

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO. 2

Cus. Miscellaneous Application No. 75837/2019
And
Cus. Miscellaneous Application (EH) No. 75836/2019
And
Cus. Appeal No. 76268/2019

(Arising out of Order-in-Appeal No. KOL/CUS/COMMISSIONER/PORT/14/2019 dated 10.05.2019 passed by the Commissioner of Customs (Port), Kolkata.

M/s. Phonex Logistics Pvt. Ltd.

A-1/46/1, Paharpur Road,
Kolkata-700066.

....Appellant (s)

Vs.

Commissioner of Customs (Port), Kolkata.

15/1, Strand Road,
Kolkata-700001.

....Respondent (s)

Appearance:

Shri S. K. Mehta, Advocate for the Appellant (s)
Shri S. K. Naskar, A. C. (AR) for the Respondent(s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: - 14.06.2019

Date of Pronouncement:-

FINAL ORDER NO. MO/75826-75827/2019 & FO/A/75792/2019

PER SHRI P.K.CHOUDHARY:

The facts of the case in brief are that the appellant is a container Freight Station Operator holding a License under Handling of Cargo in Customs Area Regulation 2009 (hereinafter referred to HCCAR 2009). The appellant's Container Freight Station is situated at A/1/46/1, Paharpur Road, P.O. & P.S. Rabindra Nagar, Kolkata – 700 066. The appellant

carries on business of Container Freight Station providing Customs Cargo Service such as storing and handling of the Custom's Cargo till clearance of the goods by Customs Department. The appellant had set up port like infrastructure for handling of Containerised Cargo. Container Freight Stations are set up on license to ease congestion at port.

In normal course of business goods imported at Haldia Port in containers are shifted to the Container Freight Stations of the appellant amongst other Container Freight Stations to ease congestion at the port. The petitioner stores the containers as operator of Container Freight Station under the provisions of Customs Act, 1962 and charges rent as fixed under the statute from the Importers. There is a full posting of officers of Customs at its Container Freight Station to perform Customs related functions of clearance of the goods

2. The Ld. Advocate appearing on behalf of the appellant submits as follows:-

That, at the material time, the Customs Officers posted at the appellants CFS were headed by the Assistant Commissioner of Customs, Sri S.K. Biswas, incharge of CFS Phonex Logistic Pvt. Ltd. On 10th March, 2018, the appellant was given a job under No. 3219/2018 dated 6th March, 2018 to move a container bearing No. SEGU 4330930 FROM Haldia Port to its container Freight Station at Paharpur Road. It was loaded on a trailer bearing Regn. No. WB29A 6223. The appellant was allowed to move the container from the port at late night on 10th March, 2018. After loading of the container, the trailer left Haldia Port

under security and pilot van. The trailer after covering a distance about 5 Kms from the Haldia Port brake down near another Customs Container Freight Station namely LCL (CFS). The engine of the trailer got seized and failed. The appellant immediately sent an SOS to Mr. Biswas, being the appellant's Custom officer in charge, about the break down as well as approached the Customs Officers posted at LCL (CFS) being the nearby CFS about the breakdown of the trailer. The trailer was somehow brought at a secured place to a warehouse namely "Five Star Warehouse", adjacent to LCL (CFS) for repairing of the trailer. The appellant's engineer as well as a technical team was sent immediately but the trailer could not be repaired.

Ultimately on 13th March, 2019, the appellant sought permission from the Assistant Commissioner posted at the appellant's CFS namely Mr. S. K. Biswas to shift the container to a substitute trailer being no. WB 41A 4340, which was allowed. The container was loaded on trailer bearing no. WB41A 4340 on 13th March at about 7:00 P. M. and driven by a driver employed by LCL (CFS). It reached the appellant's CFS at 3:00 A.M. on 14th March 2018. The status and the movement of the container was all throughout reported to the officers of the Customs posted at the appellant's CFS.

Upon arrival of the trailer at the appellant's CGS, due notice was given to the Assistant Commissioner posted at the petitioner's CFS.

A routine enquiry was taken up. Container was examined and found to be properly sealed. 100% examination of the goods was done. They

were found to be in order. The statement of the driver of trailer no. WB 41A 4340 namely Mr. Jabbar Khan was recorded. Mr. Jabbar Khan was an employee driver of Customs approved CFS viz. LCL (CFS). He stated that since the vehicle could not be repaired, container was transferred to trailer no WB41A 4340 and he drove the trailer loaded with the container to the appellants Container Freight Station.

The officers of LCL (CFS) were also asked to give report of the incidence. It was reported that the trailer no. WB29A 6223 suffered a break down and it could not be repaired and the container had to be shifted on 13th March 2018 on trailer no. WB 41A 4340 to reach its destination.

The container reached safely and securely on 13th March, 2018. A Show Cause Notice was issued to the appellant (at page 31) on 24th August, 2018. The Show Cause Notice alleged that the appellant did not bring the container within 6 hours as required under the Public Notice No. 70 of 2016 and also did not report to the Assistant Commissioner of CFS whereby the safety of the container was threatened. The container was shifted to vehicle No. WB 41F 4340 without the requisite permission from the competent authority.

The appellant denied all the charges as not tenable on the following grounds:-

- (i) Firstly, because of the break down, it was not possible to bring the container within 6 hours. (ii) Secondly, that the appellant had informed the Assistant Commissioner Mr. S.

K. Biswas about the status throughout and only on his permission, the container was shifted to trailer no. WB-41F 4340 and all throughout the container was kept fully thirdly secured and guarded. The entire operation was carried out in the presence of the officers posted at LCL (CFS), which is a customs licensed Container Freight Station.

In the course of enquiry, the fact that the appellant had informed the Assistant Commissioner posted at its CFS as well as LCL (CFS) was not disputed. Safety of the container was found to be adequately protected. It was not under dispute that the shifting of the container was done on the basis of the permission granted. In the course of enquiry, it was alleged that the petitioner did not inform the status of breakdown, in writing, officially to the Assistant Commissioner posted at the appellant's CFS.

The enquiry officer gave a report wherein it was mentioned that the appellant did not report about the incidence in writing to its officers. The other charges as to the security threat and shifting without permission, were not found to be true. It gave a report that the trailer suffered a break down. In the report it was stated that the appellant failed to bring the container within 6 hours and thus failed to fulfil the obligations cast under para 8.2 of the Public notice no. 7/2018, which directs the container to be brought within the reasonable time, which is six hours. The relevant portion of the report is set out herein below:-

"Para 9 (iii).....In the instant case, there is no official intimation regarding the breakdown of the truck, neither they felt it important to intimate customs and apprise the situation with proper letter and documents."

The appellant throughout reported the status to the Customs officers posted at its CFS. Such reporting was recorded. There was no case of shifting of the container without permission. There was no charge of breach of Section 33 of Customs Act, 1962. Section 33 of the Act is set out herein below;

33. Unloading and loading of goods at approved places only

Except with the permission of the proper officer, no imported goods shall be unloaded, and no export goods shall be loaded, at any place other than a place approved under clause (a) of section 8 for the unloading or loading of such goods

The shifting was done owing to breakdown of the trailer to a substitute trailer, in presence of the officers posted at LCL (CFS), which is corroborated by the Report of LCL (CFS) dated 12th May 2018 (Page 50 of Appeal Memo). It rendered the charge of not reporting the matter nugatory. The reporting could be done orally which was recorded at LCL (CFS) as well as the appellant's CFS.

Since the matter was under SOS, all updating and reporting was done orally which was duly recorded. It was not possible at the material time, to report in writing. Reporting in such circumstances is normally verbal which is subsequently, recorded.

In the adjudication order, the Commissioner passed an order prohibiting the petitioner from doing any work for 180 days. The

Commissioner's order is non-speaking. No dispute has been raised regarding the verbal intimations given from time to time and shifting of container took place on the basis of permission granted. No charge is made regarding non-compliance of Section 33 of the Customs Act, 1962. Shifting was done in the presence of officer posted at LCL (CFS) which is also a licensed Container Freight Station. There is no denial and dispute in the proceeding by Mr. S. K. Biswas that he was not informed about the breakdown of the trailer or that for shifting of the trailer, he did not grant any permission.

The cause of action alleged in the proceeding was that the operator failed to report in writing and that the container did not reach within 6 hours after leaving Haldia Port. In case of breakdown of the trailer, such time limit cannot be adhered to and for such incidence, penal provisions are not invokable.

The Adjudicating Authority in paragraph 25 of the order held that the appellant was liable for penal action in view of paragraphs 20,21,22 and 23 of the report which do not give any incriminating finding. Further, the Commissioner passed the order prohibiting the petitioner to carry on its business for a period of six months, considering a previous case, which was neither related to the operation nor part of the charges made in the Show Cause Notice. The earlier case was in fact related to infrastructural matter where the petitioner made an exit gate following the fire brigade compliance, to which customs contended that prior permission from the Customs should also have been obtained. The referred penalty of

Rs.50,000/- had no bearing with the subject case. It was a ground outside the Show Cause Notice. The adjudication order was passed prohibiting the petitioner from doing any business for 180 days which is otherwise very excessive.

The petitioner submits that the order passed by the Commissioner is non-speaking. There is no finding given by him. The order is passed contrary to the law as laid down by the Hon'ble Supreme Court in the case of Kranti Associates Pvt. Vs. Masood Ahmed Khan and other reported in 2010 (9) SCC 496. Paragraph 47 of the Judgment may be referred to. There is no finding of fact in the order.

3. Heard both sides and perused the appeal records.
4. I find that the enquiry report also does not discuss any evidence on which the finding in the Report is based. The Hon'ble Supreme Court in the case of Sher Bahadur Vs. Union of India as reported in 2002 (7) SCC page 142 (para 7) held that mere noting in the report would not in principal satisfy the rule of sufficiency of evidence. There is no finding that there was a breach of provision of Section 33 of the Act. Already the appellant has suffered the punishment in the order for more than 40 days. It stands idle with huge infrastructure. As per the detailed submissions made by the Ld. Advocate appearing on behalf of the appellant and on going through the chronology of the events, it is observed that the

Adjudicating Authority never disputed the fact that the appellant informed the Competent Authority from time to time about the breakdown of the trailer and the movement of the container.

5. In view of the above discussions, the impugned order cannot be sustained and the same is set aside. The appeal filed by the appellant is allowed.

(Pronounced in the open court on)

(P.K.Choudhary)
Member(Judicial)

T. K.

