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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CUSTOMS APPEAL NO. 5 OF 2007

The Commissioner, JNCH,
JNPT, Nhava Sheva, Dist. Raigad .. Appellant
vs.
Kargawal Corporation
Survey No. 269/1/1/1/1/3, Village Athal,
P.O.Naroli, Silvassa,
U.T.of Dadra, Nagar & Haveli ..Respondent

Mr. Pradeep S.Jetly, Senior Advocate a/w Mr.Jitendra B.Mishra, for
Appellant.
Mr.Anil Balani, for Respondent.

**CORAM : K.R.SHRIRAM, J.
M. S. KARNIK, J.**

DATE: SEPTEMBER 23, 2021

ORAL JUDGMENT (K.R.SHRIRAM, J.) :

1. This appeal is filed under Section 130 of the Custom Act, 1962 against an order dated 24th January 2006 passed by the Customs, Excise and Service Tax Appellate Tribunal (the ‘Tribunal’). The Tribunal, by the impugned order, had partly allowed the appeal filed by the respondent by reducing the redemption fine imposed on respondent for unauthorised import of restricted item, i.e., rough marble blocks without an import licence in violation of the provisions

of EXIM policy.

2. Respondent had imported three consignments of the restricted goods, i.e., rough marble blocks covered by three bills of entry being B/E no. 999963, no. 999964, both dated 20th October 2005 and no. 621758 dated 16th November 2005. Mr.Jetly stated that this appeal, presently will have to be restricted only with regard to bill of entry no. 999964 dated 20th October 2005 since the monetary limit in case of other two bills of entry is below Rs. 20 lakhs. Mr.Jetly stated that there are circulars and instructions received to not to press the case where the subject matter of dispute is below the limit prescribed for High Court, i.e., Rs. 20 lakhs.

3. Admittedly, respondent had imported restricted item without specific import licence issued by proper authority, i.e., the Director General of Foreign Trade. It is alleged by Mr.Jetly that respondent was a repeat offender and in the past also the goods imported were cleared on payment of redemption fine in lieu of confiscation of the goods.

4. In the present case, respondent had waived issuance of a show cause notice and requested that the case be adjudicated without conducting a personal hearing. Respondent's case was adjudicated by Commissioner of Customs (Imports), JNCH, Nhava Sheva [COC (I)] and COC (I) passed an order dated 16th December 2005 and received on 3rd January 2006 whereby, with regard to the bill of entry no. 999964 dated 20th October 2005, he ordered confiscation of the goods which were valued at Rs. 44,46,247.63 in terms of Section 111(d) of the Customs Act, 1962. COC (I), however, permitted respondent to redeem the goods on payment of redemption fine of Rs. 37 lakhs and also imposed a penalty of Rs. 1 lakh on respondent under Section 112(a) of the Customs Act, 1962. The fact that the COC (I) has powers to give an option to the importer to pay in lieu of confiscation such fine as the said officer thinks fit is not in issue.

Section 125 of the Customs Act reads 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 1[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, [no such fine shall be imposed],

Provided further 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) 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 an appeal against such order is pending."

5. Against this order passed by COC (I), respondent preferred an appeal before the Tribunal and the order dated 24th January 2006 of the Tribunal is impugned in this appeal. The Tribunal observed that the COC (I) has imposed almost 72 to 80% fine and reduced it to 35% of the value determined.

6. The order of the COC (I) and of the Tribunal are very brief and it will be useful to reproduce the relevant portions of those orders. Paragraphs 4 & 5 of the order of the COC (I) read as under :

"4. The facts of the case are self explanatory - the item under import Rough Marble Block is restricted as per the EXIM Policy 2004-2009 and hence its impost requires a

specific licence. No such licence is admittedly available and has been produced. There is thus a violation of Section 3(2) of the Foreign Trade (Development & Regulation) Act, 1992 read with the EXIM Policy. The goods thus are liable for confiscation since their import in the absence of any such licence is a contravention of the provisions of Section 111(d) of the Customs Act, 1962. The importers are held to be persons concerned with the offence and hence are liable for penalty in terms of Section 112(a). The importer has pleaded for restricting fine/penalty to 35%. However, given the facts of the case viz. that the fact of import rough marble blocks requires a specific licence being a well established requirement of the Foreign Trade Policy, this is untenable.

ORDER

5. Having regard to my findings. I order confiscation of the goods valued at Rs.44,46,247.63 imported vide B/E No. 999964 dated 20.10.2005 in terms of Section 111(d). I however permit the importer to redeem the goods on payment of RF of Rs.37,00,000 (Rupees Thirty Seven Lakhs only). I impose a penalty of Rs.1,00,000/- (Rupees One Lakhs only) on the importer M/s.Kargwal Corporation in terms of Section 112(a) of the Customs Act, 1962."

Paragraphs 1 & 2 of the order of the Tribunal read as under :

1. After allowing the applications for stay filed by the importer against the orders of the Commissioner of Customs, we proceed to hear and decide the appeal themselves as the dispute before us, viz. appropriate fine to be levied in the case of import of rough marble blocks, stands settled by a series of orders of the Tribunal. We find that the Commissioner has levied a fine of approximately 72 to 80% and penalty of Rs. 1,00,000/- in each case. The appellants seek reduction of the percentage of fine on the basis of earlier orders to the extent of approximately 35%.

2. On hearing both sides and noting the submission of the learned SDR that no leniency ought to be shown to the appellants herein on the ground that they are repeated offenders, we find that there is no such conclusion reached by the adjudicating authority in any of the three adjudication orders challenged before us in these appeals. We find that there is no discussion in the impugned orders

as to how the quantum of fine has been arrived at and as to what would be the margin of profit in order to arrive at the quantum of fine. Noting that in the case of import of similar goods and of rough marble slabs also, the Tribunal has been consistently holding that a fine which works out to about 20 to 30% of the assessable value would be sufficient, in a series of decisions, we reduce the fines in each case to 35% of the value determined which is the transaction value because the value has been accepted, keeping in mind the fact that the appellants herein had earlier also imported rough marble blocks, as seen from the earlier orders of the Tribunal and, therefore, they have been importing these goods over a period of time even without a licence."

7. On 8th February 2007, this appeal was admitted and following questions of law were framed.

1. Whether on the facts and circumstances of the case, the Hon'ble Tribunal was right and justified in law in reducing redemption fine, imposed u/s 125 of the Customs Act, 1962, in all the three cases from Rs. 30,00,000/- to Rs.37,00,000/- and Rs. 21,00,000/- to 35% of the determined value of the goods, which worked out to approximately Rs.13,37,000/- to Rs. 16,57,000/- and Rs.9,68,305 ?

2. Whether on the facts and circumstances of the case, the Hon'ble Tribunal was right and justified in law in intervening with the amount of redemption fine, imposed under Section 125 of the Customs Act, 1962, on the Respondents for unauthorised import of restricted items without which specific import licence, by reducing the redemption fine from Rs. 30,00,000/- Rs. 37,00,000/- and Rs. 21,00,000/- to 35% of the determined value works out to Rs.13,37,000/-, Rs.16,57,000/- and Rs.9,68,305/- approximately.

3. Whether in the facts and circumstances of the case, reduction of redemption fine imposed on an importer for unauthorised import of restricted items to the extent that the importer will be able to make profit even after paying the fine and penalty and thus giving an incentive to continue to import such restricted item, is justified in law

and whether a substantial question of law can be said to have arisen out of an order of the Tribunal reducing such redemption fine imposed as a deterrent for the unauthorised import?"

We have heard Mr.Jetly and Mr.Balani.

8. COC (I) has not given any basis as to how he decided a redemption fine of Rs. 37 lakhs. It is settled law that the quantum of redemption of fine which could be imposed is always dependent on the determination of the market price of the goods confiscated. ¹The Apex Court in the case of **Commissioner of Customs, Mumbai Vs. Mansi IMPEX** says "this is one of the pre-requisites prescribed in the statute itself". In the case at hand, the COC (I) has not even conducted a sample market survey for determining the market price of the goods, without doing that, it could not have been possible for the COC (I) to arrive at a legally justified and correct quantum of redemption fine to be imposed.

Paragraphs 12 to 15 of Mansi IMPEX (*supra*) read as under :

"12. Section 125 of the Act being the provision for levying the redemption fine in lieu of confiscation, the said provision is to be strictly followed and, therefore, said redemption fine should be imposed by the competent authority which amount would not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

13. It is true that in the present case, the respondents had

1 2011(270) E.L.T. 631 (S.C.)

imported Marble Blocks without any licence and, therefore, their goods which were sought to be imported, were confiscated. On payment of duty as determined, the question that arose was as to what would be the redemption fine payable, if any. The said issue was considered by the Commissioner and thereafter he had imposed redemption fine in lieu of confiscation and also penalty in terms of the provisions of Sections 125 and 112 of the Act respectively. However, the aforesaid orders passed by the Commissioner came to be interfered with by the Tribunal whereby the Tribunal reduced the quantum of redemption fine as also the penalty.

14. We have considered the submissions of the counsel appearing for the appellant that the aforesaid reduction in case of redemption fine as also the penalty is illegal and without jurisdiction. However, the records disclose that the Commissioner had imposed the redemption fine in lieu of confiscation without making any market enquiry and survey regarding the market price of the goods confiscated at the relevant point of time. The quantum of redemption fine which could be imposed is always dependent on the determination of the market price of the goods confiscated. This is one of the pre-requisites prescribed in the statute itself. In the present cases where not even a sample market survey was done for determining the market price of the goods, it could not have been possible for the Commissioner to arrive at a legally justified and correct quantum of redemption fine to be imposed. Any such determination would also be without following the procedure prescribed under the Act.

15. We also feel that as of now also, no useful direction could also be given to the Commissioner to get a market survey made even at this stage due to lapse of number of years in the meantime and also because of the fact that no sample of the goods imported by the respondents has been retained or kept by the Department. Therefore in our considered opinion, in the aforesaid appeals, no useful purpose would be served by interfering with the orders passed by the Tribunal, particularly in view of the fact that even the Department is unable at this time to ascertain and determine the market price of the goods confiscated so as to enable the authorities to levy appropriate redemption fine. In that view of the matter, we dismiss these appeals on the aforesaid grounds leaving the parties to bear their own costs."

9. In ²**Commissioner of Customs (Import) Vs. Stoneman Marble Industries**, the Apex Court concurred with the view expressed by a Division Bench of this Court while dismissing the appeal filed by the department, and in that case also subject matter was illegal importation of marble, where High Court held that whether the reduction in redemption fine and penalty is justified or not, is essentially a finding of fact. We also respectfully agree with the view expressed by the Division Bench. Paragraphs 7 and 15 of *Stoneman Marble Industries (supra)* read as under :

7. As afore-mentioned, the High Court has, vide the impugned orders, rejected the applications filed by the Revenue on the ground that no question of law arose from the orders of the Tribunal. It has held as follows :

“Having heard the counsel on both sides, we are of the opinion that there are no questions of law which can be said to arise out of the order of the Tribunal. It is not disputed by the Revenue that the facts in the case of Respondents i.e. Marmo Classic and the facts in the case of Stonemann Marble Industries and Jai Bhagwati Impex Pvt. Ltd. are similar. On perusal of the orders passed by the Tribunal in the case of Stonemann Marble Industries and Jai Bhagwati Impex Pvt. Ltd. it is seen (sic). that the Tribunal has reduced the redemption fine and penalty by taking into account the margin of profits and the demurrage incurred by the importers of the said consignments. It is pertinent to note that the Tribunal in similar circumstances, have taken a uniform view to restrict the redemption fine to 20% of the CIF value and penalty to 5% of the CIF value. Under these circumstances, it is evident that the decision of the Tribunal is essentially based on finding of fact. The Tribunal has reduced the redemption fine and penalty by taking into account its earlier decision as well as the margin profit and the amount of demurrage incurred on the goods. It is not disputed by the Revenue that the CEGAT has power to reduce the redemption fine and penalty. Therefore, in the facts of the case whether the

reduction in redemption fine and penalty is justified or not, it is essentially a finding of fact and no material has been adduced by the revenue to establish that the order of the Tribunal is ex facie perverse, arbitrary & contrary to the facts on record.

.....
 15. *Thus tested, we are in complete agreement with the High Court that the questions raised by the Revenue for reference could not be said to be questions of law. It bears repetition that the Revenue did not specifically challenge the finding of the Tribunal that the facts in the instant cases were similar to those in M/s. Stonemann Marble Industries (supra), which was essentially a finding of fact. Although, we do find some substance in the submission of learned counsel for the Revenue that a standard formula cannot be laid down for imposition of redemption fine and penalty under the aforementioned provisions of the Act and each case has to be examined on its own facts but when a final fact finding body returns a finding that the facts obtaining in each of the cases before it are similar, and such finding is not questioned, levy of redemption fine or penalty uniformly in all such cases cannot be construed as laying down an absolute formula, which is the case here. We are convinced that the Revenue did not discharge its burden under Section 130A of the Act in as much as it did not specifically challenge the Revenue's aforesaid finding as being perverse. In this view of the matter, the High Court was justified in declining to issue direction to the Tribunal to make a reference under Section 130A of the Act.*

10. Mr.Jetly submitted that respondent was a repeat offender and relied upon the judgment of this Court in the case of ³**Sophisticated Marbles & Granite Industries Vs. Union of India** to submit that this Court should not be lenient to respondent because respondent was a repeat offender and the Court should sustain the order passed by the COC (I).

11. We have to note that COC (I) has not even observed in

³ 2004 (166) E.L.T. 318 (Bom.)

his order that respondent was a repeat offender or that was the reason why he imposed the penalty of almost 80% on respondent.

12. In our view the Tribunal has correctly observed that there was no discussion in the order of the COC (I) as to how the quantum of fine has been arrived at and what would be the margin of profit in order to arrive at the quantum of fine. The Tribunal has at least given the basis as to why they have reduced redemption fine to 35%.

13. In the circumstances, in our view, appeal requires to be dismissed. The questions of law framed as above, though we have observed whether reduction in redemption fine and penalty is justified is essentially a finding of fact, are still answered in affirmative.

14. Appeal dismissed.

(M.S. KARNIK, J.)

(K.R.SHRIRAM, J.)