



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.11.2021

Delivered on : 30.11.2021

CORAM:

**THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and**

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
C.M.A.(MD)Nos.916 and 917 of 2014**

and

M.P.(MD)No.1 of 2014 in C.M.A.(MD)No.916 of 2014

and

M.P.(MD)Nos.1 and 2 of 2014 in C.M.A.(MD)No.917 of 2014

Shri Rama Thenna Thayalan

... Appellant in both
the C.M.As.

-VS-

1.The Customs Excise and Service Tax
Appellate Tribunal,
South Zonal Branch,
26, Haddows Road,
Chennai - 600 006.

2.The Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin - 628 004.

... Respondents in
both the C.M.As.



C.M.A.(MD)Nos.916 and 917 of 2014

PRAYER in both the C.M.As.: Civil Miscellaneous Appeals filed under Section 35G of the Central Excise Act, 1944, against the final order Nos.40134/2014 and 40133/2014, dated 24.01.2014, in Appeal Nos.C/189/2011 and C/179/2011, respectively, passed by the Customs Excise and Service Tax Appellate Tribunal, South Zonal Branch, Chennai.

For Appellant : Mr.M.Kumar
(in both the C.M.As.)

For Respondent No.1 : No Appearance
(in both the C.M.As.)

For Respondent No.2 : Mr.B.Vijay Karthikeyan
(in both the C.M.As.)

COMMON JUDGMENT

**S.VAIDYANATHAN, J.
and
G.JAYACHANDRAN, J.**

These two appeals are arising out of the common order dated 24.01.2014, viz., one dismissing the appeal filed by the appellant herein against the imposition of penalty of Rs.3,00,000/- and another against the order of the CESTAT allowing the appeal of the Department for enhancement of penalty and thereby, enhancing the penalty from Rs.3,00,000/- to Rs.5,00,000/-.



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY 2. Since the facts and law involved in both the cases are one and the same, both the Civil Miscellaneous Appeals are taken up for final disposal and common order is passed as below.

3. Based on the specific intelligence gathered by the Directorate of Revenue Intelligence [D.R.I.] that red sanders logs were smuggled out of India in a container bearing No.VMLU 3200873 covered under Shipping Bill No.1955099, dated 09.07.2008 along with Annexure - A signed by the appellant herein. The said container was immediately recalled. However, the container, which had already sailed to Malaysia on 14.07.2008, was examined and found containing Red Sanders and therefore, sent back to Tuticorin. The same reached Tuticorin Port on 10.08.2008. The enquiry conducted revealed the fact that shipping bill was prepared in Custom House by one R.Sivaraman of M/s.Vishal Enterprises, Tuticorin. The statement of R.Sivaraman revealed that the Customs House Agents Licence of M/s.Vector Freight Forwarders was used by them for preparing the shipping bills and the container was stuffed with red sanders mis-declaring it as Coco Peat at the instance of one J.Francis Kumar, Marketing Executive of M/s.Sai Freight Private Limited, Tuticorin. The further investigation revealed



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY

that the shipping bill prepared by him on obtaining the signature of Customs House Agent [CHA] through Shri G.Ravi of M/s.Vector Freight Forwarders [the appellant herein].

4. According to the appellant, G.Ravi was their employee operating at Tuticorin and blank Annexure – A was handed over to him, since the appellant was operating from Coimbatore and six Annexures were required at Tuticorin. The show cause notice dated 27.01.2009 was served on Muthu and George by D.R.I. under the Customs Act, 1962 and the Foreign Trade (Development and Regulation) Act, 1992 to the persons involved in illegal export of 10.760 MTs. of Red Sander logs to Malaysia. The appellant herein is one among them. After enquiry, penalty of Rs.10,00,000/- was imposed on the appellant under Section 114(i) of the Customs Act, 1962, vide order dated 30.08.2010. Aggrieved by the order passed by the Additional Commissioner, Custom House, Tuticorin, the appellant herein preferred statutory appeal before the Commissioner, Customs and Central Excise (Appeals), Tiruchirappalli, in Appeal No.15 of 2015. In the appeal, the penalty of Rs.10,00,000/- was reduced to Rs.3,00,000/-, by order dated 28.02.2011.



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY

5.The appellant herein preferred further appeal in C/Appeal No.179 of 2011 before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Branch, Chennai [CESTAT] against the imposition of penalty under Section 114(i) of the Customs Act. Being aggrieved by the rejection of penalty, the Customs Department preferred an appeal in C/Appeal No.189 of 2011.

6.These two appeals along with the appeals filed by the other persons were taken up for consideration by the CESTAT and an order was passed on 24.01.2014 holding that the penalty of Rs.3,00,000/- imposed on the appellant is very low and it is liable to enhanced to Rs.5,00,000/-. Thus, the appeal filed by the Revenue was partially allowed and the appeal filed by the appellant herein was rejected. Being aggrieved by the said order, the present appeals are filed by the appellant.

7.According to the appellant, the main ground of attack on the impugned order is that the authorities have failed to properly appreciate the facts and circumstances of the case and the application of Section 50(2) and 114 of the



C.M.A.(MD)Nos.916 and 917 of 2014

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Customs Act, 1962. The order of the Commissioner of Customs is a cryptic order without discussing the legal issues. The grounds raised by the appellant were not properly meted out by the authorities. While a specific finding regarding substitution of the goods by George and Muthu, the appellant, who is the Customs House Agent cannot be suspected or faulted for the said substitution. As a Customs House Agent, the appellant has nothing to do with the goods and is only concerned with the documentation of the export. While the shipping bill was duly signed by the Exporter and certified by the Superintendent of Central Excise, for the contents of the container, the Customs House Agent cannot be found guilty and the penalty imposed on him is arbitrary. The appellant left blank Annexure-A, for being used for exports, as the said Annexure – A only provides particulars regarding goods under shipment. The Customs House Agent is not liable for any mis-declaration. Annexure – A is based on other shipping documents including the invoice and the shipping bill. Therefore, for the mis-declaration or substitution of the goods in the course of transit, the Customs House Agent cannot be held liable. Section 50(2) of the Customs Act, 1962 is not applicable to the appellant, being a Customs House Agent. Similarly, there is no contravention of Customs Act by the appellant to impose penalty under Section



C.M.A.(MD)Nos.916 and 917 of 2014

114(i) of the Customs Act, 1962. For any violation of the Customs House Agent Licensing Regulations, which is a Code by itself, the authorities can proceed against the Customs House Agent only under that Regulation and not under the Customs Act. Therefore, the CESTAT is not correct in holding that the appellant is liable for penalty under Section 114(i) of the Customs Act, 1962.

8.The learned counsel appearing for the appellant would submit that time and again the Courts have held that the Customs House Agent cannot be held liable for mis-declaration or misuse of the licence, if any third party without knowledge of the Customs House Agent, exports prohibited goods by mis-declaration. Further, he would contend that in the alleged shipping bill Annexure–A used for smuggling the Red Sander is a photocopy of the blank Annexure – A, signed by the Customs House Agent, which was used by one Ravi, co-employee of the appellant, who was acted on his own way without being any authorization. The appellant has never indulged in the transaction and cannot be accused of violating Regulation 13(a) and (b) of the Customs House Agents Licensing Regulations, 2004 [CHALR].



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C.M.A.(MD)Nos.916 and 917 of 2014

9. Further, it is contended that as a Customs House Agent, his role is limited and for the declaration and mis-declaration of the goods, he cannot be liable for any contravention of Section 50(2) of the Customs Act, 1962. When the goods were stuffed in the container, it was only Coco Peats and the container was sealed by the Central Excise Officers. Only on verifying the Cargo, the Customs Officer has allowed the export and made an endorsement in the Shipping Bill as Let Export. During the investigation, it was established that when Red Sander was substituted for Coco Peat, without appreciating the facts and law properly, the Additional Commissioner had imposed penalty of Rs.10,00,000/-, which was interfered by the Commissioner of Customs and reduced to Rs.3,00,000/-. Whereas, on further appeal by the Department, the same has to be enhanced to Rs.5,00,000/-, which is nothing but non-application of mind and improper application of the provisions of law.

10. Section 50 (2) of the Customs Act, 1962 reads as below:-

"50.Entry of goods for exportation.-

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to



C.M.A.(MD)Nos.916 and 917 of 2014

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a declaration as to the truth of its contents.

11. Section 114(i) of the Customs Act, 1962 reads as below:-

"114. Penalty for attempt to export goods improperly, etc.-

(ii) 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;"

12. In these cases, the substantial questions of law raised by the appellant are as below:-

"C.M.A.(MD)No.916 of 2014:-

1. Whether the Tribunal was correct in confirming the penalty under Section 114(i) of the Customs Act, 1962 on the appellant even while the appellant has not contravened any of the provisions of the Customs Act, 1962?

2. Whether the first respondent Tribunal was correct in rendering a finding that the appellant has violated Section 50(2) of the Customs Act, 1962 while the said provision relates to declaration being made by the Exporter in the shipping bill and whether the imposition of penalty is



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C.M.A.(MD)Nos.916 and 917 of 2014

sustained when the appellant is not the Exporter?

3. Whether the enhanced penalty is sustainable?

4. Whether the first respondent Tribunal was correct in holding that the appellant is liable to penalty under Section 114(i) of the Customs Act, when it is apparent on the face of the record that the Customs Officers have affixed their seal and certified that the container under export contained goods as declared in the shipping bill and the appellant went by the certification of the Customs Officers in presenting shipping documents for export?

C.M.A.(MD)No.917 of 2014:-

1. Whether the Tribunal was correct in confirming the penalty under Section 114(i) of the Customs Act, 1962 on the appellant even while the appellant has not contravened any of the provisions of the Customs Act, 1962?

2. Whether the first respondent Tribunal was correct in rendering a finding that the appellant has violated Section 50(2) of the Customs Act, 1962 while the said provision relates to declaration being made by the Exporter in the shipping bill and whether the imposition of penalty is sustained when the appellant is not the Exporter?



WEB COPY



C.M.A.(MD)Nos.916 and 917 of 2014

3. Whether the first respondent Tribunal was correct in upholding/enhance the penalty imposed on the appellant under Section 114(i) of the Customs Act, 1962 for the alleged contravention of Customs House Agents Licensing Regulations, 2004 when the said Regulations is a code by itself and therefore, for the violations and contraventions of the Regulations, the appellant can be proceeded only under the said Regulations and not under the Customs Act, 1962?

(4) Whether the first respondent Tribunal was correct in holding that the appellant is liable to penalty under Section 114(i) of the Customs Act, 1962 even while it has been consistently held by the Tribunal/High Courts that Customs House Agent cannot be faulted for mis-declaration of the importer/exporter?

(5) Whether the first respondent Tribunal was correct in confirming the penalty against the appellant even while Sri George has admitted that he is the mastermind behind the transaction and has not implicated the appellant as being involved in the export of Red Sanders?

(6) Whether the first respondent Tribunal was correct in suspecting the *bona fides* of the appellant even while Sri George who is the main man behind the entire case admits that he only organized and substituted Red Sander Woods in



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY

the place of Coco Peat?

(7) Whether the first respondent Tribunal was correct in holding that the appellant is liable to penalty under Section 114(i) of the Customs Act, when it is apparent on the face of the record that the Customs Officers have affixed their seal and certified that the container under export contained goods as declared in the shipping bill and the appellant went by the certification of the Customs Officers in presenting shipping documents for export?"

13.The Customs House Agents Licensing Regulations, 2004 is nothing but supporting legislation passed in exercise of the powers conferred by sub-section 2 of Section 146 of the Customs Act, 1962. The role and responsibility of the Customs House Agent in case of mis-declaration of goods has to be dealt with based on *mens rea* to the contribution of the Customs House Agent allowing the smugglers to misuse the licence issued to him.

14.A Division Bench of this Court in almost identical facts of the case in **K.V.Prabhakaran Vs. Commissioner of Customs, Chennai** reported in **2019 (365) E.L.T. 877 (Mad.) [C.M.A.No.2940 of 2017, decided on 30.10.2017]** has



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY

held that lending the CHA licence to a third party for usage without knowing the actual importer and the goods to be imported, is a serious issue. Misuse of CHA licence or reckless and careless lending of the same, the unscrupulous person for facilitating smuggling activities should be viewed seriously and held that imposition of penalty by invoking the provisions of the Customs Act is not only justifiable but also acceptable.

15. In the present case, Red Sanders has been stealthily exported to Malaysia in a Container bearing No.VMLU 3200873 covered under Shipping Bill No.1955099, dated 09.07.2008 along with Annexure – A signed by the appellant herein. It is admitted by the appellant that the blank signed Annexure – A was handed over to his employee one Ravi working at Tuticorin. The very admission itself is sufficient to hold that the appellant was reckless and negligent in using his Customs House Agent Licence. The declaration of goods found in the shipping bill hold sway by Annexure – A. In a scheme of conspiracy, the Customs House Agent cannot escape from liability pleading ignorance of the transaction. It is found by the authorities that the appellant has given undated and unsigned/signed blank Annexure – A and Appendix Forms for clearance use to



C.M.A.(MD)Nos.916 and 917 of 2014

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Shri.Ravi. One R.Sivaraman, Proprietor of M/s.Vishal Enterprises, Tuticorin, undertook the clearance work for M/s.Kumari Coir Products by using the blank form given by Shri.Ravi. Annexure – A form submitted to the Customs House in respect of dubious transaction is with the signature of Shri Rama Theena Thayalan, the appellant herein.

16.The appellant is not a *bona fide* Customs House Agent and he was just collecting rental income out of his licence and has no reason mandatory for having such usage. While such positive finding against the appellant is available, there is no illegality or perversity in the penalty imposed. Both the provisions of the Customs House Agents Licensing Regulations, 2004 as well as the Customs Act, 1962 contemplate action against the violators of the Customs Act by mis-declaring the goods and enable imposition of penalty.

17.The plea that action against the erring Customs House Agent can be initiated only as per the procedure under CHALR 2004 and not under Section 114(i) of the Customs Act is baseless argument.



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY 18.Regulation No.12 of CHALR 2004 says that the licence is not transferrable or sold. Thus, while granting licence, it is very clear that the licensee cannot allow the third party to misuse the licence. Regulation No.13 of CHALR imposed certain obligations on the Customs House Agent and one such obligation is to 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 and yet another obligation is to 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.

19.From the records and the own admission of the appellant, it is clear that the appellant had not discharged these obligations, which cast on him. It is a case where under the guise of Coco Peats, prohibited goods namely, Red Sanders weighing 10.760 MTs. has been transported. The DRI based on the intelligence gathered, had rescued the goods and found the Cargo was transported based on the Annexure – A containing the signature of the appellant Customs House Agent. Customs House Agent is governed by the Regulations framed by the Government



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY

in exercise of the powers conferred under the Customs Act, 1962. Therefore, mis-declaration of goods and attempt to export such goods is punishable under Section 114 of the Customs Act. A Customs House Agent, who is a party to the mis-declaration, is liable to pay penalty not exceeding three times of the value of the goods mis-declared. The first respondent Tribunal is empowered to enhance the penalty imposed, if the penalty imposed is not adequate. Further, the provisions under the Regulations to punish the Customs House Agent for violation and contravention of the Regulations is in addition to the penal provisions prescribed under the parent act, namely, the Customs Act. It is incorrect to say that the Customs House Agent is liable only under the Regulations for any violation and contravention. The licence issued to the Customs House Agent under conditions not to commit any grave offence. If action under the Regulations not sufficient for the grave offence, the Customs House Agent is liable also to be proceeded under the Customs Act. There is no legal impediment to proceed against the Customs House Agent under the Customs Act besides action under the Regulations.



C.M.A.(MD)Nos.916 and 917 of 2014

WEB COPY 20. The substantial questions of law are answered accordingly as above.

Therefore, we hold that there can be no excessive exercise of power in imposing penalty of Rs.5,00,000/-. Hence, this Court holds that the appeals challenging the order of CESTAT deserves to be dismissed, accordingly, dismissed. Consequently, connected Miscellaneous Petitions are closed.

Index : Yes / No

[S.V.N., J.] [G.J., J.]
30.11.2021

To

1. The Customs Excise and Service Tax
Appellate Tribunal,
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26, Haddows Road,
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C.M.A.(MD)Nos.916 and 917 of 2014

S.VAIDYANATHAN, J.
and
G.JAYACHANDRAN, J.

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Pre-delivery common judgment in
C.M.A.(MD)Nos.916 and 917 of 2014

30.11.2021