IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.11.2017

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition No.30841 of 2017
and
W.M.P.Nos.33756 to 33758 of 2017

M/s. Shri Ram Trading Company,
rep. by its Proprietor Shri Rahul Goel. ...Petitioner

Vs.

1. The Commissioner of Customs, Chennai,
IV Commissionerate, Customs House,
No.60, Rajaji Salai, Chennai - 600 001.

2. The Deputy Commissioner of Customs,
Group 7B/7H, Chennai IV Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai - 600 001. ...Respondents

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus to call for records of the second respondent, in F.No.S. Misc.409/2017-Gr. 7B/7H, dated 06.10.2017, read with clarification, dated 24.10.2017, and to quash the same; and to direct release of the goods under seizure and further, to direct the second respondent to restrict the quantum of Bond and Bank Guarantee for provisional release to the goods pertaining to Bill of Entry No.2078826, dated 13.06.2017 (live consignment) and also to direct issuance of a detention cum demurrage waiver certificate in terms of Handling of Cargo in Customs Areas Regulations, 2009.

For Petitioner : Mr.S. Krishnanandh
For Respondents : Mr. S. R. Sundar,
Senior Panel Counsel

O R D E R

Heard Mr. S. Krishnanadh, the learned counsel appearing for the petitioner and Mr. S. R. Sundar, the learned Senior Standing Counsel for the Revenue, accepting notice on behalf of the respondents. With the consent on either side, this Writ Petition is taken up for disposal.

2. The petitioner has filed this Writ Petition, challenging the order/communication passed by the second respondent, dated 06.10.2017, in exercise of his powers under Section 110 (A) of the Customs Act, 1962 (hereinafter, referred to as 'the Act'), permitting provisional release of the goods, covered under Bill of Entry No.2078826, dated 13.06.2017.

3. The petitioner had imported certain goods from China. The consignment was said to contain LED rope lights, light panels, etc., The consignment was detained on a reasonable suspicion that, there has been mis-declaration of the retail selling price of the products. Pending investigation, the petitioner is stated to have remitted a sum of Rs. 7.54 lakh approximately, vide TR 6, on 31.07.2017; and sum of Rs.3.17 lakh on 31.07.2017, being the additional amount, which the petitioner was orally directed to be remitted, and another sum of Rs.7,00,000/- on 01.09.2017, and in all, a sum of Rs.17,71,000/- was paid by the petitioner.

4. The respondent, while passing the impugned order, has directed the petitioner to execute a personal bond, for the value of Rs.50,39,326/-, and furnish a bank guarantee for a sum of Rs.46,69,783. Since the petitioner was not aware, as to how, this amount has been quantified, they submitted a representation to the second respondent, on 10.10.2017, stating about payments made by them, being a total sum of Rs.17.7 lakh, and while requesting for details, as to how, the quantification has been done, also requested that the goods may be released without insisting on payment of further money or execution of bank guarantee or personal bond. In response thereof, the second respondent, by the communication, dated 24.10.2017, informed the petitioner that the bank guarantee has been demanded for a sum of Rs.46,69,783/-, to cover the adjudication levies, as mentioned in paragraph No.2.2 of the Board's Circular No.35 of 2017, for the seized goods and for two imports, which were earlier effected by the petitioner, where, duty liability works out over Rs.30,00,000/-, as per DRI's, CZU's report. So far as adjudication levies are concerned, it is with regard to the live consignment, covered under the Bill of Entry No.2078826, dated 13.06.2017.

5. Admittedly, the case is yet to be adjudicated, and the question of exactly quantifying the adjudication levies cannot arise at this stage, and, if done so, it would amount to pre-judging the matter. Similarly, with regard to duty liability for the two earlier imports, the second respondent has stated that, DRI, CZU has given a report that the duty liability works

out over Rs.30,00,000/-. However, it appears that, till date, in respect of the two earlier imports effected by the petitioner, which were cleared in June, 2017, no notice has been issued to the petitioner for re-opening the assessment, and therefore, the respondent/Customs Department cannot withhold the live consignment, and seek to recover duty liability in respect of the past imports, for which, no proceedings have been initiated by the Department so far. Therefore, it is submitted that, the conditions imposed by the respondent/Department are unsustainable, onerous, illegal, and, in violations of principles of natural justice.

6. The learned Senior Standing Counsel for the respondent/Customs Department resisted the prayer sought for by the petitioner, and while seeking to sustain the impugned order, placed reliance on the decision of the High Court of Delhi, in the case of i) Mala Petrochemicals & Polymers Vs. A.D. G. Directorate of Revenue Intelligence, [(2017) 353 E.L.T. 446 (Delhi) and submitted that the decision in the case of Navshakti Industries Pvt. Ltd., Vs. Commissioner of Customs [(2011) 267 E.L.T. 483 (Delhi) (referred to by the High Court of Delhi, in Mala Petrochemicals & Polymers) will not apply to misdeclared goods, which attract confiscation under Section 111 (m) of the Act, where, the circumstances so warrants penalty provisions, contained in Sections 112, 114 A and 114 AA of the Act.

7. Further, by placing reliance on the decision of the Hon'ble Division Bench of this Court, in the case of Malabar Diamond Gallery Pvt. Ltd., Vs. Addl. Dir. General, Directorate of Revenue Intelligence, Chennai, [(2016) 341 E.L.T. 65 Madras], it is submitted that, the expression, "subject to the prohibition under the Customs Act, 1962 or any other law for the time being in force'', in Section 2 (33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and the other laws. Production of legal and valid documents for import, along with payment of duty, determined on the goods imported are certainly conditions to be satisfied by an importer. If the conditions for import are not complied with, then, such goods, cannot be permitted to be imported, and thus, to be treated as prohibited from being imported.

8. The factual matrix of the present case appears to be not in dispute, as the allegation was not pertaining to mis disclaration of the nature of the goods, but with regard to retail selling price of the products. Thus, if ultimately, on adjudication, it is found that that the retail selling price declared by the petitioner, in the Bill of Entry is lower than the actual retail price, then, it would result in changes in the valuation of the goods, demanding higher rate of tax, penalty

and other charges. Therefore, in the strict sense, the decision in the case of Mala Petrochemicals & Polymers (supra) cannot be applied to the case on hand, essentially, when the Court is only testing the correctness of the conditions imposed by the second respondent, after having exercised his powers under Section 110 A of the Act.

9. Similarly, the decision of the High Court of Delhi, in the case of Malabar Diamond Gallery Pvt. Ltd. (supra), cannot be applied to the facts and circumstances of the present case, because, it is not the case of the Department that the goods are prohibited to be imported, but a case with regard to mis-declaration of the retail selling price of the products, where, the power under Section 110 A has been exercised by the second respondent.

10. Now, turning back to the facts of the instant case, as pointed out earlier, the details regarding the fixation of quantum, for which, the petitioner has to execute the bond has not been clearly spelt out in the impugned communication of the second respondent, dated 24.10.2017. However, with regard to the quantum of bank guarantee levied to cover the adjudication levies, in respect of live consignment, the petitioner has stated that, the adjudication is yet to commence and in respect of duty liability for two earlier imports, no proceedings have been initiated till date.

11. A some what an identical case was considered by the Hon'ble Division Bench of Bombay High Court, in the case of Biharilal Singhal Vs. Union of India [(2010) 253 E.L.T. 358 (Bombay)]. While issuing similar order of provisional release, the petitioner therein, by impugned communication, dated 29.09.2009, was called upon to submit a bank guarantee equivalent to the two Bills of Entry, along with past 28 Bills of Entry finally assessed even in the year 2009. While testing the correctness of the said communication, the Hon'ble Division Bench came down heavily on the Revenue and deprecated their action, in seeking to recover the dues in respect of the past imports, where, the duties were finally assessed. At this juncture, it would be worthwhile to refer to the finding rendered by the Hon'ble Division Bench in the said case, which reads as follows:-

> " 16. We were also taken to the various provisions of the Act, by Mr. Shah as well as Mr.Sethna in support of their respective submissions. The Revenue cannot demand the amount of duty in respect of duty in respect of past CVD on the imports

covered under 28 bills of entry, which were already assessed and cleared during the year 2009, in the absence of any positive action by issuing show cause notice to set up demand in this regard. Needless to mention that once the show cause notice is issued, the assessee/noticee would get an opportunity to putforth his say. Once he has elected to file his say and objection is raised, then, the adjudicating authority is free to adjudicate upon rival contentions in accordance with law by reasoned order following principles of natural justice. But no law permits the revenue to twist the arms of the importer in the manner, it is being done through the communication, dated 1st October, 2009. The action of the revenue to the extent of their duty demand in respect of CVD for the past import covered under 28 Bills of entry during the year 2009 is clearly bad and illegal and unsustainable in law besides being in breach of principles of natural justice.

19. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to seek whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where, a mode is prescribed for doing an act, and there is no impediment in following that procedure, performance of the act otherwise and in a manner, which does not disclose any discernible principle,which is reasonable, may itself, attract the vice of arbitrariness. Even statutory order must be informed by reason and it follows that, an act uniform by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom, the governance is entrusted for the time being. It is trite that, 'be you ever so high, the laws of above view. (Kumari Shrilekha Vidyarthi and others Vs. State of U.P. and others, (1991) 1 SCC 212.) "

12. After having made the above observation, the impugned

communication thereunder was set aside, insofar as it makes the demand of the differential amount of duty of the past imports, and the order, pertaining to the live consignment were maintained.

13. The case on hand is no better a case, than, what was considered by the Hon'ble Division Bench of Bombay High Court, in the aforementioned decision. With regard to the scope of judicial review against the orders of provisional release under Section 110 A of the Customs Act, useful reference may be made to the Division Bench decision of the High Court of Delhi, in Mala Petrochemicals & Polymers Vs. A.D.G. Directorate of Revenue Intelligence, [(2017) 353 E.L.T. 446 (Delhi). It was held that the scope of judicial review of such orders is to examine, if the discretion has been rightly exercised; that it is not based on irrelevant materials and is far and reasonable in the circumstances. It was pointed out that failure to draw a distinction between seizure of imported goods for undervaluation and seizure of imported goods upon misdisclaration and treat all types of wrongful imports on an equal footing might result in miscarriage of justice.

14. In the case on hand, as far as the adjudication levies in respect of live consignment are concerned, it is yet to be quantified. Though the Board's Circular provides for such adjudication levies, there can be no question of quantifying the same at this stage, without opportunity to the petitioner. Further, the amount of Rs.30,00,000/- for the duty liability in respect of the past imports cannot be insisted upon at this juncture, as no proceedings have been initiated against the petitioner, in respect of those consignments, which were already cleared.

15. Therefore, this Court is inclined to interfere with the impugned communication dated 06.10.2017 and the clarification, dated 24.10.2017, to the extent indicated below;-

i The petitioner is directed to execute a personal bond for a sum of Rs.50,39,326/- and furnish a bank guarantee for a sum of Rs. Rs.16,69,783- (Rs.46,69,783/ - Rs.30,00,000 = Rs.16,69,783/-). Both the personal bond and the bank guarantee shall be furnished within a period of two weeks from the date of receipt of a copy of this order.

ii) It is made clear that the payments, stated to have made by the petitioner, amounting to Rs.17.7 lakh, as mentioned in their representation, dated 10.10.2017, will abide by the ultimate adjudication made to the petitioner's case, in respect of the live consignment.

iii). On compliance of the above conditions, the respondent/Customs Department shall release the goods within seven days from the date of such compliance.

iv) Since it is submitted by the learned counsel for the petitioner that, due to detention, the goods have suffered heavy demurrages and the petitioner is in the process of filing an Application for waiver, and sought for appropriate direction to the respondent/Department to give a Demmurrage and Detention Certificate from the date of detention till the date of release. As and when, the petitioner makes such Application for waiver of Detention and Demurrages Charges, the second respondent is directed to consider the same in accordance with relevant Regulations and issue such Certificate covering the period from the date of detention till the date of release.

15. In the result, this Writ Petition is disposed of. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1. The Commissioner of Customs, Chennai,
IV Commissionerate, Customs House,
No.60, Rajaji Salai, Chennai - 600 001.

2. The Deputy Commissioner of Customs,
Group 7B/7H, Chennai IV Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai - 600 001

+1cc to Mr.B.Sathis Sundar, Advocate SR.No.84621
+1cc to Mr.S.R.Sundar, Advocate SR.No.84876

Writ Petition No.30841 of 2017

MP(CO)
GN(12/12/2017)