Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 10801 of 2021
(Arising out of OIA-MUN-CUSTM-000-APP-75-79-2020-21dated- 30/06/2021 passed by - Commissioner of CUSTOMS-MUNDRA)

JANKI DASS RICE MILLS **.....Appellant**
Nandana Road Taraori Karnal
Karnal
Karnal, Haryana

VERSUS

C.C.-Mundra **.....Respondent**
Office of The Principal Commissionerate Of Customs, Port User Buld. Custom House Mundra, Mundra, Kutch, Gujarat- 370421

WITH

Customs Appeal No. 10832 of 2021- (DEVINDER KUMAR)
Customs Appeal No. 11052 of 2021-(VENUS CLEARING AGENCY)
Customs Appeal No. 11053 of 2021- (V ARJOON)

APPEARANCE:
Shri Ajay Singh, Shri Paritosh Gupta, Advocates for the Appellant
Shri Vinod Lukose, Superintendent (Authorised Representative) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. A/ 10788 - 10791 /2022

DATE OF HEARING: 02.05.2022
DATE OF DECISION: 07.07.2022

RAMESH NAIR

The present appeals are directed against the impugned order-In-Appeal No. MUN-CUSTM-000-APP-75 to 78 dated 30.06.201 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Briefly, the facts of the present case are that the appellant M/s Janki Dass Rice Mills had exported Rice under disputed Shipping Bills which were originally booked for Iran, but investigation revealed that the consignments were delivered to UAE and hence violated the provisions of para 2.40 and 2.53 of Foreign Trade Policy. Accordingly, show cause notice dtd. 14.02.2019 was issued and after due process of law the adjudicating authority had held that the goods is liable for confiscation under Section 113(i) and 113(d) of the Customs Act 1962 and imposed the penalties under Section 114 of the customs Act 1962 and under Section 114AA of the

Customs Act 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules 1993 read with provisions of Section 50 of the Customs Act 1962. Being aggrieved with the impugned order Appellants filed Appeals before the Commissioner (Appeals), who vide impugned order-in-appeal upheld the order of Additional Commissioner, Customs House, Mundra and dismissed the appeals filed by the Appellant. Aggrieved, the appellants have filed these Appeals before CESTAT.

3. Shri Ajay Singh, Learned Counsel appearing for the Appellant M/s Janki Dass Rice Mills and for Co-appellant Shri Devinder Kumar submits that allegations are based on statements of persons and letters from Shipping line stating that containers were discharged at Jabel Ali Port in UAE coupled with statement of their employee. No inquiry or investigation, whatsoever was conducted as to what happened to the containers/ goods after they were offloaded at Jabel Ali. During the investigation, Appellant had always maintained that the goods, though were offloaded at Jabel Ali, ultimately reached Iran and the proof of receipt of the goods by the original consignee as well as remittance as received from the very same consignee were also submitted by the Appellant before the revenue. Appellant's request for examination/cross-examination of witnesses in compliance with Principles of Natural Justice and compliance with provisions of Section 138B of the Customs Act 1962 was denied by the department. Procedure prescribed under Section 138B was required to be mandatorily followed. However, in disregard to the mandate provided under the Act and settled legal principle of natural justice, the authority continued to rely upon such statements without affording an opportunity for examination/cross examination of the witnesses. Consequently the impugned order was liable to be set aside.

3.1 He also submits that once the goods were shipped and the bill of Lading was issued, the goods become property of the purchaser of the goods and the title in the goods become vested with such purchaser i.e. the foreign buyer. The purchaser who held the title in the goods was then free to deal with the goods. Therefore, the change in port of discharge of the containers/goods after the goods were out of charge and handed over to shipping company and loaded on the vessel was prerogative of the consignee/ foreign buyer and thus the Indian Exporter cannot be held liable for any such act, at the behest of the foreign buyer.

3.2 He further submits that documentary evidences in the form of photographs of the rice bags along with supporting documents were submitted showing that the bags were printed with Iranian language label and markings. As per the laws in UAE, the rice packed in Iranian language and labels as per Food Laws of Iran Government cannot be sold in UAE region as for selling in gulf region, the markings are required in Arabic and English. A precondition for the clearance of an import of any agricultural food products into Dubai is the Import Certificate from Dubai Municipality is required. Also, for any food product that is to enter the UAE, there must be a license granted to the consignee to trade in foodstuffs. In the impugned matter even the phytosanitary certificate declaring the destination as Iran was furnished before customs authority in India. There is no allegation or any evidence in the case, that the said certificates were amended at any stage in order to get the goods cleared in a country other than Iran. The findings of the Ld. Original authority as confirmed by the Appellate authority that the impugned goods have been exported to UAE merely because the same were discharged in UAE port, without verifying whether such goods could be exported to UAE in the absence of any evidence or whether these have been further shipped to Iran, is a finding totally based on assumptions and presumption.

3.3 He also submits that Original Authority as well as the Appellate authority failed to appreciate that the allegation in the notice that the goods have not reached the destination Iran, was made merely by adducing evidence to the effect that the containers were offloaded at Jebel Ali Port in UAE. This at the most can create a suspicion/doubt, but by no stretch of imagination leads to conclusion that goods did not reach Iran. It is settled position in law that 'Suspicion', however strong, cannot be a substitute for evidence. Both the adjudicating authority in the above view of the matter ought to have looked in to the documentary evidence produced by the Appellant in the form of Dubai Customs documents showing further movement of goods from Jebel Ali port to Creek port and onward export to Iran is smaller vessels. Once the documents were adduced by the appellants, controverting the contention of the department, burden of proof shifted back to the customs authorities to prove with valid and sustainable evidence that the Rice was actually cleared from Jebel Ali in UAE.

3.4 He further submits that Original as well as Appellate authority failed to appreciate that the SCEMs submitted by the Appellant conclusively

demonstrated that the goods were exported from Dubai to Iran as confirmed in sub-para(ii) of the Consulate letter reproduced in OIO. The transaction also reveals that the destination port of SCEM's were 'Delvat'/Bushire and other small port all in Iran. These are all small ports in Iran across from Jebel Ali, UAE.

3.5 He also submits that Original as well as Appellate authority failed to appreciate that once the Let Export Orders were granted and the goods were shipped on board of the vessel, keeping in view the provisions of Section 149 of Customs Act, 1962, no amendment in Shipping Bill could have been permitted as contended by the impugned show cause notice and confirmed by the impugned orders. In absence of any violation under Customs Act the proceedings are without jurisdiction.

3.6 He also argued that that Ld. Commissioner fails to appreciate that in the Indo-Iranian Trade, there was no embargo or condition that the exported goods must reach Iran or that they should be consumed in Iran to be eligible to fall within the Rupee trade. In other words there was no "end use" or "used in Iran" only condition. In absence of any such condition, imposing of such condition by assumption as proposed by the impugned show cause notice and confirmation of such non existing condition has vitiated the proceeding. In the case of rice being exported to Iran there was no condition that goods cannot be exported or dealt with in any other manner by the Iranian buyer. In absence of any such condition the impugned show case notice liable to be dropped in limine only without going further in merits of the case. The declaration made before the customs authorities cannot be said to be incorrect in as much as the said goods were exactly as per the description at the time of effecting the exports. The change in B/L has been effected only after completion of all customs procedures and reaching of the vessel in international waters by the Shipping company. Penalty under Section 114AA is leviable only in case of any "material particular" being declared false or incorrect. Mere change of port of discharge from the one originally declared in SB other is not any offence under the Customs Act. The said change in some case is due to reasons known to consignee. It is also fact that the impugned goods are duty free and not involving any export incentives. Hence the goods are not liable for confiscations and no penalty can be imposed.

3.7 Shri Paritosh Gupta, Learned Counsel appearing on behalf of Appellant M/s. V. Arjoon, CHA submits that the diversion of goods to Dubai after clearance for Iran was not brought to the notice of Customs authorities at the port of export by exporters or shipping lines, because cargo had already left Indian waters and had reached Jebel Ali and Exporters/Shipping Line had not requested for any amendment in the Shipping Bill. That no malafide can be attributed to the CHA in the absence of any motive to unlawfully derive any gain. The Role of the CHA is to file shipping bills on the basis of the documents provided by the exporter. Appellant always taken due care in preparing true and correct documents and hence it cannot be alleged that there was a mis-declaration on the part of the CHA. Further, it is also a fact that the exporter is responsible to remit the foreign remittances in the foreign currency, this responsibility cannot be passed on to other person.

3.8 Shri Paritosh Gupta, Learned Counsel also appeared on behalf of Appellant M/s Venus clearing Agency submits that appellant engaged in the business of rendering support services and freight forwarding services to various importers/ exporters. In the impugned matter both the adjudicating authority considered the appellant as Customs Brokers. Appellant have not acted as Customs Broker hence penalty in the impugned matter on appellant is legally not correct. Section 114AA is attracted in a case where the person knowingly enters wrong information in any document submitted with the customs authority. In the present case appellant has not made, singed or used any declaration before the Customs authorities, hence penalties on the appellant is illegal and unlawful. By virtue of documentary evidence produced by the exporter, it is evident that disputed qty. of rice exported by the exporter have duly reached to Iran. In such circumstance penalty is not sustainable.

4. Shri Vinod Lukose, Learned Superintendent (AR) on behalf of revenue reiterates the findings of OIA and placed reliance on the following decisions.

(i) Dharmpal Satyapal [2015 (320)ELT 3 (SC)]

(ii) Patel Engineering Ltd. [2014(307)ELT 862 (Bom)]

(iii) N S Mahesh [2016 (331) ELT 402 (Ker)]

(iv) Chennai Marine Trading [2014(304)ELT 354(Mad.)]

(v) A G Incorporation [2013(287)ELT 357(Tri)]

(vi) Pundole Shahrukh [2014(313)ELT 573 (Tri.)]

(vii) GTC Industries Ltd. [2011(264)ELT 433 (Tri.)]

(viii) Harminder Singh Chaddha [2018(362)ELT 95]

(ix) Krishnaram Dyeing & Finishing Works [2007(209)ELT 410(Tri.)

(x) Om Prakash Bhattia [2003(155) ELT 423 (SC)

(xi) Rajeev Verma [2007(218)ELT 200 Del]

(xii) Shri Rama Thenna Thayalan [2021-TIOL-2269-HC-MAD-CUS]

(xiii) Shri Chinta Haran Oja CHA [2020-TIOL-611-CESTAT-DEL]

5. Heard both sides and perused the records of the case. We find that the case of the department is that M/s Janki Dass Rice Mills had filed the Shipping Bills/Export documents for export of goods i.e. Rice to Iran but the goods were delivered at UAE. The remittance was received in Indian Rupees from Iran instead of free convertible foreign currency. Thus, there appeared to be mis-declaration on part of Appellant. The revenue in support of allegations relied upon the statements of Director, CHAs and the officials of Shipping Lines. However, these persons were not examined in the adjudication proceedings even after the request of Appellant and as such their statements are not admissible as evidence under the provisions of Section138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance of the provision of Section138B of the Act, the statements are not admissible as evidence. Section138B of the Customs Act, 1962 reads as under :-

> ***"138B. Relevancy of statements under certain circumstances. -*** *(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
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> *(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable or*
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> *(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.*

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

5.1 We also find that the rejection of cross-examination in the impugned matter tantamount to violation of principles of natural justice. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section138B. The Hon'ble Madras High Court in the case of *Veetrag Enterprises* v. *Commissioner of Customs* - 2015 (330) E.L.T. 74 (Mad.) has observed as under :

"8. While considering the value of cross-examination, the Apex Court in Ayaaubkhan Noorkhan Pathan's case (cited supra) held thus :

"Cross-examination is one part of the principles of natural justice :

23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given an opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice."

A mere reading of the above said proposition clearly shows that the rules of natural justice require that a party must be given an opportunity to adduce all relevant evidence upon which he relies and further that the evidence of the opposite party should be taken in his presence by giving an opportunity of cross-examining the witnesses examined by that party. In the present case, neither any speaking order has been passed nor the respondent justified in not permitting the petitioner to cross-examine the above said eight witnesses. Thus, such attitude of the respondent shows that the petitioner was not given fair opportunity to defend their case, therefore, not providing an opportunity to cross-examine the above said eight witnesses, in my

view, would violate the principles of natural justice. Accordingly, the impugned order is set aside and the respondent is directed to permit the petitioner to cross-examine the above said eight witnesses and pass appropriate orders on merits and in accordance with law. Such exercise shall be completed by the respondent within a period of 45 days from the date of receipt of a copy of this order.

9. In fine, for the reasons stated above, the writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed."

5.2 We also find that in the present matter all the documents in respect of disputed consignments were in the name of Iranian buyers. There is nothing on record to show that the said documents were amended at any stage so as to permit import of goods at UAE. Further Revenue nowhere produced any documentary evidence to show that the exports documents produced by the Appellant were false and fabricated. We find that once all the export documents were in the name of Iranian buyers there was no scope for clearance of the goods in UAE and its subsequent sale. Further department nowhere disputed the foreign remittance of impugned consignments in Indian Rupees from Iran. In the present matter Appellant also produced the documentary evidences related to re-exported/ transhipments from Dubai to Iran. These documents consisted of -

(i) Documents issued and certificated by Dubai Customs relating to the impugned goods that were re-exported /transhipped from Dubai to Iran.

(ii) Copies of Invoices issued by the freight movers M/s A. Mohamed Zubair at Dubai with regards to movement of containers from Jabel Ali Port to Greek Customs Port where the said containers were destuffed and from where the Rice bags containing Rice were exported/ transhipped to Iran.

(iii) Letter issued by the agent, who acted at the behest of the Iranian buyer to tranship the impugned goods from Jabel Ali Port to Greek Customs Port and onwards to Iran in smaller boats.

(iv) Letter issued by the buyer in Iran, certifying that the rice exported from India vide disputed consignment was received by them in Iran.

(v) Bank documents indicating that remittance have been received from the same buyers.

5.3 We also noticed that in the case of food products the goods which are exported to Iran required Phytosanitary Certificate with each consignment which is issued by the Ministry of Agriculture and Farmer Welfare, Government of India. These certificates are required to be enclosed with each consignment and these certificates are issued by the officials of Ministry of Agriculture and Farmer Welfare, Govt. of India after proper inspection of each consignment. In the present case we have gone through the Phytosanitary Certificates produced by the Appellant. Each of these Phytosanitary Certificate carries e-Registration No., the name of the exporter in India and consignee in Iran, number of bags and its quantity etc. There is no allegation or any evidence that the said certificates were amended at any stage in order to get the goods cleared in a country other than Iran.

5.4 Without prejudice to the above, we further find that Appellant lost the ownership of the goods as soon as 'let export order' was issued by the Customs authorities. After the said let export order it was the responsibility of the Shipping Lines to ship the goods to the foreign buyer and the exporter having no control over the goods. Hence, Appellant cannot be held responsible if the importer situated at Iran had given instruction to change the port from Bandar Abbas port to Jabel Ali port as after the 'let export order' was issued by the Customs authorities it was the importer at Iran who became the owner of the goods. In support of this finding we rely upon the CBEC circular No. 999/2015-CX dated 28-02-2015. This circular is with regard to at what point of time the transfer of property takes place in cases of exports. The CBEC has categorically clarified that after the let export order is issued the transfer of property can be said to have taken place at the port where the shipping bill is filed by the exporter. Further the Hon'ble Apex Court in the case of Collector of Customs, Calcutta Vs. Sun Industries reported in 1988 (35) ELT 241 has held in categorical terms that in case of exports the title of the goods gets transferred to the buyer as soon as the ship carrying goods crossed territorial waters of India.

5.5 We also find that in the present matter none of buyer at Iran have claimed that the goods have been short shipped /not received by them. None of the remittance receipts furnished to the concerned Bank, have been objected to by the concerned Indian Bank. None of the remittance receipts have been alleged to be fake. As per RBI regulations payment against

exports can be received from consignee (foreign buyer) as shown in export documents and cannot be received from any other party. Therefore the contention of revenue that payment has come from third party and not from actual buyer in UAE has no basis and not supported by any evidences, hence not sustainable.

5.6 Without prejudice, we further observe that in this case the only allegation and finding against Appellant is that they had violated para 2.53 of the FTP i.e. to say that since according to the Customs the goods were actually exported to UAE, the payments should have been received in convertible foreign exchange. The whole case revolves around irregularities in respect of receipt of currency with regard to exported goods. We find that these violations relate to post export conditions. There is no doubt that any violation relating to foreign exchange are covered under FEMA, 1999 and not under the Customs Act. Though the show cause notice invoked Section 113(d) and 113(i) of the Customs Act but these provisions were invoked by only alleging violation of para 2.53 of the FTP and section 8 of FEMA, 1999. We are therefore of the view that there was no violation of Customs Act in any manner. There is no dispute about the description of the goods, its quantity and value. The export of rice was neither prohibited nor restricted. It is a well settled law that in respect of alleged violation of foreign exchange, it is the erstwhile FERA authorities or FEMA authorities who are competent to initiate the proceedings against the party. In support of this finding we rely upon the law laid down by this Tribunal in the case of Chinku Exports Vs. Commissioner of Customs, Calcutta reported in 1999 (112) ELT 400 (Tri). This judgment has been upheld by the Hon'ble Apex Court as reported in 2005 (184) ELT A36. This judgment has been followed by this Tribunal in the case of Hillari Computer Exports (P) Ltd vs. Commr. of Cus., Visaskhapatnam reported in 2006 (199) ELT 636 and in the case of Bank of Nova Scotia Vs. Commissioner of C.Ex (Adj), Bangalore reported in 2009 (233) ELT 260 (Tri.-Bang). Though the first two judgments relate to period when FERA was in operation whereas the third judgment in the case of Bank of Nova Scotia relates to period when FEMA came into operation wherein it has been held that if at all there is violation of FEMA and the related regulations suitable action lies with the enforcement authorities and Reserve Bank of India. It has further been held that with regard to the violations of Exim policy, adjudication can be done only by authorities notified under section 13 of Foreign Trade (Development & Regulation Act), 1992. Hence in the facts of the present case since it was only a case of alleged violation of the provisions of Foreign Trade (Development & Regulation Act) and rules

made there under as well as that of Foreign Exchange Management Act, the Customs authorities did not have jurisdiction to issue the show cause notice for said violation.

5.7 In respect of the Appeal filed by M/s. V. Arjoon, CHA and M/s Venus clearing Agency we find that the CHA had filed shipping bills as per the documents provided to him by exporter. Further, M/s Venus was working on the instructions of exporter. Therefore the bonafide act of the Appellants cannot be doubted. The act of filing the export documents for customs clearances shows that the appellants have no *mens rea* and filed the documents being a *bona fide* facilitators.Further, in any event of the matter, since we have already held that the goods were ultimately delivered to the buyers at Iran, there is no justification for imposing penalty upon the appellants, therefore, the penalty imposed on the all the co-appellants is set aside.

6. In view of our above discussion and finding, the order of the Commissioner (Appeals) is set aside and all the appeals filed by the Appellants are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 07.07.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Geeta