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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 50831 of 2020 (SM)

(Arising out of Order-in-Original No.43/2019/MKS/PR.COMMR./IMP/ICD/TKD dated 20.12.2019 passed by the Principal Commissioner of Customs (Customs), Tughlakabad, New Delhi)

M/s Container Corporation of India Ltd. **Appellant**
CONCOR Bhawan, C-3, Mathura Road,
Opposite Apollo Hospital,
New Delhi.

VERSUS

Pr. Commissioner of Customs **Respondent**
Inland Container, Tughlakabad
New Delhi-110020.

APPEARANCE:

Shri B.L. Narasimhan, Ms. Jyoti Pal and Ms. Kruti Parashar, Advocates for the appellant.
Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50952/2022

DATE OF HEARING:12.04.2022
DATE OF DECISION: 04.10.2022

ANIL CHOUDHARY:

The issue in this appeal is demand of duty on goods allegedly pilfered from Customs Area - bonded premises. The appellant has been appointed as Custodian & Customs Cargo Service Provider ('CCSP') for handling of imported goods in the customs area as specified in terms of Section 45 of the Customs Act, *inter alia,* for Inland Container Depot, Tughlakabad ('ICD TKD') and has entered into a contract with Asian Cargo Movers ('Asian Cargo') for mechanized cargo handling and inventory management at ICD TKD.

2. M/s Baljit Nutritions Stores (P) Ltd. ('importer') purportedly imported 'nutritional supplements' consisted in 10 pallets

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('subject goods') vide Bill of Entry for warehousing No.5865305 dated 04.07.2016 ('subject BOE' or 'bill of entry').

3. Vide its letter dated 21.07.2016, the importer made a request to Customs for converting the subject BoE into a Bill of Entry for Home Consumption in order to store the subject goods in a bonded warehouse under Section 49. This request was allowed on 22.07.2016.

4. Importer addressed a letter to the appellant along with requisition form, intimating that it has been granted the permission to store/warehouse goods under Section 49 of the Customs Act, for a period of 30 days-during which the importer intended to re-export the subject goods. The importer further stated that if it fails to re-export the subject goods within a month, then it would transfer the goods to a private bonded warehouse.

5. Subject goods were presented to Asian Cargo (in 10 pallets) and were warehoused (without inspection or opening the pallets) by mentioning details as declared in the subject BoE.

6. The importer again requested that the Bill of Entry for home consumption may be converted to bill of entry for warehousing. Request was allowed on 02.08.2016, by Customs.

7. Importer intimated Customs that it had found a buyer, and requested that the goods may be allowed for third-country export.

8. The matter (regarding clearance of goods for export to third country) was adjudicated by Joint Commissioner of Customs (vide Order dated 8.6.2017 as referred in the impugned SCN/OIO)

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and the importer was given an option to export after deposit of fine and penalty. The importer deposited such dues.

From the date of warehousing, the subject goods were lying in the warehouse, in the same condition. The subject goods had not been opened/handled by the appellant, except 2 pallets had to be separated from the remaining, due to termite attack. The said goods (including the 2 pallets which were separated) are still lying in the warehouse.

9. On obtaining permission for export, importer approached the appellant for release of the subject goods; Appellant directed the importer to pay the warehousing charges of Rs.4,46,487/-, which was duly deposited. Thereafter, the appellant directed Asian Cargo to provide possession of the subject goods to the importer.

10. Importer's authorized representative visited the warehouse, on being shown the subject goods, denied identity and claimed that the goods actually imported were lost. On 22.06.2017, Asian Cargo informed the appellant that the importer is denying ownership or identity of the subject goods and alleging loss of imported goods.

11. On receipt of the said information, the appellant filed a First Information Report on 30.06.2017 ('FIR'). On receiving such FIR, Delhi Police for the first time opened the packages and found only packaging material of the brand 'muscle pharma' inside the cartons.

12. The importer then filed a writ petition with the Hon'ble High Court of Delhi ("High Court") seeking release of the subject goods. The appellant, Asian Cargo and the Principal Commissioner of

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Customs (Import), ICD, TKD were the co-respondents to the said case.

13. In the course of proceedings before the High Court, the High Court had appointed a 'local commissioner' to inquire into the location and existence of the subject goods. The local commissioner after conducting inquiry into the location and existence of goods, had concluded that the said goods did not exist. In light of the same, the High Court passed its order dated 09.07.2018 stating that in the absence of the existence of the subject goods the petition seeking release of the goods could not be granted. Further, observed that since the subject goods were subjected to 100% check as well as valuation by the Customs Department, the writ petition seeking release of the goods, which are no longer in existence, cannot be granted. If the petitioner /importer wishes it can agitate its grievance and seek appropriate remedy in accordance with law.

14. During pendency of the writ petition, show cause notice dated 24.05.2018 was issued to the appellant by the Commissioner of Customs, alleging that the subject goods have been pilfered while in the custody of the appellant. Further, the appellant have failed to discharge its responsibility under 'Handling of Cargo in Customs Area Regulations, 2009'. Accordingly, show cause notice proposed to demand duty of Rs.15,84,802/- along with interest under the provisions of Section 45(3) of the Act read with Regulation 6 (1)(j) of Handling of Cargo in Customs Area Regulation, 2009 (HCCAR). The show cause notice further proposed cancellation of the appellant's licence, which was granted to them under Regulation 10 of HCCAR, 2009 and why the same should not be placed under suspension.

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Further, penalty was proposed under Section 117 of the Act, alleging violation of Section 45 and 141 of the Customs Act, 1962.

15. The appellant denied the allegations by filing interim reply dated 2.8.2018. Since the appellant denied the allegations, the Commissioner appointed Dy. Commissioner (Technical) as "Inquiry Officer". The Inquiry officer, after holding the personal hearings, issued Inquiry Report dated 7.8.2019, concluded that the appellant was unable to safely keep the warehoused cargo in its customs cargo bonded area, which had resulted in the subject goods going missing. Thus, the appellant failed to meet or comply its obligations and responsibility under Regulation 5 & 6 of HCCAR, 2009.

16. That the appellant filed its submissions opposing the inquiry report while refuting the allegations.

As the goods appeared missing, CONCOR had filed FIR on 30.06.2017, which was pending investigation. Delhi Police in its investigation opened the packages, and found only packing materials of the brand **'Muscle Pharma'** inside the cartons.

17. Ld. Commissioner framed the following issues:-

(i) Whether the CONCOR/appellant is liable to pay customs duty along with interest on the goods in question in terms of Section 45(3) of the Act red with Regulation 6(1)(j) of HCCAR, 2009.

(ii) Whether the appellant is liable for action for violation of Regulation 5(1)(ii) read with Regulation 6(1)(i) of HCCAR, 2009, and further penalty should be imposed under Regulation 12(8) read with Regulation 11 of the HCCAR, 2009.

(iii) Whether approval granted to CONCOR under Regulation 10 of HCCAR is liable to be placed under

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suspension or revoked under Regulation 11 read with Section 12.

(iv) Whether CONCOR is liable for penalty under Section 117 of the Customs Act, 1962.

18. Ld. Commissioner observed that the goods in question were undisputedly kept with the appellant appointed as custodian of the imported goods, until they are cleared for home consumption. The fact of non-availability of the goods has been confirmed during inquiry by the local Commissioner appointed by the Hon'ble High Court. As per report of the Inquiry officer dated 10.05.2019, CONCOR has not been able to safely keep the warehoused cargo in its customs bonded area. Thus, they failed to meet their obligations and responsibilities under Regulations 5 & 6 of HCCAR, 2009.

19. The defence taken by the appellant that the overall management and supervision of all imported warehousing including bonded warehouses, where the goods of importer were warehoused, was done by M/s. Asian Cargo Movers.

20. Thus, any shortcomings is actually attributable to Asian Cargo Movers, who are the sub-contractor of CONCOR. They have pleaded that the matter is still pending investigation by Delhi Police and accordingly, the proceedings may be kept in abeyance.

21. Ld. Commissioner passed the impugned order confirming the proposed demand of duty of Rs.15,84,802/- along with interest under Section 45(3) of the Act read with Regulation 6(1)(j) of HCCAR. Further, penalty of Rs.50,000/- was imposed under Section 117 of the Act. Ld. Commissioner observed that the appellant was responsible for safety of the imported goods under its custody and thus, is liable to pay duty on the goods pilfered after entry thereof in

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the customs area. It is the appellant, who is responsible for shortcomings, if any, of their sub-contractor – Asian Cargo Movers. Ld. Commissioner further observed that pending investigation on the basis of FIR for the missing goods has no relevance as regards the action under the show cause notice under the Customs Act. Ld. Commissioner held that CONCOR is responsible having failed to meet its obligations and responsibilities under Section 5 & 6 of HCCAR.

22. Further held, CONCOR also failed to fulfill their undertaking to comply with the provisions of the Customs Act and the Rules and the Regulations. Accordingly, they are liable to penalty.

23. So far the proposal of suspension is concerned, it was observed that it is a preventive action. There must be sufficient reasons available to the effect that unless such immediate suspension is ordered, the damage already caused would either continue or likely to continue. Further observed that no such case is made out for action under Regulation 11 read with Regulation 12 of HCCAR. Hence, proposal of suspension /revocation of the approval granted under Regulation 10 of HCCAR was dropped. Being aggrieved, the appellant is in appeal before this Tribunal.

24. Ld. Counsel for the appellant, Shri B.L. Narsimhan, *inter alia,* submits that there is no evidence that the goods were pilfered while in the custody of the appellant. The impugned order as well as inquiry report merely assumed that the goods were pilfered, which is the sole basis for confirmation of demand. There is no evidence that the packages were subject to physical examination by the Customs Authorities and/or the appellant. The allegation in the show cause notice has been made assuming that the identity of the goods is undisputed. It has been assumed that on opening of the sealed

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packages, only packing material was found and hence the goods have been pilfered during the custody of the appellant. However, the Department has not brought on record even a single documentary evidence suggesting that the subject goods were physically examined at any stage and that the packages (consisting of 10 pallets) indeed contained 'Nutritional Supplement' as claimed by the importer.

25. Neither the appellant nor Asian Cargo Movers examined the contents of the packages. The importer had filed bill of entry purportedly being 'Nutritional Supplements' of various brands, which were imported in the form of 10 pallets (no. of packages). At the time of filing of requisition form for storing the subject goods in the warehouse under Section 49, the importer had declared the quantity of the subject goods as 10 pallets. However, the appellant neither opened the packages nor had the opportunity to examine the contents of such packages. Only the cartons containing the importer's goods, which were stored in two particular pallets, had to be separated from the other pallets due to a termite attack.

26. It was only for the first time in July, 2017, when on filing of FIR, Delhi Police came to inspect the goods stored at Warehouse no.2, ICD, TKD, that the pallets were opened and packaging material of brand name 'Muscle Pharma' was discovered. Prior to this, Appellant/Asian Cargo Movers had neither opened nor examined the packages and the same were taken into the warehouse, as per the declarations made by the importer.

27. Ld. Counsel further submits that the appellant, as a Custodian of the goods under Section 45 of the Act, does not have the right to open the cartons/boxes/pallets/goods, in any manner, or

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inspect whether the goods purported to be imported, have actually been imported or anything else has been imported by mistake or otherwise. As per Regulation 2 of the Imported Packages (Opening) Regulation, 1963, 'no person shall, except with the permission of the proper officer, open any packages of goods imported into India and lying in a Customs Area'. Admittedly, no such instructions for opening the packages were given to the appellants. Thus, the appellant neither opened nor examined the contents of the packages at the time of accepting them for warehousing.

28. It is further urged that admittedly, the bill of entry does not contain any physical examination order and further, there is no proof that the identity of the purportedly imported goods was actually ascertained. Further, admittedly, at the time of import or unloading, a requisition sheet filled by the importer for storage of the goods and the Tally Sheet issued by Asian Cargo Movers and the subject goods remained in 10 pallets from the point of import till the time such goods were warehoused. It is further submitted that in normal circumstances, in case of edible goods, sample is required to be drawn and sent for FSSAI or AQCS testing, while the remaining goods remained in the warehouse. However, as the importer had filed bill of entry for warehousing, no such sample was taken out for testing and no gate out pass had been issued for such goods as per the record. Thus, in no circumstance, the appellant dealt with the subject goods directly. Had the goods in question subjected to physical examination or subject to drawal of samples of the goods, the same would have been removed from the cartons, which were further enclosed in the pallets. If the cartons had been opened, the goods would have been required to be placed in new pallets post

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such examination for storing the same in the warehouse. As the goods were never opened nor palletised, it proved that the goods were never subject to any physical examination. Such submission had also been made before the Inquiry Officer, who failed to appreciate the same.

29. It is further urged that the appellant as a Custodian of the goods cannot be saddled with the responsibility of ascertaining the identity of the goods. Thus, Revenue have erred in assuming the identity of the goods to confirm the charge of pilferage against the appellant. In absence of power or opportunity to physically examine the goods, the appellant as a Custodian could neither ascertain the identity of the goods nor was obligated to do so. In absence of any permission to open the packages from the proper officer, the appellant had no means to examine the contents of the packages. The subject goods /packages were admittedly for warehousing on the basis of the declaration made by the importer in the bill of entry. Upon issue of release order by the Customs officers, the appellant had identified the packages/pallets but the importer disputed the same. Accordingly, FIR was filed by the appellant and when the sealed packages /pallets were opened by Delhi Police, it was found to contain packing materials only. However, the importer, instead of checking the contents of import of such goods, has mischievously tried to shift the responsibility on the appellant by alleging that the subject goods have been lost while in the custody of the appellant. Thus, no case of pilferage of the imported goods is made out against the appellant-custodian. The appellant had offered the goods for delivery to the importer in the same position/sealed as had been presented to him for warehousing. Thus, the appellant cannot be

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saddled with any duty liability for alleged pilferage under Section 45(3). Reliance is placed on the ruling of this Tribunal in the case of **CC Vs. Board Trustees of the Port of Mumbai -2005 (182) ELT 260 (T),** wherein it has been held that before duty liability is shifted on the 'custodian of the goods', pilferage has to be established and such charges cannot be confirmed on the basis of assumption.

30. Reliance is also placed on the ruling in the case of **Gujarat Adani Port Ltd. Vs. Commissioner of Customs, Jamnagar – 2014 (309) ELT 120 (T-Ahmd.),** wherein regarding certain 'shortages' detected in the imported cargo, it was held that no duty liability can be confirmed against custodian in the absence of any evidence on pilferage. Reliance is also placed on the ruling in the case of **CC Vs. Board of Trustees of Mumbai Port Trust – 2007 (216) ELT 47 (T-Mumbai) and Board of Trustees of the Port of Mumbai Vs. CC, Mumbai – 2008 (223) ELT 635 (T-Mumbai).**

31. It is further urged that none of the inquiry reports submitted by the local Commissioner appointed by the Hon'ble High Court and by Delhi Police on the FIR filed by the appellant nor the inquiry report of the inquiry officer dated 10.05.2019 contain any evidence to confirm the charge of pilferage or that too while the goods were in the custody of the appellant.

31. It is further urged that the report of the Inquiry Officer is not reliable as it simply relies on the report of the Commissioner appointed by the Hon'ble High Court, who has only stated that the goods were not produced as the consignment in question was not traceable. In fact, the goods/pellets as available with the appellant were actually presented to the local commissioner. However, since the same did not match the description of the goods, as per bill of

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entry, the local commissioner concluded that the goods did not exist. It was on this basis that the Hon'ble High Court in its order dated 09.07.2018 held that since the goods claimed to be released were not found in existence, the same cannot be released and accordingly, the writ petition of the appellant was disposed with directions to seek alternative remedy.

33. So far the filing of the FIR by the appellant is concerned, it is urged that as the appellant did not have any right to examine the goods, on the dispute raised by the importer as to the identity of the goods, it was not possible to ascertain whether the goods were actually lost as claimed by the importer. Thus, the only way to ascertain the same was to file an FIR, which the appellant did. The filing of FIR cannot, by any means, be construed as an admission regarding pilferage. Thus, reliance placed by the Adjudicating Authority on the inquiry report is misplaced and erroneous. It is further relevant that no inquiry report has been relied upon in the adjudication order dated 8.6.2017 passed by the Joint Commissioner granting permission to re-export the goods, wherein it was observed that – AQCS has issued rejection certificate for the subject consignment. Such observation is bad as it does not specify the reason for issue of rejection of certificate. Further, such observation is also erroneous in absence of any record of samples having been drawn for testing.

34. It is further urged that pilferage is a serious charge, which can only be proved with the help of sufficient and cogent evidence. In the facts of the present case, where the appellant as Custodian has accepted the sealed packages without inspection and offered such sealed packages for delivery cannot be blamed for

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shortages/deficiencies. Accordingly, ld. Counsel prays for allowing of the appeal and setting aside of the impugned order.

35. Ld. Authorised Representative for Revenue relies on the impugned order.

36. Having considered the rival contentions, I find that admittedly, the imported packages have never been opened either by the Customs Authorities for inspection nor any sample was drawn. Simply based on the declaration of the importer the goods had been allowed to be warehoused by the Customs Authorities. The same were accepted without any inspection by the appellant being sealed packages/pallets. Further, admittedly, the appellant, pursuant to order for release of the goods, had offered sealed packages/pallets to the importer for delivery. However, the importerhave disputed the goods without any evidence of pilferage. Further, in the investigation by the Police, pursuant to FIR filed by the appellant, no evidence of pilferage has been found. The packages were admittedly opened for the first time by the Police Officer, wherein the packing material was found instead of 'Nutritional Supplements' as purportedly imported. From the reports submitted by the local Commissioner appointed by the Hon'ble High Court, it is evident that he visited the site and thereafter reported that no goods were in existence at the place - customs bonded premises. The Commissioner also indicated that the FIR has been lodged with the Police, which is under investigation.

37. I further find the conduct of the importer also to be dubious as initially he filed bill of entry for warehousing on 4.7.2016. Thereafter, after about 15 days, he has filed request for converting the warehousing bill of entry into a bill of entry for home consumption, which was allowed on 22.07.2016, still importer did not

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take the delivery and again requested on 1.8.2016 for reconversion of the bill of entry to that of warehouse, which was allowed on 02.08.2016 and immediately thereafter on 5.8.2016 intimated the Customs that he has found a buyer and requested that the goods may be allowed for third country export. Further, such request was repeated on 24.05.2017 stating that they have received purchase order from a buyer at Dubai.

38. In view of my aforementioned observations and findings, I hold that no case of pilferage is made out against the appellant. Accordingly, the appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefits in accordance with law.

[Order pronounced on 04.10.2022].

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.