A M/S. RAJMAL LAKHICHAND AND ANR.

v.

COMMR. CEN. EXC. & CUSTOMS, AURNAGABAD

(Civil Appeal No. 4919 of 2011)

JULY 4, 2011

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[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Customs Act, 1962: s.130(3) – Reference – Scope of – C *Confiscation of seized silver – Silver weighing 194.250 kgs. which was locally purchased confiscated u/s.120(2) and silver weighing 1713.807 kgs. imported illegally from abroad confiscated u/s.111(d) – Tribunal directed confiscation of entire quantity of silver u/s.120(2) – Provision of s.120(2) was* D *not invoked in the show cause notice for silver weighing 194.250 kgs. – Reference application before High Court – Question referred to High Court that whether Tribunal was justified in invoking s.120(2) to order confiscation of silver when the said provision was not invoked in the show cause* E *notice and when the appellants were not given any opportunity of being heard in the matter by the Tribunal – High Court answered the reference in favour of appellant holding that Tribunal was not justified in invoking s120(2) to confiscate entire silver – It refused to expand the scope of reference to* F *confiscation of silver to the extent of 1713.807 Kgs. and restricted it to the silver weighing 194.250 Kgs. only – Correctness of – Held: Correct – Tribunal was not justified in invoking the provisions of s.120(2) to order confiscation of silver when the said provision was not invoked in the show cause notice and when the appellant was not given any* G *opportunity of being heard in the matter by the Tribunal – High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated u/s. 111(d) of the Act while hearing the reference with regard to silver weighing 194.250 kgs. but*

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confiscated under a different provision of law, namely, u/ s.120(2) of the Act – High Court rightly held since two different laws are applicable there was no scope of expanding reference to include silver weighing 1713.807 Kgs also – Reference.

During search, the Directorate of Revenue Intelligence, seized silver weighing 1913.256 Kgs. from the premises of the appellants. Pursuant to the same, a show cause notice was issued to the appellants. The adjudicating authority discharged the show cause notice holding that the evidence collected were not convincing enough to hold the allegations as proved. The Tribunal allowed the appeals and ordered for confiscation of the seized silver absolutely and also imposed penalty on the appellants.

The appellants filed applications in which they framed as many as 11 questions and prayed for reference to the High Court. The Tribunal by its order dated 26.09.1996 rejected the reference applications holding that none of the questions raised therein required consideration by the High Court and also directed confiscation of silver weighing 194.250 kgs. which was locally purchased from "M/s. D" and for confiscation of another quantity of silver weighing 1713.807 kgs. as it was imported illegally from abroad.

Aggrieved, the appellants filed the application under Section 130(3) of the Customs Act before the High Court seeking direction to the Tribunal to refer the questions of law which the Tribunal refused to refer. The High Court passed the order to the effect that the question of law arose whether the Tribunal was justified in invoking the provisions of Section 120(2) of the Customs Act, 1962 to order confiscation of silver weighing 194.250 kgs. purchased from "M/s. D" when the said provisions was not invoked in the Show Cause Notice and when the

A appellant was not given any opportunity of being heard in the matter by the Tribunal.

The appellant sought modification of the order which subsequently came to be modified deleting the words "weighing 194.250 kgs. purchased from M/s. D". B Consequent upon the said modification, the modified question was referred to the High Court deleting the words "weighing 194.250 kgs. purchased from M/s. D". The High Court answered the said question in favour of the appellant and held that the Tribunal was not justified C in invoking the provision of Section 120(2) of the Customs Act, 1962 to confiscate the seized silver to the extent it was confiscated in exercise of that power in absence of any show cause notice and also in absence of opportunity of being heard. By the said judgment and D order, however, the High Court refused to expand the scope of reference to the confiscated seized silver to the extent of 1713.807 kgs. and restricted it to the silver of 194.250 kgs. only. The instant appeal was filed challenging the order of the High Court.

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Dismissing the appeal, the Court

HELD: 1. Since, silver weighing 1713.807 kgs. was confiscated under Section 111(d), law applicable to the said confiscation was totally different from the F confiscation of silver weighing 194.250 kgs. which was directed to be confiscated by applying the provisions of Section 120(2) of the Customs Act. The High Court was right in holding that since two different laws are applicable there is no question of getting the scope of G reference expanded to include the silver weighing 1713.807 Kgs also for consideration while hearing the reference restricted only to the sliver weighing 194.250 Kgs. The confiscation of silver weighing 194.250 Kgs. by applying provisions of Section 120(2) of the Act was H illegal and without jurisdiction as the show cause notice

was not issued proposing to make the said provisions applicable and, therefore, there was a violation of principle of natural justice. Section 120(2) of the Customs Act on which the confiscation of silver weighing 194.250 kgs. was concerned, cannot by any stretch of imagination be said to be similar or applicable to the other quantity of silver which was confiscated. Legal position is totally different and legal principles which are applicable also being different there was no scope for extending the reference by the High Court nor was there any scope for reframing or redrafting the question referred by including another separate and independent question of confiscation of silver weighing 1713.870 kgs. [Paras 13, 14] [860-E-H; 861-A-B]

2. Bare reading of Section 130(4) shows that the said provision came into the statute book only with effect from 2003 and, therefore, said provision is not applicable to the facts of the instant case. Section 130B is also not applicable to the instant case for the said provision applicable only for the purpose of amendment of the statement of the case. It has no relevance so far as the issue with regard to redrafting or reframing of a question of law is concerned. Therefore, the High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated under Section 111(d) while hearing the reference with regard to silver weighing 194.250 kgs. but confiscated under a different provision of law, namely, under Section 120(2) of the Customs Act. [Paras 16, 18, 19] [861-D-G-H; 862-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4919 of 2011.

From the Judgment & Order dated 20.4.2010 of the High Court of Bombay in Custom Reference No. 1 of 2002.

A Soli Sorabjee, Preetesh Kapur, Seema Bengani, Sanbha Giri Rumnong, Dr. Kailash Chand for the Appellants.

B. Bhattacharya, ASG, Rajiv Nanda, Sunita Rani Singh, B. Krishna Prasad for the Respondent.

B The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 20.04.2010 passed by the Bombay High Court in C Custom Reference No. 1 of 2002 whereby the High Court answered the question referred to it by the Customs, Excise and Gold (Control) Appellate Tribunal [for short "the Tribunal"] in favour of the appellant and against the Revenue holding that the Tribunal was not justified in invoking the provision of Section D 120(2) of the Customs Act, 1962 to confiscate the seized silver to the extent it was confiscated in exercise of that power in absence of any show cause notice and also in absence of opportunity of being heard. By the aforesaid judgment and order, however, the High Court refused to expand the scope E of reference to the confiscated seized silver to the extent of 1713.807 kgs. and restricted it to the silver of 194.250 kgs. only.

3. The Directorate of Revenue Intelligence [for short "the DRI"] searched the premises of the appellants on the basis of information gathered by it to the effect that large quantity of F about 132 bricks of silver had been smuggled through sea route and diverted to Jalgaon. During the aforesaid search the DRI seized silver in Choursa form weighing 1913.256 kgs. Pursuant to the same, a show-cause notice was issued to the appellants dated 07.08.1993 to which they submitted their G replies. The adjudicating authority took up the matter for consideration and by its order dated 30.08.1994 discharged the show-cause notices holding that the evidence collected were not convincing enough to hold the allegations as proved. The Central Board of Excise and Customs, New Delhi exercising H powers under Section 129D of the Customs Act directed the

collector to apply to the Tribunal for determination of the issues specified in the review order, consequent upon which, the Tribunal was approached. The Tribunal by its order dated 19th March, 1996 allowed the appeals by setting aside the impugned order and ordered for confiscation of the seized silver absolutely. The Tribunal further held that Mr. Ishwarlal Lalwani and M/s. Rajmal Lakhichand, in whose custody the seized silver was found were liable for imposition of penalty under Section 112(b) of the Customs Act. Accordingly, a penalty of Rs. 10 lakhs was imposed as personal penalty on Mr. Ishwarlal Lalwani for acquiring the smuggled silver. The Tribunal, however, did not impose separate penalty on M/s. Rajmal Lakhichand since personal penalty on the person managing the affairs of the firm was imposed. The Tribunal also imposed penalty of Rs. 1 lakh on Mr. Sureshkumar Seth who had procured smuggled silver and delivered it to Mr. Ishwarlal Lalwani. M/s. Rajmal lakhichand and Mr. Ishwarlal Lalwani being aggrieved by the order dated 19th March, 1996 filed two reference applications in which they framed as many as 11 questions and prayed for reference to the High Court. The Tribunal by its order dated 29.09.1996 rejected the reference applications holding that none of the questions raised therein required consideration at the hands of the High Court.

4. Being aggrieved by the aforesaid order of the Tribunal rejecting the reference applications the appellants moved the High Court by way of application under Section 130(3) of the Customs Act. By filing the aforesaid applications the appellant-assessee sought for a direction to the Tribunal to refer the questions of law which the Tribunal refused to refer. The High Court took up the aforesaid application for consideration and passed an order on 17.03.1999 to the following effect: -

> "2. We have heard the learned counsel for the parties. The learned counsel for the Petitioners has submitted redrafted questions which according to him bring out the real controversy that arises from the order of Tribunal. We have carefully considered the questions proposed by the

A Petitioners before Tribunal and the redrafted questions submitted before us. We have also heard Mr. R.V. Desai, learned counsel for the Respondent. In our opinion, the following question of law arises from the order of the Tribunal:

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> "Whether the Tribunal was justified in invoking the provisions of Section 120(2) of the Customs Act, 1962 to order confiscation of silver weighing 194.250 kgs. purchased from M/s. Dilipkumar Harichand & Sons, Jalgaon, when the said
> C provisions had not been invoked in the Show Cause Notice and when the applicants were not given any opportunity of being heard in the matter by the Customs, Excise & Gold (Control) Appellate Tribunal?"

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> 3. We accordingly direct the Tribunal to refer the above question to this court for opinion under Section 130(3) of the Customs Act, 1962. Rule is made absolute in the above terms."

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5. It is thus established from the aforesaid order passed by the High Court that only one question of law was found to have arisen from the order of the Tribunal dated 26.09.1996 which required consideration at the hands of the High Court. The prayer before the High Court was also to refer the other
F questions but the High Court felt that only the reframed question to the aforesaid effect only is a question of law arising from the order of the Tribunal, which was accordingly directed to be referred. Consequent upon the said order the Tribunal prepared the statement of case and referred the aforesaid question for
G the consideration of the High Court for its opinion under Section 130(3) of the Customs Act, 1962. Subsequent to the receipt of the aforesaid statement of case from the Tribunal the assessee took out a motion to the minutes of the order dated 17th March, 1999 passed by the High Court and sought
H modification of the order which subsequently came to be

modified deleting the words "weighing 194.250 kgs. purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon". Consequent upon the aforesaid modification, the modified question thus referred to the High Court for its opinion reads as under: -

> "Whether the Tribunal was justified in invoking the provision of Section 120(2) of the Customs Act, 1962 to order confiscation of silver, when the said provisions had not been invoked in the Show Cause Notice and when the applicants were not given any opportunity of being heard in the matter by the Customs, Excise & Gold (Control) Appellate Tribunal?"

6. The aforesaid reference was taken up for consideration by the High Court and during the course of arguments counsel appearing for the appellant sought to get the scope of the reference extended by making the submission that the question referred would also bring within its fold the entire quantity of silver weighing 1913.256 kgs. and not restricted to only 194.250 kgs. purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon. It was also submitted on behalf of the appellant that while considering the question referred to the High Court for its opinion it would have to deal with the legality of the confiscation of the entire quantity of silver weighing 1913.256 kgs. and if that is not done the very purpose of deleting the aforesaid words would get frustrated and would be rendered otiose.

7. The counsel appearing for the respondent, however, refuted the aforesaid submissions contenting inter alia that the High Court cannot expand the scope of the reference by including for its consideration the entire quantity of silver, i.e., 1913.256 kgs. It was also submitted by him that the attempt to widen the scope of the question to bring within its fold entire quantity of the confiscated silver weighing 1913.256 kgs. is nothing but an attempt to bring the question for consideration before this Court through back door which is not permissible in law. It was also submitted that the deletion of the words

A referred to hereinabove would in no way enlarge the scope of the question referred for so far as the silver weighing 194.250 kgs. is concerned, as the same stood on completely different footing than the silver which was imported illegally and, therefore, confiscated. It was submitted by him that the silver B weighing 1713.807 kgs. was confiscated under Section 111 (d) of the Customs Act, whereas rest of the silver weighing 194.250 kgs. was confiscated under sub-Section (2) of Section 120 of the Customs Act and, therefore, law applicable being different, the two types of silver stood apart from each other. It C was also submitted by him that the two types of silver being in issue and only one of it having been referred there is no question of reframing or recasting the question of law as suggested by the counsel appearing for the appellant as the other quantity of silver weighing 1713.807 kgs. involves and D revolves around a completely different law, namely, Section 111(d) and, therefore, cannot be held to be permissible to be raised on the same question as that of silver weighing 194.250 kgs.

8. In the light of the aforesaid submissions of the counsel E appearing for the parties we have considered the records. It is disclosed from the records that the Tribunal by its order dated 29.09.1996 directed for confiscation of silver weighing 194.250 kgs. which was locally purchased from M/s. Dilipkumar Hirachand & Sons, Jalgaon, whereas the Tribunal also directed F for confiscation of another quantity of silver weighing 1713.807 kgs. as it was imported illegally from abroad. Despite the fact that the silver weighing 194.250 kgs. was locally purchased the Tribunal directed for confiscation of the said quantity of silver also by applying the provisions of Section 120(2) of the G Customs Act which provides that where smuggled goods are mixed with other goods in such a manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable for confiscation. The Tribunal also held that it was not possible to separate the quantity of silver H weighing 194.250 kgs. from the rest of the smuggled silver and,

therefore, by virtue of Section 120(2) of the said quantity was also held liable for confiscation. A

9. The aforesaid order of the Tribunal also makes it crystal clear that out of the entire quantity of silver weighing 1913.256 kgs., silver weighing 1713.807 kgs. was confiscated under Section 111(d) whereas silver weighing 194.250 kgs. was confiscated under Section 120(2) of the Customs Act. B

10. The High Court in the impugned order took notice of the aforesaid difference of the orders of confiscation and the two types of silvers by applying two different provisions of law. C The High Court observed that the Tribunal also considered the prayer of the counsel appearing for the appellant-assessee regarding the reframing of the question of law referred by the Tribunal to the High Court in terms of the order of the High Court as also the effect of the deletion of few words from the said D question and that thereafter the Tribunal held that the deletion would not make any difference either way because the said deletion was in respect of applicability of the provisions of Section 120(2) of the Customs Act inasmuch as the powers under Section 120(2) were exercised with respect to the silver E weighing 194.250 kgs. only.

11. Despite the deletion of the aforesaid words the issue that was required to be considered was only in respect of the provisions applicable being sub-Section (2) of Section 120 of the Customs Act and, therefore, in any event and even after F the deletion of the said words the question of law which was referred and was required to be answered by the High Court was restricted only to the said quantity of silver weighing 194.250 kgs. for which only provisions of sub-Section (2) of Section 120 of the Customs Act was being made applicable. G

12. In the present case, 11 questions were raised by the appellants before the Tribunal seeking for reference of the same as questions of law to the High Court by way of reference. The Tribunal rejected the said application seeking H

A for reference holding that none of the said 11 questions could be referred to the High Court by way of reference. As against the aforesaid decision of the Tribunal, the High Court directed that only one question out of the said 11 questions, particularly, question No. 11 is a question of law which could be referred
B to the High Court for its opinion and not any other question. At that stage, the appellant-assessee had the remedy to approach this Court as against the aforesaid order by the High Court calling for just one question out of the 11 questions to be referred to the High Court. The aforesaid remedy which was
C available to the appellant at that stage was not resorted to and only one question was then referred for the consideration and answer by the High Court. While the aforesaid question of law which was referred to the High Court for its opinion was being considered and argued, effort was made by the appellant-
D assessee to get the scope of reference expanded to other question for which earlier reference was sought and rejected by the Tribunal as also by the High Court.

13. Since, silver weighing 1713.807 kgs. was confiscated under Section 111(d), law applicable to the said confiscation
E was totally different from the confiscation of silver weighing 194.250 kgs. which was directed to be confiscated by applying the provisions of Section 120(2) of the Customs Act. The High Court in the impugned judgment and order held that since two different laws are applicable there is no question of getting the
F scope of reference expanded to include the silver weighing 1713.807 kgs. also for consideration while hearing the reference restricted only to the silver weighing 194.250 kgs. The High Court held that the confiscation of the aforesaid silver weighing 194.250 kgs. by applying provisions of Section 120(2)
G of the Customs Act is illegal and without jurisdiction as the show-cause notice is not issued proposing to make the aforesaic provisions applicable and, therefore, there was a violation o- principle of natural justice.

14. The aforesaid provision on which the said confiscatior
H of silver weighing 194.250 kgs. is concerned, cannot by an

stretch of imagination could be said to be similar or applicable to the other quantity of silver which was confiscated. Legal position is totally different and legal principles which are applicable also being different there was no scope for extending the reference by the High Court nor was there any scope for reframing or redrafting the question referred by including another separate and independent question of confiscation of silver weighing 1713.870 kgs.

15. Mr. Soli Sorabjee, Sr. Advocate, appearing for the appellant sought to rely upon sub-Section (4) of Section 130 of the Customs Act to contend that the High Court has the power to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

16. We have considered the said submission of Mr. Sorabjee, but, unfortunately, we are not in a position to agree with him as it is clear on a bare reading of the said provision that the said provision came into the statute book only with effect from 2003 and, therefore, said provision is not applicable to the facts of the present case.

17. Mr. Soli Sorabjee, Sr. Advocate, also relied on Section 130B which is power of the High Court to require the statement to be amended. The said Section provides that if the High Court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

18. We have considered the said submission also of the counsel appearing for the appellant and are of the opinion that the said provision is not applicable to the present case for the said Section 130B is applicable only for the purpose of amendment of the statement of the case. It has no relevance so far as the issue with regard to redrafting or reframing of a question of law is concerned.

19. Therefore, we are of the considered opinion that the High Court was justified in refusing to expand the scope of the reference so as to include the silver weighing 1713.807 kgs. which was confiscated under Section 111(d) while hearing the reference with regard to silver weighing 194.250 kgs. but confiscated under a different provision of law, namely, under Section 120(2) of the Customs Act.

20.Before parting with the case, however, we would like to observe that in the counter affidavit filed by the respondent certain observations have been made regarding the order passed by the High Court. Subsequently, however, the person who has filed the aforesaid counter affidavit had submitted an additional affidavit tendering his unqualified apology in the following manner: -

"2. I state that the criticism, if any, of the Judgment of the High Court on merits, in the Counter-affidavit on behalf of the Respondents dated 2.2.2011 is not deliberate and totally unintentional. The inadvertence in this regard is highly regretted and deponent unconditionally withdraws any such criticism and tenders unconditional apology. The deponent has highest respects for the Hon'ble Courts and is duty bound to comply the directions passed by the Hon'ble Courts."

21. Although at one stage we were very unhappy with the language used by the deponent in the counter affidavit but since the concerned officer has tendered unqualified apology and has withdrawn the said statements made in the affidavit, we accept the aforesaid apology tendered and we do not intend to proceed any further in the matter and treat the said chapter closed.

22. In terms of the aforesaid observations and findings we dismiss this appeal leaving the parties to bear their own costs.

D.G. Appeal dismissed.