

2020-TIOL-367-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, KOLKATA
COURT NO. I**

Cus. Appeal No. 76022 of 2015

Arising out of Order-in-Appeal No.83-84/Pat/Cus./Appeal/2015, Dated: 12.08.2015
Passed by the Commissioner (Appeals), Customs, Central & Service Tax, Patna

Date of Hearing: 13.01.2020

Date of Decision: 15.01.2020

**COMMISSIONER OF CUSTOMS
PATNA, 5TH, FLOOR, CENTRAL REVENUE
BUILDING, BIR CHAND PATEL, PATNA-800001**

Vs

**M/s EVERSINE CUSTOMS C AND F PVT LTD
4, N. S. ROAD, KOLKATA WEST BENGAL-700001**

Appellant Rep by: Shri A K Singh, AR

Respondent Rep by: Shri Arijit Chakraborty, Adv.

CORAM: P K Choudhary, Member (J)

P Anjani Kumar, Member (T)

Cus -

Show Cause Notice does not invoke the Provisions of Customs Brokers Regulations; moreover violation if any under the Customs Brokers Regulation, cannot automatically make the appellants liable for penalty under Customs Act - Looking into the fact that the Department has not taken any action under the said Customs Broker Regulations on the appellant, other than allegation of accepting documents from Shri Sujan Sharma, no allegation or evidence to show that the appellant was indeed in the knowledge of the fact of smuggling of Red Sanders has been brought on record - appellant has received an authorization from the Exporter and the Department does not allege that the antecedents of the exporter were not verified by the appellants - It is also not made clear as to what was wrong with the authorization received by the appellants from the exporter and if the Original Exporter was also fake or otherwise - Therefore, accepting the documents from Shri Sujan Sharma and receiving payment in cash do not in themselves constitute an offence punishable under Customs Act, 1962 - No case has been made by the department that there was some positive act or abetment of the smuggling by the appellant - In fact, as a Customs Broker, his role has not even begun as the said goods have been apprehended well before they reached the port - There is no whisper leave alone evidence that the appellant was aware of the fact that Red Sanders logs were stuffed in the container and were to be exported in the consignment for which they have received authorization - Appellant has not rendered himself liable for penalty u/s 114 of Customs Act, 1962 - Revenue appeal is, therefore, dismissed: CESTAT [para 9]

Appeal dismissed

FINAL ORDER NO. 75085/2020

Per: P Anjani Kumar:

Heard both sides and perused the records of the case.

2. On the basis of specific intelligence received by DRI, a Truck bearing No. NL-02L/2947 carrying a container No CNSU 2066053 was intercepted by the DRI Officers at Bhargama More at Raniganj, District- Araria, Bihar and 408 Logs of Red Sanders, totally weighing of 13220 Kg and valued of Rs.5,94,90,000,were seized. Investigation was conducted and Show Cause Notice dated 01/10/2014 was issued to various parties including appellant. The Show Cause Notice were adjudicated vide OIO No.03-Cus/JC/DRI/2015 dated 30/04/2015 by Joint Commissioner inter alia imposed Penalty of Rs. 30, 00,000 on the appellant. On an appeal, filed by the Appellant, Commissioner (Appeals), vide Order-in Appeal No. 83-84/Pat/Cus/ Appeal/ 2015, set aside the penalty imposed on the appellant.

3. Revenue preferred an appeal to CESTAT and this Bench while setting aside the Order of the Commissioner (appeals), reduced the Penalty imposed on the Appellant by the Original Authority from Rs. 30, 00,000 to 15, 00,000. The appellant approached the Hon'ble High Court of Kolkata who vide Order dated 26/06/2009, in CUSTA 67 of 2018, have remanded the matter back to this Bench while observing that the finding paragraph 5 of the Impugned Order is not sufficient for imposing of penalty of Rs.15,00,000/- on the appellant.

4. The Ld. Counsel for the appellant submits that the allegation leveled against them is not substantiated; whereas the seizure was affected in Bihar, it was alleged that the Appellant, a CHA, seating in Kolkata abetted the attempt to smuggle out Red Sanders. He further submits that his role as CHA, in the entire operation has not even begun at the Port of Kolkata; no evidence has been placed by the Revenue on his specific role other than stating that they have connived with the perpetrators of the offence. He submits that they have obtained due authorization by the licit exporter.

5. Per contra, Ld. AR reiterates the findings of OIO and submits that the appellant as CHA was engaged by one Shri Sujan Sharma, Proprietor of Arihant Logistics; Shri Sujan Sharma was a habitual offender; Shri Sujan Sharma has exported similar consignments in the past and his another consignment was intercepted and seized at Kolkata in the same day; Shri Sujan Sharma appears to have prepared and used fake documents for the purpose of smuggling activities and because of real identity and whereabouts could not be ascertained. He further submits that the appellants have undertaken to process and clear the documents on behalf of the Exporters without verifying the bona fides of the exporter; Shri Nakul Prasad, Export Executive of the Appellants has accepted that they have dealt with Shri Sujan Sharma; received payment in cash; however, they have been receiving payments from others only through check: they do not know exporter and have accepted to process the documents at the behest of Shri Sujan Sharma.

6. The brief issue for consideration in the current proceedings is directed by Hon'ble High Court of Kolkata to see whether in the facts and circumstances of the case there is sufficient reasoning has been given by this bench while imposing penalty of Rs 15, 00,000 on the appellant.

7. On a re-appreciation of the facts of the case, we find that the appellant is a CHA; it is alleged that Shri Sujan Sharma, a habitual offender, used fake address for attempted illegal export of Red Sanders and has engaged the services of appellant; the services of the appellant as a CHA were yet to start. It is seen that the Export executive of the Appellant has accepted that they normally do not receive payment in cash from their customers but in the case of Shri Sujan Sharma, they have accepted; they do not have the exporter but got the authorization papers from Shri Sujan Sharma and not from M/s. Arihant Logistics. On this basis, Department seeks to impose penalty on the appellant under Section 114 of the Customs Act.

8. We find that Section 14 of the Customs Act, 1962 reads as follows.

SECTION 114:- Penalty for attempt to export goods improperly, etc.-

Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under 113, or abets the doing or omission of such an act, shall be liable,-

(i) In the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;

(ii) In the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;

(iii) In the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.

We find that as per the above, in order to be liable for penalty, in terms of Section 114 of Customs Act, 1962, a person has to do or omit to do any act which act or omission would render such goods liable to confiscation under Section 113, or abet the doing or omission of such an act. Going by the wordings of the Section, it is apparent that there should be positive act or omission or abatement on the part of the Appellant so as to render him liable for penalty. We find that Ld. Commissioner (Appeals) has observed that while the Show Cause Notice seeks to impose penalty for connivance, the Adjudicating Authority has imposed penalty for abatement.

9. We find that though the Show Cause Notice and the Order-in-Original speak of acceptance of documents by the Appellant Company from Shri Sujan Sharma, no evidence of Connivance has been brought forth. We find that in the Grounds of Appeal, the Department submits that he has violated the Provisions of Regulation 11 (a) of Customs Brokers Licensing Regulation 2013. However, we find that the Show Cause Notice does not invoke the Provisions of Customs Brokers Regulations; moreover violation if any under the Customs Brokers Regulation, cannot automatically make the appellants liable for penalty under Customs Act. More so, looking into the fact that the Department has not taken any action under the said Customs Broker Regulations on the appellant, we find that other than allegation of accepting documents from Shri Sujan Sharma, no allegation or evidence to show that the appellant was indeed in the knowledge of the fact of smuggling of Red Sanders has been brought on record. Moreover, as submitted by the appellants and not denied by the Revenue, the appellant has received an authorization from the Exporter and the Department does not allege that the antecedents of the exporter were not verified by the appellants. It is also not made clear as to what was wrong with the authorization received by the appellants from the exporter and if the Original Exporter was also fake or otherwise. Therefore, we find that accepting the documents from Shri Sujan Sharma and receiving payment in cash do not in themselves constitute an offence punishable under Customs Act, 1962. We find that no case has been made by the department that there was some positive act or abatement of the smuggling by the appellant. In fact as a Customs Broker, his role has not even begun as the said goods have been apprehended well before they reached the port. There is no whisper leave alone evidence that the appellant was aware of the fact that Red Sanders logs were stuffed in the container and were to be exported in the consignment for which they have received authorization. In view of the above, it is seen that the appellant has not rendered himself liable for penalty under Section 114 of Customs Act, 1962. Therefore, we have no hesitation in coming to a conclusion that the appeal deserves to be dismissed.

10. Accordingly, appeal C/76022/2015 is dismissed.

(Pronounced in open Court on 15.01.2020)

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