

Sanjay Shah Proprietor of Edge, Vs The Commissioner of Customs

Court: Madras High Court (Madurai Bench)

Date of Decision: Nov. 25, 2010

Acts Referred: Constitution of India, 1950 " Article 226

Criminal Procedure Code, 1973 (CrPC) " Section 164

Customs Act, 1962 " Section 108, 28(2), 28AB, 7B, 7I

Citation: (2011) 264 ELT 211

Hon'ble Judges: T. Raja, J; R. Banumathi, J

Bench: Division Bench

Advocate: P. Saravanan, for the Appellant; B. Vijay Karthikeyan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T. Raja, J.

The Appellant herein, after losing his legal battle before the learned Single Judge, has preferred the present writ appeal.

2. The Appellant has been carrying the business of measuring tapes (hereinafter referred to as "goods") from China through the Tuticorin Port. The

goods imported by the Appellant attract Anti Dumping Duty (hereinafter referred to as "ADD") and the ADD is livable based on the net weight of

the consignment imported by the Appellant. The Appellant had mis-declared the net weight of the consignment as 8350 Kgs in the B.E. No.

446476, dated 06.10.2008 as against the actual net weight of 18989 Kgs ascertained by the DRI. The above said mis-declaration was evident

from the Appellant's averment that he has paid Rs. 19.55 lakhs as ADD meant for 18989 Kgs. Therefore, the Appellant was found to have

evaded payment of ADD to the tune of Rs. 1,57,82,914/- as worked out in respect of their import of goods under 12 Bills of Entry listed in the

show cause notice dated 08.04.2009 issued by the DRI, Tuticorin and subsequently, an order was passed in Order in Original of Commissioner of

Customs, Tuticorin, order No. 01/2010, dated 27.07.2010, which came to be confirmed and as a result, he was ordered to adjust the ADD

amount of Rs. 48,93,796/- paid already towards part amount of ADD livable and further, the demand of balance amount of Rs. 1,08,89,118/-

was sought from the Appellant u/s 28(2) of the Customs Act, 1962, along with interest at appropriate rates u/s 28 of the Customs Act.

Subsequently, the Appellant herein challenged the proceedings dated 27.07.2010 passed by the Commissioner of Customs in order No. 01/2010

(Commissioner) to quash the same with further direction to the Respondent to adjudicate the matter by giving opportunity to the Appellant to cross

examine the Clearing House Agent and Investigating Officer as the same is violation of principles of natural justice, before this Court.

3. The learned Single Judge of this Court finding that the impugned order passed by the Commissioner of Customs/Respondent herein is

appealable under Sections 7B or 7I of the Customs act and the Appellant had approached the writ Court under Article 226, without preferring an

appeal against the impugned order, to the Customs, Excise and Service Tax Appellate Tribunal, dismissed the writ petition on the ground that

when there is an effective appeal forum available to the writ Petitioner/Appellant herein under Sections 7B or 7I of the Act, the writ petition is not

maintainable under Article 226 of the Constitution of India. Aggrieved by the said order, the present writ appeal has been filed.

4. Learned Counsel appearing for the Appellant advanced two fold submissions. Firstly, when there has been a violation of principles of natural

justice, existence of alternative appeal remedy will not be a bar for invoking Article 226 of the Constitution of India. In support of his submission,

he has relied upon the judgment of the Hon"ble Apex Court reported in 1998(8) SCC.

Secondly, It was contended that the Respondent, while passing the impugned order, rejected the case of the Appellant, even without giving an

opportunity for cross-examining the purported sources of the material evidence based on which the Respondent had passed the impugned order.

Therefore, he was contended that right to cross-examine the persons whose acts of commission or omission have turned out to be the crucial links

in the chain of events, which is being a part of principles of natural justice, refusal of cross-examination to be considered as denial of natural justice.

On these two counts, sought for reversing the impugned order passed by the learned Single Judge.

5. Per contra, learned Counsel appearing for the Respondent has urged before this Court to dismiss the writ appeal as held by the learned Single

Judge, on the ground that when the Appellant has got effective and efficacious alternative remedy before the CESTAT, Chennai, the present writ

appeal cannot be allowed to be filed, which will, otherwise, help the Petitioner to circumvent the appeal provision available under Sections 7B or

7I of the Customs Act, to the Appellant before the CESTAT, Chennai.

Secondly, it was contended that the rejection of request for cross-examination has been held that to be not a violation of principles of natural

justice, by referring a judgment of the Apex Court in the case of Surjeet Singh Chhabra Vs. Union of India and others, , wherein it is held that

when a person seeks for cross-examination of witnesses as regards the place at which recovery was made, in view of the confession made by the

said person, the same being binding upon him, failure to give him opportunity to cross examine the witnesses, would not violate the principles of

natural justice. Further, it was held that the Customs Officials are not Police Officers, therefore, the confession, though retracted is an admission

and very well binds the person concerned and on that basis, prayed for dismissal of the appeal.

6. Heard the learned Counsel appearing on either side and perused the materials available on record.

7. The Appellant herein has mis-declared the net weight of his consignment imported through Tuticorin Port as 8350 Kgs in the B.E. No. 446476,

dated 06.10.2008 as against the actual net weight of 18989 Kgs ascertained by the DRI. The mis-declaration of the net weight made by the

Appellant was self-evident from his averment indicating that he has paid Rs. 19.55 lakhs as ADD meant for 18989 Kgs. The net weight of 18989

Kgs was accepted both by the Appellant as well as Respondent. Therefore, it is clearly proved that the Appellant has mis-declared the weight of

imported consignment as 8350 Kgs instead of 18989 Kgs. Hence, a show cause notice dated 08.04.2009 was issued by the DRI demanding a

duty amount of Rs. 1,57,82,914/-. As the Appellant has admitted the mis-declaration, the Respondent has confirmed the duty amount of Rs. 1,

57, 82,914/- in order No. 1/2010 (Commissioner), dated 27.07.2010. Therefore, as the said order is appealable before the CESTAT, Chennai,

circumventing the appeal remedy available to the Appellant, the present writ appeal cannot be entertained by the writ Court sitting under Article

226 of the Constitution of India. Therefore, in our considered view, the learned Single Judge has rightly dismissed the writ petition directing him to

avail the appeal remedy available under Sections 7B or 7 I of the Act.

8. Secondly, the Adjudicating Authority had already found that there was no need for the cross-examination of Clearing Housing Agent and

Investigating Officers, holding that denying cross-examination would not violate the principles of natural justice. In the present case, the Appellant

being an importer adopted a systematic method of mis-declaring the weight to evade ADD and he himself admitted this practice in his statement

dated 20.10.08 and 03.11.08. Further, the ADD was calculated based on the weight ascertained from the samples submitted by the Appellant.

Therefore, there is no reason to give an opportunity to the importer to cross-examine the persons and the question of giving an opportunity to the

Appellant to cross-examine the persons will not arise in this case, as it is not the violation of principles of natural justice as held by the Hon"ble

Apex Court in Surjeet Singh Chhabra's case (supra), wherein, it has been vividly held that the failure to give him an opportunity to cross-examine

the witnesses is not violation of principles of natural justice.

9. Further, we have also gone through the voluntary statement dated 20.11.2008 made by the Appellant u/s 108 of the Customs Act, 1962,

voluntarily admitting that he was in the habit of mis-declaring the weight of the goods in all those bills of entry to evade payment of legitimate Anti

Dumping Duty. Surprisingly, this statement, which was given voluntarily, neither retracted by the Appellant nor contradicted or disproved by

placing evidences subsequent to his voluntary statement.

On the question of allowing Appellant to cross-examine the Clearing House Agent and Investigating Officers, it is pertinent to bear in mind that the

case has been clearly made out by the investigation based on the voluntary statement of Shri Sanjay H. Shah, Proprietor of M/s. Edge and other

documentary evidences such as lab test report. Therefore, there is no need for the cross-examination of Clearing House Agent and Investigating

Officers.

Further, the Appellant has adopted a systematic method of mis-declaring the weight to evade Anti Dumping Duty and the said fact was also

admitted by the Appellant in his statement dated 20.10.2008 and 03.11.2008. Further, the ADD is calculated based on the weight ascertained

from the samples submitted by the Appellant only.

10. At this juncture, though it cannot be denied that right of cross-examination in any quasi-judicial proceeding is valuable right given to the

accused/notice, as these proceedings may be adverse consequences to the accused, the Hon"ble Apex Court in the case of The Assistant

Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others, , has held that the right of cross-examination can be taken

away.

In yet another case, the Hon"ble Apex Court in the case of Surjeet Singh Chhabra Vs. Union of India and others, , has again held that when the

Petitioner seeks for cross-examination of witnesses, who have said that the recovery was made from the Petitioner, necessarily an opportunity

required to be given for the cross-examination of witnesses as regards the place at which recovery was made. But, in view of confession made by

the Petitioner, the same was binding upon him and therefore, in such facts and circumstances, failure to give him opportunity to cross-examine the

witnesses would not violate the principles of natural justice. Further, it was held that the Customs Officials are not Police Officers. Therefore, the

confession, though retracted is an admission and binds the Petitioner.

11. When we further look at the case of the Appellant, who has been in this line of business for a long time and continuously importing measuring

tape from various countries, it was noticed that he has been issued with two show cause notices for confession of Anti Dumping Duty, which

indicates that the Appellant was very well aware of Levy of Anti Dumping Duty on Measuring tape of Chinese Origin on the basis of weight and

landed value and the Appellant being a regular importer, knowingly under declared the weight and suppressed the actual net weight of the goods,

so as to evade/avoid payment of legitimate customs duty (Anti Dumping Duty). Therefore, on the basis of the dictum laid down by the Hon"ble

Apex Court, particularly, in the case of The Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others, ,

holding that the confession statement recorded by the Customs Officers u/s 108 of the Customs Act, 1962, without complying with Section 164 of

the Code of Criminal Procedure, is admissible in evidence, the Appellant cannot be allowed to claim for the cross-examination of witnesses.

Therefore, the contentions raised by the learned Counsel for the Petitioner, complaining that the learned Single Judge had wrongly rejected the

case of the Appellant, to set aside the impugned order do not carry any merit.

12. In result, this Court, for all the aforesaid reasons, finding no merit in the writ appeal, dismisses the same. No Costs.

13. After we have passed the order, the learned Counsel for the Appellant requested the Court to grant time to the Appellant to file an appeal. As

directed by the learned single Judge, effective forum being available to the Appellant u/s 7B or 7I of the Act, the Appellant is at liberty to move the

appellate forum if he is so advised. If the Appellant so prefers the appeal, the time spent in these proceedings shall be excluded for calculating the

period of limitation.