CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 474 of 2011

[Arising out of Order-in-Original No: 28/2011/CAC/CC/BKS dated 31st March 2011 passed by the Commissioner of Customs (Adjudication), Mumbai.]

Gulbir Singh Anand … ***Appellant***
Prop: Apollo Roadways, 519 Central Faculty Building,
Fruit & Vegetable Market, Sector 19, Vashi
Navi Mumbai 400 705

versus

Commissioner of Customs (Import) ***…Respondent***
JNCH, Post Uran, Dist Raigad, Sheva – 400 707

WITH

(i) Customs Appeal No. 475 of 2011 (Naresh Dhanji Bhanushali); (ii) Customs Appeal No. 543/ of 2011 (Sajjan Kumar Goel); (iii) Customs Appeal No. 549 of 2011 (Suresh Khandelwal); (iv) Customs Appeal No. 554 of 2011 (Bhimsen Bhagwat Singh); (v) Customs Appeal No. 563 of 2011 (Bhagwan Tulsiyan)

[Arising out of Order-in-Original No: 28/2011/CAC/CC/BKS dated 31st March 2011 passed by the Commissioner of Customs (Adjudication), Mumbai.]

APPEARANCE:

Shri Hemant Dave, Shri JH Motwani and Shri AM Sachwani, Advocates for the appellants

Ms PV Sekhar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86469-86474 / 2019

DATE OF HEARING: 26/02/2019
DATE OF DECISION: 26/08/2019

PER: C J MATHEW

All these appeals, disputing the penalty imposed on each of the appellants in proceedings that were initiated against M/s Lord Empire International for illicit clearance of 'brass scrap' and 'copper scrap' by claiming the benefit of exemption in notification no. 43/02-Cus dated 19 April 2002 against fraudulently obtained 'advance licence' with intent to divert for sale instead of utilisation in manufacture, are disposed off by this common order.

2. The importer on record is not in appeal and, thereby, findings of the adjudicating authority on the leviability of duty and confiscation of goods is not under challenge. Nevertheless, it would be worthwhile to record, in brief, the facts of the case. In the impugned order, it has been held that, with intent to divert goods imported against conditional notification of exemption, some of the appellants herein conspired to obtain, through submission of false documentation, advance licences which would enable clearance without payment of duty. The deployment of importer-entity, though said to have been established by Shri Surender Agarwal as a proprietorship in collaboration with Shri Bhagavan Tulsiyan and Shri Suresh

Khandelwal, was held to have been masterminded by Shri Sajjan Kumar Goel. The licences obtained from Director General of Foreign Trade, under the ‘duty exemption entitlement certificate’ scheme of the Foreign Trade Policy and presented for the import of 24 consignments between October 2002 and March 2003, were suspended on 3rd March 2003 by the licensing authority following which investigations were commenced by the Directorate of Revenue Intelligence.

3. During the course of investigations, statements of Shri Bhimsen Singh, partner of the ‘custom house agent’, M/s Nikhil Shipping Agency, and that of Shri Gulbir Anand, proprietor of M/s Apollo Roadways, and of Shri Naresh D Bhanushali, proprietor of M/s ND Bhanushali, both of whom had undertaken the carriage of the imported goods, were recorded. The custom house agent and the transporters admitted to have dealt with the three persons *supra* associated in the importing entity. Accordingly, show cause notice dated 3rd October 2007 was issued against the importer as well as the various individuals. Admittedly, the evidences relied upon in the said show cause notice, as well as the notice itself, did not name Shri Sajjan Kumar Goel.

4. That was to come later after his interception and arrest in April 2008. From his deposition and that of the other individuals named in

the notice, it was alleged that he had not only invested substantial sums of money in the consignments that had since been detained but was directly concerned with the clearance of the goods as well as the diversion. Thereafter, on 27th May 2009 an *addendum* was issued to the show cause notice charging him with complicity in the import and diversion of the impugned goods.

5. We have heard Learned Counsel for the appellants and Learned Authorised Representative at length. As the duty liability and confiscation is not liable to challenge except by the importer-entity, it is the acts of omission and commission on the part of the various appellants herein that leading to the confiscation of the goods that must be dealt with by us.

6. It is seen from the impugned order that the findings pertaining to the role of the transport undertakings is sketchy and devoid of facts that would link the activity of transportation with knowledge of the illicit nature of the movement. Any transporter, in the commercial sense, is merely required to deliver goods at the consigned address; there is no evidence here that the delivery had been effected to a different location. It is also not in the nature of their professional commitment to require establishment of the provenance of the articles carried by them or to be conversant with the various schemes of import or the provisions of Customs Act, 1962. Nor are they required,

under section 151 of Customs Act, 1962, to act as watchdogs of officers of customs. In the absence of any evidence of their awareness that the goods transported by them should legally have been delivered at the address provided for in the advance licences, the imposition of penalty against them is not justified. Consequently, the penalties imposed on Shri Gulbir Singh Anand and Shri Naresh D Bhanushali are set aside.

7. The other appellants are said to have been actively concerned with, and held to be beneficiaries of, the diversion of ‘brass scrap’ and ‘copper scrap’ imported against fraudulently obtained advance licences purportedly for manufacture and export. The adjudicating authority has held that the principal conspirator in this attempt to defraud public revenue is Shri Sajjan Kumar Goel with the others having been his witting instruments. The plea of the former is that he is a lender of funds without any knowledge of the scheme hatched for evasion of duties of customs. Undoubtedly, an ordinary financier, without any benefit other than interest, cannot be held to be a contributory to contraventions calling for confiscation of the goods. The identification of circumstances of involvement of Shri Goel, if ascertained to be correct, would alter the hierarchy of involvement and the consequences thereof. It would, therefore, be appropriate to take up the submissions made on behalf of Shri Goel first.

8. Besides the primary plea of having been a lender of money to M/s Lord Empire International, it is submitted by Learned Counsel that the inclusion of Shri Goel, through an *addendum* to show cause notice, is patently illegal. According to him, the investigations culminating in issue of the original notice did not contain any reference to Shri Goel and none of the noticees therein had brought up his name or his involvement in the import and clearance. He questions the genuineness of the statement recorded after the issue of show cause notice as none of them had been asked to substantiate this failure to do so on previous occasions. Learned Counsel also challenges the reliance placed upon the confession recorded from Shri Goel as this had been retracted at the first available opportunity. Drawing attention to the lapse of time between the alleged contravention and the imposition of penalty, Learned Counsel, placing reliance on *State of Punjab v. Bhatinda District Co-op Milk Producers Union Ltd [2007 (217) ELT 325 (SC)], Commissioner of Central Excise, Chandigarh v. Hari Concast (P) Ltd [2009 (242) ELT 12 (P&H)], Commissioner of Central Excise, Chandigarh-I v. Mohindra Iron & Steel Industries [2014 (310) ELT 495 (P&H)], Bhawani Castings (P) Ltd v. Commissioner of Central Excise, Chandigarh [2010 (254) ELT 247 (P&H)]* and *Commissioner of Central Excise, Chandigarh-I v. Malwa Iron & Steel Co [2015 (320) ELT 533 (P&H)]*, contends that, even if there is no special limitation prescribed

in section 112 of Customs Act, 1962, recourse can be had to imposition of penalty only within a reasonable time of commission of the alleged offence. He also assailed the casual discarding of the findings of the Income Tax Appellate Tribunal on the very issue of money having been lent to the other noticees.

9. Countering these claims, Learned Authorised Representative places reliance on the decision of the Hon'ble Supreme Court in *Surjeet Singh Chhabra v. Union of India [1997 (89) ELT 646 (SC)]* which has held that

> *'3….It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner.'*

to justify the reliance placed in the impugned order on the confession of Shri Goel. Further reliance is placed on the decision of the Hon'ble Supreme Court in *KI Pavunny v. Asst Collector (HQ), Central Excise Collectorate, Cochin [1997 (90) ELT 241 (SC)]* and on the decision of the Hon'ble High Court of Madras in *Assistant Collector of Customs, Madras v. Govindasamy Raghupathy [1998 (98) ELT 50 (Mad)]*. Reliance was also placed on the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Mumbai v. Kalvert Foods*

India Pvt Ltd [2011 (270) ELT 643 (SC)].

10. Customs Act, 1962 prescribes limitations for the recovery of duty under section 28 of Customs Act, 1962. However, there is no such limitation insofar as confiscation proceedings are concerned and, likewise, on the imposition of penalty. There is no doubt that a reasonable proximity of detriment with the cause is a consummation devoutly to be sought for. Nevertheless, that cannot be a reason, or a ground, for failing to act within the confines of the statute that is intended to protect the country from the ill-effects of smuggling. We find no illegality in the imposition of penalties for incidents that have occurred more than five years prior.

11. The findings against Shri Goel, as the prime conspirator, is based on a confession recorded from him as well as the corroboration of the confession from the other noticees. It is also on record that the show cause notice, as originally issued, did not include him as a noticee and has no mention of him anywhere within. The corroboration of the confession is, therefore, inconsistent with statements recorded before the confession obtained from Shri Goel. It is only with a reconciliation of the inconsistency that the corroborative statements could be acceptable for recording a finding. Such a reconciliation is markedly absent in the impugned order. It would be in the natural order of human behaviour to pass the buck to

conveniently available individual. The convenience of that availability would have to be discounted in the adjudication order for the corroborative statements to have credibility. We see a lack of such.

12. The contention of Learned Counsel that the confession statement, which is the cornerstone of the findings against Shri Goel, was retracted and hence not reliable does not appear to have been dealt with in the impugned order. The gap between the confession and the retraction cannot be wished away. The decision of the Hon'ble High Court of Madras in *re Govindasamy Raghupathy* and that of the Hon'ble Supreme Court in *re KI Pavunny* and in *re Kalvert Foods Pvt Ltd,* cited by Learned Authorised Representative, were disposals of claims made while challenging prosecution proceedings under Customs Act, 1962. Such proceedings are initiated after the findings are established in adjudication proceedings. It is that very foundation which is under challenge before us. Furthermore, the decision in *re Surjeet Singh Chhabra* was rendered in the context of confiscation that had been upheld at the adjudication, and appellate stages, and the undisputed possession of the contravening goods in the hands of the appellant therein. In the present instance, it is the link between the offending goods and Shri Goel that is sought to be established through the statements whose credibility is now cast in doubt. The several judgements, therefore, cannot come to the aid of the impugned order.

13. In the light of the foundation itself being questionable and the leap to isolation of the prime mover in the conspiracy being in jeopardy, it would be appropriate for the adjudicating authority to apply its mind to the various challenges made by Shri Goel before us to come to a conclusion on the nature of his role in the act of smuggling. The determination of such a role would have a direct impact on the contributory aspects of S/Shri Surender Agarwal, Bhagwan Tulsiyan and Suresh Khandelwal.

14. To enable this, we set aside the impugned order and direct the adjudicating authority to decide afresh the submissions of the four above in response to the show cause notice to the extent that we have not ruled upon.

15. The appeals of S/Shri Gulbir Singh Anand and Naresh D Bhanushali are allowed by setting aside the penalties and that of the others are allowed by way of remand.

(Order pronounced in the open court on 26/08/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as2602*