

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION**

WRIT PETITION NO. 12915 OF 2016

Kalpena Industries Limited	)	... Petitioner.
A Company incorporated under the Companies	)	
Act, 1956 and having its Mumbai Office at 106,	)	
Laxmi Plaza, Andheri (W), Mumbai-400 053,	)	
and inter alia, a factory 24/3, Demini Road,	)	
Dadra, Silvassa.	)	

V/s.

- | | | |
|---|---|------------------|
| 1. The Union of India, |) | |
| through the Secretary Ministry of Finance |) | |
| Department of Revenue, North Block, |) | |
| New Delhi -110 001. |) | |
| |) | |
| 2. The Commissioner of Customs (Exports), |) | |
| JNCH, Nhava Sheva, having his office at |) | |
| Post : Uran, Raigarh Dist., |) | |
| Maharashtra – 400 707. |) | ... Respondents. |

Mr. Prakash Shah, Advocate, a/w. Mr. Vir Sanghvi i/by P.D.S. Legal
for the Petitioner.

Mr. M. Dwivedi, Advocate for the Respondent No.2.

**CORAM : S. C. DHARMADHIKARI AND
SMT.BHARATI H. DANGRE,JJ.**

DATE : 01st MARCH, 2018.

**(Judgment Reserved on : 30.01.2018)
(--"-- Pronounced on : 01.03.2018)**

JUDGMENT : (Per Smt.Bharati H. Dangre, J.)

1 The present writ petition is filed by the Petitioner Company, incorporated under the provisions of the Companies Act, 1956 and engaged in the manufacturing of polyethylene/polypropylene compound and PVC compound, seeking a writ in the nature of mandamus, directing the Respondent No. 2 to permit the petitioners to cross-examine 11 truck owners, whose statements are relied upon in the show cause notice issued to the petitioner, alleging that the goods imported by the Company have not reached the factory of the petitioner.

 The petitioner is served with the show cause notice by the Commissioner of Customs (Exports), Jawaharlal Nehru Custom House, Nhava Sheva, asking it to show cause as to why penalty should not be imposed on the Managing Director, Assistant

Manager, Commercial Head & Company Secretary-cum-Authorized Signatory of the Petitioners Company and also the partners of the said Company since they have indulged in evasion of central excise duty and customs duty by diverting the indigenously procured inputs as well as imported inputs in local market and by clandestine removal of the finished goods. The show cause notice sets out that the raids were conducted at the factory premises at Dadra and Daman, godown of the petitioner and also at residential premises of the Managing Director and Assistant Manager cum Authorized Signatory at Vapi and Mumbai Head Office of the Petitioners on 3rd / 4th February, 2010 and various documents were seized under the distinct panchanamas and the stock position of raw material and finished goods was recorded. During the course of the investigation, the officers of the department also recorded the statements of various persons including the employees of the petitioner company as also the transporters engaged in transportation of raw materials goods. Premises of all the transporters were also searched during the course of the investigation and certain documents were procured from them by

executing panchanamas to M/s. KIL from different consignees and make arrangement for delivery of finished goods as parcel to other transporters for onward transportation.

Based on the said material, the show cause notice alleges that the petitioner's company have been habitually indulged in diversion of the imported goods, imported by them on payment of duty and Imported duty free against Advance Authorization / Licences. It was alleged that in order to fulfill export obligation, they are showing fake clearance / deemed exports under CT-3 to M/s. Tara Holdings Ltd. (100% EOU), West Bengal.

2 Paragraphs 43.9 to 43.20 of the show cause notice refer to the statements of the transporters and it is alleged that these truck transporters assisted the petitioners company to sell all raw materials under the guise of clearance of finished goods to one M/s. Tara Holdings Pvt. Ltd. (100% EOU) at Kolkata, Howrah (WB) and M/s. Sarla Gems Limited at Kolkata without physical delivery of the same, by providing vehicle numbers and lorry receipts without actually transporting the goods. It is alleged that these transporters

have assisted M/s. KIL to conceal their illicit sale of raw materials in guise of clearances of finished goods to M/s. Tara Holdings. It is also alleged that these transporters have concerned themselves in storing, depositing, removing, selling and purchasing the duty free imported goods which they knew and had reasons to believe that such goods are liable for confiscation under the Act and invite penalty under section 112 of Customs Act, 1962.

3 Based on the aforesaid statement, the show-cause notice ask the petitioners to show cause as to why action should not be initiated against them to the following effect : (i.e. as per para 44 of the show cause notice) –

“Para 44 : Now therefore, M/s Kalpena Industries Limited, Survey No.24/3, Village : Demini, Dadra, Silvassa, are hereby called upon to Show Cause to the Commissioner (Port -Export) of Customs, Jawaharlal Nehru Customs House, Nhava Sheva, having his office situated at Jawaharlal Nehru Customs House, Nhava Sheva, Po-Uran, District Raigad (MH), as to why :

i 702 MT of PVC Resign valued at Rs.3,29,80,357/- (as detailed in Annexure “A-8” to the Show Cause Notice) should not be confiscated under Section 111 (O) of Customs Act, 1962.

ii Customs Duty amounting to Rs.61,42,270/- (as detailed in Annexure “A-8” to the show cause notice), should not be demanded and recovered under proviso to Section 28 (4) of Customs Act, 1962, and the bonds executed by them against the said Advance Authorisations at the time of imports of the said goods be enforced for recovery of the said duty as per the conditions of the Notification No. 93/2004-Cus dtd 10/9/2004 and No.96/2009-Cus dtd 11/9/2009.

iii 944 MT of LLDPE and Silicon Fluids (VTMOS) valued at Rs.6,69,18, 426/- (as detailed in Annexure “A-13” to the Show Cause Notice) should not be confiscated under Section 111 (O) of Customs Act, 1962.

iv Customs Duty amounting to Rs. 1,49,08,584/- (as detailed in Annexure “A-13” to the Show Cause Notice), should not be demanded and recovered under proviso to Section 28 (4) of Customs Act, 1962 and the bonds executed by them against the said Advance Authorisations at the time of imports of the said goods be enforced for recovery of the said duty as per the conditions of the Notification No. 91/2004-Cus dtd 10/9/2004 and No. 93/2004-Cus dtd 10/9/2004.

v Interest at appropriate rate should not be demanded and recovered on the customs duty evade by them at paras (ii) & (iv)

vi Penalty should not be imposed under Section 112/114A of the Customs Act, 1962 for (I), (ii), (iii) and (iv) above.

4 The Petitioners by their letter dated 15.12.2015 showed cause to the said notice, responding that there is no diversion of exempted material and requested for dropping of the proceedings initiated against them since the goods were not diverted and it was specifically contended that the entire quantity of PVC Resign was physically brought to the Dadra Factory and the entire quantity was utilized for manufacturing purpose of the dutiable production of the Dadra factory. Relying upon several pronouncements from various authorities, it was canvassed that the goods cannot be confiscated and no redemption fine can be imposed when the goods are not physically available and not seized and released against enforceable security.

5 In response to the personal hearing intimation dated 24.08.2015, personal hearing was fixed on 09.09.2015 and a notice of which was served on the petitioner on 05.09.2015. For want of sufficient time, the petitioner expressed inability to appear at the personal hearing fixed on 09.09.2015 and addressed a communication to permit the petitioner to cross-examine 11 vehicle owners since their statements were relied upon for issuance of the show cause notice. In the communication addressed to Commissioner of Customs on 08.09.2015, the petitioner invited attention to their specific request for cross-examination of 11 vehicle owners, who denied the transportation of imported goods from Bhiwandi godown to Dadra factory and whose statements were relied upon by the department, for raising the demands.

The Petitioners reiterated their demand on 19.01.2016 by inviting attention of the Hon'ble Commissioner of Customs to the judgment of the Hon'ble Gujarat High Court in the case of **Mahek Glazes Pvt. Ltd., vs. Union of India**, reported in 2014 (300) E.L.T. 25 (Guj)., where the Gujarat High Court had held that the party had a right to be told whether his application for cross-

examination is granted or refused before final order is passed. The attention of the Commissioner was invited to that portion of the judgment, where the Hon'ble High had held that without dealing with and disposing of the party's application for cross examination, the adjudicating authority could not have adjudicated the issues. The request was, therefore, made to decide the application for cross-examination of the transporters.

6 The Assistant Commissioner of Customs on 14.09.2016 informed the decision of the Adjudicating Authority i.e. Commissioner of Customs (NS-IV), JNCH, Nhava Sheva, on the application, seeking cross-examination in relation to the show cause notice issued to the petitioner. The communication addressed to the petitioner, mentions that the request of the noticee for permission of cross-examination of persons indicated in their letter dated 15.1.2016 and reiterated in the letter dated 19.01.2016, is not supported by valid reasons. The communication sets out the following reasons :

“ I find that the request of noticee for permission of cross examination of persons as indicated in their letter dated 15.01.2016 and again vide letter dated 19.01.2016 is not supported by valid reasons. It is noticed that all the relied upon documents including statements of the concerned persons, whose cross-examination has been sought have already been provided to the Noticee and instead of making submission on merits, attempt has been made to delay the proceedings in-seeking cross examination without any valid reasons.

It is also noticed that it is not obligatory on the adjudicating authority in such quasi judicial proceeding to accede to such unreasonable demands.”

Reliance was placed on the following judgments :

- i. Union of India Vs. Rajendra Bajaj (2010 (253) E.L.T. 165 (Bom)]
- ii. Kanungo & Co. Vs. Collector of Customs, Calcutta & others (1993(13)E.L.T.1486 (SC)
- iii. Fortune Impex Vs. Commissioner of Customs, Calcutta (2001 (138) E.L.T. 556 (Tri-Kolkata)]
- iv. Suman Silk Mills Pvt. Ltd., Vs. Commissioner of Customs & C.Ex. Baroda (2002 (142) E.L.T. 640 (Tri-Mumbai)] Tribunal

- v. Jagdish Shanker Trivedi Vs. Commissioner of Customs, Kanpur (2006 (194) E.L.T. 290 (Tri-Del)]
- vi. Liyakat Shah Vs. Commissioner of C.Ex. Indore-II (Bhopal) (2000 (120) E.L.T. 556 (Tribunal)]

By placing reliance on the said judgments, the communications mentions that it was not obligatory on the part of the adjudicating Authority to accede to such unreasonable demands.

It is this impugned communication dated 14.09.2016, which is assailed by the petitioner in the present petition.

7 The said communication is assailed on the ground that the impugned decision is in utter violation of the principles of natural justice. It is further contended that it is incumbent on the part of the Respondent No. 2 to permit the petitioner to cross-examine the persons whose statements are sought to be relied upon in the show cause notice and this is in conformity with the principles of natural justice. It is further stated that the purported rejection of the request to cross-examine the persons is ex-facie unjustified and contrary to the binding principles of law. It is

further alleged that the respondent no. 2 has committed grave error of law in holding that all the relied upon documents including the statements of concerned persons, whose cross-examination has been sought have already been provided to the petitioner. The reliance placed on the judgment mentioned in the impugned order is alleged to be erroneous and on the other hand the petitioner placed strong reliance on the judgment of the Hon'ble Apex Court in the case of Ayaab Khan Noor Khan Pathan vs. State of Maharashtra (2013) 4 SCC 465.

8 In support of the petitioners, we have heard learned Advocate Mr. Prakash Shah, assisted by Mr. Vir Sanghvi, who would harp on the principles of natural justice and would argue that the basic principles of natural justice though enunciate two rights namely -

(a) Audi Alteram Partem Rule i.e.

that no person shall be condemned unheard and,

(b) Nemo judex in causa sua i.e.

that no person can be a judge in his own case.

The principles have been further refined and various facets have been evolved and acknowledged in series of decisions. He would argue that the material on the basis of which action is proposed against a person, if entails civil consequences, then such material is to be supplied to the person concerned and if the matter includes documentary evidence, the same must be supplied and if it includes statements of persons or the documents authored by certain persons, then such persons must be made available for cross examination before the Authority. He would thus clamp the impugned rejection as grave injustice and prejudice to the petitioners. The learned counsel would, therefore, pray for issuance of a writ of mandamus, directing the respondents to permit the petitioners to cross-examine 11 truck owners/transporters, whose statements were relied upon in the show cause notice. to allege that the imported goods have not reached the factory of the petitioners. He, therefore, prays for quashing and setting aside the said impugned order/ communication.

9 The learned counsel representing the Revenue would refer to a catena of judgments to canvass the submission that it is not imperative on the part of the adjudicating authority to offer such an opportunity. Learned counsel for the revenue relied upon the judgment of the Hon'ble Apex Court in case of **Telestar Travels Pvt. Ltd., vs. Special Director of Enforcement**, reported in 2013 (289) E. L. T. 3(S.C.), which answered a similar issue in reference to the Foreign Exchange Regulation Act, 1971 and reliance is placed on the said judgment to advance a submission that the right of cross-examination available under the Evidence Act, 1872 is not implicit in the adjudication procedure under Rule 3 of the Adjudication Rules framed under section 79 of the Foreign Exchange Regulation Act, 1973. The learned counsel for the Revenue would refer to the following paragraph from the said judgment, i.e. para nos 16 & 17 and 18, :-

“16. That brings us to the third limb of attack mounted by the appellants against the impugned orders. It was argued by Mr. Diwan that while holding that Bountiful Ltd., was a paper Company and was

being controlled and operated from India by the appellants through Shri Sirish Shah, the Adjudicating Authority had relied upon the statements of Miss Anita Chotrani and Mr. Deepak Raut, and a communication received from the Indian High Commission in London. These statements and the report were, according to Mr. Diwan, inadmissible in evidence as the appellant's request for an opportunity to cross examine these witness had been unfairly declined, thereby violating the principles of natural justice that must be complied with no matter the strict rules of Evidence Act had been excluded from its application.”

17. Mr.Malhotra, on the other hand, argued that the right of cross-examination was available to a party under the Evidence Act which had no application to adjudication proceedings under FERA. He relied upon the provisions of Section 51 of the Act and Adjudication Rules framed thereunder in this regard. He also placed reliance upon a decision of this Court in Surjeet Singh Chhabra vs. Union of India and Ors. (1997) 1 SCC 508 = 1997 (89) E.L.T. 646 (S.C.) to argue that cross-examination was unnecessary in certain circumstances such as the one at hand where all material facts were admitted by appellants in their statements before the concerned authority.

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.”

The learned counsel for the Revenue would also refer to the judgment of the Apex Court in the case of **Kanungo and Company vs. Collector of Customs & Ors.**, reported in 1973 (2) SCC 438, which was also referred to and relied upon while deciding the **Telestar Travels Pvt. Ltd.**, cited supra.. According to learned counsel, the Hon'ble Apex Court in the said judgment, had clearly held that the principles of natural justice do not require that in the matters like this, there is absolute right of cross-examination.

The learned counsel of the Revenue would rely upon para 12 of the Apex Court which reads as under :

“12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the

persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.”

The learned counsel for the Revenue also relied upon the judgment of the Hon'ble Bombay High Court in the case of **Patel Engineering Ltd., vs. Union of India**, reported 2014 (307) E.L.T.-862 (Bom.), dealing with an appeal preferred by the unsuccessful assessee, challenging the findings rendered by the adjudicating authority and before the CESTAT. The counsel for the Revenue relies on paragraph 23 of the said judgment which reads as follows :

“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.”

10 For effective adjudication of the controversy in hand and to determine as to whether the petitioners ought to be permitted to avail the opportunity of cross-examination, as prayed by them, it would be necessary to dwell upon the statutory scheme under which such a right is claimed. The Petitioner was served with the show cause notice, asking it to show cause as to why certain goods which they are manufacturing and dealing with be not confiscated under section 111 of the Customs Act, 1962 and the custom duty should not be demanded and recovered from them under the proviso to section 24 (4) of the Customs Act.

The Customs Act, 1962 is an Act dealing with the law relating to customs, aims at sternly and expeditiously deal with the smuggled goods and curb the dents on the revenue thus

caused. The Act contains the provisions for confiscation of goods and conveyance and imposition of penalties, when any goods are imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force. The enactment prescribes a mechanism for levy of, and exemption from payment of custom duties leviable under the Act.

Chapter 14 of the Act prescribes for a detail procedure for adjudication. Section 122 of the Customs Act, 1961 sets out the procedure for adjudication of confiscations and penalties and it reads thus :

“122. Adjudication of confiscations and penalties. — In every case under this Chapter in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged, —

(a) without limit, by a 1[Commissioner of Customs] or a 2[Deputy Commissioner of Customs];

[(b) where the value of goods liable to confiscation does not exceed [two lakh] rupees, by an [Assistant Commissioner of Customs or Deputy Commissioner of Customs];

(c) where the value of the goods liable to confiscation does not exceed [ten thousand] rupees, by a gazetted officer of customs lower in rank than an [Assistant Commissioner of Customs or Deputy Commissioner of Customs].

Section 122A lays down Adjudication procedure which reads as follows :

122A. Adjudication procedure.—(1) The adjudicating authority shall, in any proceeding under this Chapter or any other provision of this Act, give an opportunity of being heard to a party in a proceeding, if the party so desires.

(2) The adjudicating authority may, if sufficient cause is shown, at any stage of proceeding referred to in subsection (1), grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during the proceeding.]

Section 123 provides for the burden of proof to be discharged in certain cases and Section 124 of said Act, mandates issuance of

show cause notice before confiscation of goods. Section 124 needs the reproduction here and is being reproduced as under :

“124. Issue of show cause notice before confiscation of goods, etc.—No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person —

(a) is given a notice in 1[writing with the prior approval of the officer of customs not below the rank of a Deputy Commissioner of Customs, informing] him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter: Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral.

11 The Adjudication procedure contemplated in Chapter 14, thus mandates the adjudicating authority to follow the principles of natural justice before issuing an order of confiscation of any goods or imposition of any penalty on any person and it mandates issuance of notice in writing, informing the owner of the goods or such person of the grounds on which it has proposed to confiscate the goods or to impose the penalty and on affording an opportunity to make a representation in writing within such reasonable time, as may be specified and also offer the reasonable opportunity of being heard in the matter. Thus what we find is that the principles of natural justice are implicitly engrafted in the said provision with a view to offer an opportunity to the owner of the goods to justify that the goods are not smuggled goods and they are not liable for confiscation or imposition of penalty.

12 Section 124 of the Customs Act, 1962 under which show cause notice has been issued to the petitioner contemplates a notice in writing informing the grounds on which it has proposed to

confiscate the goods or impose a penalty and giving an opportunity of making representation in writing within a reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty. Section 124 also contemplates a reasonable opportunity of being heard in the matter. The learned counsel for the petitioner emphasizes that this reasonable opportunity would bring within its ambit following of principles of natural justice and which would extend a right to cross-examination the witnesses. It is no doubt true that right of cross-examination is vital and can be put to use to shake the credit of a party and the trustworthiness or veracity of his evidence. Though right of cross-examination is not an indefeasible right vested in a party, exercise of such right would depend on the facts of each case and would depend on the language used in the statute and also the scheme of an particular enactment and even if there is no specific provision in the statute, such right can be exercised or permitted to be exercised. The petitioner before us intends to cross-examine the truck owners whose statements have been heavily relied upon to arrive at a prima facie opinion on the

basis of which a show cause notice under the Customs Act, 1962 came to be issued.

13 The well known principles of natural justice which have been evolved in the judicial process including the administrative and quasi-judicial process constitute the basic elements of a fair hearing and ensure fair-play and justice in the decision making process and they are recognized as fundamental principles of justice, ensuring that the authority conducting the proceedings acts fairly. The said principles which have been so recognized and evolved through the process of judicial interpretation and are sacrosanct to the proceedings and any infraction of the said principles, invite an action of striking down the decision making process, being violative of principles of natural justice. This corollary and weightage attached to the principles of natural justice would also include a right to cross-examination and through various judicial pronouncements the said right has been evolved as part and parcel of the principles of natural justice.

The Hon'ble Apex Court in the case of *M/s. Bareilly Electricity Supply Co. Ltd. vs. The Workmen and Others*, reported in 1971 (2) SCC 617, while applying the principles contained in the Evidence Act to the procedure contemplated under the Industrial Disputes Act and was confined to with an issue about the applicability of the said principles in the proceedings in relation to the workmen and the Hon'ble Apex Court was dealing with an enquiry into misconduct by a public servant in which he complains that he was not permitted to cross-examination. In fact though he was allowed to put questions and evidence was recorded in his presence and the procedure prescribed in the Evidence Act of recording the Chief-Examination first and then allowing the delinquent to exercise his right to cross-examination was not followed but the enquiry officer himself cross-examined the witnesses. In this backdrop the Hon'ble Apex Court observed :

“But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the

party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure-under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the evidence Act are not strictly applicable except in so far as [Section 11](#) of the Industrial Disputes Act 1947 and the rules prescribed therein permit it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced.”

“Again if a party wants an inspection, it incumbent on the Tribunal to give inspection in so far as it is relevant to the enquiry. The applicability of these principles is well recognized and admit of no doubt.”

The Hon'ble Supreme Court as early in 1958 while dealing with the case of **Khemchand Vs. Union of India**, AIR 1958 300 while dealing with the dismissal of an employee and the right available under Article 311 (2) of the Constitution of India, in the facts of the case had held that “reasonable opportunity envisaged to the Government Servant by the provisions contained in Article 311 (2) includes (a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is informed of the charges levelled against him and the allegations on which such charges are based; (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witness in support of his defence and finally (c) an opportunity to make his representation as to why the proposed penalty should not be inflicted on him though this decision will have to be restricted to the peculiar facts of the case.

The Hon'ble Apex Court in the case of **The State of Jammu and Kashmir and Ors. vs. Bakshi Gulam Mohammad & Anr**, reported in AIR 1967 Supreme Court 122, had an occasion to consider the sweep of the principles of natural justice. In

paragraph 20 of the said judgment, the Hon'ble Apex Court held that right of natural justice requires that the party against whom allegation is being inquired into should be given a hearing. Right of hearing does not include right to cross examine. Right to cross-examination must depend upon circumstances of each case and also on the statute under which allegations are being enquired into.

In State of Kerala vs. K. T. Shaduli Grocery Dealer Etc. [(1997) 2 SCC 777] facts involve disclose that in the assessments of the assessee to sales tax for three assessment years, the returns filed by him on the basis of his books of account appeared to the Sales Tax Officer to be incorrect and incomplete since certain sales appearing in the books of account of certain wholesale dealer as having been effected by the assessee in his favour were not accounted for in the books of account maintained by the assessee. The assessee applied to the Sales Tax Officer for affording him an opportunity to cross examine the wholesale dealer in regard to the correctness of his accounts, but this opportunity was denied to him and the Sales Tax Officer proceeded to make a best judgment assessment under Section 17 (3).

On these facts, it has been held that “the act of the Sales Tax Officer in refusing to summon the wholesale dealer for cross examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee”.

The proviso appended to section 17(3) was to the following effect “provided that before taking an action under this sub-section, the dealer shall be given a reasonable opportunity of being heard and, where a return has been submitted, to prove correctness or completeness of such return”. Thus, on the facts of this case when the assessee had no other means to refer/ rebutte the account book of the wholesaler dealer, then, the right of cross-examination of the wholesaler dealer was a reasonable opportunity, contemplated by the proviso to section 17(3) of the Act.

Latest judgment of the Hon'ble Supreme Court, dealing with the right of cross-examination is reported in AIR 2013 SC 58 in the case of **Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra**. The said case revolves around the caste certificate

issued to the appellant and its validity. The appellant being the member of Scheduled Tribe had approached the Caste Scrutiny Committee for verification of his claim. The issue involved in the case was denial of the opportunity to cross-examine witnesses and it was canvassed before the Hon'ble Apex Court that in absence of such opportunity it has resulted into grave miscarriage of justice. The Hon'ble Apex Court, after referring to a catena of its earlier judgments made the following observations in para 28 :-

“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 cross-examining 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 cross-examination.

29.

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, 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 cross-examination is an integral part and parcel of the principles of natural justice.”

In view of the above judgment of the Hon'ble Supreme Court especially in the latest judgment of *Ayaaubkhan Norrkhan Pathan* (Supra), it would clearly follow that cross-examination of witnesses has been held to be an integral part and parcel of the principles of natural justice. Refusal to grant permission to cross-examine witnesses would be normally be an exception.

14 The reliance placed on the judgment of Hon'ble Delhi High Court in a recent decision in the case of **Shahid Balwa, Vinod Goenka vs. the Directorate of Enforcement**, [201 (2013) Delhi

Law Times 211 (DB)], while dealing with the Foreign Exchange Management Act and the Rules and had an opportunity to consider an argument on the point as to whether the permission to cross-examination was contemplated within the scheme of the enactment. The Application was moved for cross-examination of three persons since their statements were relied upon and it was attempted to canvass that the cross-examination is an integral part and parcel of the principles of natural justice and on a fair reading of the FEMA Act and Rules, it is imperative to permit such cross-examination and the same would be an indefensible right. The learned single Judge has dismissed the writ petition and letters patent appeal came to be filed before the Division Bench. The Division Bench on consideration of the position of law and placing reliance on the judgment in the case of **State of Kerala vs. K. T. Shaduli Grocery Dealer Etc.**, supra, summarized the position in paras 34 and 35 thus :

“34. Keeping in view the facts of the present case and the nature of allegations being raised against the appellant the judgments of the Supreme Court in the

case of K.T. Shaduli (supra), Khem Chand vs. UOI (supra) and Ayyaubkhan Noorkhan Pathan vs. State of Maharashtra (supra) would in our view apply to the facts of this case. The respondent has failed to place on record any fact to show that prejudice would be caused to it if the appellant is permitted to cross-examine the said witness. In fact a query was posed to the learned Counsel for the respondent about whether any prejudice would be caused to the respondent if the cross-examination is allowed. The learned counsel could not specify any prejudice. In our view the present appeal should be allowed to the extent that the appellants should be entitled to cross-examine the three witnesses whose statements have been relied upon by the respondent in the complaint. The respondent in the complaint have heavily relied upon the statement of Shri Ahmad Sakir, Shri Pratap Ghose and Shri K. Vasudeva. It would be in the fitness of things that to test the veracity of their statements which is relied upon by the respondent the appellants are allowed to cross-examine them.

35. However, other than the three witnesses no grounds are made out to cross-examine any other person. The request of the appellant to cross-examine Shri Rajeswhar Singh, Assistant Director, the

complainant is a request without merits. The said complainant has filed the complaint based on material gathered by the respondent. No. purpose would be served by putting him to cross-examination as is sought by the appellants.”

15 This Hon'ble Court (Coram : S.C. Dharmadhikari & Smt. Bharati H. Dangre, JJ) in writ petition no. 2803 of 2015 decided on 30.01.2018 in case of **Lalit Kumar Modi vs. Special Director, Directorate of Enforcement (Western Region) & Anr.** had an occasion to deal with the same enactment and the issue as to whether an opportunity to cross-examine is a part and parcel of the reasonable opportunity. Since the application was made before the adjudicating authority to cross-examine those persons whose statements were relied upon, was denied, this court after having deep consideration of the judgment in the case of **Telestar Travels Pvt. Ltd.**, supra and on consideration of the judgment delivered by the High Court of Delhi in case of **Shahid Balwa**, supra, allowed the writ petition by relying upon paragraph 14 of the judgment of this court in the case of **Nirmal Seeds Pvt. Ltd., vs. the Union of**

India & Anr., decided on 27.02.2017, and held that when the petitioner is charged with violation of the Act and Rules and is prosecuted against by relying upon the material which include a statement of person recorded by the authority under the FEMA Act and a show cause notice issued to the petitioner as to why the penalty should not be imposed in terms of section 13 on him, the petitioner is entitled to avail his right of cross examination.

16 Though we are conscious of the fact that right of cross-examination may not be construed as an indispensable right under the scheme of the Customs Act, we are of the view that the right of cross-examination is not infringeable rule. We would not hesitate to hold that the said right necessarily attributed by reasonable opportunity and by principles of natural justice, its availment would depend on the nature of proceedings involved and the provisions of the statute; though we do not intend to lay down that it is an absolute right vested in a party.

 In the backdrop of these facts before us and since the statements of the truck owners were heavily relied upon to

attribute that the petitioner company had illicitly acquired raw materials as LDPE/ LLDPE in the open market without payment of applicable CENVAT duty in guise of duty free clearance and modified the LLDPE to one M/s. Tara Holdings Pvt. Ltd., which is 100% EOU. It is alleged that the said fake deemed exports shown by the petitioner company to fulfill export obligation towards imports done by them as duty free under advance licence / authorization scheme with payment of custom duty. It is alleged that the entire exercise undertaken by the petitioner company where the subject goods were diverted elsewhere and export obligation has been tried to be fulfilled is the said fake deemed exports by reasonably raising collusion or deliberate mis-statement or suppressing of the facts which warrant confiscation of the said goods and also rendered the petitioner company liable for penalty under section 112 (a) of the Customs Act, the role played by the various persons / company and the transporters etc. and evasion of central excise duty by the petitioner company is specifically carved out. As far as the transporters are concerned, it

is alleged that they have assisted the petitioner to conceal their illicit sale of raw materials.

17 Heavy reliance has been placed on the judgment delivered in the case of **Patel Engineering** (Supra). Perusal of the facts referred in the said judgments are distinct and the Hon'ble Division Bench of this court was dealing with the very peculiar facts and circumstances of the case and the assessee had filed a bill of entry for clearance of two tower cranes under EPCG license, claiming benefit of the notification 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 tower cranes. The examination of the goods revealed lot of discrepancies and which were put across to the assessee and thereafter, the Assistant Chief Engineer was called and goods were shown to him and his statement was recorded under section 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. The Division Bench noted that there was a contradiction in the Chartered Engineer's certificate and contents of the bill of entry and that there was a clear suspicion that the inspection appears to have been done even before the containers were opened. Even Chartered Engineer was summoned and he admitted that he had issued the Chartered Engineer's Certificate without inspecting the machines. The high rank officers such as of the rank of Vice President of the assessee, the suppliers were also summoned and their statements were recorded and show cause notices were issued and then adjudicated.

In this background, the Division Bench observed that no prejudice has been caused to the assessee by not permitting the panel members to be cross-examined. The court concluded that 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 and the assessee could have in the teeth of this material, which was placed by us before, the department was in a position to defend itself effectively. It is in these

circumstances, the Hon'ble Court observed that where the assessee had several opportunities to make his submissions with regard to the findings of the report of the expert panel, the refusal to permit cross-examination was perfectly justified.

18 No doubt the principles of natural justice have been held to be sacrosanct and have been placed at a highest pedestal in the adjudication proceedings which are judicial, quasi-judicial or administrative. However, there is no straight-jacket formula in which the principles of natural justice can be confined and which principles of natural justice or which facets of it is applicable, would depend upon the nature of the law and statute under which adjudication is undertaken and several other factors. Further every departure from principles of natural justice may not result in miscarriage of justice and the Hon'ble Apex Court has at times refused to strikeout an action, not being in conformity with the principles of natural justice, unless the prejudice caused is demonstrated. In the words of the Hon'ble Apex Court, it will be “useless formality”, if the resultant situation would be the same

even after due adherence to the principles of natural justice. The question as to what extent the principles of natural justice need to be stretched as they cannot be moulded and are not to be construed with stringent strictness but needs to be dealt with the flexibility. The principles of natural justice is necessary concomitant in any lis and non-violation thereof have been held to be infringement of right to defend effectively and the courts have come upon heavily and have struck down such action. The Hon'ble Apex Court in the case of **Canara Bank and Ors. vs. Debasis Das and Ors.** (2003) 4 Supreme Court Cases 557, where the Apex Court has observed thus in paragraph 19 as under :

“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 fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an

administrative at has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. 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.

The said position has been clarified by the Hon'ble Apex Court in catena of judgments of the Hon'ble Apex Court as well as this court. They have consistently applied the theory of resultant prejudice and have examined whether non-observance of the principles of natural justice has caused prejudice to the party and at times have also formed an opinion as to whether observance of the principles of natural justice would have gained advantage to a party or was it merely an “empty formality”.

19 The grievance made by the learned counsel for the petitioner is about the denial of right to cross-examine the transporters, specifically when their statements have been relied upon in the form of opinion, leading to show cause, in relation to

the liability under the provision of the Customs Act. The learned counsel would argue that the said statements have been specifically relied upon and if they have been relied upon then fairness and equity demands that the petitioners be afforded an opportunity to cross examine those witnesses, when the specific allegation is that the customs duty to the tune of Rs. 61,42,270 and Rs. 1,49,08,584/- has been evaded and not only the duty but interest and penalty has also been sought to be imposed on the petitioners by the impugned show cause notice. According to the learned counsel, the revenue was not justified in denying the said opportunity only on the ground that it would delay the proceedings. The learned counsel for the petitioner would rely upon the judgment of the Delhi High Court in the case of **Shahid Balwa, Vinod Goenka vs. Directorate of Enforcement**, reported in [201 (2013) Delhi Law Times 211 DB] and also on the judgment delivered by the Division Bench of this Hon'ble Court (Coram : S.C. Dharmadhikar and B. P. Colabawalla, JJ) in the case of **Nirmal Seeds Pvt. Ltd., vs. The Union of India & Anr.** (Writ Petition No. 1643 of 2017). The learned counsel would argue that though a

right to cross-examination is not an indefeasible right, the same could be availed of depending upon the facts and circumstances of each case.

20 In these peculiar circumstances, in order to effectively defend itself the petitioner is entitled to cross-examine the said transporters as that would offer the petitioner “ a reasonable opportunity” as contemplated under section 124 (c) of the Customs Act, 1962. The Petitioner company is entitled for the said opportunity since the Revenue Authority specifically relied on the statements of the transporters in support of the show cause notice, proposing confiscation of the goods and levying of penalty and foisting the liability on the petitioner company under the said Act.

21 In the backdrop of the aforesaid discussion, the writ petition is allowed. Impugned order dated 14.09.2016 and the contents of the said communication are quashed and set aside,

declining the opportunity to cross-examine, as sought by the Petitioner.

22 The Respondent Authorities are directed to offer an opportunity of cross-examination to the petitioner company as sought in the applications dated 15.01.2016 and 19.01.2016. Respondent No. 2 would permit the petitioner to cross-examine the truck owners whose names have been mentioned in applications dated 15.01.2016 and 19.01.2016 and the entire exercise of conducting the cross-examination be completed within period of six weeks from the date of the receipt of this order and once such opportunity is availed, the show cause notice be adjudicated by the Respondent Authority.

(SMT.BHARATI H.DANGRE,J.)

(S.C.DHARMADHIKARI,J.)

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