IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.234 of 2006

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Commissioner of Custom (Prev.) Patna C.R.Building B.C. Patel Path, Patna
.... Appellant/s

Versus

Shri Bijoy Kumar Lohia @ B.Kumar @ Bijay Lohia, M/S. Bijay Stores,95, Alupatti No.1. Rly. Gate Siliguri.
.... Respondent/s

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with

Miscellaneous Appeal No.235 of 2006

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Commissioner of Customs (Prev.) Patna C.R. Building B.C. Patel Path, Patna.
.... Appellant/s

Versus

Narendra Kumar @ Lohia (M/s. Bijay Stores) C/O M/S. Bijoy Store 95, Alupatti No.1, Rly. Gate Siliguri.
.... Respondent/s

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Appearance :
(In MA No.234 of 2006)
For the Appellant/s : Mrs. Nivedita Nirvikar

For the Respondent/s : Mr.
(In MA No.235 of 2006)
For the Appellant/s : Mrs.Nivedita Nirvikar

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

7 19-02-2015 Heard learned counsel for the appellant.

Both the appeals arise out of the common order dated 24.11.2005 passed, by the Member (Technical), Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, in Appeal No.CSM-139/2004 and 140 of 2004, by which the Tribunal has allowed the appeals filed by the respondents and set aside the orders dated 21.7.2004 passed by the Commissioner

(Appeals) Customs and Central Excise, Patna.

The proceedings arose out of seizure of 112 bags of betel nuts and 05 bags of poppy seeds under Section 110 of the Customs Act, 1962 on 6.2.1998. Out of the same, 50 bags of betel nuts and 5 bags of poppy seeds were unclaimed. With respect to remaining 62 bags of betel nuts, the claims were made respectively by the two respondents and another person. The Joint Commissioner, Customs, Patna by his order dated 31.12.2001 directed absolute confiscation of the entire seized articles, which were taken in appeals. The respondents challenged the order before the Commissioner (Appeals), Customs and Central Excise, Patna and upon rejection of the same by order dated 21.7.2004 moved before the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, which allowed their appeals leading to the filing of the present appeals by the Department.

Learned counsel for the appellant-Department has sought to assail the order of the Tribunal on the ground that the claim for only 62 bags of betel nuts was made but no one came forward to claim five bags of poppy seeds and even the claim for remaining 62 bags of betel nuts was made belatedly, which goes to show that the same were of third country origin and illegally imported from Nepal, as has been held by the Joint Commissioner and Commissioner (Appeals).

It is further submitted that the factum of third country origin of the betel nuts was also supported by trade opinion taken by the Customs Department and thus the orders passed by the Joint Commissioner and the Commissioner (Appeals) ought not to have been interfered with by the Tribunal.

It is not in dispute that the goods in question are not notified goods under Section 123 of the Customs Act and thus the burden of proof in such matters that they were of foreign origin or smuggled would squarely lie upon the Department. The Tribunal while coming to the said conclusion has relied upon a decision of the Calcutta High Court in the case of the Commissioner of Customs (Prev),W.B., Kolkata vs. Sudhir Saha: 2004 (172) ELT-26 (Cal). The question of reliance of the trade opinion, when there are no significant differences in the betel nuts of Indian origin as compared to those of foreign origin, has also been decided against the Department in the case of Commissioner, Customs Department, Government of India, Patna vs. Dwarika Prasad Agarwal: 2009 (2) PLJR 858 and its analogous cases, in paragraph No.8 of which it has been held as follows:-

> "8. We do not find any substance in the submission of Mr. Singh. It is not in dispute that betel nut is non-notified item and, as such, the onus to prove that the same is of foreign origin lies on Custom authority. It is further not the case that betel nuts available in the country are significantly different than those of foreign country. The contention that betel nuts of

> foreign origin are little bigger than what is available in the country itself will not lead to the conclusion that it is of foreign origin. In our opinion, in absence of significant and apparent difference between the betel nuts available in this country and of foreign origin it shall be difficult to come to a definite finding that betel nuts are of foreign origin on the basis of trade-opinion. We hasten to add that trade-opinion may not be an expert opinion but opinion based on long experience in the trade considering significant difference in the items of Indian origin and foreign origin may be of persuasive value and may not be thrown out only on the ground that trade opinion is not an expert-opinion. If there are significant differences in shape, size, taste etc. of betel nuts of Indian origin than the betel nuts of foreign origin the person in trade may form an opinion that it is of foreign origin which in the facts of a given case may be accepted. However in the present case we find that the trade opinion is not based on any significant decisive difference. In that view of the matter, we are of the opinion that betel nuts directed to be confiscated cannot be said with certainty to be of foreign origin."

Similar view has been held in a catena of decisions. In view of the well established proposition of law, we do not find any merit in the appeals filed by the Department. The appeals are, accordingly, dismissed.

V.P.Sinha/-

(Ramesh Kumar Datta, J)

(Anjana Mishra, J)

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