

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Customs]
ORIGINAL SIDE

CUSTA/4/2022
MAT/556/2019
CAN/4016/2019
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

SHRI HIMADRI CHAKRABORTY

CUSTA/5/2022
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

RAHUL RANJAN

CUSTA/6/2022
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

SHRI KISLAY

CUSTA/7/2022
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

GIRISH SHARMA

CUSTA/8/2022
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

SUJAY KUMAR SARKAR

CUSTA/9/2022
IA NO.GA/2/2022

COMMISSIONER OF CUSTOMS,
AIRPORT AND ADMN. KOLKATA

-Versus-

M/S. AAI CARGO LOGISTIC AND
ALLIED SERVICES COMPANY
LIMITED

BEFORE :
THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 7th June, 2023

Appearance :
Mr.K.K. Maiti, Adv.
Mr.Tapan Bhanja, Adv.
..for the appellant.

Mr.Agnibesh Sengupta, Adv.
Mr.Jaydeb Ghorai, Adv.
Mr.Diptesh Ghorai, Adv.
...for the respondent in CUSTA/7/2022.

The Court : We have heard Mr. K.K. Maiti, learned counsel, assisted by Mr. Tapan Bhanja, learned advocate appearing for the appellant/revenue and Mr. Agnibesh Sengupta, learned counsel for the respondent in CUSTA/7/2022.

These bunch of appeals can be divided into two categories. The first being MAT/556/2019 which was filed by the Department challenging the correctness of the order in WP 25447(w)/2018 dated 1st February, 2019. The said writ petition was filed by the respondent in MAT/556/2019 challenging an order-in-original dated September 6, 2018 passed by the adjudicating authority in exercise of its powers under the provisions of the Customs Act, 1962. By the said order, penalty has been imposed on the respondent in this appeal. The primary ground on which the order of adjudication was challenged is by contending that the adjudicating authority had referred to the statements of around 11 per cent recorded under Section 108 of the Act and in spite of specific request to afford an opportunity to cross-examine those persons, the adjudicating authority rejected the request and simultaneously passed the order of adjudication which was impugned in the writ petition. Elaborate submissions have been made before the learned Writ Court both by the revenue as well as the writ petitioner and by the impugned order dated 1st February, 2019, the learned Writ Court came to the conclusion that the respondent/writ petitioner should be afforded an opportunity to cross-examine those persons from whom statements have

been recorded under Section 108 of the Act. Accordingly, the writ petition was disposed of by permitting the adjudicating authority to proceed with the show cause notice dated February 13, 2017 and reply thereto in accordance with law and the adjudicating authority will afford reasonable opportunity of cross-examination of the witnesses which the writ petitioner seeks to cross-examine subject to the provisions of Section 138B of the Act. There were other co-noticees who were also imposed with penalty by the common order of adjudication dated 6th September, 2018. Those co-noticees did not file a writ petition but availed the statutory remedy of appeal before the Tribunal. The learned Tribunal by separate orders had followed the order passed by the learned Writ Court in WP 25447(w)/2018 dated 1st February, 2019 and allowed the appeals and remanded the matters with the same direction as issued by the learned Writ Court.

Aggrieved by the such orders, the revenue has preferred appeals under Section 130 of the Customs Act raising the following substantial questions of law.

- (i) *Whether the Learned Tribunal has committed the gross error of law by not dealing with the appeal on merits and by not giving any independent reason thereto?*
- (ii) *Whether the Learned Tribunal's observation is correct as the Hon'ble High Court has set aside the impugned Order-in-Original dated 06.09.2018 in the case of Sampad Narayan Mukherjee is binding in the case of present respondent when*

the said respondent herein is not a party in the case before the Hon'ble High Court?

- (iii) Whether the Order fo the Hon'ble High Court in Writ Petition No.25447(w) of 2018 which was relied upon by the Learned Tribunal is in personam or in rem?*
- (iv) Whether the observation of the Adjudicating Authority for non granting the opportunity of cross-examination to the respondent is required to be dealt with by the Learned Tribunal before remanding the case for denovo Adjudication?*
- (v) Whether in terms of Section 138B of the Customs Act, 1962 is it mandatory for the Adjudicating Authority to provide opportunity of cross-examination when the voluntary statements of the witnesses have not been retracted?*
- (vi) Whether the reliance of the order of the Hon'ble High Court by the Learned Tribunal is correct when the order of the Hon'ble High Court dated 01.02.2019 in W.P. No.25447(w) of 2018 (Sampad Narayan Mukherjee –Vs- Union of India & Ors.) is under challenge and pending before the Hon'ble Division Bench.*

Since the issue involved is common and the question as to whether the respondent is entitled for an opportunity to cross-examine those persons from whom statements were recorded is also a common question in all these cases, the intra-court appeal as well as the statutory appeals filed by the revenue were heard together and are disposed of by this common judgment and order.

On several dates the matter was heard and elaborate submissions were made by the learned standing counsel appearing for the revenue and the learned counsel appearing for the respondent in MAT/556/2019 and the other advocates appearing for the other respondents.

The short question would be as to whether the adjudicating authority was right in refusing to grant an opportunity of cross-examination of third parties from whom statements have been recorded which have been referred to and relied upon in the adjudication order which was impugned in the writ petition as well as before the learned Tribunal. The adjudicating authority in the first paragraph of the order of adjudication dated 6th September, 2018 has opined that evidence in adjudication proceedings need not be like the one in the criminal case and finding in adjudication is based on preponderance of probabilities. Further, the adjudicating authority observed that in the cases on hand there are enough circumstantial evidences which provide for reliable basis for corroboration of the statement given under Section 108 of the Act. Furthermore, it has been observed that the witnesses who have given statements voluntarily have not retracted their statements and the witnesses are well conversant with the facts of the case and the role of the noticees/respondents. Therefore, the adjudicating authority rejected the prayer for cross-examination on the ground that it is flimsy. The adjudicating authority relied upon a judgment of the Hon'ble Supreme Court in *Kanugo & Co. Vs. Collector of Customs, Calcutta & Ors.*, reported in

1983(13) ELT 1486 (SC). As pointed out earlier, the question would be that if third party statements are to be relied upon with or without corroborative evidence, is the noticee entitled to cross-examine the said third party? As pointed out earlier, elaborate submissions have been made and voluminous compilation of judgments have been placed by the learned standing counsel for the revenue as well as the learned counsel for the respondent. In our considered view, the necessity to answer the question of law arises for consideration in these appeals may not arise on account of the peculiar facts and circumstances of the case. Admittedly, as per the view taken by the adjudicating authority as is evident from the order of adjudication that there are sufficient evidence available to justify the imposition of penalty on the noticees. It is true that the adjudicating authority has stated that this defence which is available corroborates the statement given by the third parties under Section 108 of the Act. Thus, if according to the adjudicating authority, there is enough evidence to pin down the respondent de hors the statements recorded under Section 108 of the Act, this Court fails to understand as to why the adjudicating authority should place reliance upon the statement under Section 108 of the Act. The learned counsel for the respondent in MAT/556/2019 submitted that in several of the decisions relied upon by the revenue they were cases where statements were retracted and certain other cases where there was direct link between the persons who had given the statements who were also noticees as well as the other co-noticees and the case on hand is entirely different as the noticees who are

respondents in these appeals are independent persons. In our view, considering various factors more particularly the peculiar facts and circumstances of the case and also taking note of the fact that the adjudication proceedings commenced with the issuance of the show cause notice in the year 2018, and the matter has been lingering before this Court as well as before the Tribunal for several years. We are of the view that without answering the substantial questions of law which have been raised by the revenue in these appeals, a workable direction can be issued whereby the questions of law can be left open at the same time, the rights of the respondents/noticees are protected as well as the interest of the revenue also can be protected. In that view of the matter, the appeals stand disposed of with the following order and directions :

The respondents are directed to treat the order of adjudication dated 6th September, 2018 as a show cause notice and the respondents are directed to submit their additional reply clearly pointing out that the statements recorded under Section 108 of the Act cannot be relied upon to frame the noticees and the respondents shall submit their additional reply on the alleged evidence which is stated to be available with the Department as mentioned in the order of adjudication. The respondents are directed to submit their reply within a period of six weeks from the date of receipt of the server copy of this order. On receipt of the reply, the adjudicating authority is

directed to afford an opportunity of personal hearing to the authorised representative of the respondent and adjudicate the case afresh.

We make it clear that while adjudicating the case afresh, the adjudicating authority shall not rely upon and refer to any of the statements which have been recorded under Section 108 of the Act from third parties in which the names of the respondents have been referred to and the adjudication shall be done based on the evidence which is stated to be available with the Department and considering the objections that the respondents will raise in their additional response directed to be submitted as above. The respondents are directed to submit as above. 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 respondents 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. We once again make it clear that the substantial questions of law which have been raised by the revenue are left open and the observations and findings rendered by the learned Writ Court to justify its ultimate conclusion are not to be treated as precedent and the legal question is left open.

The adjudicating authority shall endeavor to complete the adjudication proceedings afresh as expeditiously as possible preferably within a period of four months from the date on which the personal hearing is concluded.

It is further made clear that this order shall enure in favour of the respondents who are before this Court and not in respect of any other persons who have not questioned the adjudication order dated 6th September, 2018 either before this Court or before the learned Tribunal.

With the above directions, the appeals stand disposed of.

With the consent of the learned advocates appearing for the respective parties, MAT/556/2019 is treated as on supplementary list and the same is also disposed of.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)