

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 12517 of 2016

DATE OF DECISION :- June 21, 2016

Horizon Ferro Alloys Pvt. Ltd. And others

...Petitioners

Versus

Union of India and others

...Respondents

CORAM: HON'BLE MR.JUSTICE M.JEYAPPAUL

HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present:- Mr. Sujay Kantawala, Advocate with Mr.Pankaj Bali, Advocate for the petitioners.

Mr. V.K. Kaushal, Advocate for respondent no.1.

Mr. Kamal Sehgal, Advocate for respondent no.3.

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? **Yes**

M.JEYAPPAUL, J.

1. Reply was filed.
2. Heard the submissions made by learned counsel appearing for the writ petitioners and the learned counsel appearing for the respondents.
3. The first grievance raised in the petition revolves around interpretation of Section 4(2) of the Code. It is contention of the petitioners that the Respondents are not following the procedure prescribed under

provision inconsistent with the same in the Act. Several orders granting interim protection pending decision on this very issue are already placed on record and referred in the earlier Order dated 13.6.2016. Without prejudice to their contentions on this legal issue, the petitioners have joined the investigations being conducted by the DRI in respect of seizure of Cigarettes and restricted R-22 Gas, which were admittedly imported by the petitioner company by concealment in aluminium scrap and mis-declaration of material particulars in the three Bills of Entry filed at ICD at Ludhiana. The alleged offence is a “cognizable” offence in terms of Section 104(4) of the Customs Act, 1962.

4. The petitioner company has admitted mis-declaration in these three Bills of Entry and is willing to pay the differential duty on the Cigarettes for seeking its provisional release, and is willing to resort to statutory route of self-surrender by invoking jurisdiction of Settlement Commission for settlement of case at once upon issuance of show cause cum demand notice in respect of these three Bills of Entry. The settlement Commission is statutorily empowered to grant immunities from penalty, fine and prosecution under the Customs Act, 1962. Moreover, even otherwise the alleged offence is a compoundable offence.

5. It is submitted that although the R-22 Gas is a 'restricted' item for import, and the goods Cigarettes and the R-22 Gas were imported by concealment, however, none of these goods are expressly notified as 'prohibited' for importation. Imported Goods can only be seized under Section 110 of the Act, when there exists a reasonable belief that the same are liable to confiscation under Section 111. In respect of such goods even

if the same are confiscated upon culmination of adjudication under Section

28 read with 124 of the Act, the owner/importer 'shall' be given an option to redeem the goods on payment of redemption fine in terms of Section 125 of the Act. Section 110A of the Act provides for provisional release of seized goods even pending adjudication. The petitioner company relies upon the Order dated 4.8.2015 of the Customs Excise and Service Tax Appellate Tribunal in the matter of Bhargav B. Patel in Appeal No. C/381/10-Mum reported in 2015-TIOL-1951-CESTAT-Mum, which is in the context of Section 125 of the Act. In para 11 thereof, it was held that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly “prohibited”, the Adjudication Authority is obliged to offer to the owner of the goods an option to pay fine in lieu of confiscation. The Tribunal referred to Asian Food Industries, 2006 (204) ELT 8 (SC), wherein the Hon'ble Apex Court inter alia observed that the meaning of word “prohibited” will have to be construed in regard to the text and context in which it is used and the words prohibition, restriction and regulation are meant to be applied differently. The Tribunal also observed that in the context of Section 111(d) or 113(d), in several precedents, the definition of 'prohibited goods' as contained in Section 2(33) of the Customs Act, 1962 has been applied liberally, including in ***Om Parkash Bhatia vs Union of India, 2003 (155) E.L.T. 423 (S.C.)*** and ***Sheikh Mohd. Omer v. Collector, 1983 (13) E.L.T. 1439 (S.C.)***. However, the issue, whether in the context of Section 125, the definition of 'prohibited goods' under Section 2(33) is applicable or not, was neither raised nor determined in these precedents. The Tribunal also relied upon settled principles of statutory interpretation as held in ***Ramesh Mehta vs. Sanwal Chand Singhvi (2004) 5 SCC 409*** for ascertaining the scope of words 'unless the

context otherwise requires' appearing in Section 2(33) for application of the definition of 'prohibited goods', and rightly held that the liberal definition of Section 2(33) which is applied in the context of Section 111 or 113 cannot be applied in the context of Section 125. The Tribunal relied upon the judgment of Hon'ble Andhra Pradesh High Court in ***Shaik Jamal Basha vs. GOI, 1997 (91) ELT 277 (AP)***, wherein after considering both Section 111 as well as scheme of Section 125 in a case of concealment the High Court was pleased to hold that attempt to import gold un-authorisedly will come under the second part of Section 125 (1) of the Act where the adjudging officer is under mandatory duty to give option to the person found guilty to pay fine in lieu of confiscation. Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is 'prohibited' but no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation. Hon'ble Madras High Court in ***T Elavarasan, 2011 (266) ELT 167 (MAD HC)***, was pleased to rely on the said judgment of Hon'ble Andhra Pradesh High Court and held that an option has to be given to the petitioner to pay the applicable customs duty and the redemption fine and to get the gold jewellery released, as per Section 125 of the Customs Act, 1962. In the context of Section 125 if the word "prohibited" is construed as to apply in respect of every violation of any regulation or restriction or statutory procedural requirement, the word 'shall' in said Section would be rendered redundant and meaningless. If the definition of 'prohibited goods' is applied in the context of Section 125, it would result in absurdity rendering the word 'shall' redundant and otiose, because there cannot be any situation where the goods would be liable to confiscation under Section 111

and 113 as the case may be without there being any violation of the provisions under the Customs Act, 1962 or under any other law or rules, regulations made thereunder. Therefore, in the context of statutory provisions of Section 125, so as to give a meaningful application to both words 'may' and 'shall' used in the said Section, the definition of 'prohibited goods' is inapplicable by application of settled principles of statutory interpretation. The Tribunal was therefore correct in observing that under Section 125 of the Customs Act, unless the importation or exportation of goods is expressly "prohibited" the Adjudication Authority would be obliged to offer to the Owner the goods an option to pay fine in lieu of confiscation.

6. In the instant case the Cigarettes and restricted R-22 Gas were admittedly imported by concealment. None of the two goods are expressly "prohibited" for importation. Therefore, ultimately the petitioner company who is owner as well as importer would be entitled for an option to redeem the goods even upon adjudication. In such case, Section 110A concerning provisional release would be applicable.

7. In the instant case, the stand taken on behalf of DRI was that the goods which according to their own estimate have local market value of ₹10 Crores would be absolutely confiscated and would have to be burnt or destroyed, and that such cases of fraud cannot be settled by the Settlement Commission. On behalf of DRI objection was raised even on territorial jurisdiction of this Court in respect of the matter. However, since the place of importation is at Ludhiana where the declaration was filed, we see no merit in this objection. The Learned Counsel appearing for the petitioners

of *Mohammed Irfan Khwajamiya Shaikh, 2006 (204) ELT 637* granting complete immunity from prosecution and settling the case against adjustment of duty, fine and penalty where Cigarettes were illegally imported by concealing them among Radio Cassette Recorders. Therefore, even other objections are without merits.

8. It was further stated on behalf of DRI that so far as payment of duty or provisional release is concerned, the same is to be determined or decided by the Commissioner of Customs at Ludhiana. The Commissioner of Customs (Preventive), Amritsar who holds the charge of Commissioner of Customs at Ludhiana, has filed a short affidavit inter alia taking a different stand that assessment/determination of duty would have to be done by DRI after issuing a notice under Section 28. As per this affidavit, DRI is proper officer and such notice under Section 28 would have to be adjudicated in accordance with law before asking to pay the duty. Thus, although the petitioner company has shown willingness to pay duty evaded for provisional release, both these respondents have taken contrary stand regarding who amongst them would have to determine the duty i.e. would be the adjudicating authority. In such peculiar circumstances, we find it just and expedient to entertain the request of the petitioner company for considering conditional provisional release of the seized Cigarettes instead of relegating the petitioner company to the respondents for deciding this issue of provisional release of seized Cigarettes which are perishable in nature.

9. The Respondents have doubted the genuineness of the invoices submitted by the petitioner company under Affidavit before this Court.

Customs Duty chargeable on total 900 cartons as per these three invoices is computed at ₹6,21,14,598/-. The petitioner company is willing to make payment of this computed differential duty on provisional basis in three installments for seeking provisional release of seized Cigarettes imported under each of the three consignments.

11. Whereas the local market value of the seized Cigarettes is ascertained by the DRI as evident from the Panchnama, but no assessable value for the purpose of arriving at duty liability is proposed either in the remand application or before this Court. The Local market value would be inclusive of duties and taxes etc. The Invoices submitted before the Court under Affidavit cannot be brushed aside.

12. We therefore find it reasonable to permit provisional release of the seized Cigarettes on submission of a bond for total ₹6,21,14,598/- indemnifying Respondent Commissioner at Ludhiana for making good all the liabilities that may arise under the Act in respect of the goods imported under the three Bills of Entry, with the following further conditions-

(a) The petitioner company is permitted to pay within one week from the date of this Order, the differential duty in respect of 300 cartons of cigarettes admittedly imported by concealment vide Bill of Entry no. 4785466 dated 4.4.2016. Upon making such payment the said seized 300 cartons of cigarettes shall be released on provisional basis within 48 hours;

(b) Within 10 days thereafter, the petitioner company would deposit the differential duty in respect of 300 cartons of cigarettes admittedly imported by concealment vide Bill of

Entry no. 4308262 Dated 19.2.2016. Upon making such payment the said seized 300 cartons of cigarettes shall be released on provisional basis within 48 hours;

(c) Within 10 days thereafter, the petitioner company would deposit the differential duty in respect of 300 cartons of cigarettes admittedly imported by concealment vide Bill of Entry no.4410560 dated 27.02.2016. Upon making such payment the balance seized cartons of cigarettes shall be released on provisional basis within 48 hours.

(d) After release of the seized goods, the petitioner company shall affix labels containing the mandatory warnings on the packages so released on provisional basis before selling the same in market.

13. Although the petitioners have raised a substantial question of law regarding applicability of section 4(2) of the Code, which has prima facie merits. However, since the petitioners have shown their willingness to adopt the route of settlement and to discharge their duty liability even before issuance of notice under Section 28, we deem it appropriate to dispose of the petition at this stage with following directions-

(a) The Petitioners would co-operate in investigations and would appear as and when summoned. The Respondent DRI would permit the presence of an advocate at visible but not audible distance during interrogation as well as recording of statement which shall be permitted to be recorded in petitioner's own handwriting during reasonable office hours;

(b) The Respondent DRI shall issue a notice in respect of the

aforesaid three Bills of Entry under Section 28 read with 124 of the Customs Act, 1962 within four weeks from the date of this Order;

(c) The petitioners would have to file their application for settlement of case not later than four weeks from the date of receipt of such notice;

(d) Settlement Commission would be free to decide all issues in respect of the said three Bills of Entry in accordance with law including release of R-22 gas.

(e) No coercive steps prejudicing personal liberty would be taken against the petitioners on either punitive or preventive basis in relation to the above case.

(f) In the event the petitioner company fails to make payment of duty as aforesaid for provisional release the respondents would be at liberty to move for vacation of the protection granted to the petitioners.

14. With the above directions the writ petition is disposed of while keeping open for the petitioners to raise the legal issue regarding applicability of Section 4(2) of the Code, if so required.

(M. JEYAPPAUL)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

June 21, 2016
p.singh