

(1991) 09 AP CK 0004

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 161 of 1991

Assistant Collector of Central Excise

APPELLANT

Vs

Duncan Agro Industries Ltd.

RESPONDENT

Date of Decision : 18-09-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 47, 47(1), 49, 49(1), 9
Central Excises and Salt Act, 1944 — Section 14, 9(1), 9D
Customs Act, 1962 — Section 108

Citation : (1991) 2 APLJ 459

Hon'ble Judges : N.D. Patnaik, J

Bench : Single Bench

Advocate : K. Subrahmanya Reddy and Special Counsel assisted by D. Venkateshwara Rao and C.V. Vinitha Reddy, for the Appellant;

Judgement

1. Criminal M.P. 399/1991 is filed to grant leave to prefer an appeal (Criminal Appeal No. 161/1991) against the judgment dated 16th November, 1990 in C.C. No. 179/1986 in the Court of the Special Judge for Economic Offences, Hyderabad acquitting the accused.

2. The petitioner (appellant) filed the complaint against the accused for offences under the Central Excise Act and for criminal conspiracy. The gist of the allegation is that the 1st accused and the 3rd accused companies who were engaged in the manufacture of cigarettes at their factory at Biccavolu have committed evasion of excise duty payable on cigarette with the help of the other accused. The trial court framed four charges. The 1st charge is u/s 120-B I.P.C. r/w Sections 9(1)(n), 9(1)(bb), 9(1)(bbb) of the Central Excises and Salt Act against A. 8 to A. 31 and A. 34 to A. 40. The second charge is u/s 9(1)(b) and 9(1)(bb) r/w Section 9(1)(d) of the Central Excises and Salt Act against A-1, A-3, A-7, A-8, A-18 to A-28, A-30, A-34, A-38 to A-40. The third charge is u/s 9(1)(b), 9(1)(bb) and 9(1)(d) of the Central Excises and Salt Act against A-1, A-4 to A-17, A-23, A-25 to A-31, A-34 to A-38, A-40. The fourth charge is under Sections 9(1)(b), 9(1)(bb) and 9(1)(d) of the Central Excises and Salt Act

against A-1, A-3, A-8 to A-24. The learned Special Judge for Economic Offences found that the prosecution has failed to prove all the charges and acquitted the accused. In the memorandum of appeal a note is made which reads that A-2 was deleted by an order of Supreme Court holding A-1 and A-2 are one and the same. A-32 and A-33 were discharged while framing charges. As regards A-4, A-29 and A-31 the prosecution conceded that there is no proof against them in respect of the cigarettes from Biccavolu. Therefore, the appeal is filed against other accused.

3. The main contention of the learned counsel for the appellant is that the trial Court committed an error in discarding the statements recorded by the Central Excise Officers u/s 14 of the Central Excise Act from the witnesses and also from persons who subsequently became accused, which are now in the nature of confessional statements. Section 14, sub-section (1) of the Central Excise Act enables any Central Excise Officer duly empowered by the Central Government to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any enquiry which such officer is making for any of the purposes of this Act. Sub-section (2) says all that persons so summoned shall be bound to attend either in person or by an authorised agent and state the truth upon any subject respecting which they are examined or making statements and to produce documents and other things as may be required. Sub-section (3) says that every such enquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The trial Court rejected the statements of the witnesses on the ground that the persons are alive excepting one person who died and so the statements of those persons are irrelevant. As regards the confessional statements recorded from the accused by the Central Excise Officers, he found that they are not voluntary. Therefore, he rejected all the statements and confessions recorded u/s 14 of Central Excise Act.

4. While Section 14 of the Act enables the Central Excise Officer to summon any person to give evidence or produce a document and to record the statement in any enquiry which that officer is making for the purpose of that Act, Section 9D deals with the relevancy of statements under certain circumstances. Sub-section (1) says that a statement made and signed by a person before any Central Excise Officer or gazetted rank during the course of any enquiry or proceeding under this Act, shall be relevant for the purpose of proving in any prosecution for any offence under this Act, the truth of the facts which it contains (a) when the person who made a 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 circumstances of the case the Court considers reasonable or (b) when the person who made the statement is examined as a witness in the case before the Court either opinion, that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. The trial Court held that all the witnesses from whom the statements are recorded by the

Central Excise Officer are alive excepting one person by name N. Mallikarjuna Rao, who died and found that only Ex. P-46 and Ex. P-47 which are the statements made by C. Mallikarjuna Rao are admissible in evidence and other statements are not admissible as the witnesses are alive. He has considered the effect of clause (b) of Section 9D also and observed that none of the witnesses from whom the statements were recorded have been treated as hostile and hence clause (b) is not applicable and therefore their statements cannot be admitted in evidence in the interest of the justice. He has stated that at best the statements can be used only for contradicting the evidence of the witnesses u/s 145 of the Evidence Act, but they cannot be treated as substantive evidence in view of Section 9D of the Act. I agree with this finding of the learned Special Judge that the statements of witnesses recorded by the Central Excise Officer u/s 14 of the Central Excise Act and who are alive cannot be treated as substantial evidence in the criminal prosecution in view of Section 9D of the Act.

5. The next question is about the confessional statements recorded by the Central Excise Officers from some persons who were later arrayed as accused in the case. The accused have retracted from the confessional statements. The learned Special Judge has rejected those statements on the ground that they are not voluntary. He has pointed out that the persons who recorded the statements are persons in authority and the concerned officers have admitted that they told the accused that they have to face the prosecution if they do not make a true statement and that itself would show that threats were meted out to the accused before recording statements and so they are hit by Section 24 of the Evidence Act. He has also pointed out that when a confessional statement is recorded by a Magistrate u/s 164 Cr. P.C. several precautions are taken to see that they are voluntary statements and even if the confessions are recorded by the Central Excise Officers, they have to take the necessary precautions. But the officers have admitted that they have not put a vital question that the statements which the person is likely to make will be used against him. Therefore, he held that those confessions are not voluntary.

6. The learned counsel for the appellant has pointed out that in order to attract Section 24 of the Evidence Act, the threat or inducement must be from a person in authority. But, in this case, merely because the officers who have recorded the statements have told the accused that they are bound to speak the truth and if they do not speak the truth they are liable for prosecution, they are only bringing to their knowledge the statutory provisions of Section 14 of the Excise Act. Therefore, Section 24 of the Evidence Act is not applicable. He has relied on the following decisions :-

7. In the case reported in Percy Rustomji Basta Vs. State of Maharashtra, the Supreme Court has considered Section 108 of the Customs Act which is similar to Section 14 of the Central Excise Act and pointed out that wherein an enquiry in connection with smuggling of goods, Customs Officer told person summoned u/s 108 of Customs Act that law required such person to tell truth and explained

consequences of Section 193, I.P.C. such explanation by Customs Officer did not constitute threat u/s 24 of Evidence Act. That person had no basis for supposing that by making the statement he would gain any advantage or avoid any evil with reference to the proceedings in respect of which an inquiry was being conducted by the Customs Officers.

8. He has also referred to the decision of the Supreme Court in *Veera Ibrahim Vs. The State of Maharashtra*, in which it is pointed out that to attract the prohibition enacted in Section 24 of Evidence Act it must be established that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority.

9. The learned counsel for the appellant therefore contended that the confessional statements recorded by the Central Excise Officers from the accused are not hit by Section 24 of the Evidence Act and they cannot be discarded on that ground.

10. As I have stated above, the learned Special Judge has discarded the confessional statements on two grounds. Firstly that they are hit by Section 24 of the Indian Evidence Act and secondly the Excise Officers did not follow the procedure prescribed u/s 164 of the Code of Criminal Procedure while recording the confessions. Though Section 14 of the Central Excise Act enables the Excise Officers to record the statements of any person in the enquiry which they are making for the purpose of that Act, it does not contain any provision for recording confessional statements or the procedure to be followed by the Central Excise Officers while recording the confessional statements of accused persons. According to Section 4(2) of Code of Criminal Procedure, all offences under any other law i.e., other than the Indian Code shall be investigated, enquired into, tried or otherwise judged with, according to the same provision i.e. Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner of place of investigation, enquiring into, trying or otherwise dealing with such offences. A Division Bench of this Court held in *N.S.R. Krishna Prasad v. Directorate of Enforcement* (W.P. No. 3103 of 1991) that Section 108 of the Customs Act does not empower the authority to record the confessional statement from a person summoned thereunder and therefore the Customs Officer can only record the confessional statement by following the procedure prescribed u/s 164 of the Code of Criminal Procedure by administering necessary warning and non-compliance with the mandatory provisions contained in Section 164, sub-section (2) of the Code of Criminal Procedure renders the statement inadmissible in evidence. The learned counsel for the appellant has pointed out that the decision of the Supreme Court in *Haroon Haji Abdulla Vs. State of Maharashtra*, which says that statements made in answer to notices u/s 171A of the Sea Customs Act which is also a similar provision are not confessions recorded by the Magistrate u/s 164 of the Code of Criminal Procedure, was not brought to the notice of the Division Bench which rendered the above judgment and therefore the judgment of the Division Bench is not correct. In para 6 of the

judgment of the Supreme Court it is stated as follows :-

"These statements are not confessions recorded by a Magistrate u/s 164 Cr. P.C. but are statements made in answer to a notice u/s 171(A) of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from someone in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received and also against a co-accused jointly tried with him. Section 30 of the Evidence Act does not limit itself to confessions made to Magistrates, nor do the earlier Sections do so and hence there is no bar to its proper application to the statements such as we have here".

This decision only says that as the statements recorded by the Officers u/s 171(A) of the Sea Customs Act are not confessions recorded by a Magistrate u/s 164 of the Code of Criminal Procedure and are made subject to the safeguards under which confessions are recorded by Magistrate, they must be specifically scrutinised to find out whether they are made under threat or promise from someone in authority. That decision has not considered the question whether a Customs Officer recording the confession u/s 171(A) of the Sea Customs Act has to follow the prescribed procedure u/s 164 of Code of Criminal Procedure. The Division Bench of our High Court in the case referred to above has referred to the decision of the Supreme Court in *A.R. Anthulay v. Ramdas Srinivas Naik* AIR 1984 S.C. 719.] which has referred to Section 4, sub-sections (1) and (2) of the Criminal Procedure Code and observed as under :-

"In the absence of a specific provisions made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Criminal Procedure Code. In other words Criminal Procedure Code is the parent statute which provides for investigation, inquiring into and trial of cases by Criminal Courts of various designations".

The Division Bench, has, therefore, held that as there is no power in the Excise Officer u/s 108 of the Customs Act enabling him to record a confessional statement, he must necessarily fall back upon the requirements of Section 164 of Code of Criminal Procedure. Therefore the decision of the Division Bench is not at all contrary to the decision of the Supreme Court in *Haroom Haji v. State of Maharashtra* (supra), because that decision did not consider this matter.

11. Section 164(2) of the Code of Criminal Procedure says that the Magistrate shall before recording any such confession, explain to the person making it that he is not bound to make his confession and that if he does so, it may be used as evidence against him and the Magistrate shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily. Therefore, though Section 164 of Code of Criminal

Procedure only refers to a confession recorded by Magistrate, but in view of the decision of the Division Bench of our High Court referred to above, the same procedure has to be followed by the Customs authorities in recording the confessional statement from the accused persons. It follows that the basic condition to be fulfilled by the Officer recording the confession is to administer a warning to the person making it, that he is not bound to make a confession and if he does so, it may be used as evidence against him. The learned Judges who delivered the decision of the Division Bench have observed that :-

"It is a fundamental basic principle of criminal jurisprudence that caution must be administered to a person from whom a confessional statement is recorded that the same would be used against him in a judicial proceeding".

Since the Excise Officers who have recorded the statements from the accused in this case have not administered the warning to the accused as required u/s 164, sub-section (2) of the Code of Criminal Procedure, non-compliance of the mandatory provision contained in Section 164, sub-section (2) of Code of Criminal Procedure renders the statements inadmissible in evidence as held by the Division Bench. Therefore, those statements are inadmissible against the makers thereof or against the co-accused.

12. Having discarded the statements recorded u/s 14 of the Excise Act, the learned Special Judge considered the other evidence on each charge. It may be noted that if the statements recorded u/s 14 of the Excise Act are not taken into consideration, there is no satisfactory evidence to prove the charges. I will consider the submissions made by the learned counsel for the appellant on the individual charges. The case of the prosecution under second charge is that during the period from 1-4-1983 to 30-11-1985 A-1 to A-3 companies are alleged to have sold some quantities of tobacco to A-7 company, that some tobacco was transferred from Biccavolu factory to Agarpala and some tobacco was lost or damaged and that this is not correct but in fact it was used for clandestinely manufacturing of cigarettes and thereby they evaded payment of excise duty thereof. The prosecution had adduced some evidence to show that these sales are fictitious. The learned Special Judge after considering the evidence has disbelieved the prosecution case that huge quantities of unaccounted cigarettes were manufactured with the tobacco which is falsely shown as sold or damaged. He has pointed out that there is no evidence to show that the factory in fact manufactured excess quantities of cigarettes in excess of what is accounted for, that the factory was under the physical control of the Central Excise authorities who are posted in the factory round the clock in accordance with the shift system and therefore it is not possible for any unaccounted tobacco for production or clandestine removal of cigarettes. The learned counsel for the appellant has stated that even though the staff of the Central Excise department were posted on duty round the clock the prosecution suspects that they have colluded with the accused permitting them to remove the quantities of cigarettes on which tax was not paid. The burden is on the

prosecution to establish that the huge quantities of tobacco which was said to have been sold or destroyed was in fact used for the manufacture of cigarettes and that they have removed without paying tax. Even assuming for the sake of argument that some quantity of tobacco was not sold or damaged as alleged by the prosecution, the prosecution has to further prove that the said quantity of tobacco was used in the manufacture of cigarettes. It is stated that about four thousand to five thousand machine cards were seized by the department to show the production during that period. Out of them only one set of four bunches of machine cards relating to one month i.e., November, 1985 are produced in the Court and are marked as Ex. P-112. Ex. P-113 is a work sheet showing the calculations made by P.W. 7. The accused have filed a reconciliation statement Ex. D-6 filed before the Principal Collector of Central Excise, New Delhi. The learned trial Judge observed that when the documents constituting the basis for Ex. P-113 are not made available to the Court it is not possible to vouchsafe its correctness or to disbelieve Ex. D-6. He has also pointed out that apart from raw-tobacco there are other materials which are required for the manufacture of cigarettes i.e. paper, shells, slides, filter material etc. and no verification was made by the officers regarding the usage of other raw-materials in order to justify the inference that so much of raw-tobacco was used for unaccounted production of cigarettes. He has therefore come to the conclusion that the prosecution has failed to prove that there was clandestine production of cigarettes by using unaccounted tobacco on a large scale during that period. As I have stated above even if it is to be assumed that the accused have not accounted for some quantity of tobacco still the burden is on the prosecution to prove that the said tobacco was used in the manufacture of cigarettes and as the prosecution failed to establish by satisfactory evidence that there was clandestine manufacture of cigarettes during that period the finding of the learned trial judge that the prosecution failed to prove the charge cannot be said to be wrong.

13. The prosecution case on the third charge is that the accused have escaped from payment of excise duty by reducing the value of the cigarettes by deducting the cost of post-manufacturing expenses. They contend that A-4 to A-7 are only the front companies of A-1 and A-3 and did not render any service. The learned Special Judge held that they are not front companies and the service charge constitutes post-manufacturing expenses which are not subject to duty. He has followed the decision of a Division Bench of this Court in *Indo National Limited v. Union of India*[1979 (4) ELT (J 334).] which has laid down that expenses for advertisement, publicity, godown charges, insurance, sale promotion, marketing and distribution, freight, packing and interest are post-manufacturing expenses and should be excluded from the normal price. Likewise selling costs and selling profits should also be excluded and therefore found that the post-manufacturing expenses are not chargeable to excise duty. The learned counsel for the appellant has stated that this decision of the Division Bench is no longer good law in view of the decision of the Supreme Court in *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, . That decision says that

where the sale is effected at the factory gate expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handing charges, interest on inventories (stocks carried by the manufacturer after clearance) charges for other services after delivery to the buyer namely after sales services and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It is further pointed out that where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at place or places outside the factory gate the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot on the same ground be deducted. But the assessee will be entitled a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery. Therefore, the Supreme Court had allowed only certain items of expenditure but disallowed all other items. It is stated that in pursuance of the decision of the Supreme Court the assessments were reopened and the department was asked to make further assessment. In fact it is stated that when a show cause notice was issued the first accused has challenged it by way of writ petition in the Delhi High Court which was dismissed in the decision reported in *Duncan Agro Industries Ltd. v. Union of India* [1989 (39) ELT 211 (Delhi)]. Therefore the excise authorities have to assess the duty payable by the accused company. Unless the assessment is finalised it cannot be said that there is an evasion in payment of excise duty. The learned counsel for the appellant has pointed out that adjudication of the duty is different from a prosecution and it is open to the department to pursue both the actions. He has relied upon the above decision in support of his contention. It is stated that the proceedings for the recovery of duties and imposition of penalties taken under fiscal statutes are distinct from the prosecutions in pursuance of criminal complaints.

14. The question that arose in that case was that if the department proceeds both with the show cause notice and also the criminal prosecution any statement given by the petitioner therein may be used as evidence in the criminal case and therefore it offends Article 20(3) of the Constitution of India. The Court held that the immunity granted under Article 20(3) of the Constitution does not apply to adjudication proceedings. At the time of hearing of that case the learned Additional Solicitor General appearing for the respondent therein stated that the respondent will not use in the criminal trial any of the statements made by the petitioner in that adjudication proceedings and so it was held that the principles of fair play have been respected. But the question in the present case is whether the accused can be prosecuted for non-payment of excise duty. As I have stated above they have deducted some amounts from the value according to previous decision on the ground of post-manufacturing expenses. Since the adjudication proceedings are pending before the Central Excise authorities, they have to determine what are the items that can be deducted and what items cannot be

deducted in view of the decision of the Supreme Court and finalise the tax payable by the accused. Therefore, at this stage it cannot be held that the accused evaded payment of tax since the adjudication proceedings are still pending before the authorities. Therefore, I hold that the prosecution on this charge is premature.

15. On charge No. 4 the prosecution case is that 520 cartons of cigarettes were found in godown 8-A of the factory which is not the authorised godown. Therefore, they alleged that the accused have kept them there with an intention to clandestinely remove them without payment of excise duty. The contention of the accused is that they are found to be substandard and therefore they wanted to open the cigarettes and use it for manufacture again. The learned Special Judge held that even assuming that the allegation of the prosecution is true, but it is only at the stage of preparation and not even an attempt to commit the offence. Rule 9(1) of the Central Excise Rules says that no excisable goods shall be removed from any place whether they are produced, cured or manufactured etc. until the excise duty payable thereon has been paid. Rule 47(1) reads that a manufacturer shall provide a store-room or other place of storage at his premises for depositing the goods made on the same premises without payment of duty. Sub-rule (3) reads that every such store-room or place shall be declared by the manufacturer and approved by the Collector. Rule 49(1) reads that payment of duty shall not be required in respect of excisable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a storeroom or other place of storage approved by the Collector under Rule 47. So, the duty has to be paid only when they are removed from the place of manufacture i.e., the factory or from the approved store-room. It is not the case of the prosecution that 520 cartons of cigarettes are being taken out of the factory gate without paying the duty. Their allegation is that the said cartons are found in a godown which is not authorised. Rule 49 says that if they were removed from the approved store-room under Rule 47 then duty has to be paid. But there is no evidence to show that these 520 cartons were kept in an approved store-room or removed from there. Therefore, the stage of payment of duty has not yet arisen. It may be that if any violation of the Rules has been committed by keeping 520 cartons of cigarettes in an unauthorised godown, the departmental authorities may take action regarding the said violation. But, it cannot be said that the accused had evaded payment of duty by keeping the cartons in unauthorised godown. The offence of evasion of tax will arise when the accused take out the goods from the factory gate when excise duty has to be paid or make attempt to take it out of the gate. But merely keeping the cartons in an unauthorised godown when no tax is payable at that stage, does not amount to evasion of excise duty. Therefore, I agree with the finding of the learned trial Judge that at best it may be at the stage of preparation but no offence or even attempt to commit offence has been committed by the accused.

16. Charge No. 1 :- The learned trial Judge held that there is no evidence to

prove the conspiracy with the object of committing evasion of excise duty. The learned counsel for the appellant has stated that apart from the statements recorded by the Central Excise officers u/s 14 of the Act, there is no other substantial evidence for the prosecution to prove this charge. I, therefore, agree with the finding of the trial court that the prosecution failed to prove this charge also.

17. This is an appeal against the acquittal. The trial Judge had considered the entire evidence and came to the conclusion that the prosecution failed to establish the charges and after considering the submissions made by the learned counsel for the appellant, I have also agreed with the findings of the learned Special Judge that the charges are not proved. As the prosecution has failed to make out a case to grant leave to file appeal against the order of acquittal passed by the trial court, the petition for leave to file the appeal is dismissed and consequently the appeal is also dismissed.