In the High Court of Judicature at Madras

Dated: 26.06.2015

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The Honourable Mr.JUSTICE R.SUDHAKAR
and
The Honourable Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.1235 of 2015

& M.P.No.1 of 2015

Ram Gopal Kudal
D-1109-1110
Ashirwwad Park City Light, Surat
Gujarat - 395 007.
.... Appellant

Vs.

1. Additional Commissioner of Customs
(DEEC), Chennai,
Customs House, 60 Rajaji Salai,
Chennai - 600 001.

2. Customs, Excise and Service Tax Appellate
Tribunal, Chennai Bench,
No.26, Haddows Road, 1st Floor,
Shastri Bhavan Annexe,
Chennai - 600 006.
.... Respondents

APPEAL filed under Section 130 of the Customs Act against the order dated 06.05.2015 made in Misc.Order No.40718 of 2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.Karthik Sundaram

For Respondents: Mr.A.P.Srinivas

J U D G M E N T
(Judgment of the Court was delivered by R.SUDHAKAR,J.)

Challenging the Miscellaneous Order passed by the Tribunal ordering pre-deposit, the appellant is before this Court.

2. The brief facts of the case are as follows:
Alleging that the appellant and his associates M/s.Narayan Impex and Shree Shyam Exports were misusing the license received under

Advance License Scheme and evading customs duty on the imported goods by diverting goods imported duty free under the license into the local market without utilizing them for the intended purpose, show cause notice was issued to the appellant along with other persons proposing to confiscate the goods, demand customs duty and levy penalty under Section 114A of the Customs Act. Since the appellant did not respond to the said show cause notice, the Adjudicating Authority granted an opportunity of personal hearing, for which also the appellant did not appear. Hence, the Adjudicating Authority after going through the records passed the following order:

> "(i) I hold that the illicitly cleared goods i.e. 46080 Kgs of imported Polyester yarn valued at Rs.29,15,522/- covered under the Bills of Entry No.900316 & 900317 both dated 30.06.2006 liable for confiscation under 111(o) of the Customs Act, 1962.
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> (ii) I confirm the Customs duty amounting to Rs.12,59,782/- (Rupees Twelve Lakhs Fifty Nine thousand Seven Hundred Eighty Two only) foregone on illicitly cleared Polyester fabrics admeasuring 46080 Kgs valued at Rs.29,15,522/-, under Section 28(2) of Customs Act, 1962 read with the provisions of Notification No.43/2002-Cus dated 19.04.2002 Notification No.91/2004 - Cus., dated 10-9-2004 along with applicable interest under Section 28AB of the Customs Act 1962 read with the provisions of the aforesaid Notification.
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> iii) I confiscate i.e., two consignments of Polyester Fabrics admeasuring 80465.34 Mtrs. (93265.4 SQM) valued at Rs.15,15,314/- imported in the name of M/s.Narayan Impex under B/E No.883275 & 883276 both dated 29.02.2005 which were seized at Chennai Sea Port under 111(o) of the Customs Act, 1962. However I give the option of redeeming the goods on payment fine of Rs.10,00,000/- (Rupees Ten Lakhs only) in terms of Section 125 of the Customs Act 1962. This option shall be exercised within 30 days of service of this order failing which the confiscation shall become absolute.
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> iv) I confirm the Customs duty amounting to Rs.39,96,773/- duty leviable on the said seized goods imported in the name of M/s.Narayan Impex under B/E No.883275 & 883276 both dated 29.09.2005 which were seized at Chennai Sea Port under Section 28(2) along with applicable interest under Section 28AB of Customs Act, 1962 read with the afore said Notifications relevant Notification No.43/2002 - Cus. dated 19.04.2002 Notification No.91/2004-Cus. dated 10.9.2004 as applicable.
>
> v) I impose a penalty of Rs.52,56,555/- (Rupees Fifty two lakhs fifty six thousand five hundred and fifty five only) on M/s.Narayan Impex, along with Shri.Ramgopal Kudal and Shri Shyam Bihani under Section 114A of the Customs Act, 1962."

3. As against the imposition of penalty under Section 114A of the Customs Act, an appeal was filed before the Commissioner (Appeals), who dismissed the appeal, thereby upheld the order of adjudication. Aggrieved by the same, an appeal was filed before the Tribunal and the assessee, it appears did not appear in person, but filed written submissions. Therefore, the Tribunal proceeded to dispose of the matter on the basis of the written submissions filed by the appellant, wherein it was stated that penalty ought not to have been imposed under Section 114A jointly and severally. Before the Tribunal, the Department relied on the decision of the Tribunal dated 04.12.2014 in Order No.42226-42229 of 2014 in the case of M/s.Naranan Impex and others, associate of the appellant. The Tribunal, taking note of the adjudication order, which was confirmed in appeal, held that when the licence was obtained fradulently for the purpose of importing goods and avoiding payment of duty, which has been set out in paragraph 23 of the adjudication order, the role of the appellant has been established. Accordingly the Tribunal, passed the following order:

> "3. On a perusal of the Order-in-Original and the impugned order, it was found that the appellant has not appeared before the Adjudicating authority or before the lower appellate authority inspite of personal hearing was granted by both the authorities below. Upon a perusal of the Order-in-Original, it was found that the Adjudicating authority demanded Customs duty and also confiscated the goods and imposed penalty on the importer M/s.Narayan Impex and also imposed penalty on the appellant and others. The appellant's prayer before the Commissioner (Appeals) is against the penalty of Rs.52,56,555/-. Since it is clearly established the entire advance licence has been obtained fradulently, as has been clearly brought out in the Order-in-Original at p.23, prima facie, as the role of Shri Ram Gopal Kudal has been established.
>
> 4. Considering the above facts and circumstances of the case, the appellant is directed to deposit Rs.25,00,000/- (Rupees Twenty Five Lakhs only) within a period of four weeks from today. Upon deposit of the said amount, pre-deposit of balance adjudged dues shall remain waived and stay recovery thereof till disposal of the appeal."

4. Aggrieved by the said order of the Tribunal, the appellant is before this Court.

5. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

6. We find from the order of the Authorities below that the appellant did not appear before both the lower Authorities as well as

before the Tribunal. Even though personal hearing was granted twice to the appellant, the appellant did not appear before the Authorities below. Hence, on the basis of the records, the lower Authorities passed the order. We find no error in the order of the Tribunal ordering pre-deposit. We find that the Adjudicating Authority has considered the involvement of present appellant in the illegal import of goods by indulging in the act of misusing the advance licence and evading customs duty on the imported goods. The Adjudicating Authority found that the appellant herein in association with Shri Shyam Bihani entered into a conspiracy with malafide intention to obtain advance licence in the name of M/s.Narayan Impex fradulently for import of goods without payment of duty under the Advance Licence Scheme and to divert them into local market.

7. It is seen that having failed to appear before all the three authorities, for the first time before the Tribunal, the plea that Section 114A does not apply has been raised. We find that Section 114A provides penalty for short-levy or non-levy of duty in certain cases, which reads as follows:

> SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :
> Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined :
> Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :
> Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account :
> Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the

first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation. - For the removal of doubts, it is hereby declared that-

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

8. In the show cause notice issued, in paragraph No.5, it was stated as follows:

i) the goods i.e. two consignments of Polyester Fabrics admeasuring 80465.24 Mtrs. (93265.4 SQM) valued at Rs.15,15,314/- (PMV Rs.49.66 Lakhs) imported in the name of M/s.Narayan Impex under B/E No.883275 & 883276 both dated 29.02.2005 and placed under seizure at Chennai Sea Port should not be confiscated under 111(o) of the Customs Act, 1962

ii) The appropriate Customs duty leviable on the said seized goods should not be demanded and recovered from them along with interest in terms of Section 28(1) and 28AB of Customs Act, 1962 read with relevant Notification No.43/2002 - Cus. dated 19.04.2002 Notification No.91/2004-Cus. dated 10.9.2004 as applicable, upon redemption, if any allowed by the adjudicating authority.

v) penalty should not be imposed on them under Section 114A and 112 of Customs Act, 1962"

9. We find that the plea of the appellant that no penalty should be imposed under Section 114A is not correct in view of para (i), (ii) & (v) of para 5 of the show cause notice, which we set out above. The show cause notice has been issued in terms of Section 28 along with a demand of penalty under Section 114A as against the importer and the present appellant as well as involved in the

fradulent import. The evidence available indicates the knowledge and involvement of the appellant in the import of the goods, which established the role of the appellant. Therefore, we find no justification in modifying the order passed by the Tribunal. The appellant has not filed any supporting material to substantiate the plea of financial hardship.

10. In the light of the above, the order of the Tribunal stands confirmed and this appeal stands dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
1. Additional Commissioner of Customs (DEEC), Chennai,
Customs House, 60 Rajaji Salai, Chennai - 600 001.

2. Customs, Excise and Service Tax Appellate
Tribunal, Chennai Bench,
No.26, Haddows Road, 1st Floor,
Shastri Bhavan Annexe, Chennai - 600 006.

+ 1 cc to Mr.A.P. Srinivas, Advocate Sr.31721
+ 1 cc to M/s. Karthik Sundaram, Advocate Sr.31638

C.M.A.No.1235 of 2015
& M.P.No.1 of 2015

TEJ(CO)
Eu 15.07.15