Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 11607 of 2017 - DB

(Arising out of OIO-AHM-CUSTM-000-COM-001-17-18 dated 31/05/2017 passed by Commissioner of CUSTOMS-AHMEDABAD)

Hanumansingh Lakhavat **........Appellant**
Proprietor Of M/s. H.r. Containers,109,lodha Complex,
Court Circle(choraha),
Udaipur, Rajasthan

VERSUS

C.C.-Ahmedabad **......Respondent**
Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

APPEARANCE:
Shri Devashish K Trivedi, Advocatet for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR), for the Respondent

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

Final Order No. 10189/2024

DATE OF HEARING: 04.12.2023
DATE OF DECISION: 22.01.2024

RAMESH NAIR

The captioned appeal is filed by Mr. Hanumansingh Lakhavat against the Order-In-Original No. AHM-CUSTM-000-COM-001-17-18 dated 31.05.2017. In the impugned order the Ld. Commissioner of Customs, Customs House, Navarangpura, Ahmedabad had adjudicated a Show Cause Notice dated 31.12.2014 issued to confiscate seized logs of red sanders, green marble, Nilgiri logs, the Trailor, two trucks in which the said goods had been stuffed and the conveyance used to transport the containers and to penalise various persons involved in the attempt to unauthorizedly export red sander logs in contravention of the prohibition.

1.1 On the basis of an intelligence, a surveillance was kept outside a warehouse located at Piplaj Cross Roads, NH8, Opposite Ganesh Marble, Village- Dimral, Nadiad on 03.07.2014. On verification of the warehouse on 03.07.2014 at Nadiad, it was noticed that one container placed on trailor loaded with goods for export and two trucks were found at premises. It was found that the container was stuffed from the premises of M/s Parth

Natural Stone Pvt. Ltd. (100% EOU) with polished green marble slabs. The container was affixed with bottle seal by central excise officer of Range-II, Udaipur in order to get them exported through ICD Khodiyar, Ahmedabad. However the container was found open by removing the rivets of the handles of the container and most of the green marble slab had been offloaded in the warehouse in order to replace them with Red Sander logs. On examination of the trucks it was found that these two trucks were loaded with red sander logs concealed in between Nilgiri wooden logs and between shootings/sands filled with worn out plastics bags. Red Sander logs are prohibited for export. Mr. Rajesh Subramaniam who was present at the warehouse premises informed that one Mr. Anwar had brought the trailor from Udaipur to the warehouse. He further informed that the goods meant for export were removed from the container and were to be replaced with Red Sander Logs.

1.2 Based on the primary inferences, the goods alongwith Trailor and Trucks were placed under seizure on 03.07.2014. Sample were drawn from suspected wooden logs. The sample were sent to the Deputy Conservator of Forest, Social Foresty Department, Ahmedabad on 06.08.2014. The Deputy Conservator of Forest in his reply dated 07.08.2014 confirmed the samples to be Red Sander Wood. Further the investigations were carried out. Statements of persons were recorded during the course of the investigation in order to bring out evidence for export of Red Sander Logs.

1.3 Appellant in his statement deposed that he was the proprietor of M/s H R containers and used to co-ordinate with Exporters for freight rates, with shipping lines and also arrange containers and provide transport facilities for export. He accept his role in disputed consignments. The residential premises of Appellant was also searched and among other thing, Indian Currency worth Rs. 7.5 Lakhs were withdrawn on 05.07.2014. After recording the statements, the final investigation also revealed that in addition to the present consignment, 7 more consignments of Red Sander Logs he had brought and was also trying to remove the goods from the two trucks in order to replace some logs from those two trucks. Accordingly, Appellant was called upon to show cause as to why penalty should not be imposed on him under Section 114(i) and 114AA of the Act and an amount of Rs. 7,50,000/- recovered from his house should not be confiscated under Section 121 of the Act.

1.4 The show cause notice was adjudicated by the Commissioner who ordered absolute confiscation of the Red Sander Wood Logs and ordered confiscation of the trailer/trucks / Marbles with an option of redemption on payment of a fine and also imposed penalties on all the noticees. The penalty on the present appellant is Rs. 50,00,000/- and of Rs. 5,00,000/- imposed under the provisions of Section 114(1) and Section 114AA of the Act. Ld. Commissioner also ordered for the absolute confiscation of the amount of Rs. 7,50,000/- recovered from the residence of Appellant under the provisions of Section 121 of the Act.

1.5 As regards the appellant involvement in the transactions inviting penalties on him and confiscation of cash, the Commissioner has found as follows :-

> *"He was instrumental in moving the container to the Nadiad warehouse for the replacement of red sander logs in connivance with Mr. Rajesh Subramaniam and Mr. Abdul Jaffer. It is already established that the retraction of his statement is on evidentiary value given the circumstantial evidences surrounding the exports of red sander logs. In view of the above, he has concerned himself in the export/attemped export of prohibited goods. Accordingly, Mr. Hanumansingh Lakhavat is liable for penal action under the provisions of Section 114(i) of the Act. I further found that Mr. Lakhavat knew that the 7 containers exported in the past were loaded with red sanders in the guise of marble slabs and 1 container seized on 3/4. 07.2014 was to be loaded with red sanders in the place of marble slabs and therefore, he had used incorrect and false documents in order the smuggle the red sander logs out of India. Therefore, he is liable for penalty under the provisions of Sections 114AA of the Act."*

1.6 Being aggrieved with the impugned order appellant filed the present appeal.

2. Shri Devashish K. Trivedi , Learned Counsel appearing on behalf of appellant submits that the impugned order is illegal, improper and incorrect and deserves to be quashed and set aside because, the Adjudicating authority has failed to understand that there was no cogent corroborative and independent evidence against the appellant. The Ld. Adjudicating authority has also failed to appreciate that it was not correct that appellant

was involved in any kind of smuggling activity. Appellant was engaged in a business of only providing empty containers to various interested shippers (exporters). He used to charge for the said containers. Neither was he involved/ assigned the work of transporting empty containers from the shipping line/CHA to the factory of the shipper (Exporter), nor was he involved/assigned the work of stuffing of the export goods in the said containers, nor was he involved/assigned the work of transporting the said stuffed containers to ICD or any other place.

2.1 He further submits that the allegation made in the show cause notice that the appellant was getting export orders from various marble exporters situated in Udaipur, thereafter doing the work of container stuffing and thereafter transporting the container to a godown situated in Nadiad in guise of transporting the said stuffed containers to ICD, Khodiyar were not correct. Although, detailed submission were made before the Learned Adjudicating authority, he has miserably failed to appreciate the same. Therefore also , impugned order deserves to be quashed and set aside.

2.2 He also submits that the Learned Adjudicating authority has also failed to appreciate that the reliance placed in the show cause notice on the statements of the appellant herein as also statements of other co-noticee was not sustainable. The Learned Adjudicating authority has failed to consider the retraction affidavits and detailed submission of the appellant. He has also failed to consider the records of cross examination/ examination of the exporters (shippers) who were examined during the course of adjudication before the Ld. Adjudicating Authority.

2.3 He further submits that in para 23.1 of the show cause notice it is contended that the appellant had opened the container by removing the rivets of handles, removed the original cargo i.e marble slabs and concealed red sanders in the marble slabs. However these contentions of the show cause notice which are the basis for proposing imposition of penalty on the appellant herein are extremely far from truth. As such, they are in contradiction to the case of the DRI itself. It is so because, on one hand, the case of the DRI is that the appellant herein had never personally visited the godown premises at Nadiad where the alleged illegal activity if replacing marble slabs with red sander logs was taking place, whereas on the other hand, a foundation of proposing imposition of penalty on the appellant herein is made on such contradictory allegations.

2.4 He also submits that only activity which the appellant herein used to undertake while dealing with the exporters was that, on request of the said exporters, the appellant used to arrange for empty containers from the Shipping Line. However, transportation of the empty containers was from the shipping line to the factory of the shipper was arranged by the shippers themselves. Thereafter, the containers were stuffed and sealed in presence of the officers of Central Excise Department. Thereafter, the transportation of the stuffed container in trucks to the port of export i.e. ICD Khodiyar was arranged by the shippers themselves. The appellant herein was not at all concerned with container stuffing or transportation of container. The appellant was also not concerned with the foreign buyers. He had never contacted any foreign buyers for or on behalf of the shippers. He had not even found out any foreign orders for the shippers.

2.5 He argued that the appellant was doing business for providing export container to the shippers prior to the investigation initiated by the DRI regularly and in normal course of business. Therefore, bona-fidely and regularly the appellant was doing business

2.6 He also submits that after the goods were stuffed in the container for export, same were transported by the transporter from the shipper's factory and instead of reaching ICD, they were transported to warehouse premises near Piplaj Cross Road, NH-8, Opp. Ganesh Marble, Village – Dumral, Nadiad, Dist. Kheda, Gujarat, no investigation even worth the name was carried out at the end of the transporters. The first thing DRI ought to have done was to initiate investigation at the end of the transporter and record the statement of the concerned transporters. However none of the officers of DRI had initiated any investigation at the end of the said transporter. No statement of the owner of transport company is recorded.

2.7 He further submits that it was particularly submitted before the Adjudicating authority that since the statements of the appellant herein viz. statement dated 07.07.2014 and 05.07.2014 were not recorded in free and fair atmosphere and that were not given voluntarily by the appellant but his signature were obtained forcefully and after beaten up very badly and that although it was submitted that said statements were retracted at the earliest hour and although the retraction affidavits also submitted before the Ld. Adjudicating authority, he had miserably failed to appreciate the said retractions.

2.8 As far as the amount of Rs. 7,50,000/- being seized from the appellant's residence is concerned, he submits that the same was withdrawal from the Banks by the appellant and submitted the copy of Bank statements. The Learned Adjudicating authority has failed to appreciate that Rs. 7,50,000/- were withdrawn from two banks accounts of the appellant for some renovation work which was being carried out the residential house of the appellant herein. Ld. Commissioner ignored the bank statements and confiscated the cash amount. It may be appreciated that there are no evidence to support allegation that Rs. 7,50,000/- being seized were received by the appellant towards consideration for illegal activity of export of red sander logs. The said amount is officially withdrawn by the appellant herein from his bank accounts.

2.9 He further submits that during the cross-examination, the exporter of Marbles has accepted that Appellant carried out business of making available containers on rent to them. Appellant do not give any instructions regarding the quantity of marble to be stuffed in a container, when the same is stuffed for the purpose of export in factory premises. Appellant never gave any instruction regarding the quality of marble to be exported. As regard Shri Rajesh Subramaniam and Shri Anwar Khan and the officers of the DRI are concerned, although cross examination of both of them was particularly requested, the same was not afforded to the appellant herein. As such, the settled preposition of law is that having regard to overall facts and circumstances of the case, it must be decided whether the statements of those people whose cross-examination is not conducted, could be given weightage or otherwise. The appellant herein understand that both the aforesaid witness are not traceable. It seems that they are master mind behind the smuggling activity. Therefore also, considering the overall the facts and circumstances, allegations levelled against the appellant would not sustain.

3. The Learned Superintendent (AR) Shri Himanshu P. Shrimali supported the findings in the impugned order.

4. After hearing both sides and after going through the impugned order, we find that the main reliance by the adjudicating authority, for imposition of penalties on the appellant placed is the confessional statements of the appellant. It is on record that appellant has disputed that the statements which the DRI officers used against him were obtained by practicing duress, torture and by way beaten up. When an objection is made that a statements is obtained unfairly, it is for the Adjudicating authority to first decide whether the statement was voluntary and this principle of law is quiet settled and well known now. Further Ld. Adjudicating authority totally ignored the retraction of the statement by the appellant through affidavit and denied their involvement in the offence which was totally overlooked by the Ld. Commissioner in impugned order. Further, we find that no cross-examination of certain witnesses viz. Shri Rajesh Subramaniam and Shri Anwar Khan and the officers of the DRI asked for was extended to the appellant. Learned Adjudicating authority cannot brush aside the request for cross-examination of the relied upon witnesses/investigating officers. If for any reason the cross-examination of the witness cannot be extended then the adjudicating authority has to intimate the appellant about such rejection by a separate letter as is now settled legal position. It is well settled that a person cannot be penalized merely on the basis of a circumstantial evidence and assumption and presumption and ignoring the provisions of law.

4.1 We find that Appellant is proprietor of M/s H.R. Containers and M/s Apex Containers, Udaipur. Appellant arranged empty containers from various shipping lines to exporters. In each and every case, appellant provided KYC details to the shipping line. Thereafter, a delivery order is given by the shipping line to the appellant. In the said delivery order all the details such a details of shipper, port of loading, various charges, vessel details, port of discharge, etc, is mentioned. The shipping lines send the empty container to the concerned CHA. In case where the transport is arranged by the appellant, appellant's transporter shall pick up the container from the CHA, who would be allowed to remove container from the port to the factory of the shipper/exporter. Appellant herein was in the business of providing containers to various exporters who are in need of containers since the year 2008.

4.2 In the present disputed matter there are three shipper viz,. (i) M/s. Parth Natural Stone Pvt. Ltd. (ii) M/s Nidhi Marbles and (iii) M/s Madhusudan Marbles Pvt. Ltd. All the three shipper had told the appellant that they would send their respective transporters to collect empty container from the CHA M/s Priti Clearing Agency, Ahmedabad. Accordingly they had sent their respective transporter to collect the empty container from ICD from CHA. We find that in the impugned transactions, appellant had no role to play, he was not physically present either at ICD for the purpose of lifting empty containers and taking the shipper's premise for container stuffing. The Appellant had physically not visited any of the said places. During the course of surveillance by DRI, in the warehouse premises situated village –Dumral Nadiad the Appellant was not found at the said premises. In such situation the allegation of the revenue in impugned show cause notice that appellant had opened the container by removing the rivets of handles, removed the original cargo i.e. marble slabs and concealed red sander in the marble slabs cannot be correct and contradictory of fact on records. We find that the appellant had no active role in the transactions that led to the confiscation of the contraband red sandel wood logs.

4.3 From the records of the cross-examination of Shri Mahendra Jain, Proprietor of M/s Nidhi Marble, Udaipur, Shri Naresh Bolya, Managing Director of M/s Parth Natural Stones Pvt. Ltd., Udaipur, Shri Sunil Kumar Agrawal, Manager Accounts of M/s Madhusudan Marbles Pvt. Ltd., Udaipur and Shri Mukesh Kabra, Director of M/s Madhusudan Marbles Pvt. Ltd., Udaipur, we find that the appellant had absolutely no role to play in the alleged smuggling of red sander logs. The appellant have neither instructed any of the exporter of marble slabs to stuff poor quality of marble slabs in the export containers nor have the appellant instructed any of the exporters of marbles slabs to stuff less quantity of marble slabs in the export container. Further department nowhere provide any evidences by which it can be established that the appellant have any contract with foreign recipients.

4.4 We also find that in the present matter shippers are not made party to the show cause notice. Marbles slabs were exported by the shippers. There is no case of the department in the present matter that export orders from interested foreign buyers were procured by the appellant herein on behalf of the Shippers/ exporters. It is not the case that the appellant herein had collected exports proceeds from the said foreign buyers and given it to the shippers. It is not the case that appellant herein was given commission for sale of export goods by the shipper. It was not the case that the appellant herein had physically remained present at the time when container were being loaded with the green marbles, further it is not the case that the these containers were transported in truck belonging to the transporters on the instance of appellant herein. During the cross – examination exporter have clarified and accepted that the appellant only does business of providing containers in rent. They have also admitted that the appellant do not give any instruction regarding the quality of marble to be stuffed in a container.

4.5 We find that there is no evidence to show that the appellant had actually assisted in loading red sanders or tampering the container or they were even aware that red sanders had been filled into the container somewhere on the way. Under these circumstances, in this case, apparently penalty has been imposed on the appellant on the ground that he has abetted in stuffing and attempted export of red sanders in the container. Abetment means a positive act on the part of the appellant and as can be seen from the facts and circumstances, there is no evidence forthcoming to show that the appellant had given any assistance in the attempted export of red sanders. Under these circumstances exist, penalties imposed on the appellant are not sustainable and the same is set aside.

4.6 As regard the absolute confiscation of the cash of Rs 7,50,000/- seized from the residence of appellant, we find that Ld. Commissioner in impugned order held that " it is clear from the deposition of Mr. Hanumansingh Lakhavat dated 05.07.2014 that he had received an amount of Rs. 8 lacks from Mr. Abdul Jaffer through angadiyas for the past consignments of smuggling and had used Rs. 50,000/- while the balance of Rs. 7,50,000/- was found at his residence during the search." At this juncture, it is relevant to refer to the provisions of Section 121 of the Customs Act which reads a under : -

> *"**121. Confiscation of sale-proceeds of smuggled goods. -** Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods [the sale-proceeds], thereof shall be liable to confiscation."*

For invoking the provisions of Section 121, the following two pre-conditions have to be satisfied : -

a. The sale proceeds should relate to smuggled goods.

b. The sale should have been made by a person having knowledge or reason to believe that the goods are smuggled goods.

4.7 In the case on hand, there is absolutely no evidence to show that the said sum was relating to the sale proceeds of smuggled goods, which were sold by the appellant, who was having knowledge or reason to believe that the goods are smuggled goods. On going through the observations made by the learned Adjudicating Authority, we are in disagreement with that as in the present case the Adjudicating Authority and revenue has failed to prove that the cash recovered is the sale proceeds of past consignment of smuggled goods. It is observed that appellant produce the records before the adjudicating authority to justify that the cash recovered from the residential premises. Appellant produced the banks statements evidencing withdrawal of cash from his bank accounts. Appellant produced the Bank statements. If the evidence produced by the appellant were not acceptable then the same could have been countered on the basis of some positive evidence and cannot be brushed aside on presumption. It has been the subject matter of various decisions laying down that onus to prove so is upon the Revenue and is required to be discharged by production of affirmative, tangible and positive evidences. One such reference can be made to the decision of the Tribunal in the case of *Pandit D.P. Sharma* v. *CCE, Calcutta-II* [2001 (137) E.L.T. 692 (Tri.-Kolkata)], wherein after taking note of various decisions, the seized currency was released in the absence of any evidence to the contrary. The said decision of the Tribunal was affirmed by the Hon'ble Supreme Court when the appeal filed by the Revenue was rejected in the case of *Commissioner* v. *Pandit D.P. Sharma* [2003 (157) E.L.T. A201 (S.C.)]. To the same effect is another decision of the Tribunal in the case of *S. Kotteswaran* v. *Collector of CE (Customs), Madras* [1997 (91) E.L.T. 435 (Tribunal)]. It was held in the said decision that mere non-accountal as to receipt of money is not sufficient so as to hold it as sale proceed of smuggled silver, the same is not liable to confiscation under Section 121 of the Customs Act. Further Tribunal in the case of *Collector of Central Excise* v. *Sudhir Electronics* [2000 (123) E.L.T. 1054 (Tribunal)] has held that inasmuch as the Indian currency is not one of the specified items under Section 123 of the Customs Act, Department has to establish the sale of the smuggled goods and the identity of the seller and the producer and confiscation of the same cannot be made solely on the retracted statement. Law is settled on the above issue. Therefore, the impugned order *qua* absolute confiscation of cash seized is contrary to law which shows that the Adjudicating Authority has not applied its mind for absolute confiscation of currency seized during the course of investigation. Therefore, we hold that the seized currency during the course of investigation cannot be confiscated without proving that the said seized currency is the sale proceeds of smuggled goods. Therefore, we hold that absolute confiscation of the seized currency of Rs. 7,50,000/- is not sustainable accordingly, the confiscation is set aside and the Adjudicating Authority is directed to release the said amount to the appellant.

5. In view of the above observations, the penalties are set aside. Appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 22.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha