CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 86133 of 2015

[Arising out of Order-in-Original No.14/2014-15 dated 19.02.2015 passed by the Commissioner of Customs (NS-General), Raigad, Maharashtra]

Shri Mohammed Altaf **.....Appellant**
A-5, Army Welfare Society, Sector-9,
Nerul (East), Navi Mumbai-400 706

VERSUS

Commissioner of Customs (NS-General) **.....Respondent**
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal. Uran, Dist. Raigad, Maharashtra- 400 707

WITH

Customs Appeal No. 86134 of 2015

[Arising out of Order-in-Original No.14/2014-15 dated 19.02.2015 passed by the Commissioner of Customs (NS-General), Raigad, Maharashtra]

Shri Ali Imran Shafiullah Khan, **.....Appellant**
Flat No. 2812, Building No.28, Phase-III,
Kohinoor City, Kirol Road,
Kurla (W), Mumbai-400 070

VERSUS

Commissioner of Customs (NS-General) **.....Respondent**
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal. Uran, Dist. Raigad, Maharashtra- 400 707

Appearance:

Shri G.B. Yadav, Advocate for the Appellant

Shri K.K. Srivastava, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. A/85793-85794/2020

Date of Hearing: 02.01.2020
Date of Decision: 25.09.2020

Per: P.ANJANI KUMAR

An intelligence developed by the DRI Mumbai Zonal Unit, revealed that a syndicate headed by one Shri Piyush Meghani and assisted by one Deepak Joshi amongst others had exported a consignment of Red sanders by replacing the original cargo of "Indian Hand Knotted Woollen Carpets"; The original cargo, covered by three Shipping Bills, all dated 01.03.2013, vide container No. ETEU 2326256 was declared to be exported by M/s Kay Creative Rugs, Mirzapur and consigned to M/s Carpet Roll Supplies Ltd., Bradford, UK whereas port of discharge was Port Kelang. The container sailed out of Nhava Sheva Port per Vessel MOL Dignity, was re re-called, by DRI, back to Nhava Sheva Port on 04.04. 2013; examination of the said container on 05.04.2013 resulted in recovery of 12.295MT of Red Sanders valued at Rs. 1.22 Crores; the same was seized on 05.04.2013. Statements of various persons, including S/ Shri Mohammed Altaf (on 09.04.2013), Piyush Meghani, Ali Imran Saifullah Khan (on 30.4.2013) were recorded. Wild Life Crime Control Bureau (WCCB), Ministry of Environment and Forests, Government of India, vide their Report No. C-13011/3/ 2009/13/Vol. 5175 dated 22.04.2013, confirmed the cargo to be Red Sanders (Pterocarpus Santalinus) is listed in Appendix II of Convention of International Trade of Endangered Species (CITES) of Wild Flora and Fauna and the export of the same is prohibited under Chapter 4A, S. No. 154 of the Current Export Policy". A Show Cause Notice bearing F. No. DRI/MZU/C/INV-12/2012-13/9571 dated 01.10. 2013 was issued by the Additional Director General, DRI (MZU), calling upon, inter alia both the Appellants, the persons concerned to show cause as to why 12.295 MT of Red Sanders valued at Rs. 1.22 Crores seized on 05.04.2013 should not be held liable for confiscation under Section 113 (d) (f) (g) (h) and (k) 113 of Customs Act, 1962 and as to why penalty should not be imposed on both the Appellants under Section 114(i) of the Customs Act 1962. Commissioner of Customs Nhava Sheva, vide impugned order OIO No.14/2014-15 dated

18.02.2015, confiscated 12.295MT of Red Sanders valued at Rs.1.22 crores under Section 113 (d) (f) (g) (h) and (k); He also imposed penalties of Rs.2 crores and 25 Lakhs on Shri Mohammed Altaf (Appeal No C/86133/2015) and Shri Ali Imran Saifulla Khan (Appeal No C/86134/2015) under Section 114(i) of the Customs Act 1962, the appellants.

Submissions on behalf of the appellants

2. Shri G.B. Yadav, Advocate, appearing on behalf of the Shri Mohammed Altaf, submits a chart listing the events of the case in a chronological manner and submits that first confessional statement of Mohd. Altaf was recorded on 09.04.2013 under threat and coercion; he was again called for statement on 10.04.2013; but since he was tortured so much on 09.04.2013 he had to be admitted to the hospital on 10.04.2013 for a week; thereafter, also he was called again and again by issuing summons but due to his bad health he could not attend the DRI office for which he sent letters dated 22.04.2013 with Medical Certificate, 29.04.2013 and 09.05.2013 requesting for giving another date; the Appellant retracted his statement recorded on 09.04.2013 by filing an Affidavit dated 13.05.2013 in the Court of Hon'ble ACMM at Mumbai; thereafter again DRI started summoning the Appellant and his wife to which his wife replied vide letters dated 18.07.2013 and 24.07.2013; after a gap of seven months of the issue of SCN, DRI, filed a rebuttal to the Retraction dated 13.05.2013 in the Court of Hon'ble ACMM, Mumbai, on 11.12.2013; the Appellant filed a Counter Rebuttal to the Rebuttal dated 11.12.2013 in the Court of Hon'ble ACMM, Mumbai; the Appellant further vide letter dated 28.08.2014 sent copies of his Retraction Affidavit dated 13.05.2013 submitted before the ACMM Court, Rebuttal to the Retraction filed by the DRI as well as Counter to the Rebuttal filed by the Appellant in the Court of ACMM and also requested the Commissioner to provide copies of the Application and Activation Form of Mobile No. 9619811923 allegedly used by the Appellant and the statement of the IEC holder (Exporter) in order to enable the Appellant to file proper reply. The Commissioner vide letter dated 20.08.2014 rejected the Appellant's request for cross-examination of witness; Thus, Shri Altaf retracted his statement on 13.05.2013 and 4.10.2013; vide letters dated 13.11.2013 and 16.08.2014 requested for another date and cross examination of S/Shri Piyush Meghani, Shaikh Mohammed Arif, Ali Imran Saifullah Khan, Nabi Ahmed Shaikh, and Bhavin D. Meghani. He submits that Shri Ali Imran Saifulla Khan retracted his statement dated 30.04.2013.

2.1. Shri Ali Imran Saifulla Khan retracted his statement dated 30.04.2013 on 02.05.2013 and filed replies dated 20.12.2013 and 07.10.2014

3. Learned Advocate submits that the Commissioner mainly relied upon the retracted statements of the Appellants; statements, statements of co-noticees S/Shri Piyush Meghani, Shaikh Mohd. Arif Abdul Jabbar Nabi Ahmad Shaikh; (Para 4.13); statements of S/Shri Sachin Narayan Waghmare, Mahendra Kumar Tiwari @ Guddu, AnshumanPandey, Shailendra Pandey, P. Subramanium, Ramani kandan Pichikanu, P.D.Kotwal, Mohit Agarwal and Shaikh Abdul Kadar @ Salim and Call records of 9619811923, 7874606602, 9833896565 & 8800373512 allegedly used by S/Shri Mohd Altaf, Piyush Meghani, and Deepak Joshi & Gangi Reddy respectively.

4. It was alleged that Mohd. Altafplayed key role as evident not only from his own confessional statement but those of his co- conspirators. Piyush Meghani, Shaikh Mohd. Arif Abdul Jaffar Ali Imran Saifullah Khan and Nabi Ahmad Shaikh; he appointed Deepak Joshi and Shaikh Mohd. Arif Abdul Jaffar to arrange blank seals to duplicated by embossing the same with Customs insignia and Ali Imran &Nabi Ahmad Shaikh for switching of the carpets with red sanders.

4.1. It was alleged that Shri Ali Imran Saifulla Khan arranged for the labourers for loading/unloading and was present during the stuffing of red sanders.

5. Learned Advocate further submits that DRI referred the case to the CBI vide their letter F. No. DRI/MZU/C/INV-12/2012-13/6741 dated 10.08.2013; CBI registered an FIR alleging misuse of official position by the Appellant Shri Altaf as public servant in conspiracy with all the co Noticees including second Appellant Ali Imran Khan in the present case before this Tribunal; on completion of investigation the CBI filed the Charge Sheet No.RCBA1/2014/A0035 Case No935/PW/201) , under Section 173 of CrPC, before court of the Additional Chief Metropolitan Magistrate at Esplanade, alleging that Shri Deepak Joshi in conspiracy with Jayraj Sheth@ Rajesh Ratilal Shah and Nabi Ahmad replaced the original cargo with red sanders and resealed the said container using false custom bottle neck seals and loaded the container in the vessel MOL-Dignity which sailed on 15.03.2013; in absence of any cogent evidence against the Appellants Mohd. Altaf and Ali Imran Saifulla were not being charge sheeted.

6. Learned Advocate submits that penalty is not imposable on both the Appellants under Section 114(i) of the Customs Act 1962 in view of the following.

(i). there is no evidence of criminal conspiracy by Mohd. Altaf with the second appellant Ali Imran or any other person to smuggle red sanders as per CBI; as such, the findings of Commissioner being contrary to the said report are arbitrary and devoid of merits; since both the Appellants have neither done nor omitted to do nor have they abetted the doing of such an act or omission which rendered the seized goods liable to confiscation under Section 113 no penalty can be imposed on them.

(ii). penalty has been imposed solely on the basis of confessional statements of the Appellants and other co accused all of which have been admittedly retracted as noted by the Commissioner; the confessional statements of Appellants and others are not corroborated in material particulars; call records relied upon (Para 5.4 to 5.8 of the order) are not corroborated except by the unsubstantiated statement of Shri Mohit Agarwal, a fellow officer perhaps under pressure by senior officers of DRI; there is no evidence of ownership use of the telephone no.9619811923 by the Appellant Mohd. Altaf; the Appellant never left the station to go to Hyderabad in November 2012as recorded in his statement; the alleged investment of Rs.50 lakhs to the Appellant with Shri Piyush Meghani by taking loan from Salim recorded in the statement of the Appellant is not corroborated by Salim and Piyush Meghani and that the request of the Appellant to cross examine the persons who incriminated the Appellants has been summarily rejected by the Commissioner.

(iii). the other persons like S/Shri Sachin Narayan Baghmare, Mahendra Kumar Tiwari@Guddu, Anshuman Pandey, Shailendra Pandey, P. Subramanian, Ramanikandan Pichikanu, P.D. Kotwal who dealt with goods by filing the Shipping Bills, booking of container and other shipping work have not incriminated the Appellant.

(iv). Jayraj Sheth and Ganesh Jayaswal named by P. Subramanian, Ramnikandan Pichikanu and others have not been interrogated even though their telephone no. and email id was available although CBI has named and charge sheeted him as the main person responsible for smuggling the seized goods and further no penalty is imposed by Commissioner on Ganesh Jayaswal even after recording his complicity for reasons known to him only.

7. Learned Advocate submits that commissioner finds that S/Shri Mohd Altaf and others viz Piyush Meghani, Shaikh Mohd. Arif Abdul Jabbar, Ali Imran Saifulla Khan, Nabi Ahmad Shaikh, Deepak Joshi and Ganesh Jayaswal and have illegally attempted to export prohibited items, hence all are liable to penalty and imposed penalty on everyone except on Ganesh Jayaswal; Retractions are an afterthought, Cross examination is not a right and hence denied.

8. Learned Advocate further submits that Penalty has been imposed solely on the basis of confessional statements of the Appellant and other co accused. It is impermissible in law because

(i). it is well settled principle of law that confession of co-accused person cannot be treated as substantive evidence and can be pressed into service when the court is inclined to accept other evidence and feels the necessity of seeking assurance of the conclusion deductible therefrom and that the confession of one co accused cannot be corroborated by another co accused; moreover, confessional statements of the Appellant and other co-noticees have been retracted.

(ii). Cross examination of co Noticees has been denied on flimsy grounds.

(iii). Confessional statements of Appellant and others are not corroborated in material particulars in as much as phone Numbers of which call records are relied upon do not belong to the Appellant and co Noticees; department has not provided the document for recorded ownership of any of the telephones; no finding recorded by the Commissioner on Appellant's request for non-supply of documents requested.

(iv). Appellant never left the station to go to Hyderabad in November 2012as recorded in his statement; statement of Shri Mohit Agarwal about the Appellant is not substantiated by any documentary evidence.

(v). Salim has not corroborated the alleged lending of Rs.50 lakhs to the Appellant as seen in the retracted statement of the Appellant.

(vi). Shri Piyush Meghani's retracted statement also shows his investment of only Rs.12.5 lakhs instead of Rs.25 lakhs typed in the statement of Mohd Altaf. No investigation to confirm borrowing by Piyush from S.KapoorJewellers and his bank record is made by DRI.

(vii). No arrest is made in the case in such a big case of alleged smuggling of Red Sanders.

(viii). the persons like S/Shri Sachin Narayan Baghmare, Mahendra Kumar Tiwari@Guddu, Anshuman Pandey, Shailendra Pandey, P. Subramanium, RamanikandanPichikanu, P.D.Kotwal who dealt with the Shipping Bills, booking of container and other shipping work have not named the Appellant.

(ix). Shri Jayraj Sheth and Ganesh Jayaswal named by P. Subramanian, Ramnikandan Pichikanu and others have not been interrogated even though their telephone no. was available; no investigation is made in respect of exporting firm M/s Kay Creative Rugs despite telephone Nos, Bank account and address available with the DGFT website;

(x). No penalty is imposed on Ganesh Jayaswal even after recording his complicity for reasons known to the Commissioner.

(xi). DRI has deliberately not examined Deepak Joshi despite his petition in the high Court admitting everything about the case and without any basis the Commissioner also records that his story is not reliable.

9. The Appellants rely upon the cases of Debu Saha 1992 (59) ELT 442 (T); Kallatra Abbas Ali 1994 (69) ELT 212 (Ker); Mohtesham Mohd Ismail 2007(220) ELT3 (SC) and Hari Charan Kurmi Manu/SC/0059/1964 (AIR 1964 SC1184).

Submissions on behalf of the department

10. Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative, appearing on behalf of Revenue reiterates the findings in OIO and submitted a written brief. He submits that intelligence developed by the DRI, revealed that a syndicate headed by one Shri Piyush Meghani has been indulging in smuggling of Red Sanders, out of the country; one Shri Deepak Joshi and an Officer of Customs, Marine & Preventive Wing, Commissionerate of Customs (Preventive)were the key members of the syndicate which has exported a consignment of Rod sanders by replacing the original cargo " Indian Hand Knotted Woollen Carpets" in Container No. ETEU 2326256 using the importer Exporter Code (IEC) of M/s Kay Creative Rugs, Mirzapur, consigned to M/s Carpet Roll Supplies Ltd. Bradford, U.K., showing the port of discharge as Port Kelang. Learned Authorised Representative, submits that entire racket of smuggling of Red Sanders out of the country started with the meeting of Mohammad Altaf, then Assistant Commissioner of Marine& Preventive Wing of the Customs Preventive Commissionerate, with one Gangi Raddy, supplier of Red Sanders at Nandiyal, Kurnool District, Andhra Pradesh in November0 2012 Shri Gangi Reddy proposed smuggling out of the Red Sanders, and roped in Shri Piyush Meghani, a habitual offender and ex-detune under COFEPOSA, who was already into the smuggling of Red Sanders.

11. Learned Authorised Representative submits that Shri Mohammed Altaf, Gangi Reddy and Piyush Meghani met a couple of times at Navi Mumbai, hatched a plan for smuggling of Red Sanders, invested for procurement and also undertook the operations which involved extensive logistics and strategic planning; Mohammad Altaf roped in freelance Customs Clearing Agent Deepak Joshi @ Diiip who volunteered to oversee the entire ground operations along with this associates Ganesh Jaiswal and Hanumantha; role of each of the individual is enumerated in Paras 7(c) of the Order in Original dated 18/02/2015.

12. Learned Authorised Representative submits that during the course of hearing, learned advocate for the appellants took the plea that CBI in their charge sheet dated 11/12/2015, did not charge Shri Mohammed Altaf and Shri Ali Imran Shafiullah Khan due to absence of any cogent and legal evidence revealed during investigation. However, DRI, vide their letter dated 07/01/2020, clearly indicated that though a complaint has been filed under Section 132,135 of the Customs Act, 1962 against all persons involved in the smuggling of Red Sanders including Shri Mohd Altaf and no final decision is yet made by the Court.

13. Learned Authorised Representative further submits that Shri Mohit Agrawal categorically stated that the mobile number 9619811923 was being used by Shri Altaf Mohammed who was at that time working with him in Customs Marine and Preventive Wing, Mumbai; though Shri Altaf had sought cross examination of various other co-accused, he did not ask for the cross examination of Shri Mohit Agrawal; this clearly shows that Shri Mohd Altaf was using the mobile phone and hence did not challenge the facts corroborated by Shri Mohit Agarwal.

14. Learned Authorised Representative submits that it is pertinent to mention that Shri Mohd Altaf did not appear, in response to further summonses on 25/06/2013, 17/07/2013 and 16/08/2013, citing evasive replies; this implies that he was involved in the smuggling activities; Shri Mohd. Altaf was identified by Shri Bhavin Meghani, Shri Shaikh Mohd Arif Abdul Jabbar, Ali Imran Khan, Shri Nabi Ahmad Shaikh alias Sheru and Sheikh Abdul Kadar alias Salim; Shri Mohd. Altaf has identified Shri Piyush Meghani and Shri Deepak Joshi; Shri Ali Imran Shafiullah Khan was identified by Shri Shaikh Mohd Arif Abdul Jabbar, and Shri Nabi Ahmad Shaikh alias Sheru whereas, Shri Ali Imran Shafiullah Khan identified Shri Mohd Altaf, Shri Dilip @ Deepak Joshi, Shri Nabi Ahmad Shaikh alias Sheru and Shri Shaikh Mohd Arif Abdul Jabbar.

15. Learned Authorised Representative also submits that Shri Mohd Altaf had retracted his statement recorded on 09/04/2013 by way of filing a retraction on 13/05/2013 in Hon'ble CMM Court, Mumbai after a gap of 1.25 months; department also filed a rebuttal on 15/01/2014; he relies upon the following case laws to say that retraction doesn't vitiate the proceedings and prays that the appeals made by the Appellants may be dismissed.

(i). Ashok Kumar Shroff Vs CC, Bangalore 2011-TIOL-1824-CESTAT-BANG

(ii) K. Abdul Karim Vs Director, Enforcement Directorate. 2017 (353) ELT 345 (ATFE)

(iii). Chander Prakash Verma Vs CC (Preventive) 2019 (366) ELT 414 (Del.)

16. Heard both sides and perused the records of the case. We find that the brief issues that requires decision in the case is as to whether the appellants have rendered themselves liable for penalty under Section 114(iii) of the Customs Act 1962. The main contention of the appellant is that the allegation is only based on statements of the appellants and other co-accused; the same are retracted; there is no corroborative evidence to confirm their Role in the smuggling of Red sanders. On the other hand it's the department's stand that the appellants were the key persons in the smuggling of Red Sanders; they have accepted their role in their respective statements recorded under Section 108 of the Customs Act,1962 and rebuttal was an afterthought and hence not to be relied upon.

17. Before we proceed further, we find it would be beneficial to have a look at the findings to appreciate how the commissioner has evaluated the evidence in the adjudication order.

17.1. In respect of Shri Mohammed Altaf, Learned Commissioner finds that.

Whereas on perusal of records/statements of Noticees, I find that, Mohammed Altaf in his statement recorded on 09.04.2013 under Section 108 of the Customs Act inter-alia admitted that he met one Gangi Reddy while travelling from Mumbai to Andhra Pradesh, who told Altaf that he is a supplier of Red Sanders and was looking for a buyer in Mumbai; that Gangi also gave Phone Number of Piyush Meghani and asked him to verify his antecedents to check whether he is interested in smuggling of Red Sanders; that he met Piyush and enquired whether he interested in smuggling activity; thereafter Altaf met Gangi Reddy and Piyush in Navi Mumbai in December, 2013 and hatched a plan to smuggle Red Sanders; that he knew Deepak Joshi, CHA who used to clear Carpet consignments from Nhava Sheva; that Altaf took him into confidence and enquired about smuggling of Red Sanders; that Deepak Joshi agreed to help in clearing the cargo of Red Sanders I find that, Piyush Meghani in his statement recorded on 15.04.2013 under Section 108 of the Customs Act, 1962 inter-alia stated that he had arranged the overseas buyer for Red Sanders in the instant case at the instance of Mohammed Altaf; that Mohammad Altaf invested Rs. 50,00,000/- for procurement of Red Sanders and also asked him to invest 25,00,000/- for the same; that he arranged for an empty container for shipment of cargo. Whereas, on perusal of statements of various co-conspirators of smuggling viz. Shri Shaikh Mohammed Arif Abdul Jabbar, Shri All Imran Shaflullah Khan, Nabi Ahmed Shaikh @ Sheru, I find that all of them pointed towards Mohammed Altaf as the key conspirator of the plan who also gave instructions to carry out the smuggling activities. Perusal of call detail analysis of Cell Phone No. 9619811923 of Mohammed Altaf (as stated in Para 5.4 above) corroborates the nexus between him, Gangi Reddy and Piyush Meghani, the prime conspirators and other associates; that there are frequent calls made by Altaf to Gangi, Piyush and Deepak during the period February-March, 2013. I find that, Shri Mohit Aggarwal, Dy. Commissioner of Customs, Commissionerate of Customs (Preventive), Mumbai in his statement recorded under Section 108 of Customs Act, 1962 confirmed that Mobile No. 9619811923 belonged to Mohammed Altaf. I find that all the conspirators whose statements were recorded under Section 108 of the Customs Act, 1962 were duly warned by the Investigating Agency and they were well aware of the facts that the statements they were rendering will be used against them as evidence in the legal proceedings. The statement of Mohammed Altaf was recorded on 9th April, 2013 and the retraction was filed by him belatedly on 13th May 2013 with the lame excuse that since he was in the hospital and not in proper state of mind, he filed the retraction on discharge from the *hospital. The statement given by Mohammed Altaf is clearly an afterthought because he was aware what statement he had given and he could have retracted the statement the very next day. Further after receiving the SCN on 1.10.13, and after going through the SCN, he filed the second retraction on 4.10.13, which is also an afterthought and therefore not worthy of consideration. Further summons were issued to Mr. Mohammed Altaf on 25.6.13, 17.7.13 and 16.8.13 to appear before the investigating agency on 28.6.13,22.7.13 and 19,8,13 respectively, however he did not appear before the investigating agency and sent evasive replies expressing his inability to attend on some pretext or the other, Further Mrs. S.Altaf wife of Shri Mohammed Altaf was issued summons on 22.7.13 to appear on 24.7.13, instead of cooperating with the investigating agency, she informed the investigating agency about her and her husband's un-willing ness to report to the investigating agency on various alibis. In view of this, I find that even though Shri Mohammed Altaf claimed that he is a sincere officer and made first case of averting smuggling of Red Sanders in M & P Wing, his repeated avoidance to appear before the investigating agency on flimsy grounds raises enough doubt about his shying away from the investigation with ulterior motives. The evidence, in the form of statements of co-conspirators, call records of Mobile No. 9619811923 used by Altaf and his voluntary statement recorded under Section 108 of the Customs Act, 1962, indicate that Mohammed Altaf was very much involved/actively participated in the alleged act of smuggling of Red Sanders out of India, which renders himself liable for penal action under Section 114 of the Customs Act, 1962.*

17.2. In respect of Shri Mohammed Altaf, finings of Learned Commissioner are as follows.

Ali Imran Shafiullah Khan during his statement recorded under Section 108 of the Customs Act, 1962 voluntarily stated that he met Mohammed Altaf through Arif in the month of January and agreed to involve in smuggling of Red Sanders. He roped in Sheru, Manager of Aqdas Maritime Pvt. Ltd. and driver Azar who drove the truck containing Red Sanders to the Aqdas Maritime ground. He told how they broke open the original seals and substituted the carpets with Red Sanders with the help of labourers arranged by Azar. All Imran Shafiullah Khan filed in his reply dated 7.10.2014 to SCN through his Advocate Roopchand Kanungo submitted that he had already submitted notarized retraction to the statement given before DRI officers to Addl. Director General, DRI and he was not involved in the instant case and nothing to do with the seized goods. He further stated that the

SCN did not mention the submission of retraction filed by him. It is also stated that the statements of other co-noticees not binding on him.

18. We turn our attention to the important points alleged to have been accepted by Shri Mohammad Altaf in his statement on 09.04.2013. We find that he stated, inter alia, the following.

- He met Shri Gangi Reddy, a supplier of Red sanders, in about November 2012 during some function at his in-laws place at Nandyal; Shri Gangi Reddy enquired about prospective buyers of Red sanders in Mumbai; Shri Gangi Reddy visited Shri Altaf at his residence in Navi Mumbai in first fortnight of December 2012. Shri Altaf met Shri Piyush Meghani 2nd or 3rd week of December 2012. Shri Altaf arranged for the meeting between Shri Gangi Reddy and Shri Piyush Meghani; he met Shree Deepak Joshiu, a CHA, who agreed for export of Red sanders; subsequently, in late January or first week of February, he informed Shri Piyush Meghani about Deepak Joshi's readiness; Piyush Meghani spoke with Deepak Joshi and thereafter they had chalked out a plan to smuggle Red Sanders;
- In the month of February, 2013 (around 2nd or 3rd week), himself, Shri Gangi Reddy and Shri Piyush Meghani met at Hotel Yogi Executive, Sanpada and decided that Gangi Reddy would invest 40%, Piyush Meghani and himself 30% each for procurement of Red Sanders; they would share the payment received from the buyers in the same ratio after excluding the expenses; his investment in purchase of Red Sanders was Rs. 50,00,000/-; similarly Rs. 50,00,000 was invested by Piyush Meghani and he undertook the expenses (around 40 lakhs) to be paid for Deepak Joshi; Gangi Reddy had invested about Rs. 70,00,000/- for procurement of Red Sanders; the amount of Rs. 1,70,00,000/- was used to procure about 12 MT of Red sanders; the Red Sanders was procured at the rate of about Rs. 1350/- per Kg. and was sold in the international market at about US$ 60 to 65 per Kg.; he arranged the above amount of Rs. 50,00,000/- in cash from Sheikh Salim, who was in the business of manufacturing caps and doing embroidery on garments, and was a distant cousin of his wife, on interest basis; it was agreed upon that he would pay him

Rs. 5,00,000/- more after a period of 45 days; Sheikh Salim was and his factory was located somewhere in Mumbai; he received the said amount of Rs. 50,00,000/- on 6th of March, 2013 from Sheikh Salim at a public place in Crawford Market and handed over the same to a person of Piyush Meghani after confirming his identity; Shri Piyush Meghani was the person who was in touch with the buyers based abroad; Shri Meghani specifically asked him to get the photographs of Red Sanders at the time of stuffing in the container so that they could be shown to the overseas buyers and advance payment could be arranged for the next consignment of Red Sanders;

- Deepak Joshi could not take photographs of Red Sanders while stuffing so Gangi Reddy was asked to get the photographs and he vide SMS sent an E-Mail ID exportgoods123@gmail.com and password 'goods export' from where the photographs could be downloaded; the same was conveyed to Piyush Meghani; during the course of his statement he accessed the said E-Mail account i.e. exportcloods123@ qmail.com with the password 'goodsexport'; on the available office computer with internet facility and downloaded the photographs of Red Sanders; he was unaware as to who created the said Email Id or the who was using it; however the said Email ID was sent to him by Gangi Reddy by SMS from his mobile no 9619811923.

19. Ongoing through the retractions filed by the appellant, it is seen that he has mentioned that:

- The officers of DRI have kept him waiting outside the cabin; called him after some time handed over a bunch of typed papers and asked him to sign; he was pressurized and threatened of dire consequences if he did not sign; he struggled till the midnight and had no option but to sign the papers.
- The officers had a pre-determined plan to implicate him; it was wrongly mentioned that he had two mobiles whereas he had only one number i.e. 9920126003; 9619811923 did not belong to him.
- He was a hard working and sincere officer; detected many cases of smuggling of red sanders and others.

- He was mentally paralyzed because of the stress and had to be hospitalized on 10.04.2013 and was discharged on 27th April, 2013; he executed retractions on 13.05.2013 and 03.10.2013.
- His or the statements of the co-accused cannot be any evidence against himself.

We find that DRI had filed a rebuttal before the Additional Chief Metropolitan Magistrate stating that it was pertinent that Shri Altaf and the other accused Mr. Bhavin Dinesh Meghani had retracted on the same day i.e. 13.05.2013; the retractions are routine in casual and do not refute any specific point admitted; the statement was a voluntary disclosure narrating the entire chain of events commencing from his acquaintance with the suppliers of red sanders, the buyers and the CHA; he possessed the password for the email with ID exportgoods123 @gmail.com; he forwarded the photographs of red sanders to other persons in the syndicate.

20. Ongoing through the statement of Shri Mohammad Altaf, we find that he has not only signed each sheet of the statement but also subscribed in hand writing at the concluding portion that:

> "*The above statement is correctly recorded as per my say & is typed on office computer. The same is my warranter statement which is true and correct and given by me without any force or fear.*"

The statement records vividly the details which are likely to be known only to a person who has gone through the entire activity. The names of places where he met other conspirators, the dates and the manner are not sketchy but are elaborate. Shri Altaf has not only narrated his version of the story but has accessed the email which he used to operate to send the photographs of Red sanders to the other persons who are involved in the smuggling. It is difficult to believe that the officers of DRI could not have put at least this part of the story in the mouth of Shri Altaf.

21. Shri Altaf has given the retraction without giving any specific point he wanted to retract. His plea was that the officers of DRI had a pre-meditated plan to involve him in the case of smuggling of red sanders. He has not given any specific reasons and did not also mention any specific officer of DRI who was against him and who had any vested interest in involving Shri Mohammad Altaf. In the absence of any cogent reasons specified by Shri Mohammad Altaf to substantiate the willful action on the part of the officers of DRI, the retraction has been rightly held to be an afterthought by the Adjudicating Authority. It is not brought out as to why the investigating agency was particularly interested in fixing Shri Mohammad Altaf, more so, looking into the fact that he was a senior officer of the department. Under the circumstances, on the facts of the case, any prudent person would have reservations on the allegations levelled by the appellant i.e. Shri Mohammad Altaf. Shri Altaf was not posted in the concerned department in the impugned case of export of Red Sanders. No extraneous reasons have been put forth by the appellants to allege that DRI wanted to implicate him if he was no way concerned. No personal enemity, if any, by the officers of DRI towards Shri Altaf was alleged. It is pertinent to note as submitted by the Authorized Representative, Shri Bhavin Meghani; Shri Shaikh Mohd. Arif Abdul Jabbar; Ali Imran Khan; Shri Nabi Ahmad Shaikh alias Sheru; Sheikh Abdul Kadar alias Saleem and Shri Ali Imran Shafiullah Khan have identified Shri Mohammad Altaf. Further, Shri Altaf has identified Shri Piyush Meghani and Shri Deepak Joshi. Shri Ali Imran Shafiullah Khan was identified by Shri Shaikh Mohd. Arif Abdul Jabbar; Shri Nabi Ahmad Shaikh alias Sheru and Shri Dilip @ Deepak Joshi. It cannot be said that each of the above have a pre-determined plan to implicate Shri Mohammad Altaf that too without any rhyme and reason. It is also pertinent that a colleague of Shri Mohammad Altaf, Shri Mohit Agrawal, who was that time working with him in Customs Marine and Preventive Wing, Mumbai, has categorically stated that the mobile number 9619811923 was being used by Shri Altaf Mohammed. No reason whatsoever has been assigned by Shri Altaf as to why one of his colleagues would testify against him. It is interesting to note, as submitted by the AR, that Shri Altaf had sought cross examination of various other co-accused, did not seek for the cross examination of Shri Mohit Agrawal. No reason was put forth or alleged to show that Shri Mohit Agrawal had some personal grouse against Shri

Altaf. Therefore, in the entirety of things, we find that the statement given by Shri Mohammad Altaf is voluntary and the retraction has no bearing whatsoever on the proceedings. The Learned Advocate for the appellants vehemently argued that the mobile number 9619811923 was not registered in his name and he was not using it. It would be very naïve to assume that people who are in smuggling would use only those phones registered in their name. What is important is whether the appellants have used the phone or not. The statement of Shri Mohit Agrawal proves that the said number 9619811923 was being used by Shri Altaf. Therefore, we find that the submissions on the registration of phone number are not acceptable.

22. The appellant has taken a plea that his statement having been retracted and the statements of co-accused cannot be an evidence to implicate him. In view of our discussion above, we find that the statements have been recorded under Section 108 of the Customs Act, 1962 and the provisions thereof have been explained to the appellants and the retractions are held to be an afterthought. Therefore, we find that the statements of the appellants and those of the co-accused have evidentiary value in the proceedings before us. We find that the appellants have also taken a plea that the CBI has not found any evidence to proceed against them and have not filed any FIR against them and therefore, the proceedings against them under Customs Act also need to be discharged.

23. We find that proceedings under CrPC and proceedings under Customs Act, 1962 are on a different footing. The standard of proof in a criminal proceeding is proof beyond doubt whereas in the adjudication proceedings, the standard of proof is preponderance of probability. We find that various Courts have established this principle in a number of judgments. We find that in the case of K.V. RAJAGOPAL 2015 (318) E.L.T. 48 (Mad.), High Court of Madras held that:

> ***22.*** *From the abovesaid law laid down by the Hon'ble Supreme Court and finding of this Court, we are of the view that the Act contemplates two separate proceedings for the same act or omission and therefore, there is no question of double jeopardy involved, as rightly pointed out by the learned counsel appearing for*

the first respondent. The Hon'ble Supreme Court also considered various provisions of the Act and finally held that mere acquittal in the criminal proceedings before Magistrate Court in every case cannot result in setting aside, ipso facto, the orders of the confiscation passed by the competent authority under the Act. Therefore, the contention of the appellant that the judgment of the Judicial Magistrate acquitting the appellant was binding on the Departmental Authorities, adjudicating the question of confiscation is not correct. As rightly pointed out by the learned counsel appearing for the first respondent, the fact of seizure of gold and silver bars recovered from the appellant's residence is not in dispute. In the criminal proceedings, it is the duty of the prosecution to prove the case beyond any reasonable doubt and also to prove the mens rea for the above said criminal act by adducing reliable evidence. In the instant case, the respondents have discussed in detail about the seizure of gold and silver bars from the residence of the appellant and the above said fact was not disputed by the appellant. Therefore, the appellant cannot be exonerated from adjudication proceedings.

Also, we find that Hon'ble High Court of Madras in the case of Rekhi Road Liners (P) Ltd.1999 (113) E.L.T. 413 (Mad.) held that:

> ***8**. Consequently, we do not find any error whatsoever in the order of the Tribunal repelling the challenge made to the adjudication proceedings on the basis of the acquittal by the criminal Court and that on giving benefit of doubt. Consequently, we answer the questions referred to us in the following manner. The first question has to be answered by holding that the acquittal of the applicants by the criminal court of the charge in the proceedings instituted under Section 135 of the Act does not bar or take away the rights of the competing authority to proceed in the matter against the applicants for violation, rendering them liable for action under Section 112 of the Act. As for the second question, the Adjudication Authorities discharging powers under Section 112 or under Section 111 of the Act are not disabled by the verdict of acquittal recorded in favour of the accused and that too when the same has been by extending benefit of doubt from proceeding in the matter under Sections 111 and 112 of the Act. As for the third question, we are of the view, that since the quantum, nature and character of proof required before the criminal court in a prosecution under Section 135 of the Act being wholly distinct, different and altogether separate from the one required and the manner of consideration in the adjudication proceedings under Sections 111 or 112 of the Act and they substantially and totally differ in character and contents, the Adjudicating Authorities are not disabled from independently adjudicating the matter under Sections 111 and 112 of the Act on the basis of the materials available on record before them. No costs.*

24. Further, we find that Hon'ble High Court of Delhi in the case of S.N. Ojha Vs Commissioner of Customs in the judgment dated 05.11.2015 in Cus. AC. 2/2007 held that:

> *35. The Court is conscious that in the criminal case the CBI charge sheet did not name the Appellant as an accused. However, that cannot by itself lead to the inference that in the adjudication proceedings, where the standard is of preponderance of probabilities, the Department has failed to establish its case.*

We find that the facts of the case are comparable to the proceedings before us. In view of the ratio of the above cases, we find that non-filing the charge sheet by CBI, *ipso facto* does not vitiate the proceedings under the Customs Act.

25. We find that the appellants have relied upon some case law. Ongoing through the cases, we find facts of the cases are different. In case of Debu Saha, it came on record that the medical examination of appellant indicated injuries on his person while in custody; in the case of Kallatra Abbas Haji, original statements of co-accused were not produced admitted in evidence; in the case of Mohtesham Mohammed Ismail, it was held that confession of the co-accused cannot be treated as evidence. We find that the facts of the present case are different. The main accused in the instant case has confessed, his retraction at a later date notwithstanding, the same is corroborated by the statements of co-accused. The facts therein in the cases relied upon are different from the cases. Hence, the same are not to be relied upon. Similarly, the Authorised representative submits a report dated 7-1-2020 given by DRI. The report having been submitted after the hearing loses any evidentiary value. Therefore, we are not inclined to rely upon the same either.

26. In view of the above, we find that the role of Shri Mohammad Altaf has been established with a reasonable degree of evidence so as to establish the offence under Customs Act, 1962 in adjudication proceedings. We find that Shri Mohammad Altaf has involved himself in the act of smuggling of red sanders. Ongoing through the facts of the case, we are convinced that Shri Mohammad Altaf has played a pivotal role in the smuggling of red sanders. He has not only negotiated with the suppliers, the middleman, the exporters and the logistics persons in the export of red sanders but also has invested certain amount in the business. The Advocate representing Shri Mohammad Altaf pleaded that there is some discrepancy in the amount stated to have been invested by Shri Altaf. Shri Altaf is alleged to have invested Rs.50, 00, 000/- as per his own statement whereas Shri Meghani reported the same to be Rs.12, 50,000/-. However, this goes to prove that Shri Mohammad Altaf has invested certain amount with a view to have pecuniary gain in the business.

27. As per our detailed discussion above, we find that the retractions made by Shri Altaf have no substance and have been rightly held to be an afterthought by the Adjudicating Authority. We find that the role played by Shri Mohammad Altaf is evident in the case and looking into the fact that he is a responsible officer of the Customs Department, entrusted with the responsibility of curbing smuggling activities, we find that the appellant has not made out any case for proving the allegations to be wrong and baseless. We find that it is a clear case of the fence eating the crop and therefore, need to be treated with circumspection. We find that this being a case of smuggling, no prudent man with a reasonable intelligence would have left concrete evidence that can be gathered and produced by the agencies involved. In this context only, various Courts have held that the degree of evidence in taxation and smuggling cases need not obviously be at par with that required in a criminal prosecution. We find that the investigation has to a reasonable extent came out with evidence that can be analysed and accepted on the principles of preponderance of probability. Therefore, we uphold the penalty imposed on Shri Mohammad Altaf, under Section 114 (i) of Customs Act, 1962. However, looking into the long legal proceedings that the appellant has undergone and looking into the investment made by the appellant in the smuggling of red sanders of 12.25 MT totally valued at 1.22 Crores, we are inclined to reduce the penalty to Rs.25,00,000 (Twenty-Five Lakhs only).

28. We find that the other appellant Shri Ali Imran Shafiullah Khan, had a role in tampering with the seals and loading that container with red sanders with the help of Dilip (Deepak Joshi),Sheru, Nayan Singh (driver arranged by Sheru) and Arif. It has not been brought on record as to the amount of financial benefit that accrued to the appellant. Under the circumstances, we find that penalty of Rs.25, 00,000/- imposed on Shri Ali Imran Shafiullah Khan is on the higher side. While finding that the role played by Shri Khan is brought out with reasonable evidence, we are inclined to reduce the penalty to Rs.5, 00,000/-

29. The learned Advocate for the appellants have also taken the the following pleas that

- No arrest is made in the case in such a big case of alleged smuggling of Red Sanders.
- the persons like S/Shri Sachin Narayan Baghmare, Mahendra Kumar Tiwari@Guddu, Anshuman Pandey, Shailendra Pandey, P. Subramanium, RamanikandanPichikanu, P.D.Kotwal who dealt with the Shipping Bills, booking of container and other shipping work have not named the Appellant.
- Shri Jayraj Sheth and Ganesh Jayaswal named by P. Subramanian, Ramnikandan Pichikanu and others have not been interrogated even though their telephone no. was available; no investigation is made in respect of exporting firm M/s Kay Creative Rugs despite telephone Nos, Bank account and address available with the DGFT website;
- No penalty is imposed on Ganesh Jayaswal even after recording his complicity for reasons known to the Commissioner.
- DRI has deliberately not examined Deepak Joshi despite his petition in the high Court admitting everything about the case and without any basis the Commissioner also records that his story is not reliable.

We find that the above pleas have no bearing on the instant case. We are not sitting in judgement as to whether DRI has conducted the investigation properly, whether the agency ought to have arrested some people and whether they should have issued SCN to some others etc. We are also not sitting in judgment to decide whether commissioner has properly imposed penalties on others. Moreover, as per their own submission the petition said to have been filed by Shri Deepak Joshi is before the Honourable High Court for decision. What is before us is to decide whether the adjudicating authority was correct in holding that the two appellants i.e. Shri Mohammad Altaf and Shri Ali Imran Shafiullah Khan were liable to penalty for their involvement in the smuggling of impugned goods. Therefore, we addressed the issues only to that extent.

30. In view of the above, Appeal No. C/86133/2015 filed by Shri Mohammad Altaf is disposed of by modifying the penalty imposed to Rs.25, 00,000/- (Twenty-Five Lakhs only) and Appeal No. C/86134/2015 filed by Shri Ali Imran Shafiullah Khan is disposed of by modifying the penalty imposed to Rs.5,00,000/- (Five Lakhs only).

(Order pronounced in the open court on 25.09.2020)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Judicial)