IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75232 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS/CCP/AKR/134-137/2022 dated 07.03.2022 passed by Commissioner of Customs (Appeals), Kolkata.)

Shri Amit Ghosh
(S/o Late Asit Kumar Ghosh, Khardah Bosepara, Madhurmath, Kolkata-700117.)
...Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata
.....Respondent
(Custom House, 3rd Floor, 15/1, Strand Road, Kolkata-700001.)

WITH

(i) Customs Appeal No.75233 of 2022 (Shri Sanjay Kumar Gond Vs. Commissioner of Customs (Preventive), Kolkata); (ii) Customs Appeal No.75234 of 2022 (Shri Ajay Kumar Gond Vs. Commissioner of Customs (Preventive), Kolkata); (iii) Customs Appeal No.75406 of 2022 (Shri Akash Jagdish Issrani Vs. Commissioner of Customs (Preventive), Kolkata);

(Arising out of Order-in-Appeal No.KOL/CUS/CCP/AKR/134-137/2022 dated 07.03.2022 passed by Commissioner of Customs (Appeals), Kolkata.)

APPEARANCE

Shri Arijit Chakraborty, Advocate for 1st three Appellants and Shri Nilotpal Chowdhury, Advocate for 4th Appellant

Shri M.P.Toppo, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75055-75058/2023

DATE OF HEARING : 3 February 2023
DATE OF DECISION : 13 February 2023

P.K.CHOUDHARY :

All the four Appellants are in Appeal against the common Order-in-Appeal No. KOL/ CUS/ CCP/ AKR/ 134-137/ 2022 dated 07.03.2022

passed by the Commissioner of Customs (Appeals), Kolkata thereby upholding the common Order-in-Original No. 27/ ADC(P)/ CUS/ WB/ 21-22 dated 29.06.2021 passed by the Additional Commissioner of Customs (Preventive), Kolkata imposing respective penalties upon the appellants herein:

Sl. No.	Appeal Number	Name of Appellant	Amount of Penalty (in Rs.)	Penal Provision of Customs Act, 1962
1.	C/72532/2022	Shri Amit Ghosh	5 Lakh	112(b)
2.	C/75233/2022	Shri Sanjay Kumar Gond	5 Lakh	112(b)
3.	C/75234/2022	Shri Ajay Kumar Gond	5 Lakh	112(b)
4.	C/75406/2022	Shri Akash JagdishIssrani	10 Lakh	112(a) & (b)

Since all the Appeals are arising from common Order-in-Appeal, all the four Appeals have been taken up together for consideration on merits.

2.1. The facts of the case in brief are that the first three Appellants viz. Shri Amit Ghosh, Shri Ajay Kr. Gond & Shri Sanjay Gond were all working as Havalders of Customs at NSCBI Airport, Kolkata and on 06.03.2017, said three Appellants were intercepted together in front of Gate No. 4A & 4B of Netaji Subhash Chandra Bose International Airport (NSCBI) Airport, Kolkata by the Officers of Directorate of Revenue Intelligence, Kolkata at around 20:40 hrs. when they allegedly named the fourth Appellant viz. Shri Akash Jagdish Issrani who was then intercepted from a Mumbai bound flight at the Domestic terminal of NSCBI Airport, Kolkata and thereafter, they were taken to the office of DRI, Kolkata at 8, Ho-Chi-Minh Sarani, Kolkata–700071 where there was alleged recovery and seizure of 2 pcs. of gold weighing 1000 gms. each from Shri Amit Ghosh and 2 pcs. of gold weighing 1000 gms. each from Shri Ajay Kumar Gond. There was no

recovery of gold from Shri Sanjay Gond or Shri Akash Jagdish Issrani. Another person viz. Md. Ali was also intercepted somewhere outside the NSCBI Airport from whose possession Indian Cash Currency amounting to Rs. 2,20,000/- was recovered. Indian cash currency amounting to Rs. 51,870/- & Rs.67,940/- respectively was recovered from Appellant Shri Amit Ghosh and Shri Sanjay Kumar Gond.

2.2. The recovered 4 pcs of gold weighing in total 4000 gms. valuing Rs.1.22 Cr. (approx.) and cash Indian currencies were seized under Section 110 of the Customs Act, 1962 and the entire process of drawing of Panchnama and Inventory/Seizure List was completed at 23:50 hrs. of 06.03.2017. Separate statements all dated 07.03.2017 of the Appellants were recorded u/s. 108 of Customs Act, 1962 wherein allegedly they have admitted their complicity with the smuggling activity of gold. That all the Appellants were arrested under Section 104 of Customs Act, 1962 and were remanded to judicial custody on 08.03.2017 as per order of the Ld. Chief Metropolitan Magistrate, Bankshall at Calcutta.

2.3. On completion of investigation, Directorate of Revenue Intelligence (DRI) issued Show Cause Notice under Section 124 of Customs Act, 1962 proposing confiscation of seized gold as of foreign origin and smuggled in nature and Indian Cash currency as sale proceeds of smuggled goods. Penalty was proposed to be imposed upon various noticees.

2.4. Before the Adjudicating authority, the first three Appellants denied recovery of any gold from their possession and demanded cross-examination of the panch witnesses. They also pleaded that since the authority failed to comply with the provision of Section 155(2) of Customs Act, 1962, the proceeding against them should be dropped/ quashed. They placed reliance upon various judicial pronouncements in this regard. The fourth Appellant demanded cross-examination of first three Appellants herein on the ground that apart from statements of the said three co-accused, there is nothing on-

record to implicate him in the present case. The Adjudicating authority vide Order in Original ordered for absolute confiscation of the seized gold and Indian Cash Currency and though dropped proceeding against other noticees, imposed penalties, as indicated hereinbefore, upon the present Appellants. The Commissioner (Appeals) upheld findings of the Adjudicating Authority. Hence, the present appeals praying for setting aside of the respective penalty upon the Appellants.

3.1. Shri Arijit Chakraborty, Ld.Advocate appearing on behalf of first three Appellants contended that the Summons under Section 108 of the Customs Act, 1962 were issued to all the three Appellants on 06.03.2017 requiring their appearance before the DRI Authority at 10:30 p.m. of 06.03.2017, but the purported statements are all dated 07.03.2017 which evidences the fact of overnight detention of the Appellants and extraction of statements from them. Further, the Memos of Arrest reflects the fact that the Appellants were put to arrest at 22:00 hrs. on 07.03.2017 i.e. after more than 24 hrs. from their interception and further, the Appellants were produced before the Chief Metropolitan Magistrate, Calcutta on 08.03.2017 after 2 p.m. and as such, the Appellants were detained at the office of DRI, Kolkata from around 10:00 p.m. of 06.03.2017 to 1 p.m. of 08.03.2017 when the said purported statements all dated 07.03.2017 were recorded/extracted from the Appellants and accordingly, the Appellants filed their respective Retraction Petitions before the Chief Metropolitan Magistrate, Calcutta on 14.03.2017 i.e. next date of production from judicial custody and the Chief Metropolitan Magistrate, Calcutta had duly reflected such filing of Retraction Petitions in his Order dated 14.03.2017 in Misc. Case No. 14718/17. The Appellants in their respective Retraction Petition dated 14.03.2017 explained the fact of torture, both physical and mental, and extraction of statements dated 07.03.2017 by the DRI and prayed for not to take any cognizance of such statements. They also explained as to why the Retraction Petition could not be filed on 08.03.2017 during the first production before the Ld. CMM. It is submitted that hence, statements

dated 07.03.2017 of the Appellants cannot be considered as their voluntary statements and/or confession since the same were duly retracted at the earliest opportunity by the Appellants and no subsequent and/or further statement of the Appellants were ever recorded by the DRI Authority. Nowhere in the Show Cause Notice or Order-in-Original it is also alleged that the retractions so made by the Appellants were not proper or correct. Reliance has been placed in the Judgement of the Hon'ble Supreme Court of India in the case of Vinod Solanki v. Union of India [2009 (233) E.L.T. 157 (S.C.)]; Judgment of Hon'ble High Court at Allahabad in the case of Commr. of Customs (Preventive), Lucknow v. Shakil Ahmed Khan [2019 (366) E.L.T. 634 (All.)]; and, Order of a co-ordinate bench of this Tribunal at Delhi in the case of Rajeev Kumar v. Commr. of Customs, New Delhi [2022 (382) E.L.T. 209 (Tri. - Del.)].

3.2. It is further submitted that to controvert the allegation of recovery of gold, the Appellants prayed for opportunity of cross-examination of the panch witnesses viz. Sarjit Kumar Yadav and Md. Tabraj Alam, but the Adjudicating Authority has arbitrarily denied the same on the ground that there was no claim of the gold seized and no reason of seeking cross-examination was assigned. It is submitted that when the allegation of recovery of gold from the possession of the two Appellants was denied by the Appellants, the allegation can only be verified from the panch witnesses and unless such panch witnesses are produced for cross-examination, the allegation of recovery from the two Appellants cannot be substantiated. It is also submitted that the Commissioner (Appeals) in the Order-in-Appeal has erroneously held that no reason of seeking cross-examination was provided, but went on to decide the matter upon the alleged fact that there was recovery of gold from the two of the Appellants. This is absolutely bad in law and liable to be quashed.

3.3. It is submitted that when the allegation of recovery of gold from two of the Appellants could not be established in course of adjudication

and/or in Appeal before the Ld.Commissioner (Appeals) and when the initial statements extracted from the Appellants during their illegal detention for more than 40 hrs. at DRI office, have been duly retracted by them and there is no other evidence to implicate the Appellants in the alleged act of smuggling, penalty/s imposed upon them is liable to be set aside.

3.4. It is contended that the Appellants being Havalders of Customs were protected under Section 155(2) of the Customs Act, 1962. In the present case, the "accrual of such cause" was on 06.03.2017 and hence, the period for initiating any proceeding against the first three Appellants expired on 05.06.2017. Further, the proceeding under Section 124 of the Customs Act, 1962 was initiated against the Appellants by way of Show Cause Notice dated 05.09.2017, but no ("a month's previous notice in writing") such intended proceeding was ever issued to the Appellants. Hence, the entire proceeding against the said Appellants under the said Show Cause Notice culminated into Order-in-Original imposing penalty/s upon the Appellants and Order-in-Appeal rejecting Appeals of the Appellants, is *void abinitio* for non-compliance of the mandatory provision of Section 155(2) of the Customs Act, 1962. Reliance with respect to applicability of the provision of Section 155(2) of the Customs Act, 1962 is placed in the Order No. FO/A/75056-75060/2019 dated 15.01.2019 in Customs Appeals Nos.460, 541-544/09 [Shri Prabir Kumar Guha & Ors. v. Commr. of Customs (Airport & Admn.), Kolkata] passed by this Tribunal.

4. Shri Nilotpal Chowdhury, Ld. Advocate appearing for the fourth Appellant viz. Shri Akash Jagdish Issrani submitted *inter alia* that the entire basis of proceeding and imposition of penalty against him is the initial statements of the other three accused/ Appellants in the proceeding. If the said three accused/ Appellants are denying their said initial statements, there can be no proceeding against him on the basis of such retracted statements of the said accused/ Appellants.

Further, the Order-in-Original does not specify any role of the Appellant for imposition of penalty upon him. He also contended that imposition of single penalty upon the Appellant under both the clauses (a) & (b) of Section 112 of Customs Act, 1962, is also bad in law. He prayed for setting aside of the penalty.

5.1 *Per contra*, Shri M.P. Toppo, Ld. Authorized Representative appearing for the Revenue submitted that it is the case of the DRI that Shri Akash Jagdish Issrani in course of his return journey from Dubai on 06.03.2017 had handed over the seized gold to accused Shri Ajay Kumar Gond at the toilet of Arrival of International Terminal at NSCBI, Kolkata. Shri Amit Ghosh, Shri Ajay Kumar Gond and Shri Sanjay Kumar Gond acted at the behest of Md. Ali.

5.2. He submitted that the first three Appellants confessed such facts in their statements all dated 07.03.2017 under Section 108 of Customs Act, 1962 before DRI. Though the Appellants have retracted from their said statements before the Chief Metropolitan Magistrate, Calcutta, they have not been able to substantiate that they were not found in possession of gold. He relied upon the Order of a co-ordinate Bench of this Tribunal at New Delhi in the case of Kuber Tobacco Product Ltd. v. Commr. of C.Ex., Delhi [2013(290) ELT 545 (Tri-Del.)] to contend that since "gold" is notified under Section 123 of Customs Act, 1962, the "burden of proof" is on the Appellants to show that the gold seized in this case, is of non-smuggled nature and the statements were obtained by threat or coercion.

5.3. He further submitted that the denial of cross-examination of panch witnesses is not violation of natural justice since the Appellants have failed to prove beyond doubt that the gold bars of foreign origin were not recovered from their possession during the search conducted on their person.

5.4. It is contended by the Ld.Authorized Representative for the Revenue that the first three Appellants shall not be entitled for the immunity under Section 155 of Customs Act, 1962 since sub-section

(1) thereto provides only immunity for act done or intended to be done in 'good faith' and in the present case the said three Appellants were found in possession of seized gold and Indian Cash currency, which they could not account for and as such, their act was not in 'good faith'. He prayed for upholding of the Order-in-Appeal.

6. Heard all the parties and perused the documents made available by the appearing Counsels. All the parties filed their written notes of argument. I have gone through the Appeal records and relevant documents on record. It is not of much dispute that the entire case of Revenue is based upon the allegation of recovery of gold from Shri Amit Ghosh and Shri Ajay Kumar Gond and the statements all dated 07.03.2017 of the first three Appellants. The Appellants have denied the fact of recovery and said statements to be voluntary in nature.

7.1. I find that it is not in dispute that the first three Appellants were arrested on 07.03.2017 at 22.00 hrs. as mentioned in the respective Memo of Arrest, while they were apprehended on 06.03.2017 at 20.40 hrs. as evident from the Panchanama dated 06.03.2017. The respective Summons under Section 108 of Customs Act, 1962 all dated 06.03.2017 were issued upon the first three Appellants requiring their respective appearance on 06.03.2017 at 10.30 PM. All the initial statements of said three Appellants are dated 07.03.2017 as recorded at the office of DRI, Kolkata. The accused/ Appellants were thereafter produced before the Chief Metropolitan Magistrate, Calcutta on 08.03.2017. Ld. Authorized Representative appearing for the Revenue did not dispute the fact that all the time since apprehension upto production before the Ld. Magistrate, the Appellants were in the custody of DRI, Kolkata and there is no lock-up of DRI, Kolkata for overnight detention of the accused persons. The statements, sought to be relied upon by the Revenue, are admittedly recorded during such illegal detention of the Appellants at the office of DRI, Kolkata for two nights.

7.2. The first three Appellants duly retracted from such statements before the Chief Metropolitan Magistrate, Calcutta on 14.03.2017 during their production after first remand. Such fact is evident from the Order dated 14.03.2017 passed by Chief Metropolitan Magistrate, Calcutta in Misc. Case No. 14718/17. In the retraction, the Appellants stated before the Ld. Magistrate that the statement dated 07.03.2017 was extracted from them by the DRI Officers upon physical and mental torture during such prolonged detention.

7.3. I find that the Show Cause Notice in this case was issued on 05.09.2017 i.e. after almost 6 months, but no subsequent statement of any of the Appellants was recorded. The Chief Metropolitan Magistrate, Calcutta in his Orders dated 08.03.2017 in Misc. Case No. 14718/17 while remanding the Appellants, amongst others, to judicial custody till 14.03.2017 had directed that *"Superintendent PC Home is directed to allow the IO of the DRI, Customs to enter into the Jail premises for interrogation and also allow them to reduce the statement if any of the accused person in writing in course of his interrogation"* It appears from a Letter dated 10.03.2017, being RUD No. 15 to Show Cause Notice, that only on 13.03.2017 the IO of DRI visited the jail premises when the Jail Authority endorsed that *"Interrogation done in my presence"* and the IO of DRI made endorsement that *"Interrogation done but they (all the six accused) refused to give any statement"*. The Chief Metropolitan Magistrate, Calcutta again vide his Order dated 14.03.2017 held that *"DRI officials are permitted to examine the accused in JC. They are also authorized to record statements if made."* However, the Show Cause Notice does not refer to any attempt made by DRI to interrogate and/or record statement of the accused/ Appellants at judicial custody after the Order dated 14.03.2017 when more particularly the retractions were filed on 14.03.2017 before the Chief Metropolitan Magistrate, Calcutta.

7.4. It is also on-record that vide Order dated 11.04.2017 while granting bail to the Appellants in Misc. Case No. 14718/17 the Chief

Metropolitan Magistrate, Calcutta saddled the accused/ Appellants with the condition *"to meet the I.O once in a week until further orders."* There is no allegation in the Show Cause Notice that the accused/ Appellants did not comply with such condition of bail. Surprisingly, there is even no recording of statement from any of the first three Appellants during their such visits at the office of DRI, Kolkata.

7.5. The Hon'ble Supreme Court of India in the case of Vinod Solanki v. Union of India [2009 (233) E.L.T. 157 (S.C.)] has held that –

> *"34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.*
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> *35. In the instant case, the Investigating Officers did not examine themselves. The authorities under the Act as also the Tribunal did not arrive at a finding upon application of their mind to the retraction and rejected the same upon assigning cogent and valid reasons therefor. Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or a quasi criminal case but there cannot be any doubt whatsoever that the court is obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece of*

evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage.

36. Appellant is said to have been arrested on 27-10-1994; he was produced before the learned Chief Metropolitan Magistrate on 28-10-1994. He retracted his confession and categorically stated the manner in which such confession was purported to have been obtained. According to him, he had no connection with any alleged import transactions, opening of bank accounts, or floating of company by name of M/s. Sun Enterprises, export control, Bill of Entry and other documents or alleged remittances. He stated that confessions were not only untrue but also involuntary.

37. The allegation that he was detained in the Office of Enforcement Department for two days and two nights had not been refuted. No attempt has been made to controvert the statements made by appellant in his application filed on 28-10-1994 before the learned Chief Metropolitan Magistrate. Furthermore, the Tribunal as also the Authorities misdirected themselves in law insofar as they failed to pose unto themselves a correct question. The Tribunal proceeded on the basis that issuance and services of a show cause notice subserves the requirements of law only because by reason thereof an opportunity was afforded to the proceedee to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law. The statement made by the appellant before the learned Chief Metropolitan Magistrate was not a bald statement. The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent examination of the factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act."

As such, the burden is on Revenue to establish the voluntary nature of the statements all dated 07.03.2017 recorded from the first three Appellants in the present case. The Revenue has failed to adduce any evidence to that effect. On the contrary, the facts and circumstance, stated *supra,* including the fact of prolonged detention of the Appellants at the office of DRI prior to their first production before the Ld. Magistrate and non-recording of any subsequent statement of the Appellants in spite of having ample opportunities, establishes the non-voluntary nature of said initial statements all dated 07.03.2017 of the said Appellants. Hence, the said initial statements cannot be basis of any penal consequence in the present case.

7.6. I also find that though Section 138B of Customs Act, 1962 provides for examination of the makers of any statement, the Adjudicating authority did not exercise such power with respect to the first three Appellants herein before taking cognizance of such initial statements which were retracted before the Ld. Magistrate. Moreover, from the impugned Order-in-Original it would be evident that in course of adjudication, the fact of retraction was also duly brought before the Adjudicating authority by the Ld. Advocate appearing for the Appellants, but the Ld. Adjudicating authority simply ignored the same while arriving at his findings with respect to the statements dated 07.03.2017 of the Appellants and proceeded on the basis of such statements as being voluntary in nature and has mis-directed himself by arriving at a finding at para 4.17(xii) of Order-in-Original that the retraction was in reply to Show Cause Notice and hence, such finding is not maintainable in law.

The Hon'ble High Court at Allahabad in the case of Commr. of Customs (Preventive), Lucknow v. Shakil Ahmed Khan [2019 (366) E.L.T. 634 (All.)] has held that –

> *"22. In the present case the order passed under Sections 111 and 112 of the Customs Act by the Commissioner Customs (P),*

Lucknow on 5-8-2014 and the said order records the entire proceedings conducted during the investigation. A perusal of the aforesaid order would indicate that no efforts were made by the appellants to prove that the confessional statements were made voluntarily. No Customs Officer or any independent witness was examined by the said authority which could prove that the said confessional statement was taken voluntarily and could be used as a substantial piece of evidence against the respondents.

23. That the authorities below had totally relied on the confessional statement for passing the impugned order against the respondents and it is to be examined as to whether in absence of any other evidence it was reasonable or prudent for holding the respondents guilty for the offence under Sections 111 & 112 of the Customs Act.

24. In the case of Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence - 2018 (8) SCC 271 = 2018 (362) E.L.T. 935 (S.C.) paragraphs 11 and 12 is reproduced herein under :-

"11. in Kashmira Singh v. State of Madhya Pradesh MANU/SC/0031/1952; (1952) SCR 526, this Court relied upon the decision of the Privy Council in Bhuboni Sahu v. The King MANU/PR/0047/1949 : (1949) 76 Indian Appeal 147 at 155 and laid down as under :

"Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in Bhuboni Sahu v. The King. "It does not indeed come within the definition of" 'evidence' contained in Section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross examination." Their Lordships also point out that it is "obviously evidence of a very weak type…… It is a much weaker type of evidence than the

evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the judge refuses to believe him except in so far as he is corroborated.

12. The law laid down in Kashmira Singh (supra) was approved by a Constitution Bench of this Court in Hari Charan Kurmi and Jogia Hajam v. State of Bihar MANU/SC/0059/1964 : (1964) 6 SCR 623 at 631-633 wherein it was observed :

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerburty a confession can only be used to "lend assurance to other evidence against a co-accused". In re Periyaswami Moopan Reilly. J., observed that the provision of Section 30 goes not further than this : "where there is evidence

against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence". In Bhuboni Sahu v. King the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence". It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in Kashmira Singh v. State of

Madhya Pradesh where the decision of the Privy Council in Bhuboni Sahu case has been cited with approval."

25. By the law laid down above it is clear that a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused.

26. In the present case the CESTAT has rightly concluded that a confiscation and penalty order was passed solely on the retracted statement of the appellant Mr. Shakil Ahmad Khan and father of the appellant Mr. Mridul Agarwal and further these persons were not examined in the adjudication proceedings and therefore, the confiscation, penalty order has been passed only on the basis of such confessional statement is contrary to settled legal position and was clearly illegal, arbitrary and liable to be set-aside, and the judgment of CESTAT is affirmed to that effect. In the present appeal we have given our anxious consideration to the substantial questions formulated by the petitioner and are of the considered opinion that no substantial question of law arises for determination of this Court in as much as the questions raised by appellant have already been conclusively decided by the Hon'ble Supreme Court.

27. We do not find any infirmity with the order of the CESTAT dated 22-5-2018 and no substantial question of law raises in these appeals which are hereby dismissed."

As such, the position of law is no more *res integra* that the retracted statements cannot be the sole basis of penalty under Section 112 of Customs Act, 1962. In the present case, if the said initial statements all dated 07.03.2017 of the first three Appellants, which were retracted on 14.03.2017 before the Ld. Magistrate, are taken out of record, there would be nothing to implicate the Appellants herein as liable for

any penal action under Section 112 of the Act. In such circumstance, imposition of penalties upon the Appellants on the basis of such retracted statements, all dated 07.03.2017, is liable to be quashed.

7.7. As regards the opportunity of cross examination of the panch witnesses in this case, I find that the very fact of recovery of gold from the possession of Appellant Shri Amit Ghosh and Appellant Shri Ajay Kumar Gond has been disputed by them from the very initial days. The Panchanama dated 06.03.2017 of Panchas viz. Shri Sarjit Kumar Yadav of 6, Ho-Chi-Minh Sarani, Kolkata – 700 071 and Md. Tabrej Alam of 8, Ho-Chi-Minh Sarani, Kolkata – 700 071 provides that they were witness to the entire process of movement of DRI Officers, apprehension of Appellants, recovery of goods, seizure of the goods on 06.03.2017 at the call of the DRI Officers. It is the case of the first three Appellants that there was no such Panch witness during their apprehension outside of NSCBI Airport or during search of their respective person at DRI Office at 8, Ho-Chi-Minh Sarani, Kolkata – 700 071 on 06.03.2017. They alleged that Panch Witnesses were later called by DRI Officers on 07.03.2017 to sign the Panchanama dated 06.03.2017 only.

7.8. The requirement of cross-examination of Panch witness has been dealt with in M.P. Jain v. Collector of Customs [1988 (37) E.L.T. 577 (Tribunal)] as under -

> *"15. Though the adjudicating authority may refuse cross-examination of the informants for justifiable reasons, he should invariably allow cross-examination of seizing officers and the panch witnesses as well as the witness who do not come under the category of the informants but on whose evidence the adjudicating authority places reliance. The adjudicating authority should bear in mind that cross-examination is an effective tool to test the veracity of the witness and the reliability of his evidence. It is further necessary to remember that what is relevant in considering the request for cross-examination is not as to whether the Act or the Rules provide such a right but whether the request is relevant,*

justified or genuine or was it made just to protract the proceedings or with a view to malign or browbeat the witness or that the defence taken does not justify cross-examination.

16. The High Court of Orissa had an occasion to consider the fact of not allowing cross-examination of the seizing officer. In Ramakrishna Agarwala v. Collector of Customs and Central Excise (1981 E.L.T. page 217) the Division Bench of the Orissa High Court observed "It is not disputed before us by learned Standing Council that the petitioner was emitted to an adequate opportunity of substantiating his stand and we are not prepared to accept the position maintained in the counter affidavit that the opinion of the adjudicating officer was final on the question as to what could be relevant in the defence of the petitioner. The matter should have been left to the petitioner and the adjudicating authority should not have taken that burden on him. We are inclined to agree with Mr. Mohante that principles of natural justice have been violated and the petitioner have been denied a reasonable opportunity to substantiate his stand.

17. The Central Board of Excise and Customs in the case of Vaidyanath Agency [1981 E.L.T. page 94 (CBEC)] held that the denial of cross-examination of the officer who conducted the inspection of stock is denial of natural justice. As stated earlier what is required to be considered is not as to whether the party has the right to cross-examine a witness but to consider whether the facts and circumstances of the case justify granting of such a request made by the party who was required to rebut the charges and was to establish his defence."

Likewise, in the present case, when the Appellants denies the allegation of recovery of gold from their possession, it was incumbent upon the Revenue to produce the Panch witnesses for cross-examination to unearth the facts before the Adjudicating authority. In other words, it was for the Revenue to establish the fact of recovery of contraband from the possession of the two of the Appellants herein upon cogent evidence, which they have failed to do more particularly

when the place of interception and search-seizure was admittedly different in the present case. Having not done so, the Revenue cannot derive any adverse conclusion against the Appellants on the basis of the alleged recovery.

7.9. The reliance placed in the case of *Kuber Tobacco Product (supra)* on behalf of Revenue actually supports the contention of the Appellants that the burden of proof is on the person claiming anything. In the present case, as held hereinbefore that it is the claim of the Revenue that the contrabands were recovered from the two of the Appellants and the initial statements of first three Appellants were voluntary in nature. In such circumstance, the burden of proof in this regard was on the Revenue, which they failed to discharge on both account. The argument that since 'gold' is notified under Section 123 of Customs Act, 1962, the burden of proof will be on the noticee/ Appellants, cannot be appreciated since Section 123 *ibid* provides for 'burden of proof' with respect to legal procurement and possession of 'gold' by it's owner and it nowhere provides that the 'burden of proof' w.r.t. non-voluntary nature of statement and/or non-recovery of contraband from the possession, is on the noticee/ appellants.

7.10. That it is also admitted position that the first three Appellants were working as Havalders of Customs, Department of Revenue, Ministry of Finance, Government of India on 06.03.2017 when they were apprehended by DRI, Kolkata. Section 155 of the Customs Act, 1962 provides as follows –

> Section 155. Protection of action taken under the Act.— (1) No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations.
>
> (2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and

> of the cause thereof, or after the expiration of three months from the accrual of such cause.

That from the reading of the said provision of the Customs Act, 1962 it would be evident that sub-Section (1) and sub-Section (2) thereof operates at different circumstance. While sub-Section (1) *ibid* applies to the Officer of Central Government on-duty, sub-Section (2) *ibid* applies to all the Officers of Central Government w.r.t. any proceeding in pursuance of the Customs Act, 1962. The argument advanced on behalf of Revenue that sub-Section (2) must be preceded by sub-Section (1) of Section 155 *ibid* cannot be accepted since the said provisions are neither disjunctive nor conjunctive in nature.

7.11. This Tribunal after considering several earlier judicial pronouncements in the Order No. FO/A/75056-75060/2019 dated 15.01.2019 in Customs Appeals Nos. 460, 541-544/09 [Shri Prabir Kumar Guha & Ors. v. Commr. of Customs (Airport &Admn.), Kolkata] has held that the mandates of Section 155(2) of Customs Act, 1962 are to be fulfilled while contemplating a proceeding under Customs Act, 1962 against any Officer of the Central Government. Revenue has not placed reliance upon any *contra* judgment in this regard. In the present case, admittedly, the cause of action arose on 06.03.2017 but no Show Cause Notice under Section 124 of Customs Act, 1962 was issued within three months from such date. The Show Cause Notice was issued only on 05.09.2017 i.e. much beyond the period of such three months. Further, on a specific query, it was confirmed by the Revenue before this Tribunal that no one month's previous notice was also issued to the first three Appellants before contemplation of the proceeding under Section 124 *ibid* against them. Hence, there was no compliance of the mandates of Section 155(2) of Customs Act, 1962 in the present case against the first three Appellants which renders the entire proceeding bad in law.

7.12. The imposition of penalty upon the fourth Appellant under Section 112(a) & (b) of the Customs Act, 1962 on the basis of retracted

initial statements all dated 07.03.2017 of the first three Appellants herein, is also perverse in nature inasmuch as apart from such retracted statements of the co-accused, there is nothing on-record to implicate the fourth accused in the alleged act of smuggling of the seized gold. Hence, in absence of any independent corroborative evidence against the fourth Appellant, penalty upon him is not imposable. Further, single penalty under both the clauses (a) & (b) of Section 112 of Customs Act, 1962, is erroneous in law in as much as both such clauses operates at separate domain altogether. While clause (a) of Section 112 *ibid* prescribes penalty for the act of commission and/or omission in illegal import and/or abetment thereto, clause (b) thereof prescribes penalty for knowingly dealing with the illegally imported goods. As such, imposition of single penalty upon the fourth Appellant i.e. Akash Jagdish Issrani by the Adjudicating authority under both clauses (a) and (b) supports the contention on behalf of the said Appellant that the Adjudicating authority was not sure about the alleged role of the said Appellant in the alleged act in want of specific allegations against him in the Show Cause Notice, but mechanically imposed the penalty on him. Such imposition of penalty is liable to be quashed.

8. In view of the above discussions and findings, I set aside the respective penalties as imposed upon the four Appellants herein under Section 112(b) and/or 112(a) & (b) of Customs Act, 1962 under the impugned Order-in-Original as confirmed by the impugned Order-in-Appeal.

As a result, the Appeals are allowed. The Appellants shall be entitled to consequential reliefs, if any, as per law.

(Order pronounced in the open court on 13 February 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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