IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.40337 of 2020

(Arising out of Order-in-Appeal Airport Cus. I No. 141/2020 dated 8.6.2020 passed by the Commissioner of Customs (Appeals – I), Chennai)

Hamid Basith **Appellant**
S/o Mohammed Gani
No. 22/25, 1st Street
Ashok Nagar, Chennai – 600 083.

Vs.

Commissioner of Customs **Respondent**
Commissionerate – I
Chennai Airport & Air Cargo Complex
New Custom House, Meenambakkam
Chennai – 600 027.

Tuticorin – 628004.

APPEARANCE:

Shri T. Kulasekaran, Advocate for the Appellant
Shri M. Jagan Babu, AC (AR) for the Respondent

CORAM

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

Final Order No. **41449 / 2021**

Date of Hearing : 23.03.2021
Date of Pronouncement: 29.03.2021

The appeal has been filed against the order passed by Commissioner (Appeals) who rejected the appeal on the ground of being time-barred.

2. On behalf of the appellant, ld. Counsel Shri T. Kulasekaran appeared and argued the matter. It is submitted by him that the appellant was intercepted at the exit hall of the Anna International Airport with hand baggage, carton box etc. On suspicion, he was examined which revealed that he was carrying cigarettes, saffron in bags and gold which was concealed in his body. Proceedings were initiated and after adjudication, the original authority ordered for

absolute confiscation of all the goods and imposed penalty of Rs.80,000/- under section 112(a) of the Customs Act, 1962. Against this order, the appellant filed appeal before Commissioner (Appeals) who without going into the merits of the case has dismissed the appeal on the ground that the appeal is filed beyond the period of limitation. He explained that the appellant has received the Order in Original only on 16.12.2019. Though the Order in Original is dated 19.10.2019, the appellant has not received the copy of the Order in Original on 20.11.2019 as contended by department. Later, the consultant of the appellant issued a letter dated 31.10.2019 requesting to supply a copy of the Order in Original. The department issued a copy of the Order in Original to the consultant which was received by him on 16.12.2019. The appeal was then filed before Commissioner (Appeals) on 9.3.2020 which is well within 85 days from the date of receipt of the Order in Original by the consultant. The Commissioner (Appeals) has computed the limitation from 20.11.2019 stating that the acknowledgment card establishes that the Order in Original dispatched on 18.11.2019 was received by the representative of the appellant at the appellant's address on 20.11.2019. He submitted that the said acknowledgment card is signed by some unknown person and the appellant has not received the copy of the Order in Original. The appellant has furnished an affidavit swearing that the Order in Original was not served to him either in person or through post and that he has come to know about the copy of the Order in Original only when the consultant has received it by speed post on 16.12.2019. He prayed that the order passed by the Commissioner (Appeals) on the ground of time-bar may be set aside and the matter be remanded to the Commissioner (Appeals) for hearing the issue on merits.

3. The ld. AR Shri M. Jagan Babu appeared on behalf of the department. He adverted to page 6 of the Order in Appeal and argued that the acknowledgment card is placed as part of the Order in Appeal and would show that the registered post containing the Order in Original was served upon the appellant on 20.11.2019. Thus appeal has been filed after lapse of 113 days from the date of communication of the order. The appeal ought to have been filed within 60 from the date of communication of order and the the Commissioner (Appeals) can condone the delay of another 30 days. Since the appeal has been filed after 90 days period, which is beyond the maximum condonable period, Commissioner (Appeals) has rightly rejected the appeal.

4. Heard both sides.

5. At the outset, the Bench entertained a doubt whether the appeal would lie before the Tribunal due to the restriction provided under first proviso to sub-clause (a) of clause (1) to Section 129A of the Customs Act, 1962. The relevant provision is extracted as under:-

> ***"SECTION 129A. Appeals to the Appellate Tribunal****. - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order –*
>
> *(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;*
>
> ***(b) an order passed by the Commissioner (Appeals) under section 128A;***
>
> *(c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;*
>
> *(d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day*

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to –

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made thereunder."

6. As per the above proviso, no appeal would lie before the Tribunal in respect of any order passed by Commissioner (Appeals) if such order relates to any goods imported or exported as baggage. In the present case, apart from confiscating the goods in the baggage, there is also an issue of smuggling of gold. Further, the order passed by the Commissioner (Appeals) does not touch the merits of the case and is confined to the time-bar aspect in filing the appeal. So it would fall under sub-clause (b) of clause (1) of Section 129A of the Customs Act, 1962.

7. In the present case, the department contends that the Order in Original was sent on 18.11.2019 to the address of the appellant and that it was received by the appellant on 20.11.2019. To support this contention, the acknowledgement card of the registered post has been produced. On perusal of this document, it is seen that a person named S. Mujahian has signed and received the registered post. The department is not able to explain who is Shri S. Mujahian or how he is related or known to the appellant. The appellant has denied receipt of the Order in Original by registered post and has affirmed this by affidavit. When a letter is sent by registered post a presumption is to

be drawn that it has been received by the addressee. However, such presumption is a rebuttable presumption. A negative fact can be established only by affidavit. When the appellant has affirmed the negative by filing an affidavit, the burden shifts on the department to establish as to why they served the registered letter to Shri S. Mujahian. Department has establish details that the person who signed the acknowledgment card is known to the appellant or that they have served the letter on the person who is duly authorized by the appellant. The department has failed to establish these facts. The only conclusion that can be arrived therefore is that the order is served on some person other than the appellant. When the registered post is received by some person unknown to the appellant it cannot be said that the order is served or communicated to the appellant. The consultant of the appellant has obtained a copy of the Order in Original on 16.12.2019. The appeal then has to be filed within 60 days from 16.12.2019. The appellant has filed the appeal before Commissioner (Appeals) on 9.3.2020 which is beyond 60 days period. The Commissioner (Appeals) can condone delay of 90 days. The delay in this case would be less than 30 days. So when computed from 16.12.2019, the appeal has been filed within the time limit condonable by Commissioner (Appeals). The appellant has filed appeal along with application to condone delay stating that he was sick. It is pertinent to mention that section 139A and section 153 uses the word that the order, decision, summons etc. is to be served. The department has failed to establish that the Order in Original was served on appellant.

8. For the above, I find that the rejection of appeal on the ground of time-bar cannot sustain and requires to be set aside. The impugned order is set aside and the appeal is remanded to the Commissioner (Appeals) who shall consider the application for delay and dispose of the appeal on merits.

(Pronounced in open court on 29.3.2021)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

Rex