

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.01.2021
PRONOUNCED ON : 09.02.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANANAN

W.P.No.17003 of 2018

M/s.Spk Impex

Represented by its Managing Partner K.Saminathan,
No.5/6, Sridevikuppakm Road,
Kasi Industrial Estate, Valasarawakkam,
Chennai 600 087.

... Petitioner

vs

1.The Commissioner of Customs (Seaport-Export),
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

2.The State Rep.by Inspector of Police,
Valasaravakkam Police Station,
Chennai 600 087.
(R2 impleaded as per order dt.10/01/2020
made in WMP.No.744/2020
in W.P.No.17003/2018)

... Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India praying for issuance of a writ of
Certiorarified Mandamus to call for the records of the
respondent culminating in the issue of order-in-Original
No.12417/2010 dated 15.07.2010 passed by the respondent from
File No.S4/639/2001-BONDS and quashing the same direct the
respondent to give compensation of Rs.1,96,68,874/- together
with interest from 01.12.2006 to the petitioner for loss of
297.06 MTs of scrap.

For Petitioner : Mr.S.Murugappan

For Respondent : M/s.Hema Murali Krishnan
Sr.Standing Counsel

O R D E R

The Petitioner has filed this writ petition for the following relief:-

"(i) to call for the records of the respondent culminating in the issue of Order-in-Original No.12417/2010 dated 15.07.2010 passed by the respondent from File No.S4/639/2001-BONDS and quashing the same.

(ii) direct the 1st respondent to give compensation of Rs.1,96,68,874/- together with interest from 01.12.2006 to the petitioner for loss of 297.06 MTS of scrap".

2. The petitioner had imported 453 mts. of mixed scraps for being re-exported after segregation. The seized mixed scraps were stored in a ware house/Godown of the petitioner and was seized by the Commissioner of Customs Office during November-2002 and thereafter seizure mahazar was drawn on 24.01.2003. At the time of seizure on 24.01.2003, the Managing Partner of the petitioner had given an undertaking dated 24.01.2003 which reads as under:-

"I, K. Saminathan, Managing Partner, M/s. SPK Impex, 5/6, Sridevikuppam Road, Kasi Industrial Estate, Valasaravakkam, Chennai-87 and assure that they will not be disposed off/removed/parted with/substituted/added to/other wise dealt with in any manner except with prior written permission of Appraiser, SIIB"(Special Investigation Intelligence Branch)".

3. The seizure culminated in a show cause proceedings dated 17.07.2003 and an adjudication order dated 20.04.2004, Order-in-Original No.2119 of 2004 of the 1st respondent (Commissioner of Customs (Seaport-Export)).

4. Aggrieved by the same, the petitioner preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as CESTAT) in C.A.Nos.262 to 266 of 2004 and C.A.Nos.251 & 252 of 2004 which eventually culminated in Final Order No.1150 to 1156 of 2006 dated 30.11.2006 and thus the Order-in-Original No.2119 of 2004 dated 20.04.2004 passed by the 1st respondent was set aside.

5. However, during the interregnum, the petitioner came

to know that the seized goods which were earlier ordered to be confiscated by the aforesaid Order-in-Original No.2119 of 2004 dated 20.04.2004 were missing and therefore an intimation letters dated 14.06.2015 was given to the 1st respondent (Commissioner of Customs (Seaport-Export)) and its insurer namely the New India Assurance Company Limited on 12.01.2005. This was followed by a FIR dated 11.07.2005 of the Judicial Magistrate No.1, Poonamallee in FIR No.732 of 2005. Thereafter, a fresh mahazar was drawn by the office of the 1st respondent on 13.01.2006 which quantified the total loss of 297.06 Metric Tonnes of the mixed scraps imported by the petitioner which was earlier seized vide Mahazar dated 24.01.2003. After investigation, the Judicial Magistrate No.1, Poonamallee closed the FIR on 24.11.2006 on the ground that the goods losts were 'undetected'.

6. The Insurance Company also rejected the claim filed by the petitioner on 11.10.2007.

7. Under these circumstances, a parallel proceedings were initiated against the petitioner seeking to demand duty on the lost quantity of the mixed scraps valuing of 297.06 Metric Tonnes vide demand notice dated 06.11.2007. The demand was confirmed by the Assistant Commissioner of Customs (Bonds) vide order dated 03.12.2007. Order dated 3.12.2012 of the Assistant Commissioner of Customs (Bonds) came to be challenged in W.P.No.1917 of 2008. The writ petition was dismissed on 17.03.2008 while extending the interim relief pending disposal of the appeal before the Commissioner of Customs (Appeals). The said appeal is said to be pending before the Commissioner (Appeals) as on date.

8. Meanwhile, the petitioner sent a representation dated 09.04.2008 and a filed written submission and requested the respondent to compensate it for the loss suffered by it on account of theft of 297.06 Metric Tonnes of mixed scraps of imported stock for being segregation and for re-export. In this background, the impugned Order-in-Original No.12417 of 2010 dated 15.07.2010 came to be passed by the respondent in compliance of the directions of this Court in W.P.No.26948 of 2008 dated 27.04.2010.

9. Aggrieved by the same, the petitioner had earlier filed an appeal in C.A.No.348 of 2010 before the CESTAT, Chennai which came to be dismissed vide its Final Order No.40880 of 2018 dated 16.02.2018 by CESTAT, Chennai on the ground that it had no jurisdiction to entertain an appeal under Section 129(A) of the Customs Act, 1962. In view of the same, the petitioner has now challenged the impugned Order-in-Original No.12417 of 2010 dated 15.07.2010 in this writ petition.

10. The learned counsel for the petitioner submits that as per Section 126 of the Customs Act, 1962, after the date of confiscation, the seized goods stand vested with the Central Government and therefore the question of the petitioner company being made on liable for the theft does not arise. It is submitted that the petitioner is entitled for compensation.

11. It is therefore submitted that the petitioner is entitled for compensation. In this connection, a reference was made to the decision of the Bombay High Court in Giridharlal Kalyandas Advani Vs Union of India, rendered in (1992) 58 E.L.T 453 (Bom.).

"The submission is correct and deserves acceptance. The respondents have deprived the petitioners of the advantage of the value of the ornaments and the petitioners were compelled to reimburse their customers from whom the ornaments were received. In these circumstances, the respondents are bound to pay the market value of the gold ornaments as prevailing on February 22, 1983 along with interest at the rate of 12% per annum from February 22, 1983 till the date of actual payment."

The above order was made in the background of the following submissions:-

" 2. Shri Joshi, learned Counsel appearing on behalf of the petitioners, submitted that the gold ornaments were seized by the Superintendent of Central Excise in exercise of powers conferred under Section 66(1) of the Gold (Control) Act, 1968. Shri Joshi submitted that as the Additional Collector came to the conclusion that the seized gold ornaments were not liable to confiscation, the respondents were duty bound to return the gold ornaments and in case the gold ornaments were not available for return because of the default of the seizing authorities, then the petitioners were entitled to the value of the gold ornaments. The submission is correct and deserves acceptance. It is not permissible for the respondents to decline to return the seized gold ornaments after adjudication or to reimburse the petitioners of the value of the gold ornaments, in case the ornaments were stolen due to the negligence of the respondents. Shri Desai, learned Counsel for the respondents submitted that the gold ornaments were seized by the

Superintendent of Central Excise in discharge of statutory functions which are referable and based on the delegation of the sovereign powers of the State. The learned counsel urged with reference to the decision of the Supreme Court in *Kasturi Lal v. State of U.P.*; reported in A.I.R. 1965 SC 1039, that the action for damages for loss caused by tortuous act will not lie if the tortuous act is committed by a public servant in discharge of statutory functions which are referable to the sovereign powers of the State. In our judgment, the assumption of Shri Desai that the powers of seizure are referable to the sovereign powers of the State is fallacious. The power to seize is under the statutory provision, i.e. Section 66(1) of the Gold (Control) Act, and it is impossible to suggest that a power to seize is based on the sovereign power of the State. The gold ornaments were seized because the Superintendent of Central Excise felt that the petitioners were holding the ornaments in violation of the statutory provisions of the Gold (Control) Act. There is no inherent power to seize gold ornaments de hors the provisions of the Gold (Control) Act and consequently the power to seize is not referable to the sovereign power of the State. In our judgment, the respondents were duty bound to return the gold ornaments.

3. Shri Desai submitted that as the gold ornaments seized from the petitioners were stolen, there is no compulsion under the Gold (Control) Act, to return the ornaments to the petitioners. The submission is only required to be stated to be rejected. It is not permissible for the respondents to retain the seized ornaments on a fallacious ground that there is no compulsion to return the ornaments. There is compulsion to return the seized articles when the adjudicating authority finds that seizure was on assumption which is not sustainable. In case the seized articles are not available for return, then the respondents are bound to refund the market value of the ornaments and the market value is to be ascertained with reference to the date on which the liability of the respondents arose to return the ornaments. In other words, the market value of the ornaments has to be ascertained as on the date when the Additional

Collector passed the order discharging the show-cause notice and was liable to return the ornaments.

It is also required to be stated that the return filed on behalf of the respondents does not indicate as to how the gold ornaments were stored, what reasonable precautions were taken to see that the gold ornaments will not be lost during the pendency of adjudication proceedings and when it was realised that the ornaments were lost and what steps were taken to realise the stolen ornaments. The return is entirely silent on this crucial aspect and, therefore, it is not clear as to whether the claim of theft of the gold ornaments is genuine or otherwise. In any event, as the respondents are claiming that the gold ornaments are lost, the respondents are bound to return the market value of the ornaments as prevailing on February 22, 1983, when the Additional Collector passed the order discharging the show-cause notice.

4. Shri Joshi submitted that the amount which the petitioners were entitled to was withheld by the respondents right from February 22, 1983 and, therefore, the respondents are bound to return the amount along with reasonable rate of interest".

12. Defending the impugned order, the learned counsel for the 1st respondent submits that a huge quantity of mixed scraps weighing about 297.06 Metric Tonnes could not have been lost on a single date. It is submitted that the premises itself was under the custody of the petitioner and that the petitioner was a custodian of the seized goods which were eventually confiscated. It is submitted that, even after confiscation was ordered, the petitioner exercised a lien over the goods on behalf of the 1st respondent and therefore the petitioner cannot take advantage of his own mistake. Under these circumstances, the learned counsel for the 1st respondent prayed for dismissal of the writ petition.

13. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent. The petitioner, a 100% Export Oriented Unit had imported 1914.256 metric tons of scrap under 77 Bills of Entry and had allegedly cleared the same in violation of Letter of Permission and In Bond Manufacturing License and that the imported goods did confirm to the description of the items allowed to be imported

by the petitioner as per the aforesaid Letter of Permission/In Bond Manufacturing License issued to the petitioner.

14. Therefore, benefit of Customs Notification No.53/97-Cus dated 3.6.1997 extended at the time of import of 1609.326 metric ton of scrap cleared under various bills of entry were sought to be denied to the petitioner. The petitioner was therefore called upon to pay an amount of Rs.1,64,80,526/-of 1156.326 Metric ton of scrap cleared under various Bills of Entry by the petitioner.

15. The show cause notice also called upon the petitioner to pay an amount of Rs.64,56,373/- being the proportionate duty on 453 metric tons of scrap that was lying in the petitioner's bonded premises when a Mazhazer dated 24.01.2003 was drawn.

16. The respondent Vide Order in Original No.2119/2004 denied the benefit of Notification No.53/97-Cus dated 3.6.1997 to the petitioner. The operative portion of the said order reads as under:

"78. In view of the above discussions, I pass the following order.

a) I hold the entire quantity of 1914.256 Mts of scrap to have been imported and cleared in violation of Letter of Permit/Legal Undertaking/In-boind-manufacturing, Licence/3-17 general-Bonds as these were found to be other than the items permitted under the Letter of Permit/Legal Undertaking/In-bond-manufacturing License/B-17 general Bonds and also noit accounted and used as per the terms and conditions of the notification;

b) I deny the benefit of Notification No.53/97 extended to a quantity of 1609.326 Mts imported under the subject bills of entry.

I demand duty amounting to Rs.1,64,80,526/- (Rupees One Crore sixty four lakhs eighty thousand five hundred twenty six only) on 1156.326 Mts of mixed metal scrap which was not levied on the imported goods, under proviso to section 28(1) of the Customs Act, 1962 along with the interest as applicable.

(d) I demand duty amounting to Rs.64,56,373/- (Rupees Sixty Four lakhs fifty six thousand three hundred and seventy three only) on 453 MT of scrap lying with SPK under Section 28 (1) of Customs Act, 1962.

e) I order confiscation quantity of 1609.326

MTs of scrap out of which 453 MTs has been seized, and the balance quantity not available for confiscating under Section 111(d)(j)(m) and (o) of the Customs Act, 1962. I order that SPK shall pay a fine of Rs.30,00,000/- (Rupees Thirty lakhs only) in lieu of confiscation in respect of 1156.326 MTs of scrap and a fine of Rs.10,00,000/- (Rupees ten lakhs only) in lieu of confiscation in respect of 453 MTs of mixed metal scrap under seizure. The option to pay fine in lieu of confiscation in respect of 453 MTs of scrap should be exercised within 30 days of the receipt of the order or within such extended period as may be allowed by the Assistant Commissioner/Deputy Commissioner, SHB, Custom House, Chennai.

f) The declared value of the goods at US\$89943.98, imported under the 6 Bills of Entry No.435919/26.10.2002, 452523, 452522, 452631, 452632 and 452633, all dated 02.01.2003 is rejected;

g) The declared value of the goods at US\$89943.98, imported under the 6 Bills of Entry No.43591/26.10.2002, 452523, 452522, 452631, 452632 and 452633, all dated 02.01.2003 is ordered to be fixed at US\$17123247 under Ruler 8 of CVR 1988.

h) In view of the mis-declaration of the value and description, I order confiscation of the goods, value of Rs.83,36,256/- (CIF) imported under the 6 Bills of Entry bearing Nos.4325919/26.10.2002, 452523, 452322, 452631, 452632 and 452633, all dated 02.01.2002 under Section 111(d)(n) & (o) of the Customs Act, 1962. However, the goods were allowed to be re-exported provisionally and are not available for confiscation. Therefore, I order enforcement of the bank guarantee executed for the purpose and adjustment of Rs.10 lakhs towards fine in lieu of confiscation.

i) I order confiscation of the goods valued at US\$ 181342.91 (CRF, consigned in 7 containers and imported under B/L Nos.2237NRC00864, 2237FRC00384, 2237NRC00888 & 870200101723 under Section 111 (d) (g) (m) (o) of the Customs Act, 1962. However, the goods were allowed to be re-exported provisionally and are not available for confiscation. Therefore, I order enforcement of

the bank guarantee executed for the purpose and adjustment of Rs.10 lakhs towards fine in lieu of confiscation.

j) I impose a penalty of Rs.10 lakhs (Rupees ten lakhs only) on Shri Saminathan and SPK jointly and severally under Section 112 (a) of the Customs Act, 1962.

k) I also impose a penalty of Rs.1,64,80,526/- (Rupees One Crore sixty four lakhs eighty thousand five hundred and twenty six only) on Shri Saminathan and SPK, jointly and severally, along with interest on the duty demanded, under Section 114 A of the Customs Act, 1962.

l) I impose a penalty of Rs.20,00/- on Shri Vijayan of M/s.Vaishnavi Metals, Chennai under Section 112(a) of the Customs Act, 1962.

m) I impose a penalty of Rs.20,000/- on Shri Venkatachalam under Section 112(a) of the Customs Act, 1962.

n) I impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) on Shri P.r.Venkataraj, the Chartered Engineer under Section 112(a) of the Customs Act, 1962.

o) I also impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) on M/s.Global Metals under Section 112(a) of the Customs Act, 1962 and order adjustment of the amount by enforcement of the bank guarantee executed at the time of re-export.

p) I impose a penalty of Rs.1,00,000/- (Rupees One lakh only) each on S/Shri Chandramohan Sahaney and Sri Mahesh Kumar of Delhi under Section 112(a) of the Customs Act, 1962.

17. The petitioner preferred an appeal against the said. In insofar as 453 metric tons is concerned, the CESTAT vide its Final Order No. 1152-1156/2006 dated 30.11.2006 held as under :-

9. The next point decided was whether the benefit of Notification No.53/1997-Cus dated 5.6.1997 could be extended to the entire quantity imported. The quantity imported was accepted as 1914.256 M.Ts and the stock available was 453 MTs. The Commissioner decided that the benefit of Notification was admissible only for a quantity of 304.93 M.Ts. which had been exported. A quantity

of 1156.326 M.Ts of scrap of value Rs.2,98,86,946/- was worked out at Rs.1,64,80,526/-. The above quantity was liable for confiscation under Section 111(d) as the same had been removed without following the procedure prescribed in Notification No.53/1997-Cus and provisions of the Customs Act. As the EOU had not segregated the scrap and had not exported the same, this quantity was liable for confiscation under Section 111(0) of the Customs Act.

10. As regards the stock of 453 M.Ts. available with the EOU, the adjudicating authority found that the EOU had not fulfilled the export obligation, especially, because export proceeds to the extent of US \$ 106113.95 was pending receipt and the value addition was admittedly 12.6% as against the fixed 20%. The imported material was not only cables, transformers and motors as allowed in the LOP but mixed metals. The Commissioner, accordingly worked out the duty due on 453 M.Ts. of scrap at Rs.64,66,373/- and on 1609.327 M.Ts. of scrap at Rs.2,29,36,899/- . For the transactions violating various provisions of the Customs Act, which rendered the goods liable to confiscation, the adjudicating authority penalized the EOU, S/Shri Saminathan, Thenkumaran, Selvam, Paulraj, employees of SPK., S/Shri Mahesh Kumar, Chandra Mohan and Sahney, scrap dealers in Delhi, Shri Vijayan Shri Venkatachalam, traders in Scrap and Shri Venkatraju, Chartered Engineer. He also found M/s. Global Metals liable for penalty under Section 112(a) for rendering the goods contained in 15 containers liable for confiscation.

11. In their appeal SPK submitted that as per LOP dated 16.11.2000, the appellants were permitted to import "worn" out goods/scrap like cables, transformers and motors for recovery of copper/brass scrap for export of copper scrap, brass scrap, aluminum scrap and zinc scrap after segregation. It was submitted that their imports had been cleared on 1st check basis after examination by the Chartered Engineer. The goods had been cleared based on the report of the Chartered Engineer and enhancements of value where necessary. They segregated waste from various metal scrap, sold iron and steel scrap locally on payment of duty and destroyed the waste in the

presence of Bond Officer. They imported 1914.25 M.Ts. of mixed metal scrap under 77 Bonds. They segregated and exported 661.23 tons copper and brass scrap and cleared 279.18 Mts. of iron and steel scrap for local sale and destroyed 161.37 Mts of wastage generated. There was a balance of 512 Mts of mixed scrap in stock and as the exports and DTA sales related to 59 bonds. As the stock available was 453 tons there was a shortage of 59 tons. The appellants could not clear the goods covered by six Bills of Entry and goods contained in another 7 containers owing to financial difficulties. M/s.Global Metals, the supplier of the scrap consignments approached the High Court for permitting it to re-export the material. The High Court of Madras directed the department to complete the investigation and to decide their representation. In response to the SCN, the appellants had submitted that being a EOU they had no need to under declare the value and that London Metal Exchange price could not be adopted to assess the scrap metal imported by them as the LME price related to individual metal scrap. During the cross examination, Shri Vijayan and Shri Venkatachalam, local dealers had deposed that they had given admission statement initially to the effect that they had purchased copper and brass scrap from the appellants due to fear. Shri Sathaymurthy, Bond Officer had confirmed that waste/rubbish arose was destroyed in his presence by the Company and necessarily certificate issued. It was claimed that allegation of diversion of imported material was based on statements and presumptions. They had maintained clear records showing the receipts, disposal, export and balance. In the grounds of appeal the appellants alleged that the finding in the impugned order that 1136.326 M.Ts. of scrap had been cleared in the DTA had been arrived at on the basis of alleged Stuffing Report, Railway Receipts, etc. and the statements reported to have been made by transporters at Delhi. The appellants alleged that the Stuffing Report, Railway Receipt, etc. were records maintained by third parties not connected with them and appellants had maintained statutory records, certified by the Bond Officer. The transport documents showed lifting of scrap consignments from Valasaravakkam and there were other units dealing in scrap at Valasaravakkam. There was no concrete evidence linking the

appellants with those scraps consignments sent to Delhi. The load sheets for transport of scrap consignments did not show the address of the appellants. The scrap buyers Shri Mahesh Kumar, Shri Chandra Mohan and Shri Sahney, all of Delhi denied receiving any scrap from the appellants. Searchers of their premises did not yield any incriminating documents. This showed that they had not purchased any scrap from the appellants. The appellant as well as alleged buyers of scrap denied despatch and receipt of the goods respectively and there were no incriminating evidence to show that despatch or receipt of any piece of scrap. Therefore, the impugned order should not have been based on the statements of intermediaries. The investigating authorities had not confronted the alleged buyers. The fact of telephone calls originating from the appellants alone did not establish anything in the absence of evidence of contents of the conversation. The local dealers of the scrap denied purchasing scrap from the appellants. The Commissioner had attributed denial of receipt of goods by Delhi dealers to their fear of action from Sales tax and Income Tax authorities. This was a needless presumption and observation. Therefore, the finding that there was evidence to suggest that 1136.327 M.Ts. had been diverted for local sales was without substance; that there were no documents to show that 279.18 Tonnes of steel scrap had been sold did not prove that such sales had not taken place. The Chartered Engineer during inspection and officers during the visit of the factory had seen iron and steel scraps. They had cleared iron and steel scrap on payment of proper duty with the approval of the Department.

12. It was submitted that when goods which were to be exported were cleared in DTA without prior approval, duty had to be demanded without invoking proviso to Section 3 of the Central Excise Act, 1944. Thus duty payable on such scrap would not be Customs duty but the duty applicable in terms of Section 3 of the Central Excise Act, 1944. Therefore, the impugned order was erroneous. In this regard, the appellants relied on the case law Sam Spin Tex and Others Vs. CCE [2004 (112) ECR715] wherein it was held that when an EOU removed goods to DTA without proper authority,

what was to be charged would be excise duty and not customs duty. It was submitted that comparing the contents of the 15 containers to determine the waste in respect of the previous imports was unsustainable as no two scrap consignments were alike. The Bond Officer witnessed the destruction of wastage and confirmed the same. It would be illogical to ignore the deposition by the Bond Officer and to prefer the statements of employees. It was not necessary to destroy the waste by way of hammering it. If the waste was paper, 22 M.Ts. of waste could be destroyed in a matter of a few hours. It was submitted that the supplier had supplied scrap with higher waste contents. The finding of the adjudicating authority that 661.239 tonnes had not been exported and only 304.929 tonnes had been exported was erroneous and legally unsustainable. The Shipping Bills as well as invoices duly assessed and processed and also Bills of Lading issued by shipping agency showed the export of 661.239 Tonnes of segregated scrap. This fact could not be brushed aside. Statutory records could not be ignored and private records of uncertain value preferred. Citing the Board's Circular No.21/95-Cus. Dated 10.3.95, the appellants claimed that if the EOU became liable to pay duty for failure to fulfil any condition of Notification No.13/81 dated 9.2.81, the Board of Approval or Development Commissioner concerned had to determine that the unit had failed to export the fixed percentage of articles for the specified period and that the conditions of the exemption Notifications had been violated. At this stage the department could issue notice to the EOU. As per this Circular the duty due should be confirmed only after a definite conclusion had been arrived at by the Development Commissioner as regards non fulfilment of export obligation etc. Therefore, the denial of the benefit of Notification No.53/91-Cus dated 3.6.97 was not in order. The quantity of 453 tonnes scrap was still in the bonded warehouse and therefore the demand of duty on the bonded goods was incorrect. It was reiterated that the certificate issued by the Bond Officer and the records maintained by the EOU showed that imported scraps had been properly accounted for. Statutory records could not be thrown out giving preference to unauthenticated private records as well as third party statements. The adjudicating authority had not relied on

concrete evidence to contradict the statutory records of the EOU. Therefore the finding of liability to confiscation of 1156.367 M.Ts. and 453 MTs. of scrap and imposition of Rs.30 lakhs fine and Rs.10 lakhs find respectively were incorrect. As regards 453 M.Ts., the orders were premature and illegal. The penalty of Rs.10 lakhs and Rs.1,64,80,526/- jointly and separately under Section 114A and 112(a) on SPK and Sh.Saminathan were unwarranted and arbitrary.

18. It is out of the 453 metric tons of scrap about 297.06 metric ton of scrap which had apparently gone missing for which the petitioner is seeking compensation and interest in this writ petition.

19. From a reading of the Final Order No. 1152-1156/2006 dated 30.11.2006 of the CESTAT, it appears that the petitioner had taken a stand that the 453 metric tons was still available and there was a shortage of only 59 metric tons even though much water had flown before the Final Order No.1152-1156/2006 dated 30.11.2006.

20. It was incumbent on the part of the petitioner to have brought to the Notice of the CESTAT that apart from 53 metric tons of imported scrap which missing, 297.06 metric ton out of 453 metric tons of the seized and confiscated had gone missing during the pendency of the appeal before the Tribunal. Instead, the petitioner suppressed these facts and has later filed an application for compensation before the respondent.

21. It must be also recalled that, on the date of the Mahazer (24.1.2003), the Managing Partner of the petitioner was informed to not to deal with the seized goods except with the prior written permission of the Special Investigation and Intelligence Branch of the Customs Department. The market value of the seized goods was estimated to be approximately 3 crores on the date of the seizure.

22. The seized quantity of the scrap was allegedly in the custody of the petitioner at the petitioner's premises between 3.12.2002 and 28.12.2002 when the petitioner's premises was inspected on a suspicion that about 59 metric tons of bonded goods had been allegedly diverted into the local market without payment of Customs duty by the petitioner and therefore a seizure was effected on 24.1.2003. It is not clear when the

seized goods went missing.

23. The writ petition that was earlier filed before this court in W.P.No.26948 of 2008 which came to be disposed by an order dated 27.4.2010 was also belated with a view to resurrect a stale claim for compensation and perhaps to stave off liability. The present writ petition challenging the Order in Original No.12417 of 2010 dated 15.7.2010 of the respondent for the relief for compensation is for the alleged loss even otherwise hopelessly time-barred.

24. Therefore the finding arrived the CESTAT as far as the quantity are concerned are not conclusive especially when a party who seeks compensation on the ground that out of the seized quantity of 453 metric tons of imported scrap, 297.06 metric ton of scrap was missing before the said order was passed.

25. There is a doubt as to the exact quantity of goods that were seized. As the quantity was arrived based on the documents and not on physical verification, the value of seized quantity cannot taken a final. On one hand, the customs department had alleged that there were large-scale diversion, on the other hand, the petitioner had denied the same as it is evident from reading of the extracted passages from Final Order No.1150-1156 of 2006 dated 13.11.2006 of the CESTAT.

26. Further, a demand notice dated 6.11.2007 was issued to the petitioner by the Asst.Commissioner of Customs (Bonds) seeking to demand a sum of Rs.42,33,841/- being the proportionate customs duty on 297.06 MT of out of the seized quantity of imported metal scraps which was allegedly lost from the bonded premises of the petitioner.

27. An appeal against the said order dated 3.12.2007 of the Assistant Commissioner of Customs (Bonds) confirming the demand proposed notice dated 6.11.2007 is said to be still pending before the Commissioner of Customs (Appeals). The details of the said appeals have not been furnished either by the petitioner or by the respondent.

28. Further, petitioner became the bailee of the seized goods and therefore the seized/confiscated quantity continued to be in the custody of the petitioner from the date of the seizure. The petitioner continued to be the bailee of the seized goods till it was ordered to be confiscated by the respondent

vide Order in Original No.2119 of 2004 dated 20.4.2004 and thereafter.

29. Though, as per Section 126 of the Customs Act, 1972 once the goods are ordered to be confiscated, the property in such confiscated goods stand vested with the Central Government and the officer adjudging shall take possession of the confiscated goods, the respondent had not taken possession of the quantity.

30. From the facts of the case, it is also not clear as to when the alleged theft had taken place. It appears that the lock and key of the bonded premises was with the petitioner. The petitioner was the custodian of the seized and confiscated quantity. The investigation caused by the Judicial Magistrate also records that RC's Final Report had been received from the police treating the case as undetected. The insurer has also dis owned the liability.

31. Further, the petitioner preferred an appeal Vide C/262 to 266 of 2004 and C/251 and 252 of 2004 against the Order in Original No.2119 of 2004 of the first respondent confiscating the seized goods.

32. It should be remembered that the authorities acting under the provisions of the Customs Act, 1962 are not covered by strict rules of evidence. They go by preponderance of probability based on the available records. In this case, the seizure was effected on 24.1.2003. It was not based on the actual weighing of the scarp that was available at the petitioner's Licensed and In Bond Manufacturing premises. The calculation was based on the value cleared and sold to third parties in breach of the conditions of import and In Bond manufacturing facilities of the petitioner. The quantum of 453 M.Ts. was arrived based on the documents and not on physical measurement.

33. In my view, the petitioner has not made out of the case for interference with the impugned Order in Original No.12417 of 2010 dated 15.7.2010 passed by the respondent. The control over the warehouse was with the petitioner. It should be also recalled that earlier, the bonded warehouses of 100% Export Oriented Units were a physical control of the Department. However, after 1998 the physical control was removed and therefore the responsibility of safe keeping of imported goods was with the petitioner.

34. As the respondent had not taken physical control of the seized quantity and that seized quantity which was ordered to be confiscated continued to be in possession of the petitioner, petitioner was responsible for the loss of such seized/confiscated goods. In any event, as mentioned above the jurisdiction of this court under Article 226 of the Constitution

of India cannot be abused by converting it into a Civil Court to order compensation for the alleged loss with recording of evidence.

35. A Writ Court cannot be converted into a Civil Court to determine disputed question of facts and the extent of compensation to be paid to the petitioner. To claim compensation for the alleged loss suffered by the petitioner, a proper trial and recording of evidence is a sine-qua non and it is only thereafter a Court can order compensation to the plaintiff. A writ Court under article 226 of the Constitution of India is not competent to decide such disputed questions of facts. The petitioner should have therefore filed a civil suit in the first instance instead of inviting an order from the respondent in the impugned Order No Original 12417 of 2010 dated 15.7.2010 by filing W.P.No.26948 of 2008.

36. Even otherwise, seized/confiscated goods were allegedly lost during 2005. Therefore, it was incumbent on the part of the petitioner to have filed a suit within the period of limitation prescribed in the Limitation Act. Instead, the petitioner merely proceeded to lodge a private complaint which culminated in an FIR No.732 of 2005 dated 11.7.2005 of the Judicial Magistrate Court No.1 which was eventually closed by the Judicial Magistrate based on the report of the police on 24.11.2006.

37. Further, the respondent had given an option to the petitioner to pay redemption fine under section 125 (1) of the Customs Act, 62 while passing Order in Original No.2119 of 2004 dated 20.04.2004. It was open for the petitioner to pay the redemption fine and agitate the issue before the Tribunal questioning the imposition of such redemption fine on the petitioner.

38. Under these circumstances, I find no merits in the present writ petition. Accordingly, the present writ petition is liable to be dismissed and is hereby dismissed. No cost.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kkd

To

The Commissioner of Customs (Seaport-Export),
Custom House,
No.60, Rajaji Salai,
Chennai 600 001.

+1 cc to M/s.S.Murugappan, Advocate Sr.No. 6917
+1 cc to M/s.Hema Muralikrishnan, Advocate Sr.No. 6922

W.P.No.17003 of 2018

VSNI (CO)
RMP (01/03/2021)



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