

Santosh Textile and ors. Vs. Commissioner of Customs

Santosh Textile and ors. Vs. Commissioner of Customs

SooperKanoon Citation : sooperkanoon.com/44540

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-08-2007

Reported in : (2007)(117)ECC350

Judge : J Balasundaram, Vice, K Agarwal, S T Chittaranjan, K Kumar, T Anjaneyulu

Appellant : Santosh Textile and ors.

Respondent : Commissioner of Customs

Advocate for Pet/Ap. : Shri. A.V. Naik

Judgement :

2. All the appeals are disposed off by a common order as they involve the same questions of law.

3. In so far as Shri B.P. Kotak and Shri Sunil Hemani are concerned the Id. Counsel has submitted that there is no specific directions from the Member, CBEC for filing an appeal against them. The question which has been framed for determination by this Tribunal refers to exporters, their directors and others. Quite evidently, the appeal against Respondents 2 and 3 have been filed by the Commissioner by treating them as one of the "others". This, in the submission of the respondents, is clearly impermissible as it was necessary for the Member, CBEC to have specifically indicated the names of the persons against whom an appeal was directed to be filed. The Commissioner (Adjudication) could not be

vested with a discretion to decide who the "others" should include. It was therefore submitted that the appeals filed by the department against Respondents 2 and 3 were without jurisdiction and hence not maintainable.

4. Insofar as Respondent 1 is concerned, the following contentions were urged in the course of the hearings held before the Tribunal: i) In all, 14 show cause notices were issued to the Respondent 1, which have been categorized in four groups in the impugned order of the Commissioner of Customs (Adjudication). Notices covered by Group I and II relate to alleged manipulation of export documents and consequent penal action under Sections 114(i) and under Section 117 of the Customs Act, 1962. Notices covered by Group III and IV, on the other hand, relate to imports effected at Nhava Sheva Port and Mumbai Customs House against transferable Advance Licences. These notices demand duty from importers as well as propose penal action against Respondent 1 under Section 112 of the Customs Act, 1962.

(ii) Since the prayer in the Revenue's appeal against Respondent 1 is confined to imposition of penalty under Section 112 of the Customs Act, 1962, it is obvious that the review which the Board has ordered relates only to the charges and allegations contained in notices covered by Group III and IV. As such, the allegations and charges contained in the notices covered by Group I and II are no longer the subject matter of dispute.

(iii) In respect of the 7 notices which are categorized in Group III and IV, exports by different exporters were effected from Kandla and the imports were made against transferable advance licences at Nhava Sheva Port and at Mumbai Port respectively. In these notices, the charge leveled against respondent 1 was that he had 'conspired' with the exporters in fraudulently obtaining advance licences on the basis of a manipulated Export Promotion (EP) copy of the shipping bill. The said notices also contained allegations of 'abetment' against the employees of the CHA firm, viz. Shri Sunil Hemani, Shri Sabu George, Shri S. Rajappan.

(iv) Insofar as the charge of 'conspiracy' against Respondent 1 is concerned, the Commissioner (Adj) had dropped the charge and the Board's order of Review does not seek to challenge the said adjudication order on this aspect, but seeks to

now invoke a charge of 'abetment' against the Respondent 1 and impose penalty upon him under Section 112 of Customs Act. It was submitted that since a charge of 'abetment' was not leveled against Respondent 1 in the show cause notice and no finding thereon was recorded by the Commissioner in the impugned order, the review order passed by the Board which seeks to level such a charge against the Respondent for the first time cannot be sustained. It was pointed out that under Section 129D of the Customs Act, 1962, the Board is empowered to direct filing of an appeal to the Appellate Tribunal only for determination of such points which "arise out of the impugned decision or order. In as much as the point the revenue wants the Tribunal to determine (i.e. whether appellant can be held guilty of abetment) does not arise out of the impugned order of the Commissioner, the order of Review passed by the Board and the appeal filed is not maintainable. In this regard reliance was placed on the decisions of the Tribunal. (Extrusion Processes Ltd. v. Collector ; Collector v. MRK Frozen Food Exports Collector v. Lyka Labs 1999 (109) ELT 420; J & Ice Creams v. Commissioner 1999 (14) ELT 965; JBS Capacitors v. Collector).

(v) Without any prejudice to the aforesaid contention as to the maintainability of the appeal, it was submitted that the appeal seeks to charge Respondent 1 with abetment for those acts of the Respondent "which resulted in the issue of DEEC licences showing higher quantity of PFY for import". This is evident from para 4(vi) of the Review Order which reads thus: 4(vi)...abetted the offence of manipulation in the weight shown in the Shipping Bills which resulted in the issue of the DEEC licences showing higher entitlement of import of PFY...for these acts of abetment, which resulted in the issue of DEEC licences showing higher quantity of PFY for import.

...However, in the show cause notice the charge was brought out against B.P. Kotak, Chairman M/s. Radhakrishna Shipping Pvt Ltd. and others, that they had abetted the offence of manipulation in the weight shown in the shipping bills which resulted in the issue of DEEC licences showing higher quantity of PFY.... This order of the Commissioner of Customs (Adj) also does not appear to be correct in law because penalty had been proposed on Mr. Kotak and others for these acts of abetment, which resulted in the issue of DEEC licences showing higher quantity of

PFY for import.

(vi) In the light of the above submissions, it was submitted that the only ground which this Hon'ble Tribunal is required to determine is whether Respondent I was guilty of abetting the "offence of manipulation" in the weight shown in the shipping bill which resulted in the issue of DEEC licence showing higher quantity of PFY.

(vii) It was submitted that the Show Cause Notice (No. S/10-29/97-Adj issued to P.A. International) accepts in para 41 that the DEEC licences showing higher quantity were issued on the basis of 'manipulated Export Promotion (EP) copies of Shipping Bills'. The orders of Id. Deputy DGFT in the case of P.A. International & Ors also clearly records that the exporter had obtained DEEC licence showing a higher quantity of PFY on the basis of manipulated "EP copies" of the shipping bills. This order of Deputy DGFT has been relied upon in the show cause notice and it has not been the department's case at any stage of the proceedings that the DEEC licences were obtained on the strength of any other copy of the shipping bill. The limited question which therefore arises for determination before this Tribunal is whether the respondent had abetted the offence of manipulation of the Export Promotion (EP) copy of the shipping bills which resulted in the issue of DEEC licences showing higher quantity of PFY.

(viii) It was submitted that the arguments made by the Id. DR in the course of hearing went far beyond the above ground as the Id. DR read out several allegations in the Show Cause Notices which were related to manipulation in the 'duplicate' copy of Shipping Bill and their removal from the Kandla Custom House, etc., which though contained in the show cause notice were not sought to be revived in the revenue's appeal by this Hon'ble Tribunal. The scope of the revenue's appeal cannot be expanded to revive all the allegations and charges contained in the notice in absence of specific grounds and reasons for doing so. It was therefore submitted that the various arguments made by the Id. DR. relating to manipulation of duplicate copy of the shipping bill and their removal from the Kandla Custom House are not relevant or germane for the purpose of revenue's appeal and therefore need to be excluded from consideration.

ix) Having brought out the limited scope of the department's appeal, the attention of the Hon'ble Bench was invited to the findings of the Commissioner in the

impugned order in para 51 read with para 36 and 37 of the impugned order. The relevant findings in the order are as follows: 36... The position that clearly emerges is that adequate evidence exists to establish that export promotion copies of the shipping bills have been tampered with and these alterations could well have been carried out by the exporter themselves without intervention or assistance from any one else, after they got triplicate copies from the CHA after completion of shipments. There is no evidence directly implicating the CHA, Shri Kotak or the employees of the CHA with the tampering of the export promotion copies of the shipping bills.

37... I have to take note of the fact that export promotion copy is returned by the CHA after shipment is completed, to the exporters for presentation to the concerned authorities for claiming export benefits. Hence, tampering of this copy would have been possible at the hands of the exporter without help from outside agency. No connivance with CHA is called for. As soon as E.P copy is received by the exporter, it was open for him to submit the copy of as it was or submit it to DGFT after alternation.... Even the copies of Shipping Bills maintained in CHA's office and recovered by DRI show the correct weight. If CHA or their employees were involved, copies of S/Bs recovered from the CHA's premises would have shown the manipulated figures. Even the dock examination register shows the correct weights, which confirms that CHAs have presented correct S/Bs for examination. Manipulations appear to have been done after Customs examination and out of charge order, for which CHA cannot be faulted.... Moreover, the alleged evasion of customs duty by way of duty free import of input materials more than the entitlement has been caused only by grant of the DEEC licences for the higher quantity based on the manipulated E.P copies of S/Bs submitted by the exporter. This has been specifically mentioned in the order of the cancellation of the relevant DEEC licences. Hence on this basis, I am to hold that the exporters have manipulated export promotion copies of the shipping bills after the goods were exported and on that basis they had fraudulently obtained the DEEC licences, which has resulted in evasion of duty. It is also pertinent to note that Shri Deepak Bajaj and Shri Rajiv Kumar Bajaj carried electronic typewriter all the way to Kandla for typing S/Bs which also goes to establish their design to alter the S/Bs, at a later stage subsequent to export. Hence, if any manipulation in the triplicate copy of the

S/Bs has been done by the exporters, after the goods have been cleared by Customs, the CHA cannot be held liable. Shri Rajiv Kumar Bajaj, in his statement dated 27.3.1995 (in reply to query No. 16) had admitted that they inserted one figure on the left side of the weight column, after the S/Bs were passed, which shows that it was a post clearance alteration for which CHA cannot be held liable.

(x) The Id. Counsel submitted that the appeal filed by the Revenue does not contain any basis to contest the findings of the Commissioner that the manipulation in the EP copies of the shipping bills was carried out by the exporters themselves by using a portable typewriter carried by them from Mumbai to Kandla without any help from the CHA. None of the grounds taken by the department have any relevance to the aforesaid findings of the Commissioner which alone are relevant for deciding whether or not Respondent 1 was guilty of abetting the offence of manipulating the weight shown in the EP copy of the shipping bill. Since the allegations in the show cause notice relating to manipulation in the duplicate copy of the shipping bill as well as their removal from the Kandla Custom House are not the subject matter of the department's appeal, the arguments made by the Id. DR on these aspects are completely irrelevant.

(xi) The show cause notice had alleged that Respondent 1 was involved in the manipulation of the Export Promotion Copy of the shipping bill and that he was present in Kandla during the relevant time to personally ensure that the manipulation in the shipping bill was carried out to suit the exporter's requirements. In support of this allegation, the notice had relied upon the statements of the exporters and also the hotel records at Kandla, which purported to show that the respondent was present in Kandla during the relevant period. The notice in para 51(f) refused to believe the statement of the respondent, in which he had denied his role in the manipulation and for this purpose relied upon hotel records to show that the Respondent 1 was present in Kandla. The allegations in this regard appear from paras 51 (e) to 51(g) of the show cause notice. In the course of adjudication, the respondent has pointed out that the statements of the exporters were self-serving and false as the exporters had themselves admitted subsequently that the manipulation in the Export Promotion Copy of the shipping bill was done by them by using their own portable typewriter which they had

carried from Mumbai (As per statement of Rajiv Bajaj dt. 27.3.1995 at para 15(e) of SCN). The order of the Joint DGFT canceling the licences in fact relies upon the shipping bill copies recovered from the CHA as reflecting the correct weight (vide Order No. F-3/53/95-96/ECA/BOM/701 to P.A. International). No incriminating document was recovered from the respondent's premises. Respondent's statements were also exculpatory. The said statements which denies his involvement in the alleged manipulation are sought to be discarded in the show cause notice only on the ground that contrary to his claim in the statement that he was absent from Kandla at the relevant time the hotel record was otherwise. It was pointed out during the hearing that the hotel records and the statements of the hotel's representatives at Kandla itself showed that the respondent was not present in Kandla during the period when the shipping bills were filed and processed. Further the Apex Court in the case of CCE v. Trivandrum Rubber Works Ltd. that unless there is evidence on record to show that a CHA continues to remain as the agent of the importer, even after the goods have been cleared through customs, it cannot be presumed that the CHA continued to be the agent of the importer. Though the decision is in regard to service of demand notice on the importer, the principle laid down in the said judgment is equally applicable to the present case. Therefore, if any manipulation in the Export Promotion Copy of the Shipping Bill had been carried out by the exporters after the goods have been cleared by the Customs, there can be no basis for presuming that the CHA was responsible for such action.

(xii) Based on the above submissions, the Commissioner (Adjudication) had dropped the case proceedings against the respondent. In the appeal filed before the Tribunal, there is no effective challenge against the two submissions made by the respondents, which found acceptance with the Commissioner (Adjudication). The fact that the exporters' statements were contradictory and false is not in dispute. The further fact that the respondent was absent from Kandla at the relevant time is also not in dispute. Also the fact that the exporters themselves had carried out the manipulation in the Export Promotion Copy of the shipping bill by using their own typewriter is not controverted in the department's appeal. This being the position, the charge that the Respondent 1 abetted the offence of manipulation of the Export Promotion Copy of the shipping bill is not based on any

basis, let alone a valid one. Apart from the fact that there is complete absence of evidence to prove respondent's involvement in the act of manipulation of the Export Promotion Copy of the shipping bill, the circumstances of the case also cannot justify such an inference for the reason that if the respondent was really a party to the conspiracy of forging/manipulating the documents, there would have been no need for the exporters to carry their own typewriter from Mumbai to Kandla when respondent had a full-fledged office in Kandla with several typewriters and typists to carry out the alleged manipulation. As such, the Revenue's contention in the appeal is illogical besides being baseless.

(xiii) Without prejudice to the aforesaid contentions, it was submitted that since the Board had decided not to pursue the case against Respondent 1 insofar as SCNs in groups I and II are concerned, where the primary charge was "manipulation of export documents" and consequent penal action under Section 114, it would be incongruous to hold Respondent 1 guilty of abetting illegal imports based on the premise that there was 'manipulation in export documents.' If at all the Board was serious in its allegations about manipulation of documents, it ought not to have accepted Commissioner order insofar as the same had dropped case proceedings against Respondent 1 in SCNs I and II where manipulation of export documents was the primary charge.

5. On an overall appreciation of the evidence cited in the SCN, the Id.Commissioner has rightly come to the conclusion that the licences were obtained for an inflated quantity of PFY on the basis of manipulated exchange control copies, which were given to the exporters after shipment, whereas copies of Shipping Bills resumed from the respondents show the correct weights, which are relied upon by DGFT for getting at the correct weight. In these circumstances, it is highly probable that manipulations on the Exchange Control Copies of the S/Bs could have been done by the exporters after shipment without any abetment or assistance from the respondents. The Revenue has not even at this stage, rebutted the above findings by producing any evidence to show that exchange control copies were tampered with by the respondents.

Records like dock examination register taken over from the docks also show the correct weights showing that the respondents have presented the S/Bs to the docks showing the correct weight. The hotel records heavily relied upon by the Revenue to allege that Shri B.P. Kotak was personally involved, being present during the shipment and during the period of logging the DEEC books, do not show that Shri Kotak was in the hotel during or round about those dates. Personal involvement of Shri Kotak in any of the acts alleged is not established by any credible evidence. On account of these factors, the Id. Commissioner has extended the benefit of doubt and rightly dropped the penal proceedings against the respondents. The entire Revenue appeal and the arguments of Id. DR do not in any way discredit the above factors giving the benefit of doubt in favour of the respondents. Mere reiteration of the allegations in the SCN without meeting the reasoning in the findings of the Id. Commissioner cannot make it an improper or illegal order.

6. In the affidavit of M/s. Sharan Exports it is interalia submitted that the said firm has not paid anything over and above the Clearing and Forwarding Charges shown in the bill raised by Shri Radha Krishna Shipping (P) Ltd. It is clearly mentioned that an amount of Rs. 4.521/- per container was paid and not Rs. 1 lakh as has been alleged; thus the payment made only towards the normal clearing & forwarding charges and nothing else; that the ex-parte order has deprived me of an opportunity to present the correct facts and evidences. Besides, as borne out by the letters dated 4th October 2000; that no inspection of vital documents has been given. The ex-parte order has been passed in violation of principles of natural justice; that even after the request for adjournment for one more hearing was granted to other notices, but no such opportunity of hearing was given to M/s. Sharan Exports and no intimation was given to the firm for further subsequent date of hearing; that the manipulation of weight in the E.P. copies of the Shipping Bills in the basis against the firm which can be proved to be manipulated only if the original shipping bills which are admittedly and undisputedly supposed to be in Customs custody are compared with the E.P. copies; Exchange Control Declaration form is a crucial document for ascertainment of actual weight which has also not been produced or compared beside the same were being in the custody of the Reserve Bank of India (RBI); until and unless these GRs are

matched by DESACS, the original GRs is to be retained by RBI, Ahmedabad and the duplicate is to be retained by the RBI, Mumbai. That the firm was informed by the RBI by a letter dated 20th October 2000 that out of 8 GR's only 1 GR No. AF 771042 is not available with them; that the missing GR relates to shipping bill No. 5114 dated 30.3.94 which is part of our shipment from Kandla, which is the subject matter in this case; that in case of P.A. International he also a co-noticee, the Bank of Tokyo has informed by a letter dated 15.5.2001; that they have sent a duplicate GR form to RBI; that Part F of Part II of the D.E.E.C.License pertains to exports and is crucial as it shows the details of the audit by the Customs authorities and their report thereon, in relation to exports; that it is also significant to mention that the Audit is not conducted on the basis of E.P. Copy but on the basis of photo copy of the Original Shipping Bill; The DRI has obtained from DGFT, all copies of licences and documents relating to our exports from Kandla and enclosed these in the R.U.D's; para 3.5 (i) at page 14 of the standing order specifically stipulates that the DEEC copy of the shipping bill has to be cross checked with the photo copy of the original copy of the shipping bill retained in the export filed; it is not the department's case that no collusion with the Audit Officers; in fact at page 24 of the impugned order the Commissioner (Adjudication) has held "in a case where Departmental Officers are also concerned with the act, when there is no allegation of collusion against the officers, allegation of mis-declaration or clandestine removal cannot be sustained. When the documents are admittedly in the control and custody of the Customs Officers and when there is no allegation of collusion against any of these officer, allegation of their removal by the CHA and the employees without their knowledge or connivance cannot be justified; that it is proved that our original shipping bill was correct as shown in the DP copy; there is no register like examination register and a rough register containing some entries has been relied upon by the Department; the Port Trust copies purportedly recovered from the CHA office have been relied upon as evidence against us; the copy of the Port Trust supplied by Kandla Custom House and relied upon by the Department also do not constitute reliable evidence; that my statement have been recorded under threats and given under acute pressure and distress. I was also arrested and have retracted my statements at the first available opportunity, when the first hearing was fixed before the Hon'ble Chief Metropolitan Magistrate on

220.4.95; that the export goods were neither prohibited nor dutiable. Therefore, the invocation of Section 113(d) is misconceived and the order is not sustainable. Consequently the imposition of penalty under Section 114(i) & Section 117 on the basis that the export goods are liable for confiscation under Section 113(d) is erroneous and illegal; that the Apex Court judgment in Commissioner v. Prayag Exporters Pvt. Ltd. 2004 9163 E.L.T. A113 (S.C.) is clearly applicable to our case.

7. The Id. DR in his reply to the affidavit has interalia submitted that the appellants evaded duty to the tune of Rs. 1.55 Crore; the DGFT cancelled their licences Ab Initio; This order of cancellation has not been set aside; that the appellants have availed benefit of notification by fraud; that they obtained Advance Licences by not exporting goods; the Commissioner has correctly confirmed duty against void licence; that the DR has proved in open court with documents from DGFT, CHA, shipping Agents, Port Trust, Textile Authorities, Registers in docks, bill of Ladings, Container's detail and the documents filed by the appellants filed by the appellants also support the case of the department.

8. It is seen that the DR has given figures relating to various shipping bills and the appellants running into about 8 pages which do not appear to have been duly considered in the impugned order.

Therefore it is difficult for us to appreciate the same; that the DR has also stated that there is no violation of principles of natural justice. He has relied on the cases of V.K. Thampi v. CC Cochin , that he submitted that no issue of transfer and transferee since importer and exporter is same person; in support of his contention he relied on in the cases of FEDCO (P) Ltd. v. S.N.Bilgrami SC, New Indian Assurance Co. Ltd. Shimla v.Kamla and Ors., East India Commercial Co. Ltd. v. CC.Calcutta , Blue Blends (India) Ltd. v. CC. Mumbai 2001 (136) ELT 411 (Tri.-Mum), A.R. Gupta v. CC. Mumbai 2000 (126) ELT 1152 (Tri.), Suraj Sales Corporation v. Commissioner of Customs, Mumbai 2002 (149) ELT 1413 (Tri. Mum), ICI India Ltd. v. CC (Port) , Taparia Oversea (P) Ltd. v. Union of India Bom. He also in his written submission in reply to the affidavit mentioned admission of fraud by importers, corroborated by co-accused, Retraction is afterthought, no evidence of force threat, coercion etc. produced. Further in support of his

contention he has relied on the decision in the case of Naresh J. Sukhawani v. Union of India Pvt. Ltd. v. CCE, Ahmedabad 2001 (136) ELT 1255 (Tri. Mumbai), Sudesh Kumar Mittoo v. CCE, Jaipur 2001 (136) ELT 100 (Tri. Del), Dinesh Khindria v. CC. New Delhi 2001 (135) ELT 610 (Tri. Del), Gehri Lal Dagalia v. CC. Jaipur 2002 (148) ELT 736 (Tri. Del), R.S. Verma v. CC. Calcutta 2001 (137) ELT 652 (Tri. Kol), Satish Kumar v. CC, New Delhi , Abha Impex v. CC. Bombay 1999 (109) ELT 876 (Tri.). Gundesh Raju v. CC. Bangalore , Hanuman Prasad v. CC, Jaipur , Bhagwan Tana Patil v. State of Maharashtra 1975 1 SCJ 571, Ratan Exports & IND v. CC. Chennai 2000 (123) ELT 808 T affirmed by SC in 2001 (127) ELT A48 SC, Rajiv Wollen Mills v. CC T affirmed in 1998 (97) ELT, A145 (S.C.), Roopkala Export Corp v. UOI , De-NOCIL. Corp Prot v. CC, Mumbai , Chandigarh Admin. v. Jagjit Singh Coromander Fertilisers Ltd. v. Union of India and Ors.

), Kalyani Packaging Industry v. Union of India 9. With regard to non-availability of the original and duplicate copy of the shipping bill the Id. DR has relied on the decision in the case of Natwar Textile Processors Pvt. Ltd. and Protection Manufs Pvt. Ltd. 2004 (177) ELT 612. Section 65 of the Evidence Act 1872 provides that Secondary evidence may be given of the existence.

condition or contents of a documents in the following cases: When the original have been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason) not arising from his own default or neglect, produce it in reasonable time He also referred Section 36B of the Central Excise Act. 1944 with regard to admissibility of micro-films and computer print outs as documents as evidence.

With regard to remittance of full foreign exchange into India is not sure indication of declared export. In this regard he relied on the decision in the case of Pankaj v. Sheth and Merchant Exports v. CC, Cochin . As regards the admission of guilt he submitted that if no guilty then there is no need of further investigation. In this regard he relied on the decision in the case of Shri Katki Gurakhu Karyalaya , Besco Ltd. 2001 (137) ELT 168 T (Kol). As regard the effect of fraud which is normally vitiate any act or order. He relied on the decision in the case of SCC-0550-SC and CC, Kandla v. Essar Oil Ltd. enhancement of penalty he relied on

the decision in the case of Abdul Khader v. Union of India , La Grande Projects Ltd. v. CC, Mumbai 2002 (150) ELT 719 (Tri.), Ratan Exports & Ind v. CC.Chennai 2000 (123) ELT 808 (Tri.), Ram Narain Poply v. CBI AIR 2003 SCW 3257 etc. and strongly requested the bench to hold the order of the Commissioner.

10. We find that the department has filed the appeals against J.L.

Kocker, B.P. Kotak, Sunil H. mani, Kanthaswamy, Radhakrishna Spg Pvt.

Ltd., Rajeev Bajaj, K.V. Gopal Krishnan, Ashok B. Rajani, Sharan Export. P.A. International, Sabu George, Rajkumar Hasija. Deepak Bajaj, Trabsworld Shipping Services, Srinivas Rajappan, Dee-Gee Exports for enhancement of penalty and for imposition of penalty on the CHAs.

11. After perusal of the impugned order, we find that the Commissioner has recorded sufficient reasons for imposition of lesser penalty and for exoneration of CHAs. In our view the same does not require any enhancement or imposition of penalty on the CHAs. It is seen from the impugned order that Shri Dipak Bajaj has admitted that he made alterations on the Shipping Bills. Shri. B.P. Kotak against whom allegations of conspiracy is made, in his very first statement has denied his involvement in the alternations made in the Duplicate Shipping Bills. He has stated that he being M.D. and Chairman of the CHA was not concerned with day to day affairs, nor he was aware in variations in weights noticed. Shri B.P. Kotak being the CMD can not be expected to be dealing with day today affairs and it was not his duty to process the Shipping bills either in the Docks or in the Custom House. His instructions to his staff to render assistance to Shri Dipak Bajaj cannot be construed to be malafide in the absence of any specific evidence to the effect that he gave directions to his staff to help Shri Dipak Bajaj in manipulating the export documents. Shri. Dipak Bajaj has admitted that he instructed Shri Dilip Jagtap to procure the duplicate Shipping bills from the Shipping Agent on the pretext of requirement for bank/octroi purposes, and after manipulation in weight figures on the duplicate copy, the duplicate shipping Bills were returned to Jagtap who in turn returned the same to the Shipping agent and got back the undertaking given by him. Against this factual back-drop, allegation of conspiracy against Shri Kotak or his rendering any assistance in alternation of the shipping bills, either personally or

through instruction to his staff, has not been established. No doubt, an area of suspicion was created, because of his behaviour, of not responding to the summons and coming out of Mumbai to keep himself scarce. It, however, creates only suspicion which can not take place of proof in the absence of any positive evidence against Shri Kotak's involvement in manipulation of Shipping Bills. The Commr. Has, therefore, extended the benefit of doubt to Shri Kotak and discharged him from, all the three Show Cause Notices.

12. With regard to other persons to whom the Commr. has discharged, he has recorded that charges & allegations are general and no specific allegations of their involvement in alternation of the Shipping Bills is discussed in the Show Cause Notices. And also he did not find direct evidence implicating persons discharged. Therefore, in our opinion we do not find any justification for enhancement of penalty to CHA, who have been discharged by the Commr. after going into great details and on the basis of available records, we would, therefore, not like to re-open their cases. It may be mentioned that we have already dismissed the appeal of Dee Gee Exports for non-compliance. Therefore, the impugned order will sustain against them.

13. As regards the appeals of Santosh Textile, Sharan Exports, Rajkumar Hasija, P.A. International, Ashok B. Rajani and Blend Syntec, it is seen that the Id. Counsel appearing for the appellants have raised certain points in the affidavit filed by them with supporting documents annexed therewith running into thousands of pages containing various figures and facts which were not produced earlier before the lower authorities. Similarly the department also in their reply have quoted various decisions and referred to various facts and figures which were earlier not produced before the lower authorities. Therefore, we find that the appeals filed by the above appellants need to be remanded to the Commissioner for fresh adjudication for the following reasons: (i) Shri A.V. Naik. Advocate appearing for the appellants has submitted that the Commissioner has not given personal hearing.

Therefore, the principles of natural justice have been violated.

(ii) No findings have been given with regard to imposition of penalty on the importer. The Commissioner has also not discussed the availment of benefit by the exporter. He also submitted that no penalty has been imposed on the importer under Section 112. No finding has been given with regard to Raj Kumar Hasija. Regarding the allegations of pre-fixing figures in the shipping bills he submitted that at Kandla Port no FIR was lodged or no departmental enquiry was conducted. The Commissioner has failed to give his findings with regard to 13 shipping bills in the case of Saran Exports. The Id. Advocate appearing for Saran Exports also submitted that the calculation done with regard to Part F has not been considered and no findings has been given by the Commissioner. The Commissioner has also failed to give his findings on DEEC book. Part F was not shown to the Commissioner.

(iii) The Id. Counsel also submitted that they were not allowed to inspect the original records. The Id. Counsel has forcefully submitted that once the Commissioner has held that the import is not illegal, there is no question of duty demand in the matter as per the decision of the Apex Court as reported in 2002 (143) ELT 153 (SC). As regards the cancellation of the licences the same cannot be done from retrospective date as held by the Apex Court as reported in 1992 (58) ELT 163 (SC) and 2000 (12) 577 (SC). The affidavit of Saran Exports gives so many facts and figures which have not been considered by the Commissioner and findings recorded thereon. It may not be possible for us to go in so many details of documents. The only alternative is that all the facts and figures mentioned in the affidavit may be looked into by the Commissioner and the Commissioner may pass a fresh speaking order after affording reasonable opportunity of hearing to the appellants.

14. The reply to the affidavit filed by the department also contains so many facts and figures on which the findings is needed by the Commissioner. Both the sides have cited several case laws which were not cited before the Commissioner earlier. Therefore, it is necessary that the same are pursued by the Commissioner. We, therefore, remand all the appeals to the Commissioner for fresh adjudication except the appeals of the Revenue seeking enhancement of penalty and imposition of penalties on CHAs. Revenue's appeals in this regard are

dismissed. Chittaranjan Satapathy Krishna Kumar Member (T) Member (J) I have carefully perused the proposed order recorded by the Hon'ble Member (Judicial). Since there are allegations of fraud and manipulation in the shipping documents, which were handled by the CHA and their employees as well as the exporters, and since apart from the allegations made by the Department, the exporters are also blaming the CHA for the manipulations and the CHA is denying the same, I am of the view that a partial remand will constrain the adjudicating Commissioner to arrive at the truth. Hence, I am of the view that the appeals filed by the exporters as well as the Departmental appeals filed against the exoneration of the CHA are required to be remanded together to enable the adjudicating Commissioner to properly examine the issue afresh and to come to a correct finding as to whether there were manipulations, and if so, who were responsible for the same. Hence, I propose that all the appeals including the appeals filed by the Department of remanded together.

The following difference of opinion has arisen between Member (Judicial) and Member (Technical). The matter is therefore, referred to the Hon'ble President for appropriate order: Whether in view of the facts and circumstances of the case and the legal position as explained in the order recorded by Member (Judicial), the appeal filed by the appellants except the appeals of the revenue are to be remanded and the appeals filed by the Revenue are to be dismissed.

Whether all the appeals filed by the appellants including the appeals filed by the Revenue are to be remanded as held by the Hon'ble Member (Technical). Chittaranjan Satapathy Krishna Kumar Member (T) Member (J) 2. This reference has been made to third member to express his opinion on the divergent views arrived at by the Hon'ble Member (J) and Hon'ble Member (T) in the above referred appeals against the impugned order.

Accordingly, I have heard both set of advocates appearing for different appellants and as well as Id. SDR appearing for the revenue. After hearing extensively at length and on perusal of orders recorded by both the Id. Member (J) and Id. Member (T) and further pursuing the impugned order passed by the adjudicating authority, I proceed to decide the reference as under: i) An Order recorded by the

Hon'ble Member (J) Shri. Krishna Kumar is well reasoned one after due consideration of all the facts and circumstances of the case and as well as the law on the given subject. Therefore, I do not feel it necessary to reiterate the facts and circumstances covering these appeals at the cost of repetition except those which are canvassed before me and relevant for the purpose of the reference. I have also perused the order recorded by Dr. C. Satapathy, learned Member (T) which is cryptic in nature and based on the claim of the exporters about the alleged manipulation by the CHA and CHA is denying the same. Therefore, I am unable to pursue myself to agree with the views expressed by the Id. Member (T). Mere basing on the exporters claim that the CHA is responsible for the manipulation of Shipping Bills in view of specific denial of the same by the CHA & in absence of specific finding on the charge of conspiracy against the respondents.

Whereas, the order of Id. Member (J) discusses the alleged contraventions made against exporters and as well as the CHA and assigned reasons, thereupon, after due consideration of facts and law. They are not hitherto specifically dissented by the Id. Member (T). Therefore, I would agree and concur with the views expressed by Id. Member (J) and order that the appeals filed by revenue are to be dismissed and the appeals filed by M/s. P.A. International, M/s.

Sharan Exports, Shri. Rajkumar Hasija and Shri. Ashok B. Rajani be remanded back to the adjudicator for determination after applying the principle of natural justice.

3. Finding of the Id. Member (J) is on overall appreciation of the facts, circumstances of the case, and the evidence available on record.

It is seen that there exists probability of manipulation of Export Promotion (EP), copy of the Shipping Bills by the exporters after shipment without any abatement or assistance from the respondents. On the other hand there is no concrete evidence in favour of the revenue to rebut the findings of the adjudicator in this regard or to establish alleged manipulation on the part of the respondents. There is no credible evidence to show that Shri. Kotak was in the Hotel during or round about the days when the shipment was done. I am also fortified by the plea made before me by the respondents in the appeal filed by the Commissioner of

Customs, to the effect that order of review by the CBEC is narrow and is concerned with only the imposition of penalties under Section 112 of the Customs Act and not on other charges which were raised in the 14 Show Cause Notices issued. The power to review and file an appeal against an order of the Commissioner is *suigeneris* and is not an open appeal filed as in the case of other appellants. The entire charge against the CHA or their employees, having manipulated the Export Promotion (EP) copy of the shipping bills resulting in the issue of High Quantity of advance licenses would not *prima facie* call for the penalty under Section 112 of the Customs Act, even if the charges are upheld in toto. The adjudicating authority has rightly discharged them. There exists no valid grounds to reopen their case.

4. There is no basis to accept the plea made by the revenue that the Commissioner's finding in respect of manipulation in EP copy of the Shipping Bills was carried out by the exporters themselves by taking portable typewriters to the Kandla and other Ports. Similarly other grounds taken do not bring out the complexities to call for the penalties under Section 112 on the CHA and or their employees.

5. Further perusal of the record in the appeals filed by the exporters, it is noticed that both the Id. Member (T) and Id. Member (J) are silent on certain important issues, which would not make the remand order, otherwise effective. The entire case of the revenue based (a) on the copies of Mates Receipt dated 06.04.1994 and copies of documents issued there under (b) copies of Port Trust Shipping Bills dated 30.03.1994 recovered from office of the CHA bearing the vessel name as "Orient Challenger" (c) Examination Register. What is observed is that, the impugned order ignored and do not make any appreciation in respect of RBI General Repatriation Form (GR Form) and Part "F" of the Advance License. The documents i.e. GR Form which after export submitted to the Custom Department and thereafter lying with the RBI would appears to be vital documents to bring home charges against the exporters/or to absolve them. There is no finding as such, about these documents. These documents have to be brought on record and a finding is to be arrived at after hearing the submissions of exporters. The case law cited in respect of them by the exporters shall be considered by the

adjudicator as to their applicability and implication.(Devengere Cotton Mills Ltd. v.Commissioner of Central Excise 2006 (198) E.L.T. 482 (SC). I would concur with the findings reached by the Id. Member (J) and answer reference accordingly.

The appeals of M/s. P.A. International, Ashok Rajani, Blend Syntec, Rajkumar Hasija, M/s. Sharan Exports, M/s. Santosh Textile (Appeal Nos.

C/903 to 905/02, C/926 to 928/02) are allowed and the appeals filed by the Revenue (Appeal Nos. C/247 to 262/03) are dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com