In the High Court of Judicature at Madras

Dated : 27.8.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal Nos.1901 to 1903 of 2018 &
CMP.Nos.14630 to 14632 of 2018

Shri G.Masilamani, Proprietor,
M/s.G.Masilamani ...Appellant in CMA.No.1901/18

M/s.Transquare Clearing and
Forwarding ...Appellant in CMA.No.1902/18

Shri.V.Sundaramoorthy ...Appellant in CMA.No.1903/18

Vs

The Commissioner of Customs
(Chennai-IV), Custom House,
No.60, Rajaji Salai, Chennai-1. ...Respondent in all the CMAs

APPEALS under Section 130A of the Customs Act, 1962 against final order Nos.40756 to 40758 of 2017 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 12.5.2017 in Appeal Nos.C/41896 to 41898/2015-DB.

For Appellants : Mr.S.Murugappan
For Respondent : Mr.K.Ravi, SSC

COMMON JUDGMENT
(Judgment was delivered by T.S.SIVAGNANAM,J)

These appeals are directed against the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Appeal Nos.C/41896 to 41898/2015 in Final Order Nos.40756 to 40758 of 2017 dated 12.5.2017. The appellants in these three appeals are Mr.G.Masilamani, M/s.Transquare Clearing and Forwarding and Mr.V. Sundaramoorthy, who was the clerk working under the said Mr.G.Masilamani (appellant in CMA.No.1901 of 2018).

2. The Directorate of Revenue Intelligence (DRI) issued a show cause notice dated 02.12.2014 under Section 124 of the Customs Act, 1962 (hereinafter referred to as the Act). In the said show cause notice, there were eight noticees, of which, the appellant in CMA.No.1901 of 2018 is the third noticee, the appellant in CMA.No.1902 of 2018 is the fourth noticee and the appellant in CMA.No.1903 of 2018 is the fifth noticee. The allegation pertains to smuggling of red sanders under the cover of magnesium sulphate in HDPE bags. The said show cause notice proposed imposition of penalty on all the three appellants under Section 114 of the Act.

3. The appellants submitted their replies dated 11.2.2015, 09.4.2015 and 11.2.2015 respectively. After considering the said replies and affording an opportunity of personal hearing, during which, the appellants were represented by their respective authorized representatives/advocates, the Commissioner of Customs, Chennai-IV, by an Order-in-Original dated 29.5.2015, confirmed the proposals in the said show cause notice and imposed penalty of Rs.10 lakhs on the said Mr.G.Masilamani, proprietor of M/s.G.Masilamani, Customs House Agent (CHA), Rs.5 lakhs on the said M/s.Transquare Clearing and Forwarding and Rs.10 lakhs on the said Mr.V.Sundaramoorthy, apart from confiscating the goods.

4. The appellants preferred appeals before the Tribunal as against the order of the Commissioner of Customs. The appeals filed by the appellants herein and the appeal filed by one Mr.P.Ashok Kumar, who was noticee No.7 in the said show cause notice, were taken up together and by a common order dated 12.5.2017, the appeals were dismissed. Challenging the same, these appeals have been filed raising the the following substantial questions of law :

> "Common questions in all the appeals :
>
> (1) Whether there is scope for imposing penalty under Section 114 of the Customs Act, 1962 in the absence of any knowledge and specific role on the part of the appellants and the appellant firm of the offence alleged to have been committed by some other person ? And
>
> (2) In the absence of any evidence whatsoever to hold that the appellants had knowledge or actively participated in the attempted export of red sander logs, is the Tribunal right in holding the appellants as abettors ?
>
> Additional question in CMA.No.1902 of 2018: Whether the Tribunal is correct in

upholding the penalty on the proprietor as well as the proprietary firm under Section 114 of the Customs Act, 1962 on the very same grounds ?"

5. Mr.S.Murugappan, learned counsel for the appellants submits that there is absolutely no evidence to establish the role of the appellants in the act of smuggling of red sander logs and in such circumstances, penalty under Section 114 of the Act cannot be imposed. It is further submitted that Mr.G. Masilamani - the appellant in CMA.No.1901 of 2018 did not file the shipping bill, but it was filed by one M/s.T.Shanmugasundaram, which was the CHA, in the name of one M/s.A.S.P.Senna Traders and even according to the Department, the brain behind the attempted export is one Mr.Hemadri, who could not be traced by the Department, as he was absconding. It is pointed out that the Department has not taken effective steps to trace the said Mr.Hemadri, though he had filed petitions seeking anticipatory bail before both the Sessions Court as well as this Court and later, withdrew the petitions.

6. It is also submitted by the learned counsel for the appellants that the said M/s.Transquare Clearing and Forwarding only arranged for the containers and therefore, no penalty could have been imposed on the other appellants and the common order passed by the Tribunal is wholly unsustainable. It is further submitted that the Tribunal did not consider the grounds raised by the appellants and merely based on assumptions and presumptions, the Tribunal confirmed the findings of the Commissioner of Customs. According to the learned counsel, the Tribunal failed to take note of the important fact that there is no material evidence to connect the appellants with the smuggling activity. It is also submitted that there is no scope for imposing penalty under Section 114 of the Act in the absence of any knowledge and specific role on the part of the appellants in the offence alleged to have been committed by some other person. Thus, in the absence of any evidence to hold the appellants had knowledge or actively participated in the attempted export of red sander logs, the Tribunal fell in error in holding that the appellants had abetted the offence.

7. In support of his contention, the learned counsel for the appellants has placed reliance on the decisions of two Hon'ble Division Benches of this Court in the case of Commissioner of Customs (Exports) Vs. I.Sahaya Edin Prabhu [reported in (2015) 320 ELT 264] and in the case of Commissioner of Customs (Port Export) Vs. M.Renganathan [reported in (2017) 345 ELT 95].

8. Per contra, Mr.K.Ravi, learned Senior Standing Counsel appearing for the respondent has drawn the attention of this Court to the various allegations contained in the said show

cause notice and the findings given by the Commissioner of Customs, as confirmed by the Tribunal and submits that it was a clear case of contradictory statement, that the Commissioner of Customs had clearly brought out the role of the appellants in the smuggling activity and that the penalty imposed on the appellants has been done validly and in accordance with law and also prayed for confirming the order passed by the Tribunal.

9. We have heard the learned counsel for the parties and carefully perused the materials placed on record.

10. The first and foremost thing, which has to be seen, is as to whether there is any evidence either before the Original Authority or before the Tribunal to link the appellants with the smuggling of red sanders.

11. The said show cause notice dated 02.12.2014 states that the office of the said M/s.T.Shanmugasundaram, whose CHA was used for the purpose of export of cargo, was searched and at that time, one Mr.K.Ashok Kumar, Executive in the said M/s.T.Shanmugasundaram, the said Mr.V. Sundaramoorthy and one Mr.K.Bakthavachalam, both clerks in the said M/s.G.Masilamani were present and that on enquiry, the said Mr.K.Ashok Kumar of the said M/s.T.Shanmugasundaram, CHA informed that the customs clearance work relating to the said M/s.A.S.P.Senna Traders under Shipping Bill No.2657917 dated 12.5.2014 was attended by said M/s.G. Masilamani, CHA and that the said M/s.G.Masilamani was allowed to use the CHA licence of the said M/s.T.Shanmugasundaram in clearing the goods pertaining to the said M/s.A.S.P.Senna Traders.

12. In the said show cause notice, it has been further mentioned that the address of the owner of the trailer used for transporting the container was obtained from the Transport Department, from which, the name of the owner was ascertained as Mrs.D.Jayanthi, W/O Mr.Dharani and that the details of the driver of the trailer were obtained from the Chennai Port and identified as one Mr.Dharani. It has also been mentioned in the said show cause notice that summons were sent to the address noted by the Court, but they were returned with the postal endorsement 'no such addressee', after which, the officials of the DRI carried out an inspection at the said address and reported that no such address existed in Chennai-79.

13. After considering the reply given by the appellants, the Commissioner of Customs, in our considered view, had done a thorough factual exercise to ascertain the culpability of the appellants in the transaction. The Commissioner of Customs noted that the said Mr.V. Sundaramoorthy and the said Mr.Hemadri entered into a conspiracy and arranged a genuine export

consignment to smuggle red sander logs out of India through the said consignment, for which, the said Mr.Hemadri approached the said Mr.V.Sundaramoorthy of the said M/s.G.Masilamani, CHA for carrying out the work of clearance in Chennai and had given them all the documents, which were in the name of the said M/s.A.S.P.Senna Traders namely the IEC holder. It was further noted from the surveyor's report that the container was tampered without disturbing the liner and the customs seal and a part of the declared cargo was de-stuffed and replaced with red sanders. It was also noted that when the said M/s.A.S.P.Senna Traders were contacted during the second week of May 2014, but after the consignment was retained by the DRI, they disowned the consignment and stated that they had not effected any exports. Thus, considering the factual position, the Commissioner of Customs found that there is an attempt to misuse the IEC to effect illegal export.

14. Further, from the statement, it emerged that the said Mr.P.Ashok Kumar was working for one M/s.Dravidian Logistics, CHA and he is a close friend of the said Mr.Hemadri and that the appellants or the others, who had given their statements, did not plead any ignorance of the transaction nor ignorance of the persons, whose names have been mentioned there. Thus, the complexity and the connivance among persons, which include the appellants, had been clearly brought out in the order passed by the Commissioner of Customs.

15. When the order passed by the Commissioner of Customs was tested before the Tribunal, the Tribunal also examined the factual position and recorded a finding that when the said Mr.G.Masilamani tried to contact the said Mr.Hemadri - the man behind the attempted export of red sanders, he did not respond to his call and when the said M/s.A.S.P.Senna Traders were contacted to ascertain the identity of the exporter, they disowned the consignment of the offending goods. The Tribunal found on a consideration of the evidence available that the appellants were so intimately connected with the offence as well as smuggling racket and that therefore, the appellants could not gain benefit of the decision. The Tribunal, on noting the facts, held that the appellants' role was avidly clear that perpetuated smuggling for having lent their licence and had to face the consequence of misuse of such CHA licence to carry out smuggling.

16. The Tribunal also found that the said Mr.G.Masilamani and the said Mr.V.Sundaramoorthy, without having the CHA licence, which was suspended due to non payment of service tax of Rs.6 Crores, deliberately used the licence of the said M/s.T.Shanmugasundaram, CHA and filed the shipping bill involving their freight forwarding concern namely the said

M/s.Transquare Clearing and Forwarding deliberately in the name of the said M/s.A.S.P.Senna Traders by using their IEC to defraud the Customs. The Tribunal further found that the live consignments and the past consignments were dealt by all of them following such modus operandi with oblique motive to make undue gain at the cost of the Customs. It was also fund that incidence of seizure of red sanders by the investigation brought out the role of the smuggling racket, of which, the appellants were members, that the plea of the appellants that they were innocent was rejected for having not brought out the illegal act of the said Mr.Hemadri to the knowledge of the Customs and that instead of doing so, all of them had concerted effort to deceive the Customs and the so called exporter disowned the consignment, which was attempted to be exported. Thus, the Tribunal concluded that the appellants acted in connivance with the racket till the offending container was seized by the investigation resulting in the discovery of smuggled goods and that they could not lead any evidence to prove their detachment to the attempted export of the offending goods.

17. In our considered view, there was abundant evidence available, which was considered by the Original Authority and a finding has been rendered as to the complexity and the modus operandi adopted by the appellants for the purpose of illegal export of red sanders.

18. In the decision in I.Sahaya Edin Prabhu, smuggling of red sanders was involved and it was prevented by the Customs Department. However, in that case, the Original Authority as well as the Tribunal found that there was no positive role of the CHA in the attempt to smuggle out red sanders wooden logs and the only allegation against the CHA was that he did not discharge his duty in the normal course of service. Thus, the Hon'ble Division Bench confirmed the finding of the Tribunal. In our considered view, the decision in I.Sahaya Edin Prabhu cannot be of any assistance to the appellants in the light of the fact that the factual findings recorded by the Commissioner of Customs as well as the Tribunal show the close and intricate link of the appellants in the attempt to smuggle red sanders.

19. The decision in M.Renganathan arose out of export of red sanders by concealing the same along with the cargo described as natural slate stone. Here also, the Tribunal came to the conclusion that there was no material evidence to conclude that the CHA was having knowledge of export of goods improperly i.e. the CHA had no knowledge of red sanders in the consignment in the guise of natural slate stone and that therefore, Section 114 of the Act was not attracted. This decision also does not render any assistance to the case of the appellants in the light of the factual position, which emerged in the matter and which has been

dealt with by the Commissioner of Customs in an elaborate manner as well as by the Tribunal. Thus, we find that no grounds have been made out by the appellants to interfere with the order passed by the Tribunal.

20. For the above reasons, the appeals are dismissed and the substantial questions of law raised for consideration are answered against the appellants and in favour of the Revenue. No costs. Consequently, the connected CMPs are also dismissed.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

To
1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, No.26, Shastri Bhavan Annexe Building, Haddows Road, Chennai-6.
2.The Commissioner of Customs (Chennai-IV), Custom House, No.60, Rajaji Salai, Chennai-1.

+ 1 cc to M/s. S. Murugappan, Advocate Sr.58573

CMA.Nos.1901 to 1903 of 2018 &
CMP.Nos.14630 to 14632 of 2018

NRI(CO)
EU(20/09/2018)