

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 05.05.2010
Judgment Delivered on: 12.05.2010

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CUSAC 8/2009

VISHNU KUMAR

... Appellant

- versus -

COMMISSIONER OF CUSTOMS NEW DELHI

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr C. Harishankar and Mr S.Sunil

For the Respondent : Mr Mukesh Anand and Mr Shailesh Tiwari

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J.

1. This appeal under Section 130 of Customs Act, 1962 is directed against the order dated 04.06.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), whereby it allowed the appeal filed by the respondent against Order-in-Original No. KRB/ACE/08/05 dated 09.06.2005 passed by the Commissioner of Customs (Exports) and imposed a penalty of Rs10,000/- upon the appellant.

2. The following question of law arises for our consideration in this case:

“Whether the finding of the Customs, Excise and Service Tax Appellate Tribunal that the appellant is liable for penalty under Section 112(a) of the Customs Act, 1962 on the charge of abetment is perverse?”

3. On 12.10.2002, the officers of Directorate General of Revenue Intelligence, on receipt of information regarding smuggling of contraband goods through speed post parcels, visited Speed Post Centre at Bhai Vir Singh Marg, New Delhi and identified 8 parcels, including 4 parcels received from Singapore and addressed to M/s Beam Technology. It was noticed that the declaration, pasted on these parcels, did not contain information regarding description, value and quantity of goods, in terms of Section 82 of Customs Act. On opening the parcels, they were found to contain computer parts which attracted payment of custom duty. It was also found that the description and quantity of the goods, as noted in the invoice, found in the parcels, were different from the actual description, quantity and value of the goods. Since the goods appeared to be illegally imported into India, the same were placed under seizure. During the course of enquiry, statement of one Kumesh Chauhan, who had earlier been delivering parcels to M/s Beam Technology, was recorded. He informed that 9 similar parcels, addressed to Shri Sandeep Sehgal at the

address of M/s Beam Technology, were delivered by him on 11.01.2002 and no custom duty was charged in respect of those articles. Those 9 parcels were cleared for duty free delivery by Shri Rajesh Kumar, Customs Inspector posted at that Centre. In his statement, Shri Rajesh Kumar, Customs Inspector admitted that in respect of the 9 parcels, which were marked by him for duty free delivery, there was no customs declaration and those parcels were similar to the 4 parcels seized by DRI on 12.10.2002. On enquiry being made from the appellant Vishnu Kumar, who was a Sorting Assistant in the Centre, he stated that one Kishori Lal, who was posted as a Postal Clerk at Foreign Post Office and was his friend had asked him to keep a watch on parcels meant for some parties, including M/s Beam Technology and M/s Abhishek Electronics and inform him about their arrival. He further stated that he used to do the needful on account of his friendship with Kishori Lal and that all the parcels, regarding which Kishori Lal had made enquiries, were sent directly to the parties for duty free delivery, without sending them to Foreign Post Office for customs examination. He also admitted that on 11.10.2002, 9 parcels of M/s Beam Technology and two parcels of M/s Abhishek Electronics had been cleared by Shri

Rajesh Kumar, Customs Inspector for duty free delivery. In his statement, Shri Kishori Lal stated that one Sandeep Sehgal, proprietor of M/s Beam Technology, used to approach him and pay him Rs15,000/- per parcel to get them cleared, without payment of duty and that he used to share this money with Rajesh Kumar, Customs Inspector. He also admitted that 9 parcels cleared on 11.10.2002, in the name of M/s Beam Technology, were cleared for duty free delivery, with the help of Customs Inspector Shri Rajesh Kumar. He further stated that between August, 2002 to 11th October, 2002, he had got cleared about 30-40 parcels, containing computer parts, without payment of duty and had received Rs 5 lakhs, half of which, was given by him to Shri Rajesh Kumar. He stated that he did not inform the appellant Vishnu Kumar about the contents of the parcels though he had given Rs 200/- to him. Shri Rajesh Kumar, Customs Inspector, corroborated the statement of Shri Kishori Lal and also implicated his senior officers. Shri Sandeep Sehgal was also examined and he admitted having imported computer parts without payment of duty and also having paid Rs15,000/- per parcel to Shri Kishori Lal.

4. The Commissioner of Customs (Exports) imposed

penalty of Rs 10,000/- upon the appellant Vishnu Kumar in respect of parcels meant for M/s Abhishek Electronics, vide Order-in-Original No.RSS/ACE/32/2003 dated 28.11.2003/ 2.12.2003. But, in the appeal, filed by the appellant Vishnu Kumar against that order, the penalty was set aside by CESTAT vide its order dated 28.03.2005.

5. In respect of the parcels delivered at M/s Beam Technology, the Commissioner of Customs (Exports) vide Order-in-Original No. KRB/ACE/08/05 dated 09.06.2005, imposed penalties upon Shri Sandeep Sehgal, proprietor of M/s Beam Technology, Shri Rajesh Kumar, Shri Kishori Lal and Shri Joginder Gulati. He, however, dropped the charges against the appellant Vishnu Kumar. The persons on whom penalty was imposed by the Commissioner of Customs (Exports) filed appeals, challenging the order passed by the Commissioner. Department also filed an appeal against the order passed by the Commissioner dropping charge against the appellant Vishnu Kumar. While upholding the penalty imposed upon Shri Sandeep Sehgal, Shri Rajesh Kumar and Shri Kishori Lal, the Tribunal also set aside the order of the Commissioner dropping the charge against the appellant Vishnu Kumar and imposed a penalty of Rs10,000/- upon him

under Section 112(a) of Customs Act. While, allowing the appeal of the department against the appellant, the Tribunal, *inter alia*, held that from the statement of the appellant, it was clear that he had also abetted in this illicit import and clearance of dutiable goods, without payment of duty.

6. Section 112(a) of Customs Act, to the extent it is relevant, provides that 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 111 or abets the doing or omission of such an act, shall be liable to penalty, to the extent stipulated in the Section.

7. Section 82 of Customs Act, to the extent it is relevant, provides that in the case of imported by post, any label or declaration, accompanying the goods which contains the description, quantity and value thereof, shall be deemed to be an entry for import for the purpose of the Act.

8. In the impugned order, the Tribunal has referred to certain notifications which put restrictions on import of goods through post parcels and permit the import of goods through post parcels only when such parcels bear, on the front, a declaration, giving description, weight and value of the contents of the parcels. The Tribunal was of the view that the

notification issued under Section 11 of Customs Act has to be treated as a notification, imposing restriction on the import of goods through post parcel/letter packet, unless the same are accompanied by a declaration declaring the nature, weight and value of the contents. It was not disputed before the Tribunal that the 4 parcels seized by DRI on 10.12.2002 did not have declaration mentioning their description weight and value of their contents. It was noted by the Tribunal that there was evidence on record to indicate that this was not an innocent omission since clearance of the post parcels for duty free delivery at the sorting stage, without sending the same to foreign post office, would have been impossible if the actual description, quantity and value had been declared on the Declaration Form pasted on the parcels. The Tribunal, therefore, held that the goods seized by DRI on 10.12.2002 had been imported contrary to the prohibition imposed under Section 11 of Customs Act and, therefore, had rightly been confiscated under Section 111(d) of the Act. The finding of the Tribunal to the extent it held that the goods, seized by DRI, were liable to confiscation under Section 111(d) of the Act has not been disputed before us.

9. The next question which comes up for consideration

is as to whether the appellant had abetted in the act committed by the importers of these goods. The expression “abetment” used in Section 112(a) of Customs Act has not been defined in the Act. However, Section 107 of IPC defines “abetment” as under:-

“107. Abetment of a thing.-A person abets the doing of a thing, who-

First: -Instigates any person to do that thing; or

Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly: -Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation1:- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.”

10. Thus, the charge of abetment would stand substantiated if it is proved that the alleged abettor had instigated the doing of a particular thing or he had engaged with one or more persons in a conspiracy for doing of that thing or he had intentionally aided doing of that thing by an

act or illegal omission. In order to constitute abetment by conspiracy, there must be a combination of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy. Where the parties concert together and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole. It is not sufficient to prove that the charged act could not have been committed without intervention of the alleged abettor. What is necessary is that the intervention should have been made with intent to facilitate the commission of that act. Intentional aiding, therefore, is the gist of abetment, as defined in clause thirdly of Section 107 of IPC. If there is a community of interest between the aiding person and the person who commits the actual act, it can be safely inferred that the dominant intention of the alleged abettor was to aid the doing of that particular act.

11. As regards the standard of proof required to prove the charge of abetment, for the purpose of Section 112(a) of Customs Act, it is settled proposition of law that though the penalty proceedings under Customs Act, 1962 are quasi-criminal in nature, the Department is not required to prove its

case beyond reasonable doubt, as is required to prove commission of an offence in a criminal prosecution and it is sufficient if the guilt attributed to the charged person is established on a preponderance of probabilities. As observed by the Supreme Court in **Collector of Customs, Madras & Others vs. D.Bhoormull**: 1983 ELT 1546(SC), all that is required to be established is such a degree of probability that a prudent man may, on its basis, believe in the existence of the act in issue.

12. As noted earlier, the parcels in question did not have, on them, the prescribed declaration giving the description, weight and value of the goods that were imported into India. The appellant did not bring this material fact to the notice of Customs Inspector, posted at the Centre. When an official engaged in sorting of such parcels finds a parcel without requisite declaration pasted on its front, he, if acting bona fide, is bound to get suspicious and bring this fact to the knowledge of the Customs Inspector posted at the Centre so that he could send such parcel to the Foreign Post Office for the purpose of its examination before clearing it for delivery to the person for whom it has been sent. This is not the case of the appellant that he had brought this fact to the notice of the Customs

Inspector Shri Rajesh Kumar.

13. It is not in dispute that as and when any parcel was received at his Centre for M/s Beam Technology or M/s Abhishek Electronics, the appellant used to watch those parcels and inform Shri Kishori Lal. According to him, Shri Kishori Lal used to inform him in advance about the arrival of the parcels and used to tell him to keep an eye on it. In his statement, the appellant further stated that in the Month of August, 2002 when he was posted as Arrangement Clerk at this Speed Post Centre, Kishori Lal suddenly increased friendship with him and though he felt disgusted in informing Kishori Lal about the arrival of parcels, he still used to inform him on account of his friendship with him. He also stated that all the parcels about which Kishori Lal had enquired from him were sent directly to the parties, without first sending them to Foreign Post Office. He also admitted that on 11-12th October, 2002, Kishori Lal had enquired about arrival of parcels of these parties and he had informed Kishori Lal accordingly. He further admitted that the Customs Inspector had released 9 parcels of M/s Beam Technology and two parcels of M/s Abhishek Electronics on 11.10.2002, without detaining and charging any duty. He also admitted that he used to watch the

Inspector silently as to what he did with the parcels and that even if the Customs Inspector detained the parcels, he used to inform Kishori Lal about the same.

14. If an outsider asks an employee engaged in sorting out of parcels received from abroad, to keep watch on the parcels, which are not meant for him, but are meant for some other person(s), and are to be received regularly the employee if acting bona fide, will in such circumstances, definitely ask him as to why he was interested in those parcels and what connection he had with the persons to whom the parcels had been sent. The appellant does not claim to have made any such enquiry from Shri Kishori Lal. The act of the appellant in keeping a silent watch on what the Customs Inspector did with the parcels and informing Kishori Lal about it, is also a strong circumstance which suggests that the appellant believed that the parcels contained dutiable goods. That precisely was the reason for keeping a watch of what the Customs Inspector did with the parcels and informing Kishori Lal about it. The very fact that the appellant himself felt disgusted in informing Kishori Lal about the arrival of these parcels also is a strong circumstance which suggests that he knew that Customs Duty was being evaded by clearing those parcels without first

sending them to Foreign Post Office for the purpose of examination. Had that not been the case, there would be no reason for him to feel disgusted or ashamed of what he was doing.

15. The appellant admittedly having known that the Customs Inspector had released 9 parcels meant for M/s Beam Technology and two parcels of M/s Abhishek Electronics on 11.10.2002, without detaining them and without charging any duty, his act in informing Kishori Lal about arrival of four more parcels on 12.10.2002 leaves no reasonable doubt that he knew that the parcels being cleared by Shri Rajesh Kumar, Customs Inspector contained dutiable articles and, therefore, ought to have been sent to Foreign Post Office for their examination. It is thus quite clear that the appellant was aiding in clearance of dutiable goods without payment of requisite Customs Duty.

16. It has come in the statement of Kishori Lal that he used to give Rs 200/- to the appellant. The statement of Kishori Lal not being exculpatory in nature, it can be used not only against him, but also against the appellant. As noted by the Supreme Court in **Naresh J. Sukhawani vs. Union of India**: AIR 1996 SC 522, the statement made before the

Customs Officer is not a statement recorded under Section 161 of the Code of Criminal Procedure and is a material piece of evidence collected by the Customs Officers under Section 108 of Customs Act and such material can certainly be used against the appellant.

17. The learned counsel for the appellant has referred to the decision of the Supreme Court in **Shri Ram vs. The State of U.P.:** (1975) 3 SCC 495. One of the appellants before the Supreme Court was convicted under Section 302 of IPC read with Section 109 thereof. During the course of the judgment, it was observed that in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime and the mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107 of IPC. It was further observed that intentionally aiding and therefore active complicity is the gist of the offence of abetment under the third paragraph of Section 107.

18. Knowledge and intention being state of mind, it may not be possible to prove them by way of direct evidence and they have to be primarily inferred from the act and conduct of

the charged person, which need to be analysed in the light of attending facts and circumstances of the case. The facts and circumstances of the present case lead to an irresistible conclusion that the appellant knew that the parcels sent to M/s Beam Technology and M/s Abhishek Electronics contain dutiable goods and he, despite knowing this fact, facilitated the evasion of customs duty, firstly by informing Kishori Lal about the arrival of these parcels in the Speed Post Centre and about the treatment given by the Customs Inspector to those parcels and then by not bringing it to the notice of the Customs Inspector that these parcels did not have the mandatory declaration giving description, quantity and value of the goods, on them. Obviously, the purpose of keeping Kishori Lal informed about the arrival of these parcels was to enable him to speak to the Customs Inspector Rajesh Kumar so that he does not detain them and does not send them to Foreign Post Office for their examination. Receipt of money by the appellant from Kishori Lal indicates that he knew that duty was being evaded by clearing those parcels without examination and that is why he was being paid for the information being passed by him to Kishori Lal. Therefore, the judgment, relied upon the by the learned counsel for the

appellant is of no help to him.

19. The facts and the circumstances of the present case show that the appellant was a party to the conspiracy, pursuant to which customs duty was being evaded by clearing dutiable goods, without sending the parcels, containing those goods, to the Foreign Post Office for the purpose of examination and he also intentionally aided in evasion of duty. The evidence available on record in the form of statement of the appellant recorded under Section 108 of Customs Act, coupled with the statement of Kishori Lal is sufficient to prove the complicity of the appellant in evasion of customs duty.

20. It was contended by the learned counsel for the appellant that since the penalty against the appellant by the CESTAT in respect the parcels addressed to M/s Abhishek Electronics, the same treatment needs to be given to him in respect of the parcels addressed to M/s Beam Technology. We find that no such submission was made by the appellant before the CESTAT. We, therefore, are not inclined to entertain this plea at this stage.

21. The tribunal has returned a finding of fact that the appellant had abetted in the illicit import and clearance on dutiable goods without payment of duty. The finding recorded

by the Tribunal cannot be said to be perverse in any manner.
No substantial question of law arises for our consideration in
this appeal. The appeal is, accordingly, dismissed.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

May 12, 2010
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