(2019) 08 DEL CK 0245

In the Delhi High Court

Case No : Custom Act Appeal No. 325 Of 2018, Civil Miscellaneous Application No. 50885, 50887 Of 2018

Exim Cargo Services APPELLANT

Vs

Commissioner Of Customs (General) RESPONDENT

Date of Decision : 23-08-2019

Acts Referred:
Customs Act, 1962 — Section 108, 112, 113, 114, 130

Citation : (2019) 8 AD(Delhi) 401 : (2019) 368 ELT 1024

Hon'ble Judges : Vipin Sanghi, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Shalinder Saini, Jitender Saini, Rashmi Malhotra, Harpreet Singh, Suhani Mathur

Final Decision : Allowed

Judgement

Sanjeev Narula, J

1. The present appeal has been filed under section 130 of the Customs Act, 1962 against the order dated 08.05.2018 in Customs Appeal No. C/50754/2018-CU[DB] and order dated 27.07.2018 in Customs ROM Application No. C/ROM/50603/2018 (in Customs Appeal No. C/50754/2018-CU[DB]), passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Principal Bench, New Delhi, whereby Order-in-original dated 06.02.2018 of the Commissioner of Customs (General), Custom House, New Delhi cancelling Customs House Agency License of the Appellant, has been upheld.

2. It is the case of the Appellant that he is the proprietor of M/s Exim Cargo Services and works as Custom House Agent/Broker and used to facilitate importers in completing the necessary documentation provided by the importers or their nominated persons for clearances of imported goods from customs. During 2015-2016, one importer i.e., M/s Pax Technology Private Limited imported certain Point of Sale and/or Mobile Point of Sale devices (also known as

'POS' and 'MPOS' respectively). The Customs observed some irregularity in respect of clearance of such imports and based upon specific inputs, examined one such consignment and seized it for further investigation. During the course of investigation, authorities recorded statements of various persons which revealed involvement of some persons acting as intermediaries, in forgery of invoices, mis-declaration and under-valuations. Accordingly, SCNs were issued to various persons and Customs Housing Agents including the Appellant, accusing the Appellant of not informing the importer about the requirement of BIS certification and ETA by WPC for importation of such devices into India, under Regulation 10 of the Customs House Agent Licensing Regulations (CHALR), 1984 superseded by Customs House Agents Licensing Regulations, 2004 and subsequently by Customs Brokers Licensing Regulations, 2013. The SCN issued to the Appellant was finalised by the Commissioner of Customs (General) on 06.02.2018, ordering cancellation of the CHA license of the Appellant. The Appellant's appeal before the CESTAT, Principal Bench, New Delhi met with the same fate by virtue of the impugned order dated 08.05.2018. The Appellant then preferred a Rectification Application before the CESTAT, which too was dismissed by it vide order dated 27.07.2018.

Consequently, the Appellant has preferred the present appeal.

3. Notice of the Appeal was issued on 05.12.2018 and the following question of law was framed:

"Whether the CESTAT fell into error in attributing the statements of Rajender Kumar @ Raju to the appellant and whether the finding with respect to the omission and negligence was of such magnitude as to call for revocation of the CHA licence in the circumstances of the case?"

4. We have heard the learned counsels for the parties and perused the records. From the records, it is evident that the statement of one Rajender Prasad - an employee of the appellant, was recorded under Section 108 of the Customs Act. A perusal of the statement shows that he has not made any admission of any wrongdoing, or guilt in the matter of acting as the Customs House Agent of the importer Exim Cargo Services.

5. There is another person whose statement has been recorded, namely Rajender @ Raju under Section 108 of the Customs Act. In his statement, he has, inter alia, stated as follows:

"Question 2: Have you formed any firm or company and also have you any associate or partner in your business?

Answer: I have not formed any firm or company but in my business of customs clearance, Shri Susheel Kumar Mishra is my regular partner. Shri Sanjay Kataria is also an associate in our business. We contact various collectively and share the profit earned.

Question 3: please provide business address of all of you? Answer: While me and

Shri Susheel Kumar Mishra operates from our office at Ground Floor, K-384, Gali no. 6, Mahipalpur Extension, New Delhi. Exact number of the office is not readily known to me. However, I can take you to his office as well.

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Question 5: How did you come in contact with Ms. Latha of M/s Pax Technologies?

Answer: M/s pax Technologies are the clients of Shri Sanjay Kataria, our business associate. Shri Sanjay Kataria was directly ?dealing with M/s Pax Technologies. We were receiving the documents and payment for the work done for Ms.Latha from Shri Sanjay Kataria.

Question 6; what kind documents did you receive for Shri Sanjay Kataria? What was the mode of payment?

Answer: I used to receive copy of DO and invoice from Shri Sanjay Kataria. I used to forward the same to Shri Randhir Singh 'G' card holder for filling of bill of entry inrespect of import consignment of M/s Pax Technologies.

Question 7: You are being shown the copy of statement dated 14.01.2016 tendered by Shri Sanjay Kataria under section 108 of the Customs Act, 1962, where he has stated that Ms. Latha used to authorize Shri Sandeep, your employee to obtain D.O. and other documents from DHL in respect of her import consignment. Please comment?

Answer: As stated above, we Susheel Kumar Mishra, Sanjay Kataria and myself have common business interest and hence all the three were managing the business jointly and our employee Sandeep was also following the instructions and directions issued by Sanjay Kataria.

Question 8: You have stated that you three viz. Susheel Kumar Mishra, Sanjay Katariaand yourself have common business interest and Shri Sanjay Kataria himself is a 'G'card holder and also works for M/s Emee Logistics, CHA, then why did he not undertake the clearance work of M/s Pax in his own firm and referred to some other person viz. Shri Randheer?

Answer: Preciously, one consignment of M/s Pax was stuck up in customs and was not allowed clearance and hence we did not deem fit to clear the consignment on a CHA known to us but we referred the clearance to Randheer, who on many occasions for the consignments of M/s Pas got cleared from Customs.

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On being asked about my dealing with M/s Pax Technologies, I state that, I have already narrated in my earlier statement dated 15/01/16 about my dealing with M/s Pax. M/s Pax are the client of Shri Sanjay Kataria and he provided us the job of custom clearance of imports made by M/s Pax. Since, I have neither F-card nor G-card, I alongwith my business partner Shri Sushil Kumar MIshra engaged the services of Shri Randhir, who is a G-card holder. As per my knowledge Randhir is not working for any particular CHA, but he files bills of entry a different CHA's and pays them on mutually agreed upon basis for lading the name of CHA'S. In the case of bills of entry of MIS Pax I state that Shri Sanjay Kataria gave us the business for custom clearance in July 2015.Till date as per my knowledge seven consignments of M/S Pax have been handled by me in company of my partner Sushil Mishra I have already admitted in my earlier statement dated 15.01.2016, that the invoices representing. The correct value of the goods, imported by M/S. Pax, were forge by me by making scanned copy. There by declaring lesser value to customs resulting in short payment of custom duty. On being specifically asked I state that with this act of forgery we all three Shri Sanjay Kataria, Sushil Kumar Mishra benefited where the money earned was not distributed by us on mutually agreed upon basis. On being further informed that in bill of entry no-35266007:DT 9/12/15, 334699 or 23/11/15, 3141261 or 3/11/15, 2763917 or 30/09/15, 2121203 or3/02/15 and 2094937 or 31/07/15 paper rolls have also been declared besides declaring terminals, I state that the ? copy of invoice for these bills of entry supplied by the importers through Shri Sanjay Kataria, there was mentioned as paper roll. While preparing the forged copy of invoice I was not inserted the additional description and quantity of paper rolls as paper for printing in the invoices as the EDJ system of customers normally marks the bill of entry of paper to RMS and no assessment or examination is ordered by systems. As per my knowledge I have not handled seven bills of entry of M/s Pax from July 2015 to December 2015, out of which six bill's of entry were given act of charge through? RMS where neither any assessment was made by the assessing group nor any examination was undertaken by examining officers on being further asked, I state that in all these seven bill of entries Shri Sanjay Kataria, Shri Sushil Kumar Mishra and myself were beneficiaries and Shri Randhir was only paid Rs. five to seven thousand per consignment on being specifically asked as to whether any person or official from customs, the custodians of import staff, M/S DHL, Shri Randhir Singh G-card. holder or Shri Kamal Kumar Sukhramani F-card holder or M/S Exim Cargo CHA In forging the misdeclaration what so ever, my answer is no. As already stated in my statement dated 15/01/2001, the business now a days is very down and in order to earn some extra money I along with Shri Sushil Mishra and Shri Sanjay Kataria not misdeclared the value."

(Emphasis supplied)

6. From the statement of said Shri Rajender@Raju, it is evident that he works along with his associates Sanjay Kataria and Sushil Kumar Mishra, who are the ones who had done the paper work on the basis of information derived from the importer. The respondents have proceeded to cancel the license of the appellant on the basis of the statement attributed to Rajender @ Raju. Further, a perusal of para 2 of the Order-in-original, as well as the separate statements of Rajendra Prasad and Rajendra @Raju shows, that Rajendra Prasad (G-card holder and employee of the Appellant) aged about 57 years, S/o Sh. Mahesha Nand, CHA

Address RZ-E450, Gali No. 27-C, Sadh Nagar-II, Palam Cly, New Delhi, whose statement was recorded u/s 108 of Customs Act on 14.03.2018 is one person, whereas Rajender @Raju, s/o Sh. Chhabil Das, resident of 887/14, New Brahm Colony, Sonepath, whose statement was recorded on 15.01.2016, is a different third person with a separate distinct identity, who had no direct or indirect relationship with the Appellant firm, or with the said Rajendra Prasad.

7. There is nothing to show that the appellant, or any of its employees, could be attributed any conscious or deliberate mis-statement on behalf of the importer. In the instant case, there is no corroborative evidence or statement of anybody that the CHA had information, knowledge or has connived in the alleged forgery of invoices, mis-declaration and under-valuations. It has been observed in several decisions of this Court that an element of mens rea, or any direct or indirect involvement attributable to the CHA through active knowledge or connivance is required to be proved in a proceeding for revocation of license of a Customs Housing Agent/ Customs Broker. Reference may be made to the decision in Kunal Travels (Cargo) v. Customer of Customs 2017 SCC OnLine Del 7683. Reference may also be made to a decision of the Bombay High Court in Amritlakshmi Machine Works v. The Commissioner of Customs (Import) 2016 SCC OnLine Bom 66, wherein, in a proceeding under sections 112, 113 and 114 of the Customs Act, it was observed that imposing penalty upon an abettor without any mens rea on his part would bring all business to a halt as even innocent facilitation provided by a person which has made possible the act or omission to act possible, could result in imposing of penalty. The Customs Broker/ Customs Housing Agent merely acts as a facilitator or agent for carrying out import operations. Thus, it appears that there is no reason to attribute any negligence to the appellant in the instant case.

8. Consequently, in our view, the CESTAT fell into error in attributing the statement of Rajender @ Raju to the appellant and on that basis, directing cancellation of the CHA license of the Appellant. In our view, there is no negligence which would be attributed to the appellant who acted on the basis of the instructions of the importer while filing the documents for clearance of the import. The appeal accordingly succeeds. Consequently, the order dated 06.02.2018, i.e. Order-in-Original No. 08/2018 passed by respondents is set aside. We also set aside the order-in-original revoking the license of the appellant. The impugned order passed by the CESTAT dated 08.05.2018 is set aside. We are informed that the tenure of the said license has expired. The revocation of the license by the impugned order shall not come in the way of the appellant in seeking renewal thereof.

9. We make it clear that this order shall not come in the way of the proceedings initiated against the importer on allegations of mis-declaration and mis-description.