IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Customs Appeal Nos.75673 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AKR/876-877/2021 dated 31.12.2021 passed by Commissioner of Customs (Appeals), Kolkata.)

Commissioner of Customs (Preventive), Kolkata
(15/1, Strand Road, Custom House, Kolkata-700001.)

...Appellant

VERSUS

Shri Amit Jalan

.....Respondent
(S/o Shri Shyam Sunder Jalan, 14/15, Bangur Avenue, Kolkata-700055.)

WITH

Customs Appeal Nos.75675 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AKR/876-877/2021 dated 31.12.2021 passed by Commissioner of Customs (Appeals), Kolkata.)

Commissioner of Customs (Preventive), Kolkata
(15/1, Strand Road, Custom House, Kolkata-700001.)

...Appellant

VERSUS

Shri Ashok Kumar Jalan

.....Respondent
(S/o Late Madan Lal Jalan, AC-13, Sector-I, Salt Lake, Kolkata-700064.)

APPEARANCE

Shri S.Chakraborty, Authorized Representative for the Revenue

Shri Wattan Sharma & Shri Debaditya Banerjee, both Advocates for the Respondent (s)

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

FINAL ORDER NO. 75032-75033/2023

DATE OF HEARING : 6 February 2023
DATE OF DECISION : 6 February 2023

ASHOK JINDAL :

These Appeals are directed against the impugned order wherein the Ld.Commissioner(Appeals) dropped the penalty imposed on the Respondents under Section 112(a) and (b) of the Customs Act, 1962.

2. Briefly stated the facts of the case are that on 09.06.2019 DRI conducted raid in on-going bus in Dankuni Toll Plaza wherein one Shri Anand was intercepted along with 8 k.g. of gold along with Rs.24,000/- which gave the seizure value to the tune of Rs.2,74,84,000/-. Thereafter the Respondents were taken into custody by DRI on 10.06.2019 from Quest Mall and was illegally detained by DRI till 10.00 p.m. on 11.06.2019 and thereafter, produced before the Ld.CMM, Bankshal Court at Calcutta on 12.06.2019. In the course of detention, the Respondents were made to make a statement in various papers and documents reflecting their voluntary statements. Pertinent herein to be mentioned that such papers and documents have also been used in the instant proceeding by DRI. It was alleged that the Respondents had admitted to have been involved in several smuggling activities including the one seized on 09.06.2019. When, the Respondents were produced before the Ld.CMM they squarely denied and heavily disputed such a statement reflected as voluntary by DRI by retraction petition filed on 12.06.2019. Thereafter, the Respondents were detained under COFEPOSA proceedings. However, the said proceedings were dropped by the Hon'ble Apex Court by Order dated 04.03.2020. In the meantime, a Show Cause Notice dated 29.11.2019 was issued proposing penalty in terms of Section 112(a) and/or (b) of the Customs Act, 1962. The Adjudicating authority imposed a penalty of Rs.15.00 Lakhs on Shri Ashok Kr. Jalan and Shri Amit Jalan to the tune of Rs.7.5 Lakhs under Section 112(a) & (b) of the Customs Act, 1962. The said order was challenged by both the Respondents before the Ld.Commissioner(Appeals) who dropped the penalties imposed on the Respondents. Aggrieved from the said order, the Revenue is before me.

3. The Ld.Authorized Representative for the Revenue submitted that the Appellant has made voluntary statements on 10.06.2019 and

11.06.2019 and although the said statements were retracted before the Ld.CMM on 12.06.2019, but again corroborated the statements on 14.06.2019 before the DRI officers. There are some Whatsapp chat between one Shri Anand and the Respondents which is another evidence against the Respondents, therefore, the Ld.Commissioner(Appeals) made an error by dropping the penalty against the Respondents. He further submitted that the statement recorded before the Customs official is not a statement recorded under section 161 of the Criminal Procure Code therefore it is a material piece of evidence collected by the Customs officials under section 108 of the Customs Act, therefore, the Ld.Commissioner(Appeals) made an error while dropping penalty. In support of his contentions, the Ld.Authorized Representative for the Revenue relied on the following decisions:-

(a) Surjeet Singh Chhabra Vs. UOI
[Order dated 25.10.1995 by the Hon'ble Apex Court]
(b) Naresh J. Sukhawani Vs. UOI
[1996 (83) ELT 258 (SC)]
(c) Percy Rustomji Basta Vs. State of Maharashtra
[1983 (13) ELT 1443 (SC)]
(d) K.I. Pavunny Vs. Asstt.Collr. (HQ), C.Ex. Collectorate, Cochin
[1997 (90) ELT 241 (SC)]
(e) Kuber Tobacco Products Ltd. Vs. Commissioner of C.Ex., Delhi
[2013 (290) ELT 545 (Tri.-Del.)]
(f) Vinod Solanki Vs. UOI & Anr.
[Civil Appeal No.7407 of 2008 by Hon'ble Apex Court]

4. On the other hand, the Ld.Counsel appearing on behalf of the Respondents submits that in view of instructions issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs F.No.390/Misc./163/2010-JC dated 17.12.2015, the Appeals shall not be filed before this Tribunal wherein the subject matter of the Appeal having amount involved is less than Rs.10.00 Lakhs. In that circumstances, the Appeals are not maintainable.

5. On merits, the Ld.Counsel submits that there is no corroborative evidence to the statements made by the Respondents which has been retracted by them and no cross-examination was granted to the Respondent which is violation of principles of natural justice. In that

circumstances Appeals are required to be dismissed. To support their contention they relied on the following decisions :-

(a) Sudarsan Jana Vs. Commissioner of Customs (P), Kolkata
[2017 (357) ELT 656 (Tri.-Kolkata)]
(b) Vinod Solanki Vs. UOI
[2009 (233) ELT 157 (SC)]
(c) A.L. Jalaludeen Vs. Dy. Dir. Of Enforcement Directorate, Chennai
[2010 (261) ELT 84 (Mad.)]
(d) UOI Vs. Kisan Ratan Singh
[2020 (372) ELT 714 (Bom.)]
(e) Sachin Kumar Vs. Commissioner of Customs, Mangalore
[2020 (374) ELT 775 (Tri.-Bang.)]
(e) Rajendra Prasad Vs. Commissioner of Customs, Patna
[2001 (136) ELT 925 (Tri.-Kolkata)]

6. Heard the parties and considered the submissions.

7. On careful consideration of the submissions made by both the sides, I find that in view of instructions issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs F.No.390/Misc./163/2010-JC dated 17.12.2015, the revenue involved in the Appeals are nil as Commissioner(Appeals) has not imposed any penalty on the Respondents, therefore, I hold that Appeals are not maintainable before this Tribunal.

8. On merits also, I find that except the statements recorded by the DRI dated 10.06.2019 and 11.06.2019 which were retracted by the Respondents on the first opportunity available on 12.06.2019 before the Ld.CMM, Kolkata, no other corroborative evidence has been brought on record. In that circumstances penalty on the Respondents are not imposable. The case laws relied upon by the Ld.Authorized Representative are not applicable to the facts of the present case. In the case of Surjeet Singh Chhabra (supra) there was an evidence of recovery of gold in the possession of the accused apart from the statement recorded under Section 108 of the Customs Act, 1962. In that circumstances, the decision is not applicable. The remaining cases relied upon by the Ld.Authorized Representative are not applicable to the facts of the present case.

9. Further I find that in the case of Rajendra Prasad (supra), this Tribunal has observed as under:-

"4. *Shri R.K. Roy, learned JDR, countering the arguments of the learned Consultant, reiterates the findings of the original authority and the appellate authority. He submits that the corroborative evidence can be used as a substantial evidence, as held by the Honourable Supreme Court in the case of Naresh J. Sukhawani v. Union of India reported in 1996 (83) E.L.T. 258 (S.C.) wherein it was held that the statement of the co-accused, recorded under Section 108 of the Customs Act, 1962, inculpating himself as well as the petitioner can be used as a substantive evidence. Shri Roy has also invited my attention to the decision of the Honourable Tribunal in the case of Mohmedbhai Asrafbhai Kimsarwala v. Collector of Customs reported in 1991 (52) E.L.T. 573 (Tribunal), wherein it was held that the statement of an accomplice without corroboration would not be sufficient to prove the guilt, and when there is a knowledge of involvement, personal penalty can be imposed. It was also held that before acceptance of the statement of the accomplice, some corroboration from some independent source is called for.*

5. *After hearing both sides and on going through the Order-in-Original and the Order-in-Appeal, it is observed that the appellants were penalised solely on the statement of Shri Shiv Kumar Sharma, the driver. Except the statement of Shri Shiv Kumar Sharma, there is no other independent evidence to corroborate the statement of the co-accused. It is an accepted legal proposition which has been accepted by the Apex Court in various judgments that the statement of co-accused, when not corroborated by any independent evidence, cannot be taken as a Gospel Truth. Therefore, reliance on the statement of the co-accused without corroboration is unacceptable in law. The reliance of Revenue on the judgment of the Hon'ble Supreme Court in Naresh J. Sukhawani is of no avail inasmuch as the statement of the co-accused in that case inculpates himself as well as the petitioner. In the instant case, the co-accused shifted the entire guilt on the appellants. In view thereof, the personal penalties imposed on the appellants are not warranted. Therefore, I have no hesitation in holding that the personal penalties are required to be set aside. Accordingly, I do so."*

10. Further, in the case of Sachin Kumar (supra), the Tribunal held as under:-

> ***"6.*** *After considering the submissions of both the parties and perusal of the material on record, I find that the appellant Sachin Kumar was a transport agent who arranged the truck for the exporter and appellant No. (2) Venugopal acted as a CHA for clearance of the goods at the NMPT, Mangalore and appellant No. (3) Ravichandra arranged the CHA and the container. Further, I find that the goods were stuffed at the KSDL factory, Bangalore in the presence of Mr. Hashim, Director of the exporter company and Superintendent of Central Excise and thereafter it was sent to Mangalore and from Mangalore it was exported. Subsequently, DRI got intelligence that the exported goods were falsely declared as 'Mysore Detergent Cakes' by illegally concealing read sanders and thereafter the vessel containing the container was called back from Columbo and it was seized by the DRI. During the investigation DRI recorded the statement of Mr. Hashim, Director of exporter company and also the appellants. In the statement of Mr. Hashim, he has clearly stated that he was responsible for smuggling of red sander wood logs and the appellants were not knowing about their smuggling plan. All these appellants were based at Mangalore whereas the truck was stuffed with Mysore Detergent Cake at Bangalore in the presence of the Director of the company and the Superintendent of Central Excise. Further, I find that both the authorities in their orders have admitted that there is no direct proof of the complicity of the appellants and there is suspicion against each of the appellant and on the basis of that suspicion, the appellants have been imposed penalties. It is pertinent to note that the Tribunal in various decisions cited supra by the Learned Counsel for the appellant has consistently held that for imposing the personal penalty under Section 114(i) of the Customs Act, 1962, there should be acceptable legal evidence on record about the acts of commission or omission by the appellant. Further in order to hold that the appellant has abetted in the commission of the offence, there has to be a knowledge on the part of the appellant regarding the illegal activities of the exporter whereas in the present case no corroborative evidence has come on record which pinpoint that the appellant had the knowledge of the illegal activities of*

the exporter company. In the case of Commissioner of Customs, Mumbai v. M. Vasi cited supra, the Tribunal has held that abetment presupposes knowledge of the proposed offence and in the absence of knowledge penalty under Section 112 on the charge of aiding or abetting would not sustain. Further in the case of Shree Renuka Sugars Ltd. v. CC, Mangalore cited supra, the Tribunal has held that on the basis of mere suspicion against CHA, penalty cannot be imposed. Further, I find that the decisions relied upon by the Learned DR are not applicable in the facts and circumstances of the present case because in the present case, penalties have been imposed on the appellant merely on the basis of suspicion without any evidence on record and the suspicion cannot take the place of proof. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the same by allowing the appeals of the appellants. Penalties imposed on the appellants are also set aside."

11. Further, in the case of Kisan Ratan Singh (supra), The Hon'ble Bambay High Court held as under :-

"7. *According to prosecution, the statements of both accused were voluntarily and correctly recorded without use of any force or inducement. The Trial Court after considering the evidence recorded and the facts and circumstances of the case, has held that the statements recorded under Section 108 have not been independently corroborated. The Trial Court has held that without an independent corroboration or without any evidence the statements recorded of accused under Section 108 has no evidentiary value, more so when there has been a retraction. I am in agreement with the conclusion arrived at by the Trial Court.*

8. *Admittedly, panch witness of the panchnama recorded on 4th February, 1991, when the gold and Indian and Foreign currencies were allegedly seized, have not testified. Even the persons, who typed the panchnama, and PW-1 says it was one G.H. Shaikh, has not testified. Moreover, the panchnama is written in English but the panch witnesses have signed in Hindi and Gujarati. Panchnama also does not record whether the panch witnesses knew English. PW-1 also says both panch witnesses are from N.M. Joshi Marg as per panchnama Exhibit P-2 and*

that N.M. Joshi Marg was 4 to 5 km away from the said premises. How did the panchas then land at the said premises? That is a mystery. Therefore, I am unable to believe the panchnama as produced was really prepared. To add to this, PW-2 says he does not know the details of panchnama because he was not party to panchnama. PW-2 also says PW-1 had called the panch witnesses and they were taken from "our" office to the said premises. If that was so, why were the panch witnesses not examined. PW-2 also says, though he was a member of the search party, he does not remember the mode of transport that was used to go to the said premises from their office. One can understand he may not remember the vehicle details but "mode of transport" is unbelievable. If I have to accept the submission of Ms. Mane that dehors the panchnama, in view of the confession recorded under Section 108, the Court can still convict the accused, then I ask myself why should they even take any panch witness and why should any one go through the trouble of recording of panchnama and producing the panch witness at the time of trial. Moreover, if I have to simply accept the statement recorded under Section 108 as gospel truth and without any corroboration, I ask myself another question, as to why should anyone then go through a trial. The moment the Customs authorities recorded the statement under Section 108, in which the accused has confessed about his involvement in carrying contraband gold, the accused could be straightaway sent to jail without the trial Court having recorded any evidence or conducting a trial.

9. *Various Courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. For this, I find support in State of Maharashtra v. Harshad Vaherbhai Patel & Ors. [2012 (1) Bom.C.R. (Cri) 500] and unreported judgment of this Court in Shri Malki Singh v. Suresh Kumar Himatial Parmar in Criminal Appeal No. 228 of 1999 delivered on 29-11-2019 [2020 (371) E.L.T. 642 (Bom.)]. Paragraph 8 of Malki Singh's judgment reads as under :*

> *"8. It is no doubt true that under section 104 of the Customs Act, 1962, the Customs Officer is vested with power to arrest if*

he has reason to believe that any person has committed an offence punishable under sections 135 or 135A of the Customs Act. Under Section 108 of the Customs Act, the Customs Officer is also vested with power to summon persons to give evidence documents and all persons so summoned are bound to attend, on being summoned. The statement made to the Customs Officer is not hit by Section 25 of the Indian Evidence Act, 1872, the position of law being very well settled that the Customs Officers are not police officers and resultantly, a statement made to the Customs Officer is not hit by Section 25. At the same time, the position of a retracted confession is also well settled :- without any independent corroboration it cannot sustain a conviction and retracted confession may form basis of conviction without corroboration if it is found to be perfectly voluntary, true and trustworthy. The Court is duty bound to examine whether the statement referred to as a confessional statement meets the test of truthfulness and being voluntary in nature. In absence of any independent material brought on record by the appellant, the Chief Metropolitan Magistrate was perfectly justified in acquitting the accused no. 2. In absence of any evidence corroborating the statement of the accused no. 2 made before the Customs Officer on 24th March, 1996 under Section 108 of the Customs Act, the statement in isolation do not warrant conviction, particularly when it is retracted with a plea of coercion."

10. *Ms. Mane relied on the judgment of the Apex Court in Ramesh Chandra v. State of West Bengal [AIR 1980 Supreme Court 793] to submit that customs officers are not police officers and the statement recorded under Section 108 of the Customs Act, 1962, is admissible in evidence. I have to be candid that I have no quarrels with the preposition submitted by Ms. Mane. The issue is, can that statement be accepted blindly without corroboration, and the answer is no."*

12. In view of the above discussion, I hold that the Ld.Commissioner(Appeals) has rightly dropped the penalty against the Respondents as there is no corroborative evidence on record in

support of the statement made before DRI Officers which were retracted on first available opportunity before the Ld.CMM and no cross-examination of any witness has been granted to the Respondents. Therefore I do not find any merits in the Appeals filed by the Revenue.

Accordingly, the same are dismissed.

(Dictated and pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

sm