

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.6.2017

CORAM

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

C.M.A.No.2485 2013 and
M.P.No.1 of 2013

Commissioner of Customs (Exports)
Custom House, Chennai-600 001.

... Appellant

-Vs-

1. Bansal Industries,
KN /B-11, Gali No.10,
Upper Anand Parbat,
New Delhi- 110 005.

2. Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai-600 006.

....Respondents

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962 to set aside the final order No.287/2007 in Appeal No. C/108/2003 dated 22.03.2007 on the files of Customs, Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai, against the order of the Commissioner of Customs in order in Original No 228 of 2003-CAU dated 24.02.2003 in F.No CAU/DRI/25/01/S8/CAU(sea)/178/01.

For Petitioner : Mr.P.Rajkumar Jhabak
For Respondent 1 : Mr.S.Murugappan

JUDGMENT

1. This is an appeal preferred by the Revenue against the Judgment and Order, dated 22.03.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, 'the Tribunal').

2. The appeal was admitted on 10.10.2013, when, the following questions of law were framed for consideration by this Court:

"1. Whether the second respondent is correct in coming to the conclusion that no redemption fine can be imposed with harmonious reading of Section 125(1) and 126 of the Customs Act, 1962?

2. Whether the second respondent is correct in coming to the conclusion that a penalty of Rs.1,00,000/- would be fit the offence found against the first respondent ?"

3. The learned counsel for the Revenue at the very outset, states that he does not wish to press question No.2 pertaining to penalty, in view of the fact that the penalty imposed is below the monetary limit fixed in Circular: 390/Misc./163/2010-JC(8-2011) dated 17- Aug-2011. The record shows that the Adjudicating Authority had imposed a penalty in the sum of Rs.5 lakhs, which the Tribunal reduced to Rs.1 lakh. Insofar as the second question of law is concerned, there appears to be an error which has crept in the question of law. Accordingly, the counsels agree that the question of law needs to be re-framed. It is ordered accordingly. The re-framed question of law shall read as follows:

"Whether the second respondent has misdirected itself in law and on facts in holding, that under the provisions of Section 125(1) of the Customs Act, 1962, the redemption fine shall be the present market value of the subject goods less the customs duty paid thereon?"

4. The brief facts which are required to be noticed for the purpose of disposal of the present appeal are as follows:

4.1. The assessee had imported "tin-free sheets waste/waste defective sheets". These goods were assessed to duty based on the declaration made by the assessee. However, based on the intelligence received by the Revenue, the consignments containing the subject goods were intercepted and thereafter, detained. The subject goods were re-examined in the presence of independent witnesses. The samples taken were tested, where upon, it was found that they could not be classified as tin-free steel sheets. The Revenue came to the conclusion that they could

be classified only as "prime sheets".

4.2. Since, there was a mis-declaration and under valuation of the subject goods, summons were issued to the assessee. The assessee took the defence that the overseas supplier had committed a mistake while dispatching the goods and hence, a lenient view of the matter ought to be taken. The assessee, evidently, agreed to pay differential duty.

4.3. Consequent there to, a show cause notice was issued to the assessee to which a reply was filed. The assessee in his reply denied the allegations made in the show cause notice.

4.4. Upon the assessee's request, the subject goods were re-examined. The re-examination revealed that 70,261 Metric Tonnes (MTs) out of the total quantity imported were tin-free sheet, while the balance quantity equivalent to 198.673 MTS was tin Sheets (secondary). It appears that though the Adjudicating Authority accepted the second examination report, it ruled that it was a case of deliberate misdeclaration with an intent to evade duty. Accordingly, the Adjudicating Authority ordered confiscation of 198.673 MTs of tin plate waste/waste above 600 mm, under Section 111(m) of the Customs Act, 1962 (in short, 'the Act'). The assessee, however, was given the option to redeem the goods upon payment of fine of Rs.25 lakhs. The differential duty which was demanded, was pegged at R.14,12,161/-. In addition, there to, as indicated above, the penalty in the sum of Rs.5 lakhs was imposed under Section 112 of the Act.

4.5. The assessee being aggrieved by the same, preferred an appeal with the Tribunal to set aside the order of the Adjudicating Authority, i.e., The Commissioner of Customs (export), mainly, on the ground that, since, the supplier had made a mistake in despatching the subject goods, it cannot be said that he had willfully suppressed and mis-declared the subject goods with an intent to evade duty.

4.6. The revenue being aggrieved by the conclusion reached by the Tribunal preferred an appeal to this Court, wherein, this Court framed the following question of law for consideration

"Whether the element of mens rea is required for imposition of punishment under the Customs Act".

4.7. This Court by Judgment dated 13.9.2006 reversed the Judgment of the Tribunal based on its view that mens rea is not a necessary ingredient for levying penalty. In coming to this conclusion, this Court relied upon the Judgment of the Supreme

Court in : CHAIRMAN, SEBI V.SHRIRAM MUTUAL FUND [(2006)SCC 361]. This Court while setting aside the Judgment of the Tribunal, remanded the matter to it, for a fresh consideration on merits.

4.8. It is in this context that the Tribunal was required to take up the matter in the second round. The Tribunal by virtue of the impugned Judgment, as indicated above, has sustained the penalty, having regard to the observations made by this Court in its Judgment dated 13.9.2006, wherein it held that mens rea was, not a necessary ingredient for imposition of penalty. The Tribunal, however, in the facts and circumstances which obtained in the case reduced the penalty from Rs. 5 lakhs to Rs. 1 lakh.

4.9. Insofar as the aspect pertaining to whether or not redemption fine was liable to be imposed on the assessee, the Tribunal made the following observations in paragraph 3:

"After examining the records and hearing both sides, we find that misdeclaration of 198.673 Mts of tin plate waste by the appellants is an established fact. Hence the said quantity of goods are liable for confiscation under Section 111(m) of the Act. Indeed this liability was implicitly upheld by the Hon'ble High Court inasmuch as, unless the goods are liable for confiscation, its importer will not be liable for penalty. Penalty under Section 112(a) of the Act depends on whether the importer by his commission or omission, has rendered the goods liable for confiscation under Section 111 of the Act. By directing this Tribunal to proceed to determine the penal liability of the appellants, the Hon'ble High Court was proceeding on the premise that the goods were liable for confiscation. The question now before us is whether a redemption fine is liable to be imposed on the appellants under Section 125 of the Act. Learned Counsel submits that the facts relevant to this question were considered by this Tribunal in the earlier final order and the same have not been rebutted. With reference to a worksheet presented by him today, learned counsel submits that the appellant had actually incurred loss to the extent of 12% in connection with the subject import and therefore no fine is liable to be imposed in lieu of confiscation of the goods. The worksheet produced by counsel reads as under:-

Value of Tin Plate 178.15 Mts, as per
Bill of Entry No. 12198 dated 19.04.2001- Rs. 39,19,853.00

Duty on the above - Rs. 24,64,019.00

Value of Tin Plats 20.523 MTs. covered
by Bill of Entry No. 8783 dated 19.04.2001 -Rs. 4,51,570.00

Duty on the above - Rs. 2,83,857.00

Total value including duty of 198.673 Mts.
of Tin Plate - Rs.71,19,299.00

5% clearing expenses - Rs. 3,55,965.00

Landed cost - Rs.74,75,264.00

Landed cost Per Metric Tone - Rs. 37,625.00

Market Price of Similar goods (PMT) - Rs. 35,000.00

Profit/Loss Margin:-

Market Price - Landed Cost CIF

$$35,000.00 - 37,625.00 \div 22,000.00 = 12\% \text{ (Loss)}$$

The above data have not been disputed in quantitative terms Under the proviso to Section 125 (1) of the Customs Act, redemption fine shall be the present market value (PMV) of the goods less the any amount of customs duty paid thereon. In view of the above data, we think, no redemption fine can be imposed in this case. Therefore, while upholding the confiscation, we set aside the redemption fine."

5. Having regard to the observations made by the Tribunal, what is required to be examined is : as to whether the Tribunal has misdirected itself in appreciating the scope and ambit of Section 125. For this purpose, we seek to extract herein the relevant parts of Section 125 which is hereunder:

"125. Option to pay fine in lieu of confiscation.-

"(1) Whenever confiscation of any goods is authorised by this 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 the goods 2[or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu

of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2)"

6. A perusal of the aforesaid extract of Section 125 of the Act would show that whenever confiscation of goods is ordered, the officer may give the owner of the goods or where the owner of the goods is not known, the person from whom possession or custody of the goods is seized, option to pay in lieu of confiscation, such fine as he thinks fit. A plain reading of the section shows that this option would also extend to those confiscated goods, the importation or exportation of which is prohibited under the Act or any other law for the time being in force.

7. The proviso to sub-section (1) of Section 125 of the Act states that without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated less the duty chargeable in case of imported goods.

8. In the instant case, the proviso to subsection (2) of Section 115 of the Act need not detain us, which generally relates to confiscation of conveyances. Suffice it to say that the authority concerned has the discretion to give an option to seek release of confiscated goods, upon payment of such fine as the authority thinks fit and, the fine so imposed should not exceed the market price of the confiscated goods and in arriving at the market price, adjustment of duty chargeable in case of imported goods is required to be made.

9. According to Mr. Murugappan, the learned counsel, who appears for the assessee, such an exercise has been carried out and, for this purpose, he relies upon the calculations noted in paragraph 3 of the impugned Judgment. The learned counsel for the revenue, on the other hand says that work sheet was handed over to the Tribunal on the date of hearing and therefore, quite logically, the officers of the revenue could not have ascertained the market price of similar goods. Furthermore, the learned counsel for the revenue says that the Tribunal has erroneously come to the conclusion that under the proviso to Section 125(1) of the Customs Act, the redemption fine has to be the market price of the confiscated goods less the customs duty

paid qua them.

10. We must note that Mr. Murugappan, in the course of his arguments has relied upon the Judgment of the Division Bench of Calcutta High Court in the matter of : Pradeep Ch. Saha Vs. Additional Collector of Customs [1993 (68) E.L.T. 525 (Cal)]. Based on this Judgment, Mr. Murugappan has submitted that the purpose of imposing redemption fine is to "mop up" to the maximum extent, the possible profit that the assessee may earn on the subject goods, if they are released to him against payment of fine.

11. Having examined the record and heard the learned counsels for the parties, we are inclined to agree with the counsel for the revenue that the Tribunal did not bear in mind, the scope and ambit of Section 125 of the Act. In particular, the Tribunal as indicated above lost track of the fact that the proviso only mandates that the redemption fine should not exceed the market value of the confiscated goods after due adjustment has been made qua duty imposed on imported goods. The proviso to section 125(1) of the Act does not say as construed by the Tribunal that the redemption fine should equal the market value. Furthermore, it appears that the Tribunal did not give enough time to the revenue to revert with the necessary information as to what would be the market price of the subject goods. The work sheet, it appears was presented to the Tribunal on the date of hearing; a fact which is evident, upon a mere perusal of paragraph 3 of the impugned Judgment.

12. Therefore, for the foregoing reasons, we are inclined to agree to the plea advanced before us by the counsel for the revenue that the matter requires a re-look. Accordingly, the impugned Judgment is set aside. The question of law framed, as indicated above, is answered in favour of the revenue and against the assessee. The Tribunal will re-examine the matter, in the light of what is being observed herein above. While doing so, the Tribunal will ascertain among other things, the market value of the goods after giving due opportunity to the contesting parties. Furthermore, the Tribunal will also bear in mind the dicta of the Division Bench of the Calcutta High Court in Pradeep Ch. Saha case.

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13. The appeal is disposed of in the aforesaid terms. Consequently, the pending application is closed. However, there shall be no order as to costs.

-s/d-

Assistant Registrar(CCC)

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Sub-Assistant Registrar

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To

1. Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai-600 006.

2. Commissioner of Customs(Exports)
custom House, Chennai 600 001.

+1 CC to Mr.S. Murugappan, Advocate sr 41477

+1 CC to Mr.P. Rajkumar, Advocate sr 41640

C.M.A.No.2485 2013

SKV(CO)
sp(11/07/2017)

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