



C.M.A.(MD)No.944 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
30.01.2024	20.02.2024

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

**C.M.A.(MD)No.944 of 2016
and
C.M.P.(MD)No.8489 of 2016**

T.Manivannan,
Proprietor,
M/s.N.K.R. Corporation,
122, Madhavaram High Road (North),
Perambur, Chennai – 600 011.

... Appellant

vs.

1.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin – 628 004.

2.Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan,
No.26, Haddows Road,
Chennai – 600 006.

... Respondents



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PRAYER: Civil Miscellaneous Appeal filed under Section 130(1) of the Customs Act, 1961, against the final order No.40598/2016, dated 11.04.2016, in Appeal No.C/26/2008-SM, on the file of the second respondent Tribunal.

For Appellant : Mr.B.Satish Sundar

For Respondents : Mr.R.Nandakumar
Senior Panel Counsel for Central Govt.

JUDGMENT

DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

The Civil Miscellaneous Appeal is directed against the Final Order No. 40598/2016, dated 11.04.2016, in Appeal No.C/26/2008-SM, passed by the Customs Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai, confirming the order dated 30.11.2007, passed in Order–in-Original No.64/2007, by the Commissioner of Customs, Tuticorin.

2. On 24.03.2006, on specific information, DRI Tuticorin, conducted search of the Container No.CRXU 169704-8 covered under the shipping Bill No.

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1590098 filed by M/s.Freedom Impex, Tuticorin, by its Proprietor John Alexander for export of 104 crates of gypsum boards. M/s.FG Global Resources, Malaysia, was shown at the consignor.

3. The search of the cargo leads to recovery of 1.650 MTs. of red sanders, prohibited goods under the Customs Act. The red sanders were kept concealed under gypsum boards in 94 crates by creating a cut cavity inside the pile of gypsum boards. Following the seizure, the office premises of M/s.Freedom Impex was searched. The Proprietor John Alexander was secured and his statement under Section 108 of the Customs Act was recorded on 26.03.2006. The said statement found inculpatory in nature, admitting the mis-declaration also indicting T.Manivannan, the appellant herein as the abettor and supplier of the red sander logs, which is a prohibited goods.

4. Thereafter, Manivannan's shop premises and godown were searched. Nothing incriminating was recovered. He was served with a show cause notice and confronted with the statement of John Alexander incriminating him in the offence. Manivannan denied any knowledge about the attempt of illegal export of

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red sanders. After recording his statements on three different dates, Manivannan was arrested on 19.06.2006 and also detained under COFEPOSA Act. However, the detention order was later revoked by the Government based on the report filed by the Advisory Board.

5. After taking into consideration the statements of John Alexander implicating Manivannan and the statements of Manivannan, the explanations given by Manivannan to the show cause notice dated 13.09.2006 and the submissions made during the personal hearing, the Order-in-Original, dated 30.11.2007, was passed holding that the red sanders totally 1500 pieces, weighing 1.6450 MTs. having market value of Rs.49.50 Lakhs are liable for absolute confiscation to the Government under Section 113 of the Customs Act, 1962. Further, the Commissioner of Customs also held that T.Manivanan (appellant herein), who is the Proprietor of M/s.N.K.R. Corporation, Chennai, had sent the prohibited red sanders to John Alexander for onward export to Malaysia illegally. The voluntary confessional statement given under Section 108 of Customs Act corroborated by other evidences on record is sufficient to prove the commission of offence under the Customs Act. Hence, passed the following order:-

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(i) To confiscate the seized red sanders worth Rs.49.50 Lakhs absolutely.

(ii) The gypsum board used to conceal the contraband viz., the red sanders which was estimated to be worth approximately Rs.0.88 Lakhs ordered to be confiscated under Section 119 of the Customs Act with option to the owner M/s.Freedom Impex, Tuticorin, to redeem the same within 30 days on payment of a fine of Rs.10,000/- under Section 125 of the Customs Act.

(iii) A penalty of Rs.5 Lakhs was imposed on Manivannan (appellant) under Section 114 (1) of the Customs Act.

6. To set aside the order imposing penalty of Rs 5 Lakhs, T.Manivannan preferred appeal under Section 129-A of the Customs Act and same was taken up for consideration by the CESTAT in Appeal No.C/26/2008-SM. The said appeal came to be dismissed holding that the contention of the appellant / T.Manivannan that penalty cannot be imposed based on the uncorroborated statement of a co-accused is not sustainable in view of the judgment of the Hon'ble Supreme Court in **Naresh J Sukhawani vs. Union of India [1996 (83) ELT 258 (SC)]**.



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7. Final Order No.322/2010 of CESTAT, dated 17.03.2010, in Appeal No.C/26/2008 was challenged by the appellant before this Court by filing C.M.A. (MD)No.1156 of 2010 under Section 130(1) of the Customs Act. The Division Bench of this Court at the time of admitting the appeal, granted stay of the order on condition that the appellant deposits 50% of the penalty and framed the following substantial questions of law for consideration:-

"(a) Whether the 1st Respondent Tribunal as a final fact finding body ought to have asked for corroboration on material particulars in the statement of co-accused John Alexander by independent evidence/material so as to rely on the same for suspending the penal liability against the Appellant?"

(b) Whether the 1st Respondent Tribunal has committed an error of jurisdiction in not even adverting to or evaluating the intrinsic worth of the exculpatory statements of the Appellant, which are on record in juxtaposition to the so called confessional and voluntary statements of the said John Alexander?"



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8. After considering the submissions of the rival parties, the Division Bench of this Court observed, no discussion has been made with regard to the factual aspects put forth on the side of the appellant. Then held, the order passed by the appellate authority is not legally and factually sustainable and the same is liable to be set aside. Accordingly, the Division Bench of this Court allowed Civil Miscellaneous Appeal on 31.01.2014 and remitted the matter back to CESTAT to consider the factual aspects put forth on either side and also consider recent decisions rendered by the Hon'ble Supreme Court and pass suitable orders on merits.

9. On remittal, the CESTAT re-heard the appeal and dismissed the appeal on 11.04.2016 holding, when John Alexander (co-accused) disclosed the offending goods (red sanders) was supplied by the appellant Manivannan, the appellant has not discarded this statement by leading any cogent evidence. Alexander, who is not a man of means, had acted as conduit of the appellant to export the same for a consideration of Rs.2,00,000/-. The appellant failed to controvert the cash payment of Rs.40,000/- made by him to Alexander towards consideration through the carrier of the offending goods. The statement of Alexander recorded before his arrest and during the judicial custody in the prison,

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is binding. The identification of the appellant's photo by Alexander in the presence of the Jail Superintendent never challenged. The statement of Alexander is so credible and believable to use it against the appellant, the co-accused and it is not only the statement of Alexander, who indicted appellant to the scrutiny of the law, but also the goods that came from him was independent evidence showing his involvement.

10. The above finding and the reasoning for the conclusion is targeted in the appeal preferred by the appellant. The learned counsel for the appellant reading extensively the impugned order of the CESTAT commented that it is a perverse order to the core and suffers misreading of facts and misapplication of law. He submitted that certain observations made in the impugned order are not borne by record, but sourced from the fertile imagination of the Author. He submitted that except the uncorroborated inculpatory statement of the co-accused John Alexander, there is no piece of evidence, which incriminates the appellant. The three statements of the appellant recorded under Section 108 of the Customs Act is total denial and exculpatory in nature. While so, even the facts found in the statement of John Alexander, which are verifiable, were not verified by the

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Department and placed before the Tribunal. However, the Tribunal has held that it is the burden of the appellant to rebut those facts, which are facts not existing. He further submitted that the judgments of the Hon'ble Supreme Court rendered in **Surjeet Singh Chhabra vs. Union of India** reported in **1997 (89) E.L.T. 646 (SC)** and **K.I.Pavunny vs. Assistant Collector (HQ.), Central Excise Collectorate, Cochin** reported in **1997 (90) E.L.T. 241 (SC)** were misapplied to the facts of the case by the Tribunal and the facts were tweaked to suit the case of the Department.

11. The learned Senior Panel Counsel appearing for the Customs submitted that, it is well settled principle of law that the statement recorded under Section 108 of the Customs Act is a substantive piece of evidence not only against the maker of the statement, but also against the co-accused. No corroboration to the statement is required. The appellant was given adequate opportunity to provide rebuttal evidence, but nothing produced by him to prove his innocence. Apart from the two judgments cited by the Tribunal, even recently, the Division Bench of the Karnataka High Court in **Commissioner of Customs, Mangaluru vs. Imtiaz Ahmed (2023 (8) Centax 2 (Kar.))** by its order dated 15.12.2022, has

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held that the statement recorded under Section 108 of Customs Act, 1962, by Customs Officer cannot be construed as a confessional statement of co-accused and is admissible as an independent piece of evidence without any corroboration.

12. The question of law involved in this Civil Miscellaneous Appeal against the order of CESTAT is as under:-

**Whether inculpatory statement of co-noticee be a
conclusive proof against co-noticee without
corroboration?**

13. Section 108 (1) of the Customs Act, empowers any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary, either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Customs Act. Under Section 108(3) of the Act, all persons so summoned are bound to attend, either in person or by an authorised agent, as may be directed. All persons so summoned shall be bound to state the truth. Section 108(4) of the said Act provides that every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860.

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14. The Constitutional Bench of the Hon'ble Supreme Court as early as 1960 in **Amba Lal vs. Union of India and others (AIR 1961 SC 264)** has held that Customs Officers are not judicial Tribunal and the proceedings before them are not a prosecution. However, when the relevant provisions under the Sea Customs Act and Land Customs Act provides for confiscation and imposition of penalty, the act gets the penal character. In such a situation, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply.

15. In **Illias vs. Collector of Customs, Madras (1969 (2) SCR 613)**, the Hon'ble Supreme Court made it clear that though the Customs Officers are invested with many powers of Police Officer in matters relating to arrest, investigation and search, they do not thereby, become a Police Officer within the meaning of Section 25 of the Evidence Act and so the confession statements made by an accused person to a Customs Officer is admissible in evidence against him.

16. Having consistently held that the statement given to the Customs Officer recorded under Section 108 of the Customs Act is admissible in evidence, the Hon'ble Supreme Court has also considered the evidentiary value of retracted

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confession statements alleged to have been obtained under force, threat or coercion. The three Judges Bench of the Hon'ble Supreme Court in **K.I. Pavunny vs. Assistant Collector (H.Q.) Central Excise Collectorate, Cochin** (cited supra), after referring to the earlier Constitutional Bench decisions rendered in **Haricharan Kurmi and Jogia Hajam vs. State of Bihar (AIR 1964 SC 1184)** and **Nisshi Kant Jha vs. State of Bihar (1969 (1) SCC 347)** and also few more judgments including **Naresh J. Sukhawani vs. Union of India (1995 Supp (4) SCC 663)** and **Surjeet Singh Chhabra vs. Union of India (1997 (3) SCC 721 : 1997 (89) ELT 646)**, held as under:-

"25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words, whether



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*it was not obtained by threat, duress or promise. If the court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. **However, prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution.** (Emphasis added)*

26. As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc. separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the



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

17. The question whether the confession statement of an accused could be relied upon to prove the prosecution case against the co-accused tried in the same case, came up for consideration in **Kashmira Singh vs. State of Madhya Pradesh (AIR 1952 SC 159)** before Three Judges Bench of the Hon'ble Supreme Court and later by four Judges Bench in **Balbir Singh vs. State of Punjab (AIR 1957 SC 216)** and subsequently before the Constitutional Bench in **Haricharan Kurmi and Jogia Hajam vs. State of Bihar (AIR 1964 SC 1184)**. The march of law on this legal point succinctly extracted in **K.I.Pavunny's** case as below: -

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"21. In *Kashmira Singh case [(1952) 1 SCC 275 : AIR 1952 SC 159 : 1952 SCR 526]*, the co-accused, Gurcharan Singh made a confession. The question arose whether the confession could be relied upon to prove the prosecution case against the appellant Kashmira Singh. In that context, Bose, J. speaking for a Bench of three Judges laid down the law that the Court requires to marshal the evidence against the accused excluding the confession altogether from consideration. If the evidence dehors the confession proves the guilt of the appellant, the confession of the co-accused could be used to corroborate the prosecution case to lend assurance to the Court to convict the appellant. The Court considered the evidence led by the prosecution, dehors the confession of co-accused and held that the evidence was not sufficient to bring home the guilt of appellant Kashmira Singh of the charge of murder. The appellant was acquitted of an offence under Section 302 IPC but was convicted for the offence under Section 201 IPC for destroying the evidence of murder and sentenced him to seven years' rigorous imprisonment. This decision was considered by a four-Judge Bench in *Balbir Singh v. State of Punjab [AIR 1957 SC 216 : 1957 Cri LJ 481]* wherein it was held that if there is independent evidence, besides the confession, the rule that the confession could be used only to



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*corroborate the other evidences loses its efficacy. Therefore, it was held that if the retracted confession is believed to be voluntary and true, it may form the basis of a conviction but the rule of practice and prudence requires that it should be corroborated by independent evidence. Therein also, for the charges of capital offence, the trial court did not accept the confessional statement of the co-accused containing inculpatory and self-exculpatory statement. The High Court reversed the acquittal and convicted the accused, accepting that part of the confessional statement of the accused which was corroborated from other evidence. This Court upheld the conviction and held that it is not necessary that each item of fact or circumstance mentioned in the confessional statement requires to be corroborated separately and independently. It would be sufficient if there is general corroboration. The ratio in **Kashmira Singh case [(1952) 1 SCC 275 : AIR 1952 SC 159 : 1952 SCR 526]** was referred to.*

*22. In **Hem Raj v. State of Ajmer [1954 SCR 1133 : AIR 1954 SC 462]** a three-Judge Bench to which Bose, J. was a member, was to consider whether retracted confession of an accused could be corroborated from the material already in the possession of the police prior to the recording of the confession. Therein the confession was recorded under*



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Section 164 of the Code during the committal proceedings but at the trial it was retracted. This Court held that the evidence already on record of the police could be used to corroborate the retracted confession.

*23. In **Haricharan Kurmi v. State of Bihar [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344]**, a Constitution Bench was to consider as to when the confession of a co-accused could be used as evidence under Section 3 of the Evidence Act. It was held that the confession of a co-accused cannot be treated as substantive evidence. If the Court believed other evidence and felt the necessity of seeking an assurance in support of its conclusion deducible from the said evidence, the confession of the co-accused could be used. It was, therefore, held that the Court would consider other evidence adduced by the prosecution. If the Court on confirmation thereof forms an opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of the guilt of the accused. It is, thus, seen that the distinction has been made by this Court between the confession of an accused and uses of a confession of the co-accused at the trial. As regards the confession of the accused and corroboration to the retracted confession, in **Girdhari Lal Gupta v. D.N. Mehta, Asstt. Collector of Customs [(1970) 2 SCC 530 :***



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1970 SCC (Cri) 496], a Bench of two Judges considered and held that if the evidence of an investigating officer is found to be reliable, whether it can be used to corroborate the evidence depends on the facts of each case. In that case, relating to the offence under Foreign Exchange Regulation Act, it was held that the evidence of the investigating officer and other evidence could be used to corroborate the recoveries made of the Indian currency being exported. This Court upheld the conviction of the accused."

18. In Naresh J. Sukhawani vs. Union of India reported in **1995 Supp (4) SCC 663**, the appellants contended that the statement of co-accused could be used only to corroborate other evidence as one of the circumstances under Section 30 of the Evidence Act, but it cannot be used as substantive evidence without corroboration from other independent evidence. This contention was negated by the Bench of the Hon'ble Supreme Court, consisting two Judges holding that, it must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. The material which incriminates the co-noticee

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inculcating him in the contravention of the provisions of the Customs Act can certainly be used to connect the co-noticee. It can, therefore, be used as substantive evidence.

19. From the judgments referred to above, the dictum of the Hon'ble Supreme Court, it could be safely concluded that ;-

(a) The statement recorded by a Customs Officer under Section 108 of the Customs Act is substantive piece of evidence.

(b) The inculpatory statement of one noticee can be put against the co-noticee.

(c) The inculpatory statement of the maker can be used against him without corroboration.

(d) If the statement is retracted subsequently by the maker, the maker of the statement has to prove the statement was obtained under threat, coercion or force.

(e) As far as the portion indicting the co-noticee, prudence requires, the Court to examine whether there is any probability or circumstances to believe the existence of the fact found in the portion of the statement which indicts the co-



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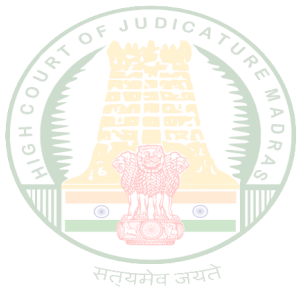
noticee. The cordinal principle an accomplice is unworthy of credit, unless he is corroborated in material particulars never to be ignored.

(f) The portion of the statement indicting the co-noticee can be tested in two ways, (i) statements regarding facts which are verifiable must be verified based on evidence; and (ii) facts which are within the exclusive knowledge of the co-noticee, presumption with the aid of Section 106 of the Evidence Act can be drawn.

20. The learned counsel for the appellant referring the statements of the appellant, which is exculpatory and total denial of his involvement in the alleged abetment to export red sanders through John Alexander and the retracted statement of John Alexander indicting the appellant submitted that, the statements read as a whole, would clearly show that the Department failed to check the veracity of facts, which are easily verifiable. Relying on the uncorroborated statement of a tainted person is contrary to the law laid by the Hon'ble Supreme Court.

21. Per contra, the learned counsel representing the Department heavily relying upon the statement of John Alexander and the statements of appellant T.Manivannan submitted that, the final fact finding authority namely, CESTAT

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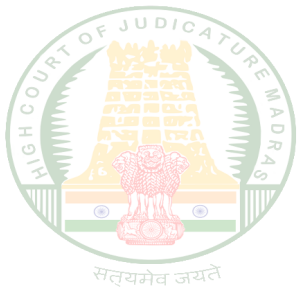
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had applied the principle of preponderance of probability and the principle fraud vitiates all solemn proceeding and rightly held, the appellant is liable to pay penalty for abetting John Alexander to illegally export red sanders by misdeclaring it as gypsum boards. The material seized and the statement of John Alexander is sufficient to hold the appellant guilty. The statement of John Alexander indicting the appellant T.Manivannan ought to have controverted with material evidence by the appellant. Mere denial will not exonerate him from the liability. The judgment of the Karnataka High Court in **Commissioner of Customs, Mangaluru vs. Imtiaz Ahmed** (cited supra) holds the field as on date and hence, the appeal is liable to be dismissed.

22. The scrutiny of the statement given by John Alexander on 26.03.2006, incriminates the appellant T.Manivannan as the supplier of the red sanders. The incriminating parts are:-

(1) Manivannan of Perambur, Chennai, came in contact with me through Santhanameeran. He was also involved in smuggling sandalwood and red sanders to foreign country.

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(2) In the month of February, 2006, I rang up to Manivannan and requested him to arrange for smuggling of sandalwood or red sanders business to me. At first, he did not agree to this. After speaking to him on many occasions, he agreed to give red sanders for sending through Tutiorin Port.

(3) Manivannan sent red sanders keeping gypsum boards on top of them in a lorry to the godown at Sugar Mill Colony, Tirunelveli, which I had taken on rent.

(4) Manivannan sent red sanders totally in 1500 pieces. Long frame, small frame and curved pieces each 500 numbers.

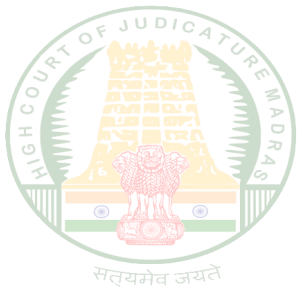
(5) He (Manivannan) told me to send these red sanders to the buyer's address in Malaysia given by him. For smuggling, he gave advance of Rs.1,00,000/-

(6) He gave Rs.40,000/- through the person, who came when red sanders came in the lorry.

(7) He deposited in Chennai the balance Rs.60,000/- in my ICICI Bank Account No.613905014790.

(8) After the cargo arrived, he sent the buyer's address in Malaysia through KPN bus courier.

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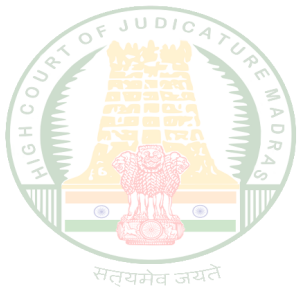
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(9) He (Manivannan) is residing at Perambur Highway Road. I do not know his full address. He is having a garments manufacturing factory in Perambur Highway Road. I do not know his contact phone number.

23. On 19.06.2006, further statement of John Alexander was recorded while he was confined in Madurai Central Prison, being detained under COFEPOSA Act. He was shown a computer print out of a photograph and asked to identify. John Alexander has identified the person in the said photograph as Manivannan. It is relevant to note that the identification of Manivannan through photograph was after about three months from Manivannan was called to give his statement. Incidentally, it was also on the day when he was arrested and remanded to judicial custody.

24. From the appellant Manivannan, three statements were recorded. First statement is on 31.03.2006, the second statement is on 04.04.2006 and the third statement is on 19.06.2006. The scrutiny of these statements reveals that the appellant had admitted that he know John Alexander of Tuticorin while he was doing garment business in the name of M/s.Raja International during the year

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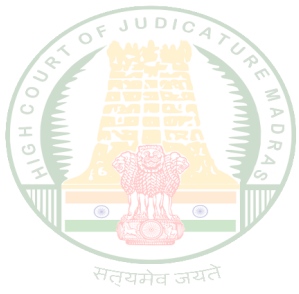
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2000-2001. He recently spoke to Alexander over phone regarding alliance for his daughter to verify the credential of the prospective bridegroom. When the statement of John Alexander dated 26.03.2006 was shown to Manivannan and asked to give his explanation, Manivannan after going through the statement, has stated that he is noway connected with his (Alexander) statement. He has not involved with Alexander in red sanders business. When he was asked about whether he know about the Company by name, M/s.Freedom Impex, Tuticorin, (the Company of John Alexander), Manivannan has replied in negative.

25. On 04.04.2006, when Manivannan appeared before the Assistant Director, DRI, in response to the summons issued to him under Section 108 of the Customs Act, he had stated that from the year 1999, his Company M/s.N.K.R. Corporation possess permit to hold stock of red sanders and the licence issued by D.F.O., Chengalpet Division, Kanchipuram District, is valid upto 31.03.2006. To the query, whether his Company was booked for any offence in respect of red sanders, he has answered in negative. Again, when the statement of John Alexander recorded on 26.03.2006 shown to Manivannan and sought his explanation, he had reiterated his earlier explanation dated 31.03.2006 and had

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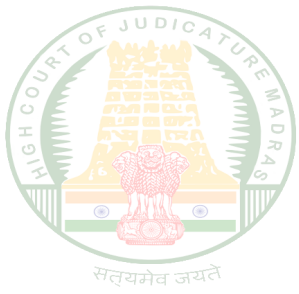
clarified further that he know him as Alex of Tuticorin and not as John Alexander.

He had denied the allegation that he arranged for transport of the red sanders along with gypsum boards to Tirunelveli during the month of Janurary, 2006.

26. On 19.06.2006, Manivannan appeared before Senior Intelligence Officer, D.R.I. on summoned and was asked to give further statement. Once again, he was asked to explain about the statement of John Alexander, dated 26.03.2006, incriminating him. He had firmly denied it and stated that he was noway connected with the consignment seized by D.R.I. at Tuticorin Port, which was attempted to be exported by John Alexander of M/s.Freedom Impex. When the statement of John Alexander recorded on 19.06.2006, in which he has identified Manivannan through the photograph, the appellant had refused to answer further.

27. At this juncture, it is to be noted, the records relied by the Department indicates, Alexander was summoned under Section 108 of the Customs Act for the second time and his statement was recorded on 19.06.2006 before the Jailer, Central Prison, Madurai. The appellant, vide summon dated 15.06.2006, was asked to appear before Senior Intelligence Officer, D.R.I., Chennai, on

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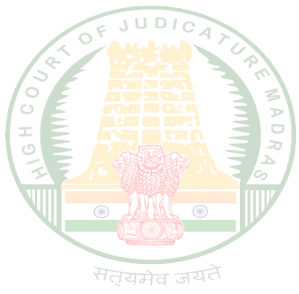


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19.06.2006 at 12.00 noon, to give evidence and produce documents in connection with the seizure of red sanders from M/s.Freedom Impex. The appellant had appeared before the Senior Intelligence Officer, D.R.I. at Chennai on 19.06.2006 in response to the summon. The statement recorded remain inconclusive with the noting that the appellant refused to reply to the question when confronted with the statement of John Alexander dated 19.06.2006, which was supposed to be recorded on the same day at Madurai Central Prison. In the impugned order, the conduct of the appellant his refusal to sign the statement been considered as an attended circumstances to infer his guilty. Whereas, the time and sequence apparently indicates that by all probability, the statement of John Alexander purported to have recorded in Madurai Central Prison on 19.06.2006 could not have reached Chennai and shown to the appellant on the same day at 12.00 noon, when he appeared before the Senior Intelligence Officer, D.R.I. Further, by recording that the appellant had refused to sign the statement, the Department has made it as a reason to arrest him and produce before the Magistrate on the same day at about 09.00 p.m.

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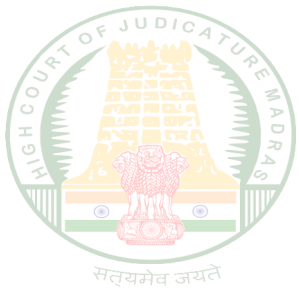
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28. The order of CESTAT, which is impugned in this appeal, to say the least is smeared with perversity. Misapplication of law and distortion of facts found in abundance in the impugned order. While remitting the matter back for re-consideration, this Court, vide order dated 31.01.2014, ordered CESTAT being the final fact finding authority, to look into the factual aspect put forth by both parties and consider the recent judgments of the Hon'ble Supreme Court. Under the guise of complying the direction, misread the statement of the appellant, by recording that the appellant when interrogated by the Investigating Officer, has admitted his trade in red sanders since 1999 to recover the loss in his garment business, he exported red sanders in the name of M/s.N.K.R Corporation from Chennai Port in the past and his refusal to sign the third statement as a reason to presume his guilty.

29. The facts, such as the alleged payment of Rs.60,000/- through ICICI Bank as remuneration for the illegal export and the alleged transit of Cargo from Chennai to Tirunelveli by the appellant, were never verified, though they are verifiable. The admission that the appellant is a licensed dealer in red sander and he know the exporter John Alexander as Alex of Tutucorin is neither a fact to

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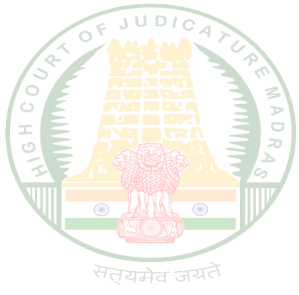
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corroborate the incriminating statement of co-noticee, indicting the appellant. The principle of preponderance of probability been wrongly invoked by CESTAT without any fact either circumstantial or by way of corroboration relate the appellant to the Cargo seized by D.R.I. Not even a remote material available to believe the statement of a tainted person.

30. The decisions of the Hon'ble Supreme Court in **K.I.Pavunny's case** (cited supra) or in **Naresh J.Sukhawani's case** (cited supra) and the decision of the Karnataka High Court in **Imtiaz Ahmed's case** (cited supra) does not vouchsafe the impugned order holding the appellant guilty based on the confession of the co-accused without semblance of corroboration or circumstances. If statement of an accomplice accepted without material corroboration, it will be travesty of justice.

31. Therefore this Court holds that the order of the CESTAT impugned in this appeal is liable to be set aside, being perverse and contrary to law.



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32. In the result, this Civil Miscellaneous Appeal is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

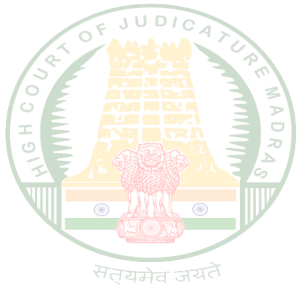
Index : Yes
NCC : Yes
smn2

[G.J., J.] & [C.K., J.]
20.02.2024

To

- 1.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin – 628 004.
- 2.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan,
No.26, Haddows Road,
Chennai – 600 006.

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DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
C.M.A.(MD)No.944 of 2016

20.02.2024

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