

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**WRIT PETITION(L) NO.3220 OF 2020**

Sameer Shah (Real Name "Javed Shaikh") ] .. Petitioner

vs.

The Union of India & Anr. ] .. Respondents

Mr. Bharat Raichandani a/w Mr.Rishabh Jain i/b UBR Legal for Petitioner .  
Mr.Karan Adik a/w Mr. D.B. Deshmukh, for Respondents.

**CORAM : S.V. GANGAPURWALA &  
M.G.SEWLIKAR, JJ.**

**RESERVED ON : 26.04.2022**  
**PRONOUNCED ON : 09.06.2022**

**JUDGMENT : (PER : M.G.SEWLIKAR, J)**

1] Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing at the stage of admission.

2] By this writ petition, the Petitioner is seeking the quashing of the order dated 8th May, 2020 passed by the Respondent no. 2 whereby the appeal of the petitioner has been dismissed

3] Facts leading to this petition shorn of details can be stated thus:-

The petitioner is working with Airport Sorting Authority (APSO) as a clearing agent. It is further alleged that a criminal conspiracy was hatched by Naishad Kapadia, Mohammad Manaswal, Ketan Kothari and others to defraud the Government of India of its legitimate revenue by causing import of Iridium Sponge. Pursuant to the conspiracy, the Iridium Sponge was imported from Singapore by one Mohammadi Manswala in the name of NBK enterprises on a grossly understated value under the cover of invoice raised by M/S Lim fa Pte Ltd or M/S Yuva International Pte Ltd. Based upon the purported intelligence, the officer found a speed post parcel that had arrived at APSO office under consignment note sent by M/S Yuva International Pte Ltd. The said parcel was found to be a cardboard box with a speed post label pasted on it. Based upon this investigation, statements of Naishad B. Kapadia, Yusuf Manaswala, Smt. Tasneem M. Lokhandwala, Shri Karan Kothari, Iqbal Sattur, Balu Kothare and Moiz Mohta came to be recorded under Section 108 of the Customs Act, 1962. Statement of the Petitioner was recorded under section 108 of the Customs Act, 1962. Based upon the above investigation, show cause notice came to be issued to the petitioner and six others.

4] It is further alleged that except the Petitioner and one Mohammadi Manaswala, all the other noticees approached the Settlement Commissioner for the settlement of the case. Vide the final orders dated 23<sup>rd</sup> October, 2013, 27<sup>th</sup> April, 2015 and 24<sup>th</sup> February , 2014 the Settlement Commissioner passed the order directing to pay the full amount of duty with interest. It is further alleged that vide Order-in-original dated 13<sup>th</sup> March, 2013, Respondent No. 2 imposed a penalty of Rs 90,05,396/- under Section 112 Of the Customs Act 1962. Against this order, Petitioner preferred Writ Petition No. 2948 of 2020. This court vide order dated 30<sup>th</sup> January, 2020 directed the petitioner to file an affidavit giving complete address for future correspondence and scheduled personal hearing on 24<sup>th</sup> February 2020. Personal hearing was held on 29<sup>th</sup> April, 2020. The Petitioner had made a request for the cross examination of Naishad B Kapadia, Yusuf Madraswala, Smt. Tasneem M. Lokhandwala, Shri Karan Kothari, Iqbal Sattur and Balu Kothare Moiz Mohta. This request was turned down by the Respondent No. 2. Thereafter, vide order dated 8<sup>th</sup> May, 2020, Respondent No.2 imposed penalty of Rs 90,05,396/- on the Petitioner. This order is impugned in this petition.

5] Learned counsel Shri Raichandani submitted that the principles of natural justice have been violated by Respondent No.2 while passing the

impugned order in original. He submitted that Respondent No.2 did not furnish opportunity to the Petitioner to cross-examine the witnesses. Respondent No.2 observed that cross-examination of witnesses would not shed any further light and on this ground Respondent No.2 did not permit the Petitioner to cross-examine the witnesses. It is submitted that if the principles of natural justice are violated the order passed by the Authority is a nullity in the eye of law. For this proposition, Learned counsel Mr.Raichandani placed reliance on the case of M/s. **Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II, reported 2015 (324) ELT (641) (S.C.)** for this

6] Learned counsel Shri Karan Adik for the respondents submitted that the Respondent No.2 has passed the impugned order after considering the entire material on record. He submitted that the other material on record is sufficient enough to prove the culpability of the Petitioner. He submitted that by permitting the Petitioner to cross-examine the witnesses, nothing fruitful would have come out. Respondent No.2 considered the other material on record and came to the conclusion about involvement of the Petitioner in the alleged offence. He submitted that t Appeal under Section 127 A of the Customs Act is provided against the final orders of Respondent No.2. He further submitted that the order under Section 127J passed by the

Settlement Commission is conclusive. It would not be prudent to allow the Petitioner to cross-examine the witnesses and thereby re-open the case on trivial grounds. He submitted that the Petitioner did not seek alternative efficacious remedy of Appeal and has directly approached this Court under Section 226 of the Constitution of India which is impermissible. He prayed for dismissal of the Writ Petition. He placed reliance on the following authorities.

i] **WP No.2539 of 2020 with WP NO.2540 of 2020 with IA No.93482 of 2020 in the case of Raju Laxman Pachhapure vs. Union of India & Anr.** in which it is observed thus,

“13. Having heard the learned counsel for the parties for some time and also having perused the papers and proceedings, we are not persuaded to invoke our writ jurisdiction at this stage. We are of the considered opinion that the alternative remedy of appeal is efficacious and the reason given for not invoking the same i.e. pre-deposit being burdensome does not appeal to us. Accordingly, we relegate the petitioners to the remedy available under the CGST Act by way of appeal.”

ii] **WP No.8516 of 2018 in the case of United Spirits Ltd. vs. The Union of India & Anr.** in which it is observed thus :

“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 petition bypassing the alternate and efficacious remedy of appeal clearly available to the petitioner.”

7] Admittedly, permission to cross examine the witnesses was denied to the petitioner. It is settled principle of law that order passed without following principles of natural justice is a nullity.

8] In the case of M/s. **Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II, reported 2015 (324) ELT (641) (S.C.) (supra)** the permission to cross-examine the witnesses was declined by the Adjudicating Authority. In the case of Andaman Timber Industries it is observed thus :

“6. According to us, not allowing to assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the

said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.”

9] Learned counsel Mr.Raichandani has also placed reliance on the case of **Lalit Kumar Modi v. Special Director, Directorate of Enforcement (Western Region), Mumbai 2018 (360) E.L.T. 583 (Bom.)** in which it is observed thus :

“39. In the facts and circumstances before us, we have found, from a perusal of the show cause notices and the complaint, based on which they have been issued, that the adjudicating authority expressly relies upon these statements, which have been referred to in Annexure II and given by the persons whose names have been enlisted in the show cause notices. It is undisputed before us that these statements have been recorded by the authority so empowered under the FEMA. These statements have been recorded in connection with the violation and breaches of the FEMA and its rules. They have been recorded in connection with and have direct nexus to the IPL, which was conducted in South Africa. The persons connected with the affairs of the BCCI and others, who have given these statements, are referred to with names in the annexure. This is not a merely referred material. These statements are proposed to be expressly relied upon. If they are relied upon, then, it is incumbent upon the first respondent to allow the petitioner to allow the petitioner to cross-examine these persons during the course of the adjudication.”

10] From the order of the Respondent No.2 it is seen that Adjudicating Authority has placed reliance on the statement of Naishad B.

Kapadia. The Respondent No.2 has observed in the order dated 08.05.2020 that the show cause notice had categorically and comprehensively brought out the role of all the persons including that of Shri Javed Shaikh @ Samir Shah @ Dasu Shetty who was named for his alleged involvement only by one person i.e. Shri Naishad B. Kapadia. It has further observed that in judicial proceedings before the Settlement Commission all the above five noticees including Shri Naishad B. Kapadia have accepted the charges in SCN and duty liability, interest and penalty imposed have been paid. It has further observed that the judgment of Settlement Commission was based on same set of statements including Shri Naishad B. Kapadia and other material evidence given in show cause notice. It has further observed that the cross-examination of persons sought, at this stage would not shed any fresh light on the detailed investigation conducted by the department as even in the recent submissions during personal hearing held on 02.03.2020 his role in clearance of goods was not denied.

11] These observations clearly show that reliance was placed by the Settlement Commission and also respondent No.2 on the statement of Naishad B. Kapadia, while passing the impugned order. If the Petitioner is not permitted to cross-examine the witness, petitioner will be adversely affected. It is not in dispute that except Naishad B. Kapadia, no other



witness has stated anything in their statements against the Petitioner. Therefore, the cross-examination of other witnesses is not at all necessary in the facts and circumstances of the case. Cross-examination of Naishad B. Kapadia only is relevant as evidence/statement is relied against the Petitioner. The Petitioner is entitled to cross-examine the witness even if the material available against the Petitioner in the said statement is too little. The impugned order passed by the Respondent No.2 does not say that there is no material against the Petitioner in the statement of Naishad B. Kapadia. It has simply declined the permission to cross-examine the witness Naishad Kapadia and other witnesses only on the ground that it will not shed any further light. It is not for the authority to conclude in advance whether the cross-examination would be helpful or not or nothing fruitful would be elicited in cross-examination. This approach of Respondent No.2 is not correct. Without cross-examining the witness it is impermissible for the Authority to say that no fresh light will be shed.

12] it is true that alternative remedy of appeal to the Appellate Tribunal under section 127A of the Customs Act, 1962 is available to the petitioner. However, when the principles of natural justice are violated doors of this Court cannot be closed for the Petitioner on the ground of availability of alternate efficacious remedy. It is the right of every person to cross-

examine the witnesses on whom reliance has been placed by the Authorities. In this view of matter, we deem it appropriate to set aside the impugned order and remand the matter to the Respondent No.2 for deciding afresh with the directions that respondent no.2 shall permit the Petitioner to cross-examine the witness Naishad B. Kapadia. Accordingly, following order is passed :

- i] Writ Petition is allowed.
- ii] The impugned order dated 08.05.2020 is set aside.
- iii] The Respondent No.2 is directed decide the matter afresh after giving opportunity to the petitioner to cross examine the witness Naishad B. Kapadia. All the points are kept open
- v] Rule is made absolute on above terms.

**[M.G.SEWLIKAR, J]**

**[S.V.GANGAPURWALA, J]**