



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 25.04.2018
CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

W.A(MD)NO.705 OF 2014 against W.P(MD)No.15220 of 2013
and
M.P(MD)No.1 of 2014

M/s.Roshan Overseas,
represented by its Proprietor
Usman Abdul Noble,
Having Office at Godown No.13,
Laxman Compound,
Rohanlal Village, Bhiwandi,
Thane District,
Maharashtra State.

:Appellant/Petitioner

.vs.

1. The Commissioner of Customs,
Customs House,
Tuticorin - 628 004.

2. The Additional Director General,
Zonal Unit,25, Directorate of Revenue,
Intelligence, Gopalakrishna(Iyer)Road,
T.Nagar,Chennai - 600 017.

: Respondents/Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent
praying this Court to set aside the order passed by this Court in
W.P(MD)No.15220 of 2013, dated 23.09.2013.

Prayer in WP(MD). 15220/ 2013 :

Writ Petition is filed under Article 226 of the Constitution
of India, praying this Court To issue a Writ of Certiorarified
Mandamus, calling for the records pertaining to the Impugned Order
passed by the 1st respondent in Order No.6/2013 dated 20.06.2013,
quash the same and direct the 1st respondent to pass a fresh
adjudication order after permitting the petitioner to cross
examine the officers, who effected the seizure and the witnesses
who were present at the time of seizure of the imported goods
covered under a Bill of Entry No.5485068, dated 16.12.2011.

**JUDGEMENT**

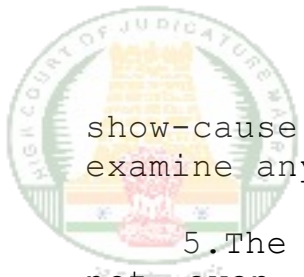
[Judgement of the Court was made by **K. RAVICHANDRABAABU, J.**]

The appellant is the Writ Petitioner. They are aggrieved against the dismissal of their Writ Petition filed against the order in original passed by the Commissioner of Customs, Tuticorin, dated 20.6.2013.

2.The matter pertains to import of Dyed Polyester Woven Fabric by the writ petitioner through Bill of Entry No.5485068 dated 16.12.2011. According to the revenue, the writ petitioner undervalued the goods to the extent of 75%. Thus, a show cause notice was issued on07.2012. The writ petitioner made some replies on 09.09.2012, 27.09.2014, 24.10.2012 and 16.10.2012. A personal hearing was also held on 30.12.2013, on which day, the petitioner presented a written submission dated 12.12.2013. Thereafter, the Adjudicating Authority, after discussing all the facts and circumstances and also by giving reason as to why he is denying to the petitioner the chance of cross-examination all officers and mahazer witnesses, passed an order of adjudication, impugned in the writ petition, thereby rejecting the declared value shown by the writ petitioner and consequently by redetermining the value. Thus, the Adjudicating Authority ordered payment of duty of Rs.50,95,774/-. The Adjudicating Authority also ordered confiscation of the subject matter goods under Section 111(m) of the Customs Act ,1962, however, by giving an option to the writ petitioner to redeem the same on payment of fine of Rs.15,00,000/- in lieu of confiscation. He also imposed a penalty of Rs.30,00,000/- on the proprietor of the writ petitioner Firm and further penalty of Rs.30,00,000/- on one Mosin of the petitioner Firm. Aggrieved against the said order, the appellant herein, as the writ petitioner, filed the above writ petition, which in turn was dismissed by the learned Single Judge as stated supra.

3.The main grievance of the Writ Petitioner before the Writ Court is that they were not given an opportunity to cross-examine any witness. Therefore, it was contended before the Writ Court that the order in original impugned in the Writ Petition cannot be sustained, as there is violation of principles of natural justice.

4.The Revenue opposed the Writ Petition including its maintainability, on the reason that as against the order impugned, a statutory appellate remedy is available to the Writ Petitioner under Section 129(A) of the Customs Act before the Appellate Tribunal. On the allegation of violation of principles of natural justice, it was pointed out before the learned Judge that the Writ Petitioner has not submitted any explanation to the



show-cause notice and therefore, he is not entitled to cross-examine any witness.

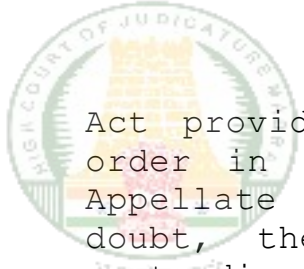
5.The learned Judge, after finding that the Petitioner did not even chose to submit his explanation to the show-cause notice, held that he is not entitled to cross-examine any witness. The learned Judge has also pointed out that the Petitioner would be in a position to cross-examine the witnesses only to substantiate the stand taken in the reply to show-cause notice and on the other hand, the Petitioner having not filed any reply to the show-cause notice, cannot seek for cross-examination of the witnesses. The learned Judge after holding that the Petitioner/appellant is not entitled to cross-examine the witnesses and that there is no violation of principles of natural justice, has however, given liberty to the Petitioner to workout their remedy by preferring an appeal before the appellate authority. The learned Judge has also observed that if any such appeal is filed, time spent in the writ proceedings shall be excluded while computing the period of limitation.

6.The learned counsel for the appellant submitted that the appellant, in fact, has filed written submission, dated 12.02.2018 at the time of personal hearing and therefore, at least based on such written submission, the Revenue should have given opportunity to cross-examine the witnesses.

7.On the other hand, the learned counsel for the respondents / Revenue submitted that the appellant did not meet the allegations made in the show-cause notice on merits in any of their replies filed after issuing the notice as well as in their written submission, dated 12.2.2018 filed at the time of personal hearing. Therefore, he contended that in the absence of any specific denial of the allegations made in the show-cause notice by making averments with facts and figures, the Petitioner/appellant cannot seek for cross-examining the witnesses as a matter of right.

8.Heard both sides.

9.The Writ Petitioner has chosen to challenge the order in original passed by the first respondent, dated 20.6.2013. The Adjudicating Authority namely, the first respondent through the impugned order, rejected the declared value of the subject-matter goods, imported under the subject-matter Bill of Entry and consequently ordered payment of duty of Rs.50,95,774/- on the re-determined value. The Adjudicating Authority also imposed penalty of Rs.30 lakhs each, on the proprietor of the firm as well on another person. There is no dispute to the fact that order in original was passed after issuing show-cause notice and <https://hcservices.equifirst.gov.in/hcservices> according an opportunity of personal hearing and after discussion of all the facts and circumstances. There is no dispute to the fact that the relevant statute namely the Customs



Act provides a statutory appellate remedy against the impugned order in original, before the Customs, Excise and Service Tax Appellate Tribunal under Section 129 (A) of the said 'Act'. No doubt, the Writ Petition was sought to be maintained by contending that the principles of natural justice was violated, as the request of the Writ Petitioner for cross-examining the witnesses was not granted. The learned Judge, on the other hand, found that the Writ Petitioner has not given explanation to the show-cause notice and consequently, he is not entitled to cross-examine the witnesses. When we perused the order impugned in the Writ Petition, more particularly, the findings rendered at Paragraph 23, 24 and 25 of the same, we find that the Adjudicating authority has observed that the replies, dated 9.9.2012, 27.9.2012, 4.10.2012 and 16.10.2012 given by the petitioner to show-cause notice as well as the written submission, dated 12.02.2018 submitted by them at the time of personal hearing, did not touch upon the merits of the allegations made in the show-cause notice and on the other hand, they were repeatedly sent only by stating that the date of issuance of show-cause notice was not available; that the date of seizure was not available in the show cause notice and that the date of drawal of sample should be reckoned for calculating six month period for the issue of show-cause notice.

10. When the show-cause notice was issued with certain allegations of mis-declaration of the value, reply to the show-cause notice should meet the such allegations and state specifically as to how such allegations are factually and legally not correct or sustainable. In this case, the Adjudicating Authority has pointed out that no such contention was raised in the reply to the show-cause notice as well as in the written submission made during the personal hearing. However, it is argued by the learned counsel for the appellant that there are sufficient particulars available in the replies and written submissions. We are refraining ourselves from looking into those material documents at this stage, as we find that all these factual contentions have to be gone into, considered and decided by the next fact finding authority namely, the appellate Tribunal, more particularly, when there are disputed questions of facts. Whether the contentions raised by the Petitioner before Adjudicating Authority are sufficient and consequently, based on those reply and the written submission whether the Petitioner is entitled to cross-examination of witnesses is certainly a matter for the next fact finding authority viz., The Tribunal to consider and decide and not for this court while exercising the discretionary jurisdiction of Article 226 of the Constitution of India.

11. Therefore, the question of violation of principles of natural justice as raised in this case, cannot be decided without going into the merits of the matter, more particularly, without appreciation of the materials placed before the Adjudicating



Authority and hence, we do not propose to accept the contention of the writ petitioner that, in this case, there is a clear-cut violation of principles of natural justice. On the other hand, we are of the view that the Writ Petitioner can raise this point as well before the appellate authority namely, the Tribunal, which in turn shall go into such issue also along with other issues on merits and decide as to whether the Petitioner, based on the materials placed already before the Adjudicating Authority, was entitled to cross-examination of the witnesses. When such course of action is available to the Writ Petitioner by way of filing an appeal before the appellate Tribunal we do not find any reason to interfere with the order passed by the learned Single Judge, except making one clarification that the issue with regard to the entitlement of the Writ petitioner to cross-examine any witness is also left open to be agitated before the appellate authority.

12. On the question of maintainability of the writ petition, it is to be noted that in this case, the Adjudicating Authority passed the impugned order admittedly after issuing the show cause notice and also affording an opportunity of personal hearing to the writ petitioner. Therefore, it cannot be contended that the Adjudicating Authority violated the principles of natural justice. However, it is claimed by the writ petitioner that not giving an opportunity to cross-examine the witnesses also amounts to violation of principles of natural justice. The question as to why such opportunity was not given to the petitioner, certainly is not a simple question of law and on the other hand, it is a question of fact, which is answered by the Adjudicating Authority in the impugned order itself. Whether the reasons stated by such authority in not providing an opportunity to cross-examine are sustainable or not is the question that has to be considered and answered only by re-appreciation of all the facts and circumstances, which, in our view, has to be done only by the next fact finding authority, namely, the appellate authority. Therefore, we are not convinced to appreciate the contention of the writ petitioner with regard to maintainability issue. It is useful to note at this juncture, an observation made by the Hon'ble Apex Court in **Panjab Roadways vs. Panja Sahib Bus Transport Company** reported in (2010) 5 SCC 235 at paragraphs 37 and 38, as extracted hereunder:-

"37. Article 226 of the Constitution of India confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of fundamental rights or any other purpose, the powers are of course wide and expansive but not to be exercised as an appellate authority re-appreciating the finding of facts recorded by a tribunal or an authority exercising quasi-judicial functions. The power is highly discretionary and supervisory in nature. Grant of stage carriage permits is



primarily a statutory function to be discharged by the RTA exercising powers under Section 72 of the Act and not by the High Court exercising the constitutional powers under Article 226 or 227 of the Constitution of India.

38. A writ court seldom interferes with the orders passed by such authorities exercising quasi-judicial functions, unless there is serious procedural illegality or irregularity or they have acted in excess of their jurisdiction....."

13. It is well settled that in a case involving fiscal nature, availing of statutory appellate remedy has to be first exhausted and hence, the party cannot come to this Court directly and file a petition under Article 226 of the Constitution of India. This view is already expressed in very many decisions out of which we quote few decisions which are as follows:-

"1) **M/s.Nivaram Pharma Private Limited rep.by its Director Sardarmal M.Chordia, Madras -vs- The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras and others** reported in (2005) 2 MLJ 246(DB)

2) **United Bank of India -vs- Satyawati Tondon and others** reported in (2010) 8 SCC 110

3) **Raj Kumar Shivhare -vs- Assistant Director, directorate of Enforcement and Another** reported in (2010) 4 SCC 772.

4) **Metal Weld Electrodes -vs- CESTAT, Chennai** reported in 2014 (299) ELT 3 DB."

14. Therefore, we are of the considered view that the filing of the very writ petition itself against the order of the Adjudicating Authority is not maintainable, as the appellant/writ petitioner is having statutory and efficacious appellate remedy before the appellate Tribunal, in this case, CESTAT.

15. With the above observations, the Writ Appeal stands disposed of. The appellant is granted four weeks time to file an appeal before the Appellate Tribunal. If any such appeal is filed before the Appellate Tribunal, the said authority shall consider the same and pass appropriate orders on merits and in accordance with law, without reference to the period of limitation. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(crl side)

/True Copy/



To

1. The Commissioner of Customs,
Customs House,
Tuticorin - 628 004.

2. The Additional Director General,
Zonal Unit, 25, Directorate of Revenue,
Intelligence, Gopalakrishna (Iyer) Road,
T.Nagar, Chennai - 600 017.

+1cc to Mr.P.Saravanan, Advocate Sr.No.63545
+1cc to Mr.S.Gurumoorthy, Advocate Sr.No.63277

VSN/SKN

VB/JC/SAR3/16/05/2018/7P/5C

**JUDGEMENT MADE IN
W.A (MD) NO.705 OF 2014
and
M.P (MD) No.1 of 2014
25.04.2018**