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

Appeal No.C/351/2012

[Arising out of Order-in-Original No.10/2012 dt.03.10.2012 passed by Commissioner of Customs, Tuticorin]

Surya Prakash Kothari — Appellant

Versus

Commissioner of Customs, Tuticorin — Respondent

Appearance :

Shri B.V. Kumar, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 26.04.2018

FINAL ORDER No. 41366 / 2018

Per Bench

The facts of the case are that the officers of Directorate of Revenue Intelligence (DRI) on 28.07.2011 intercepted two 20 feet containers laden in two identical lorries, bearing registration numbers

TN 23 D 7797 and TN 28 H 5759. The laden containers were identical and red in colour bearing same No.CRXU1143513 and 'Cronos' markings. The container brought in the Truck No.7797 was found to be sealed with one time bottle seal and contained 116 nos. of Granite Slabs of various length and breath. These containers were accompanied by original and duplicate invoice No.28 dt. 27.7.2011 of M/s.Prism Granites, Madurai intended for consignee M/s. Figard Building Materials Trading Co., Dubai with declared value of US$ 5964. The second container on examination was found to contain reddish brown colour wooden logs which were subsequently confirmed as Red Sanders without any accompanying documents valued at Rs.1.12 crores. As per the investigations, it appeared that Shri Senthil Murugan @ City Raja and Shri Vasudevan @ Ravi had floated a fictitious firm M/s.Jai Trans, Chennai purportedly engaged as Clearing, Forwarding, Transport and Indenting Agents; that they approached one Shri Surya Prakash Kothari (appellant herein) of Prism Granites and ordered for granite slabs; that they paid the money in advance and exported granite slabs on three occasions in the name of Prism Granites; that Shri Kothari had lent his IEC to them; that sale proceeds by way of bank realization was arranged through Indian Overseas Bank, Madurai; that after receipt of money through the bank Shri Kothari paid the already received money back to Vasudevan @ Ravi. It appeared to the department that Senthil Murugan @ City Raja and Vasudevan @ Ravi had engaged themselves in the act of attempting export of Red Sanders in the guise of granite slabs; that they had brought substitution cargo, granite slabs from Prism Granites; that they got IEC of Prism Granites from the appellant, Shri Surya Prakash Kothari; that they had appointed and led a team of persons for the transport of red sanders and also allegedly cheated the officers of Customs in the manner of examination by way of presenting the granite for examination at CFS in one truck and substitution of red sanders for export in another truck. Pursuant to investigations, a show cause notice dt. _.01.2012 was issued, inter alia to Shri Surya Prakash Kothari, Managing Partner of Prism Granites. In adjudication proceedings, vide an Order No.10/2012 dt. 3.10.2012 apart from absolute confiscation of the consignments of 11.20 MTs of Red Sanders, 116 Granite Slabs, the containers and trucks, a penalty of Rs.10 lakhs was also imposed, inter alia on Shri Surya Prakash Kothari under Section 114 (i) of the Customs Act, 1962. Aggrieved, Shri Surya Prakash Kothari has preferred this appeal.

2. Today when the matter came up for hearing, on behalf of the appellant, Shri B.V.Kumar, Ld. Advocate made various submissions which can be broadly summarized as under :

i) All the three earlier consignments of granite exported by Prism Granites under shipping bill Nos.2182171 dt. 17.1.2011, 2478606 dt.10.2.2011 and 3352041 dt. 23.4.2011 had been intercepted by same Customs Inspector, Shri Ravi and had been found to contain only granite slabs as indicated in the invoices of Prism Granites.

ii) None of the persons involved in the case have implicated Shri Surya Prakash Kothari or Prism Granites, in the alleged smuggling activity of red sanders. SCN also has not alleged any connivance of Shri Kothari or Prism Granites with any of the conspirators involved in smuggling of red sanders.

iii) Prism Granites only received correct consideration for the granite exported by them and nothing extra has been received over and above the invoice amount. Even for the impugned consignment, value mentioned in the invoice is the correct value.

iv) There is nothing to indicate in the evidence that the granite slabs were used as cover cargo by Surya Prakash Kothari or Prism Granites for alleged smuggling activity by him.

v) Abetment pre-supposes knowledge of the proposed offences and also pre-supposes benefit to be derived by the abettors there from; that at the most, the act or omission of Shri Kothari can be termed as negligence but the ingredients of abetments are not present. In support of this contention, Ld. counsel relied on the following case laws :

a) Tata Oil Mills Company Ltd. Vs UOI –
1986 (26) ELT 931 (Bom.)

b) M. Shashikant & Co. Vs UOI
1987 (30) ELT 868 (Bom.)

c) Dwarknath Padhy Vs CC Hyderabad
2007 (209) ELT 376 (Tri.-Bang.)

d) CC Mumbai Vs M. Vasi
2003 (151) ELT 312 (Tri.-Mumbai)

e) R.P.Narayana Vs CC Madras
1997 (940 ELT 174 (Tribunal)

3. On the other hand, Ld. A.R Shri B. Balamurugan supports the impugned order. He draws our attention to para-62 of the impugned order. He submits that as correctly observed by the adjudicating authority, receipt of money from unknown person shows the complicity of Prism Granites. Appellant cannot also claim innocence when he had allowed his IEC to be used by other. Circumstantial evidence shows that appellant had assisted in the offence of

smuggling activity using the granite slabs to cover up Illegal export of red sanders and by allowing the export to be made in the name of Prism Granites.

4. Heard both sides and have gone through facts.

5.1 Discernably, from the facts on record, it appears the main perpetrators of the foiled attempted export of red sanders had gone to great lengths to plan and execute the modus operandi. It also appears to reason that the consignment of granite slabs might have been camouflage cargo to be presented for Customs examination to be possibly substituting later within the consignment of red sanders in another identical container on which the same container number and other markings had been got done.

5.2 Be that as it may, the issue that comes up for decision here concerns only the aspect of abetment or otherwise on the part of Shri Surya Prakash Kothari of Prism Garments so as to impose penalty under Section 114 (i) of the Customs Act, 1962.

5.3. To understand the issue better, it would be worthwhile to reproduce the concerned Section 114 (i) of the Act under which the penalty has been imposed as under :

> **"SECTION 114. — Penalty for attempt to export goods improperly, etc**. — Any person 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 113, or abets the doing or omission of such an act, shall be liable, -
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> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;"

5.4 Ld.Advocate was at pains to convince us that Shri Surya Prakash Kothari (appellant) can at best be said to have been negligent by his act of sharing IEC code and in allowing export proceedings to be remitted through his bank account even when he had already got the sale price by way of advance in cash from Shri City Raja @ Vasudevan. We do not find this proposition as convincing. It is not the case that Shri Surya Prakash Kothari was a neophyte in business, and unaware of the minimal aspects of the manner of sale and export of granite slabs. We are also unable to fathom how the very convoluted manner of receiving sale proceeds, by cash in advance, subsequently receiving sale amount from abroad, that too from an unknown person, through banking channels and then returning the cash advance received back to Vasudevan did not raise any doubt or discomfort in the mind of Shri Kothari, as would have been happened to any other prudent person.

5.5 This being so, while there is nothing on record to allege that Shri Kothari had conspired or connived with the main protagonist in the attempted export of red sanders, he will definitely have to take the blame for having facilitated the entire modus operandi by allowing use of his IEC and also allowing bank account to be used by Shri S. Vasudevan.

5.6 At the same time, we are also unable to accept the conclusions of the adjudicating authority that Prism Granites acted hand in glove in the whole planning and had got high price for the granites. This is surely not supported by facts as narrated in the SCN. The adjudicating authority himself has found in paras 58 & 59 of the impugned order that Shri Surya Prakash Kothari allowed Shri Vasudevan to use name and IEC of his firm with clear motive of gaining more money and for which reason he never bothered to check the credentials of the parties to whom granite is to be exported or of Shri Vasudevan.

5.7 In the event, we find that although there is nothing much in the record which can point to any active abetment on the part of Shri Surya Prakash Kothari, the acts and omissions on his part definitely point to a level of “passive abetment”.

5.8 Ld. Advocate has also relied on a slew of case laws. We find that these case laws have set aside allegations of abetment, inter alia on the grounds that there was no knowledge of the proposed offence, no benefit to be borne by the abettors therefrom, no allegation or suppression of consideration having been demanded by the alleged abettor, the action and omission only being of dereliction of duty or negligence etc. In the present case, however, we find that appellant even though might not have been actively involved or connived in the attempted export, surely derived benefit by way of being enabled not only to get repeat orders of granite slabs from Shri Vasudevan but also safeguard his financial interest by taking advance as collateral and return the same back to Shri Vasudevan only after the equal amount had been remitted from abroad to his bank account. This being so, we are of the considered opinion that penalty under Section 114 (i) of the Act is very much imposable on Shri Kothari. However, taking note of the fact that no active abetment, connivance or conspiracy with the main perpetrator has been alleged or brought out in the SCN, penalty of Rs.10 lakhs is certainly on the higher side and therefore reduce the same to Rs.3,00,000/- (Rupees Three lakhs only). We make it clear that we are not interfering with any other portion of the impugned order. The impugned order is modified only to the extent of reducing the penalty from Rs.10,00,000/- imposed under Section 114 (i) ibid on the appellant Shri Surya Prakash Kothari to **Rs.3,00,000/- (Rupees three lakhs only).** The appeal is partly allowed on above terms.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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