

2019-TIOL-2607-CESTAT-MAD

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHENNAI
COURT NO. I**

Customs Appeal No. 40784 of 2019

Arising out of Order-in-Appeal No. 12/2019-TTN(CUS), Dated: 06.02.2019
Passed by the Commissioner of Customs & Central Excise (Appeals), No.1, Williams Road,
Cantonment, Tiruchirapalli - 620001

Date of Hearing: 08.08.2019

Date of Decision: 22.08.2019

**M/s O M S SIVAJOTHI MILLS
3, PARANGIRINATHAPURAM COMPOUND, PULLALAKOTAI ROAD
VIRUDHUNAGAR - 621001**

Vs

**COMMISSIONER OF CUSTOMS
CUSTOM HOUSE, NEW HARBOUR ESTATE
TUTICORIN - 628004**

Appellant Rep by: Shri A K Jayaraj, Adv.

Respondent Rep by: Shri M Jagan Babu, AR

CORAM: P Dinesha, Member (J)

Cus - The assessee has imported 100 Metric Tonnes of "Green Mung Beans" of Tanzanian origin - A sample of same was sent for lab analysis, but however, upon examination, the FSSAI rejected the imported cargo as, according to it, the sample did not conform with the standards laid down for Mung Beans under Regulation 2.4.6.8 of Food Safety and Standards Regulations, 2011 - The assessee thereafter requested for re-export of imported goods - The scope of appeal and the issue therefore to be decided is the liability of assessee to redemption fine under Section 125 of Customs Act, 1962 over and above confiscation and the penalty under Section 112 (a) ibid - The fine i.e., redemption fine, is an option in lieu of confiscation and hence, both cannot run simultaneously, which means redemption fine is leviable only as an alternative to confiscation - The assessee has not questioned the confiscation and hence, there is no option available to it - Consequently, there is no question of exercising any option in lieu of confiscation - When the order as to confiscation remains unchallenged, the importer accepts the order of confiscation and even the exporter offers willingness to accept back the consignment, there cannot be any question of redemption fine - Therefore, the redemption fine imposed and upheld by First Appellate Authority cannot sustain and is accordingly set aside - The penalty under Section 112 (a) would be imposed in case of improper importation of goods which has rendered the imported goods liable to confiscation under Section 111 and for this, the abetment is not a criterion - A mere importation that would render such goods liable to confiscation, is sufficient to attract penalty - Therefore, the penalty appears to be justified - The penalty under Section 112 (a) is reduced to Rs. 10,000/- only: CESTAT

Appeal partly allowed

Case laws cited:

M/s. Siemens Limited Vs. Collector of Customs reported in 1999 (113) E.L.T. 776 (S.C.)... Para 2.2

Sankar Pandi Vs. Union of India reported in 2002 (141) E.L.T. 635 (Mad.)... Para 2.2

Central Marketing Agency Vs. C.C., Calcutta – 2004 (178) E.L.T. 601 (Tri. – Kol.)... Para 2.2

Padia Sales Corporation Vs. C.C. – 1992 (61) E.L.T. 90 (Tri. – Del.)... Para 2.2

SDS Ramcides Crop Science Pvt. Ltd. Vs. C.C., Chennai-II – 2017-TIOL-3682-CESTAT-MAD... Para 2.2

C.C., Mumbai Vs. Mansi Impex – 2011-TIOL-78-SC-CUS ... Para 2.2

Regal Impex Vs. Commissioner – 2015-TIOL-2494-CESTAT-DEL... Para 2.2

M/s. Chennai Marine Trading Co. P. Ltd. Vs. Commr. of Cus. (Sea), Chennai - 2013-TIOL-1454-CESTAT-MAD... Para 3.3

Trilok Chand Jain Vs. State of Delhi reported in AIR 1977 S.C.C. 666 (S.C.)... Para 4

FINAL ORDER NO. 41028/2019

Per: P Dinesha:

When the matter was taken up for hearing, Shri. A.K. Jayaraj, Ld. Advocate, appeared for the assessee and Shri. M. Jagan Babu, Ld. AR, appeared for the Revenue.

2.1 The contentions of the Ld. Advocate for the assessee are summarized as under :

(i) The appellant imported 100 Metric Tonnes of "Green Mung Beans" of Tanzanian origin under Bill-of-Entry No. 7183951 dated 12.07.2018. A sample of the above imported item was sent for lab analysis, but however, upon examination, the Food Safety and Standards Authority of India (FSSAI) rejected the imported cargo under Section 25(1)(i) of the Food Safety and Standards Act (FSSAI), 2006 as, according to it, the sample did not conform with the standards laid down for Mung Beans under Regulation 2.4.6.8 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. Consequently, they did not issue "No Objection" Certificate for the clearance;

(ii) The appellant thereafter requested for re-export of the imported goods;

(iii) The Adjudicating Authority passed Order-in-Original No. 34/2018-ADC dated 04.09.2018 after the appellant requested for adjudication without Show Cause Notice and without personal hearing vide its letter dated 09.08.2018;

2.2.1 Ld. Advocate would also submit that the appellant having requested for re-export and the foreign exporter having also accepted to take back the rejected cargo, he seeks the indulgence of this Court with regard to the redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962 and also the penalty imposed under Section 112 (a) *ibid*.

2.2.2 In this connection, Ld. Advocate heavily relied on the decision of the Hon'ble Supreme Court in the case of *M/s. Siemens Limited Vs. Collector of Customs reported in 1999 (113) E.L.T. 776 (S.C.)* wherein the Hon'ble Apex Court has ordered for refund of the amount paid as and by way of redemption fine. Ld. Advocate also referred to the judgement of the Hon'ble jurisdictional High Court in the case of *Sankar Pandi Vs. Union of India reported in 2002 (141) E.L.T. 635 (Mad.)* which thereafter came to be approved by the Hon'ble Supreme Court, as reported in *2018 (360) E.L.T. A214 (S.C.)*, specifically in support of his contention. He also inter alia relied on the following decisions :

- a. *Central Marketing Agency Vs. C.C., Calcutta – 2004 (178) E.L.T. 601 (Tri. – Kol.)*
- b. *Padia Sales Corporation Vs. C.C. – 1992 (61) E.L.T. 90 (Tri. – Del.);*
- c. *SDS Ramcides Crop Science Pvt. Ltd. Vs. C.C., Chennai-II – 2018 (359) E.L.T. 239 (Tri. – Chennai) = 2017-TIOL-3682-CESTAT-MAD*
- d. *C.C., Mumbai Vs. Mansi Impex – 2011 (270) E.L.T. 631 (S.C.) = 2011-TIOL-78-SC-CUS*
- e. *Regal Impex Vs. Commissioner – 2016 (332) E.L.T. 835 (Tri – Del.) = 2015-TIOL-2494-CESTAT-DEL*

2.3 With regard to the penalty under Section 112 (a), Ld. Advocate submitted that the appellant had only placed order for "Green Mung Beans", the commercial invoice for which is placed at page number 49/50 of the Appeal Memorandum. He also referred to the Packing List at page number 51 as also the Phytosanitary Certificate issued by the Ministry of Agriculture, Food Security and Cooperatives, the United Republic of Tanzania, apart from the recommendation for release issued by the Ministry of Agriculture and Farmers Welfare, Department of Agricultural Cooperation and Farmers Welfare, Directorate of Plant Protection, Quarantine and Storage, Government of India, dated 16.07.2018 to conclude that the appellant had absolutely no role as regards the quality of the goods that came to be supplied to it; therefore, there is no question of any abetment as the appellant had no hand in either the selection of the goods or their packing, which was done exclusively by the supplier.

3.1 Per contra, Ld. AR for the Revenue supported the findings of the lower authorities. He further contended that food grains are meant for human consumption, the imports of which are always monitored by the Allied Acts as the safety/health of human beings are paramount. The importation of such food grains are therefore allowed only after the clearance of the FSSAI, which mandates prior permission before import.

3.2 Referring to the Phytosanitary Certificate issued by the Tanzanian Government, Ld. AR submitted that the said certificate is not as per the norms of the Indian Government and hence, the same need not be relied on by either the FSSAI or even the Customs authorities. Referring to the other certificate issued by the Ministry of Agriculture and Farmers Welfare, Ld. AR submitted that the same does not relate to the quality of the import, rather it is only a test as regards the fumigation standards to exclude destructive insects and pests and therefore, the same does not meet the requirements of the FSSAI Standards.

3.3 He relied on the decision of this Bench of the Tribunal in the case of *M/s. Chennai Marine Trading Co. P. Ltd. Vs. Commr. of Cus. (Sea), Chennai reported in 2013 (297) E.L.T. 111 (Tri. – Chennai) = 2013-TIOL-1454-CESTAT-MAD* in support of his contentions.

3.4 Ld. AR concluded that in view of the imported consignment being declared unfit for human consumption as the same was below par and not meeting with the standards prescribed by statutes relating to food safety, order of the First Appellate Authority needs to be sustained.

4. In reply to the above, Ld. Advocate relied on the decision of the Hon'ble Supreme Court in the case of *Trilok Chand Jain Vs. State of Delhi reported in AIR 1977 S.C.C. 666 (S.C.)*.

5. I have heard the rival contentions, perused the orders of the lower authorities and have also gone through the various decisions relied upon by both the parties.

6. The scope of the appeal and the issue therefore to be decided is the liability of the appellant to redemption fine under Section 125 of the Customs Act, 1962 over and above confiscation and the penalty under Section 112 (a) *ibid*.

7.1 Section 125 of the Customs Act, which renders an option to an importer to pay fine in lieu of confiscation, reads as under :

"SECTION 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 [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit :

[Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further 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.]

[(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Explanation. - For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received."

7.2.1 Clearly, as the heading itself points out, the fine i.e., redemption fine, is an option in lieu of confiscation and hence, both cannot run simultaneously, which means redemption fine is leviable only as an alternative to confiscation. The appellant here in this case has not questioned the confiscation and hence, there is no option available to it. Consequently, there is no question of exercising any option in lieu of confiscation. When the order as to the confiscation remains unchallenged, the importer accepts the order of confiscation and even the exporter offers willingness to accept back (re-export) the consignment, there cannot be any question of redemption fine. Therefore, the redemption fine imposed and upheld by the First Appellate Authority cannot sustain and is accordingly set aside.

7.2.2 This view is supported by various judicial precedents relied on by the Ld. Advocate for the assessee.

7.3 In the order of this Bench in the case of M/s. Chennai Marine Trading Co. P. Ltd. (supra) relied upon by the Ld. AR, the very imported consignment itself was a restricted item for import. In the peculiar facts and circumstances of the case, the binding decision of the Hon'ble jurisdictional High Court and the Hon'ble Supreme Court (supra) prevails and therefore, the appeal as regards this issue is allowed.

8.1 The next issue agitated by the appellant is the levy of penalty under Section 112 (a) of the Customs Act. For the sake of convenience, the same is extracted hereinbelow :

"SECTION 112. Penalty for improper importation of goods, etc. -

Any person, -

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

8.2.1 A reading of the above Section makes it clear that the penalty under Section 112 (a) would be imposed in the case of improper importation of goods which has rendered the imported goods liable to confiscation under Section 111 and for this, I am of the opinion that abetment is not a criterion. Apparently, Clause (a) of Section 112 has two limbs – the first being "improper importation of goods by any person who, in relation to any goods ... would render such goods liable to confiscation"; and the second limb starts with "or abets the doing or omission or such an act." Hence, a mere importation that would render such goods liable to confiscation, as indicated above, is sufficient to attract penalty. Therefore, I am of the view that the penalty appears to be justified.

8.2.2 In this regard, I draw support from the decision of the Hon'ble jurisdictional High Court, relied on by the Ld. Advocate for the appellant in the case of Sankar Pandi (supra) which decision has thereafter been upheld by the Hon'ble Apex Court, as reported in *2018 (360) E.L.T. A214 (S.C.)*, wherein similar penalty has been upheld.

8.3 But however, considering the facts and circumstances of this case and the undisputed bona fides of the appellant, the penalty under Section 112 (a) is reduced to Rs. 10,000/- only. The impugned order of the First Appellate Authority on the penalty under Section 112 (a) is therefore modified to this extent.

9. In the result:

(i) The impugned order as regards the redemption fine is set aside;

(ii) The impugned order as regards the penalty under Section 112 (a) is modified to the extent as indicated above;

10. The appeal is partly allowed.

(Order pronounced in the open court on 22.08.2019)