



C.M.A.(MD)No.577 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.11.2022

DELIVERED ON : 14.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

and

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

C.M.A.(MD)No.577 of 2016

and

C.M.P(MD)No.6689 of 2016

A.M.Ahamed & Co.,

Represented by its Managing Partner,

Mr.J.M.Iqbal,

15, Pereira Street, Tuticorin-628 001,

Tamil Nadu.

.. Appellant/Appellant

Vs.

1.The Commissioner of Customs,

Custom House, New Harbour Estate,

Tuticorin-628 004.

.. 1st Respondent/Respondent



C.M.A.(MD)No.577 of 2016

2.The Hon'ble Customs, Excise and Service Tax

Appellate Tribunal, South Zonal Bench,

Haddows Road, Shasthri Bhawan,

Chennai-600 006.

.. 2nd Respondent/NIL

PRAYER: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, against the Final Order No.40281/2016, dated 16.02.2016 in Appeal No.C/196/2011-SM, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.Hari Radhakrishnan

For Respondents : Mr.R.Nandha Kumar for R1

JUDGMENT

M.S.RAMESH, J.

and

N.ANAND VENKATESH, J.

This appeal has been filed by the Customs House Agent (hereinafter referred to as 'CHA') under Section 130 of the Customs Act, 1962, challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal(CESTAT), dated 16.02.2016, confirming the order



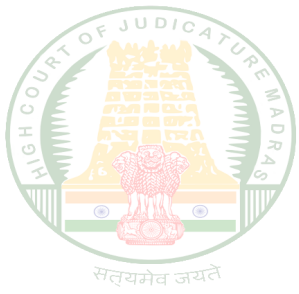
C.M.A.(MD)No.577 of 2016

passed by the Commissioner (Appeals), dated 28.04.2011.

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2. The appellant in his capacity as CHA filed a bill of entry at Tuticorin port on 16.11.2009 on behalf of the importer M/s.I.Tech Imports and Exports, Chennai so as to get used plastic injection mould machines cleared by the customs. The value that was declared by the importer was SGD28500. The customs got the goods value by the Chartered Engineer as SGD44600. On payment of the customs duty, the goods were also duly cleared.

3. On the basis of an information received to the effect that the machines are imported by misdeclaring the country of origin to evade anti-dumping duty, the office of the Directorate of Revenue Intelligence conducted a raid in the office premises of the importer. A case came to be registered for undervaluation against the importer.



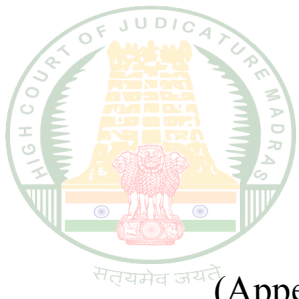
C.M.A.(MD)No.577 of 2016

WEB COPY

4. A show cause notice was issued to the importer and also to the appellant. They were asked to show cause as to why penalty should not be imposed under Sections 112(a) and 114A of the Customs Act for undervaluation and thereby rendering the goods liable to confiscation.

5. The matter was ultimately decided by the Additional Commissioner of Customs and through order dated 31.01.2011, penalty was imposed against the appellant for conniving with the importer in misdeclaring the value of the goods.

6. Aggrieved by the above order, an appeal came to be filed before the Commissioner of Customs (Appeals) under Section 128 of the Customs Act. While filing this appeal, apart from raising various grounds on merits, the attention of the Commissioner (Appeals) was also drawn to the order passed by the Settlement Commission, dated 09.11.2010 whereby the importer paid the additional amount of customs duty and he was granted immunity from prosecution, fine and penalty. The Commissioner



C.M.A.(MD)No.577 of 2016

WEB COPY

(Appeals) passed an order dated 28.04.2011 rejecting the appeal, but however, the penalty was reduced from Rs.3,00,000/- to Rs.2,20,000/-. Aggrieved by the same, an appeal was filed before the Tribunal and the Tribunal dismissed the appeal through order dated 16.02.2016. Left with no other alternative, the present appeal has been filed before this Court.

7. Heard Mr.Hari Radhakrishnan, learned counsel appearing on behalf of the appellant and Mr.R.Nandha Kumar, learned counsel appearing on behalf of the first respondent.

8. The following Substantial Questions of Law arise for consideration in this appeal:

(1) Whether the Tribunal went wrong in not rendering any findings on the grounds raised by the appellant and gave findings on issues which did not have any relevance in deciding the appeal and thereby delivered a perverse order?

(2) Whether the order of the Customs and Central Excise

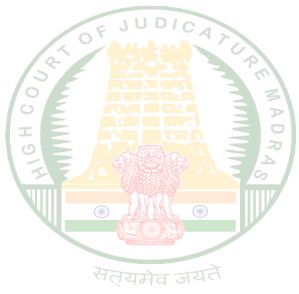


C.M.A.(MD)No.577 of 2016

WEB COPY

Settlement Commission, dated 30.11.2010 granting immunity to the importer from prosecution, fine and penalty, will also enure to the benefit of the appellant and consequently, the appellant will not be liable to pay the penalty?

9. The main ground on which the penalty was imposed against the appellant was that the appellant as CHA has abetted the importer to undervalue the goods and that the appellant had prior knowledge as to the actual value of the imported goods. To come to this conclusion, the Additional Commissioner of Customs as well as the Commissioner (Appeals) relied upon the documents that were seized from the importer which contained two sets of invoices for the same goods. The authority also came to a conclusion that the CHA, having knowledge of undervaluation of goods did not properly guide the importer to comply with the provisions of the Customs Act and Rules made thereunder. Accordingly, the penalty was imposed against the appellant. The Commissioner (Appeals) reduced the penalty from Rs.3,00,000/- to Rs.2,20,000/-.

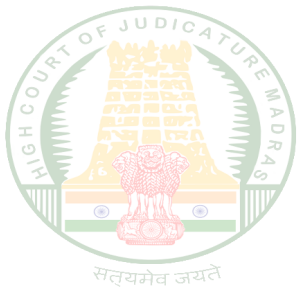


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10. It is seen from the grounds of appeal that was filed before the Tribunal that various grounds have been raised by the appellant. Apart from the other grounds, the order of the Settlement Commission has also been specifically mentioned in the grounds of appeal. Infact, an application was filed to adduce additional evidence and to produce the relevant documents along with the order of the Settlement Commission and the same was also allowed by the Tribunal by an order dated 28.04.2011.

11. The Tribunal virtually went on a tangent and the finding of the Tribunal is extracted hereunder:

“5. When first page of the appellate order is looked into it gives an impression that the differential value sent to the Bank of India account was hawala money transaction by the undervaluation process. Once such material comes to notice, the illegality of the transaction should end with the penal consequence of law. Appellant's contention that the word "person" used in section 114AA of the above said Act only speaks of the person who is involved. It



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is not necessary that a person involved in disguise shall avoid penal consequence of law when any breach of law comes to notice of Revenue to believe that the same was done by a person in disguise of a business concern. Therefore the plea of "person" fails when penalties were imposed against two different breach of law alleged.

6. When the magnitude of the penalty is looked into there appears no further consideration to be made since the appellant through e-mail transaction has stepped up into the shoe to benefit his client importer. Appellant's involvement was consciously and knowingly which cannot be ruled out. Law is well settled that fraud is a nullity and should get burial death. Therefore, any interference to the appellate order shall be a mockery for which the appeal is dismissed."

12. It is clear from the above that the Tribunal did not consider any of the grounds raised by the appellant including the order passed by the Settlement Commission. In view of the same, the order of the Tribunal must



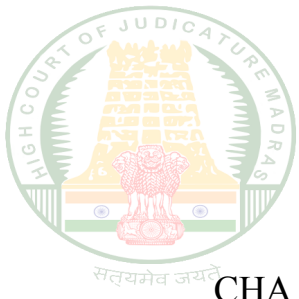
C.M.A.(MD)No.577 of 2016

WEB COPY

be held to be perverse. The first substantial question of law is answered accordingly.

13. The natural consequence of the above finding would be to remand the matter back to the file of the Tribunal with a direction to pass orders on the grounds raised by the appellant in accordance with law. However, this Court is not inclined to remand the matter at this length of time and particularly, upon considering the order passed by the Settlement Commission, whereby the main importer has been let off by granting him immunity from prosecution, fine and penalty.

14. The licence of the CHA was cancelled and the same became a subject matter of challenge before this Court in W.P.No.30884 of 2013. The learned Single Judge allowed the writ petition and aggrieved by the same, the Department filed an appeal in W.A.No.371 of 2015. The Division Bench considered the order passed by the Settlement Commission and came to a conclusion that when the importer had escaped liability, the



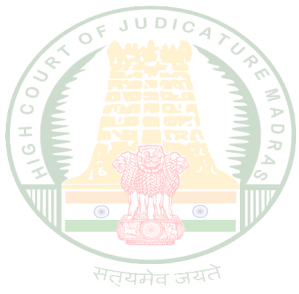
C.M.A.(MD)No.577 of 2016

WEB COPY

CHA cannot be mulcted with a liability and the benefit has to enure in favour of the CHA also. Accordingly, the writ appeal came to be dismissed by an order dated 02.07.2015.

15. The Apex Court in ***Union of India (UOI) and Ors. vs. Onkar S. Kanwar and Ors.*** reported in 2002 (145) ELT 266 (S.C.) was dealing with the effect of an assessee being given the benefit of a Samadhan Scheme. The finding rendered by the Apex Court is extracted hereunder :

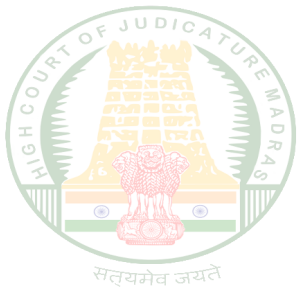
“14. We have heard the parties. In our view, a reading of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order shows that where a declaration had been made in respect of a tax arrear and where in respect of the same matter a show cause notice had also been issued to any other person, then the settlement in favour of the declarant has to be deemed to be full and final in respect of other persons on whom show cause notices had been issued. It is settled law that when an Appeal is pending there is no finality to the proceedings. The proceedings are then deemed to be



C.M.A.(MD)No.577 of 2016

WEB COPY

continuing. Undoubtedly, at one place the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order seems does state that the show cause notice should be pending adjudication. However, the same order also talks of the show cause notice being in respect of same matter on which the show cause notice has been issued to the main declarant. Then the Order provides that a settlement in favour of the declarant will be deemed to be full and final in respect of other persons also. This Order has to be read as a whole. If read as a whole, it is clear that a settlement by the main declarant is to operate as full and final settlement in respect of all other persons on whom show cause notice was issued in respect of the same matter. Thus read as a whole the words "pending adjudication" cannot be read to exclude cases where the proceedings are still pending in Appeal. Even otherwise the order has to be read along with the Kar Vivad Samadhan Scheme. Under the Kar Vivad Samadhan Scheme a party can file a declaration so long as the proceedings are pending. Thus, even though the show cause notice may have been adjudicated upon and an Appeal is pending a



WEB COPY

party could still take the benefit of the Kar Vivad Samadhan Scheme and file a declaration. The object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order is to give benefit to a settlement by the main party (i.e. the Company in this case) to all other co-noticees. This being the object a classification, restricting the benefits only to cases where the show cause notice is pending adjudication, would be unreasonable. If read in this manner the Order would be discriminatory. An interpretation which leads to discrimination must be avoided. An interpretation, as suggested by Mr. Ganesh, would also be against the object of the Kar Vivad Samadhan Scheme (Removal of Difficulties) Order. It is therefore not possible to accept the submissions of Mr. Ganesh. In our view the reasoning given by the High Court of Kerala is correct and needs to be upheld.”

16. It is clear from the above that where the benefit has been granted under the Samadhan Scheme to the main party, that benefit must



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also enure in favour of the other co-noticees and it would be unreasonable and discriminatory if the benefit is not extended.

17. Once an order of settlement is passed by the Settlement Commission, the entire dispute comes to an end and thereafter, the case cannot be adjudicated qua the other co-noticees. The effect of the settlement mechanism that has been provided in the Samadhan Scheme that was dealt with by the Apex Court in the judgment referred supra, will equally apply when an order is passed by the Settlement Commission. The very purpose of approaching the Settlement Commission is to bring to an end proceedings initiated by the authorities. While passing the order, the Settlement Commission takes into consideration the offer/disclosure made by the importer and also the submissions of the department and finally, a decision is taken. In this case, the Settlement Commission found that the importer had made true and full disclosure of all the facts relating to imported goods. The Commission also took into consideration the additional amount of Customs duty and interest paid by the importer.

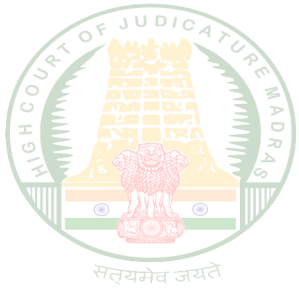


C.M.A.(MD)No.577 of 2016

WEB COPY

Accordingly, the importer was granted immunity from prosecution, fine and penalty. If the proceedings against the importer has thus come to an end, it will be discriminatory and unfair to continue the proceedings as against the CHA in relation to the very same transaction. The order of the Customs and Central Excise Settlement Commission, dated 30.11.2010 granting immunity to the importer from prosecution, fine and penalty, will also enure to the benefit of the appellant. The second substantial question of law is answered accordingly.

18. In view of the above discussion and the substantial questions of law having been answered in favour of the appellant, this Court holds that the appellant is not liable to pay any penalty. Accordingly, the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT), dated 16.02.2016 is hereby set aside and consequently the orders passed by the Commissioner (Appeals), dated 31.01.2011 is also set aside.



C.M.A.(MD)No.577 of 2016

WEB COPY

19. In the result, this Civil Miscellaneous Appeal stands allowed. No Costs. Consequently, connected miscellaneous petition is closed.

**[M.S.R., J.] & [N.A.V., J.]
14.11.2022**

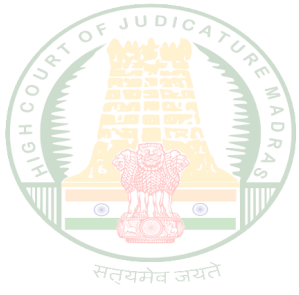
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To

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Page No.15 of 16



WEB COPY

C.M.A.(MD)No.577 of 2016

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**Pre-delivery Judgment made in
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14.11.2022