IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2017

CORAM:

THE HONOURABLE MR. JUSTICE T.S. SIVAGNANAM

W.P.No.5744 of 2017

M/s.Prakash Gold Palace Private Limited
represented by its Director,
P.Mukesh Kumar Jain .. Petitioner

Vs.

The Principal Commissioner of
Customs - AIR
New Customs House,
Meenambakkam
Chennai - 600 027. .. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus, to direct the respondent herein to implement the order of the Commissioner of Customs (Appeals), Chennai in C.Cus-I.No.13 dated 13.01.2017.

For Petitioner : Mr.B.Kumar, Senior Counsel for
for Mr.T.Sudhan Raj

For Respondents : Mrs.Hema Muralikrishnan

ORDER

Heard Mr.B.Kumar, learned senior counsel representing Mr.T.Sudhan Raj, learned counsel for the petitioner and Mrs.Hema Muralikrishanan, learned senior panel counsel for the respondent department.

2. With the consent of the learned counsel appearing on either side, the writ petition itself is taken up for disposal.

3. The petitioner has filed this writ petition seeking for implement of the order passed by the Commissioner of Customs (Appeals) dated 13.01.2017. In the said order, the Commissioner of Customs (Appeals) held that the confiscation under Section 111(d) of the Customs Act is not sustainable and as the gold was declared in the Customs Declaration Card, the the same cannot be confiscated under Section 111(l) and accordingly held that there

is no infirmity in the order passed by the Adjudicating Authority dated 12.08.2015 and rejected the appeal filed by the department.

4. The petitioner submitted a representation dated 30.01.2017 to the respondent requesting to release the gold in question on the ground that the appeal filed by the department has been rejected by the Commissioner of Customs (Appeals). However, till date, the same was not considered by the respondent.

5. It is submitted by the learned senior panel counsel for the respondent that as against the order passed by the Commissioner of Customs (Appeals), the respondent - department has preferred a revision under Section 129DD of the Customs Act for reviewing the order-in-appeal and a notice of such revision dated 01.05.2017 has been served on the petitioner. Therefore,

the order passed by the Commissioner of Customs (Appeals) should be kept in abeyance till the revision is decided.

6. In identical situation, the said issue was considered by this Court in an unreported order dated 01.12.2016 made in WP.Nos.26496 to 26498 of 2016 (Shri Munivelu Bharathi v. Principal Commissioner of Customs (I), Chennai and another), wherein, after taking note of the decision of the Division Bench of High Court of Punjab and Haryana in the case of NVR Forgings vs. Union of India reported in 2016 (335) E.L.T. 679 (P&H), the writ petitions were disposed of, giving certain directions. The operative portions of the said order read thus:

> "3.The respondents in the counter affidavit have made elaborate reference to the factual details. However, those details cannot be gone into in these writ petitions as the Department were unable to succeed before the Commissioner (Appeal-I). The only issue to be seen is as to whether a direction should be issued to the respondent to release the gold bars/jewellery within a time frame. The only defence raised by the respondent is that the petitioner have filed revision before the Central Government against the orders passed by the Commissioner (Appeals). Though such revisions are pending before the revisional authority/Central Government, the Hon'ble Division Bench of High Court of Punjab and Haryana in the case of NVR Forgings vs. Union of India reported in 2016 (335) E.L.T. 679 (P&H) held that the revision by the Central Government entrusted to a Joint Secretary level

officer equal to Commissioner is not empowered to pass revisional order against the order passed by the Officer of same rank and therefore the order passed by the revisional authority which was challenged in a writ petition was set aside. The operative portion of the order reads as follows:

> "8.In the present case, the impugned order was passed by the Joint Secretary to Government of India who was also Commissioner of Central Excise and Customs. Thus, the order-in-appeal as well as revisionary order had been passed by the officers of the same rank which is not permissible as per law. Adverting to the judgments relied upon by the learned counsel for the respondents, it may be noticed that the said decisions were based on individual fact situation involved therein. Thus, the respondents cannot derive any advantage from the said pronouncements."

4.The Special Leave Petition filed as against the above order by the Central Government in SLP(Civil) CC 19063 of 2016 was dismissed by the Hon'ble Supreme Court on 17.10.2016. The Central Government has filed a review petition as against the said order and the same has been dismissed on 07.11.2016. Therefore, as on date, the revisional authority would not have jurisdiction to proceed with the revision as the Joint Secretary of the Central Government is the officer equivalent in cadre to that of the Commissioner who passed an order in appeal, which is sought to be implemented by way of these writ petitions.

5.The learned senior panel counsel appearing for the respondent has produced a communication from the Central Board of Excise and Customs dated 16.11.2016 from which it is seen that the above legal position has been accepted by the Department and they are taking remedial measures. Taking into consideration of the fact that orders have been passed by the Commissioner (Appeals) during September/December 2015, the gold bars/jewellery cannot be endlessly be retained by the Department, more so, when the petitioner has consented before the adjudicating authority as well as the appellate authority who have granted the relief of re-export subject to payment of redemption fine and penalty. In the event there is a re-organization done by the Central Government and the defect pointed out in the case of NVR Forgings (supra) is a remedy, then the revisional authority would be entitled to hear the revision petition. Thus, while issuing appropriate direction, the interest of revenue also has to be protected.

6.Accordingly, the writ petitions are disposed of by directing the respondent to release the gold bars/jewellery to the petitioner within a period of one week from the date on which the petitioner pays redemption fine and penalty and also furnish a bond securing the interest of the Department that in the event of their success before the revisional authority, they will be able to proceed against the petitioner in terms of the provisions of the Customs Act and Rules framed there. No costs. Consequently, connected miscellaneous petitions are closed."

7. Thus, by taking note of the above legal position, as held by the Division Bench of High Court of Punjab and Haryana in the case of NVR Forgings vs. Union of India reported in 2016 (335) E.L.T. 679 (P&H) and also following the earlier order of this Court, this writ petition is disposed of by directing the respondent to release the gold to the petitioner within one week from the date on which the petitioner furnishes a bond for the value of the gold, securing the interest of the department that in the event of their success before the Revisional Authority, they will be able to proceed against the petitioner in terms of the provisions of the Customs Act and Rules framed thereunder. On such furnishing of bond, the gold shall be released to the petitioner within a period of one week thereafter. The respondent - department is entitled to pursue the revision as per law. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Principal Commissioner of
Customs – AIR
New Customs House,
Meenambakkam
Chennai – 600 027.

+2cc to M/s.T.Sudhan Raj, Advocate SR.No.48388

W.P.No.5744 of 2017

RSK(CO)
GN(19/07/2017)