CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70506 of 2019

(Arising out of Order-in-Original No.06/Commissioner/LKO/2018-19 dated 08/03/2019 passed by Commissioner of Customs, Lucknow)

Shri Kamlesh Gupta, **.....Appellant**
(Naunia, Gadaura, Maharajganj, U.P.)

VERSUS

Commissioner of Customs (Preventive), Lucknow Respondent

(5th Floor, Kendriya Bhawan, Sector-H, Aliganj, Lucknow)

APPEARANCE:

Shri Shubham Agarwal, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70078/2023

DATE OF HEARING : 18 August, 2023
DATE OF DECISION : 18 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.06/Commissioner/LKO/2018-19 dated 08/03/2019 passed by Commissioner of Customs, Lucknow. By the impugned order Commissioner has held as follows:-

"F.1. I order confiscation of the seized 40,000 Kg. of Urad Ki Dal valued at Rs. 14,20,000 under Section 113(b) & (d) of the Customs Act, 1962. Since, the said 40,000 kgs of Urad ki Dal have been provisionally released to Shri Kamlesh Gupta, Prop. of M/s Gupta trading Company on furnishing a Cash Security of Rs. 3,55,000/- and on executing a bond of Rs. 14,20,000/-, I

order to appropriate the cash security of Rs. 3,55,000/- to the exchequer in lieu of this confiscation;

F.2. I order confiscation of the seized Truck bearing Registration No. UP-35-H-9828 under Section 115(2) of the Customs Act, 1962. Since, the said seized vehicle has already been released to its lawful owner in compliance of O.I.O No. 03/Commissiner/LKO/2013 dated 26.09.2013 in favour of Shri Vijay Shanker Tripathi on deposition of Redemption fine of Rs. 2,00,000/- vide TR-6 challan no. dated 08.10.2013, I order to appropriate the above said amount of Rs.2,00,000/- to the exchequer in lieu of this confiscation;

F.3. I order confiscation of the seized Truck bearing Registration No. UP-78-CN-4811 under Section 115(2) of the Customs Act, 1962. Since, the said seized vehicle has already been released to its lawful owner i.e Shri Bhola Shanker Pandey, in compliance of O.I.O No. 03/Commisssioner/LKO/2013 dated 26.09.2013 on deposition of Redemption fine of Rs. 2,00,000/- vide TR-6 challan no. dated 08.10.2013, I order to appropriate the above said amount of Rs. 2,00,000/- to the exchequer in lieu of this confiscation;

F.4. I impose penalty of Rs. 14,00,000/- (Rs. Fourteen Lakh only) upon Shri Kamlesh Gupta (owner of seized Urad Ki Dal). Since, Shri Kamlesh Gupta has deposited an amount of Rs.2,00,000/- & Rs.3,00,000/- (Total Rs.5,00,000/-) as pre-deposit while filing an appeal before the Hon'ble CESTAT, New Delhi against O.I.O No. 03/Commissiner/LKO/2013 dated 26.09.2013, Therefore, I order for appropriation of the same to the exchequer in lieu of imposition of penalty. However, it should be ensured that the remaining dues (if any) shall be recovered from the noticee.

F.5. I impose penalty of Rs.10,000/- (Rs. Ten Thousand only) upon Shri Bhola Shanker Pandey (owner of seized Trucks bearing Reg. No. UP-78-CN-4811). Since, Shri Bhola Shanker Pandey *has deposited an amount of Rs 10,000/- in compliance of O.I.O No.03/Commissioner/LKO/2013 dated 26.09.2013. Therefore, I order for appropriation of the same to the exchequer in lieu of imposition of penalty. However, it should be ensured that the remaining dues (if any) shall be recovered from the noticee.*

F.6. I do not impose any penalty upon Shri Vijay Shanker Tripathi under Section 114 of the Customs Act, 1962."

2.1 I have heard Shri Shubham Agarwal learned Advocate appearing for the appellant and Shri Manish Raj, learned Authorised Representative appearing for the revenue.

3.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

3.2 The present proceedings have arisen as the sequel of the Tribunal's Final Order No.71737-71740/2017 dated 23/11/2017 by which the matter was remanded back to Commissioner for denovo consideration while remanding the Tribunal has observed as follows:-

"5. The appellants' contentions, represented through their ld. Advocate, Ms. Surabhi Sinha, are to the effect that the statement of Shri Kamlesh Gupta has been found to be incorrect by the Adjudicating Authority himself, when he himself observed that the names of the buyers disclosed by the appellants were found to be fake/non-existing, as also the fact that he had to receive an amount of Rs.2.59 Crores from his said buyers. As such, the Commissioner has himself concluded that Shri Kamlesh Gupta has given false statement. Nevertheless, he has relied upon the same very statement of Shri Kamlesh Gupta disclosing that the pulses in question were meant for illegal export from India to Nepal.

6. The appellants' contention is that they requested for cross-examination of all the various deponents of the statements, so as to arrive at, correct factual position. She clarifies that in the Panchnama, the place of seizure has been shown as near Indo-Nepal Border but the trucks were seized *from the godown of Shri Kamlesh Gupta. The pulses in question were duly covered with the documents, showing the purchase of the same. To establish that the interception and seizure of the trucks was at the godown premises, cross- examination of the Officers as also other deponent of the statements was requested for. The said prayer stands rejected by the Commissioner by simplicitor observing that such request is irrelevant and cross-examination cannot be allowed on flimsy grounds and in a routine manner.*

7. I note that the issue whether cross-examination is required or not, depend on the facts and circumstances of each and every case. If the appellant is disputing the factual positions and if the various deponents' statements have retracted from their earlier statements, such cross- examination is required to test the veracity of their statements as also to establish the factual position. Such cross-examination was necessary, especially in view of the fact that the Adjudicating Authority himself found incorrectness of the statement of Shri Kamlesh Gupta. In fact, I find that the Hon'ble Punjab & Haryana High Court in the case of M/s Ambika International Versus Union of India & Another reported at 2016-TIOL-1238-HC-P&H-CX, has held that not only cross-examination but examination-in-chief is also required to be undertaken by the Adjudicating Authority before the statement of any person is relied upon. The Hon'ble Supreme Court in the case of Arya Abhushant Bhandar Versus Union of India reported at 2002 (143) E.L.T. 25 (S.C.), has observed that non-production of such witnesses for cross-examination results in breach of natural justice. To the same effect is the decision of the Hon'ble Delhi High Court in the case of Basudev Garg Versus Commissioner of Customs reported at 2013 (294) E.L.T. 353 (Delhi). Further the Hon'ble Supreme Court in the case of Andaman Timber Industries Versus Commissioner of Central Excise, Kolkata-II reported at 2015 (324) E.L.T. 641 (S.C.), has held the effect of the cross-

examination of the witnesses is to judge the testimony of the witnesses.

In as much as, the Adjudicating Authority has not provided the cross-examination, I am of the view that the impugned order is in violation of the principles of natural justice and is required to be set aside on the said ground itself. Accordingly, I set aside the same and remand the matter to the Lower Authorities for afresh decision, after affording the cross- examination of the witnesses, as prayed for by the appellant."

4.2 During the denovo proceedings Commissioner has expressed his inability to allow the cross examination by observing as follows:-

E.1. I have gone through the records of the case including defence replies submitted by the party & the order of Hon'ble CESTAT. Before initiation of the discussion & findings of the subject case it is pertinent to mention that the show cause notice dated 16.07.2013 of the subject case was adjudicated by the then Commissioner, Customs (P) Commissionerate, Lucknow vide Order-in-Original No.03/आयुक्त./लखनऊ/2013 dated 26.09.2013. However, aggrieved by Order-in-Original No. 03/आयुक्त./लखनऊ/2013 dated 26.09.2013 Shri Kamlesh Gupta (owner of seized goods), Shri Vijay Shanker Tripathi (owner of seized truck no. UP-35-H- 9828), Shri Bhola Shanker Pandey (owner of seized truck no. UP-78-CN-4811) & Shri Rahul Mishra (supplier of the seized goods) preferred an appeal before Hon'ble CESTAT. Subsequently, Hon'ble CESTAT vide order dated 23.11.2017 allowed the appeal in respect of Shri Rahul Mishra & the remaining three appeals of Shri Kamlesh Gupta, Shri Vijay Shanker Tripathi & Shri Bhola Shanker Pandey were remanded for afresh decision after affording of cross examination of witnesses as prayed for by the appellants. The said order of Hon'ble CESTAT was accepted by the department.

Accordingly, I observe that there are two issues to be decided in the light of order of Hon'ble CESTAT which are stated as under:-

- Providing of cross examination of the witnesses to the noticees before issuing afresh order.

- The truck owners i.e. Shri Bhola Shanker Pandey (owner veh. No UP 78 CN 4811) & Shri Vijay Shanker Tripathi (owner veh No. UP 35-H-9829) were given an opportunity for provisional release of their trucks.

E.2. Firstly, I am discussing the point where Hon'ble CESTAT in their findings provided the truck owners i.e. Shri Bhola Shanker Pandey (owner veh. No. UP 78 CN 4811) & Shri Vijay Shanker Tripathi (owner veh. No. UP 35-H-9829) an opportunity for provisional release of their respective vehicles. In this connection, I find that in compliance to Order-in-Original No. 03/आयुक्त./लखनऊ/2013 dated 26.09.2013, the then adjudicating authority in reference to trucks bearing Reg. No. UP-78-CN-4811 & UP-35-H 9828 & their respective owners had ordered as under:-

- Confiscated the seized Truck bearing Registration No. UP-35-H-9828 under Section 115(2) of the Customs Act, 1962. Further, giving an option to redeem the said truck on paying redemption fine of Rs.2,00,000/-.
- Confiscated the seized Truck bearing Registration No. UP-78-CN-4811 under Section 115(2) of the Customs Act, 1962. Further, giving an option to redeem the said truck on paying redemption fine of Rs. 2,00,000/-.
- Penalty of Rs. 10,000/- was imposed on Shri Bhola Shanker Pandey (owner of seized truck no. UP-78-CN-4811) under Section 114 of the Customs Act, 1962.
- No penalty was imposed on Shri Vijay Shanker Tripathi (owner of seized truck no. UP-35-H-9828)

E.3. I observe that the said seized trucks were not released provisionally till the time of issuance of the O.I.O. No. 03/आयुक्त./लखनऊ/2013 dated 26.09.2013, however, the then adjudicating authority gave the truck owners an option to redeem the same on payment of Rs. 2,00,000/- (Rs. Two Lakh Only) on their respective trucks bearing Reg. No. UP-78-CN-4811 & UP-35-H 9828, I find that it is available on records that Customs Division Nautanwa (custodian of the seized goods) was requested vide letter dated 15.01.2019 by Customs Headquarter for providing the present status regarding the release of the said seized trucks. Accordingly, the Deputy Commissioner Customs Division Nautanwa vide letter dated 30.01.2019 intimated as under:-

- That the seized vehicle no. UP-32 H-9828 has been released in favour of its lawful owner i.e. Shri Vijay Shanker Tripathi on deposition of redemption fine of Rs. 2,00,000/- in Govt. account;
- That the seized vehicle no. UP-78 CN-4811 has been released in favour of its lawful owner i.e. Shri Bhola Shanker Pandey on deposition of redemption fine of Rs. 2,00,000/- and personal penalty of Rs. 10,000/- in Govt. account;
- No other noticee has deposited personal penalty imposed on them.
- Shri Kamlesh Gupta filed an appeal before the Hon'ble CESTAT against Order-in-Original No 03/आयुक्त./लखनऊ/2013 dated 26.09.2013 and deposited pre-deposit of Rs. 2,00,000/- & Rs. 3,00,000/- (Total Rs. 5,00,000/-) in Govt. account.

E.4. In context to above, I observe that the said vehicles have already been released to their respective owners in compliance of Order-in-Original No. 03/आयुक्त./लखनऊ/ 2013 dated 26.09.2013. Therefore, no action is warranted in reference to the findings of Hon'ble CESTAT regarding Provisional release of the said seized vehicles.

E.5. Now, I would discuss the main point on the basis of which the instant case was remanded by the Hon'ble CESTAT for denovo adjudication. Hon'ble CESTAT vide it's order dated 23.11.2017 observed that the denial of cross examination of the witnesses in Order-In-Original was in violation of principles of natural justice and the same shall be provided to the noticees before afresh decision. Therefore, in compliance of the same dates of cross examination of the witnesses were fixed on 13.08.2018, 31.08.2018 & 18.09.2018. Further, to ensure that letters reached to their actual destination thus ensuring that the directions of the Hon'ble CESTAT regarding cross examination of the Panch witnesses may be complied with; the letters of communication of the same were not only send to the witnesses on their known available address vide letter dated 02.08.2018, 16.08.2018 & 05.09.2018, but also served through jurisdictional division of this office i.e. Division Nautanwa vide letter dated 02.08.2018, 16.08.2018 & 05.09.2018.

E.6. In this connection, I observe that the Dy. Commissioner, Division Nautanwa vide his letters dated 28.08.2018 & 13.09.2018 forwarded the acknowledgement dated 27.08.2018 & 11.09.2018 of the Panch witnesses wherein they after acknowledging the receipt of said letters have submitted that 'they are daily wages laborers and are unable to attend the cross examination and further reiterated that they are in full agreement with the Panchnama of the instant matter."

E.7. I observe that the genuineness & authenticity of the Panch witnesses cannot be questioned as they are duly receiving the letters of the department but due to their personal/economical reasons, are unable to attend the proceedings of cross examination. However, I observe that most importantly witnesses in their said letters have categorically stated that they are in full agreement with the Panchnama of the instant matter.

E.8. I also observe that Shri Kamlesh Gupta (owner of seized 40,000 kgs Urad Ki Dal) through his representative Shri Raghvendra Pratap Singh vide letter dated 15.11.2018 submitted that due to absence of panch witnesses hearing was not possible and the instant case may be decided on the basis of statements, documents and replies available on record.

E.9. Therefore, in light of above, I find that though every possible effort was made for the cross examination of Panch witnesses by serving them letters not only through post but also through jurisdictional Division Office, but to their personal reasons/ economic compulsion, they did not appear for cross-examination. I am, therefore, left with no option but to proceed and decide the instant matter on the basis of material available on record. I find that the following issues are to be decided for denovo adjudication of the case."

4.3 It is observed that the matter was remanded to the Commissioner with the observation that matter should be adjudicated after affording the cross-examination of denovo-proceedings. Appellant had requested for the cross-examination of panch witnesses to the Panchnama dated 19/20.01.2013. Commissioner has recorded in his order that cross examination of panch witnesses is not possible because the panch witnesses, after acknowledging the receipt of the letters dated 20.08.2018 & 13.09.2018, has submitted that 'they are daily wages laborers and are unable to attend the cross examination and further reiterated that they are in full agreement with the Panchnama of the instant matter.'

4.4 Further, the Commissioner has observed that the genuineness of the panch witness cannot be questioned as they are duly receiving the letter of the Department but due to his personal economical reasons they are unable to attend the proceeding of cross-examination and they have stated in their response that the confirm the genuineness of Punchnama. In my opinion such confirmation of the punchnama behind the back of the appellant, is not acceptable evidence in law. Cross examination of witness to the punchnama is not for affirming the punchnama, but is procedure prescribed by law, to establish the genuiness of the document sought to be relied in the proceeding against the appellant. It is by way of cross examination appellant would have disputed the genuiness of the punchnama and the crediblity of witness.

4.5 Further, the Commissioner has concluded to the genuineness of the Punchnama without the cross-examination of panch witnesses who admittedly are daily wage laborers, as stated above. As per CPC, a Panchnama is a valid Punchnama if the same is drawn in presence of two respectable panch witnesses from the locality. The fact that the panch witnesses are stated to be 'daily wage laborers unable to attend cross-examination for personal economical reasons' cannot be the ground for holding that Punchnama genuine. The genuineness of panch witnesses itself in doubt as they are not appearing for cross examination. By not allowing the cross-examination of panch witnesses of Panchnama dated 19/20.01.2013 cannot be considered as authentic document for the purpose of proceeding against the appellant. It is also not understood if the two panch witnesses were not available for cross examination, why the Commissioner had not called the officers who had recorded the Panchnama for cross-examination. At least by cross examination of these officers, authenticity of this Panchnama could have been established. Without doing so, I do not find any merits in the findings recorded by the Commissioner. Similar view has been expressed by the Ahmedabad Bench in case of Agarwal Metals & Alloys [2021 (378) E.L.T. 155 (Tri. - Ahmd.)] in following words:

> *"11.6 We are also in agreement with the Appellant that the statements of witnesses cannot be relied upon as they failed to appear for cross-examination. The Appellant had sought cross-examination of the witnesses and had justified the reason for the same. We observe that even though the adjudicating authority had granted cross-examination of certain witnesses i.e. Mr. Ramesh Jain, Mr. Azad Derasaria, Mr. Narendra Jain and Mr. Rajeshwar Dubey none appeared for the same. We are of the view that the Department is bound to enforce the presence of the witnesses whose cross-examination was sought by the Appellant. Our views are based on the following decisions Tulsyan NEC Ltd. v. Commissioner of Customs, Chennai reported in 2003 (157) E.L.T. 627 (Mad.); Rama Shyama Papers Ltd. v. Commissioner of C.EX, Lucknow*

reported in 2004 (168) E.L.T. 494 (Tri. - Del.) and Shalimar Agencies v. Commissioner of Customs, Kandla reported in 2000 (120) E.L.T. 166 (Tribunal). Since the witnesses failed to appear for cross-examination, their statements cannot be relied upon. Similar view has been taken by us in Sunland Metal (supra) in Para 10 to 12 of the order and we reiterate the same."

4.6 In similar case of Bakul Poly Pack Pvt. Ltd [2018 (363) E.L.T. 376 (Tri. - All.)] Allahabad Bench has held as follows:

"4. As per the directions, the Adjudicating Authority issued summons under Section 14 of the Central Excise Act, 1944. Both the Panchas (public witnesses) were summoned to appear in person for hearing on 25th October, 2007, before him and for cross-examination, which were sent to the Panchs at their home address through registered speed post. However, the said summons were received back from the Postal Authority with the remark that the addressee have left the said address, without any whereabouts of the new address. Another attempt was made to deliver the summons through the office of Additional Director General, DGCEI, New Delhi to the said Panchs/witnesses to appear before the Additional Commissioner on 25-10-2007 for the examination/cross-examination. However, the Deputy Commissioner, DGCEI also returned the said summons in original stating therein that the said panch witnesses were not available at the given addresses and their new addresses are not known to the present resident of the said premises. Accordingly, the summons could not be served. Thereafter, date of personal hearing was fixed. The Ld. Counsel for the appellant reiterated that the Panchnama itself is void ab initio as the Panch witnesses were in fact persons brought by the officials of the inspecting team/DGCEI, and who had not presented themselves for cross-examination. Accordingly, he prays to drop the proceedings. It is further urged that the inspection/search proceedings were violation of the provisions of the Criminal Procedure Code and the Officers

made their own persons witness and such persons were accompanying the Officers. Thus, Panchnamas are not a true piece of evidence. Thus, by the third OIO dated 27th November, 2007, the Additional Commissioner was pleased to confirm the demands along with confiscation and penalty is in past.

5. Being aggrieved the appellant preferred appeal before the Ld. Commissioner (Appeals) on the ground among others that the alleged physical verification dated 20-10-2003 was incorrect and on eye estimation basis and there were actually no discrepancies in the stock. Seizure of goods in the factory of the appellants, based on eye estimation and not actual measurements was illegal and thus confiscation was not justified. It was also stated that it is settled law that the entire burden of proving its case lies on the Revenue, who is bound to produce cogent and tangible evidence in support of its case. The Department relied upon the Panchnama dated 20-10-2003 which is highly questionable document and the case is not proved beyond doubt. Further, the Adjudicating Authority have violated the Principles of Natural Justice and has failed to give effect to the orders of the Commissioner (Appeals), wherein the Learned Commissioner (Appeals) had remanded the matter with the clear direction to extend opportunity of cross-examination of the Panch witnesses, which was not complied by the Adjudicating Authority. Reliance was placed on Section 18 of the Central Excise Act, 1944 which makes specific provisions with regard to the searches made under the Act, which has to be carried out in accordance with the Criminal Procedure Code, 1998.

6. The Ld. Commissioner (Appeals) have observed that it is well settled law by the Larger Bench of this Tribunal in the case of Bhillai Conductors Pvt. Ltd. reported at 2000 (125) E.L.T. 781 (3 Member Bench) wherein held that the entire burden of proving its case lies on the Revenue, who is bound to produce cogent and tangible evidence in support of its case. The

Department relied upon the Panchnama dated 20-10-2003 which is highly questionable document and the case is not proved beyond doubt. Further, the Adjudicating Authority have violated the Principles of Natural Justice and has failed to give effect to the orders of the Commissioner (Appeals), wherein the learned Commissioner (Appeals) had remanded the matter with the clear direction to extend opportunity of cross-examination of the Panch witnesses, which was not complied by the Adjudicating Authority. Thus, the entire Panchnama proceedings are infructuous and in fact void ab initio. They, further held that the Adjudicating Authority should have appreciated that Section 18 of the Central Excise Act, 1944 which makes specific provisions with regard to the searches made under the Act, which has to be carried out in accordance with the Criminal Procedure Code, 1998. There is no room for resumption and presumption in cases of alleged clandestine removal; the standard of proof in cases of clandestine removal is proved beyond doubt and not that of the preponderance of probabilities and positive evidence is necessary to sustain the charge of clandestine removal. Under the facts and circumstance it was also held that no case is made out against the Director Shri Awadhesh Narain Tripathi has no evidence has been lead in the Show Cause Notice to prove that he was in any way concerned in acquiring the possession of or was in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner dealing with the impugned goods. The Learned Commissioner (Appeals) have, further, observed that even assuming that the stock verification was correct as per the Panchnama and, there is no evidence that there was any attempt to clandestinely remove the goods found in excess as the same were lying within the factory premises. Accordingly, the Ld. Commissioner (Appeals) further held that the confiscation of seized goods is not proper as the goods are still lying in the factory premises and there is no evidence of clandestine removal as well as on the ground that the Department has failed to provide cross-

examination of witnesses. Accordingly, the appeals of the respondents are allowed.

7. Being aggrieved the Revenue is in appeal on the grounds among others that according to Rule 25(1)(b) of Central Excise Rules, 2002, which makes it very clear that even if an assessee does not account for any excisable goods produced or manufactured or stored by him, even without any intention to clear the same clandestinely, the goods in question will be liable to confiscation. Thus, the excess raw material and finished goods found in the factory of the respondents was liable to confiscation and the Ld. Commissioner (Appeals) have erred in setting aside the confiscation. The next ground of contention is that the Ld. Commissioner (Appeals) have erred in holding the panch witness as bad and illegal. Under the fact that there is no evidence at all that the panch witnesses were accompanying the Department officials right from the time they entered the promises of the appellants and that they were not independent and disinterested witnesses. The punch witnesses were as per records, called later on. Even, if they were not called from the locality. When seizure took place, they could be very well called from another locality as per the Cr.P.C., 1998.

8. The respondents are absent in spite of notice. It is seen that the notices sent have been returned by the Postal Department with the remark left without address. In the circumstances, it is decided to dispose of these appeals, ex parte.

9. Having considered rival contentions, and after going through the records, I find that the Ld. Commissioner (Appeals) have rightly held that there has been failure on the part of the Additional Commissioner to comply with the directions given by the Ld. Commissioner (Appeals) in the earlier gound of litigation. I also find that Revenue have not been able to controvert that the witnesses were not the persons brought along with the search team. Under the provisions of the Criminal Procedure Code, such witnesses have to be persons of

> *repute staying in the near vicinity or the locality where the search or seizure takes place. Such provisions have been admittedly not followed. Accordingly, I hold that the proceedings are vitiated and the adverse conclusions drawn by the Additional Commissioner have been rightly held to be unsustainable by the Ld. Commissioner (Appeals)."*

4.7 Chandigarh Bench has in case of Dirba Pipes Pvt. Ltd [2017 (347) E.L.T. 529 (Tri. - Chan)] observed as follows:

> *"15. As observed by the adjudicating authority in the impugned order, that the panch witnesses were tax drivers which brought the raiding party from Ludhiana to Dirba and they have received remuneration from the raiding party. In their respective statements that the raid were carried out and signed the papers at the behest of the officers without being able to read or understand the contents. These facts have not been denied by the Revenue, in that circumstance, panchnama drawn during the course of investigation have no evidentiary value. Therefore, the statement recorded and records seized during the course of investigation have no evidentiary value, therefore, these documents cannot be relied upon to allege the allegation of clubbing of clearances of the units on the basis of said records as the panch witnesses are independent persons were not present at the time of search. In the show cause notices, the photocopies of the documents which are not available in original has been relied on by the revenue is not admissible evidence in light of the decision of the Apex Court in the case of J. Yashoda v. Shobha Rani - 2007 (212) E.L.T. 458 (S.C.)."*

4.8 Further, I find that the Tribunal, while remanding, has referred to a number of decisions in para-7 of the order by which it has been held that cross-examination in such a situation needs to be allowed. The impugned order which has been passed contrary to the directions recorded in the order remanding the matter for de novo consideration without any valid justification cannot be sustained.

4.9 Further, as the prayer made in the appeal is only to the extent of setting aside the penalty of Rs.14,00,000/- imposed under Section 114 of the Customs Act, 1962 on the present appellant, the same is set aside.

5.1 Accordingly, as far as the present appellant is concerned, I do not find any merits in the impugned order and the same is set aside and appeal of the appellant is allowed to the extent of prayer made in the appeal.

(Operative part of the order pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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