

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50796 of 2019

[Arising out of Order-in-Original No. VIII/ICD/TKD/6/Adj./Imp./Pr. Commr./07/2017/50524 dated 14.02.2019 passed by the Principal Commissioner, Customs, New Delhi]

**M/s Silicone Concepts
International Pvt. Ltd.**

A-77, DDA Sheds
Okhla Industrial Area
Phase – II, New Delhi

...Appellant

Vs.

Principal Commissioner of Customs

ICD, TKD (Import)
New Delhi

...Respondent

APPEARANCE:

Shri A.K. Prasad, Advocate for the Appellant

Shri Rakesh Kumar, Authorised Representative for the Respondent

Coram: HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. 50963/2019

DATE OF HEARING : 17 May, 2019

PRONOUNCED ON : 01 August, 2019

RACHNA GUPTA

M/s. Silicone Concepts International Pvt. Ltd. (M/s. SCIPL, hereinafter)/the appellants are engaged in import and trading of various products as epoxy, stone cleaner, stone care, polyester, firelight, etc. imported from M/s. Akemi Chemisch Technische Spezialfabrik GMBH, Germany (hereinafter referred as M/s Akemi). The Department got an information about M/s. SCIPL to have mis-declared the value of the imported goods to the Customs and to have mis-classified goods to evade payment on MRP/RSP basis and to not to have included the amounts paid to the parent Company terming them as 'Royalty' in connection with import of goods treated by M/s. SCIPL in the assessable value. On the basis of said information, the search of the appellants premises seizing goods/documents/laptops, etc. was conducted on 10.12.2015.

Seized goods, however, were given to the Directors of SCIPL namely Shri Vineet Saluja and Shri Pradeep Sharma for safe custody. The statement of Shri Vineet Saluja was recorded on 10.12.2015, 20.07.2016, 19.06.2016 and 15.11.2016. The statement of Shri Pradeep Sharma was recorded on 10.12.2015 and 16.05.2016 accepting that M/s. SCIPL have committed the above mentioned acts. From the entire investigation, Department observed that M/s. SCIPL has colluded with their overseas suppliers and has fabricated documents and created parallel set of documents i.e. invoices to be submitted to Customs with an intention of evading payment of applicable duty and invoices for the purposes of actual payments. While they have made payments on the basis of invoices showing actual transactional value, they have caused duplicate invoices showing lesser value to the Customs Authorities for the purpose of assessment. Both the afore-named Directors were observed to be the master mind for the entire fraud committed by M/s. SCIPL as they only aided the Company in suppressing the actual value paid for the imports to their suppliers i.e. M/s. Akemi. Department also observed that M/s. SCIPL have used the services of M/s. Dadson Global Cargo, New Delhi who facilitated clearance of cargo of M/s. SCIPL through 7 different CHAs. None of those CHAs were observed to have followed the KYC norms nor did they bother to ascertain the credentials of M/s. SCIPL. Resultantly, a show cause notice No. 03/2017 dated 22.02.2017 was served upon M/s. SCIPL, both its Directors, Proprietor of M/s. Dadson Global Cargo and all the CHAs as named in the said show cause notice proposing the re-determination of the assessable value, re-classification of the goods, confiscation of the seized goods which were provisionally released

and confiscation of the goods re-determined. Differential Customs duty was proposed to be recovered. Penalties were proposed to be imposed upon both the Directors as well as the Proprietor of M/s. Dadson Global Cargo. The penalties upon all the CHAs were also proposed to be imposed. During adjudication of the said show cause notice, the appellant made a request for cross examination of Shri Vineet Saluja, Shri Pradeep Sharma, Ms. N. Rashmi and Shri Amit Mallik. The said request was turned down vide the Order communicated to the appellant vide letter No. 07/2017 dated 13.02.2019. Being aggrieved of the said denial that the present Appeal has been preferred before this Tribunal.

2. We have heard Shri A.K. Prasad, learned Advocate for the appellant and Shri Rakesh Kumar, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that the show cause notice reveals that the same has been issued relying upon the statements of Shri Vineet Saluja, Shri Pradeep Sharma, Ms. N. Rashmi and Shri Amit Mallik. For the contents of the said statement to be relevant, the person making the statement have to be examined as a witness before the adjudicating authority prior the said statement is admitted in evidence and the person has to be cross examined by the assessee. It is impressed upon that said is the mandate as per the principles of natural justice. Otherwise also Section 9D of Central Excise Act, 1944 which is *para materia* with Section 138 of Customs Act, 1962 statutorily mandates the same. Learned Counsel has relied upon the Single Member Bench decision

of this Tribunal bearing Final Order No. 53409-53411/2016 dated 06.09.2016 wherein it has been held that the statements recorded during investigation are required to be examined in Chief and the right of cross examination cannot be denied merely because the deponents are either co-noticees/employees of the assessee. Learned Counsel has also relied upon the following case laws:

- **Elora Tobacco Co. Ltd. Vs. C.C.E., Indore** reported in **2017 (347) ELT 614 (Tri.-Del.)**
- **Agarwal Round Rolling Mills Ltd. Vs. C.C.E. & S.T., Raipur** reported in **2015 (317) ELT 145 (Tri.-Del.)**
- **J&K Cigarettes Ltd. Vs. Collector of Central Excise** reported in **2009 (242) ELT 189 (Del.)**
- **Arya Abhushan Bhandar Vs. Union of India** reported in **2002 (143) ELT 25 (S.C.)**

4. While rebutting these arguments it is submitted on behalf of the Department that the principles of natural justice do not require that in each and every matter the person who has given information should be examined in presence of the appellant/assessee or should be allowed to be cross examined by the person concerned in support of the statements made before the Customs Authorities. It is submitted that Section 9D as relied upon by the appellant is not applicable to the given circumstances because the person who are prayed to be cross examined are not any other persons but the Directors and the employees of the appellant/ assessee and their statements actually are the confessions on the part of the appellant that too to the Customs officers who are not the police officers, which bind the appellant with no opportunity to the appellant Company to cross examine the person making statement on appellant's own behalf. Thus, there is no infirmity in the Order under challenge. Learned Authorised Representative for the

Department has relied upon **Surjeet Singh Chhabra Vs. Union of India** reported in **1997 (89) E.L.T. 646 (S.C.)** and **Kanungo & Co. Vs. Collector of Customs, Calcutta and others** reported in **1983 (13) E.L.T. 1486 (S.C.)**.

5. After hearing both the parties and perusing the record, our considered opinion is as follows:

5.1 The impugned Appeal has been filed against an interlocutory Order passed by the adjudicating authority below while adjudicating the impugned show cause notice vide which the request of cross examination of four persons whose statement were recorded during investigation i.e. prior issuance of the impugned show cause notice was denied. Thus, the issue in controversy in the present Appeal is extremely limited in nature in the terms as to:

Whether denial of cross examination of the impugned witnesses amounts to violation of Section 9D of Central Excise Act, 1944/138 of Customs Act, 1962 and is violative of principles of natural justice.

Section 9D reads as follows:

"Section 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 interests 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.”

5.2 This Section deals expressly with the circumstances in which a statement recorded before a Gazette Officers can be treated as relevant for the purposes of proving the truth of contents thereof. What is categorically required by the Section is that the person whose statement was earlier recorded before Gazette Officer has to be examined as witness before the adjudicating authority who thereafter has to arrive at an opinion that having regard to the circumstances of the case the statement should be admitted in evidence in the interest of justice. It is only after both these steps are complied with that the statement would be eligible for being treated as relevant in the proceedings so that the assessee can if it so chooses exercise the option to test the evidence by way of cross examination. The said right is otherwise permitted under Section 138 of the Indian Evidence Act, 1932.

6. The entire case law relied upon by the appellant is based on Section 9D. Thus, it becomes important for us to adjudicate as to:

Whether the statements of the persons as are prayed to be cross examined qualify to be called as statement simplicitor.

7. Admittedly Shri Vineet Saluja and Shri Pradeep Sharma are the Directors of the appellant Company. As per Company Act, a Company Director is appointed or elected Member of the Board of Directors of a Company who with other Directors as the responsibility for determining and implementing the Company's policy. A Company Director neither has to be a stock holder/

shareholder nor a employee of the firm. He is the one who acts on the basis of Resolution made at Director's meeting and derive its power from the corporate legislation and from the Company's Articles of Association. As such, Director of a Company is none but the Company's agent who can bind the Company for any Act of his conduct. Keeping in view the same, the statement of Shri Vineet Saluja, Shri Pradeep Sharma is opined to not to be a statement simplicitor but a statement as that of the appellant Company and as such these statements are actually the confessions on behalf of the appellant Company. Since these statements were made to the Customs officers, the statements are out of the ambit of Section 24 of Indian Evidence Act and are readily admissible into evidence. As it was held by three judge Bench of Hon'ble Apex Court in the case of **State of Punjab Vs. Barkat Ram** reported in **1962 (3) SCR 338** where Court has gone to the extent of holding that the confessions made to the Customs officers if voluntarily made, can be the sole basis of the conviction.

8. Though the appellant have taken the plea that both the witnesses were compelled to give the initial statement of acknowledging the guilt but they had subsequently retracted. This controversy was cleared by Supreme Court **Bhagwan Singh Vs. State of Punjab** reported in **AIR 1952 (S.C.) 214** holding that even if it is a retracted confusion, it must first be tested whether confusion is voluntary and trivial inculcating the accused in the Commission of the crime, if affirmative findings, even retracted confusion can be recorded. The Apex Court clarified that to prove that the statement was not voluntary and was obtained by threat or

duress the burden lies upon the accused. We observe that there is nothing on record till date to satisfy the adjudicating authorities that the statement/confessions of the Directors of the Company were however made under threat or duress. Therefore, we are of the opinion that statements even if retracted can form the basis of conviction without examination of the persons making confessions in the manner as mentioned under Section 9D of Excise Act/138 of the Indian Evidence Act.

9. It is also an apparent and admitted fact that Shri Vineet Saluja and Shri Pradeep Sharma are not merely the Directors/agents of appellant Company but are the co-noticees as well. Hon'ble Apex Court in the case of **Haricharan Kurmi and Jogia Vs. State of Bihar** reported in **1964 Constitutional Bench of Supreme Court 1184** has considered the controversy as to:

When the confession of co-accused/ co-noticee can be used as evidence under Section 3 of the Evidence Act.

10. The Hon'ble Court held that though the confession of co-accused cannot be treated as substantive evidence but if the Court believed other evidence and felt the necessity of seeking an assurance in respect of its conclusion deducible from the said evidence the confession of the co-accused could be used. Seeing from this angle also, there appears no need for permitting cross-examination at least of Shri Vineet Saluja and Shri Pradeep Sharma.

11. Since the statement of the Directors of the Company are opined to be in the form of confessions, the Directors are none but those who have stepped into the shoes of the accused Company.

Otherwise also, they themselves are co-noticees and the imposition of penalty has been proposed against them. To our opinion, the fundamental right as enshrined under Article 20(3) of the Constitution of India which prohibits self incrimination is applicable to both of them. This Tribunal in the case of **Mayamahal Industries Vs. Collector of Central Excise, Meerut** reported in **1995 (80) E.L.T. 118** has held that it would not be proper to put the co-noticee in a position where he might have to incriminate himself by giving evidence.

12. Coming to the aspect of violation of natural justice, it has way back been listed by Supreme Court in **Kanungo & Co. Vs. Collector of Customs, Calcutta and others** reported in **1983 (13) E.L.T. 1486 (S.C.)** wherein it was held that principles of natural justice do not require that where the show cause notice set out of the material on which the Customs Authorities had relied and it was for the appellant to give a suitable explanation, persons who had given information should be examined in presence of the appellants or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. It was clarified that formal cross-examination was procedural justice and principles of natural justice did not require that there should be a kind of formal cross examination. It was held that natural justice certainly includes that any statement of person before it is accepted against somebody else that the person should have an opportunity of meeting it whether by way of interrogation or by way of comments and assailing as the party charged as a firm and reasonable opportunity to see comment and criticisms. The

evidence, statement or recorded on which the charge is being made against him the demands and test of natural justice are satisfied. This Tribunal in the case of **Popular Carpet Industries Vs. Commissioner of Customs, Mumbai** reported in **1996 (84) E.L.T. 244** has held that where a co-noticee did not agree to be examined he cannot be compelled to come as a witness for cross-examination. The Hon'ble High Court of Calcutta in the case of **Tapan Kumar Biswas Vs. Union of India and others** reported in **1996 (63) E.C.R. 546** has held that where the proceedee would be entitled to intercept the relevant documents they would not be entitled to cross examine any witness.

13. From the above discussion it becomes clear that the confessional statements are out of the ambit of Section 9D as relied upon by the appellant and as has been considered in the various case laws relied upon by the appellant. The co-noticee, if his statement amounts to confession, cannot be compelled to be cross examined and there would be no violation of principles of natural justice in that case. Though ample opportunity with the proceedee/assessee has to be granted to put forth his defence, however, the assessee cannot be compelled to self-incriminate himself. In view of the said observations we are of the opinion that permission for cross examining Shri Vineet Saluja and Shri Pradeep Sharma has rightly been denied. As far as Ms. N. Rashmi and Shri Amit Mallik are concerned, since their statements as were given during the investigation do not amount to confession, they both can be allowed to cross-examine but not against their wish.

14. As a consequence of entire above discussion, we hereby partly allow the Appeal by way of remand directing adjudicating authority below to seek the consent of Ms. N. Rashmi and Shri Amit Mallik qua their willingness to be cross examined and to accordingly re-decide the issue of cross examination of said two witnesses, afresh. However, non cross examination of Shri Vineet Saluja and Shri Pradeep Sharma is held neither violative of Section 9D nor of principles of natural justice. The Order under challenge till that extent is hereby upheld.

[Order pronounced in the open Court on 01.08.2019]

(C. L. MAHAR)
MEMBER (TECHNICAL)

DJ

(RACHNA GUPTA)
MEMBER (JUDICIAL)