IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2016

CORAM:

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.No.29098 of 2016

and W.M.P.No.25143 of 2016

M/s.Durga Trade Link,
rep by its Proprietor Mr.Dinesh Kumar,
No.27, Strotten Muthiya Mudali Street,
3rd Floor, Sowcarpet,
Chennai - 600 079. ... Petitioner

Vs.

1.The Commissioner of Customs (Group 7H-Ch.IV),
Custom House, No.60, Rajaji Salai,
Chennai – 600 001.

2.The Joint/Additional Commissioner of Customs (Group 7H),
Custom House, No.60, Rajaji Salai,
Chennai – 600 001.

3.The Deputy Commissioner of Customs (SIIB),
Custom House, No.60, Rajaji Salai,
Chennai – 600 001. ... Respondents

Writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of mandamus directing the respondents herein to permit the petitioner to re-export of the goods viz., 222 cartons of Cotton Shoes, imported vide Bill of Entry No.4914937 dated 15.04.2016 and Bill of Lading No.SZP626217400.

For Petitioner : Mr.A.K.Jayaraj
For Respondents : Mr.G.M.Syed Nurullah Sheriff

O R D E R

1. This is a writ petition, whereby, the petitioner seeks issuance of a mandamus or any other writ, order or direction for re-export of goods, which comprise of 222 cartons of Cotton Shoes, which were imported vide Bill of Entry No.4914937, dated

15.04.2016.

2. I may only note that this is a third round of litigation. The petitioner had approached this court in earlier two rounds by way of writ petitions filed under Article 226 of the Constitution. In the first instance, the writ petition, which was filed, was numbered as : W.P.No.28214 of 2016. The said writ petition was disposed of vide order dated 11.08.2016.

2.1 A perusal of the operative portion contained in the said order would show that the petitioner was given leave to withdraw the said writ petition with liberty to file a separate petition to seek the release of goods covered under the Bill of Entry No.4914937, dated 15.04.2016, except in respect of goods described as 'Cotton Shoes'. The apparent reason as to why liberty was given only for goods other than Cotton Shoes was that objections qua to move afresh release of Cotton Shoes had been raised by intellectual property right holders with regard to the import of Cotton Shoes to India.

3.Accordingly, the petitioner filed a fresh writ petition being : W.P.No.28306 of 2016. In the said writ petition, the following prayer was made:

> "…. Petition filed under Article 226 of the Constitution of India, seeking for a writ of mandamus directing the respondents herein to release the goods viz., 179 cartons of glass beads, 16 bundles of small garments, 102 cartons of toy baby chair, 59 cartons of toy ball, and 50 cartons of Broom sticks, imported vide Bill of Entry No.4914937 dated 15.04.2016 after collecting appropriate duty for the total quantity of the goods except 222 cartons of Cotton Shoes."
>
> (Emphasis is mine)

3.1. This writ petition was disposed of by the Hon'ble Mr.Justice T.S.Sivagnanam, vide order dated 29.08.2016. The learned Judge, after noting, in a tabular form, as to what the entire consignment comprised of, (which was otherwise the subject matter of the aforementioned Bill of Entry), passed the following relevant directions:

> "....3.From the written instruction given by the Department, it is prima facie seen that the petitioner is a regular importer and has come to adverse notice of the Department on several occasions. This is because the petitioner has always been filing Bills of Entry with incorrect details or suppressing the nature of goods which have been imported. In the present Bill of Entry, the petitioner has sought for clearance of the following items; (1)Glass Crystal beads; (2) Smilee Balls (Toy Balls); (iii) Cotton Shoes; (iv) Wooden sticks (mob

sticks); (5) Assorted Ladies Garments; (6) Baby Chair; (7) Empty Shoe Boxes printed with 'Nike' (unfolded); (8) Shoes with brand name 'Nike'; (9) Shoes with brand name 'Adidas'.

4.The matter was taken for investigation by the SIIB. On examination of the consignment, it was seen that the petitioner did not declare the Glass Crystal Beads in the Bill of Entry and so far as the Toy Balls, it appears that there is a difference in quantity and the wooden sticks, it appears that it has been mentioned as broom sticks and baby chair, though the quantity is 1632 pieces, the petitioner had declared only 1248 pieces in the Bill of Entry. The contents of the consignment have been given by the Department in a tabulated form which is as follows:

Sl.No.	Description	Quantity	Remarks
1.	Glass Crystal Beads	179 cartons	Not declared by the importer
2.	Smilee Balls (Toy Balls)	59 cartons (3540 doz)	3900 dzn were declared
3.	Cotton Shoes	10 cartons (255 pair)	1000 pairs were declared
4.	Wooden Sticks (Mob Sticks)	50 bundles (2500 pcs)	22750 pcs were declared (Broom Stick)
5.	Assorted Ladies Garments	16 bundles	Not declared by the importer
6.	Baby Chair	102 cartons (1632 pcs)	1248 pcs declared by the importer
7.	Empty Shoe Boxes printed with 'Nike' (unfolded)	800 pcs	Not declared by the importer
8.	Shoes with brand name 'Nike'	3528 pairs	Not declared by the importer
9.	Shoes with brand name 'Adidas'	1296 pairs	Not declared by the importer

5.So far as Serial Nos.3, 7, 8 & 9, since objections have been raised by M/s.Nike International

Limited and M/s.Adidas A.G. New Delhi, the petitioner has sought for re-export of the said items. Therefore, the writ petition in so far as it relates to Serial Nos.3, 7, 8 & 9 stands dismissed. With regard to the other items viz., Serial Nos.1, 2, 4, 5 & 6, the respondents are directed to assess the same to duty and intimate the petitioner since it is stated that similar products imported by the other importers have already been examined and value has been fixed and clearance have been effected. The above direction shall be complied with, within a period of two weeks from the date of receipt of a copy of this order. ....”

4.I am informed that the order passed by the learned Judge was taken up in Appeal to the Division Bench by the respondents herein. I am further informed that the said appeal was numbered as : W.A.No.1282 of 2016 and, was disposed of on 24.11.2016.

4.1.Though, the order of the Division Bench has not been placed before me, the counsels for both the parties submit that pursuant to the order of the Division Bench, the goods, referred to in Serial Nos.1, 2, 4, 5 & 6 of the table appearing in the Learned Judge's order dated 29.08.2016, to which I have made a reference above, have been released.

5.It is in these circumstances that the petitioner has filed the captioned writ petition for being permitted to re-export “Cotton Shoes”.

5.1.I must record at the outset, that, to begin with learned counsel for the respondents had raised a preliminary objection, with regard to the maintainability of the writ petition on the ground that the learned Single Judge vide order dated 29.08.2016, had dismissed the writ petition with regard to Items mentioned in Serial Nos.3,7, 8 & 9, which, broadly, pertain to Cotton Shoes.

5.2. On the other hand, learned counsel for the petitioner, however, refuted this submission advanced on behalf of the respondents.

6.Therefore, let me first deal with the preliminary objection raised by the respondents.

6.1. A perusal of the earlier orders passed by this Court, makes it quite clear that insofar as the Cotton Shoes were concerned, the learned Judge had not rendered a decision on merits. The dismissal, as it appears, was on account of the fact that they were branded goods with regard to which objections had been raised by the concerned right holders. There is, in that sense, no bar of res judicata, which is, what, in sum, the counsel for the respondents seeks to argue, qua Cotton Shoes.

6.2.The fact that objections have been raised by the right holders is also discernible from the counter affidavit filed on behalf of the respondents. As a matter of fact, the respondents concede as much in the counter affidavit. It is averred by the respondents that they have issued notice to both M/s.Nike International Limited and M/s.Adidas A.G. New Delhi, in respect of the goods in issue.

6.3. This notice to the right holders, according to the respondents, has been issued in accordance with the Notification No.47/2007 - Customs (N.T.), dated 08.05.2007, read with Central Board of Excise & Customs Circular No.41/2007 - Customs, dated 29.10.2007.

6.4 The aforementioned circumstances clearly indicate that there was infact no decision on merits. Therefore, dismissal simplicitor without decision on merits is not by itself a good enough reason to prevent the petitioner from preferring the instant writ petition.

7.This brings me to the other contention advanced on behalf of the respondents, which is, that investigations are on, and that, right holders have to be heard and therefore, no relief ought to be granted in the writ petition.

8.On the other hand, the learned counsel for the petitioner says that the petitioner has a right to re-export the subject goods i.e., Cotton Shoes, even in terms of the provisions of the aforementioned notification.

9.In support of their submissions both the counsels have placed reliance on Clause 11 of notification dated 08.05.2007.

10.In these circumstances, it becomes incumbent to extract the provisions of Clause 11 of notification dated 08.05.2007:

> ".... 11. Disposal of Infringing goods. - (1) Where upon determination by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, it is found that the goods detained or seized have infringed intellectual property rights, and have been confiscated under Section 111 (d) of the Customs Act, 1962 and no legal proceedings are pending in relation to such determination, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall, destroy the goods under official supervision or dispose them outside the normal channels of commerce after obtaining 'no

objection' or concurrence of the right holder or his authorized representative:

Provided that if the right holder or his authorized representative does not oppose or react to the mode of disposal as proposed by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within twenty working days after having been informed, or within such extended period as may have been granted by the Commissioner at the request of the right holder, not exceeding another twenty working days, he shall be deemed to have concurred with the mode of disposal as proposed by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be:

Provided further that the costs toward destruction, demurrage and detention charges incurred till the time of destruction or disposal, as the case may be, shall be borne by the right holder.

(2)There shall not be allowed the re-exportation of the goods infringing intellectual property rights in an unaltered state.

(3)The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may on his own, or at the request of the right holder, retain samples of goods infringing intellectual property rights prior to their destruction or disposal and provide the same to the right holder or importer if such samples are needed as evidence in pending or future litigations. ....”

11.A perusal of sub clause (1) of Clause 11 would show that once, the concerned officer, finds that the goods seized or detained infringe intellectual property rights and stand confiscated under Section 111 (d) of the Customs Act, 1962, and that, there are no legal proceedings pending in relation to such determination, he is required to either destroy the subject goods under official supervision or, have them disposed of outside the channel of commerce, albeit, after obtaining a no objection or concurrence of the right holder or his authorized representative.

11.1. Under the proviso to sub clause (1) of Clause 11, a time frame for this purpose has been set out.

11.2. Insofar as Sub-clause (2) of Clause 11, is concerned, it provides that no re-exportation of the infringing goods would be allowed in an “unaltered state”.

11.3. Under Sub-clause (3) of Clause-11, the concerned officer, may, either on his own, or, at the request of the right holder retain the samples of the infringing goods prior to their destruction or disposal and provide the same to the right holder or the importer if such samples are needed as evidence in pending or future litigation.

11.4.I may, at this juncture, also point out that the petitioner has filed a representation dated 07.08.2016, with the Commissioner of Customs, by which, he, inter alia seeks permission to re-export the subject goods, i.e., 222 cartons of Cotton Shoes which were attempted to be imported into the Country.

12.Admittedly, this representation has not been disposed of.

13.Therefore, having regard to the fact that the respondents are still investigating the matter and have not as yet made determination one way or the other under Clause 11 of the Notification dated 08.05.2007, I deem it fit to dispose of the writ petition with a direction to the respondents to complete the investigation and pass appropriate orders, after hearing the concerned parties, which would include the petitioner and the right holders. In case, the respondents were to come to a conclusion that the subject goods, i.e., 222 cartons of Cotton Shoes infringe the intellectual property rights of the concerned right holders, then, they would proceed in terms of the provisions of Clause-11 of the Notification dated 08.05.2007, and, while doing so, also consider whether it would be appropriate to allow re-export of the subject goods with due alteration.

13.1. Needless to say that, if, the petitioner is aggrieved by the determination made by the respondents, he will have liberty to take recourse to an appropriate remedy, albeit, in accordance with law. The respondents will carry out the aforesaid exercise with due expedition, though, not later than four weeks from the date of receipt of a copy of the order.

14. The petitioner would be well advised to cooperate in the investigation so as to hasten the determination in the matter by the respondents.

15. The captioned writ petition is disposed of, with the aforesaid observation. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Customs (Group 7H-Ch.IV),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

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3.The Deputy Commissioner of Customs (SIIB),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.Syed Nullaha Sheriff, Advocate, S.R.No.71968
+1cc to Mr.A.K. Jayaraj, Advocate, S.R.No.72008

ug(CO)
md(14/12/2016)

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and W.M.P.No.25143 of 2016