IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24 .09.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No. 1913 of 2018

The Commissioner of Customs,
Chennai II Commissionerate,
No. 60, Rajaji Salai,
Customs House,
Chennai - 600 001. ... Appellant/Respondent

-vs-

M/s. Novel Impex,
Shop No. 55, Amoluck Complex,
II Floor, No. 3, Periya Naicken Street,
Sowcarpet, Chennai - 600 003.
... Respondent/Appellant

Civil Miscellaneous Appeal filed under Section 130 of Customs Act, 1962 against the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 13.04.2018 made in Final Order No. 41201/2018.

For Appellant : Mrs.R.Hemalatha

For Respondent : Mr.S.Baskaran
for Mr.N.Vishwanath

JUDGMENT
[Judgment of the Court was delivered by T.S.Sivagnanam, J.]

This appeal, by the Revenue, is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal (for brevity “the Tribunal”) in Final Order No.41201 of 2018 dated 13.04.2018.

2.This appeal is admitted on the following substantial questions of law:

“1. Whether on the facts and circumstances of the case, the Hon'ble CESTAT is right in law in having held that the Hon'ble Apex Court in 2011 (269) ELT A416 (SC) had affirmed the decision of the Delhi High Court in Nav Shakthi Industries?

2. Whether the Hon'ble Tribunal is correct in seeking to follow the findings of the Hon'ble Delhi High Court in the case of Bhaiya Fibres Ltd., that purportedly laid emphasis on Regulation (2) of the Customs (Provisional Duty assessment) Regulations, 1963 which postulates 25% of provisional duty even in cases of the present like involving Section 110A of the Act?"

3.The respondent imported two consignments, vide bills of entry dated 06.10.2017. Based on intelligence that the goods imported were mis-declared, the DRI detained the consignments. In the course of investigation, it appears that one Shri Mahaveer Kumar stated that the imported consignments were not owned by the respondent/importer and those consignments were actually imported by him in the name of the respondent and the goods were owned by Shri Rajesh Shah of M/s.Molten Crystals, Mumbai.

4.From the documents retrieved, it was stated that the transaction value of the two consignments was Rs.1,45,44,653/- whereas, the value declared for the purpose of customs clearance was only Rs.43,58,498/-. Accordingly, the goods were seized.

5.The respondent filed Writ Petition before this Court in W.P.No.37162 of 2017 praying for a direction to consider their request for provisional release of the seized consignments. The Writ Petition was disposed of by order dated 21.12.2017, with a direction to the authority to consider the request for provisional release of the Cargo.

6.As per the directions issued, the adjudicating authority considered the request and allowed provisional clearance under Section 110A of the Customs Act, 1962, (hereinafter referred to as "the Act") imposing two conditions namely,

a) Submission of Bond for full value of consignment i.e., Rs.1,45,44,653/-; and

b) Submission of Bank Guarantee for Rs.1,00,00,000/-.

7.The respondent filed Writ Petition No.1549 of 2018 challenging the conditions imposed in the said order. Ultimately, since the importer had appeared before the DRI authorities and a statement was recorded, the Writ Petition came to be disposed of by directing the respondent to file an appeal against the order under Section 110A of the Act before the

Commissioner of Customs (Appeals). The appeal was dismissed, vide order dated 09.03.2018. Against the said order, the respondent preferred appeal to the Tribunal and the Tribunal, by order dated 13.04.2018, directed the Department to release the goods on submission of Bank Guarantee for 30% of the differential duty and bond for 70% of differential duty. The Tribunal also ordered to issue detention certificate for waiver of demurrage and detention charges.

8.The respondent filed another Writ Petition in W.P.No.14021 of 2018 seeking for a direction to implement the order of the Tribunal. The said Writ Petition was disposed of by order dated 18.06.2018 with certain observations taking note of the fact that the statutory time limit for filing the appeal against the order of the Tribunal was yet to be over and observed that if the Department fails to invoke the appeal remedy available to them within the period of limitation, or on expiry thereof within one week thereafter, the Department shall implement the order passed by the Tribunal. The Department filed Writ Appeal against the said order in W.A.No.1645 of 2018, which was disposed of by judgment dated 03.08.2018, directing the Department to file statutory appeal within two weeks from 03.08.2018, failing which, the order of the Tribunal should be implemented. This is how the present appeal has been filed by the Department questioning the correctness of the order passed by the Tribunal dated 13.04.2018.

9.Mrs.R.Hemalatha, learned Senior Standing Counsel for the Revenue contended that the respondent had admitted that he was not the owner of the goods but, the goods belong to one Shri Rajesh Shah and one Mr.Mahaveer Kumar was the person behind the import and without considering this vital aspect, the Tribunal ought not to have directed release of the goods with modified conditions than what was imposed by the adjudicating authority.

10.It is further submitted that the said Mr.Mahaveer Kumar did not co-operate with the investigation and only after he was caught, he had given statement stating that he had imported similar consignments through various other ports and so far as the subject consignment is concerned, he stated that he had imported the same in the name of the respondent and the proprietor of the respondent is his nephew.

11.It is submitted that the Tribunal permitted provisional clearance of the goods on furnishing of Bank Guarantee for 30% of the differential duty and considering the lack of credibility of the respondent, after finalization of the provisional assessment, the collection of differential duty, based on personal bond, is next to impossible and would result in loss of Revenue. Further, the amount of Bank Guarantee directed to be furnished is grossly inadequate.

12.It is further submitted that the transaction value of the said goods is almost three times the value declared in the import document and this aspect ought to have been taken note of by the Tribunal. Further, it is submitted that the Tribunal failed to distinguish between provisional assessment of goods under Section 18 of the Act and provisional release under Section 110A of the Act and the Tribunal ought to have taken note of the decision of the High Court of Delhi in the case of Mala Petrochemicals & Polymers vs. The Additional Director General, DRI & Another in W.P.(C) No.3965 of 2017 dated 19.05.2017. Further, it is submitted that the Tribunal failed to properly appreciate the effect of the Board Circular No.35/2017-Cus., dated 10.08.2017, which stipulates guidelines for provisional release of seized imported goods.

13.It is further submitted that the decision of Hon'ble Supreme Court in Commissioner vs. Navshakti Inds. Pvt. Ltd. [2011 (269) E.L.T. A146 (SC)] directing release of the goods therein on furnishing a Bank Guarantee for 30% of the differential duty, cannot be taken to be an affirmation of the decision of the High Court of Delhi in Navshakti Industries P. Ltd. vs. Commissioner of Customs [2010 (253) E.L.T. 771 (Delhi)]. Therefore, it is submitted that the order passed by the Tribunal requires to be set aside and the substantial questions of law, which have been framed for consideration, be answered in favour of the Revenue.

14.Mr.S.Baskaran, learned counsel appearing for Mr.N.Viswanathan, learned counsel for the respondent submitted that the order passed by the Tribunal is fair and reasonable and the Tribunal has considered all the contentions put forth by the Revenue and after taking note of the facts, has imposed the condition as contended therein, after satisfying itself that the said condition will protect the interest of Revenue.

15.It is further submitted that the Tribunal took note of the fact that the goods have been subjected to 100% examination once by the Customs Authorities and subsequently, by the DRI and admittedly, there is no discrepancy in the description and quantity of the goods. Though all the facts were available while issuing the order of provisional release dated 19.01.2018, nothing was disclosed to the respondent and this fact was noted by the Tribunal in the impugned order. Furthermore, the Tribunal noted that there is no reason to impose such an onerous condition of providing Bank Guarantee of Rs.1,00,00,000/-, which is more than 69% of the enhanced value. Further, it is submitted that in the absence of any material available with the Department to justify the enhancement and in the absence of any disclosure of such material, there is no question of law arising for consideration in this appeal much less a substantial question of law and therefore, the appeal is not maintainable.

16.To buttress the submission as to what would be a substantial question of law, Mr.S.Baskaran, learned counsel referred to the decision of the Hon'ble Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwari (Dead) [Appeal (Civil) No. 1117 of 2001; Dated 08.02.2001] and the decision in Steel Authority of India Ltd., Vs. Designated Authority, Directorate General of Anti-Dumping and Allied Duties [2017 (349) E.L.T. 193 (SC)].

17.Reliance was placed on the decision of the Division Bench of the High Court of Delhi in Bhaiya Fibres Ltd. vs. Additional Director General of Revenue Intelligence [2012 (281) E.L.T. 396 (Del.)] wherein, the Court pointed out that in sum and substance provisional release of goods and provisional assessment of goods are same because, provisional release of goods cannot be effected without provisional assessment of goods. It was further held that if the Department is able to show that it acted in accordance with law, it would really make no difference because, the principles laid down by Customs (Provisional Duty Assessment) Regulations, 1963 would nevertheless be binding for provisional clearance of the goods in the absence of any other method of safeguarding the interest of the Revenue.

18.Reliance was placed on the decision of the Division Bench of this Court in the case of Commissioner of Customs, Tuticorin Vs. Empire Exports [2013 (287) E.L.T. 41 (Mad.)], where provisional release was ordered on payment of 30% of differential duty.

19.Reliance was also placed on the judgment of the Division Bench of this Court in the case of The Assistant Commissioner of Customs and Another vs. M/s.Kanishka Enterprises [Writ Appeal No. 384 of 2018; Dated 27.02.2018] wherein, the order passed by the Writ Court, permitting release of goods on payment of 30% of the differential duty, was upheld.

20.By way of reply, Mrs.R.Hemalatha, learned Senior Standing Counsel submitted that the condition to pay 30% of the differential duty is not an universal rule and in all cases, the decision in the case of Commissioner vs. Navshakti Inds. Pvt. Ltd. [2011 (269) E.L.T. A146 (SC)] (supra) cannot be made applicable, more so in the case on hand, on account of the factual position.

21.It is submitted by the learned counsel that show cause notice has been issued to the respondent on 06.04.2018, which contains all the details and in which, among other things, it has been proposed to re-determine the value of the goods at Rs.1,45,50,020/- as against declared value of Rs. 43,58,498/- and in such circumstances, prayed that the order passed by the adjudicating authority, dated 19.01.2018, may be restored.

22.Heard the learned counsels for the parties and carefully perused the materials placed on record.

23.The undisputed facts are that the consignment in question was imported in the name of the respondent, vide two bills of entry dated 06.10.2017. From the show cause notice dated 06.04.2018, it is seen that the Customs Authorities had inspected the consignment but, appear to have not pointed out any discrepancy. Subsequently, DRI had detained the consignment on the allegation of the value of the goods being mis-declared. Thus, it is clear that the description of goods has not been disputed. The quantity, which was declared in the import documents, has also not been disputed.

24.Two issues, which are now brought forth pursuant to investigation done by DRI are with regard to the mis-declaration of the value of the cargo and disputing the ownership of the Cargo. For over two months, the goods were detained, as a result of which, the respondent approached this Court by way of a Writ Petition in W.P.No.37162 of 2017 praying for a direction to the Customs Authorities to provisionally release the goods and by taking note of the directions issued by the Hon'ble Supreme Court in Commissioner vs. Navshakti Inds. Pvt. Ltd. [2011 (269) E.L.T. A146 (SC)] (supra).

25.At the time when the Writ Petition was filed, the importer has stated that they are not aware as to the reason for detention. The Department also did not give any specific instruction to their Standing Sounsel in that regard. Thus, balancing the interest of the importer as well as the Revenue, the Court directed the Customs Department to consider the application for provisional release and pass appropriate orders within a time frame and while doing so, consider the request for waiver of demurrages and detention charges, as the consignment was detained at the instant of the Department. Pursuant to such direction, an order dated 19.01.2018 was passed permitting provisional release by imposing two conditions, directing the petitioner to submit a bond for full value of consignment of Rs.1,45,44,653/- and submission of Bank Guarantee for Rs.1,00,00,000/-. The order did not disclose as to what was the basis for arriving at the value of the consignment, nor the nexus with regard to the amount of Bank Guarantee insisted upon. This order, dated 19.01.2018, passed by the Customs Department, was put to challenge in W.P.No.1549 of 2018. Considering the factual matrix involved and the other allegations, the Court directed the respondent to prefer an appeal before the Commissioner of Customs (Appeals) challenging the conditions imposed in the order dated 19.01.2018. Accordingly, an appeal was preferred by the respondent before the Commissioner of Customs (Appeal). The appeal was rejected by order dated 09.03.2018, holding that the adjudicating authority rightly insisted for Bank Guarantee for Rs.1,00,00,000/- taking into account the differential duty and probable fine and penalty. Further, the non-cooperative attitude of the respondent with the DRI, Ahmedabad also appears to have weighed in the minds of appellate authority while rejecting the appeal.

26.Challenging the said order, the respondent preferred appeal to the Tribunal. The Tribunal, by the impugned order, has ordered provisional release by directing the respondent to pay 30% of the differential duty between the duty on the declared value and the duty on proposed enhanced value fixed by the Department by way of a Bank Guarantee; the respondent shall execute a personal bond for value of balance of 70% of differential duty to the satisfaction of the competent authority. Immediately after the order of the Tribunal, the respondent filed Writ Petition before this Court in W.P.No.14021 of 2018 dated 18.06.2018, praying for a direction to implement the order. On the date when the Writ Petition was filed, the period of limitation for filing an appeal by the Department before the Division Bench of this Court, was yet to expire. Therefore, the Writ Court granted time for filing the statutory appeal within the time permitted under the statute. The respondent was not satisfied with the direction issued and filed an appeal against the said order in Writ Appeal No.1645 of 2018 before the Hon'ble Division Bench, the Revenue stated that the appeal papers are ready and it will be filed within two weeks and recording the said submission, the Writ appeal was disposed of by judgment dated 03.08.2018 with direction to file the appeal within such time.

27.As pointed earlier, the quantity of goods imported has not been disputed. The description of the goods has not been disputed. The dispute is with regard to the valuation. Though several contentions were raised by the learned counsel for the appellant with regard to the effect of the decision of the Hon'ble Supreme Court in the case of Commissioner vs. Navshakti Inds. Pvt. Ltd. [2011 (269) E.L.T. A146 (SC)] (supra), on the case on hand, it may not be necessary for this Court to undertake an exercise in that regard, in the light of the fact that the Department accepted the request of the respondent for grant of provisional release and passed an order to the said effect dated 09.01.2018.

28.Thus, the only question, that is, required to be considered, is whether the conditions imposed in the order dated 19.01.2018, are fair and reasonable or is it onerous and unreasonable. Undoubtedly, there is room for exercise of discretion while considering an application for provisional release exercising powers under Section 110A of the Act. However, such exercise cannot be unguided or unbridled. The exercise of discretion and imposition of conditions should satisfy the test of reasonableness vis-a-vis the factual matrix.

29.Mrs.R.Hemalatha, is right in her submission to state that no two cases of provisional release are identical. Therefore, to that extent, the learned counsel is right in her submission that the earlier decisions, relied on by Mr.S.Baskaran, cannot be an universal rule for all cases of provisional release.

30.What is required to be seen in the instant case is whether there was justification on the part of Customs Department to insist upon Bank Guarantee for Rs.1,00,00,000/-. Admittedly, in the order dated 19.01.2018 no reasons have been assigned by the Customs Department to impose such a condition.

31.Mrs.R.Hemalatha relies upon a circular issued by the Board. In our considered view, circulars can be guidelines for the officers and such circulars also provide for exercise of discretion by the competent authority as contained in Paragraph 2.3 of Circular No.35/2017-Cus., dated 16.08.2017, which states that depending on the specific nature of the case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated in paragraph 2.2 of the circular. Thus, the circular does not foreclose exercise of the discretion by the competent authority, who imposes condition on examination of the Cargo.

32.As pointed out earlier, the goods were subjected to 100% examination by the Customs Department, who did not point out any discrepancy. On the goods being detained, the DRI made 100% inspection and pointed out mis-declaration of the value. When the respondent's application for provisional release was considered, they were not informed as to on what basis the value of the cargo was enhanced to Rs.1,45,44,653/-, as admittedly show cause notice was not issued on the said date. Therefore, the Tribunal was right in its observation that investigation was yet to be completed on the date when the order dated 19.01.2018 was passed. It is true, that as on today the respondent has been issued with a show cause notice dated 06.04.2018 proposing to enhance the value of the goods among other things.

33.On a reading of the show cause notice it appears that there are several materials, which have been referred to in the show cause notice and it is for respondent to reply to the show cause notice and participate in the adjudication. Since, show cause notice has been issued to the respondent, this Court would be fully justified in considering the allegations made in the show cause notice while considering as to what would be the reasonable conditions to be imposed in the respondent's case, while ordering release.

34.With regard to the non-cooperation of the respondent with the investigation, this was brought to the notice of this Court when one of us (TSSJ) sitting single, heard W.P.No.1549 of 2018 and in the said Writ Petition, it was noted that the respondent did not co-operate with the DRI, Ahmedabad and one Senior Intelligence Officer of DRI, Ahmedabad was present in Court and directions were issued after which, the respondent appeared before the Officer at Chennai and a statement was recorded. Therefore, Mrs.R.Hemalatha is right in her submission that the non-cooperative attitude of the assessee also to be borne in mind so that ultimately when the adjudication is completed, the amount of duty if determined, should not become irrecoverable.

35.Furthermore, one other factor, which is pointed out, is the statement given by one Mr.Mahaveer Kumar, who claims to be the beneficial owner of the goods. However, we do not propose to dwell further on this aspect, as it is a matter to be considered while adjudicating the show cause notice.

36.Thus, considering all the aspects, we are of the view that the following order will safeguard the interest of Revenue as well as the respondent while permitting provisional release of the goods. Accordingly, the appeal is partly allowed and the order passed by the Tribunal is modified as follows:-

(i) The respondent shall pay the duty as declared by them on the import value, if not already paid;

(ii) The respondent shall pay 50% of the differential duty between the duty on the declared value and the duty on proposed enhanced value fixed by the Department by furnishing a Bank Guarantee;

(iii) The respondent shall execute a personal bond for value of balance of 50% of differential duty to the satisfaction of the competent authority;

On fulfilment of the conditions stipulated above, the goods shall be released provisionally within a period of two weeks from the date of compliance of the conditions.

(iv) The demurrages and detention charges for the entire period from the date of detention till the date of clearance shall stand waived;

(v) The respondent is directed to submit their reply to the show cause notice and participate in the adjudication of the show cause notice by extending full co-operation;

37.In the light of the above, the substantial questions of law, framed for consideration, are answered accordingly. No costs.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

mrm/abr

To

1.The Customs, Excise & Service Tax Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road, Chennai-600 006.

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

+1cc to Mr.R.Hemalatha, Advocate, S.R.No. 65986
+2cc to Mr.N.Viswanathan, Advocate, S.R.No. 65710

C.M.A.No.1913 of 2018

SJ(CO)
GN(27/09/2018)