

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 12.04.2013

+ CUS.A.A. 7/2010

BASUDEV GARG

... Appellant

versus

COMMISSIONER OF CUSTOMS

... Respondents

AND

+ CUS.A.A. 10/2010 & CM No. 21740/2010

ARUN GUPTA

... Appellant

versus

COMMISSIONER OF CUSTOMS

... Respondents

AND

+ CUS.A.A. 12/2010 & CM No. 21751/2010

ANIL GOEL

... Appellant

versus

COMMISSIONER OF CUSTOMS

... Respondents

AND

+ CUS.A.A. 13/2010 & CM No. 21754/2010

ANIL GOEL

... Appellant

versus

COMMISSIONER OF CUSTOMS

... Respondents

Advocates who appeared in this case:

For the Appellants : Mr C.Hari Shankar and Sh. S.Sunil.
For the Respondent : Mr.Kamal Nijhawan, Senior Standing Counsel with
Mr.Sumit Gaur, Advocate.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V. EASWAR

JUDGMENT

BADAR DURREZ AHMED, J

1. These appeals are directed against the order dated 15th March, 2010 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. In all these appeals, the common issue that has been sought to be raised by the appellants is that the appellants have made a request of cross-examination of the persons whose statements have been referred to in the show-cause notice dated 30th April, 2004 as also relied upon by the Commissioner in the Order-in-Original dated 30th November, 2005 as also by the Tribunal in its order dated 15th March, 2010 but that request has not been acceded to. The result being that the appellants have been deprived of their right to cross-examine the makers of the statements. Therefore, there has been a violation of the principles of natural justice. Furthermore, it is contended that the statements, unless the exceptions carved out in Section 138 (B) of the Customs, 1962 are clearly made out, cannot be regarded as

being relevant and therefore cannot form the basis of proving the truth of the facts contained in the statements.

2. In all these appeals except CUSAA No. 7/2010, an additional issue has also raised and that is with regard to the non-supply of the enquiry report conducted after the conclusion of hearing by the Srilankan authorities. Before we address these issues, it would be necessary to set out some facts.

3. The principle allegation against the appellants is that they imported Ball Bearings of Chinese origin but showed by them as having been imported from Srilanka in order to evade anti-dumping duty. Show-cause notices were issued to the appellants on 30th April, 2004. Those show-cause notices contained references to several statements of various individuals. In the case of the appellant, Sh.Anil Goel, there is a list of the statements which had been referred to and relied upon in the show-cause notice and that appears in para 5 of the reply to the show-cause notice dated 05.06.2004. The said para reads as under:-

“5. The above allegations against our client, Sh. Anil Goel are based on the testimony of the following witnesses recorded under Section 108 of the Customs Act, 1962 or certain documents obtained by DRI, during the investigation.

1. Statement of Sh. Ashok Pathak (Para 2 of SCN)
2. Statement of Shri. Dalbir Singh (Para 4 of SCN)
3. Statement of Shri. Sureshkumar, Driver of M.K. Transports (Para 5 of SCN).
4. Statement of Shri. Jaipal Singh, owner of the shop. (Para 7 of SCN).
5. Statement of Sh. Mukesh Kumar Gupta (Para 13 : 14/11/03 of SCN).
6. Statement of Shri. H.L. Arora (Para 15 if SCN).
7. Statement of Shri. Raj Kumar Parcha (Page 16 of SCN).
8. Statement of Shri. Ravinder Uniyal (Para 19 of SCN).
9. Statement of Shri. Dinesh Kumar, Driver (Para 20 of SCN).
10. Statement of Shri. Dalbir Singh, Driver (Para 21 of SCN).
11. Statement of Shri. Gulab Singh, Driver (Para 23 of SCN).
12. Statement of Shri. Gulab Singh, Driver (Para 23 if SCN).
13. Statement of Shri. Basant Sharma, owner of the truch (Para 24 of SCN).
14. Statement of Shri. Tutul Mondal, Driver (Para 25 of SCN).
15. Statement of Shri. Gautam Chatterjee (Para 26 of SCN).
16. Statement of Shri. Yusuf Khan, Driver (Para 27 of SCN).
17. Statement of Shri. Gajender Singh Uniyal (Para 28 of SCN).
18. Reference to DRI, Chennai letter dt. 14.11.2003 (Para 29 of SCN).
19. Statement of Shri. Mohan Lal Thapar (Para 31 of SCN).

20. Letter dt. 3.2.04 of Shri. Suresh Pal Gupta of Dubai (Para 32 of SCN).
21. Statement of Shri. Dilip F. Mehta (Para 34 of SCN).
22. Statement of Shri. Kamlesh Jain, Chennai (Para 37 of SCN).
23. Enquiries with Dept. of Commerce, DRI, Chennai (Para 37 of SCN).
24. Letter dated 8.03.04 from Asma Noor, Executive Secretary (Para 39 of SCN).
25. Statement of Shri. Kapur Chand (Para 40 of SCN).”

4. From the above, it is apparent that 21 statements of different individuals have been referred to in the show-cause notice. It is also clear from paragraph 6 of the very same reply dated 05.06.2004 to the show-cause notice that a request for summoning the persons who made those statements were clearly made. Paragraph 6 of the said reply reads as under:-

“6. From the above narration and evidence relied upon in the Show Cause Notice it would be seen that the entire case is built on the basis of statements of certain witnesses and the report sent by DRI, Chennai on the basis of enquiries conducted by Central Intelligence Unit of Sri Lankan Customs. Therefore, Your Honour is requested to summon all the above referred witnesses including the Customs Officers of Sri Lanka who have verified the premises in Sri Lanka and have done enquiries without recording statements of the landlord. If any report including final report in writing has been sent by Sri Lankan

Customs, copy of the same may be made available as the same is relied upon in DRI, Chennai's letter dated 14.11.2003. However, in the interest of justice our client would like to have entire communication received from Sri Lankan Customs."

5. It has further been pointed out that the request for summoning the witnesses has been noted in the Order-in-Original dated 30.11.2005 itself. This is apparent from paragraph 50 of the Order-in-Original which clearly reveals that there was a request to summon all the persons who allegedly made these statements including the Custom Officers of Srilanka for cross-examination. The Order-in-Original, in paragraph 61 records that the request for cross-examination of witnesses and DRI Officers was denied. This would be apparent from paragraph 61 which is re-produced herein below:-

"(61) The request of noticees namely S/Shri. Anil Goel, Suresh Pal Gupta, Gagan Thapar and Mukesh Kumar Gupta for cross-examination of witnesses and DRI officers was denied and the date of personal hearing was fixed for 14.10.2004. All the notices were informed about the date of personal hearing accordingly, Shri. Gagan Thapar vide letter dated 15.10.2004 was informed that his request for cross examination of witnesses was not accepted by the Competent Authority. He was also directed to submit the reply to the show cause notice within 15 days, however, no reply was submitted by him."

6. Furthermore, the right to cross-examine had been denied by the Commissioner of Customs on the understanding that no right of cross-examination of witnesses and Officers of Customs exists in the notices in the course of adjudication proceedings. This contention is recorded in paragraph 67 of the Order-in-Original.

7. The appellants were aggrieved by the Order-in-Original dated 30.11.2005 and, therefore, they preferred appeals before the Tribunal. In the said appeals, specific points with regard to denial of opportunity of cross-examination were also taken. However, the Tribunal by virtue of the impugned order dated 15.03.2010 brushed aside the said point in the following manner:-

“64. Overseas enquiry was not challenged to be motivated. Result of enquiry remained uncontradicted except bald plea of denial of cross examination when the goods recovered by search operation proved motive of appellants as well as their ill will and part of goods smuggled was proved to be without proof of import. The case of mis-declaration was proved beyond doubt by cogent evidence gathered by Investigation. Natural justice did not appear to have been violated when cogent evidence brought out by Investigation left no doubt about involvement of the group promoting smuggling through various conduits. The appellants lead their defence and their case was in entirety considered by the learned Adjudicating Authority considering their reply to

show cause notice. When the Investigation in Sri Lanka by the Intelligence Authority of that country supported the case of Investigation in India, credibility of evidence gathered by Investigation remained undoubted. Evidence act not being applicable to quasi judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. Revenue discharged its onus of proof and burden of proof remained un-discharged by appellants. They failed to lead their evidence to rule out their role in the offence committed and prove their case with clean hands. Nothing was repelled by them to show that “KG: brand ball bearings were not of Chinese origin. They failed miserably to prove their bonafide. The import documents mis-declared the imported goods to be of Sri Lankan origin. The duty free exemption scheme available to goods manufactured in Sri Lanka was abused by appellants and customs duty was evaded on the Ball Bearings imported. Abuse of Notification benefit granting exemption to goods manufactured in Sri Lanka was proved by Investigation.

65. xxxxx xxxxx xxxxx

66. Principal grievance of the learned counsel Sri. Pradeep Jain was violation of principles of natural justice. That did not weigh consideration when material on record suggested that oral evidence recorded in the course of investigation were neither recorded under whims and fancies nor caprice. Allegations were properly brought out by show cause notice bringing the modus operandi for leading defence. None of the evidence was

gathered behind back of the appellants. The report from Sri Lankan Customs was a follow up of the Investigation itself. The outcome of Investigation was exposed in the Show Cause Notice bringing out the chain of smuggling activities. Appellants failed to rule out questionable role of each other, but contributed to the promotion of smuggling. None of the evidence gathered by Investigation were liable to be discarded merely because those gave rise to adverse consequence against the appellants, in view of their credence and trustworthiness as well as reasonability. Entire argument of revenue on the point of law relating to cross examination and nature of evidence as well as concealed nature of smuggling activities were forceful. Therefore, there is no scope to hold that the adjudication proceedings suffered from violation of natural justice when the unfair deal of appellant surfaced. Accordingly the citations made by the appellants in the course of hearing were misplaced by them who failed malafide of Investigation of the Investigation by any means was liable to be vitiated.”

8. Another point which was raised in some of these appeals was that the show-cause notices were issued on 30.04.2004 and the Noticees were supposed to respond to the show-cause notice on the basis of the material available with the Noticees on that date. Even hearing in the matter was concluded on 14.10.2004. Yet, the Commissioner of Customs placed reliance on the subsequent report dated 20.07.2005 which was based on an investigation/enquiry conducted after the conclusion of the hearing on 14.10.2004. That report/documents pertaining thereto had not been

supplied to the appellant in order to ascertain the response to the same. It was submitted that in the absence of the said report and documents, the appellants had been denied the valuable right to answer to and meet the points raised in the report/documents. The fact that the report, subsequent to the hearing on 14.10.2004 was considered is clear from the following extract of paragraph 70 (iv) of the Order-in-Original.

(70)(iv) Similarly, as regards imports of bearings by M/s Maya Trading Co. and Devsons, it has been submitted by Shri Anil Goel that he is not concerned with these imports. However, he seems to make all efforts to establish the bonafide of the imports Made by M/s Maya Trading Co. and Devsons. It has been submitted by him in written brief submitted at the time of personal hearing on 14.10.2004 that the matter of authenticity of Country of Origin Certificates filed by M/s Maya Trading Co. and Devsons for clearance of goods at ICD Patpargani, was taken up by his advocate with the Board of Investment, Sri Lanka vide letter dated 10.05.2004 and it has been confirmed by the Department of Commerce , Sri Lanka vide letter dated 28.07.2004 that the certificate of origins referred to in Advocate's letter were issued by the Department of Commerce, Sri Lanka. On this basis, it has been claimed by him that the manufacturing activity of bearings was undertaken in Sri Lanka and the Country of Origin Certificate were issued by the Department of Commerce. As per the records placed before me, the Advocate M/s V.M.Doiphode vide letter dated 10.05.2003 had made the following request to the Department of Commerce Sri Lanka:

"I will be highly obliged if the Department of Commerce furnish to us the following information to enable us to defend our client. Shri Anil Goel:

Whether the following Certificates of Origin is issued by the Deptt. of Commerce or their authorised signatory Certificate of origin Nos.

(i) CO/ISFTA/03/2748 dated 09.05.2003

(ii) CO/ISFTA/03/3618 dated 16.06.2003

(iii) CO/ISFTA/03/2138 dated 03.04.2003

These certificate of origin were issued in respect of bearings exported from Sri Lanka by M/s Aurea Industries Pvt. Ltd.. You are therefore requested to confirm regarding the issue of above referred certificates at an early date."

In reply to this letter, M/s Bogollagama & Co., Bar-at-Law and Legal Consultants vide letter dated 11.06.2004 forwarded a letter dated 28.07.2004 claimed to be from Mr. R.D. Kulatilleke, Deputy Director of Commerce, Department of Commerce, Sri Lanka to Shri V.M. Doiphode .

This letter No. COM/ISFTA/C00/04 dated 28.07.2004 contains the following information:

"With reference to your letter of 10th May 2004, we are pleased to confirm that the certificate of origin referred to in your letter were issued by the Department of Commerce."

In this matter, it would not be out of place to mention here that it was already been verified by DRI during investigations and clearly brought out in the Show Cause Notice that the three certificates of origin as mentioned hereinabove were forged documents: However, in view of the noticee's aforesaid fresh submissions, the matter was taken up by DRI to verify authenticity of the said correspondence, submitted to the Adjudicating authority, as the contents thereof appeared to be quite vague and misleading. Verification were conducted through Sri Lankan Customs. Sri Lanka Customs, after conducting verifications with Deptt.

of Commerce, Sri Lanka, informed via letter No. CIU/WROA/05/07 dated 20.07.2005 that the certificate of origin nos. CO/ISFTA/03/2748 and CO/ISFTA/03/3618 though issued by Deptt. of Commerce, Sri Lanka, have not been issued to M/s Aurea Industries Pvt. Ltd. but instead have been issued to M/s Celetron Ltd., Kandy, Sri Lanka for computer parts manufactured by them. The copies of original certificates issued by the Department of Commerce were also enclosed with the said letter of Sri Lankan Customs. It was also informed by Sri Lankan Customs that certificate no. CO/ISFTA103/2138 is under investigation by them. The said correspondence is before me. These independent investigations made by the DRI through Sri Lankan Customs, thus, fully demolish the conclusion sought to be drawn by the noticee that the bearings were manufactured in Sri Lanka and the certificate of origin were genuine. Thus, the noticee is trying to mislead the Deptt. by misrepresentation of facts. In these circumstances, I hold that the three forged certificates of origins as mentioned hereinabove are forged certificates.”

9. We have considered both the aspects of the matter and have heard counsel of both sides. The learned counsel for the appellants have placed reliance on the decision of the Supreme Court in the case of **Swadeshi Polytex Ltd. Vs. Collector** reported in **2000 (122) E.L.T. 641 (S.C.)** as well as on **Laxman Exports Limited Vs. Collector of Central Excise** reported in **2002 (143) E.L.T. 21 (SC)** for the proposition that whenever any statement is relied upon by the Revenue, an opportunity of cross-examining the maker

of the statement should be given to the Noticee. Learned counsel for the appellants also placed reliance upon a decision of a Division Bench of this court in the case of **J & K Cigarettes Ltd. Vs. Collector of Central Excise** reported in **2011 (22) S.T.R. 225 (Del.)**.

10. Insofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in *Swadeshi Polytex Ltd. (supra)* and *Laxman Exports Limited (supra)*. Apart from this, the decision of this court in *J & K Cigarettes Ltd. (supra)* clinches the issue in favour of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question. The said Section 9D of the Central Excise Act, 1944 reads as under:-

“9D. Relevancy of statement 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 proceedings under this Act shall be relevant, for the purpose of proving, an 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 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 interest of justice.

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

11. We may straightaway say that the provisions of Section 9D of the Central Excise Act, 1944 are identical to the provisions of Section 138B of the Customs Act, 1962 which would be applicable in the present case.

12. Section 138B of the Customs Act, 1962 reads as under:-

“138B. Relevancy of statements under certain circumstances –(1) A statement made and signed by a person before any gazetted officer of customs 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 interest of justice.

(2) The provisions 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.”

It is apparent that both the provisions are identical.

13. This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under:-

“12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub –Section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the Collector holding that it was not possible to procure

the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal.”

14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a 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 and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under:-

“29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the

provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted.”

15. The observations and conclusions arrived at by the Division Bench in the case of *J & K Cigarettes Ltd.* (*supra*) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, section 138B of the Customs Act, 1962 has not been examined at all.

16. For this reason, we feel that the Tribunal should have a fresh look at these cases keeping in mind the provisions of Section 138B as also the decision of this court in *J & K Cigarettes Ltd. (supra)*. The Tribunal will also consider the fact of non-supply of the report and other documents which were obtained by the concerned authorities from Srilanka after hearing had been concluded on 14.10.2004. Consequently, we set aside the impugned order and remit the matters to the Tribunal for a fresh consideration in the light of the observations and directions given above. Parties shall be at liberty to raise all issues available to them in law.

17. The parties shall appear before the Tribunal on 7th May, 2013 in the first instance. No further notice would be necessary to any of the parties. The appeals stand disposed of.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

APRIL 12, 2013

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