

**(2015) 07 MAD CK 0058**

**In the Madras High Court**

**Case No :** Civil Miscellaneous Appeal Nos. 1723-1724 of 2005 and C.M.P. Nos. 9689-9690 of 2005

Commissioner of Customs, Tuticorin

APPELLANT

Vs

Kamalabhai

RESPONDENT

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**Date of Decision :** 24-07-2015

**Acts Referred:**

Customs Act, 1962 — Section 11, 11(2), 111, 113, 113(1)  
Foreign Exchange Regulation Act, 1973 — Section 18, 18(1)(a), 19, 67  
Foreign Trade (Development and Regulation) Act, 1992 — Section 19, 3(3)

**Citation :** (2015) 324 ELT 70 : (2015) 52 GST 816 : (2016) 36 GSTR 465

**Hon'ble Judges :** R. Sudhakar and S. Vimala, JJ.

**Bench :** Division Bench

**Advocate :** S. Thirumavalavan, Standing Counsel, for the Appellant; Arvind Kumar, for the Respondent

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## **Judgement**

R. Sudhakar, J.—The above Civil Miscellaneous Appeals filed by the Revenue as against the order passed by the Customs, Excise and Service Tax Appellate Tribunal , [2005 (186) E.L.T. 459 (Tribunal)] are admitted by this Court on the following substantial questions of law:

"1. Whether the Tribunal is correct in holding that Section 113 cannot be invoked for confiscation of goods already exported?

2. Whether the Tribunal is correct in the interpretation of law i.e. interpretation of Section 113 , which reads: "Confiscation of goods attempted to be improperly exported...". Whether "successful attempt" of the improperly exported goods does cease to be "attempted to be improperly exported"?"

After hearing the arguments of both sides, on the previous occasion, we thought it fit to re-frame the questions of law. Accordingly, the questions of law admitted by this Court are reframed as follows:

"1. Whether the Tribunal was correct in holding that Section 113 of the Customs

Act cannot be invoked for confiscation of goods already exported?

2. Whether the Tribunal was justified in setting aside the order of penalty on the exporter under Section 114 of the Customs Act?"

2. We have heard both sides at length on the re-framed questions of law.

3. The brief facts leading to the present case are as follows:

Based on the intelligence gathered, the Officers of the DRI visited the premises of M/s. K. Kamala Bai, a proprietary concern run by Shri C. Kantilal, in the name of his wife Smt. Kamala Bai, who had imported several tonnes of Cassia duty free under DEEC Scheme against advance licence issued in their favour. In the course of investigation, it was found by the authorities that instead of exporting the cassia oil, to fulfill the export obligation, the importers exported castor oil mixed with certain additives with the help of supporting manufacturer and transporter and clandestinely disposed the cassia so imported in the local market. Hence, show cause notice was issued alleging as follows:

"73.476 MT of Cassia imported and cleared duty free under the DEEE Scheme by availing the benefits of Customs Exemption Notification No. 116/88, dated 30-3-1988 against Advance Licence No. P/K/3528067, dated 17-3-1992 were not sent for distillation of Cassia Oil at the premises of the supporting manufacturer viz. M/s. Sha Devi India, Madurai, but clandestinely diverted to local market by the importer M/s. K. Kamala Bai, Madras without bills."

4. Apart from the above, various allegations have been raised in the show cause notice, which are set out in paragraph 6.1 of the show cause notice.

5. As a result, the charge under the show cause notice are as follows:

"7.1. From the foregoing, it appears that

a. there is a clear mis-declaration of the description of the goods entered for exportation in the shipping bill No. 1755, dated 9-1-1994 and exported as such and the goods appeared to have been rendered liable for confiscation under Section 113(1) of the Customs Act, 1962 read with Section 50(2) *ibid*;

b. that as per Section 18(1)(a) of Foreign Exchange Regulations Act, 1973, there is a prohibition on export of goods unless the exporter concerned furnished correct material particulars in the prescribed form. In the present case, the details of description of goods were incorrect as found during the course of investigation. Hence the goods appeared are liable for confiscation under Section 113(d) of Customs Act, 1962 read with Section 18(1)(a) of Foreign Exchange Regulations Act and Section 67 *ibid*;

c. that as per Rule 14(2) of Foreign Trade (Regulations) Rules, 1993 in exercise of the powers conferred on the Central Government under Section 19 of the Foreign Trade (Development and Regulations) Act, 1992, no person shall employ any corrupt or fraudulent practice for the purpose of obtaining any licence or

importing or exporting any goods. In the present case, there is a clear cut and deliberate attempt on the part of the exporter that 73.476 Mts. of Cassia valued at Rs. 26,71,587 cleared duty free under Bill of Entry No. 24969, dated 16-7-1993; 27046, dated 30-7-1993, 29539, dated 18-8-1993 and 29579, dated 18-8-1993 against advance licence No. P/K 3528067, dated 17-3-1992 were not used in the process of extracting Cassia Oil for export. Instead 735 Kgs of cheap castor oil mixed with synthetic oil under the guise of cassia oil had committed. This appears to operate as a prohibition under Section 113(d) of Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 and the rules made there under by virtue of powers conferred on Central Government under Section 19 of Foreign Trade (Development & Regulation) Act, 1992;

d. that the exporters M/s. K. Kamala Bai, Madras, its proprietrix Mrs. K. Kamala Bai,

a. there is a clear mis-declaration of the description of the goods entered for exportation in the shipping bill No. 1755, dated 9-1-1994 and exported as such and the goods appeared to have been rendered liable for confiscation under Section 113(i) of Customs Act, 1962 read with Section 50(2) *ibid*;

b. that as per Section 18(1)(a) of Foreign Exchange Regulations Act, 1973, there is a prohibition on export of goods unless the exporter concerned furnished correct material particulars in the prescribed form. In the present case, the details of description of goods were incorrect as found during the course of investigation. Hence the goods appeared are liable for confiscation under Section 113(d) of Customs Act, 1962 read with Section 18(1)(a) of Foreign Exchange Regulations Act and Section 67 *ibid*;

c. that as per Rule 14(2) of Foreign Trade (Regulations) Rules, 1993 in exercise of the powers conferred on the Central Government under Section 19 of the Foreign Trade (Development and Regulations) Act, 1992, no person shall employ any corrupt or fraudulent practice for the purpose of obtaining any licence or importing or exporting any goods. In the present case, there is a clear cut and deliberate attempt on the part of the exporter that 73.476 Mts. of Cassia valued at Rs. 26,71,587 cleared duty free under Bill of Entry No. 24969, dated 16-7-1993; 27046, dated 30-7-1993, 29539, dated 18-8-1993; and 29579, dated 28-8-1993 against advance licence No. P/K 3528067, dated 17-3-1992 were not used in the process of extracting Cassia Oil for export. Instead 735 Kgs or cheap castor oil mixed with synthetic oil under the guise of cassia oil had committed. This appears to operate as a prohibition under Section 113(d) of Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 and the rules made there under by virtue of powers conferred on Central Government under Section 19 of Foreign Trade (Development & Regulation) Act, 1992;

d. that the exporters M/s. K. Kamala Bai, Madras, its Proprietrix Mr. K. Kamala

Bai, Shri C. Kantilal Power of Attorney of M/s. K. Kamala Bai, Madras, M/s. Sha Devi India, Madurai, Shri K.R. Ravi Shankar Babu Proprietor of M/s. Sha Devi India, Shri K.R. Ramesh Babu, M/s. Deluxe Roadlines, Madras and Shri Lalith D. Shah Manager, M/s. Deluxe Road lines have indulged in various acts and omissions contravening the provisions of Customs Act, 1962 read with Foreign Trade (Development & Regulation) Act, 1992 and also Foreign Exchange Regulation Act, such acts abets ultimately led to the successful attempt of exporting goods which were liable for confiscation as aforesaid and are consequently liable for a penalty under Section 114(i) of Customs Act, 1962; and

e. that the Custom House Agent M/s. S. Ukkirapandian Pillai & Sons, Tuticorin attempted to export the goods improperly representing M/s. K. Kamala Bai, Madras-1 and hence they are liable for penal action under Section 114(i) of Customs Act, 1962 also read with Section 147 of the Customs Act, 1962 wherein there is an inherent liability on the agent on behalf of the exports.

8. Now therefore, M/s. K. Kamala Bai, Madras, the proprietrix Mrs. K. Kamala Bai, Shri C. Kantilal, M/s. Sha Devi India, Madurai, Shri K.R. Ramesh Babu K.R. Ravi Shankar Babu, M/s. Deluxe Road lines, Madras Lalith D. Shah and M/s. S. Ukkirapandian Pillai & Sons, Tuticorin are hereby required to Show Cause to the Commissioner of Customs, No. 4A, Dindigul Road, Trichy within 30 (thirty) days of receipt of this notice as to why;

(i) the goods covered by the shipping Bill No. 1758 dated 19-1-1994 valued at Rs. 42,51,030 should not be held liable for confiscation under Section 113(i) read with section 50(2) of Customs Act, 1962 and further under Section 113(d) read with Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 and Section 18 and 67 of Foreign Exchange Regulations Act, 1973; and

(ii) penalty should not be imposed on them under Section 114 of the Customs Act, 1962."

6. Thereafter, the Adjudicating Authority, after due process of law, adjudicated the matter and came to the conclusion that the exporter had exported the goods by misdeclaration defeating the object of the DEEC Scheme. The findings of the Adjudicating Authority read as follows:

"118. As the exporter had exported the goods by misdeclaration, I hold that the Castor Oil mixed with Cinnamic Aldehyde valued at Rs. 42,51,030/- which were already exported is liable for confiscation under Section 113(i) of the Customs Act, 1962 read with Section 50(2) of the Customs Act, 1962 and also under Section 113(d) of the Customs Act, 1962 read with Section 18(1)(a) and Section 67 of the Foreign Exchange Regulations Act read with Section 3(3) of Foreign Trade (Development & Regulation) Act, 1992.

119. I also hold that Shri C. Kantilal having Power of Attorney for M/s. K. Kamala Bai conspired and with the help of Shri K.R. Ravishankar Babu of M/s. Sha Devi India and Lalit D. Shah of M/s. Deluxe Roadlines managed to export Castor Oil

mixed Cinnamic Aldehyde in the guise of Cassia Oil and hence Shri C. Kantilal is liable for penal action under Section 114 of the Customs Act, 1962.

120. I also hold that S/Shri K.R. Ravishankar Babu of M/s. Sha Devi India and Lalit D. Shah of M/s. Deluxe Roadlines assisted Shri C. Kantilal of M/s. K. Kamala Bai in the successful attempt of exportation of Castor Oil mixed with Cinnamic Aldehyde by manipulating their records and hence they are also liable for penal action under Section 114 of the Customs Act, 1962.

121. As far the goods valued at Rs. 25,000/- which were seized from the factory premises of M/s. Sha Devi India are concerned, they were used as an evidence for clearance of castor oil in the guise of cassia oil and will be dealt separately.

122. I also hold that the Custom House Agent, M/s. Ukkira Pandian Pillai & Sons, Tuticorin, who had helped in exporting the goods improperly meant for M/s. K. Kamal Bai, Madras are also liable for penal action under Section 114(1) of the Customs Act, 1962 read with Section 147 of the Customs Act, 1962.

123. Though the Castor Oil has been exported under the Shipping Bill No. 1755 dated 19-1-1994 in the guise of Cassia Oil, inspite of the fact liability for confiscation exists, under Section 113(i) read with Section 50(2) of the Customs Act, 1962 read with Section 18(1)(a) and Section 67 of the Foreign Exchange Regulation Act, 1973 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 inasmuch as these goods are not available for confiscation, there is no point in ordering confiscation of the same. However the liability for penal action on the exporter is warranted for this mis-declaration."

7. Aggrieved by the order of the Adjudicating Authority, the appellant as well as the first respondent herein preferred appeal before the Tribunal.

8. The Tribunal, after considering the submissions made on both sides held that once the goods were exported, confiscation under Section 113 of the Customs Act would not arise and as a result, the penalty also would be set at naught. For better clarity, we extract below the relevant portion of the order of the Tribunal:

"4. After giving our careful thought to the submissions, we find that the impugned order was passed in adjudication of a show cause notice pertaining to goods already exported. The assessee has argued, through counsel, that goods already exported were not liable to be confiscated under Section 113 and no penalty relatable to such confiscation was liable to be imposed on the exporter. This argument has been vehemently opposed. However, we have not come across any valid challenge to this argument. After going through the provisions of Section 113 , we find that the legislative intent behind them is explicit in the very caption of Section 113 , which reads:

"Confiscation of goods attempted to be improperly exported etc....."

This caption noticeably reads "confiscation of goods attempted to be improperly exported". We note that every clause of Section 113 justifies the above caption.

For instance, Clause (a): reads "any goods attempted to be exported by sea or air....". Clause (b) reads: "any goods attempted to be exported by land on inland water..." The rest of the clauses also read likewise. We have no doubt in our mind that, when the above provision was enacted, Parliament was conscious of the fact that goods already exported out of Indian territory was incapable of being confiscated. A significant contrast is noticeable in Section 111 . The caption for Section 111 reads: "confiscation of improperly imported goods...". Every clause of this Section uses the word "imported" and not the expression "attempted to be imported". Parliament was, again, aware of the fact that any goods "attempted to be imported" were capable of being confiscated on account of its being out of Indian territory.

5. For the reasons stated, we hold that the provisions of Section 113 cannot be invoked for confiscation of goods already exported. Section 113 can be pressed into service only to confiscate goods which are "attempted to be exported" in violation of any of the prohibitions mentioned in the various clauses thereof. The confiscation order in respect of the subject goods is, therefore, bad in law. Consequently, the order of penalty on the exporter under Section 114 is not sustainable. In the result, we set aside the order of the Commissioner and allow the assessee's appeal with consequential reliefs if any. Consequently, the Revenue's appeal seeking enhancement of penalty gets dismissed."

9. Aggrieved by the order of the Tribunal, the Revenue is before this Court.

10. Learned Standing Counsel appearing for the Revenue submitted that mis-declaration of goods exported prima facie makes such goods prohibited in terms of Sections 18(1)(a) and 67 of the Foreign Exchange Regulations Act, 1973. He further submitted that there is a clear mis-declaration of the description of the goods entered for exportation in the Shipping Bill, the goods are liable for confiscation under Section 113 of the Customs Act.

11. Learned counsel appearing for the respondent/assessee submitted that the goods already exported were not liable for confiscation under Section 113 of the Customs Act. Consequently, the exporter could not be penalised under Section 114 of the Customs Act.

12. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

13. It is seen from the facts narrated that in this case, the exporter had furnished false material particulars in the prescribed form for the export of Cassia Oil. In fact, the investigation clearly proved that what was exported was Castor Oil mixed with certain chemicals. This fact is not in dispute. The question is whether the interpretation of Section 113(d) of the Customs Act, as has been propounded by the Tribunal, can be accepted. The Tribunal came to hold that Section 113 could not be invoked for confiscation of goods already exported. According to the Tribunal, the legislative intent behind Section 113 is only in

relation to confiscation of goods attempted to be exported and therefore, it would not get attracted in a case of goods already exported. This proposition propounded by the Tribunal does not found to be correct, for the reason that Section 113(d) of the Customs Act makes it clear that the liability of goods for confiscation arise as soon as the goods are attempted to be exported and an attempt to export the goods necessarily precedes the actual export of the goods. This proposition has been propounded by the Full Bench of the Calcutta High Court in the case of Euresian Equipments and Chemicals Ltd. and Others Vs. The Collector of Customs and Others, in the following manner:

"25. We have earlier set out the provisions of Section 11 of the Customs Act which confers power on Central Government to prohibit importation or exportation of goods for purposes mentioned therein. These purposes indeed cover very-very wide fields. Some of the purposes for which the prohibition may be imposed as stated in Section 11(2) are, prevention of smuggling, prevention of shortage of goods of any description and prevention of the contravention of any law for the time being in force. Section 113 provides for liability of the goods to confiscation in case of any violation of the prohibition imposed under Section 11 of the Act and Section 11 provides for personal penalty for those whose acts or omissions render the goods liable to confiscation under Section 113 . To construe the said sections to mean that Section 114 can only be attracted when the goods are attempted to be exported and will have no application when goods have in fact been exported will defeat the purpose and object for which the said provisions have been introduced. The submissions that the Legislature has so intended by using the words "attempt to export" in Section 113(a) , (b) and (d) and the analogy of the offence of attempt to commit suicide given in this connection are, in our opinion, misleading and devoid of merit. An attempt to commit suicide is indeed an offence and the act of committing suicide resulting from the successful attempt may not be considered to be an offence. This is so for the simple reason that once a person attempting to commit suicide succeeds in his attempt he places himself beyond the reach of law and no punishment is intended to be inflicted on the dead person or his heirs and legal representatives by imposing any fine or penalty, as they may in no way be liable or responsible for the said act. As we have earlier observed the liability of the goods to confiscation arises under Section 113(d) , as soon as the goods are attempted to be exported and the attempt to export the goods necessarily precedes the actual export of the goods. Goods become liable to confiscation as soon as the attempt is made. There is no provision in the Act to suggest that this accrued liability is wiped out or extinguished with the exportation of the goods. It may be that after the goods had in fact been exported the liability of the goods to be confiscated may not be enforceable by actual confiscation of the goods. Personal penalty of any person who, in relation to the goods, does or omits to do any act which act or omission renders the goods liable to confiscation under Section 113 or abets the doing or omission of such an act has been provided in Section 114 . This provision is attracted as soon as the goods incur the liability to confiscation under

Section 113 and such liability, as we have earlier held, arises when the goods are attempted to be exported contrary to any prohibition. It is to be noted that at the time when the goods are sought to be exported they are undoubtedly export goods within the meaning of Section 2(19) of the Customs Act. The liability of personal penalty provided in Section 114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Section 113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement. In the case of illegal export of any goods contrary to prohibition the effect may be that the liability of the goods to confiscation which arises and accrues may not be capable of enforcement but the personal liability which arises with the accrual of liability of the goods to confiscation can be enforced and by enforcement of the personal liability the offender can still be brought to book and this kind of offence may be checked. We must, therefore, hold that by virtue of Section 23A of the Foreign Exchange Regulation Act, 1947 the provisions of Sections 113 and 114 of the Customs Act, 1962 are attracted, when there is a contravention of Section 12(1) of the Foreign Exchange Regulation Act, 1947 in relation to goods which had in fact been exported. This was indeed the first question which came up for consideration before the Division Bench and has been referred to the Full Bench and our answer to this question is therefore in the affirmative."

14. In the above said decision, there was a show cause notice issued by the Department for taking penal action against the exporter under Section 114 of the Customs Act for violation of Section 12(1) of the Foreign Exchange Regulation Act, 1947. The contention of the Department was that by virtue of the amendment of Foreign Exchange Regulation Act, 1947 it was necessary for the exporter to submit the G.R.I. Forms declaration true in all material particulars under the provisions of Section 12(1) of the said Act. Since this was not done, the export of the goods were liable to prohibition under the above Notification No. G.S.R. 2641, dated 14-11-1969. By virtue of Section 23A the prohibition also falls, under Section 11 of the Customs Act, 1962, and hence the goods were liable to confiscation under Section 113(d) and (1) of the Customs Act, 1962. M/s. Euresian Equipments and Chemicals Ltd., Calcutta, S/Sri. Laxmi Prasad Jajodia, Manick Chand Jajodia and Jugal Kishore Jajodia were the persons concerned for the mis-declaration of the goods and values of the goods exported and hence liable for penal action u/s. 114(1) of the Customs Act, 1962. M/s. Euresian Equipments and Chemicals Ltd., Calcutta and its directors S/Sri. Laxmi Prasad Jajodia, Manick Chand Jajodia and Jugal Kishore Jajodia were called upon to explain the matter in writing and to show cause to the Collector of Customs, Calcutta, why penal action under Section 114 of the Customs Act, 1962 should not be taken against them.

15. The validity of the above said show cause notice was challenged by the exporter in a Writ Petition. Learned single Judge dismissed the Writ Petition holding that if the export is made on the basis of incorrect declaration under Section 12(1) of the Foreign Exchange Regulation Act, this will amount to

contravention of the Customs Act. On appeal, the matter was referred to the Full Bench and the following questions of law were raised before the Full Bench:

"(1) Whether, by virtue of Section 23A of the Foreign Exchange Regulation Act, 1947, the provisions of Sections 113 and 114 of the Customs Act, 1962 are attracted for the contravention of Section 12(1) of the Foreign Exchange Regulation Act, 1947, in relation to goods which had been exported beyond India.

(2) Whether, when goods have been exported beyond India such goods may be said to be "export goods" as defined in Section 2(19) of the Customs Act, 1962 and liable to confiscation under Section 113 for the purpose of imposition of penalty under Section 114 of the said Act."

16. The Full Bench of the Calcutta High Court, after hearing the submissions on both sides, answered the above questions of law in the following manner:

"25. We have earlier set out the provisions of Section 11 of the Customs Act which confers power on Central Government to prohibit importation or exportation of goods for purposes mentioned therein. These purposes indeed cover very-very wide fields. Some of the purposes for which the prohibition may be imposed as stated in Section 11(2) are, prevention of smuggling, prevention of shortage of goods of any description and prevention of the contravention of any law for the time being in force. Section 113 provides for liability of the goods to confiscation in case of any violation of the prohibition imposed under Section 11 of the Act and Section 11 provides for personal penalty for those whose acts or omissions render the goods liable to confiscation under Section 113 . To construe the said sections to mean that Section 114 can only be attracted when the goods are attempted to be exported and will have no application when goods have in fact been exported will defeat the purpose and object for which the said provisions have been introduced. The submissions that the Legislature has so intended by using the words "attempt to export" in Section 113(a) , (b) and (d) and the analogy of the offence of attempt to commit suicide given in this connection are, in our opinion, misleading and devoid of merit. An attempt to commit suicide is indeed an offence and the act of committing suicide resulting from the successful attempt may not be considered to be an offence. This is so for the simple reason that once a person attempting to commit suicide succeeds in his attempt he places himself beyond the reach of law and no punishment is intended to be inflicted on the dead person or his heirs and legal representatives by imposing any fine or penalty, as they may in no way be liable or responsible for the said act. As we have earlier observed the liability of the goods to confiscation arises under Section 113(d) , as soon as the goods are attempted to be exported and the attempt to export the goods necessarily precedes the actual export of the goods. Goods become liable to confiscation as soon as the attempt is made. There is no provision in the Act to suggest that this accrued liability is wiped out or extinguished with the exportation of the goods. It may be that after the goods had in fact been exported the liability of the goods to be confiscated may not be enforceable by actual confiscation of the goods. Personal penalty of

any person who, in relation to the goods, does or omits to do any act which act or omission renders the goods liable to confiscation under Section 113 or abets the doing or omission of such an act has been provided in Section 114 . This provision is attracted as soon as the goods incur the liability to confiscation under Section 113 and such liability, as we have earlier held, arises when the goods are attempted to be exported contrary to any prohibition. It is to be noted that at the time when the goods are sought to be exported they are undoubtedly export goods within the meaning of Section 2(19) of the Customs Act. The liability of personal penalty provided in Section 114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Section 113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement. In the case of illegal export of any goods contrary to prohibition the effect may be that the liability of the goods to confiscation which arises and accrues may not be capable of enforcement but the personal liability which arises with the accrual of liability of the goods to confiscation can be enforced and by enforcement of the personal liability the offender can still be brought to book and this kind of offence may be checked. We must, therefore, hold that by virtue of Section 23A of the Foreign Exchange Regulation Act, 1947 the provisions of Sections 113 and 114 of the Customs Act, 1962 are attracted, when there is a contravention of Section 12(1) of the Foreign Exchange Regulation Act, 1947 in relation to goods which had in fact been exported. This was indeed the first question which came up for consideration before the Division Bench and has been referred to the Full Bench and our answer to this question is therefore in the affirmative.

26. An order by the proper officer permitting clearance and leading of the goods under Section 51 of the Customs Act does not effect the position. We have earlier noticed that under Section 113 of the Customs Act export goods incur the liability to confiscation at the stage when they are attempted to be exported. The attempt to export necessarily precedes actual export. At the time of attempting to export the goods contrary to prohibition, the liability of the goods to confiscation arises and at that point of time when the liability to confiscation arises, the goods are "goods which are to be taken out of India to a place outside India" and are, undoubtedly, "export goods" within the meaning thereof as defined in Section 2(19) of the Act. Actual export of the goods, as a result of the attempt succeeding subsequent to the stage of the attempt, is not indeed of any material consequence. The goods are "export goods" as defined in Section 2(19) of the Customs Act, 1962 at the time the goods incur the liability to confiscation under Section 113 of the said Act. We accordingly answer the second question which came up for consideration before the Division Bench and which has been referred to the Full Bench in the manner indicated above."

(Emphasis Supplied)

17. The Full Bench has clearly held that even in respect of goods already been exported, the provisions of Section 113(d) of the Customs Act would stand

attracted and Penalty under Section 114 is justified.

18. Section 113(d) provides that any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force shall be liable to be confiscated.

19. The reasoning of the Full Bench of the Calcutta High Court is that the goods are liable for confiscation as soon as an attempt is made. We are in agreement with the said reasoning.

20. For better clarity, Sections 113 and 114 of the Customs Act read as follows:

"Section 113 . Confiscation of goods attempted to be improperly exported, etc. The following export goods shall be liable to confiscation-

- (a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs air port appointed for the loading of such goods;
- (b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of Section 7 for the export of such goods;
- (c) any dutiable or prohibited goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;
- (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;
- (f) any dutiable or prohibited goods which are loaded or attempted to be loaded in contravention of the provisions of Section 33 or Section 34 ;
- (g) any dutiable or prohibited goods loaded or attempted to be loaded on any conveyance or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;
- (h) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under Section 77 ;
- (i) any dutiable or prohibited goods which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof;

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under Section 74 ;

(k) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any willful Act, negligence or default of the exporter his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

(l) any specified goods in relation to which any provisions of Chapter IV-B or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened."

"114. Penalty for attempt to export goods improperly, etc. Any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 113 or abets the doing or omission of such an act 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 five times the value of the goods or one thousand rupees, whichever is the greater;

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

(iii) in the case of goods under claim for drawback, to a penalty not exceeding five times the amount of drawback, claimed or one thousand rupees, whichever is the greater."

21. In the instant case, the goods have already been exported. Hence, if the goods have already been exported, the question of confiscation will not arise and that has been rightly observed by the Adjudicating Commissioner. Hence, the Adjudicating Commissioner had rightly held that since the goods are not available for confiscation, there is no point in ordering confiscation. Therefore, he proceeds to impose penalty in terms of Section 114 of the Customs Act, which is in accordance with the provisions of the Customs Act.

22. The intention of the Statute is to proceed against the offender to export goods contrary to the provisions of the Act. Similarly, the personal penalty is on the person who in relation to the goods does or omits to do any act which act or omission of such an act shall render the goods liable for confiscation under Section 113 or abets the doing or omission of such an act has been provided in Section 114 of the Customs Act. In this case, the finding of the Commissioner is that the goods have been exported contrary to the prohibition imposed by law. Hence, an attempt has been made contrary to the prohibition, which is already culminated in export and consequently penalty was rightly imposed by the Adjudicating Authority.

23. In the light of the above, we hold that the Tribunal was error in coming to the

conclusion that since the goods have already been exported and not available for confiscation, there could not be an order of confiscation under Section 113 of the Customs Act and hence, Section 114 of the Customs Act will not be sustainable. The finding of the Tribunal, therefore, is erroneous and accordingly, the order of the Tribunal stands set aside. As the Department has not raised any issue with regard to the enhancement of penalty, we do not propose to go into that issue.

24. In view of the foregoing reasons, we pass the following order:

(i) The questions of law are answered in favour of the Revenue and against the assessee.

(ii) The order of the Tribunal stands set aside.

In the result, the above appeals are allowed. No costs. Consequently, C.M.P. Nos. 9689 and 9690 of 2005 are closed.