CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.2

CUSTOMS APPLICATION (MSIC) NO. 85577 OF 2023
IN
CUSTOMS APPEAL NO: 1142 OF 2008

[Arising out of Order-in-Original No: 98/2008/CAC/CC/KS dated 30th April 2008 passed by the Commissioner of Customs (Adjudication), Mumbai.]

Ashwani Aggarwal
A-1/330 Paschim Vihar, New Delhi 110063 … ***Appellant***

versus

Commissioner of Customs (Adjudication)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Sunil Kumar Jha and Shri Deepak Gandhi, Advocates for the appellant

Shri S K Hatangadi, 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: 85433/2024

DATE OF HEARING: 26/10/2023
DATE OF DECISION: 24/04/2024

PER: C J MATHEW

The present challenge, in this appeal of M/s Ashwani Aggarwal, is to the imposition of penalty of ₹ 75,00,000 under section 112 of

Customs Act, 1962 in order[1] of Commissioner of Customs, Mumbai which is alleged to be entirely out of jurisdictional ambit of the said empowerment. In imposing penalty on a number of persons, the order is primarily about confiscation of imported goods under section 111 of Customs Act, 1962 which has enabled invoking of the consequent penal detriment in section 112 of Customs Act, 1962 and this is where the nub lies. Therefore, though the confiscation itself is beyond controversy, if only for reason of lack of challenge thereto in this appeal, the factual matrix is deserving of some attention, even cursory, owing to the statutory design of cause and effect. That the impugned order, presumably, appears to have blurred the boundaries of the two alternative, and mutually exclusive, limbs in the causal portion of the penal provision is further reason for harking back to the circumstantial compulsions that prompted resort to section 111(d) and section 111(f) of Customs Act, 1962.

2. The case of the customs authorities is that the impugned goods, landed in ‘customs area’ between 2nd April 1999 and 15th April 1999, were suspected as likely to have ‘markings’ thereon tampered with or even substituted and, therefore, seized, on 16th April 1999 and 22nd April 1999, after detailed examination had established variance with the corresponding declaration in ‘import manifest’ filed under section

[1] [order-in-original no. 98/2008/CAC/CC/KS dated 30th April 2008]

30 of Customs Act, 1962 relating to four bills of lading for goods consigned to M/s Eastern Designers and two consigned to M/s Dharam Exim; two other suspected consignments intended for M/s JN Exports, duly entered for home consumption *vide* bills of entry no. 5095/13.04.1999 and no. 5105/13.04.1999 under section 46 of Customs Act, 1962, were found to be in order. Notwithstanding that these two consignments were *bona fide,* the 'customs house agent' (as they were then designated), M/s P Cawasji & Co, was found to have handled earlier imports of this importer as also that of M/s Dharam Exim, one of the other two consignees *supra* and, thus, the starting part of investigation which culminated in impugned order.

3. The limelight, now shifted from the impugned goods to the 'custom house agent', enabled investigation to pinpoint two purported 'employees' of theirs, one Sanjay Arora and one Mukesh Saxena, as handlers of transactions of M/s JN Exports, along with that of M/s Dharam Exim, as 'freelancers' operating under the umbrella of M/s P Cawasji & Co but in absence of the former without trace and nothing but details of clearances obtained from the latter who, by his own admission, had no contact with the 'clients', the trail appeared to have gone cold. M/s JN Exports was also unable to assist in identifying the 'clients' even though they, too, had been grouped with others of whom only M/s Eastern Designers was admitted to be linked though not in connection with any import as they had been involved only in one

consignment from Taiwan at Calcutta transacted in 1994. M/s JN Exports further disclaimed any connection with the imports purportedly effected by them which, to the investigation, exposed contours of a conspiracy, using fronts and non-existent entities for import, and elaborate subterfuge to conceal the misdeclaration from customs officials whose suspicions may, otherwise, have been aroused had the 'real importer' came forward to clear the goods. M/s Chawla Highway Carriers, the lorry operator, was brought within the ambit of investigation from statement of the said Saxena, and reflected in statement of Shri Rashmikant Mehta, identifying them as transporter of goods cleared in the past.

4. The significance of the primary role of the said Saxena, along with that of the said Arora, was brought out in statement of Shri Rashmikant Mehta who, while elaborating on the compartmentalization of operations in their organization, also informed the investigators that

> *'4. ………… he is working as Manager with M/s. P. Cawasji and C. that he operates from an office at 303, Gokul Building Broda Street, Masjid East; that Sanjay Arora and Mukesh Saxena were shown as employees in M/s. P Cawasji & Co. on his recommendation; that both these persons were operating from his office, that they have furnished him few details about the clearances handled by them which were entered in his computer. He submitted the details after retrieving the same from his computer and stated that he does not know any of the parties figuring in these details. He further stated interalia that Sanjay Arora and Mukesh Saxena were*

receiving Import invoices, Packing lists, Bills of lading etc. on fax, some where in fountain area at a Public Communication Center, that they are getting the Bills of Entry typed outside; that they used to obtain the signature of Smt Dolly Khambatia on the Bills of Entry, that Sanjay Arora had been Customs pass as well as Dock pass and that Shri Mukesh Saxena had Dock pass; that the applications recommending issue of passes to them were singed by Smt Dolly Kambata on his recommendation that the consignments after clearance were sent to Delhi by these two persons through M/s. Chawla Transport company, sherrif Devji Street, Masjid Bundar, Mumbai 400 003; that Sanjay Arora had cleared all the papers pertaining to the import clearances of Delhi based firms from his office, that no documents have been left by Sanjay Arora; that sanjay Arora had come to know that some consignments will be examined by the DRI officers; that to the best of his knowledge both Sanjay Arora and Mukesh Saxena have gone underground Shri Rashmikant Mehta furnished the addresses, residence telephone and mobile cell phone numbers of Sanjay Arora and Mukesh Saxena. From the details furnished by Shri Rashmikant Mehta, it appeared that large number of consignments in the name of M/s. J. N. Export International M/s. Akansha Overseas, M/s. Vikas Fasteners, M/s. Intertrade Incorporation, M/s. Princeton Technologies and M/s. Dharam Exim, (all Delhi based) have been cleared in the past from Mumbai port.'

which, in a manner, was not only confirmed but also further advanced by the said Saxena in his statement to the effect that

'8(ii) ………. that on seeing the DRI Officers, he tried to escape, and created a scene with the help of his neighbours and friends; that the summons pasted on his residence door

under panchanama dated 22.6.99 was seen by him but he did not respond to the said summons; that his residence telephone number is 6141768 and his mobile telephone number is 98201 53161; that he joined M/s. N.G. Joshi CHA as a Dock - Customs Clerk, that Rashmikant Mehta was also working with him at M/s. N.G. Joshi, that he knows Rashmikant Mehta for the last five years; that he worked with M/s. N.G. Joshi for 3 years and then with M/s. International Express company; that, thereafter, he started his own company by name M/s. Balaji International Agencies; that Sanjay Arora was also working with him at M/s. N.G. Joshi and M/s. International Express company; that he and Sanjay Arora left the job from M/s. International Express Company, and decided to do business together; that they approached Rashmikant Mehta with a request to introduce them to a CHA whose licence could be used for Customs Clearance; that Rashmikant Mehta introduced them to M/s. Dolly Kambatta of M/s. P. Cawasji and Co. CHA; that on the recommendation of Rashmikant Mehta, they were shown; as employees of M/s, P. Cawasji & Co., however they were mainly attending to the Customs clearance of their own parties; that he had a Dock pass and Sanjay Arora had a Customs pass as well as a Dock pass; that ha and Sanjay Arora were handling the import clearance of M/s. J.K. Chemicals Ltd. Mumbai and M/s. Akanksha Overseas, M/s. Vikas Fasteners, M/s. Inter Trade/ Incorporation, M/s. Princeton Technologies, M/s. Dharam Exim and M/s. J.N. Export International all of Delhi; that in the middle of April '99, four consignments were imported in the name of M/s. Eastern Designer, New Delhi and two consignments were imported in the name of M/s Dharam Exim, New Delhi; that in all these consignments, the goods were declared as 'Garment accessories' and the shipments were from Singapore to Mumbai; that each of these consignments consisted of more than one package, that the importer had *informed him and Sanjay Arora that only one package each from the said six consignments contained Garment accessories/Shoulder pads, and that the balance packages contained Computer parts and Watch movements; that during the same period two consignments were imported in the name of M/s. J.N. Exports, New Delhi which were declared as containing 'Shoulder pads'. That M/s. P. Cawasji & Co. had filed Bill of Entry for clearance of the said goods imported in the name of M/s. J.N. Exports; that their intention was to clear the consignment imported in the name of M/s. J.NM. Export and thereafter file Bills of Entry for clearance of goods imported in the name of M/s. Eastern Designer and M/s. Dharam Exim by declaring the goods as 'Garment accessories'; that each of the packages containing garment accessories in the six consignments were meant for presenting before the Customs officer for examination; that before the consignments of M/s. J.M. Exports could be cleared, he learned that the DRI Officers were looking out for the shipments imported in the name of M/s. J.N. Export, M/s Eastern Designers and M/s. Dharam Exim; that he informed Sanjay Arora accordingly; that they went to their office located at 303, Gokul Bldg., Baroda Steel Iron market, Masjid Bunder (E), Mumbai on 15.4.99 and removed all documents relating to the imports in the name of the above companies; that thereafter both of them went out of Mumbai to avoid the DRI Officers. Shri Mukesh Saxena further stated, interalia, that he does not want to disclose the details of the Importers i.e. M/s. J.N. Exports International, M/s. Eastern Designer and M/s. Dharam Exim and the persons who imported the said consignments; that Sanjay Arora was staying at Flat No. 701, 'B' Wing, 2nd Cross Lane, Accord Bldg., Lokhandwala complex, Andheri (W), Mumbai; that his Telephone no. is 6368379 and Mobile no. 9821025803; that at present Sanjay Arora is in New Delhi and his contact no. is 5116240; that all*

> *the consignments imported and cleared in the name of the parties of New Delhi were sent to New Delhi through M/s. Chawla Transport, Chakala Street, Masjid Bunder, Mumbai; that he is holding a Current Account no. 846 in Punjab & Maharashtra Co-op. Bank, Masjid Bunder, Mumbai; that Sanjay Arora holds a Saving A/c No. 2121 in the same bank. Shri Mukesh Saxena identified Sanjay Arora from a photograph. Shri Mukesh Saxena was also identified by Shri Rashmikant Mehta and Smt. Dolly Khambatta during the aforesaid statement.'*

as narrated in the impugned order and thus hyphenating the said Arora with the putative 'kingpins' of fraudulent imports. Shri Mehta was also persuaded to furnish details of clients actually transacting through the duo, even though ostensibly handled by his 'custom house agency, which enabled investigators to identify the financial institution used for licit payments and, thereby, the proprietorship owned by one Sanjay Kumar, who was finally deduced to be the same Sanjay Arora, as the source of payments as well as the telephone line associated with the bank account being that of the appellant herein and occupant of premises at which other importers, handled by the duo through the 'custom house agency', operated.

5. However, this chain of evidence remained in a *cul de sac* with no trace of any of the links who had been summoned to join the investigations necessitating extension of deadline, under section 110 of Customs Act, 1962 for issue of show cause notice, to 14th April 2000 on two occasions. Two developments of significance, *viz.*, seizure of

three consignments – two in which bills of entry had been filed and one yet to be – on 2nd November 1999 despite absence of any discrepancy of contents with declaration and the communication of 29th April 1999 from the freight forwarder in Singapore, seeking for return of the consignments claimed to have been dispatched in error, which was countered with request of 22nd March 2000 from the investigation seeking details of Indian person/entity with whom negotiations for despatch of goods was undertaken in the past, marked the investigations.

6. Thereafter, while noting that

> *'23(iii) In view of the non-availability of the persons summoned in the case, especially S/Shri Sanjay Arora, Ashwini Aggarwal, and Ravinder Pal Kapoor, it was not possible to determine the liability of the persons vis-a-vis the goods under seizure and the goods in the consignments cleared earlier. Hence, proceedings in the show cause notice were restricted to liability of goods under seizure to confiscation under the provisions of Section 111 of the Customs Act, 1962, Determination of the liability of the persons in relation to the said goods under seizure and the other consignments cleared as aforesaid under the "provisions of Section 112 of the Customs Act, 1962 has not been proposed in the show cause notice as investigations were continuing. An addendum to the show cause notice upon completion of investigations, may be issued, if found necessary disclosing all the evidence collected in the case, relevant for determination of the liability of the persons under Section 112 ibid.'*

proceedings were commenced by show cause notice dated 31st March

2000

7. We have heard Learned Counsel for the appellant and Learned Authorized Representative at length. Before evaluating the legality of imposition of penalty, it would be appropriate to recollect the empowerment thus

> *Section 112. Penalty for improper importation of goods, etc.-*
>
> *Any person, -*
>
> *(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
>
> *(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
>
> *shall be liable, -………'*

in Customs Act, 1962 and, as arising from the pre-requisite of

> *'Section 111. Confiscation of improperly imported goods, etc. –*
>
> *The following goods brought from a place outside India shall be liable to confiscation: -*
>
> *xxxxx*
>
> *(d) any goods which are imported or attempted to be*

> *imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;*
>
> *xxxxxx*
>
> *(f) any dutiable or prohibited goods required to be mentioned under the regulations in an arrival manifest or import manifest or import report which are not so mentioned;'*

in Customs Act, 1962 which is the limited framework within which the merit, if any, or otherwise in invoking of the penal provision lies.

8. Doubtlessly, the impugned consignments, yet to be set in motion for clearance for home consumption, were already ascertained and with no controverting thereof, as comprising goods not covered by bills of lading rendering those liable to confiscation under section 111 of Customs Act, 1962. The confiscation was founded upon the impugned goods having been imported contrary to any prohibition as well as for non-inclusion in the import manifest. The confiscability of the impugned goods were not challenged and, indeed, in absence of importer on record and with discarding of the plea of the shipping agent for restoration of possession, could not have been. Nor is there any challenge, initiated at the instance of review authority, to any error in resort to breaches that merited confiscation, to any deficiency in the impugned order or against failure to specify one of the two, and

mutually exclusive, limbs of section 112 of Customs Act, 1962 either. Therefore, the evaluation of sustainability of the impugned penalty must, necessarily, be either with reference to alleged acts of omission or commission by the appellant that rendered the impugned goods liable to confiscation or with reference to possession/handling of goods that were known, or believed, to be liable to confiscation.

9. The goods were consigned to importers in India who, it appears from the investigation, were connected in some way in the past to the appellant. All the statements that were relied upon in the impugned order do suggest that the appellant may have acquired possession of or dealt in the goods that had been cleared in the past by the very same importers. However, there is no finding that the goods imported in the past were liable to confiscation under section 111 of Customs Act, 1962. Consequently, and the established connection notwithstanding, section 112 of Customs Act, 1962 could not have been invoked for imposition of penalty on appellant in relation to imports of the past.

10. As far as current imports are concerned, there is no finding that the appellant had been responsible for acts of omission and commission owing to which the goods were rendered liable for confiscation under section 111(d) of Customs Act, 1962. That there was prohibition on import of the impugned goods into India is an unchallenged finding and, therefore, triggering liability for confiscation upon entry into the

territory owing to which it would have to be established that despatch of these to India had been organized by the appellant for validating consequential recourse to section 112 of Customs Act, 1962. We do not perceive any finding on that score in the impugned order. Confiscation under section 111(f) of Customs Act, 1962 stems from non-declaration in the arrival report or import manifest stipulated in section 30 of Customs Act, 1962. That responsibility vests in the 'person-in-charge' of conveyance which the appellant is not. Consequently, there is absence of finding on act of omission or commission by the appellant in relation to entries in the import manifest. Clearly, section 112(a) of Customs Act, 1962 does not lie against the appellant in the facts and circumstances in which the impugned goods came to be confiscated.

11. The question of acquiring possession or handling of goods known, or believed, to be liable to confiscation for the two breaches as held in the impugned order would, necessarily, arise after the liability crystallised upon being brought into India and upon non-inclusion in the import manifest. It is on record that the goods remained under 'customs control' till after completion of the adjudication process. The appellant did not have access to the goods during, or after, arrival in India and, therefore, could not have been alleged to have been concerned with the handling of the impugned goods. This is evident from the absence of

'(26)….. any owner or any person holding himself out to be

importer;'

as set out in the definition of 'importer' in section 2 of Customs Act, 1962 as then extant. The goods are, as yet,

> *'(25)….. any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;'*

and, thus, 'imported goods' within the meaning of section 2 of Customs Act, 1962 and, thereby, unavailable to importer or anyone else, including appellant, to afford jurisdiction for invoking section 112(b) of Customs Act, 1962.

12. For the above reasons, we set aside the impugned order and allow the appeal. Miscellaneous application also stands disposed off.

(Order pronounced in the open court on 24/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*