



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOMS APPEAL (L) NO. 582 OF 2024

Commissioner of Customs NS-V ... Petitioner

vs.

DOC Brown Industries LLP ... Respondent

AND

CUSTOMS APPEAL (L) NO. 594 OF 2024
WITH
INTERIM APPLICATION (L) NO. 5902 OF 2024

Commissioner of Customs NS-V ... Petitioner

vs.

Rahul Bajaj ... Respondent

AND

CUSTOMS APPEAL (L) NO. 595 OF 2024

Commissioner of Customs NS-V ... Petitioner

vs.

Seema Rubesh Shah ... Respondent

Mr. Karan Adik with Ms. Sangeeta Yadav, for the Applicant/appellant.
Mr. Gopal Mundhra with Mr. Rajat Bharadwaj i/b. Economic Laws
Practice, for the respondents.

CORAM: G. S. KULKARNI &
KISHORE C. SANT, JJ.
Reserved on: 19 March, 2024
Pronounced on: 20 March, 2024

JUDGMENT (Per G. S. Kulkarni, J.)

CUSTOMS APPEAL (L) NO. 582 OF 2024

1. This appeal of the revenue is directed against the order dated 11 May 2023 passed by the Central Excise and Service Tax Appellate Tribunal whereby the respondent's appeal was allowed, by setting aside the order passed by the adjudicating officer (Commissioner of Customs), confiscating the goods and imposing penalties by an Order-in-Original dated 6 April 2022 passed on the show cause notice issued to the respondent.
2. The relevant facts are required to be noted: The respondent filed two bills of entries for clearance of goods described as "Caresmith Wave Body Massager". The concerned officer of the department, on examination of the goods, formed an opinion that the item, as imported by the respondent, is an "Adult Sex Toy", and therefore, was prohibited for import as per the Customs Notification No.01/1964- Customs dated 18 January 1964. On such premise, a show cause notice dated 6 January 2022 was issued to the respondent calling upon the respondent to show cause as to why such goods ought not to be confiscated and penalty imposed including on its partners.
3. The show cause notice was adjudicated by an Order-in-Original dated 6 April 2022 as passed by the Commissioner of Customs, who held that the

import in question was of prohibited goods as per the Customs Notification dated 18 January 1964, hence, the goods were liable for confiscation under Section 111(d) of the Customs Act, 1962.

4. The findings as recorded by the Commissioner are peculiar and clearly appears to be quite astonishing and too far-fetched, when he reduces in writing his vivid imagination on what an equipment for a body massage would be and more particularly on his perception on the perceived uses, in the context of import in question. Apart from this, he also sought expert opinions from a physiotherapist and a gynecologist on the question as to whether the said product is a body massager or an adult sex toy. It appears that such experts clearly opined that although undoubtedly the item as imported was a body massager, however, it was also their opinion that the item could also be used for the purpose which the Commissioner contemplated.

5. Surprisingly, the Commissioner also referred to the provisions of Section 292 (2) of the Indian Penal Code, *inter alia* observing that such item of import would be hit by the said provision, which ordains that a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt

the persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The Commissioner, thereafter, considering the effect of Notification No.1/1964 dated 18 January 1964 issued under the provisions of Section 11 of the Customs Act, proceeded to hold that the import for such reasons would stand covered by Clause (ii) of the said notification, which prohibited import of any obscene book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object. The relevant observations made by the Commissioner in the Order-in-Original are required to be noted which read thus:-

“51.1 From the opinion of the experts both that of the department and importers. I find that it is accepted fact that the goods are in the natures of goods which act as body massagers and capable of and being used as devices as adult sex toys to satisfy basic instincts of people. The subject product is containing as article which falls under category of "Obscene Article" (Sex Toys) packaged in a cloth bag. The box is having a charging cable also. It is seen on Internet, that the item (identical) is being traded on amazon website-<https://www.amazon.in/Caresmith-Massager-Sports-Relidf-Entire/dp/B08CZSD7KF>. The reviews of customers and replies to customer queries by suppliers, like the Customers/users reviews on questions and answers on Caresmith Wave Body Massager are Question:- Is the massager safe to use for women? Also is it washable? Answer by one the customer : Yes safe and washable too. Question: - can this be used for masturbation? Answer by the customer: Yes it can be used just clean it before using confirms that the item is being used as Obscene Article (Sex Toys). Further contention of the importer that since the goods are sold through e-commerce websites like Amazon.in and Flipkart.com the items cannot be prohibited is not tenable as e-commerce companies like Amazon, Flipkart are not competent to decide whether the goods are prohibited or not.

51.2 In this context the provision of S. 292 of the Indian Penal Code reads as.

Section 292 in The Indian Penal Code

For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

51.3 Reference is drawn to Notification No. 1/ 1964 - Customs 18th January, 1964 which reads as :

GSR 87 - In exercise of the powers conferred by section 11 of the Customs Act, 1962 (52 of 1962) and in suppression of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 41- Cus., dated the 1st February, 1963, the Central Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in sub-section (2) of that section, hereby prohibits the import of the following goods, namely:-

1. Counterfeit coin or coin made under the Native Coinage Act, 1876, or Indian Coin, which is not of the established standard in weight or fitness:
2. any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

... ..

51.3 This leads me to conclude that the goods imported viz "Caresmith Wave Body Massager" are being marketed not primarily as a message device but as a sex toy. The purpose is not to be used as a device to provide relief to muscular stress but to provide stimulation and erotic pleasure. Accordingly, I hold that the impugned goods viz., "Caresrnith Wave Body Massager" are Adult Sex Toys and are therefore, prohibited goods which cannot be allowed to be released into the Country for consumption and therefore, are required to be absolutely confiscated."

6. The Commissioner, accordingly, passed the following order:

"55. I find that the importer had mis-declared the description of the goods. The invoice produced at the time of import did not show the correct description of the goods. It appeared that the importer is attempting to smuggle the prohibited goods Sex Toys in guise of "Caresmith Wave Body Massager". The impugned goods are not only visually but also intended to be used as obscene goods. Further, the medical opinion as brought out in foregoing paras also indicate that

these can be used as Sex articles thus, it appears that the goods i.e. "Caresmith Wave Body Massager" imported by importer, Doc Brown Industries LLP vide abovementioned 7 Bills of Entry as per table-1 total declared Assessable value of Rs. 1,74,87,298/- (Rs. One Crore Seventy Four Lakh Eighty Seven Thousands Two Hundred and Ninety Eight only) are liable to confiscation under section 111(d) & section 111(m) of the Customs Act, 1962."

7. The respondent being aggrieved by the Order-in-Original, approached the tribunal in the appeal in question. The tribunal, considering the approach of the Commissioner and the contentions as urged on behalf of the department, severely criticized the findings as recorded by the Commissioner and held that the view taken by the Commissioner was purely the Commissioner's imagination, to categorise the item not as a body massager, but an Adult Sex Toy. It was observed that the sale of body massagers within the national boundaries was not subjected to any prohibition. In discarding the submission of the revenue to that effect, it was observed that the adjudicating authority had appeared to have found a cause to pause for ascertainment of his authority to determine goods as 'obscene' solely in international transactions, while no such restrictions were placed on domestic transactions, on such category of goods. It was observed that the adjudicating authority had made erroneous construction of the words as contained in Clause (ii) of the notification and the stand of the adjudicating officer based on the potential user of the impugned goods to regard the goods as obscene and prohibited, was patently illegal. The tribunal observed that the finding of the adjudicating

authority that the impugned goods merit confiscation was “too wide off the mark”, considering as to what the law would mandate and accordingly allowed the appeal filed by the respondent, observing that the findings of the Commissioner to be totally untenable. It is on the above backdrop, the present appeal has been filed, proposing the question of law which we advert hereinbelow.

8. The revenue has urged the following substantial questions of law for our consideration in the present appeal:-

“1. Whether the CESTAT erred in holding at paragraph 27 of the Impugned Order that "The finding of the adjudicating authority that the impugned goods merit confiscation is, thus, too wide off the mark, as far as the law invoked therein is concerned, on several counts. We note that the 'claim' of the importer has not been controverted and that the adjudicating authority has not placed any evidence on record in support of his conclusion on 'preference' in usage." when clearly the Customs had relied upon several reviews by customers on the website, and also a report by DR. GD POL foundation clearly stated that it can be used as a sex toy and head of NMMC hospital Vashi and also opinion of physiotherapy doctor Miss Prachi Shah who stated that the subject goods will not cause any trauma or harm if it is used as a device for pleasure?

2. Whether the CESTAT erred in holding at Para 28 of the impugned order that "No such judicial determination on 'body massagers' has been relied upon by the adjudicating authority" when the law itself is clear under the Customs Notification 1 / 1964 as issued under Section 11 of the Customs Act 1962 wherein obscene articles are prohibited as per Sr. No. 2 of the notification no. 01/64-Cus dated 18.01.1964 read with section 292 of the Indian Penal Code 1860?

3. Whether the CESTAT erred in holding at Para 31 of the impugned order "That the impugned notification lacked definition of 'obscene' was not unknown to the adjudicating authority is not in doubt as seen from the attempt to fill that gap by reference to deeming provision in the Indian Penal

Code, 1860." when it is mandatory and infact necessary to read the general definition of obscene as laid under Section 292(b) of the IPC 1860 as it also deals with imports?

4. Whether the CESTAT erred in passing a complicated and a convoluted order riddled with complex jargon rather than simply the issue?"

9. We have heard learned Counsel for the parties. We have perused the record.

10. At the outset, we may observe that the entire basis for the Commissioner to regard the goods in question which are 'body massagers' to be adult sex toys appears to be his perception on a reading of the notification No.1/1964 dated 18 January 1964. As on date, such notification is stated to be valid, although it is almost 60 years old. It is quite possible that in regard to some of its contents, the notification may also have lost its efficacy in the contemporary times. Be that as it may, as the said notification was the very foundation to trigger the Commissioner's thoughts on the issue that the goods are prohibited goods in passing the Order-in-Original, we need to note the said notification, which reads thus:-

**"Notification-Customs - Customs - Non Tariff
(Department of Revenue)
Notification No. 1/1964-Customs
(As amended by Notification No. 48/2007 dated 8/5/2007)**

New Delhi, the 18th January, 1964

GSR 87- In exercise of the powers conferred by section 11 of the Customs Act, 1962 (52 of 1962) and in suppression of the notification of the

Government of India in the Ministry of Finance (Department of Revenue) No. 41- Cus., dated the 1st February, 1963, the Central Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in sub-section (2) of that section, hereby prohibits the import of the following goods, namely:-

i. Counterfeit coin or coin made under the Native Coinage Act, 1876, or Indian Coin, which is not of the established standard in weight or fitness:

ii. any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

iii. Omitted

iv. Ormitted

v. goods made or produced beyond the limits of India and having applied thereto any name or trade mark being or purporting to be the name or trade mark of any person who is manufacturer, dealer or trader in India unless-

a. The name of trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of India, and

b. The country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name of trade mark and in the English language:

(vi) piece goods manufactured outside India, such as are ordinarily sold by length or by the piece, if each piece has not been conspicuously marked-

a. with the name of the manufacturer, exporter, or whole-sale purchaser in India, of the goods, and

b. with the real length of the piece in standard yards or standard meters inscribed in the international form of numerals;

(vii) Ormitted

(viii) goods which are required by a notification under section 139 of the Trade Marks Act, 1999, to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer or the person for whom the goods were manufactured uness such goods show such indication applied in the manner specified in the notification;

(ix) cotton yarn manufactured outside India, such as is ordinarily imported in bundles, if each bundle containing such yarn has not been

conspicuously marked-

a. with the name of the manufacturer /exporter, or whole-sale purchaser in India, of the goods, and

b. with an indication of the weight and the count of the yam contained in it, accordance with the rules made under section 82 of the Trade Marks Act, 1999

(x) cotton sewing, darning crochet or handicraft thread manufactured outside India, if each of the units in which the thread is supplied has not been conspicuously marked-

a. with the name of the manufacturer, exporter, or whole-sale purchase in India, of the goods, and

b. with the length or weight of the thread contained in it and in such other manner as is required by the rules made under section 82 of the Trade Marks Act, 1999.

(No.1 Cus/F.No.4/10.63Cus.VIII)

S.VENKATESAN
Dy.Secretary

(Clauses (iii), (iv) and (vii) has been omitted; by Notification No. 48/2007 dated 8/5/2007)

(In clause (viii), for the words and figures" section 117 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 139 of the Trade Marks Act, 1999" has been substituted; by Notification No. 48/2007 dated 8/5/2007)

(In sub-clause (b), for the words and figures" section 75 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 82 of the Trade Marks Act, 1999" has been substituted, by Notification No. 48/2007 dated 8/5/2007)

(In sub-clause (b), for the words and figures" section 75 of the Trade and Merchandise Marks Act, 1958," the words and figures" section 82 of the Trade Marks Act, 1999" has been substituted; by Notification No. 48/2007 dated 8/5/2007)"

(emphasis supplied)

11. The only relevant portion of the aforesaid notification is the underscored portion being Clause (ii), as referred by the Commissioner to label

the goods as prohibited. Such clause prohibits import of the goods, namely, any obscene book, pamphlet, paper, drawing, painting, representation, figure or article. Necessarily, in our opinion, the different items as set out in Clause (ii) are required to be read *ejusdem generis*. These machines like massagers certainly cannot be compared with the companion items in the said entries which are in the nature of book, pamphlet, paper, drawing, painting, representation, figure or article, etc.

12. This apart, we are in complete agreement with the findings as recorded by the tribunal that it was totally unwarranted and in our opinion, perverse for the Commissioner to take recourse to clause (ii) of the said Notification to regard the goods in question as prohibited goods, for more than one reason. Firstly, it was clearly the figment of the Commissioner's imagination and/or his personal perception that the goods are prohibited items. This was far from the legal consequence as brought about by the notification that the goods could be so categorized. We may add that such thinking of the Commissioner was beyond anybody's control. The notification also could not have supported such perception of the Commissioner when he regarded the goods as obscene. As rightly observed by the tribunal, and obviously as body massagers being traded in the domestic market, were not regarded as prohibited items, was certainly a relevant consideration.

13. Further and most significantly the very foundation of the objection of the Commissioner being on the basis of an imaginary / probable use of the goods, for the purposes as opined by him, raises more complications. If the test of mere imagination or ingenuity is to be applied to prohibit clearance of any goods, this would cross all boundaries of the customs officials being governed by law and the rules. In the facts of the present case, the Commissioner (adjudicating officer) has failed to act as a prudent official who would be expected to act reasonably in deciding the issues of clearance of goods in question, which ought to have been strictly in accordance with law. Any perverse application of law would fall foul of the rules of legitimacy and fairness expected from a quasi judicial authority. Such approach of the Commissioner has been rightly criticized by the tribunal. If what was observed by the Commissioner in the order-in-original is accepted to be the only test, it would amount to accepting personal views of the officer which would be something unknown to law. Such approach is certainly not permissible. We also say this in the context of the opinions which were gathered by the Commissioner. These experts invited by the department clearly opined that the goods in question were body massagers which could be subjected to other uses. Thus, merely because the goods can be subjected to an alternative use, of the nature, as the Commissioner contemplated, this can never be the test to hold that the goods were prohibited, when they otherwise satisfied the test of

goods, which could be imported and sold. Thus, there was no material before the adjudicating officer, to categorize the goods under clause (ii) to be any obscene book, pamphlet, paper, writing, drawing, painting, representation, figure or article, and of objectional description, falling under the notification. Such view of the Commissioner was patently perverse.

14. In the light of the aforesaid discussion, we are of the clear opinion that no substantial question of law would arise for our consideration as raised on behalf of the Revenue. The tribunal is correct in its view when it set aside the orders passed by the Commissioner. The appeal is without merit. It is accordingly rejected.

15. Dismissed. No costs.

Customs Appeal (L) No. 594 of 2024 & Customs Appeal (L) No. 595 of 2024

16. These companion appeals are of the partners of M/s. Doc Brown Industries LLP who were aggrieved by an order imposing penalties by the adjudicating officer. In view of our aforesaid judgment confirming the order passed by the tribunal in the revenue's appeal against the firm, the present appeals are also required to be rejected. They are rejected for the reasons we have set out in deciding the aforesaid appeal against the revenue and in favour of the firm.

17. Dismissed. No costs.

18. In view dismissal of Customs appeal (l) No.594 of 2024, pending Interim Application (L) No.5902 of 2024 would not survive. It is accordingly disposed of.

(KISHORE C. SANT, J.)

(G. S. KULKARNI , J.)