

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

RESERVED ON: 29.03.2023
DELIVERED ON:13.04.2023

CORAM:

**THE HON'BLE MR. ACTING CHIEF JUSTICE T.S. SIVAGNAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

A.P.O. NO. 28 OF 2023

I.A. NO. G.A./01/2023

**MUMTAZ MEHBOOB MUNSHI
VERSUS
COMMISSIONER OF CUSTOMS (PORT), KOLKATA AND OTHERS**

Appearance:-

**Mr. Atish Dipankar Roy, Adv.
Mr. Soumyajit Mishra, Adv.**

....for the Appellant.

**Mr. K.K. Maity. Adv.
Ms. Manasi Mukherjee, Adv.
Mr. Kaushik Dey, Adv.**

.....for the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, ACJ.)

1. This intra court appeal filed by the writ petitioner is directed against the order passed by the learned single bench in WPO No. 568 of 2019 dated 05.12.2022.
2. We have heard Mr. Dipankar Ray, learned advocate assisted by Mr. Soumyajit Mishra, learned advocate for the appellant and Mr. K.K. Maity, learned senior standing counsel assisted by Ms. Manasi Mukherjee, learned standing counsel for the first respondent and Mr. Kaushik Dey, learned standing counsel for the second respondent and Mr. Rajesh Kumar Shah, learned standing counsel for the Union of India.
3. The appellant had filed a writ petition praying for return of the interest amount of Rs. 13,04,464/- which according to the appellant has been illegally collected in the name of rent, insurance and GST charges which are not payable by the appellant. The facts leading to the filing of the writ petition are set out hereunder:
4. The appellant was granted advance license by the Foreign Trade Development Officer, Mumbai dated 26.06.2002 to manufacture and export of 310 metric tons of zinc oxide of 100% purity through their supporting manufacturers. On 15.07.2002, the appellant purchased on high sea sales basis zinc ingots the said product which were stuffed into eight containers, were seized by the Directorate of Revenue Intelligence, (DRI) on the allegation that the goods were to be diverted to the local market instead of sending the same to the supporting manufacturers for manufacture of goods to be exported. Show cause notice dated 14.02.2003 was issued as to why,

the eight containers which were detained should not be signed and the goods to be confiscated in terms of Section 111 of the Customs Act, 1962, (the Act). The appellant submitted their reply and the show cause notice was adjudicated culminating in an order-in-original dated 31.10.2005, confiscating the goods under Section 111(m) and (o) of the Act with an option to redeem the goods on payment of redemption fine of Rs. 25,00,000/- as penalty in lieu of confiscation under Section 125 of the Act. The sum of Rs. 38,74,372/- was demanded as duty along with interest. The appellant challenged the order before the Customs Excise and Services Tax Appellate Tribunal, East Zone Bench, Kolkata (the tribunal). The tribunal by order dated 08.09.2008 remanded the matter to the adjudicating authority with certain observations. This order was challenged by the appellant before this Court in CUSTA No. 06 of 2009. While the appeal was pending, the adjudicating authority took up the matter for de novo consideration in terms of the order passed by the tribunal and passed the order dated 05.01.2018 reiterating the conclusions which were arrived at in the first order-in-original dated 31.10.2005. The appellant unconditionally accepted the order paid the entire amount which was demanded in the order-in-original namely fine in lieu of the confiscation, duty, interest and penalty. After the payment of the amounts as quantified in the order-in-original dated 05.01.2018, seven out of the eight containers which were in the custody in the DRI were released to the appellant however one of the container was not released as it was in a bonded warehouse of the Central Warehousing Corporation (CWC). The said container was not released on the ground that unless and until the appellant pays the warehousing charges/rent to the CWC, the same cannot

be released. By communication dated 29.03.2019, the Assistant Commissioner of Customs directed the appellant to pay the charges since the goods were kept from October 2002 and the amendment to Section 68 of the Act made in 2016 would not be applicable. The appellant had accordingly paid the amount under protest on 24.08.2019 and thereafter filed the writ petition for the aforementioned relief.

5. The learned single bench noted that under the pre-amended Section 68, there was a provision that the goods which were warehoused may be cleared for home consumption after paying rent however the said provision was deleted by way of substitution of the said Section with effect from 14.05.2006 by Finance Act, 2016. The learned writ court noted that it is an admitted position that the goods in question which were kept in the bonded warehouse for which rent has been demanded and recovered from the appellant/writ petitioner pertains to the period prior to the amendment/substitution as the period for which rent has been recovered is from 2001 to 2009 which covers both pre-substituted provisions of Section 68 and post substituted provisions of Section 68. The learned Writ court held that CWC was perfectly justified in demanding rent for the period prior to 14.05.2016 and the appellant is entitled for refund of the rent which has been collected for the period after 14.05.2016. The appellant being aggrieved by that portion of the order passed by the learned single bench in not granting full relief to the appellant by way of directing refund/return of the entire amount has filed the present appeal.

6. The case of the appellant is that the amendment to Section 68 of the Act by which the term "rent" has been deleted by way of substitution is

retrospective in nature and not prospective on and from 14.05.2016 when the substitution took place. It is submitted that Section 68(b) of the Act has been substituted whereby the words penalty, interest and other charges was substituted with the words interest, fine and penalties on 14.05.2016 which means the earlier provision was repealed and a new provision has been put in place instead and the new provision has to be read retrospectively from the time when the original Section was enacted. Further it is contended that the newly substituted provision has to be effective even for the goods kept in the warehouse prior to such substitution of the statutory provision of Section 68 of the Act otherwise while releasing the goods after such substitution, there would be unreasonable discrimination amongst all the goods being released. Further it is submitted that an amendment by way of substitution, no substantive right has been taken away nor any penal consequences has been imposed and only an obvious mistake was sought to removed and therefore the amendment will have retrospective effect. Thus, it is contended that when there was no provision under which the authorities can demand rent or warehousing charges from the importer, the amount which was paid by the appellant under protest has to be returned to the appellant.

7. The learned advocate appearing for the appellant has drawn our attention to the material papers annexed with the stay petition to demonstrate about the various orders which were passed by the authorities and ultimately communication sent by the Deputy Commissioner of Customs Group-IV, Customs House, Kolkata dated 18.09.2009 wherein it was acknowledged that the appellant has paid the applicable duty, interest,

fine and penalty and NOC from the DRI has also been issued to release the goods subsequent to adjudication of the case by the Commissioner of Customs (Port) and therefore the Deputy Commissioner of Customs, SPS (Port), Kolkata was directed to allow for clearance under the supervision of the preventive officer. It is submitted that inspite of such a direction, the goods were not released. By letter dated 17.11.2018, CWC informed DRI that the appellant had stated that they are not liable to pay storage charges of CWC and they are not bound to pay the charges as the cargo is detained by DRI under Section 110 of the Act. Therefore, CWC sought for necessary guidance from DRI. By communication dated 29.03.2019, the appellant was informed by Assistant Commissioner of Customs that Section 68 of the Act as applicable in the appellant's case should be read as before the amendment of the Act in the year 2016 and hence the appellant is not entitled for protection under the amended Section 68 and cannot claim that the amended provision will operate retrospectively. Further it was stated that the detention charges and warehousing charges are payable to the custodians and shall be paid by the appellant even where the customs detention has been finally held as improper or illegal.

8. The learned advocate for the appellant placed heavy reliance upon the communication dated 25.05.2019 from the Deputy Commissioner of Customs, apprising Group IV, Kolkata, to the Regional Manager of CWC informing him to release the goods as per guidelines under Regulation 6(l) of the Cargo Handling Rules in Customs Area 2009 (regulations). In spite of said factual position, CWC by communication dated 04.07.2019, directed the appellant to pay the storage charges and insurance charges which was

paid by the appellant under protest. After referring to the amendment to Section 68 of the Act by Finance Act, 2016, published in the Gazette of India dated 14.05.2016, the learned advocate for the appellant referred to the Regulations 6(l) and submitted that the said regulation clearly states that subject to any other law for the time being in force, the customs cargo services provider shall not charge any rent or demurrage on the goods seized or detained or confiscated as the case may be. Therefore, it is submitted that no rent is payable by the appellant. With regard to the effect of substitution by way of an amending Act, it was contended that it has effect of deleting the old provision and make a new provision and therefore it is retrospective in character. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Gottumukkala Venkata Krishamraju Versus Union of India and Others***¹ and ***Government of India and Others Versus Indian Tobacco Association***². With the above submission, the learned advocate appearing for the appellant prayed for allowing the appeal.

9. The learned standing counsel appearing for DRI contended that the order-in-original passed by the adjudicating authority has been accepted in full by the appellant, consequently the detention and seizure of goods are valid and therefore the appellant is liable to pay the warehousing charges to CWC. The learned advocate referred to Section 63 of the Customs Act before omission i.e. with effect from 14.05.2016 and submitted that prior to the said date the appellant is liable to warehousing charges/rent to CWC. To

¹ (2019) 17 SCC 590

² (2005) 7 SCC 396

draw a comparison as to the effect of the amendment the learned advocate referred to Section 129E of the Act which is also one of the provisions which stood substituted. In support of his contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Chandra Sekhar Jha Versus Union of India and Others*** in ***Civil Appeal No(s). 1566 of 2022*** dated 28.02.2022 wherein the Hon'ble Supreme Court held that the amended provision (Section 129E) had come into force from 06.08.2014 and the stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance No. 2 Act, 2014, Section 129E as substituted will not apply. Reliance was also placed on the decision of the High Court of Bombay in ***Apollo Paper Mills Limited Versus Union of India***³ wherein it was held that when the correctness of the order of confiscation has not been disputed and the importer having been found guilty of contravening the provision of the Customs Act, such an importer cannot seek for waiver of the warehousing charges by CWC.

10. In reply, learned advocate appearing for the appellant submitted that the two decisions relied on by the learned standing counsel for DRI appear to have been passed much after the law laid down by the Hon'ble Supreme Court in ***Gottumukkala Venkata Krishnamraju*** and ***Indian Tobacco Association*** and those decisions having not been considered in the case of ***Chandra Sekhar Jha***, the said decision is per incuriam. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in ***Mamleshwar Prasad and Another Versus Kanhaiya Lal***⁴.

³ 2006 (206) ELT 106 (Bom)

⁴ (1975) 2 SCC 232

11. The first aspect which we have to point out is that the appellant was found guilty of diverting the goods meant for manufacture of export goods resulting in issuance of show cause notice proposing to confiscate the goods, and impose penalty and other charges. The order was put to challenge before the tribunal and the tribunal initially allowed the appeal and remanded the matter to the adjudicating authority for de novo consideration. While the matter was pending before the adjudicating authority, the appellant filed an appeal against the said order of the tribunal before this Court in CUSTA No. 06 of 2009. While the appeal was pending, the Commissioner took up the matter for de novo consideration and the order of adjudication was passed on 05.01.2018 confiscating the total quantity of 197.521 metric tons of imported zinc under Section 111(m) and (l) of the Act. However, the adjudicating authority imposed a redemption fine of Rs. 25,00,000/- in lieu of confiscation under Section 125 of the Act. The value of the goods was re-determined, the demand of duty as proposed in the show cause notice at Rs. 38,74,372/- was confirmed. Mandatory penalty equivalent to the duty evaded was imposed and personal penalty was imposed on the directors and others. Though the appellant had challenged the order of the tribunal before this court after the order of adjudication dated 05.01.2018 gave up the challenge and accepted the order-in-original, paid the redemption fine, penalty and interest. The goods were imported in eight containers and seven containers which were in the custody of DRI were released on payment of the redemption fine, duty and penalty. The eighth container was in the custody of the warehouse of CWC. The dispute hinges upon the release of the 8th container. The CWC had demanded the

payment of warehousing charges/rent as a pre-condition for the release of the container. The appellant though has paid the rent in full would contend that the payment was made under protest and on the account of amendment to Section 68 of the Act whatever has been collected from the appellant has to be returned. The appellant relied upon the Regulation 6(l) of the Handling of Cargo and Customs Areas Regulation (2009) and would contend that CWC cannot charge any rent or demurrage on the goods detained/confiscated by the department. The Hon'ble Supreme Court in **Gottumukkala Venkata Krishamraju** (supra) while dealing with the effect of substituted provision held as follows:-

Ordinarily wherever the word 'substitute' or 'substitution' is used by the legislature, it has the effect of deleting the old provision and make the new provision operative. The process of substitution consists of two steps: first, the old Rule is made to cease to exist and, next, the new Rule is brought into existence in its place. The Rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. No doubt, in certain situations, the Court having regard to the purport and object sought to be achieved by the Legislature may construe the word "substitution" as an "amendment" having a prospective effect. Therefore, we do not think that it is a universal Rule that the word 'substitution' necessarily or always connotes two severable steps, that is to say, one of repeal and Anr. of a fresh enactment even if it implies two steps. However, the aforesaid general meaning is to be given effect to, unless it is found that legislature intended otherwise. Insofar as present case is concerned, as discussed hereinafter, the legislative intent was also to give effect to the amended

provision even in respect of those incumbents who were in service as on September 01, 2016.

12. In ***Indian Tobacco Association***, the Hon'ble Supreme Court pointed out as follows:-

The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, 5th Edition, at p.1281, the word "substitute" has been defined to mean "to put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group); or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague."

13. Thus the argument of the learned advocate for the appellant is that by virtue of the substitution by Finance Act, 2016, the old provision stood deleted and it ceased to exist and the new rule is brought into existence in its place. In the aforementioned decisions of the Hon'ble Supreme Court after pointing out the above aspects, it has also been pointed out that in certain situations, the court having regard to the purport and object sought to be achieved by the legislature may construe the word substitution as an amendment having a prospective effect. Therefore it was held that a universal rule that the word "substitution" necessarily or always connotes two several steps, that is to say one of repeal and another of fresh enactment even if it emphasis two steps. Bearing the above legal principles in mind, we need to examine the factual position in this case. The eighth container in which the goods were imported were ceased by the DRI in the year 2002 and in February 2003 show cause notice was issued as to why

the goods should not be confiscated under Section 111 of the Act. Out of the eight containers, seven containers in the custody of the DRI were released and one container was in a bonded warehouse of the CWC was not released. The dispute is only with regard to the 8th container. On the date when the container was warehoused, the warehousing agencies namely CWC was entitled to demand rent. The amendment was made to the statutory provision with effect from 14.05.2016. Thus, on the date when the goods were entrusted to the custody of CWC, the law permitted CWC to demand and recover rent for the storage. Thus, in our view it is in the nature of vested right conferred upon the warehousing agency to demand and collect rent.

14. The question would be as to whether this right of CWC to demand and collect rent from the date on which the goods were warehoused stands extinguished in its entirety after the amendment. The power to demand and collect rent flows to CWC from the statutory provision. Thus, statutorily CWC was entitled to demand and collect rent. Having steered clear of this aspect, we once again need to examine the facts of the appellant's case. The order of adjudication dated 05.01.2018 imposing fine, duty and penalty was unconditionally accepted by the appellant. The corollary being that the appellant is guilty of having illegally diverted the goods in the local market without utilizing the goods imported under advance license for manufacture of product for export. The question would be whether such a person who has been found guilty of violating the terms and conditions of the advance license can seek for waiver or complete waiver of the warehousing charges. The detention and confiscation of the goods having been held to be valid on

account of the fact that the appellant accepted the order-in-original, the appellant cannot be heard to say that the entire warehousing charges has to be waived. More particularly when the goods were warehoused much earlier to the amendment of the statutory provision. Therefore, we are of the view that we need not travel very far to decide as to what is the effect of this substituted provision whether it is prospective or retrospective as we are convinced that on facts the appellant having accepted the order-in-original in which they have been found guilty of violation of the terms and conditions of the advance license cannot be heard to say that the warehousing charges has to be waived in its entirety. The learned single bench has granted relief to the appellant prospectively namely after the amendment till the date of the release of the goods. The revenue has not preferred any appeal against the said findings. Therefore, we refrain from voicing any opinion on that portion of the order which has accrued in favour of the appellant. It appears that the revenue has not seriously contested the matter with regard to the effect of the amending act and in any event if an occasion arises at a later date this question being of law has to be decided. The case of the revenue is fortified by the decision of the Hon'ble Supreme Court in **Chandra Sekhar Jha**. The challenge in the order passed by the High Court rejecting the appeal filed against the order passed by the tribunal on the ground that the requirements with regard to the pre-deposit of the amount in terms of Section 129E of the Customs Act, 1962 was not complied with. Section 129E of the Customs Act as it stood before the substitution by Act 25 of 2014 gave discretion to the appellant tribunal under certain circumstances to dispense with the pre-deposit. By virtue of substitution of the new Section

129E by Act 25 of 2014, this discretion of the tribunal was done away with and the appellant who intend preferring the appeal before the tribunal or the Commissioner of Appeals are to compulsorily deposit 7.5% of the duty where the duty or duty and penalty are in dispute or penalty where such penalty is in dispute. The second proviso to the amended Section 129E stated that the provisions of the new Section shall not apply to stay applications and appeals pending before any appellate authority prior to the commencement of Finance No. 2 Act, 2014. The appellant before the Hon'ble Supreme Court contended that their case relates to the year 2013 and he should be governed by the Section 129E prior to the substitution which came into effect from 06.08.2014. The Hon'ble Supreme Court took note of the second proviso in Section 129E as substituted would not apply to stay applications and appeals which were pending before the appellate authority prior to the commencement of the Finance Act No. 2 of 2014. Though in the case on hand there is no such proviso, the sum and substance of the relief granted to the appellant by learned single bench has indirectly made such an interpretation. Though we do not fully agree in the said interpretation, since the revenue is not on appeal before us against the said findings, we do not wish to express our opinion of this issue. The contention for the learned advocate for the appellant that the decisions in the case of **Chandra Sekhar Jha** and **Apollo Paper Mills Limited** are per incuriam cannot be accepted as the facts in those cases were different and more importantly, the Hon'ble Supreme Court in **Gottumukkala Venkata Krishamraju** (supra) has pointed out that it is not an universal rule that the word "substitution" necessarily or always connotes two severable steps that is to say one of

repeal and another of fresh enactment even if it is emphasizes two steps. Be that as it may, on facts, as pointed out earlier, the appellant having accepted the order-in-original holding him guilty of violation of the terms and conditions of the advance license and the provisions of the Act and the goods having detained and kept in the custody of the warehouse from 2002, a vested right accrues in favour of CWC to recover the rent payable to them and therefore the demand made on the appellant by CWC, atleast up to the date when the provision was amended is valid and proper and the said amount already paid by the appellant need not be returned or refunded to the appellant.

15. For all the above reasons, the appeal stands dismissed.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- SACHIN)