09.06.2025
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Sl. No. 05
ML
Ct. No. 05

WPA 2121 of 2025

Sunil Kumar Patwari
Vs.
The Additional Commissioner, Airport & Air Cargo Complex, NSCBI, Airport & ors.

Mr. Biswajit Mukherjee
Mr. Sandip Choraria
Mr. Sukalpa Seal
Mr. Rishav Manna
Mr. Akash Chakraborty
.... for the petitioner
Mr. Shiv Shankar Banerjee
Mr. Tapan Bhanja
..... for the Customs Authority
Mr. Srijib Chakraborty
Mr. Amal Kumar Datta
....for the UOI

1. Challenging, *inter alia,* the show-cause notice dated 13th September, 2019 passed by the Additional Directorate of Revenue Intelligence, Delhi Zonal Unit, and the order in appeal dated 15th October, 2024 passed by the Commissioner of Customs (appeals), Kolkata, the instant writ petition has been filed.

2. Mr. Mukherjee, learned senior advocate representing the petitioner by drawing attention of this Court to the paragraph 36 of the show-cause would submit that it is an admitted position that M/s Reach Infocom Technology Pvt. Ltd. (hereinafter referred to as the "importer") is a regular importer of Mobile phone and laptop of Reach brand from China. It is also an admitted position that the importer had paid Countervailing Duty (CVD) on the RSP/MRP, less abatement, as declared by them in the Bills of Entry filed before the Customs Authorities at the time of importation. However, at a later stage, after clearance from Customs, the

MRP stickers of such goods were replaced with the stickers having higher MRP and the said goods were sold to ultimate customers at a higher MRP. On the basis of the above allegations, the petitioner including the other directors of the importer were called up to show-cause as to why:

(i) The goods having total assessable value of Rs. 3,44,550/- imported under Bills of Entry as detailed in "Annexure-III" to this notice and seized vide seizure memo dated 24.05.2019, should not confiscated under Section 111(m) of the Customs Act, 1962;

(ii) The revised/changed RSP, as mentioned in "Annexure-III" to this Notice, should not be taken as the correct RSP for assessment of Additional Duties of Customs payable thereon in terms of Section 3 of the Customs Tariff Act, 1975 read with Section 4A of the Central Excise Act, 1944 and the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008;

(iii) In case, redemption of above confiscated goods is allowed under Section 125 of the Customs Act, 1962, differential duty amounting to Rs. 15,648/- (Rupees Fifteen Thousand Six Hundred and Forty Eight only), as detailed in "Annexure-III", should not be demanded and recovered in terms of the provisions of Section 125(2) of the Customs Act, 1962 read with Section 28(4) of the Customs Act, 1962 along with applicable interest under the provisions of Section 28AA of the Customs Act, 1962;

(iv) Penalty under Section 112(a)(ii) and Section 114AA of the Customs Act, 1962, should not be imposed on them.

3. Mr. Mukherjee, would submit that the customs authorities do not have the jurisdiction and/or competence to question any act or action of the importer once, the imported goods are cleared in accordance with Section 47 of the Customs Act, 1962 (hereinafter referred to as the "said Act"). Notwithstanding the aforesaid, pursuant to the show-cause by the order in original dated 4th March, 2024, a penalty of Rs.10,00,00,000/- has been imposed on the petitioner under Section 114AA of the said Act.

4. Mr. Mukherjee, would further submit that the aforesaid imposition of penalty is without jurisdiction. Although, the petitioner had preferred an appeal from the aforesaid order, the same does not and cannot regularize the direction for imposition of penalty since the aforesaid order is without jurisdiction.

5. By placing the order dated 15th October, 2024, it is submitted that the Commissioner of Customs did not enquire into the case made out by the petitioner and had dismissed the appeal in a mechanical manner. Questioning not only the initiation of proceedings but also the orders passed by the adjudicating authority being the order dated 4th March, 2024 and the order passed by the appellate authority refusing to entertain the appeal by reasons of the failure on the part of the petitioner to put in the pre deposit in terms of Section 129E of the said Act the writ petition has been filed.

6. I find that in the instant case, on the basis of the show-cause as aforesaid, the adjudicating authority had assessed the value of the imported goods imported under 67 number of Bills of entries which are listed in annexures - I, II & III of the show-cause notice, which had been seized vide Seizure Memo dated 24th March, 2019, to be confiscated under Section 111(m) of the said Act. Proceeding on such premise, the adjudicating authority was, *inter alia*, pleased to observe and direct as follows:

65. In view of above

65.1 The impugned goods having total Assessable Value of Rs. 2,98,96,887/- imported under 67 nos. of Bills of Entries as listed in Annexure-I, II & III of the subject SCN, seized vide Seizure Memo dated 24.05.2019, shall be confiscated under Section 111(m) of the Customs Act, 1962;

65.2 The revised/changed Retail Sale Price (RSP) as mentioned in Column 13 of aforesaid Annexure-I, II & III to the subject SCN shall be taken as the correct RSP for

assessment of additional duties of Customs payable on the said seized goods in terms of Section 3 of the Customs Tariff Act, 1975 read with Section 4A of the Central Excise Act, 1944 and the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008;

65.3 Differential duty totally amounting to Rs.14,24,782/- as detailed in aforesaid Annexure-I, II & III, shall be demanded and recovered with interest from the importer, M/s Reach Infocom Technology Pvt. Ltd., in terms of Section 125(2) read with Section 28(4) & Section 28AA of the Act of 1962; and

65.4 Penalty under Section 112(a)(ii) & Section 114AA of the Customs Act, 1962, shall be imposed on the Noticees, namely, M/s Reach Infocom Technology Pvt. Ltd., Shri Sunil Kumar Patwari, Shri Mintu Saha, Shri Anis Rahman, and Ms. Kinjal Desai.

65. Further, in support of their submissions, the Noticees have cited various case laws. In this regard, I find that the cited judgements and case laws are of no help to the Noticees in as much as the same were pronounced under altogether different facts and circumstances. None of the decisions cited above have dealt with the import by misdeclaring the RSP in the Bills of Entry so as to evade Customs duty. The case laws cited do not have an overarching, unquestioned and blanket applicability in such cases of wilful mis-declaration and suppression of facts. Such serious offences do not have sanction and reprieve given to it by any case law. As has also been held – each and every decision of a court cannot be followed without considering the factual background and/or the arguments advanced before it. No judgement can be read as if it is a statue [Supreme Court judgement in the case of UOI Vs. Dhanwanti Devi – 1996 (6) SSC 44 and High Court of Calcutta in judgement of Bipin M Pujara Vs. Commissioner of Customs – 1999 (107) ELT 298 (CAL)].

66. I further find that the statement recorded under Section 108 of the Customs Act, 1962 has evidentiary value under the provisions of law. I find that the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra Vs. U.O.I. [reported in 1997 (89) E.L.T. 646 (S.C.)] held that evidence - confession statement made before Customs officer, though retracted within six days, is an admission and binding, since Customs Officers are not Police Officers under Section 108 of the Customs Act and FERA. The Hon'ble Supreme Court, in the case of Naresh J. Sukhawani v. Union of India [reported in 1996 (83) E.L.T. 258], also held that the statement recorded under Section 108 of the Customs Act, 1962 made before the Customs officials, is not a statement recorded under Section 161 of Cr. PC. Therefore, it is a material piece of evidence collected by the Customs officials under Section 108 of the Customs Act, 1962 and it can be used as substantive evidence connecting the petitioners with the contravention of Customs Act. The Hon'ble Supreme Court in another matter of GULAM HUSSAIN SHAIKH CHOUGULE vs. S. REYNOLDS, SUPDT. OF CUS., MARMGOA [reported in 2001(134) ELT 3 (SC)], has categorically held that "statement recorded by Customs Officers under Section 108 of the Customs Act is admissible in evidence. The Court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act....". Apex Court in the case of Percy Rustomji Basta Versus the State of Maharashtra [1983 (013) ELT 1443 (S.C.), a case in which the appellant was convicted under Section 135 of the Customs Act and 120-B of the IPC, considered the question whether Section 24 of the Evidence Act was a bar to the admissibility of a statement given by the accused of offences under the Customs Act. This Court repelled the contention based on Section 24 of the Evidence Act and the facts. It was again followed in Veera Ibrahim versus the State of Maharashtra 1983 (013) ELT 1590 (S.C.). The Hon'ble Apex Court in the case of BADAKU JOTI SVANT versus STATE OF MYSORE reported at 1978 (2) ELT J 323 (SC) held as, "In this view of the matter the statement made by the appellant to the Deputy Superintendent of

Customs and Excise would not be hit by Section 25 of the Evidence Act and would be admissible in evidence unless the appellant can take advantage of Section 24 of the Evidence Act. As to that it was urged on behalf of the appellant in the High Court that the confessional statement was obtained by threats. This was not accepted by the High Court and therefore, Section 24 of the Evidence Act has no application in the present case. It is not disputed that if this statement is admissible, the conviction of the appellant is correct. As we have held that a Central Excise Officer is not a Police officer within the meaning of those words in Section 25 of the Evidence Act, the appellant's statement is admissible. It is not ruled out by anything in Section 24 of the Evidence Act and so the appellant's conviction is correct and the appeal must be dismissed".

I find that the statements recorded in this case and made part of the SCN are voluntary in nature and therefore, carry substantive evidentiary value as held above by various judgements.

ORDER

67. In view of above discussions and findings, I pass the following Order:

67.1 I Order that the impugned goods having total Assessable Value of **Rs. 2,98,96,887/-** imported under 67 nos. of Bills of Entries as listed in Annexure-I, II & III to the subject SCN, seized vide Seizure Memo dated 24.05.2019, shall be confiscated under Section 111(m) of the Customs Act, 1962, for the reasons discussed *supra*. I also impose a redemption fine of Rs 20000000 (Rupees Two Crores only) in lieu of confiscation.

67.2 I Order that the revised/changed Retail Sale Price (RSP) as mentioned in Column 13 of aforesaid Annexure-I, II & III to the subject SCN shall be taken as the correct RSP for assessment of additional duties of Customs payable on the said seized goods in terms of Section 3 of the Customs Tariff Act, 1975 read with Section 4A of the Central Excise Act, 1944 and the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008;

67.3 I Order that **differential duty** totally amounting to **Rs. 14,24,782/-** as detailed in aforesaid Annexure-I, II & III to the subject SCN, shall be demanded and recovered with interest from the importer, M/s Reach Infocom Technology Pvt. Ltd., in terms of Section 125(2) read with Section 28(4) & Section 28AA of the Act of 1962; and

67.4 I impose a penalty of **Rs. 1,42,478/-** (Rupees One lakh Forty Two Thousand Four Hundred Seventy Eight only) under Section 112(a)(ii) and Rs 10,00,00,000 (Rupees Ten Crores only) under section 114AA of the Customs Act, 1962, on M/s Reach Infocom Technology Pvt. Ltd., for their acts of omission and commission, as discussed in the foregoing paragraphs.

67.5 I impose a penalty of **Rs. 1,42,478/-** (Rupees One lakh Forty Two Thousand Four Hundred Seventy Eight only) under Section 112(a)(ii) and Rs 10,00,00,000 (Rupees Ten Crores only) under section 114AA of the Customs Act, 1962, on Shri Sunil Kumar Patwari, for their acts of omission and commission, as discussed in the foregoing paragraphs.

67.6 I impose a penalty of **Rs. 1,42,478/-** (Rupees One lakh Forty Two Thousand Four Hundred Seventy Eight only) under Section 112(a)(ii) and Rs 10,00,00,000 (Rupees Ten Crores only) under section 114AA of the Customs Act, 1962, on Shri Mintu Saha, for their acts of omission and commission, as discussed in the foregoing paragraphs.

...-Cus-AP/ACC-Kolkata

67.7 I impose a penalty of **Rs. 1,42,478/-** (Rupees One lakh Forty Two Thousand Four Hundred Seventy Eight only) under Section 112(a)(ii) and Rs 10,00,00,000 (Rupees Ten Crores only) under section 114AA of the Customs Act, 1962, on Shri Anis Rahman, for their acts of omission and commission, as discussed in the foregoing paragraphs.

67.8 I impose a penalty of **Rs. 1,42,478/-** (Rupees One lakh Forty Two Thousand Four Hundred Seventy Eight only) under Section 112(a)(ii) and Rs 10,00,00,000 (Rupees Ten Crores only)under section 114AA of the Customs Act, 1962, on Ms. Kinjal Desai., for their acts of omission and commission, as discussed in the foregoing paragraphs.

67.9 This Order-in-Original is issued without prejudice to any other action that may be taken against the Noticees of the subject Show Cause Notice or any other person(s) concerned with this case under the Customs Act, 1962 or any other law for the time being in force in India.

Date: **04-03-2024**

Signed by Sushilkumar
Govindrao Kale
Date: 04-03-2024 12:15:26
Reason: Approved

SUSHILKUMAR KALE
ADDITIONAL COMMISSIONER
Airport and Air Cargo Complex,
NSCBI Airport, Kolkata-700052

7. Challenging such direction, the petitioner had approached the appellate authority. The Commissioner of Customs (appeals), Kolkata by the order impugned dated 15th October, 2024 had dismissed the said appeal on the ground of non-compliance of provisions of Section 129E of the said Act. To morefully appreciate the aforesaid provision, Section 129E of the said Act is extracted herein below:

> *"129E. **Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. -***

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -

(i) under sub-section (1) of section 128 , unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officerof customs lower in rank than the

2 [Principal Commissioner of Customs or Commissioner of Customs];

(ii) against the decision or order referred to in clause (a) of sub-section (1)of section 129A , unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
(iii) against the decision or order referred to in clause (b) of sub-section(1) of section 129A , unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against :

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores :
Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.]"

8. Having regard to the specific embargo provided for in Section 129E of the said Act, the appellate authority being the Commissioner of appeals, in my view, is estopped from entertaining an appeal, if the pre-deposit as provided therein is not furnished. Admittedly, in this case, the petitioner did not comply with the direction for payment of pre-deposit which prompted the appellate authority to dismiss the appeal.

9. Interestingly however, Mr. Mukherjee representing the petitioner has attempted to make out a case that since,

the entire proceedings are without jurisdiction, non-compliance of the direction for payment of pre-deposit which resulted in dismissal of the appeal cannot stand in the way of the petitioner in preferring the writ petition. I however, find that the writ petitioner did not straight away invoke the writ jurisdiction prior to preferring the said appeal. The petitioner had in fact while adhering to the statutory provisions applied before the appellate authority. Since, the petitioner had invoked the statutory remedy, the petitioner was obliged to adhere to the provisions of the statute for maintaining the statutory appeal. The petitioner having failed to comply with the statutory provisions, in my view it would not be fit and proper for this Court to exercise discretion in favour of the petitioner. As such I find no scope to entertain the writ petition. However, the petitioner may avail further statutory remedy as may be advised.

10. With the above observations and directions, the writ petition is dismissed without any order as to costs.

11. Since the respondents have not been called upon to file affidavit, the allegations made in the writ petition are deemed not to have been admitted by the respondents.

(Raja Basu Chowdhury, J.)