

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2017

CORAM:

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

C.M.A. No.2799 of 2017

and

C.M.P. No.15986 of 2017

The Commissioner of Customs (Sea)
Chennai VI Commissionerate
Customs House
Chennai - 600 001 ... Appellant

Vs.

M/s.B.V. Leathers,
No.147, Vepery High Road
Periyamet, Chennai - 600 003 ...Respondent

Civil Miscellaneous Appeal filed under Section 130 of
Customs Act, 1962 against the Final Order NoA0780 of 2017
dated 23.05.2017 passed by the CESTAT, Chennai.

For Appellant : Mr.T.Pramod Kumar Chopda

JUDGMENT

(Delivered by S.MANIKUMAR, J.)

On 23.11.2016, the respondent has been informed of an order of provisional release passed by the Principal Commissioner of Customs (III), Chennai, on the basis of Board Circular No.01/2011-Cus dated 04.01.2011, subject to the following conditions i.e. (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; and (iii) after adequate number of samples as required including for possible prosecution may be taken/collected before such provisional release.

2. Subsequently, taking note of an order made in W.P. Nos.43062 to 43070 of 2016 dated 22.12.2016, revised provisional order dated 12.04.2017 has been passed by the Deputy Commissioner of Customs (Exports), Chennai. An order in original was passed on 12.04.2017. Discussions and findings of the said order, are as follows:

"Discussion and Findings

6. From the facts narrated, investigation has to be carried to find out the following:-

- Whether switching of sample [sent/taken to the CLRI (Central Leather Research Institute)] has been done for getting favourable certification for the goods as Finished Leather thereby facilitating the fraudulent export of 'semi finished leather' in the guise of 'finished leather' to evade payment of export duty, to avail undue drawback and also other incentive schemes?
- Who are all the persons involved in switching the samples?
- Who are all the actual beneficiaries of the subject export?

7. I find that it becomes imperative to find answers for the above questions in order to take investigation to the logical conclusion and I find that the same could not be carried out within the six months period and the same needs to be investigated.

8. In view of the circumstances as explained in the foregoing paragraphs and in the interest of justice and fair investigation and for logical conclusion of investigation and also based on the sufficient facts available on record, I am satisfied to extend the time period for the issue of notice under clause (a) of Section 124 of the Customs Act, 1962 by further six months with effect from 14.04.2017.

Accordingly, I pass the following order:-

ORDER

9. In exercise of the authority vested with me under Section 110(2) of the Customs Act, 1962, I hereby extend the period of issuance of show cause notice by another six months i.e. till 13.10.2017 in respect of the goods meant for export vide shipping bill No.1466900 dated 05.10.2016."

3. Being aggrieved by the same, B.V.Leathers, respondent herein, has filed an appeal to CESTAT, Chennai. After hearing the learned counsel for the parties, and taking note of the decision of the writ court in W.P. Nos.43062 to 43070 of 2016 dated 22.12.2016, CESTAT, Chennai, has allowed the appeal filed by the respondent. At paragraph 11 of the. Final Order dated 23.05.2017, CESTAT, Chennai, ordered as here under:

"11. We make it clear that this order is only for the purpose of provisional release of the seized export goods and does not seek to interfere or influence with any ongoing investigations or other proceedings that may be initiated against the appellant under provisions of law. "

4. Being aggrieved by the Final order dated 23.05.2017, Commissioner of Customs (Sea), Chennai IV Commissionerate, Customs House, Chennai - 600 001, has filed instant civil miscellaneous appeal, on the following substantial questions of law:

1. Whether in the facts and circumstances of the case, the Tribunal was right in modifying the provisional release order when admittedly the investigation is in progress in respect of the subject export goods is finished leather eligible for exemption from export duty or unfinished leather liable for export duty and ineligible for drawback and export incentive?

2. Whether in the facts and circumstances of the case, the Tribunal was justified in allowing the appeal by modifying the terms of provisional release order based on the order passed in W.P. Nos.1620 to 1628/17 dated 25.01.2017 against which revenue has filed Writ Appeals?

5. Earlier, in W.A. Nos.1019 and 1020 of 2017 dated 07.09.2017, we considered, as to whether the department is empowered to issue a revised provisional order quantifying the value of the goods and seek for adequate security in the form of bank guarantee towards redemption, fine and penalty and vide common judgment dated 07.09.2017, at paragraph Nos.32 to 48, held as follows:

"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 expert 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."

6. The above decision, shall, squarely apply to the facts of this case and in the said circumstances, there is no need to advert once again to the very same submissions.

Civil Miscellaneous Appeal is disposed of. No costs. Consequently, the connected civil miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

Copy to

The Registrar
CESTAT,
South Zonal Bench,
Chennai.

+ 1 cc to M/s. T. Pramod Kumar, Advocate SR.70451

C.M.A. No.2799 of 2017

PPA (CO)
EU (04/01/2018)

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