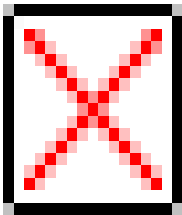


Opaque provisions - 'The lost 'proper officer' - An opportunity to infuse lucidity

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By Prabhad Dobriyal ¹



I. Introduction

1. The question of whether an officer of the Directorate of Revenue Intelligence ('DRI') is a 'proper officer' under Section 2(34) of the Customs Act, 1962 ² ('**Customs Act**') for the purposes of Section 28 of the Customs Act has long been subject to scrutiny and debate; the debate seemingly reaching its crescendo in the judgment delivered by the Hon'ble Supreme Court in **Canon India** ³. Before delving into the findings of the Hon'ble Supreme Court, it would be prudent to trace the genesis and evolution of the interpretation given to the definition of 'proper officer' and 'officer of customs' as defined under the Customs Act.

II. Road to Sayed Ali

2. In **Poona Roller** ⁴, the Hon'ble Customs, Excise and Gold (Control) Appellate Tribunal ('**CEGAT**'), Mumbai had held that although the Assistant Director, DRI was designated as Assistant Collector of Customs, under Notification No. 19/90, dated 26-4-1990; it did not specifically assign the powers of levy and collection of duty to the Assistant Director, DRI. As, a show cause notice under Section 28 of the Customs Act, can only be issued by a 'proper officer'; it was held that in the absence of assignment of powers of levy and collection, either by the Board or the Commissioner of Customs, the Assistant Director DRI is not empowered to issue a show cause notice as envisaged under Section 28(1) of the Customs Act. Interestingly, the Hon'ble CEGAT, Mumbai also observed that under Circular dated 14.05.1992 ('**Circular**'), the Central Board of Excise and Customs ('**CBEC**') had clarified that in order to maintain **status quo**, show cause notices under Section 28 would continue to be issued by the Collectors of Customs. Therefore, while also placing reliance on the Circular, the Hon'ble CEGAT, Mumbai held the Collectors of Customs to be the 'proper officers' for the purposes of issuing show cause notices under Section 28 of the Customs Act. The decision in **Poona Roller** was followed in **Dhirendra N. Seth** ⁵, **Ramesh Nebhnani** ⁶, **A. Shankar Rao** ⁷

3. Although, from a bare perusal, it appeared as though the Circular did not deal with assigning functions under Section 2(34) of the Customs Act, as it did not mention Section 2(34); the Hon'ble CEGAT, New Delhi, in **Bakeman's Home Products** ⁸, while following the decision in **Poona Roller**,

held that this would not invalidate the Circular if, otherwise, issue of a circular could be traced to any statutory power as, the CBEC was empowered to entrust specific functions to officers of customs. It is pertinent to note that Section 2(34) was referred with respect to assigning functions to officers of customs, whereas in **Canon India**

the Hon'ble Supreme Court had held that a proper officer cannot be appointed under Section 2(34) of the Customs Act.

4. In **Manohar Bros. (Capacitors)** ⁹

, the Hon'ble CEGAT, Mumbai, clarified that although the Commissioner of Central Excise, Bombay - III was appointed as a Commissioner of Customs, thereby qualifying to be an 'Officer of Customs', this by itself would not mean that the Commissioner is a 'Proper officer' under Section 28(1) of the Customs Act. Therefore, it is pellucid that there was a clear delineation between the functions of an 'Officer of Customs' and a 'Proper officer' under the Customs Act.

5. The importance of a 'Proper officer', in so far as their power to issue show cause notice under Section 28 was reiterated in **Association for Dev. Youth India Pvt. Ltd.** ¹⁰, wherein the Hon'ble CEGAT, New Delhi, relied on **Poona Roller**

, to distinguish the requirement under Section 124 and Section 28(1) of the Customs Act. The Court observed that, under Section 124 of the

Customs Act, the word 'Proper officer' was not included, thereby the DRI officer was empowered to issue a show cause notice under Section 124 of the Customs Act.

6. A definite deviance from the prevailing rulings in so far as the delineation between the functions of an 'Officer of Customs' and a 'Proper officer' under the Customs Act can be noted in **Pushpit Steels Pvt. Ltd.** ¹¹. The Hon'ble CEGAT, Chennai relied on **Poona Rollers** and **Bakeman's Home Products**

to hold that the show cause notice under Section 28 of the Customs Act, issued by the DRI officials was bad in law. However, it went on to add that as the issue covered under the show cause notice was already taken cognizance of by the 'Proper officer' of Kochi customs; the principle of "comity of courts" would preclude the DRI from exercising concurrent jurisdiction on the same issue.

7. In **Mahesh India** ¹², the Hon'ble CEGAT, Mumbai reiterated the ratio laid down in **Poona Rollers**

and held that, even though the DRI officer would qualify to be an 'Officer of Custom'; he would not be a 'Proper officer' to issue show cause notice under Section 28 of the Act. The judgment in **Mahesh India** was distinguished in **Kandla Clearing** ¹³

, wherein the Hon'ble CESTAT, New Delhi reiterated the observations in **Association for Dev. Youth India Pvt. Ltd** while holding that; the Additional Director General of Revenue Intelligence being appointed as Collector/Commissioner of Customs, had the power to issue show cause notice under Section 124 of the Customs Act.

8. A detour from the prevailing understanding of a DRI officer being a 'Proper officer' for the purposes of Section 28 of the Customs Act occurred in **Konia Trading** ¹⁴

wherein the CESTAT, New Delhi had held that officers of DRI appointed as customs officers shall have the same power as Customs officers, who are 'proper officer' in relation to matters where customs officers are notified as 'Proper officer' ¹⁵

. Therefore, it was held that the DRI officers possessed the power to issue a show cause notice under Section 28 of the Customs Act.

9. The schism created by the decision rendered in **Konia Trading** was widened by the Hon'ble High Court of Bombay in **Electron Textile Exports** ¹⁶. Subsequently, in the appeal filed against **Mahesh India** ¹⁷; the Hon'ble High Court of Bombay while relying on **Electron Textile Exports** partly overruled the decision of CEGAT, Mumbai in **Mahesh India**

, in so far as the power of DRI to issue show cause notice under Section 28 of the Customs Act, is considered. The decision rendered in **Konia Trading** was relied upon in several judgments ¹⁸

, thereby marking a complete transition; DRI officers possessed the power to issue a show cause notice under Section 28 of the Customs Act.

10. However, the issue was finally settled in **Sayed Ali** ¹⁹

, wherein the Hon'ble Supreme Court of India accepted the contention that all 'officers of customs' are not necessarily 'proper officers' ²⁰ and only such customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. It is pertinent to note that the Hon'ble Supreme Court held that the Board or the Commissioner of Customs is competent to appoint a 'proper officer' under Section 2(34) of the Customs Act. However, this finding would subsequently be negated by the Hon'ble Supreme Court in **Canon India**.

III. Amendments made to Customs Act post Sayed Ali

11. In the aftermath of **Sayed Ali**, Explanation 2 ²¹

was appended to Section 28 of the Customs Act from 08.04.2011; Explanation 2 clarified that any non-levy, short-levy or erroneous refund pertaining to the period prior to which the Finance Bill 2011 receives assent would be governed by the older Section 28, as it stood before the Finance Bill 2011. Further, the CBEC issued Notification No. [44/2011 - Customs \(N.T.\)](#) ²² ('**Notification 44/2011**') dated 06.07.2011, notifying, *inter alia*,

a) Additional Director Generals, b) Additional Directors or Joint Directors and c) Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence as 'proper officer' for the purposes of Section 17 and Section 28 of the Customs Act. It is pertinent to note that the aforesaid Notification was issued under Section 2(34) of the Customs Act; a finding that was subsequently reversed in **Canon India**.

12. In addition to the above, in order to cure the defects on the basis of which the **Sayed Ali**

judgment was passed; The Customs (Amendment and Validation) Bill, 2021 ²³ ('**Validation Bill**

') was introduced in the Lok Sabha on 08.08.2011 proposing to insert Sub-Section (11) ²⁴

to Section 28 of the Customs Act, thereby, deeming 'officers of customs' appointed before 06.07.2011 to have and always had the power of assessment under section 17 of the Customs Act and also, deemed to have been and always had been the proper officers for the purposes of Section 17. The Statement of objects and reasons to the Validation Bill, at paragraph 3, categorically clarified that,

"it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any

to the Customs Act.

13. However, under Circular No. [44/2011 - Customs](#) ²⁵

dated 23.09.2011 the CBEC clarified that officer of DRI and DGCEI will not adjudicate show cause notices issued under Section 28 of the Act. This appears to have been a measure to avoid overlapping of jurisdictions and multiplicity of proceedings wherein, a customs officer and an officer of DRI, both being 'proper officer', take cognizance of the same matter.

IV. Post-amendments to Customs Act

14. In **Sunil Gupta** ²⁶

, the Hon'ble Bombay High Court held that Explanation 2 to Section 28 only clarified that cases governed by Section 28 initiated prior to the Finance Bill, 2011 were to be governed by Section 28, as it stood prior to the date on which such assent was received. It went on to hold that the insertion of Section 28(11) was distinct from Explanation 2 and pertained to the competence of the officer; the Court upheld the retrospective application of Section 28(11) while observing that due to the retrospective application of Section 28 (11), all such officers appointed as 'proper officer' by the Central Government or the Board under Section 6 of the Customs Act were deemed to always have been 'proper officer'. The Hon'ble Bombay High Court therefore distinguished the **Sayed Ali**

judgment by observing that the notifications appointing 'proper officer' were not given retrospective application at the time of rendering the judgment in **Sayed Ali**, thereby rendering the Judgment unapplicable.

15. Subsequently, the Hon'ble Delhi High Court in **Mangali Impex** ²⁷

curtailed the retrospective effect of the Validation Act, while holding that Section 28(11) would not be applicable to cases prior to 08.04.2011, as Section 28 (11) of the Customs Act opens with a non-obstante clause which overrides 'anything to the contrary contained in any judgment, decree or order of any court'. However, it was held that the non-obstante clause does not override any other provisions of the Customs Act or any other Act for the time being in force. Therefore, as Explanation 2 stipulated that older Section 28 would apply, in cases of any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President; Section 28 (11) which was enacted under the Validation Act from 16.09.2011 would not apply to such cases. Therefore, Section 28 (11) would only apply retrospectively for the period of 08.04.2011 (Explanation 2 was added to Section 28) and 06.07.2011 (Notification 44/2011 was issued).

16. However, for the period subsequent to 08.04.2011; the Hon'ble Delhi High Court went on to hold that the insertion of Section 28(11) to the Customs Act would not be a panacea in so far as the issue of duplicity/overlapping of jurisdiction of officers is concerned. Therefore, in effect, the Hon'ble Delhi High Court's judgment completely neutralized the effect of Section 28 (11).

17. The Hon'ble Supreme Court of India stayed ²⁸ the judgment in **Mangali Impex**

; this prompted the CBEC to issue Instruction dated 03.01.2017 ²⁹

and Instruction dated 03.09.2019 clarifying that the Revenue was not barred from adjudicating show cause notices covered by the **Mangali Impex** Judgment.

V. Canon India

18. The proverbial *deus ex machina* for assessee came in the form of **Canon India**

, wherein the Hon'ble Supreme Court held that the Parliament consciously chose to apply the article 'the' before 'proper office' ³⁰ under Section 28 of the Act, thereby the 'proper officer' is such who is appointed the function under Section 28 of the Act. The Hon'ble Supreme Court further went on to hold that a 'proper officer' is one who "in the first instance, assessed and cleared the goods"; therefore, the power of re-assessment is to be exercised by the same officer or his successor who had exercised power of assessment, thereby, upholding the principle of judicial comity ³¹.

19. It was also held that only the Central Government possess the power to entrust functions of Customs officer on other officers of the Central or the State Government or local authority under Section 6 of the Customs Act ³²

. As such, CBIC had no power to appoint a 'proper officer', even lesser so under Section 2(34) of the Customs Act.

20. The Hon'ble Supreme Court in **Agarwal Metals** ³³, while following the decision rendered in **Canon India**

held that the Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), was not a proper officer within the meaning of Section 28(4) read with Section 2(34) of the Customs Act, 1962.

VI. Review of Canon

a. Section 28(11) of the Customs Act

21. As stated above, the Statement of objects and reasons to the Validation Bill, at paragraph 3, categorically clarified that the intent behind inserting Section 28 (11) was to retrospectively validate the show cause notices issued by the DRI officials, by deeming them to always have been the 'proper officer' under the Customs Act, irrespective of the assignments made on 06.07.2011. However, the constitutional validity of Section 28(11) is sub-judice before the Hon'ble Supreme Court ³⁴

. It is pertinent to note that the Hon'ble Supreme Court in **Canon India** has not dealt with the validity of Section 28(11) or the fact that the matter is sub-judice before the Hon'ble Supreme Court.

22. If Section 28(11) is not struck down and the retrospective application is upheld by the Supreme Court, it would lead to a scenario wherein a person appointed as 'officer of customs' under any notification issued by the CBEC/CBIC would be deemed to have been a 'proper officer', since the date of appointment, thereby validating any show cause notice issued by such officers under Section 17 or 28 of the Customs Act.

Section 2(34)

23. Another fertile ground for contending the Hon'ble Supreme Court's judgment in **Canon India**

invariably lies in the judgment delivered by the Hon'ble Supreme Court in **Sayed Ali**

wherein it was held that the Board or the Commissioner of Customs is competent to appoint a 'proper officer' under Section 2(34) of the Customs Act. While the judgment in **Sayed Ali** was rendered by a Division bench; the judgment in **Canon India**

has the force of a full bench behind it. In any case, it is palpable that there is a dissonance in so far as the power of the Board to appoint a 'proper officer' under Section 2(34) is concerned. It is pertinent to note that the judgment delivered in **Canon India**

did not take note of the position of law as propounded in **Sayed Ali** ; therefore, the interpretation of law laid down in **Sayed Ali** has not been directly overruled. An important question that arises here is whether a bench of the Hon'ble Supreme Court constituted, having a higher strength, may overturn a judgment delivered by a bench constituted having lesser strength, without referring to the judgment delivered by the bench of lesser strength. In **Hyder Consulting** ³⁵, the Hon'ble Supreme Court had held that,

"a decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the Court of record"

. As such, it cannot be said that the Hon'ble Supreme Court, in **Canon India** has considered the decision rendered in **Sayed Ali** ; therefore, it may be argued that the decision rendered in **Canon India** was **per incuriam**.

24. Further, it is trite law that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law ³⁶

. Therefore, the notifications issued by the Board appointing 'proper officer' under the Customs Act may be saved and held to be lawfully correct, unless it is held that the Board itself did not have any power to issue notifications appointing 'proper officer' under the Customs Act.

VI. Conclusion

25. The evolution of the concept of 'proper officer' under the Customs Act which began more than 20 years ago, stands amalgamated in a position of opacity. Although, certain issues such as the power of a 'proper officer' to issue show cause notice under Section 28 of the Customs Act stand resolved; issues pertaining to the power of the Board to appoint 'proper officer' under the Customs Act and whether such appointment can be done under Section 2(34) of the Customs Act, and whether an 'officer of custom' and a DRI officer being a 'proper officer' can both exercise jurisdiction in the same matter, remains to be resolved. Although, the substantial questions of law analysed in the aforementioned paragraphs have the potential to cause debilitating loss of revenue to the Government of India, it appears there is an opportune moment before the Hon'ble Supreme Court of India to tune the discordant chords and compose a harmonious interpretation of the law, finally.

[The views expressed are strictly personal.]

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² Section 2(34) of the Act reads as under:

"2. Definitions: In this Act, unless the context otherwise requires

"(34) Proper officer" in relation to any functions to be performed under this Act, means the Officer of Customs who is assigned those functions by the Board or Collector of Customs'."

³ M/s. Canon India Private Limited Vs. Commissioner of Customs, - [2021-TIOL-123-SC-CUS-LB](#)

⁴ Commissioner of Customs, Bombay Vs. Poona Roller, 1997 (89) E.L.T. 604 (Tribunal)

⁵ Dhirendra N. Seth Vs. Commissioner of Cus., Kandla, 2000 (122) E.L.T. 625 (Tribunal)

⁶ Commissioner of Customs, Mumbai Vs. Ramesh Nebhnani, 2001 (138) E.L.T. 232 (Tri. - Mumbai)

⁷ Commissioner of Customs, Mumbai Vs. A. Shankar Rao, 2002 (149) E.L.T. 387 (Tri. - Mumbai)

⁸ Bakeman's Home Products Pvt. Ltd. Vs. Collector of Cus., Bombay, 1997 (95) E.L.T. 278 (Tribunal)

⁹ Manohar Bros. (Capacitors) Vs. Collector of Customs - II, Bombay, 1998 (98) E.L.T. 821 (Tribunal)

¹⁰ Association for Dev. Youth India Pvt. Ltd. Vs. Collector of Customs, Kandla, 2001 (130) E.L.T. 585 (Tri. - Del)

¹¹ Pushpit Steels Pvt. Ltd. Vs. Commissioner of Customs, Kochi, 2001 (130) E.L.T. (Tri. - Chennai)

¹² Commissioner of Customs, Mumbai Vs. Mahesh India, 2003 (151) E.L.T. 605 (Tri. - Mumbai)

¹³ Kandla Clearing Pvt. Ltd. Vs. Commissioner of Cus., Kandla, 2003 (158) E.L.T. 86 (Tri - Del)

¹⁴ M/s. Konia Trading Co. Vs. CC, Jaipur, [2004-TIOL-560-CESTAT-DEL-LB](#)

¹⁵ Durga Prasad Vs. H. R. Gomes, [2002-TIOL-2770-SC-CUS-CB](#)

¹⁶ Commissioner of Customs (Import) Vs. Electron Textile Exports (P) Limited & Another, Customs Appeal No. 41 of 2005

¹⁷ Commissioner of Customs (Import), Mumbai Vs. Mahesh India, 2009 (243) E.L.T. 339 (Bom.)

¹⁸ Omi Textile Vs. Commissioner of Cus. & C. Ex., Nashik, 2004 (174) E.L.T. 180 (Tri - Mumbai); Kripa Shankar Vs. Commissioner of Customs (Prev.), Mumbai, 2005 (184) E.L.T. 198 (Tri - Mumbai); Commissioner of Customs (Export), Mumbai Vs. Unity Steel Ltd., - [2006-TIOL-43-CESTAT-MUM](#)

; Tata Consultancy Services Vs. Commissioner of Cus. (Airport) Mumbai, 2006 (196) E.L.T. 198 (Tri - Mumbai); Chandra Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi, 2008 (224) E.L.T. 583 (Tri. - Del.)

¹⁹ Commissioner of Customs Vs. Sayed Ali, - [2011-TIOL-20-SC-CUS](#)

²⁰ Devilog Systems India v. Collector of Customs, Bangalore, 1995 (76) E.L.T. 520 (Kar.); Orient Arts & Crafts v. Commissioner of Customs (Prev.), Mumbai, 2003 (155) E.L.T. 168 (Tri-Mum); Informatika Software (P) Ltd. & Anr. v. Commissioner of Customs (P), Calcutta, 1997 (73) ECR 348 (Tri.-Kolkata).

²¹ Explanation 2 to Section 28 of the Customs Act -

"Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

²² <https://www.cbic.gov.in/htdocs-cbec/customs/cs-act/notifications/notfns-2011/cs-nt2011/csnt44-2k11>

²³ [https://prsindia.org/files/bills_acts/bills_parliament/2011/Custom_\(44_of_2011\)_Eng.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2011/Custom_(44_of_2011)_Eng.pdf)

²⁴ Sub-section (11) to Section 28 of the Customs Act -

"2. In section 28 of the Customs Act, 1962, after sub-section (10), the following subsection shall be inserted, namely:-

"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

²⁵ <https://www.cbic.gov.in/htdocs-cbec/customs/cs-circulars/cs-circulars-2011/circ44-2k11-cus>

²⁶ Sunil Gupta Vs. Union of India, - [2014-TIOL-1949-HC-MUM-CUS](#)

²⁷ Mangali Impex Ltd. and Ors. Vs. Union of India, [2016-TIOL-877-HC-DEL-CUS](#)

²⁸ Union of India & Ors. Vs. Mangali Impex., Order dated 01.08.2016 in Civil Appeal No. 6142 of 2019

²⁹ <https://www.cbic.gov.in/resources/htdocs-cbec/excise/cx-instructions/cx-instructions-2017/cx-ins-scn-callbook-withdrawn.pdf>

³⁰ Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore, - [2002-TIOL-678-SC-MISC](#)
; Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd., (2001) 3 SCC 609

³¹ See supra note XXVII; India Household and Healthcare Limited v. LG Household and Healthcare Limited, (2007) 5 SCC 510; Kenapo Textiles Pvt. Ltd. v. State of Haryana, (1992) 84 STC 88 (P&H);

³² Section 6 of the Customs Act -

"6. Entrustment of functions of Board and customs officers on certain other officers -

The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."

³³ Commissioner of Customs, Kandla Vs. M/s. Agarwal Metals and Alloys, [2021-TIOL-233-SC-CUS-LB](#)

³⁴ See supra note 28

³⁵ Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa, (2015) 2 SCC 189

³⁶ Md. Shahabuddin vs. State of Bihar and Ors., 2010 (3) SCALE 204; N. Mani Vs. Sangeetha Theatre and Ors., (2004) 12 SCC 278

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