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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.76182 of 2016

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/33/2016 dated 08.04.2016 passed by Commissioner of Customs (Port), Kolkata.)

Shri Arup Mukherjee, Proprietor,
M/s. Shiva Trading Company
(Marshal House, 11th Floor, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

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

WITH

Customs Appeal No.75060 of 2017

(Arising out of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/33/2016 dated 08.04.2016 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Bose Enterprise
(57, K.D. Mukherjee Road, Behala, Kolkata-700060.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

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

APPEARANCE

Shri H.K.Pandey, Advocate for the Appellant (s)
Shri T. Suleman, Authorized Representative for the Revenue

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

FINAL ORDER NO. 77015-77016/2024

DATE OF HEARING : 04.09.2024
DATE OF DECISION : 23.09.2024

Per : RAJEEV TANDON :

The present proceedings are in pursuance of Order-in-Original No.KOL/CUS/COMMISSIONER/PORT/33/2016 dated 08.04.2016 passed with reference to Show Cause Notice issued under Section 124 of the Customs Act, 1962 concerned with a case of attempted export of Red Sanders detected in Customs Transit Declaration (CTD) consignment (Nepal Export). The said order imposes a penalty of Rs.50.00 Lakh each on the two appellants in the present appeal.

2. Based on intelligence gathered, the DRI officers of Calcutta Zonal Unit, interdicted a consignment of export of an attempted smuggling of Red Sander woood logs in the guise of Nepalese cane handicrafts under CTD No.295 dated 30.03.2014/EF-14 dated 03.04.2014. The examination of the said consignment led to seizure of 210 Red Sander wood logs against 56 packages of Nepalese cane handicraft as declared.

3. Investigations were conducted into the matter and one Shri Dilip Kr. Sarkar of the Customs Brokers Firm M/s. Bose Enterprise (the appellant) indicated to the officers that though he was unaware about the stuffing of the container, but had heard from the lorry driver that the stuffing was done somewhere in Darbhanga. He also informed of the details of the transporter and pointed out that they had received the job from one Shri Srikanta Adhikary (the appeal filed by Shri Srikanta Adhikary in the matter was disposed of vide Final Order No.76224/2024 dated 04.07.2024). Upon further investigations Shri Sudipta Bose, F. Card holder and owner of the firm M/s. Bose Enterprises informed the authorities that they had taken up the dock clearance for export of the present consignment through the said Shri Srikanta Adhikary, who was well-known to him for several years in the course of business. The adjudication order records that the appellant did not pay to Shri Adhikary and would rather determine his clearing charges depending on the nature of job and communicate the same to Shri Adhikary, as it was the latter who would negotiate with the party

(exporter) in money matters. He informed that they would take up the job once Shri Srikanta Adhikary had agreed to pay the charges demanded. The adjudication order also notes that Shri Sudipta Bose had admitted before the authorities of deputing Shri Dilip Kr. Sarkar, Dock Sarkar on behalf of his firm to carry out the aforesaid export clearance work for the Nepalese exporter-M/s. Bhadrakali Exports Pvt.Ltd., Nepal for shipment to Busan, Korea. It is also recorded in the order that the appellant had no contact with M/s. Bhadrakali Exports, Kathmandu, Nepal and that the impugned job was picked up by Shri Srikanta Adhikary and handed over to them for their professional services of Customs clearance. The Appellant firm did not possess any letter of authorization, issued in the name of the CHA firm by the Nepal based exporter nor were they aware of the profile of the exporter. Also they did not know the exporting firm personally and were of the view that KYC norms did not apply to foreign clients.

4. In the course of investigations, the authorities also examined Shri Arup Mukherjee, Proprietor of M/s. Shiva Trading Company, also an appellant in the present appeal, who was named by Shri Srikanta Adhikary as the person from whom the latter had procured the instant job. The appellant Shri Arup Mukherjee in his testimony to the authorities informed that he was concerned with procuring work orders from clients and handing it over to the CHA for execution, that he handed over the documents related to the container concerned (No.TRHU 298 7633) to Shri Srikanta Adhikary and that he had procured the said documents from one Shri Sujan Sharma of Arihant Logistics. Shri Arup Mukherjee further informed that the "Cart In Order" for the said consignment was however obtained by him. He also informed the authorities that there was no written agreement between him and Arihant Logistics who used to pay him on cash for the jobs undertaken. It is also on record that the proprietor of the said firm Shri Sujan Sharma was not known to the appellant and was also unaware of the profile of the Nepal based exporter or that of the importer based in South Korea.

5. The contentions of the appellant is that at the time of examination of the subject cargo at Kolkata port the seal on the container was found to be intact and that the only allegation against them in the notice is with regard to non-compliance of their duties as a CHA. That he had neither obtained the KYC documents from the Nepalese importer nor that of Arihant Logistics. Moreover, they had not verified the existence of the firm Arihant Logistics, nor the antecedents of Shri Sujan Sharma, proprietor thereof, though they had handled several consignments on earlier occasions on behalf of M/s. Arihant Logistics. It is for this reason that the charge for inviting penal action under Section 114(i) of the Customs Act, 1962 was made out and upheld against the appellants.

6. Pleading against imposition of penalty the Ld.Counsel for the appellants invites our attention to section 114(i), which reads as under:-

> ***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;*

and submits that there being no allegation of abetment in the impugned Show Cause Notice no penalty under section 114(i) is imposable on them under the circumstances.

6. The Ld.AR arguing on behalf of the respondents reiterates the findings of the Adjudicating authority and submits that this is a grave and heinous crime, whereby export of prohibited goods banned under CITES and Wildlife Protection Act, 1972, as endangered species, was attempted at through the Nepal CTD route. He further emphasizes that

the negligence and omission in performance of their statutory responsibility led to this massive attempt at evasion of Red Sanderwood logs. He therefore justifies the order invoking penalty on the appellants.

7. We have heard the two sides and considered the facts on record and examined the testimonies of various people investigated by the authorities in the chain of attempted export of the present shipment.

8. As noted from hereinabove, it is evident that the role played by Shri Arup Mukherjee and M/s. Bose Enterprises was shorn of adhering to prescribed procedures and formalities as enshrined in law. Both the appellants herein completely failed in ascertaining the whereabouts by way of KYC of the persons associated from whom they had sourced the business nor were they in possession of any letters of authorization or profile assessment and verification report etc. of their ultimate client M/s. Bhadrakali Export Pvt.Ltd., Nepal for whom they undertook the said transit clearance of Nepal based cargo meant for export to Korea. We are not in agreement with the appellant's plea that as the show cause notice makes out no allegation of abetment against the appellants, no penalty can be imposed on them under section 114(i) of the Customs Act, 1962. A close and careful look would reveal that it is not only abetment which could result in fixation of penal liabilities on the person concerned, but the law also provides for imposing penalty for doing or failure to do any act which act or omission, renders such goods liable to confiscation under section 113. Section 114(i) primarily holds a person liable for penal action for such act of omission or commission and abetment is only secondary to the act of omission or commission. The law is very categorical regarding the imposition of penalty under such circumstances.

9. It was primarily for the CHA firm, to have obtained and fulfill the KYC requirements as required in law and merely on orally sourcing the business through Shri Arup Mukherjee without actually simultaneously obtaining KYC documents from him is a gross failure and omission in performance of the statutory responsibilities. The fact that the present attempted export of Red Sanders was attempted through a chain of

intermediaries with at no stage of any mention of KYC documents coming through is a pointer to the grave omissions at different stages facilitating the said export of banned goods. Shri Arup Mukherjee who used to make payments to the appellant M/s. Bose Enterprises with reference to services rendered by them thus cannot absolve himself of his role as an intermediary in the sordid saga of the said attempted export. The fact that he was an important link and sourcing the business for the customs broker without either knowing his clients nor having obtained necessary documents to ascertain and fulfill the KYC requirements is certainly an omission of serious proportions and having admittedly been in the trade sourcing business for several years it indeed is an omission of multitude ramifications and no less casual and deliberate in nature.

10. We therefore are of the view that the appellants have not made out a convincing case for non-imposition of penalty on them. However, considering the facts and circumstances of the case and the totality of the action on part of the two appellants, we feel a penalty of Rs.4,00,000/- (Rupees Four Lakh) each would meet the ends of justice.

11. Appeals are disposed in the above terms.

(Order pronounced in the open court on Sep. 23, 2024.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

sm