

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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.76485 of 2016

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/52/2016 dated 25.05.2016 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Katras Ceramics & Refractories Pvt.Ltd.

(P.P. Chandore vis Sujua, Dist.Dhanbad, Pin-828121.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(Customs House, 15/1, Strand Road, Kolkata-700001.)

.....Respondent

WITH

Customs Appeal No.76486 of 2016

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/52/2016 dated 25.05.2016 passed by Commissioner of Customs (Port), Kolkata.)

Shri Vikram Bole, Director

M/s. Katras Ceramics & Refractories Pvt.Ltd.

(P.P. Chandore vis Sujua, Dist.Dhanbad, Pin-828121.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(Customs House, 15/1, Strand Road, Kolkata-700001.)

.....Respondent

APPEARANCE

Shri Arijit Chakraborty & Shri N.Chowdhury, both Advocates for the Appellant (s)

Shri S.Debnath, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76122-76123/2024

DATE OF HEARING : 11.06.2024

DATE OF DECISION : 11.06.2024

Per : RAJEEV TANDON :

The appellants are manufacturers/exporters of High Alumina Refractories Fire Bricks. Shri Vikram Bole, now deceased was the erstwhile Director of the said manufacturing company. The two appeals have been filed by the appellants assailing the penalty imposed on them under section 114(i) of the Customs Act.

2. The facts of the case are as under:-

3. Acting on intelligence, the DRI interdicted a container number CAIU 3577240 (20') that was factory stuffed for export of High Alumina Refractories Fire Bricks and sealed with Central Excise Lead Seal and Shipper's one time bottle seal bearing number OOLCVE4828 under cover of Shipping Bill No.1958480 dated 02.04.2014 duly supported by ARE-1 - 08/13-14 dated 27.03.2014. Upon examination the said container on 05.04.2014 at N.S. Docks, Kolkata was found to contain Red Sanders wood logs of assorted size, concealed behind the High Alumina Refractories Fire Bricks. Further, enquiries initiated revealed that in the recent past two other containers said to contain High Alumina Refractories Fire Bricks were exported by the said exporter to East Shop General Trading, LLC, Dubai, United Arab Emirates. At the instance of the investigating agency, the said two consignments were recalled by the shippers. 100% examination thereof also revealed adoption of the aforesaid *modus operandi* for export of Red Sanders wood logs.

4. The investigations revealed that the arrangements for transport of cargo, nomination of container agents etc. for the impugned export was entrusted to one Shri Raj Kumar Singh alias R.K.Singh said to be acting at the instance of the overseas importing firm. This fact has been confirmed by almost one and all, against whom necessary enquiries/investigations were conducted by the DRI. It has been further borne out from the investigations that all requisite information was

routed over phone. This piece of evidence enquiry, also emanates not only from the enquiries initiated against the CHA firm, but also that from the Late Director (Appellant No.2) of the manufacturing firm who confirms that it was one Shri Raj Kumar Singh of Kolkata from whom he had procured/received the export offers. It further comes out during investigations that the procurement of orders etc. and all other correspondence was through e-mail, transcripts of which were also tendered to the investigating officers. Late Shri Vikram Bole also tendered three telephone numbers of Shri Raj Kumar Singh (R.K.Singh) of which two of such numbers were also confirmed and corroborated by the CHA firm on which telephone numbers they would have verbal communication regarding various necessities for the export shipment. Notably no Letter of Credit or Bank Guarantee was furnished by the importer and it was only by way of assurances of Shri R.K.Singh, whom Late Vikram Bole is said to have met 10-12 times during the period at the time of export. Remittances would reach the account of M/s. Katras Ceramics & Refractories, Dhanbad within 90 days of shipment. It is also of interest to note that a token amount in cash was paid by R.K.Singh towards security deposit to act as a guarantee for receipt of remittance of export. It is observed from the records of the case that all those investigated, have denied any knowledge as to how the Red Sanders wood logs were stuffed in the container in which High Alumina Refractories Fire Bricks were loaded under the Central Excise supervision at the factory premises. It also comes out from the records that while transport arrangements were made by R.K.Singh on each of the occasions, he remained present at the factory premises with vehicle and container (as per the statement dated 09.04.2014 of Late Shri Vikram Bole). As investigations proceeded, it is of importance to note that the alleged R.K.Singh remained elusive and the investigating agency could not apprehend him, and has therefore not been investigated upon. It is noted from the records that for each of the three shipments cleared from the factory nearly 4,000 numbers of High Alumina Refractories Fire Bricks were stuffed in the said 20' containers

under supervision of Central Excise Superintendent with net weight ranging from 15.725 MT to 17.250 MT as ordinarily appropriate for the container capacity of the said dimensions and size.

5. During the course of adjudication proceedings, the authorities have confiscated the seized Red Sanders wood logs (prohibited goods) and imposed penalty of varying amounts on various persons including the two appellants herein, as an outcome of the findings of the Adjudicating authority regarding export/attempted export of Red Sanders in the guise of High Alumina Refractories Fire Bricks. Commissioner of Customs (Port), Customs House, Kolkata in his findings in Para 55 has categorically held that :-

"55. the entire operation was being carried out by **Shri R.K.Singh**, which includes finding of overseas buyer; negotiation with overseas buyer; and transportation of goods from factory premises to Customs Station (Dock). When the mis-declaration was detected, Shri Vikram Bole taken a plea that entire mis-declaration was made by Shri R.K.Singh during the transportation of the goods without his knowledge/consent. However, no corroborative evidence/facts have been brought on record by Shri Bole that whatever he is saying is correct, therefore, he cannot be absolved with his responsibility."

5.1 The basis to fix Late Vikram Bole, by the authorities is the fact that upon detection of mis-declaration he had taken the plea that the entire mis-declaration was made by Shri R.K.Singh during the transportation of goods without his knowledge/consent, and that he could not produce any corroborative evidence/facts in support of his contention, to absolve himself of his responsibility. We are afraid that the onus is on the department to lead by way of evidence of an affirmative role/action on the part of the person being subjected to penalty. From the aforesaid, it is clear that the Commissioner's finding is an inclusive finding as the Ld.Commissioner elaborates that the entire operation which included certain activities as specified by him aforesaid were at the behest organized and executed by Shri R.K.Singh. That being the situation, affixing responsibility on other individuals for

certain acts undertaken behind their back, unknown to such persons and without any evidence to indicate complicity on the part of such persons cannot therefore be the cornerstone of holding such persons liable to punitive action in the absence of the alleged kingpin Shri R.K.Singh not being subjected to any enquiry. We also feel that subjecting the exporter, who had no role to play in the matter after the goods left his factory and loading of such goods in the said container were executed under supervision of Central Excise authorities, is grossly unfair and unwarranted. The investigations have failed to bring to fore any knowledge about the conduct of the aforesaid crime on the part of the exporting firm as well as the Director who are the appellants in the present matter. For ready reference and better appreciation of the subject, it would be imperative that the impugned section under which penalty has been imposed on the two appellants is gone through. The same reads as under:-

SECTION 114. Penalty for attempt to export goods improperly, etc. — Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act], whichever is the greater;

6. As evident from the above definition, it is for the department to muster evidence to support the commission or the omission of an Act (in the present case the act of export/attempted export of Red Sanders wood logs) to hold a person liable to consequences thereof. The fact that the goods were factory stuffed under supervision of the Central Excise authorities, the fact of generation of ARE1, duly signed by the Proper Officer in support thereof certainly goes a long way in

establishing the credentials and bonafides of the two appellants herein and the veracity of stuffing of the refractory Bricks for export under claim for drawback, in the export containers..

7. We find that there is no credible assertion on the part of the department pinpointing the said Red Sanders export to be a result of deliberate/conscious action on the part of the appellants. No evidence therein leading to the involvement of the company, in removing the declared goods and re-stuffing them with Red Sanders somewhere *en route* is placed on record. As the ARE1 clearly supports the proposition of export of High Alumina Refractories Fire Bricks from the factory premises, it thus would be held to be conclusive. It is undisputed that in the present case, the goods were examined and loaded at the factory premises, the goods got stuffed at the factory premises by the Revenue officers under their supervision and seal was put on the container which was found to be intact at the time of goods having reached the docks for purpose of export. That being the situation and with no shred of evidence, being led by the department, to implicate the exporter of any conscious knowledge of export of Red Sanders wood logs, we find that there is no case for the department under the circumstances to cause punitive action against the exporter. The fact that the export goods were stuffed in the container in presence of Central Excise officer and sealed in their presence only advances the case for exoneration from penalties of the exporter. It is further noted from records that the exporters have lodged necessary complaints with the jurisdictional Police authorities, in respect of their goods which were loaded on to the impugned containers and subsequently not found, vide their letter dated 18.04.2014, actively followed it up vide communication dated 18.05.2014, re-asserting for seeking FIR numbers in the matter and reminding the authorities vide their communication dated 29.10.2014. Also on record is seeking of a detailed communication to the Police authorities dated 24.05.2014 *inter alia* pleading for laying their hands on the alleged intermediary - Raj Kumar Singh, who had made a representation to the exporting firm that he would make a security

deposit with the firm by way of cash of a certain percentage of the invoice value and that the title of the document would thereafter be given to him, which goods he would send to the foreign buyers and after remittances were received, the said security deposit would be returned to him. It was accordingly and with reference to these terms and conditions that the said Raj Kumar Singh appointed Customs House Agents, Freight Forwarders for the purpose of export and directly paid their remuneration cost and container rents etc.. No malafide have been pointed out by Revenue, in acceptance of the said terms and conditions by the exporting firm. The exporting firm having merely agreed to R.K.Singh's proposal in this regard.

8. Raj Kumar Singh, the alleged mastermind and the person behind the whole scheme of things, has remained elusive to the authorities in this regard.

9. Shri S.Debnath, Ld.Authorized Representative for the department has drawn our attention to the above referred findings of the adjudicating authority and reiterates the facts on record asserting that the exporter as well as the Director of the exporting firm were both guilty of contumacious conduct for export of goods liable for confiscation under section 113 of the Customs Act and rightly leviable to penalty under section 114(i) *ibid*.

10. It has now been produced on record that the appellant Vikram Bole in Customs Appeal No.76486 of 2016 has since passed away on December 05, 2019, therefore, the appeal filed by the said appellant would thus abate in terms of Rule 22 of the CESTAT Procedure Rules, 1982, as there is no such application on record for continuance of the proceedings initiated by the successor-in-interest or any other legal representative on his behalf. It is therefore not required to elucidate any further in respect of Customs Appeal No.76486 of 2016.

11. In so far as appeal of the exporting firm is concerned, we find no evidence brought out by the department, least of all any credible evidence, in order to implicate knowledge/involvement on the part of the appellant in the attempted/export of Red Sanders wood logs. There is nothing to state that the containers after having left the exporters' premises were still under their control, or that the exporters assisted the loading of Red Sanders onto the container or the containers were tampered by them or had any knowledge about the loading of Red Sanders onto the containers duly loaded and sealed under the supervision of Central Excise officers. The Tribunal in a slew of cases in the absence of evidence directly implicating the appellants has held as unjustifiable to impose penalty on the exporting firm. It is settled law that conjectures and loose circumstances cannot replace the need for a cogent proof, suspicion if any is required to be duly corroborated with independent evidence, which in the present facts and circumstances on record is non-existent. The department has thus failed to establish any knowledge on part of the exporter of the fact of replacing the High Alumina Refractories Fire Bricks with red sanders wood logs and camouflaging them behind a layer of High Alumina Refractories Fire Bricks. The substitution of loaded goods at the factory premises *en route* the docks, remains a mystery in so far as to when where and who did it and is not borne out from the enquiries conducted by the department. It would be thus a gross error in penalizing the exporter for an act for which no evidence is led to fasten him with the crime. The following decisions can be adverted to, in this regard. :-

- (i) A.K.Saha vs. Commr. of Customs (P), Calcutta
[2001 (136) E.L.T. 303 (Tri.-Kolkata)].
- (ii) Dhakad Metal Corporation vs. Commr. of C.Ex. & S.T., Daman
[2015 (330) E.L.T. 561 (Tri.-Ahmd.)]
- (iii) Kiran S. dixit vs. Commr. of Customs, Hyderabad
[2014 (301) E.L.T. 337 (Tri.-Bang.)]
- (iv) Air Freight Ltd. vs. Commr. of Customs (Airport), Mumbai
[2004 (172) E.L.T. 229 (Tri.-Mumbai)]

(v) Nanda Incorporated vs. Commr. of Customs (EOU), Chennai-IV
[2018 (363) E.L.T. 673 (Tri.-Chennai)]

12. Moreover, the Hon'ble High Court at Calcutta in the case of **Commissioner of Customs (Port), West Bengal vs. M/s. Ashoke Enamel & Glass Work Pvt.Ltd.** in Customs Appeal No. 6 of 2017 dated 22.11.2021 involving identical question where DRI had busted a case of attempt to export Red Sanders wood had upheld the Tribunal's order which set aside penalty levied on the exporting firm on the plea that there was no specific allegation in the show cause notice to connect the exporter with the attempt to export Red Sanders wood log. We are thus of the view that the appellant cannot be proceeded against merely on assumption and made a victim of circumstances holding them liable for contraband found to be stuffed inside the container. This is all the more so, as the goods were stuffed under supervision of Central Excise officers and seals were found to be intact and untampered at the time of examination of cargo. The order of the lower authority cannot therefore be sustained.

13. In view of the aforesaid findings, we are of the view that the Customs Appeal No.76485 of 2016 is required to be allowed while Customs Appeal No.76486 of 2016 filed by Shri Vikram Bole, has to abate because of the demise of the appellant. Ordered accordingly.

(Operative part of the order was pronounced in the open Court.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)