

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.12.2016

PRONOUNCED ON: 10.04.2017

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G. RAMESH,

AND

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

C.M.A.No.2853 of 2015

M/s. Sanco Trans Ltd
Appellant

..

vs

1. The Customs, Excise and
Service Tax Appellate Tribunal,
South Zonal Bench,
No.26, Shastri Bhavan Annexe
Building, Haddows Road,
Chennai 600 006
2. The Commissioner of Customs(Seaport-Export),
Custom House,
No.60, Rajaji Salai,

Chennai 60001.

.. Respondents

Prayer: Civil Miscellaneous Appeal filed under section 130A of Customs Act, 1962, against the Final Order No.40628/2015 dated 15.06.2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr. S. Murugappan

For Respondent: Mr.A.P.Srinivas

Sr.Standing Counsel for R2

and R1-Tribunal

J U D G M E N T

(Dr.Anita Sumanth, J.)

This Civil Miscellaneous Appeal is filed by the assessee challenging an order of the Customs Excise and Service Tax Appellate Tribunal dated 15.6.2015 confirming imposition of penalty under section 114 of the Customs Act (in short 'Act') though reducing the quantum from Rs.5 lakhs to Rs.2.5 lakhs.

2. The brief facts in issue are as follows;

The appellant is a Customer Freight Station (CFS) and a custodian of goods for the purpose of import and export in terms of section 45 of the

Customs Act 1962 (hereinafter referred to as 'Act'). A show cause notice dated 16.10.2007 was issued by the Directorate of Revenue Intelligence (DRI) pursuant to the seizure of 30.212 metric tonnes of 'red sanders logs', being prohibited goods, falsely declaring the same to be 'natural granite chips'. A response was filed by the appellant on 20.2.2008 denying any involvement in the transaction. The defence taken was to the effect that the goods originally packed in the container, 'natural granite chips', were substituted clandestinely and without the knowledge of the appellant at the time of transportation to the port for export. Once the containers were packed and sealed, they were beyond the control or responsibility of the custodian and no liability could, according to the appellant, be fastened on it on this account. Thus, since the role of the CFS as custodian did not extend to the supervision of transportation from the CFS to the port, there was no liability in regard to any event that may transpire after the goods left the freight station. According to the appellant, transportation was the domain of custom house agent and not the custodian.

3. An order-in-original was passed on 23.12.2008 rejecting the objections raised and confirming the levy of penalty of an amount of Rs.5 lakhs on the appellant in terms of section 114 of the Act. The levy was challenged before the CESTAT, which vide the impugned order dated 16.05.2015 confirmed the levy while reducing the quantum thereof.

4. The aforesaid order of the CESTAT is impugned before us raising

the following substantial question of law for our consideration;

‘Whether there is scope for imposing penalty under section 114 of Customs Act 1962 in the absence of any knowledge on the part of the appellant of the offence alleged to have been committed by the exporter?’

Section 114 of the Customs Act reads thus:

114. Penalty for attempt to export goods improperly, etc.- Any person 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 113, or abets the doing or omission of such an act, 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 three times the value of the goods as declared by the exporter or the value as determined under this Act) whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114-A, 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 28-AA 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 any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.’

5. The appointment of the appellant as a Container Freight Station (CFS) carries with it certain responsibilities relating to the receipt, storage

and movement of the cargo in its possession. The Appellant was declared as a Container Freight Station (CFS) in terms of Public Notice No.69/93. The procedure set out was in terms of para 3 thereof that states as follows:

‘ The procedure in vogue at present in respect of clearance of imported goods from the port area is also applicable for the clearance of such imported goods from the container freight stations belonging to the SANCO TRANS LIMITED, situated at Tiruvottiyur, Madras - 600 019. Similarly the rules and regulations which are applicable for the movement of containers from the port area are also applicable for the movement of containers from and to the aforesaid viz. Sanco Trans container Freight Station, with modifier if necessary.’

A detailed set of guidelines was issued by the Central Board of Excise and Customs in Circular N0.128/1995 in F.No.434/12/92-CUS IV dealing with the appointment of custodians. The guidelines are exhaustive and address comprehensively all aspects of safeguarding of the goods such as the provision of safe and secure premises for storage of cargo, various stipulations with respect to the infrastructure to be provided, insurance, execution of a bond equal to the value of the goods stored and supported by a bank guarantee/Government bond/cash deposit equivalent to the 10% to the value of the goods, liability of duty on goods lost or pilfered in movement from the CFS, liability of duty for goods lost during transshipment, security of premises, cost of customs staff posted in the CFS, provision of furnished office space and residential accommodation as well as transport and other infrastructural and administrative arrangements. Sub-clause (5) requires the custodian to abide with all rules and regulations under the Customs Act.

6. The Circular specifically deals with the movement of cargo and places accountability in respect of the goods moving from a CFS on the custodian in the following terms in sub-clause (8) thereof:

‘The custodian shall give separate bond with sufficient bank guarantee of the value of the bond towards the duty element of the Export goods transported from the customs area to the gateway port/any other customs area for export/transshipment. Custodian would also be held responsible for the duty and for other penalties leviable for the goods lost during transshipment from the said customs area to the gateway port/other customs area.’

7. A subsequent circular issued in 1998 in No.57/1998, dated 04.08.1998 further elaborated and streamlined the role of a custodian as follows:

‘Various references have been received from Associations of Trade and Ministry of Commerce to allow movement of export goods through containers/trucks from hinterland to gateway Airports for the purpose of exports by air. The matter was discussed in meeting of SCOPE AIR held at Jaipur on 10th September, 1997 also. The matter was examined by Board and it has been decided that the following procedure may be followed for transferring goods from factory of manufacture, ICDs/CFSs to Gateway airports for export of the goods from such airports. The procedure adopted for shipment by air and sea would remain alike.

2. The exiting Scheme provides that full container load (FCL) cargo can be transferred under Customs/ Central Excise seal from ICD/CFS or from the factories, in case of container stuffed inside the factory, to the Gateway Port. Similarly it is proposed that the goods from the factory of manufacture or from the ICD/CFS can also be transferred in a truck, sealed by Customs/Central Excise officer to the Airport for further shipment by air or for further consolidation of such goods in the port into a

container. This would also enable carriage of smaller packages belonging to more than one exporter in one truck which would be sealed after stuffing in the ICD/CFS.

3. For accountability, in case the goods are moving from the factory of manufacture, it will be the responsibility of the factory owner or exporter and in case the goods are moving from ICD/CFS, it would be the responsibility of the custodian of the ICD/CFS. The custodian shall accept responsibility for shortages in the goods during transit and will be required to pay the amount equal to drawback/duty amount and other benefits availed by the exporters. They may be asked to execute separate bond for the transport of the goods from ICD to Ports/Airports and vice versa.

4. In case of movement of goods from ICD/CFS, the exporters are required to bring their goods meant for export to ICD/CFS and to file six copies of Shipping Bill along with all necessary documents like GR Form, AR Form, certificates issued by Export Promotion Councils, documents regarding quotas wherever applicable, etc. The Shipping Bills will be assessed as usual, the goods examined, samples drawn, if required, inspection carried out by other agencies under any one of Allied Acts. After the assessment of Shipping Bills, original and duplicate Shipping Bills along with the two more copies (transference copies) and original GR form will be retained at the ICD. The original GR form will be forwarded to respective branch of Reserve Bank of India.

5. The examination order would be given on duplicate and both transference copies of Shipping Bill. The report would also be recorded on all these copies, duplicate copy of S/B would be retained in ICD and transference copies would be forwarded to the Airport/ Port. FOB value of goods would be debited from the continuity bond executed by the custodians. After the examination is over, all the packages would be handed over by the Customs. Authorities to the custodians of goods along with two transference copies of Shipping Bill, certified copy of invoice, packing list and other documents in sealed cover. The goods are to be transported by container or truck, the entire cargo body of which can be sealed with tamper proof bottle seals, all the packages

would be stuffed can be sealed with tamper proof bottle seals, all the packages would be stuffed in the container/trucks under supervision of customs and representatives of the custodians. After the stuffing, the containers/trucks would be sealed with tamper proof bottle seals. The examination order and endorsements that the trucks are sealed would be made on both copies of Shipping Bill and AR4 form, it would be signed by customs as well as custodian's representatives. The seal number would be endorsed on all documents.

6. The custodians would be required to move the goods by road or rail upto Gateway Ports/Airports.

7. At the Gateway Ports/Airports, both the copies of Shipping Bill would be presented by the custodian's representative to the proper officer of Customs who would verify the genuineness of documents and check the marks and numbers of the seals on trucks/containers as recorded on the documents. The customs officer would inspect the seals of trucks/containers and will endorse the two transference copies of Shipping Bill and AR 4 in the following manner, "inspected and the seals found intact bearing the following marks and Nos-----".

8. In case customs seal on the container/trucks are found broken or tampered with or some discrepancy found in seal nos., the matter would be brought to the notice of Assistant Commissioner of Customs and such container/trucks would be subjected to 100% examination. In case seals are found intact as per documents and documents in order, the Preventive Officer posted at Airport/Port will endorse the Transference copies of Shipping Bill with 'Shipment allowed' endorsements. The Preventive Officer posted at Port/Port will endorse, let export" on both the copies of Shipping Bill and AR4 at the time of actual shipment. One copy of Shipping Bill would be retained at the Port/airport of Shipment and another transference copy would be returned to ICD/CFS from which the container/trucks originated.

9. On receipt of transference copy of Shipping Bill the ICD/CFS would match it with duplicate copy of Shipping Bill and to ensure that the goods have been exported. If the copy is not received within 90 days, the Assistant

Commissioner of customs shall raise a demand on the custodian equal to the duty & drawback contained in the export goods in addition to action against the exporter & intimate the DGFT & RBI.

10. The salient features would be:-

i. The Shipping Bills would be passed at ICD/CFS and same are not required to be passed at Gateway Ports/Airports. There would be no further examination of the goods if the seals are found intact.

ii. The drawback would continue to be sanctioned after the 'let export' order is given on the Shipping Bill.

iii. Original GR form would be retained at ICD/CFS and would be forwarded to respective branch of RBI there only.

iv. The export for all statistical purpose would be taken from ICD/CFS and it would be included in all statements of exports from that station.

v. The exports under DEC/DEPB etc., under the proposed scheme would be allowed in case the same are allowed from that station.

vi. AR 4 and other Central Excise procedures as provided under Central Excise Rules and instructions issued by Board from time to time would be applicable.

11. On receipt of transference copy of Shipping Bill, the necessary credits would be given in continuity bond executed by the custodians for movement of goods.

12. The Customs/ Central Excise staff for above mentioned & all related work could be provided on cost recovery basis.

13. In case the exporters desire to get the goods examined and container/trucks stuffed and sealed in

factory of manufacture for the purpose of exports from Gateway Ports/Airports, the procedure for examination of goods are sealing packages and trucks as contained in Rule 187 of the Central Excise Rules, 1944 and instructions issued from time to time on the subject, would be followed. Customs House and Central Excise Commissioner may issue suitable Public Notices incorporating the above positions. The difficulty if any in following the above procedure may be brought to the notice of the Board.'

Though the circular is voluminous, we have thought it fit to extract it in full, in order to place on record, the comprehensive nature of the instructions in regard, to the movement of goods and detailed instructions thereto.

8. The scheme and purport of the arrangement thus indicates clearly that a custodian has, as the name suggests, full custody of the goods entrusted to it from the time of storage till the time the goods are moved, arrive at the gateway port or other customs areas/equivalent and are cleared for export. The submission of the learned counsel for the appellant is to the effect that mens rea is necessary to attract the provisions of section 114 to the transaction. The Tribunal, on the other hand, proceeds on the basis that the existence of mens rea is not an essential ingredient to establish contravention of a civil law, placing reliance on the judgments of the Supreme Court in the case of *Chairman, SEBI vs. Shriram Mutual Fund* (2006 (5) SCC 361 and *Pine Chemicals Suppliers vs. Collector of Customs*, followed and applied by this Court in *Commissioner of Customs (Export), Chennai-I vs. Bansal Industries* (207 ELT 346).

9. The case of the petitioner is that the sealed containers were

tampered with in transit between the CFS and the gate way port and the contents replaced with red sanders logs, a prohibited item. They would deny all responsibility for the substitution of the goods, stating that the onus of providing transportation and consequently the responsibility connected therewith, lay with the customs house agent. The guidelines issued reveal otherwise. Increasing clarity has been brought in with regard to the role and responsibility fastened upon the custodian with the evolution of the guidelines from 1993 to 1998. It is made incumbent on the CFS/custodian to assume responsibility, not merely for duty liability on loss/pilferage of goods under transportation, but for the goods itself. Even if the appellant were to state that the 1993 guideline was unclear in this regard, the 1998 circular is crystal clear. The transaction in question occurred in 2004 when the aforesaid circular was in effect. The very fact that a custodian is to be held responsible for loss of the goods means that the ultimate responsibility in relation to the contents of the container lies with it. This will include loss of the original goods by substitution which has happened under the watch of the CFS.

10. Custody is a dynamic process commencing with the receipt of cargo, movement of goods by the custodian and concluding with the presentation of shipping documents by the representative of the custodian at the gateway ports/airports and including all events in between. Any attempt to dilute the responsibility of the custodian in this sequence would clearly be contrary to the apparent intention. The custodian is, but one link in the chain

of events relating to the movement of goods in the course of import and export. Accepting the argument of the appellant would weaken one link of the chain, thus compromising the entire network. The reliance placed by the Appellant on the decision of this court in *Commissioner of Customs vs. Sahaya Edin Prabhu and another* is of no support to it since the relevant circulars extracted above were, unfortunately, not brought to the notice of the court.

11. That a custodian is involved, and is thus responsible for all aspects of a transaction within the contours of circular 57/98 dated 04.08.1998 would thus admit of no doubt. As a consequence the provisions of section 114 will stand automatically attracted in the event of violations by way of omission and commission of the acts stated therein. For the above reasons, this appeal is dismissed. The substantial question of law is answered against the assessee and in favour of the Revenue. No costs. Consequently, connected M.P.No.1 of 2015 is closed.

[H.G.R.,J.] [A.S.M.J.]
10.04.2017

msr

Index:Yes/No

Speaking Order/Non-Speaking Order

To

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South Zonal Bench, Chennai.

HULUVADI G. RAMESH, J.

and

Dr.ANITA SUMANTH, J.

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PREDELIVERY JUDGMENT IN

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