IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75656 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS/Airport/KS/366-368/2024 dated 07.06.2024 passed by the Commissioner of Customs (Appeals) 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001)

M/s. Rakesh Kumar Roshan **: Appellant**
S/o Shri Yashwant Kumar, Flat No.
73-A-1, Urban Sabujayan Society,
Jagatipota, Kolkata-700 099.

VERSUS

The Commissioner of Customs (Appeals) **: Respondent**
3rd Floor, Custom House,
15/1, Strand Road, Kolkata-700001

APPEARANCE:

Shri S. K. Mohapatra, Advocate
Shri Arijit Goswami, Advocate
Shri Subhrabrata Chattaraj, Consultant for the Appellant

Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76226/2026

DATE OF HEARING: 19.08.2026
DATE OF PRONOUNCEMENT: 24.09.2026

Order: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Appeal No. KOL/CUS/AIRPORT/KS/366-368/2024 dated 07.06.2024, which has upheld the Order-in-Original No. KOL/CUS/JC/AP/ADMN/37/2023 dated 12.07.2023, wherein, inter alia, a penalty of Rs.50,000/- has been imposed on Shri. Rakesh Kumar Roshan, the Appellant herein.

2. The facts of the case are that two passengers, by name Shri Sagar Chakraborty and Shri Sunil

Mahato, were intercepted at the departure area of the Netaji Subhas Chandra Bose International Airport, Kolkata, when they were scheduled to depart from Kolkata to Dubai by Flight No. FZ-460 on the intervening night of 01/02.10.2021. On examination, they were found to be carrying a substantial quantity of foreign currency in contravention of the applicable provisions of law. The officers recovered a total of 3,55,000 Saudi Arabian Riyals (710 pieces of denomination 500) and 29,500 UAE Dirhams (59 pieces of denomination 500), equivalent to Rs. 73,17,300/-, concealed in different bags and garments carried by the two passengers. Since neither of the appellants were able to produce any document evidencing lawful acquisition, possession, carriage or export of the foreign currencies, the same were seized under the reasonable belief that they were being exported in contravention of the provisions of the Customs Act, 1962 read with the Foreign Exchange Management Act, 1999 and the rules and regulations framed thereunder. The seized currencies were subsequently verified by officials of the State Bank of India, NSCBI Airport Branch, who confirmed their genuineness.

2.1. During the course of investigation, statements of both the passengers were recorded under Section 108 of the Customs Act, 1962. The investigation further revealed that Shri Rakesh Kumar Roshan, a Preventive Officer of Customs posted at the NSCBI Airport, Kolkata during the relevant time has facilitated the passengers and helped them to carry the foreign currencies. According to the Revenue, the material collected during investigation disclosed that the said Customs officer facilitated the movement of the passengers through airport formalities despite

knowledge of the foreign currencies being carried by them. The Revenue accordingly alleged active abetment on the part of the said officer in the attempted illegal export of the foreign currencies by the two passengers. Accordingly, the show cause notice issued proposed imposition of penalty on the Appellant herein.

2.2. On adjudication, the Ld. Adjudicating authority, has inter alia, imposed a penalty of Rs.50,000/- on the Appellant. On appeal, the Ld. Commissioner (Appeals) has upheld the penalty imposed on the appellant.

3. The Ld. Counsel appeared on behalf of the Appellant made the following submissions:

3.1. No positive act of facilitation is established. The Appellant, in the ordinary discharge of his duty, checked the boarding pass of Shri Mahato, found no baggage tag affixed, and was told by the passenger that he carried no check-in baggage. The passenger's handbag was examined in the presence of the Superintendent and other officers and nothing incriminating was found. The Appellant thereafter had no further role, and the subsequent recovery of foreign currency was made independently by DRI officers on an intelligence-based interception. At the highest, this is a case of an officer having been misled by a passenger — not an act of facilitation.

3.2. Mere negligence or lack of highest diligence does not amount to misconduct inviting penalty. It is settled law that failure to attain the highest standard of efficiency does not ipso facto constitute misconduct: J. Ahmed v. State,

AIR 1979 SC 1022. Likewise, mere negligence for want of diligence on the part of a Customs officer does not ipso facto render the act culpable so as to invite penal consequence: A.N. Bhatt, 1991 (55) ELT 580 (Tri-Mad).

3.3. Uncorroborated statement of a co-noticee cannot sustain penalty. The entire case against the Appellant rests on the uncorroborated version of co-noticee Shri Mahato that he handed over Rs. 10,000/- to the Appellant for smooth passage. There is no recovery of any such amount from the Appellant, no corroboration in the CCTV footage, and no independent witness. It is well settled that the statement of a co-noticee, without independent corroboration, cannot be acted upon to fasten penal liability: *Supdt. of Customs v. Bhanabhai K. Patel, 1995 (76) ELT 508 (SC); Union of India v. Kisan Ratan Singh, 2020 SCC OnLine Bom 39; Rajendra Prasad v. Commissioner of Customs, 2001 (139) ELT 925 (T).*

3.4. The alleged text message is inadmissible in evidence. Reliance has been placed by the Departments below on a printout of a text message allegedly sent by the Appellant, recovered from the co-noticee's phone. No Section 138C(2) certificate (pari materia with Section 65B, Evidence Act) accompanies this electronic record, nor is there any forensic report linking the message to a device used by the Appellant. In the absence of the mandatory certificate, such secondary electronic evidence is wholly inadmissible: Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473; *S.N. Agrotech v. Commissioner of Customs, 2018 (361) ELT 761 (Tri-Del),* holding Section 138C of the Customs Act to be pari materia

with Section 65B of the Evidence Act. The findings below, being founded on this inadmissible material, cannot be sustained.

3.5. Suspicion, however grave, is not proof; ingredients of abetment are absent. It is trite that suspicion cannot take the place of proof, and that circumstantial evidence must exclude every hypothesis except guilt: Hanumant Govind v. State of M.P., AIR 1952 SC 343; Rahaman v. State of U.P., AIR 1972 SC 110. Further, abetment requires proof of intentional aiding with active complicity — mere facilitation in fact, without intent, is insufficient: Shri Ram v. State of U.P., AIR 1975 SC 175. No such intentional, active complicity is established against the Appellant on this record.

3.6. Protection under Section 155 of the Customs Act. The Appellant, having acted (at worst) in the bona fide discharge of official duty, is entitled to the protection contemplated in *Costao Fernandes v. State, 1996 (82) ELT 433 (SC),* and the consistent line of authority following it — *Commissioner of Customs v. M.I. Khan, 2000 (120) ELT 542 (T); Commissioner of Cus. & C.Ex. v. Rajiv Kumar Agarwal, 2007 (217) ELT 392 (T); Commissioner of Customs v. M. Vasi, 2003 (151) ELT 312 (T); Commissioner of Customs v. Hargovind Export, 2003 (158) ELT 496 (T); Yogesh Kumar v. Commissioner of Customs (Export), 2006 (201) ELT 66 (T)* — under which no penalty under Section 114 is sustainable against such an officer.

3.7. In view of the foregoing submissions, the Ld. Counsel submits that both the authorities below have proceeded on surmise, conjecture and inadmissible material, without a shred of independent

corroboration, and have failed to establish the essential ingredients of abetment under Section 114 of the Customs Act, 1962. Accordingly, the Ld. Counsel submits that the impugned Order-in-Appeal, to the extent it confirms the penalty of Rs. 50,000/- on the Appellant, is unsustainable in law and on facts.

4. The Ld. A.R. submits that the evidence gathered during the course of investigation has established that the Appellant has facilitated the passengers in carrying the Foreign Currencies, even when they knew that the said passengers were carrying foreign currencies. Accordingly, the Ld. Counsel supported the imposition of penalty on the Appellant in the impugned order.

5. Heard both sides and perused the appeal documents.

6. From the documents available on record, we find that during the course of performing normal duties in the airport, the Appellant has examined the passenger's handbag in the presence of the Superintendent and other officers and nothing incriminating was found. We find that officers of DRI intercepted the Passengers subsequent to examination by the Customs officer and recovered foreign currencies. We observe that the recovery of foreign currencies from the passengers by DRI officers was an intelligence-based action. The Appellant posted at airport on duty has no such information with him. He has performed his duty by conducting normal examination, in which he has not noticed any foreign currency concealment by the passengers. Thus, we are of the view that the

Appellant cannot be faulted for not detecting the foreign currencies concealed by the passengers.

6.1. We find that the entire case against the Appellant has been built on the basis of the statements recorded from the co-noticee Shri Mahato, who has claimed that he had handed over Rs. 10,000/- to the Appellant for smooth passage. However, we find that the Appellant has not moved out from the airport after examination of the said passengers and no money has been recovered from the Appellant. We observe that there is no corroboration of the allegation of payment of money by the Passengers in the form of CCTV footage or any independent witness. It is a well settled that the statement of a co-noticee, without independent corroboration, cannot be acted upon to fasten penal liability. In support of this view, we rely on the decision in the case of *Supdt. of Customs v. Bhanabhai K. Patel, 1995 (76) ELT 508 (SC); Union of India v. Kisan Ratan Singh, 2020 SCC OnLine Bom 39; Rajendra Prasad v. Commissioner of Customs, 2001 (139) ELT 925 (T).*

6.2. It is settled law that failure to attain the highest standard of efficiency does not ipso facto constitute misconduct. This view has been held in the case of J. Ahmed v. State, AIR 1979 SC 1022. Likewise, mere negligence for want of diligence on the part of a Customs officer does not ipso facto render the act culpable so as to invite penal consequence, as held by the Tribunal in the case of A.N. Bhatt, 1991 (55) ELT 580 (Tri-Mad).

6.3. We find that the Ld. Adjudicating authority has relied on a printout of a text message allegedly sent by the Appellant, recovered from the co-

noticee's phone. In this regard, we observe that the investigation should have followed the procedure prescribed under Section 138B of the Customs Act and obtained a Certificate as mentioned in Section 138C of the Customs Act, to rely on the electronic evidences recovered from the mobile phone of the Co-Noticees. However, we find that no such Certificte as mentioned under Section 138C (2) (pari materia with Section 65B, Evidence Act) has been obtained in this case. In the absence of the Certificate, we hold that the electronic record recovered during investigation has no evidentiary value. We also find that there is no forensic report linking the message to a device used by the Appellant. In the absence of the mandatory certificate, such secondary electronic evidence is wholly inadmissible. This view has been held by the Hon'ble Apex Court in the case of *Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473; S.N. Agrotech v. Commissioner of Customs, 2018 (361) ELT 761 (Tri-Del).* Thus, we observe that the findings of the Ld. adjudicating authority in the impugned order, implicating the Appellant in the alleged offence of recovery of foreign currencies, on the basis of inadmissible electronic evidence, is legally not sustainable.

6.4. We observe that the allegation against the Appellant has been sustained in the impugned order on the basis of suspicion only. It is a trite that suspicion cannot take the place of proof, and that circumstantial evidence must exclude every hypothesis except guilt. This view has been held in the case of Hanumant Govind v. State of M.P., AIR 1952 SC 343 and Rahaman v. State of U.P., AIR 1972 SC 110. Further, we observe that abetment requires proof of intentional aiding with active

complicity — mere facilitation in fact, without intent, is insufficient. This view has been held in the case of Shri Ram v. State of U.P., AIR 1975 SC 175. We observe that no such intentional, active complicity is established against the Appellant in this case. Accordingly, we hold that the allegation of facilitation of the passengers to carry the foreign currencies has not been established in this case.

6.5. We also observe that the Appellant has claimed Protection under Section 155 of the Customs Act, as he has acted in the bona fide discharge of official duty and hence he is entitled to the protection as contemplated in *Costao Fernandes v. State, 1996 (82) ELT 433 (SC),* and the consistent line of authority following it — *Commissioner of Customs v. M.I. Khan, 2000 (120) ELT 542 (T); Commissioner of Cus. & C.Ex. v. Rajiv Kumar Agarwal, 2007 (217) ELT 392 (T); Commissioner of Customs v. M. Vasi, 2003 (151) ELT 312 (T); Commissioner of Customs v. Hargovind Export, 2003 (158) ELT 496 (T); Yogesh Kumar v. Commissioner of Customs (Export), 2006 (201) ELT 66 (T)* — under which no penalty under Section 114 is sustainable against such an officer.

6.6. In view of the foregoing findings, we find that both the authorities below have proceeded on surmise, conjecture and inadmissible material, without any independent corroboration, and have failed to establish the essential ingredients of abetment under Section 114 of the Customs Act, 1962. Accordingly, we hold that penalty of Rs. 50,000/- imposed on the Appellant in the impugned order is legally not sustainable in law and on facts and hence we set aside the same.

7. In the result, we set aside the penalty imposed on the Appellant and allow the appeal filed by them, with consequential relief, if any, as per law.

(Order Pronounced in Open court on 24.09.2026)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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