CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD

REGIONAL BENCH, COURT NO. 2

CUSTOMS APPEAL NO. 10036 OF 2015

[Arising out of OIA-KDL-CUSTM-000-APP-395-14-15 dated 09/10/2014 passed by Commissioner of CUSTOMS-KANDLA]

BHATIA SHIPPING PVT LTD **Appellant**
Golden Arcade, 1st Floor, Office No. 113,
Plot No. 141-142, Sector-08,
Gandhidham,
Gujarat

Vs.

COMMISSIONER OF CUSTOMS-KANDLA **Respondent**
Custom House, Near Balaji Temple,
Kandla,
Gujarat

Appearance:
Shari Vinay Ansurkar, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (Authorized Representative) for the Respondent

CORAM:
HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)

<u>FINAL ORDER NO. 10998/2024</u>

Date of Hearing : 18/04/2024
Date of Decision : 03/05/2024

<u>SOMESH ARORA</u>

The Appellant was engaged as a CHA by M/s. Philips Carbon Black Ltd., Kutch for export of "Carbon Black" which were stuffed at their factory into the container no. GESU5044393 and were removed for export under Self sealing procedure. The Appellant filed a Shipping Bill No. 3446527 dated 11-01-2013 on behalf of the exporter which was registered on the system on 14-01-2013 due to EDI problem and was marked by the system as "Check Packages". As per the said instructions the Appellant on 15-01-2013 vide their email dated 15-01-2013 sent to Shipping line namely M/s. Caravel Logistics Pvt. Ltd. to ground the container for the purpose of Customs examination. However, the Shipping line had boarded the said container on 14-01-2013 on Vessel "HAMMONIAIONIUM" without Customs examination and without LEO. The said container was called back on 21-01-2013 and taken for further examination. The same was seized under panchanama dated 20-02-2013. During the course of investigation statements of various persons as under were recorded by the Departmental Officers.

a. Shri. Ashok Kumar Bissa - GM of the Appellant
b. Shri. Vijay Maheshwari - Sr. Executive of Shipping Line
c. C. Shri. Moncy George - Sr. Manager of Shipping Line

Since, the goods were exported prior to issuance of LEO by the Proper Officer, the Additional Commissioner (DP), Customs House, MPSEZ, Mundra issued a Show Cause Notice No. S/DP-24/MP&SEZ/2013 dated 03/05/2013 to the Shipping Line, the Appellant and the Custodian directing them to show cause as to why penal action under Section 114 (iii) of the Customs Act, 1962 should not be taken against them. The Appellant vide their letter dated 04-06-2013 filed their reply in defense of the SCN and requested to drop the same. However, the Addl. Commissioner, Customs House, MP & SEZ, Mundra rejected contentions of the Appellant and passed the Order-in-Original No MP&SEZ/45/12- 13 dated 25-03-2014 imposing penalty of Rs. 1 lakh upon the Appellant under Section 114 (iii) of the Customs Act, 1962. The Appellant preferred an Appeal against the Order-in-Original dated 25-03-2014 before Commissioner of Customs (Appeals), Kandla at Ahmedabad and requested to set aside the penalty imposed upon them. However, the Commissioner of Customs (Appeals), Kandla passed an Order-in- Appeal No. KDL/Custom-000/APP-395-14-15 dated 09-10-2014 upholding the imposition of penalty on the Appellant.

2. Being aggrieved by the Order-in-Appeal dated 09-10-2014 (the impugned Order). The Appellant prefers this Appeal primarily on the grounds mentioned hereunder:

a) The Appellant submits that the Commissioner (Appeals) has not recorded his findings against each and every submission made by the Appellant in their Appeal Memorandum and therefore the impugned Order is a non-speaking Order which is not sustainable in law and deserves to be set aside.
b) The Appellant also submits that the Commissioner (Appeals) merely reproduced the findings of the lower authority that the obligation of the CHA is vide enough to extend up to the point of export. While holding so the Commissioner (Appeals) failed to record his reasoning as to how the CHA is under an obligation to supervise the loading of container on the vessel especially when no LEO is issued by the Proper Officer. In fact, non issuance of LEO and loading of container by the Shipping line without LEO cannot be termed as contravention of

obligation of the CHA i.e. the Appellant, so as to attract penal action under Section 114(iii) of the Customs Act, 1962. As such, the impugned Order is bad in law and is required to be set aside.

c) The Appellant submits that the Respondent failed to appreciate the following submissions/contentions / grounds of Appeal of the Appellant.

   i. That while imposing penalty on the Appellant the lower authority at para 23 of his Order recorded the findings that all the persons committed breach of prohibition laid down under Section 34, 40 read with 51 of the Customs Act, 1962 and therefore all them are not allowed from dis-owning their responsibility. It is submitted that the said findings are contrary to the facts in as much as Shri. Vijay Maheshwari, Sr. Executive of the Shipping line in his statement dated 21-01-2013 clearly admitted that they failed to discharge their duty. Further, Shri. Moncy George, Sr. Manager of Shipping line in his statement dated 01-03-2013 admitted that the incident took place due to mis-communication of their surveyor. In other words, the Shipping line has not dis-owned their responsibility and therefore the findings of the lower authority forming the basis for imposition of penalty on the Appellant under Section 114(iii) are grossly erroneous and not legally sustainable.

   ii. That while holding the Appellant guilty for violation of Sections 34, 40 and 51 of the Customs Act, 1962 the lower authority failed to appreciate that the said Sections were not invoked in the Show Cause Notice against the Appellant. As such, the Order in Original was passed beyond the scope of the Show Cause Notice which is not legally sustainable. It is a settled law that Order of adjudication cannot travelled beyond Show Cause Notice and therefore imposition of penalty is not warranted as held in the decision of Honorable CESTAT in the case of Cargomar Vs. CC, Trichi reported in 2007 (215) E.L.T. 317 (Tri. Chennai).

   iii. That the there is no mandatory provision under the Customs Act putting the CHA under the obligation to inform the Shipping line that the LEO was not available with them and therefore Shipping line should not load the container on the Vessel. In fact, it was a statutory obligation upon the Shipping line to load the container only after the receipt of the LEO and in the absence of which they should have held back the container. In other words, the Appellant who is a CHA cannot be blamed for the unauthorized and illegal act committed by the Shipping line and the proposal of imposition of penalty upon them is not valid.

iv. That the lower authority has not commented on the submission of the Appellant that when they had sent email dated 15-01-2013 to the Shipping line they had not flouted any procedure and therefore there was no act of omission or commission on the part of the Appellant which rendered the goods liable for confiscation.

v. That the lower authority has not appreciated the submission of the Appellant that as per the statement dated 20-02-2013 of Shri Ashok Kumar Bissa the EDI System was closed on 12-01-2013 and 13-01-2013 and therefore it was beyond the control of the Appellant to hand over the LEO to the Shipping line. Had the system been available the Appellant could have obtained the LEO and the irregularity could have been avoided.

vi. That it is not the case of the Department that the Appellant had instructed the Shipping line to load the container on 14-01-2013 without there being any LEO in their hands and therefore they cannot be held liable for penalty under Section 114 (iii) of the Customs Act, 1962.

vii. That it is not the contention of the Department that the Appellant was aware of the loading of the container on 14-01-2013 without the LEO and supervision of the proper Officer. As such there is no act on the part of the noticee which rendered the goods liable for confiscation under Section 113 (g) of the Customs Act, 1962 attracting penalty under Section 114 (iii).

viii. That the issue involved in the present case is squarely covered by the decision of Honorable CESTAT, Mumbai in the case of Mohini Organics Pvt. Ltd. Vs. CC (Export), Nhava Sheva reported in 2009 (240) E.L.T. 589 (Tri.- Mumbai) wherein it has been held that when there is no knowledge on the part of the CHA about the loading of containers by shipping line without supervision or without LEO and there is no evidence of any incriminating conduct against the CHA, the penalty under Section 114 (iii) of the Customs Act, 1962 is not imposable.

ix. That there is no confiscation of the goods and therefore penalty under Section 114(iii) of the Customs Act, 1962 is not legally sustainable upon the Appellant as there was no act of omission or commission on their part, which rendered the goods liable for confiscation under Section 113(g) as alleged in the SCN. It is a settled law that when the goods are not liable for confiscation due to any act of commission or omission, no penalty can be imposed as held in the decision of Hindustan Cargo Ltd Vs. CCE, Chennai reported in 2007(220) ELT 349 (Tri-Chennai).

x. That neither Show Cause Notice nor the impugned Order records any specific act on the part of the Appellant which rendered the goods liable for confiscation under Section 113 (g) of the Customs Act, 1962. Therefore, in absence of any evidence of any incriminating conduct on the part of the Appellant penalty under Section 114 (iii) is not justified in terms of the decision of Honorable CESTAT, Mumbai in the case of Mohini Organics Pvt. Ltd. Vs. CC (Export) Nhava Sheva reported in 2009 (240) E.L.T. 589 (Tri.- Mumbai).

xi. That the lower authority ought to have held that once the container was inwarded in the Port/Terminal the Appellant had no control over the physical custody of the goods and it was the Shipping line alone, who pre- maturely took action of loading the container without LEO obtained and submitted by the Appellant to him. Thus, the unauthorized act of the shipping line resulted into the violation of Rule 113(g) for which the Appellant cannot be held liable under Section 114(iii) of the Customs Act, 1962.

xii. That when it is a standard operating procedure which lays down that the container should not be loaded without the LEO and supervision, approval of the Customs officer, the Appellant was not under any obligation to inform the shipping line about the stoppage of the container that was loaded without following the mandatory requirements. Therefore, the findings of the Respondent that the Appellant failed to perform their duty and the act of omission or commission, if any, on the part of the Appellant rendered the exported goods liable for confiscation are grossly erroneous, baseless and not legally sustainable.

xiii. That penalty under Section 114 (iii) cannot be imposed for violation of provisions of Section 30, 40 & Section 51 in as much as, as per Section 114 penalty can be imposed for act of omission or commission which renders the goods liable for confiscation under Section 113. In the instant case the Respondent has not held that the act of the Appellant rendered the goods liable for confiscation under Section 113.

3. The Learned AR while reiterating the findings recorded by lower authorities particularly emphasized the following:

> *"21. It is not in dispute that the goods were shipped prior to issuance of LEO. The fact is that the said shipping bill which was registered on the System on 14.01.2013 was marked by the system for "Check Packages" and all the noticees in this case are very well aware of the procedures of export of self sealing containers in case of system checked packages. The export goods covered by the sald shipping bill sailed off on 14.01.2013 without waiting for LEO which was issued by the proper officer after called back on 28.01.2013.*
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> *22. Section 50 of the Customs Act provides that the export of any goods shall make entry thereof by presenting to the proper officer, in the case of goods to be exported in vessel, a shipping bill in the prescribed form; that the exporter, while presenting shipping bill, shall, at the foot thereof, make and subscribe to the declaration as to the truth of its contents. Section 51 of the Customs Act provides that the proper officer of customs may make an order for permitting clearance and loading of the goods for exportation, which would mean that the goods for exportation could not be loaded in vessel without obtaining permission of the proper officer of customs. The other legal provisions covered in the matter is that: As per Section 34 of the Customs Act, 1962 the goods cannot be unloaded or loaded on the vessel except under the supervision of the proper officer. As per Section 40 of the Customs Act, 1962, the person in-charge of the vessel under obligation not allows any goods on board unless the proper documents, duly passed by the proper officer are handed over to him. Failing which, the goods are liable for confiscation under Section 113 (f) and 113(g). All these provisions have clear nexus to Section 51 of the Act.*
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> *23. It is very much clear from the above provisions that the exporter or any person on behalf of him who have filed the shipping bill has to wait for permission of the proper officer of customs for clearance of loading of the goods for exportation. In the instant case, it clearly makes that the shipping line, CHA and the Custodian are liable to wait for the clearance of the proper officer of customs. Thus, as per the said provisions of Section 51 of the Act, any exportation without LEO is prohibited.. Further, Section 114 of the Customs Act also stipulates imposition of penalty on any person who fails to do an act due to which the said goods become liable of confiscation. In the instant case, the system checked packages were not available for examination and the same was loaded on Vessel without LEO which was admitted by all i.e M / s Bhatia Shipping (CHA), M/s Caravel Logistics Pvt Ltd (Shipping Line) and M/s Adani Port & SEZ Ltd (Custodian). It would thus appear that goods exported without LEO are liable to confiscation under Section 113 (f) and 113(g) of the Act. Who ever have omitted to do so anything to ensure compliance with the requirement of Section 51 required to be held to have render the goods liable for confiscation. A mere liability of the goods to confiscation is enough. Section 42 of the Act provides that the shipping line shall not permit the conveyance to depart from the customs station until a written order to that effect has been given by the proper officer. The manner in which a CHA and the Custodian should function in relation to any goods for export has provided under the Customs House Agents Licensing Regulations (Now Customs Broker Licensing Rule 2013) and Handling of Cargo in Customs Area Regulations, 2009 respectively. The obligations of a CHA and Custodian are wide enough to extend upto the point*

> *of export of goods as in the present case. Any claim by the above persons, shifting the responsibility to other shoulder cannot be accepted as it defies reason and the convey provisions of law. Thus, all of the above mentioned persons committed breach of the prohibition laid down under the Section 34 40 read with 51 of the Customs Act and coming within the sphere of influence of the above said provisions of Act. Therefore, all of them are not allowed from disowning their responsibility and consequently have a penal liability under Section 114 (iii) of the Act as proposed in the show cause notice. He therefore emphasized that penalty has been leniently imposed and deserves to be maintained."*

3.1 Further written submissions were received for consideration on May 18th and 22nd April, 2024 and which *inter alia* seek to place reliance on the following decisions.

- 2018 (362) E.L.T. 184 (Tri. Delhi) in the matter of Fast Cargo Movers Vs. Commissioner of Customs, Jodhpur
- 2013 (290) E.L.T. 334 (Guj.) in the matter of Anchor Logistics Vs. Commissioner of Customs
- 2010 (251) E.L.T. 444 (Tri. Mumbai) in the matter of N Karim & Sons Vs. Commissioner of Customs – (Export) Nhava Sheva
- 2010 (261) E.L.T. 1176 (Tri. Mumbai) in the matter of Soham Logistics Pvt Ltd Vs. Commissioner of Customs (Export) Nhava Sheva & Ors.

3.2. Learned AR on the other hand seeks to place reliance on the decision of Blossom Grocery & Food India Pvt Ltd Vs. Commissioner of Customs (Export) Nhava Sheva as reported in 2014 (302) ELT 267 (Tri. Mumbai). The rival contention being that *mensrea* is required for imposition of penalty under section 114 on the appellant and not required as per the decision of Blossom Grocery & Food India Pvt Ltd (cited supra) as per authorized representative of the department.

4. Considered, it is well settled including by the decision of Hon'ble Gujarat High Court in Anchor Logistics v/s. C.C. (cited supra) that invoking section 114 and its various clauses prior knowledge about the offending goods, as well as *mensrea* is required. Same has been held for offending goods to invoke section 114(iii) of the Customs Act, 1962 as been held by this bench of Tribunal only in 2017 (355) E.L.T. 422 (Tri. Mumbai) in the matter of Arvind Limited Vs. Commissioner of Customs, Kandla. Therefore, the decision of Blossom Grocery & Food India Pvt Ltd cited by the learned AR does not come to department's help in view of cited case law. And the same

is distinguishable from various judgments quoted by the appellant. Penalty, therefore cannot be imposed.

5. Appeal is therefore liable to be accepted. Same is allowed with consequential relief.

(Dictated and pronounced in the open court on 03.05.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

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