CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 881 of 2009

[Arising out of Order-in-Original No: 89/2009/CAC/CC/KS dated 13th May 2009 passed by the Commissioner of Customs (Adjudication), Mumbai.]

Ashwin K Joshi … ***Appellant***
M/s HP Joshi & Co, CHA 11/0205, Room No. 16/17
2nd Floor, Double View Building, 52 Mint Back Road,
Fort, Mumbai 400 001

versus

Commissioner of Customs (Export) ***…Respondent***
Jawaharlal Nehru Port Trust, Nhava Shave, Dist: Raigad

WITH

(i) Customs Appeal No: 882 of 2009 (Kantilal H. Joshi), (ii) Customs Appeal No: 883 of 2009 (H. P. Joshi & Co), (iii) Customs Appeal No: 903 of 2009 (Iqbal Mohan Amritlal Mehra), (iv) Customs Appeal No: 904 of 2009 (Iqbal Mohan Amritlal Mehra), (iv) Customs Appeal No: 979 of 2009 (CC (Export) Nhava Sheva v. Specialist Exports), (v) Customs Appeal No: 1049 of 2009 (CC (Export) Nhava Sheva v. Radheshyam Exports Pvt. Ltd.)

[Arising out of Order-in-Original No: 89/2009/CAC/CC/KS dated 13th May 2009 and Order-in-Original No: 88/2009/CAC/CC/KS dated 11th May 2009 passed by the Commissioner of Customs (Adjudication), Mumbai.]

APPEARANCE:

Shri JC Patel with Shri Rohan Balani, Advocates for the appellants

Shri R Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86739-86744 / 2019

DATE OF HEARING:	19/03/2019
DATE OF DECISION:	19/09/2019

PER: C J MATHEW

These seven appeals against two orders-in-original, though listed together on the insistence of Learned Authorised Representative and disposed off by this common order, have their own separate histories that may require recounting here.

2. In proceedings initiated against some claimants of drawback against exports in which purchase price of 'garments' were enhanced through a trial of invoices purportedly issued to obfuscate massive overvaluation in shipping bills and those in which exports purportedly to Russia against Letter of Credit under the escrow account for liquidation of Indian debt with erstwhile Union of Soviet Socialist Republics which culminated in the impugned order, the value was re-determined, claim for drawback was denied, goods were confiscated, penalties were imposed against exporters besides others who were associated in the scheme for illegal availment of drawback. The exporting units were M/s Specialist Exports and M/s Radheyshyam Exports Pvt Ltd and the two key individuals who were alleged to have masterminded the scheme are Shri Kiran Nagindas Vohra and Shri

Iqbal Mohan Amritlal Mehra. Not unnaturally, all filed appeals against the order of adjudication.

3. The Tribunal, *vide* order no. 350-353/08/C.II dated 26th June 2008, remanded four of these to the original authority and thereafter the remaining three too *vide* order no. A/394 to 396/08/CSTB/C-I dated 4th July 2008. The fresh adjudication orders no. 88/2009/CAC/CC/KS dated 11th May 2009 and no. 89/2009/CAC/CC/KS dated 13th May 2009 of Commissioner of Customs (Adjudication), Mumbai dropped proceedings against Shri Kiran Nagindas Vohra but while confirming the denial of drawback and confiscation of the goods reduced the penalties on others. Revenue filed appeals against the two orders which had dropped penal proceedings initiated against Shri Vohra; two appeals were filed by Shri Iqbal Mehra against imposition of penalties of ₹ 15,00,000 each under section 114 of Customs Act, 1962 in the two orders. The Custom House Agent, its partner, Shri Kanti Lal Hari Shankar Joshi and an employee, Shri Ashwin Joshi, challenged the imposition of penalties of ₹ 5,00,000, ₹ 3,00,000 and ₹ 2,00,000 respectively. Two directors of M/s Radheyshyam Exports Pvt Ltd, Shri Sandeep Naik and Shri Shilpesh Sawant, also disputed the penalties imposed on them.

4. The Tribunal, *vide* order no. A/1921-1929/13/CSTB/C-I dated

15th May 2013, dismissed the appeals of Shri Naik and Shri Sawant for non-prosecution and, while upholding the penalties against Shri Iqbal Mehra, allowed the appeals of Revenue to impose like penalties on Shri Vohra besides deciding on the non-maintainability of the appeals of the other three as being outside the scope of remand, as set out by Tribunal in the earlier round of appeal. The latter preferred applications for rectification of mistake and, on perusal of record evidencing that the remand order encompassed the challenge posed by these three, the Tribunal, *vide* order no. M/1408-1410/14/CSTB/C-I dated 15th July 2014 restored these.

5. Shri Kiran Vohra approached the Hon'ble High Court of Bombay challenging the imposition of penalty against him by the Tribunal and, noting that

> *'18. All this was before the Tribunal and rather the Tribunal was aware of the case of the appellant and Mehra. From paragraphs 5.1.1., the Tribunal at page 46 refers to the allegations, the transactions and the drawback. However, after being made aware of the findings of the Commissioner and referring them in para 4.1.2, we are not able to find any independent conclusion of the Tribunal. The Tribunal has not concluded that the Commissioner's reasoning is either perverse or vitiated by any error of law apparent on the face of the record. If the statements made by Vora have been retracted and the Tribunal was inclined to proceed on the footing that retracted statements can be utilised by the Revenue, then, it was incumbent upon it to refer to the*

corroborative material. That the Tribunal does not find it necessary to refer to it in details is evidenced by virtue of its general and sweeping observations in para 4.1.3 of the order. If the cross-examination of Naik and the conclusion of the Commissioner (Adjudicating Authority) drawn therefrom is contrary to the overwhelming evidence on record, then, we do not find any reference to such evidence save and except the interim replies given to the show cause notice wherein the said Vora - appellant before us purports to deal with the allegations in the show cause notice on merits. We do not find the Tribunal referring to any independent corroborative material. If indeed there was any, it was the duty of the Tribunal to have expressly referred to it and relying upon the same, overturned the order of the Commissioner. Instead, the Tribunal makes reference to the general principle that retraction of statement and cross-examination of certain persons would not make any dent in the plethora of evidence produced by the Department and confessions of various persons. True that the same may be dealing with other appellants and their cases. Equally true it is that their appeals were, therefore, without any merit. However, it was the duty of the Tribunal to have referred to the specific allegations against the appellant allegedly floating fictitious companies and enabling them to avail of duty drawback benefit. Therefore, the duty of the Tribunal was to deal with specific allegations against the appellant, the response and the evidence in relation thereto. Based on the general evidence and against other appellants it could not be established before the Tribunal that the Commissioner has erred in taking a view that no penalties can be imposed on the said Vora. The Tribunal's conclusion that in case of retraction of confessional statement can be ignored might be correct as a general statement of law but that inculpatory portion of retracted confession must be relied upon together

> *with independent corroborative material. The same only cannot be then relied upon and to base any conclusion. Therefore, its further finding that a case cannot be demolished merely by cross-examination of witnesses by ignoring circumstances and corroborative evidence is equally vitiated because the crossexamination may contain admissions. The cross-examination may also have vital omissions and inconsistencies. If all this has to be ignored, then, there has to be overwhelming independent material. Nothing of all this has been referred to, much less in details. In these circumstances, we cannot agree with Mr. Jelty that the Tribunal's order cannot be termed as perverse. We do not agree with him that this appeal is an attempt at reappreciation and reappraisal of the factual conclusions.*
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> *19. Once we hold as above, then it is evident that the Tribunal's conclusions cannot be sustained. They are vitiated by errors of law apparent on the face of the record. They are perverse for the Tribunal omitted from consideration, not only the conclusions recorded by the Commissioner / Adjudicating Authority, but the material referred by him. His reasons are based on the statements in the cross-examination of Sandeep Naik and the failure of the Revenue to bring in independent corroborative material. In these circumstances, this appeal raises clearly substantial questions of law. We are of the opinion that the Tribunal's order deserves to be quashed and set aside. The substantial question of law is answered in favour of the appellant and against the Revenue.'*

the Hon'ble High Court remanded the issue back to the Tribunal. In the light of the obvious submissions that would be made by Learned Authorised Representative, it also needs to be highlighted that the Hon'ble High Court did also observe that

‘14. Suffice it to note that before the Commissioner viz. Adjudicating Authority, when all the materials were placed by both sides, he had not only the statements which were later on retracted but the response or replies of other noticees. We are rather surprised that the Adjudicating Authority and equally the Tribunal follows in all such cases as a routine, a pattern. The pattern being those noticees who were called upon to show cause filed their response and replies in writing. They rely upon certain documents which may be also relied by the Revenue and emanating from the Revenue's record. The Tribunal as also the Adjudicating Authority in this case has proceeded on the footing that there is no denial of the existence of the documents or their contents. There is no dispute raised in that regard. Therefore, the Tribunal has permitted cross-examination of the noticees either by the department or by the co-noticees. We are mindful of the fact that in adjudication or such proceedings, strict rules of evidence or the law of evidence may not be applicable. However, what the principles of natural justice demand is that what is in evidence cannot be relied upon. What is evidence is something about which a party has given a writing in the form of an affidavit. Further, such party is then crossexamined by the opponent or the adversary against whom the statement or material is sought to be relied upon. If the veracity of this is tested in the cross-examination and the party withstands the same then alone the version as found in the affidavit or the recorded statement can be termed as evidence and accepted and relied upon by an Adjudicating Authority. (See M/s. Bareilly Electricity Supply Co. Ltd. vs. The Workmen and Ors. AIR 1972 SC 330). This salutary principle would govern even adjudication proceedings. We do not, therefore, know as to on what basis, even if all had consented, that the Adjudicating Authority and the Tribunal allowed co-noticees to cross examine each other. Here also

> *in this case and in the Memo of Appeal in the present matter, we find that the appellant has while disassociating himself completely from the transactions and the entities, sought to inculpate Mr. Mehra. Therefore, it is one version against the other. In such circumstances, the Tribunal as also the Commissioner would have been properly advised to chart a safe course and as is found in the above principles.'*

even while making it clear that

> *'20. Thus, this appeal succeeds. The impugned order is quashed and set aside. Resultantly, the appeal of Mr. Kiran Nagindas Vora shall stand restored to the file of the Tribunal for a decision afresh on merits and in accordance with law. We clarify that we have not expressed any opinion on the rival contentions. Our reference and somewhat extensive to the allegations in the show cause notice, the stand of Mr. Kiran Nagindas Vora shall not be construed as any opinion of this Court in his favour. Equally, we do not hold that the Commissioner's order is vitiated or perverse as alleged by the Revenue. All contentions of both sides are kept open. We further direct that while the Tribunal should decide the appeal afresh, it must ignore all its earlier conclusions. It must permit parties to advance contentions and rely upon the record.'*

6. Shri Iqbal Mehra was also before the Hon'ble High Court of Bombay wherein the matter was also remanded back to the Tribunal by taking note that

> *'1. This appeal is filed by Iqbal Mehra who was also proceeded against and with similar allegations as that of the appellant in Customs Appeal No.97 of 2014 – Kiran*

Nagindas Vora. Mr. Motwani, learned counsel appearing on behalf of the appellant has canvassed detailed submissions in support of the appeal of Mr. Mehra. However, he would submit that the Tribunal has completely omitted from consideration, the allegations against Mehra and specifically levelled by the Revenue. Similarly, his specific stand and to the contrary has also not been referred by the Tribunal. In that regard, our attention is invited to the Tribunal's order at paragraphs 4.1.3 and 4.1.4. It is alleged that Mr. Mehra's case has not been referred at all. It has been also pointed out to us that while the Tribunal makes a reference to the case of Vora, it fails to notice that similar allegations have been levelled against the said Mehra as well. The said Mehra was also before the Adjudicating Authority. The said Mehra could not succeed before the Adjudicating Authority, but was visited with penalty. In an appeal by the said Mehra against such imposition of penalty, it was incumbent on the Tribunal to have considered his appeal independently and in details. Assuming that the case was on par with Kiran Nagindas Vora, then, while noticing his case and his specific stand, the Tribunal should have also performed its duty and referred to the allegations against Mehra and the reply or response of the said Mehra to it. That having not been done, the conflicting order and variations emerging therefrom shows that there are substantial questions of law.'

7. Of the three appeals restored by the Tribunal, it is now submitted that Shri Kantilal H Shah has since expired on 7th May 2016 and that, according to the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982, in the absence of an application for carrying the proceedings forward, appeals abate. The certificate issued by the Municipal Corporation of Greater Mumbai is placed on record.

Accordingly, the appeal abates, notwithstanding the various decisions cited on which we decline to make any observations thereto or issue any directions thereon.

8. Consequently, we are now confronted with two appeals of Revenue disputing the dropping of proceedings against Shri Kiran Vohra, two appeals of Shri Iqbal Mehra against the imposition of penalties of ₹ 15,00,000 each and the appeal of the ‘custom house agent and its employee’. The issues pertaining to overvaluation of export goods, the diversion of the same at Dubai and the consequent ineligibility for drawback and the confiscation are beyond the scope of resolution by us as the exporters are not in appeal. We, therefore, confine ourselves to the claim by each of these appellants of lack of knowledge of the illicit nature of the cargo.

9. The goods are offending for having been misdeclared, both in value and the intended destination, which is liable to be visited with confiscation under section 113(d) and 113(l) of Customs Act, 1962. The first of these pertains to contravention of prohibition and the second to non-inclusion of material particulars in the entries made under section 50 of Customs Act, 1962.

10. From the allegations it is seen that the exporter was proceeded against for claiming drawback on exports declared to be valued much higher than the actual procurement price. From this it should be

apparent that the condition of the goods or any other physical characteristics, which an agent or its employee may be privy to, is not the subject of controversy. There is no allegation that the goods of a different description or of apparently of poor quality had been shipped but that the value of the goods has been inflated. In these circumstances, the penalties imposed on M/s HP Joshi & Co and Shri Ashwin Joshi under section 114(i) of Customs Act, 1962 would not sustain. The sole allegation against the 'Custom House Agent' is that they allowed unauthorized use of their licence to Shri Amit Champaklal Shah. Mis-use of licence is to be visited with penalties prescribed in the special law for Regulations framed under section 146 of Customs Act, 1962. The charge against Shri Ashwin Joshi was based upon a statement of Shri Shilpesh Ramakant Sawant which, despite retraction, was held to be relevant as the retraction claiming use of force was not corroborated with any other evidence of having been compelled. Thus, a proposition, which fails the test of reasonableness, must be corrected by evidence but a statement of retraction does not have to be. The findings that follow from this assumption on the part of adjudicating authority evidently lacks reason and logic. Therefore, the penalties imposed on the custom house agent, M/s HP Joshi & Co, and Shri Ashwin Joshi fail.

11. It is seen that the Hon'ble High Court of Bombay has held that there is similarity of allegation against both Shri Kiran Nagindas

Vohra and Iqbal Mohan Amritlal Mehra and that any discrimination thereto is not proper. The original authority has excluded Shri Kiran Nagindas Vohra from penal action while imposing penalty on Shri Iqbal Mohan Amritlal Mehra. It was in the contest of the upholding of the penalty against the latter and the imposition, for the first time, of the penalty on the former that the matter was considered by the Hon’ble High Court of Bombay.

12. It is seen from the statement of Shri Sandeep Naik that Shri Vora had no communication with M/s Radheshyam Exports Pvt Ltd. The statements that led to the imposition of penalties against the two individuals were retracted and hence not admissible as evidence. We also find no documentary, or other, evidence to support the allegations in the show cause notice against these two individuals. The reliance placed on the statements of one another, even if they were co-noticees, were not sufficient to establish correctness of those statements. The retraction of the statements are also equally valid. In the absence of any material evidence that could overcome the findings of the original authority in favour of Shri Kiran Nagindas Vohra and of any material that could support the findings against Shri Iqbal Mohan Amritlal Mehra, without reference to the statements alone, the penalties against them will not sustain.

13. Accordingly, penalties challenged in the appeals are set aside

and the appeals are allowed. Appeals of Revenue for imposition of penalties on Shri Kiran Nagindas Vohra are dismissed.

(Order pronounced in the open court on 19/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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