Pallavi

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM DUTY REFERENCE (L) NO.36525 OF 2024

Commissioner of Customs (Preventive) Mumbai …Appellant

Versus

Nucleus Securities …Respondent

Mr J B Mishra, *for the Appellant.*
Mr Abhishek Adke *a/w Deepali Joshi, for the Respondent.*

CORAM **M.S. Sonak &**
Jitendra Jain, JJ.
DATED: **30 JULY 2025**

ORAL ORDER : (PER : M.S. Sonak J.)

1. Heard learned counsel for the parties.

2. On 10 January 2005, a co-ordinate Bench of this Court disposed of the Customs Applications and directed the Tribunal to send the Statement of the Case to this Court regarding the substantial questions of law that were formulated in this order, as expeditiously as possible.

3. This Court's order dated 10 January 2005 is transcribed below for the convenience of reference: -

> *"1. Heard the learned counsel for the Applicants and the learned counsel for the Respondent. Both the learned counsel for the Applicants and Respondent have*

categorically agreed that in view of the larger bench decision of CESTAT dated 12th August, 2005 in Weizmann Ltd. & Anr. Vs. CC (Prev) Mumbai, 2005 (126) ECR 282 decision in favour of the Revenue, all the above applications are required to be allowed. These applications have raised following substantial question of law :-

1. *Whether on the facts, circumstances and the evidence available on record, the Tribunal was justified in holding that if the sale proceeds of smuggled goods have changed form and lost its character, the confiscation of the same cannot be ordered when the available evidence in the case clearly indicates that the cash amounts (i.e sale proceeds of smuggled gold) was deposited in the fictitious accounts in the bank and FFMC and the amount lying in the pay order account of the bank were intercepted before the money could be credited to the account of FFMC and the tribunal has it self held that when the money was put in to the bank, it was sale proceeds of smuggled gold and therefore the ingredient of section 121 was satisfied with regard to it?*

2. *Whether in the facts and circumstances in the case of the Tribunal was justified in holding the penalty imposed on the FFMC's under section 112 and 114 of the Customs act. 1962 is not sustainable, when the available evidence indicates that FFMC's consciously dealt and released foreign exchange to apparent fictitious entities and added smuggling of the goods?*

3. *Whether on the facts are in the circumstances of the case the CEGAT was right in law in setting aside the confiscation and deleting the penalty without appreciating the clinching, evidence and material available on record?*

4. *Whether on the facts and in the circumstances of the case the finding of the CEGAT are perverse and unreasonable as thy fail to take into account clinching evidence and material available on record.*

In view of the above, the Tribunal is directed to send the

statement of case to the High Court with regard to the aforesaid substantial questions of the as expeditiously as possible. All the above applications stand disposed of."

4. By a separate order, in proceedings arising from this matter, the Respondent herein had been directed to furnish a Bank guarantee in an amount of Rs. 26,86,000/- to secure the claims of the Customs Authorities. Despite this Court's order dated 10 January 2005, since the Tribunal failed to send the Statement of the Case to this Court, the Respondent applied for the return of the Bank guarantee. However, this was denied to the Respondent vide the order dated 20 October 2022 made in Writ Petition (L) No.26651 of 2022.

5. The Respondent, therefore, filed an SLP (C) No.3534 of 2023 before the Hon'ble Supreme Court, which was disposed of by an order dated 9 September 2024. The Bank guarantee was returned to the Respondent, and the Respondent was directed to file an undertaking in this Court to the effect that it would make payments as decided by the High Court and in accordance with the directions that the High Court may issue. By this order, the Hon'ble Supreme Court requested this Court to hear and dispose of the Reference at the earliest.

6. Writ Petition No.4762 of 2022 appeared on the cause list on 18 November 2024. On that date, there was no appearance on behalf of the petitioner. However, we took note of the Hon'ble Supreme Court's order and the directions to dispose of the Reference. Accordingly, we directed that the Writ Petition and the Reference be placed on the cause list at the earliest.

7. On 4 December 2024, this Reference was placed before this Bench. We noted that the same was numbered only on 3 December 2024. Mr. Mishra, the learned counsel for the Applicant (Customs Department) agreed to provide a private paper-book in terms of the Rules before 10 January 2025. The matter was accordingly posted on 24 January 2025 for final disposal.

8. Mr. Mishra handed over a copy of the Statement of the Case and connected matters only on 2 July 2025. Accordingly, notices were issued to the Respondent returnable on 23 July 2025 after noting that this was the matter which the Hon'ble Supreme Court expedited. On 23 July 2025, the learned counsel for the parties stated that the papers are traced and the paperbook is complete, and therefore, the matter will have to be finally heard. This matter was then posted on 30 July 2025 for final hearing by retaining its position.

9. Today, we have heard Mr. Mishra for the Customs Department and Mr. Abhishek Adke for the Respondent.

10. As noted above, in our order of 10 January 2005, this Reference was primarily entertained given the decision of the Larger Bench of CESTAT dated 12 August 2005 in **Weizmann Limited & Anr. vs. CC (Prev) Mumbai**[1].

11. Today, it was pointed out to us that the Co-ordinate Bench of this Court in the case of **Weizmann Limited & Anr. vs.**

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1 2005 (126) ECR 282

Commissioner of Customs[2] has reversed the decision of the Full Bench of the Tribunal. This, according to us, is a strong ground to return this reference unanswered or, in any event, for not answering the questions of law in favour of the Applicant, i.e., the Customs Department.

12. After the Tribunal was directed to draw the Statement of Case and send it to this Court, the Tribunal, in paragraph 8 of its Statement of Case filed on 30 January 2023, observed as follows:-

> *"8. The concerned Customs department, vide its letter dated 01.03.2023, have further informed that the judgement in the case of Weizmann Ltd. & Anr. Vs. CC. (Prev.), Mumbai, reported in 2005 (185) ELT 278 (Tri. - LB) was reversed by the Hon'ble High Court of Bombay reported in 2013 (287) ELT 427 (Bom.). (copy enclosed) and hence, on perusal of the said judgement, it appears that nothing remains in the present 'Statement of Case' being filed by the Tribunal as per the directions of the Hon'ble High Court Order dated 10.01.2006 in Customs Application No 28 of 2001.*
>
> *The above Statement of Case is submitted in compliance with the directions contained in order dated 10th January, 2006 and reiterated in order dated 20th October, 2022, of the Honble High Court in Reference Application No. 28 of 2001.*
>
> *Dated this the 30th day of January, 2023."*

13. Thus, the Tribunal did forward the statement of case based on this Court's order dated 10 January 2005 directing it to do so. The Tribunal, made it clear that given the decision of this Court reversing the view taken by the Larger Bench of the Tribunal, *"it appears that nothing remains in the present Statement of Case*

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2 2012 SCC OnLine Bom 499

being filed by the Tribunal as per the directions of the Hon'ble High Court dated 10 January 2006 in Customs Application No.28 of 2001."

14. Mr. Mishra, however, submitted that the decision of this Court in **Weizmann Limited (Supra)** is distinguishable on the facts. After having secured the order dated 10 January 2005 from this Court by relying upon the decision of the Full Bench of the Tribunal in **Weizmann Limited,** we are not too sure whether the Applicant can now seek to distinguish the said decision, purportedly on the ground that it involves some different facts or that it was distinguishable for some other reason.

15. In any event, Mr. Mishra's main contention was that specific findings of fact to the effect that the Respondent had not abetted any smuggling activity of Ambalal Soni were vitiated by perversity.

16. On the issue of factual findings and the error in imposing penalty, the CESTAT, in paragraphs 36 to 38, has observed as follows:-

> *"36. Considerable arguments were advanced before us by the counsel for these appellants to say that in essence the guidelines of the Reserve Bank had been followed. Here again we have to distinguish between possible negligence on the part of the moneychanger and its knowing involvement in smuggling of foreign exchange abroad. The provisions of Section 114 would apply if the currency is liable to confiscation under Section 113. The Commissioner has invoked Clause (d) of Section 113. This renders goods liable to confiscation goods attempted to be exported contrary to any prohibition*

imposed by the Customs Act or any other law. Even if we assume that there was some negligence on the part of these firms, the penalty cannot be imposed under Section 114 unless it can be shown that they by doing so, abetted the export of the currency. They would in turn require that they knew, or had good reason to believe, that the traveller's cheques which they issued were not be utilised for the purpose for which they were issued i.e., for business or personal travel, and would be sent abroad, and despite this issued such cheques. We are unable to find anything either in the show cause notice or in the order of the Commissioner that cites evidence to show the existence of such conducts. The Commissioner cites evidence from the statement of Firoz Batliwala that Nahalchand Lalloochand sometimes issued foreign exchange without verifying the air tickets of the passenger. From this bare sentence alone it is not possible to say that any of the cheques with which we are concerned was issued without proper verification or not or alleges that this was the case, the absence of such verification was deliberate for the reason that moneychanger consciously abetted smuggling of foreign exchange. The fact that Mukesh Himatlal of the firm agreed to pay Firoz Batliwala commission, no doubt in turn for steering applicants for foreign exchange, does not have any relevance.

37. *Similarly, the Commissioner cites the statement of Abdul Merchant and Kirti Shah of Trade Wings Limited, saying that Firoz Batliwala had brought number of applicants to it for issue of cheques, to show knowledge on the part of this firm. He finds that this Company had not verified the backgrounds of Vijay Agencies or two other persons Firoz Batliwala brought. It is difficult to see from this how he concludes that Trade Wings was aware that the traveller's cheques were being obtained, not for the purpose for which they were stated to be, but to be sent abroad. His conclusion that Abdul Merchant was aware of the conduct and business, antecedence of Zakir Hussein, Firoz Batliwala, Ambalal Soni and that Trade Wings was acting in connivance is not based on sound evidence.*

> *38. During the hearing, counsel for one of these moneychangers submitted that their activities in the issue of foreign exchange had been subjected to audit by the Reserve Bank of India which found no irregularities in their conduct of its business. In the case of these moneychangers too, we would emphasise what we have said about the two banks and their employees, their negligence and shortcomings, assuming that it is so, cannot by themselves amount to acts or omissions inviting penalty under Section 114. For that penalty to be imposed it must be shown that there was conscious abetment or attempt to smuggle foreign exchange. In our view, there is no evidence to show this. In the case of these moneychangers too, there is not a slightest basis for imposition of penalty on them under Section 112. These moneychangers only came to the picture for issue of traveller's cheques for which the payment was made from the accounts operated by Soni and his associates. The notice does not allege any connection "between them and acts retating to such smuggling. Thus, therefore, there is no basis for penalty under Section 112."*

17. Admittedly, the Respondent is only a moneychanger, and the allegation was about abetment. Apart from alleging perversity, Mr. Mishra was, however, unable to point out any material, either (Show Cause Notice or O.I.O.), based upon which he could demonstrate that the findings exonerating the Respondent, who are only money changers, from the charge of abetment were vitiated by perversity. Clear findings have been recorded to the effect that there was no material on record to sustain the charge of abetment by the money changer – Respondent.

18. This reference is mainly concerned with questions of law. The findings of fact are ordinarily not interfered with unless a clear case of perversity is made out. No such case is made out in this

case. This is an additional ground for answering this reference against the revenue.

19. Therefore, because this Court has reversed the decision of the Full Bench in **Weizmann Limited (Supra)** which was the base for entertaining this reference and furthermore because findings of fact recorded by the CESTAT are not demonstrated to be vitiated by any perversity, we answer the questions against the Applicant (Customs Department) and in favour of the Respondent – Assessee.

20. Now that we have answered the Reference in the above terms, the undertaking given by the Respondent is hereby discharged.

21. Reference is answered and disposed of accordingly.

22. No costs.

(Jitendra Jain, J) **(M.S. Sonak, J)**