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

CUSTOMS APPEAL NO. 100 OF 2012
WITH
CUSTOMS APPEAL NO. 101 OF 2012

M/s. Amritlakshmi Machine Works]
having its office at 103, Neelam Centre,]
'A' wing, 1st Floor, Hind Cycle Road,]
Near T. V. Industrial Estate, Worli,]
Mumbai 400 030.] .. Appellant.

V/s.

The Commissioner of Customs (Import)]
having his office at New Custom House,]
Ballard Estate, Mumbai 400 038.] .. Respondent.

WITH
CUSTOMS APPEAL NO.102 OF 2012
WITH
CUSTOMS APPEAL NO.103 OF 2012

Mr. N. K. Bramchari]
Managing Partner, M/s. Amritlakshmi]
Machine Works, 103, Neelam Centre,]
'A' wing, 1st Floor, Hind Cycle Road,]
Near T. V. Industrial Estate, Worli,]
Mumbai 400 030.] .. Appellant.

V/s.

The Commissioner of Customs (Import)]
having his office at New Custom House,]

Ballard Estate, Mumbai 400 038.] .. Respondent.

Mr. Naresh Thacker with C. Nanda and Mr. Chirag Shetty, for the Appellants.
Mr. A. S. Rao i/b. S. D. Bhosale, for the Respondents.

CORAM: M.S.SANKLECHA,
M.S.SONAK &
G.S.KULKARNI, JJJ.

RESERVED ON: 28th OCTOBER, 2015
PRONOUNCED ON : 29th JANUARY, 2016.

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

This Full Bench has been constituted on a reference made on 23rd April, 2015 by a Division Bench of this Court in ***Amritlakshmi Machine Works & Others v/s. The Commissioner of Customs (Import)***[1]. This reference has arisen when the Division Bench in Amritlakshmi Machine Works (supra) was considering four appeals (two by the partnership firm and two by its managing partner) under Section 130 of the Customs Act, 1962 (the Act) from a common order dated 7th May 2012 of the Customs, Excise Service Tax Appellate Tribunal (Tribunal). All the four appeals raised the following substantial question of law:-

> *" Whether the Tribunal has erred in imposing simultaneous penalties on both partners and partnership firm?"*

This reference arose as in the view of the Division Bench in Amritlakshmi Machine Works (supra) there was a cleavage of opinion on the above issue between the decisions of two Division Benches of this Court. In ***Texoplast Industries v/s. Additional Commissioner of Customs***[2] the Division Bench answered the above question in the negative

1 303 ELP 161
2 272 ELT 513

i.e. in favour of the Revenue while in ***Commissioner of Customs (EP) v/s. Jupiter Exports***[3] the Division bench answered the above question in the affirmative i.e. in favour of the Appellant-Assessee.

2 In view of the above conflict, the following questions have been referred to us for our opinion:-

> *"(a) Whether under the Customs Act, 1962 and particularly in exercise of the powers conferred by Section 112(a) thereof, simultaneous penalties on both the Partner and Partnership firm can be imposed?*
>
> *(b) Whether, the judgment in the case of Commissioner of Customs (E.P.) v/s. Jupiter Exports reported in 2007 (213) E.L.T. 641 (Bom.), holding that separate penalty on a partnership firm and a partner cannot be imposed, lays down the correct law or whether, as held by the later Division Bench in the case of Texoplast Industries v/s. Additional Commissioner of Customs reported in 2011 (272) E.L.T. 513 (Bom.) it is permissible to impose penalty separately on a partnership firm and a partner particularly in adjudication proceedings under the Customs Act, 1962?."*

3 The bare facts which arose before the Division Bench in Amritlaxmi Machine Works (supra) are set out in its order. The order of the Division Bench referred to the facts emanating from one of the two show cause notices (both of which are identical) leading to four appeals (two by the firm and two by the partner) and are reproduced in verbatim as under:-

> *"4:- The facts necessary to appreciate this question are that the Appellants are, inter alia, engaged in the manufacture of textile machines. The Appellants applied for and were granted Value Based Advance License No. 03014593 dated 22-11-1996 against*

3 213 ELT 641

which the Appellants were, inter alia, permitted to import 248 pieces of ball bearings valued approximately at Rs.9 lacs within the overall value of Rs.50,05,468/-. It is stated that sometime in February, 1997 the Appellants discharged their export obligation and therefore, the said license became transferable. As the Appellants were not able to import any goods under the said license for the initial validity period, the Appellants requested for extension of the validity period of the said license. A part of the said license was utilized by importing two consignments vide Bill of Entry filed in January, 1997 and August, 1998, respectively. The validity of the said license was extended up to 21-5-1999 and the value thereof was reduced by the office of the Joint Director General of Foreign Trade, Mumbai to Rs.43,41,140/- leaving an unutilized balance of Rs.27,32,557/-;

5 The information was received by officers of the Directorate of Revenue Intelligence, Mumbai Zonal Unit that several consignments of Bearings have been imported in the names of M/s. Hiral Overseas, M/s. Ankit International, M/s. Nippon Bearings Pvt. Ltd. M/s. M. M. Corporation, M/s. Nippon Bearings (India), M/s. S.N.M. Enterprises, M/s. Devanti Overseas and a few other firms. The bills of entry for all these goods have been filed by certain Custom House Agent. The clearance of the goods was sought against a duplicate Advance License No. 0111434 dated 22-11-1999 issued in the name of M/s. Amrit Laxmi Machine Works and transferred in the names of these firms and that this duplicate advance license was issued against the original license No. 03014593 dated 28-11-1996. The limits of this license and terms thereof are referred to and it is alleged that in the light of information received, the bills of entry were collected, documents were scrutinized and which reveal details of the transaction. The details of good covered by another 29 bills of entry are referred to and in the light of further disclosures, what has been alleged is that M/s. Amrit Laxmi Machine Works, Khar, Mumbai, the license holder and Shri N. Nagdutt Bramhachari, Directo of the license holding firm for the advance license No. 0111434 dated 22-11-1996 read with license No. 03014593 dated 28-11-1996 have caused the obtaining of the advance license duplicate copy of the advance license, amendment to the list attached to the license so as to cover the goods which were not used in the export product and

made misrepresentation in obtaining duplicate copy of the license. But, for the said license being obtained in the manner in which it has been so obtained fraudulently, based on misrepresentation/ false documents, the clearance of goods free of duty would not have been considered and allowed by the Customs. They have thereby abetted the doing or omitted the doing of such acts which have been rendered the goods covered by this notice liable to confiscation under the provisions of Section 111 of the Customs Act, 1962. They have, therefore, rendered themselves liable to action under the provisions of Section 112(a) and/or Section 112(b) of the Customs Act, 1962;

6 Accordingly, a show cause notice was issued calling upon M/s Amrit Laxmi Machine Works, the license holder and others, as to why 2033 pieces of Bearings as detailed in the notice should not be confiscated under the provisions of Section 111(d) of the Customs Act, 1962 read with the Foreign Trade (Development & Regulation) Act, 1992 and under Section 111(m) of the Customs Act, 1962; and without prejudice to above for the reasons of liability to confiscation of goods under Section 111 as to why penalty under Section 112(a) and/or 112(b) of the Customs Act, 1962 should not be imposed on each of them;

7 The show cause notice was, therefore, taken up for adjudication by the Commissioner of Customs (Adjudication), Mumbai and he confirmed the demand to the extent indicated therein. He imposed penalty under Section 112(a) of the Customs Act, 1962 on the following persons:

(a) M/s. Amrit Laxmi Machine Works : Rs. 15 lacs,
(b) Mr. N. Nagdutt K. Brahmachari : Rs. 5 lacs.

8 This order of adjudication of the Adjudicating Authority was challenged before the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai and by the impugned order dated 7-5-2012, the Appeal of the Appellant has been dismissed."

4 Being aggrieved by the impugned order dated 7th May 2012 of the Tribunal, the Appellant-firm and its partner had preferred two appeals each under Section 130 of the Act arising out of two separate

show cause notices. The substantial question raised in the four appeals to this Court is the jurisdiction of the Authorities under the Act to ***impose*** simultaneous penalties both upon the partnership-firm and its managing partner under Section 112(a) of the Act.

5 Before the Division Bench, the Appellant contended that in view of the decision of this Court in Jupiter Exports (supra) it was not open to the Authorities under the Act to impose simultaneous penalties upon the Appellant-firm and the Appellant-partner of the firm. This is so as this court in Jupiter Exports (supra) has held that when a penalty is imposed upon the partnership firm, separate penalty cannot be imposed upon the partner of the firm. As against the above, the Revenue contended that in view of the later decision of this Court in Textoplast Industries (supra) rendered after considering the decision in Jupiter Exports (supra), simultaneous penalties are imposable upon both the partnership firm and its partner under Section 112(a) of the Act.

6 The Division Bench in Amritlakshmi Machine Works (supra) observing the apparent conflict between the decisions rendered by the two Division Benches in Jupiter Exports (supra) and Textoplast Industries(supra) referred the above questions to the Hon'ble the Chief Justice. This for constituting a larger Bench of this court so as to resolve the conflicting views of the two earlier Division Benches.

7 It is in the above context that the two questions as formulated herein above have been referred by the Hon'ble the Chief Justice for consideration of this Court.

8 On reading of the questions framed for our consideration,

the counsel for the parties jointly submit that it is clear that the answer to question no. 2 is inter alia dependent upon our answer to question no.1. This is so as for the purposes of opining on question no.1, we would have to consider the two decisions of this Court in Jupiter Exports (supra) and Textoplast Industries (supra) and in that context also decide whether they are reconcilable and if not, which of the two views is the correct view or is there a third view in the context of Section 112(a) of the Act. Thus, inherent in answering Question No.1, we would have to necessarily answer Question No.2. In the circumstances no separate submissions were made in respect of each of the Questions but while making submissions on Question No. 1, submissions were also made in respect of Question No.2. Thus our discussions on the two questions are not segregated question wise, but are clubbed.

9 Mr. Thakkar, learned Counsel appearing for the Appellant in support of the proposition that penalty cannot be imposed simultaneously upon a partnership-firm and its partners under Section 112(a) of the Act submits as under:-

(a) The issue of jurisdiction under Section 112(a) of the Act to impose simultaneous penalties upon the partnership-firm and its partners stands concluded by the decision of this Court in Jupiter Exports (supra) holding that it cannot be done. This decision is binding. Subsequent decision of this Court in Textoplast Industries (supra) ought to have followed the binding decision of this Court in Jupiter Exports (supra). The subsequent decision of this Court in Textoplast Industries (supra) has incorrectly applied the decision of the Apex Court in ***Standard Chartered Bank v/s.***

Directorate of Enforcement[4] which was rendered in the context of the Foreign Exchange Regulation Act, 1973 (FERA), and would have no application while interpreting Section 112(a) of the Act;

(b) The scheme of the Act and FERA are entirely different. The Act unlike FERA is divided into different chapters and certain provisions/ sections of the Act, are made applicable only to a particular chapter. This chapterization is significantly absent under FERA. Therefore the provisions/ sections of FERA are not restricted in its application. Thus though Section 140 of the Act appears to be identical to Section 68 of FERA, it is not. This is so as the width of application of Section 140 of the Act is restricted. Evident from the fact that Section 140 of the Act is applicable only to offences under Chapter XVI of the Act which when contrasted with Section 138B of the Act, which is also a part of Chapter XVI is made applicable across the Act. Thus, the provisions of Section 140 of the Act have to be restricted in its application;

(c) It was submitted that Chapter XVI of the Act applies to offences and prosecution alone as evident from the heading of the Chapter XVI of the Act. In contrast Chapter XIV of the Act (Section 112 is a part thereof) deals with confiscation of goods and imposition of penalties and not with offences as specified in Chapter XVI of the Act;

(d) In any view, it is submitted that on a plain reading of Section 112(a) of the Act, no penalty is simultaneously imposable upon the

4 197 ELT 80

partnership-firm and its partners. The penalty under Section 112(a) of the Act is imposable upon a person also who does or omits to do any act which renders the imported goods liable to confiscation. A person not being defined under the Act, has to be understood as defined in the General Clauses Act and would include a partnership-firm. However, a firm is not distinct from its partners. A firm name is merely a compendious name to describe all the partners. This is so for the reason that the partnership-firm is not a separate legal entity. Thus, once penalty is levied upon the partnership-firm, it would tantamount to imposing a penalty upon each of the partners individually in respect of same offence. Therefore imposition of penalty once more on the individual partner is not warranted; and

(e) Imposition of penalty separately upon the partnership-firm and the partners for the same contravention would amount to double jeopardy/ penalty. Therefore, it is submitted that such imposition of double penalty is not sustainable in the face of Article 20(2) of the Constitution of India.

10 Per contra, Mr. Rao, learned Counsel appearing for the Revenue in support of its contention that penalty under Section 112(a) of the Act is imposable on the Partnership-firm and the partners simultaneously, submits as under:-

(a) The reference to a Full Bench by the Division Bench in Amritlaxmi Machine Works (supra) was not called for. This for the reason that there is only one decision holding the field in respect of imposition of simultaneous penalties upon the Partnership-firm and its partners and that is the decision of the Division Bench in

Textoplast Industries (supra). It is submitted that this Court in Jupiter Exports (supra) was not called upon to deal with the issue of simultaneous penalties upon the Partnership-firm and the partners. Thus no referable question arises for consideration by this full Court;

(b) The entire issue of simultaneous penalties upon the partners and the partnership-firm stands concluded not only by the decision of the Apex Court in Standard Chartered (supra) but also by an earlier decision of the Apex Court in **Agarwal Trading Corporation v/s. Assistant Collector of Customs**[5]. The Supreme Court while construing the erstwhile Sea Customs Act, has held that penalty can be imposed upon the partnership-firm and also on the partners in-charge of the business of the firm. In view of the above, it is submitted that the decision of the Apex Court concludes the issue in favour of the Revenue;

(c) Attention was invited to Section 112 of the Act which empowers imposition of penalty on any person. It is emphasized that the penalty is not restricted to only the importer. Therefore, where under the Customs Act, the Partnership-firm is an importer who has filed a bill of entry, it can be visited with penalty in its capacity as an importer. This is so as a firm is a person as defined under the General Clauses Act, 1897. A partner of the Partnership-firm can be visited with penalty along with the firm under the Act. This is so as a partner is a person different from the importer i.e. the partnership-firm. Section 112 of the Act does not restrict the number of persons on whom penalty can be imposed; and

5 13 ELT 1467

(d) The application of the decision of the Apex Court in Standard Chartered (supra) while dealing with Section 68 of the FERA is apposite while considering Section 140 of the Act. This is so as in fact, there is no difference in the scheme of FERA and the Act particularly with regard to Section 140 of the Act and Section 68 of FERA. The penalty which is imposed under Section 112(a) of the Act is in respect of goods which are liable for confiscation under Section 111 of the Act. The goods which are liable for confiscation under Section 111 of the Act arises out of acts which would also amount to an offence for the purposes of Chapter XVI of the Act and provided under Section 135(1)(a) of the Act. Thus, the provisions of Section 140 of the Act could be read into Section 112(a) of the Act while invoking the same for the purpose of imposition of penalty upon the partners as well as the firm.

11 For proper appreciation of the submissions made by the Counsel before us, it would be necessary to extract the relevant provisions of the Act, FERA, Partnership Act and General Clauses Act, which are as under:-

Customs Act:-

CHAPTER - I

"Section 2- Definitions – In this Act, unless the context otherwise requires, -

(26):- *"Importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer."*

(33):- *" Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."*

CHAPTER -XIV

CONFISCATION OF GOODS AND CONVEYANCES AND IMPOSITION OF PENALTIES

111:- Confiscation of improperly imported goods, etc. *- The following goods brought from a place outside India shall be liable to confiscation:-*

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c)of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded

from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) [any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54];

(n) any dutiable or prohibited goods transitted with or without transhipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under

this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IV-A or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]

112:- Penalty for improper importation of goods, etc.-
Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,shall be liable,-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods are or five thousand rupees], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is the greater-

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereinafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and

(iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees],whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest].”

CHAPTER – XVI

OFFENCES AND PROSECUTIONS

135:- Evasion of duty or prohibitions- *(1) Without prejudice to any action that may be taken under this Act, if any person -*

(a) is in relation to any goods in any way knowingly concerned in mis-declaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be; or

(c) and (d) …. …. …. …. ….

138B:- Relevancy of statements under certain circumstances – *(1) …. …. …. …. …. ….*

2 The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.”

140:- Offences by companies- *(1) If the person committing an offence under this Chapter is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Chapter if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The Foreign Exchange Regulation Act, 1973

"Section 50:- Penalty *- If any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of section 18, section 18-A] and clause (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).*

"56:- Offences and prosecutions.—

(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of [section 18, section 18-A], clause (a) of sub-section (1) of section 19, sub-section (2) of section 44 and sections 57 and 58], or of any rule, direction or order made thereunder he shall, upon conviction by a Court, be punishable, —

(i) …. …. …. ….
(ii) …. …. …. ….
(2) to 6 …. …. …."

"68:- Offences by companies *– (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly;*

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section(1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

General Clauses Act, 1897

GENERAL DEFINITIONS

3. Definitions – In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context -

(1):- *"abet", with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code."*

42:- *"person" shall include any company or association or body of individuals, whether incorporated or not."*

Indian Partnership Act, 1932-

CHAPTER – II

THE NATURE OF PARTNERSHIP

"Section 4:- Definition of *"partnership",* "partner", "firm" and "firm name" - "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the 'firm name'."

CHAPTER – IV

RELATIONS OF PARTNERS TO THIRD PARTIES

"25. **Liability of a partner for acts of the firm -** Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

26. **Liability of the firm for wrongful acts of a partner.**— Where, by the wrongful act or omission of a partner acting in

> the ordinary course of the business of a firm, or with the authority of his partners, loss or *injury* is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner."

12 At the very outset, Mr. Rao, learned Counsel appearing for the Revenue contends that the entire basis for referring the questions to the Larger Bench, arises out of a fundamental error in concluding that there is a difference of opinion in the two decisions rendered by the Division Benches of this Court in Jupiter Exports (supra) and Textoplast Industries (supra). It is submitted that in the case of Jupiter Exports (supra), though the Court did observe that it is well settled that simultaneous penalties cannot be imposed upon the partnership-firm and its partners, the same was in fact, not a question raised in the appeal before it. The questions raised before this Court in Jupiter Exports (supra) were as under:-

> *"(a) Whether exports made by manipulating and forging the documents and creating false records and exporting items other than that declared in the shipping bill are liable for confiscation?*
>
> *(b) Whether the license obtained by manipulation and forging the documents for creating false record so that the requirement of the DEEC scheme is fulfilled, is valid and legal?*
>
> *(c) Whether the license holder or the transferee of the license obtained by manipulation and forging documents are entitled to import validly, illegally and exempted from payment of duty?"*

It is, therefore, submitted that the issue of simultaneous penalties upon the partnership-firm and its partners was not an issue for consideration by the Court in Jupiter Exports (supra). Consequently, there

is only one decision on the issue of imposing simultaneous penalties upon the partnership-firm and its partners under Section 112(a) of the Act i.e. the decision of the Division Bench in Textoplast Industries (supra). Thus no referable question arises and should be returned unanswered in the absence of any conflict.

13 We have considered the above submission and find the same unacceptable for the following reasons:-

(a) The Division Bench in Textoplast Industries (supra) proceeded on the basis that the decision rendered in Jupiter Exports (supra) could not be followed as the same was contrary to the law laid down by the Supreme Court in Standard Chartered (supra). This was as the decision of the Apex Court in Standard Chartered(supra) was not brought to the notice of the Division Bench in Jupiter Exports(supra). Thus, even the Division Bench in Textoplast Industries (supra) proceeded on the basis that the issue for consideration before it was also a subject matter of consideration before the Court in Jupiter Exports (supra). It did not hold that the decision of the Division Bench in the Jupiter Exports (supra) with regard to imposition of simultaneous penalties were mere obiter and/or observations and therefore did not lay down the law on the issue;

(b) Moreover even before the Division Bench in Amritlaxmi Machine Works (supra), the Revenue had not contended that the decision in Jupiter Exports (supra) was in the nature of obiter to the extent of its observation that simultaneous imposition of penalties upon the

partner and its partnership-firm is not permissible. The possible reason for not canvassing the aforesaid view before the Division Bench in Amritlaxmi Machine Works (supra) was that the observations of the Court in Jupiter Exports (supra) were rendered in the context of the submission made on behalf of the Revenue that the order of the Tribunal be set aside in its entirety and the order of the Commissioner of Customs be restored. The order of the Commissioner of Customs had, inter alia, imposed simultaneous penalties upon the partnership-firm and its partners. The appeal filed by the firm(importer) and its partners before the Tribunal in Jupiter Exports (supra) was allowed to the extent it imposed simultaneous penalties upon the partnership-firm and its partners. The Revenue had carried the issue in appeal before this Court and albeit the questions as framed before the Division Bench of this Court did not raise the issue of simultaneous penalties being imposed upon the partnership-firm and its partners yet, in the context of the submissions made before it, the Court gave its findings on the issue viz. simultaneous penalties not being imposable. Therefore to the above extent, the order of the Commissioner of Customs which was sought to be restored by the Revenue, could not be done, in its entirety. Thus, it cannot be now urged by the Revenue that the issue did not arise for consideration before the Division Bench of this Court in Jupiter Exports (supra); and

(c) In any case, the Division Bench of this Court in Amritlaxmi Machine Works (supra) was certainly of the view that the later

Division Bench's decision in Textoplast Industries (supra), was not acceptable in view of the distinction made therein for not following the decision of this Court in Jupiter Exports (supra). The occasion to refer a question of law to the Larger Bench need not emanate only on account of difference of opinion between two Co-ordinate Benches but could also arise where a Bench of the Court is unable to subscribe to the earlier view of a Bench of equal strength of the same Court (See **UOI v/s. G. S. Grewal**[6]**.**) Thus the questions as framed for our opinion, does require consideration.

14 We shall now examine the submissions made by Counsel in support of and against the proposition that simultaneous penalties cannot be imposed upon the partnership-firm and its partners under Section 112(a) of the Act. However, before we examine the submissions, it would be useful to broadly refer to the scheme of the Act.

15 The charge of Customs duties under the Act as provided in Section 12 of the Act is on the goods imported into or exported from India. It has nothing to do with the persons importing or exporting the goods unless exemption is granted under Section 25 of the Act from the duties of Customs on the basis of the character of the person importing and/or exporting the goods. Nevertheless, the entire process of assessing the import/ export goods to duties of Customs is initiated by the person who is importing/ exporting the goods. The basic requirement for a person to import/export goods, is an allotment of Import-Export Code (IEC) number by the Director General of Foreign Trade (DGFT). On the basis of the IEC number, a person can initiate the process of filing a Bill

6 2014(7)SCC 303

of Entry in case of import goods and a Shipping Bill in case of export goods. In the present facts, we are concerned with imported goods. Therefore, a person who files a Bill of Entry in respect of imported goods is an importer as defined in Section 2(26) of the Act i.e. any person who has at any time between the import of goods and clearance for home consumption includes the owner of the goods or any person holding himself out to be an importer. Thus, the bill of entry is filed by the importer under Section 46 of the Act and the same is assessed to duty under Section 17 of the Act by a proper Officer of the Customs after being satisfied that the goods being imported, are not prohibited goods liable for confiscation under Section 111 of the Act. It is only then that the Assessing Officer passes an order, allowing clearance of the goods for home consumption either from the Customs Station i.e. Docks, Air Port and/or from the ware-house where the goods have been stored.

16 So far as penal provisions under the Act are concerned Chapter XIV of the Act provides for confiscation of improperly imported goods and conveyances and imposition of penalties. The bare reading of Section 111 of the Act which is a part of Chapter XIV of the Act indicates all acts and/or omissions which would render the goods being imported liable for confiscation as they would become prohibited goods as defined under Section 2(33) of the Act. This action under Section 111 of the Act is an action against the offending goods alone. Section 112 of the Act provides for imposition of penalty in respect of persons concerned with the import of offending goods which are hit by Section 111 of the Act. Section 112(a) of the Act which concerns us, makes any person who has done or omitted to do any act or abets the doing or omitting the doing of

any act which would render the imported goods liable for confiscation under Section 111 of the Act liable to penalty. Section 112(b) of the Act provides for imposition of penalty when any person acquires possession of the offending goods or is concerned with carrying, depositing, concealing, selling or dealing with goods which he knows or has reason to believe are liable to confiscation under Section 111 of the Act. Thus the liability under Section 112(a) of the Act is a strict liability (save and except in case of abetment). While the liability under Section 112(b) of the Act requires knowledge before a person can be visited with penalty. So far as Section 112(a) of the Act is concerned there are two classes of persons liable for penalty there under, one a person who does or omits to do any act which renders the goods liable for confiscation and the other is a person who abets the doing of any act or omission to do any act which renders the goods liable for confiscation under Section 111 of the Act. It thus attempts to bring in persons who are not directly concerned but even indirectly concerned with the illicit importation within the scope of penal provision of Section 112 (a) of the Act. Thus, these proceedings under Section 112(a) and (b) of the Act are in personam. The Act provides in Chapter XIV thereof that before any order in respect of confiscation of goods and/or imposition of penalty is passed, an entire adjudicatory process as provided in Sections 122 to 126 of the Act is followed. This ensures issue of appropriate show cause notice, hearing and passing of an appealable order.

17 The Act besides having provided for the above quasi judicial adjudicatory process for confiscation and penalty as a part of Chapter XIV of the Act also deals with Offences and Prosecutions under Chapter XVI of

the Act. It specifies various offences to which Chapter XVI of the Act applies. Section 135(1) of the Act which is a part of Chapter XVI of the Act provides without prejudice to any other action that may be taken under the Act, for offences in case of imported goods, at the pain of imprisonment of the person concerned.

In fact Section 135(1)(a) states that if any person in relation to any goods, is in any way, knowingly concerned in mis-declaration of value or fraudulent evasion of duty or of any prohibition under the Act or any other law for the time being in force in respect of such goods (Covers cases falling under Section 112(a) of the Act with the additional requirement of *mens rea*);

While Section 135(1)(b) covers cases of persons who are knowingly concerned with acquiring, possessing, carrying, depositing, harbouring keeping, selling or purchasing or dealing with goods which he knows or has reason to believe are liable for confiscation under Section 111 of the Act. (Covers cases falling under Section 112(b) of the Act);

Satisfaction *inter alia* of any the above two sub clauses is an offence for the purposes of Chapter XVI of the Act. However, knowledge is a *sine-qua-non* for applicability of any of the two provisions. The words in Section 135(1)(a) of the Act are very wide viz. *"in any way knowingly concerned in"*. Section 140 which is a part of Chapter XVI of the Act, provides that where an offence is committed under Chapter XVI of the Act is a company which by an explanation thereto includes a partnership firm, then every person who was at the time when the offence was committed was the Officer in-charge of and/or responsible to the Company and/or Firm for its conduct, shall be deemed to be guilty of the

offence and be proceeded accordingly. This of course is subject to a caveat that where such director/partner is able to establish/prove that the offence has been committed without his knowledge, then the prosecution must fail. Thus, criminal prosecution can be initiated against the partnership-firm and its partner as prescribed in Chapter XVI of the Act.

18 From the aforesaid Scheme of the Act with regard to import of goods, it is clear that though the charge under the Act is on import/export of the goods, action can be initiated against offending goods which fall foul of Section 111 of the Act and also on any person whose act or omission to act has rendered the goods falling foul of Section 111 of the Act. Thus, the penalty under Section 112(a) of the Act is not restricted to only such a person who has filed a bill of entry i.e. the importer but includes within its scope any other person who acts or omits to do any act rendering such goods liable for confiscation, including one who has abetted the act or omission. Further, the Act provides not only for quasi judicial proceedings for imposition of penalty on the person and confiscation of goods in case they offend Section 111 of the Act but also for prosecution in criminal proceedings in Court of law under Chapter XVI of the Act. The criminal proceedings are subject of course to satisfying the additional requirement of doing the act or omitting to do the act with knowledge of the goods becoming liable for confiscation. It should be noted that Section 127 of the Act, which is a part of Chapter XIV of the Act provides that any action taken under Chapter XIV of the Act shall not bar/affect any proceedings taken under Chapter XVI of the Act. Thus, the Act itself provides for parallel proceedings for imposition of penalty under the Act and for prosecution under the Criminal Procedure Code, 1973 in

terms of Chapter XVI of the Act. This is permissible and not hit by double jeopardy as held by the Apex Court in **Union of India v/s. Purshottam**[7] This is for the reason that the concept of double jeopardy would only apply to successive punishment of criminal character.

19 It was firstly contended on behalf of the Appellant that the issue is covered by the decision of the Division Bench of this Court in Jupiter Exports (supra). The subsequent decision of this Court in Textoplast Industries (supra) has incorrectly applied the decision of the Apex Court in Standard Chartered Bank (supra) to read the provisions of Section 140 of the Act into Section 112(a) of the Act. This is particularly so as according to the appellant when the decision in Standard Chartered Bank (supra) was rendered in the context of FERA provisions. It is submitted that not only the scheme of the Act and FERA are different as is evident from the division of various Sections of the Act into different chapters of the Act unlike FERA. Besides the differences in the language employed in Section 140 of the Act and Section 68 of FERA. Thus the interpretation put by the Apex Court on Section 68 of FERA cannot be applied to Section 140 of the Act. This is contested by the Revenue who submit that there is, in fact, no distinction in the scheme of FERA and the Act in the context of Section 140 of the Act and Section 68 of FERA. Therefore, the application of the decision of the Apex Court in Standard Chartered Bank (supra) while dealing with Section 68 of the FERA is appropriate while considering Section 140 of the Act. It is submitted that the absence of Chapterisation in FERA is not such a difference as would warrant ignoring the principles laid down by the Apex Court while dealing

7 2015 (3) SCC 779.

with FERA. It is submitted that the basis of the penalty under the FERA is contravention of its provisions while basis of the proceedings under Section 140 of the Act, is committing an offence under the provisions of Chapter XVI of the Act. The penalty which is imposed under Section 112(a) of the Act is in respect of goods which are liable for confiscation under Section 111 of the Act, which is also an offence.

20 We note that it is undisputed that the decision in the case of Standard Chartered Bank (supra) was rendered in the context of FERA and we are concerned with the Act. Therefore, though the wordings of Section 68 of FERA and Section 140 of the Act are similar, there are significant differences between the two. In particular the words used in Section 140 of the Act that it applies to offences under this Chapter i.e. Chapter XVI of the Act and it is not so in Section 68 of FERA. Thus unlike Section 140 of the Act, Section 68 of the FERA does not restrict its operation only to offences and prosecutions but makes it applicable to all the contraventions across all sections of FERA. One more significant difference is that wherever the Parliament decided that the provisions of Chapter XVI of the Act is to be made applicable across all the provisions of the Act, it so specifically provided for it, as is noticed in Section 138B of the Act which is also a part of Chapter XVI of the Act. Thus, while interpreting Section 140 of the Act, meaning must be given to the words 'in this Chapter' occurring therein. It is a settled rule that while interpreting a fiscal or a penal enactment it is not open to ignore any words thereof on any assumed or supposed intention/object. (See ***Grasim Industires Ltd. V/s. Collector of Customs***[8]). Thus though aid /guidance

8 *2002(4) SCC 297*

could be taken from the decision of the Apex Court in Standard Chartered Bank (supra), the same cannot be applied, as it is, ignoring the differences in wordings of Section 68 of FERA and Section 140 of the Act.

21 The Division Bench of this Court in Textoplast Industries (supra) had while placing reliance upon the decision of Apex Court in Standard Chartered Bank (supra), held it is applicable to the Act on the following basis:-

> *"16:- Finally, Section 68 was held only to be clarificatory in nature:*
>
> > *" Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine."*
> >
> > *(emphasis supplied)*
>
> *The ratio of the decision of the Supreme Court would indicate the following principles: (i) Both, in the matter of criminal prosecution and in the imposition of a penalty, following a process of adjudication, the essential basis for the proceeding is a contravention of the provisions of the Act; (ii) The expression "offence" cannot be narrowly confined to a commission of a crime alone, but would comprehend within its purview, the commission of an act which is prohibited by law; (iii) The deeming fiction which is created in the case of an offence by a Company so as to bring within its purview, a person in charge of or responsible for the affairs of the Company as well as its stated officers would apply not only to a criminal prosecution, but to an adjudication as well. This would in our view necessarily extend to a situation where in terms of the explanation, the 'Company' as defined is a partnership firm. In the case of a partnership firm, the expression 'Director' is extended by the explanation to mean a partner of a firm. The principles which have been enunciated by the Supreme Court were sought to be distinguished, however, on the ground that unlike in the case of the FERA, the Customs Act, 1962*

contains a separate Chapter on offences and prosecutions and that hence, the deeming fiction can only be confined for the purposes of prosecutions under the Chapter. Hence, it was urged that where an adjudication proceeding is commenced against a partnership firm, it would not be permissible to impose a penalty both upon a firm and its partner. The submission cannot be accepted. Acceptance of this submission would lead an anomalous situation where, for the purposes of a criminal prosecution, a partner of a partnership firm as well as a person who was in charge of and was responsible for the conduct of the business would be held responsible whereas a much narrower construction would have to be imposed while construing who could be proceeded with for the purposes of an adjudication. There is no logical reason why Parliament would intend to make a stricter provision in the matter of an adjudication leading up to the imposition of a penalty as compared to a proceeding in the nature of a criminal prosecution…"

22 From the above observations, we notice that the difference between Section 68 of FERA and Section 140 of the Act was noted by the Court. However, the difference was ignored on the basis that accepting the same would lead to an anomalous situation and there is no logic for the difference. It is a well settled rule of interpretation that in interpreting a fiscal and/or penal legislation, meaning must be given to each word of the statute and it cannot be ignored on the basis that it does not appear logical. The Apex Court in ***Martand Dairy and Farm Vs. U.O.I.***[9] had observed that *"Taxation consideration may stem from from administrative experience and other factors of life and not artistic visualisation or neat logic and so the literal, though pedestrian interpretation must prevail."* Similarly, in ***Azamjaha Vs. Expenditure Tax Officer***[10], the Court has observed that logic or reason cannot be of much avail in interpreting a taxing statute. Moreover, it is clear that the

9 1975(4) SCC 313
10 1971 (3) SCC 621

Parliament had specifically provided in Section 140 of the Act that it shall have application only in respect of offences under this Chapter i.e. Chapter XVI of the Act. If Section 140 of the Act is juxtaposed with Section 138B of the Act both being a part of Chapter XVI of the Act, it would be clear that restricting the operation of Section 140 of the Act to only Chapter XVI of the Act is deliberate. This is so as whenever the Parliament intended that the provisions of Chapter XVI of the Act shall have application in relation to any other proceedings under the Act, it has so provided, as is evident from Section 138B(2) of the Act. Therefore, we do not agree with the view of the Division Bench in Textoplast Industries (supra) to the extent it holds that the decision of the Apex Court in Standard Chartered Bank (supra) would apply to Section 140 of the Act so as to govern adjudication proceedings under Section 112(a) of the Act as in the case of Section 68 of FERA being applicable to Section 50 of FERA.

23 Similarly, the reliance by the Revenue upon the decision of the Apex Court in **Prakash Metal Works v/s. Collector of Central Excise**[11] – referred to in passing by the Division Bench in Textoplast Industries (supra) seems inappropriate as the observations therein to the effect that "we uphold the impugned order of the Tribunal imposing penalty on the partners and the firm of partnership" were casual observations. We say so after due consideration, as we are conscious of our obligation to follow and implement the decisions of the Apex Court. It was in the above circumstances that we closely read the decision of the Supreme Court in Prakash Metal Works (supra) and find that the issue of simultaneous penalty on the partnership firm and the partner was

11 216 ELT 600

not the question raised before it.Consequently there were no arguments/submissions made before the Court contesting the imposition of simultaneous penalty upon the partnership-firm and the partners. Thus the observations in Prakash Metal Works (supra) is of no effect as it is in the nature of casual observations in the facts before it and would not qualify to be even an obiter. The Supreme Court in **Director of Settlement v. M.R. Apparao and Anr**[12] has in the context of the law declared by the Supreme Court being binding on all courts within India observed as under:-

> *" A judgment of the court has to be read in the context of the questions which arose for consideration in the case in the context of the questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such a manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight."*
>
> (emphasis supplied)

While as pointed out herein above the observations in regard to simultaneous penalties in Prakash Metal works(supra) are not even obiter but merely casual observation. It is a settled principle of law that "*A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the Judges"* as observed by the Apex Court in **Armaendra Pratap Singh v/s. Tej Balendar Prajapati**[13].

24 It was then contended by the Revenue, de hors the decision

12 2002(4) SCC 638
13 2004 (10) SCC 65

of the Division Bench of this Court in Textoplast Industries (supra) to the extent it placed reliance upon the decision of the Supreme Court in Standard Chartered Bank (supra), the provisions of Section 140 of the Act has to be read in to Section 112(a) of the Act during the adjudication proceedings. This on a plain interpretation of the Act. In fact it is emphasized that this Court in Textoplast Industries (supra) had on first principles held that Section 140 of the Act has to be read into Section 112(a) of the Act. It is submitted that the goods which are liable for confiscation under Section 111 of the Act arises out of acts and/or omissions which would also be an offence for the purposes of Chapter XVI of the Act as provided for under Section 135(1)(a) of the Act. Thus, the provisions of Section 140 of the Act could be read into Section 112(a) of the Act while invoking the same for the purpose of imposition of penalty upon the partners as well as the firm. This is contested by the Appellant contending that the offence listed out in Section 135 of the Act are only criminal offences and require knowledge. Thus, it could have no application where penalty is being imposed for a civil wrong under Section 112 of the Act. More particularly so when it provides for strict liability.

25 We note that Section 135 of the Act begins with the words '*without prejudice to any action that may be taken under the Act*' while listing out the offence of evasion of duty or prohibition under Chapter XVI of the Act. The offences listed out in Section 135(1)(a) of the Act would include within it all acts and/or omission to act on the part of any person in relation to any goods, in any way, knowingly, concerned with mis-declaration of value, fraudulent evasion of duty or evasion of any

prohibition either under the Act or any other Act. The list is exhaustive to include all acts/omissions which would render the goods liable for confiscation under Section 111 of the Act for which penalty is provided under Section 112(a) of the Act if they are accompanied with knowledge / *mens rea*. Thus, the acting or omitting to act leading the goods becoming liable to confiscation would be an offence under Chapter XVI of the Act as it is specified in Section 135(1)(a) of the Act, provided it is done knowingly. Thus the provisions of Section 140 would apply to such offences. It is pertinent to note that Section 140 of the Act while restricting its application to an offence under Chapter XVI of the Act, does not restrict its application only to prosecutions in criminal Court. Thus Section 140 of the Act could be read into adjudication proceedings resulting in penalty under Section 112(a) of the Act provided the act or omission on the part of any person in making the goods liable to confiscation is also an offence under Section 135(1) (a) of the Act. Section 112(a) of the Act to the extent it covers a person who abets the doing or omitting the doing of any act as plainly read would also be an offence under Section 135(1)(a) of the Act also. This is so as the requirement of knowledge is found only in case of abetment and not in other cases listed in Section 112(a) of the Act. The word abetment is not defined in the Act, therefore the meaning assigned to it in Section 3(1) of the General Clauses Act, 1897 which is as given under Section 107 of the Indian Penal Code. An abetment would include by definition intentional aiding when covered by Explanation 2 read with third category listed in Section 107 of the Indian Penal Code. (See Supreme Court decision in ***Shree Ram v. State of U.P.***[14]). Mere facilitation without

14 1975 AIR(SC) 175

knowledge would not amount to abetting an offence. Parliament has specifically included abetment in Section 112(a) of the Act, to include acts done with knowledge, otherwise the first portion thereof *"Any person – (a) who in relation to any goods does or omits to do any act ….."* would cover acts done or omitted to be done on account of instigation and/or encouragement without knowledge. However, the first portion of Section 112 (a) of the Act is only to make person of first degree in relation to the act or omission strictly liable. Persons who are not directly involved in the act or omission to act, which has led the goods becoming liable for confiscation cannot be made liable unless some knowledge is attributed to them. Therefore, it is to cover such cases that Section 112(a) of the Act also includes a person who abets the act or omission to act which has rendered the goods liable to confiscation. Imposing penalty upon an abettor without any *mens rea* on his part would bring all business to a halt as even innocent facilitation provided by a person which has made possible the act or omission to act possible could result in imposing of penalty. To illustrate innocent transferee of a license which enabled the purchaser of the license to misuse the license could be imposed with penalty. This could never be the intent or objective of Section 112 (a) of the Act.

26 It must be noted that the Division Bench of this Court in ***State Vs. Abdul Aziz***[15]***,*** did observe in a Criminal Appeal that *mens rea* may not be required to establish the charge of abetment in case, the context so requires. The Court was concerned with Section 5 of the Imports and Exports (Control) Act, 1947, which at the relevant time, read as under :-

15 *AIR 1962 Bom. 243*

"If any person contravenes or attempts to contravene or abets a contravention of any order made or deemed to have been made under this Act or any condition of a licence granted under any such order, he shall, …….. be punishable with imprisonment, etc. ……."

The charge against the respondent no.1 was that he was a Chairman of a Co-operative Society which had been issued a license to import silk on the condition that it would be used / consumed in its power-looms. However, this condition of the license was not fulfilled as the imported silk was sold in the local market after import. Therefore, prosecution was launched against the respondent no.1 and other office bearers of the Co-operative Society. In the above facts, the Court had to consider whether there was a breach of Section 5 of the Imports and Exports (Control) Act, 1947 and it answered the same in the affirmative. The defence of respondent no.1 before the Court was that in the absence of the Co-operative Society being a made party, no proceedings could be taken against the office bearers. This was on the basis that at the highest the office bearers would have only abetted the offence and in the absence of knowledge, the charge of abetment against the office bearers could not stand. The Court relied upon the General Clauses Act and the definition given in the Indian Penal Code of the word "abetment". The Court in particular relied upon Section 3 of the General Clauses Act, which states that unless there is anything repugnant in the subject or context, the definition given therein would apply to all Central Acts. The Court held that section 5 of the Imports and Exports (Control) Act, 1947 makes no reference to *mens rea*. The abetment referred to therein must also to be

treated on the same footing and, therefore, offence of abetment would not require any kind of *mens rea* before Section 5 of the Import and Export Control Act could be attracted. Thus, the Court refused to interfere in launching of proceedings against respondent no.1. However, the Court does record that in facts before it, there is no dispute that the respondent no.1 was aware of the terms and conditions imposed in the licence. It is also undisputed that he has given his consent to the company for selling the imported goods. Thus, in the facts before it *mens rea* did exist. Therefore, the aforesaid decisions would not apply while interpreting Section 112(a) of the Act as the observation of presence of mens rea in case of abetment, not being necessary was in the nature of obiter. We would do well to keep in mind the manner in which a judgment is to be read as observed by the Supreme Court in ***Natural Resources Allocation***[16] "*It is important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact*". Thus, in the facts of *Abdul Aziz (Supra)* mens rea on the part of respondent no.1 was established. Moreover, in the context of Section 112(a) of the Act, we do not find anything repugnant in its subject or context so as not to apply the definition / meaning of abet as given in the General Clauses Act, 1897.

27 It, therefore, follows that in all cases (other than abatement) falling under Section 112(a) of the Act, unlike Section 112(b) of the Act, *mens rea* is not a *sina qua non* for the imposition of penalty. The Supreme

16 2012 (10) SCC-1

Court in **Chairman, SEBI v/s. Shriram Mutual Fund**[17] has held *mens rea* is not an essential element/ingredient to impose penalty for a breach of a civil obligation, unless the language of the statute indicates the need to establish the same. Therefore normally where Section 112(a) of the Act is invoked (save cases of abetment on the part of the noticee), Section 140 of the Act cannot be read into it. This is so as an offence under Section 135(1)(a) of the Act would postulate that the person has knowingly committed an offence. Thus in cases other then abetment falling under Section 112(a) of the Act the liability for penalty is strict without any reference to *mens rea* / knowledge. Therefore the attribute of knowledge, necessary for being an offence under Section 135(1) (a) of the Act, cannot be read into Section 112(a) of the Act for the purposes of imposing penalty [except in cases of abetment]. Therefore for purposes for imposition of penalty under Section 112(a) of the Act unlike Section 112(b) of the Act mens rea / knowledge is irrelevant(save cases of abetment). Therefore where the notice under Section 112(a) of the Act against the firm is of abetment then it also is an offence under Section 135(1)(a) of the Act, making Section 140 of the Act applicable.

28 However, the Appellant contend that offences under Chapter XVI of the Act cannot be read into penalty proceedings under Section 112(a) of the Act by reading the words *"criminal"* as a prefix to the words *"offence under this Chapter"* as found in Section 140 of the Act. We find that above addition of the words criminal to the word offence in Section 140 of the Act as sought to be done by the appellant, inexplicable. Much emphasis was laid on the title of Chapter XVI of the Act to emphasize that it applies only to offences and prosecutions. Thus it is submitted that

17 (2006) (5) SCC 361

offences which lead to prosecutions would necessarily be criminal offences. However as held by the Supreme Court in **Frick (I) Ltd. v/s. UOI**[18] heading of chapter cannot determine the interpretation of a statutory provision in the absence of any ambiguity in the provision itself. No ambiguity is even alleged in Section 140 of the Act which would justify taking the aid of Chapter heading. Thus we do not need to look at and/or examine the Chapter heading of Chapter XVI of the Act to interpret Section 140 or 135 of the Act. In any case, an identical submission trying to restrict the meaning and ambit of the word offence to only criminal offences was subject matter of consideration by the Apex Court in Standard Chartered Bank (supra). However the same was negatived in the following words :-

> *"27:- Both, Section 50 providing for imposition of penalty and Section 56 providing for prosecution, speak of contravention of the provisions of the Act. Contravention is the basic element. The contravention makes a person liable both for penalty and for prosecution. Even though the heading to Section 56 refers to offences and prosecutions, what is made punishable by the Section is the contravention of the provisions of the Act and the prosecution is without prejudice to any award of penalty. The award of penalty is also based on the same contravention. Section 63 is the power of confiscation of currency, security or any other money or property in respect of which a contravention of the provisions of the Act has taken place conferred equally on the Adjudicating Authority and the Court, whether it be during an adjudication of the penalty or during a prosecution. Whereas Section 64 (1) relating to preparation or attempt at contravention is confined to Section 56, the provision for prosecution, sub-Section (2) of Section 64 makes the attempt to contravene or abetment of contravention, itself a contravention, for the purposes of the Act including an adjudication of penalty under the Act. Section 68 relating to*

18 1990(1) SCC 400

offences by companies, by sub-Section (1) introduces a deeming provision that the person who was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty along with the company of the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly. The proviso, no doubt, indicates that a person liable to punishment could prove that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Sub-Section (2) again speaks only of a contravention of the provisions of the Act and the persons referred to in that sub-section are also to be deemed to be guilty of the contravention liable to be proceeded against and punished accordingly. The word 'offence' is not defined in the Act. According to Concise Oxford English Dictionary, it means, 'an act or instance of offending'. Offend means, 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. According to New Shorter Oxford English Dictionary, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault." Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn, 2005 page 3302). This Court in Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya [(1997) 2 SCC 699] stated that the word 'offence' generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In Brown v. Allweather Mechanical co. [(1954) 2 QB 443], it was described as "a failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt." The expression 'offence' as defined in Section 3(38) of the

General Clauses Act means an act or omission made punishable by any law for the time being in force. 'Punishable' as noticed by this Court in Sube Singh & Ors. Vs. State of Haryana & Ors. [(1989) 1 SCC 235] is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, 'punish' means, 'inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)'. In the New Shorter Oxford English Dictionary (Vol. 2, 3rd ed., reprint 1993), the meaning of punishment is given as, "infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law." Going by Black's Law Dictionary (8th ed.) it is, "a sanction-such as a fine, penalty, confinement, or loss of property, right or privilege-assessed against a person who has violated the law." According to Jowitts Dictionary of English Law Vol. 2 (2nd ed. By John Burke), punishment is the penalty for transgressing the law. It is significant to notice that Section 68, both in sub-Section (1) and in sub-Section (2) uses the expression, shall be liable to be proceeded against and punished accordingly. There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or can be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine."

(emphasis supplied)

29 Thus it is not open to restrict the meaning of the word "offence" by prefixing the word criminal to it. In any case addition of words to a fiscal statute and/or penal section is against the basic canons of interpretation. One more feature to be noted is that both abetment

under Section 112 of the Act and offences listed out in Section 135(1) (a) of the Act postulate contravention of the Act with knowledge.

30 However, the question posed to us is specific viz. whether simultaneous penalties upon the firm and its partners can be imposed under Section 112(a) of the Act. Thus, we are to consider only the issue of penalty under Section 112(a) of the Act without reading it with any other provisions. As pointed out above, Section 112(a) of the Act consists of two parts viz: (i) strict liability arising on doing any act or omitting to do it, which renders the imported goods liable to confiscation and (ii) Abetting the act or omission rendering the goods liable to confiscation. Thus in first class of above cases where the allegation against the particular firm is not of abetment but one of doing or omitting to do any act which renders the imported goods liable for confiscation. Then in such cases i.e. where the importer is a partnership firm inasmuch as it is in possession of IEC code number and has filed a Bill of Entry for the import of goods and the allegation is not of abetment but of doing an act or omitting to do an act which rendered the goods liable for confiscation. It has nothing to do with *mens rea*/knowledge. In such a case a penalty imposed upon the firm would be a penalty imposed upon all the partners of the firm as this has nothing to do with the knowledge of the breach rendering the goods liable for confiscation under Section 111 of the Act. It is a case of strict liability. However, in such cases, if the Revenue seeks to impose a penalty upon the partner, then the notice must make out a case of knowledge on the part of the partner in his individual capacity so as to make it a case of abetment by the partner in respect of the acts and/or omission of the partnership firm. This is on a plain reading of Section

112(a) of the Act. This is so as the breach on the part of the partner concerned is independent of the breach committed by the firm. To the above extent, it is a penalty imposed upon two separate persons for distinct breaches. It cannot be imposed on a partner ipso facto merely because penalty is being imposed upon the partnership firm under Section 112(a) of the Act.

31 We make it clear that that although the Division Bench of this Court in Textoplast Industries (supra) has held on first principles that Section 140 of the Act is to be read into all cases falling under Section 112(a) of the Act, we do not agree. Section 140 of the Act on first principles has to be read into only in cases where the notice to impose penalty under Section 112 (a) of the Act, the Revenue makes out a case of an offence *prima facie* satisfying the requirements of Section 135(1)(a) of the Act. It is only then that Section 140 of the Act can be invoked for purposes of imposition of penalty under Section 112(a) of the Act both upon the partner as well as the firm. In the second class of cases i.e. abetment under Section 112(a) of the Act a specific case of abetment against the partner would have to be made for a separate penalty upon him. The notice issued by the Revenue should make out a case of the partner having acted and/or omitted to act with knowledge in his individual capacity that such act and/or omission to act on the part of the firm would render the goods liable to confiscation. It has nothing to do with Sections 135 and 140 of the Act. However, penalty cannot be imposed on the partner merely because penalty is being imposed upon the firm. The burden is upon the Revenue in the show cause notice to make out a case that penalty is imposable under Section 112 of the Act upon the

partner for abetment of the offence by the firm. This is so, as otherwise, a penalty imposed upon the firm would be a penalty imposed upon all the partners of the firm as this has nothing to do with the knowledge of the breach rendering the goods liable for confiscation on the part of the partners concerned. The liability is strict. Therefore, imposed on all parties irrespective of the fact, whether the partner concerned is an active or sleeping partner.

32 It was next contended by the Appellant that in any case on a plain reading of Section 112(a) of the Act, simultaneous penalties are not imposable upon a partnership firm and its partner. In terms of Section 112(a) of the Act a penalty is imposable upon any person whose act or omission to act renders the imported goods liable for confiscation under Section 111 of the Act. The word '*person*' has not been defined under the Act. Therefore, the meaning as ascribed to the word '*person*' in Section 2(42) of the General Clause Act, 1897 which defines a person to include any company or association or body of individuals whether incorporated or not. Thus, it is not disputed before us that a partnership-firm is a person for the purpose of Section 112 of the Act. However, according to the Appellants, though a partnership-firm is a person for the purpose of Section 112 of the Act, yet it has no separate legal existence from its partners. It is only a compendious name to describe all the partners collectively. In as much as it is not an entity- distinct and different from its partners. In support reliance is placed upon the decisions of the Supreme Court in **Controller and Auditor General v/s. Kamlesh V. Mehta**[19] and **N. Khadevvali Saheb v/s. N. Gudu Saheb**[20]. There can be

19 2003(2) SCC 349
20 2003(3) SCC 229

no dispute to the above general proposition of law. The above position is also clear by virtue of Sections 4, 25 and 26 of the Indian Partnership Act, 1932. However where the legislation, specifically provides otherwise, then a partnership firm should be accorded a status of a separate legal entity. This has been so held by the Supreme Court in **State of Punjab v/s. Jullunder Syndicate**[21] wherein the Court while dealing with a Sales tax legislation has observed that *"Though under the partnership law a firm is not a legal entity but only consists of individual partners for the time being, for purposes of tax law, Income Tax as well as Sales Tax, it is a legal entity."* Similarly in an proceeding under the Income Tax legislation the Apex Court in **CIT v/s. A. W. Figgis**[22] has observed *"It is true that under the law of partnership a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners……But under the Income Tax Act the position is somewhat different. A firm can also be charged as a distinct assessable entity different from its partners who can also be taxed separately."* Under the Act, undisputedly a Partnership firm is not given a status of a separate legal entity in the absence of Section 140 of the Act. Thus, in the absence of invoking Section 140 of the Act, no separate penalties under Section 112 of the Act would be imposed simultaneously on firm and its partners.

33 Nevertheless the Revenue places strong reliance upon the decision of the Supreme Court in Agarwal Trading Company(supra) wherein it has held that the firm though not a legal entity, still is considered to be a person under the provisions of the Sea Customs Act. The Apex Court upheld the penalty upon partnership-firm as well as the

21 1966 AIR(SC) 1295
22 24 ITR (SC) 405

partner who was the officer in charge of the firm for contravention of the Foreign Exchange Regulation Act, 1947 (FERA 1947). However, the same seems to have proceeded on the basis that Section 23C of the FERA, 1947 which was similar to Section 68 of FERA – that penalty was imposed on both the firms as well as on the partners. The contention of the party was that because a firm is not a legal entity, it cannot be a person within the meaning of Section 8 of the FERA 1947 and Section 167 of the Sea Customs Act. This was negatived by applying the definition of person given in General Clauses Act, 1897 and Section 23C of the FERA 1947. Thus, penalty in the facts before the Supreme Court was under the Sea Customs Act for contravention of FERA 1947. In the present case, we are not concerned with the provisions of FERA 1947 and the Sea Customs Act but are only required to consider the provisions of the Act. Further the Apex Court in Agarwal Trading(supra) was not concerned with Section 112(a) of the Act. Thus the above case does not in the context of the question raised for our consideration advance the cause of the Revenue.

34 In fact the IEC number is in the name of the partnership firm which collectively represents all the partners as laid down under the Partnership Act. Therefore in the absence of Section 140 of the Act, a partnership firm does not have an identity different from its partners. Section 140 of the Act alone bestows an independent identity upon the firm and has application only in respect of such a partner who is the person responsible to the firm for its business. Further Section 140 of the Act has limited application only in respect of an offence specified under Chapter XVI of the Act of which Section 140 is a part. It cannot be read into Section 112 (a) of the Act, against the firm unless the notice issued

invokes Section 135 of the Act. This breach is not only for imposition of penalty under Section 112(a) of the Act but also an offence under Chapter XVI the Act.

35 We may point out that the appellant also placed reliance upon the decisions of the Supreme Court in ***Deputy Commissioner of Sales Tax v/s. K. Kalukkutti***[23], ***Malbar Fisharies Co., v/s. CIT***[24] and ***Dulichand v/s. CIT***[25]. In all the above cases the factum of partnerships was sought to be determined on application of the partnership law. This is not so in the present facts. Thus the above cases have no application to the issue arising for our consideration. Therefore we are not dealing with the above case law cited on behalf of the appellant. Similarly reliance by the Appellant upon the decision of the Delhi High Court in the case of ***Madan Lamba v/s. CIT***[26] is misconceived. The issue therein was imposition a penalty upon the partner of the firm for late filing of his personal return of income. The explanation for late filing by the partner of his individual return was only on account of delay in finalization of the firm's account. It was not a case of penalty upon the partner in his capacity as a partner for late filing of return by the firm. Therefore the issue being completely different therein, we do not deal with the same.

36 It was next contended by the Appellant that in any event imposing penalty upon the partnership firm and the partner amounts to double penalty for the same offence and therefore hit by Article 20(2) of the Constitution of India. We are unable to understand how Article 20(2) of the Constitution is applicable. This is not a case of prosecution but one

23 1985 AIR 1443
24 1979(4) SCC 766
25 29 ITR 535
26 134 ITR 849

of adjudication proceedings. Further as pointed out herein above in cases where Section 140 of the Act can be invoked while issuing notices under Section 112(a) of the Act on the partner, no question of double penalty arises as the same are being imposed on two separate persons under the Act.

37 In view of the above, the decision of the Division Bench of this Court in Textoplast Industries (supra) to the extent it places reliance upon the Apex Court decision in Standard Chartered Bank (supra) does not seem to be appropriate as it was rendered under a different statute. Each of the two Act i.e. FERA and the Act, provides a different scheme for imposition of penalty. However, the decision in the case of Textoplast Industries (supra) to the extent it holds on first principle that simultaneous penalty is imposable is the correct view only to the following extent:-

(a) where the show cause notice makes out a case of an offence under Section 112(a) of the Act read with Section 135 (1)(a) of the Act, then alone, Section 140 of the Act is applicable for penalty upon the partner; or

(b) where the show cause notice makes out an independent case of abetment by the partner for the act or omission done by the partnership firm which has rendered the goods liable for confiscation under Section 111 of the Act. The notice in such a case need not invoke Sections 135 or 140 of the Act for simultaneous imposition of penalties.

However, we would like to clarify that (a) above are not cases where Section 112(a) of the Act is alone invoked for breaches under

Section 111 of the Act. These are cases where penalty is being imposed for an offence under Section 135(1)(a) of the Act r/w Section 112(a) of the Act. Thus, it would cover cases where the allegation is that the importer (firm) is knowingly concerned with acting or omitting to act rendering the goods liable to confiscate then, the partner incharge of the affairs of the firm would be liable (Section 140 of the Act).

38 In both the above cases simultaneous penalties is imposable upon the partnership firm and the partner. It is not open to the Authorities under the Act to impose penalty upon the partner ipso facto only because penalty is being imposed upon the firm under Section 112(a) of the Act.

39 In the light of our above discussion, we answer the two questions posed for our opinion as under:-

Question (a)- Yes. Simultaneous penalty can be imposed both on the partners and partnership-firm under Section 112 (a) of the Act where the charge on the firm is of acting or omitting to act rendering the goods liable for confiscation and the notice issued to the partner makes out a separate case of abetment on his part. This abetment should be in respect of the act and/or the omission to act on the part of the firm which has rendered the good liable for confiscation under Section 111 of the Act or where the allegation on the firm is of abetment and / or *mens rea*, then Section 135(1)(a) and 140 of the Act is applicable and simultaneous penalty is imposable. It is made clear that in all other cases falling under Section 112 (a) of the Act simultaneous penalties upon the firm and its partner cannot be imposed. It is made clear that no penalty

can be imposed upon the partner ipso facto merely on account of the fact that penalty is being imposed on partnership-firm.

Question (b)- the decision in Textoplast Industries (supra), arrived at on first principle is the correct view only to the following extent:

(a) where the show cause notice makes out a case under Section 112(a) of the Act read with Section 135 of the Act then alone on application of Section 140 of the Act simultaneous penalties are imposable upon the firm and its managing partner; or

(b) where the show cause notice makes out an independent case of abetment upon the partner for the act or omission of the partnership firm which has rendered the goods liable for confiscation under Section 111 of the Act. This is on the plain reading of Section 112 (a) of the Act, without any reference/ reliance to Chapter XVI of the Act. The decision in Jupiter Exports(supra) holding that no separate penalty upon the firm and the partner can be imposed under Section 112(a) of the Act in all cases is not the correct view.

40 In view of the above we conclude that there is jurisdiction with the authorities under the Act to impose simultaneous penalties upon the partnership firm and its Managing Partner under Section 112(a) of the Act in the above cases.

41 It is made clear that the issue posed before us was only in respect of a partnership firm registered under the Indian Partnership Act 1932. We have not in any manner dealt with partnership firm registered

under the Limited liability Partnership Act, 2008 and the liability of its partners under Section 112(a) of the Act.

42 This **Reference** is **disposed of** in above terms. No order as to costs.

(M.S.SANKLECHA, J.)

43 **M. S. Sonak, J:-** I have read the judgment of my brother – M. S. Sanklecha. J and find myself respectfully in agreement with his views on the two questions raised for our opinion.

(M.S.SONAK,J.)

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

44. I have had the advantage of going through the Judgment of my learned brother M.S.Sanklecha, J. I am of the view, that, as the statutory provision stands, simultaneous penalties can be imposed on the partnership firm and the partners under Section 112(a) of the Customs Act 1962 (for short 'the Act'). I am, therefore, unable to persuade myself to the following view by my learned brother M.S.Sanklecha, J. as observed in paragraph 39 of the judgment, as a condition on which simultaneous penalties is held, can be imposed:-

> "(i) **As regards 'Question a'** :- Only when the notice issued to the partner makes out a separate case of abetment on his part or where the allegation on the firm is of abetment and / or mens rea, then Section 135(1)(a) and 140 of the Act is applicable and simultaneous penalty is imposable. It is made

clear that in all other cases falling under Section 112(a) of the Act simultaneous penalties upon the firm and its partner cannot be imposed. It is made clear that no penalty can be imposed upon the partner ipso facto merely on account of the fact that penalty is being imposed on partnership firm."

"(ii) **As regards 'Question b'**:- Only where the show cause notice makes out a case under Section 112(a) of the Act read with Section 135 of the Act then alone on application of Section 140 of the Act simultaneous penalties are imposable upon the firm and its managing partners;"

Section 112(a) provides for a civil obligation of payment of a penalty as a result of a departmental adjudicatory process. Penalty may be imposed for an act of commission or omission and/or abetment thereof which amounts to contravention of the provisions by the Act leading to confiscation of goods. Section 112(a) does not require any *mens rea* and thus application of provisions of Section 135(1)(a) of the Act which is a provision dealing with an offence is not a sine qua non for the application of Section 112(a) of the Act. Section 112(a) and Section 135 stand independent of each other. I am also unable to subscribe to the conclusion of my learned brother that the decision of the Division Bench of this Court in "***Textoplast Industries Vs. Additional Commissioner of Customs, (2011(272) E.L.T. 513 (Bom.)***" to the extent it places reliance upon the Apex Court's decision in the case "***Standard Chartered Bank V. Directorate of Enforcement, (2006(1997) ELT 18(S.C.)"*** is not appropriate. I am of the clear opinion that the decision in "***Textoplast Industries Vs. Additional Commissioner of Customs"*** (supra) lays down the correct law in holding that it is permissible to impose penalty separately on partnership firm and its partners in adjudication

proceedings under the Customs Act,1962. Having recorded my respectful disagreement, I proceed to record my opinion on the issues which are arise for consideration of the larger Bench.

45. By the referring order of the Division bench, the following questions of law are referred for the opinion of the Larger Bench:-

(i) Whether, under the Customs Act,1962 and particularly in exercise of the powers conferred by Section 112(a) thereof, simultaneous penalties on both the Partner and Partnership firm can be imposed ?

(ii) Whether, the judgment in the case of "**Commissioner of Customs (E.P.) Vs. Jupiter Exports"** reported in **"2007 (213) E.L.T. 641 (Bom.)**" holding that separate penalty on a partnership firm and a partner cannot be imposed, lays down the correct law or whether, as held by the later Division Bench in the case of **Textoplast Industries Vs. Additional Commissioner of Customs** reported in **2011(272) E.L.T. 513 (Bom.)**, it is permissible to impose penalty separately on a partnership firm and a partner particularly in adjudication proceedings under the Customs Act,1962 ?

46. The issues are pure questions of law. The facts of the case, which are subject matter of the appeals, leading to the reference of the above questions for the opinion of the larger Bench have been extensively set out in the referral order of the Division Bench as also in the judgment rendered by my learned brother M.S.Sanklecha, J. I avoid repetition and proceed to deal with the legal issues.

47. In the context in hand, the parties have confined their submissions principally to the interpretation of Section 112(a) of the Customs Act,1962 (for short "the Act"). Learned Counsel for the appellant would submit that simultaneous penalties cannot be imposed on the partnership firm and the partners. He submits that the decision of the Division Bench of this Court in "***Textoplast Industries"*** does not lay down the correct law for the reason, that the decision of the Supreme Court in the case of "***Standard Chartered Bank V. Directorate of Enforcement, (2006(1997) ELT 18(S.C.)",*** which the Division Bench relies, was rendered in the context of Foreign Exchange Regulation Act,1973 (for short "FERA") and thus, the principles as laid down in interpreting the provisions of the FERA could not have been applied by the Division Bench to interpret Section 112 of the Act, to hold that simultaneous penalties can be imposed on the firm and the partners. He submits that the Division Bench thus ought not to have applied the deeming fiction created by Section 140 of the Act to Section 112(a) of the Act. In this context it is urged that Section 140 of the Act falls under Chapter XVI which prescribes 'Offences and Prosecution', whereas Section 112(a) falls under Chapter XIV which provides for 'Confiscation of Improper Imported Goods and Penalties'. It is, therefore, submitted that scheme of FERA which does not chapterize the provisions cannot be borrowed to interpret the Act. Learned Counsel for the appellant has also drawn the attention of the Court to the provisions of Section 138-B(2) and 138-C(4) of the Act to submit that wherever the Legislature has thought it appropriate, the provisions have been made applicable to the entire Act, whereas no such reference is available in Section 140 so as to

make it applicable outside Chapter XVI and more particularly to make it applicable in respect of imposing of penalties. It is submitted that the decision of the Division Bench in "***Commissioner of Customs (E.P.) Vs. Jupiter Exports***" reported in "***2007(213) E.L.T. 641 (Bom.)***" lays down the correct law which holds that simultaneous penalties cannot be imposed on the firm and the partners. In the written submissions the appellants have urged as under:-

(i) Penalty under Section 112(a) of the Act is imposable on "person" who does/omits to do or abets an act rendering goods liable for confiscation under Section 111;

(ii) there is no definition of 'person' under the Act, therefore, Section 3(42) of the General Clauses Act,1897 is applicable, under which 'person' includes body of individuals, whether incorporated or not. Therefore, partnership firm is required to be treated as 'person' under Section 112(a) of the Act;

(iii) A firm acts through its partners, therefore, act of the partner on behalf of the firm is an act of the firm. An imposition of penalty on the firm would in effect be imposition of penalty on all the individual partners since 'person' referred to in Section 112(a) is the body of individuals as a whole;

(iv) Separate penalty on the individual partners would amount to double penalty. This is against Article 20(2) of the Constitution of India;

(v) Section 140 does not override the entire Act which applies only to offences under Chapter XVI.

(vi) The deeming fiction created under Section 140 of the Act cannot be extended to apply to Section 112(a) of the Act as it cannot be

extended beyond the purpose for which it is created;

(vii) In the absence of a deeming fiction, similar to Section 140 of the Act in Section 112(a), only the 'person' under Section 112(a) i.e. the body of individuals (firm), would be liable to penalty and the individuals comprised in that body would not be separately and individually liable to penalty.

(viii) The provisions of Section 135 in Chapter XVI cannot be imported into Section 112 to read every contravention as an offence so as to attract Section 140. Invocation of prosecution in terms of Section 135 is independent of proceedings contemplated under Section 112 and the two cannot be said to be overlapping.

48. On the other hand, learned Counsel for the Revenue would submit that the decision of the Division Bench in "***Textoplast Industries***' ***(***supra***)*** concludes the issue that simultaneous penalties can be imposed on the firm and the partners. He submits that in the case of "**Commissioner of Customs (E.P.) Vs. Jupiter Exports"** the Division Bench was not dealing with the issue of imposition of simultaneous penalties on the firm and the partners and the observations as made in paragraph 19 is only an obiter. Learned Counsel for the Revenue submits that in "***Textoplast Industries***' ***(***supra***)*** the Division Bench was called upon to decide the issue as to whether penalties can be simultaneously imposed on the partnership and the partners as can be seen from the question (B) in para 1 of the judgment. It is submitted that the Division Bench in "***Textoplast Industries***' ***(***supra***)*** has rightly applied the principles of Law as laid down in the decision of the

Supreme Court in the "***Standard Chartered Bank V. Directorate of Enforcement"*** (supra) and thus there is no conflict between the decisions in the case of "***Textoplast Industries***' ***(***supra***)*** *and* "**Commissioner of Customs (E.P.) Vs. Jupiter Exports".** It is submitted that, also, the decision of the Supreme Court in the case of "*M/s.****Agarwal Trading Corporation and others Vs. The Assistant Collector of Customs, (AIR 1972 SC 648)"*** and the principles of law as laid down in "***Standard Chartered Bank V. Directorate of Enforcement"*** (supra) would wholly cover the issue that simultaneous penalties can be imposed on the firm and its partners. It is submitted that in view of the decision in "***Standard Chartered Bank"*** (supra), the deeming fiction under Section 140 of the Act can be made applicable to the penalty proceedings and thus simultaneous penalties can be imposed on the partners and the firm. It is, therefore submitted that the questions as referred to the Larger Bench do not arise.

49. As noted above, the Division Bench of this Court in the case of "***Commissioner of Customs (E.P.) Vs. Jupiter Exports***" (supra) has held that that separate penalty on a partnership firm and a partner cannot be imposed. Whereas the Division Bench in the case of "***Textoplast Industries Vs. Additional Commissioner of Customs***" (supra) has held that it is permissible to impose penalty separately on a partnership firm and partners in adjudication of the proceedings under the Customs Act. The referral Bench having noted the diverse views in these two decisions have referred the above questions to be answered by the larger Bench.

For the reasons which are elaborately set out in the referral order, the submission on behalf of the Revenue that no referable question arises for consideration of the Larger Bench, cannot be accepted.

50. At the outset, it would be appropriate to refer to the said two decisions of the Division Bench of this Court. In ***"Commissioner of Customs (E.P.) Vs. Jupiter Exports"*** (supra), the Division Bench in paragraph 19 has observed as under:-

> "19. Having heard the rival parties, no fault can be found with the view taken by the Tribunal. It is now well settled that when partnership is penalised, separate penalties cannot be imposed on the partners."

On a perusal of the questions of law as raised in the said case, which are quoted in paragraph 10 of the decision, it is quite clear that though the Division Bench has made the above observations, the issue as to whether simultaneous penalties can be imposed on the partners and partnership firm was not the issue for consideration before the Division Bench and the observations at paragraph 19 (supra) is a reiteration of the submissions made on behalf of the Assessee relying on the decision of the Tribunal in the case of "***Swem Industries vs Commissioner of C. Ex. & Cus., (2003(154) E.L.T. 417 (Trib)),*** wherein the Tribunal had made some passing observations as under:-

> ***"... ... ...*** *It has been a consistent view taken, in accordance with the long decisions of the Tribunal, that penalty upon the partner of a firm cannot be imposed in addition to the penalty on the firm. We therefore, set aside the penalty of Rs.1.00 lakh imposed on Fahod Safi Motiwala."*

51. Further in ***Textoplast Industries,*** the issue of simultaneous penalties on the firm and the partners squarely fell for consideration of the Division Bench, which held that simultaneous penalties can be imposed on the partnership firm and its partners for breach of the provisions of the Customs Act inter alia on first principles and also applying the principles of law laid down by the Supreme Court in the case of "***Standard Chartered Bank (supra)".*** In answering the question "***as to whether imposition of a penalty on a partnership firm as well as on the partners under Section 112 of the Act is permissible and justified***", the Division Bench considering the scheme of the Act and more particularly, the provisions of Chapter XIV which deal with 'Confiscation of Goods and Imposition of Penalties' as juxtaposed with the provisions of Chapter XVI which deals with the 'Offences and Prosecution', held that the essential element both in the case of criminal prosecution and the adjudication proceedings leading to imposition of penalty, is the breach or the contravention of the provisions of the Act. The Division Bench noted the provisions of Section 68 of the Foreign Exchange Regulation Act which deals with the offences by companies and more particularly the following Explanation to the said provision which would make the firm and its partners liable if the offence is committed by a firm :-

> *"**Explanation**.—For the purposes of this section—*
>
> *(i) "company" means any body corporate and includes a firm or other association of individuals; and*
>
> *(ii) "director", in relation to a firm, means a partner in the firm."*

The Division Bench in "***Textoplast Industries***" noted that as in Section 68 of the FERA, Section 140 of the Act, which also provides for

offences by Companies, incorporates a similar 'explanation' (supra) and thus applying the deeming fiction as created by Section 140 of the Act to the penalty proceedings under Section 112(a) of the Act, simultaneous penalties can be imposed on the firm and its partners.

52. A question thus arises 'whether apart from the true and correct meaning to be attributed to the words "any person" as used in Section 112(a), the legal fiction as created under Section 140 more particularly by the "Explanation" to the said provision can be read into the provisions of Section 112(a) of the Customs Act so as to include imposition of penalty separately on a firm and its partners.'

53 To examine the above issues, it would be appropriate to extract Section 112 of the Customs Act,1962 which reads thus :-

> **"112. Penalty for improper importation of goods, etc. — Any person,—**
> **(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or**
> (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,—
> in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;
> (ii) in the case of dutiable goods, other than prohibited goods, to a penalty [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is greater;

> [(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereinafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;
> (iv) in the case of goods falling both under clauses (I) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;
> [(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]"
>
> (emphasis supplied)

54 In the present context legislative background of the Act would be of some relevance. Since ancient times in England duties were collected on import and export of goods and the same had become customary, which came to be termed and popularly known as 'customs'. In India these duties are the prerogative of the Parliament under the Constitution. It is well settled, that the Act is held to be an important legislation from the point of view of the country's economic stability by preventing smuggling in goods. It is clear from the preamble that the Act consolidates and amends the law relating to customs. One of the principal rules of interpretation to interpret such an enactment as held by the Supreme Court in ***Ravalu Subba Rao versus CIT (AIR 1956 SC 604)*** would be to interpret the provisions as forming an Act, being complete in itself and exhaustive of the matters dealt therein. Further an interpretation, keeping in view the object, the Act seeks to achieve would be required to be resorted. The Supreme Court in a recent decision in the

case of "***Nemai Chandra Kumar & Ors. Vs. Mani Square Ltd. & Ors., (AIR 2015 SC 2955)***", considering catena of decisions on the principles of interpretation, has observed that ordinarily, the court would resort to a plain meaning rule (also known as literal rule) for statutory interpretation which emphasizes that the starting point in the statutory interpretation is statute itself. It is observed that the intention of the legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said.

55 Section 112 of the Act, which is in question, is a penalty provision. Coupled with the above principles of statutory interpretation it would also be useful to refer to the following rules of construction as applicable to penal statutes noted in the salutary book on the subject "**Principles of Statutory Interpretation** – by Justice G.P.Singh, 13th Edition,:-

> *"We are always trying to find the intention of the Legislature. Where taking into account the surrounding circumstances and the likely consequences of the various possible constructions there can be at all any doubt about the intention, we must, where penalties are involved, require that the intention shall clearly appear from the words of the enactment construed in the light of those matters. But if we can say that those matters show that a particular result must certainly have been intended , we would, I think, be stultifying the underlying principle if we required more than that the statutory provisions are reasonably capable of an interpretation carrying out that intention." In an earlier case, LORD REID explained that the rule of restrictive interpretation of penal provisions "only applies where after full enquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings.", for the imprecision of language is such that it is `difficult to draft any provision which is not ambiguous in that sense. Difference of*

*judicial opinion as to the meaning of the provision may also be not enough for applying the rule, and a judge while dealing with a question of construction of the provision must himself be in real doubt before he can call in aid the rule. [**Director of Public Prosecutions V. Onewell, (1968)3 All ER 153, p.157 (HL) followed in Farrel V. Alexander, (1976)2 All ER 721, pp.727, 744 (HL); Attorney General's Reference (No.1 of 1988), (1989)2 All ER 1: (1989)2 WLR 729 (HL)**.*

STORY, J. in agreeing to the rule in its "true and sober sense" stated the same as follows: "Penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statue, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word." [United States V. Winn, 3 Sumn 209, Fed Case No.16, 740; referred to in Johnson V. Southern Pacific Company, 196 US 1, pp.18, 19: 49 Law Ed 362, pp.3 69, 370. See further Kanwar Singh v. Delhi Administration, AIR 1965 SC871 : 1965(1) SCR 7.]"
(emphasis supplied)

56 In the light of the above principles of interpretation, Section 112(a) needs to be examined. Section 112(a) begins with the word "*any person*", who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act. The words "*in relation to*" as used in section 112 of the Act would mean "*to be concerned with*". An 'importer' has been defined under Section 2(26) of the Customs Act to mean *"importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption,*

includes any owner or any person holding himself out to be the importer."
The other two definitions which have a relevance as seen from the language of Section 111 of the Act and which need to be noted are the definitions of "dutiable goods" defined under Section 2(14) and "prohibited goods" defined under Section 2(33) of the Act. They read as under:-

> *"2(14) "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid;"*
> … … … …
> *"2(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;"*

57 The Scheme of the Act, shows that the Act in itself is a complete Code, which provides for search, seizure, confiscation of goods and conveyances, imposition of penalties, settlement of cases, appeals, offences and prosecution.

58 A partnership firm can be an importer. If the goods imported by the partnership firm are rendered liable for confiscation, then whether by virtue of Section 112 (a) of the Act penalty can be separately imposed on the firm and its partners or whether the intention is of a levy only on either of them and as a first step what does a plain reading of Section 112 indicate can be considered? Section 112 of the Act opens with the word "any *person*". When the Legislature has thought it appropriate to use the word '**any person**' as regards the applicability of Section 112(a) then what is the purport as regards a partnership firm and its partners.

59 It is to be noted that Section 112 falls under Chapter XIV of

the Customs Act which deals with the "C***onfiscation of goods and conveyances, and imposition of penalties***". It is further significant that the Legislature has simplicitor used the word "any person" to fasten the liability of a penalty. In this situation, the first obligation on the Court is to interpret the provision as it stands. The intention of the Legislature which can be discerned from the use of the words 'any person' in framing Section 112 of the Act on a plain reading would include every category of person who can be said to render himself liable for a penalty, as a result of confiscation of goods imported in contravention of the provisions of the Act. The Customs Act has not defined the word "person" and therefore the definition and rules of interpretation contained in the General Clauses Act 1897, can be to be taken recourse of, provided there is nothing repugnant to it in the other provisions of the Act or any different intention can otherwise be read in the enactment, as Section 3 of the General Clauses Act would provide.

60. Section 3(42) of the General Clauses Act defines "***person***" ***to mean "person shall include any company or association or body of individuals, whether incorporated or not***". A partnership firm therefore falls within the definition of 'person' as defined in the General Clauses Act. Though under the Common law of England, a firm is not a juristic person, the firm name being only a compendious expression to designate the various partners constituting it, however as held by the Supreme court in ***Dulichand Laxminarayan versus CIT, Nagpur (AIR 1956 SC 354),*** inroads have been made by the statutes into this conception, and firms have been regarded as distinct entities for the purpose of some statutes. The Act in question can be said to be one of such legislations. A firm for the purposes of the Act and more particularly Section 112 (a) thus can be

certainly regarded as a distinct entity different from its partners. This legal position that a firm would be a distinct entity from its partners in the context of certain enactments is also supported from the authoritative pronouncement of the Supreme Court in the following decisions.

61 The Supreme Court in "**Y.Narayana Chetty & Anr. Vs. ITO Nellore, (AIR 1959 SC 213)"** was considering the following definition of assessee under Section 2 clause (2) of the Income Tax Act as it stood prior to the amendment of 1953:-

"**a person** by whom income tax is clearly payable."

It was held that the word "person" in the above provision would obviously include a firm under Section 3(39) of the General Clauses Act, which provides that a person includes '*any company or association or body of individuals whether incorporated or not*'. It was observed that it would not be correct to say that an assessee under Section 2 sub-section (2) of the Act necessarily means an individual partner and does not include a firm.

62 The Constitution Bench of the Supreme Court in the case of "***Commissioner of Income Tax, Madras and Another Vs. S. V. Angidi Chettiar (AIR 1962 SC 970)***" in dealing with a case pertaining to imposition of penalty on a registered firm, under the Income Tax Act read with the provisions of Section 3(42) of the General Clauses Act, observed as under:-

> *"The expression "person" is defined in S.2(1) of the Act as including "a Hindu undivided family and a local authority." That evidently is not an exhaustive definition and recourse is permissible to the General Clauses Act which says in S.3(42) that a "person" includes "any company or association or body of individuals whether incorporated*

or not." A firm is manifestly a body of individuals and would therefore fall within the definition of "person", and may be exposed to an order for payment of penalty in the circumstances set out in cls. (a), (b) and (c) of S .28 of the Income Tax Act. That a firm, registered or unregistered, may be liable to pay penalty has been further clarified by proviso (d) which declares the quantum of penalty payable by firms, registered as well as unregistered."

(emphasis supplied)

63 The Supreme Court in "***M/s. Agarwal & Co. Vs. Commissioner of Income Tax, U.P., (AIR 1970 SC 1343)***" in considering the Section 3(42) of the General Clauses Act which defines "person", has observed that the definition of "person" under Section 3(42) of the General Clauses Act cannot be imported into the Partnership Act, the provisions of which alone are relevant to find out as to who could join as partners. It was observed that it is a partnership constituted according to the Partnership Act that can be considered as partnership under the Act. Whereas the definition of 'person' under the Income Tax Act is intended for the purpose of levying income-tax and for other cognate matters.

64 In "***D. K. Cassim and Sons v. Abdul Rahman, reported in AIR 1930 Rangoon 272"***, the Division Bench held that a firm can be considered to be 'person' under Order 33 Rule 1 of the Code of Civil Procedure. This was a case where the plaintiff-firm had applied for leave to appeal as a pauper. Order 33 Rule 1 of the Civil Procedure Code which was being interpreted by the Court reads as under:-

> "A person is a pauper who is not possessed of sufficient means to enable him to pay the fee prescribed by law."

65 The exposition of law in the above decisions makes it clear, that a partnership firm, when is an importer of goods would be a person for the purposes of Section 112(a) of the Act and cannot escape the liability to be fastened of a penalty for any acts or omissions which result in contravention of the provisions of the Act. To this extent the appellants too agree on the above legal position.

66 Now as regards the question whether partners can also be liable under Section 112(a) of the Act for payment of a penalty apart from the firm, so as to independently fall within the meaning of the word "any person" as used in Section 112 (a) of the Act. As regards inclusion of the partner as a person, for such acts of contravention, it may be observed that the definition of a person under Section 3(42) of the General Clauses Act is an inclusive definition, and thus apart from what it provides namely that a *"person" shall include any company or association or body of individuals, whether incorporated or not"*, that is a "firm" it would also include within its ambit '*natural persons*'. This would be adopting the literal meaning of the word 'person'. The word person has been described in the Webster Dictionary as under:-

> "**person** : 1. a human being, whether man, woman, or child: … …. …. 3. Social, an individual human being, esp. with reference to his social relationships and behavioral patterns as conditioned by his culture. 4. Philos. A self-conscious or rational being. 5. the actual self or individual personality of a human being...."

67 The Supreme Court in the case of "***Oswal Fats and Oils Ltd. Vs. Additional Commissioner (Administration), Bareilly Division,***

Bareilly & Ors., ((2010)4 SCC 728)" while examining usage of the word 'person' in Section 154(1) of the U.P. Zamindari Abolition and Land Reforms Act,1950, has observed that the word 'person' was required to be interpreted keeping in view the object of the legislation and by applying the rule of contextual interpretation, the applicability of which has been recognized in the decisions of the Supreme Court in "***Poppatlal Shah Vs. State of Madras, (AIR 1953 SC 274)", "S.K.Gupta Vs. K.P.Jain, (AIR 1979 SC 734)", "RBI Vs. Peerless General Finance and Investment Co.Ltd., (AIR 1987 SC 1023)" and "Central Bank of India Vs. State of Kerala ((2009)4 SCC 94))***". It was thus observed that the word "person" would include human being and a body of individuals which may have juridical or non-juridical status. The above position in law with certitude indicates that for the purposes of Section 112(a) of the Act when it uses the word "any person" would include its partners distinct from the firm. It may therefore be observed that in a generic sense the legislature has considered the partnership firm and the partners to be distinct and independent for the purposes of Section 112(a) of the Act for the purpose of levy of penalty. There is no different legislative intent which can be gathered. When the firm by itself is required to be regarded as a distinct entity, then the partners are required to be considered as independent 'persons' in the word 'person' as incorporated in Section 112(a) of the Act.

68 Now as regards the question 'whether simultaneous penalties can be imposed on a partnership firm and its partners in relation to the acts and omissions as contemplated under Section 112(a) of the Customs Act', a plain reading of Section 112(a) of the Customs Act does not indicate any legislative intent which would indicate that simultaneous penalties cannot be imposed. The acts of omission and commission may

also be the acts of the partners. The involvement of certain partners to contravene the provisions of the Act in a given case, may be apparent to the Customs Authorities. In such case can a partner say that though he is involved in the act of contravention, nonetheless only the firm be penalised. Of course it cannot be said that in every case all the partners become liable for a penalty for such acts of contravention of the provisions of the Act. It may vary from case to case depending on the degree and the nature of involvement.

69 To examine this issue and in the present context, it would be useful to refer to the 'Statement of Objects and Reasons' dated 8th June,1962 to the Act and the Notes on Clause 112 which read as under:-

> *" The Sea Customs Act which lays down the basic law relating to customs was enacted more than 80 years ago. It has been amended from time to time and some important amendments were made by the Sea Customs (Amendment) Act,1955. General and comprehensive revision of the Act has not so far been undertaken. Several provisions of the Act have become obsolete. Difficulties have also been experienced in the implementation of certain other provisions. The trade has been pressing for certain changes and facilities. Smuggling, consequent to controlled economy, has presented new problems. To meet these requirement, it has become necessary to revise the Act.*
>
> *The Land Customs Act was passed in 1924. It is not a self-contained Act and applies by reference provisions of the Sea Customs Act to land customs with certain modifications. There is no separate law relating to air customs, and the administration of air customs is governed by certain rules made under the Indian Aircraft Act,1 911. While revising the Sea Customs Act, it is proposed to consolidate the provisions relating to sea customs, land customs and air customs into one comprehensive measure.*

The Notes on Clauses explain in detail all the changes which are proposed to be introduced in the new law as compared with the existing law.

Dt. *Sd/-*

***Notes on Clause 112**.*

Clause 112 makes the following changes in the existing provisions:-

(i) The existing provisions do not provide for personal penalty on the concerned persons for every contravention specified in the existing provisions corresponding to the new clause 111. Under the proposed clause 112, the persons concerned in every contravention mentioned in clause 111 will become liable to a personal penalty.

(ii) under the existing provisions even where a personal penalty is provided in respect of a contravention, it is leviable only on the persons actually concerned in the contravention. Under the proposed clause any person who abets such contravention will also become liable to a personal penalty. Thus a financier who finances smuggling or a dealer who helps in the disposal of smuggled goods will also be liable to a personal penalty.

(iii) under the existing provisions, the maximum personal penalty that may be imposed for a contravention involving evasion of revenue is one thousand rupees. This is being enhanced to three times the duty sought to be evaded or one thousand rupees, whichever is the higher. The maximum penalty of one thousand rupees is inadequate considering that duty amounting to several thousands of rupees is many a time sought to be evaded."

(emphasis supplied)

70 The Statement of objects and reasons can very well be relied upon in understanding the legislative intent as observed by the Supreme Court in "***Hyderabad Industries Ltd. & Anr. Vs. Union of India and***

Others, (1995)5 SCC 338)". The above statement of objects and reasons and the Notes on Clause 112 clearly demonstrate that the legislative intent behind Section 112 was to provide for personal penalty on the concerned persons for every contravention specified in Section 111 and that it would also include personal penalty not only on the persons who are actually concerned in the contravention but on those who abet such contravention would also become liable to a personal penalty. That is those persons who are directly and principally involved or persons in the first degree as also those who are indirectly involved in the contravention, whose acts are to aid and assist and/or who abet such contravention. The involvement of such persons would depends on the facts of each case. The notes on Clause 112 also gives an illustration that a financier who finances smuggling or a dealer who helps in the disposal of smuggled goods will also be liable to a personal penalty as these acts are in the nature of abetment. These persons may not necessarily be part of the Company or a firm importing the goods. Thus what is significant to be noted from the notes on Clause 112 as appended to the Statement of Objects and Reasons is that every 'contravention' as mentioned under Section 111 of the Act will become liable for a personal penalty, and persons who are actually concerned with the contravention and those who abet such contravention would become liable for a personal penalty.

71 The basis for imposing of a penalty would therefore be the nature of the acts or omission which would render the goods liable for confiscation. Each of the clauses (a) to (p) of Section 111 of the Act speaks of such acts or omission which contravene and or violate the provisions of the Act and thus become directly relevant for the purposes of levy of penalty under Section 112(a) of the Act. Thus what is relevant for

the purposes of imposing a penalty is the contravention /breach of the provisions of the Act as specified in section 111 of the Act, rendering the goods liable for confiscation as also aiding and assisting (abetting) such acts and omissions. Section 112(a) cannot be read in isolation but is required to seen in the context of Section 111 and other provisions in the scheme of the Act. It is needless to observe that before imposing a penalty adequate safeguards are provided in Chapter XIV of the Act. A reference can be made to the provisions of Section 122-A of the Act which provides for the 'adjudication procedure' to say that the adjudicating authority shall in a proceeding under Chapter XIV or any other provision under the Act, give an opportunity of being heard to a party in a proceeding. Section 123 of the Act provides for the 'burden of proof'. Section 124 provides for issuance of a show cause notice and provides that no order confiscating any goods or imposing any penalty on any person shall be made under the said chapter unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty; and is given an opportunity of making a representation and a reasonable opportunity of being heard in the matter. Section 125 provides for an option to pay fine in lieu of confiscation. Section 127 is a significant provision which provides that an award of confiscation or penalty by Customs officer shall not interfere with the other punishments to which the person affected thereby is liable under the provisions of chapter XVI of the Act or any other law. A conjoint reading of these provisions shows that before an order imposing a penalty is made, the authority is required to adopt a procedure as contemplated by the said provisions, wherein full opportunity can be availed by the person to prove that there is no liability on such person as a

owner or otherwise to suffer confiscation or a penalty. It is thus not a case, that where the acts of contraventions and/ or omissions which lead to confiscation if are by a partnership firm and its partners, in every such case, penalty is required to be simultaneously imposed on the firm or its partners, it would depend on the facts of each case. The above provisions create an adequate safeguard to give full opportunity to each of the category of persons to prove that they are not liable for imposing of a penalty. It depends on the facts of each case as to what is the role which can be said to be attributed to such persons in contravening the provisions of the Act. The persons can be the principal persons or persons in the first degree who contravene the provisions of the Act. The others may be in a category who aid and assist the contravention and thus can be the persons of the second degree in effecting the contravention who can be said to be have abetted the contravention, who also become liable for a penalty under Section 112 (a) of the Act. As a guiding factor the illustration of abetment as appearing in the Note to Clause 112 of the 'Statement of Objects and Reasons', throws a complete light on this aspect. In a given case if a partnership firm which is the importer has acted in contravention of the Act leading to confiscation of goods, in such a case only the firm be imposed a penalty, and not a penalty on the partners who may have actually executed such contravention, in my opinion, is not the intention of the legislature. There can be a situation vice-versa. Further these partners can indulge into such acts through another firm and so on and so forth by escaping a penalty. The legislature has thought it appropriate that be it the firm or the partners, the contravention if is, at their hands needs to be met with a penalty. The penalty should serve as a deterrent not only for the act of commission or omission in question, in a given

contravention, but also for all times to come. Assuming that only firm is imposed a penalty and not its partners or other persons through whom the firm has acted, then in that case the authorities would have no record of the persons who have actually indulged in such subversion of law. These partners or other persons who are connected in such activities can still indulge in such activities through another firm or any other legal entity. If such situations do not find a recognition in the provision, the same would be rendered otiose. Section 154-B of the Act as inserted by Amendment Act No.29 of 2006 is the acceptance of this position which provides for publishing the names of any person and any other particulars relating to 'any proceedings' or 'prosecutions' under the Act in respect of such persons. A reference also needs to be made to Section 147 of the Act which provides for the liability of principal and agent. This provision throws a light that the Act seeks to bring within its purview, the contravention if any by the agent of the owner or importer or exporter, as if it is the act of the owner or importer or exporter and impose a liability as if the acts of the agent are acts of the owner or importer or exporter. Thus, even the acts of contravention by a third party either on an express or implied authority of the owner, importer or exporter would be relevant for the purpose of any proceedings under the Act.

72 The intention of the Legislature is thus explicit to treat the nature of the contravention as listed in clauses (a) to (p) of Section 111 of the Act liable for penalty when the acts and omissions can be attributed to persons indulging in such contravention. The intention of the provision obviously is two fold, firstly it is the interest of protection of the revenue that is the economic aspect, and secondly it should be a deterrent to the persons indulging into such acts or omissions amounting to contravention

of the provisions of the Act. Thus on its purposive interpretation it cannot be said that section 112(a) of the Act precludes, in a given case, to impose simultaneous penalties on the firm and its partners. As the firm and its partners are required to be considered distinct from each other, for the purposes of Section 112(a) of the Act, the submission on behalf of the appellant that a simultaneous penalty would amount to double jeopardy cannot be accepted.

73 I am in complete agreement with the submission of as made on behalf of the Revenue that the above position that simultaneous penalties can be imposed on the firm and its partners also stands concluded in view of the authoritative pronouncement of the Supreme Court in the case of "*M/s.**Agrawal Trading Corporation and others Vs. The Asstt. Collector of Customs, (AIR 1972 SC 648)***".** In this decision the Supreme Court was dealing with a case in which a fine was imposed on the firm under Section 167(3) of the Sea Customs Act 1878 with a personal liability of Rs.1000/- under Section 167(37) of the Act with further fine of Rs.51,000/- under Section 167(8) of the Act read with Section 23-C of the Foreign Exchange Regulation Act. Section 23-C was not a penalty provision as it pertained to an offence. Thus the penalty as imposed was under Section 167 of the Sea Customs Act. The currency notes of Rs.51,000/- which were seized were also confiscated. Section 167 of the Sea Customs Act which dealt with the Punishment for offences fell under Chapter XVI of the Sea Customs Act titled 'Offences and Penalties'. Section 167 as it stood was a composite provision dealing with penalties as also offences. It would be apt to extract the relevant provisions of the Sea Customs Act which fell for consideration of the Supreme Court:-

"CHAPTER XVI

OFFENCES AND PENALTIES

Punishments for Offences : 167. *The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively : -*

Offence	**Section of this Act to which offence has reference**	**Penalties**
3. If any person ship or land goods, or aid in the shipment or landing of goods, or knowingly keep or conceal, or knowingly permit or procure to be kept or concealed, any goods shipped or landed, or intended to be shipped or landed, contrary to the provisions of this Act, or if any person be found to have been on board of any vessel liable to confiscation on account of the commission of an offence under No. 4 of this section, while such vessel is within any bay, river, creek or arm of the sea which is not a port for the shipment and landing of goods,	General 11	such person shall be liable to a penalty not exceeding one thousand rupees
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from the Union of Burma contrary to such prohibition or restriction, or if any attempt be made so to import or export any such goods, or if any such goods be found in any package produced to any officer of Customs as containing no such goods, or if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in the Union of Burma, or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on hoard of any vessel for exportation contrary to such prohibition or restriction.	18 & 19	such goods shall be liable to confiscation ; any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.
37 —If it be found, when any goods are entered at, or brought to be passed through,	86 & 137	such packages, together with the whole of the goods

a custom-house, either for importation or exportation, that tai the packages in which they are contained differ widely from the description given in the bill of entry or application for passing them, or the contents thereof have been wrongly described in such bill or application lion as regards the denominations, characters or conditions according to which such goods are chargeable with duty, or are being imported or exported, or the contents of such packages have been misstated in regard to sort, quality, quantity or value, or (d) goods not stated in the bill of entry or application have been concealed in, or mixed with, the articles specified therein, or have apparently been packed so as to deceive the officers of Customs, and such circumstance is not accounted for to the satisfaction of the Customs-collector,		contained therein, shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.

74 A perusal of the above provisions clearly indicate that the provisions pertained to imposing of a penalty and not dealing with punishment for acts constituting a criminal offence though the provision in some of the other clauses spoke of a conviction before a Magistrate (clauses 76 onwards). The other provision with which the Supreme Court was concerned in the case, was Section 23-C of the Foreign Exchange Regulation Act,1947. This provision deals with offences by Companies and reads thus:-

> *"**23-C: Offences by companies – (1)** If the person committing a contravention is a company, every person who, at the time the contravention was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and **shall be liable to be proceeded against and punished accordingly**:*
>
> *Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he*

exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention under this Act has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section, -

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm, means a partner in the firm."

Section 23-C of the FERA,1947 thus creates a deeming fiction by which, where a person committing a contravention is a company, every person who, at the time the contravention was committed was in-charge and was responsible to the company as well as the Company shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. The explanation to this section expanded the scope of the provision so as to bring within the ambit of the expression "company" a "firm" or an "association of individuals", and for the expression "director' a partner of the firm. It can be noted that Section 167 of the Sea Customs Act 1878, did not have an explanation as provided under Section 23-C of the FERA,1947.

In interpreting the above provisions, the Supreme Court held that the contention of the appellant that the firm is not a legal entity and thus it cannot be a person within the meaning of under Section 167(3), (8) and (37) of the Sea Customs Act and Section 8 of the Foreign Exchange Regulation Act was untenable. The Supreme Court, in repelling the contention firstly that the definition of 'person' under the General Clauses Act does not apply to a firm which is not a natural person which has no legal existence and secondly sub-clauses (3), (8) and (37) of Section 167 of the Sea Customs Act were not applicable to the appellant-firm, held that the 'Explanation' (supra) clearly provides that a company for the purpose of that Section is defined to mean any body corporate and includes a firm or other association of individuals and a Director in relation to a firm means a partner in the firm. In the context of the said provisions (supra) under the Sea Customs Act and the FERA 1949, which

dealt with penalties, the Supreme Court observed that the High Court was right in holding that once it is found that there has been a contravention of any of the provisions of the Sea Customs act read with the Foreign Exchange Regulation Act by a firm, the partners of it who are in-charge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without their knowledge or they exercised all due diligence to prevent such contravention. The explanation under Section 23-C of the FERA Act,1947 was clearly applied to the penalty provision under the Sea Customs Act. In other words, the Supreme Court applied the deeming fiction under Section 23-C of the FERA,1947 to the penalty provisions as contained under Section 167 of the Sea Customs Act in confirming the penalty on the firm and its partners. Thus, the penalty on the firm and the partners under the Sea Customs Act was upheld. It is pertinent to note the observations of the Supreme Court which read thus :-

> *" 7. The second contention that because the firm is not a legal entity, it cannot be a person within the meaning of Section 8 of the Foreign Exchange Regulation Act or of Section 167(3), (8) and (37) of the Sea Customs Act, is equally untenable. There is of course, no definition of person in either of these Acts, but the definition in section 2(42) of the General Clauses Act 1897, or section 2(3) of the Act of 1868 would be applicable to the said Acts in both of which 'person' has been defined as including any company or association or body of individuals whether incorporated or not. It is of course contended that this definition does not apply to a firm which is not a natural person and has no legal existence, as such clauses (3), (8) and (37) of Section 167 of the Sea Customs Act are inapplicable to the appellant firm. In our view, the explanation to S.23C clearly negatives this contention, in that a company for the purposes of that section is defined to mean any body corporate and includes a firm or other association of individuals and a Director in relation to a firm means a partner in the firm. The High Court was clearly right in holding that once it is found that there has been a contravention of any of the provisions of the Foreign Exchange Regulation Act read with Sea Customs Act by a firm, the partners of it who are in-charge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without their knowledge or they exercised all due diligence to prevent such contravention."*

It is therefore quite clear that the Supreme Court need Sections 167(3), (8) and (37) of the Sea Customs Act under which a penalty was imposed, applicable to the firm as also to the partners and upheld simultaneous imposing of the penalty on the firm and its partners by applying the deeming fiction under Section 23-C of the FERA,1947.

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75. It is significant as also it cannot be overlooked that in the above decision, the Supreme Court has confirmed the following observations of the Division Bench of the Calcutta High Court in the case "*M/s.**Agarwal Trading Corporation and others Vs. The Assistant Collector of Customs & Ors., (AIR 1964 Cal 347)***"

> *"**20**. The argument that only a natural person is amenable to the jurisdiction under Clauses (3), (8) and (37) of Section 167 of the Sea Customs Act cannot also be accepted. Although the word "person" has not been defined in the Sea Customs Act, under the General Clauses Act it includes any company or association or body of individuals whether incorporated or not. It is true that the General Clauses Act came on the Statute Book long after the Sea Customs Act. But under Section 23-C of the Foreign Exchange Regulation Act and the explanation thereto where the contravention is by a firm every person who at the time the contravention was committed, was in charge of, and was responsible to the firm for the conduct of its business as well as the firm itself shall be deemed to be guilty of the same and liable to be proceeded against and punished. **The result is that once it is found that there has been a contravention of any provision of the Foreign Exchange Regulation Act read with the Sea Customs Act by a firm the partners of it who were in charge of its business or were responsible for the conduct of the same cannot escape liability unless it is proved by them that the contravention took place without their knowledge or that they exercised all due diligence to prevent such contravention.***
>
> ***21**. In my opinion, the further argument that an attempt to contravene any provision of the Sea Customs Act is not an offence under the said Act is without any substance. If the offence relates to Foreign Exchange the provisions of Sections 23-A and 23-B of the Foreign Exchange Regulation Act are attracted drawing in their chain the offences and penalties prescribed under the Sea Customs Act. The result is that any attempt to contravene a provision of the Foreign Exchange Regulation Act is punishable under the relevant provisions of Section 167 of the Sea Customs Act. Besides under Section 167 clause 8 of the Sea Customs Act an attempt made to export any goods the exportation of which is prohibited or restricted by or under Chapter IV of the Act, which includes Section 19, renders the goods liable to confiscation and any person concerned in any such offence liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees. If the word ' "goods" in the above is substituted by "Indian Currency" under the Foreign Exchange Regulation Act an attempt to export Indian Currency Notes can be dealt with under the Sea. Customs Act.*
>
> ***22**. On the facts of this case, I find myself unable to come to the conclusion that there was no evidence before the Customs officer to lead to the*

conclusion that the firm including its members were guilty of contravention of law. … … …

… … … - according to the Customs authority its cashier at the relevant time - all prima facie indicate that it was the firm which was attempting to export Indian currency to Hongkong. The inference drawn from the circumstances by the Customs authorities that Tewari could not have been doing it on his own behalf is one which can easily be deduced. On a common sense view of things the firm could be held privy to the attempt to export Indian currency out of India. Of course, it was open to the partners to adduce evidence to the effect that they knew nothing about it, that they had nothing to do with the offending package and that Tewari was doing something without their knowledge or connivance. No attempt in this direction was ever made. In fact the members of the firm did not make use of the opportunity of the personal hearing given to them. … … …"

***23**. … … … … I do not find myself able to hold that all the principles of criminal jurisprudence are attracted to enquiries under the Sea Customs Act by the Customs Officers. Dealing with Sea Customs Act and the Land Customs Act in **Thomas Dana v. State of Punjab, AIR 1959 SC 375** at p.381 the Supreme Court observed that*

"all criminal offences are offences, but all offences in the sense of infringement of a law, are not criminal offences. Likewise, the other expressions have been used in their generic sense and not as they are understood in the Indian Penal Code or other laws relating to criminal offences Section 167 speaks of offences mentioned in the first column in the Schedule, and the third column in that Schedule lays down the penalties in respect of each of the contraventions of the rules or of the sections in the Act. There are as many as 81 entries in the Schedule to Section 167, besides those added later, but each one of those is and more entries, though an offence, being an act infringing certain provisions of the sections and rules under the Act, is not a criminal offence. Out of the more than 81 entries in the Schedule to Section 167, it is only about a dozen entries, when contemplate prosecution in the criminal case, the remaining entries contemplate penalties other than punishments for a criminal offence."

(emphasis supplied)

From the above decision, it is quite clear that the firm and its partners are 'persons' described under Section 112(a) of the Act and can be held to be separately liable for imposition of a penalty under Section 112(a) of the Act, if the firm and its partners have committed any acts which would fall within the purview of the said Section.

76. Apart from the above clear position as noticed in the decision in "*M/s.**Agrawal Trading Corporation**"* **(supra)**, on behalf of the Revenue it is contended that the Division Bench in "***Textoplast***

Industries" (supra) has rightly applied the deeming fiction under Section 140 of the Act to come to a conclusion that simultaneous penalties can be imposed on the partnership firm and the partners under Section 112(a) of the Act, in applying the principles as laid down by the Supreme Court in the ***Standard Chartered Bank vs. Directorate of Enforcement" (supra).*** To appreciate the submissions it would be appropriate to extract Section 140 of the Act which reads thus:-

> "140. Offences by companies.—
> "(1) If the person committing an offence under this Chapter is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Chapter if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
> Explanation — For the purposes of this section,—
> (a) "company" means a body corporate and includes a firm or other association of individuals; and
> (b) "director," in relation to a firm, means a partner in the firm."

From perusal of Section 140 it is clear that it creates deeming fiction so as to provide that if a person committing an offence as defined under Chapter XVI is a company then every person who at the time offence was committed was incharge of and was responsible to, the Company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded

against and punished accordingly. However, with a safeguard that nothing contained in the provision shall render any such person liable to such punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Sub-section (2) provides that notwithstanding anything contained in sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. The Explanation extends the scope of the provision by bringing within the ambit of the expression "Company" a firm or an association of individuals and within the ambit of the expression 'director' a partner of the firm. It is therefore, clear that under Section 140, a partnership firm as also the partners would become liable to be punished simultaneously. It can be instantly seen that the provision is similar to Section 23-C of the FERA 1947 (supra) which also incorporated a similar deeming fiction.

77. The question is whether the deeming fiction created under Section 140 can be made applicable to Section 112(a) of the Act as held by the Division Bench in "***Textoplast Industries" (supra).*** It is well settled that an order imposing penalty is a result of quasi criminal proceedings. In the "***Commissioner of Income Tax, West Bengal Vs. Anwar Ali, (AIR 1970 SC 1782)",*** the Supreme Court considered as to what is the nature of penalty proceedings. In referring to the decision of the Supreme Court in the case "***C. A. Abraham vs. The Income Tax Officer, Kottayam and another, (AIR 1961 SC 609)***", it was observed that it is settled by now that the order imposing penalty is the result of a quasi criminal proceedings. It was observed that in England also it has never been doubted that such proceedings are penal in character

[***Fattorini (Thomas) (Lanchashire) (Ltd., v. Inland Revenue Commissioner), 1943 (11) I.T.R. (Supp.)50***.]

78. Imposing of a penalty can also be a punishment. Section 140 indicates the manner in which a contravention by a company can be dealt with. From the perusal of Section 112(a) of the Act, it is difficult to conceive, that a different Legislative intention other than the one in Section 140 of the Act to impose a penalty both on the firm and its partners can be gathered. The above position in law can be ascertained from the decision of the Supreme Court in M/s. Agarwal Trading Corporation (supra) in which the Supreme Court applied the deeming fiction (similar to Section 140 of the Act) created by Section 23-C of the FERA,1947 to the penalty provision under Section 167(3), (8) and (37) of the Sea Customs Act to uphold imposing of the penalty on the firm and the partners. The situation in hand, pertaining to the Act is not at all different. In fact Section 140 is available in the Act itself. The Act is required to be read in its entirety to ascertain the real intention of the Legislature. This clearly demonstrates that for the interpretation of a penalty provision (Section 112 of the Act) the contravention as contemplated under Section 111 of the Act can be regarded as an offence and the deeming fiction under Section 140 of the Act becomes squarely applicable. This is also for the reason and in the sense, that infringement of law as contemplated under the said provision though is not made a criminal offence but can still be regarded as an offence for the purpose of applying the deeming fiction created under section 140 of the Act, so as to make the firm and the partners simultaneously liable for imposing a penalty. A purposive interpretation of these provisions in my submission explicitly say so. It is a well settled that all criminal offences are offences

but all offences in the sense of infringement of a law, are not criminal offences as held in "***Thomas Dana v. State of Punjab, AIR 1959 SC 375***." This also finds support from Section 3(38) the General Clauses Act which defines an offence to include any act or omission made punishable by any law for the time being in force.

79. It is significant that the above position in law as laid down in **"M/s.Agarwal Trading Corporation and others Vs. The Assistant Collector of Customs"** (supra) can also be noted from the decision of the Supreme Court in **"Standard Chartered Bank vs. Directorate of Enforcement" (supra).** The Supreme Court, in considering the penalty provisions as contained in Section 50 of the Foreign Exchange Regulation Act,1973 (for short "FERA") has held that the deeming fiction which is created by Section 68 which is a provision dealing with offences by Companies, to bring within its purview the person in-charge of and responsible for the affairs of the company as well as the company would become squarely applicable to the penalty proceedings. The explanation to Section 68 of the FERA is similar to the explanation under Section 140 of the Act by virtue of which a Company would mean a firm and the Directors in relation to a firm would mean partners of a firm. As to what would be meant by contravention and whether an offence can be said to be a contravention or only a criminal act for the purposes of such legislations are the issues considered by the Supreme Court in this decision. It is thus necessary to note the following observations of the Supreme Court:-

> *"27. Both, Section 50 providing for imposition of penalty and Section 56 providing for prosecution, speak of contravention of the provisions of the Act. Contravention is the basic element. The contravention makes a person liable both for penalty and for prosecution. Even though the heading to Section 56 refers to offences and prosecutions,*

what is made punishable by the Section is the contravention of the provisions of the Act and the prosecution is without prejudice to any award of penalty. The award of penalty is also based on the same contravention. Section 63 is the power of confiscation of currency, security or any other money or property in respect of which a contravention of the provisions of the Act has taken place conferred equally on the Adjudicating Authority and the Court, whether it be during an adjudication of the penalty or during a prosecution. Whereas Section 64 (1) relating to preparation or attempt at contravention is confined to Section 56, the provision for prosecution, sub-Section (2) of Section 64 makes the attempt to contravene or abetment of contravention, itself a contravention, for the purposes of the Act including an adjudication of penalty under the Act. Section 68 relating to offences by companies, by sub-Section (1) introduces a deeming provision that the person who was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty along with the company of the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly. The proviso, no doubt, indicates that a person liable to punishment could prove that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Sub-Section (2) again speaks only of a contravention of the provisions of the Act and the persons referred to in that sub-section are also to be deemed to be guilty of the contravention liable to be proceeded against and punished accordingly. The word 'offence' is not defined in the Act. According to Concise Oxford English Dictionary, it means, 'an act or instance of offending'. Offend means, 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. According to New Shorter Oxford English Dictionary, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault." Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn, 2005 page 3302). This Court in Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya [(1997) 2 SCC 699] stated that the word 'offence' generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In Brown v. Allweather Mechanical co. [(1954) 2 QB 443], it was described as "a failure to do something prescribed by a statute may be described as an offence, though no criminal sanction

is imposed but merely a pecuniary sanction recoverable as a civil debt." The expression 'offence' as defined in Section 3(38) of the General Clauses Act means an act or omission made punishable by any law for the time being in force. 'Punishable' as noticed by this Court in Sube Singh & Ors. Vs. State of Haryana & Ors. [(1989) 1 SCC 235] is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, 'punish' means, 'inflict a penalty on as retribution for an offence; inflict a penalty on someone for (an offence)'. In the New Shorter Oxford English Dictionary (Vol. 2, 3rd ed., reprint 1993), the meaning of punishment is given as, "infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law." Going by Black's Law Dictionary (8th ed.) it is, "a sanction-such as a fine, penalty, confinement, or loss of property, right or privilege-assessed against a person who has violated the law." According to Jowitts Dictionary of English Law Vol. 2 (2nd ed. By John Burke), punishment is the penalty for transgressing the law. It is significant to notice that Section 68, both in sub-Section (1) and in sub-Section (2) uses the expression, shall be liable to be proceeded against and punished accordingly. There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or can be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine.

28. … … ...

29. There does not appear to be any reason to confine the operation of Section 68 of the Act as was done by the High Court. Merely because the expression 'punished' is used, it does not mean that it is confined to a prosecution under Section 56 of the Act, since the element that attracts the imposition of penalty and the prosecution is the same, namely, the contravention of any of the provisions of the Act. Moreover, there is nothing in the Act which confines the expression 'punished' only to a punishment for a criminal prosecution. An imposition of a penalty can also be a punishment. The second part of the reasoning appears to be self-contradictory. If a person includes a company, there is no reason to confine Section 68 to a prosecution only, because the company as a person is liable to be proceeded against under Section 50 and Section 56 of the Act, though in a

criminal prosecution the punishment by way of imprisonment can be imposed only on the officer or officers of the company referred to in Section 68 of the Act. Section 68 only indicates the manner in which a contravention by a company can be dealt with and it does not show that it is confined in its operation only to prosecutions against a company. It is a general provision relating to a contravening company, which is to be proceeded against whether it be under Section 50 or under Section 56 of the Act. The fact that a fine alone can be imposed on a company in a prosecution under Section 56 of the Act, cannot enable us to confine the operation of Section 68 to criminal prosecutions alone under the Act. We see no reason to whittle down the scope of Section 68 of the Act.

30. It is true that the entire penalty that may be imposed on adjudication, is capable of being recovered from the company itself. But that does not mean that it cannot be recovered from the officer incharge of the company or those who connived at or were instrumental in the contravention of the provisions of the Act by the company. Once the ingredient of the offence is contravention of the provisions of the Act and the consequences flowing from the contravention is to make that person including a company liable for penalty as well as for prosecution, there does not appear to be any justification in confining the scope of the Section 68 only to prosecutions under Section 56 of the Act. We have earlier indicated that use of the expression 'offence' in the marginal heading of Section 68 is not indicative of the expression 'being confined to a criminal offence alone' because an offence in the context of the Act is really a contravention of any of the provisions of the Act referred to in Section 50 and in Section 56 of the Act."

(emphasis supplied)

From the above observations of the Supreme Court it is clear that imposing of a penalty is also regarded as a punishment. In the context of the Act, Section 140 when it speaks of an offence, it is required to be considered as an act contrary to or forbidden by law or a breach /contravention of the provisions of the Act and only indicates a manner in which a contravention and/or violation of the provisions of the Act is to be dealt. As regards the deeming fiction created by it, the deeming fiction cannot be confined only in respect of prosecutions against the firm but also to the penalty proceedings which can be initiated under Section

112(a) of the Act. Thus, even on this count the deeming fiction created under Section 140 can be taken recourse in applying Section 112(a) of the Act. In view of the enunciation of law in "Standard Chartered Bank" (supra), the reliance of the appellants on the observations in "***Rajkumar Khurana Vs. State of (NCT of Delhi) and Anr., (2009)6 SCC 72"*** and "***Union of India and Anr. Vs. Samrat Raj Dugar & Anr., (1972(2) SCC 66)***, is not well founded.

80. Thus also from the decisions in **"M/s.Agarwal Trading Corporation and others Vs. The Assistant Collector of Customs"** (supra) and in ***"Standard Chartered Bank vs. Directorate of Enforcement"*** *(supra)* the unequivocal conclusion which can be derived is that the partners and the partnership firm can both be simultaneously liable for imposition of penalty, this is for the reason that in imposing of a penalty as also in a criminal prosecution as would fall in the Act, the basic ingredient to initiate such actions is the breach/contravention of the provisions of the Act. The Supreme Court has held that the term 'offence' as in the present context appearing in Section 140 cannot be confined to a criminal act but in the context of the Act would include within its ambit such acts or omissions which amount to contravention of the provisions of the Act, which includes contraventions as contemplated in Section 111 of the Act. The deeming fiction created under Section 140 would thus become applicable even to penalty proceedings and enable the authorities to impose a penalty on the firm and its partners separately.

81. A contention is urged on behalf of the appellant that the decision in ***Standard Chartered Bank*** *(supra)* was rendered in the context of the FERA 1973, in which the scheme of the Act was not the

same as in the Customs Act. It is further urged that the provision Section 140 of the Act which pertains to Offences by Companies falls in a separate Chapter namely Chapter XVI of the Act which is a chapter dealing with offences and penalties, whereas section 112 falls under Chapter XIV of the Act which pertains to "Confiscation of goods and conveyances and imposition of penalties" and thus the decision of the Supreme Court in Standard Chartered Bank cannot apply in interpreting Section 112(a) of the Act so as to apply the deeming provisions as contained in Section 140 of the Act. This contention is not well founded, for the reason that, what the Supreme Court has held in Standard Chartered Bank [though not referring to the decision in ***M/s. Agarwal Trading Corporation*** (supra)] is similar to what was held in ***Agarwal Trading Corporation*** (supra), which is clear in the Supreme Court confirming similar findings of the Division Bench of the Calcutta High Court (supra) wherein the Calcutta High Court had held that the term offence in construing the penalty provision is required to be understood in the generic sense and not as they are understood in the Indian Penal Code or other laws dealing with similar offences. In "***Agarwal Trading Corporation***" (supra) a penalty on the partners and the partnership firm was confirmed, whereas in ***Standard Chartered Bank*** *(supra)* the Directors were held liable for a personal penalty by application of the above principle. The Act in question, in my opinion, cannot be differently interpreted on the grounds as urged by the appellants looking at the Scheme of the Act and the object which it seeks to achieve. In view of principles of law as enunciated in the decision of the Supreme Court in the case of "*M/s.****Agarwal Trading Corporation and others"*** *(supra)* ***and "Standard Chartered Bank"*** *(supra)*, the submissions on behalf of the

Appellant that only because the deeming fiction as created in Section 140 of the Customs Act falls under Chapter XVI which pertains to offences cannot be read in Chapter XIV in its application to Section 112(a) of the Act, cannot be accepted. Even otherwise, it is a settled principle of law that the Legislation in its entirety is required to be considered to construe the real intention of the Legislature. In view of the clear position in law as laid down in the above decisions of the Supreme Court, the Appellant cannot be successful to urge this submission.

82. The above enunciation of the law as laid down in the decision of the Supreme Court in "M/s.**Agarwal Trading Corporation and others Vs. The Assistant Collector of Customs" (supra) and** "***Standard Chartered Bank vs. Directorate of Enforcement" (supra)"*** clearly go to show that the partners and the partnership firm can simultaneously become liable for imposition of a penalty.

83. There is one more facet which needs to be noted as argued on behalf of the appellant namely that the act or omissions of the firm are acts or omissions of the partners for the reason that the partnership firm is not distinct from its partners under the Indian Partnership Act 1932 and thus simultaneous penalties cannot be imposed on the partnership firm and the partners. I do not agree. For the purpose of application of Section 112(a) of the Customs Act, the above discussion clearly shows that the legislative intent is obviously to treat the firm and its partners separately for the purpose of considering the levy of penalty. Section 3(42) of the General Clauses Act gives the firm a legal status. A firm being given such a legal status is well recognized. (See: "***Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694***.")

84. As regards the use of the words “abets the doing or omission of such an act” as appearing in the second part of Section 112(a), the language of this part of the provision makes it clear that the intention is to bring within its ambit the acts of those persons which are distinct from the principal acts falling under the previous part of the said provision. In other words, the word “abets” would mean the acts and omissions of those persons who would be principals of the second degree. The word “abets” cannot be construed to mean that the ‘principal persons’ who by their acts and omissions have rendered the goods liable for confiscation under Section 111 of the Act can be considered as abettors as well, so as to fall in the second part of Section 112(a) of the Customs Act. This is for the reason that persons can either be persons principally liable for an act or omission or may be an abettor. Further the word 'abet' as used in Section 112(a) of the Act cannot be understood as it would be understood strictly under the criminal law, wherein mens rea would be a necessary requirement. A plain reading of Section 112(a) clearly indicates that there is no requirement of a mens rea for imposing a penalty for an act of abetment. Abetment in this context would be abetment to contravene the provisions of the Act. This can be noted from the fact that the legislature has not used the words 'knowingly', 'willfully' etc. It may not, therefore, be appropriate to read such words into the provision which would render it nugatory. Whenever the legislature wanted to include such prior knowledge or intention in contravening the provisions of the Act, it has been so expressly included. A perusal of Section 112(a) clearly indicates that abetment as envisaged in this provision would not require any mens rea. The position in law in interpreting such provisions wherein it is held that mens rea is not to be read in statutory contraventions/offences, can

be noted from some decisions.

85. In a Constitution Bench decision of the Supreme Court in "***Indo China Steam Navigation Co. Vs. Jasjit Singh, the Addl.Collector of Customs, Calcutta, (AIR 1964 SC 1140)***", the Supreme Court was considering the question 'whether contravention of Section 52A of the Sea Customs Act,1878 could be established unless mens rea was proved in respect of alleged contravention. Section 52A was couched in the following language:-

> *"Any vessel constructed, adapted, altered or fitted for the purpose of concealing goods shall not enter within the limits or any port in India or the Indian Customs waters."*

The contravention of Section 52A was punishable with confiscation of the vessel under Section 167(12A) of the Sea Customs Act. The Supreme Court held that in order to establish contravention of Section 52A of the Sea Customs Act mens rea need not be proved, the knowledge of owners or even of the master was, in the context of Section 52A was entirely irrelevant. What was relevant was a vessel answering the description prescribed by the Section, entered within the limits of an Indian Port, and when it is found that certain construction, adaptation or alteration have been carried out in a ship for the purpose of concealing goods, the mere fact that the master or the owners of the vessel were not shown to have been privy to such alternation etc. would not be sufficient to exclude the operation of Section 52A. The Supreme Court observed thus:-

"22. On the other hand, the scheme of S.67 supports the contention of the Additional Solicitor-General that if we read S.52A along with S.167(12A), it would be clear that the legislature intends, by necessary implication, the exclusion of mens rea in dealing with the contravention of s. 52A. Section 167(12A) provides that if a vessel constructed, adapted, altered or fitted for the purpose of concealing goods under s. 52A, enters or is within the limits of any port in India or within the Indian Customs waters such vessel shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding Rs. 1,000. It would be noticed that in column 1, s. 167(12A) reproduces the material words of s. 52A and does not add the words "knowingly or wilfully". It is significant that the words "knowingly or wilfully" are used in several other provisions contained in s. 167. Section 167(14) and s. 167 (61) use the word "wilfully" in respect of the commission of the offences there specified. Similarly s. 167(3) and s. 167(81) use the word "knowingly" and s. 167(78) uses the word "intentionally". Similarly, in s. 167(8), though the words "knowingly or wilfully" are not used, we have the expression "concerned in", and that may introduce considerations of mens rea. Thus, where the legislature wanted to introduce the knowledge or intention actuating the commission of the offence as an essential element of the offence, it has used appropriate words to indicate that intention. The failure to use a similar word in S.167(12A) cannot, therefore, be regarded as accidental, but must be held to be deliberate. In our opinion, there is some force in this argument as well. Besides, there can be no doubt that in construing a section, it would be relevant for the Court to consider whether the construction for which Mr. Choudhary contends would not make the provisions of S.52A read with S.167(12A) substantially nugatory. If it appears that the adoption of the said construction would substantially defeat the very purpose and intention of the legislature in enacting the said section, that would be a legitimate reason for rejecting the said construction. If the words used in s. 52A are capable of only one construction and no other, and that construction is the one suggested by Mr. Choudhary, the fact that by adopting the said construction the section would be rendered nugatory, would not be of any material significance. If, on the other hand, two constructions are reasonably possible one of which leads to the anomaly just indicated, while the other does not and helps the effectuation of the intention of the legislature, it would be the duty of the Court to accept the latter construction.

24. The intention of the legislature in providing for the prohibition prescribed by S.52A is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling,of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit Organisation which, for motives of profit making, undertakes this activity. That is why S.52A makes an absolute prohibition against the entry of a vessel which contains, inter alia any alteration made for the purpose of

concealing goods. Entry of contraband gold with the help of ships has thus become a serious problem and is intended to be checked by this absolute prohibition. If it was held that the knowledge of the owners of the offending vessel or of its master should be proved before S.52A is held to be contravened, in a majority of cases, the offending vessels will escape punishment. It is not difficult to imagine that mens rea or guilty mind could rarely be established against the owners of vessels which are traveling on the High-seas and it may not be always easy to prove the guilty knowledge even of the master of the ship. If the guilty mind is made an essential constituent of the section, it would be very easy both for the owners and the master of the ship to plead that the alleged alteration, adaptation or fitting was made without their knowledge and even contrary to their instructions. It is not difficult to realise in this connection that it would be almost impossible for the customs authorities to establish mens rea in the manner suggested by the appellant. Section 52A refers to the construction for the purpose of concealing goods, but it is obvious that no vessel would ordinarily be constructed initially for the purpose of concealing goods. Like the adaptation, alteration or fitting, the construction also would be made in such a manner as would not be easily detected or discovered. Therefore, it seems to us plain that if we are to accept the construction suggested by Mr. Choudhary, mens rea would rarely be proved against the owners of the vessel, or even its master and the section, in substance, would remain a dead letter on the statute-book." (emphasis supplied)

86. A useful reference can also be made to the decision of the Supreme Court in the case of "***J.K.Industries Ltd. & Ors. Vs. Chief Inspector of Factories and Boilers & Ors., [(1996)6 SCC 665]***". In this case the issue which fell for consideration before the Supreme Court was the interpretation of 'occupier of a factory' as defined under proviso (ii) to Section 2(n) of the Factories Act,1948. The question being 'whether in the case of a company which owns and runs a factory, it is only Directors of a Company who can be notified as the occupier of the company in the meaning of proviso (ii) to Section 2(n) of the Factories Act,1948', or whether the Company can nominate any other employee to be an occupier by passing a resolution to the effect that the said employee shall have ultimate control over the affairs of the factory. The Supreme Court in this context made the following observations:-

*"**40.** In keeping with the aim and object of the Act which is essentially to safeguard the interests of workers, stop their exploitation, and take care of their safety, hygiene and welfare at their place of work, numerous restrictions have been enacted in public interest in the Act. Providing restrictions in a statute would be a meaningless formality unless the statute also contains a provision for penalty for the breach of the same. No restriction can be effective unless there is some sanction compelling its observance and a provision for imposition of penalty for breach of the obligations under the Act or the rules made thereunder is a concomitant and necessary incidence of the restrictions. Such a provision is contained in Section 92 of the Act, which contains a general provision for penalties for offences under the Act for which no express provision has been made elsewhere and seeks to lay down uniform penalty for all or any of the offences committed under the Act. The offences under the Act consist of contravention of (1) any provision of the Act; (2) any rules framed thereunder; and (3) any order in writing made thereunder. It comprises both acts of omission and commission. The persons punishable under the section are occupiers and managers, irrespective of the question as to who the actual offender is. The provision, is in consonance with the scheme of the Act to reach out to those who have the ultimate control over the affairs of the factory to see that the requirements for safety and welfare of the employees are fully and properly carried out besides carrying out various duties and obligations under the Act. Section 92 contemplates a joint liability of the occupier and the manager for any offence committed irrespective of the fact as to who is directly responsible for the offence. The fact that the notified/identified director is ignorant about the 'management' of the factory which has been entrusted to a manager or some other employee and is himself not responsible for the contravention cannot absolve him of his liability. The identified/notified director is held vicariously liable for the contravention of the provisions of the Act, the rules made thereunder or of any order made in writing under it for the offender company, which is the occupier of the factory.*

***41.** Mr Jain, Mr Nariman and Mr Tripathi, appearing for the appellants, however, argued that since Section 92 imposes a liability for imprisonment and/or fine, both on the occupier (the notified director) and the manager of the factory, jointly and severally, for the contravention of any of the provisions of the Act or any rule made thereunder or of any order in writing given thereunder, irrespective of the fact whether the occupier (the notified director) or manager, had any mens rea in respect of that contravention or that the contravention was not committed by him or was committed by any other person in the factory without his knowledge, consent or connivance, it is an unreasonable restriction. The learned counsel argued that in criminal law, the doctrine of vicarious liability is unknown and if a director is to be punished for something of which he is not actually guilty, it would violate his fundamental right as enshrined in Article 21 of the Constitution. It was urged that on account of advancement in science and technology, most of the companies, appoint professionally qualified men to run the factories and*

nominate such a person to be the 'occupier' of the factory and make him responsible for proper implementation of the provisions of the Act and it would, therefore, be harsh and unreasonable to hold any director of the company, who may be wholly innocent, liable for the contraventions committed under the Act etc. when he may be totally ignorant of what was going on in the factory, having vested the control of the affairs of the factory to such an officer or employee, by ignoring the liability of that officer or employee. The argument is emotional and attractive but not sound.

42. *The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution etc. in India and abroad. "Absolute offences" are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty. Such offences are generally known as public welfare offences. A seven-Judge Bench of this Court in* ***R.S. Joshi v. Ajit Mills Ltd. [(1977) 4 SCC 98 :*** *1977 SCC (Tax) 536 : AIR 1977 SC 2279] observed: (AIR p. 2287 : SCC p. 110, para 19)*

"Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force…." (emphasis supplied)

87. In "***James David Crighton & Ors. Vs. S.K.Srivastava, reported in AIR 1969 Calcutta 260***", a learned Single Judge of Calcutta High Court held that mens rea may not be an element in interpretation of Section 30, 111, 112 of the Customs Act, relying on the decision of the Supreme Court in the case "*Indo-China Steam Navigation Co. Vs. Jasjit Singh, the Addl. Collector of Customs, Calcutta, (AIR 1964 SC 1140)*". The Court made the following significant observations in para.15 and 16 of the judgment:-

"15. Now bearing in mind the value to be attached to the absence of mens rea in a statutory offence under section 52A read with Section 167 (12A) as laid down by the Supreme Court, I have to see how far those considerations apply in interpreting Sections 30,111 and 112 of the Customs Act. There is no dispute that the goods seized from the vessel are all prohibited goods, within meaning of Section 2 (33) of the Customs Act. They were brought to India form places outside India. Thus even though the petitioners were not aware that the offending goods were being brought to India, they were in fact being carried to India by their vessel from places outside India. Does this alone make the petitioner no.1 an importer and stamp upon the goods with the character of imported goods ? The definitions of "import" (as in Section 2 (33) and of "imported goods" as in Section (2 (25) do not add the words "knowingly or willfully" before the words "bringing" or "brought" into India, as was done in some other provisions of the Sea Customs Act, for example as in Sections 167 (14) and 167 (61). Does this indicate that the legislature did not want to introduce knowledge and intention as an essential element of the offence? Can it be said that one does not bring anything or nothing can be brought by him unless he knowingly or willfully does so, I do not think that the sweep of the meaning of the word "bring" or "brought" can be so narrow as that. One may bring infection of a disease in his family without ever intending to carry the same and may also bring misfortune upon himself without knowing or intending so to do. Thus, although the prohibited goods may have been carried in the vessel without the knowledge of petitioner no.1, the fact that they arrived in India by the vessel from a place outside, stamp upon the goods the character of imported goods. This is so even though the person or persons responsible for the importation was or were other than the petitioners. If the goods were imported goods as I hold they were then their inclusion in the import manifest was obligatory on the part of the Master of the vessel, regard being had to the plain language of Section 30 of Customs Act which does not make any exception for any kind of I mported goods even though unknowingly carried or brought to India. But then the question arises as to how can a Master of a vessel include in the manifest, goods about the existence of which he had no knowledge and which were so cleverly secreted by smugglers that it required the full ingenuity of the rummaging department of the Customs to discover them. To hold t hat because of this difficulty, the failure to include the imported goods in the Manifest would not attract the mischief of Section 30 read with sections 111 and 112 may be to resign oneself to clandestine importation of huge quantity of prohibited goods in India which the Government of India wants to prohibit or regulate for economic reasons. The procedure prescribed by the Customs Act namely that all imported goods shall be included in the Manifest and delivered to the proper official of the Customs under Section 30 that the failure so to do will render the imported goods liable to confiscation under Section 111(f) and that omission to discharge the statutory duty will render the person responsible therefor to a penalty under section 112, are all meant to safeguard the economies of the country form the danger of uncontrolled clandestine importation. To hold

that an innocent Master of a vessel who is unable to contro l illegal importation of large quantities of prohibited goods should not be visited with the penalty under section 112, may render the safeguards wholly nugatory. When importation of prohibited are discovered form hidden nooks and corners of a vessel it may be difficult to establish that the Master of the vessel had knowledge of the illegal importation. He may always come out with the explanation as done in this case that he had warned the crew against indulging in illegal importation and had taken all precautions to see that prohibited goods did not enter the vessel without complying with the legal formalities and thus escape the provisions of section 112, read with sections 111 and 30. An interpretation of section 30, 111 (f) and 112 in a manner which may render imposition of penalty for importation of prohibited goods in India impossible should be avoided."

(emphasis supplied)

88 In the case of "***State Vs. Abdul Aziz, (AIR 1962 Bom 243)"*** in construing Section 5 of the Imports and Exports (Control) Act,1947, read with the provisions of Section 3(1) of the General Clauses Act it was held that abetment does not require any mens rea. The Division Bench observed as under:-

"... .... It is sufficient to note that abetment has not been defined in the Imports and Exports (Control) Act of 1947. That being the case, we will have to take into account the definition of the term contained in Section 3(1) of the General Clause Act,1897. Sub-section (1) provides:

"Abet, with its grammatical variations ..... shall have the same meaning as in the Indian Penal Code."

All the definitions contained in Section 3 of the Act, however, are subject to the qualification, which is laid down in that section to the following effect:

"In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant to the subject or context ....."

Although, therefore, the definition contained in section 107, Indian Penal Code, will be applicable, it is necessary to find out as to whether there is anything repugnant in the subject or context. Section 5 of the Act of 1947 by itself makes no reference to mens rea. Abetment of the contravention of the Order is coupled together with contravention itself in the same provision. It must, therefore, be treated as standing on the same footing. In our view, therefore, the offence of abetment

also would not require any kind of mens rea."

89. It is thus clear from the principles of law as enunciated in the above decisions of the Supreme Court, it would not be appropriate to read that only when the partners knowingly do certain acts or omissions or when only they have the prior knowledge, that their acts amount to contravention of the provisions of Section 111 of the Act which would lead to confiscation of goods, only in that case they can be held liable for penalty under Section 112(a) of the Act. Such an interpretation would lead to reading something in section 112(a) which is expressly kept away by the Legislature. The legislature has intended exclusion of mens rea into section 112(a) of the Act in dealing with contravention of Section 111 of the Act. This is clear as the Legislature does not use the words 'knowingly' or 'willfully' or 'intentionally' in Section 112(a) which can be noted in other provisions, and this is certainly not accidental. If such words which can be considered to be deliberately avoided to be used by the Legislature, if read into the provisions of Section 112(a), it would render Section 112(a) nugatory resulting in defeating what is intended by the Legislature. The firm and the partners thus can in a given case be subjected to a simultaneous penalties for the contravention of Section 111 of the Act resulting into confiscation of the goods, however the same would be subject to the either of the parties proving that the contravention has taken place without their knowledge or despite exercise of all due diligence to prevent such contravention, which is a safeguard inherently provided by the Act. Thus as regards use of the word "abets" in Section 112(a) of the Act, it may be observed that same would not attract the Rule of mens rea. Further it is well settled that a penalty is imposed under the Act for such acts which are in the nature of breach of a civil

obligation and by an adjudicatory proceeding, different from criminal proceedings before a Criminal Court and thus would not attract the Rule of mens rea.

90. In regard to the main issue relating to the levy of simultaneous penalties a useful reference can also be made to a decision of the Division Bench of Kerala High Court in "***India Sea Foods Vs. Collector of Customs and Central Excise, Cochin***" reported in "***1984(16) ELT 243 (DB)***" (Writ Appeal No.321 of 1975 dated 25 May 1978). In dealing with the case of imposition of penalty on the firm as well as the managing partners it was held to be legal and valid. The Division Bench has made the following observations:-

> "We do not see, and are unable to understand, why the firm and the partners thereof cannot both be adjudged guilty of contravention, or be subjected to a penalty, under the provisions of the Act. It is possible to find, as in this case, the firm guilty of an act or omission which renders the goods liable to confiscation, and at the same time to find the partners thereof guilty of abetment in the doing or omission of such act. It seems possible again to find the legal entity of a partnership liable for the act or contravention, and at the same time to hold the human agency through which it acts, also responsible for the same."

91. As regards the issue of application of Section 135(i)(a) of the Act to adjudication proceedings under Section 112(a) of the Act and more particularly to the partnership firm and its partners, pertinently, neither of the parties have urged that Section 135 can be read while applying Section 112(a) of the Act. Moreover as noted in paragraph 47(viii) above, the Appellants have urged to the contrary. I am of the opinion that the legislature in its wisdom has worded Section 112(a) to include the firm and its partners as persons who would be liable for penalty to be levied,

depending on the facts of the case. As noted above a conjoint reading of the provisions as contained in Chapter XIV shows that simultaneous penalty can be imposed on the firm and its partners, where the authorities on materials available to them are clear of the direct or indirect involvement of the partners in contravening the provisions of the Act. It is not in every case, penalty is required to be imposed simultaneously on the firm and its partners. It would obviously depend on facts and circumstances of each case. Before an order imposing a penalty is made, the authority is required to adopt a procedure as contemplated in the provisions wherein full opportunity can be availed by the person to prove that a penalty need not be imposed under Section 112(a) of the Act. The principle of mens rea is not attracted under Section 112(a) of the Act to impose penalty on those who can be said to abet the contravention. Section 112(a) is an independent provision. Section 135(i)(a) is a provision dealing with a criminal offence and thus, cannot have a relevance in penalty proceedings adopted under Section 112(a) of the Act, as the essential ingredient in respect of a criminal offence is mens rea. This is how Section 135(i)(a) specifically refers to a prior knowledge. Reading Section 135(i)(a) even remotely in the implementation of Section 112(a) would result into a legal absurdity and a violence to the provisions of Section 112(a) and defeat the clear intention of the legislature, as it would amount to incorporating a foreign ingredient or something which the legislature never intended. In the entire scheme of Chapter XIV of the Act which deals with "Confiscation of Goods and Conveyances and Imposition of Penalties", in the matter of imposing of penalties, the legislature has clearly left it to the wisdom of the executing agencies of course subject to the appropriate safeguards, and evaluation. In my

opinion, a judicial interpretation which would further the intention of the legislature is to be adopted, if so, then an interpretation to read Section 135(i)(a) in Section 112(a) can never be contemplated as these are independent provisions having different objects. The former speaks of a criminal offence requiring the offence to be proved beyond reasonable doubt and the latter deals with a monetary penalty, to be imposed in departmental adjudication proceedings.

92. The sequel to the above discussion is that the first question is required to be answered in the affirmative, that is simultaneous penalties can be imposed on the firm and the partners under the Act and more particularly under Section 112(a) of the Act. However as the Act itself stipulates, the same would be subject to the parties proving that the contravention has taken place without their knowledge or despite exercise of all due diligence to prevent such contravention.

93. As regards the second question, the decision of the Division Bench of this Court in "***Textoplast Industries Vs. Additional Commissioner of Customs"*** *reported in* ***2011(272) E.L.T. 513 (Bom.)*** lays down the correct law in holding that it is permissible to impose penalty separately on partnership firm and the partners in adjudication proceedings under the Customs Act.

94. The reference would stands answered in the above terms.

(G.S.Kulkarni. J)

S.R.JOSHI/PVR