

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.24059 of 2009
and
M.P.No.1 of 2009
and W.M.P.No.11052 of 2019

J.M.Baxi and Co, (Tuticorin),
No.3rd Floor, Clive Battery Complex,
No.4 and 4A, Rajaji Salai,
Chennai 600 001.
Rep by its Power Agent,
Capt R.Venkatesh. Petitioner

vs.

- 1.Government of India,
Ministry of Finance,
Department of Revenue,
Rep by its Joint Secretary,
No.14, Hudco Vishala Building,
B Wing, 6th Floor, Bhikaji Cama Place,
New Delhi 110 066.
- 2.Commissioner of Customs & Central Excise (Appeals),
No.1, Williams Road,
Cantonment, Trichy 622 001.
- 3.Deputy Commissioner of Customs,
Customs House,
Tuticorin.
- 4.Joint Commissioner of Customs,
Customs House,
Tuticorin. Respondents

Prayer: Writ Petition is filed under article 226 of the Constitution of India, writ of Certiorari, calling upon the records leading to the passing of the impugned order bearing F.No.373/120/SL/06-RA-CUS passed in order No.281/09 dated 28.10.2009 by the first respondent and to quash the same.

For Petitioner : Mr.P.Giridharan

For Respondents : Mr.B.Ramu Manohar
for R2 to R4
O R D E R

The petitioner is aggrieved by the impugned order dated 28.10.2009 passed by the 1st respondent in Revision Application No. 373/120/SC/06-RA under Section 129 DD of the Customs Act, 1962.

2.By the impugned order the 1st respondent has rejected the Revision Application filed by the petitioner under Section 129DD of the said Act.

3.Petitioner a steamer agent of the Vessel M.V. Lu Karavelow had discharged consignments of Soda Ash for consignees under various bills of lading for different customers/importers. The present Writ Petition is confined to import of 50,000 bags of Soda Ash under 3 different bill of lading and for an importer named Ultra Marine Pigment Ltd., Ranipet, Tamilnadu.

4.The said vessel arrived at Tuticorin Port on 15.12.1995. Subsequently, the entire manifested consignment is said to have been discharged at Tuticorin Port under the supervision of an independent surveyor namely M/s. Ericsson and Richards (Tuticorin) who certified that the entire manifested quantity had been discharged at the Tuticorin Port.

5.Importer's agent namely Vallavarayar and Sons also did not notice any shortage in the discharge of the manifested quantity at time of discharge of the import consignment at the Tuticorin Port.

6.Before the consignment was discharged, the importer filed Bill of Entry dated 14.12.1995 and later cleared the consignment.

7.Later, the importer filed an application for remission of customs duty under section 23 of the Customs Act, 1962 stating that there was short receipt of quantity by it. Remission of duty was disallowed.

8.Under these circumstances, the importer filed an appeal before the Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) allowed importers appeal vide order dated 16.12.1997 bearing reference C.CUS.No.1493/1997. The relevant portion of the aforesaid order reads as under:-

In this case, the refund claim for Rs.1,77,547/- for 886 bags short-delivered against the manifested quantity was rejected on the ground that Tuticorin Port Trust have intimated to the Customs Officers that they were not the bailee of the cargo and do not maintain tally sheets for the cargo landed.

The appellants contend that they had got the survey done and the cargo delivered to them was 886 bags short of the manifested quantity. This delivered quantity has been certified by the Port Trust vide their certificates dated 19.4.1996 and 22.4.1996 (entry Nos.I.A.No.714/1 dated 19.4.1996 and 714/2 dated 12.5.95 respectively). Under Section 23 of the Customs Act, 1962 they were entitled to remission of duty for the quantity that had been short delivered against the manifested quantity, I agree with the appellants that there is sufficient evidence on record to show that they had received 886 bags short than the quantity for which they had paid duty. They would therefore, be entitled for refund of short-landed cargo under Section 23 of the Customs Act, 1962. The question of unjust enrichment would not arise in the case as the refund amount relates to quantity which was short delivered. The appeal is allowed.

9.Further, appeal to the Tribunal by the Customs Department vide Appeal No. C/Ref/36/99 in C/1119/99 was also dismissed by the Tribunal vide its Final Order No.528 of 1999 dated 08.03.1999.

10.It was held that Tribunal had no jurisdiction to decide the case. Further, Reference vide C/Ref/36/99 was also dismissed by the Tribunal by its Final Order No.12/2000 dated 22.03.2000 as misconceived.

11.Pursuant to the above Order of the Tribunal, the customs department also refunded the amount claimed as remission of duty to the said importer.

12.After the respondents were forced to refund the amount claimed as remission of duty under Section 23 of the Customs Act, 1962 to the importer, the Deputy Commissioner of Customs, Tuticorin issued a notice dated 09.08.2000 to the petitioner and called upon the petitioner to show cause as to why penalty under Section 116 of the Customs Act, 1962 should not be imposed upon the petitioner.

13. Petitioner was also called upon to furnish Guarantee in terms of Section 41, 42, 97 (2) of the Customs Act, 1962. The notice further called upon the petitioner to furnish a reply within 15 days from date of receipt of the same feeling which the matter would be adjudicated without further reference to the petitioner.

14. The petitioner replied to the above show cause notice on 18.08.2000. Without adjudicating the said show cause notice, a 2nd show cause notice was later issued to the petitioner on 31.01.2004.

15. The petitioner also replied to the said show-cause notice. The 2nd show cause notice ultimately culminated in an order dated 18.05.2005 of the Deputy Commissioner of Customs. The Deputy Commissioner of Customs dropped the proceedings based on the available evidence on record.

16. However, the said order was appealed against before the Commissioner of Customs (Appeals) on 13.4.2006. This was pursuant to a review of the said order of the Deputy Commissioner of Customs under section 129D(2) of the Customs act, 1962 by the Commissioner.

17. The said Appeal was numbered as Appeal No. C24/1/2006-TTN (Cus) (Dept.). The Commissioner of Customs (Appeals) by an order dated 11.08.2006 reversed the order passed by the Deputy Commissioner of Customs in Order in Original No.94/05-06 with the following observations:

" There is no dispute that penalty can be imposed on steamer agent who is acting on behalf of vessel. This was held in the case of M/s. Transworld Shipping vs. C.C 2003(154) F1.T 137 (CEGAT). If the goods are short landed, the earlier is liable to pay penalty upto twice the amount of duty payable on such short landed goods.

07. The copy of order Asst. Deputy Commissioner as adjudicating authority is sent to Commr. After examination of the order, if Commr. is of opinion that the order needs review, review application can be filed with Commr. (A) u/s. 129 D (2) of CA. The Commr. can instruct the adjudicating authority within a period of six months (where it is possible to do so) but not beyond a period of one year from decision of order of adjudicating authority to apply to Commr. (A). Thus six months limit is only

indicative and not binding. On receipt of such order, the adjudicating authority (Jt.Commr./DC/AC as the case may be) should file application to Commr.(A) within three months (appeal against his own order). This will be treated by Commr.(A) as appeal by department against the decision of adjudicating authority. In other words, the appeal filed by Revenue is well within the limitation provided under the CA '62. In view of forgoing the arguments and case laws put forth by respondent are not applicable. In result, the penalty twice the amount of duty payable on short landed goods is correctly leviable, hence the Revenue appeal succeeds and allowed.

8. The appeal is disposed of accordingly."

18. Under these circumstances, the petitioner preferred a Revision Application No.373/120/SC/06-RA before the 1st respondent under Section 129 DD of the Customs Act, 1962. By the impugned order dated 28.10.2009, the 1st respondent rejected the Revision Application filed by the petitioner with the following observations:

" 6. Govt. notes that short landing has actually occurred in this case which stands finally confirmed by way of legal proceedings-culminating into final CEGAT order which resulted into consequential refund of Rs.1,77,547/- in this case matter. The applicant submits alleged loss of cargo cannot be attributed to them as there were multiple handling of cargo goods before actual delivery. Here, Govt. is of the opinion that as per nature/category of cargo i.e. bags of soda ash, the confirmation of proper landing/receipt can only be confirmed by actual weighment as per the manifested (measurement) Units i.e. M.Tonnes. Therefore, the submission of the applicant that cargo was discharged in full as per initial survey report does not hold good till a report containing actual weighment receipt details is finalized and Govt. feels that the legal responsibility of steamer Agent i.e. the applicant's does not cease on mere initial outer surveys of said full discharge of cargo loaded in the ship. The Steamer Agent do remains liable for actual and proper weighment/measurement. Since short receipt has actually happened in this case, which may be due

to any of the reasons, the legal liability remains that of steamer which may be due to any of the reasons, the legal liability remains that of steamer agent i.e. the applicant. Therefore, Govt.is of the opinion that the applicant has rightly been held as liable for action under Section 116 of Customs Act, 1962 in this case.

7. Now Govt.takes up the point of "Limitation ". The applicant's sole reliance on this issue is upon " O bitter dicta" judgments specifically that of Hon'ble High Court in Writ Petition No.528/95. On this Govt. is of the view that the fact of the case proceedings as were continuing before other appellate forums in the matter distinguishes this case from that of (any) normal delayed case. The penal proceedings under Section 116 of Customs Act, 1962 were initiated in the year 2000. Applicant claimed that proceeding were dropped but it has been observed in the impugned order in appeal no speaking order in original was passed by adjudicating authority. No such order was communicated to the applicant. Hence the already initiated proceedings continued upto the issue of impugned order in original. Moreover the short landing of goods was not reported to customs and no amendment in IGM was effected due to which department had not accepted the short landing of goods. But in this case Commissioner (Appeal) decided that there was a short landing of goods and therefore refund of Rs.1,77,547/- was admissible. The said order was upheld by the Hon'ble Tribunal. In view of the long drawn proceedings the time gap in the conclusion of penal proceedings under Section 116 of Customs Act, cannot be called as hit by time limitation. Thus taking into view the no limitation period under Section 116 of the Customs Act, 1962 along with requirements of Section 124 (and other provisions of the act ibid, Govt.is in conformity with the view of Commissioner (Appeals) that Show Cause Notice and also further proceedings in this case were not time barred.

19.The learned counsel for the petitioner submits that on merits there is no evidence to suggest there was any short

landing of the goods. The independent claim of the importer under section 23 of the Customs Act, 1962 is not on account of any short landing.

20. That apart, the learned counsel for the petitioner submits that the earlier show-cause notice filed on 19.08.2000 was belated though bill of entry was filed on 14.12.1995 by the importer. He further submits that the petitioner had submitted a reply to show-cause notice on 18.08.2000. Thereafter, no orders can be passed.

21. He submits that the 2nd show-cause notice issued on 31.01.2004 which ultimately culminated in the impugned order is without any justification.

22. It is submitted that the 2nd show-cause notice was issued after a lapse of 9 to 10 years from the date of imports. He further submits that the proceeding under section 116 has to be co-terminus with the proceedings against an importer under section 28 or under Section 27 of the Customs Act, 1962 in the case of refund of customs duty.

23. It is submitted that it cannot be independently issued after a lapse of limitation under Sections 26, 27 and 28 of the Customs Act, 1962. In any event, he submits that show-cause notice after lapse of 15 years of the subject import was time-barred. The learned counsel for the petitioner refers to the decision of the Bombay High Court dated 12.06.1995 in W.P.No.528 of 1995 rendered in 1995 (80) ELT 781(Bom.), wherein it was held as under:-

"The exercise of powers under Section 116 of the Customs Act, if necessary, must be undertaken within a reasonable time. Shri Venkateswaran submitted that the Customs Excise and Gold Control Tribunal has held that show cause notice issued beyond the period of five years from the date of vessel leaving the Port is arbitrary and unreasonable. In our judgment, the period of five years is more than reasonable. Indeed, the bond executed by the Agents should also be for a duration of five years and in case the respondents desire to proceed against the Agents, action must be taken before the expiry of the period. The bond should not be kept alive for all time to come and must be limited for a duration of five years from the date of execution. For these reasons, the show cause notice issued by respondent No. 1 cannot be sustained and petition must succeed."

24.The learned Counsel for the petitioner also relied on the following decisions:-

i. Atlantic Shipping Pvt. Ltd. Vs. Union of India, 2011 (272) E.L.T.656 (Kar.).

ii.M/s.Inter-Ocean Shipping (1) Pvt. Ltd. Vs. The Government of India and Ors., order dated 30.07.2019 passed by this Court in W.P.No.24969 of 2004.

iii.M/s.Transworld Shipping Services Pvt. Ltd. Vs. The Government of India and Ors., order dated 21.10.2017 passed by this Court in W.P.No.33139 of 2004.

25.Defending the order of the Commissioner of Customs (Appeal) and that of the 1st respondent Joint Secretary under Section 129 DD of the Customs Act, 1962. Mr.A.P.Srinivas, the learned counsel for the Respondent (Revenue), submits that both the orders of the Commission of Customs (Appeals) and the 1st respondent are well reasoned and require no interference.

26.He submits that the provisions of under Section 116 is no governed by any period of limitations and therefore, the authorities under the Customs Act, 1962 can initiate proceedings under Section 116 of the Customs Act, 1962 at any point of time.

27.He further submits that a similar view has been taken in the context of Section 124 of the Customs Act. In this connection, he relied on the decision of the Supreme Court in the case of CC Vs. M/s.Jagadish Cancer & Research Centre reported in (2001 (132) FLT 257 (SC 3 member bench), it was held in the another case in CC Vs. CT Sean Research Centre rendered in 2003 (155) FLT 3 (SC) and therefore submits that the present writ petition was liable to the dismissed.

28.He further submits that the scope of the writ petition is limited and the courts are concerned only with the decision-making process and not with the conclusion and therefore the order passed on merits cannot be interfered unless they are perverse.

29.He further submits that the importer has also been given refund of the duty on account of short land of the imported consignment and therefore the 1st respondent was justified in upholding imposition of penalty under Section 116 of the Act.

30.I have heard the learned counsel for the petitioner and the respondent. I have also perused the records.

31.It may be useful to refer to Chapter VI of the Customs Act, 1962 which deals with provisions relating to conveyances carrying imported goods.

32.As per Section 29 of the Customs Act, the person-in-charge of any vessel or any aircraft entering India shall not permit the vessel or aircraft to call or land at any place other than the customs port or customs Airport.

33.Under Section 30(1) of the Act, the person-in-charge of a conveyance carrying imported goods shall within twenty-four hours after arrival at the Customs Station, deliver to the customs officer an import manifest making and subscribing a declaration as to the truth of its contents.

34.The imported goods are not permitted to be unloaded until an order has been passed by the proper officer granting entry inwards to such vessel under Section 31 of the Act. Section 32 of the Act provide that no imported goods required to be mentioned under the regulation of an import manifest shall be unloaded at any Customs Station except the permission of the Officer.

35.Under Section 34 of the Act, the imported goods shall not be unloaded from any conveyance except under the supervision of the proper officer. As per the proviso, the Board may give general permission for any goods or class of goods to be unloaded or loaded without the supervision of the proper officer.

36.Under Section 42 of the Act, the person-in-charge of a conveyance which has brought any imported goods shall not cause or permit the conveyance to depart from that custom station until a written order to that effect has been given by the proper officer.

37.Chapter VII deals with the subject of the clearance of imported goods. Under Section 45 of the Act, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused in accordance with the provisions of Chapter VIII.

38.Vessel carrying imported goods requires permission for landing at the Port and imported goods are required to be unloaded and given to the custody of the Port before the importer can clear the imported consignment. Report generated under Section 45(2)(a) of the Customs Act, 1962, is to be forward to the Customs authorities. Section 43 of the Major Port Trust Act, 1963, fixes responsibility or the board for loss of Goods as a bailee.

39. Port Trust authorities cannot permit removal except under and in accordance with the permission given by the Customs Officer.

40. It may also be useful to refer to Sections 23 and 116 of the Customs Act, 1962 for a proper disposal of the present Writ Petition. These portions read as under:-

"Section 23 "Remission of duty on lost, destroyed or abandoned goods -

(1) Without prejudice to the provisions of Sec. 13, where it is shown, to the satisfaction of the Assistant Collector of Customs, that any imported goods have been lost, otherwise than as a result of pilferage, or destroyed, at any time before clearance for home consumption, the Assistant Collector of Customs shall remit the duty on such goods.

(2).....

Section 116. Penalty for not accounting for goods.-If any goods loaded in a conveyance for importation into India, or any goods transhipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the 1 [Assistant Commissioner of Customs or Deputy Commissioner of Customs], the person-in-charge of the conveyance shall be liable,-

(a) in the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;

(b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.

41. The importer had claimed remission of duty under Section 23 of the Customs Act, 1962. It appears that the application for

remission of duty was rejected by the concerned officer vide Order-in-Original RLC.No.4/96-97-Refunds dated 16.04.1997. On further appeal, the importer was held eligible for remission of customs by Commissioner of Custom Appeals vide Order dated 16.12.1997.

42.Further, appeal to CEGAT was dismissed as without Jurisdiction. After refunding the amount to the importer, the present proceedings were initiated.

43.Though remission of duty was allowed to the importer by the Appellate Commissioner vide order dated 16.04.1997 referred to supra, it will be useful to refer to factual finding of the Assistant Commissioner in O.I.O.No.4/97 dated 16.04.1997 which reads as follows:-

14.The Asst. Traffic Manager of zone 'B' extension port, vide his letter dated 27.9.96 has reported that a quantity of 20097 bags of soda ash were delivered as per Port records. He further stated that the port does not have the practice of issuing B certificate. With regard to the cargo landed at zone 'A', the traffic has stated that while 29850 bags were landed, only 29017 bags were delivered. It was also stated in the above letter that as Tuticorin Port is not the bailee of the cargo, it does not maintain any tally sheets of the cargo landed from any vessel. It was also informed that the port does not issue B certificate.

15.Thus from the above documents, it is evident that the certificate issued by the Port Trust is not based on any physical tally conducted by the Port Trust but based on the survey report.

16.A perusal of the survey report shows that as per para 3 of the narrative report, the surveyors conducted a tally at zone 'A' only and were not associated with the landing of cargo at zone B. It is further mentioned that a proper tally could not be made towards the completion of discharge from the vessel as the cargo was dumped due to labour refusing to stack the cargo properly into the slings in view of the nature of the cargo.

17.I find that both the Port Trust Certificate and the survey report to be defective for the following reasons.

- i. The port Trust has claimed that it is not the bailee of the cargo and that it does

not maintain tally sheets for the cargo landed.

- ii. The survey report of M/s. Peirce Leslie clearly states that the survey was conducted in zone 'A' only and no survey was conducted in zone 'B'. Even with respect to zone 'A', it concedes that a proper tally could not be made towards the completion of discharge.

18. Therefore I find that neither document can be deemed to be a conclusive evidence to the fact that the entire cargo was not received.

19. In their reply to the Show Cause Notice issued by this office, the importer has categorically mentioned that their claim for refund is based on the survey report. However the survey report in question suffers from various deficiencies as discussed above and therefore, I find that it cannot permit the basis for settlement of this refund.

20. Even at the time of personal hearing, the importer has only reiterated that their refund claim is based on the Port Trust Certificate and the survey report.

21. They have further claimed that their overseas insurance company has settled their claim on the basis of the survey report.

22. However as discussed supra, the survey report itself is defective and therefore the insurance settlement based on the defective survey report is not of any help in conclusively establishing the storage of goods.

44. In the present case, the custody of the imported goods was with the Tuticorin Port Trust which is constituted under the provisions of the Major Port Trust Act, 1963. Tuticorin Port Trust was required to keep a record of such goods and send a copy thereof to the proper Officer of the customs.

45. There is a categorical finding in O.I.O.No.4/97 dated 16.04.1997 of the Assistant Commissioner while rejecting the claim for remission of duty of the importer that a proper tally could not be made during the completion of discharge from the vessel as the cargo was dumped due to labour refusing to stack the cargo properly into the slings in view of the nature of the cargo. He has further observed that both the Port Trust Certificate and the survey report of M/s. Peirce Leslie, neither show that the entire cargo was not received by the Tuticorin

Port Trust. Thus, there is no evidence of short landing.

46. Further, a joint report signed by the petitioner, by Villavaryar & Son the agent of the importer M/s. Ultramarine & Pigments Ltd. and by Master of ship on 21.12.1995, confirmed that 50,000 bags were indeed discharged from 16.12.1995 till 21.12.1995. It is clearly mentioned that "cargo discharged as per B12 and cargo manifest".

47. Remission of customs duty was allowed by the Appellate Commissioner to the importer on account of short delivery of the goods and not on account of the short landing of the goods. Therefore, there is no nexus between the alleged short landing and short receipt.

48. In this case, the importers had produced a certificate dated 29.02.1996 of Lloyd's Agents after filing a refund claim on 26.12.1996.

49. In this case, no short landing was noticed by the Customs Department when the goods were discharged at the Tuticorin Port Trust.

50. There is no evidence on record to conclude there short landing. On the other hand, the goods were discharged at the Tuticorin Port. However, after they were discharged, the aforesaid goods were delivered to the importer filed a refund claim on 27.04.1996.

51. The short landing was to be ascertained then and there as and when the imported goods were discharged from the vessel and were transferred to the Port Trust.

52. Therefore, unless there was a report of the surveyors or any other report of the custodian of the goods namely the Tuticorin Port Trust certifying that there were short landing, a steamer or its agent cannot be held liable merely because remission of customs duty was allowed to the importers under Section 23 of the Act.

53. Further, remission of duty is granted where the importer satisfies the Asst. Commissioner or the Deputy Commissioner of Customs that the imported goods have been lost or destroyed at any time before clearance for home consumption under Section 23. However, remission cannot be granted where loss is on account of pilferage of the goods before clearance for home consumption.

54. Where as, Section 116 of the Act applies only if any goods loaded in a conveyance for importation into India are not unloaded at the place of destination in India or where there is a failure to unload and the goods are not accounted for to the

satisfaction of the Assistant Collector of Customs. Only under those circumstances, the person in charge of the conveyance shall be liable to a penalty.

55.Further, invocation of section 116 of the Customs Act is not dependent on the outcome of the application for remission of customs duty of an importer.

56.If there was indeed short landing, the authorities ought to have initiated proceedings independently irrespective of the application for remission of Customs duty under the provisions of the Customs Act, 1962.

57.Therefore, invocation of Section 116 of the Customs Act, 1962 long after 9 to 10 years of the actual import and clearance of the goods by the importer cannot be countenanced.

58.Under these circumstances, the impugned order of the 1st respondent seeking to justify levy of penalty on the petitioner under Section 116 of the Customs Act, 1962 cannot be sustained and is therefore liable to be quashed.

59.In the light of the above discussion, the impugned order is quashed with consequential relief to the petitioner. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy//

Sub Assistant Registrar

jas/jen

To

1.Government of India, Ministry of Finance,
Department of Revenue, Rep by its Joint Secretary,
No.14, Hudco Vishala Building, B Wing, 6th Floor,
Bhikaji Cama Place, New Delhi 110 066.

2.Commissioner of Customs & Central Excise (Appeals),
No.1, Williams Road, Cantonment, Trichy 622 001.

3. Deputy Commissioner of Customs,
Customs House, Tuticorin.

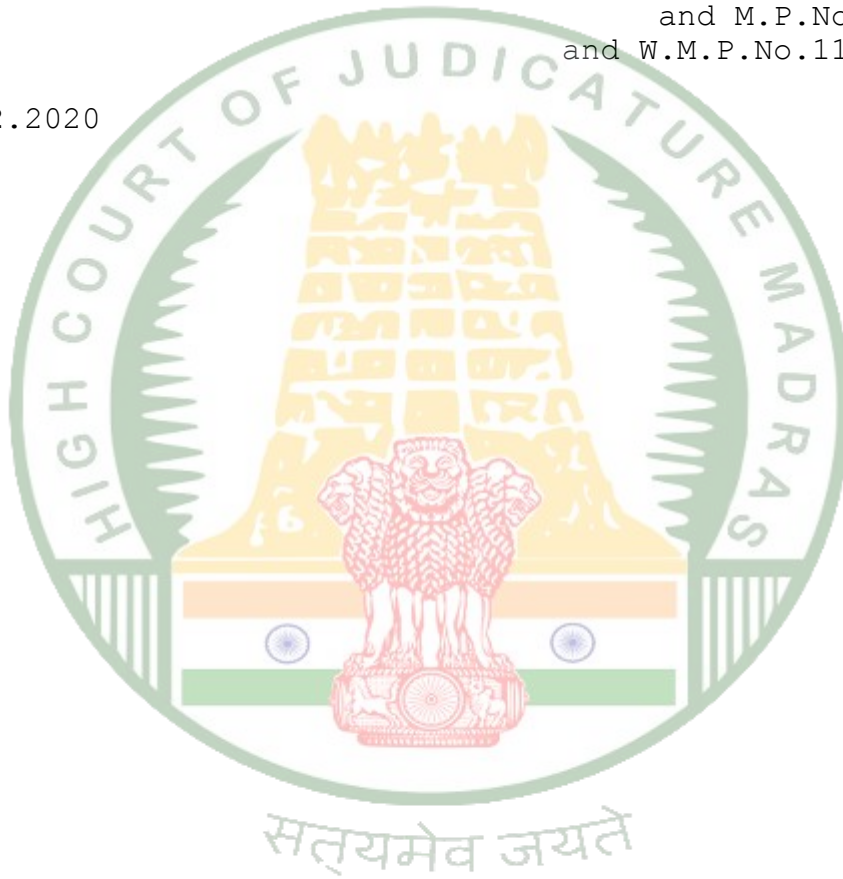
4. Joint Commissioner of Customs,
Customs House, Tuticorin.

+1cc to Mr.B.Rabumanohar, Advocate, SR.No.101317.

+1cc to Mr.P.Giridharan, Advocate, SR.No.10143.

W.P.No.24059 of 2009
and M.P.No.1 of 2009
and W.M.P.No.11052 of 2019

LN(CO)
CSR: 24.02.2020



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