

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**COURT No. IV**

**Customs Appeal No. 53193 of 2018**

(Arising out of Order-in-Original No.25/2017 dated 23.11.2017 passed by the Commissioner of Customs (Exports), ICD, Tughlakabad, New Delhi)

**Container Corporation of India LTD.**

ICD, Tughlakabad, New Delhi-110019

**Appellant**

Vs.

**Commissioner of Customs (Exports),**

ICD, Tughlakabad, New Delhi-110019

**Respondent**

**APPEARANCE:**

Shri Usman Khan, Advocate for the Appellant

Shri Nagendra Yadav, Authorised Representative for the Respondent

**CORAM:**

**HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)**

**HON'BLE MS. HEMAMBIKA R.PRIYA, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 51422/2023**

**Date of Hearing: 03/08/2023**

**Date of Decision: 10.10.2023**

**DR.RACHNA GUPTA:**

Present appeal is arising out of Order-in-Original No.25/2017 dated 23.11.2017.

2. The brief facts of the case are as follows:

3. M/s.Pico Trading Co. had filed Bill of Entry No.028721 dated 27.10.2011 for the clearance of goods imported in container No.CLHU 8612196. The goods stuffed in different containers were declared as steep glass bowl and deep cut glass bowl with declared valued of Rs.8,12,745.6/- Based on specific intelligence, the container was

examined on 02.11.2011/03.11.2011, in the presence of independent witnesses/panchas and Shri Sanjay Arora, proprietor M/s.Pico Trading Co. Representative of CHA, namely, Shri Nandan of Excellent Cargo was also initially present. In addition to declared products, there were found 45 other different kinds of branded products including ladies purses, branded liquor etc., found, the details of which were mentioned in the annexure to panchnama prepared during the said examination. The total value was assessed at Rs.3,24,93,750/-. Since contents of the container were highly misdeclared and undervalued, the examining officer seized the goods of the said container/alongwith the container and handed over the same to the Manager of Container Corporation of India Limited<sup>1</sup>(hereinafter referred as CONCOR).

4. After recording the statements of all concerned including that of proprietor of importer, Shipping line personnel, CHA and his representative, officers of CONCOR, overseas enquiries were also made in the matter. Based thereupon show cause notice bearing C.No.VIII/ICD/10/TKD/SHB-Imp/Inv/31 Cont./111/2012/Pt.III/25266 dated 5.12.2015 was served upon 17 noticees including CONCOR, the present appellant. It has been proposed that the Customs duty amounting to Rs.1,00,36,067/- be recovered from CONCOR in terms section 45 of Customs Act, 1962<sup>2</sup> read with Regulation 6 of Handling of Cargo in Customs Area Regulations,2009<sup>3</sup> (herein after referred as HCCAR,2009) Penalty was also proposed to be imposed on the appellant. With respect

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<sup>1</sup> CONCOR

<sup>2</sup> The Act

<sup>3</sup> HCCAR,2009

to other co-noticees, there were respective several proposals in the show cause notice. The proposal qua appellant has been confirmed vide order under challenge Order-in-Original bearing No.25/2017 dated 23.11.2017. Being aggrieved, the appellant is before this Tribunal.

5. We have heard Shri Usman Khan, Id. Advocate for the appellant and Shri Nagendra Yadav, Id. DR for the Department.

6. It is submitted on behalf of Appellant that the Appellant is a public sector undertaking under administrative control of Ministry of Railways, Government of India, which is engaged in the business of providing Inland transportation of containers having larger undertaking inland container depot<sup>4</sup>. CONCOR, the appellant is the custodian of all goods lying in the import shed Area in terms of section 45 of Customs Act, 1962.

7. While challenging order, in question, Id.Counsel has mentioned that Id. Commissioner has failed to take note of the fact that the appellant is not a party to the panchnama and security of container was the responsibility of Central Industrial Security Force<sup>5</sup> whose personnel were deployed in the ICD Tughlakabad<sup>6</sup>. The appellant had no knowledge of the contents of the container No.CLHU 8612196. Panchnama dated 2.11.2011 does not bear signature of any one on behalf of the CONCOR, as is apparent from the two panchnamas dated 2.11.2011 and 3.11.2011. The appellant's insurance surveyor signed panchnama only on 15.12.2012. The appellant had engaged highly

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<sup>4</sup> ICD

<sup>5</sup> CISF

<sup>6</sup> TKD

skilled security force i.e. CISF for guarding the area. Once container got handed over to said CISF, its safety and security becomes the duty of CISF. Hence it is CISF who should be held responsible for the alleged movement of container from its original location to another location, without any proper authorization and also for customs' seal to have been found tampered with. In the given circumstance, the responsibility cannot be fastened on CONCUR just for being the custodian under section 45 of Customs Act, 1962.

8. Ld. Counsel also mentioned that the matter was investigated by police and enquiry held by DIG Commissioner and nothing was found against CONCOR. The order under challenge is set aside accordingly prayed to be set aside and appeal is prayed to be allowed.

9. While rebutting the submissions made on behalf of appellant, Id.DR has mentioned that examination of the container No.CLHU 8612196 and contents therein was conducted in the presence of independent witnesses with the representatives of all concerned i.e. the representative from shippingline of CHA of importer. A proper inventory of goods found stuffed into the container was prepared in their presence. The contents were found contrary to the declarations in Bill of Entry. Even second time examination of the said container on 15.10.2012 when customer's seal was found tampered, was also done in presence of all the above mentioned persons in the premises of appellant itself. Such proceedings were sufficient to fix the liability of custodian, CONCOR under Regulation 6 HCCAR,2009 and section 45 of Customs Act, 1962. It is impressed upon that the presence of

custodian in examination proceeding is not mandatory except where there is a prior indication or doubt about pilferage of goods. It is brought to the notice that joint survey was conducted in the presence of surveyor of the appellant when seal on the container was found tampered/altered in unauthorized manner and container was found shifted from the original location without permission from proper officer. Till this stage there was no indication about any pilferage from the said container. The goods were found pilfered after the second time examination. However, on being asked the reason for replacement/tampered, customs seal on the container, the appellant not only showed ignorance, but tried to shift their responsibility upon the security agency i.e. CISF, despite statutory mandate of section 45 of the Act.

10. Ld.DR further mentioned that when the goods are unloaded into customs area, these have to remain in custody of approved person, CONCOR is admittedly the approved custodian. In case of any shortage/pilferage of such goods, tampering of seal or even movement of container from its location, liability has to be fastened on the custodian only. It is brought to notice that after first examination of container on 02/03.11.2011 customs new seal No.594385 was affixed and CONCOR was requested to keep the container No.CLHU 8612196 in safe custody. Letter of Superintendent (Admn) (Import Shed) to the Manager, CONCOR dated 02.11.2011 is impressed upon. Though CONCOR, while trying to prove their bonofide, have contended about lodging FIR on 17.10.2012 reporting theft of goods from customs area but the said act also cannot absolve them from their liability of being

custodian. With these submissions, it is mentioned that there is no infirmity in the order under challenge and appeal is liable to be dismissed.

11. Having heard rival contentions and perusing the record, we observe following as admitted facts:

(i) The container No.CLHU 8612196 was imported in the name of M/s.Pico Trading Company, proprietor where of is Mr.Sanjay Arora, it was placed for clearance vide Bill of Entry No.5028721 dated 27.10.2011. It was examined by Special Intelligence and Investigation Branch (SIIB) of Customs on 02/03.11.2011.

(ii) Undeclared goods that too of highest brands were found stuffed in the said container. Accordingly undeclared goods valuing Rs.3,24,93,750/- along with container were seized, were destuffed and the container was affixed with Customs seal No.5944385. The said container was handed over to the appellant/CONCOR for safe custody.

(iii) This seizure was disputed by the appellant on the ground that there are two panchnamas of 2.11.2011 and 3.11.2011 which is sufficient to doubt the examination, proceedings and factum of customs seal. Also none of the panchnamas bear signature of appellant nor its representative.

(iv) On 1.6.2012, when the container was found to be affixed with seal No.344378, Department alleged tampering of seal on the container lying in the customs area and also that it was found at different location.

(v) The appellant on 15.10.2012 requested for a joint survey of the said container which was conducted in the presence of the Insurance Surveyor of the Appellant.

(vi) In the joint survey the container was found to contain goods worth of only Rs.2,35,000/- as contrary to such number of variety of goods as were assessed at Rs.3,24,93,750/- on 2.11.2011.

(vii) The inspecting team thus formed an opinion that the remaining goods had been pilfered.

(viii) To safeguard itself the appellant lodged an FIR with Delhi Police on 17.10.2012, reporting loss/theft of goods which were found missing from container.

12. From the above admitted facts, it is apparent that the goods valued more than Rs.3.25 crores were imported in the name of M/s.Pico Trading Co. at behest of Mr.Sanjay Arora, who had misdeclared and undervalued the goods in the Bills of Entry dated 27.10.2011. Resultantly the said container was seized and was handed over to CONCOR, the appellant, custodian.

(viii) The CONCOR had admitted the custody of the goods. Accordingly, section 45 of Customs Act, 1962 is relevant which reads as under:-

***Section 45. Restrictions on custody and removal of imported goods.-***

*(1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.*

*(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,—*

*(a) shall keep a record of such goods and send a copy thereof to the proper officer;*

*(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.*

*(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.*

13. Regulation 6 of Handling of Cargo in Customs Area Regulations, 2009 is also relevant. The relevant regulations thereof are 1(f), 1(i) and 1(q) which reads as under:-

*"6. Responsibilities of Customs Cargo Service provider:*

*(1) The Customs Cargo Service provider shall -*

*(a) to (e) -----*

*(f) not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser.*

*(i) be responsible for the safety and security of imported and export goods under its custody.*

*(j) to (p) -----*

*(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder."*

14. Meaning of both these provisions has been discussed by this Tribunal in the case of M/s.Continental Warehousing Corporation (Nhava Seva) Ltd. vs. Principal Commissioner of Customs, Chennai-2021 (12) TMI 745 as under:

*"5.4 Section 45 of the Customs Act, 1962, dealing with clearances of imported goods, prescribes restrictions on custody and removal of imported goods. Further, Section 45(1) authorizes the granting of custody of imported goods with such approved person, until the same are cleared, as prescribed. Section 45 (2)*

*prescribes the role of the person who is given the custody of the imported goods, and Section 45 (3) speaks of the consequences in case such imported goods are pilfered while in custody of the approved person, which makes such person liable to pay duty at the prevailing rate. This means that until 29.03.2018 (ie., the date of amendment), the custodian of the imported goods had no authority at all to release the imported goods from its custody. Further, the Regulations in question, i.e., HCCAR, 2009, casts certain responsibilities on the Customs Cargo Service provider (CFS) which is also based on the conditions to be fulfilled before issuing a Public Notice. Regulation 6 (1) interalia mandates that the customs cargo service provider shall not permit goods to be removed from the customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser. When there is a specific embargo prohibiting the custodian from moving the goods, without a specific order in writing is a clear violation of the Regulations.”*

15. As already observed above, the container was handed over to the custody of the appellant is an admitted fact. When the said admission is seen through the prism of above quoted interpreted provision, it cannot be denied that the said provisions have been violated and that there is lack of diligence towards responsibility of the custodian. However, the appellant though has pleaded its non involvement with panchas at the time of initial inspection when two contradicted panchnamas were prepared and that there was no information of Customs seal bearing No.594385 having been affixed at the time when the container was handed over to appellant, CONCOR and also that the responsibility of the custodian was otherwise given to CISF. But we observe that irrespective there were two panchnamas but both mentions to have been drawn on 2.11.2011, both bear signatures of two panchas, namely, Rajesh Kumar and Shri Anu Sharma and of independent witnesses Shri Kamlesh Kumar alongwith signatures of proprietor of importing company, namely Shri Sanjay Arora.

16. From the perusal of both panchnamas, we do not observe any cogent difference in the contents thereof except that the time of proceeding is slightly different. In panchnama signed on 2.11.2011,

proceedings are mentioned to have started at 12.00 hours and to have ended at 23.00 hours. Whereas for panchnama dated 3.11.2011, the proceedings are mentioned to have started at 12.18 hours on 2.11.2011 and to have got concluded at 00.30 on 3.11.2011. Thus, there is not much difference except 15 minutes/ while beginning one and half an hour time duration while ending the proceedings. Since examination ended post midnight, means date got changed by that time. To our opinion, this cannot be the reason to challenge or to doubt the veracity/correctness of the panchnama. We also observe that only one out of the two panchnamas bear signatures of Customs Inspector, namely, Rakesh Kumar. Hence this panchnama can be held as the one drawn at the relevant time. As already observed above that examination which started in afternoon of 2.11.2011 continued till its midnight i.e. early morning of 3.11.2011, the plea taken about date is not at all relevant to doubt the panchnama which bears signatures of all concerned. On perusal of panchnama, it is amply clear that after such inspection of container on 02/03/11.2011 the container was resealed with new Customs seal No.594385 and was handed over to the manager of CONCOR, the appellant for the safe custody. This fact is also coming out from the cross examination of Customs Inspector, Shri Rajesh Kumar. The letter dated 02.11.2011 also corroborates the handing over the container with said seal to CONCOR – appellant. The contention of appellant that it has no knowledge about seal nor any responsibility for the container lying in the customs area/shed is not sustainable.

17. Coming to the issue of objection about Customs seal, we observe that the appellant has not brought to our notice that it was mandatory for the Customs Inspector to cut seal only in the presence of custodian of CONCOR on 2.11.2011. Admittedly, it was case of mis-declaration and undervaluation and till the request of appellant of joint survey on 15.10.2012 no pilferage was at all noticed. It is clear that presence of CONCOR was mandatory neither on 02/03.11.2011 nor even on 15.10.2012. The examination on 15.10.2012 was though, conducted in presence of CONCOR. Hence, we do not find any reason to differ from the finding in the order under challenge that at the time drawing panchnama dated 2.11.2011, Customs seal No.594385 was affixed on the container and the said seal was handed over to the CONCOR. It is coming apparent from the statements of proprietor of company as well as shipping line who was also present at the time of said panchnama drawn and have signed panchnama wherein it is recorded that Customs seal was cut and the container was resealed and handed over to the CONCOR for safe custody. None of them was cross examined by the appellant. Resultantly, there is no evidence produced by the appellant to falsify the contents of panchanma.

18. With respect to the plea about transferring liability to CISF, we observe from above quoted specific section 45 of Customs Act, 1962, that custodian is a person who has been approved by the Commissioner of Customs. Admittedly such approval was given to the appellant/CONCOR. Admittedly, there is no such approval in favour of the CISF. All the allegations as fastened against the custodian are under Regulation 6 HCCAR,2009 and section 45 of Customs Act, 1962 i.e.

against the approved by custodian, who is none but CONCOR, the appellant. As per section 45 (2) (b) of Customs Act, 1962, the custodian is duty bound to not to permit such goods to be removed from the customs area, except under and in accordance with written permission of proper officer or otherwise dealt with. Admittedly, there was no such permission with CONCOR for removal of the goods.

19. As already observed above, that there is no denial that the container had shifted from its location within the customs area. Also the seal of the container was found tampered and most of the goods were found pilfered from the said container. As per section 45, the custodian is burdened with the responsibility of safe custody of imported goods unless and until those goods cleared either for home consumption or for being warehoused. Admittedly, the goods got pilfered and container seal found tempered when the goods were not still cleared. Resultantly, we do not find any reason to absolve the appellant from the responsibility fastened upon him and violation confirmed.

20. In the light of entire above discussion, we do not find any reason to differ with findings in the order under challenge. Resultantly, the order is hereby upheld. Consequent thereto the appeal is hereby dismissed.

(Order pronounced in open court on 10.10.2023)

**(DR.RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

**(HEMAMBICA R PRIYA)**  
**MEMBER (TECHNICAL)**

