

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. 85795 of 2013

(Arising out of Order-in-Appeal No. 667 to 669(Adj. Export)2012/JNCH/EXP-91 to 93 dated 14.11.2012 passed by the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva.)

Vijay S. Poojary
3rd Floor, Chandra House,
90 Perin Nariman Street,
Fort, Mumbai – 400 001

.....Appellant

VERSUS

Commissioner of Customs (Export),
Nhava Sheva
JNCH, Post – Uran, District – Raigad,
Nhava Sheva, Maharashtra – 400 707

.....Respondent

WITH

Customs Appeal No. 85796 of 2013

(Arising out of Order-in-Appeal No. 667 to 669(Adj. Export)2012/JNCH/EXP-91 to 93 dated 14.11.2012 passed by the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva.)

Mohan S. Poojary
M/s. Mayuri Clearing & Shipping Agency,
F-359, Dreamz Mall, LBS Marg,
Bhandup (W), Mumbai – 400 078

.....Appellant

VERSUS

Commissioner of Customs (Export),
Nhava Sheva
JNCH, Post – Uran, District – Raigad,
Nhava Sheva, Maharashtra – 400 707

.....Respondent

AND

Customs Appeal No. 85810 of 2013

(Arising out of Order-in-Appeal No. 667 to 669(Adj. Export)2012/JNCH/EXP-91 to 93 dated 14.11.2012 passed by the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva.)

Kunverji Darshi & Sons
89, Kazi Sayyed Street,
Masjid, Mumbai – 400 003

.....Appellant

VERSUS

Commissioner of Customs (Export),
Nhava Sheva
JNCH, Post – Uran, District – Raigad,
Nhava Sheva, Maharashtra – 400 707

.....Respondent

APPEARANCE:

Ms. C. Pooja Reddy, Advocate for the Appellant
Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85663-85665/2022

Date of Hearing: 28.06.2022

Date of Decision: 28.07.2022

These three appeals are filed against a common order passed on 14.11.2012 by the Commissioner of Customs (Appeals), Mumbai-II, JNCH, Nhava Sheva challenging the legality of confirmation of penalty at the reduced rate under Section 114(3) of the Customs Act, 1962.

2. During the course of argument learned Counsel for the Appellant Ms. C. Pooja Reddy submitted that the said penalty was

imposed by the Adjudicating authority without following the principle of natural justice against which they preferred the appeal before the Commissioner (Appeals) that yielded no fruitful result. She has drawn attention of this Bench to the various statements of the witnesses including that of the partner Mr. Mohan S. Poojari who stated that 'somebody was misusing their CHA licence' but that statement was not accepted by the Adjudicating Authority or Commissioner (Appeals). On the other hand, they were denied of the opportunity of cross examination of some of the officials and witnesses, basing on whose statement penalty was imposed and confirmed by the Authorities below. She placed her reliance in the judgement of this Tribunal reported in *2015 (328) ELT 590 (Tri.-Mum.)* in the case of *Crown lifters Pvt. Ltd.* and reported in *200 (123) ELT 39 (Cal.)* in the case of *M.S. Naina Vs. Collector of Customs, West Bengal, Calcutta-I* in support of her argument.

3. Learned Authorised Representative Mr. Bhushan Kamble argued in support of the reasoning & rationality of the order passed by the Commissioner (Appeals) and pointed out that most of the statements are made by the Appellants own people who have not even rescinded from their statement at any point of time for which no irregularity can be noticed in the order passed by the Commissioner (Appeals) in partly confirming the adjudication order.

4. I have perused the case record as well as the Appellate Authority's detailed order. As could be noticed, in para 5 of his order

the Commissioner (Appeals) had summed up the grounds raised by the Appellants. Sub Para D and E of Para-5 are required to be reproduced below:-

"D. That none of the documents requested for by the Appellant have been provided to the Appellant. The only reason mentioned in the impugned Order is that the request of the Appellant has been forwarded to the DRI and that the DRI vide their letter dated 11.09.2009 informed that the Shipping Bills were filed electronically and were made available by the Department. With regard to the relied upon documents, EP copies of the Shipping Bills were already furnished to the notices.

E. The Appellant made a specific request for an opportunity of cross-examination of certain officers and witnesses who were concerned with the said case and whose evidence would be relevant i.e. who had granted Let Export Order on the basis of various documents. However, in spite of these specific and repeated requests, no opportunity of cross-examination has been granted. No reasons as to why cross-examination cannot be granted are also communicated or mentioned in the impugned Order."

He had clearly mentioned about none supply of copies of relevant documents and not granting opportunity of cross examination of the witnesses by the Appellants. Though some reasons like electronic filing and availability of shipping bills were shown to have been made available to the Appellant both the adjudicating authority and Commissioner (Appeals) had not dealt with the non-compliance of the principle of natural justice of providing opportunity of cross examination of the witnesses, basing on whose statements penalties were imposed.

5. It is needless to mention here that through a series of decisions passed by the Hon'ble Supreme Court and the Hon'ble High

Courts of our country it has become a settled principle of law that evidence not tested by the cross examination has no probative value and there should be opportunity provided to the opposite parties to cross examination the witnesses (in the case of G. Balaji and Others Petitioners Vs. Saravanasamy passed by the Hon'ble Madras High Court on dated 20.07.2020). In this context, it is equally important to reproduce the relevant portion of the judgment of Hon'ble Supreme Court passed in the case of *Vidhyadhar Vs. Manikrao & Anr.* [AIR 1999 SC 1441], wherein it was categorically observed that:

"16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in [Sardar Gurbakhsh Singh v. Gurdial Singh and Anr.](#) . This was followed by the Lahore High Court in [Kirpa Singh v. Ajaipal Singh and Ors.](#) AIR (1930) Lahore 1 and the Bombay High Court in [Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh](#) AIR (1931) Bombay 97. The Madhya Pradesh High Court in [Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat](#) also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in [Arjun Singh v. Virender Nath and Anr.](#) held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in [Bhagwan Dass v. Bhishan Chand and Ors.](#) , drew a presumption under [Section 114](#) of the Evidence Act against a party who did not enter into the witness box."

6. In view of the judicial precedent set by the writ courts including the Hon'ble Apex Court of this land, I am of the considered view that placing reliance on the statements of the witnesses

recorded by the Departmental Officers without providing an opportunity of cross examination to the Appellant is a clear violation of principle of natural justice, for which the order passed by the Commissioner (Appeals) cannot sustain in law and facts. Hence the order.

ORDER

7. All the three appeals are allowed by way of remand to the Adjudicating Authority with direction to provide copies of relied upon documents and opportunity of cross examination of those witnesses, so as to complete a *de novo* proceeding and pass necessary order placing reliance only on the evidence of those witnesses who could be cross examined by the Appellant. Evidence of witnesses, whose attendance could not have been procured at the time of first adjudication order on account of their death or other legal impediment as contemplated in the Indian Evidence Act, may be accepted as corroborative piece of evidence. Since the issue is about a decade old matter, the *de novo* adjudication proceeding is expected to be completed within six months from the date of receipt of this order. Accordingly the order passed by the Commissioner (Appeals) in confirming the penalty under Section 114(3) at the reduce rate is hereby set aside.

(Order pronounced in the open court on 28.07.2022)

(Dr. Suvendu Kumar Pati)
Member (Judicial)