

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 01.10.2015
% Judgement delivered on: 23.11.2015

+ **W.P.(C) 3598/2015**

M/S SANTOSH HANDLOOM Petitioner

versus

THE COMMISSIONER OF CUSTOMS
(IMPORT) & ORS Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Priyadarshi Manish, Mrs Anjali J. Manish, Mr Rahul Ranjan & Mr Piyus Kumar, Advs.

For the Respondents: Mr Kamal Nijhawan & Ms Shreya Sinha, Advocates for R- 1 & 2.
Mr Satish Aggarwala & Mr Amish Aggarwala, Advocates for R-3.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. In this writ petition the principal grievance, which has been raised, is that, there has been a failure on the part of the respondents to comply with the statutory provisions of Section 110(2) of the Customs Act, 1962 (in short the Act).

1.1 The petitioner claims that the respondents have detained the imported goods beyond the period of six (6) months without issuing a show cause notice as contemplated under Section 110(2) of the Act.

1.2 The show cause notice and the order passed thereof by the respondents to demonstrate that they have taken recourse to the proviso appended to Section 110(2) of the Act, which enables triggering of an

extended period of six (6) months, has no legal sanctity, according to the petitioner, for the following reasons:

- (i) Firstly, the show cause notice seeking extension of time for compliance of the requirements of Section 124 of the Act, is ante-dated.
- (ii) Secondly, the service of show cause notice effected on the Customs House Clearing Agent (in short the CHA), is no service in the eyes of law, being contrary to the provisions of Section 153 of the Act.

2. The aforesaid are the broad contours of the issues which arise for consideration in the present writ petition. The reason, that I have set out these broad contours, is that, there are other connected writ petitions qua which arguments have been addressed by both sides, whereupon judgement has been reserved in each of those matters. The legal submissions advanced, in these cases, by both sides are common. Therefore, it is common ground that a decision in this case would apply on all fours to the other connected matters.

3. The specifics which concern this writ petition, are as follows:

3.1 The petitioner vide commercial invoice dated 25.05.2014 had placed an order for polyester quilt covers (in short quilt covers) and 100% polyester bed sheet sets. The price per quilt cover was shown as USD 1.25 per piece, while in so far as the polyester bed sheets were concerned, each set was priced at USD 1 per set. The goods under the said invoice were shipped, on 03.06.2014.

3.2 A second order was placed by the petitioner vide commercial invoice dated 30.05.2014. This time around, the goods ordered were only quilt covers. As in the earlier invoice, the price indicated was USD 1.25 per piece.

3.3 Upon arrival of the goods, the petitioner filed two bills of entry, on 15.07.2014. In respect of invoice dated 25.05.2014, a bill of entry bearing no. 6097564 was filed, and a sum of Rs. 7,01,673/- was paid as duty against a declared value of Rs. 24,31,985.57/-. In so far as invoice dated 30.05.2014 was concerned, a bill of entry no. 6097566 of even date i.e. 15.07.2014 was filed and a duty in the sum of Rs. 4,17,550/- was paid against a declared value of Rs. 14,46,626.23/-.

3.4 The Department of Revenue Intelligence (in short the DRI) detained the goods on 25.07.2014, on the ground that the goods imported were not quilt covers. The officers of the DRI were of the view that the goods imported were in fact “....*a running length of printed fabric which has been folded at mid length having loose stitching on two sides...*”. Accordingly, two panchnamas of even date i.e. 25.07.2014 were drawn. The officers of the DRI also drew samples of the goods detained. These samples were sent for testing and for seeking an expert opinion, on an aspect which I will advert to in the latter part of my narration.

3.5 It is common ground though that the goods, which were seized by the DRI, are lying stored, at present, in a warehouse.

3.6 The petitioner, however, on its part has sent several representations for release of goods detained, to various officers of the Customs. These representations are dated : 04.08.2014, 07.10.2014, 22.10.2014, 29.10.2014 and 17.11.2014. Pertinently, while, in the first two representations the petitioner simply asked for release of goods, in the representations which followed, a request in the alternative, was made, that they be released based upon provisional assessment.

3.7 In the interregnum, the petitioner obtained a report of the Textile

Committee; a body set up by the Ministry of Textiles, Government of India, in respect of samples drawn from the imported consignment by one of its associate firms. The Textile Committee vide its report dated 25.08.2014 confirmed that the sample submitted to it could be classified as “...*polyester woven printed quilt case*...”.

3.8 By a communication dated 26.11.2014, the Deputy Commissioner of Customs ordered provisional release of goods, which were the subject matter of the two bills of entry referred to above. As per the terms fixed for release (as indicated in the said communication), the petitioner was required to submit two PD Bonds in the sum of Rs. 19,59,246/- and Rs. 28,03,294/-, and two bank guarantees, in the sum of Rs. 11,22,453/- and Rs. 16,49,178/-.

3.9 The bank guarantees, as indicated in the communication, were of a value which was equivalent to 20% of the differential duty as the goods were assessed under CTH 54077400.

4. The aforementioned communication went on to state that the DRI had already granted permission under Section 49 of the Act, so that, demurrage and detention charges on the imported consignment could be minimized.

4.1 It is important though, to note, that in this very communication the Deputy Commissioner of Customs had indicated the “*re-assessed*” value of the imported consignment was pegged at USD 2.65 per piece. As a matter of fact, the value of the PD Bonds, which I have made a reference to above, is fixed keeping in mind the re-assessed value per piece.

4.2 Since the goods were detained/ seized by the DRI on 25.07.2014, and no show cause notice under Section 124(a) of the Act had been issued within the prescribed statutory period of six (6) months, a decision was taken by the respondents to trigger the extended period of six (6) months, as investigation

in the matter had not concluded.

4.3 Accordingly, on 23.01.2015, a show cause notice under the proviso to sub-section (2) of Section 110 was served on the petitioner's CHA. The CHA, apparently, acknowledged the receipt of the show cause notice and waived personal hearing in the matter on behalf of the petitioner.

4.4 Consequently, respondent no.1 on that very date i.e. 23.01.2015, passed an order extending the period for issuance of show cause notice under Section 124(a) of the Act for a further period of six (6) months after the expiry of the initial period of six (6) months from the date of seizure. This was a common order passed in respect of the petitioner herein and in respect of other entities, some of whom, as indicated above, have also filed writ petitions in this court.

4.5 Notably, the show cause notice dated 23.01.2015 for extension of time, which was adjudicated upon on that very date by effecting service on the petitioner's CHA, was dispatched only on 30.01.2015.

4.6 The order, which was passed on 23.01.2015, was also dispatched to the petitioner by post on 31.01.2015.

5. The petitioner, being aggrieved by the aforementioned actions of the respondents, moved this court by way of a writ petition under Article 226 of the Constitution. Notice in the writ petition was issued on 15.04.2015, when, respondents, who were on advance notice, entered appearance via their advocates.

5.1 On that date a formal notice was issued with a direction to the counsel for respondent no.1 and 2 to file the counter affidavits limited to the alleged infraction of the provisions of Section 110 (2) and 124(a) of the Act.

5.2 Since then respondent no. 1 and 2, which are the main contesting

parties, have filed their counter affidavits. A perusal of the counter affidavit would show that it deals with all submissions including the submissions made in the writ petition with regard to violation of the provisions of Section 110(2) and 124(a) of the Act. This fact is being highlighted by me, as during the course of submissions, erroneously, the counsel for respondent no. 1 and 2 had conveyed that because of the limited nature of the notice, the counter affidavits filed were confined to only aspects which related to the alleged violation of Section 110(2) and Section 124(a) of the Act.

5.3 This statement was made by the counsel for respondent no.1 and 2, when arguments were sought to be advanced by the counsel for the petitioner in relation to Section 17 and 18 of the Act. Briefly, the counsel for the petitioner had attempted to convey to the court that even though in the letter dated 26.11.2014 the respondents had ostensibly ordered provisional release of the goods, they had in fact carried out a re-assessment and, therefore, were required to pass a speaking order under Section 17(5) of the Act.

5.4 In other words, it was argued by the counsel for the petitioner that the order for provisional release was required to be made under Section 18 of the Act, while that for re-assessment was required to be passed under Section 17(5) of the Act. Since in the letter dated 26.11.2014 the re-assessed value of the quilt had been indicated, albeit without articulation of any reasons, the said communication could not be sustained, and hence, was required to be quashed.

6. However, in view of the objection raised by the counsel for the respondents, the counsel for the petitioner reiterated that in so far as this and the connected petitions were concerned, he would confine his challenge to

the violation of the provisions of Section 110(2) read with Section 124(a) of the Act. Therefore, the logical sequitur of this would be that the petitioner would have given up the relief sought in prayer clause (c) and (d) of the writ petition. The writ petition is, accordingly, confined to relief sought in prayer clause (a) and (b).

SUBMISSIONS OF COUNSELS

7. On behalf of the petitioner, Mr. Manish argued that the show cause notice dated 23.01.2015 and the consequent order of even date i.e. 23.01.2015 was unsustainable, in law, for the following reasons:

- (i) That the show cause notice was ante-dated. This he sought to demonstrate by placing reliance on the original postal cover which bore the date of dispatch as 30.01.2015, and the tracking report.
- (ii) A perusal of show cause notice dated 23.01.2015 would show that there are interpolations as, the time of hearing, which is, shown as 1230 hours, has been inserted by hand, in, what is, otherwise a typed document.
- (iii) Similarly, in so far as the order dated 23.01.2015 is concerned, the learned counsel relied upon the tracking report of the postal department. In so far as the stand of the respondent in their counter affidavit is concerned, which is that the service on the CHA was service in consonance with the provisions of the Act, Mr Manish, placed reliance on Section 153 of the Act, to contend that the service could only have been made on the petitioner (i.e. the importer) by either having it physically tendered or by having it sent by registered post and, in the alternative, if it was not possible to serve in the aforesaid manner, it had to be affixed on the notice board of the customs house. In other words, it was the submission of the counsel that service of the show cause notice dated 23.01.2015, on the CHA, was no service in the

eyes of law. It was contended by the learned counsel that not only was the service of the show cause notice made on the last date of the expiry of the period of limitation but also purported waiver of the petitioner's valuable right to personal hearing by its CHA, was accepted without the CHA being asked to tender his authority to represent the petitioner.

8. Mr. Nijhawan, who appeared for respondent no. 1 and 2, on the other hand, submitted that the goods of the petitioner along with those of 14 others, were seized, as the DRI, had a genuine concern that goods, which were printed fabric, were being imported as made up quilt covers by having the fabric folded at mid-length with loose stitching on two sides.

8.1 It was submitted that the respondents had obtained the opinion of the Apparel Export Promotion Council (in short the AEPC), as also that of the Textile Committee. Learned counsel submitted that the AEPC had opined that the sample submitted to them (which was drawn from the imported consignment), would fall in the category of "fabric" or "upholstery fabric".

8.2 Mr. Nijhawan, however, accepted the position that the show cause notice dated 23.01.2015 was dispatched via post on 30.01.2015. Similarly, in so far as the order dated 23.01.2015 was concerned, Mr. Nijhawan submitted that it was dispatched on 31.01.2015.

8.3 It was, however, the contention of the learned counsel that the service of show cause notice dated 23.01.2015, which was effected on the CHA on the same date i.e. 23.01.2015, was valid in the eyes of law.

8.4 For this purpose, learned counsel for respondent no.1 and 2, relied upon provisions of Section 146A and 147 of the Act. The submission of the learned counsel, in fact, was that, the legal requirement of effecting service of notice prior to the prescribed period of time stood complied with, once

the said show cause notice was handed over to the CHA, on 23.01.2015.

8.5 It was contended that a conjoint reading of sub-sections (1) and (2) of section 147 of the Act would show that anything that may be done by an owner, importer or exporter of any goods, could also be done on their behalf by the agent. It was contended that, as per section 147(2) of the Act, the burden was on the owner, importer or exporter to show to the contrary that they had not empowered its agent to act on their behalf, and that, the action attributed to them, albeit via their agent, was done without their knowledge and consent. It was submitted that the petitioner, in this case, had not discharged its burden as required under Section 147(2) of the Act.

8.6 As regards the allegation of the petitioner that the show cause notice dated 23.01.2015 contained interpolation, Mr Nijhawan submitted that the said allegation was baseless. The CHA was, in fact, given a choice of appearing either at 1230 hours or 1430 hours, as per his convenience. The CHA, according to Mr Nijhawan, on the other hand, submitted a letter of even date i.e. 23.01.2015, whereby he waived the right to personal hearing in the matter.

8.7 It was further contended that since “final re-assessment” required generation of a test report, the petitioner was given an option to clear the goods on a provisional basis. According to the learned counsel, as the petitioner had not exercised the option given to it, the goods were stored in a warehouse to avoid accumulation of demurrage and detention charges.

8.8 The learned counsel further submitted that order dated 23.01.2015 is an appealable order and, therefore, an alternative remedy being available to the petitioner, the instant writ petition ought not to be entertained.

REASONS

9. Having perused the record and heard the learned counsels for the parties, what has emerged, is as follows:

(i) The petitioner has imported goods which have been classified as quilt covers. The bill of entries were filed accordingly, and requisite duty, was deposited, as per the classification made by the petitioner.

(ii) The DRI, however, detained/ seized the goods on 25.07.2014. A panchnama of even date was drawn up and samples were taken. The samples were sent by the DRI to AEPC, and the Textile Committee. While the AEPC opined that the samples could be categorized as fabric, or upholstery fabrics, the Textile Committee only opined upon the composition of the samples.

(iii) On the other hand in the report dated 25.08.2014, submitted by the Textile Committee to the petitioner, the conclusion reached was that the sample could be classified as “*polyester woven printed quilt case*” under HSN 6302.22.

(iv) The period of six (6) months from the date of seizure by the DRI would come to an end on 24.01.2015

(v) The show cause notice dated 23.01.2015 was dispatched by post on 30.01.2015, at 1511 hours from Kalkaji Head Quarters, which was delivered on 03.02.2015 at 1437 hours.

(vi) The order dated 23.01.2015, passed qua the show cause notice of the said date i.e. 23.01.2015, was dispatched on 31.1.2015 at 1904 hours, once again, from Kalkaji Headquarters and, was received on 07.02.2015 at 1317 hours.

(vii) The dispatch register, as shown to me in court, had typewritten sheets.

The explanation given by the respondents in their counter affidavit, is that, the entries in the dispatch register are usually made by the clerk manually, however, in cases where dispatch is required to be made qua more than one party i.e. vis-à-vis large number of recipients, the details, are typed out and pasted on the dispatch register.

(vii)(a). In this case as well, I am told, such methodology was followed, though admittedly, the dispatch of the show cause notice and the order, as indicated above, took place on 30.01.2015 and 31.01.2015, respectively.

(viii) The petitioner, it appears, had preferred an appeal against the communication dated 26.11.2014, in respect of which, the Addl. Commissioner of Customs addressed a communication dated 21.03.2015 to the Commissioner of Customs in which quite revealing it is stated, that since, a speaking order under Section 17(5) of the Act had not been passed, the said communication which provided for only provisional assessment of the bills of entry, was not an appealable order.

10. Therefore, having regard to the aforesaid facts, what is required to be examined, is the impact of the provisions of the Sections 110, Section 124, 143, 146 and 147 of the Act.

10.1 Section 110 of the Act empowers the respondents where it has reason to believe that goods are liable to be confiscated under the Act, to seize such goods. This power is contained under sub-section (1) of Section 110 of the Act. However, sub-section (2) of Section 110 provides, quite clearly, that when goods are seized under sub-section (1) of Section 110 and no notice in respect thereof is given under clause (a) of Section 124, within six (6) months of the seizure of the goods, the goods so seized, are required to be returned to the person from whom they were seized. There is no ambiguity

in the statute, with regard to this position.

10.2 Sub-section (2) of Section 110 is, however, impregnated with the caveat, which is provided for in the form of a proviso. The proviso to sub-section (2) of Section 110 states that the period of six (6) months provided therein, may be extended by the Commissioner of Customs, on sufficient cause being shown, by another period not exceeding six (6) months.

10.3 In the facts obtaining in this case, if the date of dispatch, by post, of the show cause notice dated 23.01.2015 is taken into account, then, clearly, on a plain reading of provisions of Section 110(2) read with Section 124(a), the respondents would have to return the goods to the petitioner. The reason for the same being, that the show cause notice dated 23.01.2015, seeking to trigger the extended period provided for in the proviso to sub-section (2) of Section 110, was dispatched only on 30.01.2015.

10.4 The respondents, however, have tried to meet this challenge by taking shelter under the factum of receipt of show cause notice by the CHA, on 23.01.2015. A careful perusal of the receipt appended with the counter affidavit of respondent no.1 and 2 would show that these are hand written receipts, which have been received, in most cases, by the G-card holders of the CHA. What is not known, though, whether the show cause notice was sealed in an envelope or was handed over without an envelope.

10.5 Be that as it may, the respondents in paragraph 7 of the show cause notice, make the following averments:

“....7. In case, the noticees are interested to be heard in person, they may appear before the Commissioner of Customs, ICD, Tughlakabad, New Delhi on 23.01.2015 at 12:30 hrs. Or 14:30 hrs. Whichever is convenient to them. If no cause is shown against the action proposed to be taken as mentioned herein

above, by the noticees or through their authorised representative and they do not appear for personal hearing on the specified dates the case will be decided on the basis of the facts available on the records.....”

10.6 A perusal of the original of the show cause notice, appended to the counter affidavit of respondent no.1, would show that 1230 hours was inserted by hand as if by way of an afterthought by the signatory of the show cause notice. The insertion, to my mind, makes no sense since ordinarily one would have thought a fixed time slot would have been given to the noticee, to make an appearance. There is nothing in the record which would show that the noticees sought an accommodation. There is no dispute about the fact that the noticees were the importers themselves i.e. the petitioner in this case. It is important to note that this was a common show cause notice issued to the petitioner along with 14 other entities.

10.7 It appears, by some strange coincidence, the respondents managed to persuade CHA of the petitioner, as well as those engaged by other entities, to submit a letter to them that they did not want a personal hearing in the matter on behalf of the importer, in the case concerning extension of the period for issuance of a show cause notice.

10.8 Thereupon, the respondent no.1 i.e. the Commissioner of Customs, passed a common order dated 23.01.2015 (involving 15 entities, which included the petitioner), and extended the time for issuance of a show cause notice by another period of six (6) months, in terms of requirements of proviso to Section 110(2) of the Act.

10.9 The reason given for triggering the extending period, is that, the test reports had not been received from the Textile Committee in respect of all samples sent to it save and except in two cases, one of which involved the

petitioner and the reference in this regard is given to bill of entry no. 6097566 dated 15.07.2014, and the other involving an entity by the name of Balaji Handloom; concerning bill of entry no. 6209855 dated 23.07.2014. It is further stated that likewise expert opinion of AEPC had not been received save and except in the case of petitioner and the Balaji handloom. In the case of the petitioner and the Balaji Handloom, it is stated that even though the test report of the Textile Committee and expert opinion of the AEPC had not been received, since the said entities had not declared the Unit Quantity Code against each tariff item, the quantification of goods in square meters was required to be done for calculation of duty which necessitated the re-examination of the goods.

11. Though, whether this reason, would constitute a sufficient ground for extension of time appears to be weak as in the petitioner's case, the AEPC's opinion was received on 14.08.2014, while the Textile Committee report was generated on 04.09.2014 - even if one were to accept these reasons necessitating extension of time, the manner of its extension is clearly not in accordance with the law. The reason, that I have come to this conclusion is as follows.

11.1 Section 153 of the Act provides the manner in which any order or decision passed, or any summons or notices issued under the Act are required to be served. In order to appreciate the scope of the said provision, it may be relevant to extract the same for the sake of convenience. However, before I proceed to extract the provisions of Section 153, as it stands incorporated at present, one would also like to advert to the said provision prior to its amendment by virtue of Finance Act, 2012.

Section 153 as it appeared prior to the amendment

153. Service of order, decision, etc.

Any order or decision passed or any summons or notice issued under this Act, shall be served,

(a) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; or

(b) if the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house....”

(emphasis is mine)

11.2 Post amendment the expression “or to his agent” appearing in clause (a) stands excluded. The amended Section 153, to the extent it is relevant for our purpose, is extracted hereinbelow:

Section 153 post amendment

“...153. Service of order, decision, etc.

Any order or decision passed or any summons or notice issued under this Act, shall be served,

(a) by tendering the order, decision, summons or notice or sending it by registered post or by such courier as may be approved by the Commissioner of Customs; or

(b) if the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house....”

11.3 A bare reading of the amended Section would show that the legislature has consciously done away with the service of orders, decisions, summons and notices on the agent. The CHA, is an agent, who operates under a special contract with an importer or exporter, and in this context is authorized to perform various functions to clear the goods from customs. It is no part of the general duty cast upon the CHA to accept service of notices,

summons, orders or decisions of the customs authorities, unless he has been specially authorized to do so. The CHA's explicit and implied authority is confined to his acts, as an agent, qua transactions relating to business concerning entry or departure of conveyances or, import or export of goods at the custom stations. In case the importer or exporter, in this case the petitioner, were to enlarge his authority, a specific authorization in that behalf ought to have been issued in his favour. The scope of the duties of an agent, and in that sense, the authority of the CHA, is provided for in the definition of customs broker, in regulation 2(c) of the Customs Brokers Licensing Regulations, 2013 (in short the 2013 Regulations). The said definition reads as follows:

“..... (c) “Customs Broker” means a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station;...”

11.4 In case the CHA, represents to the customs authorities that he has the authority to accept orders, notices, summons, orders or decisions, it is incumbent upon him to produce the same before the concerned authority. A provision in respect of this aspect is found in regulation 11(a) of the 2013 Regulations. The same reads as follows:

“.... **Regulation 11. Obligation of Customs Broker.** – A Custom Broker shall –

(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;...”

11.5 A conjoint reading of the definition of a custom Broker in regulation

2(c) along with regulation 11(a) of the 2013 regulation, would show, that it is no part of the usual and ordinary duty of the CHA to accept service of orders, summons, decisions or notices issued by the custom authorities. In case CHA represents, he has such an authority, he would have to produce the same before the concerned statutory authority. In this case the respondents neither sought production of the authority nor did the CHA supply any such documents to the custom authorities, which could, in the ordinary course, have persuaded them to serve the notices on the CHAs. Therefore, in the ordinary course, the customs authorities were required to follow the provisions of Section 153 of the Act, which required the service to be effected on the importer i.e. the petitioner in this case.

12. The respondents' reliance on Section 146 and Section 147 of the Act will not help their cause for the following reasons; but before I do so, it is important to understand the broad scope of the said provisions.

12.1 Section 146(1) of the Act generally provides that no person shall carry on business as an agent relating to entry or departure of conveyance or import or export of goods at any custom station unless he holds a license in that behalf in accordance with the regulation. Sub-section (2) of Section 146 empowers the Central Excise and Customs Board to make regulations with regard to the licence, which would include the circumstances in which a licence may be suspended or revoked and for a remedy by way of an appeal against such orders.

12.2 Section 146A provides for representation via an authorized representative by a person who is entitled to or is required to appear before an officer of customs or Appellate Tribunal in connection with proceedings under the Act, save and except in respect of proceedings under Section 108

of the said Act. In the category of authorized representatives, there is a reference to a CHA, who has obtained his licence under Section 146 of the Act. The other persons, who have been included in the definition are a relative; or a regular employee, a legal practitioner, who is entitled to practice in any civil court in India; or any person who has acquired such qualifications as the Central Government may specify in the rules made in this behalf. There are other sub-sections appended to Section 146A, which I do not propose to refer to as they are not relevant for the present case.

12.3 Section 147 provides for liability of a principal and agent. Sub-section (1) of Section 147 provides, where anything under the Act is required to be done by the owner, importer or exporter of any goods, it may be done on his behalf by his agent.

12.4 Sub-section (2) provides that any act done by the agent of the owner, importer or exporter of any goods, shall unless contrary is proved, be deemed to have been an act done, with the knowledge and consent of such owner, importer or exporter, so that, in any proceedings, the owner, importer or exporter shall also be liable as if things had been done by him.

12.5 Sub-section (3) of Section 147 provides that when any person is explicitly or impliedly authorized by the owner, importer or exporter of any goods, to be his agent, in respect of such goods, for all or any purposes of the act, such person shall, without prejudice to the liability of the owner, importer or exporter, be deemed to be the owner, importer or exporter of such goods for such purposes.

12.6 There is a proviso to sub-section (3) of Section 147, which in a sense protects the agent, save and except against his wilful act, negligence or default. The proviso is indicative of the fact that where any duty is not

levied, or is short levied, or is erroneously refunded, for any reason, then such duty shall not be recovered from the agent unless in the opinion of the Asstt. Commissioner of Customs or Deputy Commissioner of Customs, it cannot be recovered from the owner, importer or exporter.

12.7 As indicated above, if the agent is negligent or in default, or his wilful act results in any of the situation referred to above, then recovery can be made against him, as well.

13. To my mind, the scope of Section 146 is plainly this, which is, it statutorily recognizes the appointment of a CHA and safeguards this appointment by providing that only that person will act as a CHA who holds a licence granted in that behalf in accordance with the regulations. In this connection, I have already adverted to the 2013 Regulations.

13.1 Section 146A makes provision for appointment of an authorized representative. It, therefore, recognizes the fact that even a CHA can act as an authorized representative. Meaning thereby, that merely because a CHA has a licence in consonance with the regulations, it does not empower him to act as an authorized representative for those persons who are entitled to or required to appear before an officer of customs or the Appellate Tribunal in connection with any proceedings under the Act. In so far as proceedings under Section 108 of the Act are concerned, even with authority a CHA cannot appear for his principal. As regards business relating to entry or departure of conveyance is concerned or import or export of goods to a custom station is involved, concerned, a CHA regularly acting for and on behalf of the owner, importer or exporter of goods may have the implied authority to act in the matter. That, however, will not authorise the CHA to dawn the robe of an authorized representative, as envisaged in section 146 of

the Act. If that was not the position, then to my mind, there was no need for the legislature to make a provision for that purpose, and thereby, specifically, include CHA in sub-section (2), clause (b) of Section 146A of the Act.

13.2 In so far as Section 147 is concerned, it statutorily recognizes the principle of agency. Therefore, sub-section (1) of Section 147 statutorily recognizes the fact that anything which an owner, importer or exporter of goods is required to do, it can be done on his behalf by an agent. Therefore, quite logically, sub-section (2) of Section 147 provides that if, any act is done by the agent of an owner, importer or exporter of goods, then it shall be deemed to have been done with the knowledge and consent of such an owner, importer or exporter. The purpose being, that the principal can be held liable in a proceedings carried out under the Act for the acts done by his agent as if they were done with his knowledge and consent.

13.3 Sub-section (3) of Section 147 creates a deeming fiction, and in that sense, is an extension of the agency principle and, therefore, provides that when any person is expressly or impliedly authorized by an owner, importer or exporter of any goods, to be his agent, he is deemed to be the owner, importer or exporter of such goods, albeit without prejudice to the liability of the principal i.e. the owner, importer and exporter. This deeming fiction comes with a caveat that if, it involves aspects related to non-levy of duty or short-levy of duty or even duty which is erroneously refunded, then the agent will not be held liable, in so far as recovery is concerned, except in two situations. First, the said circumstances ought not to have occurred on account of wilful act, negligence or default of the agent. Second, the Asstt. Commissioner of Customs or Deputy Commissioner of Customs should not

have formed an opinion that duty involved cannot be recovered from the owner, importer or exporter.

13.4 Clearly, Section 147 is an omnibus section which generally covers all acts of agency. Acts of agency, which involve business of entry or departure of conveyance or import or export of goods at the custom stations, would be covered under Section 147 of the Act. Other acts would also be covered, provided there is due authorization conferred on the agent to act on behalf of the owner, importer or exporter of goods. The CHA has no general authority, to my mind, to act in respect of every act that the owner, importer or exporter is called upon to do or may be required to do under the provisions of the Act. It is, keeping in mind this object, and / or the purpose, that the legislature has consciously provided that service of orders, decisions or summons or notices, can only be effected in the manner provided in clause (a) of Section 153 by serving it upon the person for whom it is intended, in this case, the noticee. Prior to the amendment made in 2012, service under Section 153 could also perhaps be effected on an agent, albeit an authorized agent, not on a CHA. After the amendment it appears that the legislature has done away with the service on the agent completely, by recognizing the fact that orders, decisions passed, summons or notices issued, need to be served in the first instance on the person for whom they are intended. It is after the intended person is served, that he could take a decision as to who would thereafter be entitled or authorized to appear for him before the concerned statutory authority. The amendment in that sense lends greater clarity qua the scope of the provision.

14. Thus, to my mind, the argument of Mr Nijhawan that service on the CHA of the show cause notice dated 23.01.2015, would meet the rigour of

the law, is untenable in law.

15. If this argument falls, as it does in my opinion, then surely the entire edifice of the defence mounted by respondent no.1 and 2 would also fall. Consequently, the respondents, in accordance with the mandate of the law which has received judicial imprimatur, would be required to release the goods seized, to the petitioner.

16. Before, I conclude I must deal with the argument of Mr. Nijhawan that there is an alternative remedy available to the petitioner by way of an appeal, and therefore, the writ petition ought not to be entertained. According to me, this submission, will not help the cause of the respondents in this case as the entire proceedings for the reasons indicated above were beyond jurisdiction, therefore, this plea of the respondents is rejected.

17. Which brings me to a question, as to whether the confiscation proceedings can proceed in the matter? The answer to that question lies in the judgement of the Supreme Court in the case of ***Harbans Lal vs Collector of Central Excise and Customs 1993 (67) E.L.T. 20 (SC)***. In other words while the order passed under the proviso to Section 110(2) is held invalid, it would not in any manner affect the investigation, which is presently underway. With the quashing of the show cause notice dated 23.01.2015, and the order of even date i.e. 23.01.2015, the position which will obtain is that the respondents will have to return the seized goods to the petitioner. This would, however, not mean that respondents cannot continue their investigation and proceed to the next step towards trial by complying with the provisions of Section 124 of the Act.

18. Resultantly, the reliefs sought in terms of prayers (a) and (b), are allowed.

19. However, in the facts and circumstances, of the case, the parties will bear their own costs.

RAJIV SHAKDHER, J

NOVEMBER 23, 2015

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