BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	Pronounced on
01.12.2021	10.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.(MD) Nos.685 and 686 of 2014

Mr.G.Ravi ... Appellant / Appellant (In Both CMAs)

-vs-

1.Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench,
Shastri Bhawan Annexe,
1st Floor, 26 Haddows Road,
Chennai-600 006.

2.The Commissioner of Customs,
Customs House,
Tuticorin-628 004.

3.The Commissioner of Customs & Central Excise (Appeals),
No.1, Williams Road, Cantonment,
Tiruchirappalli-620 001. ... Respondents/Respondents (In Both CMAs)

Common Prayer: Civil Miscellaneous Appeals filed under Section 130 of the Customs Act, 1962, against the Final Order Nos.40131-40136/2014 dated 24.01.2014 in Appeal Nos.C/145/2011 and C/188/2011 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai insofar as the Appellants are concerned.

For Appellants (In Both CMAs) : Mr.A.K.Jayaraj
For Respondents (In Both CMAs) : Mr.R.Aravindan

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C O M M O N   J U D G M E N T

S.VAIDYANATHAN,J.,
and
G.JAYACHANDRAN,J.,

These two appeals are arising out of the common order dated 24.01.2014, viz., one dismissing the appeal filed by the appellant herein against the imposition of penalty of Rs.2,00,000/- and another against the order of the CESTAT, partially allowing the appeal of the Department for enhancement of penalty and thereby, enhancing the penalty from Rs.2,00,000/- to Rs.5,00,000/-.

2.Since the facts and law involved in both the cases are one and the same, both the Civil Miscellaneous Appeals are taken up for final disposal and common order is passed as below.

Brief Facts in nutshell:

3. A Shipping Bill No.1955099 dated 09.07.2008 was filed in the name of M/s.Kumari Coir Products for alleged export of cargo declared to have been containing "Coco Peat" to Malaysia and one S.Chandrasekhar was the proprietor of M/s.Kumari Coir Products. On a specific information gathered by the Directorate of Revenue Intelligence [D.R.I.] that red sanders logs were smuggled out of India, the said container was immediately recalled. However, the container, which had already sailed to Malaysia on 14.07.2008, was examined at Malaysian Port and found stuffed with Red Sanders and therefore, it was sent back to Tuticorin. The same reached Tuticorin Port on 10.08.2008. On enquiry, it was found that one George, had played the vital role in the illicit export of the prohibited goods with the assistance of M/s.Kumari Coir Products and its Proprietor, namely, S.Chandrasekhar, thereby, the Import and Export code of M/s.Kumari Coir Products was allowed to be used by the said George. It was further found that one Muthu, who is a Manager-cum-Driver of the lorry bearing Reg.No.TN-23-0420, on his way to Tuticorin Port Trust, had replaced the cargo with red sander woods. The enquiry conducted revealed the act that shipping bill was prepared in Custom House by one R.Sivaraman of M/s.Vishal Enterprises, Tuticorin. The statement of R.Sivaraman revealed that the Customs House Agents Licence of M/s.Vector Freight Forwarders was used by them for preparing the shipping bills and the container was stuffed with red sanders mis~declaring it as Coco Peat at the instance of one J.Francis Kumar, Marketing Executive of M/s.Sai Freight Private Limited, Tuticorin. The further investigation revealed that the shipping bill prepared by him on obtaining the signature of Customs House Agent [CHA] through Shri G.Ravi of M/s.Vector Freight Forwarders.

4. According to the Appellant, a show cause notice was issued to him, seeking explanation as to why penalty under Section 114 (i) and 117 of the Customs Act, 1962 should not be imposed on him, for which, he had given a detailed reply, denying the allegation. After enquiry, penalty of Rs.10,00,000/~ was imposed on the appellant under Section 114(i) of the Customs Act, 1962, vide order dated 30.08.2010. Aggrieved by the order passed by the Additional Commissioner, Custom House, Tuticorin, the appellant herein preferred statutory appeal before the Commissioner, Customs and Central Excise (Appeals), Tiruchirappalli, in Appeal No.25 of 2011. In the appeal, the penalty of Rs.10,00,000/~ was reduced to Rs.2,00,000/~, by order dated 22.03.2011.

5. Aggrieved by the said order dated 22.03.2011, the appellant herein preferred further appeal in Appeal No.C/145/2011 before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Branch, Chennai [CESTAT] against the imposition of penalty under Section 114(i) of the Customs Act. Being aggrieved by the reduction of penalty, the Customs Department preferred an appeal in C/188/2011.

6. These two appeals along with the appeals filed by the other persons were taken up for consideration by the CESTAT and an order was passed on 24.01.2014 holding that the penalty of Rs.2,00,000/~ imposed on the appellant is very low and it is liable to enhanced to Rs.5,00,000/~. Thus, the appeal filed by the Revenue was partially allowed and the appeal filed by the appellant herein was rejected. Being aggrieved by the said order, the present appeals are filed by the appellant.

7. According to the appellant, the main ground of attack on the impugned order is that the authorities have failed to properly appreciate the facts and circumstances of the case and the application of Section 50(2) and 114 of the Customs Act, 1962. The order of the Commissioner of Customs is a cryptic order without discussing the legal issues. The grounds raised by the appellant were not properly meted out by the authorities. When there was a specific finding regarding substitution of the goods by George and Muthu, the appellant, who is an employee of the Customs House Agent cannot be suspected or faulted for the said substitution. As an employee of the Customs House Agent, the appellant has nothing to do with the goods and is only concerned with the documentation of the export. While the shipping bill was duly signed by the Exporter and certified by the Superintendent of Central Excise, for the contents of the container, the employee of the Customs House Agent cannot be found guilty of abetting the crime contrary to the legal position settled by Supreme Court in ***Sri Ram vs. State of U.P., 1975 SC 175*** and Trilok Chand Jain vs. State of Delhi, 1977 SC 666. Therefore, when there is no element of mens rea, the penalty imposed on him is arbitrary. For the mis~declaration or substitution of the goods in the course of transit, the Customs House Agent or its employee cannot be held liable. Section 50(2) of the Customs Act, 1962 is not applicable to the appellant, being an employee of the Customs House Agent. Similarly, there is no contravention of Customs Act by the appellant to impose penalty under Section 114(i) of the Customs Act, 1962. Therefore, the CESTAT is not correct in holding that the appellant is liable for penalty under Section 114(i) of the Customs Act, 1962.

8.The learned counsel appearing for the appellant would submit that time and again the Courts have held that an employee of the Customs House Agent cannot be held liable for mis~declaration or misuse of the licence, if any third party without his knowledge, exports prohibited goods by mis~declaration. Further, he would contend that in the alleged shipping bill Annexure-A used for smuggling the Red Sander is a photocopy of the blank Annexure-A, signed by the Customs House Agent and the appellant has never indulged in the transaction and cannot be accused of violating Regulation 13(a) and (b) of the Customs House Agents Licensing Regulations, 2004 [CHALR]. The Customs Department, having chosen to issue show cause notice, cannot proceed under Sections 114(i) and 117 of the Customs Act.

9. Further, it is contended that as an employee of the Customs House Agent, his role is limited and for the declaration and mis~declaration of the goods, he cannot be liable for any contravention of Section 50(2) of the Customs Act, 1962. When the goods was stuffed in the container, it was only Coco Peats and the container was sealed by the Central Excise Officers. Only on verifying the Cargo, the Customs Officer has allowed the export and made an endorsement in the Shipping Bill as Let Export. During the investigation, it was established that when Red Sander was substituted for Coco Peat, without appreciating the facts and law properly, the Additional Commissioner had imposed penalty of Rs.10,00,000/~, which was interfered with by the Commissioner of Customs and reduced to Rs.2,00,000/~. Whereas, on further appeal by the Department, the same has been enhanced to Rs.5,00,000/~, which is nothing but non~application of mind and improper application of the provisions of law.

10.Section 50 (2) of the Customs Act, 1962 reads as below:~

> --50.Entry of goods for exportation.~
> (2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

11. Section 114(i) of the Customs Act, 1962 reads as below:~

> --114.Penalty for attempt to export goods improperly, etc.~
> (ii) 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 three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;--

12. In these cases, several substantial questions of law have been raised by the appellant herein. It is seen that the provisions of the Customs House Agents Licensing Regulations, 2004 are nothing, but supporting legislation passed in exercise of the powers

conferred by sub~section 2 of Section 146 of the Customs Act, 1962. The role and responsibility of the Customs House Agent in case of mis~declaration of goods has to be dealt with based on the *mens rea* to the contribution of the Customs House Agent allowing the smugglers to misuse the licence issued to him.

13. A Division Bench of this Court in almost identical facts of the case in ***K.V.Prabhakaran Vs. Commissioner of Customs, Chennai*** reported in ***2019 (365) E.L.T. 877 (Mad.) [C.M.A.No.2940 of 2017, decided on 30.10.2017]*** has held that lending the CHA licence to a third party for usage without knowing the actual importer and the goods to be imported, is a serious issue. Misuse of CHA licence or reckless and careless lending of the same, the unscrupulous person for facilitating smuggling activities should be viewed seriously and held that imposition of penalty by invoking the provisions of the Customs Act is not only justifiable but also acceptable.

14. In the present case, there was a stealthy export of Red Sanders to Malaysia in a Container bearing No.VMLU 3200873 covered under Shipping Bill No.1955099, dated 09.07.2008 along with Annexure-A signed by the appellant herein. It is admitted by the employer / Customs House Agent, of the appellant that the blank signed Annexure-A was handed over to the Appellant working at Tuticorin. The very admission itself is sufficient under Section 108 of the Customs Act to hold that the appellant was reckless and negligent in using the Customs House Agent Licence of his Employer. The declaration of goods found in the shipping bill hold sway by Annexure-A. In a scheme of conspiracy, either the Customs House Agent or employee cannot escape from the liability pleading ignorance of the transaction. Both the provisions of the Customs House Agents Licensing Regulations, 2004 as well as the Customs Act, 1962 contemplate action against the violators of the Customs Act by mis~declaring the goods and enable imposition of penalty.

15. Sections 114 and 117 of the Customs Act, 1962 stipulate the word 'any person', meaning thereby that any person, who contravenes any provision of this Act or abets any such contravention is liable to pay a penalty. The purpose of enactment is to rope a person, who contravenes the provisions of the Act and the case of the Appellant cannot be treated to be a different one to that of Rama Thenna Thayalan / Customs House Agent / Appellant in C.M.A.(MD) Nos.916 and 917 of 2014, wherein, this Court has elaborately discussed about various factors and provisions of the Act. As held by the Supreme Court in the case of ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma and Others***, reported in **(2002) 2 SCC,** “no part of statute shall be construed as unnecessary or superfluous”.

16. The plea that action against the erring person / Customs House Agent or his Employee can be initiated only as per the procedure under CHALR 2004 and not under Sections 114(i) or 117 of the of the Customs Act or the provisions of Customs Act does not apply and both are baseless argument. Regulation No.12 of CHALR 2004 contemplates that the licence is not transferable or sold. Thus, while granting licence, it is very clear that the licensee cannot allow the third party to misuse the licence. Regulation No.13 of CHALR imposed certain obligations on the Customs House Agent and one such obligation is to exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage and yet another obligation is to verify antecedent, correctness of Importer Exporter Code (IEC) Number, identity of this client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.

17. From the records and the admission of the appellant and his Employer, it is clear that the appellant had not discharged these obligations, which cast on him. It is a case where under the guise of Coco Peats, prohibited goods namely, Red Sanders weighing 10.760 MTs. has been transported. The DRI based on the intelligence gathered, had rescued the goods and found the Cargo was transported based on the Annexure-A, prepared by the Appellant herein, containing the signature of the employer of the appellant. Therefore, mis~declaration of goods and attempt to export such goods is punishable under Section 114 of the Customs Act. A person, who is a party to the mis~declaration, is liable to pay penalty not exceeding three times of the value of the goods mis~declared. The first respondent Tribunal is empowered to enhance the penalty imposed, if the penalty imposed is not adequate. Section 117 of the Customs Act is a residuary provision for imposing penalty for contravention. When penalty is prescribed elsewhere in the Act, the maximum cap of Rs.One Lakh fixed under Section 117 is not applicable. Therefore, the submission of the Appellant that penalty of Rs.5,00,000/- is excessive and beyond power is *ex facie* untenable. Further, the provisions under the Regulations to punish a person for violation and contravention of the Regulations is in addition to the penal provisions prescribed under the parent act, namely, the Customs Act. Therefore, it is incorrect to say that the Appellant is liable only under the Regulations for any violation and contravention and if the action under the Regulations is not sufficient for the grave offence, there is no legal impediment to proceed against the employee / appellant of the Customs House Agent under the Customs Act besides action under the Regulations.

18. In fine, finding that there is no mala fide or infirmity in the order, imposition penalty at Rs.5,00,000/-, we hold that the appeals challenging the order of CESTAT deserve to be dismissed.

Accordingly, both these ***C.M.A.(MD) Nos.685 and 686 of 2014, are hereby dismissed***. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

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TO:-

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+1 CC to M/s.A.K.JAYARAJ, Advocate (SR-38455[F] dated 13/12/2021)

Judgment in
C.M.A.(MD) Nos.685 and 686 of 2014
10.12.2021

TP(CO)
GC(04.01.2022) 7P 5C