CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

CHENNAI

SOUTH ZONAL BENCH, COURT HALL No. III

CUSTOMS APPEAL No.41932 of 2014

(Arising out of Order-in-Original No.25355/2014, dated 12.05.2014 passed by Commissioner of Customs, Custom House, No.60, Rajaji Salai, Chennai 600 001)

The Commissioner of Customs ...**Appellant**
Custom House
Chennai 600 001

Versus

M/s. Ganga Enterprises **...Respondent**
Shop No.1 K H 419
Gali No.9, Saboli Bagh
New Delhi 110 093

WITH

CUSTOMS APPEAL No.41933 of 2014

(Arising out of Order-in-Original No.25355/2014, dated 12.05.2014 passed by Commissioner of Customs, Custom House, No.60, Rajaji Salai, Chennai 600 001)

The Commissioner of Customs ...**Appellant**
Custom House
Chennai 600 001

Versus

Shri Yuvaraj Singh **...Respondent**
M/s. Elish Technology Express
B-5, Ground Floor, 20 Feet Road
Meet Nagar, Delhi 110 094

WITH

CUSTOMS APPEAL No.41934 of 2014

(Arising out of Order-in-Original No.25355/2014, dated 12.05.2014 passed by Commissioner of Customs, Custom House, No.60, Rajaji Salai, Chennai 600 001)

The Commissioner of Customs ...**Appellant**
Custom House
Chennai 600 001

Versus

Shri D Vignesh **...Respondent**
Managing Director
M/s. K.B.S Manian and Bros Pvt. Ltd.
No.12, Jaffer Syrang Lane
Chennai 600 001

WITH

CUSTOMS APPEAL No.41935 of 2014

(Arising out of Order-in-Original No.25355/2014, dated 12.05.2014 passed by Commissioner of Customs, Custom House, No.60, Rajaji Salai, Chennai 600 001)

The Commissioner of Customs ...**Appellant**
Custom House
Chennai 600 001

Versus

M/s. K.B.S. Manian & Bros Pvt. Ltd. **...Respondent**
No.12, Jaffer Syrang Lane
Chennai 600 001

AND

CUSTOMS APPEAL No.41937 of 2014

(Arising out of Order-in-Original No.25355/2014, dated 12.05.2014 passed by Commissioner of Customs, Custom House, No.60, Rajaji Salai, Chennai 600 001)

The Commissioner of Customs ...**Appellant**
Custom House
Chennai 600 001

Versus

Shri Jaffer **...Respondent**
General Manager
M/s. Allport Logistics,
Malaysia

APPEARANCE:

Shri R. Rajaraman, Authorised Representative for the Appellant
Ms.Vishnu Priya, (Amicus Curie), Advocate for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER Nos.40551-40555/2024

Date of Hearing :10.05.2024
Date of Decision:28.05.2024

ORDER : Per Ms. SULEKHA BEEVI C.S.

The issue involved in all these appeals being the same they were heard together and are disposed of by this common order.

2. Brief facts are that M/s. K.B.S. Manian and Brothers Pvt. Ltd., Chennai had filed bill of entry dated 17.09.2012 on behalf of M/s. Ganga Enterprises, New Delhi for import of 25 metric ton of "Gypsum Plaster in Powder Form" in 1250 bags.

3. On the basis of specific intelligence that cigarettes are being smuggled in container bearing No. CLHU 4175797 as goods imported in the name of M/s. Ganga Enterprises, the said goods were examined by DRI officers on 25.09.2012. It was found to contain 992 bags of 20 kg. each of gypsum plaster in powder form packed in white coloured bags as against the declared quantity of 1250 bags. Behind these white coloured bags, the officers found 240 light brown colour carton boxes. On opening these carton boxes, it was found to contain cigarette packets. The cigarette packets did not contain any statutory warning as stipulated under Cigarettes and Other Tobacco Products (packing and labelling) Amendment Rules, 2009 and did not show date of manufacture and date of expiry. The cigarettes valued at Rs.1,22,85,440/- as well as the gypsum plaster valued at Rs.2,74,463/- were seized under the Customs Act 1962. As undeclared cigarettes were found concealed behind gypsum plaster powder bags and also as the quantity of gypsum plaster was mis-declared Show Cause Notices were issued to the importer M/s. Ganga Enterprises and others. After due process of law, the original authority vide common order dated 12.05.2014 rejected the description of the goods declared under bill of entry dated 17.09.2012 and reassessed the goods. The original authority ordered for confiscation of the smuggled cigarettes and imposed redemption fine of Rs.23,15,000/- with option to redeem the goods; penalty of Rs.98.0 lakhs also was imposed on Shri Anil Gupta. The adjudicating authority imposed penalty of Rs.2.0 lakhs on Shri. Yuvaraj Singh and Rs.3.0 lakhs on

Shri D. Vignesh under Section 112 (a) of Customs Act. The original authority did not impose any penalty on the Respondents herein under Section 114 AA of the Customs Act 1962. Aggrieved by such order of not imposing penalty under Section 114 AA, the department is now before the Tribunal.

4. The learned AR Shri R. Rajaraman reiterated the grounds stated in the appeal. It is submitted that the bill of entry was filed as a Power of Attorney holder. During the course of personal hearing before the adjudicating authority, there was an attempt by the Respondents to state that it was a case of mistaken shipment and the cigarettes were meant for some other port. It was stated by them that on instructions from their importer they have contacted the overseas supplier and would be returning the container to Malaysia. Inspite of evidences showing that the importers had tried to smuggle the cigarettes into the country, the adjudicating authority has not imposed any penalty on the respondents under Section 114 AA. Further, the proceedings against the Respondent, Shri Jaffer has been wholly dropped by the adjudicating authority. The learned AR adverted to the allegations raised in the Show Cause Notice. In para 10 of the Show Cause Notice, the role played by Shri D. Vignesh is clear. This Power of attorney holder of M/s. KBS Manian Brothers Pvt Ltd. and Managing Director of the CHA firm has deposed that he came to know about one Shri Jaffer of All Port Logistics in Malaysia during first week of September 2012, Shri Jaffer contacted him and requested him to handle the clearance of gypsum powder from Malaysia to Chennai and to handover the cargo to M/s. Ganga Enterprises. It is stated that Shri Anil Gupta from Delhi contacted him through landline referring the name of Shri Jaffer of Malaysia to handle the clearing and forwarding of the consignment of gypsum powder. It is stated by Shri Vignesh that he had not met the importer and the documents were personally handed over to

him by a representative of importer. These facts would show that Shri Vignesh had acted in concurrence of M/s. KBS Mani and Brothers Pvt. Ltd. and M/s. Ganga Enterprises to smuggle cigarettes in to the country.

5. The role of M/s. Ganga Enterprises, Shri Anil Gupta and Shri Yuvaraj Singh and Shri Jaffer is discussed in para 5 to 7 of the Show Cause Notice.

6. Shri Yuvaraj Singh did not respond to the summons issued to him repeatedly. All the summons were sent by RPAD and the tracking of India Post reveal that summons were served and received by Shri Yuvaraj Singh. However, instead of appearing before the officer, Shri Yuvaraj Singh sent a letter dated 15.12.2012 wherein he made an effort to distance himself from the impugned import.

7. In connection with investigation, the Delhi Zonal Unit of DRI caused search of the premises of the IEC holder (Shri Anil Gupta) which was mentioned in the import documents. When the officers visited the premises on 24.09.2012, it was found to be locked. The premises appeared to have been not opened for four months. The officers recovered two envelopes from the premises which were addressed to one Shri Yuvaraj Singh and sent by Shri Sanjay Goel, Delhi. Accordingly, the officers visited the premises of Shri Yuvaraj Singh who was found to be running a Call Centre in the name of M/s. Phoenix Technology Express and M/s. Amruth Enterprises. During investigation, Shri Yuvaraj Singh produced a copy of the IEC of M/s. Ganga Enterprises and informed the officers the he is attending the accounts of M/s. Ganga Enterprises. It is submitted

by the Ld. AR that all these would show that the Respondents have acted hand-in-gloves to import cigarettes without payment of duty.

8. The adjudicating authority has refrained from imposing penalty under Section 114 AA against the Respondents though there is sufficient evidence against them attracting the ingredients of Section 114 AA of Customs Act 1962. The adjudicating authority merely imposed penalty under Section 112 (a) of the Customs Act 1962. The learned AR prayed that the appeals may be allowed by revising the impugned order and imposing penalties on the Respondents under Section 114 AA of the Customs Act 1962.

9. None appeared for the Respondents even though repeated notices were issued. The notice sent to Shri Vignesh, was returned as "addressee left". The Bench appointed Learned Counsel, Ms. Vishnu Priya, as the Amicus Curie to assist the Bench in disposing the case. The Ld. Counsel Ms. Vishnu Priya submitted her arguments which are summarized as under. The discussions made by the adjudicating authority in para 35 to 37 was adverted to by the Ld. Counsel to argue that there are no grounds to impose penalty under Section 114 AA. It is submitted by the Ld. Counsel that only Shri Vignesh, Power of Attorney holder and the CHA firm M/s KBS Manian and Brother Pvt Ltd. had appeared and contested the matter before the adjudicating authority. The other three Respondents namely M/s. Ganga Enterprises, Shri Yuvaraj Singh and Shri Jaffer neither filed any reply to Show Cause Notice nor appeared for personal hearing. M/s. Ganga Enterprises is the importer and Shri Anil Gupta is its Proprietor. The premises shown in IEC of M/s. Ganga Enterprises was found to be taken on rent by Shri Yuvaraj Singh. The documents pertaining to M/s. Ganga Enterprises was found in the said premises. However, Shri Yuvaraj Singh had not responded to the summons. Merely for this reason,

the Original authority has held that Shri Yuvaraj Singh has acted in connivance with M/s. Ganga Enterprises and attempted in smuggling cigarettes in to the country. Thus, penalty has been imposed on M/s. Ganga Enterprises and / or Shri Anil Gupta as well as Shri Yuvaraj Singh under Section 112 (a) of the Customs Act 1962.

10. In para 36 of the order in original, the adjudicating authority has held that in the absence of material evidence in the Show Cause Notice that Shri Yuvaraj Singh provided any documents which was false or incorrect in any material particular, there is no ground to impose penalty under Section 114 AA. In the same para it was held that there is no indictment in the Show Cause Notice that Shri Vignesh or M/s. K.B.S. Manian and Brothers Pvt. Ltd, the CHA has knowingly or intentionally made, signed or used any declaration or statement or document which is false or incorrect in any material in particular. For this reason, the adjudicating authority has refrained from imposing penalty under Section 114 AA.

11. In para 37, the reasons for not imposing penalty on Shri Jaffer, Malaysia has been discussed. It is stated that no details are available regarding the identity or exact role played by Shri Jaffer and therefore penalty is not imposed on Shri Jaffer under Section 112 (a) Section 114 (AA) of the Customs Act 1962.

12. The Ld. Counsel adverted to Section 114 AA of the Customs Act 1962 and argued that the Show Cause Notice does not bring out any ingredient of the said Section against these appellants. The decision of the Tribunal in the case of ***M/s. Artisan Welfare Society Vs. the Commissioner of Customs, Tuticorin 2023***

(7) TMI 841 (Tribunal, Chennai) and the decision in the case of ***M/s. Cochin Air Cargo Clearing House and Others Vs. Commissioner of Customs (Preventive) Tiruchirapalli 2023 (9) TMI 1198 (Tribunal-Chennai)*** was relied. The decision of the Tribunal in the case of ***Hera Shipping Solutions Pvt Ltd. Vs. Commissioner of Customs, Chennai-IV 2022 (382) ELT 552 (Tribunal, Chennai)*** was also relied. The Ld. Counsel prayed that the department appeals may be dismissed.

13. Heard both sides.

14. The appeal has been filed by the department aggrieved by the order passed by the adjudicating authority in not imposing penalty under Section 114 AA of Customs Act 1962 on the Respondents. The facts narrated above show that there had been an attempt to smuggle cigarettes in to the country. The main person who was entrusted to import the goods is Shri Jaffer of Malaysia. The said person had contacted Shri Vignesh to file the bill of entry under the IEC code of M/s. Ganga Enterprises. However, Shri Jaffer was not traceable. The adjudicating authority has dropped the entire proceedings against Shri Jaffer. In para 35 to 37 the adjudicating authority had discussed in detail the reasons for not imposing penalty under Section 114 AA on the Respondents. The department has not able to establish that these Respondents made any document which is false or incorrect in any material particular. The exact nature of the document alleged to be fabricated by these Respondents is not brought out in the grounds of appeals filed by the department. In the absence of ingredients to attract Section 114 AA the penalty under the said Section cannot be imposed.

15. The Tribunal in the case of M/s. Artisan Welfare Society (supra) had occasion to consider a similar situation. The facts in the said case was attempt to export red sanders. The Tribunal observed that as the investigation could not prove that the exporter therein knowingly or intentionally made any false declaration or statement could not be punished by penalty under Section 114 AA. The relevant paragraph reads as under:

> 9. The Ld. Advocate has argued that the penalties under Section 114 (i) and 114 AA does not apply to the facts and this is not the case where no goods are exported but only documents are created and the penalty imposed is exorbitant and disproportionate. We find that the original authority has not imposed penalties under Section 114 (i) and also 114 AA of the Customs Act 1962. The relevant provisions are extracted below:-
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> "SECTION 114. Penalty for attempt to export goods improperly, etc.-- Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable,
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> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty (not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act), whichever is the greater,"
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> "SECTION [114AA. Penalty for use of false and incorrect material if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods)".

16. In the case of M/s. Cochin Air Cargo Clearing House and Others (supra) the Tribunal observed as under:

> "14. The said section speaks about an agent acting on behalf of the principal under the Indian Contract Act 1872. As per the principles of Agency, the principal is not bound by the acts of an agent if such acts have not been authorized. In order to avoid any person from absolving from the liability contenting that he has not authorized his agent to do such an act, the said provision introduces a legal fiction by which the agent is deemed to be the importer / exporter. This in no way extends to the acts done by a CHA/CB who acts on behalf of the importer/exporter under the provisions of Customs Act, Rules and Regulations. The Tribunal in the case of Gajanan B. Sutrik (supra) had occasion to consider similar issue and held as under:
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>> "5. We have carefully considered the submissions made by both sides. We have also perused the statements recorded from the appellants by the investigating agency. From the statement, no conclusion can be reached as to their involvement in the fraudulent transactions. All the appellants in their statements have deposed that they undertook/participated in transaction for export of goods in good faith. The CHA has also submitted the identification document such as bank opening account establishing the identity of the exporter. In these circumstances, invoking the provisions of Section 147 and deeming the CHA and his employee as agent of the exporter is clearly unsustainable in law. This Tribunal decision in case of Aspinwall & Co. (supra) affirmed by Hon'ble Apex Court also makes the position

very clear. Therefore, in the absence of any evidence, linking the CHA firm or its employee to the fraudulent transaction undertaken by the exporter, and consequent imposition of penalty would not arise at all. As regards the role of Shri Manohar S. Anchan, it is evident that his role was limited to introducing the exporter to the CHA. In the statement recorded under Section 108, he has clearly stated that he has not seen the goods and, therefore, he was not aware of the nature of the goods under export. In these circumstances, no mala fide can be attributed to Shri Manohar S. Anchan as to his knowledge of the fraudulent transaction. Therefore, imposition of penalty is not warranted.

6. Accordingly, we set aside the penalty imposed on the appellants Shri Manohar S. Anchan, Shri Suresh Dalvi, proprietor of CHA firm M/s. Indian Seaways and Shri Gajanan Sudrik, employee of CHA firm under Section 114 of the Customs Act, 1962. Thus the appeals are allowed".

15. After appreciating the facts and evidence, we hold that the department has failed to establish that the appellants have connived or abetted in the overvaluation of goods and attempted export of the same. There is no iota of evidence to establish that appellants had falsified any documents. The ingredients of section 114A stands un established. Moreover, the invocation of sub-section (3) of section 147 against these appellant is totally erroneous.

16. In the result, the impugned order against the appellants ae set aside. The appeals are allowed with consequential relief, if any.

17. From the forgoing, we find that the order passed by the adjudicating authority in not imposing the penalty under Section 114 AA does not require any interference. The appeal filed by the department is devoid of merits. The appeals are dismissed.

18. The Bench appreciates the effort and time put by the Ld. Counsel Ms. Vishnu Priya to assist the Bench in disposing the appeal in the absence of the Respondent.

(Order pronounced in the open court on 28.05.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

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

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