

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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75713 of 2025

(Arising out of Order-in-Original No. KOL/CUS/PR.COMMR/PORT/ADJN/12/2025 dated 07.04.2025 passed by the Principal Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata – 700 001)

Sandeep Kumar Dikshit

437A, Patrapara Road,
Purasree Patrapara, Chandannagar,
Hooghly – 712 136

: Appellant

VERSUS

Principal Commissioner of Customs (Port)

Custom House, 15/1, Strand Road,
Kolkata – 700 001

: Respondent

APPEARANCE:

Shri H.K. Pandey, Advocate,
Shri Arijit Chakrabarti, Advocate,
For the Appellant

Shri T. Sulaiman, Authorized Representative,
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76880 / 2025

DATE OF HEARING: 19.06.2025

DATE OF DECISION: 10.07.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The instant appeal has been filed by Shri Sandeep Kumar Dikshit (hereinafter referred to as the "appellant") against the Order-in-Original No. KOL/CUS/PR.COMMR/PORT/ADJN/12/2025 dated 07.04.2025 passed by the Principal Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata, wherein penalties have been imposed on the appellant, under Sections 114(i) and 114AA of the Customs Act, 1962.

2. The facts of the case are that the container No. TCKU 2571904, placed for export under shipping bill No. 6092170 dated 25.02.2016, was intercepted by Directorate of Revenue Intelligence (DRI), Kolkata Zonal Unit. Upon examination, the said container was found to be stuffed with 59 numbers of wooden boxes stacked in the front side and behind that, red coloured wooden logs, believed to be red sanders, were concealed. The red coloured wooden logs weighing 14790 kgs., valued at Rs. 6,65,55,000/-., were seized under Section 110 of the Customs Act, 1962, for further action.

2.1. Statement of the freight forwarder namely, Shri Rajiv Agarwal of M/s. Kunal Ocean Agency was recorded on 03.03.2016, wherein, he *inter alia* stated that the container No. TCKU 2571904 was booked by Shri Sudhir Jha through e-mail dated 25.02.2016; that he had booked other three containers also in the name of M/s. Srijita Exports as per the direction of Shri Sudhir Jha and he had received the payments from Shri Sudhir Jha through cheques of M/s. US clearing Agency, though the bills were raised in the name of M/s. Srijita Exports. It was also stated that he did not know M/s. Srijita Exports and never received payments from the said exporter.

2.2. Shipping Bill No. 6092170 dated 25.02.2016 was filed by CHA, M/s A. K. Sirkar & Sons. Statement of its partner viz. Shri Somnath Sirkar, the CHA/CB was recorded on 04.03.2016 and 06.04.2016, wherein, he *inter alia* stated that he had allowed Shri Sudhir Jha to handle the import-export work using the license of M/s A. K. Sirkar & Sons. It was also stated that he had no knowledge of the exporter viz. M/s. Srijita Exports; that since the beginning of 2015 Shri

Sudhir Jha had done many exports in the name of M/s. Srijita Exports as well as in the name of other exporters; Sudhir Jha of M/s US Clearing Agency had used the stamp and seal of his CHA firm and worked on their behalf on monetary considerations. He agreed that he is responsible for clearance of the said seized goods, as the documents pertaining to that exports have been filed in the name of the CHA Firm owned by him.

2.3. Further statement of Shri Somnath Sirkar was recorded on 30.06.2016, wherein he submitted the e-mail dated 25.02.2016 was received from Shri Sudhir Jha. The said e-mail reveals that he had received export documents from Sudhir Jha through mail id usclearing2000@gmail.com and thereafter, he had filed the said Shipping Bill No.6092170 dated 25.02.2016.

2.4. Statement of Shri Suman Hazra, employee of Shri Sudhir Jha was recorded on 07.03.2016, 04.07.2016 and 09.08.2016 wherein he has stated that export documents were sent to the CHA either on 25.02.2016 or 26.02.2016 through the e-mail id usclearing2000@gmail.com used exclusively by his employer, Shri Sudhir Jha. It has been stated by him that after completion of exports, he had received the copies of documents related to the intercepted consignment of M/s. Srijita Exports on 04.03.2016 from Shri Bidyanand Jha, who had been working on temporary license at Kolkata Port.

2.5. M/s Kunal Ocean Agency Pvt. Ltd., the freight forwarder, vide letter dated 23.05.2016 and 26.05.2016 intimated that as per instructions of Shri Sudhir Jha, they had booked containers for exporters M/s. Akash Ganga Enterprises (IEC No. 0205006183);

M/s. Sayantika Enterprise (IEC No. 0213003163) and M/s. Gopals Associates (IEC No. 0204000246) apart from M/s Srijita Export (IEC No. 0213005794) and had received payments from Shri Sudhir Jha in respect of the said IEC holders. Payments were made by cheque using the bank account of Sudhir Jha and documents submitted by container agent revealed an average payment of Rs. 65,000/- per consignment.

2.6. Investigation revealed that apart from Shipping Bill No. 6092170 dated 25.02.2016, 15 more consignments were exported by Shri Sudhir Jha in the name of M/s. Akashganga Enterprises (IEC 0205006183), M/s. Sayantika Enterprise (IEC 0213003163), M/s. Gopals Associates (IEC 0204000246) and M/s. Srijita Exports (IEC 0213005794)

2.7. Shri Sudhir Jha had not appeared on the due date and dishonoured 6 summonses dated 7.03.2016, 14.03.2016, 28.03.2016, 11.04.2016, 26.04.2016 and 11.05.2016 issued for his appearance in the matter. A Look-out Circular was issued on 19.05.2016 vide LOC No. 16/2016 dated 19.05.2016.

2.8. Shri Bidyanand Jha, employee of Shri Sudhir Jha, looking after his work at Kolkata Port, never appeared before DRI in the matter in spite of several summons issued to him.

2.9. Enquiry with the transporters and drivers of trucks revealed that all booking had been done by Sudhir Jha and goods were loaded from a godown at Krishnarampur, Panchabatitala, P.S.- Chanditala, District – Hooghly, PIN -712705.

2.10. Statement of Godown Owner, namely, Shri Paresh Das, recorded on 03.06.2016, revealed that the said godown was given on rent to Shri Prasenjit Sani (not a party to the proceeding) under proper agreement. Statement of Shri Prasenjit Sani recorded on 09.06.2016 revealed that he had let out a portion of said godown on rent to Shri Sudhir Jha but he failed to submit copy of any sublet agreement.

2.11. Statement of Shri Sudhir Jha was recorded on 23.05.2016 wherein, he *inter alia* stated that he had received export documents from one Shri Bhagwat Sharma who introduced himself as Manager of M/s. Srijita Exports. In the said statement, Shri Sudhir Jha stated that he was introduced to Shri Bhagwat Sharma in Custom House and that Shri Bhagwat Sharma told him that Shri Sandeep Kumar Dikshit (the appellant herein) had sent him; that all original documents are lying with Shri Bidyanand Jha and he instructed Shri Suman Hazra to collect it and handed over the same to either M/s. A. K. Sirkar & Sons or DRI Officers.

2.12. In his statement dated 24.05.2016, Shri Sudhir Jha stated that Shri Bhagwat Sharma was introduced with him at Custom House, Kolkata in a random meeting in the month of November, 2015 citing reference of Shri Sandeep Kumar Dikshit. He was introduced to Shri Sandeep Kumar Dikshit through Shri Nirmal Jha in the month of November, 2015 when mobile number 8335857530 was exchanged.

2.13. Sudhir Jha was arrested on 24.05.2016 and produced before Ld. Chief Metropolitan Magistrate, Bankshall Court, Calcutta on 24.05.2016 and was remanded to judicial custody. Complaint for prosecuting him under Section 135 of the Customs Act

was filed by DRI on 22.06.2016 on the basis of prosecution sanction order issued on 14.06.2016 by the Additional Director General, DRI, Kolkata. Sudhir Jha was released on bail on 22.06.2016.

3. On completion of the investigation, a Show cause Notice dated 26.08.2016 was issued, inter alia, for confiscation of the seized 14,790 kgs. of red sanders wood valued at Rs.6,65,55,000/- (approx.) under Section 113(d) of the Customs Act, 1962. Penalties were also proposed on Shri Sudhir Jha, M/s. Sea King Agencies, Shri Bidyanand Jha and Shri Arvind Rana by way of the above Notice.

4. After issuance of Show Cause Notice dated 26.08.2016, Sudhir Jha was summoned again and his statements were recorded on 26.10.2016 and 21.11.2017.

4.1. In his statement dated 26.10.2016, Shri Sudhir Jha inter alia stated that he knew Shri Sandeep Kumar Dikshit, Inspector, since April, 2014; that he had met Shri Sandeep Dikshit several times either at Dalhausi, Kolkata or below DRI Office. He also stated that all documents of Srijita Exports were given by Shri Sandeep Dikshit by calling him below DRI Office; all export documents in relation to four firms had been given by Shri Sandeep Dikshit and after exports, all those documents were returned to him either below DRI Office or Dalhausi, Kolkata; further, that Shri Sandeep Dikshit used to contact him using the number 8967650859 for this purpose; payments of 16 consignments towards ocean freight and transport was given by Sandeep Dikshit @ Rs. 30,000/- per consignment in cash.

4.2. Further, in his statement dated 21.11.2016, Shri Sudhir Jha *inter alia* stated that he never visited the godown at Dankuni, never took it on rent of Rs.25,000/- per month and never have any agreement in this regard; that Shri Prasenjit Sani (the occupier/ lease of the godown) is lying that he had taken the said godown on rent and stored red coloured logs; that all drivers are telling false facts regarding his presence at godown while loading and sealing of containers by him in their presence.

4.3. Statement of Shri Nirmal Jha, who allegedly introduced the Appellant to Sudhir Jha, was recorded on 06.07.2016. The said statement was not relied upon by DRI but supplied by them vide letter under DRI F. No. DRI/KZU/AS/ENQ-13/2016/Pt./1351 dated 08.03.2018. Shri Nirmal Jha denied introducing Shri Sudhir Jha with Shri Sandeep Kumar Dikshit.

4.4. Statement of appellant i.e., Shri Sandeep Kumar Dikshit, was recorded on 08.06.2016, wherein, he denied knowing any person by name Shri Sudhir Jha, but accepted that Shri Nirmal Jha was known to him since 2008. It was informed that Shri Nirmal Jha used to provide him raw intelligence.

5. During the investigation and before issue of the above said Show Cause Notice dated 26.08.2016, in a case related to export under duty drawback scheme through Petrapole Land Customs, office premises of M/s Spak Enterprise Pvt. Ltd., Cock Burn Lane, Room No. 403, 4th Floor, Kolkata – 700 016 was searched, wherefrom the DRI *inter alia* purportedly recovered a DVD and seized it under Panchanama dated 29.07.2016 in course of the search proceedings. Printouts of the contents of the said DVD was taken by DRI on 29.07.2016. As per Annexure to

Panchanama dated 29.07.2016, the said DVD contains 45 files/folders in the master folder named "DOC". Thereafter DRI, Kolkata prepared a forensic copy of the DVD on 18.01.2017 under Panchanama dated 18.01.2017. However, no certificate has been obtained in terms of Section 138C of the Customs Act, 1962.

6. Statement of Shri Ajay Kumar Mahapatra the Director of M/s. Spak Enterprise Pvt. Ltd. was recorded on 29.07.2016 and 02.08.2016, wherein he *inter alia* stated that the seized DVD belongs to one Jyoti Biswas of Maslandpur, who used to take printouts using his office infrastructure and services of his staff Shri Dibakar Dey and Shri Manish Kumar Karna.

6.1. On 03.08.2016 and 06.01.2017, statements were recorded from Sh.Manish Kumar Karna, wherein *inter alia*, he has stated that he knew that the said DVD seized by DRI officers belongs to Shri Jyoti Biswas but he never opened it and he never took printouts from the said DVD.

6.2. On 21.09.2016, Shri Jyoti Biswas was apprehended, who was wanted in another case of the DRI Kolkata (mentioned in Para 9.2.1 of said Supplementary SCN), wherein said Shri Jyoti Biswas was the prime accused.

7. The statements of Shri Jyoti Biswas was recorded on different dates and further statements of Shri Sudhir Jha, Shri Dibakar Dey and Rudra Prasad Mondal were also recorded. Those statements are recorded to clarify the details available in the DVD. Thereafter, the Supplementary Show Cause Notice, dated 18.05.2017 was issued.

8. The following persons were made Noticees vide the Supplementary Show Cause Notice dated 18.05.2017:-

- i. Shri Vikash Kumar, Deputy Commissioner,
- ii. Shri Sandeep Kumar Dikshit, the then Inspector of Customs and now Superintendent of CGST & C. Ex.,
- iii. Shri Kislay, Inspector
- iv. Shri Jyoti Biswas,
- v. Shri Sudhir Jha
- vi. M/s. A. K. Sirkar & Sons, CHA,
- vii. Shri Somnath Sirkar, Partner of M/s A. K. Sirkar & Sons, CHA
- viii. M/s. Sea King Agencies, CHA,
- ix. Shri Bidyanand Jha, employee of Shri Sudhir Jha
- x. Shri Arvind Rana, employee of Shri Prasenjit Sani.

8.1. While issuing the Supplementary Show Cause Notice, following evidences/statements were considered by DRI, Kolkata: -

- (i) Further statement of appellant was recorded on 07.10.2016, wherein, he has stated that he was I.O. of the case related to fraudulent export under DEPB/DFIA Scheme through Ghosadanga LCS wherein, one Shri Jyoti Biswas of Jyoti Cinema, Maslandpur, 24 PGS (North) was prime suspect and

that he (the appellant herein) was instrumental in issuance of 10 to 12 Show Cause Notices against said Jyoti Biswas.

(ii) Further statement of appellant was recorded on 19.04.2017, wherein, he confirmed his view regarding voice sample and challenged the authenticity of the DVD through his letter dated 17.04.2017. It was alleged that appellant had received one water purifier and one kitchen chimney which was negated by him vide letter dated 19.04.2017. The appellant denied to have received the water purifier or kitchen chimney as 'gift', instead he submitted that they were purchased by him by making payments through banking channels in such purchases were submitted to DRI Authorities which they never rebutted. He further reiterated that the mobile number 8967650859 was never used by him.

(iii) Statements of Shri Rudra Prasad Mondal were recorded on 27.09.2016 and on 14.03.2017 in a separate case which was related to 'duty drawback' in respect of exports effected through Petrapole LCS by M/s Spak Enterprise Pvt. Ltd as well as by other exporters. In these statements, Sri Rudra Prasad Mondal has alleged that he supplied Kitchen chimney and water purifier to the appellant. In the said case related to duty drawback, complicity of the appellant was investigated by DRI, Kolkata but, he was not made a noticee in the SCN issued in the said case. Also, the final report sent by DRI vide letter dated 21.04.2017 did not implicate the appellant herein in said drawback case(s) but facts of that case is being used in instant case.

8.2. Accordingly, the Supplementary Show Cause Notice dated 18.05.2017 came to be issued, inter alia, with the appellant as a noticee. The said Supplementary Show Cause Notice has made various proposals against all the noticees, as to why: -

"i) penalty under Section 114 (i) of the Customs Act, 1962 should not be imposed on each of them for the attempted smuggling of the said seized 14,790 Kgs Red Sanders wood, a prohibited item, valued at Rs 6.65 Crores (approx.);

ii) penalty under Section 114AA of the Customs Act, 1962 should not be imposed on each of them for using fake and forged documents in the attempted smuggling of the said seized 14,790 Kgs Red Sanders wood, a prohibited item, valued at Rs 6.65 Crores (approx.);

iii) penalty under the Section 114 (i) of the Customs Act, 1962 should not be imposed on each of them for earlier smuggling of suspected 225 MT Apprx., of Red Sanders Wood, a prohibited item, valued at Rs 100 crores (Approx.) exported in 15 consignments in the name of exporters without their knowledge as stated before; and,

iv) penalty under the Section 114AA of the Customs Act, 1962 should not be imposed on each of them, for using fake and forged documents, for earlier smuggling of suspected 225 MT Apprx., of Red Sanders Wood, a prohibited item, valued at Rs 100 crores (Approx.) exported in 15 consignments in the name of exporters without their knowledge as stated before."

9. The above Show Cause Notice was adjudicated by the Ld. Principal Commissioner of Customs (Port), Custom House, 15/1, Strand Road, Kolkata, vide the impugned order dated 07.04.2025, wherein a total penalty of Rs.1,50,00,000/- has been imposed on the appellant under Sections 114(i) and 114AA of the Customs Act, 1962. For better appreciation of the facts, the relevant portion of the impugned order related to the appellant herein, is reproduced below:-

"VII In respect of Shri Sandeep Kumar Dikshit (Noticee no. 2 of supplementary SCN dated 18.05.2017)

"i. I impose a penalty of Rs 10 lakh on Shri Sandeep Kumar Dikshit under Section 114 (i) of the Customs Act, 1962 in respect of the attempted smuggling of the said seized 14,790 Kgs Red Sanders wood, a prohibited item, valued at Rs 6.65 Crores (approx.);

ii. I impose a penalty of Rs 20 lakh on Shri Sandeep Kumar Dikshit under Section 114AA of the Customs Act, 1962 for using fake and forged documents in the attempted smuggling of the said seized 14,790 Kgs Red Sanders wood, a prohibited item, valued at Rs 6.65 Crores (approx.);

iii. I impose a penalty of Rs 40 lakh on Shri Sandeep Kumar Dikshit under the Section 114 (i) of the Customs Act, 1962 in respect of earlier smuggling of suspected 225 MT Apprx., of Red Sanders Wood, a prohibited item, valued at Rs 100 crores (Approx.).

iv. I impose a penalty of Rs 80 lakh on Shri Sandeep Kumar Dikshit under the Section 114AA of the Customs Act, 1962 for using fake and forged documents, for earlier smuggling of suspected 225 MT Apprx, of Red Sanders Wood, a prohibited item, valued at Rs 100 crores (Approx.)."

10. Aggrieved against the imposition of the above said penalties, the appellant has filed this appeal.

11. In his Grounds of Appeal, the appellant categorically denied to have any involvement in the alleged offence of smuggling of 'Red Sanders'. Accordingly, he submitted that penalties have been imposed on him arbitrarily, without any evicence against him. The submissions made by the appellant against imposition of penalties on him are summarized below:

(i) Statements of Sudhir Jha are contradictory

to the facts disclosed: Analysis of e-mail correspondences, financial investigation, booking of container, booking of transporters and activities related to loading-unloading of goods, sealing of containers etc reveals that the facts stated by Sudhir Jha in his statements are contrary to the facts disclosed by other witnesses as well as contrary to bank statements and e-mail correspondences disclosed by container agent, e-mail correspondences disclosed by CHA/CB, CDRs of the mobile numbers stated to be used by appellant. Shipping Bills were filed during the period 07.04.2014 to 25.02.2016 and all export documents were forwarded by him to CHA/CB through e-mail, based on which the said shipping were filed. Sudhir Jha alleged that appellant herein has provided him export documents by calling him using the mobile numbers 8967650859 & 8335857530 but the RUDs disclosed that he was not in contact with appellant during the said filing period and the Ld. Adjudicator had held in para 5.6.2 that all export documents including ARE-1s were forged by Sudhir Jha. Considering the allegations in the SCN and the findings of Ld. Adjudicator, it is

evident that the allegation on the part of appellant regarding supplying him forged export documents did not survive and Sudhir Jha had tried to divert the direction by contradicting his earlier statements dated 23 & 24.05.2016 recorded by DRI.

(ii) Sudhir Jha was accused of offence under Customs Act since 22.06.2016 and his further statements are inadmissible as evidence: Prosecution complaint was filed against Shri Sudhir Jha on 22.06.2016 which was transferred by Ld. Chief Metropolitan Magistrate, Bankshall Court, Calcutta on 05.07.2016 for trial. Thus, the statements of Sudhir Jha recorded after 22.06.2016 are barred by Article 20(3) of the Constitution of India being unworthy of any evidentiary value. Reliance is placed in support of this contention on the following: -

- 1983 (13) E.L.T. 1590 (S.C.) [Veera Ibrahim V/s State of Maharastra]
- 1999 (110) E.L.T. 324 (S.C.) [Romes Chandra Mehata V/s State of West Bengal]
- 2010 (260) E.L.T. 526 (Guj.) [Bhavin Impex Pvt. Ltd. V/s State of Gujarat]

(iii) Statements of Sudhir Jha and Dibakar Dey are vague and not corroborated with other RUDs: Sudhir Jha and Dibakar Dey, both were neither asked by the DRI nor disclosed themselves the specific date and time as well as venue pertaining to exchange of specific export documents and cash. They had tendered general statements and allegations levelled are vague in nature and not corroborated with the

other RUDs viz. e-mail conversations /CDRs /Bank Statements /Counterfoils of Bank Slips /statements of transporters /Statement of Nirmal Jha in case of Sudhir Jha etc. Reliance is placed by the appellant on the following judgment:-

- 2019 (370) ELT 1449 [*Chandrashekhar R. Shukla vs Commissioner of Customs (Imports) Nhava Seva*]

(iv) Availability of alleged forged export

documents with DRI: In the same matter, a disciplinary inquiry has been conducted under the CCS (CCA) Rules by appointing an Inquiry Officer. During the said inquiry, verification of originals was demanded by appellant and the same was allowed. Opportunity of inspection of originals of the relied upon documents had not provided by the Ld. Adjudicator in the instant case. The Joint Inspection Report drawn on 26.09.2023 reveals that in the instant case, none of the export documents passing through customs authorities and having their seal(s) and signature(s) are either seized by DRI or found in their possession abinitio [**Sl. No. 9 & 11 of the Joint Inspection Report dated 26.09.2023, Page-736-737, Vol.-II**].

Through submission dated 24.05.2024, copy of said Joint Inspection Report was provided to the Ld. Adjudicator with request to either consider the same or provide opportunity of inspection of those export documents passing through customs authorities of Kolkata Port. As noted in paragraph 5.6.2 of impugned Order-in-Original, DRI did not offer any comments on the said Joint Inspection Report, though, request was made by Ld. Adjudicator in this regard. It is evident

from here that none of the export documents actually utilised in the export process are available with DRI and entire allegations have been levelled on the basis of unsigned printouts taken from a forged DVD. It is settled position of law that in the absence of actual documents used for act of forgery, the allegation of forging alleged export documents or any act in relation to such forgery cannot sustain.

(v) Seized DVD destroyed in custody of DRI, Kolkata: In the said Joint Inspection Report dated 26.09.2023, DRI has disclosed that the original DVD which was allegedly seized at the premises of M/s Spak is broken **[Sl. No. 12, Page-737, Vol.-II]**. The instant SCN is related to smuggling of huge quantities of contraband under cover of forged documents, and the DVD was basis of fresh investigation and issuance of supplementary SCN. The original DVD has been broken in the custody of DRI is something unheard of. Appellant submitted that he had worked in this esteemed organisation and received appreciation letters from the DG, DRI and ADG, DRI. Importance of the seized evidence and material exhibits can be understood, especially when the matter has been referred to other law enforcing agency. This clearly shows that either there was no DVD with 45 files or content of the DVD was altered and now it has been destroyed to conceal the identity of real perpetrators.

(vi) RUD-58, i.e. DVD is forged evidence used as original: The Supplementary SCN dated 18.05.2017 has been issued based on re-investigation which was necessitated by alleged

recovery of a DVD by DRI at M/s Spak Enterprises under Panchnama dated 29.07.2016. As per Annexure to Panchnama dated 29.07.2016 which is the screen shot of the DVD taken at 01:11 AM on 29.07.2016, said DVD contains 45 files/folders in its master folder DOC. Its forensic copy was prepared by DRI in their office on 18.01.2017 and provided as RUD-58 to the said Supplementary SCN. It has been alleged that the DVD contained the soft copies of ARE-1s which were used in fraudulent export of red sanders. It has also been alleged that said DVD contained voice clips related to conversations of the appellant with Jyoti Biswas. Ld. Adjudicator in para 5.6 had elaborately discussed the irrefutable infirmities of the seized DVD and decided that the seized DVD is inadmissible evidence. However, Ld. Adjudicator had silently bypassed the contentions of the appellant raised regarding use of a forged electronic evidence as genuine one by DRI. In this regard, the appellant made the following submissions for consideration:

- a. The search proceedings were held during the time period of 15:20 hrs to 20:30 hrs on 29.07.2016 under the Panchnama dated 29.07.2016.
- b. As per the Annexure to the Panchnama which is Screen shot of the 'DOC' folder of the seized DVD, time and date is 1:11 AM on 29.07.2016, almost 12 hours prior to the start of search proceedings. This clearly proves the fact that the Panchnama is false and is

not drawn in real date and time. It also shows that the alleged DVD was already in possession of DRI and falsely shown to be recovered from the premises of M/s Spak under a Panchnama signed by two ignorant persons as panch witnesses.

- c. The said Annexure to the Panchnama dated 29.07.2016 shows that the DOC folder of DVD contained 45 files/folders. As evident from the Panchnama, copies of said seized DVD were made by search team, the mode and manner of such preparation is unexplained. Data cannot be transferred directly from one DVD to another DVD. It requires burning tools in the form of external software to burn data into the DVD.
- d. The seized DVD was RW drive i.e. re-writable and thus when seized, the same should be attributed with hash value and seizure should be done with declaration / certificate under Section 65B of the Indian Evidence Act, 1872. When a RW drive is copied, a new hash value is created. In that case, it is crucial evidence to know the hash value of original DVD at the time of its seizure, which was not done by DRI on 29.07.2016.
- e. Forensic copy of seized DVD was prepared by DRI in their Office on 18.01.2017 and relied upon as RUD-

58. Another DVD [not the seized DVD] containing 20 audio files was sent to CFSL, Chandigarh for forensic analysis of 20 voice clips only, as reflected from the RTI Reply dated 13.12.2022 received from CFSL Chandigarh [copy enclosed]. The forensic copy of the DVD prepared on 18.01.2017 had hundreds of voice clips. So, again, forgery had been committed in obtaining the forensic report from CFSL Chandigarh. Further, DRI had never asked CFSL Chandigarh Authorities to find out the creation time and matching of seized DVD with Annexure to the Panchanama dated 29.07.2016 in order to ascertain the number of files/folders in its master folder DOC to confirm the veracity/authenticity of the seized DVD. In spite of repeated requests, no such expert opinion was provided.

- f. Thereafter, the appellant was forced to utilize the services of M/s Truth Labs, Kolkata in order to ascertain the number of files/folders in its master folder DOC to confirm the veracity/authenticity of the seized DVD. Expert Opinion of Forensic Experts of M/s Truth Labs, Kolkata clearly prove that the DVD relied upon [RUD-58] contains 44 files/folders in master folder DOC having modification time as 02:30:26 hrs, dated 29.07.2016. It shows that files were

either deleted or altered or tampered. It also confirms that the hash value of DVD having 45 files/folders will be different to the hash value of DVD having 44 files/folders. Thus, the aspect of using forged means by DRI is apparent.

- g. Repeated requests have been made to DRI to provide the forensic copy of the original DVD which contained 45 files/folders in master folder DOC, but it has not been provided. DRI has not given any reason for this difference in number of files. It is evident that either DRI is concealing something which was in the DVD or the DVD which has been made RUD is not that one which was recovered from M/s Spak Enterprise Pvt. Ltd.
- h. By using a forged DVD and documents derived from such forged DVD and showing its corroboration with statements of Jyoti Biswas, Rudra Prasad Mondal and Dibakar Dey recorded in the case of export under duty drawback scheme through Petrapole LCS, DRI had implicated the appellant in the case. And, the Ld. Adjudicator had stepped into the shoes of DRI while passing the impugned order and imposing penalty.

(vii) DRI failed to corroborate the retracted statements of Jyoti Biswas with independent documentary evidences: In course of Appellant's posting as Intelligence Officer at DRI, Kolkata during the period 11.01.2012 to 29.02.2016, he was investigating officer of a case mentioned in Para 9.2.1 of said Supplementary SCN, wherein, said Jyoti Biswas was prime accused and the appellant was instrumental in issuance of 10 SCNs to said Jyoti Biswas proposing penalty and other penal actions under Customs Act, 1962. The statements of Jyoti Biswas relied upon in the instant case are retraced and motivated statements. These statements were recorded in line with the documents derived from a fake/forged DVD. The DVD is already declared as inadmissible by the Ld. Adjudicating authority in paragraph 5.6 of the Order-in-Original. Further, Ld. Adjudicator himself had negated the allegations levelled in Supplementary SCN that Jyoti Biswas had forged the export documents and as held in paragraph 5.8.2, all export documents including ARE-1s were forged by Sudhir Jha. Thus, any allegations arising out of retracted and motivated statements of Jyoti Biswas not corroborating with documentary evidences and self-contradictory statements of his associates qua appellant herein are unsustainable and, thus, bad in law.

(viii) Compliance of Section 138C of the Customs Act, 1962: In the instant case, no certificate under Section 138C of the Customs

Act, 1962 read with Section 65B of the Indian Evidence Act, 1872 has been procured by DRI while seizing the DVD or documents derived from such DVD. The export documents actually utilised in the export proceeding and passing through customs authorities of Kolkata Port is not in possession of DRI. The DVD is inadmissible evidence, as declared by the Ld. Adjudicator, thus, the documents printed from such inadmissible DVD are also inadmissible. In this connection, the appellant relies upon the following judgments-

- *2023 (385) E.L.T. 338 (S.C) [Jeen Bhawani International V/s Commissioner of Customs, Nhava Sheva-III]*
- *2025 (5) TMI 1626 - CESTAT Kolkata [P.C. Jain, M/S Bhagawati Enterprise, M/S Sovitec International, M/S Cosmic Enterprises, M/S Jain Prints, Dharam Pal Jain and M/S Jain Impex Versus Commissioner of Customs (Port), Kolkata]*

11.1. Without prejudice to the above, the following further submissions have also been made by the appellant in support of his contentions: -

- (I) None of the statements of co-accused and witnesses have been examined in compliance to Section 138B of the Customs Act, 1962 and hence, the Ld. Adjudicating Authority could not have considered the same as relevant in the proceeding. This is so held by the Hon'ble High Court, Calcutta in case of *Sampad Narayan Mukherjee v. Union of India* [2019 (366) E.L.T. 280 (Cal.) = 2019 SCC OnLine Cal 150] and

upheld in the case of *Commissioner of Customs, Airport & Admn. v. Himadri Chakraborty* [2023 (386) ELT 418 (Cal.)].

- (II) It is settled position of law that statement of co-accused cannot be the sole basis to arrive at any penal consequence against any person without any cogent and corroborative evidence. Reliance is placed upon the following case laws:

- a. 2007 (220) ELT 3 (S.C.)
- b. (2006) 13 SCC 210
- c. (2007) 8 SCC 254
- d. 2019 (366) ELT 634 (All.)
- e. 2010 (260) ELT 180 (Cal.)
- f. 2014 (301) ELT 170 (P&H)

- (III) Statements of witnesses cannot be relied upon for imposition of penalty upon any person unless such witness is produced for cross-examination. The appellant submitted that cross-examination of witness, has never happened in the present case. As such, the statements cannot be used against the appellant herein for any penal action. This is so held by the Hon'ble High Court, Calcutta in case of *Ajay Saraogi v. Union of India* [AIR OnLine 2023 Cal 1837].

- (IV) If the statements of the said co-accused and witnesses are taken out of record, there shall be nothing in the present case for imposition of any penalty upon the present appellant.
- (V) The finding at paragraph 5.15.5(iii) of the order of the Ld. Adjudicating Authority with respect to

Mobile No. 8335857530, which is registered in the name of some other person, is beyond the CDR relied upon by DRI in the Supplementary SCN and hence, cannot be of any basis against the appellant.

- (VI) The finding at paragraph 5.15.5(i), (ii), (iv) & (v) of the impugned order passed by the Ld. Adjudicating Authority with respect to Mobile No. 8967650859, which is allegedly "*said to be used by*" the appellant herein, is not sustainable as the same was found to be registered in name of two different persons. Investigation with Bikash Basu of Gaighata, North 24-Parganas does not implicate the present appellant. No investigation with Laizu Bibi is available on-record. The period of dispute is from 07.04.2014 to 25.02.2016 as per DRI, whereas, CDR of said Mobile Number has been relied upon for the period from 02.02.2016 to 22.12.2016 (i.e. mostly beyond the period of dispute) allegedly in use of the appellant and having no CDR with Sudhir Jha during said dispute period of filing of shipping bills. No corroborative evidence in support of such allegation could be brought on-record.
- (VII) On the basis of the tower location of Mobile No. 8967650859 showed its use at or around Chandannagar, Hooghly, West Bengal where the appellant resides, it is presumed that such mobile number was in use of the appellant. It is submitted that such presumption is also contrary to the vague statement of co-accused Sudhir Jha who allegedly stated that he used to collect documents for export from the appellant

either in front of DRI Office at Ho-Chi-Minh Sarani, Kolkata or at Dalhousie, Kolkata after contacting in the said mobile number. In other words, if the said vague statements of co-accused Sudhir Jha disclosing no specifics viz. time /date /venue of alleged exchange of specific document is considered to be correct then the tower location of said mobile number should have been at or around Ho-Chi-Minh Sarani, Kolkata or at Dalhousie, Kolkata at the relevant time. Further, since the appellant is not the only resident of Chandannagar, the evidence in the form of said tower location of said mobile number registered in name of two different persons during the concerned period, cannot be of any basis against the appellant. However, the case cannot be built on the basis of vague statement of the co-accused and mere existence of call records, as held by the Tribunal, Mumbai bench in case of *Chandrashekhar R. Shukla vs Commissioner of Customs (Imports) Nhava Seva* reported in 2019(370) ELT 1449.

(VIII) Appellant duly produced purchase invoices for "Aquaguard Water Purifier" and "Kitchen Chimney" installed at his residence together with bank statement reflecting payment for such purchases, which could not be disputed in the process of adjudication. As such, the same cannot form any basis for imposition of penalty upon the appellant herein.

(IX) The Adjudicating Authority at paragraph 5.6.6. of the Order has held that alleged seized DVD does not qualify as valid evidence and as such, any statement of any person, whether co-

accused or witness, in relation to any purported extraction from such DVD, cannot be of any basis of any adverse conclusion against the appellant herein. Since the Adjudicating Authority has rejected evidentiary value of the purported DVD and since such order of the Ld. Adjudicating Authority has not yet been questioned by the Department, question of availability of any forged or fake document used in connection to the instant case, does not and cannot arise inasmuch as Paragraph 33.3 of Supplementary Show Cause Notice dated 18.05.2017 alleges that co-accused Jyoti Biswas used to get printout of forged documents for export from the said alleged DVD provided to him by co-accused Vikash Kumar. Consequently, question of involvement of the present appellant with respect to any such forged or fake document also cannot arise since the existence of any such alleged forged or fake documents for export allegedly printed from the said DVD, has been rejected by the Ld. Adjudicating Authority.

- (X) It is Pertinent to mention that as per statement of CHA/CB the documents meant for export were received by them through e-mail dated 25.02.2016 from Sudhir Jha with respect to the consignment seized by DRI in the present case, whereas, statement of co-accused Sudhir Jha allegedly stating that export documents were physically received by him from the present appellant after calling him using the mobile number 8967650859, stands completely at contradiction, which the Investigating Authority never tried to verify but on the basis of such

purported contradictory statement of said co-accused Shri Sudhir Jha has proceeded against the present appellant upon complete *bias* and *mala fide*.

- (XI) The appellant, being Intelligence Officer at DRI, Kolkata, during the period from 10.01.2012 to 29.02.2016 conducted series of investigation against several persons, including co-accused Jyoti Biswas, involving fraudulent exports. Paragraph 9.2.1 of the Supplementary Show Cause Notice dated 18.05.2017 reflects details of 17 such cases, but for the reasons best known to the SCN issuing Authority/Investigating Authority, fact that all such investigations were conducted as I.O. by the present appellant against the co-accused Jyoti Biswas, has been comfortably suppressed in the SCN, though such fact was duly recorded in the statement dated 07.10.2016 of the present appellant. Pertinent to mention that out of such 17 SCNs, on completion of investigation, 10 SCNs were issued during the tenure of the present appellant at DRI, Kolkata and such SCNs were drafted only by the present appellant at that relevant point of time. Rest 7 SCNs were issued subsequently by the officer taken charge from the present appellant where the investigations were also completed by the present appellant only. Admittedly, as per DRI investigation in the present case, said co-accused Jyoti Biswas, was deeply connected with Ajay Kumar Mahapatra, from whom the purported DVD was recovered; Dibakar Dey, employee of Ajay Kumar Mahapatra; and, Rudra Prasad Mondal, accomplice of Jyoti Biswas. Jyoti

Biswas retracted his all statements in court of law at first available opportunity. All statements of Ajay Kumar Mahapatra and Rudra Prasad Mondal were recorded in another case. Only the statement dated 22.02.2017 of Dibakar Dey was recorded in the present case. From such details of co-accused and witnesses of the present case, the purpose and reason of false implication of the present appellant is evident on-record.

(XII) In relation to present case, DRI, being investigating authority, has filed complaints u/s 132, 135(1)(a)(i)(C), 135(1)(b)(i)(C) and 135(1)(c)(i)(C) of the Customs Act, 1962 in Case No. CS/49708/2016 and CS/2566/2020, which are at present pending before Ld. Judicial Magistrate, 7th Court, Calcutta and Ld. Judicial Magistrate, 11th Court, Calcutta respectively, but in none of the said complaints, the present appellant has been made accused which reflects the fact that no sanction for prosecution against the appellant has been accorded in connection to the present case. Said complaints contradict each other with respect to creation of the fake documents. The SCNs dated 26.08.2016 and 18.05.2017 also contradicts each other with respect to creation of the fake documents and Ld. Adjudicating Authority had confirmed the allegations levelled in SCN dated 26.08.2016 in this regard in paragraph 5.8.2 of the Order-in-Original that Sudhir Jha had forged all export documents including ARE-1s.

(XIII) It is submitted that penalties imposed at para (VII) (iii) & (iv) of the impugned Order-in-Original is not maintainable in law upon the finding of 'suspected' 'earlier smuggling' inasmuch as goods exported under the said 'earlier' consignments are neither available physically nor covered under any bond and there is no evidence on-record suggesting any connection of the present appellant with the said alleged 'earlier smuggling'. As stated *supra* statements of co-accused/witness, in absence of opportunity of cross-examination and compliance to Section 138B *ibid*, cannot be sole basis of imposition of any penalty upon the present appellant on those 'suspected' 'earlier smuggling'. Further, surprisingly, no officer of Customs who admittedly issued Let Export Order/s in said 'suspected' earlier exports, were subjected to investigation and/or made party in the proceeding though RMS Instruction with respect to such consignments reflects instruction for physical examination of consignment/s. In absence of any such investigation, it cannot be 'suspected' that there was any 'earlier smuggling' of any Red Sander Wood implicating any connection of the present appellant. The Hon'ble High Court, Calcutta *vide* Order dated 18.07.2017 in W.P.O. 385 of 2017 [Noor Alam V/s Commr. of Cus. (Airport & Administration)] and *vide* Order dated 25.07.2017 in W.P.O. 413 of 2017 [Sarfaraz Mahammed v. Commr. of Cus. (Airport & Administration)] has repeatedly held that penalties imposed on assumption of earlier illegal import cannot sustain in law and hence,

such penalties were set aside. Ratio of such Orders of the Hon'ble High Court, Calcutta is squarely applicable with respect to penalties imposed upon the present appellant in the present case and as such, the same are liable to be quashed and set aside at the threshold.

(XIV) Imposition of penalty u/s 114AA of the Customs Act, 1962 upon the present appellant without any specific finding in accordance to the said provision of law, is also not maintainable in law. There is no specific finding in the Order-in-Original w.r.t. alleged document/statement/declaration, which is false or incorrect in any material particular in the transaction of any business for the purpose of Customs Act, 1962 which the appellant had knowingly and intentionally made/ used/ signed or caused to be so. Hence, imposition of penalty under the said provision of law cannot sustain in law.

(XV) Imposition of penalty u/s 114(i) of the Customs Act, 1962 upon the present appellant is also bad in law inasmuch as the appellant herein has neither done nor omitted to do or abated any act of such commission and/or omission which rendered any goods liable for confiscation u/s 113 of the Customs Act, 1962 in the present case.

11.1. In view of the above submissions, the appellant prays for setting aside the penalties imposed on him vide the impugned order, thereby allowing his appeal.

12. The Ld. Authorized Representative of the Revenue reiterated the findings of the adjudicating authority in the impugned order. Further submissions made by the Ld. Authorized Representative are summarized below: -

(i) The Container No. MAGU 2539151 corresponding to Shipping Bill No. 4020191 dated 07.11.2015, was detained by Hong Kong Customs on 29.12.2015. This container was found by Hong Kong Customs to have 'wood' of suspicious nature. Overseas enquiry was carried out of the suspected seized wood found from Container NO. MAGU 2539151 on 29th December, 2015. It has been intimated vide letter dated 30th March, 2017 from Consulate General Office Hong Kong that the wood which was seized on 29th December, 2015, from container No. MAGU 2539151, is Pterocarpus Santalinus (Appendix II species) (Red Sanders) as per Agriculture, Fisheries and Conservation Department (AFCD) of Hong Kong.

(ii) **Enquiries With Freight Forwarder, Container Agent And Coin:** Shri Ajay Kumar Shrivastav, of M/s Speedways Logistics Pvt Ltd (Freight Forwarder) was summoned under section 108 of Customs Act, 1962 on 23.11.2016 when he inter-alia stated that:-

a) He worked with Shri Sudhir Jha from December, 2014 and he has given orders for 7 consignments.

b) He was shown the mail correspondences dated 30.12.2015 received from Unni Krishnan Nair via mail

'mcscal.expmkt@seahorsehroup.co.in'

wherein it was informed that in container No. MAGU 2539151, wood was detained by Hong Kong Customs. Shri Unni Krishnan Nair is the Assistant Manager of Marine Container Services (1) Pvt Ltd (MCS) which is agent of Yang Ming Line (YML). They received the mail as they booked the container for shipment through MCS and the goods, i.e., 'wood' was detained as Hong Kong Customs found the wood to be of suspicious nature.

c) Shri Sudhir Jha has placed the order for shipment to Hong Kong where wood was found in container No. MAGU 2539151. This was exported against Shipping Bill No. 4020191. He (Sudhir Jha) has informed that only sanitary ware will be exported.

d) As per shipping line MCS, two third of the total cargo was detained.

e) They have informed Shri Sudhir Jha about detention of Cargo and wood found in the said container via mail. This was submitted to DRI.

f) In the subject consignment where the wood was detected by Hong-Kong Customs, the destination of the consignment was supposed to be changed to Port Klang, Malaysia.

g) The photograph shown to him by DRI is of Shri Sudhir Jha who had placed the subject order.

h) The remaining goods in the container i.e. sanitary ware were destroyed as per instruction from Shri Sudhir Jha as no buyers could be found for the same.

(iii)Speedways Logistics Pvt Ltd., submitted one letter dated 23.11.2016 giving details of mail Correspondences with Shri Sudhir Jha in respect of container No. MAGU 2539151. It appears from the mail correspondences that Shri Sudhir Jha was aware about the detention and inspection of container MAGU 2539151 against B/L No. S505000829.They submitted another letter dated 24.11.2016 along with mail correspondence and Hong Kong Customs and Excise Department, Cargo Examination Report. From the cargo examination report it appears that 9214 Kilogram Wood Logs (Suspected Red Sandalwood in 392 numbers) and 2145.9 Kilograms Wood Dust were detained/seized on 29.12.2016.

(iv)They further submitted another letter dated 29.11.2016 along with documents related to mail correspondences and proof of payment received from M/s U.S Clearing Agency for the Container No. MAGU 2539151. It appears that Shri Sudhir Jha paid the total amount of Rs 3,27,604/- towards all charges including detention charge to M/s Speedways Logistics Pvt Ltd.

(v)Two similar suspected exports took place in respect of M/s Sayantika Enterprise, Proprietor: Sujit Golder to United Arab Emirates where the consignee/importer was one M/s Royal Touch General Trading LLC, PO Box-82526, Sharjah,

Dor No. 163/A Rauf Al Khair Building, Industrial Area 13, Sharjah UAE. An overseas enquiry was carried out in Dubai for verification and antecedent check of the consignee/importer. A report dated 28.2.2017 was received from Indian Consulate at Dubai stating that the said M/s Royal Touch General Trading LLC is not registered with Sharjah Chamber of Commerce or Department of Economic Development of Sharjah. It further stated that the given P.O-Box-82526, Sharjah is not of M/s Royal Touch General Trading LLC, but of another company operating in Sharjah in the field of Trading of Kitchens & Restaurant Equipment. In other words the consignee has also been found to be dubious/fake and non-existing.

(vi) **Statement Of Shri Sudhir Jha Dated 26.10.2016:** Shri Sudhir Jha was once again summoned under Section 108 of Customs Act, 1962 on 26.10.2016 when he inter-alia stated that:-

- a) He reiterates what he said in his statements given on 23.5.2016, 24.5.2016 and 16.6.2016.
- b) He knew Shri Sandeep Kumar Dikshit, who was posted at DRI Kolkata office from April, 2014 and he met him many times at the ground floor below DRI office at Kolkata and also at Dalhousie Kolkata. However he never went to his house.
- c) Shri Sandeep Kumar Dikshit gave him export documents, i.e., ARE-15, Invoices, and other export related documents of M/s

Srijita Export in respect of 4 consignments at the ground floor below the DRI office at Kolkata.

d) All ARE-1s, Invoices Packing lists and other export related documents were given to him by Shri Sandeep Kumar Dikshit at the ground floor below the DRI office and Dalhousie Kolkata and he (Sandeep Kumar Dikshit) took back all the documents after shipment at the same place and he did not have any documents with him now.

e) Shri Sandeep Kumar Dikshit used to contact him from the phone number 8967650859 and many other numbers which he could not recollect now.

f) Shri Sandeep Kumar Dikshit had paid him towards freight and transport charges for all the 16 consignments mentioned above. He was paid Rs. 30,000/-Approx. for each consignment by Sandeep Kumar Dikshit and he (Sudhir Jha) paid Rs. 25,000/- Approx. towards ocean freight, transportation and other charges.

g) He knew Shri Vikash Kumar, Deputy Commissioner of Customs and met him at Customs House License department for enquiry about CHA license and Dock sircar license.

h) He was not having any CHA or any other Customs license in his name.

i) On 23.05.2016 he stated that he knew Shri Sandeep Kumar Dikshit from November,

2015 but that was a wrong statement and he knew him April, 2014.

j) On 23.05.2016 and 24.05.2016 wherein he stated that all documents were given to him by Shri Bhagwat Sharma was a wrong and false statement and Shri Sandeep Kumar Dikshit actually gave him all the documents i.e. ARE-1, Invoice, Packing list and other export related documents.

(vii) Statement Of Shri Sudhir Jha Dated 21.11.2016: Shri Sudhir Jha was further summoned under section 108 of Customs Act, 1962 on 21.11.2016 when he inter-alia stated that:-

a) He was shown the statements recorded under section 108 of Customs Act, 1962 of Shri Prosenjit Sani (who had sublet the said godown to Shri Sudhir Jha) dated 09.06.2016, 10.06.2016 and 13.06.2016 but he was not aware of any godown and he did not take any godown on rent and did not take any advance from Shri Prosenjit Sani and never went to Dankuni. Shri Prosenjit Sani has given false statements.

b) He was shown the statements recorded under section 108 of Customs Act, 1962 of Shri Arvind Rana(employee of Shri Sudhir Jha) dated 09.06.2016, 10.06.2016 and 13.06.2016 wherein he (Arvind Rana) stated that in the godown situated at Krishnarampur, Panchyabatiala, Chanditala of Shri Prosenjit Sani, he carried out loading and unloading of red coloured logs as per his

(Sudhir Jha) advice from December 2015 with the help of 10-12 labourers and he (Sudhir Jha) himself sealed the containers with both Central Excise seal and bottle seal four times and also he (Arvind Rana) escorted Shri Ashok Rai driver of the container vehicle to the godown twice. Shri Sudhir Jha claimed that all statements of Arvind Rana were false as he had not seen any godown.

c) Neither did he make any payment to Shri Arvind Rana nor he (Arvind Rana) worked for him.

d) He was shown the seizure list, Panchnama dated 04.03.2016 where 14.970 MT of Red Sanders was seized which was loaded at ChanditalaKrishnapurDankuni godown but he was not aware where these Red Sanders was loaded, he only knew that Sanitary ware and Commode basin was loaded at ChanditalaDankuni which was declared in ARE-1, Invoice Packing List.

e) Shri Sandeep Kumar Dikshit whom he identified in photograph on 24.05.2016 at DRI office was confronted on 21.11.2016 at DRI office but he (Sandeep Kumar Dikshit) refused to identify him (Sudhir Jha). Shri Sandeep Kumar Dikshit was not telling the truth.

f) He never went to ChanditalaDankuni godown at the time of loading on 27.02.2016.

g) When confronted by DRI on 21.11.2016 with mobile phone analysis of 9830836725 and 8697723537 he agreed that he went to ChanditalaDankuni and in a Dhaba where he handed over the ARE-1, Invoice, Packing List to Shri Arvind Rana which was given to him by Shri Sandeep Kumar Dikshit. He met Arvind Rana at ChanditalaDankuni as per direction of Shri Sandeep Kumar Dikshit.

(viii) Seizure of DVD containing evidences of smuggling of red sanders in the subject case and other exports: In another case being investigated by DRI, Kolkata Zonal Unit in the matter of exports of readymade garments to Bangladesh through Petrapole Land Customs Station by a syndicate using the IECs of two firms namely M/s. Spak Enterprises Pvt. Ltd. and M/s. Samiran Biswas where on investigation the goods were either found to be misdeclared in terms of quality, quantity and value or junk to earn undue Duty Drawback of Rs. 1.42 crores (approx), some incriminating documents and things including a DVD were recovered and seized by DRI On 29.07.2016 from the premises of M/s Spak Enterprises Pvt Ltd., 1, Cock Burn Lane, Room No. 403, 4h Floor, Kolkata. The documents included soft copies of ten ARE-1s and other export documents of M/s. Sayantika Enterprise, M/S. Akash Ganga Enterprise and M/s. Gopals Associate, which were fraudulently used in the export of suspected Red Sanders on earlier occasions in this case. Forged IEC, forged PAN of proprietor Shri Raju Biswas and letter heads of M/s Srijita Exports were also recovered as soft copies found in the DVD. It appears that

the said forged and fake documents were used in attempted export and fraudulent exports of total 240 MTS of Red Sanders valued at Rs 100 Crore (Approx) in the subject case. A person named Shri Jyoti Biswas was subsequently arrested by DRI on 22.09.2016. He admitted that he was instrumental in printing of the ten ARE-1s as found in this DVD which were given to him by Shri Vikash Kumar, Deputy Commissioner of Customs. The DVD also contains several audio clips containing recorded conversations appears to between Shri Jyoti Biswas and Shri Vikash Kumar, Deputy Commissioner of Customs. Shri Sandeep Kumar Dikshit, Inspector of Customs and Shri Kislay, Inspector of Customs.

(ix) It has been revealed that Shri Jyoti Biswas was a business associate of Shri Ajay Kr Mahapatra and documents / things related to various companies controlled by Shri Jyoti Biswas were also kept in the office premises of M/s Spak Enterprise Pvt Ltd., at 1 Cock Burn Lane, Room No. 403, 4h Floor, Kolkata 700016. Shri Jyoti Biswas used to come to the said office frequently and engaged his (Shri Ajay Kumar Mahapatra) employees Shri Manish Karna and Shri Dibakar Dey for his own work also. Shri Ajay Kumar Mahapatra is one of the Directors of M/s Spak Enterprise Pvt Ltd. It appears that Shri Jyoti Biswas forged the ARE-1s and other export related documents as he categorically stated that he received forged ARE-1 and other export related documents in soft copies in DVD which he has printed and handed over the documents

to either Shri Vikash Kumar, Shri Sandeep Kumar Dikshit or Shri Kislay.

(x) Shri Sudhir Jha stated that he got the ARE-1 and other export related documents for the consignment which was seized on 4.3.2016 and other 15 consignments which were exported, from Shri Sandeep Kumar Dikshit. It appears from the conversations in voice clips found in the seized DVD that Shri Jyoti Biswas was in constant touch with Shri Vikash Kumar, Shri Sandeep Kumar Dikshit and Shri Kislay. Even the name of the exporters whose IEC were used for fraudulent export of suspected Red Sanders were being discussed amongst other things in the said voice clips.

(xi) **Contents of seized DVD corroborating alleged officers connivance with Shri Jyoti Biswas:** The seized DVD appears to contain some audio recordings of conversation between Shri Jyoti Biswas and departmental officers which was recorded by Shri Jyoti Biswas on his mobile and later stored in a DVD by him. Shri Jyoti Biswas in his statement dated 27.10.2016 stated that in the said DVD, all files starting with prefix 'Dkst' contain voice clips of Sandeep Kumar Dikshit, all files starting with prefix 'KLX' contain voice clips of Kislay and all files starting with prefix 'X2' contains the voice clips of Shri Vikash Kumar.

(xii) As per the claim of Shri Jyoti Biswas the voice clip recordings found in the seized DVD indicate that the 3 officers - Shri Vikash Kumar, Shri Sandeep Kumar Dikshit and Shri Kislay were acting against the Department and planning out

their frauds. There appears to be distinct reference of Shri Sandeep Kumar Dikshit enquiring with Shri Jyoti Biswas about M/s. Srijita Export and M/s. Sayantika Enterprise as evident, from the voice recording clip in file name Dkst_0101_01475T and Dkst_0603_081332.

(xiii) In the audio file "Dkst 0101 014757", Shri Sandeep Kumar Dikshit appears to be enquiring about a company for which no registration was done and whether anything else was required to prepare the documents and also whether he (Jyoti Biswas) had prepared any new documents. Shri Jyoti Biswas replied that the name is Srijita Enterprise for which registration was not done and the other company name is M/s Sayantika Enterprise which has registration, and that Sujit Goldar is the Proprietor of Sayantika Enterprise and one Shri Biswas, i.e., brother of Shri Biswanath Biswas is the proprietor of M/s Srijita Enterprise. Shri Jyoti Biswas also says that he will message him (Sandeep Kumar Dikshit) the full details of M/s Srijita Export regarding IEC and Proprietor name. Shri Jyoti Biswas also says that he did not make any new documents and asked whether the job belongs to him (Sandeep Kumar Dikshit) or SAAB (Shri Vikash Kumar) to which he (Sandeep Kumar Dikshit) replied that it belongs to both. Jyoti Biswas also says that he will introduce someone who has full knowledge. Shri Sandeep Kumar Dikshit says that he will meet with him and discuss.

(xiv)In audio file 'Dkst 0603_081332, Shri Sandeep Kumar Dikshit appears to be enquiring with Shri Jyoti Biswas whether he brought any new documents some 6-7 days before in respect of Sayantika Enterprise on 25th or 26th August to which Shri Jyoti Biswas replied that he did not do so. Shri Sandeep Kumar Dikshit says that he will meet Jyoti Biswas on Saturday.

(xv)The detailed path of the voice clips (audio files) mentioned above/below found stored in the said seized DVD are the given in the table below:-

Folder/File name	Conversation recorded and stored in soft form between	Path
Dkst 0101 014757	Sandeep Kumar Dikshit and Jyoti Biswas	D:\Doc\Phone Call\Call Record
Dkst 0603 081332	Sandeep Kumar Dikshit and Jyoti Biswas	D:\Doc\Phone Call\New Folder
Dkst 0922 164641	Kislay and Jyoti Biswas	D:\Doc\Phone Call 27092015
Dkst 0922 204827	Kislay and Jyoti Biswas	D:\Doc\Phone Call\27092015

Dkst 0926 111412	Kislay and Jyoti Biswas	D:\Doc\Phone Call\27092015
Dkst 0926 191126.	Kislay and Jyoti Biswas	D:\Doc\Phone Call\270922015

(xvi)Audio files starting with 'Dkst' appear to be conversation between Shri Sandeep Kumar Dikshit, Inspector of Customs and Shri Jyoti Biswas.

(xvii)As stated above the seized DVD also contains ten forged copies of ARE-1s used in cases of suspected smuggling of Red Sanders in the name of exporters - M/s Sayantika Enterprise, M/s Gopals Associate and M/s Akash Ganga Enterprise). According to Shri Jyoti Biswas, these ARE-1s used in the suspected Smuggling of Red Sanders were also given to him by Shri Vikash Kumar. The DVD also has forged IEC of M/s Srijita Exports Srijita Exports and forged PAN of its Proprietor Shri Raju Biswas. Shri Sandeep Kumar Dikshit in fact has also been named by Shri Sudhir Jha to have been clearly involved in this Red Sanders smuggling case and who was constantly meeting the latter and giving him ARE-1s and even financing the logistics in the subject case.

(xviii) Statements Of Shri Divakar Dey Of M/s

Spak Enterprise Pvt Ltd: Shri Divakar Dey, employee of M/s Spak Enterprise Pvt. Ltd was summoned under section 108 of Customs Act, 1962 on 09.11.2026 when he inter-alia stated that:-

- a) He is an employee of M/s Spak Enterprise Pvt Ltd and the name of his employer is Shri Ajay Kumar Mahapatra and he works in the capacity of Peon
- b) One person named Shri Jyoti Biswas known to his employer used to come to their office at M/s Spak Enterprise Pvt Ltd and used the office computer and took printout.
- c) Shri Jyoti Biswas started coming to their office from June, 2015.
- d) He met Shri Sandeep Kumar Dikshit as per instruction of Shri Jyoti Biswas and sometimes he (Sandeep Kumar Dikshit) handed over sealed envelopes to him (Divakar) which was delivered to Shri Jyoti Biswas and sometimes he (Divakar) handed over sealed envelopes to Shri Sandeep Kumar Dikshit either near Maidan Metro or Camac Street Pantaloons (shop) as per direction from Shri Jyoti Biswas,
- e) After reaching Maidan Metro or Camac Street Pantaloons, he used to contact Shri Sandeep Kumar Dikshit over phone No. 8967650859 and he came to the spot for handing over sealed envelopes. He did not know the contents of the envelopes as those were sealed.

f) He met Shri Sandeep Kumar Dikshit nearly four to five times from July 2015 to March 2016 exchanged envelopes. He delivered the envelopes the same day to Shri Jyoti Biswas and the very next day Shri Jyoti Biswas used to give it back to Shri Sandeep Kumar Dikshit.

g) He identified the photographs of Shri Jyoti Biswas and Shri Sandeep Kumar Dikshit shown to him by DRI.

(xix) Statement Of Shri Jyoti Biswas, the Owner of DVD Seized on 29.07.2016 from Premises Of M/s. Spak Enterprise Pvt. Ltd.:

The statements of Shri Jyoti Biswas, Maslandpur were recorded under section 108 of Customs Act, 1962 on 21.09.2016, 22.09.2016, 03.10.2016, 27.10.2016 and 02.11.2016 when he inter-alia stated that:-

a) He was shown the printout of documents in relation to M/s Srijita Export, M/s Ákash Ganga Enterprise, Ms Gopal Associates and M/s Sayantika Enterprise which was taken from the DVD seized from the premises of M/s Spak Enterprises Pvt Ltd, 1 Cockburn Lane, Kolkata 700016.

b) He has seen those documents. Shri Vikash Kumar used to give him those documents in DVD and he printed the same in coloured papers and gave them back to Shri Vikash Kumar, Shri Kislay and Shri Sandeep Kumar Dikshit. He gave It to Shri Sandeep Kumar Dikshit through

shri Divakar, who is an employee of M/s Spak Enterprise Pvt Ltd. The documents were printed by Shri Manish Karna, an employee of M/s Spak Enterprise Pvt Ltd., as per his instruction and in his presence. He was doing it from 2014 onwards. He did not know who affixed the stamp on those printouts or whosigned those documents, i.e., ARE-1s and other export related documents.

c) Shri Vikash Kumar, age about 35 years is Deputy Commissioner of Customs, Shri Kislay and Shri Sandeep Kumar Dikshit were Inspectors of Customs and Shri Sandeep Kumar Dikshit was in DRI Kolkata six months back and at present posted at Custom House, Kolkata.

d) He met Shri Sandeep Kumar Dikshit nearly 4 to 5 times at his residence at ChandannagarPatrapara, after 29.7.2016, i.e., after booking of case against M/s. Spak Enterprise Pvt. Ltd.

e) Shri Kislay was posted at Kendriya Utpad Shulk Bhawan, Rajdanga Main Road, Kolkata and both Kislay and Sandeep Kumar Dikshit were 35 years old approximately. He met both of them at their residences.

f) He knew Shri Vikash Kumar since 2012 when he was posted at Chandannagar Central Excise when he called him and asked him to float a company for export through Petrapole LCS, and as per his

advice he floated a company name Victory Exim and DB Exports.

g) He visited his (Vikash Kumar) residence at D-15 4h Floor, Ruby Govt Quarter and met Shri Kislay and Shri Sandeep Kumar Dikshit at his residence and he worked as per direction of Shri Vikash Kumar. Kislay also resides at Ruby Govt Quarter and Sandeep Kumar Dikshit resides at Patra Para, Chandannagar in a two storied building. He also visited Kislay's residence.

h) He was not aware that the documents were used in attempted fraudulent export of Red Sanders in the guise of wash basin which were seized at Kolkata Port on 04.03.2016, the same documents were found in the DVD which was seized from the premises of M/s Spak Enterprises Pvt Ltd. He only used to print export related documents, i.e., ARE-1, Invoices, Packing lists, etc., from a DVD which was given to him by Shri Vikash Kumar, DC.

i) He was not aware that all the ARE-1, Invoices, Packing lists etc., shown to him by DRI on 21.09.2016, the print outs of which were taken from the copy of seized DVD, were fake and bogus and fraudulent exports took place under cover of those ARE-1e

j) He identified the photograph of Shri Vikash Kumar, Deputy Commissioner of

Customs and Shri Sandeep Kumar Dikshit shown to him by DRI.

k) He did not know any persons namely Shri Raju Biswas of M/s Srijita Export, Shri Sujit Golder of M/s Sayantika Enterprise, Shri Palash Ghosh of M/s Gopal Associates and Shri Manoj Podder of M/s Akash Ganga Enterprises and he was not associated with any firm named M/s U.S Clearing Agency

l) He did not know Shri Sudhir Jha, Shri Somnath Sircar, Shri Suman Hazra and Shri Bhagwat Sharma.

m) The DVD contains recording of some voice clips which were initially recorded in one Chinese mobile he used earlier and later stored in DVD by him.

n) In the said DVD the file name Dkst 0101-013108 contains the voice clips of Sandeep Kumar Dikshit, Inspector of Customs, and all files starting with "Dkst" contain voice clips of Sandeep Kumar Dikshit.

o) The file name KLX 0101_144813 contains the voice clips of Kislay, Inspector of Customs and all files starting with "KLX contain voice clips of Kislay.

p) The file name X2_0101_004605 contains the voice clips of Shri Vikash Kumar, Deputy Commissioner of customs and all files starting with 'X2' were the voice clips of Shri Vikash Kumar.

q) He was not aware that the documents found in the DVD were used for smuggling of Apprx. 225 MT of Red Sanders valued at Rs 100 Crore. He again reiterated that he only took print out from the said DVD- as per instruction-of Shri-Vikash Kumar and-handed it over to Shri Vikash Kumar, Shri Kislay and Shri Sandeep Kumar Dikshit.

r) He was again shown the printout of documents, i.e, ARE-1s and other export related documents where he made endorsement as 'this document was given to me as Soft copy In a DVD by Shri Vikash Kumar, DC of Customs', He mentioned the year only i.e., the year when he received the DVD from Shri Vikash Kumar and not the exact date as he could not recollect. After getting the DVD, he took print out immediately and handed it over within one or two days to Shri Vikash Kumar, Shri Kislay and Shri Sandeep Kumar Dikshit.

s) He received all documents in soft copy from Shri Vikash kumar, DC of Customs and hand over the printout of the documents so received to Shri Vikash Kumar, Shri Kislay and or Shri Sandeep Kumar Dikshit

t) He mentioned the folders where ARE-1and other export related documents were stored in the seized DVD.

(xx) From the facts as mentioned it emerges that Shri Jyoti Biswas, Shri Vikash Kumar, Shri Sandeep Kumar Dikshit and Shri Kislay appears to have connived with Shri Sudhir Jha, directly or indirectly in attempted smuggling/ smuggling of Apprx. 240 MT of Red Sanders valued at Rs 100 Crore in respect of 16 Shipping Bills in the subject case. They appear to have formed a syndicate which carried out the smuggling of Red Sanders. They systematically forged ARE-1s and other export related documents in respect of four exporters namely M/s Srijita Export, Ms Akash Ganga, Enterprise, M/s Gopal Associates and Ms Sayantika Enterprise for smuggling of Red Sanders. It appears that Shri Sandeep Kumar Dikshit maintained close liaison between Shri Sudhir Jha and Shri Jyoti Biswas and actively took part in smuggling activities. It appears that he along with Shri Vikash Kumar and Shri Kislay forged export related documents with the help of Shri Jyoti Biswas who is known as a master operator having multiple such cases booked against him by DRI and handed them over to Shri Sudhir Jha who ultimately executed the export clearances in respect of the four exporters.

(xxi) It appears that Shri Jyoti Biswas with his long previous record of forgeries/manipulations forged seals and stamps as well as forged signatures of officers and printed the fake export documents, used forged exporters signatures and handed them over to either Shri Sandeep Kumar Dikshit, Shri Vikash Kumar or Shri Kislay which was ultimately handed over to

Shri Sudhir Jha by Shri Sandeep Kumar Dikshit for fraudulent , against the appellant.

(xxii) It appears that Shri Jyoti Biswas with his long previous record of forgeries/manipulations forged seals and stamps as well as forged signatures of officers and printed the fake export documents, used forged exporters signatures and handed them over to either Shri Sandeep Kumar Dikshit, Shri Vikash Kumar or Shri Kislay which was ultimately handed over to Shri Sudhir Jha by Shri Sandeep Kumar Dikshit for fraudulent attempted export of 14.79 MTS in the subject case and suspected export of Red Sanders totalling 225 MTS for earlier period. He appears to have systematically forged the Central Excise seals and affixed forged signatures of Central Excise officers on the ARE-1s and other Central Excise related documents in such manner and was a main member of the smuggling syndicate.

(xxiii) Shri Sudhir Jha admitted that he took up the export clearance work for all the 16 consignments involving 16 Shipping Bills which were used in the attempted smuggling of Red Sanders seized and suspected fraudulent exports of total 240 MTS Red Sanders valued at Rs 100 Crore. He also admitted that the goods were being loaded at ChandítalaDankuni and he went to ChanditalaDankuni handed over ARE-1, Packing List and Invoice to Shri Arvind Rana on 27.2.2016.

(xxiv) **The analysis of Tower Location ID of the Mobile Phone Nos.:** 9830836725 and 8697723537 used by shri Sudhir Jha indicate

that on 27.2.2016 and 18.1.2016, he was present at/near the vicinity of the godown at ChanditalaDankuni where Red Sanders were stored and loaded. He had spoken from -these numbers on seven occasions on the said dates at/ from the vicinity of godown at Chanditala, Dankuni. The Truck No. WB 71A 1644 entered the Port area with container No. TCKU 2571904 on 27.2.2016 which was subsequently seized by DRI on 04.03.2016 containing 14,790 Kgs. of red sanders valued at Rs 6.65 Crores along with 56 pkts of ceramic wash basin and 03 empty pkts. Shri Arvind Rana, employee of Shri Sudhir Jha also confirmed in his statement that Shri Sudhir Jha was present in the godown and that Shri Sudhir Jha himself sealed the container with Central Excise seal and bottle seal.

(xxv)Shri Sudhir Jha identified Shri Sandeep Kumar Dikshit (appellant) as the officer who had given him all the ARE-1s and other export related documents and also financed him towards transportation and other logistics support for all the 16 consignments involved in this case.

12.1. In view of the above submissions, it is the contention of the Ld. Authorized Representative of the Revenue that the evidences available on record indicates that Shri Sandeep Kumar Dikshit (the appellant herein) was actively involved in the alleged smuggling of Red Sanders. Accordingly, he submits that the Ld. adjudicating authority has rightly imposed penalties on the appellant for his role in the alleged offence.

13. Heard both sides, perused the appeal records and all the documentary evidence placed before us.

14. We observe that the DRI, Kolkata Zonal Unit had intercepted the Container bearing No. TCKU 2571904, placed for export of goods mentioned in the Shipping Bill No. 6092170 dated 25.02.2016. On examination of the said container, it was found to contain 14,790 kgs. of Red Sanders logs, which is a prohibited item for export under Chapter 44, Sl. No. 188 of the Export Policy 2015-20. Accordingly, the Red Sanders, valued at Rs.6,65,55,000/-, were seized under the Customs Act, 1962.

15. On completion of the investigation, initially, a Show Cause Notice dated 26.08.2016 was issued, *inter alia* proposing confiscation of the impugned goods. In the said Show Cause Notice dated 26.08.2016, there was no allegation against the appellant herein, namely, Shri Sandeep Kumar Dikshit.

15.1. Subsequently, by way of the Supplementary Show Cause Notice dated 18.05.2017, the appellant has been implicated in the present proceedings.

16. We find that the Supplementary Show Cause Notice dated 18.05.2017 has been issued to the appellant primarily on the basis of the incriminating material found against the appellant in the DVD recovered and the statements recorded.

17. It is seen from the records that the appellant has made various submissions before the investigation officers wherein he has categorically stated that he is no way connected with the alleged offence of export of Red Sanders. However, the Id. adjudicating has not agreed to the said submissions

of the appellant and passed the impugned order *interalia* imposing penalties, totalling to Rs.1,50,00,000/-, on the appellant, under Sections 114(i) and 114AA of the Customs Act, 1962 for his role in the alleged offence in the present case as well as on the smuggling of Red Sanders on the earlier occasions.

17.1. In the present case, it has been primarily alleged that the appellant, Shri Sandeep Kumar Dikshit, along with Shri Vikash Kumar and Shri Kislay, has handed over the documents related to the export consignments to Shri Sudhir Jha for fraudulent attempted export of 14.79 MTS in the current case and suspected export of Red Sanders totalling to 225 MTS on earlier occasions. The main allegation against the appellant is that he, along with Shri Vikash Kumar and Shri Kislay, have systematically forged the Central Excise seals and affixed forged signatures of Central Excise officers on the ARE-1s and other Central Excise related documents and gave it to Shri. Sudhir Jha who intturn facilitated the exports of 'Red Sanders'. Hence, the appellant has been accused to be one of the main members of the smuggling syndicate in this case. Accordingly, the impugned penalties have been imposed on him under the Customs Act, 1962.

18. Having heard the contentions raised by the parties and perused the documents placed before us, we find that, in the present case, the following main questions are required to be answered, in order to decide as to whether or not the appellant is liable for penalties under the Sections 114(i) and 114AA of the Customs Act, 1962, as have been imposed on him by the Id. adjudicating authority in the impugned order:-

- I. Whether the contents of the DVD seized from the premises of M/s. Spak Enterprise Pvt. Ltd. can be treated as admissible evidence to implicate the appellant in the alleged offence?**
- II. In the absence of a certificate as required under Section 138C of the Customs Act, 1962, whether the documents contained in the DVD can be considered as admissible evidence?**
- III. Whether the statements recorded in this case without complying with the provisions contained in Section 138B of the Customs Act, 1962, which is in *pari materia* with Section 9D of the Central Excise Act, 1944, can be relied upon against the appellant to implicate the appellant in this case?**
- IV. Whether statements recorded from co-accused can be relied upon to implicate the appellant in this case?**
- V. Whether the statement recorded from Shri Sudhir Jha can be relied upon to implicate the appellant in this case?**
- VI. Whether the retracted statement of Shri Jyoti Biswas can be relied upon to implicate the appellant in this case?**
- VII. Whether the CDR analysis can be treated as admissible evidence for penalizing the appellant in this case?**
- VIII. Whether the allegation of receipt of pecuniary benefits by the appellant is substantiated with evidence?**

19. We now proceed to discuss these issues in seriatim.

Issue I: Whether the contents of the DVD seized from the premises of M/s. Spak Enterprise Pvt. Ltd. can be treated as admissible evidence to implicate the appellant in the alleged offence.

20. We find that in the instant case, the name of the appellant herein has mainly come to the knowledge of the investigating officers after recovery of the DVD from the premises of M/s. Spak Enterprises Pvt. Ltd., 1, Cock Burn Lane, Room No. 403, 4th Floor, Kolkata – 700 016 on 29.07.2016. Thus, the information available in the DVD and the statements recorded in connection with the DVD has become the prime to implicate the appellant in the alleged offence of smuggling of 'Red Sanders'. We observe that the appellant has questioned the validity of the DVD and the documents contained therein.

20.1. The appellant's primary contention in this regard is that the entire allegation against him has been levelled on the basis of unsigned printouts taken from a forged DVD. It is his further submission that in the absence of the original documents used for the act of forgery, the allegation of forging alleged export documents or any act in relation to such forgery cannot sustain. It has also been submitted by the appellant before us that the **seized DVD has been destroyed in custody of DRI, Kolkata**. In this regard, we have taken note of the appellant's submission that in the Joint Inspection Report dated 26.09.2023, DRI has disclosed that the original DVD which was allegedly seized at the premises of M/s. Spak Enterprises is broken. In this regard, we observe that the DVD in question was recovered by DRI at M/s Spak Enterprises under Panchnama dated 29.07.2016. It has been stated that as per Annexure

to Panchanama dated 29.07.2016, which is the screen shot of the DVD taken at 01:11 AM on 29.07.2016, the said DVD contains 45 files/folders in its master folder viz. "DOC", whose forensic copy was prepared by DRI in their office on 18.01.2017 and provided as RUD-58 to the said Supplementary Show Cause Notice. In this regard, the appellant contends that the original DVD getting broken in the custody of DRI is something unheard of; the appellant submits that he had worked in the same organization and they know the importance of the seized evidence and material exhibits, especially when the matter has been referred to other law enforcing agency; that this clearly shows that either there was no DVD with 45 files or content of the DVD was altered and now it has been destroyed to conceal the identity of real perpetrators. Reference has also been drawn to the Statements of Shri Ajay Kumar Mahapatra, the Director of M/s. Spak Enterprise Pvt. Ltd., recorded on 29.07.2016 and 02.08.2016, wherein he *inter alia* stated that the seized DVD belongs to one Jyoti Biswas of Maslandpur, who used to take printouts using his office infrastructure and services of his staff, namely, Dibakar Dey and Manish Kumar Karna; the Statements of Manish Kumar Karna, recorded on 03.08.2016 and 06.01.2017, wherein he *inter alia* stated that he knew that the DVD belongs to Jyoti Biswas but he never opened it and he never took printouts from the said DVD. From the statements of Shri. Jyoti Biswas we find that he recorded the conversations with the appellant, Sh. Vikas Kumar and Sh. Kislay in his mobile and later he transferred all those voice clippings and the documents given by Sh. Sudhir Jha in the said DVD. Thus, we observe that Jyoti Biswas was the Person who created the original

DVD. But, he has retracted his statement. Further, the appellant submitted that during his tenure in DRI he has registered many cases against Sh. Jyoti Biswas. Hence, he has a grudge against him. Thus, the submission of the appellant is that the statements of Sh. Jyoti Biswas are prejudiced against him and hence they cannot be relied upon against him. Accordingly, the appellant has questioned the evidentiary value of the DVD and the documents contained therein and the statements recorded in connection with the DVD, to implicate him in the alleged offence and argued that the same cannot be relied upon against him in this proceedings.

20.2. We observe that the instant proceedings are related to smuggling of huge quantities of contraband under cover of forged documents, and the DVD was the basis of fresh investigation and issuance of supplementary SCN dated 18.05.2017. The said DVD is said to contain 45 files/folders in its master folder named "DOC". A forensic copy of the same was prepared by DRI in their office on 18.01.2017 and provided as RUD-58 to the said Supplementary SCN and it has been alleged that the DVD contained the soft copies of ARE-1s which were used in fraudulent export of Red Sanders *inter alia* with the connivance of the appellant. It has also been alleged that said DVD contained voice clips related to appellant's conversations with Jyoti Biswas, a co-accused in this case. The appellant has pointed out that this DVD is brought on record in the said Supplementary Show Cause Notice proceedings dated 18.05.2017 and its creation time is 02:30:26 hrs dated 29.07.2016, a time after the time stamp of Annexure-A to said Panchanama dated 29.07.2016. He thus questioned the evidentiary value of the DVD.

20.3. From the impugned order, we find that the Id. adjudicating authority, at paragraph 5.6, has elaborately discussed the irrefutable infirmities of the seized DVD and held that the seized DVD as inadmissible evidence. The relevant observations of the Id. adjudicating authority in the impugned order are reproduced below: -

"5.6.1 I further find that Shri Sandeep Kumar Dikshit (Noticee no. 2 of Supplementary SCN) and Shri Kislay (Noticee no. 3 of Supplementary SCN) have submitted that DVD (RUD no. 58 of supplementary SCN) cannot be relied upon as evidence against them due to following reasons:

For that the alleged original equipment (Primary Evidence), re, Chinese Mobile Phone and Computer used to burn data into the allegedly secondary evidence viz. DVD (found at M/s Spak Enterprises or any other Computer/Hardware) was never traced, recovered and seized by the Investigating Authority

b. For that the DVD cannot be treated as an original device as the same is only a storage device.

c. For that it is an admitted fact that no requisite certificate was provided by the Investigating Authorities in regards to the said DVD as per Section 138C of the Customs Act, 1962 read with Section 65B of the Evidence Act, 1872.

d. For that no reasoning has been provided for not seizing the computer found at the premises of M/s Spak Enterprises, even though the DVD was allegedly recovered from the same premises.

e. They have cited the judgement of Hon'ble Supreme Court in Arjun Panditrao Khotkar v/s Kailash Kushanrao Gorantyal wherein Hon'ble Supreme Court has made

it mandatory that a certificate under Section 65B of the Indian Evidence Act is required when reliance is being placed upon an electronic record.

f. For that DRI has acknowledged in their letter to CBI that they did not have original DVD as it has been damaged.

5.6.2 I find that submissions of the noticees (Shri Sandeep Dikshit and Shri Kislay) were forwarded to the DRI requesting to offer comments on claim of the noticees that few RUDs are not available with DRI. However, DRI did not offer any comment on the claim of the noticees regarding non availability of RUDs. Therefore I find that I have to verify the claim of the noticees on the basis of evidences submitted by them during the adjudication proceedings.

5.6.3 Therefore I find that I have to verify the claim of the noticees on the basis of evidences submitted by them during the adjudication proceedings. I find that Shri Sandeep Kumar Dikshit submitted a copy of Inspection of Documents' Report dated 26.09.2023 which was carried out in the office of DRI, KZU in presence of Deputy Director of DRI wherein at St no. 12, it has been mentioned that original DVD actually seized on 29.07.2016 was not shown and it has been informed by DRI that original DVD has been damaged.

5.6.4 I further find that as per Panchnama dated 29.07.2016, the officers of DRI entered the campus of M/s Spak Enterprises Pvt Ltd on 29.07.2016 at 3 PM. As per annexure to the said panchnama (a screenshot of computer), the seized DVD had 45 files and the timing of the screenshot is shown as 1.11 AM of 29.07.2016 i.e. before the initiation of search proceedings which I find strange.

5.6.5 I further find that Shri kislay has submitted in his defense reply a computer screenshot of DVD provided to him as RUD 58.

As per this screenshot, the supplied DVD (RUD 58) contains only 44 files (instead of 45 files as per panchanama dated 29.07.2016) and its date of creation is 29.07.2016 at 2:36:26 AM. The DRI was requested to comment on these anomalies contained in the reply of the noticee but they did not offer any comment.

5.6.6 I further find from DRI has not refuted the claim of noticees that they have not been provided certificate under 138C of Customs Act in respect of DVD provided to them as RUD 58 of Supplementary SCN. In view of above facts, I find strength in the submissions of the noticees that DVD should not be treated as evidence against them and therefore I hold that DVD ie. RUD no. 58 lacks merit to be treated as a piece of evidence against the noticees."

(Emphasis supplied)

20.4. From the findings recorded by the Ld. adjudicating authority reproduced above, we find that after analyzing the Annexure to the Panchnama dated 29.07.2016 and other documents associated with the DVD, he has come to the conclusion that the DVD should not be treated as evidence in this case. We do not find any reason to disagree with this finding of the Ld. adjudicating authority.

20.5. Further, we also find force in the submission made by the appellant in this regard that data cannot be transferred directly from one DVD to another DVD. It requires burning tools in the form of external software to burn data into the DVD. It is observed that the seized DVD in this case was a 'RW' drive i.e. re-writable and thus when seized, the same should be attributed with hash value and seizure should be done with declaration / certificate under Section 65B of the Indian Evidence Act, 1872. When a RW drive is copied,

a new hash value is created. In that case, it is crucial evidence to know the hash value of original DVD at the time of its seizure, which was not done by DRI on 29.07.2016. We observe that the Forensic copy of seized DVD was prepared by DRI in their Office on 18.01.2017 and relied upon as RUD-58. Another DVD [not the seized DVD] containing 20 audio files was sent to CFSL, Chandigarh for forensic analysis of 20 voice clips only, as reflected from the RTI Reply dated 13.12.2022 received from CFSL, Chandigarh.

20.6. The appellant has claimed that the forensic copy of the DVD prepared on 18.01.2017 had hundreds of voice clips. DRI has obtained the forensic report selectively from CFSL, Chandigarh. Further, DRI had never asked CFSL, Chandigarh Authorities to find out the creation time and matching of seized DVD with Annexure to the Panchanama dated 29.07.2016 in order to ascertain the number of files/folders in its master folder, DOC, to confirm the veracity/authenticity of the seized DVD. In fact, the submission of the appellant is that in spite of repeated requests by him, no such expert opinion was provided. Thereafter, the appellant was forced to utilize the services of M/s Truth Labs, Kolkata in order to ascertain the number of files/folders in its master folder "DOC" to confirm the veracity/authenticity of the seized DVD. We have gone through the Expert Opinion of Forensic Experts of M/s. Truth Labs, Kolkata submitted by the appellant, which proves that the DVD relied upon [RUD-58] contains 44 files/folders in master folder "DOC" having modification time as 02:30:26 hrs, dated 29.07.2016. It shows that files were either deleted or altered or tampered. It also confirms that the hash value of DVD having 45 files/folders will be different to the hash

value of DVD having 44 files/folders. Admittedly, the appellant had made repeated requests to DRI to provide the forensic copy of the original DVD which contained 45 files/folders in master folder DOC, but it has not been provided. DRI has not given any reason for this difference in number of files. Thus, it has been submitted before us by the appellant that the DVD which has been made RUD is not the one which was recovered from the premises of M/s Spak Enterprise Pvt. Ltd.

20.7. It is also a fact that the appellant had questioned the authenticity of the DVD through his letter dated 17.04.2017 before the Id. adjudicating authority, which was not accepted by the said authority. We find merit in the claim of the appellant that the documents available in the said DVD may have been fabricated. This DVD was found much later after commencement of the investigation. Admittedly, the DVD relied upon in the impugned proceedings is not the original one recovered from the premises of M/s. Spak Enterprises Pvt. Ltd. We also find that proper procedure has not been followed while recovering the DVD. From a perusal of the records, it is observed that the DRI has seized the DVD on 29.07.2016, which is much before the issuance of the Show Cause Notice dated 26.08.2016. However, it is pertinent to note that the evidence available in the said DVD was not incorporated in the Notice dated 26.08.2016. Subsequently, searches were conducted and statements were recorded from various persons, after recovery of the DVD in question, which is said to contain 45 files in its master folder (DOC). A forensic copy of the said DVD has been prepared by the DRI on 18.01.2017, under Panchanama dated 18.01.2017. As already observed above, it is on

record that the original DVD is not available. There is no evidence brought on record to show as to how the said DVD was destroyed or tampered with. Since the original DVD seized from the premises of M/s. Spak Enterprise Pvt. Ltd. is unavailable, which is the main source of information based on which the Supplementary Show Cause Notice has been issued, we are of the opinion that without verifying the original DVD, the information available in the re-constructed DVD cannot be relied upon to implicate the appellant in the alleged offence.

20.8. In view of the discussions above and on the basis of the findings recorded by the Ld. adjudicating authority in paragraphs 5.6.1 to 5.6.6 reproduced above, we hold that the DVD and the documents contained therein cannot be relied upon as admissible evidence in this proceedings. Accordingly, the answer to question (I) raised in paragraph 18 of this order (supra) is in the negative.

Issue II: In the absence of a certificate as required under Section 138C of the Customs Act, 1962, whether the documents contained in the DVD can be considered as admissible evidence.

21. We have examined the contention raised by the appellant as to non-compliance of the provisions of Section 138C of the Customs Act, 1962 by the Revenue as regards the purported contents of the DVD in question. It is a fact on record that no certificate under Section 138C of the Customs Act, 1962 read with Section 65B of the Indian Evidence Act, 1872 has been procured by DRI while seizing the DVD or documents derived from such DVD. The originals of the export documents, which were actually utilized in the export proceedings and for passing

through Customs authorities of Kolkata Port are not in the possession of DRI.

21.1. The appellant has contended that computer printouts taken from the DVD recovered during the search as well as extracted from e-mail cannot be relied upon as evidence to impose penalty on him, in the absence of a certificate as prescribed under Section 138C of the Customs Act, 1962.

21.2. For ready reference, the provisions of Section 138C of the Act are reproduced as under: -

"SECTION 138C. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. — (1) Notwithstanding anything contained in any other law for the time being in force, -

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question,

shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer print out shall be the following, namely :-

(a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a

single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken

to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. - For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

21.3. From the Section 138 C reproduced above, we observe that computer print outs can be relied upon as evidence in any proceedings only when the Certificate as mentioned in subsection (4) of Section 135C is obtained. Admittedly, no such Certificate has been obtained in this case. Hence, we observe that the contents of the said DVD cannot be relied upon in this proceedings. In this regard, we find that this issue has been examined by the Hon'ble Bombay High Court in the case of *Commissioner of Jeen Bhavani International Versus Commissioner of Customs, Nhava Sheva-III [(2023) 6 Centax 11 (Tri.-Bom)]*, wherein the Hon'ble High Court has made the following observations: -

"12.1 Section 138C ibid deals with the situation, where the computer printouts cannot be considered having evidentiary value in certain circumstances. Various conditions have been prescribed under the statute. Admittedly, in this case, the prescribed conditions have not at all been complied with by the

department. More particularly, the required certificate in terms of sub-section (4) of Section 138C *ibid* has not been furnished by the department. In this context, the Tribunal in the case of S.N. Agrotech (*supra*) has held that in absence of certificate required under section 138C *ibid*, the electronic documents in the form of computer printouts cannot be relied upon by Revenue for confirmation of the adjudged demands. The relevant paragraphs in the said order are extracted herein below:

"7. Section 138C of the Act, 1962 provides admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. For the proper appreciation of the case, Section 138C of the Act, 1962 is reproduced below :

.....

8. On close reading of Section 138C of the Act, 1962, it is seen that the Legislature had prescribed the detailed procedure to accept the computer printouts and other electronic devices as evidences. It has been stated that any proceedings under the Act, 1962, where it is desired to give a statement in evidence of electronic devices, shall be evidences of any matter stated in the certificate. In the present case, we find that the provisions of Section 138C of the Act were not complied with to use the computer printouts as evidence. The Ld. Counsel for the appellants submitted that there is a gross illegality committed during the retrieval of the electronic documents. It appears from the Panchnama and record of proceedings that the alleged data recovered from electronic documents, so seized, were copied in a hard disk in presence of one person and, thereafter, it was opened in front of other persons. It is noted that the certificate was not prepared during the seizure of the electronic devices, as required under the law.

9. The investigation is normally started after collecting the intelligence/information from various sources. The investigating officers are

procuring the evidences in the nature of documents, statements, etc., to establish the truth. During the evolution of technology, the electronic devices were used as evidence. In this context, the law is framed to follow the procedure, while using the electronic devices as evidence for authenticity of the documents, which would be examined by the adjudicating authority during adjudication proceeding. In the instant case, it is found that the entire case proceeded on the basis of the electronic documents as evidence. But the investigating officers had not taken pain to comply with the provisions of the law to establish the truthfulness of the documents and merely proceeded on the basis of the statements. Hence, the evidence of electronic devices, as relied upon by the adjudicating authority cannot be accepted.

10. The Hon'ble Supreme Court in the case of Anvar P.V. (supra), while dealing with Section 65B of the Evidence Act, 1872 (Pari materia to Section 138C of the Act, 1962), observed as under :

"14. Any documentary evidence by way of an electronic record under the Evidence Act; in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under section 65B. - Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic

record, it is permissible provided the following conditions are satisfied :

- (a) There must be a certificate which identifies the electronic record containing the statement;*
- (b) The certificate must describe the manner in which the electronic record was produced;*

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record, is duly produced in terms of Section 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under section 65B of the Evidence Act are not complied with, as the law now stands in India.

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"22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under section 63 read with Section 65 of the Evidence Act shall yield to the same. Generaliaspecialibus non derogant, special law will always prevail over the general law. It appears, the Court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

11. Upon perusal of the judgment of the Hon'ble Supreme Court in the case of Anvar P.V. (supra), we note that the Apex Court has categorically laid down the law that unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. We note that the Section 138C of the Customs Act is parimateria to Section 65B of the Evidence Act. Consequently, the evidence in the form of computer printouts, etc., recovered during the course of investigation can be admitted as in the present proceedings only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant laptop/computer. After

perusing the record of the case, we note that in respect of the electronic documents in the form of computer printouts from the seized laptops and other electronic devices have not been accompanied by a certificate as required by Section 138C(2) as above. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court (supra), the said electronic documents cannot be relied upon by the Revenue for confirmation of differential duty on the appellant. In the present case, the main evidence on which, Revenue has sought to establish the case of undervaluation and misdeclaration of the imported goods is in the form of the computer printouts taken out from the laptops and other electronic devices seized from the residential premises of Shri Nikhil Asrani, Director in respect of which the requirement of Section 138C(2) has not been satisfied. On this ground, the impugned order suffers from incurable error and hence, is liable to be set aside."

12.2 Further, in the case of Tele Brands (India) Pvt. Ltd. (supra), the Tribunal by relying upon various authoritative judgments has also held that the computer printouts allegedly recovered from the computer of the assessee cannot be relied upon as admissible evidence, in absence of compliance of the conditions laid down in Section 138C ibid. In the instant case, it is not established that the computer in question was in regular use by the appellant in the course of his business. No certificate whatsoever, as required under the provisions of Section 138C (2) was obtained. It is settled proposition of law that if a certain act is to be done by a certain authority, in a particular manner, the same should be done in the manner in which it is ordained. There are no short cuts in investigation. Without fulfilling the statutory requirements, subjecting the computer to forensic analysis is of no help and would not help the cause of Revenue. Therefore, we are of the considered opinion that the emails/documents etc retrieved in the instant case are not reliable evidence for the reasons cited above.

12.3 With regard to seizure of CPU and alleged data retrieved there from, the department has concluded that there was parallel set of invoices for the 21 Bills of Entry, wherein the actual invoice values have

been shown, which were less than the declared invoice values. We find that the procedures laid down under section 138C have not been observed by the department, in addition to non mentioning of the details of the CPU, the place of installation in the premise, custodian of the CPU etc. Therefore, we find that as per the ratio laid down in the above referred judgments, the documents retrieved, lost their evidentiary value and cannot be relied upon for upholding the charges of undervaluation of goods and demand of the differential duty."

21.3.1. We find that the above decision has been affirmed by the Hon'ble Supreme Court as reported in (2023) 6 Centax 14 (S.C.).

21.4. In view of the above discussion and by relying on the decision cited supra, we observe that the provisions of Section 138C have not been complied with in this case and accordingly, we hold that the information available in the said DVD cannot be relied upon as evidence against the appellant in the impugned proceedings. Thus, the answer to the question (II) raised in paragraph 18 of this order is in the negative.

Issue III: Whether the statements recorded in this case without complying with the provisions contained in Section 138B of the Customs Act, 1962, which is in pari materia with Section 9D of the Central Excise Act, 1944, can be relied upon against the appellant to implicate the appellant in this case.

22. We also observe that the appellant has been implicated on the basis of statements recorded during the course of investigation from various persons

involved in the alleged offence, namely, Shri Jyoti Biswas, Shri Sudhir Jha, Shri Rudra Prasad Mondal and Shri Dibakar Dey and many others said to be associated with the offence. The appellant's contention is that the provisions of Section 138B have not been complied with for relying on such statements and thus, it is argued by him that the statements recorded from these persons cannot be relied upon in the adjudication proceedings against the appellant for imposition of penalties, as have been confirmed in the impugned order.

22.1. For the sake of ready reference, Section 138B of the Customs Act is extracted below: -

"SECTION 138B. Relevancy of statements under certain circumstances. —

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as

they apply in relation to a proceeding before a court.”

22.2. As per Section 138B, it is mandatory for the adjudicating authority to follow the procedure set out therein for the purpose of relying upon statements in proceedings. We find that the appellant had sought cross-examination of Shri Jyoti Biswas, Shri Sudhir Jha, Shri Rudra Prasad Mondal and Shri Dibakar Dey, whose statements have been relied upon by the Id. adjudicating authority, but the Id. adjudicating authority has not allowed cross-examination of these persons, except Shri Sudhir Jha. In this regard, it is seen that even the cross-examination of Shri Sudhir Jha could not be conducted due to non-supply of documents. It is well settled that statements of witnesses cannot be relied upon for imposition of penalty upon any person unless such witness is produced for cross-examination. Since cross-examination of witnesses has never happened in the present case, as such, the statements thereof cannot be used against the appellant herein for any penal action, as has been held by the Hon'ble High Court, Calcutta in case of *Ajay Saraogi v. Union of India* [AIR OnLine 2023 Cal 1837]. Thus, we are of the view that principles of natural justice, as enshrined in Section 138B of the Customs Act, 1962, have not been followed in this case.

22.3. In this regard, we also refer to the decision of this Tribunal in the case of *P.C. Jain, M/s. Bhagawati Enterprise &ors. v. Commissioner of Customs (Port), Kolkata* [2025 (5) TMI 1626 – CESTAT, Kolkata] wherein it has been observed as under: -

"7.2 In that circumstances, the issue arises:-

(a) whether the statements recorded during the course of investigation can be admissible in the absence of the following these procedures as laid down under Section 1388 (1)(b) of the Customs Act, 1962, or not

The said issue has been examined by this Tribunal in the case of M/s Sharp Mint Limited Vs Commissioner of Central Excise vide Final Order No.58832-58833/2024 dated 16.10.2024, wherein this Tribunal has observed as under:

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7.3 Further, the Hon'ble Allahabad High Court has also examined this issue whether the statements recorded during the course of investigation is admissible or not? in the case of Commissioner of Central Excise, Meerut I Vs. Parmarth Iron Private Limited reported in 2010 (260) ELT 514 (All.), the Hon'ble High Court has observed as under:

"15. The question, however, before us is, does the respondent have a right to call upon the appellants to make available the witnesses for cross-examination even before they being examined or their statements relied upon by the Department in proceedings in adjudication. None of the judgments cited above were on the issue of making available the witnesses for cross-examination in order to reply to a show cause notice. Those judgments as already explained were in the course of adjudicating proceedings.

Is, therefore, an assessee entitled to cross examine the witnesses at the stage of filing a reply to the show cause notice? A show cause notice is issued on the basis of uncontested material available before the Assessing Authority, who based thereon, has arrived at a prima facie finding whether a show cause notice ought to be issued or not. The material, thus, which has to be considered is, untested

and uncorroborated. A party is called upon to reply to the said show cause notice in order to enable the Revenue to know the stand of the assessee, in the context of the material produced as to whether the proceedings should be further proceeded with. It is an opportunity to the party being proceeded against to disclose any material that the party may have to rebut the prima facie opinion. Even if, the assessee fails to reply to the show cause notice, that does not amount to an admission of the contents of the show cause notice in the absence of any statutory provision and it is always open to an assessee to cross-examine the witnesses whose statements are relied upon or sought to be examined on behalf of the Revenue.

At the stage of show cause notice, there is no adjudication. It is only a step in the process of adjudication. The show cause notice by itself is not an order of assessment. The order of assessment will be passed only after considering the evidence and the material, which is placed before the quasi judicial authority/tribunal. Therefore, as the show cause notice is based on prima facie material and constitutes a prima facie opinion, that does not result into an order of adjudication. The question, therefore, of an assessee being entitled to cross-examination, even before the adjudication has commenced, in our opinion, surely would not arise. It is only after the adjudication proceedings have commenced pursuant to the show cause notice and if the Revenue seeks to rely upon the statements or documents, then the principles of natural justice would require in the absence of any statutory provision, that the person whose statement was recorded is made available for cross-examination to test the veracity of the statement.

16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in

adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.

17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross-examination before the reply to the show cause notice is filed and before adjudication commences. The exercise of cross-examination commences only after the proceedings for adjudication have commenced.

Having said so, in our opinion, the first question is answered accordingly."

We take note of the fact that the provisions of Section 9D of the Central Excise Act, 1944 and Section 138B of the Customs Act, 1962, are parimateria.

7.4 In terms of Section 138B(1)(b) of the Customs Act, 1962, the relevant portion is that when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. In this case, no such procedure has been followed that the statement which has been relied upon by the adjudicating authority were not examined In-Chief and when the witness has not been. examined, therefore, the question of making an opinion of the admissibility of the said statement as an evidence, does not arise. Consequently, the statement recorded during the course of investigation cannot be relied upon without following the procedure laid down under Section 138B(1)(b) of the Customs Act. 1962 as held by the judicial pronouncements cited above. In view of this, we hold that the statement recorded during the course of investigation cannot be relied upon to allege under-valuation against the appellants."

22.4. We also take note of the appellant's contention in this regard that the entire proceedings rely upon various statements recorded, but the procedure as prescribed under section 9D of the Central excise Act, which is in pari materia with Section 138B of the Customs Act, has not been followed. We, therefore find merit in the submission of the appellant that the said statements cannot be relied upon in the instant proceedings against the appellant.

22.5. We find that this view is also supported by the decision of this Tribunal in the case of *M/s. Gobinda Das v. Commissioner of Customs (Prev.), Kolkata [2023 (5) TMI 672 – CESTAT, Kolkata]*, wherein it was held as under: -

"22. 138B. Relevancy of statements under certain circumstances,

(1) A statement made and signed by a person before any Gazetted Officer of customs during the course of any inquiry or proceeding under this act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances, of the case, the court considers unreasonable; or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion the, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as

they apply in relation to a proceeding before a court.].

23. 9D. Relevancy of statements under certain circumstances,

(i) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains.-

a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable: or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this act, other a proceeding before a court, as they apply in relation t a proceeding before a court.

24. The Appellant relied upon the decision of the Hon'ble Punjab and Haryana High Court in the case of G-Tech Industries Vs UOI 2016(339)ELT 209 (P &H), wherein it has been held that the Adjudicating Authority should first examine the person whose statement is to be relied upon to form an opinion whether the statement is to be admitted as an evidence. After that if that statement is to be admitted, then an opportunity is to be given for cross examination. The gist of the order cited above is reproduced below.

"Evidence - Statement before Central Excise Officer - Stage of relevance comes after admission of statement in accordance with procedure prescribed in Section 9D(1)(b) of Central Excise Act, 1944- Rigour of this procedure is exempted only when handicaps referred in Section 9D(1)(a) ibid apply - Hence, adjudicating authority cannot straightaway rely on such statement unless and until he can

legitimately invoke Section 9D(1)(a) ibid - In all other cases, to rely on for proving truth of contents of statement, he has to first admit statement in evidence in accordance with Section 9D(1)(b) ibid, for which he has to summon person who had made statement, examine him as witness before him in adjudication proceeding, and arrive at opinion that statement should be admitted in interests of justice - Only thereafter, question of offering witness to assessee for cross-examination can arise. -Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof. [paras 16, 17, 18, 19]

Evidence Statement before Central Excise Officer Relevancy of Procedure prescribed in Section 9D(1) of Central Excise Act, 1944-It has to be followed in adjudication proceedings as well in criminal proceedings relating to prosecution in absence of circumstances specified therein, evidentiary value of statement is lost and truth of facts therein has to be proved by evidence other than statement itself It becomes irrelevant statement, reliance on which is vitiated in law and on facts. [paras 7, 8, 9]

Evidence Statement before Central Excise Officer Discretion exercised by adjudicating officer under Section 9D of Central Excise Act, 1944 to admit statement can be challenged in appeal and writ proceedings Hence, to invoke Section 9D(1)(a) ibid, adjudicating authority has to pass reasoned and speaking order, which is amenable to challenge by assessee. [para 12]

Evidence - Statement before Central Excise Officer - Reliance without invoking Section 9D(1) of Central Excise Act, 1944 to find that attendance of makers of statements could not be obtained for any of reasons contemplated therein It is violation of mandatory requirement of section which vitiated adjudication order - On facts, directions given that if Revenue intended to rely on statement, they would apply to adjudicating officer to summon him, have his examination-in-chief and give copy thereof to assessee to cross-examine them. (paras 22, 23, 24]

Evidence Statement before Central Excise Officer Procedure prescribed in Section 90(1)(b) of Central Excise Act, 1944-Use of 'shall' indicates that it is mandatory to follow it Rationale for this is that statement before Gazetted Central Excise officer has every chance of having been recorded under coercion or compulsion. [paras 14, 15]

Evidence Statements Recorded behind back of assessee They cannot be relied upon, in adjudication proceedings, without allowing assessee opportunity to test it by cross-examining makers of said statements. (para 24)

22. The Appellant also referred the decision of the Hon'ble Bombay High Court in the case of Prakash Raghunatha Autade Vs UOI 2022 (380) ELT 264 (BOM), the gist of the decision is reproduced below:

Adjudication - Show cause notice - Witnesses - Cross-examination of Natural justice - Stage prior to issuance of show cause notice cannot be regarded as an inquiry or proceeding as contemplated in Section 9D of Central Excise Act, 1944 Therefore, any statement recorded prior to issuance of such show cause notice not a statement recorded in course of inquiry or proceeding and no right accrues in favour of noticee to insist on cross-examination of witnesses, whose statements have been recorded and referred to in show cause notice, even prior to a reply thereto being submitted -Question of cross-examination of witnesses would arise only after statements of witnesses are recorded by relevant authority in course of adjudication proceedings. [para 12]"

25. We find that section 9D is parimateria to Section 138 B of Customs Act 1962 and hence the ratio of the above said decision squarely applicable to this case as well. In this case, the adjudicating Authority has not examined the person who has given the statement which has been relied upon to implicate the Appellant. Also, no opportunity of cross examination given to the Appellant to question the basis on which the co accused has implicated the Appellant in this case. When the procedure set out in Section 138 B is not followed, the statement of the co accused has no evidentiary value. Also, in this case the statement of the co accused has not been corroborated by any other evidence. In view of the decisions discussed in para 6 above, the Appellant

cannot be penalized based on the statement of the co-accused alone."

22.6. In view of the discussions above and by relying on the decisions cited supra, we hold the statements relied upon by the Id. adjudicating authority in the impugned order are not admissible evidences in the current proceedings against the appellant, in view of non-compliance of the provisions as mandated under Section 138B of the Customs Act, 1962, which is in *pari materia* with Section 9D of the Central Excise Act, 1944. Thus, answer to the question raised in paragraph 18(III) of this order (supra) is in the negative.

Issue IV: Whether statements recorded from co-accused can be relied upon to implicate the appellant in this case.

23.1. We also take note of the argument put forth by the appellant that the statement(s) of co-accused recorded under Section 108 of the Customs Act, or any other statement having confessional in nature cannot be treated as substantive evidence and can be pressed in to service only when the court is inclined to accept other evidence. We are of the view that the statements of Shri Sudhir Jha and retracted statements of Shri Jyoti Biswas, both co-accused, and evidence from another case of duty drawback, cannot be the sole basis of imposition of any penalty under the Customs Act, 1962. It is observed that there has been no corroboration of statements of Shri Sudhir Jha, Shri Jyoti Biswas, Shri Rudra Prasad Mondal or Shri Dibakar Dey through independent evidence such as call detail records or financial transactions, etc., which, on the contrary, have been claimed by the

appellant to be contradictory to the call detail records. In such circumstances, we agree with the submission of the appellant that the statements of the co-accused cannot be the sole basis for imposition of penalty on the appellant.

23.2. This view is supported by the decision in the case of *Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate [2007 (220) E.L.T. 3 (S.C.)]* relied upon by the appellant, wherein it was observed as under: -

"16. We may, however, notice that recently in Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram [2006 (13) SCALE 386], this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources."

23.3. We also agree with the appellant's claim in this regard that the statements of Shri Sudhir Jha and Shri Dibakar Dey are vague and not corroborated with other RUDs. In this case, Shri Sudhir Jha and Shri Dibakar Dey, both have never been asked by the DRI nor have they themselves disclosed the specific date and time as well as venue pertaining to exchange of specific export documents and/or cash. They had tendered general statements and which are not corroborated with the other RUDs viz. e-mail conversations /CDRs /Bank Statements /Counterfoils of Bank Slips /statements of transporters /Statement of Nirmal Jha in case of Sudhir Jha etc. In support of our view, we rely on the decision in the case of *Chandra Shekhar R. Shukla v. Commissioner of*

Customs (Imports), Nhava Seva [2019 (370) E.L.T. 1449 (Tri. – Mumbai)]

23.4. Therefore, from the above, we are of the considered opinion that the statements of the co-accused cannot be construed as reliable evidence against the appellant in this case. Accordingly, the answer to the question (IV) raised in paragraph 18 of this order (supra) is in the negative.

Issue V: Whether the statement recorded from Shri Sudhir Jha can be relied upon to implicate the appellant in this case or not.

24. The main allegation levelled against the appellant in this case that he had allegedly formed a syndicate, along with others, for smuggling of Red Sanders into the country and abetted such offence by supplying manipulated export related documents, ARE-1s, etc. The Ld. adjudicating authority has mainly relied upon the statement recorded from Shri Sudhir Jha to substantiate the allegations. In his statement dated 24.05.2016, Shri. Sudhir Jha has inter alia claimed that he was introduced to appellant through one Shri Nirmal Jha in November 2015. However, in his further statement dated 26.10.2016, he claimed that he met the appellant in April 2014. Further, in his statement dated 26.10.2016, Shri Sudhir Jha has claimed that the appellant had given him the export documents/invoices in question in respect of the subject consignments near the DRI building. In this regard, we find that the appellant had denied knowing Shri Sudhir Jha but stated that Shri Nirmal Jha was known to him as a CHA Agent. Shri Nirmal Jha in his statement dated 06.07.2016 denied introducing the

appellant to Shri Sudhir Jha. The appellant thus claims that the statement of Shri Sudhir Jha is contradictory to the statement of Shri Nirmal Jha, an independent and reliable witness. Thus, the submission of the appellant is that the statements of Shri Sudhir Jha, being a co-accused, cannot be relied upon in these proceedings.

24.1. In order to examine the reliability of the statements recorded from Shri. Sudhir Jha, we have gone through the various statements recorded at the initial stages of the investigation. From the facts of the current seizure of 'Red Sanders', we find that the Customs Broker, M/s. A.K. Sircar & Sons, had filed the Shipping Bill No. 6092170 dated 25.02.2016. In the course of investigation, Shri Somnath Sircar, Partner of the Customs Broker, M/s. A.K. Sircar & Sons, in his statement dated 04.03.2016 inter alia stated that the said export consignment was handed to him over by Shri Sudhir Jha; that the documents pertaining to the above said consignment were signed by Shri Bidyanand Jha.

24.2. From the statement dated 04.03.2016 Shri Suman Hazra, employee of Shri Sudhir Jha, we observe that Shri Bidyanand Jha has handed over to him the photocopies of export documents relating to the consignment contained in the Container No. TCKU 2571904. In his statement Shri Somnath Sircar stated that Shri Sudhir Jha of M/s. U.S. Clearing Agency had not given the original documents to him and that he had no knowledge about the exporter, namely, Shri Raju Biswas of M/s. Srijita Exports. Shri Somnath Sircar, in his further statement recorded on 06.04.2016, stated that Shri Sudhir Jha had started using the stamp of their Customs Broker firm, M/s.

A.K. Sircar & Sons. In his statement dated 07.03.2016, Shri Suman Hazra, employee of M/s. U.S. Clearing Agency stated that all export documents were kept in the office, except the documents related to the exports of M/s. Srijita Exports, which were kept by Shri Sudhir Jha himself; that he sent those documents to the Customs Broker via e-mail on 25th or 26th February, 2016, after getting it from his employer i.e., Shri Sudhir Jha. It has also been stated by him that he got the copies of the documents relating to M/s. Srijita Exports from Shri Bidyanand Jha on 04.03.2016. In his further statement recorded on 04.07.2016 Shri Suman Hazra have stated that he e-mailed copies of the export related documents to the CHA, M/s. A.K. Sircar & Sons from the email id "uscclearing2000@gmail.com" on 25th or 26th February, 2016 and also that the above e-mail ID was exclusively used by him and his employer, Shri Sudhir Jha; that he forwarded e-mails from the said e-mail ID in respect of the firms M/s. Sayantika Enterprise, M/s. Gopals Associate and M/s. Akash Ganga Enterprise to the CHA, M/s. A.K. Sircar & Sons as per the direction of Shri Sudhir Jha. We also take note of the statement dated 09.09.2016 of Shri Suman Hazra, wherein he inter alia stated that he could not access the said e-mail ID after the first week of March, 2016, when the seizure of the subject container took place, as the password had been changed.

24.3. We also observe that Shri Rajiv Agarwall, one of the Directors of M/s. Kunal Ocean Agency Pvt. Ltd., the freight forwarder who had booked the container bearing no. TCKU 2571904, was recorded on 03.03.2016. In the said statement, he inter alia stated that he had got the order for picking up the container through the e-mail received from Shri Sudhir Jha, for

shipment of the export cargo by M/s. Srijita Export and accordingly, he placed the order to M/s. Transworld GLS (India) Pvt. Ltd. Shri Rajiv Agarwal also stated that he has booked the said container and three other containers earlier for M/s. Srijita Export, as per the direction of Shri Sudhir Jha; he himself opened his email-ID and submitted printouts of the documents so received from Shri Sudhir Jha. It also transpires from the said statement that he received payments for booking those containers in cheques from Shri Sudhir Jha of M/s. U.S. Clearing Agency although the bills were raised in the name of M/s. Srijita Export; that he did not know the exporter viz. M/s. Srijita Export and never received any payments from them. A further statement was again recorded from Shri Rajiv Agarwal on 06.06.2016 wherein he inter alia stated that he had booked nine containers pertaining to the exporters, M/s. Srijita Export (Prop. Raju Biswas), M/s. Akash Ganga Enterprise (Prop. Manoj Polur), M/s. Sayantika Enterprise (Prop. Sujit Golder) and M/s. Gopals Associate (Prop. Palash Ghosh) as per the instruction of Shri Sudhir Jha of M/s. U.S. Clearing Agency, though he did not know these exporters.

24.4. It is also a fact on record that M/s. Kunal Ocean Agency Pvt. Ltd. submitted two letters dated 23.05.2016 and 26.05.2016 to the DRI wherein they have stated that as per the instruction of Shri Sudhir Jha, they had booked containers for M/s. Akash Ganga Enterprises (IEC No. 0205006183), M/s. Sayantika Enterprise (IEC No. 0213003163) and M/s. Gopals Associates (IEC No. 0204000246) apart from M/s Srijita Export (IEC No. 0213005794), and also received payments in cheque in respect of these IEC holders from Shri. Sudhir Jha.

24.5. During investigation, it was also revealed that M/s. Speedway Logistics Pvt. Ltd was the freight forwarders in respect of the suspected 7 containers dealt by Shri Sudhir Jha. Shri Siddharta Singh, employee of M/s. Speedway Logistics Pvt. Ltd., in his statements admitted that 5 containers were booked for M/s. Sayantika Enterprise and 2 containers for M/s. Gopals Associate, which were as per the instructions of Shri Sudhir Jha. M/s. Speedway Logistics Pvt. Ltd. also submitted the statement of ICICI Bank showing the payment particulars from Shri Sudhir Jha vide letter dated 05.07.2016.

24.6. From the above statements, it is clear that Shri Sudhir Jha had booked the containers in respect of all the exports made by M/s. Akash Ganga Enterprises, M/s. Sayantika Enterprises and M/s. Gopals Associates and M/s Srijita Export. In all these above statements, none of them have implicated the appellant as the person who had handed over the documents. As per the statements recorded, Shri. Sudhir Jha was the person who booked the containers in respect of all the alleged exports. He was the person who paid the freight. He handled all the export documents in respect of all these exports. We observe that only in his statement dated Shri. Sudhir Jha implicated the appellant as the person who habded over the documents to him. We find that this claim of Shri. Sudhir Jha is not supported by any other evidence.

24.7. Regarding the ARE-1s filed in respect of the current exports vide Shipping Bill No. 6092170 dated 25.02.2016, it is observed from the impugned order dated 07.04.2025, at paragraph 1.19, that enquiries had been conducted with the Rishra Central Excise

Division in respect of the ARE-1 bearing No. 011/15-16 dated 26.2.2016 which were submitted along with the Shipping Bill for export. The DRI requested Rishra Central Excise Division vide IR No. 5785 dated 8.3.2016 to conduct enquiry regarding authenticity of the above ARE-1. It was confirmed by the Central Excise office (Rishra Division, Range I of Kolkata-IV Central Excise Commissionerate) vide their letter under IR No. 603 dated 15.3.2016 that the said ARE-1 (No. 011/15-16 dated 26.2.16) and other relevant documents are fake. It was also confirmed by the above letter that there is no unit in the name and style of M/s B.P Agarwal & Sons holding Central Excise RC No. AABCR2137BXM001 or M/s Srijita Export registered under the Range 1 of Rishra Division. The letter also confirmed that no officers by the name of Shri Anil Chakraborty, Superintendent of Central Excise and Shri Gautam Das, Inspector of Central Excise, shown to have signed the said ARE-I, were posted in the said Range-1 of Rishra Central Excise Division during the material period of the subject export clearance.

24.8. A perusal of the records also reveals that an enquiry was also conducted with the manufacturer, M/s. Raj Finoxides Private Limited, Khariar, Dankuni, Hooghly, whose Central Excise Registration No. AABCR2137BXM001 had been used in the concerned ARE-1 (ref. paragraph 1.21 of the impugned order dated 07.04.2025), wherefrom it was gathered that the said manufacturer had never made any exports till date and were not associated with the said exports in any way. A letter dated 13.06.2016 appears to have been submitted by M/s. Raj Finoxides Pvt. Ltd. wherein they confirmed that they were not into the export business.

24.9. We observe that in his statement dated 23.05.2016, Shri Sudhir Jha stated that he has received the said documents for clearance of the subject export consignment from one Shri Bhagwat Sharma, who had introduced himself as the manager of M/s. Srijita Export. In his statement, he has stated to have used the stamp of M/s. A.K. Sircar & Sons for the last 2.5 years and used to give the Customs Broker an amount of Rs.8,000/- per month; that he had engaged Shri Manoj Singh as the transporter for M/s. Srijita Export; that he sent all the four containers to Dankuni as per Instructions of Shri Bhagwat Sharma and Shri Bhagwat Sharma might have contacted the driver after container pick up and call them for loading. It also appears from the said statement that he engaged Shri Rajeev Agarwall of M/s. Kunal Ocean Agency Pvt. Ltd, for pick up of all the four containers of M/s Srijita Export including the subject container and paid him in cheque, but he did not have the original export documents of Shipping Bill No. 6092170 dated 25.2.2016 relating to M/s Srijita Export except invoice and packing list; that he has asked Sri Suman Hazra to take all the original documents from Shri Bidyanand Jha and submit to DRI or M/s A.K Sircar and Sons; that all original documents were lying with Shri Bidyanand Jha, he did not have his residential address. It has also been stated by Shri Sudhir Jha that the export documents, i.e. ARE-1 011/15-16 dated 26.2.2016 and other documents like Appendix III (for export goods under claim for drawback), Appendix C-1(to be filled by Central Excise Officer) on which he put his signature, were all forged as the signature of Shri Raju Biswas did not match.

24.10. Subsequently, during the course of further investigation, a statement was recorded from Shri Manoj Kumar Singh, transporter, on 30.05.2016, wherein the said transporter stated that he had acted on the instruction received from Shri Sudhir Jha of M/s. U.S Clearing Agency; that Shri Sudhir Jha used to provide him information regarding pickup of containers via e-mail and after that, the containers were picked up; that it was Shri Sudhir Jha who used to instruct him about the location from where the goods would be loaded; it is stated that accordingly he used to instruct his driver. In his statement, Shri Manoj Kumar Singh also informs that each and every time, it was Shri Sudhir Jha who used to instruct him over phone for movement of vehicles with empty containers, and not any other person; that Shri Sudhir Jha had also instructed him to take the vehicle No. WB71A 1644 to Tara Marine Plot at Khiderpore, Kolkata for pick-up of empty container on 25.02.2016, from where the same was to be taken to the loading point at a godown in Dankuni, near Amul factory, where the driver namely, Shri Ashok Kr. Rai had gone previously for loading on an earlier occasion.

24.11. In his statement dated 02.06.2016, Shri Ashok Kr. Rai, driver of the Vehicle No. WB71A 1644 stated that he had visited the above said godown located at Dankuni after picking up the empty container from Tara Marine Plot and left after keeping the container truck inside the said godown on 26.02.2016; that he had acted as per the instruction of his employer, Shri Manoj Kumar Singh.

24.12. From the statement dated 03.06.2016 of Shri Paresh Das, owner of the godown situated at Krishnarampur, Panchyabatitala, Chanditala, Hooghly,

it is revealed the said godown was given on rent to Shri Prasenjit Sani of 26, Belur Road, Howrah – 711 204 on a monthly rental of Rs.35,000/- from 2014 (mid) under the premise of storage of plastic granules in the said godown. Shri Prasenjit Sani, in his Statement dated 09.06.2016, had stated that he had sub-let the said godown to Shri Sudhir Jha for a monthly rent of Rs.25,000/- since November, 2015 and since then, Shri Sudhir Jha had been using the said godown. Shri Prasenjit Sani, in his statement, has stated Shri Arvind Rana to be the person who was looking after the godown and named him as the person who could throw light on the illegal smuggling of 'Red Sanders'. It was confirmed by Shri Arvind Rana, employee of Shri. Prasenjit Sani that Shri. Sudhir Jha used to keep 'logs' in the godown at the end of January, 2016. In his statement dated 10.06.2016, Shri Prasenjit Sani again reiterated that his employee, i.e., Shri Arvind Rana, had informed him about the availability of red coloured wooden logs at the godown and accordingly, he had asked Shri Sudhir Jha about the said logs, to which it was informed by Shri Sudhir Jha that he was having valid papers for the logs.

24.13. Further Statement of Shri Arvind Rana recorded on 09.06.2016, reveals that loading and unloading of red coloured wooden logs had taken place four times, which were brought in 10 wheeler trucks and unloaded in the godown and then loaded in container and sealed by Shri Sudhir Jha, who used to bring the Central Excise seal and plier in a bag and Shri Sudhir Jha himself had sealed the container with bottle seal and Central Excise Seal on all these four occasions. Shri Arvind Rana stated to have arranged 10/12 labourers as per instructions of Shri Sudhir Jha,

for which he paid Rs 500/- each to each labourer, the money for labour was provided also being provided by Shri Sudhir Jha; that he loaded the red coloured wooden logs and wash basin in the container, on or around 25th February, 2016, as per the instruction of Shri Sudhir Jha; that the red coloured wooden logs were loaded in container in presence of Shri Sudhir Jha and him and sealed by Shri Sudhir Jha himself and that he had informed his employer namely, Shri Prosenjit Sani about loading and unloading of red coloured wooden logs in godown but he (Shri Prosenjit Sani) directed him to continue with it.

25. The main allegation against the appellant, as could be seen from paragraph 31 of the said Supplementary SCN is that he had taken the forged and fake ARE-1s and other export related documents from Shri Jyoti Biswas or Shri Vikash Kumar or Shri Kislay and handed over those to Shri Sudhir Jha, who ultimately, with help of those fake documents effectively executed the exports (smuggling) of Red Sanders. In his statement dated 26.10.2016, Shri Sudhir Jha inter alia stated that he knew Shri Sandeep Kumar Dikshit, Inspector, since April, 2014; that he had met Shri Sandeep Kumar Dikshit several times either at Dalhausi, Kolkata or below DRI Office. He also stated that all documents of Srijita Exports were given by Shri Sandeep Dikshit by calling him below DRI Office; all export documents in relation to four firms had been given by Shri Sandeep Dikshit and after exports, all those documents were returned to him either below DRI Office or Dalhausi, Kolkata; further, that Shri Sandeep Dikshit used to contact him using the number 8967650859 for this purpose; payments of 16 consignments towards ocean freight and transport was given by Sandip Dikshit @ Rs.

30,000/- per consignment in cash. Further, in his statement dated 21.11.2016, Shri Sudhir Jha inter alia stated that he never visited the godown at Dankuni, never took it on rent of Rs.25,000/- per month and never have any agreement in this regard; that Shri Prasenjit Sani (the occupier/ lease of the godown) is lying that he had taken the said godown on rent and stored red coloured logs; that all drivers are telling false facts regarding his presence at godown while loading and sealing of containers by him in their presence.

25.1. From the statement of Shri. Sudhir Jha dated 24.05.2016, we find that he has mentioned Shri Nirmal Jha as the person who introduced the Appellant to him, in November, 2015. However, we find that Shri Nirmal Jha, in his statement, has denied introducing Shri Sudhir Jha with Shri Sandeep Kumar Dikshit. We also find that the said statement was not relied upon by DRI but supplied by them vide letter under DRI F. No. DRI/KZU/AS/ENQ-13/2016/Pt./1351 dated 08.03.2018, to the appellant. It is also a fact that in his statement recorded on 08.06.2016, the appellant has denied knowing any Shri Sudhir Jha but accepted that Shri Nirmal Jha was known to him since 2008, who, as per the appellant, used to provide him raw intelligence. In this regard, we observe that if the appellant is known to Shri Sudhir Jha from 2014 onwards, he would have mentioned his name in any of the statements recorded during the initial stages of the investigation. This statement is therefore contrary to his statements dated 23/24.05.2016 that he was said to be introduced to Sandip Dikshit in November, 2015. Thus it is seen that the appellant has been highlighted as one of the main persons behind the

entire smuggling operation by Shri Sudhir Jha only after recovery of the DVD in question.

25.2. Further, in his statement dated 21.11.2016, Sudhir Jha inter alia stated that he never visited the godown at Dankuni, never took it on rent of Rs. 25,000/- per month and never had any agreement in this regard. That Prasenjit Sani (the occupier/ lease of the godown) is lying that he had taken on rent the said godown and stored red coloured logs. That all drivers are telling false facts regarding his presence at godown while loading and sealing of containers by him in their presence. There appears to be no corroboration by way of examination of drivers or the godown owner/keepers in support of the denial made by Sudhir Jha in these statements.

25.3. Considering the fact that he used to receive these export documents from one Shri Bhagwat Sharma and not from the appellant herein as claimed in his initial statements dated 23 & 24.05.2016, it can be inferred that in his subsequent statement dated 26.10.2016, he has implicated the appellant as the person who has handed over all the documents connected with the exports, as an after thought made by him with a view to escape himself from the alleged offence. It is relevant to note the submission of the appellant in this regard that when there is no call/contact with Shri Sudhir Jha during the filing period of 07.04.2014 to 25.02.2016 through any disclosed means in form of any documentary evidences. The appellant has pointed out that at that time, he was working as Intelligence Officer at DRI Kolkata during relevant period which is a high-pressure job. DRI had never alleged that the appellant was absent from Office during working hours. We also

observe that the locations of the alleged calls using the mobile number 8967650859 are not found at the vicinity of DRI Office or Dalhausi area of Kolkata, as discussed in paragraph 22 of the Supplementary SCN dated 18.05.2017. Further, the building wherein the DRI Office is situated is high security zone covered under CCTV coverage and no such evidence or copy of Visitor's Register of DRI, Kolkata was either provided or brought on record in any proceeding held till date substantiating alleged exchange of documents with Shri Sudhir Jha at downstairs of DRI Office or inside DRI Office. The allegations are vague in nature that many other mobile numbers were used for alleged exchange of documents and cash. Neither any details of such mobile numbers have been disclosed.

25.4. It is also seen from the records that the Bank Statement of Shri Sudhir Jha was neither disclosed nor relied upon by DRI in instant case. As per statement dated 24.05.2016, Shri Sudhir Jha had paid for container booking, transporter, etc. As per statement dated 26.10.2016, Shri Sudhir Jha stated that all the payments related to these 16 consignments were given by him which he had received from Sandeep Dikshit @ Rs. 30,000/- per consignment in cash. He used to pay 25000/- per consignment for ocean freight and transport. All the payments related to these 16 consignments were given by Sudhir Jha by cheque. RUDs related to financial details shared by container agent revealed that all payments were made towards freight and transportation charges exclusively by Shri Sudhir Jha using banking channels.

25.5. Shri Bidyanand Jha, the employee of Shri Sudhir Jha appears to have stated before CBI that Shri Sudhir Jha maintained several Bank Accounts either in his name or in the name of his proprietorship firm. Bank statement of entire export period and all of accounts maintained by Shri Sudhir Jha were suppressed by DRI. The bank statements of container agent and counterfoils relied upon by DRI evidently prove that Shri Sudhir Jha had made expenditure @ Rs. 65,000/- per consignment towards freight and transportation charges which contradicts the claim of Shri Sudhir Jha.

25.6. In this regard it may also be pertinent to note that as per statement of CHA/CB, the documents meant for export were received by them through e-mail dated 25.02.2016 from Sudhir Jha with respect to the consignment seized by DRI in the present case, whereas, statement of co-accused Sudhir Jha allegedly stating that export documents were physically received by him from the present appellant after calling him using the mobile number 8967650859, which stands completely at contradiction, which the Investigating Authority never tried to verify.

25.7. Statements of Sri Sudhir Jha are full of inconsistencies which cannot be given credence to for arriving at conclusion to establish the charges against the appellant herein. In his statements, Shri Sudhir Jha himself is contradicting the statements tendered by him earlier. Also, he is the person who had forged the documents and made all arrangements as per the SCN dated 26.08.2016 and also affirmed by the Ld. Adjudicator in the impugned order at Paragraph 5.8.2. Thus, the statements of co-accused Shri Sudhir Jha being inconsistent and self-contradictory as well as

contradictory to the facts disclosed by him and non-corroborative to the documentary evidence on record, cannot be relied upon against the appellant herein. Also, it has no evidentiary value in absence of independent corroboration as well as in absence of mandatory compliance of Section 138B of the Customs Act, 1962 in terms of the settled position of law in this regard.

25.8. From the statements of the agency, transporters and owner of the godown where the goods were kept, it is amply clear that they have submitted before the DRI that Shri Sudhir Jha was only making the payments in respect of the services done by them. Shri Sudhir Jha, in one of his statements, has however, mentioned that the said activities were financed and/or completed with the help of the appellant herein, although without any valid corroborative evidence in support thereof. Thus, we find that Shri Sudhir Jha claiming the appellant to be a key person in the smuggling syndicate is an afterthought, which was only done by his statements recorded subsequent to recovery of the DVD. Hence, there is no merit in the statement of Shri Sudhir Jha implicating the appellant in the alleged offence.

25.9. From the evidences available on record, we observe that all these documents, which had been filed in the name of M/s. Srijita Export and other earlier exports have been fabricated. Most of the statements recorded during the course of investigation indicate Shri Sudhir Jha as the person who has handled all the documents related to the alleged exports involving Red sanders. The name of the appellant was not indicated by any of the persons associated with the export of the current consignment

or any of the past consignments. In view of the foregoing, we hold that the statement of Shri Sudhir Jha cannot be treated as admissible evidence in the current proceedings against the appellant. Accordingly, answer to question (V) raised in paragraph 18 of this order (supra) is in the negative.

Issue VI: Whether the retracted statement of Shri Jyoti Biswas can be relied upon to implicate the appellant in this case.

26. We observe that the allegation against the appellant has been made on the basis of the DVD recovered from M/s. Spak Enterprises Ltd. We find that Shri. Jyoti Biswas was the person who created the DVD. Hence, his statement is relevant to analyze the role of the appellant in the alleged offence.

26.1. It has been contended by the appellant that some of the statements relied upon against the appellant in this case were allegedly recorded under duress and coercion and retracted later. Hence, the appellant submitted that such retracted statements have no evidentiary value in the absence of any corroborative evidence.

26.2. In this regard, we observe that the Ld. adjudicating authority has heavily relied on the statements recorded from Shri Jyoti Biswas, Shri Sudhir Jha, Shri Rudra Prasad Mondal and Shri Dibakar Dey, who are co-accused in this case. We find that the Statement of Shri Jyoti Biswas was recorded on 21.09.2016 and 22.09.2016 before his arrest on 22.09.2016, which he retracted when he was produced before Ld. Chief Metropolitan Magistrate, Bankshall Court, Calcutta on 22.09.2016 in presence

of DRI Officers. His further statements were recorded on 03.10.2016, 27.10.2016 & 02.11.2016 u/s 108 of the Customs Act, 1962 by bringing him in the DRI Office, while he was in Judicial Custody. He was released on bail on 09.12.2016. He had retracted his said statements on 19.12.2016 before a Court of Law. Since the statement of Shri Jyoti Biswas has been retracted, we agree with the contention of the appellant that the same cannot be relied upon as evidence for implicating the appellant in the alleged offence, in the absence of any corroborative evidence. Reliance in this regard is placed on the decision of *Jeen Bhawani International (supra)*, wherein it has been observed as under :

"14. We find that revenue heavily relies on the statements of Shri Mahesh Chandra Sharma, though retracted later. The adjudicating authority has held that no documents are available in the case records to show that the statements, recorded between November, 2016 and June, 2019, were retracted by the appellant. Further, he also held that belated retraction has no evidentiary value and the evidences available on record in the form of statements cannot be ignored. On perusal of the appeal records, we find that by letter dated 5-9-2019, addressed to the adjudicating authority, the appellant had retracted all the statements, assigning the reason that the appellant had never stated regarding mis-declaration of value, quantity or description of goods and accordingly, deny the whole statements recorded under section 108 ibid. It has further been stated that the statements were obtained by threat, duress etc.

14.1 We find that the statements were recorded by the department from Shri Mahesh Chandra Sharma on different dates in a span of 3 years. However, the copies of same were not furnished to the appellant immediately on completion of the summon proceedings. Upon receipt of the SCN together with the RUD's, the appellant came to know about the content in the statements, though made by him and thus, had sent the retraction letter within the reasonable time. Thus, it cannot be said that there

is inordinate delay in filing the retraction letter. Further, the letter of retraction cannot be discarded on such ground, without examining the genuineness of the transactions and for that purpose, to verify the authenticity of available documents and those retrieved during the course of investigation, which admittedly has not been done by the department. In this context, the law is well settled that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and having also made a few payments as per the statement, it cannot lead to self-assessment or self-ascertainment. In the case of Vinod Solanki [2009 (223) E.L.T. 157 (S.C.)], the Hon'ble Supreme Court has ruled that the initial burden to prove that the confession was voluntary is upon the department and that evidence brought by confession if retracted, must be corroborated by other independent and cogent evidence. Madras High Court in the case of Shri Nandi Dhall Mills India Private Limited [2022 \(60\) G.S.T.L. 227](#) (Mad.)] held that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. Though the judgement was pronounced in respect of GST, it goes to indicate that acceptance by the appellant during the course of recording the statement is not just enough and the same has to be confirmed by adducing independently corroborative evidence. The whole case cannot rest simply on the basis of a retracted statement though belatedly.

*14.2 We find that the appellants have shown enough cause for delayed retraction. Learned Commissioner has simply brushed the same aside. He should have examined the appellant during the adjudication proceedings in terms of Section 138(B) of the Customs Act, 1962, to confirm the veracity. Learned adjudicating authority could have examined the officers too. Section 138B (1) *ibid* deals with the aspect of relevance of statements under certain circumstances. It has been provided that a statement made and signed by a person during any enquiry or proceeding shall be relevant, for the purpose of proving an offence, when the person, who made the statement, is examined as a witness in the case before the court. In this case, having acknowledged that the retraction has been made by*

the appellant in the course of the adjudication proceedings, more specifically, during the period between issuance of SCN and passing of the impugned order, it was incumbent upon the learned adjudicating authority to examine the person, who made the statement. However, the adjudicating authority chose to rely on the statement alone as evidence, which is beyond the scope and ambit of the statutory provisions. Thus, contents of the retracted statement cannot simply be brushed aside, to conclude that the appellant has indulged into the activity of undervaluation of goods."

26.3. We observe that the investigation failed to corroborate the retracted statement(s) of Jyoti Biswas with independent documentary evidences. In this regard we take note of the fact that during the course of appellant's posting as Intelligence Officer at DRI, Kolkata during the period 11.01.2012 to 29.02.2016, he was investigating officer of a case mentioned in Paragraph 9.2.1 of said Supplementary SCN, wherein, said Jyoti Biswas was the prime accused and the appellant was instrumental in issuance of 10 SCNs to said Jyoti Biswas proposing penalty and other penal actions under Customs Act, 1962. We observe that the statements of Shri. Jyoti Biswas were recorded in line with the documents derived from a DVD. We have also observed that the said DVD itself has been treated as inadmissible by the Id. adjudicating authority, as could be seen from paragraphs 5.6.1 to 5.6.6 of the impugned order. We also find that Shri. Jyoti Biswas has later retracted his statements. Thus, we find merit in the submission of the appellant that the statements of Jyoti Biswas relied upon in the instant case are motivated statements given by him with a view to implicate the appellant as a retaliatory action.

26.4. Thus, we hold that the Statement recorded from Shri Jyoti Biswas, which has been retracted before a court of law, cannot be relied in the instant proceedings against the appellant. Accordingly, answer to question (VI) mentioned in paragraph 18 of this order (supra) is in the negative.

Issue VII: Whether the CDR analysis can be treated as admissible evidence for penalizing the appellant in this case.

27. The appellant submitted that the Call Records Analysis cannot be considered as reliable evidence for imposition of penalty in this case. In this regard, we observe that the examination of the call records reveals the following:

(a) SDR of mobile Numbers 8967650859 shows its registration in name of two different persons during 02.02.2016 to 22.12.2016. Allegations have been levelled that the mobile number 8967650859 was used by appellant till 22.12.2016, showing location at Chandannagar, though said number was registered in the name of two different persons during the said reference period making it highly improbable to be in use by the appellant.

(b) Mobile Number 8335857530 was activated on 27.02.2016 and its CDR had only one call on 27.02.2016 but the Para 22.3 of Supplementary SCN shows 28 calls. Thus, we observe that implicating the appellant on the basis of the call records is not supported by the respective CDR. Further, this number had

no call to any of the numbers of Shri Sudhir Jha, but, shown as 01 call on 26.02.2016 by the Ld. Adjudicator in para 5.15.5(iii) of the impugned order which is not supported by the CDR.

(c)The Ld. Adjudicating authority has relied upon the allegations made by DRI in the impugned SCN without going in to actual analysis of call detail records and tower locations of mobile phones alleged to be used by the appellant. It has been further noted by the Ld. Adjudicating authority that the appellant used mobile number 8967650859 to contact Sri Sudhir Jha for exchange of documents. In para 5.15.6, while countering the defence argument that no call record has been found between Sri Sudhir Jha and the mobile number 8967650859, the Ld. Adjudicating authority has opined that call record details can not indicate content of conversation. In this regard, we observe that if Shri Sudhir Jha used to collect the documents from the appellant at DRI office he must have contacted the appellant. There must be call detail records during material filing period. But, we find that no such evidence could be noticed from the call records analysis.

(d)Further, the tower location of mobile number 8967650859 would have been at Dalhousie or at DRI office, but again the Ld. adjudicating authority has opined that the tower location of said mobile number was at Chandannagar.

(e)The tower location of the said mobile was at Chandannagar but, it has been opined by the

Ld. adjudicator that the documents using this mobile number were exchanged at DRI, Kolkata or at Dalhousie. The Ld. adjudicator has believed the story of DRI without going in to actual analysis at his own level.

27.1. We find that in paragraph 22.2 of the Supplementary SCN, analysis of call details have been given where two mobile phone numbers which are issued to some other persons have been alleged to be used by the appellant. As per paragraph 1.4 of the Supplementary SCN, the shipping bills in question were filed between 07.04.2014 and 25.02.2016. The call details as discussed in paragraph 22.2, however, do not match with these dates. No call is there to show that the exchange of documents took place on this time at this place. As per the statements recorded during investigation, Shri.Sudhir Jha is the person who filed the shipping bills, therefore call record details in respect of Sudhir Jha is relevant in the current proceedings. On perusal of the call records as per CDRs and SDR, it is not proved that appellant did have any conversation during the period of filing the Shipping Bills [07.04.2014 to 25.02.2016] with the key person Shri Sudhir Jha, who admittedly filed the Shipping Bills and held responsible for forging all export documents including all ARE-1s.

27.2. We also find force in the following submissions made by the appellant in respect of CDR analysis with regard to Shri Sudhir Jha: -

- (i) Sudhir Jha alleged that the mobile numbers 8335857530 and 8967650859 were used by the appellant for exchange of documents with him for filing of Shipping Bills. Shipping Bills were filed during 07.04.2014 to 25.02.2016.

- (ii) As per CDR, the mobile number 8335857530 was activated on 27.02.2016, hence any conversation on this number is of no use for the purpose of such alleged exchange of documents. It also shows that statement of Sudhir Jha was false.
- (iii) It is on record that all documents for the purpose of filing of shipping bill No. 6092170 was sent on 25.02.2016 through e-mail usclearing2000@gmail.com to CHA A K Sirkar & Sons, as reflected in relied upon document. Also, there was no amendment in the shipping Bill after 25.02.2016 as shown in the "Shipping Bill Movement" generated from EDI System and enclosed at page-903, Vol.-II of appeal papers.
- (iv) There is no corroborative evidence in form of CDR to show that Sudhir Jha was called either on 25.02.2016 or prior to it for exchange of alleged export documents and/or cash. The entire allegations fall flat on this ground alone.
- (v) During the reference period of filing of shipping bills [07.04.2014 to 25.02.2016], there is no call with Shri Sudhir Jha using the mobile number 8967650859. As per SDR of the mobile number 8967650859, it was registered since 01.11.2013 to August, 2016 in the name of Shri Bikash Basu and thereafter, in the name of Smt. Laizu Bibi. The use of said mobile number during the period of 02.02.2016 to 22.12.2016 by the appellant herein is unrealistic on this ground alone. Technically, it is not possible for any person to have same mobile number with two different subscribers during the period. Before alleging that these mobile phones were used by him it should have been analysed that there are two different subscribers. There is no investigation

with Laizu Bibi, the second subscriber. The said number was in use since 01.11.2013 and filing of shipping bill in the instant matter held during 07.04.2014 to 25.02.2016 but there is no call to Sudhir Jha during the said filing period. Hence, the possibility that this number may be utilised for such purpose by the appellant does not arise.

27.3. As regards the CDR analysis with regard to Shri Jyoti Biswas and his associates, we find that the call details with Jyoti Biswas and Divakar Dey have no relevance as the DVD itself had been declared inadmissible evidence, thus any document derived from DVD is also inadmissible. As evident from above, there is no evidence to prove that the alleged forged documents were handed over by appellant to Shri Sudhir Jha, who was held responsible for filing the shipping bills and forging export documents including ARE-1s.

27.4. We also take note of the fact that the allegations are not corroborated by the CDR. Regarding the mobile number 8335857530, the information given in Supplementary SCN dated 18.05.2017 appear to be unreliable. As mentioned in paragraph 22.3 of the Supplementary SCN, there are 45 calls using mobile number 8335857530 at the location Chandannagar during 27.02.2016 to 23.02.2017. However, it has been submitted before us that the SDR & CDR relied upon does have any such call. The only call using this mobile is generated on 27.02.2016 and there is no call to any of the known numbers of Sudhir Jha. Thus, we find force in the contention of the appellant that the allegation in the said Show Cause Notice as to there being frequent

calls and corroborative evidence, is contrary to the documents relied upon.

27.5. We find that in his defence, the appellant has urged the following grounds before the Id. adjudicating authority: -

- (a) SDR of mobile Numbers 8967650859 shows its registration in name of two different persons during 02.02.2016 to 22.12.2016. Allegations levelled [Para 22.3, Page- 351, Vol-I] that the mobile number 8967650859 was used by appellant till 22.12.2016 showing location at Chandannagar, though said number was registered in the name of two different person during the said reference period making highly improbable to be in use by the appellant.
- (b) Mobile Number 8335857530 was activated on 27.02.2016 and its CDR had only one call on 27.02.2016 but the Para 22.3 of Supplementary SCN [Page- 351, Vol-I] shows 28 calls, which is a false fact not supported by the respective CDR. Further, this number had no call to any of the numbers of Shri Sudhir Jha, but, shown as 01 call on 26.02.2016 by the Ld. adjudicator in paragraph 5.15.5(iii) [Internal page272 of OIO] which is not supported by the CDR.

27.5.1. However, from the impugned order, it is seen that the Ld. Adjudicating authority has brushed aside the said submissions and has inter alia opined that call record details can not indicate content of conversation. For the sake of ready reference, the relevant portion of the paragraph 5.15.6 of the impugned order is reproduced below: -

"I find these submission lack any merit as call data records cannot indicate content of conversations took place between the persons involved in the call. In the subject case, call data records clearly suggest that Shri Dikshit was in touch with Shri Sudhir jha (a key member of the smuggling syndicate). I also find that Shri Dikshit did not offer any comments of the 76 calls between Jyoti Biswas (Key member of syndicate involved in multiple cases of frauds under Customs Act) between the period from 01.02.2016 to 21.09.2016. These frequent calls between key members of syndicate clearly suggests a cordial relationship enjoyed by Shri Sandeep Dikshit with Shri Jyoti Biswas and Shri Sudhir Jha."

27.6. Thus, we observe that if Shri Sudhir Jha used to collect the documents from the appellant at DRI office he must have contacted the appellant and there must be call detail records during material filing period. Further, the tower location of mobile number 8967650859 would have been at Dalhousie or at DRI office, but again the Ld. adjudicating authority has opined that the tower location of said mobile number was at Chandannagar.

27.7. Thus, we observe that the analysis of CDR in this case does not establish that the phone numbers had been used by the appellant or that the appellant had made calls to the other persons accused in the notice in regard to the alleged offence. Accordingly, the question raised in paragraph 18(VII) of this order is answered in the negative.

Issue VIII: Whether the allegation of receipt of pecuniary benefits by the appellant is substantiated with evidence

28. We observe that the allegation of receipt of pecuniary benefits in connection with the offence has been levelled against the appellant mainly on the basis of the Statements of Shri Rudra Prasad Mondal.

28.1. It is seen that the statements of Shri Rudra Prasad Mondal, associate of Shri Jyoti Biswas, were recorded on 27.09.2016 and on 14.03.2017 in a separate case related to fraudulent export under 'duty drawback scheme' through Petrapole LCS. In these statements, Shri Rudra Prasad Mondal has alleged that he supplied Kitchen chimney and water purifier to the appellant. On 19.04.2017, appellant had submitted all purchase documents along with bank statement evidencing the payments for said purchases. In the said case related to duty drawback case, complicity of the appellant was investigated by DRI, Kolkata but, he was not made a noticee in the SCN issued in the said case. Also, we observe that the final report sent by DRI vide letter dated 21.04.2017 addressed to the Commission of Customs (Preventive), CC(P), WB, Kolkata did not implicate the appellant herein in said drawback cases. We also observe that mandatory compliance under Section 138B of the Customs Act had not been done in case of statements of Shri Rudra Prasad Mondal.

28.2. The Id. adjudicating authority, at paragraph 5.14.3(iii) of the impugned order, has levelled the allegations on the appellant on the basis of pecuniary gains as in the aforementioned statements of Sri Rudra Prasad Mondal. Based on his statement, inference has been drawn under paragraph 5.15.10 of

the impugned order that the appellant received financial incentives in relation to his role in the alleged offence. However, it is seen that the appellant has produced evidence to the effect that those household goods were purchased by him by making payments through banking channels and duly reported to DRI on 19.04.2014. It has been particularly submitted that those purchase documents along with bank statements were also submitted to the Id. adjudicating authority, who had not rebutted the same. Further, we take note of the appellant's submission in this regard that these statements, which were recorded in another case, have been imported and relied upon in the impugned Order-in-Original. In terms of the settled position of law, the said statements of Sri Rudra Prasad Mondal recorded in the case of export under duty drawback scheme through Petrapole LCS are not relevant in the present case of export through Kolkata Port. Hence, we do not find any merit in the conclusion made by the Id. adjudicating authority in this regard with respect to receipt of financial incentives in connection with the alleged offence. Accordingly, the answer to the question raised in paragraph 18(VIII) is in the negative.

29. In view of the detailed observations in the preceding paragraphs, we summarize our findings in respect of the issues framed at paragraph 18 of this Order, as under: -

- I. The information available in the said DVD cannot be relied upon as admissible evidence against the appellant in the impugned proceedings.

- II. The provisions of Section 138C have not been complied with in this case and hence the print-outs taken from the DVD cannot be used against the appellant in these proceedings.
- III. The statements relied upon by the Id. adjudicating authority in the impugned order are not admissible evidences in the current proceedings against the appellant, in view of the non-compliance of the provisions as mandated under Section 138B of the Customs Act, 1962, which is in *pari materia* with Section 9D of the Central Excise Act, 1944.
- IV. The statements of the co-accused cannot be construed as reliable evidence against the appellant in the facts and circumstances of this case.
- V. The statement of Shri Sudhir Jha cannot be treated as admissible evidence in the current proceedings against the appellant.
- VI. The statement recorded from Shri Jyoti Biswas, which has been retracted before a court of law, cannot be relied in the instant proceedings against the appellant for imposition of penalties.
- VII. The analysis of CDR in this case does not establish that the phone numbers had been used by the appellant or that the appellant had made calls to the other persons accused in the notice in regard to the alleged offence.
- VIII. The allegation of receipt of financial incentives by the appellant in connection with the alleged offence is not corroborated with evidence.

30. We further observe that the current issue was initiated with the seizure of Red Sanders logs, placed for export in Container No. TCKU 2571904. Statements of various persons in connection with the above case were relied upon in the initial Show Cause Notice issued in respect of the alleged smuggling of Red Sanders. Subsequently, evidences in the form of the DVD, inter alia purportedly containing voice clips and recordings between the appellant and other co-accused, along with further statements of co-accused, have been brought in, to allege involvement of the appellant in respect of present as well as past exports.

30.1. It is evident that the involvement of the appellant in past illegal exports, has been sought to be substantiated only through the said DVD and statements as mentioned above. As already observed by us, the DVD in question and the statements do not qualify as valid evidence in this matter being non-compliant with the mandatory provisions laid down under Sections 138C and 138B of the Customs Act respectively. There is no other corroborative evidence available on record to justify the allegations against the appellant. Hence, we find the allegations to implicate the appellant in the past offence are unsubstantiated and uncorroborated.

31. Having addressed the issues under dispute, we now proceed to examine the applicability of the relevant statutory provisions invoked in this case to impose penalties on the appellant. We find that penalties have been imposed on the appellant under Section 114(i) and 114AA of the Customs Act, 1962. For the sake of ready reference, the relevant Sections of the Customs Act, 1962, are reproduced below: -

▪ **Section 114:**

"Section 114 - Penalty for attempt to export goods improperly, etc. — Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

- (i) *in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act], whichever is the greater;*

..."

▪ **Section 114AA:**

"SECTION 114AA - Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

31.1. From the above cited Section 114 of the Act, we observe that the said section prescribes penalty on any person "who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act". Section 114AA envisages that a person who knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, shall be penalized under the said Section. We observe that in the present case, the evidences available on record do not indicate that the elements required for imposition of penalty under Section 114(i)

of the Act are available. Hence, we hold that the imposition of penalty under Section 114(i) of the Customs Act on the appellant is unwarranted and the same is hereby dropped.

31.2. Further, Section 114AA mandates penalization of a person for “use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business”. We find that the above ingredients which are essential for inviting penalty under Section 114AA of the Act are absent in the case. Therefore, we do not find any justification for imposition of penalty under Section 114AA of the Customs Act on the appellant and accordingly, set aside the penalties under the said Section.

32. In view of our above findings, we set aside the penalties imposed on the appellant in the impugned order, under Sections 114(i) and 114AA of the Customs Act, 1962, and allow the appeal filed by the appellant.

33. The appeal is disposed of in the above manner.

(Order pronounced in the open court on **10.07.2025**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)