(2023) 04 CESTAT CK 0028

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No.75626 Of 2021

Ajay Sarawagi APPELLANT

Vs

Commissioner Of Customs (Preventive), Shillong RESPONDENT

Date of Decision : 17-04-2023

Acts Referred:

Central Excise Rules, 2002 — Rule 26
Central Excise Rules, 1944 — Rule 209A, 28(8), 28AA
Customs Act, 1962 — Section 11AC(1)(a), 11AC(1)(d), 77, 108, 111, 111(b), 111(d), 111(j), 112, 112(a), 112(b), 112(b)(ii), 114A

Citation : (2023) 04 CESTAT CK 0028

Hon'ble Judges : P.K.Choudhary, Member(J)

Bench : Single Bench

Advocate : Pranab Sikdar, S.Chakraborty

Final Decision : Allowed

Judgement

P.K.Choudhary, Member(J)

1. The present Appeal has been filed against the Order-in-Original dated 05.03.2021, whereby the Commissioner of Customs (Preventive), North Eastern Region, Shillong has imposed a penalty of Rs.50.00 Lakhs under Section 112(b)(ii) of the Customs Act, 1962 in relation to his role in the alleged smuggling of miscellaneous contraband goods.

2. The facts of the case in brief are that a container vehicle bearing Registration No.NL01AC 1931 while crossing Kanchipur area was intercepted on 12.08.2009 at about 16.30 hrs. The Customs officers opened the container of the truck and detected some HDPE bags and some cartons loaded inside. On preliminary checking of the HDPE bags and cartons it was found to contain cigarettes, cosmetics, shoes, mobile batteries and wrist watches. The driver of the vehicle Shri Raju Hak stated that goods were loaded by one Shri Amarjit Sahu of Imphal. Shri Amarjit Sahoo was brought to the Customs Divisional office in Imphal and in his presence the Customs officers opened the boxes and HDPE bags, examined

the goods and counted the contents. Shri Amarjit Sahoo in his statement submitted as under:-

(i) The contraband goods belong to Shri Ajay Sarawagi, Son of Shri Hanuman Prasad, R/o Balaji Niwas, 3rd Floor, RKC Road, Near Railway Gate No.9, Bharalumukh Kamrup Metro, Assam-781009 (Appellant)

(ii) He was working on behalf of Shri Ajay Sarawagi, as a supplier as well as caretaker of contraband goods after purchasing the same from Nampholong, Myanmar.

(iii) The goods were sent by one Zuber Ali of Moreh in 4 Tata DI mini truck on 11.08.2019 and the same were received on 12.08.2019 at about 1000 hrs.

(iv) After that the goods were loaded in the Truck NL 01-AC-1931 belonging to M/s. Chitransh Express Cargo Pvt.Ltd., which was arranged by Shri Ajay Sarawagi.

(v) Shri Ajay Sarawagi gave him the mobile number of the driver of the truck and told him to contact him. He contacted the driver and told him to come to Langthabal to pick him up and will go to Yairipok to load the goods.

3. The Impugned orders show that the residential premises and shop of Shri Ajay Sarawagi was identified, but Shri Ajay Sarawagi could not be located though his residence was kept under surveillance. A Show Cause Notice was issued to the Appellant and others proposing confiscation of the seized goods under Section 111(b) & (d) and imposition of penalty under Section 112 (b)(ii) on the Appellant. Being aggrieved, the Appellant is in Appeal before this Tribunal.

4. The Ld.Counsel, appearing on behalf of the Appellant, submits that the Ld.Commissioner erred in imposing penalty upon the Appellant. It is his submission that no follow up action was conducted nor any statement of Shri Ajay Sarawagi was recorded. No summons was issued to Shri Ajay Sarawagi under Section 108 of the Customs Act, 1962. He further submits that since the Appellant Shri Ajay Sarawagi was not examined in the offence, any punitive action is violative of principles of natural justice. He also submits that no follow up action was conducted for Shri Zuber Ali, who have supplied the goods either. The Ld.Counsel further submits that the Mobile number of the supplier of goods i.e. Shri Zuber Ali and the alleged recipient of the goods i.e. Shri Ajay Sarawagi was not obtained from Shri Amarjit Sahu to corroborate the statement. No call log verification of Shri Amarjit Sahu was made to establish the veracity of his statement. No other evidence was adduced to corroborate his statement of Shri Amarjit Sahu. The Ld.Counsel further submits that the Appellant is not connected even remotely with the goods found and the question of ownership is a far-fetched thought. He has no financial capacity to trade in goods valued at Rs.4.00 Crores. It is also submitted that though the goods seized were valued at Rs.3.72 Crores, but the financial angle was not verified as to who procured such high value goods and payment was made by whom. The Ld.Counsel further submits that the Appellant has not received the Show Cause Notice or any personal

hearing notice possibly due to peak of Covid Pandemic and continuous lock-down during that period. No further service was caused by the Ld.Adjudicating authority as a result, the Appellant was unaware of the entire proceedings. Thus it is a case of serious breach of principles of natural justice as the Appellant was punished without being given an opportunity to plead his case. He relied upon various judgements in support of his arguments.

5. The Ld.Authorized Representative for the Department reiterates the findings of the impugned order giving major thrust on the statement recorded from Shri Amarjit Sahu.

6. Heard both sides and perused the Appeal records.

7. I find that the role of the Appellant in the whole episode has been derived only from the statement of Shri Amarjit Sahu and two past penalties imposed on the Appellant.

8. I find from the submissions of the Ld.Consultant that Shri Amarjit Sahu might have concealed facts. It is not believable that he did not know the address or contact of Shri Zuber Ali, who has delivered the contraband goods worth Rs.4.00 Crores approx.. Call log records could have been verified to identify the persons, who were in contact with Shri Amarjit Sahu at the time of supply/movement of the goods, which could have conclusively proved the complicity of Appellant in the case or not . Proceeding on the basis of statement of co-accused is not sufficient to hold the Appellant guilty of smuggling in absence of any search and recovery from his place. The alleged statement of the co-accused cannot be relied upon to implicate a person on charges of smuggling. Therefore, it was incumbent on the Investigating Officer, to have searched and recorded statement of the Appellant and to further prosecute him in the matter on the basis of its finding. As the department has neither shown any evidence nor explained satisfactorily as to why they have not conducted follow up action with the Appellant at the investigation stage, not even a Summon U/s 108 fo the said Act was issued. Therefore, the proceedings against Shri Ajay Sarawagi on the basis of the statements of the co-accused is not sufficient to hold him guilty of smuggling, especially when no search and recovery has been done at his place. It is a settled law that no person shall be implicated in a crime merely on the basis of an allegation leveled by a co-accused, without any corroborative evidence. I find that in the case of Ravi Garg v. Collector of Customs, New Delhi [1996 (86) E.L.T. 357 (Tribunal)], the Tribunal held that :-

"15. Mohinder Singh has not been examined by the investigating officers. The notice which was sent to his address, has been returned without service. It is stated by the department that the said notice was pasted on the door of his shop. It is stated that he had avoided the summons. Mohinder Singh has submitted that he has never avoided the summons and he was not aware of the allegations made in the show cause notice. He has stated that if he could be served with court summons then it is surprising as to how the department could not arrest him for the purpose of investigation and to record his statement. The learned Advocate also argued on this point only. We notice that the summons of the magistrate court, on the complaints of the department, has been served on the Mohinder Singh. The alleged statement of the co-accused cannot be only taken to implicate a person on charges of gold smuggling. Therefore, it was incumbent on the investigating officer, to have searched and arrested Mohinder Singh for recording his statement and to further prosecute him in the matter. As the department has not shown by any evidence nor explained to our satisfaction as to why they had not arrested him, therefore, the proceedings against Mohinder Singh on the basis of the statements of co-accused is not sufficient to hold him guilty of gold smuggling, especially when no search and recovery has been done at his place. Even there is no evidence of previous record of gold smuggling against him. The appellants Ravi Garg, Surinder Kumar Anand and Shyam Babu Verma have implicated Mohinder Singh but these statements which are self implicating in nature, should have been confronted to Mohinder Singh. It is not sufficient to say that the summons were pasted on his shop and merely because he has not come forward to give statement to explain the allegation made against him by co-accused, therefore, the case against him stands proved. The principles of natural justice require that the accused in a matter is required to be confronted with the evidence, which the department has collected against him and full opportunity should be given to an accused to defend himself. It is not the case of the department that the address of Mohinder Singh is not correct. The postal remarks on the summons sent by the DRI shows that on repeated visits the shop was found to be closed and hence, the cover containing the summons were returned to the sender. The department officers cannot take this postal endorsement as `refusal of summons' and the appellant Mohinder Singh had knowledge of the case. Therefore, the department officials not having apprehended and no further investigation having been done against him, is by itself sufficient to set aside the order of penalty against Mohinder Singh. We therefore, set aside the order of penalty passed against Mohinder Singh."

Penalty under Section 112(b) of the Customs Act, 1962.

Penalty under Section 112(b) of the Customs Act, 1962, can be imposed when a person acquires possession of or is in any way concerned in carrying, removing, depositing, harboring, 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 of the Customs Act, 1962. It is not the case of the Revenue that the Appellant has indulged in any of the activities as mentioned under Section 112(b) of the said Act. As the Appellant did not acquire possession of or in any way concerned with the seized goods, penalty under Section 112(b) of the Act ought not to have been imposed. Section 112 is extracted below for ready reference.:-

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, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

[(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]

[(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater; in the case of goods falling both under clauses (i) and (iv) (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

in the case of goods falling both under clauses (ii) and (v) (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]

Section 112(b) of the Customs Act, 1962, is identical to earlier Rule 209A of the Central excise Rules, 1944, and Rule 26 of Central Excise Rules, 2002. Relevant provisions of the said statutes are extracted below:-

Rule 209A of the Central Excise Rules, 1944:

"Rule 209A. Penalty for certain offences.

- Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

Rule 26 of the Central Excise Rules, 2002 :

RULE 26. Penalty for certain offences. —

[(1)] Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or [two thousand rupees], whichever is greater.

[Provided that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.]

[(2) Any person, who issues –

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]

9. The Hon'ble Bombay High Court in the case of Commissioner of Central Excise vs. Ramesh Kumar Rajendra Kumar & Co. [2015 (325) E.L.T. 506], while interpreting Rule 209A held as under:-

"7. Having heard learned counsel for the appellant-Revenue and Mr. Sanklecha as Amicus Curie, it is necessary to turn to Rule 209A, which reads as under :

"Rule 209A. Penalty for certain of fences. - Any person who acquires possession of, or is any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

The sine qua non for a penalty on any person under the above rule is : either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act i.e. the act which could not have been done without handling or movement of excisable goods as mentioned in the rule. The words “who acquires possession” would indicate that the person sought to be penalized under this rule has to first acquire the possession and then do the activity of transportation etc. as contained in the rule. It is, thus, clear that the physical possession of the goods is a must for doing the activity of transporting referred in Rule 209A. The ratio laid down by this Court in Jayantilal Thakkar & Co. (supra) covers the issue. In the said judgment, it is held that in the given situation, if the assess is only issuing invoices wherein there is no movement of the goods, they cannot be visited with penalty under Rule 209A.”

10. The Tribunal in the case of D. Ankneedu Chowdhry Vs. Commissioner of Customs [2004 (178) E.L.T. 578] has held that :-

“5. We have carefully considered the submissions. The short question arising for consideration is whether the penalty imposed on the appellant under Section 112(b) of the Customs Act is sustainable on facts and in law. The department’s proposal was to impose penalty under Clause (a) of Section 112. But the Commissioner chose to invoke Clause (b) to impose the impugned penalty. The appellant was never called upon to show cause why a penalty should not be imposed on him under Clause (b) of Section 112. Hence the Commissioner’s decision suffers from the vice of negation of natural justice. This apart, as any penalty under Section 112 has a nexus to the confiscability of the imported goods, we have first to address the question whether the goods were liable to be confiscated under Section 111(j) of the Customs Act. In this context, we find much force in the arguments of the ld. DR. Admittedly, no duty was paid on the goods. At the time of clearance, it was not known to the proper officer that the duty payment endorsements in the Bills of Entry were forged. Later on, in the course of investigation, it turned out that those endorsements were forged and that there was no actual payment of duty. This forgery, which is not in dispute, rendered the clearance of the goods illegal inasmuch as law did not permit the goods to be cleared for home consumption without payment of duty, there being no exemption from payment of such duty. The permission for clearance, granted by the proper officer, was subject to payment of duty. As there was no payment of duty, there was no valid permission either. In the result, the clearance of the goods was unauthorised and illegal and this very fact rendered the goods liable for confiscation under Clause (j) of Section 111 of the Customs Act. The confiscation ordered by the Commissioner is not to be faulted. However, whether the above penalty was liable to be imposed on the appellant would depend on whether his conduct satisfied the requirement of Clause (b) of Section 112 of the Act. This clause reads as under :-

“(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.......”

In order that a person is penalised under the above provision, it has to be established that he acquired possession of or was 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 knew or had reason to believe, were liable to confiscation under Section 111 of the Act. Ld. DR has harped on the expression underlined above and submitted that the appellant had dealt with the goods by associating himself with the modus operandi of clearance of the goods. Ld. Counsel has opposed this argument. We find that no physical act of the appellant in relation to the goods in question has been brought out to justify the penalty. The expression “in any other manner dealing with” has to be understood ejusdem generis with the preceding words/ expressions in the clause in terms of the Apex Court’s ruling in Thakur Amar Singhji v. State of Rajasthan [AIR 1955 SC 504]. The Court held thus :-

“the true scope of the rule of ‘ejusdem generis’ is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow.”

According to the above doctrine, the meaning of the expression “in any other manner of dealing with” should be understood in a sense similar or comparable to how the preceding words viz. carrying, removing, depositing etc. are understood. In other words, “any other manner of dealing” with the goods is also some physical manner of dealing with the goods. In the impugned order, there is no finding that the appellant physically dealt with the goods in question, nor was any allegation to this effect raised against him in the relevant show cause notice. Therefore, the provisions of Section 112(b) were not applicable to the case. It would follow that the penalty imposed on the appellant is not sustainable on facts or in law.”

11. The Tribunal in the case of Shri Vipul Joshi v. CC, Ahmedabad (Customs Appeal No.10053 of 2022) vide Final Order No.A/11181/2022 dated 04.10.2022 has held as under -

“6.17 We also find that the appellant cannot come within the ambit of Section 112(b) because appellants had never acquired possession or in any way concerned of the activities mentioned in the Section or any measure dealing with any goods which the appellants knew or had reason to believe are liable to confiscation. In the absence of the department having not proved the knowledge of the appellant in the activities relating to the smuggled gold, there were no grounds for imposition of penalty on him.It is now well established that mensrea is an important ingredient for imposing a penalty on the persons enumerated in Section112(b) of the Customs Act. The evidence brought out by the department nowhere suggests that the appellants were aware that the goods in question were smuggled into the India. The penalty imposed on Appellant, therefore, cannot be sustained.”

12. I find that Section 112(b) of the Customs Act, 1962 is not applicable to the facts of the present case because records show that the Appellant had never acquired possession or in any way was connected with the activities mentioned in the Section or in any manner dealing with any goods which the Appellant knew or had reason to believe are liable to confiscation. It is now well established that mens rea is an important ingredient for imposing penalty on the persons enumerated in Section 112(b) of the Customs Act, 1962. The evidence brought out by the department nowhere suggests that the Appellant was aware that the goods in question were smuggled into the country. The penalty imposed on the Appellant, therefore, cannot be sustained.

13. Past offence can be at best enhancer of civil and/or criminal liabilities, but no penalty can be imposed on any concurrent alleged offence. It is well settled law that no penalty under section 112(b)(ii) of the Customs Act, 1962, can be imposed without proving the nexus with the goods under seizure which are liable for confiscation.

In view of the above discussions, I am of the considered view that the Appellant is not liable for imposition of penalty under Section 112(b) of the Customs Act, 1962. Therefore, I set aside the penalty of Rs.50,00,000/- (Rupees Fifty Lakhs only) imposed under Section 112(b) (ii) of the Customs Act, 1962 and allow the Appeal with consequential relief, as per law.

