IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 10.08.2023	Pronounced on: 19.02.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.6734 of 2022

Rayavarapu Sri Devi. ... Petitioner

Vs.

1. The Principal Commissioner of Customs (Adjudciation-Air),
   Chennai I Commissionerate,
   New Custom House,
   Meenambakkam,
   Chennai – 600 027.

2. The Joint Commissioner of Customs (Adjudciation-Air),
   Chennai I Commissionerate,
   New Custom House,
   Meenambakkam,
   Chennai – 600 027.

3. The Principal Commissioner (RA) &
   Ex-Officio Additional Secretary to the Government of India,
   8th Floor, Centre-1,
   World Trade Centre,
   Cuffe Parade,
   Mumbai – 400 005. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the Impugned Order No.282-283/2021-CUS (SZ)/ASRA dated 25.10.2021 in F.No.373/272/B/2020-RA/6218 and in F.No.380/56/B/SZ/2020-RA/6218 passed by the third respondent and quash the same and direct the second respondent to return the foreign currency of USD 67600 to the petitioner.

For Petitioner : Mr.Hari Radhakrishnan

For Respondents : Mr.K.S.Ramaswamy
Central Government Standing Counsel

ORDER

I have considered the arguments advanced by the learned counsel for the petitioner and the learned Central Government Standing Counsel for the respondents.

2. I have also perused the Impugned Orders dated 25.10.2021 passed by the third respondent as a revisional authority under the provisions of the Customs Act, 1962.

3. This writ petition has been filed to quash the Impugned Order dated 25.10.2021 passed by the third respondent respondents under Section 129DD of the Customs Act, 1962.

4. The aforesaid order was passed pursuant to a Revision Petition filed by the Principal Commissioner of Customs (Adjudication-Air), Chennai I Commissionerate, the first respondent herein against the Order – in – Appeal Airport. Cus. I No.206 of 2020 (F.No.C4/I/99/O/2020-AIR) dated 20.08.2020 of the Commissioner of Customs (Appeals-I), Chennai.

5. By the Impugned Order, the third respondent has accepted the Revision Petition filed by the first respondent herein against the order of the aforesaid Order of the Commissioner of Customs (Appeals-I), Chennai.

6. Operative portion of the Impugned Order reads as under:-

> "*15. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.*
>
> *71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be*

based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper, and such discemment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

16. The Government finds that the appellate authority has allowed to redeem the foreign currency on payment of redemption fine of Rs. 4,00,000/- under Section 125 of the Customs Act, 1962 which was ordered to be paid within120 days of the communication of the Order. Also, the personal Penalty of Rs. 5,00,000/-imposed under Section 114 of the Customs Act, 1962 was reduced to Rs. 3,25,000/-. Considering that such huge amount of currency was being carried concealed in the bags, currency remained unaccountable, none of differing versions of sourcing currency were found true, thus discretion used by Commissioner (Appeals) to allow redemption of prohibited goods was inappropriate. Facts and circumstances of the case warrants absolute confiscation of foreign *currency as held by the adjudicating authority. The reduced personal penalty is reasonable and judicious. Government therefore finds no reason to interfere in the penalty imposed by the appellate authority.*

17. Accordingly, the revision application no. 373/272/B/2020-RA filed by the applicant and the revision application no. 380/56/B/SZ/2020-RA filed by applicant department are decided on above terms."

7. Earlier the petitioner herein had suffered an adverse order in the hands of the second respondent vide Order-in-Original No.61/2020-2021-Commissionerate-1 dated 08.06.2020 of the second respondent.

8. By the aforesaid order, the proposals contained in Show Cause Notice dated 21.10.2019 bearing reference:O.S.No.40/2019-INT-AIR issued under Section 124 of the Customs Act, 1962 was confirmed.

9. The petitioner herein had partly succeeded before the Commissioner of Customs (Appeals-I), Chennai by Order – in – Appeal Airport. Cus. I No.206 of 2020 (F.No.C4/I/99/O/2020-AIR) dated 20.08.2020.

10. The Commissioner of Customs (Appeals-I) partly modified Orde - in - Original No.61/2020-2021-Commissionerate-1 dated 08.06.2020 of the second respondent by holding that the petitioner was entitled for redemption of the currency seized from the person of the petitioner on payment of redemption fine.

11. Operative portion of the Order-in-Original No.61/2020-2021-Commissionerate-1 dated 08.06.2020 reads as under:-

"*18. Considering the above facts, I pass the following order:-*

ORDER

i. *I order for absolute confiscation of the seized foreign currency equivalent to Indian Rs.46,44,120/- (Rupees Forty Six Lakhs Forty Four Thousand one Hundred and Twenty Only) under Section 113 (d), 113 (e) & 113 (h) of the Customs Act, 1962 read with FEM (Export and Import of Currency) Regulations, 2015.*
ii. *I impose a penalty of Rs.5,00,000/-(Rupees Five Lakh Only) on the passenger, Smt. Rayavarapu Sridevi w/o Shri.E.Subramaniam under Section 114 of the Customs Act, 1962."*

12. Operative portion of the Order – in – Appeal Airport, Cus.I No.206/2020 dated 20.08.2020 of the Commissioner of Customs (Appeals-I) reads as under:-

> "*11. Having regard to the above discussions, the pax's request for redemption of currency is considered under Sec.125 of the Customs Act as it as it is not a prohibited item and it is evident that the currency belonged to the pax. It was also pleaded in the appeal in the light of Tribunal judgement in* ***Philip Fernandes Vs Commr. Of Customs*** *[2002(146) ELT 180 Tri. Bom] to impose lesser fine and penalty while allowing redemption of foreign currency. Imposition of fine and penalty is on the basis of circumstances, Hon'ble Supreme Court in the case of M/s. Mansi Impex, 2011(270) ELT 631(SC) has held that there was no universal rule in imposition of fine and penalty. The seized foreign currency of value Rs. 46,44,120/- is allowed to be redeemed payment of fine of Rs. 4,00,000/- (Rupees Four lakhs only) under Sec. 125 Customs Act, 1962 within 120 days of the communication of this order. The Hon'ble Supreme Court in the case of Zunjarrao Bhikaji Nagarkar Vs Union of India [1999 (112) E.L.T. 772 (S.C.)], has held that* ***Penalty to be imposed has to be in commensurate with the gravity of the offence and the extent of the evasion****. Accordingly, I reduce the personal penalty from Rs. 5,00,000/- to Rs. 3,25,000/- (Rupees three lakhs twenty five thousand only). In my considered opinion this would meet both ends of justice.*
>
> *11. The adjudicating authority's order is modified to the above extent and the appeal is allowed with the above terms.*
>
> *Ordered accordingly.*"

13. The facts are not in dispute. The only issue that arises for consideration is whether the confiscation of foreign currency valued at Rs.46,44,120/- (676 US $) carried by the petitioner in person which was seized and ordered to be confiscated is justified or not under the provisions of the Customs Act, 1962.

14. Vide Order-in-Original No.61/2022 dated 08.06.2020, the second respondent had earlier ordered absolute confiscation of the currency seized from the person of the petitioner on 24.05.2019 at the time when the petitioner was proceeding to Board Air Craft bound to Kuala Lumpur, Malaysia.

15. The confiscation was ordered under Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 read with the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015. When seizure was ordered on 24.05.2019, Section 11 of the Customs Act, 1962 had been amended vide Section 59 of the Finance Act, 2018 (Act 13 of 2018) on 29.03.2018.

16. Section 11 of the Customs Act, 1962 is in Chapter IV of the Customs Act, 1962. It deals with "Prohibition on Importation and Exportation of Goods". Section 11(1) of the Customs Act, 1962, empowers the Central Government to prohibit import and export of goods either absolutely or subject to such Notification for any of the purpose specified in Sub-Section (2). Sub-Section (2) to Section 11 of the Customs Act, 1962 reads as under:-

Section 11. Power to prohibit importation or exportation of goods	
(1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.	(2) The purposes referred to in sub-section (1) are the following:—
	(a)the maintenance of the security of India; (b) the maintenance of public order and standards of decency or morality; (c) the prevention of smuggling; (d) the prevention of shortage of goods of any description; (e) the conservation of foreign exchange and the safeguarding of balance of payments; (f) the prevention of injury to the

	economy of the country by the uncontrolled import or export of gold or silver; (g) the prevention of surplus of any agricultural product or the product of fisheries; (h) the maintenance of standards for the classification, grading or marketing of goods in international trade; (i) the establishment of any industry; (j) the prevention of serious injury to domestic production of goods of any description; (k) the protection of human, animal or plant life or health; (l) the protection of national treasures of artistic, historic or archaeological value; (m) the conservation of exhaustible natural resources; (n) the protection of patents, trademarks [copyrights, designs and geographical indications]; (o) the prevention of deceptive practices; (p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India; (q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security; (r) the implementation of any treaty, agreement or convention with any country; (s) the compliance of imported goods with any laws which are

	applicable to similar goods produced or manufactured in India; (t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige; (u) the prevention of the contravention of any law for the time being in force; and (v) any other purpose conducive to the interests of the general public.”

17. As per Section 59 of the Finance Act, 2018 (Act 13 of 2018), Sub-Section (3) to Section 11 of the Customs Act, 1962 shall be inserted with effect from such date as the Central Government may, by notification in the Official Gazette, appoint Section 11(3) of the Customs Act, 1962.

18. Sub-Section (3) to Section 11 of the Customs Act, 1962 and Section 59 of the Finance Act, 1959 reads as under:-

Section 11(3) of the Customs Act, 1962	***Section 59 of the Finance Act, 1959***
11(3) Any prohibition or restriction or obligation relating to import or export of any goods or class of goods or clearance thereof provided in any other law for the time being in force, or any rule or regulation made or any order or notification issued	*59.In the Customs Act, in section 11, after sub-section (2), the following sub-section shall be inserted with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, namely:-*

thereunder, shall be executed under the provisions of that Act only if such prohibition or restriction or obligation is notified under the provisions of this Act, subject to such exceptions, modifications or adaptations as the Central Government deems fit.	*"(3) Any prohibition or restriction or obligation relating to import or export of any goods or class of goods or clearance thereof provided in any other law for the time being in force, or any rule or regulation made or any order or notification issued thereunder, shall be executed under the provisions of that Act only if such prohibition or restriction or obligation is notified under the provisions of this Act, subject to such exceptions, modifications or adaptations as the Central Government deems fit.".*

19. Section 11(3) of the Customs Act, 1962 was inserted by Section 59 of the Finance Act, 2018 (Act 13 of 2018) on 29.03.2018. However, Section 11(3) of the Customs Act, 1962 as inserted by Section 59 of the Finance Act, 2018 (Act 13 of 2018) on 29.03.2018 is yet to be notified.

20. The Appellate Commissioner had modified the Order-in-Original No.61/2020-21 dated 08.06.2020 vide Order-in-Appeal Airport.Cus.I.No.206 of 2020 by allowing redemption under Section 125 of the Customs Act, 1962 on payment of redemption fine of

Rs.4,00,000/-. The Appellate Commissioner also reduced the penalty imposed under Section 114 of the Customs Act, 1962 to Rs.3,25,000/- from Rs.5,00,000/-.

21. If Section 11(3) of the Customs Act, 1962 as inserted by Section 59 of the Finance Act, 2018 (Act 13 of 2018) on 29.03.2018 had been notified by the Central Government, any prohibition or restriction or obligation relating to import or export of any goods or class of goods or clearance thereof provided in any other law for the time being in force, or any rule or regulation made or any order or notification issued thereunder could be executed under the provisions of that Act only if such prohibition or restriction or obligation is notified under the provisions of Customs Act, 1962 subject to such exceptions, modifications or adaptations as the Central Government deems fit.

22. There are no notifications issued under Sub-Section 11(3) of the Customs Act, 1962 which has been brought to the attention of this Court under which there is a corresponding prohibition and/or restriction for import of currency.

23. As per Section 11-I of the Customs Act, 1962, having regard to the magnitude of illegal export of goods of any class or description, the Central Government may issue Notification to prevent "illegal export" of such goods. As per Section 11 H (a) of the Customs Act, 1962, illegal export means, export of any goods in contravention of the provisions of the Customs Act, 1962 or any other law for the time being in force.

24. There are no notifications issued under Section 11-I of the Customs Act, 1962. Under Section 113(d) of the Customs Act, 1962 any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force shall be liable for confiscation.

25. Section 113(d) of the Customs Act, 1962 reads as under:-

> "*any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force*"

26. The definition "goods" in Section 2(22) (d) of the Customs Act, 1962 includes "currency and negotiable instruments". Section 2(33) of the Customs Act, 1962 defines the expression "prohibited goods".

27. As per the definition of "prohibited goods" in Section 2(33) of the Customs Act, 1962, prohibited goods? means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

28. Section 2(22)(d) and Section 2(33) of the Customs Act, 1962 read as under:-

Section 2(22) (d) of the Customs Act, 1962	***Section 2(33) of the Customs Act, 1962***
2(22) "goods" includes- *(a)* *(b)* *(c)* *(d) currency and negotiable instruments;*	*2(33)-prohibited goods? means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;*

29. Under Regulations 5 and 6 of The Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, there is non prohibition on export and import of foreign currency. Regulations 5 and 6 of The Foreign Exchange Management (Export and Import of

Currency) Regulations, 2015 reads as under:-

***5. Prohibition on export and import of foreign currency**:-*	***6. Import of foreign exchange into India**:-*
Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.	*A person may –* *(a)send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques;* *(b)bring into India from any place outside India without limit foreign exchange (other than unissued notes),* *provided that bringing of foreign exchange into India under clause (b) shall be subject to the condition that such person makes, on arrival in India, a declaration to the Custom authorities in Currency Declaration Form (CDF) annexed to these Regulations;* *provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time does not exceed US$10,000 (US Dollars ten thousands) or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at any one time does*

	not exceed US$ 5,000 (US Dollars five thousands) or its equivalent."

30. Under Regulation 7(3)(b) of The Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 any person may take out of India unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015.

31. Regulation 7(3)(b) of The Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 reads as under:-

> "***7. Export of foreign exchange and currency notes:-***
>
> *(3) Any person may take out of India, -*
>
> *(b) unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015;"*

32. The Reserve Bank of India has issued A.P.(DIR Series) Circular No.45/2015-16 [(1)/6(R)] dated 04.02.2016. Relevant portion of A.P.(DIR Series) Circular No.45/2015-16 [(1)/6(R)] dated 04.02.2016 reads as under:-

“2. Synopsis of the new regulations is given as under:

A. Export and import of Indian currency and currency notes

b) Any person resident outside India, not being a citizen of Pakistan or Bangladesh, and visiting India,

- *i. may take outside India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person*
- *ii. may bring into India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 (Rupees Twenty Five Thousand only) per person*

C. Export of Foreign Exchange and Currency Notes

- *i. An authorised person may send out of India foreign currency acquired in normal course of business,*
- *ii. any person may take or send out of India, -*

- *a) Cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000;*
- *b) foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or the rules or regulations or directions made or issued*

thereunder;

c) currency in the safes of vessels or aircrafts which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank;

iii. any person may take out of India, -

a) foreign exchange possessed by him in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 ;

b) unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 ;

iv. any person resident outside India may take out of India unspent foreign exchange not exceeding the amount brought in by him and declared in Currency Declaration Form (CDF).

33. Only an authorised person is entitled to send foreign currency acquired in the normal course of business. Any person other than the authorised person may send out of Indian Foreign Exchange obtained by drawl from an authorised person in accordance with the provisions of the Act or Rules or direction made or issued thereunder.

34. Foreign Trade (Development and Regulation) Act, 1992 r/w Foreign Trade (Regulation) Rules, 1993 read with The Foreign Trade Policy 2015-2020 and the provisions of the Foreign Exchange Management Act, 1999 read with The Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 thus contain restriction on import and export of foreign currency.

35. Section 125 of the Customs Act, 1962 gives a discretion to the Adjudicating Authority to impose fine in lieu of confiscation. There is no doubt that the currency that was attempted to be exported out of country without proper declaration by the petitioner was liable for the confiscation under the provisions of the Customs Act, 1962 and the provisions of the regulations mentioned above framed under the provisions of the Foreign Exchange Management Act, 1999.

36. Therefore, without doubt, it is clear that import or export of foreign currency is prohibited if it is in contradiction of the above Regulation.

37. If import or export of “goods” is prohibited either under the provisions of the Customs Act, 1962, or under any other law time being

in force, such goods can be ordered to be confiscated under Section 112 & Section 113 of the Customs Act, 1962.

38. Under Section 114 of the Customs Act, 1962, penalty can also be imposed for attempting to export goods improperly. Section 113 and Section 114 of the Customs Act, 1962 go hand in hand. They read as under:-

Section 113 of the Customs Act, 1962	***Section 114 of the Customs Act, 1962***
113. Confiscation of goods attempted to be improperly exported, etc:- *The following export goods shall be liable to confiscation:-* *a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;* *b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;* *c) any [***] goods brought near the land frontier or the coast of India or near any bay, gulf, creek creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;* *d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to*	***114. Penalty for attempt to export goods improperly, etc.***—*Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable:-* *i. in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 5 [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act], whichever is the greater;* *ii. in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or*

any prohibition imposed by or under this Act or any other law for the time being in force; *e) any [***] goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;* *f) any [***] goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;* *g) any [***] goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;* *h) any [***] goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;* *i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;]* *[(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;]* *j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;* *k) any goods cleared for exportation 3 *** which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;*	*five thousand rupees, whichever is higher:* *Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]* *iii. in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]*

l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.	

39. Sub clause (d) to Section 112 of the Customs Act, 1962 clearly attracted in the facts of the case.

40. However, under Section 125 of the Customs Act, 1962, discretion is vested with the Assessing Officer to release the goods on payment of redemption time. Section 125 of the Customs Act, 1962 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 4 [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 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.
***Explanation**.—For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received."*

41. The Hon'ble Supreme Court in **Union of India Vs. Raj Grow Impex LLP**, 2021 (377) E.L.T. 145 (S.C.), held that when export or import have a far reaching impact on the national economy. Therefore, discretion under Section 125 of the Customs Act, 1962 needs to be exercised with caution. Paragraph No.82 of the said judgment reads as

under:-

> "*82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers.* ***This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter****. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.*"

42. The language of Section 125 of the Customs Act, 1962 is ambiguous in a limited way.

43. The use of the word "shall" after the word "and" creates

confusion. The syntax/construction appears to be faulty. Instead if the word “shall” is shifted after the word “goods” and it would give a correct meaning.

44. However, as mentioned above the Hon’ble Supreme Court has clarified the scope of Section 125 of the Customs Act, 1962 in **Union of India** vs. **Raj Grow Impex LLT**, 2021 (377) E.L.T. 145 (S.C.).

45. For the sake of clarity Section 125(1) of the Customs Act, 1962 can be understood by shuffling the word “**shall**” after the word “**and**” in the second column as follows:-

Section 125(1) of the Customs Act, 1962 reads as under:-	**Section 125(1) of the Customs Act, 1962 shall be read as follows:-**
125(1) Option to pay fine in lieu of confiscation- *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*	***125(1) Option to pay fine in lieu of confiscation-*** *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:*	*under this Act or under any other law for the time being in force, and,**(*)** in the case of any other goods, **(shall)** 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:*

(*) The word "shall" shifted.

46. Thus, discretion is to be exercised by the Adjudicating Officer under Section 125 of the Customs Act, 1962, to allow redemption of prohibited goods of payment of redemption fine. The Appellate Commissioner has modified by giving an option to the petitioner to pay redemption fine and has reduced the penalty. Although the Central Government is empowered to file revision to modify any order of the Appellate Commissioner, I find the discretion was properly exercised while modifying Order-in-Original No.61/2020-2021-Commissionerate-1 dated 08.06.2020 by the Appellate Commissioner vide Order-in-Appeal Airport.Cus.I No.206 of 2020(F.No.C4/I/99/O/2020-AIR) dated 20.08.2020 while ordering reduced penalty and release of the currency on payment of redemption fine. Unless the discretion was wrongly executed

by the Appellate Commissioner, while passing Order dated Order-in-Appeal Airport.Cus.I No.206 of 2020(F.No.C4/I/99/O/2020-AIR) dated 20.08.2020, such exercise of discretion cannot be disturbed under Section 129DD of the Customs Act, 1962.

47. Therefore, the seized currency ordered to be confiscated under the provisions of the Customs Act, 1962 in view of Section 113(d), 113(e) & 113(h) of the Customs Act, 1962 is directed to be released subject to the petitioner paying the redemption fine and penalty imposed by the Commissioner of Customs (Appeals-I) vide Order dated Order-in-Appeal Airport.Cus.I No.206 of 2020(F.No.C4/I/99/O/2020-AIR) dated 20.08.2020 within a period of thirty (30) days from the date of receipt of a copy of this order.

48. In the result, this writ petition stands allowed with the above observation. No costs.

19.02.2024

Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No
kkd/krk/rgm

To

1. The Principal Commissioner of Customs (Adjudciation-Air),
   Chennai I Commissionerate,
   New Custom House,
   Meenambakkam,
   Chennai – 600 027.

2. The Joint Commissioner of Customs (Adjudciation-Air),
   Chennai I Commissionerate,
   New Custom House,
   Meenambakkam,
   Chennai – 600 027.

3. The Principal Commissioner (RA) &
   Ex-Officio Additional Secretary to the Government of India,
   8th Floor, Centre-1,
   World Trade Centre,
   Cuffe Parade,
   Mumbai – 400 005.

C.SARAVANAN, J.

kkd/krk/rgm

W.P.No.6734 of 2022

19.02.2024