THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

FIRST APPEAL NO. 1003 OF 2007

The Commissioner of Central Excise,
N-5, Town Centre, CIDCO,
Aurangabad – 431 003. ... **APPELLANT**

VERSUS

I. M/s. Sanket Food Products Pvt. Ltd.,
A-9/25 & 27, Additional M.I.D.C.,
Jalna, Through it's Managing Director.

i(i) Shri. Sanjay Shah, Director,
M/s. Sanket Food Product Pvt. Ltd.,
Himco House, 1st Floor, MIDC,
Jalna, Dist. Jalna.

i(ii) Shri. V. V. Mule,
Authorised Segnatory,
M/s. Sanket Food Products Pvt. Ltd.,
A-9/25 & 27, Additional M.I.D.C.,
Jalna, Dist. Jalna.

i(iii) Shri. Sudhir Khanna,
Sales Representative,
M/s. Sanket Food Products Pvt. Ltd.,
A-9/25 & 27, Additional M.I.D.C.,
Jalna, Dist. Jalna.

i(iv) Shri. Ketan Shaha, Director,
M/s. Sanket Food Products Pvt. Ltd.,
Sharda House No. 1-28/40/41,
Deomurti Road, Near Civil Hospital, Jalna.

i(v) Shri. Suresh s/o. Nagindas Soni,
Tulshi Nivas, Talreja Nagar,
Jalna. ... **RESPONDENTS**

…

Mr. D. S. Ladda, Advocate for Appellant.

Mr. Makrand Joshi h/f. Mr. R. R. Chandak, Advocate for Respondents.

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CORAM : **T. V. NALAWADE & SUNIL K. KOTWAL, JJ.**

RESERVED ON : 07th March, 2019.

PRONOUNCED ON : 29th March, 2019.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is admitted. Notice after admission is made returnable forthwith. As paper-book is already produced, heard both the sides for final disposal.

2 The appeal is filed by the Excise Department to challenge the order passed by Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"), New Delhi in proceeding A. No. E/5133-5138/04-C on 26th April, 2005. The Respondent, assessee and the persons, who were involved as Directors and in other capacity in the business of the assessee had filed proceeding before the Tribunal and by common order, the order

of the adjudicating authority, Commissioner is set aside by the Tribunal. The Commissioner had confirmed the duty and penalty imposed on the Respondents in original order No.12/CEX/2004 on 23rd August, 2004. Demand of excise duty of Rs.5,67,86,460/- and the demand of penalty of similar amount under Section 11AC of the Central Excise Act, 1994 (hereinafter referred to as “the Act”) was made. There was a demand of interest under Section 11AB of the Act. Ketan Shah, a Director and Respondent was directed to pay penalty of Rs.25,00,000/- in accordance with the demand made under Central Excise Rules, 2001-2002. There was a demand of Rs.5,00,000/- as penalty as against other director Sanjay Shah under similar Rules. There was a demand of penalty of Rs.2,00,000/- as against M/s. Vishnu Vijay Packaging concern. There was a demand of Rs.2,00,000/- from Suresh Nagindas Soni, who was employed by assessee. There was a demand of penalty of Rs.10,000/- from V.V.Mule, who was authorized signatory of Respondent, assessee. There was a demand of Rs.50,000/- as penalty from Sudhir Khanna, representative of the assessee, who was working at Delhi. All these demands were confirmed by the Commissioner after considering the material and the contentions of the present Respondents, but the entire order of Commissioner is set aside by the Tribunal.

3 The present proceeding is filed against the assessee, who was in the business of manufacture of Gutka and scented tobacco, against two Directors like Sanjay Shah and Ketan Shah, against Mule (employee of the concern), against Khanna (representative of the assessee, who was working at Delhi) and against Soni (Production Manager of the assessee).

4 In view of the reasoning given by the CESTAT that the retracted statements of the Respondents and others cannot be used against the Respondents and further observations that there was no material to prove clandestine removal of excisable goods, this Court holds that following substantial questions of law needs to be decided in the present matter. During arguments this Court had expressed that the following two points will be decided by this Court in the appeal.

i) Whether retracted statements recorded under Section 14 of the Act could have been used as admissions; and

ii) Whether the Tribunal has committed error in holding that there was no material for making the order and whether the Tribunal has committed error in not considering the relevant material, which was produced before the adjudicating authority.

5 The submissions made before this Court and record, which was produced before the learned Commissioner show that many relevant circumstances were made out by the Department. This Court is now quoting those circumstances and the record and on that basis it can become possible as to whether inference can be drawn as against the assessee for fixing the liability, which was done by the Commissioner. The circumstances and the record are as under:

i. The assessee / M/s. Sanket Food Products Private Limited is a private limited company of Ketan Shah and Sanjay Shah. These two brothers were Directors of this company at the relevant time and they were involved in the management of the company. The company was engaged in manufacturing of Gutka / Pan Masala.

ii. The assessee had two factories, two units in Jalna district at the relevant time and the third unit was started in Delhi after December 2001. The two units at Jalna were situated at A-9/ 25/ & 27, Additional MIDC, Jalna and Gat No.186, Tahsil Badnapur, District Jalna.

iii. The two units of the company where manufacturing activity was going on, were transferring goods for sale to office of company viz. M/s. Sanket Food Products Private Limited, A 7/1 Additional MIDC, Jalna.

iv. The proceeds of sale were received at M/s. Sanket Agencies situated at HIMCO House, 1st Floor, Nehru Road, Jalna.

v. The assessee was a franchisee of M/s. J. M. Advertising Company and the assessee was using the band name “Goa Gutka” for selling the Gutka as a franchisee. The assessee was manufacturing the Gutka under his own brand names also like Satyam, Shahi, Bazigar, Mini and Pan Masala.

vi. On 8th March, 2002, the officers of the DGCEI searched the various premises of the aforesaid assessee simultaneously. During visit, inquiry was made with the staff of the company and record was also taken over from the aforesaid places.

vii. There is no dispute over the aforesaid circumstances at (i) to (vi) made out by the department.

viii. The assessee was availing CENVAT in respect of raw material like Printed Laminated Rolls

(PLRs). On other raw material like Supari, Catecho, lime, scent excise duty was not payable.

ix. During search of the aforesaid premises and particularly the factory premises, the officers noticed that there was excess stock of PLRs and it was weighing 7459.59 kilograms. The value of this stock was Rs.12,68,131/- and as this stock was unaccounted, it was seized under *Panchanama*. Separate show cause notice was issued in respect of this discrepancy, but no plausible explanation is given in respect of this excess stock.

x. The inquiry revealed that the assessee was getting PLRs from M/s. Orian Laminators Limited situated at Aurangabad. The officers visited the premises of M/s. Orian Laminators Limited and its stock was inspected alognwith the record. In the premises of M/s. Orian Laminators Limited, excess stock of 10000 pouches, which could have been used for Gutka and PLRs bearing printed name of Goa-1000 brand totally weighing 1723.65 kilograms was found. The management of M/s. Orian Laminators Limited could not give satisfactory explanation about this excess stock. Separate show cause notice was given to M/s. Orian Laminators Limited. The inquiry revealed that only the present assessee was purchaser of such PLRs from M/s. Orian Laminators Limited.

xi. Various brands of Gutka were manufactured at both the units of assessee at Jalna and the product was sold from the office of M/s. Sanket Products mentioned above, which was also situated at Additional MIDC, Jalna. Search of this premises was taken. The record of stock transferred from both the units was collected showing that all the goods were being transferred to this depot. The stock shown to the transferred was recorded at these places. However, some private documents were recovered from these three premises showing that the actual production and actual stock transferred was not recorded at all these three places.

xii. The documents recovered from M/s. Sanjay Agencies, Jana, where the directors were collecting sale proceeds showed that Suresh Soni was working as a marketing official and Sanjay was collecting the sale proceeds in this office. The record which was found at this place revealed that the day-to-day activity of production, stock transferred and actual sale was recorded initially in private documents. The private documents showed the actual daily stock position of raw material, finished goods and payments made to sales personals. The vehicles number in which the goods were cleared, were also mentioned in these private documents. These private documents were then compared with the aforesaid statutory record including RG-I register. The comparison revealed that only some transactions and manufacture only to some extent was mentioned in statutory record of the assessee. It revealed that more quantity of goods were manufactured and cleared, but they were not shown in the statutory record. Interrogation was first made with the officials of the factories, who were working at the aforesaid two units. The interrogation revealed that the goods, which were not shown in statutory record, but which were shown in the private record, were manufactured and were cleared though they were not recorded in statutory record. This record was confronted to the concern including the two Directors of the company when their statements were recorded under Section 14 of the Act.

xiii. During search of M/s. Sanjay Agencies where the sale proceeds were being collected, cash amount of Rs.17,38,230/- was recovered on 8th March, 2002. Sanjay Shah was present in the office at the relevant time. The documents, which were recovered from this office revealed more information about evasion of excise duty. The aforesaid cash recovered was unaccounted and no explanation about it was given. Sanjay Shah admitted that he was looking after the sale proceeds of Gutka manufactured in the aforesaid units and the amount, which was with him was a part of sale proceeds. As there was no mention of cash amount of Rs.17,38,230/- in the statutory record, statement of Sanjay was recorded by confronting the statutory and private record. On this point, a statement of Ketan Shah was recorded on 9th March, 2002. The information supplied revealed that many sales, which were effected from this office were not recorded and that is why unaccounted cash amount was with them. The staff of the assessee also revealed the same thing.

xiv. On 8th March, 2002, residential place of Soni, person involved in the management was searched. Cash amount of Rs.2,00,000/- was recovered from him. Some documents in respect of manufacture and sale activity of the assessee were also recovered from him and they were seized. These documents also revealed that the actual quantity of manufacture, actual clearance and sale was not mentioned in the statutory record. His statement revealed that to avoid the making of payment of duty, such separate private record was created. He could not give satisfactory account in respect of Rs.2,00,000/- and he tried to say that this amount was given to him as bonus by Ketan Shah. There was no mention about this amount also in the statutory record of the assessee.

xv. Statement of Soni recorded on 8th March, 2002 revealed that he was a proprietor of M/s. Sharda Associates situated at B-6, Additional MIDC, Jalna. He informed that he was engaged in manufacturing scented tobacco, which was used by the assessee for manufacturing of Gutka. He admitted that apart from supply of scented tobacco to the assessee, he was looking after the marketing of Gutka manufactured by assessee for entire State of Maharashtra. Though he informed that he was getting Rs.14,000/- per month from the assessee for rendering his services, no such record was found. One more statement of Soni was recorded on 9th March, 2002. The statement of Ketan Shah revealed that Soni was engaged in marketing Gutka manufactured by the assessee and that is why some record of activity of the assessee was found with Soni. This record was also showing that the entire activity of manufacture, stock transferred and sale was not mentioned in the statutory record.

xvi. During search of unit No.1 of the assessee, a private file was recovered in which there was a mention about daily stock of raw material, daily brand-wise production of Gutka etc. The statement of Joshi, Production Manager, was recorded on 9th March, 2002 by confronting the documents, which were in the file. He disclosed that those documents were private containing the information regarding actual daily stock and actual production. Many figures were mentioned in the record and Joshi explained the meaning of those figures. Said record did not tally with the RG-I register of unit No.1. Many entries, which were appearing in the file were not made in RG-I register. Joshi gave explanation that as per the instruction of Ketan Shah, the statutory record was created. In the statement dated 11th July, 2002 Ketan Shah admitted that the quantity mentioned in the private record recovered from unit No.1 was the quantity of goods manufactured, but most of the quantity was not recorded in RG-I register. The officers verified each page of the private record after comparing it with RG-I register for every day activity. For giving illustration, they found that on 28th February, 2002, when 674 bags of Gutka were manufactured, only 192 bags were shown to be manufactured. Statement of Mule, authorized signatory of the assessee was recorded on 13th June, 2002 and he admitted that the actual production of 28th February, 2002 was 674 bags, but the quantity of 192 bags was shown in the statutory record. They were Goa-1000 Gutka bags. In the statement dated 11th July, 2002, Ketan Shah also gave similar admission. This way the quantity manufactured every day, which was mentioned in private record was compared with the statutory record and those entries, which were inconsistent were confronted to these persons and their statements were recorded.

xvii. The inquiry made by the officers revealed that all the raw material was procured for assessee at unit No.1 in centralized manner. As already mentioned, raw material like Supari, perfume, lime, catecho, cardamon do not attract central excise duty. In view of these circumstances, no further inquiry was possible with the shop keepers from whom this material was procured. No correct stock of this material was kept in the record of the units. As already observed, scented tobacco was procured from M/s. Sharda Associates of Soni. Only remaining material like Plastic Laminated Rolls is subject to central excise duty and the assessee was availing CENVAT credit on the duty. Examination of book stock, physical stock and inquiry with the management in respect of PLRs was possible. On the basis of record recovered, investigation was conducted with regard to PLRs with concerns like M/s. Akar Laminators, M/s. Vishnu Vijay Packaging Limited (VVPL) and one more concern like M/s. Orian Laminators Limited. These concerns were engaged in manufacture of plain, flexible, laminated, printed films in the forms of rolls and pouches. The concerns like M/s. Akar Laminators Limited and M/s. Vishnu Vijay Packaging Limited are sister concerns. They were undertaking to do the work of each other on job basis and also on sale and purchase basis.

xviii. Record of M/s. Akar Laminators Limited and M/s. Vishnu Vijay Packaging Limited was examined by the officers and statements of persons like Rane and Sarode were recorded. Both the concerns were having printing cylinders. M/s. Akar was not having printing cylinders of M/s. Sanket or Goa Gutka, but M/s. Vishnu Vijay Packaging Limited was having printing cylinders of “GOA PLUS INNER” (8 numbers) and “GOA PLUS OUTER” (8 numbers). Thus, M/s. Vishnu Vijay Packaging Limited was having cylinders of Goa brand, which was the production of the assessee. There was a record to the effect that flexible laminated plastic of “YAHOO” brand was supplied to M/s. Sanket Industries, Jalna, but there was no cylinder of that brand with both these sister concerns. Thus, by showing the supply of film of brand “YAHOO”, the film for Goa brand was supplied. It was shown to be supplied to M/s. Sanket Industries Limited, but it was actually supplied to M/s. Sanket Food Products, assessee. This supply was found to be of

21344.38 kilograms. The record showed that the printed laminated film of 100.25 kilograms was supplied to the assessee for the period 1st April, 2001 to 28th February, 2002. The record showed that M/s. Vishnu Vijay Packaging had printing cylinders of “Goa 1000” and “Goa Plus” also. Two sets each of these cylinders were there. Information revealed that one time use of each cylinder gives 4 to 8 tons of printed films. After that the cylinder requires re-engraving. The facilities of re-engraving was available with M/s. Akar Laminators Limited (unit No.2). Record showed that on eight occasions, the work of re-engraving of cylinders was done by M/s. Akar Laminators Limited for M/s. Vishnu Vijay Packaging Limited. Thus, the work of re-engraving was done for making supply to assessee. On that basis, calculations of duty are made by the officers.

The record of work done by these two

sister concerns for each other was collected. The work of printing and lamination of plain film was given by M/s. Akar Laminators Limited of 6275.68 kilograms to M/s. Vishnu Vijay Packaging and M/s. Akar Laminators Limited got similar quantify of printed film. However, M/s. Akar Laminators Limited sold 23722.25 kilograms of printed film to M/s. Vishnu Vijay Packaging Limited. This material was sold to M/s. Sanket Industries. As already observed, the material ultimately was reached to M/s. Sanket Food Products Limited, assessee. Thus, the investigation revealed that the official sale of only 100.25 kilograms was shown to be made to M/s. Sanket Food Products Limited, assessee and other record was made in the name of M/s. Sanket Industries of aforesaid two Shah brothers. The film supplied by the aforesaid concerns was reached to M/s. Sanket Food Products Limited as only M/s. Sanket Food

Products Limited, assessee was manufacturing the Gutka of Goa brand. Thus, the work of quantity of more than 24.04 tons was actually done for the assessee and that was of preparation of pouches for Goa Gutka. This record of manufacturing of the film was tallying with the private record recovered by the officers from the two units of assessee, which was to the effect that the assessee had paid Rs.70,22,039/- to M/s. Vishnu Vijay Packaging Limited. The official record, however, was created to show that the work worth Rs.20,712/- was got done from M/s. Vishnu Vijay Packaging Limited.

xix. As per the record of assessee, M/s. Orian Laminators Limited, Aurangabad was also supplier of printed laminated rolls to the assessee. When the premises of M/s. Orian Laminators Limited were searched on 8th March, 2002, the search revealed that there was excess stock of 10000 pouches and there was excess stock of 1723 kilograms of printed laminated rolls bearing print of Goa Gutka 1000 brand. No satisfactory explanation was given by the persons controlling M/s. Orian Laminators Limited in respect of this excess quantity. Similarly, there was shortage of 1412 kilograms of plain polyester film. The record of M/s. Orian Laminators Limited showed that the finished goods were not recorded in RG-I register. The statement of Jhunjhunwala, Managing Director of M/s. Orian Laminators Limited was recorded on 8th March, 2002. He admitted that without accounting any RG-I register and without making payment of excise duty, they had cleared goods, which were delivered to the assessee. When it was found in possession of the aforesaid material, there was no record of order of printed laminated films from the assessee and Jhunjhunwala gave information that the assessee used to give orders orally and so the record was not kept. Information was collected from Sharma, Production Manager of M/s. Orian Laminators Limited about the capacity of the factory to manufacture on the basis of existing numbers of cylinders. He admitted that the quantity of 1412.2 kilograms of polyester film was used for giving delivery to the assessee of Goa Gutka and it was of printed laminated film. He admitted that in respect of the delivery already given, no account was maintained. This stock matched with the excess stock recovered from the units of factory of the assess. The unaccounted printed laminated film of 5648 kilograms was delivered to the assessee by M/s. Orian Laminators Limited. Thus, from the three concerns, this kind of raw material weighing 29.71 tons was purchased by the assessee, but correct account of this raw material was not maintained by the assessee. The account in respect of most of this quantity was with the aforesaid two sister concerns.

The information revealed that by using aforesaid quantity of film 7.43 crore pouches could have been produced. The officers have considered all these material for calculation of the duty evaded by the assessee. Thus, unrecorded printed laminated film was used by the assessee for unrecorded manufacture of Gutka.

xx. The private record of M/s. Sharda Associates also showed that it was engaged in manufacturing of pre-formulated Gutka. It was supplying such loose Gutka to unit No.2 of the assessee. It was not maintaining any record or account in respect of this supply also. As Soni was working for the assessee, this circumstance again shows another mode of evasion of excise duty.

xxi. The officers had recorded statements of transporters showing that they had transported loose Gutka from the premises of assessee to Gujarat. No account of such Gutka was maintained by the assessee. It needs to be mentioned here that no calculation of evasion of excise duty is made and the calculation is only in respect of finished goods.

xxii. There is a record to show that Respondent, Khanna of Delhi was appointed as marketing representative by the assessee for northern India. Such record was recovered from Jalna, office of the assessee and also from Delhi office of the assessee. In the statements given by Soni and Shah, they admitted that Khanna was working for assessee in Delhi. At Delhi, as per the official record, manufacturing activity was started by assessee of Goa Gutka from December 2001. The record revealed that prior to December 2001 also, Goa Gutka was soled by the assessee at Delhi. This quantity was not shown in the statutory record of Jalna. The record recovered from Khanna showed that he had received 1370 boras of Gutka from Jalna and the value of the transaction was Rs.1,35,75,580/-. Record of Khanna showed that upto 28th February, 2001, the amount of Rs.89,02,458/- was paid by him to Ketan Shah and remaining amount was due from Khanna. The purchase rates record is there and as per this record, amount is calculated. Profit figure was also there on record. No written agreement was brought in existence and Khanna disclosed that there was oral agreement with the assessee through Soni. He revealed that for Delhi unit, Jalna factory was manufacturing Gutka prior to December 2001 and after that Delhi unit started manufacturing activity.

It is not disputed that Khanna was

working as Sales Manager since December 2000. Inquiry revealed that Khanna was being paid Rs.32,000/- per month for discharging the duty.

Record is collected to show that 1801 boras of Gutka were removed to Delhi from Jalna by evading excise duty. Record is collected like railway receipts to show that from Delhi office of assessee, Goa Gutka was dispatched for areas of northern India like Dehradun, Akbarpura, Shahganj, Sultanpur, Saharanpur etc. This record is of pre December 2001 period. Statement of one Gupta, employee of assessee, who was also working at Delhi about these dispatches is recorded. Statement of one Mohan Suri, a railway booking agent is also recorded and the record is recovered and seized from his office. This record is to the effect that the aforesaid dispatches of Goa Gutka was for Delhi unit of the assessee. The material revealed that from Jalna, aforesaid material was dispatched by Sachkhand Express train and by railway 3158 boras of Gutka were reached to Delhi. In respect of Gutka sent to Delhi, there was evasion of duty of Rs.1,75,94,010/- and thus total recovery of excise duty, which needs to be made was calculated as Rs.5,67,86,460/-.

6 Before the adjudicating authority, Commissioner, aforesaid record was produced and the statements of 12 witnesses recorded under Section 14 of the Act were produced. The learned Commissioner allowed the present Respondents to cross-examine 10 witnesses though statements of 12 witnesses were produced. The witnesses like Sanjay Shah, Ketan Shah (two Directors of the assessee), Animesh Gupta (employee of the assessee from Delhi), Soni (employee of the assessee), Joshi (employee of assessee) and Sudhir Khanna (employee of assessee appointed at Delhi) admitted every suggestion given to them during cross-examination as they wanted to retract the statements. Jhunjhunwala, Managing Director of M/s. Orian Laminators Limited also turned hostile and he retracted the

statement. Two *Panch* witnesses on the incident of recovery of documents and seizure like Diama and Harun Khan turned hostile, but they admitted their presence on the spot when the officers had visited those places and *Panchanamas* were prepared. They admitted their signatures appearing on the record. Under these *Panchanamas*, documents and cash amount was recovered and seized and so, even after considering the circumstance that the *Panch* witnesses did not admit the contents, the record can be considered as relevant record.

7 The other witnesses like transporter Moin, Mule employee also turned hostile. It appears that as these persons against whom record was collected and there was a possibility of imposing penalty on them and at the end penalty was also imposed on the manufacturers and the persons managing the concerns, the department did not examine them as witnesses of department, but the learned Commissioner allowed the Respondents to give evidence in the form of cross-examination and opportunity was given to them. Much is made before Tribunal about the circumstance that all these witnesses retracted their statements and denied the contents of the documents. The Commissioner had considered the circumstance that

only Khanna had retracted from the statements dated 8th March, 2002 and 24th April, 2002 immediately. No other Respondents had retracted from the statements till they were cross-examined by their own counsel. Many statements of these witnesses were recorded after keeping gap in consecutive statements, but in subsequent statements also, previous statements were not retracted by these Respondents and this circumstance is considered as relevant by the learned Commissioner. The learned Commissioner has considered the circumstance that the record recovered prior to the statement and after the statement was found to be consistent with the contents of the statements of Respondents. The learned Commissioner has considered the date-wise production, date-wise removal of finished goods and those figures were compared with the statements and the private record created by the Respondents and further there was independent record of packaging material collected from aforesaid three concerns. There was another circumstance like Gutka supplied to Delhi unit of huge quantity and there was independent record of railway receipts and the record of railway booking agent. Thus, it cannot be said that to corroborate the retracted statements of the Respondents, there was no material. The private record was collected from different places and different persons and all that record was considered by the learned Commissioner. The circumstance like excess quantity of raw material, film found in the factory of the assessee and found in the factory of supplier, was relevant circumstance and it was considered as such by the learned Commissioner. There was circumstance of recovery of huge amount of unaccounted cash from the place where the sale proceeds were collected and this circumstance also relevant. The circumstance that some record was found with Soni, employee of the assessee was also relevant and the circumstance that Soni had not kept any record about supply of scented tobacco was also considered by the learned Commissioner.

8 The learned counsel for Appellant placed reliance on the observations made in some reported cases and submitted that the statements recorded under Section 14 of the Act can be used against the maker even after retraction. He submitted that in the present matter, only Khanna had retracted the statement immediately, but the Directors of the assessee had not retracted the statements till they were examined before the Commissioner when many statements

were given by them and this circumstance is not considered by the Tribunal. He submitted that even a witness from one concern, who had supplied laminated film was examined and there were above circumstances, which were considered by the learned Commissioner against the Respondents, but that material is not touched by the Appellate Tribunal. He submitted that as relevant material, which is there to corroborate the statements given under Section 14 of the Act is not considered, the Tribunal has given erroneous decision. This Court holds that there is substance in the aforesaid submissions made and the relevant circumstances, which corroborate the retracted statements are already quoted. Further the provision of Section 9D of the Act is not touched by the Appellate Tribunal. The circumstance that the proceeding which was started against Jhunjhunwala was dropped could not have made much difference as Jhunjhunwala was examined before the adjudicating authority and there was material like record of M/s. Orian Laminators Limited showing supply of laminated film, which was not accounted by the assessee. There is huge material in support of the statements given, which is already quoted and that record is not at all touched and appreciated by the Appellate Authority. While deciding the appeal, the Tribunal ought to have touched that material and ought to have given reasons for setting aside the findings of the adjudicating authority but that is not done. In such a case, when the material of aforesaid nature is available, the burden or proof also shifts and assessee is required to explain the things made out by the material. For that, the provisions of Sections 106 and 114 of the Evidence Act can be used. That approach was not adopted by the Appellate Tribunal. In view of the provisions of the Act, the proceeding before the adjudicating authority needs to be treated as judicial proceeding and so, such approach was possible. This Court has no hesitation to hold that the circumstance that most of the raw material except laminated film was not covered by the Central Excise Act was misused by the Directors of the assessee and there was clandestine removal of the goods.

9 The learned counsel for Appellant placed reliance on the observations made in the following cases:

a) ***1997 (2) LCX0021***, (*K.I. Pavunny Vs. Asstt. Collr. (HQ.), C. EX. Collectorate, Cochin*);

b) ***(2006) 204 ELT 293***, (*Commissioner of Central Excise, Ahmedabad-I Vs. Metal Tubes (India)*).

In the first case, the Apex Court has laid down that if there is material for general corroboration to the contents of statement given under Section 14 of the Act, the retracted statement also can be used against the Accused in criminal case. In view of the nature of proceeding of adjudication and nature of burden of proof, such material can be definitely used against the maker.

10 The learned counsel for Respondents placed reliance on some observations made in some reported case as under:

a) ***2018 (361) E.L.T. 167 (Mad.)***, (*The Commissioner of Central Excise, Madurai Vs. Vasu Chemicals*), Madras High Court;

b) ***2017 (345) E.L.T. 629 (Guj.)***, (*Commr. of C. EX., CUS., & S.T., Bharuch Vs. Shree Krishna Industries*), Gujarat High Court;

c) ***2016 (338) E.L.T. 203 (Guj.)***, (*Commissioner of C. EX. & CUS., & Surat-I Vs. Jai Bhawani Metal Industries*), Gujarat High Court;

d) ***2016 (344) E.L.T. 111 (Guj.)***, (*Commissioner of C. EX., Customs & Service Tax Vs. Krishna Sales*), Gujarat High Court;

e) ***2015 (322) E.L.T. 283 (Guj.)***, (*Commissioner Vs. Fact Paper Mill Ltd.*), Gujarat High Court; and

f) ***2010 (251) E.L.T. 376 (Bom.)***, (*Singh Scrap Processors Pvt. Ltd. Vs. Collector of C. EX., Mumbai-VII*), Bombay High Court.

The facts of all these cases were different.

11 In view of the discussion made above, this Court holds that the statements recorded under Section 14 of the Act of the witnesses, who were examined before the adjudicating authority can be used as admissions though they are retracted and they can be used in relation to the material, private documents recovered from the premises of the assessee and the premises of the suppliers, who had supplied raw material like laminated films. This Court further holds that the decision of the Appellate Tribunal is bad in law as the relevant material is not considered by the Appellate Tribunal. For these reasons, the decision of the Appellate Tribunal needs to be set aside.

For giving opportunity to the Appellant before the Tribunal and for consideration of the material, which was considered by the learned Commissioner, the matter needs to be remanded back and so, the following order is passed:

ORDER

I. The appeal is partly allowed.

II. The decision of the Appellate Tribunal is hereby set aside.

III. The matter is remanded back to the Customs, Excise and Service Tax Appellate Tribunal for fresh consideration.

IV. The Customs, Excise and Service Tax Appellate Tribunal is to consider and decide the appeal within a period of four months from the date of receipt of this judgment.

V. Pending civil application stands disposed of.

[SUNIL K. KOTWAL, J.] **[T. V. NALAWADE, J.]**

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