

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

WEST ZONAL BENCH

Excise Appeal No. 1168 of 2010

(Arising out of Order-in-Original No. 98/CEX/Commr/2009 dated 30.03.2010 passed by the Commissioner of Central Excise, Aurangabad)

Parvati Steel Rolling Mills Pvt. Ltd.
Plot no. A-29, Additional MIDC,
Jalna

.....Appellant

VERSUS

Commissioner of Central Excise,
Aurangabad
Town Centre, N-5, CIDCO
Aurangabad

.....Respondent

WITH

(i) Excise Appeal No. 1169 of 2010 (Shri Pawankumar Fakirchand Gupta) (Arising out of Order-in-Original No. 05/CEX/Commr/2010 dated 25.02.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad); **(ii) Excise Appeal No. 1170 of 2010 (Shri Ravi S. Gupta)** (Arising out of Order-in-Original No. 98/CEX/Commr/2010 dated 27.11.2009 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad); **(iii) Excise Appeal No. 1171 of 2010 (M/s. Parvati Steel Re Rolling Mills Pvt. Ltd.)** (Arising out of Order-in-Original No. 05/CEX/Commr/2010 dated 25.02.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

APPEARANCE:

Shri Jitin Singhal, Advocate with Shri D.R. Gadekar, Consultant for the appellant

Shri P.K. Acharya, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/87018-87021/2023

DATE OF HEARING : 11.05.2023
DATE OF DECISION : 18.10.2023

Per: AJAY SHARMA

These appeals have been filed assailing the impugned Orders-in-Original dated 30.3.2010 & 25.2.2010 respectively passed by the Commissioner of Central Excise & Service Tax, Aurangabad confirming the duty demand alongwith interest & equal penalty on two companies and also confirming the penalty on the individuals.

2. The issue involved herein is whether department has made out a case of clandestine removal even by preponderance of probability on the basis of evidence collected and statements recorded?

3. The case made by the department against M/s Parvati Steel Rolling Mills Pvt. Ltd. & its Manager Shri Ravi S. Gupta is stated in brief as follows. Based on intelligence of clandestine removal of steel bars, the officers of DGCEI conducted searches at various places including the premises of manufacturers of Steel Bars, its Traders, transporters of M.S. Bars, buyers of steel bars etc. and during the search on 24.2.2006 at the premises of a trader/broker viz. M/s. Dhanshree Laxmi Steels, Jalna (hereinafter referred to as "DLS") five (5) hand written diaries were recovered which contained details of purchase & sale transactions of M.S.Bars. On the basis of these diaries,

investigation was initiated. During investigation statements of various persons were recorded and various evidences were collected in order to establish the clandestine removal. After conclusion of investigation, the department came to the conclusion that during the period from 28.5.2004 to 4.4.2006 M/s. Parvati Steel Rolling Mills Pvt. Ltd. clandestinely manufactured and cleared 3635.715 MT of MS bars of various sizes and accordingly a show cause cum demand notice dated 27.11.2007 was issued to M/s. Parvati Steel Rolling Mills Pvt. Ltd. & its Manager Mr.Ravi S. Gupta alongwith 9 others, after invoking extended period, as to why:-

- i) The Central Excise duty amounting to Rs.1,07,14,072.00 (Rupees one crore seven lakhs fourteen thousand seventy two only) [Rs.1,05,02,992.00 Basic+ Rs.2,10,080.00 Education Cess] leviable on its illicit clearances of 3635.715MT of TMT bars of various sizes as detailed in Annexure -A(1) to A(3), during the period 28.05.04 to 04.04.06, should not be demanded and recovered from it, in terms rule 4 of the Central Excise Rules, 2002 and Rule 14 of the Cenvat Credit Rules, 2004 read with the proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944.
- ii) The Central Excise duty of Rs.3,17,098/- (Basic Excise duty + Rs.6,324/- (Education Cess) totalling Rs.3,23,422/- (Rupees three lakhs twenty-three thousand four hundred and twenty-two only) already paid by it vide PLA debit entry no. 1 dated 06.04.06, as detailed in the annexure-I should not be appropriated and adjusted against the said Central Excise duty demand.
- iii) Penalty should not be imposed upon it, under provisions of Rule 25 of the Central Excise Rules, 2002 and Rule 15 of the Cenvat Credit Rules, 2004 read with provisions of section 11AC of the Central Excise Act, 1944.

- iv) Interest at the appropriate rate, on the Central Excise duty determined to be payable, under the provisions of section 11A(2) of the Central Excise Act, 1944, should not be charged and recovered from it, under the provisions of section 11AB of the Central Excise Act, 1944.

Shri Ravi S. Gupta, Manager of Parvati, the noticee no.2 and the noticee no.3 to 11, are also required to show-cause to the said Commissioner of Central Excise & Customs, Aurangabad, within 30 days of the receipt of this notice, as to why penalty should not be imposed upon them under Rule 26 of the Central Excise Rules, 2002 for their active involvement in the commissioning the offence in the evasion of Central Excise duty by Parvati.

4. So far as Appeals pertaining to M/s. Parvati Steel Re-Rolling Mills Pvt. Ltd. are concerned, a search was conducted by the officers of DGCEI at the premises of a broker namely Anil Dattabhau Lingade and during search a *pen drive* was recovered from the possession of his accountant Mr. Pradeep Bora and based on the documents recovered allegedly from the said pen drive and statements recorded during investigation, a show cause cum demand notice dated 6.3.2009 was issued to M/s. Parvati Steel Re-Rolling Mills Pvt. Ltd. and its Director Mr. Pawankumar Fakirchand Gupta, for clandestine manufacturing & clearing of 1170.970 MTs of finished goods viz. M.S. TMT bars during the period 1.2.2008 to 9.3.2008, as to why:-

- i) Central Excise duty amounting to Rs.66,21,435/- (Rupees Sixty-six lakhs twenty-one thousand four hundred and thirty-five only) (Basic Rs.64,28,578/-, Education Cess Rs.1,28,572/- and Secondary and Higher Edu. Cess Rs.64,286/-), leviable and not paid by them, on 1170.970 MTs of the finished goods viz. MS TMT bars, valued at Rs.4,16,37,347/- removed without payment of duty (as detailed in the Annexure II to this

Notice) should not be demanded and recovered from them, under the proviso to sub-section (1) of section 11A of the Central Excise Act, 1944;

- ii) Rs. 20,00,000/- (Rupees twenty lakhs only) paid vide TR-6 challan no.12/2007-08, dated 12.03.2008 during the course of the case investigations, towards their formally admitted consequential Central Excise duty liability, should not be appropriated against the Central Excise duty that would be determined under provisions of Section 11A(2) of the Central Excise Act, 1944, as payable by them;
- iii) A penalty should not be imposed on them under the provisions of Section 11AC of the Central Excise Act, 1944, read with Rule 25 of the Central Excise Rules, 2002;
- iv) Interest at the appropriate rate should not be charged and recovered from them under the provisions of Section 11AB of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Rules, 2002.

5. The Adjudicating Authority i.e. learned Commissioner vide separate impugned orders dated 27.11.2009 & 25.2.2010 respectively confirmed the demand of duty alongwith interest and equal penalty on both the companies alongwith penalties on the individuals.

APPEAL Nos. E/1168/2010 & E/1170/2010

6. According to learned counsel, the entire case of the department against M/s. Parvati Steel Rolling Mills Pvt. Ltd. is based upon some diaries or documents allegedly recovered and the statements of third parties and the demand/penalties were also confirmed by the adjudicating authority on that basis only which is totally contrary to the settled legal position. Learned counsel also submits that there is no evidence of clandestine

clearance during the relevant period and the demand has been quantified on speculation based on some theoretical calculation. He also submits that the demand cannot sustain merely on the basis of third party statements without there being any corroboration such as evidence of procurement of raw material and clearance of finished goods etc. He also submits that neither Mr. Suresh Agarwal, from whose possession the five diaries were allegedly recovered nor Mr. Suresh Kumar Mohata, employee of DLS, who is purportedly the author of the diaries, implicated the appellants and that Mr. Suresh Agarwal in his cross-examination has specifically mentioned that he has not named any manufacturer other than Shree Om Rolling Mills and that his statements during investigation were recorded by the department in English language which he was unable to understand as he don't know English language. He also mentioned that the officer who recorded the statement told him that these statements contained exactly the same details which were recorded in his statements on 24.2.2006 and that in good faith he signed those documents. Learned Counsel further submits that so far as other witnesses are concerned, they requested for their cross-examination but the Adjudicating Authority rejected the same and since the cross-examination of other witnesses have not been allowed, their statements cannot be relied upon. He also submits that there is no compliance of Section 9D of Central Excise Act, 1944.

APPEAL Nos. E/1169/2010 & E/1171/2010

7. While making submissions in the matter of M/s. Parvati Steel Re-Rolling Mills Pvt. Ltd., learned counsel submits that the entire case of the department is based on the pen drive allegedly recovered from Mr. Pradeep Bora -accountant of broker Mr. Anil Dattabhau Lingade & few statements and that no incriminating document has been recovered from the premises of the appellants herein. According to learned counsel, the pen drive has allegedly been recovered from a third party and the purported contents of the said pen drive have been recorded on paper as statements. He further submits that the said pen drive, from where the statements have been recorded and relied upon while confirming the demand, has not been shown to them. Therefore, the entire case is based upon the documents retrieved from the pen drive recovered from the third party. During adjudication proceedings the appellant had asked for the cross-examination of Mr. Pradeep Bora, Mr. Anil D. Lingade, Mr. Sunil Lingade (Prop. of M/s. Om Trading), Mr. Vikas D. Patil (Prop. of M/s. Vaishnav Steel) and Shri Sachin Agarwal (Prop. of M/s. Tirupati Sales) and also few others but the said request for cross-examination was rejected by the adjudicating authority. According to learned counsel, the alleged pen drive has been recovered from the possession of a person who has nothing to do with M/s. Om Trading or M/s. Vaishnav Steel or M/s. Tirupati Sales. He also submits that there is no evidence of procurement of raw material required to manufacture these goods alleged to

be cleared clandestinely. The department has failed to produce statements of the suppliers of the raw material or the ultimate buyers of the finished products. The department has also failed to produce any evidence in support of their submission that during the period in issue the appellant has manufactured TMT bars in excess of what has been recorded in its books of accounts. Non-compliance of requirement of Section 9D has been raised herein also.

In support of his submissions, learned counsel relied upon few decisions which are as under:-

- (i) *Andaman Timber Industries vs. CCE, Kolkata; 2015 (324) ELT 641 (SC)*
- (ii) *Hi-Tech Abrasives Ltd. vs. CCE, Raipur; 2018 (362) ELT 961 (Chhattisgarh)*
- (iii) *Shree Sidhbali Ispat Ltd. vs. CCE, Nagpur; 2017(357) ELT 724 (Tri.-Mum)*
- (iv) *Continental Cement Company vs. UOI; 2014 (309) ELT 411 (All.)*
- (v) *CCE vs. Brims Products; 2011 (271) ELT 184 (Pat.)*
- (vi) *Karan Traders vs. Jt. Commr. C.Ex., Salem; 2016 (339) ELT 249 (Mad.)*

8. Per contra learned Authorised Representative appearing on behalf of revenue supported the findings recorded in the impugned orders and prayed for dismissal of the appeals. According to learned Authorised Representative the appellants had not been able to justify the requirement of cross-examination, therefore the same has been rightly rejected by the Adjudicating Authority. He further submits that a clear case of clandestine removal has been made out against the appellants and therefore the duty and penalties have been rightly imposed.

He further submits that the case is based upon the private documents recovered during search operations and corroborated by the statements recorded. As per learned Authorised Representative there is plethora of decision in favour of the department stating that statements given before Central Excise authorities are valid even if retracted later on and that denial of cross-examination does not affect the principle of natural justice. For some persons whose cross-examinations were permitted and were retracted, learned Authorised Representative submits that the depositions made in the cross-examination are nothing but an afterthought which cannot affect the evidentiary value of original statements. He also filed compilation of cases and drew our attention towards the decision of the Hon'ble Supreme Court in the matter of *Muddasani Venkata Narsaiah (Dead) through L.Rs. vs. Muddasani Sarojana; (2016) 12 SCC 288* for justifying the rejection of the request of cross-examination by the adjudicating authority.

9. We have heard learned counsel for the appellants and learned Authorised Representative on behalf of revenue and perused the case records including the written submissions/synopsis and case laws placed on record. The entire case of the department, so far as M/s. Parvati Steel Rolling Mills is concerned, is mainly based upon the diaries allegedly seized from the possession of Mr. Suresh Agarwal and the statements of Mr. Suresh Agarwal and Mr. Suresh Mohta who, as per the department, purportedly the writer of the diaries. While

confirming the demand, the adjudicating authority appears to have taken into consideration the statement of purportedly six actual buyers also, although Mr. Suresh Agarwal has specifically and repeatedly mentioned that he has no details of any buyers. During cross-examination a specific question was asked to Mr. Agarwal to which he answered in negative. The said question and its reply are as under:-

"Question 8: Did the diaries resumed by officers on 24.2.2006 from your premises contained details of trading in respect of goods manufactured by M/s. Kalika Re-rolls Private Ltd. or M/s. Shiv Shakti Re Rolling Mills Private Ltd. or M/s. Dhanlaxmi Re-Rolling Mills or M/s. Parvati Steel Rolling Mills Private Ltd.?"

Ans. No. Only details of M/s. Shriom Rolling Mills."

We are conscious of the fact that although the cross-examination of the author of the diaries i.e. Mr. Suresh Mohata, entries in which to a large extent have been the basis of the issuance of show cause notice and confirmation of demand, was allowed by the adjudicating authority but the department failed to produce him for cross-examination, therefore in our considered view no reliance can be placed on his statements and our view finds support from the decision of the Hon'ble High Court of Judicature at Madras in the matter of *Karan Traders (supra)*. Otherwise also the statements of Shri Suresh Agarwal and Shri Suresh Mohta were mainly inculpatory in nature. Department produced some six actual buyers before the adjudicating authority and their statements were also recorded. But they failed to convince us from where they get to know the names of those alleged buyers.

The appellants have asked for the cross-examination of those alleged six actual buyers but were not permitted.

10. Case against Parvati Steel Re-Rolling Mills Pvt. Ltd. has been built up on the basis of the alleged pen drive recovered from the possession of a person Mr. Pradeep Bora, accountant of Mr. Anil Dattabhau Lingade (a broker) during the search conducted at his office on 11.3.2008. The data contained in the said pen drive was retrieved and printout were taken by the department under panchnama dated 11.3.2008. The demand was confirmed by the Adjudicating Authority on the basis of the documents allegedly retrieved from the said pen drive coupled with some statements recorded during investigation as well as u/s. 14 *ibid*. Admittedly the cross-examination was not granted to the appellants as according to the adjudicating authority that was not relevant despite the fact that the charges in the show cause notice are based on the evidence emanating from the seized documents and statements recorded during the course of investigation.

11. In our view, not allowing cross-examination is violative of the principle of natural justice. In catena of decisions it has been held that such statements cannot be relied upon. Denial of cross-examination by the adjudicating authority is a clear violation of the mandate of Section 9D *ibid*. In the matter of *Hi-Tech Abrasives Ltd. (supra)* Hon'ble Chhattisgarh High Court has held that statements recorded u/s. 14 of the Act cannot be relied upon as evidence without following the rigour of Section 9D of

the Act since the provisions of Section 9D are mandatory in nature. Mere recovery of private records, that too from the third party, is not sufficient to prove clandestine removal and a concrete and clinching evidence is required to prove such allegations and it is for the department to discharge the burden and prove the charges of clandestine removal against the appellants. The department has to prove the allegation on the basis of cogent corroborative evidence which in the facts of the present case the department has failed to do. Neither any evidence of procurement of raw material nor its transportation nor any evidence of manufacturing of finished goods nor its onward transportation or its buyers have been produced on record by the department. There is no evidence of flow back of money.

12. It is settled position that the statements of witnesses cannot be relied upon unless they are corroborated with cogent evidence and when there is no corroborative evidence to support statements of witnesses those statements cannot be relied upon without offering a chance of cross-examination to the person charged. Denial of cross-examination vitiates entire proceedings as it amounts to violation of principle of natural justice. An incriminating material sought to be used against a person without giving opportunity of cross-examination of author of such document/statement amounts to an *ex parte* proceeding, i.e. deciding matter without giving opportunity of hearing to other side. It is no doubt true that there is no right of cross-

examination if sufficient corroborative evidence exists, but in the present case we are unable to find the sufficient corroborative evidence against the appellants and therefore the appellants were justified in asking for cross-examination. The Hon'ble High Court of Judicature at Allahabad in the matter of *C.C.E., Meerut-I v. Parmarth Iron Pvt. Ltd.*; 2010 (260) E.L.T. 514 (All.), while relying upon the law laid down by the Hon'ble Supreme Court in cases of *Arya Abhushan Bhandar v. U.O.I*; 2002 (143) E.L.T. 25 (S.C.) and *Swadeshi Polytex Ltd. v. Collector, Central Excise*; 2000 (122) E.L.T. 641 (S.C.) and of the Hon'ble High Court of Judicature at Bombay in case of *Gyan Chand Sant Lal Jain v. U.O.I*; 2001 (136) E.L.T. 9 (Bom.), has held that at the stage of adjudication, it is the right of an assessee to seek cross-examination of the witnesses whose statements are sought to be relied upon by the Revenue and that cross-examination is necessary so that it could be established whether the statements recorded had been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like. In *J.P. Iscon Pvt. Ltd. vs. CCE, Ahmedabad-I*; 2022 (63) G.S.T.L. 64 (Tri.- Ahmd.) it has been held by a co-ordinate Bench of the Tribunal that "*statements recorded during investigation, whose makers are not examination-in-chief before the adjudicating authority, would have to be eschewed from evidence, and it will not be permissible for Ld. Adjudicating Authority to rely on the said evidences. Therefore, we hold that none of the said statements were admissible evidence in the present case*". On similar lines, another co-ordinate Bench of the Tribunal in the

matter of *Gaurav Mungad vs. CCGST, Ex.&Cus., Bhopal; 2021 (376) E.L.T. 69 (Tri. - Del.)* allowed the appeal filed by the assessee therein with consequential relief since the statement recorded by the prosecution were not permitted to be cross-examined. Hon'ble Supreme Court also in the matter of *Andaman Timber Industries (supra)* while allowing the appeal filed by the assessee therein has laid down that not allowing the assessee to cross-examine the witnesses by the adjudicating authority, though the statements of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity inasmuch as it amounts to violation of principle of nature justice because of which the assessee was adversely affected.

13. In view of the discussions made hereinabove, we are of the considered view that the department has miserably failed to substantiate the allegation of clandestine manufacture and clearance by any tangible or corroborative evidence. The diaries or pen-drive from a third party cannot be said to be sufficient proof of such allegation and the department has failed to make out a case beyond any doubt. Therefore, the appeals filed by the Appellants are allowed by setting aside the impugned orders.

(Pronounced in open Court on 18.10.2023)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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