IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2016

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THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

W.P.No.41041 of 2016
And
W.M.P.No.35046 of 2016

K.H.Mohamed Ismail (alias)
Kose Hajamohideen Mohamed Ismail ... Petitioner

Vs.

1 The Assistant Commissioner (AIU)
O/o.The Principal Commissioner of Customs
Chennai-I Commissionerate, Air Intelligence Unit
Anna International Terminal
Chennai Airport
Chennai – 600 027.

2 The Assistant Commissioner of Customs (Disposal-Air)
O/o.The Principal Commissioner of Customs
Chennai-I Commissionerate, Air Intelligence Unit
Anna International Terminal
Chennai Airport
Chennai – 600 027. ... Respondents

Prayer:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned proceedings of the 2nd respondent dated 10.11.2016 bearing F.No.O.S.1366/2015-AIR and to quash the same and consequentially direct the respondents to release the seized goods of the petitioner as per Mahazar dated 23.12.2015 on the file of the respondents.

For Petitioner : Mr.N.Muthukumaran
for M/s.MCGAN Law Firm
For Respondents : Mr.B.Rabu Manohar

O R D E R

1.This is a writ petition in which, challenge is laid to the communication dated 10.11.2016, passed by the second respondent, whereby, it has been communicated to the petitioner that the gold bars/ gold jewellery weighing 466 grams, valued at Rs.11,93,892/-, would be disposed of, upon expiry of 15 days from the date of issuance of the said notice, unless a stay is obtained by him on the operation of the order-in-original or the order in appeal. The consequential relief that the petitioner seeks is that the seized goods i.e., gold bars be released to him as per Mahazar dated 23.12.2015.

2.What is curious is that there is infact, concededly, no adjudication order passed by the respondents herein. Therefore, the reference in the impugned communication dated 10.11.2016 that the seized goods would be released unless a stay is obtained of the order in original or of the order-in-appeal is completely contrary to the records obtaining in the case; a circumstance, which has been affirmed before me by the counsel for the respondents.

3.Briefly, the instant writ petition came to be instituted in the background of following facts and circumstances:

3.1.The petitioner, who is an Indian passport holder travelled from Abu Dhabi to Chennai on a Jet Airways Flight, 9W 525/23.12.2015, which reached Chennai on 23.12.2015. Upon his arrival, the petitioner was intercepted at the airport. The petitioner, was subjected to search. The search revealed that the petitioner was carrying four yellow coloured metal bars, which according to the respondents were concealed in grey coloured trousers worn by him. Accordingly, the gold bars were seized. The respondents, however, as per the prescribed procedure had the gold bars weighed. The record shows, that the four gold bars, weighing 466 grams, which were valued at Rs.11,93,892/-, had a purity of 24 carat.

4.It appears that the petitioner had moved this Court by way of a writ petition, which was, numbered as W.P.No.1142 of 2016 to seek provisional release of the seized goods i.e., the gold bars. The said writ petition, however, was disposed of on 03.02.2016, with a direction to the respondents to conclude the adjudication proceedings within a period of twelve weeks from the date of receipt of a copy of the order. While passing the order, this Court, observed that the petitioner could seek release of gold only after completion of adjudication. However, having said so, in paragraph 7 of the very same order, the Court made the following observation:

> ***"7.In these circumstances, I do not find any merit in the writ petition. Learned counsel for the petitioner submitted that liberty may be given to the petitioner to file appropriate application under section 110 A of the Income Tax Act and the respondents may consider the same in accordance with law. It is open to the petitioner, to file an application before the respondent under section 110-A of the Customs Act along with the copy of this order and the respondents are at liberty to decide the same on merits and in accordance with law."***

5.The petitioner claims that the certified copy of the said order, i.e., order dated 03.02.2016, was made available only on 25.02.2016 and therefore, he had no occasion to approach the respondent for a provisional release of the goods prior to the date of receipt of a copy of the order. The record, however, shows that on 12.02.2016, the respondents declined the petitioner's request of provisional release of goods, based on an earlier representation dated 28.12.2015, made by him to the respondents.

6.In effect, it is the contention of the petitioner that even before he could make formal representation for release of goods by invoking the provisions of Section 110 A of the Customs Act, 1962 (in short the "Act"), the request was declined based on a pending representation.

7.It is, in these circumstances, that the petitioner filed a second writ petition i.e., W.P.No.12123 of 2016, wherein, a challenge is laid to the order dated 12.02.2016. I am told that the said writ petition is pending adjudication before this Court. Therefore, as would be obvious, this is really the petitioner's third attempt to seek, inter alia, release of the goods, apart from another relief, to which, I have made a reference right in the beginning.

8.It is in these circumstances that the submission made on behalf of the petitioner is, that, not only, is the impugned order factually erroneous, but is also, contrary to law as there can be no confiscation of the goods, i.e., gold bars without an adjudication order. It is further argued by the learned counsel for the petitioner that since no show cause notice was issued within the period of six months, as is the requirement under Section 124 (a) of the Act, the seized goods, i.e., the gold bars are required to be released unconditionally to the petitioner under provisions of Section 110 (2) of the Act.

9.Furthermore, it is argued that the stand taken by the respondents, that the petitioner had waived his right to the issuance of show cause notice is obviously incorrect, as the respondents seek to rely on a letter dated 23.12.2015, which is the date when the petitioner was intercepted at the Airport and the goods in issue were seized. In this connection, the submission of the learned counsel for the petitioner is that, the respondents have fabricated the contents of the aforementioned letter by having them typed on a paper, on which his signatures had been obtained under coercion.

10.It is stated that for all these reasons, not only should the impugned communication be quashed but also the said goods i.e., gold bars should be released to the petitioner. In support of his submission, the learned counsel for the petitioner seeks to rely upon a Division Bench Judgment of the Delhi High Court, dated 06.04.2016, passed in ***W.P.(C) No.11641 of 2015, titled: Shiv Shakti Trading Company Vs. The Commissioner of Customs (Preventive) and another***.

11.On the other hand, the learned counsel for the respondents seek to place reliance on the stand taken in the counter affidavit. It is, however, conceded by the learned counsel for the respondents that no adjudication order has been passed. In sum, the learned counsel for the respondents says that there is an error in the impugned communication dated 10.11.2016, to the extent, it refers to the fact that the petitioner should obtain a stay of the operation of the order-in-original or the order-in-appeal.

11.1. Notwithstanding the error, the submission made on behalf of the respondents is that they would, in any event, have the power to proceed with the adjudication.

12.Having heard the learned counsels appearing for the parties and perused the record, what emerges is as follows:

12.1. Firstly, that the contents of the impugned communication dated 10.11.2016 are clearly erroneous. Even a cursory perusal of the communication would show that it is a format letter in which blank spaces have been filled up without due application of mind.

12.2. Secondly, as rightly contended by the learned counsel for the petitioner, the respondents could not have reached the stage of "absolute confiscation" of the goods in issue, till they passed an adjudication order.

12.3. Learned counsel for the respondents has stated categorically before me, as indicated right at the outset, that there has been no adjudication in this matter. The issue, therefore, is that, should the subject goods i.e., the gold bars, be released unconditionally to the petitioner.

13.Learned counsel for the petitioner says that the letter appended to the respondents' counter affidavit, which is dated 23.12.2015, was not been tendered by the petitioner. As indicated above, the contention of the petitioner, is that, the contents have been typed out by the respondents on a paper, on which, his signatures had been obtained at a prior point in time and that too under coercion. Respondents, obviously, deny this charge.

13.1. According to me, an issue, such as this, would require examination, and therefore, it would have to be assumed at the moment that the petitioner did waive his right to be served with a show cause notice under Section 124 (a) of the Act.

13.2. However, notwithstanding the aforesaid circumstance, the respondents were required to conclude the adjudication, within a reasonable period of time. (See ***Shiv Shakti Trading Company Vs. The Commissioner of Customs (Preventive) and another).***

13.3. Seizure in this case took place on 23.12.2015, that is nearly a year ago. To date, adjudication has not been completed.

13.4. In these circumstances, as a matter of law, release of the subject goods would have to be ordered.

14. Having regard to the aforesaid, I have put to the learned counsel for the petitioner as to whether he would be in a position to furnish some security for the value of the goods.

15.Learned counsel for the petitioner says that bank guarantee, equivalent to 50% of the value put down in the communication dated 10.11.2016, could be furnished, coupled with a personal bond for the remaining amount of the value of the seized goods i.e., the gold bars.

16.Accordingly, the communication dated 10.11.2016 is quashed. Respondents are, however, given liberty to conclude the adjudication with due expedition, though, not later than four (4) weeks from the date of receipt of a copy of this order. The respondents will, however, release the seized goods i.e., the gold bars to the petitioner on a bank guarantee being furnished, equivalent to 50% of the value of the seized goods, as indicated in the communication dated 10.11.2016.

16.1. Furthermore, the petitioner will furnish a personal bond for the remaining 50% of the value of the seized goods i.e., the gold bars.

17.The writ petition is disposed of in the aforesaid terms. There shall be no order as to costs. Consequently, the pending Miscellaneous Petition is also closed.

20.12.2016

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Index: Yes/ No
Internet: Yes/ No

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