(2012) 03 DEL CK 0359

In the Delhi High Court

Case No : CUSAA No''s. 42 and 44 of 2011

Commr. of Cus. and C. EX., Delhi IV APPELLANT

Vs

Achiever International RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Customs Act, 1962 — Section 11, 11(1), 111, 111(d), 112(a)
Foreign Exchange Regulation Act, 1973 — Section 18
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (2012) 286 ELT 180 : (2013) 20 GSTR 247

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Satish Kumar, SSC for the Department, for the Appellant; Pradeep Jain and Shubhankar Jha, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—These are two cross-appeals by the Commissioner of Customs and Achiever International, a partnership firm against the order dated 8th March, 2011 2011 (184) ECR 344 , passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (Tribunal, for short). The impugned order disposes of Appeal No. C/16/2010-CUS-DB, arising out of order-in-original dated 22nd October, 2009, passed by the CCE (Adjudication), New Delhi. Facts necessary for disposal of these appeals may be noticed.

2. By notification dated 6th October, 2006, anti-dumping duty was imposed on Compact Disc-R (CD-R, for short) originating from Hong Kong, Taiwan and Singapore. By another notification dated 13th March, 2008, anti-dumping duty was also imposed on CD-R originating from some mother countries like Thailand, Vietnam, Korea, Iran, Malaysia and UAE.

3. On the basis of intelligence reports, Directorate of Revenue Intelligence came to know that some importers were indulging in evasion of antidumping duty. On 21st June, 2008, premises of three importers viz. Neeru Trading Company, Ashok

Enterprises and Nihal Trading Company were searched. On the basis of incriminating material, show cause notices were issued to Achievers International, its partner Vineet Gupta and Naveen Kumar sole proprietor of Neeru Trading Company.

4. Thereafter, Order-in-original dated 22nd October, 2009 was passed by Commissioner of Central Excise (Adjudication), recording, inter alia, the following findings :-

(a) Neeru Trading Company was a dummy entity and actually controlled and managed by Achievers International and its partner - Vineet Gupta.

(b) Naveen Kumar, the so-called proprietor was not conducting business or aware of the activities of Neeru Trading Company. He was merely a name giver.

(c) Naveen Kumar admitted in his statement that he was a matriculate and a villager, who was made to sign papers etc. by and at behest of Vineet Gupta. He was less than 18 years of age when the bank account in the name of Neeru Trading Company on asking of Achievers International/Vineet Gupta was opened.

(d) Vineet Gupta was instrumental in procuring registration of Neeru Trading Company and obtaining the Importer/Exporter Code Certificate (IEC Certificate, for short) issued by the Directorate General of Foreign Trade (DGFT, for short), which enabled imports in the name of Neeru Trading Company. The declarations made to obtain the IEC code and for imports in the name of Neeru Trading company were false and wrong. Achievers International/Vineet Gupta was involved in making the said false and wrong declarations.

(e) Achievers International/Vineet Gupta had forged and fabricated signatures of Naveen Kumar in the High Seas Sale Agreement of consignment imported vide IGM dated 17th June, 2008 for 7,80,000 DVD-Rs/CD-Rs. The said consignment was lying at ICD, Loni.

(f) Achievers International had imported CD-Rs/DVD-Rs of nearly Rs. 10 crores in this manner.

5. The aforesaid findings recorded in the order-in-original are supported by the investigation done and the material/evidence collected on and after the search. These include, (i) Neeru Trading Company was not found to be actually operating from premises Nos. 1137, Third Floor, Gali Samoshan, Farash Khana, Delhi-6 and 2533/14, Sai Chamber, Gali Lantern Wali, Naya Bazar, Delhi-6, (ii) Naveen Kumar was not capable and competent to do the said business. He had not made any investment. Naveen Kumar in his statement had implicated and elucidated upon the involvement of Achievers International/Vineet Gupta; (iii) Statements by officers/employees of Customs House Agents i.e. M/s. Skyking (I) Tours and Travels namely H.K. Sharma, Rajender Goyal of TWK Management Solutions Pvt. Ltd. had confirmed the involvement of Achievers International/Vineet Gupta. Similarly statement of Girish Goyal of Goyal Cargo Services affirmed that Achievers International had imported consignments in the names of Neeru

Trading Company; (iv) Consignments imported by Neeru Trading Company were transported as per the directions of Achievers International/Vineet Gupta to the godowns and locations as directed by them.

6. At the time of search, warning notices were issued to different Commissionerates not to clear consignments belonging to the aforesaid three entities including Neeru Trading Company. Information was received from ICD Ballabhgarh/Faridabad that five containers containing DVD-R/CD-R had been imported by Neeru Trading Company and bill of entry dated 18th June, 2008, in respect of one container had been filed. Information was received from Assistant Commissioner of Customs, ICD, Loni that one container had been imported in the name of Neeru Trading Company vide bill of entry dated 16th July, 2008, which had been filed by Achievers International on procurement of the consignment by a High Seas Sale Agreement. As noticed above, in the order-in-original it has been held that this High Seas Sale agreement purported executed by Naveen Kumar was forged.

7. After noticing the aforesaid facts, the Commissioner (Adjudication) went into the question whether the aforesaid goods imported were prohibited goods within the meaning of Section 2(33) of the Customs Act, 1962 ("Act", for short) and it was held that same were prohibited goods liable to be confiscated u/s 111(d) of the Act. The Commissioner (Adjudication) also examined the question and held that the goods should not be released on payment of redemption fine u/s 125 of the Act. By the order-in-original, the Commissioner (Adjudication) directed that the entire consignment of DVD-Rs/CD-Rs consisting of 45,00,000 and 7,80,000 pieces of DVD-Rs/CD-Rs having assessable value of Rs. 1,87,18,330/- and Rs. 34,71,362/- respectively should be absolutely confiscated u/s 111(d) read with Section 125 of the Act. Penalty of Rs. 30 lacs each (total Rs. 60 lacs) was personally imposed on Vineet Gupta under the said Act for violating Sections 112(a) and 114AA of the Act. Penalty of Rs. 50,000/- was also imposed on Naveen Kumar, u/s 112(a) of the Act.

8. By the impugned order passed by the Tribunal, it has been held as under :-

6.1 We have carefully considered the submissions from both sides and perused the records. Shri Vineet Gupta, partner of M/s. Achiever international has imported the goods in the name of Achiever International and in the names of other firms set up by him as front entity. When he is partner of a firm having IEC code, the reason for resorting to import in the name of front entities has not been satisfactorily explained. We do not envisage any honourable purpose for using such entities for importing otherwise permissible imports. The statement of Shri Vineet Gupta and statements of persons associated with clearing consignments imported in the name of M/s. Neeru Trading Co. and the statement of proprietor of M/s. Neeru Trading Co. clearly establish that Shri Vineet, partner of M/s. Achiever is the owner of the imported goods. The show cause notice issued also, on the same ground, seeks Shri Vineet Gupta and proprietor of M/s. Neeru Trading Co. to jointly and severely show cause as to why the imported goods should not be confiscated and why penalty should not be imposed on them. In other words, show cause notices clearly recognises Shri Vineet Gupta, partner of M/s. Achiever International as the owner of the goods. The quantum of penalty imposed on Shri Vineet Gupta is much higher when compared to penalty imposed on M/s. Neeru Trading Co. which also impliedly taken this fact into account.

6.2 In other words, the goods are liable for confiscation for haying imported using IEC code of another importer who has disowned any role in the import of such consignment. However, it is not disputed that the import is not of prohibited goods as such. Therefore, these goods, in our considered opinion, deserve to be given an option for redemption on payment of appropriate fine. Considering that the goods were imported in August, 2008 and that the goods are electronic goods, we deem it appropriate to allow the goods on payment of fine of Rs. 40 lakhs (Rupees Forty Lakhs only). This option should be exercised within three months from the date of receipt of this order.

6.3 Regarding the penalty imposed on Shri Vineet Gupta, we find that as the partner of M/s. Achiever International, he was instrumental in setting up frond entities and arranging import and clearance of goods using their names and the methods adopted by him were dubious in nature and therefore calls for imposition of penalty. However, as contended by learned Advocate there is no justification of separate penalty under 112(a) when there is a penalty imposed u/s 114AA. Therefore penalty under 112(a) is set aside in full. Considering the entire facts and circumstances of the case, the penalty imposed under 114AA on Shri Vineet Gupta, partner is reduced from Rs. 30 lakhs to Rs. 10 lakhs (Rupees Ten Lakhs only).

(Emphasis supplied)

9. In the appeal filed by Achievers Internationals, they have challenged the order of the Tribunal on the ground that the redemption fine imposed is exorbitant in the absence of any finding arrived at by the Commissioner (Adjudication) regarding imposition of said fine and as the goods in question were not prohibited goods. It is submitted that the Tribunal is not an adjudicating officer u/s 125 of the Act for the purpose of imposing redemption fine. We need not refer to the issues in detail as the counsel for Achiever International has not disputed and denied the finding that Vineet Gupta, partner of Achiever International was the de facto importer and had imported the consignment using the IEC certificate and showing that the import had been made by Neeru Trading Company. Even before the Tribunal, Achievers International/Vineet Gupta, it is apparent, had accepted and admitted this and had prayed for release of the goods on payment of redemption fine and reduction/deletion of the penalty imposed. They had relied on Section 125 of the Act and the power to impose redemption fine for release of the goods. We are not inclined to frame any question of law in the appeal filed by the Achievers International as the grounds and issues raised in the present appeal are substantially challenging the findings of fact, which do not

give rise to substantial question of law.

10. The contention of the Revenue in CUSAA No. 42/2011 is that :-

(i) The provisions of redemption fine i.e. Section 125 of the Act could not have been invoked and the section is not applicable as the import of the goods in the present case has to be treated and regarded as prohibited. The imported prohibited goods vest with the Central Government and were rightly confiscated.

(ii) In the alternative, it is pleaded that the redemption fine of Rs. 40 lacs is paltry keeping in view the allegation and charges.

(iii) Separate penalties can be, and were rightly, levied for violation of Section 112(a) and Section 114AA. The Tribunal was wrong in deleting penalty u/s 112(a) on the ground that separate penalties, under the said Sections, were not justified. Penalty has been imposed u/s 114AA but the penalty u/s 112(a) has been wrongly deleted.

(iv) The Tribunal was wrong in reducing the penalty u/s 114AA from Rs. 30 lacs to Rs. 10 lacs.

11. On the basis of submissions made, we are inclined to frame the following substantial questions of law in the appeal of the Revenue :-

(1) Whether redemption fine u/s 125 can be levied and the goods released when they are prohibited goods under the Customs Act, 1962 and the Tribunal was right in issuing direction/order for release of the goods on the payment of redemption fine of Rs. 40 lakhs?

(2) Whether the order of the Tribunal directing release of the goods on payment of redemption fine and the quantum thereof is perverse?

(3) Whether the Tribunal was justified in holding that separate penalties cannot be levied u/s 114AA and 112(a) of the Customs Act, 1962?

(4) Whether the Tribunal was right in reducing the penalty u/s 114AA from Rs. 30 lacs to Rs. 10 lacs and the order of the Tribunal in this regard is perverse?

In case question no. 3 is answered in favour of the Revenue :-

(5) What should be the quantum of fine u/s 112(a) of the Customs Act, 1962?

12. Section 125 of the Act reads as under :-

125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force and shall in the case of any other goods, give to the owner of the goods or, where such owner is not known the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the provision to sub-section (2) of section 115, such fine shall not exceed the price of the goods confiscated, less in the case of imported goods duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under subsection (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

13. Section 125 of the Act states that an officer adjudging may impose redemption fine in case importation or exportation has been prohibited under the Act or under any other law for the time being in force. It is clear from the language that Section 125 applies to the goods, importation and exportation of which is prohibited under the Act or under any other law for the time being in force. It applies to prohibited goods. The contention of the Revenue that Section 125 does not apply to the prohibited goods is, therefore, misconceived and wrong.

14. The next question is whether the goods DVD-R/CD-R which could be imported under the open general license are prohibited goods under the Act? Section 11(1) of the Act reads as under :-

11. Power to prohibit importation or exportation of goods. - (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification the import or export of goods of any specified description.

15. The aforesaid Section has to be contrasted with Section 2(33) which defines the words "prohibited goods". Section 2(33) of the Act reads as under :-

2(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

16. The term "prohibited goods" u/s 2(33) of the Act, is much wider than Section 11(1) of the Act which gives power to the Central Government to issue notification prohibiting import or export of goods absolutely or subject to such conditions as may be specified. Section 2(33) applies to the goods prohibited absolutely or subject to conditions stipulated u/s 11 of the Act and also to import or export of goods subject to any prohibition under the Act or any other law for the time being in force. The expression "prohibited goods" is much broader and wider and is not confined merely to goods import and export of which is prohibited absolutely or subject to conditions by a notification issued u/s 11(1). In fact, the said aspect is no longer res Integra, in view of the decisions of the Supreme Court in Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and

Others, , Toolsidass Jewraj Vs. Additional Collector of Customs and others, and Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, . As the first two decisions have been considered in the Om Prakash Bhatia''s case (supra), we are referring to the facts of the said case. In the said case, the appellant engaged in export of garments and had substantially over invoiced the export consignment. The Commissioner of Customs had imposed redemption fine of Rs. 10 lacs and Rs. 20 lacs and also held that no drawback was admissible after recording that the market value was less than the amount of drawback claimed. Before the Supreme Court, the appellant gave up the claim of duty drawback but contended that the goods were not prohibited goods and, therefore, Section 113(d) which deals with confiscation of goods improperly exported was not applicable. The Supreme Court rejected the said contention holding :-

8. The aforesaid section empowers the authority to confiscate any goods attempted to be exported contrary to any "prohibition " imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.

9. Further, Section 2(33) of the Act defines "prohibited goods " as under :

2(33) ''prohibited goods'' means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;

(Emphasis supplied)

10. From the aforesaid definition, it can be stated that: (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either "absolutely" or "subject to such conditions" to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in Sk. Mohd. Omer v. Collector of Customs, wherein it was contended that the expression "prohibition" used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of

the Import Control Order, 1955. The Court negatived the said contention and held thus: (SCC p. 732, para 11)

What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to ''any prohibition imposed by any law for the time being in force in this country'' is liable to be confiscated. ''Any prohibition'' referred to in that section applies to every type of ''prohibition''. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression ''any prohibition'' in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions ''prohibiting'', ''restricting'' or ''otherwise controlling'', we cannot cut down the amplitude of the word ''any prohibition'' in Section 111(d) of the Act. ''Any prohibition'' means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From Item (I) of Schedule I Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues.

17. Thereafter, reference was made to Section 18 of the Foreign Exchange Regulation Act, 1973 and it was observed that the said provision mandated the exporter to disclose full and true export value of the goods. Reference was also made to Section 14 read with Section 2(41) of the Act which defines the words ''valuation of goods for the purpose of assessment'' and Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993 and it was held that the export made was contrary to the prohibition imposed. Accordingly, it was held that the goods in question, which were heavily over invoiced, were prohibited goods u/s 2(33) of the Act. Imposition of redemption fine was appropriate and was upheld in the following words :-

20. Hence, in cases where the export value is not correctly stated, but there is an intentional overinvoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money-laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, overinvoicing of the export goods would result in illegal/irregular transactions in foreign currency.

18. In view of the aforesaid position, it has to be held that the goods in question were prohibited goods within the meaning of Section 2(33) of the Act. However, Section 125 is applicable to prohibited goods and redemption fine can be imposed in case of import and export of prohibited goods instead of absolute confiscation.

19. Section 125 of the Act gives discretion to the authorities to impose redemption fine and gives an option to the person to pay the same in lieu of confiscation, The option/discretion is clear from the use of word ''may''. Quantum of the fine is again discretionary as is apparent from the last part of sub-section

(1) which stipulates that such fine as the said officer thinks fit can be imposed. The proviso to sub-section (1) stipulates that it shall not exceed the market price of goods confiscated less the duty chargeable thereon. Sub-section (2) clarifies that the duty imposable is in addition to the redemption fine.

20. We have quoted above the exact reasoning and the findings recorded by the Tribunal in this regard. The Tribunal has not disturbed or adversely commented upon the fact-finding recorded in the order-in-original. DVD-Rs/CD-Rs can be imported under open general licence. However, as noticed above, the term ''prohibited goods'' in Section 2(33) is much wider than the goods stipulated in Section 11(1). The Tribunal has recorded and held that Vineet Gupta, partner of Achievers International is a de facto and true owner of the goods but the same were imported in the name of M/s. Neeru Trading Company, a proprietorship of Naveen Kumar. The IEC certificate of Neeru Trading Company was used. The Tribunal has, however, recorded that they were not able to envisage any favourable purpose as to why Achievers International which also has IEC Certificate, had resorted to import the DVD-Rs/CD-Rs in the name of the dummy entities. The reason was known to Achievers International and no one else. They should have given an explanation and the onus was on them. Reasons for setting up and making imports through a dummy concern can be many, but all of them will be negative or involve illegality in some form or the other. It is apparent from the impugned order and the reasoning given by the Tribunal that this aspect has been noticed but its relevancy and importance has been ignored. The reasoning given by the Tribunal in fact records and states that this aspect was unclear and had not been satisfactorily explained by Achievers International. This is an important facet to decide whether or not redemption fine should be imposed in lieu of confiscation and what should be the quantum of fine. At the same time, Revenue was not able to fathom and indicate why Achievers International/Vineet Gupta had made imports in the name of Neeru Trading Company and not in their own name. No investigation was made whether imports made by Neeru Trading Company would have remained unaccounted and not be recorded in the books so as to be subjected to tax. What was the motive and reason? High Seas agreement in respect of one consignment though forged does indicate that the said transaction at least would have been reflected in the books of Achievers International.

21. The Tribunal has held that quantum of penalty imposed on Vineet Gupta is much higher than the quantum of penalty imposed on Neeru Trading Company. Reasons for difference in fines are obvious. Naveen Kumar, the so-called proprietor of Neeru Trading company is a villager who did not fully understand and appreciate how he was being used for illegal activities. As noticed above, the Commissioner (Adjudication) had examined and held that the goods in question were prohibited goods u/s 125 though they may not be covered by Section 11(1). We have upheld the said legal position. The finding of the Tribunal that the goods were not prohibited goods, therefore, is contrary to the settled position of law. This is an error.

22. The Tribunal has in the impugned order not noticed the factum and the finding recorded in the order-in-original that earlier there have been imports to the extent of Rs. 10 cores in this manner. The order-in-original does not set out the details or break up, therefore, the figure is not established but it is apparent that the transactions in question were not the only transactions. There is no finding of the Tribunal on this aspect. However, the most important aspect is that the Tribunal has not taken into consideration the assessable value of the imported consignment. As per the order-in-original, the assessable value was Rs. 1.87 crores and Rs. 34 lacs (Approx.). The market value thereof which includes the Customs duty would be much more. It is stated by the Revenue that the market value of the imported consignment even today is more than Rs. 2.25 crores. The redemption fine of Rs. 40 lacs imposed, therefore, would be less than 20% of the market value of the consignment. Section 125 of the Act stipulates that the redemption fine cannot exceed the market value. It is therefore a mandatory requirement that before permitting the redemption on payment of fine, the market value of the goods should be ascertained and assessed, (see M/ s. Mohan Meakin Ltd. Vs. The Commissioner of Central Excise, Kochi, . Proviso to Section 125 stipulates that the fine shall not exceed the price of the goods confiscated less import duty chargeable thereon. The said aspect has not been examined and considered by the Tribunal in the impugned order. The market value and the conduct, are the two relevant and important considerations while exercising the discretion u/s 125 of the Act.

23. We are aware that this court is not a court of fact which can examine or re-consider the factual findings recorded by the Tribunal. We have, therefore, carefully elucidated and examined the order of the Tribunal and reasoning given therein to examine and consider whether the order imposing redemption fine of Rs. 40 lacs can be treated as perverse i.e. an order passed excluding and ignoring admissible and relevant material and takes into account and consideration extraneous material and proceeds on assumptions (See Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay, , Commissioner of Income Tax (Central), Calcutta Vs. Daulatram Rawatmull, and The Commissioner of Customs (GEN) Vs. Abdulla Koyloth, . Reasoning stated and the inferences drawn by the Tribunal for reaching the said finding can, to this limited extent, be examined to decide whether the Tribunal has acted without evidence or upon a view of facts which could not have been reasonably entertained. We have not attempted to re-appreciate the factual matrix and the findings recorded but have exercised our jurisdiction to examine existence of circumstances which is the condition fundamental for making an opinion and they at least prima facie exist. The essence of the circumstances relevant to inference is the sine qua non and must be demonstrable. Section 125 no doubt gives discretion to release the goods on payment of redemption fine but the discretion must be exercised in a just and fair manner and on the basis of facts and has to be exercised after recording cogent and relevant reasons. There should not be failure of justice or grave injustice. Statutory discretion is not usually absolute. It is qualified by

express or implied legal duty to comply with the substantive and procedural requirement before the decision is taken. In National Insurance Co. Ltd. Vs. Keshav Bahadur and Others, , it has been held as under :-

In the words of Lord Cairns, L.C. in Julius v. Bishop of Oxford :

But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

This classic observation has been quoted with approval by this Court in several cases. (See Commr. of Police v. Gordhandas Bhanji and S.P. Gupta v. Union of India.) In Halsbury''s Laws of England, 4th Edn., Vol. I, it has been observed :

28. Duty and discretion. -- * * *

A statutory discretion is not, however, necessarily or, indeed, usually absolute : It may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties.

9. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and the truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L.C., in Sharpe v. Wakefield). Also see S.C. Jaisinghani v. Union of India.

10. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently, therefore, a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore where the legislature concedes discretion it

also imposes a heavy responsibility.

The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable,"

said Lord Camden, L.C.J., in Hindson and Kersey.

11. If a certain latitude or liberty is accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

12. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (per Willes, J. in Lee v. Bude Rly. Co. and in Morgan v. Morgan).

24. The Supreme Court in the case of Shri Rama Sugar Industries Ltd. Vs. State of Andhra Pradesh and Others, , has held :

11. It is, therefore, clear that it is open to the Government to adopt a policy not to make a grant at all or to make a grant only to a certain class and not to a certain other class, though such a decision must be based on considerations relevant to the subject-matter on hand, Such a consideration is found in this case. Halsbury (Vol. 1, 4th Edn. para 33 at p. 35) puts the matter succinctly thus:

A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary or capricious. Nevertheless, it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests, hence it must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment. These propositions, evolved mainly in the context of licensing and other regulatory powers, have been applied to other situations, for example, the award of discretionary investment grants and the allocation of pupils to different classes of schools. The amplitude of a discretionary power may, however, be so wide that the competent authority may be impliedly entitled to adopt a fixed rule never to exercise its discretion in favour of a particular class of persons; and such a power may be expressly conferred by statute.

25. Keeping in view the aforesaid aspects in mind, we find that the findings or reasoning given by the Tribunal is not in consonance with the provisions of Section 125 of the Act. We have, therefore, two options. One is to remand the matter to the Tribunal for fresh consideration or pass appropriate orders in consonance with the statutory language and to do justice. We are inclined to accept the second course in the present case as delay is not in the interest of either party and is likely to cause prejudice and serve no purpose. Counsel for Achiever International had made affirmative submissions to the said effect. Therefore, we quantify the amounts payable while deciding the questions relating to penalty and redemption fine.

26. Sections 114AA of the Act reads as under :-

114-AA. Penalty for use of false and incorrect material. -- If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

27. Sections 112(a) of the Act reads as under;-

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 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 u/s 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;

(iv) 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;

(v) in the case of goods falling both under clauses (i) 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.

28. A reading of the two provisions show that they refer to different violations. In a given case, it is possible that only one provision may be attracted and in another case both provisions may be violated. When both provisions are violated, penalty under the two Sections can be imposed. There is no provision/section in the Act, which states that should penalty under one Section be imposed, penalty under the second provision should be waived. Of course, if the violations have taken place in the course of the same transaction or are a part of the same transaction and are interconnected, the quantum of penalty imposed can be appropriately modulated and rationalised. This is different from stating that penalty cannot be imposed under the two provisions.

29. Keeping in view the facts and circumstances of the present case and the quantum of the goods and the market value of the goods involved, we are inclined to and enhance the redemption fine from Rs. 40 lakhs to Rs. 80 lakhs. As far as penalty imposed u/s 114AA and 112(a) is concerned, we retain the penalty of Rs. 10 lakhs imposed u/s 114AA and impose a penalty of the same amount u/s 112(a) of the Act.

30. In view of the findings regarded above, we answer the substantial questions of law mentioned in paragraph 12 as under :-

(1) First question is answered in affirmative and it is held that the Tribunal can issue direction/order for release of goods on redemption fine but the redemption fine of Rs. 40 lakhs is inadequate and the Tribunal while deciding the said question did not take into account the relevant facts. It is enhanced to Rs. 80 lacs.

(2) Question No. 2 is answered in negative in terms of what we have stated above.

(3) Question No. 3 is again answered in negative and it is held that the penalty can be levied under Sections 114AA and 112(a) when the two provisions are violated.

(4) Question No. 4 is answered in negative and it is held that the penalty of Rs. 10 lakhs imposed u/s 114AA is not perverse.

(5) Question No. 5 is answered in affirmative and we impose penalty of Rs. 10 lakhs u/s 112(a).

In view of the abovementioned terms, we partly allow the appeal of the Revenue. The appeal of the assessee is dismissed. In the facts of the case there will be no orders as to costs.

