

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No.79482 of 2018

(Arising out of Order-in-Appeal No.100-101/Pat/Cus/Appeal/2018 dated 21.08.2018 passed by the Commissioner (Appeals) of Central GST & CX, Patna).

M/s Vijay Kumar Singh

House No.-466, Mohalla-Belbanwa, Motihari,
Dist.- East Champaran,Bihar.

..Appellant

VERSUS

The Commissioner of Customs (Preventive) Patna.

Patna Commissonerate, Bir Chand Patel Path,Central Revenue Building,Patna- 800
001.

...Respondent

With

Customs Appeal No.79532 of 2018

(Arising out of Order-in-Appeal No.100-101/Pat/Cus/Appeal/2018 dated 21.08.2018 passed by the Commissioner (Appeals) of Central GST & CX, Patna).

Shri Arvind Kumar Shahee

Prop. Of M/s. Shree Shai System, D/C23, P.C. Colony,
Khnkarbagh,Patna – 800 020,

..Appellant

VERSUS

The Commissioner Of Customs (Preventive) Patna.

Patna Commissonerate, Bir Chand Patel Path,Central Revenue Building,Patna- 800
001.

...Respondent

APPEARANCE :

Ms. Atika Sumran Ahmed, Advocate, for the Appellant

Mr. S.Chakraborty, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.75378/2023 & 75451/2023

Date of Hearing : 21.04.2023

Date of Pronouncement :12/05/23

PER RAJEEV TANDON :

The impugned two appeals have been filed by Shri Vijay Kumar Singh and Shri Arvind Kumar Shahee assailing the order passed by Commissioner (Appeals) vide Order No.100-101/Pat/Cus/Appeal/2018, dated 21st August,

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2018. The present case involves seizure of 5,700 kg. cut betel nut alleged to be of third country origin. Based on specific information concerning illegal import of cut betel nuts from Nepal into India, S.H.O. of Mufassil Police Station, Siwan, intercepted a truck coming from Gopalgunge side. The examination revealed it to be laden with cut betel nuts. The driver along with three other occupants present at the time of interdiction, however could not produce any documentation in relation to the cut betel nuts being transported. The driver however informed that the goods belong to one Shri Munna Mishra of Motihari and he was carrying the cut betel nut from Nepal to be delivered at Balia.

2. The Customs Officer upon taking over the said case (presumably for reasons of foreign origin) seized the said 5700 kgs of cut betel nuts, packed in 100 bags, under Section 110 of the Customs Act 1962. Investigations were also undertaken with Shri Bijay Kumar Singh the claimant of the said goods. In defence he submitted a copy of invoice No.133 dated 13th March, 2016 issued by Shri Arvind Kumar Shahee, Patna alongwith a copy of order dated 24th March, 2015. As per investigations carried out and the statements of Shri Bijay Kumar Singh recorded under Section 108 of the Customs Act, the said cut betel nuts were procured by him from M/s Shree Shai System, Patna, under cover of above referred invoice and that the goods were seized while in transit. Investigation undertaken with Shri Sai Systems, Patna confirmed that the impugned goods were sold by them to the appellant and they in turn had procured the said goods from Customs Division, Forbesganj, vide order dated 24th March, 2015.

3. The Ld. Commissioner (Appeals) vide impugned order upheld the orders of the adjudicating authority confiscating the said cut betel nut, allowing their provisional release imposition of redemption fine penalty on the various notices, besides confiscating and allowing provisional release of the truck

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carrying the impugned goods. In his order in appeal the Ld. Commissioner (Appeals) has observed inter alia, as under:

5."The Ld. Adjudicator did not agree with the contention of the notice/appellants and found the story put forth by them to be unacceptable. He accordingly declared them involved in the act of smuggling of betel nuts and ordered confiscation of the seized goods i.e. 5700 kg of Betel Nuts of third country origin, valued at Rs.8,55,000/- under Section 111(b) of the Customs Act, 1962. However, he offered the option of redeeming the goods to the notice/appellant no.01, on payment of Rs.4,00,000/- as Redemption Fine under Section 125 of the Act, and since an amount of Rs. 4,56,000/- had already been paid as security deposit at the time of provisional release, he accordingly ordered for appropriation of the RF against it. Further, the Ld. Adjudicator also found the seized Pick-up Van bearing registration no. HR-63B-4639, valued at Rs. 5,00,000/- was used as conveyance for illegal importation and confiscated it under Section 115(2) of the Customs Act, 1962. He offered the option of redeeming the vehicle to the notice no.06, on payment of Rs. 1,00,000/- as Redemption fine under Section 125 of the Act, and since an amount of Rs.1,50,000/- had already been paid as security deposit at the time of provisional release, he accordingly ordered for appropriation of the RF amount against it. He also imposed a penalty of Rs.56,000/- against the appellant no.01 and Rs.1,00,000/- against appellant no.02, under Section 112 of the Act".

6.-----.

7.-----.

8.1 I find this to be a typical case of smuggling of cut-betel nuts. The concocted story of the goods being the same as released from a Customs godown is too often repeated to be true. In my last one year of office, I have decided dozens of cases involving smuggling of cut betel nuts and in almost all the cases the defense puts up this alibi of the subject goods being part of the goods released/auctioned from some Customs office or the other. It can reasonably be said that the smugglers of cut betel nuts have devised a tool of claiming any seized cut betel nuts to be part of the earlier seized goods, subsequently released/auctioned by the Department. The claimant of the goods claimed the goods on 18.05.2016, after two months after the date of seizure.

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(ii). In the instant case, the goods claimed to have been purchased by the appellant no.02, were auctioned nearly a year ago. The goods

were lifted on 29.04.2015 and are claimed to have been sold to the appellant no.01 on 13.03.2016. While the goods auctioned out of Customs Div, Forbesganj consisted of 2420 kg of betel nuts, 60 kg of dry betel nuts and 3303.40 kg of cut betel nuts, the ones seized were entirely cut betel nuts. This in itself proves that the Invoice no.133 dt. 13.03.2016, issued by the appellant no.02 in favour of the appellant no.01, is nothing but a manufactured document to give cover to the illegally imported cut betel nuts.

(iii). I also find that the goods that were auctioned by Customs Div, Forbesganj, belonged to various cases pertaining to years from 2013 to 2015. Cut betel nuts are highly perishable commodities and there was no reason for the appellant no. 02 to keep it for nearly a year. The records do not speak about storage capacity of the appellant no. 02 either.

(iv) -----.

(v) -----.

(vi). The Adjudicating authority had given five numbers of opportunity on different dates, to all the notices, including the appellants, but none appeared. This proves they had nothing to show that the goods were released from Customs, Forbesganj."

4. The basis of impugned seizure under Section 110 of the Customs Act 1962 has to be on a "reasonable belief" that the goods are smuggled, of foreign origin and therefore liable for seizure. From the facts of the case, it appears that this belief is largely based on this specific information with the authorities, it may have been further strengthened by non-production of transport documents at the time of interdiction of vehicle.

5. Cut betel nuts are non-notified goods and therefore in terms of Section 123 of the Customs Act the onus to prove foreign origin and smuggled nature of the goods is on the department. The appellants have discharged their share of burden by presenting to the department an invoice No. 133, dated 13th March, 2016. I am afraid that there is nothing expressly indicated in the order appealed to confirm the existence of a

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reasonable belief. Be it, the seizure may be on an alleged specific information, but beyond the point of seizure by police and the goods being handed over to the Customs department and the supply of documents of purchase of goods through M/s Shree Shai Systems, in turn from Customs auction at Forsebganj accounting for the entire 5700 kgs by way of cut & uncut betel nuts the appellants have discharged their initial onus. Goods seized being non-notified, the burden to prove their smuggled nature is entirely on the Revenue. Merely stating that the Arecanut R&D Foundation, Mangalore, informed the goods to be of Burmese origin does not help in conclusively establishing that the goods seized were smuggled. There is no shred of evidence to establish or even state that the goods were smuggled. Having lent a credence to the goods to be procured out of Customs auction, it is for the department to affirmatively negate the same. There is no word in the order in respect of the various unanswered questions framed by the Commissioner, as to the investigations in regard to those primary questions. Moreover, smuggled character of goods is to be led and established by positive evidence and cannot be assumed on the basis of some unanswered probabilities as to non-supply of carriage documents or that of long storage or the character of the goods. Assailing the said proof, tendered by the appellants, on various pleas like this kind of a modus is a "concocted story", "I have decided dozens of cases involving smuggling of cut betel nuts and in almost all the case the defence puts up this alibi of the subject goods being part of the goods released/auction from some Customs office -----", "the claimant of the goods claimed the goods on 18.05.2016, after two months after the date of seizure", may lend some argumentative force for the department's case, however presumption as grave, cannot be considered as a conclusive proof. These arguments may tend to negate the defence's case, but do not discharge the burden cast on the department, to establish the smuggled character of goods. Since being non-notified items the smuggled

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character of the goods is required to be established by the department led by positive evidence and for any legal action, it has to be beyond an iota of doubt. That the goods were of a perishable nature, or that the appellants have not given any valid reason to hold on to the goods for this long, and such like questions do not come to the help of the department for discharge of their onus. On the contrary the fact of mould infection is indicative of goods being old and their improper storage etc., thereby lending support to the plea of the appellants. No evidence has been led by the department to establish that the seized/confiscated cut betel nut were actually smuggled and of foreign origin. Finding laches in the version of the appellant cannot bail out the department in discharge of the specific onus cast upon them to prove their smuggled character.

6. It is observed from the investigations undertaken, that the department has thus miserably failed in establishing the foreign origin of the seized, confiscated and provisionally released cut betel nuts. There being no shred of any positive piece of evidence led by the revenue, to establish the smuggled nature of the goods, being non notified goods, the onus is on the department to establish smuggled foreign origin of the cut betel nuts. The appellants have discharged their burden on the basis of invoice tendered and related procurement source. Moreover, it is not the case of the department that the goods were not procured in auction by the supplier Shri Arvind Kumar Shahee.

6.1 Questions, such as to why the goods being perishable were stored for such a long period, that no way bill, no form D-IX applicable for sale of goods were produced, no lorry receipt or transportation documents given, that the identity of seized goods did not match with the identity of auctioned goods, ipso facto do not establish least of conclusively, that the said goods were smuggled into the country. The revenue has not discharged its burden, least of all with cogent evidence. This is a clear case of assumptions and presumptions, a premediated assessment and failure to conduct proper investigations by the jurisdictional authorities. If the veracity of the invoice

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tendered by the appellant was doubted, the show cause notice issued does not indicate of any further efforts made and investigations carried out by the department towards discharge of their burden. It is a fact that the show cause notice states that testing of the samples of the product to be by Arecanut Research and Development Foundation, Mangalore revealed the product of Burmese origin and heavily infected with moulds. However, the **Hon'ble Patna High Court** in the case of **Salasar Transport Company & Another (MJC No.2185/2013)** had pointed out that the accredited nature of the said organization was not established and it had therefore accepted the argument that no legal liability could be attached. The revenue has failed to state even we bit to establish the foreign/cross border territories the said goods (if at all were smuggled) had passed through to establish their smuggled character. The report of Arecanut R&D Foundation has not been discussed, any further in the order. This fact on the contrary, could lend some support to the argument of the appellants that the impugned goods said to have been procured out of Customs auction vide order dated 24.03.2015 and betel nuts being highly perishable when tested found the product to be highly fungal infected unfit for human consumptions, as being nearly 2 to 3 years old. All these do not absolve the department in discharge of their mandate under the statute. Assailing the evidence tendered by the appellants could sullify it, but it does not help the department to tide over its primary responsibility and onus casted upon them under Section 123 of the Act.

7. In view of the above, the department not being able to discharge the onus cast upon them to establish the smuggled character of the goods, the confirmation of sale to the appellants by Shri Arvind Kumar Shahee picking up the betel nuts in the departmental auction, the order in appeal is set aside and the appeals allowed.

(Pronounced in the open Court on 12/05/2023)

Sd/-

(Rajeev Tandon)
Member (Technical)

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