BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 29.10.2021
Pronounced on : 28.05.2022

CORAM
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)No.3009 of 2020
and
W.M.P(MD).Nos.2548 of 2020 and 8919 of 2021
(Through Video Conference)

Rajkumar Gowthaman .. Petitioner

Vs.

The Joint Commissioner of Customs(Preventive),
O/o.Commissioner of Customs,
No.1, Williams Road,
Cantonment,
Tiruchirappalli-620 001. .. Respondent

Prayer: Writ Petition is filed under Article 226 of Constitution of India to issue a Writ of Certiorari, to call for the records in respect of the adjudication order passed by the respondent in C.No.VIII/10/17/2016, dated 13.12.2019 and quash the same.

For Petitioner : Mr.B.Kumar
Senior Counsel
for Mr.S.Sivakumar
For Respondent : Mr.B.Vijay Karthikeyan
Senior Standing Counsel

ORDER

The necessary facts, which are required to be noticed for the disposal of this writ petition are as follows:

On 28.10.2015, based on the specific input received from the Directorate of Revenue Intelligence, Chennai Zone, surveillance on the movement of vehicles were mounted in the Pattukkottai-Thanjavur Highway, where, the officers of the customs identified and intercepted a TATA Indica Vista car bearing Registration No.TN-47-AD-7027 at Pulavankadu. Two persons were inside the vehicle, namely, M.Karthikeyan of Karur and A.Sheik Fareed of Pallapatti, Karur District. On a reasonable belief, in pursuant to the intelligence, since the smuggling of gold were not denied by the two persons, the car along with the occupants were taken to the office of the Assistant Commissioner of Central Excise and Service Tax, Thanjavur, for detailed examination.

2.On the thorough examination of the vehicle in the presence of two independent witnesses and the suspects, the officers of the revenue noticed 12 packets wrapped with white colour adhesive tapes kept concealed under the back seat of the car. Subsequently, the

occupants said to have admitted that the boxes contained gold smuggled from Srilanka via Muthupettai sea shore and received by a person, by name, one Raj near Thambikottai and they were meant for onward carriage/transportation to Chennai.

3.Thereafter on opening the boxes, the officers found that the 12 packets contained 104 yellow coloured metal biscuits and bars. Upon examination of the same 80 biscuits were found to be gold biscuits with foreign markings and 24 numbers of yellow coloured metal bars in crude form and thereafter, the gold Assayer assessed the biscuits and certified that all the 80 pieces of foreign marked gold biscuits have purity of 24 carat and 24 numbers of yellow coloured metal bars were gold bars in crude form with the purity of 24 carat. He also ascertained the total weight of the 80 pieces of foreign marked gold biscuits as 8000 grams (each 100 grams) and the total weight of 24 pieces of gold bars in crude form as 7229 grams and altogether weighing 15229 grams. The total value of the goods was also arrived at Rs.4,12,70,590/- based on the prevailing market rate of Rs.2,710/- per gram of 24 carat gold.

4.Pursuant to this incident, actions were initiated against those two persons, and also against some other persons, based on the input the customs received from those two persons. Ultimately, an adjudication proceedings went on and an adjudication order was passed by the customs on 31.03.2017, where, the goods, which were seized, were ordered for absolute confiscation including the packaging material as well as the vehicle, that is, TATA Indica Vista car, under the provisions of the Customs Act, 1962 (in short 'the Act') and the authorities also imposed a penalty under Section 112 of the Act, on three persons, namely, one Siddique Gani imposing a penalty of Rs.1,00,00,000/-(Rupees one crore only) under Section 112(a) of the Act, and against the two other persons, namely, Sheik Fareed and Karthikeyan, who were present in the car at the time of seizure, a sum of Rs.50,00,000/-(Rupees fifty lakhs only) each, under Section 112(b) of the Act.

5.Pursuant to the said adjudication process and the order of adjudication passed on 31.03.2017, based on the input supplied by them implicating the petitioner herein, the Customs has come forward to issue a show cause notice to the petitioner on 08.09.2017.

6.The said show cause notice was under challenge in W.P.No.26000 of 2017 filed by the petitioner herein before the Principal Bench of this Court, where, initially by order, dated 05.10.2017 an interim order not to precipitate the matter further was ordered, and thereafter, on the basis of the arguments advanced on both sides, on 01.11.2017, the writ Court directed the customs to file an affidavit that, whether the customs will be willing to adjudicate the impugned show cause notice without any reference to the findings in the adjudication order, dated 31.03.2017 made against the three persons referred to above.

7.Pursuant to the same, on 08.11.2017, an affidavit was filed, recording the same, the writ Court passed the following order:

"5.Today, when the matter is heard, an affidavit of undertaking dated 08.11.2017 has been filed by the Joint Commissioner of Customs (Preventive), Office of the Commissioner of Customs (Preventive), Trichy, who is the adjudicating authority for the said case and paragraph no.8 of the affidavit would be relevant, which is quoted hereinbelow:-

"8.I state that accordingly, the Joint Commissioner of Customs, Trichy do undertake to adjudicate the above 8 said Show Cause Notice F.No.DRICZU/TTN/VIII/48/INT-2015 dated 08.09.2017 without being influenced by the findings rendered in the Order in Original No.TCP-CUSTOMS-PRVADC-014-17 dated 31.03.2017 but based upon the available material and statement recorded under the provisions of the Customs Act, 1962."

6.The learned counsel appearing for the petitioner, on instructions, submits that the averments set out in paragraph no.8 of the affidavit of undertaking filed by the adjudicating authority would be sufficient to safeguard the interest of the petitioner.

7.In the light of the above, the affidavit of undertaking dated 08.11.2017 filed by the adjudicating authority, is placed on record and the writ petition is disposed of with a direction to the adjudicating authority to adjudicate the show cause notice without being influenced by the findings rendered in the order-in-original dated 31.03.2017 and proceed based on the available material and the statement recorded under the provisions of the Customs Act, 1962.

8.With the above observations, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed."

8.Subsequent to the same, a speaking order was passed by the customs on 20.02.2018, in response to the request made by the petitioner, dated 15.01.2018 to give a chance of cross-examination of the two persons from whom statements were obtained, whereby, the petitioner was implicated in the case, rejecting the claim of the petitioner for cross-examination of the co-accused. The relevant portion of the said speaking order, dated 20.02.2018 reads thus:

"Further in the subject case six PH have already been given on 24.10.2017, 27.10.2017, 03.11.2017, 15.01.2018, 18.01.2018 and 22.01.2018. But none of the noticee has appeared during the said PH.

In view of the above, the request for cross-examination of the co-accused is denied herewith.

Further, as per the direction of Hon'ble High Court of Madras the case is taken up for adjudication on the basis of available materials and the statements recorded under the provisions of the Customs Act, 1962."

9.On the same day, that is, on 20.02.2018, an adjudication order also was passed against the petitioner, which was issued on 07.03.2018, whereby, the customs had imposed a penalty on the petitioner under Section 112 of the Act for a sum of Rs.1,00,00,000/- along with four others, namely, one Mohammed Ibrahim, Mansur Ali, Raj and Palani by imposing a penalty of Rs.25,00,000/-, Rs.10,00,000/-, Rs.50,00,000/- and Rs.50,00,000/- respectively.

10.The said order of adjudication, dated 20.02.2018 was under challenge before this Court by the writ petition filed by the petitioner in W.P.(MD)No.10345 of 2018. The said writ petition was disposed of by the writ Court, that is, the Madurai Bench of this Court on 18.12.2018, where, the learned Judge has passed the following order:

"7.The learned standing counsel appearing on behalf of the respondent would submit that the issue on hand is no longer res integra. His contention is that the writ petitioner has no right to ask for cross examination of a co-noticee and that this issue has already been decided by the Hon'ble High Court of Delhi as well as Hon'ble High Court of Allahabad, whose decisions were followed by me vide order dated 27.02.2018 in W.P.(MD) No.863 of 2018. No doubt, the said submission of the respondent is well founded. But this as rightly pointed out by the learned senior counsel appearing for the writ petitioner, the sheet anchor of the approach adopted by me was the premise that the co-noticees can complain of infraction of their fundamental right under Article 20(3) of the Constitution of India if they were subjected to cross examination.

8. As rightly contended by the learned senior counsel appearing for the writ petitioner, the impugned proceedings are adjudicatory in character and they cannot be called as criminal proceedings. The persons against whom the adjudication proceedings are taken under Chapter XIV of the Customs Act cannot be labeled as accused. In this regard, the learned senior counsel placed reliance on the decisions of the Hon'ble Supreme Court reported in 1996 2 SCC 471 in the matter of Director of Enforcement vs M.C.T.M.Corporation Pvt. Ltd., and others. No doubt, those proceedings pertain to Foreign Exchange Regulations Act, 1947. But then, the principle laid down in the said decision can be applied with equal

force even to proceedings arising under the Customs Act of 1962. This aspect of the matter was not argued before me when I disposed of W.P.(MD) No.863 of 2018.

9. A mere look at the order dated 20.02.2018 rejecting the writ petitioner's request for cross examination starts and ends by describing Siddique Gani and Mohammed Ibrahim as co-accused. The opening line reads as "With respect to the request for the cross examination of the co-accused" and it ends as follows, "the request for cross examination of the co-accused is denied". Admittedly, the said Siddique Gani and Mohammed Ibrahim cannot be called as co-accused. The writ petitioner is also not figuring as an accused. Between these two sentences, the Authority has only referred to a host of case laws and there is no discussion of the facts involved. In fact, the first case law reported in 2006 (194) E.L.T. 290 (Tri.Del) referred to by the respondent states that one cannot insist on the right of cross examination and one cannot demand cross examination as a matter of right. It means that a demand can be made and it will have to be considered. In this case, there is absolutely no consideration of the petitioner's request at all. The order in my view is virtually a non-speaking order.

10.In this view of the matter, the order impugned in the writ petition stands quashed and the writ petition is Allowed. The matter is remitted back to the file of the respondent to pass orders afresh in accordance with law. The respondents will first consider the petitioners's request for cross examination by taking into account the facts obtaining in this case and pass a speaking order and only thereafter take up the matter on merits. No costs. Consequently, connected miscellaneous petitions are closed "

11.Pursuant to the said order passed by the writ Court, dated 18.12.2018, atleast three times, that opportunity was given for cross-examination of the two persons, namely, Siddique Gani and Mohammed Ibrahim, but in none of these occasions, eventhough the petitioner with his representative or counsel present for cross-examination, those two persons not appeared. Thereafter, a written submission to the show cause notice, dated 08.09.2017 in detail had been given by the petitioner on 25.09.2019, where the main ground raised by the petitioner is that, since the customs could not produce the two persons for cross-examination and in this regard, the customs department has failed to summon those persons by using coercive process, and only sending summons, which is probably ignored by the recipients, it is only a lip- service and a pretend in complying with the order of the High Court, dated 18.12.2018, therefore, the statements given cannot be relied upon by the customs

in completing the adjudication, therefore, if that statements given by those two persons were not subjected to cross-examination or not made available for such cross-examination, those statements cannot be relied upon and if those statements are ignored, there could be no further material against the petitioner, hence, the petitioner can be exonerated from the adjudication proceedings.

12.However, the respondents completing the adjudication, has passed an order, dated 13.12.2019, issued on 23.12.2019, imposing the said penalty, which has already been imposed in the earlier adjudication order on the six persons including the petitioner, therefore, challenging the said order of adjudication, dated 13.12.2019 issued on 23.12.2019, the petitioner has filed the present writ petition.

13.Heard Mr.B.Kumar, learned Senior Counsel appearing for the petitioner. He has raised the main ground that, once, the two persons, namely, Siddique Gani and Mohammed Ibrahim, were not made available for cross-examination to the petitioner during the adjudication process, it will be a fatal to the entire proceedings, therefore, the entire adjudication order, which is impugned in the writ petition has to be set aside.

14.In alternative, the learned Senior Counsel would contend that, if at all the two persons, whose cross-examination was not made possible and whose statements were main reasons for issuing show cause notice and to do the adjudication against the petitioner, atleast the statements obtained from the two persons, can be ignored and in this regard, if at all any other materials available for the customs to proceed against the petitioners, without referring to the statements given by those two persons, for the said purpose, the matter can be remitted back to the customs for re-consideration, after setting aside the impugned order, he contended.

15.In support of these contention, the learned Senior Counsel has relied upon the following decisions:

1.2005 (10) SCC 634
(Lakshman Exports Ltd., v. Collector of Central Excise)

2. 2016(15) SCC 785
(Andaman Timber Industries v.Commissioner of Central Excise)

3.1961 (1) SCR 933 (Amba lal vs. Union of India)

4.W.P.Nos.2383 to 2386/2002, High Court, Madras.
(V.Bhaskaran vs.The Special Director, Enforcement Directorate, New Delhi)

5.1989 (4) SCC 418 (N.Meera Rani v.Government of Tamilnadu and another)

16.By relying upon these decisions, the learned Senior Counsel would contend that the cross-examination is an important facet of any enquiry or adjudication, if the persons, whose statements is heavily relied upon by the adjudicating authority or a prosecution,

and if such an opportunity of cross-examination is not given to the accused or noticee, then, it will be a fatal to the entire adjudication process, therefore, on that ground itself, which have been clearly reiterated in those cases cited supra, the impugned adjudication order is liable to be interfered with, the learned Senior Counsel contended. He would also submit that as against the earlier adjudication order, dated 20.02.2018, when writ petition was filed by the same petitioner, this Court, by order, dated 18.12.2018 has made a clear observation that, the authorities, that is, the customs department should have considered the request of the petitioner for allowing him to cross-examine the two persons. By making this observation, the learned Judge in the writ order, dated 18.12.2018, has given a direction that the respondents will first consider the petitioner's request for cross-examination by taking into account the facts containing in this case and pass a speaking order and only thereafter, take up the matter on merits.

17.Therefore, the impact of the direction given by the writ Court in the earlier round of litigation is to see that the petitioner would get chance of cross-examining the two witnesses, whose statements are very crucial in the adjudication process and based on which only, the petitioner's role has been projected by the customs. In absence of such an opportunity of cross-examining the two persons, certainly, the whole process would get vitiated, hence on the sole ground, the impugned order is liable to be interfered with and for the said purpose only, instead of filing an appeal against the impugned adjudication order, the petitioner has chosen to file this writ petition as a denial of cross-examination is nothing but a violation of the personal lilberty and protection guaranteed under Article 20 and 21 of the Constitution of India.

18.Making all these submissions, the learned Senior Counsel would contend that the impugned order is liable to be set aside and the writ petition is to be allowed.

19.Per contra, Mr.B.Vijay Karthikeyan, learned Senior Standing Counsel appearing for the respondent customs has made submissions that the entire smuggling operations was unearthed by the customs department, where, there has been a link between each of the parties and initially, though adjudication went on only against three persons, namely, Siddique Gani, Sheik Fareed and Karthikeyan, the customs had got material to show that there has been involvement of the petitioner and others in the entire gamut of smuggling issue. Therefore, a show cause notice was issued against the petitioner, as before which he obtained anticipatory bail avoiding arrest and the very said show cause notice, dated 08.09.2017 issued against the petitioner itself was under challenge in W.P.No.26000 of 2017, where, an undertaking affidavit was filed by the customs that the customs department undertake to adjudicate the show cause notice, dated 08.09.2017, without being influenced by the findings rendered in order in original, that is, the adjudication order, dated 31.03.2017, but based upon the available materials and statement recorded under the provisions of the Customs Act.

20.Accordingly, without being influenced by the said adjudication order, dated 31.03.2017 only based on the other available materials as well as the statements obtained by the customs under the provisions of the Act, the adjudication went on, where, a speaking order dated 20.02.2018 also was passed by the customs to reject the claim of the petitioner for giving a chance of cross-examination of the co-accused and on that date the adjudication order itself was passed, however, that was again challenged by the petitioner before this Court in the second round of litigation, that is, in W.P(MD).No.10345 of 2018.

21.In the said writ petition, only a direction was given by the writ Court by order, dated 18.12.2018, that the customs will first decide the request of the petitioner for cross-examination. The said direction in fact, has been complied with by the customs department as they have decided to give the chance of cross-examination of the two persons as sought for by the petitioner and accordingly, summons were issued to those two persons, wherein in respect of Siddique Gani, summons have been served, however, in respect of Mohammed Ibrahim, the summon could not be served as no such an address and no such person is available in the said address. Because of the said reason, the cross-examination though was given, it could not be utilised, as those two persons had not turned up for the summons.

22.He would further submit that merely because of the chance of cross-examination could not be given to the noticee, whether the entire adjudication process would be a fatal one or not is concerned, the law is well settled in this regard.

23.The learned Standing Counsel would further submit that insofar as the said question is concerned, number of decisions have come from various High Courts as well as the Hon'ble Supreme Court and in this context, the learned Standing Counsel appearing for the respondent customs has relied upon the following decisions:

1.2003 (153) E.L.T. 244 (SC)
[Union of India v. G.T.C. Industries Ltd.]

2. 2021 (377) E.L.T. 13 (Madras)
[Stalin Joseph v. Commissioner of Customs, Airport, Chennai]

3. 2018 (2) CWC 588
[Roshan Overseas v. Commissioner of Customs, Tuticorin]

4. Hon'ble High Court of Madras at Madurai Bench (DB) in W.A.(MD)No.1146 of 2018

5. 2015 (325) E.L.T. 250 (Allahabad)
[Ashish Kumar Chaurasia v. Commissioner, CESTAT]

6. 2016 (333) E.L.T. A231 (SC)
[Ashish Kumar Chaurasia v. Commissioner, CESTAT]

7. 2015 (321) E.L.T. 604 (Delhi)
[Mahender Jain v. Commissioner of Customs (Import & Export)]

8. 2015 (323) E.L.T. A187 (S.C.)
[Mahender Jain v. Commissioner of Customs (Import & Export)]

9. 2021 (376) E.L.T. 46 (Telangana)
[Mohammed Muzzamil v. Central Board of Indirect Taxes&CUS]

10. 2019 (367) E.L.T. 759 (M.P.)
[Kirit Shrimankar v. Commissioner of CGST & Cental Excise]

24.By relying upon these decisions, the learned Standing Counsel would contend that the opportunity of cross-examination as sought for by the petitioner, though had been given by summoning the two persons, who have to be cross-examined by the petitioner side, since one of those two persons have not received the summons, as his whereabouts is not known and had not turned up, as one of the persons having received the summon, did not turn up. Therefore, that situation cannot lead to a fatality of the case as projected by the petitioner side, therefore, the learned Standing Counsel would canvass the point by relying upon the afore-cited judgments that, the adjudication process went on against the petitioner is sustainable.

25.Moreover, the learned counsel would further contend that as against the order impugned, that is, adjudication order, if at all the petitioner is aggrieved, he can very well prefer an appeal, instead of preferring the appeal, he cannot come forward to invoke the writ jurisdiction once again as the issue involved in the entire gamut, which culminated in the impugned adjudication order can be gone into in detail only by next fact finding authority, who is none other than the Appellate Authority, and therefore, without exhausting such an appeal remedy, the petitioner may not come forward to make a plea that the impugned order can be agitated before this Court invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

26.Therefore, on this ground alone, the plea raised by the petitioner is liable to be rejected and the writ petition is liable to be dismissed, he contended.

27.I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

28. Instead of preferring an appeal against the impugned adjudication order, why the petitioner has chosen to file writ petition is the question, however, the same is answered by the learned senior counsel appearing for the petitioner that, the chance of cross-examination of the two crucial persons, whose statements have been mainly relied upon by the customs, since has not been

given to the petitioner, that will lead to the fatality of the case, therefore, such a denial of cross-examination amounts to violation of the fundamental rights of the petitioner guaranteed under Article 20 of the Constitution of India, therefore, on that ground alone, the impugned adjudication order is liable to be set aside.

29.In support of the said contention, the learned Senior Counsel as stated supra, relied upon some of the judgments, where, in the case of ***V.Baskaran v. Special Director of Environment Directorate, New Delhi*** in W.P.Nos.2383 to 2386 of 2002, dated 24.06.2005, he has relied upon the following observation made by the learned Judge:

> *"69.I am inclined to hold that it is certainly open to the authorities to gather information for their own satisfaction pursuant to their investigation from any source. Such sources need not be disclosed. There is of course no duty to produce such persons for cross examination. There is also no need to produce anyone at the stage when the individual is called upon to show cause against the proposed proceedings. But when once the enquiry commences and if the adjudicating authority ultimately proposes to rely in his final order on the statement of any witness and would ultimately render the finding on such reliance on the evidence of the witness against the accused, the enquiring authority cannot be permitted to rely on such evidence or statement unless he has been produced for cross-examination.*
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> *70. I agree that the accused cannot be permitted to stall the enquiry if a witness is not produced. His right will be only to comment about the non-production if in the order of adjudication, reliance is placed upon the statement of a witness not produced for cross-examination. Appellate authorities are bound to reject such material. To hold otherwise, namely, that the Department can rely on statements of persons not produced for cross-examination in spite of demand by the accused, would amount to gross injustice and violation of basic concept of fairness. The adjudicating authority should ignore such material while passing final order."*

30.That apart, the learned Senior Counsel heavily relied upon the judgment of the Hon'ble Supreme Court in Andaman Timber case reported in 2016(15) SCC 785, where, he relied upon the following paragraphs:

> *"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses*

were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7.As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.), Commissioner v. Andaman Timber Industries Pvt. Ltd.] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."

31.In the said case of Andaman Timbers Industry is concerned, the Hon'ble Supreme Court, no doubt, has observed that not allowing the Assessee to cross-examine the witness by the adjudicating authority, though the statements of those witnesses were made the basis of the impugned order is a serious flaw, which makes the order nullity in as much as it amounted the violation of principles of natural justice, because of which, the Assessee was adversely affected, whether the said situation is prevailing in the present case is the question.

32.In this context, the statements obtained by the customs department from various persons under Section 108 of the Customs Act, have been relied upon by the customs side. In this context, the original records were produced before this Court, where the learned Standing Counsel was able to demonstrate that, it is not only on the basis of the statement given by the Siddique Gani, but also on the basis of the statement given by one Sheik Fareed, whose statement was recorded on 28.10.2015 and also the statement given by Karthikeyan, dated 18.01.2016, the connection of the petitioner with regard to the smuggling episode has been established *prima facie*, he contended.

33.That apart, the statement of Siddique Gani, dated 16.04.2016, recorded under Section 108 of the Customs Act also has been relied upon.

34.Assuming that in the statement of Siddique Gani or Mohammed Ibrahim, as these two persons, according to the petitioner, had implicated in their statements the role of the petitioner and those statements are eschewed even then, whether the customs can maintain the adjudication and to come to a conclusion that the petitioner is liable to be imposed the penalty under the provisions of the Customs Act, has to be gone into.

35.In this context, if we look at the adjudication order, it is not on the basis of the mere statement given by the said Siddique Gani as well as the Mohammed Ibrahim, the petitioner has been implicated. The petitioner, even in his statement states about the knowledge of these persons including Siddique Gani and Mohammed Ibrahim. Phone calls were emanated from the mobile number of the petitioner to Karthikeyan or Sheik Fareed, who were the drivers or accomplice to the driver on the particular date, when the seizure taken place.

36.There has been a huge haul of smuggled gold and this is evidence that there has been a big smuggling activity went on, which

has been correctly unearthed by intercepting the smuggling vehicle on the particular date, based on the proper tip received from the DRI by the customs.

37.Moreover, insofar as the legal position is concerned, whether the denial of opportunity of cross-examination is the fatality to the case is concerned, as referred to above, nearly about ten decisions have been cited by the learned Standing Counsel appearing for the customs. In 2003(153) ELT 244 SC in ***Union of India v. CTC Industries Limited,*** the Hon'ble Supreme Court has held as follows:

> *"10.Learned Senior Counsel appearing for the Union of India Mr.Jaideep Gupta submitted that no statement was taken from Shri Sailo by the authorities nor did the authorities rely upon any statement of Shri Sailo against GTC. That it was not a case where the evidence had been produced by the appellant in support of its case and no opportunity of cross-examination was given to the other side. Notice could not be issued to Shri Sailo under Section 14 of the Act to compel his attendance and to make a statement coupled with the opportunity to the GTC to cross-examine him. That Shri Sailo being a co-noticee, could not be compelled to appear as witness against himself. Non-summoning of a co-noticess for the purpose of cross-examination by another co-noticee did not amount to breach of Principles of Natural Justice. In the alternative, it was submitted that in a case based on violation of Principles of Natural Justice, it is to be shown that some prejudice was caused to the aggrieved person because of the alleged breach of violation of Principles of Natural Justice. It was vehemently contended that the Collector in coming to the finding that the GTC was the real manufacturer and the NET its front company did not rely upon the statement of Shri Sailo. In coming to this finding the Collector had primarily placed reliance on the statements of other persons.*
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> *.....*
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> *16.An adverse finding could not have been recorded against the GTC by relying upon the oral submissions made by a co-noticee at the hearing without any supporting material on record, providing die opportunity to GTC to meet the same.*
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> *17. For the reasons stated above, the appeal is accepted in part and directions issued by the High Court to the Collector to summon Shri Sailo, Liantilinga and Lalchungunga for necessary examination and to afford an opportunity to the GTC to cross-examine them are set aside. But the order of the High Court setting aside the order of the*

Collector is sustained on the ground that the Collector had erred in placing reliance on the submissions of Shri Sailo. The direction issued by the High Court that the proceedings shall be taken by the officer other than the one who had made the adjudication order shall also stand set aside. Otherwise also this direction has become infructuous with the passage of time. The incumbent Collector is directed to decide the matter afresh on the basis of any other material obtained and also placed on record for the purpose duly granting reasonable opportunity to GTC to produce evidence in rebuttal."

38.In 2021 (377) ELT 123 (MDS), a Division Bench of this Court in the matter of ***Stalin Joseph v. the Commissioner of Customs (Airport Chennai)*** has held as follows:

"30.With regard to the plea that the appellant should be permitted to cross examine every person, the Adjudicating Authority, in our view, rightly pointed out that such request has to be considered based on facts and circumstances of each case. After referring to the factual matrix, the Adjudicating Authority concluded that the request for cross examination was a mere ploy and to scuttle and delay the adjudication process. The conduct of the appellant is clearly brought out in the adjudication order that he has been evading the summons and absconding and not availing the opportunity of personal hearing. After elaborately discussing all the factual matrix, the Adjudicating Authority held that the other co-noticees have not retracted their statements given under Section 108 of the Act and the plea made by the appellant for cross examination is only for dragging on the proceedings and therefore, there are enough and valid grounds to deny such request. The facts, which have been brought out by the Adjudicating Authority in the Order-in-Original, clearly expose the appellant's role.

31.We agree with the finding of the Adjudicating Authority that the plea raised by the appellant demanding cross examination is only with a view to drag on the matter. In fact, in the reply/representations, which the appellant had sent, he has not been specific as to why he requires cross examination because, the appellant has not brought out any independent facts or evidence as his defence to the allegation made against him in the show cause notice. The reply is a bald denial of the entire allegations stating that the appellant is not involved in the import of the said items. However, during the course of investigation and while

considering the entire matter, the Adjudicating Authority has been able to bring out the facts as to how the appellant has impersonated himself, opened bank account in the name of a fictitious person, remitted customs duty by effecting cash payment in dummy bank accounts, opened in the name of an Enterprise and one Shri Rakesh Upadhaya. Therefore, we are of the view that the facts and circumstances of the case would clearly show that the request for cross examination is devoid of merits, lacks bonafide and rightly denied by the Adjudicating Authority.

32.It was argued before us that the appellant has been framed by the investigating agency as well as the Department on the ground that he had lodged a complaint before the CBI and certain officers of the DRI have been charged. Therefore, the appellant would seek to argue that the proceedings are vitiated on account of mala fide. If this is the case of the appellant, then there should be specific allegation against the named officers against whom, he alleges mala fide or bias. Admittedly, no such officer has been made a party to the writ petition. Therefore, the plea of mala fide exercise of power has to be definitely rejected.

33.So far as the decision in the case of Vulcan Industrial Engineering Co. Ltd., (supra) is concerned, the case was on a different factual background, where the request for cross examination was never decided by the Adjudicating Authority and the Order-in-Original was passed whereas, in the case on hand, the request for cross examination has been considered and a decision has been rendered by the Adjudicating Authority in the Order-in-Original, which we find to be just and proper. Therefore, the said decision is of no assistance to the case of the appellant.

34.In the case of Mahek Glazes Pvt. Ltd. (supra), the Court did not express any opinion on the issue as to whether the petitioner therein had a right to seek cross examination in the facts of the said case and the Court went to the extent of observing that it refuses to comment on the petitioner's insistence for cross examination or the authority's reluctance to grant it. Further, the said decision was relied on to state that the request of cross examination should have been decided separately and not along with the Order-in-Original. This proposition cannot be canvassed by the appellant, as the Adjudicating Authority has clearly brought out the conduct of the appellant at the stage of the investigation and even after the

show cause notice was issued. The appellant did not cooperate with the adjudication process, was unsuccessful in obtaining an order of Anticipatory Bail and he was absconding. More importantly, the statements, which were given by the other co-noticees, which have been referred to by the Department, have not been retracted and remained as such. Therefore, the Adjudicating Authority was right in observing that the request for cross examination was a ploy and only to drag on the proceedings. That apart, if the co-noticees, who were examined and who have given statements which clearly brings out the role of the appellant, then the appellant should set up his defence by placing reliance on some evidence available with him and establish that on account of the defence available with him, his request for cross examination is justified.

35.We have perused the replies given by the appellant to the show cause notices and all that we find is a simple denial of his involvement. The fact position opens a pandora-s box, which clearly brings out the deep rooted involvement of the appellant in the entire process. Therefore, the decision in Mahek Glazes Pvt. Ltd. (supra), is clearly distinguishable.

36.The decision in the case of Andaman Timber Industries (supra) and Ummer Abdulla (supra) are cases, which arise out of an order passed by the Tribunal, which were challenged by filing an appeal before the High Court, where the Court decided the substantial questions of law. However, in the instant case, the appellant had filed a writ petition. Therefore, the questions of law, which have been decided in those cases were done after the Tribunal, being the last fact finding authority, had given a conclusive finding on facts and the Court proceeded to decide the substantial questions of law raised before it. Therefore, the appellant cannot press into service those decisions to support his case."

39.Another Division Bench of this Court in 2018 (2) CWC 588 in the matter of ***Roshan Overseas v. the Commissioner of Customs***, has held as follows:

"12.On the question of maintainability of the writ petition, it is to be noted that in this case, the Adjudicating Authority passed the impugned order admittedly after issuing the show cause notice and also affording an opportunity of personal hearing to the writ petitioner. Therefore, it cannot be contended that the Adjudicating Authority violated

the principles of natural justice. However, it is claimed by the writ petitioner that not giving an opportunity to cross-examine the witnesses also amounts to violation of principles of natural justice. The question as to why such opportunity was not given to the petitioner, certainly is not a simple question of law and on the other hand, it is a question of fact, which is answered by the Adjudicating Authority in the impugned order itself. Whether the reasons stated by such authority in not providing an opportunity to cross-examine are sustainable or not is the question that has to be considered and answered only by re-appreciation of all the facts and circumstances, which, in our view, has to be done only by the next fact finding authority, namely, the appellate authority. Therefore, we are not convinced to appreciate the contention of the writ petitioner with regard to maintainability issue. It is useful to note at this juncture, an observation made by the Hon'ble Apex Court in Panjab Roadways vs. Panja Sahib Bus Transport Company reported in (2010)5 SCC 235 at paragraphs 37 and 38, as extracted hereunder:-

> *"37.Article 226 of the Constitution of India confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of fundamental rights or any other purpose, the powers are of course wide and expansive but not to be exercised as an appellate authority re-appreciating the finding of facts recorded by a tribunal or an authority exercising quasi-judicial functions. The power is highly discretionary and supervisory in nature. Grant of stage carriage permits is primarily a statutory function to be discharged by the RTA exercising powers under Section 72 of the Act and not by the High Court exercising the constitutional powers under Article 226 or 227 of the Constitution of India.*
>
> *38. A writ court seldom interferes with the orders passed by such authorities exercising quasi-judicial functions, unless there is serious procedural illegality or irregularity or they have acted in excess of their jurisdiction....."*

13.It is well settled that in a case involving fiscal nature, availing of statutory appellate remedy has to be first exhausted and hence, the party cannot come to this Court directly and file a petition under Article 226 of the

Constitution of India. This view is already expressed in very many decisions out of which we quote few decisions which are as follows:-

"1) M/s.Nivaram Pharma Private Limited rep.by its Director Sardarmal M.Chordia, Madras -vs- The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras and others reported in
(2005) 2 MLJ 246(DB)

2) United Bank of India -vs- Satyawati Tondon and others reported in (2010) 8 SCC 110

3) Raj Kumar Shivhare -vs- Assistant Director, directorate of Enforcement and Another reported in (2010) 4 SCC 772.

4) Metal Weld Electrodes -vs- CESTAT, Chennai reported in 2014 (299)ELT 3 DB."

14.Therefore, we are of the considered view that the filing of the very writ petition itself against the order of the Adjudicating Authority is not maintainable, as the appellant/writ petitioner is having statutory and efficacious appellate remedy before the appellate Tribunal, in this case, CESTAT."

40.In yet another Division Bench judgment in W.A(MD).No.1469 of 2018, dated 30.01.2019 of this Court in ***S.Rajendran v. the The Joint Commissioner of Customs(Preventive) and others*** it has made the following observation:

"28. In the present case, the 1st respondent has relied on the statements of appellant and co-accomplices while passing Order in Original No.TCP/Cus.PRV/JTC/055-17, dated 07.12.2017. They are his employees and partners and partner's brother, who are either absconding or are not traceable and cannot be produced for cross examination.

29. They have reportedly retracted their statements recorded under Section 108 of the Act though some of them have withdrawn their retractions and have stated that their original confessions to be true in their later statements. From the order impugned in the writ petition, it appears that certain admissions appears to have been made by the appellant relating to his involvement in which case there would be no necessity to cross examine the co-notices. We do not however have the documents before us. Even if produced, we would have refrained from dissecting them while examining the order of the Single Judge.

30. Therefore, denial of cross examination of co-

accomplice who have allegedly retracted their statements is of no consequence as far as the appellant is concerned.

31. Further, in a quasi judicial proceeding, a quasi judicial authority is not governed by strict rules of evidence. Charge/case can be proved based on preponderance of probability and other available evidences and documents.

32. We are of the view that in the peculiar facts of the case, it was for the appellant to produce such co-accomplice and elicit their statements as they are not unknown or strangers to the appellant as they were working under him.

33. An order of a quasi judicial officer is sustainable if the finding arrived therein are based on preponderance of probability and other overall evidences and documents on record. Whether the finding arrived in the impugned order is solely based on the statements of co-accomplices or based on preponderance of probability or not is something which can be examined only before the Appellate Commissioner and not in a writ proceeding.

34. Scope of writ petition and the extent to which courts can interfere under Art. 226 is limited. The appellant should therefore explore options before the Appellate Commissioner and place all legal and factual submissions there. The remedies sought for by the appellant before this Court is available to him before the Appellate Commissioner.

35. We would not like to influence the Appellate Commissioner one way or the other on merits should the appellant choose to opt to question the impugned order of the 1st respondent.

36. The Appellate Commissioner can on proper examination of records can come to a just conclusion. As the jurisdiction to interfere is very limited, we would not like to pass orders on merits particularly, in view of the statements which appears to have been given by the appellant before the 2nd respondent during investigation.

37. In view of the above conclusion, we are inclined to dismiss the writ appeal. Appellant is given liberty to file an appeal before the Appellate Commissioner within two months from the date of

this order. Accordingly, this writ appeal is dismissed. No costs."

41.Similar view has been taken by the Allahabad High Court reported in ***2015(325) ELT 250(Allahabad)*** in the case of ***Asish Kumar vs. Commissioner of CESTAT,*** the said judgment was upheld by the Hon'ble Supreme Court in ***2016 (333) ELT(A) 231(SC).***

42.In ***2021(376)ELT46(Telangana)***, the High Court for the State of Telengana at Hyderabad has taken the following view:

"35.Thus there is no doubt that where a plea of violation of principles of natural justice by denying a party an opportunity to cross-examine witnesses is raised in proceedings under the Customs Act, 1962 or similar legislation, the question of prejudice suffered to such party by such denial has to be gone into. If there is no prejudice caused by such denial, no relief can be granted to him. The issues arising in this case are thus answered as above.

36. Having perused the impugned order passed by the 2nd respondent, prima facie, it appears to us that the basis for levying penalty against the petitioners were their statements recorded under Section 108 of the Customs Act, 1962, wherein certain confessions appear to have been made by them implicating themselves in the smuggling of cigarettes, which was subject matter of enquiry.

37. Therefore, we are of the opinion that no prejudice has been caused to the petitioners by the action if the 2nd respondent in denying an opportunity to them to cross-examine the other persons who had implicated them in the said act of smuggling.

38. We have also noticed that the petitioners were admittedly given a show-cause notice on 4-4-2016; they gave response there to on 2-3-2017 and 7-10-2019; and and their Counsel was also given a personal hearing on 2-3-2017 and 9-10-2019. So the contention of the petitioners that there were violation of other principles of natural justice, cannot also be sustained.

39. In this view of the matter, we are not inclined to entertain this Writ Petition.

40. We accordingly dismiss the Writ Petition at the admission stage as not maintainable, giving liberty to the petitioner to avail the alternative remedy of Appeal under Section 129A of the Customs Act, 1962.

41. We clarify that we have not expressed any opinion on the merits of the claims of the petitioners and whatever observations have been made by us are only for the purpose of disposal of this

Writ Petition and cannot be treated as conclusive; and if any such appeal is preferred by the petitioners, the same shall be decided by the Appellate Authority uninfluenced by any observations made by us in this order. No order as to costs.

42. Consequently, miscellaneous petitions, pending if any, shall stand closed."

43.Insofar as the law declared by the Hon'ble Supreme Court in Andaman Timber case cited supra, which has been taken into account by the Division Bench of this Court in Stalin Joseph case cited supra, where the Division Bench at paragraph No.36 of their order, as quoted hereinabove, has held that, since the Tribunal is the ultimate fact finding authority unless the party goes to the Tribunal and get a final verdict the question of law as to whether the denial of cross-examination or no chance of cross-examination as sought for by the noticee/petitioner concerned cannot be decided and therefore the decision in the case of Andaman Timber Industry cannot be applicable to the said facts of the case.

44.If the said principle of the Division Bench in Stalin Joseph case is applied to the present facts of the case, as here also without going to the appeal to the Tribunal, since the petitioner has approached this Court by filing the present writ petition, the principle laid down in Andaman Timber case cannot be made applicable in the present case at the present circumstances.

45.Moreover, while giving direction in the earlier round of litigation by the learned Judge, in W.P.(MD)No.10345 of 2018, dated 18.12.2018, the learned Judge in paragraph No.9 of the order has observed that, of course by taking into account the decision reported in 2006 (194) ELT 219, that, "one cannot insist on the right of cross-examination and one cannot demand cross-examination as a matter of right, it means that, a demand can be made and it will have to be considered."

46.By making these observations only, the learned Judge had given a direction to the customs to consider the first request of the petitioner for cross-examination by passing a speaking order.

47.Therefore, the request of the petitioner, in fact, having been considered was accepted by the customs and summons were issued to those two persons and among them, one had received summons and did not appear, another's whereabouts was not known.

48.In this context, it can also be viewed from this angle that, if at all the petitioner is interested for having a complete adjudication to get justice and if he was very particular that the statement given by those two persons cannot be relied and therefore, in order to retract the same, they have to be cross-examined, the petitioner could have also assisted the adjudicating authority in ensuring the presence of those two persons, who are known to the petitioner.

49.Therefore, this kind of circumstances can also be viewed that one co-noticee, while facing the adjudication process, the another co-noticee, whose presence is required for cross-examination, is by voluntary action being absent of such process of cross-examination, therefore, it can be construed that there had been a nexus between the parties as the two persons, who were sought to be cross-examined are not alien to the petitioner or they are not the independent witnesses projected by the customs authorities.

50.This position also had been considered in number of cases cited supra, and more over, consistent view have been taken by various Courts including Hon'ble Supreme Court in these matters that the mere denial of cross-examination itself cannot be treated as a fatal to the entire proceedings.

51. Here in the case in hand such a denial has not been made by the customs, though such chance was given and a demand made sincerely by the customs authorities, the co-noticee, who already suffered with the punishment of penalty in the earlier adjudication order have chosen to keep away from the proceedings as they did not want to subject themselves to be part of the proceedings for making them available for cross-examination for the reasons best known to them.

52.Therefore, in these circumstances, this Court is unable to come to a conclusion that there has been a failure on the part of the customs in securing the presence of witness for cross-examination nor it can be stated that because of those two persons have not been cross-examined, the entire adjudication proceedings is vitiated. The reason being that, it is not only based on these mere statement made by those two persons, but also based on the statement given by other persons as has been discussed above, the customs set up their case against the petitioner.

53.In this context it is further to be noted that, at the time of giving undertaking affidavit before this Court in the earlier round of litigation, that is, in W.P.No.26000 of 2017, what has been undertaken by the customs authorities is that, they will not be influenced by the findings rendered in the earlier adjudication order, dated 31.03.2017 against three persons, but based upon the available material and statement recorded under the provisions of the Customs Act, 1962, they will conduct the adjudication.

54.Therefore, whatever the statements, obtained under the provisions of 1962 Act, which includes, the statements obtained from them under Section 108 of the Customs Act can very well be relied upon, which they have already given by way of undertaking before this Court in the first round of litigation, where also, after having taken note of the same only, the further proceedings went on. Therefore, that can also be one of the reason, where, the customs can make use of the other statements given under Section 108 of the Customs Act for the purpose of completing the adjudication.

55.However, all these aspects can be gone into in detail by the further fact finding authority, that is, Appellate Authority/Tribunal before whom, if the petitioner make appeal, then all these points can be conveniently canvassed by the petitioner's side and once a quietus is given by rendering findings on the factual aspects by the Appellate Authority/Tribunal, then only, by considering the question of law, if any involved in this case, ultimately, this Court can give a finding on the legal aspect. This has been in fact emphasised by the Division Bench judgment of this Court, referred to above in Stalin Joseph case cited supra.

56.Therefore, there could be no plausible reasons on the part of the petitioner to project that the non-cross-examination of the two persons, despite the attempt being made in this regard both by the petitioner as well as the customs authorities, will be a total fatal to the entire adjudication proceedings, therefore, adjudication order is vitiated.

57.In that view of the matter, this Court feel that the petitioner can very well agitate the issue as against the impugned order by preferring an appeal where all these issues factually as well as legally can be projected and as the final fact finding authority the Appellate Authority/Tribunal can go into these aspects and render a finding.

58.In view of the afore-stated discussions, this Court feel that, the challenge made against the impugned order on the ground urged by the petitioner is unsustainable at this juncture, therefore, the writ petition fails, hence, it is liable to be rejected.

59.In the result, the writ petition is dismissed. However, it is open to the petitioner to prefer an appeal before the Appellate Authority and if any such an appeal is filed before the Appellate Authority, such Appellate Authority shall decide the appeal on merits and in accordance with law, where, whatever findings or observations given by this Court in this order shall not be taken into account or those findings and observation shall not influence the Appellate Authority, who can take a decision independently.

60.With these observations, this writ petition is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PJL

To

The Joint Commissioner of Customs (Preventive),
O/o.Commissioner of Customs,
No.1, Williams Road,
Cantonment,
Tiruchirappalli-620 001.

W.P.(MD)No.3009 of 2020
28.05.2022

RK(02/06/2022) 24P 2C