CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

COURT NO. II

Customs Appeal No.51446 of 2022 (SM)

[Arising out of Order-in-Appeal No.25 to 27 (SM)/CUS/JPR/2020 dated 27.05.2020 passed by the Commissioner (Appeals), Central Excise and Central Goods & Service Tax, Jaipur]

Harish Bhatija, **Appellant**
M/s.Harish Forex Pvt.Ltd.,
249, Opp. LMB Hotel, Johari Bazar,
Jaipur.

VERSUS

Commissioner of Customs (Preventive), **Respondent**
NCR Building, Statue Circle, C-Scheme,
Jaipur.

APPEARANCE:

Shri Arjun Singh, Advocate for the appellant.
Shri Ishwar Charan, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50902 /2022

DATE OF HEARING/DECISION:24.08.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the appellant has been rightly imposed penalty under Section 114 of the Customs Act.

3. The brief facts are that the officers of ATS (Anti-Terrorist Squad) intercepted one Mr. Anil Jain resident of Kishangarh (Ajmer), outside the departure gate no.2 of the International Airport, Jaipur, while he was going to Dubai on 17.07.2018 by Spice Jet flight SG-57 on ticket PNR-RH17KE. The ATS officers informed the Assistant Commissioner, Customs

(Preventive), Jaipur, who confirmed from departure manifest that the appellant no.1 was going to Dubai from Jaipur. The appellant no.1 along with his baggage was brought inside the airport by making entry pass. After obtaining his consent in terms of Section 102 of the Customs Act, 1962, his personal search was conducted before a Gazetted officer of Customs. During the course of personal search of the appellant no.1, a mobile phone (Samsung A3) was found. Thereafter, his baggage was opened; Foreign and Indian currency, packed in a black polythene were found along with used clothes, rusk (toast) and wafer (papad) packets. The currency notes were counted and a chart was prepared in presence of Mr. Jain and the independent witnesses. The value of foreign currency in INR as on 17.07.2018 was Rs.35,50,026/- calculated as per the conversion rate provided under Notification No.60/2018 –Customs (NT) dated 05.07.2018 and Indian Rupees found was Rs.37,650/-, thus, the total value of currencies recovered from the baggage of Mr. Anil Jain was Rs.35,87,676/-.

4. On being asked in respect of any legal documents or any approval/permission of the Reserve Bank of India to carry the foreign currency as per law, Mr. Anil Jain denied having any legal document or any approval /permission from the Reserve Bank of India.

5. On being asked by the officers, Mr. Anil Jain stated that he has been working with New Satguru Trading LLC, Dubai for the last seven years at a salary of 6000 Dirham per month. He also informed that the said Foreign Currency has been given to him by one Shri Bharat Thadani, resident of Christian Ganj, Vaishali Nagar Road, Ajmer on 16.07.2018 at a Foreign Exchange Shop, No.249, Opp. LMB Hotel, Johri Bazar, Jaipur. Mr. Anil Jain further informed that he would have delivered/handed over the said currency in Dubai to one Shri Jonny Thadani, who is younger brother of Shri

Bharat Thadani and he would have received Rs.20,000/- for delivery of the said currency at Dubai.

6. The statement of Shri Anil Jain was recorded on the same day under Section 108 of the Custom Act, 1962, wherein, he, *inter alia,* stated that he is working as employee at Satguru Trading LLC, Dubai for the last 7 years drawing salary of AED 6000 per month and he is resident of Kishangarh. He was intercepted by the ATS officers, Jaipur while entering the International Airport, before departure hall and on examination, the officers found Indian currency as well as foreign currency. Accordingly, was brought into Airport by the officers for conducting thorough examination of his baggage, foreign currency valued at INR 35,50,026/- and Indian Currency of Rs.37,650/- totalling Rs.35,87,676/- was recovered. He was not having any legal documents or approval/permission of Reserve Bank of India for carrying the said currency, and the currency he was carrying, was given by one Shri Bharat Thadani for delivering to his brother, Shri Jonny Thadani at Dubai, for which he would have received Rs.20,000/- for carrying the foreign and Indian currency, to which he had agreed. Accordingly, the Customs seized the foreign and Indian currency along with packages and luggage.

7. In the course of further investigation, statement of Shri Bharat Thadani was recorded, who, *inter alia,* stated that he lives in a joint family in his parental house, where his uncle, Shri Shrichand Thadani's family also resides. Shri Jonny Thadani is son of his uncle, Shri Shrichand Thadani, who has been working at garments shop of his brother-in-law, Shri Kamlesh Thadani at Dubai for the last 4 to 5 years; that he himself had worked in Dubai from 2012 to 2016 at Haldiram Company. At the same time, he worked part time at Mobile Shop of his

brother-in-law, Shri Kamlesh Thadani; that he met with Shri Anil Jain only at the shop of Kamlesh Thadani, after that he had no contact with him. He neither met Shri Anil Jain after 2016 nor he contacted him over his phone; that he did not give Rs.20,000/- to Shri Anil Jain for delivering the foreign currency to his brother, Shri Jonny Thadani at Dubai; that he has been using Mobile No.7014416360 since 2016; he does not recall that the SIM of his mobile was issued from the identity of one of his family members, but only he has been using this mobile no.; that he never contacted Shri Harish Bhatija or Shri Sunny Bhatija and never visited M/s.Harish Forex Services Pvt. Ltd., Shop No.249, Opposite LMB Hotel, Johri Bazar, Jaipur.

6. Further, statement of Shri Harish Bhatija (appellant) S/o Shri Ramchandra Bhatija of M/s. Harish Forex Services Pvt. Ltd. was recorded on 3.8.2018, who, *inter alia,* stated that he and his son, Shri Sunny Bhatija work at M/s. Harish Forex Services Pvt. Ltd., 249, Opposite, LMB Hotel, Johri Bazar, Jaipur (Rajasthan), that he has two mobile numbers 9829055140 and 9887752993 and his son, Shri Sunny Bhatija's mobile number is 9887727081; that he never met Mr.Anil Jain or Shri Bharat Thadani and he never contacted them through mobile.

7. The officers also called for the call detail records from Bharati Airtel and M/s. Reliance Jio Infocom Ltd. of mobile numbers of this appellant - Harish Bhatija, Anil Jain and Bharat Thadani. As per call detail records, it appeared that Bharat Thadani was in constant touch with Anil Jain since 01.11.2017 and there were 172 calls including SMS between them. Thus, it appeared that Bharat Thadani was not speaking the truth that he never met Anil Jain since 2016, nor he had any contact with him over phone. In his further statement, Shri Bharat Thadani reiterated his earlier statement and stated that he does not know any person of M/s. Harish Forex Services Pvt.

Ltd. Further, he does not know why Shri Anil Jain has taken his name in the case. Further statement of Shri Anil Jain was recorded on 12.11.2018, wherein he reiterated that he was in regular contact with Shri Bharat Thadani, who had ordered for supplies of Apple 1-phones, branded perfumes, food supplements, cosmetic items, etc., from Dubai, to be sold in India. Whenever he went to Dubai, Shri Bharat Thadani contacted him for such items and for carrying these items, he was given money by Mr. Thadani. As per instructions from Mr. Bharat Thadani, he had collected foreign currency amounting to Rs.35,50,026/- from M/s. Harish Forex Pvt. Ltd., for which Bharat Thadani had already made payment to the present appellant - Harish Bhatija. However, Shri Harish Bhatija has not given any bill in respect of the foreign currency delivered to him (Mr. Anil Jain).

8. Thus, it appeared to Revenue that Shri Bharat Thadani and Shri Harish Bhatija are involved in export of foreign currency seized from Shri Anil Jain, which was being carried illegally against the provisions of the law. The same appears to be liable to confiscation for violation of the provisions of the Foreign Exchange Management Act, 1999 read with Regulation 3, 5 and 7 of Foreign Exchange Management (Export and Import Currency) Regulations, 2015 read with Baggage Rules, 2016 and Section 77 of the Customs Act.

9. Accordingly, show cause notice dated 15.01.2019 was issued with proposal to confiscate the foreign currency along with Indian currency as well as bags and wrappers. It was further proposed to impose penalty under Section 114 and 114 AA of the Customs Act, 1962 on Shri Anil Jain. This appellant- Shri Harish Bhatija and Shri Bharat Thadani were made co-noticees proposing to impose penalty under Section 114 and 114 AA of the Act. This appellant contested the show cause notice by filing reply, *inter alia,* submitting that the provisions of Section 3, 5 and 7 of Foreign

Exchange Management (Export and Import of Currency), Regulations, 2015 are not applicable in the facts and circumstances and further stated having no connection with Shri Anil Jain and Shri Bharat Thadani and he does not know why Shri Anil Jain has taken his name or his firm's name. It was further stated that under Section 114 of the Customs Act, penalty is imposable, when any person, who in relation to any goods does or omit to do any act, which act or omission would render such goods liable to confiscation under Section 113 of the Act. As this appellant has not done any of the violations, as mentioned under Section 114, he is not liable to penalty. Further, urged that show cause notice is based on third party statement, which are not substantiated. Separate replies were also filed by the other co-noticees.

10. In his reply, Shri Anil Jain, *inter alia,* stated that he was intercepted by the Customs officers outside the Airport premises and thus, he did not enter customs area, and accordingly, the seizure and allegation of attempt to smuggling foreign currency and Indian currency is bad in law and on facts.

11. Shri Bharat Thadani has filed reply, *inter alia,* stating that he was unemployed and has closed down his restaurant and did not have such huge money of about Rs.35 lakhs so as to purchase foreign currency for remittance through Anil Jain. It was further stated that Shri Anil Jain was a habitual offender and has taken the name of other co-noticees in order to save himself. The show cause notice was adjudicated without examining Shri Anil Jain in the course of adjudication proceedings, nor he was offered for cross examination. Vide Order-in-Original dated 24.07.2019, the absolute confiscation of foreign currency of value Rs.39,35,87,676/- under Section 110(1) read with Section 113(d) and (c) along with confiscation of one bag

used for concealment of currency under Section 110(1) read with Section 119 of the Act was confirmed. Further, penalty was imposed under Section 114 on this appellant and Mr. Anil Jain. A penalty was also imposed under Section 114 on Shri Bharat Thadani and also a penalty under Section 114 AA of the Act.

12. Being aggrieved, all the three persons had filed appeals before the Commissioner (Appeals), who vide common order-in-appeal dated 27.05.2020 has been pleased to dismiss all the appeals. Being aggrieved, this appellant is before this Tribunal.

13. Ld. Counsel for the appellants, *inter alia,* urges that the whole case of Revenue against this appellant is based on unsubstantied statement of Mr. Anil Jain, from whose possession the currency was recovered and seized. At the very first instance, this appellant has denied interaction either with Mr. Anil Jain or with Mr. Bharat Thadani. Further, admittedly, as per call detail records, there is no calls made by this appellant with other co-noticees. It is further urged that Revenue neither examined their witness - Anil Jain in the adjudication proceedings nor any cross examination was ever offered, which is gross violation of the provisions of Section 138 B of the Customs Act. Accordingly, imposition of penalty, relying on the statement of Mr. Anil Jain is bad both in law and on facts and further, relies on the ruling of the Tribunal in the case of **Marshal Machado Vs. CC(Export), Mumbai – 2015 (330) ELT 334.**

14. Ld. Authorised Representative relies on the impugned order.

15. Having considered the rival contentions, I find that the whole case of Revenue is based on the statement of Shri Anil Jain. I further find that the statement of Shri Anil Jain is third party evidence, which is unsubstantiated. Further, Shri Anil Jain has not been examined in the adjudication

proceedings, as required under Section 138 B of the Act and hence, the same is not reliable. There is absence of any other evidences to corroborate the statement of Anil Jain against this appellant. Accordingly, I allow this appeal and set aside the impugned order, so far this appellant is concerned. The appeal is allowed with consequential benefits.

[order dictated & pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.