**Ravi Garg Vs. Cc**

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**SooperKanoon Citation** : sooperkanoon.com/10331

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Nov-07-1996

**Reported in** : (1997)(69)LC107Tri(Delhi)

**Judge** : S Peeran, K D Shiben

**Appellant** : Ravi Garg

**Respondent** : Cc

**Judgement** :

1. This reference application has been filed against the final order No. A/837-42/96-NB dt. 15.3.1996. The Tribunal disposed of by this common order, these appeals arising from common order in original No.331/91 dt. 14.2.1992 passed by the Additional Collector of Customs, New Delhi. Out of six appellants, only Shri Ravi Garg, the present applicant has filed this reference application seeking reference of the questions noted below for reference to the High Court in terms of Sub-section (1) of Section 130 of the Customs Act, 62. The appellant's Counsel has framed eight questions for reference which are noted hereinbelow: I. Whether the Appellate Board was right in giving a finding that there was no violation of the rules and principles of natural justice in placing reliance and pressing in service the relied upon documents without their veracity having been tested by the touch-stone of cross examination; II. Whether the Appellate Board was right in giving a finding that the petitioner/applicant had "waived the right of cross-examination" during the course of personal hearings before the Id. Collector on 6.12.1991; (Applicant submits that since the above finding is against records and it gives rise

to a question of law [Para 1, 3 (last sentence) and 11] of memorandum of written submissions dt. 30.12.1991 refers) III. Whether the Appellate Tribunal failed to appreciate that the submission made by applicant's counsel before the adjudicating authority during personal hearing on 6.12.1991 was not in the nature of a "waiver" of his right but was in the nature of suggestion that the proceeding be concluded since witnesses have failed to appear despite repeated opportunities and they were thus disentitled to infinite opportunities particularly considering that the witnesses were officers/employees of the DRI who have failed to appear without any cause; IV. Whether the Appellate Tribunal was right in giving a finding on the basis of narration in the order-in-original that "the case had been closed at the instance of the Advocates appearing for the applicants" for the request/suggestion as attributed to the applicant during the personal hearing on 6.12.1991 is not only self contradictory but did not survive beyond 18.12.1991 as the I d.

Collector did not close the case on 18.12.1991 in terms of the same; Further the reason for closing the proceeding on 24.12.1991 is not given by the Id. Collector and the Appellate Tribunal has wrongly attributed to the applicant/appellant; V. Whether the Appellate Tribunal was right in taking adverse notice on non-filing of an affidavit by the applicant's counsel in support of his denial of any waiver of cross-examination of witnesses for which there was no warrant considering the fact that the same counsel had appeared before the Appellate Tribunal who had appeared by the Collector in adjudication proceedings; (Petitioner/applicant submits that there was no reason for his counsel to believe that his denial of waiver before the Appellate Tribunal required any affidavit in support once he was personally before them) VI. Whether the Id. Collector was right in concluding the adjudication proceedings on 24.12.1991 without securing the presence of the witnesses even by resort to coercive process particularly when- (a) the petitioner had provided ample justification for examination of witnesses cited; (b) the witnesses were the officers and employees of the Directorate of Revenue Intelligence, New Delhi; (c) the witnesses had persistently defined to comply with the notices issued by the Id. Collector who even ensured service per messenger for the hearing fixed for 24.12.1991; and (d) the witnesses had defaulted in appearance without showing any cause let alone sufficient cause, VII. Whether the

Id. Collector and the Appellate Tribunal were right in inferring waiver of cross-examination on the part of the noticee from the request/suggestion attributed to him during the hearing on 6.12.1991 particularly considering that he had made a clear grievance of non-appearance/production/examination of the witnesses and claimed benefit-in-law of the same in his memorandum of written arguments dt. 30.12.1991, which memorandum was admittedly filed after closing of the personal hearing and stands acknowledged by the Id. Collector in para 2 at page 7 of the impugned order-in-original.

Applicant submits that in view of the submissions made in the above memorandum on the above matter. Id. Collector ought to have fixed further hearing for examination of witnesses and ensured their presence in case he was not to be extended the benefit in law for the non-appearance/production/ examination of witnesses, full justification of whose examination was given before they were given notice for their appearance for their examination of witnesses is attributed to the applicant during the personal hearing on 24.12.1991, where after noticees were directed by the Id. Collector to file their written submissions.

VIII. Whether the Appellate Tribunal erred to appreciate that in the facts and circumstances of the case, the nature of allegations, defence and evidence, examination of witness was in the larger interest of justice and the applicant's denial of waiver in this respect should not have been faulted in the manner done in the impugned order- in-appeal and ought to have set aside the impugned order-in-original as violative of rules of natural justice and directed de novo adjudication affording to examine cited witnesses? 2. We have heard Id. Advocate Shri Trilok Kumar for the applicant and Shri K.K. Jha, Id. DR for the Revenue. Pointing out the findings of the Tribunal in para 12 of his order, Id. Advocate submitted that the Advocate appearing for the appellant had" waived" the right of cross-examination and that the Counsel had not filed the affidavit to the contra is not a correct finding of facts. He pointed out to the written submission dt. 30.12.1991 filed by the Advocate Shri J.S.Aggarwal who heard before the Additional Collector as well as before the Tribunal to the effect that the officers prepared the Panchnama on 27.6.1990 had not been made available for cross examination. He further pointed out to last sentence in para 3 of the said written submission wherein said Advocate had contended that the Pachnama cannot by any stretch of imagination be termed as a legal one and that is why the officers avoided to appear for cross-examination. Ld. Advocate again pointed out to para 11 of the said written submission wherein the Advocate appearing had contended that- In view of these serious contradictions, it was being stressed that the officers may be called for cross-examination to clear these points so as to enable your goodself to take a correct and judicious view, but it is regretted that they had avoided to come. So the said benefit, as per settled law should be extended to Noticees Svs. Ravi Garg and Ram Pratap. There is not an iota of evidence to connect them with the said Gold.Ld. Advocate submitted that the Advocate appearing for the appellant had not given up his right of Cross-examination and therefore, the factual details recorded by the Additional Collector in the order was not correct and hence the Tribunal had come to incorrect conclusion of the facts against the material on record and therefore, a question of law arises for reference to the High Court. It is his submission that if the Panchnama and the statement of the appellant Shri Ravi Garg is not taken into consideration, then there will be no evidence to corroborate the case of smuggling against the appellant Ravi Garg and hence he should have been granted the benefit of doubt. As the same has not been granted by the Tribunal, on incorrect appreciation of fact, therefore, question of law arises for reference to the High Court. He also submitted that he had filed a writ petition against the order of the Tribunal, in which he had filed an affidavit of Shri J.S. Aggarwal to the effect that Shri J.S. Aggarwal had not waived the right of cross-examination. However, the Hon'ble High Court did not entertain the writ petition and therefore, he has filed the present reference application seeking reference of the points of the questions provided by him to the High Court. On a particular query from the bench as to whether the questions are not repeated, the Counsel admitted the position. He reiterated that in view of the written submission filed by the Additional Collector not having been taken into consideration it would result in a question of law for reference to the High Court.

3. Ld. DR submitted that the Tribunal has merely appreciated the facts on record and on such appreciation has come to the conclusion and there is no violation of principles of natural justice and such conclusion of facts does not give rise to the question of law for reference to the High Court. Ld. DR pointed out that all the

questions framed for reference are in the nature of arguments on grounds of appeal and not questions of law for reference to the High Court and therefore, prayed for dismissal of the application.

4. We have carefully considered the submissions made by both the sides and have perused the records and the questions raised by the applicant Shri Ravi Garg and his Advocate for reference to the High Court. As can be seen from the questions raised as noted above, most of the questions are all questions of fact and none of the question raised pertained to questions of law. It is well settled that only questions of law are required to be referred to the High Court in terms of Sub-section (1) of Section 130 of the Customs Act, 1962. In case of S.D. Sakpal and Anr. v. Collector of Customs (P), Bombay as reported in 1988 (33) ELT.181, the Tribunal has held that the questions as to admissibility of confessional statement, effect of retraction of confession, admissibility of confession of co-accused/accomplices, evidential value of confessional statements of accused, co-accused or accomplices being settled questions of law, by various decisions of Hon'ble Supreme Court, therefore, the questions are not referrable under Section 130(1) of the Customs Act, 1962. The Tribunal further held that it is settled law that the retraction will not have the effect of wiping out the earlier confessional statement. The Tribunal further held that it is also a settled law that under the Evidence Act confession made to a police officer is not admissible in evidence, but then under the Customs Act, the confession made to a Customs Officer is admissible in evidence. Under both the laws before accepting the statements whether confessional or otherwise of any witness, the Court or the quasi-judicial authority requires to be satisfied as to the voluntariness and also as to its truthfulness. Therefore, the Tribunal held that there is no scope to refer the questions to the High Court.

The Tribunal further held in para 15 of the said judgment that the question related to denial of the principles of natural justice is not referrable to the High Court. The Tribunal has held that whether there has been a denial of the principles of natural justice is not a pure question of law and it is more a question of fact to be decided on the basis of evidence. Therefore, the Tribunal held that such questions bases on facts cannot be referred to the High Court in terms of Section 130(1) of the

Customs Act. This judgment of the Tribunal is fully applicable to the facts of the present case and it requires to be applied in toto.

We also notice that in the present case the appellant has also signed on the Panchnama along with other appellants. The appellant Shri Ravi Garg has not chosen to examine himself before the authorities as a witness nor he has requested the other appellant to be examined as a witness to challenge the varacity and correctness of the panchnama. The other appellants have not challenged the varacity and correctness of the panchnama and other statements. The other appellants also did not choose to examine themselves as witnesses nor they have filed application in this regard. Therefore, even on a consideration of the grounds made out in the reference application, we find the Tribunal has correctly arrived at the conclusion that there has been no denial of principles of natural justice. The Advocate appearing for the appellants had filed his written submission in which he has slated that the effect of non-examination of the officers as witnesses should be taken into consideration. The Tribunal did take this point into consideration and independently on appreciation of all the facts and material on record have come to the conclusion about the involvment of the appellants in the offences alleged against them. The retracted statement of the appellant was also considered and it has found that the earlier statement given by the appellant was sustainable. The Tribunal also had come to the conclusion that the appellant had not challenged the correctness of the panchnama. The Tribunal had noted that the appellants had stated that the panchas being security guards of DRI, they cannot be taken as witnesses for seizure. However, they had admitted about the seizure of gold and Indian currency from the respective vehicles by attesting their signature on the panchnamas. The Tribunal therefore, held that the panchnama not having been challenged, therefore, it has to be held that the gold and Indian currency had been recovered from the respective vehicles as alleged in the show cause notice. The appellant Shri Ravi Garg had taken a plea that the cash was recovered from the Maruti car. It is his plea that the cash was received by him as consideration of sale of immovable property under a sale agreement. Noting these facts, the Tribunal had come to the conclusion that till date the said Ravi Garg had not produced any evidence pertaining to the registration of sale deed in respect of immovable property. The person who had paid the cash had not filed his affidavit nor he had been produced any witness to prove the contention that the money had been paid to Ravi Garg towards purchase of the said property. It also noted that the Ravi Garg had also not produced any certificate from the local authority to show that he owned the said property and the said property was valued at Rs. 15 lakhs at the time of sale agreement. The Tribunal further observed that therefore, the sale agreement which had been produced to show that he had received the said amount and it was rightly disbelieved and rejected by the adjudicating authority. The Tribunal further held that Ravi Garg had also not produced any evidence to show that the trading activity carried on by him was so enormous and that he was having so much cash in his business account on that date. The Tribunal examined the few bills produced by him regarding trading business and held that the bills did not reflect the turnover, nor profit and loss account nor did it indicate anything about the state of business of appellant, Ravi Garg. The Tribunal noted that the Ravi Garg in his statement has given meticulous details and material facts pertaining to the smuggling activity done by him. The Tribunal also noted that he had also stated that his father and brother were doing jewellery business and he was purchasing gold for them. The Tribunal noted that this fact is not denied by him and by his Advocate, while arguing before Tribunal.

Therefore, the Tribunal concluded that these material facts could not have been concocted by the department and got it recorded through Ravi Garg in the statement recorded under Section 108 of the Act. It was also noted that Ravi Garg had merely sent a letter stating that the statement had been forcefully recorded. The Tribunal noted that he had admitted the recovery of cash but only stated that it was recovered from the car and not from the scooter. The Tribunal observed that this statement is belied by Panchnama which clearly disclosed the recovery of gold from the Maruti car and cash from the scooter and this fact had been conclusively established beyond reasonable doubt. The Tribunal noted about the statement of Ravi Garg in his reply that he had current account in Vijaya Bank, Chandni Chowk, and he had been transferring money in lakhs to Calcutta by Hundis. He had also stated that Rs. 12.20 lakhs was duly accounted in the books and was meant for purchase of Jute. The Tribunal observed that Ravi Garg had not produced any evidence to substantiate these statements. Therefore, on the basis of all the evidence which is in the nature of facts, the Tribunal concluded that

Ravi Garg had not produced any evidence to substantiate these statements. Therefore, the Tribunal held that the conclusion arrived at by the Id. Additional Collector that the cash was meant for purchasing smuggled gold stands established and proved, beyond reasonable doubt. The Tribunal has concluded that the confiscation of Indian Currency and imposition of penalty on Ravi Garg was sustainable.

The Tribunal however, reduced a penalty on Ravi Garg from Rs. 10 lakhs to Rs. 8 lakhs for the reasons stated in the order.

5. Analysis of the above facts clearly disclosed that the Tribunal had arrived at the conclusion on the basis of the material facts and therefore they are not referrable in terms of Section 130(1) of the Customs Act. The Tribunal in the above cited judgment has also concluded that such conclusion on facts arrived at on findings pertaining to principles of natural justice and, all questions of fact are not referrable to the High Court. We further note that the conclusions of the Tribunal are purely on the basis of facts and such conclusions are not referrable to the High Court under Section 130(1) of the Customs Act, in terms of the Hon'ble Supreme Court judgment rendered in the case of Sir Shadilal Sugar and General Mills Ltd. and Anr. v. Commissioner of Income Tax, New Delhi 6. In that view of the matter, we do not find any substance in the reference application and hence the same is rejected.