IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2022

CORAM :

THE HONOURABLE MR. JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Writ Appeal Nos.453 to 455 of 2022
and C.M.P.Nos.3273, 3278 & 3279 of 2022

Ashish Mundhra ...Appellant in W.A.No.453 of 2022
Abhishek Mundhra ...Appellant in W.A.No.454 of 2022
R.Mahaveer Pipada ...Appellant in W.A.No.455 of 2022

Versus

1.The Commissioner of Customs (Appeals - I),
O/o. The Commissioner of Customs (Appeals - I),
No.60, Rajaji Salai, Custom House,
Chennai - 600 001.

2.The Assistant Commissioner of Customs (Review Cell),
Chennai - I, Commissionerate
New Custom House,
Air Cargo Complex,
Meenambakkam,
Chennai - 600 027.

...Respondents in all W.As

Common Prayer:

Writ Appeals filed under Clause 15 of Letters Patent, praying to set aside the order passed by the learned Judge in W.P.Nos.5910, 5908 & 12756 of 2021 dated 11.01.2022.

Common Prayer in W.P.Nos.5910, 5908 and 12756 of 2021:

Writ Petitions filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the Impugned order in Appeal AIR.C.Cus.I.No.281, 282, 283 & 284/2020 in F.No.C4/I/139, 150,153 & 202/0/2020-AIR dated 27/11/2020 of the first Respondent and quash the same in so far as the Petitioner is concerned.

For Appellant in all W.As :Mr.Muralikumaran
for M/s.McGan Law Firm

For Respondents in all W.As:Mr.V.Sundareswaran,
Senior Panel Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by R.MAHADEVAN, J.)

Heard both sides and perused the materials placed before this court.

2.These Writ Appeals are directed against the common order dated 11.01.2021 passed by the learned Judge in W.P.Nos.5910, 5908 & 12756 of 2021 filed by the respective appellants herein.

3.According to the appellants, M/s.Mundhra Bullion Private Limited was engaged in trading of bullion and one Abishek Mundhra (appellant in WA.No.454 of 2022), who was the former director of the said company, on 14.10.2013, carried gold weighing 15.16 Kgs from Kolkata to Chennai, in his hand baggage, after duly declaring the possession of the same to the airport authorities. But, the officials of the DRI seized the same and without any jurisdiction, issued show Cause Notices dated 13.04.2014 to the appellants and other notices. Thereafter, pursuant to the order dated 19.08.2019 passed in WP.No.10816 of 2015 filed by Abishek Mundhra and the order dated 24.01.2020 passed in WP.Nos.5550 and 5523 of 2015 filed by others, adjudication process commenced and the adjudicating authority, without affording an opportunity of cross examining the witnesses, passed the order-in-original dated 13.07.2020 bearing No.87/2020-21 Commissionerate - I, followed by two Corrigendums dated 15.07.2020 and 20.07.2020, thereby, ordering confiscation of the seized goods with an option to redeem the same on payment of fine in lieu of confiscation, besides imposing penalty on the appellants.

4.The appellants further averred that challenging the aforesaid order of the adjudicating authority, the appellants preferred statutory appeals under section 128 of the Customs Act, 1962, before the first respondent, while the second respondent filed cross Appeals. However, without providing sufficient opportunity to the appellants to put forth their case, the first respondent dismissed the appeals preferred by the appellants and passed the order-in-appeal dated 27.11.2020.

For better understanding, the operative portion of the said order is extracted below:

"i. I set aside the denovo order no.87/2020-21-Commissionerate - I dt.13.07.2020 passed by the Additional Commissioner of Customs (Adjudication - Air) in its entirety, while allowing the departmental appeal (C4/I/153/O/2020-AIR) filed U/Sec.129 D(4) of Customs Act, 1962.

ii. I confiscate absolutely the 296 nos. of cut rectangular foreign origin gold bars weighing 15.160 kgs., valued @ Rs.4,53,89,040/- seized vide mahazar dt.14.10.2013 U/Sec.111 (d) & (I) r/w. Sec.120(1) of Customs Act, 1962 covered in the Additional Director, DRI, Chennai Zonal Unit's show cause notice vide F.No.VIII/48/22/2013-DRI (CZU) dt.13.04.2014.

iii. I confiscate the small black colour hand bag, packing materials such as plastic container, Bengali Newspapers used for covering the gold bars and the rubber bands U/Sec.118 of the Customs Act, 1962.

iv. The appeal of Abishek Mundhra (C4/I/139/O/2020-AIR) is rejected, as it has no merits.

v. I impose a penalty of Rs.1 Crore (Rupees One Crore only) U/Sec.112(a) of the Customs Act, 1962 upon Abishek Mundhra, Director, M/s.Mundhra Bullion Private Limited, Chennai having address at No.20, Thulasingam Street, Sowcarpet, Chennai - 600 079.

vi. The appeal of Ashish Mundhra (C4/I/150/O/2020-AIR) is rejected, as it has no merits.

Vii. I impose a penalty of Rs.1 Crore (Rupees One Crore Only)U/Sec.112(a) of the Customs Act, 1962 upon Ashish Mundhra, Managing Director, M/s.Mundhra Bullion Private Limited, Chennai having address at No.20, Thulasingam Street, Sowcarpet, Chennai - 600 079.

viii. I impose a penalty of Rs.1 Crore (Rupees One Crore Only) U/Sec.112(a) of the Customs Act, 1962 upon R.Mahaveer Pipada residing at No.29, Block A, 101, Sankeswarar Niketan, Zinda Sahib Street, Kondithope, Chennai - 600 079.

ix. I impose a penalty of Rs.1 Crore (Rupees One Crore Only) U/Sec.112(a) of the Customs Act, 1962 upon Raju @ Mukesh, Kolkata.

x. The appeal of Goutam Chakraborty (C4/I/202/O/2020-AIR) is rejected, as it has no merits.

xi. I impose a penalty of Rs.50 Lakhs (Rupees Fifty Lakhs only) U/Sec.112(a) of the Customs Act, 1962 upon Goutam Chakraborty having address at 6G/1A/5, Gopal Chandra Bose Lane, Kolkata – 700 050. ”

Aggrieved over the same, the appellants in WA.Nos.453 and 454 of 2022 filed writ petitions in WP.Nos.5908 and 5910 of 2021, in which, on 10.03.2021, after recording the undertaking given by the learned counsel that the appellants confined the writ petitions to the statutory violations and agitated the other issues before the CESTAT, the learned Judge granted an order of interim stay in respect of recovery of penalty under section 112(a) of the Act, alone. The relevant paragraphs of the said order are quoted below for ready reference:

> “ Mr. J.Vasu, learned Junior Standing Counsel accepts notice for the respondent and seeks some time to obtain instructions and file a counter qua the enhancement of penalty under Section 112 (a) of the Customs Act, 1962, as a prima facie case is made out only in regard to this issue.
>
> 2. Mr. Muralikumaran, learned counsel appearing for the petitioner would state that the petitioner intends to file an appeal as against the ejection of the appeal by the first appellate authority on all other points, and this is recorded.
>
> 3. As regards the enhancement of penalty, the order-in original dated 13.07.2020, impose the penalty of a sum of Rs.12 lakhs under Section 112 (a) of the Act. The provisions of Section 128A (3) of the Act provides for the procedure in disposal of appeal by the commissioner (Appeals) and also vests powers of enhancement upon the authority. However, in terms of the proviso thereto, the Commissioner (Appeals) is required to call upon the assessee to show cause notice why such enhancement should not be made, prior to proceeding with such enhancement. In the present case such opportunity is stated to have been denied.
>
> 4. There shall be an order of interim stay of recovery of penalty under Section 112(a) of the Act alone, till the next date of hearing”

Thereafter, all the writ petitions were dismissed as infructuous, on the ground of availability of alternative appeal remedy to the appellants, by a common order dated 11.01.2022, which is impugned in these writ appeals.

5.The learned counsel for the appellants submitted that while the show cause notice issued by the DRI itself is to show cause as to why the seized goods should not be confiscated under sections 111(d) and 111(l) of the Customs Act, 1962 r/w section 120(1) of the ibid Act, the first respondent erred in confiscating the seized goods, that too, without following due process of law as contemplated under section 128A of the Customs Act, 1962; and the first respondent ought not to have relied on the statements of the alleged witnesses to the show cause notice to reverse the order of the Adjudicating Authority, when it was the specific contention of the appellants that despite an opportunity of cross examining the witnesses, was sought for by the appellants, the same was not granted and an order-in-original was passed. The learned counsel further submitted that at the time of admission of the writ petitions filed by the appellants challenging the order-in-appeal passed by the first respondent, the learned counsel undertook to agitate the issues other than the statutory violation before the CESTAT and restricted the relief sought in the writ petitions to that effect, which submission was recorded by the learned Judge in her interim order dated 10.03.2021. However, without deciding the issue relating to statutory violation on merits, the learned Judge erroneously dismissed the writ petitions on the ground of alternative remedy, by the order impugned herein. Therefore, the learned counsel sought to allow these writ appeals by setting aside the order of the learned Judge passed in the writ petitions.

6.Mr.V.Sundareswaran, learned Special Panel Counsel appearing for the respondents produced a copy of the communication of the Deputy Director, Directorate of Revenue Intelligence (DRI), Chennai, dated 20.04.2022, received by him through e-mail, which reads as under:

> "With respect to the above mentioned subject it is to intimate that though DRI is not a respondent in the concerned WA, following comments are being offered since it was specifically sought.
>
> Since the prayer in the WA is against the justness of single judge order, issue may be argued to remand back the case to the single judge."

Therefore, the learned counsel prayed that the matter may be remanded to the learned Judge for fresh consideration.

7.Taking note of the facts and circumstances of the case and having regard to the submissions made by the learned counsel on either side, the order impugned herein is set aside and the matter is remanded to the learned Judge for passing orders afresh, after deciding the issue relating to statutory violation, on merits and in accordance with law, after affording due opportunity to all the parties, as expeditiously as possible.

8.All these Writ Appeals are disposed of in the above terms. No costs. Consequently, connected Miscellaneous Petitions are closed.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

mrr
To

1.The Commissioner of Customs (Appeals - I),
O/o. The Commissioner of Customs (Appeals - I),
No.60, Rajaji Salai, Custom House,
Chennai - 600 001.

2.The Assistant Commissioner of Customs (Review Cell),
Chennai - I, Commissionerate
New Custom House,
Air Cargo Complex,
Meenambakkam,
Chennai - 600 027.

3.The Section Officer,
Writ Section,
High Court, Chennai.

+1cc to Mr.V.Sundareswaran, Advocate Sr. 29161

Writ Appeal Nos.453 to 455 of 2022

jpl [co]
srg 09/06/2022