BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.08.2023

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THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.14081 of 2019 and
W.M.P.(MD)No.10559 of 2019

A.Arunkumar ... Petitioner

Vs.

The Principal Commissioner of Customs
(Preventive),
No.1, Williams Road,
Cantonment, Tiruchirappalli-620 001. ... Respondent

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a ***Writ of Certiorari,*** calling for the records relating to the impugned Order-in-Original No.67502 of 2019, dated 11.02.2019, issued by the respondent and to quash the same.

For Petitioner : Mr.A.Mohamed Ismail
For Respondent : Mr.N.Dilip Kumar

O R D E R

This writ petition is filed for writ of ***Certiorari,*** to quash the impugned Order-in-Original No.67502 of 2019, dated 11.02.2019, issued by the respondent.

2. The petitioner is working as an Appraiser in Chennai Customs. During 2005 to 2006, he was transferred to Coimbatore Customs. The respondent issued Show Cause Notice No.63 of 2011, dated 29.09.2011 directing the petitioner to show cause as why penalty should not be imposed under section 114 (iii) and section 117 of the Customs Act, 1962. Even though reference is made only to section 114 (iii), at the charging portion section 117 has been invoked. The reason for imposing penalty was spelt out in paragraph 21 of the show cause notice, wherein the respondent alleged that while the petitioner was functioning as an Appraiser in Chennai, the petitioner has certified the value of books in 39 shipping bills bearing the same number and allowed the exports of stainless steel utilities in the name of M/s.Ayyappan Industries thereby, allowed the wrong claim of duty drawback. Hence, he is liable for penal action under section 114(iii) of Customs Act, 1962.

3. The petitioner had submitted an explanation, vide letter, dated 06.01.2012 and submitted further statements vide letters dated 19.03.2012, 21.05.2012, 24.01.2017 and 09.05.2018. The petitioner was granted personal hearing on various dates. After elaborate enquiry, the respondent passed the

order-in-original dated 25.03.21019 imposing penalty of Rs.10,000/- under section 117 of the Customs Act. Aggrieved over the present writ petition is filed.

4. The learned Senior Standing Counsel appearing for the respondent submitted that the petitioner is having an alternative remedy and without invoking the alternative remedy the petitioner is before this Court. The learned Counsel appearing for the petitioner submitted that since there is violation of principles of natural justice, the petitioner is entitled to file writ petition. The petitioner also submitted that the petitioner had raised limitation question also. In order to ascertain whether there is violation of principles of natural justice this Court proceeds to hear the case.

5. The contention of the petitioner is that when the respondent had rendered a finding that the petitioner has not connived / colluded with the parties and section 114 (iii) is not attracted, in such circumstances the respondent cannot impose penalty under section 117 when there is no allegation

against the petitioner in paragraph 21 to invoke section 117. The entire transaction is narrated in the show cause notice, but the allegation against the petitioner is only in paragraph 21 alone. The relevant portion of paragraph 21 of the show cause notice is extracted hereunder:

> *"21. Further, it appears that Shri Arun Kumar while functioning as Appraises of Customs ICD Irugur now working in Custom House Chennai has certified the value of goods in 2 sets of 39 Shipping bills bearing the same number and thus allowed the exports of stainless steel utensils in the name of M/s Ayyappan Industries, Shri J.S.Babu Inc. and M/s Samy Metal Industries and helped Manish Kumar Jain and R.V.Shanmugam to wrongly claim duty drawback and therefore he is liable for penal action under* ***Section 114 (iii)*** *of Customs Act, 1962."*

6. The show cause notice further states that the petitioner is liable to be imposed with the penalty under Section 117 of the Customs Act however, it says for reasons spelt in paragraph 21 of the show cause notice and the relevant portion is extracted hereunder:

> *"iii) Shri Arun Kumar is hereby called upon to show cause to the Commissioner of Central Excise, Coimbatore Commissionerate, 6/7 A.T.D. Street, Race Course Road, Coimbatore-18 as to why penalty should not be imposed on him under Section 114(iii) and Section 117 of*

Customs Act, 1962 ***for reason spelt out on para 21 of the show cause notice****.”*

Under paragraph 21 the only allegation is that the petitioner as an appraiser had signed two sets of bills, but the said two sets of bills were not served along with the show cause notice. Infact in the same show cause notice it is stated that the shipping bills were not available or lost. In such circumstances the allegation against the petitioner is without any evidence.

7. The further contention of the petitioner is that when the show cause notice is not referring to any violation which would attract Section 117, simply by referring to Section 117 in the last paragraph of the show cause notice, the respondent cannot impose penalty against the petitioner under Section 117. The relevant provision of section 117 is extracted hereunder:

“117. Penalties for contravention, etc., not expressly mentioned.—Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding 3 [one lakh rupees].”

8. The said provision is residual or miscellaneous provision, even then there should be allegation and proof to invoke the said provision. Infact the respondent had rendered a categorically finding that the petitioner had not colluded or connived with the parties and hence section 114 (iii) is not attracted and the relevant portion is extracted hereunder:

> *"28.4 Therefore, penalty under Section 114 of CA 1962 is imposable in respect of those cases, where the departmental officer has connived / colluded with the parties concerned, with ulterior motive for consideration. As discussed above, there being no connivance I hold that the officer is not punishable under Section 114 (iii) of Customs Act, 1962."*

The respondent has considered the case of the petitioner and has come to conclusion that the petitioner has not committed any offence which is punishable under section 114 (iii). While that being so, then the respondent cannot proceed further under the section and impose penalty under section 114 and the respondent rightly had dropped the charge under section 114. But as far as section 117, there is no allegation against the petitioner to invoke section 117. For imposition of penalty again the paragraph 21 ought to be seen and in the said paragraph the respondent had stated that the petitioner had signed two sets of shipping bills. But this Court had already held that the respondent had not produced any such two sets of bills in the show cause notice and infact the respondent had stated in the show cause notice that the said two sets of bills are not available or lost. When there is no proof then the respondent cannot invoke section 117. More so, when there is a finding that the petitioner has not colluded or connived with the parties, when the respondent himself had given clean sheet for the petitioner, the imposition of penalty under section 117 is unwarranted.

9. When there is no charges / allegation to invoke the provisions of Section 117, the respondent is not having power to pass orders invoking the section 117. Even assuming that the respondent is empowered, then the respondent without calling for further explanation from the petitioner or without issuing further show cause notice for invoking the provision of Section 117, the respondent cannot pass orders imposing penalty. Since the respondent had passed the impugned order without calling for further explanation or further show cause notice, hence the order is liable to be quashed for violating the principles of natural justice. Hence the plea of alternative remedy by the

respondent is rejected. This Court is of the considered opinion seeing from any angle the imposition of penalty under section 117 is illegal and the same is liable to be quashed.

10. As far as the plea of limitation is concerned, the alleged occurrence happened in the year 2005 to 2006, the show cause notice was issued in the year 2011 and adjudication proceedings was conducted and completed in the year 2019. However, the learned Senior Standing Counsel appearing for the respondent submitted that since it involved huge amount of duty drawback by the exporters, the plea of duty limitation cannot be adjudicated in the present writ petition. Moreover the respondent had initiated criminal proceeding and disciplinary proceeding and the same may be affected. Therefore, this Court is not adjudicating the issue of limitation and the question of limitation is left open.

11. For the reasons stated supra, this Court is quashing the impugned order. Therefore, the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

12. This order is passed without prejudice to the pending disciplinary proceedings as well as criminal proceedings. The petitioner is facing disciplinary proceedings and criminal proceedings which can be independently dealt with by the concerned authorities.

14.08.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No

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S.SRIMATHY, J.

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