* **HIGH COURT OF DELHI : NEW DELHI**

Customs Act Case No. 06/2006

\+ Judgment reserved on: July 25, 2006

% Judgment delivered on: October 17, 2006

% SHRI BALWAN SHARMA. ..... Appellant
Through: Mr. M. Chandrashekhar, Sr. Advocate with Mr.Manish Pushkarna, Advs.

versus

COMMISSIONER OF CUSTOMS & OTHERS ..... Respondent
Through: Mr. Biswajit Bhattacharya & Mr. A. Vohra Bandhu, Advs.

CORAM
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest?

VIPIN SANGHI, J.

1. This is an appeal under Section 130 of the Customs Act, 1962 (for short `the Act') directed against the final order bearing No.818-829/05-Cus., dated 9-13th May, 2005 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as `the Tribunal') in Appeal Nos. C/388/03, C/387, C/389 to

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397/03 and C/549/03 directed against the order in Original bearing No. AKR /CC/ICD/TKD/31 & 32/03 dated 30th June, 2003 passed by the Commissioner of Customs, ICD, Tuglakhabad, New Delhi whereby the first appeal of the Appellant against imposition of penalty of Rs.1,00,000/- by the Commissioner of Customs by his Order-In-Original dated 30th June, 2003 has been rejected.

2. By our order of even date, we have already dismissed the two appeals, one of M/s Suren International Ltd (Custom Case No.4.2006) and the other of M/s Gaurav Exim Pvt. Ltd (Custom Case No.3/2006) arising out of the common impugned order.

3. The background facts can be culled out from para 159 of the Order in Original passed by the Commissioner of Customs which reads as follows:-

> "Briefly stated, the facts are that on the basis of a specific information, 40 containers of M/s. Suren International Ltd. were seized at ICD, TKD on various dates from 8th August, 2001 to 25th September, 2001, after due examination and on a reasonable belief that the goods were deliberately mis-declared in respect of weight, description and value etc. In respect of 17 containers, 6 Bills of Entry were filed on 30th and 31st July, 2001. Upon examination of those 17 containers, it was found that there was gross mis-declaration of weight and description of the goods. Besides, concealment of some undeclared metals also came to light. Thereafter, remaining 23 containers which arrived later and no Bill of Entry was filed to clear those containers seemingly and most likely in the fear that similar mis-declaration would be detected by the Customs, were also taken up for examination with reference to the IGM and Bill of Lading description. Total quantity of aluminium scrap and copper scrap as declared by the noticee or as shown on Bills of Lading in those 40 containers irrespective of whether or not Bills

of Entry were filed were 357.226 Mts and 99.199 Mts respectively. Whereas on physical examination, the total weight of aluminium scrap and copper scrap were found to be 365.89 Mts and 300.62 Mts respectively. Besides, 40 Mts of prime quality Tin and 42 Mts of prime quality of nickel were also recovered. From the test report of representative samples drawn from the seized consignments, received from CRCL, it is seen that the percentage of purity of the samples, particularly that of mis-declared nickel and copper was higher than 99%. In respect of aluminium of also the purity of most of the samples was 99% barring a few ones, where it was found to vary from 92.08% to 98.28%. The CRCL report in respect of nickel seized from Ganga Nursery godown at Vasant Kunj revealed that the purity of nickel was as high as 99.9%. The above interception of trucks and the seizure from Ganga Nursery godown were made on the basis of specific information. From the two trucks No. DLI GB 0749 and No.DLIL/D-0025, total quantity of 21.3 Mts of zinc valued Rs.14,59,101 together with the trucks were seized on 7th August, 2001. In Ganga Nursery godown, the total quantity of 4716 nos. of foreign marked tin weighing 131.74 MT valued Rs.3.95 crores and 36.430 MT of nickel valued at Rs.1.46 crores were recovered and seized on 10th August, 2001. It goes without saying that the seizure made in the city was a follow up action of the detection and the seizure made at ICD, TKD."

3. The Appellant claimed to be a Director of M/s. Suren International Ltd (SIL), since 1st April, 2001. It appears that the Appellant was actively involved in the clandestine imports in question. The transporter, one Mr. R. P. Sharma stated that the Appellant was the incharge of the godowns of SIL and it was the Appellant who had requested for a truck so that the goods could be shifted to another godown on 7th August, 2001. The driver, Mr. Desh Raj also stated that the truck had been taken to the godown of SIL on the instruction of the Appellant. Mr. Brij Mohan, an employee of SIL had also stated that the Appellant would give him directions to issue sales invoices for

about last six months. The Manager, import/export of SIL also stated that the Appellant was working at the godown of M/s. SIL. The statements made by the Appellant, as reflected in paras 18 & 20 of the Order-in-Original shows that the Appellant tried to give misleading and unbelievable stories at different times. Smt. Renu Mahant, Director of SIL stated that the Appellant was looking after the sale-purchase and other works of the company for the past 3-4 years. She stated that the Appellant placed the purchase orders on behalf of the firm SIL and he talked to the foreign suppliers. The sale contracts were signed by the staff after discussion with the Appellant. The type and quality of the material to be imported was decided by the Appellant. Even though it appears that Smt. Renu Mahant tried to shift the entire responsibility on the Appellant herein in relation to the clandestine activities of SIL, nevertheless, it is evident that the Appellant was managing the godown of SIL and was instrumental in the rushed shifting of the goods in question from the godown of SIL on 7th August, 2001, just a few hours before the search. The Commissioner of Custom has noticed, and rightly so, that the Appellant was prepared to own up the entire responsibility as he had claimed to be a Director of SIL from the date anterior to the date of the clandestine imports in question and that he had tried to obstruct the investigations.

4. Since the main grievance of the Appellant before us was

that the Tribunal in the impugned order had not discussed his case at all, we decided to look into the Order- in-Original for ourselves to see if any prejudice has been caused to him on account of the Tribunal not having specifically discussed the facts pertaining to the involvement of the Appellant in the whole clandestine affair. It is for this reason that we have culled out some of the salient features about the involvement of the Appellant in the clandestine removal of goods by SIL.

5. Though the Tribunal ought to have specifically dealt with his case, since that would demonstrate application of mind by the Tribunal to the facts of the Appellant's case, we feel that no prejudice has been caused to the Appellant because on an appreciation of the facts of this case, we are of the opinion that the appeal of the Appellant was rightly rejected by the Tribunal.

6. The penalty against the Appellant has been imposed by the Commissioner of Customs under Section 112(b) of the Customs Act. Section 112(b) of the Customs Act, in so far as it is relevant, reads as follows:-

> "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 under section 111."

7. The learned counsel for the petitioner has urged that the show cause notice issued to the petitioner is bad in law inasmuch as it

does not specifically mentions the relevant clause of Section 112 of the Customs Act, under which the penalty was proposed to be imposed. The petitioner has contended that it was incumbent upon the authority issuing a show cause notice to specifically mention that the penalty was to be imposed under clause (a) or clause (b) and non-mentioning of the said fact was fatal to the notice itself and all subsequent proceedings would be illegal.

8. Reliance has been placed upon a Single Bench decision of Madras High Court reported as ***B.Lakshmichand vs. Government of India***, 1983 ELT 322. The said decision however, does not comes to the rescue of the Petitioner inasmuch as, in the said case both the show cause notice as well as the orders passed by the authorities contained no reference to either clause (a) or clause (b) of Section 112 of the Act. It was found that the essential ingredients of the offence alleged were also not set out with reference to either of the clauses. Hence there was no application of mind at the earlier stage i.e at the time of issuance of the notice or the subsequent stage i.e at the time of imposition of penalty.

9. That is not the case here. Para 99(viii) internal page 47 of the show cause notice clearly spells out the charge against the petitioner which falls under Section 112(b) of the Act. Further, para 123(i) read with para 124(iv) of the order-in-original when read with the findings on facts contained in the said order clearly spell out the

ingredients of the offence under clause (b) of Section 112 of the Act.

10. Moreover, the law on issue of reference to specific clause (s) of Section 112 in the show cause notice was considered in ***M/s. Omega Trading Agency, Bombay & Another vs. J. Datta, the then Collector of Customs, Bombay & Others,*** reported as *1987 (13) ECR 1177* wherein in the show cause notice, no mention of clause (b) of Section 112 under which the penalty was imposed was made. The Court still upheld the show cause notice and the penalty imposed. It was held that where the facts have been clearly stated and such facts contained in the notice clearly indicate the charge against the accused then the notice is not bad. Further even if a wrong provision was cited, that would not by itself vitiate the proceedings or the notice. Similar view has been expressed by a Division Bench of Calcutta High Court in ***Narender M. Kapadia vs. Union of India & Others*** reported as *1977 Cr LJ 1303*, wherein, while dismissing the contention of the Appellant similar to the one raised hereinabove, it was observed in Para 6 of the judgment on page 1308;

> "On behalf of the Appellants it was urged that it was not clearly stated how the Section 112 of the Customs Act had been violated. In our opinion, that was not necessary. The Respondents had drawn attention to the facts which according to them made the Appellants liable and had also drawn attention to the relevant provisions of law. In that view of the matter, in our opinion, the notice in question cannot be condemned as being vague or laconic."

11. In the facts as emerging from the Order-in-Original it is seen that the case of the Appellant squarely fell under clause (b) of Section 112 of the Act since he was involved in "carrying, removing, depositing, harbouring, keeping, concealing of goods which he must have known or at least had reason to believe (being the Godown Manager of SIL) to be liable for confiscation under Section 111.

12. We, therefore, do not see any force in the contention of the Appellant that the Tribunal had imposed the penalty without referring to the provisions of Section 112(b) of the Act. The penalty has been imposed by the Commissioner of Customs after understanding the facts in detail and by applying the law and the Tribunal has simply affirmed that order by dismissing the Appellant's first appeal.

13. In view of the aforesaid, in our opinion, the appeal does not raise any substantial question of law for our consideration under Section 130 of the Act and accordingly we dismiss this appeal.

VIPIN SANGHI
JUDGE

MADAN B. LOKUR
JUDGE

October 17, 2006
as