CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 52193 of 2019 [SM]

[Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/ICD/PPG/183-184/2019-20 dated 24.05.2019 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

Smt. Sushma
W/o. Late Shri Subhash Chand **...Appellant**

VERSUS

Commissioner of Customs, **...Respondent**
ICD, Patparganj, New Delhi.

APPEARANCE:

Shri V.S. Negi, Advocate for the Appellant
Shri Yashvir Singh, Authorized Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 19.04.2021
DATE OF DECISION : 13.07.2021

FINAL ORDER NO. 51657/2021

RACHNA GUPTA:

Present appeal has been filed by one Shri Subhash Chand, the then Inspector, Customs (now deceased). His widow Smt.Sushma has been substituted as appellant vide order dated 26.03.2021 pursuant to her application praying her impleadment being the legal representative of the deceased. The Order-in-Appeal dated 24.05.2019 has been assailed in the present appeal. The relevant factual matrix for the purpose is as follows:-

An intelligence was received about some expartees in Delhi to have been involved in export of carpets, garments, fabrics etc. to different countries at highly over-invoiced values thereby availing undue export incentives as that of duty draw-back etc. Intelligence indicated that one Shri Sajjan Kumar was the key-person in the entire fraudulent exports through as many as following seven number of different companies:-

1. Durga Apparels Pvt. Ltd.
2. Om Shreem Ananda Foods Pvt. Ltd.
3. Threepence Craft
4. Designer Innovation
5. White Swan Inc.
6. Blue Cobalt Impex
7. Heena Prints

Later following two companies were also found to be solely controlled by Sajjan Kumar:

1. Indus Chemitex Ltd.
2. S.R. Goyal & Sons (HUF)

Later he was found to be the key-person for two more firms, namely, M/s. Indus Chemitex Ltd. and S.R. Goyal & Sons (HUF). Based on the said investigation searches were conducted at various places including residence and the offices of various companies of Shri Sajjan Kumar. His statement and statement of various other concerned were got recorded. After recovering various incriminating documents that the market inquiry got conducted by the officers of ICD, Ballabgarh with sample of hand-made knotted carpet which was drawn out of 10 shipping bills filed by M/s Durga Apparel Private Limited (DAPL) on 29.11.2010. The said inquiry was got conducted by the present appellant the then Inspector (now retired) alongwith another Inspector namely Shri Naresh Kumar. The inquiry got conducted from two firms in Rohini, namely, M/s. S.R. Goyal and Sons and M/s. Indus Chemitex Ltd.

2. After receiving the inquiry report from the appellant that DRI approached both the said companies, recorded the statements and found that both those firms were also controlled by the kin-pin of impugned fraudulent export, namely, Shri Sajjan Kumar. It was also found that none of those firm was engaged in dealing with carpets. M/s. Indus Chemitex Ltd. obtained IEC in 2011 for export of garments and fabrics prior to which it was engaged in trading of grocery items. Similarly M/s. S.R. Goyal and Sons, on the date of market inquiry, was engaged in trading of FMCG goods. However, later this firm also started export of fabrics. Both these firms denied to have issued any information about market rate of carpets to the appellant and Inspector, Naresh Kumar. Based on these finding that a Show Cause Notice No.8719 dated 14.08.2013 was served upon the appellant proposing the imposition of penalty under Section 114 (iii), 114 AA of Customs Act, 1962 for conducting the market inquiry in a manner as amounts to abeting the fraudulent export of goods by the companies of Shri Sajjan Kumar i.e. DAPL, OSAF, DI, TC etc., as mentioned in the table above,

resulting in incorrect availment of draw-back. This proposal was confirmed by Order-in-Original No.44/2016 dated 26.09.2016 vide which penalty of Rs.1,00,000/- was imposed upon the appellant. The said order has been confirmed vide the Order under Challenge. Accordingly, the appellant is before this Tribunal.

3. I have heard Shri V.S. Negi, learned Counsel for the appellant and Shri Yashvir Singh, learned Departmental Representative for the Revenue.

4. It is mentioned on behalf of the appellant that the penalty has wrongly been imposed upon deceased Subhash Chand, who conducted the market survey in official discharge of his duty. Subash expired/died on 20th February, 2021. It is impressed upon by he widow of the deceased that any negligence while conducting the market survey may amount to dereliction of duties on his part. But can never be alleged as abetment for fraudulent export of goods by the companies of Shri Sajjan Kumar. It is submitted that at the time of conducting inquiry from M/s. Indus Chemitex Ltd. and M/s. S.R. Goyal and Sons it did not come to the notice of the appellant that both of those companies are also owned by Shri Sajjan Kumar and that those were not dealing into export of the carpets.

5. It is further submitted that though DRI collected such informations about said companies which show that the inquiry

had been conducted in casual manner, but there was no intent of appellant to involve with the defaulting exporter nor any collusion for defrauding the Government Exchequer by claiming duty draw-back on high value. Otherwise also there is no such allegation in the Show Cause Notice, nor any evidence has been produced on record by the Department to show that the market inquiry was conducted by the appellant with a *malafide* intend to extend undue benefit to the exporter and to help him export such goods which otherwise were liable for confiscation. Nor there is any evidence to prove that appellant has been the beneficiary of the higher duty drawback claimed by the exporter. In the given circumstances, the same cannot be held to be an act of abetment. No question of imposition of penalty on the said ground at all arises. The order under challenge holding the involvement and collusion of the appellant with the exporters in exporting their goods on highly inflated value to defraud the Government Exchequer are alleged to be absolutely wrong and baseless. The order under challenge is, accordingly, prayed to be set aside. Appeal is prayed to be allowed.

6. While rebutting these allegations, ld. D.R. has mentioned that the appellant and the another Inspector, who conducted the market inquiry in respect of value of hand-made knotted carpets have admitted for the inquiry to have been conducted casually and improperly as the two firms from whom the inquiry was conducted were found to not to be involved in carpet exports, hence, were not eligible to give the export price for such carpets.

Above all, the kingpin exporter Shri Sajjan Kumar was found to be the exporter for those two firms as well. It is impressed upon that none of those firms had IEC code for exporting carpets on the date of the market inquiry. There is an admission of Shri Rajeev Goyal, Director of M/s. Indus Chemitex Ltd. about their firms to have been engaged in trading of grocery items. Learned D.R. has impressed upon that based on these facts and evidences the Adjudicating Authority below has rightly held about both the Departmental Officers to have conducted the market inquiry improperly and any amateur manner. Thus, there is no infirmity in those findings. Accordingly, the order under challenge is prayed to be upheld.

7. After hearing the rival contentions and perusing the entire record, I observe and held as follows:-

The appellant has been alleged to have abeted the fraudulent export of goods by the companies of kingpin Shri Sajjan Kumar resulting in incorrect availment of draw-back. The said allegations have been leveled based on the following facts:-

1) Appellant alongwith Co-Inspector Shri Naresh Kumar conducted the market inquiry about the rate of hand-knotted carpets in a casual manner.
2) None of the firms inquired by them was dealing into such carpets.
3) None of those firms were existing at the address given in the Inquiry report.

4) The Director thereof denied to issue any quotation for the value of the carpets.
5) The formality of conducting market inquiry was concluded by the Inspectors/Departmental Officers by obtaining price from the company of same person who otherwise has been alleged to be the kingpin of fraudulent exports.

8. I observe that the above observed facts are the allegations in the Show Cause Notice and these facts only, are the findings in the order under challenge. Nothing has been discussed by the Adjudicating Authority as to what has rendered the alleged casual and amateur manner of conducting market inquiry into an act of alleged abetment for fraudulent export. To further appreciate, it is important to understand the ingredients of the penal offence, namely, abetment. Section 107 of Indian Penal Code 1862 defines abetment to include instigating any person to do a thing or engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or intentional aid by any act or illegal omissions to the doing of the said act. Thus, abetment under the Indian Penal Code basically takes place when a person abets the doing of a thing by following:-

1) Instigating a person to commit an offence, or,
2) Engaging in a conspiracy to commit it, or
3) Intentionally aiding a person to commit it

9. Instigation basically means suggesting, encouraging or inciting a person to do or abstain from doing something. Thus, instigation is something which must be sufficient to actively encourage a person to commit an offence. It should not be mere advice or simple suggestion. Conspiracy on the other hand means an agreement between two or more persons to commit an unlawful act where conspirators must actively agree and prepare themselves to commit that offence. For intentionally aiding the offender the abettor has to facilitate the crime or has to help the offender in committing the crime/offence. In any case, the intention to instigate or conspire or aid the offender to commit an illegal act/omission is utmost important.

10. Reverting back to the facts of the present case the allegation against the appellant is of conducting market inquiry in such a manner so as to aid the fraudulent exporters to draw heavy duty draw backs. Apparently, this inquiry was conducted post the alleged fraudulent exports were already made. From the above discussion, it is abundantly clear that to constitute abetment the abetor has to come into action of abeting the offender prior later does or fails to do an act which amounts to committing the crime/offence. The market inquiry was post the commission of crime of fraudulent export of handwoven carpets which were otherwise liable for confiscation to wrongly avail higher duty draw-back by Mr. Sajjan Kumar. Hence, no question arises of abeting him at a stage later than the commission of said fraudulent exports. There is no evidence produced by the

department which may prove that the appellant ever instigated or conspired or intentionally aided Shri Sajjan Kumar to fraudulently export the hand woven carpets to traders in different countries and to take as high as 12 Crores of drawback in DAPL and higher drawback in other companies as well. There is no evidence that appellant has been the beneficiary of these amounts or part thereof. From the documents and statements on records it is very much apparent that it was Sajjan Kumar who with the help of Mohammad Najib Sattar, Menon the trader of fabric Alip Kumar Das, & Shamsher, Singh, his employees was over-invoicing the value of carpets meant for export. Sajjan Kumar admitted same vide his statements dated 24.08.2011, 25.08.2011. There is no mention of any involvement of the appellant either in the form of instigation or conspiracy to aid the impugned fraudulent export. Though said statement got retracted vide his letter dated 26.08.2011 to Director General, DRI. But said retraction stands rebutted from letter No.50 D/25/2011 dated 02.09.2011 (RUD-II) and also from his own subsequent letter dated 11.11.2011 (RUD-12) where he informed Director General, DRI, about him to be the authorized person of all the companies in Table-I. All the documents collected & statements recorded by the department are absolutely silent about any alleged role of the appellant.

11. No doubt, the penalties under Section 114 (iii) & 114 AA having been confirmed by the Adjudicating Authority below,

based on the facts that both the firms which were inquired by the appellant were not competent to give the rate of the sample of the carpets taken from alleged exports being found to be the companies of Shri Sajjan Kumar only and none of them being the exporter of carpets on the date of market inquiry. Their IEC code for garment/carpet export is four months later than the date of inquiry. But these facts are, at the most sufficient to show that:

(i) the appellant, as inquiry officer, was not diligent enough to gather relevant details.

(ii) He failed to appreciate the relevant facts.

(iii) Appellant conducted enquiry in casual & improper manner. To my opinion such negligence on part of appellant amounts to dereliction of his duties but not alleged abetment.

12. To my opinion abeting is something much more than the negligence or dereliction of duties. As already discussed above, the noticed negligence on part of the appellant unless and until goes back to the stage of initiation of crime, same cannot be held to the abetment either instigation or conspiracy. The improper and amateur act of market survey in the given facts and circumstance, cannot be held as aiding Shri Sajjan Kumar to make fraudulent export of carpets.

13. Hon'ble Supreme Court in the case of **Shri Ram & Another vs. The State of Uttar Pradesh reported in 1975 SCC (3) 495** has specifically held that intentional aid and active

complicity is the gist of the offence of the abetment. I observe from the Show Cause Notice as also from the order under challenge that there is no allegation against the appellant about intentional aiding and active complicity. All what alleged is that the appellant conducted the market inquiry into a casual and amateur improper manner. There has been catena of judgments to show that any lapse in performance of duty by Custom Officer can at the most be considered as inefficiency which cannot lead to any charge of abetement or connivance thus attracting the penalty under Section 114 of Customs Act. I rely upon the decision of this Tribunal in the case of **Boria Ram vs. Commissioner of Customs, New Delhi – 2017 (354) ELT 661 (Tri.-Del.)** and also upon a decision of Tribunal Mumbai in the case of **Ruchika International vs. Commissioner of Customs, Pune – 2015 (328) ELT 660 (Tri.- Mum**.). It was held in this decision that the allegations of abeting the over valuation after collusion with exporter need specific cogent evidence. In absence thereof it is merely dereliction of duties which can be proceeded in terms of Central Civil Services Rule, 1965. I observe that there is no evidence produced by the Department that appellant in any way has benefited himself due to the impugned exports by Shri Sajjan Kumar. The entire burden was of the Department to prove knowledge on the part of the appellant but there is no such evidence nor even for the fact that some consideration has gone to the appellant for endorsing the market report. In the given circumstances, it is merely negligence or dereliction of duties which without intention cannot be called as collusion or abetment. Above all, Custom Officers are entitled to protection in view of section 155 read with section 106 of Customs Act as was held by **Hon'ble Madras High Court in the case of Shri Vasudeva Bank vs. Union of India reported as 1990 (48) ELT 214** where the Hon'ble Court has analyzed the phrase "good faith" and has given protection to Government servants discharging their statutory duties. Further, I find that the entire onus was of the Department to bring on record some cogent evidence to prove the positive act of alleged abeting on part of the appellant. But there is nothing produced on record about any nexus of the appellant with the allegations of collusion and connivance with Sujjan Kumar for abeting the over-valuation of goods exported. **Commissioner, Central Excise, New Delhi vs. MI Khan – 2000 (120) ELT 542** of this Tribunal is another decision where it has already been held that unless ingredients for proving the charge of abetment have been brought out in the Show Cause Notice and when there is no admission by the Custom Officer for alleged abeting, penalty under Section 114 cannot be imposed. Though the Adjudicating Authority below has taken a plea that the appellant in his statement has admitted for the alleged offence but the perusal of the document on record shows that the admission of appellant is only to the fact that the inquiry conducted by him with his Co-Inspector Naresh Kumar is an improper inquiry that too after it was brought to his notice that both the firms inquired by them are found by DRI to have been controlled by same Sajjan kumar who has been investigated in the impugned matter. The said statement, to my opinion, has wrongly been considered as an admission of appellant for abeting fraudulent exports made by Sajjan Kumar and for heavy amount of draw back being claimed by him.

14. As a consequence of entire above findings, the order under challenge is hereby set aside. Appeal stands allowed.

[Order pronounced in the open Court on 13.07.2021]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita