CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70259 of 2023

(Arising out of Order-in-Appeal No.747-CUS/APPL/LKO/2022 dated 03/10/2022 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

Shri Pankaj Kumar Yadav, **.....Appellant**
(S/o Sri Laxman Yadav, Pro. Ganga Enterprises,
Debibari, Lambandeekhi West, Koochbehar, W.B.-736101)

VERSUS

Commissioner of Customs (Preventive), Lucknow

....Respondent

(5th & 11th Floor, Kendriya Bhawan, Aliganj, Lucknow-226024)

APPEARANCE:

Shri Anuj Agarwal, Advocate for the Appellant
Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70221/2023

DATE OF HEARING : 06 November, 2023
DATE OF DECISION : 06 November, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.747-CUS/APPL/LKO/2022 dated 03/10/2022 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow. By the impugned order Commissioner (Appeal) has held as follows:-

"From above I find that confiscation cannot sustain or the basis of trade opinion or the report of ARDF alone, which is nothing but an opinion and not a conclusive proof of evidence but from the records I find that the adjudicating authority has held the goods liable for confiscation on account of the fact that facts of this case differ from the

one cited above by the appellant. From Para 15 of the cited Order above I find that documents of purchase of Betel nuts from the local market had not been doubted by the department... .The documents produced by the respondents indicated that the goods in question were purchased from local markets, and in support of the purchases they produced the market receipts which has not been doubted by the Revenue Authorities themselves at any stage of the proceedings......... However, in the present case the consigner appellant firm M/s Ganga Enterprises was found to be non-existent at the address mentioned in the invoice number 15 dated 8th Nov. 2019 and the given address belonged to the house of Mrs. Kanak Prabha Das and even the GSTN No. 19AXKPY9108L1ZH issued to Mr. Pankaj Kumar Yadav was found to be cancelled for violation of the provisions of the GST Act, thus, the facts of this case are clearly distinguishable from the one cited by the appellant in his defence. Even the driver of the vehicle Sri Rajesh Sharma was found to be non existent at the address disclosed by him at the time of seizure of the vehicle. The adjudicating authority, keeping in mind the differing facts of the case has, thus rightly held the goods liable for confiscation and penalty imposed upon the appellant and there is nothing on record before me to deviate from this finding, consequently I uphold confiscation of the impugned goods and imposition of penalty upon the appellant.

The appeal is disposed of accordingly."

2.1 On 12.11.2019, officers of Customs Preventive, Commissionerate, Lucknow on the basis of information that foreign origin betel nuts have been smuggled into India are being transported in a container No.NL-01-K-9828 during the transit between West Bengal to Delhi at Basti Toll effected seizure of 22750 Kgs. of betel nuts owned by the appellant. The seizure of said container loaded with goods was done in presence of independent witnesses.

2.2 Two traders opined that betel nuts were of foreign origin, thus the same was seized under the relevant provisions of the Customs Act.

2.3 To find country of origin to the said betel nut, samples of the said Betel Nuts drawn and the same were sent to Arecanut Research & Development Foundation, Mangalore for testing. After testing of the said samples ARDF, Mangalore stated that the said sample of betel nut seems to be of Indonesian origin.

2.4 During the investigation the consigner firm M/s Ganga Enterprises was found to be non-existent at the address mentioned in invoice number 15 dated 08th November, 2019. The appellant had stated that he has purchased the seized betel nuts from local formers and traders of Assam and West Bengal and dispatched the same under proper invoice, manifest, consignment note, money receipt and e-way bill and provided the documents in support of his claim.

2.5 A show cause notice dated 30.12.2020 was issued, asking them to show cause as to why-

> *(क) क्यों न उपरोक्त 325 बोरे विदेशी मूल की सुपाड़ी जिसका वजन 22750 किलोग्राम तथा मूल्य रुपये 68,225,000/- है, को सीमा शुल्क अधिनियम, 1962 की धारा 111 के अंतर्गत अधिहरण (Confiscate) कर लिया जाये |*
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> *(ख) क्यों न उपरोक्त सुपाड़ी को ढोने में प्रयुक्त वाहन संख्या NL 01K 9828 जिसका मूल्य रुपये 10,00,000/- है, को अधिनियम की धारा 115 (2) के अंतर्गत अधिहरण (Confiscate) कर लिया जाये |*
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> *(ग) क्यों न उपरोक्त (i) श्री पंकज कुमार यादव पुत्र श्री लक्ष्मण यादव, (ii) श्री राकेश कुमार कोचर पुत्र श्री बनारसी दास (iii) श्री विनोद कुमार गोयल पुत्र श्री मदन लाल गोयल, (iv) श्री सुशांत दत्ता पुत्र स्वर्गीय शांति रंजन दत्ता, (v) मेसर्स एस एस रोड लाइन्स, TA-5, रेगुलेटेड मार्केट, मालगुडी मंडी सिलीगुड़ी, पश्चिम बंगाल (vi) श्री विजय आहूजा पुत्र-स्वर्गीय श्री क्रिशन लाल आहूजा एवं (vii) श्री सूरज शर्मा पुत्र श्री*

राजीव शर्मा एवं (vii) जिससे सम्बंधित हो, के ऊपर सीमा शुल्क अधिनियम, 1962 की धारा 112 के अंतर्गत जुर्माना लगाया जाये |

(घ) जब्त सुपारी एवं इसे ढोने में प्रयुक्त वाहन ट्रक संख्या NL 01K 9828 के सामायिक उन्मुक्ति के समय कस्टम्स हेड में TR6 चलान दिनांक 13/12/2019 को जमा प्रतिभूति की राशि क्रमशः रुपये 6,8:2,500/- एवं रुपये 1,00,000/- को सीमा शुल्क अधिनियम 1962 की धारा 126 के अंतर्गत क्यों न सीमा शुल्क के मद में समायोजित कर लिया जाये।"

2.6 This show cause notice was adjudicated by the Original Authority vide Order-in-Original No.81/JC-ADC/2021-22 dated 10.01.2022, wherein following has been held:-

आदेश

1. ***मैं उपरोक्त 325 बोरे, वजन -22750 किलोग्राम इंडोनेशियन मूल की सुपाड़ी, मूल्य रुपया 68,25,000/- को सीमा शुल्क अधिनियम 1962 को धारा 111 के अंतर्गत अधिग्रहण करने का आदेश देता हूँ। मैं उपरोक्त माल को उसके विधिक स्वामी के पक्ष में अधिनियम की धारा 125 के अंतर्गत रु० 7,00,000/- (रु० सात लाख मात्र) के विमोचन शुल्क एवं अन्य देय समस्त शुल्कों को इस आदेश की प्राप्ति के तीस दिनों के अन्दर जमा करने के पश्चात् उक्त माल को अवमुक्त करने का विकल्प देता हूँ | चूँकि उक्त अभिग्रहीत सुपाड़ी की सामयिक उन्मुक्ति रुपये 6 ,82,500/- की नगद प्रतिभूति जमा करने पर दिनांक 22.12.2017 को कर दी गई. अतः मैं सामयिक उन्मुक्ति की उक्त राशि रु० 6,82,500/- विमोचन शुल्क के एवज में केंद्र सरकार के पक्ष में समायोजित करने का आदेश करता हूँ ।***
2. ***मैं अभिग्रहीत वाहन संख्या NL 01K 9828 मूल्य 10,00,000/- को सीमा शुल्क अधिनियम 1962 की धारा 115 (2) के अंतर्गत अधिग्रहण करने का आदेश देता हूँ एवम वाहन स्वामी को रु० 1,00,000/ (रु० एक लाख मात्र) की विमोचन राशि जमा करने पर अधिनियम की धारा 125 के अंतर्गत उपरोक्त वाहन को विमोचित करने का विकल्प देता हूँ। चूँकि उक्त अभिग्रहीत वाहन रजिस्ट्रेशन संख्या NL 01K 9828 की सामायिक उन्मुक्ति रु01,00,000/- की नगद प्रतिभूति जमा करने एवम् वाहन के अभिग्रहण मूल्य के बराबर बांड निष्पादित करने पर वाहन स्वामी के पक्ष में कर दी गयी थी। अतः मैं सामयिक उन्मुक्ति की उक्त राशि रु० 1,00,000/- को वाहन के***

विमोचन शुल्क के एवज में भारत सरकार के पक्ष में समायोजित करने का आदेश करता हूँ ।

3. ***मैं निम्न ज्ञापियों पर सीमा शुल्क अधिनियम, 1962 की धारा 112 (1) के अंतर्गत निम्नलिखित शास्ति रोपित करता हूँ- -***

(1) ***श्री पंकज कुमार यादव पुत्र श्री लक्ष्मण यादव पर रु. रु० 1,00,000/ (रु० एक लाख मात्र);***

(2) ***श्री राकेश कुमार कोचर पुत्र श्री बनारसी दास पर रु.50,000/- (पचास हजार मात्र);***

(3) ***श्री विनोद कुमार गोयल पुत्र श्री मदन लाल गोयल पर रु.50,000/- (पचास हजार मात्र);***

(4) ***श्री सुशांत दत्ता पुत्र स्वर्गीय शांति रंजन दत्ता पर रु.50,000/- (पचास हजार मात्र):***

(5) ***मेसर्स एस एस रोड लाइन्स पर रु. 50,000/- (पचास हजार मात्र);***

(6) ***श्री विजय आहूजा पुत्र स्वर्गीय श्री किशन लाल आहूजा पर रु. 50,000/- (पचास हजार मात्र);***

(7) ***श्री सूरज शर्मा पुत्र श्री राजीव शर्मा पर रु. 25,000/- (पचीस बजार मात्र);***

(8) ***मै, जिस किसी से संबंधित है पर सीमा शुल्क अधिनियम 1962 की धारा 112 (b) के अंतर्गत दण्ड लगाने का अधिकार सुरक्षित रखता हूँ।"***

2.7 This appeal was disposed of by the Commissioner (Appeals) by the impugned order referred in para-1 above. Aggrieved appellant has filed present appeal.

3.1 I have heard Shri Anuj Agarwal learned Advocate appearing for the appellant and Shri Sandeep Pandey learned Authorised Representative appearing for the revenue.

3.2 Learned Counsel for the appellant submits that the issue involved in the present appeal is no longer res-integra and settled by:

- Tribunal has in the case of Maa Guari Traders [final Order No 72729/2018 dated 26.11.2018] has categorically held that no reliance for the establishing the smuggled nature of betel nuts can be placed on the opinion of Arecanut Research & development Foundation, Mangalore. This order has been upheld by the Hon'ble Jurisdictional High Court and has been followed constantly by the Tribunal.

- The seizure made in the case is course of local transportation of the goods within the country and no evidence has been produced by the department to establish that these goods were of smuggled nature.
- Tribunal has in its order dated 11.12.2019 while dismissing the revenue appeal against the order of Commissioner (Appeal) allowing the provisional release of the goods, categorically recorded the finding that no evidence has been produced to establish the smuggled nature of these goods.

3.3 Learned Authorized Representative appearing for the Revenue re-iterates the finding recorded in the impugned Order-in-Appeal.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 At the outset it is observed that the impugned goods i.e. Betel Nuts are not the goods specified or notified under Section 123 of the Customs Act, 1962. Thus the burden to prove the smuggled nature of these goods lies on the Custom Authorities as held by the Tribunal in the case of Baboo Banik [2004 (174) E.L.T. 205 (Tri.- Kolkata)]. Tribunal in the case of Bijoy Kumar Lohia [2006 (196) E.L.T. 215 (Tri.-Kolkata)] has held that the local trade opinion cannot take the place of the legal evidence. No case has been made out for the seizure and confiscation of the Betel Nuts is made out as no evidence has been placed on record to establish the foreign origin of these goods, or of illegal importation of the same. These goods were seized when they were being transported within the country, which do not cross any international border from the place of origin to destination.

4.3 In case of Maa Gauri Traders [2019 (369) ELT 1024 (T-All)] Allahabad Bench has held as follows:

> *"We also note that the reliance on the opinion of Arecanut Research & Development Foundation (ARDF), Manglore as regards the country of origin by the Original Adjudicating Authority was not proper inasmuch as the said organization in reply to an RTI query has stated that it is not possible to determine the place of origin of betel nuts through test in laboratory. As such we agree with the Appellate Authority that the said report can only be treated as an opinion and not as scientific test report regarding the country of origin. Further, even if the betel nuts are held to be of foreign origin, the same can be confiscated only when it is proved that betel nuts has been illegally smuggled into the country. Revenue has not produced any evidence to show that the betel nuts in question were smuggled into India. The respondent had also brought on record a survey report on the cultivation of areca nuts in India issued by the Directorate of Arecanut and Spices Development, Ministry of Agriculture, Government of India which shows that substantial production of betel nuts in West Bengal, Assam and North Eastern State. In the absence of any positive evidence to establish the foreign origin of the goods and their illegal smuggling into the country, we agree with the Appellate Authority that their confiscation is neither warranted nor justified. As such, we find no infirmity in the impugned order of the Commissioner (Appeals)."*

4.4 The order of the Allahabad Bench was challenged by the revenue before the Hon'ble Allahabad High Court of in Customs Appeal No.3 of 2019. Disposing of this appeal by order dated 21.08.2019, Hon'ble High Court as reported at [2019 (368) E.L.T. 913 (All.)] observed as follows:

> *"10. The learned counsel for the Revenue has canvassed mainly with regard to the fact that the betel nuts having been*

proved to be of foreign origin, relying on the report of the ADRF, the Tribunal committed manifest error by not relying on the same, and thereby proceeded to dismiss the appeal preferred by the Revenue. He relied upon the judgment of the ***Collector of Customs Vs D. Bhoormall, 1983(13)ELT 1546 (SC)****, to show that the revenue is not required to prove its case with mathematical precision, but is only required to establish such a degree of probability that a prudent man may, on that basis, believe of existence of facts in issue, and therefore submitted that the RTI reply is general in nature while the specific report by the Arecanut Research and Development Foundation is that this report is given by specialized agency and therefore should have been relied upon by the authorities below.*

11. The only question raised in the present appeal is with regard to the origin of the betel nuts, as to whether they are of foreign origin, or they have been purchased locally as asserted by the respondents before the authorities below. In our considered opinion the issue regarding to origin of the betel nuts, would be purely a question of fact.

12. In the case of ***Union of India v. Ibrahim Uddin, (2012) 8 SCC 148*** *the Apex Court has considered as to what would be a "question of fact" as contra-distinguished from a "question of law". In paragraph 65, citing the judgment in the case of* ***Suwalal Chhogalal v. CIT [(1949) 17 ITR 269 (Nag)],*** *the Court has held as under:*

> ***"... A fact is a fact irrespective of evidence by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient material."***

13. Further in Sewalal Chhogalal (supra) the Court also held in paragraph 67 and 68 that:-

> ***"67. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are***

perverse. [Vide Jagdish Singh v. Natthu Singh[(1992) 1 SCC 647 : AIR 1992 SC 1604] , Prativa Devi v. T.V. Krishnan [(1996) 5 SCC 353] , Satya Gupta v. Brijesh Kumar [(1998) 6 SCC 423] , Ragavendra Kumar v. Firm Prem Machinery & Co. [(2000) 1 SCC 679 : AIR 2000 SC 534] , Molar Mal v. Kay Iron Works (P) Ltd. [(2000) 4 SCC 285 : AIR 2000 SC 1261] , Bharatha Matha v. R. Vijaya Renganathan [(2010) 11 SCC 483 : (2010) 4 SCC (Civ) 498] and Dinesh Kumar v. Yusuf Ali[(2010) 12 SCC 740 : (2010) 4 SCC (Civ) 738] .]

68. In Jai Singh v. Shakuntala [(2002) 3 SCC 634 : AIR 2002 SC 1428] this Court held that (SCC p. 638, para 6) it is permissible to interfere even on question of fact but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible—it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection".

*14. Similar view has been taken by the Hon'ble Apex Court in **Kashmir Singh v. Harnam Singh [(2008) 12 SCC 796 : AIR 2008 SC 1749**] .*

15. Applying the principles enshrined in the aforesaid decisions to the facts of the case at hand, it is apparent that the CESTAT after considering all the material on record including the orders passed by the authorities below, have given a concurrent finding of fact that the Revenue could not establish the foreign origin of the betel nuts . The documents produced by the respondents indicated that the goods in question were purchased from local markets, and in support of the purchases they produced the market receipts which has not been doubted by the Revenue Authorities themselves at any stage of the proceedings. The report of the ARDF has also been held to be not reliable in as much as it could not be shown with any degree of certainty that *the origin of the betel nuts could be established by testing in a laboratory, as is clear by the answer to the RTI query given by Directorate of Arecanut And Spice Development, Ministry of Agriculture and Farmers Welfare, Government of Kerala.*

16. Further it is relevant to observe that the Revenue did not argue or place any material to indicate that the betel nuts in question were smuggled into India, even if, for a moment, it is assumed that they were of foreign origin, in order to sustain the order of confiscation and penalty.

17. Considering the aforesaid factual matrix, the judgment of the Hon'ble Apex Court in the case of ***Collector of Customs Vs D. Bhoormull (Supra)*** *would also not be of any assistance to the Revenue, in as much as, they have failed to establish with any degree of probability that a prudent man, on its basis, could believe that the betel nuts were of foreign origin."*

4.5 Decision of Allahabad Bench in case of Maa Gauri Traders, was relied upon by the Kolkata Bench in case of Laltanpuii [2022 (382) E.L.T. 716 (Tri. – Kolkata)]. The Bench stated as follows:

"11. Revenue relies heavily on the certificate issued by Arecanut Research and Development Foundation (ARDF), Mangalore. We find that various fora have held that the institute is not accredited and hence, the report is not reliable. It was held by High Court of Patna 2020 (371) E.L.T. 353 (Pat.) that in absence of any material to show ARDF Mangalore is accredited laboratory by competent authority under Act and Rules, it's report cannot have consequence of fastening of any legal liability and 'No legal liability can flow from report of such an institution', hence authorities not justified in again relying thereon to justify seizure in question. Tribunal, in the case of M/s. Maa Gauri Traders 2019 (369) E.L.T. 1024 (Tri - All.), held that since betel nuts are also produced in India, in absence of any evidence that confiscated goods were illegally smuggled into India, same cannot be confiscated merely based on test report of an organization which later on also admitted that country of origin cannot be determined through test in the laboratory. We also find that Learned Commissioner (Appeals) in the case of Monjurul Haque Laskar set aside the departments stand on the above ground and the order was upheld by the Tribunal vide

Final Order 75038/2019 on an appeal filed by the department. Tribunal observed that (Para 8).

Revenue's entire reliance is on the basis of M/s. Arecanut Research & Development Foundation, Mangalore (ARDF) Certificate. As it is reported that the ARDF is not an accredited Laboratory, no legal liability can flow from the report of such institution. The Revenue could not prove that the goods were smuggled or produce any corroborative evidence in support of their case...

We also rely on Dungarmal Mohata v. CC (Preventive), Calcutta, 2006 (200) E.L.T. 522 (Cal.)."

4.6 Affirming this order of Kolkata Bench, Hon'ble Meghalaya High Court as reported at [2022 (382) ELT 592 (Meghalaya)] held as follows:

"4. The Division Bench of the Tribunal recorded the finding that the confiscated betel nut is non-notified goods and therefore, burden to prove the fact of smuggling lies on the department and same has not been discharged. In this regard, the department relied upon the certificate issued by the Arecanut Research and Development Foundation, Mangalore to show that the confiscated goods/betel nuts are of foreign origin. However, the Tribunal refused to consider this certificate on the ground that the said Institution is not accredited and hence the report was not relied on. The Tribunal in this regard relied on the decision of the Patna High Court reported in 2020 (371) E.L.T. 353 (Patna).

5. After hearing the Learned Counsel appearing for the respective parties and after going through the impugned judgment and order, we find no error in the findings given by the Tribunal. The said findings, in our opinion are supported by reasons and therefore, we are not inclined to interfere in this appeal. Appeal has no merit and is accordingly dismissed."

4.7 SLP filed by the revenue against this order of Hon'ble High Court of Meghalaya has been dismissed by the Hon'ble Supreme Court as reported at [2022 (382) ELT 588 (SC)].

4.8 Commissioner has sought to distinguish the facts of the present case from the cases referred above and has stated that registration of Appellant under GST was cancelled and the consignor was found to be non-existent. However while observing so he has not stated a single ground as who these establish the foreign origin and smuggled nature of the impugned goods. Impugned goods namely betel nuts are not specified under Section 123 of the Customs Act, 1962 and the burden to prove the smuggled nature of the same is on the Custom Authorities. If the evidences on the basis of which foreign origin of the goods are found unsatisfactory as per the above said decision, I do not find that the Custom Authorities have discharged the burden cast on them under Section 123, ibid. Cancellation of registration under GST may be for violation of the provisions of that Act, and non existence of consignor etc., at specified address do not establish the case of the revenue for holding the goods to be of foreign origin and smuggled into India.

4.11 I do not find any merits in the impugned order of Commissioner (Appeals). I want to make it clear that this order pertains only to the appeal before me.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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