IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76184 of 2024

(Arising out of Order-in-Original No. 60/ADC(P)/CUS/WB/18-19 dated 17.12.2018 passed by Commissioner of Customs (Prev.) Kolkata.)

M/s. Bapi Das,
(Paschim Hridaypur, Nabadal Road, P.O.- Hridaypur, P.S.- Barasat, Kolkata-700127)

...Appellant

VERSUS

Commissioner of Customs (Prev.), Kolkata,
(Customs House, 15/1, Grand Strand Road, Kolkata-700001)

.. ...**Respondent**

APPERANCE :
Shri Shovendu Banerjee, Advocate for the Appellant
Shri Tariq Suleman, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)

Final Order No...75851/2026

DATE OF HEARING : 01.07.2026

DATE OF PRONOUNCEMENT: 06.07.2026

PER R. Muralidhar :

The issue pertains to seizure of 40 pieces of gold from one Kartik Sen who was arrested on 13.01.2018 by the officers of DRI. The officers of DRI recorded his statements on 13.01.2018 and 14.01.2018. He allegedly stated that one Shri Susil Bauli introduced the appellant to Shri Sen and on instruction of the appellant he used to collect gold from Ranaghat from one person named Bharat Biswas. After recording some more statements, Adjudication process was taken up, which resulted in confiscation of the seized gold and penalties were imposed on various noticees including the present appellant. No one has laid claim to the confiscated gold and no other noticee is in appeal except for the present appellant, who is agitated by the penalty of Rs.30,00,000 imposed on him. His appeal before the Commissioner (Appeals) came to be dismissed. Being aggrieved, the appellant is before the Tribunal.

2. The Learned Counsel appearing for the appellant makes the following submissions:

3. The statements of Kartik Sen, who was in possession of the gold pieces, was recorded on 13.01.2018 and 14.01.2018, who has stated that the present appellant, Bapi Das was introduced by one Balui and after that Kartik Sen started carrying the smuggled gold and such activities have been undertaken on several occasions. [Copy enclosed in the Appeal paper book]

4. The statement of Shri Balui was recorded on 12.02.2018, wherein Shri Balui has stated that he never knew the appellant or that he has never introduced the appellant to Shri Sen. [Copy enclosed in the Appeal paper book]

5. The DRI issued summons to the appellant to appear before the authority on 7.07.2018. The appellant duly complied with the summons and appeared before the authority. [Copy enclosed in the Appeal paper book]

6. The appellant in his statement dated 07.07.2018 has stated that he knew Kartik Sen since about 12 years and he has introduced him to Bharat Biswas and has confessed that upon his instructions the smuggling goods carrying was being done by Kartik Sen. [Copy enclosed in the Appeal paper book]

7. The appellant who was arrested and was produced before the Chief Metropolitan Magistrate, has retracted the statement given under coercion on 07.07.2018. [Copy enclosed in the Appeal paper book]

8. No statement was recorded from Bharat Biswas, who was supposedly involved in the alleged smuggling activities and was said to be introduced to Kartik Sen by the appellant.

9. In the recorded statement dated 07.07.2018, the appellant also named two other persons, Asit Roy and Shyam Sarkar apart from Bharat Biswas as suppliers of the smuggled gold. No statements were recorded from these persons.

10. Based on the statements of Kartik Sen , the Appellant and Bauli without any other corroborative evidence the proceedings were initiated in which appellant has been imposed with a penalty of Rs.30,00,000.

11. The Appellant submits that findings contained in the order against the appellant are based on assumption and presumption and on the basis of uncorroborated statement of co-accused. Without any evidence, the involvement of the Appellant has been inferred solely on the basis of the statement of the co-accused, which cannot be relied upon in the absence of independent corroborative evidence. There is no evidence that the Appellant offered the work of carrying smuggled gold to Shri Kartik Sen.

12. The alleged admission of Shri Kartik Sen is of no consequence in this case in the absence of any corroborative evidence. There is no scope for inferring that the Appellant was actively involved in smuggling of gold at any point of time. Therefore, the finding in the Order-in-Original against the Appellant is erroneous and without any evidence. Since the findings are based only on the statement of the co-accused, without any independent, corroborative evidence, the Order passed by the Adjudicating Authority imposing penalty on the Appellant and upheld by the appellate authority solely on the basis of the statement of the co-accused cannot be sustainable in law.

12. The appellant relies upon the following decisions:-

i) **Mohtesham Mohd. Ismail Vs. Special Director, Enforcement Directorate- 2007(220)ELT 3 (SC).**

That a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the

Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. A confession purported to have been made before an authority would require a closure scrutiny. It is therefore, now well settled that the Court must seek corroboration of the purported confession from independent sources.

ii) **Prakash Kumar Vs. State of Gujarat- (2007) 4 SCC 266 .**

The confession of co-accused by itself is not sufficient to hold the other accused guilty. It has been held repeatedly by this Court that the confession of a co-accused is a fragile and feeble type of evidence and it could only be used to support the other evidences, if any, adduced by the prosecution.

iii) **Assistant Collector of Customs Vs. Amrik Singh 2014 (301) ELT 170 (P&H) .**

The question arises whether the admission of co-accused under Section 108 of the Customs Act can be basis of conviction of other caucused. The Ld. Trial Court has rightly held that statement of caucused under Section 108 of the act against the co-accused with a weak type of evidence and conviction of co-accused cannot be based on the uncorroborated statement of co-accused.

iv) **Anisur Rahaman Vs. Commissioner of Customs (Prev.) West Bengal 2003 (160) ELT 816 (Tri-Kolkata).**

Non-appearance before DRI Officer in response to summons is not a ground for holding that the appellant is guilty. The entire case is based upon the statement of the Driver which is in the nature of uncorroborated statement of a co-accused and cannot be made the sole-basis for penalizing the appellant.

v) **Jahed Mondal Vs. Commissioner of Customs (Prev.), West Bengal 2002 (149) ELT 319 (Tri.-Kol.) Para 8 & 11.).**

Penalty has been imposed upon Shri Jahed Mondal based upon the statement of Bablu Biswas who was intercepted by the Customs Officer from whose possession one gold biscuit has been recovered. Penalty cannot be imposed on the basis of confession of co-accused unless corroborated by other evidences. Non-appearance in response to Summons cannot be a factor or criteria in determining the guilty conduct of the appellant.

vi) **Narayan Das Vs. Commissioner of Customs, Patna- 2004 (178) ELT 554 (Tri.-Kolkata) Para-6.**

Mere inculpatory statement of the co-acused about the purchase of gold from the appellant cannot be the basis of imposing penalty under Section 112(b) of the Customs Act, 1962 in the absence of any other corroborative evidence.

13. In the case of **Flemingo DFS Pvt. Ltd., Vs. Commissioner of Customs, Visakhapatnam reported in 2018 (363) ELT 450 (Tri-Hyderabad)**, it has been held that if Revenue chooses not to examine any person in the adjudication proceedings, it amounts to giving up that witness and such statement cannot be considered relevant. Since the co-accused person whose statement has been relied upon in this case was not examined in adjudication proceedings, his statement could not have been considered relevant against the Appellant.

14. The appellant submits that Adjudicating Authority should have first examined the person whose statements have been relied upon to form an opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence. This was mandatory. The statement of any person cannot be relied upon directly as has been held

by the Hon.ble High Court in the case of **G-Tech Industries – Vs. Union of India- 2016 (339) ELT 209 (P&H)**. In the said decision the rationale behind the mandate contained in Section 9D of the Central Excise Act, 138B of the Customs Act, 1962 has been extensively discussed and prescribed.

15. The appellant submits that the Adjudicating Authority, therefore, should follow the procedure to rely on the statement as relevant for proving the truth of the contents of the statement, to admit the statement in evidence. In this case, the said mandate has not been followed and hence the statement of the co-accused in this case cannot be said to be voluntary and his statement also cannot be said to be true and correct and shall not be taken as evidence.

16. The connection between the Appellant and Shri Kartik Sen was a phone number. Mr. Sen was told to call the Appellant in the phone number 8972746145. On verification, the phone number was found to be registered in the name of Miss Bali Bor. So, on the basis of these evidences alone it cannot be concluded that Mr. Sen was carrying the gold for the Appellant.

17. Further Shri Sen, in his statement alleged that he used to collect gold from Ranaghat to Kolkata from one person named Bharat Biswas having number 87680778863 as directed by the appellant. Later on the basis of investigation it was found that the said number belongs to one

Nikhil Biswas. The said person in the name of Bharat Biswas was never found by the department. This inference is not supported by any evidence.

18. The appellant respectfully submits that the impugned order is liable to be set aside for the additional reason that the authorities below have placed substantial reliance upon the statement of the appellant recorded under Section 108 of the Customs Act, 1962, completely overlooking the undisputed fact that the said statement was retracted by the appellant at the very first available opportunity. The appellant had specifically brought the fact of such retraction to the notice of the adjudicating authority as well as the Commissioner (Appeals), yet both authorities have proceeded as though the statement was voluntary and truthful, without recording any finding on the validity or effect of the retraction.

19. The Hon'ble Supreme Court in **Commissioner of Customs (Imports), Mumbai v. Ganpati Overseas**, reported in **2023 (386) E.L.T. 802 (S.C.)**, has affirmed the view of the Tribunal that statements recorded under Section 108, having been retracted at the earliest available opportunity, could not be relied upon in the absence of independent corroborative evidence. The Hon'ble Supreme Court categorically held that while statements under Section 108 are admissible, a statement recorded under coercion or duress cannot be used against the maker thereof. The Court further approved the

Tribunal's approach in refusing to place reliance on the retracted confessional statements where no corroborative material was forthcoming.

20. Significantly, the investigation has not yielded any incriminating material from the appellant. No smuggled gold was recovered from his possession or premises. No document, ledger, diary, transport record, bank transaction, cash trail or any other material connecting the appellant with the alleged smuggling has been brought on record. Even the alleged Call Detail Records merely indicate exchange of calls between certain mobile numbers and do not establish either the identity of the persons speaking or the contents and purpose of the conversation. Thus, there is not a single independent circumstance corroborating the alleged retracted statement.

21. In view of the above it is humbly prayed to set aside the penalty imposed on the appellant.

22. The Ld A R appearing for the Revenue submits it is on record that the carrier of the gold Kartik Sen has clearly stated that it was the appellant Bapi Das, who has introduced him to the suppliers of the smuggled gold and made him carry the same on regular payment being made on trip-wise basis. It is also on record that the phone call details between the appellant, Kartik Sen and Biswas establishes that all the three were in regular touch for carrying out the transactions. The Ld AR

relies on the detailed findings of the lower authorities and justifies the penalty imposed on the appellant.

23. Heard both the sides and perused the appeal papers and documents produced before me.

24. Admittedly, Kartik Sen, who is the carrier of 40 pcs of gold was intercepted and the gold was recovered from his possession. After due process, the gold in question valued at Rs.1,50,00,000 has been confiscated absolutely and there is no claimant towards the ownership of the same. From the records it is seen the other noticees have not even filed any appeal before the Commissioner (Appeals). Hence, even their appeals are not before the Tribunal. Thus the only appeal is that of the present appellant, who has been imposed with a penalty of Rs.30,00,000.

25. On going through the case records, I find that the entire case against the appellant hinges on the following three recorded statements:

(a) Kartik Sen – 13.01.2018 / 14.01.2018

(b) Sushil Bawlay – 05.02.2018

(c) Bapi Das – 07.07.2018

26. The relevant portions of these statements are reproduced below:

54

Statement of Shri Kartick Sen son of Late Subodh Sen aged about 47 years presently residing at Guma, Netajinagar, behind Guma 2 No. BDO Office, P.O. Guma, P.S.- Ashoknagar, North 24 Parganas, PIN-743704, in response to the summons issued under section 108 of Customs Act, 1962 on 13-01-2018

I, Kartick Sen son of Late Subodh Sen aged about 47 years presently residing at Guma, Netajinagar, behind Guma 2 No. BDO Office, P.O. Guma, P.S. - Ashoknagar, North 24 Parganas, PIN-743704 having mobile no. 8372006573 do hereby record my statement in reply to the summons issued to me under section 108 of the Customs Act, 1962. I have been explained that giving false and/or incorrect statement is punishable under law and my statement can be used against me or anybody else.

I live in the above address with my family, my elder brother Mukul Sen and his family and my wife Smt Sudha Sen.

I worked as a helper in painting jobs in different houses and used to earn about Rs 6000/- per month. I got married in March 2017 and as I could not manage with this small income, I was looking for some more income. I used to work under one labour contractor Shri Sushil Bauli who stays in my vicinity. As I was in need of money, Shri Sushil Bauli introduced me with one Bapi Das of Hridaypur who proposed me to carry smuggled gold from Ranaghat to Kolkata and for that I would be getting Rs 1000/- per trip. As I was in need of money, I agreed to the proposal. Shri Bapi Das gave me his phone number as 8972746145. I used to collect the gold from Ranaghat from one person named Bharat Biswas (phone number 8768078863) as directed by Bapi Das. I used to collect the gold biscuits from the two storied house of Shri Bharat Biswas which is beside Ranaghat Post Office near the Ranaghat Railway Station. Therefrom, as instructed, I used to take a bus to Chakdaha and therefrom I used to board a train and get off the train in Bidhannagar. Therefrom as directed by Bapi Das again, I used to take a local bus to deliver the gold at some place on VIP road at Lake town or Bangur crossing. One private vehicle used to come and as arranged over phone, I used to board the vehicle. The vehicle goes inside a nearby lane and after handing over the gold biscuits I used to leave the vehicle. I do not know the name of the receiving person but his phone number is 8514058846. The person is fair, lean and almost 5'8" in height.

To a specific question, I am to state that Shri Bharat Biswas is stoutly built, around 5'7" and light black complexion.

I started this job since last one month and in total I ferried the smuggled gold six times, 160 pieces weighing about 19 kg. Yesterday on 12.1.2018 and day before yesterday i.e on 11.01.2018, I ferried a total quantity of 60

Kartick Sen
13/1/18

27. In this statement, Kartik Sen states that he was introduced to the appellant by one Sushi Bauli, a labour contractor. After he met the appellant Bapi Das, that person offered him Rs.1000 for carrying the smuggled gold. He was also introduced the Bharat Biswas, from whom the gold was being collected.

166

Statement of Shri Sushil Bawaly son of Late Gurubar Bawaly aged about 48 years presently residing at Guma, Netajinagar, behind Guma 2 No. BDO Office, P.O. Guma, P.S.- Ashoknagar, North 24 Parganas, PIN-743704, in response to the summons issued under section 108 of Customs Act, 1962 on 05.02.2018

I, Sushil Bawaly son of Late Gurubar Bawaly aged about 48 years presently residing at Guma, Netajinagar, behind Guma 2 No. BDO Office, P.O. Guma, P.S.- Ashoknagar, North 24 Parganas, PIN-743704. I have been explained the provisions of Section 108 of Customs Act, 1962 and I understand that giving false or fabricated statement is punishable under law. I also understand that this statement of mine can be used as an evidence against me, any person, my firm/company, any other firm/company in any Court of law in India. I also understand that this inquiry shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of Indian Penal Code, 1860.

On being asked I state that we are five brothers and three sisters, sisters are married. Elder brother expired some 8-9 years ago. All the brothers live separately. I live with my wife and two children. I am graduate in Arts. I submit a copy of my Adhaar Card bearing No. 4275 7125 4058. I work as daily labour. I have knowledge of interior decoration, i.e., painting, plaster of paris etc., I used to earn Apprx., Rs 10,000/- per month.

On being asked I state that I know Shri Kartick Sen for the last 20 years. He resides near our house. So far my knowledge goes he used to work in a company at Kolkata, the details is not known to me. However Shri Kartick Sen worked with me as labour under one Shri Pratul Biswas whose phone number is 9143687381 some few months back. Both of us worked under Shri Pratul Biswas. My phone number is 9735790992. I do not have any other number. I am using this phone for the last 8-9 years.

On being asked I state that I do not know any person named Bapi Das of Hridaypur. I have never introduced Shri Kartick Sen with Shri Bapi Das. I do not know any person named Shri Bharat Biswas of Ranaghat. I never heard his name.

Sushil Bawaly 12.2.18

I have seen the relevant portion of statement of Shri Kartick Sen recorded under Section 108 of Customs Act, 1962, shown to me by DRI Kolkata, where he has stated that I introduced him with one Shri Bapi Das of Hridaypur. I strongly deny his statement. I never introduced Shri Kartick Sen with Shri Bapi Das. I do not know any Bapi Das.

On being further asked I state that I do not know where is Shri Kartick Sen now. I only know that he is not there at his residence.

The above statement has been given without being under any threat, pressure or duress. The statement has been given to the best of my knowledge and belief.

Before me

DIRECTORATE OF REVENUE INTELLIGENCE KOLKATA

28. In the above statement, Sushil Bauli, who was said to have introduced Kartik Sen to the appellant Bappi Das, has clearly denied his role in the alleged introduction. He has also stated that he does not know either Bapi Das or Bharat Biswas.

29. Thus the statement of Kartik Sen and that of Sushil Bauli are giving two different versions about the relationship between the appellant and Kartik Sen.

49

I, Bapi Das, S/o Late Netai Pada Das, aged about 44 Years, presently residing at Nabadal Road, Near Puja Mandir, Paschim Hridaypur, P.O- Hridaypur, P.S- Barasat, Kolkata 700127 having contact Nos. 8336008270, 8327431154 and 8167719678 do hereby record my statement in response to the summon issued to me under section 108 of the Custom Act, 1962 on 7.7.2018.

I Bapi Das, S/o Late Netai Pada Das, aged about 44 Years, presently residing at Nabadal Road, Near Puja Mandir, Paschim Hridaypur, P.O- Hridaypur, P.S- Barasat, Kolkata 700127 giving the following statement voluntarily against Summons under Section 108 of Customs Act, 1962 before the Senior Intelligence Officer. I have been explained the provisions of Section 108 of Customs Act, 1962 and I understand that giving false or fabricated statement is punishable under law. I also understand that this statement of mine can be used as an evidence against me, any person, my firm/company, any other firm/company in any Court of law in India. I also understand that this inquiry shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of Indian Penal Code, 1860.

The statement is recorded in the desktop computer found in the office request.

Ques1. Please introduce yourself.

Ans: I am a businessman by profession. I have a grocery shop at Hridaypur Bazaar. I am also engaged in export business only. I do not remember the IEC number right now. I live with my wife, son and daughter. We are three brothers and three sisters. My elder brother name is Shri Chaitanya Das who has a rice shop at Hridaypur and the other brother name is Shri Gobindo Das, he is also into business. I do not have any relation with them. I want to add that I have two rooms bearing Nos. 505 and 509 at 32 Nalini Seth Road, Kolkata 700007. Though my name features in shop No. 305 at the said address but it is controlled by my brother Shri Gobindo Das. My yearly income is about 18-20 lakh yearly.

Ques 2: Why the shop was taken at 505 and 509 and when it were taken on rent.

Ans. The shop 505 was taken some four years back and 509 was taken nearly 18 months back. I took the shop to do business. I took the shop to enhance my export business which is in the name of D.D Enterprise I used to export rice.

Ques 3: Do you have any other profession, if so please specify.

Ans. Initially when I was working with my brother Shri Gobindo Das at Room No 305, he used to send me to different shops and places to collect money which was basically

9/9/18

before me
7/7/18
...TEKAR
Senior Intelligence Officer
Directorate of Revenue Intelligence
Kolkata Zonal Unit, Kolkata

DIRECTORATE OF REVENUE INTELLIGENCE * KOLKATA *

50

sale proceeds of smuggled gold. I have altercation with my brother some 4 to 5 years back and I refuse working with him. After taking the shop in my name as mentioned above, people whom I knew earlier came to me and offered me to do the job of gold smuggling on the basis of commission. I agreed to their proposal and I used to get Rs 1500 to 2000 per biscuit as commission. I do not have the names and addresses of the persons who used to give delivery of the gold in my shop and I also do not have the name and address of the persons who used to take delivery of gold from me or as per my instruction. The gold was seldom delivered in my shop it is basically delivered in the market place.

Ques 4. How do you know Shri Kartick Sen of Guma Ashoknagar.

Ans. I know him since long as he used to work in our shop some 12 years ago. he worked for me for nearly one year at that time .

Ques 5. Are you aware that he has been arrested for smuggling of gold.

Ans. Yes I am aware.

Ques 6. How long you are using the mobile phone number 8972746145.

Ans. I have used the number 8972746145 some six months ago for few months but I do not remember exactly how long I used it.

Ques 7. How long do you know Shri Bharat Biswas of Barberia, North 24 Pargans.

Ans. Shri Bharat Biswas of Ranaghat Barberia came to my shop No. 505 some two years ago and offered me the job of gold smuggled from Bangladesh. I do not know the exact address of Shri Bharat Biswas, though I went to a house which took about 15 minutes by motor cycle, I am not sure whether the house belongs to Shri Bharat Biswas.

Ques 8. When did you met/ or talked with Shri Kartick Sen last.

Ans. I do not remember exactly but we are in touch. I met him at Madhyamgram station one month ago.

Ques 9. Why did you introduced Shri Kartick Sen with Shri Bharat Biswas.

Ans. I introduced Shri Kartick Sen with Shri Bharat Biswas for the purpose of carrying gold smuggled from Bangladesh.

Ques 10. Shri Kartick Sen in his statement recorded under section 108 of Customs Act, 1962 on 13.1.2018 stated that you introduced him with Shri Bharat Biswas and as per Shri Bharat Biswas and your instruction he carried smuggled gold which was seized on

2

9/9/18

before me

30. In this statement recorded on 07.07.2018, the appellant has stated that he knows Kartik Sen for about 12 years and that he has used him for the smuggling activities and has also mentioned the roles of Bharat Biswas and Asit Roy and Shyam Sarkar. This is confessional statement implicating the appellant in the alleged smuggling activities.

31. Now it would be important to go through the retraction statement of the appellant made before the Magistrate, which is reproduced below:

24

In the Court of the Ld. Chief Metropolitan Magistrate
Court Calcutta

Customs
Case No: Misc -05/2018

D.R.I. Kolkata

RETRACTATION PETITION

-vs-

Bapi Das alias Chotobabu @ Bapida
-Accused

The humble petition on behalf of the
accused person above named.

Most Respectfully Sheweth:-

i) That the above named accused person was arrested of the above noted case record.

ii) That the DRI Kolkata using force upon the above named accused person to make the statements. The above named accused person make statements due to under torture of the DRI Kolkata. The above named accused person denied all the statement which he gave to DRI Kolkata.

iii) That the above named accused person denied all the statements which he had made DRI Kolkata on 07/07/2018 and 08/07/2018.

Hence it is prayed that your Honor would be pleased to consider the above fact and circumstance and allow other pass such order / orders as your Honor may deem fit and proper for the ends of Justice.

-बापी दास,
Sig. of Bapi Das

Attested
Lock up incharge
... Court (S)
08/07/18

COMPARED AND FOUND CORRECT
10/7/18
Comparing Asst.

And for this act of kindness your petitioner as in duty bound shall ever pray.

CERTIFIED TO BE A TRUE COPY
Manoj ... 10/7/18
Head Comparing Clerk
Office of the Chief Metropolitan Magistrate
CALCUTTA
Authorised U/S 76 Act I (Evidence Act) of 1872

32. It can be seen that he has stated that he was forced the give the statement by the DRI officials on 07.07.2018 & 08.07.2018. He has denied all the statements made before the DRI officials.

33. From the above extract, it is observed that this retraction has taken place in the presence of the DRI officials, whose signatures are visible at the top right hand corner.

34. After this retraction, no further statement was recorded from the appellant.

35. A careful and harmonious reading of the above four crucial statements, makes me to conclude as under:

(a) With the statement of Sushil Bauli not corroborating the statement of Kartik Sen, the statement of Kartik Sen cannot be taken on the facial value as evidence.

(b) The Statement of Sushil Bauli in no way implicates the appellant.

(c) The statement of the appellant recorded on 07.07.2018 loses its evidentiary value by the fact that the same was retracted on the very next day before the Magistrate in the presence of the DRI officials.

36. Therefore, the Revenue could not have gone ahead with their proceedings with such flawed recorded statements, which would finally prove fatal to the Revenue's case.

37. Adding fuel to the fire situation is the fact of not subjecting even the three persons recording the statement to the procedure prescribed under Section 108 of the Customs Act. The High Courts and Tribunals time and again consistently have held that the persons recording the statements before the Gazetted officers of the Department, have to once reiterate the same before the Adjudicating authority to the effect that such statements were given by them without any force or coercion.

38. In the case of **G-Tech Industries Vs. Union of India-2016 (339) E.L.T. 209 (P&H)** has held as under:-

> ***3.*** *The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of 17,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.*
>
> ***4.*** *In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*

*"**9D. 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 opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.
(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5. *A plain reading of sub-section (1) of Section 9D of the Act 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.*

6. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.) = 2011 (22) S.T.R. 225 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

7. *There can, therefore, be 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 in adjudication proceedings as in criminal proceedings relating to prosecution.*

__8.__ As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified 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, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

__9.__ The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

__10.__ Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.

__11.__ Clause (a) of Section 9D(1) refers to the following circumstances :

(i) when the person who made the statement is dead,

(ii) when the person who made the statement cannot be found,

(iii) when the person who made the statement is incapable of giving evidence,

(iv) when the person who made the statement is kept out of the way by the adverse party, and

(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

__12.__ Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that *the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 21831/1994, dated 3-1-1995 [since reported in 1995 (75) E.L.T. A177 (S.C.)], wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.*

13. *If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(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 interests of justice.

14. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

15. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

16. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.*

17. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

18. *It is only, therefore,-*

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,
that the question of offering the witness to the assessee, for cross-examination, can arise.

19. *Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

20. *Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :*

> *"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."*

21. *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v. C.C., 2001 (137) E.L.T. 637 (T).*

22. *It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without following the* *mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.*

23. *The said Order-in-Original, dated 4-4-2016, passed by Respondent No. 2 is, therefore, clearly liable to be set aside.*

24. *In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No. 2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No. 2 for adjudication de novo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural justice in the following manner :-*

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be

> *open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).*
>
> ***25.*** *The writ petition is allowed in the aforesaid terms.*

39. This decision of the High Court places high importance towards fulfillment of the procedure prescribed under Section 9D of CEA 1944. The Section 108 of the Customs Act 1962 is *para materia* to Section 9D of CEA 1944. In the present proceedings, the records nowhere show that this procedure was not followed by the Revenue, before admitting the recorded statements as evidence.

40. In a recent judgement in the case of **Commissioner of Customs (Imports), Mumbai Vs Ganpati Overseas(2023) 11 Centax 101 (S.C.),** the Supreme Court has held as under:

> **28.** Thus, what is deducible from an analysis of the relevant legal provisions and the corresponding judicial pronouncements is that a customs officer is not a police officer. Further, the person summoned and who makes a statement under section 108 is not an accused. However, a statement made by a person under section 108 of the Customs Act before the concerned customs officer is admissible in evidence and can be used

against such a person. Object underlying Section 108 is to elicit the truth from the person who is being examined regarding the incident of customs infringement. Since the objective is to ascertain the truth, the customs officer must ensure the truthfulness of the statement so recorded. If the statement recorded is not correct, then, the very utility of recording such a statement would get lost. It is in this context that the customs officer who is empowered under section 108 to record statement etc. has the onerous responsibility to see to it that the statement is recorded in a fair and judicious manner providing for procedural safeguards to the concerned person to ensure that the statement so recorded, which is admissible in evidence, can meet the standard of basic judicial principles and natural justice. It is axiomatic that when a statement is admissible as a piece of evidence, the same has to conform to minimum judicial standards. Certainly a statement recorded under duress or coercion cannot be used against the person making the statement. It is for the adjudicating authority to find out whether there was any duress or coercion in the recording of such a statement since the adjudicating authority exercises quasi-judicial powers.

41. Admittedly, in the present case, the initial statement recorded by the appellant implicating himself in the allegation contravention, has been retracted before the Magistrate on the very next day. Therefore, as per the ratio of the above Supreme Court decision, the statement of the appellant given on 7.7.2018, could not have been used against him.

42. Coming to the reliance placed on the statement of the co-noticee, the Hon'ble Supreme Court in the case of **MOHTESHAM MOHD. ISMAIL Vs SPL. DIRECTOR, ENFORCEMENT DIRECTORATE 2007 (220) E.L.T. 3 (S.C.) [09-10-2007],** has held as under:

15. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well-settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. [See *Haricharan Kurmi etc*. v. *State of Bihar* - AIR 1964 SC 1184; *Haroom Haji Abdulla* v. *State of Maharashtra* - AIR 1968 SC 832; and *Prakash Kumar alias Prakash Bhutto etc.* v. *State of Gujarat* - (2007) 4 SCC 266].

16. We may, however, notice that recently in *Francis Stanly @ Stalin* v. *Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram* [2006 (13) SCALE 386], this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources.

17. In *The Assistant Collector of Central Excise, Rajamundry* v. *Duncan Agro Industries Ltd.* - JT 2000 (8) SC 530, this Court held :

> "...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 scrutinised 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."

43. In the above judgement , the Hon'ble Supreme Court has clearly held that:

(a) The retraction of the statement is required to be considered. The original statement can be relied on, only with proper corroborative evidence.

(b) The statement of co-accused cannot be taken as a substantive evidence.

(c) Any statement given before the Gazetted officer under Section 108, should pass the test of Section 24 of the Evidence Act.

44. The ratio laid down the case laws discussed above, is squarely applicable to the facts of the present case.

45. At the cost of repetition, it would be worth to recall that:

(a) The self-implicating statement of the appellant stands retracted. Hence, it has lost its credibility as evidence.

(b) The other two Statements do not corroborate each other.

(c) No corroborative evidence has been brought in by the Revenue to substantiate their case against the appellant.

(d) The procedure prescribed under Section 108 of the Customs Act 1962 has not been followed.

46. Therefore, following the ratio of the cited case laws, I set aside the penalty of Rs.30,00,000 against the appellant.

47. The appeal stands allowed. The appellant would be eligible for consequential relief, if any, as per law.

(Pronounced in the open court on…06.07.2026..)

Sd/-
(R. Muralidhar)
Member (Judicial)

Tushar Kr.