IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 11.02.2021

CORAM

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MS.JUSTICE R.N.MANJULA

| Judgment Reserved on 27.01.2021 | Judgment Pronounced on 11.02.2021 |
|---|---|

C.M.A.No.2834 of 2014

M/s.Varalakshmi Exports,
No.35, Old No.7, Mission Road,
Bangalore - 560 027. ... Appellant

Vs

1.The Customs, Excise & Service Tax Appellate Tribunal,
Haddows Road,
Chennai - 600 006.

2.The Commissioner of Customs, (Port-Export),
Chennai - 600 001. ... Respondents

[R1 deleted vide order of Court dated
11.04.2017 made in CMA No.2834/14 & M.P.No.1/14
(RSAJ & RSKJ)]

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962 against the order dated 02.12.2013 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai made in Final Order No.40601 of 2013.

For Appellant : Mr. T.Ramesh

For Respondents : M/s.R.Hemalatha
Standing Counsel

JUDGMENT

R.N.Manjula, J.

This Appeal has been filed under Section 130 of the Customs Act, 1962 (hereinafter referred to as "the Act"), challenging the order dated 02.12.2013 made in Final Order No.40601 of 2013 on the file of the Customs, Excise & Service Tax Appellate Tribunal, Chennai (for brevity "the Tribunal").

2. The Appellant has raised the following substantial questions of law for consideration of this Court :-

> (i) Whether the Tribunal is right in confirming the demand for the period 17.03.1994 to 04.10.1995 which is barred by limitation under Section 28 of Customs Act?
>
> (ii) Whether extended period of limitation can be invoked against the appellants for the period 17.03.1994 to 04.10.1995 for demanding duty during the said period?
>
> (iii) Whether the imposition of penalty under Section 112 against the appellants is sustainable when Tribunal has not got any power to impose penalty under Section 112 of Customs Act for the first time, when there was no proposal in the show cause notice, nor the adjudicating authority has imposed such penalty under Section 112?

3. Heard Mr.T.Ramesh, learned counsel appearing for the appellant and M/s.R.Hemalatha, learned Standing Counsel appearing for the respondents.

4. The 1$^{st}$ Appellant is engaged in Manufacture and Export of Silk Sarees and the 2$^{nd}$ and third Appellants are the sister concerns of the first Appellant. The fourth appellant is the Managing Partner of the first appellant and he is a partner of the second and third appellants and he takes care of the import and utilization of the goods. The first Appellant has obtained eight advance licenses from the Joint Director General of Foreign Trade (JDGFT), Bangalore for the import of Mulberry Raw Silk without payment of customs duty with an obligation to export finished goods like Silk Sarees. The said condition forms part of the Duty Exemption Entitlement Certificate (DEEC). The exemption of customs duty is covered under Notification No.203/92-Cus dated 19.05.1992 for Value Based Advance Licenses (VABAL) and 204/92-Cus dated 19.05.1992 for Quantity Based Advance License (QBAL). The present Appeal relates to duty free

import of Raw Silk under Advance License No.2310212 dated 25.01.1993 under Customs Notification No.203/92-Cus and Exemption Notification No.204/92-Cus dated 19.05.1992.

5. The First Appellant imported Mulberry Raw Silk by availing duty exemption between the period from 17.03.1994 to 04.10.1995 on the condition to fulfill the export obligation. The first Appellant has failed to fulfill the export obligation. And the imported duty free materials were utilized for manufacturing of Silk Sarees and selling them in the local market through its sister concerns M/s.Varalakshmi Handlooms and M/s.Varalakshmi Silk House (who are the Appellants 2 and 3 herein).

6. After issuing show cause notice for the above violation, the Commissioner of Customs issued the following order :-

> "(i) I demand from M/s.Varalakshmi Exports, Bangalore customs duty amounting to Rs.83,00,745/- payable on mulberry raw silk imported under advance licence No.23120212 dated 15.01.93 and 3035148 dated 16.5.94 in terms of undertaking furnished under the conditions of the notification read with proviso to Section 28(1) of the Customs Act 1962.
>
> (ii) I impose a penalty of Rs.83,00,745/- equal to the amount of duty evaded under Section 114A of the Customs Act, on the said M/s.Varalakshmi Exports, Bangalore.
>
> (iii) I demand from M/s.Varalakshmi Exports, Bangalore, interest @ 24% per annum from the date of import.
>
> (iv) Rs.17,00,000/- remitted vide Challan dated 3.2.99 and 17.2.99 should be appropriated towards the above dues.
>
> (v) I impose a penalty of Rs.1,00,000/- (Rupees one lakh only) on Shri K.H.Subramani partner of M/s.Varalakshmi Exports, Bangalore under Section 112(a)(2) of Customs Act.
>
> (vi) I also impose a penalty of Rs.25,000/- (Rupees twenty five thousand only) each on M/s.Varalakshmi Handlooms, Bangalore and M/s.Varalakshmi Silk House, Bangalore under Section 112(a)(2) of Customs Act 1962."

7. Aggrieved by the said order, the Appellants preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), South Zonal Bench, Bangalore. The Tribunal observed that the earlier order was passed ex-parte and hence one more opportunity should be given to the Appellant. By so observing, the matter was remanded to the Adjudicating Authority for de-novo consideration. After affording an opportunity to the

appellants, the Adjudicating Authority passed a fresh order in O-I-O No.5988 /2007 dated 14.03.2007. The effect of the above order of the Adjudicating Authority is as under :-

(i) The demand of duty for Rs.83,00,745/- on the first appellant under Section 28(1) of the Customs Act 1962 was confirmed.
(ii) The demand of interest as applicable at appropriate rate on the amount of duty evaded from the date of import.
(iii) A fine of Rs.20,00,000/- was imposed in lieu of confiscation under Section 125 of the Customs Act 1962.
(iv) A penalty of Rs.83,00,745/- equal to the amount of duty was imposed on the first appellant under Section 114A of the Customs Act.
(v) A penalty of Rs.10,00,000/- was imposed on the fourth appellant under Section 112(a)(ii) of the Customs Act.
(vi) A penalty of Rs.5,00,000/- was imposed on the second and third appellants under Section 112(a)(ii) of the Customs Act.

8. Aggrieved by the said order the Appellants preferred an Appeal before the Tribunal. The Tribunal has considered the Appeal and passed an order to the following effect :-

(i) the demand of duty of Rs.48,03,968 computed in respect of Bill of Entry cleared during the period from 12.04.1993 to 28.02.1994, as shown in the show cause notice dated 10.03.1999 is beyond five years and it is liable to be dropped. However, the rest of the demand of duty of Rs.34,96,777/- was upheld.
(ii) the penalty imposed under Section 114A and interest imposed under Section 28AB were also set aside for the reason that the above provisions have been inserted by way of amendment in the Act only on 20.08.1996 and that the imports have been done prior to the said date (reliance was placed on the decision of the Tribunal in Ram Khazana Electronic Vs. Commissioner of Customs - 2003(156) ELT 122 (Tribunal)].
(iii) the imposition of fine of Rs.20,00,000/- imposed under Section 125 was also set aside for the reason that the earlier order of the Adjudicating Authority dated 01.11.2000 did not mention about the penalty under Section 125. The Tribunal relied on the decision on the case in 2009 (233) ELT 102 (Tri.-Del.) (Goenka Impex Pvt. Ltd. Vs. Commissioner of Customs, Lucknow), 2007 (210) ELT 96 (Tri.-Mumbai) (MRF Ltd Vs. CCE), 2005 (192) ELT 740 (HC Infosystems Ltd. Vs. CCE,

Meerut). The ratio decidendi followed by the Tribunal is that in de-novo proceedings neither quantum of penalty can be enhanced nor any new order of confiscation or imposition of fine can be imposed. But the demand of penalty of 50% of duty was sustained under Section 112 of the Act.

(iv) The penalty imposed on appellant No.2 and 3 is reduced to Rs.25,000/- each and Rs.1,00,000/- on the 4th appellant under Section 112(a)(ii) of the Act.

9. Now, the Appellants have filed this appeal by partly challenging the order of the tribunal on two grounds.

Firstly, the demand of duty issued by the respondent Department itself is barred by limitation and the extended period of limitation is not applicable as there is no suppression of facts.

Secondly, the imposition of penalty under Section 112 of the Customs Act is without jurisdiction because it was invoked for the first time by the Tribunal and that Section 112 is not attracted to the facts of the present case.

10. The First Appellant being an entrepreneur involved in export business he was given with the benefit of importing Mulberry Raw Silk duty free as per the Customs notification No.203/92-Cus dated 19.05.1992 and Exemption Notification No.204/92-Cus, dated 19.05.1992. The First Appellant has got a valid license to enjoy the above said benefit under Duty Exemption Entitlement Certificate (DEEC) which has certain conditions. As per the said conditions, the exemption of customs duty can be enjoyed only if the First Appellant exports finished goods of Raw Silk sarees of a prescribed Foreign Exchange value.

11. The First Appellant did not deny the fact that he did not comply the export condition. Instead of utilizing the imported raw materials for the purpose of manufacturing and exporting finished goods of silk sarees, he sold them in the local market through the Second and Third Appellants. If the post import obligation is not fufilled the statutory consequences will follow automatically . But the contention of the Appellants before this Court by raising the first question of law is that they did not suppress any material facts and hence extended period of limitation is not applicable for the purpose of saving the limitation for the show cause notice issued on 10.03.1999 for the impugned imports relating to the period between 17.03.1994 to 14.10.1995.

12. The Tribunal has accepted that the period of limitation in respect of Bill of Entry cleared during the period from 12.04.1993 to 28.02.1994 got expired and dropped the demand of duty for Rs.48,03,968/-, after recording that the five years

period in respect of the Bills of Entry for the period from 12.04.1993 to 28.021994 got expired.

13. The Revenue relied on the earlier decision of the Tribunal given in Lady Amphthil Nurses case and contended that the relevant date for computing the period of limitation should be taken from the date of show cause notice.

14. In Mediwel Hospital & Healthcare Pvt.Ltd, the Hon'ble Supreme Court has held that

> “Obligations cast on the importer was a continuing obligation. Needless to say that in a continuing obligations the date of the clearance of the goods cannot be the date for determining the limitation”

15. By accepting that the violation of post import condition is a continuing one, the Five Members Bench of the Tribunal subsequently held in Bombay Hospital Trust case that it is wrong to state that the period of limitation commences from the date of issue of show cause notice and it is held as follows:

12. As regards the time limit under Section 28, both sides have agreed that since the duty demand does not relate to short levy or non-levy at the time of initial assessment on importation, but has arisen subsequently on account of failure to fulfill the post-importation conditions under the Notification under the Notification No.64/68, the said section 28 has no application to a duty demand of this kind. We do not therefore, wish to dwell further on the inapplicability of section 28 to such demands. However we note that since no time-limit is prescribed under any other provisions of the statue, the notice of demand in such cases cannot be subjected to any limitation of time. This view is supported by the ratio of the following two decisions of the Hon’ble Bombay High Court and the Apex Court:-

(i) Bombay Cotton Mills Pvt Ltd. v. S.K. Bhardwaj, A.C.C.E. – (1987 (32) E.L.T. 534 (Bombay).

(ii) Commissioner v. Raghuvar (India) Ltd.- 2000 (118) E.L.T. 311 (S.C.)

…………….

21. For the reasons stated above, we agree the conclusion in Lady Amphthil

(Supra) that the duty can be recovered by the Department when the post importation conditions of an exemption notification are not fulfilled. We however do not agree with the observation in Lady Amphthil (supra)that the period of limitation in such cases will commence from the date of issue of notice. Since the time limit prescribed under section 28 has been held to be not applicable in such cases, and since there is no other time -limit prescribed under the Customs law to cover such cases, we are of the view that the notice of demand will not be subject to any limitation of time in cases of non-fulfillment of post importation conditions casting a continuous obligation as noted by us in paragraph 12 above.

22. Accordingly we answer the reference as follows:-

(i) When a post-importation condition in an exemption notification is not fulfilled, the Department has the power to recover the escaped duty in terms of Section 12 of the Customs Act, 1962. Paragraph 12of the Apex Court decision in Mediwell (Supra) also provides an authority for recovery.

(ii) Such demand notices will not subject to any limitation of time.

16. The tribunal has observed in its order that it relied on the decision of Bombay Hospital Trust Case. However it has given a different interpretation for the above finding rendered in Bombay Hospital Trust Case and held that the show cause notice dated 10.03.2009 in respect of Bill of Entry cleared during the period between 12.04.1993 to 28.02.1994 is barred by limitation. The Tribunal adopted the extended limitation contemplated under sec.28(4) and set aside the demand of duty for Rs.48,03,938/-, despite it is held in Bombay Hospital Trust that sec. 28 in its entirety is not applicable and that there is no limitation for issuing show cause notices in the cases of violation of post import conditions. However the Revenue has not challenged that portion of the order of the Tribunal on Appeal.

17. The Appellant of this case has accepted the relief and the logic of the tribunal's order in respect of setting aside the portion of the demand of duty of Rs.48,03,968/- in respect of Bill of Entry cleared during the period between 12.04.1993 to 28.02.1994 on a finding that it is barred by limitation. And claims that the demand of duty for the Bill of Entry relating to the period from 17.03.1994 to 04.10.1995 is also barred by limitation and that he has not suppressed any facts. The learned counsel for the Appellants submitted that the Department has full knowledge about the activities and non-export of the goods under DEEC by the Appellants and that the license in question was expired on 24.01.1994 and 16.05.1994.

18. The demand of duty for violating the post importation condition of an exemption notification is not confined to any period of limitation and hence there is no relevancy in the argument of the Appellants that they did not suppress any material facts. Just because the Tribunal has wrongly interpreted the order passed in the Bombay Hospital Trust Case

or the Revenue was indifferent to such wrong interpretation and the resultant effect, this Court can not make an unnecessary exercise by analyzing the fact whether or not there was or any suppression of facts in the context of Sec. 28(4). Sec.28(4) refers only about those cases for which limitation is applicable but because of certain aggravating circumstances like suppression of facts, the limitation gets extended to 5 years.

19. Even if the point on suppression of fact is analysed for the sake of completion, the records would show that the First Appellant had sold the Mulberry Raw Silk imported on Exemption Certificate, in the local market through the second and third appellants. After Inspection the First Appellant remitted Rs.17,00,000/- under challan dated 03.02.1999 and 17.02.1999 towards the appropriation of the duty liability. Knowing fully well about the export obligations on Exemption Certificate and having violated it , the First Appellant had sold them in the local market through the Appellants 2 and 3. The mere delay on the part of the Authorities to detect the violation of export obligation and issue show cause can not be construed as a permissive violation. The Suppression of Facts and materials is very much visible from the conduct and the pattern in which the Appellants caused the disappearance of the raw materials.

20. Had the Tribunal rightly interpreted the the dictum laid down in Bombay Hospital Trust case on the point of limitation for cases falling under post import obligations, it would not have occasioned the Appellants to make a claim on the point of limitation by referring to sec. 28(4) of the Act. Hence the claim of the Appellants on the point of limitation does not deserve merit. Since there is no period of limitation for violations of post import obligations, hence, the Questions of law 1 and 2 are answered against the Appellants.

21. The next Argument advanced by the learned counsel for the Appellants is that the imposition of the penalty under Section 112 against the first Appellant has never been contemplated in the show cause notice and that it has been ordered for the first time by the Tribunal. The power of Department to initiate the duty recovery proceedings for violating the conditions of import Exemption Certificate has been settled in the decision of the Five Members Bench of the Tribunal in Bombay Hospital Case.

22. The five bench Tribunal in its judgement referred the order of the Supreme Court passed in Mediwel Hospital & Healthcare Pvt. Ltd case and distinguished that in the subsequent cases the Supreme Court relied the decision of the Mediwel Hospital & Healthcare Pvt. Ltd , so far it relates to the observation made by the Supreme Court in Paragraph 12 of the judgment. The Tribunal has elaborated on this point in Bombay Hospital Case by reiterating para 12 of Mediwell as under :-

> 15 . We find that in Mediwell (supra), the Apex Court has interpreted the said Notification No. 64/88 in the context of allowing import of medical equipment without payment of duty and has observed in Paragraph 12 thereof as follows :-
>
> "While, therefore, we accept the contentions of Mr. Jaitley, learned senior Counsel appearing for the appellant that the appellant was entitled to get the certificate from Respondent No. 2 which would enable the appellant to import the equipment without payment of customs duty but at the same time we would like to observe that the very notification granting exemption must be construed to cast continuing obligation on the part of all those who have obtained the certificate from the appropriate authority and on the basis of that to have imported equipments without payment of customs duty to give free treatment at least to 40% of the outdoor patients as well as would give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500/- p.m. The competent authority, therefore, should continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty and if on such enquiry the authorities are satisfied that the continuing obligation are not being carried out then it would be fully open to the authority to ask the person who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty. Needless to mention that the Government has granted exemption from payment of customs duty with the sole object that 40% of all outdoor patients and entire indoor patients of the low income group whose income is less than Rs. 500/- p.m. would be able to receive free treatment in the Institute. That objective must be achieved

at any cost, and the very authority who have granted such certificate of exemption would ensure that the obligation imposed on the persons availing of the exemption notification are being duly carried out and on being satisfied that the said obligations have not been discharged they can enforce realization of the customs duty from them."

The Apex Court has thus clearly held that the said Notification No. 65/88 casts a continuing obligation and that in the event of failure to discharge that obligation, duty is demandable.

16 . The learned senior Advocate for the appellants has argued at length that Paragraphs 12 and 13 of Mediwell (supra) are not to be taken as ratio decidendi or obiter dicta as they are in the nature of casual observation. We do not find force in such argument. In the concluding sentence of Paragraph 14 of Mediwell (supra), the Apex Court has clearly stated that "availability of such concession by the appellant would be subject to the direction and conditions as stated earlier". As such, the earlier Paragraph 12 is an integral part of the Apex Court's order being directions for availing the duty concession under the impugned notification. Moreover, we note that the Larger Bench of three Judges of the Apex Court in Sri Sathya Sai Inst. (supra) has overruled the extra conditions imposed under Paragraph 13 of Mediwell (supra) but has left Paragraph 12 untouched. The fact that a Larger Bench of the Apex Court has overruled the Paragraph 13 goes to show that everything beyond Paragraph 11 in Mediwell (Supra) is not in the nature of casual observation contrary to the arguments by the learned senior Counsel. Moreover, since Paragraph 12 has not been overruled, the same, in our view, provides binding authority for recovery of duty. We also note that the Honourable Karnataka High Court has followed the same in Medical Relief Society (supra).

17 . The ratio of Faridabad CT Scan Centre (supra) that benefit of exemption notification is not to be extended to some one on the ground that such benefit had wrongly been extended to others, in our view, does not nullify the interpretation of the impugned notification and direction for duty demand contained in Paragraph 12 of Mediwell (supra) as these are two different legal issues.

18. It has been argued by the ld. Senior Counsel that in Paragraph 12 of Mediwell (supra), the Apex Court has not directed the Customs authorities to demand duty. A distinction is sought to be made between the DGHS who issued the certificates and Customs authorities who granted the exemption at the time of importation. We are of the view that DGHS and the Customs authorities are two branches of the same Government that has issued the exemption notification and Lady Amphthil (supra) has correctly concluded that the Customs authorities have jurisdiction for demanding of duty for violation of post-importation conditions by placing a reliance on the decision of the Apex Court in Sheshank Sea Foods Pvt. Ltd. v. UOI - MANU/SC/1806/1996.

23. The First Appellant imported the Mulberry Raw Silk on Exemption Certificate under DEEC Scheme, since the exemption of customs duty given vide the notification Nos. 203/1992 and 204/1992. The post import condition as prescribed in the above documents was not complied by the first appellant. During the inspection also the unused raw materials were not found to be available for confiscation. If the post import conditions of Exemption Certificate are not complied, the character of the goods which have been imported duty free revert back to goods duty bound prohibited goods and hence they are liable to be confiscated. The penalty for importation of goods by breaching the conditions prescribed under Section 112. The various clauses of Section 112 set out the method in which the penality should be quantified. In the show cause notice dated 10.03.1993 issued to the Appellants, in para 17 it has been mentioned that the Fourth Appellant failed to utilize the raw materials as per the terms of the conditions of the Advance Licence and the Customs Notification and he has disposed off the said raw materials through Appellants 2 and 3 in contravention of the provisions of the said notifications and hence he is liable to be imposed with penalty under Section 112(a)(ii) of the Customs Act 1962.

Section 112(a) reads as under;

Any person-

> a) Who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under sec.111 or abets the doing or omission of such an act …

112(a) (ii) is extracted as below :-

> "(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of Section 114-A, to a penalty not exceeding ten per

cent of the duty sought to be evaded or five thousand rupees, whichever is higher".

16. Sec. 114- A, mandates a penality equal to duty where there is suppression of facts and also interest. And it has come into effect from 28.09.1996. Since the demand of duty pertains to the Bill of Entries connected to the period prior to the amendment, the Tribunal (CESTAT) had restricted the imposition of penality to the Section 112 (prior to its amendment ) and reduced it to 50% of the duty evaded, by exercising its discretion. .

24. Section 114(A) of the Customs Act which empowers the Department to impose the penalty equal to the duty was not in force during the impugned period and hence the Tribunal modified the imposition of penalty by restricted it to Section 112 (prior to its amendment). The words 'prior to amendment 'assumes significance for the reason that subsection 112 (b) (ii) was amended in the year 2015 by virtue of Act 20 of 2015. Prior to the said amendment the said subsection 112 (b) (ii), encompassed a discretion to impose penalty at an amount not exceeding the duty evaded or at Rs5,000/- whichever is greater.

25. In para 17.1 of the show cause notice also, the act of the First Appellant in selling away of the goods liable to be confiscated has been mentioned and the penalty is also contemplated under sec.112(a) (ii). However, in the concluding part of the show cause notice the penalty for the above violation is mentioned as under sec.114 -A. This is obviously for the reason that after the above amendment in the year 2015, the effect of sec.112(a)(ii) is subject to sec. 114-A.

26. Since both sec.114-A and the amendment to sec.112(b)(ii) were in not in force during the relevant period, the order of the Tribunal modifying the penality by using the discretion vested under sec.112 (prior to amendment) is correct only. In fact the modification has put the Appellants in a more advantageous situation and it was not prejudicial to their interest. The Appellants did not suffer any new penality other than the one mentioned in the show cause despite a right provision which was in force at the relevant point of time was employed by the Tribunal. The process for imposing penality under sec. 112 has been initiated (though a more stringent provision is mentioned in the concluding portion of the show cause) from the time when show cause was issued and the Appellants have also been given with the opportunity to defend

themselves. Hence the Appellant cannot claim that the order of the Tribunal which modified and reduced the penality under sec. 112 is altogether a new one or that they were not given with any opportunity of hearing. Hence, the question of law No.3 also answered against the Appellants.

27. In the result, the Appeal is dismissed and No costs.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1. The Commissioner of Customs, (Port-Export),

Chennai - 600 001.

2.The Customs, Excise & Service Tax Appellate Tribunal,
Haddows Road,
Chennai - 600 006.

Copy to
The Section Officer
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High Court, Madras 104.

+1 CC to Mr.T. Ramesh, Advocate sr 8556.
+1 CC to Mrs.R. Hemalatha, Advocate sr 7769.

C.M.A.No.2834 of 2014

PP(CO)

SP(12/03/2021)