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

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 75329 of 2021

(Arising out of Order-in-Appeal No. KOL/CUS(PREV)/SILIGURI/AKR/23-24/2021 dated 07.01.2021 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sujit Mitra **: Appellant**
S/o. Late Keshab Mitra,
Rabindra Nagar, Falakata, Jalpaiguri,
West Bengal – 735 211

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Siliguri Commissionerate

AND

Customs Appeal No. 75330 of 2021

(Arising out of Order-in-Appeal No. KOL/CUS(PREV)/SILIGURI/AKR/23-24/2021 dated 07.01.2021 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Kalyan Saha **: Appellant**
Proprietor of M/s. Akash Trading Co.,
S/o. Late Dipak Kr. Saha,
Kamakhaguri, District: Alipurduar,
West Bengal – 736 202

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Siliguri Commissionerate

APPEARANCE:

Shri Arijit Chakraborty, Advocate for the Appellant(s)

Shri S. Chakravorty, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER Nos. 77907-77908 / 2024

DATE OF HEARING / DECISION: 18.12.2024

ORDER:[PER SHRI K. ANPAZHAKAN]

Shri Kalyan Saha (hereinafter referred to as the "Appellant No.1") is the Proprietor of M/s. Akash Trading Company and is a registered dealer / trader of betel nuts. During the normal course of his business, the Appellant No. 1 has sold a consignment containing 16080 kgs. of betel nuts to one Shri Sujit Mitra of Rabindranagar, Falakata (hereinafter referred to as the "Appellant No. 2") vide Invoice No. 04 dated 12.12.2017. The said consignment was carried by a vehicle bearing Registration No. AS-01/FC/8995.

1.1. The Officers of the Customs Division, Dinhata, Coochbehar intercepted the vehicle and seized the consignment of betel nuts available in the said vehicle on the allegation that the betel nuts were of foreign origin, smuggled into India and there was no document available with the carrier evidencing legal purchase of the goods. Consequent to seizure, the Appellant No. 1 had applied for provisional release of the seized goods vide letter dated 20.12.2017.

1.2. Provisional release of the goods was allowed vide Order dated 27.12.2017 against cash security of Rs.2,73,280/- paid by the Appellant vide TR-6 Challan dated 29.12.2017 and on execution of a full value bond.

2. Upon completion of the investigation, a Show Cause Notice C. No. VIII (10)07/CUS/ADJ/JC/CCP/SLG/2018-19/321 dated 05.06.2018 was issued *inter alia* proposing confiscation of the seized goods under Section 111(b) and (d) of the Customs Act, 1962.

3. On adjudication, the Ld. Additional Commissioner of Customs, Siliguri has passed the Order-in-Original No. 43/JC/CCP/SLG/2018-19 dated 07.03.2019, issued on 12.03.2019, wherein he has ordered for confiscation of the seized betel nuts under Section 111(b) and (d) of the Customs Act, 1962. He has also allowed redemption of the same on payment of a fine of Rs.2,73,280/- in lieu of confiscation under Section 125 of the Act. Penalties of Rs.1,00,000/- and Rs.50,000/- were imposed on the Appellant No. 1 and Appellant No. 2 respectively, under Section 112(b) of the Customs Act, 1962.

4. On appeal, the Ld. Commissioner (Appeals) has passed the impugned Order-in-Appeal No. KOL/CUS(PREV)/SILIGURI/AKR/23-24/2021 dated 07.01.2021 wherein he has rejected the appeals filed by the Appellants.

5. Aggrieved by the confirmation of the demands, the present appeals have been filed by the Appellants.

6. The Appellant No. 1 viz. Shri Kalyan Saha submits that the impugned order has been passed on the basis of assumptions and presumptions. It is his contention that there is no evidence available on the record to substantiate the allegation that the goods were smuggled in nature. It is stated that the impugned order has relied upon the report submitted by Arecanut Research and Development Foundation (ARDF) to arrive at the conclusion that the betel nuts seized were of foreign origin. In this regard, Appellant No. 1 submits that ARDF is a private organization which cannot be considered as an expert to determine the origin of the betel nuts in question; it is a settled position of law that the opinion of ARDF can at best be considered as a trade opinion, which has no validity

before the eyes of law. The Appellant No. 1 also submits that the Ld. Appellate Commissioner has held that ARDF is an expert to issue the certificate of origin as it undertakes research on mechanism in areca nut cultivation; however, there is no corroborative evidence to substantiate this finding. It is also submitted that there is no existing procedure for determination of origin of the betel nuts. Accordingly, it is his submission that the impugned order confiscating the betel nuts based on the ARDF Report is bad in law.

6.1. In support of his contention, the Appellant No. 1 relied upon the decision of the Hon'ble Calcutta High Court in the case of *Commissioner of Cus., C.Ex. S.T., Siliguri v. Subodh Das [2023 (385) E.L.T. 693 (Cal.)]* wherein it has been categorically held that in respect of goods seized from a domestic area, the burden is on the Department to prove that the goods are of foreign origin and smuggled in nature.

6.2. The Appellant No. 2 viz. Shri Sujit Mitra submits that he is the Power of Attorney Holder of the Vehicle No.AS-01/FC/8995 which was engaged in the transportation of the impugned consignment of betel nuts from M/s. Akash Trading Company, Kamakhaguri, Alipurduar to Falakata, Coochbehar on 13.12.2017. He submits that the Customs Officers intercepted the said vehicle and seized the betel nuts in the vehicle; he was having the document for transportation of the said goods. It is his submission that he was in no way concerned with the alleged importation of the betel nuts without payment of duty. Accordingly, he submits that the penalty imposed on him under Section 112(b) of the Customs Act, 1962 is not sustainable in law.

6.3. In view of the above, both the Appellants have prayed for allowing their appeals.

7. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. We find that the consignment of 16080 kgs. of betel nut was seized from the vehicle bearing Registration No.AS-01/FC/8995 at Coochbehar on 13.12.2017. The Appellant No. 1 has submitted that the driver was carrying the Tax Invoice No. 04 dated 12.12.2017 for transportation of the said goods. Thus, it is his contention that the goods were of domestic origin and sold through a proper invoice in the normal course of business. It appears that the Customs Authorities have seized the goods on the reasonable belief that the goods were 'smuggled' in nature. But, we find that there is no evidence brought on record to substantiate this allegation that the goods were of foreign origin and smuggled in nature. We observe that betel nut is not a notified item under Section 123 of the Customs Act, 1962. Thus, the onus is on the Department to prove that the goods were smuggled in nature.

9.1. We find that the lower authorities have relied on the Report received from ARDF to substantiate their allegation that the goods were of foreign origin and smuggled into India. In this regard, we observe that ARDF is not an organization accredited by the Government for issuing the certificate of origin. This view has been expressed by the Hon'ble Allahabad High Court in the case of *Maa Kamakhya Trader v.*

Commissioner of Customs (Preventive) [2024 (389) E.L.T. 185 (All.)], wherein it has been observed as under: -

> *"23. Unless there pre-existed objective/scientific test to determine the origin of goods and/or unless the ARDF report had arisen on such a test to ascertain the origin of goods, the report of the ARDF though described as one of a neutral third party, it may never be acknowledged as cogent or objective material that may lead to formation of a "reason to believe" that the goods were of foreign origin.*
>
> *24. Second, even that opinion is not definitive but only suggestive. The words "resembles and seems" used in the report to record the opinion of the ARDF itself admit of possibility of the facts being otherwise. In fact, no definite opinion has been expressed that the goods were of foreign origin. Unless such definitive opinion existed, the report itself may never form objective material to form a "reason to believe". Suspicions, howsoever strong may never replace/substitute "reasons" that may be tested against material on which it may arise.*
>
> *25. Similar conclusion has been reached by this Court with respect to similar report of the ARDF with respect to Betel nuts in Commissioner Customs, (Preventive) v. M/s. Maa Gauri Traders (supra), wherein it was observed as below :-*
>
>> *The report of the ARDF has also been held to be not reliable inasmuch as it could not be shown with any degree of certainty that the origin of the betel nuts could be established by testing in a laboratory, as is clear by the answer to the RTI query given by Directorate of Arecanut And Spice Development, Ministry of Agriculture and Farmers Welfare, Government of Kerala."*

9.1.1. Therefore, by relying on the decision cited *supra*, we hold that the ARDF Report alone cannot form the basis for arriving at the conclusion that the goods were of foreign origin and smuggled in nature. The allegation of foreign origin and smuggled nature of the goods must be substantiated with cogent evidence. Confiscation of the goods cannot be done merely on the basis of assumptions and presumptions or a mere suspicion that the goods were of foreign origin.

9.2. We also find that there is no corroborative evidence brought on record by the investigation to substantiate the allegation that the goods were of foreign origin and smuggled in nature. Thus, we find that the Department has failed to establish that the goods were of foreign origin and smuggled into the country without payment of customs duties. On the other hand, we find that the appellant has produced Invoice No. 04 dated 12.12.2017 evidencing legal purchase of the goods through domestic sources. We find that the investigation has not brought in any evidence to negate the claim of the Appellant No. 1 that the goods were legally purchased from domestic sources. Since betel nut is not a notified item under Section 123 of the Customs Act, 1962, the onus is on the Department to prove that the goods were smuggled in nature. As the Department could not produce any evidence to substantiate the allegation that the betel nuts were of foreign origin, except the ARDF report, we hold that the goods are not liable for confiscation. As the goods are not liable for confiscation, the question of imposing redemption fine in lieu of confiscation does not arise.

9.2.1. We find that this view has been taken by the Hon'ble High Court of Calcutta in the case of *Commissioner of Cus., C.Ex. S.T., Siliguri v. Subodh Das [2023 (385) E.L.T. 693 (Cal.)]* wherein the Hon'ble High Court has held that when goods are seized from a domestic area, the burden falls on the

Departmental Officers to prove that the goods are smuggled in nature. The relevant portion of the said decision is reproduced below: -

> *"5. In support of its conclusion, the Tribunal placed reliance on the judgment of this Court in the case of Commissioner of Customs (Preventive), WB, Kolkata v. Sudhir Saha, reported in 2004 (172) E.L.T. 26 (Cal.) = 2004 taxmann.com 1512 (Cal.). In the said decision, the Court held that betel nuts which were seized are not notified goods under Section 123 of the Customs Act and the said provision applies only in respect of goods which are smuggled and smuggled goods means something suggesting that they are of foreign origin and their recent importation from abroad. In this regard, reliance was placed on the decision in the case of Shantilal Mehta v. Union of India, reported in 1983 (14) E.L.T. 1715.*
>
> *6. The Tribunal noted that the facts of the case on hand were identical to that of the facts in the case of Sudhir Saha and that the burden of proof to establish the smuggled nature of the seized goods was on the department and taking note of the factual position, the Tribunal held that the department miserably failed to discharge the burden cast upon them. Further, the Tribunal took note of the finding recorded by the Commissioner in the adjudication order wherein it has been stated that there may be a possibility that the subject betel nuts too are of foreign origin and were smuggled to India. Commenting upon the said finding, the Learned Tribunal, in our view, rightly held that this finding is based entirely on presumption for which there is no legal or factual basis disclosed. That apart, the Tribunal has also examined the other facts, namely, the statements which were recorded from the respondents at the first instance, which were subsequently retracted before the Learned Magistrate. The Tribunal found that the statements initially recorded from the respondents who are semi-literate persons were identical and one was mirror image of the other and, therefore, the Tribunal rightly disbelieved those statements and in any event the same having been retracted at the earliest point of time, held that the statements could not have been the basis of the adjudication. Further, on facts, the Tribunal found that the goods were*

seized far away from the international border in the interior of North Bengal from trucks/warehouses and also it is an undisputed fact that betel nuts are sold in the adjoining States of Assam and Manipur as well as north districts of West Bengal and their adjacent area. Therefore, the Tribunal came to the conclusion that in the absence of evidence on the contrary disclosed, it has to be concluded that the Revenue has been unable to establish the smuggled nature of the seized goods and, thus, discharge the burden of proof cast upon the revenue in this respect.

7. Further, the Tribunal examined the other factual aspects and found that the documents on record show that the goods were purchased from local markets and/or from Mandi located in Jalpaiguri district of West Bengal. The said purchases of agricultural produce such as betel nuts are regulated by the respective District Regulated Market Committees and the Sub-divisional Officers in terms of the West Bengal Agricultural Produce Marketing (Regulation) Act, 1972. Further, the Tribunal noted that copies of the receipts issued by the Market Committees were on record evidencing that the market fee was paid by the respondents and, therefore, concluded that the seized consignment had been purchased on payment of such cess under the Regulation Act of 1972. Furthermore, the bag containing the seized goods did not contain any foreign markings. Furthermore, the Tribunal noted that during the course of investigation undertaken by the DRI, no other incriminatory material was obtained either from the raids conducted or in course of interrogating witnesses that would indicate that the said goods were sourced from outside India.

8. Thus, based on presumptions and assumptions, it cannot be held that the goods were smuggled goods and in the absence of any evidence produced by the Revenue to discharge the burden cast upon them, in our view, the Tribunal noting the facts of the case had rightly granted the relief in favour of the respondents. Furthermore, there was no testing of the seized goods through any accredited Agency for determining any constituent property or characteristic that would indicate or establish foreign origin of the said goods. The Tribunal noted that the only evidence on the basis of which the proceedings were initiated and the order of adjudication was passed against the nine respondents is based on a statement recorded from the respondent in CUSTA

> *22 of 2022. All the respondents were arrested and produced before the Learned Chief Judicial Magistrate, Siliguri before whom the so-called voluntary statements were retracted. The Tribunal noted that it is on record that the respondent in CUSTA 22 of 2022 had retracted the statements on 16th March, 2016 before the Learned Additional Chief Judicial Magistrate, Siliguri before whom he was produced after arrest. Thus, in the absence of any independent evidence to bring home a charge of smuggling, the Tribunal set aside the adjudication order. Furthermore, the Tribunal noted that there was no discussion on the retraction of statements made on oath by the respondents and the witnesses who implicated the respondents were not produced for cross-examination in spite of a specific request made by the concerned respondent and this request was rejected on the ground that the occupants of the trucks had allegedly described the true facts in course of the statements recorded under Section 108 of the Act which were affirmed by the respondent in CUSTA 22 of 2022."*

9.2.2. We find that the ratio of the above decision is squarely applicable to this case.

10. Accordingly, in view of the above discussion and by relying on the decisions referred to above, we hold that the impugned order confiscating the betel nuts in question is not sustainable. Accordingly, we set aside the same.

11. Since the violations alleged by the Department has not been substantiated with evidence, we hold that the appellants are not liable for penalty. As the confiscation of the goods is not sustained, we hold that the penalty imposed on the Appellant No. 1 under Section 112(b) of the Customs Act is not sustainable and accordingly, the same is set aside.

12. Regarding the penalty imposed on the Appellant No. 2 under Section 112(b) of the Act, we observe that he is the Power of Attorney Holder of the Vehicle bearing Registration No. AS-01/FC/8995 which was carrying the consignment. There is no evidence brought on record regarding his involvement in the alleged offence. In these circumstances, we hold that the penalty imposed on the Appellant No. 2 is not sustainable and hence, we set aside the same.

13. In the result, we set aside the impugned order and allow the appeals filed by both the Appellants, with consequential relief, if any, as per law.

(Operative part of the order was pronounced in open court)

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd