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

Pronounced on: April 23, 2019

+ **W.P. (C) No. 1735/2016, C.M. APPL. No. 7433/2016**

GILLETTE INDIA LTD.

..... Petitioner

Through: Mr. Jayant K. Mehta, Mr. Shaurya Kuthiala, Mr. Kapil Arora, Ms. Nayan Jain, Ms. Suveni Bhagat, Mr. Rahul Kukreja, Mr. Shubhankar, Mr. Sajal Jain, Advocates.

versus

COMMISSIONER OF CUSTOMS & ORS.

..... Respondents

Through: Mr. Sameer Jain, Standing Counsel, CBEC, Mr. Angad Sandhu, Mr. Suvigya Awasthy, Ms. Anu Suia, Mr. Karan Valecha, Mr. Anant Gupta, Advocates.

CORAM:
JUSTICE S. RAVINDRA BHAT
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. The question that has been referred to this larger Bench for decision by an order dated 9th March, 2016 of the Division Bench (DB) of this Court in the present petition is as follows:

Notwithstanding that an importer may not have made the payment of

the redemption fine duty interest and penalty within the time stipulated in the order of confiscation of imported goods passed under Section 125 read with Section 126 of the Customs Act, 1962 ('Act'), and which order has attained finality, but makes such payment belatedly but prior to the date of auction, can the Central Government retain the excess auction proceeds after adjusting the customs duty, interest, penalty and redemption fine or has such excess amount have to be returned paid to the owner of the goods?

2. The answer to the above question would require interpretation of the expression 'vest with the Central Government' occurring in Section 126 (1) of the Act. In this context, this Bench has also been tasked with examining the correctness of the decision of a DB of this Court in *MMTC v Surjit Singh Kanda 196 (2013) DLT 725 (DB)*.

The background facts

3. The background facts have been set out in detail in the referral order dated 9th March, 2016 which reads as under:

“1. The Petitioner, Gillette India Ltd. ('GIL'), is before this Court aggrieved by the auction process initiated by the Department of Customs ('Department') in respect of the goods imported by GIL under three Bills of Entry ('B/Es').

2. GIL imported 1008 Power Tooth Brushes under B/E No. 5980646 (hereafter 'B/E No. 1') dated 13th February, 2012 in a single consignment and warehoused the said consignment in a public bonded warehouse by executing a Warehousing Bond under Section 59 of the Customs Act, 1962 ('Act').

3. GIL imported 300 Power Tooth Brushes under B/E No.

6029833 dated 17th February, 2012 (hereafter 'B/E No. 2') and executed a warehousing bond in respect thereof under Section 59 of the Act.

4. The third consignment comprising (a) 76,800 units of Gillette Mach 3 Cartridges (b) 1,02,400 units of Gillette Mach 3 (c) 2,68,800 units of Gillette Mach 3 Cartridges (d) 30,720 units of Gillette Fusion Cartridges was imported by Bill of Entry No.6568999 (hereafter 'B/E No. 3') dated 17th April, 2012. This was warehoused in the public bonded warehouse for which a Warehousing Bond was executed by GIL under Section 59 of the Act. It is stated that a substantial portion of the said consignment was removed during the warehousing period. However, one portion thereof containing 7680 pieces remained in the warehouse.

5. A request was made by the Petitioner for extending the warehousing period under Section 61(1) of the Act in respect of the aforementioned B/Es. A personal hearing was granted to the Petitioner on 20th December 2013 by the Deputy Commissioner of Customs ('DC') (Bond) in respect of B/E Nos.1 and 2.

6. An Order-in-Original dated 31st December, 2013 was passed in respect of B/E No.1 confiscating the goods under Section 111 read with Section 111(d), (j) and (o) thereof. However, an option was given to GIL to redeem the goods confiscated by paying redemption fine of Rs.25,000/- in terms of Section 125(1) of the Act within 30 days of the said order. The order made it clear that "in case the redemption fine is not paid within time, ownership of the goods will vest with the Central Government in terms of Section 126 of the Customs Act, 1962." It was further stated that after redemption of the goods, GIL would be allowed a one-time clearance of the goods, within 30 days of the receipt of the order, on payment of duty and interest at the applicable rates under Section 61(2) of the Act read with Section 72(b) of the Act thereof. Additionally, a penalty of Rs. 10,000/- was imposed under Section 112 of the Act.

7. As far as B/E No. 2 is concerned, a separate order of the same

date was passed confiscating the goods and giving an option to GIL to redeem the goods on paying a redemption fine of Rs.10,000/- under Section 125 of the Act within 30 days. A penalty of Rs. 5,000/- was levied under Section 112 of the Act.

8. It is not in dispute that the aforementioned two Orders-in-original dated 31st December 2013 were not challenged by the Petitioner.

9. As far as B/E No. 3 is concerned, on 30th December 2014 the DC (Bond) passed an order confiscating the goods, giving an option to GIL to redeem them on payment of redemption fine of Rs.50,000/- within 30 days. It was further directed that after redemption of the goods, GIL would pay the custom duty amounting to Rs. 1,58,454/- assessed on the goods lying uncleared and interest thereon at the applicable rates under Section 61(2) read with Section 72(b) of the Act. A penalty of Rs.15,000/- under Section 112 of the Act was also levied.

10. It is stated by GIL that the aforementioned order has been appealed against by GIL before the Commissioner of Customs (Appeals) ('CCA'). A copy of the memorandum of appeal along with an application for stay filed by the Petitioner on 4th March, 2015 has been placed on record.

11. Mr Satish Kumar, learned Senior Standing Counsel for the Department, states that the Department is yet to receive notice in the aforementioned appeal. Mr Jayant Mehta, learned counsel for the Petitioner, on the other hand states that he has no information as such on status of the appeal except to the extent that it is still pending before the CCA.

12. GIL states that in respect of the order passed with reference to B/E No. 1 it made payment of the duty, penalty, interest and redemption fine by a challan dated 15th April, 2014 with a delay of 74 days from the expiry of last date of payment. It is however contended that if the period is calculated from the date that GIL received a copy of the said order, the delay in making payment

worked out to 25 days.

13. GIL states that in respect of the order passed with reference to B/E No. 2 it made payment of the duty, penalty, interest and redemption fine by a challan dated 12th May 2014 with a delay of 100 days, which if calculated from the date of receipt of the order worked out to 51 days.

14. On 25th July 2014, GIL addressed a letter to the Commissioner of Customs seeking permission to clear the goods under B/E Nos. 1 and 2 in view of the aforementioned payments.

15. On 30th December 2014, GIL addressed a letter to the DC (Bond) seeking permission for ex-bonding of the goods warehoused under B/E Nos. 1 and 2

16. However on 11th February 2016 an Internal Auction Catalogue was issued offering the goods confiscated under B/E Nos.1, 2 and 3 for auction on 16th February 2016. On 12th February 2016, GIL addressed a letter to the DC (Bond) requesting that the said goods be withdrawn from the auction process. Not receiving a response to the said letter, the present writ petition was filed.

17. At the hearing on 29th February, 2016, the Court required Mr Satish Kumar to inform the Court about the current status and in particular whether the goods in question have already been auctioned.

18. Today Mr Satish Kumar produced before the Court a communication dated 8th March 2016 addressed to him by the DC (Legal) stating that the goods confiscated under B/E Nos. 1, 2 and 3 were already been sold to the auction purchaser. However, it is clarified that the demand draft (DD) received from the auction purchaser is yet to be encashed and the goods are still lying with the Department. The abovementioned letter sets out in a tabular form, in respect of each of the B/Es, the duty, redemption fine, penalty and the interest as well as the amount for which the goods have been sold. It is clarified by Mr Satish Kumar that the amount

collected from the auction purchaser includes the duty, the redemption fine, penalty and interest as well as the amount for which the goods have been sold.

19. The principal contention of Mr Jayant Mehta is that although the goods confiscated may have vested with the Central Government under Section 126 of the Act, that provision has to be read with Section 125 of the Act which gives the Department the right to recover such fine as the officer in charge of adjudging may think fit in lieu of confiscation of goods. It is contended that the Department cannot appropriate the goods and if the importer has already made payment of the duty, interest, penalty and redemption fine (although belatedly but prior to the date of auction), the Department cannot insist on recovering anything more by way of auction sale. He submits that as far as B/E Nos. 1 and 2 are concerned even if an auction sale of the good imported thereunder has taken place, the amount recovered by the Department, in excess of the duty, interest, penalty and redemption fine will have to be handed over to the importer. In support of this submission reliance is placed by Mr. Mehta on the decision of the Division Bench of this Court in **MMTC v. Surjit Singh Kanda 196 (2013) DLT 725 (DB)**.

20. As far as B/E No.3 is concerned, it is submitted by Mr. Mehta that there is a Circular No.711/4/2006 dated 14th February 2006 issued by the Central Board of Excise and Customs (CBEC) which mandates that where an appeal has been filed against an order of confiscation of goods and when such appeal is pending, the goods confiscated would cannot be sold by public auction or in any other manner unless notice is issued to the owner of the goods. Further a reference is made to the decision in **Kailash Ribbon Factory Ltd. v. Commissioner of Customs & Central Excise 2002 (143) ELT 60 (Del)** which mandates that confiscated goods which are the subject matter of an appeal before the Tribunal or Court “shall not be auctioned or disposed of without prior written permission or order from the concerned Tribunal or the Court.” Therefore, as far as B/E No.3 is concerned, it is urged that the auction held by the Department should be held to be invalid.

21. Having heard the learned counsel for the parties and having examined the judgement of this Court in **MMTC v. Surjit Singh Kanda** (*supra*), the Court is of the view that the position regarding the vesting of the confiscated goods in the Central Government under Section 126 of the Act, the constitutional validity of which is not challenged, requires detailed examination. The Court is of the view that the present factual situation where the importer has failed to make payment of the redemption fine, duty interest and penalty within the time stipulated in the Order-in-Original, with such Order-in-Original not being challenged, was not present before the Court in **MMTC v. Surjit Singh** (*supra*).

22. The question that arises, therefore, is whether notwithstanding that an importer may not have made the payment of the redemption fine duty interest and penalty within the time stipulated in the order of confiscation of imported goods passed under Section 125 read with Section 126 of the Act, and which order has attained finality, but makes such payment belatedly and prior to the date of auction, the Central Government can recover, through the process of auction of such goods, only such amount as was due to it, viz., the customs duty, interest, penalty and redemption fine and any excess amount recovered by the Central Government has to be paid to the importer of the goods? This would in turn require an interpretation of the expression “vest in the Central Government” occurring in Section 126(1) of the Act. The Court is of the view that the decision of the coordinate Bench in **MMTC v. Surjit Singh** (*supra*) cannot be construed as an authoritative pronouncement on the above issue. Yet, since the said decision is being relied upon by GIL, the Court is of the view that the above issue and incidentally the correctness of the decision of this Court in **MMTC v. Surjit Singh** (*supra*) would have to be considered by a larger Bench.

23. It is stated that the decision of this Court in **MMTC v. Surjit Singh** (*supra*) is the subject matter of an appeal before the Supreme Court, being CA Nos. 165-166 of 2015. The Court has been shown a copy of the order dated 6th January, 2015 in SLP

(C) No. 35999-36000 of 2013 by which leave was granted giving rise to the aforementioned appeals. By the said order and the interim relief granted earlier was directed to continue.

24. Consequently, as far as B/E Nos. 1 and 2 are concerned, the Court permits the Department to encash the DD deposited by the auction purchaser, release the goods imported thereunder to the auction purchaser and issue the requisite sale confirmation. This is subject to the Department abiding by the further directions that may be issued by the Court at the time of disposal of this petition. It is made clear that GIL would have no right to seek the return of the aforementioned goods that are handed over to the auction purchaser. The question whether the Department is required to pay GIL the amount recovered in excess of the duty, interest, penalty and redemption fine will be considered, and appropriate directions issued in that regard, by the Larger Bench while disposing of the petition.

25. As far as B/E No.3 is concerned, the appeal preferred by GIL against the Order-in-Original dated 30th December 2014 is stated to be pending before the CCA. In terms of the Circular No. 711/4/2006 dated 14th February 2006 issued by the CBEC, the Department had to seek the permission of the CCA before proceeding with the auction. Accordingly, the Court directs status quo in respect of the auction of the confiscated goods covered by B/E No. 3 to be maintained till such time the CCA passes appropriate orders in relation thereto. The pending appeal shall be listed before the CCA peremptorily on 4th April 2016 for that purpose. The CCA may consider issuing notice to the auction purchaser before passing further orders on this aspect.

26. To consider the issue as set out in para 22 of this order, the petition be placed before the Hon'ble the Chief Justice for being listed before a Larger Bench on 29th April, 2016 at 2.15 pm.

27. Order dasti.”

Stand of the Petitioner

4. Mr. Jayant Mehta, learned counsel for the Petitioner, submitted that the provisions of the Act that deal with 'warehousing', viz., Sections 59, 61 to 64, 68 and 72 of the Act, empower the proper officer to demand customs duty, interest, warehousing charges, rent and penalties. None of the provisions provide for 'confiscation of such goods'.

5. As far as the provisions concerning confiscation of goods, he submitted that Section 125 of the Act operated in respect of two distinct kinds of goods viz., (i) prohibited goods and (ii) other goods. As far as prohibited goods were concerned, the customs/'adjudging' officer had the discretion to give the owner/possessor of the goods an option to pay fine in lieu of confiscation. As regards 'other goods', the 'adjudging' officer 'shall' give that option. According to Mr. Mehta, a conjoint reading of Sections 125 and 126 of the Act revealed that they did not give the customs officers an 'expropriatory' power. The option to pay fine and 'confiscation' were mutually exclusive. Confiscation had to be made at the time of adjudication and not later.

6. In other words the 'vesting' that Section 126 of the Act talks of occurs at the time of adjudication and not later. It is submitted that in respect of the 'other goods' that Section 125 of the Act speaks of, there cannot be any confiscation. The word 'vest' in Section 126 of the Act has to take colour from other provisions of the Act. Therefore, for the second category of goods viz. 'other goods', the word 'vest' would mean a limited vesting for the purposes of realisation of duty, interest and fine. This interpretation is

stated to be supported by the language of Section 150 of the Act.

7. The legislative intent that was apparent on a reading of Sections 125, 126 and 150 of the Act was not to enable the government to profit from the confiscation of goods improperly imported. The only purpose of the confiscation was to recover the duty, penalty and interest and nothing more. It is accordingly submitted that the decision of the DB in *MMTC v. Surjit Singh Kanda* (*supra*) was correctly decided and did not require reconsideration. Reference is also made to several other decisions, which would be discussed hereafter.

Stand of the Respondents

8. The stand of the Respondents, as submitted by Mr. Sameer Jain, learned counsel appearing on their behalf, is that since Section 121 provides for confiscation of the entire sale proceeds of smuggled goods, an interpretation that restricts the scope of Section 126 of the Act and permits the use of the sale proceeds of the smuggled goods to only adjustment of duty, penalty and interest would create an anomaly. It is submitted that since Section 126 of the Act provides for vesting with the Central Government of the goods that are confiscated, the vesting becomes 'absolute'.

9. There is a distinction drawn in the Act between the sale/auction of 'confiscated goods' and 'non-confiscated goods'. While in the latter, the excess amount, after adjustment of penalty, interest and duty is to be returned to the owner of the goods, there is no such corresponding provision as regards the confiscated goods. This distinction, according to the

Respondents, was deliberately drawn by the legislature in recognition of the concept of complete vesting of confiscated goods with the Central Government leaving it free to deal with such goods in any which way it pleased.

10. Reference is made to other legislations which speak of the concept of ‘vesting’ in the government of property free of encumbrances. For e.g., Section 12 of the Central Excise Act, 1944 and the corresponding CBEC Notification No. 68/63/63-C and Circular No.5/89-CE dated 19th January, 1989; Section 16 of the Land Acquisition Act, 1894, Section 71-F of the Karnataka Forest Act, 1963, Section 193 (2) of the Punjab Municipal Act, 1911 and Section 28(2) of the Provincial Insolvency Act, 1920.

11. It is submitted on behalf of the Respondents that if one goes by the dictionary meaning of the word ‘vest’ as defined in Black’s Law Dictionary as conferring ownership of the property on a person; it connotes investing a person with the full title to the property; to give such person an immediate fixed right for present or future enjoyment. The word ‘confiscate’ is defined as appropriation of property, as forfeited to the government i.e. to seize property by authority of law. The word ‘confiscate’ in Webster’s Dictionary is defined to mean ‘to appropriate as forfeited to public use or treasury, usually as penalty’. The word ‘vest’ is defined as conferring ownership, authority, etc. upon some person or persons.

Analysis of relevant provisions

12. In order to answer the above questions, it is first necessary to examine

the relevant provisions of the Act. Section 2 (39) of the Act defines the word 'smuggling', in relation to any goods, as a meaning "any act or omission which will render such goods liable to confiscation under Sections 111 or 113". Section 111 provides for confiscation of improperly imported goods. Section 110 of the Act authorizes the proper officer to seize such goods "that are liable for confiscation under this Act". Section 115 of the Act provides for confiscation of conveyance. Section 115 (2) states that any conveyance or animal used as means of transport in the smuggling of any goods or in the carriage of any smuggled goods, shall be liable to confiscation. The proviso thereto provides for the owner of such conveyance an option to pay in lieu of the confiscation of the conveyance "a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be". The Explanation thereto defines 'market price' to mean "market price at the date when the goods are seized".

13. There are several other provisions of the Act that deal with confiscation. Under Section 118 of the Act, the package in which the goods that are liable for confiscation are found, is also liable to be confiscated. The goods that are used for concealing smuggled goods are liable for confiscation under Section 119 of the Act. Under Section 120 of the Act, the smuggled goods may be confiscated notwithstanding the change in form. When the smuggled goods are mixed with other goods in such manner that they cannot be separated from such other goods, the whole of the goods are liable to be confiscated. The entire sale proceeds of the smuggled goods are liable for confiscation under Section 121 of the Act.

14. Section 122 of the Act talks of adjudication of confiscations and penalties. Under Section 122-A of the Act, the adjudicating authority would give an opportunity of being heard to a party in proceeding. Section 124 of the Act requires the issuance of a show cause notice ('SCN') to be issued before passing an order confiscating any goods or imposing any penalty on any person. The noticee could be either the owner of the goods or the person from whom the goods are confiscated.

15. Sections 125 and 126 of the Act are required to be interpreted and they read as under:

“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 [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 where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply.

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

(2) Where any fine in lieu of confiscation of goods is imposed

under sub- section (1), the owner of such goods or the person referred to in sub- section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless and appeal against such order is pending.

“126. On confiscation, property to vest in Central Government.

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.”

16. Section 150 of the Act deals with the procedure for sale of goods which are not confiscated and how those sale proceeds should be applied. Section 150 of the Act reads as under:

“150. Procedure for sale of goods and application of sale proceeds.

(1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner.

(2) The proceeds of any such sale shall be applied -

(a) firstly to the payment of the expenses of the sale,

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods,

(c) next to the payment of the duty, if any, on the goods sold,

(d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,

(e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods.”

The decision in Surjit Singh Kanda

17.1 The Court first would like to deal with the decision in ***MMTC v. Surjit Singh Kanda*** (*supra*) in some detail since its correctness is under question. The facts were that 45 kg of gold was loaned by the MMTC to the Respondent Mr Surjit Singh Kanda, who was carrying on his business of manufacturing and export of gold jewellery. He exported gold ornaments to the extent of 26 kg. In breach of the conditions imposed by the MMTC, he pledged the remaining 19kg gold with the Indian Bank to obtain credit facilities. He had also hypothecated the plant and machinery, apart from the gold and gold jewellery with Indian Bank for obtaining credit facilities.

17.2 Mr Kanda was a Non-Resident Indian settled in Canada. Having failed to meet his obligations, Mr Kanda vanished from the scene leaving the Customs Department, MMTC and the Indian Bank to fight it out amongst themselves to claim whatever was left at the factory premises.

17.3 On 8th October, 1992, a stock verification was conducted by the Customs Department. 6700.700 gms of gold jewellery was sealed and handed over to MMTC for safe custody. The Commissioner of Customs also

confiscated and seized 11120.88 gm of gold, then valued at Rs.50,04,396/- under *panchnama* dated 16th October, 1997. On 20th June, 2000, the Commissioner of Customs directed confiscation of 40.775 kg. of silver, then valued at Rs. 2,43,950/- in different forms. He also confiscated non-duty paid imported capital goods valued at Rs. 1,08,59,192/- lying at the unit of Mr Kanda.

17.4 The Indian Bank preferred an application before the Debt Recovery Tribunal-I ('DRT'), Delhi in which a recovery certificate in the sum of Rs.75,90,977/- was issued against Mr. Kanda, his firms and the guarantor Mr. T. Shah Singh. It was directed that in case they did not make the payment of the above amount, it would be recovered by auction/sale of hypothecated assets, the mortgaged properties and other personal properties.

17.5 With no payment forthcoming under the recovery certificate, the immovable property, plant and machinery was sold by the Recovery Officer of the DRT in favour of M/s Panna Jewellery. The DRT formulated the question "who has the first charge of lien over the right over the hypothecated stock of gold and jewellery as well as the plant and machinery between the Applicant, i.e., Indian Bank and the Respondent Nos. 3 and 4 i.e. MMTC and the Customs Department. The DRT held that MMTC had the first charge over the gold while Indian Bank had the first charge as far as the plant and machinery was concerned.

17.6 MMTC, Indian Bank and the Customs Department filed separate appeals before the DRAT, which held that the claim of Indian Bank had

precedence over the claims made by the MMTC and the Customs Department. In other words, it was held that the Indian Bank had the first charge even over the gold apart from plant and machinery.

17.7 MMTC challenged the decision of the DRAT before this Court. The issue raised before this Court by the MMTC was with regard to the right of appropriation of the gold and gold jewellery by the Customs Department. This Court made it clear that it was not concerned with the rights of the parties in respect of the plant and machinery, immovable property and other items that may have been recovered from the factory premises of Mr Kanda.

17.8 This Court disagreed with the DRAT and held that the first charge over the recovered gold could not be that of Indian Bank. It restored the decision of the DRT that the first charge over the said gold was of MMTC. This Court held the claim of the Customs Department to be 'meritless' considering the fact that the entire customs duty, penalty and interest in respect of the said gold "already stands fully recovered". In that context, this Court proceeded to examine Sections 125 and 126 of the Act and held that the confiscation of the imported goods did not "vest unconditional right, title and interest in such confiscated goods in the Customs Department" since "the importer avails of the right vested under section 125 of the said Act, the confiscation order would not take effect".

17.9 This Court noted that in the eventuality of the importer, failing to exercise the option to pay fine, duty and other charges payable in respect of the imported goods, "the customs department would get the right to deal

with the goods as its own”. Having held as above, it was further observed that Section 126 of the Act had to be read with Section 125 of the Act and it was only a means to recover dues of the Customs Department. It did not mean that “the Department can appropriate the said goods forever, even when the penalty, duty and other charges are paid by the importer”.

17.10 Accordingly, it was held that “no further claim of the Customs Department in respect of the said gold can survive”. It was held that in that case, the Customs Department did not even bother to appear before the DRT to stake its claim on the recovered gold and was proceeded ‘*ex-parte*’. The claim of the Customs Department was characterized as ‘frivolous’.

18. Mr Mehta has placed extensive reliance upon the above judgment to contend that even in the present case, when the Petitioner has come forward to pay the redemption fine prior to the public auction, but beyond the deadline, it would be unfair for the Customs Department to be permitted to appropriate the entire auction sale proceeds permitting it to be profited from the lapse of the Petitioner. The interest of the Department is completely protected since it had recovered the entire duty, interest and penalty amounts. As far as the Petitioner was concerned, nothing more was to be payable beyond those amounts to the Customs Department. It is submitted that it is only logical and fair that the excess amount, after adjustment of duty, interest and penalty, should be returned by the Customs Department to the Petitioner.

19. The crucial line in the judgment in *MMTC v Surjit Singh Kanda* (supra)

is about the Customs Department not being able to “appropriate the said goods forever”, even when the penalty, duty and other charges are paid by the importer”. The said judgment proceeds on the basis that once the Customs Department recovers the entire customs duty, penalty and interest, it cannot claim any further amount. In the said case, however, the question of the Customs Department having to return any money to the importer did not arise since the Customs Department was held not entitled to that excess money. This Court is unable to agree with the above approach of the DB in **MMTC v. Surjit Singh Kanda** (supra) for reasons that follow.

Analysis and reasons

20. Under Section 125 of the Act, an option indeed is given to the importer to redeem the goods by payment of fine. A time limit is also set for that purpose. If, as in the present case, the importer fails to avail of that opportunity it leads inevitably to confirming the ‘confiscation’ of the goods and their sale by public auction. Section 126 (1) of the Act spells out the legal effect of such ‘confiscation’. Section 126 (2) of the Act lends a further finality to such vesting. It requires the ‘officer adjudging confiscation’ to mandatorily “take and hold possession of the confiscated goods.” Any connection that the owner/possessor

21. The distinction sought to be drawn between confiscation of ‘prohibited goods’ and of ‘other goods’ is relevant only to the extent of the discretion in the adjudging officer to permit their redemption by payment of fine. Once there is a failure to pay the fine within the time stipulated, the consequence is the same whether the goods are ‘prohibited goods’ or ‘other goods’. The

transient nature of the confiscation ends and it becomes 'absolute'. This is what is made clear by Section 126 of the Act. Sections 125 and 126 of the Act form one continuous scheme and are not to be read disjunctively. Once the vesting of the goods in the government is absolute, it would be inconsistent with the character of that vesting to contend that the Central Government can only recover through the sale of such goods the duty, penalty and interest and should return the excess to the owner/possessor of the goods.

22. Section 150 of the Act makes it clear that the legislature has drawn a conscious distinction between what should happen to the sale proceeds when it comes to goods that are confiscated and those that are not. In other words, the goods that form the subject matter of Section 150 of the Act are not the improperly imported goods which are liable for confiscation on a collective reading of Sections 125 and 126. This differential treatment accorded to the two kinds of goods is based on an intelligible, rational criteria. The objective of Section 150 of the Act is for the government not to recover more than the duty, penalty and interest. This explains the requirement under Section 150 (2) for the 'balance, if any' after adjusting the sums spelt out in clauses (a) to (e) thereunder, to be 'paid to the owner of the goods.'

23. The submission of Mr Mehta for the Petitioner that the same treatment should be accorded to goods that have 'vested' in the central government under Section 126 of the Act overlooks the obvious distinction in the two situations. Under Sections 125 and 126 of the Act, there is no restriction on the use of the auction proceeds following the absolute vesting of the

confiscated property with the government. The importer/owner/possessor of the goods loses control over the property thereafter. It logically follows that the government is free to retain the excess sale proceeds after adjusting the duty, interest, penalty, warehousing charges and any other dues.

24. It is trite that the rule of strict interpretation would apply to taxation statutes and there is no equity in tax. In *Bharat Sanchar Nigam Limited v. ACIT Manu/ID/0462/2016*, the Supreme Court explained the cardinal rules of interpretation as under:

“13.12. The cardinal Rule of Interpretation is that the statute must be construed according to its plain language. Neither should anything be added nor anything be subtracted therefrom unless there are adequate grounds to justify the inference that the Legislature clearly so intended. It is also well settled that in a taxing statute one has to look merely at what is clearly stated. The meaning and extent of the statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be considered to be just or expedient. To put in the words Rowlatt J. as held in *Cape Brandy Syndicate v. Commissioners of Inland Revenue [(1921) 1 KB 64, 71]*. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

13.14. It is well understood that the Court only interprets the law and cannot legislate. Even if a provision of law is presumed to be misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary as held in *Padma Sundara Rao v. State of Tamil Nadu (2002) 255 ITR 147* at pages 154 to 155 (SC); *Prakash Nath Khanna v. CIT (2004) 266 ITR 1* at page 9 [SC]; *Union of India v. Rajeev Kumar AIR (2003) SC 2917* at 2923. Courts cannot reframe the words used by the legislature as they have no powers to legislate. A matter

which, for the sake of an argument, should have been provided for in a statute cannot be supplied by the Courts as to do so will be an act of legislation and not of interpretation. Reliance may be placed on *Smt. Kanta Devi v. Union of India* (2003) 4 SCC 753 & 757.

13.17. The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the Legislature. Undoubtedly, if there is a defect or an omission in the words used by the Legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to statutes or read words into it which are not there, especially when the literal reading produces intelligible results. Reference may be made to *Dadi Jaganath Dham v. Jammullu Ramulu* AIR [2001] (SC) 2699 at 2703. Any presumption to the contrary in the absence of any ambiguity would be contrary to the settled legal position as the legislature as far as possible is presumed to know what it intends to say.”

Supreme Court decisions

25. There are a large number of decisions that explain what happens when a property ‘vests’ in the government. In *Shewpujanrai Indrasanrai Ltd v. The Collector of Customs* AIR 1958 SC 845, it was recognized that the property vests absolutely in the government once a confiscation order was made. It was held that all other rights of any other person in the said property stands extinguished. In *Fruit & Vegetable Merchants Union v. Delhi Improvement Trust* AIR 1954 SC 344, the word ‘vest’ was held to be a word of variable import. The scheme of the relevant sections had to be read and construed for meaning purpose and rationale manner. It was held that a property must vest in title or may vest in possession or in a limited sense depending on the context. This was referred to subsequently by the

Supreme Court in *Municipal Corporation of Hyderabad v. P.N. Murthy* (1987) 167 ITR 204 (SC) and *Smt. Sulochana Chandrakant Galande v. Pune Municipal Transport* (2010) 8 SCC 467 where it was held that the land once vested in the State could not be divested. A land vested in the State gave it a right to change its user. In the sense, the Court recognized that once the property vested in the State, the State is free to deal with it in any which way it liked. In *Dayawanti Punj v. New Delhi Municipal Committee* (1982) 2 SCC 164 it was explained that the expression ‘vest’ is in a sense synonymous with the word ‘title’. The word ‘vest’ came up for interpretation in *Howrah Municipal Corporation v. Ganges Rope Co. Ltd.* (2004) 1 SCC 663 wherein it was observed that “the word ‘vest’ is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created”. It was also noted that with the long usage the word ‘vest’ has also acquired a meaning as ‘an absolute or indefeasible right’.

High Court decisions

26. The Karnataka High Court in *M/s Afzal Agency v Customs, Excise & Service Tax Appellate Tribunal* 2005 (3) KLJ 186 noted that “once the goods are confiscated unless the importer redeems the goods by paying redemption fine he is not reacquiring the ownership of the goods”. Redemption fine was only to get over the order of confiscation. Even if he was permitted re-export, the importer could only avoid payment of duty, but not fine in lieu of confiscation. Likewise, in *Md. Numan Alam v Union of India* Manu/BH/0803/2007, it was held that under Section 125 of the Act, the owner of the goods confiscated had the option to pay redemption fine in

lieu of confiscation. However, it did not mean that the Customs Officer had “to wait endlessly for exercise of such option by the owner of goods”. If the redemption fine was not paid within the time stipulated, the officer was authorized by law to take and hold possession of confiscated goods and also to take consequential action for its auction in accordance with provisions of Act and the Rules made thereunder. It was held that in such circumstances the auction sale was not illegal.

27.1 In this context, it is necessary to deal with one more judgment relied upon by Mr Mehta in *Shabir Ahmed Abdul Rehman v Union of India 2009 (235) ELT402 (Bom)*. In that case, the Petitioner on his arriving from Muscat on 17th April, 1997 was apprehended at the Bombay Airport. He was carrying 41 gold bars valued at Rs. 18,88,337/- (international market value) and Rs.23,16,500/- (local market value) concealed in a pouch. The gold bars were seized from the Petitioner on the belief that they were liable to be confiscated. After an SCN was issued only 3rd July, 1997, by an order dated 11th November, 1997, the said gold was liable to be confiscated. A penalty of Rs.3 lakhs was imposed.

27.2 The Petitioner then filed an appeal in which the gold was directed to be reshipped subject to the payment of fine Rs.6 lakh and the personal penalty was reduced from Rs.3 lakh to Rs.1 lakh. Both the Department and the Petitioner filed revision application before the Government of India.

27.3 The Joint Secretary to the Government of India by the order dated 21st September, 1998 held that the Petitioner was entitled to redeem the

confiscated gold subject to payment of duty and also fine and penalty. By that time since the gold was already disposed of, the Commissioner was directed to return the sale proceeds subject to payment of duty, fine and penalty.

27.4 Challenging the above order, the Petitioner approached the Bombay High Court while the Department had accepted the order of the revisional authority. The Bombay High Court held that once the Petitioner had informed the Department that he was filing an appeal in the Order in Original, they should not have proceeded to the auction sale of the confiscated gold and the sale of the gold during the pendency of the appeal was held to be against the existing departmental instructions and was “not in good taste”. The Bombay High Court disagreed with the submissions of the Petitioner that he was entitled to the market value of the gold.

27.5 The Bombay High Court proceeded to examine “whether the petitioner is entitled to the sale proceeds after deducting duty, fine and penalty imposed on the petitioner”. Interestingly, there the Customs Department stated that they were ready to pay the balance amount to the Petitioner. The Bombay High Court permitted the Customs Department only to deduct the fine and penalty, but not the duty and to pay the balance amount with interest @ 9% per annum to the Petitioner from the date of the revisional order till they made the payment.

28. In the above judgment there was no discussion as such of either Section 125 or 126 of the Act. It appears to have proceeded on a concession by the

Department that it is prepared to return the excess sale proceeds after deducting the duty, fine and penalty. The said decision is therefore is not in any particular help in deciding the issues that arise in the present case.

29. Notice also needs to be taken of another decision of this Court in ***Kailash Ribbon Factory Ltd. v. The Commr. of Customs & Central, Delhi 2002 (143) ELT 60 (Del)***. It was held in that case that the Revenue's action of auctioning of the confiscated goods without prior written permission of the Court during the pendency of the appeal before it was not proper. What the Court found fault was that the auction took place during the pendency of the Petitioner's appeal before the Tribunal and yet no permission was obtained of the Tribunal. Here again, the judgment does not discuss Sections 125 of 126 of the Act. The only principle decided was that "during the pendency of the appeal confiscated goods could not have been auctioned without the prior permission of the appellate court". The entire value of the confiscated goods was directed to be returned to the Petitioner. The context in the present case is different. This decision too, is therefore, not of any assistance to the Petitioner.

Conclusions

30. To summarise the conclusions:

(a) Once there is a failure to pay the redemption fine in lieu of confiscation as determined under Section 125 of the Act, within the time stipulated, the consequence of the 'confiscation' becoming absolute and the confiscated goods vesting absolutely in the central government inevitably has to follow in terms of Section 126 of the Act. The consequence is the same whether the

goods are 'prohibited goods' or 'other goods'.

(b) Sections 125 and 126 of the Act form one continuous scheme and are not to be read disjunctively. Once the vesting of the goods in the government is absolute, it would be inconsistent with the character of that vesting to contend that the Central Government can only recover through the sale of such goods the duty, penalty and interest and should return the excess to the owner/possessor of the goods.

(c) Therefore, this Court is unable to concur with the DB which decided **MMTC v. Surjit Singh Kanda** (*supra*) that on a collective reading of Sections 125 and 126 of the Act, the Customs Department is precluded from retaining the excess sale proceeds after adjustment of duty, penalty and interest.

31. The question referred to this Bench is answered in the affirmative by holding that under Sections 125 read with Section 126 of the Act, where the redemption fine in lieu of confiscation is not paid within the time stipulated, the Central Government is entitled to retain the excess auction sale proceeds of the confiscated goods, after adjustment of the duty, penalty, interest and other statutory dues. The central government in such circumstance is under no obligation to return the excess amount to the importer. **MMTC v. Surjit Singh Kanda** (*supra*) to the extent it holds to the contrary is accordingly overruled.

32. No further orders are required to be passed as far as B/E (3) which

would abide by the decision of the Appellate Authority.

33. The writ petition is dismissed. The pending application is disposed of.
No costs.

S. MURALIDHAR, J.

S. RAVINDRA BHAT, J.

VIBHU BAKHRU, J.

APRIL 23, 2019

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