BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **02.11.2020**

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.(MD)No.2860 of 2019 & W.M.P.(MD) No.2158 of 2019

(Through Video Conference)

M/s.Patwari Clothing Pvt. Ltd.,
(represented by its Director Mr.B.Praveen Kumar),
No.19, 1st Level, D.D.Urs Road,
Mysore -1 ... Petitioner

Vs

1) The Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin 628 004

2) The Assistant Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin 628 004 ... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a **Writ of Certiorari** calling for the records in connection with the impugned letter No.VIII/10/852018-ADJN dated 22/01/2019 issued by the 2nd respondent and quash the same and consequently direct the 1st respondent to permit the petitioner to cross examine witnesses viz. Mr.Pravin R Sakhiya of M/s.Realwax and Mangharam Vasumal of M/s.Star Impex and Mr.C.Mahalingam Broker connection with the Show Cause Notice No.SCN/DRI/BZU/43/2018 dated 17/10/2018 on the file of the 1st respondent.

For Petitioner : Mr.R.Vinoth Bharathi

For Respondents : Mr.R.Aravindan,
Senior Standing counsel

O R D E R

Mr.R.Aravindan, learned senior standing counsel accepts notice on behalf of the respondents. By consent of both parties, the Writ Petition is taken up for final disposal at the admission stage itself.

2. This writ petition has been filed challenging the order dated 22.01.2019 issued by the respondents rejecting the request made by the petitioner to permit the petitioner to cross examine the witnesses namely Mr.Pravin R Sakhiya of M/s.Realwax and Mangharam Vasumal of M/s.Star Impex and Mr.C.Mahalingam Broker

3. A show cause notice, dated 17.10.2018 has been issued by the respondents to the petitioner under Section 124 of the Customs Act r/w Section 28 of the Customs Act. On receipt of the show cause notice, the petitioner made a request to the respondents to cross examine the above mentioned persons under Section 108 of the Customs Act.

4. According to the petitioner, he has not made any confessional statement and the impugned show cause notice has been issued by the respondents based on (a) statements of Importers (b) statement of Exporters (c) Textile Committee report and (d) Statement of Agent. Since he has not made any confessional statement, it is his case that he has the right to cross examine the afore mentioned persons under Section 108 of the Customs Act, 1962. In such circumstances, this writ petition has been filed.

5. Admittedly, no final order has been passed with regard to the payment of the customs duty or penalty by the petitioner, only a show cause notice has been issued by the respondents to the petitioner under Section 128 r/w Section 24 of the Customs Act. On receipt of the said show cause notice, the petitioner has requested the respondents to permit him to cross examine the aforementioned witness. It is his contention that he has not made any confessional statement with regard to his liability and he has categorically disputed his liability as seen from the objections raised by him before the respondents.

6. It is the further contention of the petitioner that the basis for the issuance of the show cause notice by the respondents is based on the statements made by (a) Importers (b) Exporters (c) Textile Committee report and (d) Agents, as per the annexures enclosed along with the show cause notice, dated 17.10.2018 issued by the respondents. Therefore, according to the petitioner under Section 138(B) of the Customs Act, he has a legal right to cross examine the respective witnesses, based on which, the show cause notice dated 17.10.2018 has been issued by the petitioner.

7. This Court is of the considered view that the petitioner has approached this Court prematurely without allowing the respondents to pass final orders. The petitioner has made it clear before the respondents that they intend to cross examine the witnesses, which were referred to by the respondents in the annexures attached to the show cause notice dated 17.10.2018. The respondents have rejected the request of the petitioner, but till date, final order has not been passed. If the respondents have not followed the statutory provisions as mandated under the Customs Act, 1962 by not allowing the petitioner to cross examine the witnesses, the petitioner is always at liberty to challenge the final order as and when passed by the respondents either before this Court or before the Appellate Authority, as the case may be.

8. The learned counsel for the petitioner has referred to Section 138(B) of the Customs Act, 1962 which reads as follows:-

"**138.B.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 interests 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."

9. According to him, since the basis for the show cause notice dated 17.10.2018 are the statements made by Importers, statements of Exporters, Textile Committee report and statement of Agents, and it is not based on any confessional statement made by the petitioner, the petitioner is entitled to cross examine the said witnesses as per the provisions of Section 138(B) of the Customs Act, 1962.

10. Learned counsel for the petitioner also drew the attention of this Court to the following judgments:

(i) ***K.Srinivasulu Vs. Commissioner of Customs Chennai III*** reported in **2017 (345) ELT 477 (Mad);**

(ii) ***Veetrag Enterprises Vs. Commissioner of Customs, Chennai*** reported in **2015(330) ELT 74(Mad);** and

(iii) ***Andaman Timber Industries Vs. C.C.Ex Kolkata II*** reported in **2015 (324) ELT 642 (S.C.)**

11. Referring to the aforesaid judgments, the learned counsel for the petitioner would submit that the petitioner is legally entitled to cross examine the witnesses as per the provisions of Section 138(B) of the Customs Act, 1962. According to him, the impugned order has not considered the provisions of Section 138(B) and is an erroneous order.

12. Per contra, the learned Senior standing counsel for the respondents would submit that, no final order has been passed and only a show cause notice has been issued to the petitioner and the

request made by the petitioner for cross examination of witnesses has only been rejected. According to him, if at all the petitioner has any grievance, for not following the procedure contemplated under the provisions of the Customs Act, 1962 by the respondents, they have got the liberty to challenge the same before the appropriate Appellate Authority in accordance with law. Therefore, according to him, the writ petition is not maintainable.

13. It is also the contention of the learned Senior standing counsel for the respondents that, as seen from paragraph no.16 of the counter affidavit filed by the respondents, it does not warrant permitting the petitioner to cross examine the witnesses, as the entire case is based on documentary evidence.

14. Admittedly, no final order has been passed by the respondents and the respondents have only issued the show cause notice and on receipt of the same, the petitioner has requested the respondents to permit him to cross examine the witnesses mentioned in the annexure to the show cause notice. The said request has been rejected by the respondents under the impugned order. If at all, the respondents have not followed the provisions of Section 138(B) of the Customs Act, 1962 which according to the petitioner enables them to cross examine any of the witnesses, the petitioner is always at liberty to challenge the final orders that may be passed by the respondents in accordance with law. However, in the case on hand, the petitioner has approached this Court prematurely, without allowing the respondents to pass final order after hearing the petitioner pursuant to the show cause notice issued by them on 17.10.2018 under Section 28 of the Customs Act, 1962.

15. The contentions raised by the petitioner in this writ petition will have to be necessarily considered by the respondents in the final orders to be passed by them pursuant to the show cause notice dated 17.10.2018 issued under Section 28 of the Customs Act,1962. If at all, the contentions raised by the petitioner have not been considered in accordance with law, the petitioner is always at liberty to challenge the said findings either before the Statutory Appellate Authority or before this Court, if there is any violation of principles of natural justice committed by the respondents in passing the final orders.

16. As observed earlier, the petitioner has approached this Court prematurely as the respondents have only rejected the request made by the petitioner for cross examination of witnesses on the ground that the entire case is based on documentary evidence and there is no necessity for cross examination of witnesses. If there is any legal right available to the petitioner, as contended by them in this writ petition to cross examine the witnesses, they are always at liberty to raise the same as and when any adverse order is passed against them by the respondents through its final orders pursuant to the show cause notice dated 17.10.2018 issued under Section 28 of the Customs Act, 1962.

17. Therefore, as on date, there is no merit in this writ petition as it has been filed prematurely. Therefore, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected W.M.P.(MD) No.2158 of 2019 stands closed.

18. However, it is made clear that the respondents will have to consider all the objections raised by the petitioner, including the request made by the petitioner for cross examination under the provisions of 138(B) of the Customs Act, 1962 in accordance with law while they pass the final order under Section 28 of the Customs Act, 1962.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To:

1) The Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin 628 004

2) The Assistant Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin 628 004

Order made in
W.P.(MD)No.2860 of 2019
02.11.2020

VB (24.11.2020) 5P 3C