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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 27 of 1996**

**Shri B.D. Goel,**
Asstt. Collector of Customs (Preventive),
Bombay. **..Appellant**
**(Orig. Complainant)**

**Vs.**

**1. Austin M. Gracious,**
H. No.332, Malad,
Marve Road, Kharodi Village,
Bombay-400 095.
**2. David Fernandes,**
Raymand Luis Patel House,
Kharodi Village, Marve Road (W),
Bombay-400 095. **..Respondents.**
**(Orig.Accused Nos.1 & 2.)**

**3. The State of Maharashtra.**

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Mr. N. Natarajan , Special P.P. for Appellant.
Ms. Daksha Shah for Respondent Nos.1 & 2.
Mrs. Sangeeta D. Shinde, APP for State.

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**CORAM: B.P. DHARMADHIKARI &**
**A.S. GADKARI, JJ.**

**31st July 2015.**

**<u>JUDGMENT (Per A.S. Gadkari, J.):</u>**

**1** The appellant, Assistant Collector of Customs, the original complainant has preferred the present appeal against the impugned judgment and order dated 28th September 1993 passed in N.D.P.S. Special Case No.1233 of 1988, thereby acquitting the respondent nos.1 and 2 from the offences punishable under Sections 29, 21 read with Section 8(c) and under Sections 30 read with 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act) and under Section 135(A) of the Customs Act, 1962 (for short Customs Act).

**2** The facts which give rise and are necessary to decide the present appeal can briefly be stated thus:

**(i)** That on 27.2.1988, the officers of the Customs Department were informed by their Additional Collector Shri L.D. Arora and the Superintendent Mr. T.S. Jayaram (PW No.4) to remain present in the office, as some secrete information was to be worked out. In pursuance of the said information, the raid was to be conducted at a godown situated at Kharodi Village No.1, Malad Marvey Road, Mumbai-400095. After receipt of the said information, a warrant to search under Section 105 of the Customs Act was issued by Shri S.R. Datta, the Assistant Collector of Customs, Preventive Department, Mumbai for raiding the said premises i.e. godown at Mumbai-400095. The said warrant which was issued under Section 105 of the Customs Act was for the specific reason to search the premises, as there were reasons to believe that prohibited and dutiable goods liable for confiscation and the documents and things lying therein were to be searched. In pursuance of the said search warrant, the raiding party went near the godown premises between 11.05 p.m. to 11.15 p.m. on the same date i.e. on 27.2.1988. The raiding party called two persons from the locality to act as panchas. They noticed that the said place was open godown and with tin walls without any gate or lock. There were three persons inside the said godown and they gave their names as Khalil Ahmed, Nasiruddin Ahmed and Majid. After enquiry it was revealed that the said three persons were employees of the owner of the godown namely Mr. Mustafa.

**(ii)** The search warrant was shown to the said persons who were present in the said godown and thereafter the process of search of the premises of the said godown was undertaken. There was no electric light in the said godown. With the help of torches the raiding party conducted search of the said premises. The members of the raiding party found that there was wall created from stacks of gunny bags containing empty bottles of about five feet in height and beyond the said wall a space was created of about 15 feet by 10 feet in dimension. In the said space the raiding party found gunny bundles and polythene packages. There were in all sixty four packages i.e. gunny bundles and polythene packages. On cursory examination the raiding party found slabs of dark brown colour which were having pungent smell. The raiding party suspected that it may be a Canabis Resin (Hashish). At the said place the detail examination of the packages was not carried out as the space was found to be insufficient for the same. The raiding party arranged a private motor lorry from Manori village and the said sixty four packages were loaded in that lorry in presence of panchas and three occupants/employees of the godown and were brought to the New Customs House at Ballard Estate, Mumbai.

**(iii)** After reaching the New Customs House at Ballard Estate, Mumbai all the sixty four packages were taken to the 12th floor of the Customs House Annexe Building, Ballard Pier. On examination of the said sixty four packages were found to be containing 1754 slabs of dark brown substance. That each of the slabs was found wrapped in cellaphane paper. The Customs Officers also recovered 4250 pieces of lamb skins. The samples of the said dark brown substance slabs were subjected to preliminary test with the field testing kit and the said test showed positive result for the presence of Hashish. The Customs Officers also noted that there were markings on the dark brown slabs which indicated that they were of foreign origin. The total number of 1754 slabs were weighed and their weight was found to be 1718 Kgs. Necessary and requisite samples from the slabs were taken after effecting necessary procedure and the same were sent to the Forensic Science Laboratory for its report. During the course of enquiry it was revealed that the respondent nos.1 and 2 administered threats to the employees of the said godown and stored the said contraband in the godown of Mr. Mustafa. That on 14.6.1988 the respondent nos.1 and 2 were arrested by Malvani Police Station in some other criminal offence and they were in the custody of Malvani Police Station. On receipt of the said information, the Customs Officers filed an application in the Court of Additional Chief Metropolitan Magistrate, Borivali for permission to have their temporary custody for the purpose of their interrogation in connection with seizure of the Hashish relating to the present case. The learned Additional Chief Metropolitan Magistrate, Borivali granted the said permission and accordingly the accused nos.1 and 2 were brought to the Customs Office. During the course of interrogation, the statements of the respondent nos.1 and 2 were recorded by Shri K.G. Mulchandani (PW No.7) the Superintendent of Customs under the provision of Section 108 of Customs Act in which the respondent nos.1 and 2 have confessed about their guilt. That after conclusion of the investigation/enquiry the complaint was filed by PW No.9 Shri B.D.

Goyal, the then Assistant Collector of Customs against the respondent nos.1 and 2 in the Court of learned Chief Metropolitan Magistrate, Explande Court Mumbai on 9.8.1988.

**(iv)** The Chief Metropolitan Magistrate committed the case against the respondent nos.1 and 2 to the Court of Sessions, as the case for the offences punishable under NDPS Act was disclosed against the respondent nos.1 and 2. After committal of the case, the Special Judge under NDPS Act framed charges below Exhibit-1 on 16.1.1992. The said charges were subsequently re-framed at Exhibit 5 on 26.3.1993 for the offence punishable under Sections 29, 21 read with 8(c) of NDPS Act and under Section 30 read with Section 23 of NDPS Act and also under Section 135(A) of the Customs Act. The respondent nos.1 and 2 denied the charges and claimed to be tried. Their defence was of total denial. As far as the statements recorded by the Customs Officers is concerned, they stated that they are illiterate persons and their statements were obtained from them by assaulting and threatening them. The respondent nos.1 and 2 had retracted their statements immediately when they were produced in the Court for their remand. Thus, in short the respondent nos.1 and 2 claimed innocence in the present case.

**(v)** The Special Court after recording the evidence and after hearing the parties to the said case was pleased to acquit the respondent nos.1 and 2 from all the charges levelled against them by its judgment and order dated 28.9.1993. The said judgment and order is impugned herein.

**3** In the present case, the appellant in support of its case examined in all ten witnesses.

**4** PW No.1 is Naresh D. Gaonkar who was working with Customs Department as a Preventive Officer and was a member of raiding party who conducted raid on 27.2.1988. This witness has deposed about the instructions given to him by PW No.4 T.S. Jayaram, the Superintendent of Customs and Head of Intelligence unit and raid conducted on the godown owned by Mohd. Abdul Razak Mustafa (PW No.10) at village Kharodi, Malad Marvey Road, Malad, Mumbai at about 11.15 p.m. This witness in his testimony has further deposed that the said godown was open godown with tin walls without any gate or lock. There were three persons inside the said godown. They gave their names as Khalil Ahmed, Nasiruddin Ahmed and Majid. On enquiry with the said persons, the raiding party came to know that the said three persons were employees of the said godown owned by Mohd. Mustafa. That the search warrant was shown to those employees of the godown and thereafter the raiding party conducted raid. That there was no electric light in the said godown and therefore with the help of torches the raiding party conducted search of the premises. They found that there were stacks of gunny bags in different rows. On the rear side of the godown they found that there was a wall created from the stacks of gunny bags containing empty bottles of about 5 feet in height. The raiding party noticed there was space made behind the said wall measuring about 15 feet x 10 feet in dimension. That in the said open space, the raiding party found in all 64 packages of gunny bundles and polythene packages and on cursory examination they found slabs of dark brown colour which were having pungent smell. The raiding party suspected that it must be Canabis Resin (Hashish). The raiding party did not carry out detailed examination of the packages on the spot as there was no electric light and the space was found to be insufficient. The Customs Officer arranged for a private motor lorry from Manori village and the said 64 packages were loaded in that motor lorry in presence of the panchas and three employees of the said godown and the same were brought to the New Customs House at Ballard Estate, Mumbai. That on reaching to the New Customs House all the said 64 packages and gunny bag containing empty bottles alongwith the plastic roll were taken to the $12^{th}$ floor of the New Customs House. On examination, the said 64 packages were found to be containing 1754 slabs of dark brown substance and each of the said slabs was found wrapped in cellaphane paper. The slabs of dark brown substance found in the gunny bags were covered by lamb skin. The raiding party also recovered 4250 pieces of lamb skins. PW No.1 has further stated that the samples of the said dark brown substance slabs were subjected to preliminary test with the field testing kit and the said test showed positive result for the presence of Hashish. That there was marking on the dark brown slabs and the said marking indicated that they were of Foreign Origin. The said 1754 slabs were weighed and their weight was found to be 1718 Kgs. PW No.1 has further deposed that the approximate price of the seized contraband of 1718 Kgs. in the illicit market was Rs.1,37,44,000/-. This witness has further deposed that the said Hashish weighing 1718 Kgs. was seized under the provisions of NDPS Act and Customs Act, 1962. That the panchanama was concluded at 9.00 a.m. on 28.2.1988. The said panchanama dated 28.2.1988 is at Exhibit 11. That the said samples which were taken from the said dark brown slabs were subsequently sent for chemical analysis.

In the cross-examination, this witness has admitted that he requested to the persons who were gathered near the said godown to act as panchas, however, they did not agree to act as panchas. He did not record the statements of any persons residing in the vicinity of the said godown.

That he did not take any photographs of the contraband or premises at the said godown at the time of carrying out raid. That the Customs Officer did not record statement of the lorry driver who carried the said contraband to the Customs Officer at Ballard Estate, Mumbai.

**5** PW No.2 is Rameshchandra Gosar Bid who was the then Preventive Officer in the Customs Department and was working as Intelligence Officer, was posted in the Narcotic Cell of the Customs at Mumbai at the relevant time. This witness has been examined with a view to prove the fact that the samples from the seized contraband were drawn in the presence of panchas after taking permission from the learned Special Metropolitan Magistrate and were subsequently sent to the laboratory.

**6** PW No.3 is Dilip Shelatkar, the Customs Officer. He was then working as Intelligence Officer in the Narcotic Cell of the Customs at Mumbai. He was a member of raiding party who conducted raid on the godwn situated at Malad on 27.2.1988 at about 11.15 p.m. This witness has stated that the said raiding party was consisted of Assistant Collector Shri Datta, Superintendent Shri T.S. Jayaram (PW No.4), Mr. N.D. Gaonkar (PW No.1), K.C. Mathew and others. This witness has also corroborated the fact as has been narrated by PW No.1 Naresh Gaonkar.

**7** PW No.4 is Talya Subbarao Jayaram who was then then

Superintendent of Customs and in-charge of Head Quarters Intelligence Unit, Mumbai. This witness has deposed that in pursuance of secrete information, the Assistant Collector of Customs Mr. Datta and Additional Collector of Customs Mr. L.D. Arora conducted a search of godown premises at Kharodi village near Marvey Malad under search warrant. This witness has stated the similar facts as has been deposed by PW No.1 Naresh Gaonkar. This witness has further deposed that the said Hashish of 1718 Kgs. was seized under the panchanama under the provisions of Customs Act and NDPS Act. He thereafter recorded statements of the occupants of the said godown.

In the cross-examination this witness has admitted that the names of suspects were the names of accused nos.1 and 2 (i.e. the respondent nos.1 and 2 herein). He has further admitted that before leaving their office on 27.2.1988 for carrying out raid, he did not draw any panchanama and did not make any entry in the office about the same. This witness has further admitted that at the time of recording of statements of the said three employees of the godown under Section 108 of Customs Act, he did not give any warning or caution to them that their statements could be used as evidence against them. He has further admitted that there was no endorsement on the summons that contents of the summons were explained to the said employees in Hindi. He has further admitted that the statements which are at Exhibits 25, 26, and 27 recorded by him have not been made by the said three employees in the godown in the presence of panchas.

**8** PW No.5 is Sham Harkisandas Kuvavala, the Customs Officer and a member of raiding party of 27.2.1988. It appears that the evidence of this witness is formal in nature.

**9** PW No.6 is Gokuldas Kumthekar. This witness in his testimony has deposed that he was working at Narcotic Cell of Customs as Intelligence Officer in February 1988. He along with Shri Krishin Mulchandani (PW No.7) carried out further investigation in the seizure of Hashish which was effected in the intervening night of 27$^{th}$ and 28$^{th}$ of February 1988 from the godown situated at Kharodi village, Malad Maarvey Road, Malad, Mumbai. He has further deposed that during course of investigation, he learnt that the respondent no.1 Autstin Gracious and respondent no.2-David Fernandes who were wanted in the present case had been arrested by Malvani Police Station in other offence and therefore Shri Rameshchandra Bid (PW No.2) made an application in the Court of Additional Chief Metropolitan Magistrate on 15.6.1988 praying for custody of accused nos.1 and 2 for interrogation. The said application was granted by the Court and on 15.6.1988 the custody of accused nos.1 and 2 i.e. respondent nos.1 and 2 herein was given to the Narcotic Cell of Customs, Mumai. That the custody of accused nos.1 and 2 was thereafter handed over to the Court on 17.6.1988. He has further deposed that on 16.6.1988 a person by name Mustafa was called to his office and was confronted with respondent nos.1 and 2. The said Mustafa identified the respondent nos.1 and 2. The said fact was recorded by effecting panchanama which is at Exhibit 32. In the cryptic cross-examination, no material useful to the appellants have been brought on record.

**10** PW No.7 is Krishin Girdharlal Mulchandani, the then Superintendent of Customs Preventive. This witness in his testimony has stated that in the year 1988 he was working as Superintendent attached to Narcotic Cell of the Preventive Collectorate of Customs. That he was a gazetted officer. This witness has further deposed about the information received by the Additional Collector late Shri L.D. Arora in the month of June 1988 and the raid conducted at the said godown thereon including seizure of 1718 kgs of Hashish from the said godown situated at Kharodi village, Malad Marvey Road, Malad, Mumbai. This witness has deposed about the statements recorded by him of the respondent nos.1 and 2 which are at Exhibits 38, 39, 42, and 43. That the said statements were recorded under Section 108 of Customs Act and he thereafter obtained signature of the respondents. He has deposed that he has also recorded the statement of Naziruddin Idris an independent witness which is at Exhibit 44. This witness in unequivocable terms has at various places in his depositions stated that he has recorded various statements of the witness under Section 108 of Customs Act.

In the cross examination, this witness has admitted that on 27.2.1988 he was not aware about the names of suspects involved in the raid to be effected in the intervening night of 27th and 28th February 1988. He has further admitted that at the time of recording the statements which are at Exhibits 46, 48, 49, 51, and 52, questions were put to the said persons in Hindi and they replied in Hindi. The same was subsequently translated. He has also admitted that Naziruddin Idris was illiterate person and therefore his thumb impression on his statement at Exhibit 49 was obtained. It is to be noted here that the said Naziruddin Idris was employee in the godown.

**11** PW No.8 is Narendrakumar Kasturilal Punjabi, the then Superintendent attached to Sahar Airport. This witness had issued a summons under Section 108 of Customs Act on 29.2.1988 to Mr. Mohd. Mustafa Abdul Razak the owner of the godown from where 1718 kgs of Hashish was seized. On 28.2.1988 he recorded statements of the said

Mustafa the owner of the godown which runs into nine-pages at Exhibit 60.

**12** PW No.9 is Bishan Dayal Goyal who was then working as Assistant Collector of Customs. This witness, after completion of investigation has filed complaint in the Court of Chief Metropolitan Magistrate, Mumbai which is at Exhibit 62 on record. This witness has deposed that he perused and examined all papers carefully and minutely and thereafter he submitted the complaint on 9.8.1988 in the Court on Chief Metropolitan Magistrate, Mumbai.

**13** PW No.10 is Mr. Mohd. Mustafa the owner of the said godown at Kharodi village, Malad Marvey Road, Malad, Mumbai. It appears from the evidence of this witness that it is not at all useful to the prosecution as this witness has not stated anything against the respondent nos.1 and 2.

**14** Heard Mr. N. Natarajan, Special P.P. for the Appellant, Ms. Daksha Shah for respondent nos.1 and 2 and Mrs. S.D. Shinde, the learned APP for respondent no.3-State.

**15** Before we proceed to analyze the evidence available on record on the anvil of the settled legal position, we must note here that though the impugned judgment and order refers to therein statements under Section 67 of NDPS Act recorded by the officers of the appellant, a minute scrutiny of the record and in particular Exhibits nos.38, 39, 42 and 43, clearly reveals that the said statements were recorded under Section 108 of Customs Act and not under Section 67 of the NDPS Act. On a query put by this Court to the learned Special P.P. appearing for the appellant as to whether there is any statement of the respondent nos.1 and 2/accused persons recorded under Section 67 of the NDPS Act, he fairly stated that the record discloses that there is no such statement recorded by the Officers of the Appellant and all the statements which were recorded, are under Section 108 of the Customs Act.

**16** At this stage it will be useful to note here that, it is the settled position of law that a statement recorded under Section 108 of Customs Act, 1962 has relevancy to the proceedings under the said Act (Customs Act) because it is recorded in the course of an enquiry in which the officer recording statement, such an enquiry is deemed to be judicial proceedings within the meaning of Section 193 and 228 of Indian Penal Code, 1860. The solemnity and sanctity attached to the statements made during the judicial proceedings therefore attaches to the statements made under Section 108 of the said Act.

It may be noted here that the provisions of  is to be noted here that Section 171 of the Customs Act, 1878 are analogous and corresponding to Section 108 of the Customs Act, 1962.

A constitutional bench of the Supreme Court in the case of ***Ramesh Chandra Mehta Vs. The State of West Bengal [AIR 1970 SC 940]*** has held that a Customs Officer is not a member of the police force. He is not entrusted with the duty to maintain law and order. He is entrusted with power which specifically relates to the collection of customs duties and prevention of smuggling. The test for determining whether an officer of Customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence including the power to submit a report under Section 173 of the Code of Criminal Procedure. It has been further held that a Customs Officer exercising power to make an enquiry cannot submit a report under Section 173 of the Code of Cr. P.C. The Supreme Court has held that, it is true that a Customs Officer under Section 104(3) has been vested with the powers of an officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" however does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Cr. P.C. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate do not make him an officer-in-charge of a police station. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue. Thus a Customs Officer under the Act of 1962 is not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Evidence Act.

It is thus clear that the statements recorded by the Customs Officer under Section 108 of the Customs Act is not hit by the provisions of Section 25 of the Evidence Act. It is to be noted here that a statement under Section 108 of the Customs Act as stated hereinabove is recorded either during enquiry or investigation by a Customs Officer while conducting the enquiry or investigation under the provisions of Customs Act only. It cannot have any overlapping effect on the provisions of any other Act least to say including the provisions of NDPS Act.

**17** The Supreme Court in the case of ***Rajkumar Karwal Vs. Union of India & Ors [(1990) 2 SCC 409]*** by following the ratio in the case of ***Ramesh Chandra Mehta (supra),*** has held that the officers of the Department of Revenue Intelligence (DRI) who have been invested with the powers of an officer-in-charge of a police station under Section 53 of the NDPS Act are not “police officers” within the meaning of Section 25 of the Evidence Act, 1872. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence as against him. It is further observed that officer appointed under Section 53 of the NDPS Act, other than police officer is not entitled to exercise “all” powers under Chapter XII including power to submit a chargesheet/report under Section 173 of Cr. P.C.

It is to be noted here that a confessional statement referred to hereinabove is a statement recorded under Section 67 of NDPS Act by an empowered officer authorised/appointed under Section 42 and/or 53 of the NDPS Act.

The Apex Court in the case of ***Francis Stanly alias Stalin Vs. Intelligence Officer [2007 Cri. L.J. 1157]*** has held that while it is true that a confession made before an Officer of the Department of Revenue Intelligence under the NDPS Act (underline supplied for emphasis) may not be hit by Section 25 of the Evidence Act, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act.

**18** Section 42 of the NDPS Act empowers the Customs Officer of entry, search, seizure and arrest without warrant or authorisation. The Customs Officer (being an officer superior in rank to a peon, sepoy or constable), if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under NDPS Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of NDPS Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset enter into and search any such building, conveyance or place.

Section 41 of NDPS Act enumerates the power to issue warrant and authorisation which prescribes that a Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specifically empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the NDPS Act or for search, whether by day or night of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the

NDPS Act has been committed. The said Section also gives powers to an officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government to authorise any officer subordinate to him but superior in rank to a peon, sepoy or constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such person or search a building conveyance or place.

**19** It is thus clear that there cannot be any dispute about the settled legal position that an officer of Customs Department being superior in the rank as contemplated under Sections 41 and 42 of NDPS Act can conduct search and seizure of the premises and also can conduct enquiry into an offence under the provisions of NDPS Act.

**20** The learned Special P.P. strenuously argued before us that statement recorded under Section 108 of Customs Act has to be equated and treated as a statement recorded under Section 67 of the NDPS Act. He further contended that in the statement recorded under Section 108 of Customs Act, the respondent nos.1 and 2 have confessed about their complicity in the crime as contemplated under the NDPS Act. We are afraid to accept the said submission for the reason that if it is permitted that statement recorded under Section 108 of Customs Act is ipso facto equated and/or treated with statement recorded under Section 67 of NDPS Act, the same will create anomalous situation. Section 108 of the Customs Act is unambiguous and in clear terms states that any gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or produce document or any other thing in any enquiry which such officer is making under this Act (underline supplied for emphasis). Thus it is abundantly clear that statement recorded under Section 108 of the Customs Act is for the purpose of enquiry into the acts of omission or commission done by a person under the provisions of Customs Act. Section 67 of the NDPS Act is prescribed under a separate distinct and special statute with a view to curb the trade, consumption or utilisation and merchandise of narcotic drugs and psychotropic substances. If the Customs Officer duly empowered under the provisions of Section 42 of the NDPS Act embarks into an enquiry to be conducted under the provisions of NDPS Act, he has to strictly follow the provisions prescribed under the NDPS Act. It is the settled position of law that, the stringent provisions of a statute are, strict its compliances. The legislature while enacting the NDPS Act has prescribed severe penalty if its provisions are violated and therefore the said Act also postulates and expects all the authorities who are empowered either to enquire into or investigate the same, its strict compliance in its letter and spirit.

**21** The learned Single Judge of this Court had an occasion to deal with interrelation of provisions of Section 67 of NDPS Act and Sections 108 and 135 of Customs Act, in the case of S***ardar Mohammed Wali Vs. P.S. Namboodri [2004 Cri. L.J. 5091].*** In paragraph-11 of the said decision it has been held that, the statements recorded in view of provisions of Section 67 of N.D.P.S. Act can not be equated with statements recorded in view of Section 108 and 135 of Indian Customs Act, 1962. In Section 108 the words mainly used are “Evidence”, “Summons issued for recording evidence” and “Enquiry” to be held for recording such evidence. Section 67 does not even indicate that such an officer is authorised to record “evidence”. He is not empowered to record the evidence in enquiry. That a specific offence has been indicated by provisions of Section 108, if the person fails to appear for giving evidence in the said enquiry, interrogation in context with summons served on him. That is not the case exactly, so far as Section 67 of the N.D.P.S. Act is concerned. The person may be committing the offence in view of Indian Penal Code, if he refuses to obey the order of said public servant or refuses to make a statement in that context. That but again there is possibility of a debate on the point, whether a person can be compelled to give such statement, which would be used against him, keeping in view the protection granted to him in view of Article 20(3) of the Constitution of India. Thus, statement recorded in view of provisions of Section 67 of N.D.P.S. Act cannot be equated with statements recorded in view of Section 108 of Customs Act, as this Court views. The Supreme Court has nowhere stated that those statements are similar, equal and having equal credence, while appreciating or scanning the evidence on record or while adjusting guilt or innocence of accused.

We are in agreement with the view expressed by the learned Single Judge in the aforesaid case and by accepting the said analogy mentioined in paragraph-11 of the decision in the case of ***Sardar Mohammed Wali (supra).*** We are of the further considered opinion that a statement recorded by the Customs Officer under Section 108 of the Customs Act cannot be equated and/or treated ipso facto as a statement under the provisions of Section 67 of NDPS Act even if the Customs Officer is investigating/enquiring into an offence under the provisions of NDPS Act. In our view it is mandatory and incumbent on the part of the Customs Officer conducting investigation and/or enquiry under the provisions of NDPS Act, to strictly follow the provisions of the NDPS Act. If the accused is willing to give statement under Section 67 of NDPS Act, the Customs Officer has to comply with all the parameters required under the law for recording a confessional statement including that the statement must be voluntary, without any inducement and/or threats or coercion in that behalf. Only in such a situation, statement recorded by the Customs Officer who is empowered officer under Section 42 or 53 of the NDPS Act can be considered as an admissible piece of evidence by the Courts.

**22** We are of the further considered opinion that a statement recorded under Section 108 of the Customs Act by a Customs Officer can be an admissible piece of evidence against an accused in an offence committed under the provisions of the Customs Act. The said statement recorded under Section 108 of the Customs Act, however, cannot be treated ipso facto as a statement recorded under Section 67 of the NDPS Act even if a Customs Officer is conducting enquiry into an offence under the NDPS Act. For a statement to be recorded under Section 67 of the NDPS Act by any officer as specified under Section 42 of the NDPS Act has to meet with all its requirements under Section 67 of the said Act without there being any compromise in that behalf. As stated above, in our view, a statement recorded under Section 108 of the Customs Act cannot be either equated with Section 67 of the NDPS Act or considered to be a statement under Section 67 of the said Act automatically.

**23** The learned Special P.P. in the alternate submitted that as the statements at Exhibits 38, 39, 42 and 43 are recorded under Section 108 of the Customs Act, the offence under Section 135-A stands proved against the respondent nos.1 and 2. In support of his contention he placed reliance on two decisions of Supreme Court namely (I) **1996 (83) E.L.T. 258 (S.C.) in the case of Naresh J. Sukhawani Vs. Union of India** and (ii) **1997 (89) E.L.T. 646 (S.C) in the case of Surjeet Singh Chabra Vs. Union of India.**

There is no dispute about the ratio laid down by the Supreme Court in the said two decisions, however, in the present case, as stated earlier the appellants have failed to adduce any evidence which would show that the contraband Hashish is a commodity or goods which are liable for any official duty/taxes on it, to attract the provision of 135-A of Customs Act. As held by us Hashish is a prohibited contraband under the NDPS Act and it cannot be exported or imported even by paying duty under the Customs Act.

**24** Reverting back to the facts of the present case, as stated hereinabove, it is clear from the record that the officers of the appellant in the present case have recorded various statements of the respondent nos.1 and 2 under Section 108 of the Customs Act and has claimed that those statements are inculpatory statements for basing conviction of the respondent nos.1 and 2. We have minutely scrutinized the entire evidence available on record and found that there is no statement of the respondent nos.1 and 2 recorded under Section 67 of NDPS Act. Upon a query put by this Court to the learned Counsel for the Appellant, he fairly conceded to the fact that there is no statement on record of the respondent nos.1 and 2 recorded by the complainant as contemplated under Section 67 of the NDPS Act.

**25** In the present case, PW No.7 Mr. Mulchandani has recorded the statements of the employees of the godown which are at Exhibits 45,46 and 49 under Section 108 of the Customs Act. The said persons have not been examined by the appellant during the trial and therefore the contents of the said statements including culpability against the appellant have not been established by any other evidence apart from the evidence of PW No.7, who has only proved the recording of the said statements. It is to be further noted here that the respondent nos.1 and 2 have retracted their statements which are Exhibits 38, 39, 42 and 43 under Section 108 of the Customs Act recorded by PW No.7. The prosecution has utterly failed to prove the fact that the confessional statements recorded by PW No.7 under Section 108 of the Customs Act were given by the respondent nos.1 and 2 voluntarily. This was necessary particularly in view of the fact that the said statements were retracted by the respondent nos.1 and 2 before the concerned Magistrate immediately. In that eventuality it was incumbent on the part of the prosecution to establish beyond reasonable doubt and by leading substantive corroborative evidence that the said statement were recorded by the concerned authority without exercising any threats or coercion to the accused persons. Even otherwise the statements recorded under Section 108 of the Customs Act, as mentioned hereinabove, are admissible in the evidence for establishing an offence under the provisions of the Customs Act, and particularly in the present case under Section 135-A of the Customs Act. It is pertinent to note here that PW No.9, the Assistant Collector of Customs has filed a specific complaint in the Court of Chief Metropolitan Magistrate under the various sections of the NDPS Act and also Section 135-A of the Customs Act.

Section 135-A of the Customs Act is a penal provision and specifies that if a person makes preparation to export any goods in contravention of the provisions of this Act i.e. in the present case under the provisions of Customs Act and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, he is determined to carry out his intention to commit the offence, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both.

**26** The learned Counsel for the appellant submitted that the respondent nos.1 and 2 herein are charged with preparation to export the said contraband of Hashish weighing 1718 kgs., which was found to be of foreign origin and therefore, the said provision of Customs Act is applicable. The said submission is to be recorded only with a view to reject it at its threshold. We are unable to accept the said submission on the ground that, firstly the trade of Hashish is totally banned under the provisions of NDPS Act and there is no question of its export to the foreign country. We failed to accept the submission, that the said contraband was “dutiable commodity” and were liable for export in contravention of the provisions of the Customs Act. The appellant has utterly failed to point out any provisions in the law and/or any document or notification issued in that behalf which authorises/permits a person to export the contraband mentioned in the Schedule of the NDPS Act as permissible for export by paying official duty to the Customs Department. The said submission is totally misconceived and has to be rejected in its totality.

**27** As far as the offence under the provisions of NDPS Act is concerned, we must note here that, before removing the alleged contraband, Hashish of 1718 kgs., the investigating agency has not effected any panchanama at the spot of offence from where the said contraband was taken into custody and put into the lorry. In our opinion this has led for raising a strong suspicion about tampering of the seized contraband at every stage from putting the contraband into the said lorry upto effecting its pachanama which is at Exhibit 11. There is evidence on record to show that it was in fact the quantity of 1718 kgs of Hashish. The non-sealing of seized contraband on the spot makes it vulnerable for tampering at every stage. The possibility of tampering with the alleged seized contraband cannot be ruled out at the hands of the officers of the appellant, as they have failed to scrupulously comply with the provisions of NDPS Act.

**28** As stated hereinabove, though the Officers of the Customs Department are empowered to conduct an enquiry or investigation for an offence under the provisions of the NDPS Act, they are required to follow the provisions of the said Act scrupulously. In the present case, the appellant went to the said godown in pursuance of the warrant to search under Section 105 of the Customs Act and it appears to us that the contraband found in the said godown was a chance recovery. That after the officers of the appellant prima facie found that the contraband (Hashish) was stored in the godown it was incumbent and mandatory on the part of the officers of the appellant to immediately resort to the provisions of the NDPS Act and follow it scrupulously.

It is to be noted here that a warrant of authorisation under Section 41 of NDPS Act was not taken by the appellant and therefore we can safely presume that the alleged information was with respect to certain goods which were either imported or were to be exported by avoiding duty to be paid to the Customs Department under the provisions of Customs Act and therefore we are of the opinion that it was a chance recovery for the officers of the appellant.

It is to be further noted here that PW No.2, PW No.6 and PW No.7 though are the officers of the Customs Department, they were also entrusted with duties as an Intelligence Officer, Narcotic Cell, Customs Department. PW No.7, was the Superintendent of Customs, Narcotic Cell. It appears to us that the said officers have either feigned ignorance about the mandatory provisions of the NDPS Act and/or were oblivious about its existence. The same has resulted into prosecuting unmeritoriously a case involving substantial quantity of contraband.

**29** There is no corroboration at all to the retracted inculpatory statements recorded under the provisions of Customs Act by the officers of the appellant and in the absence of such corroboration, we refrain to place reliance on such statements. The said three employees who were found in the godown were not examined by the prosecution in support of its case for corroborating the alleged confessional statements of the respondent nos.1 and 2 recorded under Section 108 of Customs Act. It is further to be noted here that those statements even do not qualify the basic test of Section 108 of Customs Act as the same have not been recorded as evidence in the present case. An authority recording evidence in proceedings which are elevated as judicial proceedings is expected to administer the oath and caution that the said statement would be used against him in a criminal trial as a piece of evidence. In none of the statements produced before us, the concerned Customs officers have bothered to administer the oath and give caution to the said persons. Therefore in our opinion the status of said statements is not better than one recorded by a police officer under Section 161 of Cr. P.C.

**30** We are at pains to note here that while scrutinizing the evidence on record, it is noticed that the respondent nos.1 and 2 in their alleged confessional statements which are Exhibits 38, 39, 42 and 43 have made reference of one Ex-Customs Officer namely Mr. Wadkar who was with them at Nashik Central Prison in the year 1986 and came into their contact. It has further mentioned in the said statements that the said officer brought a tempo and requested the respondent nos.1 and 2 to keep the said contraband in the said godown. We are astonished after scrutinizing the evidence on record that the appellant has failed to trace out the said Mr. Wadkar, the Ex-Customs Officer and has simplicitor proceeded to file a complaint on the basis of alleged confessional statements given by the respondent nos.1 and 2 herein. The evidence of PW No.10 Mr. Mustafa, the owner of the said godown is of no use to the prosecution, as it leads them nowhere.

It is to be noted that here that the recovery of the alleged contraband by the officers of the appellant was from open godown and it is not the case of the appellant that the said contraband was seized from the person of the respondent nos.1 and 2. The prosecution has failed to prove any link from which a reasonable suspicion has given rise about the involvement of the respondent nos.1 and 2 in the entire crime. As per record it is only employees of the godown who have stated about keeping of the said contraband in the godown by the respondent nos.1 and 2. In our opinion, the prosecution has failed to corroborate the said fact by adducing the evidence of the said three employees of the godown.

**31** We are constrained to note here that the officers of the appellant have conducted the enquiry and/or investigation in the present crime with utmost casualness at their commend and in perfunctory and lackadaisical manner which has resulted into prosecuting unmeritoriously a case under the provisions of NDPS Act, for which the appellant has to thank for itself.

**32** In view of the above, we find that the present appeal being sans of any merits is dismissed accordingly.

**(A.S. GADKARI,J.)** **(B.P. DHARMADHIKARI, J.)**