(2024) 01 CESTAT CK 0057

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 40087 Of 2014

J. Kulasekar APPELLANT

Vs

Commissioner Of Customs (Airport & Air Cargo) RESPONDENT

Date of Decision : 23-01-2024

Acts Referred:

Customs Act, 1962 — Section 2(26), 2(33), 2(39), 108, 111, 111(d), 111(l), 111(m), 112(a)(i), 113
Wildlife (Protection) Act, 1972 — Section 39, 48A, 49B

Citation : (2024) 01 CESTAT CK 0057

Hon'ble Judges : P. Dinesha, Member (J);M. Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : G. Shanmugam, Rudra Pratap Singh

Final Decision : Allowed

Judgement

P. Dinesha, Member (J)

1. This appeal is filed by the taxpayer against the Order-in-Original No. 724/2013 dated 23.10.2013 passed by the Commissioner of Customs (Airport & Air Cargo), New Custom House, Meenambakkam, Chennai, challenging the levy of penalty of Rs.10,00,000/- under Section 112(a)(i) of the Customs Act, 1962 on the appellant.

2.1 The case of the Revenue, as could be understood from the Show Cause Notice and the impugned Order-in-Original, are that there was an intelligence input that parts of wild animals were being smuggled into India through import by cargo/courier consignments, as a result of which the Officers at Courier Cell, Air Cargo Complex, Chennai appear to have kept special watch over the import of goods from certain uncommon places. It appears that on a random check, three consignments covered under the Airway Bill (AWB) Nos. 2575635333 and 2575635344 arrived by Flight No. EK 0544 dated 25.11.2011 and the Airway Bill (AWB) Nos. 2575635322 arrived by Flight No. EK 0544 dated 27.11.2011 from Sudan were opened.

2.2 M/s. DHL Express India Pvt. Ltd., Chennai (hereinafter referred to as ‘DHL’), the authorized couriers, appear to have filed Prior Courier Bills-of-Entry No. 86673 on 25.11.2011 at Courier Terminal operated by M/s. Esquire Express India Pvt. Ltd., Air Cargo Complex, Meenambakkam, Chennai – 600 027, for clearance of the two imported consignments covered under AWB Nos. 2575635333 and 2575635344 and another Courier Prior Bill-of-Entry No. 87259 on 27.11.2011 for the imported consignment covered under AWB No. 2575635322, wherein the declaration inter alia of the importer’s name appeared to be M/s. K.M.K. Traders, No. 26, Narayana Mudali Street, Chennai – 600 002, the description as “9 kgs. of Rings”, invoice value as US$ 10 and assessable value as Rs.612/- against the respective Airway Bills. The accompanying commercial invoices all dated 21.11.2011 revealed the details of the shipper as M/s. Malind Carft Center, Gamhuria Street, Khartoum, Sudan.

3.1 It appears that the Revenue opened the consignments for examination on 29.11.2011 in the presence of a Wildlife Inspector and one of the employees of M/s. DHL, apart from two independent witnesses, during which time it is reported that bunches of thick black coloured fibres and small hook-like objects with sharp bent ends, which looked like animal hair and animal claws, were found, the details of which are reproduced below for the sake of convenience: -

Sl. No.	AWB No.	Animal Hair (in kgs.)	Animal Claws (in kgs.)
1.	2575635322	7.00	NIL
2.	2575635333	3.00	4.00
3.	2575635344	3.50	3.00

3.2 It appears that the contents of the above consignments were examined by the Wildlife Inspector who was present there, who appears to have opined that the black coloured fibre-like material "could be Elephant Tail Hair" and the sharp, bent hook-like objects "could be Leopard Claws" as well as claws of other animals belonging to the 'big cat' family.

4. It appears that an investigation was conducted, during which time the appellant's letter addressed to the Assistant Commissioner of Customs, Courier Terminal, Meenambakkam, Chennai authorizing M/s. DHL to file declaration on his behalf on the basis of declaration invoice provided by the shipper for clearance of the consignments covered under the said three Airway Bills and the acknowledgement to that effect by M/s. DHL were noticed; the said letter also contained his mobile number and signature, but without any address of shop or residence. The same was supported by his driving licence as a proof of identity.

5.1 Thereafter, the statement of the appellant who appeared before the Superintendent on 27.03.2012 appears to have been recorded under Section 108 of the Customs Act, 1962 wherein he appears to have inter alia revealed that some African tourists came to his shop for purchase of silver ring a few months back; that they, inter alia, had offered to send some samples of animal hair from Sudan, for which they had collected his address and phone number. It appears that there was a telephone communication from the said African nationals to the appellant wherein the appellant was informed about they sending three parcels through courier mode indicating the parcel numbers as well; that later on, he called up the office of M/s. DHL from where he was guided to the customer service department, with whom he shared the AWB numbers and was asked to contact the office of M/s. DHL at Air Cargo Complex, Chennai; that since he knew that the courier / cargo would be delivered by M/s. DHL to the address of M/s. KMK Traders, he went to Air Cargo Complex in order to get the consignments cleared and receive the same.

5.2 The Revenue, during the course of investigation, appears to have made enquiries with M/s. DHL as well, who also revealed the identity of the appellant.

6. From the above, the Revenue believed that the appellant had conspired with the consignor, arranged to raise three commercial invoices all dated 21.11.2011 showing the details of the shipper, consignee, weight, description of goods, number of packages and value as: M/s. Malind Carft Center, Gamhuria Street, Khartoum, Sudan, M/s. K.M.K. Traders, No. 26, Narayana Mudali Street, Chennai – 600 002, 9 kgs., rings, one and 10 USD each respectively, imported 13.5 kgs. of elephant hair and 7 kgs. of leopard claws totally valued at Rs.2.17 crores in the name of M/s. K.M.K. Traders, a non-existent/fictitious company, conned M/s. DHL, the authorized couriers, by posing himself as the consignee and submitted authorization letter for clearance of all the three consignments, submitted his driving licence as photo-identity proof and thus, tried to clear the said import consignments by presenting himself at Air Cargo Complex itself in order to avoid delivery of the goods at the given address by M/s. DHL.

7. The above resulted in the issuance of Show Cause Notice dated 10.05.2012 inter alia proposing to treat the appellant as the "importer" under Section 2(26) of the Customs Act, 1962, for importing "prohibited goods" under Section 2(33) ibid., which act clearly amounted to "smuggling" within the meaning of Section 2(39) ibid., thereby rendering the goods so imported/smuggled liable for confiscation under Section 111 or Section 113 ibid., particularly for violation under Sections 111(d), (l) and (m) and consequently, liable to penalty under Section 112(a) ibid.

8.1 In response to the above Show Cause Notice, it appears that the appellant filed a reply vide letter dated 13.06.2013 inter alia claiming that he was unaware of the allegations against him, he was totally innocent and that he had not committed any offence so far; that the Customs Officers registered a false case against him. The appellant has also contended that he was not aware of any contraband articles being kept in the parcel / courier, he had no role in the above incident and, further, that he was also arrested for offences under Sections 39, 48-A and 49-B of the Wildlife (Protection) Act, 1972 for offences of illegal possession and transportation of scheduled wildlife materials, but however, subsequently he was released on bail by the Judicial Magistrate. He has also emphasized that 'Sections 111 (d) (i) (m)' of the Customs Act could not be invoked because he had not rendered the goods liable for confiscation by any act of omission or commission, neither the goods were seized from his possession nor did he deal with the goods in any manner.

8.2 It appears that even M/s. DHL filed its reply through its representative denying any liability to the penalty proposed and also denying their role as a conspirator in the alleged smuggling charges levelled against Mr. J. Kulasekar.

9. The Commissioner of Customs (Airport & Air Cargo), New Custom House, Chennai, having considered the replies of the co-noticees during adjudication, passed a common order by dropping the charges against M/s. DHL. Insofar as the appellant is concerned, the Commissioner has not accepted the explanation offered and vide impugned Order-in-Original ordered:-

• Absolute confiscation of the goods imported under all the three AWB Nos. 2575635333, 2575635344 and 2575635322, including the material objects namely, packing materials of no commercial value; and

• Imposition of penalty of Rs.10,00,000/-(Rupees Ten Lakhs only) under Section 112(a)(i) ibid. on the appellant.

10. It is against this order that the present appeal has been filed before this forum.

11. Heard Shri G. Shanmugam, Ld. Advocate for the appellant and Shri Rudra Pratap Singh, Ld. Additional Commissioner for the Revenue. After hearing both sides, we find that the only issue that arises for our consideration is: whether the Revenue is justified in levying penalty on the appellant under Section 112(a) of

the Customs Act, 1962?

12. We have considered the rival contentions and perused the documents placed on record including the Show Cause Notice and the Order-in-Original. The allegations against the appellant are that he was responsible for the alleged import of the disputed consignments based on uncertain/inconclusive remarks of an inspector attached to the Forest Department based on visual examination that the above consignments in question "could be Elephant Tail Hair" and "could be Leopard Claws". Before getting into the rival contentions, prima facie, we are clear that the said inspector is not an expert in the field, there is no written opinion placed on record or made available, and nor is there any definite conclusion as to the nature of the consignments in question. There is a mention about the collection of samples in the impugned order from the consignments in question, but however, nothing is placed on record as to the further investigation and the result thereof, if any, by the Revenue. Hence, at the threshold itself, the Revenue has not been able to establish that the goods in question were the same as alleged and the import of which into India was/is prohibited.

13. The appellant, though has denied being involved in any way and claimed to be ignorant of the alleged import, etc., but however, he has nowhere explained as to why he went to the DHL Office at Air Cargo Complex and why did he furnish his photo-identity proof/driving licence to M/s. DHL, but however, the above is insufficient to hold that the appellant was in fact the importer and that the impugned goods were prohibited items. The primary responsibility of proving that the goods were prohibited goods was on the Revenue, in which they have failed.

14. In view of the foregoing discussions, we are of the view that the penalty imposed on the appellant is clearly unsustainable in the eye of law, for which reason we set aside the impugned order and allow the appeal.