

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.02.2020

Pronounced on :19.05.2020

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.5233 of 2016

and

W.M.P. No.4600 of 2016

1.M/s.Jet Unipex,
No.42, Montieth Road,
Sindur Plaza,
4th Floor, Egmore, Chennai - 600 008
represented by its proprietor
Sri.P.Sunil.

2.Shri.P.Sanjay
No.42, Montieth Road,
Sindur Plaza,
4th Floor, Egmore, Chennai - 600 008.
Petitioners

Versus

1.The Commissioner of Customs,
Chennai III Commisnerate,
5th floor, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.

2.The Additional Director General,
Directorate of Revenue Intelligence,
No.503, 'A' Main Road, OMBR Layout,
Banawadi, Bengaluru - 560 043.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified mandamus, calling for records of the 1st respondent pertaining to the communication in F.No.CAU/DRI/BZU/17/2015 dated 19.01.2016, quash the same and forbear the 1st respondent from proceeding with the adjudication proceedings pending before it, without affording, the petitioners the facility of cross examination of the persons sought for and giving adequate and reasonable opportunity in such proceedings.

For Petitioners: Mr.B.Kumar, senior counsel for
Mr.B.Sathish Sundar
For Respondents: Mr. S.R.Sundar for R1
Mr.Sundareswaran, standing counsel
for R2

O R D E R

The petitioners are aggrieved by the impugned communication dated 19.1.2016 of the 1st respondent. By the impugned communication, the 1st respondent has rejected the petitioner's request for:

- a) cross examination of the persons whose statements were recorded under section 108 of the Customs Act, 1962 by the officers of the 2nd respondent; and
- b) the officers who recorded such statements.

2.The petitioners have been issued with the show cause notice dated 11.6.2015 to show cause as to why:

- a) the value of the goods imported by the 1st petitioner should not be countermanded and value adopted in the notice should be adopted; and
- b) why differential customs duty have sought to be demanded from the 1st petitioner;
- c) penalty should not be imposed under section 112 and 114 AA of the Customs Act, 1962 on the 2nd petitioner;

3.During the course of investigation which preceded the issue of the aforesaid show cause notice, the 1st petitioner had paid an amount of Rs.45 lakhs as differential tax. The show cause notice seeks to appropriate the same towards the differential duty proposed in the aforesaid show cause notice.

4.The above show cause notice was issued by the 2nd respondent Directorate Of Revenue Intelligence after investigation.

5.During the course of the investigation, statements were recorded from the 2nd petitioner on 18.12.2013; 20.12.2013 and on 17.12.2014. A statement was also recorded from the proprietor of the 1st petitioner on 20.12.2013.

6.Apart from the above two persons, statement of the Branch Manager of the petitioner's Custom House Agent Shri. C.D Palani

on 7.11.2014 and from one Shri. K.Sundaramoorthy, the Managing Partner of M/s.. Krishna Logistics Chennai, another Custom House Agent (CHA) were recorded on 25.11.2014 by the officers of the 2nd respondent.

7.It is in the course of the investigation, the petitioners deposited the aforesaid sum of Rs. 45 lakh in 2 instalment of Rs.25 lakhs and Rs. 20 lakhs on 26.12.2013 and on 3.1.2014.

8.The 2nd respondent has made out a case of undervaluation of Plaster of Paris and allied goods imported by the 1st petitioner between June 2010 and December 2013 by invoking Section 14 of the Customs Act read with Rule 9 and Rule 4 of the Customs Valuation Rules, 2007.

9.After the show cause notice was issued, the petitioners through their counsel filed a later dated 17.7.2015 and requested the 1st respondent to issue summons to:-

- i)Shri.K.Sundaramoorthy, C.D Palani and one Ayub Khan of M/s. Junaid Plaster of Paris; and
- ii)the officers of the 2nd respondent who recorded statement from these persons under Section 108 of the Customs Act, 1962 based on which the above show cause notice was issued be produced for cross-examination.

10.The petitioners through their counsels also appeared before the 1st respondent on 13.11.2015 and on 26.11.2015. On 26.11.2015, they requested for certain relied upon documents which were thereafter furnished pursuant to a communication dated 29.12.2015.

11. Since, the 1st respondent did not respond to the request to summon the above named persons, for being cross-examined petitioner sent another request.

12. By the impugned communication dated 19.1.2016, the appraiser attached to the office of the 1st respondent informed the petitioners that the statement recorded from the above named persons were true and correct and that no reasons were furnished for cross examination and hence request cannot be acceded.

13.Accordingly, the petitioners were directed to appear for a personal hearing before the 1st respondent on 29.1.2016.

14.It is in this background the present petition has been filed.

15.Both the respondents have filed their respective counters. The 1st respondent in its counter placed a strong reliance has been placed on the decision of the Supreme Court in Kanungo & Company vs Collector Of Customs And Ors 1983 (13) ELT 1486 and that of this court in Mani Bhadras Trading Co versus C.C - 2010 (251) ELT 194.

16.The 1st respondent has reiterated submission that no reasons have been given for cross examination.

17.The 2nd respondent in their counter have stated that the request for cross examination was merely intended to delay the adjudication of the show cause notice and that the as demand proposed in the show cause notice was based on independent documents, contemporaneous imports and was not based on the opinion or statement of any persons or of the officers.

18.It is stated that only statements were recorded and comparable value of identical goods were shown to these persons and nothing more. It is therefore submitted that the petitioners were not entitled to cross examine any of the persons.

19.I have heard a senior counsel for the petitioner at length and learned counsel for the 1st respondent and the 2nd respondent.

20.The learned senior counsel for the petitioner was at pains to submit that the statements were obtained from the 3 named persons by the officers of the 2nd respondent under coercion and threat. The statement obtained were not voluntary in nature and therefore it is absolutely necessary that these persons be produced for cross-examination by the petitioner for the petitioner to prove their defence.

21.In this connection, reference was made to the following 3 judgements of the Honourable Supreme Court:-

- i. DK Basu versus State of West Bengal and Ashok K Johari versus State of U.P (1997) 1 SCC 416.
- ii.Andaman Timber Industries v. CCE (2016) 15 SCC 785.
- iii.ShankariaVs State of Rajasthan (1978)3 SCC 435.
- iv. Kanungo and Co. 1983 (13) ELT 1456; and
- v.Mani Bhadras Trading Co versus CC 2010 (251) ELT 194.

22.Learned Senior Counsel submits that the Honourable Supreme Court in DK Basu versus State of West Bengal and Ashok K Johari versus State of U.P (1997) 1 SCC 416 observed that there are several other government authorities like Directorate of

Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force ((CRPF), Border Security Force (BSF), Central Industrial Security Force (CISF), Traffic Police, Central Bureau of Investigation (CBI), CID etc. who have been given power to detain a person and to interrogate him in connection with the investigation of economic offences under the provisions of the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. and that there are incidents of torture and death also.

23.He submits that the Hon'ble Supreme Court therefore has issued the following guidelines to the officers of the department in paragraph 35, which read as follows:

"35.We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or

town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

24. Learned Senior Counsel submits that none of the above safeguards were followed by the officers of the 2nd respondent during investigation and while recording statements.

25. Learned Senior Counsel hereafter drew attention to the decision of the Hon'ble Supreme Court in Andaman Timber Industries v. CCE, (2016) 15 SCC 785 where the Hon'ble Supreme Court held that not allowing an assessee to cross-examine the witnesses by the adjudicating authority though the statements of such witnesses were made the basis of the impugned order was 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. He drew attention to the following passages from the said decision:-

"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 guesswork as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

26. On the other hand, the learned counsel for the 1st respondent relied upon the following decisions:-

i. Collector of Customs Madras Vs. Kotumal Bhirumal Pihlajani & Ors AIR 1967 Mad 263 (FB)

ii. Percy Rustomji Basta V. State of Maharashtra 1971(1) SCC 847;

iii. Asst. Controller of Customs, New Delhi Vs. Kedar Nath - Crl. Appeal No.14 of 1969;

iv. K.I. Pavunny V. Asst. Collector, Central Excise Collectorate, Cochin (1997) 3 SCC 721;

v. Naresh J. Sukhawani Vs. Union of India - 1995 Supp(4) SCC 663

vi.Asst. Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd - (2000) 7 SCC 53 -.

vii.Commissioner of Customs, Calcutta Vs. Ratan Kumar Saha - 2005 SCC Online Cal 137 -

viii.Ramesh Khatani Vs. Union of India - 2007 SCC Online Raj 352;

ix.Union of India Vs. Padam Narain Aggarwal & Ors. - (2008) 13 SCC 305;

x.Nirmal Singh Pehlwan Vs. Inspector, Customs House Punjab (2011) 12 SCC 298;

xi.IVRCL Infrastructure and Projects Ltd. Vs. Commissioner of Customs, Chennai - (2015) 13 SCC 198;

xii.Tofan Singh Vs. State of Tamil Nadu - 2018(363) ELT 3 (SC);

xiii.Asst. Collector of Customs, Madras Vs. Govindasamy Ragupathy 1998(98) ELT 50 (Mad) -;

xiv.Vijay Kumar Jain Vs. Commissioner of Customs, Shillong 2001(135) ELT 137 (Tri. Del.);

xv.H.S.Ramakrishna Vs. Commissioner of Customs, Bangalore 2010(259) ELT 17 (Kar) -;

xvi.AK Subramani Vs. Commissioner of Customs, Chennai - 2017 (358) ELT 77 (Mad);

Xvii.Abdul Aziz Reshamwala Vs. Commissioner of Customs, Jaipur - 2003(158) ELT 692 (Tri. Del.) -;

Xviii.Commissioner of Customs, Mumbai Vs. Videomax Electronics - 2001(264) ELT 466 (Tri. Mumbai) -;

Xix.Mani Bhadras Trading Company Vs. CC (Sea exports), Chennai 2010 (251) ELT 194 (Mad) -;

xx.Sanjay Shah Vs. Commissioner of Customs - 2011(264)ELT 211 (Mad);

xxi.Tamilnadu Tobacco Ltd. Vs. Union of India - 1992(57) ELT 51 (Mad);

Xxii.Telestar Travels Pvt. Ltd. Vs. Special Director of Enforcement 2013(289) ELT (3) SC;

Xxiii.A.L.Jallaludeen Vs. Deputy Director of Enforcement Directorate, Chennai - 2010(261) ELT 84 (Mad) -;

Xxiv.Vivek Nand Sethi Vs. Chairman of J&K Bank and others 2005(5) SCC 337;

27. I have considered the arguments advanced on behalf of the petitioner and the respondents. I have also perused the show cause notice and documents filed along with the writ petition.

28. From the overall facts and circumstances of the present case it is noted that it was a simple case of undervaluation of goods by the petitioner.

29. Therefore, statements were recorded from the petitioner's proprietor, his brother namely the 2nd petitioner, from 2 employees of the 2 CHA's of the petitioner.

30. They appear to have confirmed that there was variance between the value declared in import invoice and invoices in the case of contemporaneous import.

31. Statements obtained under section 108 of the Customs Act, 1962 are merely intended to facilitate investigation into alleged evasion of customs duty for the purpose of adjudication under the aforesaid Act.

32. The culmination of the investigation may not only result in issuance of a show cause notice under section 28 to demand customs duty short paid or short levied but also for confiscation, fine, penalty under Section 124 of the Customs Act, 1962.

33. Depending upon the gravity of the offence committed by a person, a criminal prosecution are initiated.

34. Though it was submitted that the statements recorded from the petitioners were retracted, I do not find any material on record.

35. Neither the petitioner nor the respondents have filed any of the statements of the persons recorded under Section 108 of the Customs Act, 1982 nor the letter of retraction.

36. Since the primary purpose of obtaining statement under Section 108 of the Customs Act, 1962 was for investigation and not for obtaining confessional statements/admission of liability, the respondents were asked to find out whether they could proceed with the show cause proceedings based on evidence

gathered without placing primary reliance on the statements recorded from any of the three persons. Learned counsel for the 1st respondent has filed a copy of letter dated 7.1.2020 received by him.

37. In the said letter it has been stated that "The statements tendered by the two CHA person also supports the fact that there is nothing stated by them against the noticee as a matter of their own personal knowledge but only what comes as a result on comparing the values declared in invoices of the noticee and values declared in the invoices/import data of other importers for import of same goods from the same supplier. Therefore, the demand of the advocate for their cross examination has no reason basis and is unwarranted, as the invoices/documents have been also provided to the noticee."

38. At the same time, it has been stated that the statement of these 2 persons can be eschewed.

39. As far as officers of the 2nd respondent is concerned, it is stated that there are no statements of the officers of the 2nd respondent and therefore cross-examination of these officers is unwarranted.

40. In page number 5 of the show cause notice, it has been stated that the 2nd petitioner has agreed with the statement dated 18.12.2013 and 20.12.2013 of the proprietor of the 1st petitioner and that of Palani and K Sundaramoorthy, the two employees of the respective Custom House Agents of the 1st petitioner.

41. Certain statements of the petitioners particularly the one referred to in paragraph 12 of the show cause notice seems to indicate that there were admissions by the petitioner regarding undervaluation and that there were cash transactions in the past to evade customs duty.

42. At the same time, it is also evident that the 2nd respondent's have recovered several of the documents during the course of investigation which form the basis of proposals in the show cause notice.

43. As mentioned above, the object of empowering an officer of the customs department to record evidence under section 108 is to collect information of the contravention of the provisions of the Customs Act, 1962 or concealment of contraband or avoidance of duty of Excise so as to enable them to collect the

evidence of the proof of contravention of the provisions of the act for initiating proceedings for further action of confiscation of the contraband or imposition of penalty under the Act etc.

44. Section 108 of the Customs Act, 1962 reads as under:-

"108. Power to summon persons to give evidence and produce documents. -

[(1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.]

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required:

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

45. Section 108 of the Customs Act, 1962 gives power to a gazetted an Officer of Customs to summon any person to give evidence in any enquiry.

46. Enquiry under section 108 is deemed to be a "judicial proceeding" by virtue of sub-section (4) for the purpose of section 193 and 228 of the Indian Penal Code.

47. A person summoned to give statement under Section 108 of the Customs Act, 1962 before such officer is bound to appear and state truth. Such a person is not an accused person when such statements are recorded.

48. If such a person gives false statement before such

officer, he/she renders himself/herself liable to be prosecuted for an offence under section 193 and section 228 of the Indian Penal Code, 1860 and thus invites a collateral criminal proceedings.

49.As per the decision of the Honourable Supreme Court in Percy Rustomji Vs State of Maharashtra 1971 (1) SCC 847 such officers conducting enquiry under section 108 of the Customs Act, 1962 are not police officers and the person against whom such enquiry is made is also not an accused person. The statement made by such person in that enquiry "is not a statement made by a person accused of any offence".

50.The court therefore held that section 24 of the Indian Evidence Act, 1872 is therefore not applicable to such statements.

51.In K.I.Pavunny versus Assistant Collector (HQ) Central Excise Collectorate , Cochin (1997) 3 SCC 721, the Honourable Supreme Court while holding that such officers are not police officers, at the same time held that confessional statements recorded by such an officers whether under compulsion or voluntary cannot be said to have been obtained by threat, inducement or promise and statements recorded under section 108 of the Customs Act and are admissible in evidence for prosecution under Section 135 of the Customs Act, 1962 and they can be the basis for conviction if they are not obtained under coercion and threat.

52.The Court held that threat emanates from the statute and the officer merely enforces the law.

53.The position of law summarised by the Hon'ble Supreme Court in K.I. Pavunny v. Asstt. Collector (HQ), Central Excise Collectorate, (1997) 3 SCC 721 : 1997 SCC (Cri) 444in para 17 is reproduced below:-

"17.It would thus be clear that the object of the Act empowering Customs Officers to record the evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act so as to initiate proceedings for further action of confiscation of the contraband or imposition of the penalty under the Act etc. By virtue of authority of law, the officer exercising the powers under the Act is an authority within the meaning of Section 24 of the Evidence Act.

a.Though the authority/officer on suspecting a person of having committed

the crime under the Act can record his statement, such a person perforce is not a person accused under the Act.

b. He becomes accused of the offence under the Act only when a complaint is laid by the competent Customs Officer in the Court of competent jurisdiction or Magistrate to take cognizance of the offence and summons are issued. Thereafter, he becomes a person accused of the offence.

c. A statement recorded or given by the person suspected of having committed an offence during the inquiry under Section 108 of the Act or during confiscation proceedings is not a person accused of the offence within the meaning of Section 24 of the Evidence Act.

d. Though the Customs Officer is an authority within the meaning of Section 24 of the Evidence Act, by reason of statutory compulsion of recording the statement or the accused giving voluntary statement pursuant to his appearing either after issuance of summons or after the appellant's surrender, such statement cannot be characterised to have been obtained by threat, inducement or promise.

e. The collection of evidence under Section 108 and other relevant provisions relating to search and seizure are only for the purpose of taking further steps for confiscation of contraband and imposition of penalty.

f. The selfsame evidence is admissible in evidence on the complaint laid by the Customs Officer for prosecution under Section 135 or other relevant statutes."

54. Still further in para 25, the Court held as under:-

"25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and

circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution."

55. Thus, the statements which are recorded under section 108 of the Customs Act, 1962 is intended for setting the law in motion for officers acting under the Act to investigate and collect evidence for issuing show cause notice whether under section 28 of the Customs Act, 1962 or under section 124 of the Customs Act, 1962 or under other provisions of the Customs Act, 1962.

56. Such investigation may result in prosecution before the Magistrates Court in which case, persons may be arrayed as "accused" and the persons whose statements are relied upon may be shown in the list of witnesses.

57. In K. Ipavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, referred to supra, it was held that a conviction also can be based on the statements recorded under Section 108 of the Customs Act, 1962. However, Practice and Prudence require the court to examine the evidence produced by the prosecution to find out whether any other facts and circumstances which corroborate the retracted confessions.

58. Confirmation of demand solely based on statements recorded under Section 108 of the Customs Act, 1962 would require cross-examination by the petitioner.

59. At the same time, if such statements are merely intended for corroboration of independent evidence, the cross-examination need not be allowed.

60. Therefore, it is for the 1st respondent to decide whether the statements recorded are to be solely relied for confirming the proposed demand or are relied for mere corroboration of independent evidence gathered during investigation.

61. In the case of former, mandatorily such statements would require cross-examination and without cross-examination, confirmation of demand would be contrary to the law settled by the Hon'ble Supreme Court in Andaman Timber Industries Vs CCE referred to supra.

62. If reliance is to be placed on any statement of any person as a witness, the 1st respondent is enjoined to issue summons and produce such persons for cross examination, unless of course such person is a co-accomplice of the noticee or an employee of the noticee.

63. Therefore, it is for the 1st respondent to issue summons to these two employees of CHA's for being present for cross examination if the 1st respondent is of the view that reliance has to be placed on the statement of these persons before passing an order in the said show cause proceeding.

64. Therefore, 1st respondent may inform the petitioner whether it proposes to confirm the demand solely based on the statements of the persons whose statements have been recorded under Section 108 of the Customs Act, 1962 and if that be so, produce them for cross examination by the petitioner.

65. As far as the alleged use of threat while recording statements and subsequent retraction is concerned, there are no records before me. Neither the petitioner nor the respondent have filed copies of statements recorded under section 108 of the Customs Act, 1962. The petitioners have also not filed any copy of letter of retraction.

66. Thus, it cannot be said that guidelines of the Honourable Supreme Court in D.K Basu Vs the State of MP referred to supra was violated particularly in the light of absence of any material records/documents to substantiate that threat or coercion was exercised on the petitioners when statements were recorded. As there are no documents to substantiate that the statements recorded were retracted by the petitioners, I am unable to accede to the request of the petitioner.

67.Further, petitioners were not arrested or detained. They were merely summoned under section 108 of the Customs Act, 1962 to record evidence and to produce documents for making enquiry under the Act.

68.If the proprietor of the 1st petitioner or the 2nd petitioner were arrested, there should have been some records to substantiate the same in which case the decision of the Supreme Court in DK Basu versus State Of West Bengal can be applied to the facts of the case.

69.Therefore, I do not find any merits in the request of the petitioner for cross examination of the officers of the 2nd respondent.

70.As indicated above, adjudication proceedings under the Customs Act, 1962 cannot solely be based on the inculpatory statements of witnesses and noticee alone. Such statements can be only used for corroborating the case which the Department proposes to establish before the quasi-judicial authorities.

71.The department is bound to prove the case based on balance of probabilities as per well-recognised principle of law in the case of departmental adjudications.

72.It is therefore made clear that in case primary reliance is to be placed on the statements of the 2 employees of the 2 CHA's for passing adjudication order, the 1st respondent shall issue suitable summons for cross examination by the petitioner before passing such order.

73.In the light of the above discussions, I find no merits in the present writ petition. I therefore, dismiss the above writ petitions with the following observation:-

i.The 1st respondent is directed to complete the adjudication proceedings within a period of 9 months from date of receipt of this order since the dispute pertains to import made by the petitioner between 2010 and 2013;

ii.It is for the 1st respondent to take a call as to whether it proposes to solely rely on the statements recorded under section 108 of the Customs Act, 1962 for confirming the demand in which case, the 1st respondent shall produce such persons for cross examination by the petitioners;

iii.On the other hand, if reliance is placed on independent evidence gathered by the officers of the 2nd respondent, the 1st respondent need not issue

summons to the persons who statements were recorded under section 108 of the Customs Act, 1962.

iv. At the same time, the 1st respondent is not governed by strict rules of evidence. The 1st respondent shall be governed by preponderance of probability and Customs Valuation Rules, 2007 read with Section 14 of the Customs Act, 1962.

v. Needless to state, the petitioners shall be given an opportunity to file their final reply.

vi. Petitioner shall also be entitled to file their written representation/notes after the conclusion of the personal hearing by the 1st respondent.

vii. The 1st respondent may set time limit for completion of adjudication proceedings with the aforesaid period.

74. The above petition stands dismissed with the above observation. Connected Miscellaneous Petition is closed. No cost.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Customs,
Chennai III Commissonerate,
5th floor, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.
2. The Additional Director General,
Directorate of Revenue Intelligence,
No.503, 'A' Main Road, OMBR Layout,
Banaswadi, Bengaluru - 560 043.

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