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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 243 of 2012 - DB

(Arising out of OIO-KDL/COMMR/08/2012-13 dated 25/07/2012 passed by Commissioner of CUSTOMS-KANDLA)

Lilaram Arjandas Asudani ....**Appellant**
13, Rajnigandha Bunglows,
Near Sant Kabir School, Thaltej,
AHMEDABAD, GUJARAT

VERSUS

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

WITH

Customs Appeal No. 244 of 2012 - DB

(Arising out of OIO-KDL/COMMR/08/2012-13 dated 25/07/2012 passed by Commissioner of CUSTOMS-KANDLA)

Deepak Lilaram Asudani ....**Appellant**
13, Rajnigandha Bunglows,
Near Sant Kabir School, Thaltej,
AHMEDABAD, GUJARAT

VERSUS

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

APPEARANCE:
Shri Vikas Mehta, Consultant appeared for the Appellant
Shri Sanjay Kumar, Superintendent (AR) appeared for the Respondent

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

Final Order No. 12974-12975/2024

DATE OF HEARING: 28.11.2024
DATE OF DECISION: 03.12.2024

RAMESH NAIR

These appeals have been filed by Lilaram Arjandas Asudani and Shri Deepak Lilaram Asudani. Against the impugned Order-In-Original No. KDL/COMMR/08/2012-13 dtd. 25.07.2012

1.1 The brief facts of the case is that M/s Rodex International, KASEZ, Gandhidham had filed a Bill of Entry No. 1296 dtd. 02.02.2011 before KASEZ, Gandhidham for the import of a total of 73 packages, including 28 refrigerators and 41 LCD/Plasma TVs. On the basis of intelligence, the officers of DRI detected and seized 28580 pieces of memory cards found to be concealed at the back portion of 4 refrigerators from the container. Shri Dilip Dhakan, partner of M/s. Rodex International, in his statement dtd. 03.02.2011, admitted that they had not declared the 28580 pieces of memory cards in the said bill of entry and also stated that his friend Shri Lilaram Asudani, had persuaded him to smuggle the memory cards by concealing them in the import cargo, on financial consideration. On scrutiny of the email-message from the phones of Shri Lilaram Asudani, the correspondences made with the overseas supplier, Shri Pranav Chavda, Chief Executive Officers of M/s. Kobian Pvt. Ltd., Singapore were revealed further, email message of Shri Sarav, an employee of Shri Lilaram Asudani were retrieved from the possession of Shri Dilip Dhakan, Partner of M/s. Rodex International which showed the scanned copies of import documents like Invoice dtd. 07.01.2011 issued by M/s. Kobian Pte. Ltd., bill of lading No. CGL/SINMUM/5820 dtd. 10.01.2011. Thus, the facts indicate that M/s. Rodex International, Shri Dilip Dhakan, partner of M/s Rodex and Shri Lilaram Asudani are the key persons for the said fraud. During the investigation officers also recorded the statement of various employees and other persons. After detail investigation, a show cause notice dtd. 07.07.2011 was issued to the appellants for confiscations of the goods and proposing penalties. In adjudication, Ld. Commissioner vide impugned order dtd. 25.07.2012 imposed the penalty of Rs. 50 Lakhs and 10 Lakhs on the Shri Lilaram Asudani and Shri Dipak Asudani under section 112(a) of the Customs Act, 1962. He also imposed the penalty of Rs. 25 Lakhs on Shri Lilaram Asudani under Section 114AA of the Customs Act, 1962. Being aggrieved against the impugned order, the appellants have filed these appeals before the Tribunal.

2. Shri Vikas Mehta Ld. Consultant appearing on behalf of the Appellants submits that the impugned order violated the principles of natural justice as the adjudicating authority has not considered the request for cross-examination. The Appellants had requested for cross-examination of the witnesses whose statements have been relied upon in sustaining the allegations against the appellant.

2.1 He also submits that the penalty has been imposed on appellant only because the appellant had been alleged to be the person behind the import. For imposition of penalty under Section 114, some degree of involvement or knowledge of contravention on the part of the abettor must be shown. In the impugned order no evidence direct or even indirect has been adduced to show that the appellant has some knowledge of contravention of law, as such imposition of penalty is not justified. He placed reliance on the following judgments.

(i) Liladhar Pasoo Forwarders P. Ltd. Vs. Commissioner of Customs, Mumbai -2000(122)ELT 737 (T)

(ii) Southern Steel Ltd. Vs. State of Andhra Pradesh –AIR 1970 SC (253) (1979 ELT (J402).

(iii) Akbar Baruddin Jiwani Vs. Collector of Customs – 1990(47)ELT 161 (SC)

(iv) Radha Kishan Bhatia Vs. Union of India -2004(178)ELT 8(SC)

2.2 He also submits that the penalty imposed under Section 112(a) of the Act also legally not correct. On going through the said Section 112, it is revealed that penalty under the said section can be imposed for improper importation on any person. Thus, penalty can be imposed on any person under the said section, only if he is involved in import of the goods in an improper way. In the present case, the appellant is not in any way connected with the import of the goods under seizure, as such, imposition of penalty under Section 112 of the said Act is without authority of law and the impugned order imposing penalty is required to be quashed and set aside.

2.3 He further submits that the entire case against them has been made on the basis of oral evidence of the importer without any corroboration from independent source. The importer even after seizure of the goods had approached the Hon'ble High Court of Gujarat for release of goods under seizure and had taken the release of the said goods. On one hand the said importer stated that the goods are owned by the appellant and on the other hand he approached the judicial forum for taking release of the seized goods. The adjudicating authority has allowed the release of the said goods under seizure to the importer. Thus the entire conduct of the importer is dubious and has implicated the appellant for ulterior reason. He placed reliance on the following judgments:-

(i) Debu Saha Vs. Collector of Customs (Preventive)- 1992(59)ELT 442 (Tribunal)

(ii) Raj Television Networks Vs. Commissioner of Customs, Chennai -2007(215)ELT 71 (Tri. Chennai)

2.4 He also submits that mere forwarding of certain documents by his employee can not be ground for imposition of penalty under Section 112(a) of the said Act. The Ld. Adjudicating authority has also considered the receipts of one cover under Airway Bill No. A78177181 by the appellant as one of the findings for imposition of penalty. The Adjudicating authority has referred to the email of the First Flight Courier. The said email only confirms the delivery of the envelope under the above referred Air Way Bill. The said courier could not in any way have known the contents of the envelope. The Appellant was asked during his statement above the content of said envelope to which it was categorically stated that the said envelop contained his documents. Thus, the receipts of envelope cannot be in any way be ground for imposing penalty under Section 112(a) of the said Act.

2.5 He also submits that no evidence has been brought on record which suggest that the appellant was aware of the memory cards having been sent by the supplier at his instance.

3. On other hand, *Per contra*, Shri Sanjay Kumar, Ld. Superintendent, defended the order of Adjudicating authority.

4. Heard both the sides and perused the records. We find that in the present case Ld. Commissioner has proceeded against the Appellant with a prejudged and pre-determined mind that by holding them as they are main persons. The Adjudicating authority in coming to abve conclusion has relied upon certain email correspondence recovered from the mobiles. In the present matter neither appellants nor their employee filed the Bill of Entry for import of the disputed goods, there is no case of deliberate misdeclaration made out on the part of the appellant. The Bill of Entry had been filed by M/s Rodex International.

4.1 We further find that Ld. Adjudicating authority also not considered the request of appellants for cross-examination of witnesses. We find that persons are not examined in the adjudication proceedings and as such their statements are not admissible, as evidence under the provisions of Section 138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance with the provision of Section 138B of the Act, the statements are not admissible as evidence and accordingly, the case of revenue against the appellants does not stand. We further find that the appellants have categorically denied their connection with the seized imported goods. We also noticed that importer has approached the Hon'ble High Court for release of goods , this itself clearly show that Appellants are not concern with the imported goods and in absence of any corroborative evidence the imposition of penalty on them are bad and fit to be set aside.

4.2 Further we find that department relied upon the Emails and other electronic evidences for justifying the penalty on the appellants. However, Emails and other electronic evidence cannot be relied upon to prove charges against the appellants in absence of compliance of provisions of Section 138C of the Act ibid as held by the Hon'ble Supreme Court in *Anvar P.V.* v. *P.K. Basheer* - 2017 (352) E.L.T. 416 (S.C.) and by Tribunal in case of *S.N. Agrotech* v. *Commissioner of Customs, New Delhi* - 2018 (361) E.L.T. 761, wherein, it was held that Section 138C of the Act ibid is *pari materia* to Section 65B of Evidence Act, 1872 and therefore evidence in form of computer printouts etc. can be admitted only subject to satisfaction of conditions precedent under Section 138C of the Act ibid and in absence of certificate, these electronic documents cannot be relied upon by the Department to prove role of the appellants. In this case there is no such certificate.

4.3 We also find that for imposition of penalty under Section 112(a), a positive act or omission is to be established. For imposition of penalty *mala fide* act/omission is one of the requirements. In the present matter we find that no *mala fide* has been brought on record on the part of appellant so as to impose penalties on the appellants under Section 112(a) and Section 114AA of the Customs Act, 1962.

5. In the result, the impugned order upholding imposition of penalties on the appellants are set aside and the appeal filed by the Appellants are allowed with consequential relief, if any.

(Pronounced in the open court on 03.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi