CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 519 OF 2004

[Arising out of Order-in-Original No: CCP/KPM/ADJN/M&P/5/2004 dated 30th March 2004 passed by the Commissioner of Customs (Preventive), Mumbai.]

Aasu Textile Pvt Ltd
A-203/204 Udyog Bhavan, Sonawala Road
Goregaon (E), Mumbai - 400063 … ***Appellant***

versus

Commissioner of Customs (Preventive)
New Custom House, 2nd Floor, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Ankit Daga, Advocate with Ms Aarti Agarwal, Advocate for the appellant

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87282 /2021

DATE OF HEARING: 14/09/2021
DATE OF DECISION: 09/12/2021

PER: C J MATHEW

In this appeal against order-in-original no. CCP/KPM/ADJN/ M&P/5/2004 dated 30th March 2004 of Commissioner of Customs

(Preventive), Mumbai, in addition to the determination of the legality of confiscation of the impugned goods under section 111(d) of Customs Act, 1962 to be redeemed thereon under section 125 of Customs Act, 1962 and imposition of penalty under section 112 of Customs Act, 1962, we are also called upon to consider the competence under section 110 of Customs Act,1962 to effect seizure and the impact thereof on the legality of consequential proceedings commencing with issue of show cause notice. The Hon'ble High Court of Bombay, before which these were raised for the first time, by order of remand dated 18th January 2018 in customs appeal no. 84/2006, against final order no. A/86972-86973/2016 disposing off appeal no. C/519/2004 and C/682/2004, has directed the Tribunal to do so.

2. On the former occasion, Tribunal had narrowed the resolution of dispute to ascertainment of correctness of the confiscation of goods and, from the inability of the appellant to reconcile the impugned goods and documents of licit import, held against them. It is, therefore, necessary for us to underline that the order impugned had not fastened duty liability on the appellant specifically under section 28 of Customs Act, 1962. Nonetheless, the option to redeem the goods carried the statutory caveat of duty having to be borne and, we must emphasize, that crystallizing of liability is also a statutory responsibility. The detriment of confiscation under section 111(d) of

Customs Act, 1962 and imposition of penalty under section 112 of Customs Act, 1962 were consequences of the finding that 105 cartons of ‘nylon filament yarn’ with markings of ‘NFY-75D/48SD’ seized at the premises of M/s Rahul Roadways, Bhiwandi did not match the description in the bill of entry no. 129/04.12.2002 and 137/04.12.2002 furnished by the godown keeper, and declaring 42 cartons and 63 cartons respectively of ‘nylon filament yarn’ and ‘70D248 F-SD’, in support of legal possession of the imported goods owing to which the onus, devolving under section 123 of Customs Act, 1962 on the person from whom the goods were seized, had not been adequately discharged leading to confiscation and imposition of penalty.

3. The goods, initially detained on 9th January 2003, were seized *vide* panchnama dated 9th July 2003 when the appellant herein was issued with show cause notice proposing confiscation of the goods weighing 25100.5 kgs valued at ₹ 37650.75. At that point in time, the decision of the Hon’ble Supreme Court in *Commissioner of Customs V. Syed Ali [2011 (3) SCC 537]* had not yet been handed down and by the time the appeal was before the Tribunal, legislation, affording retrospective jurisdiction by insertion of section 28(11) by Customs (Amendment and Validation) Act, 2011 dated 16th September 2011, had been enacted and notification no. 44/2011-Cus(NT) dated 6th July 2011 under section 2(34) of Customs Act, 1962 for assigning the functions of ‘proper officer’ issued, and it was probably because of

that that the issue of jurisdiction was not agitated or decided upon.. We do so now on directions of the Hon'ble High Court.

4. We have heard Learned Counsel and Learned Authorised Representative at length and, having perused the written submission preferred by both and the records pertaining to the appeal, proceed to render our findings.

5. The preliminary issue of jurisdiction arises from the alleged lack of competence on the part of the Superintendent of Central Excise to exercise powers under section 110 of Customs Act, 1962, as well as lack of competence of the Deputy Commissioner of Central Excise to issue show cause notice, and it is contended that the irreparable taint of illegality attends upon all subsequent proceedings. Section 110 of Customs Act, 1962 empowers seizure of goods that are believed to be liable to confiscation under section 111 of Customs Act, 1962 and most of the several breaches enumerated therein, including 'goods, imported, attempted to be imported or brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by and under the Act,' has aught to do with assessment and issue of notice for recovery of duty. Nevertheless, seizure of goods enables custodianship till confiscation, envisaged in section 111, is ordered or till return to the person from whom seizure was effected if notice has not been issued within the

prescribed time. In the present instance, the seizure was formally effected only on 9th July 2003 which is also the date of issue of show cause notice. At no stage between detention of the goods and till the matter was taken before the Hon'ble High Court of Bombay was the alleged illegality of seizure challenged by the appellant herein. Now that it has been raised and the appeal restored before the Tribunal, it needs to be addressed.

6. It has been imputed that the show cause notice has been issued by an officer of central excise; proceedings were not initiated under section 28 of Customs Act, 1962, which enables recovery of duties that were not levied or were short-levied at the time of clearance but under section 124 of Customs Act, 1962 prescribing notice before proceeding with adjudication for confiscation. The essentials of the procedural validity are issue of notice by the competent authority, opportunity for making a representation and reasonable opportunity of being heard followed by a reasoned order. The Deputy Commissioner of Central Excise is not barred from issuing a notice with section 122 of Customs Act, 1962 delineating the various hierarchical distinctions. In the present case, the adjudication is that of Commissioner of Customs. Consequently, it cannot be said that there is jurisdictional impediment that bars, or has tainted, the proceedings leading to the impugned order.

7. A finding on merit will decide the acceptability of the claim of the appellant that the imported goods had been legally obtained and under the cover of the two bills of entry. It is common ground that the 'denierage' of the 'yarn' in the two bills of entry is not the same as that seen in the markings on the cartons. It is also on record that the test result has not evidenced the conformity of the 'denierage' with the markings on the package. Therefore, it was reasonable to presume that the goods did not match the documents of clearance and section 123 of Customs Act, 1962, placing onus on the person from whom the goods were seized to prove legal possession thereof, is not discharged.

8. The appellant had obtained clarifications from the supplier that, in their local market, 'synthetic yarn' was available or marketed under certain 'denierage' which was adopted for the purpose of invoice and other documents on the basis of which the declaration was made in the bill of entry. The clarifications received from the overseas supplier was not within the possession of the adjudicating authority who appeared to have been influenced only by the discrepancy of the 'denierage' and by the endorsement on the bill of entry produced by the appellant. The notings about availment of CENVAT credit as demonstrating transfer may well be a hypothesis that could have been tested from available records. In these circumstances, we are unable to conclude whether the adjudication was carried out after affording the appellant of every opportunity of pleading their defence.

9. It would, therefore, be in the interest of justice for the adjudicating authority to take a fresh decision on the mater after giving an opportunity to the appellant to refute all allegations and also to consciously discharge the onus imposed on them under section 123 of Customs Act, 1962. To enable this to be done, we set aside the impugned order and remand the matter back to the original authority.

(Order pronounced in the open court on 09/12/2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*