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

Customs Appeal No. 76043 of 2016

(Arising out of Order-in-Adjudication Order No. 04/CUS/CC(P)/WB/2016 dated 09.05.2016 passed by Commissioner of Customs (Prev.) W.B. Kolkata.)

Sri Suseth Pal,
S/O, Sri Sushil Chandra Pal, 915, lock-A, Lake Town, Kolkata-700089.

...Appellant (s)

VERSUS

Commissioner of Customs (Prev.), W.B., Kolkata.
15/1, Strand Road, Kolkata-700001.

. ..**Respondent(s)**

With

Customs Appeal No. 76044 of 2016

(Arising out of Order-in-Adjudication Order No. 04/CUS/CC(P)/WB/2016 dated 09.05.2016 passed by Commissioner of Customs (Prev.) W.B. Kolkata.)

Sri Khalid Biswas,
S/O Sushil Chandra pal, Vill.+Post- North Mahadipur,
P.S.- English Bazar, District-Maldah, Pin-732216.

...Appellant (s)

VERSUS

Commissioner of Customs (Prev.), W.B., Kolkata.
15/1, Strand Road, Kolkata-700001..

. ..**Respondent(s)**

And

Customs Appeal No. 76218 of 2016

(Arising out of Order-in-Adjudication Order No. 04/CUS/CC(P)/WB/2016 dated 09.05.2016 passed by Commissioner of Customs (Prev.) W.B. Kolkata.)

Sri Biplab Mohanta,
S/o Sri Palan Mohanta, Gayeshpur, Koltapara, P.O.- Jhaljhalla, Dist.- Maldah,
Pin-732102.

...Appellant (s)

VERSUS

Commissioner of Customs (Prev.), W.B., Kolkata.
15/1, Strand Road, Kolkata-700001..

. ..**Respondent(s)**

And

Customs Appeal No. 76431 of 2016

(Arising out of Order-in-Adjudication Order No. 04/CUS/CC(P)/WB/2016 dated 09.05.2016 passed by Commissioner of Customs (Prev.) W.B. Kolkata.)

Commissioner of Customs (Prev.), W.B., Kolkata.
15/1, Strand Road, Kolkata-700001..
... ...Appellant (s)

VERSUS

Shri Suseth Pal,
S/O Shri Sushil Chandra Pal, (CHA LIC No. P-39), 915, Block-A Lake Town, Kolkata-700089 & Others.

. ..**Respondent(s)**

And

Customs Appeal No. 76432 of 2016

(Arising out of Order-in-Adjudication Order No. 04/CUS/CC(P)/WB/2016 dated 09.05.2016 passed by Commissioner of Customs (Prev.) W.B. Kolkata.)

Commissioner of Customs (Prev.), W.B., Kolkata.
15/1, Strand Road, Kolkata-700001..
... ...Appellant (s)

VERSUS

Shri Uttam Sarkar,
S/o of Shri Srinath Sarker, Proprietor of Uttam and Brothers (IEC No. 0203004795)
Vill.+P.O.- 141. Kamat, Changrabandha, P.S. Mekhlignaj, Dist. Cooch Behar, Pin 135 301 & others.

. ..**Respondent(s)**

APPERANCE :
Shri Rathin Banerjee, Advocate for the Appellant
Shri S. Debnath, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76357-76361/2023

DATE OF HEARING : 11.08.2023

DATE OF DECISION : 11.08.2023

PER K. Anpazhakan :

There are five appeals filed against the common adjudication order dated 09.05.2016, passed by the Commissioner of Customs (Prev), Kolkata. Three appeals are filed against imposition of penalties against the Appellants in the impugned order and two appeals are filed by the Department against non imposition of penalty under Section 114AA of the Customs Act, 1962 as well as the order of the Commissioner allowing re-export of the goods which has been detected with some hazardous material.

2. For ready reference, the 'Order' portion of the impugned order is reproduced below:

ORDER

(i) I order for confiscation of the goods under Bills of Entry Nos. 103/IMP/CUS/MDPR/2015 dated 01.03.2015, 105/IMP/CUS/MDPR/2015 and 106/IMP/CUS/MDPR/2015 both dated 02.03.2015 under Section 111 (d), (j), (I) and (m) of the Customs Act, 1962. However I give an option to redeem the goods covered under the aforesaid Bills of Entries except the goods which has been detected with hazardous Azo dye Benizidune on payment of redemption fine of Rs.5,00,000/- (Rupees five lakhs) only under Section 125 of the Customs Act, 1962.

(ii) I order for destruction of the goods nder Bills of Entries No. 103/IMP/CUS/MDPR/2015 dated 01.03.2015 and 105/IMP/CUS/MDPR/2015 dated 02.03.2015 which has been detected with hazardous Azo dye Benzidine. However, I give an option to the importer to re-export the said goods on payment of redemption fine of Rs.20,000/- (Rupees twenty thousand) only within 30 days of receipt of the order.

(iii) I order for payment of the dirrerential duty to the tne of Rs.83,229/- (Rupees eighty three thousand two hundred twenty nine) only in respect of the aforementioned consignments reassessed after re-ascertaining the assessable value under Section 125 (2) of the Customs Act, 1962.

(iv) I impose a penalty of Rs.2,00,000/- (Rupees Two Lakh) only on Noticee No. 1 Shri Uttam Sarkar under Section 112(a) of the Customs Act, 1962.

(v) I impose a penalty of Rs.50,000/- (Rupees fifty thousand) only on Noticee No. 2, Shri Biplab Mohanta under Section 112(a) of the Customs Act, 1962.

(vi) I impose a penalty of Rs.50,000/- (Rupees fifty thousand) only on Noticee No. 3, Shri Suseth Pal under Section 112 (a) of the Customs Act, 1962.

(vii) I impose a penalty of Rs.10,000/- (Rupees ten thousand) only on Noticee No. 4 Shri Khalid Biswas under Section 112 (a) of the Customs Act, 1962.

(viii) I refrain myself fro confiscating the vehicle Nos. WB 61 7933, WB 03 B 8223 and WB 23 B 6946 under Section 115 of the Customs Act, 1962.

(ix) I refrain myself from imposing any penalty under Section 114 AA of the Customs Act, 1962 on Noticee No. 1 and Noticee No. 3.

3. The details of the appeals are as under:

(i) Customs Appeal No. 76043 of 2016

This Appeal has been filed by Shri.Suseth Pal, Partner of the CHA firm M/s Paul Roadways, against imposition of penalty of Rs. 50,000/- on him under Section 112(a) of the Customs Act, 1962.

(ii) Customs Appeal No. 76044 of 2016

This Appeal has been filed by Shri Khalid Biswas, employee of the CHA Firm M/s Paul Roadways, against imposition of penalty of Rs. 10,000/- on him under Section 112(a) of the Customs Act, 1962.

(iii) Customs Appeal No. 76218 of 2016

This appeal has been filed by Shri. Biplab Mohanta, Authorized Representative of the importer M/s Uttam and Brothers against imposition of penalty of Rs. 50,000/- on him under Section 112(a) of the Customs Act, 1962.

(iv) Customs Appeal No. 76431 of 2016

This appeal has been filed by the Department against the order of the Commissioner allowing re-export of the goods which has been detected with some hazardous material and non imposition of penalty On Shri. Uttam Sarkar under Section 114AA of the Customs Act, 1962.

(v) Customs Appeal No. 76432 of 2016

This appeal has been filed by the Department against the order of the Commissioner allowing re-export of the goods which has been detected with some hazardous material and non imposition of penalty on Shri. Suseth Pal under Section 114AA of the Customs Act, 1962.

3. Briefly stated facts of the case are that three Bills of Entry were filed by M/s Paul Roadways, as Customs Broker, for clearance of goods imported from Bangladesh, through the Mahadipur Land Customs Station, by the importer M/s Uttam and Brothers. The importer had deputed their Authorized Signatory Shri. Biplab Mohanta (Appellant) along with the documents for transacting business from the LCS. The Custom Broker had deputed their H-card holder Sri Khalid Biswas (Appellant) to transact the import consignment. The importer Shri. Uttam Sarkar has taken out the goods from the LCS without any examination report and without 'out of charge certificate' issued by the proper officer of Customs. The Officers of DRI intercepted the consignments

and found that the goods were misdeclared in terms of quality, quantity, description and composition. Accordingly, the said goods were seized by the officers under Section 110 of the Customs Act, 1962. In the impugned order, the adjudicating authority confiscated the goods and allowed the same to be redeemed, except the goods which has been detected with hazardous material. The goods which were found with hazardous material were ordered for destruction, however, an option was given to the importer to re-export the said goods on payment of fine of Rs 20,000/-.

4. The present appeals are filed by Shri.Suseth Paul, Partner of the CHA firm M/s Paul Roadways, Shri Khalid Biswas, employee of the CHA Firm, Shri. Biplab Mohanta, Authorized Representative of the importer M/s Uttam and Brothers against imposition of penalties. In their ground of Appeal they stated that they are only employees of the CHA Firm and the importer respectively. They performed the duties as assigned to them by their Firms. They have no role in the alleged commission of the offence. On the other hand the Ld. A.R argued that they have abetted the offence committed by the Firms and hence they are liable for penalty. The Ld. A.R. also stated that Uttam Sarkar and Suseth Pal are liable for Penalty under Section 114AA of the Customs Act, 1962. Also, the goods which are hazardous in nature cannot be released. Accordingly, he contended that the impugned order allowing re-export needs to be set aside.

5. We observe that in order to examine the liability for penalty on the Appellants, their role needs to be examined in the commission of the offence. The findings of the adjudicating authority against these Appellants in paras 50 to 56 in the impugned order, are reproduced below:

> "50. I find from the statement of Shri Biplab Mohanta, the authorized representative of M/s Uttam and Brothers under Section 108 of the Customs Act, 1962 on 11.03.2015 that he performed the entire job in relation to clearance of goods imported by M/s Uttam and Brothers

through Mahadipur LCS, he had prepared challans of the trucks containing the imported goods as per the instruction of Shri Uttam Sarkar.

51. I find that in the course of investigation statement of Sri Uttam Sarkar, Proprietor of M/s Uttam & Brothers had been recorded wherein be inter-alia has submitted that due to security reason the said three consignments under Bills of Entry Nos. 103/IMP/CUS/MDPR/2015 dated 01.03.2015, 105/IMP/CUS/MDPR/2015 and 106/IMP/CUS/MDPR/2015 both dated 02.03.2015 were taken out of the MLCS without any examination report and without out of charge order issued by the proper Customs Officer at his own risk and responsibility. I also find that Shri Tapan Kumar Roy, Superintendent of Customs Mahadipur L.C.S. in his written statement under Section 108 of the Customs Act, 1962 stated that he had no knowledge about the fact that three vehicles supposedly loaded with import consignments of M/s Uttam and Brothers (Bills of Entry Nos. 103/IMP/CUS/MDPR/2015 dated 01.03.2015, 105/IMP/CUS/MDPR/2015 and 106/IMP/CUS/MDPR/2015 both dated 02.03.2015 had left the LCS without completion of examination and without getting clearance, he further submitted that as the Inspector was unwell, the said consignment were not fully examined, though he and the Assistant Commissioner, Malda examined 2/3 samples and as examination was not complete, the report was not recorded and no out of charge was given by him.

52. I also find from the statements of Shri Khalid Biswas and Shri Suseth Pal recorded under Section 108 of the Customs Act, 1962 that those three consignments were duly examined by customs officers at Mahadipur LCS on 03.03.2015 and duties were paid on them. But as the examining Officer was ill, the Bills of Entry were not signed and no examination report and out of charge order was given against the said three consignments and Shri Khalid Biswas accordingly requested he importer vide letter dated 03.03.2015, not to move the said consignments from the LCS, he himself had submitted a copy of the said letter to the Customs office at MLCS, he also submitted that Shri Uttam Srkar in reply to the aforementioned letter stated that as the said three consignments were examined by the Customs officer and duty has been paid in respect of them, he is moving those trucks on his own risk and responsibility apprehending security problems.

53. The Show Cause Notice proposes penal action under Section 112 (a) of the Customs Act, 1962 on Shri Biplab Mohanta, Authorized signatory of M/s Uttam & Brothers for abetting the importer in the acts of

omission & commission which appears to render the instant consignment liable for confiscation. Shri Biplab Mohanta in his reply has stated that no specific role enacted by him has been delineate for contemplating the abatement. He is just an employee of the Importer firm, engaged at Mahadipur Land Customs Station carrying out import clearance and had no knowledge or any scope of knowledge about the details of goods. I find that no evidence has been put forth to prove any wrongful action on the part of noticee No. 2, apart from the usual scope of activity regarding clearance of cargo as an employee of the importing firm. I find on careful consideration that penalty under Section 112 (a) of the Customs Act, 1962 is imposable on Sri Biplab Mohanta for removal of the consignments without out of charge order and for this act omission and commission they are liable to appropriate penal action.

54. I find that the allegation raised against Shri Suseth Pal partner of CHA, M/s, Paul Roadways and its 'H' Card Holder Shri Khalid Biswas is that they failed to fulfill their obligation under Regulation 11 of the Customs Broker License Regulations 2013 which required them to advice their client to comply with the required them to advise their client to comply with the provision of Customs Act, and in case of non-compliance to bring the matter to the notice to the department but instead actively assisted the importer in their fraudulent activities. The noticee No. 3 & 4 in their reply to the Show Cause Notice has stated that their role in the impugned transaction was confined to only transacting business at the Mahadipur Land Customs Station under supervision of the Customs Officials. They stated that after scrutiny of the shipment documents along with the procurement order and after obtaining due authorization and providing guidance to their client they had taken up the job. They were at no point of time informed by their client that the consignment contained mis-declared non-declared or undervalued goods. I however find that the CHA without out of charge order and for this act of omission and commission they are liable to appropriate penal action.

55. I find from the reply of Noticee No. 5, 6 and 7 that they have merely provided the service of their vehicle for carrying the consignments imported under Bills of Entry Nos. 103/IMP/CUS/MDPR/2015 dated 01.03.2015, 105/IMP/CUS/MDPR/2015 and 106/IMP/CUS/MDPR/2015 both dated 02.03.2015 to goods from te incoming Bangladesh truck to their trucks were carried on in front of and under supervision of the Customs Officer at the MLCS. I find that the vehicle owners did not have any direct involvement with this instant importation and were merely

hired for transportation and transshipment of goods. Considering their role and scope of activity I hold that the carrier vehicles as referred above are not liable for confiscation under Section 115 of the Customs Act, 1962.

56. I find that Noticee No. 1 and Noticee No. 3 has not made, signed or used any declaration, statement or document in transaction of business under the Customs Act, 1962 apart from the import documents supplied by the Bangladeshi exporter. I find the Noticee No. 1 did not have any prior knowledge or additional knowledge about the type and quantity of the Readymade Garments transshipped apart from the invoice and related import documents supplied by the Bangladesh exporter. Accordingly, I hold that noticee No. 1 and Noticee No. 3 has not intentionally or knowingly made, signed or used any declaration/statement or documents for transaction of business under the Customs Act, 1962 and thus not liable to penalty under Section 114 AA of the Customs Act, 1962.

6. From the findings reproduced above, we observe that the Bills of Entry were presented before the Customs Officers at Mahadipur LCS for examination. The goods were assessed and customs duties were also paid. However, the consignments were taken out without examination report and out of charge certificate from the concerned officers of the LCS, thus the provisions of Section 47 of the customs Act are violated. In their defence, Shri Suseth Pal and Shri. Khalid Biswas stated that the three consignments were duly examined by the customs officers and duties were also paid. But, the Bills of Entry were not signed and examination report and out of charge were not given, as the Customs officer who examined the consignments was ill. Shri. Khalid Biswas stated that he has requested the importer vide letter dated 03.03.2015 , not move the said consignments from the LCS. He tendered copy of the letter dated 03.03.2015 of his firm M/s Paul Roadways, written to M/s Uttam and Brothers informing *interalia* that the vehicle in respect of the import consignments should not be moved until and unless out of charge is received from Mahadipur Customs. He also tendered copy of a letter dated 03.03.2015 of M/s Uttam and Brothers, signed by Shri Uttam Sarkar issued in reply to

their afore-mentioned letter, wherein it was *interalia* stated that as the said three consignments were examined by the Customs officer and duty had been paid in respect of them, he (Uttam Sarkar) is moving those trucks on his own risk and responsibility apprehending security problems on verbal assurance of the Customs officer to the effect that they would be signing the paper on the next day. But, they had not informed the Customs about such illegal clearances of the said three consignments in writing. The importer Uttam Sarkar has moved the said consignments out of the customs area taking the entire responsibility for the movement on his own.

7. We find that these findings have been recorded by the adjudicating authority in the impugned order and not disputed. We observe that Suseth Pal and Khalid Biswas are Partner and Employee of the CHA Firm engaged by the importer for the purpose of clearance of the goods, by filing the Bills of Entry and observing the customs formalities of clearance. From the findings recorded in the impugned order, we obseve that they have filed the Bills of Entry properly and presented them for examination and assessment. After assessment, customs duty has also been paid. Since the Bills of Entry were not signed and out of charge certificate was not given, they advised the importer not to move the goods out of the LCS in writing vide their letter dated 03.03.2015. However, the importer took the risk and moved the goods out of the LCS on his own, without listening the advice of the CHA. Thus, we hold that the CHA cannot be held responsible for the violations committed by the importer, without listening the advice of the CHA. Accordingly, we hold that the penalty imposed on Shri Suseth Pal, Partner of the CHA Firm and Shri. Khalid Biswas, Employee of the CHA Firm, under Section 112(a) of the Customs Act, 1962 are not sustainable.

8. Regarding the penalty imposed on Shri. Biplab Mohanta, Authorized Representative of the importer Uttam and Brothers, we observe that he

performed the entire job related to clearance of the imported goods, as directed by the importer Uttam Sarkar. As an Authorized Representative of the Importer, he completed the clearance formalities , paid duty and prepared Challans of the trucks containing the imported goods as per the directions of the importer Uttam Sarkar. In his defence, Shri Biplab Mohanta stated that he is just an employee of the Importer Firm. He has been engaged by the importer to carry out the Customs clearance work at the Mahadipur LCS. He has no knowledge about the mis-declaration of the goods. He has not advised the importer to move the goods out of the LCS without the out of charge certificate. We find that the adjudicating authority has not given any findings in the impugned order regarding the role of the Authorized representative in the commission of the offence. The Authorized Representative has specific roles assigned in the customs clearance work. There is no evidence available on record to establish that he was involved in removing the goods out of the LCS without 'Out of charge certificate'. Shri Uttam Sarkar, in his statement dated 16.042015 categorically stated that due to security reasons they have taken out the said three consignments from the LCS without any examination report and without out of charge order issued by the proper Customs officers at his own risk and responsibility. The findings in the impugned order also indicates that the trucks containing the goods were removed from the LCS without the out of charge certificate, by the importer Uttam Sarkar on his own, by taking the risk associated with such offence on himself. Under these circumstances, an employee of the importing firm cannot be held responsible for the offence wantonly committed by the importer Uttam Sarkar. Accordingly, we hold that the penalty imposed on the Authorized Representative Shri. Biplab Mohanta under Section 112(a) of the Customs Act, 1962 is not sustainable.

9. Two appeals have been filed by the Department against the order of the Commissioner allowing re-export of the goods which has been detected with some hazardous material and non imposition of penalty On Shri. Uttam Sarkar and Shri. Suseth Pal under Section 114AA of the Customs Act, 1962.

10. Regarding the order for re-exportation granted by the Commissioner, we observe that the Commissioner has categorically given his findings that the goods contain hazardous Azo benzidine more than 50 ppm and held that the goods were liable for destruction or re-exported. In terms Board Circular No. 23/2004-Cus dated 15.03.2004 read with DGFT Notification No. 29/(RE-2004)/2002-2007 dated 28th January 2004, import of textile and textile articles is permitted subject to the condition that they shall not contain any of the hazardous dyes whose handling, production, carriage or use is prohibited by the Government of India. The Test Reports indicate that the instant consignment contains hazardous azo dye Benzedrine more than 50ppm which is prohibited for importation by the government of India under Section 6(2)(d) of the Environment (Protection) Act, 1986 (29 of 1986) read with Rule 13 of the Environment (Protection) Rules, 1986. The Azo Dye testing in respect of the readymade garments is done to prevent the use of harmful chemicals in readymade garments, which may cause cancer to human skin, and even to the bladder, ureter and other organs. Therefore, the goods detected with Benzedine more than 50ppm were required to be ordered for destruction.

11. We observe that Section 125 of the Customs Act allows the adjudicating Authority to give an option to the importer to redeem the goods on payment of Fine inlieu of confiscation. In the instant case, as the goods were hazardous in nature, releasing it in the domestic market or destroying it may harm the environment. Accordingly, the adjudicating authority has allowed the goods to be re-exported on payment of Fine. We find that there is no violation of any of the provisions of Customs Act, 1962,in granting re-export against payment of

fine. Accordingly, we uphold the order of the Commissioner allowing re-export of the hazardous goods on payment of Fine.

12. The next ground under which the Department filed the two appeals is that penalty has not been imposed on Shri. Uttam Sarkar and Shri. Suseth Pal under Section 114AA of the Customs Act, 1962. For ready reference the Section 114AA is reproduced below:

> *114AA. Penalty for use of false and incorrect material.—If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.*

13. In terms of Section 114AA of the Customs Act, 1962, if a person knowingly or intentionally makes, signs or uses, or causes to be made signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods. We observe that the adjudicating authority has given a findings in para 56 of the Impugned order, for non imposition of penalty on Noticee No1 (Uttam Sarkar) and Noticee No. 3 (Suseth Pal), which is reproduced below:

> I find that Noticee No. 1 and Noticee No. 3 has not made, signed or used any declaration, statement or document in transaction of business under the Customs Act, 1962 apart from the import documents supplied by the Bangladeshi exporter. I find the Noticee No. 1 did not have any prior knowledge or additional knowledge about the type and quantity of the Readymade Garments transshipped apart from the invoice and related import documents supplied by the Bangladesh exporter. Accordingly, I hold that noticee No. 1 and Noticee No. 3 has not intentionally or knowingly made, signed or used any declaration/statement or documents for transaction of business under the Customs Act, 1962 and thus not liable to penalty under Section 114 AA of the Customs Act, 1962.

14. We find that Section 114AA of the Customs is very specific about purposes for which the penalty under this section is imposable. We agree with

the findings of the adjudicating Authority that the Shri. Uttam Sarkar and Suseth Pal has not intentionally or knowingly made, signed or used any declaration/statement or documents for transaction of business under the Customs Act, 1962 . There is no evidence brought in by the investigation to substantiate the allegation against them for imposition of penalty under section 114AA of Customs Act, 1962. Hence, we hold that they are not liable to penalty under Section 114 AA of the Customs Act, 1962. Accordingly, we uphold the impugned order not imposing penalty on the above said persons.

15. In view of the above discussion, we allow the three appeals filed by the Appellants vide Appeal Numbers 76043 of 2016, 76044 of 2016 and 76218 of 2016. We reject the Department Appeal Nos. 76431 of 2016 and 76432 of 2016.

(Dictated and pronounced in the open court)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar