

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.06.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.5790 of 2017
and
W.M.P.Nos.6193 & 6194 of 2017

Vijayraj Surana

... Petitioner

Vs

1. The Commissioner of Customs (Appeals - II),
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.

2. The Additional Commissioner of Customs,
Chennai - III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India to pass an order of Writ of Certiorarified Mandamus, calling for the records of the first respondent herein culminating in the issue of Order in Appeal in C.Cus.II No.890/2016 dated 29.09.2016 passed from file No. C4-II/693/O/2016-SEA and quashing the same direct the second respondent to adjudicate the case after permitting examination of the persons whose statements are relied upon in the show cause Notice F.No.DRI/CZU/VIII/48/ENQ-01/INT-47/2014, dated 09.04.2015.

For Petitioner : Mr.S.Murugappan

For Respondents : Mrs.Hema Muralikrishnan, SSC

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O R D E R

The order under challenge in the present writ petition is predominantly made on the ground that the petitioner was denied of an opportunity to cross examine the witnesses from whom statements have been recorded by the authority and put forth against the petitioner herein, while imposing penalty.

2. The charge laid against the petitioner herein, who is the Managing Director of M/s.Surana Corporation Ltd. is that, the petitioner had entered into a conspiracy agreement with certain named and unknown persons and thereby procured smuggled foreign gold items, without any record of procurement. In the statement given by the petitioner, it is recorded that the petitioner had gone through the voluntary statement of three of his staffs and obtained the signatures therein. He had also stated that the smuggled gold were dealt by them.

3. It is the submission of the learned counsel for the petitioner that there was no admission with regard to the charge of conspiracy as against the petitioner herein and therefore he had sought for permission to cross examine these three witnesses, which came to be denied by the authority.

4. The learned Senior Standing Counsel for the respondents on the other hand would submit that the cross examination of such witnesses is not mandatory in the light of the admissions made by the petitioner himself in his statement recorded before the authority.

5. The second respondent herein, while rejecting the petitioner's request for cross examination of the witnesses had stated that the cross examination of such witnesses is not mandatory, in view of the decision of the Hon'ble Supreme Court reported in 1983 (13) ELT 1486 in the case of Kanungo & Company Vs. Collector Customs, Calcutta and Ors. To such a rejection, the petitioner has raised his objections through a reply dated 21.12.2015. He had also raised a specific ground before the Appellate Authority that the denial of cross examination would be in violation of the principles of natural justice. The Appellate Authority, while dealing with this aspect had relied upon the decision of the Hon'ble Supreme Court reported in 1997 (89) ELT 646 in the case of Surjeet Singh Chhabra Vs Union of India, and held that there is no hard and fast rule in quasi judicial proceedings on cross examination and on the basis of the circumstances of these cases, the cross examination was held to be not mandatory.

6. The Hon'ble Apex Court in the case of Surjeet Singh Chhabra Vs Union of India, (supra) had held that, when the petitioner seeks for cross examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross examination of the witnesses as regards the place at which the recovery was made. But in the facts of that case, the Supreme Court held that the failure to give the petitioner therein an opportunity to cross examine the witnesses is not violative of the

principles of natural justice.

7. In the instant case, the specific charge against the petitioner was a conspiracy agreement with certain named and unknown persons for the purpose of procuring smuggled gold and this aspect of conspiracy was not admitted by the petitioner in his statement recorded before the authorities. The issue as to whether there was a conspiracy or not is now claimed to be established through cross examination of the three witnesses.

8. The learned counsel for the petitioner relied upon a decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. Commissioner of Es.Kolkata - II reported in 2015 (324) E.L.T. 641 (S.C), wherein, it was held that when the appellant had contested on the truthfulness of the statements of witnesses and wanted to discredit their testimony, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross examination. Holding so, the Hon'ble Apex Court held that the denial of the request of cross examination was a serious flaw.

9. The learned Standing Counsel for the respondents relied upon the decision of the Hon'ble Division Bench of this Court reported in 2018 (362) E.L.T. 559 (Mad.) in the case of Lawn Textile Mills Pvt. Ltd. Vs CESTAT, Chennai, for the proposition that, when the inspection of the factory was done in the presence of the Manager, the Managing Director thereafter cannot retract the statements made, which can only be held as an afterthought. Such a proposition is not the issue involved in the present writ petition, since the petitioner seeks for an opportunity to cross examine the witnesses for the purpose of establishing that there was no act of conspiracy on his part. Hence, the said decision is not applicable for the case in hand.

10. The learned Standing Counsel also relied upon a decision of the learned Single Judge of this Court reported in 2017 (357) E.L.T. 104 (Mad.) in the case of Deepak Kumar Vrs. Principal Commissioner of Customs, Chennai, to justify that the denial of cross examination would not amount to the violation of principles of natural justice. In the said case, the learned Judge of this Court had found as follows:

"13. True that the petitioner has also raised the ground of violation of principles of natural justice. According to him, the refusal to cross-examine those two persons, namely, Thameem Ansari and Syed Rehman has resulted in violation of principles of natural justice. I do not think that the petitioner is justified in raising such objection now, especially, when the order passed by the Adjudicating Authority on 30.11.2015 denying the request of the petitioner to cross-examine

those two persons, has not been challenged by the petitioner and on the other hand, by accepting the said order, the petitioner appeared further and filed additional written submissions, as required under the said order dated 30.11.2015. Even otherwise, the Adjudicating Authority has dealt with in detail as to why such request is rejected by relying on certain case laws. In any event, as the Appellate Authority is also a fact-finding authority, certainly, the petitioner is entitled to canvass before such authority as to how such denial of cross-examination of those two persons, has resulted in affecting his interest. If the request for cross examination was not at all considered, then it is a different matter to say that there is a violation of principles of natural justice. On the other hand, if such request is considered and rejected on some reasons and findings, then it is for the next fact finding authority to go into the same to find out as to whether such reasonings and findings are justifiable or not. Therefore, at this stage, this Court is not inclined to go into such question and give any finding on the same."

11. A perusal of the aforesaid observation reflects that the Court had come to the conclusion that there was no violation of principles of natural justice, since the petitioner therein had not challenged the denial of the request to cross examine and in case when the request for such cross examination has been rejected, then it is for the next fact finding authority to go into the same as to whether such denial is justifiable or not.

12. In the instant case, when the petitioner has sought for a request to cross examine, the same came to be denied. Thereafter, the petitioner had also raised this before the Appellate Authority, which was also rejected for the reasons already discussed. As such, the facts involved in the aforesaid case is totally in contra to the issue in the present writ petition and thereby the proposition laid down therein, may not be applicable to the present case.

13. For all the foregoing reasons, this Court is of the affirmed view that the petitioner can be granted an opportunity to cross examine the three witnesses viz., Maheswaran, Dhamodharan, Abdul Azeez, which exercise should be completed within a stipulated time. Consequently, the Order-in-Appeal No.C.Cus.II No.890/2016, dated 29.09.2016, passed by the first respondent in file No.C4-II/693/O/2016-SEA, is set aside and the matter is remanded back to the second respondent herein for the limited purpose of permitting the petitioner herein to cross examine the three witnesses viz., Maheswaran, Dhamodharan, Abdul Azeez. Such an exercise of cross examination shall be

completed, as expeditiously as possible, in any event, within a period of 6 weeks from the date of receipt of a copy of this order. The Adjudicating Authority shall thereafter pass appropriate orders, after giving an opportunity to the petitioner herein to put forth his submissions based on the statement of witnesses during the course of their cross examination, on its own merits as expeditiously as possible.

14. It is made clear that this Court has not expressed any of its views with regard to the merits of the case and that the authority is at liberty to pass orders in accordance with law. It is further made clear that the order passed in the present writ petition will not have a bearing on any other person who may be involved in the proceedings.

15. Accordingly, the writ petition stands disposed of. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

vum/hvk

To

1. The Commissioner of Customs (Appeals - II),
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.
2. The Additional Commissioner of Customs,
Chennai - III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.S.Murugappan, Advocate, S.R.No. 46746
+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 47161

W.P.No.5790 of 2017 and
W.M.P.Nos.6193 & 6194 of 2017

KK(CO)
GN(17/07/2019)