

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH

Court-I

Appeal No.C/61162-61163/2018

(Arising out of OIA No.LUD-EXCUS-001-APP-1418-18
dt.17.7.2018 passed by the Commissioner of Customs
(Appeals), Ludhiana)

Date of hearing/Decision:05.12.2018

J.S.Steel Traders

Appellant

Vs.

CC, Ludhiana

Respondent

Present for the Appellant: Shri Saurabh Kapoor, Advocate
Present for the Respondent: Shri M.S.Dhindsa, AR

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Bijay Kumar, Member (Technical)

FINAL ORDER NO.63541-63542/2018

PER: ASHOK JINDAL

The impugned orders have been challenged by the appellant on the ground that during the course of adjudication, the appellant sought cross examination of the chemical examiner as well as chartered engineer, which has not been granted to the appellant, the same is in violation of principles of justice.

2. Heard the parties.

3. Considering the fact that the provisions of Section 138 (b) of the Customs Act, 1962 are *pari materia* to the provisions of Section 9D of the Central Excise Act, 1944 and in the case of Alliance Alloys Pvt Ltd vs. CCE, Delhi-2016 (338) ELT Tri.-Chan.). This Tribunal has examined the issue whether in terms of Section 9D of the Central Excise Act,1944, the adjudicating authority is required to

first examine the witness in chief for cross examination or not.

This Tribunal in para 16 has observed as under:-

"16. We also find that the adjudicating authority has not followed the procedure laid down under Section 9D of the Act. A Similar issue came up before this Tribunal in the case of Kuber Tobacco India Ltd. wherein vide Final Order No. 50938-50942/2016, dated 4-3-2016 [[2016 \(338\) E.L.T. 113](#) (Tri. - Del.)], this Tribunal has observed as under :-

We have gone through the facts of the case wherein the 7. certain machines were installed at Sandeep Poultry Farm Khasra No. 63/3, Village KheraKhurd, New Delhi-110082 found wherein 'Kanchan/Kanchann' brand gutka and 'wiz' brand pan masala manufactured clandestinely without declaring the said premises as registered premises for manufacture of the said gutka. The contention of M/s. Kuber is that they were not involved in the activity of manufacture of gutkhas and the said activity was illicit and misused of their brand name and goodwill of the appellant by certain elements who were manufacturing duplicate goods bearing M/s. Kuber brand names and clearing them in the market. The facts of the case are not in dispute, the appellants have raised the dispute that the statements recorded during the course of investigation cannot be relied upon as admissible evidence in terms of the provisions of Section 9D(2) of the Act. In that circumstance, it is better to extract the provisions of Section 9D which are reproduced as under :-

Relevancy of statements under certain circumstances.

- **"9D.** A statement made and signed by a person before any Central Excise (1) 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 the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice;

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

8. The main contention of the appellant is that the deponents whose statements have been relied upon by the adjudicating authority were not put to examination-in-chief before providing an opportunity of cross-examination. A plain reading of sub-section (1) of Section 9D makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein. Therefore, there is no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much as in adjudication proceedings as in criminal proceedings relating to prosecution. Therefore, sub-section (1) of Section 9D set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer shall be relevant, for the purpose of proving the truth of the facts contained therein. If the circumstances are absent, therefore, the statement, which has been made during the course of inquiry/investigation, before a gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein as observed by Hon'ble Delhi High Court in the case of J.K. Cigarettes (supra) wherein Hon'ble High Court has observed as under :-

Bare reading of the above section manifests that under certain 12. circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazetted rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal.

In other words, in the absence of the circumstances specified 9. in Section 9D(1), the truth of the facts contained in any statement, recorded before a gazetted Central Excise officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1). Therefore, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1)(i) the person who made the statement has to first be examined as a witness in the case

before the adjudicating authority, and (ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. The same view has been taken by Hon'ble Allahabad High Court in the case of Parmarth Iron Pvt. Ltd. (supra) wherein the High Court has observed as under :-

We, therefore, have no hesitation in holding, that there is no 16. requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.

We further find that in the case of 10. Smt. Sharadamma (supra), Hon'ble Karnataka High Court has observed as under :-

It is not the duty of the Court to direct the parties or compel 9. the parties as to in what manner they should conduct their case before the Court or also what quality of evidence they should place before the Court. But the duty of the court is only to appreciate the case in the proper perspective and on the basis of what is placed before the Court. Even with regard to the prayer for permitting the applicant to cross-examine the plaintiff, the prayer is misconceived as the question of cross-examination arises only when a witness has tendered evidence in chief-examination. Under section 138 of the Indian Evidence Act, cross-examination follows chief-examination, but not without chief-examination. If there is no chief-examination, there is no cross-examination. It is only witness who is examined in chief who can be cross-examined. Therefore, a prayer for cross-examination of the plaintiff even when the plaintiff has not been examined in chief is ridiculous and not provided for under Section 138 of the Evidence Act The Trial Court has rightly rejected the application. No scope for interference with an order of this nature.

We further find that in the case of 11. Swiber Offshore Construction Pvt. Ltd. (supra), this Tribunal has further observed as under :

We therefore have no hesitation in holding that the impugned 6. Order passed by the Commissioner as an adjudicating authority is appealable order in terms of Section 129A of the Act, even as per the ratio laid down in the above binding precedent. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section 138B without there being any objective formation of opinion based on any

material on record to come to the conclusion that any specified circumstance mentioned in Section 138B(1)(a) exists. These circumstances mentioned in Section 138B(1)(a) are also contained in pari materia Section 9D(1)(a) and were recorded as follows in *J.K. Cigarettes Ltd.*, [2009 \(242\) E.L.T. 189](#) (Del.) -

Section 9D "25. of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant. These are :-

- (a) when the person who had given the statement is dead;
- (b) when he cannot be found;
- (c) when he is incapable of giving evidence;
- (d) when he is kept out of the way by the adverse party; and
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable."

These circumstances show that if witness cannot be examined for any of these five reasons, the statement previously recorded would be relevant. The adjudicating authority was therefore bound to follow the binding precedent and in absence of any specified circumstance to consider the statement relevant without examining the witnesses, erred in rejecting the request of the appellant to examine the witnesses and to offer them for cross-examination.

The appellant has also relied on the judgment of Hon'ble Apex Court in *Sukhwant Singh v. State of Punjab*, (1995) 3 SCC 367 to give emphasis on his submission that examination of witness is mandatory unless specified exceptional circumstances mentioned in clause (a) of Section 138B(1) exist. The Hon'ble Apex Court was pleased to hold that -

It will be "8. pertinent at this stage to refer to Section 138 of the Evidence Act which provides :

Order "138. of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

We therefore find force in the submission of the Id. counsel 10. for the appellant. We find no reason to justify rejection of request made by the appellant to the adjudicating authority in light of Section 138B of the Act, to summon witnesses for examination and to offer them for cross-examination if their statements were to be considered as relevant and admitted in evidence in the interest of justice.

We further find in the case of 12. Bussa Overseas Properties Ltd., this Tribunal again observed as under :-

The fact that in cases relating to smuggling or indeed any 24. case civil or criminal cannot or need not be proved for degree of mathematical precision or that the department governed by strict rules of evidence is again no answer. The department is certainly bound by the contents of the Customs Act, 1962 and the general principles of evidence.

which has been affirmed by the Apex Court.

We further find that Hon'ble Punjab 13. & Haryana High Court in the case of Sukhwant Singh it has been observed as under :-

It will be pertinent at this stage to refer to Section 138 of 8. the Evidence Act which provides :

Order of examinations. "138. *- Witnesses' shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

It would, thus be seen that Section 138 (supra) envisages that 9. a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be reexamined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the code of Criminal Procedure, 1898.

In view of the above analysis, it is clear that during 14. adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross examined. In the absence of examination in chief, allowing the cross-examination, is a futile exercise. We further find that the appellants have challenged the impugned order on the ground that the evidence in the form of statements gathered have no link of the appellants to the activities took at Sandeep Poultry Farm which is required to be examined on the basis of records available during the course of adjudication and the same has not been considered judicially."

Thereafter this Tribunal has set aside the adjudication order."

4. In view of above observations, we find that the adjudicating authority has not followed the procedure laid down under Section 138 (b) of the Customs Act, 1962 as discussed above.

5. In the result, we set aside the impugned orders and remand the matter back to the adjudicating authority to re-adjudicate the matter in terms of the observations of this Tribunal in the case of Alliance Alloys Pvt.Ltd. (supra).

6. The appeals are disposed of by way of remand.

(operative of the order was pronounced in the court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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