CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeals involved:

C/21, 22, 82, 83, 84, 85/2007

[Arising out of Order-in-Original No. 40/2006 dated 12.12.2006
passed by the Commissioner of Customs, Cochin.]

PHILIP VARGHESE,
POOVANATHUMMOTTIL HOUSE
THINKALKARIKKAKAM, KULATHUPUZHA,
KOLLAM DISTRICT, KERALA — Appellant(s)

P.V.VIJAYAKUMAR
S/O SRI.P.V.VELAYUDHAN, KATTUMMEL
PARAMBU, PALLURUTHY, COCHIN-6, KERALA — Appellant(s)

M.E.DHARMARAJAN
S/O. SANKARAN, MUTHATTU ENDHUMPALLY
HOUSE, VETTOM P.O., MALAPPURAM
DISTRICT, KERALA — Appellant(s)

T.MOHAMMED
S/O. T.POKER, THOTUNGAL HOUSE,
MUTHOOR, TIRUR, KERALA — Appellant(s)

KUNHI MOHAMMED @ KUNHIPPA
S/O. SRI MOHAMMED KUTTY,
MANGATTUPALLIMALIL HOUSE, AREEKODE,
THALAKADATKHUR P.O., TIRUR — Appellant(s)

MOHAMMED ABDUL @ NASAR
BEERAN MOHAMMED
S/O MANGATTUPALLIMALIL, BEERANKUTTY,
HOUSE NO.4/330, AREEKODE, TIRUR — Appellant(s)

Versus

Commissioner of Customs
COCHIN-CUS
CUSTOM HOUSE
COCHIN - 682009
KERALA — Respondent(s)

Appearance:

Shri Anil Kumar. B, Advocate
A.K.B. ASSOCIATES
#211, COMMERCE HOUSE, 9/1,
CUNNINGHAM HOUSE, 9/1,
CUNNINGHAM ROAD,
BANGALORE – 560 052.
KARNATAKA — For the Appellant

Mr. K. T. Pakshirajan,,
Asst. Commissioner (AR) — For the Respondent

Date of Hearing: 24/09/2018
Date of Decision: 26/09/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21438 - 21443 / 2018

Per : P. ANJANI KUMAR

M/s. Pride International Trading have imported consignment of consumer goods and household goods through the Custom House Agent (CHA). They have filed a Bill of Entry No.151584 on 25.11.2004 for clearance. The CHA filed an application with ACC seeking permission to move the container from docks to M/s. Asian Terminals, CFS for destuffing under customs supervision. The container was moved towards the CFS but was stopped and parked less than half a kilometer from CFS. In the late evening/midnight, it was observed by the Customs Officers that two lorries had gained access to the premises and one of the lorry was parked back-to-back with the said container. The officers apprehended three person viz., (i) Shri Kunhi Mohammed alias Kunhippa; (ii) Shri P. V. Vijaykumar; and (iii) Shri Philip Varghese. However, one person who was later identified as Shri Mohamed Abdul Nasar, Proprietor of M/s. Pride International Trading escaped by running away. Investigations conducted by customs officers revealed that the concerned persons were attempting to smuggle the goods from the container before a formal customs release order has been issued. Statements of different persons involved were recorded and a show-cause notice was issued proposing:

(i) Confiscation of goods imported;

(ii) Confiscate the two lorries bearing registration No. KL 10 D216 owned by Shri Kunhi Mohammed and KL 10 E8937 driven by Shri M. E. Dharmarajan;

(iii) Imposing penalty on Mohammad Abdul Nasar; Kunhi Mohammed, Shri P. V. Vijaykumar; Shri R. Sreekumar, Shri Philip Varghese, Shri T. Mohammed, Shri M.E. Dharmarajan, Shri Tissan J. Thachankary of M/s. Asian Terminals; Shri Mathew Philip and Smt. Ajitha Sajith.

2. The Commissioner of Customs vide Order-in-Original has confiscated the impugned goods vide Order No.40/2006 dated 12.12.2006, however, (i) confiscated the goods and gave option for redemption of goods on payment of Rs.7 lakhs; (ii) confiscate the lorries and allowed redemption on payment of fine of Rs.1 lakh each; (iii) imposed penalty of Rs.2 lakh on Shri Mohammed Abdul Nasar; Rs.6 lakh on Shri Kunhi Mohammed; Rs.3 lakh on Shri P. V. Vijaykumar; Rs.2 lakh on Shri R. Sreekumar; Rs.2 lakh on Shri Philip Varghese; Rs.1 lakh each on

Shri T. Mohammed and Shri M. E. Dharmarajan under Section 112 (a) and (b) of the Customs Act, 1964. However, the Commissioner has dropped the proceedings against Shri Tissan J. Thachankary, M/s. Asian Terminals, Shri Mathew Philip and Smt. Ajitha Sajith. Aggrieved by the above order, the following appeals have been filed.

Sl. No.	**Appeal No.**	**Appellants**
1	C/21/2007	KUNHI MOHAMMED @ KUNHIPPA
2	C/22/2007	MOHAMMED ABDUL @ NASAR BEERAN MOHAMMED
3	C/82/2007	PHILIP VARGHESE,
4	C/83/2007	P.V.VIJAYAKUMAR
5	C/84/2007	M.E.DHARMARAJAN
6	C/85/2007	T.MOHAMMED

2. The learned counsel for the appellants has submitted that while they are not making any appeal on merits of the case, they are aggrieved by the penalties imposed by the Commissioner (A). The learned counsel stated that the learned Commissioner has erred in imposing penalties under Section 112 (a) and (b) of the Customs Act, 1962. He stated that the provisions under Section 112(a) and 112(b) are in a different domain. Whereas Section 112(a) talks of commissions and omission before the import of the goods and Section 112(b) talks the manner of dealing with the goods after importation, this has

been clearly enunciated by this very Bench in the case ***V. Lakshmipathy vs. Commissioner of Customs, Cochin: 2003 (153) ELT 640 (Tri.-Bang.)***, wherein it has observed in para 2(c) as under:

> *"The imposition of a penalty under Section 112(a) of the Customs Act presupposes an existence of an element of mens rea. There is no evidence to indicate any such guilty mind on the part of the appellant herein. There is no evidence that the appellant herein had dealt with any manner with the goods found to be liable to confiscation. The provisions of Section 112 would apply only to persons who engage themselves in the physical act of importation of the goods. While Section 112(a) would be applicable in respect of those acts that are committed prior to the importation of the goods, the provisions of Section 112(b) would be applicable in respect of acts committed post-importation. The acts committed have to be in relation to the goods which are liable for confiscation under the provisions of Section 111. In this case, the act of the appellant, in indicating "man-made fabrics" in the licence on the application made in the DGFT's office cannot be considered to be an act to constitute that it was physically connected with the importation or preparation for import of the goods with knowledge on his part and consequently the provisions of Section 112(a) cannot be invoked against the appellant in the facts of this case."*

2.1 Further, the learned counsel has submitted that though the drivers had no role in the attempt to smuggling of goods they have been penalized by the adjudicating authority. The penalties on drivers may be set aside. The learned counsel submitted that in view of the fact that Commissioner has not properly appreciated the distinction between the provisions of Section 112(a) and (b) of the Customs Act, 1962, it is not proper on his part to impose penalty on all the persons under both Sections. It is expected that the adjudicating authority comes to a conclusion while appreciating the facts of the case and the provisions of law in a proper perspective. He requested that for this precise reason, the matter may be remanded back to the adjudicating authority.

3. The learned DR for the Department has reiterated the findings of the Order-in-original and has submitted that the conclusions were drawn by the Commissioner after going through the facts of the case and the statements of the concerned persons recorded during investigations. The statements were not retracted before the issue of show-cause notice and hence, the statements can be relied upon. Therefore, the question of showing lenience towards the drivers is not called for. He relied upon the case of ***Gobind Lal vs. CC, Jaipur: 2000 (117) ELT 515 (Tri.)*** wherein it was held that:

> **"Statement made before Customs official is a material piece of evidence collected under Section 108 of the Customs Act, 1962 and can be used as substantive evidence connecting the appellants with contravention of Customs Act - 1996 (83) E.L.T 258 (S.C.) relied - Statements made being specific and the retraction of statements delayed the penalty imposed upheld though quantum reduced - Sections 108 and 112 of Customs Act, 1962."**

3.1 He also relied upon the following case:

Sl. No.	Citations	Gist of the Decisions
1	Mr. Surjeet Singh Chhabra: 1997 (89) ELT 646 (SC)	The Supreme Court held that confession statement made before the Customs Officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers.

Sl. No.	Citations	Gist of the Decisions
2	M/s. Bhana Khalpa Bhai Patel: 1997 (96) ELT211 (SC)	The Supreme Court held that statement recorded under the Customs Act/ Central Excise Act, when found to be voluntary, not vitiated in any manner, admissible in evidence.
3	M/s. Shama Fireworks Industries	The High Court held that the statement of partner recorded which was not retraced, rejected the plea of assessee that they had no capacity to manufacture so much of quantity, considering clandestine removal of goods and the way the assessee were operating.
4	M/s. Hillari Computer Exports (P) Ltd.: 2006 (199) ELT 636 (Tri.-Bang.)	The Tribunal held that the voluntary statement of the Managing Director corroborated by other two directors and two senior officials in his own handwriting could not have been the imagination of the departmental officers.
5	M/s. Mahindra Chandra Dey: 1997 (89) ELT 478 (Cal.)	The High Court held that confessional statement given before the Customs Officers is admissible as evidence, since while giving statement the person was neither accused nor deprived of personal liberty not the proceeding a judicial one.
6	M/s. Gopal Textile Mills (P) Ltd.: 2007 (215) ELT 558 (Tri.-Ahmd.)	The Tribunal held as maintenance of private records and removal of goods entered in the private records without payment of duty – Officers of company admitted clandestine removal of their statements were not retracted later – Such admitted facts need not be corroborated or proved, therefore, absence of further investigation for corroboration not to be held against Department.

4. Heard both sides and perused the records of the case. We find that the learned counsel for the appellant has made a case for a need to distinguish between the provisions contained in subsections (a) and (b) of Section 112 of Customs Act, 1962. For a proper appreciation, a look at the provisions of the Sections is given as follows:

"112. Penalty for improper importation of goods, etc.

Any person,-

(a) Who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or

(b) Who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111."

A reading of the provisions indicates very clearly that they are under different domains. Whereas subsection (a) envisages an action of commission or omission in relation to the goods which would render the goods liable for confiscation under Section 112 of Customs Act, 1962; Subsection of (b) of Section 112 envisages certain act concerning the goods, therefore, it has to be understood that both the provisions are in a different spheres of operation as held by the Tribunal in the case of ***V. Lakshimpathy*** cited supra. Both the situations are clearly delineated. Therefore, we find that the learned Commissioner has erred in putting both the subsections together while imposing penalty. It was incumbent on the part of the adjudicating authority to clearly satisfy the offence of each of the persons involved and then to apply the penalty provisions as the commissions or omissions by the respective persons may invite. Therefore, as requested by the learned counsel for the appellants, we find that the matter has to go back to the original authority for appreciating the facts vis-à-vis penal provisions and to pass a suitable order.

4.1 Regarding the request made by the learned counsel regarding the imposition of penalty on truck owners/drivers is concerned, we find that as the case itself is remanded back for a fresh consideration on the issue of imposition of penalties, it would not be proper at this juncture to pass a judgment on part of the order. It would be in the fitness of the case that the learned Commissioner gives a fresh look at the facts of the case and submissions of the owner/driver of the lorries as far as penalties imposed on them are concerned.

5. In view of the above, we allow the appeals by way of remand to the original authority.

(Order was pronounced in Open Court on **26.09.2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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