

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.A.Nos.1019 & 1020 of 2017
and
CMP Nos.14359 and 14360 & 14361 of 2017

1. The Commissioner of Customs (Exports)
Chennai-IV, Commissionerate,
Customs House,
Chennai - 1.
2. The Deputy Commissioner of Customs (SIIB),
Customs House,
Chennai - 1.
3. The Deputy Commissioner of Customs (Exports),
Chennai - IV, Commissionerate,
Customs House, Chennai-1 ... Appellants in both W.As.

versus

1. M/s.Sri G.P.R. Leathers,
rep. by its Proprietor Shri G.Prakash Reddy,
No.41/5, Perianna Maistry Street,
Periamet, Chennai - 600 003. .. Respondent in W.A.1019/17
2. M/s.Parveen Leather Exports,
rep. by its Proprietor Shri Jaffer Siddique,
No.62/B, Perianna Maistry Street,
Periamet, Chennai - 600 003. .. Respondent in W.A.1020/17

Writ Appeals under Clause 15 of the filed against the
common order dated 18.07.2017 passed in WP Nos.7429 & 7430 of
2017, as corrected on being mentioned on 24.07.2017.

WP.7429 & 7430/2017:

Prayer: Under Section 226 of the Constitution of India praying
for the Issuance of Writs of Mandamus to direct the
respondents to release the goods covered by shipping bill
No.1415092 and 1415135 respectively both dated 03.10.2016
forthwith for export.

For Appellants : Mr.T.Pramodkumar Chopda
in both W.As.

For Respondent : Mrs.V.Pramila
in both W.As.

COMMON JUDGMENT

(Order of the Court was made by S.MANIKUMAR, J.)

Challenge in the writ appeals is to the common order made in W.P.Nos.7429 and 7430 of 2017 dated 18.07.2017, by which, the Writ Court followed, an earlier order in W.P.Nos.1620 to 1628 of 2017, dated 30.01.2017. Provisional release of the goods has been ordered, subject to the respondents, complying with the conditions imposed by the Court in W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, respectively dated 22.12.2016 and 25.01.2017, respectively.

2. Short facts leading to the appeals are that the respondents viz., M/s.Sri G.P.R.Leathers, Chennai and M/s.Parveen Leather Exports, Chennai, are exporters, in respect of finished leather. They submitted that shipping bills have been filed for export, of above said goods. Samples were drawn by CLRI in terms of Customs Facility Circular No.1/2014 dated 02.01.2014 and a report dated 07.10.2016, was issued by CLRI, Madras, certifying that the sample satisfy the norms and conditions prescribed by the Director General of Foreign Trade (DGFT) Public notice No.21/2009-14 dated 01.12.2009.

3. Subsequently, the entire consignments under Shipping Bills were examined by SIIB officers on 14.10.2016, in the presence of two independent witness, representatives of the concerned Customs Broker (who have filed shipping bill on behalf of the exporters/respondents) and the godown Supervisor of CWC Virugambakkam CFS. Samples were drawn for testing and verification under Mahazar dated 14.10.2016. Samples were sent to CLRI for testing on 14.10.2016. Subsequently, on testing and verification, CLRI, vide report dated 11.11.2016, forwarded the test results certifying that the samples do not satisfy the norms and conditions as laid down in DGFT Public notice No.21/2009-14 dated 01.12.2009, for the type of 'Finished Leather' as declared by the respondents.

4. The department has contended that respondents have misdeclared the description and attempted to export the subject goods, by evading export duty at 60% as per Sl.No.26, of the Export Tariff by availing undue drawback of 6% (applicable drawback for finished leather as per Drawback Schedule) and also by availing MEIS incentive of 2% on FOB

value. Department has seized the goods under the provisions of Section 110 of the Customs Act, 1962 with effect from the date of examination i.e. 14.10.2016, vide Seizure Memo dated 16.11.2016.

5. Thereafter, by letter dated 21.02.2017, a request has been made by the exporters to the Commissioner of Customs (Export), Chennai IV Commissionerate, Customs House, Chennai, for provisional release of goods. Responding to the above, vide order dated 25.11.2016 the Principal Commissioner of Customs-III (SIIB), Customs House, Chennai -1, recommended for provisional release of the subject goods, pertaining to the exporters vide Table-I, as per the provisions of Section 110A of the Customs Act, 1962 and in terms of the CBEC Circular No.01/2011 dated 04.01.2011, subject to the following conditions.

- (i) On payment of applicable export duty.
- (ii) On execution of bond for the value of the goods and appropriate security for fine and penalty leviable.
- (iii) After drawal of adequate number of samples as required including for possible prosecution before such provisional release.
- (iv) Additional bond that the exporters shall not claim the benefit of Chapter 3 of the Foreign Trade Policy.

6. Time for issuance of show cause notice has been extended upto 13.10.2017 in terms of Section 110(2) of the Customs Act, 1962, by Order-in-Original No.54865/2017 dated 12.04.2017 issued vide F.No.Enq/63/2016-SIIB/S.Misc.37/2017-SIIB dated 23.11.2016.

7. Earlier in similar circumstances, being aggrieved by the conditions imposed in the order of provisional release dated 23.11.2016, of the Principal Commissioner of Customs-III (SIIB), Customs House, Chennai -1, M/s.Sri Vijayalakshmi Leathers, rep. by its Partner S.Ramanathan and other leather exporters filed separate writ petitions. After hearing the learned counsel for the parties, writ Court, vide common order in W.P.Nos.43062 to 43070 of 2016 and WMP Nos.36923 to 36939 of 2016 dated 22.12.2016, at paragraph Nos.20 & 20.1 ordered as hereunder.

"20. According to me, in line with the judgements referred to above, which includes the judgment 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 nationalized 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."

8. Reading of the above, makes it clear that writ Court had given an option to the petitioners therein, to seek for release of the goods by furnishing bank guarantee from a nationalised bank equivalent to 30% of the export duty. Dispute is whether the goods are finished goods or unfinished goods, the latter, subject to export duty at the rate of 60%. Except duty, insofar as other conditions contained, in paragraphs 6,7 and 8, are concerned, writ Court, categorically held that those conditions would remain unaltered.

9. At the risk of repetition, this Court deems it fit to reproduce the same. The conditions in paragraphs 6, 7 and 8 of the order of provisional release dated 23.11.2016, are as hereunder.

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 applicable export duty;
- (ii) on execution of bond for the value of the goods and appropriate security for fine and penalty leviable;
- (iii) after adequate number 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 of 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)."

10. Pursuant to the common orders passed by this Court, in W.P.Nos.43062 to 43070 of 2016 and WMP Nos.36923 to 36939 of 2016 dated 22.12.2016, the Deputy Commissioner of Customs (Exports), Commissionerate-IV, Customs House, Chennai, issued an order of provisional release dated 10.01.2017 to the petitioners, in W.P.Nos.43062 to 43070 of 2016. As all the subsequent orders are similar in nature, suffice to reproduce one such order.

F.No.S.Misc.185/2016-EDC Dated: 10.01.2017

To

M/s.Sri Vijayalakshmi Leathers,
70/4, Wudhucattan St.,
Periamet,
Chennai.

Sir,

Sub: Provisional Release of Export Cargo - Reg.

Please refer to the seizure of the export of items declared as Finished Leather covered under shipping bill 1454214 dated 04.10.2016, filed by your firm M/s. Sri Vijayalaksmi Leather., (IEC-0491009593) wherein SIIB upon investigation seized the entire consignments of goods covered under the said Shipping Bill, since you had violated the provisions of the Customs Act, 1962, thus rendering the good liable for confiscation under the provisions of the Customs Act, 1962. As per the SIIB communication, you had mis-declared the value of goods presented for export as Finished Leather, whereas upon investigation and testing by CLRI the subject goods were identified as Unfinished Leather and did not meet the norms and conditions for the type of Finished Leather as laid down in the DGFT Public Notice no.21/2009 dated 01.12.2009 and hence the subject export consignment is seized under section 110 of the Customs Act, 1962. The Principal Commissioner (Chennai III) had accorded permission for the provisional release based on the final order dated 22.12.2016 in W.P.No.43063 of 2016 filed before Hon'ble High Court of Madras of the subject consignment of Finished Leather covered under Shipping bill 1454214 dated 04.10.2016, upon the execution of an Indemnity Bond towards the FOB value of the subject goods, in this case it is the declared value of Rs.33,25,068/- (Rupees Thirty Three Lakhs Twenty Five Thousand and Sixty Eight

Only), and you are hereby requested to execute an Indemnity Bond for a value of Rs.33,25,068/- (Rupees Thirty Three Lakhs Twenty Five Thousand and Sixty Eight Only), and a security in the form of Bank Guarantee for Rs.19,28,540/- (Rupees Nineteen Lakhs Twenty Eight Thousand Five Hundred and Forty Only - 30% of 60% of Export duty - Rs.5,98,513/- + 40% on FOB towards the security for Fine and Penalty - Rs.13,30,027/-) as per the provisions of the CBEC circular No.01/2011-Cus dated 04.01.2011 and the Hon'ble High Court's order for the provisional release of the subject cargo covered under above referred shipping bill filed in the name of M/s.Sri Vijayalakshmi Leathers. It is also directed by the Principal Commissioner (Chennai III) that a separate bond may be executed containing the clause that you will not be claiming any MEIS benefits for the subject consignment. It is also hereby advised that the description of the goods may be amended as Unfinished Leather since the SIIB unit had finalized the identity of the goods as Unfinished Leather. Upon the receipt of the Indemnity Bond, Bond for non-claiming of the MEIS benefits and the required Bank Guarantee the permission for export process will be granted.

Sd/-

(T.NALINA SOFIA)

DEPUTY COMMISSIONER OF CUSTOMS

(Exports)

11. Material on record discloses that the subsequent provisional orders dated 10.01.2017, issued to the exporters, were again challenged in W.P.Nos.1620 to 1628 of 2017. Prayer sought for in all the writ petitions are similar and therefore, suffice to incorporate the same from one of the writ petitions viz. W.P.No.1620 of 2017.

"praying for a writ of certiorarified mandamus, by calling for the records of 4th respondent and quashing the Impugned Order, viz., communication dated 10.01.2017, issued from File No./S.Mic.185/2016-EDC and quash the same and to direct the respondents to release the goods covered by shipping bill No.1454214 dated 04.10.2016, forthwith for export."

12. Pending disposal of W.P.Nos.1620 to 1628 of 2017, petitioners therein, have filed W.M.P.Nos.1580 to 1588 of 2017, for a direction to the respondents therein, to provisionally release the export consignment, within a prescribed time limit, in accordance with the earlier order dated 22.12.2016, in W.P.Nos.43062 to 43070 of 2016, passed by the writ Court, without any further conditions.

13. Though, the department has objected to the relief sought for, contending inter alia that they are empowered to call for the petitioners therein, to execute an indemnity bond and security in the form of bank guarantee, as per the provisions CBEC Circular No.01/2011 dated 04.01.2011, and ordered provisional release covered under the shipping bills submitted by the exporters / writ petitioners, in W.P.Nos.1620 to 1628 of 2017, the writ Court, at paragraph No.6 of the common order made in W.M.P.Nos.1580 to 1588 of 2017 in W.P.Nos.1620 to 1628 of 2017 dated 25.01.2017, observed that seeking security in the form of Bank Guarantee is uncalled for and, in a sense, diluted the very essence of the order dated 22.12.2016, passed by the writ Court, in W.P.Nos.43062 to 43070 of 2016. Writ Court further observed that the respondents therein in the earlier round of litigation, had not articulated that they would require the petitioners therein, to offer security towards fine and penalty, in the form of a Bank Guarantee. So saying, writ Court, in W.M.P.Nos.1580 to 1588 of 2017 in W.P.Nos.1620 to 1628 of 2017 dated 25.01.2017, stayed the advice contained in the communication dated 10.01.2017, requiring the writ petitioners to declare the goods as unfinished goods and further directed the release of goods forthwith, upon fulfillment of conditions already stipulated in the order dated 22.12.2016 made in W.P.Nos.43062 to 43070 of 2016.

14. When W.P.Nos.1620 to 1628 of 2017, came up for further hearing on 30.01.2017, both the learned counsel appearing for the parties submitted that subject goods were released in terms of the orders made in W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, respectively dated 22.12.2016 and 25.01.2017. Both the counsel also seemed to have submitted that the writ petitions can be closed. Placing on record the above submission, by common order dated 30.01.2017, W.P.Nos.1620 to 1628 of 2017, have been closed.

15. When W.P.Nos.7429 & 7430 of 2017, came up for hearing on 18.07.2017, the writ Court disposed of W.P.Nos.7429 and 7430 of 2017, directing provisional release of the goods, subject to the petitioners therein, complying with the conditions imposed in the earlier writ petitions ie. W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, dated 22.12.2016 and 25.01.2017, respectively.

16. Today, alongwith the instant W.A.Nos.1019 & 1020 of 2017 filed against the orders made in W.P.Nos.7429 and 7430 of 2017 filed by petitioners herein, dated 18.07.2017, other appeals filed by the department viz., W.A.Nos.1097 to 1105 of 2017 filed against the interim orders made in W.M.P.Nos.1580 to 1588 of 2017 in W.P.Nos.1620 to 1628 of 2017 dated 25.01.2017, came up for admission.

17. By observing that the interim order issued in WMP Nos.1580 to 1588 of 2017 in W.P.Nos.1620 to 1628 of 2019, had merged with the final orders passed in the writ petitions and challenge to the interim orders, does not survive, W.A.Nos.1097 to 1105 of 2017, were dismissed.

18. Though the abovesaid writ appeals were dismissed, on the grounds stated supra, we have not recorded any finding therein as to whether the appellants viz., Principal Commissioner of Customs-III (SIIB), Customs House, Chennai and others are empowered to seek for execution of bank guarantee for the value of the goods and appropriate security for fine and penalty, as per condition No.6(ii) of the initial provisional order dated 23.11.2016.

19. At this juncture, we take note of the fact that when the conditions imposed in the initial provisional order dated 23.11.2016, were challenged, writ Court, at paragraph No.20.1 of the order dated 22.12.2016, made in a batch of writ petitions viz., W.P.Nos.43062 to 43070 of 2016, has categorically held that all other conditions contained in paragraphs 6, 7 and 8 shall remain unaltered. So saying, writ petitions have been disposed of.

20. In the subsequent writ petitions viz., W.P.Nos.1620 to 1628 of 2017, when communication dated 10.01.2017, requiring the exporters to offer bank guarantee for fine and penalty, in terms of monetary value of the goods and in terms of CBEC Circular No.01/2011 dated 04.01.2011, was challenged, writ petitions have been finally disposed of on 30.01.2017, stating that they were closed. Here again, there is no specific finding as to whether the department can insist for bank guarantee on the monetary value for fine and penalty.

21. When there is no final adjudication on merits and writ petitions were closed, by stating that, interim orders have been complied with, pending appeals, though filed with a delay, we are of the view that such interim orders passed in writ petitions, cannot be treated as a precedent.

22. Though the said issue has been addressed at the time of hearing of the interim applications, there is no final verdict. Therefore, we are of the view that department can seek for an adjudication on that issue, in the instant appeals and we deem it fit to address the issue, with reference to the challenge made to the following orders, in the subsequent writ petitions viz., W.P.Nos.7429 & 7430 of 2017, filed by M/s.Sri G.P.R.Leathers, Chennai and M/s.Parveen Leather Exports, Chennai, respectively.

23. Prayer sought for in the above writ petitions, is for an issuance of a writ of mandamus to direct the respondents

therein, to release the goods covered by shipping bill Nos.1415092 and 1415135, respectively, both dated 03.10.2016, forthwith, for export. Before the writ Court, contentions have been made that when the petitioners therein, sought for provisional release of the goods, pursuant to the orders passed by the writ Court dated 22.12.2016 in W.P.Nos.43062 to 43070 of 2016, the department is still insisting upon furnishing of bank guarantee for the penalty and fine amount. Reliance has also been made on the interim order dated 25.01.2017 passed in the subsequent batch of writ petitions viz., W.P.Nos.1620 to 1628 of 2017, which were closed vide order dated 30.01.2017.

24. Before the writ Court, department has contended that as against the order passed in W.P.Nos.1620 to 1628 of 2017 dated 25.07.2017, writ appeals were preferred, and that there was a delay in filing the appeals. The matters were in the process of being listed.

25. By observing that unless and until the orders passed in W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, respectively dated 22.12.2016 and 25.01.2017, have been stayed, altered or modified, and taking note of the fact that the department had already complied with the directions issued in W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, the writ Court has disposed of W.P.Nos.7429 and 7430 of 2017 on 18.07.2017, directing provisional release of the goods, subject to the petitioners therein, complying with the conditions imposed in the earlier writ petitions ie. W.P.Nos.43062 to 43070 of 2016 and W.P.Nos.1620 to 1628 of 2017, dated 22.12.2016 and 25.01.2017, respectively.

26. Being aggrieved by the common order made in W.P.Nos.7429 and 7430 of 2017, dated 18.07.2017, instant appeals have been filed contending inter alia:

(a) that the impugned order of the learned Judge is against the probabilities and evidence of facts put forth before the Court and also contrary to well settled principles of law.

(b) that the learned Judge ought to have seen that though the first test report was in favour of the respondent, which seemed to have been obtained by manipulation of samples, but the second test report which was based on the samples drawn in the presence of two independent witness, representative of the concern custom broker prove that the goods in question is not 'finished leather' but 'semi finished leather'.

(c) that the learned Judge ought to have seen that the respondent by misdeclaring the description had not only attempted to evade export duty of 60% leviable on export of semi finished leather as pr Sl.No.26 of the Export Tariff, but also availed drawback of 6% (applicable drawback for finished leather as per Drawback Schedule) and MEIS incentive of 2% on

FOB value of export goods.

(d) that the learned Judge ought to have seen that as the matter is under investigation and prima facie, there is a case against the respondents for mis-declaration and attempt to avail the benefit of export, which is not eligible for subject goods. Hence the respondent should have been directed to comply the provisional release order dated 06.04.2017.

(e) the learned Judge ought to have seen that in the order dated 22.12.2016 passed in W.P.No.43062 to 43070 of 2016, the condition imposed in paragraph 6.1 of the order dated 23.11.2016 alone was modified and the conditions prescribed, in para 6, 7 and 8 except in para 6.1 were upheld.

(f) the learned Judge ought to have seen that in pursuance to the order dated 22.12.2016 the adjudicating authority, in those cases issued a communication dated 10.01.2017 and directed the exporters therein, to furnish bank guarantee for 30% of export duty, indemnity bond for the value of the goods, bank guarantee for 40% of the FOB value, towards security for the fine and penalty and bond for not claiming any MEIS benefit for the goods to be exported.

(g) the learned Judge ought to have seen that the communication dated 10.01.2017 by the concerned authority was not set aside in the common order dated 25.01.2017 passed in W.P.No.1620 to 1628 of 2017, but against the said order, the revenue has filed Writ Appeals on 28.04.2017 and that the same were pending for condoning delay in filing, in CMP No.9301 to 9309 of 2017, which came up for hearing on 28.06.2017 and that the Hon'ble Division Bench, has ordered the same to be posted before other bench.

(h) the learned Judge ought to have considered the pendency of the Writ Appeals, filed by the department, instead of passing the impugned order directing the Appellants to grant provisional release of the goods, on respondent complying with the condition imposed, in the orders dated 22.12.2016 and 25.01.2017 respectively.

(i) the learned Judge ought to have seen that the Writ Petition Nos.1620 to 1628 of 2017, had become infructuous, in view of the 1st Appellant having passed the provisional release order dated 06.04.2017 in pursuance to the respondent's petition / representation dated 21.02.2017.

27. Defending the orders passed by the writ Court in W.P.Nos.7429 & 7430 of 2017, dated 18.07.2017, impugned in the instant appeals, Mrs.Pramila, learned counsel for the respondents/exporters, submitted that the initial order made in W.P.Nos.43062 to 43070 of 2016 dated 22.12.2016, by which, the writ Court directed provisional release, has not been challenged by the department, by filing appeals. But subsequently, when the Deputy Commissioner of Customs (Exports), Commissionerate-IV, Customs House, Chennai, by communication dated 10.01.2017, directed the exporters to offer bank guarantee for fine and penalty, the said order was

challenged by the exporters in W.P.Nos.1620 to 1628 of 2017. She further submitted that insofar as the orders made in W.P.Nos.43062 to 43070 of 2016 dated 22.12.2016, department has complied with the same and therefore, it is not open to pursue the instant appeals, in respect of some other shipping bills.

28. Inviting the attention of this Court to the CBEC Circular No.01/2011 dated 04.01.2011, learned counsel for the respondents/exporters further contended that the order of provisional release dated 23.11.2016, directing the exporters to offer bank guarantee for fine and penalty, is contrary to the very policy of the Government, which the writ Court, has taken note of. For the abovesaid reasons, she prayed to dismiss the appeals.

29. By way of reply, Mr.Pramod Kumar Chopda, learned counsel for the appellants/department submitted that when the writ Court, in a batch of writ petitions viz., W.P.Nos.43062 to 43070 of 2016 dated 22.12.2016, categorically held that all other conditions contained in paragraphs 6, 7 and 8 shall remain unaltered, there is absolutely no necessity for the department to prefer any appeal. In the above batch of writ petitions, what was ordered by the writ Court is an option to seek for release of the subject goods/consignment by furnishing the bank guarantee from a nationalised bank equivalent to 30% of the export duty, instead of 60% applicable to unfinished goods. Dispute is only whether the goods are finished goods or unfinished goods and that the time for issuance of show cause notice has already been extended up to 13.10.2017. He further submitted that condition Nos. 6(ii) and 6(iii) contained in the provisional release order dated 23.11.2016, has only been reiterated, by mentioning the monetary value. He further submitted that when misdeclaration is sought to be adjudicated, the department is empowered to release the goods provisionally, on execution of a bond of an amount equivalent to the value of the goods alongwith furnishing an appropriate security in order to cover the redemption, fine and penalty.

30. Material on record discloses the following:

"(i). It is informed that, initially for all these ten shipping bills wherein samples were drawn from these consignments by the CLRI at CWC Virugambakkam CFS, as per the procedures devised in the Facility Circular No.01/2014 dated 02.01.2014 issued by the Commissioner of Customs (Exports), Custom House, Chennai, the CLRI vide their reports dated 07.10.2016 submitted to Docks, Customs has certified that in all these ten cases, the samples satisfies the norms and conditions as laid down in DGFT Public Notice No.21/2009-14

dated 01.12.2009 for the type of Finished Leather as declared. The copy of the reports are enclosed along with the check list of the ten shipping bills.

(ii). Further, based on intelligence, the goods have been examined by the officer of SIIB on 14.10.2016 and representative samples were sent to the CLRI, Chennai for testing. The CLRI, Chennai have furnished their reports dated 09/10.11.2016 and 11.11.2016 to SIIB wherein it has been certified that the samples pertaining to these ten consignments does not satisfy the norms as per DGFT Public Notice No.21/2009-14 dated 01.12.2009. The copy of the CLRI reports are enclosed. The details of these ten consignments and CLRI reports dated 07.10.2016 received by Docks and the CLRI reports dated 09/10.11.2016 and 11.11.2016 received by SIIB pertaining are furnished in the Annexure-I.

(iii). Since both the reports initially furnished by the CLRI to the Docks and the subsequent reports furnished by CLRI to SIIB pertaining to these ten consignments are contradictory, further investigation is in process. However, the CLRI has certified that the goods meant for export pertaining to the ten consignments does not satisfies the norms and conditions as per the DGFT Public Notice No.21/2009-14 dated 01.12.2009 for the type of Finished Leather as declared vide their reports dated 09/10.11.2016 and 11.11.2016 for the samples drawn by SIIB. Further as per Sl.No.176 of Chapter 41 of Export Policy of ITC (HS) classification Unfinished leathers are not freely exportable. As per this provision, only leathers that conform to the definition of Finished Leathers given in Note 1 of Chapter 41 of Export Policy are freely exportable. Hence it is seen that these ten exporters have misdeclared the description and attempted to export and thereby to evade export duty of 60% [i.e for Semifinished Leathers - as per Export Tariff CTH 41, 43 (Hides and Skins and leathers, tanned and untanned, all sorts but not including manufactures of leather)]. Further these exporters have claimed undue drawback at 6% [i.e applicable drawback for Finished Leathers as per Drawback Schedule 2015]. Since the goods are liable for confiscation under Section 113(i)(ii) of the Customs Act, 1962 the same were seized in terms of Section 110 of the Customs Act, 1962 vide seizure Memos (10 Nos) all dated 16.11.2016 (w.e.f 14.10.2016 i.e. from the date of examination of the goods)."

31. From the above, it is clear that the department has seized the goods in terms of Section 110 of the Customs Act, 1962 and that investigation is under progress and pending the same, the Principal Commissioner of Customs (III), has recommended for provisional release of consignments in respect

of the shipping bills of the exporters, in terms of CBEC Circular No.01/2011 dated 04.01.2011, with the following conditions.

- (i) On payment of applicable export duty.
- (ii) On execution of bond for the value of the goods and appropriate security for fine and penalty leviable.
- (iii) After drawal of adequate number of samples as required including for possible prosecution before such provisional release.

32. According to the department, goods were declared as 'finished goods' by the exporter. Whereas, the reports indicate that they were 'unfinished'. Therefore, the department has contended that there is misdeclaration and goods are liable for confiscation under Section 113(i)(ii) of the Customs Act, 1962 and thus, seized in terms of Section 110 of the Customs Act, 1962.

33. Circular No.01/2011-Customs, issued by Central Board of Excise & Customs, Ministry of Finance, Department of Revenue, Government of India, deals with provisional release of export - goods detailed for investigation.

34. Clause No.4 of the CBEC Circular No.01/2011 dated 04.01.2011, reads thus.

4. Seizure should be resorted to only when the Customs officers have a reason to believe that the goods in question are liable to confiscation under the Customs Act, 1962 and thereafter the provisions of Section 110A of the Customs Act, 1962 would come into play. However, there may be situations when the goods are to be detained for purpose of tests etc. to confirm the declaration. In such cases the endeavour should be to quickly undertake the necessary action (test/enquiry etc.) and take appropriate legal action thereafter so that the period of detention is kept to the minimum. Thus, the following course of action is prescribed in respect of goods entered for exportation:

(a) In case the export goods are found to be mis-declared 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 goods along with furnishing an appropriate security in order to cover the redemption, fine and penalty.

(b) In case the export goods are either suspected to be prohibited or found to be prohibited in terms of the Customs Act, 1962 or ITC (HS), the

same should be seized and appropriate action for confiscation and penalty initiated.

(c) In case the export goods are suspected of mis-declaration or where declaration is to be confirmed and further enquiry/confirmatory test or expert opinion is required (as in case of chemicals or textiles materials), the goods should be allowed exportation provisionally. The exporters in these cases are required to execute a Bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty in case goods are found to be liable to confiscation. In case exports are made under any Export Promotion / Reward Schemes, the finalization of export incentives should be done only after receipt of the test report / finalisation of enquiry and final decision in the matter. The Bond executed for provisional release shall contain a clause to this effect.

(d) Export goods detained for purpose of tests etc. must be dealt with on priority and the export allowed expeditiously unless the prohibited nature of goods is confirmed. Continued detention of any export goods in excess of 3 days must be brought to the notice of the Commissioner of Customs, who will safeguard the interest of the genuine exporters as well as the revenue."

35. As observed supra, in none of the final orders passed by the writ Court, there is a clear finding, as to whether the conditions imposed on 10.01.2017 are within the powers of the Customs department in terms of the Board's circular stated supra.

36. Clause No.4(a) of the circular, clearly states that, 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 goods along with furnishing an appropriate security in order to cover the redemption fine and penalty.

37. Condition No.6(ii) stated supra makes it clear that on execution of bond for the value of the goods, an appropriate security for fine and penalty leviable, goods can be provisionally released. Reading of both clause No.4(a) of the Board's circular dated 04.01.2011 and condition No.6(ii) imposed in the initial provisional release order dated 23.11.2016, makes it clear that what is reiterated by the department in the subsequent communication dated 10.01.2017,

is only the expansion of the expression, "an amount equivalent to the value of the goods" as mentioned in clause 4(a) of the circular, in terms of monetary value of the goods declared. In the further communication dated 10.01.2017, the department has used the expression, "on the execution of bond for the value of goods and appropriate security, fine and penalty", and nothing more. Said aspect is clear from the reading of clause No.4(a) of the Board's circular dated 04.01.2011, which also states that on execution of a bond, of an amount equivalent to the value of the goods, alongwith furnishing appropriate security, in order to cover the redemption, fine and penalty.

38. When the circular dated 04.01.2011 empowers the department to insist for appropriate security in order to cover redemption, fine and penalty, there is no manifest illegality in imposing a condition in the communication dated 10.01.2017 of the department, requiring the exporter to offer bank guarantee. What should be the form of security, is the discretion of the department and in the case on hand the department has sought for Indemnity Bond for value of goods and bank guarantee towards redemption, fine and penalty. The petitioner has been given the option to seek for release of the goods by furnishing bank guarantee from a nationalised bank equivalent to 30% of the export duty

39. It is the case of the department, that there is misdeclaration and attempt to evade duty. On the facts and circumstances of the case, discretion exercised by the department, directing the exporters to submit bank guarantee, towards redemption, fine and penalty, cannot be said to be erroneous or contrary to the orders of this Court, in W.P.Nos.43062 to 43070 of 2016 dated 22.12.2016.

40. In the light of the expression, an amount equivalent to the value of goods stipulated in Condition No.6(ii), with due respect, we are unable to subscribe to the views of the learned Single Judge that monetary value mentioned in the subsequent communication dated 10.01.2017 is in a sense diluted the very essence of the order dated 22.12.2016. Even taking it for granted, that in the earlier round of writ petitions, respondents therein have not articulated that the exporters have to offer security towards fine and penalty, in the form of a Bank Guarantee, that does not amount to a waiver of exercise of the powers conferred on the department by virtue of Clause No.4(a) of the Board's circular dated 04.01.2011.

41. At the risk of repetition, when condition Nos.6(ii) & 6(iii) remain unaltered, as per the earlier orders made in W.P.Nos.43062 to 43070 of 2016 dated 22.12.2016, it cannot be contended that the department has erred in directing the

exporters to offer Bank Guarantee as an appropriate security, in order to cover redemption, fine and penalty. In our view, the department cannot be compelled to follow an earlier interim order, which has merged with a simple closure of writ petitioner, without there being any adjudication on the merits.

42. In *State of Orissa Vs. Madan Gopal Rungta*, reported in 1952 AIR 12 : 1952 SCR 28, the Hon'ble Apex Court held that interim orders are passed in aid of the main relief.

43. In *Kihoto Hollohan Vs. Zachillhu* reported in 1992 SCR (1) 686: 1992 SCC Suppl. (2) 651 the Hon'ble Apex Court held that the purpose of interlocutory orders is to preserve in status-quo the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency.

44. In *M/s. Shree Chamundi Mopeds Ltd., Vs. Church of South India Trust Association, Madras*, reported in AIR 1992 SC 1439, the Hon'ble Supreme Court explained the distinction between quashing of an order and staying the operation of an order, as hereunder:

"... while considering the effect of an interim staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of the operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order, which has been quashed. The stay of operation of an order does not, however, lead to such a result."

45. On the facts and circumstances of the case on hand, the writ Court has not quashed the order impugned. It has only stayed the order. Needless to state that quashing of an order impugned, results in the position, as if there was no such order, on the date of passing the order. Stay of the order, does not lead to such an inference.

46. The Hon'ble Supreme Court in *State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*, reported in (2009) 5 SCC 694, indicated that interim order which does not finally and conclusively decide an issue cannot be a precedent. The relevant observation reads as under :-

"21. A precedent is a judicial decision containing a principle, which forms an authoritative element termed as ratio decidendi. An interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final interim order containing prima facie findings, are only tentative. Any

interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing."

47. In Narcotics Centre Bureau Vs. Dilip Pralhad Namade reported in AIR 2004 SC 2950 : (2004) 3 SCC 619, the Hon'ble Supreme Court held that there was no scope for laying down a law at the interlocutory stage.

48. In the light of the discussion and decisions, we are of the view that common orders passed in W.P.Nos.7429 and 7430 of 2017 dated 18.07.2017, requires interference. Orders impugned in these writ appeals are set aside. Writ Appeals are allowed. No Costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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TO:

1. The Commissioner of Customs (Exports)
Chennai-IV, Commissionerate,
Customs House,
Chennai - 1.

2. The Deputy Commissioner of Customs (SIIB),
Customs House,
Chennai - 1.

3. The Deputy Commissioner of Customs (Exports),
Chennai - IV, Commissionerate,
Customs House, Chennai-1
+lcc to M/s.V.Pramila, Advocate sr.65747
+lcc to M/s.G.Viswanath, Advocate sr.65746
+lcc to Mr.T.Pramodkumar Chopda, Advocate sr.65074(3/10/2017)

W.A.Nos.1019 & 1020 of 2017 and
CMP Nos.14359 and 14360 of 2017

ss(25/9/2017)