IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL No. 14 of 2014

The Commissioner of Customs Export **..Appellant.**

Vs.

National Leather Cloth Manufacturing Company **..Respondent.**

Mr Pradeep S. Jetly for the Appellant.

Mr Prakash Shah a/with Mr Jas Sanghavi i/by PDS Legal for the Respondent.

CORAM : S.C. DHARMADHIKARI &
N.W. SAMBRE, JJ.
DATE : 4th FEBRUARY, 2015.

P.C.

1) This appeal by the Revenue challenges the order passed by the Customs, Excise and Service Tax, Appellate Tribunal, West Zonal Bench at Mumbai dated 23rd January, 2013.

2) The appeal of the assessee has been partly allowed by the Tribunal by this order. The revenue has raised a question of law and Mr Jetly termed it as substantial only because in paragraph 8 of the Tribunal's order, it is held as under:-

> "8. As rightly argued by the learned counsel for the appellants, as the goods have not been seized and are not available, redemption fine is not imposable. With these terms, the appeal is partly allowed by dropping the redemption fine against the appellants."

3) Mr Jetly submits that this finding in the Tribunal's order is contrary to law. Mr Jetly has elaborated his submission by pointing out that the show cause notice came to be issued because the assessee imported various consignments / goods as per the annexure to the show cause notice on presenting import licences mentioned in the annexure under the advance licence. The assessee thus availed duty free clearances on imported goods under Notification No.203/92-Cus dated 19th May, 1992 against such licences.

4) Inviting our attention to this Notification, copy of which is at page 74 of the appeal paper book, Mr Jetly would submit that the Exemption is admissible if the condition in clause (v) thereof that export obligation is discharged, within the period specified in the certificate styled as Export Obligation Discharge Certificate or within such extended period as may be granted by the Licensing Authority, by exporting goods manufactured in India in respect of which no input stage credit is obtained under Rules 56A or 57A of the Central Excise Rules, 1944, is complied with. Further, the facility under Rule 191A or 191B of the said Rules has

not been availed; and drawback has not been claimed either under Section 74 of the Customs Act, 1962 or Customs and Central Excise Duties Drawback Rules, 1971. Mr Jetly submits that the exempt materials shall be utilized for discharge of export obligation and no part thereof shall be disposed of in any other manner before export obligation under the said licences has been discharged in full and export proceeds realized, Mr Jetly submits that condition No. (v) (a) of this Notification has been specifically referred in the show cause notice and it is alleged that in the goods imported towards fulfillment of export obligation under the said licences, the input credit was in fact availed and contrary to this condition. Therefore, the show cause notice alleged as such in paragraph 3 a breach of this Notification and particularly clause (v) (a). In paragraph 4 the show cause notice alleges that the importers made a wrongful declaration on the export documents to the effect that no input stage credit (MODVAT) had been availed of on the input used in the manufacture of export goods, while in fact such benefit was availed in respect of the said export goods. Consequently, wrongful availment of duty free benefits against the said licence by the importers took place. Thus, there is an allegation of false declaration being filed and in terms of the show cause notice itself the goods exported were liable to confiscation under section 113 (d) of the Customs Act and the importers were liable for penal action under section 114 of the Customs Act, 1962. Thus, the show cause notice specifically alleges as to how the wrongful act would result in contravention of section 111 (o) of the Customs Act and that the goods were liable to confiscation.

5) In these circumstances, the Tribunal could not have rendered a finding of fact that as the goods have not been seized and are not available, redemption fine is not imposable. Mr Jetly would submit that there is a bond and which is implicit in terms of Notification No. 203/92. In that regard our attention has been invited to clause (i) and (ii) of this Notification, copy of which is at page 74 of the paper book. Therefore, Mr Jetly would submit that once a bond or a legal undertaking has been contemplated in terms of the Notification itself and at the time of the clearance of the imported materials, then, this is not a case where the Tribunal could have held that the goods have not been seized and are not available. The goods may have been utilized in manufacture of export goods or export product. The goods may not be available but in terms of the Notification, itself, if a bond is contemplated that bond can be enforced and executed. In enforcing and executing it, it is possible and permissible for the revenue to resort to the powers under the Customs Act, 1962. In these circumstances, this is not a case where the Division Bench judgment of this Court in the case of Commissioner of Customs (Import)

Mumbai Vs Finesse Creation Inc. **2009 (248) ELT 122** would apply.

6) Placing reliance upon the judgment of the Supreme Court in the case of Rexnord Electronics and Controls Ltd. Vs Union of India reported in **2008 (224) E.L.T. 184,** Mr Jetly would submit that the High Court of Karnataka view in the case of Commissioner of Customs, Bangalore Vs. Shilpa Trading Co. reported in **2014 (309) E.L.T. 641 (Kar)** supports his argument. The High Court of Karnataka is relying upon a judgment of the Hon'ble Supreme Court in the case of Weston Components Ltd Vs. Commissioner of Customs, New Delhi reported in **2000 (115) E.L.T 278**.

7) The appeal therefore be admitted on the substantial question of law, is the argument of Mr Jetly.

8) On the other hand, Mr Prakash Shah, learned Counsel appearing on behalf of the assessee submits that the Tribunal's view is imminently possible and in the given facts and circumstances. Mr Shah would submit that for the purpose of the adjudication order being sustained in its entirety the Tribunal had to satisfy itself that the show cause notice specifically alleged that the goods have been seized and confiscated. Even if the goods are not available for confiscation, the redemption fine has been imposed. That is how at page 33 the operative directions (ii) of the adjudication order would read. It is the correctness of

this approach and the finding based thereon, which was in issue before the Tribunal. If the imported goods are not confiscated and they are admittedly not available for confiscation then a redemption fine should not have been imposed. This case would, therefore, squarely fall within the ratio of the Division Bench of this Court in the case of Finesse Inc. (supra). Thus, the larger question posed and for consideration of this Court does not arise in this case and the appeal does not raise any substantial question of law. It deserves to be dismissed.

9) Mr Shah has taken us through the Customs Act and particularly section 28, section 110, section 110A and section 111 (o), section 125, 126 and 127. He would submit that the common thread that flows from a reading of these sections is that the seizure of the goods is on reaching a reasonable belief that they are liable for confiscation. It is their confiscation and a provisional relief from the consequences under section 110A against either a bond or security that is then contemplated in law. Then, it should be held that even if the goods are not available for confiscation, still a bond having been executed or a security given against their release from seizure that the provisions of section 111 (o) would come into force. In that event the redemption fine could have been insisted upon and if that was not paid the goods vest in the Government on confiscation and in terms of section 126. Mr Shah therefore submits

that the appeal be dismissed.

10) With the assistance of the learned counsel appearing for parties, we have perused the appeal paper book and with all annexures. We have also perused the relevant statutory provisions and the decisions brought to our notice and the notification copy of which is at page 74 of the appeal paper book.

11) The show cause notice alleges violation of condition no. (v) (a) of the Notification No. 203/92. The show cause notice alleges that no input stage credit was admissible but in violation of this condition such a credit was availed of. A wrongful declaration has been given and on the basis of which input stage credit which was otherwise not admissible has been availed of. Such being the nature of the breach and violation and of this notification so also the licence that the goods which have been imported into India and for the purpose of eventual exports against an advance licence have been so brought in duty free. Once the condition is violated then the goods would attract duty and further consequences under the Customs Act, 1962. Further, the show cause notice alleges that the export is an act contrary to the prohibition under Foreign Trade (Development and Regulation) Act, 1992, Rule 14 of the Foreign Trade (Regulation) Rules, 1993 and by virtue of section 3 (3) of the said Act and section 113 (d) of the Customs Act not only the goods exported were

liable for confiscation but penal consequences and action can follow.

12) Thereafter there is an allegation that the goods have been imported in contravention of the provisions of Section 110 (o) of the Customs Act consequent to the violation of the condition in the Notification referred by us above. Therefore, the show cause notice calls upon the assessee to show cause as to why the exemption claimed in respect of imports made against Bills of Entry Nos. 1898 and 1902 (as per Annexure) should not be denied and the duty amounting to Rs.13,39,909/- along with interest at 24% should not be demanded and recovered under section 28 of the Customs Act, 1962 and why penalty should not be imposed under section 112 and 114 of Customs Act, 1962.

13) It is on such a show cause notice and being not satisfied with the stand of the assessee that the Commissioner of Customs (Export) passed the adjudication order. The adjudication order confirmed the duty demand and the findings in that regard are to be found at running page 31 to 33 of the appeal paper book. The demand has been confirmed and at page 33 in clause (ii). Thereafter, this is what is directed:-

> *"(ii) Further, non-compliance with condition (v) of Notification No. 203/92 renders the imported goods liable to confiscation under Section 111(o) of the Customs Act, 1962, as the conditions on the basis of which exemption was allowed to the imported goods have not been fulfilled. I, accordingly hold that the imported goods are liable to confiscation under this*

> *Section. However, as the goods are not available for confiscation. I impose a redemption fine of Rs. 1339909/-(Rupees Thirteen Lakhs Thirty Nine Thousand Nine Hundred and Nine only) on the goods imported vide the two Bs/E mentioned above, in lieu of confiscation under section 125 (1) of Customs Act, 1962.”*

14) The assessee filed an appeal against such an order of the Additional Commissioner of Customs (Export) dated 3rd February, 2009. The Tribunal upheld this order save and except the operative clause 2 reproduced above.

15) We are of the view that the Tribunal's order has been rendered in the backdrop of the peculiar facts and circumstances. The show cause notice itself alleges that the goods which have been imported into India by the assessee are not available for confiscation. Yet, the adjudicating authority proceeded to impose a redemption fine. That seems to have been confirmed by the appellate authority as well. That is how the Tribunal concluded that if the goods are not available for confiscation, the redemption fine could not have been imposed. Now, in doing that the Tribunal has not referred to any provision of law nor it has referred to any judgment of this Court or of the Hon'ble Supreme Court. We do not find therefore any larger controversy or wider question needs to be decided, particularly as raised by Mr Jetly and sought to be answered by Mr Shah.

In the statutory background and the allegations in the show cause notice so also the Conditions in the Notification, the Tribunal has not referred to any bond or a legal undertaking. The Tribunal has found that the Notification contemplates that the materials imported are covered by a value based duty exemption entitlement certificate issued by the licensing authority in the form specified in the schedule annexed to the Notification, that the importer at the time of clearance of the imported materials produces proof of having executed a bond or legal undertaking before the licensing authority concerned for complying with the conditions of the Notification and makes a declaration before the Assistant Collector of Customs to pay on demand an amount equal to the duty leviable but for the exemption on imported materials in respect of which the conditions specified in the notification have not been complied with. The bond or a legal undertaking is not necessary in respect of the imports falling within the proviso below clause (b) of condition No. (ii). Then condition No. (iii) postulates that the licence and the said certificate is produced before the officer of customs at the time of clearance of imported goods out of customs control and then there are further conditions after the proviso below condition No. (iii). The condition No. (v) is that the export obligation is discharged within the period specified or within such extended period by exporting goods manufactured in India in respect of which no input stage credit is obtained. This is the condition stated to be violated. Therefore, the export obligation was discharged but the export goods manufactured in India though not exigible for input stage credit that has been wrongfully availed of. In such circumstances and in the factual background of the present case, where goods were not available for confiscation yet the redemption fine was imposed by the adjudicating authority that the Tribunal found it to be not imposable. In doing that it may have not referred to any provision but we find that the Tribunal's view in this case and in the backdrop of the factual position is possible.

16) The availability of goods is one of the criteria which has been evolved in the reported decision of this Court in the case of Commissioner of Customs (Import), Mumbai Vs. Finesse Creation Inc. **2009 (248) ELT 122**. There, what was found by the Division Bench was that the imported goods were confiscated and a redemption fine of Rs. 13,45,000 under section 125 of the Customs Act, 1962 was imposed in lieu of confiscation. The assessee in that case appealed to the CESTAT against the order and raised several contentions. One of which was that the imposition of redemption fine was impermissible. Before the Tribunal the assessee relied upon a judgment of the Punjab and Haryana High Court in the case of Commissioner of Customs, Amritsar Vs. Raja Impex (P) Ltd., **2008**

(229) ELT 185. The revenue relied on the Hon'ble Supreme Court's decision in the case of M/s Weston Components Ltd Vs. Commissioner **2000 (115) E.L.T. page 278.** Distingushing Weston's judgment (supra), the Division Bench held that the goods were released on the application of the assessee before the Supreme Court and on execution of a bond. Therefore, when the import was not found to be valid or there was any other irregularity which would entitle the customs authorities to confiscate the goods. That merely because the bond was executed would not take away the power of the Customs authority to levy redemption fine. The goods not being available for custody does not mean that the redemption cannot be imposed was an argument of the assessee before the Supreme Court which came to be rejected. The Division Bench then held that the redemption fine is a concept which arises in the event the goods are available and are to be redeemed. If the goods are not available there is no question of redemption of the goods.

17) We find that the Division Bench relied upon section 125 of the Customs Act in that regard. Whenever confiscation of any goods is authorized by the Customs Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods give to the owner of goods or where such

owner is not known the person from whom possession or custody have been seized an option to pay in lieu of confiscation such fine as such officer thinks fit. Now, in the present case, we do not want to go into the larger question as raised in view of the findings in paragraph 5 of the Division Bench Judgment in the case of Finess Creation Inc. However, in the present case, in the show cause notice what has been alleged is a violation of condition No. (v) (a). That condition has been referred and the condition itself opens with the words "that the export obligation is discharged within the period specified in the certificate or within the extended period by exporting goods manufactured in India." Clause (v) (a) states that in respect of such goods no input stage credit could be obtained. In the light of this specific violation which is alleged and the preceding conditions of the Notification No. 203/92 dated 19th May, 1992 not being attracted and no finding of any bond having been executed or a legal undertaking furnished having been rendered by the adjudicating authority that the Tribunal was of the opinion that redemption fine is not imposable. That was also because the goods have not been seized. This view of the Tribunal in the given facts and circumstances and considering the language of sub-section (1) of section 125 also does not suffer from such serious legal infirmity or perversity which would warrant our interference in further appellate jurisdiction. Once the export obligation is discharged, then, it is the later part of Section 125 (1) of the Customs Act, 1962 which will be applicable. In this case, the goods being of the later category but they were not available once the export obligation is discharged by the assessee. While clarifying that the Tribunal found that the custody of the goods has not been seized nor the possession taken and they were not available for confiscation, then, the question of redemption fine which is essentially a option to pay in lieu of confiscation would not arise. The term 'redemption' appears to have been coined by parties over a passage of time. Section 125 speaks of option to pay a fine in lieu of confiscation. In the light of the seizure being not possible in this case, that this finding has been rendered by the Tribunal, we do not find any larger question or wider controversy arising from such a factual finding. In such circumstances, we do not think that the appeal raises a substantial question of law and particularly as framed by the Revenue.

18) We would keep the issue as raised by Mr Jetly and sought to be answered by Mr Prakash Shah open for consideration in an appropriate case. The appeal is dismissed accordingly. No costs.

(N.W. SAMBRE, J.) **(S.C. DHARMADHIKARI,J)**