IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Dated : 14.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CMA.No.2750 of 2017

M/s. J.J. Trading Corporation
No.17, Wellington Estate,
24, Commander-in-Chief Road

Chennai - 600 105. ...Appellant

versus

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

...Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 130 (1) of the Customs Act, 1961 to set aside the Misc. Order No.40383/2016 dated 09.08.2016 in C/Misc./40184/2015 in Appeal No.C/405/2007 passed by Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant :Mr.B.Satish Sundar

For Respondent : Mr. Pramod kumar Chopda

JUDGMENT

(Judgment of the Court was delivered by M.Dhandapani., J.)

This Civil Miscellaneous Appeal is filed against the Order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Miscellanoues Order No.40383/2016 dated 09.08.2016 in C/Misc./40184/2015 in Appeal No.C/405/2007.

2. The brief facts of the case are as follows:

The appellant is a Partnership concern. In connection with seizure of 10 MTs of sandal wood chips, tendered for export, under Shipping Bill No.03508 dated 15.07.1992, investigations were undertaken by the Special Investigation Branch of the respondent/Department. According to the investigation, the appellant submitted false documents like certificate of origin, Form-II filed along with the Bill of Entry, and attempted to export the said goods. The further investigation revealed that the sandalwood in question was said to have been obtained from one M/s.Divya Impex Corporation, Hyderabad, which firm procured the sandalwood under Certificate of Procurement dated 07.02.1992 issued to them by the Chief Conservator of Forest, Andhra Pradesh (issued Certificate of Origin by the Principal Conservator of Forest vide letter dated 05.08.1992). The said authority i.e., Principal Conservator of Forest, informed that no such certificate was issued by their Office. On conclusion of investigations, the Office of the Special Intelligence Branch, Customs, issued a show cause notice dated 11.09.1992 proposing confiscation of the 10 MTs of sandalwood under Section 113(d) and 113(i) of the Customs Act, 1962 besides imposition of penalties on the firm and its erstwhile partner, Mr.M.Manickam. After receipt of the show cause notice, the Commissioner of Customs, vide Order-in-original No.146/1992 dated 21.10.1992, ordered for absolute confiscation of 10 MTs of sandalwood (worth about Rs.21,20,000/-) u/s. 113(d) and 113(i). A penalty of Rs.2,00,000/- was imposed on the appellant/firm under Section 114(i) of the Customs Act, 1962.

3. Aggrieved by the same, the appellant preferred an Appeal before the CESTAT, South Zonal Bench, Chennai, on the ground that the "Certificate of Origin of procurement" issued by M/s.Divya Impex Corporation, Hyderabad was genuine in terms of Section 125 of the Customs Act, 1962 and they were holding proper license to redeem the goods to export the goods. Without taking note of all these aspects and only by considering the over all submission made by the appellant, CESTAT remanded the matter back to the original authority for fresh consideration.

4. After remanding the matter to the original authority, partner of the appellant's firm viz., one A. Sivan filed several Writ Petitions and Writ Appeals before this Court and all those Writ Petitions and Writ Appeals were dismissed. Against the show cause notice, this court has also issued a direction to the appellant to participate in the adjudication proceedings. Thereafter, again the adjudication proceedings were initiated back to square on 16.11.2007. The adjudicating authority passed the Order-in-Original No.6842/2007, which in nutshell are as follows:

> 28. Principal Chief Conservator of Forest, Hyderabad, A.P. vide his letter reference No.37506/92 -V2 dt:05.08.92 clarified in response to an enquiry by the dept that no such certificate of origin as mentioned above was issued by them and further the signature appearing thereon is not of any of the Chief Conservators of Forest working in their dept. Further the Divisional Forest Officer, Rajampet, A.P. in his letter No.3611/92/E.4 dt:13.08.92 clarified that the permit in question is not a genuine one for the following reasons:
>
> (i)No Form II permit was issued by their office

for transportation of sandalwood chips because sandalwood is not endemic in their division.

(ii) The Form II permit produced differs from their office with respect to the type of print and dimension of the form.

(iii) The date of issue of permit is indicated as 24.07.92 whereas no permit was issued at all by them on that date.

(iv) The division office seal found on the permits in question was in English whereas the permits are issued by them with the office seal in Telugu.

Investigation conducted by the department also revealed that M/s.Divya Impex Corporation never existed at premises No.6-3-11, Begampet, Hyderabad-16 declared as their address. Discrete enquiries made revealed further that the declared source of sandalwood viz., Shri R.S.Ramanujam of Kodur, A.P. patta lands S.No.818/1, 1504/1, 1491/3, 684/2-a did not exist in the survey records maintained in the Village Administrative Office, Rajampet.

29. It is further seen from the records that the impression of Forest Dept. seal was not found on the wax seals on the gunny bags containing the Sandalwood Chips for which Shri.Manickam of M/s.J.J.Trading Corporation, Madras had no explanation.

30. From the evidence enumerated above, it is crystal clear M/s.Divya Impex Corporation is a fictitious firm not in existent. The documents as to the source of origin and transport of the subject sandalwood were fabricated to cover the smuggling. I do not therefore find any substance in the argument of the Advocate that COP was forged one is baseless. Further, I observe that Shri.A.Sivan was convicted by the Hon'ble Addl.Chief Metropolitan, Chennai on 23.03.2004 in a case in RC/2/S/93 filed by the CBI against M/s.J.J.Trading Corporation, Shri.Manickam and Shri.A.Sivan, Partners. In the prosecution, Shir.A.Sivan admitted the charges levelled against them. Therefore, the contention that they are not aware of proceedings against M/s.J.J.Trading Corporation is totally baseless and a sham to protract the litigation and divert the main issues.

31. The learned counsel submitted that the

certificate of origin was not required to be produced by them, and it was done unknowingly. In this context, I find that significantly, the format of the certificate of origin bears the endorsement.

"Issued under the Export Trade Control". Likewise, the transport permit in form II bears the following amplification at the top:

"Permit for the import export/transport of sandalwood/redsanders wood of private lands or foreign territory".

Sandalwood is a precious natural resource. To protect and preserve the natural resource and to curb illegal felling of sandalwood, the possession and movement is regulated by Statutory enactments and Rules. Rule 3 of Tamil Nadu Sandalwood Transit Rules, 1967 has been referred in the Show Cause Notice as under:

"Condition for import, export and movement - No person shall import sandalwood into or export sandalwood from, or move sandalwood, within any place in the state unless such sandalwood is accompanied either by a permit referred to in Rule 4 or by a way permit referred to in rule 6 and unless such sandalwood bears the mark of the Government of Origin, as provided in rule 7 of the property made in respect of such sandalwood which has been duly registered in accordance with rule 7".

The above shows that the movement and export of sandalwood (which includes sandalwood chips also as per Rule 2 (iii) i bid) is subject to State Control and a valid permit is a statutory requirement. The fact that M/s.J.J.Trading Corporation manipulated fake certificate of origin only to overcome the above statutory requirements. Hence to my mind this is a clear fraud willfully and intentionally perpetuated to plunder the scarce natural resources and needs to be curbed with heavy hands.

33. It is noticed that the letter of credit which was opened on 17.02.92 with initial validity period only upto 15.04.92 was extended several times. I hold that the amendment of the letter of credit by way of extending time period as in the instant case, particularly when there is change in export policy banning the item for export is of material significance in regard to the terms of the letter of credit and is to be deemed as opening of a fresh letter of credit altogether. I may also quote in this connection an extract from page 130 of Customs Appraising Manual, Volume II in further support of my above finding:

"In a conference between the customs and the licensing authorities held in May 1978 at Bombay, the provisions of Transitional Arrangements under paras 207, 210 of 1977-78 were discussed with reference to extension of letter of credit after the crucial date. A view was held that as long as the letter of credit was opened before the critical date, mere extension of the date of shipment without change in value, quantity and description of the goods in the letter of credit was not of material importance and the restriction should not apply, as the original letter of credit remained substantially the same. However, Chief Controller of Imports & Exports, New Delhi, held that the benefit of pre-ban-commitment should not be given in such cases, as this would only open the gates in more inflow of banned and canalised items. (Letter No.IPC/5/5/78 dt: 19.07.78) The position is that when the letters of credit were so amended, it should be taken that there was no irrevocable letters of credit earlier, and that in such cases the restriction imposed should be applicable".

In the light of the above, the exporters' claim for a pre-ban commitment is not convincing. M/s.J.J.Trading Corporation themselves produced an Export Trade Control licence dt:21.08.92 issued by the ETC authorities for the sandalwood chips in question much later to the date of filing the shipping bill. As per the conditions printed on the reverse of the licence, the licence is valid only for export by the named consignor and the transfer of license with or without consideration will render the licence null and void. The named consigner in this case as per the licence is M/s.J.J.Trading Corporation. Whereas the exporter's name declared in the shipping bill is M/s.Divya Impex Corporation, Hyderabad. The certificate of origin of the goods and the transport permit relating to the goods under export viz. Sandalwood chips are all in the name of M/s.Divya Impex Corporation. The validity of export sought to be made against the export licence issued in the name of M/s.J.J.Trading Corporation is therefore, called into question. This apart, it has already been established from the facts that the documents of origin and movement of the sandalwood chips sought to be exported in the name of M/s.Divya Impex Corporation being a fictitious concern. As such, there is no authentic right of possession for the export of the goods in the name of M/s.Divya Impex Corporation. Consequently M/s.J.J.Trading Corporation, claiming their right of export of the above goods on account of / through M/s.Divya

Impex. Corporation hold no better right for such entitlement than M/s.Divya Impex themselves. The mere possession of a ETC licence in their name would not provide the permit for export in the above circumstances when the declared exporter was someone else viz., M/s.Divya Impex Corporation who has been further established to be a fictitious concern hold in fake documents of origin and movement of the sandalwood chips in possession for the purpose of export. It could easily be inferred from the above that a non existent firm viz. M/s.Divya Impex Corporation was brought in with fabricated false documents to cover the illegal procurement and disguise the movement of sandalwood for export purpose with a pure profit motive. Viewed in the light of this perspective, I hold the exportation as unauthorised. I find M/s.J.J.Trading Corporation have willfully committed a fraud to plunder the scarce natural resources. For this they devised a modus operandi wherein the name of a non-existent fictitious firm was brought in documents were prepared in that name so that if any stage the fraud is detected by law enforcing agencies, then they would not be traced."

5. Accordingly, the original authority again ordered for absolute confiscation of 10 MTs of Sandal Wood Chips valued at Rs.21,20,000/- under Section 113 (d) and 113 (i) of the Customs Act, 1962 and imposed a penalty of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only) under Section 114 of Customs Act, 1962 on M/s.J.J.Trading Corporation/appellant.

6. Aggrieved by the same, the appellant preferred further appeal under Section 129 (E) of the Customs Act under the CESTAT along with waiver application in C/PD/269/2007 in C/405/2007. On 19.02.2008, the CESTAT, South Zonal Bench, Chennai passed an order directing the appellant to pre-deposit an amount of Rs.50,000/- under Section 129 (E) of the Customs Act within four weeks and posted for reporting compliance on 10.04.2008. Thereafter, on 21.04.2008, the time for pre-deposit was extended by another two weeks and again posted the matter for reporting compliance on 12.05.2008. Finally, the order was complied with on 03.05.2008.

7. Perusal of the impugned order in Final Order No.40081/2015 passed by the Tribunal dated 28.01.2015, shows that the said appeal was filed in the year 2007. On 28.01.2015 also, no one represented on behalf of the appellant. However the appellate authority passed an order on merits, holding that the act of the appellant in exporting the impugned goods, i.e., sandalwood is not permissible, according to the EXIM Policy, 1997, and bringing such goods in the negative list of export is alleged and hence, they were

confiscated. The Certificate of Origin of procurement of the goods produced by the appellant was fake and fabricated. That certificate shows that the buyer of the goods was one M/s.Divya Impex Corporation, Hyderabad, who procured the impugned goods from a private source, namely, Mr.R.S.Ramanujam, Kodur, Andhra Pradesh. The Certificate indicating the name of those persons was not issued by the Principal Chief Conservator of Forest, Hyderabad, Andhra Pradesh. The said certificate was fabricated by the appellant, to escape from the Customs Authorities in exporting the banned goods. Accordingly, the appeal was dismissed on merits and the confiscation was upheld and imposed penalty of Rs.1,50,000/- on the appellant under Section 114 of the Customs Act.

8. Aggrieved by the said order, the appellant herein filed a restoration application and also a Miscellaneous Application under Rule 41 of the CESTAT Procedure Rules, 1982. The Appellate Tribunal, on 09.08.2016, dismissed the Miscellaneous Application on the ground that the Tribunal has already passed a detailed Order in Final Order No.40081/2015 on 28.01.2015 and held that any interference, to recall that order, shall defeat the spirit of Justice and there is no question of recalling the order, since the order was passed on merits.

9. Assailing the said order, the present Civil Miscellaneous Appeal is filed.

10. The appellant mainly objected the adjudication on the ground that Section 125 of the Customs Act, 1962, requires exercise of judicial discretion by the adjudicating authority and grant option to the exporter or importer to redeem goods. He explained that the goods were sandalwood chips and were procured from genuine sources and not attempted to smuggle. The act of the appellant was a bonafide one and the appellant was not granted option to redeem the goods. Therefore, not exercising the judicial discretion in favour of the appellant to redeem the goods by the adjudicating authorities is bad in law. On the said ground, the authority rejected the same, which was dealt with in paragraph No.2 of the final order passed on 28.01.2015 wherein, the authority demonstrates non-existent/fictitious concerns were created and fraudulent documents were designed for attempting to export the prohibited goods. From the origin to the destination, the modus operandi shows conscious efforts adopted by the appellant to export the prohibited goods.

11. That apart, none of the documents were produced before the original authority. Being the appellant, it is for him to disprove the departmental allegation. Hence, there is no question of exercising the judicious discretion in favour of the appellant invoking Section 125 of the Customs Act.

12. Apart from the above, learned counsel appearing for the appellant has raised a substantial question of law that whether the Tribunal is right in rejecting the miscellaneous application for restoration of the appeal and at the same time rendered findings on merits under the impugned order and therefore, whether there has been a miscarriage of justice or error on the procedure adopted by the Tribunal? The substantial question of law raised by the learned counsel for the appellant is in no way useful for the appellant.

13. Learned counsel for the appellant, in support of his contention, has relied on a judgment of this Court in Civil Appeal in C.A.No.3049 of 1998 in the case of J.K. Synthetics Ltd., Vs. Collector of Central Excise, wherein it was held that where a party was prevented from appearing on the date of hearing, due to sufficient cause and faced with an ex parte award, it was as if the party was vested with an award without notice of the proceedings. If sufficient cause was shown, which prevented a party from appearing, the Industrial Tribunal had the power to set aside the exparte award. The relevant portion of the case in the J.K. Synthetics Ltd., Vs. Collector of Central Excise, is extracted as follows:

> "Therefore, even if respondent was not present when the appeal was called for hearing, would not absolve the Tribunal from deciding the appeal on merits on the basis of material on record. That in fact the Tribunal did. The decision taken by the Tribunal in the absence of the respondent is not an ex parte decision or decree as understood under the Code of Civil Procedure or in a Civil Court and if it is a decision on merits, we fail to see how we can review or set aside the same. Recalling the order passed on merits would in fact amount to setting aside or reviewing an order decided on merits. In doing so, the Tribunal would be exercising a power which is not vested in it by law. We do not think that in such a situation Rule 41 of CEGAT (Procedure) Rules, 1982 could be pressed into aid by the appellants in support of their request for recalling the order."

On perusal of the above discussions, it is clear that if the party was prevented from appearing due to sufficient cause and when the cause shows the prevention of the party from appearing before the authorities, the Tribunal or Court may take into consideration of recalling the order. The show cause notice was issued in the year 1992 and the original authority passed confiscation order and imposed penalty. Even after a lapse of 25 years, the authority was not able to implement the order till

date, which would go to show that the appellant, was not interested in pursuing the adjudication and tried to protract the matter in one way or the other either before adjudicating authority or before this court.

14. However, on perusal of the entire records, it is seen that the appellant, in one way or the other, has protracted the proceedings, right from the year 1992, till date and on perusal of the application made before the authority for recalling the order, it would show that no sufficient cause was established for preventing the person from appearing before the authority. The reason stated in the application is extracted as follows:

> "3. The Applicant says and submits that its non-appearance and that of its counsel is neither willful nor wanton, but only due to the facts that the Counsel for Applicant was unavoidably held up before the Hon'ble High Court in a part heard matter and had requested through a proxy counsel for short adjournment."

15. Without establishing sufficient cause for non-appearance before the authority, that too, when the appellant has filed a petition to recall the order when he all along, agitated the case before the authorities, his non-appearance before the Appellate Authority in his appeal, this Court, is not convinced with the reason given in the application for recalling the order. Accordingly, we do not find any reason to interfere with the order passed by the respondent and it has to be negatived. There is no sufficient cause to prevent the person to appear before the authority and accordingly, the question of law is answered against the appellant.

In the result, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-

ASST. REGISTRAR

/TRUE COPY/

SUB ASST. REGISTRAR

To
The Commissioner of Customs (Port-Export) Customs House
No.60, Rajaji Salai,
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+1 CC to Mr. Pramod kumar Chopda Advocate SR.NO.67173/17
+1 CC to Mr.B.Satish Sundar Advocate SR.NO.67224/17

CMA.No.2750 of 2017

SJ(CO)
VC (26/10/2017)