



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

% **Judgment reserved on: 15 September 2023**
Judgment pronounced on: 25 September 2023

+ W.P.(C) 4386/2023
AJAY SAGAR

..... Petitioner

Through: Mr. Deepak Gandhi and Mr.
Bhavneet Arora, Advs.

versus

PRINCIPAL COMMISSIONER OF CUSTOMS (IMPORT)

..... Respondent

Through: Ms. Satish Kumar, Sr. SC along
with Ms Vaishali Goyal, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J.

1. The instant writ petition has been preferred seeking to invoke the extraordinary jurisdiction conferred upon the Court by Article 226 of the Constitution and to frame directions for waiver of the pre-deposit requirement as placed in terms of Section 129E of the **Customs Act, 1962**¹.

2. The petitioner is constrained to approach this Court since Section 129E of the Act no longer incorporates a provision which may be invoked by either the **Commissioner (Appeals) Customs and**

¹ Act



Central Excise² or the **Customs, Excise & Service Tax Appellate Tribunal**³ to waive the condition of pre-deposit in case of undue hardship. It becomes pertinent to note that Section 129E of the Act as it stood prior to its amendment by Finance Act (No .2) of 2014 had conferred a discretion on the Commissioner (Appeals) as well as the CESTAT to dispense with the deposit liable to be made for the purposes of an assessee pursuing an appeal where it was found that the deposit of duty, interest or penalty levied would cause undue hardship.

3. Mr. Gandhi, learned counsel for the petitioner had contended that notwithstanding the deletion of that provision from Section 129E of the Act, this Court by virtue of its constitutional powers would still be entitled to waive the condition of a pre-deposit in appropriate cases.

4. Our attention was drawn to the recent decision rendered by a Division Bench of the Court in **Mohd. Akmam Uddin Ahmed & Ors. vs. Commissioner Appeals Customs and Central Excise and Others**⁴ where the question of the power of a High Court to dispense with the requirement of pre-deposit and to frame appropriate directions reducing the burden on an assessee in extraordinary and exceptional circumstances was answered in the following terms: -

“26. The petitioners placed reliance on judgments of Coordinate Benches of this Court in *Pioneer Corpn. case* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , *Narender Yadav case* [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415] and *Shubh Impex case* [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793] to canvas the argument that the court has in special circumstances,

² Commissioner (Appeals)

³ CESTAT

⁴ 2023 SCC OnLine Del 2450



waived the payment of mandatory pre-deposit amount as envisaged in Section 129-E of the Act.

27. A Coordinate Bench of this Court in *Pioneer Corpn. case* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , where the court, while discussing the amendment made to Section 35-F of the Central Excise Act, 1944 (hereinafter referred to as “the CE Act”) (which section is pari materia to Section 129-E of the Act and also requires a pre-deposit in the case of an appeal), held that prior to the amendment of Section 35-F of the CE Act, a discretion was available to the Central Excise and Service Tax Appellate Tribunal (hereinafter referred to as “Cestat”) to consider financial hardship and accordingly determine the pre-deposit amount post the amendment, a direction of waiver of the pre-deposit would be contrary to the express legislative intent of the amendment. However, it further held that the jurisdiction of the High Court under Article 226 cannot be taken away and that such power should be used only in rare and deserving cases where a clear justification is made out for such interference as follows:

“9. ... A direction, therefore, to the Cestat that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35-F with effect from 6-8-2014. *While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35-F cannot possibly be taken away, the court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out of such interference.* Having heard the submissions of Mr Datta and having perused the adjudication order, the court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the petitioner's appeal before the Cestat is concerned”.

(emphasis supplied)

28. The Coordinate Benches of this Court in *Narender Yadav case* [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415] and *Shubh Impex case* [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793] , both of which, while dealing with the amended provision of Section 129-E of the Act, have permitted waiver of the mandatory pre-deposit as is envisaged in the said provision but, in exceptional circumstances.

29. In *Narender Yadav case* [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415], a Coordinate Bench of



this Court, while recording that the petitioner was a salaried employee drawing Rs 14,500 per month (i.e., Rs 1,74,000 per annum) and that the order-in-original did not give any reasons for the penalty imposed on the petitioner, directed that the requirement of pre-deposit under Section 129-E of the Act be waived. The relevant extract is below:

“... The petitioner's grievance is that as H-card holder, imposition of over Rs 3.8 crores penalty in the overall circumstances of the case, *given that the order-in-original did not record any specific adverse finding against him, is unwarranted.* The petitioner, therefore, seeks a direction that the requirement of pre-deposit as a condition for the hearing and disposal of the appeal — before the Commissioner (Appeal), should be dispensed with.

The court has considered the submissions, and the fact *that the order-in-original discloses no reason why penalty was imposed upon the petitioner — a salaried employee drawing Rs 14,500 per month. In the circumstances, the petitioner's appeal to the Commissioner (Appeals) shall be heard on its merits without insisting upon the requirement of pre-deposit; it is accordingly directed to be waived....”*

(emphasis supplied)

30. In *Shubh Impex case* [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793] , a direction to make a pre-deposit of Rs 1.27 crores, being 7.5% of the duty imposed, under Section 129-E of the Act was challenged by the appellant. While discussing the judgment in *Pioneer Corpn. case* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63] , a Coordinate Bench of this Court recognised the existence of the power available to the court under Article 226 of the Constitution albeit under rare and compelling circumstances. The court, thus, directed that a pre-deposit be made in the sum of Rs 5 lakhs in addition to the token pre-deposit already made by the appellant therein. The relevant extract is below:

“10. Given the aforesaid facts, while we are inclined to accept the preliminary objection of the respondents on the alternative remedy, *we are also inclined to interfere and relax the condition of pre-deposit. We would direct that on the petitioner making a pre-deposit of Rs 5,00,000 in addition to Rs 3,70,008*, the appeal which would be filed by the petitioner would be *entertained* by the first appellate authority. The pre-deposit would abide by the result of the appeal. First appeal, if preferred within 21 days, would not be



rejected on the ground of limitation.

11. In *Pioneer Corpn. v. Union of India* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], a Division Bench of this Court has held that the High Court while exercising writ jurisdiction under Article 226 of the Constitution can exercise discretion and reduce the pre-deposit in rare and deserving case, notwithstanding the amendment made under Section 35-F of the Customs Act (*sic* — Central Excise Act).

The statute has not withdrawn or taken away the said power vested in the writ court, which should be exercised in rare but compelling and deserving cases, when the cause of justice requires such reduction.”

(emphasis supplied)

31. Another Coordinate Bench of this Court in *Manoj Kumar Jha v. DRI* [*Manoj Kumar Jha v. DRI*, (2019) 365 ELT 166], allowed the appeal to be prosecuted on payment of partial pre-deposit, given the financial stringency of the appellant in the case, subject to the furnishing of bond or reasonable security. Reference can be made to para 3 of this judgment, which reads as follows:

“3. To this Court, it appears that the petitioner is a man of limited means. It is not clear whether any prosecution has been launched against the petitioner. In these circumstances, *in view of the material-on-record which suggests that the petitioner has very limited means to deposit any amounts*, this Court is of the opinion that the relief is warranted. *The requirement of pre-depositing of any amount directed to be waived, however, the petitioner shall furnish a bond and also provide reasonable security* having regard to the list of immovable properties produced before the court. Subject to this, the requirement of pre-deposit is hereby waived. The petitioner's appeal shall be revived and now Cestat shall proceed to hear the parties on its merits after issuing adequate notice to the counsel.”

(emphasis supplied)

32. The Allahabad High Court in *Ganesh Yadav case* [*Ganesh Yadav v. Union of India*, 2015 SCC OnLine All 9174], while upholding the requirement of pre-deposit under Section 35-F of the CE Act as mandatory and dismissing the constitutional challenge, held that the High Court under Article 226 of the Constitution of India is vested with the jurisdiction in an appropriate case to dispense with the requirement of a pre-deposit. Reliance is placed



on the following extract:

“8. ... The requirement of a deposit of 10% is in the case of an appeal to the Tribunal against an order of the Commissioner (Appeals). This requirement cannot be regarded or held as being arbitrary or as violative of Article 14. Above all, as the Supreme Court held in *Shyam Kishore v. MCD* [*Shyam Kishore v. MCD*, (1993) 1 SCC 22] *the High Court under Article 226 of the Constitution is vested with the jurisdiction in an appropriate case to dispense with the requirement of pre-deposit and the power of the court under Article 226 is not taken away*. This was also held by the Supreme Court in *Govt. of A.P. v. P. Laxmi Devi* [*Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 720] in which the Supreme Court observed that recourse to the writ jurisdiction would not be ousted in an appropriate case....”

(emphasis supplied)

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34. A Coordinate Bench of this Court in *Dish TV India Ltd. case* [*Dish TV India Ltd. v. Union of India*, 2020 SCC OnLine Del 2580] , in a matter concerning the import of satellite/viewing cards by the petitioner company, upheld the mandatory pre-deposit in view of the amendment to the Act. The aforesaid judgment while discussing the amendment of Section 129-E of the Act noted the fact that the petitioner's annual turnover for Financial Year 2018-2019 was more than Rs 6000 crores and that the mandatory pre-deposit would be a miniscule percent thereof, has directed the pre-deposit be made.

35. The Coordinate Bench in *Dish TV India Ltd. case* [*Dish TV India Ltd. v. Union of India*, 2020 SCC OnLine Del 2580] relied on the previous decision in *Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST* [*Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST*, 2019 SCC OnLine Del 12414 : (2019) 368 ELT 579] and *Anjani Technoplast Ltd. v. Commr. of Customs* [*Anjani Technoplast Ltd. v. Commr. of Customs*, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] to hold that waiver of pre-deposit cannot be granted.

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41. Thus, an analysis of the conspectus of law as enunciated above gives a clear understanding that after passing of the Amendment Act on 6-8-2014, the amended Section 129-E of the Act and also Section 35-F of the CE Act shall be applicable in those cases where the appeal has been filed after 6-8-2014.



42. However, as discussed above, the Coordinate Benches of this Court have exercised and, thus, preserved the power as available under Article 226 of Constitution of India to either waive the pre-deposit condition or to grant the right to appeal subject to a part deposit or security. The power, albeit, has been exercised only in rare and exceptional cases.

43. It was held by the Allahabad High Court, speaking through Dr D.Y. Chandrachud, Chief Justice (as His Lordship then was) in *Ganesh Yadav case* [*Ganesh Yadav v. Union of India*, 2015 SCC OnLine All 9174] that:

“8. ... Whether the writ jurisdiction under Article 226 should be exercised, having due regard to the discipline which has been laid down under Section 35-F of the Act, is a separate matter altogether but it is important to note that the power under Section 226 (sic: Article 226) has not been, as it cannot be, abridged.”

(emphasis supplied)”

5. As would be evident from the conclusions recorded in *Mohd. Akmam Uddin Ahmed*, the Court came to conclude that notwithstanding the amendments introduced in Section 129E of the Act, the powers conferred upon a High Court by Article 226 of the Constitution stand preserved and would not detract from its authority to either waive the condition of pre-deposit or to grant a right of appeal subject to a deposit being made lower than the minimum as prescribed in Section 129E of the Act. Our Court had also approved the judgment rendered by the Allahabad High Court in **Ganesh Yadav vs. Union of India & Ors.**⁵ which had held that whether the invocation of the jurisdiction of the High Court under Article 226 of the Constitution is merited or not would be one which would have to be considered on the basis of the facts obtaining in individual cases.

⁵ 2015 SCC OnLine All 9174



6. *Mohd. Akmam Uddin Ahmed* thus constitutes an authoritative precedent for the proposition that Section 129E of the Act as it stands presently, would not detract from the powers of a High Court in appropriate cases to absolve assesses' of the financial burden flowing from the requirement of a pre deposit. However, the judgment enters a note of caution by holding that the said power would be liable to be invoked in "*rare and deserving*" cases or where extraordinary situations and circumstances warrant the exercise of that discretion.

7. While affirming the principles that were enunciated in **Narender Yadav vs. Joint Commissioner of Customs (Exports)**⁶, the Court in *Mohd. Akmam Uddin Ahmed* reaffirmed the principle that the writ jurisdiction would be liable to be exercised "*in rare but compelling and deserving cases, when the cause of justice requires such reduction*". We are thus left only to consider whether the case of the petitioner would fall in the rare and exceptional category.

8. The facts as disclosed on the record would indicate that the respondents on the basis of intelligence received came to conclude that various importers including M/s M.M. Enterprises were illegally importing worn clothing and electronic goods by misdeclaring them to be "*Assorted Printed Books*". The **Directorate of Revenue Intelligence**⁷ officers on the basis of inputs received came to form the opinion that those importers were deliberately adopting means to evade payment of appropriate customs duty. Various searches are stated to have been conducted and imported containers examined.

⁶ 2019 SCC OnLine Del 12415

⁷ DRI



During the course of the investigation, the DRI Officers also recorded the statements of several parties including the petitioner here. The petitioner is also stated to have been arrested and produced before the Court of the Metropolitan Magistrate before whom on 18 February 2009 he is stated to have retracted his statement.

9. A **Show Cause Notice**⁸ dated 20 May 2011 came to be issued to the petitioner responding to which a reply was submitted for the consideration of the Adjudicating Authority. Ultimately, and on 27 May 2022, the Order-in-Original came to be passed with the Adjudicating Authority holding the petitioner liable to pay a penalty of Rs. 25,00,000/- under Section 112 of the Act and Rs. 1,00,00,000/- under Section 114AA of the Act.

10. Aggrieved by the aforesaid order, the petitioner is stated to have filed an appeal before the CESTAT. However, the same was not numbered as the petitioner did not comply with the provisions of Section 129E of the Act.

11. For the purposes of examining the nature of allegations as were levelled against the petitioner, we deem it apposite to extract the following parts from the Order-in-Original:-

“33. The summary of investigations relating to import of ‘Old and used worn clothing’. Electronic Goods, Electrical Goods, Cables, Fabrics etc. in the guise of ‘Assorted Printed Books’ during the period 2006-07 is as follows:

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(xii) It also appears that at least three persons of this cartel, namely-Vijay Sagar, Ajay Sagar and Amit Sharma were actively

⁸ SCN



involved in the fraudulent clearances during 2006-07, by virtue of their confessional statements during the later stages of investigation. It appears that during the entire period of investigation, the work of liaison with Rajnish Bhardwaj was dealt by Vijay Sagar, single handedly. After the fabricated Bill of Entry generated by Rajnish Bhardwaj was filed in the CMC, Ajay Sagar provided logistical support for getting the consignment cleared in the import shed of ICD, TKD. It is learnt that Ajay Sagar was working in a Forwarding Firm, during 2006- 07 and along with that he had been independently handling clearances of the import consignments of two of the actual importers of books, namely-M/s Canam Books and M/s Daman Impex. The cartel apparently devised a strategy where they planned to use these containers as a decoy for being produced before the Examining Officer of the import shed against the container of other dutiable goods, including 'worn clothing' which had been under restricted category. Therefore, when the containers of books of either of these two importers arrived in the ICD, the same would be deliberately withheld for some time after getting the Customs out of charge, if a consignment, which was sought to be cleared by way of mis-declaration was due to be available soon. This Container of books was then presented before the Customs for getting clearance of the Container of dutiable goods, such as worn clothing, electronic goods etc.

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55. The evidences put forth by the department are discussed below:-

(i) xxx

(ii) xxx

(iii) Statements of various persons recorded during the course of investigation

55.7 During the course of Investigation various statements were recorded. The evidences collected through statements in a tabular form are as follows:-

TABLE-E

| Sr. No. | Noticee No. | Name of person | Recorded on | Evidence collected through statement |
|---------|-------------|------------------|-------------|--|
| 12 | 27 | Shri Vijay Sagar | 18.02.2009 | (i) that in October, 2007, he alongwith Shri Gaurav Gupta opened a freight |



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| | | | <p>forwarding firm M/s Fantastic Cargo Movers, in which he was a partner and during the period from February 08 to January 09, had cleared 28 import consignments at nil rate of duty, mis declaring the goods as "Assorted Printed Books". (ii) that out of the 28 consignments, in 12 consignments of electronic goods (air conditioners and digital video cassettes), he provided name and IEC codes of firms for facilitating Customs clearance; that he used to charge 13,85,000 per container for those clearances; <u>and that for clearance of consignments of worn out garments, he received 12,20,000/- per container through Amit Sharma and Ajay Sagar who in turn were in direct contact with the importer</u> (iii) that he forged the import documents such as bill of lading, packing list and invoice (iv); that they had cleared 12 consignments of air conditioners & digital video cassettes of Shri Mohit Chadha, 37 /13 West Patel Nagar, New Delhi - 8 by declaring the goods as 'assorted printed books' at 'NIL' duty through ICD, TKD (v) that for those 12 consignments they provided him (Shri Mohit Chadha) the name and IEC Code of the importer firm in whose</p> |
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| | | | | <p>name the bills of entry were filed (vi) that the consignment covered under bill of entry No. 757901 dated 01.02.2009 consisted of parts of CFL (compact fluorescent lamp); that Shri Harbhajan Singh, Lajpat Nagar imported the said consignment in the name of M/s S.K. Tradecom Pvt. Ltd. (vii) that the importers provided the original bills of lading and all other import documents such as invoice, packing list, and on that basis, forged import documents were prepared by them (viii) that he approached Shri Rajnish Bhardwaj of CMC at ICD, TKD for creating a new IGM on the basis of manipulated / forged documents (ix) that the jobs related to consignments at serial nos.1,4, 5, 6, 9, 11, 12, 13 of the said chart were provided by Shri Sultan Bhai through Shri Amit Sharma (x) that for those consignments, the original bills of lading and other forged import documents were provided/prepared by Shri Amit Sharma (xi) <u>that the jobs related to consignment al SL. No. 17, 18, 20-24 of the said chart were provided by Shri Ajay Sagar</u> (xii) that Shri Jugal Kishor Chadha was the owner of those import consignments.</p> |
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| 19 | 29 | Shri Ajay Sagar | 18.02.2009 | <p>(i) that he was working for M/s Fantastic Cargo Movers since the beginning(ii) that he was providing clients to M/s Fantastic Cargo Movers whose consignments were cleared by them in the guise of “Assorted Printed Books” (iii) that in December 2008, Shri Ashish Chadha, S/ o Shri Jugal Kishore Chadha told him to arrange the IEC name and address for clearance of worn clothing, which had become restricted, but since he was unable to do so, Shri Ashish Chadha arranged the IEC of M/s M.M. Enterprises (iv) <u>that in the month of December 2008 and January 2009, he got cleared 7 consignments in the name of M/s M.M. Enterprises in the guise of “Assorted Printed Books” (v) that he forged signatures on behalf of M/s M M Enterprises while receiving delivery orders from concerned shipping line- M/S Hyundai Merchant Marine India Pvt. Lid. and M/s K-Line.</u></p> |
| 20 | 29 | Shri Ajay Sagar | 24.03.2009 | <p><u>he was, interalia, shown the statement of Ashish Chadha containing the details of SMSs exchanged between them and he agreed to the contents of the said statement.</u></p> |



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| 25 | 3 | Shri Ashish Chadha | 26.02.2009 | <p>(i) that the consignments cleared in the name of M/s M.M. Enterprises belonged to them (he and his father) (ii) <u>that for the purpose of clearance of import consignments through ICD, TKD, they had reached an agreement with Shri Ajay Sagar to clear each container on cash payment of Rs. 3.50 lakhs plus shipping charges, and that Shri Ajay Sagar in association with his brother Shri Vijay Sagar and others, would get the documents remade showing the goods as books and would also get IGMs amended to that effect</u> (iii) that he was well aware of this mischief and indulged in the said activity so as to save Customs duty and fine and penalty leviable on such imports (iv) that prior to imposition of restriction on imports of worn clothing, they had been importing goods in the name of their own firms namely M/s Jug Vijay Enterprises and M/s Chadha Sons Enterprises, but subsequent to imposition of restriction on such imports they started importing goods in the name of M/s M.M. Enterprises and others and in this way they had</p> |
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| | | | | <p>imported goods in the name of some 25-30 companies (v) that he destroyed faxes and emails relating to imports made by them (vi) that he directed their foreign supplier to furnish wrong address of M/s M. M. Enterprises in some of the bills of lading and having deleted the SMS exchanged by him with Shri Ajay Sagar (vii) that he also mentioned the name of Shri Maninder Pal Singh (Resident of A-3/75 First Floor, Sector 11 Rohini) for having assisted them in the said imports by providing names and Importer Exporter codes of various firms/companies for the purpose of imports against a monetary consideration of 12,000 to 15,000 per container</p> |
| 45 | 22 | Shri Tejinder Singh Bakshi | 28.01.2010 | <p>(i) that on being asked about the fact of imports in the name of M/s Swani International, which was not his firm, he submitted that after the goods were placed in the restricted category, <u>he was facing problem in importing the goods, when one Vijay Sagar and Ajay Sagar who lived in Rohini came to him and assured him that he would be</u></p> |



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| | | | | <p><u>delivering the goods at his godown without him getting involved in the imports(ii) that he decided to give them one consignment on test check basis (ii) that he could not also provide any proof of payment of duty on the said consignment and agreed that since the goods were declared as books, no duty was paid thereon and as such he was willing to deposit the duty liability on the said consignment within a weeks' time (iii) that he subsequently deposited an amount of Rs. 3,00,000 towards duty liability.</u></p> |
| 51 | 29 | Shri Ajay Sagar | 06.12.2010 | <p>“(i) He reiterated all the earlier statements including the latest ones on the clearances related to the period 2006-07 and the modus operandi in the import shed (ii) he was working independently as well and he handled forwarding on his own account of two parties namely Canam Books & Daman Impex who were importing books(iii) that since he was already dealing with forwarding work for his company, he had all the contacts and hence he could manage the forwarding</p> |



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| | | | | <p>of those consignments (iv) that for the clearance of those consignments he took the services of M/ s Shivoy Enterprises(v)that in the year 2006-2007, Deepak Seth had told him to withhold containers of books even after clearance on several occasions(vi) that at that time he was not aware about the exact reason for this since Deepak Seth used to give him a discount of Rs. 10,000 per container”</p> |
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“56.5.1 As far as retraction in r/o. other Noticees to the SCN are concerned, I find though the Hon'ble Court was aware yet they were sent to judicial custody. Further each of the Noticees who retracted their first statements had subscribed to the truthfulness in their further statements. The further statements recorded remain unretracted. The Notices after admitting guilt have also paid part amount of duty, which shows their complicity.

56.5.2 I do not find any merit in such retraction and reject them as an afterthought and legal tutoring to avoid the clutches of law.”

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“80. Discussions on defense submitted by Shri Ajay Sagar (Noticee No.29)

A.I He submitted that the statements recorded under Section 108 were retracted by Jitender Singh, Gaurav Gupta and Vijay Sagar at the first instance when they were produced before the Duty Magistrate in Patiala House.

2. The initial statements recorded were retracted. There is nothing on record to suggest that subsequent statements were retracted also. The detail discussions have been made at Para 56 above. The



evidences put forth by the department have been discussed in Para 54 to 62 above. For brevity it is not discussed here.

B.1 They further submitted that the G-Card issued to Jitender Singh was obtained on the recommendation of Sushil Malik of M/s Cargo Care and no evidence whatsoever was collected to show that the license of M/s Cargo Care was sub-let to Fantastic Cargo allegedly belonging to Gaurav Gupta and Vijay Sagar. It is pertinent to add that the salary of Jitender Kumar was being paid by M/s Cargo Care and not M/s Fantastic Cargo.

2. Statement of Shri Sushil Malik, Proprietor of M/s Cargo Care (CHA No R29/91) was recorded on 18.1.2009, in which he admitted to have sublet his CHA licence to Shri Gaurav Gupta and Shri Vijay Sagar through Shri Jitender Kumar against a monthly monetary consideration of 5000.00. The fact that the Notice sublet his CHA license to Shri Vijay Sagar for monthly monetary consideration for utilizing the license is unabashedly declared by Shri Vijay Sagar in his statement before DRI.

3. The defence submissions are thus bereft of truth.

C.1 They submitted that the only unsubstantiated allegation against the Noticee is that he allegedly connected Gaurav Gupta and Vijay Sagar with potential buyers as also that he collected monies and documents from shipping lines/ cliens. These acts by themselves are not incriminating at all. The acts attributed to Ajay Sagar, by no stretch of imagination fall in the category of import, aiding in import. The only other material the SCN disclosed to connect Ajay Sagar with the alleged conspiracy was an SMS exchange with the importer. The SMS that is not admissible as per decisions of the Hon'ble Apex Court.

2. The contents of SMS have been accepted by the Importer in his statements. The evidence cannot be brushed aside. Accordingly, the defense submissions merit rejection.

D.1 They submitted that the SCN relies heavily on the SMS chats between Noticee and Ashish Chaddha which cannot be received in evidence since they are not accompanied by a certification as required by Section 65B of the Evidence Act. Therefore, any conclusion based on the same is non-est in the eyes of law and cannot be read against the Notices and proposed accomplices.

2. The SMS were retrieved and submitted voluntary, which is certification itself, under Panchnama. I find that the aforesaid is the finding during examination and was recorded under Panchnama. The Panchnama is essentially a document recording certain things



which occur in the presence of the Panchas and which are seen and heard by them. Accordingly, the submissions are not acceptable.

3. In view of the above discussions, the complicity of the Noticee is established.”

12. From the material gathered in the course of investigation, the statements attributed to the persons involved including the petitioner as well as the conclusions drawn and recorded in the Order-in-Original it is manifest that the respondents had found that the petitioner was complicit and actively involved in the evasion of duty and the intent of these parties to mis-declare imports while acting in concert. Bearing in mind the material which has been relied upon and the nature of the allegations levelled against the petitioner, we find ourselves unable to hold that his case would fall in the category of *rare and exceptional* cases. Prima facie, and solely for the purposes of examining whether waiver is merited, we have delved through the relevant record and find that the conclusions drawn by the respondents insofar as the petitioner is concerned can neither be said to be wholly perverse or unsustainable. We thus find that the circumstances do not warrant the invocation of the extraordinary power conferred by Article 226 of the Constitution.

13. The writ petition fails and shall stand dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

SEPTEMBER 25, 2023

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