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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: December 1, 2015  
Date of decision: December 10, 2015

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**CEAC 1/2011**

RAKESH KUMAR GARG ..... Petitioner  
Through: Mr. Krishna Kant with Mr. Manoj  
Awasthi, Advocates.

versus

COMMISSIONER OF CENTRAL EXCISE ..... Respondent  
Through: Mr. Satish Kumar, Senior Standing  
counsel.

**WITH**

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**CEAC 2/2011**

SANTOSH KUMAR GARG ..... Petitioner  
Through: Mr. Krishna Kant with Mr. Manoj  
Awasthi, Advocates.

versus

COMMISSIONER OF CENTRAL EXCISE ..... Respondent  
Through: Mr. Satish Kumar, Senior Standing  
counsel.

**AND**

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**CEAC 3/2011**

DEVI DASS GARG ..... Petitioner  
Through: Mr. Krishna Kant with Mr. Manoj  
Awasthi, Advocates.

versus

COMMISSIONER OF CENTRAL EXCISE ..... Respondent  
Through: Mr. Satish Kumar, Senior Standing  
counsel.

**CORAM:**  
**JUSTICE S. MURALIDHAR**  
**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

**10.12.2015**

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**Dr. S. Muralidhar, J.:**

1. These three appeals are directed against the common order dated 6<sup>th</sup> August 2010 passed by the Customs, Excise & Service Tax Appellate Tribunal ('CESTAT') in E/266/2006-268/2006-EX/DB arising out of an order-in-original dated 28<sup>th</sup> October 2005 passed by the Commissioner of Central Excise, Delhi (CCE).

2. By the impugned order, CESTAT reduced the penalty levied on the Appellants herein by the CCE under Rule 209A of the Central Excise Rules, 1944 (CE Rules 1944) and Rule 26 of the Central Excise Rules 2002 (CE Rules 2002) to Rs. 5 crores each.

3. While admitting these appeals on 24<sup>th</sup> October 2011, the following question of law was framed:

“Whether the Tribunal is right in imposing penalty of Rs. 5 crores on the Appellant under Rule 26 of the Central Excise Rules, 2002 and Rule 209A of the Central Excise Rules, 1944?”

***Background facts***

4. The brief facts leading to the present appeals are that M/s. Amar Jyoti Packers ('AJP'), a sole proprietary firm of which Ms. Mahesh Kumar Gautam was sole proprietor, was engaged in manufacturing *pan masala* and *gutka* of 'Rajdarbar' brand. Mr. Devi Das Garg (the Appellant in CEAC No. 3 of 2011), was one of the two partners of M/s. Sonal Food Products ('SFP') which owns the 'Rajdarbar', 'Rahat', 'Rustam', and 'Raj Tilak' brands used to manufacture *gutka* and *pan masala* by AJP. One of his sons Mr. Santosh Kumar Garg (the Appellant in CEAC No. 2 of 2011) is the other partner in SFP. Mr. Rakesh Kumar Garg (the Appellant in CEAC No. 1 of 2011) is the other son of Mr. Devi Das Garg.

5. It is stated that AJP was set up on 1<sup>st</sup> April 2000 for the manufacture of *gutka* and *pan masala*. On 13<sup>th</sup> April 2000, AJP entered into a franchisee agreement with SJP for using the aforementioned brand names. Six months thereafter, i.e., on 20<sup>th</sup> October 2000 the officers of the Central Excise Commissionerate (Preventive), Delhi (hereafter 'the Department') conducted searches in the premises of AJP and the suppliers of raw materials of AJP. They recorded the statements of Mr. Vinod Kumar Bansal, an Accountant as well as authorized signatory of AJP. They also recorded the statements of Mr. Manoj Bansal, the Manager of M/s. Surya Traders ('ST'), Mr. Dinesh Kumar, a typist of AJP and Mr. Dev Kumar Sharma, Accountant of ST. The statements of Mr. Sunil Kumar Aggarwal and the three Appellants herein were also recorded.

6. It is stated that Mr. Mahesh Kumar Gautam was initially unavailable for recording his statement. He is stated to have made himself available only on

23<sup>rd</sup> April 2002. His statement came to be recorded for the first time on 26<sup>th</sup> April 2002. What is significant, however, is that on 26<sup>th</sup> April 2002 itself Mr. Mahesh Kumar Gautam lodged a first information report ('FIR') with the police alleging torture by the officers of the Department. Mr. Gautam thus retracted his statement. Subsequently he made two further statements on 4<sup>th</sup> November 2003, when he did not implicate any of the Appellants herein, and on 12<sup>th</sup> March 2004 which he subsequently retracted.

***The show cause notice***

7. In the course of investigations, the officers of the Department continued recording statements of certain other persons and this continued well into 2004. Ultimately it was on 20<sup>th</sup> May 2004 that a show cause notice ('SCN') was issued raising a duty demand of Rs. 33,20,03,239 with the breaking of Rs. 5,51,94,181 for the period 1<sup>st</sup> April 2000 to 20<sup>th</sup> October 2000 and Rs. 27,68,09,058 for the period from 21<sup>st</sup> October 2000 upto 30<sup>th</sup> June 2002. This was apart from the penalty proposed. The above SCN was issued to M/s AJP, M/s. ST, the three Appellants herein and Mr. Vinod Bansal. Enclosed with the SCN was a duty calculation chart drawn up on the basis that there were 20 working machines with a production capacity of 200 pouches per minute.

8. The central allegation in the SCN was that during the course of the search it was observed that 20 pouch packing machines were found working and these were found manufacturing 200 pouches per minute; that the records for consumption of raw materials in Form IV register and records for production and clearances of finished goods in RG-1 register showed that

large quantities of *gutka* and *pan masala* had been manufactured and clandestinely cleared without payment of excise duty and thereby there was deliberate evasion of payment of excise duty.

***The statements of Mahesh Kumar Gautam***

9. The SCN also mentioned that summons was issued to Mr. Mahesh Kumar Gautam, the Proprietor of M/s. AJP on seven dates and except for the summons dated 23rd April 2002 none of the other summons was responded to. Mr. Mahesh Kumar Gautam appeared on 26th April 2002 and gave a statement wherein besides submitting photocopies of the agreement for using the Rajdarbar brand and the rent agreement with the owner of the premises at Khasra No.223, Village Budhpur, Delhi, he admitted to the correctness of the *panchnama* drawn up on 20<sup>th</sup> October, 2000, which had been signed by Mr. Vinod Kumar Bansal. Mr. Gautam was stated to have produced a copy of the agreement dated 13<sup>th</sup> April, 2000 between SFP and AJP which was signed by Mr. Santosh Kumar Garg and Mr. Devi Das Garg, as Partners of SFP. He is stated to have admitted to working as a *pujari* in the temple in the house of Mr. Rakesh Kumar Garg and getting Rs.2000-3000 per month. He stated that Mr. Rakesh Kumar Garg had got him to sign some papers for the purpose of procuring a ration card for him. Mr. Gautam is supposed to have stated that till October, 2000, he was unaware that Mr. Rakesh Garg had opened a factory in the name of M/s. AJP in the name of Mr. Gautam for the manufacture of *pan masala* and it was only during the raid that he became aware of the said activity. He is supposed to have admitted to receiving raw material from M/s. ST and to the fact that each machine installed in M/s. AJP packed 200 pouches of 2 gms each per minute



and that about 150-160 bags of finished goods were manufactured in a day. He is further stated to have admitted that about 12-14 bags would be loaded per trip on three wheeler tempos of make Vikram for transportation.

10. Mr. Gautam is supposed to have tendered a further statement on 4<sup>th</sup> November, 2003, on which date he again stated that raw materials were purchased from M/s. ST for which payments were made through cheques and that the brand Rajdarbar was owned by SFP; and that he knew nothing of the mixing of chemicals used in AJP's factory. However, Mr. Gautam failed to give any further details including money invested by him; the plant and machinery involved; the raw material purchased and the transactions in the bank account of AJP.

11. A third statement was tendered by Mr. Gautam on 12<sup>th</sup> March, 2004 where he reiterated his earlier statement made on 4<sup>th</sup> November, 2003. He stated that Mr. Vinod Bansal was doing the job of mixing *khushboo* (perfumery compound) and *Zarda* and that Mr. Bansal would be knowing whether the raw material was received from M/s. ST with or without bills; whether the finished goods were removed without or without bill and as to who kept the account of the finished goods supplied from the factory.

***The statement of Mr. Bansal***

12. The SCN also referred to the statement given on 29<sup>th</sup> April, 2002 by Mr. Bansal described as the Accountant and Authorised Signatory of AJP. Prior to being engaged by AJP he was working as a Manager to M/s. Krishna Packers. He confirmed that the *panchnama* recorded on 20<sup>th</sup> October, 2000 was prepared in his presence and that the quantity of *gutka* manufactured in

one shift, as recorded therein, was correct. He is supposed to have admitted that the production of *gutka* and *pan masala* by M/s. AJP was to the extent of 150 bags per day whereas only 25-30 bags were shown as having been produced per day in the RG-1 register. Mr. Bansal confirmed his signature dated 4<sup>th</sup> July, 2001 as the authorised signatory of M/s. ST.

13. Mr. Bansal made a further statement on 17<sup>th</sup> July, 2003 where he is stated to have admitted to having worked with AJP from March 2000 till January, 2003. A third statement was tendered by him on 23<sup>rd</sup> February, 2004 wherein he is supposed to have reiterated his earlier statement tendered on 20<sup>th</sup> October, 2000. A fourth statement was tendered on 1<sup>st</sup> March, 2004 when he was confronted with bill books containing invoices. He was also shown the bill books of M/s. Krishna Packers but he could not say anything about the invoice books. In a statement made on 5<sup>th</sup> March, 2004 he agreed that there was a difference in the consumption of the raw materials as shown in the books of AJP to an extent of 8383 kgs but was unable to explain the reasons therefor.

***Other statements***

14. Mr. Dinesh Kumar made a statement on 19<sup>th</sup> March, 2004 accepting his earlier statement made on 20<sup>th</sup> October, 2000. He worked in AJP as a typist and looked after the work of Central Excise in the absence of Mr. Bansal. He too was earlier working with Krishna Packers till 31<sup>st</sup> March 2000 and thereafter started working with AJP. According to him, Mr. Bansal looked after all the work related to the factory of M/s. Krishna Packers. He did not mention the role of any of the Appellants.

15. The next witness examined was Mr. Rajender Singh, who worked as a packer and gave his statement on 24<sup>th</sup> February, 2004. He too worked for AJP for 5-6 months from August, 2000 onwards. He was not present on 20<sup>th</sup> October, 2000 when the raid was conducted. According to him all directions were given by Mr. Bansal who also used to disburse the salaries.

16. The statement of Mr. Ram Bhoor was recorded on 5<sup>th</sup> January, 2004. He stated that House No.1304, Gali No.2, Shiv Mandir Colony, Alipur, Delhi was built on the land owned by his father who had expired about a year earlier. He had rented out a room on the first floor to Mr. Babu Lal, who worked for a company manufacturing 'Rajdarbar'. A further statement of Mr. Ram Bhoor was tendered on 23<sup>rd</sup> March, 2004 when he clarified that at the relevant time his father was the owner of the house and a portion of the house was rented out to a company named 'Rajdarbar' and that his father could have provided correct information about the tenancy. He stated that Mr. Babu Lal never visited the room after the raid on 17<sup>th</sup> November, 2000.

17. Mr. Sunil Kumar Aggarwal, the Proprietor of M/s. ST gave a statement on 22<sup>nd</sup> April, 2002. According to him, the premises 31/22, Bees Killa Road Jindpur, Village Alipur, Delhi was owned by Mr. Devi Das Garg. The premises was taken on rent with effect from 1<sup>st</sup> April, 1998. According to him Mr. Bansal was the authorised signatory of AJP and was not related to M/s. ST and he was not aware as to why Mr. Bansal had signed as such on 4<sup>th</sup> July 2001 in the sales tax proceedings. In a further statement on 9<sup>th</sup> August 2002, Mr. Aggarwal *inter alia* stated that the factory of M/s. ST of



which he was the Proprietor commenced on 1<sup>st</sup> April, 1998. The *kattha* packing machine was purchased in March, 2000. He furnished the ledger accounts showing the purchases of *supari*, *kattha*, *chuna*, *illaichi*, tobacco, perfume and packing materials.

18. Mr. Sunil Kumar Aggarwal who was also the Proprietor of M/s. Shree Ram Enterprises gave another statement on 14<sup>th</sup> July, 2003. The said concern was the predecessor to M/s. ST which was initially financed by M/s. Candy Properties, M/s. Narsi Hotels, etc. Mr. Aggarwal stated that he was introduced to Mr. Devi Das Garg by a relative, Mr. Vinod. He confirmed that goods were sold to AJP and Mr. R.K. Enterprises. He was also a Proprietor of M/s. Surya Ornaments, which would purchase old jewellery and convert them into gold bars, which were further sold. He confirmed that gold jewellery worth Rs.66,70,000 was purchased from the Garg family and that they sold the gold bars made therefrom for Rs.80.00 lakh. Between April and September 1999, he admitted to having purchased Rs.2 crore of jewellery from the Garg family which was then converted into gold bars and sold for Rs.2,84,44,028/-. A further statement was made by him on 31<sup>st</sup> October, 2003. He conveyed lack of knowledge of the buyers of the gold bars. He made a further statement on 19<sup>th</sup> February, 2004 when he claimed to be unable to explain the presence of stock of mixture of *kattha* and *chuna*; stock of mixture of *kattha*, *chuna* and menthol (perfume) on 31<sup>st</sup> October, 2001 as per *panchnama*.

19. Mr. Manoj Bansal tendered his statement on 19<sup>th</sup> February, 2004 accepting the *panchnama* dated 20<sup>th</sup> October, 2000 in respect of the

proceedings at the premises of M/s. ST. He confirmed the stock position in terms of Annexure B to the *panchnama*.

20. Mr. Dev Kumar Sharma gave his statement on 19<sup>th</sup> March, 2004 accepting the statement earlier given by him on 20<sup>th</sup> October, 2000. He is also purported to have confirmed the annexures to the *panchnama* and documents seized.

21. Mr. Kishore Kumar Aggarwal, Director of Narsi Foods Pvt. Ltd. tendered a statement on 9<sup>th</sup> August, 2002. He had joined as a Director of the said company and looked after its market, sales and purchases. He spoke of purchasing *supari* from M/s. Vasu International and that they were manufacturing *sada pan masala* of Narsi Gold brand and Jackpot brand. He denied having made any purchases of raw material from M/s. ST. A further statement was made by him on 7<sup>th</sup> April, 2003 when he stated that his company was established in 1993 with Mr. Rakesh Kumar and that they had sold *supari* and *kattha*.

22. Mr. Manoj Hora also explained the working of M/s. Narsi Foods Pvt. Ltd. He too accepted the *panchnama* drawn on 20<sup>th</sup> October, 2000. Another employee of M/s. Narsi Foods Pvt. Ltd. was Mr. Vinod Aggarwal whose statement was recorded on 25<sup>th</sup> February, 2004. He explained that the company was established in 1995 and its Directors at that time were Devi Das. He was not aware who was the owner of the company at 3/27, Roop Nagar, Delhi.

### ***Statements of the Appellants***

23. As far as the Appellants were concerned Mr. Rakesh Garg appeared on 23<sup>rd</sup> April, 2002 for tendering a statement. He was a Director, Partner and Owner of fifteen companies other than M/s. Narsi Foods Pvt. Ltd. He stated that he was not the owner of Rajdarbar but his younger brother Mr. Santosh Kumar Garg was the owner. He stated that he was a Director in Narsi Foods Pvt. Ltd. till 2001 when he had resigned as such. He claimed that Mr. Devi Das Garg was no more a Director of the said company. He stated that Mr. Devi Das is the owner of premises 31/22, Bees Killa Road, Jindpur, Village, Alipur, Delhi, which was rented out to M/s. ST on 1<sup>st</sup> April, 1998.

24. On 7<sup>th</sup> July, 2003 Mr. Rakesh Garg appeared on behalf of his father Mr. Devi Das Garg, his mother and his wife, and, tendered a statement. He is *inter alia* supposed to have stated that his father Mr. Devi Das Garg sold jewellery worth Rs.12,05,053.05 to Surya Ornaments, jewellery worth Rs.7,34,478/- to M/s. Shreeji Jewellers during the year 1998-99 and jewellery worth Rs.39,33,705/- to Surya Ornaments during the year 1999-2000. Mr. Rakesh Garg is supposed to have stated that his father received Rs.1,40,01,717.51 as profit from M/s. Radhika International during the year 1999-2000. He also gave details of the jewellery sold by his mother during the year 1998-99 and 1999-2000 and that she gifted Rs.40,00,000/- to Mr. Santosh Garg during the year 2000-2001.

25. Mr. Santosh Garg gave a statement on 9<sup>th</sup> August, 2002 stating that he was a partner in M/s. SFP of which his father was the owner. The company was established for the business of pan masala and gutkha and brand names Rajdarbar, Rajtilak, Rabat, Rustam were registered. He claimed that the

company closed around 1995-96 and thereafter the brand names were franchised to other companies on the basis of royalty. He claimed that the brands were franchised to AJP by a franchise agreement. He submitted a copy of the ledger; account of royalties for the last two years from AJP. Another statement was tendered by Mr. Santosh Kumar Garg on 30<sup>th</sup> May, 2003 when he claimed to be the owner of Rajdarbar brand.

26. Mr. Mithilesh Kumar Tripathi gave his statement on 21<sup>st</sup> July, 2003 on behalf of his wife making claims regarding sale of jewellery. Likewise Mr. Subhash Mittal, proprietor of M/s. Shreeji Foods and Shreeji Jewellers gave his statement on 6<sup>th</sup> November, 2003. He stated that he had started M/s. Shreeji Foods during 1996-97 for trading in supari, kattha, chuna, etc. and that the premises at Alipur was taken on rent from Mr. Devi Das and Mrs. Kusum Lata Garg. The firm had a few machines some of which were sold to M/s. AJP. M/s. Shreeji Jewellers were also started in the said premises in March, 1999. He admitted to have purchased old gold ornaments from Mr. Mithilesh Kumar Tripathi, Mrs. Seema Tripathi and the Appellants herein.

***Case of the Department***

27. According to the Department, the inference of clandestine removal of large quantities of *gutka* was based on the following evidence:

- i. Availability of 423 bags of manufactured *pan masala* and *gutka* in the factory premises of AJP during the raid on 20<sup>th</sup> October 2000.
- ii. That 20 packing machines out of 26 were found working on the date of the raid with each machine manufacturing 200 pouches per minute.



iii. Admissions made by Mr. Vinod Bansal on 20<sup>th</sup> October, 2000 regarding each packing machine packing 200 pouches per minute and that 30-35 workers were working at the time of the raid.

iv. The statement on 24<sup>th</sup> February 2004 of Rajender Singh working as a packer in the factory of AJP regarding clearance of 160 gunny bags of finished products per day.

v. The fact that the stock of *supari* and finished goods found on 20<sup>th</sup> October, 2000 was far in excess of the balances recorded in the registers maintained and found in the premises.

vi. The statements of Mr. Manoj Bansal, Mr. D.K. Sharma of Surya Traders; the statement of Mr. Mahesh Gautam.

28. Mr. Mahesh Kumar Gautam lodged an FIR with the police and also sent a telegram on 27<sup>th</sup> April, 2002 retracting the statement made by him on 26<sup>th</sup> April, 2002. He also furnished a medical report of the Lok Nayak Hospital at 0030 hours.

### ***The stand of AJP***

29. During the course of the adjudication proceedings, AJP by letters dated 30<sup>th</sup> July, 2007, submitted two affidavits of Mr. V.K. Malhotra and Mr. N.K. Arora in support of the technical reports submitted earlier on 18<sup>th</sup> August, 2004. AJP also enclosed 34 documents and photocopies of cheques bearing signatures of Mr. Mahesh Kumar Garg, Proprietor of AJP in order to dispel



the notion that he was only a front man for the Gargs. It was also contended that the show cause notice dated 4<sup>th</sup> May, 2004 was beyond the period of six months from the period under demand, i.e. 20<sup>th</sup> August, 2000 to August, 2002.

30. AJP raised a question as to how, after coming to know at the time of the raid on 20<sup>th</sup> October, 2000 that the machines were producing 200 pouches per minute, the Department could have allowed the clandestine removal thereafter of the excess quantity for a period of 22 months. The RT-12 forms submitted for the period post raid, i.e. October 2000 to August, 2002 had been received by the Department and this showed that the production did take place during the aforementioned period. Accordingly, it was contended that the demand for the period after October 2000 was untenable in law. AJP also submitted a technical report about pouch producing capacity of the machines installed in AJP factories. According to the said report it could never have been possible for them to produce 200 pouches per minute as alleged by the Department.

31. The noticee also sought the examination of the aforementioned persons whose statements have been recorded and relied upon in the SCN. However, despite listing the matter for the personal hearing on two occasions, i.e. 2<sup>nd</sup> August and 16<sup>th</sup> August, 2005, none of the witnesses appeared for cross-examination. It was accordingly contended that their statements could not be relied upon.

### ***Case of the Appellants***

32. Particular to the three Appellants herein it was contended that the

penalties imposed on them under Rules 209 and 209A of the CE Rules, 1944 and Rules 25 and 26 of the CE Rules, 2002 were not maintainable. It is pointed out that Rule 209/25 applied only to a manufacturer which in this case admittedly was AJP. As far as Rule 209A/26 was concerned, it applied to the individuals who had dealt with the excisable goods as manufacturer or in acquisition and transportation. It is pointed out that there is no such allegation in the SCN *vis-a-vis* the three Appellants.

33. There was no allegation that any of them supervised the manufacture of *Pan Masala* or provided the staff or machinery to AJP or obtained any profit from AJP apart from receiving royalties on behalf of SFP. There was no allegation of providing transportation for storage or provision of supervisory staff or money or distribution network assistance to AJP. Even the factory was never visited by any of them. In any event Mr. Rakesh Kumar Garg was not involved in the brand used by AJP. The loans given by Mr. Rakesh Kumar Garg and his brother and father of the companies of which they were Directors gave interest bearing loans to AJP without any security. However, the entire loan amounts stood repaid with interest well before September, 2001.

***Adjudication order***

34. In the adjudication order dated 28<sup>th</sup> October, 2005, the CCE held as follows:

(i) Scrutiny of the *panchnama* drawn on 20<sup>th</sup> October, 2000 in the premises of ST revealed that the unit was engaged in cutting, grinding and mixing *supari*, *kattha*, menthol, *khusboo* and tobacco. This would be supplied to

AJP and Narsi foods in gunny bags. The stock of supari and finished supari was much in excess of what is recorded in the Register. The *panchnama* dated 20<sup>th</sup> October, 2000 for the proceedings at Surya Traders also revealed that they were engaged in the readymix material in bulk for *pan masala* and *katha*.

(ii) From the statement of Mr. Dev Kumar Sharma, the Accountant at M/s. ST it was clear that the entire mixture was being packed in gunny bags and supplied to Narsi Foods Pvt. Ltd in cash payment. The goods were dispatched through local tempos and approximately 60 workers were employed on daily wage basis against cash payment. Only *kattha* and *supari* instead of *cut/grinded/mixed supari, kattha, chuna* and *illaichi* were mentioned on the invoices/challans issued and signed by Mr. D.K. Sharma.

(iii) The CCE also referred to the statements of, Mr. Sunil Kumar, Proprietor of M/s. ST and Mr. Manoj Bansal and held that M/s. ST was a front firm for the family.

(iv) As regards the statements made on various dates from October, 2000 to February, 2004 by Mr. D.K. Sharma, Mr. Manoj Bansal and Mr. Sunil Kumar it was not mentioned by them that the mixture seized was not capable for being used in *Pan Masala/gutkha*. This stand, therefore, was an afterthought. It was nevertheless acknowledged that Mr. Sharma was not available for cross-examination.

(v) Since the technical report produced was of a later date, i.e. 21<sup>st</sup> July, 2004, wherein it was stated that the machines installed in the premises of

M/s.ST could not produce *Pan Masala* or tobacco, the CCE rejected the report holding it to be a “dictated one and not reliable”. The plea that the mixture made by M/s. ST could not be used for making *Pan Masala* was rejected. There were two machines installed and the mixing did not require any sophisticated physical or chemical reaction. Even an oven for making *supari* was not necessary. Consequently it was held that M/s. ST was capable of manufacturing *Pan Masala* mixture for use in making the pouches and were actually supplying the quantities to AJP without issuing proper bills.

(vi) The annual production of AJP was much higher than what was recorded in the RG-1 register, implying that the actual quantum of production was suppressed with the intent to suppress clearances of finished goods so manufactured to evade central excise duty liabilities. The statements recorded during investigation and the *panchnama* prepared fully proved the case of the Department.

(vii) The CCE also found that the technical report submitted by the AJP was not reliable and, therefore, was not acceptable. Apart from the technical report of Mr. D.K. Malhotra, other technical reports prepared by Mr. Deepak Anand and Mr. N.K. Arora were also rejected since they were not on the basis of any detailed analysis of the production capacity of the machines. In this basis, the demands raised in the SCN were affirmed by the CCE.

### ***Appeals to the CESTAT***

35. Appeals were filed against the order of the CCE by AJP as well as the Appellants herein. However, the appeal of AJP was dismissed in default and



not carried further in appeal to this Court.

36. As far as the appeals of the Appellants were concerned, by the order dated 12<sup>th</sup> April 2006, the Tribunal directed the Appellants to make a pre-deposit of Rs.2 crore each. This order was affirmed by the High Court on 7<sup>th</sup> July, 2006 while extending the period for making the pre-deposit by two months. The Supreme Court affirmed the order on 4<sup>th</sup> September, 2006.

***Impugned order of CESTAT***

37. By the impugned order, the CESTAT has affirmed the order of the CCE in original to the extent of holding that the Appellants are liable for penalty. However, the amount of penalty levied on each of the Appellants was reduced from Rs.25crore, Rs.21crore and Rs.21 crore on Mr. D.D. Garg, Mr. R.K. Garg and Mr. S.K. Garg respectively to Rs.5 crore each.

38. The CESTAT noted that other than the statement of Mr. M.K. Gautam there was no other independent evidence showing that the Appellants were the persons controlling AJP and its operations. The CESTAT rejected the plea that the said statement retracted by Mr. Gautam on the very next day, was obtained by subjecting him to duress and coercion. According to the CESTAT there was no denial that Mr. Gautam was working only as a *pujari* on monthly wages of Rs.2,000 to Rs.3,000 in the house of Mr. R.K. Garg and it was difficult to believe that overnight he became the manufacturer of a popular 'Rajdarbar' brand *Gutka* and *Pan Masala*.

39. According to the CESTAT notwithstanding the retraction of the statement by Mr. Gautam it had the 'ring of truth'. It was not known



whether the police had taken any action on his complaint or any order of the court had been passed. The medical examination only showed his symptoms as loose motions, vomiting and abdominal pain with umbilical region tenderness and there was no remark or observation in the said report whether there were any signs of his being beaten up. Therefore, the CESTAT held that his retraction based on the complaint given by him to the police and the medical examination did not prove in any way that his statement dated 26<sup>th</sup> April 2002 had been recorded under duress or coercion. A reference was made to the decision of the Supreme Court in *Vinod Solanki v. Union of India 2009 (233) ELT 157 (SC)*.

40. The CESTAT also referred to the fact that the further statements of Mr. Gautam were recorded on 4<sup>th</sup> November 2003 and 12<sup>th</sup> March 2004 where he confirmed the earlier statement dated 26<sup>th</sup> April 2002 as true and correct. In the said statements also, he had stated that the machines installed in AJP had been taken from M/s. Krishna Packers on credit and that both M/s. Krishna Packers and M/s. ST were related to the Garg family. In that view of the matter, all three statements of Mr. Gautam were treated as voluntary and hence admissible in evidence.

41. The CESTAT also referred to the statement of Mr. Dev Kumar Sharma dated 20<sup>th</sup> October 2000, which had not been retracted, which stated that it was the Gargs who were the actual owners of M/s. ST and that the raw materials, i.e., *supari*, tobacco, *illaichi*, *chuna*, *kattha*, perfumes etc., were being supplied by M/s. ST after grinding and mixing all those and converting them into *pan masala/gutka* on the instructions of the Gargs.

42. The CESTAT recorded that the statement of Mr. Dev Kumar Sharma was corroborated by receipt of certain consignments of raw materials by M/s. ST from M/s. Sai Fragrance and Flavours with the address at Jindpur, Alipur, Delhi whereas the invoice address mentioned was the Model Town office premises of Gargs. This also corroborated the statement that the said premises i.e. D-1/2, Model Town-III, Delhi was the headquarters of AJP. Further although Mr. Vinod Bansal was the Manager and authorised signatory of AJP, and on paper had no relationship with M/s. ST, he had signed on several papers as its authorised signatory. This showed that Gargs through Mr. Vinod Bansal were controlling both ST as well as AJP.

43. According to the CESTAT, the above evidence was sufficient to prove the case of the Department against the Gargs. This was even if the gold transactions of Garg family with M/s Surya Ornaments and M/s Shreeji Jewellery were ignored on the ground that these transactions pertained to 1998-99 and 1999-2000 period, whereas the period of duty evasion was from 1<sup>st</sup> April 2000 to 31<sup>st</sup> August 2002. Further the Gargs themselves have adduced no evidence to show that they had no connection with ST and AJP other than the agreement of NFPL with AJP regarding the use of 'Rajdarbar' brand. A reference was made to the decision of the Supreme Court in ***Naresh J. Sukhawani v. Union of India 1996 (83) ELT 258 (SC)*** and it was held that the statement of Mr. Gautam was in the nature of an inculpable statement of a co-accused which could be used as substantive evidence against Mr. Gautam. Further the statement was corroborated by the statements of Mr. Dev Kumar Sharma and Mr. V.K. Bansal.

*Submission of counsel*

44. This Court has heard the submissions of Mr. Krishna Kant, learned counsel for the Appellant and Mr. Satish Kumar, learned counsel for the Respondents.

45. It is submitted by Mr. Kant that the CESTAT erred in failing to notice that no penalty could have been imposed on the Appellants under Rule 26 of the CE Rules 2002 as there was no allegation in the SCN or any conclusion drawn in the order in original by the CCE or by the CESTAT itself to the effect that any of these Appellants ever received or purchased any goods from AJP or sold any goods manufactured by AJP. There was no evidence also that any of the Appellants supervised the dispatch or the removals made by AJP or provided any distribution network assistance to it or transported stored any goods or provided any premises for production or storage of any goods. There was no evidence that any of the Appellants appointed any supervising staff in AJP. In other words, none of the ingredients of Rule 26 stood satisfied. There was no evidence that any of these Appellants received money out of the sales made by AJP or any profits therefrom or provided machines to AJP or any financial assistance for its activities of clandestine removal of excisable goods. As regards the allegation that most of the companies in which Mr. D.D. Garg was Director gave interest free loan to AJP without security, the CESTAT failed to notice that the entire loan amount was repaid by AJP even prior to the date of search.

46. As regards the retraction by Mr. Gautam of his statement, it is urged by

Mr. Kant that the CESTAT overlooked the legal position explained in *K. I. Pavunny v. Assistant Collector of Central Excise, 1997 (90) ELT 201(SC)*, *Ravindran @ John v. Superintendent of Customs 2007 (80) RLT 427* and *Mahindra Chadnra Dey v. CEGAT 1992 (58)ELT 192 (Ca1.)* and several orders of the CESTAT itself which required independent corroboration of retracted statements before they could be relied upon. It was not noticed that as far as Mr. Gautam was concerned, there were several acts done by him which substantiated the plea that he was in fact the proprietor of AJP.

47. On the other hand, Mr. Satish Kumar, learned Senior Standing counsel for the Department sought to support the impugned order of the CESTAT. According to him the CCE had undertaken a detailed analysis of the evidence on record and in particular the evidence of Mr. Mahesh Kumar Gautam. He submitted that the involvement of the three Appellants in the affairs of AJP was convincingly established. He submitted that with the dismissal of AJP's appeal by the CESTAT, the order-in-original of the CCE, as far as the liability of AJP was concerned, became final. It is no longer open, therefore, even for the Appellants to assail that part of the order of the CESTAT.

### **Rule 26**

48. The present appeals essentially concern the role of the three Appellants and whether the penalty levied on them under Rule 26 of the CE Rules 2002 and Rule 209A of the CE Rules 1944 was justified. Rule 26 of the CE Rules 2002 reads as under:

“Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping,



concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater.”

49. Rule 209A of the CE Rules 1944 was more or less similarly worded. These are penal provisions that call for a strict interpretation. Therefore, in order that penalty may be levied, it will have to be satisfactorily proved that the ingredients of Rule 26 of the CE Rules 2002 are existent *qua* the person proposed to be subject to the penalty. In other words, for the purposes of levy of penalty the Department would have to show the actual involvement of the person sought to be penalised in the actions of possessing, transporting, removing, keeping, concealing, selling or purchasing, etc. of the excisable goods, which he knows or has reason to believe are liable to confiscation.

50. In *Gian Mahtani v. The State of Maharashtra AIR 1971 SC 1898* it was observed by the Supreme Court that the main accused, who played the leading role “in extensive smuggling operations on his own admission” did create a serious suspicion but “according to the system of jurisprudence which we follow, conviction cannot be based on suspicion nor on the conscience of the Court being morally satisfied about the complicity of an accused person.”

51. The SCN which proposed the penalty would have to make out a case for how Rule 26 is attracted. In the present case, apart from merely stating that the three Appellants were in control of the affairs of AJP, there is nothing in



the SCN which points to how they were actually involved in the transporting, removing or clearing of excisable goods by AJP. The SCN at the same time acknowledges that AJP is an independent entity against whom the SCN was also issued and against whom a separate order has been passed confirming the demand of duty and interest, apart from penalty.

52. The mere fact that challenge by the AJP to the adjudication order failed, on account of its appeal being dismissed in default by the CESTAT, does not preclude the Appellants from showing that the penalty against them is not justified in law.

***The evidence of Mahesh Kumar Gautam***

53. The main evidence relied upon by the Department in support of its case against the Appellants herein is that of Mr. Mahesh Kumar Gautam. As already noticed there were three statements made by him. The first one was on 26<sup>th</sup> April, 2002 where he is supposed to have made several incriminating statements to the effect that the actual owners of AJP were the Gargs. However, this was retracted by him at the earliest available opportunity by lodging an FIR to the police and also by producing the medical certificate in support of his contention that the statement had been extracted under duress and coercion.

54. The reasons given by the CCE which had been accepted by the CESTAT in rejecting the above explanation is that the medical certificate itself did not show that Mr. Gautam was beaten up by the excise officials. Neither the CCE nor the CESTAT could have taken upon themselves to determine what the true purport of the medical certificate was. Given the proximity of the

lodging of the FIR accompanied by the medical certificate it rendered probable the version of Mr. Gautam that he was subjected to third degree torture when he made the statement on 26<sup>th</sup> April, 2002. The CCE and the CESTAT should have been cautious in proceeding to rely on such statement without seeking independent corroboration.

55. The decision in *K.I. Pavunny v. Assistant Collector, Central Excise (supra)*, holds that where a confession is shown to be involuntary, as a matter of prudence, the authority should seek some independent corroboration. In the present case the fact that an FIR was registered by Mr. Gautam against the excise officials immediately after the statement was given is a strong indication of the lack of voluntariness in making the statement.

56. In *Ravindran and Peter John v. The Superintendent of Customs 2007-TIOL-89-SC-CUS*, the Supreme Court cautioned that a confession cannot form the sole basis of a conviction under the Customs Act. Two other decisions that are relevant in this context are *V. Ananthraman v. Union of India 2003 (151) ELT 278 (Bom.)* and *Nicco Corporation Ltd. V. Commissioner of Service Tax 2014 (307) ELT 228 (Cal.)*.

57. As pointed out by the learned counsel for the Appellants certain other crucial factors which do not appear to have been considered either by the CCE or the CESTAT are that Mr. Gautam continued filing documents on behalf of AJP even after the conclusion of the search proceedings. The agreement signed by him on 22<sup>nd</sup> March 2000 with Mr.D.N. Rana for hiring the premises for the factory was not shown to be a false document. The

application for obtaining the central excise registration of AJP and the declaration under Rule 173-B were signed by him. He had sent a letter to the Department authorizing Mr. Vinod Bansal to sign documents for excise purposes; a franchisee agreement with SFP was signed by him; the Central Excise Bond in Form B-1 was executed by him on 7<sup>th</sup> September 2000; he applied for sales tax registration both under the Delhi Sales Tax Act as well as the Central Sales Tax Act. In April 2000, he gave a statement to the Sales Tax Department that he was the proprietor of AJP. Even after the raid, he continued to file income tax returns as well as sales tax returns and complied with other statutory requirements. He filed his own income tax return for the AY in which search was conducted showing his income from business. He filed an application to the income tax department for issuance of a PAN mentioning himself as proprietor of AJP.

58. Further, Mr. Gautam's statement made on 4<sup>th</sup> November, 2003 does not contain anything incriminating as far as the Appellants herein are concerned. He talks of the payments made to M/s ST and to Krishna Packers. He states that the owner of the Rajdarbar brand was SFP and that the accountant of the AJP was Mr. V.K. Bansal. When he was asked: "Those persons who had given you to use your own Branch, what kind of control was there regarding the quality etc. of the goods manufactured by Amar Jyoti Packers and in what manner?" he answered "Sometimes Sonal Food Products may come and check." When asked "Who used to look after the work of compounding mixing and who used to do?" he answered "Shri Vinod Bansal, who was the Accountant in Amar Jyoti Packers..." When specifically asked whether there was "any kind of office or any connection in House No.1304, Shiv

Mandir Colony, Alipur Village?” he stated “In my knowledge there was no connection with me or with Amar Jyoti Packers with this address.” Nothing in these replies to the above detailed questions show that he was a stranger to the business of AJP as is sought to be projected by the Department.

59. In his statement dated 4<sup>th</sup> November 2003, there was a pointed question: “What do you do nowadays?” he stated “I and my family are being originally doing *puja archana* and I am also doing the same work because I am free/unemployed.” When asked about purchase of plant and machinery of AJP, he stated that had purchased some machines from the market. No question was asked about the Gargs being the real owners of the business. Consequently the Court fails to appreciate on the reading of the above statement dated 4<sup>th</sup> November, 2003, as has been done by the CCE and the CESTAT, that Mr. Gautam reaffirmed the statement made on 26<sup>th</sup> April, 2002.

60. On 12<sup>th</sup> March 2004, Mr. Gautam was again shown his earlier statement dated 26<sup>th</sup> April, 2002 and asked to reaffirm it. This time again when asked who used to do the mixing of the scent and zarda etc., he named Mr. V.K. Bansal. He also stated that he had seen his statement of 4<sup>th</sup> November 2003 and read it and he was fully satisfied with it. A reading of the statement dated 12th March 2004 shows that according to Mr. Gautam, it was essentially Mr. V.K. Bansal who was looking after the work of AJP. When asked: “Who used to look after the factory and its office and account works in Amar Jyoti Packers”, Mr. Gautam answered: “The accounts relating to Amar Jyoti Packers and other office work were looked after by Shri Vinod



Bansal. Besides him there was no other person.” It is also significant that this statement was also retracted by Mr. Gautam, a fact which is not taken note of by either the CCE or the CESTAT.

61. Consequently the Court is unable to concur with the CCE or the CESTAT that the evidence of Mr. Gautam clinches the issue concerning the Gargs being the actual owners of the AJP. Both the CCE and the CESTAT have proceeded on an erroneous appreciation of the statements of Mr. Gautam.

62. Considering that Mr. Gautam’s statements implicating the Appellants were retracted, the CCE and the CESTAT should have produced other independent corroborative evidence. That clearly was not available in the present case. It is the statement of Mr. Gautam that has been relied upon to hold that there was 'maximum involvement' of Mr. Rakesh Kumar Garg in the clandestine activity although as already noticed hereinbefore the statement of Mr. Gautam was a weak evidence. Even in the statement of Mr. Santosh Garg, there was no admission about his being involved in the management or control of AJP. No cross-examination was offered of any of the witnesses whose statements were relied upon in the order of the CCE.

63. Significantly the case made out by the Department was also that M/s. ST was also a front unit of the Garg family. However, no penalty was levied on M/s. ST on the ground that there is no evidence on record that they were concerned with the clandestine clearance of *pan masala*.

64. The CCE proceeded to hold that “duty and penalty” can be “realised

only from Gargs and neither from M/s. AJP nor Mr. Gautam.” It is perhaps for this reason that the CCE proceeded to impose a high penalty on the Gargs. This contradicted the final operative portion of the said order where a penalty of Rs.33,20,02,329/- was, in fact, levied on AJP under Section 11AC of the CE Act apart from levying penalty of Rs.21 crores on Mr. Devi Das Garg under Rules 209 and 209A of the CE Rules 1944 as well as Rules 25 and 26 of the CE Rules, 2002.

65. In *Commissioner of Central Excise, Meerut-I v. R.A. Castings Pvt. Ltd. 2011 (269) ELT 337 (All.)* allegations were made against the Assessee therein about using fictitious firms to avoid the liability arising from share trading. It was *inter alia* observed by the High Court, while affirming the order of the CESTAT which set aside the duty demand as well as penalty, that reliance has been placed on the incriminating statements of the share brokers who had not been produced for cross-examination. In *Union of India v. M.S.S. Foods Products Ltd. 2011 (264) E.L.T. 165 (MP)*, the proceedings against the Respondent therein for clandestine removal of *gutka* ended in quashing of the demands by the CESTAT. This was because no material was brought on record to indicate to whom the imported goods were sold and how the goods were clandestinely removed from the factory. It was observed that excise duty cannot be levied “merely on the basis of assumption or presumption.” Reliance in that case was placed on the statement of the proprietor of the Respondent and it was held that since there was no admission in the said statement that the seized product was manufactured by the Respondent or cleared from its factory premises, the said statement was not sufficient to initiate action against the Respondent.

66. As already noticed there is no question of application of Rule 25 since that applies only to the actual manufacturer of the excisable commodity whereas that is not even the case of the Department vis-a-vis the three Appellants.

67. Another important point that was overlooked by the CCE and the CESTAT is that the entire duty was raised on the basis of the capacity of the packing machines for the period 1<sup>st</sup> April, 2000 to 31<sup>st</sup> August, 2002, whereas the Department after having conducted the search on 20<sup>th</sup> October, 2000 did not, in fact, apprehend a single consignment clandestinely removed after 20<sup>th</sup> October, 2000 up to 31<sup>st</sup> August, 2002.

68. Secondly, prior to the amendment introducing Section 3A under the Finance Act 2008, empowering the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods (the provision was made effective from 10<sup>th</sup> May, 2008), there was no provision to levy duty on *pan masala* or *gutka* on the basis of the pouch packing machine(s). Considering that the demand was being raised for the past period 1<sup>st</sup> April, 2000 to 31<sup>st</sup> August, 2002, the Department had to demonstrate the legal basis for demanding the duty on the basis of the capacity of the pouch packing machines.

69. Thirdly, neither the SCN notice nor the order in original or the impugned order of the CESTAT discussed any evidence regarding purchase and storing and transporting of the huge quantity of raw material of 6,200 MT, which would be required to manufacture the quantity stated to have been

produced in excess by AJP. There appears to have been no investigation conducted on this aspect of the matter.

***The case qua each Appellant***

70. As regards Mr. Rakesh Kumar Garg, his connection with SFP or AJP was not established. It was only Mr. Gautam who alleged that Mr. Rakesh Kumar Garg got some papers signed from him. However, the fact that there was a rent agreement executed on 22<sup>nd</sup> March, 2000 itself and an application was filed for Central Excise registration and a General Bond Form B-1 itself shows that Mr. Gautam was fully conscious and aware of what he was doing while acting on behalf of AJP.

71. As far as Mr. Santosh Kumar Garg is concerned, the link between SFP of which he was a partner and AJP as far as manufacturing and sale of *gutka* and clandestine removal is concerned has not been established. All that was brought on record was that SFP received royalty payments regularly from AJP. Three statements were recorded of Mr. Santosh Kumar Garg and in none of them he was confronted with the clandestine removal of consignments by the AJP.

72. As far as Mr. Devi Das Garg is concerned, the Department does not deny that he is a permanent resident of Mathura and there is no evidence on record specifically connecting him with the activities of AJP.

***Conclusion***

73. For all the aforementioned reasons, the Court holds that the requisite evidence necessary for levy of penalty on each of the Appellants under Rule



26 of the CE Rules 2002 was not brought on record by the Department and, therefore, the levy of penalty was in the first place is unsustainable.

74. For the aforementioned reasons, the Court sets aside the order of the CESTAT dated 6<sup>th</sup> August, 2010 restricting the penalty amount vis-a-vis each of the Appellants to Rs.5 crores. The amounts deposited by the Appellants during the pendency of these appeals will be returned to them together with any interest accrued thereon. The guarantees furnished by the Appellants shall stand discharged.

75. The appeals are allowed in the above terms but in the circumstances with no orders as to costs.

**S. MURALIDHAR, J.**

**VIBHU BAKHRU, J.**

**DECEMBER 10, 2015**