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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CUSTOMS APPEAL (L) NO. 51 OF 2017
WITH
NOTICE OF MOTION (L) NO. 2425 OF 2017
IN
CUSTOMS APPEAL (L) NO. 51 OF 2017**

1. The Commissioner of Customs (Import -I)
New Customs House, Ballard Estate, Mumbai –
400 001.

...Appellant

Versus

S.S. Offshore Pvt. Ltd.
4th Floor, Viraj Impex House, 47, P.D'Mello
Road, Mumbai – 400 009.

...Respondent

Mr. Pradeep Jetly, for the Appellant.
Mr. Sridharan with Ms. Lakshmi Menon i/b Ms. Apurva Pohonerkar
Mehta, for the Respondent

**CORAM: M.S. SANKLECHA AND
RIYAZ I. CHAGLA, JJ.
DATED: 21ST DECEMBER 2017**

ORAL JUDGMENT :- (Per M.S. Sanklecha J.)

1. This appeal under Section 130-A of the Customs Act, 1962 (the Act) takes exception to order dated 31st October 2017 passed by the Customs, Excise & Service Tax Appellate Tribunal, (West Zonal Bench) at Mumbai (Tribunal). The impugned order dated 31st October 2017 of the Tribunal partly allowed the

Respondent's appeal from letter dated 25th September 2017 communicating the decision of the Commissioner of Customs (Import-I) allowing provisional release under Section 110- A of the Act of the imported vessel Sagar Fortune(vessel), subject to certain conditions, pending final adjudication. The vessel had been seized on 21 August 2017 under Section 110 of the Act. The Tribunal after setting aside the letter dated 25 September 2017 restored the issue to the adjudicating authority i.e. Commissioner of Customs(I) to pass a fresh order.

2. The Revenue urges only the following question of law for our consideration:

“Whether the Tribunal has jurisdiction to entertain an Appeal against a letter allowing provisional release of Vessel “Sagar Fortune” under Section 110A of the Customs Act, 1962”?

From the impugned order dated 31st October 2017 of the Tribunal, it appears, that , the Revenue had not urged the issue raised hereinabove before the Tribunal. However, as the question raised is one of jurisdiction on undisputed/admitted facts, going to the root of the dispute, and if the appellant is correct, it would make the impugned order dated 31 October 2017 a nullity

(see **Kiran Singh & Ors. Vs. Chaman Paswan AIR 1954 (SC) 340**) we are considering the question urged. In support of considering a question of jurisdiction(on admitted facts) in an appeal before this court even when not urged before the Tribunal we place reliance upon the decision of the Supreme Court in **Santosh Hazari vs. Purshottam Tiwari 251 ITR 84**. Normally, following the decision of this Court in **CIT vs. Tata Chemicals Ltd. 256 ITR 395** where an issue has not been raised before the Tribunal, we do not entertain the question pertaining to the issue before us for the first time. However when the issue is one of jurisdiction(on admitted facts) of the Tribunal to pass an order is concerned, the question going to the root of the dispute, would require consideration. The Respondent also do not object to the above question of jurisdiction being considered by the Court in this appeal.

3. The question as proposed is a substantial question of law and therefore admitted.

4. At the request of the Counsel, the appeal itself is being taken up for final disposal.

5. Briefly, the facts relevant to this appeal are as under:-

(a) On 20th July 2017 the Respondent filed a Bill of Entry for the import of a second hand vessel. In its Bill of Entry the Respondent declared the value of its vessel to be of Rs.13.82Crores and classified the same under Chapter 89 Heading 8901 of the Customs Tariff Act, 1975(Tariff Act). The Bill of Entry was assessed and vessel allowed to be cleared for home consumption. On 3 August 2017 the vessel was allowed to be converted from a foreign run vessel to a coastal run vessel.

(b) Thereafter on 21 August 2017 the officers of the Intelligence and Investigation Branch of the Commissioner of Customs on a reasonable belief that the vessel is liable for confiscation on account of incorrect classification/declaration, seized it.

(c) On 7 September 2017, the Respondent met the Commissioner of Customs(I) and sought provisional release of the vessel under Section 110A of the Act. On 25 September 2017, the Deputy Commissioner of Customs communicated the decision of the Commissioner of Customs(I) allowing provisional release of the vessel subject

to conditions i.e. a bond equal to 100% of the re-ascertained value and a bank guarantee of 30% of re-ascertained value of Rs.41.45Crores.

(d) Being aggrieved by the above letter dated 25 September 2017 communicating the decision allowing provisional release of the vessel, the Respondent filed an appeal to the Tribunal. The appeal as filed by the Respondent was entertained by the Tribunal under Section 129A (1) (a) of the Act. On merits, the Tribunal by the impugned order dated 31st October 2017 set aside the letter dated 25 September 2017 which allowed conditional provisional release of the vessel under Section 110A of the Act and restored the issue to the Commissioner of Custom(I) to decide the issue afresh.

6. The challenge in this appeal is not to the decision taken on merits by the impugned order dated 31 October 2017 of the Tribunal. The challenge in this appeal is only to the jurisdiction of the Tribunal to entertain an appeal from a letter 25 September 2017 allowing provisional release of the seized vessel. This in the

context of the Tribunal's powers to entertain appeals under Section 129A (1) (a) of the Act.

7. Before recording and considering the submission of the rival parties, we may profitably reproduce the relevant provisions of the Act, in the context of the appeal, as under:

“Section 2. Definitions-In this Act, unless the context otherwise requires.

(1) “adjudicating authority” means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal.”

“Section 110A – Provisional release of goods, documents and things seized pending adjudication.
– Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.”

“Section 129A – Appeals to the Appellate Tribunal. –
(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order
–

(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under Section 128A:

(c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under Section 130, as it stood immediately before that day:

Provided..

(1A) to (6).....”

8. Mr. Jetly, the learned counsel for the Revenue in support of his contention that the impugned order dated 31 October 2017 of the Tribunal is without jurisdiction, submits as under:

- a. The jurisdiction of the Tribunal under Section 129A(1) (a) of the Act is only to entertain appeals from a decision or an order passed by the Commissioner of Customs as an adjudicating authority. In this case the letter dated 25 September 2017 of provisional release of the vessel under Section 110A of the Act, is not an order or decision but only a letter. Therefore no appeal against the letter can be entertained by the Tribunal even when it is admittedly issued at the behest of the Commissioner of Customs (I);

- b. In any event, no appeal can be entertained by the Tribunal from the letter dated 25 September 2017 (even if assumed to be decision/order) as it is not passed/issued by the Commissioner of Customs as an adjudicating authority. An appeal can be entertained under Section 129A (1) (a) of the Act only if the decision or order is passed as an adjudicating authority.
- c. The letter dated 25 September 2017 allowing provisional release of the seized vessel is pending adjudication, as is evident from Section 110A of the Act. Thus the letter dated 25 September 2017 cannot be on the directions of the Commissioner of Customs(I) as an adjudicating authority. Thus not appealable.
- d. It is fairly conceded that the larger bench of the Tribunal in ***Commissioner of Central Excise and Service Tax v. Gaurav Pharma Ltd.***¹ has taken a view that an appeal from a letter directing provisional

1 2015(326) ELT 561.

release of seized goods under Section 110A of the Act is an appealable order under Section 129A(1)(a) of the Act to the Tribunal. However it is submitted that the same has not been accepted by the Revenue as it is subject matter of challenge in an appeal before the Punjab and Hariyana High Court and awaiting admission.

- e. Our attention is invited to the decision of this Court in ***Commissioner of Central Excise v Narendra Plastic Pvt. Ltd.***² wherein this issue viz. whether a letter directing provisional release of the goods is appealable or not , was left open to be considered in an appropriate case keeping in view the decision of the larger bench of the Tribunal in ***Gaurav Pharma (Supra)***. It is submitted that this is an appropriate case where the issue should be adjudicated upon.

9. On the other hand, Mr. Sridharan, the learned counsel appearing for the Respondent in support of the impugned order submits as under :-

² 2016(342) E.L.T. 497 (Bom.)

a. The letter dated 25 September 2017 allowing provisional release of the vessel by the Commissioner of Customs is in the nature of interim order / decision pending final disposal of the dispute by adjudication. Nevertheless, the passing of an interim direction/order has an element of a *lis* i.e. deciding between the competing interest of the Revenue and the importer. Thus an adjudicatory function at the interim stage by the very adjudicatory authority who is to decide / adjudicate *inter alia* upon the seizure and the dispute finally.

b. Attention was particularly invited to the amendment to Section 110A of the Act w.e.f. 8 April 2011 which replaced/substituted the words “Commissioner of Customs” with the words “adjudicating authority” as the person who has to pass an order or take a decision for provisional release. This was deliberately done as there is an element of adjudication involved while deciding to provisionally release the seized goods and the terms of release.

c. In terms of Section 129A (1) (a) of the Act every order or direction by the Commissioner of Customs as an

adjudicating authority is appealable. Unlike other sub-clauses of sub-section (1) of Section 129A of the Act, sub-clause (a) does not specify under which section the order must be passed by the lower authority for it to be appealable to the Tribunal. Therefore the only requirement under Section 129 A (1) (a) of the Act is that the orders passed by the Chief Commissioner or the Commissioner must be passed under the Act, as an adjudicating authority. This is satisfied in the present case. Therefore the appeal was properly entertained.

d. Reliance is placed upon the reasoning and the decision of the larger bench of the Tribunal in ***Gaurav Pharma (Supra)*** which has held that a communication/letter directing provisional release of the seized goods is an order or decision appealable to the Tribunal.

e. This issue also arose for consideration before the Delhi High Court in ***Gurdeep Kaur Vs. C.C. (Preventive)***³ ***and Candex Chemical Fibres Co. (P.) Ltd. Vs. CC***⁴ wherein it has been held that such communication / letters

3 2015 (325) ELT 490 (Del.)

4 2014 (310) ELT 500 (Del.)

directing provisional release of seized goods under Section 110A of the Act are appealable to the Tribunal under Section 129A(1)(a) of the Act; and

f. In cases where petitions are filed under Article 226 of the Constitution of India seeking judicial review of orders passed under Section 110 A of the Act, the Revenue has objected to the same being entertained by the Court on the ground of alternative remedy. In support, attention is invited to the decisions of the Rajasthan High Court in the case of ***Shiv Mahal Textiles Pvt. Ltd. v. Director General of Revenue Intelligence⁵ and Gentleman Suitings Pvt. Ltd. Vs. Director General Revenue Intelligence⁶***. Thus the Revenue cannot take inconsistent stands. Particularly when Rule of law requires that the law be applied uniformly to all.

10. Before dealing with the rival submissions, we must make it clear that no fault can be found in the Tribunal entertaining the appeal from the letter dated 25 September 2017 directing provisional release of the vessel. This for the reason that at the time the division bench of the Tribunal entertained the appeal and

5 Civil Writ Petition No. 4946 of 2012 dated 18th December 2012.

6 2012 (12) TMIO Rajasthan High Court.

passed the impugned order dated 31 October 2017, it was bound to do so, as the issue was concluded by the decision of its larger Bench in ***Gaurav Pharma (supra)***. This decision of the larger bench continues to be binding in the absence of any stay from a higher forum, although the appeal filed therefrom is awaiting admission. The doctrine of precedents obliged the Tribunal to entertain the appeal from the letter dated 25 September 2017 allowing provisional release of the seized goods. Nevertheless this appeal is being entertained as it raises a question of jurisdiction (on admitted facts). This is in terms of the decision of the Supreme Court in ***Carona Ltd.v Parvathy Swaminathan & sons. 2007(8)SCC 559 and Kanwar Singh Sainny vs. High Court of Delhi 2012 (4) SCC 307*** that the issue of jurisdiction can be raised at any time and no amount of waiver and/or consent can bestow jurisdiction on a court which does not possess it.

11. The primary submission on the part of the Appellant is that the letter dated 25 September 2017 is a mere letter and not an order or decision. Therefore it is submitted that no appeal under Section 129A (1) (a) of the Act from the letter dated 25 September 2017 is maintainable. We asked Mr. Jetley, Counsel for the Revenue, as to whether there is any special requirement / insignia

to be satisfied before a letter reaches the status of an order/decision under the Act, even if the letter dated 25 September 2017 clearly is a decision. In response we are informed that the letter would achieve the status of an order or decision under the Act only when it is preceded by a show cause notice or hearing. If this submission is to be accepted, then a letter by the Commissioner of Customs giving certain binding direction would be unassailable in appeal under the Act , because the decision communicated by a letter, is in breach of Natural Justice. There cannot be any premium on an authority under the Act failing to follow the Rule of law nor can the authority/ Revenue be permitted to take advantage of its own wrong. The appellate remedies under the Act are provided to ensure that the Authorities under the Act remain within the bounds of its authority and pass correct orders on facts and law. The Supreme Court in ***Sitaram v. State of U.P. AIR 1979(SC) 745*** has described an appeal is one in which the issue to be examined is whether the order of the court from which appeal is brought was correct on the materials before it. Therefore, in the present facts, an order or decision under Section 129A (1) (a) of the Act would mean any order or direction which decides competing interest / lis even for the interim i.e. pending the final disposal of the dispute before the authority. The

only requirement in terms of Section 129A (1) (a) of the Act being that such decision / order (whether conditional or unconditional) is binding. In any case, we may point out that in this case the Respondent was heard by the Commissioner of Customs on 7 September 2017 before taking the decision as contained in the letter dated 25 September 2017. Therefore even if we apply the test proposed by the Revenue for a letter to achieve the status of a decision or order is a grant of hearing, the letter dated 25 September 2017 satisfies the above test.

12. It was then contended by the Revenue that in any event the letter dated 25 September 2017 would not be an appealable order under Section 129A (1) (a) of the Act as it is not passed/ issued by the Commissioner of Customs as an adjudicating authority. In support our attention is invited to Section 110 A of the Act, to contend that as the direction has been issued pending adjudication, the letter dated 25 September 2017 is not issued by the Commissioner as an adjudicating authority for the reason that the adjudication is yet to be done. The above submission completely ignores the fact that with effect from 8 April 2011, Section 110A of the Act has undergone a change and now such interim order / decision pending the adjudication has to be taken

by an adjudicating authority i.e. the Commissioner of Customs(I) in this case. In terms of Section 129A (1) (a) of the Act, for a decision/order to be appealable, it should be issued only by the Adjudicating authority as in this case. De hors the above, in any case, the passing of an interim decision / order has an element of a lis i.e. deciding between the competing interest of the Revenue and the importer before the final adjudication. Therefore an adjudicatory function in terms of the Act is to be decided by the adjudicatory authority who is also to decide / adjudicate the dispute finally. In fact the substitution with the words “adjudicating authority” for the words “Commissioner of Customs” was deliberately done as there is an element of adjudication involved while deciding to provisionally release the seized goods and the terms of release. Thus we find no merit in the above submission.

13. In fact during the course of the hearing, we asked Mr Jetley, the learned Counsel for the Revenue, whether the letter dated 25 September 2017 allowing provisional release of the seized goods, if not classifiable as a quasi judicial order then what is its character? Mr Jetley in response rightly submitted that the communication dated 25 September 2017 is not a legislative order. However he vehemently submitted that the letter dated 25

September 2017 is not even an administrative order. However no reasons for the same are forthcoming. In any case the difference between the manner in which the decisions are to be taken in case of administrative orders and quasi judicial order has long been obliterated, when civil consequences are involved, as in this case (see ***A.K. Kraipak v. U.O.I. 1969(2) SCC 262; Sahara (India) v. CIT 2008(14) SCC 151***). In any case even if it is assumed that the letter dated 25 September 2017 is an administrative decision, yet it is still an order passed by an adjudicating authority and the same would still be appealable under Section 129A (1) (a) of the Act. This for the reason that in terms of the above provision the only requirement for an appeal to be entertained is that the order/decision is to be as an adjudicating authority i.e. Commissioner of Customs(I). This decision in the letter dated 25 September 2017 is in terms of Section 110A of the Act is required to be taken by the adjudicating authority.

14. Thus for the purposes of the Tribunal entertaining the appeal from the letter dated 25th September 2017, it would make no difference if it is an administrative or a quasi-judicial order / decision. However for the purpose of completeness we would like

to refer to the test laid down by the Supreme Court in the ***Automotive Tyre Manufacturers Association v. Designated Authority and Others***⁷ to draw a distinction between administrative and quasi judicial order at paragraph 65, as under:-

“65. More often than not, it is not easy to draw a line demarcating an administrative decision from a quasi-judicial decision. Nevertheless, the aim of both a quasi-judicial function as well as an administrative function is to arrive at a just decision. In ***A.K. Kraipak v. Union of India*** this Court had observed that the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, regard must be had to:

- (i) the nature of the power conferred;
- (ii) the person or persons on whom it is conferred;
- (iii) the framework of the law conferring that power;
- (iv) the consequences ensuing from the exercise of that power; and
- (v) the manner in which that power is expected to be exercised.

15. On application of the above five tests to the present case, the nature of the power conferred under Section 110 read with Section 110A of the Act is to deprive a owner of the goods the use of his property till the final adjudication of the proposed

7 (2011) 2 Supreme Court Cases 258.

confiscation or allowing the provisional release of the goods subject to certain conditions to safeguard the interest of the Revenue till the final decision is taken. It is undisputed that the exercise of power which is conferred under Section 110A of the Act would have civil consequences. The power when exercised could lead to either the State being left without security by the time the adjudication order is passed or the conditions for provisional release could be so onerous that it would be impossible for the importer to comply with them and use the goods till adjudication is over. The person vested with the power to allow provisional release of the seized goods is the adjudicating authority under the Act. The Act itself deals with import of goods into the country. All of the above, would suggest that the order/decision given for provisional release would be in the nature of quasi judicial decision/order.

16. We are conscious of the fact that a right of an appeal has to be bestowed by a statute and no person can claim it as of a right, *de hors* the statute. However having found that there is a right of appeal conferred from the orders of the Commissioner of Customs in terms of Section 129A (1) (a) of the Act, it must be construed liberally (see ***CIT vs. Ashoka Engineering 194 ITR 645***). This is

particularly so as sub clause (a) unlike other sub clauses to subsection 1 of Section 129A of the Act does not restrict the right of appeal to the sections of the Act under which the order is passed and/or decision taken. Moreover an appeal from a decision of provisional release under Section 110 A of the Act, would cause no prejudice to the Revenue. The goods which have been seized continue to be seized until the importer satisfies the conditions of provisional release and the adjudication proceeding are not in any manner halted / adjourned, merely because the importer is not satisfied with the terms of provisional release. Therefore we hold that the order/direction given under Section 110 A of the Act is an appealable order under Section 129A(1) (a) of the Act .

17. We have perused the decision of the larger bench of the Tribunal in **Gaurav Pharma (supra)** which analyses the nature of an order / decision taken by the adjudicating authority under Section 110A of the Act as observed in the following paras as under:-

“30. Section 129A(1) (a) provides for any aggrieved person to file an appeal to the Appellate Tribunal against “a decision or order passed by the Principal Commissioner of Customs or Commissioner of

Customs as an adjudicating authority". It is not disputed that an order under Section 110A can be issued only by an adjudicating authority. Revenue argues that though the order is by an adjudicating authority, it is not an adjudication order. This will take us to who is an "adjudicating authority". Section 2(1) states that "adjudicating authority" means "any authority competent to pass any order or decision under this Act..." Having arrived at the uncontested conclusion that an order under Section 110A is issued by adjudication authority it will be illogical to infer that an order under Section 110A of a non-adjudicatory disposition but passed by the adjudicating authority. It is interesting to note that the words "adjudicating authority" replaced "Commissioner of Customs" in Section 110A with effect from 8th April 2011.

31.

32. It is also relevant to consider assertion by Revenue regarding the administrative nature of an order under Section 110A. Revenue asserts that there is no *lis* at the time of issuing order or release of seized goods. This contention is misconceived. Neither Section 110A nor any other provision of the Act prescribes specific preset conditions or guidelines for exercising such powers. Apparently the adjudicating authority exercises wide ranging discretionary powers, not fettered by any express statutory conditions, pre-listing the types of order that could be issued. When a statute confers powers upon a public official to decide on a person's rights and interests, the principles of natural justice guide the exercise of that power unless specifically excluded by the statute itself. To state that a decision or order in exercise of such powers is of unilateral, administrative nature is not legally tenable. The distinction sought to be made that the adjudicating authority acts in circumstances like this which affects the rights of the owner of goods, as not an adjudicating authority, is artificial and fallacious. Hon'ble Supreme Court in *Raj Kumar V. CIT (2007) 2 SCC 181* held that when civil consequences ensue, there is hardly any

distinction between an administrative order and a quasi-judicial order. The Hon'ble Apex Court observed that there might have been difference of opinions at one point of time, but it is now well settled that the thin line between an administrative and a quasi-judicial order now stands obliterated.

33. ...

34. An order for provisional release of seized goods is not to be issued mechanically. The same is issued after due consideration of various factors like the nature of goods, the seriousness of the offence etc. When the order has civil consequences, remedy against any adverse order is by way of appeal. Judicial review by the Courts in exercise of constitutional powers cannot be the only automatic recourse as argued by Revenue. Here, the provisions of Section 129A(1) (a) cannot be restrictively interpreted to mean that only final adjudication orders are covered under the terms "a decision or order passed by Commissioner of Customs as adjudicating authority". There is neither a textual nor normative warrant for such interpretation.

35....

36. Apart from the above, we find that the distinction sought to be made by categorizing some orders (like the one under Section 110 A) as an interim order will not sustain legal scrutiny. Section 110A provides for restoring seized goods to the owner. No doubt the offence case is still pending final outcome. However, an order for provisional release is a stand alone order irrespective of the final outcome of investigation or adjudication. The same is not predicated by possible later outcomes. Refusal to release the goods or imposing harsher conditions for release will certainly have legal adverse consequences to the owner of the goods. Hence, the owner has to have a remedy which is statutorily provided under Section 129A."

18. We are in complete agreement with the analysis done by the larger bench of the Tribunal in **Gaurav Pharma (supra)** as reproduced in the extracts hereinabove.

19. To our mind the communication / letter dated 25th September 2017 is a decision taken by the adjudicating authority and is appealable to the Tribunal under Section 129(1)(a) of the Act.

20. We also note that the Delhi High Court in the cases of **Gurdeep Kaur (supra)** and **Candex Chemical (supra)** has also taken a view similar to ours. Further before the Rajasthan High Court in the cases of **Shiv Mahal Textiles (supra)** and **Gentleman Suitings (supra)** the Revenue has successfully urged before the Court that an appeal from an order passed under Section 110 A of the Act is available. No reason has been shown for urging differently before us from that urged by the Revenue before the Rajasthan High Court.

21. In the above view, the substantial question of law is answered in affirmative, that is in favour of the Respondent – Assessee and against the Revenue. Accordingly the Appeal is dismissed. No order as to costs.

22. In view of the above, the Notice of Motion is also dismissed as infructuous.

(RIYAZ I. CHAGLA J.)

(M.S. SANKLECHA J.)