CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

CUSTOMS Appeal No. 12078 of 2014
(Arising out of OIA-207-210/2014/CUS/COMMR-A-/KDL dated 18.03.2014 passed by Commissioner of Customs -Kandla)

NILESH SHIYANI **...Appellant**
PROPRIETOR OF M/S, HARI OM INTERNATIONAL,
TULSI SHYAM MAHADEV STREET, MIRZAPUR, BHUJ,
KUTCH,-GUJARAT

VERSUS

C.C. KANDLA **...Respondent**
CUSTOM HOUSE,
NEAR BALAJI TEMPLE,
KANDLA-GUJARAT

APPEARANCE:
Shri Saurin Ashok Shah, Advocate appeared for the Appellant
Shri Sanjay Kumar, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12622 /2023

DATE OF HEARING: 09.10.2023
DATE OF DECISION: 16.11.2023

RAMESH NAIR

1. The present appeal is directed against the Order-In-Appeal No. 207/2014/CUS/Commr(A)/KDL dated 18.3.2014 of Commissioner of Customs (Appeals) Kandla by which Order-In-Original No. MP & SEZ/05/ADC /SS/EXP/2013-14 dated 07.06.2013 passed by the Additional Commissioner, Customs, Custom House, MP & SEZ, Mundra has been upheld. By the impugned Order penalty of Rs. 1,00,000,00/- has been upheld under Section 114 (i) of the Customs Act, 1962 upon appellant, Shri Nilesh Bhikhalal Shiyani, Proprietor of M/s. Hari Om International, a Merchant Exporter engaged in the export of food items.

2. Briefly the facts are that appellant has exported goods in container No. GATU8007720 covered under Shipping Bill No. 1715647 dated 26.10.2020 filed at the custom House, MP & SEZ, Mundra, consigned to M/s. Batik Emporium General Trading (LLC), Dubai, UAE declaring goods as wafer, cumin seed, far far, roasted matti and mamra. The container was shipped on the vessel MV Kanivu voyage – 827W on 30.10.2010 scheduled to reach Jabel Ali on 03.11.2010, however, on 01.11.2010 officers of DRI directed the container liner agent M/s. Trans Asian Shipping Services (P) Ltd to recall the container back to Mundra. The officers carried out search at the premises of appellant as well as forwarders firm, M/s. Bright Shipping at Mundra and CHA firm, M/s. Jayshree Clearing Forwarding and Shipping Agents Pvt Ltd. The exported container was received back on 20.11.2010 at MundraPort and upon opening, 387 logs of wood and 11.14 MTS of Food items viz. wafers, cumin seeds, Far Far, Roasted Matti, Mamra/Haldi Ram make Bakharwadi, Khata Meetha, Phalahari Chivda. Corn flakes mixture were found as per the panchnama dated 23.11.2010. The opinion of Forest Officers was sought and they opined that prima facie the logs were red sanders, a prohibited item; as per sr. 154 of Table B of Schedule 2 of the Export Policy, export of Red Sanders Wood in any form, whether raw, processed or unprocessed is prohibited.The officers of DRI on that basis proceeded to seize 10.700 MTS of 387 wood logs and 11.14 MTS of food items.

3. During investigation statements of following persons were recorded:

   i. Statements dated 25.11.2010 and 26.11.2010 of NileshShiyani were recorded in which he has inter alia admitted to have been present during stuffing of logs of red sanders and not declared the same in the shipping bills;

ii. In the statement dated 23.02.2011 Smt. Damini Pradip Lakhia, she interalia stated that she was posted during the period 28.7.2009 to 3.01.2011 as Superintendent of Central Excise, Range -1, Bhuj; she did not visit stuffing place of exporter as there was heavy office work and that she does not know who has put the one-time bottle-seal on the container of M/s. HariOm International; that she has signed Annexure C-I at the range office itself on the basis of declaration made by the exporter.

iii. Statement dated 25.02.2011 of Devendra Singh was recorded by the officers of DRI, Gandhidham, in which he interalia stated that he was Inspector of Central Excise, Range – I,Bhuj, during the period 06.01.2020 to 21.01.2011; that Nilesh Shiyani had wrongly stated in his statement that Shri Devendra Singh Inspector of Central Excise AR- 1 Bhuj visited the said ware house, inspected empty container and bags of food items stored there and left; that he had handed over one-time bottle seal to Shri Mukesh as per the directions of the Superintendent and signed the export documents in range office in presence of superintendent on the basis of declaration made by the exporter; that bottle seal no. mentioned in the panchnama dated 23.11.2011 drawn at MICT Mundra was the same which was given by him to employee of Hari Om International for affixing on the container and container seal no 0031757 has been issued by the Range Excise Office.

iv. Statement dated 30.4.2011 of Shri Turk Faisal Abdul Mazid, employee of M/s. Jayshree Clearing Forwarding and Shipping Agency Private Ltd who acted as CHA, Statement of Shri Kasam Hamid Theba, proprietor of M/s. Bright Shipping, who acted as a forwarder were also recorded.

v. Statement dated 21.4.2011 of Shri JeetuHarikishanChandnani, Branch Manager of Trans Asian Shipping Services (P) Limited was recorded; it was interalia stated that Mr.Ranjit of M/s. Bright Shipping had booked 40' container for M/s. Hari Om International which was gated-in on 25.10.2010 by M/s. Bright Shipping, Bill of Lading (BL) was issued on 28.10.2010; that Trans Asia deal with about 5000 to 7000 containers, it was not possible for them to show correct tare weight of container in Bill of Lading, therefore there is difference of tare weight in BL dated 28.10.2010.

vi. Statement of Shri MukeshMuljiRuparel, Director of Jayshree Clearing Forwarding and Shipping Agents Private Limited was recorded where he inter alia stated that Shipping Bills were filed by them and that exporter's forwarders, Shri Ranjit of M/s. Bright Shipping looked after the work of booking of containers, transportation, give documents for clearance of the shipping bill.

vii. Statement dated 12.01.2011 of Shri Ranjit Ramakrishna Punapullai, partner of M/s. Bright Shipping, that he arranged for vehicle for transportation of the container from M/s. Monarch Movers which arrived on 22.10.2010 at around 9.30 PM at the Honeycomb CFS and it was stuffed on 23.10.2010;

that shriNileshShiyani called him on 24.10.2010 at around 11 am to enquire about the trailer as the vehicle which left after mid night, the driver of the vehicle, lost his driving control and trailer fell in to a pit and broke down at Anjar; that he called driver of the trailer who confirmed the same and the driver told him that the trailer in broken state has been reported to the transporter, M/s. Monarch Movers who assured for arrangement of mechanic for repairs; that the whole day of 24.10.2010 the trailer was under repairs at Anjar and moved only at night of 25.10.2010 towards Mundra and reached in the morning and gated-in inside the port area, there the seal was verified by the Gate Customs Officer and stamped and signed on the Annexure/Central Excise Invoice; that he waited for the original documents to be received from Shri Mukesh, employee of Hari Om International as there was change in weight and packaged in the previous shipments and filed the checklist of Hari Om International on 25.10.2010 after receipt of Original documents for clearance of container; after approving of the checklist, he received the shipping bill with Let Export Order on 26.10.2010 from Faisal, employee of CHA; that the weighment of the container never took place as it was never a practice to weigh the container with cargo, only on doubt the customs authorities weighted the container; that in respect of all the export consignment of Hari Om International having destination as UAE, the exporter insisted for very fast clearance, early supply of Bills of Lading and remained ready for making extra payments to accelerate their export work; in export container no. GATU8007720 also they insisted to get it cleared very fast ; that after the search of his office by the officers of DRI , Shri

Nilesh Shiyani had told him that the subject container should not be called back at any cost.

4. A show cause notice dated 18-5-2011 was issued to the appellant, calling upon as to why 10.7 MT of Red Sanders Logs having grey market value of Rs. 42.80 Lakhs (international grey market value of about Rs. 85.60 Lakhs) seized from the export container covered under shipping bill no. 1715647 date 26.10.2010 should not be confiscated under section 113(d) and (i) of the Act read with sub-section (i) of Section 11 of Foreign Trade (Development and Regulation) Act, 1992 and Rule 11 of Foreign Trade (Development and Regulation) Rules, 1993 as export of logs of red sanders out of India is prohibited, food items with pro-rata FOB value of INR 2,13,167/- covered under Invoice No: 0M07/10-11 dated 23.10.2010 and BL No. TALTSG00767441 dated 28.10.2010 (Trans Asia Container Line) and Shipping Bill No. 1715647 dtd. 26.10.2010 (Custom House: MP & SEZ Mundra) totally weighing 11.14 MT seized from container No: GATU8007020 should not be confiscated under section 119 of the Customs Act 1962 as they were used to conceal logs of red sanders meant for smuggling, penalty should not be imposed on him under section 114 (i) of Customs Act, 1962 for smuggling of logs of red sanders out of India for the reasons given in the foregoing paras. (a) M/s. Jayshree Clearing Forwarding and Shipping Agency Private Limited of Mumbai, (b) Shri Mukesh Mulji Ruparel, the Director of CHA firm M/s. Jayshree Clearing Forwarding and Shipping Agency Private Limited of Mumbai (c) Shri Turk Faisal Abdul Mazid 'H' card holder of M/s. Jayshree Clearing Forwarding and Shipping Agency Private Limited of Mumbai, (d) Shri Kasam, Hamid Theba proprietor of M/s. Bright Shipping, Mundra and (e) Shri Ranjit

Ramakrishna Punapullai@Ranjit Pillai of M/s Bright Shipping Mundra and (f) Shri Shailesh as to why penalty should not be imposed on them under section 114 (i) of the Customs Act, 1962 for abetment of smuggling of logs of red sanders out of India for the reasons given in the said notice.

5. The Additional Commissioner, Customs House, MP&SEZ, Mundra by his Order dated 07.06.2013 confirmed the show cause notice; Ordered absolute confiscation of goods and imposed penalty of Rs. 1,00,00,000/- (Rupees One Crore) on Shri Nilesh Shiyani and Shri Shailesh of Chennai and imposed penalty of Rs. 1,00,000/- (One Lakh) each on the other above named co-noticees under section 114 (i) of the Act. As against the present appellant he has interalia held that he has in his statement admitted that he had procured logs of red sanders from person known as Shailesh from Chennai and stuffed logs of red sanders in the container and concealed them behind the packets of food items; that Shri Ranjit Pillai admitted that when Shri Nilesh Shiyani came to know that the container was recalled by the DRI, he directed him not to bring the container back at any cost; corroborative evidences on record, which prove that Shri NileshShiyani had active involvement in the attempt to illegal export of Red Sanders. As regards the other co-noticees viz. CHA, their employees, and forwarders who arranged the container for stuffing and transportation and clearance of the container for exports, he has held that there is no evidence to establish the charge of conspiracy and abetment in smuggle of red sanders out of India, however, they have indirectly helped and failed to exert due diligence. As regards Shri Shailesh of Chennai, the adjudicating authority has held that 'Shailesh ' was a fake name for hiding actual identity, he is the person who brought the 10.700 MT of Red Sanders Logs, he proposed Shri

Nilesh Shiyani for smuggling of Red Sanders; brought the said Red Sanders Logs illegally to the place of stuffing and hence abetted in illicit export of the same which prove that Shri Shailesh of Chennai was the mastermind and kingpin in this entire racket to smuggle the prohibited goods knowing fully well that the export of Red Sander logs was prohibited under the Foreign Trade Policy. The Order-In-Original of Additional Commissioner was upheld by Commissioner of Custom (Appeals) mainly on the ground that statement of the appellant was voluntary; there was no use of force upon him or that his signatures were obtained on blank paper; that container was admittedly carrying the same bottle seal which was originally placed at the premises when the goods were stuffed and that too without any damage or tampering and that investigation had conclusively established that Shri Nilesh Shiyani had maliciously taken advantage of the shortage of officers and other practical administrative problems of the department to chase his smuggling activities. He further held that when there was no question about identity of the goods, it is immaterial that recovery panchnamas had no detailed description about impugned goods and that questioning opinion dated 26.11.2010 of forest officers who were officially deputed by the Deputy Conservator of Forest with specific direction to carry out the subject verification is also not found to be based on acceptable grounds as no re-test of another set of samples was demanded by the appellant.

6. Shri. Saurin Ashok Shah, Learned Counsel appearing for the appellant assailed the Order of Commissioner of Customs (Appeals) Kandla on the following grounds:a) that no reliance could have been placed on the Statements dated 25-11-2010 and 26-11-2010 of the appellant recorded under section 108 of the Act and relied upon in the

impugned order as the same has been retracted at the very first instance on appellant being produced before the learned Chief Judicial Magistrate; when the appellant was produced before the learned Chief Judicial Magistrate, Bhuj-Kutchh, a clear-cut allegation of signatures having been obtained on blank papers, being beaten-up and has been falsely trapped were redressed by the appellant which came to be reduced into writing by the learned chief judicial magistrate, Bhuj; impugned order incorrectly held that signatures on the Statements were not the same as appellant used in ordinary course of business by the appellant suggest vindictiveness and malafide intention to disown the same at a later date; that on the contrary different signatures suggests that appellant was not willing party to the facts narrated in the so-called statements of the appellant recorded by the DRI; appellant has been assaulted by the officers of DRI on 25-11-2010 and was sent for treatment at G K General Hospital, Bhuj in support of which evidences are placed on record;

b) that samples of timber logs drawn vide panchnama dated 23-11-2010 was not the same as examined by the forest department while forming opinion dated 26-11-2010; that the panchnama dated 23-11-2010 stated that they cut four small pieces as samples, the officers put each of the four samples of the impugned timber logs in cloth liner paper envelope and seal all those four envelopes properly with wax and DRI Brass Seal, on the other hand Opinion of forest department dated 26-11-2010 it was found that two wooden pieces were there in the said paper cover; one piece is in cylindrical shape and is of dark red colour and other piece is rectangular in shape and is of whitish-red colour and edges of the same are of whitish colour; he argued that when one piece of wood was kept in one envelope/cover then how come two pieces of wood are found in one envelope/cover and that there is no explanation to this material discrepancy; that therefore a legitimate conclusion can be drawn that what was seized and kept in each envelope was not the same put before the forest department for obtaining their opinion and therefore no reliance can be put forward by DRI that the timber logs found is nothing else but Red-Sanders and penalty imposed U/s. 114(i) of Customs Act is per se bad in law.

c) that there is no conclusive or cogent evidence or material on record to indicate that 387 timber logs are Red Sanders; that the opinion of forest officer dated 26-11-2010 is not conclusive in nature but just a mere prima facie opinion and that no other material is placed on record whereby one can draw a final conclusion that the timber log is Red Sanders; that no reliance can be placed on additional documents viz. letter dated 05-09-2023 of Deputy Director of DRI regarding inventory and disposal of seized goods to justify 387 timber logs is Red Sanders for the reason of material discrepancy not only in the number of logs as well as in terms of weight of logs but also no material emerging on record about 11.40 MT food articles as well as sealing procedure while handing over the custody of logs and food articles;

d) there is nothing on record to indicate as to where and when and by whom, the so-called 387 pieces of timber log came to be stuffed in container no. GATU 8007720 which was sealed in presence of Shri Devendra Singh – Inspector of Central Excise and in presence of Smt. Damini Pradip Lakhia – Supt. Of Central Excise; that documents placed on record from page 39 to 44 it emerges that net weight of the container No. 8007720 was found 16610 kgs and gross weight 16820 kgs when it left the Mundra port towards Jebel Ali but when the container was called back it reflects gross weight was 25.630 MT of the container bearing no. GATU – 8007720 and on examination 387 logs of timber wood was found, the DRI has not recorded the statement of Shri A. R. Chavda – Officer of Custom whose rubber stamp is found on page 43 about the difference in weight. As regard the One-time Bottle seals on the container, the DRI recorded the statement of Smt. Damini Pradip Lakhia- Superintendent Of Central Excise dated 23-02-2011 wherein it indicates that "She did not know who has put the one time bottle seals on the container"; that DRI also recorded the statement of Shri Devendra Singh – Inspector of Central Excise dated 25-02-2011 wherein it indicates that "He had handed over ONE TIME BOTTLE SEALS to Shri Mukesh as per the directions of the Superintendent"; thus the statement of Shri Mukesh was of utmost importance to throw light as to who affixed the ONE TIME BOTTLE SEALS on the container GATU – 8007720 but DRI has unfortunately not recorded the statement of Shri Mukesh who would have been instrumental to throw light as to who affixed ONE TIME BOTTLE SEAL on the said container and as to when, where and by whom the said so-called 387 timber logs came to be stuffed in the container; the DRI has also not recorded statements of labourers of nearby area who would have placed the 387 timber logs in the container GATU – 8007720 and thus there is nothing on record to indicate as to where, when and by whom the timber logs came to be stuffed in the container and therefore also the present appellant cannot be held liable or responsible U/s. 113 (d) of the Customs act for attempting to export prohibited items.

e) that the Statement of Shri Nilesh Bhikhalal Shiyani can be of no avail to DRI and no reliance can be placed on the said statement and that of Ranjit Ramakrishna Punapullai (Ranjit) would not render any adverse inference to be drawn against Nilesh Bhikhalal Shiyani; that record indicates that Ranjit had a understanding of 50% share in profit/loss incurred in M/s. Bright Shipping though he was not partner in M/s. Bright Shipping; the so-called statement of Ranjit that "Shri Nilesh Shiyani told him that subject container should not be called back at any cost" came to be recorded on 12-01-2011 i.e. after almost 72 days of the search carried out on 01-11-2010 at the office premises of forwarder firm – M/s. Bright Shipping at Mundra and various documents were recovered; that on that basis no assumption can be made that Shri Nilesh Shiyani had knowledge about the Red Sanders stuffed in the container and therefore he made such statement to Ranjit Pillai; that it would be too far-fetched to make such assumption that shri Nilesh Shiyani had knowledge about the Red Sanders stuffed in the container and therefore he made such statement to Ranjit Pillai; that assuming without admitting that such statement was made by Nilesh Shiyani then also no adverse inference can be drawn by making assumption that Shri Nilesh Shiyani had knowledge about the Red Sanders stuffed in the container and therefore he made such statement to Ranjit Pillai; that the container contained food product which had a very short shelf life and therefore Shri NileshShiyani would have been worried about the likelihood of loss that would be incurred if the container is called back as all the food items in the said container would become redundant for being exported again due to short shelf life left for consumption.

7. Shri Sanjay Kumar, Learned Superintendent(AR) appearing on behalf of department reiterated the findings given by Learned Commissioner of Customs (Appeals) Kandla. He submitted that container seal is found intact and forest officers have clearly opined that the goods are

prima facie red sanders, the appellant has in his statement admitted, in that view impugned order merits to be upheld.

8. We have carefully considered the submission made by both the sides and perused the records. The issue to be determined is whether appellant has mis-declared exported goods viz. food articles such as wafers, cumins seeds, far far, roasted matti, mamra etc. stuffed in container, which after sailing having recalled by the officers of DRI, contained prohibited item viz. 387 logs of Red Sanders as was prima facie opined by the forest officers. And if yes, whether penalty imposed under section 114 (i) of the Act upon the appellant is proper and sustainable for his acts and omission in alleged illegal export of prohibited goods. It is a matter of record that One-time bottle seals of the central excise were affixed after stuffing of container at the ware house/factory of the appellant which has been found untampered upon examination and recovery of wooden logs prima facie appearing to be red sanders. On this backdrop, an apparent case of mis-declaration of exported goods by the appellant is appearing on record. In this regard, it is noticed that jurisdictional central excise officers namely Shri Devendra Singh – Inspector and Smt. DaminiLakhia have signed examination report of the goods stuffed in which para 13 states net weight of the stuffed container as 16610 Kgs and gross weight 16820 kgs; the report also states Bottle seal bearing No. TAS278658 and central excise seal bearing No. 0031757; the officer of Customs namely Chavda A. R. has signed the shipping bills and permitted exports after verification of the shipping bills which also states the aforesaid details. The above-named officers of department were responsible for supervising the stuffing of goods and affixing the seal and verification of the cargo as per the shipping bill, however, they have not been made party to show cause notice

nor they have been examined by the adjudicating authority in terms of section 138B of the Act. At this juncture, it is observed that the possibility of substitution of cargo enroute the port or post entry into gate of port is not investigated;such possibilities cannot be ruled out particularly in view of tribunal decisions in which cases of substitution of cargo and double bottle seal used by the miscreants enroute is mentioned in the case of SHUVAM ENTERPRISE V. COMMR. OF CUS. (AIRPORT & ADMN.), KOLKATA2016 (344) E.L.T. 305 (Tri. - Kolkata), the relevant excerpt of which is as below:

> ***2.*** *Shri R.K. Choudhary (Advocate) and Shri B.N. Pal (Advocate) appeared on behalf of the appellant. Shri R.K. Choudhary argued that appellant had a valid CHA Licence under Customs House Agents Licensing Regulations, 2004 (CHALR). That appellant was engaged by a Nepali Exporter for shipment of 24 MT of Mustard Oil Cake (Khali) to be consigned to Hong Kong via South Africa. That two containers with the goods, duly inspected by the Customs Authorities at Jogbani, were bottle sealed by Nepalese Customs and forwarded to Kolkata for shipment. That CTD (Custom Transit Declaration) was filed by the appellant on the basis of documents provided by the Nepalese Exporter through its agent in India. That the containers were intercepted by DRI in the docks at Kolkata and upon inspection by DRI, in the presence of representative of the appellant, one of the two bottle seals was found to be tampered but the second seal of the other container was found to tally with the declared seal number mentioned in the covering document. That on examination by DRI, the containers were found to contain 19.65 MT of Red Sanders wood. That after necessary investigation appellant was alleged to have violated Regulation 13(a), 13(b) and 13(c) of the CHALR, 2004 [comparable to Regulation 11(a) 11(b), 11(c) & 11(n) of the CBLR, 2013]. That after conducting necessary inquiry proceedings CHA License of the appellant was revoked by adjudicating authority under order dated 27-2-2015 read with a corrigendum dated 13-4-2015.*
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> ***2.1*** *It is the case of the appellant that CHA was approached for the clearance of Export consignment only from Kolkata Port and cannot be held responsible for any substitution of goods done before the containers reached the Docks in Kolkata. That CHA deputed his person at Nepal for witnessing the stuffing of declared export goods and Customs at Nepal put the seals on the containers and endorsed the CTD. That when the containers were brought to Jogbani LCS the Indian Customs checked the sealed containers and found the same to be in order and accordingly endorsed CTD for onward transit of containers to Kolkata Port. That role of the CHA was to start only by filing CTD and other related documents with Kolkata Customs. That DRI intercepted the containers on 29-11-2012 before the containers could be checked and inspected by the CHA. That DRI called for the representative of the CHA for investigation and as per the DRI investigation container seal was tampered and goods substituted between Jogbani LCS and Kolkata port for which CHA is not responsible. That the job of transit between Jogbani and Kolkata was assigned to Freight Forwarder appointed by the Exporter. That the enquiry report was submitted beyond the stipulated period of 90 days from the date of issue of notice under CBLR, 2013.*

8.1 Similar observation of tempering of seal and substitution of cargo enroute are noticed in the case of NileshKatira and M/s. Marathon Corporation versus Commissioner of Central Excise & ST, Nagpur – 2022 (3) TMI 238 – CESTAT Mumbai and in the case of Maheshwari Rocks (I) Pvt Ltd – 2009 (10) TMI 803 – CESTAT Chennai. It is observed that miscreants looking for bonafide exporters for booking a container to load the red sanders from a regular exporter of low value food items to ensure smooth clearance is not unknown. This can be observed in para 4.2 of the former case, the finding of the adjudicating authority in that case is as below:

> 4.2 In the order in original Jt Commissioner has recorded the findings as follows:
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> *"10.1 The Noticees has contended that both the noticees i.e. M/s. Marathon Corporation, Mumbai and Shri NileshKatira one of the partners in M/s.Marathon Corporation had no role in the attempted export of prohibited goods and they didn't abet the act of Commission of Sanjay Pawar rendering the goods liable for confiscation, hence they are not liable for penal action under Section 114(i) of the Customs Act, 1962. I have gone through the present SCN and the reply submitted by the noticees and find that Sanjay Pawar is the main conspirator who hatched a criminal conspiracy to smuggle Red Sanders and he not only arranged the Red Sanders, but also managed to pose as an agent for overseas clients for vegetables and contacted M/s. Marathon Corporation, for supply of the vegetables. Sanjay Pawar chose M/s.Marathon Corporation, Mumbai because he required a bonafide exporter for booking a container to load the red sanders and the said company was a regular exporter from ICD Janori, and this would have ensured smooth clearance through Customs at ICD Janori. Further, he was aided by M/s Marathon Corporation, who neither asked for any documents about the credentials of Sanjay Pawar nor verified the credentials of Sanjay Pawar, and also allowed the container booked by them Marathon, along with the goods to be transported by the truck trailer arranged by Sanjay Pawar. The said Sanjay Pawar also appears to have replaced the declared goods with the prohibited Red Sanders enroute ICD Janori to JNPT Port. Sanjay Pawar not only replaced the declared cargo with prohibited goods but also appears to have removed the original Central Excise & Custom Bottle Seal number affixed on the said container while replacing the goods and faked the same with the tampered Seal with the same mark and number in order to hoodwink the authority in case the container was checked enroute to Port for smooth sailing of the cargo.*
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> *10.2 M/s. Marathon Corporation, Mumbai have aided and abetted Sanjay Pawar in the smuggling of prohibited Red Sanders by exhibiting gross negligence in not verifying the address of Sanjay Pawar, not asking for the PAN Card of Sanjay Pawar and also allowing the container booked by them along with the goods to be transported by the truck trailer to be arranged by Sanjay Pawar. I find that M/s.Marathon Corporation, Mumbai have filed the impugned shipping bill under claim of drawback and hence they are responsible for the goods as exporters. These actions on the part of M/s.Marathon*

Corporation have aided and abetted the purported smuggling of Red Sanders by Sanjay Pawar and his accomplices.

10.3 I find that Shri NileshKatira, the partner of M/s.Marathon Corporation, the main acting partner of the said exporting firm, by his own admission, he had stated that he was responsible for all affairs of the firm as only he looked after all the matters. He is in this export business since long as before Marathon as he was operating M/s.Siddhivinyak Exports. This amply clarifies that he was well aware of the Rules / Acts and provisions made therein under and compliance thereof by an exporter/ importer. Despite being aware of these facts, he dealt with so called Sanjay Pawar in a very casual manner without taking into consideration the basics of the care and precautions any exporter/importer is required to exercise before making any deal. As a prudent businessman/exporter, he was required to know the credentials of the person he was dealing with. The failure on the part of Shri NileshKatira shows that he had taken his business too lightly and had also taken least care of the provisions of rule of land governing the exports. While he attempted to export the first consignment of Tomotoes to buyer linked with the Sanjay Pawar, he got the experience that overseas buyer or the Sanjay Pawar is not trust worthy. Despite that experience he went ahead in dealing with the said Sanjay Pawar for further exports and in this dealing also, the amount agreed was not received by him in advance as agreed upon in spite of the repeat experience, he went ahead with future exports. Shri NileshKatira neither attempted to verify the credential of Sanjay Pawar nor of the overseas buyer named by Sanjay Pawar, despite of he was a frequent visitor to Dubai for his export business as most of their overseas clients were based there. Same applies to the case of Sanjay Pawar as well as the driver with whom the container was sent by Sanjay Pawar for stuffing. Shri NileshKatira inexplicably neither asked for the driver's particulars in the form of PAN Card nor address proof or aadhar card or any identification proof containing his photograph nor verified his credential before handing over the goods to him. These actions of Shri NileshKatira of M/s. Marathon Corporation, Mumbai clearly have aided and abetted the purported smuggling of Red Sanders by Sanjay Pawar and his accomplices.

10.4 Further, I find that the noticees have knowledge of Public Notice No. 17/2012 and at the cost of their KYC documents they arranged the empty container and allowed the container booked by them (Marathon) along with the goods to be transported by the truck trailer arranged by Sanjay Pawar without asking for any documents about the credentials of neither Sanjay Pawar nor the driver of the truck trailer. The Sanjay Pawar took stock of this approach of M/s.Marathon Corporation and Shri NileshKatira and make them part of his plot of smuggling of Red Sender. Their careless approach and non-compliance of the know your customer (KYC) norms "enabled said Sanjay Pawar in the illegal attempted export of Red Sanders in violation of prohibition imposed under the provisions of Foreign Trade Policy, rule 11 of Foreign Trade (Regulation) Rules 1993, and Sections 33, 34, 50 & 115 (d) of Customs Act 1962. Said acts of omission and commission of M/s.Marathon Corporation and Shri NileshKatira rendered the Red Sanders liable to confiscation under Section 113(d), 113(1), 113(i) and 113(ia) of Customs Act 1962 read with Rule 11 of Foreign Trade (Regulation) Rules 1993, relevant provisions of Indian Forest Act 1927 and for violation of CITES convention. Hence M/s. Marathon Corporation & Shri NileshKatira, Mumbai are liable for penal action under section 114 (i) of Customs Act, 1962.

10.5 Further the noticees have cited several case laws. However on comparison of the facts and circumstances of the instant case, it is observed that the said case laws are not squarely applicable in this case. In this context, in the case of Bhavnagar University Vs. Palitana Sugar Mills P. Ltd. - 200312SCC 111, the Hon'ble Supreme Court has observed: -It is well settled that a little difference in facts or additional facts may make a lot difference in the precedential value of a decision."

10.6 The Sanjay Pawar (absconder and still to be apprehended) is the main conspirator in organising the illegal attempted export of Red sanders of international value of ₹ 4.70 crores vide Shipping Bill No. 6196190 dated 01.03.2016 with his accomplices. The Summons under Section 108 of the Customs Act 1962 could not be issued to Yadav, the Driver as no addresses could be assigned to him. As regards transporter company M/s.Soham Transport, summons was issued but could not be served as it was not found existing on the given address. Since Sanjay Pawar is absconding and is yet to be apprehended, action against him is kept in abeyance. Whenever he and his accomplice are apprehended, their statement(s) will be recorded under Section 108 of the Customs Act, 1962 and used as evidence against him/them and/or any other person to initiate action under Customs Act 1962, Foreign Trade (Regulation) Rules 1993, and relevant provisions of Indian Forest Act 1927 and for violation of CITES convention."

8.2 Tribunal in the above decision following Chennai Tribunal decision in the case of Maheshwari Rocks set aside the penalty imposed under section 114 of the Act upon the exporter, the operative part of that decisions is extracted here:

4.7 In similar facts and circumstances in case of Maheshwari Rocks (I) Pvt Ltd [2010 (262) ELT 574 (T-Chennai)] following was held:

"Heard both sides. While dealing with the stay applications filed by the appellants, the following order was passed :

"A shipping bill was filed on 12-7-2006 in the name of M/s. Maheshwari Rocks India Pvt. Ltd., (MRIPL) Bangalore for export of a consignment of polished granite tiles. When the consignment reached the Chennai Port, officers of DRI inspected the container and the cargo. It was found that the one-time seal and the Customs seal affixed on the container were intact. The rivets at the other end of the container doors had been deftly cut and the container stuffed with red sanders logs. Further investigation revealed that two persons by name S/Sh. Muralikrishna and Ramesh had befriended the exporter as representatives of the buyer in Malaysia. They behaved with the authorities as if they represented the exporter. The goods were examined at the ICD, Bangalore in the presence of S/Sh. Muralikrishna, Ramesh and the representative of the CHA and the container sealed. M/s. Caravel Shipping Services Pvt. Ltd., (CSSPL), the steamer agents had arranged container and the vehicle to carry the consignment to Chennai Port. After due process of law, the Commissioner confiscated 16.27 MTs of the red sander logs valued at ₹ 50 lakhs seized from the container under Section 113(d) of the Customs Act, 1962 (the Act). He also imposed penalties on various persons found to have associated with the attempt to smuggle out red sanders. An amount of ₹ 3 lakhs each was imposed on the exporter M/s. MRIPL and M/s. CSSPL both under Section 114 of the Act. The Commissioner had found that M/s. MRIPL and M/s. CSSPL had, by their acts of commission and omission, rendered the red sanders logs under seizure liable for confiscation. Moving the application for waiver of predeposit and stay of recovery of the impugned penalties, the counsel for the appellants submit that, once the export goods had been stuffed in the presence of Customs officials and the container sealed with the Customs seal and the steamer agent's seal, both the appellants ceased to be responsible for its safe transport to the gateway port. The learned counsel representing the exporter invited our attention to Circular No. 57/98-Cus. Dated 4-8-98 issued by the Central Board of Excise & Customs where it has been clearly stated that in case the goods are moving from an ICD, the responsibility to account for the goods-intransit is that of the custodian, namely the ICD. The Id. Counsel for the appellants took us through the findings of the Commissioner as regards the roles of the appellants in the offending transactions. The Commissioner had not found any

active or positive role on the part of the appellants in rendering the seized red sander logs liable for confiscation. Therefore, they pray that the predeposit of penalties may be waived and their recovery.

2. Ld. JDR reiterates the findings of the Commissioner.

3. We have carefully considered the submissions by the learned counsel for the parties. We observe from the impugned order that the Commissioner has found that the exporter had not behaved in a responsible and sensible manner. They had entrusted the export goods with two unknown persons S/Sh. Muralikrishna and Ramesh to transport the same to the ICD, Bangalore. Like-wise, the other appellant M/s. CSSPL had arranged the vehicle to carry; the impugned goods on the request of S/Sh. Muralikrishna and Ramesh, who were neither the exporter nor the CHA. According to him, the steamer agent should have verified the antecedents of the above two persons before handing over the vehicle to carry the goods. He also records in the order that at the time of examination of the goods at the ICD, they were found as declared.

4. We observe that the Commissioner has not found that both the appellants were aware of the design of S/Sh. Muralikrishna and Ramesh to substitute the export goods tiles with contraband red sander logs. He has only found that the exporter did not behave sensibly and responsibly. The observation of the Commissioner about the conduct of the steamer agent is also to the same effect. We find that these are not good enough reasons in arriving at a finding that the appellants had rendered the impugned goods liable for confiscation. The appellants have made prima facie case against the penalties imposed on them. In the circumstances, we order waiver of predeposit and stay of recovery of the impugned penalties till the disposal of the appeals."

We have not heard anything from the department's side to change our prima facie view. Shri T.H. Rao, Ld. SDR, appearing for the appellants reiterates the finding in the impugned order and emphasizes that as per the statements recorded, not only this consignment but nine other similar consignments have been exported adopting the similar modus operandi. He states that the exporter should have been careful in ensuring that the container is not tampered with and the goods are not substituted.

***2**. Shri B. Venugopal, Ld. Advocate, appearing for the appellant exporter states that the exporters are not involved in the smuggling of red sanders nor any evidence has been found to that effect. On the other hand, the adjudicating Commissioner has given a clean chit to the exporter but has penalized them on mere suspicion. He also refers to Circular No. 57/98-Cus dated 4-8-98 under which it is specified under para-6 that the custodian would be required to move the goods by road or rail upto the gateway port/airport. In view of this circular, the exporter's liability is over once the goods have been examined by the customs in the ICD and the seals are put on the container. The appellant exporter is therefore not liable for substitution of the cargo during movement from ICD, Bangalore to Chennai port.*

3. After hearing both sides, we find that the ICD has not been issued with a show cause notice and it is not known why Shri R. Baskaran and Shri Murali got access to the cargo enroute to Chennai when ICD, Bangalore as the custodian was supposed to be in charge of moving the cargo from ICD to gateway port. In the absence of any positive findings, regarding the involvement of the appellant exporter, we confirm our prima facie view, grant the benefit of doubt to him and set aside the penalty imposed on him. Appeal No. C/214/08 filed by the appellant exporter is allowed."

4.8 In view of the discussions as above I do not find any merits in the impugned order.

5.1 In view of the discussion as above I set aside the impugned order and allow the appeals filed by the appellants.

8.3 Apart from the fact that no investigation, on the possibility of substitution of cargo in the container enroute and use of double bottle seals, having been carried out; it can be seen that Central Excise officers who have signed verification of the cargo stuffing and custom officer who has signed verification of shipping bills have not been made party to the Show cause notice; no proceedings have been launched against them. In that view authenticity of verifications signed by them is essentially not questioned, if that is so, declared cargo as per the shipping bill at the end of exporter cannot be doubted.

8.4 As regard, the statement of appellant, it is observed that evidence have been placed on record that the same were not voluntary having been retracted. It is further observed that appellant has not been examined under section 138B of the Act, in that view statements of the appellant cannot be held as relevant and no reliance can be placed on the same. Reliance in this behalf is placed upon following decisions:

- G. Tech Industries v UOI-2016 (339) ELT 209 (P & H)
- Jindal Drugs P. Ltd v UOI-2016 (340) ELT 67 (P & H)
- J & K Cigarettes Ltd v CCE- 2009 (242) ELT 189 (Del)
- BasudevGarg v CC-2013 (294) ELT 353.

It is further observed that statements of Director/Employee of Custom House Agent – M/s. Jayshree Clearing Forwarding and Shipping Agency Private Ltd, partners of forwarders firm – Bright Shipping do not implicate the appellant except the statement of Ranjit Pillai who has stated that appellant was agreeable to pay higher container price for fast clearance and that when container was recalled, he directed that container should not be called back at any cost. On the other hand, there is also narration of vehicle breakdown enroute port of customs in the statement of Mr. Ranjit Pillai which shows possibilities of substitution of cargo enroute without knowledge of exporter from whose factory/ware house the container was stuffed and sealed. Apart from the said statement which on the face of it does not inspire confidence as to any truth it contained, for the reasons pointed out at para. 6 (e) above, even otherwise, maker of the statement having not been examined under section 138B of the Act; same is not relevant and cannot be relied upon to implicate the appellant, reliance in this behalf is placed on the judgements *supra.*

8.5 In the above background, it is to be held that documentary evidences viz. stuffing of cargo in form of Annexure/examination report verified and signed by the central excise officers and verification of the shipping bill by the officer of Custom would prevail over the aforesaid oral statements. Consequently, no case of mis-declaration can be said to have been established on the part of appellant. Red Sanders have been found from the same container bearing no. GATU 8007720 and seal bearing no. TAS278658 and Excise Seal No. 0031757 found to be intact, is evidence of occurrence of illegal attempt to export red sanders, however, person who carried out the said act is not identified; particularly, in view of fact that penalty has also been imposed on person called Shailesh from Chennai who is stamped as kingpin in export of red sanders, however, investigation could not trace him.

8.6 It is also observed that no evidence put forth as regards antecedents of the exporter of irregular exports in the past, nor there is any evidence of appellant's role in procurement of red sanders; as such there is no evidence of appellant's connection with such activities.

8.7 Since the role of the appellant in the illegal attempt to export red sanders is not established with cogent evidence, penalty upon appellant, imposed under section 114(i), is liable to be set aside.

8.8 Accordingly we set aside the penalty imposed upon the appellant. Appeal is allowed.

(Pronounced in the open court on 16.11.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha