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

+ **CUS.A.C. 2/2007**

Reserved on: September 30, 2015

Decision on: November 05, 2015

S.N.OJHA

..... Petitioner

Through: Ms. Meenakshi Arora, Senior  
Advocate with Mr. Piyush Kumar, Ms. Shikha  
Sapra, Mr. Tushar Joshi, Advocates.

versus

COMMISSIONER OF CUSTOMS

..... Respondent

Through: Mr. Rahul Kaushik, Senior Standing  
counsel.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

**05.11.2015**

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**S.Muralidhar, J.:**

1. This is an appeal by the Appellant, S.N. Ojha, former Assistant Commissioner (Export), posted at the Inland Container Depot ('ICD'), Tughlakabad under Section 130 of the Customs Act, 1962 ('Act') against an order dated 21<sup>st</sup> November 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') in Customs Appeal No. C/422/03-B.

2. By the said impugned order, the CESTAT dismissed the Appellant's appeal and affirmed the order dated 19<sup>th</sup> August 2003 passed by the Commissioner of Customs imposing a penalty of Rs. 3 lakhs on the

Appellant under Section 114 (iii) of the Act.

3. The background to the present appeal is that the Appellant joined the Customs Department as Customs Appraiser on 25<sup>th</sup> April 1986. He was promoted to the grade of Assistant Commissioner on 29<sup>th</sup> February 1996 and thereafter to the grade of Deputy Commissioner on 12<sup>th</sup> November 2002. On 24<sup>th</sup> July 1998 he was posted as Assistant Commissioner (Export) at the Internal Container Depot (ICD), Tughlakabad and also Assistant Commissioner (Adjudication). He was in-charge of processing of the shipping bills filed for export of goods through the ICD. He also performed other functions allied and incidental thereto.

4. It is stated that the procedure for processing the shipping bills on the Customs EDI computer system was prescribed in Public Notice No. 8/97 dated 13<sup>th</sup> August 1997. It is further stated that in terms of the said public notice the data from the shipping bills as provided by the exporter, would be entered into the EDI system. The processing of the said shipping bills at the level of Assistant Commissioner was limited to the verification of online particulars already entered into the EDI system. It is sought to be suggested that at the stage of processing, neither are the original documents produced before the Assistant Commissioner nor are the goods brought within the customs area.

5. On 12<sup>th</sup> December 1998 the Directorate of Revenue Intelligence ('DRI') received information that the old and used clothes were being exported from ICD, Tughlakabad by certain exporters in order to fraudulently claim drawback. The said exporters included M/s. R.S. & Co., M/s. Stitch & Style, M/s. Himgiri Overseas, M/s. Deepshikha Overseas and M/s. Saharanpur Handicrafts, New Delhi. Acting on the

said information the DRI detained 12 containers at Mumbai port and another 10 containers at the Nhava Sheva port prior to their being loaded on to vessels. Four containers which had already sailed from Mumbai were called back through the steamer agent. All these containers had been cleared for export through the port of ICD, Tughlakabad, New Delhi.

6. When the containers were examined by the Officers of DRI between 12<sup>th</sup> December 1998 and 11<sup>th</sup> March 1999 the goods were found to be old and used. Mr. Joseph Kuok, Superintendent of Customs who had given the "Let Export Orders", Mr. Lovkesh Sharma, and Mr. Zaki Anwar, Inspectors who had issued the examination report for the consignments, the Clearing Agent and the Clearing Clerk who had attended to the exports were summoned by the DRI Officers under Section 108 of the Act. On examination of 26 containers it was found that there was no marking of serial numbers on the cartons in some of the containers. Further although some cartons were numbered, those did not tally with the serial numbers given in the shipping bills, invoices and packing lists. Also the goods were not found as per the declarations given in the shipping bills and invoices by the exporter. Some of the garments were spoiled, discoloured and torn. The value of the goods in all 26 containers was assessed at Rs. 69,26,325 as against the declared FOB value of Rs. 31,39,72,656.77 on which fraudulent drawback claimed was Rs. 5,43,91,420.

7. The investigation revealed that 10 containers' load of readymade garments which had earlier been exported by M/s. Himgiri Overseas and M/s. Deepshikha Overseas and delivered at Dubai were also of similar nature. The declared FOB value of the goods in the said 10 containers

was Rs. 11,45,84,196.50 on which fraudulent drawback availed was Rs. 1,97,84,550 . From the total drawback due on 26 containers and the 10 containers already delivered, the sum of Rs. 3,87,12,610 was found to be disbursed. The Commissioner of Customs, ICD, Tughlakabad was asked not to disburse the balance amount of Rs. 3,54,63,360. From the disbursal of the aforementioned drawback amount to the different firms, it was noticed that the amount of drawback disbursed to one unit was transferred to other, which showed a clear nexus between the units.

8. 26 panchnamas were prepared from the inspection of the containers in the presence of some of the customs officials. The statements of several of them were recorded. Mr. Lovkesh Sharma tendered 6 statements on 4 different dates during recording of proceedings in the panchnama, i.e., on 12<sup>th</sup> January 1999, 18<sup>th</sup> January 1999, 10<sup>th</sup> March 1999 and 11<sup>th</sup> March 1999. He further tendered statements on 9<sup>th</sup>, 12<sup>th</sup> December 1999 and 15<sup>th</sup> March 1999. Mr. Joseph Kuok gave 4 statements on 3 different dates, i.e., 12<sup>th</sup> January 1999, 18<sup>th</sup> January 1999 and 13<sup>th</sup> February 1999 during recording of proceedings in the panchnama. He made further statements on 16<sup>th</sup>, 17<sup>th</sup> February 1999, 26<sup>th</sup> March 1999 and 26<sup>th</sup> August 1999.

9. On the basis of the above statements, a show cause notice ('SCN') was issued to the several parties including the Appellant on 3<sup>rd</sup> December 1999 proposing an imposition of penalty under Section 114 of the Act. The Appellant submitted a reply on 13<sup>th</sup> June 2000 and further written submissions on 13<sup>th</sup> September 2000, 11<sup>th</sup> October 2000 and 13<sup>th</sup> March 2002. As already noticed, the Commissioner of Customs by Order-in-Original dated 19<sup>th</sup> August 2003 levied a penalty of Rs. 3 lakhs on the Appellant under Section 114 (i) and 114 (iii) of the Act.

This was affirmed by the CESTAT by its impugned order dated 21<sup>st</sup> November 2005.

10. The findings *qua* the Appellant in the order-in-original dated 19<sup>th</sup> August 2003 passed by the Commissioner of Customs were as under:

(a) The statements of Mr. Zaki Anwar and Mr. Lovkesh Sharma, Inspectors showed that they had cleared the goods covered by 85 shipping bills on the instruction of the Appellant despite the fact that the said bill was over-valued. The statements of the Inspectors showed that the Appellant's complicity and awareness.

(b) The frequency of calls received by and made by the Appellant to Mr. Rajesh Kumar, the proprietor of the five concerns viz., M/s. R.S. & Co., M/s. Hingiri Overseas, M/s. Deepshikha Overseas, M/s. Stitch & Style and M/s. Saharanpur Handicrafts, New Delhi indicated that the Appellant knew Rajesh Kumar. The evidence showed that Rajesh Kumar was introduced to the Appellant by his predecessor Mr. J.P. Singh, Assistant Commissioner and therefore, Rajesh Kumar was known to the Appellant.

(c) The Appellant's plea of heavy pressure of work or pre-occupation was not believable. In light of the instructions issued by the Department that goods for which the drawback claim made was over Rs. 1 lakh would require scrutiny/approval of the Assistant Commissioner before clearance, the Appellant could not divest himself of his responsibility by pleading ignorance.

(d) 85 of the 100 shipping bills were assigned for examination to Mr. Lovkesh Sharma and this was confirmed by Mr. Joseph Kuok, Superintendent.

(e) Although the evidence tendered by a co-noticee required corroboration, the fact was that there was gross misdeclaration of value, description and quantity in respect of as many as 100 consignments. This circumstance proved the involvement of the Appellant and the officers working under him. It amounted to 'smuggling' within the meaning of Section 2 (39) of the Act.

(f) The Appellant was guilty of complicity with Rajesh Kumar in the export fraud and was liable to penalty under Section 114 (iii) of the Act.

11. The CESTAT in the impugned order found that both Lovkesh Sharma and Joseph Kuok had been acting under the instructions of the Appellant and had permitted the consignments to be exported without examination. Consequently, the findings of the Commissioner of Customs in the order-in-original were upheld.

12. Ms. Meenakshi Arora, learned Senior counsel appearing for the Appellant, made the following submissions:

(i) During the initial interrogation neither Lovkesh Sharma nor Joseph Kuok named the Appellant. However, in their statements tendered after two months after the search, in order to save themselves, they falsely implicated the Appellant.

(ii) While Lovkesh Sharma, Zaki Anwar, Joseph Kuok and even J.P. Singh had been suspended by the Department, the Appellant was not. He was, in fact, promoted to the grade of Deputy Commissioner.

(iii) The Central Bureau of Investigation ('CBI') registered an FIR on 1<sup>st</sup> June 1999 against Lovkesh Sharma and Joseph Kuok, the Custom House Agent and the exporter. However, the Appellant was not named in the chargesheet dated 29<sup>th</sup> April 1999.

(iv) The finding of the Commissioner of Customs that the Appellant had been responsible for the clearance of the consignments covered by 100 shipping bills was perverse since the said bills were filed in a span of 20 days and during that time the Appellant had processed about 3000 bills for export of garments. Therefore, 100 bills out of 3000, particularly of five different exporters, could not have raised any suspicion as there was no alert *qua* the said five exporters. None of the 100 bills was ever returned to the Appellant or was showed to the Appellant after processing.

(v) Lovkesh Sharma and Zaki Anwar were habitual offenders and had been penalised or convicted in several other cases. Zaki Anwar's statement that he had shown samples to the Appellant in the room of Superintendent was patently wrong and uncorroborated. Neither Joseph Kuok nor R.S. Tandon, who were the Superintendents, had ever stated in their respective statements that Anwar had showed the samples to the Appellant in their room. There were numerous inconsistencies in the statements of Joseph Kuok, Lovkesh Sharma and Zaki Anwar which made their statements unreliable and inadmissible in law. Reliance was placed on the decisions in *Mohtesham Mohd. Ismail v. Special Director, Enforcement Directorate 2007 (8) SCC 254*, *Vinod Solanki v. Union of India 2009 (233) ELT 157 (SC)*, *Union of India v. Bal Mukund 2009 (12) SCC 151*, *Noor Aga v. State of Punjab (2008)*

*16 SCC 417.*

(vi) Joseph Kuok was fully exonerated in the Department's proceedings despite being named by the CBI in the chargesheet.

(vii) The public notice issued by the Department required the Assistant Commissioner to scrutinise export declarations/shipping bills by perusing the particulars online. He was not required to inspect the bills even where the drawback claimed was over Rs. 1 lakh. The processing of the shipping bills was complete even prior to the arrival of the goods in the shed. Once a shipping bill was processed, the Assistant Commissioner had no access or control over the movement of the shipping bill or the cargo and would come to know of it if and only if the bills were returned to the Assistant Commissioner's screen with objection/query. The Court was shown the chart and the flow sheet showing the movement of the goods from one stage to the other to buttress the above submission.

(viii) The fact that there were several calls from Rajesh Kumar only showed that the Appellant as a nodal officer for grievance redressal, had to attend to complaints and queries of the exporters on a regular basis. The inference that he was acting in collusion with Mr. Rajesh Kumar was perverse. Further, in the absence of the transcript of the alleged conversations, the data concerning the calls could not lead to any adverse inference. Despite their being 120 calls from J.P. Singh to Rajesh Kumar and 82 calls from Rajesh Kumar to J.P. Singh, they were both exonerated.

(ix) The marking of shipping bills by the Appellant to Joseph on



the relevant date was done as Mr. Tandon was not available as he was busy in other work. The marking was in *bona fide* discharge of his duty. The mere fact that the appeal of Satish Kumar and Anwar were also dismissed would not automatically mean that the Appellant's case should also fail since both Anwar and Gupta were accused in other cases and had been suspended even at the initial stage of the enquiry. On the other hand, the Commissioner of Customs having exonerated Joseph Kuok and CESTAT having exonerated J.P. Singh and R.K. Srivastava, the Appellant should also be exonerated.

13. In reply to the above submissions, Mr. Rahul Kaushik, learned Senior standing counsel for the Respondent, drew the attention of the Court to the detailed order passed by the Delhi High Court in *Sudhir Sharma v. Commissioner of Customs 2015 (319) ELT 450 (Del)* where, in similar circumstances, the Court had upheld the order of the CESTAT which had affirmed the penalty levied on the custom officers involved in a large scale case of fraud in respect of drawback claims. He referred to the order passed by the Supreme Court dated 27<sup>th</sup> February 2015 in Special Leave Petition (Civil) No. 22381 of 2015 [*Ajay Yadav v. Commissioner of Customs (Import and General)*] where the SLP of Mr. Ajay Yadav against the above order of this Court was dismissed as withdrawn.

14. Mr. Kaushik pointed out that the Court ought not to interfere with the concurrent findings of the Commissioner and the CESTAT unless they were shown to be perverse. Reliance was placed on the decisions in *Naresh J. Sukhawani v. Union of India 1996 (83) ELT 258 (SC)*; *Collector of Customs, Madras v. D. Bhoormul (1974) 2 SCC 544*; *K.I. Pavunny v. Assistant Collector (HQ), C. Ex. Collectorate, Cochin 1997*

*(90) ELT 241 (SC); Balkrishna Chhaganlal Soni v. State of West Bengal 1983 ELT 1527 (SC); Vishnu Kumar v. Commissioner of Customs, New Delhi 2010 (26) ELT 356 (Del); Surjeet Singh Chhabra v. Union of India (1997) 1 SCC 508 and Telstar Travels Private Limited v. Enforcement Directorate (2013) 9 SCC 549.*

15. Mr. Kaushik also drew the attention of the Court to the fact that as far as the co-noticees were concerned, the appeals filed by Mr. Satish Gupta and Mr. Anwar against the order of the CESTAT had failed. The further appeals filed by them in Supreme Court were also dismissed.

16. Before proceeding to discuss the above submissions, the Court proposes to discuss the legal position as regards the scope of the judicial review. The Court also notes that by the order dated 3<sup>rd</sup> September 2007 the question of law framed was whether the CESTAT was justified in upholding the penalty levied on the Appellant?

17. Since one part of the evidence relied upon by the Department in the present case is comprised of the statements of the co-noticees, the legal position as regards the evidential value of such statements requires to be examined. In the context of the Foreign Exchange Regulation Act, 1973 ('FERA'), the Supreme Court in *K.T.M.S. Mohd. v. Union of India 1992 (3) SCC 178* emphasized in the context of a retracted statement by the noticee, it had to be shown that the initial statement was voluntary. Any statement obtained under inducement, threat, coercion or other improper means had to be rejected. At the same time, merely because a statement is retracted, it would not automatically lead to the inference that it was obtained involuntarily. The burden would shift to the maker of the statement to establish that improper means had been adopted for

obtaining such statement. If the maker failed to establish the allegation of inducement, threat etc. the adjudicating authority would not proceed to decide the show cause notice on the sole basis of such statement but look for other corroborative evidence.

18. Subsequently, in *Vinod Solanki v. Union of India* (*supra*) the Supreme Court reiterated the above legal position and observed:

“34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion etc but the requirement is that it may appear to be Court as such.”

19. The Court also referred to the decision in *Mohtesham Mohd. Ismail v. Special Director, Enforcement Directorate* (*supra*) which held that “a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom.”

20. In *K.I. Pavunny v. Assistant Collector* (*supra*), the Supreme Court held in the context of a retracted confession, that “rule of prudence and practice does require that the Court seeks corroboration of the retracted

confession from other evidence.” It was further observed:

“it is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of given set of facts.”

21. The upshot of the above discussion is that while the strict requirements of the Evidence Act, 1872 would not apply to enquiries and investigations undertaken by the DRI or the Customs Department, the broad principle that statements made have to be voluntary and not under threat, coercion, would nevertheless apply. Where the maker of such statement retracts it later by alleging that it was obtained under coercion, threat or duress, the burden was on the maker of the statement to prove such coercion, threat or duress. Even where he fails to do so, the adjudicating authority would not rely solely on the retracted statement but would look for other independent corroboration.

22. The other aspect in the present case concerns the conduct of the officers of the Department and their role in the large scale fraud concerning the claim of duty drawback. The case explaining the legal position in this regard require to be briefly discussed. ***Vishnu Kumar v. Commissioner of Customs*** (*supra*), concerned the conduct of a sorting assistant at the post office. In the context of a charge against him of abetting the smuggling of dutiable goods under Section 112 of the Act, the Court observed that “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.”

23. In *Sudhir Sharma v. Commissioner of Customs* (*supra*) the conduct of the officers of the Department in a case of abetment of smuggling of silk was being examined. The Court discussed the applicable law and observed that the Appellant there was implicated not solely on the confessional statement of one of the officers but also on the basis of other material. After noticing the decision in *Collector of Customs, Madras v. D. Bhoormul* (*supra*), the Court noted:

“the law does not insist upon an impossible threshold of proof to establish allegations in Customs proceedings and that if on probabilities the statutory authorities can establish evasion, the legal standards are adequately met with.”

24. In light of the above legal position, the Court proceeds to examine the present case, in light of the evidence brought on record by the Department. At the outset, the Court would like to observe that its powers of judicial review in the present appellate proceedings would not extend to again analysing the evidence threadbare. The reference made hereafter to the statements of the officers recorded during the investigation is for the limited purpose of examining whether any relevant evidence has been overlooked or whether the appreciation of the evidence by the authorities below is perverse or whether the conclusions drawn on the analysis of such evidence is that which no prudent person could have arrived at.

25. The Court notices that the criticism by the Appellant of the statements of Lovkesh Sharma and Anwar is not that they were obtained under duress or coercion but they were made belatedly with a view to escaping liability and passing the blame on to the Appellant. Lovkesh Sharma and Anwar were co-noticees with the Appellant. Their statements are no *per*

se exculpatory. Even the statement of Joseph Kuok does not appear to indicate that he was denying his role altogether.

26. As far as Zaki Anwar is concerned, the first two statements on 9<sup>th</sup> and 10<sup>th</sup> February 1999 were made during the panchnama proceedings. He was asked certain specific questions to which he gave replies. While it is true that in the statement of 9<sup>th</sup> February 1999 he did not name the Appellant, in the statement made on 10<sup>th</sup> February 1999 he definitely mentioned that he had shown the samples of the goods to the Appellant who was Assistant Commissioner (Export) at the relevant time. The following questions and answers are relevant in this regard:

“Q.8 Did you show sample of the goods to Assistant Commissioner (Exports) and who was the officer occupying the post of Assistant Commissioner (Export) at that time?

Ans. 8. Yes, I shown the samples of the goods to Assistant Commissioner (Exports). Shri S.N. Ojha was the Assistant Commissioner (Export).

Q.9. Was the samples shown to other Superintendent who had marked the documents to you?

Ans.9 No, samples were directly shown Shri S.N. Ojha, Assistant Commissioner (Exports).

Q.10. How many samples were shown to Sh. Ojha?

Ans.10. One sample from each shipping bill wherever Superintendent had remarked for xxxxx. The samples to Assistant Commissioner.

Q.11 Was the fact of showing samples to Assistant Commissioner recorded on the shipping bills or elsewhere?

Ans.11 The fact of showing samples to Assistant Commissioner was recorded in the computer in departmental comments.

Q.12 Who fed these departmental comments in the computer?

Ans. 12 I myself fed the comments.

Q.13 Were these comments also attested or checked by the Superintendent?

Ans.13 Yes, these were checked while giving the order of 'Let Export' by Superintendent.

Q.14. What was the method of showing sample to Assistant Commissioner?

Ans.14. The Assistant Commissioner had come to the export shed and the samples were shown in the Superintendent's cabin where Sh. S.N. Ojha was sitting.

27. Three months later, i.e., on 4<sup>th</sup> May 1999 when his statement was again recorded Zaki Anwar mentioned *inter alia* that the Appellant had borrowed his mobile; that the Appellant might have made calls from the said mobile to Rajesh Sharma; that he did show the shipping bills to the Appellant. In his statement made on 14<sup>th</sup> September 1999 Zaki Anwar was confronted with the statement of the Appellant made on 25<sup>th</sup> August 1999 and he gave the following answer:

“Q. 4. Please go through the statement of Sh. S.N. Ojha, AC dated 25<sup>th</sup> August 1999, wherein he has stated that there is no evidence to prove that the samples were shown to him. Moreover AC had denied having seen the samples, what do you say about this?”

Ans.4 I have gone through the statement dated 25<sup>th</sup> August 1999 of Sh. S.N. Ojha, AC and I have put my dated signature on the same. As stated in my answer to question no. 2 above, that this fact can be verified from the computer print out at ICD, Tughlakabad that I fed the remarks “Samples shown to AC” and I once again state that after showing the samples to AC, I fed the said remarks.”

28. Likewise Lovkesh Sharma in his statement dated 9<sup>th</sup> March 1999 categorically stated that “I attended the work and cleared the goods for export on the verbal instruction of Shri S.N. Ojha.” He mentioned that when instructions were given to him by the Appellant he was along with him. He stated that “I believe that similar instruction might have been given to Shri Joseph Kuok by Shri S.N. Ojha.” In his further statement on 12<sup>th</sup> March 1999 when asked why the Superintendent, Mr. Kuok marked all the documents to Mr. Rajesh Bhasin to him, Lovkesh Sharma stated that “I can presume safely that he was also instructed by Shri S.N. Ojha accordingly.” Lovkesh Sharma was then asked:

“Q.6 When did Shri S.N. Ojha instruct you?

Ans. 6 So far as I remember it was in the first week of November 98.

Q.7 Why Shri S.N. Ojha, Assistant Commissioner chose to instruct you not anybody else?

Ans. 7 I had worked with him in adjudicate cell for about 2 or 3 months. If appears he due to the instructed me.”

29. Lovkesh Sharma stuck to the stand he took on 15<sup>th</sup> March 1999 and stated that whenever a shipment was made by Rajesh Kumar @ Rajesh Bhasin “I was instructed by Sh. S.N. Ojha, Assistant Commissioner to clear the goods.” He also categorically stated that he had pointed out discrepancies to the Appellant who nevertheless asked him to clear the goods.

30. The statement of Joseph Kuok made on 17<sup>th</sup> February 1999 clearly implicated the Appellant. The following question and answer are relevant



in this regard:

“Q.1 You have seen the remark put by Sh. S.N. Ojha, Assistant Commissioner, Export on the Annexure ‘C’ to the shipping bill No. 1038428 dated 21<sup>st</sup> November 1998 what you have to say about the said remark please explain.

A.1 On 24<sup>th</sup> November 1998 the Assistant Commissioner Shri S.N. Ojha spoke to me on phone in the export shed that since Shri R.S. Tandon, Superintendent Export shed was busy I was to attend to the shipping bills and give ‘Let Export Order’. He further said that he was giving the order in writing too.”

31. Joseph Kuok was consistent in his stand in the subsequent statement made on 26<sup>th</sup> March 1999 when he gave the following answers:

“Q.4 How all the 85 shipping bills came to you as Superintendent Exports?

A.4 The CHA usually bunches the documents together and the same was presented at my table by Sh. Lovkesh Sharma.

Q. 5 Why all the 85 shipping bills were marked to Sh. Lovkesh Sharma only?

A.5 I recollect that Sh. Lovkesh Sharma requested me to made these documents to him as he told me that he is under instructions from AC Sh. S.N. Ojha to facilitate clearance of the goods. I confirmed the position from Sh. S.N. Ojha and accordingly marked the documents to Sh. Lovkesh Sharma.”

32. On 26<sup>th</sup> August 1999 Joseph Kuok again stated:

“Q. 2 On a single day there were 34 SBs of two parties which were examined by one Inspector Sh. Lovkesh Sharma? How so much work or no. of SBs given to one Inspector whereas there were 7 inspectors? Similarly how can one Superintendent had given LEO for these 34 SBs?

A.2 The SBs are marked to the Inspectors by the Superintendents depending on the workload for the inspection and his presence at the export shed. Regarding the 34 SBs Sh. Lovkesh Sharma told me that he was under instructions from

the Assistant Commissioner Sh. S.N. Ojha to facilitate clearance of the goods and therefore, I marked the same to him. This was also confirmed verbally from the Assistant Commissioner Sh. S.N. Ojha.”

33. The contention that the above statements were an afterthought or that they are unreliable and inconsistent is not borne out. Further, as observed by the Commissioner of Customs, there is sufficient corroboration by the fact that as many as 100 consignments were allowed to be cleared without proper verification. The Appellant has been unable to show that any relevant piece of evidence has been overlooked or that the appreciation of the evidence by the Commissioner or the CESTAT is perverse.

34. As regards the procedure followed, it is not the case of the Department that the EDI computer system had thrown up these discrepancies. The Department has been able to substantiate that the Appellant had given oral instructions to his subordinates on how they should act.

35. The Court is conscious that in the criminal case the CBI chargesheet did not name the Appellant as an accused. However, that cannot by itself lead to the inference that in the adjudication proceedings, where the standard is of preponderance of probabilities, the Department has failed to establish its case.

36. The fact that Joseph Kuok was exonerated in the adjudication proceedings does not in any affect the case against the Appellant. The case of the Department against the Appellant stands substantiated by the evidence on record. Considering the number of consignments and the value thereof , the submission that there was heavy pressure of work and therefore, the Appellant cannot be held responsible is unacceptable.

37. There is no legal infirmity in the impugned orders of the Commissioner of Customs or the CESTAT. Further, the penalty levied on the Appellant cannot be said to be excessive. It does not call for interference.

38. The appeal is accordingly dismissed with costs of Rs. 10,000. The interim order passed on 12<sup>th</sup> March 2007 is vacated.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**NOVEMBER 05, 2015**

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