

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

Customs Appeal No. 1123 of 2009

(Arising out of Order-in-Original No. 136/2009/CAC/CC/RBT dated 10.09.2009 passed by Commissioner of Customs (EP), Mumbai)

M/s. Peacock Industries Ltd.

Appellant

69 A, Rajgir Chambers, 8th floor,
12/14, Shahid Bhagat Singh Marg,
Opp. Old Custom House,
Fort, Mumbai.

Vs.

Commr. of Customs (EP), Mumbai

Respondent

New Custom House,
Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 1124 of 2009

(Arising out of Order-in-Original No. 136/2009/CAC/CC/RBT dated 10.09.2009 passed by Commissioner of Customs (EP), Mumbai)

Shri Daud A. Dawood

Appellant

69 A, Rajgir Chambers, 8th floor,
12/14, Shahid Bhagat Singh Marg,
Opp. Old Custom House,
Fort, Mumbai.

Vs.

Commr. of Customs (EP), Mumbai

Respondent

New Custom House,
Ballard Estate,
Mumbai 400 001.

Appearance:

Shri Brijesh Pathak, Advocate, for the Appellant

Shri Manoj Kumar, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/ **86787-86788 / 2019**

Date of Hearing: 11.06.2019

Date of Decision: 10.10.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against the order in original no. 136/2009/CAC/CC/RBT dated 10.09.2009 passed by Commissioner of Customs (EP), Mumbai. By the impugned order Commissioner has held as follows:

- i. I hold that M/s PIL are the importers in this case and therefore I confirm the duty of Rs 47,62,720/- along with applicable interest against M/s PIL.*
- ii. I confiscate the goods valued at Rs 36,80,016/- under Section 111(o) of the Custom Act, 1962 and impose a redemption fine of Rs 15 lakhs under Section 125 of the Customs At, 1962.*
- iii. "I impose penalty of Rs 50 on M/s Lakhs on M/s PIL and Rs 25 Lakhs on Shri Daud A Dawood under Section 112(a) of Customs Act, 1962.*

2.1 Appellants had imported 224 MT of HDPE of Korean Origin and sold the same on high seas to M/s Taneja Exports. The goods were got cleared by the M/s Taneja Exports after filing the Bill of Entry and completion of import procedures and formalities. The goods were cleared against the License No P/K/L/M/353/226 dated 20.07.93 and DEEC Book No 092892 dated 20.07.93, without payment of duty.

2.2 On the basis of investigation undertaken by the SIIB of the Custom House at port and Jaipur it was found that the Licence and Deec book against which the goods had been cleared was not issued by the ADGFT Jaipur and was fraudulently manipulated by the appellants and other concerned with imports. A show cause notice was issued to the importers (filing the Bill of Entry) and the appellants.

2.3 Commissioner proceeded to adjudicate the case against the and held goods were liable for confiscation, allowed them to be redeemed against redemption fine and also confirmed the duty demanded. Against this order appellants had filed the appeal before tribunal, which was

allowed by the tribunal and matter remanded back vide CESTAT Final Order No A/317-318/WZB/2004/C-III dated 14.02.2005, for de novo adjudication after allowing the cross examination as requested.

2.4 In remand proceedings commissioner has readjudicated the matter in respect of appellants as per the impugned order referred in para 1, supra. Aggrieved by the impugned orders appellants have preferred these appeal.

3.1 We have heard Shri Brijesh Pathak, Advocate for the Appellant and Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue

3.2 Arguing for the appellants learned counsel submitted that-

- The impugned order has been passed by the Commissioner in remand proceedings. While remanding the matter CESTAT has directed the adjudicating authority to consider the request of cross examination made by the appellant.
- Appellants had requested for cross examination of Shri Jayesh Tanna, Shri K L Sharma and Shri Pankaj Mehta. Amongst the three persons whose cross examination was requested only Shri Pankaj Mehta appeared and was cross examined.
- Since Shri Jayesh Tanna and Shri Pankaj Mehta did not appeared for cross examination, they had requested the adjudicating authority not to rely upon their statement for proceeding against the appellants as has been held by the Hon'ble Bombay High Court in its order dated 11th October 2018 in Writ Petition No 11351 of 2018, Kurele Pan Products Pvt Ltd [2014 (307) ELT 42 (ALL)] and Swagat Synthetics [2018 (360) ELT 900 (Guj)].
- He also submitted that in the first adjudication proceedings the penalties imposed on the appellants were Rs 20 Lakhs on M/s PIL and Rs 10 Lakhs on

Shri Daud M Dawood. While in remand proceedings Commissioner has imposed penalties of Rs 50 Lakhs and Rs 25 lakhs respectively contrary to the orders of Tribunal in case of Goenka Impex Pvt Ltd [2009 (233) ELT 102 (T.Del)] and Maestro Motors Ltd [2005 (183) ELT 467 (T-Del)]

3.3 Arguing for the revenue learned authorized representative submitted-

- In the remand proceedings Commissioner has allowed the cross examination of the persons requested and all the efforts were made for producing those person.
- Shri Jayesh Tanna had through his advocate Shri J C Patel submitted that since he was co-noticee in the matter he should not be cross examined.
- He referred to various paras of the Commissioner order in which all the efforts made to produce the persons for cross examination have been recorded and stated that after making all the efforts Commissioner has proceeded to decide the case on the basis of the evidences available on record and cross examinations conducted.
- Evidentiary value of the statements made by co-noticee cannot be discarded as has been held by the Apex Court in case of Surjeet Singh Chabbra [1997 (89) ELT 464]
- Further Hon'ble Supreme court has in case of K I Pavunny laid down the test for admitting any statement recorded under Section 108 in evidence against the accused person. In view of the above decisions the approach of Commissioner cannot be faulted with.

4.1 We have considered the impugned order, submissions made in the appeals and during the course of argument of appeals.

4.2 Admittedly the matter has been readjudicated by the Commissioner in remand proceedings. While remanding the matter CESTAT has directed for cross examination of three persons who had given the statements under Section 108. Commissioner has in impugned order as directed allowed the cross examination of the persons as directed. However Shri Jayesh Tanna refused to appear for cross examination and submitted through the counsel that since he was co-noticee in the matter he should not be cross examined and asked to give evidence against himself. The relevant para's of Commissioner Order are reproduced below:

“29. Personal hearing and cross examination intimations vide letters dated 01.12.2005 were sent to i) Shri Deepak Ganatra, ii) Shri Jayesh Tanna, iii) Shri K.L. Sharma and M/s. PIL. The hearing was fixed on 20.12.2005. All the intimations except those sent to Shri Jayesh Tanna and Shri K.L. Sharma returned with a remark that the addressee is unknown. A letter dated 15.12.05 was received from Shri Sujay Kantawala on behalf of M/s. PIL and its Director Daud. A. Dawood requesting for two weeks time for reply. On 20.12.05, Shri S.K. Pathan and Shri D.D. Jadhav, advocates on behalf of Shri Tanna attended and sought time to file a reply. A letter dated 20.12.05 was received from Shri R.J. Bhatia, advocate for Shri K.L. Sharma stating that Shri Sharma was unwell and hence requested for adjournment.

30. Next personal hearing was fixed on 16.01.06 and intimations vide letter dated 21.12.05 were sent to all concerned. The intimations sent to Shri Deepak Ganatra and M/s. PIL returned with a remark that the addressee is unknown. On 16.01.06 Shri J.C. Patel, Advocate for Shri

Jayesh Tanna appeared before my predecessor and it was clarified to the advocate that Shri Tanna was required to be present only for cross examination by M/s. PIL and Mr. Dawood.

31. Vide letter dated 17.01.06, Shri Sujay Kantawala who had not appeared for the hearing scheduled on 16.01.06, requested for another date of hearing. Shri C.R. Hirani, advocate for K.L. Sharma vide letter dated 20.01.06 had requested for another date of hearing as he also did not attend the scheduled PH on 16.01.06.

32. Next personal hearing was fixed on 24.02.06 and intimations vide letter dated 03.2.206 were sent to all concerned including M/s. Rashmi Shipping Agency. The intimations sent to Shri Deepak Ganatra, Shri Dawood and M/s. PIL returned with remarks that the addressees are unknown. Vide letter dated 16.02.06, Shri Sujay Kantawala, Advocate for M/s. PIL and Mr. Dawood requested for another personal hearing on 10.03.06 or 17.03.06. This office had received a letter dated 23.02.06 from Shri Jayesh Tanna stating that since Mr. Tanna is a co notice in the SCN, he cannot be compelled to subject himself for cross examination, accordingly his presence may not be insisted. This office vide letter dated 01.03.06 addressed to Shri Jayesh Tanna had requested him to cooperate with the department in order to mitigate the grievances of the notices M/s. PIL and Mr. Dawood and therefore requested him to be present for cross examination on 08.03.2006. This letter was written to Shri Jayesh Tanna in addition to the intimation vide letter dated 22.2.2006, requesting him to attend the personal hearing on 08.03.2006.

33. Next personal hearing was fixed on 08.03.06 and intimations vide letter dated 22.2.06 were sent to i) Shri Deepak Ganatra, ii) Shri Jayesh Tanna, iii) Shri K.L. Sharma, iv) M/s. PIL, v) Shri Dawood and vi) M/s. Rashmi

Shipping Agency. The intimation sent to Shri Deepak Ganatra returned with a remark that the addressee is unknown.

34. On 08.03.2006, Shri K.L. Sharma did not appear for hearing and Cross Examination. Shri C.R. Hirani, advocate on behalf of Shri Sharma had given a letter dated 8.3.2006 and requested for further 2 weeks time to ascertain the position with respect to CESTAT order. A letter dated 8.3.2006 by Shri Jayesh Tanna was received in this office on 8.3.2006 stating that he had not received the copy of CESTAT order. Shri Pankaj Mehta of M/s. Rashmi Shipping Agency turned up for cross examination by Shri Sujay Kantawala, advocate on behalf of M/s. Peacock Industries that was held before my predecessor Smt. Neelam Rattan Negi, the same is reproduced as under:

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36. Shri Sujay Kantawala, Advocate on behalf of M/s. PIL vide letter dated 29.3.2006 submitted as under:

“a. Your Honour was pleased to allow cross-examination of Mr. Pankaj Mehta. Mr. Jayesh Tanna has been changing his stand from time to time and despite your Honour addressing correspondence to him, he deliberately chose not to remain present for cross-examination. In view of this fact and in view of the recent decision in the case of Ashwin S. Mehta & ors. Vs. CC, Mumbai reported in 2006(72)RLT 786-Cestat, Mum, the statements of Tanna / Ganatra etc are of no relevance and cannot be relied upon vis-à-vis my clients.

b. In the previous adjudication proceedings, my clients, by written submissions dated 29th August 1998 had interalia stated that the duty liability is on the Importer. My clients had sold the goods on High Seas to M/s. Taneja Exports. It is on record that it was Mr. Jayesh Tanna who

had approached the CHA Mr. Pankaj Mehta along with the high sea sales contact and other import documents of the goods, the same were delivered from the docks gate to Shri Jayesh Tanna as transport was arranged by Mr. Tanna. This is clear from the testimony conducted on 8th March 2006. Hence, Jayesh Tanna was acting on his own and used his own mind and it is clearly evident that my clients never know that M/s. Taneja Exports was created by certain other persons and clients were never aware that the advance licence which was issued in the name of Taneja Exports and which was used for clearance of the goods was a forged one. Mr. Jayesh Tanna, in his statement dated 18.4.2004, has clearly stated that Mr. Deepak Ganatra, his relative, who is engaged in trading of chemicals, proposed to Mr. Tanna about this entire deal and introduced Mr. Pritipal Singh sometime in September, 1993.

c. In fact, Mr. Tanna has undertaken to pay whatever Government Revenue he and Ganatra have evaded by their activities which clearly proves that Mr. Jayesh Tanna has, in connivance with Ganatra, Pritipal Singh and Kisen Sharma jointly conspired to evade the duty. It also appears that one Mr. Pradeep Borana is also equally guilty as an abettor. Hence, it is very clear that Jayesh Tanna and Deepak Ganatra appear to be responsible for disposal of the goods and the penalty has been rightly imposed on them.

d. In fact, they should be asked and directed to pay the Customs duty also. Your Honour will also appreciate that my clients have agitated these issues from a long time and they have fully co-operated with the Adjudication proceedings. Hence, it is prayed that the Show Cause Notice, proposing penalty against my clients, may be discharged vis-à-vis my clients, in the interest of justice

and for this act of kindness, my clients shall as in duty-bound for ever pray."

37. Another personal hearing / cross-examination was fixed on 25.04.06 and intimations vide letter dated 04.4.06 were sent to i) Shri Deepak Ganatra, ii) Shri Jayesh Tanna, iii) Shri K.L. Sharma, iv) M/s. PIL and v) Shri Dawood. The intimation sent to Shri Deepak Ganatra returned with a remark that the addressee is unknown. On 25.4.2006, nobody other than Shri Kantawala, advocate for M/s. PIL attended the hearing. Shri Kantawala, vide letter dated 25.4.2006 stated that all the witnesses have chosen to remain absent in a show of complete defiance to the adjudication process. In this context, he stated that his written submissions under cover of letter dated 29.3.2006 may be considered and the matter may be decided on the basis of these submissions.

38. Another personal hearing / cross-examination was fixed on 19.06.06 and intimations vide letter dated 25.5.06 were sent to i) Shri Deepak Ganatra, ii) Shri Jayesh Tanna, iii) Shri K.L. Sharma, iv) M/s. PIL and v) Shri Dawood. The intimation sent to Shri Deepak Ganatra returned with a remark that the addressee is unknown. On 19.6.2006, nobody other than Shri Kantawala, advocate for M/s. PIL attended the hearing. Shri Kantawala during the course of hearing on 19.6.2006 reiterated submissions made earlier and drew attention to his letter dated 25.4.2006. He requested that proceedings against his clients be dropped.

39. As directed by the Hon'ble CESTAT, opportunities of cross-examination of various witnesses were allowed and it is seen that none of the witnesses except Shri Pankaj Mehta have appeared for cross-examination by the subject notice. The two notices have been given ample opportunity of personal hearing and their written submissions made by their advocate Shri Sujay Kantawala are before me. In the wake of available evidences and

submissions, I proceed to decide the subject SCN with respect to the two noticee M/s. Peacock Industries Ltd. (PIL) and Shri Daud A. Dawood, Director of M/s. PIL whose case has been remanded for denovo consideration by the CESTAT and is the subject matter of this adjudication proceedings.

40. On the basis of evidences available on record, submissions made by these two noticee through their counsel from time to time and cross examination of Shri Pankaj Mehta, I have to decide the following:

i) whether M/s. PIL, who is the High Sea Seller, is liable for duty of Rs.47,62,720/- along with interest as applicable in the subject case?

ii) whether the subject goods are liable for confiscation under section 111(o) of Customs Act, 1962 and whether M/s. PIL and Shri Daud A. Dawood are liable for penalty under section 112(a) of the Customs Act, 1962?"

4.3 After recording the issues raised for cross examination and formulating the issues for his consideration of evidences on record Commissioner has proceeded to determine the questions before him by recording as follows:

"41. One of the submissions of the learned advocate on behalf of M/s. PIL and Shri Daud A. Dawood is that his clients have sold the goods on high seas to M/s. Taneja Exports, that as per the cross examination, it is evident that Shri Jayesh Tanna on behalf of M/s. Taneja Exports had dealt with the CGA directly and arranged for clearance of the goods, that Mr. Tanna has undertaken to pay whatever Government Revenue has been evaded. It was also submitted that duty liability is on the Importer and his clients having sold the goods to M/s. Taneja Exports are not liable for the payment of duty on these goods. I find

that the facts of the case are not as simple as the same are made out to be. I tried to reason whether the High Sea Seller (M/s. PIL) is not related to the High Sea Buyer (M/s. Taneja Exports) and had nothing to do with the goods subsequently cleared by the High Sea Buyer as is expected to be in a commercial High Sea Sale Transaction? I find that the relationship between High Sea Buyer (M/s. Taneja Exports) and M/s. PIL (High Sea Seller) is brought out in the investigations detailed above in Para 20 of this Order. In the statement dated 25.8.1994, Mr. Daud A. Dawood, Director of M/s. PIL had stated that he received an amount of only Rs.14 lakhs in cash from M/s. PIL. This is only a part of the High Sea Sale Transaction. It is also seen that he failed to substantiate the receipt of even this part payment. Daud A. Dawood further accepted in his statements (and the same has not been retracted till date) that he has claimed 176 MT of HDPE back from M/s. Taneja Exports in lieu of part HSS sale proceeds. This shows that the nature of High Sea sale transaction is not at arms length between the two parties namely M/s. PIL and M/s. Taneja Exports.

42. I also find that the investigations, as detailed at para 2 of this order, have revealed out that High Sea Buyer (M/s. Taneja Exports) is a non-existent entity as it was stated by the Jurisdictional Assistant Commissioner, Central Excise & Customs that there was no such address as 74, Polo ground, Jaipur existing at Jaipur. Most striking feature noticed in the so called High Sea Sale Agreement with M/s. Taneja Export is that M/s. PIL's address is 74, Polo ground, Udaipur as its Director M/s. Daud A. Dawood and the fake (non-existent) address of the High Sea Buyer is 74, Polo ground, Jaipur. It can be seen that the address of both is identical and the one of High Sea Buyer is shown as Jaipur and High Sea Seller is Udaipur. I am unable to satisfy my conscience that identical address of High Sea Seller and High Sea Buyer could be mere coincidence. Be

as it may, the claim of High Sea Seller that he was not aware of fake address of High Sea Buyer is amusing since he was in constant contact with High Sea Buyer even after the sale is said to be over. Based on these facts I am not inclined to accept the submission of M/s. PIL that they are not at all concerned with the issue after their (so called) High Sea Sale Agreement.

43. The High Sea Seller (M/s. PIL) having claimed back part of HDPE which is cleared duty free under advance licence, cannot feign ignorance as to why goods were cleared duty free. It was the condition of the notification 204/92-Cus. dated 19.5.92 (DEEC Scheme) that goods after clearance shall be used for manufacture of a final product (actual use) by the importer. Thus, the High Sea Seller taking back the goods after clearance shows that the goods have not been used by Actual user and thereby the goods are liable for confiscation and are confiscated under section 111(o) of Customs Act, 1962.

44. I do not consider the claim of Shri Kantawala, that since no cross examination is done, no credence can be placed on their statements recorded. I find that these statements are recorded under section 108 of Customs Act, 1962 and not retracted till date. The statement recorded under section 108 of the Customs Act, 1962 has evidentiary value. It has been held in various judgments and more specifically quoted 2008 (226) ELT 183 (Raj.) in the case of Ramesh Khatnani Vs Union of India dated 9.7.2009 that "Statement of a person under Section 108 ibid in adjudicatory proceedings against him cannot be discarded". I consider the statement of Shri Daud A. Dawood who himself agreed that he dealt with M/s. Taneja Exports (High Sea Buyers) and has received 176 MT of HDPE back after clearance in lieu of consideration. Further, it is also not that the whole case is decided only

on the basis of these statements as discussed herein above.

45. In the cross examination allowed of Shri Pankaj Mehta of CHA M/s. Rashmi Shipping Agency he had said that he had dealt with High Sea Buyer regarding filing of the Bill of Entry. This is not an issue before me since the investigations have revealed that High Sea Buyer M/s. Taneja Exports represented by Shri Tanna is a creation of High Sea Seller. The High Sea Sale is not valid because the High Sea Buyer is a fictitious firm. I consider the case of *Jhunjhunwala Vanaspati Ltd. Vs. Commissioner – 2009 (237) ELT A20 (SC)* wherein the appeal by the party against the Hon'ble High Court of Gujarat order citation 2008 (232) ELT 600 (Guj.) dated 4.7.2008 was dismissed. The Order of the High Court in an identical case of High Sea Sale wherein the High Sea Buyer vanished after clearance leading to inference that the buyer was creature of respondent to avail benefit of concessional rate of duty. I apply the ratio of this judgment in the subject case wherein not only the High Sea Buyer is found to be a fictitious firm but the High Sea Seller has also appropriated a portion of the goods which were cleared 'Duty Free' by the fictitious firm. The fact that the goods, after clearance came back to High Sea Seller clinches the issue that the High Sea Seller i.e. M/s. PIL is the actual importer.

46. M/s. PIL have knowingly entered into High Sea Sale transaction with a non-existent entity namely M/s. Taneja Exports and have also received a part of the consignment (176 Mts of HDPE) cleared duty free (under DEEC licence) routed back to them. They have apparently succeeded in getting the goods cleared duty free by a fictitious entity thereby violating the conditions of the notification 204/92 dated 19.5.92. The High Sea Sale transaction with M/s. Taneja Exports was made by Shri Daud A. Dawood in his capacity as the Director of M/s. PIL. In the wake of above,

it appears that M/s. PIL and Shri Daud A. Dawood are responsible for the various acts for which the goods are held liable for confiscation under section 111(o) and therefore both are liable for penalty under sec. 112 ibid."

From the discussions it is quite evident that the findings in the impugned order are not based only the statements of the Shri Taneja only who was not cross examined as he refused to make himself available being the co noticee. The order is based on holistic examination of all the evidences. Hon'ble Supreme Court has in case of Vinod Kumar Vs State of Punjab [2015 (3) SCC 220] expressing anguish over the state and manner in which the cross examination of the witness is used to stall the proceedings observed as follows:

"41. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the

material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in- chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross- examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

In the same decision Hon'ble Apex Court has stated as follows:

"29. The next aspect which requires to be adverted to is whether testimony of a hostile evidence that has come on record should be relied upon or not. Mr. Jain, learned senior counsel for the appellant would contend that as PW-7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination he has taken the path of prevarication. In Bhagwan Singh V. State of Haryana[(1976 (1) SCC 389], it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In Khuji @ Surendra Tiwari V. State of Madhya Pradesh[(1991) 3 SCC 627], the Court after referring to the authorities in Bhagwan Singh (supra), Rabindra Kumar Dey V. State of Orissa[(1976) 4 SCC 233] and Syad Akbar V. State of Karnataka [(1980) 1 SCC 30], opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof."

In view of the decision of Hon'ble Apex Court as referred above we do not find any merits in the submissions of the Appellant relying on the decisions of Hon'ble Bombay High Court in its order dated 11th October 2018 in Writ Petition No 11351 of 2018, Kurele Pan Products Pvt Ltd [2014 (307) ELT 42 (ALL)] and Swagat Synthetics [2018 (360) ELT 900 (Guj)] in the facts of the present case.

4.4 Hon'ble Apex Court has stated the law in respect of admissibility of the statement of co-accused in decisions as follows:

Kanungo & Company [1983 (13) ELT 486 (SC)]

"12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

Naresh J Sukhwani [1996 (83) ELT 258 (SC)] :

"It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we

do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine."

K I Pavunny [1997 (90) ELT 241 (SC)]

"In Naresh J. Sukhawani V/s. Union of India [(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 vs. Union of India [1997 (89) ELT 464], 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 120-B 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 the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve"

4.5 In view of the decision of Tribunal in cases referred by the appellants in their submissions we are of the view that Commissioner had limited scope in the remand proceedings and could not have put the appellants in more precarious position than what was held against them in the earlier proceedings specifically when revenue had not filed any appeal against the earlier order. The relevant paragraphs of the decisions referred are reproduced below:

Goenka Impex Pvt Ltd [2009 (233) ELT 102 (T-Del)]

"7. The appellants also submitted that in the earlier proceedings, the adjudicating authority imposed a penalty of Rs one lakh, whereas in the remand proceedings the penalty of Rs 2 lakhs has been imposed. The contention is

that in the remand proceedings , the quantum of penalty cannot be enhanced. We find that as the adjudicating authority at first time imposed penalty of Rs. one lakhs and revenue has not filed the appeal against the impugned order hence the penalty is reduced to one lakhs."

Maestro Motors Ltd [2005 (183) ELT 467 (T-Del)]

"7.The learned Advocate has rightly pointed out that it was not open to the Commissioner to enhance the penalties in respect of the appellants (except M/s. Dolphin Motors (P) Ltd.) under the remand proceedings as the appellants cannot be placed in a precarious position than what they were in before filing the appeals.

Thus following the above decisions of the tribunal we reduce the penalty imposed on the appellant to equal the penalty imposed in earlier proceedings.

5.1 In view of the discussions as above we partly allow the appeals filed by the appellants and reduce the penalty imposed under section 112 (a) to Rs 20 lakhs and 10 lakhs respectively. The appeals are disposed accordingly.

(Order pronounced in the open court on 10.10.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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