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

**WEST ZONAL BENCH**

**CUSTOMS APPEAL NO: 442 OF 2011**

[Arising out of Order-in-Original No: 43/2011 dated 30th April 2011 passed by the Commissioner of Customs (Export), Nhava Sheva.]

**Rajiv Mehta**
1202 Midtown Apartment, BG Khar Marg
Campa Cola Compound, Worli, Mumbai - 400018 … ***Appellant***

*versus*

**Commissioner of Customs (Export)**
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

*APPEARANCE:*

Shri S N Kantawala, Advocate for the appellant

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

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
**HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: 85328/2024**

DATE OF HEARING: 20/11/2023
DATE OF DECISION: 14/03/2024

*PER: C J MATHEW*

The appellant, Shri Rajiv Mehta, is before us with the grievance that penalty under section 114 of Customs Act, 1962 has been imposed on him in relation to goods entered for export by M/s MJM Corporation, of which he is the proprietor, in December 2003 and January 2004 that were confiscated, under section 113 of Customs Act, 1962, in proceedings before Commissioner of Customs (Export), Nhava Sheva culminating in order[1] impugned here. The cavil expressed before us is that, except by relying on statements that were not even admissible, there was no other ground for burdening him with the detriment under challenge. One container load of 43,200 nos. ‘mens’ t-shirts’, entered for export against shipping bill no. 2504032/29.12.03, no. 2504033/29.12.03, no. 2504034/29.12.03 and no. 2504036/29.12.03, and another comprising 43,200 nos. ‘ladies dresses’, entered for export no. 2517068/03.01.04, no. 2517261/03.01.04, no. 2517265/03.01.04 and no. 2517270/03.01.04, that had been granted ‘let export order’ upon completion of formalities under Customs Act, 1962 were put on hold and returned to the container freight station for re-examination which established the said goods, claimed to be valued at US$ 8.50 and US$ 6.50 apiece respectively, to be of such poor quality as to be valued at a mere ₹ 9,28,900 instead of value of ₹ 2,94,33,520, and supported by ARE-1 with value of ₹ 2,66,54,400 purporting to be production of M/s Sri Shyam Overseas, in support of claim for ‘authorization’ exempting duties of customs to the extent of ₹ 41,21,000 under the ‘duty entitlement pass book (DEPB)’ scheme in the Foreign Trade Policy

[1] [order-in-original no. 43/2011 dated 30th April 2011]

(FTP) on future imports. Additionally, only 21,600 pieces of ‘t shirts’ and 33,300 pieces of ‘ladies dresses’ were found in the two containers.

2. The adjudicating authority has held that

> *‘3.5 From the facts as unfolded during the investigations conducted by the DRI, it is seen that M/s. MJM Corporation which was into the business of export and import of steel items ventured into the impugned fraudulent export of ready-made garments with a view to claim and earn undue export incentives under the export promotion schemes, as per the suggestions of Shri. Pravin Joshi, representative of the CHA M/s. Virat Industries. Shri. Pravin Joshi had advised Shri Rajiv Mehta, Proprietor of M/s MJM Corporation that the business of such fraudulent export of ready-made garments would fetch him a profit of Rs. 5 lakhs per container exported. Shri. Rajiv Mehta was also convinced of the fact that Shri. Pravin Joshi could get the export documents and cargo of such fraudulent exports cleared through customs even if they are overvalued, mis-declared, et al. Shri. Rajiv Mehta, accordingly, made preparations which included, amongst other things, finding an overseas buyer, procuring cheap quality goods and obtaining ARE-Is from some manufacturers. Thus he contacted Shri. Hasan A!i alias Alibhai in Dubai and got assurance that once the goods reached Dubai, he would dear the same and remit the,cost of the consignment. It was also decided that Shri. Rajiv Mehta would return Alibhai the excess amount remitted for the overvalued goods and in addition, would pay @ Rs. 1.50 per $ of excess remittances made by Shri. Alibhai. Shri Rajiv Mehta contacted one Shri Shyam Bhai of M/s. Shyam Overseas, Surat through a broker Shri. Jagdev of Kalamboli container yard and procured four ARE-Is towards manufacture and export of 43,200 pieces of men's T-shirts and another four ARE-Is*

*towards manufacture and export of 43,200 pieces of ladies Dresses. In the bargain for procuring these ARE-Is Shri. Rajiv Mehta was also to receive an amount of Rs. 4.69 lakhs from Shri. Shyam Bhai out of the rebate of the central excise duty payable to the manufacturer of the exported goods. Investigations had later revealed that four of these ARE-Is issued towards manufacture and export of 43,200 pieces of ladies Dresses were counterfeit Though the ARE-Is were obtained from Shri. Shyam Bhai of M/s. Shyam Overseas, goods were not purchased from them. On the contrary, the goods i.e. 21,600 pcs. of low quality men's T-shirts were procured locally from Shri. Jagdev for Rs. 5.80 lakhs and 33,300 pieces of cheap quality un-usable ladies tops (rags/chindi) from Shri, Aslam of Kurla for Rs. 1,50,000/-. Further, an amount of Rs. 11 lakhs along with the documents such as invoice, ARE-Is, etc. prepared by Shri. Rajiv Mehta, were handed over to Shri. Nitin Pherwani, who along with Shri. Pankaj Rawal handed them over to Shri. Pravin Joshi for clearing the consignment through customs. Thus it is clear that Shri. Rajiv Mehta, in order to earn huge profit by deceiving the Government exchequer, knowingly attempted fraudulent export to Dubai, with the help of Shri. Pravin Joshi, Representative and Shri. Vikas Doshi, Proprietor, CHA M/s. Virat Industries.*

*3.6 In the present case, following facts also prove that the FOB values declared in the shipping bills were not correct.*

*i) Purchase of garment at much lower value.*

*ii) Arrangement of receiving higher amount of foreign exchange from overseas buyer and return of differential amount on payment of Rs.1.50 per dollar (para 1.20 of this order).*

*iii) Submission of forged ARE-Is (para 1.14 and 1.15 of this order)*

*Based upon all these evidence, it is proved that the value declared by exporter is not the correct value. Hence, the same is required to be rejected based on the report of AEPC, market enquiry and purchase price as accepted by the exporter (para 1.38.3 of this order). As such I hold that the value of the impugned goods as re-determined at Rs. 9,28,900/- after taking into account the actual purchase price of the impugned goods as disclosed by the exporter himself and the selling price of such or like goods in the market and also by adjusting it upwards by 25% considering the normal profit margins and other incidental expenditure to be the assessable value of the impugned goods under the provisions of section 14(1) of the Customs Act, 1962 and reject the FOB value declared in the impugned shipping bills.'*

to conclude that

*'3.9 Coming to the role played by each of the noticees I find that Shri. Rajiv Mehta, Proprietor of M/s MJM Corporation with the active guidance, help and support of S/Shri. Pravin Joshi and Vikas Doshi, indulged in the impugned fraudulent export with a claim of undue benefit to the tune of Rs. 41.21 lakhs from the Government under the export promotion schemes. S/Shri. Pravin Joshi and Vikas Doshi, as per their own admissions, were to earn Re. 1/- per piece of the items being exported. They had knowingly and actively abetted the fraudulent export and had also to get their share of profit out of this, The case laws relied upon by the noticees in their defence are not applicable in the*

*instant case as those relate to mistakes while carrying out bonafide business transactions.*

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3.13 *Shri. Rajiv Mehta, Proprietor of M/s MJM Corporation, Mumbai had categorically admitted that Shyam Bhai would issue only the ARE-Is in the name of M/s MJM Corporation, Mumbai, against which, the fraudulent exports of locally procured goods, would be carried out by him, and against such export documents, Mr. Shyam Bhai would claim rebate of Rs. 26,65,440/- on the Central Excise Duty from the Jurisdictional Central Excise Authorities, out of hat his commission would be Rs. 4.69 lakhs as calculated below*

1) *ARE-I for T-shirts @ Rs. 322 per piece @ 2 % = Rs. 6.44 x 43,200 = Rs. 2,78,208/-.*

2) *ARE-I for Ladies Dress @ Rs. 295 per piece @ 1.5% = Rs. 4.42 x 43,200 - Rs. 1,90,944/-*

*Total = Rs. 4,69,152/-*

*Further the investigation report of DRI, Surat revealed that M/s. Sri Shyam Overseas, who had obtained the third and fourth copies of the ARE-Is from Central Excise office at Surat, and had claimed rebate of Rs. 26.65 lakhs against 8 ARE - 1 (4 for Mens T shirt and 4 for ladies dress). The third and fourth copies of the ARE-Is of Men's T shirt tallied with the original andduplicate copies of the ARE-Is resumed from the exporter. The other four AREls pertaining to ladies dress were found to issue in the name of other exporters i.e. M/s. Daffodils Exports and M/s. Khazana Overseas and not M/s. MJM Corporation, Mumbai,* *The above facts clearly prove that Shri Rajiv Mehta had attempted to export the impugned goods against fictitious and forged AREls and Shri Shyam bhai of M/s.Sri Shyam Overseas, Surat, had not only indulged in issuing fake ARE-Is to facilitate the fraudulent export of spurious goods by M/s. MJM Corporation, Mumbai without actually supplying any goods, but also had attempted to claim a huge amount of Rs. 26.65 lakhs as Central Excise Duty rebate accruing on the supporting Central Excise invoices which were proved fictitious and forged. So I find that M/s. Shyam Overseas; Surat had played an important role and had abated in this alleged export, hence the acts of commission and omission are liable for penalization. Therefore, I order toimpose penalty on M/s Shyam Overseas, Surat under Section 114 of the Customs Act, 1962.'*

3. Thus, the confiscation of the goods under section 113(d) and 113 (i) of Customs Act, 1962 for incorrect declaration of quantity, for not conforming to the value declared and covered by documents only purporting licit clearance from factory of manufacture was found to suffice for section 114 of Customs Act, 1962 to be invoked against the appellant.

4. Learned Counsel for appellant drew our attention to

*'1.37.1 that Shri. Rajiv Mehta, the sole proprietor of M/s. MJM Corporation was the key person behind the impugned attempt of fraudulent export by mis-declaration and gross overvaluation of cheap quality T-shirts and rags/chindis with an intention to avail undue*

*export benefits and to defraud the Government exchequer to the tune of Rs. 41.21lakhs; that he, on the advice of Shri. Pravin Joshi, arranged ARE-Is from M/s. Sri Shyam Overseas, Surat to misguide the customs officer into believing that the goods were supported by genuine ARE-Is; that however, in reality he had procured the cheap quality goods locally; that he, with the help of a broker named Shri. Jagdev, had purchased 33,500 pieces of rags/chindis from Shri. Aslam of Kurla for Rs. 1.5 lakhs and he had also purchased 21,600 pieces of very cheap quality T-shirts from a godown at Kalamboli for Rs. 5.80 lakhs; that he himself supervised the packing of these goods at Kalamboli and Vinay container yard and arranged for the transport of the said cargo to CWC, Dronagiri through a local transporter, for onward export; that he financed the entire procurement, transportation and customs clearance of the impugned export goods; that he paid a huge amount of Rs. 11 lakhs to Mr. Pravin Joshi for carrying out the clearance work of such low quality goods by mis-declaring them and had thus plotted to defraud the Government exchequer to the tune of Rs. 41.21 lakhs; that he, during his visit to Dubai in the month of September, 2003, had developed contacts with one Alibhai and it was the same Alibhai, who was supposed to receive the delivery of the impugned export goods at Dubai and sent the remittances to M/s. MJM Corporation in India;'*

and pointed out that

*'2.2.1 that in para 24 of the show cause notice it had been stated that representative samples of each item were sent to Apparel Export Promotion Counsel (AEPC),*

*Mumbai who in their report dated 25.02.2004 arrived at the ascertained value of T-shirts @ Rs. 35/- to Rs. 45/- per piece; that it was not known as to when and under what reference number the representative samples were sent to AEPC, Mumbai; that in para 25 of the show cause notice, samples of T-shirts were got evaluated from M/s. Gayatri Textiles, Bhiwandi, Dist. Thane, who in their report dated 25.02.2004 had valued it at Rs. 23.50 per piece; that as per para 26 of the show cause notice, samples of Ladies Dress were got evaluated from M/s. Badrinath Fabrics, Bhiwandi, Dist. Thane who had held the samples to be not fit for use as ladies dresses having no commercial value; that all these market enquiries had been undertaken behind the back of the noticee who, at no stage, was associated with such market enquiries conducted as per para 24, 25 and 26 of the show cause notice; that the procedure adopted by the Department for such market enquiries lacks transparency and was in contravention to the principles of natural justice and hence, these enquiries were in the nature of ex-parte enquiries; that consequently, the valuation arrived on the basis of such enquiries had no legal basis and such valuations of the impugned goods were arbitrary and much more on the lower side; that copies of the findings of such market enquiries had not been furnished to the noticee which was further in violation to the principles of natural justice;*

*2.2.2 that from the perusal of the show cause notice, it was clear that the noticee was enticed by Shri. Pravin Joshi, Noticee No. 3, into the export of readymade garments; that the noticee was engaged in the export of stainless steel utensils etc. and he was a novice as far as export* *of RMG is concerned; that in para 36 (ii)(b) of the notice, it had been clearly stated that Shri Pravin Joshi was the brain behind the alleged fraudulent export; that the noticee in the interest of natural justice, may be allowed to cross-examine Shri. Pravin Joshi to prove that the noticee was an innocent victim lured by Shri. Pravin Joshi who was a kingpin in the alleged fraudulent, export;*

*2.2.3 that they referred to the judgment in the case of Akshay Exports & Inds. vs. C.C., Mumbai- 2003 (156) E.L.T. 268 (Tri.- Kolkata) wherein it had been held that the onus to prove a charge of over-valuation was on the Department by bringing on record the material evidence; that in this case, no material evidence had been tendered by the department to prove over-valuation of the impugned goods, so the burden of proof casted upon the department had not been discharged; that in terms of section 14 of the Customs Act, 1962 the department's case was not based upon any evidence of contemporaneous exports of other independent exporters of identical goods; that in view of the aforesaid submissions and the case law cited above, the valuations arrived at in paras 24, 25 and 26 of the show cause notice were arbitrary and value had been deliberately kept on lower side, the cross-examination of the persons referred to in the aforesaid paras 24, 25 and 26 associated with giving opinion as to valuation of the impugned goods may be allowed, in the interest of natural justice; that by such cross-examination, the noticee would be able to prove that the valuations arrived at by the aforesaid persons were unrealistic and not based on any licit documentary evidence;*

*2.2.4 that the statements of the noticee under section 108 of the Customs Act, 1962 had been recorded umpteen number of times starting from 14.01.2004; that the noticee had retracted his statements recorded on 15.01,2004, 19.01.2004 and 21.01.2004 vide his sworn affidavits dated 16.01.2004,19.01.2004 and 21.01.2004 before the Additional CMM, Esplanade Court, Mumbai; that in view of the aforesaid retractions, the statements of the noticee recorded under section 108 of the Customs Act, 1962 ceased to have any evidential value and being involuntary, could not be relied upon by the Department as evidence; that the noticee relied upon case law of Kalicharan Basantlal vs. CCE - 1989 (41) E.L.T. 162 (T) wherein it had been held that it is trite law that whenever a confessional statement is retracted, it is the duty of the authority deciding the case to take into consideration the said retraction and the truthfulness of the confessional statement; that the noticee also relied upon the Apex Court Judgment in the case of K.I. Pavunny vs. AC Cen. Excise, Cochin -1997 (90) E.LT. 241 (S.C.) wherein in para 10 it had been held that confessional statement of accused, if found to be voluntary, can form the sole basis for conviction. If retracted, Court is required to examine whether it was obtained by threat, duress or promise and whether the confession is truthful; that in view of the retractions cited above, and in view of the legal position enumerated in the foregoing paras, the statements of the notice recorded under section 108 of the Customs Act, 1962, ceased to be voluntary and hence could not be relied upon as evidence;'*

had not been addressed in the impugned order.

5. He further contended that, in the light of

*'3.11 Allegation against Shri. Suhas Prabhu, Examining Officer, is that he had cleared the impugned goods without carrying out proper examination as per the examination orders given in the EDI system and thus aided and abetted the fraudulent intentions of other noticees. I find that, though strictly speaking, the officers were supposed to login and see for themselves the examination orders in the EDI system in the case of each and every shipping bill and act accordingly, due to the excessive amount of work thrust upon them a practice of examination of goods on the basis of the examination orders manually recorded by the "Goods Registration Officer", who was also an equivalent rank officer, on the annexure "C" was in vogue. In the present case, these annexure "C" could not be produced by investigating officer, hence contention of the officer that he had carried out the examination in the case of seven shipping bills diligently as per the examination instructions recorded on the annexure "C" cannot be refuted or dismissed as incorrect. Hence, charges of ignoring the examination order is not proved conclusively. It is also relevant that in the case of the goods covered under the 8th shipping bill the marks and numbers found while examining the goods were not found on the goods seized by the DRI later. (para 2.9.1 of order refers) Therefore, the_p!ea of officer that goods have been substituted needs to be given due weightage. The fact that the officers, at the material time, were working out of another shed due to a fire accident in that particular shed and that there was considerable delay of 4 days in stuffing of the goods examined, substitution of the goods after the examination cannot be ruled out. It is also pertinent to note that there is no allegation of any illegal gratification on Shri. Suhas Prabhu. In these circumstances, I have no doubt in*

> *extending the benefit of doubt to absolve him from the charges leveled against him.'*

which the adjudicating authority concluded would discharge the appellant too from charge of committing an act or omitting to commit act that rendered the goods liable to confiscation.

6. Learned Authorized Representative narrated the backdrop for enunciation of the case against the appellant and drew attention to the blatant misdeclaration of quantity and value besides the elaborate subterfuge of resorting to prepared documentation as proof of procurement which enabled misuse of rebate and export promotion incentives. He also submitted that the appellant had testified to payments for the coverup and to arrangements at destination. He argued, with reference to decisions, that retraction was not relevant to testimony in statements and that cross-examination was not mandatory.

7. It is on record that cross-examination, of another noticee and a person whose valuation was the core of the notice, sought by appellant had been denied. It is not proper for a noticee in proceedings invoking the same penalty provisions to be cross-examined by another as the objective of adjudicatory proceedings is not determination of preference among noticees but evaluation of the role of noticees as having contributed to confiscation of goods. The case law cited by Learned Authorized Representative were judgements in which specific

factors weighed for disallowance of similar pleas for non-admissibility thereof implying that the manner in which section 138B of Customs Act, 1962 is complied with must rest on facts and circumstances of each case; further, none of the cited decisions pertain to cross-examination for ascertainment of credibility of persons purporting to have carried out survey of market value. Normally, that would have sufficed for remand of the matter back to adjudicating authority for fresh determination after such compliance. It is now over two decades since the impugned occurrence and over a decade since the adjudication process was completed. The plausibility of establishing relevancy of facts appears to be only a wing and a prayer. Hence, we proceed to the other submission made on behalf of the appellant.

8. The adjudicating authority found it fit to conclude that the customs official, assigned with the task of completing the regulatory mandate of section 51 of Customs Act, 1962, was not derelict in his duties even though the goods had not been proceeded against by him at that stage and it is the claim of Learned Counsel that sauce for the goose is sauce for the gander. That the goods as found during investigation, and not being in accord with declaration under section 50 of Customs Act, 1962, were liable for confiscation is not the controversy in this appeal against penalty imposed under the authority of section 114 of Customs Act, 1962. The receipt of benefit of rebate of duties of central excise and export promotion incentive under schemes in the Foreign Trade Policy (FTP), even if

ineligible or attempted to be obtained without entitlement, does not bring down the force of section 113 of Customs Act, 1962. The known contents of the container, and with no case of those being violative of any prohibition or restriction, does not suffice for confiscation except in conjunction with the declaration made. The contents, therefore, entered the orbit of section 113 of Customs Act, 1962 only after shipping bills were filed for export and, thereby, scope for contribution to that consequence - by committing, or omitting to commit, an act - would arise from entry and to subsist only till the containers had passed out of effective custody and control of the owner and agent.

9. The impugned order has held that the goods having remained, albeit in the containers, in a designated area of the port of export after examination by the officer-noticee, and, though the adjudicating authority shied away from saying so, after the cessation of control over the goods by the appellant, possibility of substitution could not be foreclosed with much the same benefit flowing from shipment of goods of unknown provenance and diminished value as before; that, in any case, is different violation and allegation not incorporated in the show cause notice. The confiscability of the goods is not in dispute here; the appellant is in dispute over the penalty imposed on him, and as proprietor of the exporting entity, from consequence of the confiscation. The confiscation has been ordered on the ground of goods being prohibited and of not conforming to ‘material’ particulars

declared for exportation. It is on record that goods were examined and allowed to be transferred to 'sterile area' from where they would be loaded on the carrier. With the officer-noticee having been discharged from the allegation of not having conformed to the statutory mandate in section 51 of the Customs Act, 1962, the conformity of the contents of the container, at that point in time, with the declaration is beyond controversy. No evidence has been brought on record that the goods were not substituted after examination which would have been manifested by appeal of Revenue against the dropping of charges against officer-noticee. It would appear that such possibility had not been conjectured and not investigated by the agencies of Revenue and, in the circumstances, is not amenable for refutation of the claim of appellant seeking the benefit from that finding.

10. The show cause notice contains narration of role of appellant in procuring the goods, as found, and of his role in procuring documentation for non-existent goods as well as the 'greasing' of the system to leach the exchequer. These are derived from statements which were not subjected to the rigour of section 138B of Customs Act, 1962. Those may not, therefore, be appropriate grounds for connecting the appellant with misdeclaration or entering goods for export without declaration. The plausibility of goods having conformed to declaration, though found otherwise subsequently, at the time of completion of statutory obligation devolving on the appellant is no longer fiction and,

in the absence of refuting thereto with facts, must serve the exporter too.

11. Consequently, we set aside the impugned order and allow the appeal.

*(Order pronounced in the open court on 14/03/2024)*

**(AJAY SHARMA)**
***Member (Judicial)***

**(C J MATHEW)**
***Member (Technical)***

***/as**