CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>BANGALORE</u>

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 362 of 2009

[Arising out of Order-in-Original No. 24/2009 dated 19/02/2009 passed by Commissioner of CUSTOMS, COCHIN]

M/s. Liberty Oil Mills Limited **....Appellant**

Amerchand mansion D
Wing,16,madamecameroad,colaba,mumabi
MUMBAI
MAHARASHTRA
400001

VERSUS

C.C-Cochin-cus **....Respondent**

CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

AND

Customs Appeal No. 392 of 2009

[Arising out of Review Order No. 05/2009 dated 28/04/2009 passed by Chief Commissioner of Central Excise, Cochin and Chief Commissioner of Customs, Bangalore]

C.C-COCHIN-CUS **....Appellant**

CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

VERSUS

M/s LIBERTY OIL MILLS LTD., **....Respondent**

AMERCHAND MANSION, D WING
16.MADAME CAMA ROAD COLABA, MUMBAI

<u>Appearance:</u>

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MH
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For the Appellant

Shri S. Chandramohan, Commissioner (AR) — For the Respondent

CORAM: HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO. 20349-20350 / 2020

DATE OF HEARING: 20.02.2020
DATE OF DECISION: 03.06.2020

PER: P.ANJANI KUMAR

M/s Liberty Oils Ltd., Thane have imported about 2000 MTs of RBD Palmolein and filed various Bills of Entry at the Port of Cochin. In terms of Notification 39(RE-2007)/2004-09 dated 16th October 2007 import of Palm oil and its fractions was not permitted through Kochi Port. Hon'ble High Court of Kerala in Writ Petition No. 32705/2007 stayed the operation of the said Notification vide Order dated 05.11.2007. The Hon'ble High Court, however, vide Judgment dated 15.02.2008 dismissed the Writ Petition. During the interregnum, Bills of Entry were provisionally assessed and the imported Palm oil was cleared for home consumption. A SCN was issued to M/s Liberty Oils Ltd. seeking to confiscate 1999.695 MTs of RBD Palmolein and to impose penalty under Section 112 of Customs Act, 1952. The SCN was adjudicated wherein, vide Order dated 12.02.2009, Commissioner imposed a penalty of Rs. 80 Lakhs and however, refrained from imposing redemption fine as the goods were already released. M/s Liberty Oil filed Appeal No. C/362/2009 against the imposing of penalty and Revenue filed an Appeal C/392/2009 against non-imposition of redemption fine.

2. Learned Counsel for M/s Liberty Oils Ltd. submits that a firm contract was established on 29.09.2007 whereas the import restriction was placed on 16.10.2007 and therefore, provisions relating to transition period are applicable and penalty cannot be imposed on them. He relies upon the following cases:

- *Viraj Impex Ltd., 2017 (346) ELT 188 (Bom.) and 2004 (177) ELT 960 (Tri. Mum.)*
- *P.T. Impex, 2015 (321) ELT 38 (P&H) and 2014 (302) ELT 154 (Tri. Del.)*
- *Shri Shakti Iron & Steel Rerolling Mill Vs CC, Kandla, 20054 (304) ELT 279 (Tri. Ahmd.)*

3. Commissioner, Authorized Representative argued at length touching several issues involved in the case. He argues that the observation, of the High Court in the Viraj Impex case that irrevocable letter of credit was not established by the petitioners but that by itself cannot be a ground to say that concluded contract which was entered into by the petitioners was not a genuine contract, is not *ratio decidendi* as there is a statutory requirement by the Notification and the Notification was not set aside. He relies upon the observation of Hon'ble Supreme Court, in the case of Oriental Insurance Company, Civil Appeal No. 5209/2007, on the issue of applicability of precedent. The Apex Court observed as follows:

> *13……. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.*
> *14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*
> *15. The following words of Lord Denning in the matter of applying precedents have become locus classicus:*

3.1. He submits that in the case of Viraz Impex, the contract was entered on 26.11.1998 and the restriction Notification No. 34 was issued on 10.12.1998 regarding the floor price of defective/secondary HR coils; the importer has requested the supplier on 15.12.1998 to cancel the contract, however, the supplier insisted the performance as they have in turn placed an order for purchase with another firm and went to the extent of threatening the importer with damages. Therefore, the *force majure* of circumstances imports were affected. The facts of the case are different in the instant case and as per the contract; the importer could cancel the contract or move the contract to any other Port. Factually also, the very same importer was importing from other Ports like Goa, JNPT, Mumbai and Kandla. Therefore, Learned Commissioner argues that the ratio of the Hon'ble High Court decision in Viraz Impex is not applicable. Moreover, the instant case is after the pronouncement of the case under a different Notification and different set of circumstances. He submits that the law should be purposively and strictly construed as held by the Apex Court in the following cases:

- *Mafatlal Industries Vs UOI, 1997 (89) ELT 247 (SC)*
- *State of Jharkhand Vs Ambay Cement (2005) 1 SCC 368*
- *Kedarnath Jute Manufacturing Co. V CTO, Calcutta, (1965) 3 SCR 626*

He submits that as there is no confusion in Notification No. 39 (RE-2007)/2004-09 dated 16.10.2007 and as the importer did not open an irrevocable commercial letter of credit, the import cannot be permitted.

4. Learned Commissioner further submits that with the pronouncement of Final Order by the Hon'ble High Court of Kerala in the subject Writ Petition, the Interim Stay granted by the Hon'ble Court is rendered *non est*. Moreover, Hon'ble High Court did not quash the Notification. Relying on the Apex Court decision in the case of Shri Chamundi Moped Ltd. Vs Church of South India Trust Association, Madras, 1992 (3) SCC 1, he submits that *a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in restoration of the position as its stood on the date of passing of the order which has been quashed. The stay operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.* Learned Commissioner has also touched upon the principles of doctrine of merger and unjust enrichment and submits that with the issuance of Final Order by High Court, the stay is automatically vacated and the position before the issuance of the stay order is restored. Relying on the principle of promissory estoppel, he submits that the importer is bound by the conditions of the bond, he submitted a provisional release. One such condition was that Clause (C) that the importer pays to the President penalty and fine that may be adjusted in lieu of the confiscation of said goods mentioned in the schedule for importation of goods. Relying upon the following case laws, learned Commissioner submits that the adjudicating authority erred in finding that as the goods were not physically available, no redemption fine could be levied:

- *Weston Components Ltd. Vs CC, 2000 (115) ELT 278 (SC).*
- *CCE Vs Raja Impex, 2009 (229) ELT 185*
- *Shiv Kripa Ispat P Ltd. Vs CCE, 2009 (235) ELT 623 (T-LB)*
- *CCE Vs Mithran, 2017 (347) ELT 603f (HC-DB, MADRAS)*
- *CCE Vs Shilpa Trading Company, 2014 (309) ELT 641 (HC-DB,Kar)*
- *CCE Vs Kay Bee Tax Spin Ltd., 2017 (349) ELT 451 (HC-DB, Guj.)*

5. On hearing rival contentions, we find that the facts of the case are certainly different from the case referred by the importer. We find that the importer has not made out any case to show the compelling circumstances under which they could not either cancel the Contract or alter the Port of discharge. The Hon'ble High Court of Kerala has restored the position existing as on the date of import by quashing the Writ Petition. Therefore, we find that the importer was required to comply with the Notification dated 16.10.2007, inasmuch as they could not produce an irrevocable commercial letter of credit as required by the Notification. Therefore, we find that the impugned goods are liable for confiscation in terms of Section 111 (d) of Customs Act, 1962. However, looking into the long legal process undergone by the appellants and looking into the circumstances of the case, we are inclined to reduce the penalty to Rs.38 Lakhs from Rs.80 Lakhs. Appeal No. C/362/2009 is disposed of accordingly. In respect of Departmental Appeal No. C/392/2009, we find that there is force in the argument of the department. Accordingly, we find that Learned Commissioner erred in holding that no redemption fine could be levied as the goods were not physically available. We find that the goods were provisionally released in terms of a bond submitted by the importers. Therefore, in view of the Apex Court decision in the case of Weston Components Ltd., we find that redemption fine is liable to be imposed. Accordingly, we modify the OIO to that extent and impose redemption fine of Rs. 5 Lakhs.

6. Accordingly, the impugned order is modified to the extent of reducing penalty from Rs.80,00,000/- to Rs.38,00,000/- (Rupees Thirty Eight Lakhs Only). Accordingly, appeal No. C/362/2009 is disposed. Appeal No. C/392/2009 is allowed and redemption fine of Rs.5,00,000/- (Rupees Five Lakh Only) is imposed.

(Order pronounced in the open court on **03.06.2020**.)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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