

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1643 OF 2017

Nirmal Seeds Private Limited
a Company incorporated under the
Companies Act, 1956 and having its
office at Anturli Phata, Bhadgaon Road,
Pachora, District: Jalgaon.

.... Petitioners

- Versus -

1. The Union of India
through the Secretary, Ministry
of Finance, Department of Revenue,
North Block, New Delhi-110 001.
2. The Commissioner of Central Excise,
Customs & Service Tax, Nasik-I,
having his office at Plot No.155,
NH, 'Jaistha & Vaisaka', CIDCO,
Nasik-I Commissionerate,
Nasik – 422 008.

.... Respondents

Mr. V. Sridharan, Senior Counsel with Mr. Prakash
Shah & Mr. Jas Sanghavi i/by M/s. PDS Legal for
the Petitioners.

Mr. Swapnil Bangur with Mr. Sham Walve for the
Respondents.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : FEBRUARY 27, 2017

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. Rule. The respondents waive service. By consent, rule is made returnable forthwith and the petition is taken up for hearing and final disposal.

2. The petitioners are a company incorporated under the Companies Act, 1956. They are engaged, *inter alia*, in the manufacture of products which are styled as eco-friendly products. The description of the same is provided in para 4.1 of the petition. Then it is stated that their final products in two forms, namely, liquid form and powder/granule form are applied for seed treatment and/or soil application and/or foliage application. The petitioners have described how these final products are obtained. We are least concerned with that for the simple reason that the petitioners' offices were visited by the Preventive Cell/Wing of the Central Excise, Nashik-I

Commissionerate, Nashik. During the course of the search, the Revenue discovered that these are excisable goods. The petitioners manufacture them and, therefore, they are liable to pay excise duty. Relying upon the materials obtained during the search and also the statements of the officers/employees of the petitioners, a show cause notice, dated 16-9-2016 (Exhibit-C) was issued and alleging that there is duty evasion in the sum mentioned therein.

3. The petitioners, during the course of the proceedings and pursuant to this show cause notice to which they submitted a detailed reply, addressed a communication dated 23-11-2016 requesting the second respondent to permit cross-examination of the persons mentioned in the said communication. These are not the persons related to the petitioners' establishment but they are the employees of the distributors of the petitioners. Their statements have been expressly relied upon in the show cause notice, dated 16-9-2016, to allege that the petitioners are engaged in the manufacture of products which are sold as insecticides and plant growth stimulant/plant growth regulators.

The petitioners while denying that the statements of the employees of these distributors can be used against them, specifically contended that they are not experts. Therefore, on the strength of their version no proceedings can lie and alleging the evasion of central excise duty. All the more, therefore, it is necessary to cross-examine them.

4. The petitioners relied upon a record of the personal hearing held on 20-1-2017. The petitioners submitted that the request contained in their letter specifically to cross-examine all these three employees, since their statements were relied upon, has been rejected.

5. The rejection is contained in the correspondence and the record of the personal hearing.

6. It is on this basis that it is contended by Mr. Sridharan, learned Senior Counsel appearing for the petitioners, that the statements have been specifically relied upon. If they have been relied upon, then, fairness and equity

demand that the three employees whose statements are proposed to be used against the petitioners to allege that central excise duty to the tune of Rs.36,15,27,746/- has been evaded and, therefore, not only that sum but the applicable interest and penalty should be imposed, requires that the petitioners are furnished this reasonable opportunity.

7. This request is opposed by the Revenue. It is submitted that these are only delaying tactics. Secondly, at this stage this Court should not interfere in the action in its writ jurisdiction for no order against the interest of the petitioners has been passed. In the event any such order is passed, then, the petitioners have adequate remedies and particularly of appeals. In that, they can urge and raise the ground of prejudice by denial of the opportunity to cross-examine the witnesses.

8. We have heard both sides at some length. There are two Judgments which are relied upon by the Revenue's counsel to oppose this petition. They are in the matters of ***Telestar Travels Pvt. Ltd. Vs. Special Director of Enforcement*** and ***Patel***

Engineering Ltd. Vs. Union of India, reported respectively in 2013 (289) E.L.T. 3 (S.C.) and 2014 (307) E.L.T. 862 (Bom).

9. From the head-note itself it is apparent that in the case of **Telestar Travels** (supra), the Hon'ble Supreme Court opined that right of cross-examination available under the Evidence Act, 1872 cannot be claimed as of right. The cross-examination may be permitted to test the veracity of the statements which have been made. The proceedings were under the Foreign Exchange Regulation Act, 1973 (for short, "FERA"). The Rule 3 of the Adjudication Rules framed under Section 79 of the FERA does not apply to adjudication proceedings. That apart, the Hon'ble Supreme Court still opined 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. In para 18, the Hon'ble Supreme Court held as under:-

"18. There is, in our opinion, no 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. For instance, a similar plea raised in Surjeet Singh Chhabra v. Union of India and Ors., (1997) 1 SCC 508 = 1997 (89) E.L.T. 646 (S.C.) before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed:

“3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of

the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.”

The context in which the observations were made are set out while enumerating the facts. The appellant-Telestar Travels carries on a travel agency business and is specialised in booking of tickets for crew members working on ships. Most of the shipping companies are based abroad with their representatives located in Mumbai would issue instructions to the company to arrange air passage for the crew from Mumbai and other places in India to particular ports abroad. The company would then

take steps to have tickets issued on the basis of such instructions for different destinations. The appellant-company's case was that the travel agents in U.K. had of late started offering cheap fares for seaman/crew travelling to join the ships. In order to benefit from such low fare tickets, the shipping companies are said to have desired that the benefit of such low fare tickets be organised for them by Telestar. In order to make that possible, Telestar approached one entity in U.K. for getting such cheap seamen tickets. The arrangement is then set out in details. After the process adopted was not found to be legally permissible and remittances brought by the said Telestar contravened the provisions of the FERA that a show cause notice was issued. The show cause notice relied upon certain materials. The replies were filed denying the allegations. It is clear from the factual narration that Telestar sought to cross-examine one of the officials of the UK company with whom it had dealt with and the Indian High Commission officials in London who had met that gentleman of the entity abroad. Then certain others whose statements were recorded were also sought to be cross-

examined. The request was not accepted. It is in these circumstances that the adjudication order, the Appellate Order and this Court's order dismissing the appeal was challenged by Telestar. One of the arguments was that the cross-examination was not allowed and in dealing with the same, the above quoted observations were made in para 18.

10. However, in the same Judgment the Hon'ble Supreme Court has also held, on facts, that no prejudice is caused. It is in these circumstances that further observations in para 20 of the Judgment have emerged.

11. We are not unmindful of these salutary principles and which have been followed in the case of **Patel Engineering** (supra) by this very Division Bench. In the absence of any prejudice and demonstrable, it is not possible to assail any adjudication order or an order passed in a quasi-judicial proceedings on the ground that it violates the principles of natural justice. The Judgment and Order in the case of Patel Engineering, therefore, merely re-states the settled principles. It

is their application to the given facts and circumstances which has to be borne in mind.

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 deposed 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.

13. It is in these circumstances that the cross-examination of these three persons is necessary. Further, these are persons not connected with the petitioners. They are the employees of the distributors. From what we gather and in the proceedings is that these persons were available. The petitioners have pointed out as to how at a personal hearing on 20-1-2017 the petitioners were not aware of the fact that their request for cross-examination was rejected. The letter dated 17-1-2017 was received on the next date of hearing, i.e. 21-1-2017. The second respondent did not inform the petitioners during the course of the hearing about the rejection of their request to cross-examine the said three persons. Therefore, at that time the petitioners

were taken by surprise as they had no knowledge that their request to cross-examine was rejected even prior to the personal hearing. The petitioners have pointed out as to how in the impugned communication the authorities are alleging that the statements of these three witnesses have been recorded to ascertain what is their perspective about the products and for what purposes the end-users, i.e., the agriculturists are buying the products from their firms. Thus, the statements of these three persons corroborate the fact which is otherwise recorded in various documentary records, as recovered from the petitioners' factory. Thus, the authorities are bent upon relying on these statements. That is apparent from the written communication/order by which the request for cross-examination of these three persons has been rejected. The authority has been bold enough to state that the statements of these three persons were not hidden from the petitioners' knowledge and were known to the Microbiologist & In-charge of Bio-product Division and the Assistant General Manager of the petitioner-company when their statements were recorded.

Curiously, then in the communication at page 29 it is stated that both the employees of the petitioners have expressed their disagreement with the views of the three persons.

14. We do not think that such an approach, apart from being unhealthy and non-conducive to fair and impartial adjudication subserves the cause of justice. The cross-examination of these persons is not a proper method to belie their expertise and it is sought apparently for inconveniencing and making them uncomfortable for giving a version to help the investigation in the matter and for delaying the adjudication proceedings is one of the reasons assigned in the impugned communication. We are shocked and surprised that a Commissioner of Central Excise, Customs and Service Tax, Nashik-I Commissionerate, Nashik holds such a view. We do not see how a personal embarrassment is caused merely because witnesses are sought to be cross-examined on an advisory. There is nothing by which the proceedings partake the character of sullyng his image and harming his reputation. It is in the course of the proceedings and to falsify his version that answers are

elicited. Depending upon the response to the questions the assessee can modulate and modify his stand and arguments. We do not see what inconvenience and lack of comfort is noticed by the adjudicating authority and why he is keen to protect these persons has not been explained to us at all. If the very purpose of the cross-examination is to elicit the truth and the adjudication proceedings are nothing but an attempt to vindicate the truth, then, the adjudicating body or authority should not adopt such a position and stand. It is this communication and a lengthy one running into two pages which enables us to interfere in writ jurisdiction with the same. It would be a complete mockery of rule of law and there would be no guarantee of justice if such high level officials and adjudicating authorities hold such a view with regard to compliance with the principles of natural justice. While it is true that they are not codified or embodied in a statute, yet they are fundamental to the rule of law and administration of justice. Courts and Quasi-Judicial bodies heavily rely on these principles which are salutary in nature. Therefore, when the principle and

to be followed is that justice should not only be done but seen to be done that enables us to interfere in this matter in writ jurisdiction. We do not see how any charge of delay in the proceedings can be levelled in the facts and circumstances of the present case. The show cause notice is of the year 2016. Its adjudication has commenced in 2016. It is during the course of the adjudication that the request, as made in January 2017, has been turned down by the impugned communication dated 17-1-2017. We have not been indicated by the Revenue that in order to avoid any delay they would not rely on the statements of these three persons. The Revenue has also not taken before us a stand that these persons would be made available for cross-examination. Instead, reliance is placed on the two Judgments noticed above. Once we see that in the facts and circumstances of the present case the said Judgments are not applicable, then, this writ petition must succeed. Rule is accordingly made absolute in terms of prayer clause (a). We quash and set aside the impugned communication and direct that the petitioners would be permitted to cross-examine the three persons with

regard to whom the request was made. They shall be made available for cross-examination by the petitioners on 14-3-2017. The petitioners shall cross-examine these three persons and who shall remain present before the adjudicating authority on 14-3-2017, at 11:00 a.m.. The petitioners have stated before us that these three witnesses would be cross-examined by their Advocate/legal representative on 14-3-2017 itself. The cross-examination would be concluded on that day.

15. We, therefore, direct that in the event the petitioners remain absent or do not avail of the opportunity to cross-examine these three witnesses, then, they shall forfeit the liberty given to them, as above. Needless to clarify that if these three persons remain absent or do not present themselves for cross-examination on a date and time convenient to the adjudicating authority and to them and which may be later than 14-3-2017, then the respondent/Revenue is prevented from relying upon their statements and to support its allegations in the show cause notice.

16. The petition stands disposed of in the above terms.

No order as to costs.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)