

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8516 OF 2018**

United Spirits Ltd. .. Petitioner
VS.
The Union of India and anr. .. Respondents

Mr. Bharat Raichandani a/w. Ms Pragya Koolwal I/b UBR Legal
for the Petitioner.
Mr. P.S. Jetly a/w. Mr. J.B. Mishra for the Respondents.

**CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 14 JUNE 2019.**

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- 1] Heard learned counsel for the parties.
- 2] The challenge in this petition is to the order dated 20th February 2018 and Corrigendum dated 12th March 2018 and 23rd March 2018 (Exh-A colly) made by Commissioner of CGST and Central Excise, Nashik, disposing of Show Cause Notice dated 1st August 2017 issued to the petitioner.
- 3] As against the aforesaid impugned orders, an appeal lies to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in terms of Section 35B of the Central Excise Act, 1944 read with Section 86 of the Finance Act, 1994. However, Mr. Raichandani, learned counsel for the petitioner, submits that since the impugned orders have been made in breach of principles of natural justice, the bar of alternate remedy ought not to be made applicable and this Court should entertain the present petition against the impugned orders.

4] Mr. Raichandani, by way of elaboration submits that the impugned orders rely upon the statements of the employees of the petitioner recorded under Section 14 of the Central Excise Act, 1944. He submits that despite specific request, respondent No.2 denied the petitioner opportunity of cross-examining the employees in the context of their recorded statements. He submits that even the request for cross-examination came to be denied only in the impugned order and that too, without assigning any reasons or in any case, cogent reasons. He submits that all this clearly amounts to violation of principle of natural justice and fair play and constitutes the good ground for quashing the impugned orders and remanding the matter to the respondent No.2 for re-adjudication after afford of opportunity of cross-examination.

5] Mr. Raichandani relies upon the following decisions in support of the aforesaid submissions:

- (i) M/s. Andaman Timber Industries Vs. Commissioner of Central Excise, Kolkata-II – 2015 – TIOL-255-SC-CX;**
- (ii) Commissioner of Central Excise, Meerut-I Vs. Parmarth Iron Pvt. Ltd. - 2010 (260) ELT 514 (All.);**
- (iii) Kellogg India Pvt. Ltd. vs. Union of India – 2006 (193) ELT 385 (Bom);**
- (iv) Basudev Garg Vs. Commissioner of Customs – 2013 (294) E.L.T. 353 (Del.)**
- (v) Kalpena Industries Ltd. vs. Union of India – 2018 (361) ELT 271 (Bom.)**
- (vi) Jindal Drugs Pvt. Ltd. Vs. Union of India – 2016 (340) ELT 67 (P&H)..**

6] Mr. Jetly, learned counsel for the respondents, submits that this is really not a case of violation of principles of natural justice or fair play. In any case, he submits that the petitioner had an alternate and efficacious remedy of an appeal and therefore, this Court may not interfere with the impugned order in the exercise of its jurisdiction under Article 226/227 of the Constitution of India.

7] Upon analysis of the record as well as the impugned orders, we find that the complaint of the petitioner is not that there was no compliance whatsoever with the principles of natural justice or fair play but rather, the complaint relates to insufficient compliance with such principles. The petitioner was issued a Show Cause Notice to which the petitioner has duly responded. Along with the Show Cause Notice, the material which was proposed to be relied against the petitioner was also furnished to the petitioner. The petitioner was also afforded an opportunity of the hearing by the respondent No.2, which opportunity, the petitioner has duly availed. The petitioner has also filed detailed written statements and produced documents in support of its case. Therefore, this is not a case where the impugned orders came to be made without issuance of any notice whatsoever to the petitioner or without affording any opportunity of hearing to the petitioner. The complaint essentially, relates to inadequate compliance and not total non-compliance with the principles of natural justice and fair play.

8] Besides, Mr. Raichandani is not right in his submission that respondent No.2 has not even dealt with the issue of cross-

examination or that the request for cross-examination came to be rejected on the basis of unreasoned order. The impugned order, does provide reasons as to why the request for cross-examination was not considered. The question as to whether such reasons are sufficient or not can always be agitated by the petitioner by instituting an appeal against the impugned orders.

9] Since this is not a case of total non-compliance with principles of natural justice, the issue of prejudice also assumes significance. It is not sufficient for the petitioner to merely allege failure of natural justice, but further the petitioner, has to make out a case of consequent prejudice, particularly in a case where the complaint really is of inadequate opportunity and not of no opportunity whatsoever. The case of prejudice, if any, as also response to the same will essentially involve adjudication into factual aspects which exercise can be effectively undertaken in the course of appeal rather than in these proceedings.

10] The petitioner, in the facts and circumstances of the present case, has therefore not made out a case warranting the exercise of extraordinary jurisdiction under Article 226/227 of the Constitution of India, bypassing the alternate and efficacious remedy by way of an appeal before the Appellate Authority. The decision relied upon by the petitioner turn on their own peculiar facts and are therefore, distinguishable.

11] In *M/s. Andaman Timber Industries (supra)*, the Apex Court was concerned with a situation where the Adjudicating

Authority did not even deal with the plea relating to request for cross-examination. The issue of alternate or efficacious remedy did not even arise in this matter, because the assessee had in fact instituted appeals against the orders of Adjudicating Authority. The same was the position in *Parmarth Iron Pvt. Ltd. (supra)* and *Basudev Garg (supra)*. These decisions can therefore, be of no assistance to the petitioner on the issue of bypassing alternate and efficacious remedy, which is admittedly available to the petitioner.

12] In *Kellogg India Pvt. Ltd. (supra)*, itself lays down that the petitioner has to make out a very strong case in order to bypass alternate and efficacious remedy available under the Statute. That was a case where documents which were relied upon by the Adjudicating Authorities were not even made available to the assessee.

13] *Kalpena Industry Ltd (supra)* in fact, reiterates that the right to cross-examination is not an indefeasible right, but the same could be availed only if the facts and circumstances necessitate the same. It is only in the peculiar factual circumstances that writ Court entertained a petition questioning the communication rejecting request for cross-examination. This case is also distinguishable, considering the peculiar facts involved in as well as the circumstances that the challenge was not to the final order, which would have been clearly appealable.

14] *Jindal Drugs Pvt. Ltd. (supra)* refers to Section 9D of Central Excise Act, 1944 and holds that cross-examination is to be permitted where the Adjudicating Authority proposes to admit statements in evidence in interests of justice. In the present case, the Adjudicating Authority has not based its decision solely upon the statements with regard to which cross-examination was applied for but the Adjudicating Authority has relied upon other materials/documents as well.

15] As noted earlier, this is not a case of “*no opportunity*” but at the highest the complaint relates to ‘*no adequate opportunity*’. The petitioner will therefore, have to make out a case, not only of failure of natural justice but also a case of consequent prejudice. All this, will require examination and evaluation of facts, which can be conveniently gone into the appeal rather than in the exercise of powers of judicial review. For all these reasons, we are satisfied that no case has been made out to entertain the present petition bypassing the alternate and efficacious remedy of appeal clearly available to the petitioner.

16] Therefore, leaving all contentions open, we dismiss this petition but grant liberty to the petitioner to avail remedy of appeal as against the impugned orders. If such remedy, is indeed availed within two weeks from the date when this order is uploaded on the website, we request the Appellate Authority, in the peculiar circumstances of the present case, to entertain such appeal on merits, particularly since the petitioner was pursuing the present writ petition.

17] Accordingly, this petition is dismissed with liberty as aforesaid.

18] In the facts and circumstances of the present case, there shall be no order as to costs.

(M.S.SONAK, J.)

(M.S.SANKLECHA, J.)