

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court – I

Appeal No.C/30349/2017

(Arising out of Order-in-Appeal No.VIZ-CUSTM-00-APP-113-16-17 dt.15.02.2017
passed by CCCE & ST (Appeals), Visakhapatnam)

HBL Power Systems Ltd.

.... Appellant(s)

Vs.

CC, Visakhapatnam

..... Respondent(s)

Appearance

Shri Y. Sreenivasa Reddy, Advocate for the Appellant.

Shri B. Guna Ranjan, Superintendent/DR for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 05.06.2018

Date of Decision: 05.07.2018

FINAL ORDER No. A/30684/2018

[Order per: P.V.Subba Rao]

1. This appeal is filed by the appellant against the Order-in-Appeal No. VIZ-CUSTM-000-APP-113-16-17 dated 15.02.2017 passed by the Commissioner (Appeals) upholding the Order-in-Original passed by the Additional Commissioner of Customs, Visakhapatnam.

2. Heard both sides and perused the records. The appellant herein imported steel wires which, at the time of examination, were found to not confirm to the standards laid down under the Steel and Steel products (Quality Control) Order, 2015 issued under the Bureau of Indian Standards Act. The bill of entry was facilitated by the Risk Management System of Customs but the out-of-charge officer found that the products did not meet the standards. Accordingly, after following due process of law, the Additional Commissioner of Customs ordered confiscation of the goods viz., steel wires imported by the appellant under Section 111(d) of the Customs Act r/w Bureau of Indian Standards Act, 2016 and Steel and Steel products (Quality Control) order, 2015. He also gave the appellant an option to redeem the goods only for the purpose of re-export on payment of redemption fine of Rs.2,00,000/- under Section 125 of the Customs Act, 1962. He also imposed a penalty of Rs.1,00,000/- on the appellant under Section 112(a) of the Customs Act, 1962. Aggrieved, the appellant approached the Commissioner (Appeals), who vide Order-in-Appeal No. VIZ-CUSTM-000-APP-040-16-17 dated 19.07.2016, remanded the matter back to the Additional Commissioner. The matter was re-adjudicated by the Additional Commissioner of Customs vide Order-in-Original No.91/2016 dated 09.09.2016 and he re-confirmed the confiscation of the goods under Section 111(d) of the Customs Act, 1962. He gave the importer an option to redeem the goods only for the purpose of re-export on payment of redemption fine of Rs.2,00,000/- under Section 125 of the Customs Act. He also imposed a penalty of

Rs.1,00,000/- on the importer under Section 112(a) of the Customs Act. One of the arguments put forth by the appellant during the adjudication is that their goods cannot be confiscated, referring to BIS Act, 2016, since it had not yet come into force at the time of import of the goods. Further they argued that the earlier BIS Act, 1986 was no longer in existence as it has been repealed by the Act of 2016 and no quality control orders were issued under the new Act. The Additional Commissioner of Customs enquired the matter from the Bureau of Indian Standards who confirmed that the BIS Act, 1986 was still in force and would continue to be so until the new Act of 2016 comes into force. The reason for this is that the BIS Act, 1986 is repealed by new BIS Act, 2016 and until the new Act comes into force, the old Act is not repealed. Aggrieved by the Order-in-Original (de-novo), the appellant appealed to the Commissioner (Appeals), who vide Order-in-Appeal No. VIZ-CUSTOM-000-APP-113-16-17 dated 15.02.2017, rejected the appeal. The instant appeal is against this Order-in-Appeal. In their appeal, the appellant prayed that the Tribunal may please set aside the order of Lower Appellate Authority and allow the redemption of goods with reduction in penalty and pass any other order as deemed fit. During personal hearing the Learned Counsel for the appellant agreed that the goods which they have imported fall within the scope of the Steel and Steel Products (Quality Control) Order, 2016, and hence are prohibited for import by virtue of general note 2(a) of Schedule-I of the ITC (HS) policy without registration of the supplier of the goods with the BIS. Hence they are liable for confiscation and the

goods have been confiscated and a penalty has been imposed on them. The goods were further permitted to be redeemed on payment of fine of Rs.2,00,000/- on the condition that they should be re-exported. It was his submission that Section 125 of the Customs Act, 1962, provides for allowing redemption of prohibited goods on payment of fine not exceeding the market value of such goods. There is no provision under which any other restrictions can be imposed by the adjudicating authority for release of goods along with payment of redemption fine. He relied on the case *Amba Lal Vs Union of India & others* [1983 (13) ELT 1321 (SC)] in which the Hon'ble Apex Court held that there is no reason for non-release of goods which will be imported for use and the manufacture of the product. He also relied on the judgment of the Tribunal in the case of *Commissioner of Customs Vs Aban Exim Pvt. Ltd.* [2014 (307) ELT 598], in which it was held that imposition of conditions while granting option to redeem confiscated goods is not warranted.

3. Learned Departmental Representative (DR), on the other hand, reiterated the arguments made in the Order-in-Original and Order-in-Appeal and argued that simply because the goods were not absolutely confiscated and redemption was allowed, it does not mean that the goods which do not meet the BIS Standards should be allowed to be used in India, contrary to the policy. He relied on the following case laws in which redemption fine was imposed and re-export of the confiscated goods was allowed.

1. Collector of Customs, Bombay Vs Elephanta Oil & Industries Ltd [2003 (152) ELT 257 (SC)], in which it was held that when the goods were confiscated and thereafter they were permitted to be re-exported; penalty can be imposed under Section 112 of the Customs Act.

2. A K Jewellers Vs Commissioner of Customs, Mumbai [2003 (115) ELT 585 (Tribunal – Larger Bench)], in which it was held as follows:

"Redemption fine in lieu of confiscation and re-export of two independent actions, hence the view taken that in case the assessee is allowed to re-export, the confiscation and redemption fine is not justified, is not a correct view. Further we find that this view is also taken by the Hon'ble Supreme Court in the case of Commissioner of Customs Vs Elephanta Oil Industries Ltd reported in 2003 (152) ELT 257 (SC) rejecting the contention of the importer that once the imported article is re-exported as directed by the Department, there is no question of levying any penalty or redemption fine."

4. Considered arguments on both sides and perused the records. It is not dispute that the steel wires which were imported did not have the BIS certification required as per the Steel and Steel Products (Quality Control) Order, 2016. It is also not in dispute that in view of the general note 2(a) of Schedule-I of the import policy framed under Foreign Trade and Development Regulations Act, 1992, mandatory BIS standards prescribed for products manufactured in India also apply to imported goods. In other words, goods which do not meet the mandatory BIS requirements cannot be imported into India. Therefore, imported goods are liable for confiscation. As per Section 125 of the Customs Act, whenever goods are confiscated the adjudicating authority has to give an option of redemption to the importer in all cases except in respect of prohibited goods where

the adjudicating authority may or may not give the option of redemption. In this case, the adjudicating authority has given the option of redemption with an additional condition that the goods after redemption should be re-exported. Now the question which arises is whether after giving option of redemption, the adjudicating authority can also add an extra condition that the goods should be re-exported. It is argued on behalf of the appellant that no such condition can be imposed, while respondent argued that such condition can be imposed as per the existing case laws. The appellant relied on the case of Amba Lal Vs Union of India to support his case. The relevant para no.12 of this judgment is reproduced as follows:

"12. It is then contended that the Collector of Central Excise had no jurisdiction to impose conditions for the release of the confiscated goods. The Collector of Central Excise in his order says, "In addition the import duty leviable on all these items together with other charges, if any payable, should be paid and necessary formalities gone through before the goods can be passed out of Customs Control." In Shewpujanrai Indrasanrai Ltd. v. Collector of Customs, 1959 SCR 821: 1983 E.L.T. 1085, a similar question arose for consideration of this Court. There by an impugned order the Collector of Customs imposed two conditions for the release of the confiscated goods, namely, (1) the production of a permit from the Reserve Bank of India in respect of the gold within four months from the date of despatch of the impugned order, and (2) the payment of proper customs duties and other charges leviable in respect of the gold within the same period of four months. This Court held, agreeing with the High Court, that the Collector of Customs had no jurisdiction to impose the said two conditions. The learned Additional Solicitor General concedes that the said decision applies to the present case. We do not, therefore, express any view whether that decision can be distinguished in its application to the facts of the present case. On the basis of the concession we hold that the conditions extracted above, being severable from the rest of the order, should be deleted from the said order of the Collector of Central Excise."

5. As may be seen in this case the Hon'ble High Court had held that the Collector of Customs had no jurisdiction to impose conditions and the

Learned ASG had conceded to this decision. Therefore the Hon'ble Apex Court did not express any view on this decision and passed the order based on the concession by the ASG that the conditions should be severed from the rest of the case. Thus this issue was not examined by the Hon'ble Apex Court.

6. On the other hand, the Learned Departmental Representative relied on the order of the Larger Bench of the Tribunal in the case of AK Jewellers Vs Commissioner of Customs, Mumbai, in which the Tribunal upheld the imposition of redemption fine as well as the order to re-export.

Para Nos.10 and 11 reproduced as follows:

" 10.After going through the provisions of Section 125 of the Customs Act, we find that provisions of this section do not specifically provide that an option may be given to redeem the goods for re-export. It empowers an adjudicating authority in case of goods the import or export of which is prohibited under Customs Act or under any law in force, to grant an option to pay in lieu of confiscation such fine as the said authority thinks fit. The provisions of this section equally apply to the goods to be exported as well as imported goods. Where the goods which have been tendered for export are ordered to be confiscated and an option to redeem the goods on payment of fine, it would follow that option is for the export of the goods. This is no doubt different from re-export. Re-export is a facility permitting export of goods which have already been permitted to be imported. Except in cases where import is prohibited by any law, those goods which have been imported may be permitted to be exported. The formal procedure of filing a shipping bill and observing other formalities relating to export of goods would have to be followed. There is no prohibition on the adjudicating authority from permitting re-export of the goods. When an adjudicating authority after ordering confiscation of imported goods permits their re-export, he is in effect first ordering the redemption of the goods on payment of fine and thereafter permitting them to be re-exported. Each of these two actions is independent and is permitted by law. An order whereby both are combined, therefore, is not contrary to law.

11.If we take up the issue from another angle that where the adjudicating authority allows re-export of the prohibited goods and in such a case, by holding that the order of confiscation and redemption fine is not justifiable, this will make the provisions of Section 125 of

the Customs Act redundant which specifically empowers the adjudicating authority to exercise his powers in respect of prohibited goods. As confiscation and redemption fine in lieu of confiscation and re-export are two independent actions, hence the view taken that in case the assessee is allowed to re-export, the confiscation and redemption fine is not justified, is not a correct view. Further, we find that this view is also taken by the Hon'ble Supreme Court in the case of C.C. v. Elephanta Oil & Industries Ltd. reported in [2003 \(152\) E.L.T. 257](#) (S.C.) rejected the contention of the importer that once the imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine. The Hon'ble Supreme Court held that power to levy the penalty under Section 112 of the Customs Act for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Customs Act. The question of law referred to the Larger Bench is answered accordingly."

7. The Learned Departmental Representative also relied on the judgment of the Hon'ble Apex Court in the case of Collector of Customs, Bombay Vs Elephanta Oil and Industries Ltd. Para Nos.8, 9 & 10 are reproduced as follows:

" 8.We would first deal with the contention raised by the learned senior counsel Mr. Sanghi appearing on behalf of the respondent that once the imported article is re-exported as directed by the department, there is no question of levying any penalty or redemption fine. In our view, this submission is without any substance because confiscation of goods and thereafter permitting the respondent to re-export the same would not mean that penalty under Section 112 of the Customs Act cannot be levied. The power to levy penalty under Section 112 for improper importation of goods is different from the power of confiscation of goods under Section 125 and giving an option to pay in lieu of confiscation such fine as authority thinks fit which are exercised under Section 125 of the Act. Relevant part of Section 112 reads thus: -

*" **Penalty for 112. Improper importation of goods, etc.** — Any person, —*

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or

(b)

shall be liable.-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees."

9. *As against this, Section 125 empowers the concerned officer to confiscate the goods which are illegally or improperly imported. After confiscation of the goods under the said section, the Collector of Customs is empowered to give an option to the concerned party to get the same back after paying redemption fine. Section 125(1) reads thus: —*

" Option Section 125. To pay fine in lieu of confiscation. —
*(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, **give to the owner of the goods or**, where such owner is not known, the person from whose possession or custody such goods have been seized, **an option to pay in lieu of confiscation such fine as the said officer thinks fit.**"*

10. *From the aforesaid two sections, it is apparent that both operate in different fields, namely, one requires imposition of penalty and other provides for confiscation of improperly imported goods. Section 111 provides that goods brought from the place outside India are liable to confiscation if the goods are improperly imported as provided therein. In cases where goods are liable to confiscation, discretion is given to the authority to impose penalty. Further, Section 125 empowers confiscation of such goods and thereafter, confiscated goods vest in the Central Government. The Section further empowers the authority to give an option to the owner or the person from whom goods are seized to pay fine in lieu of such confiscation for return of the goods and the fine is also limited up to the market price of the goods. Therefore, levy of fine in lieu of confiscation is in addition to levy of penalty imposable under Section 112."*

8. We find in the case laws relied upon by the Learned Departmental Representative, the Adjudicating Authority "permitted re-export of goods" and the question was whether redemption fine can still be imposed and the decision was that redemption fine can still be imposed. The question before us is different as the importer does not want to re-export the goods and the adjudicating authority, in his Order compels him to do so by giving a conditional redemption of goods. Such a case arose in the case of *Amba Lal Vs Union of India & others* [1983 (13) ELT 1321 (SC)], where

the Hon'ble Apex Court did not examine this issue because the Learned ASG representing the Revenue conceded to the decision of the Hon'ble High Court that the Collector cannot impose conditions while allowing redemption.

9. In other words, the Adjudicating Authority permitting re-export of confiscated goods is different from the compelling re-export of the goods by passing an Order. Section 125 of the Customs Act reads as follows:

"125. Option to pay fine in lieu of confiscation.—

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods for, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."

10. A plain reading of the above section shows that it does not confer upon the Authority passing the Order any power to impose any conditions while allowing redemption of goods.

11. The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal

(who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon'ble Supreme Court and High Courts can and do examine the validity of the laws and subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Hon'ble Supreme Court in *UOI Vs Kirloskar Pneumatics Company 1996 (84) ELT 401 (SC)* in which it was held as under:

*"According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which inter alia includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by Section 27 does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. Learned Counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of nine Judges along with the issue relating to unjust enrichment. **Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by Article 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State Act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a Civil Court. No such delegation or conferment can ever be conceived.** We are, therefore, of the opinion that the direction contained in clause (3) of the impugned order is unsustainable in law"*

12. We also find that not only Section 125 but no Section of the Customs Act, 1962 gives any officer the power to compel anyone to import or export or re-export. This Section also does not give the

Adjudicating Authority the right to give a conditional redemption saying “you can redeem only if you agree to re-export”. In case of prohibited goods the adjudicating authority has only two options:

(a) to allow redemption on payment of fine; or

(b) to not allow redemption.

13. In view of the above, we find that the condition in the Order-in-Original that the goods should be re-exported after redemption is liable to be set aside and we do so.

14. Appeal is allowed to the extent that the condition in the Order-in-Original that the goods should be re-exported after redemption is set aside.

(Pronounced in the open Court on 05.07.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)