

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH - COURT NO. 01

Customs Appeal No. 85580 of 2023

(Arising out of Order-in-Original No. 04/2023-24/COMMR/MS-GEN/CAC/JNCH dated 18.04.2023 passed by the Commissioner of Customs (General), CCSP Cell, JNCH, Nhava Sheva)

M/s Container Corporation of India Ltd.

.... Appellant

(DRT CONCOR CFS), Sector-2,
Plot No. 33, 34 & 35, Navi Mumbai – 400707.

Versus

Commissioner of Customs, Nhava Sheva

.... Respondent

CCSP Cell, JNCH, Nhava Sheva,
Uran, Navi Mumbai- 400707.

Appearance:

Shri V.M. Doiphode, Advocate for the Appellant

Ms. Manisha Goel & Shri Ashwini Kumar, Auth. Representatives for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86353/2023

Date of Hearing: 12.05.2023

Date of Decision: 11.09.2023

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Container Corporation of India Limited, Mumbai (referred herein as 'appellant's), who are operating Dronagiri Rail Terminal Container Freight Station (CONCOR-DRT CFS), at Nhava Sheva, being aggrieved against the Order-in-Original No. 04/2023-24/COMMR/MS-GEN/CAC/JNCH dated 18.04.2023 (referred to as 'impugned order') passed by the learned Commissioner of Customs (General), Jawaharlal Nehru Custom House (JNCH), Nhava Sheva.

2.1 Briefly stated, the facts of the case are that the appellants herein was appointed as a 'custodian' of Container Freight Station (CFS) under Section 45(1) and 141(2) of the Customs Act, 1962 and also as a Customs Cargo

Service Provider (CCSP) duly approved by the Commissioner of Customs (General), JNCH, Nhava Sheva under Regulation 10 of Handling of Cargo in Customs Areas Regulations (HCCAR), 2019. The CCSP license for the appellants was renewed from time to time by the Commissioner of Customs (General), JNCH and the latest approval as a CCSP was issued by Public Notice No.134/2020 dated 14.10.2020 for five years with effect from 15.03.2020.

2.2 A Shipping Bill No.5807023 dated 05.06.2013 was filed by an exporter M/s. Krish Exports, Mumbai, before JNCH Customs for export of "household articles of stainless steel, SS Utensils" to Hong Kong, in a factory stuffed container GESU-3997518 and the same was given "Let Export Order" (LEO) from the appellant's CFS. Special Intelligence & Investigation Branch (SIIB) of JNCH Customs on the basis of a specific information received about smuggling of Red Sanders wood logs stuffed into the container No. GESU-3997518 had put on hold the export goods in the said the container, and examined the same by drawing panchanama dated 14.06.2013 at the appellant's CFS. It was found that as against the declared goods of '7454 Kgs. of stainless steel household articles' mentioned in the said Shipping Bill, the goods present in the containers actually were found to be the 'Red Sanders of 12695 Kgs.,' which are prohibited for export. The prohibited goods attempted for illegal export were seized under the Customs Act, 1962 and handed over for safe custody with the appellants, being custodian of import/export goods under a Panchnama dated 14.06.2013.

2.3 Subsequently, during a surprise visit conducted by JNCH Customs officers at the premises of the appellants CFS on 14.08.2014, an empty container having unique No. XINU 1349960 was placed near another container having customs seized goods bearing same unique No. XINU 1349960. Thus, it was found that two containers with the same unique container number were found to have been kept adjacent to each other in the area for storage of customs seized containers. On detailed examination, it was found that the empty container was marked with the container No.XINU 1349960 on all four sides of its body. However, on the top of the empty container and on the CSC plate, which is affixed at the time of its manufacture, the actual No. XINU 1106045 was declared. Thus, the modus of removing seized red sanders kept in safe custody in the appellants CFS, by substituting the container having seized goods with another empty container pasted with same unique container number, similar to the seized goods container, by certain unscrupulous elements was identified and the illegal act was stopped by JNCH Customs. After this incident, JNCH Customs undertook

complete physical inventory of containers having seized goods that were put on hold by Customs. As a result it was found that container GESU-3997518 handed over to the appellants CFS for safe custody vide panchanama dated 14.06.2013 having seized red sanders of 12695 Kgs. were found stolen by adopting the above modus operandi.

2.4 In view of the above, the department had initiated separate show cause proceedings against the exporter and other persons concerned in respect of the attempt to smuggle red sanders under the Customs Act, 1962, by issue of SCN No.SG/MISC-119/2013/SIIB(X) JNCH dated 28.11.2013. Further, show cause proceedings was also initiated against the appellants in respect of violations of clauses (a), (b), (f), (i) and (q) of sub-regulation (1) of Regulation 6 of Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR) and Sections 45(2), 141 of the Customs Act, 1962 by issue of SCN No.1254/19-20/CFS M.Cell/CAC/JNCH dated 16.03.2020.

3. Learned Advocate appearing for the appellants stated that HCCAR is applicable only to import/export goods; these regulations will not apply to seized goods which have been handed over for safe custody to the appellants. Further, he stated that the provisions of Section 45(2) *ibid*, apply only in respect of imported goods, and since the goods involved are 'export goods', invocation of the above legal provision in the impugned order cannot be sustained. He also claimed that there was no letter or *Supratnama* given for handing over the seized export goods for safe custody with the appellants. Further, he stated that the appellants have not failed to provide security to the seized goods, as in the Police investigation none of the employees of the appellants were found to be involved. Hence, he stated that the appellants are not responsible for the theft which occurred due to their contractors. Learned Advocate also stated that the order for recovery of the value of seized goods which have been pilfered, in terms of HCCAR and imposition of penalty under Section 117 under the Customs Act, 1962 are not sustainable as the legal provisions only provide for demand of duty on goods and such penalty is applicable only for violation of the provisions of the Customs Act and not Regulations. Thus, he claimed that the impugned order is not legally sustainable and the same be set aside. In the additional written submission of the learned Advocate, he claimed that the insurance policy of the New India Assurance Company Ltd. for the relevant period provides for insurance liability in relation to cargo and containers and such liability is in respect of loss or destruction of, or damage to cargo as per CBEC regulations on

handling of cargo in Customs area. Since as per the comprehensive package insurance policy, insurance is covered for claims made against duty imposed by the customs authority which is legally payable for loss or damage to cargo, and in this case the export cargo does not attract any export duty, he stated that there is no liability on the appellants towards customs duty and therefore the confirmation of liability on the part of the appellants to pay the value of the goods referred to the customs Department is not sustainable.

4. The Authorised Representative appearing for the Revenue reiterated the findings of the Commissioner of Customs (General) and contended that the same is sustainable in view of the legal provisions cited in the impugned order. He had also submitted a copy of Public Notice No.52/2009 dated 06.08.2009 providing for the procedure to be followed in respect of entry of factory stuffed (including self sealed) export containers in the JNCH Custom House, and the appellant's CFS has been designated as one of the facility where such export containers would be handled for processing customs work relating to exports. The copy of the shipping bill No.5807023 dated 05.06.2013 extracted from Customs EDI system clearly indicate that the export container GESU-3997518, in which smuggling of red sanders was attempted, was initially processed at the appellant's CONCOR-DRT CFS for completion of export formalities. Further, the panchanama dated 14.06.2013 specifically states in the second last paragraph that the custody of the seized red sanders wood logs in container No. GESU-3997518 was handed over to the manager of the CONCOR-DRT CFS for safe custody. Thus the responsibility of the appellants as CCSP cannot be abdicated by claiming that no letter or *Supratnama* was given for handing over the seized export goods. Since the seized export goods were absolutely confiscated and were liable for disposal, the value of such goods is liable to be compensated by the appellants to the customs Department. Accordingly the value of disposal material was estimated on the basis of market value, as per valuation report dated 04.01.2016. He further submitted that the appellants have violated the provisions of section 141(2) *ibid*, and thus imposition of penalty under section 117 is correctly warranted. He also submitted that there have been continuous correspondences with the appellants from 2016 onwards by the Customs Commissionerate for recovering the value of pilfered cargo from them and after comprehensive investigation, conduct of inquiry proceedings as per HCCAR, the show cause proceedings have been initiated and hence the impugned order is sustainable in law.

5. Heard both sides and perused the records of the case including the additional written submissions made by both sides.

6. We find that the learned Commissioner in the impugned order dated 18.04.2023, in exercise of the powers vested with him under Regulation 11(1) of HCCAR, after duly following the procedure stated therein, had ordered for suspension of approval which was granted to the appellants for operation as Customs Cargo Service Provider (CCSP) for a period of 15 days w.e.f. 01.05.2023 to 15.05.2023 subject to certain conditions or relaxation, for allowing import-live cargo pending clearance and existing export consignments to be exported and for auction of goods on which notices have been issued. Besides the above, the impugned order also imposed penalty on the appellants under Section 117 *ibid* and Regulation 12(8) of HCCAR and ordered for recovery of the value of pilfered goods under Regulation 5(6) of HCCAR. Thus, we would like to examine the case before us in great detail with respect each of its factual matrix as well as on the legality of the HCCAR-Regulations in terms of the Customs Act, 1962.

7. On perusal of the records and factual matrix of the case, it is seen that there was a specific information received by Special Intelligence & Investigation Branch (SIIB) of JNCH Customs that in the Shipping Bill (S/B) No.5807023 dated 05.06.2013 filed by an exporter M/s. Krish Exports, Mumbai, instead of declared item of "household articles of stainless steel, SS Utensils of net weight 7454 kgs." intended for export to Hong Kong, an attempt is being made to smuggle 'Red Sanders wood logs' in the container No. GESU-3997518. The SB No.5807023 filed by the exporter in this case indicates at the relevant column, the name of customs authorised place as 'CONCOR CFS' where the customs procedures have been carried out and 'Let Export Order' was given by the proper officer of Customs under Section 52 *ibid*, on 06.06.2013 for loading the said container in the vessel for export. However, owing to the action taken by SIIB Customs on the basis of specific information, the said export container which was about to be exported was put on hold and the shipping line was directed to shift the said container that was about to be exported, by sending it back to CONCOR-DRT CFS on 14.06.2013 for the purpose of detailed examination and further investigation. Upon examination of export goods in container No. GESU-3997518 by SIIB Customs, it was actually found to contain non-declared goods viz., 'Red Sanders Wood of 12695 Kgs.' falling under S. No.143 &154 of Chapter 44 of Schedule 2 (Export Policy) of the Foreign Trade

Policy 2009-2014 which are "Prohibited" for export as per the said Export Policy, inasmuch as Red Sanders (*Pterocarpus Santalinus*) is an endangered species and figures in Appendix II of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). Thus, we are of the considered view that it is a clear case of prohibited goods attempted for illegal export which were thwarted by SIIB wing of JNCH Customs by taking timely action and thus such export goods attempted for illegal export was rightly seized as the same were liable to confiscation under Section 113 of the Customs Act, 1962.

8. It is also a fact on record that a panchanama dated 14.06.2013 was drawn upon seizure of the prohibited goods viz. 'Red Sanders Wood of 12695 Kgs.' stuffed in container No. GESU-3997518 at the appellant's CFS and the same were handed over to the appellants for safe custody. The relevant paragraph of the panchanama dated 14.06.2013 is extracted below:

"...In our presence, the said one container bearing number GESU-3997518 (20"), re-sealed with Customs Bottle seal No.1413790 and Concor Seal No. D 164229 prima facie containing prohibited goods were handed over to the Manager, DRT CFS for safe custody..."

This factual position is duly supported by the letter dated 10.11.2016 written by the appellants to M/s New India Assurance Co. Ltd., wherein it is *inter alia* mentioned that the subject container was handed over by SIIB Customs in loaded condition on 03.06.2013 and relevant copies of documents such as Customs letter 07.05.2013 regarding shifting of container from JNPT port to CONCOR-DRT CFS, panchanama dated 14.06.2013 prepared by SIIB officials have also been given to the appellants at the time of handing over the said container. Thus, the fact of handing over the seized goods for safe custody with the appellants, being custodian of import/export goods under a Panchnama dated 14.06.2013, is a proven fact beyond doubt. Thus, the argument advanced by learned Advocate for the appellants that the seized container was not an export cargo, but was kept in safe custody as a courtesy to customs department and the copy of Panchanama was not available with them, is factually incorrect.

9. In order to examine the legality of the orders passed by the learned Commissioner of Customs in the impugned order, we may like to refer to the provisions of Section 141(2) of the Customs Act, 1962 and the Regulations framed there under i.e., HCCAR. For ease of reference, the relevant portions of the said section/regulations are extracted below:

"Section 141. Conveyances and goods in a customs area subject to control of officers of customs. -

(1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed."

"Regulation 1. Short title and commencement.-

(1) These regulations may be called the Handling of Cargo in Customs Areas Regulations, 2009.

(2) They shall come into force on the date of their publication in the Official Gazette.

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Regulation 2. Definitions.-

(1) In these regulations, unless the context otherwise requires, -

(a) "Act" means the Customs Act, 1962 (52 of 1962);

(b) "Customs Cargo Services provider" means any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in section 45 of the Act and persons as referred to in sub-section (2) of section 141 of the said Act;

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Regulation 5. Conditions to be fulfilled by Customs Cargo Service provider -

The Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods in a customs area shall fulfill the following conditions, namely:-

(1) Provide the following to the satisfaction of the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, namely :

(i) Infrastructure, equipment and adequate manpower for loading, unloading, stacking, handling, stuffing and de-stuffing of containers, storage, dispatch and delivery of containers and cargo etc., including :-

(a) standard pavement for heavy duty equipment for use in the operational and stacking area;

(n) security and access control to prohibit unauthorized access into the premises, and

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(o) such other equipment or facilities as the Board or Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may specify

having regard to the screening, examination, custody and handling of imported or export goods in a customs area.

(ii) safe, secure and spacious premises for loading, unloading, handling and storing of the cargo for the projected capacity and for the examination and other operations as may be required in compliance with any law for the time being in force;

(iii) insurance for an amount equal to the average value of goods likely to be stored in the customs area based on the projected capacity, and for an amount as the Principal Commissioner of Customs or Commissioner of Customs, as the case may be may specify having regard to the goods which have already been insured by the importers or exporters.

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Regulation 6. Responsibilities of Customs Cargo Service provider:

(1) The Customs Cargo Service provider shall -

(a) keep a record of imported goods, goods brought for export or transshipment, as the case may be, and produce the same to the Inspector of Customs or Preventive Officer or Examining officer as and when required;

(aa) Provide information regarding arrival of the imported goods to the Deputy Commissioner or Assistant Commissioner of Customs immediately on arrival of said goods in the customs area and also information about their departure after the clearance thereof.

(b) keep a record of each activity or action taken in relation to the movement or handling of imported or export goods and goods brought for transshipment;

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(f) not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser;

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(i) be responsible for the safety and security of imported and export goods under its custody;

(j) be liable to pay duty on goods pilfered after entry thereof in the customs area;

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(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder."

We also find that the sub-section (2) to Section 141 was firstly introduced in the Union Budget for the year 2008, by amending Section 141 which is extracted below:

Amendment of section 141. **69.** Section 141 of the Customs Act shall be numbered as sub-section (1) thereof and, after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:—

“(2) The imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.”

In terms of the Rules of Procedure and Conduct of Business in Lok Sabha, there is a requirement for any bill providing for giving law making power on the subject or to any person i.e., power to make delegated legislation in the form of Regulations in this case, to follow the requirements of Rule 70. The said rule is extracted below:

"70. A Bill involving proposals for the delegation of legislative power shall further be accompanied by a memorandum explaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptional character."

In this regard, We find that the Memorandum regarding Delegated Legislation contained as a part of the Finance Bill, 2008, provided the powers to the Central Board of Excise & Customs (CBEC) to make regulations as extracted below:

"Clause 69 of the Bill seeks to insert a new sub-section (2) to section 141 of the Customs Act empowering the Central Board of Excise and Customs to make regulations in respect of the manner in which imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area and also in respect of the responsibilities of persons engaged in such activities."

From the memorandum so accompanying the bill, it could be reasonably concluded that the parliament had possessed of the information regarding the delegated legislation that was introduced in the Finance Bill, 2008. The purpose of the memorandum to focus the attention of the members of the parliament to the provisions of the bill involving delegation of legislative powers have thus been fulfilled in this amendment. The members of the parliament avail of this opportunity and may move an amendment to these provisions for the delegation of such legislative power. From the above, it could thus be concluded that the memorandum attached to the Finance Bill, 2008 provides full information and, purport and effect of the delegation of power to subordinate authorities, the points which may be covered in the area of delegation, the particulars of subordinate authorities who are to exercise the delegated powers, and the

manner in which such power is to be exercised, in respect of the above amendment. Thus the sub-section (2)n of Section 141 became part of the Customs Act, 1962, upon passing of Finance Act, 2008 w.e.f. 10.09.2008. Therefore, we find that the Handling of Cargo in Customs Areas Regulations, 2008 (HCCAR) which had been framed by CBEC in exercise of the powers thereof, as provided under Section 141(2) *ibid*, has proper force of law. Thus, an order passed by the learned Commissioner in exercise of the powers vested with him under Regulation 12(7) of HCCAR for suspension, imposition of penalty is legally sustainable.

10.1 Learned Advocate appearing for the appellants giving his written submission during the hearing challenged the impugned order on the grounds that the provisions of Section 45(2) of the Customs Act, 1962 apply only to imported goods and seized container which was meant for export, under the provisions of Section 50 and 51 do not have any restriction; and that HCCAR do not apply to seized goods given for safe custody. Thus he claimed that the learned Commissioner has erred in his order and thus the impugned order is not sustainable. Further, he had questioned about the legality of the order on recovery of the value of pilfered goods kept in the safe custody of custodian/CCSP and the imposition of penalty in the impugned order.

10.2 It is a well settled principle that the statute must be read as a whole in its context to understand its true meaning and intent. When the question arises as to the meaning of a certain provision in the statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. This statement of rule was adopted by the Honourable Supreme Court in the case of *Poppatlal Shah vs The State Of Madras, Union Of India & Others*- 1953 AIR 274; 1953 SCR 677 as well as in the case of *Union of India Vs. Elphinstone Spinning & Weaving Co. Ltd. &Ors.* – AIR 2001 SC 724. The relevant portion of the said judgement of Hon'ble Court in *Elphinstone supra*, is extracted below:

"It is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word phrase or sentence is to be considered in the light of the general purpose and object of the statute."

10.3 In this context, we may like to refer the legislative history behind the basic provisions of the Customs Act, in order to clearly bring out the correct legal position. The Customs Act, 1962, comprehensively provide for administration of Customs function of the Central Government, by consolidating the existing legal provisions governing Sea Customs, Land Customs and Air Customs, by enacting a new legislation through introduction of the Customs Bill, 1962 (Bill No. 56 of 1992) in the Parliament on 15th June, 1962, which became the Customs Act, 1962 (Act 52 of 1962) with effect from 13.12.1962. The Statement of objects and reasons for introduction of the Customs Bill and the relevant notes on clauses which explain the specific provisions of Section 141 *ibid*, is extracted below:

"STATEMENT OF OBJECTS AND REASONS

The Sea Customs Act which lays down the basic law relating to customs was enacted more than 80 years ago. It has been amended from time to time and some important amendments were made by the Sea Customs (Amendment) Act, 1955. General and comprehensive revision of the Act has not so far been undertaken. Several provisions of the Act have become obsolete. Difficulties have also been experienced in the implementation of certain other provisions. The trade has been pressing for certain changes and facilities. Smuggling, consequent to controlled economy, has presented new problems. To meet these requirements, it has become necessary to revise the Act. The Land Customs Act was passed in 1924. It is not a self-contained Act and applies by reference provisions of the Sea Customs Act to land customs with certain modifications. There is no separate law relating to air customs, and the administration of air customs is governed by certain rules made under the Indian Aircraft Act, 1911. While revising the Sea Customs Act, it is proposed to consolidate the provisions relating to sea customs, land customs and air customs into one comprehensive measure.

The Notes on Clauses explain in detail all the changes which are proposed to be introduced in the new law as compared with the existing law.

*NEW DELHI;
The 8th June, 1962."*

Extract of Section 45 & 141 of the Customs Act, 1962 and relevant notes on clauses

Clearance of imported goods

"45.(1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,-

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer."

"Clause 45 replaces existing section 85 (of the Sea Customs Act, 1878) with the following amendments:-

(i) the existing section specifies that either the Port Trust or the Customs Department shall take charge of the landed goods. The new provision enables the Collector of Customs to approve for this purpose other persons also like officers of State Governments in charge of minor ports, agents of the vessel or aircraft.

(ii) item (a) of sub-clause (2) is a new provision which provides specifically that the person in whose custody imported goods are kept shall keep a record of such goods and shall send a copy thereof to the proper officer of the Customs.

(iii) the existing obsolete provision making the ship's agents liable to discharge all claims for damage and short-delivery is being deleted."

CHAPTER XVII MISCELLANEOUS

"141. All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs."

"Clause 141 is a new provision under which all conveyances and goods in a customs area shall for the purposes of enforcing the provisions of the new law be subject to the control of customs officers. This is necessary for effective control over goods and conveyances. The new clause covers the provisions in the existing Sections 77 and 78."

The plain reading of the above provisions and the notes on clauses explain that the earlier system of imported goods being discharged to the Port Commissioners or Port Trust were being replaced with the new provision of appointment of custodian under Section 45 of the newly introduced Customs Act in 1962. The then existing system of shipping agents being responsible for discharge and damage, if any, were deleted and under the new dispensation, the custodian was being made responsible for accounting and holding custody of the imported goods, till the time these goods were cleared for home consumption or for transshipment or to be moved to bonded warehouses. At that relevant time, since port trusts were handling the activities in respect of major sea ports and similarly Airport Authority of India were handling such function in respect of all international airports, they were the natural custodians, being established by the

respective acts of parliament. Thus, when the section 45 was first introduced in the year 1962, it started with the *non-obstante clause* for granting superimposing authority for those natural custodians to continue to function while granting approval by the Collector of Customs for the new persons being appointed as custodian of imported goods under Section 45(2). However, in respect of export goods, as such goods after customs processing were allowed to loaded directly on the vessel intended to be carrying export goods, there were hardly any need for keeping its custody by any person. Simultaneously new Section 141 was introduced to provide overall control of conveyances and goods in customs area to be brought under the control of Customs officers for enforcing the provisions of the new Act.

10.4 With the liberalization of the economy, widespread industrialization, enhanced economic growth, development of multi-modal transport system, a need was felt to develop Container Freight Stations (CFSs) which worked as extended arm of the port in avoiding congestion at sea ports and for expediting the unloading and loading of goods at the port terminals. Thus, major ports were made efficient by concentrating on quick out turn of the vessels calling on the port, by modernising the port handling infrastructure, having PPP model of developing modern port terminals, material handling systems, specialised infrastructure for container vessels and bulk handling of cargo etc. thereby reducing the dwell time of cargo and turnover time of vessels calling at the ports, which naturally lead to reduced transaction cost in international trade. In the process, the imported goods were immediately sent to CFS upon unloading at the port terminals. Similarly, in the hinterland the Inland Container Depots (ICDs) were allowed to perform the function like a dry port and offer common user Customs clearance facilities at the doorstep of importers and exporters. These CFSs/ICDs were appointed as custodians under Section 45 of the Customs Act, 1962 after the initial approval given by the Inter-Ministerial Committee under the Ministry of Commerce. The appellants are also one of such custodian who was initially appointed by the Commissioner of Customs, JNCH Customs vide Notification No.02/99 dated 18.07.1999 and were further given custodianship for extended area as per their application vide Notification No.6/2006 dated 21.03.2006 and the custodianship were periodically renewed from time to time. Therefore, it must be understood that the custodians appointed under Section 45(2) *ibid*, are governed by the legal provisions of the Customs Act, 1962 as a whole including Section 141 of the said Act.

11. The background behind the legislation of Section 141(2) *ibid*, indicates that the Comptroller & Auditor General of India (C&AG) had undertaken a review on the working of ICDs/CFSSs by conducting test check of records of customs as well as custodians for three years from 2000-2001 to 2002-2003 in relation to transmission of import/export goods between ICD/CFSS and gateway port, proper storage, safe custody and clearance thereof on payment of appropriate Customs duty to the Government. The report of C&AG presented to the Parliament in paragraph 3.7 of Report of C&AG for the year ended March, 2004, No. 10 of 2005, Union Government (Indirect Taxes – Customs) were further examined by the Public Accounts Committee (PAC) and in its 27th Report (2005-06), the PAC had recommended for formulating appropriate legal provisions and guidelines to control the activities of custodians. The relevant recommendations of the PAC in this regard are extracted below:

"59. The Committee's examination of the subject is based on the Audit Review on the working of Inland Container Depots (ICDs)/Container Freight Stations (CFSSs) in relation to clearance/disposal of uncleared/ unclaimed cargo on payment of appropriate customs duty to the Government. For this, Audit had conducted test-check of records of customs as well as custodians i.e. ICDs/CFSSs located in 13 Commissionerates for three years i.e. from 2000-01 to 2002-03 with the objective of assessing whether Revenue due to the Government viz. duty on unclaimed/uncleared goods at ICDs was recovered in time. The Committee's examination of the subject has revealed a number of deficiencies in the system. There have been instances where prescribed rules/regulations and procedures have not been followed in respect of disposal of uncleared/unclaimed goods leading to inordinate delay in their disposal and consequent non-recovery/delay in recovery of customs duty on auctioned goods etc. The existing monitoring mechanism in the Ministry/Department in respect of functioning of ICDs/CFSSs, also seem to be very weak and ineffective. These issues have been discussed in detail in the succeeding paragraphs.

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65. Under the extant rules/arrangements, responsibility for clearance / disposal of goods lies with the Custodian and the role of Customs in disposal of cargo is to examine the status of cargo and give permission to Custodians when sought for under the Customs Act. The Committee are informed that in case of non-fulfilment of the obligations by the Custodians concerned Commissioners of Customs can cancel the approval given to them to operate ICDs/CFSSs. However, no detail Rules empowering the Customs to take any punitive/deterrent action against the Custodians in such cases have been framed. Further, no safeguards for protection of Revenue in cases of negligence or violations of the conditions/guidelines by the Custodians exist in the Customs Act. The Committee feel that Government should formulate appropriate rules and guidelines to control the activities of the Custodians so that in the event of their failure to adhere to the obligations, the Department/Board can take suitable punitive action against the erring Custodians so that revenue could be protected. For this, if necessary, the Customs Act, 1962 may be amended."

In pursuance of these recommendations, the Government had inserted a new Section 141(2) to the Customs Act, 1962 and thereafter under its authority framed the Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR, 2009). The HCCAR, 2009 provide for the manner in which the imported goods/export goods shall be received, stored, delivered or otherwise handled in a Customs area. These regulations also prescribe the responsibilities of persons engaged in the aforesaid activities. The said regulations also provided for transitional provisions under Regulation 4, whereby the existing custodians who were earlier appointed under Section 45 of the Customs Act, 1962 shall continue to operate without any disruption in their export/import operations. However, the regulations stipulated that the existing custodians would be required to provide specified facilities and fulfil the conditions mentioned in Regulation 5 and 6, within the specified time period. It was also clarified by the CBIC in the circular No.13/2009- Customs dated 23.03.2009, that on fulfilment of the prescribed conditions the approval letter shall be issued by the jurisdictional Commissioner of customs to the existing custodians for having approved the facility for a period of 5 years and its renewal thereafter, as per Regulation 13 of HCCAR. Accordingly, we find that in this case the appellants were continued to be appointed as a custodian under Section 45(2) *ibid*, and were also approved as 'Customs Cargo Service Provider (CCSP)' under HCCAR lastly by Public notice No.134/2020 dated 14.10.2020 for 5 years w.e.f. 15.03.2020.

12. From the detailed analysis of the background of the legislation for incorporating Section 141(2) in the Customs Act, 1962, and the formulation of HCCAR in the above paragraphs, it is clear that custodians appointed under Section 45(2) *ibid*, subsequent to the implementation of HCCAR, were also required to be approved as CCSP for handling of import/export goods in a customs area under Section 141(2) *ibid* and HCCAR. Considering the factual position that the appellants were notified by the jurisdictional Commissioner of Customs for handling both the export and import containers as well as for processing of related documents, right from the beginning vide various notifications dated 18.07.1999, and subsequent renewals vide notifications dated 11.11.2003, 21.03.2006, 04.01.2011 and thereafter periodically till the last renewal on 14.10.2020, the appellants cannot escape from the responsibilities and obligations cast upon them as CFS operator and CCSP under HCCAR for proper handling of import/export goods as mandated under Section 141(1) and (2) *ibid*. Hence, we are of the considered view, that all custodians

who are handling the import/export goods, in a customs area are required to fulfil the conditions prescribed under Regulation 5 and are required to discharge their responsibilities as laid down under Regulation 6 *ibid*. Any violations of the said regulations may attract initiation of necessary action by the jurisdictional customs authorities in terms of Regulation 11, 12 *ibid*. Inasmuch as the learned Commissioner of Customs had followed the due process of law and abided by the principles of natural justice in passing the impugned order, we find no infirmity in the said order.

13. In terms of Section 2 of the Customs Act, 1962, the phrases 'export' and 'export goods' have been defined. The relevant provisions have been extracted as below:

"Section 2 Definition:

In this Act, unless the context otherwise requires—

(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19) "export goods" means any goods which are to be taken out of India to a place outside India;"

In the present case before us, the export goods stuffed in container No. GESU-3997518 were brought in to the customs area and after completing the customs procedures was given clearance for exportation in the form of "Let Export Order". However, before the export goods were loaded on the vessel/conveyance and it leaving India, timely action taken by SIIB JNCH Customs detected the attempt of smuggling Red Sanders wood logs stuffed into the said container No. GESU-3997518. As the said export goods were "prohibited" in terms of FTP, the same being liable for confiscation were promptly seized by the customs authorities and were handed over to the appellants for safe custody. From the above, it transpires that the said export goods which were brought into the customs area, for purported export after completing all the formalities and procedures of customs to be taken out of India, remained as 'export goods', despite these being liable for confiscation, and having been seized. The nature of the goods have clearly proved as 'export goods' and precisely for the illegal act of export, the customs authorities have initiated action on various persons concerned separately the provisions of Customs Act, 1962. Therefore, the argument advanced by the learned Advocate for the appellants that the goods under seizure, which were pilfered, are not 'export goods' do not find any support of law.

14.1. From the plain reading of the legal provisions under Section 110 of the Customs Act, 1962, about the category of persons to whom the seized goods could be handed over, in cases where it is not practicable to remove, transport or store or take physical possession of the seized goods, does not include the custodian/CCSP, as it lists out only the owner of the goods or the beneficial owner or any person holding himself to be the importer or any other person from whose custody such goods have been seized. Further, the instructions issued by the CBEC vide Instruction No.1/2017-Customs dated 08.02.2017, specifically provided that besides drawing a panchanama, the proper officer should also pass an appropriate order as 'Seizure memo/order etc.' clearly mentioning the reasons to believe that the goods are liable for confiscation. However, the said instructions specifically state that it applies only in all future cases, and do not cover the past cases. Further, the Panchanama dated 14.06.2013, specifically state that the attempted illegal export of 'Red Sanders' being prohibited for export, are being seized under the reasonable belief that the same are liable for confiscation under the provisions of Customs Act, 1962. Thus, we find that the argument of the Advocate for the appellants that there is no *Supratnama* or order for handing over the seized goods to the appellants, and thus they are not liable for the pilferage of seized goods, does not have any legal validity.

14.2 Further, it is not the case of the appellants that the seized export goods were confiscated and thereupon such goods became the property of the Central Government and thus it is only the Customs who are responsible for the loss or pilferage of the goods and not the appellants. On the contrary, the export goods upon seizure on 14.06.2013 were handed over for safe custody with the appellants as custodian/CCSP, and before these could be confiscated and the property on such goods being vested with the Central Government, the pilferage of the seized goods from the custody of the appellants had occurred in this case. Hence, the value of such seized goods could not be confiscated and be disposed/sold by following the due process of law, denying the entire disposal value of such goods being credited to the government's exchequer. In fact special dispensation had been provided for relaxation of the condition of the Chapter 44 of Schedule 2 of the ITC (HS) Classifications of Export and Import Items for allowing export of 9784.1363 MT of Red Sanders wood, in the form of log obtained out of confiscated/seized stock in respect of the Government of Andhra Pradesh & Directorate of Revenue Intelligence (DRI) Vide DGFT Notification No. 47 (RE-2013)/2009-2014 dated 24.10.2013 as amended. Further, CBED also

followed and e-auction process for sale through MSTC, a Government of India company, and thus it enables reasonableness to the value of Red Sanders adopted in the impugned order. Thus, the basis for valuation of the loss of goods having the basis on such value, as elaborated by the learned AR finds logic and is legally acceptable. Therefore, we are of the view that the action in the impugned order demanding the value of the seized goods that were pilfered from the custody of CCSP in terms of the action to safeguard interest of Revenue in respect of the seized goods, and thus recovery of the above amount under HCCAR and under the general powers vested with the Central Government under Section 142 *ibid*, is valid in law.

15. In examining the specific regulations which have been shown to have violated under the impugned order, we may like to refer to CBIC Circular No.13/2009-Customs dated 23.03.2009 which was issued for explaining the salient features of the HCCAR. The relevant paragraph of the said circular is extracted below:

"Circular No.13/2009-Customs

*F.No.450/55/2008-Cus.IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs*

159A, North Block, New Delhi - 1.

23rd March, 2009.

Subject: "Handling of Cargo in Customs Areas Regulations, 2009"- regarding.

A reference is invited to Notification No.26/2009-Customs (N.T.) dated 17.3.2009 bringing into effect the "Handling of Cargo in Customs Areas Regulations, 2009" (referred in short as 'regulations'). The regulations provide for the manner in which the imported goods/ export goods shall be received, stored, delivered or otherwise handled in a customs area. The regulations also prescribe the responsibilities of persons engaged in the aforesaid activities. It may be recalled that the Public Accounts Committee (2005-06) in its twenty-seventh report had recommended for formulating appropriate legal provisions and guidelines to control the activities of custodians. In pursuance of the recommendations made by the Public Accounts Committee (PAC), the Government had inserted a new sub-section (2) to section 141 of the Customs Act, 1962. These Regulations have been framed by the Department in pursuance of the recommendations of the PAC and consequent to the amendment of the Customs Act, 1962 as aforesaid. The salient features of the regulations are indicated in the following paragraphs.

2.1. *The regulations shall be applicable to all 'Customs cargo service providers' (CCSPs) that is to say all persons operating in a customs area and engaged in the handling of import/export goods. These include the Custodians holding custody of import / export goods and handling such goods and all persons working on behalf of such custodians such as fork lifter material handling equipment operators, etc. The regulations would also cover consolidators/ break bulk agents and other persons handling imported/export goods in any capacity in a customs area. The regulations provide for various responsibilities and conditions for different kinds of CCSPs. The conditions prescribed under Regulation 5 would apply to the CCSPs who desire to be approved as custodians of imported /export cargo and thus handle goods in customs areas. These conditions shall not apply to those persons who only provide certain services on their own or on behalf of the custodians referred above*

2.2. *Responsibilities prescribed in Regulation 6 on the other hand apply to both categories of persons i.e. all Custodians and persons who provide various services as above. Certain responsibilities specifically apply to one of the category. For example, the responsibility for safety and security, pilferage of goods under their custody, disposal of uncleared, unclaimed or abandoned goods within the prescribed time limit, payment of cost recovery charges of the customs officers posted in the facility are applicable to the persons who handle imported or export goods in the capacity of an approved custodian. On the other hand, responsibilities for publishing or display of the schedule of charges for the activities undertaken in respect of imported/ export goods shall apply to both categories of persons. These responsibilities have been specified with the overall objective of expeditious clearance of goods, reduction of dwell time, transaction cost and to safeguard revenue."*

From plain reading the legal provisions of these regulations and the CBIC Circular, it transpires that the CCSP is required to fulfil the responsibilities laid down under the HCCAR and this includes both in respect of activities undertaken by him as custodian as well as in respect of various service providers contracted or employed by the CCSP for providing the services on their behalf. One of the conditions to be fulfilled for appointing as CCSP under Regulation 5(i)(n) and 5(ii) is that the CCSP shall provide security and access control to prohibit unauthorized access into the premises, as well as provide safe, secure and spacious premises for loading, unloading, handling and storing of the cargo and for the examination and other operations as may be required in compliance with any law for the time being in force. In the present case, the factory sealed export goods initially entered into the CONCOR-DRT CFS for complying with the customs procedures for export, and later brought in by SIIB Customs for detailed examination of attempted smuggled goods and later were handed over to the appellants for safe custody of the seized goods in container No.GESU-3997518 at the appellant's CFS. The facts of the case and the customs and police investigation (which have given in detail in the following paragraphs)

brings out clearly the conclusion that the appellant's facilities at CONCOR-DRT CFS, particularly the Kalmar forklift, empty container, truck were used for pilferage of customs seized goods contained in container No. GESU-3997518.

16.1 Investigation conducted by Customs and the inquiry proceedings under HCCAR reveals that during a surprise visit conducted by JNCH Customs officers at the premises of the appellants CFS on 14.08.2014, the entire modus of removing the Customs seized goods in a container XINU 1349960, kept under safe custody with the appellants, by substituting similarly numbered container by fabricating the unique container number (obliterating by repaint of the container number on all four sides from XINU 1106045 to XINU 1349960) were identified. Further, JNCH Customs undertook complete physical inventory of containers having seized goods which had led to the present case of theft coming to the fore, and it was found that one another container GESU-3997518 handed over to the appellants CFS for safe custody vide panchanama dated 14.06.2013 having seized red sanders of 12695 Kgs. were found stolen by adopting the above modus operandi. Thus, it transpires that there was a serious attempt to undermine the safety and security of the customs seized goods in the appellant's premises at CONCOR-DRT CFS and certain unscrupulous persons had succeeded in pilferage of the goods kept under the safe custody of the appellants. This fact is duly supported by the voluntary statements given by Shri Vishal Patil, Deputy General Manager of CONCOR-DRT CFS before customs authorities, as he had stated that the empty containers after destuffing of the cargoes are stacked at empty stack yard of the CFS and thereafter these empty containers are shifted to the nominated empty container yard of shipping lines. CONCOR-DRT CFS had issued one order for empty container No. GESU-3630950 to M/s Apna Logistics and issued container loading instruction to M/s Highway Roadlines for loading of container on 12.05.2014 and 25.05.2014; however, as the said container No. GESU-3630950 was not traceable in the yard, the matter was brought to the notice of the CONCOR-DRT CFS, who in turn have questioned the container handling contractor, Security agency and transport contractor about the non availability of empty container and having found it missing had filed an FIR with Uran Police Station on 22.07.2014. The above facts clearly indicate that despite having knowledge of the pilferage of container from the appellant's CONCOR-DRT CFS premises and having taken action for filing of FIR with police authorities, the appellants had not taken any other action as is expected of a prudent CCSP in ensuring safety and security of the customs seized goods handed over to them for safe custody, as one another attempt was

made for removing the Customs seized goods by substitution of container XINU 1349960, within a gap of few days, which was only identified by JNCH Customs on 14.08.2014.

16.2 We also find that the CBIC have clarified vide Circular No.13/2009 dated 23.3.2009 that the HCCAR is applicable to all Customs Cargo Service Providers (CCSP) including the CFS, ICDs, Ports, airports and LCS. It has been specifically provided that the conditions to be fulfilled as prescribed under Regulation 5 of HCCAR which *interalia* include "security and access control to prohibit unauthorised access into the premises", apply to custodians of import/export cargo i.e., CFS, ICD etc. Further, responsibilities prescribed under Regulation 6, *interalia*, included responsibility for the safety and security of imported and export goods under the custody of custodian, and this apply to all CCSPs including the service providers of CFS, ICD. This has been clarified specifically in the said circular which state that "*it may however be clarified that custodian will be responsible for fulfilment of the conditions of these Regulations even in respect of CCSPs working on their behalf or with their permission*". Hence the appellants cannot escape from the responsibilities cast upon them under HCCAR, claiming that the theft has happened due to their contractual employees.

16.3 Thus, we find that it is clearly proved by the above factual reports arising out of the investigation conducted by Customs and Police authorities, and hence we do not have any hesitation in arriving at the conclusion that the appellants did not fulfil the conditions of Regulation 5(1)(i)(n) and 6(1)(i), by their failure to restrict unauthorized access into the premises and allowing the pilferage of goods and by their failure to provide safe and secure storage facility of customs seized goods kept in the containers within CONCOR-DRT CFS premises and allowed certain unauthorized persons to remove the customs seized goods.

17. It further transpires from the records of the case that a separate Police investigation had been conducted on the theft of seized goods and the final report/Charge Sheet No.182/14 dated 31.12.2014 in FIR 132/14 was filed by Uran Police before the Hon'ble Court of First Class Magistrate, Uran in which they had arrayed 6 persons as accused in the above fraud. It is stated in the said document that with criminal intention, the above group had put duplicate number on empty container lying in appellant's premises to substitute Customs seized goods, and moved the seized red sanders in original container by using appellant's Kalmar forklift and placed it on their truck MH-04-BU 8050 owned by

one of the accused, by outwitting the security guard and removed the same from appellants CFS. Hence, all the six accused were charged for violations under IPC and Forest Act, 1927 in the above case. The Police authorities have also drawn a panchnama dated 20.08.2014 of the fabricated container No. GESU-3630950 and handed it to the appellants CONCOR-DRT CFS for safe custody. However, learned Advocate for the appellants attempted to project that the seized container was not an export cargo, but was kept in safe custody as a courtesy to customs department; and the police investigation has not implicated any employee of appellants, and thus they are not responsible for the pilferage of the seized goods/container. The facts indicated in the police investigation and their final report/Charge Sheet being contrary to the stand taken by appellants and stands to prove the involvement of a number of unauthorized persons who had access to the CONCOR-DRT CFS, and the equipment available therein, for clandestine manner of removing the customs seized container. Thus, it is a clearly proven fact that the entire theft of customs seized red sanders have been orchestrated by the group of miscreants using the equipment belonging to the appellant's contractor that were available in CONCOR-DRT CFS and the movement of the container (having seized goods) in the truck was organized by one of the appellant's operator, improperly without any documents and by violating the laid down procedures for movement of container/goods in Customs area. This also goes to prove that had they kept a proper record of the customs seized goods/container, and connected records relating to movement of such goods/container from the demarcated area, or any other container entering in or exiting from the CONCOR-DRT CFS, then the whole operation of bringing into CONCOR-DRT CFS empty container, fabrication of empty container so as to look like seized goods container, and taking away the customs seized goods container, without any authority of Customs department would have been very easily detected by the appellants themselves. The HCCAR apply to the custodian under the provisions of Section 141(2) of the Customs Act, 1962 which *inter alia* prescribe the manner in which the goods shall be handled in a customs area and the responsibilities have been framed accordingly. Besides this, the responsibility of the custodian under Section 45(2) is to keep the imported goods in safe custody, maintaining of records and not to permit its removal without any authorization from Customs. The absence of proper system of security, control and maintenance of records in the present case of seized export goods *mutatis mutandis* apply to the imported goods also. Hence the appellant cannot escape from the responsibilities and obligations cast upon them as CFS operator under HCCAR for proper handling of import/export goods. In view of this, we find that

the appellants have failed to fulfil the responsibilities entrusted on them under Regulation 6(1)(a) and 6(1)(b) of HCCAR.

18.1 We also find from comprehensive insurance package policy produced by the Advocate for the appellants that relevant policy Section 6 covering the 'Liability in relation to cargo & containers including air cargo consignments' specifically provide *inter alia*, for the liability in respect of loss or destruction of or damage to Cargo/Containers under:-

(a) approved trading conditions and/or:-

(b) as per Indian Railways Act, 1989 adopted by CONCOR

(c) as per CBEC regulation on handling of cargo in Customs area etc.

(d) Air cargo - ...

(e) Liability in relation to cargo & containers whilst they are in their custody.

However this liability shall be restricted to Rs.50/- per kg or actual whichever is lower, except for air cargo consignments.

Further, under policy Section 8 providing for "Insurance in respect of liabilities to Customs authorities" it is also stated that any duty imposed by the Customs Authorities which the Insured, or other person acting on the Insured's behalf, becomes legally liable to pay in satisfaction of any claim or claims resulting from Loss and/or damage to cargo as specified in Insured's Import/Export Continuity Bonds, provided the claims towards loss or damage to cargo become admissible under the policy. Thus, the plain reading of the above clauses of the comprehensive insurance policy entered into by the appellants, appear to cover the liability arising from the loss, destruction or damage to cargo and containers in the custody of the appellants, and more so in particular reference to the CBEC regulations/HCCAR. It is also noted that the general exclusions to the said insurance policy *inter alia* provides that 'wilful act or wilful negligence or the Insured or his representative' are not covered under the said insurance policy. The factual records also indicate that New India Assurance Company Ltd. i.e., the insurer company, after detailed examination of the claim for insurance made by the appellants have responded vide their letter dated 10.11.2016 in which they had *inter alia* stated that equipment available in the CFS belonging to one of the contractor of appellant has been utilized and movement of the container (having seized goods) was organized by one of the operator without any document and against the contractual procedures. They have also stated that the goods were removed by alteration of container number on the sides of container and they have expressed that it is not clear that how such an exercise

of alteration of number on all the sides could have been committed, if reasonable and proper care had been taken by the appellants. Thus they closed the insurance claim filed by the appellants as 'No claim'. The above facts indicate that this rejection of the insurance claim of the appellants does not entail the claim of the appellants that on account of no export duty, the claim has been rejected and hence they are not liable to pay for the pilferage of goods given to them for safe custody. Such rejection as discussed above is purely on the basis of the appreciation of the factual matrix in the specific claim by the insurance company and it does not have any bearing on the responsibility of the appellants towards the HCCAR.

18.2 The Chief Manager of Container Corporation of India Ltd. Shri Arujay Kumar Singh had given a voluntary statement before Customs, stating that they suspect a criminalized act in the theft of containers and their security system and operational procedures have been tampered by some unscrupulous persons with involvement of few of their contractor's staff. The aforesaid detailed discussion of the factual matrix of the case clearly points out that the appellants have deliberately violated 6(1)(f) and 6(1)(q) of the HCCAR.

19. The conditions applicable to CCSP, custodian/CFS under Regulation 5(6) include an undertaking to indemnify the Commissioner of Customs from any liability arising on account of damages caused or loss suffered on imported or export goods due to various unnatural causes or otherwise handling of such goods. Customs investigation conducted with regard to the export goods which were purportedly received in a factory sealed container, with the jurisdictional Central Excise authorities i.e. the Deputy Commissioner, Central Excise, Vasai division, Thane-II Commissionerate vide their letter dated 05.07.2012 also revealed that no such container bearing No. GESU-3997518 had been stuffed by the officers of Tech-III, Vasai division and the officers who were named in the Stuffing/ Examination Report for self-sealing had not attended the said export. Thus, it appeared that the export of goods was *ab initio* had an element of fraud. It is on record in the chargesheet filed by the police authorities that there was a criminal element in the theft of seized red sanders that had happened on 25.05.2014. Further during the surprise visit of JNCH Customs on 14.08.2014, Customs have found one another attempt for removal of seized red sanders, by substitution of empty container with the seized red sander container. The serious violations on security of the CFS and the goods stored inside the CFS, established through inquiry report under HCCAR and Police investigation, have

led to the action to safeguard government interest on the seized goods, and thus recovery of the above amount. Hence, we find that there is no illegality in the impugned order in seeking recovery of the value of the goods which were pilfered from the custody of the appellants as CCSP, due to aforesaid act of negligence and improper handling of cargo in customs area. Further, we find that the Customs department had been in correspondence with the appellants to deposit Rs.4,44,32,500/- way back vide letters dated 03.11.2016, 25.01.2017, 17.04.2018 and 20.11.2018 written by the Commissioner of Customs. Further, on the basis of the appellant's reply dated 19.12.2018 to keep the issue in abeyance till the time of receipt of report of police investigation, the Customs authorities have awaited and then proceeded as per law. Hence, we find that there is no undue delay or any illegality in the action taken by Customs department.

20. Regulation 11 of HCCAR provide for suspension of approval for appointment as the Customs cargo service provider by the jurisdictional Commissioner of Customs, by following the prescribed procedure. In this case show-cause notice dated 16.03.2020 was issued and upon completion of inquiry, the enquiry report dated 27.05.2012 was submitted and on this basis the impugned order dated 18.04.2023 was issued. It is on record that the adjudicating authority has given personal hearing to the appellants on 17.03.2023 and 05.04.2023 and after taking into account the submissions made by them, the learned Commissioner under Regulation 12(8) ordered for suspension of the operation of CCSP for 15 days besides imposition of penalty for the contravention of the provisions of HCCAR for an amount of Rs.50,000/-. Hence, we find that there is no illegality in the action taken on imposing penalty and for suspension of CCSP approval granted to the appellants for limited number of 15 days. We also find that in the clarification issued by CBEC vide circular No. 13/2009-Customs dated 23.03.2009, the provisions of Regulation 7(2) has been explained stating that in order to overcome situations where clearances of imported/export goods are getting affected by congestion at a particular CFS, the Commissioner of Customs may consider regulating the entry of goods in that particular CFS for a temporary period, say 15 days, in terms of this regulation. In such cases, the Commissioner of Customs may not allow any import/export cargo to be received and handled in the facility or may allow such reduced quantity as considered sufficient for being handled efficiently for such temporary period till the congestion is cleared and the delay in clearance of goods is sorted out. Thus the guidance of the Circular for temporary suspension

of CCSP's operation even without involving any violation of the Regulation by a CCSP, is to ensure the overall objective of expeditious clearance of goods, reduction of dwell time, transaction cost and to safeguard revenue. In fact, the order of dispensation for suspension of the appellants CONCOR-DRT CFS in the impugned order, had followed the above guidelines of the CBIC circular and thus did not put any embargo on existing export goods meant for export and imported goods-live consignments already available with the CFS for its home consumption clearance by the importers. Further, auction of the goods for which notices have been issued under Section 48 by the custodian/CCSP and under other auction process were also permitted during such suspension period. Hence, the export and import trade has not been affected by this suspension action. Further, it is clear that the appellants work was not entirely shutdown and that there was sufficient work for the personnel employed and the contractors engaged by the appellants, disproving the appeal made by the learned Advocate that the suspension action has adversely affected the importers and exporters community and that livelihood of a large number of persons employed by them were affected. However, as the period for which the suspension of 15 days was ordered was in terms of specific dates, i.e., from 01.05.2023 to 15.05.2023, which had expired during the process of this appeal, no precipitative action was taken by the Customs pending this appeal, and the impugned order to this extent has become infructuous. Thus, even the illusory adversity of closure of the appellants CONCOR-DRT CFS has not happened in reality and hence there is no ground for entertaining the appeal on this ground.

21. We find that Section 117 of Customs Act, 1962 provide for imposition of penalty on any person who contravenes any provision of the said Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, to be liable to a penalty not exceeding four lakhs rupees. The maximum amount of penalty prescribed under Section 117 initially at Rs. One lakh was revised upwards to Rs. Four lakhs, with effect from 01.08.2019. The detailed discussions in the preceding paragraphs clearly prove that the appellants not only failed to fulfil the conditions and to abide by the responsibilities reposed on them as CCSP, but also failed to rectify the situation as one another attempt was made again for illegal removal of seized red sanders, which was identified by SIIB Customs on 14.08.2014. Hence, there are clear violations of the HCCAR and Section 141(2) of the Customs Act, 1962 by

the appellant and thus we do not find any infirmity in the impugned order imposing penalty under Section 117 *ibid* on the appellants.

22. In view of the above, the appeal filed by the appellants is dismissed.

(Order pronounced in the open court on 11.09.2023)

(S.K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

Sinha