

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

Appeal No. C/104/2011

(Arising out of Order-in-Original No.38/2010 dated 22.12.2010
passed by the Commissioner of Customs, Tuticorin)

A.P.T. Mahadevan

Appellant

Vs.

Commissioner of Customs, Tuticorin

Respondent

Appearance

Shri P.V. Sanjeev, Advocate for the Appellant

Ms. T. Usha Devi, DC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :20.03.2019

Date of Pronouncement :25.03.2019

Final Order No. **40594 / 2019**

Per Bench

The facts of the case are that on specific intelligence the Officers of Directorate of Revenue Intelligence (DRI) examined an export cargo covered by two Shipping Bills No.2187801 dated 15.12.2009 and 2192337 dated 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 dated 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 440kgs. 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 dated 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

(i) Shri A.P.T. Mahadevan	Rs.25,00,000/-
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under Section 117 of the Act, inter alia on

(i) Shri M.K.M. Manthiram	Rs.1,00,000/-
(ii) Shri C. Gunasekaran	Rs.10,000/-
(iii) M/s.Smile Shipping Services	Rs.1,00,000/-
(iv) Shri B. Jawahar	Rs.50,000/-

2. The Id. counsel Shri P. V. Sanjeev appeared and argued the matter on behalf of the appellant. It is submitted by him that the appellant was arrested by the officers of DRI on 25.12.2009 while he was standing in front of Mahalakshmi Tower Lodge. The appellant is neither the seller nor the manufacturer of alleged impugned goods "Ketamine Hydrochloride". The appellant was not seen in possession of the impugned goods or the appellant is transporter or exporter. The allegation is that no objection certificate was not procured for the impugned goods intended for export. As the appellant was not in any way connected with the goods and as no goods were seized from the custody of the appellant, the penalty imposed on the appellant is extremely unfair and baseless. The department has not seized any document or recovered any evidence so as to show that the appellant had signed the documents pertaining to export of the subject impugned goods. The statement given under Section 108 of the Customs Act, 1962 by Sathish Kumar and Kandasamy has not mentioned anything implicating the appellant with the impugned goods. The Commissioner has relied on the statement of Ambalavanan. However, the said person has not stated that the appellant has any connection with the impugned goods. Further, his statement is hearsay evidence.

3. The case of the department is that the goods that were intended for export without no objection certificate is ketamine

Hydrochloride. In fact, Notification No. 67/2007 dated 27.12.2007 states that no objection certificate is required for Ketamine. Ketamine and Ketamine Hydrochloride are different and distinct goods. He relied upon the decision of the jurisdictional High Court in the case of M. Buhari Vs. State of Tamilnadu reported in 2010 (2) MWN (CrI.) 414 (DB) to argue that the Hon'ble High Court in the said case had held that Ketamine Hydrochloride is different from Ketamine. Notification 67/2007 states that no objection certificate is required for export of Ketamine. That there is no such requirement in the case of Ketamine Hydrochloride. He thus argued that the penalty imposed upon the appellant is without any legal basis.

4. The Id. Ms. T. Usha Devi supported the findings in the impugned order. She referred to the statements recorded from various witnesses and argued that the said statements are admissible in evidence. The quantity of 440 Kgs. of Ketamine Hydrochloride valued at Rs.1.54 crores were kept concealed in declared cargo of free flowing iodised salt and other export cargo like fried grams, rice flakes, butter chilli etc. The shipping bill was filed in the name of M/s. Dhanalakshmi Exports, Chennai. It is therefore clear that the goods were attempted to be smuggled out of India in violation of the provisions of Customs law. As per Notification No. 67 (RE-2007) / 2004-2009 dated 27.12.2007, the export of Ketamine requires no objection certificate. Ketamine Hydrochloride is nothing but derivative of

Ketamine. Ketamine Hydrochloride is a compound and derivative of Ketamine. The intention of the Legislature is not to restrict export of Ketamine. The notification covers the compounds and derivatives of ketamine in any form. Hence the case law relied upon by the Id. counsel for the appellant is not applicable. The Id. AR took assistance of the order of the Hon'ble High Court of Bombay in the case of R. Bharathi Dasan Vs. Union of India – 2009 (247) ELT 18 (Bom.). She submitted that in the said decision, the Hon'ble High Court of Bombay has granted bail to the petitioner therein who was arrested for export of Ketamine Hydrochloride without prior permission and approval of Narcotics authorities. She therefore contended that Ketamine Hydrochloride is also covered by the notification.

5. With regard to the facts of the case, she submitted that there is sufficient evidence to show that the appellant attempted to smuggle the prohibited goods out of India. The appellant in his statement dated 25.12.2009 admitted that 200 Kgs. of Ketamine Hydrochloride belonged to Shri Yasin of Maravamangalam near Madurai who is also an associate of Shri Ambalavanan. Shri N. Kandasamy in his statement dated 25.12.2009 confessed that Ambalavanan introduced Yasin and Yasin gave him salary of Rs.10,000/- per month. Further, the appellant has admitted that he had received 240 Kgs. of Ketamine Hydrochloride at Chennai from one Subhu Khan @ Bansilal, a Malaysian national who sent Ambalavanan of

Mudukku Meendan Patti, Nallatinputhur to receive at Tuticorin and was included in the seized quantity of 440 Kgs. The rest of 200 Kgs. of Ketamine Hydrochloride belonged to Yasin of Maravamangalam near Madurai who is also associate of Ambalavanan. The appellant has confessed the attempted smuggling of the goods. He admitted receipt of Rs.1,25,000/- for the successful export of Ketamine Hydrochloride of 25 Kgs. in August 2009 and that he used to get Rs.5000/- per kgs. of Ketamine Hydrochloride as commission from Subhu Khan @ Bansilal. Later, after lapse of three months, in his representation dated 29.3.2010, it is mentioned by him that Ketamine Hydrochloride was kept without his knowledge and only in his further letter dated 7.10.2010 he alleged that the CHA is the person who has played the entire role and that the earlier statement was given under coercion. The involvement of the appellant is very much clear from the facts of the case. Thus, the penalty imposed is legal and proper.

6. Heard both sides.

7. The co-noticees of the proceedings had filed appeals before Tribunal and vide Final Order Nos. 42172 to 42176/2018 dated 30.7.2018, the Tribunal had allowed appeals with consequential relief setting aside the penalties imposed upon them. The foremost contention raised by the appellant is that the impugned goods which are alleged to be smuggled out of India is Ketamine Hydrochloride. Notification 67/2007

mentions that no objection certificate is to be obtained for Ketamine. The notification does not say that No Objection Certificate is required for Ketamine Hydrochloride. He has relied upon the decision of the jurisdictional High Court in the case of M. Buhari (supra) to argue that Ketamine Hydrochloride is different from Ketamine. In para 6 to 8, the said issue is discussed in detail, which is as under:-

"6. In this context, it is relevant to mention that we have already held in our order in HCP Nos. 1303 and 1306 of 2009 dated 18.6.2010 that pure Ketamine is available in powder form and Ketamine Hydrochloride, which is also in powder form, is an organic compound of Ketamine, different from pure Ketamine. In view of the same and in the light of the view expressed by the earlier Division Benches of this Court in (1) N.K.Jawahar Ali and Others Vs. The State of Tamilnadu, rep. by its Secretary, Public (SC) Department, Fort St. George, Chennai – 600 009 and others, 2009 (2) LW (Crl.) 1285 and (2) Esakkimuthu v. State, represented by Commissioner of Police, Office of the Commissioner of Police, Kokkirakulam, Tirunelveli City and Another, 2009 (3) MLJ (Crl.) 1, the failure on the part of the Detaining Authority to consider whether Ketamine and Ketamine Hydrochloride are one and the same substance would amount to non-application of mind and the same would vitiate the order of detention.

7. The learned counsel for the petitioner also drew our attention to the Notification No. 67 (RE-2007) 2004 -2009 dated 27.12.2007 under which restriction has been imposed only regarding Ketamine and not on export of Ketamine Hydrochloride. The attention of this Court was also drawn to the report of Forensic Sciences department, Government of Tamilnadu, Narcotics Division, Chennai – 4, a copy of which is available in page 183 of the paper book. In the said report, a finding was recorded to the effect that the samples drawn from the alleged contraband seized from Shahul Hameed was Ketamine Hydrochloride. At the bottom of the report, the following notes are found:-

1. Ketamine Hcl is the hydrochloric salt of Ketamine
2. Ketamine Hcl is not covered under NDPS Act of 1985

3. *Ketamine Hcl is an animal anaesthetic and is occasionally used as Human anaesthetic also.*
4. *Ketamine is a psychedelic substance similar to phencyclidine (PCP).*

8. *From the said report and the explanatory note 1 and 2, it is quite obvious that Ketamine Hydrochloride is different from Ketamine. It is also obvious that Ketamine Hydrochloride is not covered under the NDPS Act, 1985. A reading of the said notice in conjunction with the Notification referred to supra, will make it obvious that for exporting Ketamine alone, a no objection certificate from the Narcotics Commissioner is needed and for exporting Ketamine Hydrochloride no such 'No Objection Certificate' is needed. Therefore, we are convinced with the tenability of the contention raised on behalf of the petitioner that the observation of the Detaining Authority that the petitioner / detenu was indulging in smuggling of Ketamine through carriers much against the above said notification, shows non-application of mind."*

8. The Hon'ble High Court of Madras has held Ketamine Hydrochloride is different from Ketamine. During the relevant period only Ketamine was notified for requirement of obtaining NOC for export of the goods.

9. The Id. counsel has also produced Notification dated 10.2.2011 in F. No. N/11012/4/2010-NC-II. In the said notification, Ketamine has been notified as psychotropic substance. The department has not been able to put forward before us that Ketamine Hydrochloride has been notified vide notification 67/2007.

10. The Id. AR has relied upon decision in the case of R. Bharathi Dasan (supra). The said decision is with regard to bail application wherein the bail was granted to the petitioner therein. There is no discussion as to whether Ketamine and

Ketamine Hydrochloride are one and the same in the said judgment. By judicial discipline, we are bound by the decision of the Hon'ble jurisdictional High Court in the case of M. Buhari (supra).

11. On facts, it is seen that the appellant was arrested while he was standing near Mahalakshmi Tower Lodge at Kovilpatti by the DRI officers. The shipping bill was not filed by the appellant. The appellant is neither the owner nor the exporter of the goods also. There is no direct evidence that the appellant had handled or had rendered any positive act for the smuggling of goods out of India. The entire evidence for imposing penalty upon the appellant is based on statements.

12. From the discussions above and following the decision of the jurisdictional High Court in M. Buhari (supra), we are of the opinion that the penalty imposed cannot sustain. The impugned order is modified to the extent of setting aside the penalty imposed on Shri A.P.T. Mahadevan. The appeal is allowed with consequential relief, if any.

(Pronounced in court on 25.03.2019)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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