CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Customs Miscellaneous Application No. 85495 of 2023
In
Customs Appeal No. 86362 of 2023

(Arising out of Order-in-Original No. 01/2023-24/COMMR/NS-GEN/CAC/JNCH dated05.04.2023 passed by the Commissioner of Customs (General), JNCH, Nhava Sheva)

Speedy Multimodes Limited …. **Appellants**
Container Freight Station, Village Sonari
Taluka Uran, Navi Mumbai – 400707.

Versus

Commissioner of Customs (General) …. **Respondent**
CCSP Cell, JNCH, Nhava Sheva,
Uran, Navi Mumbai- 400707.

Appearance:

Shri Jitu Motwani, Advocate for the Appellant

Shri S.K. Hatangadi, Authorized 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/85257/2024

Date of Hearing: 05.09.2023
Date of Decision: 04.03.2024

PER :*M.M. PARTHIBAN*

This appeal has been filed by M/s Speedy Multimodes Limited, Navi Mumbai (herein after, referred to, for short as 'the appellants'), being aggrieved against the Order-in-Original No. 01/2023-24/COMMR/NS-GEN/CAC/JNCH dated 05.04.2023(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 *inter-alia* are operating Speedy Multimode Container Freight Station (Speedy CFS), at Nhava Sheva and was appointed as a 'custodian' of Container Freight Station (CFS) under Section 45(1) and 141(1) 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 CFS was issued on 05.02.2018 and 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.105/2022 dated 21.01.2022.

2.2 On the basis of specific intelligence received by the Directorate of Revenue Intelligence, Nhava Sheva unit of Mumbai Zonal Unit (DRI-MZU) that one import consignment in container No. GESU 4913126 of M/s Siddhivinayak Trading Company laden on Trailer vehicle No.MH-12-FZ-8978 is suspected for smuggling, the same was intercepted by DRI-MZU officers at a godown premises situated in Taloja MIDC. The DRI-MZU officers, on finding that the bottle seal of the imported container was found broken, had secured the same with lock and wrapped with cloth and seal identification 'DRI seal No.20' under a panchnama dated 05.02.2019 for its movement under DRI escort for detailed examination by them at Speedy CFS. The said container was received inside the Speedy CFS and placed inside the examination area of the Speedy CFS for detailed examination by DRI-MZU officers under panchnama proceedings. The mahazar drawn before panchnama witnesses at Speedy CFS on 05.02.2019 for such detailed examination of the goods present in container No. GESU 4913126 indicate that these were smuggled 'Gudang Gram' brand cigarettes of foreign origin brought into India having total quantity of 93,60,000 sticks. These were contained in 650 boxes, each having 6 inner packages of 10 cartons, each carton having 20 packets, and each packet consisting of 12 cigarette sticks (650X6X10X20X12=93,60,000). After detailed examination of the said container with 93,60,000 sticks of foreign origin cigarettes, the container was closed and sealed with Indian Customs Nhava Sheva Bottle seal No.1362910 and were handed over for safe custody to the appellants, being the custodian of Speedy CFS.

2.3 Subsequently, on receipt of a specific intelligence that some unscrupulous persons in and around the Speedy CFS area are contemplating to exchange/transfer seized cargo lying in Speedy CFS, the Central Intelligence Unit of JNCH (CIU-JNCH) and DRI have arrived at Speedy CFS at 2.30 P.M. on 08.12.2020, for ascertaining whether the imported cargo contained in container No. GESU 4913126 is lying safely. The panchnama proceedings were drawn for the above verification revealed that the panchnama witnesses verified the container seal No. SML 1054 affixed to the said the container and opened all packages one by one, and the goods were found in all a total of 652 packages. The aforesaid verification revealed that there were for 4 carton boxes containing 100 cartons, each containing 240 sticks of cigarettes (4X100X240=96,000 sticks); 448 carton boxes, each containing 60 cartons and each carton containing 240 sticks of cigarettes (448X60x240=64,51,200 sticks); and the balance 200 carton boxes were found to be wrapped with polyethene on it and found to contain with one bag of stones, clothing rugs on the top along with 10 cartons of cigarettes. (200X10X240=4,80,000 sticks). Thus the verification conducted by the CIU-JNCH and the DRI revealed that as against the seized 93,60,000 sticks 'Gudang Gram' brand cigarettes, they actually found only 70,27,200 sticks, revealing a shortage of 23,32,800 cigarettes sticks.

2.4 Thus, the modus of removing seized foreign origin cigarettes kept in safe custody in the appellants CFS, by substituting with the packing material, by certain unscrupulous elements was identified. As a result it was found that container GESU-4913126 handed over to the appellants CFS for safe custody vide panchanama dated 05.02.2019 having seized foreign origin cigarettes, part quantity of 23,32,800 cigarette sticks were found stolen by adopting the above modus operandi.

2.5 In view of the above, the department had initiated separate show cause proceedings against the appellants for violation of HCCAR and the Customs Act, 1962, by issue of SCN No.282/2021-22 CCSP/CAC/ JNCH dated 26.07.2021. The specific regulations which are alleged to have been violated by the appellants in the show cause proceedings are clauses 5(1)(i)(n), 6(1)(f) and 6(1)(i) of HCCAR. On conclusion of the inquiry proceedings, an inquiry report dated 01.02.2022 was submitted concluding that the charges proposed in the show cause proceedings have been conclusively proved to have been violated by the appellants and recommending for suitable action to be taken under the provisions of Customs Act, 1962 and the HCCAR. On the basis of said inquiry report dated 01.02.2022 and after providing opportunity for personal hearing on 17.03.2023, the learned Commissioner of Customs had passed the impugned order dated 05.04.2023, suspending the approval for operation as CCSP for the period starting from 16.04.2023 to 30.04.2023, subject to certain conditions for facilitating the existing consignments of exports and imports. Further he confirmed the demand of Rs.2,22,67,440/- being the value of preferred goods under Regulation 5(6) of HCCAR besides imposition of penalty on the appellants under Regulation 12(8) of HCCAR and Section 117 ibid. Being aggrieved with the above order, the appellants have filed this appeal before the Tribunal.

2.6 As the impugned order dated 05.04.2023, ordered for suspending the operation of appellants CFS as CCSP for the immediate period starting from 16.04.2023 to 30.04.2023, before filing an appeal before this Tribunal within the permissible period of three months, for obtaining immediate reprieve from suspension, the appellants had sought relief of the Hon'ble High Court of Bombay under Writ Petition No.5415 of 2023 seeking stay of operation of impugned order. Considering the facts that the appellants is a large scale operator dealing with capacity of almost 1200 containers and has 700 employees and grave hardship will be caused by the sudden disruption by suspension of license, the Hon'ble High Court of Bombay was of the opinion that they should grant time to the Respondent department to take instructions and considering that the suspension order will come into force on 16 April 2023, the period needs to be deferred. Accordingly, the Hon'ble High Court adjourned the case for 02.05.2023, by rescheduling the period of suspension to commence from 04.05.2023, subject to further orders to be passed by them in the said Writ Petition. As the department respondents sought time, the matter was further adjourned to 12.06.2023 with a stay on commencement of suspension up to 19.06.2023. Subsequently, the matter was heard from both sides and a final order was passed by the Hon'ble High Court of Bombay on 19.06.2023 extending the protection granted by the Court to continue to operate till an order is passed by this Tribunal on their application for stay, appeal and by keeping all the contentions of the parties open for passing appropriate orders by this Tribunal within a period of three months.

3.1. Learned Advocate appearing for the appellants stated that various submissions made by the appellants before the original authority have not been taken into consideration in the impugned order. He further stated that at the time of examination of the imported goods by DRI on 05.02.2019, the contraband goods were seized and post such examination and seizure the container was affixed with 'Indian Customs, Nhava Sheva Bottle Seal No.1862910'; whereas on suspicion of theft, when JNCH-CIU officers were about to open and examine the same container on 08.12.2020, it was carrying a different seal having 'Seal No. SML 1054'; there is no record indicating when the container having seized goods was opened and was resealed with different seal having seal No. 'SML 1054'. It is also a fact that the customs authorities have permitted M/s D.K. Enterprises, the successful bidder of auction of the seized goods for disposal in the month of June, 2020 and they had access to the subject seized goods for the purpose of packing and labelling of the cigarettes contained therein during September. 2020. Hence, he stated that it is clearly proved that 3rd party/successful bidder was having access to the seized foreign origin cigarettes, and thus the appellants are not responsible for the pilferage of the goods.

3.2 Learned Advocate also submitted that the appellants on knowing the theft from their Speedy CFS had immediately filed a complaint with the local police authorities on 09.12.2020 and during police investigation, it was revealed that nine persons were actively involved in the theft of seized foreign origin cigarettes from the appellants' CFS. The criminal proceedings in the above case have not implicated the appellants per se, but have arrested only two of its employees were who have already been discharged from their employment by the appellants; that the subject container having seized goods was kept under CCTV coverage; however, it may have been at blind spot or not covered due to technical glitches. Further the appellants have submitted the CCTV coverage for all gates from 12.08.2020 to 10.12.2020, high mass footage from 25.09.2020 to 10.12.2020 to the Customs Department. Hence he submitted that the appellants are not at fault.

3.3 Learned Advocate claimed that the seized goods was auctioned by the Department in February, 2019 and the order for disposal of the seized goods were given only in the month of September – October, 2020. However in terms of Disposal manual-2019, the department is required to dispose of the seized cigarettes immediately after seizure as these are categorised as goods having short shelf-life. Further, the successful auction bidder M/s D.K. Enterprises had carried out the labelling activity by opening the container having seized goods and closed the container; in this regard, he stated that for ensuring that the entire seized goods were safely kept inside the container after labelling, neither there exist any documents nor panchnama proceedings were drawn by the customs authorities. Hence he pleaded that the appellant shall not be held responsible for the delay in disposal of the goods by the department and for not accounting the seized goods during the process of such labelling.

3.4 Further, Learned Advocate stated that the appellants have not failed to provide security to the seized goods. Hence, he stated that the appellants are not responsible for the theft which occurred due to the contractors/third party engaged in packing and relabelling the seized goods. Learned Advocate also stated that the order for recovery of the value of seized goods which have been pilfered, in terms of Regulation 5(6) of HCCAR and imposition of penalties on the appellants under Regulation 12(8) of HCCAR, Section 117 of the Customs Act, 1962 are not sustainable as there is no evidence produced by the department to show the involvement of appellants and the recovery of value of goods was not even proposed in the SCN. Thus, he claimed that the impugned order is not legally sustainable and the same be set aside.

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. Further, the panchanama dated 05.02.2019 specifically states that the quantity of seized foreign origin cigarettes in container No. GESU-4913126as 93,60,000 sticks and the same was handed over to the appellants CFS for safe custody. The said container with seized goods was lying with the appellants CFS and thus the responsibility of the appellants as CCSP cannot be abdicated by claiming that third party was allowed access for labelling the goods. Since the seized goods were absolutely confiscated and were liable for disposal, the value of such goods which were pilfered from the appellants CFS is liable to be compensated by the appellants to the customs Department. 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 the impugned order, the Commissioner of Customs (General) had observed that there was another instance of theft of seized export goods i.e., Red Sanders contained in six containers in the same premises of appellants CFS on 18.11.2020 and they had not taken appropriate steps to stop such pilferage. Hence, learned AR claimed that the department had taken necessary action under HCCAR including recovery of the value of pilfered cargo from the appellants and after comprehensive investigation, conduct of inquiry proceedings as per HCCAR, the show cause proceedings have been initiated and necessary order passed, hence he submitted that the impugned order is sustainable in law.

5. Heard both sides and perused the records of the case including the additional written paper books submitted in this case.

6.1 We find that the learned Commissioner of Customs (General) in the impugned order dated 05.04.2023, 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. 16.04.2023 to 30.04.2023 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 at the appellants CFS. 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 Handling of Cargo in Customs Areas Regulations (HCCAR), 2019 framed under of Section 141 (2) of the Customs Act, 1962.

6.2 We further note that the Hon'ble High Court of Bombay in its judgement dated 19.06.2023 had observed as follows:

> *"5. Having heard learned counsel for the parties and having perused the record, in our opinion, it would be appropriate for the Petitioner to avail of the remedy of an appeal, so that the rival contentions of the parties on the aspects of facts and law can be adjudicated before the Tribunal. We, therefore, do not dwell into the merits of the rival contentions. We are also informed by Mr. Dada that the limitation under the provisions is of three weeks which would come to an end on or about 6th July 2023.*
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> *6. Insofar as the protection granted by this Court as noted above is concerned, in our opinion, the protection needs to be continued till the Petitioner approaches the Tribunal alongwith a stay application and till the orders are passed on the stay application. We, accordingly, dispose of this Petition in terms of the following order:-*
>
> *O R D E R*
>
> *(i). Petitioner is permitted to approach the Tribunal in an Appeal to assail the order dated 5th April 2023. Let the Appeal be filed along with the stay application.*
>
> *(ii). The protection granted by this Court vide order dated13th April 2023 shall continue to operate till the disposal of the stay application as may be filed by the Petitioner.*
>
> *(iii). All contentions of the parties on the Appeal and stay application are expressly kept open.*
>
> *(iv). Needless to observe that if the appeal alongwith stay application is not filed, protection granted by this Court shall cease to operate and in that event, Respondent shall be at liberty to take further appropriate action as per the provisions of law after the period limitation to file the appeal expires.*

(v). The Tribunal shall make an endeavour to hear the parties on the stay application and pass appropriate orders within a period of three months of the pleadings on the stay application being completed.

(vi). Writ Petition is disposed of in the above terms."

Hence, we would also deal with the present issue, as per above direction of the Hon'ble High Court of Bombay.

6.3 The issue involved in the case before us is to decide the following:

(i) Whether the suspension of the approval for operation as CCSP for a period of 15 days as specified in the impugned order, subject to certain conditions for facilitating the existing consignments of exports and imports, is valid under the Handling of Cargo in Customs Areas Regulations, 2019 (HCCAR);

(ii) whether the confirmation of demand of Rs.2,22,67,440/- being the value of preferred goods is sustainable under Regulation 5(6) of HCCAR; and

(iii) whether the appellants CFS have violated the obligations cast upon them under Regulations 5(1)(i)(n), 6(1)(f) and 6(1)(i) and consequent to the determination of these violations as applicable, whether imposition of penalty on the appellants under Regulation 12(8) of HCCAR and Section 117 of the Customs Act, 1962, is sustainable.

7. On perusal of the records and factual matrix of the case, it is seen that there was a specific information received by Central Intelligence Unit (CIU) of JNCH Customs that some unscrupulous persons in and around the Speedy CFS area are contemplating to exchange/transfer seized cargo lying in Speedy CFS, the officers of CIU-JNCH and DRI-MZU had arrived at Speedy CFS at 2.30 P.M. on 08.12.2020, for ascertaining whether the imported foreign origin cigarettes in container No. GESU 4913126, which were earlier seized by DRI-MZU and kept under safe custody of custodian CFS is lying safely or not. Earlier, on specific intelligence received by DRI-MZU that imported foreign origin cigarettes in container No. GESU 4913126 belonging to M/s Siddhivinayak Trading Company laden on Trailer vehicle No.MH-12-FZ-8978 is suspected for smuggling, the same was intercepted by DRI-MZU officers at a godown premises situated in Taloja MIDC and were escorted for detailed examination and seizure of the contraband. The DRI-MZU officers completed the detailed examination and handed over the seized foreign origin cigarettes on 05.02.2019 to the appellants CFS, being the custodian duly appointed by jurisdictional Customs authorities. The verification conducted under panchnama proceedings with independent witnesses revealed that as against the 93,60,000 sticks 'Gudang Gram' brand cigarettes seized by

DRI and handed over on 05.02.2019 to the appellants CFS as a custodian, actually only 70,27,200 sticks were found available on 08.12.2020 at the time of such verification, and there was a shortage of 23,32,800 cigarettes sticks.

8.1 It is also fact on record that on 05.02.2019 when the seized goods were handed over to appellants CFS in container No. GESU-4913126, it was sealed with 'DRI seal No.20'. Thereafter the appellants CFS was informed by JNCH customs authorities that the seized goods have been sold under auction to the successful bidder, and the customs auction documents were given to the appellants with details of the buyer for allowing access to the container of such seized goods for labelling the cigarettes with statutory declaration as required under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The container No. GESU-4913126 having seized cigarettes was opened by the JNCH customs officers in the presence of the auction buyer and the labelling process was undertaken by a contractor of the buyer for about few weeks within the appellants CFS premises, and after completing the labelling work of the statutory declarations, the same goods were again resealed with seal No. 'SML 1054'. However, at the time of verification of seized goods in container No. GESU-4913126 on 08.12.2020, it was revealed that there was a modus of removing seized foreign origin cigarettes kept in safe custody in the appellants CFS, by substituting the packing material, by certain unscrupulous elements. It is also on record that the appellants had immediately intimated to the local Police authorities about the fact of theft of cigarettes from their Speedy CFS vide their letter reference No. SML/HR/Notice/Dec.2020/012 dated 09.12.2020, for registration of FIR on the said theft. Further, the appellants CFS also informed the local police authorities about the possible modus of such theft. The relevant paragraphs of the letter written by appellants to the local police authorities vide reference No. SML/HR/Notice/Dec.-2020/013 dated 10.12.2020 is extracted below:

> *"1) Once the cargo is cleared by Customs authorities, the cargo is sent out of CFS by using exit gate pass which as per the procedure is finally signed by the General Manager Operations and or his immediate subordinate. In the matter under reference the said stolen cargo must have gone out of CFS using the exit gate pass duly signed by the then General Manager Operations Mr. Jitender Chauhan or his deputy Mr. Sandeep Likhite. we strongly feel that these two officials of our company may put more light on the matter to solve this case of alleged theft. Justin found that Mr. Jitender Chauhan has recently resigned from the services of our company and he is no more working with us.*
>
> *…*

3) when we started our own enquiries from our direct as well as indirect employees, we came to know that the said the container number GESU-4913126-40' was moved out of CFS by using tractor trailer no. MH-46-H-5856 on 19.09.2020…."

8.2 The above details indicate that despite laying down a system of control over seized goods, the container having the seized goods were allowed for clearance outside the appellants CFS without the permission of customs authorities. Further, the appellants CFS have also issued gate passes to one Shri Nawaz Khan another nine persons on 08.09.2020, 10.09.2020 and 12.09.2020 to undertake the work of affixing labels containing statutory declaration in the packets of foreign cigarettes. The detailed investigation conducted by the customs authorities also revealed that Import Operations Manager of the appellants CFS and his staff were taking cash benefits from bidders in an unauthorised manner. The appellants were not maintaining 'seal cutting register' and the seized containers was allowed for de-stuffing of labelling work without CCTV coverage. The said container No. GESU-4913126 having seized cigarettes was kept under pad lock without CCTV coverage for over 3 months without any written permission from the customs authorities.

8.3 From the above factual details, it is clearly proved that container GESU-4913126 handed over to the appellants CFS for safe custody vide panchanama dated 05.02.2019 having 93,60,000 sticks 'Gudang Gram' brand seized cigarettes, a part quantity of 23,32,800 cigarette sticks were stolen by some unscrupulous persons using the above modus operandi. Thus, the argument advanced by learned Advocate that the appellants are not responsible for theft of goods from seized container cannot be acceptable.

9. In order to examine the legality of the orders passed by the learned Commissioner of Customs (General)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;

xxx xxx xxx xxx

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;

xxx xxx xxx xxx

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

xxx xxx xxx xxx

(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.

xxx xxx xxx xxx

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 transhipment;

xxx xxx xxx xxx

(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;

xxx xxx xxx xxx

(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;

xxx xxx xxx xxx

(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 may 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) 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, 2009 (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 order of the Commissioner demanding the value of pilferage of goods as per Regulation 5(6) of HCCAR which has not been proposed in the SCN and thus have gone beyond the scope of SCN. 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 could be seen from SCN dated 26.07.2021, that it has been proposed for initiating action under Regulation 11 of HCCAR for suspension/revocation of the appointment as CCSP by initiating a separate inquiry proceedings under Regulation 12 HCCAR, besides imposition of penalty. It is also seen that Regulation 12 ibid provide for detailed procedure for appointment of inquiry authority, providing sufficient opportunities for the CCSP who are alleged to have violated HCCAR and in the course of inquiry consider all documentary evidences, take all evidences for the purpose of ascertaining the correct position and for arriving at the conclusion to submit the inquiry report the Commissioner of Customs. Further, the CCSP is given a copy of the inquiry report, an opportunity for giving a written submission against the inquiry report, and a representation to the Commissioner of Customs. On the basis of all the above details contained in the inquiry report and from the representation given by the CCSP, the jurisdictional Commissioner of Customs is required to pass a speaking order under HCCAR. Thus it appears that detailed procedure have been prescribed for taking necessary action under the HCCAR, and there does not appear to be any restriction in the nature of orders that could be passed by the Commissioner of Customs. Thus the argument advanced by the Learned Advocate for the appellants, against confirmation of demand of the value of pilfered goods under Regulation 5(6) ibid, is beyond the scope of SCN is not found correct.

11.1 It is a well settled principle that the statue 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 statue, 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 statues *pari materia*, the general scope of the statue 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 beconsidered in the light of the general purpose and object of the statue*."

11.2 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 transhipment 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.

11.3 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. 03/2018 dated 05.02.2018 and were further given custodianship for extended period as per their application 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.

12. The background behind the legislation of Section 141(2) ibid, indicates that the Comptroller & Auditor General of India (C&AG) had undertook a review on the working of ICDs/CFSs 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/CFS 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 (CFSs) 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/CFSs 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/CFSs, also seem to be very weak and ineffective. These issues have been discussed in detail in the succeeding paragraphs.*
>
> *xx xx xx xx*

> *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/CFSs. 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 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.105/2022 dated 21.01.2022 for 5 years.

13. 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 notification dated 05.02.2018, and subsequent renewal vide notification dated 21.01.2022, 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.

14. In view of the above detailed discussions, 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. Accordingly, we are of the considered view that the suspension of the approval for operation as CCSP for a specific period of 15 days, by prescribing certain conditions for facilitating the existing consignments of exports and imports, is legally valid under the Handling of Cargo in Customs Areas Regulations, 2019. However, as the said period prescribed in the impugned order i.e., 16.04.2023 to 30.04.2023 had already expired, we do not consider it necessary to impose such suspension now and therefore the impugned order to this effect is non-implementable.

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

> "*Section 2 Definition:*
>
> *In this Act, unless the context otherwise requires—*
>
> *(18) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;*
>
> *(19) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;"*

In the present case, the imported foreign origin cigarettes which are being attempted to be smuggled were seized and handed over in container No. GESU-4913126 for safe custody with the appellants CFS, and have not yet been cleared by the customs authorities out of the appellants CFS, at the relevant time of verification of the cargo by a CIU-JNCH authorities on 08.12.2020.

15.2 However, before the imported goods were cleared by disposal through auction and delivery to home consumption, the theft of part of the cigarettes have occurred at the appellants CFS. As the said imported foreign origin cigarettes were attempted for "smuggling", the same being liable for confiscation in terms of Customs Act, 1962 were promptly seized by the DRI-MZU and were handed over to the appellants for safe custody. From the above, it transpires that the said imported foreign origin cigarettes, remained as 'imported goods', despite these being liable for confiscation, and having been seized. The nature of the goods have clearly proved as 'imported goods' and precisely for the loss suffered by the act of appellants CFS, the Commissioner of Customs had demanded the value of goods to be indemnified to the Government. Therefore, the argument advanced by the learned Advocate for the appellants that the impugned order has travelled beyond the scope of SCN do not find any support of law.

16 Further, it is not the case of the appellants that the seized imported 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 imported goods upon seizure on 05.02.2019 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 or being disposed in auction after confiscation and vesting 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. 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.

17. 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 lift or 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 under taken 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 DRI-MZU sealed imported goods were handed over to the appellants for safe custody of the seized goods in container No.GESU-4913126 at the appellants CFS. The facts of the case and the customs, as well as police investigation brings out clearly the conclusion that the appellants facilities at Speedy CFS, particularly the trailer truck, entry/exit gates were used for pilferage of customs seized goods contained in container No.GESU-4913126.

18.1 Investigation conducted by Customs authorities also indicated that in the recent past in the same premises of Speedy CFS of the appellants, there was an incident of pilferage of six containers of seized 'Red Sanders' handed over to them for safe custody and an order was passed by the Commissioner on 18.11.2020 and the appellants had found to have taken no appropriate steps to improve the safety and security in the Speedy CFS.

18.2 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 or those employees engaged for labelling work by some other person/third party.

18.3 Thus, we find that it is clearly proved by the above factual reports arising out of the investigation conducted by Customs that the appellants CFS had violated the obligations cast upon them under Regulations 5(1)(i)(n), 6(1)(f) and 6(1)(i) of HCCAR, 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), 6(1)(f) 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 Speedy CFS premises and allowed certain unauthorized persons to remove the customs seized goods. Hence, we are of the considered view that imposition of penalty on the appellants under Regulation 12(8) of HCCAR and Section 117 of the Customs Act, 1962, is sustainable.

19. It further transpires from the records of the case that a separate Police investigation had been conducted on the theft of seized goods in FIR dated 28.07.2021 by Uran Police Station; nine persons were arrested as accused in the above fraud including Shri Anand G Shinde, then Supervisor and Shri Ganesh Krishna Mhatre, then Assistant Junior Officer who are the employees of appellants CFS. It is also a fact on record submitted by the appellants that one Shri Vinay Tandel, employee of the appellants was receiving acknowledgement on all copies of panchnama dated 05.02.2019 and 11.12.2020 and he had

vested interests in keeping copy of such documents and the appellants were never got to know of these documents. However, learned Advocate for the appellants attempted to project that the police investigation has not implicated the appellants CFS and only their employees of appellants, and thus they are not responsible for the pilferage of the seized goods/container. The facts indicate that the employees of appellants in connivance with the certain unscrupulous persons had allowed in an unauthorised manner the seized container to be taken out of the appellants CFS in a tractor trailer No. MH-46-H-5856 on 19.09.2020 and thus it clearly proves that they had access to the entry/exit of goods in CFS, and the equipment available therein, for loading on the tractor trailer for clandestine manner of removing the customs seized container. Thus, it is a clearly proven fact that the entire theft of customs seized foreign origin cigarettes have been orchestrated by the group of miscreants using the equipment belonging to the appellants or their contractor that were available in Speedy CFS and the movement of the container (having seized goods) in the truck was also organized by them, 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 the appellants 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 Speedy CFS, then the whole operation of bringing into their a CFS empty trailer, and taking away the customs seized goods container with said trailer in laden condition, 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 *interalia* 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 imported goods *mutatis mutandis* apply to the imported goods which are seized. 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.

20. 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 imported goods clearly proved that the imported foreign origin cigarettes were stored for safe custody and due to various acts of negligence on the part of the appellants, part of such seized goods were pilfered. Further JNCH Customs have found one another attempt for removal of seized red sanders, by the same Speedy CFS. 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. Hence, we find that there is no illegality in the action taken by Customs department.

21. 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 26.07.2021 was issued and upon completion of inquiry, the inquiry report dated 01.02.2022 was submitted and on this basis the impugned order dated 05.04.2023 was issued. It is on record that the adjudicating authority has given personal hearing to the appellants on 17.03.2023 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 Speedy 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 16.04.2023 to 30.04.2023, which had expired during the process of this appeal, and stay of the order given by the Hon'ble High Court of Bombay vide judgement dated 19.06.2023 in Writ Petition No. 5415 of 2023, 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.

22. 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 Customs and on which the Commissioner of Customs had passed an order on 18.11.2020. 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.

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

24. The miscellaneous application stands disposed of.

(Order pronounced in the open court on 04.03.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha