

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

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 85569 OF 2023

[Arising out of Order-in-Appeal No. 140 & 141 (Gr.I&IA)/2023(JNCH/Appeals dated 21st February 2023 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Ashwin Traders

C-42-B, APMC Market-I, Phase-II, Sector-19
Vashi, Navi Mumbai-400 703

... Appellant

versus

Commissioner of Customs (NS-I) (Imports-I)

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

...Respondent

WITH

CUSTOMS APPEAL NO: 85570 OF 2023

[Arising out of Order-in-Appeal No. 140 & 141 (Gr.I&IA)/2023(JNCH/Appeals dated 21st February 2023 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Ashwin Fulchand Karania

C-42-B, APMC Market-I, Phase-II, Sector-19
Vashi, Navi Mumbai-400 703

... Appellant

versus

Commissioner of Customs (NS-I) (Imports-I)

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

...Respondent

APPEARANCE:

Shri C M Sharma, Consultant for the appellants

Shri Ram 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: 85401-85402/2024

DATE OF HEARING: 11/10/2023
DATE OF DECISION: 08/04/2024

PER: C J MATHEW

The dispute in this appeal of M/s Ashwin Traders, a proprietorship concern, and Shri Ashwin Fulchand Karania arises from dismissal of their appeals, in order¹ of Commissioner of Customs (Appeals), Jawaharlal Nehru Customs House, Nhava Sheva, against resort to section 111(m) and section 111(o) of Customs Act, 1962 for confiscation of 13.5 metric tons of 'black pepper', valued at ₹ 72,78,746 imported against bill of entry no. 9926071/11.12.2020, for breach of conditions in notification no. 96/2009-Cus dated 11th September 2019 claimed then for exemption, of 59 bags containing 2950 kgs of 'black pepper', valued at ₹ 17,08,541 and recovered at the premises of M/s Eskimo Ice Mfg Co Pvt Ltd, alleged to be remnant of 300 bags imported by M/s Bruno Exports against scrips issued under 'advance authorisation scheme' in bill of entry no. 7930429/17.06.2021 and acquired by M/s Ashwin Traders in breach of conditions of import in said notification claimed for clearance without payment of duty which were allowed to be redeemed on payment of fine of ₹ 15,00,000 solely for re-export, confiscation of

¹ [order-in-appeal no. 140 & 141 (Gr.I&IA)/2023(JNCH/Appeals dated 21st February 2023)]

12050 kg of 'black pepper' which allegedly was part of the 300 bags imported by M/s Bruno Exports against scrips issued under 'advance authorisation scheme' in bill of entry no. 7930429/17.06.2021 but not available physically and penalty of ₹ 6,00,000 imposed on the individual appellant here, among several individuals and entities, under section 112 of Customs Act, 1962.

2. The case against these entities and persons had its genesis in import of 13.5 metric tons against bill of entry no. 9926071/11.12.2020 and of 13 metric tons against bill of entry no. 7930429/17.06.2020 of 'black pepper' from Vietnam without payment of duty, by recourse to scrips in accordance with 'advance authorisation' scheme of the Foreign Trade Policy (2015-20) prescribing 'actual user' condition that precluded transfer of imported goods both before and after fulfillment of export obligation though with latitude of domestic sale of goods manufactured therefrom on fulfillment of obligation, under the authority of notification no. 96/2009-Cus dated 11th September 2009; imported goods remaining unutilized could be released from the restriction only upon discharge of duty liability with interest thereon. Authorisation no. 5104133/20.01.2020 issued to M/s Bruno Exports permitted import of 'black pepper ungarbled' valued at ₹ 9,10,00,000 (CIF) for export of 'assorted pappadoms of urad dal' valued at ₹ 35,63,79,300 (FOB). On ascertainment that M/s Bruno Exports lacked manufacturing

facilities, the consignment pending clearance by appellants herein was withheld and proceedings initiated for confiscation. The second consignment, originally procured by M/s Trends Overseas and deposited in public bonded warehouse against bill of entry no. 7290318/18.03.2020, cleared on ex-bond bill of entry by M/s Bruno Exports comprised goods not available but presumed as diverted for the same reason and goods found at another premises under the control of the appellants herein. An aspect informing the proceedings was that the dilution of restriction on import of 'light black pepper', *vide* notification no. 21/2015-20 dated 25th July 2018 of Directorate General of Foreign Trade (DGFT), was predicated upon price being in excess of US\$ 500 per kg which the said imports were allegedly not in conformity with.

3. In proceedings before the original authority, only the two appellants herein responded in writing and were represented in personal hearings. On the submission that the case against them had been made out only on hearsay, they sought cross-examination of persons whose testimony against them had been relied upon. It was also contended that the consignment under clearance, which was also proposed for confiscation, was not theirs.

4. We have heard Learned Consultant at length on the above issues. Learned Authorised Representative drew our attention to the

provisions of the Foreign Trade Policy (FTP) prescribing utilisation of such goods without option of transferability and pointed out that, in relation to the goods procured from M/s Bruno Exports, the appellants were in the know of these being entailed with condition of 'actual use' justifying imposition of penalty consequent upon admitted liability to confiscation.

5. From

'9. The OA on request for cross-examination of witnesses, observed that, the appellant inter-alia accepted that he has purchased 300 Bags (15MT) of Black Pepper from Shri Nilesh which has been stored as per his advice at M/s Eskimo Ice Mfg. Co. Pvt. Ltd. The copy of Bill of Entry that the goods under B/E No. 7930429 dated 16.06.2020, shows that the said goods are imported under DEEC Scheme. Thus, it is clear that the appellant was aware that the goods were imported duty free and the same goods were purchased by him from Shri Nilesh and the storage receipt issued in the name of M/s Ashwin Traders reflecting 300 bags of Black Pepper clearly establishes the fact. These facts have been established by the department on the basis of documents recovered during the search of the premises of M/s Eskimo Ice Mfg. Co. Pvt. Ltd. and as per statement of the appellant. The appellant further accepted purchasing of 15MT of Black Pepper from Shri Nilesh at admitted lesser price than the market price and storing the same at the storage facility of M/s Eskimo Ice Mfg. Co. Pvt. Ltd. There is admission of the fact that the whole transaction was in cash, there was no retraction of the said statement of the appellant on record and not even in the written submission or the verbal submission, thus, the facts

admitted in the said statement is confirmed by their Non-retraction.

9.1 It observed that the case against the appellant is based on evidences on record during the investigation and documents recovered during the search operation and the statement of the appellant, cross examination as requested by the appellant and reason thereto are not sufficient to allow cross-examination, hence the OA denied the cross-examination requested by the appellant.

10. The appellant deals in the local market as well as imports spices too. He is found to be well-aware of the market rate of spices. As per his submission he readily agreed to purchase the whole consignment of 15 MT Black Pepper when he was offered the price at Rs. 315/- per kg, as the market rate of black pepper was Rs. 340/- to Rs. 350/- per kg at that time. He had purchased impugned goods fully knowing the fact that the goods were imported without payment of Customs duty using Advance Authorizations and diverted in the domestic market illegally. He made the whole deal in cash in lieu of legal monetary transaction through banking, as he has already accepted. He is an experienced merchant as well as an importer of spices, he can't claim his innocence for not verifying the goods or its source before purchasing them, while he got the delivery challan from the CHA which included the copy of Bill of Entry and invoice with it too. Further, delivery challan issued by Interglobe Shipping & Logistics which shows that the goods are cleared under Bill of Entry No. 7930429 dated 17.06.2020 in name of the importer M/s Bruno Exports. Copy of said BE recovered from the storage facility at of M/s Eskimo Ice Mfg. Co. Pvt. Ltd. which clearly shows that the consignment is imported under Advance Authorizations. In view of above, the appellant was fully aware of the fact that the goods were non-duty paid and imported under

Advance Authorization and full connivance with Shri Nilesh bought the said goods under cash transaction with full intent to get the benefit of the evaded Customs duty on the impugned goods by way of paying less for the said purchase than the market value. Thus the OA rightly hold that 59 bags of 50 kgs each of Black Pepper stored in the name of the appellant and seized at the storage facility of M/s Eskimo Ice Mfg. Co. Pvt. Ltd. were in fact part of the consignment of 15 MT in 300 bags imported and cleared under Ex-Bond WH B/E No. 7930429 dated 17.06.2020 in name of the importer M/s Bruno Exports and hence are liable to confiscation under Section 111 (m) & (o) of the Customs Act, 1962.'

in the impugned order, we find that the contention of unreliability of testatory evidence, in the absence of cross-examination, had not been accepted by the first appellate authority. We find that the upholding of imposing of condition that confiscated goods be re-exported upon exercise of option of redemption is contrary to the decision of the Tribunal in *Pace India v. Commissioner of Customs, Bangalore* [2020 (372) ELT 442 (Tri- Bang)] which held that

'5.1. After considering the submissions of both the parties and perusal of the material on record, we find that the order of re-export of the goods on payment of redemption fine within 30 days and if not complied with, the goods will be disposed of as per the statutory provisions, is in excess of jurisdiction conferred by the Statute, because the provisions of the Customs Act do not provide for re-export of the imported goods on payment of redemption fine and therefore the adjudication order was beyond the statutory provisions of the Customs rules. This proposition was considered by the Division Bench of the Tribunal in the case

of HBL Power Systems Ltd. v. CC, Visakhapatnam [2018 (362) E.L.T. 856 (Tri. - Hyd.)] wherein the Tribunal in identical circumstances has analysed the scope of Section 125 of the Customs Act. It is relevant to reproduce Section 125, which is hereinbelow :-

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

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

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

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

The Tribunal has considered the scope of application of Section 125 which provides imposition of penalty in lieu of confiscation and has held in para 10 to 14 reproduced hereinbelow :-

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

11. The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal (who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon'ble Supreme Court and High Courts can and do examine the validity of the laws and subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Hon'ble Supreme Court in UOI v. Kirloskar Pneumatics Company - 1996 (84) E.L.T. 401 (S.C.) in which it was held as under :

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

12. We also find that not only Section 125 but no Section of the Customs Act, 1962 gives any officer the power to compel anyone to import or export or re-export. This Section also does not give the Adjudicating Authority the right to give a conditional redemption saying “you can redeem only if you agree to re-export”. In case of prohibited goods the adjudicating authority has only two options :

- (a) to allow redemption on payment of fine; or
- (b) to not allow redemption.

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

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

Further we find that the ratio of the decision of the Tribunal in the case of HBL Power Systems Ltd. is squarely applicable in the present case. Therefore we hold that the impugned

order ordering for re-export of the goods on payment of redemption fine is not sustainable in law and therefore we set aside this finding of the Commissioner (Appeals).’

and by the Tribunal thus

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

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

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

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

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

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

11. The scope of Section 125 of the Act is limited by the words in which it is framed and it is not open to the adjudicating authority or the Tribunal (who are creatures of the statute) to stretch, modify or restrict the scope of this Section; they are bound by it. Hon’ble Supreme Court and High Courts can and do examine the validity of the laws and

subordinate legislations and pass judgments annulling or modifying them by neither the officers nor the Tribunal, as creations of the statute cannot do so. This position has been explained clearly by the Hon'ble Supreme Court in UOI v. Kirloskar Pneumatics Company 1996 (84) E.L.T. 401 (S.C.) in which it was held as under :

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

in HBL Power Systems Ltd v. Commissioner of Customs, Vishakapatnam [2018 (362) ELT 856 (Tri-Hyd)] which was upheld, in Commissioner of Customs, Vishakapatnam v. HBL Power Systems Ltd [2019 (367) ELT 154 (AP)], by the Hon'ble High Court of Telengana and Andhra Pradesh.

6. Owing to non-adherence to section 138B of Customs Act, 1962 we find ourselves unable to validate the findings of the lower authorities that have relied upon statements to conclude that the appellants were aware of the diversion that M/s Bruno Exports were engaged in which has bearing on recourse to section 112 of Customs Act, 1962.

7. The findings of the lower authorities suffer from infirmities arising from having fastened condition while ordering redemption and from the statements relied upon not having crossed the bar of relevancy prescribed by section 138B of Customs Act, 1962. We are unable to take the appeals to its logical conclusion in the absence of validity of the impugned order on both counts. Accordingly, we set aside the order and remand the matter back to the adjudicating authority for a fresh decision after permitting cross-examination of the witnesses sought for and to set right the terms of redemption in line with judicial pronouncements *supra*.

(Order pronounced in the open court on 08/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)