CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD

REGIONAL BENCH, COURT NO. 3

EXCISE APPEAL NO. 11646 OF 2018

[Arising out of OIA-RAJ-EXCUS-000-APP-299-305-2017-18 dated 20/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

SOBER CERAMICS **Appellant**
Survey No. 23/P, 8-A National Highway,
Near Dariyalal Resort,
Morbi,
Gujarat

Vs.

C.C.E. & S.T.-RAJKOT **Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,
Gujarat-360001

WITH

- **EXCISE APPEAL NO. 11647 OF 2018 (Shri Mahesh Mansukhbhai Kasundra)**
- **EXCISE APPEAL NO. 11648 OF 2018 (Shri Ketanbhai Vashrambhai Patel)**
- **EXCISE APPEAL NO. 11649 OF 2018 (Shri Kamleshbhai Gordhanbhai Patel)**
- **EXCISE APPEAL NO. 11650 OF 2018 (Shri Chirag Mansukhbhai Detorja)**
- **EXCISE APPEAL NO. 11651 OF 2018 (Shri Tribhovan Rughnath Adroja)**
- **EXCISE APPEAL NO. 11652 OF 2018 (Shri Nileshkumar Pranjivanbhai Saradava)**

[Arising out of OIA-RAJ-EXCUS-000-APP-299-305-2017-18 dated 20/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

<u>Appearance</u>:
Shri Sudhanshu Bissa, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

<u>FINAL ORDER NO. 11713-11719/2024</u>

Date of Hearing : 08.07.2024
Date of Decision : 06.08.2024

RAMESH NAIR

The brief facts of the case are that appellant is engaged in the manufacture of ceramic floor tiles and wall tiles falling under chapter 69 of the first schedule to Central Excise Tariff Act, 1985 and is registered with the Central Excise department. The goods manufactured by them are assessed to central excise duty under Section 4A of the Central Excise Act, 1994. On the basis of intelligence that the appellant firm was indulging in the evasion of excise duty by way of clandestinely clearing their finished goods, the preventive officers conducted a search of the factory premises of the appellant firm. During the search the officers have recovered some loose papers/dispatch chits. Thereafter, the statements of various persons such as partners of the firm, employees and statements of some buyers were recorded. On the basis of loose paper/dispatch chits comparing with the statutory record of the appellant it was observed that the difference quantity between both the documents were cleared clandestinely without payment of duty and without issuing invoices. In support of such allegation, the statements were relied upon wherein it was admitted that the goods were cleared clandestinely. On the basis of said investigation a show cause notice dated 31.08.2016 was issued for the period October, 2015 to December, 2015 (upto 20.12.2015) wherein central excise duty of Rs. 30,82,615/- was proposed to be demanded along with proposal of interest and imposition of penalty. The show cause notice has been adjudicated vide Order-In-Original No. 17/D/2016-17 dated 20.03.2014 passed by Deputy Commissioner Central Excise Division - Morbi wherein proposals made in the show cause notice have been confirmed. Being aggrieved by the Order-In-Original, the appellants filed appeals before Commissioner (Appeals) who vide Order-In-Appeal No. RAJ- EXCUS-000-APP-299 to 305-17-18 dated 20.03.2018 rejected the appeals. Therefore, the present appeals.

2. Shri Sudhanshu Bissa, Learned Counsel appearing on behalf of the appellant firm M/s. Sober Ceramics, Shri Ketanbhai Vasrambhai Patel and Kamleshbhai Goverdhanbhai Patel submits that the entire case is based on the statements of various persons. The appellant had requested for cross-examination of all the witnesses, however, the adjudicating authority had not granted the cross-examination and thus violated mandatory requirements as provided under Section 9D of Central Excise Act,1944. In this position, the statements without cross- examination cannot be admitted as evidence.

2.1 As regard the documents recovered such as hand written paper/sheets, he submits that the serious allegation of clandestine removal cannot be made solely on the basis of some sheets and papers, authenticity of which is not proved by any corroborative evidence. It is an admitted fact that these papers/sheets found at appellant premises were not prepared by any of the partners of the appellant firm, also there is a serious dispute regarding the authenticity of these papers/sheets. It is submitted that it was alleged that these four papers/sheets were prepared by Shri Bipin Bihari Dutta, Kiln Operator who has stated that the production details in the sheets were written by him or by other kiln operators available during a particular work shift. However, in the show cause notice it is alleged that Shri Bipin Bihari Dutta had prepared the production sheet only for the period 01.12.2015 to 21.12.2015 because he was not working with the appellant prior to this date. He submits that figures appearing in the said sheet for the period 01.10.2015 to 13.11.2015 were written by the previous kiln operator and he was not aware of the name of such kiln operator. Therefore, in the show cause notice there is a clear contradiction as on one hand it is stated that the sheets/papers were prepared by Shri Bipin Bihari Dutta, Kiln Operator and other kiln operator working in another shift and on the other hand the show cause notice alleges that Shri Bipin Bihari

Dutta had prepared the sheet only for the period from 01.12.2015 to 21.12.2015 and previous entries on the sheets/papers were made by different kiln operators who were working previously with the appellant firm. He submits that likewise there are many discrepancies in the loose papers/sheets recovered from the factory, therefore on that basis charge of clandestine removal cannot be established.

2.3 He further submits that the Learned Commissioner (Appeals) has committed an error in placing reliance upon dispatch chits, he submits that it was alleged that the appellant used to have a separate software namely Stock Software which is used for preparation of dispatch chits for every dispatch. It is alleged that after the clandestine goods were delivered by the appellant to the buyers, the dispatch chits in the stock software were used to be removed by the appellant. He submits that the reliance cannot be placed on such dispatch chits as the appellant does not know that who has prepared these chits and whether these chits were actually related to any removal of goods clandestinely is also not proved by the department. The stock software was not recovered from the premises of the appellant and no such dispatch chits were ever found to be recorded from the stock software in the computer found at the appellant's premises. The existence of such stock software itself is not proved by the department. Therefore, alleged dispatch chits were prepared on such software can also not be considered as an admissible piece of evidence.

2.4 He further submits that the chits contained in three digits format like "201" was written on the chits. The departmental officer assumed that "201" written on such chits was pertaining to year 2015 and the chits were related to the clearances made by the appellant during the period from October, 2015 to December, 2015. It is a far-fetched assumption that the chits reflecting digits of "201" were related to the year 2015 and that too a very specific period from October, 2015 to December, 2015. It was assumed by the department that number mentioned in the chits was related to the quantity of floor tiles having size of 12” by 12” which were cleared by the appellant without payment of duty. Such assumptions cannot be made on the basis of some loose papers which do not co-relate with the time period, quality and quantity of the goods manufactured by the appellant. He further submits that except some loose papers/sheets recovered from the factory of the appellant and the statements of the witnesses who were not cross-examined under Section 9D, there is no other evidence such as transportation of goods, buyer of the goods, payment particulars, production of alleged goods, purchase of raw material for manufacture of such goods, therefore, there is no tangible evidence to establish the clandestine removal of the goods. Therefore, the reliance placed on such loose papers is illegal and the demand of duty ascertained on the basis of such chits deserves to be set aside in the interest of justice.

2.5 As regard the penalty imposed on the partners, he submits that when the case is made against the partnership firm, no separate penalty cannot be imposed on the partner of the partnqership firm. He placed reliance on the following judgments:-

- *Parot Power Ltd. & Others V/s. CCE & ST, Rajkot*
  2024(2) TMI 431- CESTAT Ahmedabad
- *Forward Resources Pvt.Ltd. V/s. CCE & ST, Surat-1*
  2023(69) GSTL 76 (Tri.-Ahmd.)/(2022) 1 Centax 54 (Tri.- Ahmd)
- *Reynolds Petro Chem Ltd. V/s. CCE & ST, Surat-1*
  2023(68) GSTL 292 (Tri.-Ahmd.)/ (2022) 1 Centax 58 (Tri.-Ahmd)
- *Shri Hari Steel Industries & Other V/s. CCE & ST, Rajkot*
  2022(8)TMI 1251-CESTAT Ahmedabad
- *J.P. Iscon Pvt.Ltd. V/s. CCE, Ahd-I*
  2022(63) GSTL 64 (Tri.-Ahmd.)
- *G-Tech Industries V/s. U.O.I*
  2016(339) ELT 209 (P&H)
- *Belgum Glass & Ceramics P.Ltd. & Ors. V/s. CCE & ST, Ahd*

2015(5) TMI 528-CESTAT Ahmedabad

- *Shri Krishna Industries V/s. CCE & ST, Vadodara-II*
  2020(372) ELT 121 (Tri.-Ahmd.)
- *Sohni Ceramics & Ors. V/s. Ahd-III*
  2022(5) TMI 7-CESTAT Ahmedabad
- *Gold Metal Extrusion & Ors. V/s. CCE & ST, Rajkot*
  2019(8) TMI 958-CESTAT Ahmedabad
- *Continental Cement Company V/s. Union of India*
  2014 (309) ELT 411 (All.)
- *Commissioner of C. Ex. & ST., Udaipur V/s. Mittal Pigment Pvt. Ltd.*
  2018(16) GSTL 41 (Raj.)
- *Commr. of Cus., C.E. & S.T., Ghaziabad V/s. Auto Gollon Industries P. Ltd.*
  2018 (360) ELT 29 (All.)
- *Parot Power Pvt. Ltd. V/s. CCE & ST, Rajkot*
  2024 (2) TMI 431 - CESTAT AHMEDABAD
- *Poojan Decor Pvt Limited and Anr. V/s. Commissioner of Central Excise & ST, Ahmedabad 2023 (9) TMI 722 - CESTAT AHMEDABAD*
- *Arya Fibres Pvt. Ltd. V/s. CCE, Ahmedabad*
  2014 (311) ELT 529 (Tri.-Ahmd.)

3. Shri Himanshu P Shrimali, Learned Superintendent (AR) appearing on behalf of the Respondent reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the entire case of alleged clandestine removal of excisable goods has been mainly made out on the basis of various statements recorded from partners of the appellant firm, its employees and some buyers of the goods etc. The appellant have requested during adjudication for cross-examination of witnesses which has not been extended to the appellant. The provision of cross-examination is made under Section 9D of Central Excise Act, 1944 which reads as under:-

> *"9D. Relevancy of statements under certain circumstances.— (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under*

this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) When the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

4.1 From the reading of the above Section 9D it is seen that it is mandatory to provide the cross-examination of the witnesses to the appellant against whom the case of clandestine removal was proposed. Section 9D provides that the cross-examination is mandatory and only after cross-examination of witnesses, the statements can be admitted as evidence to use against the appellant for adjudication of the show cause notice. It is not the choice of the Adjudicating Authority to grant or to deny the cross-examination of the witnesses. Since admittedly the adjudicating authority has rejected the request for cross- examination of the witness, then the statements of the witnesses cannot be relied upon as admissible evidence. This legal issue has been considered in various judgments which are cited below:-

- <u>Motabhai Iron & Steel Industries [2015 (316) ELT (Guj.)]</u>
- ***9.*** *From the findings recorded by the Tribunal, it is apparent that the sole basis of the demand was the statement of Shri Arjandas who did not appear pursuant to the summons issued to him. The assessee was, therefore,*

deprived of an opportunity to cross-examine the witness in respect of the statements made against him. In these circumstances, no reliance can be placed on the statement of such witness who has not subjected himself to cross-examination by the affected party. Under the circumstances, the statement made by Shri Arjandas lost its efficacy and therefore, could not have been used against the assessee. Besides, the Tribunal has also found that M/s. Star Associates was regularly supplying goods to the assessee in the past and on no occasion, it was found that they had issued invoice without actually supplying the goods. It is in the light of the aforesaid facts that the Tribunal has deleted the disallowances of credit of Rs. 14,42,177/-. Under the circumstances, it cannot be said that there is any infirmity in the view taken by the Tribunal while deleting the disallowance of credit of Rs. 14,42,177/-.

- Krishna Steel Industries - 2010 (254) ELT 292

6. *I find that the statement of Shri Ganpat Shinde is most relevant in this case and the said Ganpat Shinde did not appear for cross-examination by the appellants, the statement of Shri Ganpat Shinde cannot be relied. Further, I find that the Assistant Commissioner had made enquiries in 1996 whereas transaction took place in 1994, the belated enquiry cannot be relied upon. The contention of the DR that the cross-examination was not necessary to adjudicate the case is totally irrelevant because this Tribunal has already passed the remand order with specific direction that the cross-examination of the witnesses is to be done and the said order has not been challenged by the Revenue, has become final. In this case, when the specific directions were given to decide the case after cross-examination of the witnesses was not done as the witnesses did not appear. I find that in the absence of cross-examination of witnesses as directed by this Tribunal, principle of natural justice is violated. Hence, the impugned order is set aside and the appeals are allowed.*

- Arya Fibers Pvt Ltd 2014 (311) ELT 529 (Tri. Ahm.)

29. *Apart from the aforesaid issues, there are some legal issues which we would be considering while dealing with the factual aspects of the case. On the preliminary issue of violation of principles of natural justice, we find that the Adjudicating Authority has rejected the request for cross-examination on the reasoning that no justifiable and tangible reasons have been furnished by Nova while requesting for cross examination. In this regard, the ld. Senior Advocate has referred to the communications made by Nova requesting for cross examination of the witnesses.*

30. *As early as on 28-7-2006, Nova requested for cross examination of witnesses to examine the reliability and veracity of the evidences brought on record. By subsequent letter dated 9-9-2008, Nova had raised the issue of need and relevance of cross examination in cases like the present at the initial stage and cited several judgments in support thereof, starting with State of Kerala v. K.T Shaduli Yusuff Grocery Dealer (AIR 1977 SC 1627). The names of the witnesses, whose statements had been relied upon and whose cross examination was requested for, was also indicated therein. At a personal hearing given to Nova on 15-9-2008, Nova was called upon to make elaborate submissions regarding the request made in the earlier letter in the matter of cross examination of witnesses and about the witnesses who had been named in the earlier letter. Accordingly, by its letter dated 19-9-2008, Nova classified the witnesses in six different categories for their cross-examination. The learned Senior Advocate appearing for Nova has taken us through these letters. We find, however, that by the order dated 10-10-2008 issued from the office of Adjudicating Authority, the request made in the aforesaid communication of Nova was rejected, holding that cross examination of the concerned persons did not appear to be justifiable and proper for reasons stated in the said letter. We have also been taken through the said order dated 10-10-2008. It was pointed out in the order that Nova had not furnished specific reasons for cross examination person-wise and that no tangible reasons or justification had been given for cross examination. The reasons for the conclusion of the Adjudicating Authority for the aforesaid order are also contained in the said letter. The main reason for rejection has been that the statements given by the persons concerned are only stated and confirmed on the basis of documentary facts, and some of them are employees of GSL or Nova and that, therefore, no new facts can be brought out during cross examination. It is also stated that statements of these persons have been corroborated by other evidences also which are in the form of documents or oral statements. In respect of some witnesses, cross examination has been denied on the ground that the witnesses did not have any connection with the case. The statements were based on factual details and documents maintained by the witnesses and, therefore, cross examination is not relevant and without any basis. The Adjudicating Authority also holds that, in the case of some of the witnesses, the statements are admissible in evidence under the provisions of the Act which has been corroborated by documentary evidence and, therefore, no cross examination can be acceded to. In respect of others, it is held that, they being machine operators their cross examination is not relevant. Cross examination has no relevance in the face of evidence available on record and the request was accordingly rejected. The statements of representatives of EOUs have been corroborated by other documentary evidence and are admissible as evidence under the law and cross examination of such persons* *cannot be permitted. To similar effect is the reason for rejection of cross examination in the case of transporters, since their statements have been recorded under Section 14 of the Act. The decisions cited in the submission made by Nova have been held to be not applicable since the facts and circumstances of those cases did not appear to be relevant to the facts of the present case. However, there is no discussion of any case referred to by Nova or to the facts and circumstances of those cases or even the dicta laid down in those decisions. On the contrary, the order relies upon the decision in the case of Collector v. D. Bhoormul [1983 (13) E.L.T. 1546], K. Balan v. GOI [1982 (10) E.L.T. 386 (Mad.)], UOI v. GTC Industries Ltd. [2003 (153) E.L.T. 244 (S.C.)] and Shivom Ply-N-Wood Pvt. Ltd. v CCE [2004 (177) E.L.T. 1150], and Liyakat Shah v. CCE [2000 (120) E.L.T. 556], the last 2 decisions being those of this Tribunal. The order also relies upon judicial decisions in the matter of confessions made in statement by persons who have been examined during the investigation, as being a ground for rejecting the cross examination. In Paras 56.5 to 57.27 of the impugned order, the Adjudicating Authority has reproduced the details contained in the earlier order dated 10-10-2008 by which cross examination of the witnesses had been denied.*

31. *The ld. Senior Advocate submits that the law on the issue of cross examination of witnesses whose statements have been relied upon either in the show cause notice or in the Adjudication Order is quite well-settled. As could be seen from the facts stated hereinabove, the show cause notice proceeded on the basis of documents seized from different persons and from different premises, and statements thereon made by the persons concerned with the documents. It cannot be a ground for rejecting the cross examination to say that the documents clearly proved the case of the department and no purpose could be served by cross examining the witnesses whose statements in respect of the documents were relied upon. It is, further, submitted by the learned Senior Advocate in his written submission that the correctness of the statements made by witnesses vis-a-vis documents on record and correctness of the documents on record vis-a-vis statements made by the witnesses would be the subject matter for cross examination. We find merit in the said submission made by the learned Senior Advocate. In our opinion, there has been, in the present case, denial of natural justice to Nova by the rejection of the request of cross-examination of the persons whose statements have been relied upon. In the view we are taking, the following decisions relied upon by the ld. Senior Advocate, are in support :*

In Bareilly Electricity Supply v. Workmen, (1971) 2 SCC 617, the Hon'ble Supreme Court had held that when a document is produced in a Court or Tribunal, "mere production of the document does not amount to proof of it or *the truth of the entries therein. The writer must be produced or his affidavit in respect thereof be filed and an opportunity accorded to the opposite party who challenges this fact."*

In Swadeshi Polytex Ltd. v. CCE, Meerut [2000 (122) E.L.T. 641 (S.C.)], it was held that if the Adjudicating Authority "intends to rely upon the statement of any such persons, the Adjudicating Authority should give an opportunity of cross examination to the appellant".

In Lakshman Exports Ltd. v. CCE [2002 (143) E.L.T. 21 (S.C.)], the Hon'ble Supreme Court had held that where an assessee had specifically asked to be allowed to cross examine the representatives of two concerns to establish that goods in question had been accounted for in their books of accounts and the appropriate amount of Central Excise duty had been paid, the logic of such request is clear from what is stated therein.

In Basudev Garg v. CC, New Delhi [2013 (294) E.L.T. 353], the Hon'ble Delhi High Court relied upon the earlier decision in J & K Cigarettes v. CCE [2011 (22) S.T.R. 225 (Del.)] = 2009 (242) E.L.T. 189 (Del.) and held that, insofar as general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross examining the persons who made those statements ought to be given to the assessee. Reliance is placed on the decisions of the Hon'ble Supreme Court in Swadeshi Polytex (supra) and Lakshman Exports Ltd. (supra) and to the earlier decisions of the Hon'ble Delhi High Court in J &K Cigarettes case as clinching the issue in favour of the assessee. Reference is made in the said decision to the importance of Section 9D of the Act, the validity of which was also upheld in the said decision.

32. *In the above connection, the ld. Senior Advocate has also submitted that, in the light of the decisions cited above, reliance in the cases referred to by the department and relied upon in the letter of 10-10-2008, (and recounted in the impugned order) is not appropriate. In D. Bhoormal's case (supra) what was being considered by the Hon'ble Supreme Court was the applicability of the provisions of the Evidence Act and the Code of Criminal Procedure to adjudication proceedings. In fact, this aspect has also specifically been adverted to by the Hon'ble Supreme Court in the Bareilly Electricity Supply case (supra), referred to by the learned Senior Advocate, particularly, the issue of applicability of Evidence Act to proceedings before the Courts and Tribunals. As held by the Hon'ble Supreme Court in that decision :*

If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect *thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles.*

33. *In K. Balan's case (supra), the Hon'ble Madras High Court states that the necessity of cross examination depends upon the facts and circumstances of each case. The Adjudicating Authority has to give an opportunity to the party concerned as would assure him proper opportunity to defend himself. Opportunity of cross examination is given wherever it is relevant, justified and genuine and is not for protracting the proceedings. The decision in GTC Industries case (supra) is again to the effect that cross examination cannot be granted as a matter of routine and is to depend upon the facts of each case. This Tribunal's decisions cited in the latter of 10-10-2008 are also to similar effect - that cross examination is not always a mandatory procedure to be adopted in all cases. The request should not be dismissed arbitrarily or without exercising its discretion in the facts of each case. The Adjudicating Authority may refuse cross examination for justifiable reasons. According to the ld. Senior Advocate, these judgments relied upon in the letter of 10-10-2008 are not, therefore, decisions which can justify the order passed in the present case rejecting Nova's request for cross examination of the witnesses on whose statements reliance has been placed. We agree with the aforesaid submissions of the ld. Senior Advocate that the decisions cited by the adjudicating authority on this aspect are clearly distinguishable. They do not lay down the proposition that cross-examination is not a right, but only that it would depend on the facts of each case. During the hearing held before this Tribunal, and while replying to the submissions on this issue made before us by the ld. Senior Advocate, the learned Special Counsel for the department made reference to the recent decision of the Hon'ble Supreme Court in Telestar Travels Pvt. Ltd. v. Special Director Enforcement [2013 (289) E.L.T. 3 (S.C.)], as supporting the order rejecting cross-examination. In the said case, the Adjudicating Authority had relied upon the statements of two persons and communication received from Indian High Commission in London. These statements under reference were challenged as being inadmissible in evidence as the appellant's request for an opportunity to cross examine these witnesses had been unfairly declined thereby violating the principles of natural justice. On the other hand, it was argued by the department that right of cross examination was available to a party under the Evidence Act which has no application to adjudication proceedings under the FERA and Adjudicating Rules framed thereunder. We have perused the said judgment of the Hon'ble Supreme Court and also heard the submissions of the ld. Senior Advocate. The Hon'ble Supreme Court held that it is evident from Rule 3 of the Adjudicating Rules framed under Section 79 of the FERA* *that Rules of Procedure do not apply to adjudication proceedings. At the same time, as pointed out by the ld. Senior Advocate, the Hon'ble Supreme Court proceeded to say as under :*

"That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen."

34. *After referring to the decision of the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra v. UOI [1997 (89) E.L.T. 646] and M/s. Kanungo & Co. v. CC [1983 (13) E.L.T. 1486], the Hon'ble Supreme Court (in Para 20), while dealing with the case at hand, held that reliance had been placed upon certain documents produced by the two persons as referred to above. The documents were permitted to be inspected by the appellants. Production of document duly confronted to the appellant was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the document is not subjected to cross examination. Such being the case, refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the document, cannot even on the principles of Evidence Act, be found fault with. It was, therefore, held that no prejudice was caused to the appellant nor was demonstrated by the appellant before the Hon'ble Supreme Court or before the Courts below. We agree with the submissions of the ld. Senior Advocate that the said decision of the Hon'ble Supreme Court does not support the proposition that rejection of request for cross examination of witnesses whose statements have been relied upon, does not amount to violation of principles of natural justice. On the other hand, the observations extracted above demonstrate to the contrary. As far as the facts before the Hon'ble Supreme Court were concerned, production of the documents being in the nature of production of documents under Section 139 of the Evidence Act, their cross examination was prohibited by the said Section itself. In the present case, witnesses who have given the statements are not persons who were asked to produce documents under Section 139 of the Evidence Act. Their statements were recorded as witnesses. This decision, therefore, does not help the contention put forward by the learned Special Counsel. For the above reasons, we hold that there has been a denial of natural justice in the facts of the present case. The impugned order, as is evident, solely, relies on the statements of V.N. Parab, Mohanlal Gupta,* *Ashok Chiripal, and the transporters, and on the documents seized from GSL and Nova premises and explained by the witnesses whose statements were recorded. Nova had sought permission to cross examine 63 persons for reasons which had been broadly stated by them. One could not have expected Nova to outline the scope of the questions to be put to the witnesses, when their cross examination was sought. In the present case, as we would be dealing with later, de hors the documents and the statements, there was no material to establish the case made out against Nova, GSL or the EOUs. The decisions cited by the ld. Senior Advocate categorically reject the proposition that cross examination can be refused in cases like the present. We also agree with the ld. Senior Advocate that the decisions cited by the ld. Special Counsel for the Revenue do not lay down any law to the contrary.*

35. *We are, therefore, constrained to hold that the decision made by the Adjudicating Authority in his letter dated 10-10-2008 and in the impugned order, denying Nova's request for cross examination of witnesses, and subsequently recounted in the impugned order is clearly in violation of principles of natural justice in the matter of the need to permit cross examination of witnesses on whose statements reliance has been placed.*

4.2 From the above judgments, it is settled that without cross-examination of the witness their statements recorded under Section 14 of the Central Excise Act, 1944 cannot be accepted and the demand on that basis cannot be confirmed on the charge of clandestine removal.

4.3 We find that the case is merely based on the statements and when as per our observation the said statement cannot be used as evidence then only evidence left is loose paper/sheets/dispatch chits. On perusal of those documents, we find that appellant has pointed out many discrepancies and there is a clear contradiction in the show cause notice itself about the statement of kiln operator. These documents in isolation cannot be considered as sole evidence to conclude the clandestine removal for the reason that the veracity of these loose papers/sheets/chits is also based on the statements. Since we have taken a view that without cross-examination, the statements are not admissible evidence even statements given on the basis of these loose papers and sheets, these documents have lost its' evidentiary value as submitted by the learned counsel, there are so many discrepancies in those documents. It is settled position in various judgments that only on the basis of loose paper/diaries, charge of clandestine removal cannot be established.

4.4 We further find that though the statements of partners of the appellant firm, employees and the buyers cannot be basis of clandestine removal as discussed above, however, to substantiate the case of the department when the witnesses have given the statements, the investigating officers could have traced out the transporters who might have transported these goods, however, no such investigation was carried out. Moreover, there is no evidence of procurement of raw material and use thereof for manufacture of alleged clandestinely removed goods and also there is no evidence about manufacture of such goods. The investigating officers have not verified the capacity of production, power consumption, manpower etc. to reinforce the case of alleged clandestine removal. Therefore, there is no cogent and tangible evidence on the basis of which clandestine removal can be established.

4.4 In view of the above judgments, the loose papers/sheets/chits cannot be accepted as conclusive evidence to establish the clandestine removal. Therefore, on both the counts i.e. statements without carrying out any cross-examination and loose papers/sheets/dispatch chits without having its' authenticity cannot be used as evidence for clandestine removal. Accordingly, we are of the view that the revenue could not prove beyond doubt their case of clandestine removal of excisable goods, hence the impugned order is not sustainable. Hence, the same is set aside.

4.5 Since the demand itself is not sustainable, penalty imposed on various persons will also not survive. Without prejudice, as regard the penalty imposed on the partners of the appellant firm, it is settled legal position by the Hon'ble Gujarat High Court in the case of Praveen N Shah vs. CESTAT -2012 (7) TMI 850 (Guj.) and Commissioner of Central Excise vs. Jay Prakash Motwani -2009 (1) TMI 501(Guj.) that the separate penalty on the partner of the partnership firm cannot be imposed.

5. In view of our above discussion and finding, we set aside the impugned order and allow all the appeals with consequential relief.

(Order pronounced in the open Court on 06.08.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

Dharmi