

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:22.07.2016

Date of Reserving the Order	Date of Pronouncing the Order
19.07.2016	22.07.2016

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.No.24350 of 2016
and
WMP No.20826 of 2016

S.Karthikeyan Petitioner
Superintendent of Central Excise
and Customs, 1G, Main Street,
Nachimuthu Layout,
K.K.Pudur, Coimbatore - 641 012.

Vs

The Additional Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
6/7-ATD Street, Race Course,
Coimbatore - 641 018. Respondent

Prayer : Writ Petition is filed under Article 226 of the
Constitution of India, seeking for a Writ of Certiorarified
Mandamus, to call for the records comprised in order
C.No:VIII/10/19/2014-Cus Adjn date 29.04.2016 (Sl.No.5/2016-Cus)
on the file of the respondent and quash the same.

For petitioner .. Mr.AR.L.Sundaresan Sr., counsel for
Ms.D.Naveena

For Respondent .. Mr.A.P.Srinivas Standing counsel

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O R D E R

Heard Mr.AR.L.Sundaresan, learned Senior counsel appearing
for Ms.D.Naveena, learned counsel appearing for the petitioner
and Mr.A.P.Srinivas, learned Standing counsel appearing for
the respondent.

2. The petitioner is working as a Superintendent of

Central Excise and Customs at Coimbatore and he has come to adverse notice of the Department and was placed under suspension by order passed by the Commissioner of Central Excise, Coimbatore, dated 04.02.2014. Subsequently, the Suspension Review Committee had reviewed the matter and the suspension was revoked with effect from 05.11.2015 and it is stated that disciplinary proceedings have been initiated against the petitioner. In this Writ Petition, the petitioner has challenged an order-in-original, dated 29.04.2016, passed by the Additional Commissioner of Customs, Coimbatore in which a penalty of Rs.1,74,940/- has been imposed on the petitioner under Section 112A(ii) of the Customs Act and a penalty of Rs.5,50,10,690/-, under Section 104AA of the Customs Act. The allegations, which had led to the passing of the impugned order, are that M/s.Visal Lubetech Corporation, a proprietary concern owned by one R.Parivallal at Bangalore, filed two bills of entries dated 21.12.2013 and 20.01.2014 at the Inland Container Depot, Irugur, through their Customs House Agent M/s.Nippon Express (India) Pvt., Ltd., for import of certain goods declared as Carbon Black Feed Stock (CBFS), which was stuffed in four and six containers respectively. The importer claimed classification of the goods under Customs Tariff No.28030090 attracting rate of duty of 22.583% and self assessed the amount of duty as Rs.5,09,161/- and Rs.9,20,551/- respectively with aggregate amount of duty in respect of both the bills of entry as Rs.14,29,712/-. In order to verify the correctness of the self assessment and in accordance with the Alert Circular No.12/2013, issued by the Directorate of Revenue Intelligence, samples were drawn on 30.12.2013 and it was sent for testing to the Central Revenue Control Laboratory. The sample was returned by the Central Laboratory on the ground that it was not sealed properly.

3. It was further stated that the Assistant Commissioner of Customs, ICD, Irugur, who was present at the time of drawl of sample on 30.12.2012, is said to have noticed that the colour and viscosity of the sample returned by the Central Laboratory was different from the original sample, he had seen at the time of drawl of sample. Suspecting tampering the said officer had conducted enquiries with all the officers and gathered information and brought the matter to the notice of the Commissioner of Customs, Central Excise, Coimbatore by letter dated 25.01.2014, who in turn ordered the case to be investigated by the Customs Intelligent Unit, (CIU), who had recorded statements of all the concerned individuals under Section 108 of the Customs Act. The petitioner, who was working as Superintendent, had given a statement on 25.01.2014, stating that he was present during the drawl of sample on 30.12.2013 and that the importer might have replaced the sample drawn with pre-

filled cans at the point of drawl. However, he denied having helped the importer in substitution of the sample. A second statement was recorded from the petitioner on 27.01.2014, wherein he stated to have admitted that he had received the pre-filled samples from the importer's son and he had handed over the original samples taken from the containers to the importer's son and substituted samples were handed over to the Inspector, ICD, Irugur. Further, in the statement, the petitioner is said to have stated that he was informed that the goods imported are inferior variety of CBSF and that is why necessity was there for replacement of the sample. Subsequently, sample was taken and properly sealed and sent to the Central Laboratory, who had certified that the samples were "base oil" vide report dated 01.06.2014. For the purpose of this case, it may not be necessary to refer to the other facts pertaining to the importer, which has been set out both in the show cause notice as well as in the impugned order-in-original and suffice to state that while issuing the show cause notice, the respondent stated that the petitioner admitted in his statement dated 27.01.2014, to having facilitated the substitution of the sample, despite being told by the importer that the import cargo was of the inferior quality, therefore, he had abetted the commission of offence punishable with penalty under Sections 112, 114AA of the Customs Act and opportunity was granted to the petitioner to submit his reply. The petitioner submitted a letter to the respondent, dated 23.10.2015, enclosing a letter addressed to the Chief Commissioner, Coimbatore, dated 22.09.2015, requesting the same to be treated as an interim reply. The reply given by the petitioner has been referred to in paragraph 35 of the impugned order. Essentially, the petitioner states that he was not at fault, statements recorded from the him were under threat and coercion and second statement was recorded from him cannot be relied on. Subsequently, personal hearing was granted in which the petitioner appeared through a consultant and made written submission, which has been referred to in the impugned order from paragraph 39 onwards. In paragraphs 65 and 66 of the impugned order, the respondent, while adjudicating the show cause notice, has considered the petitioner's submissions and recorded a finding that defence raised by the petitioner lacks credibility and the petitioner was held to be guilty of abetting the commission of the offence under Section 112 of the Customs Act. Ultimately, the impugned order, dated 29.04.2016, has been passed, wherein sofar as the petitioner is concerned, a penalty of Rs.1,74,940/- has been imposed under Section 112(a)(ii) and a penalty of Rs.5,50,10,690/- under Section 114AA of the Act.

4. When this Court heard the learned counsel appearing for the petitioner on 15.07.2016, Court posed a question to the

learned counsel as to why the petitioner has not availed the alternate remedy against the impugned order. The learned counsel elaborately referred to the factual matrix and referred to the averments made in the affidavit filed in support of the Writ Petition to state that the statements were recorded from the petitioner by putting tremendous pressure and coercion from the department to accept the allegations against him and the letter given by the petitioner dated 10.06.2016, will clearly prove that the allegations made against the petitioner are biased and there exists a pre-conclusion and preconceived notion against the petitioner. Further, it was contended that in the findings rendered in the impugned order, the respondent has stated that the petitioner's statement, dated 27.01.2014, was corroborated by deposition of Baskar, Balakrishnan and Murugesha Pandian and of which the statements of Baskar and Balakrishnan were relied on in the show cause notice. It is submitted that if those statements are perused they have not deposed that the petitioner has substituted the samples and they have deposed that at the time of drawing the samples the colour is sticky black. The petitioner would state that even this is not correct since during subsequent verification, the officers found it is greenish. Therefore, the learned counsel endeavoured to submit that there is no evidence to the effect that the petitioner changed the samples and mens rea was not established. In the affidavit filed in support of the Writ petition, the petitioner has referred to his medical condition by relying upon the medical certificate produced by him. However, this Court was not convinced with the submissions made by the learned counsel for the petitioner to permit the petitioner to by-pass the appellate remedy, since complicated and disputed questions of fact were involved. The learned counsel for the petitioner sought for an adjournment to enable to make further submissions. Accordingly, the matter was adjourned to 19.07.2016.

5. When the matter was heard on 19.07.2016, the learned Senior counsel appearing for the petitioner elaborately reiterated the factual matrix of the matter. A legal submission was put forth by referring to Section 155 of the Customs Act and it submitted that the said provision contains two sub-sections and sub-section (2) is an independent provision which stipulates a period of limitation for initiating proceedings against Central Government or any Officer of the Government or a local authority for any thing purporting to be done in pursuance of the Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceedings and of the cause thereof or after expiration of three months from the accrual of such cause. It is submitted that the first set of samples were drawn on 30.12.2013 and the second on 23.01.2014 and the proceedings were initiated well beyond the

period of three months as show cause notice was issued on 04.12.2014. Therefore, it is submitted that the entire proceedings are barred by limitation. In support of his contention, the learned counsel placed reliance on the decision in the case of Golla Rama Rao vs. UOI reported in 200 (124) E.L.T 112(Mad) and two decisions of the Tribunal in the cases of Commissioner of Customs, New Delhi vs. M.I.Khan reported in 2000 (120) ELT 542 (T) and Commissioner of Cus., & C.Ex.Hyderabad-II, vs. Rajiv Kumar Agarwal, reported in 2007 (217) ELT 392. The learned Senior counsel further submitted that the documents relied on in the adjudication has not been furnished to the petitioner and the contents of the statements are not known to the petitioner.

6. The learned Standing counsel appearing for the respondent submitted that the Writ Petition is not maintainable as the petitioner has not exhausted the alternative efficacious remedy available to him. In this regard, reliance was placed on the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of UOI vs. T.R.Verma reported in AIR 1957 SC 882 and the decision of the Hon'ble Division Bench of the Allahabad High Court in the case of Rama Dairy Products Ltd., vs. Secretary, UP Krishi Utpadan, reported in 2004 138 STC 508 and submitted that the remedy provided under the statute must be followed and the Writ should not be generally entertained unless the statutory remedies are exhausted.

7. On facts, it was pointed out that the importer was not sure about the non-hazardous nature of the cargo and tried to substitute the samples and the test result is valid only to the extent of proving what the samples are, and does not have any evidentiary value to prove that no substitution of the samples. It is further submitted that the barrels were inspected in the presence of the officers and representatives of the importers and the CHA. The appearance of the contents of every barrel was recorded in the inventory. The cargo is still in the safe custody of the custodian of ICD, Irugur. The slight variation in the description, such as dark green or black does not affect the identity of the cargo since both these colors are similar and refer to the same material. The descriptions provided in the statement of the officers and that given in the inventory taken by officers were as per the perception of the colors by the respective officers.

8. The learned counsel submits that the petitioner has been cast upon the duty to seal the samples immediately on drawing it and the presumption is that they were sealed immediately on drawing and this could be rebuttable only based on evidence. It is further submitted that the statements

recorded from the petitioner under Section 108 of the Customs Act, does not require any corroboration and it is admissible in evidence and belated retraction by the petitioner is an after thought. The allegation against the petitioner is the substitution of samples which was done with malafide intentions. Further, by referring to the observations made in paragraph 65 of the impugned order, it is pointed out that all the persons have deposed that the samples had physically passed through the petitioner supporting the theory of substitution. It is submitted that the penalty under Section 112 is for abetment of the offence and the penalty under Section 104AA is for causing to be made, signed or used any declaration or document, which is false or incorrect in any material particular as provided under the said section. It is further submitted that the substitution of samples were not done in good faith and hence, not covered under Section 155 of the Customs Act and the said Section provides immunity to Central Government or officers against prosecution, suit or legal proceedings in respect of acts done in good faith and such immunity is not available to the petitioner.

9. I have elaborately heard the learned counsels appearing for the parties and carefully perused the materials placed on record.

10. As pointed out earlier, the petitioner seeks to by-pass the appeal remedy available to him primarily on three grounds, firstly by contending that the entire proceedings are barred by limitation in terms of Section 155(2) of the Customs Act. By referring to the decision in Golla Rama Rao vs. UOI, (supra) it is pointed out that similar provision under the Central Excise and Salt Act, 1944, namely, Section 40 was considered in the said judgment and it was pointed out that Section 40(2) which is in para materia with Section 155(2) of the Customs Act does not grant protection to all and it merely prescribes a period of limitation just like the Limitation Act, generally prescribed a period of limitation for all actions. Further, it is submitted that Section 40(1), applies only to Government and officer of Government and Section 40(2) applies to Government, officers of Government and others also. Further, it is submitted that the test of good faith has to be found only in Section 40(1) and it is not applicable to Section 40(2). The other two grounds, which have been raised by the petitioner to by-pass the appeal remedy is stating that the documents have not been furnished and copies of the statements have not been furnished.

11. In Dr.K.Nedunchezian vs. The Deputy Commissioner of Income Tax, Central Circle, Salem reported in (2005) 2 MLJ 243,

the Hon'ble First Bench of this Court was considering a matter arising under the Income Tax Act in which the Court framed a question as to whether in Tax matter when alternate remedy is provided in the Act itself should there be short circuiting of the statutory remedy. This issue was considered after elaborately referring to several decisions and it was held that it is well settled by the series of decisions of the Hon'ble Supreme Court that particularly in tax matters, there should be no short circuiting of the statutory remedies (Titaghur Paper Mills Company Ltd. vs. State of Orissa reported in AIR 1983 SC 603 & Assistant Collector of Central Excise, Chandan Nagar vs. Dunlop India Limited reported in AIR 1985 SC 330).

12. In several other decisions referred therein, it was pointed out that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative Writ, that it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds to do otherwise. Further, it was pointed out that the Hon'ble Supreme Court in the case of Titaghur Paper Mills Company Ltd. vs. State of Orissa reported in AIR 1983 SC 603, held that the appellant therein had pleaded that there was violation of natural justice and the impugned order was without jurisdiction, yet the Supreme Court held that the petitioner should avail his alternate remedy of appeal.

13. The issue raised by the petitioner by referring to Section 155(2) of the Customs Act is a matter pertaining to limitation. From the material papers placed before this Court in the form of typed set of papers, it is seen that the petitioner has not raised such an issue at the time of submitting his letter dated 23.10.2015, where he requested his letter addressed to the Chief Commissioner, dated 22.09.2015, to be treated as an interim reply. Though in the written submissions, which were placed before the respondent during the personal hearing, the petitioner had referred to Section 155 of the Customs Act and relied upon the decision in the case of Commissioner of Customs, New Delhi vs. M.I.Khan(supra), record of the proceedings do not clearly show that the point has been canvassed as put forth before this Court by the learned Senior counsel for the petitioner. The question of limitation is not a pure question of law, but a mixed question of fact and law. Even assuming without admitting that the submissions made by the learned Senior counsel for the petitioner is correct and that Section 155(2) of the Customs Act, would stand attracted still it has to be seen as to what would be the starting point of limitation. This exercise cannot be made in a Writ Petition.

This Court could have rendered a finding on the said issue, but refrains from doing so, as it would prejudice the petitioner at the time of filing the appeal, as this Court is fully convinced that the Writ Petition cannot be entertained as serious, disputed and complicated questions of fact are involved and therefore, the petitioner should be necessarily relegated to avail the appellate remedy provided under the Customs Act.

14. Accordingly, the Writ Petition is dismissed as not maintainable, giving liberty to the petitioner to prefer an appeal before the Appellate Authority and while computing limitation, the period between 11.07.2016, till the receipt of the certified copy of this order shall stand excluded. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

pbn

To

The Additional Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
6/7-ATD Street, Race Course,
Coimbatore - 641 018.

1 cc to Mr.S.Durairaj, Advocate, sr.41869
1 cc to Mr.AP.Srinivas, Advocate, sr.42260

Pre-Delivery O r d e r i n
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