CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

CUSTOMS APPEAL NO. 52684 OF 2019

(Arising out of Order in Original No. 04-05/Commr/Cus/Ind/2019-20 dated 30.07.2019 passed by Commissioner of Customs, Indore)

M/s. Subhrabrata Chattaraj **...Appellant**
C-20, Purba Diganta, Santoshpur
Kolkata West Bengal-700001

Versus

Commissioner of Customs, Indore **....Respondent**
Post, Box, NO. 10, Manik Bagh Road, Manik
Bagh Palace, Indore, Madhya Pradesh 452001

APPEARANCE:
Mr. Abhijit Biswas, Advocate for the appellant
Mr. Nagendra Yadav, Authorized Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 05.12.2023

DATE OF DECISION: 15.02.2024

FINAL ORDER NO. 50249/2024

DR. RACHNA GUPTA

The appeal has been filed being aggrieved of the Order-in-Original No. 04-05/COMMR/CUS/IND/2019-20 dated 30.07.2019 vide which Shri Kirit Shrimankar is held to be an importer of 189 consignments imported in past and cleared in proxy using dummy IECs from ICD Dhannad/Kheda during the period from December 2011 to May 2013. The CIF value declared of Rs. 10,46,01,717/- in respect of 189 consignments has been rejected and has been re-assessed at Rs. 167,90,71,403/- with the demand of differential duty, the CIF value of Rs. 6,53,99,126/- in respect of 4 live consignments has also been rejected and re-determined at Rs. 14,45,64,928/-, the value of six other live consignments valued at Rs. 3,38,99,169/- has also been rejected and the goods covered under these consignments have been ordered confiscation and the various penalties have been imposed upon all found concerned with the impugned consignments.

2. The facts, in brief, as relevant for the present purpose are that an intelligence was received with respect to a container destined for ICD, Dhannad, Madhya Pradesh in the name of M/s Topper Milk (India) Pvt. Ltd. Indore with the manifest mentioning the goods as 'Footwear and Fabric' and that the consignment was intercepted by the Hong Kong, Customs where on examination, the goods were found to be ingots, Electroshok Batons, Knuckle Dusters and suspected counterfeit personal care products thus were seized by Hong Kong Customs after receiving the said intelligence, Directorate of Revenue Intelligence, (DRI) Mumbai Zonal Unit, Mumbai investigated the matter by foremost checking about the Importer Exporter Code (IEC) of Topper Milk (India) Pvt. Ltd. It was found that the said IEC No. 0310056659 was showing that Mr. Ajay Upadhyay and his wife Mrs. Smita Upadhyay as to Director of the said company with their office in Indore, however, the said premises were found un-occupied and an another firm in the name of M/s Sai Raj Enterprises was also found registered at the said address instead of M/s Topper Milk (India) Pvt. Ltd. The statement of Mr. Ajay Upadhyay was recorded on 24.05.2013 who stated that M/s Topper Milk (India) Pvt. Ltd. company was incorporated by him for doing the business of milk trading and the processed milk was supplied to diaries owned by his

family in Mumbai, however, the business was not profitable, he stopped the business and sold the private company to one M/s Ajay Misra in the year 2010.

2.1 While further investigating the matter, a chain of sequences was created and various other statements were recorded. It was found as follows:-

(i) During the period 15.12.2011 to 22.05.2013, 189 consignments were imported and cleared from ICD, Dhannad/ ICD, Kheda. All the aforesaid 189 consignments were imported through JNPT port near Mumbai, transported to ICD Dhannad/ICD Kheda (both were non- EDI ports) at Indore (which is about 600 Kms from Mumbai) for Customs clearance and then transported back to Mumbai for sale to various consumers. This is contrary to all commercial sense and prudence. Department opined that the goods were trans-shipped to ICD Dhannad / ICD Kheda with intent to get them cleared by resorting to mis-declaration of description and value, as a part of an arrangement.

(ii) During investigations, in addition to 10 containers detained at ICD Dhannad, 9 more containers, which were in transit at Nhava Sheva & were being attempted to be sent back to China to evade interception by DRI, were detained. Enquiries caused with the Shipping lines revealed that they had indeed received requests from their overseas office that the shippers have instructed that the containers detained at Nhava Sheva be re-shipped to the country of export, as nobody was available at ICD Dhannad to take delivery of the said consignments. All the aforesaid 19 containers were examined in detail and the goods contained therein were seized under the provisions of the Customs Act, 1962.

(iii) the aforesaid consignments were imported in furtherance of criminal conspiracy hatched by Kirit Shrimankar in association with Manjit Singh Sandh@ Ajay Sandhu, Ajay Mishra, S. Chattaraj, Sanjay Kundra, Ankit Mehta, unknown overseas suppliers of China / Hong Kong/ Thailand & others to defraud the government exchequer in the import of consumer & miscellaneous goods by resorting to fraudulent means, which included inter alia mis- declaration of the description and value of the goods, imported in proxy, using IECs of others.

(iv) that in the past all the 189 consignments (179 consignments from ICD Dhannad & 10 consignments from ICD Kheda) of consumer & miscellaneous goods were cleared from ICD Dhannad/ICD Kheda, on the strength of manipulated invoices showing a few items, with grossly understated values with the motive of evading payment of appropriate custom duty. Besides, 19 consignments imported by the syndicate in proxy, which were intended to be cleared in the same fashion were seized by DRI at ICD Dhannad (10 consignments) & Nhava Sheva port (9 consignments):

(v) 16 IECs were used in these 208 consignments (189 past and 19 live) out of which 12 IECs were found to be non-existent. The 4 (four) IEC holders who could be located, each one of them have stated in their statement under Section 108 of the Customs Act, 1962 that they have not imported any goods and that they had only lent their names for small consideration. They also did not have the financial wherewithal to affect such huge imports.

(vi) No outward remittances have been sent to the overseas suppliers in respect of any of the consignments. That it has been sent by hawala is self-evident. All the goods, imported in the past consignments were sold without maintaining any records, thereby evading Income Tax, VAT and other local levies thereon.

(vii) Apart from declared goods, there were undeclared' goods like huge quantities of chatons. ladies undergarments, gent's undergarments, Jackets. In three of the live consignments, huge quantity of restricted goods like Refrigerant R-22 gas was recovered. Likewise, in one consignment, seized at Nhava Sheva, prohibited goods like Sex Toys (replicas of male and female sex organs) were recovered.

(viii) The officers of Customs posted at the above ICD have actively colluded with the members of the syndicate in effecting fraudulent clearance of the 189 consignments, cleared in the past. It would have continued but for the intelligence and investigation by DRI.

(ix) Export declarations submitted by the Chinese exporters in respect of 148 consignments (i.e Load Port Documents), imported by the above syndicate in the past, have been obtained through Shipping Lines/CGI, Hong Kong. Comparison of these declarations with the bills of entry filed for clearance of the respective consignments at ICD Dhannad/ ICD Kheda reveal huge mis-match of value and it appears that only a few items with meagre values were declared to Indian Customs.

(x) Kirit Shrimankar did not fully cooperate in the foregoing investigations. Kirit Shrimankar did not furnish basic details like address, phone number or company name of Pawan Mishra, for whom he claims to have made part of imports (which appears to be a diversionary tactics) (b) nor gave tangible details of Ajay Mishra, who had provided him the IECs for fraudulent imports (c) nor disclosed any information about the IEC holders (d) denied to access the e-mail account used by him for forwarding the import documents of the aforesaid consignments to CHA (e) claimed to have destroyed his laptop & mobiles which amounts to destroying evidence.

(xi) Manjit Singh also did not fully cooperate in the investigations. He claimed that the 104 consignments imported and cleared by him in the past belonged to one Hussain of China, who was the supplier as well as importer of the goods into India. However, the above claim appears to be unsubstantiated as he could not furnish any details about the said Hussain or his employee Ahmed. Similarly, his contention that the 12 live consignments have been supplied to him by one Jacky of China, on credit, is untenable, as he could not furnish even the basic details like full name, address, etc of Jacky. Manjit Singh was asked to furnish details about supplier of the goods, the quantity and description of the goods imported in the aforesaid containers, the value of the goods etc. However, Shri Manjit Singh could not give any satisfactory answers on above aspects and thus failed to establish his claim on the aforesaid goods.

(xii) The import documents such as invoice, bill of lading etc, are in the name of dummy IECs with which he has no relation or connection whatsoever. Further, Manjit Singh has neither paid for the goods nor has any documentary proof of ownership of said goods in a manner known to law. Thus, his claim of ownership of said twelve containers, while disowning the past ownership, appears to be motivated to seek provisional release of high value seized goods to the prejudice of public revenue.

3. With these observations, a show cause notice dated 13.09.2014 served upon all those who were found involved in the alleged act/acts, including the present appellant. The appellant has been alleged to have abated the illegal import of goods by a mis-declaration of description and value. While adjudicating the said show cause notice, in addition to confirming the proposal as noted above, the penalty of Rs. 25,00,000/- has been imposed upon the appellant vide the order under challenge (OIO dated 13.07.2019). Being aggrieved, the appellant is before this Tribunal.

4. We have heard Shri Abhijit Biswas, Advocate for the appellant and Shri Nagendra Yadav, Authorized Representative for the Department.

5. Learned Counsel for the appellant has mentioned that the allegations against the appellant are based on surmises and conjectures, no details of the act done or omitted to have been done by the appellant which rendered the goods liable to confiscation, have been given. There is no evidence, except from procured statements of Kirit Shrimankar, Sanajay Kundra, M.S. Sandhu, Ajay Sandhu and Dayal Singh Bisht. It is mentioned that the appellant was not given any opportunity to cross examine any of these witnesses, despite the request made for the purpose. It is further submitted that mere the Act of introducing an old acquaintance to a person and requesting him to find a Customs House Agent (CHA) for clearance of goods through the subject ICDs and/or providing of a mobile sim card by the said person, cannot in any manner establish that the appellant was aware of the nature of the goods being imported by the said persons or was aware of the fact of mis-declaration in such imports/use of Dummy IECs. Appellant denied every meeting with Shri Sanjay Kundra. It is

submitted that the allegations of ‘conspiracy’ as are confirmed in the subsequent order-in-original dated 24.05.2018 have already been set-aside with setting aside of the order of imposition of penalty vide the final order of the Tribunal dated 12.11.2018. Finally, it is impressed upon that the appellant has not physically examined even a single consignment of the important goods. As a supervisory officer he was required to only countersign the assessment made by the proper officer based on the importer’s declarations and NIDB data, which he duly complied with. The allegations against the other five proper officers have been set-aside by the Adjudicating Authority itself, proceedings against them have been dropped and no penalty has been imposed. With the submissions of the order under challenge, is prayed to be set-aside and appeal is prayed to be allowed.

6. While rebutting these submissions, it is mentioned by the Learned Authorized Representative that the appellant had all knowledge of the impugned illegal imports, he knew that the imports are actually made by Kirit Shrimankar, the appellant only had introduced Ajay Sandhu with Manjeet Singh. They both have admitted in their various statements that they were importing goods in proxy, using Dummy IECs and were clearing the goods from ICD Dhannad/Kheda on the strength of manipulated invoices showing very few items, with grossly under stated values with an intent to evade the customs duties. The admissions need no further proof. Though the admissions of others cannot be read against anyone else at least not for penalizing the later. But we observe that there is no denial of appellant that he knew kirit well and that he had acquaintances with him. Based on these, it is rightly held that appellant being in the

department has mis-utilized his position and had abated the impugned illegal imports such an Act invites penalty under Section 112(a) of Customs Act, 1962. Impressing upon no infirmity in the order under challenge which is based on meticulous investigation and sufficient evidence against the appellant, the appeal in hand is prayed to be dismissed.

7. After hearing both the parties at length, we observe and hold as follows:-

In the present case, the appellant has challenged the imposition of penalty under Section 112(a) of the Customs Act, 1962. Under this Section, penalty can be imposed on the person who does an act or omission which renders the goods liable for confiscation under Section 111 or a person who **abets** the doing or omission of such an act which renderer the goods liable for confiscation. In the present case, the goods are held to have been fraudulently imported in the name of dummy IECs with mis-declaration in description and value inputs. Beneficial importers/dummy have not come forward to challenge these findings and the orders of confiscation under Section 111 (d), (f), (I) & (m) of the Customs Act of these goods and not even qua imposition of penalties upon thereon. Thus, the appellant is held to have abetted in clearance of such goods, therefore, is held liable for penalty under Section 112(a). Appellant is a Government servant serving the customs department.

We are of the opinion that the scope of present appeal is: whether the appellant has abetted the fraudulent export or he had acted in good faith.

Foremost, we need to know the definition of abetment Section 107 Indian Penal Code defines it as follows:-

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

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.

Reverting back to the facts of the present case, we observe from the record that the appellant himself vide his statement has acknowledged that he was fully aware that Ajay and Kirit were using proxy importers using dummy IECs for importing goods from his port. Kirit and Ajay Sandhu both have admitted this in their statement. There is no apparent denial that there are 427 calls between the appellant and kirit during the impugned period and that the appellant was entertained many times by said Kirit in Kirit's guest house. Admittedly, the appellant also attended marriage of Kirit's son in Mumbai in January 2013 at Kirit's expense as his guest and had also availed the flight tickets for to & fro travel for self and his family and stayed in five star hotel in Mumbai with family at kirit's expenses. The entire trip was financed by Kirit. A postpaid mobile SIM No. 8120100005, with appellant was also taken from kirit only. All these facts apparent on record are sufficient to hold that appellant was intentionally aiding kirit and all his associates to let them commit illegal imports. Hence, we hold that there are sufficient ingredients for commission of offence by the appellant.

The documents in the form of statements, investigations etc. also reveal that the appellant knew Manjit Sandhu @ Ajay Sandhu and he introduced Ajay with Kirit Shrimankar and told Kirit to help Ajay in importation. He was informed by Kirit that Kirit had met Ajay and they had made some arrangement for import of goods at Indore where Kirit would be providing IEC Codes, CHA and transport to Ajay against some consideration; that thereafter, Kirit started importing for Ajay apart from his own imports; that during one of the meeting Ajay told him that Ajay was not the owner of goods imported by him and he simply takes delivery of goods overseas from the owners and gives it to them after clearance from customs in India and he charged some amount for his services. Therefore, it is clear that the Appellant was well aware about the proxy imports of Ajay and Kirit which were being cleared from a non-EDI port which was under the Appellant's control. Being the in charge of the customs port it was his duty to discourage this fraudulent practice. However, he not only kept mum but also encouraged the proxy importers to undertake such proxy imports from his port and even facilitated such proxy importers which clearly show his connivance in promoting the fraudulent practices. Kirit and Ajay have admitted in various statements that they were importing goods in proxy, using dummy IECs and cleared the said goods from ICD Dhannad/ Kheda on the strength of manipulated invoices showing only a few items, which grossly understated values to evade duty.

Though the appellant has taken plea that the statement as relied upon by the Adjudicating Authorities are of those, who were not allowed to be cross-examined by the appellant. But, we observe that the appellant’s own statement afford sufficient corroboration to those statements. Cross-examination is vital for meeting out the allegations But when there is sufficient corroboration to those allegations, denial of cross-examination cannot be held prejudicial. Appellant has also taken plea that mere introducing an old acquaintance to a person and requesting him to find a CHA for clearance of goods through the subject ICDs and/ or providing of a mobile sim card by the said person, cannot and does not in any manner whatsoever establish, even prima facie, that the appellant was aware of the nature of the goods being imported by the said persons and/ or the fact of mis-declaration in such importation on their part and/or use of 'dummy' IECs. It is also mentioned that not only Kirit Singh, but so many other persons used to frequently call the appellant on his mobile to know about his whereabouts so that the CHA employees could contact him for counter singing of the documents. But, we observe that CDR produced on record showing 427 numbers of calls made by the appellant to Kirit Singh during the relevant time are too many in number to prove that there was no bonafide or reasonableness on part of appellant. Phonecalls as many as 427 calls to one single person, do not justify the defence taken that the purpose was only to ascertain the whereabouts.

The plea of being a supervisory office who just had to countersign the assessment made by the proper officer also is insufficient to prove appellant's innocent. The five other concerned officers have been exonerated as no connect was found between them and the importers/dummy which is not true for the appellant as discussed above. Similarly, the Final Order of this Tribunal dated 12.11.2018 against the order-in-original dated 24.05.2018; setting aside the said order-in-original is of no benefit to the appellant as it has been brought to notice that the Department has not accepted the CESTAT order dated 12.11.2018 but has filed an appeal before the Hon'ble High Court of Madhya Pradesh which is pending for disposal and was last listed on 20.01.2020. The case laws relied upon by the appellant is also found not applicable to the facts of the present case.

(vi) In the light of the entire above discussion, we do not find any infirmity in the order under challenge, the same is therefore upheld. Consequently, the appeal stands dismissed.

[Pronounced in the open Court on 15.02.2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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