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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CUSS.AA 56/2017**

Date of decision: 8th March, 2018

VAISH BROTHERS THROUGH PARTNER Appellant
Through Ms. Vidushi Shubham, Advocate

versus

COMMISSIONER OF CUSTOMS Respondent
Through Mr. Harpreet Singh, Sr. Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Heard.

2. The following substantial question of law is framed:

Whether the Customs, Excise and Service Tax Appellate Tribunal (Tribunal) was right in exercising discretion and in refusing to admit the appeal preferred by the appellant in exercise of discretion vested under proviso (iii) to sub-section (1) of Section 129A of Customs Act, 1952 ('Act', for short)?

3. As a limited and short issue arises for consideration, with the consent of the parties, we have taken up the appeal for final hearing and disposal.

4. The appellant had imported consignment of Bemberg Cupro (Viscose) fabric under Bill of Entry No.5766236 dated 18th January, 2012. Customs duty of Rs.65,460.50/- was paid by debiting transferable script

authorization/ Licence No.2910016089 dated 10th January, 2012 issued under focus product scheme. Another importer, namely, M/s.Singh World had imported camera accessories under bill of lading No.5766852 dated 18th January, 2012. M/s.Singh World had also paid customs duty of Rs.2,17,122.30/- on debiting of the same transferable script/ licence No. 2910016089 dated 10th January, 2012.

5. Aforesaid script/ license as per the appellant was originally issued by the DGFT, Moradabad to M/s Isha Color, Moradabad for Rs. 5,77,698/- who in turn transferred the same to M/s Laxmi Logistics Pvt. Ltd., Kolkata and thereafter, to M/s JSR Overseas, Bihar who in turn sold the same to M/s JMD Impex Inc and who thereafter, transferred the license to the appellant and M/s Singh World by way of issue of release advise. The appellant had obtained the Release advise for Rs. 65,407/-, whereas the M/s Singh World obtained it for Rs. 2, 17,122/-.

6. The Bills of Entry filed by the appellant and M/s Singh World along with the other import documents, subject licence and transfer letter were presented for perusal and scrutiny before the authorities and were passed out of charge by the proper officer after due scrutiny and no discrepancy was pointed out at that time and even subsequently.

7. In March 2012, the appellant and M/s Singh World received notice from the Commissioner, Air Cargo Export for purported misuse of Focus Product Scheme. It was alleged that the subject licence was invalid as the same was issued on the basis of fake shipping bills by the original holder. In other words, the script/license had been wrongly procured by M/s Isha Colour.

8. By Order in Original dated 4th March, 2014 demand of customs duty of Rs.65,407.50/- under Section 28(1) along with interest @ 18% under Section 28(A) of the Act against the appellant was confirmed. Penalty of Rs.65,407.50 and Rs.50,000/- under Sections 114A and 114AA of the Act was imposed rejecting the contention of the appellant that they were not the original allottee and were a *bona fide* third party, who had purchased the script/license for value.

9. The first appeal preferred by the appellant was dismissed vide order dated 13th February, 2015.

10. The appellant, thereafter, preferred the second appeal before the Tribunal challenging levy of penalty of Rs.65,407/- and Rs.50,000/- under Sections 114A and 114(AA) of the Act. By the impugned order dated 17th March, 2015 the appeal has been dismissed by the Appellate Tribunal recording as under:

“4. After hearing both sides and on perusal of record, it appears that Section 129A proviso (iii) of the Customs Act, 1962 provides that appeal may not be heard by the Tribunal where the amount of fine or penalty does not exceed rupees two lakhs. In the instant case, the penalty is below the prescribed limit. Hence, we decline to hear the appeal.”

Thus, the Tribunal has refused to exercise discretion to admit the appeal, as the subject matter of the appeal i.e., quantum of penalty imposed did not exceed Rs.2.0 lakhs. Reference was made to proviso to Section 129A.

11. Section 129A of the Act reads as under:-

“129A. Appeals to the Appellate Tribunal.- (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order –

- (a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;
- (b) an order passed by the Commissioner (Appeals) under section 128A;
- (c) an order passed by the Board or the Appellate Principal Commissioner of Customs or Commissioner of Customs under Section 128, as it stood immediately before the appointed day;
- (d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

- (a) any goods imported or exported as baggage;
- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder :

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

- (i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or
- (ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
- (iii) the amount of fine or penalty determined by such order, does not exceed two lakh rupees.

(emphasis supplied)”

12. It is not disputed that the respondent / revenue accepts that the appellant had right to file an appeal challenging the order of the first appellate authority confirming penalty imposed by the Order in Original before the Appellate Tribunal under Section 129A (1) of the Act. Proviso (iii) to sub-section 1 of Section 129A gives discretion to Tribunal to admit or not to admit an appeal where the amount of penalty determined does not exceed Rs.2.0 lakhs. That the discretion exists cannot be disputed. In the present appeal, however, it is exercise of the discretion in not entertaining and admitting the appeal which is in question. The impugned order merely refers to the proviso and the discretion vested with the Tribunal. The Order is silent and does not state and give reasons for exercise of discretion i.e. refusal to admit and decide the appeal on merits. Discretion gives choice of option, but the choice of option in quasi judicial matters is not absolute and unfettered. Discretion vested vide proviso to Section 129 A of the Act is an

effective tool which enables the Tribunal not waste time and effort in deciding petty and small amount cases. However, this discretionary power must be exercised and be guided by reasonableness and fairness, as the bar or prohibition is not absolute and applicable universally to all cases. Discretion should not be exercised whimsical and in an arbitrary manner for then it may lead to odd and unacceptable consequences and results.

[See *Bangalore Medical Trust Vs. B.S. Muddappa & Ors.* (1991) 4 SCC 54]

13. We have referred to the concept of discretion and exercise of discretion as we find that the appeal preferred by M/s.Singh World was also listed before the Tribunal on the same date and was allowed vide order dated 17th March, 2017. The penalty imposed on M/s.Singh World was quashed and cancelled though the script used by M/s.Singh World and the appellant was the same. No distinction or difference of facts etc. is recorded and noticed in the impugned order. Thus, the appellant, who had to pay less penalty would be penalized and suffer, while M/s.Singh World, who had to pay higher penalty would get benefit as their appeal was heard and decided on merits.

14. Counsel for the respondent is correct when he asserts that the penalty imposed in the case of M/s.Singh World is more than Rs.2.0 lakhs, therefore, their appeal could not have been dismissed under the proviso. The argument fails to notice and give due regard to the difference between existence of discretion and wrong and erroneous exercise of power conferred i.e. exercise of discretion. Existence of power would not be a good justification and reason for the Tribunal not to exercise discretion in

favour of the appellant when on similar and identical facts they have allowed the appeal preferred by another appellant for using the same script.

15. In the aforesaid circumstances, we do not think that the Tribunal has correctly exercised the discretion under the proviso (iii) to sub-section 1 of Section 129A of the Act. Accordingly, the substantial question of law is answer in favour of the appellant and against the respondent. The matter is remanded to the Tribunal to hear the appeal on merits. We clarify that we have not made any observations or comments on merits.

16. To cut short the delay, the parties are directed to appear before the Tribunal on 3rd April, 2018. There would be no order as to costs.

Order dasti.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MARCH 08, 2018
MR/pk/ssn