**(2009) 06 KL CK 0131**

**High Court Of Kerala**

**Case No:** Cus. Appeal No. 6 of 2008

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| The Commissioner of Customs | APPELLANT |
| Vs | |
| Navpad Enterprises | RESPONDENT |

**Date of Decision:** June 5, 2009

**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 35H
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 3A
- Constitution of India, 1950 - Article 136, 32
- Customs Act, 1962 - Section 112, 125, 130, 130(9)
- Limitation Act, 1963 - Section 5

**Citation:** (2009) 169 ECR 213 : (2009) 2 KLJ 642

**Hon'ble Judges:** P.R. Raman, J; P. Bhavadasan, J

**Bench:** Division Bench

**Advocate:** John Varghese, SC, for the Appellant; P.A. Augustin, T.R. Jagadeesh, E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai, P. Benny Thomas, Anil D. Nair, Samir Chakraborty and Hasmukh Kundalia, for the Respondent

**Judgement**

P.R. Raman, J.

Customs Appeal Nos. 6, 7, 8 and 9/2008 arise out of the order passed by the Customs, Excise & Service Tax Appllate Tribunal, dated 12.3.2008. Customs Appeal Nos. 13, 15 and 16 of 2009 arise out of another set of cases disposed of by a common order of the Tribunal, dated 24.7.2008.

2. The point involved is the same. Though some of the appeals are presented beyond the prescribed period of time, the appeals were presented along with a petition for condonation of delay u/s 5 of the Limitation Act. It was contended that in the absence of any express provision making the Limitation Act applicable to the appeal so presented, the appeal presented beyond the time cannot be entertained and that Section 50 has no application and placed reliance on the decision of the

Apex court in Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, . We have perused the judgment cited. The Apex Court. After considering the provisions contained u/s 35H of the Central Excise Act providing for a reference to the High Court, which provides a period of limitation but in the absence of any provision for filing any reference application beyond the said time and in the absence of any express provision making Limitation Act applicable, held that Section 5 of the Limitation Act stood excluded..

3. Though in the course of its discussion reference was also made to the appeal provision, actually, the question as to whether Section 5 did apply to an appeal preferred to the High Court u/s 130 of the Customs Act did not arise for consideration. Further, as rightly pointed out by the learned Counsel appearing on behalf of the appellant, Section 130(9) inter alia provides "that except as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 relating to appeals to this High Court shall, so far as may be, apply in the case of appeals under the Section". Thus, the appeal provision contained in the CPC are expressly made applicable. As per Order XLI Rule 3-A when an appeal is presented after the period of limitation of specified, therefore, it shall be accompanied by an application supported by affidavits setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period. However, we do not think in the factual situation, it is necessary or proper to consider these contentions for the reason that the delay has already been condoned by an order of court and in the absence of any review sought for in the matter we are not called upon to reconsider the order passed by a co-ordinate Bench of this Court.

4. Before going to the merits of the case, we may state the facts in brief necessary for the disposal of these appeals as follows.

5. The respondent in all these cases imported second hand photocopiers without obtaining license, which was in violation of the ITC regulation and the EXIM policy (Foreign Trade Policy Para 2(17). The respondent however, declared certain value and wanted to clear them on payment of duty. The Original Authority on finding that the respondent has violated the excise provisions and in view of the DGFT Circular, held that there is a policy violation and proceedings were initiated against them. The value as declared by the respondents was not accepted and it was re-fixed based on the Chartered Engineer''s certificate, which was no doubt higher than the value as declared by the respondent. The adjudicating authority held that goods are liable for confiscation, but it allowed to redeem the goods on payment of fine and also imposed penalties. Appeals preferred there from by the respondents interalia contending that the redemption fine imposed was done in an arbitrary fashion and there was no market enquiry and the redemption fine fixed is not in accordance with the provisions of Section 125 of the Customs Act. Placing reliance on some of the decisions of the Tribunal, the redemption fine was sought to be reduced to 10%

of the value of the goods and penalty to 5%. Thus, the confiscation of the goods was beyond challenge. The scope of the appeal was limited to the consideration regarding the quantum of redemption fine and penalty imposed. It was urged that the redemption fine and penalty imposed are exorbitant when the actual price of the imported goods is much less than the value fixed by the Revenue on the basis on the Chartered Engineer''s certificate, that the enhancement of the value itself has escalated the duty and there is escalation in redemption fine and penalty imposed on the appellants. It was also contended that the profit margin of 20% to 30% as found by the Commissioner was factually incorrect. Thus, they prayed that the redemption fine and the penalty be reduced to 10% and 5% respectively of the value of the imported goods. The Tribunal, after hearing the parties and after considering the precedence on the points raised, held that the value declared by the respondent has since been enhanced by the Revenue on the basis of the Chartered Engineer''s certificate and in the absence of any evidence brought out by the Revenue to show that they had paid more than what they had declared to the Customs, redemption fine of 10% and penalty of 4% would be appropriate. It was also held that in the absence of any factual difference, the Bench cannot deviate from the ratio of its own decision rendered in other cases and they were persuaded to follow the precedence while fixing the rate of redemption fine and penally.

6. The Department is therefore in appeals before us. We have heard Sri. John Varghese, Standing counsel for the appellant and the learned Senior counsel Dr. Samir Chakraborty, along with learned Counsel Mr. Hasmukh Kundalia, on behalf of the respondents. The appellant would contend that the appellate authority committed an error in reducing the redemption fine and penalty and following a uniform rate in all the cases and thereby the discretion vested in the authority has not been properly exercised and in all the cases the rate of redemption fine and penalty are uniformly applied, thereby showing non application of the mind to individual cases. It is also contended that the object of imposing a redemption fine in lieu of confiscation must be with a view to prevent the importers from earning any profits by such import done contrary to the exemption rules. He also submitted that what exactly should be the redemption fine and penalty to be imposed may differ from case to case depending upon the peculiar facts and circumstances of the case. So however, when the import made in contravention of the provisions is repeated the respondents are repeated offenders and hence there was no case made out for reduction of redemption fine and penalty from the one imposed by the adjudicating authority.

7. Per contra, the learned Counsel for the respondent would submit that the facts in hand would clearly show from the perusal of the order of the facts in hand would clearly show from the perusal of the order of the Appellate Tribunal that the Tribunal in fact considered the fact that for the purpose of imposing the redemption fine and penalty, it is not the value as declared by the importer. Thus, the enhancement of the value has resulted in the escalation of duty as also the

redemption fine and penalty. This has necessarily weighed with the Appellate Authority and the Appellate Authority has given its reason for reduction of the redemption fine and penalty and thus exercised the discretion in an objective manner having due regard to the facts in the case which does not give rise to any question of law much less any substantial question of law. It is also contended that when discretion is vested on an Authority, in the absence of any guideline in built in the provision or rule, it has to be exercised in an objective manner on well - founded principles is beyond any dispute. But in the factual situation, the Authority has applied its mind and exercised its discretion, which does not call for interference. It is also his case that the respondent is not a repeated offender as contended by the Revenue. According to him, the policy change was brought out by notification only in 2005, that for the earlier import made though he was imposed with a penalty and confiscation was ordered, ultimately the matter was taken to the Apex Court in appeal and finally it was held that the policy changes has to be brought not by circular but by notification and as such the orders passed by the Authorities were quashed. Hence in no way can it be said that he is a repeated offender. He has a further case that in the absence of any materials placed by the Revenue to draw any distinction between the cases decided earlier the tribunal was perfectly justified in following the precedence and imposing the redemption fine at the same rate. It is pointed out that various decisions referred to in the order of the Tribunal in which redemption fine imposed was only 10% and penalty 5% which was accepted by the Department and did not prefer any further appeal to higher forum and thereby they accepted the decision and it is not open for them now to contend that the rate of redemption fine as fixed by the Tribunal is on a lower side.

8. The dispute being only on the rate if redemption fine and penalty which interlia depends on the totality of the facts and circumstances in each case, we fail to see how any question of law, much less any substantial question of law could arise. A quasi judicial authority in exercising a power of discretion has to do it in an objective manner and cannot do so in a mechanical way. But we find that no peculiar facts were pleaded or materials placed to show that the redemption fine imposed at 10% and penalty at 5% is on a lower side. True that in earlier cases as pointed out in the Tribunal''s order, redemption was at the rate of 10% and penalty at 5%. If the facts in this case cannot be differentiated, then for party of reasons, necessarily, the Tribunal has to follow its precedence while imposing the redemption fine and penalty as otherwise, such decision can also be characterized as arbitrary arid discriminatory. Coming to the facts of this case, the Tribunal found that the value as fixed by the Chartered Engineer''s certificate is an enhanced value from the one declared by the assessee. That duty was imposed reckoning the value as fixed by the Chartered Engineer''s certificate. Therefore, the redemption fine imposed being on such rate as fixed in the certificate issued by the Chartered Engineer, there was escalation in the redemption fine and penalty imposed. Thus, the Tribunal has given its own reasons in the matter of fixing a rate at which the fine should be imposed.

Therefore, it cannot be said that it is a perverse finding. What would have been the rate had the matter been dealt with by this Court sitting in the armchair of the Appellate Authority, however, cannot be substituted.

9. In this regard, we may refer to certain case law cited by both sides. A Bench decision of the Madras High Court in Commissioner of Customs, Tuticorin v. Sai Copiers 2008 (226) ELT 486 (Mad.) had occasion to consider a similar case where the Tribunal had reduced the amount of penalty and redemption fine to 5% and 15% respectively of the value of the goods. It was held thus:

The statutory requirement is mat the imposition of redemption fine shall not exceed the market price of the goods confiscated, less in the case of imported goods, the duty chargeable thereon. The language employed "shall not exceed" indicates that the authorities under Act are empowered to impose redemption fine less than the market price of goods. Likewise u/s 112(a), the maximum penalty that could be levied is only prescribed, and there is no statutory prescription that the penalty should not be reduced by appellate authority.

That was also a case where the Tribunal had in fact, followed the earlier order of the Tribunal wherein the quantum of redemption fine imposed in lieu of confiscation of secondhand photocopiers valued at Rs. 17.7 lakhs was restricted to Rs. 2.5 lakhs and the quantum of penalty restricted to Rs. 85,000/- The same was followed in the case of the respondents therein by the Tribunal. It was also held that the court can interfere only in such circumstances where it was demonstrated to be whimsical resulting in miscarriage of justice..

10. In Commissioner of Customs (Import) v. Shankar Trading Co. 2008 (224) ELT 206 (Bom.) a Division Bench of the Bombay High Court also took a similar view. It was held that when the Tribunal noted that for import of similar goods around similar time in other order of the Commissioner (Appeals) the penalty and redemption fine was reduced and once the Tribunal relied on the judgment for reducing penalty and fine, it cannot be said that no reasons wens given and consequently no substantial question of law arises.

11. The learned standing counsel appearing on behalf of the appellant placed reliance on the decision in Jain Exports Pvt. Ltd. v. Union of India : 1993 (66) ELT 537 (SC). In that case, the Apex Court, while considering the quantum of redemption fine to be imposed, held that the quantum should depend on the totality of the facts and circumstances of each case and that bona fide action of assessee by itself cannot entitle him to claim full waiver of fine. It was also held that the Apex Court would not be ordinarily go into the matter while exercising jurisdiction under Articles 32 and 136 of Constitution of India unless impugned order is shown to be thoroughly arbitrary or whimsical resulting in gross miscarriage of justice.

12. In State of U.P. and Others Vs. Sukhpal Singh Bal etc. etc., the Apex Court held that the penalty is intended to protect the public revenue. As per Section 125 of the

Customs Act, what is prescribed is the maximum of the amount that could be fixed by way of redemption fine. Therefore what exactly should be the redemption fine to be imposed will necessarily depend upon the facts and circumstances of each case.

13. It is settled that power of discretion by the authority is to be exercised based on well founded principles and should not be done in a mechanical way. We have already perused the order of the Tribunal and found that the Tribunal had given its own reasons for supporting as to why the redemption fine is to be reduced. That the rate at which the redemption fine is imposed in similar cases has been taken note of only for the limited purpose of maintaining consistency. Had it been a case where materials were placed by the appellant to draw a distinction from the rest of the cases, certainly, the Tribunal would have and ought to have considered those additional materials in arriving as to whether the rate imposed should be the same or whether any variation has to be made in factual situation. In so far as no such attempt is made by the appellant before the Tribunal, we cannot find that this is dissimilar to the other cases. Any authority exercising the power is also bound by law of precedence and it is necessary to maintain consistency as otherwise it will be characterized as discriminatory. Therefore, this is not a case where the rate is. applied uniformly in a mechanical way; but similar rate of redemption time was adopted for parity of reasons.

As we have already stated, the decision rendered cannot be said to be preserve and hence no question of law, much less any substantial question of law arises for consideration. We find no merit in the appeals, the appeals are accordingly, dismissed. There will be no order as to costs.