

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

% Judgment reserved on : 18th September, 2013
Judgment pronounced on: 11th October, 2013

+ **CUS.A.C. 1/2013**

J. MITRA & BROS. Petitioner

Through Mr. Jaspreet Singh Kapur,
Advocate.

Versus

COMMISSIONER OF CUSTOMS Respondent

Through Mr. Kamal Nijhawan, Sr.
Standing Counsel with Mr.
Sumit Gaur, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. This is an appeal filed under Section 130 of the Customs Act 1962 (hereinafter referred to as "the Act") against the order dated 01.11.2012 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) dismissing the appeal of the appellant M/s. J. Mitra & Bros. against the imposition

of penalty of Rs.25 lakhs imposed by the Commissioner (I & G).

2. The appellant M/s. J. Mitra & Bros. was the sole indenting agent of M/s. Intuitive Surgical Inc., USA. in India. M/s. Intuitive Surgical Inc. was/is a firm from which the equipment surgical system in issue was imported.

3. By order dated 11.09.2013, the following substantial question of law was framed:

“Whether the Tribunal was right in holding that the appellant had abetted and was liable to pay penalty under Section 112(a) of the Customs Act, 1962 and the quantum of penalty is justified?”

4. One M/s. Cardiac Research and Education Foundation (hereinafter referred to as “CARE”) had filed bill of entry dated 15.09.2003 at Hyderabad through their Custom House Agent (CHA), M/s. Hansa Services (P) Ltd. M/s. CARE in the bill of entry had declared the

item as “Da Vinci Surgical System (Endoscopic system)” classifying the said system under Custom Tariff item 90189011 and claimed the benefit of concessional rate of Customs duty under S.No.363(A) – List 37 – Item No.82 of Notification No.21/2002 – Cus dated 1.03.2002, which covered fiber optic endoscopes of different kinds. The said item reads as under:-

“(82) Fibre optic endoscopes including, Paediatric resectoscope/audit resectoscope, Peritoneoscopes, Arthroscope, Icolaryngoscope, Fibreoptic Flexible Nasal Pharyngo Bronchoscope, Fibreoptic Flexible Laryngo Brochoscope, Video Laryngo Brochoscope and Video Oesophago Gastroscopy, Stroboscope, Fibreoptic Flexible Oesophago Gastroscopy.”

5. Alongwith the Bill of Entry, M/s. CARE had submitted a commercial invoice dated 04.09.2003 of M/s. Intuitive Surgical Inc. for “IS 1200 Da Vinci Surgical System”, amongst others a copy of brochure published by M/s. J. Mitra & Bros. for the said system in which description of the said system was mentioned as

“Endoscopic Coronary Artery Bypass System” was filed.

6. M/s. CARE declared the assessable value of the said equipment at Rs.5,80,75,000/- and paid duty of Rs.29,03,750/- at the concessional rate of 5%. Since the goods, prima facie, appeared to be misdeclared, the system imported was seized by the officers of SIIB, Hyderabad. M/s. CARE voluntarily paid an amount of Rs.2,05,58,550/- in installments in addition to the amount of Rs.29,03,750 paid initially for clearance of the surgical system towards full amount of Customs duty of Rs.2,34,62,300/- payable on the said surgical system at rate of 40.40%. On payment of the said duty, the surgical equipment was provisionally released to M/s. CARE.
7. Investigation was conducted by the respondent vis-à-vis the nature of the system and its classification for the purpose of assessment of the Customs duty.

8. Consequent to the investigation, a show cause notice was issued to M/s. CARE Foundation, its Chairman, Secretary, Bio Medical Engineer and the appellant M/s. J. Mitra & Bros. M/s. J. Mitra & Bros. was called upon to show cause as to why penalty as provided under Section 112 be not imposed on them for violation of the Customs Act.
9. By the order-in-original dated 11.07.2007, the Commissioner of Customs held that the goods imported by M/s. CARE described as “Da Vinci Surgical System (Endoscopic System)” in the Bill of Entry was, in fact, a complex robotic surgical system and was not entitled to concessional rate of duty as originally declared. The Commissioner of Customs held that M/s. CARE (importer) had attempted to evade the customs duty by misdeclaration and had thus rendered itself liable for penal action. The Commissioner of Customs held that M/s. CARE had manipulated the description of the surgical system in

connivance with the appellant M/s. J. Mitra & Bros., the indenter to evade customs duty. The appellant M/s. J. Mitra & Bros. had played a significant role in misdeclaration of the imported goods and had submitted to M/s. CARE a published brochure describing the equipment as a “Fiber optic endoscopic system” whereas the manufacturer’s literature and documents described the product as a “surgical system”. The appellant had advised M/s. CARE to submit the brochure which would have entitled M/s. CARE to make a claim of concessional rate of duty and had even suggested to M/s. CARE to add the words “Endoscopic System” to the description “Da Vinci Surgical System” in the Bill of Entry. He further held that the appellant had suggested to M/s. CARE to claim concessional rate of duty as they had imported two such systems under similar classification with concessional rate of duty. The Commissioner of Customs held that even though it was CHA, who had

filed the bill of entry on behalf of CARE, the appellant had an important role in making declaration or clearance of the goods. In view of the evidence and submissions recorded, he held that the appellant M/s. J. Mitra & Bros. alongwith M/s. CARE had planned to misdeclare the goods to wrongly avail the exemption and it was the appellant M/s. J. Mitra & Bros. who had published the brochure of the said goods in such a manner that M/s. CARE could declare the product as an endoscope.

10. The Commissioner of Customs noted the submission of a partner of the appellant M/s. J. Mitra & Bros. that the brochure printed by them was for distribution among the delegates of ISMICS (International Society for Minimally Invasive Cardiac Surgery) but found that the said brochure was also submitted to M/s. CARE and formed the basis of the declaration in the Bill of Entry.

11. The Commissioner of Customs imposed a penalty of Rs.2,34,62,300/- on M/s. CARE under Section 114 of the Act. However, no penalty under Section 112 was imposed on M/s. CARE. A penalty of Rs.5,00,000/- each was imposed on the Secretary and Chairman of M/s. CARE Foundation under Section 112(a) of the Act for their active role in misdeclaration. No penalty was imposed on the Bio Medical Engineer. Penalty of Rs.25,00,000/- was imposed on the appellant M/s. J. Mitra & Bros. for their active role in misdeklaraton of the description of the goods under Section 112(a) of the Act.

12. The appellant M/s. J. Mitra & Bros. filed the appeal before the CESTAT impugning the order-in-original of the Commissioner of Customs. The order was also impugned by M/s. CARE Foundation and its Secretary.

13. CESTAT, after examining the literature on the equipment and the manufacturers catalogue and

invoice and two medical experts, who had opined that the instrument was not a fiber optic endoscope, held that the equipment could not be considered as a fiber optic endoscope eligible for exemption. CESTAT has noted the fact that the issue whether the equipment was an endoscopic equipment and eligible for exemption was not pressed hard by the appellant M/s. J. Mitra & Bros. and the submissions were primarily qua the penalty imposed on the appellant M/s. J. Mitra & Bros.

14. Finding of fact has been arrived at by the Commissioner of Customs and the CESTAT after detailed examination of the evidences, literature, brochure of the manufacturer and the opinion of the experts that the system was not an endoscopic system and it was not qualified for exemption. Reasoning given by the Commissioner and the CESTAT are justified and cannot be questioned. We would not like to interfere with the concurrent finding of fact, indeed

the appellant has not contested the said finding.

15. Learned counsel for the appellant relied upon the judgment of the Supreme Court in ***M/s. Northern Plastics Ltd. Vs. Collector of Customs & Central Excise (1998) AIR 2371 (SC)*** to contend that whether the appellant was entitled to the benefit of exemption under a notification was a matter of belief and not a matter of 'any other particular' with regard to goods. It was in the nature of claim made on the basis of a belief entertained and could not said to be a misdeclaration. The judgment relied upon by the learned counsel for the appellant is not applicable in the facts of the present case. This is not a case of a bonafide belief that the appellant had entertained or that he was uncertain about the applicability of the notification for exemption or otherwise. It was a clear case of misdeclaration. Benefit of exemption was not available and therefore the description of the system was deliberately altered. Brochure did not correctly

describe the equipment for the purposes of availing the exemption. The statements of the officers of M/s. CARE show that the appellant was instrumental in wrong description of the system to bring it within the purview of the classification. All this was done deliberately to claim exemption that was otherwise not available. This is not a case of a belief that the appellant may have entertained but a deliberate and conscious effort to wrongly claim exemption. The said judgment is not applicable.

16. The only issue that arises then for consideration is as to what role can be ascribed to the appellant M/s. J. Mitra & Bros. in terms of the declaration/misdeclaration of the goods so as to return a finding whether the appellant M/s. J. Mitra & Bros. has abetted the misdeclaration and was liable to penalty under Section 112(a) of the Customs Act and the quantum of penalty.

17. Section 112 of the Customs Act lays down as under:-

“112. Penalty for improper importation of goods,
etc. - Any person,-

(a) 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, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111.

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 five times the value of the goods or one thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty [not exceeding five times the duty sought to be evaded on such goods or one thousand rupees], whichever is the greater;

(iii) in the case of goods in respect of which the value stated in entry, made, under this Act or in

the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding five times the value of the goods and or five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii) to a penalty not exceeding five times the duty sought to be evaded on such goods or five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the highest.

18. Section 112(a) makes any person who does or omits to do any act which act or omission would render the said goods liable for confiscation under Section 111 or any person who abets in the said omission or action liable for penalty of varying degrees.

19. Section 111 specifies the goods that are liable for

confiscation. Section 111(m) makes the goods that do not correspond in respect of value or in any other particular with the declaration or transshipment liable to confiscation under Section 111(m). A person who does or has omitted to do any act which makes the goods liable for confiscation or abets in such doing or omission makes himself liable under Section 112(a) of the said Act.

20. During investigation, statement of Sh. Arun K. Tiwari, Secretary, M/s. CARE was recorded. He had stated that the appellant M/s. J. Mitra & Bros. had advised them to submit a brochure which they would furnish for customs clearance to avail concessional rate of duty. He also stated that the description “Endoscopic System” added in bracket to Da Vinci Surgical System in the bill of entry was as per the suggestion of the appellant M/s. J. Mitra & Bros. and it was the appellant M/s. J. Mitra & Bros, who had mentioned that the two said systems under similar classification had already

been imported by them. The statement of Sh. C. Krishna Kumar, Bio Medical Engineer, M/s. CARE Hospital was also recorded, who categorically stated that the appellant had given the details to be furnished to the Customs and had guided them about the technical write-up to be submitted to the Customs and the classification to avail concessional rate of 5% Customs duty.

21. Factual findings categorically returned is that the appellant M/s. J. Mitra & Bros. has played a significant role and an active participant in misdeclaratoin of the imported goods and they had submitted to M/s. CARE a published brochure describing the equipment as an endoscope in contrast to the literature and documents of the manufacturers which described the system as Da Vinci Surgical System. It has been held that it was the appellant who had advised the filing of the bill of entry with the description 'endoscope'.

22. The finding of fact of the role played by the appellant M/s. J. Mitra & Bros. in the misdeclaration of the said equipment by M/s. Care has been affirmed by the Appellate Tribunal. Having examined the factual matrix of the matter, we are also of the considered view that the appellant M/s. J. Mitra & Bros. had clearly abetted in the misdeclaration of the goods and has rightly been held by the Commissioner of Customs and the CESTAT as liable to pay penalty under Section 112(a) of the Customs Act, 1962.
23. Learned counsel for the respondent has relied upon the case of ***Bhanabhai Khalpabhai v. Commissioner of Customs 1994 (71) ELT 3 (SC)*** to contend that presumption has to be drawn in respect of existence of mental state, and ***Vishnu Kumar Vs. Commissioner of Customs 2010 (260) ELT 356 (Del)*** to contend that charge of abetment would stand substantiated where instigation by abettor is proved and ***Additional Commissioner of Customs V. Sitaram Aggarwal***

1999 (110) ELT 185 (SC) to contend that if one consciously takes a step to promote the illegal object then even if physical connection is not established, he would be guilty. There is no dispute with the proposition of law laid down by the judgments relied upon by the counsel for the respondent. We have held that the appellant has by his conduct abetted the offence. These judgments relied upon do not advance the case of the respondent any further.

24. The issue that now remains for consideration is the quantum of penalty imposed on the appellant M/s. J. Mitra & Bros. The Commissioner of Customs in the order-in-original had imposed a penalty of Rs.2,34,62,300/- on M/s. CARE Foundation for misdeclaration under Section 114(a). However, no penalty under Section 112 of the Customs Act was imposed on M/s. CARE, who were the importers. A penalty of Rs.5,00,000/- each was imposed on the Chairman and the Secretary for their active role in

misdeclaration of the description of the goods under Section 112(a) of the Customs Act. A penalty of Rs.25,00,000/- was imposed on the appellant M/s. J. Mitra & Bros. for its active role in misdeclaration of the description of the goods.

25. CESTAT, vide the order dated 01.11.2012, held that as there was no demand under Section 28(8) of the Customs Act for duty short levied, so no penalty could have been imposed under Section 114A on M/s. CARE Foundation, the importer. The Tribunal, accordingly, quashed the penalty imposed under Section 114A. However, as no penalty under Section 112 was imposed on M/s. CARE Foundation by the adjudicating authority, the Tribunal also did not impose any such penalty.

26. As regards to the penalty imposed on the Secretary of M/s. CARE Foundation, CESTAT reduced the same to Rs.2.5 lakhs on the ground that the Secretary had not

misdeclared the goods for any personal gain. As regards to the appellant M/s. J. Mitra & Bros., no relief from the penalty imposed was granted. We may only note that the Tribunal has not referred to the penalty imposed on the Chairman of M/s. CARE probably because the Chairman was not in appeal before the CESTAT.

27. We are of the considered view that the quantum of penalty imposed on the appellant M/s. J. Mitra & Bros. is not justified and is disproportionate. No doubt that the appellant M/s. J. Mitra & Bros. has abetted the offence of misdeclaration and is liable to pay penalty under Section 112(a). The statements recorded of the Secretary and the Chairman during the investigation clearly show that the Secretary and Chairman were well aware of the fact that the goods were sought to be misdeclared. It is not that the Secretary and Chairman were driven up the garden path unknowingly by the appellant M/s. J. Mitra & Bros. by the brochure. From

the statements recorded, as extracted by the Commissioner of Customs, it is apparent that the Secretary and Chairman were well aware of the reason why the said system was being wrongly declared as an endoscopic system. They were fully aware that the system would only qualify for an exemption in case it was declared in a particular manner and words. They acted being fully aware of all the facts and it was a conscious and well informed decision. The actus reus was present and was motivated by a common goal and with a common purpose. All of them were aware as to why the system was being declared as an endoscopic system and the role played by each one was more or less similar and as culpable. It cannot be said that the Secretary played any lesser role than the appellant M/s. J. Mitra & Bros. Even if the appellant M/s. J. Mitra & Bros. had suggested misdeclaration of the equipment to save duty, the Secretary and the Chairman could have

easily declined. The fact that the Secretary and the Chairman of M/s. CARE accepted the suggestion of the appellant M/s. J. Mitra & Bros. makes their role equal.

28. The evil consequences for an equal role should also be equal. The appellant is being punished as an abettor. The gravity of the role of the abettor and a well informed principal offender cannot be different. Where the degree of offence is same the scale of punishment should also be equal. Applying principle of parity of consequence, as all are ascribed the same role and responsibility, the scale of punishment/penalty should also be the same. The Chairman and Secretary were awarded the penalty of Rs.5 lakhs each, though the CESTAT has reduced the penalty to Rs.2.5 lakhs for the Secretary, who had also filed an appeal on the ground that he had not misdeclared the goods for any personal gain. We are of the view that the penalty imposed on the appellant M/s. J. Mitra &

Bros. of Rs.25 lakhs is not justified. Applying the principle of parity, we are of the view that the appellant M/s. J. Mitra & Bros. should also be imposed the same penalty as that of the Chairman. Accordingly, we reduce the penalty under Section 112(a) from Rs.25 lakhs to Rs.5 lakhs.

29. The question of law as regards abetment and liability is accordingly answered in favour of the Revenue and against the appellant M/s. J. Mitra & Bros. and as regards quantum of penalty partly in favour of the appellant M/s. J. Mitra & Bros..

30. The appeal is accordingly disposed of with no order as to costs.

SANJEEV SACHDEVA, J.

11th OCTOBER, 2013
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SANJIV KHANNA, J.