A.Sakthivel Vs. K.Viswanathan

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Court : Chennai

Decided On : Jan-30-2015

Judge : S.Nagamuthu

Appellant : A.Sakthivel

Respondent : K.Viswanathan

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

18. 08.2009 CORAM THE HONOURABLE MR.JUSTICE S. RAJESWARAN W.P.No.19141 of 2008 and M.P.No.1 of 2009 M/s.Mani Bhadras Trading Company Rep. by its Proprietor Shri Bhavesh V.Sakaria ... Petitioner Vs The Commissioner of Customs, (Seaports Exports), Customs House, 60, Rajaji Salai, Chennai 600 001. ... Respondent Writ petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the respondent connected with F.No.CAU/DRI/27/2008 dated 28.07.2008, quash the same and consequently direct the respondent to afford cross examination of all persons sought for vide interim reply dated 03.04.2008 to the show cause notice No.VIII/48/37/2007-DRI dated 06.03.2008 furnished by the petitioner in the course of adjudication proceedings, pending before the respondent. For Petitioner : Mr.B.Sathish Sunder For Respondents : Mr.T.R.Senthil Kumar Central Govt. Senior Standing counsel ****

ORDER

The case of the petitioner is as follows: The petitioner is a proprietorship concern. They imported Self Adhesive BOPP Tapes under 20 consignments during the period from 2006 and 2007 and had filed various Bills of Entry for clearance of the same through Chennai Port. The DRI, Chennai found that the said Self Adhesive BOPP Tapes were undervalued by the petitioner concern to evade payment of appropriate customs duty. Thereafter, the Officers of the D.R.I. searched the premises of the petitioner Company on 20.06.2007 and recovered two hard discs from the two Personal Computers under a Mahazar. The hard discs were sent to Government Examiner of Questioned Documents (GEQD), Hyderabad for forensic analysis. The analysis report was received vide letter dated 31.08.2007 from the Government Examiner of Questioned Documents, Hyderabad. The said report revealed that the petitioner had resorted to mis-declaration of the value of the imported goods (self-adhesive tapes) by preparing second set of invoice, which was recovered from the hard discs seized from the petitioner concern. It was also found that the original invoice submitted to the Customs department for clearance of the goods by the petitioner was shown at lesser value than the second set of invoice retrieved from the hard discs showing value payable to the supplier in order to evade payment of higher customs duty. Under Section 108 of the Customs Act, 1962, investigations were conducted with different persons and statements were recorded on different dates. Thereafter, the petitioner and his associate Mr.Sudhir Ostwal were arrested on 21.09.2007 and they were enlarged on bail later. A show cause notice dt.06.03.2008 was issued by the DRI to the petitioner and his associate Mr.Sudhir Ostwal calling upon them to show cause as to why action should not be taken against them as stated in the notice. The petitioner through his counsel/Consultant sent an interim reply dated 03.04.2008 to the show cause notice sent by the respondent, denying the allegations and specifically requesting for cross examination of the authors of the GEQD report as the show cause notice very heavily relies on the same and also the officers from DRI who recorded the statements. Though a personal hearing was granted to the petitioner, which was held on 22.07.2008, the cross examination sought for by the petitioner was rejected. Aggrieved by the same, the above writ petition has been filed for the aforesaid relief.

3. I have heard the learned counsel appearing for the petitioner and Mr.T.R.Senthil Kumar, learned Central Government Senior Standing counsel appearing for the respondent. I have also gone through the documents including the Counter affidavit filed by the respondent.

4. The learned counsel for the petitioner would submit that the rejection of the request made by the petitioner for cross examination of Government Examiner of Questioned Documents and the persons who retrieved the data from the two hard discs seized from the Personal Computers belonged to the petitioner concern, is illegal and liable to be interfered with by this Court. Moreover, when the show cause notice heavily relies on GEQD report to sustain the allegations set out in the show cause notice, the cross examination as sought for by the petitioner in the interim reply ought to have been allowed. Further, according to him, the adjudication process of the respondent is quasi-judicial in nature and if any order that would be passed in the proceedings would have civil consequences. Therefore, it is a trite law that any order that gives rise to civil consequences would attract the principles of natural justice. Further, a reasonable opportunity contemplated under the provisions of the Act includes cross examination and therefore, request made by the petitioner in reply to the show cause notice should have been allowed and denial of the same is bad in law. Moreover, in order to defend the case of the petitioner effectively, the cross examination as sought for by the petitioner concern is necessary. The respondent being a statutory authority should not stand on technicality to reject the request for cross examination. In support of his submissions, the learned counsel relied upon the following judgments to reiterate the fact that reasonable opportunity would include cross examination also.

1. 1996(88) ELT A187 (SC) (Collector Vs Kiran Overseas) 2. 2000(117) ELT538(Sounds N.Images Vs Collector of Customs) 3. 2000(122) ELT641(SC) (Swadeshi Polytex Ltd. Vs Collector of CEX) 4. 2005(181) ELT176(SC) (Commissioner of CEX, Chandigarh Vs Metro Tyres Ltd.) 5. 2000(123) ELT50(Bombay) Nagraj Walchand Jain Vs G.Koruthu, Collector of CEX) 6. 2000(125) ELT129(Madras) (M.Ponnalagu Pillai Vs Collector of Customs, Madras) 7. 1996(88) ELT A187 (SC) (Kiran Overseas Vs Collector of Customs) 8.

2001(129) ELT654(Tri-Mum) (Carrara marble & Granite Industries Vs Commissioner of Customs (EP), Mumbai) 9. 2001(129) ELT701(Tri-Del) (Rathi Ispat Ltd. Vs Commissioner of CEX, Meerut) The learned counsel for the petitioner further relied heavily on the unreported judgment dt.24.06.2005 made in a batch matters in W.P.Nos.18918 of 2000, etc. to reiterate the fact that when a request for cross examination was made even at the stage of submitting an explanation to the show cause notice, should be entertained, as it would only be in compliance with the fundamental principles of natural justice and criminal jurisprudence. Therefore, he submits that rejection of the request made by the petitioner for cross examination warrants interference by this court and the impugned order dt.28.07.2008 is liable to be set aside. Consequently, the respondent should be directed to permit the petitioner to cross examine the authors of the GEQD report and the officers of D.R.I. who recorded the statements.

5. Per contra, the learned Central Government Senior Standing counsel appearing for the respondent while reiterating the averments made in the counter affidavit would submit that as the documents annexed to the show cause notice were retrieved from the hard discs of the petitioner's Personal Computers, the request for cross examination of the authors of GEQD, made by the petitioner is untenable. Moreover, according to the learned counsel for the respondent, the GEQD Officer has not done anything excepting printing out the data available in the hard discs of the petitioner's Personal Computers. Therefore, nothing else was added to the materials which were annexed to the show cause notice. The learned counsel for the respondent also produced a copy of the annexure to the show cause notice and submits that all the materials relied upon by the respondent have been furnished to the petitioner. He further submits that when the materials retrieved from the two hard discs of the Personal Computers belonged to the petitioner themselves, there was no need to cross examine the Officers of DRI and GEQD. Therefore, the rejection of the request for cross examination would in no way affect the interest of the petitioner or the proceedings initiated against the petitioner.

6. The learned counsel for the respondent further submits that the statements were recorded by the DRI officials under Sec.108 of the Customs Act 1962 and

the same have not been retracted by the petitioner at any stage. He further adds that the officer of GEQD could not be made available for cross examination since he has proceeded on long leave and also he has already been relieved from Forensic Department, Hyderabad. He further submits that any order passed by the respondent authority under the Customs Act, 1962 is amenable to an appeal remedy under the said Act before the Appellate Tribunal. Therefore, the writ petition has been filed without exhausting the statutory remedy available under the said Act and the same is liable to be dismissed on that score alone. Similarly, statements recorded under Sec.108 of the Customs Act are voluntary in nature and the same have not been retracted thereafter. Therefore, there is no question of cross examining the officers without citing any compelling reason. He further submits that the attempt made by the petitioner to cross examine the officer from GEQD is only to protract the proceedings initiated against the petitioner and nothing else. In support of his submission, he relied upon the judgment reported in (1973)2 SCC438(M/s.Kanungo & Company Vs Collector of Customs and others) and (2009)4 MLJ417(Ramachandra Rexins Private Ltd., Bangalore Vs Customs, Excise and Gold (Control) Appellate Tribunal, Chennai and another) to reiterate the fact that the principles of natural justice do not require in the matter of seizure of goods under Sea Customs Act, the persons who have given information should be examined in the presence of the person from whom the seizure was made or should be allowed to be cross examined by him on the statements made before the Customs authorities. Therefore, according to the learned counsel for the respondent, the case in hand does not require cross examination of the officers from DRI and GEQD and the writ petition does not merit any consideration and the same is liable to be dismissed.

7. I have considered the rival submissions carefully with regard to facts and citations.

8. It is a case of the petitioner that on the investigation made by the officers from DRI that adhesive tapes imported by the petitioner concern have been undervalued and proceedings were initiated under the Customs Act against the petitioner concern. While sending this show cause notice, the materials relied upon by the respondent were sent along with the show cause notice. While

replying to the show cause notice, the petitioner stated that certain materials retrieved from the hard discs of the Personal Computers belonged to the petitioner were not in consonance with the data available with the petitioner. Therefore, the petitioner in reply to the show cause notice, made a request to the respondent to cross examine the concerned Officer from GEQD who had taken the print outs from the hard discs of the petitioner's Personal Computers and also the author of the GEQD report so that the petitioner can defend the case effectively. But, the respondent rejected the same in the impugned order stating that there is no need for cross examination. Though the learned counsel for the petitioner reiterate the fact that reasonable opportunity would also include cross examination, I am unable to accept the submissions made by the learned counsel for the petitioner.

9. Though it is needless to add that reasonable opportunity would include cross examination, the judgment cited by the learned counsel for the petitioner, wherein the learned Single Judge of this Court has held that cross examination of witnesses are not to be dispensed with only on the ground that the subject matter is a sensitive issue. I am of the considered view that the said judgment is distinguishable on facts and law from the case on hand. While challenging the final order passed by the respondent, the petitioner has taken a stand that the denial of cross examination of the officers from DRI and GEQD would violate the principles of natural justice.A perusal of the judgments rendered by the Hon'ble Supreme Court in (1973)2 SCC438(cited supra) and Division Bench of this Court in (2009)4 MLJ417(cited supra) would clearly show that the principles of natural justice do not require cross examination of the persons who have given information. However, in this case, while replying to the show cause notice received from the respondent department, the petitioner has pointed out that there are certain discrepancies in the materials annexed to the show cause notice and therefore, the petitioner prayed for cross examination of the officers from DRI and GEQD. Whereas, as rightly pointed out by the learned counsel appearing for the respondent, the documents relied upon by the respondent are nothing but prints out taken from the hard discs of the Personal Computers belonged to the petitioner. It is open to him to point out discrepancies if any, before the adjudicating authority. The cross examination as sought for by the petitioner would in no way help the petitioner as there is no material given or spoken to by the respondent department.

10. Therefore, I am in full agreement with the learned counsel for the respondent that absolutely there is no material warranting interference by this court so as to permit the petitioner to cross examine the officers from DRI and GEQD.

11. In the result, the writ petition is dismissed. Consequently, connected M.P.No.1 of 2008 is closed. No cost. vaan To The Commissioner of Customs, (Seaports Exports), Customs House, 60, Rajaji Salai, Chennai 600 001