IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Date of Reserving the Judgment	Date of Pronouncing the Judgment
13.02.2019	25.02.2019

Writ Appeal Nos.236, 237, 240, 329 and 355 of 2019

W.A.Nos.236 and 237 of 2019:-

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

-vs-

1.The Assistant / Deputy Director,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

2.The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

3.The Assistant / Deputy Commissioner of Customs,
Group-1, Chennai II Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001 .. Respondents/Respondents

APPEAL under Clause 15 of the Letters Patent to set aside the order dated 22.01.2019, passed this Court in W.P.Nos.33269 and 33276 of 2018.

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.

WP.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 2nd respondent in so far as it pertains to import of ARecanuts (Betelnuts) 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.

W.A.No.240 of 2019:-

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

-vs-

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

APPEAL under Clause 15 of the Letters Patent to set aside the order dated 22.01.2019, passed this Court in W.P.No.540 of 2019.

WP.540 of 2019 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.A.No.329 of 2019:-

1.The Assistant / Deputy Director,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

2.The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017. .. Appellants

-vs-

1.M/s.Unik Traders,
No.140, Old Tharangupet Road,
Bangalore-560 053,
Rep., by its P.A. Holder,
Shri Asif H.Thara. .. 1st Respondent/Petitioner

2.The Additional Commissioner of Customs,
Group-1, Chennai-II Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai-600 001. ` .. 2nd Respondent/Respondent

APPEAL under Clause 15 of the Letters Patent to set aside the order dated 22.01.2019, passed this Court in W.P.No.540 of 2019.

WP.540 of 2019 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.A.No.355 of 2019:-

The Additional Commissioner of Customs,
Group-1, Chennai-II Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai-600 001. ` .. Appellant/Respondent

-vs-

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

APPEAL under Clause 15 of the Letters Patent to set aside the order dated 22.01.2019, passed this Court in W.P.No.540 of 2019.

WP.540 of 2019 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.

For Appellant and for R1 in W.A.Nos.236, 237, 240 & 329 of 2019 : Mr.Vijay Narayan Senior Counsel assisted by Dr.S.Krishnanandh

For Appellant in W.A.No.329 of 2019 & for R1 in W.A.Nos.236 & 237 of 2019 : Mr.V.Sundareswaran

For Appellant in W.A.No.355 of 2019 & for R3 in W.A.Nos.236 & 237 of 2019 & for Respondent in W.A.No.240 of 2019 & for R2 in W.A.No.329/2019 : Mrs.R.Hemalatha

COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals have filed challenging the common order passed in W.P.No.540 of 2019 & W.P.No.33269 & 33276 of 2018. The appellants in the appeals are three in number namely, the Writ Petitioner, the Directorate of Revenue Intelligence (DRI) and the Customs Department. Since all the appeals question the correctness of common order dated 22.01.2019 passed in the Writ Petitions, they were heard together and are disposed of by this common judgment. For easy reference, the parties shall be referred as the petitioner, the DRI and the Customs.

2. W.A.Nos.236, 237 & 240 of 2019 have been filed by the Writ Petitioner. W.A.Nos.236 & 237 of 2019 are directed against the order in W.P.No.33269 & 33276 of 2018, in which the petitioner questioned the correctness of the seizure memorandum dated 01.12.2018 issued by the DRI.

2.1 W.A.No.240 of 2019 is directed against the order in W.P.No.540 of 2019, which was filed challenging the correctness of the order dated 01.01.2019, permitting the provisional release of the goods subject to conditions.

2.2 W.A.No.329 of 2019 has been filed by the DRI challenging the order in W.P.No.540 of 2019 and W.P.No.355 of 2019 has been filed by the Customs challenging the very same order.

3. For the sake of convenience, with the consent of the learned counsels appearing for the parties, W.A.No.240 of 2019, is taken as the lead case. The petitioner is stated to be a trader in spices, condiments in the nature of black pepper, cassia, star aniseeds etc., and Arecanuts (Betelnuts). The petitioner would state that they are in the same line of business for over two decades and have been issued an Import Export Code by the Joint Directorate General of Foreign Trade, Bangalore. The petitioner imported 44 consignments of Arecanuts and one consignment of black pepper from Sri Lanka, stating that the goods are of Sri Lankan origin. The goods were shipped with the certificates of origin issued by the Department of Commerce, Government of Sri Lanka under the South Asian Free Trade Area (SAFTA) Agreement and Indo Sri Lanka Free Trade Agreement (ISFTA) and claimed the benefit of the notification No.75/2006-Cus.(N.T) dated 30.06.2006 and the notification No.19/2000-Cus (N.T), dated 06.03.2000. If the benefit of the notification is extended to the subject goods, then the petitioner would be entitled to import the same duty free/concessional rate. The consignments arrived at the Chennai Port, but were not permitted to be cleared for home consumption on the basis of concessional rate of duty claimed by the petitioner in terms of the aforementioned notification. The petitioner submitted request letters dated 26.11.2018 and 29.11.2018 addressed to the Customs Department as well as to the DRI seeking release of the imported goods for home consumption and also permission to re-export the goods in respect of which 'no objection' was rejected by the authorised officer of the Food Safety and Standards Authority of India contending that the representations were not considered, the petitioner approached this Court by filing Writ Petitions in W.P.Nos.33269 & 33276 of 2018 challenging the seizure memorandum dated 01.12.2018 and sought for release of the goods. The learned Writ Court by an interim order, dated 18.12.2018, granted liberty to the petitioner to approach the Adjudicating Authority and file an application under Section 110A of the Customs Act, 1962 (the Act) for provisional release of the goods. On such application being filed, the Adjudicating Authority was directed to pass appropriate orders at the earliest point of time, in any event, within five days from the date of receipt of such application, since it was stated that the goods under detention are perishable in nature. Accordingly, the petitioner through their counsels filed an application under Section 110A of the Act on 19.12.2018, requesting for provisional release of the goods. In the said

application, the petitioner stated that under similar circumstances, goods were released on execution of a bond and detention certificate for waiver of demurrage and container detention charges were also granted. Similar request was made by the petitioner in the said application under Section 110A of the Act. The Adjudicating Authority namely, the Additional Commissioner of Customs (Group-1), Chennai passed orders on 27.12.2018, permitting provisional release of the goods subject to three conditions namely, furnishing of bond equal to the value of the seized goods; bank guarantee/security deposit to cover the entire amount of differential duty; and bank guarantee/security deposit in lieu of fine and penalty amounting to 25% of the differential duty. This order was issued with the approval of the Commissioner of Customs, Chennai-II Commissionerate. Subsequently by another communication dated 01.01.2019, in continuation of the communication dated 27.12.2018, the same three conditions were reiterated , except a change in the value of the bond, the amount to be furnished as bank guarantee or security deposit towards differential duty and penalty. This order dated 01.01.2019 was impugned in W.P.No.540 of 2019.

4. The learned Single Judge heard all the three Writ Petitions together and by the impugned order partly allowed W.P.No.540 of 2019 and modified the conditions imposed for provisional release of the goods by directing the petitioner to furnish a bond equal to the value of the seized goods i.e., Rs.40,82,00,925/-; furnish a bank guarantee/security deposit to cover 30% of the differential duty; bond and bank guarantee to be furnished within a period of seven (7) working days from the date of receipt of copy of the order; and on receipt of such bond and bank guarantee/security deposit, the adjudicating authority was directed to provisionally release the goods forthwith. In the light of the order passed in W.P.No.540 of 2019, it was observed that no further orders are required in W.P.Nos.33269 & 33276 of 2018. Accordingly, those Writ Petitions were closed.

5. Mr.Vijay Narayan, learned Senior counsel assisted by Dr.S.Krishnanandh, learned counsel appearing for the appellant contended that the condition imposed by the learned Writ Court directing furnishing of a bank guarantee/security deposit to cover 30% of the differential duty is onerous and not sustainable. It is submitted that despite the factual position that the goods imported by the petitioner were of Sri Lankan origin, the DRI has detained the goods on a reasonable belief that they were not of Sri Lankan origin despite the fact that the imports were covered by certificates of origin issued under the treaties namely ISFTA/SAFTA entered into between the Government of India and the Government of Sri Lanka. It is

submitted that the detention/seizure was per se illegal in the light of the imports being covered by the certificates of origin issued by the competent authority at Sri Lanka. The learned counsel referred to the decisions of the Division Bench of this Court, where the goods which were detained by the department and provisionally released on execution of bond without the need of furnishing any bank guarantee/security deposit and there is no reason as to why the petitioner should be directed to furnish a bank guarantee to cover 30% of the differential duty. Further, it is submitted that the certificates of origin were further certified by the Sri Lankan authorities and there is no reason for the DRI to detain the consignment and grant provisional release imposing onerous conditions when similarly placed persons were permitted to clear the goods provisionally on furnishing of a simple bond. Reference was made to the circular No.35/2017-CUS., dated 16.08.2018, wherein the Central Board of Excise and Customs observed that depending on the specific nature of a case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated in the circular. It is submitted that this condition in the circular was ignored by the department while passing the order dated 01.01.2019. Reference was made to a communication emanating from the Customs Authorities in Sri Lanka to the DRI, dated 06.12.2018, wherein it was stated that all certificates of origin pertaining to import of black pepper and Arecanuts from Sri Lanka were true and genuine, and issued by the competent authority at Sri Lanka and all the goods exported under the said certificates of origin were the produce of Sri Lanka. This communication is stated to have been forwarded to the petitioner by their exporters. However, the DRI refused to accept the same under the guise of investigation. It is submitted that this communication was not placed by the department before the learned Writ Court and it is the petitioner, who mentioned about the said communication and only after the original file was produced before the Writ Court, the same came to light. The communication, dated 06.12.2018 has clearly certified regarding the genuineness and correctness of the certificates of origin produced by the petitioner and also the fact that the country of the origin of the goods was Sri Lanka. Inspite of the Writ Court having queried the officials of the DRI as to whether any further communication were received from Sri Lankan Customs in connection with the imports effected by the petitioner, the response was that the DRI has sent several communications, but they are not in receipt of any reply from their Sri Lankan counter-parts. It is therefore submitted that the learned Writ Court ought to have directed provisional release of the goods by directing the petitioner to furnish a bond without imposing any condition for furnishing a bank guarantee/security deposit to an extent of 30% of the differential duty. Further, it is submitted that similar imports effected through Krishnapattinam Port also ran into problems on account of the doubt expressed regarding the authenticity of certificates of origin and the country of origin of import of Arecanut and the Customs Authorities at Krishnapattinam Port applied circular No.35/2017-CUS., dated 16.08.2018, and permitted clearance of the Arecanut on execution of a bank guarantee of the 10% of the differential duty. Therefore, it is submitted that even putting the worst case against the petitioner, bank guarantee to the extent of 10% of the differential duty could have been adopted and if the same had been done, it would be an uniform application of the circular in respect of clearance of the identical goods in identical circumstances. Further it is submitted that the Writ Court did not grant any relief in W.P.Nos.33269 and 33276 of 2018 and both the Writ Petitions were closed without considering the prayer sought for by the petitioner for issuance of detention certificate for waiver of demurrage and container detention charges in terms of Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009. To substantiate the arguments advanced , the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of Union of India vs. Lexus Exports Pvt. Ltd. [1994 (71) ELT 348 (SC)] and Commissioner of Customs, New Dehli vs. Euroasia Global [2009 (236) ELT 627 (SC)].

6. It is further submitted that identical imports were effected through the Tuticorin Port and the goods were detained on similar grounds and such imports were effected by one M/s.Unique Spices, Kerala. The said importer filed Writ Petitions before the Madurai Bench of this Court in W.P(MD). Nos.997, 1023, 1027 and 1077 of 2019, praying for a direction upon the Customs Authority at Tuticorin to release and allow clearance of the Arecanuts imported by them as they were of Sri Lankan origin by taking into consideration the ISFTA Certificate issued by the Sri Lankan Competent Authority and as per the FSSAI Certificate. It is submitted that the said Writ Petitions were allowed as prayed for and the goods have also been released. It is submitted that the DRI has detained the consignments imported by the appellant doubting the Country of origin of the goods imported by the petitioner and in fact, the Director of Exports, Sri Lankan Customs vide a communication dated 06.12.2018 addressed to the Additional Director, DRI, Chennai stated that the Sri Lankan Customs conducted detailed enquiries with regard to the import of Arecanuts from Sri Lanka in respect of the containers sent as attachment to the said e-mails and their investigation and verification has revealed that all the containers of Arecanuts mentioned in the earlier emails are of Sri Lankan origin and have been exported from Sri Lanka in the certificate issued under IFSTA. Further, it was stated that the word transshipment in the earlier email was an inadvertent error and regret was expressed. Further it

was stated that the Sri Lankan Customs reconfirmed that all the Arecanuts exported from Sri Lanka referred to in the earlier emails sent by the Department are of Sri Lankan origin only and ISFTA certificate issued by the Ministry of Commerce (Sri Lanka) are genuine as investigation has revealed the same. Further it is submitted that in pursuance to the communication, dated 06.12.2018 from the Director of Exports, Sri Lankan Customs, the Additional Director, DRI, Chennai addressed the Additional Commissioner of Customs, Tuticorin vide letter dated 29.01.2019, enclosing the copy of the letter dated 06.12.2018 and based on the said communication, the goods have been released by the Tuticorin Customs. It is submitted that the DRI has failed to bring to the notice of this Court that along with the communication dated 06.12.2018 sent by the Sri Lankan Customs, there was an annexure containing 12 pages mentioning the code numbers and container numbers and the containers through which the goods have been imported by the petitioner also finds place in the verification list and there is no reason as to why the communication dated 06.12.2018 from the Sri Lankan Customs should not be taken into consideration for the goods imported by the petitioner when the same was taken into consideration for clearance of identical goods from the same supplier by the Tuticorin Customs. On the above grounds, the learned senior counsel submitted that the Court may direct the petitioner to furnish a bond and necessary directions may be issued for clearance of the goods and for issuance of detention/waiver certificates.

7. Mr.V.Sundareswaran, learned counsel for DRI contended that the Department is aggrieved by the order passed by the learned Writ Court modifying the conditions imposed in the order dated 01.01.2019, more so when the matter is still under investigation. It is further submitted that in W.P.No.540 of 2019, the DRI was not impleaded as a respondent and therefore, they had no occasion to file a counter affidavit and hence, they have filed an appeal challenging the correctness of the order passed in the Writ Petitions. It is submitted that the Customs Department had filed a counter affidavit clearly setting out that contrary to the claim of the petitioner, the DRI during the course of investigation has mustered huge tranche of 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 the goods were merely transshipped through Sri Lankan territory. With regard to the contention of the petitioner that the validity of the certificates of origin, it is stated that the documentary evidence mustered during the course of investigation indicate that the certificates have been obtained from the competent authority of Sri Lanka by suppressing vital information that the goods are other than of Sri Lankan origin

and they are merely transshipped through the territory of Sri Lanka which tantamounts to fraudulent procurements of certificates of origin and therefore deemed "Fraudulent" in terms of the ISFTA/SAFTA agreement and extant executive instructions. Thus the learned counsel seeks to justify the order dated 01.01.2019 and the conditions imposed therein.

8. With regard to the effect of circular dated 16.08.2017, it is submitted that the circular is a guideline issued by the CBEC to be followed in exercise of discretionary power vested with the adjudicating authority under Section 110A of the Act to balance the competing interest, that of the revenue and that of the importers and the power is exercised on a case to case basis and uniformity of treatment cannot be a rule even if the commodity is identical. It is further submitted that it is evident from the letter dated 06.12.2018, sent by the Director of Exports, Sri Lankan Customs that earlier communication from the Central Intelligence Unit of Sri Lankan Customs confirmed the consignments as transshipments, i.e. the goods were not of Sri Lankan origin, but later the Director of Exports, Sri Lankan Customs vide letter dated 16.12.2018, appears to have retracted from the said stand. It is submitted that the Director of Exports, Sri Lankan Customs is not the competent authority/nodal officer under the treaty and therefore, the veracity of the contents of the said letter have to be verified and the matter requires further investigation. Further, it is submitted that if according to the petitioner, the goods were not transshipped from Sri Lanka, then the petitioner could have very well furnished the export documents/declaration in the Automated System for Customs Data (ASYCUDA). In fact the petitioner was issued summons dated 07.01.2019 and 14.01.2019 calling upon them to provide the export documents/declarations filed by the exporter in Sri Lanka as the petitioner claimed that the goods were of Sri Lankan origin and exported from Sri Lanka which has not been complied with till date. It is further submitted that the petitioner has claimed exemption and the onus is on the petitioner to prove that he is entitled to exemption and in this regard, reliance was placed on certain decisions.

9. It is further submitted that the contentions putforth by the petitioner that they are not in a position to produce the export documents filed by the Sri Lankan exporter as they are not parties to the document, is a statement which should be rejected, since the value of the transaction is huge and nothing prevented the petitioner from requesting their exporter to furnish copies of those export documents filed in the Customs Information System of Sri Lanka and produce the same before the DRI/Customs. The fact that they have not produced the same till date would show that there is no genuineness in the claim made

by the petitioner.

10. Ms.R.Hemalatha, learned counsel appearing for the Customs adopted the stand taken by the DRI and sought to sustain the order of provisional release dated 01.01.2019 by contending that the same has been passed in conformity with the circular dated 16.08.2017 issued by the CBEC. Further, it is submitted that the DRI is investigating the matter and in such circumstances, the discretion has been properly exercised by the Customs Authority and an order has been passed under Section 110A of the Act dated 01.01.2019 and there is no error in imposing such conditions. Further, it is submitted that the scope of judicial review on the powers exercised under Section 110A of the Act is restricted and narrowed down only to the extent of reasonability in exercise of such discretion. It is submitted that the learned Writ Court ought not to have modified the conditions imposed by the Department while granting provisional release, when the investigation thus far made by the DRI, would go to show that the country of origin is not Sri Lanka and attempt has been made to avail ineligible benefits under ISFTA/SAFTA.

11. We had heard the matter on several dates and on 31.01.2019 since the contentions were advanced based upon the communications emanating from Sri Lankan Customs were pressed into service by the learned Senior counsel for the petitioner, this Court thought it fit to direct the officers of the DRI to be present in Court along with the original files on 04.02.2019. Accordingly, the original file was produced before us and considering the confidentiality involved in the matter, since investigation in progress, we made it clear to the learned counsel for the appellant that the files will be shown only to the Court for its perusal and would be returned back to the DRI. Accordingly, the Deputy Director of DRI, Chennai was present in Court along with the files and put forth his submissions and has drawn our attention to certain documents which they have recovered during the course of investigation and based on those documents, it is the stand of the DRI that there is sufficient material to show that it is a case of transshipment and the goods are not of Sri Lankan origin. Since the matter is still under investigation, we do not wish to express anything on whatever material has thus far been procured by DRI and propose to decide the correctness of the order passed in the writ petition, modifying the conditions imposed by the Customs for provisional release as imposed in its order dated 01.01.2019. Since the Department was confronted with the order passed by the Tuticorin Customs releasing the goods on furnishing of a simple bond, we directed the Deputy Director of DRI to file an affidavit setting out the factual position as to under what circumstances the consignments were released by Tuticorin

Customs, as it prima facie appeared that it is pursuant to the communication sent by the DRI to the Additional Commissioner of Customs, Tuticorin, dated 29.01.2019. Accordingly, an affidavit dated 12.02.2019 was filed by the Deputy Director of DRI, Chennai.

12. We have elaborately heard the learned counsels for the parties and given our anxious consideration to the facts and circumstances of the case.

13. The power under Section 110A of the Customs Act is a discretionary power vested with the adjudicating authority. The petitioner approached this Court challenging the seizure mahazar contending that the same is illegal. In the said Writ Petition, interim direction was issued by giving liberty to the petitioner to approach the authorities under Section 110A of the Act requesting for provisional release of the goods. In terms of Section 110A of the Act, any goods/documents/things seized under Section 110A, may, pending the order of the adjudicating authority be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require. The scope of judicial review on the exercise of such discretionary power is undoubtedly limited. The Court would be entitled to examine the correctness of the decision making process and whether there is any perversity in the exercise of such discretion, but may not substitute its opinion to the decision taken and in rarest of rare cases will do so when it finds that the exercise of discretion was not done in a proper manner or the conditions imposed were onerous. With this caveat, we proceed to examine the correctness of the order dated 01.01.2019 granting provisional release of the goods in question. In the said order, the Additional Commissioner of Customs has directed the petitioner to furnish a bond of equal to the value of seized goods, i.e. Rs.40,82,00,925/-; bank guarantee/security deposit to cover the entire amount of differential duty, i.e. Rs.41,94,30,781/-; and bank guarantee/security deposit in lieu of fine and penalty amounting to 25% of the differential duty, i.e. Rs.10,48,57,695/-. The Writ Court had modified the second condition and directed the petitioner to furnish a bank guarantee/security deposit to cover 30% of the differential duty. However, in the order passed in the Writ Petitions there is no specific mention about the bank guarantee/security deposit in lieu of fine and penalty, but it goes without saying that the Court was satisfied that if a bond of equal to the value of seized goods and bank guarantee/security deposit to cover 30% of differential duty would be sufficient to direct provisional release of the subject goods. This Court, in several decisions, have granted orders directing provisional release of the cargo subject to certain conditions. However, there can be no universal rule as to what would be the appropriate directions to

be issued while granting provisional release bearing in mind the interest of the stake holders, namely, the importer/exporter and the revenue. Therefore, we have to examine each case on its own merits and come to a correct conclusion. In the instant case, the task of establishing that the petitioner is entitled to clearance of the goods on furnishing of a simple bond is an uphill task. This is so because the petitioner claims the benefit of an exemption notification, whereby the benefit of treaties entered into between the Government of Sri Lanka and the Government of India is pressed into service. If such benefit is extended to the petitioner, then the petitioner would be entitled to clear the goods at concessional/NIL rate of duty. Therefore the DRI is right in contending that the onus is on the petitioner to establish that he is entitled to the benefit of the notification which is pursuant to the treaty entered into between the two countries. The benefit of exemption notification can be extended, if the goods in question are of Sri Lankan origin. The document which is vital to establish the same is the certificate of origin. The controversy in the present case revolves around the genuineness of the certificates of origin produced by the petitioner.

14. Notification No.19/2000-Cus (NT), dated 06.03.2000 had notified the Customs Tariff (Determination of origin of goods under the Free Trade Agreement between the Democratic Socialistic Republic of Sri Lanka and the Republic of India) Rules, 2000. The said Rules were enacted in exercise of the powers conferred under Section 5(1) of the Customs Tariff Act, 1975. Rule 3 deals with' determination of origin' and it states that no product shall be deemed to be the produce or manufacture of either country unless the conditions specified in the rules are complied with in relation to such products, to the satisfaction of the appropriate authority. In terms of Rule 4, the importer of the product shall at the time of importation make a claim that the products or produce or manufacture of the Country from which they are imported and such products are eligible for preferential treatment under the India-Sri Lanka Free Trade Agreement. The importer has to produce the evidence specified in the Rules. In terms of Rule 11, the products eligible for a certificate of origin in the form annexed to the Rules shall support preferential treatment issued by an authority designated by the Government of the exporting country and notified to the other Country in accordance with the certification procedures to be devised and approved by both the contracting parties. Thus, what is important to note is that there is an authority designated by both the Governments notified to each other and such authority has to take a decision in the matter.

15. In the case on hand, the petitioner has produced

certificates of origin stating that the goods imported are of Sri Lankan origin. However, investigation has commenced on the authenticity of the certificates of origin not at the instance of the DRI or the Customs Department, Chennai, but at the instance of Revenue Intelligence Unit in Sri Lanka. As explained by the Deputy Director, DRI in the affidavit dated 12.02.2019, the communications, which was sent by DRI were only addressed to the competent officer/nodal officer, as notified by the Sri Lankan Authorities. These communications are letters dated 31.10.2018 & 30.11.2018. However, a reply was sent by the Director of Export, Sri Lankan Customs, dated 06.12.2018 referring to letters of the DRI, dated 31.10.2018 & 30.11.2018, addressed to the Nodal Officer in Sri Lanka. This according to the DRI is a suo motu communication by the Director of Export, Sri Lankan Customs and it is not in response to a communication sent by DRI to Sri Lankan Customs. It is interesting to note that in the letter dated 06.12.2018, the Director of Exports, Sri Lankan Customs states that the word transshipment used in the earlier e-mail was in inadvertent error. Thus, it is prima facie clear that there has been a communication from the Nodal officer at Sri Lanka that the containers were transshipped and the goods are not of Sri Lankan origin. However, another authority namely, the Director of Export states that this is an inadvertent error. The correctness of the respective stand cannot be tested by us in a Writ proceedings and it is for the investigating authorities to take forward the matter. The petitioner heavily placed reliance on the orders based on which the cargo which was permitted to be cleared by the Tuticorin Customs. Infact, the communication dated 29.01.2019, from the Additional Director, DRI Chennai to the Additional Commissioner of Customs, Tuticorin appears to be the “trumpcard” of the petitioner. We directed the Deputy Director, DRI to explain and he has taken a stand in the affidavit dated 12.02.2019. We examined the contents of the communication dated 29.01.2019, the arguments advanced by the learned Senior counsel and the stand taken by the Deputy Director, DRI in his affidavit. On a plain reading of the communication dated 29.01.2019, it is seen that the DRI has not given any clean chit based on the communication dated 06.12.2018, emanating from the Director of Exports, Sri Lanka. The communication has been enclosed along with the letter dated 29.01.2018 for ease of reference and for necessary action as deemed fit by the Additional Commissioner of Customs, Tuticorin. The letter further states that verification report for all 13 numbers of certificates of origin, which would be received from Sri Lanka Customs Authority will be communicated in due course. Therefore, the communication dated 29.01.2019, cannot be taken to be as if DRI has accepted the correctness of the certificates of origin in respect of the consignments which landed in Tuticorin Port. The letter encloses the copy of the communication dated 06.12.2018, from the Director of Exports, Sri Lankan Customs and from the language employed in the communication, it is clear that it is left to the discretion of the Adjudicating Authority namely, the Additional Commissioner of Customs, Tuticorin. Therefore, on the strength of the communication dated 29.01.2019, we are of the definite view that the petitioner cannot make out a case for treating their consignments on par with the consignments which were cleared by the Tuticorin Customs.

16. The second trumpcard is the order passed by the Madurai Bench in W.P.(MD).No.997 of 2019 etc., dated 29.01.2019. In our view, the said order cannot be treated as a precedent. As the learned Single Judge examined the facts therein and came to a conclusion that the documents submitted by the petitioner therein has not been shown to be not genuine or in other words there is no material to show that the documents submitted by those petitioners are not genuine. In any event, assuming an illegality had been committed, there can be no equality in an illegality. Each bill of entry has to be examined on the declaration effected in it and merely because few consignments were allowed to be cleared can be no ground to say that similar treatment should be uniformly applied, especially when the matter is under investigation regarding the genuinity and the certificates of origin.

17. As mentioned by us earlier, we do not wish to record anything which we have seen in the original files, as the matter is only in the stage of investigation and it is for the DRI to take forward the investigation in the manner known to law. As pointed out earlier, DRI has not accepted the validity of the certificates of origin in its letter to the Additional Commissioner of Customs, Tuticorin, dated 29.01.2019. The letter qualifies the stand taken by them.

18. With regard to the plea raised by the petitioner that they are not in a position to produce the export document from their Sri Lankan Exporter stating that they are not parties to the document is a stand which is not convincing. Admittedly, the transaction runs to several crores of rupees and any prudent businessman, if he is of the firm view that the actions done by him are genuine, he will leave no stone unturned to vindicate his cause. The Deputy Director, DRI, Chennai during the course of his submission stated that statement has been recorded from the importer who appears to have stated that they have no agreements entered into between the petitioner and the Sri Lankan Exporter. We were rather surprised to be informed about the same, but however, we cannot take cognizance of the said submission, since the case is under investigation.

19. We find that the Sri Lankan Customs has addressed the Director General, DRI, New Delhi and furnished the names of two officers from the Central Intelligence Directorate to co-ordinate with the Indian Customs with the aim of sharing information and intelligence related to customs cases, according to law. This nomination is in terms of Rule 11 of the 2000 Rules notified vide notification dated 06.03.2000. In the same communication, the Sri Lankan Customs Authorities have requested the Director General DRI, New Delhi to furnish the names of Nodal Officers from their end and accordingly, it appears that two officers have been nominated by name and not by designation. Therefore, DRI is right in their submission stating that if the benefit of ISFTA scheme is to be extended to a particular consignment, then the Nodal officers who have been appointed under the said Rules would be the competent person to certify regarding the correctness of the information furnished by an importer in India based upon documents filed by the exporter in Sri Lanka. The treaties between two nations require to be treated with utmost sanctity and any attempt made to deviate or get over the conditions under the treaty should be dealt with firmly. However we do not express anything on the merits of the allegations against the petitioner, since the matter is under investigation. Therefore, in our considered view the peculiar facts and circumstances of this case warranted appropriate conditions to safeguard the interest of the revenue and this in our opinion has been rightly done by the Customs Authorities, when passing the order dated 01.01.2019 and the petitioner has not made out any case to interfere with the conditions imposed in the said order.

20. Therefore, for the reasons assigned by us earlier, we find that the conditions imposed in the order of the provisional release dated 01.01.2019, under Section 110A does not call for any interference. We find that the petitioner has not been able to make out case of any procedural irregularity or any perversity in the decision. Thus, the condition imposed is not liable to be interfered.

21. With regard to the claim for issuance of detention certificate for waiver of demurrage and container detention charges, we find that the petitioner would be entitled to the same, because the consignment has been detained at the instance of the DRI for undertaking the investigation. In the event, the petitioner complies with the conditions contained in the order of provisional release dated 01.01.2019, the competent authority is directed to issue detention certificate for the purpose of waiver of demurrage and container detention charges from the date of detention till the date of release.

22. So far as the challenge to the seizure memorandum, dated 01.12.2018, is concerned, the same cannot be a subject matter of challenge in a Writ proceedings, because a seizure mahazar is a document which is drawn to justify as to why the goods are to be seized. Therefore, the question of entertaining a Writ Petition against the seizure mahazar does not arise. Hence, the challenge to the seizure mahazar has to necessarily fail, subject to the rider that the petitioner would be entitled a detention certificate for waiver of demurrage and container detention charges, as observed above.

For the above reasons,

(i) W.A.Nos.329 & 355 of 2019, are allowed;

(ii) W.A.No.240 of 2019 is dismissed; and

(iii) W.A.Nos.236 & 237 of 2019 are also dismissed except with the direction issued for grant of detention certificate subject to the petitioner complying with the conditions in the provisional clearance order dated 01.01.2019. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

pbn

To

1.The Assistant / Deputy Director,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

2.The Senior Intelligence Officer,
Directorate of Revenue Intelligence,
No.27, G.N.Chetty Road,
T.Nagar, Chennai-600 017.

3.The Assistant / Deputy Commissioner of Customs,
Group-1, Chennai II Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001

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

+2cc to Mr.B.Sathish Sundar, Advocate, S.R.No. 17428
+1cc to Mr.R.Hemalatha, Advocate, S.R.No.17056
+1cc to Mr.V.Sundereswaran, Advocate, S.R.No. 16906

AD(CO)
GN(07/03/2019)