CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 530 of 2012

(Arising out of Order-in-Appeal No. 25 to 28/Mumbai III/2012 dated 19.03.2012 passed by the Commissioner of Customs (Appeals), Mumbai-III)

Shri Ganesh Maharudra Desai **Appellant**
Room No. 4, Sector 12,
D-16, Shivprerna Co-op. Housing Society,
Kharghar, Navi Mumbai 410 210.

Vs.

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

Appearance:

Shri Ashok Singh, Advocate, for the Appellant
Shri Manoj Kumar, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

Date of Hearing: 04.03.2022
Date of Decision: 04.03.2022

FINAL ORDER NO. A/85385/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. 25 to 28/Mumbai III/2012 dated 19.03.2012 of the Commissioner of Customs (Appeals), Mumbai-III. By the impugned order, the Commissioner (Appeals) has disposed of appeals by four appellants before him, namely, Shri Ganesh Maharudra Desai, Shri Samad Ismail Deshmukh, Shri Dadasaheb B. Pawar and Shri Allauddin Biswas. In the present case, we are concerned with the appeal of Shri Ganesh Maharudra Desai. By the impugned order, the Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs (Preventive) by which the Additional Commissioner confiscated the tug M.T. Mansi owned by the appellant and allowed it to be redeemed on payment of redemption fine of Rs.5,00,000/-. He has also imposed a penalty of Rs.2,50,000/- under Section 112(a) and 112(b) of the Customs Act.

2.1 Acting on an intelligence, officers of Customs (Preventive) intercepted three tugs, namely M.T. Baaz, M.T. Mansi and M.T. Sarsar along with motor launch P.H.N. RC. On the said tugs, certain quantity of smuggled High Speed Diesel (HSD) was found as is mentioned in order-in-original at paras 3, 4 & 5 which are reproduced below-:

"3. The surveyor sounded all the OR tanks of the tug MT Baaz by steel measuring tape and ascertained the quantity on board by volumetric measurement as the said tug was not calibrated. The tug was found to contain HSD 66 559 Kilo Litres valued at Rs. 19,96,560/- (at the rate of Rs. 30/- per litre) as per the Survey report dated 20.02.2009 of M/s J.B. Boda. Whereas M/s Esvee Associates valued the tug at Rs. 42 lakhs.

4. Thereafter, the surveyor sounded all the 05 tanks of MT.Mansi by steel measuring tape and ascertained the quantity on board by volumetric measurement as the said tug was also not calibrated. The said tug was found to contain HSD 52.839 Kilo Litres valued at Rs. 15,85,170/- (at the rate of Rs. 30/- per litre) as per the survey report dated 20.02.2009 of M/s J.B. Boda. Whereas M/s Esvee Associates valued the tug at Rs. 15,00,000/

5. Further the surveyor sounded all the 05 tanks of the tug M.T.Sarsar by steel measuring tape and ascertained the quantity on board by volumetric measurement as the said tug was not calibrated. The tug was examined and found to contain HSD 23.619 Kilo Litres valued at Rs. 7,08,570/- (at the rate of Rs. 30/- per litre) as per the survey report dated 20.02.2009 of M/s J.B. Boda. Whereas M/s Esvee Associates valued the tug at Rs. 65,00,000/-. The Motor Launch P.H.N. RC was examined and no diesel was found in it and valued at Rs 5 lakhs."

2.2 Thereafter investigation was undertaken and show cause notice was issued to the appellant along with others involved stating as follows:-

"(a) The 52100 kgs (61294 K L.) HSD Valued at Rs. 13,48,468/- (at the rate of Rs 22/- per liter) from TUG MT. Baaz discussed should not be confiscated absolutely under section 111 (d) (e) (f) and (h) of Customs Act, 1962 read with the provisions of Foreign Trade Policy 2004-2009.

(b) The 48310 kgs (56835 KL) HSD Valued at Rs 12,50,370/- (at the rate of Rs 22/- per liter) from TUG M.T. Mansi discussed should not be confiscated absolutely under section 111 (d) (e) (f) and (h) of Customs Act, 1962 read with the provisions of Foreign Trade Policy 2004-2009. (C) The 29400 kgs (34588 KL.) HSD Valued at Rs. 7,60,936/- (at the rate of Rs 22/- per liter) from TUG M.T. Sarsar discussed should not be confiscated absolutely under section 111 (d) (e) (f) and (h) of Customs Act, 1962 read with the provisions of Foreign Trade Policy 2004-2009.

(d) The said tugs viz M.T. Baaz having registration no. BDR-IV-00063, M.T.Mansi having registration number MOR-IV-000004 & M.T. Sarsar having registration number BDR-IV-01246 valued at Rs. 42 Lakhs, 15 Lakhs and 65 Lakhs respectively used for carriage, concealment, storage and smuggling of the seized diesel, should not be held liable to confiscation under section 115 of Customs Act, 1962

(e) Penalty under section 112 (a) and (b) of Customs Act, 1962 should not be imposed on Mr. Samad Ismail Deshmukh, Mr. Ganesh Maharudra Desai and Mr. Dadashaseb Bhanudas Pawar owner of the tugs M.T. Baaz, M.T. Mansi & M.T. Sarsar respectively and Shri Alauddin Biswas and Shri Iqbal Mohd. and/or any other person(s) concerned with the said goods i.e. HSD for their act or omission and commission in relation to the seized smuggled goods and which was being cleared without payment of Customs duty."

2.3 The show cause notice was adjudicated against the appellant as per the order-in-original referred in para 1 above and upheld by the Commissioner (Appeals).

2.4 Aggrieved, the appellant has filed this appeal.

3.1 We have heard Shri Ashok Singh, Advocate, for the appellant and Shri Manoj Kumar, Deputy Commissioner, Authorized Representative for the Revenue.

3.2 We find that undoubtedly certain quantity of smuggled HSD was found on board of M.T. Mansi. In para 54, the Additional Commissioner has recorded as follows:-

"54. Mr. Ganesh Maharudra Desai is owner of the tug M.T. Lion Heart (earlier name M.T.Mansi) from where 48310 kgs was seized. He had given his tug on contract to a person whose name he gave as Shri. Sankar Mahto but he did not tell the address & contact number of said Mr. Sankar Mahato it appears that Shri Ganesh Maharudra Desai has taken fictitious name in order to cut the lead of the investigation. His tug had delivered 52100 kgs of the snuggled HSD in Indian Custom Water on 17th and 18th February. 2009 to the tug M.T.Baaz besides to the quantity of 48310 kgs HSD seized from it (M.T. Mansi). In the statement recorded on 05.08.2009 under section 108 of the Customs Act, 1962 one crew member Shri Yusuf Bachchu of the tug M.T.Baaz has stated that the tandel of the tug M.T.Mansi told him during conversation that Diesel were brought from: Foreign Ships in the Sea. Though he is the owner of tug, he has not taken any precaution while giving it on contract that is normally expected from the owner. It appears that he himself is actively involved in the illicit trade of Diesel smuggling. By virtue of his above acts he rendered himself liable to penal action under Section 112 (a) and 112 (b) of Customs Act, 1962."

3.3 In para 57 again, the Additional Commissioner has recorded as follows:-

"57. The persons in charge of the conveyance at the time Iqbal Mohd. Mugal, tandel and Shri Samad Ismail Deshmukh (owner) had full knowledge and connived with each other to use the tugs M.T. Baaz to load and transport the smuggled HSD. ***The owner of M.T. Mansi Shri Ganesh Maharudra Desai has full knowledge of smuggling of diesel and used M.T. Mansi to load and transport of the smuggled HSD****. The person in-*

charge of M.T. Sarsar Alauddin Biswas and owner Dadasaheb Bhanudas Pawar had full knowledge and connived with each other to use the tug M.T. Sarsar to load and transport the smuggled HSD. All the tugs were specially altered and fitted with tanks for the purpose of concealing the smuggled HSD. ***All the tanks of tugs were used for carriage, concealment, storage and smuggling of the seized diesel. Accordingly, the tugs are held liable for confiscation in terms of Section 115(1)(a)and 115(2)of the Customs Act, 1962.*** *The valuation report of M/S Esvee Associates cannot be rejected just because the advocate has submitted another valuation report by another valuer 6 months later. M/S Esvee Associates is an independent valuer."*

3.4 Therefore there is no dispute to the above facts. The value of the tug was ascertained by M/s. Esvee Associates, an independent valuer, and on the basis of the valuation report, the value of tug has been ascertained for imposition of the redemption fine on the tug. Accordingly we do not find any error in the redemption fine imposed for the release of the said tug.

3.5 While imposing penalty, the Additional Commissioner has invoked the provisions of Section 112(a) and 112(b) of the Customs Act. It is now settled law that Section 112(a) and 112(b) are mutually exclusive and penalty cannot be imposed simultaneously under both the sections.

4.1 In view of the above, we are of the view that penalty amount on the appellant could have been placed on the lower side. It is also not the case that the present appellant was present on the tug at the time when it was intercepted. It was only during the course of investigation that he was taken to that place. Paras 18 and 19 of the order-in-original reproduced below show that there was no direct involvement of the appellant, but this tug was being used for carriage of the smuggled HSD.

"18. During the course of the above statement Shri Ganesh Maharudra Desai was taken to the berthing wharf near

Rummaging Office, where tug Mansi laden with diesel was berthed and he was shown the tug Mansi. On seeing the tug Mansi he confirmed "Mansi' is written on the said tug and that the name Lion Heart is not in the tug.

19. On 05.03.2009 further statement of Shri Ganesh Maharudra Desai was recorded under section 108 of Customs Act, 1962. He was shown Pass No. 02/09 11 200 valid from 09.11.2008 to 10.06.2009 issued by Belapur Customs, bearing tug's name as Mansi, owner's name as Mahboob Ibrahim Shaikh, tandel's name as Yusuf, for the purpose of carrying out Sand work. On seeing the said pass, Shri Ganesh M Desai stated that it seemed that the said pass had been made by Shri Mahboob Ibrahim Shaikh, who was in charge of the tug before 15.02.2009 and that he would pay the Rs 13,000 per month Investigation made with Belapur Customs revealed that the said Customs Pass was fictious."

4.2 Hence we are of the view that the penalty imposed on the appellant needs to be reduced and we reduce the same to Rs.50,000/- under Section 112(b) of the Customs Act, 1962.

4.3 In view of the discussions as above, the appeal is partly allowed to the extent of reducing the penalty from Rs.2,50,000/- to Rs.50,000/- (Rupees fifty thousand only). All other parts of the adjudication order are upheld.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(P. Dinesha)
Member (Judicial)

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