IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2021

CORAM

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

Judgment Reserved On	Judgment Pronounced On
09.08.2021	17.08.2021

W.A.No.1763 of 2021
and
C.M.P.No.11024 of 2021

1.The Commissioner of Customs (Appeals-II),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Additional Commissioner of Customs,
Chennai-III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001. .. Appellants

-vs-

Shri Vijayraj Surana,
Flat No.213, 2nd Floor, Orchid Villa,
15, Harrington Road, 6th Avenue,
Chetpet, Chennai-600 031. .. Respondent

Appeal under Clause 15 of the Letters Patent against the order dated 11.06.2019, made in W.P.No.5790 of 2017.

For Appellants : Mr.V.Sundareswaran,
Senior Standing Counsel

For Respondent : Mr.S.Murugappan

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JUDGMENT

T.S.Sivagnanam, J.

The Customs Department, which were impleaded as respondents in W.P.No.5790 of 2017, filed by the respondent herein, are the appellants before us.

2.The respondent filed the writ petition challenging the Order-in-Appeal passed by the first appellant dated 29.09.2016, and for a direction to the second appellant to adjudicate the case afresh after permitting examination (cross examination) of persons, whose statements were relied on in the show cause notice dated 09.04.2015.

3.The learned Single Bench, by order dated 11.06.2019, disposed of the writ petition with an observation that the respondent-writ petitioner can be granted an opportunity to cross examine three witnesses, viz., C.Maheswaran, Damodharan and Abdul Azeez within a stipulated time and consequently, set aside the order passed by the first appellant in Order-in-Appeal dated 29.09.2016. The learned Writ Court also fixed a time frame within which such exercise has to be completed. Further, the Court held that it has not expressed any view with regard to the merits of the case and the authorities were granted liberty to pass orders in accordance with law. The correctness of such order and direction issued in the writ petition is challenged before us in this appeal.

4.We have elaborately heard Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellants and Mr.S.Murugappan, learned counsel for the respondent-writ petitioner.

5.The Directorate of Revenue Intelligence (DRI) developed specific intelligence that M/s.Surana Corporation Limited, Chennai (hereinafter referred to as "M/s.SCL") of which, the respondent-writ petitioner was the Managing Director, have been procuring gold bars of foreign origin, which were smuggled into India and selling the same to various persons without proper invoices/bills. This information led to an investigation, which culminated in issuance of a show cause notice under Section 124 of the Customs Act, 1962 (hereinafter referred to as "the 1962 Act"). The first noticee was M/s.SCL, the second noticee was the respondent and there were eight other noticees of whom, three of them are the persons, who have been named by the respondent-writ petitioner that he should be permitted to cross examine them. They being, C.Maheswaran, the 6th noticee, Damodharan, the third noticee and Abdul Azeez, the fourth noticee.

5.1.M/s.SCL and the respondent were directed to show cause as to why the seized gold bars/cut gold bars/scrap gold bars and gold ornaments totally weighing 2339.100 grams and valued at Rs.62,56,555/- should not be confiscated under Sections 111(d) and 111(l) read with Section 120(1) of

the 1962 Act; and as to why penalty should not be imposed on them under Section 112 of the 1962 Act;

5.2.M/s.SCL, the respondent-writ petitioner and Damodharan were directed to show cause as to why the seized gold bars/cut gold bars/crude gold bars and gold ornaments totally weighing 2503.84 grams and valued at Rs.66,28,302/- should not be confiscated under Sections 111(d) and 111(l) of the 1962 Act; why the seized currency of Rs.59,900/-, being the sale proceeds of the smuggled gold, should not be confiscated under Section 121 of the 1962 Act; and why penalty should not be imposed on them under Section 112 of the 1962 Act;

5.3.M/s.SCL, the respondent-writ petitioner, one Haji Ali, the fifth noticee and C.Maheswaran were called upon to show cause as to why the seized gold totally weighing 199.980 grams and valued at Rs.5,46,545/- should not be confiscated under Sections 111(d) and 111(l) of the 1962 Act; and why penalty should not be imposed on them under Section 112 of the 1962 Act;

5.4.M/s.SCL, the respondent-writ petitioner and Abdul Azeez, the fourth noticee were directed to show cause as to why the seized gold crud bracelet totally weighing 199.810 grams and valued at Rs.5,46,081/- should not be confiscated under Sections 111(d) and 111(l) of the 1962 Act; and why penalty should not be imposed on them under Section 112 of the 1962 Act;

5.5.In respect of the four other noticees, viz., Hemanthkumar, the seventh noticee, J.Thiyagarajan, the eighth notice, G.Venkatesh, the ninth noticee and Aravindkumar, the tenth noticee, they were directed to show cause as to why penalty should not be imposed on them under Section 112 of the 1962 Act.

6.The show cause notice has elaborately set out the entire facts and the statements, which were recorded from the various persons including the noticees during the course of investigation. The respondent-writ petitioner submitted his reply dated 22.09.2015 and in paragraph 31 of the reply, the

respondent stated that he wants to be heard in person before the case is decided and would also like to cross examine Damodharan, C.Maheswaran and Abdul Azeez. The second appellant, the adjudicating authority, fixed personal hearing on 22.09.2015 on which date, the respondent had submitted written submissions through his Authorised Representative in which, the request for cross examination was reiterated. The said request was disposed of by a communication received by the counsel for the respondent on 07.10.2015, stating that the respondent has not quoted any specific reason in justification of the request for cross examination.

7.Relying upon the decision of the Hon'ble Supreme Court in ***Kanungo & Co. vs. Collector of Customs [1983 (13) ELT 1486 (SC)],*** the second appellant has stated that cross examination of witnesses is not mandatory. Therefore, the respondent was informed that the request for cross examination cannot be acceded to and requested the respondent to file additional submissions, if any, and also file objections/disputed points with regard to the statements of the persons requested for cross examination.

8.On receipt of the said communication, the respondent through their counsel, addressed the second appellant by letter dated 21.12.2015 reiterating his stand that three persons have to be made available for cross examination. Further, it was stated that if it is proposed to reject the request, he would request for separate order to be passed before proceeding with the adjudication of the show cause notice. Thereafter, the second appellant adjudicated the matter and passed Order-in-Original dated 29.04.2016 ordering seizure of gold weighing 5242.730 grams valued at Rs.1,39,79,482.80, which were confiscated; imposed penalty of Rs.70,00,000/- on M/s.SCL; penalty of Rs.70,00,000/- on the respondent-writ petitioner; penalty of Rs.59,900/- on Damodharan; penalty of Rs.1,25,000/- on C.Maheswaran; penalty of Rs.2,50,000/- on Abdul Azeez; penalty of Rs.2,50,000/- on Haji Ali; and penalty of Rs.15,00,000/- on each of the other four noticees.

9.M/s.SCL and the other noticees, viz., Damodharan, Abdul Azeez, Haji Ali, C.Maheswaran, Hemanthkumar, J.Thiyagarajan, G.Venkatesh and

Aravindkumar did not prefer any appeal against the said order dated 29.04.2016. The sole appellant was the respondent, who preferred appeal before the first appellant. The said appeal was dismissed by order dated 29.09.2016. Challenging the said order, the respondent filed the writ petition, which has been disposed of with directions as stated above.

10.The first hurdle, the respondent needs to cross is with regard to the maintainability of the writ petition. As against the order passed by the first appellant dated 29.09.2016, appeal lies to the Customs, Excise and Service Tax Appellate Tribunal, Shastri Bhavan, Haddows Road, Chennai (for brevity "the Tribunal") on payment of 10% of the duty demanded where the duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

11.The appeal could have been filed within three months from the date of communication of the order. The order passed by the first appellant dated 29.09.2016 was received by the counsel for the appellant on 20.10.2016. Therefore, the period of three months should be computed

from 21.10.2016. Thus, if an appeal had been preferred by the appellant by 19.01.2017, it would have been within time. However, the respondent chose to file a writ petition challenging the Order-in-Appeal passed by the first appellant on 27th February, 2017. On going by the said date, the writ petition could have been rejected on the ground that even though the petition is under Article 226 of the Constitution of India, the Court will be slow to ignore the statutory period of limitation prescribed under the Act more particularly, in taxation statutes.

12.Be that as it may, the writ petition was filed solely on the ground that the request made by the respondent for cross examination of those three persons could not have been rejected. Further, it was contended that a separate order, though sought for while rejecting the request for cross examination, was not passed. The respondent referred to Section 138B of the 1962 Act and submitted that sub-section (2) of Section 138 is applicable to the proceedings before the authorities and therefore, cross examination should have been permitted.

13.The respondent relied upon the decision of the High Court of Delhi in ***Basudev Garg vs. Commissioner of Customs [2013 (294) ELT 353 (Del)],*** the decision of the Madurai Bench of this Court in ***Thilagarathinam Match Works vs. Commissioner of Central Excise [2013 (295) ELT 195 (Mad)]*** and the decision of the Hon'ble Supreme Court in ***Andaman Timber Industries vs. Commissioner of Central Excise, [C.A.No.4228 of 2006 dated 02.09.2015].*** The respondent would state that though there is a provision for statutory appeal before the Tribunal, the said remedy is illusory and not efficacious for the reason that the order passed by the first appellant goes to the root of the issue relating to permitting cross examination and therefore, the respondent was justified in invoking the extraordinary jurisdiction of this Court.

14.The appellant-Revenue resisted the prayer by filing a counter affidavit wherein, a preliminary objection was raised with regard to the maintainability of the writ petition, as an appellate remedy is available to the Tribunal. Further, it is submitted that the respondent had appeared before the first appellant, represented by his counsel and after conducting a

full-fledged hearing, a detailed speaking order has been passed by the first appellant and there are several complicated factual issues involved, which cannot be agitated in a writ petition. Further, it was contended that the statements have been given voluntarily and those three persons who have given statements, who are also the noticees against whom order of confiscation/penalty has been passed, have never retracted the said statement at any earlier point of time.

15.Further, it was submitted that the request for cross examination was specifically considered by the Adjudicating Authority as well as the First Appellate Authority and detailed reasons have been given as to why cross examination need not be provided and it was a ploy adopted by the respondent to delay the proceedings. Further, it was contended that except the respondent-writ petitioner, the other nine persons, which includes M/s.SCL have not preferred any appeal to the First Appellate Authority and the order passed by the first appellant, being a common order for all the ten persons, a solitary challenge at the instance of the respondent would not be maintained.

16.Further, it was submitted that the respondent has miserably failed to prove the genuineness and the legal possession of the smuggled gold and the onus of proof was on the respondent, which he has failed to discharge. Further, in a voluntary statement given by the respondent under Section 108 of the 1962 Act, dated 15.12.2014, the respondent admitted the smuggled nature of goods.

17.The appellants relied upon the decision of the Hon'ble Supreme Court in ***Surjeet Singh Chhabra vs. Union of India [1997 (89) ELT 646]*** for the proposition that the Customs Officials are not police officers. The confession, though retracted, is an admission and binds the respondent. So there is no need to call the panch witnesses for examination and cross examination. Further, by referring to the decision in ***Kanungo & Co.*** (supra), it was submitted that merely because cross examination was not done, it would not violate the principles of natural justice. For the same proposition, reliance was placed on the decision of the Hon'ble Supreme Court in ***Union of India vs. GTC Industries Ltd., [2003 (153) ELT 244]***

(SC); Harinder Pal Singh Shergill vs. Commissioner [2010 (259) ELT A19 (SC)]; Sanjy Shah vs. Commissioner [2011 (268) ELT A109 (SC)]; and the decision of this Court in ***M/s.Veetrag Enterprises vs. Commissioner of Customs (Sea Exports) [W.P.Nos.1477 to 1479 of 2015 dated 01.06.2015].***

18.Further, it was contended that the request for cross examination was considered and the respondent was informed as to why such a request cannot be acceded to and the respondent was given further time to submit his additional submissions and after giving an opportunity of personal hearing, the order was passed and as such, there is no error in the order passed by the second appellant or that of the first appellant. The respondent, through his counsel submitted his reply to the show cause notice dated 22.09.2015. The reply was a comprehensive reply on merits and in the penultimate paragraph, a request was made to cross examine the three persons. This request was separately considered by the second appellant and by communication received by the counsel for the respondent on 07.10.2015, it was clearly mentioned as to why the request for cross

examination cannot be considered. This communication is a standalone communication, *qua* the request for cross examination. Therefore, it would be incorrect on the part of the respondent to state that no separate communication was sent rejecting the request for cross examination. Admittedly, the respondent did not question the said communication, but proceeded to give another representation on 21.12.2015. Obviously, the second appellant, having already passed an order, rejecting the request for cross examination, was not expected to act on the representation dated 21.12.2015.

19.The respondent had challenged the order passed by the first appellant, who confirmed the adjudication order passed by the second appellant not on merits, but only on the ground that cross examination was not permitted. The contention of the respondent that the appeal before the Tribunal is illusory and not efficacious is an argument, which has to be rejected. The Tribunal among the hierarchy of authorities, is the last authority, which can give a conclusive finding on facts. The person aggrieved by an order passed by the Tribunal can file an appeal to the High

Court and the appeal would be entertained only on substantial question of law and not on facts and on the merits. Though there are decisions relied on by either side on the refusal to grant an opportunity of cross examination, no straitjacket formula can be adopted on the said legal issue, as it all depends on the facts and circumstances of each case.

20.Bearing this legal principle, if we examine the case on hand, we find that the first request made for cross examination, in the representation dated 22.09.2015, appears to be a very faint plea, because the said representation is a reply to the show cause notice on merits. Furthermore, none of those three persons, who were named in the said reply, have retracted their voluntary statements given under Section 108 of the 1962 Act to the authorities. Furthermore, all those three persons were the co-noticees along with the respondent in the show cause notice, which ultimately led to the passing of the penalty order dated 29.04.2016. Those three persons have not questioned the order passed by the second appellant dated 29.04.2016 and all the findings of guilt recorded by the second appellant against those three persons stand concluded. In such circumstances, the plea raised by the

respondent to cross examine those three persons is obviously a plea to protract and delay the proceedings.

21.On perusal of the Order-in-Original dated 29.04.2016, we find that the second appellant had elaborately considered the request for cross examination and has recorded cogent reasons as to why such request cannot be accepted, in paragraphs 138 to 150. The appellant-Revenue is right in contending that the Custom Officers are not police officers and the confession, though retracted, would bind the persons, who had given the statements. The second appellant is also right in concluding that the request made by the respondent for cross examination is to delay the proceedings, as the respondent has not specified as to why his request for cross examination is justifiable. That apart, law does not always mandate cross examination more particularly, when the statements given by the said three persons are voluntary statements under Section 108 of the Act, which bind those persons and more importantly, none of the three persons have retracted the statements and allowed the statements to remain as such, the matter had went through the adjudication process and penalty/confiscation

order has been passed on 29.04.2016, which has attained finality, insofar as those three persons are concerned. Therefore, to truncate the case of the respondent alone from that of the nine other persons, who have been charged along with the respondent, which includes M/s.SCL, the company in which the respondent is the Managing Director. That apart, the respondent also in his voluntary statement has admitted the offence. Even assuming the respondent now seeks to set up a plea that the statements are not voluntary and there was some retraction, mere retraction will not render the voluntary confession statement as invalid. It appears that the respondent has made an attempt to retract the statements given on 15.12.2014, 16.12.2014 and 26.12.2014 admitting the offence after more than two months, which obviously would not stand the test for holding the statements to be not voluntary. Further, none of the staff of M/s.SCL of which, the respondent is the Managing Director, who were holding the positions of Vice President, General Manager and Manager have never retracted the statement under Section 108 of the Act. Further, the staff in-charge of purchase, accounts and supervision have admitted that they regularly used to purchase smuggled gold in the form of bars with foreign markings

brought in by smugglers, who would come to their shop and sell the same. Further, the smuggled god dealers have also admitted that they supplied gold bars/gold ornaments of foreign origin to M/s.SCL on many occasions and the respondent in his statement dated 15.12.2014, has stated that procurement of gold from various countries reduced from 2013, after Central Bureau of Investigation caused investigation. The decision in the case of ***Andaman Timber Industries*** (supra), relied on by the respondent is clearly distinguishable on facts.

22.As pointed out earlier, the process of adjudication is over and the order dated 29.04.2016 has been passed by the second appellant and it has become final as against nine others, as it is the respondent alone, who had filed an appeal under Section 129(A) of the 1962 Act before the first appellant. The said appeal has also been dismissed on merits and on doing so, the first appellant has also confirmed the order passed by the second appellant upholding the decision to deny cross examination.

23.The question of maintainability of the writ petition, though specifically raised by the appellant-Revenue before the learned Writ Court, has not been considered.

24.As mentioned above, had the appellant filed the appeal before the Tribunal on the date when he filed the writ petition, i.e., on 27th February, 2017, it would have been time barred. Though a prayer for condonation of delay could have been made before the Tribunal. In any event, if it appears that the respondent having lost out on time to avail the statutory remedy, seeks to bypass the same and file a writ petition, the Courts would not entertain such a petition and will come to the conclusion that the reason for bypassing the statutory appellate remedy is because the appeal cannot be maintained at that point of time. This is why, it is often held that though in a writ petition, the Court will take into consideration the period of limitation stipulated under the respective statute for preferring appeal/revision.

25.As pointed out earlier, the remedy before the Tribunal is not only effective but efficacious. The Tribunal will be able to re-appreciate the

facts and take a decision both on facts as well as on law. Therefore, there is absolutely no justification on the part of the respondent to bypass the appeal remedy available to him.

26.So far as the finding rendered by the appellants, denying the request of cross examination is concerned, we are of the opinion that the same is perfectly in order and the respondent cannot be heard to say that there has been violation of principles of natural justice. Thus, the decision of the Hon'ble Supreme Court in ***Assistant Collector of Central Excise vs. Dunlop India Ltd., [(1985) 1 SCC 260 (SC)]*** can be applied to the facts and circumstances of the case and the writ petition was liable to be dismissed on the ground of availability of alternate remedy.

27.The decision in ***Andaman Timber Industries*** (supra), relied on by the respondent, would not apply to the facts and circumstances of the case on one more ground that the said decision arose out of an appeal challenging the order of the Tribunal and the Court was called upon to decide a substantial question of law and not a case of a writ petition.

Further, we note that the learned Writ Court had set aside the order passed by the first appellant dated 29.09.2016, without taking note of the fact that it is a common order not only for the respondent, but for nine others, who have not preferred any appeal against the said order. The order passed in the writ petition does not specifically state that the order dated 29.09.2016 is set aside as against the respondent alone, which obviously cannot be done, because it is a common order and the culpability of 10 of them including the respondent has been brought out in the Order-in-Original as well as in the Order-in-Appeal. Therefore, the case cannot be dissected, insofar as the respondent alone is concerned and tried and tested for its correctness. Therefore, we find that the learned Writ Court has not assigned any reason as to why the Order-in-Appeal is required to be set aside in its entirety, when the Writ Court has specifically recorded that it has not expressed any opinion on the merits of the matter.

28.Thus, we find that the order and direction issued by the learned Writ Court is liable to be interfered with.

29.In the result, the writ appeal is allowed, the order passed in W.P.No.5790 of 2017 dated 11.06.2019 is set aside and the findings of the first and the second appellants, insofar as they relate to the denial of the right of cross examination of the three named persons, are confirmed. Since the learned Writ Court, nor this Court has adjudicated the merits of the matter, we leave it open to the respondent to prefer an appeal to the Tribunal, if so advised on the other issues. In the event, the respondent prefers an appeal to the Tribunal, the Tribunal, while computing the period of limitation, may exclude the period from 27.02.2017 till the receipt of the certified copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

(T.S.S., J.) (S.S.K., J.)
17.08.2021

Index: Yes
Speaking Order : Yes

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T.S.Sivagnanam, J.
and
Sathi Kumar Sukumara Kurup, J.

(abr)

Pre-delivery Judgment made in
W.A.No.1763 of 2021

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