

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 1094 & 1095 of 2008

[Arising out of Order-in-Original No. 111/08-09CC(I)JNCH dated 03.07.2008 passed by Commissioner of Customs (Import), Raigad]

M/s. Atlanta Limited

101, Shri Amba Shanti Chambers,
Opp. Hotel Leela, Andheri (East)
Mumbai-400 059.

Appellant

M/s. Rajhoo Bharot

[Managing Director of M/s. Atlanta Limited]
101, Shri Amba Shanti Chambers,
Opp. Hotel Leela, Andheri (East)
Mumbai-400 059.

Appellant

Vs.

Commissioner of Customs (Import),

Jawaharlal Nehru Customs House, Post Uran,
Dist. Raigad, Maharashtra-400 707.

Respondent

Appearance:

None for the Appellant

Shri D S Maan, Deputy Commissioner, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 23.02.2023

Date of Decision: 23.02.2023

FINAL ORDER NO. 85744-85745/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-original no. 11/08-09 CC(I)JNCH dated 03.07.2008. By the Impugned order Commissioner has held as follows:

'I reject the exemption claimed and availed under Customs Notification No. 21/2002 dated 01.03.02 in respect of import of HOPR No. HR-130 vide B/E No. 767489 dt. 08.08.02. I order for confiscation the said imported HOPR valued at Rs. 1.57.88,320/- (Assessable Value) imported vide B/E NO. 767489 dt. 08.08.02 in terms of section 111(0) of Customs Act, 1962. However I give an option to ATLANTA LTD. under section 125(1) of the Customs Act, 1962 to redeem the same on payment of Redemption Fine of Rs. 20,00,000/- (Rs. Twenty Lacs Only).

I order to confirm and demand that the amount of duty Rs. 80,20,467/- (Rs. Eighty lakhs twenty thousand four hundred sixty seven only) should be recovered under section 125(2) of the Customs Act, 1962 read with the condition no: 40 of the

notification 21/2002 dt 1-3-2002. The Bank Guarantee of Rs. 80,00,000/- executed by ATLANTA LTD. for provisional release of the seized HOPR be enforced towards duty liable.

I impose penalty of Rs. 5,00,000/- (Rs. Five Lacs only) on ATLANTA LTD. (a) under the section 112 of the Customs Act 1962.

I impose personal penalty of Rs. 5,00,000/- (Rs. 5 Lacs) on Shri Rajhoo Bbrot, Managing Director, ATLANTA LTD. under section 112(b) of the Customs Act, 1962.'

1.2 DRI on receipt of intelligence that appellant had imported and cleared Hydraulically Operated Piling Rig Machine HR-130 of MAIT make 'bearing SI. No. 1302050923 (hereinafter referred to as HOPR) vide bill of entry No.767489 dated 08.08.2002, through Nava Sheva Port by claiming and availing the benefit of conditional exemption from customs duty under SI.No.230 of the Table annexed to Notification No. 21/2002-Cus. Dated 01.03.2002, and violated the condition of the notification by deploying the machine for use in private commercial projects and had rented out the same to Valecha Engineering Ltd., (hereinafter referred to as VEL) and the machine was being used by VEL in their sites at Express Estates, Chennai. Investigations were carried out and statement of Shri. G. Radhakrishnan, Executive Director (Finance) (Appellant 1) and Shri. Rajhoo Bharot, Managing Director, Atlanta LTD. (Appellant 2) were recorded.

2.2 During course of investigation, officers of DRI visited the site where the said machines were being used in contravention of the conditions as laid by notification no. 21/2002-Customs, Dated 01/03/2002 for reasonable goods for that the machine was liable for confiscation under Custom Act, 1962. Machine was detained with the specific instructions not to be removed parts or otherwise deal with the machines without prior permission. It was further gathered that appellant 1 was dealing with the detained machine in violation of detention order served on them on 05.05.2007 and officers again visited the site on 24.05.2007 to find that a detained machine was used by the appellant 1. So the machine was seized. Vide letter dated 12.06.2007 appellant requested for provisional release of the said machine, which was allowed on a condition that the bond of full assessable value of Rs. 1,57,88,320/- and bank guarantee of Rs. 80 Lakhs is executed.

2.3 The Show cause notice dated 23.10.2023 was issued to the appellants.

2.4 The matter was adjudicated as per the Impugned order. Aggrieved appellants filed these appeals.

3.1 The matter has been listed for hearing on 01.12.2021, 23.3.2022, 14.06.2022, 11.10.2022 and for today. On all the occasions appellants choose to abstain from hearing. Accordingly, the appeal should be dismissed for non prosecution under Rule 20 of CESTAT Procedures Rule, 1982 or taken up for consideration ex-parte.

3.2 As the issue is in very narrow compass, we heard Shri. D. S. Maan, Deputy Commissioner (AR) for the respondent.

3.3 Arguing for the revenue learned AR submits as follows:

- *Contention of the Importer that they had not dispose of the impugned goods and just provided on lease/rent to other users and so they had not contravened the condition which they had undertaken at the time of import is not acceptable.*
- *Sub clause (b) of condition No.40 of Notification No.21/2002-Cus, Serial no.230, reads as under- "(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation."*
- *All the words i.e. 'Shall use'; 'exclusively' and 'shall not sell or otherwise dispose' used in the above mentioned condition only implied that it is a mandatory clause and compliance of the same is required by the person who took the benefit of the Notification.*
- *Further, the words 'shall not sell or otherwise dispose clearly means that 'sell' and 'otherwise dispose' are two separate words and cannot be considered synonyms of one another. It appears that the 'otherwise dispose' is mutually exclusive to sell and so it covers all other type of disposal of goods other than selling. In view of above, renting of the Machine before the period of expiry of 5 years covers in 'otherwise dispose' and hence goods imported under duty exemption notification are liable for confiscation under section 111(0) of the Customs Act, 1962 for breach of post import condition and the company and the MD of M/s Atlanta Limited are liable for penal action.*
- *Moreover, if the renting/leasing is to be allowed, it beats the very purpose, as the notification couldn't have imposed the conditions that the importer should have a valid contract with NHAI for road constructions. If it is interpreted to allowing renting of such goods, the notification would have included the eligibility to leasing and financing companies also.*
- *Further, from the copy of undertaking given by them at the time of importation as available at page no. 136, it may be seen they had used the word for the construction of National Highway. shall be actually used for construction National Highway. Thus by using the said goods for other purpose, it is a clear violation of the undertaking given as required by the condition of the said notification.*
- *This issue is squarely covered by Patel Engineering Ltd Vs CC(Import) reported in 2013 (295) ELT 243 (TH-Mum) - Mumbai, wherein the Tribunal has held that -*

Goods were not used for the intended purpose as undertaken by appellant and Department had rightly issued show cause notice for violation of condition of appellant's undertaking and thereby for denying the exemption- As the terms of condition of bond/undertaking were violated, appellant is liable to pay duty as demanded. This case was approved by Apex Court, and the appeal filed by the importer was dismissed.

- *In case of Gammon India Ltd Vs Commissioner of Customs reported in 2011 (269) ELT 289 (SC), it was held that If Bench of Tribunal in identical facts-situation is permitted to come to conclusion directly opposed to conclusion reached by another Bench earlier, even after noticing it, it would be destructive of institutional integrity.*
- *In case of PRADEEP MASTER BATCHES PVT. LTD. Vs COMMR. OF CUS. (EXPORT), MUMBAI [2017 (348) E.L.T. 692 (Tri-Mumbai)] it was held that there is no bar on Imposition of separate penalty on company and the Director - Director played significant role, hence, penalty rightly Imposed.*
- *In present case Shri Rajhoo Bharot, MD of the importer appellant decided the to take claim of the said notification on the impugned goods. It is his confessed position vide statement dated 23.05 2007 and said statement was never retracted (Page 148). Further, he was responsible for allowing it to be used on rent. (Findings of OA at Page 235).*
- *On the issue of interpretation of Notification reliance is placed on decsion in case of Dilip Kumar & Company reported in 2018(361) ELT 577 (SC).*
- *Tribunal decisions in the case of Ircon International 2019(366) ELT 1034(Tri. Mumbai) and Gammon India 2019(369) ELT 918(Tr. Mumbai),are distinguishable as in those cases, the goods were only used in Road Constructions, not elsewhere. Moreover, the Revenue has challenged those decisions before the Hon'ble Apex Court and in both the cases it is ordered to "Issue Notice- 2020(372) ELT A 103(S.C) in the case of Gammon India and 2019(368)ELT A 231(SC) in the case of Ircon International Ltd.*
- *Both the appellants are habitual duty evaders/offenders. In their another identical case 2017 (348) ELT 562(Tri Mumbai), the appeals were dismissed.'*

4.1 We have considered the impugned order along submissions made in the appeal and during the course of arguments.

4.2 The Impugned order records the following findings :

"12. I have gone through the entire facts of the cast and various written/oral submissions made by the importer. The issue involved is compliance of the post importation conditions set out in the exemption notification No 21/2002.Cus.

dt.1.3.2002 The importer in their reply to the Show cause notice has contested and put forth their arguments that the condition number 40 of the subject notification provides for three conditionalities. The first condition provides that the person importing the goods should have been either awarded a contract for the construction of roads in India by the National Highways Authority of India or who has been named as a sub-contractor in the contract, so awarded for the construction of roads, the second condition provides that the person so importing the goods shall give an undertaking to the effect that he shall use the imported goods exclusively for the construction of roads and finally the third condition provides that the person, so importing the goods, shall not sell or dispose of the said goods, in any manner, for a period of five years from the date of their importation.

It has been held by various Tribunals that while interpreting the notification, words should be read strictly and nothing should be added to enlarge the scope of the notification. The verbatim of the said notification (supra) shows that the condition number 40 is divided into three paras as 'a', 'b' and 'e', which are distinctly different from the dissection given by the importer. The grammatical connotation of the words in the para 'b' of the condition shows that the word 'and' is a conjunction used to join two phrases or clause or sentence to show continuity of the meaning. There is no question of reading the word 'and' disjunctively here. Accordingly, the clause for a period of five years from the date of their importation is equally applicable to two principle sentence i.e I shall use the imported goods exclusively for the construction of roads and 2. That he shall not sell or otherwise dispose of the said goods. The short phrase or clause "in any manner" expands the scope of the sentence shall not sell or otherwise dispose. Thus the ratio of the case law referred to explain the scope of the word "disposal" is not squarely applicable to the present context. Also is any legal provision 'exclusive' claim will be limited to only those that are specifically mentioned therein. Thus, the interpretation of the notification is that the imported goods should exclusively be used for Road construction and not for building or other constructions, for a period of five years and 2.that the importer shall not sell or otherwise dispose of the goods in any manner which include lease, renting etc for a period of five years.

The submission of the importer that the said assessment by the proper officer of Customs has attained finality. Here it should be remembered that the assessment was conditional aid the importer, at the time of importation, furnished an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads. Importers further submission that it is not the case in the notice that the HOPR was never or not used in the said project. Again the correct interpretation is that the imported goods should be used and only used for the construction of roads for a period five years from the date of importation. As such there

is no restriction on the number of projects executed by the importer, however all such awarded projects should be for the construction of roads only. The importers argument that the subject notification would be available only in respect of such contracts awarded by the National Highway Authority of India, where the described goods would be used for a period of five years, falls flat on this count only.

13. From the evidence in the form of statements and records scized during investigation, it has been observed that ATLANTA LTD has used HOPR at the following sites:

(a) From dated 10,02 2004 to 29.04.2005 Kahalgaon, NTPC site (Bihar) power plant.

(b) From dated 10/05/2005 to 03/08/2005 in Vashi (New Mumbai) Building projects.

(c) From dated 15/08/2005 to 30/04/2006 in NHAI's Palam site at New Delhi.

(d) From dated 01/05/2006 to till date at Chennai.- Building projects.

They had not informed/obtained permission of Customs for renting the machine to VEL for their use at the project site at Kahalgaon, Palam and Chennai, which pertains to Building projects. By using the HOPR for construction other than for roads and renting the same within five years from the date of importation, Atlanta Ltd. has violated the conditions of the notification no 21/2002- Cus. dated 01/03/2002 condition no.40 "b" on both the counts.

14. By their acts of failure to adhere to the conditions of the exemption notification, ATLANTA LTD. appears to have rendered the imported HOPR to confiscation besides rendering themselves liable to pay the duty in respect of the said HOPR. Further, they are also liable for penalty under Section 112(a) of the Customs Act, 1962.

According to Section 125 of the Customs Act, 1962:

(1) whenever confiscation of any goods is authorized by the Customs Act, 1962, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the 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 office thinks fit;

(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.

15. From the above, it appears that:

a. ATLANTA LTD. imported one HOPR vide bill of entry No. 747689 dated 08.08.2002 by claiming and availing the exemption in terms of Notification No. 21/2002- cus. dated 01.03.2002, under a condition that the HOPR will exclusively be

used for construction of roads and not dispose in any manner for a period of five years from the date of importation.

b. ATLANTA LTD. executed a bond for Rs. 80,20,467 (Rupees eight lakhs twenty thousand four hundred and sixty seven only), at the time of clearance stating that they would use the imported HOPR exclusively for the construction of roads for the period of five years from the date of importation.

c. ATLANTA LTD. violated the condition prescribed under the notification by renting out the machine to VEL who in turn used the HOPR for construction of commercial building projects.

d. The HOPR imported by ATLANTA LTD. is liable for confiscation under Section 111(0) of the Customs Act, 1962;

e. ATLANTA LTD. are liable to pay the Customs duty on the HOPR imported and cleared by them vide bill of entry No. 747689 dated 08.08, 2002 in terms of Section 12 of the Customs Act, 1962 read with Sections 111(0) and 125(1) and (2) of the Customs Act, 1962;

f. ATLANTA LTD. are liable for penalty under Section 112(a) of the Customs Act, 1962;

g. Shri Rajhoo Bbarot, as Managing Director, ATLANTA LTD. who decided to deploy the HOPR in projects other than road projects is also liable for penalty under Section 112(a) of the Customs Act, 1962

4.2 Notification No.21/2002, Serial No.230 does not restrict quantity of Import i.e. Number of machinery to be imported. It means that any importer who has been awarded a contract from NHAI for construction of road can import any number of machine under this exemption. The only condition is that the importer shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation. This period of five years should be construed with the overall exemption allowed by the Govt., it is because there is no other restriction as mentioned above. Le, number of machinery imported and therefore restriction of 5 years simply implied that the same machine should be used for completion of the particular project. If the basic condition of not selling or disposing otherwise construed otherwise, as claimed by the importer, then any person who has been awarded the contract from NHAI may import any number of machines, use it for the specific project for some time and then divert it or dispose it as per his wish. I think this view must not be in the mind of the Government while allowing such exemption, because, such view miscarriage the intention of the Exchequer.

4.3 Findings recorded by the Commissioner that notification should be strictly is supported by the decision of Hon'ble Supreme Court in case of CC Import Vs Dilip Kumar & Company [2018 (361)E.L.T. 577 (S.C.)] wherein Hon'ble Apex Court held as

follows:

'19. The well-settled principle is that when the words in a statute are clear plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanal Lal Surv. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

52. To sum up, we answer the reference holding as under-

- (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
- (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*
- (3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.'*

4.3 The issue following for early consideration in case of Rajhoo Bharot vs. Commissioner of Customs (Mumbai) [2017 (348) ELT 562 (Tri-Mumbai)]

'6. We have carefully considered the submissions made by both the sides

6.1 As regards the imports of stone crushing plant the same was used for a project awarded by MMRDA The Issue, whether MMRDA is a road construction corporation as envisaged in Condition No. 40(a) of Notification No. 21/2002-Cus. was examined at length by this Tribunal in the case of Shreeli Construction (supra) and it was held that MMRDA is not a road construction corporation within the scope and context of Condition No. 40(a). This conclusion was arrived at after careful and detailed analysis of the constitutional and organizational architecture of MMRDA and on a critical analysis of the constitutional and generic statutory functions entrusted to MMRDA. Therefore, the appellant was not entitled ab initio for the benefit of the Notification No. 21/2002-Cus.

6.2 In the case of hot mix plant, the same was imported claiming that the same would be used in a contract awarded by the Government of Gujarat for construction of road in Surat. But the hot mix was never put to use in terms of the said contract and was used in respect of construction contract awarded by MMRDA which is not a specified

organization. Both these machineries, after being put to use for about 1½ years, were diverted. The stone crushing plant was diverted for use in respect of contract awarded to M/s. Eala Tollways Pvt. Ltd. for construction work in the Nagpur urea. Similarly, the hot mix plant also was rented out to Indian Equipment Infrastructure Pvt. Ltd. for a monthly consideration of 4.75 lakhs per month. Notification No. 21/2002-Cus, envisaged the importer undertake to use the imported goods exclusively for the construction of roads by himself and he shall not sell or otherwise dispose of the said goods in any manner for a period of five years from the date of importation. In the present case, is an omitted position that after using the equipment for a period of 1 to 13% years, the imported goods were diverted for use by others, namely, M/s Baaj Tollways Pvt Ltd., and by Indian Equipment Infrastructure Ltd. In other words, the appellant did not utilise the goods for a period of five years for the construction of roads by himself. Thus, there is a clear violation of the post- Importation condition.

6.3 it is a settled position in law that an exemption notification has to be construed strictly, the same being in the nature of an exception. Inasmuch as the conditions of the exemption notification has been violated, the appellant is obviously not eligible for the benefit of exemption and consequently the appellant becomes liable to pay the differential duty at the rate prevailing at the time of importation of the goods. 6.4 There is no dispute in the present case, about the quantum of duty computed. Therefore, we hold that the appellant is liable to pay the differential duty of 144.11.453) in respect of stone crushing plant imported vide Bill of Entry No. 512687, dated 10-11-2004 and differential duty of 88.63,329 in respect of hot mix plant imported vide Bil of Entry No. 528443, dated 3-1-2005 under the proviso to Section 28(1) of the Customs Act, 1982 and also in terms of the bond/undertaking executed by the appellant at the time of importation, Inasmuch as the appellant had suppressed the fact of diversion, extended period of time is rightly evocable for demand of differential duty and we hold accordingly Consequently the appellant is also able to pay interest under Section 28AS of the Customs Act, 1902 As regards the confiscation, inasmuch as the appellant had diverted the goods before the completion of five years, the same are liable to confiscation for violation of post-importation condition and, therefore, the provisions of Section 111(e) of the Customs Act are clearly attracted. Therefore, the confiscation of the goods cannot be faulted at all The adjudicating authority has Imposed a redemption fine of 54 lakhs and 33 lakhs respectively in respect of the machinery imported which is appropriately 15% of the value of the goods. This appears to be on the higher side. Accordingly, we reduce the redemption fine imposed to 35 lakhs and 22 lakh respectively in respect of the two machineries mentioned above.

6.5 As regards the penalties imposed under Section 114A equal to the duty sought to be evaded, this is quite harsh considering the fact that the goods were used for construction of roads even though by others and not by the appellant in the facts and

the of impose a penalty of 50 lakhs on the appellant Ms. All under the provisions of Section 112(a) of the Customs Act, 1962, instead of the mandatory penalty under Section 114A equal to the duty, Inasmuch as the appellant-importer has been imposed with a penalty, we are of the considered view that penalty on the Director is not warranted. Accordingly, we set aside the same.'

4.4 In case of Patel Engineering LTD. [2013(295) E.L.T. 243 (Tri-Mumbai)] is held as follows:

'We find that the paver finisher has been imported by the appellant by claiming the exemption from duty under as per Sr. No. 230 of Notification 21/2002. For better appreciation, the relevant portion of the said condition is reproduced as under:

(a) the goods are imported by-

i)

ii) a person who has been awarded a Contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport by the National Highway Authority of India, by the Public Works Department of State Govt or by a road construction corporation under the control of the Govt of a State or Union Territory,

iii) or a person who has been named as sub-contractor in the contract referred to (3) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Publis Works Department of a State Govt or by a road construction corporation under the control of the Govt of a State or Union Territory.

(b) the importer, at the time of importation furnishes an undertaking to the Deputy Commissioner of Customs or the Asst. Commissioner of Customs as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for the period of five years from the date of the importation; and

(c) in case of goods at Sr. No. 12 & 13 of the list 18, the importer, at the time of importation of such goods, above produces to the Dy. Commissioner of Customs or Asst. Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Dy, Secretary to the Govt of India in the Ministry of Surface Transport (Roads wing, or as officer not below the rank of Chief engineer of the National Highways Authority of India to the effect that the imported goods are required for construction of roads in India"

9. It is contended that by the Ld. Sr. advocate that the condition No. 40A is fully satisfied and there is no dispute. We do agree with the same. It is also contended on behalf of the appellant that condition 40B is also fully satisfied at the time of import by execution of bond by the appellant to the affect that he shall use the imported goods

exclusively for construction of roads and he shall not sell or otherwise dispose of the said goods in any manner for a period of 5 years for the date of importation. Therefore they have not violated the condition 40B and have rightly claimed the exemption under the above Notification as the undertaking is a pre-import condition and condition No. 40B is not a post-import condition. Therefore the appellant has not violated any condition of the said Notification and for the same he is strongly relied on the decision of Sameer Gehlot (supra).

10. We have examined the case of Sameer Gehlot (supra) and in that case it is clear cut relying by the adjudicating authority that there was no post-import contravention and that the impugned exemption has been correctly availed Therefore, the said decision is not relevant to the facts of this case as in this case the show-cause notice has alleged that the appellant has not fulfilled the obligation undertaken by the appellant by executing the bond to that effect This fact has clarified in the show-cause notice itself in para 32.3 as under-

32.3 This act of the importer is in contravention to undertaking filed by themselves at the time of import clearance before the customs authority in this regard, violating condition No. 40(b) of the Notification."

Further, in para 35(b)(i) the appellant were issued show cause why "an amount of customs duty of Rs. 1,30,48 188/-leviable on the paver finisher and evaded by the importer Mis Patal Engg. Ltd should not be demanded and recovered under the proviso to Section 28(1) of the Customs Act, 1962 and also by enforcing the Bonds/undertakings executed by them at the time of import."

11. Another argument advanced by the Id. advocate is that the Notification did not contemplate actual use of the imported goods. Without going into this issue, it is a fact that the said paver finisher was found at the site of Nicco Corporation Ltd. and to ascertain the use of paver finisher, the statement of Shri Rajiv Nath, Sr. Manager Project Division was recorded and in his statement has submitted that M/s. Nicco Corporation Ltd. undertook engineering project or erection and commissioning of plant like gas plant, oil plant etc. M/s. ONGC has given a contract to M/s. Nicco Corporation Ltd. for construction of Pipe storage system with gantry crane and pipe stretching system including road culverts, site levelling works for model like Ligiri, Pukhari site, Assam. The aforesaid contract was for the period 27-3-2007 to 26-1-2008 and the contract work involves concretisation of the ground area of the entire depot and also erection of gantry crane bundle, electric panel and compressor in the said depot. He further stated that the depot which is of the size of 340 Mtr X 140 Mtr 1.6. 40,600 sq.mtr and this depot is for purpose of storage of drilling pipe by ONGC. The above mentioned total work in the contract, the later part i.e. engineering erection of rail, gantry crane bundle strip system, electric panel and compressor is being carried out by project division. The paver finisher was used for dry lean concrete for an area of 1200

sq.mtr. initially and thereafter another area of 8000 sq.mtr was also undertaken by said paver finisher.

12. From the statement of Rajiv Nath, we find that the paver finisher was used not for construction of road but for the construction of depot and platform for storage of pipes.

13. As per the condition of the Notification, the undertaking was given by the appellant at the time of import that the impugned paver finisher shall be used only and only for construction of roads for a period of 5 years. From the facts ascertained hereinabove, we find that the paver finisher was not used for the intended purpose as undertaken by the appellant. In view of this finding, the department has rightly issued show-cause notice to the appellant for violation of condition of their undertaking and thereby for denying the exemption under Notification 21/2002. As show-cause notice has been rightly issued and in the adjudication order it is also found that the impugned paver finisher was not used for construction of road, therefore they have not fulfilled the condition terms of undertaking/bond at the time of import. As they have violated the terms of condition of their bond/undertaking, therefore they are liable to pay duty as demanded in the impugned order. On limitation, we find that the show-cause notice has been issued for violation of undertaking given at the time of importation for intended use and the fact that the imported paver finisher was not found to be used for intended purpose during investigation which amounts to suppression, therefore, the show-cause notice issued is within limitation.'

5.1 In view of the above decisions we do not find merits in the appeal filed by the appellant. The same needs to be dismissed on merits.

5.2 Appeals are dismissed both in terms of Rule 20 of CESTAT Procedure Rules, 1982 and also on merits.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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