CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70196 of 2019

(Arising out of the Order in Appeal - 377-380-CUS-APPL-LKO-2018, dated - 17/07/2018 passed by Commissioner (Appeals) CGST & Central Excise, Noida)

M/s Balaji Foods **.....Appellant**
(Ausapur, Walterganj,
Distt.Basti, UP)

VERSUS
a

Commissioner of Customs (Preventive), Lucknow
....Respondent
(Lucknow)

WITH

(i) Customs Appeal No.70200 of 2019 (B N Khandelwal);
(ii) Customs Appeal No.70521 of 2019 (Jitendra Kumar Jaiswal) and (iii) Customs Appeal No.70528 of 2019 (Durgesh Kumar Jaiswal);

(Arising out of the Order in Appeal - 377-380-CUS-APPL-LKO-2018, dated - 17/07/2018 passed by Commissioner (Appeals) CGST & Central Excise, Noida)

APPEARANCE:

Shri Badri Narayan Khandelwal in person for Appellant No.1 & 2 for the Appellant
Request for virtual hearing for Appellant No.3 & 4
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70255-70258/2024

DATE OF HEARING : 06.05.2024
DATE OF DECISION : 06.05.2024

SANJIV SRIVASTAVA:

These appeals are directed against the Order in Appeal No 377-380-CUS-APPL-LKO-2018, dated 17/07/2018 of the Commissioner (Appeal) Customs, GST & Central Excise

Lucknow. By the impugned order, Order-In-Original No.33/2015 dated 19.03.2015 holding as follows has been upheld:-

"ORDER

I impose penalty under section 114 of the Customs Act, 1962 upon the following:

I. *M/s Bala Ji Foods - Rs 5,00,000/- (Rs. Five Lakh only)*
II. *Shri Badri Narayan Khandelwal -Rs 7,00,000/- (Rs. Seven Lakh only)*
III. *Shri Durgesh Kumar Jaiswal -Rs 10,00,000/-(Rs Ten Lakhs only)*
IV. *Shri Jitendra Kumar Jaiswal -Rs10,00,000/- (Rs Ten Lakhs only only)"*

2.1 Information was received that a huge quantity of Non-Basmati Non-Basmati rice had been exported to Nepal on tractor trolleys and trucks, illegally through off routes located at the Indo Nepal border. It was also noticed that such illegal exports of rice from India were entered in the bills of entry filed at the Nepalese LCSs (Bhansars).

2.2 An inquiry was initiated to trace the suppliers of the rice and it was noticed that some Gorakhpur based commission agents were involved in procuring the supplies of rice from the Rice Mills of Basti, Baharaich and Maharajganj on behalf of Nepal based customers and transporting the same under cover of the invoices issued in the names of bogus VAT licensee of Bihar.

2.3 One such agent identified was Shri Durgesh Kumar Jaiswal, M/s Om Ganapati Convassers Khoonipur Chowk, Gorakhpur. His premises was searched on 16.11. 2011. During the investigation it was noticed that the Enforcement Directorate had also investigated the business transaction of Shri Durgesh Kumar Jaiswal. Scrutiny of the documents provided by the Enforcement Directorate revealed that Shri Durgesh Kumar Jaiswal was involved in illegal export of rice to Nepal and was routing the money collected from the Nepalese buyers through eight bank accounts operated in different names to the different suppliers of food grains. From the perusal of account statements of the said bank accounts it was found that the payments were also made to M/s Bala Ji Foods (Appellant No.1) in which Shri Badri Narayan Khandelwal (Appellant 2) is partner.

2.4 Statements of appellants were recorded and thereafter a show cause notice dated 28.02.2014 issued by the Additional Director, DRI Zonal Lucknow asking the appellant 1 to show cause as to why:-

(i) The impugned consignments of NON BASMATI RICE (total quantity 290.5 MTS and value Rs. 46,58,120/-) should not be held liable to confiscation under Section 113(d) of the Customs Act, 1962;

(ii) Penalty should not be imposed on them under Sections 114 of the said Act.

2.5 Further, Appellant 2, Appellant 3 and Appellant 4, were called upon to show cause as to why penalty should not be imposed upon them under Section 114 of the Customs Act, 1962.

2.6 This show cause notice was adjudicated as per the Order-In-Original referred in Para 01 and aggrieved appellants filed the appeal before the Commissioner (Appeals) which has been decided as per the impugned order.

2.7 Aggrieved appellants have filed these appeals.

3.1 Have heard Shri Badri Narayan Khandelwal for the appellant 1 & 2 who is appearing in person and making submission as being not in a position to engage any counsel.

3.2 Despite notice none appeared for the Appellant No.3 & 4. It was informed that the counsel for the Appellant No.3 & 4 has asked for Virtual Hearing.

3.3 We have heard Shri Manish Raj, Authorized Representative for the Revenue who reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submission made in appeals and during the course of argument.

4.2 For confirming the order imposing penalties learned Commissioner (Appeals) has observed as follows:-

> *"10. I have gone through the case record. As per records of Bhansar of Nepal, Indian non-basmati rice has been sent to Nepal against the prohibition imposed vide DGFT Notification No. 55(Rt-2008)/2004-05 (as*

amended). It is admitted facts by the appellant-3, partner of M/s. Om Ganpati Canvassers, that he was involved in the brokerage of sale/smuggling of steam rice to Nepal procuring it from Rice Mills of Basti, Bahraich etc. For this purpose he engaged Shri Jitendra Jaiswal on partnership basis.

11. Further it is admitted facts that M/s. Balajee Foods have issued bill in the name of R.S. Trader, Jogbani, Bihar, but purchase of rice was denied by the owner of M/s. R.S. Traders. The appellant-1 has admitted that the payment against the supply of rice was being made by the appellant-3 and that they issued the sales bills in the name of R.S. Traders, Jogbani, the instruction of appellant-3. This clearly establishes that they were fully aware that the rice was being exported to Nepal. Therefore contention of the appellant that they were not aware of smuggling of rice to Nepal is not tenable. The appellant-1 and appellant-2 knew that 290.50 MT of rice billed to M/s RS Traders, Jogbani, Bihar, would be smuggled to Nepal as per their understanding with the brokers. The sale proceeds were also received through brokers. The Appellant-1 and Appellant-2 are not contesting the fact that the impugned 290.50 MT rice was actually smuggled to Nepal under the cover of bogus sales bills issued by them in the name of M/s R. S Traders, Jogbani, on the instructions of the brokers, who, subsequently, arranged payments for the same. It is not the argument of the Appellant-1 and Appellant-2 that the impugned quantity of rice has actually gone to the buyer mentioned in their sales bills and the sale proceeds have been received from the said buyer mentioned in their sales bills. Needless to say that sale proceeds should come from the buyer of the goods and not from any agent or else the agent should identify the entity on whose behalf the payment was made by him.

12. In the instant case it must be borne in mind that the impugned goods i. c. 290.50 MT of Non-Basmati Rice, is only a part of huge amount of smuggling of rice/foodgrains undertaken by a syndicate outlined in the DRI show cause notice and the impugned order. To establish step by step link of any clandestine activity is not possible. The Hon'ble Supreme Court in the case of CC Vs D. Bhoormull, reported in 1983 (13) ELT 1546 (SC), has held that the Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that prudent man may on its basis believe in the existence of the facts in issue. Therefore, in the circumstances of the case, confiscation of the *impugned goods and penalty on the appellant are justified. Relying on the ratio of the BHOORMULL case, Hon'ble Supreme Court in the Customs case of BALUMAL JAMNADAS BATRA, reported at 1983 (13) ELT 1558 (SC), has held that conviction and confiscation was justified if the circumstantial evidence proved that the goods were smuggled.*

13. In the instant case the impugned 290.50 MT rice was billed by Appellant- 1 & 2 to M/s R. S. Traders, Jogbani, whereas the goods did not reach there. From the combined reading of the statements of all the appellants it is evident that there was a tacit understanding among themselves and concerted action by them to bill the goods to Indian firms having TIN, and divert the consignment to Nepal by filing Pragyapan Patra (ie bill of entry) at Nepal Customs stations (Bhansar). This was to facilitate transfer of sale proceeds through banks in the bogus bank accounts opened and managed by the Appellant-3 &4. The Appellant-1 &2 have accepted that the sale proceeds in respect of the impugned quantity of 290.50 MT rice did not come from the entity mentioned in the sale bills but rather the same was received through brokers facilitating such transfer of money from Nepal.

14. Appellants-3 & 4 have contended that issuance of Show Cause Notice on this issue is against the Constitution as another Show Cause Notice on similar issue has been issued. In this regard I find that impugned Show Cause Notice has been issued against the rice supply by appellant-2, whereas Show Cause Notice dated 19.12.2013 was against the supply of Non Basmati Rice by M/s. Ganesh Agro Udyog Pvt. Ltd. Further, they have contended that money which has been deposited were sale proceed of maiz (cattelfeed) supplied from Gorakhpur to Nepal. However, they failed to produce any tangible evidence in support of their contention.

15. Thus, it is evident that the impugned 290.50 MT non-Basmati rice was improperly exported to Nepal, rendering the same liable to confiscation under section 113 (d) of the said Act. Consequently, the appellants are liable to penalty under section 114 of the said Act. Therefore, the impugned order sustainable"

4.3 It is observed that the person issuing the show cause notice as Additional Director DRI has sat over the appeal filed by the appellant and passed the order as Commissioner (Appeals). Such an order, which has been passed by the person who has himself issued the show cause notice is an interested party, is in contravention of principal of natural justice which says that no person could have been judged in his own case *"Nemo judex in causa sua"*. That being so for such violation of the basic principles of natural justice this order could have been set aside for this reason itself.

4.4 In the present case we do not find any evidence which has been adduced in the course of proceedings before any Authority which shows that the goods sold/ cleared by the Appellant 1 have been exported or any preparation for the export of the said non-basmati rice has been made by any of the appellant by taking the goods to the border/port. In fact no evidence in the form of any shipping bill or any document required for exportation has been produced at any time. The entire case is based upon certain Bill of Entries which have been noted by the Enforcement Directorate during the course of investigation which have been filed with Nepal Customs. None of these Bill of Entries refer to any documents issued by any of the appellant. Further how can it be that goods were being illegally exported through unidentified routes be subject matter of the Bill of Entries filed with Nepal Customs. We are at loss to understand how the Bill of Entries could have been filed without any export documents from the exporter from India.

4.5 Entire case has been made on the basis of the statement of M/s R S Traders to whom from the records of the appellant 1 it was found that a certain quantity of non basmati rice was sold. M/s R S Traders have in his statement avered that he only dealt in *"Masoor Daal",* and has not purchased a the goods from Appellant -1. Even if the said statement is accepted true then also it does not establish that the goods of Appellant 1 were exported or taken to port/ border for exporting. Suspicion however strong could not have been basis for proceeding against the appellant in absence of any cogent evidence. In case of **Sachin Kumar [(2020) 374 ELT 775 (T-Bang)]** Bangalore bench observed as follows:

> *"6......I find that both the authorities in their orders have admitted that there is no direct proof of the complicity of the appellants and there is suspicion against each of the appellant and on the basis of that suspicion, the appellants have been imposed penalties. It is pertinent to note that the Tribunal in various decisions cited supra by the Learned Counsel for the appellant has consistently held that for imposing the personal penalty under Section 114(i) of the Customs Act, 1962, there should be acceptable legal evidence on record about the acts of commission or omission by the appellant. Further in order to hold that the appellant has abetted in the commission of the offence, there has to be a knowledge on the part of the appellant regarding the illegal activities of the exporter whereas in the present case no corroborative evidence has come on record which pinpoint that the appellant had the knowledge of the illegal activities of the exporter company. In the case of Commissioner of Customs, Mumbai v. M. Vasi cited supra, the Tribunal has held that abetment presupposes knowledge of the proposed offence and in the absence of knowledge penalty under Section 112 on the charge of aiding or abetting would not sustain."*

4.7 As there is no evidence to establish that even a single gram of the goods allegedly to be exported illegally have been recovered/ seized/ confiscated or any document to that effect found we do not find that the appellants could have been proceeded against under the provisions of Section 114 of the Customs Act.

4.8 The entire case made against the appellants for imposing penalty under Section 114 cannot be upheld even on merits.

5.1 Appeals are allowed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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