

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

Customs Appeal No. 85160 of 2015

(Arising out of Order-in-Original No. 104/2014/CAC/CC(I)/AB/Gr.V dated 10.10.2014 passed by the Commissioner of Customs (Import), Mumbai)

Dinesh Sharma F-3, Flat No.2, Sector 2, Sector 3E/B, Opp. Fire Brigade, Kalamboli, Navi Mumbai 410 218.	Appellant
---	------------------

Vs.

Commissioner of Customs (I), Mumbai New Custom House, Ballard Estate, Mumbai 400 001.	Respondent
--	-------------------

WITH

Customs Appeal No. 85168 of 2015

(Arising out of Order-in-Original No. 104/2014/CAC/CC(I)/AB/Gr.V dated 10.10.2014 passed by the Commissioner of Customs (Import), Mumbai)

A.K. Mani Proprietor of M/s. AKM Enterprise, No.6 & 8 (Old No.176), Coral Merchant Street, Mannady, Chennai 600 001.	Appellant
---	------------------

Vs.

Commissioner of Customs (I), Mumbai New Custom House, Ballard Estate, Mumbai 400 001.	Respondent
--	-------------------

WITH

Customs Appeal No. 85914 of 2015

(Arising out of Order-in-Original No. 104/2014/CAC/CC(I)/AB/Gr.V dated 10.10.2014 passed by the Commissioner of Customs (Import), Mumbai)

Dharmesh Vador Govindji Gopalji & Sons (Now M/s. GGS Infrastructure Pvt. Ltd.) 5, Kashiram Jamnadas Building, 5, P.D'Mello Road, Mumbai 400 009.	Appellant
---	------------------

Vs.

Commissioner of Customs (I), Mumbai New Custom House, Ballard Estate, Mumbai 400 001.	Respondent
--	-------------------

AND

Customs Appeal No. 85915 of 2015

(Arising out of Order-in-Original No. 104/2014/CAC/CC(I)/AB/Gr.V dated 10.10.2014 passed by the Commissioner of Customs (Import), Mumbai)

Govindji Gopalji & Sons

Appellant

(Now M/s. GGS Infrastructure Pvt. Ltd.)
5, Kashiram Jamnadas Building,
5, P.D'Mello Road, Mumbai 400 009.

Vs.

Commissioner of Customs (I), Mumbai

Respondent

New Custom House,
Ballard Estate, Mumbai 400 001.

Appearance:

Shri Ankit Vishnoj, Advocate, for the Appellant in appeal C/85160/2015
Shri Stebin Mathew, Advocate, for the Appellant in appeal C/85168/2015
Ms. Pooja Reddy, Advocate, for the Appellant in appeal C/85914 & 85915/2015
Shri Manoj Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 24.01.2023
Date of Decision: 24.01.2023

FINAL ORDER NO. 85763-85766/2023

PER: SANJIV SRIVASTAVA

These appeals are directed against the order in original 104/2014/CAC/C(I)/AB/GR.V dated 10.10.2014 of Commissioner Customs (Imports), Mumbai. By the impugned order following has been held:

"ORDER

- (a) *I reject the declared value of Rs. 39,64,79,950/- (CIF) in respect of 122 consignments (118 used cranes and 04 consignments of accessories) imported in the name of M/s Govindji Gopalji & Sons, and high seas buyers thereof (Details as per 'Annexure-A-1', A-2, A-3', A-4', B-1 and - B-2' to the show cause notice) under Rule 10A/ Rule 12 of the Custom Valuation Rules 1988/ 2007 (as applicable) read with section 14 of the Customs Act, 1962*
- (b) *I re-determine the CIF value of 122 consignments (118 used cranes and 04 consignments of accessories)*

imported in the name of M/s Govindji Gopalji & Sons, and high seas buyers thereof (Details as per 'Annexure-A-1', A-2', A-3', A-4', B-1 and -B-2' to the show cause notice) as Rs. 73,90,29,923/- (Rupees Seventy Three Crores Ninety Lakhs Twenty Nine Thousand Nine Hundred Twenty Three Only) under Rule 3 / Rule 8 of the Custom Valuation Rules 1988 or Rule 3 Rule 9 of Customs Valuation Rules, 2007 read with section 14 of the Customs Act, 1962 (as applicable).

- (c) *I order for confiscation of 122 consignments (118 used cranes and 04 consignments of accessories) imported in the name of M/s Govindji Gopalji & Sons, and high seas buyers thereof (Details as per 'Annexure-A-1', A-2', A-3', A-4', B-1 and -B-2' to the show cause notice) having the re-determined CIF of Rs. 73,90,29,923/- (Rupees Seventy Three Crores Ninety Lakhs Twenty Nine Thousand Nine Hundred Twenty Three Only) under Section 111(m) of the Customs Act, 1962.*
- (d) *However, I give the importer M/s Govindji Gopalji and Sons an option to redeem the 117 consignments of used canes and accessories under section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 6,50,00,000/-(Rupees Six Crores Fifty Lakhs Only) in lieu of confiscation, for the containers which were seized during the investigation under section 110 of the Customs Act.*
- (e) *I give the high seas buyer M/s Reetika Road Lines an option to redeem the one used canes and accessories under section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 3,50,000/- (Rupees Three Lakhs Fifty Thousand Only) in lieu of confiscation, for the containers which were seized during the investigation under section 110 of the Customs Act.*
- (f) *I give the high seas buyer Rangara Industries Pvt Ltd. an option to redeem the one used canes and accessories under section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 14,50,000/- (Rupees Fourteen Lakhs Fifty Thousand Only) in lieu of confiscation, for the*

containers which were seized during the investigation under section 110 of the Customs Act.

- (g) I give the high seas buyer M/s AKM Enterprises an option to redeem the two used canes and accessories under section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) in lieu of confiscation, for the containers which were seized during the investigation under section 110 of the Customs Act.*
- (h) I give the high seas buyer M/s Huda Equipments an option to redeem the one used canes and accessories under section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 8,50,000/- (Rupees Eight Lakhs Fifty Thousand Only) in lieu of confiscation, for the containers which were seized during the investigation under section 110 of the Customs Act.*
- (i) I confirm the duty demand of Rs. 8,35,01,181/- for the used cranes and accessories imported by M/s. Govindji Gopalji & Sons (details as per Table 18 of the show cause notice") in terms of section 28 of the Customs Act, 1962, along with interest in terms of section 28AB of the Customs Act, 1962, as it existed at the material time (under section 28AA from 08.04.2011 onwards).*
- (j) I confirm the duty demand of Rs. 9,43,508/- for the used cranes purchased on high seas basis by M/s Rangara Industries Pvt. Ltd (details as per Table 18 of the show cause notice") in terms of section 28 of the Customs Act, 1962, along with interest in terms of section 28AB of the Customs Act, 1962, as it existed at the material time (under section 28AA from 08.04.2011 onwards).*
- (k) I confirm the duty demand of Rs. 17,86, 121/- for the used cranes purchased on high seas basis by M/s AKM Enterprises (details as per Table 18 of the show cause notice") in terms of section 28 of the Customs Act, 1962, along with interest in terms of section 28AB of the Customs Act, 1962, as it existed at the material time (under section 28AA from 08.04.2011 onwards).*
- (l) I confirm the duty demand of Rs. 11,26,632/- for the used cranes purchased on high seas basis by M/s Huda*

Equipments (details as per Table 18 of the show cause) in terms of Section 28 of the Customs Act, 1962, along with interest in terms of section 28AB of the Customs Act, 1962, as it existed at the material time (under section 28AA from 08.04.2011 onwards).

- (m) I impose penalty under section 114A, equivalent to the duty amount of Rs. 8,35,01,181/- (details as per Table 18 of the show cause notice), on M/s Govindji Gopalji & Sons. If the duty and interest as demanded above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within the said period of thirty days.*
- (n) I impose penalty under section 114A, equivalent to the duty amount of Rs. 9,43,508/- (details as per Table 18 of the show cause notice), on M/s Rangara Industries. If the duty and interest as demanded above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within the said period of thirty days.*
- (o) I impose penalty under section 114A, equivalent to the duty amount of Rs. 17,86,121/- (details as per Table 18 of the show cause notice), on Shri. A. K. Mani, Proprietor of M/s AKM Enterprises. If the duty and interest as demanded above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within the said period of thirty days.*
- (p) I impose penalty under section 114A, equivalent to the duty amount of Rs. 11,26,632/- (details as per Table 18 of the show cause notice), on M/s Huda Equipments. If the duty and interest as demanded above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest*

as per first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within the said period of thirty days.

- (q) I impose penalty of Rs. 1,00,00,000/- (Rupees One Crore Only) under section 112(a) of the Customs Act, 1962 on Shri. Darmesh Vador, Managing Partner of M/s Govindji Gopalji & Sons.*
- (r) I impose penalty of Rs. 50,000/- (Rupees Fifty Thousand Only) under section 112(a) of the Customs Act, 1962 on Shri. Dinesh Sharma, Proprietor of M/s Reetika Road Lines.*
- (s) I impose penalty of Rs. 1,00,000/- (Rupees One Lakh Only) under section 112(a) of the Customs Act, 1962 on Shri. Nizar Rangara, Chairman-cum-Director of M/s Rangara Industries Pvt. Ltd.*
- (t) I impose penalty of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only) under section 112(a) of the Customs Act, 1962 on Shri. Hakim Shaikh, Director of M/s Huda Equipments.*
- (u) I impose penalty of Rs. 3,50,000/- (Rupees Three Lakhs Fifty Thousand Only) under section 112(a) of the Customs Act, 1962 on Shri. Madan Lalwani.*
- (v) I impose a Penalty of Rs.1,00,00,000/- (Rupees One Crore Only) under Section 114AA of the Customs Act, 1962 on M/s Govindji Gopalji and Sons.*
- (w) I impose a Penalty of Rs.1,00,00,000/- (Rupees One Crore Only) under Section 114AA of the Customs Act, 1962 on Shri. Dharmesh Vador, Managing Partner of M/s Govindji Gopalji and Sons.*
- (x) I impose a Penalty of Rs. 50,000/- (Rupees Fifty Thousand Only) under Section 114AA of the Customs Act, 1962 on Shri. Dinesh Sharma, Proprietor of M/s Reetika Road Lines.*
- (y) I impose a Penalty of Rs. 1,00,000/- (Rupees One Lakh Only) under Section 114AA of the Customs Act, 1962 on M/s Rangara Industries Pvt. Ltd.*
- (z) I impose a Penalty of Rs. 1,00,000/- (Rupees One Lakh Only) under Section 114AA of the Customs Act, 1962 on*

Shri. Nizar Rangara, Chairman-cum-Director of M/s Rangara Industries Pvt. Ltd.

- (aa) I impose a Penalty of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only) under Section 114AA of the Customs Act, 1962 on Shri. A. K. Mani, Proprietor of M/s AKM Enterprises.*
- (bb) I impose a Penalty of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only) under Section 114AA of the Customs Act, 1962 on M/s Huda Equipments.*
- (cc) I impose a Penalty of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand Only) under Section 114AA of the Customs Act, 1962 on Shri. Hakim Shaikh, Director of M/s Huda Equipments.*
- (dd) I impose a Penalty of Rs.3,50,000/- (Rupees Three Lakhs Fifty Thousand Only) under Section 114AA of the Customs Act, 1962 on Shri Madan Lalwani.*
- (ee) I order for finalization of the assessment provisionally cleared one used crane viz. Lune AT-100/47 Hydraulic Mobile Crane under bill of entry no. 968060 dated*
- (ff) I order for enforcement of Bank Guarantee of Rs. 7,65,000/- furnished at the time of seeking provisional release of the aforesaid crane from Customs, towards the duty/interest/fine/penalty liability.*
- (gg) I confiscate one used crane viz. Lune AT-100/47 Hydraulic Mobile Crane cleared provisionally under bill of entry no. 968060 dated 23.09.2010 under Section 111(m) of the Customs Act, 1962. However, I give an option to the importer to redeem the goods on payment of fine of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand Only) under Section 125(1) of the Customs Act, 1962.*
- (hh) I set aside the notice issued to M/s N. Dharmadas & Co (CHA no. 11/100) Noticee no. 9, M/s N. G. Bhanushali & Co noticee no. 11 and Shri. Bharat Bhanushali, Noticee no. 12, M/s Friends Syndicate Clearing Pvt. Ltd., Noticee no. 13, Shri. V. R. Divakaran, Noticee No. 14 and M/s Lakka Transglobal India Pvt. Ltd. Noticee No. 15 and Shri. Krishnamurari Bhandari, Noticee No. 16."*

2.1 A show cause dated 04.04.2013 was issued by the Additional Director General DRI to:-

A. Shri Dharmesh Vador, the importers (persons/ legal entities) as mentioned at column B of the table given below:

Table

(In Rs)					
S. N o	Name of the Importer	No. of consign ments importe d	Declared Value	CIF Re-determined CIF Value	Differential Duty demand under section 28 of CA, 1962
A	B	C	D	E	F
1.	M/s Govindji Gopalji & Sons, Mumbai	32	6,69,91,799/-	13,70,33,060/-	+
		85	29,65,42,840/-	55,48,08,613/-	8,35,01,187/-
2.	Shri Dinesh Sharma, proprietor of M/s Reetika Road Lines	1	26,61,721/-	35,73,000/-	+
3	M/s Rangara Industries Pvt Ltd and Shri Nizar Rangara	1	1,48,92,500/-	1,16,30,654/-	9,43,508/-
4	Shri A.K. Mani, proprietor of M/s AKM Enterprise s	2	1,38,25,118/-	2,00,00,000/-	17,86,121/-
5	M/s Huda Equipment s Pvt Ltd and Shri Hakim Shaikh	1	48,27,819/-	87,22,750/-	11,26,632/-
	Total	122	39,64,79,950/-	73,90,29,923/-	8,73,57,448/-
+ Differential duty of this crane being beyond 5 years period, is beyond time period under Section 28 of the Customs Act, 1962. However, differential duty having been deposited voluntarily, the same has been adjusted against duty evaded					

jointly and severally were called upon to show cause, as to why:

- (a) *the respective declared value of the goods as mentioned in column 'D' of the Table 18 ibid (further details at 'Annexure-A-1' to 'Annexure-B-2' to this notice) should not be rejected under Rule 10A/ Rule 12 of the Custom Valuation Rules 1988/ 2007 (as applicable) and the value should not be re- determined as the value mentioned in column 'E' of the Table-18 ibid, under Rule 3 / Rule 8 of the Custom Valuation Rules 1988 or Rule 3 Rule 9 of Customs Valuation Rules, 2007 read with section 14 of the Customs Act, 1962 (as applicable);*
- (b) *the respective imported goods having re-determined value as mentioned in column 'E' of the Table-18 ibid (further details at 'Annexure-A-1' to 'Annexure-B-2' to this notice) should not be held liable to confiscation under Section 111(m) of The Customs Act, 1962;*
- (c) *the respective differential duty as mentioned in column 'F' of the Table-18 ibid (further details at 'Annexure-A-1' to 'Annexure-B-2' to this notice) should not be demanded under the provisions of section 28 of the Customs Act, 1962, along with interest in terms of section 28AB of the Customs Act, 1962, as it existed at the material time (section 28AA from 08.04.2011 onwards);*
- (d) *(d) penalty should not be imposed upon them for respective consignments mentioned at column C to Table-18, under Section 112(a) and / or Section 114A of the Customs Act, 1962;*
- (e) *penalty should not be imposed upon them for respective consignments mentioned at column C and having declared value as mentioned at column D to Table-18, under Section 114AA of the Customs Act, 1962;*

Shri Dharmesh Vador and M/s. Govindji Gopalji & Sons are further called upon to show cause as to why:

- (a) *the assessment in respect of 1 used crane viz. Lune AT-100/47 Hydraulic Mobile Crane which was imported and cleared provisionally under bill of entry no. 968060 dated 23.09.2010 (details as per Sr. No. 8 of Annexure*

"A-4" to this Show Cause Notice) should not be finalized, on the basis of the re-determined CIF values as per column no. 15 of the said 'Annexure-A-4';

- (b) the bank guarantee of 7,65,000/- furnished for seeking provisional release of the aforesaid crane viz. Lune AT-100/47 Hydraulic Mobile Crane which was allowed provisional clearance from Mumbai port (live crane), should not be appropriated against the government dues that may be adjudged under section 28 of the Customs Act, 1962 in relation to the aforesaid cranes.*

Each of M/s M. Dharamdas & Co. (CHA No. 11/100), Shri Madan Lalwani, M/s N.G. Bhanushali & Co., Shri Bharat Bhanushali, M/s Friends Syndicate Clearing Pvt Ltd, Shri V.R. Divakaran, M/s Lakka Transglobal India Pvt Ltd, Shri Krishnamurari Bhandari, is required to show cause, as to why:

- (a) penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962 in relation to the consignments, imported and cleared from Mumbai port, mentioned against their respective names In Table 17 supra;*
- (b) penalty should not be imposed upon them under Section 114AA of the Customs Act, 1962 in relation to the consignments, imported and cleared from Mumbai port, mentioned against their respective names In Table 17 supra;*

2.2 This show cause notice was adjudicated by the Commissioner by the impugned order. Aggrieved by the order appellants have filed these appeals

2.3 We are having only the appeals of Shri Dinesh Sharma (C/85160/2015) (Appellant 1), A K Mani (C/85168/2015) (Appellant 2), Dhramesh Vador (C/85194/2015) (Appellant 3) and Govindji Gopalji & Sons (C/85915/2015) (Appellant 4). We are thus deciding the issues only in respect of these four appellants.

3.1 We have heard Shri Ankit Vishnoj Advocate for Appellant 1, Shri Stebin Mathew Advocate for Appellant 4 and Ms Pooja Reddy Advocate for Appellant 3 & 4,

3.2 The counsels for the Appellant 1, Appellant 3 and Appellant 4 submitted that the order has been passed in violation of the principles of natural justice without allowing them the opportunity of hearing or the cross examination of the witnesses/ persons whose statements have been relied upon against them. Hence the order needs to be set aside on this ground itself and matter remanded to original authority for reconsideration of the issues raised by them.

3.3 Counsel for the Appellant 2, challenged the order that although he has made the submissions his submissions were not taken on record. Further the value of the two cranes have been determined at Rs 2 crore on the basis of the statement of his client. However the statement has not been referred in toto, for the reason that though initially he had paid the amount of Rs 2 crore he has been refunded Rs 75 lakhs by the seller namely Shree Dharmesh Vador the fact which is also part of the same statement. Thus the transaction value in respect of the two cranes purchased by him was Rs 1.25 crore, whereas the duty has been paid at the time of clearance of these two cranes at value which is higher than this.

3.4 Learned Authorized representative reiterates the findings recorded in the impugned order.

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

4.2 The relevant excerpts from the impugned order relevant for consideration of the issue are reproduced below:

"27 (B).(i) Shri Dinesh Sharma Proprietor of M/s Reetika Road lines vide reply dated 11.03.2014 submitted that:

1. The noticee is not in a position to bear the cost of litigation and therefore was not in a position to make any representation in the matter of SCN as he was assured by investigating authorities that once instructed amounts is paid his matter is over and he is not required to bother.

2. The noticee submitted that his submission be kindly taken on records and in view of above circumstances, he be kindly accorded a chance to present is matter in person.

3. *Shri. Dinesh Sharma (hereinafter referred to as 'the noticee') is the Proprietor of M/s Reetika Roadlines The noticee is engaged in crane hiring services and had, interalia purchased one old Used Crawler Crane P & H 670WLC SR No 50380 from M/s Govindji Gopalji & Sons, Mumbai on High Sea Sales Basis under Bill of Entry No. 824766 dated 20/2/2007 with a declared CIF Rs. 26,61,721 - and entire clearance was handled by Shri Dharmesh Vador of M/s Govindji Gopalji & Sons, the High Seas Seller.*

4. *It is On 18/03/2013, a statement of Shri Dinesh Sharma, Proprietor of the Noticee firm was recorded by DR1 officer wherein it was recorded that a cash amount of Rs. 9,11,000/- was transacted over and above the cheque payments of Rs. 26,62,000/- and actual purchase value was Rs. 35,73,000/-,*

5 *Vide letter 18/3/2013 through his letter the noticee made advance revenue deposits of Rs. Rs. 5,10,015/- towards the liabilities which may arise in the matter. He was assured that with this payment his matter is closed.*

6. *However the noticee was issued a Show Cause Notice No. DRI/MZU/B/INV- 12/ 2010-11 dated 4/4/2013 proposing rejection of declared value and proposing to hold the subject crane as liable for confiscation and proposing imposition of penalties under Section 112 (a) and 114A of the Customs Act, 1962*

7. *TIME BARRED MATTER: The noticee contend that SCN IS ISSUED BEYOND FIVE YEARS OF IMPORT. The SCN was issued on 4/04/2013 which is beyond the period of five years from the date of importation which was on 20/02/2007 and therefore there is no occasion to challenge the valuation or duty liabilities on the goods which were cleared finally on first check basis and unconditionally. It is further submitted that proposed confiscation penalties do not stand in view of the bar of limitation provided in law.*

8. *NO SEIZURE: GOODS NOT AVAILABLE FOR CONFISCATION: NO FINE IMPOSABLE The noticee submitted that the subject crane cleared finally by the Customs officers on first check basis is in their possession and same has not been physically seized.*

As goods are not seized, same are not available for confiscation and thus same cannot be held as liable for confiscation.

9. APPROPRIATION OF ADVANCE REVENUE DEPOSIT AGAINST TIME BARRED DUTY IS ILLEGAL: It is submitted that though the show cause notice proposes redetermination of Customs value by the Adjudicating Authority, it already adjudicates the proposed values, determines liabilities and appropriates the advance revenue deposits as mentioned in Para 27.1 at the Table 18 and as per remarks appended thereto. The notice does not even brings any proposal for adjustment of such deposits by the Adjudicating Authority. To this extent, such appropriation is illegal and the entire amount of Rs. 510015/- be kindly held as available to the adjudicating authority for onward disposal in terms of Customs Act 1962. The advance deposits were made during the investigations to buy peace with DRI authorities, against a threat of harassment and arrest.

10. In the instant matter the import was done on High Sea Sale basis from M/s Govindji Gopalji & Sons, an Used Crawler Crane P & H 670WLC SR No 530380, Bill of Entry No. 824766 dated 20/2/2007. The issuance of show cause notice is on 4/4/2013 which is beyond the period of five years, and hence time barred. The department has invoked the period of five years from the date of importation which is illegal and bad in law. Even though the notice being time barred the noticee to have peace of mind paid an amount of Rs. 5,10,015/- including differential duty and interest. It is further submitted that proposed penalties do not stand in view of the bar of limitation provided in law.

11. It is submitted that since the entire transaction and clearance was handled by the High Seas Seller, the noticee had no occasion to deal with the goods till completion of clearance and therefore no penalty is imposable upon him under Section 112 or 114AA of the Customs Act 1962.

12 the noticee requested that he be kindly heard in person to explain his matter in person in detail.

27.(B) (ii)It was further prayed that:

The amount deposited by the noticee as

1. *by the noticee as advance revenue deposits be kindly held as available before the adjudicating authority and the appropriation ordered in Para 27.1 of the SCN be kindly held as null and void as made at SCN stage in violation of principal of natural justice.*
2. *The used Crawler Crane P & I-1 670WLC SR No 50380 be held as not available for confiscation.*
3. *The penalties proposed in the show cause notice be dropped.*

27 (E) M/s Govindji Gopalji & Sons submitted their rely to the show cause notice. It was inter alia stated that:

1. *They denied the allegations contained in the said show cause notice, they also denied that, there was any mis-declaration of value or any other material particulars with reference to any of the Cranes imported by us and which on the subject matter of the present show cause notice.*
2. *With reference to the said show cause notice they submitted that, the allegations contained in the show cause notice are based on the incorrect statements purported to have been recorded during the investigations. These statements are, as can be seen, recorded without taking into consideration, the well established practice, procedure and the instructions of the department relating to assessment, examination and clearance of second hand Machinery.*
3. *They also submitted that, the show cause notice is absolutely illegal and without jurisdiction inasmuch as that, the show cause notice demands duty in receipt of the Cranes, which are beyond five years of the date on which the notice is issued. In the other words, the notice seeks to demand/ appropriate/ record duty beyond the extended period of limitation of five years from the date of imports. The show cause notice, therefore, is hopelessly barred by limitation.*
4. *the allegations contained in the show cause notice based on the statements, which are said to have been recorded during the investigations. None of these statements are*

corroborated by any other tangible or cogent evidence but on the other hand the said statements are totally contradictory to the laid down or the settled practice/procedure and instructions of the department relating to assessment, examination and clearance of the second hand machinery. It is therefore, submitted that, there is a need for Cross-examination of the persons whose statements are extensively referred to and relied upon in the show cause notice for the purpose of the allegations. Similarly, we also need to cross-examine the officers concerned with assessment, examination and clearance of the cranes. We have imported above 128 cranes since about 2005. All the cranes are the subject matter of the present show cause notice and therefore, the demand. It may not be necessary to cross-examine all such officers. However a two or three officers who had examined and permitted clearance of the cranes which have been cleared in each of the years covered in the show cause notice would be sufficient to bring out the incorrect and irrational nature of the notice.

- 5. that, it is now a well settled position in law that, statements cannot be taken as evidence without giving an opportunity of cross-examination of such persons which statements are relied upon.*
- 6. They need to cross examine the investigating officers who recorded then statements which according to them are incorrect and involuntary statements.*

RECORD OF PERSONAL HEARING

28.(i) Shri. V. R. Divakaran, Managing Director of M/s Friend Syndicate Clearing Pvt. Ltd Shri. K.B.Bhandari, Director, M/s Lakka Transglobal India Pvt. Ltd. and Advocate, Shri. S. K. Mathur attended the personal hearing on 10.06.2014 on behalf of M/s Friend Syndicate Clearing Pvt. Ltd, Noticee No. 13, Shri. V. R. Divakaran, Managing Director, Friend Syndicate Clearing Pvt. Ltd, Noticee No. 14, M/s Lakka Transglobal India Pvt. Ltd, Noticee No. 15 and Shri. K.B.Bhandari, Director, M/s Lakka Transglobal India Pvt. Ltd, Noticee No. 16. The advocate Shri. S. K. Mathur, submitted that:

In the SCN there is no finding against M/s Friend Syndicate Clearing Pvt. Ltd. and M/s Lakka Transglobal India Pvt. Ltd. The prominent note of taking a benchmark value was suggested by Shri. Madan Lalwani. As such no case is made out against those noticees. In the absence of mens-rea and no role displayed by them. These firms should be absolved of penalty charges.

Written submission dated 10.06.2014 were reiterated.

(ii) Shri. Vikram Jhangiani, Partner of M/s M. Dharamdas & Co Noticee no. 9 and his advocate Shri. C. Nanda Gopal attended the personal hearing held on 10.06.2014 Advocate Shri C. Nanda Gopal, quoted from SCN itself to Show not M/s M. Dharamdas & Co. who bonafide in its working. It who only one of its employees Shr. Madan Lalwani who exceeded his brief.

Case of M/s Santosh Textile v/s C.C. Mumbai was cited in favour of his client for non- application of penalty v/s 114 AA as there was no mens-rea.

Written submissions dated 10.06.2014 were reiterated.

Various cases were cited in defence for non-applicability of penalty v/s 112(9) on the noticee no. 9.

(iii) Shri. Brijesh Pathak, Advocate attended personal hearing held on 10.06.2014 on behalf of M/s N. G. Bhanushali, Noticee No. 11 and Shri. Bharat Bhanushali Noticee no. 12. He reiterated written submission placed before me on 10.06.2014.

(iv) Shri. Anil Mishra, advocate attended personal hearing held on 10.06.2014 on behalf of Shri. Dinesh Sharma of M/s Reetika Roadlines Noticee No. 3 and Shri. Madan

Lalwani Noticee No. 10

Shri Mishra reiterated written submissions made on date, in respect of Shri Madan Lalwani, Shri Lalwani has also not been investigated in this case by DRI.

Shri Anil Mishra, reiterated written submissions made on 11.03.2014 in respect of M/s Reetika Roadlines, proprietor Shri. Dinesh Sharma.

Case is time barred. No goods are available for seizure. Thus, duty deposited should be returned & no fine, penalty be levied on noticee no. 3.

DISCUSSION AND FINDINGS

29. I have carefully gone through the case records, written submission of the noticees and the submissions made by the noticees during the personal hearing. The noticee No.4, M/s Rangara Industries Pvt. Ltd, Noticee No. 5 Shri. Nizar Rangara, Noticee No. 6 M/s A.K. Mani, Proprietor of M/s AKM Enterprises, Noticee No. 7 M/s Huda Equipment Pvt. Ltd and Noticee No.8 Shri. Hakim Shaikh, Director, M/s Huda Equipment Pvt. Ltd did not appear before me for personal hearing in spite of being afforded three opportunity spread over Seven months. This steadfast abstention from the personal hearing only serves to show that the noticee is not interested in PH and rather content with adopting dilatory tactics. Under Section 122A of the Customs Acts, 1962, it is laid down that the adjudicating authority shall not grant adjournment of hearing more than three times. I am therefore, constrained to decide the case based on available records, including noticee's written submissions.

30. From the investigation conducted, statements of the concerned persons and documents recovered and taken on record the following facts emerge:

- (i) There was a meeting of mind between Shri. Dharmesh Vador (Managing Partner of M/s Govindji Gopalji & Sons) overseas supplier, High Seas Buyers (i.e. Shri. Dinesh Sharma, Shri. Nizar Rangara, Shri. A. K. Mani and Shri. Hakim Shaikh) and Shri. Madan Lalwani and others towards defrauding the public revenue by resorting to mis-declaration of the transaction value of the secondhand cranes.
- (ii) Shri. Dharmesh Vador, Managing Partner of M/s Govindji Gopalji & Sons imported 122 consignments of used cranes and accessories and cleared them from Customs on strength of manipulated invoices showing highly understated value of the cranes during the period January 2006 to September 2010. Out of these 122 consignments 05 used cranes were sold on high seas basis to other importers by Shri. Dharmesh Vador.
- (iii) Shri Madan Lalawani of CHA firm, M/s. M. Dharamdas & Co. admitted that he had suggested M/s Govindji Gopalji and Sons to declare the value of the old and used cranes as Rs.

40/- per kg of net weight of the crane as benchmark for hassle-free clearances.

(iv) M/s. Govindji Gopalji & Sons, paid the actual freight charges to the shipping lines for the import of the used cranes and suppressed the said facts with Customs Authorities by submitting manipulated invoices, wherein the value was shown as "on CIF or C &F".

(v) Shri. Dharmesh Vador of M/s. Govindji Gopalji & Sons had admitted in his statement recorded under Section 108 of Customs Act, 1962, that the amount of differential value (i.e. the difference between the actual value of the crane and the declared manipulated invoice value) to the overseas suppliers, in cash, which apparently had been remitted illegally in hawala by utilizing the services of Shri. Brijesh Gala (hawala operator).

31. first take the contention of the noticees vis-à-vis the evidences on record.

31 (A) (i) M/s Govindji Gopalji & Sons and Shri. Dharmesh Vador (noticee no. 1 and 2), denied the charges leveled against them in the show cause notice. They submitted that there was no misdeclaration of value or any material particular with reference to the cranes imported by them.

It was contended that show cause notice is absolutely illegal and without jurisdiction, the show cause notice demands duty in respect of the cranes, which are beyond five years from the date on which the notice is issued. Therefore, the show cause notice is hopelessly barred by limitation.

I agree with the contention of the notice that no duty could be demanded under Section 28 of the Customs Act, 1962 in respect of 32 cranes (details as per Sr. No.1 to 27 of 'Annexure-A-1' and Sr No.1 to 5 of 'Annexure-A-4' to this notice to the show cause notice, which were imported beyond five years from the relevant date. However, I find that Section 28 of the Customs Act, 1962, provides that where an importer has by reasons of collusion or any willful misstatement or suppression of facts, had not paid any duty which could be issued upto five years from relevant date. However, it does not bar voluntary deposit of self-admitted duty for any imports beyond five years to be adjusted for duty

and leviable against the said imports. The limitation with respect to the time only bars the department to issue demand notice under Section 28 of the Customs Act, 1962, it does not bar the importer to pay back the duty evaded on his own. Thus the duty amount and interest amount deposited voluntarily by the importer is therefore adjustable against the duty recoverable even for the period beyond five years. This has been upheld in the case of India Cements v/s CCE, Madras [1984(18)ELT 499 (TRB)] the special bench of CEGAT, New Delhi. M/s. Govindji Gopalji & sons had voluntarily made a payment of Rs. 2,85,00,000/- during the course of investigation, as detailed at para 7 to the show cause notice. This is accordingly adjusted against the duty of Rs. 2,10,54,129/- payable on the 32 cranes (details as per Sr. No.1 to 27 of 'Annexure-A-1' and Sr No. 1 to 5 of 'Annexure-A-4' to the notice to the show cause notice which are beyond five years.

Similarly, Shri. Dinesh Sharma, proprietor of M/s Reetika Roadlines (who had purchased one P & H 670 crane from Shri. Dharmesh Vador on high seas sale basis) had made voluntary payment of Rs. 5,10.015/- was accordingly adjusted against the duty of Rs. 2,85,426/- which was imported vide Bill of Entry no. 824766 dated 20.07.2007 which is beyond five years.

(ii) It was contended that the allegations contained in the show cause notice based on the statements were not corroborated by any tangible or cogent evidences but on the other hand the said statements were totally contradictory to the laid down or the settled practice/procedure and instruction of the departments relating to assessment, examination and clearance of the second hand machinery, it was therefore requested for cross examination of the persons whose statements are extensively referred and relied upon in the show cause notice. Similarly, they also requested for cross examination of the officers concerned with assessment, examination and clearance of the cranes. They further requested for cross examination of the investigating officers who recorded the statements which according to them are incorrect and involuntary statements.

I disagree with the contention of the noticees, It is evident from the investigation carried out by the DRI that Shri. Dharmesh

Vador had submitted manipulated import invoices and false declarations and the Chartered Engineer's certificates submitted to the Customs at the time of clearance of the said cranes were manipulated/doctored in respect of cranes imported in the name of M/s Govindji Gopalji & Sons. The cranes covered under the bills of entry, got assessed to lower duty on the basis of suppressed value, which were declared in the manipulated invoices and the declarations submitted under the respective bills of entry.

I find that Shri. Dharmesh Vador has himself admitted in the statement recorded under Section 108 of the Customs Act, 1962 to have undervalued the cranes imported in the name of M/s Govindji Gopalji & Sons and had voluntarily deposited an amount of 2,85,00,000/- towards Customs duty liability. Shri. Dharmesh Vador admitted that he had remitted the differential value (i.e. the difference between the actual value of the crane and declared manipulated invoice value) through unofficial (hawala) to the overseas supplier

I find that once the importer has admitted to undervaluation and made payment of differential duties, he cannot backtrack and change his stand. This view has been endorsed by the Tribunal in the case of American Eye Ltd. Vs Commissioner of Customs (Import), the Hon'ble CESTAT, Mumbai vide Order No. A/748-749/12/CSTB/C-I dated 18.10.2012 wherein it has been held in principle that once the appellant has admitted to undervaluation and misdeclaration of goods and also discharged the duty liability willingly, he cannot turn around and now say that the valuation done by Customs is not sustainable in law.

In regard to the assessment and examination carried out by the officers of the Customs for the impugned goods, I find that while allowing the goods for home consumption, assessments were made on the limited data available to the appraising officer and no detailed investigations were carried out, as of then. It was only during the course of detailed investigation carried out by the investigating agency that it was revealed and established that the value of the imported goods has been suppressed by the noticee with intent to evade duty.

As regard to affording opportunity for cross examination. I find that there is no contradiction in the depositions made by Shri. Dharmesh Vador or his above named accomplices. In view of the various confessional statements and other documentary evidences brought to fore by the investigating agency, I do not find any compelling reason for offering the cross examination as sought by the noticee and also rely on the following judgements in this regard:-

(a) In case of Fortune Impex Vs Commissioner of Customs, Calcutta reported in 2001(138) ELT 556 (Tri-Kolkata) it was observed by the tribunal that "It is not required that in each and every case cross-examination should necessarily be allowed. There is no absolute right of cross-examination provided in the Customs Act." It is felt that the cross examination is not necessary.

(b) Poddar Tyres (Pvt) Ltd. v. Commissioner - 2000 (126) E.L.T. 737:- wherein it has been observed that cross-examination not a part of natural justice but only that of procedural justice and not a 'sine qua non'.

(c) Kumar Jagdish Ch. Sinha v. Collector - 2000 (124) E.L.T. 118 (Cal H.C.): - wherein it has been observed that the right to confront witnesses is not an essential requirement of natural justice where the statute is silent and the assessee has been offered an opportunity to explain allegations made against him.

(d) A.K. Hanbeen Motarred v. Collector - 2000 (125) E.L.T. 173 (Mad HC): wherein it has been observed that the strict rule of burden of proof applicable to criminal prosecution may not be applicable to proceedings before Customs authorities.

(e) Shivom Ply -N-Wood Pvt. Ltd. Vs Commissioner of Customs & Central Excise Aurangabad- 2004(177) E.L.T 1150(Tri.-Mumbai):- wherein it has been observed that cross-examination not to be claimed as a matter of right.

(f) In the case of Liyakat Shah Vs CCE 2000 (120) ELT 556, the CESTAT has held that 'cross examination can be denied if it is just delaying tactics to avoid justice. In the case of GTC Industries Ltd. Vs Commissioner of Customs New Delhi 2011 (264) ELT 433 (Tri- Del), it has been held that Evidence in

adjudication proceeding need not be like the one in criminal cases - Findings in adjudication based on preponderance of probability - Witnesses found to be not innocent but well conversant with appellants' trade - Statements of witnesses voluntary and not retracted - Reply to show cause notice not filed and merely raised flimsy plea for cross-examination prematurely - Right to cross-examination can be taken away under certain circumstances - Cross- examination not required when circumstantial evidence providing reliable basis corroborating statements - Witnesses not having enmity with appellant and such witnesses not required to put to cross-examination No right to seek cross- examination on flimsy plea when burden of proof discharged by Revenue - Natural justice not violated".

(g). It is also pertinent to mention here the decision of Tribunal in the case of Sudhir Sharma Vs CCE 2011 (265) ELT 243, the relevant paras of the said decision are reproduced below.

18.9 Though it cannot be denied that the right of cross-examination in any quasi- judicial proceeding is a valuable right given to the noticee as these proceedings may have adverse consequences, at the same time under certain circumstances, this right of cross-examination can be taken away. Hon'ble High Court of Bombay while dealing with the similar issue in the case of Gyan Chand SantLal Jain v. UOI, reported in 2001 (136) E.L.T. 9 (Bom.) and taking into consideration the applicability of concept of principles of natural justice in that regard quoted para 76 of Halsbury's Law of England, Vol. I (4th Edition) which reads thus:-

"Natural justice does not impose on administrative and domestic tribunals a duty to observe all the technical rules of evidence applicable to proceedings before courts of law. Members of tribunals may be entitled to draw on their specialized or local knowledge of the type of, issue before them in order to supplement as well as evaluate evidence to find facts by inquisitorial methods, and inspections and to obtain information from other persons: but it will generally be a denial of justice to fail to disclose to a party specific material relevant to the

decision if he is thereby deprived of any opportunity of comment on it."

[Emphasis supplied]

The Hon'ble High Court observed thus:-

"In other words, it seems to be a fairly settled position in law that it is not necessary that persons whose statements have been previously recorded must be examined in the presence of the party against whom such previous statements are intended to be used. The rules of natural justice do require that their previous statements must be made available to the party against whom they were intended to be used and such party must be given a fair opportunity to explain the same or comment on them. What would amount to fair opportunity would depend upon the facts and circumstances of each case...."

[Emphasis supplied]

As regard to affording opportunity for cross examination of the officers who assessed and examined the cranes, I do not find any compelling reason for allowing for cross- examination of the officers who examined and assessed the cranes on the basis of the limited data available to them as discussed above, particularly when the importer had presented the manipulated invoices showing understated values for the clearance of the subject goods before the Customs authorities. Therefore, I deny the request of cross examination of the officers concerned with assessment and examination and rely on the judgements discussed in the above paras.

31 (B) Noticee no. 3 M/s Reetika Roadlines contended that the show cause notice was issued beyond five years of import therefore there is no duty liability, they further stated that the proposed penalties do not stand in view of the bar of limitation provided by the law.

I agree with the contention of the noticee that no duty can be demanded under section 28 of the Customs Act, 1962 which were imported beyond five years from the relevant date. As discussed in above para it does not bar voluntary deposit of self-admitted duty for any imports beyond five years to be adjusted for duty and leviable against the said imports. The limitation with

respect to the time only bars the department to issue demand notice under Section 28 of the Customs Act, 1962, it does not bar the importer to pay back the duty evaded on his own. Thus the duty amount and interest amount deposited voluntarily by the importer is therefore adjustable against the duty recoverable even for the period beyond five years.

31 (C) M/s Rangara Industries Pvt. Ltd. Noticee No. 4, Shri. Nizar Rangara, Chairman- Cum Director of M/s Rangara Industries Pvt. Ltd. Noticee No. 5, Shri. A. K. Mani, Proprietor of M/s AKM Enterprises, Noticee No. 6, M/s Huda Equipment Pvt. Ltd. Noticee No. 7 and Shri. Hakim Shaikh, Noticee No. 8 were given numerous opportunities to file their reply to the instant show cause notice and also make submissions during the course of personal hearing. However, they neither filed any reply to the show cause notice nor did they appear for personal hearing. I therefore find that the principals of natural justice had been complied with as the above mentioned noticees had been given adequate opportunities to have their say recorded in the matter. I therefore decide the matter on the basis of the facts available on records.”

4.3 From the excerpts produced in respect of the Appellant 1, Appellant 3 and 4 from the above order it is evident that the none of the three appellants were heard by the Commissioner while passing the order. The entire case made out against the appellants is based on the statements recorded. Further it is observed that the impugned goods were assessed to duty by the Custom authorities acting as per the provision of law. The investigations have been undertaken much later on and in some case the duty has been sought to be recovered much after the expiry of 5 years from the appellant stating the same to be voluntary payment of duty. Was the payment voluntary or not need to be established. Where the statements recorded voluntary or not is not forthcoming. The decisions relied upon by the Commissioner for not allowing the cross examination are not in cases where person comes forth after the expiry of period limitation and deposits the duty suo motto. We would rely upon the decision of Hon’ble Apex Court in the case of K I Pavunny [1997 (90) E.L.T. 241 (S.C.)] holding as follows:

"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.

31. It is seen that the contraband of 200 gold biscuits of foreign marking concealed in a wooden box and kept in the pit in the compound of the appellant was recovered at 9.00 a.m. on December 6, 1980 in the presence of Panch (mediator) Witnesses including PW-3. This is proved from the evidence of PWs 2, 3 and 5. There was nothing for PW-3 to speak falsehood against the appellant who is a friend of him. PWs 2 and 5 also withstood the grueling cross-examination. There is nothing to disbelieve their evidence. The appellant herein made statement under Section 108 at 1 p.m. on December 6, 1980, i.e., after four hours. It is unlikely that during that short period PW-2 and 5 would have obtained the retracted confession under Ex. P-4 in his own hand-writing running into 5 typed pages under threat or duress or promise. No doubt the wealth of details by itself is not an assurance of its voluntary character. The totality of the facts and circumstances would be taken into account. On a consideration of the evidence, the High Court accepted that Ex. P-4 is a voluntary and true confessional statement and accordingly it convicted the appellant of the offences. It is seen that Ex. P-4 was given in furtherance of the statutory compulsion and the appellant made statement in unequivocal terms admitting the guilt. It is seen that in Barkat Ram's case, this Court accepted the retracted confessional statement and upheld, on that basis, the conviction. In Vallabhdas Liladhar's case and also in Rustom Das's case the retracted confessional statement found basis for conviction and in the latter the recoveries were relied as corroborative evidence. In Haroom Abdulla's case, this

Court used the evidence of co-accused as corroborative evidence.

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."

4.4 In our view the appellants should be allowed an opportunity to defend their case in the manner they deem best. They should have been heard at least. That being so the appeals in respect of these three appellants need to be allowed and matter remanded to original authority for de novo consideration after allowing the opportunity of hearing to the appellant and also to cross examine the person whose statement revenue intend to rely upon against them as have been held in the following cases.

- a. Karim Jaria & Others [Final Order No A/85324-85327/2022 dated 12.04.2022]
- b. Gopalji Hevy Lifters [2017 (357) ELT (537) T-Mum)]

4.5 Now coming to the case of Appellant 2. Relevant Excerpts from the impugned order are reproduced below:

"11.1 During the course of the investigations, it was revealed that M/s. Govindji Gopalji & Sons had sold some cranes on high seas and some cranes had been sold after clearances in their own name. It was further gathered that M/s. AKM Enterprises, Chennai had purchased two cranes from M/s. Govindji Gopalji & Sons on high seas and further two cranes after M/s. Govindji Gopalji & Sons had cleared them through Customs. Further, there are several other companies which purchased cranes from M/s. Govindji Gopalji & Sons on high seas. The statements of all these individuals are as under:-

11.2 (a) Statement of Shri A.K.Mani, Proprietor of M/s. A.K.M. Enterprises [buyer of 4 cranes from M/s. Dharmesh Vador] was recorded on 12.01.2011 under the provisions of Section 108 of the Customs Act, 1962. In the said statement, Shri A.K.Mani inter alia stated that he had about 22 trucks / trailers and 9 cranes in his fleet lying at his yard in Chennai. On being asked to furnish details of the transactions relating to the aforesaid 4 cranes, Shri Mani stated that he had purchased the following two

cranes viz. (i) Grove TM 800 crane (YOM 1981) and (ii) P&H (YOM 1978), from Shri Dharmesh Vador locally. On being asked further, Shri Mani interalia stated that he had gathered from trade that one Dharmesh Vador of M/s. Govindji Gopalji & Sons had many cranes available for sale; that he contacted Dharmesh and on a pre-decided date came to Mumbai with his mechanic; that Dharmesh called him to his (Dharmesh's) Taloja yard; that there he inspected the cranes and on approval of his mechanic was interested in two cranes viz. Grove TM 800 crane of 60 Tons (YOM 1981) and P&H 660 crane of 40 tons (YOM 1978); that the deal for those two cranes was finalized for an amount of 85 lakhs; that Dharmesh wanted a substantial part of the amount to be in cash to which he refused; that Dharmesh gave him an invoice of 50 lakhs for Grove TM 800 crane and invoice of 25 lakhs for P&H 600 crane and asked for an amount of 10 lakhs in cash; that he gave the entire amount of 85 lakhs by demand drafts; that the delivery of the cranes was handed over to him at Taloja; that he transported the said cranes to Chennai through trailers; that the transport charges for both the cranes were borne by him.

11.2 (b) Under his above statement, Shri Mani gave details of two more cranes acquired from Dharmesh Vador viz. Krupp 6275 (YOM 1982) and Grove TM 1275 W STD (YOM 1986) on high seas sales. On being asked, Shri Mani interalia stated that Shri Dharmesh had sent him photographs of these cranes and offered to sell these cranes to him on High Sea Sale basis; that Dharmesh convinced him that he would be saving by way of sales tax by buying cranes on high seas basis; that the deal for these two cranes was finalized for 2 crores; that in addition the Customs duty and clearing charges were to be paid by him; that while finalizing the deal Dharmesh had informed him that they would be raising an invoice for USD 2,05,000/- plus 2% commission for Krupp 6275 crane and for USD 1,10,000/- plus 2 % Commission for Grove TM 1275; that he arranged for a term loan of 2 crores and the entire amount of 2 Crores was paid to Dharmesh through demand drafts/ RTGS; that they went to inspect the cranes at Mumbai Port when the cranes arrived; that thereafter bills of entry for clearance of the two cranes were filed

on their behalf by CHA of Shri Dharmesh viz. M/s. Friends Syndicate Clearing Pvt. Ltd.; that the Customs duty of 13,96,476/- and 26,02,523/- respectively in respect of the aforesaid cranes was paid by them; that after clearance from Customs, the cranes were transported by him to Chennai on his expense; that he got the cranes registered with RTO authorities.”

11.4 Similarly, statements of other buyers who had purchased cranes from M/s Govindji Gopalji & Sons., on High Sea Sale basis were recorded. The statements of all the high sea sale buyers are enclosed as relied upon document to this notice. The gist of the aforesaid statements as regards to cost, payments in cash and cheque is tabulated as under:-

Table-3

S N o	Name of the High Seas buyer	Date of recordi ng of the statem ent	Descripti on of the crane purchas ed on high seas from	Bill of Entry No./ Date	Declared CIF value	Actual purchase price	Payment Details	
							Payment made through cheque (i.e. the sale invoice value declared) (Rs.)	Paym ent made in cash under stated value) (Rs.)
1	2	3	4	5	6	7	8(a)	8(b)
3.	A K Mani (Propriet or M/s AKM Enterpris es)	12.01. 11	USED GROVE HYDRAU LIC CRANE CRANE Y.O.M. 1986 TM- 1275 W STD /ACCS.	857954/26.0 8.08 (Sr No 2 Annexure B-2)	48,27,8 19/-	70,00,000 /-	70,00,000 /-	-
4	A K Mani (Propriet or M/s AKM Enterpris es)	12.01. 11	USED KRUPP HYDRAU LIC CRANE 6275- YOM 1991 W?STD ACC	857954/ 26.08.08 (Sr No 3 Annexure B- 2)	89,97,2 99/-	1,30,00,0 00/-	1,30,00,0 00/-	

11.5 Under letter dated 18.03.2013, Shri Dinesh Kumar Sharma, Proprietor of M/s. Reetika Roadlines made a voluntary payment of 5,10,015/- towards his customs duty liability in respect of the crane purchased by him from Shri Dharmesh Vador on high sea sale basis. The aforesaid payment has been

deposited in the Government Treasury at New Custom House, Mumbai.

34. (i) During investigations, statements of various importers who had purchased cranes from Shri Dharmesh Vador on high seas basis were recorded. In their individual statements, the following High Sea Buyers had given the actual CIF value at which they had purchased the crane from Shri Dharmesh Vador. Therefore, I take the later admitted value values mentioned in column no. 6 of Table below, as the transaction value of the crane under Rule 3 of Customs Valuation Rules, 1988/ 2007 read with Section 14 of Customs Act, 1962.

SR N O	B/E NO	DESCRIPTIO N OF GOODS	INVOIC E VALUE	DECLARED CIF VALUE (R)	CIF VALUE ADMITTED BY THE HIGH SEAS BUYERS	SOURCE
1	2	3	4	5	6	7
3	857954/26.08.08 (Sr No 2 Annexure B-2)	USED GROVE HYDRAULI C CRANE Y.O.M. 1986 TM-1275 W STD /ACCS.	USD 110000 C&F	48,27,819/-	70,00,000/-	This crane was sold on high seas sale Shri basis to M/s. A.K.M.Enterpris es A.K.Mani has admitted in his statement dated 12.01.2011 that he has purchased this crane for 70,00,000/- CIF.
4	857954/ 26.08.08 (Sr No 3 Annexure B-2)	USED KRUPP HYDRAULI C CRANE 6275-YOM 1991 W?STD ACC	USD 205000 C&F	85,97,299/-	1,30,00,000/	This crane was sold on high seas sale Shri basis to M/s. A.K.M.Enterpris es A.K.Mani has admitted in his statement 1,30,00,000/- dated 12.01.2011 that he has purchased this crane for 1,30,00,000/- CIF.

4.6 Relevant excerpts from the statement of Shri A K Mani dated 12.01.2011 is reproduced below:

"(5) Krupp 6275 (YOM 1982) and

(6) Grove TM 1275 W STD (YOM 1986)

The above two cranes were also acquired from Dharmesh Vador. On my enquiry about crane of 100 tons and 200 tons capacity, Dharmesh sent me photographs of these two cranes. They appeared to be in good condition. I liked the cranes. Dharmesh offered to sell these two cranes to me on High Sea sale basis. He convinced me that I would be saving a handsome amount by way of sales tax if I buy these cranes on high sea sale basis. I had an Import Export Code in the name of my proprietary firm viz. A.K.M. Enterprises. The deal for these two cranes was finalized for Rs 2 crores. In addition, the Custom duty was to be paid by us. The custom clearing charges were to be borne by Dharmesh. While finalizing the deal with Dharmesh, he had informed me that they would be raising an invoice for USD 2,05,000/- plus 2% commission for Kruup 6275 crane and for USD 1,10,000/- plus 2% Commission for Grove TM1275. I arranged for a term loan of Rs 2 crores from my banker i.e. UCO bank. Within two to three weeks, the entire amount of Rs 2 crores was paid to Dharmesh through demand drafts/ RTGS. After about two to three days, I was informed by Dharmesh that my cranes have arrived at Mumbai port. I came to Mumbai alongwith Biju (maintenance-in-charge of all my cranes). We went to port to inspect the cranes. At port, I got shock of my life when I saw the Kruup 6275 crane. It was not the crane, photos of which were shown to me. Even the Grove TM1275 crane was not the same. I felt cheated. I took up the matter with Dharmesh. Initially, he was giving evasive replies. But I continued to pursue the matter with his father and other senior members of our trade. Finally, Dharmesh relented and refunded me an amount of Rs 75 lakhs from the amount of Rs 2 crores paid by me. This amount was deposited back in my UCO.bank account. Thereafter, bills of entry for clearance of these two cranes were filed on our behalf by M/s. Friends Syndicate Clearing Pvt Ltd, who was the Custom House Agent of M/s

Govindji Gopalji and Sons. On your enquiry about payment of the Customs duty, i say that the duty in respect of the above two cranes was paid by me as follows:

Sr.No	Bill of entry no and date.	Description of the crane	Value (Rs)	Duty paid (Rs)
1	857954/26.08.2008	Grove TM-1275 crane	48,76,097/-	13,96,476/-
2	857954/ 26.08.2008	Kruup 6275 Crane	90,87,272/-	26,02,523/-

On your enquiry about the payment of customs clearing charges, I say that as per our deal, the same were to be paid by Dharmesh. I do not know, what amount was paid by him as clearing charges to the Custom House agent M/s Friends Syndicate Clearing Pvt Ltd. After clearance from customs, the cranes were transported by me to Chennai on my own expense. On being asked, I say that both the cranes are registered with the RTO authorities at Chennai. Kruup 6275 crane is having registration number TN 04 AD 2664 and Grove TM1275 crane is bearing registration number TN 04 AD 2665. Both these cranes are working at sites at Chennai.”

4.7 From the above it is quite evident that actual amount paid by him against the purchase of the two cranes was not Rs 2,00,00,000/- but the actual amount paid by him was only Rs 1,25,00,000/-. That being so accepting the same as transaction value in the course of High Sea Sales, the transaction value by applying the above principles as have been applied by the show cause notice and in the impugned order, the transaction value should have been determined at Rs 1,25,00,000/- which is less than the actual transaction value declared on the Bill of Entries at the time of clearance of goods. It is settled principle in law the entire fact stated in the statement about the transaction should have been taken into account while determining the correctness of transaction. However we also take note of the submission made by the counsel and put on record that the transaction value as declared at the time of clearance will now be challenged by the appellant in any further proceedings. Having taken note of the above we are of the view that the appeal filed by the appellant 2 will have to be allowed in his favour setting aside the impugned order in his respect.

5.1 Appeals of Shri Dinesh Sharma (C/85160/2015) (Appellant 1), Dhramesh Vador (C/85194/2015) (Appellant 3) and Govindji Gopalji & Sons (C/85915/2015) (Appellant 4) are allowed and the matter remanded back to original. As the issue involved is in respect of importation made nearly 10-15 years back the matter needs to be redetermined in de novo proceedings by the original authority within three months from the receipt of this order.

5.2 Appeal of Shri A K Mani (C/85168/2015) (Appellant 2) is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu