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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : 15.10.2024

(75)

+ **CUSAA 79/2024 & CM APPL. 60340/2024**
COMMISSIONER OF CUSTOMS (EXPORT),
ICD TUGHLAKABADAppellant
versus
SHRI MANISH SINGHALRespondent

(76)

+ **CUSAA 80/2024 & CM APPL. 60417/2024**
COMMISSIONER OF CUSTOMS (EXPORT), ICD
TUGHLAKABAD, NEW DELHIAppellant
versus
SHRI RAVINDER PAL JINDALRespondent

(77)

+ **CUSAA 81/2024 & CM APPL. 60419/2024**
COMMISSIONER OF CUSTOMS (EXPORT),
ICD TUGHLAKABADAppellant
versus
SHRI DINESH BHARADWAJRespondent

Present : Mr Aakarsh Srivastava, SC and Mr Anand
Pandey, Advocate for the appellant.

None for the respondent.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The Revenue has filed the present appeals under Section 130 of the Customs Act 1962 (hereafter *the Act*), *inter alia*, impugning the common



order dated 30.04.2024 (hereafter *the impugned order*) passed by the learned Customs, Excise & Service Tax Appellate Tribunal (hereafter *the CESTAT*) in Customs Appeal No.648/2011 captioned *Shri Manish Singhal, Proprietor M/s Singhal Traders v. Commissioner of Customs*; Customs Appeal No.69/2012 captioned *Shri Dinesh Bhardwaj v. Commissioner of Customs*; and Customs Appeal No.70/2012 captioned *Shri Ravinder Pal Jindal v. Commissioner of Customs*.

2. The respondents had filed the aforesaid appeals against an Order-in-Original dated 23.11.2011 passed by the Commissioner of Customs, ICD, Tughlakabad, Delhi (hereafter *the adjudicating authority*). In terms of the said order, the adjudicating authority had directed the confiscation of the goods attempted to be exported under Shipping Bill No.1163482 dated 19.04.2010 for an amount of ₹4,47,750/- but allowed the redemption of such goods subject to the payment of redemption fine of ₹1,00,000/-.

3. In addition, it was also found that the exporter (Manish Singhal, sole proprietor of M/s Singhal Traders) had exported the goods of similar description (Mud additive chemicals for oil wells) in the past through 25 (twenty-five) shipping bills, and the adjudicating authority assumed that the said goods were also liable to be confiscated. Accordingly, the adjudicating authority directed the confiscation of the sale proceeds of ₹3,430/- which was available in the bank account of M/s Singhal Traders and ordered investigation into the remaining sale proceeds amounting to ₹1,13,43,550/-.

4. The adjudicating authority imposed the penalty of ₹25,00,000/- under Section 114 the Act as well as the penalty of ₹25,00,000/- under Section



114AA of the Act on the exporter – M/s Singhal Traders. Additionally, the adjudicating authority also imposed the penalty of ₹5,00,000/- each on the suppliers as well as the penalty of ₹5,00,000/- under Section 114 of the Act on Dinesh Bhardwaj (G-card holder).

5. Against the said the adjudicatory order, three appeals were filed by the exporter (Manish Singhal), G-Card holder (Dinesh Bhardwaj), and CHA (Rajinder Pal Jindal) respectively. However, the said appeals were allowed in terms of the impugned order.

6. The CESTAT found that the adjudicating authority had relied upon various statements made by various persons as well as the test report submitted by the Central Revenue Chemical Laboratory (hereafter *the CRCL*), however, the procedure under Section 138B of the Act was not followed. Further, the exporter's request to permit the cross examination of the Chemical Examiner – who had submitted the chemical report – was not allowed.

7. The controversy involved in the present case related to the export of goods, which were described as “Mud Additive Chemicals (Technical Grade) for oil wells”. According to the adjudicating authority, the goods were found to be urea, the export of which, at the material time was proscribed. The samples of the said goods were sent to the CRCL and the Chemical Examiner had furnished a short report by simply stating that “*The sample is urea in the form of white granules*”. The report did not provide any clue as to the tests that were carried out and the manner in which the Chemical Examiner had arrived at the conclusion.



8. In the aforesaid circumstances, the CESTAT found that it was just and proper in the given facts of this case to permit the exporter to cross examine the Chemical Examiner.

9. Since the statements relied upon by the adjudicating authority, were not subjected to the process prescribed under Section 138B of the Act, the CESTAT held that the same could not be relied upon. It was also held that the test report of the CRCL could not be relied upon for the reasons that the exporter had not been granted the opportunity to cross examine the Chemical Examiner.

10. The CESTAT concluded that once the statements and the test report of the CRCL were ignored, there was no material to sustain the order passed by the adjudicating authority and, accordingly, allowed the appeals.

11. The Revenue has projected the following substantial questions of law for consideration by this Court:-

- i. Whether order of Tribunal is based on wrong interpretation of Section 138B of the Customs Act, 1962?
- ii. Whether looking into facts of the case the Tribunal is justified in quashing the order without going into merits and only on the ground of denial of cross examination?
- iii. Whether in light of facts of the case the Tribunal is justified in setting aside the order without any remand and opportunity to the Department to allow cross examination?
- iv. Whether in light of facts of the case the Tribunal is justified in not accepting cogent and convincing reason mentioned by the Adjudicating Authority for denial of cross examination of CRCL officer?



v. Whether in light of facts of the case the Tribunal was right in insisting on cross examination even in the case of confessional statements?”

12. It is clear from the plain reading of the impugned order that the CESTAT had allowed the appeals on the sole ground that the statements, which formed the foundation of the order-in-original dated 23.11.2011 could not be used as relevant for proving the allegations against the respondents, in view of Section 138B of the Act. The exporter was given no opportunity to cross-examine any of the person whose statement was sought to be relied upon. The said persons were not examined by the Court and the Court had not expressed any opinion that the statements ought to be admitted, as contemplated under Section 138B(1)(b) of the Act. The question whether a person against whom a statement is relied upon ought to be given an opportunity to cross-examine the person who has made the statement was the subject matter for consideration by the Coordinate Bench of this Court in ***Basudev Garg v. Commissioner of Customs: 2013 SCC OnLine Del 1447.*** It would be relevant to refer to the following extract of the said decision:

“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. v. Collector of Central Excise* reported in (2000) 122 ELT 641 (SC) as well as on *Laxman Exports Ltd. v. Collector of Central Excise* reported in (2002) 143 ELT 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 and K Cigarettes Ltd. v. Collector of Central Excise* reported in [2010] 1



GSTR 482 (Del); (2011) 22 STR 225 (Delhi).

10. In so far 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.* (2000) 122 ELT 641 (SC) and *Laxman Exports Ltd.* (2002) 143 ELT 21 (SC). Apart from this, the decision of this court in *J and K Cigarettes Ltd.* [2010] 1 GSTR 482 (Delhi) 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 statements under certain circumstances.—(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank 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 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.”



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.

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 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 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 (page 490 of 1 GSTR) :

“A bare reading of the above section manifests that under certain circumstances, as stipulated therein, a statement made and signed by those persons before any Central



excise officer of a Gazetted 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. Subâ€“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 utilised in adjudication proceedings before the Collector as well. In the present case, the provisions of section 9D 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 (page 498 of 1



GSTR) :

“Thus, when we examine the provision as to whether this 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 said material, for forming the opinion. Only then, would it be possible for the affected party to challenge 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 and K Cigarettes Ltd. [2010] 1 GSTR 482 (Del) 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.”

13. Undisputedly, there are circumstances where statements can be relied upon notwithstanding that the persons against whom the said statements are relied upon have not been afforded any opportunity to cross-examine the persons, who have made the statements. However, undisputedly, the record



does not indicate that any of such circumstances existed in the facts of the present case. It is also material to note that the report of the Chemical Examiner was merely a conclusion and did not contain any analysis on the basis of which the conclusion was drawn. Clearly, in such circumstances, the exporter ought to have been provided an opportunity to cross-examine the Chemical Examiner. In the given facts, no substantial question of law arises in the present appeals.

14. In view of the above, the appeals are, accordingly, dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 15, 2024

M/RK