REPORTABLE

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP (C) No. 1854 of 1992
WP (C) No. 1895/1992
WP (C) No. 1896/1992
WP (C) No. 1897/1992
and
WP (C) No. 1898/1992

% *Reserved on : July 20, 2009*
Pronounced on : August 28, 2009

1. WP (C) No. 1854/1992

J & K Cigarettes Ltd. & Ors. . . . Petitioners
through : Mr. S.K. Bagaria, Sr. Adv. with Ms. Rohina Nath, Ms. Nisha Baghchi, Ms. Priyadeep Mr. S.K. Mongia and Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
through : Mr. Mohan Parasaran, ASG with Mr. Rajesh Katyal, Advocates and Mr. Satyavir Singh (SIO).

2. WP (C) No. 1895/1992

M/s. GTC Industries Ltd. . . . Petitioner
through : Mr. S.K. Bagaria, Sr. Adv. with Ms. Rohina Nath, Ms. Nisha Baghchi, Ms. Priyadeep Mr. S.K. Mongia and Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
through : Mr. Mohan Parasaran, ASG with Mr. Rajesh Katyal, Advocates and Mr. Satyavir Singh (SIO).

3. WP (C) No. 1896/1992

M/s. GTC Industries Limited . . . Petitioner

Mr. S.K. Mongia and
Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
<u>through</u> : Mr. Mohan Parasaran, ASG with
Mr. Rajesh Katyal, Advocates and
Mr. Satyavir Singh (SIO).

4. <u>WP (C) No. 1897/1992</u>

M/s. GTC Industries Limited . . . Petitioner
<u>through</u> : Mr. S.K. Bagaria, Sr. Adv. with
Ms. Rohina Nath, Ms. Nisha
Baghchi, Ms. Priyadeep
Mr. S.K. Mongia and
Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
<u>through</u> : Mr. Mohan Parasaran, ASG with
Mr. Rajesh Katyal, Advocates and
Mr. Satyavir Singh (SIO).

5. <u>WP (C) No. 1898/1992</u>

M/s. GTC Industries Limited . . . Petitioner
<u>through</u> : Mr. S.K. Bagaria, Sr. Adv. with
Ms. Rohina Nath, Ms. Nisha
Baghchi, Ms. Priyadeep
Mr. S.K. Mongia and
Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
<u>through</u> : Mr. Mohan Parasaran, ASG with
Mr. Rajesh Katyal, Advocates and
Mr. Satyavir Singh (SIO).

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed

A.K. SIKRI, J.

1. All these writ petitions filed by the same petitioner raise identical issue which relates to the constitutional validity and/or interpretation of the provisions of Section 9-D of the Central Excise and Salt Act, 1944 (hereinafter referred to as the 'Act'). For this purpose, we are taking note of the facts as they appear in WP (C) No. 1854/1992. The question, as aforesaid, has arisen in the following backdrop:

2. A show-cause notice dated 30.3.1998 was issued to M/s. Kanpur Cigarette Limited and M/s. GTC Industries on the allegation that Kanpur Cigarette Ltd. had manufactured cigarettes during the period February 1985 to June 1986 exclusively for and on behalf of M/s. GTC Industries with GTC brand names. It was alleged that the cigarettes were owned/purchased by GTC and were marketed by GTC through their trade channel. It was further alleged that the noticees had availed exempted rates of duty under Notification No. 211/83 based on the declaration of sale price on the cigarette packets. It was further alleged that the noticees had manufactured deceptively similar versions of certain regular brands showing lower sales price with intent to evade duty whereas GTC had all along envisaged that they would be sold at the price similar to the regular brands. It was alleged that the cigarettes so manufactured were sold through the marketing chain at the higher price and the difference between the

contravened the provisions of Rule 52 and 52A of the Exci by making false declaration with intent to evade payment of appropriate duty and had jointly rendered them liable for payment of duty as well as the penalties. The duty demanded for the said period was Rs.1,01,20,221/-. The show cause notice with annexures was voluminous running in almost 1000 pages among which 600 pages relate to the statements of 84 witnesses. Similar show-cause notices were issued to M/s. GTC Industries in respect of their units at Mumbai and Baroda and in respect of other job workers viz. J & K Cigarettes; Suvarna Filters and Cigarettes Ltd' Universal Tobacco etc.

The petitioners made a request dated 6.3.1991 for cross-examination of the various wholesale dealers and other persons on whose statements reliance had been placed in the show-cause notice. These 31 witnesses were common for all the show-cause notices.

3. The respondent No.1, however, did not allow the cross-examination of the witnesses for the reasons stated in the order dated 5.4.1991. By that order, the respondent No.1 also confirmed the demands raised in the notices. The petitioner challenged the aforesaid order of the respondent No.1 by filing various writ petitions in the High Court of Bombay, at Mumbai, the lead petition being WP (C) No. 1572/1991. The High Court of Bombay set aside the demand vide its judgment dated 3.5.1991 and remanded the case back for *de novo* adjudication after considering the request for cross-examination,

arguments. After this order of remand, the responde[nt] proceeded with the matter afresh.

4. The respondent No.1 allowed cross-examination of the witnesses, as requested by the petitioners, from time to time leaving out those who were given up by the department. Those witnesses, who were summoned and appeared, were duly cross-examined by the petitioners. However, some of the witnesses did not appear for the reasons that would be taken note of hereinafter at the appropriate stage. The respondent No.1, in respect of those witnesses, took umbrage under Section 9-D of the Act and asked the petitioners to argue the matter as according to the respondent No.1 it was not possible for those witnesses to appear. The petitioners, vide letter dated 20.4.1992, reiterated their demand for cross-examination and at the same time stated that they would be addressing oral submissions without prejudice to their right to cross-examine those witnesses. The petitioners also submitted that in case those witnesses are not allowed to be cross-examined, their statements be not relied upon. According to the petitioners, no orders were passed on this request/ application.

5. At this juncture WP (C) No. 1895/1992 was filed on 20.5.1992 alleging violation of principles of natural justice. Prayer made in that writ petition was for grant of cross-examination or, in the alternative,

petitions were filed in respect of other show-cause notices i the same manner.

6. Notices were issued in these writ petitions and interim orders were passed to the effect that final orders passed by the respondent No.1 would be placed in a sealed cover. During the pendency of these petitions, the respondent No.1/Collector confirmed the demands in all show-cause notices vide orders dated 10.7.1992. These orders were produced before the Court in a sealed cover. After hearing the parties on the said application, this Court vide orders dated 5.8.1992 vacated the stay and directed the Collector to serve the orders upon the petitioners. At the same time, liberty was given to the petitioners to file appeal if felt aggrieved against that order. Liberty was also granted to the petitioner to amend the petition. The petitioners, accordingly, amended the petition and included the prayer challenging vires of Section 9-D of the Act. These amendments were allowed.

7. The writ petitions were heard by a Division Bench of this Court. The Division Bench dismissed all these three writ petitions by means of its judgment dated 6.12.2006 holding that the true cope of Section 9-D of the Act would legitimately arise for consideration in the Supreme Court in the pending appeals. Writ petitions were, thus, dismissed without deciding the issue of vires of Section 9-D of the Act. The

dated 6.12.2006 passed by this Court have been set as matters are remanded back to this Court for consideration afresh.

8. To complete the narration of events, if is also necessary to mention that the petitioners had challenged the orders of the respondent No.1 on merits by filing appeals before the Custom Excise & Service Tax Appellate Tribunal (CESTAT). Some of these appeals were decided in favour of the petitioners and some against them. The losing party challenged the orders by filing appeals in the Supreme Court. The outcome of the appeals before the Custom Excise & Gold Appellate Tribunal (now CESTAT) as well as the Supreme Court is as under :-

Writ No.	Position in CEGAT	Position in Supreme Court
1854/1992	The CEGAT decided the Appeal on merits in favour of both the Petitioner and the job worker vide order dated 21.3.2001. The Department has filed an Appeal under Section 35L of the Central Excise Act 1944 before the Hon'ble Supreme Court being Civil Appeal No. 6398-6403/02.	The Court has admitted the Appeal without granting any interim stay. Last listed on 27.9.2002.
1895/1992	The CEGAT decided the Appeal on merits in favour of both the Petitioner and the job worker vide order dated 21.3.2001. The Department has filed an Appeal under section 35L of the Central Excise Act 1944 before the Hon'ble Supreme Court being Civil Appeal No. 6398-6403/02.	The Court has admitted the Appeal without granting any interim stay. Last listed on 27.9.2002.
1896/1992	The CEGAT in Appeal Nos. 5208/92-D and 5233/92-D confirmed the demand against the Petitioner vide order dated 4.3.1997. The Petitioner	The Hon'ble Supreme Court dismissed the Appeal bearing No. 5134-35/97 vide order dated 12.9.97 for want

1897/1992	The CEGAT after considering the application under Section 35F of the Central Excise Act, 1944 seeking waiver of the pre-deposit of the Duty and penalty demanded, dismissed the same and directed the petitioner and the job workers to deposit the same. Since the petitioner did not comply with the said order, the Appeals filed by them were dismissed for non-compliance of the above order on 15.7.1994 and 7.2.1996 (copies enclosed)	
1898/1992	The CEGAT confirmed the demand against the Petitioner vide order dated 4.7.1997. The Petitioner thereafter filed Civil Appeal No. 5134-35/97 before the Hon'ble Supreme Court against the said order.	The Hon'ble Supreme Court dismissed the Appeal bearing No. 5134-35/97 vide order dated 12.9.97 for want of pre-deposit.

9. The Supreme Court, while remitting the case back to this Court, took note of the fact that though constitutionality of Section 9-D of the Act was allowed to be challenged, but this issue was not decided by this Court and, at the same time, objection of the respondents that cause of action did not survive was also not determined, and the Apex Court was of the opinion that these aspects be considered afresh, as is clear from the operative portions of the said order :-

> "7. The High Court, as noticed hereinabove, did not decide the question of constitutionality of the said provision, nor did it determine the objection of the respondents that no cause of action had arisen therefor.
>
> 8. We are, therefore, of the opinion that interest of justice would be subserved if the impugned judgments are set aside and the matters are remitted back to the High Court for consideration thereof afresh. We direct accordingly.
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> 9. The appeals are disposed of with the aforementioned observations and direction."

10. It is in these circumstances we have to decide the que constitutional validity of Section 9-D of the Act. In the process, we have also to determine as to whether cause of action for deciding this issue arises or not.

11. Before we take up this issue, it would be necessary to point out the provisions of Section 9-D of the Act and the circumstances under which the Collector invoked these provisions in his impugned order. Section 9-D reads as under :-

> "**9-D. Relevancy of statements under certain circumstances –**
>
> (1) A statement made and signed by a person before any Central Excise 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.
>
> (2) The provisions of sub-section (1) shall, so far as may be, 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."

12. Bare reading of the above section manifests that under certain

those persons before any Central Excise Officer of a gazett 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 9-D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D 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.

13. Section 14 of the Act confers powers on the Central Excise Officer to summon persons to give evidence. Such statements are admissible in evidence. By relying upon these statements so recorded, the Central Excise Officer adjudicating the case may: (a) raise demand of Central Excise duty; (b) confiscate any goods, plant or machinery, etc.; and (c) levy penalties. Therefore, the adjudication proceedings are quasi-judicial in nature {See – ***Sri T. Ashok Pai*** v. ***CIT, Bangalore,*** (2007) 7 SCC 162, ***Vinod Solanki*** v. ***Union of India,*** (2009) 233 ELT 157; and

Kothari Filaments & Anr. v. *Commissioner of Custom*

Kolkatta) & Ors., (2009) 233 ELT 289}.

14. Going by this nature of the proceedings, which can entail civil and/or evil consequences to the show-cause noticees, submission of learned counsel for the petitioner was that the right of the accused to cross-examine persons, whose statements are relied upon against him, is a very important facets of the principles of natural justice. Normally, rule is that if the witness is not cross-examined, then the examination-in-chief/statement of that witness cannot be termed as evidence and, therefore, cannot be read in evidence. He submitted that necessity of allowing cross-examination of the witnesses in departmental adjudication proceedings is well-settled and accepted, as is clear from the following decisions :-

(i) *Laxman Exports Ltd.* v. *Collector of Central Excise*
(2005) 10 SCC 634

(ii) *Swadeshi Politex Ltd.* v. *Commnr. Of Central Excise*
2000 (122) ELT 641 (SC)

(iii) *Arya Abhushan Bhandar* v. *Union of India*
2002 (143) ELT 25 (SC)

(iv) *Gyanchand Sant Lal Jain* v. *Union of India*
2001 (136) ELT 9 (Bombay High Court)

(v) *Kellogg India Pvt. Ltd. & Madhukar Patil* v. *UOI*
2006 (193) ELT 385 (Bombay High Court)

(vi) *Ripen Kumar* v. *Deptt. of Customs*
2003 (160) ELT 60 (Delhi High Court)

(vii) *New Decent Footwear Industries* v. *UOI*

He also referred to the judgment of the Supreme Cou case of ***CCE*** v. ***Duncan Agro Industries,*** (2000) 7 SCC 53 with regard to relevancy of statements recorded by the departmental officers under the Customs Act itself, in the following manner :-

> "The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinized by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.
>
> xx xx xx
>
> We hold that a statement recorded by Customs Officers under Section 108 of the Customs Act is admissible in evidence. The court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act."

15. He also extensively read out the portions of the recent judgment reported in ***Vinod Solanki*** (supra), wherein the Supreme Court again reiterated the above principles. It was held in that case that violation of the provisions of Foreign Exchange Regulation Act, 1973 attracted penalty and the proceedings under the Act are quasi-criminal in nature. It was further held that the initial burden to prove that confession was voluntary in nature would be on the Department. While dealing with Section 24 of the Evidence Act, the Court reiterated the following principles laid down in ***State (NCT of Delhi)***

> "Section 24 lays down the obvious rule that a confession m[ade] under any inducement or threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the Court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable be excluded from evidence. The expression 'appears' connotes that the Court need not go to the extent of holding that the threat etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than police officer."

In this backdrop, he pointed out that Section 9-D of the Act makes a complete departure from the aforesaid well-settled principles relating to cross-examination. It was an exception to the normal rule and in the circumstances enumerated in the provision the accused/noticee is deprived of its valuable right of cross-examination.

16. Mr. S.K. Bagaria, learned senior counsel appearing for the petitioners, was candid that the petitioners had no quarrel about sub-section (1) to Section 9-D which applies to the proceedings under the Act before a court of law. The objection was about the extension of this provision, by sub-section (2), upon the Central Excise Officers. Learned counsel also conceded that there can be circumstances in which departure can be made from the aforesaid important principle relating to cross-examination even with regard to proceedings before the Central Excise Officers. However, his objection was that wherever any such departure is to be made, the law, at the same

32 and 33 of the Indian Evidence Act, which also incorpora exceptions to the aforesaid general rule. For this reason, conferring of such a power upon the court was not questioned, as the learned senior counsel submitted that in proceedings before the court, the court would be guided by the provisions contained in Sections 32 and 33 of the Indian Evidence Act. Insofar as sub-section (2) of Section 9-D is concerned, the argument to the validity of such provision proceeds on the premise that Section 9-D(2) read with Section 9-D(1) confers uncontrolled, unguided, unfettered and sweeping powers/discretion upon any Central Excise officer conducting "any proceeding" under the Act to unilaterally decide, *inter alia*, about any of the following factors :-

(a) Whether the witness is dead.

(b) Whether he cannot be found.

(c) Whether he is incapable of giving evidence.

(d) Whether he is kept out of the way by the adverse party.

(e) Whether his presence cannot be obtained without an amount of delay or expense which the officer considers unreasonable.

17. His submission was that in Section 9-D there are no conditions or restrictions or guidelines for exercise of the powers and discretion conferred thereunder upon a Central Excise Officer. There are no guidelines at all to decide any of the five factors mentioned in the Section and a Central Excise Officer may take any view with regard to existence of any of the aforesaid five facts solely as per his own

blanket discretion without laying down any guidelines is itse violative of Article 14 of the Constitution of India. Sweep of powers conferred upon the Central Excise Officers under Section 9-D is so wide that it is capable of being misused in the absence of any guidelines regulating the exercise of the power. Reliance is being placed on the following judgments of the Supreme Court :-

(i) *Devi Das Gopal Krishnan & Ors.* v. *State of Punjab & Ors.,* AIR 1967 SC 1895

(ii) *State of Punjab & Anr.* v. *Khan Chand*, (1974) 1 SCC 549

(iii) *Dist. Registrar & Collector, Hyd. & Anr.* v. *Canara Bank,* (2005) 1 SCC 496

18. Learned counsel dilated the aforesaid arguments by pointing out that invocation of Section 9-D of the Act by a Central Excise Officer in any adjudication proceeding may result in huge financial and other liabilities upon the assessee and one of the bare minimum safeguards that ought to be there is giving of prior intimation and grant of an opportunity to the assessee to make its submissions on invocability of Section 9-D itself and thereby enabling the assessee to take appropriate steps, as may be possible, in the circumstances of the case. Thus, for instance, if it is a matter of unreasonable expense, assessee may satisfy the officer that keeping in view the demand involved, the expenses are not unreasonable or may offer to bear the expenses. If it is a matter of unreasonable delay, the assessee may

examination. The assessee may also try to contact the through his own resources and inform him about the time and place of cross-examination. In case the adjudicator is of the view that the witness is *"kept out of the way"* by the assessee, the assessee may clarify the relevant facts and assist and cooperate with the adjudicator in contacting the witness. Giving these examples as merely illustrative examples, the learned counsel submitted that there may be several such situations where prior intimation and grant of opportunity to the assessee may eliminate the very existence of the factors mentioned in Section 9-D. According to him, however, the drastic nature of the powers and discretion conferred under Section 9-D does not even provide for any intimation or opportunity to the assessee.

19. He also submitted that the provisions of the Act itself, while conferring discretion and powers on the adjudicating authority, have simultaneously provided an important safeguard by mandating to record reasons and to take prior approval of either the Central Board of Excise and Customs or the Chief Commissioner of Central Excise. Recording of such reasons and requirement of prior approval is quite a normal methodology to provide safeguard against arbitrary exercise of such powers and discretion by the officer concerned. Such provisions are there in Sections 11DDA, 13, 14A, 33A etc. As against this, Section 9-D does not even require the recording of reasons or

most arbitrary and sweeping nature of the powers and d conferred by Section 9-D upon the adjudicating officers.

20. Mr. Mohan Parasaran, learned Addl. Solicitor General who appeared on behalf of the respondents, argued that there were sufficient guidelines inherent in Section 9-D of the Act itself. Such a provision was not unique in the Central Excise Act, but existed in number of other enactments. He submitted that this provision was *pari materia* with Section 32 of the Indian Evidence Act. Relevancy of statement of relevant fact by a person who is dead or cannot be found etc. has been provided under Section 32 of the Evidence Act, as an exception to the rule of *'exclusion of hearsay evidence'* under certain circumstances. Under these provisions, even a statement made before a police officer, under certain circumstances, which otherwise is not admissible in evidence, can be treated as relevant without examination of the witness. On the contrary, the statements recorded under Section 14 of the Act, referred to under Section 9-D are *ex facie* admissible in evidence as has been held by the Supreme Court in the case of ***Duncan Agro Industries*** (supra) and, therefore, such statements are not covered by the *principle of exclusion of hearsay evidence* and cross-examination of witnesses is not necessary in each and every case. Even then, in the interest of justice, cross-examination of witnesses, to the extent possible has been allowed by the adjudicating authority in the instant quasi-judicial proceedings

are primarily based on documentary evidences collecte during investigations and, therefore, are relevant also in terms of provisions under Section 32(2) of the Evidence Act. The facts stated therein do not necessarily require the test of cross-examination. The test of cross-examination, may in given circumstances, be superfluous, especially if the test is impossible of employment.

21. The learned ASG also referred to the earlier order passed by this Court *in extenso* and submitted that the petitioner was given proper opportunity to cross-examine the available witnesses even when provisions of Evidence Act apply only to judicial proceedings and have no strict application in quasi-judicial proceedings. He also submitted that no specific or sufficient grounds were to be fulfilled by the petitioners while challenging the provisions of Section 9-D of the Act. What exactly is the arbitrary or canalized power has not been spelled out. The only ground referred to by the petitioners was that this provision was capable of being misutilised, which could not be a ground to strike down the statutory provision.

22. We have given our due consideration to the submissions made by both the learned counsel.

23. At the outset, we have to keep in mind that while dealing with the constitutional validity of a provision, one cannot take into consideration the apprehensions expressed by the petitioners

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would be totally different from the valid exercise of conferred upon the authority under such a provision. If powers are not exercised properly and in a legal manner in a particular case, then that particular act of the quasi-judicial authority can be set at naught. This would not be a ground for declaring a provision of the Act itself as unconstitutional.

24. We may also point out at this stage itself that the power of the Parliament to make such a provision is not in question. It is also conceded by the learned senior counsel appearing for the petitioners in this case that such a provision could be incorporated in the statute, which is *pari materia* of Section 32 of the Evidence Act viz., to rely upon statements of certain persons even when they have not been produced for cross-examination, under the given circumstances. Thus, though it cannot be denied that the right of cross-examination in any quasi-judicial proceeding is a valuable right given to the accused/noticee, as these proceedings may have adverse consequences to the accused, at the same time under certain circumstances, this right of cross-examination can be taken away. Of course, the circumstances have to be exceptional.

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

(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.

26. Interestingly, the learned senior counsel for the petitioners did not join the issue that the aforesaid circumstances are not exceptional circumstances. They are the circumstances which naturally would be beyond the control of the parties and it would not be possible to produce such a person for cross-examination who had made a statement on earlier occasion. The provisions under Section 9-D of the Act are necessary to ensure that under certain circumstances, as enumerated therein, viz. if the witness has been won over by the adverse party or is avoiding appearance despite several opportunities being given. The rationale is that decision making in a case cannot be allowed to continue in perpetuity. These provisions are based on the *Doctrine of Necessity.* It provides for relevancy of statements recorded under Section 14 of the Act dispensing with or without the opportunity for testing the truth of such evidence by cross-examination. For, when a person is dead or incapable of giving evidence or cannot be found, no better evidence can be had in the circumstances than the statement tendered by witnesses before a quasi-judicial authority.

The safeguards which are enumerated in the provision under

for an exception to the rule of exclusion of hearsay evidenc proving for relevancy of even direct oral evidence of the fact under enquiry, which otherwise is not admissible, to ensure that there is no miscarriage of justice. Similarly, provisions under Section 9-D provide for relevancy of statements recorded under Section 14 of the Act, under certain circumstances, in criminal as well as quasi judicial proceedings, to meet the ends of justice.

27. We, thus, are intent to agree with the submission of the learned Addl. Solicitor General that if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, viz. relevancy of statement of fact by person who is dead or cannot be found under certain circumstances, passed with the same purpose and for the same object, the safe and well known rule of construction is to assume that the legislature, when using well-known words upon which there have been well known decisions, use those words in the sense which the decisions have attached to them. The provisions under Section 32 of the Evidence Act have not been found to be *ultra vires* of the Constitution. Therefore, the provisions under Section 9-D of the Act, which are *pari materia* with the provisions under Section 32 of the Evidence Act, cannot be held as *ultra vires* of the Constitution.

28. The moot question that arises at this stage is as to whether the

arbitrary if it is established that the provision gives uncanal uncontrolled power to the quasi judicial authorities.

But, we are of the opinion that it is not so. The safeguards are inherent in the provision itself. In the first instance, only those statements of such persons, which are made and signed before the Central Excise Officer of a gazetted rank, are treated as admissible. Thus, protection is taken to treat the statements relevant only if they are made before an officer enjoying a higher rank/status. *Secondly*, (and that has already been taken note of) such statements are made relevant only under certain specified circumstances, and these are the ones which are beyond anybody's control. *Thirdly* (and this is most important), the quasi-judicial authority can rely upon the statement of such a person only when the stated ground is proved. For example, in those cases where the person who made the statement is dead, there should be sufficient proof that he is dead. In case, where a person cannot be found, the authority would have to form an opinion, based on some material on record, that such a person cannot be found. It would not be mere *ipse dixit* of the officer. In case, cogent material is not there to arrive at such a finding, the persons against whom the statement of such a person is relied upon can always challenge the opinion of the authority by preferring appeal to the higher authority, which appeal is statutorily available. Same yardsticks would apply to other grounds. If the quasi judicial

material on record, which could be in the form of mental or disability of such a person.

29. Thus, when we examine the provision as to whether this provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi-judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for forming the opinion. Only then, it would be possible for the affected party to challenge such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted.

opportunity and passing reasoned order are the conditions i exercise of power by any quasi judicial authority and, therefore, it is not necessary that these conditions should be specifically mentioned in the provision. The very fact that before power under Section 9-D(2) of the Act could be exercised, the authority has to satisfy itself about the existence of any of the conditions stipulated therein, which provides clear and sufficient guidance to such quasi judicial authority to exercise its power under the section. We may also state that such arguments have been repelled by the Supreme Court on number of occasions. {See – ***Harishankar Bagla*** v. ***State of Madhya Pradesh***, AIR 1954 SC 465; and ***Bhatnagars & Co. Ltd.*** v. ***Union of India***, AIR 1957 SC 478}.

31. Interestingly, even in the present case, the attempt of learned senior counsel appearing for the petitioners was to show that the respondent No.1 ought to have given prior intimation and granted an opportunity to the assessee to make its submissions on invocability of Section 9-D itself and thereby enabling the assessee to take appropriate steps, as may be possible, in the circumstances of the case. He submitted that if a particular witness was not allowed to be cross-examined by stating that it was not possible to procure his presence without delay or expense, had the opportunity been given to the petitioners to meet the expenses, the petitioners would have borne the expenses and could have procured the presence of

adverse party, i.e. the petitioner, who kept a particular perso the way, the petitioner should have been confronted with that so as to enable him to contact the witness through his own resources and inform him about the time and place of the cross-examination, or else, to enable the petitioners to clarify the relevant facts and assist and cooperate with the adjudicator in contacting the witness. These examples, at the most, would indicate as to how the powers are to be exercised by the adjudicating authority. That would not make the provision arbitrary. As stated in the beginning, validity of the provision is totally different from exercise of powers by an authority invoking those provisions. We may only refer, at this stage, to the judgment of the Supreme Court in the case of ***Mahesh Chandra*** v. ***Regional Manager, U.P. Financial Corporation,*** (1993) 2 SCC 279. In that case, the Supreme Court categorically observed that wherever vide power is conferred by statutes on public functionaries, the same is subject to inherent limitation that it must be exercised in just, fair and reasonable manner, *bona fide* and in good faith; otherwise, it would be arbitrary. In such cases, test of reasonableness is more strict. Following observations therefrom are worth quoting :-

> "15. Every wide power, the exercise of which has far reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on

and in good faith merely because no personal gain or ber to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason."

32. Thus, we summarize our conclusions as under :-

(i) We are of the opinion that the provisions of Section 9-D (2) of the Act are not unconstitutional or *ultra vires*;

(ii) while invoking Section 9-D of the Act, the concerned authority is to form an opinion on the basis of material on record that a particular ground, as stipulated in the said Section, exists and is established;

(iii) such an opinion has to be supported with reasons;

(iv) before arriving at this opinion, the authority would give opportunity to the affected party to make submissions on the available material on the basis of which the authority intends to arrive at the said opinion; and

(v) it is always open to the affected party to challenge the invocation of provisions of Section 9-D of the Act in a particular case by filing statutory appeal, which provides for judicial review.

33. Thus, insofar as the *vires* of the provision are concerned, we find no merit in these writ petitions and dismiss the same.

No costs.

(A.K. SIKR
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August , 2009
nsk

2009:DHC:3538-DB

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP (C) No. 1895/1992

% *Reserved on : July 20, 2009*
Pronounced on : August 28, 2009

M/s. GTC Industries Ltd. . . . Petitioner
through : Mr. S.K. Bagaria, Sr. Adv. with Ms. Rohina Nath, Ms. Nisha Baghchi, Ms. Priyadeep Mr. S.K. Mongia and Ms. Suchi Kakkar, Advocates

VERSUS

Collector of Central Excise & Ors. . . . Respondents
through : Mr. Mohan Parasaran, ASG with Mr. Rajesh Katyal, Advocates and Mr. Satyavir Singh (SIO).

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see WP (C) No. 1854/1992.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August 28, 2009
nsk