IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.09.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

CMA.No.439 of 2019

M/s.Skylark Cargo Services,
Represented by its Partner Smt.Renuka Sekar,
Aged 53 years,
No.64, 4th Street, Labour Colony,
Guindy, Chennai – 600 032. ...Appellant

Vs.

The Commissioner of Customs (Airport & Aircargo),
Integrated Cargo Complex,
Meenambakkam,
Chennai – 600 027. ... Respondent

Prayer: Appeal filed under Section 130 A of Customs Act, 1962 to set aside the Final Order No.40134/2018 dated 19.01.2018 passed by Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.S.Murugappan

For Respondent : Mr.S.R.Sundar
Standing Cousel

JUDGMENT

(Delivered by **C.SARAVANAN, J.**)

This appellant has filed this appeal, aggrieved by the final order No.40134/2018 dated 19.01.2018 passed by Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. At the time of admission of this appeal *vide* order dated 12.03.2019, this Court has admitted the following substantial questions of law, to be answered:-

> *i. Whether there is scope for imposing penalty under Section 114 (iii) of the Customs Act, 1962 in the absence of any knowledge and specific role on the part of the appellant in the offence alleged to have been committed by some other person? And*
>
> *ii. In the absene of any evidence, whatsoever, to hold that the appellant had knowledge or actively participated in the export of shoes upper in order to claim huge drawback and is the Tribunal right in holding the appellant as abettor?*

3. By the impugned order, the Appellate Tribunal has partly allowed Customs Appeal No.230 of 2010 filed by the appellant herein by reducing the penalty imposed on the appellant by the respondent under **Section 114 (iii)** of the **Customs Act, 1962** *vide* Order-in-Original No.32 of 2010 dated

21.01.2010. It is submitted that no penalty was imposed on the appellant under **Section 114 (iii)** of the **Customs Act, 1962**. The appellant herein had filed shipping bills on behalf of the exporter in the capacity, as a Custom House Agents. It appears that Exporter had utilized the services of several Custom House Agents including the appellant and had attempted to avail excess duty draw-back against respective Shipping Bills. By Order-in-Original, the respondent had imposed a sum of Rs.3,00,000/- as penalty under **Section 114 (iii)** of the **Customs Act, 1962** (in short "Act"). As far as the appellant is concerned, the respondent had observed as under:-

> *"290. As regards the involvement of Custom House Agents in the fraudulent exports, I find that Smt.Renuka Sekar, Proprietor of M/s Skylark Cargo, Custom House Agent, has admitted in her statement that she had not obtained any authorisation from the exporters as mandatorily required as per the Custom House Agents Licensing Regulations, 1984, as amended and further it is noticed that though the freight was collected and the airway bill has been issued reflecting the "freight prepaid", the Custom House Agent had filed the Annexures and Check Lists for shipping Bills to the Customs authorities as if the value of consignments are on FOB basis."*

4. The allegation against the appellant was that the appellant had failed to comply with the requirements of Custom House Agent Licensing Regulations,

1984 (Actually, Customs House Agents Licensing Regulations, 2004).

5. The impugned order is defended by the learned counsel for the Respondent on the ground that the impugned order does not call for any interference. It is submitted that no substantial questions of law arises for consideration under **Section 130 (A)** of the Act in two appeals.

6. The learned counsel for the respondent has also drawn attention to Regulation 13 (e) to (o) of the Customs House Agents Licensing Regulations, 2004 which read as follows:-

13. Obligations of Customs Agent-

A Custom House Agent shall:-
"(a)..
(b)..
(c)..
(d)..
(e) 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;
(n) ensure that he discharges his duties as Customs House Agent with utmost speed and efficiency and without avoidable delay.
(o) verify antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information."

7. We have considered the arguments advanced by the learned counsel for

the appellant and learned counsel for the respondent and perused the materials on record.

8. In our view, the imposition of penatly against the appellant under **Section 114 (iii)** of the Act is not sustainable, as the aforesaid provision applies only where and only if, it can be said that the appellant omitted to do such an act, which would have rendered the goods liable for confisication under **Section 113** of the Act.

9. The discussion in Order-in-Original No. 40134/2018 dated **19.01.2018**, content of which has been extracted above does not indicate any active role played by the appellant, so as to warrant penalty under **Section 114 (iii)** of the Act.

10. The Tribunal although has recorded that one S.Balakrishnan (actually S.Balachandran) was a permanent employee of an Export Firm floated by K.Gunasekhar and his Association and that the said S.Balakrishnan, had clandestinely obtained ID card from the Customs, as if he was an employee of the appellant, with the intention to clear the export consignment. However, there are no documents to substantiate that at the time of the export, the said person was an employee of the appellant. The said was employed by the Appellant for

two years and ID card was obtained for *bona-fide* purpose.

10.1 Relevant paragraph from the impugned order of the Tribunal reads as under:-

> *"3.1. The appeal has been filed by M/s.Skylark Cargo Services against imposition of penalty of Rs.3 lakhs under Section 114 (iii) of Customs Act, 1962. Appellants are a CHA. It has been alleged that appellants were one of the three CHAs whose services were utilized in filing the shipping bills of the fictitious export firms allegedly floated by Shri K. Gunasekhar, S.Divakaran and his associate Shri K. Jayaraman.*
>
> *3.2. When the matter came up for hearing, Ld. Advocate Shri S. Murugappan takes us to para-82 of the SCN to contend that one Shri S. Balakrishnan who was the permanent employee of K. Gunasekhar had clandestinely obtained ID card from customs as if he is an employee of the CHA of the appellant with the intention to carry out clearance work of export consignment of the export companies floated by their employer of that person. Ld. Advocate submits that said S. Balachandran was employed by them for two years and they have obtained an identity card for bonafide business. He further contends that said Balachandran has forged the signature of authorized signatory of the company. He contends that appellant had no link with Shri Gunasekhar and that they were only victim of the fraud committed by the other persons. There is no abetment on their part and they had no knowledge of nature of the goods. For these reasons, abetment cannot be alleged against them and also provisions of Section 114 of the Act will*

not be attracted in their case, and hernice penalty of Rs. 3 lakhs imposed on them may be set aside.

3.3. On the other hand, on behalf of respondent, the Ld. Commissioner (AR) contends that there is no evidence that any complaint has been made by the appellant for the forgery alleged to have been made by Shri Balachandran. She also takes to paras 72 & 73 of the impugned order where there is narration of statement made by one Shri Divakaran dt.09.09.2005 and 21.10.2005. which clearly shows that the said Shri Balachandran was not their employee but however as requested by Shri Balachandran he got him a "H" card; that as per office records, he had given 310 signed blank docüments to Shri Balachandran for filing the shipping bills and that was done with a view to allow him to facilitate customs clearance for the export of Shri Gunasekhar. Ld. A.R also submits that in all, the appellant had handled more than 600 shipping bills for the exports done by Shri Gunasekhar. This being so, there are more than sufficient grounds and reasons to attract provisions of Section 114 (iii), hence the penalty imposed on the appellant is very much justified.

3.4. In response, Ld. Advocate takes us to para-87 of the SCN to contend that signatures affixed in the shipping bills were found to be forged/impersonated, which fact will support the contentions of appellant.”

(Shri S. Balakrishnan actaully one S Balachandran)

10.2. Relevant paragraphs from the Show cause notice issued under

Section 124 of the **Customs Act, 1962** to the Exporters and Appellant and other Custom House Agents reads as under:-

> *"82. Shri S.Balachandran being a permanent employee for more than 8 years for Shri K. Gunasekhar, had clandestinely obtained an Identity Card from Customs as if he is an employee of the CHA, V. Devendrudu with an intention to carry out the clearance work of all the export consignments of the companies floated by his Employer, Shri Gunasekhar and with the help of Shri G. Arumugam, another employee of Shri Gunasekhar, had successfully carried out his operation. On 08.09.2005 when the consignments of M/s Poppy Leather and Apparel and R.G. Impex were intercepted and seized, Shri G. Arumugam was also present along with Shri S. Balachandran and a statement was also recorded from him on 09.09.2005 wherein he has stated that he used to assist Shri S. Balachandran who also in his statements dated 08.09.2005 and 10.09.2005 had admitted the same. Whereas further investigation revealed that a company, by name, Sree Vinayaga Impex has been floated in the name of Shri G. Arumugam which had also made several consignments of such inferior/unusable leather shoe uppers and drawn ineligible drawback amount and that all the shipping documents of the companies owned/floated by Shri Gunasekhar were routed/represented by M/s Sree Vinayaga Impex to the freight forwarders and the airlines declaring themselves ad Custom House Agent. Shri S. Balachandran has deliberately concealed the fact that Shri Arumugam is the Proprietor and through that company only all the exports*

documents of 27 companies were dealt with. He has also purposely revealed certain names like, Ramu and others as if they had contacted him regarding exports by the companies floated at Tirupur with an intention to keep Shri K. Gunasekhar away from the clutches of law. This coupled with the absconding of Shri G. Arumugam clearly shows that Shri Balachandran was hand in glove in the entire operation of Shri G. Arumugam and Shri K. Gunasekhar.

83. Investigations conducted with the IATA Agents who had handled the export cargo for the companies of Shri Gunasekhar through Shri S. Balachandran and copies of export documents produced by them and available with the department, confirm that all the cargo in respect of all the firms floated by Shri K. Gunasekhar, has been booked only up to Dubai and investigation conducted with the Airlines who airlifted the export consignments of these exporters affirm that the cargo has reached and delivered only in Dubai. A communication dated 10.09.2005 of Gulf Air regarding non delivery of cargo by the consignee in Dubai, addressed to M/s Sreyas Cargo, one of the IATA agents through whom Shri S. Balachandran booked, was seized from the premises at L-7, Luv Kush Apartments, 142/12, Purasawakkam High Road, Kelleys, Chennai, being the office premises of M/s Phoenix Impex, one of the companies floated by Shri Gunasekhar and the office premises of Shri Balachandran and his colleague. In this regard, further enquiries conducted with IATA agent and the airline proves. that the cargo was taken delivery subsequently in Dubai.This clearly shows that all the cargo declared to have consigned to London has reached only upto Dubai and not the actual destinations."

11. Thus, it is clear that the appellant had no active role played in the alleged attempt to wrongly higher duty draw-back by the exporter. The appellant's status and name was misused by the exporter along with S.Balachandran. Therefore, imposition of penalty on the appellant under **Section 114** of the **Customs Act, 1962** was unjustified. Thus, the impugned order warrants an interference. Therefore, this appeal deserves to be allowed. In the result, the substantial questions of law are answered in favour of the appellant and agaisnt the Custom's Department.

[R.S.K., J.] **[C.S.N., J.]**

13.09.2024

Index : Yes/No
Speaking Order/Non Speaking Order
Neutral Citation Case : Yes/No
NST
To
1.The Commissioner of Customs (Airport & Aircargo),
Integrated Cargo Complex,
Meenambakkam,
Chennai – 600 027.

2. The Customs Excise and Service Tax Appellate Tribunal
Chennai – 600 006.

R.SURESH KUMAR, J.
and
C.SARAVANAN, J.

nst

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