

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

REGIONAL BENCH - COURT NO.II

Excise Appeal No.2640 of 2012

(Arising out of Order-in-Appeal No. dated passed by Commissioner (Appeals)
Customs, Central Excise & Service Tax, Lucknow)

M/s Kunwar Bahadur Shri Kishan,**Appellant**
(Prem Nagar, Kaimganj, Farrukhabad)

VERSUS

Commissioner of Central Excise, Lucknow**Respondent**

(Hall No.2, 8th Floor, Kendriya Bhawan,
Sector-14, Aliganj, Lucknow-226024)

APPEARANCE:

Shri Rishi Raj Kapoor, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70005/2026

DATE OF HEARING : 11 November, 2025
DATE OF PRONOUNCEMENT : 07 January, 2026

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Appeal No. 250-251-CE/LKO/2012 dated 30.05.2012. By the impugned order following has been held:

9. In the circumstances, I modify the impugned Order-in-Original No. 05-AC/FBD/CEX/12 dated 17/02/2012 passed by the Assistant Commissioner. Central Excise Division Farrukhabad to the extent that the penalty imposed upon Shri Ajay Gupta (Appellant No.2) under Rule 26 of the Central Excise Rules is set aside.

1.2 By the order in original dated 17.02.2012 following was held:

ORDER

1. *I therefore,. confirm the demand of Basic Excise Duty of Rs 3,16,940/-, Additional Excise duty of Rs. 31,694/, Ed. Cess of Rs 6,973/- and S&H Cess of Rs. 3,486/- totaling to RS. 3,59,093/- involved on 1509.24 bags of 8 gms; under Section 11A of the Central Excise Act. 1944 alongwith interest under Section 11AB of the said Act. The amount so deposited by the party as Rs.25,000/-vide GAR-7 no. 18 dated 19.1.2010 against the said clandestine removal is hereby appropriated.*
2. *I further confirm the demand of BED of Rs. 94,507/-, Additional Excise duty of Rs. 9,451/-, Ed. Cess Rs. 2,079/- and S & H Cess of Rs. 1,040/- totaling to Rs, 1,07,077/- involved on 300.022 bags of Moni sada 14 gms under Section 11-A of Central Excise Act, 1944 along with interest under Section 11- AB read with Section 11 AA of the said Act. The amount deposited by the party as Rs. 25,000/- vide GAR-7 no. 20 dated 09.02.2010 against the said clandestine removal is hereby appropriated*
3. *I impose a penalty of Rs.4,66,170/- (Rupees four lacs sixty Six thousand one hundred seventy only) on party No.1, M/s Kunwar Nagar, Kaimganj, Distt. Farrukhabad Bahadur Shri Kishan Prem under Rule 25 (b) of the Central Excise Rules, 2002 read with Section 11-AC of the Central Excise Act, 1944;*
4. *I also impose personal penalty of Rs.4,66,170/- (Rupees four lacs sixty six thousand one hundred seventy only) under Rule 26 on Shri Ajay Gupta, partner of the party M/S Kunwar Bahadur Shri Kishan Prem Nagar, Kaimganj, Distt. Farrukhabad.*

2.1 Appellant is engaged in the production of Unmanufactured Branded Chewing Tobacco (UMBCT) of "Moni Sada brand falling

under Chapter Sub heading No. 2401 1090 of the Central Excise Tariff Act 1985.

2.2 On 11/01/2010, during the course of checking of the premises of appellant No. 1, the Departmental officers recovered one red coloured diary titled as "LAKSHMI BOOK" having 68 pages, containing details of UMBCT manufactured and cleared. On scrutiny of the "LAKSHMI BOOK", same was found containing records of clearance and sale of bags and pouches of "Moni sada" UMBCT of 8 gms each and "Moni sada" UMBCT of 14 gms each by the appellant party to various purchasers without making entries of the same in their statutory records and clearing the same without issuing invoices and without payment of duty. On detailed scrutiny, it was found that the appellant No. 1 had manufactured 1502 bags + 262 packets of Moni sada UMBCT of 8 gms each (total value Rs 7,53,620/-) and 300 bags + 11 zipper pouches (total value Rs 2,25,000/-) of Moni sada UMBCT of 14 gms each without making entries in respect of the same in their statutory records and clearing the same without payment of duty. The details as available in the said dairy are reproduced below:

S No	Page No of red Diary titled as "Lakshmi Book"	No of bags of 8 gms UMBCT mfd and Cleared			No of bags of 8 gms UMBCT mfd and Cleared		
		Bags	Packet	Zipper	Bags	Packet	Zipper
1	01	262	21	0	0	0	0
2	Overleaf of page 01+02	495	72	0	0	0	11
3	Overleaf of page 02+03	436	86	0	0	0	0
4	31	54	0	0	0	0	0
5	49	45	71	0	0	0	0
6	50	09	0	0	0	0	0
7	51	05	0	0	0	0	0
8	52	04	0	0	0	0	0
9	53	17	0	0	0	0	0
10	54	04	0	0	0	0	0
11	Overleaf of page 54+55	28	0	0	0	0	0
12	56	07	0	0	0	0	0
13	57	02	12	0	0	0	0
14	Overleaf of page 57+58	13	0	0	0	0	0
15	59	14	0	0	0	0	0

16	60	06	0	0	0	0	0
17	61	14	0	0	0	0	0
18	62	34	0	0	0	0	0
19	Overleaf of page 62+63	14	0	0	115	0	0
20	Overleaf of page 63+64	04	0	0	185	0	0
21	65	05	0	0	0	0	0
22	66	18	0	0	0	0	0
23	Overleaf of page 66+67	09	0	0	0	0	0
24	68	03	0	0	0	0	0
	Total	1502	262	0	300	0	11

2.3 The diary also contained the details of the purchasers and payments received as detailed in table below:

S No	Page No. Of the Red Diary	Purchaser	Amount	Remark
1	12	Prateek Rastogi	Nil	1 bag balance
2	13	Vijay kampil Road	2740	Last balance
3	14	Ram Ashre kampil	Nil	2 Bags last balance
4	15	Anan Bhure	360	Last balance
5	16	Nagesh	3840	Last balance
6	17	Babloo	26965	Balance
7	18	Maa Bhagwati Kirana Store	Nil	4 Bags last balance
8	19	Sunil	770	Last balance
9	20	Vipin Chiloka	1950	Last balance
10	21	Kamlesh Bhardwaj	85980	Last balance
11	22	Verma Kirana Store	Nil	1 bag balance
12	23	Manish Arora	5400	Balance
13	24	Prem Avtar	Nil	3 bags balance
14	25	Jitendra	1535	Balance
15	26	Sheelu Rampur	Nil	1 bag balance
16	27	Manoj Station	2160	Balance
17	28	Paras Kirana store	6940	Balance
18	29	Laxmi Kant	400	Balance
19	30	Dharamveer	4720	Balance

2.4 Shri Ajay Gupta, Partner in his statement dated 11/01/2010 recorded on the spot under section 14 of the Central Excise Act 1944, admitted the recovery of the above diary from his factory. He further admitted packing of 300 bags, each containing 14 gms "Moni sada" UMBCT, during the period from October 2009 to January 2010 without making proper entry in the statutory records and subsequently removing the same

clandestinely without payment of Central Excise duty the appellant party deposited Rs 25,000/- vide GAR-7 NO. 18 dated 19/01/2010 Subsequently and Rs 25,000/- vide GAR-7 No. 20 dated 09/02/2010 against the said clandestine removals.

2.4 He in his subsequent statement dated 25/03/2011 recorded under section 14 of the Central Excise Act 1944, admitted that 1505 bags of 8 gms UMBCT and 300 bags of 14 gms UMBCT were manufactured and removed clandestinely, without entering the same in the statutory records and without payment of excise duty.

2.5 A show cause notice dated 14/12/2011 was issued to the appellants asking them to show cause as to why:

- (i) *The Basic Excise Duty of Rs. 3,16,940/- , Additional Excise duty of Rs. 31,694/-, Ed. Cess of Rs. 6,973/- and S & H Cess of Rs. 3,486/- totaling to Rs. 3,59,093/- involved on 1509.24 bags of 8 gms manufactured without entry in the statutory records and clandestinely removed without payment of duty due thereon in contravention of Rules 4,6, 8, 10 & 11 of Central Excise Rules 2002 should not be demanded and recovered from them under Section 11-A of Central Excise Act, 1944 along with interest under Section 11- AB read with Section 11 AA of the Act ibid;*
- (ii) *The BED of Rs. 94,507/-, Additional Excise duty of Rs. 9,451/-, Ed. Cess Rs. 2,079/- and S & H Cess of Rs. 1,040/- totaling to Rs. 1,07,077/- involved on 300.022 baas of Moni sada 14 gms manufactured without entry in the statutory records and clandestinely removed without payment of duty due thereon in contravention of Rules 4,6,8,10 &11 of Central Excise Rules 2002 should not be demanded and recovered from them under Section 11-A of Central Excise Act, 1944 along with interest under Section 11- AB read with Section 11 AA of the Act ibid;*
- (iii) *The penalty should not be imposed on party No.1 under Rule 25 (b) of the Central Excise Rules. 2002 read with*

Section 11- AC of the Central Excise Act, 1944 for violation of Central Excise Act and Rules mentioned hereinabove;

- (iv) *The penalty should not be imposed on party No.2 under Rule 26 (b) of the Central Excise Rules, 2002 for involving himself in manufacture of unaccounted goods and removal of the same without issue of invoice/bills and without payment of central excise duty due thereon.*

2.6 The case was adjudicated vide Order in Original referred in para 1.2 above.

2.7 Aggrieved by the order both appellant and Shri Ajay Gupta, Partner of the firm filed appeal before Commissioner (Appeal). Appeal filed by the partner was allowed and that filed by the appellant was dismissed.

2.8 Aggrieved appellant has filed this appeal.

3.1 I have heard Shri Rishi raj Kapoor Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant counsel submitted that

- Proceeding of seizure and confiscation of goods arising out of the same search on 11.01.2010 have been set aside by the Tribunal vide Final Order No 32680/2014 dated 30.06.2014. Since these proceedings also arise from the same search these should be set aside for this reason itself.
- Shri Ajay Gupta, Partner whose statement has been relied upon for proceedings against the appellant has filed an notarized affidavit, denying his/ appellants connection with "Red Diary titled Laxmi Book". In view of the submissions made in the affidavit the statement of Shri Ajay Gupta and entries made in this Red Diary cannot be relied in evidence against the appellant for making this demand.

3.3 Authorized representative reiterated the findings recorded in the impugned order.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records the findings as follows:

5. I have carefully gone through the facts and circumstances of the case and submissions made by the Appellants. Since both the appeals are the outcome of a single impugned order, I intend to take up and dispose of both the appeals simultaneously through a common order.

6. I find that during a visit at the appellants premises on 11/01/2010, the Departmental officers found one red coloured diary titled as "LAKSHMI BOOK" allegedly containing details of UMBCT manufactured and cleared by the appellant factory. The appellants did not challenge the Panchnama proceedings in as much as Shri Ajay Gupta, (appellant No. 2), who is the partner in the appellant factory and who looks after the administration and Central Excise work, in his statement dated 11/01/2010 recorded under section 14 of the Central Excise Act 1944, agreed of the with the Panchnama proceeding and admitted the recovery of the "LAKSHMI BOOK" containing details of UMBCT manufactured and cleared. The details of the aforesaid ""LAKSHMI BOOK"" have also been accepted by the appellant No. 2 as true in his statement dated 11/01/2010. I also find that the appellant party deposited Rs 25,000/- vide GAR-7 No. 18 dated 19/01/2010 and Rs 25,000/- vide GAR-7 No. 20 dated 09/02/2010 against the said clandestine removals voluntarily. The appellant No. 2, in his subsequent statement dated 25/03/2011, once again admitted that 1505 bags of 8 gms UMBCT and 300 bags of 14 gms UMBCT were manufactured and removed clandestinely, without entering the same in the statutory records and without payment of excise duty. At no stage of the appellate proceedings has the appellant No. 2 retracted from his confessional statement or has produced any evidence before me to show that his statements dated

11/01/2010 or 25/03/2011 were recorded under duress. Clandestine removal has been admitted by the appellants in their statements recorded under section 14 of the Central Excise Act and this has much evidential value in the absence of any contrary evidence. It is established from the records that the aforesaid statements were given by the appellant No. 2 out of his own volition and there is no allegation of coercion, threat, force, duress or pressure being utilized by the officers to extract the statements. In this context, the Hon'ble Supreme Court in the case of Commissioner of Central Excise Mumbai Vs. Kalvert Foods India Pvt. Ltd had observed that **"The statements were recorded by the Central Excise officers and they were not police officers, Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the Company which could have been made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon."** I am therefore inclined to agree with the findings of the adjudicating authority contained in the impugned Order-in-Original and hold that the appellant party is liable to pay duty as well as penalty for their acts of clandestine manufacture and removal of UMBCT.

8. Regarding the question of imposition of penalty upon appellant No. 2, it is observed the appellant No. 2 is a partner in M/s Kunwar Bahadur Shri Kishan, Kaimganj, (appellant no. 1). I find that in the case of C.C.E. & C Surat - II Vs. Mohammed Farookh Mohammed Ghani reported in 2010 (259) ELT 179 (Guj.), it has been held by the Hon'ble Gujarat High Court that **"Penalty on partner-separate penalty when same also imposed on partnership firm**

- Tribunal upheld view that no separate penalties warranted on partners - under law of partnership, firm having no legal existence apart from its partners and merely a compendious name to describe partners as distinguished from a company which stands as a separate entity distinct from its shareholders -No question of penalizing partners separately for same contravention, unless intention to treat firm and partners or distinct entities borne out from statute itself as in case of Income Tax Act 1961-Explanation to section 140 of Customs Act 1962 equates partnership firm with company in respect of commission of offences but no such corresponding provision in relation to imposition of penalty- No separate penalty warranted - section 112 *ibid*". Further, in the case of Commissioner Vs. Kamdeep Marketing Pvt. Ltd. reported in 2004 (165) ELT 2006 (Tri- Del.), it has been held by the Tribunal that **"Penalty- Personal penalty on partners/proprietor in addition to the firm not imposable - Rule 209A of erstwhile Central Excise Rules 1944- Rule 26 of Central Excise Rules 2002"**. Following the ratios laid down in the above judgments, I hold that since penalty has already been imposed upon appellant No. 1 under Rule 25 of the Central Excise Rules 2002, no separate penalty is warranted upon the appellant No. 2 under Rule 26, *ibid*.

4.4 Order in original records the findings as follows:

"I have carefully gone through the case records, submissions made in the replies made in defence, reiterated during the course of personal hearing and find 'that entire case of the party No.1 and party No.2 has been built upon the sole pleadings that the confessional statement of Shri Ajay Gupta, partner is not supported by any corroborative evidence and as such in view of catena of decisions, the statement of the partner can not be taken

as substantial and corroborative evidence in absence of any additional material.

At the same time, I find that that the parties have not denied the recovery of Red coloured diary titled as "LAKSHMI BOOK" having 68 pages containing details of UMBCT manufactured and cleared. They have also not been able to further deny the contents of aforesaid "LAKSHMI BOOK" evidencing the details of amounts standing balance upon various purchasers and the details of purchasers of UMBCT bags and payment made to the 'party'. The details of aforesaid "LAKSHMI BOOK" has also been 1 accepted/ admitted by the party No.2 as true in his statement dated 11.01.2010 recorded under Section 14 of the Central Excise Act, 1944. The party no.2 also contended in the aforesaid statement that he looks after the work of production and maintains all the records relating to Central Excise such as receipt of raw material, production and clearance and issue of invoices.

I find that the party has also deposited Rs._25,000/-vide GAR-7 no. 18 dated 19.1.2010 and Rs. 25,000/- vide GAR-7 no. 20 dated 09.02.2010 after about one month against the said clandestine removals without lodging any protest and further admitted the facts of clandestine removal in his subsequent statement dated 25.03.2011 recorded under Section 14 of the Central Excise Act, 1944 before the Superintendent (Prev.), Central Excise Division, Farrukhabad which authenticates the entries in private record "red coloured diary ie. laxmi Book i,e. Suppressed/ unrecorded production, storage, as well as illicit removal of excisable goods.

Moreover, the vital fact could not be denied that during the course of visit, Central Excise officers seized 74 bags & 13 packets of 14 gms (27x20x14) of UMBCT "Moni Sada" brand, valued at Rs. 37,837/- involving Central Excise duty of Rs. 18,025/- found in excess against recorded book

balance in R.G. 1 (Daily Stock Register) and unexplained excess stock of 73 unstitched bags of UMBCT Moni sada' containing 65200 pouches of 8 gms valued at Rs. 21,733/- involving Central Excise duty of Rs. 10,343/- as against recorded book balance in R.G. 1. The case has since been adjudicated vide Order-in-Original No.09-ACF/Adj/2011 dated 26-07-2011 and the goods seized have been confiscated and the party has suitably been penalized.

Therefore, in the present case, in view of the excess unexplained quantity of finished goods seized at the spot as well as recovery of "LAKSHMI BOOK" containing unauthorized and illicit transactions duly admitted by the party in his statements. dated 11-01-2010 and 25-03-2011 which could not be controverted by any valid and firm material, the only inevitable conclusion which can be drawn that the party no.1 and party No.2 are actively and directly indulged in illicit manufacture and removal of excisable goods.

*In view of the un-controverted corroborative evidence available against the party No.1 and 2 and in the light of decision of Hon'ble Tribunal delivered in the case of Peeru Lal vS. Commissioner Customs, Jaipur -1999 (105) E.L.T. 396 (Tribunal), there is no need of to further justify the allegation of clandestine manufacture & removal of excisable commodities. Further, in the most relevant and identical decision given in the case of Whale Stationery Products Ltd. vs. CCE, Meerut [2004 (168) E.L.T. 405 (Tri. - Del.)], it has been held by the Division Bench of Hon'ble Tribunal in para 13 of the decision that **"Where confessional statement and documentary evidence were in place, the there was no need of any further evidence to establish clandestine removal of the goods. Such clearance already stood established."** In another case of CCE, Chandigarh VS. NABHA STEELS Ltd. [2004 (169) E.L.T. 345 (Tri. Del.)], while allowing the*

appeal of the Revenue it has been held by the Hon'ble Tribunal in Para 2 of their decision that, **"2..... This plea could not be allowed to be taken by them in the face of the confessional statement of Ajay Goyal, Director of the respondents before the Excise staff at the time of checking. The respondents are bound by the admission made by their Director and could not later on complain that the shortage was not properly arrived at. Even at the time of signing of the panchnama prepared at the spot, the Director of the respondents or any other representative never took exception to the mode of verification adopted by the officers for arriving at the quantity of the goods found short."**

In the present case, the unaccounted for manufacture and clandestine removal of excisable goods has been admitted at the time of visit of Central Excise authorities which lead to seizure of unaccounted for stock of finished goods on 11-01-2010, the rebuttal statement is now being given by a defence reply dated 12-01-2012 i.e. after a gap of unexplained inordinate delay of two years, is of no consequence and avail and proved to be after thought . In the case of Devine Solutions vs. COMMISSIONER OF CENTRAL EXCISE, COIMBATORE - 2006 (206) E.L.T 1005 (Tri. - Chennai), while holding the decision of lower authority as proper in Para 4 of the decision that **"4..... the decision of the lower appellate authority to demand duty on the goods, which were rightly found to have been clandestinely manufactured and cleared during the above period requires to be sustained.."** it has been held by the Hon'ble Tribunal in para 3 of the decision that , **"3..... Moreover, the retraction made in April 2000, of earlier it statements made in May 1999 is too belated to be accepted as genuine. In the result, the confessional statements would hold the field and there is no need**

to search for evidence. The arguments to the contra cannot be accepted and, for that matter, the case law cited in the memorandum of appeal is not relevant."

In the present case, the judgment & order relied upon by the parties themselves in support of their own submissions, which has been delivered by the Hon'ble Supreme Court in the case of Sarwan Singh vs. State of Punjab- AIR-1957 SC 637 observing that "it must not only be established that the statement is voluntary but also it must be established that the statement is true" is fully/squarely applicable in the present case as from the multiple corners, the clandestine removal has been proved without any iota of doubt and their statements have been found to be voluntary & true."

In view of the above, the party has not been able to justify the relevance of series of case laws relied upon in support of their contentions and in view of the above, the series of decisions relied upon by the Party becomes not applicable under the facts and circumstances of the present case.

Further, the party is not correct in submitting that in the present case penalty under Rule 25 and 26 is not imposable being the subject matter revolves around the interpretation of statute. In this regard, I observe that the provisions of Rules 4,6,8,10 and 11 of Central Excise rules,2002 are very clear and there is no ambiguity in the language of the aforesaid Rules, which do not permit anybody to manufacture, store and clear/ remove the excisable goods defined under Section 2(d) of the Central Excise Act, 1944 r/w Section 3 of the said Act, contrary to the manner prescribed under Rules 4,6,8,10 and 11 of Central Excise Rules,2002, therefore, there is no force in the submissions of the parties. In the result, the party no.2 is liable for penal action under Rule 26 of the Central

Excise Rules, 2002 r/w Section 11AC of the Central Excise Act, 1944.

Moreover, the party No.2 himself averred in his defence reply [incorporated in Para (ix) page 10 of this order] that the penalty under rule 209A (Rule 26) can be imposed only in the condition when the person has handled the goods physically in view of the decision in the case of Kamdeep Marketing vs. CCE- 2004 (165) ELT- 206' (Tri. Delhi) and in the light of Larger Bench Decision in the case of Steel Tubes of India Limited vs. CCE Indore- 2007(217) ELT-506 (Tri. L. B.). Thus, the party no.2 is liable for penal action under Rule 26 of the Central Excise Rules, 2002.

In view of the above discussion & findings, I hold that the party no.1 are liable to pay Central excise Duty on the goods under Section 11A of the Central Excise Act, 1944 alongwith interest under Section 11AB of the said Act which was illegally manufactured, stored and removed by them in contravention to the provisions of Rule 4,6,8,10 and 11 of Central Excise Rules.2002 and liable for penalty action under Rule 25(b) of the Central Excise Rules,2002."

4.4 From the above it is evident that during the course of search/ enquiry made at the time of the search of the premises of the appellant, a red diary named "Laxmi Book" was recovered from the premises of the appellant. At the time of Panchanama proceedings on 11.01.2010, Shri Ajay Gupta, Partner (The appeal memo has been signed by Shri Ajay Gupta as Proprietor) in the firm was present. The factum of recovery of diary has been recorded in the Panchnama drawn on the spot and has also been admitted by Shri Ajay Gupta in his statement recorded on 11.01.2010. In fact in his statement recorded Shri Ajay Gupta, admitted to the contents of diary and also the fact of clandestine manufacture and clearance of the excisable goods to various persons.

4.5 The above fact of clandestine manufacture and clearance as per the said diary was subsequently admitted again by Shri

Ajay Gupta in his statement recorded on 25.03.2011. Appellant also deposited part duty against the said clandestine clearances vide GAR-7 Challan No 19.01.2010 for Rs 25,000/- and GAR-7 Challan No 20 dated 09.02.2010 for Rs 25,000/-.

4.6 At the time of search at the premises of the appellant certain un-accounted stock was also noticed this unaccounted stock was seized and subsequently confiscated vide Order-in-Original No.09-ACF/Adj/2011 dated 26-07-2011. This order in respect of confiscation was upheld by the Commissioner (Appeal) vide Order in Appeal No 182/CE/LKO/2012 dated 26.03.2012. However this order has been set aside by the CESTAT vide Final Order No 52680/2014 dated 30.06.2014 in Excise Appeal No 1289/2012-EX (SM), observing as follows:

- 4. After hearing both the sides, I find that the appellant, during adjudication, had taken stand that the goods were not fully manufactured inasmuch as the process of lime mixing was to be done. The plea stand rejected by the authorities below as afterthought.*
- 5. There is no test conducted by any expert so as to conclude as to whether the lime mixing has already done or not. As such only fact of excess goods, which are also disputed by the appellant to be not fully finished, read with the statement, cannot be held to be confiscable, in the absence of any evidence to show that they were either in the process of being removed clandestinely or were meant for clandestine removal. Accordingly, I set aside the impugned order and allow the appeal with consequential relief to the appellant."*

Counsel of appellant has relied upon this decision of the tribunal and argued that both the proceedings were result of the same search made on the 11.01.2010, hence this decision should have concluded both simultaneously in the favour of appellant. I do not find any merits in the submissions made by the counsel simply for the reason that said decision is not even in respect of the clearances made by the appellant and recorded in the red diary called "Laxmi Book". Further said decision is also not an

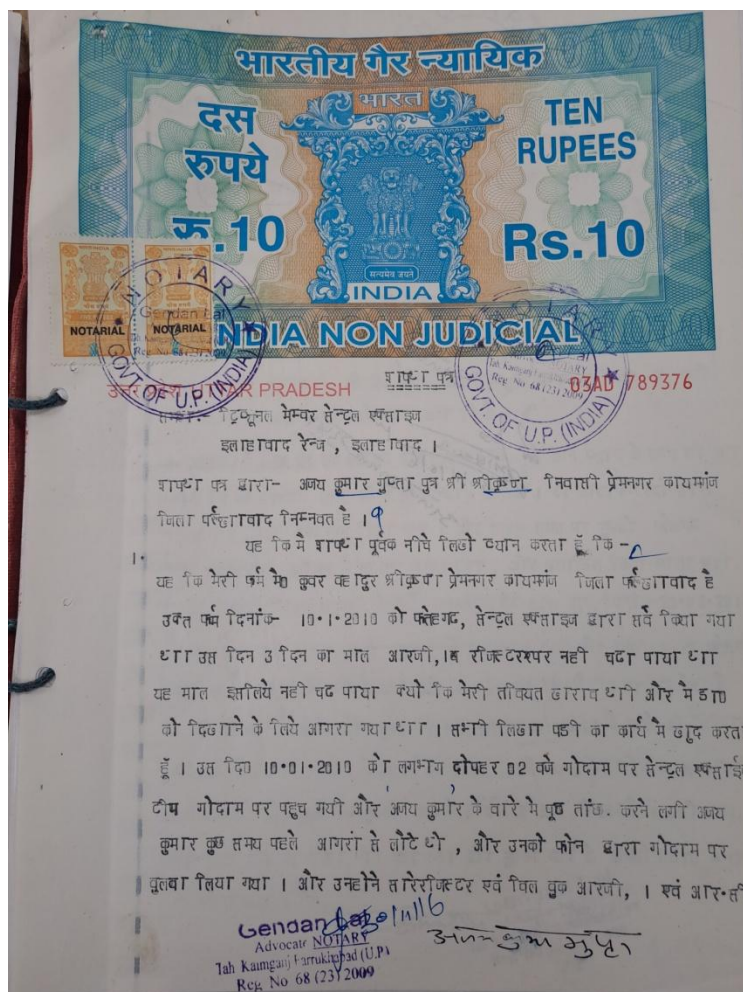
authority to pronounce that appellant were not indulging in clandestine clearance as admitted by Shri Ajay Gupta in his statement.

4.7 It is also interesting to note that in this case that Shri Ajay Gupta, Partner along with Shri Kamal Gupta, Advocate appeared for personal hearing before the adjudicating authority. No submission disowning the 'Red Diary Titled Laxmi Book' was made at the time of personal hearing. Again Shri Ajay Gupta, Partner appeared for personal hearing before the Commissioner (Appeal), again no submission disowning the 'Red Diary Titled Laxmi Book' was made before him. It is not even the submission made before either of authorities that statements of Shri Ajay Gupta were recorded under coercion or threat. Shri Ajay Gupta, was made party in the show cause notice and penalty was imposed upon him by the adjudicating authority under Rule 26 of Central Excise Rules, 2002. He in personal capacity while appearing before the adjudicating authority also did not made any submissions to this effect. The personal penalty imposed upon Shri Ajay Gupta was set aside by the Commissioner (Appeal), no submission to this effect was made before First Appellate authority also.

4.8 I also find that appellant in the appeal memo filed by them before this tribunal too has not even stated that the statement made by Shri Ajay Gupta, Partner was recorded under threat or coercion. Nor any grievance was made at the time of hearing of the stay application filed. I observe that at the time of hearing of the stay application on 28.12.2012, appellant was represented by Shri Jatin Mahajan, Advocate. By letter dated 03.03.2016, Shri Jatin Mahajan on instruction of appellant returned the brief and intimated that he is withdrawing the vakalatnama. Thereafter Shri Rishi Raj Kapur, Advocate filed his vakalatnama.

4.9 It was only after Shri Raj Raj Kapur Advocate filing his vakalatnama, a miscellaneous application E/Misc/70016/2017-SM dated 20.01.2017 was filed on behalf of appellant claiming that Shri Ajay Gupta has denied having any relation with the "Red Diary titled Laxmi Book" and his statement was taken on

force. In support a notarized affidavit reproduced below was filed. This application was allowed to be taken on record by Miscellaneous Order No. 70086/2017 dated 21.03.2017.



का प्रमाण पत्र देखने के बाद तमाम दस्तावेजों को समीक्षा के बाद सारे कागज उनके सामने प्रस्तुत किये। उसी समय को के के स्टोर एक गददी पर पहुँच गये जो हमारे भाई की है। वहाँ से उन्होंने एक ताँबे रंग डायरी ले ली, उस डायरी में हमारे भाई द्वारा अपनी तम्बाकू की बिक्री हेतु का विवरण है। जिस पर कोई भी स्वस्तार्थ छिपूटी की कोई देवता नहीं होती है। इस डायरी में नहीं कोई मोनी सादा या निर्मित तम्बाकू का कोई भी विवरण नहीं है।

2. उस दिन तक जो स्टोर अधिक वाया गया था उन्होंने उस मास को सौज कर दिया था, मैंने उस मास पर स्वस्तार्थ छिपूटी जमा कर दी थी, विभाग द्वारा पैनाल्टी लगाई गयी थी जो कि अनित और रिट्यून्स द्वारा पूरी छोड़ दी गयी थी जिसकी छायाप्रति हम इसके साथ ला रहे हैं।

3. यहाँक जो ताँबे रंग की डायरी वायी गयी थी मैंने अपने प्लान के समय ही कहा था कि यह डायरी उक्त फर्म से सम्बन्धित नहीं है। पर अधिकारियों द्वारा बार-बार मुझको परेशान किया गया। और समय-समय पर मुझको फोहगद सेन्द्रत स्वस्तार्थ ऑफिस में बुलाया जाता था, और प्रतीकित किया जाता था कि यह लिखो कि यह डायरी मेरी है। तमाम डेड सात बाद दिनांक-25.03.2011 को सहायक आयुक्त द्वारा मुझको कांसगंज से पकड़ाया गया और गाड़ी द्वारा फोहगद लाया गया और मुझको कमरे में बन्द करके कहा कि यह लिखो कि डायरी मेरी है और उस डायरी में 300 बोरी सुपर का मास 10.01.2010 के पहले की विभिन्न तारीखों में एक ही रखाही से जबरन चढ़वाया जिससे यह प्रतीत हो कि यह डायरी इन्ही की हो और कहा कि मुझको एक केसा बनाकर ऊपर भोजना है। उसी समय मुझको हाट अटेक का दोहा भी पढ़ा था और मुझको वहाँ से उन्होंने डाण के कहा भी भोजा था।

Gendun Lal
Advocate
Tah Kamgaon Panchayat
Reg No 68 (23) 2009

4. यहाँक माननीय हम आपसे धन लेना और सौजित करना चाहते हैं कि हमारी एक बोरी की बिक्री 550 रु के हिसाब से लिखी है। जब कि 550 रु के हिसाब से जो स्वस्तार्थ छिपूटी बनाई गयी है। वह नहीं बनती है। जब हमारी बिक्री एक हजार रुपये की है। तो 550 रु के हिसाब से कैसा बिक्री हो जायेगी। और उसपर उन्होंने जो स्वस्तार्थ छिपूटी की गणना की वह विवक्षित ही निश्चायकार एवं गलत है। ऐसा प्रतीत होता कि उन्होंने जान फूँकर केसा बनाने के चक्कर में इस तात डायरी को संभान में लेकर बापधानी के उपर जबरन देस्त और पैनाल्टी लगाई है।

5. यहाँक श्रीमान जी इस डायरी को संभान में न लिया जाये और बापधानी पर लगाया गया देस्त और पैनाल्टी माफ किया जाये।

6. यहाँक मैं शपथ पूर्वक प्यार करता हूँ कि बापधानी पत्र कौपरा। से 5 तक मेरी जानकारी में सही है छुपी छपाया नहीं गया है इसपर मेरी मदद करे।

शपथ

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4.10 By the above narration I find that the appellant who had never disputed the recovery of "Red Diary titled Laxmi Book" from his premises and his connection with the said diary, all of sudden by the advent of new counsel started disowning the diary and denying his connection with the same. I do not find any merits in the said submissions as the affidavit claiming so has been filed for first time in 20.01.2017 in respect of the recovery made from the premises of the appellant on 11.01.2010 i.e. more than seven years after the search. The said affidavit was never filed at the time of investigation or in proceedings before the lower authority and not even at the time of filing this appeal or at the time of argument of stay application. It is settled principle that the question sought to be agitated by way of this affidavit is a question of fact and should have been agitated at the first available opportunity. Such belated submission of this affidavit on 20.01.2017 is contrary to settled principles of law and the affidavit filed needs to be rejected on this ground.

4.11 It is settled principle in law that the statement recorded if found voluntary even if retracted can be relied in evidence. Hon'ble Supreme Court has in case of K I Pavunny [1997 (90) E.L.T. 241 (S.C.)] held as follows:

"19. Next question for consideration is : whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own hand-writing giving wealth of details running into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is : whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to

be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before the Magistrate though no complaint was filed and was released on bail. He did not complain to the Magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weightage to the same. It is true that the Magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant's knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bed-room through which he or family members could always watch anyone frequenting the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying away the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they would immediately catch hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by threat,

duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one.

20. The question then is : whether the retracted confessional statement requires corroboration from any other independent evidence? It is seen that the evidence in this case consists of the confessional statement, the recovery panchnama and the testimony of PWs 2, 3 and 5. It is true that in a trial and proprio vigore in a criminal trial, Courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the IPC, it is now well settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculcating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in Bhagwan Singh v. State of Punjab - AIR 1952 SC 214, Para 30. If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or

inducement etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the Court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the Court for ordering conviction. However, rule of prudence and practice does require that the Court seeks corroboration of the retracted confession from other evidence. The confession must be one inculcating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of given set of facts. The high degree of proof and probative value is insisted in capital offences.

21. In Kashmira Singh's case the co-accused, Gurcharan Singh made a confession. The question arose whether the confession could be relied upon to prove the prosecution case against the appellant Kashmira Singh. In that context, Bose, J. speaking for Bench of three-Judges laid down the law that the Court requires to marshall the evidence against the accused excluding the confession altogether from consideration. If the evidence de hors the confession proves the guilt of the appellant, the confession of the co-accused could be used to corroborate the prosecution case to lend assurance to the Court to convict the appellant. The Court considered the evidence led by the prosecution, de hors the confession of co-accused and held that the evidence was not sufficient to bring home the guilt of appellant Kashmira Singh of the charge of murder. The appellant was acquitted of an offence under Section

302 IPC but was convicted for the offence under Section 201 IPC for destroying the evidence of murder and sentenced him to seven years rigorous imprisonment. This decision was considered by a four-Judge Bench in *Balbir Singh v. State of Punjab* - AIR 1957 SC 216 wherein it was held that if there is independent evidence, besides the confession, the rule that the confession could be used only to corroborate the other evidences loses its efficacy. Therefore, it was held that if the retracted confession is believed to be voluntary and true, it may form the basis of a conviction but the rule of practice and prudence requires that it should be corroborated by independent evidence. Therein also, for the charges of capital offence, the trial Court did not accept the confessional statement of co-accused containing inculpatory and self-exculpatory statement. The High Court reversed the acquittal and convicted the accused, accepting that part of the confessional statement of the accused which was corroborated from other evidence. This Court upheld the conviction and held that it is not necessary that each item of fact or circumstance mentioned in the confessional statement requires to be corroborated separately and independently. It would be sufficient if there is general corroboration. The ratio in *Kashmira Singh's* case was referred to.

22. In *Hem Raj v. The State of Ajmer* - 1954 SCR 1133 a three-Judge Bench to which Bose, J. was a member, was to consider whether retracted confession of an accused could be corroborated from the material already in the possession of the police prior to the recording of the confession. Therein the confession was recorded under Section 164 of the Code during the committal proceedings but at the trial it was retracted. This Court held that the evidence already on record of the police could be used to corroborate the retracted confession.

23. *In Haricharan Kurmi & Jogia Hajam v. State of Bihar - AIR 1964 SC 1184* a Constitution Bench was to consider as to when the confession of a co-accused could be used as evidence under Section 3 of the Evidence Act. It was held that the confession of a co-accused cannot be treated as substantive evidence. If the Court believed other evidence and felt the necessity of seeking an assurance in support of its conclusion deducible from the said evidence, the confession of the co-accused could be used. It was, therefore, held that the Court would consider other evidence adduced by the prosecution. If the Court on confirmation thereof forms an opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of the guilt of the accused. It is, thus, seen that the distinction has been made by this Court between the confession of an accused and uses of a confession of the co-accused at the trial. As regards the confession of the accused and corroboration to the retracted confession, in *Girdhari Lal Gupta & Another v. D.N. Mehta, Assistant Collector of Customs & Another - 1970 2 SCC 530* a Bench of two-Judges considered and held that if the evidence of an investigating officer is found to be reliable, whether it can be used to corroborate the evidence depends on the facts of each case. In that case, relating to the offence under Foreign Exchange Regulation Act, it was held that the evidence of the investigating officer and other evidence could be used to corroborate the recoveries made of the Indian currency being exported. This Court upheld the conviction of the accused.

24. *In Nishi Kant Jha v. The State of Bihar - 1969 (1) SCC 347*, another Constitution Bench was to consider whether, when a part of the confessional statement is inculpatory and the other part exculpatory, the former part was admissible in evidence. It was held that the exculpatory part was inherently improbable and was

contradicted by other evidence and was, therefore, unacceptable. The incriminating circumstances contained in the inculpatory part of the statement were accepted to confirm the conviction of the capital offence. The law laid down by a three-Judge Bench in Chandrakant Chimanlal Desai's case is not inconsistent with the above exposition of law.

25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The Court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base conviction. However, the prudence and practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution.

26. In Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to

export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra v. Union of India - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code

stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve.

32. It is true that in criminal law, as also in civil suits, the trial Court and the appellate Court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. The question then is : whether the learned Single Judge of the High Court has committed any error of law in reversing the acquittal by the Magistrate. Not every fanciful reason that erupted from flight of imagination but relevant and germane requires tested. Reasons are the soul of law. Best way to discover truth is through the interplay of view points. Discussion captures the essence of controversy by its appraisal of alternatives, presentation of pros and cons and review on the touchstone of human conduct and all attending relevant circumstances. Truth and falsity are sworn enemies. Man may be prone to speak falsehood but circumstantial evidence will not. Falsity is routed from man's proclivity to faltering but when it is tested on the anvil of circumstantial evidence truth trans. On scanning

the evidence and going through the reasoning of the learned Single Judge we find that the learned Judge was right in accepting the confessional statement of the appellant, Ex. P-4 to be a voluntary one and that it could form the basis for conviction. The Magistrate had dwelt upon the controversy, no doubt on appreciation of the evidence but not in proper or right perspective. Therefore, it is not necessary for the learned Judge of the High Court to wade through every reasoning and give his reasons for his disagreement with the conclusion reached by the Magistrate. On relevant aspects, the learned Judge has dwelt upon in detail and recorded the disagreement with the Magistrate and reached his conclusions. Therefore, there is no illegality in the approach adopted by the learned Judge. We hold that the learned Judge was right in his findings that the prosecution has proved the case based upon the confession of the appellant given in Ex. P-4 under Section 108 of the Evidence Act and the evidence of PWs 2, 3 and 5. The prosecution proved the case beyond doubt and the High Court has committed no error of law."

4.12 Section 36A of Central Excise Act, 1944 is reproduced below:

36A. Presumption as to documents in certain cases.—Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall,—

(a) unless the contrary is proved by such person, presume—

- (i) the truth of the contents of such document;
- (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been

signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

4.13 In terms of the above section the presumption is in respect of the correctness of the facts stated in the document recovered or tendered during the investigation proceedings. In this case not only the "Red Diary titled Laxmi Book" is admissible in evidence, in view of the presumption cast by the above section but also for the reason that recovery and correctness of the facts/ entries have been admitted by the Partner of the appellant in his statements recorded under Section 14 of Central Excise Act, 1944. I do not find anything contrary to the above presumption being stated in the appeal.

4.14 I find that question of clandestine clearance is purely a question of fact and needs to be determined on the basis of the evidences recovered and marshaled in a particular proceedings. There cannot be any precedence without showing that the cases relied by the appellant were rendered in the similar or identical circumstances. It is settled principle that one addition fact/ evidence makes the case completely different from relied upon by the appellant. Though appellant has relied upon a large number of decisions but have failed to show their relevance in the facts of present case. I find no justification in placing reliance on a decision without showing any relevance to facts of case in hand.

4.15 Hon'ble Supreme Court has in case of D Bhoormull [1983 (13) ELT 1546 (SC)] observed as follows:

"31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered*

to use the words of Lord Mansfield in Blatch v. Archar (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. *Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.*

33. *Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of clause (8) of Section 167 may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling.*

43. *If we may so with great respect, it is proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of case, lighten the burden of proof resting on the prosecution. For instance, once it is*

shown that the accused was travelling without a ticket; a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.

44. *These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effect of the application of the basic principle underlying Section 106, Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient, to raise a presumption in its favour with regard to the existence of the fact sought to be proved. Amba Lal's case, (1961) 1 SCR 933 = 1983 E.L.T. 1321, was a case of no evidence. The only circumstantial evidence viz. the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an immigrant from Pakistan and had come to*

India in 1947-before the customs barrier was raised-bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts."

4.16 It is evident from the facts as stated above that the partner of the appellant firm has admitted to the recovery of the said "Red Diary titled Laxmi Book" and to the contents of the said diary. The admission of the contents is also evident from the fact that the appellant has deposited the part duty against the admitted clandestine clearances vide GAR-7 Challan No 19.01.2010 for Rs 25,000/- and GAR-7 Challan No 20 dated 09.02.2010 for Rs 25,000/-. The fact of clandestine clearance was as per the said "Red Diary titled Laxmi Book" was again admitted by the appellant in his statement recorded on 25.03.2011. It is settled principle in law that the facts admitted in the proceedings need not be proved by the other party. In the case of System and Components [2004 (165) ELT 136 (SC)] Hon'ble Supreme Court has observed as follows:

"5.....Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same. It is a basic and settled law that what is admitted need not be proved."

This decision was relied upon by the Delhi Bench in the case of Sodagar Knitwears [2018 (362) E.L.T. 819 (Tri. - Del.)] which has been affirmed by the Hon'ble Apex Court as reported at [2018 (362) E.L.T. A213 (S.C.)].

4.17 In case of ITC Ltd. [2004 (177) E.L.T. 433 (SC)] Hon'ble Apex Court observed as follows:

"18. Doubtless, the principle of res judicata is a fundamental doctrine of law that there must be an end to litigation. [See Daryao v. The State of U.P. 1962 (1) SCR 574] but the plea of res judicata has to be specifically and

expressly raised. [See : Medapati Surayya v. Tondapu Bala Gangadhara Ramakrishna Reddi - AIR (35) 1948 PC 3, 7]. This view has been recently reiterated in V. Rajeshwari v. T.C. Saravanabava - 2003 (10) Scale 768, where it is said that the foundation of the plea of res judicata must be laid in the pleadings. If this was not done, no party would be permitted to raise it for the first time at the stage of the appeal. The only exception to this requirement is when the issue of res judicata is in fact argued before the lower Court. In this case not only had the plea not been taken by the Revenue at any stage before any of the authorities, but arguments exactly to the contrary had been put forward by the respondent. We will not permit the plea to be raised now."

4.18 *The arguments being advanced by the appellant in the present appeal were foreclosed in terms of the submissions made by the appellant before the Adjudicating authority. Acting on the submissions made by the appellant adjudicating authority has not imposed any penalty. Raising these arguments for the first time in subsequent proceedings will be hit by the principles of Res-judicata. In case of M. Nagabhushana [2011 (271) E.L.T. 481 (S.C.)] Hon'ble Apex Court observed as follows:*

"13. It is obvious that such a litigative adventure by the present appellant is clearly against the principles of Res Judicata as well as principles of Constructive Res Judicata and principles analogous thereto.

14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet bis vexari, si constet curiae quod sit pro una eadem causa' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the

extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.

15. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties .

16. Justice Tek Chand delivering the unanimous Full Bench decision in the case of Mussanunat Lachhmi v. Mussammat Bhulli (ILR Lahore Vol. VIII 384) traced the history of this doctrine both in Hindu and Mohammedan jurisprudence as follows :-

"In the Mitakshra (Book II, Chap. I, Section V, verse 5) one of the four kinds of effective answers to a suit is "a plea by former judgment" and in verse 10, Katyayana is quoted as laying down that "one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of Purva Nyaya or former judgment" (Macnaughten and Colebrooke's translation, page 22). The doctrine, however, seems to have been recognized much earlier in Hindu Jurisprudence, judging from the fact that both the Smriti Chandrika (Mysore Edition, pages 97-98) and the Virmitrodaya

(Vidya-Sagar Edition, page 77) base the defence of Prang Nyaya (former decision) on the following text of the ancient law-giver Harita, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments:-

"The plaintiff should be non-suited if the defendant avers : 'in this very affair, there was litigation between him and myself previously,' and it is found that the plaintiff had lost his case".

There are texts of Prasara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition, page 15) to the same effect.

Among Muhammadan law-givers similar effect was given to the plea of "Niza-i-munfasla" or "Amar Mania taqir mukhalif." Under Roman Law, as administered by the Proetors' Courts, a defendant could repel the plaintiff's claim by means of 'exceptio rei judicatae" or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and as stated in Roby's Roman Private Law (Vol. II, page 338) the general principle recognised was that "one suit and one decision was enough for any single dispute" and that "a matter once brought to trial should not be tried except, of course, by way of appeal".

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17. The learned Judge also noted that in British India the rule of Res Judicata was first introduced by Section 16 of the Bengal Regulation, III of 1973 which prohibited the Zilla and City Courts from entertaining any cause which, from the production of a former decree or the record of the Court, appears to have been heard and determined by any Judge or any Superintendent of a Court having competent jurisdiction. The learned Judge found that the earliest legislative attempt at codification of the law on the subject was made in 1859, when the first Civil Procedure Code was enacted, whereunder Section 2 of the Code barred every

Court from taking cognizance of suits which, on the same cause of action, have been heard and determined by a Court of competent jurisdiction. The learned Judge opined, and in our view rightly, that this was partial recognition of the English rule in so far as it embodied the principles relating to Estoppel by judgment or Estoppel by record.

18. Thereafter, when the Code was again revised in 1877, the operation of the rule was extended in Section 13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action but the prohibition was extended against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent court. The learned Judge also noted that before the principle assumed its present form in Section 11 of the Code of 1908, the Section was expanded twice. However, the learned Judge noted that Section 11 is not exhaustive of the law on the subject.

19. It is nobody's case that the appellant did not know the contents of FWA. From this it follows that it was open to the appellant to question, in the previous proceeding filed by it, that his land which was acquired was not included in the FWA. No reasonable explanation was offered by the appellant to indicate why he had not raised this issue. Therefore, in our judgment, such an issue cannot be raised in this proceeding in view of the doctrine of Constructive Res Judicata.

20. It may be noted in this context that while applying the principles of Res Judicata the Court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that "the application of the rule by Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law". [See Sheoparsan Singh v. Rammanandan Prasad Singh, (1916) 1 I.L.R. 43 Cal. 694 at page 706 (P.C.)].

21. Therefore, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of Court.

22. A Constitution Bench of this Court in *Devilal Modi v. Sales Tax Officer, Ratlam & Ors.* - AIR 1965 SC 1150, has explained this principle in very clear terms :

"But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Art. 226 cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : *Daryao v. State of U.P.*, 1962-1 SCR 575; (AIR 1961 SC 1457)."

23. This Court in *All India Manufacturers Organisation* (supra) explained in clear terms that principle behind the doctrine of Res Judicata is to prevent an abuse of the process of Court.

24. In explaining the said principle the Bench in *All India Manufacturers Organisation* (supra) relied on the following formulation of Lord Justice Somervell in *Greenhalgh v. Mallard* - (1947) 2 All ER 255 (CA) :

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of

the process of the court to allow a new proceeding to be started in respect of them."

25. The Bench also noted that the judgment of the Court of Appeal in "Greenhalgh" was approved by this Court in State of U.P. v. Nawab Hussain - (1977) 2 SCC 806 at page 809, para 4.

26. Following all these principles a Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra - (1990) 2 SCC 715 laid down the following principle :

".....an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

27. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive Res Judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions."

4.19 Hon'ble Supreme Court has in the case of M J exports [2015 (325) E.L.T. 216 (S.C.)] held as follows:

"11. Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, has drawn our attention to the Order dated 2-8-2004 which was passed in Writ Petition No. 1278 of 2004. His submission was that in the earlier round of litigation before the High Court when the demand of interest was questioned, it was given up inasmuch as after arguments on this issue, the counsel for the appellant had withdrawn the writ petition. At that time,

while allowing the appellant to withdraw the writ petition, the dispute was confined only to the calculation of interest as is clear from the order dated 2-8-2004 itself which specifically referred to the averments made in Paragraphs 6 and 7. These paragraphs have already been extracted above. In Paragraph 6 particularly, Respondent No. 1 made some remarks about the calculation of the interest and had stated that it needed re-calculation. Therefore, after the dismissal of the said writ petition as withdrawn, the only issue that remains for consideration was how much interest is payable and the correct calculations thereof. It is a matter of record which flows from the correspondence exchanged thereafter between the parties that insofar as Department is concerned, it only re-worked the amount of interest and demanded interest in the sum of Rs. 4,67,02,251/- after reducing the figure from 8,43,62,504/- because of the reasons already stated above.

12. Consequently in the second writ petition, when the appellant as well as its counsel knew that the issue as to whether the interest is payable or not on other grounds had already been foreclosed in the earlier writ petition, the counsel for the appellant did not make any submission with regard to the aforesaid plea raising the issue in Show Cause Notice and limited his prayer from the date from which the interest was to be paid.

13. In these circumstances, we feel that when this issue was raised and abandoned in the first writ petition which was dismissed as withdrawn, the principles of constructive res judicata which is laid down under Order 23 Rule 1 of the Code of Civil Procedure, 1908, and which principles are extendable to writ proceedings as well as held by this Court in 'Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others' [1987 (1) SCR 200] would squarely be applicable."

4.20 Thus in view of the discussions as above I do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Order pronounced in open court on-07 January, 2026)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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