IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2019

CORAM

THE HONOURABLE DR. JUSTICE VINEET KOTHARI
and
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.3183 of 2008

Commissioner of Customs,
No.1, Williams Road,
Cantonment, Trichy 620 001. ...Appellant

vs

1.Duraiappa
2.R.Ravi
3.N.Ramesh
4.M.Udayakumar
5.N.Suresh
6.Smt.Rajeswari Ramamurthy
7.M.Muthusingaram ...Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962 read with Rule 8 of Customs (Appeals) Rules 1982), against the Final Order No.1239 to 1247 of 2005 passed by Customs, Excise and Service Tax Appellate Tribunal, Southern Zonal Bench, Chennai 600 006 in C/1451 to 1455/98 and C/1461 and 1462 of 1998.

For Appellant : Mr.V.Sundareswaran
Standing Counsel
For Respondents: Mr.B.Satish Sundar for R2,6 & 7
for M/s.K.Chandrasekaran
Not ready in Notice for
R1, 3, 4 and 5

J U D G M E N T

(Judgment of the Court was delivered by Dr.Vineet Kothari,J.)

The Revenue, Commissioner for Customs, Trichy has filed this appeal aggrieved by the order of CESTAT dated 13.09.2005, whereby the learned Tribunal allowed the appeal filed by the Assessee, M/s.Duraiappa and others and set aside the penalties imposed on these appellants by the Department in the provisions of the Customs Act, 1962.

2. The reason assigned by the learned Tribunal for setting aside the penalty as discussed in paragraphs 10.1 to 10.3, are quoted below for ready reference:

> "10.1. The question now arising to be considered is whether the present proceedings should be wound up in the light of the criminal court's judgment. This question has been agitated before us on the strength of a plethora of decisions. In the case of Capt.M.Paul Anthony (supra), the appellant was a security officer in the respondent-company, a government undertaking. He was placed under suspension and disciplinary as well as criminal proceedings were initiated against him on the ground that, in a police raid, mining sponge gold ball weighing 4.5 grams and 1276 grams of gold-bearing sand were recovered from his house. The raid was conducted at the appellant's residence on 2.6.85. He was placed under suspension on 3.6.85. Disciplinary proceedings were initiated against him by issuing a charge sheet on 4.6.85. On 3.2.87, the appellant was acquitted in the criminal case with a categorical finding that the prosecution had failed to establish that "raid and recovery" were made at the appellant's residence. In the meantime, the appellant had already been dismissed from service on the basis of disciplinary proceedings initiated against him. On 12.2.1987, the appellant requested for his reinstatement in service in view of his acquittal in the criminal court. This request was turned down by the respondents. The appeal filed against the respondent's decision was rejected by the appellate authority. The appellant then approached the High Court with a Writ petition challenging the validity of the order of dismissal on various grounds. In that Writ petition, he, inter alia, contended that the departmental proceedings and the criminal case against him were based on the same set of facts. The departmental proceedings should have been stayed till the outcome of the criminal case. The writ petition was allowed by a single Judge of the High Court directing the respondents to reinstate the appellant. The High Court, however, gave the liberty to the respondents to initiate fresh proceedings against the appellant after perusing the judgment passed in the criminal case. The judgment passed by a learned Single Judge was set aside by a Division Bench of the High Court in a letters patent appeal filed by the respondents. The judgment of the Division Bench was taken in appeal to the Supreme Court. The apex Court found that the appellant had been acquitted in the criminal case on the same set of facts and evidence as

used in the disciplinary proceedings and accordingly, the court held that it would be unjust, unfair and oppressive to allow the departmental proceedings to stand after the order of acquittal passed by the criminal court.

10.2 In Gopaldas' case, the apex Court was considering the question whether the order of confiscation of gold passed by the adjudicating authority under the Gold (Control) Act, 1968 should be allowed to stand against an order of acquittal of the appellant passed by a criminal court. It was held that mere acquittal by a Magistrate could not in every case result in setting aside of order of confiscation passed by the competent authority. However, where the accused rebutted the statutory presumption under Section 98 B of the Gold (Control) Act, the order of confiscation could not stand against the acquittal. The provisions of Section 138A of the Customs Act, referred to by ld. Senior Advocate, are pari materia with those of Section 98 B of the Gold (Control) Act, (since repealed). The provisions enabled the court to presume the existence of mens rea if it was a necessary ingredient of the offence charged. They also enabled the accused to rebut the presumption by proving beyond reasonable doubt that he had no culpable mental state with respect to the offence charged against him. The evidence adduced by the accused should be enough to make the court believe beyond reasonable doubt that he had no such culpable mental state. What the apex Court held in the Gopaldas' case was that, where the presumption under Section 98 B of the Gold (Control) Act was rebutted by the accused, the order of confiscation of gold by the adjudicating authority under the said Act could not be allowed to stand against the order passed by the criminal court acquitting the accused after considering the same set of facts and evidences. But, at what stage was the accused to rebut the presumption? This question was also answered by the court in Gopaldas' case following its earlier decision in Inder Sain vs State of Punjab, (1973) 2 SCC 372. It was held (vide para 18 & 19 of Gopaldas), on the facts of that case, that, once the prosecution adduced evidence of the accused having been in possession of primary gold, it was upto the accused to rebut the presumption of mens rea by proving that he did not knowingly possess the forbidden goods. In the instant case, the criminal court has held that the prosecution could not prove the charge framed against the appellants by the customs authorities in terms of

Section 135(1)(b), i.e., they failed to show that the appellants had physically dealt with the ball bearings with the knowledge or belief that these goods were liable to confiscation under Section 111. The court doubted the veracity of the prosecution plea that the accused had physically dealt with 1,31,076 ball bearings recovered from the ship. After examining files relating to auction sale of the confiscated ball bearings, the court found that over 21,000 ball bearings in excess of the confiscated ball bearings (1,31,076) had been auctioned by the Department, which could not be explained by the prosecution witnesses. The court pointed out many other defects of investigation and flaws of prosecution and came to the conclusion that the charge against the accused had not been proved beyond doubt. Thus, it is discernible from the criminal court's judgment that the prosecution could not even prove the alleged fact that the accused physically dealt with 1,31,076 ball bearings. Hence the court had no occasion to presume anything against the accused in terms of Section 138A (1) and therefore, the accused had no liability to rebut any presumption under the said provision. This is because, as ruled by the apex Court in Gopaldas' case, it is only after the prosecution has adduced clear evidence of the accused having physically dealt with the offending goods that the accused would assume the burden of proving that they so dealt with the goods without mens rea. i.e, without the knowledge or belief that the said goods were liable to confiscation under Section 111. Thus, for the appellants, the present case stands on a stronger footing than Gopaldas' case wherein the prosecution could prove the fact that the accused was in possession of gold but the presumption of mens rea in relation to the said fact was rebutted by the accused.

10.3 We have found that the offence charged against the appellants in both the adjudication and prosecution proceedings is substantially the same. Both the cases are based on the same set of facts. The evidence considered by the adjudicating authority and the criminal court is, by and large, the same. After appreciating the evidence, the criminal court acquitted the accused after finding that the charge against them had not been proved. In the circumstances, we are of the view that the judicial approach taken in Paul Anthony's and Gopaldas' cases can be applied to this case and, accordingly, the order passed by the adjudicating authority imposing penalties on the appellants cannot stand in the face of their acquittal by the criminal court."

3. Mr.B.Satish Sundar, learned counsel for the respondents/accused persons has submitted that the acquittal of the criminal Court of these respondents has been affirmed by the High Court by dismissal of the Criminal Appeal filed by the Revenue viz., Crl. Appeal (MD) No.1730 of 2002, The Assistant Collector of Customs vs S.Saravana Perumal @ Saravanan and others on 13.04.2010 and thus, the acquittal of the respondents/accused persons have become final at the hands of this Court. He submitted that the penalty set aside by the learned Tribunal does not require any interference of this Court in the present appeal filed by the Revenue.

4. However, the learned Standing Counsel for the Appellant/Revenue, Mr.V.Sundareswaran, submitted that the two provisions in the Act viz., 112(b) and Section 135(1)(b) of the Act, operate in different fields and have been enacted in the Customs Act, 1962, for different purposes and while Section 112 permits imposition of penalty upon the persons, who acquires possession of or in any way concerned in carrying, removing, depositing, harbouring, keeping concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe such persons are liable to confiscation under Section 111. Such persons shall be liable for penalty under Section 112(b) of the Act. He submitted that Section 135 of the Act, which provides for prosecution and imprisonment of such persons, is therefore a different provision and mere acquittal of these respondents cannot per se automatically result in the setting aside of the penalty, as the respondents in the present case had a passive knowledge of the existence of the banned goods in the vessel, which were liable to be confiscated under Section 111 of the Act. The goods in question were "Ball Bearings" contained in 24 boxes, which were found at the time of checking by the concerned Customs Authorities and proceedings were initiated in the year 1995 by show cause notice dated 04.01.1995 against them. He relied upon the judgment of the learned Single Judge of this Court in the case of N.Jayathilakan vs Additional Secretary, 1987 (31) ELT 47 (Madras) and a division Bench decision of this Court in the case of Collector of Central Excise vs. K.Renganathan, 1995 (76) ELT 261 (Madras).

5. On the other hand, the learned counsel for the respondent/accused Assessee, Mr.B.Sathish Sundar, urged that on the same set of facts and evidences, the prosecution initiated by the Customs Authorities under Section 135 of the Act has resulted in an acquittal giving them the benefit of doubt at the hands of the competent Criminal Court and the appeal of the Revenue against such acquittal has also failed at the hands of

the High Court. He therefore submitted that in the absence of any other additional or further evidence against the respondents, the learned Tribunal was justified in setting aside the penalty in question under Section 112(b) of the Act and the same does not deserve any interference of this Court in the present appeal filed by the Revenue.

6. We have heard the learned counsels at length and perused the records and the judgments cited supra.

7. Having considered the rival submissions, we are of the opinion that the present appeal of the Revenue is without any merit and deserves to be dismissed. The reasons are as follows.

8. The ingredients or for imposition of penalty under Section 112(b) of the Act as well as for launching of prosecution against the accused persons under Section 135(1b) of the Act are identically worded. To quoted below, both the provisions itself are relevant to extract.

> "112.Penalty for improper importation of goods, etc.
>
> ..(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, shall be liable,-
>
> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;
>
> (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher:
>
> Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;
>
> (iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the

> value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;
>
> (iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;
>
> (v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest."
>
> 135.Evasion of duty or prohibitions:- (1) Without prejudice to any action that may be taken under this Act, if any person-
>
> ..(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 or section 113, as the case may be; or"

9.Clause (b) of both the provisions unambiguously requires the acquiring of possession by the person concerned of the goods, which are liable to confiscate under Section 111 of the Act. Two consequences follow upon these ingredients be found available. One is imposition of penalty under Section 112(b) of the Act, another is prosecution in the Criminal Court, which may result in an imprisonment. There is no dispute before us that on the same set of facts and evidence, the concerned Criminal Court has already acquitted the respondents before us giving them the benefit of doubt. The appeal filed by the Revenue/prosecution against such acquittal has also failed. The learned counsel for the Revenue could not point out any additional evidence or material available with the Revenue other than the one, which was considered by the Courts with regard to the prosecution of Respondents under Section 135 of the Act.

10. The Hon'ble Supreme Court in the case of Capt. M. Paul Anthony vs Bharat Gold Manes Ltd., 1999(3) SCC 679, dealing with the similar situation in service law held that where the criminal case as also the departmental disciplinary proceedings were based on identical set of facts and evidence viz., the raid conducted at the appellant's residence and recovery of incriminating articles therefrom, the same set of evidence in

the form of the police officers and panch witnesses, who had raided the appellant's house and effected recovery and they were the only witnesses examined by the Enquiry Officer in the departmental enquiry also. In such circumstances, once the Criminal Court had acquitted the appellant, there was no basis to sustain the punishment imposed on the appellant in consequence of the departmental proceedings.

11. The reason of such double jeopardy to be avoided is obvious, even though the two proceedings may operate in different fields and may have different nature. The Departmental proceeding on civil side, which is based on preponderance of probability premise based, whereas on the criminal side, it is the proof beyond the reasonable doubt, which forms the basis of conviction or acquittal, are different but the distinguishing feature to allow the two proceedings to go ahead parallely is that the different set of facts and evidence should be available before the concerned authorities proceeding in two parallel proceedings. The same principles would apply in a taxing statute like the Customs Act, 1962, also because the ingredients sought to be satisfied for imposition of penalty as well as for prosecution of the concerned accused persons is same and identically worded, as it would appear from the quotation of the two provisions above.

12.A similar situation also appears to have arisen before the Rajasthan High Court in the case of Bhagwati Metals vs. Union of India, 2008 (228) ELT 20 (Raj), which was decided by the Division Bench of that Court on 23.01.2007, in which one of us (Dr.Vineet Kothari,J) was a Member of the Bench. The Court considered a similar situation and relied upon the aforesaid decision of the Division Bench in Capt. M. Paul Anthony (supra) and held that while proceedings by the Adjudicating Authority in quasi-judicial assessment powers conferred under the Act are independent and can be carried on simultaneously but at the same time, the parallel proceedings or even subsequent proceedings initiated and drawn in courts of law of competent jurisdiction, be it a criminal court or a civil court is based on the same set of facts and evidence, the findings of the court of law of competent jurisdiction cannot be said to be irrelevant altogether and cannot be brushed aside or ignored by the Adjudicating Authorities.

13. The initial part of the provisions under Section 135 of the Act, which provides for prosecution under the Customs Act, 1962 viz., "without prejudice to any action that may be taken under this Act..." also further fortifies that even though

without prejudice to the penal action, which the Authorities under the Act, may take under Section 112 of the Act, the Department can proceed for prosecution, but a similar "without prejudice" or Non-obstante clause is not provided for in Section 112 of the Act. The sequences of these two provisions viz., penalty provision in Section 112 of the Act and then prosecution under Section 135 of the Act coming after that also has a chronological meaning arising out of that. While two proceedings can be undertaken one after the another or even simultaneously but nonetheless, there is no provision in the Act, which permits the Authorities to impose and sustain the penalty under Section 112 of the Act, notwithstanding the acquittal in the prosecution proceedings under Section 135 of the Act. The purpose, as stated above is clear; to avoid the double jeopardy or double whammy of the accused persons or Assessees on the same set of facts and evidences. Therefore, unless the prosecution or the Revenue can point out the different set of facts or evidence available with them to sustain and segregate one proceedings on the another, the law laid down by the Hon'ble Supreme Court in Capt.M. Paul Anthony's case will squarely apply to the facts of the present case also.

14.We do not find any such support from the previous view of the learned Single Judge or even the Division Bench of this Court in the case of K.Renganathan (supra). The said later view of the Division Bench of this Court in K.Renganathan's case by a short order proceeded on the basis of admission of the concerned Assessee or accused persons before the statutory authorities on the basis of which, the penalty in question appears to have been sustained by the Division Bench of this Court, even though for lack of evidence, the criminal court had acquitted such persons. Here, we find, in distinction, a full discussion by the Criminal Court on the entire relevant evidence and then acquittal of these accused respondents giving them the benefit of doubt, which upon further appeal filed by the Revenue is upheld by this Court.

15.Therefore, in the absence of any additional or further material with the Revenue, we do not find any error committed by the learned Tribunal to set aside the penalty under Section 112 (b) of the Act on the basis of the order of acquittal by the concerned trial court below. As a later development, we also find that the appeal of the Revenue in this regard also, has failed at the hands of this Court that further fortifies the view that the Revenue's case for prosecuting the accused/respondents persons did not have any merit. Therefore, we cannot find any fault with the order of the learned Tribunal, setting aside the penalty in question. Consequently, the civil miscellaneous appeal filed by the Revenue would be liable to be dismissed and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

vri

To

1. The Commissioner of Customs,
   No.1, Williams Road,
   Cantonment, Trichy 620 001.

2. The Customs, Excise and Service Tax Appellate Tribunal,
   Southern Zonal Bench, Chennai 600 006.

+1 cc to Mr.V.Sundareswaran, Advocate, Sr.No. 52471
+1 cc to Mr.K.Chandrasekaran, Advocate, Sr.No. 52223

CMA NO.3183 OF 2008

NR(CO)
CSL/30.07.2019