IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.09.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.26799 of 2023
and
W.M.P.No.26228 of 2023

V.Mugunthan ... Petitioner

Vs.

The Additional Commissioner of Customs,
Chennai IV Commissionerate,
Office of the Commissioner of Customs,
Chennai -IV (Export), Customs House,
No.60, Rajaji Salai, Chennai – 600 001. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records pertaining to Order-in-Original No.101527/2023 dated 28.03.2023, passed by the respondent herein and to quash the same, in so far as, the said order have been passed without jurisdiction and authority of law and also against the various judicial pronouncements and the provisions of law, which is in clear violation to the principles of natural justice.

For Petitioner	:	Mr.S.Baskaran
For Respondent	:	Mr.M.Santhanaraman Senior Standing Counsel

ORDER

Mr.M.Santhanaraman, learned Senior Standing Counsel takes notice on behalf of the respondent.

2. The petitioner has challenged the impugned Order-in-Original No.101527/2023 dated 28.03.2023, passed by the respondent.

3. By the impugned order, the respondent has imposed penalty of Rs.35,00,000/- on the petitioner under Section 114 of the Customs Act, 1962.

4. The impugned order precedes a Show Cause Notice dated 23.08.2022.

5. As far as the petitioner is concerned, the allegations in the Show Cause Notice reads as follows:-

"40.(ab).The shipping bill no 8987965 dated 16.03.22 pertaining to M/s.Mercury & Co has been filed by using Customs Broker M/s.Svarad Logistics India Pvt. Ltd in the attempted export of red sanders. Statement of Shri.Jeevan Kumar of M/s.Morningstar Shipping Services dated 19.03.22 and 24.03.22 and statement of Shri.V.Mugunthan, Customs Broker M/s.Svarad Logistics India Pvt. Ltd dated 19.03.22 shows that V.Mugunthan has allowed Shri.Jeevan Kumar of M/s.Morningstar Shipping Services to file Shipping Bill no 8987965 dated 16.03.22 pertaining to M/s.Mercury & Co. He was not aware of the exporter details. He did not undertake KYC verification. Thus, Shri V.Mugunthan has failed to ensure the identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information as enshrined in rule 10(n) of Customs Brokers Licensing Regulations, 2018. As such, Shri V.Mugunthan, by his act of omission, is liable for penalty under section 114 of the Customs Act, 1962 for rendering the goods liable for confiscation under Section 113(d) of the Customs Act, 1962."

6. In the impugned order, the respondent has concluded as follows:-

"45. I find that Enquiry with Shri.V.Mugunthan, the Managing Director of the M/s.Svarad Logistics India Pvt Ltd., the Customs Broker whose firm filed the shipping bill has revealed that Shri.K.P.Jeevan Kumar of M/s.Morning Star Shipping Services (India) Private Ltd, Armenian Street, Chennai-1 had given him the export documents and that since Shri.Jeevan Kumar informed him that he had cleared the consignments for this exporter, he did not verify the company physically; that this is the first consignment for M/s.Mercury & Co; that based on the documents given by Shri.Jeevan Kumar who is known to him for the five months, he filed the shipping bill; that he cleared 10-12

consignments of import and export of different companies for Shri.Jeevan Kumar; that for export consignments, they arrange transportation from exporter godown to CFS and later CFS to harbour; that their staff only attends the clearance work and arrange the containers from liners; that in the subject case, they did not attend clearance work since, neither exporter nor Shri.Jeevan Kumar informed him about the transportation of the cargo to CFS and therefore, their staff did not go to CFS. I find that Shri R.Yuvaraj has given the documents such as invoice no EXP-008 dated 15.03., packing list, GST copy and KYC documents to Shri.Jeevan Kumar of M/s.Svarad Logistics India Pvt Ltd, who is the CHA for the Shipping Bill for filing of shipping bill for export of lath machines in the name of M/s.Mercury & Co. The shipping bill no 8987965 dated 16.03.22 pertaining to M/s.Mercury & Co has been filed by using Customs Broker M/s.Svarad Logistics India Pvt Ltd in the attempted export of red sanders. The export consignment which was supposed to have lathe machines instead had Red Sanders concealed. Enquiry with Shri.K.P.Jeevan Kumar of M/s.Morning Star Shipping Services (India) Private Ltd has revealed that Shipping Bill no 8987965 dated 16.03.2022 was filed through M/s.Svarad Logistics India Pvt Ltd based on the export documents given by one Shri.Yuvaraj Shri.K.P.Jeevan Kumar did not verify the exporter premises physically and also informed that the said Shri.Yuvaraj had attended the clearance work at CFS. Further, Shri.Jeevan Kumar has stated that he has not attended any other work related to this shipping bill and all works relating to assessment, clearance, arrangement of trailors and containers were done by Yuvaraj only. Shri R.Yuvaraj received all the vehicles carrying the lathe machines with Red Sanders concealed inside at M/s.Thiru Rani Logistic Pvt Ltd and facilitated the deposition of the consignment at the CFS. Shri R.Yuvaraj used this H card to attend the customs clearance work at M/s.Thiru Rani Logistics Private Ltd as revealed by their letter dated 23.03.22. I find that the work of the CHA of the shipping

Bill was done by Shri Yuvaraj instead of M/s.Svarad Logistics India Pvt Ltd. I find that the acts of omission and commission of Shri Mugunthan of filing the shipping bill as the CHA on behalf of the exporter, filing Shipping Bill with false declarations, submitting the invoice, packing list which are contrary to the facts, filing the shipping bill merely on the basis of documents received from Shri.Jeevan Kumar who is not even their employee, permitting Shri R.Yuvaraj to take care of all the CHA work which they themselves were supposed to do such as arranging tailers, containers, getting the consignment delivered at the CFS, not verifying the exporter's premises, not arranging transport from exporters godown to CFS, not arranging for containers with liners even though shipping Bill was filed by them, not sending the CHA staff for clearance work, have all rendered the Red Sanders and the cover cargo i.e., lathe machines liable to confiscation under Section 113(d) when the Shipping Bill was filed in the attempt to export prohibited goods. Therefore, I find that Shri.V.Mugunthan is liable for penalty under Section 114 for his acts of omission and commission which has rendered the above goods liable for confiscation under Section 113(d).

Now, I proceed towards the verification of written submission dated 12.09.2022 and submissions made by Shri.V.Mugunthan during personal hearing through hsi representative Shri S.Baskaran, advocate. In his submission, he submitted that they filed the subject shipping bill dated 16.03.2022, which shipping bill was assessed on 17.03.2022 by the proper officer of customs; that pursuant to the same, it can be seen that the authorized representative of the exporter, who had in fact was transacting all the business related issues on behalf of the exporter; that they acted as CB towards filing of shipping bill on behalf of the exporter, only based on the export documents furnished to them and also after obtaining proper authorization, KYC and other documents; they submitted the KYC documents to the Investigation and hence, it cannot be held that they did not verify the KYC. With regard to the imposition of

penalty, they stated that SCN only averred their failure to ensure the identity and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information and by their act of omission is liable for penalty u/s 114 of the Customs Act for rendering the goods liable for confiscation u/s.113(d) of the Customs Act, without mentioning as to what is the act of omission/commission rendered by the noticee under the Customs Act, hence, in the absence of bringing on record any cogent/tangible evidence to prove the alleged violations, if any, committed by them, the invocation of penal provisions may not be legally sustainable, more so, when the SCN was also silent and had also not referred to by which act of commission or omission by them."

7. In the writ petition, the petitioner has stated as follows:-

"E. As regards the alternative remedy of filing an appeal against the order of the 2nd respondent, it is respectfully submitted that the Hon'b'e Supreme Court in the case of State of Tripura - vs. - Manoranjan Chakraborty as well as Whirlpool Corporation - vs. - Registrar of Trade Marks had held that alternative remedy would not operate as an absolute bar and that discretion is vested with the High Court to entertain writ petition when it is found that the authorities had passed the order without jurisdiction or had purported to usurp jurisdiction without any legal foundation or that the availment of the alternative remedy will be time consuming and defeat the interest of justice and the writ court in appropriate case can exercise its jurisdiction to do substantive justice, when admittedly the impugned order is palpably wrong and unsustainable, besides being illegal and violates the fundamental right guaranteed to the petitioner under the Constitution of India."

8. The learned counsel for the petitioner submits that the issue is no longer *res integra* and is covered by the decision of this Court rendered in **Commissioner of Cus.(Exports), Chennai** Vs. **I.Sahaya Edin Prabhu**, 2015 (320) E.L.T. 264 (Mad.), wherein, in Paragraphs 4, 6 and 7, this Court held as under:-

> ***"4. The main plea of the learned Standing Counsel appearing for the department is that the first respondent, while acting as Customs House Agent, has not verified the authenticity of the documents and by such act of negligence, has abetted and aided in the smuggling of the red sander wooden logs, which are prohibited for export, and, therefore, the penalty imposed under Section 114(i) of the Customs Act is justified.***
>
> ***5. .....***
>
> ***6. With regard to the above said finding of the Original Authority, the Tribunal, in the order under challenge, held as under:-***
>
> > ***"4. I find that apart from a vague allegation in para 51 of the impugned order (supra) that the appellant had failed to discharge his functions as a CHA, in the entire order, there is no finding of a positive role of the appellant in the attempt to smuggle out red sander wooden logs or the manner in which he abetted the attempt. For failure to discharge functions as a CHA, penalties are provided in the Customs House Agents Licensing Regulations. In the absence of any finding showing that the appellant had abetted the***

failed effort to smuggle out prohibited red sander wooden logs, I find that penalty imposed on the appellant under Section 114(i) is not sustainable. Accordingly, the appeal filed by Shri I.Sahaya Edin Prabhu is allowed."

7. The Tribunal has rendered a categoric finding that there is no finding of a positive role of the first respondent in the attempt to smuggle out red sander wooden logs. Even in the order of the Original Authority, it is held that the custom house agent has not discharged his duty in the normal course of his service. As rightly observed by the Tribunal, for failure to discharge functions as a Customs House Agent, penalties are provided in the Customs House Agents Licensing Regulations. Therefore, imposition of penalty under Section 114(i) of the Customs Act is unwarranted. We, therefore, find no reason to differ with the finding of the Tribunal."

9. The learned counsel for the petitioner further submits that under similar circumstances, this Court has granted interim relief to similarly placed persons in W.P.Nos.25037 and 25043 of 2023.

10. The learned Senior Standing Counsel for the respondent on the other hand would submit that the petitioner cannot bypass the statutory remedy merely because the petitioner has to pre-deposit 7.5% of the penalty in terms of Section 129E of the Customs Act 1962.

11. It is submitted that there are several disputed questions of facts and the role played by the petitioner in the attempt of the exporter to smuggle out/export the red sander wooden logs in the lathe machines consignments.

12. Specifically, it is submitted that the petitioner had failed to take adequate care while allowing one R.Yuvaraj, to file bill of entries using the name of the exporter or using the services of his employees.

13. I have considered the arguments of the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent.

14. The order that has been passed by the Additional Commissioner of Customs the respondent cannot be said to be without jurisdiction or without the authority of law.

15. The order has been passed by an Officer under the Customs Act, 1962, in accordance with the provisions of the Customs Brokers Licensing Regulations, 2018.

16. The petitioner has to only file a statutory appeal before the Appellate Commissioner and in case the petitioner fails to get any relief, the petitioner has to further approach the Tribunal and thereafter, before this Court.

17. The statutory mechanism prescribed for redressing the grievances by way of an appeal cannot be bypassed by invoking jurisdiction of this Court under Article 226 of the Constitution of India.

18. Considering the above, Court is inclined to dismiss this writ petition with liberty to the petitioner to file a statutory appeal before the Appellate Commissioner within a period of thirty days from the date of receipt of a copy of this order.

19. In case the petitioner files the appeal within such time together with pre-deposit, the Appellate Commissioner shall consider and dispose the same on merits and in accordance with law.

20. This Writ Petition stands dismissed with the above liberty. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

13.09.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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To

The Additional Commissioner of Customs,
Chennai IV Commissionerate,
Office of the Commissioner of Customs,
Chennai -IV (Exports), Customs House,
No.60, Rajaji Salai, Chennai – 600 001.

C.SARAVANAN, J.

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