IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 04.03.2021
CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Judgment Reserved On 17.02.2021	Judgment Pronounced On 04.03.2021

W.A.Nos.360 & 363 of 2021
and
C.M.P.Nos.1435 & 1440 of 2021

Stalin Joseph,
S/o Sebastian,
9A, BB Road,
Perambur,
Chennai-39. .. Appellant/Petitioner in both Appeals

-vs-

The Commissioner of Customs (Airport),
New Customs House,
All Cargo Complex,
Meenambakkam,
Chennai-600 027. .. Respondent/Respondent in both Appeals

Appeals under Clause 15 of the Letters Patent against the orders dated 09.11.2020, in W.P.Nos.5499 of 2013 and 5495 of 2013.

Prayer in W.P.Nos.5499 of 2013 and 5495 of 2013:
Writ Petitions filed under Article 226 of the Constitution of India Praying for issuance of a Writ of Certiorarified Mandamus to call for the records made in order No.640 and 639 of 2012 dt 30.11.2012 on the file of the respondent herein and quash the same as illegal and direct the respondent to conduct fair enquiry after furnishing the relevant documents and after subjecting the investigating team under cross examination .

For Appellant : Mr.Karthik Seshadri
(In both Appeals)
For Respondent : Mr.G.Renganathan,
(In both Appeals) Central Govt. Jr. Standing Counsel

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COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals have been filed challenging two separate orders passed in W.P.Nos.5499 and 5495 of 2013, both dated 09.11.2020.

2.The appellant/writ petitioner challenged the orders passed by the Commissioner of Customs (Airport and Air cargo), Chennai dated 30.11.2012, in Order-in-Original Nos.639 and 640 of 2012.

3.The writ petitions were dismissed by the learned Single Bench on the ground that there is no acceptable explanation given by the appellant for not having resorted to the alternate remedy of filing an appeal before the Customs, Excise and Service Tax Appellate Tribunal. The learned Writ Court placed reliance on the decision of the Hon'ble Supreme Court in Assistant Collector of Central Excise vs. Dunlop India Limited [(1985) 1 SCC 260 (SC)].

4.Since the facts are identical, it would suffice to refer to the Order-in-Original No.640 of 2012, which is subject matter of W.A.No.360 of 2021.

5.Based on the intelligence gathered by the Directorate of Revenue Intelligence (DRI), Chennai Zonal Unit to the effect that certain persons/importers were importing branded glass chatons under the guise of artificial stones/imitation stones, etc., by mis-declaring the value of the consignments and misusing IECs through the Air Cargo complex at Chennai as well as through the Seaport at Chennai, investigation was conducted by the DRI and show cause notice dated 26.03.2011, was issued to several persons and the appellant before us, Mr.Stalin Joseph, was one of the noticees. The proposal in the show cause notice as against the appellant and three others, viz., M/s.Abi Sathiya Enterprises, Mr.Zahir Hussain and Mr.T.Suresh is as hereunder:-

> "(a) The description of the goods declared as "Decoration Artificial Stones (Mix Model and sizes in various colors)" imported under Bill of Entry No.652589 dated 08.10.2010 should not be rejected and held as "Glass Chatons";
>
> (b) The value declared @ $ 7.5/kg in respect of the said item referred to in (a) above, imported under Bill of Entry No.652589 dated 08.10.2010 should not be rejected in terms of Rule 12 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 read with Section 14(1) of the Customs Act, 1962;
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> (c) The value should not be re-determined as $ 97 CIF/kg in respect of the said item referred to in (a) above, imported under Bill of Entry No.652589 dated 08.10.2010 under Rule 9 of the

Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 read with Section 14 (1) of the Customs Act, 1962.

(d) The goods totally valued at Rs.2,02,71,041.78/- (A.V.) imported vide Bill of Entry No.652589 dated 08.10.2010 and seized, should not be confiscated under Section 111(d) and 111(m) of the Customs Act, 1962;

(e) Penalty should not be imposed on them under Section 112(a) of the Customs Act, 1962; and

(f) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962."

6.The appellant was issued with another show cause notice dated June, 2011 in which, the appellant and two others viz., Mr.T.Suresh and Mr.S.Antony were called upon to show cause as to why penalty should not be imposed on them under Section 112(a) and 114AA of the Customs Act, 1962 (hereinafter referred to as "the Act").

7.To be noted that in the show cause notice dated 07.06.2011, which culminated in Order-in-Original No.639 of 2012, which is subject matter of W.A.No.363 of 2021, the proposal against the appellant and two others viz., Mr.T.Suresh and Mr.S.Antony was to show cause as to why penalty should not be imposed on them under Section 112(a)/114AA of the Act.

8.The appellant filed his reply dated 10.02.2011, inter alia denying the allegations made in the show cause notice and that the allegations are only reproduction of the statements recorded by the officers. The appellant further stated that one Mr.B.Vaithiyanathan/Mr.Mohammed Saleem, is the Proprietor, who had imported the goods through Chennai Airport and that the appellant has not received any money from any person and he had fully cooperated with the Department till the conclusion of the investigation.

9.The allegation made in the show cause notice that the appellant had actively associated for import of such imitation stones on monetary consideration, was denied. Further, by referring to the facts set out in the show cause notice, the appellant contended that he is in no way connected or involved in the import and that he should not be held responsible for the act of commission or omission by other parties with fraudulent intentions. Further, the appellant contended that penal proceedings are quasi criminal in nature and the Department ought to prove and establish mens rea on the part of the accused before inflicting penalty. The appellant placed reliance on certain decisions to support such contention.

10.Further, the appellant denied the allegations that he was an abettor and stated that in order to constitute abetment, the abettor must be shown to have intentionally aided to the commission of crime, mere proof of alleged crime would not have been committed without the interposition of the alleged abettor, if not informed compliance with requirement of Section 11. This submission was made by referring to the decision in the case of Sriram vs. State of Uttar Pradesh [(1975) 3 SCC 495]. The appellant requested for grant of personal hearing and also to permit him to cross examine Mr.D.Vaithiyanathan, Mr.Mohammed Saleem, Mr.Zahir Hussain and Mr.T.Suresh after which, he agreed to submit a detailed reply. The reply dated 10.02.2011, was followed by another representation dated 13.02.2011, in respect of the show cause notice dated 26.03.2011, where under, the same stand as taken in the reply dated 10.02.2011, was reiterated and in addition, it was contended that before any reliance could be placed on the statement recorded under Section 108 of the Act, the contents of the statement, particularly those of the co-accused have to be corroborated with independent evidence and if not done, the statement so recorded is not admissible in evidence. Once again, the appellant submitted another representation dated 13.02.2012 wherein, the stand taken in the earlier two representations/reply, were reiterated.

11.The Adjudicating Authority, viz., the Commissioner of Customs (Airport and Air Cargo) took up the case and by separate orders dated 30.11.2012, rejected the stand taken by the appellant denying his role in the matter and also rejected the prayer for cross examination by assigning certain reasons and imposed penalty under Section 112(a) read with Section 114AA of the Act. The said orders were subject matter of challenge in the writ petitions.

12.Three grounds were raised in the writ petitions, viz., (i) the order imposing penalty is in violation of the principles of fair play and justice; (ii) the order is violative of Article 21 of the Constitution of India; and (iii) the order is in violation of the principles of personal hearing (natural justice).

13.The respondent/Department had filed a counter affidavit setting out the factual position and raising a preliminary objection as regards the maintainability of the writ petitions, as the appellant did not avail the statutory appellate remedy before the Tribunal.

14.To be noted, the writ petitions were filed during March, 2013 and were pending before this Court. When the cases was taken up for hearing by the learned Single Bench, during November, 2020, the Court found that there was no acceptable explanation from the appellant as to why he did not avail the appellate remedy before the Tribunal and therefore, dismissed the writ petitions as not maintainable and that the Court is not inclined to delve into the merits of the controversy involved in the case, touching upon the disputed questions of fact for effectual and complete adjudication of the matter.

15.Mr.Karthik Seshadri, learned counsel appearing for the appellant would contend that the writ petitions, having been entertained in the year 2013, ought not have been dismissed after a period of seven years on the ground of not availing the alternate remedy, without considering the contentions raised by the appellant in the writ petitions. It is further submitted that the main ground, on which the appellant had filed the writ petitions, was by contending that the initiation of the proceedings against him was in gross violation of the principles of natural justice, the appellant was not an importer and was sought to be implicated on the basis of mala fide action of high ranking officials of the DRI, against whom, the appellant had filed criminal complaint, who were charged under the provisions of the Prevention of Corruption Act for demand of illegal gratification in a case registered by the Central Bureau of Investigation (CBI).

16.Further, it is contended that though the appellant has sought for cross examination of the material evidences and copies of the documents, without affording such an opportunity, the order has been passed by the Adjudicating Authority, which shows that the order is in violation of the principles of natural justice and therefore, the writ petition was maintainable. In support of the contention that the exhaustion of alternate remedy is a principle of self-limitation, the learned counsel placed reliance on the decision of the High Court of Allahabad in Novamet Industries vs. Union of India [2008 (227) E.L.T. 363 (All.)].

17.With regard to the aspect of denial of the request for cross examination and that such denial could not have been part of the adjudication order, the learned counsel placed reliance on the decisions of the High Court of Gujarat in the case of Vulcan Industrial Engineering Co. Ltd., vs. Union of India [2013 (297) E.L.T. 190 (Guj.)] and Mahek Glazes Pvt. Ltd., vs. Union of India [2014 (300) E.L.T. 25 (Guj.)], the decision of the Hon'ble Supreme Court in Andaman Timber Industries vs. Commissioner of C.Ex., Kolkata-II [2017 (50) S.T.R. 93 (SC)] and the decision of the High Court of Kerala in Ummer Abdulla vs. Commr. Of C.Ex., Cus. & Service Tax, Calicut [2019 (367) E.L.T. 181 (Ker.)]. On the above grounds, the learned counsel sought for setting aside the Order-in-Original and remanding the matter to the original authority, affording an opportunity of cross examination to the appellant and thereafter, to re-adjudicate the matter in accordance with law.

18.Mr.G.Renganathan, learned Central Government Junior

Standing Counsel appearing for the respondent submitted that the adjudicating authority, viz., the Commissioner of Customs, has threadbare analysed the factual position and brought out the role of the appellant in the transaction to justify his decision to impose penalty and that the writ petition was not maintainable and the learned Single Bench had rightly dismissed the writ petition.

19.We have elaborately heard the learned counsels for the parties and carefully considered the materials placed on record.

20.Mr.Karthik Seshardri, would be right in his submission that when a writ petition has been admitted and pending since 2013, it may not be appropriate for the writ petition to be dismissed, after seven years, on the ground of availability of alternate remedy under the provisions of the Act. However, this contention has its own exceptions, which we are not required to go into, as the learned counsel for the appellant had made elaborate submissions on the appellant's right to seek for cross examination and as to how the denial of such right would vitiate the order of adjudication passed by the respondent/authority. Therefore, we are inclined to take up the matter for a decision on merits, rather than to relegate the appellant to avail the alternate remedy, since the pleadings were complete in the writ petitions, though the decision in the case of Dunlop India Limited (supra) has held that Court must have good and sufficient reason to bypass the alternate remedy provided by statute.

21.What weighed in our minds is that the writ petition was pending before this Court from the year 2013 and therefore, it will be harsh on the appellant to be now relegated to file an appeal before the Tribunal more so when, the respondent/Department had filed their counter affidavit in the writ petition seeking to sustain the Order-in-original.

22.We have carefully gone through the Order-in-Original, which is an elaborate order.

23.The outcome of the investigation was that Mr.Zahir Hussain was the actual owner of the goods imported by M/s.Abi Sathiya Enterprises and Mr.Zahir Hussain, in connivance with the appellant and Mr.T.Suresh, had imported branded glass chatons in the guise of artificial stones by grossly under invoicing the value of the consignment by misusing IECs, issued in the name of M/s.Abi Sathiya Enterprises. Similar is the outcome of the investigation in the other case as well.

24.The reply given by the appellant has been dealt with by the adjudicating authority from paragraph 80 of the Order-in-

Original No.640 of 2012 and from paragraph 40 of the Order-in-Original No.639 of 2012.

25.With regard to the representation given by the appellant, requesting for cross examination, the same has been dealt with by the Adjudicating Authority by observing that the appellant had no intention of defending the charges levelled against him in the show cause notice, but to cast aspersions on DRI. Further, it was observed that the Department has supplied documents relied upon in the show cause notice and informed the appellant that the documents called for by him regarding one Shri.Venkat could not be supplied to him, since they have not been relied upon by the DRI and therefore, not available or provided to the Department. Further, it was observed that the Adjudicating Authority cannot go beyond the charges levelled in the show cause notice and that it cannot go beyond the documents relied upon or found relevant to the case.

26.Further, the Adjudicating Authority pointed out that in spite of the relied upon documents having been supplied, once again another set of documents were supplied to ensure that the action of the Department is fair and reasonable. Further, it was observed that it was always open to the appellant to provide further evidence or documents, which in his opinion, would be useful in his defence and furnish the same at the time of personal hearing. Further, the conduct of the appellant was pointed out, as the appellant did not honour the summons issued by the Department, did not participate in the investigation, applied for Anticipatory Bail, which was dismissed by the Court or withdrawn by the appellant himself and even thereafter, did not avail the opportunity to participate in the investigation, but chose to abscond.

27.With regard to as to how the appellant was involved in the transaction, the same has been brought out in paragraphs 81 and 82 of the adjudication order. Further, the Adjudicating Authority has referred to the statements dated 03.12.2010 and 10.12.2010 given by Mr.R.Guruprasath, who was employed with M/s.Kotak Mahindra Bank at the relevant time and later, shifted to M/s.DLF Pramerica Life Insurance, who had gone on record to state that the appellant approached him for arranging bankers cheques without revealing his or his company's identity and that he had no knowledge of such accounts and he asked Mr.Manoj Kumar Ojha, who was his colleague in the same Bank about the said requirement and Mr.Manoj Kumar Ojha, after about two weeks time, told him to deposit the cash in the accounts of M/s.Anshika Enterprises and Shri Rakesh Upadhaya to take bankers cheques favouring Commissioner of Customs. Further, the investigation had revealed that Mr.Manoj Kumar Ojha opened dummy accounts in the names of M/s.Anshika Enterprises and Shri Rakesh Upadhaya, who was his brother-in-law and he had exploited his colleague

Mr.R.Guruprasath working in Kotak Mahindra Bank by throwing a weight based on the commission offered by the appellant, they connived with Mr.R.Guruprasath and issued bankers cheques in favour of the Commissioner of Customs from the accounts of Shri Rakesh Upadhaya and M/s.Anshika Enterprises and as per the arrangement Mr.R.Guruprasath had with the appellant, the commission was shared between Mr.R.Guruprasath and himself and one Mr.Mini and Mr.T.Suresh. Further, it has been pointed out that the bankers cheques, which were obtained from ICICI Bank, Sowcarpet Branch, Chennai from an account standing in the name of Mr.Sebastian Michael contained the address of the appellant and contained the photograph of the appellant, thus, establishing that the appellant had fraudulently opened a bank account in the name of Mr.Sebastian Michael and had given his address and photograph and this account was used by the appellant to operate fraudulently in a fictitious name of Mr.Sebastian Michael. Thus, the appellant had switched his entity by projecting/impersonating himself as Mr.Sebastian Michael with a view to camouflage the whole transaction of payment of customs of duty, so that the source of money could never be traced to him and he could conveniently evade from getting caught of any later stage of fraud, being exposed.

28.Further, it has been brought out that the entire gamut of financial transaction of the appellant are based on misrepresentation of facts by way of submitting wrong details and documents to the bank and this was able to be accomplished by the appellant, since he had contacts with bank employees, who were in lust of money. Further, on a thorough analyse of the factual details, it was established that the appellant had obtained the bankers cheques issued through bogus firms floated by him for the purpose of making indirect payment of customs duty and for other transactions. Further, the Adjudicating authority referred to the statements recorded under Section 108 of the Act, which clearly pins down the appellant in the fraudulent transaction.

29.Further, the adjudicating authority has pointed out that the appellant has not explained as to why he impersonated himself as Mr.Sebastian Michael, opened a bank account by giving his photograph and his address and issued a cheque in favour of the Commissioner of Customs as well as deposited money in cash in various dummy accounts and why he obtained bankers cheques by depositing money by cash payment in the dummy accounts in the name of M/s.Anshika Enterprises and Shri Rakesh Upadhaya. It is seen that the appellant has not been able to dislodge these facts, which emerged during the course of investigation.

30.With regard to the plea that the appellant should be permitted to cross examine every person, the Adjudicating

Authority, in our view, rightly pointed out that such request has to be considered based on facts and circumstances of each case. After referring to the factual matrix, the Adjudicating Authority concluded that the request for cross examination was a mere ploy and to scuttle and delay the adjudication process. The conduct of the appellant is clearly brought out in the adjudication order that he has been evading the summons and absconding and not availing the opportunity of personal hearing. After elaborately discussing all the factual matrix, the Adjudicating Authority held that the other co-noticees have not retracted their statements given under Section 108 of the Act and the plea made by the appellant for cross examination is only for dragging on the proceedings and therefore, there are enough and valid grounds to deny such request. The facts, which have been brought out by the Adjudicating Authority in the Order-in-Original, clearly expose the appellant's role.

31.We agree with the finding of the Adjudicating Authority that the plea raised by the appellant demanding cross examination is only with a view to drag on the matter. In fact, in the reply/representations, which the appellant had sent, he has not been specific as to why he requires cross examination because, the appellant has not brought out any independent facts or evidence as his defence to the allegation made against him in the show cause notice. The reply is a bald denial of the entire allegations stating that the appellant is not involved in the import of the said items. However, during the course of investigation and while considering the entire matter, the Adjudicating Authority has been able to bring out the facts as to how the appellant has impersonated himself, opened bank account in the name of a fictitious person, remitted customs duty by effecting cash payment in dummy bank accounts, opened in the name of an Enterprise and one Shri Rakesh Upadhaya. Therefore, we are of the view that the facts and circumstances of the case would clearly show that the request for cross examination is devoid of merits, lacks bonafide and rightly denied by the Adjudicating Authority.

32.It was argued before us that the appellant has been framed by the investigating agency as well as the Department on the ground that he had lodged a complaint before the CBI and certain officers of the DRI have been charged. Therefore, the appellant would seek to argue that the proceedings are vitiated on account of mala fide. If this is the case of the appellant, then there should be specific allegation against the named officers against whom, he alleges mala fide or bias. Admittedly, no such officer has been made a party to the writ petition. Therefore, the plea of mala fide exercise of power has to be definitely rejected.

33.So far as the decision in the case of Vulcan Industrial Engineering Co. Ltd., (supra) is concerned, the case was on a different factual background, where the request for cross examination was never decided by the Adjudicating Authority and the Order-in-Original was passed whereas, in the case on hand, the request for cross examination has been considered and a decision has been rendered by the Adjudicating Authority in the Order-in-Original, which we find to be just and proper. Therefore, the said decision is of no assistance to the case of the appellant.

34.In the case of Mahek Glazes Pvt. Ltd. (supra), the Court did not express any opinion on the issue as to whether the petitioner therein had a right to seek cross examination in the facts of the said case and the Court went to the extent of observing that it refuses to comment on the petitioner's insistence for cross examination or the authority's reluctance to grant it. Further, the said decision was relied on to state that the request of cross examination should have been decided separately and not along with the Order-in-Original. This proposition cannot be canvassed by the appellant, as the Adjudicating Authority has clearly brought out the conduct of the appellant at the stage of the investigation and even after the show cause notice was issued. The appellant did not cooperate with the adjudication process, was unsuccessful in obtaining an order of Anticipatory Bail and he was absconding. More importantly, the statements, which were given by the other co-noticees, which have been referred to by the Department, have not been retracted and remained as such. Therefore, the Adjudicating Authority was right in observing that the request for cross examination was a ploy and only to drag on the proceedings. That apart, if the co-noticees, who were examined and who have given statements which clearly brings out the role of the appellant, then the appellant should set up his defence by placing reliance on some evidence available with him and establish that on account of the defence available with him, his request for cross examination is justified.

35.We have perused the replies given by the appellant to the show cause notices and all that we find is a simple denial of his involvement. The fact position opens a pandora's box, which clearly brings out the deep rooted involvement of the appellant in the entire process. Therefore, the decision in Mahek Glazes Pvt. Ltd. (supra), is clearly distinguishable.

36.The decision in the case of Andaman Timber Industries (supra) and Ummer Abdulla (supra) are cases, which arise out of an order passed by the Tribunal, which were challenged by filing an appeal before the High Court, where the Court decided the substantial questions of law. However, in the instant case, the appellant had filed a writ petition. Therefore, the questions of law, which have been decided in those cases were done after the Tribunal, being the last fact finding authority, had given a conclusive finding on facts and the Court proceeded to decide the substantial questions of law raised before it. Therefore, the appellant cannot press into service those decisions to support his case.

37.For all the above reasons, we find that the request made by the appellant to cross examine few of the co-noticees, who were also involved in the transaction was rightly denied by the Adjudicating Authority and no prejudice has been caused to the appellant on the said ground. The reasons assigned by the Adjudicating Authority to deny cross examination, taking note of the factual situation, is well founded. That apart, the other co-noticees have not retracted their statements rendered by them under Section 108 of the Act, which is binding.

38.In the light of the above discussion, we hold that the order passed by the Adjudicating Authority does not suffer from any error of law for interfering with the same.

39.Accordingly, the writ appeals are dismissed and the orders passed by the Adjudicating Authority are confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

abr
To

The Commissioner of Customs (Airport),
New Customs House,
All Cargo Complex,
Meenambakkam, Chennai-600 027.

+2ccs to Mr.H.Karthik, Advocate SR.No. 13611

W.A.Nos.360 & 363 of 2021

A.SK(31.03.2021)