IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Customs Appeal Nos. 78004-78006/2018

Arising out of Order-in-Appeal No. 24/Pat/Cus/Appeal/2018 dated 09.05.2018 passed by the Commissioner of Customs (Prev.) Patna.

1.Mohammed Ali,
Vill-Gadaha, Anchal-Pupri, Dist.-Sitamarhi
2. Navin Kislay,
At+P.O-Phul Kahan,
Dist.-Sheohar, Bihar.
3. Sanjay Sah
S/o Bhagwan Lal Sah, Vill-Singarahiya
P.O-Kishan Pur Dist.-Sitamarhi.

….Appellant (s)

Vs.
Commissioner of Customs (Prev.), Patna.
Central Revenue Bidg, 5th Floor, Bir Chand
Patel Marg, Patna-800001.

….Respondent (s)

Appearance:
Shri K. K. Pandey, Advocate for the Appellant (s)
Shri S. Guha, (AR) for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

Final Order No.75052-75054/2020

Date of Hearing:- 16.09.2019

Date of Pronouncement:-14 January, 2020

PER SHRI P.K.CHOUDHARY:

This appeal is directed against the impugned order dated 09.05.2018 passed by the Ld. Commissioner (Appeals), CGST & Central Excise, Patna.

2. Briefly stated, the facts of the case are that the case involves seizure of misc. cloth items valued at Rs.20,10,594/- loaded on two pick up vans bearing Nos. BR-06GC/0516 and BR-06GC/9337 valued at Rs.2,00,000/- and 3,50,000/- respectively. Thus the aggregate value being Rs.25,60,594/-, on account of violation of the provisions of Sections 7,11, and 50 of the Customs Act, 1962 (hereinafter referred to as the Act for the sake of brevity) read with Section 3(2) of the FTDR Act, 1992 as the goods and vehicles appeared to be

liable for confiscation under Section 113(b) and 115(2) respectively and the persons involved were found liable for penal action under Section 114 of the Act.

2(a). The SSB personnel of BOP, Bhithamore, Sitamarhi, intercepted two pick-up vans as detailed above, laden with misc. cloth items at 0050 hrs on 31.05.2016 near Indo-Nepal border pillar no. 299. On enquiry, the occupants of the vehicles failed to produce any documentary evidence for legal possession of the goods. The SSB, therefore, on the suspicion that the goods were being taken to Nepal illegally, handed over the consignment alongwith the occupants to the LCS, Bhithamore, for further investigation and necessary action. The officials of Customs, Bhitahamore, on the reasonable belief that the consignment indeed was being smuggled to Nepal effected seizure under Section 110 of the Act.

2(b). In the course of investigation, the statements of the three occupants, noticee nos. 1 to 3 were recorded, under Section 108 of the Act, wherein noticee no. 1, the owner and driver of vehicle no. BR06GC/0516, and noticee no. 2, the driver of vehicle no. BR-06GA/9337, informed that while they were going from Pupri to Bhithamore via Chourat, the SSB personnel detained them at NH-104 near Yadupatti and handed them over to Customs. The noticee no. 03 informed that he was a labourer and had been asked by the noticee no. 02 to accompany him for the purposes of loading and unloading and that he had nothing to do with the impugned consignment.

2(c). The noticee no. 04, Sri Sanjay Sah, claimed the ownership of the goods on 25.06.15. His statement was recorded under Section 108 of the Act wherein he stated that he was a regular exporter of cloth items from Bhithamore LCS and that in the instant case too the impugned goods was coming to Bhithamore LCS for completion of export formalities when it was forcibly detained and handed over to Customs who effected the seizure. He submitted copies of Bills bearing nos. 755, 756 and 757, all dated 13.05.2016, issued by M/s KKR Agency (a cloth commission agent) of Ahmedabad, valued at Rs.8,15,245/-. He explained the difference between Bill value and seizure value as exaggeration in seizure value by the SSB.

2(d). The seizure goods were ordered to be released by the Jt. Commissioner, Customs (Hqrs), Patna to the noticee no. 04 on security deposit of Rs.3,01,590/- and furnishing of Bond for the full value of the seized goods. Similarly, both the vehicles were released provisionally to the rightful owners on similar grounds.

2(e). During the course of investigation, the Bill of Exports claimed to have been filed by the noticee no. 04, were found not to have been exported by him but by some other exporter, namely M/s Vaidehi Trader, Bhithamore. This was explained by the noticee no. 04 that since he didn't have the IEC, a prerequisite for exports of value of more than Rs.25,000/- and, as such, he had used the IEC of M/s Vaidehi Traders.

2(f). The Bills produced by the noticee no. 04 was sent to Ahmedabad for checking it's veracity but no reply was received. Reminders too remained unanswered. This created doubts about their genuineness. However, the noticee no. 04, in their defense reply stated that the supplier, M/s KKR Agency did confirm the genuineness of the bills to the Central Excise officer at the behest of Customs.

3. The Ld. Adjudicator found no merit in the charges framed by the Department as the goods were non-notified goods under Section 123 of the Act. He also found many infirmities in the seizure memo and the Panchnama. He failed to find any motive on the part of the noticee no. 04 to send the goods across to Nepal when there was neither any bar nor any duty liability on sending the impugned goods to Nepal through legal channels. He found "the allegation that these goods were seized alongwith the vehicles while

going to Nepal remains unsubstantiated" and accordingly dropped the proceedings initiated through the impugned SCN.

4. The impugned Order-in-Original was not accepted by the department and reviewed by the competent authority who found it neither to be proper nor legal vide Order in Review No. 10-Review/Pat/2017 dated 23.08.2017 and on the basis of that, Department filed appeal before the Ld. Commissioner (Appeals).

5. The Ld. Commissioner (Appeals) quashed the Order-in-Original on the basis of order in Review and ordered as follows:-

> "9. The appeal is allowed with the following orders:
>
> (a) The confiscation of the seized goods, misc. cloth items, valued at Rs.20,10,594/-, is confirmed under Section 113(b) of the Act. However, the noticee no. 04, Sri Sanjay Sah, the owner of the goods, is given the option, under Section 125 of the Act, to redeem the goods on payment of Rs.3,01,590/- and since this amount has already been paid at the time of provisional release of the goods, the same is ordered to be appropriated.
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> (b). I order for confiscation of the seized pickup van, bearing no. BR-06GA/9337, valued at Rs.2,00,000/- under Section 115(2) of the Act. However, the noticee no. 05, Sri Navin Kislay, the owner of the vehicle, is given the option, under Section 125 of the Act, to redeem the vehicle on payment of Redemption fine amounting to Rs.40,000/- and since this amount has already been paid at the time of provisional release of the vehicle, the same is ordered to be appropriated.
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> (c) I order for confiscation of the seized pickup van, bearing no. BR06GC/0516, valued at Rs.3,50,000/- under Section 115(2) of the Act. However, the noticee no. 01, Sri Mohammad Ali, the owner of the vehicle, is given the option, under Section 125 of the Act, to redeem the vehicle on payment of Redemption fine amounting Rs.70,000/- and since this amount has already been paid at the time of provisional release of the vehicle, the same is ordered to be appropriated.
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> (d). I impose penalty upon the respondents, the noticees of the impugned Show Cause Notice under Section 114 of the Act as under:-
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> (i) Noticee no. 01 Sri Mohammad Ali Rs.5,000/-
>
> (ii) Noticee no. 02 Sri Mohammad Nadeem Rs.3,000/-
>
> (iii) Noticee no. 04 Sri Sanjay Sah Rs.50,000/-

> I refrain from imposing any penalty on Noticee no. 03, Sri Sushil Kumar, Noticee no. 05, Sri Navin Kislay and Noticee no. 06 Sri Rakesh Kr. Gupta as they do not have much of a role in the entire episode."

6. Aggrieved with the Order-in-Appeal, the appellants herein have filed the present appeals.

7. Heard both sides and perused the appeal records.

8. It appears that the Ld. Commissioner (Appeals) has not justified his order with reasoning and simply agreed with the order in Review.

9. I agree with the observation of the Ld. Adjudicating Authority in as much as the seizure list and panchnama were prepared very casually. Time of seizure given in the seizure memo does not tally with the panchnama. Place of seizure in also vague. It also appears that the panchas were not independent.

10. Shri Sanjay Sah has claimed that he has exported goods valued at less than Rs.25,000/- and also exported goods valued more than Rs.25,000/ in partnership with M/s Vaidehi Traders, Bithamore. Shri Sanjay Sah also submitted copies of Bill of Entry to the investigating authorities as is evident from his statements recorded under Section 108 of Customs Act, 1962. But it appears that the investigating authority did not forward such copies to the Adjudicating Authority. Moreover, there is no bar to make export through other persons or exporter. Regarding the invoice of cloth Commission agent genuinity of the bill has not been rebutted by the department.

11. Since the impugned seized goods are not notified under Section 123 of Customs Act, 1962, the burden of proof is on the department. In the instant case, the department appears to have failed to provide the circumstantial evidence to prove the attempt of illegal export. The Adjudicating Authority appears to have rightly cited the cases of Hon'ble Patna High Court in the case of Commissioner of Customs, Patna Vs. Manish Kakrania [2016 (339)

ELT 247 (Pat.)] wherein the Hon'ble High Court has held that in cases of smuggling the burden of proof to a demonstrable degree lies on the Department. Such burden would be shifted to other person only if circumstances such as place and condition of goods, manner of packing, labeling, transportation, prima facie indicate smuggled nature of goods. In absence of such circumstances and further absence of any other evidence, confiscation of goods and penalties is not sustainable. In this case because of inconsistencies in the process of seizure, as is evident from the records of seizure memo and panchnama, as discussed in the foregoing paras, even the place of seizure and process of attempt to export illegally cannot be made out with credibility. Thus it appears that the department failed to justify the seizures.

12. In view of the above discussion, I do not find any infirmity in the impugned order of Adjudication dated 06.06.2017 and uphold the same and set aside the order dated 09.05.2018 of the Ld. Commissioner (Appeals). Accordingly, appeals filed by the appellants are allowed with consequential relief.

(Pronounced in the Open Court on…14 January, 2020.)

Sd/-
(P.K. Choudhary)
Member (Judicial)

T.K