A THE ASSISTANT COLLECTOR OF CENTRAL EXCISE, RAJAMUNDRY

v.

DUNCAN AGRO INDUSTRIES LTD. AND ORS.

AUGUST 7, 2000

B

[K.T. THOMAS AND R.P. SETHI, JJ.]

Customs Act, 1962 : Section 108.

C *Code of Criminal Procedure, 1973 : Section 164*

Central Excises and Salt Act, 1944 : Section 9(1)

Evidence Act, 1872 : Sections 24 and 25.

Excise officer—Statements recorded by—Admissibility of.

D

Cigarette companies—Directors—Prosecution under section 9(1) of Central Excise Act and Section 120-B Indian Penal Code—Statements of accused recorded by excise officer—Accused not administered warning as required under section 164(2) Criminal Procedure Code—Held, such statements are admissible in evidence—However court should examine whether inculpatory E *statements were voluntary or were vitiated on account of the provisions contained in section 24 of the Evidence Act.*

Certain cigarette companies and their Directors, respondents herein, were prosecuted under section 9(1) of the Central Excises and Salt Act, F **1944 and section 120-B of the Indian Penal Code, 1860. The case against them was that pursuant to a criminal conspiracy hatched and perpetrated by them a very huge amount of central excise duty was evaded fraudulently. The Trial Judge acquitted all of them. Revenue preferred appeal and moved for leave before the Andhra Pradesh High Court. Single Judge of the High Court declined to grant leave to appeal. Relying on an earlier decision *** G **rendered by a Division Bench, the Single Judge held that since the excise officers who have recorded the confessional statements of the accused have not administered the warning to the accused as required under section 164(2) of the Code of Criminal Procedure, those statements were inadmissible against the makers thereof or against the co-accused. Consequently all the** H **confessional statements were excluded from consideration and the remaining**

evidence was found to be insufficient to establish the guilt of the accused persons. Against the order of the Single Judge Revenue preferred appeals before this Court.

Allowing the appeals, this Court

HELD : 1. A statement recorded by customs officers under section 108 of the Cus. ns Act is admissible in evidence. The court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in section 24 of the Evidence Act. Such an exercise can be made only after the appeal is regularised by granting leave to appeal. Since leave was declined on a wrong interpretation of law, the impugned order calls for interference. Consequently, leave applied for will stand granted. Resultantly, the appeal filed in the High Court will stand regularised. The High Court should dispose of the appeal as expeditiously as possible in accordance with law. [169-G-H; 170-A-B]

2. Section 164 of the Code of Criminal Procedure empowers a judicial Magistrate to record any confession or statement made to him during the course of an investigation. The power conferred by said provision could be exercised only by a judicial Magistrate. Even a police officer on whom power of a Magistrate has been conferred is forbidden from recording a confession. Sub-sections (2) and (4) deal with procedure which such Magistrate has to follow while recording inculpatory statements made by persons.[167-G-H]

3. Section 108 of the Customs Act does not contemplate any Magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the Magistrate at that stage. The entire idea behind the provisions is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost. [168-A-C]

4. A confession made to a police officer can be recorded by him without any of the constraints incorporated under section 164 of the Code. But the safety of the confessor who makes such confession to the police officer is

that the same is forbidden from use in evidence. The ban contained in section 25 of the Evidence Act is an absolute ban. But there is no ban in regard to the confession made to any person other than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in section 24 that statement becomes useless in any criminal proceeding. [168-D-F]

N.S.R. Krishna Prasad **v.** *Collector of Customs,* **(1992) 57 ELT 568 AP, disapproved.**

Haroon Haji Abdulla **v.** *State of Maharashtra,* **AIR (1968) SC 832 = [1968] 2 SCR 641;** *Ramesh Chandra Mehta* **v.** *State of West Bengal,* **AIR (1970) SC 940 = [1969] 2 SCR 461;** *Percy Rustomji Basta* **v.** *The State of Maharashtra,* **AIR (1971) SC 1087 = [1971] 1 SCC 847;** *Harbans Singh Sardar Lenasingh and Anr.* **v.** *The State of Maharashtra,* **AIR (1972) SC 1224;** *Veera Ibrahim* **v.** *The State of Maharashtra,* **AIR (1976) SC 1167 = [1976] 3 SCR 672 and** *Poolpandi Etc. Etc.* **v.** *Superintendent, Central Excise and Ors.,* **AIR (1992) SC 1795 = [1992] 3 SCC 259; relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 628-629 of 2000.

From the Judgment and Order dated 18.9.91 of the Andhra Pradesh High Court in Crl.A. No. 161/91 and Crl. M.P. No. 399 of 1991.

U.R. Lalit, A. Subba Rao, Ms. Rekha Pandey, K.K. Dhawan, P. Parmeswaran, C.S. Srinivasa Rao, U.A. Rana, R.V. Gagrat, Amit Desai, Rajesh Nair, Ms. Gauri Rasgotra, Suman J. Khaitan and Ranjan Mukherjee for the appearing parties.

The Judgment of the Court was delivered by

THOMAS, J. Leave granted. A

Is it necessary to comply with the precautions envisaged in Section 164 of the Code of Criminal Procedure (for short 'the Code') when Customs Officers recorded statement under Section 108 of the Customs Act? A Division Bench of the Andhra Pradesh High Court held that it is necessary if the statements were to be used against the maker thereof and that view was B followed by a Single Judge of the same High Court in the present case which resulted in refusal of leave to appeal when an order of acquittal was challenged in the High Court. This appeal, by special leave, is against the said order of refusal passed by the Single Judge.

Certain companies which engaged in manufacturing cigarettes, along C with some of their Directors were prosecuted before the Court of a Special Judge (Economic Offences) at Hyderabad for offences under different clauses of Section 9(1) of the Central Excise Act and under Section 120B of the Indian Penal Code. The trial judge after holding inquiry framed charges against the respondents for the aforesaid offences and proceeded with the trial but in the D end he acquitted all of them. The gist of the allegations against them is that the respondent company, which engaged in the manufacture of cigarettes during the period between 1.9.1981 and 30.11.1985, removed large quantities of cigarettes from their factories at Biccavolu without accounting them and without paying excise duty. The further allegation is that large quantities of cigarettes were concealed in their godowns without accounting them and in E the above process a very huge amount of central excise duty was evaded fraudulently. Such acts were done by the respondent pursuant to the criminal conspiracy hatched and perpetrated by them.

The Special Judge, after a detailed trial, found the respondent not guilty F and acquitted him. The appellant filed an appeal before the High Court of Andhra Pradesh and moved for leave to appeal. Learned Single Judge who heard the petition for leave felt that he is bound by the earlier decision rendered by a Division Bench of the same High Court in *N.S.R. Krishna Prasad* v. *Collector of Customs*, [1992] 57 ELT 568 AP. According to the said decision, any inculpatory statement recorded by the authorities under Section 108 of the G Customs Act without following and complying with the constraints prescribed in Section 164 of the Code would be inadmissible evidence in a trial against the maker of that statement. What the learned Single Judge has stated on that score is the following:

"Since the Excise Officers who have recorded the statements from the H

A accused in this case have not administered the warning to the accused as required under section 164 sub- section (2) of the Code of Criminal Procedure, non-compliance of the mandatory provision contained in Section 164 sub-section (2) of the Code of Criminal Procedure renders the statements inadmissible in evidence as held by the Division Bench. Therefore, those statements are inadmissible against the makers thereof or against the co-accused."

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The Division Bench of the High Court in *N.S.R. Krishna Prasad's case* (supra), whose decision the learned Single Judge followed, has held thus:

> "It, therefore, follows that unless the empowered authority under Section 108 of the Customs Act administers the caution or the warning embodied under Section 164(2) Cr.P.C. before recording a statement of confessional nature, from the person summoned, the statement so recorded will be inadmissible in evidence for any purpose."

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D On the above premise learned Single Judge excluded all the confessional statements from consideration. The remaining evidence was found to be insufficient to establish the guilt of the respondent. Learned Single Judge declined to grant leave to appeal by observing: "As the prosecution has failed to make out a case to grant leave to file appeal against the order of acquittal passed by the trial court, the petition for leave to file the appeal is dismissed and consequently the appeal is also dismissed." If the view adopted by the learned Single Judge regarding the application of Section 164 of the Code to Section 108 of the Customs Act is erroneous, the High Court should have granted leave to appeal.

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F Incidentally, we may point out that the Union of India had challenged the decision in *N.S.R. Krishna Prasad* (supra) before this Court. A two Judge Bench of this Court has set aside the said decision on the premise that the challenge made before the High Court in that case was not sustainable in a writ petition. However, this Court did not express any opinion on the merits of the case and the question of law was left open. So in this appeal by special leave, we are only disposed to consider the sustainability of the legal position adumbrated by the Division Bench in N.S.R. Krishna Prasad regarding.

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Section 108 of the Customs Act reads thus:

> "*108. Power to summon persons to give evidence and produce documents.*- (1) Any gazetted officer of custom shall have power to

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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 in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required:

Provided that the exemption under Section 132 of the Code of Civil procedure, 1908(5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

It must be remembered that Section 171A of the Sea Customs Act, 1878 (which enactment has been repealed by the Sea Customs Act) corresponds to Section 108 of the Customs Act. In this context we may point out that Section 14 of the Central Excise Act is practically the same as Section 108 of the Customs Act. So the decision rendered by this Court under the other corresponding provisions will be of much advantage to discern how the scope of the provisions has been understood by this Court earlier.

Section 164 of the Code deals with "recording of confession and statements". The provision empowers a judicial magistrate to record any confession or statements made to him during the course of an investigation "under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial." It must be pointed out that the power conferred by the said provision could be exercised only by a judicial magistrate. Even a police officer on whom power of a magistrate has been conferred is forbidden from recording a confession. Sub-sections (2) and (4) deal with procedure which such magistrate has to follow while recording inculpatory statements made by persons.

A Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said Section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the
B premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost.

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In this context we bear in mind that a confession made to a police officer can be recorded by him without any of the constraints incorporated under Section 164 of the Code. But the safety of the confessor who makes such confession to the police officer is that the same is forbidden from use in evidence. The ban contained in Section 25 of the Evidence Act is an absolute
D ban. But it must be remembered that there is no ban in regard to the confession made to any person other than a police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned
E was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in
F Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings.

As early as in 1968 this Court had considered the scope of the statement made under Section 171A of the Sea Customs Act in *Haroon Haji Abdulla* v.
G *State of Maharashtra*, AIR (1968) SC 832 = [1968] 2 SCR 641. Hidayatullah, J. (as he then was) made the following observations:

"These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Sec.171-A of the Sea Customs Act. As they are not
H made subject to the safeguards under which confessions are recorded by

Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him."

In *Ramesh Chandra Mehta* v. *State of West Bengal*, AIR (1970) SC 940 = [1969] 2 SCR 461, it was held that "when an inquiry is being conducted under Section 108 of the Customs Act, and a statement is given by a person against whom the inquiry is being held it is not a statement made by a person accused of an offence and the person who gives the statement does not stand in the character of an accused person." This was followed by this Court in *Percy Rustomji Basta* v. *The State of Maharashtra*, AIR (1971) SC 1087 = [1971] 1 SCC 847. It was a case in which the appellant was convicted under Section 135 of the Customs Act and 120-B of the IPC. The question which this Court considered in that case was whether Section 24 of the Evidence Act was a bar to the admissibility of a statement given by the accused of offences under the Customs Act. This Court repelled the contention based on Section 24 of the Evidence Act and the facts.

A three Judge Bench of this Court has again reiterated the same position in *Harbans Singh Sardar Lenasingh and Anr.* v. *The State of Maharashtra*, AIR (1972) SC 1224. It was again followed in *Veera Ibrahim* v. *The State of Maharashtra*, AIR (1976) SC 1167 = [1976] 3 SCR 672. Another three Judge Bench in *Poolpandi etc. etc.* v. *Superintendent, Central Excise and Ors.*, AIR (1992) SC 1795 = [1992] 3 SCC 259, took the same view.

It is unfortunate that the Division Bench of the Andhra Pradesh High Court has not addressed itself of the above well settled legal position when learned Judges of the Bench (Ramanujula Naidu and Panduranga Rao, JJ) held that the statement recorded under Section 108 of the Customs Act without complying with Section 164 of the Code "will be inadmissible in evidence for any purpose."

We hold that a statement recorded by customs officers under Section 108 of the Customs Act is admissible in evidence. The court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act. Such an exercise can be made only after the appeal is regularised by granting leave to appeal. Since leave was declined on a wrong interpretation of law we

A have to interfere with the impugned order.

We, therefore, allow these appeals and set aside the impugned order. Leave applied for will stand granted. Resultantly, the appeal filed in the High Court will stand regularised. Now the High Court is to dispose of the appeal in accordance with law. As this is an old matter we direct the Registrar of the B High Court of Andhra Pradesh to include the appeal in the hearing list, as expeditiously as possible.

Parties are directed to appear before the High Court on 4-9-2000 and no fresh notice need be issued for this purpose.

T.N.A. Appeals allowed.