# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL HYDERABAD

REGIONAL BENCH – COURT NO – I

**Customs Appeal No. 211 of 2009**
(Arising out of Order-in-original No. 02/2009-Cus (Commr) dated 29.1.2009 passed by Commissioner of Customs & Central Excise, Guntur)

**LATE BATHULA SIVA PRASAD** **Appellant**
Through legal heir & son Mr. B. Anvesh
Proprietor of M/s Baba Rocks,
No. 304, Vijaya Complex,
Kurnool Road,
Ongole -523 002

*VERSUS*

**Commissioner of Customs & Central Excise** **Respondent**
Central Revenue Buildings,
Kannavarithota,
Guntur - 522004

**Appearance**

None for the Appellant.
Shri C. Mallikarjuna Reddy, Authorised Representative for the Respondent.

## CORAM:

**HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER No./30674/2019**

DATE OF HEARING: 09.04.2019
DATE OF DECISION: 17.07.2019

**ANIL CHOUDHARY:**

This appeal was filed by late Shri B. Siva Prasad, who has died on 12 August 2009, against order-in-original imposing penalty of rupees one crore under section 114 of the Customs Act. During the pendency of the appeal, the appellant died and his son and legal heir Shri B. Anvesh filed fresh vakalat of the Advocate, thus praying to be substituted for pursuing the appeal. Accordingly, substitution is allowed.

2. The brief facts of the case are that the appellant is a dealer/trader in stones. One Mr. K. Prabhakaran approached the appellant for export of stones to "Shanghai United Granite Industrial Trading Company", China. The appellant procured the requisite stone slabs from the market and accordingly exported through Mr. K. Prabhakaran vide the shipping bill No. 27/07–08 dated 6th June 2007. The said Mr. Prabhakaran again approached the appellant with purchase order dated 28th July 2007, in favour of the appellant's proprietary concern – M/s Baba Rocks for export of black galaxy rough stone blocks, gross size – CBM 2.626 and also of different size having gross volume 2.070 CBM. The appellant procured the requisite granite blocks/stone slabs from 'Golden granites' for ₹ 94,710 by cheque and provided the stones to the said Mr. K. Prabhakaran and issued invoices No. EXP003/2007-08 dated 1st August 2007 along with packing list. The said stone blocks were taken by the said Mr. Prabhakaran to 'Sterling Container Line Madras Private Ltd.', Chimakurthi ICD, for stuffing in the containers. M/s Sterling Container Line Madras Private Limited issued admittal form for the said stone blocks. Shipping bill No. 47/07 – 08 was filed by CHA (arranged by Mr. K. Prabhakaran). The goods were stuffed in presence of the customs officials and proper customs seals fixed as per norms. The goods were to be shipped through the port of Chennai – gateway port.

3. On some intelligence that red sanders logs were purported to be smuggled to Singapore through Chennai harbour, containers numbers TTSU 6013740 and TTSU 2320295 (20 feet containers) were intercepted

by the DRI officials and detained the said 2 containers at Chennai Container Terminal Ltd (CCTL), Chennai on 9 August 2007. As per the shipping bill No. 47/07 – 08 dated 3 August 2007, filed through Shri L. Shankar – CHA, Chima kurthy ICD, on behalf of M/s Baba Rocks, for export of 2 black galaxy rough blocks with gross weight 34 MT and net weight 27 MT under invoice No. Exp 003/2007 – 08 dated 1 August 2007, to the consignee – M/s Shanghai United Granite Industrial Trading Company Limited, Shanghai, China. As per the invoice and the packing list, the buyer other than the consignee was 'Garnett and Peridot PTE Ltd, Singapore and the port of discharge being Singapore. The consignment was to be shipped through MV Tiger Breeze V. 501 S. The said 2 containers had been cleared for export at ICD, Chima Kurthi and sealed with customs seal No. 1301 and line seal No. 01165 on container No. 6013740 and by customs seal No. 1302 and line seal No. 01163 on container No. 2320295. On preliminary examination of the 2 containers on 9 August 2007, customs, liner seal was found intact. On opening the said containers it was found to be stuffed with wooden logs, which appeared to be red sanders, as against the declared cargo of black galaxy rough blocks.

4. Thereafter detailed examination of the aforementioned 2 containers was done under Mahazar/punchnama proceedings on 13 August 2007, in the presence of appellant-proprietor of Baba Rocks, and others along, with Mr. M Maranco – inspector (wildlife) Ministry of environment and forest, Chennai. On recording of satisfaction that goods are red sanders, were being smuggled under mis-declaration, 940 numbers of red sanders logs totally weighing 21 MT were found, valued at Rs. 84 lakhs – market

value, were seized under the customs act. The 2 containers used for smuggling were also seized and handed over to CCTL authorities (custodian) for safe custody.

5. M/s 'Madras Homeward Freight Conference Society' vide their survey report dated 14 August 2007 reported that in both the containers 3rd and 4th lock rod rivets holding the handle were tempered and loosely fitted, after the stuffing the 3rd and 4th lock rod handle, rivets fallen from the original position and the handle came out, and that the rivets have been tempered.

6. The office premises of Baba Rocks, Ongole was searched by the officers of central excise on 10 August 2007 in the presence of MLN Sharma – Accountant. Mr. Sharma informed that they had cleared two consignments vide shipping bill No. 27/07 dated 6 June 2007 and S. B. No. 47/07 dated 3 August 2007, through ICD, Chima kurthy One Mr. K. Prabhakaran represented the foreign buyer. Further appellant by their letter dated 10 August 2007, submitted inter-alia that they have nothing to do with the seizure of red sanders and they do not have any knowledge about the same.

7. Statement of appellant – B.S. Prasad, proprietor of M/s Baba Rocks was recorded on 1 September 2007, wherein he stated that they had received partial payment for the earlier consignment on 23rd July 2007. Further he have not receive any advance payment for the present consignment. They have sent the goods under both the shipping bills based on purchase order received from 'Shanghai United Granite Industrial Trading Company'. In the statement in reply to question – who

is the contact person in respect of the shipping bill, he replied that Mr. K. Prabhakaran is the person who introduced himself as the representative of Shanghai United Granite Industrial Trading Company, and he is the contact person for him. He also provided the address of Mr. K. Prabhakaran of Chennai and stated that he had not visited the said premises. When asked whether the said Mr. K. Prabhakaran produced or showed any document to the effect that he was representing the Shanghai company, Mr. Prasad stated that the consignments were sent based on purchase orders given by the Shanghai company. The purchase orders mentioned inspection by Mr. K. Prabhakaran. Other than this no document was produced before him, nor he made any contact with the above party to verify the authenticity of Mr. K. Prabhakaran. When asked whether he verified the financial viability of the export or Mr. K. Prabhakaran, appellant stated that his contract with Mr. K. Prabhakaran is limited only to identify the stone blocks, referred by him, that he did not think that he is having that much expertise to verify or identify the quality of blocks. Further on being asked that the appellant was all along using the services of A. S. Shipping Agency – CHA, but for this consignment, the appellant replied that as Mr. K. Prabhakaran insisted to export through ICD – Chima Kurthi and the said A.S. Shipping Agency did not have any personnel at the said ICD, he allowed Mr. Prabhakaran to arrange for CHA. When asked whether he or his representative was present at the stuffing at ICD, he replied that he handed over the documents to Mr. K. Prabhakaran and none of his representative or himself was present during the stuffing. Further, on enquiry of the receipt of part payment on 23 July 2007, it appeared that the amount was received from 'Colombo Exchange Private Ltd.' The appellant stated that he did not know whether this payment had come from Singapore, China or Colombo. Mr. K. Prabhakaran said that this amount was towards part payment of the 1st consignment. The appellant explained that for the 1st consignment he received ₹120,000/-, that as explained earlier he had received 4880 US$ by TT. Thus, total he had received ₹. 3,15,724/- towards the two shipments. When asked for his comments that for the said two shipping bills he had received the entire payment, and he was not present at the ICD at the time of stuffing of cargo and further he appeared to be aware that granite blocks sent under the said two shipping bill could have been loaded in a single container instead of 2 containers, and it appeared that he had prior knowledge about substitution of red sanders for the declared cargo, the appellant replied that he had no such intuition or knowledge. He came to know about the substitution of stones with red sanders only after interception and examination by the officials. That he had allowed the use of his ICD for export, only with the intention that Mr. K. Prabhakaran would get good orders for granite export.

8. Statement of Mr. A.P. Raja of Sun Grace Logistics was recorded on 10 August 2007, who inter alia stated that, through his friend he got introduced to Mr. Prem Gupta, Director of Sun Grace Logistics. That he started working in Sun Grace Logistics as agent at Chennai. That during last week of May 2007, Mr. Prem Gupta contacted him and gave Mr. K. Prabhakaran's mobile No. and asked to provide 20 containers for Shanghai. He contacted Mr. K. Prabhakaran who informed that he is agent of Baba Export and sent container request by fax. That

accordingly, he approached 'Seahorse Shipping' and booked four containers to Shanghai, got the plot permission and gave the same to transporter Mr. Perumal. That during the previous week Mr. K. Prabhakaran contacted him and asked for the containers to Singapore. On receiving the telephone call from Mr. K. Prabhakaran he gave requisition to M/s Marine Logistics Private Limited for the containers. The transport of the containers to the ICD was arranged by Mr. K. Prabhakaran.

9. Mr. Prem Gupta, Director of M/s Sungrace Logistics vide a letter dated 2nd February 2008, stated that he received the booking for the 2 containers from their overseas agent namely M/s Asia Shield Logistics and Forwarding, Malaysia. Accordingly, had instructed his person Mr. A. P. Raja, Mr. booked the two containers with MTL Shipping Line and handed over to Mr. K. Prabhakaran who was handling the business of M/s Baba Rocks.

10. Mr. L. Sankar the CHA in his statement stated inter alia that M/s Baba Rocks is only known to him through Shri K. Prabhakaran of Sterling Container Line Madras Private Ltd – custodian of ICD, Chima Kurthi. He does not know any person of M/s Baba Rocks. That the invoice and packing list where handed over to him through Sterling Container, and he prepared and filed the shipping bill No. 47/07 – 08 dated 3 August 2007. The said consignment was examined and sealed by the customs officials. That he did not obtain any authorisation from M/s Baba Rocks for filing the said shipping bill. That at the time of loading, rough granite blocks were loaded.

11. Statement of Mr. B. Prabhakaran – Managing Director of Sterling Container Line Madras Private Ltd., – custodian of ICD Chima Kurthi in his statement, stated that the day to day activity of the ICD including receipt of blocks, allotment of containers, stuffing and sealing and movement of containers that are sealed, to the Gateway – Chennai, all is done in association with Mr. P. A. Thyagrajan, who sits at Chennai and Manoharan – staff at ICD. That being the custodian of the ICD, he knew that it is their responsibility to account for the cargo that had entered the ICD, stuffing the cargo before the jurisdictional custom officers and dispatch of the cargo up to the Gateway Port. That on obtaining the invoice and packing list from the exporter, they handover the same to the CHA stationed at Chennai. With regard to the disputed shipping bill and container, filed in the name of M/s Baba Rocks and exported through their ICD, the representative of Baba Rocks provided the export invoices along with packing list. Based on the above they requested the CHA to prepare the shipping bill and other customs related documents. That thereafter granite blocks pertaining to be black granite, relevant to the shipping bill was brought to their ICD on 4 August 2007. The granite blocks were stuffed in containers and sealed before the customs officers on 6 August 2007 itself. These two containers were loaded on truck No. TN 28 K 5635 and send to the gate way port at Chennai. That Mr. K. Prabhakaran introduced himself as the representative of exporter – M/s Baba Rocks, approached his staff Mr. Manoharan at their ICD. That normally they negotiate with the exporters for tariff, which is consolidated and includes all charges right from receiving cargo including stuffing and checking, documentation, sealing, etc. and transportation

upto the port. But in this case, the said Mr. K. Prabhakaran undertook to arrange the container and also the transportation of the same from Chennai to the ICD and back, duly stuffed, they charged ₹ 5,000/- per container. That this is the 1st time they allowed a transporter other than their own to transport the container from ICD to the port. That the gate pass and the transference copy of the shipping bill, where handed over to the transporter to be delivered to the liner. That they had not contacted Mr. Siva Prasad initially. When it was found that the blocks were being loaded in two containers, when could have been loaded on a single container, they contacted the exporter and he informed that the buyer insisted for two containers and therefore they were stuffing in two containers. On being asked as to why he allowed an unauthorised transporter to deliver the container sealed from the ICD to the port in this particular case, it was replied that the truck in question that brought the container, had been waiting at the ICD for more than 2 days and therefore they allowed. On being asked that it was the responsibility of ICD to transport the sealed container to the port and whether he obtained any guarantee in writing from the transporter for safe delivery of container, he replied in the negative. The MD of the ICD – custodian also did not know the transporter and not obtained the signature of the transporter on the requisite documents. Further the truck in question left the ICD at 6 PM on 6 August 2007 and reached the Chennai, Port only in the evening of 8th February, 2007. That therefore tempering could have happened en route and cargo replaced, of which he has got no knowledge.

12. That statement of one J. Lakshminarayanan – Manager Sales of

MTL Marine Trance Logistics Private Limited was recorded with regard to the disputed consignment, for release of the containers in question. He stated inter alia that one Shri Raja acting as agent of M/s Sungrace Logistics, contacted the Director for booking of the containers to Singapore. The said Shri Raja is having office next door to their office, who informed them that rough blocks would be stuffed at ICD. The requisition letter of M/s Sungrace Logistics were signed by Shri Raja only, and the plot permission was collected by him. That based on the plot permission the empty containers were released on 1 August 2007 and since the goods were to be stuffed at ICD, on the overall consideration, they issued the form – 13, to offload the container at CCTL.

13. Further, upon enquiry made at the given address of the said K. Prabhakaran at No. 93/1 (new No. 191) Linghy Chetty Street, Chennai – 1, no one was found. The Landlord of the said promises stated that he does not know any person named Mr. K. Prabhakaran, no such person has ever resided at the given address. Summons issued on the said Mr.K. Prabhakaran at the said given address, were returned by the postal authority with the remark – not known. Upon verification of cell phone No. 9884976922, which was being used by Mr. K. Prabhakaran, it was revealed that the connection was issued to Mr. E. Joseph. Further upon enquiry Mr. E. Joseph was also not found at the given address. Thus, the said Mr. K. Prabhakaran could not be located and enquired by the officers.

14. Letter was issued to the Regional Transport officer calling for details of the trailer used in question. In reply the RTO forwarded the

details according to which the said Registration No. was that of a motorcycle.

15. Thus, it appeared to revenue that red sanders were attempted to be smuggled out of India, in the guise of black galaxy rough blocks and appeared to be liable for confiscation, along with the containers. The appellant – M/s Baba Rocks had made the export of the granite blocks to Shanghai United Granite Industry Trading Company, Shanghai, China on the basis of the purchase order received through one Mr. K. Prabhakaran, who had introduced himself as representative of the foreign buyer. The appellant without causing verification as to the representation of Mr. K. Prabhakaran, had received advance money in Indian currency, knowing well that export proceeds are to be received from the foreign consignee throughout the authorised channel. Appellant also did not verify the veracity of the purchaser/or his agent, transporter, etc. and thus he appeared to have facilitated the smuggling of the seized red sanders and thus appeared to be liable for penalty under Section 114 of the Customs Act. Accordingly, show cause notice dated 5 February 2008 was issued on the appellant jointly with others, proposing to impose penalty with proposal to confiscate the red sanders lying seized.

16. The appellant contested the show cause notice by filing reply. Appellant further requested for cross-examination of some persons including the officers of the customs at ICD and at Chennai which was allowed. Vide the impugned order it was held that the appellant have been negligent and have failed to exercise due diligence resulting into manipulation by the said Mr. K. Prabhakaran. Accordingly, penalty of Rs.

1 crore under Section 114 of the Customs Act was imposed. Penalty was also imposed on other persons namely Mr. A. P. Raja of M/s Sungrace Logistics ₹ 3 lakhs, on M/s Sterling Container Line Madras Private Ltd., Rs. 1 crore, penalty of Rs. 1 crore on the said Mr. K. Prabhakaran, along with confiscation of the seized red sander logs, as well as the two containers used, with option to redeem the containers on payment of fine.

17. Ld. Counsel for the appellant was absent on call. As the appeal is about 10 years old it was decided to dispose of the appeal ex parte. Accordingly, heard the Ld. AR for revenue and perused the records.

18. Having considered the submissions of Ld. AR and on going through the records, we find the following anomalies: –

In the examination/cross-examination of Shri Ram Ganeshan, Head CFS and Marketing – Chennai Container Terminal Private Ltd., stated that the DRI officials had intercepted the export cargo in question, outside the CCTL. Thereafter, the DRI officials had escorted the truck with the containers into the CCTL and that after examination of the said cargo, the containers were handed over for safe custody. He also stated that the truck which hauled the containers was neither detained nor seized. Only the containers were seized with the goods by the DRI officials. Whereas on the contrary in the Mahazar/punchnama it has been mentioned that the containers were lying in CCTL, which is wrong. It was also submitted that if the truck which hauled the containers had also been seized, the investigating agency could have definitely nabbed the real culprit – Mr.K. Prabhakaran, the mastermind and the driver Mr. Perumal who drove the truck bearing registration No.TN 28 k 5635 .

19. During cross-examination, Mr. Premchand Gupta, Partner of M/s Sungrace Logistics have stated that the containers for export were released by them, at the instance of Shri K. Prabhakara, and that nobody from Baba Rocks had approached them in this regard. Smt. Susan Verghese – Senior Intelligence Officer, DRI in her cross-examination have stated that no verification was done with respect to chassis/engine No. of the vehicle – triggering question, toll gate passing of the motors vehicle – trailer used, overseas contact of consignee – Ashraf Ali, vessel Tiger Breeze used for similar shipment in the past, fax service provider from where bank transfer advise was sent to M/s Baba Rocks. She further stated that it is a fact that the said Mr. K. Prabhakaran had arranged everything and the appellant exporter – Baba Rocks have not done anything, except lending their I.E.C. code. She also stated that Sterling Container Line being the custodian of the ICD were responsible for safe transhipment of the cargo from ICD to Gateway port. She further stated that there is lack of thorough investigation in the matter.

20. During cross-examination of Mr. Nageshwara Rao, Superintendent and Mr. Ramesh Babu Inspector of the Customs, stated that granite blocks were received at the ICD, as per the admittal form and the goods were examined. Further, one block was loaded individually on each container and the containers were sealed with customs seal and the agents had also affixed their seals. Further, at the time of inspection at the Gateway Port, the customs seals are found intact prior to opening and examination of the containers. It prima facie appears that Baba

Rocks – appellant have taken all reasonable care and no *mens rea* can be attributed to them for the manipulation done by the said Mr. K. Prabhakaran.

21. Thus, from the facts on record and the statements of the responsible officers of the customs Department it appears that the appellant have not done any deliberate action or misdeed in the alleged smuggling of red sanders. Appellant have only unknowingly in good faith, allowed the use of their IE code. Thus, there is no case of imposition of penalty under Section 114 of the Customs Act made out. Accordingly, this appeal is allowed and the penalty imposed is set aside. The appellant is entitled to consequential benefits, in accordance with law.

(Order pronounced in open court on 17.07.2019)

**(ANIL CHOUDHARY)**
**MEMBER (JUDICIAL)**

**(P. VENKATA SUBBA RAO)**
**MEMBER (TECHNICAL)**

Neela reddy