CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. II

Custom Appeal No. 50958 of 2021 (DB)

(Arising out of Order-in-Original No. 03/JDR/SUSPENSION/CONFIRMATION/2021 dated 26.07.2021 passed by the Commissioner of Customs, Jaipur)

M/s Ajay Agarwal & Co. **Appellant**
P-3 Industrial Etate,
New Power House Road,
Jodhpur, Rajasthan-342003

VERSUS

Commissioner of Customs (Prev.) **Respondent**
NCR Building, Tatue Circle,
C-Scheme
Jaipur-302005(Rajasthan)

APPEARANCE:
Ms. Nisha Bineesh, Advocate for the Appellant
Shri Sanjay Kumar Singh, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 52070 / 2021

Date of Hearing: 01.12.2021
Date of Decision: 14.12.2021

PER: ANIL CHOUDHARY

1. The Appeal has been filed against the impugned Order i.e. confirmation of suspension of CB/CHA License, dated 26.07.2021 in continuation of the suspension order dated 07.07.2021 under the Customs Broker Lincense Regulation 2018 (CBLR 2018). The Customs Broker License of the Appellant has been suspended vide the impugned Order, under regulation 16(1) R.W.16(2) of the CBLR

2018 on the allegation of forgery and manipulation of documents committed by the Appellant. The Appellant was also arrested in view of the above allegation.

2. That the brief facts are- the Appellant was engaged by the importer-M/s Kinshuk Overseas, Suraj Industries compound, Dethli Road, Sidhpur-384151, Gujarat, for clearance of Watermelon seeds for human consumption, at Thar Dry Port, Jodhpur, Notification No. 03/2015-2020 dated 26.04.2021 was issued by Directorate General of Foreign Trade, wherein the Watermelon Seeds have been restricted/prohibited for import into India except under license.

3. By the above said notification dated 26.04.2021, the Import policy of Water Melon Seeds falling under HS Code 12077090 has been revised from 'Free to Restricted' subject to the revised policy condition. The Appellant has filed BOE No. 4362667 dated 18.06.2021 & BOE No. 4362638 dated 18.06.2021 on behalf of the said importer declaring the date of shipment prior to the notified date.

Allegation

4. **Examination of the online records/data**- On examination of the records i.e. tracking of the containers and bill of lading on the website of the shipping line-M/s Bay Lines, it was found that containers were loaded on board on 25.05.2021. It was almost one month after the DGFT notification No. 03/2015-2020 dated 26.04.2021 came into effect. Thus M/s Kinshuk Overeas, Suraj Industries compound, Dethli Road, Sidhpur- 384151, Gujarat appeared to have violated the provisions of DGFT notification No. 03/2015-2020 dated 26.04.2021.

5. They were in full knowledge that, the 'real time tracking status' of the containers cannot be changed, therefore they tried to manage or alter the documents on which the dates may be shown as per their convenience, and which can be used for clearance of cargo. Even M/s Kinshuk Overseas Pvt. Ltd., importer was advised for changing the date of 'Phytosaniatry Certificate' and 'Fumigation certificate' which is evident from the e mail dated 02.06.2021, where they have written ***"3. Phyto -CHANGE THE DATES ACCORDING TO BL", and "4. Fumigation-CHANGE THE DATES ACCORDING TO BL"*** They have also admitted vide e mail dated 10.06.2021, that the containers for Bill of Lading were allotted after 26.04.2021, (the date of DGFT notification)–"containers for subject BL shows that allotment has been done afterwards, which will create a huge problem for us." The note in e mail dated 02.06.2021 "Please make sure that BL & Container details must be prior to 25 April, and all the document should tally with BL Date (Phyto & fumigation should have gap with BL date, as per the normal term", clearly reflects that forged/fake documents were created as per requirement of the importer to pass through the Customs barrier undetected.

6. On scrutiny of the documents and preliminary investigation it has been revealed that the containers with watermelon seed were dispatched after 26.04.2021 (Date of DGFT Notf.,) while documents were manipulated to show it before 26.04.2021. The goods were seized on the bonafide belief that the same are liable for confiscation under Sec 111 of the Customs Act, 1962.

7. During preliminary investigation, Sh. Suraj Nand Kishore Wadhwa, Director, of the importing Co. admitted in his self-

confessional statement recorded under Sec 108 of the Customs Act, that the F card holder of the Appellant- Mr. Ajay Aggarwal has misguided him to manipulate the records.

8. That the importer has also applied to DGFT on 05.05.2021 'for relaxation' to import watermelon seeds under free import Policy as per Para 1.05 of the FTP 2015-20, and the same was still pending. They had filed BOE on 18.06.2021 and had requested the AC/DC of Port to clear the cargo as per Para 1.05 of the FTP 2015-20.

9. The mismatch of date of shipment as per internet tracking system of the impugned consignment, and the Bill of lading date, brought the conflict before the Customs Authorities. The statements of other witnesses also corroborated the same including the shipment tracking record, which proved beyond doubt that even the empty containers were not handed over to the Exporter by 26.04.2021, i.e. the date of Notification restricting watermelon seeds, which was in the knowledge of the CB.

10. The emails dated 01.06.2021 sent by CB to the importer states that "we requested everyone to ensure that the tracking of the shipping line is before 26.04.2021. Also, the reply to the shipping line for the e mail dated 01.06.2021 was forwarded on 10.07.2021, well after the seizure was made. Thus, even when the situation was doubtful, the appellant CB chose to file the BOE not as per the Revised Notification, referring the said goods under restricted category.

Legal Propositions-Allegation

11. Thus, the CB has failed to advise his client to comply with statutory provisions, exercise due diligence to ascertain the

correctness of any information which he imparted to his client and not to withhold any information issued by Customs Authorities, in relation to clearance of cargo as per Regulations 10(d), 10(e) and 10(f) of the CBLR 2018 regulations.

12. Thus, the F card Holder (Ajay Agarwal) in this case has committed fraud by manipulating document(s) to show that the shipment was before the date of the Notification dated 26.04.2021. The Hon'ble Apex Court in COMMISSIONER OF CUSTOM Versus CANDID ENTERPRISE has held that **fraud nullifies everything.**

13. Being aggrieved by the impugned order of Suspension of CB license the appellant is in appeal before this Tribunal. Learned Counsel for the Appellant urges that the court below have erred and have made factual mistakes in the impugned order, and thus have reached and have drawn erroneous conclusion. The following facts on record are undisputed.

Undisputed Facts

14. The importer- Kinshuk Overeas received pro-forma invoice dated 19/02/2021 issued by Bayroni DWC LLC, the invoice no. BICO.21.09 showing the importer-Kinshuk Overeas as consignee, shipper-Bayroni Investment International Company Ltd, Sudan, proposed shipment- April 2021-July, 2022, port of loading-Sudan, Port of discharge- any Indian port, rate per metric ton (AED) 2203.20, description-watermelon seeds for consumption purpose, number of bags 2.25.000/- (weight per bag 40kg) etc. It further contains directions for transfer of the amount through Abu Dhabi Islamic Bank, giving name of Bank, Account No., Branch no. etc. In response to the proforma invoice, the appellant remitted the amount

through Indusind Bank to the seller, referring to invoice dated 19/02/2021, (the value as per the proforma invoice) being Bank advice transfer through swift mode. The shipper-Bayroni LLC Ltd vide commercial invoice cum packing list no. BIICO.21.067 dated 20th April 2021 dispatched 180 MT (net weight) watermelon seeds packed in 4500 bags, each bag weighing 40kg for total value (AED) 3.96.576/-. The commercial invoice also have reference to the pro-forma invoice dated 19th February 2021, similarly vide another commercial invoice no. BIICO.21.61 dated 20/04/2021 the shipper dispatched another quantity of 180MT watermelon seeds similarly packed in 4500 bags of equal value. The bill of lading are numbered BAXSOC000242 and 243 both dated 20th April 2021 issued by shipping line 'Bay lines' wherein the shipper is Bayroni IIC ltd and the consignee is the importer-Kingshuk Overseas. The port of loading has been shown as Sudan and the port of discharged is Mundra, final delivery place-Jodhpur, Thar. The bill of lading also mentions the container numbers and also details of gross weight, net weight, number of bags of watermelon seeds etc. Further, documents accompanying the consignment are 'fumigation certificate' no. 040166 & 040245 both are dated 18th April 2021 issued by Competent Officer of Republic of Sudan, Ministry of Agriculture & Irrigation. Further, document annexed is 'phyto sanitary certificate' no. 01107730 & 0113629 both dated 19th April 2021 & 18th April 2021 respectively issued by the Ministry of Agriculture & Forestry Republic of Sudan. These certificates also mention the bill of lading no., name of the shipper/exporter and the buyer-importer Further the consignment is accompanied by 'certificate of origin' issued in

Sudan for the two consignments, both are dated 20th April, 2021- having reference to invoice no. of the shipper as well as the details of the consignment certifying that the goods are wholly produced in Sudan being plant products, harvested in Sudan. This certificate is also issued by the competent authority of the Government of Sudan.

15. Learned Counsel for the Appellant urges that the Revenue has not found any of the aforementioned vital documents to be forged or fraudulent. Only on the basis of assumptions and presumptions drawn on the basis of some vague data on the website of the shipping line, and statement of representative of shipping line, the Revenue have drawn adverse inference against the appellant. There is all possibility that there is error on the part of staff of the shipping line in filling and uploading the data on their Website. It is a known Canon in computerisation- 'Garbage In-Garbage Out', that is, if there is error in filling data, the final result will be also erroneous. Thus, the Learned Commissioner have erred in selectively relying on some vague data, on the Website, and ignoring the relevant document of title, that is commercial invoice, bill of lading and the documents issued by the Government Authority of Sudan, namely phytosanitary certificate, fumigation certificate, country of origin, etc. There is no discussion in the impugned order as to why these vital documents have been ignored or not relied upon. Under the Rules of evidence, documentary evidence always has precedence over hearsay evidence/ electronic evidence. Accordingly, the Learned Counsel prays for allowing the appeal with consequential benefit.

16. Ld. D.R. for Revenue have relied upon the impugned order, and also filed written submissions, which have been considered.

Conclusion

17. We have considered the rival contentions. We find that the revenue has relied heavily on the content or the information available on website of shipping lines, which may be erroneous and needs investigation. However, the documents like proforma invoice, bill of lading and the documents like certificates of origin etc., fact of payment before shipment indicates that the submissions of the appellant cannot be brushed aside. It's not proved that such documents are fabricated or manipulated. It is very difficult to deny the authenticity of the certificates issued by a sovereign Government in the absence of evidence. No such allegation of fabrication of such documents is made. Learned authorised representative for the revenue avers that the investigation is still on. Under such circumstances, the action initiated against the appellant CHA cannot be said to be on a solid foundation. The fact that investigation is pending is enough reason to conclude that the Revenue has acted in haste. Therefore, such an action cannot be sustained under Law.

18. One more evidence that the revenue relies upon is the initial statement of the importer, wherein he is alleged to have stated that he has fabricated documents on the advice of the Custom Broker/appellant. The statement has been retracted. A statement which is retracted or otherwise, and more so not being substantiated by documentary or other proof, cannot be appreciated as evidence. Moreover, we find that revenue could not bring in any evidence to show that the appellant Custom Broker had any fiduciary interest in the alleged malpractice if any on the part of the appellant. In fact, there should be a strong motive for Custom Broker for indulging in

such an activity. Revenue has not brought out any evidence, whatsoever as to the benefit that customs Broker got by indulging in such activity. There could however, be a gain for the importer. As per the averment of Authorised Representative for the Revenue, further investigations are in progress. While refraining from offering any finding on the role by importer in the said activity, we are of the considered opinion that no case has been prima facie, made against the appellant so as to warrant the suspension of Licence.

19. In view of the above, we set aside the impugned order and direct the Respondents to restore the CB licence of the Appellant within 10 days from the receipt or service of this order. Appeal allowed.

(Order pronounced in the court on 14.12.2021)

(ANIL CHOUDHARY)
Member (Judicial)

(P. ANJANI KUMAR)
Member (Judicial)

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