IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 67 OF 2018

Gagandeep Singh Anand
R/at 3/31, 2nd Floor, Shivalik
Road, ,Malviya Nagar,
New Delhi – 110 017 .. Appellant

V/s.

The Commissioner of Customs
(Import), Mumbai having its
Office at Custom House,
Ballard Estate,
Mumbai – 400 001 .. Respondent

Mr. Akhilesh Kangasia a/w Mr. Prakash Shah for the appellant
Mr. Vijay Kantharia a/w Mr. Ram Ochani for the respondent

CORAM : A.S. OKA &
M.S. SANKLECHA, J.J.

RESERVED ON : 22nd APRIL, 2019

PRONOUNCED ON : 30th APRIL, 2019

JUDGMENT : (Per M.S Sanklecha, J.)

1. This appeal under Section 130 of the Customs Act, 1962 (the Act) challenges the order dated 28th July, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal).

2. On 14th March, 2019 we passed the following order :-

"1 Appeal is admitted on the following substantial questions of law.

"1) Whether in the facts and circumstances of the case, the Appellate Tribunal is correct in upholding duty demand from the Appellant (2nd buyer of the car)?

2) Whether in the facts and circumstances of the case, the Appellate Tribunal is correct in upholding penalty of Rs.3,00,000/- on the Appellant under section 112(a) of the Customs Act,1962?

3) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in not deleting demand of duty from the Appellant (2nd buyer of the car), since the vehicle was seized by the customs on 13.8.2007 and confiscated by the Order of the Commissioner dated 24.12.2008, with an option to redeem on payment of fine under Section 125 of the Customs Act,1962, which option was never exercised, and confiscation became final?"

2 The learned counsel for the respondent waives service. Considering the narrow controversy involved, the appeal can be disposed of finally. For that purpose, though the appeal is admitted, the same shall be listed on Daily Board on 2nd April 2019."

3. This appeal could not reach hearing on 2nd April, 2019 and stood adjourned from time to time. Today, the appeal reached hearing and it was taken up for final disposal on the above substantial questions of law.

4. The brief facts leading to this appeal are that on 2nd September,

2002 one Mr. Kirit Dholakia imported a Toyota Land Cruiser Prado (for short "said car") under bill of entry No. 291047 dated 2nd September, 2002. At the time of import, it appears that Mr. Dholakia had imported the said car under the Transfer of Residence Rule 2002 and had shown the year of manufacture as 1997 and claimed depreciation thereon. The said car was allowed to be cleared for home consumption by the respondent Revenue.

5. Thereafter, Mr. Dholakia, the importer sold the said car to one Mr. Oberoi. Mr. Oberoi on purchase of the said car from Mr. Dholakia obtained the necessary documents duly signed by the importer which would be required for the registration of the said car in his name. However, Mr. Oberoi did not carry out the necessary formalities to have the registration of the said car in his name.

6. Thereafter, in March, 2005, Mr. Oberoi sold the said car to the appellant for a consideration of Rs. 12 lakhs. An amount of Rs.10 lakhs was paid by Demand Draft and Rs. 2 lakhs was paid in cash towards the purchase of the said car by the appellant to Mr. Oberoi. At the time of purchase of the said car, the appellant had obtained finance from M/s. Kotak Mahindra Primus Ltd.. On purchase, the appellant got the

registration of the said car transferred from the name of the importer / original owner to himself. This as Mr. Oberoi the immediate seller of the said car to the appellant had not registered the transfer of the said car in his name.

7. Thereafter, investigations were commenced by the Directorate of Revenue Intelligence (for short "DRI") and during the course of investigation, statement of the importer Mr. Dholakia, the first purchaser Mr. Oberoi as well as the appellant under Section 108 of the said Act were recorded. During the course of investigation, on 13th August, 2007, the said car was seized by DRI. Thereafter, a show-cause notice was issued on 30th August, 2007 demanding differential duty on account of correct valuation of the car (year of manufacture was 2002 and not 1997). This demand for differential custom duty was issued jointly and severally on the importer of the car Mr. Dholakia, the first buyer of the car Mr. Oberoi and the second buyer of the car – the appellant. Besides, seeking to impose penalty and confiscate the said car under Section 111 of the Act.

8. The appellant contested the demand for duty on the ground that he was a *bona fide* purchaser of the car and the demand of duty and /

or penalty can only be imposed upon the importer. It was also submitted that no penalty be imposed upon him as he was not involved in illegal import of the said car nor had he abetted the import of the said car. Nevertheless, the Commissioner of Customs – the Adjudicating Authority by a common order dated 24th December, 2008 confirmed the show-cause notice and demanded differential custom duty of Rs.8.86 lakhs from the appellant. Besides confiscating the said car with an option to redeem the same on payment of redemption fine of Rs.8 lakhs. Moreover, a penalty of Rs.3 lakhs was imposed upon the appellant under Section 112(a) of the said Act.

9. Being aggrieved with the order dated 24th December, 2008, the appellant preferred an appeal to the Tribunal. The Tribunal by the impugned order dismissed the appellant's appeal. This by holding that there was a deliberate mis-declaration of the year of manufacture and claiming benefit of depreciation under the Transfer of Residence Rule at the time of importing the said car. Thus, the said car being smuggled car, was liable for confiscation was correctly confiscated under Section 111 of the Act with an option to redeem the same on payment of fine under Section 125 of the Act. So far as penalty is concerned, the impugned order upheld the imposition of penalty holding that the

appellant was the financier of the imported vehicle.

10. For the sake of convenience, we take up question nos. (1) and (3) together for consideration and question no. (2) dealing with penalty separately.

11. Regarding question nos. (1) and (3) :-

(a) The undisputed facts are that the said car was imported by one Mr. Dholakia in 2002, who had filed the Bill of Entry and cleared the same. The said car was thereafter sold by Mr. Dholakia to one Mr. Oberoi, who sold it to the appellant in 2005. The said car was seized from the appellant on 13th August, 2007 and confiscated with option to redeem the same on payment of the fine on 24th December, 2008. The appellant has not exercised the option to redeem the said car till date.

(b) On the aforesaid facts, the Commissioner of Customs and the Tribunal has sought to recover the shortfall in duty payment on import of the car from the appellant. This even in the absence of the appellant redeeming the confiscated car.

(c) Mr. Akhilesh Kangasia, learned Counsel appearing in support of the appeal submits that the appellant is not liable to pay differential duty as he is not the importer but a *bona fide* purchaser of the said car.

The liability to pay the custom duty under Section 28 of the Act is on the Importer of the car and the same cannot be foisted on an innocent buyer of the said car. Moreover, the said car stood confiscated in 2008 with option to redeem the same on payment of fine, which option the appellant has not exercised. Thus, no occasion to apply Section 125(2) of the Act can arise. It is further submitted that the issue now stands concluded in favour of the appellant by the decision of this Court in ***Commissioner of Customs Vs. VXL India Ltd. (2006) 193 ELT 396***.

(d) As against the above, Mr. Kantharia, learned Counsel appearing for the Revenue in support of the impugned order of the Tribunal submits that the appellant is liable to pay the differential duty in view of the clear mandate of Section 125(2) of the Act. This requires the owner of the goods to not only pay the redemption fine but also the duty and other costs payable on the offending imported said car.

(e) We have examined the rival contentions. From the facts, it is evident that the appellant is the second buyer of the car. The importer of the car is one Mr. Dholakia who had cleared the said car from the customs on payment of customs duty and thereafter sold to one Mr. Oberoi. The appellant had purchased the said car from Mr. Oberoi in the year 2005. During the course of investigation by the DRI, the said car was seized on 30th August, 2007 and confiscated in 2008 with

option to redeem the same. It is an admitted position that since then the said car is in possession of the DRI as the option to redeem has not been exercised. The importer of the said car is Mr. Dholakia who had filed the bill of entry and cleared the said car on payment of customs duty as assessed by the Officers of the customs. In fact, on identical fact situation, where the importer of the offending car was not traceable, this Court in VXL (India) Ltd. (supra) has held that the differential duty, if any, is to be only recovered from the importer in terms of Section 28 of the Act and the same cannot be recovered from the buyer of such offended goods.

(f) Moreover, the confiscation of the said car by the order dated 24th December, 2008 of the Commissioner of Customs contained an option to redeem the same by the appellant on payment of Rs.8 lakhs as penalty. Admittedly, the appellant has not exercised the option to redeem the said car. The said car continued to be in possession of the customs. Thus, not having exercised the option to purchase the car, the occasion to invoke Section 125(2) of the Customs Act, would not arise. The said car continues to vest in the Central Government by virtue of Section 126 of the Act. Under Section 125 of the Act, there is no obligation on a party to pay the fine in lieu of confiscation but the party is given an option to redeem the goods, if he so desirous by paying fine

in lieu of confiscation of the offending goods. In this case, the appellant has not exercised the option of paying the redemption fine and, therefore, the occasion to pay in addition to the redemption fine the duty and charges payable in respect of the offending goods, does not arise. In fact, this issue is no longer *res integra* as the Supreme Court in ***Fortis Hospital Ltd. Vs. Commissioner of Customs, 318 ELT 551*** has held that the obligation to pay duty on the confiscated goods, would only trigger, when the person from whom the offending goods are seized / confiscated, exercises the option to redeem the confiscated goods. Therefore, where no such option is exercised, Section 125(2) of the Act is not set in motion. Similarly, this Court in VXL India Ltd. (supra) has upheld the view of the Tribunal taking a similar view.

(g) Thus, the demand of duty could only be made upon the importer of the goods and not upon the person in whose possession / ownership the confiscated goods were found when the owner/ possessor of the confiscated goods does not seek to redeem the offending goods under Section 125 of the Act.

(h) Therefore, for the above reasons, question no.(1) is answered in the negative i.e. in favour of the appellant and against the respondent Revenue. So also for the above reasons question no.(3) is answered in the affirmative i.e. in favour of the appellant and against the

respondent Revenue.

12. Regarding question no.(2) :-

(a) The impugned order dated 28th July, 2017 of the Tribunal upheld the order of the Commissioner of Customs imposing a penalty of Rs.3 lakhs on the appellant under Section 112(a) of the Act. The impugned order upholds the penalty on the basis of a finding that the appellant had financed the import of the car.

(b) The learned Counsel in support of the appeal submits that the finding in the impugned order that as the appellant was a financier for import of the said car is perverse. In fact, the same is clear from the finding of the adjudicating Authority at paragraph 7.1 thereof that the appellant had obtained loan from M/s. Kotak Mahindra Primus Ltd. on 25th March, 2005 so as to purchase the said car from Mr. Oberoi. Thus, on the face of the record, it is clear that the appellant had in no manner financed the import of the vehicle which have taken place in the year 2002.

(c) On the other hand, the learned Counsel for the Revenue submits that the penalty imposed upon the appellant of Rs.3 lakhs under Section 112(a) of the Act cannot be found fault with as the Tribunal observed that he had financed the import of the said car. It is thus

submitted that no interference with the impugned order of the Tribunal is called for.

(d) So far as imposition of penalty of Rs.3 lakhs under Section 112(a) of the Act is concerned, we note that it is not the case of the Department that the appellant had done any act or omission which has rendered the goods confiscated under Section 111 of the Act. There is no finding in the impugned order or even allegation in the show-cause notice to the above effect. Similarly, the basis of the Revenue's contention that the appellant had abetted the illegal import of the said car by having financed the same is contrary to the facts on record. In fact, the adjudicating order of the Commissioner of Customs records the fact that the appellant had taken a loan in 2005 to purchase the said car for a consideration of Rs.12 lakhs. Thus, the appellant could not have in any manner abetted improper importation of the said car by financing it. Consequently, there is no basis to impose a penalty under Section 112(a) of the Act upon the appellant.

(e) Therefore, for the above reasons, question no.(2) is answered in the negative i.e. in favour of the appellant and against the respondent Revenue.

13. In the above view, the substantial questions of law are answered as under :-

(a) Question (1) in the negative i.e. in favour of the appellant and against the respondent Revenue.

(b) Question (2) in the negative i.e. in favour of the appellant and against the respondent Revenue.

(c) Question (3) in the affirmative i.e. in favour of the appellant and against the respondent Revenue.

14. The appeal is disposed of in the above terms. No order as to costs.

(M.S. SANKLECHA, J.) **(A. S. OKA, J.)**