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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CUSAA 26/2011 & CM APPL.11083/2011
+ CUSAA 27/2011 & CM APPL.11086/2011
+ CUSAA 28/2011 & CM APPL.11095/2011

% Date of Decision : 18th November, 2011.

RAJIV KUMAR SHARMA Appellant
Through Mr. Mohit Singh, Adv.

versus

COMMISSIONER OF CENTRAL EXCISE
ADJUDICATION Respondent
Through Mr. Satish Kumar, Sr. Standing
counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

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

SANJIV KHANNA,J: (ORAL)

These three appeals under Section 130 of the Customs Act, 1962
(Act, for short) arises out of the common order passed by the Central

Excise and Service Tax Appellate Tribunal (tribunal, for short) dated 15.3.2010.

2. By the impugned order, the tribunal has dismissed appeals filed by the appellant herein, Rajiv Kumar Sharma, Preventive Officer of the Customs who was posted as Inspector, Customs, Tejawant Singh, and Jagmohan Singh. Penalty was also imposed on Sanjay Kumar but it appears that he did not file any appeal.

3. The impugned order sustains penalty of Rs.10 lakhs, Rs.10 lakhs and Rs.7.50 lakhs imposed on the appellant vide order dated 30.12.2003 passed by the Commissioner of Customs (Adjudication).

4. The main and the primary contention raised by appellant in the present appeal is that the impugned order passed by the tribunal is perverse and is contrary to the material and evidence on record for the following reasons :

(1) The market enquiry report submitted by the appellant was not placed on record.

(2) The factory verification report submitted by the appellant has been wrongly disbelieved as false.

(3) There is no evidence and material to show that the appellant had carried out examination and cleared 19 shipping bills.

(4) Mere telephone conversations between the appellant and Tejawant Singh did not establish conspiracy or collusion.

(5) Jagmohan Singh had withdrawn/retracted his statement.

(6) The Commissioner had let off and exonerated and did not impose any penalty on other departmental officers Gorvinder Singh Sohal, B K Pabri and V. Valte. For the same reasoning, the appellant should not be penalized. The tribunal ignored the contentions of the appellant on this aspect as well as the reply to the show cause notice submitted by the appellant with reference to the role of B K Pabri, V. Valte and Gorvinder Singh Sohal.

5. Tejawant Singh, as sole proprietor of Unicorn Industries, had exported microphones vide 26 shipping bills by declaring their export value at US dollars 39.85 per piece. The total exports were valued at Rs.12,06,65,805/- and he had availed of DEPB credit of Rs.1,67,55,800/-. The allegation, which has been accepted by the tribunal, is that the said microphones were procured and purchased by Tejawant Singh at Rs.16.50 per piece only i.e. for total value of Rs.28,74,588/-. The microphones were shown as exported to a supplier in USA i.e. Omid Trade Links, Los Angeles with the sole intent to fraudulently avail export incentives available under the DEPB scheme since the said incentive is based on the export value.

6. In so far as wrongful claim of DEPB credit by Tejawant Singh is concerned the Commissioner and the tribunal have relied upon on following findings :

(1) The exported consignment was valued by the customs authorities in USA at US dollars 0.26 per piece and US dollars 1.38 per piece.

(2) Tejawant Singh in his several statements has stated and admitted that he had purchased the exported microphones from Anil Saxena at the rate of Rs.16.50 per piece. His subsequent statement that he had purchased these microphones from one Sudhir was unsubstantiated and false.

(3) Anil Saxena had admitted that he had sold the exported microphones to Tejawant Singh at a meager price of Rs.16.50 per piece.

(4) Tejawant singh had falsely claimed that these microphones were manufactured in his factory at Mayapuri, New Delhi. On enquiry and as per documents available, Tejawant Singh did not have any equipment for manufacture of microphones in the said factory. Tejawant Singh did not have requisite technical knowledge and was not able to establish purchase of raw material, engagement of workers etc. required for manufacture of microphones.

7. The question which arises for consideration is whether there is sufficient material or evidence to show involvement of the appellant in the aforesaid fraudulent transactions to claim DEPB credit.

8. At the very outset it may be stated that we are not concerned and are not required to examine whether there was sufficient evidence or not against other departmental officers against whom show cause notice was issued, namely Gorvinder Singh Sohal, B K Pabri and V. Valte. We are primarily concerned, whether there is evidence and material to show involvement of the appellant and what is the role assigned to the appellant as per the evidence and material on record. Negative equality cannot be pleaded as a defence to any action which is in accord with law and justified.

9. The appellant has not disputed that he had carried out examination of the exported microphones in respect of seven shipping bills. The appellant has also not denied that he had been deputed to carry out market valuation of the microphones after two samples were drawn, when the first shipping bill was submitted for clearance to the customs authorities. The appellant has admitted that he was deputed to undertake factory verification of the unit of Tejwant Singh at Mayapuri and had submitted a positive report in favour of Tejwant Singh.

10. Regarding close association and involvement of the appellant, the Commissioner and the tribunal have heavily relied upon the statements of

Sanjay Kumar, customs house agent of Tejawant Singh, who had handled the export consignments covered by the 26 shipping bills. Sanjay Kumar was cross-examined by the appellant but he reiterated his earlier statements and confirmed involvement of the appellant in the fraudulent claim and his association with Tejawant Singh. It may be important to reproduce, the findings recorded by the Commissioner against the appellant on the basis of statements made by Sanjay Kumar.

“109. So far as the statements of Shri Sanjay Kumar are concerned, these were his voluntary statements tendered under Section 108 of the Customs Act, 1962. Shri Sanjay Kumar being Customs House Agent of Shri Tejawant Singh, was aware of all the activities as he was handling export consignments for and on behalf of Shri Tejawant Singh. Moreover, during the cross-examination conducted by Shri Rajeev Kumar Sharma, Inspector Customs, Shri Sanjay Kumar had reiterated the submissions already made in his said statements and thus, confirming the truth of the facts disclosed in the statements tendered voluntarily by Shri Sanjay Kumar. Further there is no contradiction in the statements of Shri Sanjay Kumar tendered by him on 12.7.2001 and 21.11.2001, as pointed out by the notices. Shri Sanjay Kumar in his statement dated 21.11.2001 had explained that initially both microphones as well as fuel pump diaphragms were assessed provisionally by the processing officer; that the first consignment of microphones of Cheval brand was exported by Shri Tejawant Singh @ US\$ 39.85; that during physical examination of said goods, two samples of small black coloured microphone like objects were drawn by Shri Rajeev Kumar Sharma for market enquiry and it was only after drawal of these samples, the meeting of Shri Rajeev Kumar Sharma was got fixed with Shri Tejawant Singh in the

Parikarma Restaurant, Connaught Place, New Delhi, where both Shri Rajeev Kumar Sharma and Tejawant Singh had a confidential talk for about 15 minutes. It was at this restaurant only where Shri Tejawant Singh handed over two letter heads of different firms which were filled in hand writing and some of the words which he remembered were :-

“To whomsoever it may concern”

One person Rajeev Kumar Sharma came to me with the samples of microphones Cheval TM. I confirm the price of this microphone as Rs. 800/- to Rs. 900/- minimum.”

Shri Sanjay Kumar had further stated that after 2-3 days, he met Shri Rajeev Kmar Sharma and Shri Rajeev Kumar handed over to him copies of the shipping bills, endorsed with the stamp of “final assessment”. Shri Sanjay Kumar had also admitted that Shri Tejawant Singh had given one mobile (Model Sony Z5) to Shri Rajeev Sharma as a gift while coming out of the above Restaurant. Shri Sanjay Kumar in his above statement had also stated that all the processing formalities in the case of exports of firms of Shri Tejawant Singh were being completed by Rajeev Kumar Sharma himself and that he used to hand over all the shipping bills and file to Rajeev Kumar Sharma to carry out physical examination of the goods and after half an hour Rajeev Kumar Sharma, Inspector used to hand over all the shipping bills back to him containing examination reports and ‘let export’ order to given by the Supdt. Shri Sanjay Kumar had specifically stated that “after the first consignment was shipped, physical examination was never carried out by any customs officer in any of these consignments and the packages were never opened.” Therefore, Shri Sanjay Kumar

had clarified that the samples were drawn only once from the first consignment and thereafter no samples were drawn. The duties of a Customs House Agent include getting the shipping bills processed, physical examination of the export consignment and completion of customs formalities and Shri Sanjay Kumar, being the Customs House Agent, was associated in all the above activities and whatever activities took place in the examination hall, were explained by him in his above statements, which are quite creditable and their credibility has not been questioned by the notices with any evidence, documentary or otherwise. Admittedly Shri Jagmohan Singh was also deputed by Shri Tejwant Singh to look after his export consignments in the examination hall and Shri Jagmohan Singh had also stated in his statement dated 29.8.2001 that no samples were drawn from the consignments during examination in his presence ever, thereby corroborating the statements of Shri Sanjay Kumar.”

11. Penalty of Rs.1 lakh has been imposed on Sanjay Kumar. Copy of the statements made by Sanjay Kumar including his cross-examination by the appellant have not been placed on record. However, during the course of hearing it was admitted that Sanjay Kumar was not cross-examined and questioned with regard to his statement about the meeting between him, Tejwant Singh and the appellant at Parikrama Restaurant and what had transpired and happened in the said meeting. The order passed by the Commissioner specifically notes and records that Sanjay Kumar was cross-examined by the appellant but he had reiterated his statements and confirmed the truth of the facts disclosed in his earlier statements.

12. Jagmohan Singh had corroborated active involvement and participation of the appellant in the fraudulent claim, in his statements recorded on 29.8.2001 and 15.10.2001. The contention of the appellant is that Jagmohan Singh on 16.10.2001 had retracted the statement recorded on 15.10.2001 on the ground that the said statement was extracted under force, coercion as well as physical torture. It may be pertinent to note and Id. counsel for the appellant very fairly has brought to our notice, order dated 27th April, 2011 passed in Customs Appeal No.1/2011, 2/2011 and 3/2011 in the case of Jagmohan Singh Vs. Commissioner of Central Excise (Adjudication), which records as under :

“5. In para 52 of the impugned order, the Tribunal has recorded that the premises of the appellant are situated in J-7/86 at Rajouri Garden, New Delhi. He is now the proprietor of M/s Lotus Cargo Service. More importantly, what is noted is that the statement of the appellant was recorded on 29.8.2001 as well and in this statement he had disclosed that he issued airway bills for the firms namely, M/s Zap Fashions, M/s Unicon Industries, M/s Bonita Industries, M/s Skyways Industries, M/s Oberoi Industries and M/s chabra Industries. In this very statement, he had also categorically accepted the fact that all these firms were controlled by Sh. Tejwant Singh who was the proprietor of M/s Unicon Industries and the appellant was the neighbor of Sh. Tejwant Singh. He had further admitted that not only he had issued airway bills, he was also looking after the customs examination of the Export Cargo relating to the aforesaid six firms. He even named one Custom Officer, namely, Inspector Sh. Rajeev Kumar Sharma who was witness to all the examination of Cargo. In this statement, he further admitted an irregular/illegal manner in which the cargos were cleared. He specifically admitted that under the

instructions of Sh. Tajwant Singh, he was writing the shipping bills to read as “Fixation of DBK in terms of Circular No.68/97-Cus dated 02.12.1997 subject to production of payment of CVD/CEX duty”.

6. First contention of the appellant, as noted above was that he had retracted the statement dated 15.10.2001 on 16.10.2001. Nothing was argued by the appellant insofar as his aforesaid statement recorded on 29.8.2001 is concerned. Further, we find that this statement was not retracted either. In these circumstances, the argument of the appellant that he had retracted his statement dated 15.10.2001 on 16.10.2001 goes into nothing when we find that the Tribunal had not relied upon such statement on 15.10.2001 but had discussed the case of the appellant based on the statement recorded on 29.8.2001 which had never been retracted. Not only this, the Tribunal has also discussed other evidence which corroborated aforesaid statement of the appellant. Discussion to this effect can be found in para 57 of the impugned order where it is mentioned that Sh. Tejwant Singh in a statement had accepted and confirmed that the appellant was his neighbor who issued airway bills for cargo clearance.

7. Even Inspector Rajeev Kumar Sharma in his statement had corroborated that all the concerns were represented by Sh. Jagmohan Singh (appellant herein) for clearance and he used to do liaison work with customs for these firms for conducting market enquiry relating to microphones. Discussion in this behalf can be found in para 68 of the order of the Tribunal.”

13. In these circumstances the so-called retraction by Jagmohan Singh relied upon by the appellant is to be rejected and does not show and establish that the order passed by the tribunal is perverse. Thus the

Commissioner and the Tribunal have not erred by relying upon the statement made by Jagmohan Singh.

14. With regard to the factory's enquiry, the appellant has pleaded that once it is established that the Central Excise had granted registration and copy of R-12 Form for the relevant period was placed on record, the appellant cannot be blamed. It is submitted that the tribunal should have accepted that Tejawant Singh had manufactured the microphones in his factory at Mayapuri. This contention has been rejected as after thorough examination of the material and evidence it has been held that microphones were not manufactured at the Mayapuri factory. In para 6(4) above these facts have been noticed. On detail verification it was found that Tejawant Singh did not have any machinery for manufacture of microphones at the Mayapuri factory. He did not know anything about manufacturing process or about the raw material used. This was admitted by Tejawant Singh in his statements dated 5.11.2001 and 6.11.2001. He had further stated that he had submitted fake documents to the appellant to show that he had factory at Mayapuri and it was his mistake to obtain Central Excise registration for the factory, which was not in existence. Further, as per call data/details, on 134 occasions, there were conversations between appellant and Tejawant Singh. This was established beyond doubt. Keeping in view the oral testimony of Tejawant Singh, Sanjay Kumar and Jagmohan Singh, the frequency of the calls made are relevant and do establish and corroborate a close relationship between

Tejwant Singh and the appellant. The appellant has not explained and shown why and for what reason he was in conversation with Tejwant Singh. In these circumstances, it cannot be said that the order passed by the tribunal upholding the findings of the Commissioner on the third aspect is perverse or without any evidence or material.

15. It may be noted here that the proceedings related to 26 shipping bills. Files relating to shipping bills went missing and were not traceable. The appellant was/is an officer working with the customs department. Three other customs officers were also issued show cause notice under Section 114 of the Act though ultimately against the said officers proceedings were dropped vide the order dated 15.3.2010. This aspect has been kept in mind by the tribunal.

16. With regard to over invoicing there is documentary evidence and material on record in the form of the export value declared in India and the import value declared and calculated by the USA Customs. On several other aspects there is oral testimony including the statements of Tejwant Singh, his customs clearing agent Sanjay Kumar and Jagmohan Singh, who were also involved in export of the said consignments. Thus findings recorded cannot be categorized as perverse or based on no material or evidence.

17. No substantial question of law arises in the present appeals and the same are accordingly dismissed along with all pending applications. However, there will be no order as to costs.

SANJIV KHANNA,J

R.V.EASWAR, J

NOVEMBER 18, 2011
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