BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 15.02.2018

Pronounced on : 27.02.2018

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.863 of 2018
and
WMP(MD)No.911 of 2018

S.Rajendran ... Petitioner

Vs.

1. The Joint Commissioner of Customs
 (Preventive),
 O/o. Commissioner of Customs
 (Preventive),
 Government of India, Ministry of Finance,
 Department of Revenue,
 No.1, Williams Road, Cantonment,
 Trichy - 620 001.

2. The Addl. Director,
 Directorate of Revenue Intelligence,
 Ministry of Finance,
 Department of Revenue,
 No.27, Adarsh Towers,
 G.N.Chetty Road, T.Nagar, Chennai - 17.

3. The Deputy Director,
 Directorate of Revenue Intelligence
 Regional Unit,
 Ministry of Finance,
 Department of Revenue,
 No.1103, Trichy Road,
 Coimbatore. ... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records of the first respondent made in Order - In Original No.TCP/Cus.PRV/JTC/055-17 dated 07.12.2017, quash the same and direct said respondent to conduct adjudication proceedings afresh after affording the petitioner the opportunity to cross examine the named persons under reply dated 04.11.2017 and reiterated in the hearing before the said respondent on 10.11.2017.

For Petitioner : Mr.B.Sathish Sundar

For Respondents : Mr.Vijayakarthikeyan

ORDER

The order dated 07.12.2017 passed by the first respondent confiscating the seized 119 pieces of foreign origin gold bars totally weighing 11.900 kgs and valued at Rs.3,57,59,500/- and the vehicle Nissan Micra Car bearing Registration No.TN 07 BQ 8485 and levying penalty on the offenders in question is under challenge in this writ petition. Penalty of Rs.2.00 crores has been imposed on the petitioner.

2.The learned counsel appearing for the petitioner has made an endorsement that he is concerned only with the levy of penalty on the petitioner and that he is not questioning the other parts of the impugned order.

3.The learned standing counsel appearing for the respondents opposed the writ petition as not maintainable in view of the availability of the appeal remedy before the Commissioner (Appeals) Cantonment, Trichy. The learned standing counsel also contested the petitioner's case on merits.

4.The officers attached to the Directorate of Revenue Intelligence, Chennai Zonal Unit intercepted the Nissan Micra Car bearing Registration No.TN 07 BQ 8485 on 22.02.2017 at 08.25 Hrs at Letchumanapatti Toll gate situated at Pudukkottai - Trichy Highway. One K.Gandhi was driving the vehicle. The contraband which was ordered to be confiscated by the impugned order was found in the said car. His statement dated 22.02.2017 was recorded under Section 108 of the Customs Act, 1962. Based on the investigation done with the said K.Gandhi, a team of Directorate of Revenue Intelligence officers searched the petitioner's residence at Chennai and seized certain documents under Mahazar dated 22.02.2017.

5.It appeared to the customs officials that the contraband in question was smuggled and attempted to be brought to Chennai at the instance of the petitioner herein. It also appeared that few others were involved in the conspiracy of the illegal act of smuggling gold into India. Information downloaded from the phones in possession of the accused revealed GPS co-ordinates and details of number of a Rs.10 note, typically used in smuggling operations. The petitioner was arrested and remanded to judicial custody. The petitioner claimed that he had nothing to do with the contraband. Statements were also obtained from other accused namely, A.Sowkath Ali and S.Maheswaran. Statements of few others were also recorded in this connection. Attempts to secure the presence of S.Rajeswaran, the brother of Maheswaran were not fruitful.

6.According to the respondents, it is the petitioner who is the master mind behind the smuggling activities. Since these antecedents facts prima facie indicated that the seized gold bars were liable for confiscation and the persons involved in the operations were liable to be levied with penalty, the second respondent issued show cause notice under Section 124 of the Customs Act, 1962. The notice was issued to 7 persons including the petitioner herein. The show cause notice enclosed the list of documents relied upon. The said list included inter alia, the statements of K.Gandhi, V.Pandi, Smt.M.Jaleela and J.Rahumankhan.

7.The petitioner herein submitted his reply dated 23.10.2017 through his counsel. The petitioner in his reply pointed out that the statements obtained from K.Gandhi, A.Sowkath Ali and S.Maheswaran have since been retracted. The petitioner completely denied his involvement in the entire episode. According to him, he has nothing to do with the seized contraband. The petitioner also wanted copies of the document relied upon. He further by a communication dated 04.11.2017 through his counsel requested that K.Gandhi, S.Maheswaran, and A.Sowkath Ali be made available for cross examination on the hearing date. The adjudication proceedings were adjourned on a few occasions and finally the impugned order dated 07.12.2017 came to be issued. The said order passed under Sections 111(a), (d) and (e) and 119, 115(2) and 112 of the Customs Act, 1962, is under challenge in this writ petition.

8.The learned counsel appearing for the petitioner placed reliance on the decisions of the Hon'ble Supreme Court reported in (2013) 4 SCC 465 (Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and Others), 2013 (295) E.L.T 195 (Mad) (Thilagarathinam Match Works vs. Commr. Of C. Ex., Tirunelveli), 2013(297) E.L.T 190 (Guj.), (Vulcan Industrial Engineering Co.Ltd vs. Union of India), 2015 (330) E.L.T 74 (Mad) (Veetrag Enterprises vs. Commr. Of Cus. (Seaport Exports), Chennai, 2014 (300) E.L.T 342 (Mad) (Commissioner of Cus. (Imports), Chennai-1 vs. Sainul Abideen Neelam) and the unreported decisions in WP(MD) No.376 of 2008 dated 26.11.2014 and WP(MD)No.27439 of 2011 dated 08.12.2011. Considerable reliance was placed on the decisions of the Hon'ble Supreme Court reported in AIR 1961 SC 264 (V 48 C 37) (Amba Lal v. Union of India) and AIR 1977 SC 1627 (State of Kerala v. K.T.Shaduli).

9.Per contra, the learned standing counsel appearing for the respondents would contend that the petitioner has no right of cross examination as demanded by him. In this regard, the learned standing counsel placed reliance on the decision of the Hon'ble Delhi High Court in CUS.AA.Nos.29, 32 to 38 of 2011 (Sudhir Sharma & Others vs. Commissioner of Customs & Others) and the Division Bench of the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in WP.No.5917 of 2017 dated 31.10.2017. The defence projected by the standing counsel rests on three premises. He would call upon this Court to straight away non suit the petitioner by relegating him to avail the alternate remedy of appeal. Secondly, he would contend that there is no question of cross examining the co-noticees who are none other than his co-conspirators and thirdly, the statements of the co-noticees are not the only material on which the adjudicating authority had placed reliance. There are other materials to support the impugned order passed against the petitioner.

10.The primary contention of the learned counsel appearing for the petitioner is that no doubt the petitioner has the option of availing an appeal to question the impugned order but then, where the adjudicating authority by denying the right to cross-examine the makers of statements which are heavily relied upon has infringed the principles of natural justice, this Court may entertain the writ petition and after quashing the impugned order remand the matter to the adjudicating authority for fresh consideration by affording the petitioner an opportunity to cross examine the makers of the statements relied upon by the authority.

11.The learned counsel appearing for the petitioner sought to distinguish the Judgment of the Hon'ble Supreme Court reported in 2001(3) SCC 221 (Lal Singh vs. State of Gujarat) and (2001) 9 SCC 1 (State of Maharastra vs. Bharat Chaganlal Raghani).

12.As rightly contended by the learned counsel for the petitioner, if the petitioner can demonstrate and establish that the Tribunal or the adjudicating authority has infringed the principles of natural justice, then certainly this Court would have the jurisdiction to entertain the writ petition straight away by bye-passing the statutory remedies that are available to the assessee/petitioner herein.

13.But, then the question is whether such an infringement has been established in this case. No doubt, there is lapse on the part of the first respondent in not passing an order negativing the request of the petitioner as and when it was made. If a request for cross examination of witnesses or supply of certain document is made, the authority is obliged to dispose of the said request then and there. If a request for adjournment is made again it will have to be dealt with then and there. It is not proper on the part of the authority to receive applications making such a request and dispose them of while passing the final order. The order rejecting the request made in the application forms an internal part of the final order. Such an approach is to be frowned upon. But, on this score this Court does not propose to interfere in the matter.

14.The petitioner demanded that K.Gandhi, A.Sowkath Ali and S.Maheswaran be made available for cross-examination. They made statements under Section 108 of the Customs Act, 1962. It is obvious that the petitioner seeks to cross examine the co-noticees. In this regard, it would be useful to refer to the decision of the Hon'ble Allahabad high Court in Central Excise Appeal No.88 of 2006 dated 14.07.2015 (Ashish Kumar Chaurasia vs. The Commissioner, Customs).

15.In the said case also, the contention of the appellant was with regard to violations of principles of natural justice, by not producing witnesses for cross examination. The Hon'ble Allahabad High Court observed that in such a situation insistence for cross-examining can be purely strategic with a view to raise a contention of violation of principles of natural justice. In almost all the cases such persons dealing in contraband would refuse to be cross-examined on the ground that they are accused of an offence and, had a fundamental right against testimonial compulsion under Article 20(3), and thereby create a situation where each one of them, would ask for cross-examination of the other and refuse to be cross-examined, and then contend that refusal has resulted in failure of proper hearing. Therefore, principles of natural justice do not require that in matters like this, persons who had given information should be allowed to be cross-examined by the co-noticees on the statements made before the customs authorities. If cross-examination is to be allowed as a matter of right then in all cases of conspiracy and joint dealings between the co-noticees in the commission of the offences in connection with the contraband goods, they can bring about a situation of failure of natural justice by a joint strategic effort such co-noticees by each one refusing to be cross-examined by resorting to Article 20(3) of the Constitution and simultaneously claiming cross-examination of the other co-noticees.

16.In the light of the decisions rendered by the Hon'ble Delhi High Court in CUS.AA.Nos.29, 32 to 38 of 2011 (Sudhir Sharma & Others vs. Commissioner of Customs & Others) and that of the Hon'ble Allahabad High Court in Central Excise Appeal No.88 of 2006 dated 14.07.2015 (Ashish Kumar Chaurasia vs. The Commissioner, Customs), this Court is of the view that the petitioner has not made out a case that the adjudicating authority has violated the principles of natural justice. Only if the infringement of the principles of natural justice is categorically demonstrated, this Court would be justified in permitting the petitioner to bye-pass the statutory remedy available to him. In as much as the petitioner has not made out a case of infringement of principles of natural justice by the first respondent, this Court is of the view that the writ petitioner can rather workout his remedies in terms of the statutory scheme laid down in the Customs Act, 1962.

17.This Court is of the view that since the petitioner has been relegated to availing the alternate remedy of appeal, there is no necessity to examine if the impugned order is resting on materials other than the statements of the said co-notices. This Court is also fortified by the decision rendered by a learned Judge of this Court (T.S.Sivagnanam, J.) in 2016 (342) E.L.T 201 (M/s. Visal Lubetech Corporation, Vs The Additional Commissioner of Customs). His lordship after referring to the decisions of this Court as well as the Hon'ble Supreme Court held that the petitioner must be relegated to avail the alternate remedy. While dismissing the writ petition, the learned Judge clarified that the petitioners therein will not be entitled to once again canvass the issue regarding their right to cross examine the witness in question during the appeal proceedings against the impugned order therein before the appellate authority.

18.This Court respectfully adopts the said course of action in this case also. This writ petition is dismissed. The petitioner is at liberty to file an appeal before the appellate authority. The time taken in prosecuting this writ petition till the issuance of the order copy will not be taken into account while computing the period of limitation for filing the statutory appeal. It is made clear that the petitioner is entitled to raise all other issues except the issue of violation of the petitioner's right to cross examine the co-noticees.

19.With this observations and liberty, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

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 O/o. Commissioner of Customs
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 Coimbatore.

+2CCs to Mr.B.Satish Sundar, Advocate, Sr.51926
+1CC to Mr.B.Vijay Karthikeyan, Advocate, Sr.51989

skm

JM/SV-MMS/SAR-II/17.05.2018/7P-7C

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