CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 251 OF 2008

[Arising out of Order-in-Original No: 60/2007 dated 14th December 2017 passed by the Commissioner of Customs (Adjudication), Nhava Sheva, Mumbai – II.]

Lalit Mange
M/s Ami Clearing & Forwarding Pvt Ltd
40/42 Mody Street, Fort, Mumbai - 40001 … ***Appellant***

versus

Commissioner of Customs (Export)
Jawarharlal Nehru Port Trust, Nhava Sheva, Tal: Uran
Dist: Raigad, Maharashtra 400707 ***…Respondent***

WITH

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Ami Clearing & Forwarding Pvt Ltd
40/42 Mody Street, Fort, Mumbai - 40001 … ***Appellant***

versus

Commissioner of Customs (Export)
Jawarharlal Nehru Port Trust, Nhava Sheva, Tal: Uran
Dist: Raigad, Maharashtra 400707 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellants

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 87404-87405/2021

DATE OF HEARING: 03/12/2021
DATE OF DECISION: 03/12/2021

PER: C J MATHEW

In these appeals, which we take up for disposal together, M/s Ami Clearing & Forwarding Pvt Ltd and, its Director, Mr Lalit Mange have challenged the imposition of penalty of ₹ 20,00,000/- each under section 112 of Customs Act, 1962 in order-in-original no. 60/3007 dated 14th December 2007 of Commissioner of Customs (Adjudication), Mumbai – II.

2. The appellant-company is a licenced 'custom house agent (CHA)' and was held to have been involved in the diversion of 'non-magnetic stainless steel/coil', imported without payment of duties of customs against 25 advance licences under the 'duty exemption entitlement certificate (DEEC)' scheme of the Foreign Trade Policy, while acting for M/s Chanakya Impex after procurement on 'high-sea-sale' basis. From the records it is seen that during search of the common premises of M/s Kanakratna Steel and M/s Sun Impex and that of M/s Reliance Stainless Steel, the other parties in the 'high sea sales' transactions, 28 packages valued at ₹20,00,000/- and one package valued at ₹ 2,88,000/- said to be covered by the bills of entry

filed by the appellant-company on behalf of M/s Chanakya Impex were found instead of being in the possession the supporting-manufacturer, M/s Paradigm. According to the investigation, this *modus operandi* of 'high sea sale' purchase and clearance enabled the original owners to sell the imported goods in the open market without having to discharge the duties of customs and also masked their presence from official records. It is alleged that the appellant-company and the Director were actively involved in the conspiracy to evade duties of customs for which proceedings were initiated against them. Relying upon the statements of Mr. Mohan Shah of Chanakya Impex, and of several transport operators, the adjudicating authority concluded that the appellants herein had connived in the diversion and, therefore, deserving of the penalties now under challenge.

3. It is contended by Learned Counsel for the appellants that, as customs house agents, their inevitable connection with the goods was misconstrued by the adjudicating authority as involvement in the diversion of goods to the market in violation of the post-importation conditions for exemption. He contends that the entire case against them has been made out on the basis of statements of co-noticees in the very same proceedings and reliance on these statements that had not, and could not have, been tested for relevancy by cross-examination is incorrect in law. Furthermore, he contends that the final disposition of the consignment had nothing to do with the

appellants and that mere implementation of instructions from their clients for movement of cargo to the weighbridge at Kalamboli from the port as well as facilitating payments made to transporters as intermediary did not constitute involvement in the alleged diversion. Learned Counsel also informs that proceedings under the relevant Customs House Agents Licensing Regulations (CHALR) which culminated in revocation of their licence by the competent authority had been set aside by the Tribunal on appeal. He further informs that the findings against the appellants in the impugned order are very sketchy with no evidence available for arriving at those conclusions.

4. According to Learned Authorized Representative, the impugned order is elaborate in its justification for arriving at the conclusion of the complicity of the appellants. According to him, monetary transactions between the ‘high-sea sales’ sellers and the importer were handled by the appellant-Director. He also pointed out that the statements of Mr Mohan Shah made it abundantly clear that the parties in the transactions had been brought together by the appellant-Director who had also procured the stamp paper for execution of the ‘high-sea sales’ agreements. Furthermore, he points out that Mr Mohan Shah had admitted to being paid ₹15/- to ₹17/- per kg through the appellant-Director for his facilitation of the deal. Relying upon the decision of the Hon’ble Supreme Court in *Naresh J Sukhwani v. Union of India [1996 (83) ELT 258 (SC)* and in *S N Ojha v.*

Commissioner of Customs [2016 (331) ELT 33 (Del.)], it was contended that there is no flaw in relying upon statements of the co-accused. Placing reliance on the decision of the Hon'ble Supreme Court in *Shah Guman Mal v. State of Andhra Pradesh [1983 (13) ELT 1631 (SC)* and in *Commissioner of Customs, Madras & Others v. D. Bhoormal [1983 (13) ELT 1546 (SC)],* it was contended the departmental authorities were not required to prove the case with mathematical precision. He also relies on the decisions in *Pradeep Master Batches Pvt Ltd v. Commissioner of Customs, Mumbai [2017 (348) ELT 692 (Tri.Mum)]* and in *Commissioner of Customs (AIR), Chennai v. A P Pinherio [2014 (306) ELT 349 (Mad.)].*

5. The appellant-company is an artificial person, separate and independent from the appellant-Director. Proceedings had been initiated against the appellant-company under relevant Customs House Agents Licensing Regulations for alleged breach of obligations prescribed in the said Regulations and, consequent upon appeal, the revocation of licence was quashed. Considering the nature of the allegations sustained in the impugned order and harped upon by Learned Authorized Representative, it would appear that these are acts of omission and commission that only a natural person was capable of and are also not activities related to the functioning of the appellant-company as a custom house agent. Consequently, the finding of culpability on the part of the appellant-company and imposition of

penalty under section 112 of the Customs Act, 1962 cannot sustain in law.

6. It is evident from the adjudication order, as well as the submission made by Learned Authorized Representative, that the entire case against Mr Lalit Mange revolves around the statement of Mr Mohan Shah of Chanakya Impex. From the statement of the transport operators narrated in the impugned order, it would appear that payments were made to the transporters by the appellant-Director and with instructions to proceed to the weighbridge beyond which the actual place of delivery was known only to the drivers of the trucks who remained untraceable. It cannot be considered beyond the normal course of a commercial transaction to have the goods weighed upon clearance from customs control and the participation of the appellant-Director in such undertaking does not suffice to establish any role in the further movement thereafter. The proceedings themselves comprised two parts: the goods which were found at the premises of the original 'high-sea sellers' and imports of goods valued at ₹9,50,30,917.43 against 25 advance licence effected prior to the searches. As far as the previous consignments are concerned, and from the narration of the transactions pertaining to the seized goods, it would appear that the culpability of the appellant-Director stands solely upon the statement of Mr Mohan Shah, the principal noticee in the proceedings. Being a co-noticee, and even if sought to be cross-

examined, permitting such confrontation during adjudication would have been legally improper. It would have been more appropriate for these statements of Mr Mohan Shah to have been used for confronting the appellant-Director when he was subject to interrogation under section 108 of Customs Act 1962. There is no evidence of that; nor is there any record of such ascertainment having taken place. Accordingly, the statements of Mr Mohan Shah fails the test of relevancy prescribed in section 138B of Customs Act, 1962. It is seen from the decision of the Hon'ble Supreme Court in *re Naresh J Sukhwani* that the statement of a co-accused was pressed into service in the context of photographs and other corporeal material. That situation does not obtain in the present dispute. Likewise, in the decision of the Hon'ble High Court of Delhi in *re S N Ojha*, the statements were used in support of other evidence that were available as corroboration. In both of these judgments, the principle laid down is that the statement of co-accused cannot be discarded merely because of coverage by common proceedings; it is abundantly clear that the statements were supplementary to the material evidence that were available against the parties concerned. In the present proceedings, admittedly, there is no material evidence that the said statement can claim to support.

7. In the light of the inadequacy of the statements for establishing the complicity of the appellant-Director in the alleged diversion, the

penalty imposed under section 112 is liable to set aside. Accordingly, both appeals are allowed.

(Operative Part of the Order Pronounced in Open Court on 3rd December 2021)

(ASHOK JINDAL)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*