

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR  
and  
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.1138 of 2017  
and CMP No.15781 of 2017

1. The Principal Commissioner of Customs-III (SIIB),  
Customs House, Chennai -1.
2. The Commissioner of Customs,  
Chennai-IV, Commissionerate,  
Customs House, Chennai - 1.
3. The Deputy Commissioner of Customs (SIIB),  
Customs House, Chennai - 1.
4. The Deputy Commissioner of Customs (Exports),  
Chennai - IV, Commissionerate,  
Customs House, Chennai-1 .. Appellants

versus

1. M/s.B.V.Leathers,  
Rep. by its Manager D.Chandrasekar.
2. Customs, Excise & Service Tax Appellate Tribunal,  
South Zonal Bench, Shastri Bhavan annexe,  
Haddows Road, Chennai. .. Respondents

Writ Appeal filed against the order dated 04.08.2017 in  
W.P.No.19376 of 2017.

Petition filed under Article 226 of the constitution of  
India praying to issue a Writ of Mandamus directing the  
respondent to release the goods covered by shipping bill No  
1466900 dated 05.10.2016 forthwith for export.

For Appellants : Mr.T.Pramodkumar Chopda  
For Respondents: Mr.G.Viswanathan (for R1)

JUDGMENT

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

Challenge in this appeal is to an order made in  
W.P.No.19376 of 2017 dated 04.08.2017, by which, the Writ  
Court directed provisional release of the goods subject to the  
petitioner complying with the conditions imposed by this 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. Writ Court further ordered that the above direction shall be complied with within a period of one week from the date of receipt of a copy of the order.

2. In a similar issue, when the Commissioner of Customs (Exports), Chennai IV Commissionerate, Customs House, Chennai and others filed W.A.Nos.1019 & 1020 of 2017, against the order made in W.P.Nos.7429 & 7430 of 2017, dated 18.07.2017, after considering the rival submissions, this Court, vide common order in the abovesaid appeals dated 07.09.2017, ordered as hereunder.

"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."

3. Instant Writ Appeal filed by the Principal Commissioner of Customs III (SIIB), Customs House, Chennai and others are on identical facts. Though a representation has been made for filing counter affidavit, in the instant appeal, we are of the view that the same is not required.

4. In the light of the common order made in W.A.Nos.1019 and 1020 of 2017 dated 07.09.2017, instant appeal W.A.No.1138 of 2017 has to be allowed on the same lines, as extracted supra. Impugned Order made in W.P.No.19376 of 2017 dated 04.08.2017 is set aside. Writ Appeal is allowed. No Costs. Consequently, the connected Civil Miscellaneous Petition is closed.

s/d-  
Assistant Registrar (CO)

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Sub-Assistant Registrar

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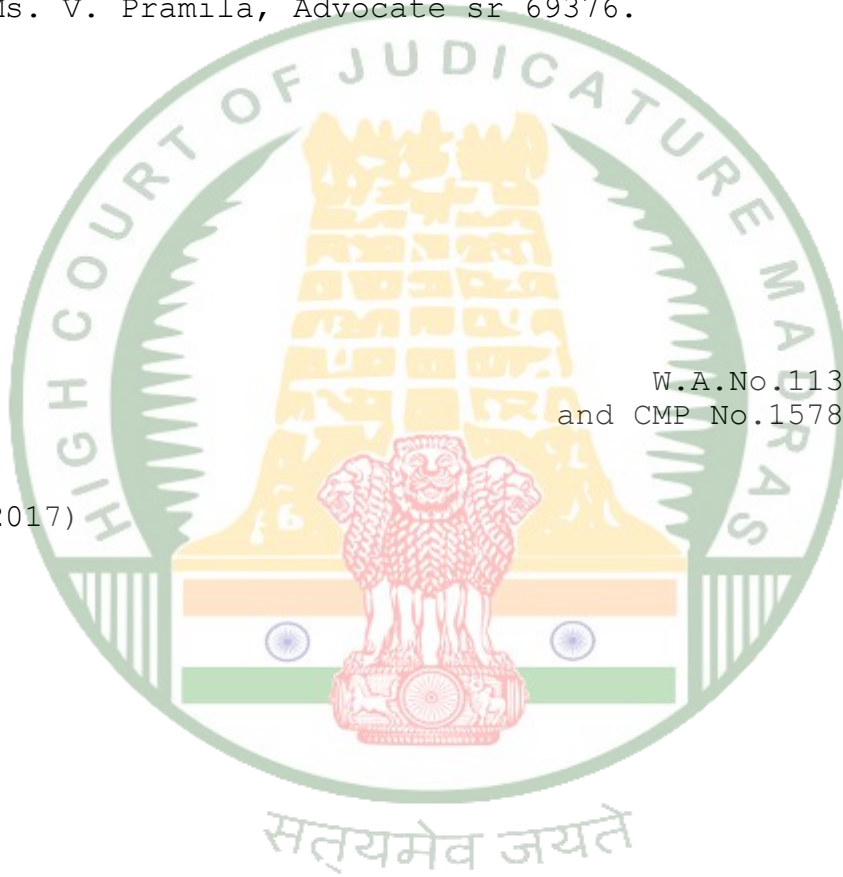
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Haddows Road, Chennai.

+1 CC to Mr.T. Pramodkumar Chopda, Advocate sr 68937.  
+1 Cc to Ms. V. Pramila, Advocate sr 69376.

SSI(CO)  
sp(24/10/2017)

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