CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH

CUSTOMS APPEAL NO: 27184 OF 2013

[Arising out of Order-in-Original No: 1/2013 dated 4th April 2013 passed by the Commissioner of Customs, Cochin.]

Forbes and Company Limited
PB No 556, Indira Gandhi Road, Willingdon Island
Cochin, Kerala – 682 003 ...***Appellant***

versus

Commissioner of Customs
Customs House, Willingdon Island, Cochin - 682009 ***...Respondent***

APPEARANCE:

Shri Aditya Venugopal, Advocate for the appellant

Shri K A Jathin, Authorised Representative for the respondent

CORAM:

HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A/ 20011 /2023

DATE OF HEARING:	09/01/2023
DATE OF DECISION:	07/02/2023

PER: C J MATHEW

By order of the Hon'ble High Court of Kerala, this challenge of M/s Forbes and Company Limited to the imposition of penalty of ₹ 1,00,00,000/- under section 112(a) of Customs Act, 1962 by Commissioner of Customs, Cochin[1] has acquired fresh lease of life after the earlier dismissal upon failure to comply with the pre-requisite in section 129 E of Customs Act, 1962, as prevailing then, mandating deposit of the disputed amount before the appeal could be taken up for disposal save for that, and to the extent, allowed by the Tribunal on application for waiver of pre-deposit filed separately but along with appeal under section 129A of Customs Act, 1962. It was the rejection of such application of the appellant with consequent default, despite adequate notice, in complying with attendant obligation to deposit the penalty in full that led to dismissal of the appeal without considering merits therein which, carried to the Hon'ble High Court[2] in appeal, culminated in order dated 3rd August 2022 restoring the appeal before the Tribunal.

2. The Tribunal had rejected the application for waiver by order dated 30th April 2015[3] for non-prosecution by M/s Forbes and Company Limited and the appeal itself was dismissed thereafter by order dated 13th July 2015[4] following which the appellant had filed application under section 129B(2) of Customs Act, 1962 for its recall citing error apparent on record that was

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1 [order-in-original no. 1/2013 dated 4th April 2013]
2 [customs appeal no. 15 of 2017]
3 [order no. 20868/2015]
4 [final order no. 21545/2015]

also rejected in order of 6th January 2017[5] for being without any merit.

3. In its appeal before the Hon'ble High Court, it was canvassed by the appellant that the non-response to the rejection of application for stay (commonplace usage for the more correct 'waiver of pre-deposit') should have had no bearing on the appeal itself as the sole consequence thereof was the liberty available to customs authorities to proceed with recovery of the amount through appropriate empowerment even while the appeal was pending for disposal. It appeared that the other, and fatal, consequence of appeal not being maintainable in the absence of pre-deposit, except to the extent waived by the Tribunal, was not pressed on behalf of Revenue. Again, with that statutory consequence not having been urged on behalf of Revenue, the Hon'ble High Court concluded, on the assertion made on behalf of appellant, that the dismissal of the appeal without specifying amount to be deposited for compliance thereof was inappropriate response on the part of an appellate institution.

4. Thus, the Hon'ble High Court, also noticing that the impugned order had been set aside by order dated 18th February 2020[6] of the Tribunal on plea of two other appellants affected by the same proceedings, observed that

[5] [order no. 20004/2017]
[6] [final order no. A/20218-20219/2020]

‘4. Advocate Dona Mary argues that the Tribunal fell in a serious error of law in passing the orders dated 30.04.2015, 13.07.2015 and 06.01.2017. The illegality pointed out in the exercise of jurisdiction by the Tribunal is that on 30.04.2015, assuming without admitting that the counsel appearing for the appellant was absent when the stay petition was called before the Tribunal, the Tribunal ought to have dismissed the stay application. It is completely unusual to dismiss the stay petition by imposing a condition to deposit the dues demanded by order dated 04.04.2013. The dismissal of the appeal on 06.01.2017, after hearing the case on 17.10.2016, shows the arbitrary manner in which the jurisdiction of the Tribunal is exercised. Under Rule 20, an application is made to recall and revise the orders made on 06.01.2017 and 30.04.2015. The said application is also dismissed. Thus, for non-complying with a condition which should not have been imposed, the appeal is dismissed, and the appellant is denied the valuable statutory right before the CESTAT, Bangalore. To bring home the inconsistent orders in the same matter, she invited our attention to the Final Order made by the Tribunal on 18.02.2020 in the appeal filed by M/s.ASEAN Cableship Pvt. Ltd.

4.1 For all the above grounds, it is argued that the orders dated 13.07.2015 and 06.01.2017 are liable to be set aside and Miscellaneous Application C/ROM/21353/2015 is allowed, and Appeal is restored and matter is heard on merits.’

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6.2 The Tribunal in one case through a default order confirmed the order dated 04.04.2013, in the case of the appellant herein and reversed the same order in the case of M/s.ASEAN Cableship Pvt. Ltd. Now, one order has two distinct consequences in the same and similar set of circumstances. To avoid such contingency and to give an

> *opportunity to the appellant in the appeal, we are convinced orders dated 13.07.2015 and 06.01.2017 can be set aside.'*

before going on to direct that

> *'6.4 The consequence of the above deliberation is that orders dated 13.07.2015 and 06.01.2017 are set aside. Application filed as C/ROM/21353 for review recall is allowed. The result thereof is that the appeal pending as Appeal No.C/27184/2013-DB is restored to the file of CESTAT. The CESTAT considers and disposes of Appeal No.C/27184/2013-DB as expeditiously as possible, preferable within three months from the date of receipt of the instant order.'*

without the option of determining the application for waiver of qualifying deposit prescribed in section 129E of Customs Act, 1962.

5. The appellant, a steamer agent, was also included in the proceedings initiated against M/s ASEAN Cableship Pte Ltd, Singapore, along with Mr Too Talk Leong, Master, CS ASEAN EXPLORER, by show cause notice proposing recovery of duty evaded under section 28 of Customs Act, 1962 and other detriments, including confiscation of the vessel, for alleged violations under Customs Act, 1962 in relation to 'stores', 'spares' and 'bunkers' while in India. The vessel had been contracted for maintenance and repair by the owners of underwater cable passing over the floor of the Arabian Sea. The impugned order held that, in the guise of 'foreign going vessel'

entitled to privileged consumption of ‘stores’ and ‘bunkers’ even while in the territorial waters and by incorrect representation while discharging obligations in section 29, section 30, section 40, section 41 and section 42 of Customs Act, 1962, the principal noticee had evaded duty with acts of omission and commission on the part of the other two, including the appellant herein, justifying confiscation of vessel and imposition of penalties. The appellant, as representative of person-in-charge of conveyance, was held responsible for enabling stay in Indian waters for 1450 days interspersed with occasional sorties outside during a total of 1750 days with only one repair having been undertaken beyond the territorial waters even as 36 episodes of such took place within.

6. According to Learned Counsel appearing for the appellant, there is no justification for continuation of the impugned penalty as the primary finding that led to invoking of section 112 of Customs Act, 1962 against the appellant had been effaced by decision[7] of the Tribunal allowing the appeals of M/s ASEAN Cableship Pte Ltd[8] and of the master of CS ASEAN EXPLORER[9] impugning the same adjudication order.

7. According to Learned Authorised Representative, the appellant herein, as steamer agent, was vicariously obligated by section 148 of Customs Act, 1962 to comply with prescriptions in

[7] [final order no. A/20218-20219/2020 dated 18th February 2020]
[8] [customs appeal no. 27102 of 2013]
[9] [customs appeal no. 27115 of 2013]

chapter VI of Customs Act, 1962 and the appellant had been derelict in discharging the responsibilities that devolved on vessels operating as ‘coastal run’ insofar as ‘stores’ and ‘bunkers’ are concerned. He relied upon the decisions of the Hon’ble Supreme Court in ***Aban Loyd Chiles Offshore Ltd vs. Union of India***[10] and in ***Commissioner of Customs, Mumbai vs. Aban Loyd Chiles Offshore Ltd***[11] and further contended that the appellant had colluded in mis-declaration for obtaining port clearance as well as in suppressing the existence of agreement with Cochin Port and the South East Asia and Indian Ocean Cable Management Agreement (SEAIOCMA).

8. There is no doubt that, in accordance with section 148 of the Customs Act, 1962, the steamer agent, as the appellant herein is, assumes full responsibility on behalf of person-in-charge of conveyance for compliance with chapter VI of Customs Act, 1962. It is on record, however, that the confiscation of the said vessel for alleged violations of chapter VI of Customs Act, 1962 as well as the duty liability arising from misuse of ‘ship stores’ and ‘bunkers’ in the findings of the adjudicating authority had been set aside by the Tribunal. In such circumstances, the related act of wrong-doing urged by the Learned Authorised Representative has ceased to be and consequently there is no scope for imposition of penalty under section 112 of Customs Act, 1962 on the representative of person-in-charge of

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[10] [2008 (154) ECR ECR 213 (SC)]
[11] [2017 (346) ELT 512 (SC)

conveyance.

9. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in open court on 07/02/2023)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)

**/as*