

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 11786 of 2017-DB

[Arising out of Order-in-Original/Appeal No MUN-CUSTOM-000-COM-01-17-18 dated 28.04.2017 passed by Commissioner of CUSTOMS-MUNDRA]

Arun Kumar

Superintendent (audit), A-312, Apna Nagar,
Gandhidham, KUTCH, GUJARAT

.... Appellant

VERSUS

Commissioner of Customs, Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat -370421

.... Respondent

APPEARANCE :

Shri D.K. Trivedi, Advocate for the Appellant

Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 11.03.2024

DATE OF DECISION: 06.06.2024

FINAL ORDER NO. 11158/2024

C.L. MAHAR :

Brief facts of the matter are that working on a specific intelligence the department has detained the export consignments of M/s. Dynamic International. As per the intelligence the declared export consignment of Ladies Fancy Scarves in seven containers contained waste clothes (rags) for which the exporter has filed shipping bills to avail benefit of duty drawback. The exporter namely M/s. Dynamic International, Surat had filed 36 shipping bills through Customs Broker M/s. DP Logistics for export of declared Ladies Fancy Scarves wherein the declared value of the export consignment was Rs. 19.60 Crores involving duty drawback of Rs. 1.85 Crores. The department examined the export consignment and on examination the

goods were found to be waste clothes "chindi" instead of declared Ladies Fancy Scarves. The goods were seized as per the provisions of Section 110(1) of the Customs Act, 1962, under the reasonable belief that the same has been mis-declared with intent to avail undue benefit of duty drawback. During the course of investigation, statements of various persons namely Shri Nitesh Gangwani, working as an executive of DP Logistics, statement of Shri Arun Kumar, Superintendent, Preventive (appellant), Shri Vishal Punjabi proprietor of M/s. Dynamic International, Shri Sumit Valecha etc. were recorded as per the provisions of Section 108 of Customs Act, 1962. After the investigation, show cause notice dated 12.02.2016 was issued to various persons including the appellant for omission and commission committed by them with regard to mis-declaration of export consignments with intent to avail undue benefit of duty drawback scheme. The matter got adjudicated vide impugned order-in-original dated 23.05.2017 whereunder a penalty of Rs. 25Lakh has been imposed on Shri Arun Kumar (appellant) under Section 114(iii) of Customs Act, 1962. The appellant is before us against the above mentioned impugned order-in-original.

2. Shri D.K. Trivedi, learned advocate appearing on behalf of the appellant submitted that appellant was working as Superintendent in the audit Section of Customs House, Mundra and he has no role either in assessment of export consignment or in clearance of export consignment and therefore, he has not committed any omission or commission in rendering the subject export consignment liable for confiscation and therefore it was wrong on the part of the Adjudicating Authority to impose penalty on him only on the basis of statements given by certain persons which were retracted before the matter was adjudicated.

2.1 Learned advocate has submitted that it was only on the basis of statement dated 20.08.2015 and 26.08.2015 of Shri Nitesh Gangwani (H-Card holder of M/s. DP Logistics), it has been alleged that appellant abetted in an attempt to export mis-declared export consignment for availing monetary benefit in the form of availing undue duty drawback benefit.

2.3 After the issue of impugned show cause notice, the department has also initiated disciplinary proceedings against the appellant in accordance with Rule 14 of CCS (CCA) Rules, 1965. It has been submitted that before the Inquiry Officer, Shri Nitesh Gangwani had remained present. He was allowed to be examined by the Presenting Officer and then Shri Nitesh Gangwani was further put to cross-examine by the Defense Assistant of the appellant. Learned advocate submitted that in the Examination-in-Chief as well as cross-examination Shri Nitesh Gangwani has specifically denied that the appellant was involved in the entire matter of exporting chindis in the guise of scarves and claiming drawback.

2.4 Learned advocate further submitted that apart from statement of Shri Nitesh Gangawani the other evidences which have been submitted by the department before the Adjudicating Authority was the call details of Shri Nitesh Gangwani and Shri Arun Kumar. It has been contended that the said whatsapp chats and messages would clearly show that there is nothing incriminating in these messages to indicate the involvement of the appellant with regard to misdeclaration of subject export consignment. The learned advocate has therefore, emphasized that no inference can be drawn from the said chat messages of mobile record of Shri Nitesh Gangwani and Shri Arun Kumar with regard to his involvement in the scandal of the misdeclaration of export consignment.

2.5 The entire case of the department is that M/s. Dynamic Industries in whose name the export shipping bills were filed by the person involved in misdeclaring the export consignment and M/s. Dynamic Industries was not real exporter and one Shri Vishal Punjabi was real mastermind behind the entire offence of misdeclaration of the export consignment. The investigation conducted revealed that Shri Vishal Punjabi, his brother, his nephew and his wife whose statements were recorded under Section 108 of Customs Act, 1962 none of these persons even knew the appellant.

2.6 Learned advocate contended that it was the case of the department that Vishal Punjabi wanted to export chindis by misdeclaring the same as fancy scarves and thus claiming undue duty drawback benefit. It has been alleged that Shri Vishal Punjabi contacted one Shri Sumit Valecha and Shri Sumit Valecha in turn asked Shri Arun Kumar (appellant herein) for appointment with Customs Broker who can get arrange clearance of the misdeclared cargo. It has been alleged that appellant has introduced Shri Sumit Valecha to Shri Nitesh Gangwani for undertaking clearance of the misdeclared cargo. The learned advocate has said that department has failed to adduce any evidence to suggest that appellant was aware about the misdeclaration of export consignment. The whatsapp chats and messages retrieved of the appellant and various other persons call records and the perusal of the same clearly indicates that appellant was nowhere involved in misdeclaration of the export consignment. It has further been submitted that statement of owner of Customs House agent M/s. DP Logistics was recorded during the course of investigation and the CHA has nowhere named the appellant and there is nothing in the statement of the owner of CHA firm which can lead to inference that appellant was involved in the said scandal or he had any knowledge of misdeclaration.

2.7 During the course of departmental enquiry, the Preventive Officer Shri Jyoti Prakash was also examined and then cross-examined before the enquiry officer. From the cross-examination it is clear that the allegation which has been made in the impugned show cause notice that Shri Nitesh Gangwani offered bribe amount at the instance of Shri Arun Kumar (Appellant) has been found completely incorrect and wrong. At the end, it has been submitted by the learned advocate that since the appellant was not aware and involve in abetment of offence of misdeclaration of the export consignment therefore, imposition of penalty of Rs. 25 Lakh under the provisions of Section 114(iii) of the Customs Act, 1962 is legally not sustainable and requested that same need to be set-aside as the career and livelihood of an officer is at stake. The learned advocate has submitted that entire case of the department against the appellant is based on various statements of accused persons recorded during the course of investigation. A request was made for cross-examination of these persons whose statements were recorded by the department as evidence however opportunity of cross-examination of these persons was not accorded by the Adjudicating Authority. The learned advocate submitted that the provisions of Section 138B of the Customs Act, 1962 has not been followed by the Adjudicating Authority and in these very facts, the findings given by him for imposition of penalty under Section 114(iii) of the Customs Act is not sustainable.

2.8 Learned advocate has relied upon various case laws which are as follows:-

(a) Vinod Solanki vs. Union of India 2009 (13) STR 337 (S.C.).

(b) Rajeev Kumar vs. Commissioner of Customs (Preventive), New Delhi 2022 (382) ELT 209 (Tri - Delhi).

(c) Birendar Kumar Singh vs. Commissioner of Customs, Lucknow 2006 (198) ELT 460 (Tri - Delhi).

(d) Mahabir Prasad vs. Commissioner of Customs (Preventive), INB, Patna 2000 (126) ELT 803 (Tribunal).

(e) Narayan Das vs. Commissioner of Customs, Patna 2004 (178) ELT 554 (Tri - Kolkata).

2.9 Learned advocate further submits that as far as the WhatsApp messages sought to be relied against the appellant, as already submitted above, there is absolutely nothing in the said WhatsApp messages which could lead to an inference that appellant was involved in the aforesaid scandal or that appellant even had knowledge about the same. Without prejudice to the same, it is submitted that even otherwise said WhatsApp messages cannot be relied in evidence against the herein for the purpose of imposing penalty on him u/s. 114(iii) (supra). It is so because the provision of Section 138C of the Customs Act is not complied. Said Section 138C of the Customs act, 1962 is *para-materia* to Section 65B of the Indian Evidence Act, 1872. In this case, neither is said section 138C (supra) followed, nor is Section 65B (supra) followed. As provided in explanation to section 138C (supra), "computer" means any device that receives, stores and processes data applying stipulated process to the information and supplying results of these processes. This means it includes a cell phone from which chat messages were made and received. Since it is so, in order to consider the chat messages as evidence, requirements of section 138C (2) are required to be complied. It requires that the WhatsApp messages must be produced by a cell phone during the period in which it was regularly used to store or process WhatsApp messages by the person having lawful control over the cell phone; the WhatsApp messages were regularly supplied to the said cell phone; the cell phone was operating properly during the entire period when it received and sent the WhatsApp messages: and the

WhatsApp messages are derived from the messages supplied to the cell phone in ordinary course of activity. As provided in Section 138C(4), if the WhatsApp messages are required to be used as evidence, a certificate certifying, identifying the WhatsApp messages and describing the manner in which it were produced; giving particulars of cell phone involved in production of the WhatsApp message to show that the WhatsApp message was produced by the cell phone, dealing with the matters of subsection (2), all the aforesaid conditions was required to be produced. However, as no such certificate is produced, even otherwise, the WhatsApp messages are not reliable as an evidence at all. Said submissions of the appellant find support from following judgments

(a) Commissioner of Customs, Lucknow vs. Sanjay Soni 2022 (381) ELT 509 (Tri-All.)

(b) Anvar P. V. vs. P. K. Basheer 2017 (352) ELT 416 (SC)

(c) J.P. Iscon Pvt. Limited vs. Commissioner of Central Excise, Ahmedabad - 2022 (63) GSTL 64 (Tri. Ahmd.)

(d) S.N. Agrotech vs. Commissioner of Customs, New Delhi - 2018 (3661) ELT 761 (Tri-Del).

3. We have also heard learned DR in details who has reiterated the findings given in the order-in-original.

4. Having heard both the sides, it transpires that one Shri Vishal Punjabi wanted to export 'Chindis' in the guise of scarves and claim duty draw back by misdeclaring the export consignment. With intention to earn undue duty draw back benefit, Shri Punjabi contacted to one Shri Sumit Valecha and enquired about the CHA (Customs House Agent) who can help them in completing the clearance formalities of export consignments. The case of

the department is that Shri Sumit Valecha on behalf of Shri Vishal Punjabi contacted Shri Arun Kumar (present appellant) and Shri Arun Kumar introduced Shri Sumit Valecha to Shri Nitesh Gangwani, H-card holder of a Customs Clearance Agent. From the entire proceedings, it transpires that CHA firm M/s. DP Logistics and its owner did not know the appellant. The appellant has never contacted the CHA M/s. DP Logistics and its owner. It was only Shri Nitesh Gangwani who worked with M/s. DP Logistics and the appellant was having some acquaintance and there are some references in whatsapp chats in these proceedings.

4.1 We take note of the fact that entire case against the appellant has been made on the basis of statements of various persons such as Shri Nitesh Gangwani, Shri Sumit Valecha, Shri Jyoti Prakash Preventive Officer etc. Second, evidence which has been adduced in the proceedings against the appellant is the Whatsapp messages exchanged with Shri Nitesh Gangwani. The Adjudicating Authority has imposed penalty of Rs. 25 Lakh under Section 114(iii) of the Customs Act, 1962 for his omission and commission as stated in the impugned show cause notice and order-in-original. The learned Adjudicating Authority while examining the role of the appellant has inter-alia mentioned as follows:-

“19.3 As already discussed hereinabove, Shri Arunkumar, Superintendent who was posted at Mundra Port came into picture on account of his old contacts having with Shri Sumit Valecha. Shri Arunkumar knew Sumit Valecha for the last 7 to 8 years. Shri Arunkumar had a meeting with Shri Valecha. In the said meeting Shri Arunkumar suggested the name of Shri Nitesh Gangwani for handling the work of Custom Broker who is known to him for 8 years. Shri Arunkumar also shared mobile number of Shri Nitesh Gangwani to Sumit Valecha for his contact. As per the statement of Shri Nitesh Gangwani dated 20.08.2015 Shri Arunkumar insisted upon him to file the Shipping Bills from Service Centre, Mundra only through Mis D.P. Logistics as against their routine practice of filing Shipping Bills from Ahmedabad office. Also as already discussed above Shri Arunkumar was in constant touch with Shri Sumit Valecha for collection of information for preparation of export documents by Nitesh Gangwani. As per the said whatsapp conversation Shri Arunkumar was receiving feedbacks from Shri Sumit Valecha ESTE Bout the dispatch and arrival of containers at Mundra Port from time to time. Shri Arunkumar also, as per the statement of Shri Nitesh Kumar dated 20.08.2015, advised him to change and declare price of goods at Rs. 240/- per piece against

proposed rates as 5.76 USD given by Shri Vishal Punjabi. A day before panchnama realizing that the conspiracy was going to be exposed Shri Nitesh Gangwani, had a telephonic talk with Shri Arunkumar and also met him at KPT, Colony, Gandhidham at 9.30 p.m. on 19.08.2015. In the said meeting Shri Arunkumar offered rupees one lakh per container to Nitesh Kumar and asked him to contact the In-charge Preventive Officer of Customs, posted at EXIM Yard (CFS) and asked him to also offer rupees one lakh per container to the officer posted there. Accordingly Shri Nitesh Kumar approached Shri Jyoti Prakash, In-charge Preventive Officer. The said officer in his statement dated 09.02.2016, stated that he had refused such offer and taken up the matter to Dy. Commissioner (Dock Examination), Customs, Mundra and, thereby, the conspiracy was completely got exposed.”

We find that appellant at the relevant time was neither posted for assessment of export consignments nor he was responsible for physical examination of the export consignment. He was posted primarily for post clearance audit work which in turn has nothing to do with the day to day clearances of export consignments i.e. to say that he could not directly involve himself in helping the clearance of misdeclared export consignments or for facilitating in misdeclaring the export consignment.

4.2 The learned Adjudicating Authority after examining statements of various persons involved in misdeclaration of subject consignment reached to the conclusion that appellant was part of conspiracy in misdeclaring the export consignment for undue duty drawback benefits. We take note of the fact that what transpires is Shri Vishal Punjabi is the master mind behind the entire attempt for export of misdeclared export consignment and the statements of Shri Vishal Punjabi and his brother clearly mentioned that they did not know the appellant. In these circumstances, we primarily believe that the appellant could not have been part of conspiracy of export of misdeclared export consignment.

4.3 We also find that learned advocate has disputed the findings of the learned Adjudicating Authority on the ground that learned Commissioner has squarely relied upon the statement of various persons without any

documentary evidences of appellant being involved in mis-declaration of export consignment. It has further been added that statements on the basis of which the appellant have been penalized are not admissible as an evidence because the mandatory legal procedure as laid down in Section 138B of the Customs Act 1962 has not been followed by the Adjudicating Authority. It will be relevant to have a glance at the provisions of Section 138B of the Customs Act, 1962 which reads as under:-

138B. Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any Gazetted Officer of customs 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 provisions 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.

It can be seen that the above provisions of Section 138B expressly provides the circumstances in which statements recorded before the any Gazetted officer shall be relevant for the purpose of establishing the truth in a particular case. It is also an established legal principal that for a case which is primarily based on the statements of various persons, cross-examination of these persons ought to be provided by the Adjudicating Authority for reaching at truth of the matter. It is essential for the Revenue that the Adjudicating Authority has himself to satisfy regarding the veracity of such statements for considering the statement as an evidence.

4.4 We also take note of the decision of the Hon'ble Apex Court in the case of *Andaman Timber Industries vs. CCE, Kolkata-ii reported at 2015 (324) ELT 641 (SC)* which is as follows:-

"6. According to us, 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 amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [[2005 \(187\) E.L.T. A33](#) (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."

Similarly, following the above decision, the Hon'ble Punjab & Haryana High Court, in the case of *Jindal Drugs Pvt. Limited vs. UOI – 2016 (340) ELT 67 (P&H)*, passed the following judgment:-

"19. 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.

20. 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.

21. 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.

22. 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.

23. 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.”

24. 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).

25. In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners 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 examined-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.)."

4.5 The learned advocate during the course of hearing submitted that examination in chief of Shri Jyoti Prakash and Shri Nitesh Gangwani which has taken place on 24.10.2019 and 26.09.2019 as well the cross-examination on the same date before the inquiry officer in a case of departmental proceedings initiated against the appellant, as per Rule 14(18) of CCS (CCA) Rules, 1965, the answer of questions 2 and 5 of cross-examination of Shri Jyoti Prakash, then Preventive Office Dock examination, Customs Mundra, are reproduced here below:-

"Q.2 Now please say whether Shri Nitesh Gangwani told you that he offered you the bribe amount at the instance of Shri Arun Kumar, then Superintendent, Customs, Mundra?

Ans: No.

Q.5. Did Shri Arun Kumar, then Superintendent, Customs, Mundra ever approach you for any work relating to alleged attempted export of waste clothes by M/s. Dynamic International, Surat?

Ans : No."

Similarly, Shri Nitesh Gangwani during the course of examination in chief, answered the question No. 4 as follows:-

Q.4 You are shown photocopy of your further statement dated 26.08.2013 recorded under section 108 of the Customs Act, 1962. Please go through the same and confirm whether it is your statement and whether what is stated in the said statement are true and correct. Please also put your dated signature on the last page of the said statement in token of having gone through

Ans: I have gone through photocopy of the statement dated 26.08.2013 shown to me. I confirm that the signatures on the said statement dated 26.08.2013 are mine. But I state that I have not agreed to the contents of earlier statement dated 20.08.2015 but my signature was obtained under pressure on the earlier statement at the time of recording this statement dated 26.08.2015. I rather state that answer to Q.No.13 of this statement is not as stated by me. I prepared the invoice after Shri Vishal Punjabi informed me on phone about the revised rate, i.e., US \$ 3.79 per piece. I also state that answer to Q.No.14 is not as stated by me. Shri Arun Kumar has never told me that he has talked to the partner. I know that Shri Vishal Punjabi is the exporter. My signatures were obtained on all pages of this statement under pressure by the officers of Customs, Mundra. Contents of statement 26.08.2015 are otherwise true and correct, except to the extent stated above. I have put my dated signature on the last page of this statement in token of having gone through the same.

4.6 Though the above cross-examination which is only pertaining to departmental inquiry it indicates that Adjudicating Authority is required first to examine the witnesses in chief and also form an opinion that in the given facts and circumstances of the matter the statements of various persons can be relied upon as an evidence and thereafter the witnesses be offered for cross-examination by the appellant. Since it is matter of record that the entire case against the appellant is based solely on the statements of the witnesses and in spite of request made to the Adjudicating Authority for their examination in chief and cross-examination, the Adjudicating Authority has not examined the crucial witnesses nor they were offered for cross-examination and therefore, we are of the opinion that considering the

statements as an evidence against the appellant without following the procedure laid down under section 138B of Customs Act, 1962, is against the accepted legal practices and judicial pronouncements made by various Courts and therefore we hold that none of the statement is admissible as an evidence against the appellant.

4.7 Now coming to the second evidence which has been adduced by the department for alleging that the appellant has been part of the conspiracy in the case of mis-declaration of export consignment is the whatsapp messages which are being exchanged between the appellant and Shri Nitesh Gangwani. The learned Adjudicating Authority has got certain portions of messages which are reproduced below:-

19.5 Thus as per the above statement Shri Arunkumar has denied certain facts as stated by Shri Nitesh Gangwani. However, in his another statement dated 25.08.2015 Shri Arunkumar was confronted with the data retrieved on the whatsapp conversation held with Shri Nitesh Gangwani. The details of the said conversation are reproduced as under:

Date and time	Shri Arun Kumar	Date and time	Shri Nitesh Gangwani
01.08.2015 at 7.50 PM	What r u doing	01.08.2015 at 8:14 PM	mundra mein FASA hu,
			Sorry appka phone receive nahi kar paya
01.08.2015 at 8:23 PM	Who is the Supdt of Jyoti (Preventive Officer)	01.08.2015 at 8:24 PM	Vipul Joshi
01.08.2015 at 7.50 PM	Both r good n		
01.08.2015 at 7.50 PM	Ur choice		
03.08.2015 at 11:31 PM	R u busy anywhere	03.08.2015 at 11:32 PM	No ser
		03.08.2015 at 11:33 PM	IEC copy
		03.08.2015 at 11:33 PM	Bank details IFSC a/c no and AD code
		03.08.2015 at 11:33 PM	invoice copy
		03.08.2015 at 11:34 PM	Mention docs from party side
09.08.2015 at 9:11 PM	Bat ho gai thi?		
09.08.2015 at 9:11 PM	Bat ho gai thi?		
09.08.2015 at 10:43 PM	Any problem?	09.08.2015 at 10:44 PM	No sir
09.08.2015 at 10:44 PM	Do not care about money	09.08.2015 at 10:44 PM	Baat ho gayi Hai Kal saare docs aa jaayenge
		09.08.2015 at 10:44 PM	I am not worried about that
09.08.2015 at 10:45 PM	Ok		
09.08.2015 at 10:45 PM	Go ahead	09.08.2015 at 10:45 PM	If u r there I am completely free
09.08.2015 at 10:45 PM	K		
09.08.2015 at 10:45 PM	By	09.08.2015 at 10:46 PM	Gud night Her
10.08.2015 at 9:55 PM	Received document?	10.08.2015 at 10:06 PM	No ser
		11.08.2015 at 1:06	Sir Konse room mein hai aap
11.08.2016 01.07 PM	Upper aa ja		
11.08.2015 4:35 PM	U got		
11.08.2016 at 4:36 PM	Received or not?	11.08.2015 at 4:37 PM	not received

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M/s Dynamic International, Surat
F.No.VIII/48-50/ADJ/Pr.Commr/MPSEZ/2015-16

		11.08.2015 at 6:34 PM	Invoice not received
11.08.2015 at 6:47 PM	I have send vehicle?	11.08.2015 at 6:48 PM	Yes sir
11.08.2015 at 6:48 PM	How many	11.08.2015 at 6:48 PM	9
11.08.2015 at 6:48 PM	K	11.08.2015 at 6:48 MP	Kya hua sir
11.08.2015 at 6:48 PM	No problem	11.08.2015 at 6:48 PM	Kuch hold Karna Hai kya
11.08.2015 at 6:48 PM	No		
11.08.2015 at 6:49 PM	I will talk in night		
11.08.2015 at 6:49 PM	With him		
11.08.2015 at 6:49 PM	Mere KO nahi lagta Woh Sunday ko stuffing karega		
11.08.2015 at 6:49 PM	Then talk u	11.08.2015 at 6:49 PM	K
11.08.2016 at 6:49 PM	Karana Padega	11.08.2016 at 6:49 PM	Let's see
		11.08.2015 at 6:49 PM	Hope for best
11.08.2016 at 6:50	Uske partner ko bej dunga	11.08.2016 at 6:50	K
11.08.2015 at 6:50 PM	K		
11.08.2015 at 8:50 PM	Have u received any Invoice		
		16.08.2015 at 10:42 PM	Sir aaj sirf 4 container stuff huye hai
		17.08.2015 at 1:26 PM	Sir kidhar Ahi aap
		17.08.2016 at 5:59 PM	Free Hai sir
17.08.2016 at 11:06 PM	Have u talk with party from landline or other Mobile phone		
18.08.2015 at 11:36 AM	I will reach office at 1300 hrs	18.08.2015 at 1:35 PM	K sir
		18.08.2015 1:35 PM	K sir
18.08.2015 at 1:36 PM	Where r u	18.08.2015 at 1:36 PM	Saurashtra cfs
18.08.2015 at 4:23 PM	How many vehicle reached		
		19.08.2015 at 4:50 PM	Upper aa ral Hai Kya sir

We find that above exchanges of messages nowhere specifically mentions that the appellant is involved in misdeclaration of export consignment.

4.8 We also take note of the fact that Section 138C which is reproduced below, provides certain procedures for admissibility of computer print-out as an evidence:-

“138C. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.

(1) Notwithstanding anything contained in any other law for the time being in force,-

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question,

shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer print out shall be the following, namely:-

(a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

We are of the view that retrieval of the data from mobile phone of a person is as good as taking out data print out from a hard disk of a computer. We, are therefore of the view that the procedure laid down under Section 138C (supra) should have been followed. Since the procedure as mentioned above has not been followed by the Adjudicating Authority, it loses its evidentiary value.

4.9 While holding the above view, we also rely upon this Tribunal decision in the case of *S.N. Agrotech vs. CC, New Delhi – 2018 (361) ELT 761 (Tri. Del.)* which passed the following decision:-

“8. On close reading of Section 138C of the Act, 1962, it is seen that the Legislature had prescribed the detailed procedure to accept the computer printouts and other electronic devices as evidences. It has been stated that any proceedings under the Act, 1962, where it is desired to give a statement in evidence of electronic devices, shall be evidences of any matter stated in the certificate. In the present case, we find that the provisions of Section 138C of the Act were not complied with to use the computer printouts as evidence. The Ld. Counsel for the appellants submitted that there is a gross illegality committed during the retrieval of the electronic documents. It appears from the Panchnama and record of proceedings that the alleged data recovered from electronic documents, so seized, were copied in a hard disk in presence of one person and, thereafter, it was opened in front of other persons. It is noted that the certificate was not prepared during the seizure of the electronic devices, as required under the law.

9. The investigation is normally started after collecting the intelligence/information from various sources. The investigating officers are procuring the evidences in the nature of documents, statements, etc., to establish the truth. During the evolution of technology, the electronic devices were used as evidence. In this context, the law is framed to follow the procedure, while using the electronic devices as evidence for authenticity of the documents, which would be examined by the adjudicating authority during adjudication proceeding. In the instant case, it is found that the entire case proceeded on the basis of the electronic documents as evidence. But the investigating officers had not taken pain to comply with the provisions of the law to establish the truthfulness of the documents and merely proceeded on the basis of the statements. Hence, the evidence of electronic devices, as relied upon by the adjudicating authority cannot be accepted.

10. The Hon’ble Supreme Court in the case of *Anvar P.V. (supra)*, while dealing with Section 65B of the Evidence Act, 1872 (*Pari materia* to Section 138C of the Act, 1962), observed as under :

“14. Any documentary evidence by way of an electronic record under the Evidence Act; in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. - Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a *non obstante* clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

(a) There must be a certificate which identifies the electronic record containing the statement;

- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record, is duly produced in terms of Section 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

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“22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the Court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in *Navjot Sandhu* case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

11. Upon perusal of the judgment of the Hon’ble Supreme Court in the case of *Anvar P.V.* (supra), we note that the Apex Court has categorically laid down the law that unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. We note that the Section 138C of the Customs Act is *pari*

materia to Section 65B of the Evidence Act. Consequently, the evidence in the form of computer printouts, etc., recovered during the course of investigation can be admitted as in the present proceedings only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant laptop/computer. After perusing the record of the case, we note that in respect of the electronic documents in the form of computer printouts from the seized laptops and other electronic devices have not been accompanied by a certificate as required by Section 138C(2) as above. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court (*supra*), the said electronic documents cannot be relied upon by the Revenue for confirmation of differential duty on the appellant. In the present case, the main evidence on which, Revenue has sought to establish the case of undervaluation and misdeclaration of the imported goods is in the form of the computer printouts taken out from the laptops and other electronic devices seized from the residential premises of Shri Nikhil Asrani, Director in respect of which the requirement of Section 138C(2) has not been satisfied. On this ground, the impugned order suffers from incurable error and hence, is liable to be set aside.

12. The Ld. AR for Revenue relied upon the decision of the Tribunal in the case of *M/s. Laxmi Enterprises* (*supra*) in which the Tribunal upheld the charge of undervaluation and demand for differential duty. In the said decision, Tribunal overruled the objection of the appellant in connection with Section 138C, by holding that the documents printed out from laptop will be admissible as evidence in view of the fact that the truth of such documents stand admitted by the proprietor in his statement.

We have gone through the said decision of the Tribunal and we note that the judgment of the Hon'ble Supreme Court in the case of *Anvar P.V.* (*supra*) has not been cited and was never brought to the notice of the Bench. Consequently, we are of the view that the decision in the case of *Laxmi Enterprises* is not applicable to the facts of the present case.

13. It is submitted by the Ld. Counsel for the appellant that the adjudicating authority had not examined the witnesses, as per the provisions of Section 138B of the Act, 1962. He has relied upon the decision of Hon'ble Delhi High Court, in the case of *J&K Cigarette v. Collector of Customs* - [2009 \(242\) E.L.T. 189](#) = [2011 \(22\) S.T.R. 225](#) (Del.). In that case, the Hon'ble High Court, while dealing with Section 9D(1) of the Central Excise Act, 1944 (*Pari materia* to Section 138B of the Customs Act, 1962) have held that the procedure as prescribed in the statute is required to be followed for proving the truth of the statement. The said decision of the Hon'ble Delhi High Court has also been relied upon by the Hon'ble Punjab & Haryana High Court, in the case of *G-Tech Industries v. Union of India* - [2016 \(339\) E.L.T. 209](#) (P & H). We find force in the submissions of the Ld. Counsel for the appellant that the adjudicating authority had not followed the procedures prescribed under Section 138B of the Act, 1962. We have already observed that the demand of duty cannot be sustained, as the evidences as available for the alleged undervaluation cannot be accepted under the law, as per the mandates of Section 138C of the Act. Hence, there is no need to discuss the said issues, as raised by the appellants regarding consideration of the provisions of Section 138B *ibid.*"

5. In view of the above discussion, we hold that the statements and whatsapp messages on the basis of which the penalty has been imposed cannot be taken as an evidence against the appellant without following due legal procedure laid down under the Customs Act, 1962 as discussed in

preceding paras. Accordingly, we hold that the impugned order-in-original, so far as imposition of personal penalty of Rs. 25 Lakh under Section 114(iii) of the Customs Act, 1962 is legally not sustainable and therefore, we set-aside the same. The appeal is accordingly allowed.

(Pronounced in the open court on 06.06.2024)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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