

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86225 OF 2022

[Arising out of Order-in- Original No: 01/2022-23/CC/NS-V/CAC/JNCH dated 6th April 2022 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Seema Rubesh Shah

203, New Shri Sagar CHS Ltd., 29, Doongersey Road
Behind Saint Elixabeth Nursing Home, Walkeshwar
Mumbai – 400006

...Appellant

versus

Commissioner of Customs(NS-V)

Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad - 400707

...Respondent

WITH

CUSTOMS APPEAL NO: 86230 OF 2022

[Arising out of Order-in- Original No: 01/2022-23/CC/NS-V/CAC/JNCH dated 6th April 2022 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Rahul Bajaj

602-F Neelkanth, 98 Marine Drive
Mumbai - 400002

...Appellant

versus

Commissioner of Customs(NS-V)

Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad - 400707

...Respondent

WITH

CUSTOMS APPEAL NO: 86237 OF 2022

[Arising out of Order-in- Original No: 01/2022-23/CC/NS-V/CAC/JNCH dated 6th April 2022 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Doc Brown Industries LLP
602-F Neelkanth, 98 Marine Drive
Mumbai - 400002

...Appellant

versus

Commissioner of Customs(NS-V)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad - 400707

...Respondent

APPEARANCE:

Shri Gopal Mundra, Advocate and Ms Smrithi, Advocate for the appellant

Shri S B Hatangadi, Assistant Commissioner (AR) for the respondent

AND

CUSTOMS APPEAL NO: 86608 OF 2022

[Arising out of Order-in- Original No: 01/2022-23/CC/NS-V/CAC/JNCH dated 6th April 2022 passed by the Commissioner of Customs (NS-V), Nhava Sheva.]

Commissioner of Customs(NS-V)
Jawaharlal Nehru Customs House, Nhava Sheva,
Tal: Uran, Dist: Raigad - 400707

...Appellant

versus

DOC Brown Industries LLP
602-F Neelkanth, 98 Marine Drive
Mumbai - 400002

...Respondent

APPEARANCE:

Shri S B Hatangadi, Assistant Commissioner (AR) for the appellant

Shri Gopal Mundra, Advocate and Ms Smrithi, Advocate for the respondent

CORAM:

HON'BLE MR S K MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A /85949-85952/2023

DATE OF HEARING:	29/11/2022
DATE OF DECISION:	11/05/2023

PER: C J MATHEW

What did the adjudicating authority see? We cannot be sure for he has been most reluctant to say but we surmise that what he saw, he considered an abomination - an abomination so vile that, according to him, no one in the world should be allowed to even glance at, let alone see. And what he saw as abomination that none should see, he drew upon his empowerment under customs law to confiscate absolutely. In emplacing the factual matrix over the legal backdrop, this exclamatory ejaculation of ours, however, has hardly any claim of, let alone pretence to, originality for nearly six decades ago, Hon'ble Justice Potter Stewart, in his contributory opinion concurring with the judgement of the United States Supreme Court in *Jacobellis v. Ohio* [378 US 184 (1964)], had, famously, asserted

'I know it when I see it.'

that has, since, acquired aura as the most expressive 'non-definition' of obscenity. And so now we have no need to beat around the bush any longer for the metaphorical cat is out of the metaphorical box: we are called upon to ascertain if the law too has like abhorrence for the impugned transaction.

2. In the context, we cannot but wonder if a single piece of those very goods imported for personal use would have aroused the same ire in him or if, in other officers of customs, the impugned goods would

have for the wisdom in the order¹ of Commissioner of Customs (NS-V), Nhava Sheva is, purportedly, representative testimony to the intent of law – a law uniformly applicable across the length and breadth of this land and, we dare say, a land that has never been coy in acclaiming that seminal exposition of the ‘art of love’ in Vatsyana’s Kamasutra and had never ventured to disown the monuments in Khajuraho and Konarak lest any innocent denizen, drawing upon the licence of past generations that had gazed admiringly at the aesthetics of those resplendently sculptural expressions depicting human bodies in their natural state engaging in nature’s primeval urge for survival of the species – inducing preservation of genes, not through the mechanical congruence of reproductive cycles, but by anticipation of pleasure playing upon imagination and emotion – be led astray. Perhaps, the profundity of this creative urge of Nature for sustaining and evolving of its own creation, not having been adequately captured in the mundane expression of the law invoked by the adjudicating authority, persuaded him that imitation of nature is abhorrent to the State. Nature does not abhor itself nor does nature repudiate imitation of itself but the State may, in its wisdom, denounce profane depiction of nature as obscene and designate agencies as instrument of retribution on its behalf to act resolutely on that which is obscene. Therefore, it is the intent of the State that such proceedings must rely upon, for Nature is not in need of an avenging angel to take the

¹[order-in-original no. 01/2022-23/CC/NS-V/CAC/JNCH dated 6th April 2022]

measure of a product of human ingenuity, even if intended for pleasure that serves not the purpose of Nature.

3. There are some preliminaries that must be addressed before approaching the nub of the issue in dispute. The adjudicating authority has directed not only absolute confiscation but also destruction of the goods. Customs Act, 1962 does not afford, by any of its provisions, authority to destroy goods at any time; indeed, a law for charging tax on goods can hardly bear within it the means of putting goods beyond the reach of the statute. Furthermore, section 125 of Customs Act, 1962 vests confiscated property in the Central Government which, though, as owner is, thereby, free to dispose of such goods as it pleases, may, nonetheless, part with it only under authority either of statutory empowerment or from Presidential delegation to subordinate functionaries and, that too, only in executive capacity which stands excluded, in no uncertain terms, from adjudicatory jurisdiction. The order to destroy is, thus, clearly beyond legal competence of the impugned proceedings and borders on misappropriation of public property.

4. Sexual acts are beyond the remit of customs law, concerned as it is with goods, and thankfully so. Depiction of sexual calisthenics in print and speech, in images and forms or in any combination thereof is pornography. It is not the case of the adjudicating authority that he is

the designated expert to identify, and empowered by statutory authority or executive delegation to police, pornography. Indeed, we have not come across any law that anathemizes pornography; and there is no reason that there should be such intrusive oversight over graphic and vocal description or over representation of an act designed by nature, and endowed in all creatures without exception, for perpetuation of the species. Prosecutions in other legal jurisdictions have stemmed from stipulative definition in municipal laws; one of the earliest, *Regina v. Hicklin* [LR 3 QB 360 (1868)], was rendered in England on possession of pamphlets, denouncing certain religious practices common among Catholics, intended for distribution that were subjected to seizure under Obscene Publications Act, 1857 and in which it was held that

‘I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall....it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.’

and, being ‘obscene’ as spelt out in the law, must face the punishment prescribed in law notwithstanding any other intent. In the United States of America, the judicial conviction of DM Bennet for mailing of pamphlet authored by Ezra Heywood, as well as disposal of the appeal before the United States Supreme Court against conviction in

Rosen v. United States [161 US 29 (1896)], fell back on the Hicklin test for determining 'obscene, lewd and lascivious' in the Comstock laws. This free run of Hicklin in the American jurisdiction ended with *United States v. One Book called Ulysses* [72 F 2d 705 (2d Cir 1934)], which coincidentally had been brought to action under the Tariff Act, 1930 authorizing district attorneys to forfeit and destroy imported works that were 'obscene', holding that the principles enunciated by the trial court, according primacy to a holistic view of literary intent, for invoking protection of freedom of expression justified the setting aside of the 'obscenity' charge. This repudiation of the prevailing test was affirmed by the United States Supreme Court in *Roth v. United States* [354 US 476 (1957)] placing emphasis on materials, whose dominant theme taken as a whole, appeals to the prurient interest of the average person, which, by application of community standards, may be determined as 'obscene' and, as in *Memoirs v. Massachusetts* [383 US 413 (1966)], holding that the First Amendment was not infringed by laws banning material utterly without redeeming social importance or are patently offensive. This was eventually succeeded by the ruling of the United States Supreme Court in *Miller v. California* [413 US 15 (1973)] establishing the 'three pronged test' of appeal of the work as a whole to prurient interests by applying contemporary community standards, description or depiction of sexual conduct or excretory functions in offensive way

according to empowering statutes and lack of serious literary, artistic, political or scientific value.

5. There is a world of difference, thus, between pornography and obscene and, as in other national jurisdictions, it is ‘obscenity’ that is criminalized in India; that can be traced to the Indian Penal Code, 1860 drafted by Macaulay and grafted into the legislative spectrum by an administration under the influence of, and steeped in, the laws of the colonizing country; that which hitherto was perceived merely as pornography, a term then in its infancy in the English language, was henceforth to be tested for offending the values prevailing in the colonizing state coloured by the moral preoccupation of those designated to enforce. Its continued existence in independent India, and for over three-quarters of a century since, has not altered the calibrating standard of values though now flavoured with mores of conduct ingrained in officialdom empowered by ‘strict liability’ prescription in statutes which exorcises challenge on ground of encroachment of rights. In other legal jurisdictions, judicial determination as set out *supra*, even with statutory criminalization of ‘obscenity’, has had to grapple with extent of permissible compromise to such rights and has tended to place resolution within a constitutional approach. That, probably, was unavoidable in prosecutions concerned with deterring ‘obscene’ printed text or picture rather than material objects and, therefore, all about the

potential of words or images to influence minds by sight or hearing and the extent to which freedom of expression may be curbed for the purpose.

6. Books, according to John Milton in *Areopagitica*,

‘...are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them.’

and that capability of provoking thought, which, in turn, by amenability to replication and dissemination, facilitates ideating without reference to the original, made published material targets of obscenity enforcement with courts upholding action against ‘obscenity’ but not pornography. Doubtlessly, the intensity that distinguishes the two is weighed down by values and mores and substantial influence inheres in both but the potential for overreach justified restricting the instruments of control stringently to ‘obscenity’ within stipulative framework.

7. In the Indian jurisdiction, the Hon’ble Supreme Court upheld conviction, under section 292 of Indian Penal Code, 1860, in *Ranjit D Udeshi v. State of Maharashtra [1965 AIR 881]* for possession of, with intent to distribute, *Lady Chatterley’s Lover* authored by DH Lawrence that, in the very legal jurisdiction in which the Hicklin test was enunciated, had been held, in *Regina v. Penguin Books Ltd*

[(1961) Crim LR 176], as not obscene under the law prevailing in England. The Hon'ble Supreme Court was not inclined to countenance either the claim of infringement of right to freedom of speech or expression or that the Hicklin rule postulated conviction even for stray references but, on the contrary, found that courts alone would determine obscenity in each particular case before going on to hold that

'The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by the courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for.

But even if we agree thus far, the question still remains whether the Hicklin test is to be discarded. We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences...

The Court must, therefore, apply itself to consider each work at a time...In other words, treating with sex in a manner offensive to public decency and morality.... judged of by our national standards and considered likely to pander to

lascivious, prurient or sexually precocious minds, must determine the result...

When everything is said in its favour we find that that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above.'

8. From the narration *supra*, it is evident that 'obscenity' is, unvaryingly, to be measured against moral values manifested as contemporary community standards and, therefore, neither amenable to a uniformly rigid benchmark in statutory enactment nor to be judged so merely for containing description of carnal intercourse.

9. Material objects, on the other hand, are bereft of such felicity for tangential propagation and objections, if at all, may be provoked only by consequences of acquisition; misuse of a material object, even if engendered in the mind, has no outcome except upon gaining possession and thus circumscribes scope for deeming as 'obscene' by the several tests *supra* which may, if at all, apply to a picture of the object and not the object itself. The proceedings impugned here were commenced against objects and not against representation of objects. It is not the controversy of threshold of 'obscenity' impinging upon freedom of expression that lies for resolution before us but the hazard of misplaced cognition bearing down upon ordinary trade and

commerce which, though no less of a right, may be subject to reasonable regulation that repels constitutional approach ingrained in evaluation of fetters to freedom of speech and expression evident in the upholding of conviction in the United States of America jurisdiction after agonizing over the primacy of the First Amendment. Furthermore, there is dearth of case law that traverses beyond alleged obscenity in publications or portrayal on stage and screen which is not surprising given that it was largely a concern of ecclesiastical proscription in Europe until about the eighteenth century and not having gained much notice in the United States of America until after the Civil War had brought the citizenry, as a whole, face to face with uncertain times giving rise to severe undermining of decorous conduct in matters carnal. However, that distinction notwithstanding, the stipulative definition of ‘obscenity’ in the Indian law should be brought into play definitively for the adjudication order to be affirmed in proceedings before us. It is, in these circumstances, that the impugned order must be evaluated for conformity with that which is legal and proper; and particularly within the legal framework that was appropriated for the assertive finding of ‘obscenity’ on the facts available on record. For here, we must note for the record, there is not even a peep that an act of obscenity was witnessed by anyone, let alone by the adjudicating authority.

10. Even as our concern here is about material objects proceeded

against for being ‘obscene’, and not published material for which the decisions *supra* were rendered, the underlying principles enunciated therein, and more particularly in *re Ranjit D Udeshi*, exert influence from circumstantial conflation. Turning to the legal armoury, section 11 of Customs Act, 1962 empowers prohibition on import or export of goods but becomes available to customs officers for interdiction only within terms of notifications issued under such empowerment by the Central Government and drawn upon here is notification no. 1/64-Cus (NT) dated 18th January 1964 prohibiting import, *inter alia*, of

‘.....

i....

ii. *any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:*

iii....’

as authority for proposing confiscation of the impugned goods under section 111 of Customs Act, 1962. That this confiscatory empowerment is not restricted only for import of goods prohibited under section 11 of Customs Act, 1962 but may be invoked fraction against goods imported contrary to ‘any other law for the time being in force’ has inconvenienced the adjudicating authority to draw also upon section 292 of the Indian Penal Code, 1860 for bridging the deficit in the notification, viz., lack of any guide to the intent of ‘obscene’ and which, notwithstanding the deeming in sub-section

therein, plagued the decisions on published material begging the question of extent of applicability and availability as trigger.

11. Before resolving that in the factual matrix of the dispute, two issues merit specific consideration at this stage. The appeals of importer and individuals arise from the order of confiscation along with direction for destroying the seized goods and imposition of penalties of varying amounts under section 112 and section 114AA of Customs Act, 1962. Consequent to direction issued under section 129D of Customs Act, 1962 by the competent Committee of Chief Commissioners, the Commissioner of Customs is also before us seeking confiscation of 2925 nos. of allegedly offending goods that, though recalled from the market by the importer upon commencement of investigations and seized under section 110 of Customs Act, 1962 on 16th November 2021 upon intimation by the importer, was inadvertently left unattended in the impugned order and also seeking imposition of fine in *lieu* of confiscating, under section 125 of Customs Act, 1962, goods unavailable for seizure. In our view, disposal of appeal of Revenue is automatically determined upon the outcome of appeal of the importer though we may be permitted at this stage to observe that the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc.* [2009 (249) ELT 122 (Bom)] which prompted the adjudicating authority to bypass section 125 of Customs Act, 1962,

being that of the jurisdictional High Court, is of more persuasive imperative than that cited on behalf of the appellant-Commissioner, viz., the decision of the Hon'ble High Court of Madras in *Visteon Automotive Systems v. Commissioner of Customs (Import), Chennai* [2018 (9) GSTL 142]. We may also note that, with the show cause notice having proposed confiscation of all 31,000 nos., imported against seven bills of entry, the claim of the importer that the appeal lacks merit for proposing detriments at stage of appeal does not stand on firm ground. The reliefs sought in appeal of Commissioner of Customs are parked for the nonce.

12. We cannot but also take note that penalty under section 114AA of Customs Act, 1962 has been imposed on the importer, as well as the two individuals before us, and ostensibly for incorrect declaration in the bills of entry filed under section 46 of Customs Act, 1962 by not describing the goods as 'adult sex toys'; there being no allegation of non-declaration, this penalty is attendant upon finding that the goods are liable for confiscation under section 111(m) of Customs Act, 1962 which is conspicuously absent in the impugned order. It has been said that there are places that even angels fear to tread for, upon such declaration, the 'proper officer' of customs would have been hard put to assess the goods to duty factored on determining the tariff item in the First Schedule to Customs Tariff Act, 1975 corresponding to description that is a close, let alone exact, match; that the impugned

goods are not just 'adult sex toys', as is evident in the adjudicatory weightage itself, renders it apparent, to even those with only casual acquaintanceship of customs law, that there must be some description therein which does approximately match. The adjudicating authority has jumped to a declaratory flaw which is relevant to goods warranting assessment or to determination of prohibition in the negative list of the Foreign Trade Policy (FTP); the ambit of a prohibition, such as in the notification issued under section 11 of Customs Act, 1962 that is not only not referenced to a tariff item but even with no pretence to rigour of description therein as 'adult sex toys', does not lend itself to legal sanction for invoking section 114AA of Customs Act, 1962. Between the expectation of the adjudicating authority that the goods should have been declared as 'adult sex toys' and the bills of entry having declared those as 'body massagers' without being controverted *in toto*, there is no scope for alleging that the ingredients of that penal empowerment have occurred. The imposition of penalties under section 114AA of Customs Act, 1962 on the importer, and the individual appellants, is not justified by any stretch in the impugned order and are, forthwith, set aside.

13. With the impugned order having, thus, travelled beyond adjudicatory jurisdiction in ordering destruction unauthorizedly, by imposing penalty unjustifiably and not having distinguished

‘obscenity’ from pornography, the challenge remaining in the appeals of M/s Doc Brown Industries LLP, Mr Rahul Bajaj and Ms Seema Rubesh Shah is limited to the confiscation of goods under section 111(d) of Customs Act, 1962 and penalties of ₹ 10,00,000, ₹ 5,00,000 and ₹ 3,00,000 imposed on *them* respectively under section 112 of Customs Act, 1962 for breach of notification prohibiting ‘obscene’ goods. It is not the case of the adjudicating authority that ‘body massagers’, as declared in the bills of entry, are prohibited for import by notification no. 1/64-Cus (NT) dated 18th January 1964. It is also not the case of the adjudicating authority that goods describable as ‘adult sex toys’ are specifically enumerated among the prohibitions in notification no. 1/64-Cus (NT) dated 18th January 1964. It is also not the case of the adjudicating authority that ‘obscene’ prohibited for import in notification no. 1/64-Cus (NT) dated 18th January 1964, is clear and unambiguous exposition of the goods intended thereby. It is the case of the adjudicating authority that the ‘body massagers’ are, in fact ‘adult sex toys’, and, therefore, disapproved for import by conformity with the deeming definition of ‘obscene’ in section 292(1) of Indian Penal Code, 1860 thereby enabling officers of customs to proceed with confiscation under Customs Act, 1960.

14. The whole turns on the correctness of the finding that the shape and features of the ‘body massager’ – not excluded by any of the experts from such use – and its motion, powered by battery-driven

motor, rendering it more aptly describable as ‘adult sex toy’ with potential for ‘stimulation and erotic pleasure’ suffices for it to be held as ‘obscene’ in law. That can be concluded only by perusal of the facts relating to import and the rival submissions, appreciation of the context in which customs law incorporated action on ‘obscene’ goods, analysis of the scope of intervention by customs officers and comprehension of the extent to which ‘obscenity’ may be applied to goods.

15. The controversy appears to have been spawned by the impediment, owing to want of catalogue, in processing of bill of entry no. 461517/17.06.2021 initiated through the default ‘faceless assessment’ route causing ‘first check’ of consignment that was found to consist of cardboard boxes, printed with ‘Caresmith Wave’ and affixed with labels indicating contents to be ‘wave body massager’ generically known as ‘body massager’ model no. CS 639 for sale at maximum retail price of ₹ 2,500 per piece. The communication of importer, M/s Doc Brown Industries LLP, *vide* letter dated 26th July 2021, intimating the goods to be ‘full body massager’ made of medical grade silicone that, for avoiding skin irritation, is soft to touch, also furnished the product catalogue and sales invoices; it was also informed that the said goods are sold online by Amazon and Flipkart as ‘sports massager’ and ‘body massager’ at about ₹ 1,599 per piece. Reasonably certain now that the said article could also be

employed as ‘adult sex toy’, and prohibited for import by notification 01/1964-Customs dated 18th January 1964, searches were conducted at the office and warehouse of the importer yielding 131 and 168 pieces respectively that were seized under section 110 of Customs Act, 1962 on 7th August 2021. Thereafter, container TRHU 608011 with 5000 pieces of product, corresponding to above-referred bill of entry that first drew the attention of customs authorities, and container GESU 6333997, for which bill of entry no. 4739227/19.07.2021 had been filed, were taken up for examination on 18th August 2021; 5000 pieces of ‘wave body massager (purple)’ model CS 639 and 1000 pieces of ‘wave body massager (pink) model CS 012 and one piece of ‘my official massager’ therein were all seized for, as expressed in the show cause notice, having potential use as ‘adult sex toy for sexual pleasure’ that was also visually obscene and, therefore, in contravention of notification no. 01/1964-Cus dated 18th January 1964. Search of another godown, after it was reported by the importing entity that some of goods out of the 20,000 pieces cleared against bills of entry no. 3317711/27.03.2021, no. 3598746/17.04.2021, no. 4077607/25.05.2021, no. 4157578/01.06.2021 and no. 4356544/17.06.2021 dispatched to online sellers had been recalled, led to recovery of 2925 pieces of ‘body massagers’ that were also seized under section 110 of Customs Act, 1962 on 16th November 2021.

16. Investigators solicited expert advice of Dr Rajesh Mhatre, Head of Department (Obstetrics & Gynecology), Navi Mumbai Municipal Corporation Hospital, Vashi and of the Institutional Research Committee of YMT College of Physiotherapy at Navi Mumbai chaired by Head of Department, *vide* communication of 16th September 2021, which were responded to by letters of 17th September 2021 and 24th September 2021 respectively; while both concurred on its potential for use as ‘adult sex toy’, the former also went on to state that he would not recommend use around ‘intimate areas’ for fear of trauma and infection. The appellant countered with opinion, dated 21st September 2021, of Ms Prachi Shah, MPT, PG(DIP), founder Encore Physiotherapy, certifying that the product is used for massaging parts of the body and that the high-grade silicon ensures no allergic reaction or rashes on skin. Likewise, Prof Chhaya Verma, Head of Department of Physiotherapy in TNMC and BYL Nair Hospital, *vide* letter dated 28th September 2021, opined that such non-medical gadgets are merely massage aids. Both sides have placed emphasis on the ‘expert opinions’, admittedly prejudiced by having been solicited - with the communication of Deputy Commissioner (SIIB), Nhava Sheva making no bones about the arousal of suspicion in the mind of the investigators – on the range of use and abuse, which is bemusing, to say the least, as there could be nothing more individualized than ‘pleasuring’ and nothing more likely to provoke

competitive assertion of mastery even by the most timorous of laymen. None of the ‘experts’ have testified to similitude with any human organ and their opinions are all about use which fail to agree upon susceptibility to infection; and whether use is determinant of ‘obscene’ is the Big A..... here!

17. Learned Counsel for appellants contended that there is nothing obscene about ‘body massager’ imported solely with intent for sale as equipment for massage-induced relaxation of muscles and that there is no reason for import of such articles, deployed, often enough, on epidermal trigger points in therapy for relieving myofascial pain, to be the subject of prohibition in any notification issued under section 11 of Customs Act, 1962. Describing the product, he submitted that the design of the operating system has positioned the controls midway which, as a distracting intrusion by difficulty of reach in the midst of more pressing pre-occupation, is certainly inconvenient in being put to use for such purpose that suggested itself to the adjudicating authority. According to him, similitude with products sold on electronic trading platforms sufficed for Commissioner of Customs (Appeals), Chennai to hold, in *re Ahmed Yousuf* [2020 (374) ELT 141 (Commr.Appl.)], that the impugned goods did not offer scope for invoking ‘obscenity’ law. Contending that community standards, as judicially determined, precludes consideration of the goods as ‘adult sex toy’, he argued that all the precedents, enumerated in the judgement of the Hon’ble

Supreme Court in *Aveek Sarkar and ors. v. State of West Bengal and ors.* [(2014) 4 SCC 69], emphasize that representation of anything must be examined in proper perspective for lewdness, lasciviousness or indecency before declaration of coverage under ‘obscenity’ law. He drew upon the authority of standard lexicon to point out that ‘obscene’, or other expressions such as ‘corrupt’, ‘deprave’, ‘lascivious’ and ‘prurient’, do not, by any stretch, apply to the impugned goods. He referred too to the decision of the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000 SCC 69] which, in approving vires of the prohibitions under customs statute, has held that assignment of authority to enforce is not licence to traverse beyond, and expand scope of, legislative intent. He also cited the decision of the Tribunal in *India Medtronics Pvt Ltd v. Commissioner of Customs, Ahmedabad* [2007 (214) ELT 373 (Tri-Ahmd)] which held that contents of website are not reliable rebuttal of contrary expert opinion. According to him, the use or misuse of an object by an individual is a matter of personal proclivity and that, as far as the impugned goods are concerned, expert opinion has not discountenanced description of the goods as ‘body massagers’ which is not prohibited by law. Taking us through the evolution of ‘obscenity’ law, he pointed out the decisions of the Hon’ble Supreme Court in *Ranjit D Udeshi v. State of Maharashtra* [1965 AIR 881] and in *Ajay Goswami v. Union of India and others*

[(2007) 1 SCC 143] make it evident that the impugned goods are not obscene.

18. Learned Authorised Representative submitted that expert opinion makes it abundantly clear that the articles under import can be used as ‘adult sex toys’ which suffices for invoking section 111 of Customs Act, 1962. The depiction of similar product, as well as the attendant description calculated to induce buyers to indulge in personal satisfaction, in ‘snapdeal’, according to him, leaves no room for doubt on this score. Taking us through the specific enumeration in the notification relied upon by the adjudicating authority and

‘(1).....a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it’

in section 292 of Indian Penal Code, 1860, he pointed out the analysis rendered in the impugned order was not flawed at all. He urged us to allow the appeal of the Commissioner as it was evident that failure to order confiscation of a part of the seized consignment was plainly attributable to inadvertence and that the show cause notice did propose confiscation of the whole of the seized goods.

19. In the impugned order, the adjudicating authority has reported that the assessing officer was of the opinion that the ‘massager’, also usable as ‘adult toy’, was liable to confiscation under section 111(d) of Customs Act, 1962 stemming from prohibition on import by notification no. 1/1964-Cus dated 18th January 1964 and, hence available consignments – cleared and uncleared – were seized under section 110 of Customs Act, 1962. It was further reported therein that

‘48..... massage means manipulation of the body’s soft tissues. Massage techniques are commonly applied with hands, fingers, elbows, knees, forearms, feet, or a device. The purpose of massage is generally for the treatment of body stress or pain. Some massaging devices are used for the treatment of body stress or pain named as body massager. I find that the importer imported “Caresmith Wave Body Massager”, which they claim can be used as a body massager as mentioned. However, due to its shape and features is mostly preferred for use as adult sex toys.’

to progress from the concern of the assessing officer upon perceiving the goods as ‘adult toys’ to concern about its potential for unconventional experimentation in a particular interpersonal activity that, normally not indulged in public is, thereby, amenable to creativity and imagination which may seem, to some, perverse fantasy while, to others, normal sexual repertoire. In this progression, the ‘shape and features’ appears not only to have influenced the reversal of dominant use, eloquently re-sequenced in the placement of ‘claim’ and ‘preferred’ *supra* in the impugned order, but also, from

‘51.1.....act as body massagers and capable of and being used as adult sex toys to satisfy basic instincts of people. (emphasis supplied) The subject product is containing as article which falls under the category of “Obscene Article” (Sex Toys) packaged in a cloth bag. The box is having a charging cable also. It is seen on Internet, that the item (identical) is being traded on amazon website...The reviews of customers and replies to customer queries by suppliers...confirms that the item is being used as Obscene Article (Sex Toys). Further contention of the importer that since the goods are sold through e-commerce websites like Amazon.in and Flipkart.com the items cannot be prohibited is not tenableas (sic) e-commerce companies like Amazon, Flipkart are not competent to decide whether the goods are prohibited or not.

xxx

51.3 This leads me to conclude that the goods imported viz, “Caresmith Wave Body Massager” are being marketed not primarily as a massage device but as a sex toy. The purpose is not to be used as a device to provide relief to muscular stress but to provide stimulation and erotic pleasure. Accordingly, I hold that the impugned goods viz. ,Caresmith Wave Body Massager” are Adult Sex Toys and are, therefore, prohibited goods which cannot be released into the Country for consumption and therefore, are required to be absolutely confiscated.’

herein, in concluding that, despite appearances, redemptory grace from exclusive deployment for therapeutic procedure available to such articles is to be denied owing to ‘expert’ opinion of physiotherapist and gynaecologist. That progression has convinced the adjudicating

authority that ‘stimulation and erotic pleasure’, even if derived in strict privacy, is frowned upon by the State of which he is the designated representative.

20. The law frowns, doubtlessly, on the ‘obscene’ as abundantly clear from section 292 of Indian Penal Code. It is also the law that has stipulated ‘obscenity’ by deeming provision and has, besides, carved out exceptions in 1925 to give effect to concerns articulated in the International Convention for the Suppression of or Traffic in Obscene Publications under the auspices of the League of Nations. That, however, is the law for domestic enforcement by penalizing offenders engaged in sale of obscene book, pamphlet, paper, drawing, painting, representation, figure or article within the country or across the border in either direction; the criminalizing intent of the law must find reflection in action against book, pamphlet, paper, drawing, painting, representation, figure or article.

21. Notification no. 1/64-Cus (NT) dated 18th January 1964 prohibiting import of

‘any obscene book, pamphlet, paper, drawing, painting, representation, figure or article’

resorted to, by elimination of the inapt leaving only ‘obscene....article’ as possibly appropriate, afforded opportunity to customs authorities for confiscating makes no mention either of ‘body

massagers’ or of ‘adult sex toys’ but sufficed for the adjudicating authority owing to preference for the former to be used as the latter. The very same enumeration is to be found in section 18 of Sea Customs Act, 1878 and, in the overhaul of over eight decades later, re-surfaced, apparently as an early measure to forestall vacuum, by policy determination under the general authority to notify prohibitions in the substituting statute. The same formulation is to be found in section 292 of the Indian Penal Code, 1860 drafted by the colonial administration to mirror the mores prevailing in England and recently enacted there as Obscene Publications Act, 1957 from which emanated the *Hicklin* decision. Effectively, the law, relied upon by the adjudicating authority and impugned before us, is a relic of Victorian imperialism against which gadgetry of a century and half later has been tested in the impugned proceedings.

22. It is not for us to speculate on retention in a different form for the next six decades though the inherent flexibility therein may have been reason enough. However, it is of interest that archived records of government transactions² indicate that, in the run up to the Morley-Minto Act of 1909, in discussions within the Executive Council of the Governor-General on banning import of a publication analysing the Revolt of 1857 as seditious on proposal by officialdom of the Bombay provincial administration, a suggestion did come up that section 18 of

² [Calcutta Records 1910, Government of India-Political Deposit-Proceedings, May 1910, No.1]

Sea Customs Act, 1878 be amended. Subsequent notings reveal doubts about empowering customs officials to determine sedition in publications as well as the potential for consequential conflict with domestic enforcement of sedition law. The compartmentalization of enforcement machinery of the time, even if restructured to some extent in governance of independent India, has not entirely erased as seen from the adjudicating authority having had to refer to the Indian Penal Code, 1860 without being able to invoke that. There is, thus, legislative intent of not only segregating the jurisdictions but, in equating domestic and international trade in 'obscene', also implies primacy assigned to the impact of trade on residents of the country by enacting detriment at par with breach in domestic trade.

23. We also gather that those discussions of the colonial administration did also consider the option of empowering customs officials through subordinate legislation so as to distance government policy from executive action which, probably, informed the structuring of prohibition of 'obscenity' through notification under Customs Act, 1962. From a perusal of section 47 of Customs Act, 1962, it is clear that customs law is concerned with collection of appropriate duty and enforcement of prohibition. Articles amenable to classification in the First Schedule to Customs Tariff Act, 1975 are to be deemed as freely importable unless specifically excluded by Foreign Trade Policy or any other statute in force; no such authority

for considering an object of trade as ‘obscene’ has been drawn upon in the impugned order and nor is there any finding in the impugned order that the goods do not merit classification claimed in the bill of entry.

24. That would appear to limit the remit of notification no. 1/64-Cus (NT) dated 18th January 1964 to executive action on imports upon determination of ‘obscene’ in accordance with the laws penalizing ‘obscenity’. The sale of ‘body massagers’ within the national boundaries have not been subject to prohibition and in discarding the submission to that effect, the adjudicating authority did not appear to have found cause to pause for ascertainment of his authority to determine goods as ‘obscene’ solely in international transactions while no such restriction is placed on domestic transactions of the same goods. The appellant had made a specific plea of electronic platforms making allowance for sale of these very goods to domestic consumers. Had a complaint been preferred, as it would have for violation of community standards if they were, action would have been initiated by police authorities against sellers and the platform leading to determination of ‘obscenity’ and the absence of such is the surest counter to the finding that ‘body massagers’ are ‘obscene articles’ liable to be confiscated upon import. Such discriminatory treatment of products, based on source, as ‘obscene’ is not contemplated by law. To approve of the detriment brought to bear on the impugned goods would amount to subordinating tariff, and trade

prohibition, policy of the Central Government to non-tariff interdiction by subordinate officialdom.

25. The adjudicating authority has placed erroneous construction on the words of the statute to draw powers that traverse the moral domain and private concern of persons. To begin with, customs law is enacted to give effect to empowering officials in collection of duties envisaged in Seventh Schedule of the Constitution and the inherent 'commodity policing' at the frontiers, or point of entry, convenience the legislature to confer power of withholding clearance of prohibited goods; prohibition has to be unambiguously spelt out in the law and, in 'obscenity' law, use is not likely to be a criteria for proscribing and, more so, in circumstances admitting more than one singular and unique use. Examples of use-based ban in notifications issued under section 11 of Customs Act, 1962 do not present themselves to us. The stand of the adjudicating authority, based on perceived potential of the impugned goods as surrogate for sexual congress that not only is biologically unproductive but also in pursuit of pleasure as an end without even a pretense to biological conformism, does not lend itself to coverage as 'obscene' from uncontroverted claim of usage as massage aid and from lack of specific proscription in the impugned, or any other, notification. Without empowerment under notification prohibiting import of an object, arrogation by customs official of authority to interdict use to which such object may be put is beyond

jurisdictional competence. Pleasuring - of self or another – with, or without assistance of, devices or objects may take many forms and, as long as it is indulged in without intentional exhibitionism, can scarcely be the remit of regulation by the State except possibly in Orwellian, or similar, fiction. The apprehension of ‘misuse’ suggested by shape and features as justification to interdict ‘body massagers’ that, unlike ‘adult sex toys’, are amenable to classification in First Schedule to Customs Tariff Act, 1975, and which the show cause notice does not contest, evokes nightmares of an over-intrusive customs administration which may find potential for ‘forbidden delights’ in several commonplace articles of commerce. After all, if shape and features were to be the characteristic of ‘obscenity’, we would end up living in world bereft of material comforts afforded by inventive genius for most goods in the tariff would be vulnerable to absolute confiscation. In any case, pleasure, and indulgence thereof, which may be anathema to those initiated into life, or term, of celibacy, is of no concern to a customs law and detriment to cross-border transactions on assumption of that concern veers dangerously close to pursuit of moral crusade.

26. It is quite possible the impugned goods may, as suggested by two of the ‘experts’ on record, well find use as ‘surrogate sex’ partner or as ‘sex aid’ but then, what would not; we do not know and, as it appears, neither does the adjudicating authority for he preferred to

refer to the unmentionable as ‘adult sex toy’ for ‘stimulation and erotic pleasure’ which, to us, appears to be delightfully vague with overtones of decadence stimulated more by moral, than legal, stipulation. Adults may toy with people and may play with toys but whether toys – symbolic of the joy of innocent childhood – should go hand in hand with the context – even if not under public gaze - that the adjudicating authority adumbrates as ‘obscene’ may not be without controversy. Therein lies the nub of the problem here: can the deployment of an expression such as ‘adult sex toy’ – not found in any statute, not in the notification grasped at, not in the tariff schedule, not in literature relating to the goods – for communicating abhorrence felt by an officer of customs suffice to deny a relaxing massage to those aware of the artifice and who are capable of, nay even willingly so, paying the price charged for it.

27. The finding of the adjudicating authority that the impugned goods merit confiscation is, thus, too wide off the mark, as far as the law invoked therein is concerned, on several counts. We note that the ‘claim’ of the importer has not been controverted and that the adjudicating authority has not placed any evidence on record in support of his conclusion on ‘preference’ in usage. Indeed, it is even doubtful if perceived usage, whether primary or peripheral, can be regulated by the State for ‘obscenity’ filtering. For starters, it would be unthinkable for the State to consider intruding on engaging of

stimulation for pleasure, whether alone or otherwise, in private except in circumstances of complaint of non-consensual or involuntary participation that then assumes the hue of a crime. Among some people of traditional mores, even in contemporary times, indulgence in such activity, or even mimicking of such, may be considered as ‘sin’ – an expression more suited to ecclesiastical denouncement. Animals ‘mate’ and humans have ‘sex’ – a distinction born from capacity for thought and articulation and from the presumption that the former is a Pavlovian response to nature’s incentive while the latter may be an end in itself with nature’s intent being of peripheral concern. Whether that be casuistry or not, it can safely be said that this distinguishment of this human function as an intensely private activity that is not even to be hinted at in polite, cultured society vests public performance, or even representation of it, as ‘obscene’, at least for sexual content. It is not for agents of the State to go beyond ‘community standards’ of morality to determine ‘obscenity’ and ‘community standards’ – either by cavil of representative of community or in notifications prohibiting import of the impugned goods - have been not accorded due weightage in the impugned order.

28. The Hon’ble Supreme Court, in *re Ranjit D Udeshi*, held that

‘.....the question still remains whether the Hicklin test is to be discarded. We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an

impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences...

The Court must, therefore, apply itself to consider each work at a time...In other words, treating with sex in a manner offensive to public decency and morality.... judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result..'

making it abundantly clear that even in determination of complaint, absent unambiguous definition, it is the courts alone that are competent to decide for each case. No such judicial determination on 'body massagers' has been relied upon by the adjudicating authority. Border enforcement of 'obscenity law' under the impugned notification is relegated to 'predicate offence' and the impugned order is, thereby, contrary to law.

29. The deeming definition of 'obscene', in so far as objects are concerned, alludes to reading, seeing and hearing as the triggers. There is nothing on record, too, to warrant any surmise that the presentation of 'body massagers' in the market place would direct thinking of 'susceptible minds' or of those 'vulnerable to improper suggestions' to conjugal relations that profane nature or calculated to cause offence in others. An officer of customs conceiving some objectionable outcome upon seeing 'body massager' does not pass muster of non-conformity to 'community standards' warranted by the

decision *supra*.

30. The submission of Learned Authorized Representative placed reliance on publicity material available on the internet. This line of argument transfers the enforcement of ‘obscenity’ law to the promotional material which, even if offending as ‘obscene’, is outside ambit of customs law for not having been imported and the regression of the ‘obscenity’ in advertisement promoting an object similar to goods imported is tantamount to transfer of offence by association which is beyond the ambit of customs law intended for goods under import.

31. The law on obscenity has been judicially perused across jurisdictions, even across generations, and pronounced to be deficient in defining ‘obscenity’; hence, the insistence on evaluation by the yardstick of ‘community standards’ which the Hon’ble Supreme Court, in *re Ranjit D Udeshi*, has held all decisions, from *re Hicklin* on, to have been founded upon. The impugned proceedings set out to do that which the law did not intend and attempted to justify that adventure without reference to any settled law. That the impugned notification lacked definition of ‘obscene’ was not unknown to the adjudicating authority is not in doubt as seen from the attempt to fill that gap by reference to deeming provision in the Indian Penal Code, 1860. However, that the particular provision did not contemplate the

consequence of use, or misuse, that the stipulation of ‘appeal to prurient interest’ and ‘tends to deprave and corrupt’ could not occur without possession or that there should have been a finding that the impugned goods are ‘lascivious’ was glossed over in pursuit of stamping out ‘stimulation and erotic pleasure’ likely to be advanced by the impugned goods. Despite this evident non-application of law and untenable reasoning in the impugned order that has interfered with legitimate business activity, we forbear from invoking empowerment in rule 40 of Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 to impose costs on the customs administration but we have no hesitation in allowing the appeals of M/s Doc Brown Industries LLP, Mr Rahul Bajaj and Ms Seema Rubesh Shah to set aside the confiscation and penalties in the impugned order. Consequently, the appeal of the Commissioner of Customs is dismissed as infructuous.

(Order pronounced in the open court on 11/05/2023)

(S K MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)