(2021) 11 CAL CK 0039

In the Calcutta High Court

Case No : IA No. GA/2 Of 2017 (Old No. GA 2026 Of 2017) In CUSTA No. 6 Of 2017

Commissioner Of Customs (Port), West Bengal — APPELLANT

Vs

M/S. Ashoke Enamel & Glass Work Pvt. Ltd. — RESPONDENT

Date of Decision : 22-11-2021

Acts Referred:
Customs Act, 1962 — Section 108, 114, 124, 130
Central Excise Act, 1944 — Section 4(1)(c)
Multimodal Transportation Of Goods Act, 1993 — Section 2(k), 2(l), 2(m), 3(4), 13, 13(1)

Citation : (2021) 11 CAL CK 0039

Hon'ble Judges : T.S. Sivagnanam, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Bhaskar Prasad Banerjee, Somnath Ganguli, Sabnam Basu, P. Singh, Sudhir Mehta, Anurag Bagaria

Final Decision : Dismissed

Judgement

This appeal by the Revenue filed under Section 130 of Customs Act, 1962 (the Act, in brevity) is directed against the order dated 30th September, 2016 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, EZB, Kolkata. The Revenue has raised the following substantial questions of law for consideration :

i) Whether the Learned Tribunal acted against the provisions of Section 114 of the Customs Act, 1962, where a clear case has been made out by the Department showing the omission and dereliction committed on the part of the said Respondent during the time of the export of the said consignment leading to seizure of red sanders in the container of the Respondent.

ii) Whether the Learned Tribunal acted with perversity in coming to the conclusion that the seal of the Respondent has been tampered with during the inspection of the goods when admittedly it appears from the record that the seal of the container containing the items to be exported was not tampered till the time of interception and recorded in the Panchanama drawn at that point of time;

iii) Whether the Learned Tribunal could ignore the provisions of Section 4(1)(c) of the Central Excise Act, 1944, which clearly specifies and defines the meaning of the term "place of removal" and also CBEC Circular No.999/6/2015-CX dated February 28, 2015.

We have heard Mr. Bhaskar Prasad Banerjee, learned Counsel appearing for the appellant and Mr. Sudhir Mehta, learned Counsel assisted by Mr. Anurag Bagaria, learned Counsel appearing for the respondent/exporter.

The Directorate of Revenue Intelligence (DRI) issued show cause notice under Section 124 of the Act dated 15th March, 2013. In the said show cause notice there are five noticees of whom the respondent was the first noticee. The allegation was that there was an attempt to export Red Sanders Wooden Logs which attempt was foiled by the department and after investigation the DRI issued show cause notice. The proposal of the show cause notice as against the respondent was as to whether Red Sanders Wooden Logs which are prohibited item should not be confiscated and whether penalty under Section 114 of the Act should not be imposed on the respondent as well as the other four co-noticees. The second noticee is the Director of the respondent company. The respondent participated in the adjudication of the show cause notice, which culminated in an order in original dated 24th February, 2015 passed by the Commissioner of Customs (Port), Kolkata. The adjudicating authority imposed penalty of Rs.50 lakhs on the respondent. Separate penalty was also imposed on the Director of the respondent which order appears to have attained finality as the Director of the company did not challenge the said order. The respondent preferred appeal before the Tribunal. The Tribunal, on going through the facts, pointed out that there is no evidence on record to indicate that the respondent had knowledge of the contraband being sent in the container. Furthermore, it noted that the goods were being transported in terms of the Multimodal Transportation of Goods Act, 1993 under which the responsibility has been fixed on the transporter soon after the container was stuffed in the exporter's factory premises and the seal was affixed by the jurisdictional Central Excise Officer.

With the above finding, the Tribunal allowed the appeal filed by the respondent. Being aggrieved by the same, the Revenue is before us by way of this appeal raising the afore-mentioned substantial questions of law.

After elaborately hearing the learned Counsel for the parties, we are of the considered view that the entire matter is fully factual and no question of law much less substantial question of law arises for consideration. We support such conclusion with the following reasons. As pointed out earlier in the show cause notice dated 15th March, 2013 issued by the DRI, copy of which has been placed before us by the learned Counsel for the respondent/exporter, we find that there is no specific allegation against the respondent/company connecting them with the attempt to export Red Sanders Wooden Logs which are prohibited item. The appellant department proceeded against the respondent by assuming that the respondent should be held responsible for the contraband being stuffed inside the container. This aspect of the matter was considered by the Tribunal and it referred to various documents more particularly the Panchanama dated 19.09.2012 in which it has been specifically stated that the seal number as mentioned on the export documents was found securely fixed on the said container, intact and untampered. Thereafter, the container was opened in the presence of all concerned as mentioned in the Panchanama. Thus, at the earliest point of time, there was nothing to connect the respondent company with the presence of the contraband inside the container which was admittedly sealed in the factory premises by the jurisdiction Central Excise Officer. Further, statement under Section 108 of the Act was recorded and the Superintendent of the Central Excise who had examined the goods had in no uncertain terms stated and confirmed his signature appearing in the ARE-1 and that it was genuine. Further, the said officer stated that he was present at the factory premises of the respondent/exporter at the time of stuffing of the goods in the container and the declared goods were stuffed in the container and it was sealed in his presence with steamer agent one time seal number and the others, namely, truck drivers, labourers and the authorised Central Excise representatives were also present during the stuffing of the said container. This factual aspect of the matter was noted by the Tribunal and, in our view, rightly held that the adjudicating authority in the order in original dated 23rd February, 2015 fixed the responsibility on the respondent/exporter based on presumption and assumption and admittedly the appellant department were unable to produce any record to connect the respondent with the presence of the contraband which was found inside the container with the seal intact at the time when the container was taken for examination. Furthermore, the Tribunal took note of Section 13 of the Multimodal Transportation of Goods Act, 1993 whereunder the multimodal transport operator has been fixed with the responsibility of the cargo for any loss/ damage or delay in delivery of consignment etc. If the multimodal transporter has to wriggle out of the obligation cast under the Act, then in terms of the first two proviso to Section 13(1) the multimodal transporter operator has to prove that no fault or neglect on his part or that of his servants or agents and he has not contributed to such loss, damage or delay.

In terms of Section 2(k) multimodal transportation has been defined to mean carriage of goods by at least two different modes of transport under a multimodal transport contract, from the place of acceptance of the goods in India (which was the factory premises of the respondent/exporter) to a place of delivery of the goods outside India.

Section 2(l) defines multimodal transport contract to mean a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight.

Section 2(m) of the Act defines multimodal transport operator to mean any person who (i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf; (ii) acts as principal and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation and who assumes responsibility for the performance of the said contract; and (iii) is registered under sub-section (3) of section 4 of the said Act.

Thus, responsibility has been fastened on the multimodal transport operator in terms of the said provision of the Act. This aspect has also been discussed by the Tribunal in the impugned order.

Learned Counsel appearing for the respondent/exporter placed reliance on the decision of the High Court of Madras in Paripooranam Steel Traders - versus- Assistant Commissioner of GST & Central Excise, Chennai reported in 2019 (26) G.S.T.L. 475 (Madras) for the proposition that the case before us is fully factual and there is no substantial question of law arising for consideration.

As pointed out earlier, the final fact-finding authority, namely, the Tribunal has re-examined the factual position and returned a finding based on documents that there is no evidence produced by the appellant department to fix the respondent/ exporter with an attempt to export Red Sanders Wooden Logs.

Thus, for the reasons stated above, we find no question of law much less substantial question of law arisen for consideration in this appeal.

For the reasons as aforesaid, the appeal fails and is dismissed.

The stay application being IA No. GA 2 of 2017 (Old No. 2026 of 2017) is also dismissed.