

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 30.10.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

Civil Miscellaneous Appeal No.2940 of 2017
& C.M.P.No.17305 of 2017

Shri K.V.Prabhakaran,
Proprietor, M/s. Sowparnika Shipping Services,
New No.206, Old No.230, Second Floor,
Thambu Chetty Street, Mannady,
Chennai - 600 001. ... Appellant

Versus

The Commissioner of Customs
Chennai IV Commissionerate,
Custom House, No.60,
Rajaji Salai,
Chennai - 600 001. ... Respondent

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, to set aside the Final Order No.40755 of 2017, dated 12.05.2017 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai and allow the appeal arising out of order in Original No.38213 of 2015 dated 29.05.2015 passed by the Commissioner of Customs IV Chennai.

For Petitioner : Mr.S.Krishnanandh

For Respondent : Mr.A.P.Srinivas

JUDGMENT

(Judgment of the Court was delivered by R.SURESH KUMAR, J)

This Civil Miscellaneous Appeal has been preferred under section 130 of the Customs Act, 1962 (in short " The Act") against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT), SZB, Chennai, by order dated 12.05.2017 made in Final Order No.40754-40755/2017, confirming the order in original made by the respondent, i.e., The Commissioner of Customs-IV, Chennai in

order in Original No.38213/2015, dated 29.05.2015.

2. The appellant, a licensed customs broker holding customs license No.AAGPP8981KCH001 issued under the Customs Broker Licensing Regulation, 2013 (in short CBLR 2013) is supposed to undertake handling of importing and exporting cargo at Chennai both at Airport and at Seaport.

3. While so, the Director of Revenue Intelligence, Chennai Zonal Unit (CZU-DRI in short) received specific intelligence that, attempts were made to illegally export red sanders, an item which is prohibited for export, through Chennai Port in a consignment covered under Shipping Bill No.1326995, dated 28.02.2014 filed in the name of M/s. Rubicon Mineral Process, Chennai.

4. On receipt of such revenue intelligence report, the shipping bill concerned was scrutinised by the customs authorities, which revealed that, the said customs bill were filed by the Customs House agent, M/s. Sowparnika Shipping Services (the appellant herein) in the name of M/s. Rubicon Mineral Process, Chennai for export of 1440 bags of "Potash Feldspar 200 Mesh" to M/s. Transport Korea Co., Ltd., Room 409 Dong-A Jel Building, Juncang Dong, 4-GA Jun-GU, Busan, Korea under the strength of invoice No. RMP/001, dated 25.02.2014.

5. The said Potash Feldspar 200 Mesh were to be exported in three containers with containers No.CAIU2281887, BMOU2319149 and HDMU2587835 with 480 bags per container, which were sealed with Customs One Time Seal (OTS) bearing Nos. BRCY 17359, BRCY 17360 and BRCY 17361 respectively.

6. In pursuance of the intelligence report, officers of CZU-DRI identified and intercepted the said containers at M/s. Chennai International Terminal Private Ltd., (M/s. CITPL, in short) on 13.03.2014. From the documents obtained from M/s. CITPL, it was seen that the said three containers have been brought into terminal from M/s. Vishrutha CFS by three separate trailers. According to the shipping bill, the said three containers were found to be sealed with Customs OTS bearing the said numbers respectively.

7. Thereafter the officers of CZU-DRI in the presence of independent witnesses, one Shankar, Preventive Officer of Customs and one Parthasarathy, Superintendent, CITPL, broke open the seals of the said three containers. Out of the three containers, in container No.BMOU 2319149, it was found to be stocked with HDPE bags containing white colour powder like substance and it was labelled / printed as "Potash Feldspar Powder 200 Mesh, Net weight 50 Kgs, mas on its top.

8. When the said goods were pulled out, the CZU-DRI officials found some material covered with grey colour plastic sheets at the back. On removing the plastic sheets, they found red coloured wooden logs inside. Since the terminal was not conducive to have a thorough and detailed examination, those containers were seized under mahazar proceedings dated 13.03.2014 and they were moved under the preventive escort to M/s. Vishrutha Logistics, CFS, Vallur village, Chennai.

9. Subsequently on 24.03.2014, the said containers were taken up for detailed examination by the officers of DZU-CRI in the presence of independent witnesses, one M.Vadamalai, Container Surveyor and Mr.K.V.Prabhakaran, Proprietor of M/s. Sowparnika Shipping Services (the appellant herein), one Mr.C.K.Litheesh, Proprietor of M/s. Flamingo Shipping Services (Freight Forwarder), one D.Gopinath, Partner of M/s. Rubicon Mineral Process, one Mr.Veeramani, General Manager, M/s.Vishrutha Logistics Ltd., and one Mr.V.Kamaraj, Assistant Conservator of Forest, Forest Protection Squad.

10. On examination of containers, bearing Nos. CAIU2281887 and HDMU2587835, they were found to be stacked with the declared goods, viz., 480 bags of Potash Feldspar 200 Mesh each. However, on examination of the third container, bearing No. BMOU2319149, it was found that the declared goods, i.e., Potash Feldspar 200 Mesh were stacked in the front portion of the container and on removal of the same, a heap of some material covered with plastic sheets were found. On removing the said plastic sheets, 226 nos. of red colour wooden logs, totally weighing 8 Metric Tonnes were found. The said V.Kamaraj, ACF, Forest Protection Squad, inspected the said red colour wooden logs and certified the same to be red sanders with the scientific name "Pterocarpus santalinus" and further stated that they were prohibited items for export under Foreign Trade Policy & CITES.

11. Thereafter on reasonable belief that the red sanders were attempted to be exported out of India in the guise of declared item namely Potash Feldspar 200 Mesh, CZU-DRI officials seized 226 nos. of red sanders logs, weighing 8 Metric Tonnes and valued at Rs.3,60,00,000/- under mahazar, dated 24.03.2014.

12. Thereafter based on the report given by M.Vadamalai, Container Surveyor, that the customs seal at the containers were tampered with, the container in question was also seized and since the Potash Feldspar 200 Mesh goods were used for the purpose of smuggling red sanders, the said Potash Feldspar 200 Mesh items were also seized.

13. After seizure of these goods, the revenue, i.e., Commissionerate-IV of Customs, Chennai had issued a show cause notice to all stakeholders, including the appellant herein on 22.09.2014 asking the noticees including the appellant to show cause to the Commissioner of Exports, Customs House, Chennai, within 30 days, as to why penalty should not be imposed on them under Section 114 of the Customs Act.

14. On receipt of the said notice, the appellant through his lawyer had given a reply on 14-17/10/2014, wherein the appellant had taken a stand that the goods stuffed into the containers impugned in the show cause notice at M/s. Vishrutha CSF under the supervision of the customs officers were declared goods and also there was no tampering of the said containers at the relevant point of time. Therefore it was submitted by the noticeee that, the appellant herein was not responsible for any tampering which might have taken place after the proper goods were stuffed into the containers in the presence of the officers of the customs and duly sealed by them.

15. The respondent / revenue, after having taken into account the facts of the case, content made in the show cause notice, reply given by the appellant and other persons to whom such show cause notices were issued along with the appellant, had imposed penalty on the appellant for a sum of Rs.5 lakhs under Section 114 of the Customs Act for the illegal act, facilitating the attempted smuggling, on the part of the appellant, by lending its CHA license to the said Litheesh without verifying the goods to be exported and without identifying the exporter also.

16. Aggrieved over the said order passed by the respondent / revenue in order-in-Original dated 29.05.2015, the appellant preferred Appeal before the CESTAT, Chennai. Along with the appellant, the said Litheesh, proprietor of M/s. Flamingo Shipping Services, Chennai also filed appeal, as he was also similarly imposed a penalty of Rs.5 lakhs.

17. Both the appeals preferred before the CESTAT were taken up and decided by the orders of the CESTAT, dated 12.05.2017 in final order No.40754 and 40755 / 2017, where the CESTAT dismissed both the appeals. As against the said orders of the CESTAT, dated 12.05.2017, the appellant, K.V.Prabhakaran, Proprietor of M/s. Sowparnika Shipping Services has preferred this Civil Miscellaneous Appeal, where he raised the following Substantial Questions of Law :

"1. Whether the Tribunal was justified in sustaining the Order-In-Original, imposing penalty when admittedly the said Order-In-Original only, found violation of the

provisions of Custom Broker Licensing Regulations, 2013.

2. Whether the Tribunal is correct in holding that the appellant was privy to then alleged misfeasance on the part of the exporter, especially, when it is the specific case of the Appellant that as a Customs Broker, he had only gone by the documents made available to him for process of the shipping bill in question.

3. Whether the tribunal, is justified and correct in sustaining the penalty against the Appellant when even according to the Order-In-Original, there were some alleged negligence attributable to the Appellant. Whether such negligence perse could be a ground for imposing penalty under section 114 of the Customs Act, 1962, is a question, which would loom large in the present appeal, especially when there is no considered finding in either by the Adjudicating Authority or the Tribunal as a last fact finding body that there was, willful negligence. Negligence perse or even, recklessness in the conduct of the Appellant, cannot be a ground for sustaining the penalty.

4. Whether the Tribunal is right in interpolating breach of obligation under Custom Broker Licensing Regulations, 2013, for rendering findings, for imposition of penalty in terms of Section 114 of the Customs Act, 1962, when admittedly, the Appellant did not do anything or omitted to do certain things or abetted in the same, which had rendered the goods in question liable for confiscation.

5. Whether the Tribunal misdirected itself in its enquiry in the appeal in holding that the Appellant would be liable for penalty in terms of section 114 of the Customs Act, 1962, when admittedly, no positive material has been placed to show overt acts of abetment with prior knowledge, especially when the Appellant had no reason to believe that the goods tendered for export was indeed the cargo which was stuffed in the container.

6. Whether the Tribunal is right in holding that the functions and obligations of the Appellant extended beyond, the filling and processing of the Shipping bill in question, having regard to the limited role of the Customs Broker in only having access to the documents and not being a party to the

inspection of the goods tendered for export, more so, when the case of investigation is that the offending goods were interpolated into the consignment after the out of charge and shut out of the container were given by the Officer of Customs.

7. Whether the Tribunal was justified in sustaining the penalty on the Appellant under section 114 of the Customs Act, 1962 for alleged failure to adhere and comply with the obligations under Custom Broker Licensing Regulations, 2013, especially when no culminated proceedings have been found against the Appellant under the Custom Broker Licensing Regulations, 2013 and when no such proceedings were pending for action against the Appellant and his license issued under the Custom Broker Licensing Regulations, 2013."

18. Mr. Krishnanandh, learned counsel appearing for the appellant in support of the said substantial questions of law submitted that, the appellant is the customs handling agent and he is governed by the CBLR 2013 and if at all any violation is found under the said regulations, on the part of the appellant, the revenue cannot invoke Section 114 of the Customs Act for imposing penalty and therefore, the very imposition of penalty by invoking the provisions of Customs Act is unlawful and therefore the order-in-Original as confirmed by the CESTAT through the impugned order is liable to be set aside.

19. In order to substantiate his contention, the learned counsel appearing for the appellant would rely upon the following decisions :

- (i) 2015 (320) E.L.T 264 (Mad.), [Commissioner of Customs (Exports) v. I. Sahaya Edin Prabhu]
- (ii) 2015 (317) E.L.T. 3 (Mad.), [Commissioner of Customs, Tuticorin v. Moriks Shipping & Trading (P) Ltd.,]
- (iii) 2016 (338) E.L.T. 380 (Mad.), [Transport Logistics v. CESTAT, Chennai].

20. By relying upon the said decisions, the learned counsel appearing for the appellant would contend that, first of all under the provisions of Customs Act, penalty cannot be imposed on the customs clearing agent, who is a licensee under the regulations and if at all any violation is found from the customs clearing agent under the regulations, the authority has to issue show cause notice only under the provision of Section 20 of the CHALR 2004 or CBLR 2013 only and not under Section 114 of the Customs Act. Therefore it was the contention of the learned counsel appearing for the appellant that the very

invocation of Section 114 of the Customs Act was without jurisdiction, in so far as the action in imposition of penalty on the appellant is concerned.

21. The learned counsel appearing for the appellant would also contend that, at the time of stuffing the containers, it was only the declared goods and after having stuffed the containers, they were sealed by the customs authorities and thereafter if at all anything had happened where allegedly the customs seals of the container were tampered with, it could have been taken place beyond the customs area, for which the customs clearing agent cannot be held responsible. Therefore the learned counsel appearing for the appellant would vehemently contend that, the imposition of penalty, that too a huge sum of Rs.5 lakhs on the appellant on the allegation that he had also abetted to attempt smuggling made by the other stakeholders in the case, which was detected by the revenue intelligence, is absolutely unjustifiable and hence the interference of this Court on the orders of the CESTAT, which confirmed the orders passed by the respondent in order-in-Original is essential.

22. Per contra, Mr.A.P.Srinivas, learned Standing Counsel appearing for the respondent / revenue made submissions that, it is based on the specific intelligence report from DRI, the containers in question were found and intercepted by the respondent and after found that in one out of the three containers, where the declared goods Potash Feldspar 200 Mesh was to be imported, wooden logs in red colour covered in grey colour polythene papers were stuffed, only thereafter the containers were seized under mahazar by proceedings, dated 13.03.2014 and after proper examination, it had been brought to M/s. Vishrutha Logistics CFS, Vallur Village, Chennai.

23. The learned Standing Counsel further submit that subsequently on 24.03.2014, the containers were thoroughly examined in the presence of appellant and other stakeholders including the proprietor of M/s. Flamingo, one C.K.Litheesh, partner of M/s. Rubicon Mineral Process, D.Gopinath, the General Manager of M/s. Vishrutha Logistics Ltd., one Veeramani and also the appellant, i.e., K.V.Prabhakaran, proprietor, M/s. Sowparnika Shipping Services. Out of the three containers, in container No.2319149, the customs team in front of all these individuals including the independent witnesses, i.e., M.Vadamalai, Container Supervisor and also one V.Kamaraj, Assistant Conservator of Forest, Forest Protection Squad, found 226 nos. of red colour wooden logs totally weighing 8 Metric Tonnes. Since the red wooden logs were certified to be red sanders by the Forest Protection squad, Assistant Conservator of Forest, V.Kamaraj, by giving its scientific name also and since the said red sanders were prohibited for export under the

Foreign Trade Policy, the red sanders, the Potash Feldspar 200 Mesh, the containers all were seized under the mahazar.

24. The learned Standing Counsel would further contend that, thereafter show cause notices were issued to all stakeholders including the appellant seeking show cause from them as to why penalty should not be imposed against them under Section 114 of the Customs Act, 1962.

25. In response to the show cause notice, the learned standing counsel would submit that, the appellant had given reply through his lawyer on 14-17/10/2014, where he had taken a ground that, at the time of stuffing the containers at M/s. Vishrutha CSF under the supervision of customs officials, only the declared goods were stuffed and there was no tampering in the container at the relevant point of time. Therefore the noticee / the appellant was no way responsible for any tampering, which might have taken place after the proper goods were stuffed in the containers.

26. The learned Standing counsel would further submit that the said defence taken through the reply given by the appellant was carefully considered by the respondent authority who after taken the entire records and evidence of the individuals / stakeholders including the statement of the appellant himself, had come to a right conclusion that the appellant also had been in aid of abetting the attempt of smuggling the prohibited goods namely Red Sanders and therefore, he is liable to pay the penalty by invoking the provisions of Customs Act and therefore the said order-in- original confirmed by the CESTAT requires no interference from this Court.

27. In support of his contention, the learned Standing counsel has relied upon the following Judgment :
2017 (346) E.L.T. 547 (Mad.), [K.V.Shivaraj v. CESTAT, Chennai].

28. We have heard in detail the submissions made by the learned respective counsels appearing for the parties and we have given our anxious consideration to the issue raised in this appeal by having gone through the materials placed before this Court carefully.

29. The allegation made against the appellant by the revenue is, whether the appellant was also in aid of abetting the stakeholders to attempt the smuggling of prohibited goods, namely Red Sanders.

30. In this regard, the very statement given by the appellant himself, as has been recorded in the show cause notice

can be gone into. The relevant portion of the finding made by the Revenue in the show cause notice about the statement given by the appellant reads thus :

"Shri K.V.Prabhakaran, Proprietor of M/s. Sowparnika Shipping Services, in his voluntary statement, dated 18.03.2014 has interalia stated that he started M/s. Sowparnika Shipping Services in 1998 and obtained CHA licence (No.R498) in the same year; that his major clients include M/s. ZIP Industries, Chingelpet; M/s. Navadurga Enterprises, Chennai etc; that he knew Shri Litheesh, who was into freight forwarding business; that Shri Litheesh asked him to lend his CHA license for arranging customs clearance of his (Litheesh) clients consignments; that Shri Litheesh promised to pay Rs.1000/- per consignment to him for lending his CHA license; that he also agreed for the same; that accordingly, Shri Litheesh came to his office and gave the invoice, packing list and IEC details of M/s.Rubicon Mineral Process and asked him to file a shipping bill for the said consignment; that accordingly, he filed the shipping bill no. 1326995 dated 28.02.2014 and informed the same to Shri Litheesh for arranging customs clearance; that Shri Litheesh attended to the customs clearance of the said consignment and subsequent stuffing of the goods in the container; that his (Prabhakaran) staff did not attend to the customs clearance of the said consignment; that he has not obtained any authorization from M/s.. Rubicon Mineral Process; that he asked for the same from Shri Litheesh; that Shri Litheesh promised to give the authorization letter later but did not provide the same; that he has not received any payment from Shri Litheesh so far for the said consignment; that he did not know anyone from M/s. Rubicon Mineral Process; that he had neither communicated with them nor had any contacts with them; that he did not know anything about the presence of red sanders in the said consignment; and that a lenient view may be taken on him."

31. It is the further finding of the authority through the show cause notice about the involvement of the appellant or his omission and commission, which reads thus :

"Further, M/s. Rubicon Mineral Process, Shri

Gopinath, Partner of M/s. Rubicon Mineral Process, Shri Litheesh of M/s. Flamingo Shipping Services and Shri Prabhakaran of M/s. Sowparnika Shipping Services have aided and abetted S/Shri Ravi Kumar and Krishna Prasad by allowing their respective firms to be used by these conspirators to smuggle red sanders in the guise of genuine customs cleared goods. They have failed to exercise due diligence in verifying the authenticity of the claims made by these people and have thereby aided the said smuggling of red sanders. S/Shri Litheesh and Prabhakaran have blindly accepted the documents given by Shri Krishna Prasad and filed shipping bill as well as arrange customs clearance of the said consignment. They have not even bothered to get the authorisation letter from M/s. Rubicon Mineral Process on whose name the shipping bill has been filed. Hence, for their acts of omission and/or commission, which have rendered the goods liable for confiscation, they all appear liable for penal action under Section 114 of the Customs Act, 1962."

Accordingly the appellant was issued the show cause notice to give show cause as to why penalty should not be imposed on him under Section 114 of the Customs Act.

32. On perusal of the stand taken by the appellant both in the statement and in the reply to the show cause notice, it reveals that, one Mr.C.K.Litheesh of M/s. Flamingo Shipping Services admittedly had asked the appellant to lend his CHA license for arranging customs clearance of his clients consignment, for which the said Litheesh promised to pay a sum of Rs.1000/- per consignment for lending his CHA license. Since the consignment in question was booked in the name of M/s.Rubicon Mineral Process, the shipping bill produced in the name of M/s.Rubicon Mineral Process was not at all handled by the appellant, instead the said Litheesh of M/s. Flamingo Shipping Services handled it and the staff of the appellant also did not attend to the customs clearance of the said consignment, as the appellant did not get any authorisation from the exporter namely, M/s.Rubicon Mineral Process and no authorisation letter has been admittedly given by the exporter. It has been the categorical statement of the appellant that, he did not know anyone from M/s. Rubicon Mineral Process and he had further stated that he had neither communicated with them nor had any contacts with them.

33. The only defence taken by the appellant in the reply to the show cause notice is that, at the time of initial

stuffing of the containers in front of the customs officials at Vishrutha CFS, only the declared goods were stuffed and thereafter, if at all any tampering, which might have been taken place, as claimed by the revenue officials, the appellant had no knowledge about the subsequent development. Therefore he cannot be held liable for the alleged attempt of smuggling of prohibited goods.

34. In this regard, it is to be noticed that, it was the categorical statement of the appellant that, he did not know anything about the exporter, namely M/s. Rubicon Mineral Process. He had not communicated with them, nor he had any contacts with them and no authorisation from the exporter was also received or verified by the appellant. According to the appellant, he had simply lent his CHA license to the said Litheesh of M/s. Flamingo Shipping Services. If that being so, the appellant cannot also plead ignorance of what had happened, subsequent to the initial stuffing of the containers.

35. It is not the case of the appellant that he knew the exporter, from whom on getting the shipping bill, he was present at the time of initial stuffing of the containers and only in the presence of himself, the container were seized with proper declared goods from the exporter. When that being so, the appellant cannot claim knowledge that at the time of initial stuffing, only the declared goods were stuffed and subsequently only it might have been tampered. Since the appellant did not have any knowledge of the initial stuffing also, as he had stated that he had lent license only to the Litheesh of M/s. Flamingo, the said defence taken by the appellant in the reply to the show cause notice cannot be accepted.

36. This aspects had been considered in detail by the revenue in the order-in-original and in this regard, the following findings and the conclusion arrived at by the authority, who passed the order-in-Original can be usefully referred to :

"22.1. Shri. K.V. Prabhakaran appeared for personal hearing before the Commissioner of Customs, Chennai-IV on 27.03.2015 and reiterated that failure to exercise due diligence or verify authenticity of documents or obtaining authorization falls under the ambit of CHALR / CBLR and not under the Customs Act. For contravention under CHALR / CBLR, no penalty under Section 114 of the Customs Act is imposable. He also stated that the customs seals were found intact and the activity of replacement of goods by tampering the container

took place outside the Customs area and hence
CHA cannot be held responsible for this. He
requested for a lenient view.

...

Shri.Prabhakaran, Prop. of M/s. Sowparnika
Shipping Services

38. Shri Prabhakaran in his voluntary statement
had stated that

Shri. Litheesh who was known to him had asked
him whether his CHA license could be used for
arranging customs clearance of some export
consignments and he had agreed for the same.
Shri.Litheesh had attended to the customs
clearance of the said consignment and
subsequent stuffing of the goods into the
containers.

He had not obtained any authorization from M/s.
Rubicon Mineral Process.

He did not know anyone from M/s. Rubicon
Mineral Process and also that he did not know
anything about the presence of red sanders in
the said consignment.

He denied most of the allegations in the show
cause notice and that statement of co-noticees
cannot be used in the proceedings which are
penal in character, without corroboration of
material particulars and cross examination of
the said persons to ascertain the truthfulness
of their respective statements.

If it proved that there was no tampering of the
containers at the time of stuffing, and also
that if the goods stuffed were the declared
goods, the question of his role in respect of
the prohibited goods does not arise.

He neither knew Shri.Ravi Kumar nor had
Shri.Ravi Kumar interacted with him and that he
was unaware as to why he had been called upon
to show cause on the charge of aiding and
abetting Shri. Ravi Kumar and Shri. Krishna
Prasad.

38.1. Shri Prabhakaran had sought for cross
examination of Shri. Vadamalai, container
surveyor, the officer who examined and
supervised the stuffing of goods and Shri.Ravi
Kumar. Shri.Prabhakaran appeared for personal
hearing before the Commissioner of Customs and
reiterated that failure to exercise due
diligence or verify authenticity of documents
or obtaining authorization falls under the
ambit of CHALR/CBLR and not under the Customs

Act. For contravention under CHALR/CBLR, no penalty under Section 114 of the Customs Act is imposable. He had also stated that the customs seals were found intact and the activity of replacement of goods by tampering the container took place outside the Customs area, and hence CHA cannot be held responsible for this.

38.2. Shri.Prabhakaran in voluntary statement had admitted that he had allowed Shri.Litheesh to use his CHA license and this act of Shri. Prabhakaran is illegal and facilitated the attempted smuggling. His failure to ensure that proper procedure are followed for the clearances made in his firm's name confirms the omissions on his part which had rendered the goods liable to confiscation. While handling the export works, he should have taken adequate care as provided in the Customs Act, 1962 and the CHALR 2004. He failed to note that persons not authorized by Customs cannot file Shipping Bill on behalf of an exporter and that his allowing Shri.Litheesh to file Shipping Bill on behalf of him had facilitated the smuggling activities. Even, allowing his request for cross examination will not prove his innocence in this act. Hence, Shri.Prabhakaran is liable to penal action under Section 114(i) of the Customs Act, 1962."

37. Accordingly the authority, who passed the order in original imposed a fine not only to the appellant but also to all the stakeholders of the issue including exporter, namely, M/s. Rubicon Mineral Process, Mr.Litheesh of M/s. Flamingo Shipping Services and others along with the appellant.

38. When the appellant and the said Litheesh filed appeal against the order in original in CESTAT, where also the CESTAT had considered the issue in proper perspective and has given the following findings :

"10.1. Evidence came to record showing that the smuggled goods were concealed under HDPE Bags containing Potash Feldspar 200 Mesh and covered by a grey coloured plastic sheet inside the container. Shri Litheesh who had no CHA license by his firm M/s. Flamingo Shipping Services, revealed story of his assistance to Shri Krishna Prasad and aided him beginning from the state of booking the container to clear the alleged export of red sanders. Such act of abetment of Shri Litheesh was corroborated from

the statement of Shri Krishna Prasad, who on examination revealed entire story of the attempted smuggling naming Shri Litheesh and bringing him to the fold of scrutiny by investigation bringing out their contact with each other from February 2014. Shri Litheesh without having CHA license and authorization from the exporter, borrowed the license of Shri Prabhakaran (owner of M/s. Sowparnika Shipping Services) facilitated the attempted smuggling as abettor. He became a party to the fraud committed against Customs making misuse of IEC of Shri Gopinath to file shipping bill in the name of M/s. Rubicon Mineral Process. Shri Krishna Prasad was found to be master mind in the perpetrated smuggling. Shri Litheesh could not rule out his role from being a member of the racket. He was one of the consults in the smuggling. When Shri Krishna Prasad handed over the documents to him for Customs clearance, Shri Litheesh without having CHA license made use of the license of M/s. Sowparnika Shipping Services owned by Shri Prabhakaran. All his sequence of acts prove his pre-meditated design to facilitate smuggling, beginning from the date of his contact with Shri Krishna Prasad, booking of container, misuse of IEC of Shri Gopinath, borrowing of CHA license from Shri Prabhakaran and filing of shipping documents before Customs without authorisation of exporter for clearance of the offending goods.

10.2. Incidence of seizure of the red sanders by the investigation also brought role of Shri Prabhakaran who lent his CHA license to Shri Litheesh to aid and abet smuggling of red sanders. Both the appellants could not detach themselves from the smuggling racket. Plea of both the appellants that they were innocent could have received consideration had they brought out the illegal act to the knowledge of Customs. But they did not. They acted in connivance with the racket till the offending container was seized by the investigation resulting in discovery of smuggled goods.

11. The proceeding under the Customs Act, 1962 is quite different and independent of any proceeding under CHALR, 2004. Appellants when failed to detach themselves from the offence and endangered the interest of Customs, they were required to be dealt under the Act. Their

role was also contributory to the confiscation of smuggled goods. Therefore, imposition of penalties of Rs.5,00,000/- on each of them does not appear to be unreasonable when their role in abetting and aiding smuggling was proved by investigation successfully.

12. It may be stated that the law of Customs has object to curb mischief against Customs and deter smuggling. Preponderance of probability is always in favour of Revenue. The appellants in this case were intimately connected with the smuggling racket without ascertaining the identity of exporter and owner of IEC. No authorisation was obtained by them to file shipping bill. Evidence came to light proving their predetermined mind to cause loss to the exchequer. Accordingly, the Adjudication made against them is upheld and their appeals are dismissed."

39. It was contended by the learned counsel for the appellant by raising the Substantial Question of Law that, for the alleged violation of the Custom Broker Licensing Regulations, penalty under the provisions of the Customs Act cannot be imposed. In this regard, the learned counsel appearing for the assessee had relied upon three Judgments cited supra.

40. In the first Judgment, in 2015 (320) E.L.T 264 (Mad.), the Division Bench of this Court has found that the Tribunal by taking note of the fact that there was no finding of a positive role of the first respondent, i.e., assessee therein or licensee therein, in attempting to smuggle out Red Sanders wooden logs, held that, imposition of penalty under Section 114 (i) of the Customs Act was not sustainable. The relevant paragraphs of the said Judgments are extracted herein for easy reference.

"2.5. The Tribunal, taking note of the fact that there is no finding of a positive role of the first respondent in the attempt to smuggle out red sander wooden logs, held that imposition of penalty under Section 114(i) of the Customs Act is not sustainable. The Tribunal allowed the appeal filed by the first respondent and set aside the penalty imposed, by observing that for failure to discharge functions as a Customs House Agent, penalties are provided in the Customs House Agents' Licensing Regulations.

...

7. The Tribunal has rendered a categorical finding that there is no finding of a positive

role of the first respondent in the attempt to smuggle out red sander wooden logs. Even in the order of the Original Authority, it is held that the custom house agent has not discharged his duty in the normal course of his service. As rightly observed by the Tribunal, for failure to discharge functions as a Custom House Agent, penalties are provided in the Customs House Agents Licensing Regulations. Therefore, imposition of penalty under Section 114(i) of the Customs Act is unwarranted. We, therefore, find no reason to differ with the finding of the Tribunal."

41. Since the facts of the said case is entirely different from the facts of the present case, where it was the finding that when there was no adverse finding against the assessee / licensee in that case, the imposition of penalty by invoking Section 114 of the Customs Act was not provided in that case. Therefore when the revenue preferred appeal before this Court, the decision made by the CESTAT was upheld. Thus, in view of the said facts, which are entirely different from the facts of the present case, the said Judgment cannot advance the case of the appellant. Therefore it is distinguishable.

42. In respect of the second case, i.e., 2015 (317) E.L.T. 3 (Mad.) is concerned, in that case the declared goods was organic dye, namely, intermediate G-salt. However, the goods exported was original salt. But this issue was found by the authorities, only after having sent the goods in question, to the laboratory test and after having obtained the report from the authorities, the Customs Authorities found the goods which were exported or attempted to export were original salt, instead of intermediate G-salt. Therefore in that context, the CESTAT had found the issue in favour of the licensee that, only after the analysis of the laboratory, it was revealed that the goods were common salt, instead of organic dye intermediate G-salt as declared, hence the penalty cannot be imposed on CHA. Therefore the finding given by the CESTAT was justified by this Court in the said Judgment and the relevant portion of the said order reads thus :

"6. Even at the very outset, it is evidence from the order of the Tribunal that the goods were examined by the Customs Department in its laboratory and analysis revealed that the goods were common salt instead of Organic Dye Intermediate G-Salt, as declared. Such being the case, this Court is baffled to note how penalty can be levied on the CHA. When the

Department itself, only on the basis of the chemical analysis, was able to ascertain that the goods attempted to be exported was not common salt, how can a CHA be expected to know of the exact nature of the product at sight. In the above stated scenario, this Court has no hesitation to hold that the Commissioner (Appeals) and the Tribunal's reasoning for setting aside the penalty imposed on the CHA is fully justified."

43. Here in the case on hand, the facts are entirely different, as there is a vast difference between the goods declared to be exported and the goods actually attempted to be exported. Here the goods declared for export is 1440 bags of Potash Feldspar 200 Mesh, whereas in one out of three containers instead of Potash Feldspar 200 Mesh, 226 nos. of Red Sanders wooden logs were stuffed inside the container and therefore the said aspect need not be found only after sending any of the goods to the laboratory test and therefore the facts in the said case cannot be fit in in the present case. Therefore the view taken by the CESTAT, as confirmed by this Court in that case, can no way be compared with the present facts of the case and therefore that Judgment would also no way be helpful to the appellant.

44. In so far as the third case cited by the appellant, i.e., 2016 (338) E.L.T. 380 (Mad.) is concerned, where based on the facts of the case, the Custom Brokers License was revoked and the security deposit was forfeited. In that case, it was the view of the Division Bench that, even though the appellant therein was found guilty of handing over blank signed forms to third parties, that would not attract punishment of cancellation of licence when no other grave charges made on the appellant therein. Only in that context, instead of cancellation of licence, penalty was directed to be imposed on the CHA and therefore that facts also can no way be compared with the present case, as in the case on hand, no action was initiated or concluded for revocation of the CHA licence itself from the appellant, instead only penalty of Rs.5 lakhs had been imposed, for the proven charge of lending the licence to the third party, which paved the way for the others to join together and to attempt to smuggle prohibited goods. Therefore such move on the part of the appellant herein, i.e., the CHA licence holder, is to be deprecated and therefore imposition of penalty by invoking provisions of Customs Act in this regard is fully justifiable. Hence, the order passed by the original authority, as confirmed by the CESTAT in the impugned order is not liable to be interfered with.

45. In the case cited by the Revenue side, i.e., 2017 (346) E.L.T. 547 (Mad.), it was the case of the assessee that he had obtained Import Export Code, however, since he could not carry the import and export business fruitfully, he permitted the IEC to be used to the person known to him and that too for a consideration, though for a very insignificant amount.

46. When that issue came to be considered by a Division Bench of this Court, this Court had taken a view that, the imposition of penalty by invoking the provisions of Customs Act was justifiable. However, imposition of Rs.1 lakhs was reduced to Rs.50,000/-.

47. Here in the case on hand because of the attitude on the part of the appellant in lending his CHA license to a third party for usage without knowing the actual importer and the goods to be imported, is a serious issue and for the said purpose, since the appellant was admittedly get only Rs.1,000/- for each consignment, the appellant has not only misused the CHA license but also very recklessly and carelessly lend it to some unscrupulous persons for facilitating smuggling activities and therefore such act on the part of the appellant shall be viewed seriously.

48. Taking into account the said aspect of the issue, the imposition of penalty of a sum of Rs.5 lakhs by invoking the provisions of the Customs Act, in the considered view of this Court, is not only justifiable but also acceptable as there was no excess imposition of penalty on the part of the revenue in this regard compared with the omission and commission of the appellant. Therefore, we are of the firm view that the order-in-Original as has been confirmed by the CESTAT through the impugned order is liable to be sustained and the Substantial Questions of law raised before this Court are to be answered in favour of the Revenue.

In the result, the Substantial Questions of Law raised in this appeal are answered in favour of the Revenue and against the appellant. Hence, the Civil Miscellaneous Appeal fails and accordingly, it is dismissed. Consequently, connected miscellaneous petition is also dismissed. No costs.

Sd/-

Assistant Registrar(Co)

//True Copy//

Sub Assistant Registrar

tsvn

To

The Commissioner of Customs
Chennai IV Commissionerate,
Custom House, No.60,
Rajaji Salai,
Chennai - 600 001.

C.M.A.No.2940 of 2017

rsk(CO)
TR(01/08/2018)



WEB COPY