposing any additional financial liability and that the final order in this behalf would be passed at the later stage in accordance with law.

Sri S. D. Sanjay, learned counsel for the petitioner submits that inspite of repeated requests, the documents, relied upon by the respondents, were not furnished to the petitioner and on account of the same it

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was not in a position to submit a comprehensive reply. He contends that instead of furnishing the documents relied upon, the impugned order was passed, through which severe restrictions, that have effect of crippling the activity of the petitioner. It is submitted that the rules that are challenged in the writ petition have the effect of violating the rights of a manufacturer and enabling authorities to pass orders in violation of settled principles of law.

Ms. Nivedita Nirvikar, learned counsel for the respondents, on the other hand, submits that the rules that are challenged in the writ petition are just the provisions enabling the Government to place restrictions upon a manufacturer or exporter, and the petitioner did not point out as to how, those provisions are contrary to the Central Excise Act or the Constitution of India. She submits that the show cause notice itself, the list of documents on which reliance is placed, was furnished and though all the documents have been furnished, the petitioner refused to participate in the enquiry, and left with no alternative, an order in terms of the law is to be passed. Learned counsel further submits that the authority that issued notice, arranged for hearing and arrived at a conclusion as to the nature of restrictions, that are to be placed upon the

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petitioner, and that the 2nd respondent did nothing more, than verifying the propriety and correctness of the order, so passed. Learned counsel submits that decision has been taken by 3rd respondent itself, and the mere fact that it was submitted for approval to the 2nd respondent, does not lead to an inference that the actual decision was taken by the 2nd respondent.

Both the learned counsel have relied upon certain precedents.

The petitioner has not only challenged the two rules, referred to above, but also assailed the correctness of the order dated 09.12.2013. Therefore, as a first step, it needs to be examined as to whether rules that are challenged in the writ petition suffer from any legal infirmity. As a matter of fact, no serious arguments as such were advanced, regarding challenge to the rules. The rules that are challenged in the writ petition read as under :

Rule 12CCC *“Power to impose restrictions in certain types of cases.- Notwithstanding anything contained in these rules, where the Central Government, having regard to the extent of evasion of duty, nature and type of offences or such other factors as may be relevant, is of the opinion that in*

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order to prevent evasion of, and default in payment of, duty of excise, it is necessary in the public interest to provide for certain measures including restrictions on a manufacturer, first stage and second stage dealer or an exporter; may by a notification in the Official Gazette, specify the nature of restrictions including suspension of registration in case of a dealer, types of facilities to be withdrawn and procedure for issue of such order by an officer authorized by the Board.”.

Rule 12AAA *“Power to impose restrictions in certain types of cases.- Notwithstanding anything contained in these rules, where the Central Government, having regard to the extent of misuse of CENVAT credit, nature and type of such misuse and such other factors as may be relevant, is of the opinion that in order to prevent the misuse of the provisions of CENVAT credit as specified in these rules, it is necessary in the public interest to provide for certain measures including restrictions on a manufacturer, first stage and second stage dealer or an exporter, may by a notification in the Official Gazette, specify nature of restrictions including*

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restrictions on utilization of CENVAT credit and suspension of registration in case of a dealer and type of facilities to be withdrawn and procedure for issue of such order by an officer authorized by the Board.”

In the scheme of the Central Excise Act and the rules made thereunder, a manufacturer can remove the finished goods from the premises, only after payment of the central excise duty. Since the prepayment of excise duty for each consignment may lead to some hardship, the facility of payment of excise duty, periodically, is extended to the manufacturers. Wherever such facility is extended, the manufacturer can remove the goods without prior payment, but the excise duty payable thereon must be remitted at certain intervals. Secondly, the Central Government has created the facility of adjustment of duty on raw-materials and other components that go to the process of manufacture, against the duty payable on the finished product, at their level. This would, inter alia, lessen the burden of payment of excise duty. This is called CENVAT credit.

Through Rule 12 CCC of the 2002 Rules, the Central Government enabled the concerned assessing

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authority to place restriction as to the facility of making deferred payment of central excise duty, in case it is noticed that the manufacturer is resorting to evasion of duty or other unlawful activities. Similarly, if a manufacturer is said to be resorting to such acts and omissions, the authority is also conferred the power to place restriction on the utilization of CENVAT credit facility for a specified period, as provided in Rule 12 EEE of the Rules. The petitioner is unable to convince this Court that the rules, referred to above, are contrary to any specific provisions of Central Excise Act or for that matter the Constitution of India. Except taking a vague, general and espacious plea, no specific grounds are urged nor any precedent cited. We, therefore, do not find any merit in the contention of the petitioner, in this behalf.

The procedure to be followed in the context of taking any measures in Rule 12 CCC of the Excise Rules, 2002, and Rule 12AAA of the Cenvat Credit Rules, 2004 is prescribed under the notification issued by the Government of India. According to the procedure, whenever any serious violations are noticed against a manufacturer, as the first and preliminary step, the concerned authority can pass an order placing restriction as to the facility of

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deferred/periodical payment of excise duty or the CENVAT credit facility. That shall be without prejudice to the steps to be taken for imposing penalty or taking the other penal measures.

We have gone through the notification and circulars that are issued in this behalf. The purport thereof is that, whenever any inspection or search is conducted, the relevant material is placed before the concerned directorate. That office would, in turn, issue a show cause notice to the manufacturer requiring it to explain as to why the restrictions contemplated in the rules be not imposed. The authority is placed in obligation to provide a hearing to the manufacturer, and then to pass an order, regarding the restrictions that are to be placed. The restrictions so determined by the authority would not come into force at once. The notification mandates that the conclusions arrived at by the authority must be submitted by the 2nd respondent, in the form of recommendations. It is only when the 2nd respondent considers and approves such recommendations that they become enforceable in their entirety or in part, depending upon the satisfaction of the 2nd respondent.

The petitioner submits that the very concept of

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administrative determination is deviated from, in this case, and it leads to a situation where the authority, which heard the arguments, does not take decision and vice versa. Reliance is placed upon the judgment of the Supreme Court in *Gullapalli Nageshwara Rao Vs. A P State Road Transport Corporation* (AIR 1959 SC 308), and *Automotive Tyre Mfrs. Association Vs. Designated Authority* [(2011) 263 ELT 481 (SC)].

In *Gullapalli Nageshwara Rao's* case, the Supreme Court held as under,

“The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enable the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure

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followed in this case also offends another basic principle of judicial procedure.”

We came across several hurdles in the instant case in the context of applying the principle enunciated by the Supreme Court. Firstly, the petitioner did not participate in the proceedings at all, except that it addressed two communications, taking exception to the very initiation of the proceedings, pleading one ground or the other./ It did not participate in the hearing that was arranged on 23.07.2012. Therefore, it becomes seriously doubtful as to whether it is open for the petitioner to raise that contention at all.

Even otherwise, the proposition advanced by the petitioner can be tested on the touchstone of known principles of law. Two aspects need to be kept in mind. The first is whether the authority issues a show cause notice, hears the submissions, objections or arguments of the parties, and thereafter it submits the gist of the arguments to a higher authority, where the actual decision is taken. The second is an instance where the authority, who issues the show cause notice, and hears the concerned party, forms an opinion by itself and passes an order, but in compliance of the requirement in law, it submits the order

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passed by it, to a higher authority for verification as to the propriety or legality. While the judgment of the Supreme Court in the case of Gullapalli Nageshwara Rao covers the first category of cases, the case on hand falls into the second category.

On facts also, this Court finds no basis for the complaint of the petitioner. In the show cause, dated 14.05.2013, the 4th respondent has stated that they listed four sets of documents on which they intended to place reliance upon. It is important to mention that almost all the documents are nothing but those that are said to have been recovered from the office of the petitioner or downloaded from their pen drive or other facilities. The text of the show cause is just half a printed page. However, in the name of raising preliminary objections, the petitioner submitted representation which runs into four closely and fully typed printed pages. It is important to take note of two concluding paragraphs of the so called preliminary objections, which read as under,

“11. The above preliminary objections have been filed and further submissions would be made at the time of hearing after receipt of all the required records and documents as indicated above and sufficient time be

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provided to the noticee after the above records are made available and it is clarified that the hearing would be before the Member, Central Excise, CBEC as per Notification No. 6/2002-CE(NT) dated 13.03.2012. we shall explain our case before the authority through our Counsel at the hearing to be fixed after all the records and documents as required are provided.”

12. We also request you to reply point-wise and para-wise to this letter to enable us to make further submissions and objections on receipt of your reply to the present preliminary objections which we shall prepare and file detailed final reply and effective personal hearing be fixed thereafter before any decision is to be taken in accordance with law by the competent authority to withdraw the notice wrongly issued.

In another communication, dated 29.05.2013, petitioner requested or insisted on the respondents not to proceed further. In their letter, dated 09.07.2013, the respondents informed the petitioner as under,

Please refer to this office “Notice” of personal hearing for 23.05.2013 and your letters dated 23.05.2013 and 29.05.2013.

As requested in your above referred letter dt. 23.05.2013, the copy of the sent deterrent proposal of

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the ADG, DGCEI, Kolkata Zonal Unit is being enclosed herewith alongwith all of the referred documents therein. Further, the Director General, CEI has granted new date of personal hearing. The personal hearing is fixed for 23.07.2013 at 11.45 hrs. and it would be held in the office of the Director General, Directorate General of Central Excise Intelligence, West Block- 8, Wing No. 6, 2nd Floor, R.K. Puram, New Delhi.

Please note that if no representation or submission is made by you or if you do not appear on the stipulated date, the matter will be decided ex-parte on the basis of facts available on record.

That however, evoked another representation running to four closely printed pages on 20th July, 2013. The approach of the petitioner is evident from the following sentence,

“In the circumstances, the hearing before you fixed for 23.07.2013 is clearly unwarranted and hence be avoided by withdrawing the show cause notice dated 14.05.2013. Kindly do so.”

One does not expect such type of correspondence or response from a manufacturer, who is facing penal proceedings under the Act and Rules.

Across the bar, learned counsel for the petitioner

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submits that the respondents have retrieved about thousand pages of material from a pen drive and online facilities of the petitioner and copies of all such documents were not furnished to the petitioner. It is in deed a farfetched argument. The respondent has precisely mentioned the documents which they intend to rely upon. It is not the complaint of the petitioner that any documents, over and above what was mentioned in the show cause notice, are relied upon. In fact that eventuality would arise only when an order is passed taking into account the documents which are not mentioned in the show cause notice. The tone and tenor of the correspondences undertaken by the petitioner discloses its intention not to participate in the proceedings, at any cost. One cannot just stretch the purport of principles of natural justice, to the extent pleaded by the petitioner.

The judgments rendered by the Delhi High Court in *Vinay Wires and Poly Products Pvt. Ltd. Vs. Member (Central Excise), Central Board of Excise and Customs, New Delhi*, and Gujarat High court in *Vishal Engineering Vs. Union of India & Ors.* are in cases where the parties are said to have been denied the opportunity of being heard. This, however, is a case where the petitioner persistently refused

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to participate in the proceedings.

We, therefore, do not find any merit in the writ petition. It is, accordingly, dismissed. There shall be no order as to costs.

Interlocutory applications, if any, shall also stand disposed of.

(L. Narasimha Reddy,CJ)

(Gopal Prasad, J)

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