

IN THE HIGH COURT AT CALCUTTA

SPECIAL JURISDICTION (CUSTOMS)

ORIGINAL SIDE

Present:-

THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM

AND

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS

CUSTA 15 OF 2025

GA/2/2025

COMMISSIONER OF CUSTOMS PORT KOLKATA

VS.

M/S EMAMI AGROTECH LTD

For the Appellant : Ms. Manasi Mukherjee, Adv. and Sr. Std. Counsel
Mr. Bijitish Mukherjee, Adv.

For the Respondent : Mr. Abhratosh Majumder, Sr. Adv.
Mr. Rahul Dhanuka, Adv.
Mr. Niraj Baheti, Adv.

Last Heard on : 23.06.2025

Judgement on : 31.07.2025

CHAITALI CHATTERJEE DAS, J:-

1. This appeal has been filed by the Commissioner of Customs (Port) against the final Order no. 76173 of 2024 dated 26.06.2024 passed by the Customs, Excise and Service Tax Appellate Tribunal , Eastern zonal bench, Kolkata under Section 130 of the Customs Act, 1962 (the Act) against Customs

Appeal No.75759 of 2023 arising out of Order-in-Appeal No. KOL/CUS/port/ks/572/2023 dated 28.07.2023 passed by the Commissioner (Appeals) of customs, Kolkata.

Heard the submissions of both the Learned Counsels.

The fact of the case is as follows:-

2. On September 6, 2021, and September 20, 2020 M/S Emami Agrotech Limited, filed 7 Into Bond Bills of Entry for warehousing in respect of imported goods, namely crude palm of edible grade. On September 21, 2021 and September 28, 2021, the importers filed Ex- Bond Bills of Entry for home consumption against above mentioned Into Bond Bills of Entry. The customs duty involved in the Ex-Bond Bills of Entry was of ₹47.82 crores. On October 8, 2021, the importer filed an application for withdrawal/cancellation of the said Ex- Bond Bills of Entry filed on September 21, 2021 and September 28, 2021 and reinstatement of Into Bond Bill of Entry.
3. On October 13,, 2021, by way of notification number 48/2021 – CUS and notification number 49/2021 – CUS, rate of basic custom duty(BCD) was reduced from 2.5% to Nil and rate of agriculture infrastructure development CESS (AIDC) was reduced from 20% to 7.5% with effect from October 14, 2021. The importer made a request on October 8, 2021, which was rejected on October 27 2021 by the Assistant Commissioner of Customs, (Apprising Group-1) on the ground that the application dated October 8, 2021 was inadequate. The importer that is M/S Emami Agro Tech Limited, submitted his explanation and provided chartered accountant certificate, and details regarding the depressed production and sales during the festival period. Once again, such request was rejected on December 4, 2021 with on the ground that

the cancellation of Ex- Bond Bills Entries would result in substantial revenue loss to the department.

4. The said rejection order dated October 27, 2021 and December 4, 2021, were challenged by the importer before the High Court at Calcutta by filing writ petition and vide order dated January 11, 2022 the High Court set aside the said orders and directed to release the goods on payment of 50% of duty in cash and balance 50% by way of bank guarantee, subject to the satisfaction of the adjudicating authority.
5. In view of the order of the High Court, the importer approached the concerned apprising group with a demand draft for a sum of ₹23.91 crores and bank guarantee of an equivalent amount along with applicable interest of ₹52.38 lakhs for a period up to January 17, 2022, in compliance to section 61(2) of the Customs Act.
6. The prayer, of the importer for cancellation of Ex- Bond Bills of Entry was further denied vide order dated January 21, 2022 holding that it would entail a revenue loss of ₹22.25 Crores, if a fresh bill of entry for home consumption is filed on January 17, 2022 for clearance of the said warehouse goods. This order was challenged before the High Court and was subsequently disposed of on the ground of having an alternate appellate remedy. Meantime, a further notification number 16/2022 – CUS dated 12.2.22 came into effect and further reduced the rate of AIDC from 7.5% to 5%. Vide an order dated March 1, 2022, the Hon'ble Division bench of this Court set aside the order dated January 21, 2022 and directed the concerned authorities to release the subject goods and pass a speaking order.

7. The importer filed manual Bill of Entry for home consumption by assessing the custom duty to the tune of 20.26crores and a draft of ₹1.02crores towards the payment of interest for the period from January 18, 2022 to March 10, 2022 on the basis of which the warehouse goods were released. On September 8, 2022, the adjudicating authority passed the order, rejecting the application for cancellation of Ex-bond bills of entry by holding that the same is not covered under section 46(5) of the Act or under any other express provision of the statute. On challenge by the importer, the Commissioner of Appeals held that if the bills of entry for home consumption was allowed to be withdrawn/cancelled and the fresh bills of entry for home consumption was allowed for clearance of the impugned goods from warehouse, there would be a substantial loss of revenue. Being aggrieved, thereby an appeal was filed before the CESTAT which was allowed by the Tribunal with the following observation,

A) bill of entry is to be filed under section 46 of the customs act and section 46 (5) of the act, provides that the proper officer may permit substitution of bill of entry for home consumption for a bill of entry for warehousing or vice versa if there is no loss of revenue and absence of fraudulent intention.

B) Section 68 of the customs act provides for clearance of warehouse goods for home consumption, but the applicant filed the bills of entry for home consumption. When neither the duty was paid, nor any order of our clearance of such goods for home consumption was made

by the proper officer. In the meantime, the applicant filed an application for withdrawal of Ex-Bond Bills of Entry and reinstatement of Into Bond Bills of Entry.

C) When the importer filed the application for withdrawal/cancellation of the Ex- bond bills of entry, there was no change of rate of duty till three months and in terms of section 61(2) of the act, the importer was not required to pay any interest.

D) As the revenue did not take any action on the application filed by the appellant and later on the rate of duty was reduced. It cannot be said that there is loss of revenue due to reduction in rate of duty later on. Furthermore no fraudulent act was proved against the appellant/importer.

8. The learned counsel appearing on behalf of the Revenue argued that section 46 (5) does not deal with the cancellation of any bill of entry, but deals with mere modification of the type code of bill of entry on importation. In the instant case, type code of bill of entry is not getting modified on importation, but issue is cancellation of the same bill of entry after it has already been warehoused and bill of entry for home consumption has already been filed, self-assessed for release therefore, importer's request for withdrawal/cancellation of Ex- bond bill of entry and reinstatement of into Bond bill of entry cannot be considered under section 46(5) of the Customs Act, 1962. It is further submitted that in terms of Section 68(b) and section 17 and 18 of the Customs Act once the self-

assessment was made and no objection is raised by the authority against the self-assessment, the assessment reaches finality leaving only option with the importer, to pay the duty as per section 15 of the Customs Act and such duty to be paid on the very date of filing of the bill of entry. Instead of paying the duty, the importer filed application for withdrawal/cancellation of the said 10 bills of entry on October 8,, 2021, after a substantial lapse of time. It is submitted that in case of customs duty to be paid on importation and exportation the date and time of determination of duty is to be strictly construed.

9. Further stand taken by the learned advocate for the Revenue is that the importer's request for cancellation of bills of entry filed for home consumption after warehousing, in absence of relinquishment of title would amount to substitution of bills of entry for home consumption with bills of entry for warehousing. If cancellation of Impugned bill of entry is carried out/permited, then imported goods will continue to remain under warehousing and in due course of time, importer will again file bill of entry under Section 68 (a) of read with section 46 of the Customs Act, for removal of the impugned goods from warehouse which will create a situation where there would be duplicate or two sets of bills of entry for release of goods which is neither statutory nor technically possible. It is their specific case that just after 6 days from the date of importer's application for cancellation of the said bills of entry, the rate of basic custom duty was reduced from 2.5% to NIL and AIDC was reduced from 20% to 7.5%, therefore, if new bills of entry for home consumption is filed that will be under reduced rate of BCD and AICD and accordingly, it would incur

huge revenue loss of ₹ 22.25 Crores approximately and hence the request of the importer cannot be permitted in terms of 46(5) of Customs Act.

10. It is submitted the importer's application for substitution or withdrawal of bill of entry actually relates to the application related to bill of entry note on importation, but bills of entry, which is filed after importation at the stage of release from warehouse for home consumption, which is already self-assessed without a reassessment is final in the eye of law.
11. The further contention of the Learned Counsel is that section 15(1) (b) has been substituted by Act 32 of 2003 when, the date for determination of duty and tariff evaluation of imported good in case of goods cleared from a warehouse under section 68 is on the date on which a bill of entry for home consumption in respect of such good is presented under the Section.
12. In the instant case 6 Ex- bond bills of entry were filed on September 21, 2021 and 4 Ex- bond bills of entry were filed on September 28, 2021. The former 6 bills of entry were assessed on September 21, 2021 and the later 4 bills of entry were assessed on September 28, 21 based on tariff value, so by that date the said bills of entry were finally assessed and quantum of duty vis-a-vis the said bills of entry were ascertained. Therefore, the importer has taken this route of filing subsequent application for substitution or cancellation of bills of entry with an intent to avoid payment of duty, interest and penalty, and hence the order passed by the tribunal is not tenable in the eye of law and should be set aside. The learned advocate on behalf of the revenue relied on the decisions reported in ***Jain Irrigation System Versus***

Commissioner of Customs ¹, ***Bharat Commerce and Indus Limited Versus Collector of Customs*** ² ***Collector of Customs, Madras Versus Tungabhadra fibres Ltd*** ³ and ***Khattar enterprises (P)Ltd Versus Collector of Customs, Calcutta*** ⁴ .

13. The learned advocate of the respondent, on the other hand argued that the submissions made by the revenue regarding the provisions of section 46(1) is limited to bill of entry for home consumption is incorrect encompasses in itself bill of entry for warehousing. Secondly, Section 46.(5) of Custom Act, 1962 allows substitution of a bill of entry for home consumption with a bill of entry for warehousing and vice versa provided the following conditions are fulfilled;

a) The interests of the revenue are not prejudicially affected and b) There should be no fraudulent intention.

14. It is contended by the learned Senior Advocate that the Parliament in its own legislative wisdom, provided for substitution of bill of entry for home consumption for a bill of entry for warehousing or vice versa. The use of the expression 'vice versa' is of pivotal importance. The interpretation sought to be given by the revenue would in effect subtract the expression vice versa. It is argued that the revenue is trying to persuade this court to interpret section 46(5) in a manner which would result in judicial legislation, both the conditions enumerated under section 46(5) to be satisfied if the request for substitution is to be allowed. In the present case, both the conditions are satisfied and therefore denial of the request for substitution was illegal. Furthermore Section 46(5) is a

¹ (2005) 189 E.L.T (BOM)

² (1997) 11 SCC 62

³ 1994 (71) E.L.T 655 (MAD)

⁴ 1997 (94) E.L.T. 454 (SC)

trade facilitation measure, and the request for substitution can only be rejected in the event the above mentioned two conditions are not satisfied.

15. It is strenuously argued by the Learned Senior Counsel that even if it is assumed that the conditions provided in section 46(5) is disjunctive or standalone in nature the reasoning given in the Order-in-Appeal that the substitution would cause loss of revenue is of no substance as there was no change of the rate of duty on the date when the application for substitution was made by the respondent. That part the revenue never made any case or made any ground that there was any fraudulent intention at the time of making application under section 46(5) rather the respondent duly corroborated its reasons with facts and figures supported by a certificate from chartered accountant.

16. The learned advocate relied upon a decision reported in **Priyanka Overseas Pvt. Ltd. vs UI** ⁵ on the point that on the date of making the application, there was no loss to revenue and therefore interest of the revenue was not prejudicially affected as on the date of making such application. Accordingly, it is prayed that since none of the contentions raised by the revenue are tenable in the eye of law, therefore, the instant appeal is liable to be dismissed with cost. What is submission of both the learned advocates.

Analysis

17. In this case the substantial questions of law taken by the revenue are as follows;

⁵ 1991 (51) ELT 185 (SC)

(a) The Learned Tribunal failed to consider that section 46 (5) does not deal with the cancellation of any bill of entry but just deals with mere modification of the type code of bill of entry. Since in this case, type code of bill of entry is not getting modified but cancellation of the same is under consideration, therefore, importer's request for withdrawal/cancellation of Ex-bond Bill of Entry and reinstatement of into-bond Bill of Entry cannot be considered under section 46 (5) of the Customs Act, 1962.

(b) The Learned Tribunal failed to appreciate that, the application of importer for withdrawal/cancellation of Ex-bond Bill of Entry and reinstatement of Into-bond Bill of Entry needs to be considered in terms of Section 46(5) of the Customs Act, 1962. Section 46(5) deals with substitution of a "bill of entry for home consumption" for "bill of entry for warehousing" of vice versa, then in this scenario, no new bill of entry gets created or no existing bill of entry gets modified ,i.e. from code 'H' to code 'W' or vice versa. Now, in the instant matter, when importer's application is perused then it appears that the said application does not amount to modification of type code of the said Bills of Entry but rather amount to cancellation of the same. But, section 46 (5) does not deal with the cancellation of any bill of entry but just deals with mere modification of the type code of bill of entry.

Since in this case, type code of bill of entry is not getting modified but cancellation of the same is under consideration, therefore, based on discussion made supra, importer's request for withdrawal/cancellation of Ex-bond Bill of entry and reinstatement of Into-bond Bill of Entry cannot be considered under section 46(5) of the Customs Act, 1962.

(c) The Learned Tribunal failed to consider that, there is no specific provision in Customs Act, 1962, for permitting the withdrawal/cancellation of Bills of Entry for home consumption, filed for clearance under section 68 of the Customs Act, except in case where the importer wants to relinquish his title to the goods. Sub proviso to Section 68 of the Customs Act, 1962 states that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made, relinquish his title to the goods upon payment of penalties, etc. and upon such relinquishment, he shall not be liable to pay duty. In the instant case, the Bills of Entry for home consumption shall be cancelled only after relinquishment. However, in the present case, the importer is not relinquishing the title of goods, therefore, cancellation of Ex-bond bills of entry cannot be permitted under law.

(d) The Learned Tribunal failed to consider that, in terms of section 68(b) of the Customs Act, once the assessment was finalized, the only option left with the importer, was to pay duty. However, instead of paying the duty, importer filed application for withdrawal/cancellation of the said 10 (ten) bills of entry on 08.10.2021.

(e) The Learned Tribunal failed to appreciate that, in the instant case, just after 06 (six) days from the date of importer's application for cancellation of the said bills of entry, the rate of Basis Customs Duty was reduced from 2.5% to NIL and AIDC was reduced from 20% to 7.5% , therefore if new bills of entry for home consumptions filed then they will be filed at a reduced rate of BCD and AIDC and accordingly, it may incur huge revenue loss of Rs. 22.25 crores approximately to the department and therefore, said application cannot be permitted in terms of Section 46(5) of Customs Act.

18. The matter pertains to 7 number Into Bond Bills of Entry for warehousing in respect of imported goods, namely Crude palm oil of edible grade filed by the respondent on September 6, 2021 and 29, 2021, also of 10 Ex Bond bills of entry for home consumption against the above mentioned into bond bills of entry which were filed on September 21, 2021 and 28 September 2021. The duty involved in the said Ex bond bills of entry was 47.82 crores. The application for withdrawal/cancellation of the said Ex bond bills of entry as filed

by the respondent was rejected on October 8, 2021. In the meantime, a Notification was published being notification number 48/2021 – CUS dated October 13, 2021 and Notification Number 49/2020 1 CUS dated October 13, 2021, whereby rate of basic custom duty.(BCD) was reduced from 2.5% to NIL and the rate of Agriculture Infrastructure Development. Cess (AIDC) was reduced from 20% to 7.5% effective from October 14,, 2021, which means after the application for withdrawal/cancellation of the Ex- bond bills of entry filed by the respondent. The reason to reject the request of the respondent dated October 8, 2021 by the Assistant Commissioner of Custom, Appraising group – 1 was that the application was inadequate and importer submitted his explanation and provided, Chartered Accountant certificate certifying the depressed production and sales during the festive period, which was rejected on December 4, 2021 on the ground that cancellation of the Ex-Bond Bills Entries would result in substantial revenue loss to the department. The order of rejection dated October 27, 2021 and December 4, 2021,were set aside by the Hon'ble Division Bench of this court, by order dated January 11, 2022 and directed to release the goods on payment of 50% of duty in cash and balance 50% by way of bank guarantee subject to the satisfaction of the adjudicating authority.

19. Therefore, it is clear that the reason assigned by the revenue for not considering the request by the importer dated October 2021 was not considered by this Court. It is further apparent from the record that the importer in compliance with such order of this Court approached the concerned Appraising group with a demand draft for a sum of ₹23.9.crores and bank guarantee, for an

equivalent amount along with applicable interest of ₹52.38 lakhs for a period up to January 17, 2022 in compliance with Section 61(2) of the Custom Act. This prayer of the importer for cancellation of Ex-bond Bill of Entry was reflected by order dated January 21, 2022 holding that if the same is to be considered it would cause loss of revenue of ₹22.25 crores. The Hon'ble Division Bench of this Court by its order dated March 1, 2022, after setting aside the order dated January 21, 2022 directed the concerned authorities to release the goods and to pass a speaking order. In view of the direction, the importer filed manual bill of entry for home consumption by assessing the customs duty to the tune of ₹20.26 crores and a demand draft of ₹1.02 crores towards the payment of interest for the period from January 18, 2022 to February 3, 2022, based on which the warehouse goods were released. The adjudicating authority passed the order, rejecting the application for cancellation of Ex-bond bills of entry on the ground that the same is not covered by section 46(5) of the act. The learned advocate of the respondent tried to impress upon this court that Section 46(5) of the Act allows substitution of bill of entry for home consumption with a bill of entry for warehousing and vice versa subject to fulfilment of two grounds and the authority failed to prove any fraudulent intention on the part of this respondent. So far the interest of revenue not to be prejudicially affected is concerned, it was pointed out that the application was made on October 8, 2021 and reduction of duties of custom took place only with effect from October 14, 2021 vide notification dated October 13, 2021. The application was filed within the prescribed period of 90 days which is the date of making the application, there was no loss to revenue and therefore the revenue was not prejudicially affected as on the date of making the application.

20. In the decision as relied upon by the learned advocate of the respondent in ***Priyanka overseas Private Limited (supra)*** it was observed by the Hon'ble Supreme Court that

'The question is whether the Appellant is liable to pay duty on the balance quantity of 6746.468 of Palm Karna and if so, what should be the rate of duty. In determining the question, it must be borne in mind the statutory principle that if a party discharge its liability by complying with the requirement of law and present paper for clearance of goods, it is obligatory on the revenue authorities to pass the order immediately thereon. If the revenue authorities either refuse to pass the order on some erroneous or imaginary grounds or on account of any conception of law, the department cannot take advantage of its own wrong in demanding higher rate of duty from the importer. Under sections 68 and 71 of the act, goods placed in a warehouse can be taken out only after clearance for home consumption. Admittedly, the appellant had done its part of legal duty by presenting bills of entry and complying with section 68(a) of the act on 28 – 1– 1988. But the Customs Officer refused to release the goods on an erroneous assumption that the applicant was liable to pay redemption fine, and since it had not paid the amount, the goods were not liable to be released. The High Court held that the imposition of redemption fine was non-est and the petitioner was within its right to claim release of goods without paying any redemption fine, on the day, it complied with the formalities under section 68 of the act. Section 68.(c) of the act, prescribes an official function which was not performed by the custom authorities due to entertainment of a wrong and illegal notion regarding the payment of redemption fine which resulted into a wrong order by the department. In the circumstances, the department cannot be allowed to take advantage of its own wrongful and illegal act. In moulding relief,

this court has always applied principles of equity in order to do complete justice between the parties’.

The facts of this case speaks of otherwise as the importer did not discharge his liability by complying with the requirement of law by presenting proper documents initially but submitted after the request was refused more so the facts of the situation, the case of Priyanka overseas Pvt.Ltd is not applicable in the instant case having different nature of dispute.

21. The relevant provision as enumerated in Section 68 of the Custom Act reads as follows:

The importer of any warehouse goods may clear them for whom consumption, if-

a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid: and

c) an order for clearance of such goods for home consumption has been made by the proper officer:

[Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selectin criteria:

Provided further that]] Substituted by Finance Act,2018 (Act No.13 of 2018), dated 29.3.2018.]

the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable on respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon:

[[Provided also that] [Inserted by Act 21 of 2006, Section 59 (w.e.f. 18.4.2006).] the owner of any such

warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

22. In the case of **Jain Irrigation System** ,accepted the request for conversion of the said Bond Bill of Entry into home consumption bill of entry so that on assessment the goods could be cleared on payment of duty and it was assessed but the applicant never paid the duty within the stipulated period nor cleared the consignment thereafter on payment of duty with interest and after a gap of 2 years the applicant by a letter requested for reconversion of the assessed bill of entry into Bond bill of entry with a view to clear the goods under the 100% EOU scheme without payment of duty. The Hon'ble Supreme Court did not accept the contentions of the applicant and observed that on the basis of conscious decision taken by the applicant the conversion was allowed and the converted bills of entry was assessed to duty so it was obligatory on the part of the applicant to clear the duties.

23. In the case on hand the Tribunal observed that provision of section 47(2) is not applicable in this case as after filing the Ex-bond bill of entry on 21.9.21 & 28.9.21 the condition of section 68 of the Act were not satisfied and as no assessment was done for clearance of goods in question ,therefore the application dated 8.10.21 is required to be disposed off.

24. It was further observed that on 8.10.2021 there was no change in the rate of duty and if the said application filed by the importer would have been considered and disposed of on the same date, the importer in that event was entitled for withdrawal /cancellation of Ex-Bond Bill of Entry and

reinstatement of Into Bond Bills of Entry. This observation of the Tribunal does not lay down the correct principal as in terms of section 68(b) and section 17 and 18 of the Act, once the self-assessment was made and no objection is raised by the Authority against the self-assessment, the assessment reaches finality and the only option left to the importer was to pay the duty which was not complied.

25. In ***Tungabhadra Fibres Ltd*** which was relied upon it was observed that “section 68 of the Act provides for clearance of Warehouse Goods for home consumption and states that the importer of any warehouse goods may clear them for home consumption in the circumstances mentioned in clause (a) to (c) . Clause (a) provides for the presentation of a bill of entry for home consumption in respect of warehouse goods. Clause (b) states that on payment of import duty leviable under section 68(b) it is seen from section 15 (1) (b) of the Act ,that in the case of goods cleared from a warehouse under section 68 the rate of duty and tariff valuation ,if any applicable to the imported goods shall be ,the rate and valuation in force on the date on which the goods were actually removed from the warehouse”

26. In this case the goods were not removed nor the payment was made and the Customs Duty involved in the said Ex-Bond Bills of Entry was Rs. 47.82 Crores. The importer made request on 21.9.21 and 28.9.21 for cancellation which was rejected on 8.10.21 on the ground that the application was inadequate and then on 13.10.21 the notification was published whereby the rate of Basic Customs Duty BCD was reduced from 2.5% to Nil and AIDC was reduced from 20% to 7.5% giving effect from 14.10.21.

In Khattar Enterprises(P) Ltd (supra) Collector of Customs, Calcutta (Supra) the question falls for consideration regarding applicability of the Notification of 198 (b) whereby partial exemption admissible in respect of the basic customs duty and auxiliary customs duty on wood and articles of wood falling under Heading No. 40.08 of the customs tariff under Notification No. 62-Cus. dated March 17, 1995 and No. 311/86-Cus. dated May 13, 1986 was withdrawn. It was held

“In the present case the original Bill of Entry was submitted by the appellant on October 09, 1986 was for warehousing. The said Bill of Entry was treated as for home consumption only on October 23, 1986 by the Assistant Collector. This does not mean that the Bill of Entry for the goods for home consumption has to be treated to have been presented on October 09, 1986. Since the Bill of Entry was noted for home consumption on October 23, 1986 it has to be presented for that purpose on October 23, 1986. The duty was therefore payable on the basis of the rates in force on October 23, 1986”.

This observation certainly goes in favour of the revenue.

27. The learned Senior Advocate on behalf of the Importer submitted that the contentions of the Revenue are not tenable as the request for substitution was made because of less production and dispatches on account of festive seasons as was supported with the certificate from the chartered accountant. Fact remains the certificate of Chartered Accountant was submitted after the prayer was turned down on the ground of inadequate document on 8.10.21. The further argument that section 46(5) allows the substitution of bill of Entry for home consumption with bill of Entry for warehousing and vice versa subject to the condition specified therein and had the request was allowed for

substitution on the date of presentation of subsequent bill of entry for home consumption for clearance would have been relevant. However this argument found not to have been any basis as in terms of Section 68(b) and section 17 and 18 of the Act, once the self-assessment was made and no objection is raised by the authority against the self-assessment, the assessment reaches finality and only option left is to pay the duty as per section 15 of the Customs Act. The former 6 bills of entry was assessed on 28.9.21 based on the tariff value as of 28.9.21 the said bills were finally assessed and quantum of duty vis-à-vis the said bills of entry were ascertained. Hence the impugned order passed by the learned Tribunal calls for interference.

28. Therefore in the above facts and circumstances this appeal filed by the Revenue stands allowed and the order passed by the learned Tribunal is set aside. The substantial questions of law are answered in favour of the revenue.

29. Photostat copy of this judgement if applied, shall be made available upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)

T.S. SIVAGNANAM, CJ:- (Concurring)

30. I have gone through the judgment prepared by sister Hon'ble Justice Chaitali Chatterjee (Das) and I am agreeable to the reasoning and the conclusions arrived at. However, I wish to give additional reasons in support of the above conclusion.

31. We have heard Ms. Manasi Mukherjee, Learned Senior Standing Counsel assisted by Mr. Bijitish Mukherjee, learned advocate appearing for the appellant revenue and Mr. Abhratosh Majumder, Learned Senior Advocate assisted by Mr. Rahul Dhanuka and Mr. Niraj Baheti, Learned Advocates appearing for the respondent assessee.

32. It is argued by the Learned Senior Advocate for the respondent that in sub section (5) of Section 46 of the Act power has been conferred on the proper officer of satisfied that the interest of the revenue are not prejudicially affected and that there was no fraudulent intension, the proper officer may permit substitution of the bill of entry for home consumption for a bill of entry for warehousing vice versa, thus the statute is clear that both condition are required to be satisfied while rejecting request for substitution. In other words it is contended that the interest of revenue should not be prejudicially affected and there is no fraudulent intention. Therefore, the stand taken by the proper officer to reject the request for substitution on the alleged ground that interest of revenue will be affected is unsustainable in law. It is submitted that this argument is without prejudice to the argument that in the respondents and the order of rejection was rightly set aside.

33. The first submission made on behalf of the respondent is with regard to the interpretation of Section 46(5) of the Act. It is submitted that the contention of the revenue that the provisions of Section 46(1) is limited to bill of entry for home consumption is incorrect as the provisions encompasses in itself bill of entry for warehousing. Further Section 46(5) allows substitution of a bill of entry for home consumption with a bill of entry for warehousing and vice-versa provided the following two conditions are met namely (a) the interest of revenue are prejudicial or prejudicially affected and (b) there was no fraudulent intention. Therefore it is submitted that both conditions enumerated under Section 46(5) are to be satisfied if the request for substitution is to be looked and in the case on hand both conditions are satisfied and therefore denial of the request for substitution was wholly illegal. It is further contended that Section 46(5) is a trade facilitation measure and request for substitution can only be rejected in the event the twin conditions are not satisfied. Thus, the interpretation would revolve upon usage of the expression “and” in Section 46(5) of the Act. The said provision states that if the proper officer is satisfied that the interest of the revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice-versa. Therefore the question to be decided is whether the expression “and” used in Sub Section (5) of Section 46 would mean that the two conditions are conjunctive or whether they are disjunctive.

34. We have heard the Learned Senior Standing Counsel on the above submission.

35. To decide the issue, we take note of Section 46(5) which is as follows:-

Section 46: Entry of goods on importation

(1).....

Proviso.....

Proviso.....

(2).....

(3).....

Proviso.....

Proviso.....

Proviso.....

(4).....

(4A).....

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

36. The above provision does confer power on the proper officer to permit substitution of bill of entry for home consumption for a bill of entry for warehousing or vice versa. However, this power can be exercised strictly in accordance with the statutory provision. The first requirement is the satisfaction of the proper officer that the interest of revenue are not prejudicially affected and that there was no fraudulent intension. The

statute uses the word “and” and the question would be whether the two parameters (i.e.) “interest of revenue are not prejudicially affected” and “that there was no fraudulent intension” has to be read disjunctively or conjunctively.

37. It has been held in ***Hyderabad Asbestos Cement Products and Others Versus Union of India and Others*** ⁶ that the word “or” is normally disjunctive and “and” is normally conjunctive, but at times they are read vice-versa to give effect to the manifest intension of the legislature as disclosed from the content. (see ***R.S. Nayak and Others Versus A.R. Antulay and others*** ⁷)

38. In ***R. Versus Oakes*** ⁸, it has been held that if the literal meaning of the words produces an unintelligible or absurd result “and” may be read for “or” and “or” for and even though the result of so modifying is less favourable to the subject provided that the intension of the legislature is otherwise quite clear.

39. In ***Punjab Produce and Trading Company Limited Versus Commissioner of Income Tax, West Bengal II, Calcutta*** ⁹ it was held that a distinction may be made between positive and negative condition prescribed by a statute for acquiring a right or benefit. Positive conditions separated by “or” are read in the alternative but negative conditions

⁶ (2000) 1 SCC 426

⁷ (1984) 2 SCC 183

⁸ (1959) 2 All Er 92

⁹ (1971) 2 SCC 540

connected by “or” are construed cumulative and “or” is read as “nor” or “and”.

40. In *Ishwar Singh Bindra Versus State of Uttar Pradesh* ¹⁰ the Hon’ble Supreme Court held the word “and” as generally a cumulative sense requiring fulfilment of all the conditions that it joins together, and herein it is the antithesis of “or”. Sometimes, however, even in such a connection, it is, by force of context read as “or”. In *Raghunath International Limited Versus Union of India* ¹¹, it was held that it is a well established principle of statutory interpretation that the word “or” is normally disjunctive and the word “and” is normally conjunctive. Both of them could be read as vice-versa but the interpretation was adopted only where the intention of the legislature was manifest. Maxwell on Interpretation of Statutes Edition IX, states that the fundamental principles of construction is that words used in a statute must be understood in their normal grammatical sense. In that sense, the word “and” is used as a conjunction, this however, will not prevent the court from departing from the ordinary grammatical meaning of a word if it appears, from the context or a consideration of the other provisions of the statute that it was the intention of the legislature to give it another meaning. Similarly if the ordinary grammatical meaning of a word results in creating an absurdity or an anomaly or of rendering the legislation of no effect, a narrower or a broader meaning may be given to the word “or” it may be construed in such a way as to obviate the absurdity or anomaly on the principle that it could not have been the intention of legislature to create

¹⁰ AIR 1968 SC 1450

¹¹ 2012 (280) ELT 321 (All)

absurdities or anomalies or to render its enactments of no effect. In such a situation, the word “and” may well be construed in a disjunctive sense and be read as “or”.

41. The above principle was followed by the Hon’ble Supreme Court in ***Babu Manmohan Das Shah Versus Bishun Das*** ¹². In ***Reserve Bank of India Versus Peerless General Finance Investment Company Limited*** ¹³, it was held that while interpreting the provisions of the statute, it is necessary that the textual interpretation should be matched with the contextual one. The Act must be looked at as a whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

42. In ***Popatlal Shah Versus State of Madras*** ¹⁴, the Hon’ble Supreme Court observed that it is settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word, phrase, or sentence is to be construed in the light of the general purpose and object of the Act itself. The title and preamble whatever the value might be aids to the construction of a statute, undoubtedly, throw light on the intent and design of the legislature and indicate the scope and the purpose of the legislation itself.

¹² AIR 1967 SC 643

¹³ 1987 (1) SCC 424

¹⁴ AIR 1953 SC 274

43. Justice G.P. Singh in Principles of Statutory Interpretation, XII Edition, has observed that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *Pari Materia* i.e. statutes dealing with the same subject matter or forming part of the same system. This principle was applied by the Hon'ble Supreme Court in ***R.S. Raghunath Versus State of Karnataka*** ¹⁵ wherein the Hon'ble Supreme Court held that the court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statutes; it must compare the clause with other parts of law and setting in which the clause to be interpreted occurs.

44. It is settled legal principle that there can be no universal rule laid down as to whether enactments shall be considered directory only or obligatory with implied nullification for disobedience. It is the duty of the court to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute. (refer to ***Shashikant Singh Versus Tarekshwar Singh and Others*** ¹⁶; ***Gujarat Assembly Matter*** ¹⁷; ***Bhavnagar University Versus Palitana Sugar Mills Private Limited and Others*** ¹⁸)

45. Further the question as to whether a statute is mandatory or directly depends on the intent of the legislature and not upon the language in which the intent is clothed. The meaning and the intention of the

¹⁵ (1992) 1 SCC 335

¹⁶ (2002) 5 SCC 738

¹⁷ (2002) 8 SCC 237

¹⁸ (2003) 2 SCC 111

legislature must govern and these are to be ascertained not from the phraseology of the provision, but also by considering its nature, its design and the consequence which would follow from construing it the one way or the other. (refer to ***State of M.P. and Others Versus Pradeep Kumar and Others*** ¹⁹ ***Owners and Parties Interested in M.V. ValiPero Versus Fernando Lopez and Others*** ²⁰)

46. Thus having steered clear of the legal position we have to read the Customs Act, 1962 as a whole and Sub Section (5) of Section 46 cannot be read in isolation. The Hon'ble Supreme Court in ***Commissioner of Customs (Preventive) Mumbai Versus M. Ambalal and Company*** ²¹ considered the object and scheme of the Customs Act and it was held that it is an Act to consolidate and amend the laws relating to customs. The Act aims to sternly and expeditiously deal with the smuggled goods, and curb the dents on the revenue thus costs. The Act provides for confiscation of goods and conveyance and imposition of penalty when any goods which are imported contrary to any provision imposed by or under the Act or any other law for the time being in force. Thus, the scheme of the Customs Act postulates curbing the dents on the revenue which may be caused owing to several reasons which are covered under the various provisions of the Act. Thus, by applying the above legal principles and reading the Customs Act as a whole the power conferred on the proper officer under Sub Section (5) of Section 46 is not absolute. The first requirement is the satisfaction of the officer that the interest of the revenue are not prejudicially affected and that there was

¹⁹ (2000) 7 SCC 372

²⁰ (1989) 4 SCC 671

²¹ (2011) 2 SCC 74

no fraudulent intention and in such an event the proper officer may permit substitution of the bill of entry for home consumption for a bill of entry for warehousing or vice-versa. Therefore, the expression “and” used in Sub Section (5) of Section 46 has to be read as “or” in other words the two conditions namely interest of revenue is not prejudicially affected and there should be no fraudulent intention should be disjunctive and not conjunctive. This interpretation alone would be in consonance with the scheme of the Customs Act. Therefore, the contention of the respondent/importer that both conditions have to be simultaneously satisfied does not merit acceptance. That apart, the power under Sub Section (5) of Section 46 provides for the proper officer upon his satisfaction, that either of the two conditions are satisfied he may permit the substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice-versa. The expression “may” used does not make the provisions mandatory because the expression “may” has to be read along with the satisfaction which has to be recorded by the proper officer. Therefore, the statutory provision provides sufficient “*play in the joints*” by giving enough discretion to the proper officer to permit substitution or not. An alternate submission was made by the Learned Senior Advocate appearing for the respondent that even assuming the conditions provided in Section 46(5) are disjunctive or stand-alone the reasoning given that the substitution would occasion loss of revenue is of no substance as there was no change of duty on the date when the application for substitution was made by the respondent.

47. Firstly, it has to be seen as to whether the respondent importer could have submitted a letter for cancellation of their earlier bill of entry for home consumption and to permit them to substitute the bill of entry for warehousing. The argument was that the department has clarified by issuing Circular no. 15 of 2009-Cus dated 12.05.2009 that interest is not payable in terms of Sub Section (2) of Section 61 of the Act if the application for substitution was made within the prescribed period of 90 days. Therefore, it is submitted that the letter for cancellation of the bill of entry for home consumption was submitted on 08.10.2021 whereas the rate of duty was reduced only by notification dated 13.10.2021 with effect from 14.10.2021 and therefore when the request was made by the importer on 08.10.2021, the rate of duty remained the same and there is no loss of revenue.

48. The above submissions does not merit acceptance for the following reasons. Section 47 of the Act deals with clearance of goods for home consumption. Sub Section (1) states that where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under the Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption. The first proviso states that provided such an order may also be made electronically through the customs automated system on the basis of the risk evaluation through appropriate selection criteria. The second proviso further provides that the Central Government may by notification in the

official gazette, permit certain class of importers to make deferred payment of the said duty or any charges in such manner as may be provided by rules. Sub Section (2) of Section 47 deals with the liability of the importer to pay import duty. Clause (a) states that the importer shall pay the import duty on the date of the presentation of the bill of entry in the case of self-assessment.

49. In the instant case, the first set of bill of entries were filed on 06.09.2021 and 20.09.2021 for warehousing of the consignments. On 21.09.2021 and 28.09.2021, the respondent filed 10 bills of entries for home consumption in connection with the 7 bill of entries for warehousing on the EDI Portal intending to clear the goods for home consumption. This bill of entry was based on a self-assessment made by importer. The department did not raise any objection regarding self-assessment or the rate of duty payable on the imported goods. If such be the fact situation in terms of clause (a) of Section 47 (2) the importer has to pay the import duty on the date of presentation of the bill of entry. Thus, the bill of entry for home consumption based upon self-assessment having not been questioned by the department is deemed to have been assessed and finality has been arrived at. In such circumstances merely because interest is not payable in terms of Section 61 (2) of the Act cannot advance the case of the respondent/importer. If the importer is statutorily bound to pay the duty on the date of presentation of the bill of entry in the case of bills of entry which are self-assessed and the respondent importer having failed to do so, cannot seek for cancellation of the said bill of entry that to by way of a letter dated

08.10.2021. In other words, the proper officer would lose jurisdiction to exercise his power under Sub Section (5) of Section 46 as the bill of entry which was presented on a self-assessment basis having been accepted, the question of substitution would not arise that to by way of a letter to cancel the Bill of entry which has already been assessed on which the import duty was payable by respondent importer on the date of which self-assessed bill of entry was presented. Therefore, the proper officer cannot exercise his power under Sub Section (5) of Section 46 and accede to the request made by the respondent in their letter dated 08.10.2021 to cancel the assessed bill of entry for home consumption. Therefore, if such is the interpretation, if the prayer sought for by the respondent importer had been acceded to, it would prejudicially affect the interest of revenue.

50. It was contended that no order was passed by the authority immediately on the request made by their letter dated 08.10.2021. Had an order been passed acceding to the request, it would have been an order against the legal principle. In this regard, Section 68 of the Act, should also be taken note of which deals with clearance of warehouse goods for home consumption. Therefore, it has to be held that a self-assessed bill of entry having been accepted by the department, cannot be cancelled at the instance of the importer as in terms of Section 47(2)(a), the importer shall pay the import duty on the date of presentation of the bill of entry on self-assessment basis.

51. At this stage, it is relevant to note that for the goods warehoused vide 7 warehousing bill of entry, the respondent/importer filed 10 bills of

entry (6 on 21.09.2021 and 4 on 28.09.2021) for home consumption clearance under Section 68 of the Act. The bill of entries were pending for payment of duty since the date of completion of assessment and after 17 days of completion of assessment of all six bills of entry for home consumption dated 21.09.2021 and 10 days of completion of assessment of 4 bills of entry for home consumption dated 28.09.2021, the respondent importer submitted a letter dated 08.10.2021 for cancellation of the 10 bills of entry.

52. As mentioned above, the bills of entries were self-assessed by the respondent importer and the department has accepted importer's assessment without questioning the same or making any alterations and therefore the assessment has been completed as of 21.09.2021 and 28.09.2021 under such circumstances question of reopening the same would not arise.

53. Section 15 of the Act deals with date for determination of rate of duty and tariff valuation of the imported goods. Sub Section (1) of Section 15 states that the rate of duty and tariff valuation if any, applicable to any imported goods shall be the rate and valuation in force mentioned in Clauses (a) (b) and (c). For the case on hand clause (b) will apply which states that in case of goods cleared from warehouse under Section 68, the rate of duty shall be the rate and valuation in force on the date on which the bill of entry for home consumption in respect of such goods is presented under that Section. In this regard, the decision of the Hon'ble Supreme Court in ***M/s. Shah Devchand and Company Versus Union of India and***

Others ²² is to be taken into consideration. Therefore, the relevant date for computing the date of customs duty in the case on hand is on the date when the respondent importer filed the bill of entry for home consumption i.e. on 21.09.2021/28.09.2021 as the assessment is complete and in terms of Section 68 (b) of the Act, the respondent was required to pay duty and applicable interest also. The respondent cannot dispute the legal principles that once the assessment has been completed there is no other option left for the respondent except to pay the duty and applicable interest which has been levied if the goods remain in warehouse beyond a period of 90 days from the date of out of charge of corresponding warehouse bill of entry in terms of Section 61(2) of the Act. Furthermore, the request made by the respondent vide their letter dated 08.10.2021 for cancellation of the bills of entry for home consumption is not feasible of consideration as the scheme of the Act does not provide for such a contingency where the self-assessed bill of entry has been accepted by the department and the assessment has been completed. The only exception is when the importer relinquishes his title to the goods as provided in the second proviso in Section 68 of the Act. Such a contingency does not arise in the case of the respondent as there is no relinquishment of the title of the goods. Therefore, the authorities were justified in rejecting the request made by the respondent as if acceded to the revenue loss would be approximately Rs. 22.25 crores. Thus, the demand made by the respondent/importer vide letter dated 08.10.2021 was beyond the scope of the provisions of the Customs Act as the Act does not provide for any withdrawal or cancellation of the bill of entry for home consumption

²² AIR 1991 SC 1931

under Section 68 of the Act and the only exception being when there is relinquishment of the title to the goods.

54. In *Jain Irrigation System Versus Commissioner of Customs* ²³

in more or less similar factual circumstances, the Hon'ble Division Bench held that the conversion of the bill of entry was permitted and the converted bill of entry was assessed duty and it was obligatory on the part of the applicant therein to clear the goods within seven days of receiving the assessed bill of entry failing which it was obligatory on the part of applicant to clear the same on payment of duty with interest and therefore, the Court approved the decision of the tribunal which affirmed the view taken by the assessing officer rejecting the re-conversion of bill of entry under Section 46(5) of the Act. It is submitted on behalf of the respondent that the said decision is factually distinguishable because request for substitution was made after a period of two and a half years. In our view, we are required to look into the legal principle which was laid down in the said decision namely that conversion was permitted under the converted bill of entry was on duty and upon such assessment, it became obligatory on the part of the applicant therein to clear the goods within a specified time and this having not been done the order of the assessing officer rejecting the re-conversion under Section 46 (5) was approved. Therefore, the decision would support the stand taken by the revenue before us.

²³ (2005) 189 ELT (Bom)

55. The decision in *Bharat Commerce and Industries Limited Versus Collector of Customs, Bombay* ²⁴ considered as to whether a letter could be treated as bill of entry for warehousing and it was held that Sub Section (1) of Section 46 requires presentation of the proper officer of a bill of entry for home consumption or warehousing in the prescribed form. Sub Section (2) lays down that the bills of entry shall include all the goods mentioned in the bill of lading or other receipts given by the carrier to the consignor. Sub Section (4) of Section 46 requires the importer to make a declaration as to the truth of the contents of such bill of entry and to produce documents in support on such declaration. Therefore, it was held that it is difficult to see in the context of these provisions how the letter could be treated as a bill of entry for warehousing as what Sub Section (5) contemplates is the substitution of one bill of entry for another. This decision supports the stand taken in this judgment in the preceding paragraphs.

56. The decision in *Khattar Enterprises Private Limited Versus Collector of Customs, Kolkata* ²⁵ would also support the case of the appellant revenue where the Hon'ble Supreme Court after examining Section 15, Section 46 and Section 68 held that these provisions show that in respect of the goods entered for home consumption the relevant date for the purpose of ascertaining the rate of duty is the date on which the bill of entry in respect of such goods was presented under Section 46.

57. The above aspects of the matter as to whether at all the proper officer could act upon a letter given by the respondent importer dated

²⁴ (1997) 93 ELT 653 (SC)

²⁵ (1997) 94 ELT 454 (SC)

08.10.2021 was not examined by the tribunal while passing the impugned order. That apart, the learned tribunal appears to have been convinced with the case of the respondent importer in the light of the circular issued by the CBEC dated 12.05.2009 to state that for clearance of the goods under Section 68 the provisions of Section 47(2) is not attracted. The learned tribunal in our considered view, committed an error in not addressing the legal issue which fell for consideration, whether the power under Sub Section (5) of Section 46 was exercisable, in the facts and circumstances of the case and whether the interest is payable or not is not the question which is germane to the issue which fell for consideration before the learned tribunal. The learned tribunal has allowed the application filed by the respondent importer for withdraw/cancellation of the Ex. bond bill of entry and re-instatement of Into-bond bill of entry, however it has not referred to under which provisions of law or in other words under which provisions of the Customs Act this was permissible. Further the finding that there was no loss of revenue also is devoid of any reasons and the learned tribunal was swayed by the date of the respondents letter dated 08.10.2021 stating that on the said date there were no change of rate of duty. Unfortunately, the questions is not as to what was the rate of duty on 08.10.2021 but the question was whether a request by way of a letter dated 08.10.2021 for cancellation of self-assessed bill of entry for home consumption was maintainable under the provision of the Customs Act. Therefore, this finding rendered by the tribunal also does not satisfy the legal principle. Hence, the learned tribunal erred in allowing the respondent's appeal and the

impugned order, calls for interference and accordingly interfered with and set aside.

58. In the result, the appeal filed by the revenue is allowed and the substantial questions of law are answered in favour of the revenue. No costs.

(T.S. SIVAGNANAM, C.J.)

