Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 30908 of 2024

M/s Forging India Iron and Steel Limited
versus
Union of India & Ors.

For the petitioner	:	Mr. Debasish Ghosh Mr. Lalit Baid Ms. Sudeshna Ghosh Ms. Sanjana Shaw
For the CGST	:	Mr. Uday Shankar Bhattacharya Mr. Tapan Bhanja
For the respondent no.2	:	Mr. Kaushik Dey Mr. Sujit Mitra
For the respondent no.4	:	Mr. A. Maity
Heard on	:	20.02.2025.
Judgment on	:	**20.02.2025.**

Raja Basu Chowdhury, J:

1. Challenging the order in original dated 30th October 2024 passed under Section 74 of the WBGST/ CGST Act, 2017 (hereinafter referred to as the "said Act"), the instant writ petition has been filed.

2. The petitioner is engaged in the business of iron and other allied iron products. It is the petitioner's case that a show case notice was issued on the petitioner on 12th February 2024 alleging amongst others that

the petitioner had availed inadmissible Input Tax Credit (ITC) amounting to Rs.3,24,63,834/-. Along with the aforesaid notice, amongst other statements, the statement of Kedar Hosen Proprietor of M/s Kedar Hosen & Co., and the statement of Niraj Kumar Nathani, director of M/s Panmal Trading Pvt. Ltd., were also disclosed and supplied to the petitioner. Since, according to the petitioner the statements made by Niraj Kumar Nathani and Kedar Hosen impeach the credibility of the petitioner, the petitioner while responding to the show cause notice by letter dated 24th April 2024, while holding out that the statements disclosed being unqualified, though cannot be used against the petitioner, however, the petitioner reserved the right to cross examine such persons whose statements were used against the petitioner.

3. It is also the petitioner's case that although, the petitioner had sought for an opportunity to cross examine the aforesaid two persons, the proper officer had turned down such request by, inter alia, holding that during investigation and subsequent tracing, the aforesaid persons were found to be actively engaged in fake ITC racket for facilitating the entitlement of fake ITC to the petitioner. Further since, the testimonies of these persons relied on, had never been retracted by such persons, the proper officer was of the view that cross examination of such persons would reveal nothing apart from what had already come to the light.

4. Mr. Ghosh, learned advocate appearing in support of the instant writ petition by drawing attention of this Court to the order dated 30th October, 2024 would submit that amongst others, the proper officer had placed reliance on the statements given by the persons which had been disclosed in the show cause notice, to disallow the ITC claimed by the petitioner in respect of the supplies effected by M/s Panmal Trading Private Ltd. He seeks to challenge the aforesaid order passed under Section 74(9) of the said Act on the ground of violation of natural justice and asserts that the petitioner having been denied the opportunity to cross examine the persons whose statements had been relied on, the above order stands vitiated on such account.

5. It is submitted that ordinarily when a statement in the form of incriminating material is used against a person, the authorities are bound to disclose the same. In the instant case since Niraj Kumar Nathani, who was named in the show cause notice had given statements against the petitioner claiming that the petitioner was one of the beneficiaries who had received bogus sale bills, the petitioner was at least entitled to test out the veracity of the statement made by such person. Insofar as the statement given by Kedar Hosen is concerned, it is submitted that the said gentleman does not know to read or write and understand the purport of his statement written in English and as such had given his statement in Hindi. The statement disclosed would reveal that the person recording the statement had not issued any certificate that the statement recorded had been read over and

explained to the said gentleman in Hindi. On such ground, the petitioner has sought for cross examination of Kedar Hosen in order to ascertain as to whether the statement recorded by the respondents were at all his statements.

6. According to Mr. Ghosh, denial of opportunity to cross examine has the effect of vitiating the entire order on account of violation of the principles of natural justice. In support of his contention, he has placed reliance on an unreported judgment delivered by the Division Bench of this Hon'ble Court in the case of ***Ajoy Sarogi vs. Union of India (FEA 2 of 2009)*** on 31st August 2023. He also placed reliance on an unreported judgment of the Hon'ble Division Bench of this Court presided over by the Hon'ble, the Chief Justice in the case of ***Roshan Sharma v. Assistant Commissioner of Revenue, State Tax, West Bengal & Ors. (MAT 854 of 2024)*** delivered on 7th May 2024. In the facts as noted above, he submits that this Court may be pleased to set aside the aforesaid order and remand the matter back to the adjudicating authority for him to enable the petitioner to cross examine Niraj Kumar Nathani and Kedar Hosen.

7. *Per contra*, Mr. Bhattacharya, learned advocate ably assisted by Mr. Bhanja, appearing for the CGST authorities at the very outset would question the maintainability of the writ petition. He submits that the order impugned is an appealable order. The petitioner has an alternative remedy in the form of an appeal before the appellate authority. Having regard thereto, this Court ought not to entertain the

writ petition. Alternatively, he submits that if this Court is of the view that this writ petition can be heard on the narrow compass as to whether the petitioner was entitled to cross examine Niraj Kumar Nathani and Kedar Hosen, the facts of the case clearly demonstrate that there is no scope or opportunity available to the petitioner to cross examine the persons whose statements had been disclosed in the show cause notice.

8. Mr. Bhattacharya submits that this is a case of availing illegal ITC on the basis of bogus bills obtained from non-existent companies / firms. By drawing attention of this Court to the statement made by the director of the petitioner, he submits that the said person had admitted to have made misdeclaration of the goods in the e-way bills for business purpose. He had also admitted that the petitioner does not have any factory or godown in East Medinipur. Having regard thereto, according to him, this case does not call for further consideration at all. In any event, he submits that the persons whose statements had been relied on, had not subsequently retracted their statements, for the petitioner to be entitled to cross examine them. In support of his contention, he has placed reliance on a judgment of the Division Bench of this Court in the case of ***Commissioner of CGST and Central Excise, Howrah versus Ashirwad Foundries Pvt. Ltd.*** reported in ***(2023) 4 Centax 265 (Cal.).*** By placing reliance on paragraphs 9, 10, 11 and 12 of the aforesaid judgment he submits that the Hon'ble Division Bench of this Court presided over the by the Hon'ble the Chief Justice has already

held that there is no vested right to seek for cross examination of any third-party witness. The Division Bench in the facts of the case had also held that the statements given before the authority having not been retracted by the persons giving such statements, no fruitful purpose will be served to permit cross examination of such statements. He has also placed reliance on a judgment delivered by the Hon'ble Division Bench of the High Court of Kerela in the case of ***K.P. Abdul Majeed vs. Commissioner of Customs, Cochin*** reported in ***2014(309) E.L.T.671 (Ker.)***. It would appear from the facts noted in the aforesaid judgment that although, the person giving his statement had retracted from his statement, the Court had refused to grant opportunity to cross examine him. In the instant case, the statements given by Niraj Kumar Nathani and Kedar Hosen are on record. Such persons had never retracted their statements. As such, the proper officer by noting that such persons were not under threat or coercion while giving their statements and they having not retracted their statements, was of the opinion that nothing more was left to reveal, and accordingly declined cross examination.

9. Independent of the above, the above statements are not the only piece of evidence relied on by the adjudicating authority to arrive at the finding noted in the order impugned. What had primarily been considered while passing the order is the alert notices/circulars issued by the Joint Commissioner, Kolkata (South) Commissionerate as also the Additional Director General, DGGI, the incident report drawn by the

Kolkata (South) Commissionerate as also the field verification report drawn by the Bureau of Investigation and the investigation conducted against M/s Panmal Trading Pvt. Ltd. To corroborate the findings based on the aforesaid documents, the statements given by Niraj Kumar Nathani and Kedar Hosen were also relied on by the adjudicating authority. According to Mr. Bhattacharya, there is no irregularity in relying on such statements. At least the entire order cannot stand vitiated for not affording the petitioner, an opportunity to cross examine Niraj Kumar Nathani and Kedar Hosen. In the facts as noted above since, the petitioner having not identified the prejudice caused, principles of natural justice cannot be resorted, to nullify a valid order, thus, no interference is called for.

10. Heard the learned advocates appearing for the respective parties and considered the materials on record. Admittedly, in this case, I find that a show cause notice was issued against the petitioner. Along with the show cause notice, statements of four persons were also relied on. The petitioner is, however, aggrieved by the denial of opportunity to cross-examine two several persons noted herein. I find that the petitioner contends that the aforesaid two persons namely, Niraj Kumar Nathani and Kedar Hosen had implicated the petitioner to be beneficiary of bogus sale bills. This, according to Mr. Ghosh, is an incriminating material which also impeaches the character, credibility and the worthiness of the petitioner. I, however find, as rightly pointed out by Mr. Bhattacharya, learned advocate representing the

respondents/CGST that this is not the only piece of evidence which was relied on by the adjudicating authority while passing the order impugned. However, the fact that the adjudicating authority had placed reliance on the above statements cannot be lost sight of. Although, a lot of stress has been laid by Mr. Bhattacharya by placing reliance on the judgment delivered in the case of ***Ashirwad Foundries Private Limited*** (supra) and the case of ***K.P. Adbul Majeed*** (supra) to drive home the point that right of cross examination is not absolute, even if the persons whose statements are relied on retracts from his statements, cross-examine cannot be claimed as a matter of right, I, however, find that in both the aforesaid judgments the consideration based on which the Division Bench of this Hon'ble Court had denied the opportunity to cross-examine was different form the instant case. While in the case of ***Ashirwad Foundries Private Limited*** (supra) what fell for consideration was a confessional statement given by the director of the party which was recorded on August, 2015, by the customs officer. Such statement was binding even if retracted by the director within six days and could be admitted in evidence, and that right of cross examination having regard to the scheme of the customs Act was not absolute. But what weighed with the Division Bench was the fact that the director had not even retracted his statement, there was no denial even in the reply to the show cause nor any allegation against the department while recording his statement. It is in those facts that the Division Bench was of the view that the issue of cross-examination could not be permitted to be raised by the party concerned whose director had not even retracted from such statement. Further, in the said case sufficient independent material was available to the adjudicating authority and as such the order passed by the adjudicating authority could not be faulted.

11. The judgment delivered in the case of ***K. P. Abdul Majeed*** (supra) proceeds on the premise that even a confessional statement given by a co-accused can be considered by the adjudicating authority under section 108 of the Customs Act 1962 for the purpose of corroborating the case based on other materials already on record despite such co accused retracting such statement, unless it is proved that the statements were not given voluntarily or were given under duress or fear etc.

12. In the instant case, the petitioner does not seek to question the statements given by its director. It is also not the case of the respondents that any confessional statement had been retracted. The petitioner only seeks to cross examine the statements given by two particular persons namely, Niraj Kumar Nathani and Kedar Hosen who are third party witness, to test out the veracity of the statements made by them. The statements given by the aforesaid two persons can under no stretch of imagination be considered to be confessional statements made on behalf of the petitioner or statements made under section 108 of the customs Act 1962. Independent of the above I may note that the Hon'ble Division Bench of this Court in the case of ***Ajoy Sarogi*** (supra)

while considering the applicability of the principles of natural justice for allowing cross-examination of a witness who had given evidence against the delinquent, had been pleased to observe that the Courts have cautioned that breach of principles of natural justice should not be mechanically applied to set aside an impugned order where on admitted or indisputable facts, only one conclusion was possible and such conclusion is the impugned order. The Courts have, however, on many occasions insisted on proof of prejudice being caused on violation of principles of natural justice and have refused to grant relief when no prejudice had been caused.

13. As such, to test out whether any prejudice had been caused, this Court had ascertained from the parties whether on the basis of the statement made by the aforesaid two persons namely Niraj Kumar Nathani and Kedar Hosen, input tax credit availed by the petitioner concerning supplies effected by the entity, namely, M/s Panmal Trading Private Ltd, had been disallowed. From the submissions of the parties and a perusal of the show cause notice it would transpire that on the basis of the disclosure made by Niraj Kumar Nathani, the entries appearing at page 52 under serial no.9 concerning input tax credit of Rs. 7,91,208/- had been ultimately denied to the petitioner. Though it is true, as rightly pointed out by Mr. Bhattacharya that the statement made by the aforesaid two persons do not form the only basis for reversing the input tax credit, however, the fact that the incriminating materials were brought in against the petitioner in the form of the statement made by

Niraj Kumar Nathani wherein he had claimed that the petitioner to be the beneficiary of bogus sale bills cannot be ignored. Consequentially the said statement influencing the order in so far as the reversal of ITC claimed on the sale bills of M/s Panmal trading Pvt. Ltd., is concerned cannot be ruled out. Insofar as the statement of Kedar Hosen is concerned, I am of the view that the same does not singularly impact the adjudication. However, at the same time not affording the petitioner an opportunity to cross-examine the above Niraj Kumar Nathani also cannot have the effect of vitiating the entire order, especially when there are other materials to support the same and the statement of Niraj Kumar Nathani is only confined to the determination made in respect of the reversal of ITC based on the alleged bogus sale bills of M/s Panmal Trading Private Ltd. The aforesaid is however, sufficient to overrule the objection as to maintainability of the writ petition. Having regard thereto, I propose to pass the following order.

a) The order dated 30th October, 2024 is kept in abeyance.

b) The adjudicating authority is directed to permit the petitioner an opportunity to cross-examine Niraj Kumar Nathani. The cross-examination must be concluded within a period of four weeks from the date of communication of this order.

c) If on the basis of the cross-examination, the adjudicating authority is of the view that a fresh order is required to be passed he shall do so alternatively, he shall make a fresh determination and pass an order regarding the reversal of input tax credit obtained by the petitioner *qua* the sale bills issued by M/s Panmal Trading is concerned and upload the same on the common portal as a supplementary order.

d) On passing of such order in terms of Clause (c) above, the order impugned shall be enforceable along with the supplementary order.

14. With the above observations and directions the writ petitioner is disposed of.

15. There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance with the requisite formalities.

(Raja Basu Chowdhury, J.)

Saswata/sb
A.R. (Court)