

(2007) 03 KL CK 0009
In the High Court Of Kerala
Case No : Customs Appeal No. 6 of 2005

Alex C. Joseph

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Constitution of India, 1950 — Article 20(2)
Customs Act, 1962 — Section 108, 111, 112, 112A, 124
Foreign Exchange Regulation Act, 1947 — Section 10, 10(1)
Income Tax Act, 1961 — Section 139(1), 271(1), 276C
Sea Customs Act, 1878 — Section 167, 167(8), 23(1), 52A

Citation : (2007) 03 KL CK 0009

Hon'ble Judges : K.M. Joseph, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : V. Giri, Sunny Varghese, P.A. Augustian and K. Jayasankar Payyoli, for the Appellant; John Varghese, for the Respondent

Judgement

K.M. Joseph, J.—This is an Appeal filed u/s 130A of the Customs Act, 1962. It is directed against Annexures A and B Orders. The case of the Appellant, in short, is as follows:

One Shri Soman Sunil Kumar had imported one Toyota Land Cruiser Jeep Car in terms of Public Notice No. 3/97 dated 31-3-1997. The import duty for the car was assessed at Rs. 9,74,631. On payment of Rs. 10,02,630 it was cleared. On coming to know of that, M/s Mohan Breweries and Distilleries Ltd. was interested in purchasing an imported car and on perusal of the documents relating to the import of the car in question and the Appellant being satisfied, that the car was legally imported and the documents with the importer were genuine, the Appellant negotiated the sale of the car at a price of Rs. 20 lakhs excluding commission to the Appellant. After the sale was concluded, the car was transferred in favour of M/s Mohan Breweries and Distilleries Ltd. Subsequently, on the alleged ground that intelligence was received by the DRI, proceedings were initiated under Annexure C Show Cause Notice dated 5-2-1999 issued to

the Appellant, Shri Soman Sunilkumar, and M/s Mohan Breweries and Distilleries Ltd. Appellant submitted Annexure D Reply which is dated 10-5-1999. Annexure E is the order passed by the Joint Commissioner of Customs. He ordered confiscation of the vehicle. Besides, he imposed a penalty of Rs. 3 lakhs on the Appellant. Rs. 10,000 was imposed on M/s Mohan Breweries and Distilleries as penalty. Likewise, Rs. 3 lakhs was also imposed on Shri Soman Sunil Kumar. The Appellant and others preferred Appeals. By Annexure F Order, the Commissioner of Customs and Central Excise (Appeals) dismissed the Appeal filed by the Appellant. Annexure G is the order of the CEGAT against the order in first Appeal. Appellant lays much store by the said decision. According to him, the CEGAT has set aside the order and remanded it for de novo consideration. Annexure H letter was given wherein certain documents were produced. By Annexure I, the original authority again imposed a penalty of Rs. 3 lakhs each on Shri Soman Sunil Kumar and the Appellant u/s 112(a) of the Act. By Annexure K, the Commissioner of Customs (Appeals) dismissed the Appeal against Annexure I. Annexure L is the order by which the CESTAT allowed the Appeal filed by M/s Mohan Breweries finding it to be a bonafide buyer and did away with the penalty. Annexure M is produced to show that the third Respondent has transferred the Appeals against the orders passed by Shri T.K. Jayaraman, Member (Technical) to the Chennai Bench of CESTAT. He is none other than the Technical Member who has come to pass the impugned orders in this case, namely Annexures A and B. The Appeal preferred before CESTAT against Annexure K order was dismissed by Annexure A with Shri T.K. Jayaraman constituting the Tribunal. Appellant preferred Annexure N Petition for rectification on the grounds that Shri T.K. Jayaraman was prejudiced, the orders passed by him were liable to be quashed and that none of the grounds raised by the Appellant were considered by him. Annexure B is the order passed on the application for rectification, dismissing the same. Annexures O and P are produced to show that Shri T.K. Jayaraman had in other cases imposed penalty on the Appellant and they came to be set aside by the Tribunal. Though the Appellant preferred a Writ Petition challenging the impugned order, that came to be dismissed vide Annexure Q on the ground of availability of alternate remedy. Annexure R is the judgment in Writ Appeal confirming Annexure Q.

2. In Annexure C Show Cause Notice, the case set up apparently, in brief, is as follows:

The car in question exceeded 1600 CC. It has 2982 CC. Under the public notice issued, such a car could be brought only if it were in use for a period of one year abroad. It is the case that the car was imported into U.A.E. only on 11-11-1997. Shri Soman Sunil Kumar filed Bill of Entry well within one year, namely on 23-2-1998. According to the Department, the date of registration in U.A.E. was shown as 15-1 -1997 which was false. It is their case that Shri Soman Sunil Kumar mis-declared with the Customs Authorities. Certain statements were relied on to implicate the Appellant. The statements include the statement of the Customs House Agent Shri Prasanna Kumar, Shri P.J. James and the Manager of

the Catholic Syrian Bank. It is noted that the Appellant by his actions has rendered himself liable for the penalty under Sections 112(a) and 112(b) of the Customs Act, 1962. However, the Show Cause Notice specifically seeks his explanation as to why penalty u/s 112(b) should not be imposed on him. It is the order passed pursuant to the show cause notice which, according to the Appellant, came to be set aside by Annexure G Order of the Tribunal. Much of the arguments turned upon the interpretation to be placed on Annexure G Order of the Tribunal. Therefore, we extract hereunder some of the relevant portions of the Annexure G Order:

8. We have considered the submissions and the material on record and find:

(a) There is no substance in the arguments of the learned Advocate that the decision in the case of Union of India and others Vs. Jain Shudh Vanaspati Ltd. and another, was applicable to only duty demands u/s 28 and since there was no duty demanded in this case, the judgment of the Supreme Court was distinguishable. We find that the Supreme Court in this decision has held as follows:

An order u/s 47 obtained by the employment of fraudulent methods does not have to be set aside by the exercise of revisional powers u/s 130 before the ill-effects of the fraud can be set right by initiation of the process of confiscation of the fraudulently cleared goods u/s 124.

In this case, it has been alleged and found that the documents for covering the entitlement, to clear the said car free of licence, were obtained by fraud. It is a different matter that the said allegations and findings may not be correct. Therefore, the distinction which the learned Advocate is trying to seek of the Supreme Court decision cannot be appreciated by us. These proceedings are found to be covered by the said decision of the Hon''ble Supreme Court and no infirmity is found as pleaded by the learned Advocate.

(b) We find that the learned Advocate's stress on the point of denial of principles of natural justice, which requires that the documents and other contentions taken by the Appellants should be re-examined in the light of the submissions made by the Appellants. That has not been done in this case. The learned Collector (Appeals) has found as follows:

As per the report from the Consul (Economic) Dubai, and the documents forwarded by them, i.e. the Customs bill and Delivery Order, the vehicle was infact imported into Dubai and taken delivery of on 13-11-1997 only. In the light of the evidence cited above in particular the evidence of import in November, 1997 sent by the Consul (Economic) Dubai, it appears that Shri Alex had fraudulently arranged for Shri Sunil Kumar to import the vehicle and to legitimise the same for Customs clearance purposes arranged for the fabrication of documents at Dubai to show registration of the vehicle on 15-1-1997 in order to satisfy the requirements of one year possession as required under ITC PN 3/97-1000. The claim that the vehicle was sent out for repairs of the gear box

and reimported later is clearly far-fetched and not acceptable as no substantial arguments have been put forth to discredit the Customs import documents.

However, from the Show Cause Notice and the Order of the Original Authority, we find that there is no report of Consul (Economic) Dubai, other than a letter CE/1/1/99 dated 16-1-1999 forwarding attested copies of certain documents. The Appellants have made a plea that principles of natural justice have been violated as adjournments were not granted. From the order of the Original Authority, we find that A-2 had requested for another date of hearing. A-1 could not be served notice of hearing. It is not known which is the report of Consul Dubai, which has been relied upon by the Commissioner (Appeals). Therefore, we find that the principles of natural justice have been not complied with, the matter therefore needs to be remanded back for de novo adjudication as pleaded by the learned advocate for the Appellants.

We also find that the learned advocate has submitted that A-2 had not committed any offence in as much as there was no error of omission or commission on his part to render the goods liable for confiscation and we also find that the original authority has found A-1 and A-2 liable for penalty for the reason that they did not co-operate with the investigating authority. We do not find this reason to be a permissible reason, to inflict the penal provision of Section 112A of the Customs Act, 1962. The provisions of the Act, are very clear and the Original Authority should come to a clear-cut finding as to for which particular Act of commission or omission, the liability of penalty was being fixed on A-1 and or on A-2. The order is therefore not upheld and is required to be remanded for redetermination to the Original Authority.

(d) As regards the redemption fine, we find that the margin of profit has been worked out by the Original Authority. The Original Authority has not taken into account, in working out this margin of profit, the costs after clearance. From para 10 of the order we find the Original Authority has taken the assessable value (CIF), duty, handling charges but has not taken the port dues and other local taxes etc., and other post removal costs which will be borne by the importers. The Order of the Commissioner (Appeals) has considered, but not quantified what are these costs which have been considered by the learned Commissioner (Appeals), except recording:

As regards the fine imposed, the plea of the first Appellant is that they are the owners who have already incurred the cost towards purchase of the car and the RF should have been determined reasonably keeping in view the market price set out by the CEGAT:

We would therefore, set aside the redemption fine also and remand the matter back for redetermination of the same. The margin of profit should be arrived at after considering and quantifying the post clearance charges, which have already been considered by the Collector (Appeals), but not quantified. Therefore, they require to be quantified. For this purpose the Appellants should provide the

necessary data to the adjudicator.

9. In view of our findings, the redemption fine and penalties on A-1 and A-2 are set aside. Appeals allowed as remand for De Novo adjudication by the Original Authority.

3. It is the complaint of the Appellant that the consequential orders, namely Annexure I, as confirmed finally by Annexure A are not in conformity with Annexure C decision. The findings in Annexure A which are relevant are as follows:

(1) CESTAT has remanded for re-determination of fine and penalty and this is not disputed.

(2) CESTAT has not set aside the confiscation. It is stated that redemption fine arises only when goods are confiscated, and that as per the Order, only the redemption fine is to be re-determined.

(3) The finding in Annexure I in relation to the Appellant is referred to. Thereafter, it is further found that it is on record that the Appellant was involved in the import by fabricating documents stated in Annexures C and E and reiterated in Annexure I.

It is stated that from the Statement of the Customs House Agent and also the Manager of the Catholic Syrian Bank that the Appellant was very much involved in the import of the car. Further, as a dealer, it is found that he was involved in selling and purchasing the car. It is noted that investigation revealed that the car could not have been in use for more than one year, and that all these indicate that both Shri Soman Sunil Kumar and the Appellant are liable for penalty u/s 112 of the Customs Act. It is further found that the Show Cause Notice being u/s 112(b), the invoking of Section 112(a) in Annexure I, is not such a serious thing in this case. The Tribunal found that Sections 112(a) and 112(b) are applicable. However, the Tribunal reduced the penalty to Rs. 2 lakhs.

4. In Annexure B which is the order passed in the rectification application, the Tribunal finds that rectification is different from review. It further finds that since power of review is not given, the Tribunal is not in a position to recall the order. The Tribunal further finds that the Appellant had not taken up any objection at the time of the hearing of the Appeal, and that if any objection had been taken up, the Tribunal would not have taken up the case and after referring to case law relating to scope of rectification, the application was rejected.

5. Shri V. Giri, learned Counsel for the Appellant would contend that this is a case where the tribunal has not comprehended the true purport of Annexure G Order of the tribunal. He would submit that the tribunal by Annexure G, had found that principles of natural justice have not been complied with, and, therefore, the matter should be decided de novo and the entire matter was at large. He would contend that it is not merely for re-determination of the redemption fine and the penalty that the matter was remitted back. He took us also through the

Statements given u/s 108 of the Customs Act. He would point out that the Statement of Shri Prasanna Kumar who is the Customs House Agent, dated 28-9-1998 does not in any way refer to the Appellant. He would submit that it is only in the Statement given by Shri Prasanna Kumar on 25-11-1998 that certain references are made to the position of the Appellant. In the Statement of Shri Prasanna Kumar dated 25-11-1998 in answer to a specific question, he would say that he knew one Shri Alex from Thiruvalla who is concerned with the above clearance. He would further say in answer to the question what was his role, that immediately during clearance, he came to know that the vehicle belonged to Shri Alex alias Babu. In answer to a further question as to how he came to know that the vehicle belonged to Shri Alex, his reply was that Shri Alex along with Shri Soman Sunil Kumar came for taking delivery of the car. It is stated by him, in answer to the Question who handed over clearance documents, like Bill of Lading, R.C. etc. to him, that Shri Soman Sunil Kumar along with another person (name not known) handed over the documents to his office. He would further say that according to his memory, few clearances of certain named persons including Shri Soman Sunil Kumar were managed by Shri Alex, and that he is having two Drivers, namely Shri Rahim and Shri Joy, and that they usually take vehicles after clearance. He also said, in answer to the question as to whether after clearance of the vehicle, he had contacted Shri Alex, that he had not contacted Shri Alex, and that may be his office staff might have contacted him.

6. Shri C.J. Augustine, Branch Manager of Catholic Syrian Bank would say that the Account of Shri Soman Sunil Kumar was opened on 23-2-1998, introduced by Shri P.J. James, General Manager, Hotel Sun International, Rajaji Road, Ernakulam by the then Manager and he joined the Branch during May, 1998. He has stated further that when the D.D. for Rs. 20 lakhs was presented in the account on 4-8-1998, as the amount was large, he contacted the introducer and verified the antecedents of the depositor. For further evidence, he has stated that Shri James promised to produce photocopy of Shri Soman Sunil Kumar's Passport. Thereafter, later on, in August, 1998, he would submit that Shri P.J. James along with a person called Shri Alex from Thiruvalla called on them and produced copy of Passport. Shri Alex is stated to be about 35 years of old, lean and black complexioned. Shri P.J. James has in his statement, inter alia, stated as follows:

That he is working as Working Partner of Customs House Agent named Shri Kunjanpilla and at Willington Island, and that he knows the Managing Partner Shri Prasannan. He would further say that while the import related activities for the import of a Toyota Prado Car of Shri Soman Sunil Kumar was going on, he was working in that agency and he has seen Shri Soman Sunil Kumar. He Jjas introduced Shri Soman Sunil Kumar to the Catholic Syrian Bank for opening account. Shri Soman Sunil Kumar was stated to be aged between 35 to 40 and fair and having a height of 5.4 feet. He would, inter alia, further state that at the time of clearance Shri Soman Sunil Kumar told that this car is brought for a person named Shri Alex and thereafter, the Manager contacted him to clarify the

introduction and through Shri Prasannan, Shri Alex was contacted and Shri Alex came to the Bank and talked to the Manager. He also stated that at the time he went to the Bank, Shri Alex gave a letter to the Manager intimating that he knows the address of Shri Soman Sunil Kumar and gave a copy of the Passport of Shri Soman Sunil Kumar. He does not know Shri Alex directly. It was told that he is from Thiruvalla. He is aged 35 years having a height of 5.9 feet and fair complexioned. When Shri Soman Sunil Kumar came at first time, driver of Shri Alex named Shri Rahim was there with him.

7. Shri V. Giri would, therefore, point out that it is clear from the statement that it is not the Appellant who introduced Shri Soman Sunil Kumar to the Bank as is clear from the statements of the Manager and Shri P.J. James. He would further submit that the statement obtained from Shri Prasanna Kumar on 25-11-1998 should not be acted upon and it is not a voluntary statement. He would further contend that documents were produced which would show that actually the vehicle was imported into U.A.E. in January, 1997 and, therefore, the very case for confiscating the vehicle is not made out. He would submit that as the order of confiscation would have a material bearing on the question of the liability to penalty besides the quantum, it is a matter which should have engaged the attention of the Authorities and the Tribunal, in the wake of Annexure G Order of the Tribunal. He also took us to Sections 112 and 112 to contend that as per the case projected in the Show Cause Notice (Annexure C) the Appellant was called upon only to give his explanation to the Show Cause Notice u/s 112 of the Act. He would submit that there was no material to implicate the Appellant actually. Besides, he would refer to Annexures O and P to contend that the Appellant stands exonerated by the Tribunal in two other cases in which the original adjudication orders were passed by the Member of the Tribunal who passed Annexures A and B.

8. Per contra, Shri John Varghese, learned Assistant Solicitor General, would point out that absolutely no case is made out for interference. He would submit that there were material and this Court may not interfere, particularly having regard to the nature of the jurisdiction. He relied on the following decisions:

- (1) Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta and Ors. 1983 E.L.T. 1392 (S.C.).
- (2) Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, .
- (3) Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, .
- (4) Sachidananda Banerjee, A.C.C., Calcutta v. Sitaram Agarwal 1999 (110) E.L.T. 292 (S.C.).

In Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta and Ors. 1983 E.L.T. 1392 (S.C.), the Apex Court held that Section 52A of the Sea Customs Act, 1878 directly prohibits the entry of vehicles

that have been so constructed, altered, adjusted, adopted or fitted as to conceal goods and is not concerned with mens rea or knowledge of its owner or master in that regard because of the absence of words "knowingly or wilfully or intentionally" therein as also the whole purpose of the enactment being to prevent smuggling. The Court took note of the fact that the words "knowingly or wilfully" are used in several other provisions contained in Section 167 of the Sea Customs Act, 1878. The Court further held that "similarly in Section 167(8) though the words "knowingly or wilfully" are not used, there is the expression "concerned in" and that may introduce consideration of mens rea.

Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, was a case u/s 271(1)(a) of the Income Tax Act wherein the Apex Court held as follows:

Section 271(1)(a) provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and Section 276C provides that if a person wilfully fails to furnish in due time the return of income required u/s 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. In the case of a proceeding u/s 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt, an element of coercion is present in the penalty. Unless there is something in the language of the statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. In the opinion of the Court, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision.

Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, was a case under the Foreign Exchange Regulation Act, 1947, wherein the Apex Court held as follows:

The proceedings u/s 23(1)(a) are "adjudicatory" in nature and character and are not criminal proceedings. The Officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to "adjudicate" only. Indeed they have to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not "Judges" of the "Criminal Courts" trying an "accused" for commission of an offence, as understood in the general context. They perform quasi judicial functions and do not act as "Courts" but only as "administrators" and "adjudicators". In the proceedings before them, they do

not try "an accused" for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his "obligations" imposed under the Act. They impose "penalty" for the breach of the "civil obligations" laid down under the Act and do not impose any "sentence" for the commission of an offence. The expression "penalty" is a word of wide significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a "penalty". When penalty is imposed by an adjudicating Officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of "prosecution" of an "accused" for commission of an "offence" in a criminal Court. Therefore, merely because "penalty" clause exists in Section 23(1)(a), the nature of the proceedings under that Section is not changed from "adjudicatory" to "criminal" prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender...Mens rea (as is understood in criminal law) is not an essential ingredients for holding a delinquent liable to pay penalty u/s 23(1)(a) of FERA 1947 for contravention of the provisions of Section 10 of FERA, 1947 and penalty is attracted u/s 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established....The breach of a "civil obligation" which attracts "penalty" u/s 23(1)(a) and a finding that the delinquent has contravened the provisions of Section 10 would immediately attract the levy of "penalty" u/s 23 irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA would be discharged where it is shown that the "blameworthy" conduct of the delinquent had been established by wilful contravention by him of the provisions of Section 10. It is the delinquency of the defaulter itself which established his "blameworthy" conduct attracting the provisions of Section 23(1)(a) with out any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty u/s 23(1)(a), the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case "would not be attracted".

In *Sachidananda Banerjee, A.C.C., Calcutta v. Sitaram Agarwala* 1999 (110) E.L.T. 292 (S.C.), K. Subba Rao, J. (as His Lordship then was) wrote a judgment disagreeing with the majority. It was a case under the Sea Customs Act. The Court had to deal with the facts which are stated, in brief, hereunder:

A Detective Constable noticed the Respondent therein and another person about whom he had certain information. They got into a bus and he also boarded in the same bus. After they got down from the bus, they came out of the park and

stood at the western footpath and a small taxi came and the Chinese accused was in the taxi. All the three got into the taxi. When it was about to start, the Constable disclosed his identity and asked them to accompany him to the Police Station. The accused tried to run away. As the Chinese accused was running away, he threw away three packets which they picked up. The packets contained 23 gold bars with Chinese inscription. A sum of money was found on search of the person of the Respondent. They were confiscated. The Court proceeded to hold that the Respondent was guilty u/s 167(81) of the Act and the acquittal was reversed. The Apex Court found that the High Court was in error in holding that the purchase was not completed and the Respondent was not concerned in dealing with the smuggling gold.

9. The first question which we must address and decide is the true effect of Annexure G order of the tribunal. Plainly put, Annexure G had become final. Is it its effect that the order of confiscation of the car ordered by the Officer has been set aside or is it its effect that the confiscation was left undisturbed? After having perused Annexure G, we would think that the tribunal has, no doubt, found that there was violation of the principles of natural justice. Adjournment sought by the Appellant and another was not given. There was no reference to the Report of the Consul (Economic), Dubai in Annexure C show cause notice or the order of the original authority. It is stated that it is not known which is the Report of the Consul, Dubai which was relied on by the Commissioner (Appeals). Therefore, de novo adjudication as sought by the Appellant, was allowed. It is further clear that the tribunal found that lack of co-operation with the investigating authority should not be a reason to inflict the penal provisions u/s 112(a) and there must be a definite finding for which particular act or commission or omission, the penalty is fixed on the Appellant and Shri Soman Sunil Kumar. It is thereafter that it is noted that the redemption fine and the penalties are set aside and there is to be a de novo adjudication. In that sense, it is clear that the tribunal wanted the matter to be re-considered. Appellant was given an opportunity to meet the case based on the documents relied on by the Department. Appellant has relied on certain documents. In the order of the original authority, after remand, namely Annexure I, the penalty is imposed again on the basis that confiscation is not set aside and the matter was remanded back for re-determination of the redemption fine and penalty. But, it is stated, in regard to the Appellant, reference was made to the original order of the adjudicating authority about his involvement. Then there is reference to the show cause notice to find that there was elaborate reference to the role of the Appellant. Then he proceeds to find that the allegations are based on Statements u/s 108 of the Customs Act. It is further pointed out that the Appellant has not rebutted the same. In Annexure K order, the tribunal, of course, has found that the order of confiscation has not been set aside, but only the fine and penalty are set aside and the matter remitted and it is for re-determination by the lower authority for the reasons stated therein. The reasoning is that when the order is to re-determine the fine, the confiscation is necessarily sustained by the CEGAT. Thereafter, the Appellate

Authority has proceeded to indicate that Shri Soman Sunil Kumar has produced documents to indicate that the vehicle was in his possession and use right from 15-1-1997. However, it is found by the Commissioner of Customs (Appeals) in Annexure K (in paragraph 8) that the said version is not true, in view of the evidence produced by the Department to show that the import was made only on 13-11-1997 and, therefore, Shri Soman Sunil Kumar is liable. In regard to the Appellant, it is found that the lower authority has given detailed reasons, and that the Appellant had abetted in the commission or omission to help in importing the car which otherwise was liable for confiscation u/s 111 and, therefore, sustained the penalty.

10. It is to be noted that in the Statement given by Shri Prasanna Kumar on 25-11-1998, he has set up the case that the Appellant along with Shri Soman Sunil Kumar came to take delivery of the car. In Annexure D explanation given by the Appellant, he would refer to the said Statement and say that Shri Prasanna Kumar has thought that the car belonged to him only from the fact that he accompanied Shri Soman Sunil Kumar when he was clearing the car. Thereafter, he has categorically stated as follows:

I submit that I accompanied Shri Soman Sunil Kumar only because if a good deal is struck, I was to get some good commission.

This stand of the Appellant would clearly prove the correctness of the Statement of Shri Prasanna Kumar in the second Statement that the Appellant did accompany Shri Soman Sunil Kumar when he was clearing the vehicle. It is to be noted that the case of the Appellant is that he was a mere broker after the import took place. Shri P.J. James in his Statement has stated that when Shri Soman Sunil Kumar came for the first time, the driver of Shri Alex, named Shri Rahim, was there with him. So also, it is to be noted that Shri Prasanna Kumar in his second Statement has stated that Shri Alex has two drivers, named Shri Rahim and Shri Joy, and usually they are taking the vehicle after clearance. It is to be noted that an appeal u/s 130A lies only on the basis of there being substantial questions of law. Appellant contends that the finding about the involvement of the Appellant is a perverse one. Case of the counsel that the involvement of the Appellant is without any basis, may be difficult to accept. Even according to the Appellant, the Appellant has accompanied Shri Soman Sunil Kumar for taking delivery. In this connection, there is reference to a letter given by the Appellant to the Bank Manager in the Statement of Shri P.J. James. In fact, in Annexure F, there is a reference to the letter dated 3-8-1998 in which it would appear to be stated that Shri Alex was personally known to Shri Soman Sunil Kumar for several years. No doubt, the letter is written by one Shri Alex John and the Appellant submits that he is Alex Joseph. The address also varies. The signature is also disputed. But, we cannot ignore the fact that in Annexure C Notice, there is reference to this letter. The discrepancy in the address and name are also noted and it is stated in paragraph 10(3) of Annexure C Notice that verifications have revealed that the address in the letter is false/fictitious

whereas the address informed by the Custom House Agent, namely Shri Alex C. Joseph, Chekkathu House, Thadiyoor P.O., Pathanamthitta is true. There is no specific denial in fact in Annexure D explanation, in regard to these matters. What the Appellant would say in his reply (Annexure D) is that he had never gone to the Bank, letter of introduction is not in his handwriting and the signature seen therein is not his. If we proceed on the basis that the address "Alex John, Thoppil House, Thiruvalla" is false/fictitious, it goes a long way to clearly probabilise the involvement of the Appellant, and show that his case is unacceptable. From the Statement of Shri Prasanna Kumar and of Shri P.J. James, one gets the impression that the car actually belonged to Shri Alex. It cannot be said that there is total want of materials to connect the Appellant to the import and clearance.

11. No doubt, Sections 112(a) and 112(b) of the Customs Act read as follows:

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 u/s 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111, shall be liable,-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods "or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under Section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iii) in the case of goods falling both under Clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(iv) in the case of goods falling both under Clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

On the one hand, Section 112(a) is attracted when any act or omission is done rendering the goods liable to confiscation. As far as Section 112(b) is concerned, it is attracted, inter alia, if a person is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any manner dealing with any goods which he knows or has reason to believe, are liable to confiscation. In order that Section 112(b) is attracted, the person who is visited with the penalty should either know or should have reason to believe that the goods in question are liable to confiscation u/s 111. The car which is not in use for more than one year and imported by an Indian national was certainly liable to be confiscated. The case of the Appellant would appear to be that there were documents which were produced, which showed that the goods were eligible to be cleared under the public notice and, therefore, it cannot be said that the Appellant could jpe penalised u/s 112(b) of the Act.

12. Undoubtedly, we would think that to attract Section 112(b) of the Act, the prohibited matters therein must be done by the persons either with knowledge that the goods in question are liable to be confiscated or he should have reason to believe that the goods in question are liable to confiscation u/s 111. In both cases, in other words, an enquiry into the state of the mind in regard to the said two matters or either of the matters is inevitable and indispensable to bring the case u/s 112(b). In other words, it is not enough that a person does any of the acts mentioned in Section 112(b) without knowledge or reason to believe that the goods are liable to confiscation. The Legislature has contemplated imposition of penalty only when there are materials to show existence of knowledge or a state where he has reason to think that the goods are liable to confiscation. In this context, it is relevant to consider the meaning of the expression "reason to believe". In the decision in Joti Parshad Vs. State of Haryana, , the Apex Court held as follows:

5. Under the Indian Penal Law, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same, Section 26 IPC explains the meaning of the words "reason to believe" thus:

26. "Reason to believe". A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.

In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning,

conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e., "knowledge" and "reason to believe" have to be deduced from various circumstances in the case.

13. As per Section 112(a) is concerned, the ingredients would be satisfied if a person does the act or commits an omission which makes the goods liable to confiscation. There is no need to make an enquiry as to whether he did it intentionally or inadvertently. In a given case, no doubt, penalty may be sustained both u/s 112(a) and 112(b). Take a case where a person imports or is a party to the importing of goods rendering them liable to confiscation, and he does it with the knowledge that it is an act or omission rendering the goods liable to confiscation. Such a person, if he does any of the acts mentioned in Section 112(b) would become liable to be visited with a penalty thereunder also.

14. The car in question was imported into UAE only on 11-11-1997. It had 2982 CC. Such a car could be imported only if it were in use for a period of one year abroad. The Bill of Entry was filed purportedly by Shri Soman Sunil Kumar on 23-2-1998. This rendered the car liable to confiscation and it has been so ordered. Going by the statements, the driver of the Appellant accompanied Shri Soman Sunil Kumar even on the day he went to the Custom House Agent for the first time. The driver of the Appellant, Shri Rahim was there with him. The Appellant himself accompanied Shri Soman Sunil Kumar at the time when delivery of the car was to be taken. Shri Prasannakumar has stated in his second Statement, no doubt, on 25-11-1998 that he came to know that the vehicle belonged to Shri Alex alias Babu, apparently the Appellant. No doubt, his reason was that he accompanied Shri Soman Sunil Kumar for taking delivery. He would further say that Shri Alex has two drivers, Shri Rahim and Shri Joy and they take vehicles after clearance, and further that, according to his memory, few clearances including that of Shri Soman Sunil Kumar were managed by him. The Manager of the Bank has stated that Shri Alex from Thiruvalla called on them along with Shri R.J. James. No doubt, the Statement of Shri R.J. James and the Manager would show that it was Shri R.J. James who introduced Shri Soman Sunil Kumar to the Bank for opening the Account. Shri James has also given a statement that Shri Soman Sunil Kumar told him that the car is brought for a person named Shri Alex, and thereafter Shri Alex was contacted through Shri Prasannakumar and he came to the Bank and he gave a letter to the Manager intimating that he knows the address of Shri Soman Sunil Kumar and gave a copy of the Passport of Shri Soman Sunil Kumar. He stated that the driver of Shri Alex, Shri Rahim, was there when Shri Soman Sunil Kumar came for the first time.

15. Therefore, it would appear to be clear that the case of the Appellant that he was a mere broker, and that he had no connection in regard to the import of the

vehicle as contended by him in Annexure D, may not hold good. There is reference to a letter in Annexure C Show Cause Notice. It is purported to have been given by one Shri Alex John. It was found on verification that the address given as Alex John, Thoppil House, Thiruvalla in the letter was false/ fictitious. The address "Alex, C. Joseph, Chekkattu House, Thadiyoor, Pathanamthitta" was found to be correct. This is the address shown by the Appellant in the Appeal Memorandum also. Admittedly the Appellant was involved at the stage of taking delivery of the vehicle. Shri James has stated that Shri Alex has given a letter to the Manager. If the contents of the letter are relied on, it would show that Shri Soman Sunil Kumar was personally known to the Appellant for several years. If we proceed on the basis that the documents produced by Shri Soman Sunil Kumar to show that the car was imported in January, 1997 are unreliable, in view of the documents relied on by the Department to show that the car was imported on 11-11-1997, it may not be possible for us to hold that there were no materials or circumstances for the authorities to proceed u/s 112(b). In fact, even the case u/s 112(a) cannot be brushed aside, as apparently as projected in Annexure C show cause, the vehicle was brought at the instance of the Appellant and for his purpose. In fact, the show cause notice sets out that the Appellant is liable under Sections 112(a) and (b). No doubt, the show cause notice sought explanation only u/s 112(b). It would be difficult for us to hold that the Appellant was a mere broker, and that he was not the actual person involved in the import of the vehicle. At any rate, having regard to these circumstances, we feel that the Appellant must be treated as having dealt with the car with the reason to believe that it was liable for confiscation u/s 111 and, therefore, liable to penalty u/s 112(b). Thus, we are inclined to uphold the order purporting to impose penalty on him.

16. However, we note that going by Annexures O and P orders, the Appellant stands exonerated in the other cases. Having regard to all circumstances, we are inclined to reduce the penalty of Rs. 2 Lakhs to Rs. 1 Lakh. Accordingly, the Appeal is partly allowed and while upholding the penalty, we reduce it to Rs. 1 Lakh (Rupees One Lakh).