



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

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W.P.[MD]Nos.11379 to 11382 & 13608 to 13614 of 2021

and

W.M.P.[MD]Nos.8903, 8906, 8909, 8911, 8912,
10549 to 10554 & 10556 of 2021

K.Sugumar	... Petitioner in WP[MD]. 11379/ 2021
R.Pachaiyappan	... Petitioner in WP(MD). 11380/ 2021
M.Senthil Kumar	... Petitioner in WP(MD). 11381/ 2021
S.Muthu	... Petitioner in WP(MD). 11382/ 2021
Babu Ibrahimsha	... Petitioner in WP(MD). 13608/ 2021
Taj Mohamed	... Petitioner in WP(MD). 13609/ 2021
Hakkim Jeeyavudeen	... Petitioner in WP(MD). 13610/ 2021
Mohamed Thoubik	... Petitioner in WP(MD). 13611/ 2021
Mohamed Riyaz Jahir Hussain	... Petitioner in WP(MD). 13612/ 2021
Absar Ali Shakul Hameed	... Petitioner in WP(MD). 13613/ 2021
Thamim Seku Abu Pakker	... Petitioner in WP(MD). 13614/ 2021

Vs.

- 1.The Commissioner of Customs,
(Preventive), No.1 Williams Road,
Cantonment, Tiruchirapalli - 620 001.
- 2.The Joint Commissioner of Customs (Preventive),
No.1, Williams Road, Cantonment,
Tiruchirapalli - 620 001.
- 3.The Joint Director,
O/o. The Additional Director General,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
No.27, G.N. Chetty Road,
T.Nagar, Chennai - 600 017.

... Respondents in all WPs

COMMON PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, calling for the records in and connected with order in Original No.TCP-CUS-PRV-JTC-37/2021 dated 22.06.2021 of the second respondent herein, quash the same and direct the said respondent to



conduct adjudication proceedings afresh by affording reasonable opportunity to put forth his case and claims thereof.

For Petitioner	: Mr.B.Satish Sundar
For Respondents	: Mr.B.Vijay Karthikeyan Senior Standing Counsel [In W.P.[MD]Nos.11379 to 11382/21]
For Petitioner	: Mr.A.Ganesh
For Respondents	: Mr.R.Aravindan Senior Standing Counsel [In W.P.[MD]Nos.13608 to 13614/21]

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COMMON ORDER

Since the issue raised in all these writ petitions is one and the same, with the consent of the learned Counsel appearing for both sides, all these writ petitions were heard together and are disposed of by this common order.

2.Since the facts are similar in respect of all these cases, the facts as narrated in W.P.[MD]No.11379 of 2021, is taken into account.

FACTS OF THE CASE:

3.That this petitioner and other petitioners after had been for a short or brief period in foreign countries like Dubai returned to India through air between 05.11.2019 and 07.11.2019. In this context, it is to be noted that based on the input received from Directorate of Revenue Intelligence (DRI), all passengers arriving from Kuala Lumpur, Dubai, Sharjah and Singapore to Trichy through some international flights like Air Asia, Air India Express, Scoot Tiger Airlines on 05.11.2019 have concealed huge quantities of 24 karat gold in the form of crude chain, paste etc. Therefore, the DRI officials at about 22:15 hours on 05.11.2019 at Trichy airport, claimed to have monitored the passengers who arrived or started arriving from the aforesaid flights and when the passengers, according to the respondent / Customs, were about to exit the green channel, their passports were verified and some of the passengers were enquired. According to the Customs, the passengers were enquired / verified whether they were in possession of any gold or any other contraband and if so, whether they have declared so on their arrival before the Customs. However, the passengers in the presence of the DRI officials stated that, they have not made any declarations and they have voluntarily accepted having brought gold in small quantities varying from 50 gms to 500 gms.

4.The fact remains that, according to the petitioners, they arrived in various flights either on 05.11.2019 or 06.11.2019 or in the early hours on 07.11.2019. After completion of the immigration formalities, when the petitioners were waiting in a queue to cross the



Door Frame Metal Detector [DFMD] kept after the immigration counters to enter into the arrival halls, the officials of the third respondent ie., DRI were examining the baggages of the passengers who arrived from various destinations and the passengers who arrived from Singapore as well as from Dubai were part of the queue.

5.The checking of hand baggages and travel bags were undertaken before the DFMD itself and the third respondent did not provide any Customs declaration form nor made any attempt to note down any oral declaration. Though these petitioners had brought some gold or gold ornaments, which according to the petitioners, they brought it after purchasing the same in the countries where they travelled, and when they were about to declare the same, even before entering into the Customs counter ie., before the Door Frame Metal Detector [DFMD], since they were intercepted by the DRI officials, there was no chance for these petitioners to declare so.

6.Thereafter, according to the petitioners, they have been taken by the DRI officials and they made a personal check and whatever the ornaments or gold or any other electronic items brought by each of these petitioners were considered to be the goods brought by these petitioners with an intention of taking them out from the Customs barrier without having declared the same for the purpose of paying the Customs duty.

7.Resultantly, these passengers ie., the passengers who arrived at the first flight in the late hours of 05.11.2019 had been gathered along with passengers subsequently arrived by various other flights on 06.11.2019 as well as on 07.11.2019 and accordingly, the Customs claimed to have drawn a mahazar, under which, whatever the goods which were brought by these petitioners seem to have been seized.

8.In this regard, it is the stand of the petitioners that they never intended to cross the Customs barrier at the airport through green channel as averred by the respondent / Customs and they in fact, intended to declare the same, since before they crossed the DFMD they were intercepted, the chance was not given to them to make the declaration. Moreover, whatever goods brought by them seized by the Customs were not based on any procedure to be adopted in this regard by drawal of mahazar with independent witnesses, after examining the passengers in front of the Magistrate and in violation of these procedures, according to the petitioners, since such a seizure exercise was completed by the Customs on the alleged single mahazar, despite the fact that this episode continued for more than 26 hours, starting from late hours of 05.11.2019 and ending at early hours on 07.11.2019, neither at the time of this seizure procedure taken place nor thereafter, the chance of retracting the alleged statements recorded by the Customs against the petitioners were given and ultimately, when show cause notices were issued, that was the first time these petitioners had an occasion to retract the same and therefore, every one of the petitioners had made a strong objection to the allegation of alleged offence under Section 102 of

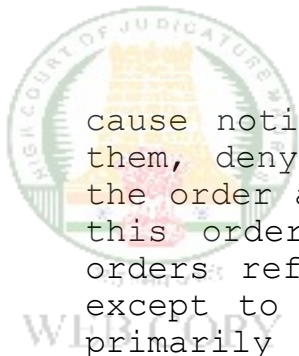


9. Not satisfied with the said reply to the show cause notice given by these petitioners, the respondent / Customs proceeded to conduct the adjudication proceedings, wherein, according to the petitioners, no proper procedure in tune with the principles of natural justice was adopted by the respondents and in this regard, though specific request was made by them to give a chance of cross examination of the mahazar witnesses as well as the DRI officials, who alone were involved in the entire episode and no Customs officials were involved in that, such a chance of cross examination was denied to the petitioners.

10. As an offshoot, it is the further case of the petitioners that, at least two passengers out of the total 129 had already approached this Court and filed writ petitions in W.P.[MD]Nos.3917 & 3918 of 2020, with a prayer to permit them to re-export the seized goods and when that issue was pending before this Court, and subsequently, when the same was decided, by order of the learned Judge of this Court dated 28.04.2021, though a strong view has been taken by the Writ Court as against the way in which the Customs acted upon by denying the opportunity, stay was granted in the writ petitions, and in order to prove their innocence as the CCTV footage, on the airport though was *suo motu* sought for by the writ Court in that writ petition, the same was not produced because the airport authority of India, which was the custodian of such recording of CCTV footage, had expressed its inability to produce the same, as it had been erased within a shortest period. Therefore, the learned Judge who passed the order as referred to above dated 28.04.2021, had observed that, the very fundamental right of the noticees to fair adjudication had been violated and adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt. Therefore, the learned Judge ordered the writ petitions giving direction to the Customs to consider the request of those two writ petitioners for re-exporting the goods seized from them.

11. Though this order was passed on 28.04.2021 at the time of issuance of show cause notice dated 29.06.2020, against these petitioners, the pendency of the said writ petitions was very well available and before conclusion of the adjudication proceedings in respect of these petitions, the order of the writ Court dated 28.04.2021 also was made available to the Customs. However, according to the petitioners, the Customs proceeded to complete the adjudication proceedings and by two separate orders dated 02.06.2021 & 22.06.2021, the adjudication proceedings concluded and order of confiscation and consequential effect has been ordered.

12. Therefore, according to the petitioners, despite the order of the Writ Court dated 28.04.2021, was in force, where it has been specifically held by the learned Judge that, the adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt and also despite the request having been made by the petitioners, of course, while making reply to the show



cause notice that, chance of cross examination has to be given to them, denying that chance of cross examination and in violation of the order already passed in this regard, as referred to above, since this order of adjudication has been passed through the impugned orders referred to above, the petitioners having no other option except to prefer writ petitions before this Court as these orders primarily is assailable, according to them, on the ground of violation of principles of natural justice. Therefore, the appeal remedy provided under the Statute to them cannot be availed at this juncture. This is how these writ petitions have been filed with the respective prayers.

ARGUMENTS ON THE PETITIONER SIDE:

13. Heard Mr.B.Satish Sundar and Mr.A.Ganesh, learned Counsels appearing for the petitioners.

14. Leading the arguments, Mr.Satish Sundar, learned Counsel appearing for some of the petitioners has broadly made the following submissions:

a) At the time of making this adjudication and passing the order after adjudication, the findings given by the Writ Court in W.P.[MD]Nos.3917 & 3918 of 2020 has been in force. Therefore, in view of the categorical finding given by the Writ Court that, adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt, the respondents ought not to have proceeded with the adjudication.

b) Though subsequently, the order dated 28.04.2021 of the Writ Court was appealed by the Customs, where an interim order of stay was granted by the Division Bench of this Court by order dated 30.06.2021, that would not justify the action on the part of the Customs to complete the adjudication process well before the interim order of stay granted by the Division Bench.

c) Since the principles of natural justice is the fundamental facet of every adjudication process, quasi-judicial proceedings, in violation of such fundamental principle, if any adjudication or proceedings is concluded, which goes against any person who sought for such procedure of following the principles of natural justice which have not been followed or denied, on that ground itself, such kind of proceedings concluded in any form would get vitiated.

d) In the case in hand, though specifically, the chance of cross examination was sought for by the petitioners, the same was denied without any plausible reason. Hence, on that ground itself, if any conclusion arrived at by the respondents through the impugned order of adjudication, the same cannot be fortified by any principles of law and therefore, the impugned orders are vitiated.

e) If at all the respondents could not examine the mahazar witnesses, for whatever reason, the contents in the mahazar which is



the basis for the very adjudication could not have been relied upon by the respondents, but in the case in hand, since they mainly relied upon the mahazar for seizure followed by the alleged statement made under Section 108 of the Act, it cannot be the basis for arriving at a conclusion that the petitioners were guilty.

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15. Apart from the abovesaid main grounds, the learned Counsel for the petitioner also canvassed the following points as ancillary submissions:

a) Since the passengers numbering about 129 who are involved in this case had arrived in three consecutive days from various destinations through various flights, all these passengers cannot be put under one basket by drawal of one seizure mahazar. Therefore, based on such one seizure mahazar, the case of the Customs cannot be built towards adjudication.

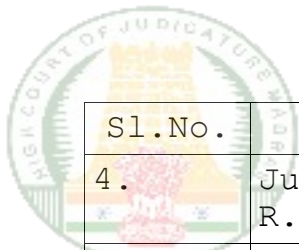
b) Since the two mahazar witnesses are the only independent witnesses for the whole episode, their deposition before the adjudicating authority is the crucial one, as by which alone the statement said to have been recorded or the averments made in the seizure mahazar can be corroborated. Therefore, the failure to produce the mahazar witnesses for examination and consequently, the cross examination is fatal to the case.

c) Under Section 102(4) of the Act, before making the search, the officer of Customs shall call upon two or more persons to attend and witness the search and to issue order in writing to them or any of them so to do and the search shall be made in the presence of such persons and the list of the goods seized during the course of search shall be prepared by such officer or other persons and signed by such witnesses. Insofar as this provision is concerned, whether the ingredients which have been stated in sub-section 4 of Section 102 have been scrupulously followed in this case itself is a question and therefore, on that ground itself, the very search and seizure made by the Customs department against the petitioners is bad in law.

16. By making these broad submissions and grounds of attack assailing the impugned order, learned Counsel for the petitioners have relied upon number of decisions in support of the case of the petitioners.

The following cases were cited by the petitioners' side:

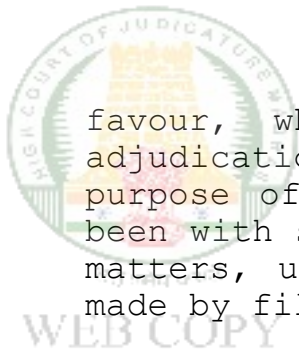
Sl.No.	Judgments
1.	Judgment of Hon'ble Supreme Court in Ambalal Vs. Union of India - (1961) 1 SCR 933
2.	Judgment of Hon'ble Supreme Court in State of Kerala Vs. K.T.Shaduli Grocery Dealer - (1977) 2 SCC 777
3.	Judgment of Hon'ble Supreme Court in Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI CINOD Secretariat, Madras - (1992) 3 SCC 1.



Sl.No.	Judgments
4.	Judgment of Hon'ble Supreme Court in BPL Ltd. Vs. R.Sudhakar and Others - (2004) 7 SCC 219
5.	Judgment of Hon'ble Madras High Court in Union of India Vs. A.S.A. Kabir - (2011) ELT 497
6.	Judgment of Hon'ble Madras High Court in Indian Bank Vs. M/s.Palpap Ichinichi Software International Ltd. in W.P.Nos.4696 and 12854 of 2012
7.	Judgment of Hon'ble Supreme Court in Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and others - (2013) 4 SCC 465
8.	Judgment in Basudev Garg Vs. Commissioner of Customs - 2017 (48) STR (Del.)
9.	Judgment of Hon'ble Supreme Court in State of Madhya Pradesh & Ors. Vs. Sanjay Nagayach & Ors. - (2013) 7 SCC 25
10.	Judgment of Hon'ble Supreme Court in Andaman Timber Industries Vs. Commissioner of Central Excise (2016) 15 SCC 785.
11.	Judgment of Hon'ble Madras High Court in Sbin Logistics Rep. by its Director Vs. Commissioner of Customs - 2018 SCC online Mad 4840: (2018) 362 ELT 226
12.	Judgment of Hon'ble Supreme Court in Maharashtra Chess Association Vs. Union of India and others - (2020) 13 SCC 285.

17.By citing these decisions, the learned Counsel for petitioners would contend that, since the principle of natural justice is an integral part of fair adjudication in any such proceedings like the present one, that principle should have been scrupulously followed by the adjudicating authority. If the adjudicating authority has decided the issue mainly relying upon the seizure mahazar as well as the alleged statement recorded under Section 108 of the Customs Act, fair chance of retracting the same and to establish the counter case on the part of the petitioners should have been given, by allowing them to cross examine both the mahazar witnesses as well as the officials or officer concerned, who prepared the mahazar as well as recording of the statements. In the absence of such a chance being given to the petitioners, the entire adjudication proceedings which culminated in the order impugned gets vitiated.

18.They would also submit that, very particularly, the present cases are concerned, it is one episode according to the Customs department. Therefore, one single seizure mahazar was prepared for the whole 129 passengers who arrived at consecutively in three days from various destinations by various flights. Two out of the 129 passengers, well before the commencement of the adjudication proceedings, approached this Court and got a findings in their



favour, where, this Court has categorically stated that, the adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt, hence the Customs should have been with self-restraint in proceeding further in these adjudication matters, unless they erase such finding, which attempt though they made by filing intra-court appeal only subsequently.

19. On the date of adjudication and passing of impugned orders, the findings given by the Writ Court as referred to above were very well available and even in the show cause notice issued by the respondent, they have mentioned that, this show cause notice is subject to the outcome of the decision to be made in pending Writ Petition Nos.3917 & 3918 of 2020. The proprietary requires that the respondent should have waited for some time to see the verdict to come from the Writ Court in the said two writ petitions. However, knowing well that, a verdict has come on 28.04.2021, where such a finding has been given, they ought not to have proceeded in concluding the adjudication proceedings against others and therefore, the whole proceedings which ended in the impugned order are made in contra or in violation of the findings given by the Writ Court. Therefore, on that ground itself, the impugned orders are liable to be interfered with.

20. Making these submissions mainly, learned Counsel appearing for the petitioners seek indulgence of this Court to set aside the orders impugned and to remand the matter back to the respondents for reconsideration, where, after giving fair opportunity, including the opportunity of cross examination, the adjudication proceedings can go on afresh and finality can be reached by the respondents, they contended.

ARGUMENTS ON THE RESPONDENTS SIDE:

21. Mr. B. Vijay Karthikeyan and Mr. R. Aravindan, learned Standing Counsel appearing for the respondent / Customs have made their elaborate submissions defending the order impugned in these cases. Broadly, they made the following submissions:

a) Though some findings were given by the Writ Court in W.P. [MD]Nos.3917 & 3918 of 2020 dated 28.04.2021, the said writ order was under challenge in Writ Appeals ie., W.A.[MD]Nos.1248 & 1249 of 2021, where a Division Bench of this Court, having considered the findings given by the Writ Court, has stayed the order, by order dated 30.06.2021. Therefore, the said order passed by the Writ Court dated 28.04.2021, is no more available to press into service against the impugned orders.

b) No doubt, the principle of natural justice is one of the important facet of any quasi-judicial or adjudication proceedings, but there is no hard and fast rule that, the chance of cross examination of witnesses, have to be given invariably in every case and if such a chance is not given, therefore, it cannot be construed as a violation of such principle.

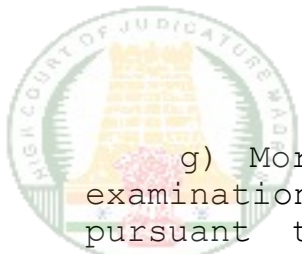


c) Though the episode was started from 05.11.2019 midnight and ended on the early hours on 07.11.2019, since there has been some interconnectivity among these petitioners or the whole passengers who were involved in the activities of bringing various metals like gold and silver and other costly electronic items to this country had a common object to clear the goods by moving through green channel, without even disclosing what they have brought and this kind of specific revenue intelligence report since was obtained by the DRI, the surveillance was mounted on the particular day at Trichy airport and since the passengers were arriving in atleast four flights originating from various destinations, more number of DRI officials were required. Therefore, more than 24 officers were gathered and this operation of search was conducted. During the search, the procedure as contemplated under Section 102(4) of the Act has been scrupulously followed and after giving a chance to every passenger of the whole 129, that whether they can be searched in front of the gazetted officer or to be taken to a nearest Magistrate, after getting their consent, search was completed and it was found that each of the 129 passengers brought gold, silver and other electronic items. With that, since they made an attempt to cross the green channel, they were intercepted and the said search was completed and the goods they brought were seized through mahazar with two independent mahazar witnesses.

d) As this operation was continuously going on for more than 26 hours, with great difficulty, the DRI officials followed the procedure in completing the search and inspection of each of the passengers out of total 129 by following the procedure strictly.

e) It is not the case as projected by the petitioners that, they before crossing the DFMD had been intercepted by the DRI officials and therefore, they had no chance to declare those goods they brought. Since they had no such intention, they in fact, has not come nearer to the Customs counter and they straightaway proceeded to cross the Customs barrier by choosing the green channel. Having waited till such time, then only the DRI officials proceeded and accordingly, they conducted search.

f) Insofar as the point raised by the petitioners that, the chance of cross examination had not been given to them, each and every 129 passengers had given statements under Section 108 and that has never been retracted. Only at the time of giving the reply to the show cause notice, that too through their lawyer, they have stated that, as if they retracted the statement recorded against them under Section 108 of the Act. When that being so, if the very 108 statement itself has not been retracted, there are judgments to state that, such kind of statement or confession voluntarily given by the noticee need not be corroborated by any external evidence and for that purpose the mahazar witness or any other witness need not be examined. Therefore, giving the chance of cross examination to these petitioners does not arise.



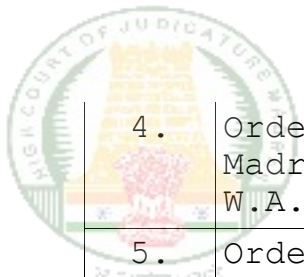
g) Moreover, assuming that they sought for a chance of cross examination first time in the reply to the show cause notice, pursuant to which, the officer who conducted the adjudication proceedings not acceded to that request made by the petitioner and accordingly, he proceeded to complete the adjudication proceedings, at that moment, the very denial of the officer concerned could have been treated as an order passed by the adjudicating authority and that order itself is an appealable order under Section 128 of the Customs Act. When the petitioners had not chosen to challenge such denial of cross examination chance as alleged, it deems that they accepted the adjudication proceedings without even acceding to their request of cross examination as that is unwarranted in the present case, in view of the categorical confession statement recorded under Section 108 of the Act readily available with the adjudication authority.

h) It is also a settled principle that, when there is an alternative efficacious appellate remedy available, without exhausting the same, the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked. Therefore, since the petitioners admittedly having not exhausted the appeal remedy, since have challenged the adjudication order, on that ground even the writ petitions can be rejected, relegating the petitioners to approach the appellate authority.

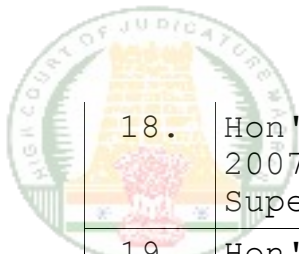
i) Insofar as the drawal of single mahazar is concerned, since there is no express prohibition available in any of the provisions of the Customs Act that, such single mahazar cannot be drawn, there is absolutely no impediment for the Customs to draw a single mahazar, that too in the given circumstances where, the entire episode taken place had been explained by the Customs.

22.By making these broad submissions, the learned Standing Counsel appearing for the Customs Department relied upon the following decisions:

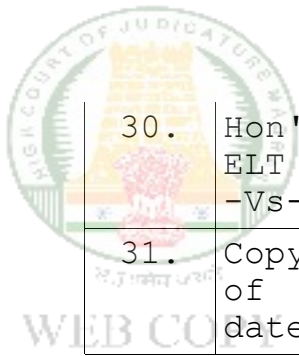
S.No.	Citations
1.	Order passed by the Hon'ble Division Bench of Madras High Court, Madurai Bench in W.A(MD) No.707 of 2010, dated 25.11.2010.
2.	Order passed by the Hon'ble Division Bench of High Court of Kerala in R.C.No.1/2010, dated 03.07.2014.
3.	Order passed by the Hon'ble Division Bench of Madras High Court in C.M.A.No.1631 of 2008, dated 23.08.2016.



4.	Order passed by the Hon'ble Division Bench of Madras High Court, Madurai Bench in W.A.Nos.821 & 822 of 2016, dated 31.01.2017.
5.	Order passed by the Hon'ble Division Bench of Madras High Court in W.P.Sr.No.71173 of 2017, dated 22.09.2017
6.	Order passed by the Hon'ble Division Bench of Madras High Court in W.A.No.640 of 2021, dated 25.02.2021.
7.	Order passed by the Hon'ble Division Bench of Madras High Court in W.A.No.1763 of 2021, dated 17.08.2021
8.	Order passed by the Hon'ble Division Bench of Madras High Court in W.P.No.5233 of 2016, dated 19.05.2020
9.	Hon'ble Madhya Baharat High Court, Indore Bench reported in 1957 AIR (MB) 159 in Radhabai -Vs- Kadar Ali.
10.	Hon'ble Supreme Court Judgment reported in 2011 (5) SCC 532 in Booz Allen and Hamilton Inc -Vs- SBI Home Finance Ltd & others.
11.	Hon'ble Supreme Court Judgment reported in 2015 (1) SCC 347 in State of Uttar Pradesh -Vs- Arvind Kumar Srivastava.
12.	Hon'ble Supreme Court Judgment reported in 2020 (1) Supreme 707 in Chairman/Managing Director, U.P.Power Corporation -Vs- Ram Gopal.
13.	Hon'ble Supreme Court Judgment reported in 2021 (4) SCC 1 in Tofan Singh -Vs- State of Tamil Nadu.
14.	Hon'ble Supreme Court Judgment reported in 1963 AIR (SC) 822 - RadhaKishan -Vs- State of U.P
15.	Hon'ble Supreme Court Judgment reported in 1970 AIR (SC) 1065 - Illias -Vs- The Collector of Customs Madras.
16.	Hon'ble High Court of Kerala at Eranakulam reported in 1989 (1) MLJ (Cri) 381 - Thaomas -Vs- Union of India.
17.	Hon'ble Supreme Court Judgment reported in 2016 (11) SCC 368 in SekharSumanVerma -Vs- The Superintendent of N.C.B & another.



18.	Hon'ble Supreme Court Judgment reported in 2007 (6) SC 410 in Ravindran @ John -Vs- The Superintendent of Customs.
19.	Hon'ble High Court of Bombay reported in 1979 Supreme (Bora) 232 in MahfooskhanMehboob Sheikh -Vs- R.J.Parakn another
20.	Hon'ble High Court of Madras reported in 1999 (113) E.L.T 801 (Mad.) in Abdul Wahib -Vs- Assistant Commissioner of Customs (Prosecutor) Madras.
21.	Hon'ble High Court of Bombay reported in 1991 (53) E.L.T 178 (Bom.) in Assistant Collector of Customs -Vs-KunhiKorathBalan.
22.	Hon'ble Supreme Court Judgment reported in 1983 (13) E.L.T 1620 (S.C.) in State of Maharashtra -Vs-NatwarlalDamodardasSoni
23.	Hon'ble Division Bench of Kerala High Court reported in 2006 (2) KLT 293 in V.J.Joseph -Vs-The Intelligence Officer.
24.	Hon'ble Division Bench of Patna High Court reported in 2002 (147) E.L.T. 47 (Pat)
25.	Judgment in C.M.A.No.2040 of 2007 - The Commissioner of Customs (AIR) Chennai -Vs- SamynathanMurugasan reported in 2009 (247) E.L.T. 21 (Mad).
26.	Hon'ble Supreme Court Judgment in Special Leave Appeal (Civil) No.22072 of 2009- SamynathanMurugasan -Vs- The Commissioner of Customs (AIR) Chennai, reported in 2010 (254) E.L.T. A15 (S.C)
27.	Judgment in C.M.A.No.922 of 2009-The Commissioner of Customs AIR Customs House, Chennai -Vs- Shri Abdul Azeez reported in 2018-TIOL-2000-HC-MAD-CUS.
28.	Hon'ble Supreme Court reported in 2003 (155) ELT 423 (SC) in Om prakash Bhatia -Vs- The Commissioner of Customs, Delhi.
29.	Hon'ble Supreme Court reported in 1998 (104) ELT 306 (SC) in GargWoollen Mills Private Limited -Vs- The Additional Collector of Customs, New Delhi.



30.	Hon'ble Supreme Court reported in 1983 (13) ELT 1527 (SC) in BalakrishnaChhaganlalSonai -Vs- State of West Bengal.
31.	Copy of Stay Order in C.M.P(MD)Nos.5264 & 5265 of 2021 in W.A(MD)Nos.1248 & 1249 of 2021, dated 30.06.2021.

23.By relying upon these judgments, learned Standing Counsel for the respondent Customs would therefore contend that, the non-giving of chance of cross examination of the witnesses in this case to the petitioners cannot make the orders impugned vitiated. They would submit that, if there are enough evidences to prove the case of the Customs against the noticees ie., the petitioners and others, no further corroborative evidence since is required, the question of examining any further witnesses including the mahazar witnesses or officials does not arise as a consequence the chance of cross examination also does not arise.

24.Insofar the order of the Writ Court dated 26.04.2021 made in W.P.[MD]Nos.3917 & 3918 of 2020 is concerned, in paragraph 15 of the said judgment, the learned Judge also had expressed his view that the petitioners in that case are not innocents. The said finding also would squarely apply to all such noticees including these petitioners. Therefore, merely because of the non-production of the CCTV footage for which the custodian is Airport Authority of India with whom the Customs Department does not have any agreement or the Customs Department cannot be a custodian of the CCTV footage of the Airport Authority of India, it cannot be construed that the entire adjudication proceedings cannot be allowed to continue and that is the reason why while interjecting the order of the writ Court, the Division Bench has categorically stated that, the finding given by the learned Judge is unwarranted and therefore, the order has been stayed. Therefore, learned Standing Counsel would contend that, the plea raised by the petitioners that chance of cross examination was not given and the writ Court order, dated 26.04.2021 was in force and therefore these two reasons were mainly projected by the petitioners in favour of them to assail the impugned order, according to the respondents counsel, would not be of much use to them and therefore, on that ground they cannot interject the impugned orders successfully. Hence, the learned Standing Counsel would contend that, the impugned orders are very well sustained and if at all still the petitioners feel that they have any grievance over the impugned order, they can very well prefer appeal before the Appellate authority and without preferring any appeal they cannot, on these two grounds, or any other grounds urge before this Court to set aside the order and to remand the matter back to the adjudicating authority for re-adjudication. Hence, the learned Standing Counsel seek indulgence of this Court to dismiss these writ petitions.



DISCUSSION:

25. Though these adjudication orders are under challenge in this batch of cases, learned Counsel appearing for the petitioners have made it clear that they knew that as against the impugned orders, they have the appeal remedy. If at all the decision taken by the adjudicating authority which culminated in the impugned order is to be questioned, no doubt, these petitioners have to file an appeal. However, in these cases, what they say is, they are not questioning the decision alone but they mainly question the decision making process, ie., fairness in adjudication. While questioning the decision making process to ensure the fairness in adjudication, the principle of natural justice always involves and therefore, in this case according to them, the said principle of natural justice since has been violated, by not permitting the petitioners to cross examine the witnesses who made the evidences of course, being part of the proceedings initiated as recorded by the Customs, that itself makes the whole adjudication process a flawed one. Therefore, on that ground only, mainly they challenge the impugned orders and that is the reason why utmost they seek the prayers of remitting the matter back to the adjudicating authority by affording the opportunity of cross examination.

26. With this caveat, if we look at the case in hand, first it starts from the seizure mahazar dated 05.11.2019. According to the seizure mahazar, based on the specific information or input received from the Intelligence, the DRI officials were alerted that passengers arriving from Kuala Lumpur, Dubai, Sharjah and Singapore to Trichy through at least four air crafts on 05.11.2019 have concealed huge quantities of 24 karat gold in the form of crude chain, paste etc, and in this regard the officers on arrival at the airport at 22:15 hours on 05.11.2019, waited at the Customs arrival hall and the passengers arriving from the aforesaid flights were about to exit the green channel were verified with their passport and certain passengers were enquired, who on enquiry, detailed in the annexure to the mahazar, were asked the question whether they were in possession of any gold or any other contraband and whether they have declared them on their arrival to the Customs. It was answered, that too in the presence of the mahazar witnesses, stating that, they have not made any declaration and have voluntarily admitted of having brought gold in crude form in small quantities varying from 50 gms to 500 gms. With this background, the respondent / Customs ie., DRI officials started proceeding with the process of search and seizure.

27. In the mahazar, two individuals stood as independent witnesses. Only in the presence of the two mahazar witnesses, the entire search and seizure, according to the customs, was conducted. The Mahazar was drawn by an Intelligence Officer of DRI, Madurai Regional unit and the seizure was effected by another intelligence officer of DRI, Madurai Regional unit, in the presence of some of the DRI officials numbering more than 20.

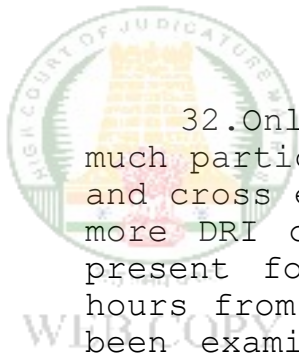


28. In the show cause notice dated 29.06.2020, it is recorded by the Customs that all these passengers were given the option to be searched before a Magistrate or gazetted officer and the passengers chose to be searched in the presence of the Senior Intelligence Officer of the DRI who is a gazetted officer. Accordingly, all the passengers were systematically searched. It is further stated in the show cause notice that, in the presence of the two independent witnesses, ie., two mahazar witnesses, the officers examined the hand baggages and checked the baggage of the passengers and from certain passengers, they were found to have brought white metal that appear to be silver, electronic items and cigarettes in commercial quantities.

29. In the show cause notice, it has further been stated that, certain packets covered by polythene cover spread in between immigration exit area and the hand baggages scanning area of the airport and the said packets were opened and found to contain yellow metal in crude form / cut bars which appeared to be gold. It further states that, they also found abandoned certain cartons which were opened in the presence of the said two independent witnesses and found to contain electronic goods and cigarettes.

30. Thereafter, the show cause notice further proceeded to say that, the gold or golden like metal seized were weighed by the approved assessors in the presence of the two independent witnesses ie., the Mahazar witnesses. Thereafter, the officers kept the seized gold flight wise in four separate metal boxes marked as Box Nos.1 to 4 and abandoned gold in another box marked as Box No.5. It further proceeds to say that, the said two independent witnesses and passengers of the relevant flights signed on the metal boxes containing gold.

31. These aspects has been stated both in the seizure mahazar as well as in the show cause notice which clearly demonstrates that, the entire search and seizure operation has taken place only in the presence of two mahazar witnesses whom they call at one place as independent witnesses. Except these two mahazar witnesses, no other witnesses except the presence of the DRI officials as mentioned in the mahazar were present. Only in that context, it is the definite case on the part of the petitioners that unless and until the two independent witnesses, in whose presence it was claimed by the Customs that every action was taken ie., search as well seizure, are brought before the adjudicating authorities to depose, in order to corroborate what has been stated in the seizure mahazar which was the only document available for the Customs prior to obtaining alleged confession statement made under Section 108(3) of the Customs Act, it cannot be concluded that the episode as claimed by the Customs Department was actually taken place.



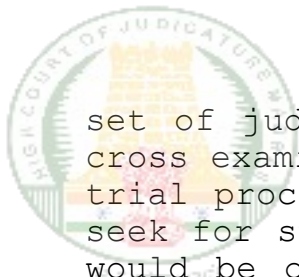
32.Only in this context, the petitioners were definite and very much particular that, these independent witnesses should be examined and cross examined. Also it is the case of the petitioners that, 20 more DRI officials or officers who were present or claimed to be present for the whole episode which took place for more than 26 hours from 05.11.2019 to 07.11.2019, either few of them should have been examined so that the statement made in the seizure mahazar could be corroborated or at least the concerned official or intelligence officer of DRI Madurai Regional Unit who was responsible for drawal of the mahazar and who was responsible for the seizure must have been examined.

33.The reason for such a demand made by the petitioners is that, except the two mahazar witnesses, and the intelligence officer who claimed to have drawn the mahazar and another intelligence officer who effected the seizure, no other persons were involved except the DRI officials who claimed to have been present. At least these four persons should be examined so that the theory projected by the Customs side as has been stated in the mahazar as well as the show cause notice can be corroborated.

34.When this plea was taken by the petitioner side that, those four persons at least should have been examined and in turn the cross examination chance should have been given to the petitioners and in the absence of the same, the entire proceedings is vitiated, on the respondent side, it was defended by stating that, if there is no confession statement recorded from each of the noticee under Section 108(3) of the Customs Act, it may be accepted that the averment contained in the seizure mahazar should be corroborated by examining the said four persons namely, two independent mahazar witnesses and two officers who claimed to have been incharge of drawal of mahazar and seizure of the goods.

35.However, the fact remains that, according to the Customs, every noticee subsequently had been given summon except few under Section 108 of the Act and on such summon they did appear before the respondent Customs and had given a voluntary confession statement within the meaning of sub-section 3 of Section 108. When such a confession statement in black and white given by these noticees are available, which has never been retracted except at the time of reply given to the show cause notice that too through their Counsel, no such external aid by way of examining those four persons in order to corroborate the contends made by the noticees are required.

36.Only to resolve this controversy, judgments were cited by both sides. I have gone through those judgments specifically cited among the list of cases mentioned above by both sides, where there are views expressed for and against that principle. In one set of judgments, the view taken by the law Courts is that, not acceding to the request of the noticees to cross examine the witnesses would not be a bar to the proceedings like adjudication. However, in another

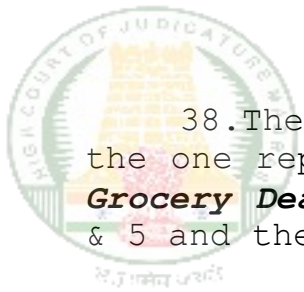


set of judgments, the view taken by the law Courts is that, since cross examination is one of the integral part of the adjudication or trial process wherein such chance shall be given to the person who seek for such cross examination and if such a chance is denied that would be one of the ground to treat the proceedings as a vitiated one.

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37. In order to delve into this issue in further detail, some of the noted judgments cited by the learned Counsel on either side can be gone into. In this context, learned Counsel appearing for the petitioners, among various judgments they cited before this Court, are very particular about the few of them. The first judgment in this context, relied upon by the learned Counsel for the petitioners is one of the earlier decision of the Hon'ble Supreme Court reported in **AIR 1961 SC 264** in the matter of **Ambalal Vs. Union of India and others**, where the learned Counsel relied upon the following:

"6. This Court has held that a customs officer is not a judicial tribunal and that a proceeding before him is not a prosecution. But it cannot be denied that the relevant provisions of the Sea Customs Act and the Land Customs Act are penal in character. The appropriate customs authority is empowered to make an inquiry in respect of an offence alleged to have been committed by a person under the said Acts, summon and examine witnesses, decide whether an offence is committed, make an order of confiscation of the goods in respect of which the offence is committed and impose penalty on the person concerned ; see Sections 168 and 171-A of the Sea Customs Act and Sections 5 and 7 of the Land Customs Act. To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except insofar as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply. If so, the burden of proof is on the customs authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence. In the present case no such evidence is forthcoming; indeed there is no tittle of evidence to prove the case of the customs authorities. But it is said that the onus shifted to the appellant for three reasons, namely, (i) by reason of the provisions of Section 178-A of the Sea Customs Act; (ii) by reason of Section 5 of the Land Customs Act; and (iii) by reason of Section 106 of the Evidence Act."



38. The next judgment heavily relied by the petitioner side is the one reported in **1977 2 SCC 777 [State of Kerala Vs. K.T. Shaduli Grocery Dealer]**, where the learned Counsel relied upon paragraphs 4 & 5 and the same reads as follows:

"4. Now, in the present case, we are not concerned with a situation where the rule of audi alterem partem has to be read into the statutory provision empowering the taxing authorities to assess the tax. Section 17, sub-section (3), under which the assessment to sales tax has been made on the assessee provides as follows:

"If no return is submitted by the dealer under subsection (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as it may consider necessary and after taking into account all relevant materials gathered by it, assess the dealer to the best of its judgment: Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard and, where a return has been submitted, to prove the correctness or completeness of such return."

It is clear on a plain natural construction of the language of this provision that it empowers the Sales Tax Officer to make a best judgment assessment only where one of two conditions is satisfied: either no return is submitted by the assessee or the return submitted by him appears to the Sales Tax Officer to be incorrect or incomplete. It is only on the existence of one of these two conditions that the Sales Tax Officer gets the jurisdiction to make a best judgment assessment. The fulfilment of one of these two pre-requisites is, therefore, a condition precedent to the assumption of jurisdiction by the Sales Tax Officer to make assessment to the best of his judgment. Now, where no return has been submitted by the assessee, one of the two conditions necessary for the applicability of section 17, subsection (3) being satisfied, the Sales Tax Officer can, after making such inquiry as he may consider necessary and after taking into account all relevant materials gathered by him, proceed to make the best judgment assessment and in such a case, he would be bound under the proviso to give a reasonable opportunity of being heard to the assessee. But in the other case, where a



return has been submitted by the assessee, the Sales Tax Officer would first have to satisfy himself that the return is incorrect or incomplete before he can proceed to make the best judgment assessment. The decision making process in such a case would really be in two stages, though the inquiry may be continuous and uninterrupted: the first stage would be the reaching of satisfaction by the Sales Tax Officer that the return is incorrect or incomplete and the second stage would be the making of the best judgment assessment. The first part of the proviso which requires that before taking action under sub-section (3) of section 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not only at the second stage but also at the first stage of the inquiry, because the best judgment assessment, which is the action under section 17, sub-section (3), follows upon the inquiry and the "reasonable opportunity of being heard" must extend to the whole of the inquiry, including both stages. The requirement of the first part of the proviso that the assessee should be given a "reasonable opportunity of being heard" before making best judgment assessment merely embodies the audi alterem partem rule and what is the content of this opportunity would depend, as pointed out above, to a great extent on the facts and circumstances of each case. The question debated before us was whether this opportunity of being heard granted under the first part of the proviso included an opportunity to cross-examine Haji Usmankutty and other wholesale dealers on the basis of whose books of accounts the Sales Tax Officer disbelieved the account of the assessee and came to the finding that the return submitted by the assessee were incorrect and incomplete. But it is not necessary for the purpose of the present appeals to decide this question since we find that in any event the assessee was entitled to this opportunity under the 'second part of the proviso.

5. The second part of the proviso lays down that where a return has been submitted, the assessee should be given a reasonable opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the enquiry before the Sales Tax Officer comes to the conclusion that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is



the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness, or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the book's of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Hazi Usmankutty and other wholesale dealers for cross-examination, but



his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted in- fraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee."

39.The next judgment relied by the petitioner side is **2011 SCC online Madras 2634; 2011 272 ELT 497 [Union of India Vs. A.S.A. Kabir]** where the learned Counsel relied upon the following observations:

"29. A perusal of the judgment of the trial Court would go to show that the trial Court has relied on the statement made by Mr.Samsudin Bin-Mohamed under Exhibit P.11. When a specific query was made to the learned Senior Counsel as to whether such a statement is admissible in evidence in the absence of examination of the maker of the statement, the learned Senior Counsel fairly submitted that the same, is not admissible in evidence.

30. The learned Special Public Prosecutor would also submit that the said statement is not admissible in evidence. For this purpose I may refer to Section 138-B of the Customs Act, 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."

31. A reading of the above provision would go to show that only in the circumstances enumerated in the said provision, the statement recorded under Section 108 of the Customs Act, by the Customs Officer can be admitted in evidence in a criminal prosecution. In this case, it is not the case that Mr.Samsudin Bin-Mohamed is not available or that the other conditions enumerated in Section 138-B of the Customs Act, are satisfied. Therefore, the statement namely Exhibit P.11 made under Section 108 of the Customs Act, by Mr.Samsudin Bin-Mohamed is nothing but a former statement which can be used either for contradicting him or to corroborate his evidence. The said statement can never be treated as substantive evidence to prove the contents of the same. Therefore, as rightly pointed out by the learned Senior Counsel, Exhibit P.11 is not at all admissible in evidence."

40.The next judgment relied by the learned Counsel for the petitioner is the judgment reported in **(2013) 4 SCC 465 [Ayaubkhan Noorkhan Pathan Vs. State of Maharashtra and others]**, where the learned Counsel relied upon the following:

"Cross-examination is one part of the principles of natural justice:

24. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan*, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: *Union of India v. T.R. Varma*, AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen*, AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar & Ors.*, AIR 1964 SC 708; *New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr.*, AIR 2008 SC 876; *Rachpal Singh & Ors. v. Gurmit Kaur & Ors.*, AIR 2009 SC 2448; *Biecco Lawrie Ltd. & Anr. v. State of West Bengal & Anr.*, AIR 2010 SC 142; and *State of Uttar Pradesh v. Saroj Kumar Sinha*, AIR 2010 SC 3131).



25. In *Lakshman Exports Ltd. v. Collector of Central Excise*, (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

26. In *New India Assurance Company Ltd., v. Nusli Neville Wadia & Anr.*, AIR 2008 SC 876; this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :-

"45. If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right."

(Emphasis added)

In view of the above, we are of the considered opinion that the right of cross-examination is an integral part of the principles of natural justice.

27. In *K.L. Tripathi v. State Bank of India & Ors.*, AIR 1984 SC 273, this Court held that, in order to sustain a complaint of the violation of the principles of natural justice on the ground of absence of opportunity of cross-examination, it must be established that some prejudice has been caused to the appellant by the procedure followed. A party, who does not want to controvert the veracity of the evidence on record, or of the testimony gathered behind his back, cannot expect to succeed in any subsequent grievance raised by him, stating that no opportunity of cross-examination was provided to him, specially when the same was not requested, and there was no dispute regarding the veracity of the statement. (See also:



Union of India v. P.K. Roy, AIR 1968 SC 850; and Channabasappa Basappa Happali v. State of Mysore, AIR 1972 SC 32). In Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill, AIR 2006 SC 1445, this Court held:

"9. In order to establish that the cross-examination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilised for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to cross-examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an adjudication being concluded, it shall be certainly open to the consumer to establish before the Appellate Authority as to how he has been prejudiced by the refusal to grant an opportunity to cross-examine any official".

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In *Rajiv Arora v. Union of India & Ors.*, AIR 2009 SC 1100, this Court held:

"13. Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that



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the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation.

14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

41. The next judgment relied by the petitioner side is the judgment in the case of **Andaman Timber Industries Vs. Commissioner of Central Excise** reported in (2016) 15 SCC 785, where the following observation has been relied upon:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the adjudicating authority thought the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. 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 concerned is not even dealt with by the adjudicating authority. As far as the Tribunal is

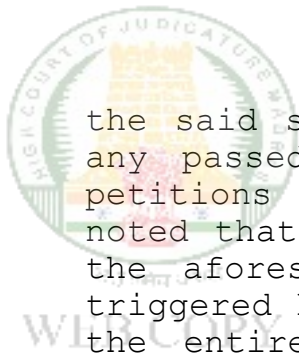


concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant for the Tribunal to have guesswork as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the adjudicating authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list could be the subject-matter of cross-examination. Therefore, it was not for the adjudicating authority to presuppose as to what could be the subject-matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came up before this Court in *CCE v. Andaman Timber Industries Ltd.*², order dated 17-3-2005 was passed remitting the case back to the Tribunal with directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show-cause notice."

42. Apart from relying upon the aforestated decisions, it is yet another vehement contention on the part of the petitioner side that two out of the 129 noticees at the earliest point of time had approached this Court by filing writ petitions in W.P.[MD]Nos.3917 & 3918 of 2020. In these writ petitions, the respective petitioners sought for a prayer of Mandamus to direct the respondents to allow re-export of the goods namely gold ornaments and electronic goods as per their request dated 03.02.2020. It is to be noted that even before show cause notice issued, it seems that those two petitioners made a request to the Customs to permit them to re-export the goods they brought in. When that writ petitions were pending, the show cause notice is issued in the present case on 29.06.2020. While issuing show cause notice, it has been specifically averred that,



the said show cause notice is subject to any order, directions if any passed or issued by the High Court, Madurai Bench in writ petitions W.P.[MD]Nos.3917 & 3918 of 2020. Therefore, it is to be noted that, the Customs by having the knowledge of the pendency of the aforestated two writ petitions and one other writ petition triggered by two out of the 129 passengers who are the noticees in the entire episode, had issued the show cause notice to these petitioners and others on 29.06.2020, where they specifically noted that, the said show cause notice is issued subject to the decision to be made by this Court in the pending writ petitions.

43.After the writ petitions having been kept pending for a year, came to be disposed of by an order of the Writ Court dated 26.04.2021. In the said order, the learned Judge recorded at paragraph No.8 that the decision reported in **2009 (247) E.L.T. 21 (Mad) in the case of Commissioner of Customs Vs. Samynathan Murugesan**, would apply to cases of this nature, where, if the manner of import is patently fraudulent then, the adjudicating authority may direct absolute confiscation of the goods instead of exercising his discretion under Section 125 of the Act. The learned Judge further observed that, the ratio of this decision would definitely apply in cases of those passengers who had carried gold in paste form by concealing it on their person. The passengers who had hidden gold in their rectum cannot contend that they intended to declare before the customs authority and pay the applicable duty.

44.However, the learned Judge has further observed in paragraphs 11, 12 & 13 which are very much relied upon by the petitioners' side. Therefore, the said paragraphs of the learned Judge's order is extracted hereunder:

"11.The Supreme Court in the decision reported in 2017 (16) SCC 93 (Directorate of Revenue Intelligence Vs. Pushpa Lekhumal Tolani), quoting International Convention on the Simplification and Harmonization of Customs Procedures, observed that a passenger going through the green channel is itself a declaration that he has no dutiable or prohibited articles. The respondents allege that the petitioners were intercepted when they were about to exit the green channel. The petitioners on the other hand claim that after the completion of immigration formalities and before crossing the DMFD, they were taken to custody. This controversy can be very easily resolved by production of the CCTV footage. The petitioners have not raised this contention as an afterthought. Right from the beginning this was their stand. Therefore, I impleaded the Airport Authority and directed them to make available the CCTV footage. The standing counsel for the Airport Authority after getting instructions submitted that since the occurrence had taken place in



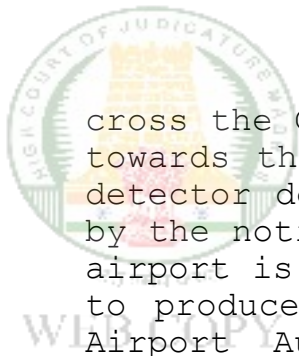
the 1st week of November, 2019, the footage got erased a few weeks thereafter and therefore, the direction issued by me in February, 2021 is impossible of being complied with.

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12.The petitioners could have established their defence only by producing the CCTV footage. They have been denied access to this vital piece of evidence. The best evidence was very much available and it was allowed to vanish. The airport authority is a limb of the State. DRI cannot wash away its hands by taking the plea that they have not installed the CCTV and that it is not in their control. When a huge smuggling attempt was busted and when two of the arrested from whom recoveries were made wrote to the Additional Director General, DRI, Chennai that if he verifies the contents of the CCTV footage, their stand will be vindicated, then it was the bounden duty of DRI to have secured the CCTV footage. Since this was not done, I have to necessarily draw adverse inference against them. The Supreme Court in the decision reported in **(2015) 7 SCC 178 (Tomaso Bruno and another Vs. State of Uttar Pradesh)** observed that as per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him.

13.Where the fundamental right of the noticees to fair adjudication has been violated, adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt. In view of my finding that the petitioners defence has been prejudiced because of the non-production of CCTV footage, the adjudication proceedings initiated against them can be allowed to continue only for the limited purpose of determining whether the goods in question can be allowed to be re-exported or whether they can be cleared on payment of applicable duties. Such an order will be passed by the concerned authority within a period of four weeks from the date of receipt of copy of this order. The authority will hear the petitioners or their authorised representative through Video Conferencing or in person before passing final orders."

45.From the said observation of the learned Judge, the petitioners' Counsel take a point and argue that in order to resolve the controversy whether the noticees had crossed or attempted to

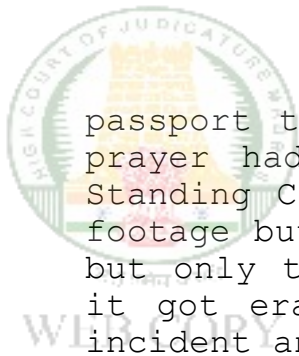


cross the Customs barrier through green channel or they simply moved towards the Customs counter and even before they crossed the metal detector door frame whether they were intercepted or not as claimed by the noticees can be easily ascertained if the CCTV footage of the airport is produced and therefore, though the learned Judge directed to produce the CCTV footage, the learned Standing Counsel for the Airport Authority after instructions submitted that since the occurrence had taken place in the first week of November, 2019, the footage got erased a few weeks thereafter and therefore, the directions issued by the learned Judge in February 2021, became impossible of being complied with.

46.After recording this aspect, learned Judge in paragraphs 12 & 13 made a strong observation and in fact at paragraph No.13 quoted hereinabove of the said order, learned Judge has gone to the extent of observing that, where the fundamental right of the noticees to fair adjudication has been violated, adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt. In view of the said finding that the petitioners' defence had been prejudiced because of the non-production of the CCTV footage, the adjudication proceedings initiated against them can be allowed to continue only for the limited purpose of determining whether the goods in question can be allowed to be re-exported. This finding of the learned Judge to state that, the adjudication proceedings cannot be allowed to continue for the purpose of determining the guilt heavily influenced the petitioners to make out a case that, when such an extreme finding has been given by the learned Judge arising out of the very same episode, because two out of 129 noticees had triggered the said writ petitions, whether there is a justification on the part of the Customs to proceed with the adjudication process pursuant to the show cause already issued.

47.Repeated arguments have been made by the learned Counsel appearing for the petitioners rallying this point stating that, on 29.06.2020, the Customs did have knowledge about the pendency of the two writ petitions. Therefore, they also mentioned in the show cause notice issued that, it was subject to the outcome of the decision to be made by this Court in the pending writ petitions. When that being so, before starting of the adjudication proceedings if the aforesaid judgment has come on 26.04.2021, where though such a finding was upset subsequently, by referring an intra court appeal, whether the Customs would be free to continue the adjudication proceedings is a major question which they posed before this Court for consideration.

48.In response to the said query on the petitioner side, learned Standing Counsel for the Customs made extensive submissions stating that, first of all, the judgment made by the learned Judge is not a judgment in rem but it is a judgment in personum. In that case, there was a specific request made on behalf of those two writ petitioners that they should have been given a chance of cross examination and otherwise they should be permitted to re-export the goods they brought in and also they made a request to issue the



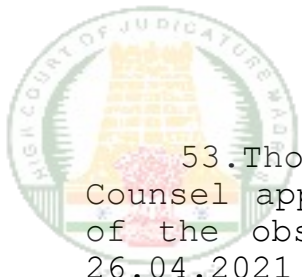
passport to them which have been seized or impounded. When such a prayer had come before the Writ Court, according to the learned Standing Counsel for the Customs, the Court wanted to see the CCTV footage but the custodian of the CCTV is not the Customs department but only the Airports Authority of India whose Counsel stated that it got erased within few weeks of the date of occurrence of the incident and only in that circumstances, the learned Judge has drawn adverse inference only in the cases in respect of those two writ petitioners where, after making such an observation in paragraph 13 as quoted above, that the adjudication proceedings cannot be allowed to continue for the purpose of determining their guilt, it was also observed that, but can be allowed to continue only for the limited purpose of determining whether the goods in question can be allowed to be re-exported.

49. Therefore, the said finding given in the order referred to above by the learned Judge can be made applicable only in respect of those two writ petitioners and therefore, in respect of their cases the adjudication is not conducted and it is kept pending.

50. Learned Standing Counsel would further submit that, apart from these two writ petitioners some other writ petitioners also had come before this Court challenging the adjudication proceedings on various grounds where also interim orders have been granted by this Court in other cases and in respect of those cases also the adjudication had not been continued and therefore, out of the 129 atleast 15 people in whose cases where specific orders either final or interim order have been passed, adjudication has not been continued and it has been kept pending awaiting the final orders to be passed.

51. Learned Standing Counsel would further submit that, even though the judgment passed by the learned Judge dated 26.04.2021 is the judgment in rem even in respect of those two noticees, since the Customs wanted to continue the adjudication process, they preferred appeals, where, the Division Bench of this Court after having observed that the observation given by the learned Judge in the Writ Court referred to above may not be warranted and accordingly, the operation of the said judgment has been stayed by order dated 30.06.2021.

52. Therefore, according to the learned Standing Counsel, the plea raised by the petitioners that on the date of adjudication and date of passing final order after adjudication in the month of June, 2021 and in the present case it is on 26.02.2021, the order passed by the Writ Court dated 26.04.2021 was in force, therefore, that operates against the Customs in respect of all noticees, cannot be countenanced, as it is not an omnibus order putting an embargo against the Customs department to proceed with the adjudication proceedings in respect of other noticees including these



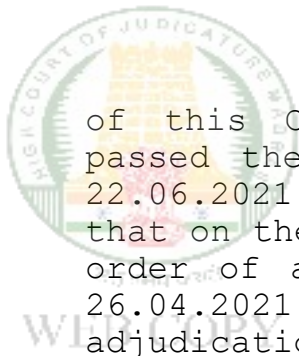
53. Though such a stand has been taken by the learned Standing Counsel appearing for the respondents, insofar as the applicability of the observation made by the learned Judge by his order dated 26.04.2021 is concerned, because, subsequently the said order have been stayed by the order of the Division Bench dated 30.06.2021, in my considered view, it cannot be stated that, the order passed and the observations made by the learned Judge on 26.04.2021 is only judgment in personum but not a judgment in rem. The said stand if it is accepted, then the note they have mentioned in the show cause notices in respect of all other noticees including these petitioners dated 29.06.2020 could not have been included stating that this show cause notice is subject to the outcome of the decision to be made in the pending writ petitions. If at all the issue raised in the said then pending two writ petitions is only related to those two noticees and whatever observations made or whatever decisions rendered by the Writ Court would not be made or cannot be made applicable to the other noticees, that kind of note need not have been appended in the show cause notices dated 29.06.2020. Therefore, it clearly discloses or demonstrates that, it is in the minds of the Customs that whatever order to be passed by the Writ Court in the pending two writ petitions definitely will have a bearing on the whole issue covering all 129 noticees and that is the reason why such a note has been appended in the show cause notices dated 29.06.2020.

54. Moreover, the theory of judgment in rem and judgment in personum cannot be invoked in a case which emanates from the same cause of action differentiating the same in respect of every cases arising from the same cause of action.

55. The cause of action which arose in respect of all the 129 noticees is the search and seizure operation conducted on 05.11.2019 to 07.11.2019. Though an attempt has been made by the learned Counsel for Customs that though single mahazar has been drawn, in respect of all 129 people, each one will be dealt with separately, it can only be treated as a single episode otherwise all the 129 noticees cannot be put in under one seizure mahazar in the presence of the same two independent witnesses.

56. When that being so, the theory of judgment in personum which the Customs side want to employ on the judgment and observation made by the learned Single Judge in his order dated 26.04.2021, in my considered opinion, cannot be accepted.

57. No doubt, after 30.06.2021, when the Division Bench took cognizance of the issue and granted an interim order of stay of the operation of the Writ Court order dated 26.04.2021, certainly the Customs would be free to proceed against every noticees if not the two persons who filed the writ petitions. However, the fact remains



of this Court, they concluded the adjudication proceedings and passed the final orders and last such final order was passed on 22.06.2021. Therefore, the contention raised by the petitioner side that on the date of adjudication and also on the date of passing the order of adjudication the findings given by the Writ Court dated 26.04.2021 was in force, therefore, as against which the adjudication in respect of other noticees arising out of same episode and same single mahazar ought not to have been completed or concluded, is to be accepted.

58. That apart, the other main plea raised on the side of the petitioners is that, the principle of natural justice is violated as the chance of cross examination of witnesses has not been given to the petitioners. At the threshold, this plea was resisted by the Revenue side by making the submission that, the petitioners have in fact not requested for any such cross examination except they gave reply to the show cause notice. Another contention raised or defence taken by the Customs side is that, the statement of confession made by every noticee recorded under Section 108(3) of the Act since have never been retracted before they filed a reply through their counsel to the show cause notice, there was no need for the Customs to go for any external aid of examining either the independent witnesses or the official witnesses to corroborate such confession statements already made by these noticees. In the alternative, the respondent Counsels have made further submissions that, merely because the chance of cross examination was denied, *ipso facto*, it cannot make the entire proceedings vitiated as the chance of cross examination whether it is a must or not depends upon the factual matrix of the case.

59. In this context, out of several judgments relied upon by the respondent Counsels, the learned Standing Counsel for Customs mainly relied upon the following two decisions :

1) **Ravindran @ John Vs. The Superintendent of Customs** reported in **2007 (6) SCC 410**, where he relied upon the following paragraphs:

"11. Learned counsel for the appellant argued that the two independent witnesses in whose presence he had been searched were not examined at the trial. Reliance was placed on an observation contained in paragraph 28 of the report in (2004) 12 SCC 201 *State of West Bengal and Others Vs. Babu Chakraborty*. In the instant case it is not disputed that two independent witnesses were associated when the search was conducted. The search was, therefore, conducted in accordance with law. But it is argued that failure to examine the two witnesses is fatal to the case of the prosecution. In our view, this is not the correct legal position. Even where independent evidence is not examined in the course of the trial the effect is



that the evidence of the official witnesses may be approached with suspicion and the Court may insist on corroboration of their evidence. In (2000) 4 SCC 465 Koluttumottil Razak Vs. State of Kerala this Court observed:-

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"In the present case, unfortunately, apart from the evidence of the police officers there is absolutely no independent evidence to ensure confidence in our mind that the search was in fact conducted by PW 1 as he has claimed. As his evidence is required to be approached with suspicion due to violation of Section 42 of the Act we may require corroboration from independent sources that is lacking in this case".

12. In (2003) 8 SCC 449 M. Prabhulal Vs. Assistant Directorate of Revenue Intelligence, a similar question was raised in the context of the provisions of the NDPS Act. This Court held:

"Next, the learned counsel contends that the independent witnesses of the recovery of the contraband having not been examined and only police witnesses having been examined, the recovery becomes doubtful. Reliance is placed upon the decision in Pradeep Narayan Madgaonkar V. State of Maharashtra. In the decision relied upon while observing that prudence dictates that evidence of police witnesses needs to be subjected to strict scrutiny, it was also observed that their evidence cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or prosecuting agency, but as far as possible, corroboration of their evidence in material particulars should be sought".

12. In the instant case we find that the courts below have critically scrutinized the evidence of the prosecution witnesses applying the rule of caution and we find no reason to disagree with their findings.

13. It was sought to be urged before us that evidence discloses that the confessions were not made voluntarily. We permitted the learned counsel to refer to the material on record and the concurrent



findings recorded by the Trial Court and the High Court. We have noticed the fact that the confession was subsequently retracted. The courts have in our view correctly appreciated the material on record and have rightly come to the conclusion that apart from the confession of the appellant Ravindran there was also other reliable evidence on record to prove his complicity. We, therefore, find no merit in this submission."

2) **Surjeet Singh Chhabra Vs. Union of India** reported in 1997 (89) E.L.T. 646 (S.C.), where he relied upon the following:

"3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. 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 recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.

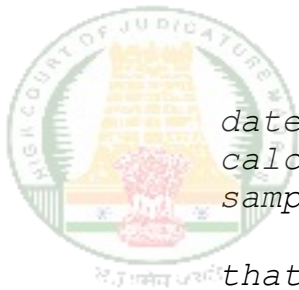
4. It is contended that under the Rules jewellery is exempted articles. Kara being a symbol of the religious wear by the Sikh community, it is a jewellery exempted from the Act and it cannot be confiscated. In view of the admission that he had purchased gold, converted as Kara and brought as such, he necessarily used it. Therefore, he is not entitled to the benefit of exemption. Under these circumstances, we do not find any illegality in the order passed by the authority warranting interference."



60. Another judgment relied by the Counsel for the respondents is a Division Bench order of this Court made in **W.A. [MD]No. 707 of 2010**, dated **25.11.2010**, where paragraphs 8 to 11 have been relied upon by the learned Counsel, which reads as follows:

"8. Secondly, the Adjudicating Authority had already found that there was no need for the cross-examination of Clearing Housing Agent and Investigating Officers, holding that denying cross-examination would not violate the principles of natural justice. In the present case, the appellant being an importer adopted a systematic method of mis-declaring the weight to evade ADD and he himself admitted this practice in his statement dated 20.10.08 and 03.11.08. Further, the ADD was calculated based on the weight ascertained from the samples submitted by the appellant. Therefore, there is no reason to give an opportunity to the importer to cross-examine the persons and the question of giving an opportunity to the appellant to cross-examine the persons will not arise in this case, as it is not the violation of principles of natural justice as held by the Hon'ble Apex Court in Surjeet Singh Chhabra's case (supra), wherein, it has been vividly held that the failure to give him an opportunity to cross-examine the witnesses is not violation of principles of natural justice.

9. Further, we have also gone through the voluntary statement dated 20.11.2008 made by the appellant under Section 108 of the Customs Act, 1962, voluntarily admitting that he was in the habit of mis-declaring the weight of the goods in all those bills of entry to evade payment of legitimate Anti Dumping Duty. Surprisingly, this statement, which was given voluntarily, neither retracted by the appellant nor contradicted or disproved by placing evidences subsequent to his voluntary statement. On the question of allowing appellant to cross-examine the Clearing House Agent and Investigating Officers, it is pertinent to bear in mind that the case has been clearly made out by the investigation based on the voluntary statement of Shri Sanjay H. Shah, Proprietor of M/s. Edge and other documentary evidences such as lab test report. Therefore, there is no need for the cross-examination of Clearing House Agent and Investigating Officers. Further, the appellant has adopted a systematic method of mis-declaring the weight to evade Anti Dumping Duty and the said fact was also admitted by the appellant in his statement



dated 20.10.2008 and 03.11.2008. Further, the ADD is calculated based on the weight ascertained from the samples submitted by the appellant only.

10. At this juncture, though it cannot be denied that right of cross-examination in any quasi-judicial proceeding is valuable right given to the accused/noticee, as these proceedings may be adverse consequences to the accused, the Hon'ble Apex Court in the case of CCE Vs. Duncan Agro Industries, reported in 2000(120) ELT 280 (SC), has held that the right of cross-examination can be taken away. In yet another case, the Hon'ble Apex Court in the case of Surjeet Singh Chhabra Vs. Union of India reported in 1997(89) ELT 646 (SC), has again held that when the petitioner seeks for cross-examination of witnesses, who have said that the recovery was made from the petitioner, necessarily an opportunity required to be given for the cross-examination of witnesses as regards the place at which recovery was made. But, in view of confession made by the petitioner, the same was binding upon him and therefore, in such facts and circumstances, failure to give him opportunity to cross-examine the witnesses would not violate the principles of natural justice. Further, it was held that the Customs Officials are not Police Officers. Therefore, the confession, though retracted is an admission and binds the petitioner.

11. When we further look at the case of the appellant, who has been in this line of business for a long time and continuously importing measuring tape from various countries, it was noticed that he has been issued with two show cause notices for confession of Anti Dumping Duty, which indicates that the appellant was very well aware of Levy of Anti Dumping Duty on Measuring tape of Chinese Origin on the basis of weight and landed value and the appellant being a regular importer, knowingly under declared the weight and suppressed the actual net weight of the goods, so as to evade/avoid payment of legitimate customs duty (Anti Dumping Duty). Therefore, on the basis of the dictum laid down by the Hon'ble Apex Court, particularly, in the case of CCE Vs. Duncan Agro Industries, reported in 2000(120) ELT 280 (SC), holding that the confession statement recorded by the Customs Officers under Section 108 of the Customs Act, 1962, without complying with Section 164 of the Code of Criminal Procedure, is admissible in evidence, the appellant cannot be allowed to claim for the cross-



examination of witnesses. Therefore, the contentions raised by the learned counsel for the petitioner, complaining that the learned Single Judge had wrongly rejected the case of the appellant, to set aside the impugned order do not carry any merit."

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61. Yet another judgment of the learned Judge of this Court in the case of **Jet Unipex Vs. Commissioner of Customs** reported in **2020 (373) E.L.T. 649 (Mad.)** was also relied upon by the learned Counsel for the Customs. In this decision, learned Counsel relied on the following observations:

"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 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 a 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.



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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".

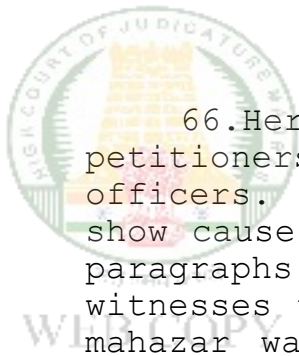
50. The court therefore held that section 24 of the Indian Evidence Act, 1872 is therefore not applicable to such statements."

62.The aforecited judgments on this point as to whether the chance of cross examination has to be mandatorily given to the parties or noticees concerned have been gone through. Infact two major set of views have been taken by the law Courts. One set of view is that the chance of cross examination if it is not given or denied, that will vitiate the proceedings and another set of view is even though such a chance is not given to the parties / noticees, that may not be fatal to the proceedings or the proceedings is not vitiated.

63.Therefore, the emerging position on analysing these judgments would be that, in a particular case whether such a chance of cross examination should be given or not can be decided only at the background of the facts of that particular case.

64.In this context, after analysing a number of judgments in this regard, the learned Judge of this Court in **Jet Unipex** case was able to draw a fine distinction between these two situations as to when such a cross examination should be given and when not.

65.The learned Judge in sum and substance has held that, if statements were received or recorded and not intended for corroboration of independent evidence, cross examination need not be allowed, which means, if unassailable evidences are already available and in order to corroborate the same, further evidences are not employed by making statements or giving evidence, such kind of evidences need not be permitted to be retracted by cross-examining the persons from whom such evidences has emanated. Therefore, the natural corollary would be that, in case the whole part of evidence is only based on the statement or otherwise of the noticees which were recorded under Section 108(3) of the Act, and the same though had not been retracted within shortest period but had been done at the time of reply to the show cause notice and merely based on those statements if the case of the customs have been built up and based on which only the adjudication went on and concluded, certainly, this Court feels that the author of such evidences shall be permitted to be examined and cross examined.



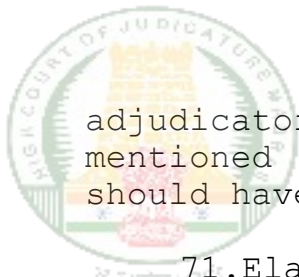
66. Here in the case in hand, it is not the plea of the petitioners to cross examine the co-witnesses and some of the officers. In this context, if we look at the mahazar as well as show cause notice which have been already dealt with in the earlier paragraphs of this order, only in the presence of two independent witnesses the entire search and seizure was conducted. The seizure mahazar was drawn by one Intelligence Officer of DRI. The entire seizure was effected by another Intelligence Officer of DRI.

67. Though, in this regard submissions were made by the petitioner side that it was not thoroughly possible for one officer to manage the entire seizure operation, of course, with the help of other officers and the individual witnesses could not have been made present for the whole episode running for more than 46 hours, this Court does not want to go into that aspect because, that is a matter of merit which has to be decided by the authority concerned. Here, only for the limited purposes whether the independent mahazar witnesses who signed in the mahazar as well as the two officers, one incharge for the drawal of mahazar another incharge for the seizure alone atleast could have been examined or could have been made available for the petitioners to cross examine. As per the law declared in number of judgments cited hereinabove, the emerging position would be that, if the cross examination part is denied whether it will be fatal to the case is concerned, in the present case, unless these four people come and corroborate before the adjudicating authority to state that they were part of the episode during the search and seizure, it is very hard to accept the version that has been projected on behalf of the Customs.

68. During the course of arguments, it was also pointed out that, under Section 138-B of the Act, whatever the statement made and signed by the person before any gazetted officer of Customs during the course of any enquiry or proceedings under the Act shall be relevant. Under sub-section 2 of Section 138-B, the provisions of sub-section (1) shall so far as may be, apply in relation to any proceedings under the Act other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

69. By relying upon heavily on this provision, the learned Standing Counsel would submit that, the confession statement were made by these noticees on various dates before the Customs officers and the same since have been recorded under Section 108(3) of the Act and the statement since is a signed statement, and given before the gazetted officer of the Customs during the enquiry, it has relevance and would apply not only to the criminal proceedings but also in adjudicatory proceedings under the Act.

70. However, in response to the said argument advanced by the Customs side, learned Counsel appearing for the petitioners would contend that, no doubt, under Section 138-B, the statement given as has been stated in sub-section (1) would be made applicable and will be relevant both in the criminal proceedings as well as in the



adjudicatory proceedings under the Act provided the conditions mentioned in Clause (a) & (b) in sub-section 1 of Section 138-B should have been complied with.

71.Elaborating further, learned Counsel for the petitioners would contend that, when the persons 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 considered unreasonable and also when a person who made the statement is examined as witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidences in the interest of justice. These are the circumstances such denial of cross examination for corroboration can be made.

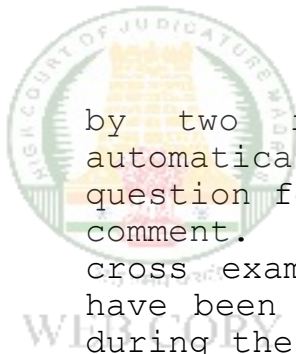
72.These two circumstances since have been mentioned in Clause (a) & (b), this should have been complied with.

73.Insofar as the said clause (a) & (b) is concerned, this Court after having gone through the same is of the view that, insofar as clause (a) is concerned, if the person is dead or cannot be found or is incapable of giving evidence, it can be proceeded to say that the statement given by such person would be relevant.

74.Here in the case in hand, whether any such attempt has been made by the Customs to comply with clause (a) of Section 138-B (1) is a question, where, there is no such attempt seems to have been made and no summons have been given to these two independent witnesses and even the mahazar drawn officer and the seizure officer who signed in the mahazar were not made present before the adjudicating officer or made available before the adjudicating officer for examination.

75.In the absence of any such attempt being made by the respondent Customs to bring the person who made the statement, it cannot be stated that the contingency noted at clause (a) have been complied with in this case. Therefore, the relevancy or admissibility of the statement is questionable in this case.

76.In the facts of the case as we quoted above, the entire case has been built up based on the single seizure mahazar, wherein, each and every aspect, according to the mahazar, was done only in the presence of the independent witnesses. They also claimed that, even after the seizure was completed the entire goods seized were kept in 5 boxes and in each of the boxes these independent witnesses signed and in every stage of search and seizure these independent witnesses were present. When that being so, the proprietary requires that, the adjudicating authority should have issued summons to these independent witnesses to corroborate the statements ie., the mahazar. Unless and until the basic fact of mahazar is corroborated

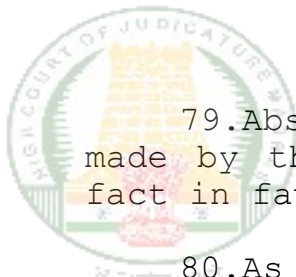


by two independent witnesses, whether the veracity can be automatically admitted in favour of the Customs is yet another question for which this Court at this moment do not want to make any comment. However, for the limited purpose of giving the chance of cross examination to the petitioners atleast that attempt should have been made by the Customs to bring those independent witnesses during the adjudication proceedings and made them available for such examination / cross examination.

77.It was yet another argument which the learned Standing Counsel appearing for the respondents made is that, if at all any chance of cross examination was asked by the petitioners and the same was denied and the adjudicatory authority proceeded to adjudicate the matter, it amounts to denial and therefore, such denial is a decision and such decision made by the adjudicating authority is also a proceedings which can be appealed under Section 128 of the Customs Act. In this context, in fact, learned Counsel for Customs relied upon a Division Bench judgment of this Court in **W.A.No.1763 of 2021 dated 17.08.2021** in the matter of **Commissioner of Customs, Chennai Vs. Shri Vijayraj Surana**, where, the learned Counsel relied upon the following passages:

"19.The respondent had challenged the order passed by the first appellant, who confirmed the adjudication order passed by the second appellant not on merits, but only on the ground that cross examination was not permitted. The contention of the respondent that the appeal before the Tribunal is illusory and not efficacious is an argument, which has to be rejected. The Tribunal among the hierarchy of authorities, is the last authority, which can give a conclusive finding on facts. The person aggrieved by an order passed by the Tribunal can file an appeal to the High Court and the appeal would be entertained only on substantial question of law and not on facts and on the merits. Though there are decisions relied on by either side on the refusal to grant an opportunity of cross examination, no straitjacket formula can be adopted on the said legal issue, as it all depends on the facts and circumstances of each case."

78.Though such an observation has been made by the Division Bench that, the Tribunal among the hierarchy of the authorities is the last authority which can give a conclusion on facts, in the very same judgment, the Division Bench also opined that, though there are decision relied on by either side on the refusal to grant an opportunity of cross examination, no straitjacket formula can be adopted on the said legal issue, as it all depends on the facts and circumstances of each case.



79. Absolutely, there can be no quarrel on the said observation made by the Division Bench, which, in my considered view, is, in fact in favour of the petitioners.

80. As rightly opined by the Division Bench, there is no straitjacket formula on the principle as to whether the chance of cross examination is a must or not, as it depends upon the facts of each of the case.

81. Moreover, insofar as the request of cross examination is concerned, it has not been specifically denied by giving any order in writing by the adjudicating authority. Had the adjudicating authority decided the issue as to whether chance of cross examination should be given to the petitioner or not as a preliminary issue and rendered a finding, giving an order to that effect, certainly the arguments advanced by the learned Counsel for the respondents can be accepted and an appeal can be filed. However, in the case in hand, that issue has not at all been considered and decided, but the adjudicating authority proceeded to complete the adjudication on whole merits of the case and passed a final order. Therefore, the arguments advanced by the learned Standing Counsel on the side of the respondent on this aspect is also not countenanced.

82. Insofar as the issue raised on the point of Section 138-B of the Act is concerned, atleast two judgments have been relied upon by the learned Counsel appearing for the petitioners.

1) **2011 SCC online Madras 2634; 2011 272 ELT 497 [Union of India Vs. A.S.A. Kabir]**, where paragraphs 29, 30 & 31 has been relied upon which have been quoted hereinabove.

2) **2017 (48) S.T.R. 427 (Del.), in the matter of Basudev Garg Vs. Commissioner of Customs**, where, the following paragraphs have been relied upon:

"9. We have considered both the aspects of the matter and have heard counsel of both sides. The learned counsel for the appellants have placed reliance on the decision of the Supreme Court in the case of *Swadeshi Polytex Ltd. Vs. Collector* reported in 2000 (122) E.L.T. 641 (S.C.) as well as on *Laxman Exports Limited Vs. Collector of Central Excise* reported in 2002 (143) E.L.T. 21 (SC) for the proposition that whenever any statement is relied upon by the Revenue, an opportunity of cross-examining the maker of the statement should be given to the Noticee. Learned counsel for the appellants also placed reliance upon a decision of a Division Bench of this court in the case of *J & K Cigarettes Ltd. Vs. Collector of Central Excise* reported in 2011 (22) S.T.R. 225 (Del.).



10. Insofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in *Swadeshi Polytex Ltd. (supra)* and *Laxman Exports Limited (supra)*. Apart from this, the decision of this court in *J & K Cigarettes Ltd. (supra)* clinches the issue in favour of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question. The said Section 9D of the Central Excise Act, 1944 reads as under:-

"9D. Relevancy of statement under certain circumstances - (1) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, an 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 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 interest of justice. (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

11. We may straightaway say that the provisions of Section 9D of the Central Excise Act, 1944 are identical to the provisions of Section 138B of the Customs Act, 1962 which would be applicable in the present case.



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12. Section 138B of the Customs Act, 1962 reads as under:-

"138B. Relevancy of statements under certain circumstances -(1) A statement made and signed by a person before any gazette officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, an 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 interest 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."

It is apparent that both the provisions are identical.

13. This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under:-

"12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-Section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in



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adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal."

14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a 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 and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under:-

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the



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said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

15. The observations and conclusions arrived at by the Division Bench in the case of *J & K Cigarettes Ltd.* (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, section 138B of the Customs Act, 1962 has not been examined at all."

83. In the said order of the Delhi High Court, the commonality between Section 9-D of the Central Excise Act and Section 138-B of the Customs Act has been underlined and ultimately they hold that the observation and conclusion arrived at by the Division Bench in the case of ***J & K Cigarettes Ltd.***, would apply with equal vigour with the provisions of Section 138-B of the Customs Act.

84. The view taken by the learned Judge of this Court in the said judgment quoted in ***A.S.A. Kabir*** case and also the decision of the Delhi High Court would be the answer to the said plea on behalf of the respondent Customs quoting Section 138-B of the Customs Act.

85. During the course of arguments, yet another interesting ground has been raised by the learned Counsel appearing for the petitioners that, the Central Board of Excise and Customs, New Delhi has issued a Master Circular dated 10.03.2017 where 89 earlier circulars issued by the Board have been rescinded and this Master Circular was issued. Though the said circular was issued primarily for the purpose of administration of Central Excise Act, 1944 as contended by the learned Counsel appearing for the respondents, certain aspects mentioned in the Master Circular can be pressed into service in the present case. In clause 14.9 under the heading 'Corroborative evidence and Cross-examination', the circular states as follows:

"14.9. Corroborative evidence and Cross-examination: Where a Statement is relied upon in the adjudication proceedings, it would be required to be established though the process of cross-examination, if the noticee makes a request for cross-examination of the person whose statement is relied upon in the SCN.

<https://hcservices.ecoudu.gov.in/hcservices> During investigation, a statement can be fortified by



collection of corroborative evidence so that the corroborative evidence support the case of the department, in cases where cross-examination is not feasible or the statement is retracted during adjudication proceedings. It may be noted retracted statement may also be relied upon under given circumstances. Frivolous request for cross-examination should not be entertained such as request to cross examine officers of CERA."

86.The circular also proceeds to say in clause 19 and 20.2 which reads thus:

"19.Powers of recovery: Recovery of confirmed demand can be made by exercising any of the powers under Section 11 of the CEA, 1944 such as adjustment from refunds payable, attachment and sale of excisable goods of such person or through certificate action treating the recoverable amounts as arrears of land revenue. After exhausting the option of taking action as above, if dues remain unrecovered, action is to be taken under the provisions of Section 142 of the Customs Act, 1962 which have been made applicable to like matters in Central Excise. Further, where the entire business is disposed off with assets and liabilities, duty or any other sums are recoverable from the successor in business also. It may be noted that under sub-Section (2) of Section 11 of the Central Excise Act, 1944, now Central Excise Officers are empowered to issue an order to any other person from whom money is due to such person from whom recovery of arrears is required to be made. Such notice for recovery to the other person is generally referred as Garnishee Notice.

20.2. Recovery during pendency of litigation: Board has issued two circulars on the subject vide Circular No.984/08/2014 - CX dated 16.9.2014 [2014 (307) E.L.T. (T47)] and Circular No.1035/23/2016-CX dated 4.7.2016.[2016 (337) E.L.T. (T25)].

(i) Sub-Section (iii) of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 stipulate payment of 10% of the duty or penalty payable in pursuance of the decision or order being appealed against i.e. the order of Commissioner (Appeals). In the event of appeal against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This need not be the same as the amount of



duty demanded or penalty imposed in the Order-in-Original in the said case.

(ii) In a case, where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed.

(iii) In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed is liable for rejection.

(iv) Section 35F of the Central Excise Act, 1944 has been amended with effect from 6.8.14 to provide for mandatory payment of 7.5% or 10% of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute for admission of appeal before Commissioner (Appeals) or CESTAT. Once the amount is paid, no coercive action shall be taken for recovery of the balance amount during the pendency of the appeal proceedings before these authorities."

87. Though it was argued by learned Counsel appearing for the respondents that this Master Circular is only meant for Excise Department and it cannot be applied to the cases or adjudication conducted or to be conducted by the Customs Department governed under the provisions of the Customs Act, if we look at clause 20.2 as quoted hereinabove, we can easily cull out that, the Board which is a common Board for Customs and Central Excise as *pari materia* deal with Sections 35-F of the Central Excise Act and Section 129-E of the Customs Act, where in sub-clause 3 of Clause 20.2 they specifically stated that, in case of any short-payment or non-payment of the amount stipulated under Section 35-F of the Central Excise Act or Section 129-E of the Customs Act, the appeal filed is liable for rejection.

88. Moreover, the copy of the first page of the original circular has been made available taken from the website of the Board where it is made clear that, the circular has been despatched to the Principal Chief Commissioner and Chief Commissioner of Central Excise as well as the Principal Chief Commissioner of Customs. Therefore, for a general principle to be administered in various circumstances, both under the Excise Act as well as the Customs Act the mandatory guidelines issued by the Board in the master Circular dated 10.03.2017 has to be followed by the officials concerned. In this context, Clause 14.9 as quoted hereinabove makes it clear that, where a statement is relied upon in the adjudication proceedings, it would be required to be established though the process of cross-examination, if the noticee makes a request for cross examination of the person whose statement is relied upon in the show cause

notice.



89. Here in the case in hand, the contents of the show cause notice has already been discussed, where the contents recorded in the seizure mahazar has been reproduced in the show cause notice and that is the main basis for the Customs case to proceed for adjudication. In the mahazar as stated already, two independent witnesses have been shown and one Intelligence Officer of the DRI who has drawn the mahazar and another Intelligence Officer of the mahazar who is incharge of the whole seizure, atleast these four persons should have been made available for examination / cross examination when specifically this was asked by the noticees. This principle as has been indicated in Clause 14.9 of the Master Circular can be considered to be an apt direction in the given circumstances of the case.

90. Fairness in adjudication and fair play in quasi judicial proceedings are the important facets of judicial proceedings and when that being so, such a fair play or fairness in adjudication whether has been ensured by the officer or the authority concerned who does the adjudication process, is an important facet to be looked into.

91. In this context, if we look at the way in which the adjudication process went on unmindful of the order passed by the Writ Court as indicated above dated 26.04.2021, which was available or in force where the Customs also did notice the same and appended their note in the show cause notice itself, the proprietary requires that the Customs authorities should have waited for some time in the first fold.

92. Assuming that on 30.06.2021, if they were able to get a stay order from the Division Bench staying the operation of the order of the Writ Court, no doubt the Customs authorities should have waited for some time and granted opportunity to all the noticees including these petitioners. However, in this case there was no such chance as before 30.06.2021, adjudication was over and orders were passed.

93. Though in this aspect a point has been raised by the learned Standing Counsel for the respondent that to meet the limitation period that the respondent had to rush upon to complete the adjudication proceedings, the said defence taken by the Customs Department through the learned Standing Counsel also cannot be accepted as the factual matrix insofar as limitation is concerned is very well saved and available for the Customs to wait for some more time.

94. Moreover, assuming that the Customs Department has taken the judgment dated 26.04.2021 as a judgment in personum applying only in respect of those two writ petitioners, in respect of other noticees they can proceed with the adjudication, but the other parameters to follow should have been strictly followed.



95. Here in the case in hand, the cross examination chance which is one of the integral facet of the natural justice principle since has been specifically denied, this Court feels that on that ground the impugned orders certainly get vitiated.

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96. In that view of the matter, for the limited purpose of remanding the matters for re-adjudication to the respondents Customs, this Court feels that the impugned orders can be interfered with.

97. For all these reasons stated above and the discussions made hereinabove, this Court feels that the impugned orders cannot be sustained. Therefore, they are liable to be set aside.

98. In the result, the impugned orders are set aside and the matters are remitted back to the respondents for re-adjudication. While making re-adjudication, the aforestated observations shall be borne in mind by the adjudicatory authority where fair opportunity of cross-examination to cross examine the witnesses, especially the two independent mahazar witnesses and two Intelligence Officers of DRI who are responsible for drawal of mahazar and the seizure of the goods atleast shall be made available to the petitioners for cross-examination. After giving such chance of cross-examination, it is open to the adjudicatory authority to complete the adjudication proceedings and pass orders on merits.

99. However, it is made clear that, whatever the observations made in this order is only as an aid of reaching the present conclusion in this order. Therefore, such observation shall not be taken by the petitioners in respect of meeting their adjudication proceedings on merits before the adjudicatory authority.

100. It is also made clear that, in view of this remand order, where re-adjudication has been directed, it goes without saying that, the goods in question shall not be disturbed or disposed till the re-adjudication process is completed.

101. With these observations, the writ petitions are ordered accordingly. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

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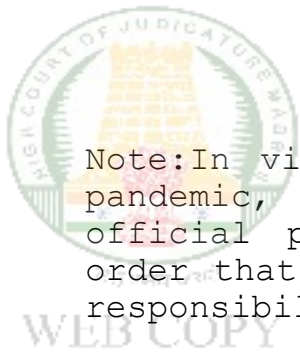
Assistant Registrar (Protocol)

// True Copy //

/ /2022

Sub Assistant Registrar (CS)

MR



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,
(Preventive), No.1 Williams Road,
Cantonment, Tiruchirapalli - 620 001.

2. The Joint Commissioner of Customs (Preventive),
No.1, Williams Road, Cantonment,
Tiruchirapalli - 620 001.

3. The Joint Director,
O/o. The Additional Director General,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
No.27, G.N. Chetty Road,
T.Nagar, Chennai - 600 017.

+1 CC to M/s.B.VIJAY KARTHIKEYAN, Advocate (SR-31718[F] dated 08/10/2021)

+7 CC to M/s.A.Ganesh, Advocate (SR-31677[F] dated 08/10/2021)

**W.P.[MD]Nos.11379 to 11382 &
13608 to 13614 of 2021
07.10.2021**

MGJ(01.06.2022) 53P 12C