

2012 (279) E.L.T. 335 (Kar.)

IN THE HIGH COURT OF KARNATAKA AT BANGALORE
V.G. Sabhahit and Ravi Malimath, JJ.

VIKRAM JAIN

Versus

COMMISSIONER OF CUSTOMS, BANGALORE

C.S.T.A. No. 27 of 2007, decided on 9-6-2011

Penalty - Imposition of - To meet with export obligation, proprietor of an EOU conspiring with Customs Inspector to export one consignment to foreign recipient; re-importing it without payment of duty with assistance of employees another EOU, and re-exporting it again by reducing weight - Adjudicating authority imposing penalty on proprietor based on materials on record and giving detailed reasons, and same confirmed by CESTAT - HELD : CESTAT was final fact finding authority, and it had confirmed impugned findings by independent assessment of materials - Mere fact that the other EOU was absolved, could not mean that the proprietor would not be liable to penalty - Section 112 of Customs Act, 1962. [paras 9, 10, 11]

Penalty - Imposition of - Absolving of those against whom similar allegations had been made - It could not mean that in separate proceedings, on independent assessment of materials, penalty should be set aside - Section 112 of Customs Act, 1962. [paras 9, 10, 11]

Appeal dismissed

REPRESENTED BY : Shri Kiran S. Javali, Advocate, for the Appellant.
Shri Y. Hariprasad, Advocate, for the Respondent.

[**Judgment per : V.G. Sabhahit, J.**] - This appeal is filed by the appellant in Appeal No. 414/2007 on the file of Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as CESTAT) dated 3-4-2007 [2007 (219) E.L.T. 649 (Tri. - Bang.)] wherein the Tribunal has dismissed the appeal filed by the appellant herein and confirmed the order passed by the Commissioner of Customs, in Original Order No. 31/2000/COMMR/CUS. ADJN., dated 13-9-2000 imposing penalty of 5,00,000/- upon the appellant under Section 112(b)(ii) of the Customs Act, (hereinafter called as the 'Acting')

2. The detailed facts necessary for deciding the question of law that arises for determination in this appeal are as follows :

This appeal is admitted for considering the following question of law :

"(1) Whether the Appellate Tribunal was right in law in confirming the penalty on the appellant when the charges against M/s. MNS Exports have been set aside?"

The material facts leading up-to this appeal are as follows :

M/s. MNS Exports Private Ltd., situated at 19/3, Konanakunte Village, Bikarispura Cross Road, Kanakapura Road, Bangalore-62, licenced as a 100% Export oriented Unit (Licence No. 55/96) having Exporters Code No. IM001175 issued by RBI, and Importer-Exporter Code No. 0791006107 issued by the JDGFT, Bangalore and having Registered office at 445/1, Kanakapura Road, 6th Cross, 7th Block, Jayanagar, Bangalore-82 and other units at No. 18/1A3, Nayandanahalli, Mysore Road, Bangalore-39, 46/1, Jaraganahalli, Kanakapura Main Road, Bangalore-78, are engaged in the manufacture of Ready Made Garments.

3. The officers of the headquarters in Bangalore, on gathering specific information that certain imports made through Air Cargo Complex, Bangalore, by M/s. MNS Exports Private Ltd., Bangalore, cleared without payment of duty, had not been received in the said factory premises, but appeared to have been diverted into the domestic market in violation of the provisions of the Customs Act, 1962, they visited the premises of M/s. MNS Exports Private Ltd., Bangalore, on 26-4-1999 and verified the physical stock of the duty free imported materials and also the Bond Register maintained with the Bills of Entry and it was noticed that there were certain discrepancies with reference to the physical stock at Unit No. 4, No. 46/1, Jaraganahalli, Kanakapura Road, Bangalore-78, as the same did not tally with the imports made, as well as the Bond Register. During the course of verification, it was informed by the said firm that the discrepancies noticed by the officers were on account of removal of certain duty free goods by them outside the 100% E.O.U. premises which were stored in the adjoining premises. During the course of verification it was also found that an enquiry was being held in the said matter. The statement of Sri Sreenivasa Rao, was recorded on 12-5-1999 under Section 108 of the Customs Act, 1962 and he *inter alia* stated that he was working as Import Assistant. In the beginning M/s. MNS Exports Private Ltd., was DTA unit and he was entrusted with the Customs Clearance work. In the year 1996, the DTA unit was converted into E.O.U. unit and he was looking after documentation work relating to import and export. Further he states that he was also doing the work relating to import and export and used to prepare the Bills of Entry in respect of import of fabrics, lining, button, zips etc. and customs clearance of the materials at Air Cargo Complex in the absence of Sri Prasad and Sri Raviprakash who were authorized to clear the import cargo. That in the month February, 1998 Sri Raviprakash and Sri Prasad of their firm approached him and informed them that one Sri Bhaskar, Customs Inspector wanted to import lining material in the name of their firm M/s. MNS Exports Private Ltd. He was told that the said imports should not be accounted in the name of M/s. MNS Exports Private Ltd., that after the import all the documents

relating to the imports were to be destroyed. In pursuance of such Act Sri Bhaskar had offered Rs. 6.50/- per metre as commission and the same was to be distributed amongst themselves. Further, Sri Raviprakash told him that already one consignment of lining material had arrived from Singapore and he handed over the cargo arrival notice, Invoice, Packing list and Air way Bill to Sri Prasad. Sri Prasad along with Sri Raviprakash went to Air Cargo Complex, Bangalore and filed the Bill of Entry number. After getting the Bill of Entry Sri Prasad took the same to the Appraiser and also gave information about the collusion of the said officials with the appellant herein for replacing the imported material. In the further statement it was revealed during investigation that he was incharge of M/s. MNS Exports Private Ltd., during the period 6/97 to 6/98 that he came in contact with Sri Raviprakash and Sri B. Prasad of M/s. MNS Exports Private Ltd., who were looking after the Customs formalities and he knew Sri Vikram Jain, the appellant herein of M/s. Texworth International, Bangalore, for a long time even before joining the Department. During the end of 1997. Sri Vikram Jain met him and discussed about the procedure followed by 100% of E.O.U. Sri Vikram Jain suggested to him that since no examination of the imported goods of 100% E.O.U. is being done by Customs at Air Cargo Complex, he could held him to get the goods imported in the name of some 100% E.O.U. who imported fabrics. Accordingly he suggested the name of M/s. MNS Exports Private Ltd., since he was incharge of the E.O.U. Sri Vikram Jain informed him that he would get one consignment of silk fabric from Singapore and request Sri Bhaskar to clear the said goods from customs and Sri Vikram Jain offered him Rs. 11.00 per metre for which he agreed and discussed the same with Sri Raviprakash who was coming to the office for filing the Bill of Entry, Bonding and other related matters. After a lapse of one week Sri Raviprakash conveyed his willingness and thereafter he offered Rs. 6.50 per metre out of Rs. 11.00 offered to him. Accordingly he informed Sri Vikram Jain to order for consignment of silk fabric and to avoid any suspicion at Air Cargo Complex, it was planned to get silk fabric as lining material in all import documents. Sri Vikram Jain ordered for first consignment of silk fabric during December 1997 and he met him near his office and handed over the fax copy of the Invoice and AWB and requested to get the consignment cleared from Customs. The said fabric which was imported in the name of M/s. MNS Exports Private Ltd., was exported by the appellant herein. Therefore, on the basis of the above said allegations that the appellant herein was recycling the goods imported by E.O.U. and exported the same to AWB Department to reach his quota under the E.O.U. scheme and therefore the proceedings were initiated.

4. It is not disputed that the consignment worth Rs. 52,37,981/- was confiscated and the confiscation proceedings are pending and it was ordered to be confiscated and since the goods had been recycled and imported in the name of M/s. MNS Export Private Ltd., the same could not be confiscated. The Commissioner of Excise Duty having held an enquiry and on considering the entire material on record negated the contentions raised by the appellant herein and gave a finding on the question of fact and imposed penalty of Rs. 5,00,000/- in exercise of the powers under Section 112 (b)(ii) of the Customs Act. Being aggrieved by the said order of the Commissioner of Customs dated 13-9-2000 an appeal was preferred before the CESTAT by the appellant herein Appeal No. 414/2007 and the CESTAT by order dated 3-4-2007 in No. 414/2007 after considering the material facts pertaining to the appellant and scrutinizing the order passed by the Commissioner imposing penalty in the appeal held that the order of the Commissioner imposing penalty of Rs. 5,00,000/- was justified and dismissed the appeal. Being aggrieved by the said order this appeal which has been preferred was admitted to consider the aforesaid substantial question of law.

5. We have heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

6. The learned counsel appearing for the appellant submitted that the finding of fact arrived at by the original authority and the appellate authority is baseless and it is not based on material on record. There is no material on record to show that the appellant was activity involved in the proceeding leading to imposition of penalty and the finding is perverse and arbitrary and M/s. MNS Export Private Ltd., against whom similar allegations were made have been absolved. The learned counsel has taken us through the provisions of Section 112(b)(i) to (v) of the Customs Act, 1962 which reads as follows :

"112. Penalty for improper importation of goods, etc.,

Any person, -

- (a) xx xx xxx
(b) xx xx xxx

shall be liable,-

- (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 the value of the goods or five thousand rupees], whichever is the greater."
- (ii) In the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;
- (iii) In the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under Section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;
- (iv) In the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;]
- (v) In the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

Further, he submitted that there is no order of confiscation in the absence of proof of the fact that the appellant was involved in the proceeding which was only attributable to Sri Bhaskar and the employees of M/s. MNS Exports Private Ltd., the penalty under Section 112(b)(ii) could not have been imposed and further submitted that when M/s. MNS Exports Private Ltd. have been absolved, the appellant herein has also been absolved and the penalty could not have been imposed.

7. The learned Standing Counsel appearing for the respondent submitted that the findings are concurrent and has been arrived at on the basis of material on record. The same is well founded and the mere fact that M/s. MNS Exports Private Ltd. has been absolved would not necessarily lead to the finding that the appellant should also be absolved when there is material to show that there are specific conduct on the part of the appellant and he was directed to pay a fine under Section 112(b) of the Act.

8. We have given careful consideration to the contentions of the learned counsel appearing for the parties and scrutinized the material on record.

9. The material on record would clearly show that in the original order passed by the Commissioner detailed reasons have been given about the role played by the appellant herein in recycling the consignment. It is also clear that the appellant herein the proprietor of M/s. Texworth International, Bangalore, had obtained three advance licenses bearing Nos. 07002691, 07002891 and 07001209 from the JDGFT, Bangalore and had conspired with Sri H. Bhaskar, Inspector of Customs to export one consignment of silk fabrics to M/s. Myer's (Fairdinkum) (P) Ltd., Singapore and reimport the same consignment in the name of M/s. MNS Exports Private Ltd., by declaring the description of the goods as lining material and getting the same cleared without payment of duty with the assistance of the employees of M/s. MNS Export Private Ltd., and re-export the same consignment by adding or reducing the weight of the silk fabric and the same lining material was adopted by Sri Vikram Jain and therefore he was liable to be penalized under Section 112(b)(ii) of the Act. The said finding is based upon the material on record. The said finding on the question of fact is confirmed by the CESTAT which is the final authority on the question of fact.

10. On perusal of the order passed by the CESTAT it is clear that the CESTAT has independently assessed the material on record and having regard to the material found against the appellant as enumerated in the order of the Tribunal at paragraph 11 the said finding on question of fact is well founded and does not suffer from any illegality as to call for interference.

11. Having regard to the said material available on record, it is clear that the material found against the appellant is entirely different from the material found against M/s. MNS Exports Private Ltd. as the employees of M/s. MNS Exports Private Ltd., and Sri Bhaskar colluded with the appellant herein for recycling the imported goods. Therefore, it is clear that the mere fact that M/s. MNS Exports Private Ltd., have been absolved cannot be a ground to absolve the appellant herein as he is liable to be imposed penalty under Section 112(b)(ii) of the Act and the quantum of penalty awarded is also justified and we answer the question of law against the appellant and in favour of the revenue and pass the following order :

12. The appeal is dismissed.

