

Orient Enterprises Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-14-1985

Reported in : (1985)(5)LC2158Tri(Delhi)

Appellant : Orient Enterprises

Respondent : Collector of Customs

Judgement :

1. Originally preferred as a revision application before the Central Government, on transfer to the Tribunal, we are treating it as an appeal. In this appeal, Order No. 494-A to 495, dated 29-2-1980 passed by the Central Board of Excise and Customs, New Delhi (hereinafter referred to as Board) has been challenged.

2. Briefly stated the facts of the case are that the importers presented three Bills of Entry at Cochin Port for the clearance of three consignments of skimmed milk powder imported from Canada. The price for the goods shown in the relevant invoices was US \$ 356.00 per MT C.I.F. Bombay. Copy of the letter of credit No. CPLC/21/78 issued by M/s Bharat Overseas Bank Ltd., New Delhi also showed the same rate.

Records show that the LC was originally opened for a total figure of US \$ 35437.00 for the shipment of about 100 MT of skimmed milk powder in 25 Kgs. packing, the terms being C.I.F. Calcutta. This was later amended by increasing the quantity and value of the goods to 130} MT and US \$ 46474.00 respectively. The mode of packing was changed to 50 lbs. and the terms to C.I.F. Bombay. The

suppliers of the goods were M/s. A.M. Aronson, Holland (hereinafter to be referred to as Holland Party) and the shippers were M/s. Ronald A. Chishohine, Canada. As the declared price appeared to be very low, the lower authorities started investigations at Cochin as well as at Bombay. In the course of these investigations, it transpired that one Shri A.H. Gandhi of Bombay, who had long standing business connections with the Holland Party had actually acted as the indenting agent for the consignment in question.

The preliminary investigations also indicated that the actual price paid for the goods was \$ 530 per MT c.i.f. as against the declared price of US \$ 356 per MT. The residential and office premises of Shri Gandhi at Bombay and also the premises of the appellants and their partners at Delhi and Bombay were searched. Certain incriminating documents were recovered from the premises of Shri Gandhi. In the course of investigations, statements of Shri Gandhi and his employee Shri Mahadevan and S/Shri K.L. Suri and R.K. Suri of the appellant firm were recovered. On completion of investigations, the Cochin CH issued a SCN to the appellants and to Shri A.H. Gandhi. The allegation against the appellants was that they had under-invoiced the goods thereby attracting confiscation of the same under Section 11 I(d) read with Section 11 I(m) of the Customs Act, 1962 (hereinafter to be referred to as Act). The appellants were also called upon as to why penalty should not be imposed on them under Section 112 of the Act.

3. So far as Shri Gandhi is concerned, the show cause notice alleged his involvement in the unauthorised importation and he was called upon to explain as to why penalty under Section 112 of the Act should not be imposed on him, being a person concerned in the said illegal deal. Both parties appeared before the Collector of Customs and Central Excise, Cochin, who after due process of law, adjudicated the case. The learned Collector held as under:- (a) the goods imported by the appellants were liable to confiscation under the provisions of Section 111(d) read with Section 11 I(m) of the Act, but gave the appellants an option to redeem the same on a fine of Rs. 8,00,000/-. In addition, a penalty of Rs. 2 lakhs was also imposed on them ; (b) the learned Collector held that the goods should be assessed to duty at the rate of US \$ 530 per MT as against the declared value of US \$ 356 per MT; and (c) Shri A.H. Gandhi was held as a person concerned in the

unauthorised importation and subjected to a penalty of Rs. 1 lakh under Section 112 of the Act.

4. Aggrieved with the above order of the Collector, both parties preferred appeals before the Board. The Board disposed of the appeals of Shri A.H. Gandhi and the appellants vide composite order dated 29-2-1980. After careful appraisal of the evidence adduced by both sides, the Board upheld the action both with regard to the confiscation of the goods as well as the quantum of penalty imposed on the appellants. However, Shri A.H. Gandhi was let off without any penal action on the ground that the Collector's orders 'penalising' him were not supported by evidence on record in the proceedings.

5. Feeling aggrieved with the Board's order, the appellants have preferred the present appeal before the Tribunal. As action against Shri Gandhi was dropped by the appellate order of the Board, he has not made any move in the matter.

6. Dr. Singhvi the learned Sr. Counsel, appearing on behalf of the appellants first took up the valuation of the goods with reference to the evidence contained in the import documents and as supported by evidence of certain contemporaneous imports. He submitted that right from the beginning the appellants' case was that they had brought the goods at the price of \$ 356 per MT. The price was somewhat lower because the goods were of 1977 year of manufacture. However, in all other respects, it was a fair price for like goods and in support he invited our attention to four importations of skimmed milk powder effected around the same time when the appellants effected their importation. The particulars of the importations such as the name of the importer, the quantity imported and the price declared in the Bill of Entry are given below :- 1. Bill of Entry No. 1318, dated 20-4-1978 for 45.729 MT @ \$ 319 per MT f.o.b. imported by Mother Theresa.

2. Bill of Entry No. 1731, dated 27-1-1978 for 30.00 MT @ \$ 325 per MT c.i.f. imported by Seva Kendra, Calcutta.

3. Bill of Entry No. 1728, dated 27-1-1978 for 200.00 MT @ \$ 325 per MT imported by Seva Kendra, Calcutta.

4. Bill of Entry No. 1836, dated 26-1-1978 for 12.00 MT @ \$ 325 per MT c.i.f. imported by Reg. Bro. Weney d'Souza SJ, Dhanbad.

7. The learned counsel emphasized that the above mentioned importations had been imported by or on behalf of Charitable organisations and were, therefore, exempted from payment of customs duty, under the relevant notifications. He pleaded that in such cases i.e. where on duty liability accrued to the goods, the price declared in the import documents can per se be treated as correct because no motive for under-invoicing the same could be attributed in such cases. Dr. Singhvi further submitted that all the import documents such as the proforma invoice, acceptance, the letter of credit and the correspondence exchanged between the supplier and the appellants refer to the price of \$ 356 per MT. The department had also not let in any evidence to show that the appellants had remitted clandestinely any amounts towards the cost of the goods over and over what was declared in the Bills of entry and the letter of credit. Dr. Singhvi pointed out that the case of the department was based on surmises and suspicions which cannot take the place of proof in law. According to him, the lower authorities had based their case on certain other pieces of evidence (we shall deal with them later in this order) none of which could be sustained in law.

8. Shri Chatterjee, who argued the department's case submitted that the goods had deliberately been under-invoiced and that the import documents had been prepared in such a way that they will materially conform to the price declared in the Bills of entry. While conceding that the lower authorities had not been able to lead any Evidence to show clandestine remittance of extra foreign exchange for the goods in question, Shri Chatterjee emphasized that it was very difficult to prove this fact.

9. We have gone into the question of valuation as reflected in the import documents and the evidence of like goods imported around the same time when the appellants' goods were imported into the country in the light of the submissions made. At the outset, we must point out that having laid the charge of under-invoicing against the appellants, it was the duty of the lower authorities to have made necessary investigation at the major ports with regard to the price at which

goods of the like kind and quality were being imported through different ports. No such investigation seems to have been conducted by the lower authorities according to the record before us. On the other hand, the appellants seem to have made serious efforts and have been able to collect and furnish evidence of contemporaneous imports which compare favourably with the price declared by the appellants in their Bills of entry.

10. Dr. Singhvi, thereafter took up the question of admissibility, relevance and legal force of 38 telex messages which, according to him constitute most material, rather pivotal piece of evidence for the department. According to the learned counsel, the goods were imported in August, 1978 and the statements of Shri Gandhi and his employees as also of partners of the appellant company were recorded in the months of August, September and October. He stated that a really important turn in these proceedings took place on 18-10-1978. On that date, the investigating officer, for the first time, confronted Shri Gandhi with copies of 38 telex messages and questions were put to him about the same. It would appear that Shri Gandhi, in reply to questions put to him, on that date stated that these were copies of telex messages sent by the Holland Party to the appellants and vice versa through him because the appellants had no telex facility of their own. Shri Gandhi further revealed during interrogation that it was the usual practice for him to receive the telexes meant for the appellants and later pass them on to them (the appellants) through one of his employees. When any matter was urgent, the gist of messages was conveyed to the appellants on telephone and thereafter either telex messages were collected by the appellants' representative or were sent to them. Shri Gandhi, however, maintained that so far as the telex messages were concerned, he was merely acting as an agent to receive and deliver the same to the appellants. He had nothing, whatsoever, to do with the subject or contents of the telex messages. It were these 38 telex messages which were treated as a highly incriminating piece of evidence against the appellants and all sorts of adverse inferences were drawn. Piecing together the contents of these telex messages, in their own way, the lower authorities came to the conclusion that the normal price for the goods in question should be \$ 530 per MT.¹¹ Dr. Singhvi further argued that reliance placed on these telexes by the lower authorities was highly questionable and unjustified as it was contrary to all principles of natural

justice. He laid lot of stress on the fact that a. complete Panchnama was prepared after the search of business and residential premises of Gandhi. A large number of documents including some telex messages found mention in the said Panchnama. However, curiously enough, there was no mention of these 38 telex messages in the Panchnama. At what stage, and from what source these documents were procured or collected during the course of investigation, has not been disclosed to the appellants till now.

Further, what was shown to the appellants were only the typed transcripts of telex messages and the originals or photo copies thereof were never shown to the appellants. In such a situation, there had been a grave denial of natural justice inasmuch as highly incriminating piece of evidence was made the bedrock of department's case when the very origin and character of telex messages has remained shrouded in mystery. The appellants were never given an opportunity through the process of cross-examination of Gandhi or any other person with regard to the authenticity, veracity or relevance of the telex messages. It is contended on behalf of the appellants that the so called telex messages were fabricated documents procured through dubious sources and therefore have no evidential value whatsoever. Dr. Singhvi stressed that when there was full and authentic evidence of correct declared price available on record, how the department would place reliance on these telex messages which did not constitute legal evidence, being unauthentic and also not capable of being subjected to a check.

12. Shri Chatterjee, the learned JDR submitted that Dr. Singhvi's contention that the 38 telex messages had been fabricated was not well founded. When they were read in their entirety, there was lot of material in the said telex messages having a bearing on the importation of 3 consignments by the appellants. Shri Chatterjee supported the action of the lower authorities in placing heavy reliance on the evidential value of telex messages.

13. We have given due thought to the arguments of both sides with regard to 38 telex messages. Indisputably, the lower authorities have treated these telex messages as the most pivotal piece of evidence against the appellants. In fact,

they seem to have almost disregarded all the documentary evidence placed on record by the appellants in view of the contents of these telex messages. We see considerable force in Dr. Singhvi's contention that it was incumbent on the part of the lower authorities to have questioned, during the course of investigations or adjudication proceedings, Shri Gandhi, his employee, and the partners of the appellant firm with regard to these telex messages. It is a well accepted principle of natural justice that to give credence to any evidence or to gauge its probative value it has to be subjected to the test of cross examination, especially a document or other piece of evidence which is in dispute. We further observe that investigations in the matter seemed to have started immediately after the importation but the existence of the telex messages was brought to surface only on 18-10-1978 i.e. after about 21/2 months. What is more surprising is the fact that even before us, the learned JDR has not been able to tell us about the source of the acquisition of these typed documents. In the absence of any knowledge about the source, it is difficult to say with certainty whether these telex messages were fabricated messages or were the handi work of a business rival of the appellants or there was some other cause. Necessary probe in the matter had not been made by the authorities below, as is indicated by the record. Before parting with this fact of the case, we must emphasize that whenever lower authorities wish to rely on any piece of evidence, in whatever form it may be, it is highly incumbent on them not to keep them out of the knowledge of the person against whom they had to be used. The principles of natural justice enjoined on the lower authorities to disclose all such pieces of evidence to the other person so that he could have a fair chance of meeting them.

14. Dr. Singhvi then referred to the application moved by the learned JDR seeking our permission to produce as additional evidence certain insurance memos covering the goods in question. It has transpired that while preparing the paperbook for the case, the JDR came across insurance memos issued by M/s. Phoenix Assurance Co. Ltd., Toronto, Canada for the goods in question. It has been pleaded that these insurance memos support the valuation adopted by the lower authorities.

It has been argued before us by Shri Chatterjee that the normal mercantile practice is to get the goods insured for 110% of their value. According to him, if the total insured value of the goods as shown in the insurance memos is multiplied by 100/110, the resultant figure would come to the price adopted by the lower authorities. Since these documents are contemporaneous in nature qua the importation of the goods in question, we allow them to be produced at this late stage as they could not be fabricated and ends of justice so demand.

15. Regarding these documents Dr. Singhvi has submitted that, in the first instance, there is no such established mercantile practice that the goods must be insured for 110% of their value and secondly, whether the goods should at all be insured and, if so, for what value, is purely a matter of contract between the buyer and the seller of the goods. He further submitted that the mathematical coincidence of the figure as put forth by the learned JDR, need not be given any weight.

We find force in the submissions made by Dr. Singhvi and hold that this additional evidence does not advance the case of the Revenue in any material way as no firm conclusions with reference to the valuation of the goods in question can be arrived at with the aid of these memos.

16. Now we come to the statements of S/Shri A.H. Gandhi, Subramaniam Mahadevan, Gopal Krishan Chada, K.L. Suri and Ramesh Kumar Suri recorded under Section 108 of the Customs Act, 1962. Dr. Singhvi has argued that these statements are not credible and it was for this reason that Shri J. Datta as Member of the Central Board of Excise and Customs, had accepted Shri Gandhi's appeal. He has further submitted that even the statements of S/Shri K.L. Suri and R.K. Suri do not inculcate them and that the lower authorities had gone wrong on this account.

17. We would first deal with the case in relation to the statement of Shri Gandhi. In the show cause notice jointly issued against M/s.

Orient Enterprises (present appellants) and Shri A.H. Gandhi, inter alia the following allegations appeared against Shri Gandhi :- "Certain investigations conducted by the Customs at Cochin as well as at Bombay revealed that the

indenting agent for the subject goods was one Shri A.H. Gandhi of Bombay, who had long standing business connections with the supplier M/s. A.M. Aronson, that the actual price paid for the subject goods was at U.S. \$ 530.00 per M/Ton C.I.F. and that the price shown in the import documents at U.S. \$ 356.00 per M/Ton C.I.F. was arrived at in order to accommodate more quantity of about 30 tons for purposes of import.

These documents speak for themselves that Shri Gandhi had entered into correspondence with the suppliers and showed his connivance and involvement with full knowledge and responsibility of under-invoicing of the subject consignment of skimmed milk powder.

Shri Gandhi had also submitted that authenticity of the telex messages stating that since the telex messages had been produced by the Department to consider their authenticity and further stated that their contents are correctly recorded therein." 18. In his adjudication order, the Collector had made the following observations in para 15 about Shri Gandhi while considering his case :-- "Shri Gandhi's argument that he was never involved in these transactions except to lend his communication facilities to M/s.

Orient Enterprises is not supported by the documents that were recovered. For example, in the letter addressed by Shri Gandhi to M/s. Aronson on 17-3-1978 he had clearly requested M/s. Aronson, the foreign indenter, as to let him know in which Swiss Bank wants Letter of Credit favouring A.M. Aronson to be opened and so also information regarding balance procedure. In other words, Shri Gandhi is fully aware of the modus operandi adopted by Shri Suri and had been instrumental in entering into correspondence with the foreign indenter in making arrangements for such under-invoicing and separate arrangements for transferring funds to the Swiss Bank, It is also further by the third para in the same letter in which Shri Gandhi has indicated that we shall request you to return L C., telegraphically so as to enable clients open credit again through Swiss Bank as suggested by you and simultaneously effecting balance procedure'. In other words, it is quite clear that the need for a change in the L.C. arose because of this transaction in which a lower price was to be indicated in the official L.C. and the balance amount to be

credited by a different arrangement. Shri Gandhi's plea that he was mainly an onlooker and has not acted in this drama cannot be accepted. His involvement as evidenced in various correspondence is much deeper and therefore the charge of abetting M/s. Orient Enterprises in undertaking this under-invoicing procedure gets clearly established." 19. In the operative part of his order, the learned Collector held as under :- "In so far as Shri Gandhi is concerned, his involvement is also fully established. I therefore impose a penalty of Rs. 1,00,000/- on Shri Gandhi under Section 112 of the Customs Act, 1962." 20. While accepting the appeal of Shri Gandhi, the Board had reversed the findings of Collector in the following terms recorded in para 9 of the order :- "So far as Shri A.H. Gandhi is concerned, no direct involvement either in the attempt at unauthorised importation or in mis-declaration of the value has not been established in the Collector's orders. Reliance placed on the use of his telex facility, and receipt by him of letters arising out of telexes sent from his machine do not implicate him in either the unauthorised importation or in the subsequent attempt at mis-declaration of the goods. The Collector's orders penalising him are therefore not supported by the evidence discussed in the proceedings. The Board accordingly allows his appeal." 21. Singhvi has pointed out that the above extracts from the various documents show that the first appellate authority had exonerated Shri Gandhi of the allegations of abetment of the alleged under-invoicing and that the same evidence cannot be used against his clients to prove the same facts. He has further contended that the evidence which has been found to be unworthy of credence while dealing with the involvement of Mr. Gandhi, cannot become truthful while considering the same against his clients. We find some force in this submission, but we would like to satisfy ourselves after further scrutiny in the light of other evidence and attending circumstances.

22. Shri Gandhi is a principal witness in this case. He was also issued show cause notice, an extract of which has been reproduced earlier. It is important to quote a part of his reply to the notice issued to him on 18-1-1979. In paragraph 5 thereof he had stated as under :- "Mr. Suri told me that others were indicating lower prices and I should quote a lower price even if the material is old, since he wanted to import a large quantity under said licences. I told him that I would not book indent for him or any one for old or sub-standard material since I was representing Semi-

Government National Dairy Corporation of Holland and Ireland. Since he insisted, I told him that he could contact M/s. A.M. Aronson of Holland and I will put him in touch with them. I gave him address of M/s. A.M. Aronson and asked him to deal directly with them. At this time Mr. Suri also told me that he was doing business in his firm name of Orient Enterprises, New Delhi." "In February 1978, Mr. Suri told me that he could not obtain milk powder from M/s. A.M. Aronson though he had placed a confirmed order at the rate of US 1356.00 with them and asked me to contact M/s.

A.M. Aronson on his behalf by telex. He also agreed to pay all telex and cable charges. 1 told him that prices in Europe were high and he should get Canadian material which was available then at cheaper rates. I also agreed to contact a supplier in Canada who can supply the Milk Powder at cheaper rates through M/s. A.M. Aronson with whom Mr. Suri had already placed direct order earlier." 23. Dr. Singhvi has also referred to the statement of Mr. Gandhi dated 4-8-1978, in particular the following answer to question No. 3 : "Question No. 3 : Why correspondence has been addressed by the supplier, you have no interest in the matter Answer : As the material was very old likely rejected and create difficulties in regard to price at the time of clearance in customs no papers received from foreign suppliers have been kept by me as whole order was arranged as direct correspondence between Orient Enterprises and the shipper." 24. The statement of Shri Gandhi had been recorded under Section 108 of the Customs Act, 1962. It is relevant to observe that Shri Gandhi wanted to make his statement in the presence of his Counsel and sought permission to do so, but the same was declined. His request is recorded in his statement 8-8-1978 in the following words : "While I am prepared to give the reply I submit my request that my Counsel may be allowed to be present. Since you have rejected my request I may be permitted to draw your kind attention that under Section 108 I believe that Counsel can be present. Further more I am advised by my Counsel that according to Constitution I cannot be a witness against myself. In spite of my contention I am making the following statement." 25. For assessing the value of a statement under Section 108 of the Customs Act, the learned Counsel for the appellants has contended that a statement under this provision has to be looked with caution as unlike the statutory safeguards provided under Section 164 of the Criminal Procedure Code

where a statement is recorded by a Magistrate, no such safeguards exist. To support his arguments, the learned Counsel has cited AIR 1968 SC 832 (Haroom Haji v. State of Maharashtra) and has taken us to para 6 of the judgment, which is extracted below :- "These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Section 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 scrutinized to finding put if they were made under threat or promise from some one 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, 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." Section 171-A of the Sea Customs Act, 1878 is identical with Section 108 of the Customs Act, 1962 The only difference is that statement under Section 108 must be recorded by a Gazetted Officer, but it was not so in Section 171-A of the Sea Customs Act, 1878. The intention of the legislature is clear as it was intended to make the statement more authentic by requiring it to be recorded by a Gazetted Officer, who would obviously be more experienced and responsible. Indubitably a statement under Section 108 of the Customs Act is relevant and admissible in evidence. Its authenticity has to be seen in the circumstances of each case. It cannot be thrown away on the sole ground that it does not stipulate the safeguards as have been provided under Section 164 of the Criminal Procedure Code. Statements under these two Statutes are recorded in two different situations and by two different authorities. In our view the law makers have provided ample safeguards by making it obligatory that a statement under Section 108 of the Customs Act could only be recorded by a Gazetted Officer. We agree with the submissions of Shri Jain, the learned SDR that the rigour of the provisions of the Indian Evidence Act cannot be applied in the proceedings before the quasi-judicial authorities. This contention also finds ample support in the decision of the Kerala High Court reported as 1984 (15) E.L.T. 129 (Ker.)-Kollatra Abbas Haji v. Government of India and Ors.

26. Merely because a statement has been recorded under Section 108 of the Customs Act does not mean that it has to ipso facto accepted as truthful. It is only a piece of evidence, which is relevant and admissible, but its value still requires to be gauged in conjunction with other evidence and attending circumstances to prove the fact in issue.

27. Close scrutiny of Shri Gandhi's statement has led us to the irresistible conclusion that it is not worthy of belief. Firstly, his statement is exculpatory in nature, although according to the allegations of the Revenue as indicated in the show cause notice, he was a co-conspirator. If such a person tries to implicate others and poses himself to be innocent, his testimony loses its probative value.

Secondly, the existence of unproved and unauthentic typed copies of the 38 telex messages was disclosed by him only on 18-10-1978, although his statement had been earlier recorded on 4th, 8th, 9th, 10th and 22nd of August, 1978 and also on 2nd September, 1978. Thirdly, the evidence against Shri Gandhi including his own statement had been disbelieved by the Board in appeal and the same cannot become truthful while using against the appellants. So we reject the testimony of Shri Gandhi, being coloured and untruthful.

28. Next witness is Subramanian Mahadevan, who was a typist/clerk employed in the office of Shri Gandhi. He was examined on 16th and 17th August, 1978 and also on 1st September, 1978. He had stated that he was getting a salary of Rs. 500. His answers to the following questions are relevant for our purpose :
"Question : Have you typed any letters of Orient Enterprises, New Delhi regarding the consignment of 130 tons of skimmed milk powder from Canada Answer : Yes I have typed letters of Orient Enterprises addressed to the shippers in Holland the dictation of which was given to me by A H. Gandhi in the presence of Suri. I had typed the said letters on the letter heads of A.H. Gandhi and handed over to the said Gandhi who then signed them and then attended to the despatch work at his own level.

Question : Could you tell me with whom else in your office the said Suri is friendly with If so please give his full name Answer : He is not friendly with any person in my office except Shri Gandhi.

Question : You have stated in the statement that you have typed certain letters of M/s. Orient Enterprises as dictated by Shri Gandhi in the presence of Mr. Suri. Kindly explain exactly how this happened.

Answer : Originally Shri Suri dictated the letter in half English, half Hindi and half Punjabi which I was unable to follow. Then he explained the matter to Mr. Gandhi in Hindi and the latter then gave the dictation in English.

Question : Were other customers of Mr. Gandhi utilising the Telex in your office

Question : Have you typed any letter addressed to Mr. Gandhi or Mr.

Suri in the letter head of M/s Aronson Shri Mahadevan further stated that after typing these letters both the office copy and the originals were handed over to Mr. A.H. Gandhi and that he had never gone to Mr. K.L. Suri's office at Bombay or anywhere else.

29. From the above statement of this typist/clerk, it is evident that his statement, in no way, incriminates the appellants. On the other hand it goes in their favour, when Mahadevan categorically stated that the letter head of M/s. Aronson had never been used in the correspondence he had typed.

30. Next, we deal with the statement of Shri G.K. Chadha, whose full name has been mentioned as Gopal Krishan Chadha. He was a clerk-cum-supervisor employed by the appellants. He has stated that as a supervisor in M/s. Orient Enterprises his nature of work was so that he was to see that the papers for the import of consignments were filed by the clearing agents and the clearing of the imported goods was accepted. He has further added that M/s. Orient Enterprises financed the importers, who were holding import licences. They acted as financiers and saw that the goods were delivered to the importers, who paid commission. He also stated that as far as he remembered they had cleared about 30 to 35 consignments from Bombay on behalf of M/s.

Abbase Brothers. Regarding the present case he stated that he was told that there was an enquiry of under-invoicing of the consignments, but he did not know anything about it. Regarding Shri Gandhi's involvement, he stated that he did not

know whether Shri Gandhi was concerned in the present import of the skimmed milk powder but he was well known to Mr.

Suri.

31. From above, it is evident that this witness also does not in any way inculcate the appellants. He has shown utter lack of knowledge on any important link in the chain.

32. The only other witnesses are Shri K.L. Suri and his son R.K. Suri, who are partners of the appellate firm. Copies of their statements have been placed on the record. We first take up the statement of Shri K.L.

Suri. Following extracts from the statements of this witness are quite relevant:-
"We acted as the financiers for M/s. Bake Foods to produce milk powder against their licences for which we obtained letters of authority. We had seven licences for the total value of about Rs. 3,95,000/- under, letters of authority. For the import of the milk powder I get 3% commission and another 2% as interest on the money financed. We have imported milk powder ten years back. We had no indenting agent for this transaction. We ourselves placed the order from the supplier. Regarding the present consignment Mr. Gandhi has not lent any help in corresponding with the suppliers. There is no correspondence with Mr. Gandhi regarding the import of this particular consignment. My office and house at Delhi were searched but no documents were seized. One L/C had been opened on 10-2-1978 in a Holland Bank which was returned by the suppliers because of exchange difficulties. As required by them a fresh L/C was opened on the Union Bank of Switzerland, Surich on 10-3-1978- On 13th March I went to the Bank and opened the fresh L/C and I received the second L/C copy from the very same day.

The letter dated 15th December, 1977 addressed to M/s. Orient Enterprises from M/s. A.M. Aronson was received by me. In that letter they have quoted the rate for the fresh production of Milk Powder at US \$ 460 to \$470 per tonne CIF. They have also stated that the market condition is very favourable due to heavy stock and over production there.

In my letter dated 28-1-1978 to M/s. A.M. Aronson I have requested Mr. Reinders to confirm his earlier price of US \$ 356/- per tonne CIF Bombay.

The present consignment was of 1977 production that is why it is cheaper." The following answers to the questions put to Shri K.L. Suri are also relevant:-
"Question : Is it correct to say that the actual price you have agreed upon for this consignment of Milk Powder with M/s. A.M. Aronson in US \$ 530 per metric tonne CIF Calcutta and the invoice shows only US \$ 356 per metric tonne and the difference of US \$ 174 per metric tonne which works out to a total difference of US \$ 22, 620 and this amount has been remitted to M/s. Aronson's account in a Swiss Bank unauthorisedly What have you got to say Answer : It is not correct that the value of US \$ 530 per metric tonne was agreed upon by us and the difference remitted to M/s.

Aronson's account in a foreign bank. I have also shown the photostat copies of 1 blank letter head of M/s. A.M. Aronson and two blank proformae of M/s. A.M. Aronson. I have not received any original documents mentioned above as stated by Mr. Gandhi. I have never used the said documents and fabricated any correspondence.

Question : Have you negotiated with any buyer in India for this consignment of Skimmed Milk Powder Answer : Since this consignment is handed over to M/s. Bakefood Products after clearance from Customs, I have not made any negotiation with any party for the same.

Question : Are you aware that Indian currency of Rs. 2,67,619/- was seized from the residence of Mr. A.H. Gandhi by the Customs at Bombay Answer : No. I do not know that any Indian currency was seized from Mr. Gandhi's residence. I only came to know, of it through the newspaper that his office and residential premises were searched." 33. In no part of K.L. Suri's statement he supported the allegation of under-invoicing. The learned SDR, has tried to make capital of the fact that this witness had tried to escape from Cochin on 25-8-1978 by air when his statement had not yet been completed and had promised to re-appear for further evidence. This conduct of Shri K.L. Suri cannot be looked with favour, but at the same time it does not advance the allegation of under-invoicing in any way. This effort to

escape from Cochin would have violated some provisions of law and legal action should have taken in this regard. But failure to take any action for that act does not raise any adverse inference with regard to the point in controversy. Further, the extracts of Shri K.L. Suri's statement appended with the show cause notice do not constitute any kind of incriminating evidence to prove the charge against him.

34. Similarly, statement of Shri R.K. Suri is also not in any way against the appellants. The witness has stated that finally they had agreed to the rate of 356 dollars and this was confirmed by the supplier. As regards the statement given by Mr. Gandhi which was read out to this witness by the Customs officer he has stated that he could only say that Mr. Gandhi had given a false statement. The following questions and answers in the statement of Shri R.K. Suri are also relevant:- "Question Have you received any blank proforma invoices or letter heads of M/s. Aronson through Mr. Gandhi Question Have any blank letter heads and proforma invoices been received from Mr. Gandhi Question Have you received any blank letter head or proforma directly from M/s Aronson 34. Ultimately it is the statement of Shri Gandhi alone which has some incriminating character. In this connection we have already opined that his statement is not credible as an exculpatory statement of a co-accused or co-conspirator is always tainted with falsehood because he twists the story or colours the version in a way to show himself innocent and paints his companion as the perpetrator of the crime. It is for this reason that the statement of such a person loses its evidential value. The statement of Shri Gandhi squarely falls in such a category.

35. Further, the unproved typed telex copies were for the first time shown to Mr. Gandhi on 18-10-1978, although he had been earlier examined on several days in the month of August and September. These copies were never confronted to Shri K.L. Suri or R.K. Suri at any stage. This unproved and unauthenticated evidence, therefore, cannot be used against the appellants. This has, therefore, to be excluded from consideration and has to be deemed non-existent.

36. Now adverting again to the allegations of under-invoicing, we find that there was direct negotiation between M/s. Orient Enterprises and M/s. A.M. Aronson. In the letter dated 8-12-1977, the appellants had made an enquiry about the prices of

skimmed milk powder. The reply had been received on 15th December, 1977 and it was stated therein that the current price for fresh production was around US \$460.00 to US \$479.00 per ton c.i.f. nett. It was further stated that in case they would accept slightly earlier production material say July/September, 1977, due to over stock position, they could get fixation of subsidy from the Government and could indicate them the availability of the lot, especially from Canada at the price of US \$ 385 ton c.i.f. nett. To this the appellants replied that they had a licence for value of Rs. 3,96,618 and that they have to supply Canadian material of July/September, 1977 production which would be acceptable utmost c.i.f.

price of US \$ 350.00 per ton.

37. In reply dated 1st January, 1978, M/s. A.M. Aronson intimated as under: "One of the producers in Canada have these stocks and are willing to sell. Utmost they can offer the material is at the price of US \$356/- ton c.i.f. Canadian origin material in packing of 50-lbs.

polylined paper bags for shipment to Bombay." In their reply dated 14-1-1978, the appellants had agreed to this price of US \$ 356 ton c.i.f.

38. The copies of the whole correspondence have been placed on record.

They appear at pages 61 to 67 of the paper book (Vol. II). It is clear from the correspondence that the invoice price was the contractual price. The lower authorities have not assigned any reason to hold that this correspondence was false or fabricated. We accept the authenticity of the correspondence relating to the contract and see no reason to hold the same as false or fabricated.

39. After considering all aspects of the case, we are of the firm view that the Revenue has failed to substantiate the allegation of under-invoicing of the imported goods and, therefore, no case stands proved against the appellants. Accordingly, the appeal deserves to be allowed.

40. In the result, we accept this appeal and set aside the impugned order. Consequential relief flowing from this order be given to the appellants.