IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2019

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.540 of 2019 and W.P.Nos.33269 & 33276 of 2018
in
W.M.P.Nos.546 to 548 of 2019
and W.M.P.Nos.38601, 38602, 38605, 38613, 38615 & 38617 of 2018

W.P.No.540 of 2019

M/s.Unik Traders
No.140, Old Tharagupet Road,
Bangalore -560 053,
Represented by its P.A
Holder Shri Asif H.Thara ... Petitioner

vs.

The Additional Commissioner of Customs,
Group-1, Chennai-II,
Commisionerate,
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to quash the communication dated 01.01.2019 bearing reference F.No.S.Misc./351/2018-Gr.1 attributable to the respondent and direct the respondent to release the consignment of Black Pepper of Sri Lankan origin covered under Bill of Entry No.8488382 dated 16.10.2018 and Arecanuts (Betelnuts) of Sri Lankan Origin covered under 36 Bills of Entry bearing Nos.8586795 / 24.10.2018; 8583766 / 24.10.2018; 8583738 / 24.10.2018; 8588360 / 24.10.2018; 8691817 / 01.11.2018; 8690361 / 01.11.2018; 8691503 / 01.11.2018; 8714626 / 2.11.2018; 8714347 / 2.11.2018; 8720607 / 03.11.2018; 8736410 / 05.11.2018; 8737175 / 05.11.2018; 8736701 / 05.11.2018; 8499039 / 17.10.2018; 8499580 / 17.10.2018; 8501242 / 17.10.2018; 8516590 / 19.10.2018; 8523562 / 20.10.2018; 8524271 / 20.10.2018; 8524758 / 24.10.2018; 8582741 / 24.10.2018; 8587224 / 24.10.2018; 8587673 / 24.10.2018; 8497797 / 17.10.2018;

8501212 / 17.10.2018; 8501724 / 17.10.2018; 8502398 / 19.10.2018; 8516420 / 19.10.2018; 8525913 / 20.10.2018; 8526390 / 20.10.2018; 8588734 / 24.10.2018; 8589240 / 24.10.2018; 8589733 / 24.10.2018; 8592929 / 24.10.2018; 8591943 / 24.10.2018; and 8590330 / 24.10.2018, for home consumption and remaining 8 Bills of Entry bearing Nos. 8511943 / 18.10.2018; 8516266 / 19.10.2018; 8580940 / 24.10.2018; 8592951 / 24.10.2018; 8690997 / 01.11.2018; 8715148 / 02.11.2018; 8736547 / 05.11.2018 and 8591941 / 24.10.2018, for re-export, on payment of declared duty and on execution of a simple bond in terms of Section 110A of the Customs Act, 1962.

W.P.No.33269 & 33276 of 2018

M/s Unik Traders
No.140, Old Tharagupet Road,
Bangalore-560053,
Represented by its P.A Holder
Shri Asif H.Thara ...Petitioner in both W.Ps

Vs.

1. The Assistant / Deputy Director,
Directorate of Revenue Intelligence,
No.27, G.N. Chetty Road, T.Nagar,
Chennai - 600017.

2. The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.27, G.N. Chetty Road, T.Nagar,
Chennai - 600017.

3. The Assistant / Deputy Commissioner
of Customs, Group-1, Chennai - II
Commissionerate, Custom House,
No.60, Rajaji Salai,
Chennai-600001. ...Respondents in both W.Ps

Writ Petition No.33269 of 2018 filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to quash the seizure memorandum dated 01.12.2018, bearing reference F.No.DRI/CZU/VIII/26/230/2018 attributable to the second respondent in so far as it pertains to import of Arecanuts (Betelnuts) of Sri Lankan origin and direct release of the consignment of Arecanuts covered under 36 Bills of Entry bearing Nos.8586795 / 24.10.2018; 8583766 / 24.10.2018; 8583738 / 24.10.2018; 8588360 / 24.10.2018; 8691817 / 01.11.2018; 8690361 / 01.11.2018; 8691503 / 01.11.2018; 8714626 / 2.11.2018; 8714347 / 2.11.2018; 8720607 /

03.11.2018; 8736410 / 05.11.2018; 8737175 / 05.11.2018; 8736701 / 05.11.2018; 8499039 / 17.10.2018; 8499580 / 17.10.2018; 8501242 / 17.10.2018; 8516590 / 19.10.2018; 8523562 / 20.10.2018; 8524271 / 20.10.2018; 8524758 / 20.10.2018; 8582741 / 24.10.2018; 8587224 / 24.10.2018; 8587673 / 24.10.2018; 8497797 / 17.10.2018; 8501212 / 17.10.2018; 8501724 / 17.10.2018; 8502398 / 17j.10.2018; 8516420 / 19.10.2018; 8525913 / 20.10.2018; 8526390 / 20.10.2018; 8588734 / 24.10.2018; 8589240 / 24.10.2018; 8589733 / 24.10.2018; 8592929 / 24.10.2018; 8591943 / 24.10.2018; and 8590330 / 24.10.2018, for home consumption and remaining 8 Bills of Entry bearing Nos. 8511943 / 18.10.2018; 8516266 / 19.10.2018; 8580940 / 24.10.2018; 8592951 / 24.10.2018; 8690997 / 01.11.2018; 8715148 / 02.11.2018; 8736547 / 05.11.2018 and 8591941 / 24.10.2018, for re-export on the basis of the IFSTA Certificates issued in respect of the said Bills of Entry by the Competent Authority in Sri Lanka read with the FSSAI Certificates and further direct the respondents to issue a Detention Certificate for waiver of demurrage and container detention charges in terms of Regulation 6 (1)(I) of the Handling of Cargo in Customs Areas Regulations 2009.

Writ Petition No.33276 of 2018 filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to quash the seizure memorandum dated 01.12.2018, bearing reference F.No.DRI/CZU/VIII/26/230/2018 attributable to the second respondent in so far as it pertains to import of Black Pepper of Sri Lankan origin and direct release of the consignment of Black Pepper covered under Bill of Entry No.8488382 dated 16.10.2018, on the basis of the ISFTA Certificate No.CO/SAF/IND/2018/00357 dated 15.10.2018, and further direct the respondents to issue a Detention Certificate for waiver of demurrage and container detention charges in terms of Regulation 6(1)(I) of the Handling of Cargo in Customs Areas Regulations 2009.

For Petitioners in all the W.Ps. : Mr.Vijay Narayan Senior counsel for Dr.S.Krishnanandh

For Respondents in all the W.Ps. : Mr.V.Sundareswaran, Standing Counsel

COMMON ORDER

W.P.Nos.33269 and 33276 of 2018 are filed challenging the seizure memorandum dated 01.12.2018 and consequently, for a direction to release the subject matter consignment covered under the Bill of Entry referred to therein.

2. W.P.No.540 of 2019 is filed challenging the conditional order dated 01.01.2019 for provisional release of the subject matter consignment.

3. As it is seen that a decision to be made in W.P.No.540/2019 will cover the relief sought for in the other two writ petitions, W.P.No.540/2019 is taken up first for disposal.

4. The following are the short facts and circumstances warranted the petitioner to file the above Writ Petition.

The petitioner is in the trade of import and local sales of spices, condiments in the nature of Black Pepper, cassia, Star Aniseeds etc. and Arecanuts (Betelnuts). They were issued with Import and Export Code by the office of the Joint Director General of Foreign Trade, Bangalore. They are assessed to Income Tax and also registered with Food Safety & Standards Authority of India. In the course of their business, they had imported 54 MTS of ''Black Pepper'' of Sri Lankan Origin and 44 consignments of Arecanuts of Sri Lankan Origin from their overseas suppliers in Sri Lanka. The goods were consigned to the petitioners by their Sri Lankan suppliers under the cover of Invoices including the Certificate of Origin issued by the Department of Commerce, Government of Sri Lanka in terms of India - Sri Lanka free Trade Agreement. The petitioner filed bills of entry for clearance of Black Pepper and Arecanuts. The goods imported by them being ''Food'' in terms of Food Safety & Standards Act, 2006, the same was forwarded by the Proper Officer of Customs to the Authorised Officer of Food Safety & Standards Authority of India for No Objection Certificate in order to permit clearance for home consumption. Accordingly, the Authorised Officer, Food Safety & Standards Authority of India issued No Objection Certificate in respect of one consignment of Black Pepper of Sri Lankan origin and issued No Objection Certificate in respect of 36 bills of entry and rejected No Objection Certificate in respect of 8 Bills of Entry in respect of the goods, namely Arecanuts of Sri Lankan Origin by stating that the goods imported by the petitioner conformed to the standard laid down under 2.9.15(1) of the Food Safety & Standards (Food Products Standards and Food Additives) Regulations, 2011. In respect of 8 Bills of Entry, where No Objection Certificate was not issued, the petitioners are bound to re-export the same on adjudication by the office of the respondent. As no action was forthcoming in releasing the goods covered by other Bills of Entry to which No Objection Certificate was issued, and since the Directorate of Revenue Intelligence had taken up investigation into the subject import of Black Pepper and Arecanuts of Sri Lankan Origin and when the Senior Intelligence Officer, vide Seizure Memorandum dated 01.12.2018 had seized those goods, the petitioner challenged the said seizure memorandum before this Court in W.P.No.33269 of

2018 and W.P.No.33276 of 2018. In the above writ petitions, an interim order was passed on 18.12.2018 granting liberty to the petitioner to approach the Adjudicating Authority and file an application under section 110A of the Customs Act, 1962 for the provisional release of the goods. It was further ordered therein that if any such application is filed, the Adjudicating Authority shall pass appropriate orders on such application at the earliest point of time, since it is stated that the goods under detention are perishable in nature. In pursuant to the said order, the petitioner caused a communication dated 19.12.2018 to the Commissioner of customs seeking for provisional release under section 110A. However, the present impugned communication was issued directing the petitioner to furnish/execute the bond and bank guarantee for provisional release of the consignment covering the entire value of the seized goods and entire amount of differential duty. Hence, W.P.No.540 of 2019 is filed before this Court.

5. A counter affidavit is filed by the respondent, wherein it is stated as follows:

This is the case of mis-declaration of Country of Origin and submissions of fraudulently obtained certificates of Origin to avail ineligible benefits under ISFTA and SAFTA, as evident from the huge tranche of documents recovered during the course of investigation. The importer has falsely tried to cast the delay on its part on FSSAI and Plant and Quarantine on DRI. During the course of investigation, the DRI has mustered huge documents from several persons/ entities involved in the transportation of the impugned goods which indicate that the goods declared to be wholly produced in Sri Lanka by the importer is not correct and on the other hand, the goods were transshipped through Sri Lankan territory. During the course of investigation, it is found that the Certificates have been obtained from the competent authority at Sri Lanka by suppressing vital information that the goods other than Sri Lankan Origin were being merely transshipped through the territory of Sri Lanka, which tantamount to fraudulent procurements of Certificates of Origin. Circular No.35/2017 is only guideline issued by the Board to be followed in exercise of discretionary power vested in the adjudicating authority under Section 110A of the customs Act. Therefore, the power is exercised on a case to case basis and uniformity of treatment cannot be a rule even if the commodity is identical.

6. Mr.Vijay Narayanan, learned senior counsel appearing for the petitioner submitted as follows:

When the subject matter goods imported by the petitioner is supported by a Certificate of Origin issued by the Sri Lankan Government, the respondent is not entitled to go beyond such Certificate and refuse the release of goods, unless the petitioner comply with the conditions imposed in the impugned proceedings. The conditions imposed for provisional release are stringent and onerous, more particularly, when the petitioner had documents in support of their claim that the goods imported had originated from Sri Lankan country. In respect of the very same goods, Krishnapattinam Customs Authority granted provisional release of goods only by taking 10% of the differential duty towards the bank guarantee. Therefore, impugned conditions cause great hardship and injustice to the petitioner. A letter dated 06.12.2018 addressed by the Sri Lanka Customs to Directorate of Revenue Intelligence, Chennai, would clearly falsify the claim of the revenue with regard to the dispute on the country of origin. In the said letter, it is clearly stated that all the containers of arecanuts are of Sri Lankan origin and have been exported from Sri Lanka with Certificates issued by the competent authority.

7. On the other hand, Mr.V.Sundareswaran, learned Standing Counsel appearing for the respondent, after producing the relevant files before this Court and taking the attention of this Court to various documents, contended that the very Certificate of Origin said to have been issued by the Sri Lankan Government is doubted by the respondent and therefore, it has to be investigated further as to whether the said Certificate was issued after considering material facts and circumstances available before such authority, who issued the said Certificate. Therefore, learned counsel contended that interest of the Revenue has to be safeguarded for the provisional release of goods and thus, the conditions imposed in the impugned order are just and reasonable.

8. Heard both sides.

9. The petitioner imported the subject matter goods by filing relevant Bills of Entry. The core dispute between the parties is in respect of the Country of Origin of those goods. It is claimed by the petitioner that the goods are of Sri Lankan Origin, whereas it is claimed by the respondent that the goods were only transshipped through Sri Lanka and not of Sri Lankan Origin itself. Both sides relied upon certain materials in support of their respective claim and contentions.

10. Admittedly, the matter is still under the investigation stage. Therefore, at this juncture, this Court is not inclined to go into any of the supportive documents relied on by the respective parties and give any finding on those documents, since any such finding will certainly prejudice the investigation. However, this Court has to consider and decide as to whether the conditions imposed for provisional release are to be sustained or not, since the respondent has agreed to release the goods provisionally, subject to the compliance of the impugned conditions.

11. W.P.No.540/2019 is filed against the condition imposed for a provisional release of the subject matter goods. In other words, it is not in dispute that the respondent has agreed to release the goods provisionally, provided the petitioner

complies with the conditions imposed in the impugned order. Therefore, this Court has to now see as to whether the conditions imposed as such can be sustained or it can be modified, so as to protect the interest of both the parties, without prejudice to further investigation of the matter and the interest of both parties.

12. There is no dispute to the fact that if the goods were originated from Sri Lankan country, there will not be any difficulty for the revenue to release those goods without imposing the conditions as stipulated in the impugned order, however by collecting the required duty. But the dispute is regarding the country of origin.

13. Learned senior counsel for the petitioner heavily relied on the communication dated 06.12.2018 issued by the Sri Lankan Customs to the Directorate of Revenue Intelligence, Chennai, wherein it is stated that on investigation and verification, it revealed that all the containers of Arecanuts mentioned in the earlier emails sent by DRI, are of Sri Lankan Origin and have been exported from Sri Lanka with Certificates issued under the ISFTA. Learned senior counsel thus, contended that so long as the Certificate of Origin issued by the petitioner is not found to be bogus or fabricated one, the respondent is not justified in imposing the onerous conditions for provisional release of goods.

14. On the other hand, it is contended on behalf of the respondent that investigation has to be carried on even in respect of the communication dated 06.12.2018 to find out as to under what circumstances, the said communication was issued when the respondent is having other materials in support of their contentions that the origin of the goods is not from Sri Lanka and on the other hand, it was only transshipped through Sri Lanka. Therefore, from the above rival contentions of the parties, it is evident that the issue with regard to the Country of Origin of goods has to be investigated and an order of adjudication has to be finally passed in this matter. At this juncture, it is to be relevant to be stated that the above said communication dated 06.12.2018, though was not referred to in the counter affidavit filed on 18.01.2019, the file produced before me contained the said letter. In fact, a copy of the said letter is also placed before this Court by the learned senior counsel for the petitioner as well. When a specific question is put to the learned counsel appearing for the respondent as to whether any further communication is received from the Sri Lankan Authority after the above said communication dated 06.12.2018, he submitted that though no further communication is received so far, the investigating authority has sent further communications to the Sri Lankan Authority to find out as to under what circumstances such communication was issued. Therefore, under the above facts and circumstances, it is evident that as on today, the said communication dated

06.12.2018, seems to be the latest communication issued by the Sri Lanka Customs Authority, prima facie, supports the case of the petitioner. Under such circumstances, this Court is of the view that imposing onerous and stringent conditions for release of the goods cannot be justified. At the same time, the request of the learned senior counsel for the petitioner offering 10% guarantee as has been taken by the Customs Authority at Krishnampatnam Port, also cannot be accepted, since as rightly pointed out by the learned counsel appearing for the respondent that such condition was imposed by such customs authority, while making provisional assessment of the Bill of Entry and not while passing order of provisional release under section 110A. Admittedly, no such provisional assessment has taken place in this case and on the other hand, the impugned conditions are imposed only for provisional release of the goods by exercising the power under section 110A of the Customs Act.

15. Considering the above stated facts and circumstances, this Court is of the view that the interest of the parties will be safeguarded if the conditions stipulated in the impugned order is modified to the following effect.

16. Accordingly, W.P.No.540 of 2019 is allowed in part and the conditions imposed in the impugned order are modified as follows:

a) The petitioner shall furnish a Bond of equal to the value of the seized goods i.e., Rs.40,82,00,925/-.

b) The petitioner shall furnish a Bank guarantee/ security deposit to cover 30% of the differential duty.

c) The above bond and bank guarantee shall be furnished by the petitioner within a period of seven working days from the date of receipt of a copy of this order.

d) On receipt of such bond and bank guarantee/ security deposit, the respondent shall provisionally release the goods forthwith.

e) The above order is passed without prejudice to the contentions of both parties and the investigation being carried on in this matter.

17. In view of the order passed in W.P.No.540 of 2019, no further order is required in W.P.Nos.33269 & 33276 of 2018. Accordingly, both these writ petitions are closed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar

//True copy//

Sub Assistant Registrar

vsi/sni

To

1. The Additional Commissioner of Customs,
   Group-1, Chennai-II,
   Commisionerate, Custom House,
   No.60, Rajaji Salai,
   Chennai - 600 001.

2. The Assistant / Deputy Director,
   Directorate of Revenue Intelligence,
   No.27, G.N. Chetty Road, T.Nagar,
   Chennai - 600017.

3. The Senior Intelligence Officer,
   Directorate of Revenue Intelligence,
   No.27, G.N. Chetty Road, T.Nagar,
   Chennai - 600017.

4. The Assistant / Deputy Commissioner
   of Customs, Group-1, Chennai - II
   Commissionerate, Custom House,
   No.60, Rajaji Salai,
   Chennai-600001.

+1cc to M/s.R.Hemalatha, Advocate SR.No.4821

+6cc to Mr.B.Sathish Sundar, Advocate SR.No.4500,4501,4502

+1cc to Mr.V.Sundareswaran, Advocate SR.No.4509

W.P.No.540 of 2019
and
W.P.Nos.33269 & 33276 of 2018

GMY(24/01/2019)