

UNION OF INDIA & ORS.

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v.

M/S. ASSOCIATED CONTAINER TERMINAL LTD.

(Civil Appeal No. 4490 of 2008)

FEBRUARY 14, 2020

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**[A. M. KHANWILKAR, HEMANT GUPTA AND
DINESH MAHESHWARI, JJ.]**

Customs Act, 1962: ss.61, 63, 72 and 150 – Imposition of custom duty – Auction of warehoused goods in case importer/owner of imported goods fails to seek release of such goods – Whether calculation of the custom duty would be assessed as on the date of the deemed removal of goods from the warehouse in terms of s.61 or on the date of sale for the reason that the importer has failed to seek clearance of the goods imported – Held: In view of the Circular issued by the Central Board of Excise & Customs dated 28th November, 2001, the custom duty is to be calculated on the sale price and not on the duty as is payable on the date of deemed expiration of permitted period of warehouse – Such Circular of the Board is binding on the Revenue – Therefore, the custom duty has to be paid on the basis of sale proceeds realised from the sale of the goods kept in a warehouse and not on the basis of the custom duty payable at the time of filing the Bill of Entry or on the date of expiry of permitted period of warehouse.

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Disposing of the appeal, the Court

HELD: 1. **Kesoram* is a case where the importer claimed levy of custom duty on goods which remained in bonded warehouse beyond the permitted period claiming that the duty as is applicable on the date the goods were sought to be removed for home consumption, will be chargeable. This Court found that the goods can be kept in a warehouse in terms of the period specified under Section 61 of the Act and, therefore, Section 68 and Section 15(1)(b) apply only when the goods were cleared from the warehouse within the permitted period or with permitted extension and not beyond the permitted period or permitted extension. The present case is not a case of levy of custom duty

- A on the importer. The importer has not sought the release of goods within the permitted period of warehouse. Therefore, the judgment in **Kesoram* will not be applicable in respect of the goods to be auctioned on account of failure to seek the release of imported goods by the importer though after the permission from the proper officer. [Para 14-15][867-G-H; 868-A-C]
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**Kesoram Rayon v. Collector of Customs, Calcutta*
(1996) 5 SCC 576 : [1996] 5 Suppl. SCR 77 – Held
inapplicable.

- 2. The purpose of Section 63 is to ensure that the
- C warehouse-keeper recovers the rent or warehouse charges from the importer. Section 150 deals with the distribution of sale proceeds if the goods other than the confiscated goods are sold under any provision of the Act. The Central Board of Excise & Customs had issued a clarification on 28th November, 2001
- D keeping in view divergence of practice with regard to apportionment of sale proceeds from disposal/sale of unclaimed/uncleared goods under Section 150 of the Act. It was communicated that the custom duty shall be determined by backward calculation considering the sale proceeds of unclaimed/uncleared goods as the cum-duty price. For calculation of duty, total sale proceeds without allowing any deduction towards sales expenses or any other charge is to be taken as cum-duty price. In view of the Circular issued by the Central Board of Excise & Customs, the custom duty is to be calculated on the sale price and not on the duty as is payable on the date of deemed expiration
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- F of permitted period of warehouse. Such Circular of the Board is binding on the Revenue. Therefore, the custom duty has to be paid on the basis of sale proceeds realised from the sale of the goods kept in a warehouse and not on the basis of the custom duty payable at the time of filing the Bill of Entry or on the date of expiry of permitted period of warehouse. [Paras 16-18]
- G [868-D-H]

Case Law Reference

[1996] 5 Suppl. SCR 77 Held inapplicable Para 3

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4490 A
of 2008.

From the Judgment and Order dated 28.11.2007 of the High Court
of Delhi at New Delhi in W.P. (C) No. 7995 of 2005.

Tushar Mehta, SG, K. Radhakrishnan, Sr. Adv., Mrs. B. Sunita
Rao, Mrs. Neelam Chand, Mrs. Shirin Khajuria, Shankar Devate,
B. Krishna Prasad, Advs. for the Appellants.

Rupesh Kumar, Mrs. Pankhuri Srivastava, Rajeev Sharma,
Ms. Neelam Sharma, Advs. for the Respondent.

The Judgment of the Court was delivered by C

HEMANT GUPTA, J.

1. The order dated 28th November, 2007 passed by the High Court
of Delhi is the subject matter of challenge in the present appeal. Vide
the aforesaid order, the writ petition filed by the respondent was allowed
and the demand raised by the appellants vide letters dated 17th February,
2005 and 19th April, 2005 were found to be without authority of law and,
thus, the appellant was directed to refund a sum of Rs.27,47,146/- together
with interest @12% per annum.

2. One M/s. Kushang Apparel Ltd. had imported CTV kits and
filed six Bills of Entries, all dated 9th February, 2001. Such goods were
permitted by the Custom Department to be kept in warehouse for one
year in terms of Section 59 of the Customs Act, 1962¹ at ICD, Faridabad.
The Bond period expired on 28th February, 2002 but the importer did not
clear the imported goods and also did not pay the rent for the warehouse.
The warehouse issued notices for the recovery of its dues failing which
it will be constrained to sell the imported goods by public auction/tender
sale. With the approval of custom authorities, the imported goods were
put for sale through auction under Section 63(2) of the Act with a valuation
of imported goods at Rs.1,52,04,176/-. However, the goods could not be
successfully sold. The valuation was reduced for the second auction
held on 4th September, 2002 to Rs.1,36,83,759/- and further reduced in
the third auction held on 7th May, 2003 to Rs.54,44,650/-. The highest bid
of Rs. 35 lakhs alone was received. The auction was not confirmed.

¹ for short, 'Act'

- A 3. Thereafter, tender sale was resorted to dispose of the goods in the warehouse. The valuation of the imported goods in the warehouse was fixed at Rs.33 lakhs for which tenders were invited upto 3rd December, 2003. Later, the valuation was reduced to Rs.30 lakhs in the second tender sale up to 31st August, 2004. In this sale process, the highest bid received was of Rs.41,44,555/-.
- B The Assistant Commissioner passed an order on 12th October, 2004 that the goods will not be cleared on ex-bond Bill of Entry as it is not a case of clearance under Section 68 of the Act but on realization of charges under Section 72 of the Act in terms of the judgment of this Court in **Kesoram Rayon v. Collector of Customs, Calcutta**². The sale proceeds will be appropriated as per Section 105 of the Act.

- C 4. Subsequently, on 2nd February, 2005, the Assistant Commissioner of Customs permitted the auctioned goods to be released to auction purchaser on furnishing of bank guarantee in the sum of Rs.27,47,146/- after paying a sum of Rs.2,05,329/- as expenses of sale and payment of
- D Rs.11,92,080/- as duty. The respondent deposited the amount of duty and also furnished the bank guarantee. Subsequently, on 4th March, 2005, the respondent was called upon to deposit remaining amount of Rs.27,47,146/- immediately failing which the bank guarantee was intended to be invoked. Subsequently, on 19th April, 2005, the Additional Commissioner informed the respondent that Chief Commissioner of the
- E Central Excise is of the view that the matter stands settled with the Board's clarification of 17th February, 2005 and the outstanding arrears of custom duty is required to be recovered. The bank guarantee was sought to be invoked which led the respondent to invoke the writ jurisdiction of the Delhi High Court.
- F 5. The High Court allowed the writ petition with the following findings:

- G “16. It appears that on the facts of the present case the occasion to invoke Section 72 (1)(d) would arise only if the goods in respect of which a bond has been executed has not been cleared for home consumption. In such event, the owner of the goods can be asked to pay the entire duty. This obviously does not apply to the warehouse-keeper like the petitioner and no demand of payment for customs duty can be made against the petitioner.

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20. We therefore hold that the Petitioner was justified in recovering the warehousing charges due to it from the auction sale proceeds in terms of Section 63 (2) of the Act. The balance amount deposited with the Government Treasury can be adjusted by the customs department towards part payment of customs duty as computed by it.”

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6. The argument of the learned counsel for the Revenue is that the distribution of sale proceeds has to be in accordance with Section 150 of the Act as there is a specific provision concerning custom duty charges which will have precedence over recovery of warehouse charges under 150(2)(e) of the Act.

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7. Before this Court, learned counsel for the appellants relied upon the judgment of this Court in *Kesoram*. This Court considered Section 15(1)(d) of the Act that if the goods which are not removed from a warehouse within the permissible period (in terms of Section 61) are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty at the rate applicable on the date of their deemed removal from the warehouse. This Court held as under:

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“13. Goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end.

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14. Section 15(1)(b) applies to the case of goods cleared under Section 68 from a warehouse upon presentation of a bill of entry for home consumption; payment of duty, interest, penalty, rent and other charges; and an order for home clearance. The provisions of Section 68 and, consequently, of Section 15(1)(b) apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when, by reason of their remaining in the warehouse beyond the permitted period

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- A or its permitted extension, the goods have been deemed to have been improperly removed from the warehouse under Section 72.

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- B 17. The consequence of non-removal of warehoused goods within the permitted period or the permitted extension is, by virtue of the terms of Section 72, certain. The date on which it comes to end is the date relevant for determining the rate of duty. When the duty is in fact demanded is not relevant. The alternative submission on behalf of the appellants must, therefore, also be rejected.”
- C 8. On the basis of the said judgment, it is contended that the duty payable on the goods imported has to be assessed on the date of deemed removal of goods from the warehouse for home consumption i.e. on the expiry of one year of the warehouse period i.e. 28th February, 2002. Therefore, the custom duty leviable as on that day is to be recovered
- D from the sale proceeds and in terms of Section 150(2) of the Act, the custom duty has to be paid in preference to the warehouse charges. Some of the relevant provisions of the Act read as under:

- E “**Section 63 . Payment of rent and warehouse charges. - (1)**
The owner of any warehoused goods shall pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Principal Commissioner of Customs or Commissioner of Customs.
- F (2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse -keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select.

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Section 71. Goods not to be taken out of warehouse except as provided by this Act. - No warehoused goods shall be taken out of a warehouse except on clearance for home consumption

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or export or for removal to another warehouse, or as otherwise A
provided by this Act.

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Section 150. Procedure for sale of goods and application of

sale proceeds. - (1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner.

(2) The proceeds of any such sale shall be applied – C

(a) firstly to the payment of the expenses of the sale,

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods, D

(c) next to the payment of the duty, if any, on the goods sold,

(d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,

(e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods.” E

9. Learned counsel for the respondent refers to Chapter 21 of Central Board of Excise and Customs Manual relating to disposal of unclaimed/uncleared cargo. The relevant clauses from the Manual read as under: F

“7. Once the goods are sold, the Customs duty on the goods is calculated. For calculation of Customs duty, the sale proceeds from the sale of unclaimed/uncleared goods is taken as cum-duty price (value + duty) and customs duty is calculated working backwards on the price realised. G

Apportionment of sale proceeds of goods:

8. On the unclaimed/uncleared goods, liabilities towards customs duty as well as carrier’s charges and storage charges arise, which H

- A are to be recovered from the sale proceeds. In addition, sales expenses incurred on sale of such goods are to be recovered. In most of the cases, the sale proceeds of such goods may not be sufficient to meet liabilities of all the agencies. In such cases, question arises as to which liability is to be met first. To take care of such a situation, provisions have been made in section 150(2) of the Customs Act. The sale proceeds of any such sale of unclaimed/uncleared goods is to be applied in following manners:
- (a) first, to the payment of the expenses of the sale,
 - (b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the custodians,
 - (c) next to the payment of the duty, if any, on the goods sold,
 - (d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,
 - (e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to Customs.
- After making above-said payments, if any balance remains, that is to be paid to the owner of the goods."
- E 10. Reference is made to another Circular dated 28th November, 2001 issued by the Central Board of Excise and Customs. The Circular reads as under:
- F "A reference was received from the Container Corporation of India (CONCOR) stating that there is a divergence of practice in Custom Houses with regard to apportionment of sale proceeds from disposal/sale of unclaimed/uncleared goods under section 150 of the Customs Act, 1962. It was reported that some Custom Houses determine the Customs duty payable on auctioned goods after deducting the sales expenses from the sale proceeds of the goods whereas other Custom Houses are determining duty on the basis of sale proceeds without allowing any deduction.
- G 2. The matter has been examined. It is clarified that –
- H (a) the Customs duty shall be determined by backward calculation considering the sale proceeds of unclaimed/uncleared goods as

the cum-duty price. For calculation of duty, total sale proceeds without allowing any deduction towards sales expenses or any other charge is to be taken as cum duty price. A

(b) After determination of the Customs duty, sale proceeds of unclaimed/uncleared goods is to be appropriated in the manner as provided in section 150(2) of the Customs Act, 1962. B

3. These instructions may be brought to the notice of all concerned by way of issuance of suitable Public Notice/Standing Order.

4. Difficulties, if any, in implementation of these instruction, may be brought to the notice of the Board. Kindly acknowledge receipt of this Circular." C

11. The issue required to be examined in the present appeal is whether the calculation of the custom duty would be assessed as on the date of the deemed removal of goods from the warehouse in terms of Section 61 as interpreted by this Court in **Kesoram** or on the date of sale for the reason that the importer has failed to seek clearance of the goods imported. D

12. As per the appellants, the right to recover customs duty is superior to the right to recover warehouse charges in terms of Section 150 of the Act and that sale was conducted under Section 72 and not under Section 63 of the Act. If the contention of the Revenue is to be accepted, the custom duty will be much more than the price received in tender sale. However, if the date of calculation of custom duty is treated to be the date of sale, the demand of sum of Rs.27,47,146/- would be untenable. E

13. The appellants have referred to a communication dated 16th April, 2004 wherein the respondent was called upon to clear the goods after the expiry of extended period failing which payment of full amount of duty will be payable together with all rent, penalties, interest and other charges. F

14. **Kesoram** is a case where the importer claimed levy of custom duty which remained in bonded warehouse beyond the permitted period claiming that the duty as is applicable on the date the goods were sought to be removed for home consumption, will be chargeable. This Court found that the goods can be kept in a warehouse in terms of the period specified under Section 61 of the Act and, therefore, Section 68 and H

- A Section 15(1)(b) apply only when the goods were cleared from the warehouse within the permitted period or with permitted extension and not beyond the permitted period or permitted extension.

15. The present case is not a case of levy of custom duty on the importer. The importer has not sought the release of goods within the permitted period of warehouse. Therefore, the judgment in *Kesoram* will not be applicable in respect of the goods to be auctioned on account of failure to seek the release of imported goods by the importer though after the permission from the proper officer.

16. Section 63 of the Act compels the owner of the warehoused goods to pay rent and warehouse charges at the rates fixed under any law for the time being in force or at such rates as may be fixed by the Commissioner of Customs. If the rent or warehouse charges are not paid, the warehouse-keeper is competent to sell the goods or such sufficient portion of the goods as the warehouse-keeper may select after permission from the proper officer. Section 63, thus, is to ensure that the warehouse-keeper recovers the rent or warehouse charges from the importer.

17. Section 150 deals with the distribution of sale proceeds if the goods other than the confiscated goods are sold under any provision of the Act. The Central Board of Excise & Customs had issued a clarification on 28th November, 2001 keeping in view divergence of practice with regard to apportionment of sale proceeds from disposal/sale of unclaimed/uncleared goods under Section 150 of the Act. It was communicated that the custom duty shall be determined by backward calculation considering the sale proceeds of unclaimed/uncleared goods as the cum-duty price. For calculation of duty, total sale proceeds without allowing any deduction towards sales expenses or any other charge is to be taken as cum-duty price.

18. In view of the Circular issued by the Central Board of Excise & Customs, the custom duty is to be calculated on the sale price and not on the duty as is payable on the date of deemed expiration of permitted period of warehouse. Such Circular of the Board is binding on the Revenue. Therefore, the custom duty has to be paid on the basis of sale proceeds realised from the sale of the goods kept in a warehouse and not on the basis of the custom duty payable at the time of filing the Bill of Entry or on the date of expiry of permitted period of warehouse.

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19. Consequently, the present appeal is disposed of with directions to ascertain the customs duty keeping in mind the dispensation indicated in the enabling provisions of the Customs Act, 1962 and Chapter 21 of Central Board of Excise and Customs Manual read with circular dated 20th November, 2011 and adjust the same as per the priority specified in Section 150(2) of the stated Act. Further, if the bank guarantee in the sum of Rs. 27,47,146/- (Rupees twenty seven lakhs forty seven thousand one hundred forty six only) has already been invoked by the appellants, the said amount shall be made over to the respondent in terms of the directions given by the High Court within three months from today after making due adjustments of the proceeds of sale as indicated hitherto.

20. The appeal is disposed of in the above terms with no order as to costs.

Devika Gujral

Appeal disposed of.