IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.1242 of 2017
And
C.M.P.No.6288 of 2017

A.K.Subramani ...Appellant

Vs.

1. The Commissioner of Customs (Port - Export),
Customs House
No.60, Rajaji Salai,
Chennai - 600 001.

2. Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, No.26,
Haddows Road, Chennai - 600 006. ... Respondents

Prayer:
Appeal filed under Section 130 (1) of the Customs Act, 1961, against the order dated 21.10.2016 passed in Final Order No.41976 of 2016 in Appeal No C/40291/20153 by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.B.Satish Sundar
For Respondents: Mr.A.P.Srinivas

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

1.This is an appeal preferred against the Judgment and order dated 21.10.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (in short, the Tribunal).

2.The allegation against the appellant is that, he had master minded the smuggling of 538 red sander logs which had an approximate value of Rs.80 Lakhs in the grey market.

2.1.The appellant was, evidently, the kingpin, who had arranged the premises for storing the aforementioned red sander logs and to effectuate this purpose had handed over a sum, equivalent of Rs.10 Lakhs to one, Mr.M.Badhusha. It appears that Mr.Badhusha had in turn, handed over, out of the said amount, a sum of Rs.3.5 Lakhs to, one, Mr.Surendra Kumar, the owner of the premises where the red sander logs were stored.

2.2.The appellant had evidently executed a lease for the subject premises in the name of one Mr.R.Pupothi Raja, Proprietor of R.P.R. Packers and Movers, having his Office at T.Nagar, Chennai. Mr.R.Pupothi Raja, was resident of Koichanur, Chennai.

2.3.The record, also shows that the plan made to smuggle red sander logs was stumbled upon by Directorate of Revenue Intelligence (in short, DRI), when, they seized on 26.06.2010, 10.786 metric tons of red sander logs at CONCOR Container Freight Station, Chennai, which were being exported in the "garb of combed yarn", under the cover of shipping bill No.3794947, dated 23.06.2010.

3.Admittedly, a show cause notice was issued to the appellant, as also to Mr.Badhusha.

3.1.Concededly, no reply was filed to the show cause notice, either by the appellant or by Mr.Badhusha.

3.2.Furthermore, statements of the appellant as well as Mr.Badhusha were recorded on 04.08.2010, under section 108 of the Customs Act, 1962.

3.3.The record shows that these statements were not retracted; though our attention has been drawn to an interim order passed by the Tribunal dated 25.03.2013, wherein, the submission of the learned counsel for the appellant is taken note of broadly, to the effect that he had retracted his statement in the bail application. According to the appellant this fact was not considered by the Adjudicating Authority.

4.The Adjudicating Authority, by a detailed order, has returned findings of fact against the appellant, which, as correctly noticed by the Tribunal, are recorded in paragraph 15 of its order.

4.1.The Adjudicating Authority, based on the findings recorded therein, proceeded to confiscate 538 nos. of red sander logs, weighing 13.590 metric tons and, as indicated above, are valued at Rs.80 Lakhs approximately.

4.2.Furthermore, penalty in the sum of Rs.5.7 Lakhs was also imposed and, a sum of Rs.3.50 Lakhs, which was deposited by Mr.Surendra Kumar, which he had received, in turn, as indicated above, from Mr.Badhusha, was adjusted towards the penalty imposed on the appellant.

5.Mr.Satish Sundar, who appears for the appellant, says that there are substantial questions of law, which arise for consideration.

5.1.According to the learned counsel, the questions of law veer around the interpretation of the provisions of Section 113 (d) of the Customs Act, 1962 (in short, the Act).

5.2.It is the learned counsel's submission that confiscation under Section 113(d) of the Act, could have been only ordered, if there was an attempt to either export the goods or they had been bought, within the limits of the customs area for the purpose of being exported.

6.The learned counsel says that admittedly, the subject goods, which were seized, were neither within the customs area nor, was any material placed on record, which would show that there was an attempt to export the goods.

6.1.Based on this submission, the learned counsel contends that this Court needs to interfere with the impugned judgment and order of the Tribunal.

7.Furthermore, we must, also indicate, that the learned counsel has relied upon a definition of “export goods” which is contained in Section 2(19) of the Act.

8.Before we proceed further, we may note that on a specific query being put to the learned counsel for the appellant, as to whether the issue articulated before us, was taken as a ground in the appeal preferred before the Tribunal; he fairly conceded that no such ground was taken in the appeal.

8.1.In other words, the learned counsel for the appellant admitted that the said ground was not advanced before the Tribunal either as part of the appeal or via oral submission.

8.2.Therefore, according to us, apart from anything else, the appeal preferred before us, on the questions of law framed therein, would not lie, as they centre around an issue concerning interpretation of Section 113(d) of the Act, which does not emanate from the order of the Tribunal. [See CIT Vs. S.S.Navigation Co. Ltd., AIR 1961 SC 1633].

8.3.This apart, according to us, in any event, the submission made by the learned counsel for the appellant, in the given facts and circumstances of the case, is unsustainable, in view of the fact that there are, on record, statements made both by Mr.M.Badhusha and the appellant under Section 108 of the Act, which, clearly show that an attempt was made to export the subject goods, outside the country, via Cochin Port.

8.4.It is not disputed by the appellant, before us, that red sander logs are a prohibited items.

8.5.The fine distinction, sought to be drawn by the learned counsel for the appellant, between “preparation” and “attempt”, is, according to us, in the given facts and circumstances of the case, not a distinction which is sustainable for the reason that the record shows that, the appellant had taken actions which demonstrate that the intent to smuggle the subject goods out of the Country had been put into action. There was, thus, according to us, a clear attempt to smuggle the subject goods out of the Country, which is evident from the following surrounding facts.

8.6.The appellant had not only acquired a place for storing the goods, but, had also paid the requisite rent for the said premises. Surender Kumar, the owner of the subject premises, who is said to have received the advance rent from the co-accused, Mr.Badhusha, deposited the said amount with the Department. The amount deposited, is a sum of Rs.3.50 lakhs. Thus, except for a bald submission and that too in the bail application to the effect that the statement made under Section 108 by the appellant had been withdrawn, when, nothing has been placed on record to show that the said statement was not voluntary or made under threat or inducement, is a stand, which cannot be given much credence. Importantly, the statement made under Section 108 of the Act by the co-accused, i.e., Mr.Badhusha remains undisturbed. Pertinently, nothing has been shown to us, to come to a contrary conclusion. Furthermore, the record shows, one, Mr.Anwar in Dubai had been identified as it appears to receive the subject goods. Reference to Mr.Anwar has been made in the statements of the appellant as well as Mr.Badhusha.

8.7.Therefore, it is not, as if, that there was only preparation i.e., a desire to smuggle without an attempt being made, as is sought to be contended by the learned counsel for the appellant.

8.8.Preparation, in our view, is a state of mind, which obtains prior to its manifestation in the form of concrete steps, which are taken to give shape to a plan which germinates in the mind, in the first instance. Once a concrete shape is given to a plan in the form of steps taken on ground, clearly an attempt to smuggle would have been made, as was the case in the instant matter.

8.9. The submission of Mr.Sundar that, since, the subject goods (i.e., red sander) was not found in the customs area, it could not be assumed that an attempt was being made to smuggle the same out of the Country is misconceived, for the reason, that the plan though still at stage of an attempt was quite proximate to its intended result, which was, to smuggle the goods in issue outside the Country. The steps taken, to which we have made a reference, were not only overt steps but were also approximate to the intended result. Proximity of steps taken to the intended result are quite clearly brought out in the instant case. See the following observations made by the Supreme Court, in this behalf, in the matter of : State of Maharashtra Vs. Mohd. Yakub and others, (1980) 3 Supreme Court Cases 57:

> "32.Let me now state the result of the search and research: In order to constitute "an attempt", first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be "proximate" to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention; but, that it must be, that is, it must be indicative or suggestive of the intention........"
>
> (Emphasis is ours)

9.We may, also indicate that the appellant miserably failed to prosecute his case, diligently, before the Tribunal. The Tribunal, in our opinion, rightly, after granting adequate opportunities to the appellant, took the decision to decide the matter on merits.

10.Therefore, for all these reasons, we find no merit in the appeal.

11. The appeal is accordingly, dismissed. However, there shall be no order as to costs. Consequently, the connected pending application is also closed.

s/d-
Assistant Registrar(CS-VIII)

True Copy

Sub-Assistant Registrar

pri/av

To

1. The Commissioner of Customs (Port - Export),
   Customs House No.60,
   Rajaji Salai, Chennai - 600 001.

2. Customs, Excise and Service Tax
   Appellate Tribunal, South Zonal Bench,
   Shastri Bhavan, no.26,
   Haddows Road, Chennai - 600 006.

+1 CC to Mr.B. Sathish Sundar, Advocate sr 23228
+1 CC to Mr.A.P. Srinivas, Advocate sr 23758

C.M.A.No.1242 of 2017
And
C.M.P.No.6288 of 2017

VD(CO)
sp(11/07/2017)