SUPREME COURT OF INDIA

Fortis Hospital Ltd.

Vs.

Commr.of Customs,Import

C.A.No.1049 of 2008

(A.K.Sikri and Rohinton Fali Nariman JJ.)

24.03.2015

JUDGMENT

A. K. SIKRI, J.

The appellant herein, which is the successor of M/s.Wockhardt Hospital and Heart Institute (referred to as the 'Institute' hereinafter) had a hospital at Bangalore. Sometime in the year 1990, the said Institute imported a Cardiac Catherization Laboratory (known as Angiography system) with its spares/accessories valued at Rs.1,14,23,471/-. The said Institute applied for exemption from payment of import duty taking shelter under the Notification No. 64/88-cus dated 01.03.1988. This notification provides for exemption on medical equipment imported against Custom Duty Exemption Certificate issued by the Director General of Health Services. Apart from the said certificate, there are certain other conditions which are mentioned in the notification that need to be satisfied to avail the exemption. These conditions are as under: -

> "All such hospitals which may be certified by the said Ministry of Health and Family Welfare, in each case, to be run for providing medical surgical or diagnostic treatment not, only without any distinction of caste, creed, race, religion or language but also: -
>
> (a) free, on an average, to at least 40 per cent of all their outdoor patients; and

> (b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and
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> (c) at reasonable charges, either on the basis of the income of the patients concerned or otherwise to patients other than those specified in clauses (a) and (b)."

From a bare reading of the aforesaid stipulations, it is clear that these conditions are to be fulfilled not at the time of the import but in future, by the importer while utilising the imported equipment. Therefore, the conditions are continuing in nature.

The Institute was not charged any import duty as it had produced requisite certificate dated 11.02.1991 issued by the Director General of Health Services, New Delhi. After sometime, the Revenue authorities/respondent herein came to know that the Institute was committing breach of the aforesaid conditions, as it had not been providing free diagnostic treatment to at least 40 per cent of all its outdoor patients and it was also not giving free treatment to indoor patients having income of less than Rs.500 per month and for this purpose, it had not got 10 per cent hospital beds reserved for such patients. It resulted in issuance of show cause notice to the Institute. Pertinently, this show cause notice dated 12.01.2000 was issued under Section 124 of the Customs Act, 1962 (hereinafter referred to as Act) and after stating that the aforesaid breach was allegedly committed by the appellant, in the show cause notice, it was proposed as under: -

> "16. Therefore, M/s. Wockhardt Hospital & Heart Institute, Bangalore are called upon to show cause to the Commissioner of Customs, Air Cargo Complex, Sahar, Andheri (E), Mumbai-99 as to why: -
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> (a) the medical equipments/spares and accessories as detailed in Annexure of the Show Cause Notice and valued at Rs.1,14,23,471/- should not be confiscated under Section 111(o) of the Customs Act, 1962.
>
> (b) Penalty should not be imposed under Section 112 of the Customs Act, 1962 for the omission and commission committed by the Wockhardt Hospital & Heart Institute Bangalore."

In para 17 of the Show Cause Notice, the Noticee was also asked to show as to why penalty under Section 112 of the Act should not be imposed. The Institute

replied to the said Show Cause Notice and also desired to be heard in person. Personal hearing was accorded to the Institute. It had filed written submissions which were also considered. However, the plea of the Institute in the reply filed to the Show Cause Notice was not accepted. Orders dated 11.07.2002 were passed by the adjudicating authority holding that the Institute had, in fact, committed the breach of the Notification No. 64/88 dated 01.03.1988. Accordingly, the goods, viz., the aforesaid medical equipment was confiscated. The operative portion of order of the confiscation and penalty reads as under:

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> "a) I order, the confiscation of the goods valued at Rs.1,14,23,471/- mentioned in the show cause notice, under Section 111(o) of the Customs Act, 1962. The importer may redeem them on payment of a fine of Rs.1,00,000 (Rs. One lakh only), within thirty days of this order.
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> b) I also direct that the importer shall forthwith pay the duty amounting to Rs.1,65,24,050/-(Rs. One crore sixty five lakhs twenty four thousand and fifty only) in view of the failure to discharge the continuing obligation under notification No. 64/88 during the material period.
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> c) I impose a penalty of Rs.25,000 (Rs. Twenty five thousand only) on the importer under Section 112(a) of the Customs Act, 1962.
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> d) The proceedings in respect of DGHS are dropped."

As is clear from this order, after confiscation of the goods, option was given to the Institute to redeem the said goods on payment of fine of Rs.1 lakhs. In addition, the Institute was also directed to pay the duty amounting to Rs. 1,65,24,050/- "in view of the failure to discharge the continuing obligation under notification No. 64/88 during the material period". Penalty of Rs. 25,000/- under Section 112(a) of the Act was also levied. The Institute challenged the aforesaid order by filing appeal before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT'). Since we are concerned with that part of the order vide which the duty was imposed, henceforth we will confine our discussion to this aspect alone.

Before the CESTAT, submission of the Institute was that in the Show Cause Notice nothing was stated about the payment of duty and as the Show Cause Notice was conspicuously absent in this behalf, in the final order, the duty could not have been demanded. It was argued that such an order would be violative of

the principle of nature justice. The Institute also referred to the provisions of Section 125 of the Act which gives an option to pay fine in lieu of confiscation. It was argued that as per this provision, option is to be given to the importer and it is left to the importer who has to exercise the same. It would imply that if no such option is exercised, the goods are not to be redeemed and they would remain the property of the Government. In that case, when such an option is not exercised, no fine is payable and when no such fine is payable, duty could not be demanded by relying on the provisions of Sub-section (2) of Section 125 of the Act, as such an eventuality has not arisen in the present case because of the reason that the Institute had not exercised the option and had not paid the fine. This contention found favour with the CESTAT and while accepting the same, CESTAT discussed the legal position in the following words:

> "We have carefully considered the rival submissions. We have also perused the case law cited before us as well as the judgment of the Hon'ble Supreme Court in the case of CC, Mumbai v. Jagdish Cancer & Research Centre 2001(132)ELT 257 (SC). It is no doubt true that under Section 125(2) of the Customs Act, 1962 when goods are redeemed, duty will have to be paid in addition to the fine imposed in view of confiscation. However, the argument before us is not that only fine is required to be paid for redemption of the imported goods. The question before us is whether duty is payable even in the event of the option not being exercised. The decision of the Supreme Court in Jagdish Cancer & Research Centre cited supra does not address itself to this issue. No such argument was ever raised before the Apex Court. The contention of the learned DR that the conduct of the appellants in use of the imported equipment after import is tantamount to their having exercised the option of redemption and, therefore, they are liable to pay duty, is not tenable as it is only on adjudication that the option is extended by the adjudicating authority and the option could not have been exercised prior to the passing of the impugned order and, therefore, the use of the imported equipment by the appellants; in their Institute cannot amount to their having exercised the option to redeem the goods, which comes at a subsequent stage namely when the impugned order of adjudication is passed. We therefore hold that the duty demand is not sustainable and accordingly, set aside the same, however, if the absence of any challenge to the confiscation and to the imposition penalty, both are sustained."

In this manner, appeal was allowed holding that demand of duty was not legally sustainable and that part of the Order-in-Original passed by the adjudicating authority was set aside.

Not satisfied with the aforesaid outcome, the respondent- Revenue challenged the order by filing appeal before the High Court of Bombay. It was argued by the Department that the moment order of confiscation is passed with option given to the Institute to redeem the goods on payment of fine, the eventuality comtemplated under Section 125(2) of the Act comes into operation and therefore, in the scheme of things, it was permissible for the Department to charge duty as well. It was also argued that when it is found that the Institute had violated the conditions stipulated in Notification No. 64/83 dated 01.03.1988, the only conclusion would be that duty was payable by the Institute and therefore, the Department was well within its right to demand the duty.

The High Court, after discussing the respective contentions in detail, accepted the submissions of the Department and set aside the order of the CESTAT. The rational given by the High Court is contained in Para 41 of the impugned judgment which interprets the provisions of Sub-section (2) of Section 125 of the Act as well reflects the reasoning adopted by the High Court in support of its view. We deem it appropriate to reproduce the same hereinbelow:-

> "41. We find it difficult to accept the above interpretation of Section 125 (2). It is well established in law that the taxing statutes have to be construed strictly and unless the literal meaning leads to anomaly or absurdity, the golden rule of literal interpretation should be adhered to. Literal meaning of Section 125(2) is that, whenever the goods liable to be confiscated under the Customs Act are allowed to be redeemed by giving an option to pay fine in lieu of confiscation imposed under Section 125(1), the owner of such goods or the person referred to in section 125(1) shall, in addition to the fine be liable to any duty and charges payable in respect of such goods. In other words, under Section 125(2), the duty payable on the confiscated goods has to be paid on imposition of fine in lieu of confiscation and it is immaterial whether such option is exercised or not."

As is clear from the above, according to the High Court, whether option under Section 125(2) of the Act is exercised or not, is immaterial.

In order to find out as to whether the High Court is right or CESTAT's interpretation of the provisions of Section 125(2) of the Act is correct, it would be necessary to peep into the said provision along with Section 124 of the Act. These two Sections are worded as follows: "Section 124. Issue of show cause notice before confiscation of goods, etc.

- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral."

"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, 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."

It may be seen from the bare reading of the aforesaid Section that under Section 125(1) of the Act, option is given to the importer whose goods are confiscated, to pay the fine in lieu of confiscation and redeem the confiscated goods. Before this action is taken, Show Cause Notice is to be issued under the provision of Section

124 of the said Act. This provision pertains to confiscation of goods and provides procedural safeguards inasmuch as there cannot be any order of confiscating any goods or imposing any penalty on any person without complying with the procedure contained in Section 124. Section 124 mandates issuance of the Show Cause Notice before passing any such order and contemplates two actions: first, relating to confiscating of the goods and second, pertaining to imposition of penalty. Pertinently, this action does not deal with payment of import duty at all.

It is not in dispute that Show Cause Notice in the instant case was issued under Section 124 of the Act. Once such a Show Cause Notice was issued and as can be seen from the proposed action which was contemplated in this provision (as has been taken note of above), it was also confined to confiscation of the imported machinery and imposition of penalty. Nothing was stated about the payment of duty. However, in spite of the fact that Show Cause Notice was limited to confiscation of the goods and imposition of penalty, the final order which was passed included the direction to pay the customs duty as well. It is clear that when such an action was not contemplated, which even otherwise could not be done while exercising the powers under Section 124 of the Act, in the final order there could not have been direction to pay the duty.

Notwithstanding the aforesaid position, as pointed out above, the Department is taking shelter under the provisions of sub-section (2) of Section 125 of the Act. However, on a plain reading of the said provision, we are of the view that such a provision would not apply in case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable. In the present case, admittedly, such an option was not exercised and the confiscated machinery was not redeemed by the Institute. As a matter of fact, thus, no fine has been paid.

Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, argued that even if an option was not exercised, the moment it was stated in the order of the Commissioner that fine is being "imposed", sub-section (2) would get attracted. We do not agree with the aforesaid submission of Mr. Radhakrishnan. The order confiscating the goods has already been reproduced above. Insofar as the payment of fine is concerned, only option was given (and that was only course of action which could be visualised under section 125). The order categorically states that "the importer "may" redeem the confiscated goods on payment of fine of Rs.1,00,000 (Rs. One lakh only)"

Indubitably, unless an option is exercised, fine does not become payable. Sub-section (2) of Section 125 uses the expression "imposed" by stating "where any fine in lieu of confiscation of goods is imposed". In Black law dictionary (Tenth edition), the word 'impose' is defined as "To levy or exact (a tax or duty)". Thus, it has to be a levy or exact which is become payable and has to be paid. Likewise, the word 'impose' is defined by Oxford English Dictionary, as relevant for the purpose of the present case, as "Lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with; force (oneself) on or upon the attention etc. of."

In view of the above, we cannot agree with the submission of Mr. Radhakrishnan that fine been "imposed" in the present case. The stipulation contained in the adjudicating order was only contingent in nature which contingency would have arisen only on exercising the option by the importer to pay fine in lieu of confiscation and to redeem the goods.

As already mentioned above, Section 124 deals with confiscation of goods and penalty and does not deal with payment of import duty. No doubt, such a payment of import duty becomes payable by virtue of sub- section (2) of Section 125 but only when condition stipulated in the said provision is fulfilled, namely, fine is paid in lieu of confiscation of goods. When the Department chose to take action under Section 124 of the Act, it should have been alive of the situation that the Noticee may not exercise the option and in such case, duty would not be payable automatically.

It is not that the Department is without any remedy. We have gone through the provisions of notification No. 64/88 dated 01.03.1988. As pointed out above, importer would be exempted from payment of import duty on hospital equipment only when the conditions contained in the said notification are satisfied. Some of the conditions, as pointed out above, are to be fulfilled in future. If that is not done and the importer is found to have violated those conditions, Show Cause Notice could always be given under the said notification on payment of duty, independent of the action which is permissible under Section 124 and Section 125 of the Act. It is also important to mention that under certain circumstances mentioned in the notification, the importer can be asked to execute a bond as well. In those cases, action can be taken under the said bond when the conditions contained therein are violated. Therefore, if the Department wanted the Institute to pay the duty, which may have become payable, it could have taken independent action; de hors Section 124 of the Act, for payment of duty, simultaneously with the notice under Section 124 of the Act or by issuing composite notice for such an action. No doubt, it could

have waited for option to be exercised by the Institute under Section 125(1) of the Act as well and in that eventuality, duty would have automatically become payable under Section 125(2) of the Act. But when such an option was not exercised, it could have taken separate and independent action by issuing Show Cause Notice to the effect that the Institute had violated the terms of exemption notification and therefore, was liable to pay duty.

What is emphasised is that when in the Show Cause Notice issued under Section 124, nothing was stated about the payment of import duty, there could not have been direction to that effect in the final order Further, insofar as Section 125(2) is concerned, the contingency contained therein did not occur in the present procedure for want of exercise of option to pay fine. We, thus, are of the opinion that the view taken by the CESTAT is correct and the contrary view taken by the High Court in the impugned judgment is not warranted on the interpretation of Section 125(2) of the Act.

High Court is not correct in observing that it is immaterial whether option under Section 125(2) is exercised or not. We would like to point out that the High Court has referred to the judgment in the case of 'Commissioner of Customs(Import), Mumbai v. Jagdish Cancer & Research Centre' [2001 (6) SCC 483] in support of its conclusion. However, on going through the said judgment, we find that the issue with which we are concerned in the present case did not occur for consideration before the court in that case at all, as is clear from para 12 of the said judgment, which is reproduced below: -

> "12. Whenever an order confiscating the imported goods is passed, an option, as provided under sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to sub-section (2) of Section 125, the person "shall in addition be liable to any duty and charges payable in respect of such goods". A reading of sub-sections (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under sub-section (2) in addition to the fine under sub-section (1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to sub-section (2) to Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short-levied or erroneously refunded, etc. The order for payment of duty under Section 125(2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer

> had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in Mohan Meakins Ltd. v. CCE wherein it has been observed in para 6: (SCC p.465) "Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section."

In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable."

Obviously, the argument raised in that case predicated on Section 28(1) of the Customs Act and plea was that notice was not issued by the "competent officer" and was also beyond the time prescribed under Section 28(1). In that context, the Court dealt with the provisions of Section 125(1) as well as 125(2) and observed that order of payment of duty under Section 125(2) would be an integral part of the proceedings relating to confiscation and consequential orders thereon. This order, however, must be pursuant to a show cause notice and adjudication. The court was not dealing with the question as to whether sub-section (2) of Section 125 would be applicable even when option to pay fine in lieu of confiscation is not exercised.

Accordingly, we allow the appeal and set aside the order passed by the High Court. We make it clear that it would still be open to the Department to take appropriate independent action against the appellant for payment of import duty, in case it is still within period of limitation.