IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.06.2017

Delivered on : 30.06.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.16172 of 2016
and
W.M.P.No.13956 of 2016

Deepak Kumar ... Petitioner

Vs.

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

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the respondent made in Order-in-Original No.44350 of 2016 dated 28.01.2016, in F.O.S.No.14/2014/PREV.ADJN UNIT and quash the same.

For Petitioner : Mr.B.Kumar,
Senior Counsel for
Mr.B.Satish Sundar

For Respondent : Mr.V.Sundareswaran
Standing Counsel

O R D E R

This writ petition is filed against the order in original dated 28.01.2016 passed by the respondent imposing penalty of Rs.2 crores on the petitioner under Section 112 (b)(1) of the Customs Act, 1962.

2. The case of the petitioner is as follows:
The petitioner is doing business of trading in jewellery and bullion. On 29.04.2014, the Director of Revenue Intelligence,

Chennai Zonal Unit, conducted search of residential premises of one Thameem Ansari and seized the gold bars allegedly weighing 33.3499 kgs on a reasonable belief that they were smuggled into India without payment of appropriate customs duty. The statement under Section 108 of the Customs Act from the said Thameem Ansari and his associate Rehman were recorded on 29.04.2014, in which, they had allegedly disclosed that the petitioner was one of the persons, to whom, such gold bars were sold on earlier occasions. The said Thameem Ansari and Rehaman had retracted from their original statements. Pursuant to the search and seizure conducted on 29.04.2014, no action was taken either to summon the petitioner or to search his residential business premises. However, on 12.09.2014, the DRI conducted a search and seizure at the petitioner's business place resulting the recovery of 2.830 kilograms of katcha gold and Indian currency notes of Rs.44,37,000/-. They were seized under a mahazar on a reasonable belief that the same was smuggled and the Indian currency seized were sale proceeds of contraband. The petitioner has resciled from his statement and has clearly stated that the same was forced and coerced out of him by exercise of threat and unlawful methods. Two show cause notices were issued, out of which, the present writ petition is concerned with the one dated 25.10.2014. In the said show cause of notice, the proposal is for confiscation of the gold bar seized from Thameem Ansari and for imposing penalties against the said persons and others including the petitioner. It is alleged in the show cause notice that the petitioner has abetted the alleged illegal transaction of dealing in gold bars knowingly that they are smuggled. To the show cause dated 25.10.2014, the petitioner caused a reply on 15.01.2015 refuting the allegations. The statement of Thameem Ansari and Rehman cannot be used against the petitioner for the reason that they are in the nature of statement of co-accused having no evidentiary value, more so, when they have been retracted by the respective makers. The petitioner sought to cross-examine those persons and however, the Adjudicating Authority rejected such request. The petitioner filed a detailed written statement of defence dated 28.12.2015 in the course of hearing of adjudication proceedings. Finally, the Adjudicating Authority passed the impugned order finding the petitioner guilty of the charge of abetment, thereby imposing penalty of Rs.2 crores in terms of Section 112(b) of the Customs Act,1962.

3. The respondent filed a counter affidavit wherein it is stated as follows:

On 29.04.2014, the Officers of Directorate of Revenue Intelligence, Chennai Zonal Unit, searched the residential premises of one Thameem ansari and recovered 33.3499 kgs of crude gold bars valued at Rs.9.91 crores. They also searched the residence of one Syed Rehman who is the close associate of Thameem Ansari. During the course of investigation, the statement of Thameem Ansari was recorded wherein he has stated that he sold the smuggled gold bars to the petitioner having Shop D Block M/s. Adinath complex and also given his contact number. Likewise, the statement of Syed Rehman was recorded under Section 108 of the Customs Act wherein he had stated that they have mainly sold the smuggled gold bars to the petitioner. Based on those information, the DRI conducted search at the shop premises of the petitioner on 12.09.2014 and seized 2.830 kgs of gold bars valued at Rs.77,35,486/- and unaccounted cash of Rs.44,37,000/-. The petitioner in his statement dated 12.09.2014 admitted his dealing viz., buying and selling of smuggled gold. He agreed that he had received smuggled gold bars around four to five times from Syed Rehman and each time, he received around 8 to 12 kgs of smuggled gold bars. The show cause notices were issued to the petitioner and others. On 30.11.2015, the petitioner was informed about the inability to accede to his request for cross examination. However, he was supplied with the documents requested by him. The petitioner had played a commercial role in dealing with the smuggled gold bars with full knowledge that they are of smuggled in nature. Therefore, for the said acts of omission and commission, he was liable for penal action under Section 112(b)(1) of the Customs Act,1962. The principles of natural justice have been duly followed during the course of adjudication. The Adjudicating Authority thoroughly discussed the material evidences available in the case and also the crucial part played by the petitioner. The two show cause notices issued to the petitioner deals with the different issues and the respective cases are dealt with separately. The present writ petition is not maintainable since the petitioner is at liberty to file an appeal under Section 129 (A)(1) of the Customs Act,1962 before CESTAT, Chennai.

4. Mr.B.Kumar, learned senior counsel appearing for the petitioner submitted as follows:

The impugned order imposing penalty on the petitioner is based on the search and recovery of 33.3499 kgs of gold from one Thameem Ansari and admittedly, the petitioner was not the recipient of such gold. For imposing of penalty under Section 112 of the Customs Act, the value of gold allegedly given to the petitioner previously should be given in the show cause notice. No such value is given. The Adjudicating Authority cannot travel beyond the show cause notice. The petitioner's request for cross examination of Thameem Ansari was rejected by one line order. With regard to the seizure of 33.3499 kgs of gold, the petitioner is not called upon to answer. The imposition of penalty on the petitioner is referable only to the alleged earlier transaction, for which, no values is given in the impugned order. Even otherwise, the materials available before the respondent, namely, the statement of Thameem Ansari and Rehman, is only a retracted statement by those persons.

Therefore, it requires corroboration. In the absence of any independent statement, those retracted statements cannot be looked into. In support of these contentions, the decision reported in 2015 (317) ELT 177 SC, 2006 (13) SCC 210 and 2014 (300) ELT 342(Madras) are relied on. The show cause notice was not clear as to on what relevant provisions of law under which it was issued to the petitioner. Therefore, it cannot be sustained. In this connection 1983 (12) ELT 322 (Madras) is relied on. Since the impugned order, imposing penalty on the petitioner goes beyond the show cause notice and without indicating the actual value of the gold alleged to have been given to the petitioner previously, the same is to be treated as the one without jurisdiction and therefore, the present writ petition is maintainable.

5. Mr.Sundereswaran, learned counsel appearing for the respondents submitted as follows:

In the show cause notice, the valuation of smuggled gold given to the petitioner and others were clearly arrived at in paragraph 29. The act of abetment on the part of the petitioner is also clearly referred to in the show cause notice. Since the impugned order was passed by the competent jurisdictional authority, the petitioner is not entitled to maintain the present writ petition as he has statutory appellate remedy before CESTAT.

6. Heard the learned senior counsel appearing for the petitioner and the learned counsel appearing for the respondent.

7. Challenge made in this writ petition is against the order-in-original dated 28.01.2016 passed by the respondent as the quasi judicial adjudicating authority. It is seen that the respondent/ adjudicating authority has passed a detailed order after thoroughly discussing the facts, circumstances, the position of law and the nature of punishment to be imposed on the parties concerned. Though the said order-in-original was passed against three other persons, namely, one Thameem Ansari, Syed Rehman and Haji Kaka, thereby confiscating 33.3499 kg of seized foreign marked gold bars and Indian currency of Rs.1,83,000/- and imposing penalty of Rs.2 crores each on Thameem Ansari and Syed Rehman and imposing penalty of Rs.4 crores on Haji Kaka, they are not before this Court and the writ petitioner alone has approached this Court and filed the present writ petition challenging the imposition of penalty of Rs.2 crores. There is no dispute to the legal position that as against the impugned order-in-original, a statutory appellate remedy is available to the petitioner before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. It is also well settled that in fiscal matters, filing of writ petition cannot be entertained or encouraged against the order

passed by the Adjudicating Authority, unless the very jurisdiction of the said authority is questioned or that there is a flagrant violation of principles of natural justice in passing the said order. In this connection, it is relevant to refer to the following decision of the Apex Court as well as the Division Bench decision of this Court reported in (2010) 8 SCC 110 (United Bank of India -vs- Satyawati Tondon and others) and (2005) 2 MLJ 246(DB) (M/s.Nivaram Pharma Private Limited, rep. by its Director Sardarmal M.Chordia, Madras –vs- The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras and others).

8. No doubt the learned senior counsel for the petitioner sought to contend that there is a jurisdictional error in this matter. According to him, the Adjudicating Authority has travelled beyond the show cause notice and imposed the penalty without giving the details of value of the gold allegedly given to the petitioner previously by those two persons, namely, Thameem Ansari and Syed Rehman. In nutshell, the crux of the contention of the learned senior counsel is that the quantum of Rs.2 crores arrived at by the Adjudicating Authority, as penalty payable by the petitioner, is without any material details and particulars. His further contention is that the petitioner was not given an opportunity to cross examine those two persons, namely, Thameem Ansari and Syed Rehman and therefore, there is a violation of principles of natural justice.

9. Upon giving careful consideration to the submissions made by the learned senior counsel and on perusal of the impugned order, I am not in a position to accept the above contentions of the learned senior counsel for the petitioner on the question of maintainability of the writ petition. The reasons are as follows:

10. It is not in dispute that a show cause notice dated 25.10.2014 was issued to the petitioner and others, wherein details of smuggled gold bars arranged by the Haji Kaka and received by Thameem Ansari and Syed Rehman, around 6 times in the past, were given in paragraph Nos.29, which reads as follows:

> 29. Further, admittedly, S/Shri Thameem Ansari and Rehman have received smuggled gold bars arranged by Shri Haji Kaka around 6 times in the past. In their voluntary statements, they have admitted that they have started receiving smuggled gold bars sent by Shri Haji Kaka since 1st week of April, 2014; that in the first two cases, as per the instructions of Shri Haji Kaka, they have received around 10 kg of smuggled gold bars (each time) from one Shri Al Ameen in Manady, Chennai; that then on April 20th, they

received around 22 kg of smuggled gold bars form a person, as told by Shri Haji Kaka; that he didn't remember the details of the said person; that similarly, they have received around 20 kg of smuggled gold bars each on 25th and 26th April; that then on 28th April, they received around 17010.520 gm of smuggled gold bars from Shri Al Ameen, as per the instructions of Shri Haji Kaka. These admissions are duly corroborated by the messages recovered from the mobile phone of Shri Rehman wherein details of quantity of previous smuggled gold bars are mentioned. Similarly, cell tower locations and call detail records also indicate that Shri Rehman has previously received smuggled gld bars. Going by their own admissions, it appears that they would have approximately dealt with 99 kg of smuggled gold bars in the past. Considering the average price of 24 ct gold bars at Chennai during the said period as Rs.2950 per gram, the estimated value of the entire gold bars smuggled and sold by these people (which could not be seized) would be of the order of Rs.29.2 crores. It is pertinent to mention here that this 99 kg of foreign origin gold, valued at approximately Rs.29.2 crores is also liable for confiscation under Section 111 of the Customs Act, 1962. But neither the said quantity of smuggled gold bars nor the sale proceeds of the same do not seem to be readily available for seizure and confiscation as discussed supra. Obviously, no duty has been paid on the said quantity, resulting in huge loss to the exchequer. But for the intervention by DRI, they would have continued to smuggle and sell foreign origin gold bars unabated. In the light of the gravity of offence committed by S/Shri Haji Kaka, Thameem Ansari, Rehman and Al Ameen as discussed above, it is felt that this case is a fit case for imposition of exemplary penalty under Section 112 of Customs Act, 1962 commensurating with the seriousness of the offence committed by them, which could be equal to be the value of gold bars so far successfully smuggled and sold by them as mentioned above.

11. Perusal of the above said averments/ allegations made in the show cause notice would show that the approximate value of the 99 kgs of smuggled gold bars transacted in the past was given. It is further seen from paragraph Nos.6 and 7 of the show cause notice that those two persons, namely, Thameem Ansari and

Rehman had given statement before the authorities that so far they have mainly sold smuggled gold bars to the petitioner and others. It is further seen in the said show cause notice at paragraph No.12, which dealt with the voluntary statement given by the petitioner, that he used to buy and sell gold bars through those two persons. Thus, in the said show cause notice, the petitioner was called upon to show cause as to why penalty should not be imposed on him under Section 112 of the Customs Act,1962. It is true that the petitioner had denied such allegation and filed a written reply to the show cause notice on 15.10.2015.

12. It is not in dispute that search and seizure were conducted on 12.09.2014 at the premises of the petitioner resulted in seizure of 2830 gms of smuggled gold bars valued at Rs.77,35,486/- along with unaccounted cash of Rs.44,37,000/-, the sale proceeds of smuggled goods under mahazar proceedings. It is also an admitted fact that consequent upon such search and seizure, separate proceedings was initiated against the petitioner which culminated into passing of a another order-in-original No.45934/2016 dated 09.03.2016 confiscating the seized gold and currency and imposing penalty of Rs.30 lakhs on petitioner under Section 112(b) of the Customs Act,1962. It is not in dispute that the above said order is challenged by the petitioner by way of an appeal before the Appellate Tribunal. Though the present impugned proceedings is in relation with the search and recovery of 33.3499 kgs of gold from the said Thameem Ansari, it is seen that the parties have given their respective statement with regard to the earlier transactions made between them, in which, the approximate quantum and value of the smuggled gold bars have also been stated, as discussed in the show cause notice at paragraph No.29. The Adjudicating Authority, after discussing the facts and circumstances has arrived at the conclusion that the petitioner is liable to pay a sum of Rs.2 crores as penalty under Section 112(b)(1) of the Customs Act,1962. No doubt, the learned senior counsel pointed out that such quantum of penalty arrived at by the Adjudicating Authority is bereft of material details and particulars. I do not think that such lapse, even assuming to be, would amount to want of jurisdiction. Even otherwise, perusal of the thorough discussion of facts and circumstances by the Adjudicating Authority, more particularly ,at paragraph Nos.24 and 25 of the impugned order would amply show that he has dealt with the approximate quantum of smuggled gold bars in the past and its value. He has also pointed out that the said quantum of smuggled gold bars in the past and the sale proceeds of the same were not readily available for seizure and confiscation. He further observed that as no duty has been paid on the said quantum, the same has resulted in huge loss of exchequer. He further pointed

out that but for the intervention by DRI, the petitioner herein and others would have continued to sell foreign gold bars unabated. Therefore, he came to the conclusion that exemplary penalty under Section 112 of the Customs Act is warranted. Therefore, I do not think that the learned senior counsel for the petitioner is justified in contending that the Adjudicating Authority has gone beyond the scope of the show cause notice. Likewise, the Adjudicating Authority has considered in detail as to how the contention of the petitioner in respect of the so called retracted statements cannot be accepted by discussing the same in detail from paragraph No.49 onwards also by relying on certain case laws in support of his conclusion. Therefore, whether such findings rendered by the Adjudicating Authority is correct or not is to be gone into only by the next fact finding authority and hence, by raising such ground, the petitioner is not entitled to maintain this writ petition. Certainly, the petitioner is not questioning the statutory competency or jurisdiction of the adjudicating Authority to adjudicate the matter. The only dispute is with regard to the liability of the petitioner to pay penalty and even assuming he is liable, then the quantum. These are all the questions involving factual aspect which are to be considered and decided only by the next fact finding authority, namely, the Appellate Authority, here in this case, CESTAT, Chennai. Therefore, it is for the petitioner to canvass the correctness or otherwise of the order passed by the Adjudicating Authority before the Appellate Tribunal by raising all the contentions.

13. True that the petitioner has also raised the ground of violation of principles of natural justice. According to him, the refusal to cross examine those two persons, namely, Thameem Ansari and Syed Rehman has resulted in violation of principles of natural justice. I do not think that the petitioner is justified in raising such objection now, especially, when the order passed by the Adjudicating Authority on 30.11.2015 denying the request of the petitioner to cross examine those two person, has not been challenged by the petitioner and on the other hand, by accepting the said order, the petitioner appeared further and filed additional written submissions, as required under the said order dated 30.11.2015. Even otherwise, the Adjudicating Authority has dealt with in detail as to why such request is rejected by relying on certain case laws. In any event, as the Appellate Authority is also a fact finding authority, certainly, the petitioner is entitled to canvass before such authority as to how such denial of cross examination of those two persons, has resulted in affecting his interest. If the request for cross examination was not at all considered, then it is a different matter to say that there is a violation of principles of natural justice. On the other hand, if such request is considered and rejected on some reasons and findings, then it is for the next

fact finding authority to go into the same to find out as to whether such reasonings and findings are justifiable or not. Therefore, at this stage, this court is not inclined to go into such question and give any finding on the same.

14. No doubt, the learned senior counsel for the petitioner relied on certain case laws as referred to supra in support of his contention on the merits of the matter. As this Court is of the view that the petitioner has to exhaust the alternative statutory appellate remedy, I am of the view that those case laws can always be pressed into service before such appellate forum while contesting the matter in appeal on the factual aspects of the same as well. Accordingly, I find that the present writ petition is not maintainable as the petitioner has to exhaust the alternative remedy of filing an appeal before the CESTAT. Thus, the writ petition is disposed of with liberty to file an appeal before the CESTAT, Chennai, within a period of four weeks from the date of receipt of copy of this order. If any such Appeal is filed, the same shall be considered on its own merits and in accordance with law without reference to the period of limitation. It is open to the petitioner to raise all the points before the Appellate Forum. Any of the observations or findings made in this order will not stand in the way of considering such appeal independently on its own merits. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsi

To

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

+2cc's to Mr.B.Sathish Sundar, Advocate, S.R.No.45717
+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.45654(20.07.2017)

W.P.No.16172 of 2016

MP(CO)
CA(10/07/2017)