CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>BANGALORE</u>

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 20053 of 2020

[Arising out of Order-in-Appeal No. 142-144/2019 dated 23/10/2019
passed by the Commissioner of Customs, Bangalore-I (Appeals)]

Sachin Kumar **....Appellant**
S/o. Late Sri Laxman Kotian, M/s. Shree Hari
Translinks, B/179, Near M/s. Aruna Industries
KIADB Industrial Area, Baikampady
Mangalore – 575 011
Karnataka

VERSUS

C.C-Mangalore **....Respondent**
New Customs House
Panambur
Mangalore – 575 010
Karnataka

WITH

(i) Customs Appeal No. 20054/2020 (Venugopal Moily);
(ii)Customs Appeal No. 20055/2020 (Ravichandra)

[Arising out of Order-in-Appeal No. 142-144/2019 dated 23/10/2019 passed by the Commissioner of Customs, Bangalore-I (Appeals)]

[Arising out of Order-in-Appeal No. 142-144/2019 dated 23/10/2019 passed by the Commissioner of Customs, Bangalore-I (Appeals)]

Appearance:

Mr. G.B. Eswarappa, Advocate
#1711/1712
5th Main Road, Judicial Layout, Opp. Jakkur
Aerodrome, Adjacent: G.K.V.K (Uas) — For the Appellant
Bangalore – 560 065
Karnataka

Mr. S. Devarajan, Jt. Commr. (AR) — For the Respondent

Date of Hearing: 09/09/2020
Date of Decision: 14/09/2020

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order Nos. 20618 - 20620 / 2020

Per : S.S GARG

These three appeals are directed against the common impugned order dated 23/10/2019 passed by the Commissioner of Customs (Appeals) whereby the Commissioner of Customs has reduced the penalty from Rs. 2,00,000/- (Rupees Two Lakhs only) imposed on Shri. Venugopal Moily alias Venu to Rs. 1,00,000/- (Rupees One Lakh only) and also reduced the penalty imposed on Sachin Kumar and Ravichandra alias Ravi to Rs. 50,000/- each (Rupees Fifty Thousand only) under Section 114 of the Customs Act, 1962. Since all the three appeals arise out of the same facts and common impugned order, therefore all the three appeals are taken together for discussion and disposal. For the sake of convenience, I take the facts of Appeal No. C/20053/2020.

2. Briefly the facts of the case are that the appellant Sachin Kumar

is a transport agent and he arranged the truck for the exporter namely, M/s. Beracha Exim Private Ltd. for factory stuffing at Bangalore for export of goods through NMPT, Mangalore. The truck from Mangalore reached KSDL factory, Bangalore and export goods namely 'Mysore Detergent Cakes' were stuffed into the container in the presence of factory executives, Mr. Hashim, Director of the exporter company and Superintendent of Central Excise. The truck with stuffed container returned from Bangalore to NMPT, Mangalore and the stuffed container was exported vide Shipping Bill No. 4249647 after Let Export Order by the Customs. The ship with the container on board sailed on 09/08/2014. After two days, on 11/08/2014, it is said that DRI, Mangalore received intelligence to the effect that the export goods were falsely declared as 'Mysore Detergent Cakes' by illegally concealing red sanders. Following this, the vessel containing the container was called back from Columbo and it reached NMPT, Mangalore and the container was discharged from the vessel on 20/08/2014. The container was destuffed and found to contain red sanders logs instead of declared cargo 'Mysore Detergent Cake'. DRI Mangalore conducted investigations and recorded the statements of various persons involving in the transaction of export under the provisions of Customs Act, 1962. Show-cause notice was issued to the appellants for their acts of omission and commission and proposed penalty under Section 114 of the Customs Act. After considering their role in the entire transaction of illegal export, the original authority imposed penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) on each of the appellant under Section 114(1) of the Customs Act, 1962. On further appeal before the Commissioner, the penalty on the appellant Venugopal was reduced to Rs. 1,00,000/- (Rupees One Lakh only) and on the other appellants namely Sachin Kumar and Ravichandra to Rs. 50,000/- each (Rupees Fifty Thousand only) under the provisions of Section 114(1) of the Customs Act, 1962.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellants submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the evidence and the various decisions on the same issue. He further submitted that the appellants rendered their routine service of arranging for container and CHA service to earn for their livelihood within the bounds of law. He further submitted that Shri Hashim, Director of exporter company made statements on 21/08/2014, 22/08/2014 and 16/09/2014 to the effect that he was responsible for smuggling of red sander wood logs and the liner, the transporter and the CHA were not knowing about their smuggling plan but the driver Ganesh Kumar knew about the smuggling operation. He further submitted that the appellant Sachin Kumar in his statement dated 25/08/2014 made it clear that he never thought about Hashim's illegal activity, he has not played any role in the smuggling of red sanders, he was not aware about the smuggling of red sanders by Hashim, he was not aware that the consignments are concealed with red sanders wood logs. He further submitted that both the authorities below have imposed penalties on the appellants considering the preponderance of probability without any corroborative and direct evidence involving the appellants in the illegal export of the red sanders. He also submitted that the impugned Order-in-Appeal in para 13.1 pertaining to the appellant Sachin Kumar records "though the investigation did not bring to light his complicity, there are enough indications that he entertained strong suspicion." He also submitted that the impugned Order-in-Appeal in para 15 concludes that the original authority imposed penalty applying the principle of preponderance of probability. He further submitted that from the evidence on record, it is clear that the appellant did not have

knowledge about the smuggling and did not abet the smuggling. He further submitted that it is well settled that personal penalty can be imposed only for contumacious act for which there should exist evidence whereas in the present case appellant performed usual and routine function of his trade as transport agent and nothing more than that. Preponderance and suspicion entertained by the respondent will not take the seat of evidence. He further submitted that there is no evidence showing that the appellant Venugopal who acted as CHA was irresponsible in performing his functions as CHA. He also submitted that there was no occasion to suspect by the CHA because the seal on the container was found in tact which was also examined by the Customs Officer at NMPT, Mangalore. In support of his submissions, the learned counsel also relied upon the following decisions:

a. *R.S Travels Vs. CCE, Hyderabad – 2007 (217) E.L.T. 384 (Tri.-Bang.)*
b. *V.K. Singh Vs. CC, Hyderabad – 2010 (257) E.L.T. 275 (Tri.-Bang.)*
c. *Cargo and Travel Services (P) Ltd. Vs. CC, Bangalore – 2010 (252) E.L.T. 82 (Tri.-Bang.)*
d. *V.K. Singh Vs. CC, Hyderabad – 2010 (253) E.L.T 685 (Tri.-Bang.)*
e. *Giavudan India Pvt. Ltd. Vs. CC, Bangalore – 2010 (261) E.L.T. 975 (Tri.-Bang.)*
f. *Air Travel Enterprises India Ltd. Vs. CC, Cochin – 2007 (211) E.L.T. 291 (Tri.-Bang.)*
g. *Kiran S Dixit Vs. CC, Hyderabad – 2014 (301) E.L.T 337 (Tri.-Bang.)*
h. *Dwarknath Padhy Vs. CC, Hyderabad – 2007 (209) E.L.T. 376 (Tri.-Bang.)*
i. *Syndicate Shipping Services Pvt. Ltd. Vs. CC, Chennai – 2003 (154) E.L.T. 756 (Tri.-Chennai)*

j. *Vetri Impex Vs. CC, Tuticorin – 2004 (172) E.L.T. 347 (Tri.-Chennai)*
k. *Maheshwari Rocks (I) Pvt. Ltd. Vs. CC, Chennai – 2010 (262) E.L.T. 574 (Tri.-Chennai)*
l. *Parvez J Irani Vs. CC (Export) JNCH, Nhava Sheva – 2016 (333) E.L.T. 333 (Tri.-Mumbai)*
m. *Liladhar Pasoo Forwarders Pvt. Ltd. Vs. CC, Mumbai – 2000 (122) E.L.T. 737 (Tri.)*
n. *CC, Mumbai Vs. M. Vasi – 2003 (151) E.L.T. 312 (Tri.-Mum.)*
o. *Shree Renuka Sugars Ltd. Vs. CC, Mangalore – 2013 (293) E.L.T. 616 (Tri.-Bang.)*
p. *Jeena & Co. Vs. Additional Collector of Customs – 1992 (58) E.L.T. 276 (Tribunal)*
q. *S. Anwarullah Vs. Collector of Customs, Madras – 1987 (27) E.L.T. 734 (Tribunal)*
r. *R.M. Kothari & Co. Vs. CC (Import), Mumbai – 2002 (150) E.L.T. 378 (Tri.-Mumbai)*
s. *Shafeek P.K. Vs. CC, Cochin – 2015 (325) E.L.T. 199 (Tri.-Bang.)*

5. On the other hand the learned DR defended the impugned order and submitted that the act and conduct of the appellant in the whole transaction of export of illegal red sanders show that they are hand in glove with the exporter and had the knowledge of the illegal act of the exporter. He further submitted that the Commissioner (Appeals) in the impugned order has raised suspicion regarding the act and conduct of the appellants in the whole transaction which is sufficient to come to the conclusion that they were involved in the illegal activities and did not discharge their obligations under the Customs Act, 1962. He further submitted that the Customs Department in the facts and circumstances of the case is not required to prove the allegation of

involvement beyond reasonable doubt and suspicion alone is sufficient to impose penalties on them. In support of his submission, he relied upon the following decisions:

a. *Collector of Customs, Madras and others Vs. D. Bhoormull – 1974 (4) TMI 33 – SC*
b. *Mr. K.P. Abdul Majeed, S/o. Hussankoya Haji Vs. CC, Cochin – 2014 (7) TMI 730 – Kerala High Court*
c. *Naresh J. Sukhawani Vs. Union of India – 1955 (11) TMI 106 – SC*
d. *CC (Export), Chennai-I Vs. Bansal Industries – 2007 (207) E.L.T. 346 (Mad.)*
e. *KN Venugopal Vs. CC, Cochin – 2019 (5) TMI 671 – CESTAT Bangalore*

5.1. He also referred to the Apex Court's decision in the case of **Collector of Customs, Madras and others Vs. D. Bhoormull** (supra) wherein the Apex Court has observed that the law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant Sachin Kumar was a transport agent who arranged the truck for the exporter and appellant No. (2) Venugopal acted as a CHA for clearance of the goods at the NMPT, Mangalore and appellant No. (3) Ravichandra arranged the CHA and the container. Further, I find that the goods were stuffed at the KSDL factory, Bangalore in the presence of Mr. Hashim, Director of the exporter company and Superintendent of Central Excise and thereafter it was sent to Mangalore and from Mangalore it was exported. Subsequently, DRI got intelligence that the exported goods were

falsely decalred as ‘Mysore Detergent Cakes’ by illegally concealing read sanders and thereafter the vessel containing the container was called back from Columbo and it was seized by the DRI. During the investigation DRI recorded the statement of Mr. Hashim, Director of exporter company and also the appellants. In the statement of Mr. Hashim, he has clearly stated that he was responsible for smuggling of red sander wood logs and the appellants were not knowing about their smuggling plan. All these appellants were based at Mangalore whereas the truck was stuffed with Mysore Detergent Cake at Bangalore in the presence of the Director of the company and the Superintendent of Central Excise. Further, I find that both the authorities in their orders have admitted that there is no direct proof of the complicity of the appellants and there is suspicion against each of the appellant and on the basis of that suspicion, the appellants have been imposed penalties. It is pertinent to note that the Tribunal in various decisions cited supra by the learned counsel for the appellant has consistently held that for imposing the personal penalty under Section 114(i) of the Customs Act, 1962, there should be acceptable legal evidence on record about the acts of commission or omission by the appellant. Further in order to hold that the appellant has abetted in the commission of the offence, there has to be a knowledge on the part of the appellant regarding the illegal activities of the exporter whereas in the present case no corroborative evidence has come on record which pinpoint that the appellant had the knowledge of the illegal activities of the exporter company. In the case of **Commissioner of Customs, Mumbai Vs. M. Vasi** cited supra, the Tribunal has held that abetment presupposes knowledge of the proposed offence and in the absence of knowledge penalty under Section 112 on the charge of aiding or abetting would not sustain. Further in the case of **Shree Renuka Sugars Ltd. Vs. CC, Mangalore** cited supra, the Tribunal has held that on the basis of mere suspicion against CHA, penalty cannot be imposed. Further, I find that the decisions relied upon by the learned DR are not applicable in the facts and circumstances of the present case because in the present case, penalties have been imposed on the appellant merely on the basis of suspicion without any evidence on record and the suspicion cannot take the place of proof. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the same by allowing the appeals of the appellants. Penalties imposed on the appellants are also set aside.

(Order was pronounced in Open Court on **14/09/2020**)

(S.S GARG)
JUDICIAL MEMBER

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