IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Customs Appeal No. 40399 of 2021

(Arising out of Order-in-Appeal Air C.Cus. I. No. 132-134/2021 dated 27.04.2021 passed by the Commissioner of Customs (Appeals-I), No. 60, Rajai Salai, Custom House, Chennai – 600 001)

Shri A. Yunus **: Appellant**
FB-7, 1st Floor, Ganga Nagar,
Jafferkhanpet,
Chennai – 600 083

VERSUS

The Commissioner of Customs **: Respondent**
Chennai – VII Commissionerate,
New Custom House, Meenambakkam,
Chennai – 600 027

APPEARANCE:

Ms. K. Nancy, Advocate for the Appellant

Shri R. Rajaraman, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

FINAL ORDER NO. 40127 / 2022

DATE OF HEARING: 24.03.2022

DATE OF DECISION: 25.03.2022

Order :

The appellant is aggrieved by the penalty imposed under Section 114(i) of the Customs Act, 1962.

2. Brief facts of the case are that on specific intelligence, a Special Officers Team of Chennai-III, Preventive Customs Commissionerate conducted search at the Kasimedu Fishing Yard, Chennai garbage area on 07.11.2018 and recovered two white coloured Thermocol

boxes with markings "THAI CARGO AIRWAY BILL NUMBER:217-23190646" and "8 THAI CARGO AIRWAY BILL NUMBER:217-23190646". On examination, the Officers found that the boxes contained 490 numbers of Star Tortoises covered under Shipping Bill No. 8745717 dated 05.11.2018, declared as "Live Mud Crabs" by Customs Broker M/s. AKR Logistics India Pvt. Ltd., which were to be exported by M/s. Daily Fresh Exports and Imports, Nagapattinam, destined to Malaysia.

3. After investigation, Show Cause Notices were issued to several persons, including the appellant herein, who is the Cargo Supervisor of M/s. Bhadra International India Pvt. Ltd., which is the cargo handling agency for airlines at the airport. After due process of law, the Original Authority vide Order-in-Original No. 1150/2020 dated 17.11.2020 held that the appellant having allowed scanning of the goods on the basis of bond closure only and having not verified the Let Export Order, the appellant, by acting in a callous manner, has facilitated the attempt to export the prohibited goods (Star Tortoises). The Original Authority therefore imposed a penalty of Rs.1,00,000/- (Rupees One Lakh Only) on the appellant under Section 114(i) of the Customs Act, 1962. Against such order, the appellant filed appeal before the Commissioner (Appeals), who vide order impugned herein upheld the same. Hence, this appeal.

4.1 On behalf of the appellant, Ms. K. Nancy, Learned Counsel, appeared and argued the matter. She submitted that the appellant, who is working as the Cargo Supervisor for M/s. Bhadra International India Pvt. Ltd., had noticed a pungent smell from the boxes and informed the same to the Officials of Thai Airways. Consequently, the goods were not permitted for shipment and a request for "shutout" of the cargo (cancellation of export) was made. On the basis of the Assistant Commissioner's permission, the goods were "shutout" without any proceedings. That later, on the basis of various statements recorded, Show Cause Notice was issued proposing to impose penalties on the Proprietor of M/s. Daily Fresh Exports and Imports, Customs Broker, Freight Forwarder and also the appellant herein, who is the Cargo Supervisor of M/s. Bhadra International India Pvt. Ltd., which acts as a cargo handling agency for various airlines. She asserted that there is no proposal in the Show Cause Notice for confiscation of the goods as the goods recovered outside the Customs area were handed over to the Tamil Nadu Forest Department Officials on 08.11.2018 itself. However, after adjudication, the Adjudicating Authority has proceeded to confiscate the said goods by issuing a corrigendum to the Order-in-Original. That thus, the Adjudicating Authority has exceeded the scope of the Show Cause Notice; that the order passed is beyond the scope of the Show Cause Notice and therefore, liable to be set aside on this ground itself.

4.2 She submitted that, in fact, it is the appellant who had pointed out to the Officials of Thai Airways that there was a pungent smell coming from the boxes, subsequent to which the export proceedings were shutout. That the export was frustrated on the intimation given by the appellant. In spite of this, the appellant has been penalized by alleging that the appellant has facilitated the export of prohibited goods. She adverted to paragraph 9 of the Order-in-Original to support her contentions. That it is clearly stated by the Adjudicating Authority in the said paragraph that it was the appellant who had intimated the Officials about the pungent smell coming from the shipment and had instructed not to load the cargo. She also adverted to paragraph 55 of the said order, wherein the Adjudicating Authority has proceeded to impose penalty for the reason that the appellant had not verified as to whether Let Export Order was issued or not; there is no allegation or finding that the appellant had any connection with the attempt to export Star Tortoises.

4.3 She submitted that the Adjudicating Authority has imposed the penalty by making a mere observation that the appellant had admitted the goods for scanning without verifying the Let Export Order and had thus facilitated the attempt to export the prohibited goods. That there is absolutely no evidence that the appellant had any role in the attempt of exporting these animals. It is argued by the Learned Counsel for the appellant that the scanning done without verifying the Let Export Order can only be considered as negligence and does not amount to abetment of smuggling.

4.4 She relied upon the following decisions:

(i) M/s. Fast Cargo Movers v. Commr. of Cus., Jodhpur [2018 (362) E.L.T. 184 (Tri. – Del.)];

(ii) M/s. Anchor Logistics v. Commissioner of Customs [2013 (290) E.L.T. 334 (Guj.)];

(iii) M/s. Guru Ispat Ltd. v. Commr. of Cus. (Port), Calcutta [2003 (151) E.L.T. 384 (Tri. – Kol.)] affirmed by the Hon'ble Supreme Court in 2003 (157) E.L.T. A87 (S.C.).

4.5 She prayed that the appeal may be allowed.

5.1 Shri R. Rajaraman, Learned Authorized Representative appearing for the respondent, supported the findings in the impugned order. He explained that the appellant is acting as the Cargo Supervisor of the cargo handling agency M/s. Bhadra International India Pvt. Ltd. and is responsible for allowing the scan of the goods before loading the goods into the aircraft. That his duty relates to receiving the scanning letter, security declaration, AWB copy and Document Bunch from the Customs House Agent. In respect of the cargo in question, he had received only the scanning letter, security declaration and AWB copy from the Customs House Agent; the Document Bunch (which contains AWB, Shipping Bill copy, bond closing copy, invoice and packing list) was not received by the appellant from the Customs House Agent. In spite of this, the cargo had reached the loading area and was about to be loaded.

5.2 Though it may be correct that the appellant had informed the higher officials about the pungent smell coming from the consignments, the appellant ought to have verified the Let Export Order before the goods reached the loading area. That the penalty imposed is therefore legal and proper.

6. Heard both sides.

7. From the facts narrated above, it is clear that the attempt to export the prohibited goods (Star Tortoises) had come to light on the information given by the appellant that there was a pungent smell coming from the cargo. In paragraph 9 of the Order-in-Original, it is discussed as under:

> *"9. …*
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> *…that at around 22:00 Hrs, Mr. Yunus A. (of Thai Airlines) intimated him bad smell is coming from the said shipment and he instructed Mr. Yunus A. not to load the cargo; that he was called by M/s. Thai Airline on 06.11.2018 and 07.11.2018 to get the cargo removed; that he was called by Sri. Selva Kumar, Duty Manager, Shed, Airport Authority who informed him to take shut out immediately for which he told him that he cannot take shut out only CHA can; that he informed M/s. VGL Freight Services to take shut out; that M/s. VGL Freight Services informed him till 07.11.2018 the CHA have not come with the documents to take shut out; that it was the work of CHA to get the shut out permission from Customs, but owing to pressure from AAI and Thai Airlines, he prepared a "Shut Out request letter" on M/s. Shanson Logistics letterhead and submitted the same to AC (Exports) on 07.11.2018; that AC (Exports) verified in the system and stated that LEO was not given for the shipping bill no. 8745717 dated 05.11.2018 and then gave the permission for the shut out on 07.11.2018; that M/s. Thai Airline gave NOC on the same shut out permission letter based on which Authority also permitted for clearance of the same; thereafter, he got permission from gate Preventive Officer; that after taking shut out he took the cargo in a*

> *vehicle (Vehicle No. TN 11W 3855, Driver – Rajni) to M/s. VGL Freight Services' office where he was informed that CHA person has arranged vehicle in which he loaded the consignment; that he doesn't know where the consignment was going; that on 08.11.2018 AC (Exports) asked him that who gave him this shipment as there is an issue relating to the consignment, for which he informed that only M/s. VGL Freight Services gave him this consignment; that both Sri. Karthikeyan (M/s. VGL Freight Services) and to Shri V. Manikandan (M/s. Airwaves Global Express) met AC (Exports); that he has not seen the cargo and has not met Shri Sanaullah K."*

8. From the above, it is very much clear that it is the appellant who had taken the first step to note that there was something fishy in regard to the cargo that was attempted to be exported. If the appellant was colluding / intentionally facilitating import of the said prohibited goods, he would not have intimated the higher officials.

9. In such circumstances, it cannot be held that the appellant has facilitated the attempt to export the prohibited goods in question. The Adjudicating Authority has imposed the penalty holding that the appellant has not been diligent in obtaining all documents and had not verified as to whether Let Export Order was issued. This cannot be the reason to hold that the appellant has abetted the attempt to export the prohibited goods.

10. The findings of the Adjudicating Authority in paragraph 55 of the Order-in-Original for imposing the impugned penalty is as under:

> *"55. Shri Yunus A., who was employed as Cargo Supervisor, M/s. Bhadra International India Pvt. Ltd. stated in his statement that his job is to receive the scanning letter, security declaration, AWB copy and Document Bunch from CHA. In respect of the impugned cargo in question, he received only the scanning letter, security declaration and AWB copy from CHA and that the*

Document Bunch was not submitted by the CHA. At the time of loading of cargo, Shri Raja informed him of pungent smell from cargo and he informed this to higher official who asked him not to ship the concerned cargo. When he brought this fact to the notice of Shri Kishore the latter told him that the goods were as per description. That based on bond closure only they admit for scanning and never see whether LEO was given or not. This shows that Shri Yunus was also working in a callous manner in facilitating the export of impugned goods which were prohibited for export."

11. As already discussed above, the reason for imposing the impugned penalty is that the appellant has not verified the Let Export Order before the goods reached the loading area. As it is established that it is the appellant who had frustrated the attempt to smuggle the prohibited goods, I am of the view that the penalty imposed under Section 114(i) of the Customs Act, 1962 cannot sustain and requires to be set aside, which I hereby do.

12. In the result, the impugned order to the extent of imposing penalty on the appellant herein is set aside.

13. The appeal is allowed with consequential reliefs, if any, as per law.

(Order pronounced in the open court on **25.03.2022**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sdd