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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 1697/2016

HIM LOGISTICS PVT. LTD ..... Petitioner
Through Mrs. Anjali J. Manish and Mr. Priyadarshi Manish, Advocates

versus

THE PRINCIPAL COMMISIONER OF CUSTOMS ... Respondent
Through Ms.Sonia Sharma, Senior Standing Counsel

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% **26.02.2016**

Dr. S. Muralidhar, J.:

CM No.7257/2016 (exemption)

1. Allowed subject to all just exceptions.

2. The application is disposed of.

WP (C) 1697/2016 & CM No. 7256/2016 (Stay)

3. Notice. Ms. Sonia Sharma, Advocate, accepts notice for the Respondent.

4. Since the point involved is a short one, the petition is taken up for final hearing.

5. The challenge in this petition is to an order dated 17th February 2016 passed by the Deputy Commissioner (Adjudication) ICD Import Thuglakabad [hereafter the 'Adjudicating Authority' (AA)] declining the

Petitioner's request for cross-examination of two persons, whose statements have been relied upon in the proceedings initiated against the Petitioner. issue concerns the denial by the Commissioner of Customs

6. The facts are not in dispute. A show cause notice ('SCN') dated 1st November 2014 was issued to M/s Spreet International (hereafter 'importer') as well as the Petitioner and four others by the Additional Director General, Directorate of Revenue Intelligence (DRI). The SCN alleged that the importer and the said persons, in collusion with the Petitioner who is a customs house agent (now known as 'customs broker') acted in collusion to make illegal import of auto parts by way of a Bill of Entry (B/E) using forged documents. The SCN *inter alia* proposed to confiscate the illegally imported goods, raise a demand for the customs duty evaded apart from interest and penalty.

7. The details of the said SCN need not be set out in detail for the present purposes except to the extent of noting that the partners of the importer firm Mr. Shyam Lal and Ms. Preeti, had 'voluntarily' given statements to the DRI, during the course of investigation, which have been relied upon by the AA in the course of the adjudication proceedings. The specific case of the DRI is that the said partners of the importer acted in collusion with the Petitioner in making the illegal imports. Therefore, their statements are a critical piece of evidence being relied upon by the Respondent in support of the SCN.

8. One of the co-noticees of the SCN, Mr. Pawan Kumar Ralli, filed WP (C) No.777/2015 in this Court, in which an order was passed by the Court on 25th January 2016, by the consent of the parties, which included the Principal Commissioner of the Customs (Import), directing that the SCN

dated 1st November 2014 should be adjudicated within a period of six weeks from that date.

9. On 9th February, 2016, the Petitioner wrote to the AA *inter alia* requesting for the cross-examination of Mr. Shyam Lal and Ms.Preeti. This was reiterated by another letter dated 15th February, 2016. The attention of the AA was drawn to Section 138 B of the Customs Act, 1962 ('Act') and the decision of this Court in ***Flevel International v. Commissioner of Central Excise 2016 (332) ELT 416 (Del)*** which in turn referred to the decisions in ***Basudev Garg v. Commissioner of Customs 2013 (294) ELT 353(Del), Laxman Exports Ltd. v. Controller of Central Excise 2002 (143) ELT 21(SC)*** and ***Swadeshi Polytex ltd. v. Collector of Central Excise 2000 (122) ELT641 (SC).***

10. By the impugned order dated 17th February 2016, the AA rejected the above request of the petitioner. The AA relied on a decision of the CESTAT in ***Jagdish Shankar Trivedi v. Commissioner of Customs 2006 (194) ELT 290 (Tri- Del)*** which held that the failure to afford an Assessee the right to cross-examine witnesses would not violate the principles of natural justice. The AA fixed the final hearing for 26th February 2016, i.e. today, at 3 pm. It is in these circumstances that the present petition has been filed.

11. While Ms. Anjali Manish learned counsel for the Petitioner reiterated the submissions in the petition and prayed for a opportunity to be provided to the Petitioner cross-examine the aforementioned two persons, Ms.Sonia Sharma, learned counsel for the Respondent vehemently resisted the said prayer. Reliance was placed by Ms. Sharma on the decision of the learned Single Judge of this Court in ***Shahid Balwa v.***

The Directorate of Enforcement (199) 2013 DLT 380 and the decision of the Supreme Court in ***M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (2003)8 SCC 449***.

12. The above submissions have been considered. At the outset it requires to be noted that the decision in ***M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence*** (*supra*) arose in the context of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act). The question was whether Section 42 (2) of the NDPS Act would apply to a search and seizure conducted by a Gazetted Officer under Sections 41 (2) and (3) of the NDPS Act. That decision does not even remotely suggest that the person against whom a statement is sought to be used by an AA would not be entitled to cross-examine the maker of such statement in the course of the adjudication proceedings. The decision in ***Shahid Balwa*** (*supra*) which arose under the Foreign Exchange Management Act 1999 acknowledged, in para 7.2, that the enforceability of the right to cross-examine witnesses or persons who have made statements against a party "if demanded, would depend upon the facts and circumstances of the case, the nature of enquiry, the provisions of the statute and the rules as also the regulations governing the enquiry, the conduct of the person seeking to enforce the right of cross-examination i.e., as to whether such a right was demanded in the very first instance or not, the prejudice, if any, caused to such a party by being denied the right of cross-examination on assessment of the entire material, which is placed before the authority conducting the enquiry."

13. In the context of the present case, Section 138 B of the Act is relevant and 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 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."

14. The above provision is *in pari materia* Section 9D of the Central Excise Act 1944 ('CE Act'), which was explained by the Division Bench of this Court in ***Basudev Garg*** (*supra*) as under:

> "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."

15. After noticing the decision in ***J & K Cigarettes Ltd. v. Collector of Central Excise reported in 2009 (242) ELT 189 (Del)*** which had upheld

the validity of Section 9D of the CE Act, the Court in ***Basudev Garg*** (*supra*) observed as under:

> "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:-
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>> "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 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."

16. The legal position explained in the above decisions was reiterated by another Division Bench of this Court recently in ***Flevel International vs. Commissioner of Central Excise*** (*supra*) where again the decision of the AA to deny the Assessee the right of cross-examination was held to be unsustainable in law being contrary to Section 9D of the CE Act.

17. In the present case, it is an admitted fact that the Respondent Department is placing considerable reliance on the statements of Mr. Shyam Lal and Ms. Preeti, the partners of the importer, in support of the case made out in the SCN. The impugned order of the AA does not indicate that any prejudice would be caused to the Department by providing the Petitioner the right of cross-examination. On the other hand the denial of such right would prejudice the Petitioner since the said statements are adverse to the Petitioner. In the circumstances, the denial of the Petitioner's right of cross-examination is held contrary to the law explained in ***Basudev Garg*** (*supra*).

18. Consequently, the Court sets aside the order dated 17th February, 2016 passed by the AA declining the request of the Petitioner for cross-examination of Mr. Shyam Lal and Ms. Preeti.

19. The AA shall now fix a date not later than within two weeks from today for the appearance of Mr. Shyam Lal and Ms. for cross-examination by the Petitioner. The Petitioner will proceed with their cross-examination without seeking any adjournment and conclude it not later than one week thereafter. The time limit of completing the

adjudication proceedings and passing the adjudication order is extended by a period of two months from the date of conclusion of the cross examination.

20. The writ petition is disposed of in the above terms.

21. Order *dasti* under the signature of the Court Master. Ms. Sonia Sharma, learned counsel for the Respondent, will communicate to the AA today's order forthwith.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 26, 2016
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