IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

W.P.No.1150 of 2017

M/s.Poddar Global Private Limited
(Formerly known as M/s.Poddar Global limited)
Rep. by its General Manager, Shri.Gopalakrishnan
... Petitioner

Vs.

1. Joint commissioner of Customs
Chennai VI Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

2. The Appraiser
Commissioner Adjudication Unit
Chennai VI Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondents

Prayer:
Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus and call for the records pertaining to the impugned order dated 19.12.2016 in F.No.CAU / DRI/ HQ/ 01/ 2016 - Chennai VI passed by the 2nd Respondent and quash the same and further direct the 1st Respondent to unconditionally release the goods seized in the various godowns of the petitioner.

For Petitioner : Mr.G.Derrick Sam

For Respondents : Ms.Hemalatha

WEB COPY

O R D E R

1.This is a writ petition by which challenge is laid to the order dated 19.12.2016 whereby, the second respondent had directed provisional release of the subject goods subject to certain conditions being fulfilled.

1.1.The conditions stipulated in the impugned order are as follows:

https://hcservices.ecourts.gov.in/hcservices/

> "1.You are permitted to Provisionally Release the Seized goods on execution of PD Bond for 100% value of goods.
> 2.The Bond shall be supported by a Bank Guarantee of Rs.49,48,680/- (Rupees Forty nine lakhs forty eight thousand six hundred and eighty only). The Bank guarantee shall contain automatic renewal clause in order to keep it alive till the finalization of the case."

The petitioner being aggrieved by the second condition imposed via the impugned order has approached this Court by way of this instant writ petition.

2.Inorder to adjudicate upon the writ petition, the following broad facts need to be noticed:

The petitioner claims to be engaged in the business of import and distribution of news print. It is the stand of the petitioner that it has not obtained a registration with the Registrar of Newspapers in India and that therefore, once news print is imported it is stored in the customs bonded warehouse.

2.1.According to the petitioner, this is permissible under the extant Exim Policy. The petitioner claims that once the goods are imported and stored in the customs bonded warehouse, the news print is thereafter sold to only those actual users, who are possessed of requisite registration certificates.

2.2. Therefore, the stand of the petitioner, is that, the actual users obtained clearance of the bonded goods by filing Ex - bond Bill of Entry.

3.In the instant case, the Directorate of Revenue Intelligence (in short, DRI) based on intelligence obtained by it, detained the news print reels, which were lying stored in the petitioner's godowns situate in five different locations i.e., Khalapur, Raigad, Delhi, Gummidipoondi and Guwahati.

4.Consequently, the DRI issued show cause notice dated 18/19/01/2016 under Section 124 of the Customs Act, 1962 (in short, the Act). By virtue of the said notice, inter alia, the petitioner was called upon to show cause as regards the following aspects, which are adverted to in paragraph 15.1:

> "(i) the Newsprint reels seized at the godown premises of M/s Poddar Global Ltd. Situated at 21/2 Alipur, Thekewali Gali, Near Surya Dharam Kanta, Alipur, Delhi having quantity of 499 Newsprint reels (including 48 slit Newsprint reels) weighing 169.515 Mts valued at Rs.64,57,165/- should

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

not be confiscated under section 111(d) and section 111(o) of the Customs Act, 1962.
Penalty should not be imposed upon M/s Poddar Global Ltd. under section 112(a) and section 112(b)(i) of the Customs Act, 1962 for the contravention as explained in the foregoing paras.
Penalty should not be imposed upon Sh. Sunil Kumar Poddar, Director of M/s Poddar Global Ltd. under section 112(a) and section 112(b)(i) read with Section 117 of the Customs Act, 1962 for the contravention as explained in the foregoing paras."

4.1.Pertinently, as would be evident upon a perusal of the extract set forth hereinabove as also the contents of the show cause notice in its entirety, that, there is no reference to the duty amount which the respondents propose to levy on the petitioner. Crucially, the petitioner was put to notice only with respect to two aspects: (i)first, that the subject goods were liable for confiscation under Section 111(d) and section 111(o) of the Act; and (ii) second, that penalty was liable to be imposed.

5.The petitioner, in response to the show cause notice submitted a representation to the first respondent, on 20.09.2016, seeking provisional release of the goods detained by the DRI.

6.The petitioner claims that it was only after several visits to the office of the second respondent that the impugned order was passed directing the provisional release of the subject goods.

6.1.As indicated above, the petitioner is aggrieved by the second condition imposed in the impugned order. The petitioner's submission, simply put is that, the condition is onerous. It is in this background, as advert to herein above, that the instant writ petition has been filed.

7.Mr.Derrick Sam, who appears for the petitioner says that the impugned order cannot be sustained, in view of the fact that in the show cause notice, there is no proposal to levy duty.

7.1.Learned counsel submits that the only aspects with respect to which the petitioner has been called upon to show cause was the possibility of confiscation of the detained goods and the levy of penalty. In these circumstances, learned counsel for the petitioner says that the demand of Bank Guarantee for a sum of Rs.49,48,680/- is completely untenable.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

8. Furthermore, the learned counsel for the petitioner says that, notwithstanding the patent error in the show cause notice, the petitioner is willing to furnish a bank guarantee for a value equivalent to 10% of Rs.49,48,680/-; which, is the figure adverted to in the counter affidavit and, is alluded to as the duty that the petitioner may have to pay for its alleged infraction of the law.

9.Ms.Hemalatha, who appears for the respondents on the other hand says that the while it is correct that the duty amount has not been adverted to in the show cause notice, the fact that there is a reference to Section 111(d) and section 111(o) of the Act in the show cause notice, would clearly indicate that, if, the adjudication were to go against the petitioner, duty would have to be paid by it.

9.1.In support of her submissions, the learned counsel draws my attention to the value of goods adverted to in the show cause notice, based on which, it is asserted that duty can be calculated and therefore, merely because there is no quantification would not render the show cause notice unsustainable.

10.In any event, according to the learned counsel for the respondents, this is an issue which can only be addressed at the time of adjudication, and therefore, the condition assailed cannot be termed as onerous. In other words, the argument of the learned counsel is that the impugned order ought not to be interfered with.

11.I have heard the learned counsels appearing for the parties and perused the record.

12.According to me, in the issuance of show cause notice, the provisions of Section 28 of the Act will have to borne in mind, in particular, the provisions of sub-Section (1)(a) of the said Section. For the sake of convenience, the relevant part is extracted herein below:

> Section 28(1)(a):
> "(a)the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."
> (emphasis is mine)

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

13.A perusal of the Section 28(1)(a) would demonstrate that the proper officer is required to indicate in the show cause notice the amount which the noticee is called upon to pay. This is crucial for various reasons including an instance, where the noticee may not wish to contest the show cause notice. There could also be other instances, where, while the substance of the charge is accepted, the quantification of duty is disputed by the noticee. Accordingly, to my mind, the noticee needs to be informed as to the amount which the customs seeks to recover by way of duty.

14.The failure to mention the amount of duty that the petitioner would have to pay, according to me, impregnates the show cause notice with a fatal weakness. However, as rightly contended by Ms.Hemalatha, this is an issue which will finally be resolved, when, adjudication of the show cause notice is undertaken by the concerned officer on merits. However, to my mind, in the interregnum this fact would impact the conditions to be put on the provisional release of goods.

14.1.Therefore, insofar as the second condition for provisional release of subject goods is concerned, the same cannot be sustained. The reason being, as indicated above, that there is no duty amount mentioned in the show cause notice. As correctly argued by Mr.Sam, there is no liability to pay duty. The figure of Rs.49,48,680/- is, admittedly, not adverted to in the show cause notice. The counter affidavit cannot paper over this crucial gap. Orders passed and / or notices issued by statutory authorities, when impugned, have to stand on their own. Gaps and deficiencies cannot be plugged by averments made and/ or explanations given in the counter affidavit. Therefore, the only condition which can be sustained and qua which no issue is raised by the petitioner is the first condition prescribed in the impugned order, whereby, execution of PD Bond equivalent to 100% of the value of goods is sought.

15.At this stage, Ms.Hemalatha, expresses concern that the goods will be released without securing any amount towards duty. I have put this aspect to the learned counsel for the petitioner, only to test the waters.

15.1. The learned counsel, in response, submits that notwithstanding the petitioner's contention, as captured above, it would be willing to furnish a bank guarantee equivalent in value to 10% of Rs.49,48,680/-, albeit, without prejudice to its rights and contentions.

15.2.It is ordered accordingly. In addition thereto, as would be clear from what is stated above, the petitioner would also furnish a PD Bond equivalent to 100% of the value of goods.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The impugned order is modified to the aforesaid extent. Furthermore, the bank guarantee furnished shall be kept alive till the adjudication of the show cause notice.

16.Needless to say, upon the petitioner complying with the directions stipulated above, the respondents will release the detained goods within a period of two days from the date of compliance of the modified conditions adverted to above.

17.It is made clear, though, that the observations made above will not come in the way of final adjudication of the show cause notice.

18.The writ petition is disposed of, in the aforementioned terms. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

pri/sl

To

1. The Joint commissioner of Customs
Chennai VI Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

2. The Appraiser
Commissioner Adjudication Unit
Chennai VI Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.Hari Radhakrishnan, Advocate, S.R.No.9463
+1cc to Ms.Hemalatha, Advocate, S.R.No.9283

W.P.No.1150 of 2017

MG(CO)
CA(16/02/2017)

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/