IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. No.93 of 2009
& M.P.No.1 of 2009

Commissioner of Customs
No.1, Williams Road, Cantonment,
Trichy - 620 001.

... Appellant/Respondent

- Vs -

S.Janarthanan
30/13, Briyant Nagar,
10th Street, Tuticorin - 8.

... Respondent/Appellant

Appeal filed under Section 130(a) of the Customs Act, 1962 read with Rule 8 of Customs (Appeals) Rules 1982 against the order dated 20.04.2005 passed by Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.613 of 2005 against the order of the Commissioner of Customs No.1, Williams Road, contonment, Trichy dated 29.4.99 in C.No.VIII/10/24/98 cus. ADJ.Order No.10/99 and against the order fo the Commissioner of Customs No.1, Williams Road, Contonment, Trichirapalli dated 3.9.98 in order C.No.VIII/10/24/98 CUS.ADJ

For Appellant : Mr.P.Mahadevan
Standing Counsel

For Respondents : Mr.T.Chezhiyan
for Mr.M.M.K.Alifadeen

J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal filed by the Revenue as against the order of the Customs, Excise and Service Tax Appellate Tribunal allowing the appeal filed by the assessee was admitted by this Court on the following substantial question of law:

"Is the learned Appellate Tribunal correct in setting aside the penalty imposed by the Commissioner of Customs when admittedly the respondent has omitted to do an act or at least abetted in such omission under Section 114 of the Customs Act and as such liable to pay penalty under Section 114 of the Act?"

2. The brief facts are as follows:

On 10.3.1998, the Officers of Customs Preventive Division, Tuticorin searched the godown at No.111, Ettayapuram Road, Tuticorin and found rows of cartons stacked in. Three persons were also seen there. On enquiry, one person identified himself as Nathan of Trichy and stated that he employed other two persons, namely, Selvaraj and Kalkan for packing the goods. The Officers found 476 cartons in the godown, out of which 419 of them containing sandalwood and 57 containing roofing tiles intended for export to Singapore. Shri.R.Kalkan stated that as directed by Nathan, he along with Shri.Selvaraj had come to the godown for packing the tiles and that he did not know anything about sandalwood. Shri.Selvaraj also stated to the same effect. The sandalwood, export which was prohibited under the Customs Act, the Foreign Trade (D&R) Act and the EXIM policy 1997-02, was seized by the officers. The roofing tiles, which appeared to have been used for concealing the sandalwood were also seized by them. The Officers also searched Room No.212 of Chitra Lodge, Tuticorin on the same day and recovered documents including visiting card of one Shri. Rahuman Sait, Shri Nathan, who in his statement dated 11.3.1998 admitted that his real name was Rahuman Sait and the above visiting card was his. He further stated that he had come to know one Shri. Dhanapal who had been illicitly dealing in sandalwood and made discussion with him for smuggling of sandalwood to foreign countries and in one such meeting, Dhanapal told him that he was going to despatch sandalwood illicitly through Tuticorin Port and wanted suitable persons for the job. Accordingly, Rahuman Sait @ Nathan suggested the name of one Alexander who was running M/s.Gilbert Overseas Shipping Company at Tuticorin and in December, 2007, he met Dhanapal, who told him that 10 tons of sandalwood were to be smuggled to Singapore and that he contacted Alexander, who arranged for the illicit export. 200 bags of sandalwood were sent to Alexander, which was kept in a godown. Since the said Alexander did not pursue the export in the manner stated, the said Rahuman Sait @ Nathan along with Dhanapal met one Maideen of Mannadi, who was an exporter in Chennai and discussed the matter and it appears that Maideen told that he would arrange illicit export through one Janarthanan @ Janar, who is the respondent herein. Accordingly, he met the said Janarthanan on 02.03.1998 and requested for arranging a godown. The said Janarthanan arranged a godown through his friend Hari.

3. In the course of investigation, it has come to the knowledge of the Department that the respondent Janarthanan was doing export business under the banner "Janar Exports" and his relative Shri.Mohan introduced Maideen of Chennai to him and the Maideen asked Janarthanan to help him in exporting goods such as sandalwood through Tuticorin Port and on 02.03.1998, Maideen contacted him over phone and told him that he got one order for export of Mangalore Tiles to Singapore from one Nathan and requested for arranging a godown. On 06.03.1998 Shri.Maideen sent documents by fax and asked Janarthanan to file the shipping bill as roofing tiles. On 07.03.1998, Janarthanan handed over the documents to Ramesh for filing the Shipping bill, who also filed the same through CHA M/s.Ukkirapandian Pillai & Sons. On 09.03.1998 Nathan @ Rahuman Sait came to the office of the Janarthanan to ascertain that shipping bill was filed and also informed that two tonnes of sandalwood were also part of roofing tiles. It appears that there has been some altercation between Janarthanan and Maideen with regard to the nature of export of sandalwood in the guise of roofing tiles, but however, the process of filing shipping bill proceeded through the said Ramesh, who corroborated the statement of Janarthanan.

4. On the basis of the oral and documentary evidence on record and complicity of various persons involved in the offence, the Commissioner of Customs, in paragraph 25 of the order dealt with the case of the respondent. The submissions made on behalf of the respondent, which was recorded by the Commissioner reads as follows:

> "25. In case of Shri Janarthanan, it was argued that he had retracted the statement and the same was not voluntary one. Others, in whose statements he was implicated, had also retracted their statements. Janarthanan had no knowledge that consignment contained sanwood prior to filing of Shipping Bill. He was contacted by Shri A.T.Mohideen through Mohan for export of Onions, tiles etc. After filing of Shipping Bill by Ramesh, Shri Rahuman Sait informed about sandal wood being part of the consignment. He had immediately asked Ramesh to cancel the Shipping Bill. On intervention by Maideen that if he did so he would involve him. He did not take any further action. He informed the facts to Ramesh. As he had no knowledge, he could not be charged under Customs Act. The sandal wood was in the process of being packed and no attempt was made to export the same. The intention to cancel the Shipping Bill and that there was no attempt to export the same."

5. With regard to the levy of penalty, the findings of the Commissioner reads as follows:

> "5. Shri S.Janarthanan:
> It has been admitted by him that he was informed

by Shri Rahuman Sait about the sandal wood being the part of roofing tiles. In spite of having knowledge, he did not inform the same to the Customs and was rather induced by Shri Maideen for monetary consideration to keep quiet. His omitting to do action required by him under the Customs Act, shows that he was involved in smuggling of sandal wood. He is, therefore, liable for penalty. "

6. Accordingly, after hearing all the parties, the Commissioner passed the following order:

" I order absolute confiscation of the Sandal Wood weighing 12,066 Mts, valued at Rs.96,52,800/- (Rupees ninety six lakhs fifty two thousand and eight hundred only) under section 113(d)(h)(i) of the Customs Act, 1962.

I order absolute confiscation of Mangalore Roofing Tiles and packing material valued at Rs.10,000/- under Section 19 of the Customs Act, 1962.

I impose penalty under Section 114 of the Customs Act, 1962 on the following persons as mentioned hereunder:

s/Shri

1. Dhanapal 25 Lakhs (Twenty five lakhs only)
2. A.T.Maideen 25 lakhs "
3. Rahman Sait 25 lakhs "
4. J.M.A.Alexander 10 Lakhs (Ten lakhs only)
5. S.Janarthanan 05 Lakhs (Five lakhs only)
6. N.Ramesh 05 Lakhs "
7. U.Sivasubramanian 05 Lakhs "

7. Aggrieved by the order of the Commissioner, the respondent herein filed an appeal before the Tribunal.

8. The Tribunal after considering the submissions made on both sides, allowed the appeal holding as follows:

"9. Against the appellant, ld. Commissioner found that, in spite of having knowledge of the sandalwood being part of the consignment of roofing tiles, he did not intimate the same to the Customs authorities. According to ld Commissioner, the omission of the appellant showed that he was involved in smuggling of sandalwood, attracting penalty under Section 114 of the Customs Act. Now, one has got to examine the provisions of Section 114, which renders a person liable for penalty if any omission of his has rendered any goods liable for confiscation under Section 113. The omission found against the appellant is non-disclosure, to the Department, of attempted export of sandalwood by others. Such an omission, however, has not been shown to have rendered the goods liable for confiscation under Section

113. It would follow that the essential requirement for a penalty under Section 114 of the Customs Act was not fulfilled in the case of the appellant."

9. According to the Tribunal, the omission found against the respondent is non-disclosure of the attempted export of sandalwood by others to the Department and such omission, however, has not shown to have rendered the goods liable for confiscation under Section 113 of the Customs Act. The Tribunal held that the essential requirement for imposing penalty under Section 114 of the Customs Act was not fulfilled in the case of the respondent.

10. Aggrieved by the order of the Tribunal, the present Civil Miscellaneous Appeal has been filed by the Revenue.

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

12. Admittedly, the goods attempted to be exported are prohibited under the Customs Act, the Foreign Trade (D&R) Act and the EXIM Policy 1997-02. Since Sandalwood was attempted to be exported in the guise of roofing tiles, the provisions made under Section 113 of the Customs Act gets attracted. Similarly, the goods entered for exportation did not correspond in respect of value or in any material particulars with the entry made under the Act. On this admitted fact, the only question arises for consideration is whether the respondent is liable for penalty under Section 114 of the Customs Act.

13. The wording in Section 114 of the Customs Act is clear that any person who, in relation to any goods does or omits to do any act which act or omission would render the goods liable for confiscation under Section 113, or abets the doing or commission of such an act shall be liable for penalty. For better clarity, it is apposite to refer Section 114 of the Customs Act, which reads as follows:

"SECTION 114. Penalty for attempt to export goods improperly, etc. - Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater"

14. In this case, the evidence on record and the statements of various persons clearly goes to show the complicity of the respondent in the act, which render the goods liable for confiscation under Section 113 of the Customs Act. He also abetted in doing such acts, which render the goods liable for confiscation. That finding of the Commissioner is not in dispute. The Tribunal on an erroneous interpretation of Section113 read with 114 of the Customs Act has come to hold that no penalty is leviable.

15. Here is a case where the findings of the Commissioner, on fact, supported by documents and the statement of individuals, clearly established the act of the respondent, which render the goods liable for confiscation under Section 113. The respondent is one among the culprits, who attempted to export sandalwood in the guise of roofing tiles. Since the respondent had knowledge about the sandalwood being part of the consignment of roofing tiles, but did not intimate the same to the customs Authorities, he is liable for penalty.

16. On a reading of the evidence and the findings of the Commissioner, we find that the Tribunal has come to the erroneous conclusion that the act of the respondent in not disclosing the information is not liable for confiscation. Accordingly, the issue is answered in favour of the Department and against the assessee. The order of the Tribunal stands set aside and the adjudication order restored. This Civil Miscellaneous Appeal stands allowed. No costs. Consequently, M.P.No.1 of 2009 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Customs, Excise & Service Tax Appellate Tribunal
   South Zonal Bench, 1st Floor, Shastri Bhavan Annexe
   26, Haddows Road, Chennai 600 006.

2. The Commissioner of Customs,
   No.1, Williams Road, Contonment,
   Trichirapalli - 620001

+1cc to M/s.P.Mahadevan, Advocate, S.R.No.109222

C.M.A. No.93 of 2009
& M.P.No.1 of 2009

UG(CO)
CA(24/03/2015)