# IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.03.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

**W.P.No.5380 of 2020 and**
**WMP No.6314 of 2020**

M/s.OPMS C & F Agencies Pvt. Ltd.,
No.51, Chevalier Shivaji Ganeshan Salai (South Boag Road)
Prem Nagar Colony,
Flat No.24, 1st Floor, P Block,
T.Nagar, Chennai-600 017. ... Petitioner

Vs

1.The Commissioner of Customs (Chennai-II),
Custom House,
No.60, Rajaji Salai, Chennai-600 001.

2.Additional Commissioner of Customs,
Group 5B, Chennai-II Commissionerate,
Custom House,
Rajaji Salai, Chennai-600 001. ... Respondents

**PRAYER:** Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records relating to the impugned Order-in-Original No.72519/2014 dated 25.11.2019 issued by the 2nd respondent, and quash the same as against the petitioner.

For Petitioner : Mr.A.Mohamed Ismail
For Respondents : Mr.K.S.Ramasamy
Central Government Standing Counsel

**O R D E R**

The petitioner is a clearing and forwarding agent. It was approached by one Diamond Fancy Goods for clearance of a consignment comprising imported measuring tapes supplied by M/s.Benitec Miller SDN BHD, Malaysia. Due verification had been made by the petitioner of the requisite particulars after which the petitioner had accepted the assignment. A bill of entry was filed on 16.09.2016 seeking clearance. The bill of entry was subject to a re-assessment and the officers assessed the goods to duty of a sum of Rs.6,15,401/-, enhancing the declared value from US Dollars 18,304.40 to US Dollars 30,852.90. An 'out of charge' order had been issued and the goods were cleared on 19.09.2016.

2.Thereafter and unknown to the petitioner proceedings had been initiated as against the importer Diamond Fancy Goods for short levy of Anti Dumping Duty under Customs Notification No.16 of 2016. The petitioner was not a party to these proceedings and had received no notices or communications from the respondents in this regard.

3.Out of the blue, the petitioner was in receipt of the present impugned order on 25.11.2019 confirming a demand of Anti Dumping Duty of a sum of Rs.32,14,738/- with applicable interest. The order in original does not refer to any opportunities extended to the petitioner for objecting to the proposal or to appear to be heard and a copy of the same though addressed to the importer under reference-1 had been issued to the petitioner under reference-2, as per Section 147(3) of the Customs Act, 1962 (in short 'Act').

4.Mr.A.Mohamed Ismail, learned counsel for the petitioner would submit that (i) the impugned order is contrary to all canons of law since a liability has been fastened on the petitioner in violation of principles of natural justice, (ii) the provisions of Section 147 are applicable only after all measures for recovery are exhausted as against the primary assessee, who is the importer.

5.Per contra, Mr.K.S.Ramasamy, learned Central Government Standing Counsel for the respondents/Customs Department would defend the impugned order stating that Section 147 is a provision for recovery and imposes a parallel and deemed liability upon the agent. Hence, there is no infirmity in the passing of the impugned order as it only makes known to the petitioner the factum of the liability under Section 147(3) of the Act.

6.Having heard learned counsel, I am of the considered view that the impugned order is vitiated on several grounds. One of the modes of assessment under the Customs Act is in terms of Section 28 thereof, which is invoked as against the importer by issue of a show cause notice. Section 147 is a provision which fastenes a corresponding, parallel and deemed liability on the agent of the principle as well. It thus stands to reason that the process and procedure for assessment that is followed qua the principle, the importer in this case, would have to be necessarily followed in the case of the agent as well.

7.In *Collector of Customs, Cochin v. Trivandrum Rubber Works Ltd., Chacki* [(1999) 2 SCC 553], the assessee therein, Trivandrum Rubber Works, was the importer. The goods had been cleared through M/s.Achudhanpillai and company to their clearing agent. A notice had been served to the importer under Section 28 of the Customs Act and this notice addressed to the importer had been served on the clearing agent.

8.The importer was served with the same notice subsequently. The notice on the importer had been served beyond limitation whereas the notice addressed to the importer, but served on the clearing agent, was on the last date prior to the expiry of limitation. The importer challenged the notice on the ground that it was barred by limitation and the defence of the respondents was that since the notice on the clearing agent was served within limitation the claim against the importer could not be held to be barred.

9.The question that was crystallised by the Hon'ble Supreme Court is, whether a notice to the importer served on the clearing agent of the importer long after the goods have been cleared by the clearing agent, will amount to a valid notice to the importer. The appeal was at the instance of the Collector of Customs, the importer having succeeded before the High Court and before the

Hon'ble Supreme Court, the Collector of Customs relied on Section 147(3) of the Customs Act.

10.Section 147, to the extent to which it was relevant for appreciation of the issue in the case of *Trivandrum Rubber Works* and in this case as well, is extracted below:

> ***'147.Liability of principal and agent***
> *(1)................*
> *(2)................*
> *(3) When any person is expressly or impliedly authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, such person shall, without prejudice to the liability of the owner, importer or exporter, be deemed to be the owner, importer or exporter of such goods for such purposes [including liability therefor under this Act]:*
> *PROVIDED that where any duty is not levied or is short-levied or erroneously refunded on account of any reason other than any wilful act, negligence or default of the agent, such duty shall not be recovered from the agent unless in the opinion of [Assistant Commissioner of Customs or Deputy Commissioner of Customs] the same cannot be recovered from the owner, importer or exporter.'*

11.The provision makes it clear that the liability multed on the agent is a deemed liability and without prejudice to the liability of the owner, importer or exporter. The proviso states that where any duty is short levied, for any reason other than any willful act of negligence or default of the agent, the liability of the agent will kick in only where, in the opinion of the Assistant Collector of Customs, the duty cannot be recovered from the owner or importer.

12.The Hon'ble Supreme Court held that in order to proceed consequent on the deeming fiction under Section 147(3), notice would have to be served under Section 28 on 'the person chargeable with duty'. If the person chargeable to duty is deemed to be the clearing agent, it follows, as a consequence of proper procedure to be followed in assessment, that a notice under Section 28 must be issued to the clearing agent also.

13.This is made clear in paragraphs 6 and 7 of the judgment extracted below:

> '.........
>
> *6.Under Section 28, notice has to be served on "the person chargeable with duty". The person chargeable with duty in the case of imports is the importer. If the clearing agent of the importer is sought to be made liable as the person chargeable with duty in the circumstances set out in Section 147(3) read with the proviso, the notice must be addressed to the clearing agent and must set out that he is being made liable under the proviso to Section 147(3).*
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> *7.We do not find that in the present case, any notice has been served on the clearing agent on the ground that the Department cannot recover the duty from the owner or importer thus making the agent liable. The notice, therefore, cannot be construed as a valid notice against the agent for the recovery of any duty from the agent under the proviso to Section 147(3). In fact, in the present case, on 9-10-1986, such notice could not have been served on the agent because on 9-10-1986, there was nothing which would lead the Assistant Collector of Customs to come to the conclusion that the duty could not be recovered from the importer. Even a notice for recovery of duty had not been served on the importer on 9-10-1986. Notice has been served on*

*the importer only later, on 14-10-1986, when such service of the notice was barred by limitation. The proviso to Section 147(3) does not contemplate a case where the claim against the principal, i.e., the importer is time-barred because of a default on the part of the Department itself. It refers to a case where a department after taking all necessary steps under the Customs Act, 1962 is, for some reason, unable to recover the duty from the importer or owner. That is not the case here. We have not been shown any reason why the notice could not be served on the importer within the period of six months prescribed under Section 28. Therefore, on the facts of the present case, the proviso to Section 147(3) is not attracted.'*

14.In the present case, admittedly no notice has been issued to the clearing agent under Section 28. The argument of the respondents that mere imposition of liability does not require prior notice on the clearing agent is rejected straightaway for the reason that such mulcting of duty is itself bound by the requirement of proper procedure for assessment, as set out under Section 28 of the Act. It simply cannot be countenanced that a demand could be thrust on an entity without following due process prior thereto.

15.That apart, and as far as recovery is concerned, it is the case of the respondents that there has been no recovery in this matter as they are cognizant of the requirements under the proviso to Section 147(3) that the assessing officer has to record his opinion that the duty has not been recovered from the importer and proceed only thereafter with measures to recover the same from the agent.

16.For the reasons as set out above, the impugned order in original is set aside qua the petitioner and as a consequence, this writ petition is allowed. No costs. Connected miscellaneous petition is closed.

**15.03.2023**

vs
Index : Yes / No
Speaking Order
Neutral Citation : Yes

To

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Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

2.Additional Commissioner of Customs,
Group 5B, Chennai-II Commissionerate,
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**Dr.ANITA SUMANTH,J.**

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