



**OFFICE OF THE COMMISSIONER OF CUSTOMS, KACHCHH
CUSTOM HOUSE, NEAR BALAJI TEMPLE, KANDLA.**

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A. File No.	:	S/10-61/Adj/2011-12
B. Order-in- Original No.	:	KDL/COMMR/ 08 /15-16
C. Passed by	:	SHRI PVR Reddy Principal Commissioner of Customs, Kandla.
D. Date of order Date of issue	:	22.07.2015 22.07.2015
E. SCN No. & Date	:	DRI/AZU/Misc-16/2011
F. Noticee(s)/Party/ Importer	:	M/s Shantilal Aboti, House No. 9, Municipal Colony, Opp. AADA office, New Anjar-370110

1. यह अपील आदेश संबन्धित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

**“केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवा कर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ,
0-20, मेघाणी नगर, नया मेंटल हॉस्पिटल कम्पाउन्ड अहमदाबाद 380 016”**

“Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,

0-20, Meghaninagar, New Mental Hospital Compound, Ahmedabad 380 016.”

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के साथ 1000/-रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो, 5000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,व्याज ,शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो, 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क ,दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्डपीठ बैंच आहरित ट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची-1, न्यायालय शुल्क अधिनियम, 1870 के मद सं.-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

6. अपील ज़ापन के साथ इयूटि/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।

Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.

7. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

8. इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Tribunal on payment of 7.5 % of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE:

M/s. Shantilal Champaklal Ahboti (hereinafter referred to as “the Noticee”) is the owner of the truck bearing registration no. GJ-12-W-8969, which is used in transportation of the containers carrying logs of red sanders meant for smuggling out India by M/s. Arihant Ceramic Industries, situated at Chotila Road, Jamvadi, Thangadh-363530, District: Surendranagar, Gujarat which is a partnership firm engaged in the business of export of Ceramic Sanitary Ware. Shri Vinaykant Amritlal Gandhi is one of the partners of the firm, through their appointed CHA M/s Amit K Dedhia, have filed the Shipping Bills bearing numbers 2773536 dated 11.3.2011 and 2773612 dated 11.3.2011 declaring description of goods as “*Ceramic Sanitary Wares*” and country of destination as Dubai (UAE). The export goods were got stuffed in container No: IALU 2203360 and IALU 2204812 under factory stuffing permission, under supervision of jurisdictional Central Excise Officers as detailed below:

Table-1

Container Number	SB No/date	Goods declared	Name and address of exporter
IALU 2203360	2773536 11.03.2011	Ceramic Sanitary Ware	M/s Arihant Ceramic Industries (IEC No. 24980010510), situated at Chotila Road, Jamvadi, Thangadh-363530, District Surendranagar
IALU 2204812	2773612 11.03.2011		

2. On the basis of the specific intelligence that Red Sander Logs were being attempted to be exported; officers of DRI de-stuffed and examined the said containers at M/s. ABG Container Yard at Kandla Port. Both the said containers were found fully stuffed with Wooden Logs and the officers of Forest Department inspected the same and opined that the same were Red Sander Logs. On counting it was found that there were total 1107 Red Sander Logs. On weighment, the same were found to be weighing 27.7 MTs. The said 1107 Red Sander Logs were placed under seizure under the said panchanama under the reasonable belief that the same are liable to confiscation under the provisions of the Customs Act, 1962. The same were handed over to the Customs Kandla for safe custody.

3. Further, the intelligence gathered by the officers of DRI indicated that in the guise of Ceramic Sanitary Ware, Red Sander Logs were already exported vide Shipping Bill No. 2699734 dated 04.3.2011, 2699205 dated 04.3.2011 and 2737867 dated 08.3.2011 in following three containers:

Table-2

Container Number	SB No & date	Goods declared	Name and address of exporter
IALU 2253972	2699734 04.3.2011	Ceramic Sanitary Ware	M/s Arihant Ceramic Industries (IEC No. 24980010510), situated at Chotila Road, Jamvadi, Thangadh-363530, District Surendranagar
CLHU-3379219	2699205 04.3.2011		
IALU 2251692	2737867 08.3.2011		

4. Above mentioned three already exported containers were recalled at Kandla Port and on arrival, the goods stuffed in the same were destuffed and examined under panchanama dated 30.3.2011. During de-stuffing and examination in the presence of the officers of Forest Department, it was found that all the three containers were fully stuffed with total 1769 Red Sander Logs totally weighing 40.53 MTs. These 1769 Red Sander Logs were also placed under seizure vide panchanama dated 30.3.2011, under the reasonable belief that the same were liable to confiscation. These Red Sander Logs were also handed over to the Customs Kandla for safe custody.

5. Details of all the five Shipping Bills filed by M/s Arihant Ceramics Industries through their CHA M/s Amit K. Dedhia

All the five containers mentioned in table 1 and 2 above are covered in the five Shipping Bills. The details of the said five Shipping Bills are as follows:-

Table-3

Shipping Bill No. and Date	Container No.	Declared Description of the goods	FOB Declared	Quantity of the declared goods	Value per MT (Rs.)
2773536 11.03.2011	IALU 2203360	Ceramic Sanitary ware	114336	11.200 MTs	10209
2773612 11.03.2011	IALU 2204812	Ceramic Sanitary ware	114336	11.200 MTs	10209
2699734 04.3.2011	IALU 2253972	Ceramic Sanitary ware	109190	10.800 MTs	109200
2699205 04.3.2011	CLHU- 3379219	Ceramic Sanitary ware	114112	11.200 MTs	10188
2737867 08.3.2011	IALU 2251692	Ceramic Sanitary ware	114336	11.200 MTs	10209
	total		566310	55.6 MTs	10185

5A. During Investigation it was found that the following trucks were used for transportation of the above mentioned seized goods:

Table No. 4

Container Number	SB No/date	Goods declared	Name and address exporter	Truck used for transportation
IALU 2203360	2773536 11.03.2011	Ceramic Sanitary Ware	M/s Arihant Ceramic Industries (IEC No. 24980010510), situated at Chotila Road, Jamvadi, Thangadh- 363530, District Surendranagar	<u>GJ-12-W-8969</u>
IALU 2204812	2773612 11.03.2011			GJ-12-W-5857
IALU 2253972	2699734 04.3.2011			<u>GJ-12-W-8969</u>
CLHU 379219	2699205 04.3.2011			GJ-12-X-2028
IALU 2251692	2737867 08.3.2011			GJ-12-X-2028

6. During investigation, it was also learnt through sources that three trailers/trucks used in transportation of the containers mentioned in Table-2 above were lying in abandoned condition near a hotel on Chotila Highway. On verification, it was found

that these three trailers/ trucks (GJ-12-W-5857, GJ-12-W-8969 and GJ-12-Y-6674) were lying there and were loaded with three containers stuffed with some goods (*one container on each trailer/ truck*). The said trailers/ trucks, along with containers and stuffed goods, were brought to Kandla Port and on examination it was found that these containers were stuffed with Ceramic Sanitary Ware. The Ceramic Sanitary Ware as well as above three trailers/ trucks were placed under seizure under panchanama dated 20.4.2011. The same were also handed over to Customs Kandla for safe custody.

7. Copies of some documents pertaining to insurance of vehicle No. GJ 12W 5857 (*short size*) and GJ 12Y 6674 (*long size*) done in year 2010 were found available in respective vehicles. In these documents value of these two vehicles were shown as Rs. 4,00,000/- and Rs. 7,50,000/- respectively. Looking to comparative condition of the vehicle No. GJ 12W 8969 its value is estimated to be approximately Rs. 3,00,000/-.

8. Details of ownership of the subject three trailers/ trucks were obtained from the office of the Regional Transport Office, Bhuj. They informed details of ownership as under:

Table-5

SI No:	RTO Registration number of trailer/ trucks	Name & address of the owner of the trailer/ trucks	Weight of the trailer/ truck
1	GJ-12-W-5857	Rahul Rajesh Bhanushali, Plot No: 190, Ashapura Society, Bharat Nagar, Gandhidham-Kutch	8000 KGs.
2	GJ-12-W-8969	Shantilal Champklal Aboti, 184 Nagar Palika Colony, Anjar-Kutch.	7500 KGs.
3	GJ-12-Y-6674	Rahul Rajesh Bhanushali, Ashapura Society, Bharat Nagar, Gandhidham-Kutch	11090 KGs.

9. To collect further evidences, following summons were issued to the owner of trailer/ truck having registration No. GJ-12W-8969 i.e. Shri Shantilal Champklal Aboti, but he did not appear before the officers of DRI for recording of his statement:

Table No. 6

SI. No.	Date of issue of summons	Date of appearance	Remarks
1	03.05.2011	09.05.2011	No response
2	14.06.2011	21.06.2011	No response
3	22.06.2011	14.07.2011	Received back undelivered

10. During investigation Red Sanders Logs exported/ attempted to be exported by M/s Arihant Ceramic Industry were seized by DRI under Panchnamas dated 16-17 March 2011 and 30.3.2011, the details of which are given in the table below:-

Table No. 7

Shipping Bill No. and Date	Container No.	Truck No.	Declared Description of the Goods	Actual Description of Goods	Seizure Panchnama date
2773536 11.03.2011	IALU 2203360	GJ 12 W 8969	Ceramic Sanitary Ware	Red Sanders Logs weighing 12.830 MTs	16- 17/03/2011
2773612 11.03.2011	IALU 2204812	GJ 12 W 5857	Ceramic Sanitary Ware	Red Sanders Logs weighing 14.870 MTs	16- 17/03/2011
2699734 dated 04.3.2011	IALU 2253972	GJ 12 W 8969	Ceramic Sanitary Ware	Red Sanders Logs weighing 13.390 MTs	30/03/2011
2699205 dated 04.3.2011	CLHU- 3379219	GJ 12 X 2028	Ceramic Sanitary Ware	Red Sanders Logs weighing 14.340 MTs	30/03/2011
2737867 dated 08.3.2011	IALU 2251692	GJ 12 X 2028	Ceramic Sanitary Ware	Red Sanders Logs weighing 12.800 MTs	30/03/2011
Total Quantity of Red Sander Logs seized:				68.23 MTs	

11. Further the three trucks used in the transportation of the containers found stuffed with the Red Sander logs were also seized under panchnama dated 20/04/2011. The details of the goods seized in the said panchnama are given in the table below:

Table No. 8

Truck No.	Container No.	Goods	Total Weight	Tare Weight of Container	Tare Weight of the truck (RTO Details)	Weight of Sanitary Ware under seizure
GJ 12 W 8969	IALU 2246649	Sanitary Ware	19.600 MTs	2.185 MTs	7.500 MTs	9.915 MTs
GJ 12 W 5857	IALU 2200695	Sanitary Ware	22.110 MTs	2.230 MTs	8.000 MTs	11.880 MTs
GJ 12 Z 6674	IALU 4563339	Sanitary Ware	37.450 MTs	4.080 MTs	11.090 MTs.	22.280 MTs
	TOTAL					44.075 MTs

12. The trucks mentioned in the table above were used for transportation of Red Sanders logs for smuggling. Truck No. GJ 12 W 5857 and GJ 12 Z 6674 are owned by Shri Rahul Bhanushali, who was actively involved in this smuggling activity and after detection of the case he is absconding. Further truck No. GJ 12 W 8969 is owned by Shri Shantilal Champaklal Aboti, to whom three summons were issued but he remained absconding. Further sanitary ware found stuffed in the containers loaded on the above said trucks/ trailers was identified by Shri Vinaykant A Gandhi, one of the partners of M/s. Arihant Ceramic Industries and Central Excise officers as the goods

stuffed in the factory premises of M/s Arihant Ceramic Industries for export. These goods were stuffed in containers for export under Central Excise sealing but were not exported. This fact makes it very evident these goods were replaced with red sanders logs in transit to Kandla port from factory premises of the exporter. During investigation it is found that the containers were stuffed in the factory premises of the exporter in the presence of Central Excise officers and the containers so stuffed were sealed in the presence of the Central Excise Officers. Only after sealing the containers with Central Excise Seal the containers were allowed to move out of the factory premises. As per statements of the Central Excise Officers and the exporter the containers were always stuffed with Sanitary Ware/ Fire Bricks only. The containers with Central Excise Seal were transported from factory premises to the Kandla Port for export from India. Further it is evident that the container seals which were placed on the containers by Central Excise Officers after stuffing of containers are not same as the seals found on the container during examination by DRI. As the seals were changed, it is evident that the sanitary ware/ fire bricks has been replaced with Red Sander Logs in the transit from factory premises of exporter to Kandla Port. After replacing the goods with Red Sanders the containers were sealed with the fake seals.

13. Therefore, a show causes notice bearing F. No. DRI/AZU/Misc-16/2011 dated. 05.03.2012 was issued by the Additional Director General, DRI, Ahmedabad to M/s Arihant Ceramic Industries, Surendranagar, Gujarat, Shri Vinaykant Amrutlal Gandhi, partner of M/s. Arihant Ceramic Industries, Shri Vishal Shah of Mumbai, Shri Rahul Bhanushali of Mumbai / Gandhidham , Shri Ganesh of Gandhidham, to the CHA i.e. M/s Amit K Dedhia, Gandhidham, Gujarat and the noticee Shri Shantilal Champklal Aboti, 184 Nagar Palika Colony, Anjar-Kutch proposing imposition of fine penalty upon them.

14. In the said Show cause Notice Shri Shantilal Champklal Aboti, 184 Nagar Palika Colony, Anjar-Kutch was called upon to show cause to the Commissioner of Customs, Kandla having his office at Custom House, near Balaji Temple, Kandla, Gujarat, as to why:-

- (i) Trailer bearing RTO Registration No: GJ-12-W-8969 valued at Rs. 3,00,000/- should not be confiscated under section 115 (2) of the Customs Act 1962;
- (ii) penalty under section 114 of Customs Act 1962 should not be imposed upon him.

15. The Noticee Shri Shantilal Champklal Aboti did not responded to the Show cause notice and the matter was adjudicated by the Commissioner of Customs Kandla vide OIO NO. KDL/Commr/09/12-13 dated 25.07.2012 wherein the then adjudicating authority ordered confiscation of the goods in question viz. Trailer bearing RTO Registration No. GJ-12-W-8969 valued at Rs. 3,00,000/- (Rs. Three Lakhs only) under Section 115 (2) of Customs Act, 1962. However, giving an option to the noticee to redeem the above mentioned confiscated goods on payment of a redemption fine of

Rs. 10,000/- (Rupees Ten Thousand only) in lieu of confiscation within 30 days of receipt of the said order by them along with a penalty of Rs. 5,00,000/- (Rs. Five Lakh only.) under Section 114 of the Customs Act, 1962.

16. Being aggrieved by the said Order the noticee preferred an appeal before the Hon'ble CESTAT, Ahmedabad contending the imposition of penalty of Rs. 5,00,000/- under the provisions of the Section 114 of the Customs Act, 1962. The Tribunal vide its order No. A/10567/2014 dated 21.03.2014 in appeal no. C/273/2012-SM remanded the matter back to the adjudicating authority and directing the Noticee to submit the reply on or before 25.04.2014.

DEFENCE & PERSONAL HEARING :-

17. As per the directions of the CESTAT the Noticee submitted their written submission in the matter on 23.04.2014 received in the office on 24.04.2014 wherein the Noticee has stated that the impugned order no. KDL/Commr/09/12-13 dated 25.07.2012 is not at all legally sustainable for the following reasons:

17.1 that there is no evidence in the entire show cause notice that the noticee replaced the Ceramic Sanitary ware in the aforementioned two containers with Red Sander logs on the way for Thangarh to Kandla port. When the Red Sander were seized from the containers, the same were not found loaded on the truck trailer of the noticee. Therefore there was no seizure of any prohibited goods from the truck trailer of the noticee. Further, the truck trailer was found to be loaded with ceramic sanitary wares. Which are not prohibited goods for export.

17.2 that Section 115(2) provides for confiscation or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable for confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal. There is no evidence that the noticee's truck trailer was used as a means of transport in the smuggling of any goods.

17.3 that there is no evidence that the noticee got prepared lorry receipts issued to non-existing transport firm with fake address. There is also no evidence that the noticee changed the seals on the containers on the way and replaced the goods. In other words, there is no evidence that the noticee did or omitted to do any act or abetted the doing or commission of any such act, which rendered the red sander wood logs liable to confiscation under section 113 of the Customs Act, 1962.

17.4 that in the case of containers loaded on the truck trailer, which are sealed at the factory / place from where the same is loaded, the truck owner or the truck driver cannot be held liable for the contents loaded in the container. The Noticee further submits that no prohibited goods were seized from his truck trailer. The noticee wishes to rely on the Hon'ble CESTAT's decision in the case of Prakash Freight Movers Ltd.,

vs. Commissioner of Customs, Chennai, reported at 2010 (261) E.L.T. 269 (Tri-Chennai), wherein the Hon'ble CESTAT set aside the order of confiscation of the trailer and imposition of penalty on the owner of the trailer on the ground that no Red Sanders were seized from the trailer of the noticee therein. The said decision of the CESTAT is squarely applicable to the facts of the noticee's case as no red sanders were seized from the truck trailer of the noticee.

17.5 that the noticee had given truck to Shri Kanji Jesang Dangar, on hire purchase basis on 06.04.2009, which was further given to Shri Rahul Bhanushali for using it for transportation on 27.07.2010. During the relevant period, the noticee was not in control of the vehicle. Subsequently, the said truck was returned to the noticee, on 08.10.2013. A copy of the affidavit given by Shri Kanji Jesang Dangar, in gujarati dated 08.10.2013 alongwith free English translation, has submitted. Therefore the noticee is holding the ownership of the vehicle as on today and also as per RTO records.

17.6 that the noticee are totally innocent in the entire activities of the main noticee , i.e. Arihant Ceramic Industries, Thangarh. The Noticee is not involved in any of the smuggling activities, as alleged in the impugned show cause notice.

17.7 that the proposal for confiscation of the truck no. GJ-12-8969 as proposed under section 115(2) of the Customs Act,1962 is not at all sustainable and is liable to be set aside.

17.9 that in view of the submissions made, the proposals to impose penalties under Section 114 of the Customs Act, 1962, is not sustainable, and therefore, is liable to be set aside.

Further adjudicating the matter afresh the Noticee was given personal hearing on 03.03.2015, 07.04.2015 and 10.07.2015. The authorized representative of the noticee Shri Amit S. Shantilal Aboti & Shri Sunil H. Krishnani, Consultant attended the hearing on 10.07.2015 wherein they have filed a written submission stating that they are the owner of vehicle/ truck bearing registration no. GJ-12-W-8969. The noticee used to run/operate his vehicle/truck in an individual capacity in local transportation prior to giving it on hire purchase. Then on dated 06.04.2009 noticee gave the said vehicle/truck to Shri Kanji JesangDangar on a hire purchase basis, which was further given to Shri Rahul Bhanushali on 27.07.2010 and during the relevant period, the noticee was not in control of vehicle. Further during that period the noticee was not aware of where does the vehicle is in use by Shri Rahul Bhanushali. Subsequently, the said vehicle/truck was returned to the noticee, on 08.10.2013. A copy of affidavit given by Shri Kanji Jesang Dangar, in gujarati dated 08.10.2013 along with English Translation is enclosed herewith for kind proposal and consideration. The contention of an affidavit states that Shri Kanji Jesang Dangar was unable to pay the agreed amount within a time limit towards purchase of above vehicle/truck henceforth he gives back the possession of said vehicle/truck to Shri Shantilal Champaklal Aboti and the entire ownership of the vehicle will now remain only with Shri Sahntilal Aboti and further Shri

Kanji Jesang Dangar has no objection and will not claim any right on the said vehicle in future.

The noticee further submitted the vehicle Report duly certified/signed by the jurisdictional RTO for the said vehicle/truck which clearly states the name of the noticee on it and requested to release the said vehicle/truck No. GJ12W-8969 at the earliest.

DISCUSSION & FINDINGS :

18. I have carefully gone through the facts of the case and defence submissions. The export of Red Sander Logs in any form, whether raw, processed or unprocessed is prohibited under the Foreign Trade Policy for 2004-2009 formulated under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (under Sl. No. 154, Tariff Item HS Code 4403 9918, 4407 9990 of Schedule 2 of Export Policy) and as per section 114 of the Customs Act 1962 when any person smuggles goods out of India or abets such smuggling he is liable for penalty. I find that the basic issue in the instant case is that Red Sander Logs, which are prohibited for export were being exported under the guise of sanitary wares. Further, I find that all the export containers were stuffed and sealed in the factory premises of M/s Arihant Ceramic Industry in the presence of the Central Excise officers and dispatched to Kandla port for export. Thereafter the seals were broken and the commodity i.e. Ceramic Sanitary Ware were replaced with the contraband red sander and the same has been tried to be exported.

19. I find that Shantilal Champklal Aboti, 184 Nagar Palika Colony, Anjar-Kutch was the owner of the trailer bearing RTO Registration No: GJ-12-W-8969 which was used in transportation of smuggled goods and the noticee was absconding from investigation and has not responded to three summons issued to him from time to time. It is only after the directions of CESTAT dated 21.03.2014 he appeared before the Adjudicating authority in the remand proceedings.

20. I find that the noticee has already paid the redemption fine of Rs. 10,000/- vide challan No. 3305 dated 06.08.12 as imposed on the noticee vide of OIO No. KDL/Commr/09/12-13 dated 25.07.2012 by the Commissioner of Customs Kandla.

21. I have also carefully gone through the copies of agreement & affidavit submitted by the noticee along with his defence reply dated 23.04.2014. The noticee has submitted following documents:-

a) Notarized agreement between Shri Kanji Jesang Dangar, Anjar, Kutch and Shri Rahul Rajeshbhai Bhanushali, Gandhidham dated 27.07.2010.

b) Notarized sale agreement between Shri Kanji Jesang Dangar, Anjar, Kutch and Shri Shantilal Champaklal Aboti dated 31.03.2011.

c) Notarized affidavit filed by Shri Kanji Jesang Dangar, Anjar, Kutch dated 08.10.2013.

22. I find that the contentions of the noticee that they are innocent is not correct. The contentions of the notice that they are not the owner of the said trailer at the material time and are there is no evidence of their involvement in the smuggling as the smuggled goods were not found loaded on the truck trailer at the time of the seizure of trailer truck is not correct.

21. I find that as per the investigation of the DRI as mentioned in para 10 above, the containers IALU 2203360 & IALU 2253972 carried by the said truck were carrying the red sanders logs and were exported under shipping Bill no. 2773536 dated 11.03.2011 and 2699734 dated 04.3.2011 respectively and the seizure of the containers was done on 16-17/03/2011 and **30/03/2011** respectively. Further as per the Notarized sale agreement between Shri Kanji Jesang Dangar, Anjar, Kutch and Shri Shantilal Champaklal Aboti it is evident that the said truck was sold on 31.03.2011. Thus, it is apparent that when the noticee came to know that the containers carried by them were seized by the DRI on 30.03.2011 he immediately transferred/sold the same to Shri Kanji Jesang Dangar, Anjar on 31.03.2011. Thus at the time of committing the crime and till the time of seizure of the containers the legal owner of the truck was the Noticee i.e. Shri Shantilal Champaklal Aboti only and onus of wrong deed lies on him alone and thus his contention of being unaware of the issue and he is not the owner of the truck is not correct. This act of the noticee only shows his deliberate action only to mislead the facts and his involvement in the smuggling with a well advanced planning in the matter.

22. I also find that the noticee has transferred the ownership of the truck on 31.03.2011 only and thus was the owner of the truck till 30.03.2011, therefore, the genuineness of the agreement between Shri Kanji Jesang Dangar, Anjar, Kutch and Shri Rahul Rajeshbhai Bhanushali, Gandhidham dated 27.07.2010 is questionable, because Shri Kanji Jesang Dangar, Anjar, Kutch was not the owner of the said truck on 27.07.2010 when he entered into an agreement with Shri Rahul Rajeshbhai Bhanushali, Gandhidham on 27.07.2010. This only shows the nexus of the persons is only to mislead the investigating agencies. Creating this type of documents is only an afterthought in order to escape from penal consequences.

23. Further, the affidavit of Shri Kanji Jesang Dangar, Anjar, Kutch dated 08.10.2013 also appears to be fabricate, only to conceal the involvement of the noticee, as Shri Kanji Jesang Dangar, Anjar, Kutch has stated that for the reason he could not pay the amount of said truck to the seller he is handing over the possession back to the noticee. From the above discussion it is evident that the truck was sold on 31.03.2011 and the buyer is returning the same back to the seller on 08.10.2013 i.e. after using the same nearly for two years on the ground of nonpayment of purchase value and the entire transactions are fictitious and doubtful in nature.

24. The noticee has stated that he has given the truck to Shri Kanji Jesang Dangar, Anjar on 06.04.2009 on hire purchase basis which was further given by Shri Kanji Jesang Dangar, Anjar to Shri Rahul Bhanushali for using it for transportation on 27.07.2010. I find that the said agreement dated 06.04.2009 was notarized on 31.03.2011 i.e. after two years. If the ownership is further transferred to Shri Rahul Bhanushali on 27.07.2010 by Shri Kanji Jesang Dangar, Anjar, then the question of notarizing i.e. legalizing the agreement on 31.03.2011 between the noticee and Shri Kanji Jesang Dangar, Anjar and further producing the same to the adjudicating authority in a quasi judicial procedure shows well planned thought and act of the noticee in connivance with the others to smuggle the prohibited items and to conceal their illegal acts.

24. Further, I find that it is almost impossible to replace the cargo/ container from the carrying truck without the consent of the driver/ the owner or without their connivance. Further the lying of truck in abandoned condition when it was seized by the DRI i.e. without any driver etc. also shows the well awareness and abetment of the noticee in the said acts. Thus applying the principle of preponderance of probability it is evident that the noticee was the owner of the said truck and was well aware and involved in the smuggling of red sanders which is very serious offence and when he came to know that the matter is taken up by the DRI he willfully left the truck abandoned which was seized by DRI on 20.04.2011 and has immediately transferred the ownership of the truck on other person name. Further, he did not responded to the summons issued during investigation only proves the guilty state of the noticee. Only after the directions of CESTAT he approached the department and has submitted the agreements & affidavit which are contradictory to each other. Thus from the above discussion and the documents/agreements /affidavit on record it is evident that this is a well planned act of the noticee in connivance with the others to smuggle the prohibited items and he is liable for penalty under section 114 of the Customs Act,1962. I find that there is no other evidence to contradict with the findings of my predecessor's order and I am in full agreement with the same. In the cases of this nature the Investigating agency is not required to prove the case with mathematical precision as held by Hon'ble Supreme Court in the case of Collector of Customs, Madras and others vs D Bhoormull, 1983 (13) E.L.T 1546 (SC). wherein it was held that the prosecution or department is not required to prove its case with mathematical precision, but what is required is the establishment of such degree of probability that a prudent man on its basis believe in the existence of the facts in issue.

25. In view of the above, I pass the following order:

: ORDER :

- (i) I order confiscation of the goods in question viz. Trailer bearing RTO Registration No. GJ-12-W-8969 valued at Rs. 3,00,000/- (Rs. Three Lakhs only) under Section 115 (2) of Customs Act, 1962. However, I give an option to

redeem the above mentioned confiscated goods on payment of a **redemption fine of Rs. 10,000/- (Rupees Ten Thousand only)** in lieu of confiscation. As the noticee has already deposited said amount vide challan No. 3305 dated 06.08.12. I order to appropriate the same.

- (i) I impose penalties of Rs. 5,00,000/- (Rs. Five Lakhs only) on Shri Shantilal Champklal Aboti, House No. 09, Opp. AADA office, New Anjar-370110 under Section 114 of the Customs Act, 1962, on the following persons / firms :

(P.V.R. Reddy)
PRINCIPAL COMMISSIONER

By REGD. POST A.D/Hand Delivery

F.No.S/10-61/Adj/2010-11

Dated : 22 /07/2015

To,

Shri Shantilal Champklal Aboti,
House No. 09, Opp. AADA office,
New Anjar-370110

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad for information.
3. The Assistant Commissioner (Recovery Cell), Customs House, Kandla.
4. Guard File.

1993 (65) E.L.T. 50 (Tribunal)

BEFORE THE CEGAT, NORTH REGIONAL BENCH, NEW DELHI

S/Shri S.K. Bhatnagar, Member (T) and D.M. Vasavada, Member (J)

BAKSHA RAM

Versus

COLLECTOR OF CUSTOMS

Order No. A/315/90-NRB, dated 7-6-1990 in Appeal No. C/1108/86-NRB

Penalty on transportation – Customs – Conveyance used for transporting contraband goods sold to another person although continued to be registered in seller's name - Seller neither having used the vehicle for transporting contraband goods nor conniving at such use of vehicle, penalty imposed not justified - Section 115 of Customs Act, 1962. -

The contention of the appellant that he has sold the vehicle, in question, to Jeevan Lal could not be verified as he could not be traced at the address given by the appellant. It was incumbent upon the adjudicating authority to enquire from him about the contention of the appellant. Much more so, when the appellant had produced photostat copy of the affidavit (Halfnama) wherein Jeevan Lal is declared to have purchased the vehicle for Rs. 12000/- on 4-3-1981 and that he had already obtained possession of the vehicle and had agreed that from that date onwards, he, i.e. Jeevan Lal would be liable to pay all taxes etc. and would be liable for all the consequences that might arise out of any accident etc. The Additional Collector observed that the registration of the seized vehicle, at the time of seizure, was still in the name of the appellant. Position of law is very clear that the owner could be liable only if it could be shown that either he had used the vehicle for transporting contraband goods or that he had allowed it to be so used or that he connived at such use of the vehicle. There is absolutely no evidence to this effect on record. So, assuming for the sake of arguments that the vehicle belonged to the appellant and was not transferred to Jeevan Lal, then also that fact, by itself, would not justify implicating the appellant with the act of transporting the contraband goods and would not justify imposition of any penalty on the appellant. [para 4]

REPRESENTED BY: None for the Appellant.

Shri R.M. Ramchandani, SDR, for the Respondents.

[Order per : D.M. Vasavada, Member (J)]. - Facts, relevant for the purpose of deciding this appeal, are that Police intercepted one Jonga Jeep bearing No. RSN 8385. The occupants managed to escape and on search the jeep was found loaded with bales and gunny bags containing some contraband goods. On inquiry, the jeep was found to be belonging to the appellant. His statement was recorded under provisions of Section 108 of the Customs Act, 1962 wherein he said that he has sold this jeep to one Shri Jeevan Lal and he produced a photostat copy of the Affidavit in support of his contention. He also gave address where Shri Jeevan Lal was working. Summons were sent at the said address, but they were returned with the remarks that 'nobody with such name was working there'. So, as stated in the impugned order para 2, contention of Shri Baksha Ram that he had sold the vehicle, could not be verified or established. Show cause notices were issued to the appellant and also to Shri Jeevan Lal and on adjudication, goods and the vehicle were ordered to be confiscated absolutely and personal penalty of Rs. 1,000/- was imposed on the appellant. Charges against Shri Jeevan Lal were dropped. Aggrieved by this order, the appellant has preferred this appeal.

2. The appellant did not remain present, but sent written submissions accompanied by the original Affidavit.

3. We heard Sh. R.M. Ramchandani, Id. S.D.R. for the respondent. Shri Ramchandani reiterated the arguments advanced in the impugned order.

4. In para 8 of the impugned order, the Additional Collector has referred to defence reply of Shri Jeevan Lal. Surprisingly, in para 2 of the impugned order, the Additional .Collector has

observed that as said, Shri Jeevan Lal could not be traced at the address given by appellant, the contention of the appellant that he has sold the vehicle, in question, to said Shri Jeevan Lal, could not be verified. Admittedly, Shri Jeevan Lal did file his defence reply and it was incumbent upon the adjudicating authority to enquire from him about the said contention of the appellant. Much more so, when the appellant had produced photostat copy of the affidavit (Halfnama) wherein said Shri Jeevan Lal is declared to have purchased the vehicle for Rs. 12,000/- on 4-3-1981 and that he had already obtained possession of the vehicle and had agreed that from that date onwards, he, i.e. Shri Jeevan Lal would be liable to pay all the taxes, etc. and would be liable for all the consequences that might arise out of any accident, etc. The Additional Collector does not appear to have confronted said Shri Jeevan Lal with the said Affidavit. He has stated that the appellant had not produced the original Affidavit, but then the Collector could have called upon the appellant to produce it. The Additional Collector verified the signature of the said Shri Jeevan Lal on the photostat copy of the Sale Deed (in the form of Affidavit) and he came to the conclusion that the signature of Shri Jeevan Lal on the said Sale Deed do not tally with the signature of his reply to the show cause notice. Apart from that the Additional Collector observed that the registration of the seized vehicle, at the time of seizure, was still in the name of the appellant. Position of law is very clear that owner could be liable only if it could be shown that either he had used the vehicle for transporting contraband goods or that he had allowed it to be so used or that he connived at such use of the vehicle. There is absolutely no evidence to this effect on record. So, assuming for the sake of arguments that the vehicle belonged to the appellant and was not transferred to Shri Jeevan Lal, as contended by the appellant, then also that fact, by itself, would not justify implicating the appellant with the act of transporting the contraband goods and would not justify imposition of any penalty on the appellant. In the circumstances, the appeal is required to be allowed. So, we pass the following final order :

The appeal is allowed and the impugned order is modified to the extent that penalty imposed upon the appellant is set aside with consequential relief to the appellant.

13. Relevant legal provisions:

1. As per section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992, all goods to which sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962. Under the Foreign Trade Policy for 2004-2009 formulated under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (under Sl. No. 154, Tariff Item HS Code 4403 9918, 4407 9990 of Schedule 2 of Export Policy), export of Red Sander Wood in any form, whether raw, processed or unprocessed is prohibited.
2. As per Section 2(33) of the Customs Act, 1962, prohibited goods means any goods the import or export of which is subject to any prohibition under this Act, 1962 or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.
3. As per Section 2(39) of the Customs Act, 1962, smuggling in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113.
4. As per Section 113(d) of the Customs Act, 1962, any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for time being in force shall be liable to confiscation.
5. As per Section 113(i) of the Customs Act, 1962, any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act shall be liable to confiscation.
6. As per section 113(k) of customs Act, 1962, any goods cleared for exportation which are not loaded for exportation on account of any willful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;
7. As per section 114 of the Customs Act 1962 when any person smuggles goods out of India or abets such smuggling he is liable for penalty.
8. As per Section 115 of the Customs Act, 1962, any conveyance used as a means of transport in the smuggling of goods or in the carriage of any smuggled goods is liable to confiscation.
9. As per section 119 of the Customs Act 1962, any goods used for concealment of smuggled goods liable for confiscation.
10. Regulation 13 of Customs House Agents Licensing Regulations, 2004 casts following obligation on the Custom House Agents:-

Notarized agreement dated 31.03.2011 and the issue was of 04.03.2011 and 11.03.2011 (S/B dates), DRI seizure dates 30.03.2011