

# Vinod Solanki vs Union Of India & Anr on 18 December, 2008

**Equivalent citations: 2009 (1) AIR BOM R 814, 2009 (3) AIR JHAR R 150, 2009 CLC 197, 2008 (16) SCC 537, 2009 CALCRILR 1 700, (2008) 16 SCALE 31**

**Author: S.B. Sinha**

**Bench: Cyriac Joseph, S.B. Sinha**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7407 OF 2008  
(Arising out of SLP (C) No. 3537 of 2008)

VINOD SOLANKI

... APPELLANT

Versus

UNION OF INDIA & ANR.

... RESPONDENTS

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. What would be the effect of a retracted confession for the purpose of levy of penalty under Foreign Exchange Regulation Act, 1973 (for short, "the Act") is the question involved in this appeal which arises out of a judgment and order dated 30.11.2007 passed by the High Court of Judicature at Bombay in FERA Appeal No. 85 of 2007.

3. On or about 25.10.1994, the office premises of the appellant was searched. Recovery of Indian currency amounting to Rs. 2,65,000/- was made. He was thereafter detained. On the next two succeeding dates, i.e., on 26.10.1994 and 27.10.1994, he allegedly made two statements before the Authorities under the Act, disclosing that all the transactions in the name of M/s Sun Enterprises, Ahmedabad and M/s Suraj Enterprises, Bombay relating to import of goods had been made by him and no import of goods had taken place in the name of the said firms. He is stated to have confessed that he was responsible for remittance of the foreign exchange worth US Dollars 11,400 and US

Dollars 22,830. In view of the said purported confession, he was arrested for alleged violation of the provisions of Section 8(3) and Section 9(1)(a) of the Act. We are not concerned with the rest of the statements.

4. He was produced before the learned Chief Metropolitan Magistrate, Bombay on 28.10.1994. Before the said court, he filed an application retracting his confession, stating:

"That from 26-10-94 evening till today when I am being produced before this Hon'ble Court, I was illegally detained in the office of the Enforcement Directorate, and during my illegal detention my involuntary, untrue and false statements have been recorded by force, coercion, threat and coercion and also threatened to detain under COFEPOSA if I will not write the statements as per their say and hence I retract my said statements as the same are not my true and voluntary statements.

I further state that Indian currency seized from me was my legitimate business money and had nothing to do with alleged FERA violation. I further say that I have no connection with any alleged import transactions, opening of bank accounts, or floating of company by name of M/s Sun Enterprises, export control, Bill of Entry and other documents or alleged remittances. I have not been furnished copy of Panchnama, though my signatures have been taken in token of having furnished the copy of the same.

I hereby rebut the false averments made in the remand application, Panchnama and in my alleged statements and hereby retract the same as the facts stated therein are not true and voluntary.

I pray that my application may be taken on record and copy of the same is annexed for the officer of the Dept."

5. Respondents, however, initiated a proceeding under Section 8(3) of the Act. A show cause notice was issued on or about 25.4.1995, the operative part whereof reads as under:-

"NOW THEREFORE, the said Shri Vinod M Solanki is hereby required to show cause in writing (IN DUPLICATE) within 30 days from the date of receipt of this memorandum, why Adjudication Proceedings as contemplated in Section 51 of the Foreign Exchange Regulation Act, 1973 (46 of 1973) should not be held against him for the said contravention of Section 8(3) and 9(1) of the Foreign Exchange Regulation Act, 1973.

IN ISSUING this memorandum, reliance is placed inter alia on the list of documents as per Annexure 'A' the original of the said documents will, on demand, be made available for inspection to the party or his lawyer or other authorized representative at the office of the Deputy Director, Enforcement Directorate, Mittal Chambers, 2nd Floor, Nariman Point Bombay - 400 021 in his office by prior appointment with him

on any working day."

6. Pursuant to or in furtherance thereof cause was shown by the appellant, inter alia, contending that no reliance should be placed on the retracted confessional statement unless the same was corroborated substantially in material particulars by some independent evidence.

7. By reason of an order dated 19.3.1996, the appropriate authority, inter alia, relying on or on the basis of the confession made by him imposed a consolidated penalty of Rs. 10 lakhs, stating:

"11. I have independently gone through the evidence on record too based on which the impugned show cause notice has been issued. The notice has abundantly and clearly explained the documents seized from him. He has also admitted to the offence in his statements recorded u/s 40 of FERA, which to date, stand. These confessional statements are amply corroborated by the material evidence seized from him which is disclosed above. By not contesting the charges, either in reply to the Show-cause Notice or during Personal hearings fixed, these further stand uncontested and thus confirmed and admitted by the notice.

12. I have, therefore, no hesitation in confirming the charges in impugned SCN again the notice and accordingly hold him guilty of contravention of Sec. 8(3) to the extent of US \$ 34,230/- in as much as he failed to utilize the said Foreign exchange for the purpose it was released to him. Further, he is also held guilty of contravention of charge u/s. 9(1)(a) for the same amount in as much he deposited it in a Foreign bank account without the General or Special exemption from the Reserve Bank of India."

8. Appellant preferred an appeal thereagainst before the Foreign Exchange Regulation and Appellate Board which on repeal of FERA stood transferred to the Appellate Tribunal for Foreign Exchange (for short, "the Tribunal") under the provisions of Foreign Exchange Management Act, 1999. The Tribunal despite noticing the contentions raised on behalf of the appellant that no enquiry had been made by the Department (1) from the bank in which the transactions in question had taken place; (2) as regards the date on which the application was signed and by whom the foreign exchange had been acquired; (3) whether the appellant had acquired the said foreign exchange from authorized dealer on the basis of any forged import documents; (4) whether the alleged documents were not produced by him before any authorized dealer; and (5) whether the impugned order was based on the confessional statement which was retracted on first available opportunity when he was produced before the Chief Metropolitan Magistrate, Mumbai for remand on 28.10.1994, dismissed the appeal, stating:

"10. In the present appeal the confessional statement of the appellant is acceptable in evidence. The appellant has not brought out anything to displace his confessional statement to prove its untruthfulness or involuntary nature. Along with his confessional statements, there is seized documentary evidence coupled with attendant circumstantial evidence to demonstrate and prove the charges against the appellant."

9. In arriving at the said finding, the Tribunal placed the onus of proof upon appellant that the confession was obtained from him by threat, coercion or force. The Tribunal held that retraction alone would not make the confession inadmissible and as even retracted confessional statement may be sufficient to hold the proceedee guilty of violation of the provisions of the Act, imposition of penalty was legally permissible.

It was furthermore held:

"18. The charges under Section 8(3) is proved against the appellant for having acquired foreign exchange by forging import documents and remitting it abroad to foreign nationals particularly when import documents relating to bogus firms along with stamps were recovered from his custody. The appellant has not been able to explain why the names of persons Milan and Anil Verma were told by him to the officers of ED which, on enquiry were found to be wrong and what benefit could be given to him out of his wrong assertion made by him to Enforcement Officers.

19. According to confessional statement of the appellant, bogus trading firms were established and run by him where he used to take foreign exchange for remittance to foreign country for the purposes of import of goods but no import took place despite the fact that the foreign exchange was remitted to Hongkong. On the basis of aforesaid discussion we are of the considered opinion that the remittance of foreign exchange was taken by the appellant for purposes of import of goods but no import of goods was made and foreign exchange was credited on the bank account of foreign national abroad where contravention of Section 8(3) and 9(1)(a) of the Foreign Exchange 1973 is clearly made out. Looking towards this situation, we are of the considered opinion that the impugned order withstands judicial scrutiny and is liable to be confirmed and upheld where the appeal is liable to be dismissed."

10. Aggrieved by and dissatisfied therewith, the appellant preferred an appeal before the High Court. Concurring with the judgment of the Tribunal, the High Court, opined:

"The burden is on the person retracting the confessional statement to lead some evidence as to why the confessional statement has to be rejected. No evidence on that count was led. Coupled with the confessional statement wherein some facts were recorded which was personal to the appellant alone, there were other documentary evidence coupled with the attendant circumstantial as noted by the tribunal to demonstrate and prove the charges against the appellant."

Appellant is, thus, before us.

11. Mr. Tarun Gulati, the learned counsel appearing on behalf of the appellant would, inter alia, submit:

i. The courts below have wrongly placed the burden of proof on the appellant.

ii. As the provisions of Section 24 of the Indian Evidence Act are attracted also in the matter of confession made before the authorities under the Act, the findings arrived at, inter alia, relying on or on the basis of the purported confession made by appellant were wholly illegal and without jurisdiction.

12. Mr.P.V. Shetty, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would contend:

i. The burden of proof has rightly been placed on the appellant as he, in view of Section 106 of the Indian Evidence Act, had special knowledge as to how he had entered into the transactions of import and on whose behalf.

ii. The very fact that the appellant had given details of the transactions is a clear pointer to the fact that only he and he alone knew thereabout and in that view of the matter no illegality can be said to have been committed in placing the burden of proof on him.

iii. The authorities under the Act having the power of carrying out search and seizure as also issuance of summons on any person and as the person so summoned has a statutory obligation to make a true statement, confession made by him would not be hit by the provisions of Section 25 of the Indian Evidence Act inasmuch as when such a statement was made by him he was not an accused and the officer under the Act was not a police officer.

13. Section 8 of the Act imposes restrictions on dealings in foreign exchange. Foreign exchange can be acquired only from a dealer authorized by the Reserve Bank of India. Sub-section (2) of Section 8 of the Act prohibits entering into any transaction providing for conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the ones for the time being authorized by the Reserve Bank of India without its previous general or special permission. Sub-section (3) of Section 8, and Section 9(1)(a) of the Act which are material for our purpose, read as under:

"8. Restrictions on dealings in foreign exchange.-

(1).....

(2).....

(3) Where any foreign exchange is acquired by any person, other than an authorized dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions

cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorized dealer or to a money-changer."

9. Restrictions on payments.- (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall-

(a) make any payment to or for the credit of any person resident outside India"

14. As indicated heretobefore, the courts below proceeded on the premise that a confession was made by appellant, although retracted later, that he had acquired foreign exchange during the period 1993-94 on the basis of forged import documents whereafter he got the same transferred to his bank account Nos. 564-000-4888-5 and No. 96300-1254-9 in Standard Chartered Bank, Asian House VI Branch and American E. Bank, Central Branch, at Hongkong and misutilized the said foreign exchange and failed to import any rough diamonds for which purpose the same was acquired.

15. The questions which would arise for our consideration are: (1) whether the appellant had made bald statement at the time of retraction alleging threat and coercion so as to shift the burden of proof from him to the Enforcement Directorate; and (2) whether consolidated penalty could have been imposed only on the basis of such retracted confession.

16. Indisputably, a confession made by an accused would come within the purview of Section 24 of the Indian Evidence Act, 1872, which reads as under:

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

17. The proceeding under the Act is quasi criminal in nature. Section 50 of the Act is a penal provision prescribing that in the event of contravention of any of the provisions of the Act or of any rule, direction or order made thereunder, a penalty not exceeding five times the amount or value involved in any such contravention may be imposed.

18. Section 71 of the Act provides for burden of proof in certain cases. Sub-section (2) of Section 71 provides that the burden of proving that the foreign exchange acquired by such person has been used for the purpose for which permission to acquire it was granted shall be on such person.

19. The Act is a special Act, which confers various powers upon the authorities prescribed therein. Even the salutary principles of mens rea and actus reus in a proceeding under the Act may not be held to be applicable. It is now a well settled principle that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a human right although per se it may not be treated to be a fundamental right within the meaning of Article 21 of the Constitution of India.

[See Article 11(1) of the Universal Declaration of Human Rights (1948) and Article 6.2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (1950) and Article 14.2 of the International Covenant on Civil and Political Rights (1966)]

20. Sub-section (2) of Section 71 places the burden of proof upon an accused or a proceedee only when the foreign exchange acquired has been used for the purpose for which permission to acquire it was granted and not for mere possession thereof. The Parliament, therefore, advisedly did not make any provision placing the burden of proof on the accused/proceedee.

21. The Act, thus, does not provide for a 'reverse burden'. No presumption of commission of an offence is raised under the Act. Even in a case where the law provides for a burden on the accused having regard to the aforementioned presumption of innocence as a human right, this Court in Noor Aga vs. State of Punjab & Anr. [2008 (9) SCALE 681] held as under:

"114. Only when these things are established, a statement made by an accused would become relevant in a prosecution under the Act. Only then, it can be used for the purpose of proving the truth of the facts contained therein. It deals with another category of case which provides for a further clarification. Clause (a) of Sub-section (1) of Section 138B deals with one type of persons and Clause (b) deals with another. The Legislature might have in mind its experience that sometimes witnesses do not support the prosecution case as for example panch witnesses and only in such an event an additional opportunity is afforded to the prosecution to criticize the said witness and to invite a finding from the court not to rely on the assurance of the court on the basis of the statement recorded by the Customs Department and for that purpose it is envisaged that a person may be such whose statement was recorded but while he was examined before the court, it arrived at an opinion that its statement should be admitted in evidence in the interest of justice which was evidently to make that situation and to confirm the witness who is the author of such statement but does not support the prosecution although he made a statement in terms of Section 108 of the Customs Act. We are not concerned with such category of witnesses. Confessional statement of an accused, therefore, cannot be made use of in any manner under Section 138B of the Customs Act. Even otherwise such an evidence is considered to be of weak nature."

{See also Alok Nath Dutta vs. State of West Bengal [2006 (13) SCALE 467] and Babubhai Udesinh Parmar vs. State of Gujarat [(2006) 12 SCC 268]}

22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. {See Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras [(1999) 6 SCC 1]}

23. The question came up for consideration before a Constitution Bench of this Court in Shanti Prasad Jain vs. The Director of Enforcement [(1963) 2 SCR 297], wherein, inter alia, it was held that the initial burden would be on the Department.

24. It is interesting to note that both the learned counsel have placed strong reliance upon a decision of this Court in K.T.M.S. Mohd. & Anr. Vs. Union of India [(1992) 3 SCC 178]. This Court therein made a distinction between the provisions of the FERA and the Income Tax Act, opining:

"31. Leave apart, even if the officers of the Enforcement intend to take action against the deponent of a statement on the basis of his inculpatory statement which has been subsequently repudiated, the officer concerned must take both the statements together, give a finding about the nature of the repudiation and then act upon the earlier inculpatory one. If on the other hand, the officer concerned bisect the two statements and make use of the inculpatory statement alone conveniently bypassing the other such a stand cannot be a legally permissible because admissibility, reliability and the evidentiary value of the statement of the inculpatory statement depend on the bench mark of the provisions of the Evidence Act and the general criminal law."

Holding in categorical terms that Section 24 of the Indian Evidence Act shall apply, it was held:

"But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected *brevi manu*. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down



that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated."

(emphasis supplied)

25. Submission of Mr. P.V. Shetty that appellant had special knowledge and that burden of proof would be on him in terms of Section 106 of the Indian Evidence Act, in a situation of this nature, cannot be held to have any substance. The initial burden to prove that the confession was voluntary in nature would be on the Department. The special or peculiar knowledge of the person proceeded against would not relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It may only alleviate that burden to discharge and very slight evidence may suffice. This Court in Collector of Customs, Madras & ors. Vs. D. Bhoormall [(1974) 2 SCC 544)] while examining the provisions of Sections 167(8) and 178A of the Sea Customs Act, held:

"33. Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of Clause (8) of Section 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling."

(Emphasis supplied)

26. Yet again in Romesh Chandra Mehta vs. State of West Bengal [(1969) 2 SCR 461] although this Court held that any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence, but as indicated hereinbefore, he being an officer concerned or the person in authority, Section 24 of the Indian Evidence Act would be attracted.

27. Reliance has been placed by the Tribunal on the decision of this Court in State (NCT of Delhi) vs. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600], commonly known as the 'Parliament Attack

case.' Therein also this Court held:

"We start with the confessions. Under the general law of the land as reflected in the Indian Evidence Act, no confession made to a police officer can be proved against an accused. 'Confessions'-which is a terminology used in criminal law is a species of 'admissions' as defined in Section 17 of the Indian Evidence Act. An admission is a statement-oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Sections 17 to 23 deals with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression 'appears' connotes that the Court need not go to the extent of holding that the threat etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than police officer."

(emphasis supplied)

28. In *Mirah Exports Pvt. Ltd. Vs. Collector of Customs* [(1998) 3 SCC 292] while considering a question of undervaluation under Section 14 of the Customs Act, 1962, this Court held that the burden of proving a charge of undervaluation lies upon the revenue, stating:

"13. The legal position is well settled that the burden of proving a charge of under-valuation lies upon Revenue and Revenue has to produce the necessary evidence to prove the said charge 'Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs' and what is to be examined is 'whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price.'"

29. Recently, in *Commissioner of Customs, Mumbai vs. J.D. Orgochem Ltd.* [2008 (6) SCALE 669] in regard to a case of determination of transactional value, it was held:

"11. Upon whom the onus of proof lies to establish the transaction value must be considered having regard to phraseology used in the Act and the Rules framed thereunder."

30. We may at this stage notice some decisions whereupon Mr. P.V. Shetty has placed strong reliance.

31. In *K.I. Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin* [(1997) 3 SCC 721], a finding of fact was arrived at that the confession was voluntary in nature. Reliance therein for the purpose of arriving at the guilt of the accused was not only placed on the statement given under Section 108 of the Customs Act, 1962 but also on the deposition of evidence of P.Ws. 2, 3 and 5.

32. In *Assistant Collector of Central Excise, Rajamundry vs. Duncan Agro Industries Ltd. & ors.* [(2000) 7 SCC 53], this Court opined that an authority under the Act while recording a statement need not follow the safeguards provided in Section 164 of the Code of Criminal Procedure, 1973. Therein also, it was held:

"The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinized by the court in the same manner as confession made by an accused person to any non- police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings."

(emphasis supplied) Yet again it was observed:

"We hold that a statement recorded by Customs Officers under Section 108 of the Customs Act is admissible in evidence. The court has to test whether the inculpatory portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act."

33. In *Gulam Hussain Shaikh Chougule vs. S. Reynolds, Supdt. Of Customs, Marmgoa* [(2002) 1 SCC 155], this Court refused to exercise its discretionary jurisdiction under Article 136 of the Constitution of India opining that the confession was rightly held by the High Court to be voluntary in nature.

34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a

conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

35. In the instant case, the Investigating Officers did not examine themselves. The authorities under the Act as also the Tribunal did not arrive at a finding upon application of their mind to the retraction and rejected the same upon assigning cogent and valid reasons therefor. Whereas mere retraction of a confession may not be sufficient to make the confessional statement irrelevant for the purpose of a proceeding in a criminal case or a quasi criminal case but there cannot be any doubt whatsoever that the court is obligated to take into consideration the pros and cons of both the confession and retraction made by the accused. It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage.

36. Appellant is said to have been arrested on 27.10.1994; he was produced before the learned Chief Metropolitan Magistrate on 28.10.1994. He retracted his confession and categorically stated the manner in which such confession was purported to have been obtained. According to him, he had no connection with any alleged import transactions, opening of bank accounts, or floating of company by name of M/s Sun Enterprises, export control, Bill of Entry and other documents or alleged remittances. He stated that confessions were not only untrue but also involuntary.

37. The allegation that he was detained in the Office of Enforcement Department for two days and two nights had not been refuted. No attempt has been made to controvert the statements made by appellant in his application filed on 28.10.1994 before the learned Chief Metropolitan Magistrate. Furthermore, the Tribunal as also the Authorities misdirected themselves in law insofar as they failed to pose unto themselves a correct question. The Tribunal proceeded on the basis that issuance and services of a show cause notice subserves the requirements of law only because by reason thereof an opportunity was afforded to the proceedee to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law. The statement made by the appellant before the learned Chief Metropolitan Magistrate was not a bald statement. The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent examination of the factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act.

38. In *Mohtesham Mohd. Ismail vs. Spl. Director, Enforcement Directorate & Anr.* [(2007) 8 SCC 254], this Court held:

"15. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well- settled principle of law that a confession of a co- accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. [See Haricharan Kurmi etc. v. State of Bihar AIR 1964 SC 1184; Haroom Haji Abdulla v. State of Maharashtra AIR 1968 SCC 832; and Prakash Kumar v. State of Gujarat (2007) 4 SCC 266].

16. We may, however, notice that recently in Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram (2006) 13 SCC 210, this Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted. A confession purported to have been made before an authority would require a closure scrutiny. It is furthermore now well-settled that the court must seek corroboration of the purported confession from independent sources."

39. There is another aspect of the matter which cannot be lost sight of. The allegations made in the show cause notice form the foundation of the case. Appellant was asked to show cause inter alia alleging that he instead of utilizing the foreign exchange acquired on the basis of forged documents, for import of rough diamonds, got the same, after remitting abroad, credited in the foreign bank account Nos. 564-000-4888-5 and 96300-1254-9 in Standard Chartered Bank, Asian House VI Branch and American E Bank, Central Branch at Hongkong, being maintained by foreign nationals. Apart from the fact that no enquiry in that behalf had been directed, the Tribunal itself held:

"14. On the basis of above discussion it established that the appellant was the brain working behind the subject import transactions where non-existent firms were established under his guidance, for which foreign exchange was acquired and remitted without corresponding import of goods particularly when the name of his co-brother, Harshad Godalia was disclosed by the appellant himself during his statement along with bank accounts of foreign nationals to whom the foreign exchange was remitted to Hongkong."

The finding that he was the brain behind and not involved in the actual transaction, therefore, does not meet the requirements of law.

40. In Commissioner of Central Excise, Bangalore vs. Brindavan Beverages (P) Ltd. & Ors. [(2007) 5 SCC 388], this Court held as under:

"12. Per contra, learned Counsel for the respondents submitted that there is no material that the respondents had ever been parties to the so called arrangement, even if it is accepted for the sake of arguments but not conceded, that such arrangement was in reality made. There was no material brought on record to show that the respondents had any role to play in such matters as alleged. Even the show cause notice did not refer to any particular material to come to such a conclusion.

Therefore, the Commissioner and the CEGAT were justified in holding that the respondents were entitled to the benefits.

13. We find that in the show cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise holder (sic franchiser). On a perusal of the show cause notice the stand of the respondents clearly gets established.

14. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted."

41. For the reasons aforementioned, the order of the Tribunal and consequently the impugned judgment and order cannot be sustained. They are set aside accordingly. This appeal is allowed. The amount of Rs. 2,65,000/- which is with the Department shall be refunded to the appellant within four weeks from date. In the facts and circumstances of the case, there shall be no order as to costs.

.....J. [S.B. Sinha] .....J. [Cyriac Joseph] New Delhi;

December 18, 2008