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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 23rd April, 2019

+ W.P.(C) 4131/2019
+ W.P.(C) 4132/2019
+ W.P.(C) 4151/2019

SH. KRISHAN KISHORE AGGARWAL Petitioner
SH. ASHOK KUMAR YOGI Petitioner
SH. KISHORE AGGARWAL Petitioner

Through: Mr. Prem Ranjan Kumar, Adv. in
W.P.(C) 4131/2019 & 4151/2019.
Mr. Amor Nath Tiwari, Adv. in
W.P.(C) 4132/2019.

versus

THE ADDITIONAL COMMISSIONER OF CUSTOMS..... Respondent
Through: Mr. Harpreet Singh, Sr. Std. Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (OPEN COURT)

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CM APPL.18617/2019 in W.P.(C) 4131/2019

CM APPL.18618/2019 in W.P.(C) 4132/2019

CM APPL.18709/2019 in W.P.(C) 4151/2019

Exemption allowed, subject to all just exceptions.

The applications are disposed of.

W.P.(C) 4131/2019, W.P.(C) 4132/2019 & W.P.(C) 4151/2019

1. The narrow ground on which the petitioners question the common order of the Additional Commissioner of Customs, is that they were denied the permission to cross-examine the witnesses whose statements, recorded under Section 108 of the Customs Act, were taken into account by the authorities and ultimately, became a part of the Order-in-Original impugned herein.

2. Learned counsel for the petitioners pointed out that the sole basis for rejection of the request for cross-examination of witnesses was twofold – (i) the request was made casually and, (ii) that few of the witnesses were interlinked. The Adjudicating Officer relied upon certain judgments, to hold that the right to cross-examination does not enure in any uninhibited manner, and in the facts of the case, the petitioners could not substantiate their request. Learned counsel for the respondent commended that this Court should accept the approach of the adjudicating authority and that the reliance placed upon the judgments of the Supreme Court was warranted. Alternatively, it is suggested that the Court should not take any steps towards setting aside the impugned order, but rather relegate the petitioner to their right of appeal. Such a right might give them a chance to examine the witnesses.

3. The relevant portion in the Order-in-Original, where the Adjudicating Officer denied the petitioners' request for cross-examination is extracted below:-

“37. Before examining the charges leveled in the impugned show cause notice on merits, I note that Shri Ashok Kumar Yogi (Noticee No.3), Shri Kishore Aggarwal (Noticee No.5) and Shri. Kishan Kumar Aggarwal (Noticee No. 6) have sought for cross-examination of each other as well as all other

persons including Shri Sukhvinder Singh, Shri Jayant Vikram whose statements have been relied upon in the impugned show cause notice. I find that the above Noticees No. 3, 5 & 6 have sought for cross-examination of all the persons including the cross-examination of each other, in a routine manner without giving any cogent reasons. I find that the above Noticees and the Co-Noticees/other persons, whose statements have been relied upon in the impugned show cause notice, had tendered their statements voluntarily and the same had been retracted by them. I find that the statements of above Noticees as well as the other Co-Noticees in support of the allegations made in the show cause notice, were recorded under Section 108 of the Customs Act, 1962, which is a 'Judicial Proceedings' within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860. I further find that none of the persons concerned retracted their statements during the course of investigations or subsequent to completion thereof. Therefore, the cross-examination of the Noticees/Co-Noticees or the persons concerned was not at all warranted in the instant case. I find support on this count from the judgment of Hon'ble Supreme Court in the case of Kanungo & Co. Vs. Collector of Customs, Calcutta and Others – 1983 (13) E.L.T. 1486 (S.C.) The relevant Para of the judgment of the Hon'ble Supreme Court is reproduced below:

'Para 12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show cause notice issued on August, 21, 1961, all the materials on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons, from whom enquiries were alleged to have been made by the authorities, should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this, the persons who have given information should be examined in the presence of appellant or should be allowed to be cross-examined by them on the statements made before the Customs

Authorities. Accordingly, we hold that there is no force in the third contention of the appellants.'

I further find that the above decision of the Apex Court has been followed by the Hon'ble Calcutta High Court in the case of Tapan Kumar Biswas Vs. Union of India and in a number of other judicial pronouncements, as well as in the case of Devi Dass Garg Vs. CCE, Delhi-I reported as 2010 (257) E.L.T.. 289 (Tri.Del.).

38. I also find in the matter of Jagdish Shankar Trivedi Versus Commissioner of Customs, Kanpur- 2006(194) ELT 290 (Tri-Del), the Principal Bench of the Hon'ble CESTAT, New Delhi relying upon the decision of the Hon'ble Apex Court in Surjeet Singh Chhabra case vs UOI reported in 1997 (89) ELT 646 (SC), has held that admission made by an assessee binds him and, therefore, failure to give him the opportunity to cross-examine the witnesses was not violative of principles of natural justice. It was specifically held that "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 offence 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 other co-noticees. The decision of the Hon'ble Apex Court in Kanungo & Co. was followed by the Calcutta High Court in Tapan Kumar Biswas Vs. Union of India reported as 1996 (63) ECR-546 (Calcutta) in paragraph 17 of the judgment and it was held that in a proceeding under the Customs Act the proceedees are not entitled to cross-examine the witnesses. The decision in Ashutosh Ghosh and Another V. Union of India and Others reported in 1977 Criminal Law Journal N.O.C. 67, was also relied upon and it was observed in paragraph 20 of the judgment that the Supreme Court in Ashutosh Ghosh's case has categorically held that a proceedee

is not entitled to cross-examine the witnesses. The decision of the Division Bench of the Calcutta High Court in Kishan Lal Aggarwala Vs. Collector of Land Customs-AIR-1967 Cal.80 was also referred in paragraph 18 of the judgment and it was held to be laying down the proposition that cross-examination of the witnesses in the matter under the Sea Customs Act was not comprehended. Referring to all these decisions, the court held, that a proceedee was not entitled to cross-examination of any of the witnesses under Section 124 of the said Act which lays down the extent of applicability of the principles of natural justice and under which lays down the extent of applicability of the principles of natural justice and under which a proceedee was not entitled to cross-examine any witness (para 11). Thus in view of the decisions of the Hon'ble Supreme Court in Kanungo & Co., Ashutosh Ghosh and of the Calcutta High Court, in the above two decisions, it is abundantly clear that a noticee can not claim a right to cross-examine under Section 124 of the said Act." I further find that the Hon'ble Supreme Court of India in the case of Surjeet Singh Chhabra vs Union of India reported as 1997 (89) ELT 646 (SC) has held that "non allowing cross-examination is not violative of principles of natural justice even if confession was retracted within six days; that the confession statement made before the Customs officer though retracted within six days is an admission and binding since the Customs officers are not the Police officers. Similarly the Hon'ble Supreme Court in the case of Naresh J Sukhawani Vs Union of India [1996(83) ELT 258] has held that statement made before the Customs Officials is not a statement under Section 161 of Cr.P.C. Therefore, it is a material piece of evidence collected by the customs officials under section 108 of the Customs Act, 1962, and it can be used as substantive evidence connecting the petitioners with the contravention of the Customs Act. Therefore, the admittal statements of the persons/witnesses as relied upon in the impugned show cause notice, have the evidentiary value in view of the above settled laws of the Hon'ble Apex Court."

4. In addition, the Order-in-Original relied upon the Bench rulings of the Customs, Excise & Service Tax Appellate Tribunal ["CESTAT"]. This

Court is of the opinion that the view and approach of the Additional Commissioner is flawed. A plain reading of the judgment in *Kanungo & Co.* (supra), relied upon in the impugned order shows that the Additional Commissioner completely misinterpreted the terms and purport of the Supreme Court judgment. What the Court said in that case was that, if information is received by the statutory authorities, which triggers an inquiry and culminates in adjudicating proceedings, there is nothing in law to compel the authorities to involve the informant, (or the person providing the information), in the judicial proceedings so as to warrant her or his cross-examination. This, however, does not imply that if an individual is involved in the proceeding, which results in an adverse order against a third party, (and who is asked to join the proceedings, or whose statement is used) the third party is precluded from seeking cross-examination of the informant, if the latter's statements were recorded or were to be considered in the proceedings as material evidence. This Court notices in the present case that the statements of the co-accused, recorded under Section 108 of the Act, ultimately became the basis of the impugned order. The denial of the right of cross examination of such witnesses, was plainly in violation of the principles of natural justice.

5. Having regard to the above discussion, the Court is of the opinion that it would not be appropriate to relegate the appellant to the remedy of cross-examination in the course of an appeal, which would in effect amount to denial of an appellate forum, in the event, the findings of the Additional Commissioner are affirmed. As a consequence, the impugned order dated 07.02.2019 [O-I.O.No.45/2019/K.R.Madhar/ADC/EXP/ICD/TKD] is set aside, as against the petitioners. The Additional Commissioner of Customs shall proceed to hear the petitioners and also grant appropriate and

sufficient opportunity to cross-examine the witnesses, whose cross-examination was sought but denied in the original proceedings, which culminated in the impugned original order. The parties shall be present before the Additional Commissioner on 15th May, 2019, who shall then proceed to act in accordance with law.

6. The writ petition is allowed in the above terms.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 23, 2019
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