IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.40045 of 2021

(Arising out of Order-in-Appeal Seaport C. Cus. II No. 1054/2020 dated 11.12.2020 passed by the Commissioner of Customs (Appeals – II), Chennai)

M/s. Hera Shipping Solutions Pvt. Ltd. **Appellant**
New No. 18, Old No. 9/1, 2nd Floor
Jaffar Syrang Street
Chennai – 600 001.

Vs.

Commissioner of Customs **Respondent**
Chennai IV Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

APPEARANCE:

Shri Derrick Sam, Advocate for the Appellant
Shri R. Rajaraman, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order No. **40117 / 2022**

Date of Hearing : 03.02.2022
Date of Pronouncement: 08.03.2022

Per Ms. Sulekha Beevi C.S.

The appellant is aggrieved by the order passed by the Commissioner (Appeals) who remanded the matter to the adjudicating authority directing to reconsider the non-imposition of penalty under sec. 114 and 114AA of the Customs Act, 1962.

2. Brief facts are that the Directorate of Revenue Intelligence, Chennai Zonal Unit gathered specific intelligence that attempts were made to smuggle red sanders from Chennai Port in consignment

covered under Shipping Bill dated 2.5.2018 in the name of M/s. Universal Concrete Technology. The said bill was filed by the Customs Broker, the appellant herein. Pursuant to the intelligence on 9.5.2018, the container was off loaded from vessel for verification. The officers found the container to be stuffed with red colour wooden logs which were red sanders. During the course of investigation, it was revealed that an unknown person introduced himself as Shri Rajesh to Shri Mahimai David and impersonated himself as Shri Sampath Kumar, Proprietor of M/s. Universal Concrete Technology, Coimbatore. Shri Mahimai David who was Sales Manager of M/s. New Idea Logistics received the documents including KYC and self-declaration form. M/s. New Idea Logistics did not obtain authorization directly from the exporter. M/s. New Idea Logistics arranged the Customs Broker viz. M/s. Hera Shipping Solutions (the appellant herein) for providing clearance services. The appellant attended to the clearance work of M/s. Universal Concrete Technology (Exporter) on behalf of M/s. New Idea Logistics Pvt. Ltd. had not verified the authenticity of the client and thus contravened Regulation 11(a), 11(d) and 11(n) of CBLR, 2013. Statements were recorded and documents were collected. Show Cause Notice was issued to Shri Mahimai David as well as the appellant herein and others under sec. 124 of the Customs Act, 1962 proposing inter alia to impose penalties.

3. After due process of law, the adjudicating authority vide Order in Original dated 29.4.2019 ordered for confiscation of the red sander logs and imposed penalty of Rs.75 lakhs on Shri Mahimai David under sec. 114 of the Customs Act, 1962. A further penalty of Rs.75 lakhs

was imposed under sec. 114AA of the Customs Act, 1962. The penalties proposed against the appellant herein under section 114, as well as, Section 114AA were dropped.

4. Against such order of non-imposition of penalty upon the appellant herein, the department filed appeal before Commissioner (Appeals). The matter was remanded by Commissioner (Appeals) vide impugned order to the adjudicating authority to reconsider the issue of non-imposition of penalties under sec. 114 and 114AA on the appellant. Aggrieved by such direction of remand, the appellant is before the Tribunal.

5. The learned counsel Shri Derrick Sam appeared and argued for the appellant. He adverted to para 49 of Order in Original which reads as under:-

> *"I find that the contention of the Customs Broker in their reply to the show cause notice that they had verified the IEC and obtained authorisation from the exporter before taking up the filing of first shipping bill in the name of M/s.Universal Concrete Technology was true as they had admitted that they have no contact with the exporter and the Shri I.Mahimai David was doing all the transactions with the exporter. From the evidence on record, it is clear that the Customs Broker had merely processed the shipping documents received from Shri I.Mahimai David and prepared check list and finally filed the shipping bill without bothering to verify the correctness of the documents they handled. Had they verified the existence of the exporter at the time of filing the shipping bill, the impersonation act of Shri Rajesh would have come to light and the attempted illegal export of red sanders could have been detected. By their action of not verifying they failed to discharge the obligation cast on them under the Regulations 11 (a), 11 (d) and 11 (n) of the Customs Brokers Licensing Regulations 2013. I observe that this action of the Customs Broker of not obtaining authorisation from the exporter and not conducting proper verification is only a lapse on their part contravening the provisions of Customs Broker Licensing Regulations 2013. I further find that the Customs Broker had only filed the shipping bill on the basis of the documents received by them and there is nothing to prove that they actively colluded with Shri Rajesh (impersonating Shri Sampath Kumar of M/s.Universal Concrete Technology) or Shri I.Mahimai David in the attempted smuggling of*

> *Red Sanders. The fact that the declared export goods have been substituted with Red Sanders enroute to Port by the investigation findings also prove that they were not involved in the attempted export of red sanders. In such circumstances , I hold that the Customs Broker has not done any act of omission or commission which made the goods liable for confiscation. However, I hold them responsible for failure to discharge the functions of a Customs Broker as provided in the Customs Brokers Licensing Regulations, 2013. I observe that the Hon'ble Tribunal in the case of Commissioner of Customs (Exports) Vs. I Sahaya Edin Prabu - 2015 (320) ELT 264 (Mad.) held that for failure to discharge as a Customs House Agent penalties are provided in the Customs House Agents Licensing Regulations and imposition of penalty under Sec. 114 of the Customs Act, 1962 is not warranted. The said decision of the Hon'ble CESTAT was also upheld by the Hon'ble High Court of Madras by its Order dated 8.1.2015. Applying the ratio, I hold that M/s.Hera Shipping Solutions P Ltd., Customs Broker are not liable for penalty under Sec. 114 of the Customs Act, 1962. Since the Customs Broker had merely filed the shipping bill and had not caused submission of false documents/declaration to Customs, I hold that penalty under Sec.114AA is not applicable in their case."*

6. He argued that it was categorically found by the adjudicating authority that the appellant had no knowledge of the attempted smuggling of red sanders and that the appellant had not done any act of omission or commission which made the goods liable for confiscation. In spite of this, the Commissioner (Appeals) in para 8 held that since the shipping bill was filed by the appellant, who is a Customs Broker, the appellant has facilitated the smuggling activity. This finding is completely erroneous. The only allegation in the Show Cause Notice dated 8.4.2018 is that the appellant had not obtained authorization directly from the IEC holder. There is no allegation or any evidence furnished by the department that the appellant had directly participated in the misuse of IEC or attempt to smuggle prohibited goods. When there is a categorical finding by the adjudicating authority that the appellant had no role in the attempted smuggling activity, the Commissioner (Appeals) ought not to have held against the appellant.

The order passed by the Commissioner (Appeals) is based on assumptions and presumptions only.

7. The learned counsel submitted that the allegations if at all would come under the Customs Broker Regulations only for which penalty cannot be imposed under sec. 114 / 144AA of the Customs Act, 1962. The appellant had filed shipping bill on behalf of M/s. Universal Concrete Technology, Coimbatore. The required documents were received from Shri Mahimai David which is accepted and admitted by the said person. In para 31 of the Show Cause Notice, the allegation against the appellant is as to why penalty should not be imposed for contravention of Regulations 11(a), (d) and (n) of CBLR, 2013. Although the contravention is violation of CBLR, 2013, the proposal is to impose penalty under sec. 114 and 114AA of the Customs Act, 1962 which cannot sustain.

8. To support his arguments, he relied upon the decision of the Hon'ble High Court of Madras in the case of Commissioner of Customs, Chennai Vs. L. Sahaya Edin Prabhu reported in 2015 (320) ELT 264 (Mad.). He argued that the Hon'ble High Court in the said case has held that for violation under the CBLR, there can be no penalty imposed under the Customs Act, 1962 unless there is a clear finding that the appellant has abetted the offence.

9. With regard to imposition of penalty under sec. 114AA of the Customs Act, 1962, the learned counsel submitted that the appellant had filed the shipping bill on behalf of the exporter. There is no documentary evidence which even remotely suggests that the

appellant was aware of the forging of documents or the attempt to smuggle goods. In the absence of such allegations in the Show Cause Notice, the findings of the Commissioner (Appeals) that the appellant has abetted / facilitated the attempt to smuggle red sanders is without any basis. He prayed that the appeal may be allowed.

10. The learned AR Shri R. Rajaraman supported the findings in the impugned order.

11. Heard both sides.

12. The findings arrived by the adjudicating authority as to whether there is any involvement of the appellant who is a Customs Broker has already been reproduced above. The adjudicating authority has categorically held that the appellant has not done any act of omission or commission which has made the goods liable for confiscation. Further, in the Show Cause Notice, there is no allegation that the appellant had done any act facilitating the attempt to smuggle red sanders. The statement of Shri Mahimai David shows that he had collected the documents from the exporter and the same were submitted to the appellant to file the shipping bill.

13. Para 31 of the Show Cause Notice shows the summary of allegations. The allegation against the appellant herein in clause (x) and (aa) of the said para reads as under:-

> *"(x) M/s. Hera Shipping Solutions Pvt. Ltd. Customs Broker by contravening the Regulations 11(a), 11(d) and 11(n) of Customs Brokers Licensing Regulations 2013 had abetted this smuggling of Red Sanders logs by attending Customs clearance work of M/s. Universal Concrete Technology on behalf of M/s. New Ideas Logistics Pvt. Ltd. and Shri Mahimai David had undertaken clearance for 8 shipments without obtaining authorization of M/s. Universal Concrete Technology and by not verifying the authenticity of M/s.*

Universal Concrete Technology and therefore liable for penalty under section 114 of the Customs Act, 1962 read with Section 50 of the Customs Act, 1962 and Shipping Bill (Electronic Integrated Declaration) Regulations, 2011.

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(aa) M/s. Hera Shipping Solutions Pvt. Ltd. Customs Broker by filing Shipping Bill in the name of M/s. Universal Concrete Technology without authorization from the exporter in contravention of Regulation 11(a), 11(d) and 11(n) of Customs Brokers Licensing Regulations, 2013, and Shipping Bill (Electronic Integrated Declaration) Regulations, 2011 read with Section 50 of the Customs Act, 1962 is liable for penalty under section 114AA of the Customs Act, 1962."

It can be seen that the allegations are that appellant has contravened the Regulations under 11(a), (d) and (n) of CBLR, 2013. For the above contraventions, the proposal is to impose penalty under section 114 and 114AA of the Customs Act, 1962 r/w section 50 of the Act ibid.

14. In para 14 of the reply to the Show Cause Notice, the appellant has stated that though Shri Mahimai David was their ex-employee was not working for them anymore. The said person is presently working as a sales manager in M/s. New Idea Logistics Pvt. Ltd. The appellant had verified the IE Code and found that it was valid. Further, the appellant had submitted KYC form and necessary authorization obtained from the exporter. In fact, the appellant had obtained the authorization, KYC details before filing the shipping bill.

15. Shri Mahimai David has stated that the appellants had no knowledge about the incident. In order to attract section 114 of the Act, the department has to establish some act or omission by which the appellant has abetted the offence. Section 107 of IPC defines 'abetment'. As per the third limb of this definition, if a person 'intentionally aids, by any act or illegal omission, the doing of that

thing', it would be abetment of an offence. Mens rea is a main ingredient as the third limb uses the word 'intentionally'. Nothing is brought out in the nature of evidence to establish that the appellant had done or omitted to do any act intentionally. The alleged contraventions come within the CBLR, 2013 only.

16. When there is no evidence to establish any overt act or mens rea to facilitate the commission of offence, the finding of the Commissioner (Appeals) that the appellant has facilitated the attempt to smuggle red sanders is without any factual and legal basis and cannot sustain.

17. From the observations made above, we find that the order passed by the Commissioner (Appeals) is without correctly appreciating the facts or the provisions of the law. The impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in open court on 8.3.2022)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. ANJANI KUMAR**)
Member (Technical)

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