$~14

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 5307/2017**

MAGGIE MARKETING PVT LTD ..... Petitioner

Through : Mr. Priyadarshi Manish, Ms. Anjali Jha Manish, Mr. Ashutosh Mishra and Mr. Sagar Rohatgi, Advs.

versus

THE COMMISSIONER OF CUSTOMS (EXPORTS) & ORS ..... Respondents

Through : Mr. Sanjeev Narula, Sr. Standing Counsel and Mr. Abhishek Ghai, Adv.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% **07.07.2017**

Dr S Muralidhar, J.:

1. This petition has been filed by Maggie Marketing Pvt. Ltd., which is a company having its corporate office at Karol Bagh, New Delhi. Petitioner is engaged in the business of import of miscellaneous electronic items, mobile accessories etc.

2. The challenge in the present petition, which is the second round of litigation, is to an order dated 2nd June, 2017 passed by Assistant Commissioner of Customs, by which goods imported by the Petitioner under five different Bills of Entry (B/E) were ordered to be released provisionally with conditions. Four of the B/Es were dated 8th April, 2017 and one was

dated 19th April, 2017.

3. The background facts are set out in two orders passed by this Court in the earlier writ petition filed by the same Petitioner. The first being the order dated 30th May, 2017 passed in W.P.(C) No.4956/2017 which reads as under:

> "*1. Notice. Mr. Sanjeev Narula, Senior Standing Counsel accepts notice. Learned counsel for the Petitioner has placed before the Court a chart giving details of 10 bills of entry (B/E) filed by the Petitioner on various dates beginning from 3rd April, 2017 till 19th April, 2017.*
>
> *2. The grievance of the Petitioner is that although the consignments, which were brought in containers, have been examined in the presence of the Customs House Agent ('CHA') of the Petitioner, there is no intimation received till date as regards the outcome of such examination. A reference is made to a recent circular issued on 8th February, 2017 by the Central Board of Excise & Customs about timely action to be taken by the Department on goods that have arrived at the port but are held-up without any separate seizure orders being passed.*
>
> *3. Mr. Sanjeev Narula, Senior Standing Counsel for the Department states that of the ten B/Es, the CHA has not still furnished the originals of two B/Es (9258840 and 9259533 dated 11th April, 2017).*
>
> *4. It is stated by Ms. Anjali Manish, learned counsel for the Petitioner, without prejudice to her contention that the documents in original have already been furnished, that that in respect of these B/Es the CHA will present all the original documents today itself at 4 pm. The statement is taken on record. If the CHA presents the documents, as stated, the examination of the two containers will be undertaken forthwith and a decision will be taken and communicated t the Petitioner not later than one week from today.*
>
> *5. As far as B/E No. 9230914 dated 8th April, 2017 is concerned, Mr. Narula states that an order of the provisional release of the goods will be passed positively on or before 2nd June, 2017.*

6. In relation to three B/Es i.e., Nos. 9141745, 9230885 and 9368425, Mr. Narula states that the seizure orders have been passed yesterday i.e., on 29th May, 2017. Copy thereof has been handed over to learned counsel for the Petitioner. As regards B/E 9229993 dated 8th April, 2017, he states the examination of the container is complete but there appears to be an issue regarding valuation. It is directed that an order in this regard should be passed on or before 2nd June, 2017.

7. That leaves three B/Es i.e., 9230900, 9230883 and 9371704. Mr. Narula assures the Court that the examination of these containers having been already completed in the presence of the CHA, necessary orders in respect thereof will positively be passed on 2nd June, 2017.

8. The Court directs that an affidavit of compliance be filed by the Department before the next date of hearing.

9. List on 10th July, 2017.

10. Dasti under the signature of the Court Master."

4. Due to an error in the said order as regards the details of the B/Es, upon mentioning a further order was passed on 31st May 2017, which reads as under:

"*1. Upon being mentioned, the matter has been taken up for hearing.*

2. Having heard learned counsel for the parties, paras 5 and 7 of the order dated 30th May, 2017 shall now read as under:-

> *5. As far as B/E No. 9230900 dated 8th April 2017 is concerned, Mr. Narula states that an order on the request for the provisional release of the goods will be passed positively on or before 2nd June 2017.*
>
> *7. That leaves three B/Es, i.e., 9230914, 9230883 and 9371704. Mr. Narula assures the Court that the*

> *examination of these containers having been already completed in the presence of the CHA, necessary orders in respect thereof will positively be passed on 2^{nd} June 2017."*
>
> *3. Order be given dasti under the signature of Court Master.*"

5. Pursuant to the above orders, the impugned dated 2^{nd} June, 2017 has been passed in which the conditions for provisional release are as follows:-

> a) Deposit by the Petitioner of 100% of the differential Customs duty amount;
>
> b) Furnishing of a Bond equivalent to re-determined value of the goods;
>
> c) Furnishing Bank Guarantee representing 15% of the differential duty with auto renewal clause as per Reserve Bank of India ('RBI') directions;
>
> d) Furnishing of an undertaking not to contest the identity, quantity and description of the goods.

6. Additionally in some of the consignments, one other condition is that the goods, which are restricted or prohibited or found mis-declared/undeclared, would not be released.

7. The grievance of the Petitioner is that the conditions are too harsh; that mis-declaration was found only to a small extent in 4 of the 5 B/Es; that the procedure that ought to have been followed for effecting seizure was not followed; that the seizure actually did not take place in the presence of the importer but purportedly in the presence of its Custom Handling Agent ('CHA') which is also disputed by the Petitioner.

8. Ms. Anjali Manish, learned counsel for the Petitioner submitted that since the Petitioner, in any event, was not seeking release of the mis-declared/undeclared goods (constituting a small portion of the entire consignment) or the restricted or prohibited goods, the condition that it should deposit 100% of the differential duty and also furnish a bank guarantee for 15% thereof was not warranted. She urged that Court should modify the impugned order of provisional release of goods and replace it with the conditions as contained in some of the earlier orders of this Court including ***Spirotech Heat Exchangers Private Limited v.Union of India 2016*** **(341)** ***ELT 110 (Del)*** and ***J.B. Overseas v. Union of India 2016 (340) ELT 507 (Del).*** Ms. Manish further pointed out that the reference to the National Import Data Base ('NIDB') was inappropriate inasmuch none of the goods imported by the Petitioner were mentioned therein.

9. Mr Sanjeev Narula, learned Senior Standing Counsel for Respondent Department placed before the Court in a tabular form a detailed analysis of the contents of the consignments imported by the Petitioner under each of the five B/Es. This showed that not only was there a mis-description of the goods imported but also misdeclaration of the quantity and value in four out of five B/Es. Mr Narula further pointed out that even prohibited goods like smart phones with sim slots were sought to be 'smuggled' in through larger consignments. Although the Petitioner may be a first time importer, the type of the goods sought to be imported were such that the interest of the revenue had to be protected and in those circumstances, the conditions imposed could not be said to be harsh or unreasonable. Mr Narula pointed out that

impugned order was appealable and the Court should not lightly interfere with the provisional release order under Article 226 of the Constitution of India.

10. The legal position as regards provisional release of imported goods and distinction between orders of provisional release of goods and provisional assessments was explained recently by this Court in its decision dated 19th May, 2017 in WP(C) No. 3965 of 2017 (***Mala Petrochemicals and Polymers v. The Addl. Director General, Directorate of Revenue Intelligence***). After discussing the earlier decisions of this Court and the Supreme Court on the topic, the Court observed:

> "21. The Court finds that the distinction between the goods being released provisionally in terms of Section 110 A of the Act and provisional assessment of the goods under Section 18 of the Act read with the Regulations thereof was perhaps not acknowledged in many of the orders earlier passed by the Court. More importantly, none of these cases, as already noticed, actually dealt with the provisional release of goods that had been imported by misdeclaring them.
>
> 22. Ultimately, each case turns on its peculiar facts. There can never be a blanket rule that in all cases of misdeclaration 100% of the duty must be asked to be deposited or that if the importer is asked to do so then he cannot be asked to furnish a BG. For instance, in *Malabar Diamond Gallery P Ltd. v. The Addl Dir General DRI 2016 (341) ELT 65*, the Madras High Court held that although the import of gold was not prohibited, if the import was in violation of the conditions attached to such import, could amount to smuggling and that a prayer for provisional release could be refused. The decision in *Sada Sukhi Electronic P Ltd v CC (Seaport-Import) 2014 (304) ELT 42 (Mad)* involved misdeclared goods and the conditions imposed were the deposit of 100% of the duty on the declared value, 50% of the differential duty, and personal bond for the remaining 50%.

> 23. The power under Section 110 A of the Act involves exercise of discretion. The scope of judicial review is to examine if the discretion has been rightly exercised; that it is not based on irrelevant materials and is fair and reasonable in the circumstances. It is not an appellate power. The drawing of a distinction between seizure of imported goods as a result of undervaluation and seizure of imported goods upon misdeclaration cannot per se be said to be irrational. On the contrary, the failure to draw such a distinction and treat all types of wrongful imports on an equal footing might result in miscarriage of justice. That is perhaps why Section 110 A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognised legal limits."

11. In light of the above legal position, what is required to be examined in the instant case is whether the conditions imposed by the Respondent in the impugned order of provisional release of the imported consignments in favour of the Petitioner requires any interference by this Court.

12. Having considered the submissions of learned counsel for the parties and having perused the documents placed on record, the Court is not persuaded to accept the submissions of learned counsel for the Petitioner that the conditions imposed in the impugned order are harsh or unreasonable or arbitrary so as to warrant interference by this Court in the exercise of its jurisdiction under Article 226 of the Constitution. While the views expressed by this Court at this stage are *prima facie* it cannot be overlooked that the case put forth by the Department that there has been a misdeclaration in terms of description, quantity and value has not been able to be effectively countered by the Petitioner at this stage. Also, it is not disputed by the Petitioner that some of the goods imported are in the prohibited/restricted category. In the circumstances, the conditions for provisional release as

contained in the impugned order, cannot be said to be arbitrary or unreasonable. No case is made out for interference, at this stage.

13. The petition is accordingly dismissed. The next date of hearing, 13th July 2017, stands canceled.

S.MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 07, 2017
dk