CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Miscellaneous Application (COD) No. 85169 of 2019
(On behalf of Appellant)
and
Customs Miscellaneous Application (COD) No. 85413 of 2019
(On behalf of Appellant)
in
Customs Appeal No. 85427 of 2019

(Arising out of Order-in-Original CAO No 149/2007/CAC/CC/KAP dated 01.01.2008 passed by Commissioner of Customs (Export Promotion), Mumbai)

Commissioner of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

Shri M.V. Shirkar (P.O.) **Respondent**
Mangal Prabhat, Surya Nagar,
Vitawa, Thane-Belapur Road,
Thane 400 605.

WITH

Customs Appeal No. 85942 of 2019

(Arising out of Order-in-Original CAO No 149/2007/CAC/CC/KAP dated 01.01.2008 passed by Commissioner of Customs (Export Promotion), Mumbai)

Commissioner of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

Shri K.K. Sharma **Respondent**
Tax Recovery Cell,
New Custom House,
2nd floor, Annexe Bldg.,
Mumbai 400 001.

Appearance:

Shri Manoj Kumar, Assistant Commissioner, Authorised Representative for the Appellant
None for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/87427-87428/2019**

Date of Hearing: 03.10.2019
Date of Decision: 03.10.2019

PER: SANJIV SRIVASTAVA

These appeals have been filed by revenue along with the application for condonation of delay against the order in original CAO No 149/2007/CAC/CC/KAP dated 01.01.2008 passed by the Commissioner of Customs (Export Promotion), Mumbai. By the impugned order, the Commissioner has held as follows:

1) *"The goods entered for export under Shipping Bill Nos 526019, 5226025 and 5226028 all dated 31.05.2002 are confiscated under Section 113(d) read with the Section 113(l) of the Customs Act, 1962.*
2) *The drawback claimed in respect of the past exports under Shipping Bill No 2333201, 5223202 & 5223203 all dated 17.05.2002, 5224631, 5224646 & 5224659 all dated 25.05.2009 is rejected.*
3) *I also impose the following penalties under Section 114 of the Customs Act, 1962.*
    a. *Rs 1,00,000/- (Rupees One Lakh only) on Shri Krishnam Raju, The proprietor of M/s Lovely Enterprises.*
    b. *Rs 1,00,000/- (Rupees One Lakh only) on Shri Asif Hussain.*
    c. *Rs 5,00,000/- (Rupees Five Lakh only) on Shri Amber Mufti.*
    d. *Rs 2,50,000/- (Rupees Two Lakh Fifty Thousand only) on Shri Rajendra Tripathi.*

e. Rs 2,50,000/- (Rupees Two Lakh Fifty Thousand only) on Shri Gawade.

4) Penal proceedings against Shri Shaukat Ali Khan, Director of CHA, M/s Hina Shipping & Clearing (Cochin) (P) Ltd & CHA M/s Exfin Shipping India Ltd are dropped.

5) Penal proceedings under Customs Act, 1962 against Shri A K Chaudhary, the then Dy Commissioner, Shri K K Sharma, Supdt, Shri R K Tomar Supdt and Shri M V Shirkar, Preventive officer are dropped. This does not bar the authorities from taking any action against the officers under "Conduct Rules/ any other law, as deemed fit and if found necessary."

2.1 These appeals have been filed by the revenue as per the directions contained in the tribunal interim order No 1/34-36/2017 dated 16.11.2017 to file separate appeals in respect of other parties/noticees also where the department was aggrieved. Department had filed Appeal No C/432/2008 against the same impugned order, making M/s Lovely Enterprises a respondents. However during the course of argument of appeal it was observed that the appeal was directed against the dropping of proceedings against Shri K K Sharma Superintendent and Shri M V Shirkar (Preventive Officer). Accordingly tribunal vide its interim order referred above directed the revenue to file separate appeals making the said persons as respondent.

2.2 As directed these appeals have been filed and since these appeals have been filed with the delay of 9 years and 11 months, applications for condonation of delay too have been filed.

2.3 Rule 6A of CESTAT Procedure Rules, 1982 reads as follows:

"6A. Notwithstanding the number of show cause notices, price lists, classification lists, bills of entry, shipping bills, refund claims/demands, letters or declarations dealt with in the decision or order appealed against, it shall suffice for purposes of these

rules that the appellant files one Memorandum of Appeal against the order or decision of the authority below, along with such number of copies thereof as provided in rule 9.

Explanation. In a case where the —

(1) impugned order-in-appeal has been passed with reference to more than one orders-in-original, the Memoranda of Appeal filed as per Rule 6 shall be as many as the number of the orders-in-original to which the case relates in so far as the appellant is concerned.

(2) In case an impugned order is in respect of more than one persons, each aggrieved person will be required to file a separate appeal (and common appeals or joint appeals shall not be entertained)."

2.4 Without going into the interpretation of Rule 6A and explanation thereto we find that these appeals have been filed by the revenue as directed by the tribunal, to comply with the requirement of explanation (2) to Rule 6A. Since the main appeal was filed within time, these appeals are only technical appeals and the delay in filing these appeals need to be condoned. We do accordingly.

3.1 In their appeal memo, the appellant revenue has challenged the order of Commissioner, dropping the penal proceedings initiated against them by stating as follows:

"31. However, the Committee observes that the Preventive Officer Shri M.V. Shirkar in his statement, has admitted that package Nos.1 and 22 were examined by him in respect of Shipping Bill No.5226025 and that the samples from the inspected packages were drawn by him and he had personally taken the same for perusal of Dy. Commissioner / Docks, who, after seeing the same had signed on the Annexure-C attached to the Shipping Bills. He further stated that the goods were examined and samples were drawn in the presence of CHA & Superintendent Shri K.K. Sharma. He stated that when he examined / inspected the goods, the said goods were in order and the samples drawn and shown to Dy. Commissioner / Docks

were not old or used garments. However, on showing the samples drawn under panchnama dt. 12.06.2002 from export consignment of M/s. Lovely Enterprises (wherein package Nos. (1) and (22) were examined by him under Shipping Bill No.5226025/31.05.2002) he stated that they are not similar or identical to the goods initially examined by him. He also identified Shri R.G. Gawde during the investigation and stated that Shri R.G. Gawde was the CHA present at the time of examination of the subject export goods of M/s. Lovely Enterprises.

32. It is also observed by the Committee that Shri R.G. Gawde (CHA) Employee), in his statement has stated that he was present at the time of examination of Shipping Bills 5226019, 5226025 and 5226028 all dated 31.05.2002, but as the goods were found to be of inferior quality than as declared in the Shipping Bills, he had refused to sign the said Shipping Bills. He further stated that when this fact was conveyed to Mr. Mufti, he was told it was none of his (Mr. Gawde) business to see the quality of the goods and he (Shri Mufti) would manage the examination officer.

33. Supdt. Shri K.K. Sharma, in his statement has stated to have given the Let Export Order for the said S/Bills. On being asked by he was not present at the time of examination, he stated that since the samples were drawn and shown to DC/STP and accepted by him, he presumed that the sequence was to be allowed and accordingly LEO was given on the basis of examining officer's report.

34. It is also observed by the Committee that first the samples were drawn at the time of examination and then shown to Dy. Commissioner / Docks and it would be only thereafter that the question of approval or rejection would come up before the Dy. Commissioner. Shri K.K. Sharma could not have known beforehand that the samples drawn would be approved by Dy. Commissioner and therefore, should have seen the samples during examination. It is also observed by the Committee that *the Let Export Order was given by Shri Sharma, Supdt. and SDF for the shipping bills in question were also signed by him and he admitted having signed them. It is therefore to be construed that he deliberately kept himself from the examination being fully aware of the fraud being committed by the exporter and allowed the goods to be cleared for export.*

35. It is clear from the above discussion that Shri Shirkar and Shri K.K. Sharma had played active role in the fraud committed by the exporter, in as much as the samples stated to be drawn by Shri M.V. Shirkar (Preventive Officer) and shown by him to the Dy. Commissioner at the time of allowing export clearance, were different from the goods examined under panchnama (after recall of the same export consignments). Therefore, it appears that the export consignments containing old & used garments were allowed to be cleared for export by Shri M.V. Shirkar (Preventive Officer) and Shri K.K. Sharma (Superintendent), who examined and gave Let Export Order for the subject Shipping Bills. The fact is further corroborated by the statement of CHA's representative Shri Gawde, who stated that at the time of initial examination, the goods were found to be of inferior quality."

4.1 We have heard Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue. None appeared for the respondents.

4.2 Arguing for the revenue authorized representative reiterated the submissions made in appeal.

5.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

5.2 Commissioner has while discussing the role of these two officers in para 81, 82 & 83 of his order observed as follows:

"81. The role of the Preventive Officer Shri Shirkar and the Superintendent (with reference to the charges in the notice) does raise doubts of suspicion. More so, in the context of their deposition and the facts that had emerged. In other words, according to both the officers, the goods that were examined,

after recall, were old and used, whereas initially examined goods were different. When one considers the claim that the goods were examined initially before shifting, the possibility of their character being different upon recall, does raise many questions. Unfortunately, these questions were never raised in the investigations, nor any attempt made to find out the answers. An Adjudicating Authority cannot substitute or fill in the loopholes, and therefore the benefit of doubt is extended to the two officers, as far as action under Customs Act is concerned. It is a different matter altogether, for initiating action under the Conduct Rules.

82. The Hon'ble Tribunal in the case of CC Bangalore Vs N M Naushad [2007 (210) ELT 464 (Tri Bangalore)] held that officers failure to perform their duty of scrutinizing/ examining the documents, at best be dereliction of duty which can be proceeded in terms of CCR Rules. Investigations for proving the charge of abetment as required under Section 112 (a) of Customs Act, 1962, not brought out in Show Cause Notice.

83. Similarly in the case of CC New Delhi vs Hargovind Export [2003 (158) ELT 496 (Tri Delhi)] held that only highlighting the dereliction of duty by the respondents not sufficient for imposition of penalty. Exporter denied knowing any of the officers personally. Nothing brought on record to show the knowledge of and benefit to the officers and the Tribunal refused to interfere with the Commissioner's order dropping charges against the officers."

5.3 In the appeal filed by the revenue, nothing has been brought on record to show that the respondents had connived and abetted in the acts of exporter to claim the drawback fraudulently. In absence of any personal knowledge of the respondents or their act of connivance or abetment in the acts of exporters the provisions of Section 114 could not have been invoked against these officers. Commissioner has also not given the clean chit to these officers in respect of their failure to perform the duties assigned to them diligently. He only has extended the benefit of doubt as departmental investigation has failed to show that these officers had knowledge and had connived with the exporter in his act.

5.4 Mumbai Bench of Tribunal has in case of Harvinder Singh [2015 (328) ELT 512 (T-Mum)] held as follows:

"6. *To sum up the matter, the penalty under Section 114(iii) of the Customs Act, 1962 is held not sustainable, as the appellant has neither done anything nor omitted to do any act which act or omission would render such goods liable to confiscation, nor he has abetted in doing or in omission of any act which shall attract penalty provisions on him. All the four appeals are allowed with consequential relief, if any. The impugned orders are set aside, and the appeal is allowed."*

5.5 Thus we do not find any merits in the appeals filed by the revenue.

6.1 In view of discussions as above-

i. Miscellaneous applications filed for condonation of delay in filing these appeals are allowed;
ii. Appeals filed by the revenue are dismissed.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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