CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

S.No.	Appeal No.	Appellant	Respondent
1.	C/141/2011	M.K.M. Manthiram	Commissioner of Customs, Tuticorin
2.	C/66/2011	C.Gunasekaran	-do-
3.	C/104/2011	A.P.T.Mahadevan	-do-
4.	C/139/2011	Smile Shipping Services	-do-
5.	C/140/2011	B. Jawahar	-do-
Arising out of Order-in-Original No.38/2010 dt. 22.12.2010 passed by the Commissioner of Customs, Tuticorin			

Appearance :

Shri B. Satish Sundar, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 30.07.2018

FINAL ORDER No. 42172-42176 / 2018

Per Bench

All the appeals since relating to the same impugned order they are taken up together for common disposal.

2. The facts of the case are that on specific intelligence the Officers of Directorate of Revenue Intelligence (D.R.I) examined an export cargo covered by two Shipping Bills No.2187801 dt. 15.12.2009 and 2192337 dt. 23.12.2009 filed in the name of Dhanalakshmi Exports, Chennai declared to consist of Free Flow Iodized salt, Rice Flake, Vathal etc. and consigned to M/s.Worldwide Agro

Products Enterprises Unit, Malaysia. There were 520 yellow coloured HDPE bags in which salt was declared to be packed was examined and sent for testing and found to be in the form of white crystalline powder which answered the tests for Ketamine Hydrochloride. Accordingly, a show cause notice dt. 19.06.2010 was issued to M/s.Dhanalakshmi Exports, Shri A.P.T. Mahadevan and other noticees, inter alia proposing confiscation of quantity of 440 kgs. Ketamine Hydrochloride valued at Rs.1.54 crores allegedly kept concealed in declared cargo of free flowing Iodized salt and other export cargo. The SCN also proposed imposition of penalty under Section 114AA and 117 of the Customs Act, 1962 on M/s.Smile Shipping Services, CHA, Shri B. Jawahar (Partner of Simile Shipping Services), Sri M.K.M. Manthiram (Branch Manager of M/s.Smile Shipping Services), Shri V. Muthuraj, Proprietor of Vishwa Shipping Services (Freight Forwarder) and Shri C. Gunasekaran (Authorized Signatory of Smile Shipping Services). The adjudication proceedings culminated in issue of impugned order dt. 22.12.2010 by the adjudicating authority inter alia confirming proposals in the SCN and also imposing following penalties :

under Section 114 (i) of the Act, inter alia on

- Shri A.P.T. Mahadevan – Rs.25,00,000/-

under Section 117 of the Act, inter alia on

- Shri M.K.M. Manthiram – Rs.1,00,000/-
- Shri C. Gunasekaran – Rs.10,000/-
- M/s.Smile Shipping Services – Rs.1,00,000/-
- Shri B. Jawahar – Rs.50,000/-

Aggrieved, the aforesaid persons have filed the present appeals.

3. on 30.07.2018, when the matter came up for hearing, appellant Shri A.P.T Mahadevan (appellant in Appeal C/104/2011) was not present nor was he represented by any counsel. Ld. Advocate Shri B.Satish Sundar appears on behalf of the appellants viz. Shri M.K.M. Manthiram (appellant in C/141/2011), M/s.Smile Shipping Services (appellant in C/139/2011) and Shri B. Jawahar (appellant in C/140/2011). Ld. Advocate Ms.Nancy appears on behalf of appellant Shri C. Gunasekaran (C/66/2011). Ld. Advocate Shri B. Satish Sundar drew our attention to the following facts of the matter :

i) The exporter by name A.P.T. Mahadevan has admitted his involvement.

ii) Shri M.K. Manthiram (employee of CHA) in his statement has stated that they handled customs clearance with instructions of Shri V. Muthuraj of Vishwa Shipping Services (freight forwarder) and that they had handled earlier consignments for exports of Dhanalakshmi Exports.

iii) As per Shri B. Jawahar, Partner of the CHA, inter alia in his statement has denied knowledge of the consignment and has stated that customs clearances work at Tuticorin were handled by S/Sh Manthiram and Muthuraj and for that purpose, he used to send blank signed annexures in a lot from Chennai to Tuticorin over period of time.

iv) Ld. Advocate draws our attention to the findings of the adjudicating authority against Shri B.Jawahar and Shri Manthiram at paragraphs 28.06 and 28.07 of the impugned order respectively. The adjudicating authority has found that due diligence to ascertain genuineness of the exporter has not been exercised by the CHA and its employees. On this finding, he has held that all are privy to misstatement and illicit attempted export. Ld. Advocate submits that such a finding of negligence to ascertain genuineness of exporter cannot be translated into a drastic conclusion of involvement in smuggling.

v) Ld. Advocate drew our attention to para 28.11 of the impugned order where the adjudicating authority has however held that in the issue of signed blank annexures / declarations which have paved the way for illicit export there is no intentional mis-declaration and that *mens rea* does not exist in their case. On this finding, he has held that they are not liable to penalty under Section 114AA of the Customs Act, 1962.

vi) However in spite of such a finding, the adjudicating authority has held without any justification that as the violations of CHA and their men are not specifically covered under other sections of the Customs Act, 1962, they are liable for penalty under Section 117 of the Customs Act, 1962.

vii) When the adjudicating authority has made a clear cut finding that appellant had no knowledge and had not involved by abetting in the attempted illicit export by the exporter leading to dropping of proposed penalty under Section 114AA, the imposition of penalty under Section 117 ibid is not justified.

viii) The adjudicating authority has found that appellant committed violation of not getting authorized directly from the exporter and they did not verify genuineness and authenticity of the exporter. However such violation would attract action, if at all, under the Customs Agents Licensing Regulations, 2004 (CHALR) and not under the Customs Act, 1962. Ld. Advocate relies upon the following case laws which have clearly held that penalty under Section 117 cannot be imposed for alleged infraction of obligations cast under CHALR 2004 or CBLR 2013 :

(i) CC Chennai Vs I. Sahaya Edin Prabhu – 2015 (320) ELT 264 (Mad.)

(ii) M. Renganathan Vs CC Chennai – 2009 (235) ELT 860 (Tri.-Chennai)

(iii) Syndicate Shipping Services Pvt. Ltd. Vs CC Chennai
2003 (154) ELT 756 (Tri.-Chennai)

(iv) Sarosh Nagarwala Vs cc (Export) Nhava Sheva
2017 (358) ELT 542 (Tri.-Mumbai)

3.1 Ld. Advocate Ms. Nancy supports and adopts the arguments of Shri Satish Sundar, Advocate in respect of her appellant (C.Gunasekaran – Appeal C/66/2011) also.

4. On the other hand, Ld. A.R Shri A. Cletus supports the impugned order. He points out that even though the adjudicating authority may have held that appellants are not liable for penalty under Section 114AA of the Act, however he has clearly found that there are other violations committed by the appellant, which are specifically covered by other penal provisions of the Act and hence for that reason, he has correctly imposed penalties under Section 117 which is the provision for penalty in respect of violations of Customs Act, 1962 not elsewhere provided for.

5. Heard both sides and have gone through the facts.

6.1 The appellant Shri A.P.T. Mahadevan did not appear for the hearing nor was he represented by any counsel. It is seen that this appellant was not represented even during the early hearings on 5.6.2018, 10.4.2018 and 07.03.2018. The only obvious inference that can be drawn is that the said appellant is not interested in pursuing the appeal. In the circumstances, we find it proper to dismiss Appeal C/104/2011 for non-prosecution.

6.2 In respect of the remaining appellants, we find that the matter has been more amply covered in their favour in the case of *CC (Exports) Chennai Vs I. Sahaya Edin Prabhu* - 2015 (320) ELT 264 (Mad.) wherein the Hon'ble High Court of Madras has held that for the failure of the CHA to discharge his functions, penalties are provided in the CHALR, and imposition of penalty under Section 114 (i) of the Customs Act is unwarranted. The relevant para of the order is reproduced as under :

> "**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 Custom 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."

6.3 The CESTAT Chennai in the cases of *Syndicate Shipping Services Pvt. Ltd. Vs CC Chennai* (supra) and *M. Renganathan Vs CC Chennai* (supra) has held that when there is no positive evidence on record to show any malafide intention on the part of the Custom House Agent or that he has abetted such contravention, penalty is not imposable under Section 117 of the customs Act, 1962.

6.4 The show cause notice itself had not proposed any penalty for improper exportation of goods or omitting to do any act or abetment rendering penalty under Section 114 of the Act. The only penal provisions that were invoked were a penalty for use of false, incorrect material under Section 114AA ibid and the penalty under Section 117 ibid for failure to comply with any provisions of the Customs Act for which no penal clause is provided. This being so, even at the stage of issue of SCN there was no consolidated allegation of abetment in the attempted fraudulent export by the CHA and its partner / employees. Even so, the adjudicating authority while dropping proposed penalty under Section 114AA has categorically found that no *mens rea* can be alleged against these appellants. Viewed in the light, the alleged infraction should at the most result, if at all, be initiation of proceedings under CHALR 2004 and surely not under the Customs Act, 1962. We find that this very conclusion has been fortified by the ratio of the case laws relied upon by the Ld. Advocate.

6.5 In the light of discussions and findings, following the ratio of above judgement, we find that penalties imposed under Section 117 on the appellants viz. Shri M.K.M. Manthiram, Shri C. Gunasekaran, M/s.Smile Shipping Services and Shri B. Jawahar cannot sustain and will have to be set aside, which we hereby do. Appeal Nos. C/141/2011 C/66/2011 C/139/2011 and C/140/2011 are allowed with consequential benefits, if any, as per law.

To sum up,

- Appeal No.C/104/2011 dismissed for non-prosecution;
- Appeal Nos. C/141/2011 C/66/2011 C/139/2011 and C/140/2011 allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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