REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 4294-4295 OF 2002

COMMISSIONER OF CUSTOMS — APPELLANT

VERSUS

SAYED ALI & ANR. — RESPONDENTS

WITH

[CIVIL APPEAL NOS.4603-4604 of 2005]

J U D G M E N T

D.K. JAIN, J.:

1. Challenge in these civil appeals, filed under Section 130E of the Customs Act, 1962 (for short "the Act"), is to the orders dated 1st October, 2001 and 4th January, 2005 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the CEGAT") and the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT") respectively. In the first set of appeals (Nos. 4294-4295 of 2002), the CEGAT has held that the Commissioner of Customs (Preventive), Mumbai, not being a "proper officer" as defined in Section 2(34) of the Act, did not have jurisdiction to issue show cause notice in terms of Section 28 of the Act.

However, in the second set of appeals (Nos. 4603-4604 of 2005), the CESTAT has, to the contrary, held that the Commissioner of Customs (Preventive), Mumbai had jurisdiction to issue notice under Section 28 of the Act.

2. Since the question of law arising in all the appeals is similar, these are being disposed of by this common judgment. However, to appreciate the controversy, facts in C.A. Nos. 4294-4295 of 2002 are adverted to. These are:

Respondent No. 1 is a partner in respondent No. 2 firm viz. M/s. Handloom Carpet, which is engaged in the business of carpet manufacture/export. Respondent No. 2 was charged with misusing the Export Pass Book scheme by selling goods cleared duty free in the open market or selling the pass book on premium in violation of the ITC restriction imposed on such sale. Investigations in the matter were conducted by the Marine and Preventive Wing of the Customs. On 28th August, 1991, the Assistant Collector of Customs (Preventive), Mumbai, issued to the respondents a show cause notice, alleging violation of the provisions of Section 111(d) of the Act. On 3rd February, 1993, the same officer adjudicated upon the said show cause notice, confirming the demands raised in the show cause notice.

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3. Being aggrieved, the respondents preferred an appeal before the Collector of Customs (Appeals), who vide order dated 14th December, 1993, allowed the appeal holding that since the matter involved demand of duty beyond a period of six months, the show cause notice was required to be issued by the Collector, and not by the Assistant Collector. Nevertheless, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

4. Accordingly, the Collector of Customs (Preventive) issued show cause notice dated 16th April, 1994 asking the respondents to show cause as to why the goods under seizure valued at `1,04,118.52/- should not be confiscated, and customs duty amounting to `5,07,274/- be not levied in terms of Section 28(1) of the Act, by invoking the extended period of limitation. Penalties under Sections 112(a) and (b)(i) and (ii) of the Act were also proposed.

5. In reply to the show cause notice, the jurisdiction of the Collector of Customs (Preventive) was questioned on the ground that the jurisdiction of a Commissioner by virtue of Notification No. 251/83 being more specific and limited in nature, the said notification will prevail over Notification No.250/83. Vide order dated 19th August, 1996, the

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Collector of Customs (Preventive) rejected the objections regarding his jurisdiction, holding thus:

> "It is not disputed by the parties that by virtue of notification No. 250/83 the commissioner of customs (preventive) Mumbai is appointed as Commissioner of Customs in the areas comprising Districts of Mumbai, Thane and Kolaba and a concurrent jurisdiction is thus vested in respect of Mumbai port also. What is being contended is that the jurisdiction of commissioner of customs, Mumbai under Notification No. 251/83 is more specific and limited. In this regard it is relevant to refer to the definition of smuggling under the provisions of customs Act, 1962. Under the Act Smuggling is defined as any act or omission which renders the goods to confiscation under the provisions of the Act. In this case M/s handloom carpet manufacturer (sic) are charged with trafficking of the goods imported and cleared only free in violation of the provisions of notification No. 117/88 dated 30-3-1988 and fabrication of documents to show receipt and consumption of the same in their factory. The goods imported and cleared duty free were thus rendered liable for confiscation under the provisions of the customs Act, 1962 and the customs (preventive) Commisionerate created for the purpose of prevention of smuggling and detention of cases of smuggling including commercial frauds is thus (sic) competent to investigate and adjudicate the case."

The Collector confirmed the demand of duty of ` 5,07,274/-under Section 28(1) of the Act. He also ordered confiscation of two consignments of dyes sulphur blue and sulphur blue green valued at ` 1,34,118.52/-, and imposed a redemption fine of ` 1,50,000/-.

6. Aggrieved, the respondents preferred appeals before the CEGAT. As afore-mentioned, accepting the preliminary objection of the respondents

regarding jurisdiction of the Collector (Preventive), the CEGAT has, vide the impugned order, allowed the appeals, observing that:

> "it is very clear that the Commissioner of Customs (Preventive) does not have jurisdiction to issue the impugned show cause notice and in view thereof he could not have the jurisdiction to adjudicate the matter when imports have taken place at Bombay Customs House."

7. At the sake of repetition, it may be noted that although the facts obtaining in C.A. Nos. 4603-4604 of 2005 were similar to those in C.A. Nos. 4294-4295 of 2002, but, in the former case, following the decision of its larger bench in ***Konia Trading Co.*** *Vs.* ***Commissioner of Customs, Jaipur***[1]**,** the CESTAT while upholding the issue of show cause notice by the Collector of Customs (Preventive) under Section 28 of the Act, set aside the order of adjudication passed by the said officer with a direction that the issues be determined afresh by the jurisdictional Collector of Customs who had earlier assessed the bill of entry in question at Bombay Port.

8. Hence, the present cross appeals by the revenue and the importers. At the very outset, we may clarify that these appeals are confined only to the question of validity of the demands raised by virtue of re-assessment orders passed by the Collector of Customs (Preventive) Mumbai, pursuant to the issue of show cause notices under Section 28 of the Act.

[1] 2004 (170) E.L.T. 51 (Tri.-LB)

For the sake of convenience, hereinafter, both the CESTAT and CEGAT are referred to as "the Tribunal".

9. Mr. Harish Chander, learned senior counsel appearing on behalf of the Revenue in one set of appeals, contended that once the Commissioner (Preventive) had been appointed as Collector of Customs (Preventive), Bombay by virtue of the Notification Nos. 250/83 and 251/83, issued by the Central Government under Section 4 of the Act, the former became "proper officer" in terms of Section 2(34) of the Act, and was competent to issue notice under Section 28 of the Act as the goods were cleared for home consumption in Bombay. In support of the proposition that an officer of Customs who has been assigned certain functions, which are to be performed under the Act is a "proper officer" and such assignment can be done by the Board or the Commissioner of Customs, reliance was placed on the decision of this court in ***Union of India & Ors.*** *Vs.* ***Ram Narain Bishwanath & Ors.***[2] as also on a larger bench decision of the Tribunal in ***Konia Trading Co.*** (supra) and another decision of the Tribunal in ***Manohar Bros. (Capacitors)*** *Vs.* ***Collector of Customs-II,***

[2] (1998) 9 SCC 285

Bombay*[3]*, the latter having attained finality on the dismissal of revenue's appeal by this Court (See : ***Collector*** *Vs.* ***Manohar Bros. (Capacitors)***[4]).

10. *Per contra,* Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the respondents in C.A. Nos. 4294-4295 of 2002, contended that the statutory powers conferred under Section 28 of the Act must be exercised by an officer of Customs, who has been assigned those functions either by the Central Board of Excise and Customs or by the jurisdictional Commissioner of Customs (Imports). As the Commissioner (Preventive) has not been appointed as a "proper officer" for the purposes of assessment or re-assessment, nor assigned any functions under Section 28 of the Act or under any other Section related to assessment of goods entered for home consumption, he was not competent to issue notice under Section 28 of the Act, argued the learned counsel. It was also urged that mere appointment of a person as an officer of Customs with territorial jurisdiction over the Mumbai port under Section 4 of the Act, does not *ipso facto* confer authority on him to exercise the statutory powers entrusted to proper officers, as under the Act, while all proper officers must be 'officers of Customs', all 'officers of Customs' are not "proper officers". In support of the proposition, learned counsel heavily

[3] 1998 (98) E.L.T. 821 (Tri)
[4] 2004 (166) E.L.T. A152 (S.C.)

relied on a decision of the Karnataka High Court in ***Devilog Systems India*** *Vs.* ***Collector of Customs, Bangalore***[5] and orders of the Tribunal in ***Orient Arts & Crafts*** *Vs.* ***Commissioner of Customs (Prev.), Mumbai***[6] and ***Informatika Software (P) Ltd. & Anr.*** *Vs.* ***Commissioner of Customs (P), Calcutta***[7]. Learned counsel submitted that the use of the expression "proper officer" in contradistinction to "officer of customs" in certain Sections in the Act makes it clear that the two expressions cannot be used interchangeably. Learned counsel contended that if the Revenue's contention that all "officers of customs" are "proper officers" is accepted, it would render Section 2(34) otiose, and would amount to re-writing the Act, leading to administrative anarchy. In support, reliance was placed on the decision of this Court in ***The Commissioner, Sales Tax, U.P.*** *Vs.* ***M/s. Suraj Prasad Gouri Shankar***[8]**.**

11. Explaining the procedure for clearance of imported goods for home consumption, learned counsel submitted that the Act clearly delineates the functions to be performed by the Commissioner of Customs (Imports) and the Commissioner (Preventive). According to the learned counsel under Section 30 of the Act, the owner of a vessel, on arrival or prior to

[5] 1995 (76) E.L.T. 520 (Kar.)
[6] 2003 (155) E.L.T .168 (Tri-Mum)
[7] 1997 (73) ECR 348 (Tri.-Kolkata)
[8] (1974) 3 SCC 230

arrival, is required to file an Import General Manifest ("IGM") with the proper officer i.e. the Commissioner of Customs (Imports), the Rummaging and Intelligence Wing of the Preventive Division checks the conveyance to ensure that all goods in the vessel are mentioned in the IGM; then, in terms of Section 31 of the Act, an order allowing "entry inwards" is granted by the proper officer, i.e. Commissioner of Customs (Imports); the goods are unloaded under the supervision of the Preventive Officer in terms of Section 34; and then, the importer files a bill of entry, which is assessed by the "proper officer" i.e. Commissioner (Imports) who, on payment of all duties by the importer, issues an order allowing clearance of goods for home consumption under Section 47 of the Act. It was thus, asserted that once goods are manifested, the jurisdiction to pass any order of assessment or re-assessment vests in the Collector of Customs (Imports) and not in the Collector of Customs (Preventive). To bring home the point, reference was made to a decision of the Calcutta High Court in ***Sharad Himatlal Daftary*** *Vs.* ***Collector of Customs***[9]. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports) Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer

[9] 1988 (36) E.L.T. 468 (Cal.)

which was duly executed, undertaking the obligation of export. Learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

12. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:

> **"28. Notice for payment of duties, interest etc.** — (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -
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> (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
>
> (b) in any other case, within six months,
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> from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

> **Provided** that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

It is plain from the provision that the "proper officer" being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the "proper officer".

13. Section 2(34) of the Act defines a "proper officer", thus:

> " **2. Definitions.-**……
> (34)"proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;

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It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be "proper officers" in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an "officer of customs" is the "proper officer".

14. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs

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(Imports) or the Preventive Collectorate, would be "proper officers". In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

15. In this behalf, our attention was also invited by Mr. Joseph Vellapally to standing order No. 35/89 dated 12th July, 1989, issued by a Collector of Customs, holding dual charges of Collector of Customs, Calcutta and Collector of Customs (Preventive) as also to certain notifications issued by the Board under Section 2 (34) of the Act clearly defining the functions of the Customs House and the Preventive Collectorate.

16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show cause notice for re-

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assessment under Section 28 of the Act. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications No. 250-Cus and 251-Cus., both dated 27th August, 1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not *ipso facto* confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act. In that view of the matter, we do not find any substance in the contention of Mr. V. Shekhar, learned Senior Counsel, appearing for the revenue in the second set of appeals, that the source of power to act as a "proper officer" is Sections 4 and 5 of the Act and not sub-section 34 of Section 2 of the Act. The said sections merely authorize the Board to appoint officers of Customs and confer on them the powers and duties to be exercised/discharged by them, but for the purpose of Section 28 of the Act, an officer of customs has to be designated as "proper officer" by assigning the function of levy

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and collection of duty, by the Board or the Commissioner of Customs. The argument is rejected accordingly. Similarly, revenue's reliance on the decision of this court in ***Ram Narain Bishwanath & Ors.*** (supra) is clearly misplaced. In that case the issue for determination was that when goods imported and cleared at Paradip Port (Orissa State) were seized by the Customs authorities in West Bengal on the allegation that these had been imported on the strength of fictitious licences, whether the customs authorities at Paradip or West Bengal will have the jurisdiction to initiate adjudication proceedings. By a short order it was held that it was for the customs authorities at Paradip to initiate proceedings against the importer. Apart from the fact that none of the statutory provisions were considered in that case, the issue arising for consideration in the present appeals was not the subject matter therein. Thus, the said decision is of no avail to the revenue.

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17. For the aforegoing reasons, we do not find any merit in the stand of the revenue. Resultantly, C.A. Nos. 4294-4295 of 2002, being devoid of any merit, are dismissed, while C.A. Nos. 4603-4604 of 2005 are allowed. Before parting with the cases, we once again clarify that this judgment shall not preclude the revenue from initiating any proceedings against the

importers for recovery of duty and other charges payable in respect of the subject goods, if permissible under the Act.

18. However, in the facts and circumstances of these cases, there shall be no order as to costs.

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(D.K. JAIN, J.)

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(H.L. DATTU, J.)

NEW DELHI;
FEBRUARY 18, 2011.
RS

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