

Pdp

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISIDITION**

WRIT PETITION NO. 5753 OF 2021

Prakash Raghunath Autade

.. Petitioner

Vs.

The Union of India & Anr.

.. Respondents

Mr. Arshad Hidayatullah, Senior Advocate a/w Mr. Makarand Joshi, Mr. Rakesh Sawant, Shamiyana Hussain i/by MAX Legal for petitioner.

Mr. Jitendra B. Mishra a/w Dhananjay B. Deshmukh for respondents.

**CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

DATE: DECEMBER 3, 2021

PC:

1. The Principal Additional Director General, Directorate General of GST Intelligence, Pune Zonal Unit, Pune issued a show-cause-cum-demand notice dated 24th September, 2020 calling upon the petitioner to explain why action, as proposed in paragraph 17 thereof, should not be taken against him for alleged violation of the provisions of the Central Excise Act, 1944 (hereafter "the Act", for short) as well as other statutory provisions.

2. On receipt of such notice, the petitioner replied by a letter dated 23rd October, 2020 addressed to the Commissioner of

CGST, Kolhapur. At the out-set, he denied each and every allegation made in the show-cause notice. He, however, made a categorical statement that the said letter ought not to be treated as his reply to the show-cause notice. Referring to the statements of witnesses (recorded prior to the issuance of the show-cause notice) based whereon the show-cause notice came to be issued, the petitioner called upon the Commissioner to produce such witnesses for being cross-examined by him. This course of action, according to the petitioner, flowed from the statutory mandate contained in section 9D of the Act. While so asking the Commissioner, the petitioner referred to another show-cause notice dated 25th September, 2020 which was answerable to the Deputy Commissioner of CGST, Division IV, Kolhapur Commissionerate and requested that both notices be adjudicated together.

3. The Commissioner, by a letter dated 13th July, 2021, responded by stating that the petitioner not having replied to the show-cause notice, his request for cross-examination of the witnesses, at that stage, was premature. It was also stated that as and when the petitioner files his reply, his request for cross-examination of the witnesses would be examined in the light of the facts and circumstances of the case.

4. Aggrieved by denial of the opportunity to cross-examine the witnesses whose statements were relied upon to issue the show-cause notice, the petitioner has invoked the jurisdiction of this Court by presenting this writ petition seeking, *inter alia*, the following relief: -

“(a) Issue a Writ of Prohibition or a Writ in the nature of Prohibition Quo Usque prohibiting the Respondents from taking any steps or holding any proceeding pursuant to or in furtherance or in implementation of the show cause notice dated 24th September, 2020 until the Respondent No. 2 complies with mandatory statutory procedure prescribed under Section 9D of the Act.”

5. We have heard Mr. Hidayatullah, learned senior advocate appearing for the petitioner and Mr. Mishra, learned advocate for the respondents.

6. We record that several decisions of the Punjab and Haryana High Court have been relied on by Mr. Hidayatullah, whereas Mr. Mishra has relied on two decisions of the Allahabad High Court.

7. In **Commissioner of Central Excise, Meerut-I vs. Parmarth Iron Pvt. Ltd.**, reported in 2010 (260) E.L.T. 514 (All.), it has been laid down as follows: -

“15. The question, however, before us is, does the respondent have a right to call upon the appellants to make available the witnesses for cross-examination even before they being examined or their statements relied upon by the Department in proceedings in adjudication. None of the judgments cited, above were on the issue of making available the witnesses for cross-examination in order to reply to a show cause notice. Those judgments as already explained were in the course of adjudicating proceedings.

Is, therefore, an assessee entitled to cross examine the witnesses at the stage of filing a reply to the show cause notice? A show cause notice is issued on the basis of uncontested material available before the Assessing Authority, who based thereon, has arrived at *prima facie* finding whether a show cause notice ought to be issued or not. The material, thus, which has to be considered is, untested and uncorroborated. A party is called upon to reply to the said show cause notice in order to enable the Revenue to know the stand of the assessee, in the context of the material produced as to whether the proceedings should be

further proceeded with. It is an opportunity to the party being proceeded against to disclose any material that the party may have to rebut the *prima facie* opinion, even if, the assessee fails to reply to the show cause notice, that, does not amount to an 'admission' of the contents of the show cause notice in the absence of any statutory provision and it is always open to an assessee to cross-examine the witnesses whose statements are relied upon or sought to be examined on behalf of the Revenue.

At the stage of show notice, there is no adjudication. It is only a step in the process of adjudication. The show cause notice by itself is not an order of assessment. The order of assessment will be passed, only after considering the evidence and the material, which is placed before the quasi judicial authority/tribunal. Therefore, as the show cause notice is based on *prima facie* material and constitutes a *prima facie* opinion, that does not result into an order of adjudication. The question, therefore, of an assessee being entitled, to cross-examination, even before the adjudication has commenced, in our opinion, surely would not arise. It is only after the adjudication proceedings have commenced pursuant to the show cause notice and if the Revenue seeks to reply (sic, rely) upon the statements or documents, then the principles of natural justice would require in the absence of any statutory provision, that the person whose statement was recorded is made available for cross-examination to test the veracity of the statement.

16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon in issue (sic, issuing) the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.

17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross-examination before the reply to the show cause notice is filed and before

adjudication commences. The exercise of cross-examination commences only after the proceedings for adjudication have commenced."

(emphasis supplied)

8. The Allahabad High Court while deciding **Kanpur Cigarettes Ltd. vs. Union of India**, reported in 2016 (344) E.L.T. 82 (All.), heavily relied on the afore-quoted observations from the earlier decision and held that the insistence of the petitioner (Kanpur Cigarettes Ltd.) that it be permitted to cross-examine the witnesses and thereafter it would submit its reply to the show-cause notice is not correct. It was also held that the petitioner is first required to submit its reply to the show-cause notice putting its defence and thereafter in course of adjudication proceedings, it would be entitled to cross-examine the witnesses who depose in support of the claim of the revenue.

9. The decisions relied on by Mr. Hidayatullah do not strike a discordant note. Since we find that all the three decisions are authored by the same learned Judge (Hon'ble M. Jeyapaul, J.), we may refer to only the decision in **G-Tech Industries vs. Union of India**, reported in 2016 (339) E.L.T. 209 (P & H). After considering the scope, effect and import of section 9D of the Act, the Division Bench laid down the law as follows: -

16. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement

recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

18. It is only, therefore, -

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

24. In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No.2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No.2 for adjudication *de novo* by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural justice in the following manner: -

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No.2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e., before Respondent No.2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements

on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No.2, would have to be eschewed from evidence, and it would not be permissible for Respondent No.2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No.2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in *Arya Abhushan Bhandar v. U.O.I.*, 2002 (143) E.L.T. 25 (S.C.) and *Swadeshi Polytex v. Collector*, 2000 (122) E.L.T. 641 (S.C.)."

(emphasis supplied)

10. We share the views expressed by the Allahabad High Court and the High Court of Punjab and Haryana.

11. Section 9D of the Act, which is the sheet anchor the petitioner's claim, reads as follows:

"9D. Relevancy of statements under certain circumstances. –
 (1) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of

any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

12. The portion of section 9D underlined above for emphasis are important. A stage prior to issuance of show-cause notice cannot be regarded as an inquiry or proceeding as contemplated in the Act. As per sub-section (1) of section 14 of the Act, power to summon witnesses in any inquiry for purposes specified therein has been conferred on an officer duly empowered by the Central Government and in terms of sub-section (3) thereof, any such inquiry shall be deemed to be a judicial proceeding within the meaning of section 193 and 228 of the Indian Penal Code. Prior to the issuance of a show-cause notice, neither any inquiry nor a proceeding can be said to have commenced. Therefore, any statement recorded prior to the issuance of such show-cause notice is not a statement recorded in the course of an inquiry or proceeding and no right accrues in favour of a noticee to insist that he be offered for cross-

examination the witnesses, whose statements have been recorded and are referred to in the show-cause notice, even prior to a reply thereto being submitted. Once the show-cause notice is issued, it is for the petitioner to deny and dispute the allegations levelled therein and if he so chooses to raise such defence as he may be advised. Omission and/or failure to reply to a show-cause notice may not, in all cases, amount to an admission of the allegations. In the present case, such question of admission does not arise because the petitioner in his reply dated 23rd October, 2020 has clearly denied and disputed the allegations levelled against him. The only question is at what stage would he be entitled to cross-examine the witnesses. As has been held in **G-Tech Industries** (supra) as well as in **Parmarth Iron Pvt. Ltd.** (supra), it is only after the statements of witnesses are recorded by the relevant authority in course of adjudication of proceedings and such evidence is regarded as relevant that the noticee has the right to claim that he be extended the opportunity to cross-examine such witnesses so as to extend to him fair, reasonable and adequate opportunity of defence.

13. In such view of the matter, we dispose of this writ petition with the following order: -

- (a) the petitioner is granted liberty to file a final reply to the show-cause-cum-demand notice dated 24th September, 2020 within a fortnight from date;
- (b) after the reply is received, the relevant authority shall decide whether to carry forward the proceedings against the petitioner;

- (c) if no reply is received or the relevant authority decides against the petitioner, the proceedings shall be taken to its logical conclusion in accordance with law;
- (d) if in the course of adjudication proceedings before the relevant authority any witness is summoned in terms of the power conferred by section 14 of the Act and his statement is recorded and found relevant, such statement shall not be relied upon against the petitioner unless he has been given suitable and reasonable opportunity to cross examine such witness;
- (e) the evidence of the witness, as above, shall be recorded in the presence of the petitioner; and
- (f) based on the evidence and other materials on record, the relevant authority shall proceed to pass a final order in accordance with law.

14. Let the aforesaid exercise be completed as early as possible, preferably within six months of submission of the final reply by the petitioner or the date fixed hereby for such purpose, whichever is earlier.

15. All contentions on merits of the show-cause notice are left open.

16. There shall be no order as to costs.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)