

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.12.2016

Coram

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.Nos.43062 to 43070 of 2016
and W.M.P.Nos.36923 to 36939 of 2016

W.P.No.43062 of 2016

M/s.Sri Vijayalakshmi Leathers,
represented by its Partner, S.Ramanathan,
No.04, Wuthucatan Street,
Periamet,
Chennai-600 003.

.. Petitioner

Vs

1. The Principal Commissioner of Customs-III (SIIB),
Custom House,
Chennai-600 001.
2. The Commissioner of Customs,
Chennai IV Commissionerate,
Custom House,
Chennai-600 001.
3. Deputy Commissioner of Customs (SIIB),
Custom House,
Chennai-600 001.

.. Respondents

* * *

Prayer in W.P.No.43062 of 2016 : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari or any other appropriate writ or order or direction in the nature of Writ by calling for the records of third respondent and quashing the impugned order, viz., communication dated 23.11.2016, issued from File No./Enq.63/2016 SIIB, and quash the same.

* * *

For Petitioners in : Ms.V.Pramila

all the W.Ps.

For Respondents : Mr.S.R.Sundar,
in all the W.Ps Standing Counsel

COMMON ORDER

1. These are nine (9) writ petitions, which seek to challenge a common order dated 23.11.2016, passed by respondent No.3, whereby, provisional release of goods sought to be exported by the petitioners, has been directed, albeit, on certain conditions set forth in the said order, which are purportedly said to be onerous and against the usual conditions put forth in such like matters.

2. The conditions, which have been imposed are set out in paragraphs 6, 7 and 8, of the impugned orders.

2.1. For the sake of convenience, they are set forth hereafter:

"..... 6. The Principal Commissioner of Customs (III) has recommended for provisional release of the said consignments in respect of the above ten shipping bills as above in terms of Board Circular No.01/2011-Cus dated 04.01.2011 (copy enclosed) with the following conditions :-

- (i) on payment of appropriate export duty ;
- (ii) on execution of bond for the value of the goods and appropriate security for fine and penalty leviable ;

(iii) after adequate numbers of samples as required including for possible prosecution may be taken / collected before such provisional release.

7. In view of the Pr.Commr-III's instructions, it is informed that if the exporters avail the option for Provisional release of the goods, the same may be communicated to SIIB before according 'Let Export Order' to enable the SIIB to draw samples as instructed.

8. The copies of relevant shipping bills and other connected documents are hereby forwarded to you for taking further action. Further, additional bond may also be taken from the exporters that they shall not claim the benefits of Chapter 3 of Foreign Trade Policy (copy enclosed)."

3. I may also indicate, at the outset, that the petitioners counsel has argued before me that the petitioners have no difficulty in complying with the conditions set out in paragraphs 6 to 8 of the impugned order, save and except the condition stipulated in clause (i) of paragraph 6.

3.1. As would be evident, the said condition stipulates payment of applicable export duty in order to seek provisional release of the subject goods.

4. Notice in these writ petitions were issued on 09.12.2016. Though, no counter affidavit has been filed on behalf of the respondents, arguments were advanced, based on the record filed with this Court, along with the writ petitions.

4.1. Respondents, though, have filed a typed set of documents, containing documents which they thought were material for adjudication of the case. Therefore, with the consent of counsel for the parties, the writ petitions were taken up for final hearing and disposal.

5. In order to adjudicate upon the instant writ petitions, the following brief facts, which are common to all the petitioners are required to be noticed :

5.1. The petitioners sought to export what they claim are the consignments of "finished leather" via nine (9) shipping bills.

5.2. Evidently, on 05.10.2016, samples were drawn by respondent No.2, which were sent for testing to the Central Leather Research Institute (in short "CLRI").

5.3. Consequent thereto, on 07.10.2016, CLRI submitted its report, which was indicative of the fact that the samples, satisfied the norms stipulated under the public notice.

5.4. It appears that respondent No.3 was not satisfied with the report of CLRI, as it had received intelligence inputs which propelled him to doubt the veracity of the outcome indicated in the CLRI report.

5.5. Resultantly, on 08.10.2016, the warehouse, where the consignments were lying, were sealed. The aforesaid action was followed by fresh samples being drawn by respondent No.3, on 14.10.2016.

5.6. Given the fact that there was a delay in moving the goods out of India, on 07.11.2016, the petitioners, via their Advocate, submitted a representation to the Commissioner of Customs (Exports), to seek, provisional release of subject goods.

5.7. Pertinently, the request for release was, inter alia, based on the provisions of the Circular No.01/2011-Customs, dated 04.01.2011, issued by the Central Board of Excise and Customs (in short "the Board").

5.8. Admittedly, the said representation was not, immediately, attended to and, instead, a second set of samples was drawn by respondent No.3, on 09.11.2016. These samples were also sent by respondent No.3, for testing to CLRI.

6. The petitioners, having become aware of this development, apparently, on 11.11.2016, made a request to the Assistant Commissioner of Customs, SIIB, Customs House, Chennai, that they be supplied the test report generated by CLRI; which, incidentally, would have been the second test report.

6.1. I may only note that each of the petitioners sent an

identical, though, separate communication of even date, i.e., 11.11.2016. Furthermore, in this communication, once again, the petitioners, inter alia, sought release of the subject goods goods at the earliest.

6.2. It is the case of the petitioners that on 15.11.2016, a meeting, along with their Advocate, was convened with respondent No.3, to seek a status report, with regard to the matter in issue.

6.3. It appears that two days later, a second meeting, in this behalf, was also convened with respondent No.3, that is, on 17.11.2016. The exercise, I am given to understand, was repeated on 18.11.2016 and 22.11.2016. According to the petitioners, the Customs House Clearing Agent (CHA) engaged by them, also met up with respondent No.3, to check the status of the consignments.

6.4. The record shows that the subject consignments, in the interregnum, were formally seized on 16.11.2016, via nine (9) separate seizure memos of even date, i.e., 16.11.2016.

6.5. A perusal of the seizure memos would show that the respondents have seized the subject consignments, in exercise of power under Section 110 of the Customs Act, 1962 (in short "the Act"), albeit, with effect from the date of their examination, i.e., 14.10.2016, on the ground, the subject goods are liable for confiscation under Section 113(i) of the Act.

7. It is, in this background, that the impugned order came to be passed; which, the petitioners claim, was served upon them on 25.11.2016.

8. As indicated above, aggrieved by the condition put forth in paragraph 6(1) of the impugned order, which, *inter alia*, requires the petitioners to pay the entire applicable export duty - these writ petitions have been filed.

9. Learned counsel for the petitioners says that not only do the petitioners have a good prima facie case on merits, but the condition imposed is onerous and is contrary to the orders passed in the following cases :

(i).Commissioner of Vs. Navshakti Industries Ltd., 2011 (269) E.L.T. A 146 (SC).

(ii).Zest Aviation Pvt. Ltd., Vs. Union of India, 2013 (289) E.L.T. 243 (Del.)

(iii).Aban Exim Pvt. Ltd., Vs. Principal Commissioner of Customs, 2015 (319) E.L.T. 430 (Del.)

9.1. It is also argued by the learned counsel for the petitioners that the respondents contention that the subject goods are not "finished leather", is, perhaps, based on a misunderstanding of the processes involved in reaching the finished leather stage. It is the learned counsel's submission

(which, quite obviously, can only be based on guess work, as the investigation is still on) that often respondents classify such link goods as unfinished leather, when one of the processes, which is, otherwise, minor in nature, is not complete. Towards this end, learned counsel gave an example of a process described as "finishing coat". It was stated that, in past, objection of this nature was raised by the respondents, which was examined and found untenable, both by the tribunal and this Court.

9.2. In this regard learned counsel drew my attention to two judgements of the tribunal, namely, ***(i) Vijayalakshmi Leathers Vs. Commissioner of Customs, 2009 (119) E.L.T. 656 (Tribunal); and (ii) judgement dated 10.07.2009, passed in Appeal No.C/267/2009, titled : M/s.Expos Leather Company Vs. Commissioner of Customs, Chennai.***

9.3. As would be obvious from the cause title of the instant writ petitions that, ***Vijayalakshmi Leather case*** relates to one of the petitioner's before me, i.e., petitioner in W.P.No.43062 of 2016.

9.4. Furthermore, learned counsel points out that the judgement of the tribunal in ***Expos Leather Company case*** was challenged before this Court. This Court, vide judgement dated 19.11.2010, passed in C.M.A.No.2937 of 2010 repelled the challenge. A copy of the judgment has been filed to drive home the point.

9.5. In sum, based on the judgements of the tribunal, it was

argued by the learned counsel that for the subject goods, to reach the stage of "finished leather", there are several processes involved, and that, merely, because there are minor deficiencies, the subject goods cannot be classified as "unfinished leather", as is sought to be done by the respondents.

9.6. It is, thus, the submission of the learned counsel for the petitioners that the entire case set up by the respondents, as if a fraud has been committed by the petitioners, is a complete bogey, which ought not be countenanced by this Court.

9.7. This apart, learned counsel relies upon the Board's Circular No.01/2011-Customs, dated 04.01.2011 to seek provisional release of goods on execution of a bond of an amount equivalent to the value of the goods along with an appropriate security.

9.8. More importantly, learned counsel says that the respondents to date have not supplied the petitioners with a copy of the second report said to have been generated by CLRI, despite a request having been made in that behalf.

10. On the other hand, Mr.Sundar, who appears for the respondents, has resisted the variation of the condition contained in clause (i) of paragraph 6 of the impugned order.

10.1. Quite, inexplicably though, while resisting variation of the aforementioned condition, learned counsel makes a submission that the impugned order being an internal communication between

respondent No.3 and respondent No.2 cannot be relied upon by the petitioners in the present proceedings.

10.2. Furthermore, learned counsel submits, (sans any record or an affidavit) that the second set of samples had to be drawn, as intelligence was received by the respondents that the first report was generated after the samples drawn in that behalf had been surreptitiously substituted.

10.3. Learned counsel relied upon the Board's Circular No.01/2011-Customs, dated 04.01.2011, and the facility circular No.01/2014, dated 02.01.2014, as also upon extracts taken from the Board's Customs Manual, in particular, Clause 2.2.(c), to contend, that there can be no variation of the condition contained in paragraph 6(i) of the impugned order.

10.4. In order to buttress his submissions, learned counsel, relied upon the following judgements:

(i).Apollo Cranes Pvt. Ltd., Vs. Union of India, 2012 (275) E.L.T. 148 (Bom.)

(ii).Judgement of the Division Bench of this Court dated 28.07.2016, passed in W.A.No.377 of 2016, titled : Malabar Diamond Gallery Pvt. Ltd., Vs. The Additional Director General, Directorate of Revenue Intelligence, Chennai Zonal Unit and others.

11. I have heard the learned counsel for the parties and perused the record.

12. Clearly what emerges from the record is as follows :

(i) There are two reports of CLRI one of which has been placed on record by the petitioners. The other report is in the custody of the respondents, the existence of which is not denied. The first favours the petitioners, while the second report, a fact not denied by Mr.Sundar, is not in favour of the petitioners.

(ii) The subject goods by themselves are not prohibited goods.

(ii)(a) In fact, provisional release is already ordered by respondents, albeit, on conditions which the petitioners claim are rigorous and contrary to the usual conditions imposed in such like matter.

(iii) The communication dated 23.11.2016, has, in fact, been adverted to in respondent No.3's letter of even date, i.e., 23.11.2016 addressed to the Advocate acting for the petitioners. The suggestion, therefore, that the petitioners had assessed, unauthorisedly, internal communication, appears to be untenable for the reason that respondent No.3 says that respondent No.1 has recommended provisional release of subject goods in terms of the Board's Circular No.01/2011, dated 04.01.011.. As a matter of fact, conditions for provisional release, are, in fact, provided in the communication, exchanged between respondent No.3 and respondent No.2, which, quite obviously could only have been

furnished by the office of the respondents, otherwise how else would the petitioners know the conditions on which subject goods were intended to be released.

(iv) Consignments containing the subject goods have been lying in the custody of the respondents, since, 04.10.2016, despite, several requests made by the petitioners for their provisional release in consonance with their statutory right, under Section 110A of the Act.

(v) There was no movement in the matter, till the impugned order was passed.

13. Thus, having regard to the aforesaid facts, what is required to be considered is : whether it is a fit case to allow provisional release of the subject goods, by relaxing the rigour of the condition contained in clause (i) of paragraph 6 of the impugned order.

13.1. In this context, I may refer with profit the observations of the Supreme Court in **Commissioner V. Navshakti Industries Ltd., 2011 (269) E.L.T. 146 (SC)**. However, while, advertent to the observations of the Supreme Court, it may be relevant to note that the Court was dealing with a matter arising out of a judgment of the Delhi High Court which had permitted release of goods based on execution of a bond equivalent to 20% of the differential custom

duty by substituting the said condition with the condition to furnish a bank guarantee equal to 25% of the value of goods.

"..... Leave granted.

The present appeal is directed against the judgment and order dated 11th May, 2010 passed by the Division Bench of the High Court of Delhi directing the appellants herein to clear the goods of the respondents on their furnishing a bond of 20% of the differential duty to the satisfaction of the concerned Commissioner of Customs.

The appellants have filed the present appeal being aggrieved by the aforesaid order in respect of which it is being contended that the aforesaid order passed by the High Court is erroneous as the amount for which the bond is to be furnished by the respondents is on the lower side.

Having considered the facts and circumstances of the case and also taking notice of the fact that the goods in question are newsprint which is perishable in nature, we issue a direction that the goods of the respondents shall be cleared by the appellants herein on the respondents' furnishing a bank guarantee of 30% of the differential duty to the satisfaction of the Commissioner of Customs. The goods shall be released in terms of this order immediately on furnishing of the aforesaid bank guarantee and satisfaction of the concerned Commissioner of Customs. We also direct the Commissioner of Customs to hear the adjudication proceeding pending before him as early as possible, preferably within a period of of three months, from the date of receipt of

a copy of this order.

In terms of the aforesaid order, the appeal stands disposed of. We, however, make it clear that while passing the aforesaid order, we have not expressed any opinion or views on the merits of the dispute which shall be independently considered by the competent authority.”

14. Similarly, in a Division Bench judgement of the Delhi High Court in **Zests Aviation Pvt. Ltd., Vs. Union of India, 2013 (289) E.L.T. 243 (Del.)**, the same parameter was followed. This yardstick was also adopted by the Delhi High Court in **Aban Exim Pvt. Ltd., Vs. Principal Commissioner of Customs, 2015 (319) E.L.T. 430 (Del.)**.

15. I must note that, as against this, the respondents have relied upon the Division Bench judgement of this Court dated 28.07.2016, passed in W.A.No.377 of 2016, titled : **Malabar Diamond Gallery Pvt. Ltd., Vs. The Additional Director, Directorate of Revenue Intelligence**.

15.1. Notably, the Division Bench, in the said case (contrary to argument advanced on behalf of the respondents), has cast an obligation on the competent authority to arrive at a satisfaction, whether, the goods seized, which are otherwise liable for

confiscation, can be released provisionally, pending adjudication.

15.2. This apart, in my view, the ratio of the judgement in ***Malabar Diamond Gallery Pvt. Ltd.*** Case has to be read in the context of facts obtaining in that case. That was a case, where, smuggling of gold jewellery was involved, which is not the case here. Therefore, on facts, the said judgement is clearly, distinguishable from the facts obtaining in the instant case.

15.3. Furthermore, I may also note that the judgement of the Bombay High Court, in the case of ***Apollo Cranes Pvt. Ltd., Vs. Union of India, 2012 (275) E.L.T. 148 (Bom.)***, which, apparently, has taken a different view from those cited by the petitioners, pertinently, has not noticed the judgement of the Supreme Court in ***Navshakti Industries case***. This aspect of the matter has been brought to fore by the Division Bench of the Delhi High Court in ***Zest Aviation case*** as well.

16. I may also note that clause 2.2. (c) of the Board's Customs Manual, relied upon by Mr.Sundar, clearly says that save and except in exceptional cases, pending investigation, wherever, importer or exporter is willing, he should be allowed provisional clearance of goods, by furnishing a bond for full value of the goods supported by an adequate Bank Guarantee, as may be determined

by the proper Officer. Furthermore, the said clause goes on to say that provisional clearance ought to be the rule and not an exception. This, approach is also recommended in the Board's circular dated 04.01.2011. I may quote, with profit in this behalf, the following clause from the Board's circular :

“..... (a) In case the export goods are found to be misdeclared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be **ordered to be released provisionally on execution of a Bond of an amount equivalent to the value of the goods along with furnishing an appropriate security in order to cover the redemption fine and penalty.**”

(emphasis is mine)

17. At this juncture, I must indicate that Mr.Sundar's reliance on the Facility Circular dated 02.01.2014 to resist the relaxation of conditions is untenable, for the reason that the facility circular does not override the conditions set out in Board's circular dated 04.01.2011. The Facility circular has to be read in the context of the exhortation by the Board, which is, to order provisional release of goods of both importers and exporters, as a matter of rule, to avoid interminable detention, as it otherwise, results in congestion of Ports and accumulation of demurrage charges.

17.1. A perusal of the Facility Circular, on which reliance was

placed by Mr.Sundar, would show that it provides for provisional assessment of goods. (i.e. finished leather consignments) pending receipt of test report by the respondent. The Facility Circular does not override the Board's Circular dated 04.01.2011. In fact, the communication dated 23.11.2016 addressed to petitioner's advocate itself orders provisional release of subject goods; a fact, which only supports the argument that there is no contradiction between the facility circular and the Board's circular dated 04.01.2011.

17.2. Therefore, the objection of Mr.Sundar, based on the contents of the Facility Circular, is rejected.

18. As would be evident from the facts noted above, there is, even according to the respondents, one report of CLRI, which is in favour of the petitioners. The second report, which has been, apparently, generated, wherein, CLRI has, purportedly, come to the conclusion that the subject goods are not finished leather, has not been placed on record. Furthermore, this report has not, apparently, been handed over to the petitioners.

18.1. Therefore, for the respondents to detain the goods interminably, would neither enure to the benefit of the petitioners nor to the interest of the State. Interminable detention results in accumulation of demurrage and detention charges, apart from loss

of foreign exchange, which has to be best avoided, unless, as indicated in the Board, in the Circular of 04.01.2011, they fall in the category of goods, which require absolute confiscation.

19. A perusal of the impugned order would show that while provisional release has been ordered, the conditions imposed are onerous.

19.1. Therefore, what this Court is called upon to do is to rule as to whether or not the condition imposed is onerous, given the facts and circumstances of this case.

20. According to me, in line with the judgements referred to above, which includes the judgement of the Supreme Court in **Navshakti Industries case**, the condition imposed sub clause (i) of paragraph 6 of the impugned order can be relaxed, by substituting the said condition, with an option being given to the petitioners to seek release of the subject goods/consignments by furnishing a Bank Guarantee of a nationalised bank equivalent to 30% of the export duty. This is so, as finished leather, as per the extant policy, is freely exportable, while, generally, unfinished leather, i.e., hides, skins, leather - tanned and untanned, are subject to export duty, at the rate of 60%. It is ordered accordingly.

20.1. It is made clear, however, that, all other conditions

contained in paragraphs 6, 7 and 8 shall remain unaltered.

21. Needless to say, any observations made hereinabove will not impact the final outcome of the case. The respondents will carry out the mandate of this order with due expedition, though, not later than one (1) weeks from the date of receipt of a copy of the order.

22. The writ petitions and pending applications are disposed of, in the aforementioned terms. There shall, however be no order as to costs.

gg/sl

22.12.2016

Index : Yes / No

Internet : Yes

Note : Issue order copy on 26.12.2016

To

1. The Principal Commissioner of Customs-III (SIIB),
Custom House,
Chennai-600 001.
2. The Commissioner of Customs,
Chennai IV Commissionerate,
Custom House,
Chennai-600 001.
3. Deputy Commissioner of Customs (SIIB),
Custom House,
Chennai-600 001.

RAJIV SHAKDHER, J.

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W.P.Nos.43062 to 43070 of 2016

22.12.2016