[2023] 13 S.C.R. 172 : 2023 INSC 881

CASE DETAILS

COMMISSIONER OF CUSTOMS (IMPORTS), MUMBAI

v.

M/S GANPATI OVERSEAS THROUGH ITS PROPRIETOR SHRI YASHPAL SHARMA & ANR.

(Civil Appeal Nos. 4735-4736 of 2009)

OCTOBER 06, 2023

[B. V. NAGARATHNA AND UJJAL BHUYAN, JJ.]

HEADNOTES

Issue for consideration: Whether the tribunal was justified in holding that enhancement of value of the imported goods and the penalties imposed by the Commissioner of Customs on the noticee-respondents could not be sustained and consequently in setting aside the same.

Customs Act, 1962 – 14 – Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 – r. 4, 8, 5, 6 and 7 – Transaction value of imported goods – Determination of – Allegations of under-invoicing of price and thereby evasion of customs duty by the respondents – Initiation of proceedings on the basis of the price declared by the foreign supplier in the first set of export declarations filed before the Hong Kong customs authority – Discrepancies noticed in the price mentioned in the export declarations and the price of the goods as per the import invoices – Filing of second set of export declarations albeit imposition of penalty for mis-declaration of price at the initial stage, which stood paid by the foreign supplier – Department after rejecting the price declared as per the import invoices, invoked r. 8 straightaway instead of going through rr. 5, 6 and 7 thereof sequentially – Correctness:

Held: If transaction value of imported goods cannot be determined, the value shall be determined by proceeding sequentially through rr. 5 to 8 – Where the value of imported goods cannot be determined under the provisions of any of the rr 5 to 7A, the value shall be determined using reasonable means as provided in r. 8-the residual method – Furthermore, transaction value can be rejected if the invoice price is not found to be correct

but it is for the department to prove that the invoice price is incorrect – On facts, both the department as well as the adjudicating authority were not justified in rejecting the import invoice price of the goods as not correct and enhancing the price by straightaway invoking r. 8 when there was no evidence before them to do so – Thus, the tribunal was justified in setting aside the order passed by the adjudicating authority – No error or infirmity in the impugned judgment of passed by the tribunal. [Paras 34.1, 37, 40.2, 41,42]

Customs Act, 1962 – Initiation of proceeding alleging under-invoicing of price of goods imported from foreign country and thereby evading customs duty by the noticee – Reliance upon the unattested photocopies of the first set of export declarations filed by the foreign supplier before the customs authority showing great discrepancy in the price mentioned in the export declarations and the price of the goods as per the import invoices – Justification:

Held: Export declarations relied upon by the Department and earlier by the Directorate of Revenue Intelligence were unattested photocopies – Since those documents were used as a piece of evidence against the noticee, it was necessary that those documents were required to have been proved – Unattested photocopies of the relied upon documents without anyone proving or owning up the veracity of the same would not have any evidentiary value – Very substratum of these documents was subsequently removed when the foreign supplier filed a second set of export declarations before the Hong Kong customs authority showing lower price matching the price of the goods declared in the import invoices – Foreign supplier had paid the penalty for mis declaration of price at the initial stage – There can be no justifiable reason for the department to harp upon the price of the goods as per the initial export declarations by placing reliance on the unattested photocopies of the first set of export declarations to prove under-invoicing for the purpose of evading customs duty – Tribunal rightly held that the value shown in the first set of export declarations could not form any reliable basis for enhancement of the value. [Paras 16, 17]

Customs Act, 1962 – s. 108 – Power to summon persons to give evidence and produce documents – Admissibility in evidence of the statement recorded u/s. 108:

Held: Customs officer is not a police officer, and the person summoned and who makes a statement u/s. 108 is not an accused – However, a statement made by a person u/s.108 before the concerned customs officer is admissible in evidence and can be used against such a person – Object underlying s. 108 is to elicit the truth from the person who is being examined regarding the incident of customs infringement, thus customs officer must ensure the truthfulness of the statement so recorded – If the statement recorded is not correct, then, the very utility of recording such a statement would get lost – It is axiomatic that when a statement is admissible as a piece of evidence, the same has to conform to minimum judicial standards – Statement recorded under duress or coercion cannot be used against the person making the statement and the adjudicating authority is to find the same – On facts, statement of director of the supplier firm and proprietor of the importer, recorded u/s. 108 wherein both admitted under valuation – Tribunal noted the factum of retraction of the statement and thus, refused to give credence to such statement – Approach of the tribunal is justified. [Paras 18, 20, 28]

LIST OF CITATIONS AND OTHER REFERENCES

Commissioner of Customs, Calcutta v. South India Television (P) Ltd. (2007) 6 SCC 373 : [2007] 8 SCR 95; *Rabindra Chandra Paul v. Commissioner of Customs,* (2007) 3 SCC 93 : [2007] 3 SCR 319 – relied on.

Surjit Singh Chhabra v. Union of India, 1997 (89) ELT-646; K.I. *Pavunny v. Assistant Collector* (1997) 3 SCC 721 : [1997] 1 SCR 797; *State of Punjab v. Barkat Ram* [1962] 3 SCR 338; *Ramesh Chandra Mehta v. State of West Bengal,* AIR 1970 SC 940 : [1969] SCR 461; *Collector of Customs, Madras v. D. Bhoormall* (1974) 2 SCC 544 : [1974] 3 SCR 833; *Naresh J. Sukhawani v. Union of India* AIR 1996 SC 522 : [1995] 4 Suppl. SCR 778; *K.I. Pavunny v. Assistant Collector* (1997) 3 SCC 721 : [1997] 1 SCR 797; *Union of India v. Padam Narain Aggarwal,* AIR 2009 SC 254 : [2008] 14 SCR 179; *Eicher Tractors Limited v. Commissioner of Customs* (2001) 1 SCC 315 : [2000] 4 Suppl. SCR 597 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4735-4736 of 2009.

From the Judgment and Order dated 27.06.2008 of the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No.C/1347 & 1374 of 2002.

Appearances:

Balbir Singh, ASG, Arijit Prasad, Sr. Adv., Rupesh Kumar, Mukesh Kumar Maroria, Ms. Rukmini Bobde, Aniruddh Sharma II, Ishaan Sharma, Advs. for the Appellant.

V. Lakshmikumaran, Ms. Apeksha Mehta, Ms. Neha Choudhary, Ms. Charanya Lakshmikumaran, Ms. Falguni Gupta, Ms. Umang Motiyani, M. P. Devanath, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

UJJAL BHUYAN, J.

1. Since both the appeals arise out of the common judgment and final order dated 27.06.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai with parties also being the same, the two appeals were heard together and are being disposed of by this common judgment and order.

2. The appeals have been filed by the Commissioner of Customs (Imports), Mumbai under Section 130-E of the Customs Act, 1962 against the common judgment and final order dated 27.06.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (briefly the 'CESTAT' or 'the Tribunal' hereinafter) in Appeal Nos. C/1347 and 1374 of 2002.

3. The issue that arises in the two appeals is whether the CESTAT was justified in holding that enhancement of value of the imported goods and the penalties imposed by the Commissioner of Customs (Adjudication-1),

Mumbai on the respondents could not be sustained and consequently in setting aside the same?

4. A brief recital of facts would be in order.

4.1. Show cause notice dated 17.12.1999 was issued to the respondents by the Additional Director General, Directorate of Revenue Intelligence, New Delhi. It was mentioned therein that secret information was received by the Directorate of Revenue Intelligence that M/s Ganpati Overseas had imported tuners from Hong Kong at grossly under invoiced prices, thereby evading huge customs duty. The information revealed that the firm M/s Ganpati Overseas was owned by one Mr. Yashpal Sharma; the Hong Kong based supplier M/s Arise Enterprises was owned by his relative Mr. Suresh Chandra Sharma; the imported goods were cleared from Air Cargo Complex, Sahar, Mumbai and that M/s National Shipping Agency, Mumbai had acted as the Customs House Agent.

4.2. Upon receipt of such information, Directorate of Revenue Intelligence carried out investigation wherefrom it could be gathered that M/s Ganpati Overseas had imported twenty consignments during the years 1997-98 and 1998-99. It was found that M/s Ganpati Overseas had imported mainly tuners from M/s Arise Enterprises, Hong Kong and had also imported about three-four consignments of saw filters alongwith the tuners. Directorate of Revenue Intelligence obtained information from the Consulate General of India at Hong Kong that M/s Arise Enterprises, Hong Kong belonged to one Mr. Suresh Chandra Sharma who alongwith his wife Mrs. Kusum Sharma were the directors. When Mr. Suresh Chandra Sharma visited India in March, 1999, his statement was recorded on 08.03.1999 under Section 108 of the Customs Act, 1962 (referred to as the 'Customs Act' hereinafter). In his statement, Mr. Suresh Chandra Sharma stated that M/s Ganpati Overseas belonged to Mr. Yashpal Sharma who was his co-brother. He stated that M/s Ganpati Overseas was in the business of importing electronic goods since 1997-98. He had supplied tuners and saw filters to M/s Ganpati Overseas through his firm M/s Arise Enterprises from Hong Kong.

4.3. Mr. Suresh Chandra Sharma admitted that the rate of tuners per piece as shown in the invoices by M/s Arise Enterprises did not reflect the actual price. He had deliberately mentioned lower price with the intention of saving customs duty in respect of the goods imported by his co-brother,

Mr. Yashpal Sharma. The actual price of the tuners was quite high. The differential amount i.e. the difference between the actual price and the declared price was retained in India which he used to collect from Mr. Yashpal Sharma.

4.4. Mr. Yashpal Sharma was also summoned whereafter his statement was recorded under Section 108 of the Customs Act on 15.03.1999. Apart from narrating the factum of importing the goods by showing prices much lesser than the actual price meant to evade customs duty, he stated that the amount of payment disclosed in the import documents were sent by him to Mr. Suresh Chandra Sharma through the banking channel, whereas, the balance differential amount used to be handed over to Mr. Suresh Chandra Sharma on his visits to India.

4.5. It was mentioned that price of tuners so imported as per the sales vouchers was in the range of Rs. 40-60 per piece but the actual market value of these tuners was in the range of Rs. 200-325 per piece. In this manner, the respondents had evaded customs duty amounting to a total of around rupees twenty five to thirty lakhs approximately.

4.6. Mr. Yashpal Sharma was arrested on 15.03.1999 under Section 135 of the Customs Act. He was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Patiala House, New Delhi subject to the condition that a sum of rupees ten lakhs should be deposited in the office of the Directorate of Revenue Intelligence on 30.03.1999 and a further sum of rupees twenty lakhs should be so deposited within a period of forty-five days. Both the amounts were accordingly deposited.

4.7. From a scrutiny of the relevant materials including export declarations, it was found that the price of tuner as per the export declarations filed by the exporter before the Hong Kong Customs and Excise Department was Hong Kong $67.67 per piece which was much higher as compared to the price declared in the invoice by M/s Ganpati Overseas before the Indian customs authority at the time of importation of the goods. In this connection, the Directorate of Revenue Intelligence prepared two charts; as per chart-I, M/s Ganpati Overseas had evaded customs duty to the extent of Rs. 1,07,41,419.00 on import of nineteen consignments. Likewise, Directorate of Revenue Intelligence prepared chart-II which dealt with importation of 3200 pieces of tuners which were made in Taiwan. It was noted that the

value of the goods declared before the customs authority was Hong Kong $19200 whereas the actual value was Hong Kong $211468.07 as per export declaration before the Hong Kong Customs and Excise Department. Thus, according to the Directorate of Revenue Intelligence, M/s Ganpati Overseas had evaded customs duty to the tune of Rs. 8,67,762.00. The price of goods as shown in the import documents by M/s Ganpati Overseas was found to be much less than the real price of the goods, i.e., at the price at which those were supplied from Hong Kong. Therefore, the import valuation was rejected in terms of Section 14 of the Customs Act and the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (briefly, the 'Customs Valuation Rules' hereinafter).

4.8. The show cause notice proposed that the value of imported goods should be determined under Rule 8 of the Customs Valuation Rules on the basis of the value given in the export declarations obtained from the Hong Kong Customs and Excise Department. Alleging that respondents had wilfully misdeclared and suppressed the correct value of the imported goods with an intent to evade duties of customs, Directorate of Revenue Intelligence invoked the extended period of limitation as per the proviso to Section 28(1) of the Customs Act. It was mentioned that M/s Ganpati Overseas was liable to pay the differential customs duty of Rs. 1,07,41,419.00 leviable on the import of tuners, saw filters etc. as per chart-I and Rs. 8,67,762.00 as per chart-II, the total amount being Rs. 1,16,09,181.00. Respondents were therefore called upon to show cause as to why the aforesaid amount of customs duty should not be demanded and recovered from them and also as to why the imported goods should not be confiscated under Sections 111(d) and 111(m) of the Customs Act, besides appropriation of the amount of Rs. 30 lakhs already deposited. Respondents were further called upon to show cause as to why penalty under Section 112(a) of the Customs Act should not be imposed upon them and as to why interest should not be levied on the evaded customs duty.

4.9. The noticees were directed to submit their reply to the Commissioner of Customs, Air Cargo Complex, Sahar Airport, Mumbai within the stipulated time. It was mentioned that the show cause notice was issued under Section 124 of the Customs Act read with the proviso to Section 28(1) of the aforesaid Act.

5. M/s Ganpati Overseas through its lawyer replied to the aforesaid show cause notice on 20.05.2000. While denying all the allegations in totality, it was mentioned that the Commissioner of Customs vide his letter dated 07.04.2000 had rejected the request of M/s Ganpati Overseas for supply of certain documents sought for, on the ground that those documents were not relied upon. It was submitted that those documents might have relevance while preparing the defence and that absence of those documents would handicap the noticees in putting forth a proper defence. While reiterating the request for such documents, the noticees submitted what they called an interim reply.

5.1. It was mentioned that Mr. Yashpal Sharma was the proprietor of the noticee firm which was engaged in the business of import of tuners etc. during the years 1997-98 and 1998-99. The imports were made from M/s. Arise Enterprises, Hong Kong. At the time of clearance, the bills of entry were filed through the Customs House Agent and the imported goods were cleared after proper assessment by the customs authority on payment of due customs duty. Those goods were subsequently sold in the local market. In all, twenty consignments were imported. The noticees thereafter described and furnished the details of two types of tuners which were imported over a period of about nine months consisting of twenty consignments.

5.2. The noticees adverted to the allegations made in the show cause notice that the price declared by the noticees was not correct and was on the lower side, as proved by the statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma recorded under Section 108 of the Customs Act as well as by the export declarations filed by M/s Arise Enterprises before the Hong Kong Customs and Excise Department. It was pointed out that the two statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma could not be termed as voluntary under any circumstances. Those inculpatory statements were obtained through coercion and under duress. It was pointed out that the statement of Mr. Yashpal Sharma was structured in such a manner as to tally entirely with the statement of Mr. Suresh Chandra Sharma. That apart, statement of Mr. Yashpal Sharma was contradictory to his own statement made before the Additional Sessions Judge where he had stated that there was no under valuation or under invoicing of the goods imported. Therefore, it was contended that both the statements were not at

all reliable. Further, Mr. Yashpal Sharma vide letter dated 25.08.1999 had retracted the statement made by him under Section 108 of the Customs Act.

5.3. Regarding the export declarations filed by M/s Arise Enterprises before the Hong Kong customs authority, it was submitted that it was not known as to when these declarations were forwarded by the Consulate General of India, Hong Kong to the Directorate of Revenue Intelligence, New Delhi. The copies relied upon by the department were unattested and photocopies, thus unreliable. That apart, when the noticees contacted M/s Arise Enterprises, Hong Kong, it was acknowledged that due to error on the part of the staff, value of the goods was incorrectly shown in the export declarations. The mistake was subsequently rectified whereafter M/s Arise Enterprises lodged a second set of declarations before the Hong Kong customs authority and paid the penalty which was levied.

5.4. It was stated that the noticees were informed by the Hong Kong supplier that the tuners, saw filters etc. were being offered to them on stock clearance basis at lower prices. It was for this reason that the goods were sold to the noticees at lower prices, details of which were mentioned in paragraph 11 of the reply.

5.5. After saying so, it was pointed out that different prices in export declarations and in import invoices did not necessarily mean that the price shown in the export declarations was correct and that the one declared in the import invoices was incorrect.

5.6. The reply also touched upon the method of valuation as well as the valuation of the goods by the customs authority in India. After adverting to various provisions of the Customs Valuation Rules, it was asserted that the price at which the goods of the respondents were assessed and cleared was more or less correct. It was pointed out that the department could not adduce any single piece of evidence to arrive at the so called correct value of the goods. No value of identical or similar goods could be produced. No evidence of market value was adduced. No attempt to find out the price per unit was made for a comparison. That apart, no incriminating document or material was produced to establish under valuation. There was no evidence as to how remittances over and above the invoice price were made. One and only ‘evidence’ relied upon by the department was the initial value shown in the export declarations which was declared to be incorrect by the

supplier itself and later on rectified. Thus, there was no mis-declaration either in respect of description of the goods or value of the goods. No question of confiscation under Sections 111(d) and 111(m) of the Customs Act was made out. That apart, the goods were not prohibited ones, the import of which would warrant confiscation. In any view of the matter, the goods on being cleared by the customs authority were sold by the noticees much before the issuance of the show cause notice. Therefore, there cannot be any confiscation of such goods. In so far deposit of Rs. 30 lakhs by Mr. Yashpal Sharma is concerned, the same was to fulfil the bail condition imposed by the Additional Sessions Judge. Since there was no short payment of customs duty, question of appropriation of the aforesaid amount did not arise; neither any penalty was imposable nor interest leviable. M/s Ganpati Overseas, therefore, requested the Commissioner to drop the proceedings.

6. Reply of the respondents was found to be not acceptable. Therefore, the case was taken up for adjudication. Accordingly, the case was transferred to Commissioner of Customs (Adjudication-1), New Customs House, Mumbai for the purpose of adjudication. During the adjudication process, personal hearing was afforded to the respondents.

6.1. Adjudicating authority noted that the customs department had alleged under valuation of the goods in question resulting in evasion of customs duty to the tune of Rs. 1,16,09,181.00. To prove under valuation, the department had relied upon the price mentioned in the export declarations filed by the supplier before the Hong Kong customs authority in respect of nineteen consignments. The price so declared was considered as the correct transaction value. In respect of one more consignment where export declaration was not available, department had proposed enhancement of the price of the goods on the basis of the other export declarations. Adjudicating authority did not accept the contention of the respondents that the price mentioned in the export declarations filed before the Hong Kong customs authority could not be accepted. Distinguishing the facts of the two cases relied upon by the respondents, the adjudicating authority took the view that even if the copies of the export declarations available with the Directorate of Revenue Intelligence were not attested or were xerox copies, it would not make those copies unreliable or unauthentic. Therefore, taking into account the fact that the supplier M/s Arise Enterprises had acknowledged

that those declarations were filed by them, which was not denied by the respondents, the adjudicating authority held that there was no reason to doubt the veracity of the export declarations even if those were unattested and were mainly xerox copies. Accordingly, the adjudicating authority held that the information obtained was correct and genuine.

6.2. On the contention that statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and therefore could not be relied upon, adjudicating authority held that both of them in their statements recorded under Section 108 of the Customs Act had admitted to having under-invoiced the price of the goods and had voluntarily paid Rs. 30 lakhs towards payment of evaded customs duty during the investigation. They had also explained in their statements the modus operandi adopted by them and the manner of transfer of the differential amount. Therefore, the adjudicating authority opined that he had no reason to accept the plea of the respondents that the statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and should not be relied upon. This plea was taken only as an afterthought.

6.3. Contention of the respondents that the declared price was correct when compared with contemporaneous imports was also not accepted by the adjudicating authority as the invoices of the contemporaneous imports did not reveal the specification, quality etc., of the products.

6.4. Adjudicating authority also rejected the contention of the respondents that the supplier M/s Arise Enterprises had purchased the goods in question on stock clearance basis at a lower price and for this reason it could sell the goods to M/s Ganpati Overseas at a lower price. According to the adjudicating authority, this was again an afterthought and an invented argument as the noticees had not declared that the goods were purchased in stock lot. Neither invoices nor export declarations as well as the bills of entry or any other document on record suggested that the subject goods were purchased in stock lot at a price lower than the normal one. Rather, such a plea would support the allegation of the department that the invoice price was not a normal price and coupled with the fact that the parties were relatives, had rendered the invoice price unacceptable for assessment in terms of Section 14(1) of the Customs Act read with Rule 2(2) of the Customs Valuation Rules. Since neither the transaction value of similar goods nor

contemporary prices etc. were available, resort to Rules 5, 6 and 7 for determining the assessable value of the goods was not possible. Therefore, Rule 8 of the Customs Valuation Rules was correctly applied.

6.5. Holding that the export declarations reflected the true transaction value which was misdeclared by the importer to evade customs duty, the adjudicating authority vide the order-in-original dated 17.06.2002 held that the proviso to Section 28(1) of the Customs Act was applicable. Consequently, M/s Ganpati Overseas was held liable to pay the differential customs duty of Rs. 1,16,09,181.00 alongwith interest forthwith. For misdeclaration and under valuation, the goods in question were held liable for confiscation under Sections 111(d) and 111(m) of the Customs Act. However, as the said goods were not available having been cleared no order for confiscation was passed. Further, equivalent amount of differential customs duty was imposed on M/s Ganpati Overseas as a penalty under Section 114A of the Customs Act and in addition, penalty of rupees five lakhs was imposed on Mr. Yashpal Sharma under Section 112(a) of the Customs Act.

7. Aggrieved by the aforesaid order-in-original of the adjudicating authority, respondents preferred appeals before the CESTAT which were registered as Appeal Nos. C/1347 and 1374 of 2002.

7.1. CESTAT opined that export declarations filed by the foreign supplier before the Hong Kong customs authority could not be relied upon for the purpose of enhancement of value. This was for more than one reason. Firstly, those declarations were unattested photocopies. Secondly, the supplier had filed another set of declarations indicating the price as shown in the invoices of the imports. Thirdly, for filing incorrect declarations which had to be subsequently replaced by another set of declarations, the foreign supplier had paid penalty before the Hong Kong customs authority. Fourthly, no investigation was carried out by the customs authority with the Hong Kong customs authority revealing anything to the contrary. On that basis, CESTAT held that the price shown in the initial export declarations could not form the basis for enhancing the value of the goods.

7.2. CESTAT noted that nothing incriminating was recovered from the importers in the form of text messages etc. CESTAT also recorded that there was no evidence of contemporary imports which had higher value.

The foreign supplier had given explanation in respect of the price initially declared in the export declarations, which explanation was not discarded.

7.3. According to CESTAT, value in the export declaration may be relied upon for ascertainment of assessable value under the Customs Valuation Rules and not for determining the price at which the goods are ordinarily sold at the time and place of importation. CESTAT referred to and relied upon the decision of this Court in *Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd.,* (2007) 6 SCC 373 wherein this court held that the burden lies upon the department to prove under valuation by evidence or information about comparable imports and if the charge of under valuation is not supported by such evidence or information, the benefit of doubt has to be given to the importer. On the basis of the aforesaid decision, CESTAT recorded that there was not only no contrary evidence of contemporaneous import but even the foreign supplier had satisfactorily explained that the price initially shown in the export declarations was incorrect which was subsequently amended and accepted by the Hong Kong customs authority.

7.4. As regards the statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma, the Tribunal observed that these statements were retracted at the earliest available opportunity. Decisions relied upon by the appellant, viz., Surjit Singh Chhabra Vs. Union of India, 1997 (89) ELT-646 and in K.I. Pavunny Vs. Assistant Collector, (1997) 3 SCC 721 did not advance the case of the department. Tribunal observed that in the said decisions, this court has held that the inculpatory portion of confessional statement of accused, even if retracted, could be relied upon to base conviction if it is found to be voluntary and truthful; however, this Court sounded a note of caution that prudence and practice would require that such confessional statement should be corroborated by other evidence adduced by the prosecution. Statement of Mr. Yashpal Sharma that the actual market value of the tuners was in the range of Rs.200.00 and Rs.325.00 per piece which would make the market price thereof in excess of Rs.700.00 after adding normal profit could not be taken to be voluntary and true for the reason that tuners were supplied to the respondents at negotiated price of four different rates i.e. HK$ 4.00, 4.50, 5.50 and 6.00. In that view of the matter, Tribunal was of the view that the loaded value proposed by the department would not be correct since the

proposed Free on Board (FoB) price would be about Rs.372.00 per piece and CIF (Cost, Insurance and Freight) value would be Rs. 454.00 per piece and the landing cost would be Rs.660.00 per piece after adding customs duty.

7.5. CESTAT also noted that the importers i.e. respondents had produced invoices of contemporaneous imports by M/s Bharat Electronics and M/s K.S. International to show price comparable with the price declared by them in respect of the goods in question.

7.6. In the above backdrop, CESTAT vide the judgment and order dated 27.06.2008 held that enhancement of the value of the imported goods as well as the penalties imposed could not be sustained. Accordingly, those were set aside and appeals filed by the respondents were allowed.

8. It is this order of CESTAT which has been impugned in the two appeals before us.

9. This court vide the order dated 24.07.2009 had issued notice. Thereafter, the appeals were admitted on 10.12.2010.

10. Respondents have filed counter affidavit through Mr. Yashpal Sharma. After narrating the facts, respondents have supported the judgment and order passed by the CESTAT while controverting all the contentions raised by the appellant. Respondents have, therefore, sought for dismissal of the appeals.

11. Mr. Rupesh Kumar, learned counsel for the appellant has assailed the judgment and order of CESTAT. He has asserted that the appellant was justified in determining the value of the imported goods under Rule 8 of the Customs Valuation Rules on the basis of the declared value of the goods mentioned in the export declarations filed by the supplier which were obtained from the Hong Kong customs authority. The invoices presented by the respondents before the customs authority did not represent genuine and actual transaction.

11.1. The price declared in the invoice was much lower than the value declared in the export declarations filed in Hong Kong. Since it did not reflect the correct transaction value, the value appearing in the import invoices did not fulfil the criteria of Section 14(1) of the Customs Act and Rule 4 of the Customs Valuation Rules as per which the transaction value of the imported goods is the price actually paid or payable when sold for export to India.

11.2. He submits that the export declarations filed by the foreign supplier before the Hong Kong customs authority was not the sole basis for increasing the value of the subject goods. There were sufficient materials on record to prove under valuation. Both Mr. Suresh Chandra Sharma, director of the supplier firm and Mr. Yashpal Sharma, proprietor of the importer, in their statements under Section 108 of the Customs Act had admitted under valuation. In his statement, Mr. Yashpal Sharma had stated that the supplier M/s Arise Enterprises, Hong Kong belonged to his co-brother Mr. Suresh Chandra Sharma. Mr. Suresh Chandra Sharma used to send the goods on his own and that he had never sent any written or oral order for supply. As and when M/s Arise Enterprises would dispatch the goods, Mr. Suresh Chandra Sharma would inform Mr. Yashpal Sharma over telephone to whom the goods were to be sold, in what quantity and at what price. Thereafter, he used to sell the goods at the settled price and receive the payments. He had stated that he was not aware of the actual price of the goods imported from Hong Kong. The amount of payment as per the import documents were sent by him to Mr. Suresh Chandra Sharma through banking channel and the balance amount he used to handover to Mr. Suresh Chandra Sharma whenever he visited India.

11.3. Learned counsel has highlighted the fact that the supplier in Hong Kong and the importer in India were related parties. Therefore, the contention that the foreign supplier had filed another set of export declarations wherein the price shown in the invoices matched with that shown in the import documents in India was an afterthought to frustrate the proceedings initiated by the customs authority.

11.4. He further submits that where the importer like the respondents had not laid any basis for acceptance of the invoice price as transaction value, then the authorities would be legally justified to initiate fixation of price under Rule 5 onwards under the Customs Valuation Rules. According to him, the department had to take recourse to Rule 8 of the aforesaid Rules straightaway instead of proceeding through Rules 5, 6 and 7 as neither transaction value of similar goods nor contemporary prices were available. Therefore, the adjudicating authority had rightly invoked Rule 8 while assessing the transaction value to determine the short levy of customs duty and for imposing penalty. CESTAT was not at all justified in interfering with

such a reasoned order of the adjudicating authority. In these circumstances, he seeks setting aside of the order of the CESTAT dated 27.06.2008.

12. Per contra, Mr. V. Lakshmikumaran, learned counsel for the respondents has supported the order of CESTAT and submits that the appeals of the department wholly lacks merit and therefore should be dismissed.

12.1. He submits that the Tribunal was fully justified in holding that the price declared in the import invoice was correct. The foreign supplier had withdrawn the original export declarations earlier submitted before the Hong Kong customs authority and thereafter had filed another set of declarations where the declared price matched the price shown by the respondents in the import invoices. The subsequent declarations were accepted by the Hong Kong customs authority following which penalty was levied which was paid by the supplier.

12.2. Mr. Lakshmikumaran, learned counsel submits that the export declarations relied upon by the appellant were only photocopies which were neither signed nor attested. As such, those export declarations did not have any evidentiary value. He has asserted that the price reflected in the import invoices was the sole consideration for sale which satisfied the definition of transaction value as per Rule 4 of the Customs Valuation Rules.

12.3. According to Mr. V. Lakshmikumaran, there were no evidence before the customs authority to prove under valuation. Statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma could not be relied upon to prove under valuation for more than one reason. Firstly, when the two statements were recorded there was no evidence available with the customs department to prove under valuation. Secondly, both the statements were almost identical and matched each other which would indicate that those were dictated ones. Therefore, it is clearly evident that those were obtained under coercion and undue pressure. Thirdly, the two statements were retracted at the first available opportunity. Fourthly, the Additional Sessions Judge, New Delhi while granting bail to Mr. Yashpal Sharma had recorded in his order dated 26.05.1999 that the statement made was under coercion and pressure and therefore, the same could not be termed as a voluntary statement. In the circumstances, Tribunal was fully justified in not giving any credence to the above two statements.

12.4. He further submits that though the appellant had placed much emphasis on the fact that the parties are related and that filing of the second set of export declarations was an afterthought, the same is totally irrelevant. On the contrary, it is on record that the second set of export declarations were accepted by the Hong Kong customs authority by imposing penalty which was paid by the Hong Kong supplier.

12.5. Asserting that there was no under valuation of the imported goods, learned counsel submits that valuation of imported goods is governed by the Customs Valuation Rules and not by price declaration made by the supplier in another country. Appellant was not justified in by-passing Rules 5, 6 and 7 of the Customs Valuation Rules while determining the transaction value and straightaway invoking Rule 8. Customs department had not made any effort to gather evidence to determine transaction value of identical or similar goods imported contemporaneously. In this connection, learned counsel has relied upon the decision of this court in *Rabindra Chandra Paul Vs. Commissioner of Customs,* (2007) 3 SCC 93 and in the case of *South India Television (P) Ltd.* (supra). He, therefore, submits that there was no error or infirmity in the view taken by CESTAT. Consequently, the appeals are liable to the dismissed.

13. Submissions made by learned counsel for the parties have received the due consideration of the court.

14. Before we deal with the rival contentions, it would be relevant to have a brief recap of the factual narrative. Based on an intelligence input received by the Directorate of Revenue Intelligence that M/s Ganpati Overseas had imported tuners etc. from Hong Kong at grossly under invoiced prices thereby evading huge customs duty, a show cause notice dated 17.12.1999 was issued to the respondents. As per the show cause notice, M/s Ganpati Overseas had imported twenty consignments of tuners and saw filters from M/s Arise Enterprises, Hong Kong during the years 1997-1998 and 1998-1999. Mr. Suresh Chandra Sharma and his wife Mrs. Kusum Sharma were the directors of M/s Arise Enterprises, whereas, Mr. Yashpal Sharma was the proprietor of M/s Ganpati Overseas. Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were co-brothers.

14.1. Statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma were recorded under Section 108 of the Customs Act. In their

respective statements which virtually complimented each other, they admitted that the price of goods as per the export declarations filed by the foreign supplier before the Hong Kong customs authority reflected the actual price. On import, the price was kept intentionally low to avoid paying due customs duty. Actual price of the goods was quite high. The difference between the actual price and the declared price was retained in India, which Mr. Suresh Chandra Sharma used to collect from Mr. Yashpal Sharma whenever he visited India. However, the two statements were subsequently retracted on the ground that those were obtained under coercion and duress.

14.2. Mr. Yashpal Sharma was arrested on 15.03.1999 under Section 135 of the Customs Act. He was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Patiala House, New Delhi conditional upon depositing Rs.30 lakhs, which he deposited. In his bail order, the Additional Sessions Judge recorded that the statement made by Mr. Yashpal Sharma under Section 108 of the Customs Act was forcibly taken, and, therefore, could not be relied upon.

14.3. It has come on record that the foreign supplier had admitted before the Hong Kong customs authority that price of the goods declared in the initial export declarations was not correct because of mistake committed by the staff. It thereafter submitted a second set of export declarations where the price of the goods declared matched the price of the goods at the time of import in India. This was accepted by the Hong Kong customs authority but on payment of penalty which was paid by the supplier.

14.4. Be that as it may, the show cause notice proposed levy of higher customs duty with interest; confiscation of the imported goods; and imposition of penalty.

14.5. Respondents submitted their reply denying all the allegations. The show cause notice was adjudicated upon by the Commissioner of Customs (Adjudication-1), Mumbai. In his order-in-original dated 17.06.2002 the adjudicating authority accepted the price mentioned in the initial export declarations filed by the supplier before the Hong Kong customs authority in respect of nineteen consignments. In respect of one consignment where export declaration was not available, adjudicating authority accepted the price mentioned in respect of the nineteen consignments. Adjudicating authority brushed aside the objection raised by the respondents that copies of

the export declarations available with the Directorate of Revenue Intelligence were not attested and were simply xerox copies. Adjudicating authority took the view that merely because the copies of the export declarations were not attested or were xerox copies, those would not become unreliable or unauthentic. According to the adjudicating authority, the supplier had acknowledged those export declarations. Therefore, he held that information obtained by the Directorate of Revenue Intelligence based on the export declarations was correct and genuine.

14.6. He also rejected the objection of the respondents that statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma were not voluntary and therefore could not be relied upon. According to the adjudicating authority, both the two persons had admitted to under invoicing of the price and this was buttressed by the fact that Mr. Yashpal Sharma had voluntarily paid Rs.30 lakhs towards the evaded customs duty during the investigation stage. Such objection was therefore held to be only an afterthought.

14.7. Further contention of the respondents that the declared price is correct when compared with the contemporaneous imports was not accepted by the adjudicating authority on the ground that invoices of contemporaneous imports did not reveal the specification, quality, etc. of the products.

14.8. Adjudicating authority also rejected the contention of the respondents that the supplier had purchased the goods on stock clearance basis at a lower price for which reason it could sell the goods to M/s Ganpati Overseas at lower price. Such a contention was held to be an afterthought as M/s Ganpati Overseas did not produce any invoice etc. of purchase of goods on stock clearance basis. Since neither transaction value of similar goods nor price of contemporaneous imports etc. were available, adjudicating authority held that the department had rightly invoked Rule 8 of the Customs Valuation Rules instead of going through Rules 5, 6 and 7 sequentially.

14.9. The order-in-original was assailed by the respondents in appeals before the CESTAT. Vide the judgment and order dated 27.06.2008, CESTAT set aside the order-in-original passed by the adjudicating authority. CESTAT recorded that the initial export declarations filed by the foreign supplier before the Hong Kong customs authority could not be relied upon for enhancing the declared value of the imported goods. Copies of those export declarations available with the department were unattested photocopies.

That apart, the foreign supplier had filed a second set of export declarations before the Hong Kong customs authority declaring the price as shown in the invoices of the imports. This was accepted by the Hong Kong customs authority but on imposition of penalty on the supplier which was paid by the supplier. CESTAT noted that no investigation was carried out by the customs authority with the Hong Kong customs authority to support their allegation. Therefore, CESTAT held that the value of the goods shown in the initial export declarations could not form the basis for enhancing the value. Nothing incriminating was recovered from the importers. There was no evidence before the customs department of any contemporaneous import having higher value. Thus, the department could not prove under-valuation by adducing evidence.

14.10. As regards statements of Mr. Yashpal Sharma and Mr. Suresh Chandra Sharma, CESTAT observed that those statements were retracted at the earliest available opportunity. In the absence of any corroborative material or evidence, CESTAT declined to give much credence to the two statements.

14.11. Further, it was observed that while respondents had produced invoices of contemporaneous imports by M/s Bharat Electronics and M/s K.S. International at price comparable with the price declared by the respondents, those were summarily rejected by the adjudicating authority without the department discharging the burden to prove the contrary.

14.12. In such circumstances, CESTAT vide the judgment and order dated 27.06.2008 set aside the order-in-original and allowed the appeals of the respondents.

15. As we have seen, both the department and the adjudicating authority had relied upon the initial export declarations filed by the foreign supplier before the Hong Kong customs authority for the purpose of enhancing the value of the goods. CESTAT had interfered with the same. We believe, CESTAT was justified in doing so.

16. Proceeding alleging under-invoicing of price and thereby evading customs duty by the respondents was initiated by the Directorate of Revenue Intelligence and carried forward by the customs department primarily on the basis of the price declared by the foreign supplier in the first set of

export declarations filed before the Hong Kong customs authority. It was noticed that there was great discrepancy in the price mentioned in the export declarations and the price of the goods as per the import invoices. To support the above allegations, the department relied upon copies of those export declarations. Adjudicating authority brushed aside the objections raised by the respondents that the copies of the export declarations relied upon by the Directorate of Revenue Intelligence and the department were not attested and were just xerox copies. Adjudicating authority took the view that merely because the copies of the export declarations were just xerox copies and were not attested, the said fact did not make those documents unreliable or unauthentic. It was held that the foreign supplier had accepted the factum of filing those declarations which the noticees did not deny. This finding of the adjudicating authority was negatived by the CESTAT. The Tribunal, while accepting the objections of the respondents that those declarations could not be relied upon for the purpose of enhancement of value not only because those were unattested photocopies but also for the reason that the foreign supplier had explained that incorrect price was erroneously mentioned in the first set of export declarations for which it filed a second set of export declarations showing the price of goods in question matching with the price as declared in the import invoices. The second set of export declarations was accepted by the Hong Kong customs authority but for showing incorrect price initially, imposed penalty which was paid by the foreign supplier. CESTAT also noted that no investigation was carried out by the customs authority with the Hong Kong customs authority indicating anything incriminating against the respondents. Therefore, CESTAT held that the value shown in the first set of export declarations could not form any reliable basis for enhancement of the value.

17. We concur with the view taken by CESTAT. First and foremost, the export declarations relied upon by the appellant and earlier by the Directorate of Revenue Intelligence were unattested photocopies. Since those documents were used as a piece of evidence against the respondents, it was necessary that those documents were required to have been proved as is understood in law. Unattested photocopies of the relied upon documents without anyone proving or owning up the veracity of the same would not have any evidentiary value. It is another matter that the very substratum of these documents was subsequently removed when the foreign supplier

filed a second set of export declarations before the Hong Kong customs authority showing lower price matching the price of the goods declared in the import invoices. We need not go into the reasons necessitating filing of the second set of export declarations simply because, the Hong Kong customs authority had accepted the second set of export declarations albeit imposition of penalty for mis-declaration of price at the initial stage. It has also come on record that the foreign supplier had paid the penalty. If this be the position, there can be no justifiable reason for the appellant to harp upon the price of the goods as per the initial export declarations by placing reliance on the unattested photocopies of the first set of export declarations to prove under-invoicing for the purpose of evading customs duty.

18. This brings us to the statements of Mr. Suresh Chandra Sharma and Mr. Yashpal Sharma recorded under Section 108 of the Customs Act. Statement of Mr. Suresh Chandra Sharma was recorded on 08.03.1999 whereas the statement of Mr. Yashpal Sharma was recorded on 15.03.1999. Reference to the full details of the two statements so made may not be relevant. Suffice it to say, according to Mr. Suresh Chandra Sharma, Mr. Yashpal Sharma, who was his co-brother, was the proprietor of the importer M/s Ganpati Overseas. He had supplied tuners and saw filters to M/s Ganpati Overseas through his firm M/s Arise Enterprises, Hong Kong. He stated that the price of the goods shown in the import invoices did not reflect the actual price. Price of the goods in the import invoices was deliberately declared low with the intention of saving customs duty. Actual price of the goods was quite high. While the invoice amount after sale upon import used to be sent to him by Mr. Yashpal Sharma through the banking channel, the differential amount was retained in India by Mr. Yashpal Sharma who paid the same to Mr. Suresh Chandra Sharma whenever he visited India.

18.1. Mr. Yashpal Sharma in his statement also stated more or less the same thing as stated by Mr. Suresh Chandra Sharma. He was arrested on 15.03.1999 itself under Section 135 of the Customs Act. However, he was enlarged on bail on 30.03.1999 by the Additional Sessions Judge, Delhi subject to deposit of Rs. 30 lakhs within a specified period, which he paid. It has come on record that the Additional Sessions Judge in his bail order dated 26.05.1999 had mentioned that the statement of Mr. Yashpal Sharma recorded under Section 108 of the Customs Act may not have been a

voluntary one. It may be mentioned that Mr. Yashpal Sharma vide his letter dated 25.08.1999 had retracted the statement made by him under Section 108 of the Customs Act. CESTAT noted the factum of retraction of the statement and therefore, refused to give credence to such confessional statement. In our view, no fault can be found with the approach of the CESTAT.

19. Section 108 of the Customs Act deals with the power to summon persons to give evidence and produce documents. Section 108 of the Customs Act as it stood at the relevant time is extracted as under:-

> **108. Power to summon persons to give evidence and produce documents.-**
>
> (1) Any gazetted officer of customs duly empowered by the Central Government in this behalf 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 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 as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

20. From a reading of the provisions of Section 108 of the Customs Act, as it stood at the relevant point of time, we find that any gazetted officer of customs duly empowered by the Central Government had the authority

to summon a person whose attendance be considered necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer was making with respect to the smuggling of any goods. A person so summoned was bound to make a statement as regards the subject which was being examined. Such an enquiry by the customs officer would be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

21. While we are on Section 108 of the Customs Act, we may also advert to Section 24 of the Evidence Act, 1882 which deals with admissibility of a confession. Section 24 of the Evidence Act reads as under:

> **24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.**—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

22. From a reading of Section 24 of the Evidence Act what is clear is that a confession made by an accused due to any inducement, threat or promise having reference to the charge against the accused person would be irrelevant in a criminal proceeding. This court held in *State of Punjab Vs. Barkat Ram* 1962 (3) SCR 338 that customs officers are not police officers for the purpose of Section 25 of the Evidence Act which says that no confession made before a police officer shall be proved as against a person accused of any offence. A constitution bench of this court in *Ramesh Chandra Mehta Vs. State of West Bengal,* AIR 1970 SC 940 held that customs officers are entrusted with the powers specifically relating to collection of customs duty and prevention of smuggling. For that purpose, they are invested with the power to search any person on reasonable suspicion, to summon a person to give evidence, to arrest such a person if there is a reasonable suspicion that such a person is guilty of an offence under the Customs Act etc.

23. For collecting evidence, the customs officer is entitled to serve summons upon a person to produce a document or other thing or to give evidence etc. However, he has no power to investigate a customs infringement as an offence nor has he the power to submit a report under the Code of Criminal Procedure. A customs officer is not a police officer. Dealing with Sections 167(8) and 178(A) of the Sea Customs Act, 1878, this court in *Collector of Customs, Madras Vs. D. Bhoormall,* (1974) 2 SCC 544 held that provisions of the Evidence Act and the Code of Criminal Procedure did not govern the onus of proof under Section 167(8) of the Sea Customs Act. In such proceedings, the customs officer was guided by the basic principles of criminal jurisprudence and natural justice. The burden of proving that the goods were smuggled goods was on the department. The cardinal principle having an important bearing on the incidence of burden of proof was that sufficiency and weight of the evidence was to be considered according to the proof which it was in the power of one side to prove and in the power of the other side to have contradicted.

24. In *Ramesh Chandra Mehta* (supra), the objections as to admissibility of a confessional statement under Section 25 of the Evidence Act were rejected, holding that such a statement was admissible in evidence in customs proceedings since customs officers are not police officers.

25. This court in *Naresh J. Sukhawani Vs. Union of India,* AIR 1996 SC 522 clarified that a statement made before the customs officer is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. It is material piece of evidence collected by the customs officer under Section 108 of the Customs Act.

26. A three-judge bench of this court in *K.I. Pavunny Vs. Assistant Collector,* (1997) 3 SCC 721 considered the question as to whether a retracted confessional statement would be inadmissible in evidence in the context of the Customs Act. After holding that a statement recorded under Section 108 of the Customs Act is admissible in evidence, this court considered the next question as to whether such a statement can form the sole basis for conviction. The further question was whether a retracted confessional statement requires corroboration from any other evidence. After referring to various judicial pronouncements this court observed that there is no prohibition under the Evidence Act to rely upon a retracted confession to

prove the prosecution case or to make the same the basis for conviction of the accused. But practice and prudence would require that the court would seek assurance by getting corroboration from other evidence adduced by the prosecution.

27. Again, in *Union of India Vs. Padam Narain Aggarwal,* AIR 2009 SC 254, this court considered the provision of Section 108 of the Customs Act in great detail and thereafter observed that the said section obliges the person summoned to state the truth upon any subject in respect of which he is being examined. He is not absolved from speaking the truth on the ground that such a statement is admissible in evidence and could be used against him. The provision thus enables the custom officer to elicit the truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. However, a person called upon to make a statement before the customs authorities is not an accused. The entire idea behind Section 108 is that the customs 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. Therefore, statements recorded under Section 108 of the Customs Act are distinct and different from statements recorded by a police officer during the course of investigation under the Criminal Procedure Code.

28. Thus, what is deducible from an analysis of the relevant legal provisions and the corresponding judicial pronouncements is that a customs officer is not a police officer. Further, the person summoned and who makes a statement under Section 108 is not an accused. However, a statement made by a person under Section 108 of the Customs Act before the concerned customs officer is admissible in evidence and can be used against such a person. Object underlying Section 108 is to elicit the truth from the person who is being examined regarding the incident of customs infringement. Since the objective is to ascertain the truth, the customs officer must ensure the truthfulness of the statement so recorded. If the statement recorded is not correct, then, the very utility of recording such a statement would get lost. It is in this context that the customs officer who is empowered under Section 108 to record statement etc. has the onerous responsibility to see to it that the statement is recorded in a fair and judicious manner providing for procedural safeguards to the concerned person to ensure that the statement

so recorded, which is admissible in evidence, can meet the standard of basic judicial principles and natural justice. It is axiomatic that when a statement is admissible as a piece of evidence, the same has to conform to minimum judicial standards. Certainly a statement recorded under duress or coercion cannot be used against the person making the statement. It is for the adjudicating authority to find out whether there was any duress or coercion in the recording of such a statement since the adjudicating authority exercises quasi-judicial powers.

29. Proceeding ahead, we find that the department, after rejecting the price declared as per the import invoices, had invoked Rule 8 of the Customs Valuation Rules straightaway instead of going through Rules 5, 6 and 7 thereof sequentially. This was approved by the adjudicating authority after rejecting the submission of the respondents that contemporaneous imports of similar goods by M/s Bharat Electronics and M/s K.S. International had prices comparable with the prices declared by the respondents in the import invoices.

30. Before we deal with this aspect, we may advert to the relevant legal provisions. Section 2 (41) of the Customs Act defines the expression 'value'. It says 'value' in relation to any goods means the value thereof determined in accordance with the provisions of sub-Section (1) of Section 14 (w.e.f. 10.10.2007 this definition has been amended to include sub-Section (2) of Section 14 as well).

31. Section 14 of the Customs Act provides for valuation of goods. Before the amendment in 2007, Section 14 read as under:

> **14. Valuation of goods for purposes of assessment-** (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be-
>
> the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course or international trade, where-
>
> (a) the seller and the buyer have no interest in the business of each other; or

(b) one of them has no interest in the business of the other,

and the price is the sole consideration for the sale or offer for sale:

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50;

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1) or sub-section (1A) if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

(3) For the purposes of this section-

(a) "rate of exchange" means the rate of exchange-

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

32. Section 156 of the Customs Act confers general power upon the Central Government to make rules consistent with the Customs Act to carry out its purposes.

33. In exercise of the powers conferred by Section 156 of the Customs Act read with Section 22 of the General Clauses Act, 1897 and in supersession of the Customs Valuation Rules, 1963 except in respect of things done or omitted to be done before such supersession, the Central Government has

made the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (already referred to as the 'Customs Valuation Rules').

33.1. Rule 2(1)(c) defines "identical goods". It means imported goods-

> (i) which are same in all respects including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;
>
> (ii) produced in the country in which the goods being valued were produced; and
>
> (iii) produced by the same person who produced the goods or where no such goods are available, goods produced by a different person.
>
> However, such goods shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.

33.2. Likewise, Section 2(1)(e) defines "similar goods" to mean imported goods-

> (i) which although not alike in all aspects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trademark;
>
> (ii) produced in the country in which the goods being valued were produced; and
>
> (iii) produced by the same person who produce the goods being valued, or where no such goods are available, goods produced by a different person;
>
> But it shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer of

these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.

33.3. Rule 2(1)(f) defines "transaction value" to mean the value determined in accordance with Rule 4 of the Customs Valuation Rules.

33.4. Rule 2(2) mentions the instances where persons shall be deemed to be "related". In the context of the facts of the present case, what may be of relevance is Rule 2(2)(viii) which says that persons shall be deemed to be "related" only if they are members of the same family. Therefore, the question is whether co-brothers can be construed to be members of the same family? However, this aspect may not require much deliberation in view of our discussions in respect of the other issues.

34. Rule 3 of the Customs Valuation Rules reads as under:

3. Determination of the method of valuation—For the purpose of these rules, -

(i) the value of imported goods shall be the transaction value;

(ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these rules.

34.1. Thus, as per Rule 3, the valuation of imported goods shall be the transaction value. However, if that value cannot be determined, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Customs Valuation Rules.

35. This brings us to transaction value dealt with in Rule 4 which is as under:

4. Transaction value. —(1) The transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these rules.

(2) The transaction value of imported goods under sub-rule (1) above shall be accepted:

Provided that –

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which–

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to same condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below.

(3)(a) Where the buyer and seller are related, the transaction value shall be accepted provided that the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.

(b) In a sale between related persons, the transaction value shall be accepted, whenever the importer demonstrates that the declared value of the goods being valued, closely approximates to one of the following values ascertained at or about the same time-

(i) the transaction value of identical goods, or of similar goods, in sales to unrelated buyers in India;

(ii) the deductive value for identical goods or similar goods;

(iii) the computed value for identical goods or similar goods.

Provided that in applying the values used for comparison, due account shall be taken of demonstrated difference in commercial levels, quantity levels, adjustments in accordance with the provisions of Rule

9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related;

(c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

36. To complete the narrative, we may mention that while Rule 5 deals with transaction value of identical goods, Rule 6 deals with transaction value of similar goods. On the other hand, Rule 6A provides for determination of value when transaction value is not available. Rule 7 which comes after Rule 6A provides for determination of deductive value and Rule 7A provides for computed value.

37. Where the value of imported goods cannot be determined under the provisions of any of the aforesaid rules, the value shall be determined using reasonable means as provided in Rule 8 i.e. the residual method.

38. In *Rabindra Chandra Paul* (supra), this court referred to its earlier decision in Eicher Tractors Limited Vs. Commissioner of Customs, (2001) 1 SCC 315, and held as follows-

6. In Eicher Tractors Ltd. Vs. Commr. Of Customs, this Court held that the principle for valuation of imported goods is found in Section 14(1) of the Customs Act, 1962 which provides for the determination of the assessable value on the basis of the international sale price. Under the said Act, customs duty is chargeable on goods. According to Section 14(1), the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed it has to be decided under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place and importation in the course of international trade. The word "ordinarily" implies the exclusion of special circumstances. This position is clarified by the last sentence in Section 14(1) which describes an "ordinary" sale as one where the seller or the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. Therefore, when the above conditions regarding time, place and absence of special circumstances stand fulfilled, the price of

imported goods shall be decided under Section 14(1-A) read with the Rules framed thereunder. The said Rules are the Customs Valuation Rules, 1988. It was further held that in cases where the circumstances mentioned in Rules 4(2)(c) to (h) are not applicable, the Department is bound to assess the duty under transaction value. Therefore, unless the price actually paid for the particular transaction falls within the exceptions mentioned in Rules 4(2)(c) to (h), the Department is bound to assess the duty on the transaction value. It was further held that Rule 4 is directly relatable to Section 14(1) of the Customs Act, 1962. Section 14(1) read with Rule 4 provides that the price paid by the importer in the ordinary course of commerce shall be taken to be the value in the absence of any special circumstances indicated in Section 14(1). Therefore, what should be accepted as the value for the purpose of assessment is the price actually paid for the particular transaction, unless the price is unacceptable for the reasons set out in Rule 4(2). It was further held that the word "payable" in Rule 4(1) must be read as referring to the "particular transaction" and payability in respect of the transaction contemplates as situation where payment of price stands deferred. Therefore, Rule 4 is limited to the transaction in question. It was further held that Rule 5 allows the transaction value to be determined on the basis of identical goods imported into India about the same time; Rule 6 allows fixation of transaction value on the basis of the value of similar goods imported into India about the same time. Where there are no contemporaneous imports into India, the value is to be decided under Rule 7 by a process of deduction in the manner provided therein. If this is not possible, then the value shall be computed under Rule 7-A. It was further held that it is only when the transaction value under Rule 4 is rejected, only then under Rule 3(ii) the value shall be determined by proceeding sequentially through Rules 5 to 8. Conversely, if the transaction value can be decided under Rule 4(1) and does not fall under any of the circumstances given in Rule 4(2), there is no question of determining the value under the subsequent rules. It was further held that discount is a recognised feature of international trade and as long as those discounts are uniformly available and as long as they are based on commercial considerations, they cannot be denied under Section 14.

> 7. The primary base for customs valuation is the transaction value i.e. the price actually paid or payable for the goods when sold for export to the country of importation, subject to adjustment. The said price should not be subject to any condition or consideration that could prevent the value from being determined under Rule 4(1). Where the Department has reason to doubt the truth or accuracy of a declared value, it may ask the importer to provide further explanation to the effect that the declared value represents the total amount actually paid or payable for the imported goods. If the declared value is lower than the declared value of similar goods imported by other buyers at or about the same time, it can constitute "reason to doubt" the truth or accuracy of the declared value indicated in the commercial invoice (see Rule 10-A). Under Rule 8(2)(i) no value shall be determined based on the selling price of the goods produced in India. In cases where the Department fails to establish circumstances mentioned in Rule 4(2), the transaction value declared by the assessee cannot be rejected and the price mentioned in the invoice should be held to represent the transaction value.

39. The dispute involved in *South India Television (P) Ltd.* (supra), was as regards the assessable value of ceramic capacitors and diodes imported by the importer from the foreign supplier at Hongkong. The price declared by the importer was not accepted by the customs authority on the basis of overseas investigation report whereafter Rule 8 of the Customs Valuation Rules was invoked. This court examined and analysed Section 2(41) and Section 14(1) of the Customs Act in the following manner:

> **10.** We do not find any merit in this civil appeal for the following reasons. Value is derived from the price. Value is the function of the price. This is the conceptual meaning of value. Under Section 2(41), "value" is defined to mean value determined in accordance with Section 14(1) of the Act. Section 14 of the Customs Act, 1962 is the sole repository of law governing valuation of goods. The Customs Valuation Rules, 1988 have been framed only in respect of imported goods. There are no rules governing the valuation of export goods. That must be done based on Section 14 itself. In the present case, the Department has charged the respondent importer alleging misdeclaration regarding

the price. There is no allegation of misdeclaration in the context of the description of the goods. In the present case, the allegation is of under invoicing. The charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods. It is for the Department to prove that the apparent is not the real. Under Section 2(41) of the Customs Act, the word "value" is defined in relation to any goods to mean the value determined in accordance with the provisions of Section 14(1). The value to be declared in the bill of entry is the value referred to above and not merely the invoice price.

11. On a plain reading of Section 14(1) and Section 14(1-A), it envisages that the value of any goods chargeable to ad valorem duty has to be the deemed price as referred to in Section 14(1). Therefore, determination of such price has to be in accordance with the relevant rules and subject to the provisions of Section 14(1). It is made clear that Section 14(1) and Section 14(1-A) are not mutually exclusive. Therefore, the transaction value under Rule 4 must be the price paid or payable on such goods at the time and place of importation in the course of international trade. Section 14 is the deeming provision. It talks of deemed value. The value is deemed to be the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or for offer for sale. Therefore, what has to be seen by the Department is the value or cost of the imported goods at the time of importation i.e. at the time when the goods reach the customs barrier. Therefore, the invoice price is not sacrosanct.

39.1. This court held that before rejecting the invoice price, the department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. In this regard, this court held that under valuation has to be proved. If the department wants to allege under valuation, it must make detailed inquiries, collect material and also adequate evidence. If the charge of under valuation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. The charge of under invoicing has to be

supported by evidence of prices of contemporaneous imports of like goods. It has been held as follows:

> **12.** However, before rejecting the invoice price the Department has to give cogent reasons for such rejection. This is because the invoice price forms the basis of the transaction value. Therefore, before rejecting the transaction value as incorrect or unacceptable, the Department has to find out whether there are any imports of identical goods or similar goods at a higher price at around the same time. Unless the evidence is gathered in that regard, the question of importing Section 14(1-A) does not arise. In the absence of such evidence, invoice price has to be accepted as the transaction value. Invoice is the evidence of value. Casting suspicion on invoice produced by the importer is not sufficient to reject it as evidence of value of imported goods. Undervaluation has to be proved. If the charge of undervaluation cannot be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer. If the Department wants to allege undervaluation, it must make detailed inquiries, collect material and also adequate evidence. When undervaluation is alleged, the Department has to prove it by evidence or information about comparable imports. For proving undervaluation, if the Department relies on declaration made in the exporting country, it has to show how such declaration was procured. We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. However, even in adjudication proceedings, the AO has to examine the probative value of the documents on which reliance is placed by the Department in support of its allegation of undervaluation. Once the Department discharges the burden of proof to the above extent by producing evidence of contemporaneous imports at higher price, the onus shifts to the importer to establish that the invoice relied on by him is valid. Therefore, the charge of under invoicing has to be supported by evidence of prices of contemporaneous imports of like goods.

39.2. Reverting to Section 14(1) of the Customs Act, this court held that it is for the department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. This is what this court has said:

> **13.** Section 14(1) speaks of "deemed value". Therefore, invoice price can be disputed. However, it is for the Department to prove that the invoice price is incorrect. When there is no evidence of contemporaneous imports at a higher price, the invoice price is liable to be accepted. The value in the export declaration may be relied upon for ascertainment of the assessable value under the Customs Valuation Rules and not for determining the price at which goods are ordinarily sold at the time and place of importation. This is where the conceptual difference between value and price comes into discussion.

40. Section 14 of the Customs Act and Rules 3 and 4 of the Customs Valuation Rules again came up for consideration before this court in Varsha Plastics Private Limited (supra). As regards Section 14(1) of the Customs Act, this court analysed the said provision in the following manner:

> **19.** Section 14(1) of the Act prescribes a method for determination of the value of the goods. It is a deeming provision. By legal fiction incorporated in this section, the value of the imported goods is the deemed price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade.
>
> **20.** The word "ordinarily" in Section 14(1) is a word of significance. The ordinary meaning of the word "ordinarily" in Section 14(1) is "non-exceptional" or "usual". It does not mean "universally". In the context of Section 14(1) for the purpose of "valuation" of goods, however, by use of the word "ordinarily" the indication is that the ordinary value of the goods is what it would have been in the course of international trade at the time of import. Section 14(1), thus, provides that the value has to be assessed on the basis of price attached to such or like goods ordinarily sold or offered for sale in the ordinary course of events in international trade at the time and place of transportation.

40.1. After adverting to the procedural aspects provided in the Customs Valuation Rules, more particularly in Rules 3 and 4 thereof, this court referred to its earlier decision in Eicher Tractors Limited (supra) and held that the price paid by the importer to the vendor in the ordinary course of commerce shall be deemed to be the value in the absence of any special circumstances indicated in Section 14(1) and particularised in Rule 4(2).

However, when the transaction value under Rule 4 is rejected, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Customs Valuation Rules. This court held as follows:

> **23.** In *Eicher Tractors* this Court held that the value, according to Section 14, shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade. It was further held that by Rule 4(1) mandate has been cast on the authorities to accept the price actually paid or payable for the goods in respect of the goods under assessment as the transaction value but this mandate is subject to certain exceptions specified in Rule 4(2). It was also held by this Court in Eicher Tractors [(2001) 1 SCC 315] that both Section 14(1) of the Act and Rule 4 provide that the price paid by the importer to the vendor in the ordinary course of commerce shall be deemed to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2). However, when the transaction value under Rule 4 is rejected, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the Rules.

40.2. This court also referred to the decisions in *Rabindra Chandra Paul* (supra) and *South India Television (P) Ltd.* (supra) to reiterate the recognised legal position that transaction value can be rejected if the invoice price is not found to be correct but it is for the department to prove that the invoice price is incorrect.

41. Thus, on a cumulative analysis of the facts and the legal position as alluded to hereinabove, we have no hesitation in coming to the conclusion that both the department as well as the adjudicating authority were not justified in rejecting the import invoice price of the goods as not correct and enhancing the price by straightaway invoking Rule 8 of the Customs Valuation Rules when there was no evidence before them to do so. In these circumstances, CESTAT was justified in setting aside the order in original.

42. We, therefore, do not find any error or infirmity in the impugned judgment and order of CESTAT. The appeals filed by the department are devoid of merit and those are accordingly, dismissed. No costs.

Headnotes prepared by:
Nidhi Jain

Appeals dismissed.