

**IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Foreign Exchange)
Original Side**

**FEA 2 of 2009
IA No. GA 1 of 2009 (Old No. GA 308/2009)
Ajay Saraogi
Vs.
Union of India**

With

**FEA 3 of 2009
IA No. GA 1 of 2009 (Old No. GA 311/2009)
Sanjay Saraogi
Vs.
Union of India**

with

**FEA 25 of 2009
Monotosh Saha
Vs.
Special Director, Enforcement Directorate,
Foreign Exchange Management Act, New Delhi & Anr.**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

For the Petitioner : Mr. Farook Razack, Sr. Adv.
in FEA 2 of 2009 & Mr. Sohail Haque, Adv.
FEA 3 of 2009 Mr. Jaydeb Ghorai, Adv.
Mr. Diptesh Ghorai, Adv.

For the Petitioner : Mr. Sudhir Kumar Mehta, Adv.
in FEA 25 of 2009

For Enforcement : Mr. Vipul Kundalia, Adv.
Directorate in Mr. Arijit Chakrabarti, Adv.
FEA 2 of 2009 Mr. Anurag Roy, Adv.
FEA 3 of 2009 Mr. Deepak Sharma, Adv.
& FEA 25 of 2009

Hearing concluded on : July 13, 2023
Judgment on : August 31, 2023

DEBANGSU BASAK, J. :-

1. Three appeals have been heard analogously as they involve similar issues.
2. Primarily, the issue which has fallen for consideration in the three appeals is whether the adjudicating authority was right in refusing an opportunity of cross-examination of natural persons whose statements recorded under Section 108 of the Customs Act, 1962 had been referred to and relied upon in the adjudication order, or not.
3. Learned Senior Advocate appearing for the appellants in FEA 2 of 2009 and FEA 3 of 2009 hereinafter referred to as the first set of appeal, has submitted that, the appellants prayed for cross-examination of one Shri Nirmal Kumar Karmakar before the adjudication authority. Such prayer had been turned down by the adjudication authority in the order dated May 31, 2005. The Appellant Tribunal had rejected the prayer also.
4. Learned Senior Advocate appearing for the appellants in the first set of appeal has submitted that, since the department was relying upon statements made by the persons who were being investigated in the case and who gave statements against the appellants, it was incumbent on the part of the

adjudicating authority to allow examination of such persons. In support of his contention, he has relied upon **2019 SCC OnLine Cal 150 (Sampad Narayan Mukherjee Vs. Union of India)**, unreported decision of the Division Bench in **CUSTA 4 of 2022, MAT 556 of 2019 (Commissioner of Customs, Airport and Admn Kolkata vs. Shri Himadri Chakraborty)**, **2018 SCC OnLine Calcutta 5709 (Sadguru Forwarders Pvt Ltd. Vs. Commissioner of Customs (Port))** unreported decision in **APOT No. 56 of 2018 and APOT 57 of 2018 (Commissioner of Customs (Port), Custom House & Anr vs. Sadguru Forwarders Pvt Ltd.)**, **2016 Volume 15 SCC 785 (Andaman Timber Industries vs. Commissioner of Central Excise)**, **1985 Volume 3 Supreme Court Cases 398 (Union of India vs. Tulsiram Patel)**, **2023 SCC OnLine SC 621 (Aureliano Fernandes Vs. State of Goa)**, **2010 SCC OnLine Cal 2593 (Jha Shipping Agency Vs. Union of India)**, **2017 SCC OnLine Raj 4246 (Shree Parvati Metals Vs. Union of India)**, **2005 Volume 10 Supreme Court Cases 634 (Lakshman Exports Ltd vs. Collector of Central Excise)**, **2019 SCC OnLine Del 8305 (Krishan Kishore Aggarwal Vs. Additional Commissioner of Customs)**, **2013 SCC OnLine Guj 3579 (Rajesh**

Shantilal Adani Managing Director Vs. Special Director Enforcement Directorate).

5. Learned Senior Advocate appearing for the first set of appeal had submitted that, a request was made for supply of the opinion of the handwriting expert in respect of a letter dated June 22, 2004. Moreover, statement of two other persons had not been supplied to the appellants. Relying upon **2009 Volume 2 Supreme Court Cases 192 (Kothari Filaments and Anr Vs. Commissioner of Customs (Port) Kolkata)** he has submitted that, denial to supply the opinion of the handwriting expert, a copy of the statements of the two persons resulted in violation of the principles of natural justice.
6. Learned Senior Advocate appearing for the appellants in the first set of appeal has submitted that, proceedings under the Foreign Exchange Management Act, 1999 (FEMA) and the Foreign Exchange Regulation Act, 1973 (FERA) are quasi criminal in nature. He has relied upon **2008 Volume 16 Supreme Court Cases 537 (Vinod Solanki vs. Union of India)** and an unreported decision dated March 3, 2010 passed in **FEA No. 15 of 2008 (Sushil Kumar Sharma Vs. Special Director, Enforce Directorate).**

7. Learned Senior Advocate appearing for the appellants in the first set of appeal has submitted that, the provisions of Section 138B of the Customs Act, 1962 are not applicable to a proceeding under FERA. He has contended that, conditions enumerated in Section 138B of the Customs Act, 1972 are absent in the facts and circumstances of the present case. He has relied upon ***ILR 2013 III Del 2269 (Basudev Garg vs. Commissioner of Customs), 2016 SCC OnLine Del 1236 (HIM Logistics Pvt Ltd vs. The Principal Commissioner of Customs), 2017 SCC OnLine KER 21780 (Krishna Brothers and Ors. Vs. Commissioner of Customs)*** in support of his contention.
8. Learned Senior Advocate appearing for the appellants in the first set of appeal has contended that, statement of co-accused is very weak type of evidence. In support of such contention he has relied upon ***AIR 1964 SC 1184 (Haricharan Kurmi and Anr. Vs. State of Bihar)***, and ***2007 Volume 8 Supreme Court Cases 271 (Surinder Kumar Khanna vs. Intelligence Officer, Directorate of Revenue Intelligence)***.
9. Learned Advocate appearing for the appellant in the 2nd set of appeal has referred to the facts obtaining in three cases.

He has pointed out that, on February 2, 1996, a consignment of live crabs was intercepted by customs authorities and in one basket, foreign exchange was seized. The stationery used for export had borne the name of the firm of the appellant. However, no signature of the appellant had been produced on any document. The appellant had claimed that, he was not aware of the foreign currency found in the consignment. No nexus between the appellant and the foreign currency found had been established. The appellant had been proceeded against and arrested under COFEPOSA. The appellant had been released from custody in such proceedings and that the authorities abandoned such proceedings in 2002. Proceedings under FERA had been conducted on materials comprising of statement of one Mr. Paresh Saha.

10. Learned Advocate appearing for the appellant in the 2nd set of appeal has contended that, the statement recorded under Section 108 of the Customs Act, 1962 cannot be used in FERA proceedings. In support of such contention, he has relied upon **1992 Volume 3 Supreme Court Cases 178 (K.T.M.S Mohd. and Another versus Union of India)** and **2008 Volume 16 Supreme Court Cases 417 (Noor Aga vs. State of Punjab and Another)**.

11. Learned Advocate appearing for the appellant in the 2nd set of appeal has contended that, the rule of reverse burden is not attracted. In support of such contention, he has relied upon ***Vinod Solanki (supra)***.
12. Relying upon ***2009 Volume 12 Supreme Court Cases 162 (Union of India versus Bal Mukund)*** and ***2018 (362) ELT 935 (SC) (Surinder Kumar Khanna versus Intelligence Officer, DRI)***, learned Advocate appearing for the appellant in the 2nd set of appeal has contended that, penalty order passed by the adjudicating authority relying upon the statement of Mr Paresh Saha was in derogation of the law.
13. Relying upon ***Sampad Narayan Mukherjee (supra)*** and the order of the appeal court in the appeal with regard thereto, learned Advocate for the appellant in the 2nd set of appeal has contended that, the right of cross-examination has been recognised therein. Various High Courts have held the same views. In support of such contention, he has relied upon ***2018 (361) ELT 90 (M/s Ambika International vs. Union of India and Another)***, ***2019 (367) ELT 181 (Ummer Abdulla vs. Commissioner of Central Excise)***, ***2018 (362) ELT 385 (Kirit Shrimankar Vs. Commissioner of CGST &***

***Central Excise and Another), 2013 (294) ELT 353
(Basudev Garg vs. Commissioner of Customs).***

14. Learned Advocate appearing for the Enforcement Directorate (ED) has referred to the facts of the case in respect of the first set of appeals. He has contended that the prayer for cross-examination was dealt with by the Tribunal in its order dated October 27, 2008. He has pointed out that, Mr. Nirmal Kumar Karmakar was asked to appear before the adjudicating officer for cross-examination but he did not appear and being a noticee in the proceeding he remained absent in such proceedings and did not contest the same. He has pointed out that, the Tribunal considered **1997 Supreme Court Cases (508) (Surjeet Singh Chhabra versus Union of India and Others)** with regard to denial of cross-examination.
15. Learned Advocate appearing for the ED has pointed out that the case against the appellants in the first set of appeals is not solely dependent upon the statement of Mr Nirmal Kumar Karmakar. He has contended that contravention of Sections 9 (1) (b) and 9 (1) (d) of FERA had been established on the basis of documents recovered during the search by the officers of ED from the premises of Mr Nirmal Kumar

Karmakar on March 4, 1997, as well as from the premises of the appellants on April 3, 1997. The recovered documents had been explained thoroughly by Mr Nirmal Kumar Karmakar as well as by the appellants. Such explanation had revealed Hawala transactions by the appellants. Statements of the appellants had been recorded under Section 40 of FERA which is deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860. He has drawn the attention of the Court to the findings recorded by the Tribunal in this regard.

16. Learned Advocate appearing for ED has contended that Section 53 of FERA is not applicable to the present case since Mr Nirmal Kumar Karmakar was not a witness but a co accused. Hence, the question of summoning or enforcing his attendance as a witness did not arise.

17. Relying upon ***Vinod Solanki (supra)*** learned Advocate appearing for ED has contended that, statements recorded under Section 40 of FERA are valid evidence in the eye of law. Confessional statements made by the appellants in the first set of appeals have been corroborated from the documents seized from their office as well as from the office of Mr Nirmal Kumar Karmakar and hence the confessional

statements of such appellants coupled with the recovered documents are evidence to substantiate the contravention of Sections 9 (1) (b) and 9 (1) (d) of FERA on the part of such appellants.

18. Learned Advocate appearing for the ED has contended that the appellants in the first set of appeals failed to discharge the burden of proof under Section 71 of FERA. He has placed reliance on ***Vinod Solanki (supra)*** in this regard.
19. Learned Advocate appearing for the ED has contended that, Section 9D of the Central Excise Act, 1944 and Section 138B of the Customs Act, 1962 are pari materia. He has referred to ***2009 (242 ELT 189 (Del) (J&K Cigarettes Limited versus Collector of Central Excise)*** and contended that, the right of cross-examination can be taken away in exceptional circumstances. This view has been upheld by the Supreme Court in ***2023 (384) ELT 239 SC (GTC Industries Ltd versus Collector of Central Excise)***.
20. Learned Advocate appearing for the ED has contended that, the right of cross-examination cannot be considered as a mandate in a quasi-judicial proceeding under FERA and could depend upon facts and circumstances of each case. He has contended that, unless the noticee demonstrates

prejudice suffered by him for want of the opportunity of cross-examination, question of violation of natural justice does not arise. In support of such contention, he has relied upon **1973 Volume 2 Supreme Court Cases 438 (Kanungo & Co versus Collector of Customs and others)**, **1995 SCC OnLine Cal 485 (Tapan Kumar Biswas versus Union of India and others)**, **1997 Volume 1 Supreme Court Cases 508 (Surjeet Singh Chhabra versus Union of India and others)**, **2013 Volume 9 Supreme Court Cases 549 (Telstar Travels Private Ltd and Others versus ED)**, **2014 SCC OnLine Bom 791 (Patel Engineering Ltd. Vs. Union of India and Another)** and **2015 (323) ELT 73 (SC) (Patel Engineering Ltd versus Union of India and others)**, **2021 (376) ELT 46 (Telegana) (Mohammed Muzzamil versus Central Board of Indirect Taxes)**, **2003 Volume 4 Supreme Court Cases 557 (Canara Bank and others versus Debasis Das and others)**, judgement and order dated December 16, 2022 passed in **CEXA 22 of 2021 (Commissioner of CGST and CX, Howrah versus Ashirwad Foundries Private Limited and another)**.

- 21.** Learned Advocate appearing for the ED has contended that, the appellants in the first set of appeals failed to demonstrate

any prejudice suffered by them due to non-availability of the opportunity of cross-examination of Mr. Nirmal Kumar Karmakar. He has contended that since the imposition of penalty upon the appellants had been based on corroborative evidence on record, the order dated October 27, 2008 passed by the Tribunal should be upheld.

22. In ***Tulsiram Patel (supra)*** the Supreme Court has considered several appeals by special leave and petitions under Article 32 of the Constitution raising substantial question of law as to the interpretation of Articles 309, 310 and 311 of the Constitution. The proceedings involved government servants who had been either dismissed or removed from service without holding any enquiry, they being not informed of the charges against them nor given any opportunity of being heard in respect of such charges. In such context, the Supreme Court has held with regard to the principles of natural justice, that: –

“95. The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness

which is the same as discrimination; where discrimination is the result of State action, it is a violation of Article 14: therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of State in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.

96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence.....”

23. Lakshman Exports Ltd (supra) has also recognized that, an assessee should be allowed to cross examine the

representatives of the prosecution to establish that the goods in question had been accounted for in their books of accounts and appropriate amount of Central Excise had been paid, in proceedings under the Central Excise Act, 1944.

- 24.** With regard to breach of principles of natural justice by not allowing the assessee to cross examine the witnesses by the adjudicating authority, **Andaman Timber Industries (supra)** has held as follows: –

“6. According to us, not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the adjudicating authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal

has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.”

25. Aureliano Fernandes (supra) has observed that Article 14 of the Constitution was often described as the Constitutional Guardian of the principles of natural justice and it expressly forbade the State, as defined in Article 12, from denying any person, equality before law or equal protection of the laws. It has observed that, principles of natural justice guaranteed under Article 14, prohibited a decision-making adjudicating authority from taking any arbitrary action, be it substantive or procedural in nature.

26. Kanungo and company (supra) has dealt with the provisions of Sea Customs Act, 1878 read with Section 3 (2) of the Imports and Exports (Control) Act, 1947. In the context of seizure of goods under the Sea Customs Act, 1878 it has observed that the principles of natural justice do not require that in a matter of seizure of goods under such Act, the persons who gave information should be examined in the presence of the person from whom seizure was made, or

should be allowed to be cross-examined by him on the statements made before the Customs Authorities. Nothing has been placed before us to suggest that, the provisions of the seizure procedure under the Sea Customs Act, 1878 and the proceedings under challenge are *pari materia*.

27. In ***Debasis Das and others (supra)*** the Supreme Court has dwelt upon the principles of natural justice in the context of a disciplinary proceedings. It has held that, although post decisional hearing may not be a substitute for a pre-decisional hearing, in given circumstances, post decisional hearing may be substantial compliance of the principles of natural justice particularly when, the delinquent was unable to establish any prejudice caused by a post decisional hearing.

28. In ***Surjeet Singh Chhabra (supra)*** the importer had made a confessional statement that he purchased the gold and brought the same. In such context, it has been held that the importer was bound by the confessional statement and the failure to give him the opportunity to cross examine the witnesses is not violative of principles of natural justice. Nothing has been placed before us in the 3 appeals that, any

of the appellants made any confessional statement as to their guilt in the adjudication proceedings.

29. In ***Telstar Travels Private Limited (supra)*** the Supreme Court has held that, production of documents in terms of Section 139 of the Evidence Act, where the witnesses producing the documents is not subjected to cross-examination, did not violate the principles of natural justice. Moreover, in the facts of that case, the documents had been disclosed to the noticees and they had been permitted to inspect the same. The documents had been produced to confront the noticees. In such circumstances, the refusal of the adjudicating authority in permitting cross-examination of the witnesses producing the documents was not faulted. Furthermore the disclosure of the documents to the noticees and the opportunity given to them to rebut and explain the same had been held to be substantial compliance with the principles of natural justice. Consequently, it was held that, no prejudice had been caused to the noticees nor was any prejudice demonstrated by the noticees before the Supreme Court.

30. ***Vinod Solanki (supra)*** has considered proceedings under the provisions of the FERA to be quasi criminal in nature. It

has considered Section 71 (2) of the FERA and observed that, Section 71 (2) of the FERA places the burden of proof upon an accused or a proceedee only when the foreign exchange acquired has been used for the purpose for which permission to acquire it was granted and not for mere possession thereof. It has also observed that, the Parliament did not make any provision placing the burden of proof on the accused / proceedee, and that FERA does not provide for reverse burden.

31. *Kothari Filaments and Anr (supra)* has considered proceedings under the Customs Act, 1962. It has held that, statutory authorities under the Customs Act, 1962 exercises quasi judicial function. It has also observed that, the Customs Act, 1962 does not prohibit application of principles of natural justice.

32. *Mohtesham Mohd. Ismail (supra)* has considered proceedings under FERA. It has held that, an adjudicating authority acting under the provisions of FERA exercises quasi judicial power and discharges judicial functions. It has also observed that an adjudicating authority although an officer of the Central Government, should act as an impartial Tribunal.

33. *Haricharan Kurmi and Anr. (supra)* has observed that, judicial decisions consistently held that a confession cannot be treated as an evidence which is substantive evidence against a co-accused person. It has noted that, a confession of a co-accused is evidence of a very weak type. It does not come within the definition of evidence as contained in Section 3 of the Evidence Act. It has noted that Section 30 of the Evidence Act, however provides that the Court may take a confession into consideration and thereby act upon it. It has observed that, confession is only one element in the consideration of all the facts proved the case. It has observed that, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined by Section 3 of the Evidence Act, 1872.

34. *Noor Aga (supra)* has been rendered in the context of a prosecution under the Narcotic Drugs and Psychotropic Substances Act, 1985. It has also considered provisions of section 108 of the Customs Act, 1962. It has held that, enquiry under section 108 of the Customs Act, 1962 is for the purpose of such Act and that it cannot be used for the purpose of convicting accused under the NDPS Act, 1985 or

under any other statute including the provisions of the Customs Act, 1962. It has also explained section 138B of the Customs Act, 1962 as follows: –

“84. Even otherwise Section 138-B of the 1962 Act must be read as a provision containing certain important features, namely:

(a) There should be in the first instance statement made and signed by a person before a competent customs official.

(b) It must have been made during the course of enquiry and proceedings under the Customs Act.

Only when these things are established, would a statement made by an accused become relevant in a prosecution under the Act. Only then can it be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of sub-section (1) of Section 138-B deals with one type of persons and clause (b) deals with another. The legislature might have in mind its experience that sometimes witnesses do not support the prosecution case, as for example panch witnesses, and only in such an event an additional opportunity is afforded to the prosecution to criticise the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded, but while he was examined before the court, it arrived at an opinion that his statement should be admitted in evidence in the interest of justice which was evidently to make

that situation and to confirm the witness who is the author of such statement, but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. The confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138-B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature. (See Gopal Govind Chogale v. CCE [(1985) 2 Bom CR 499 : 1984 Mah LR 890] , Bom CR paras 12-14.)”

35. *Bal Mukund and Others (supra)* has considered the permissibility of conviction based on confessional statement of co-accused. It has held that, confessional statement of co-accused cannot be used as substantive evidence against other co-accused in the absence of independent corroboration.

36. *Surinder Kumar Khanna (supra)* has noted that, the issue whether statement recorded under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 can be treated as a confessional statement is pending before the Larger Bench. It has observed that even if such statements are treated as confessional statements certain additional features are required to be established before being relied on against co-accused. It has observed that, confession cannot be treated as evidence against co-accused. Confessional

statement of co-accused cannot by itself be treated as substantive piece of evidence against another co-accused and can, at best, be used or utilized in order to lend assurance to the Court.

37. The contours of natural justice in the context of seizure of a vehicle by the Customs Department under the provisions of the Customs Act, 1962 had come up on consideration in ***Tapan Kumar Biswas (supra)***. In the facts of that case, the writ petitioner had neither filed show-cause nor took any steps to inspect the documents. In such context, request for cross-examination had been turned down. It had observed that, Section 124 of the Customs Act, 1962 itself provides for the extent of application of the principles of natural justice. In the facts of that case, it had held that, the writ petitioner was not entitled to cross-examine any witness.

38. The Bombay High Court in ***Patel Engineering Ltd. (supra)*** on the aspect of breach of principles of natural justice has noted that, no technical breach can be advantageous, provided the breaches caused by such breachers is not established. In the facts of that case, the Court did not find any violation of the principles of natural justice by the refusal

of the authorities to permit cross-examination of other panel members.

39. The Division Bench of our Court in ***Jha Shipping Agency (supra)*** has observed that, if the decision in the justice delivery system results in evil and civil consequences natural justice has to be followed. It has also observed that one of the facets of natural justice is to afford the adversary cross-examination of the persons whose testimony or statements were relied upon in the decision making process.
40. The Rajasthan High Court in ***Shree Parvati Metals (supra)*** has observed that, cross-examination is a right of an assessee.
41. The Delhi High Court in ***Krishan Kishore Aggarwal (supra)*** has considered the issue of cross-examination of witnesses whose statements recorded under Section 108 of the Customs Act, 1962 were taken into account in the order in original. It has observed that, where information received by the statutory authorities triggers an inquiry and culminates in adjudication proceedings, there is nothing in law to compel the authorities to involve the informants in the judicial proceedings. However, if the individual is involved in the proceedings, which results in an adverse order against third

party, then on the principles of natural justice such third party can cross-examine the witness.

42. The Gujarat High Court in ***Rajesh Shantilal Adani Managing Director (supra)*** has noted the observations of the Division Bench of our High Court rendered in ***Jha Shipping Agency (supra)***. In the facts of that case, it has observed that refusal on the part of the adjudicating authority to permit cross-examination of the experts had violated the principles of natural justice.

43. A Division Bench of our Court in ***Sushil Kumar Sharma (supra)*** has considered the issue of natural justice in the context of FEMA. It has observed that, imposition of penalty on persons under FERA and FEMA is a quasi criminal proceeding. It has also observed that, in order to charge a person penalty, authority concerned must come to a definite fact finding on a preponderance of probability if not beyond reasonable doubt that he had contravened the statutory provision.

44. The Delhi High Court in ***Basudev Garg (supra)*** had set aside the impugned order and remanded for fresh adjudication in view of the breach of principles of natural justice. The Delhi High Court in ***HIM Logistic Pvt Ltd (supra)*** had set aside the

order of the adjudicating authority for not allowing cross-examination of the prosecution witnesses.

45. The Kerala High Court in ***Krishna Brothers and Ors.*** had set aside proceedings under the Custom Brokers Licensing Regulation, 2013 on the grounds of principles of breach of natural justice.
46. The Bombay High Court in ***Prakash Raghunath Autade (supra)*** has considered the stage at which a noticee is entitled to cross examine the witnesses. It has referred to previous authorities and observed that, it is only after the statement of witnesses are recorded by the relevant authority in course of adjudication proceedings and such evidence is regarded as relevant that the noticee has the right to claim that he be extended the opportunity to cross examine such witnesses so as to extend to him fair, reasonable and adequate opportunity of defence.
47. ***Sampad Narayan Mukherjee (supra)*** has considered Sections 108, 122, 122A and 138B of the Customs Act, 1962 and the right of cross-examination of witnesses introduced by the prosecution in an adjudication process under the Customs Act, 1962. It has observed as follows:-

“26. The Act of 1962 empowers the customs authorities to make an enquiry, initiate adjudication proceedings and file prosecution. The Act of 1962 allows an appeal against an order in original passed in the adjudication proceeding. There is provisions for revision also. When making an enquiry, an officer of the Customs may require attendance of a person to make a statement. He is empowered to require a person to make a statement under Section 108 of the Act of 1962. Such a statement made in the course of an enquiry, and if its limited to the enquiry, then, the question of the person making the statement being open to cross-examination does not arise. However, once an adjudication proceeding is initiated, and a statement made under Section 108 of the Act of 1962 is introduced as a piece of evidence in such adjudication proceedings, then, the person making that statement must be made available for cross-examination to the party against whom such statement has been used in the adjudication proceedings, subject to the provisions of Section 138B of the Act of 1962. If the conditions prescribed under Section 138B (1) of the Act of 1962 is satisfied, then, the statement made by a person under Section 108 of the Act of 1962 would become relevant in the adjudication proceedings, notwithstanding, such a person not being cross-examined by the person who is affected by such a statement.”

48. In ***Sadguru Forwarders Private Limited (supra)*** the Single Bench noticing that requests for cross-examination of one of

the prosecution witnesses was denied in the adjudication process and no reason for such denial being given in the order of adjudication, had set aside the order of adjudication and permitted the authorities from completing the adjudicating process in accordance with law. The appeal court had held that, the noticee has a right of cross-examination of the prosecution witnesses.

- 49.** The Appeal Court, in ***Shri Himadri Chakraborty (supra)*** where the correctness of ***Sampad Narayan Mukherjee (supra)*** was questioned has observed that,

“In the event, the adjudicating authority is of the view that the statement under Section 108 of the Act has to be relied upon then it goes without saying that the respondent shall be entitled to a full-fledged opportunity of cross-examining such of those persons from whom statements under Section 108 of the Act have been recorded.”

- 50.** Principles of natural justice have two primary facets, namely, no one should be the judge of his cause and hear the other side. The issues that have been raised in the three appeals pivot around the *audi alterem partem* rule of the principles of natural justice.

51. Principles of natural justice have been recognized to be a part of Article 14 of the Constitution of India. It has also been recognized that, Article 14 is not the sole repository of the principles of natural justice. Principles of natural justice stand attracted in every adjudicatory proceeding, be it judicial, quasi judicial or administrative, unless specifically excluded by statute. An administrative action or a quasi judicial decision has to conform with the principles of natural justice when such action or decision affects the rights or results in consequences for a party. Orders that have been assailed in these appeals have resulted in consequences for the appellants. Impugned orders have to pass the test of adherence to principles of natural justice to attain validity. Adherence to the principles of natural justice in the adjudicatory process resulting in consequences for the affected party is so imperative that has to be read into a statutory provision of adjudication when it is silent on such aspect. It is a protection which has been guaranteed under Article 14 of the Constitution.

52. *Audi alteram partem* which is a dimension of the principles of natural justice has the requirement of allowing cross-examination of the witnesses who give evidence against the

delinquent. It has been recognized by judicial pronouncements that, administrative and quasi judicial orders must also adhere to the principles of natural justice. Courts have held that adherence to the principles of natural justice in the decision making process of administrative and quasi judicial authorities/bodies prevents injustice. Courts have carved out an exception to the adherence to the principles of natural justice.

- 53.** Courts have cautioned that breach of principles of natural justice should not be mechanically applied to set aside an impugned order where, on admitted or indisputable facts only one conclusion was possible and such conclusion is the impugned order. Courts have however on many occasions insisted on proof of prejudice being caused on violation of principles of natural justice and refused to grant relief when no prejudice had been established.
- 54.** In FEA 2 of 2009, an adjudication order dated January 31, 2005 had been passed imposing penalty for contravention of Section 9 (1) (b) (d) of FERA. In arriving at the decision dated January 31, 2005 an adjudicating authority had taken into account document seized on March 14, 1997 from one Mr. Nirmal Kumar Karmakar who admitted payment of money to

the appellants in FEA 2 of 2009. An appeal had been carried against the order in original dated January 31, 2005 which was dismissed on October 27, 2008.

55. At both the stages, the appellant had prayed for cross-examination of Mr. Nirmal Kumar Karmakar. The adjudicating authority had rejected such prayer on the ground that, the documents seized from the appellant had corroborated the statements made by Mr. Nirmal Kumar Karmakar. The appellant authority had rejected the prayer for cross-examination by placing reliance on ***Surjeet Singh Chhabra (supra)*** and alluding to the fact that although Mr. Nirmal Kumar Karmakar was asked to appear before the adjudicating officer for cross-examination, he did not appear and being a co-noticee in the proceeding he had remained absent from contesting his case before the adjudicating officer.

56. In the adjudication proceedings, the prosecution had relied upon statement made by Mr. Nirmal Kumar Karmakar to bring home the charges as against the appellant. Prayer for cross-examination of Mr. Nirmal Kumar Karmakar had been denied first by the adjudicating authority and thereafter by the appellate Tribunal. At no stage, did the adjudicating

authority or the appellate authority had returned a finding that cross-examination of Mr. Nirmal Kumar Karmakar was not possible in view of events akin to those enumerated in Section 138 B of the Customs Act, 1962, happening. Mr. Nirmal Kumar Karmakar was alive both at the point of time of the order of adjudication dated January 31, 2005 and the appellate authority order dated October 22, 2008. The prosecution has not established that Mr. Nirmal Kumar Karmakar could not be found or was incapable of giving evidence or was kept out of the way by the appellant or his presence could not be obtained without an amount of delay and expense under the circumstances of the case, the authorities considers unreasonable. The adjudicating authority and the appellate authority did not return any finding akin to Section 138 B (1) of the Customs Act, 1962 in relation to the statements of Mr. Nirmal Kumar Karmakar that had been introduced in evidence in the adjudicating proceeding. Documents seized from Mr. Nirmal Kumar Karmakar had also been introduced in the adjudication proceedings.

57. It has been contended on behalf of the Enforcement Directorate that, the appellant in FEA 2 of 2009 had recorded

a statement dated April 3, 1997 under Section 40 of the FERA, which is deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Indian Penal Code, 1860. The statement had been recorded without any coercion and that such statement contained wealth of information which were within the exclusive knowledge of the appellant and could not have been made as a result of tutoring and compulsion.

58. Such a contention of the Enforcement Directorate has currency should the confessional statement stands corroborated by independent documents and should the Enforcement Directorate not introduced documents seized from Mr. Nirmal Kumar Karmakar and statement made by Mr. Nirmal Kumar Karmakar in the adjudication proceedings. Independent of such documents seized from and the statements of Mr. Nirmal Kumar Karmakar the Enforcement Directorate had to prove the charges as against the appellant, on a preponderance of probability if not beyond reasonable doubt, given the quasi criminal nature of the proceedings. Having introduced the statement of Mr. Nirmal Kumar Karmakar and documents seized from him in evidence in the adjudication proceedings, it was incumbent

upon the Enforcement Directorate to allow cross-examination of Mr. Nirmal Kumar Karmakar. Not having done so, the proceedings both at the order in original stage as also in the appellate stage have been vitiated by the breach of principles of natural justice.

- 59.** It has been contended that, the appellant in FEA 2 of 2009 has not established any prejudice by the denial of the right of cross-examination. Right of cross-examination has been recognized by judicial pronouncements noted above in proceedings under the FERA which results in an adjudication imposing consequences. In FEA 2 of 2009 the appellant had faced penalties imposed for contraventions of Section 9 (1) (b) and (d) of FERA which had been upheld by the appellate authority. Appellant can be said to be prejudiced for not having been granted the right of cross-examination in as much as the appellant lost the opportunity to establish the truthfulness of the statement made by Mr. Nirmal Kumar Karmakar and the veracity of documents seized from him which were the grounds on which, the appellant had been found guilty of contravention of the provisions of FERA. Moreover, the statement of Mr. Nirmal Kumar Karmakar had lost relevance in the adjudicating proceedings, once, the

same was not tested on the anvil of cross-examination particularly when , the relevancy of the statement of Mr. Nirmal Kumar Karmakar cannot be introduced in the adjudication proceedings on the principles akin to Section 138 B of the Customs Act, 1962.

- 60.** The factual situation as has been obtaining in FEA 3 of 2009 is similar to those of FEA 2 of 2009. On the parity of the reasoning of FEA 2 of 2009, the order of adjudication and the order passed by the appellate authority in FEA 3 of 2009 are also vitiated.
- 61.** The contention of the Enforcement Directorate with regard to reverse burden under Section 71 of the FERA has been put to rest in ***Vinod Solanki (supra)***.
- 62.** In FEA 25 of 2009 the appellant had suffered order in original and appellate authority's order where, at both stages, the prayer for cross-examination of prosecution witnesses had been negated. On the parity of the reasoning of FEA 2 of 2009 and FEA 3 of 2009, since, the authorities had introduced evidence of natural persons in the adjudication proceedings, the appellant was entitled to cross-examine such natural person. Not having been allowed to cross-examine such witness of the prosecution, in the adjudication

proceedings, the entire proceedings stood vitiated. The appellate authority had incorrectly held that the appellant was not entitled to cross-examine the prosecution witnesses.

63. In such circumstances, the orders under appeal in the three appeals are set aside. The authorities are at liberty to commence the adjudication proceedings from the stage of evidence of the prosecution. All prosecution witnesses have to be allowed to be cross-examined by the appellants.

64. FEA 2 of 2009, FEA 3 of 2009 and FEA 25 of 2009 with all other connected applications are disposed of accordingly.

[DEBANGSU BASAK, J.]

65. I agree.

[MD. SHABBAR RASHIDI, J]