NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 1057 OF 2019
(arising out of SLP(C) No. 12471 of 2018)

COMMISSIONER OF CUSTOMS ....APPELLANT(S)

VERSUS

M/S. ATUL AUTOMATIONS PVT. LTD. ...RESPONDENT(S)

WITH

CIVIL APPEAL NO(s). 1058 OF 2019
(arising out of SLP(C) No.12704 of 2018)
COMMISSIONER OF CUSTOMS ....APPELLANT(S)
VERSUS
M/S. PARAG DOMESTIC APPLIANCES ...RESPONDENT(S)

CIVIL APPEAL NO(s). 1060 OF 2019
(arising out of SLP(C) No.16325 of 2018)
COMMISSIONER OF CUSTOMS ....APPELLANT(S)
VERSUS
M/S. ATUL AUTOMATIONS PVT. LTD. ...RESPONDENT(S)

CIVIL APPEAL NO(s). 1059 OF 2019
(arising out of SLP(C) No.16204 of 2018)
COMMISSIONER OF CUSTOMS ....APPELLANT(S)
VERSUS
M/S. PARAG DOMESTIC APPLIANCES ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

Leave granted.

2. The respondents during October-November, 2016 imported certain consignments of Multi-Function Devices (Digital Photocopiers and Printers) (hereinafter referred to as "MFDs"). The Commissioner of Customs held that the imports were in violation of the Foreign Trade Policy framed under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the "Foreign Trade Act") and Rule 15(1)(2) of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 (hereinafter referred to as "Waste Management Rules"). Redemption fine was imposed under Section 125 of the Customs Act, 1962 and the consignment released for re-export only. Penalty was also imposed under Section 112(a) along with penalty under Section 114AA of the Customs Act as also penalty was imposed on the Directors.

3. In appeal before the Tribunal, the respondents did not contest that the import was in violation of the Foreign Trade Policy having been made without the necessary prior authorisation. The Tribunal held that the MFDs did not constitute "waste" under Rule 3(1)(23) of the Waste Management

Rules and had a utility life of 5 to 7 years, as certified by the Chartered Engineer. Release of the consignment was directed under Section 125 of the Customs Act as the respondents were held to have substantially complied with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j) except for the country of origin certificate. The Tribunal further noticed that earlier also similar consignments of the respondent and others had been released at the Calcutta, Chennai and Cochin ports upon payment of redemption fine. The redemption fine was reduced as also the penalty under Section 112(a) of the Customs Act was reduced including that on the Director also. The penalty under Section 114AA was done away with.

4. In the appeal preferred by the Revenue, the High Court held that the MFDs correctly fell in the category of "other wastes" under Rule 3(1)(23) of the Waste Management Rules read with Part B and Part D of Schedule III Item B1110 dealing with used Multi-Function Printer and Copying Machines. Adverting to the provisions of the Foreign Trade Act and the Foreign Trade Policy

framed thereunder, it was held that the MFDs were not prohibited but restricted items for import. Section 11(8) and (9) of the Foreign Trade Act provided for confiscation and redemption of goods imported without authorisation upon payment of market value. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value, with further liberty to the Director General of Foreign Trade (hereinafter referred to as "the DGFT"), along with directions.

5. Shri Maninder Singh, learned senior counsel appearing for the appellant submitted that import of the MFDs without authorisation permit and in violation of the Foreign Trade Policy is not in dispute. The imported MFDs having been held to be "other wastes", documentation being incomplete under Part D of Schedule III of the Waste Management Rules, re-export was rightly ordered under Rule 15 of the Waste Management Rules while imposing redemption fine. Section 125 of the Customs Act could not have been relied upon, in the facts of the case, to hold that fine in lieu of confiscation would suffice for purpose of

redemption permitting import. Even if the MFDs were a restricted and not prohibited item, absence of the necessary authorisation under the Foreign Trade Policy would give it the character of a prohibited item. The respondents had been habitual in the illegal import of similar consignments. Merely because on earlier occasions, similar consignments imported in violation of the law may have been released on payment of redemption fine, it did not vest a legal right in the respondent to claim similar relief always. The customs authorities, in the facts of the case, cannot be said to have detained the consignment without justification.

6. Shri Mukul Rohatgi, learned senior counsel appearing for the respondent submitted that MFDs were imported in October-November, 2016. The requirement of extended producer responsibility under the E-waste (Management) Rules, 2016 was deferred till 30.04.2017 by the Technical Committee under the Ministry of Environment and Forest. In any event, the respondent has obtained the same before release of the consignment. The question for disposal of the imported machine

at this stage is premature as it has a utility life of 5 to 7 years. The consignment was not a prohibited but restricted item. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The discretionary power has to be tampered with reason and has to be read along with the Foreign Trade Act and the policy framed under the same. The Customs Department has consistently in the past been permitting the release of MFDs on levy of redemption fine. The discriminatory treatment with regard to the present consignment is unjustified. The DGFT had declined to issue authorisation certificate. There was substantial compliance with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j).

7. We have considered the submissions on behalf of the parties. The MFDs were imported in October-November 2016. They were detained by the customs authorities opining that the imports had been made in violation of the Foreign Trade Policy, 2015-2020 framed under Sections 3 and 5 of the Foreign Trade Act and the Wastes Management Rules.

8. Clause 2.01 of the Foreign Trade Policy provides for prohibition and restriction of imports and exports. The export or import of restricted goods can be made under Clause 2.08 only in accordance with an authorisation/permission to be obtained under Clause 2.11. Photocopier machines/Digital multifunction Print and Copying Machines are restricted items importable against authorisation under Clause 2.31. Indisputably, the respondents did not possess the necessary authorisation for their import. The customs authorities therefore *prima facie* cannot be said to be unjustified in detaining the consignment. Merely because earlier on more than one occasion, similar consignments of the respondent or others may have been cleared by the customs authorities at the Calcutta, Chennai or Cochin ports on payment of redemption fine cannot be a justification simpliciter to demand parity of treatment for the present consignment also. The defence that the DGFT had declined to issue such authorisation does not appeal to the Court.

9. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules,1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply *mutatis mutandis* as deemed to have been made under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is

restricted. We therefore find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the customs authorities with fine under Section 112(a) of the Customs Act,1962.

10. The Central Government had permitted the import of used MFDs with utility for at least five years keeping in mind that they were not being manufactured in the country. The Chartered Engineer commissioned by the customs authorities had certified that the MFDs were capable of utility for the next 5 to 7 years without any major repairs. Considering that at import they had utility, the High Court rightly classified them as "other wastes" under Rule 3(1)(23) of the Waste Management Rules, which reads as follows :-

> "Other wastes means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country."

11. Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule

mentions used Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The respondents have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.

12. Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly the Customs Act does not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to authorisation. The High Court therefore rightly held that the MFDs having a utility period, the Extended Producer Responsibility would arise only after the utility period was over. In any event, the E-waste Rules 2016 certificate had since been issued to the respondents by the

Central Pollution Control Board before the goods have been cleared.

13. We therefore find no reason to interfere with the impugned orders. In the statutory scheme of the Foreign Trade Act as discussed, we further find no error in the penultimate direction to the respondents for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the respondents shall be entitled to set off.

14. The appeals are dismissed.

…………………………………CJI.
[RANJAN GOGOI]

……………………………………J.
[NAVIN SINHA]

……………………………………J.
[K.M. Joseph]

NEW DELHI
JANUARY 24, 2019.