

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2019

JUDGMENT RESERVED ON 16.04.2019	JUDGMENT PRONOUNCED ON 25.04.2019
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CORAM:

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

WRIT APPEAL NOS.1215 OF 2019
AND 938, 941, 943, 984,
1022, 1023, 1025, 1026 AND 1027 OF 2019
AND
C.M.P.NOS.7074, 7083, 7088, 7375, 7689, 7690, 7691,
7692, 7694, 7695, 7696, 7700, 7702 AND 8396 OF 2019

1.THE COMMISSIONER OF CUSTOMS,
CHENNAI-II COMMISSIONERATE,
NO.60, RAJAJI SALAI,
CUSTOMS HOUSE, CHENNAI-600 001.

2.THE JOINT/ADDL COMMISSIONER OF
CUSTOMS (GR-5),
NO.60, RAJAJI SALAI, CUSTOMS HOUSE,
CHENNAI-600 001.

.... APPELLANTS 1 & 2 IN WA.NOS.1215, 938,
943, 1022, 1023, 1025, 1026 & 1027/19

3.THE ASSISTANT/DEPUTY COMMISSIONER OF
CUSTOMS (GR-5),
NO.60, RAJAJI SALAI,
CUSTOMS HOUSE, CHENNAI-600 001.

.... APPELLANTS 3 IN WA.NOS.1215, 984/2019

-VS-

M/S.CITY OFFICE EQUIPMENT,
REP., BY ITS PROPRIETOR,
PAWAN KUMAR JHUNJUNWALA,
NO.10, AZIZ MULK 4TH STREET,
THOUSAND LIGHTS, CHENNAI-600 006.

... R1 IN WA.NOS.1215/19, 94/2019

1 M/S. EXCEL COPIERS,
UB-14D, ARUNACHAL BHAWAN BARAKHAMBA ROAD,
NEW DELHI,
REP BY ITS PROPRIETOR MR.ANBKIT KHETTERPAL.

... R1 in WA.No.938/2018

2 THE REGIONAL JONIT DIRECTOR,
SHASTRI BHAVAN, NUNGAMBAKKAM, CHENNAI-6

(R2 SUOMOTO IMPEADED AS PER THE ORDER OF THIS COURT DATED
20/03/2019 MADE IN WA.NOS.938, 941 AND 943/2019 AND
CMP.NOS.7074, 7083 AND 7088/2019 ON THE FILE OF THIS COURT)

M/S. DELHI PHOTOCOPIERS,
B-30/2, 3RD FLOOR, JHIMIL INDUSTRIAL AREA,
DELHI 110095,
REP.BY ITS PARTNER MR.JITENDER MOHAN

... R1 IN WA.NO.943/2019

M/S.SKYLARK OFFICE MACHINES,
SHOPO NO.4, GROUND FLOOR,
DOOR NO.10,
AZIZ MULK 4TH STREET,
THOUSAND LIGHTS,
CHENNAI 600 006,
REP BY ITS PROPRIETOR,
SHRI ROHIT JHUNJHUNWALA

... R1 IN WA.NO.984/2019

M/S.ATUL AUTOMATION PVT LTD,
NO.8 BENTINCK STREET,
TAHER MANSION,
KOLKATA- 700001,
WEST BENGAL,
REP BY ITS DIRECTOR,
ATUL KAMDAR

... R1 IN WA.NO.1022/19, 1023, 1025, 1026 & 1027/19

Prayer:

APPEALS under Clause 15 of the Letters Patent to set aside
the order dated 22.02.2019 made in Writ Petition No.26054,
32646, 32649, 32642, 26049, 32154, 32156, 32157, 32159 & 32155
of 2018 on the file of this Court.

Prayer in WP.NOS. 26054, 32646, 32649, 32642, 26049, 32154,
32156, 32157, 32159 & 32155/18:

directing the respondents herein to assess and clear the goods under import viz. 202, 476, 527, 132, 466, 107, 544, 272, 136 & 119 units of Old and Used Digital Multifunction Print and copying Machines covered under Bill of Entry Nos.6818580, 7893233, 7374355, 7288405, 7009656, 7186237, 7658481, 7745849, 7658186 & 7658190 dated 15.6.2018, 03/09/18, 26/07/18, 20/07/2018, 29/06/2018, 12/07/2018, 16/08/2018, 23/08/2018, 16/08/2018 & 16/08/2018 upon the payment of applicable duties of customs as determined by the Chartered Engineer vide its report dated 29.6.2018, 14/09/2018, 17/08/2018, 30/07/2018, 10/07/2018, 30/07/2018, 05/09/2018, 03/09/2018, 01/09/2018 & 01/09/2018 and in terms of the judgment rendered by the Honourable division bench of the High court of Andhra Pradesh and Teleangana at Hyderabad vide order dated 6.4.2018 in W.P.No.2728/2018 which order came to be accepted by the Central Board of Indirect Tax and customs, New delhi, vide their communication letter dated 14.6.2018 deciding not to file SLP before the Honourable Apex court as against the said orders and also by considering the petitioner's rep dated 06/07/18, 17/09/18, 17/09/18, 17/09/18, 20/07/18, 18/09/18, 18/09/18, 18/09/18, Nil & 18/09/18 respectively.

For Appellant (in W.A.No.1215/2019)	:	Mr.K.S.Ramaswamy Senior Standing Counsel
For Appellant (in W.A.Nos.1022, 1023, 1025, 1026 & 1027/2019)	:	Mrs.Hema Muralikrishnan, Senior Standing Counsel
For Appellant (in W.A.Nos.938, 941 & 943 of 2019)	:	Mrs.R.Hemalatha, Senior Standing Counsel
For Appellant (in W.A.No.984 of 2019)	:	Mr.T.L.Thirumalaisamy Senior Standing Counsel
For Respondents/ Writ Petitioners (in all Appeals)	:	Mr.Vijay Narayan, Senior Counsel for Mr.N.Viswanathan
For Respondent/DGFT	:	Mr.V.Chandrasekaran, Standing Counsel

COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals are directed against the common order dated 22.02.2019 passed in the writ petitions filed by the respondents/writ petitioners praying for issuance of a Writ of Mandamus to direct the appellants to assess and clear the goods imported by them, viz., Old and Used Digital Multifunction Print and Copying Machines (for brevity, "MPCMs") covered under the respective bills of entries upon payment of applicable duties of customs as determined by the Chartered Engineer, vide its report, and in terms of the judgment rendered by the Division Bench of the High Court Andhra Pradesh and Telangana at Hyderabad in W.P.No.2728 of 2018 dated 06.04.2018 which was accepted by the Central Board of Indirect Tax and Customs, New Delhi.

2.With the consent of the learned counsel on either side, W.A.No.1215 of 2019 is taken as the lead case.

3.The respondent imported MPCMs with accessories and attachments through the Chennai Customs classifying the goods under CTH 84433100. The rate of duties applicable was zero percent BCD as exempted under Serial No.2 of Notification No.24/2005-Cus., dated 01.03.2005 with zero percent surcharge and 18% IGST. The consignment was ordered for examination under first check appraisalment system as they being second hand / used machinery. The goods were examined in the presence of the Chartered Engineer approved by the Director General of Foreign Trade (DGFT) and the reports were forwarded. The report stated that no major repairing or reconditioning was noticed by the Chartered Engineer who also confirmed that the goods are not e-wastes and non-hazardous. The Department took a stand that the import of the second hand machines are allowed for clearance subject to fulfilment of the following three conditions:-

(i) Production of authorisation/import license issued by the DGFT authorities since the subject goods are restricted under para 2.31 of FTP 2015-20.

(ii) Registration under the provisions of "Requirements for Compulsory Registration" with BIS as per the Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order 2012, dated 07.09.2012 and subsequent orders dated 25.06.2013 and 07.11.2014 issued by MeitY.

(iii) Compliance of procedures as per the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 & E-Waste Management Rules, 2016.

The appellant/Department stated that the goods imported by the respondent can be permitted for clearance only after production of authorisation/import licence issued by the DGFT authorities or any other notification or clarification issued by the DGFT and they have to fulfil the other two conditions, viz., BIS certificate and compliance of procedures as per the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and E-Waste Management Rules, 2016.

4.The respondent/importer had complied with the condition as required under the Hazardous and other Wastes (Management & Transboundary) Rules, 2016 and E-Waste Management Rules, 2016. However, they did not produce the authorization/import licence issued by the DGFT authorities and BIS certificate as required under the Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order 2012, dated 07.09.2012, and subsequent orders dated 25.06.2013 and 07.11.2014 issued by the Ministry of Electronics and Information Technology (MeitY). Thus, the stand taken by the appellant/Department was that all the three mandatory requirements under the relevant Act/Rules have to be independently fulfilled for clearance of the second hand machinery. Faced with this situation, the respondent/writ petitioner sought permission to warehouse the goods in terms of Section 49 of the Customs Act, 1962 (hereinafter referred to as "the Act") and they required time to produce necessary documents and fulfil the statutory compliance before seeking for clearance of the imported goods. The respondent after having warehoused the goods, submitted representation dated 06.07.2018 to release the goods provisionally against PD bond and cash deposit as per the percentage followed by the Custom House. In the said representation, the respondent contended that if the import of such second hand machinery is restricted/curtailed, it may result to closure of Indian Manufacturers and the "Make in India" policy of the Government may become an exercise in futility. With regard to the MeitY/BIS Guidelines - Rules, the respondent took a stand that the subject machines are not notified in the order and notification of MeitY and it would not be open to the custom authorities to insist for registration of the subject machines in terms of the order dated 07.09.2012 and the notification of MeitY dated 07.11.2014.

5.The respondent relied upon the decision of the High Court of Andhra Pradesh in W.P.No.2728 of 2018 dated 06.04.2018. The representation dated 06.07.2018 was received by the appellant/Department on 17.07.2018. Immediately thereafter, on 27.07.2018, the respondent filed the writ petition for the aforementioned relief. In the writ petition, the Customs Department (appellants) alone were impleaded as respondents and

the authorities of DGFT and MeitY were not made party respondents. The prayer sought for was resisted by the appellant/Department that the three conditions mentioned above have to be independently fulfilled for clearance of the goods and admittedly, the respondent/writ petitioner did not fulfil two of the three conditions and therefore, they are not entitled for clearance of the goods.

6.It was argued that the appellants having warehoused the goods on their own volition in terms of Section 49 of the Customs Act, Section 110 of the Act cannot be invoked. The learned Single Bench by the impugned order directed the appellants to release the consignments of MPCMs in cases where there is no challenge to the policy guidelines, upon the respondents furnishing a bond for 90% of the enhanced valuation of the goods, and security for the remaining 10% within one week from the date of furnishing of the aforesaid security. The learned Writ Court while issuing the said direction, referred to the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs vs. Athul Automations Private Limited [Civil Appeal Nos.1057, 1058, 1060 and 1059 of 2019: dated 24.01.2019] and followed the condition imposed by the Hon'ble Supreme Court by directing the respondent to furnish a bond for 90% of the enhanced valuation and security for the remaining 10%. The correctness of the direction issued is being challenged before us.

7.We have heard Mr.K.S.Ramaswamy, Mrs.Hema Muralikrishnan, Mrs.R.Hemalatha and Mr.T.L.Thirumalaisamy, learned Senior Standing Counsels for the appellant/Revenue; Mr.Vijay Narayan, learned Senior Counsel, for Mr.N.Viswanathan, learned counsel for the respondents/writ petitioners; and Mr.V.Chandrasekaran, learned Standing Counsel for the Director General of Foreign Trade, which Department was suo motu impleaded by us in one of these appeals.

8.The goods imported by the respondent/writ petitioner are second hand machinery. In terms of the policy guidelines issued by the DGFT, authorisation/import licence ought to have been obtained, as the goods are restricted for import in terms of Para 2.31 of the Foreign Trade Policy 2015-20.

9.Before the learned Writ Court, there was no challenge to the policy guidelines or the notification issued by MeitY. This has been noted by the learned Single Bench in para 20 of the impugned order. Thus, the respondent would have to reconcile with the fact that the goods imported by them require prior authorisation/import licence for being imported into India. Apart from the requirement to have an authorisation/import licence, there are two other requirements to be fulfilled by the importer for being entitled to seek clearance of the goods. The

three conditions which we have noted above are independent and they are not optional, in other words, all the three conditions are required to be fulfilled. We say so because, in the batch of cases before us, none of the respondents/writ petitioners have either challenged the Foreign Trade Policy or the Statutory Notification issued by MeitY.

10. The appellants have stated before us that the respondent complied with the procedures as per the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and E-Waste Management Rules, 2016 to certain extent. We take it that, there has been fulfilment of one of the three conditions, yet the respondent/importer has not fulfilled two of the conditions, viz., authorisation/import licence and BIS certificate as required under the 2012 order dated 07.09.2012 and subsequent orders dated 25.06.2013 and 07.11.2014 issued by MeitY.

11. Before us, the respondent do not dispute the fact that they do not have authorisation/import licence, but the fact remains that the respondent/writ petitioner had applied for such licence and in most of the cases, the licence so requested has been rejected by MeitY. The particulars in this regard have been furnished by the authorities of DGFT in the form of a tabulated statement and by way of illustration, we take the case of the respondent in W.A.No.1215 of 2019, viz., M/s.City Office Equipment, which had filed the bill of entry on 15.06.2018. The information produced before us shows that their application for grant of import licence was rejected as not recommended by MeitY vide OM No.16(19)/2018-IPHW dated 07.03.2018. This fact appears to have been not placed before the learned Writ Court, nor explicitly stated in the affidavit filed in support of the writ petition. This fact would not have come to light, but for this Court suo motu impleading the authorities of DGFT as a party to one of these appeals. In all fairness, the respondent/writ petitioner ought to have impleaded the authorities of the said two Departments, since there is a restriction for import of the subject goods and it is the authorities of DGFT and MeitY who would have a say in the matter, as the Customs Department is only an implementing authority. Thus, we would be fully justified in arriving at a conclusion that the respondent/writ petitioner was fully aware of the fact and that an import licence and appropriate BIS clearance certificate under the relevant order is a prerequisite and having been well acquainted with the legal position, they have applied for grant of such licence which was either rejected or not entertained or kept pending without orders. In such a factual position, we would be fully justified in holding that the appellant can insist upon orders for provisional release of the imported goods by raising a plea that the provisions of the Foreign Trade Policy and the

various notification and orders are not sustainable or inapplicable to the goods imported by them. In fact, this was rightly noted by the learned Single Bench in the impugned order that there is no such challenge to the Foreign Trade Policy or any notification or order.

12.The next question to be considered is whether Section 110A of the Customs Act could be invoked by the respondent/writ petitioner. The representation dated 06.07.2018 (17.07.2018) does not explicitly state under which provision of the Customs Act they requested for clearance of the goods. It merely requested for provisional clearance. The relevant provision under the Customs Act which provides for provisional clearance of goods is Section 110A. The said provision would apply to goods, documents or things seized under Section 110, 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. Thus, prerequisite for Section 110A to be attracted is seizure of the goods under Section 110 and in terms of sub-Section (1) of Section 110, if the proper officer has reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods. Admittedly, till date, the goods have not been seized. The respondents do not dispute the said factual position. This is more so because, the goods have been warehoused in terms of Section 49 of the Act.

13.Section 49 of the Act states that where in the case of any imported goods, whether dutiable or not, entered for home consumption, the custom authorities is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored for a period not exceeding thirty days in a public warehouse or in a private warehouse if facilities for deposit in a public warehouse are not available, but such goods shall not be deemed to be warehoused goods for the purposes of Customs Act and accordingly, the provisions of Chapter IX (warehousing) shall not apply to such goods. Proviso to Section 49 states that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time. This warehousing is done on the application made by the respondents/importer requesting time for production of requisite documents and the Assistant Commissioner of Customs being satisfied that the goods cannot be cleared within the reasonable time, pending clearance, has permitted the goods to be stored in a warehouse. Thus, in the absence of seizure, the provision of Section 110A would be inapplicable.

14.It is the argument of Mr.Vijay Narayan, learned Senior Counsel that it is not necessary for a formal order of seizure to be effected, but it is sufficient to show that the goods having been detained and orders have not been passed for clearance of goods, the respondents/importers are entitled to seek for provisional clearance. Reliance was placed on the decision of the Hon'ble Division Bench of the High Court at Calcutta in E.S.I. Ltd. vs. Union of India reported in 2003 (156) ELT 344 Cal.

15.The learned Senior Standing Counsel for the appellants would contend that as long as there is no order of seizure, Section 110A will not be applicable, nor the principles laid down thereunder can be made applicable.

16.Before we examine the decision in the case of E.S.I. Ltd. (supra), we need to point out that request for provisional clearance was made vide representation dated 06.07.2017 received by the Department on 17.07.2017. The writ petition was filed on 27.07.2018. Thus, within ten days from the date on which representation was given, the respondent/importer approached this Court seeking for issuance of a Writ of Mandamus to direct release of the goods. Courts have repeatedly held that a Writ of Mandamus should not be issued to dispose of representations, that too, without affording reasonable time to the authorities to act upon such representations. From the facts, it is clear that the respondent/importer did not afford reasonable time to the Department to consider the representation more so when they have warehoused the goods at their option in terms of Section 49 of the Act.

17.In the case of E.S.I. Ltd. (supra), the goods which were imported were originally detained and subsequently, the rooms in which the goods were kept were sealed by the Customs officers and therefore, the Court held that the importer's dominion over the goods initially detained went out of the hands of the importer, after the rooms in which the goods have been kept were sealed by the customs officers and it would tantamount to seizure for all practical purposes. In the cases on hand, there is nothing placed on record by the respondent/importer that there is a prohibitory order prohibiting them from seeking clearance of the goods. The stand of the Department is that three conditions have to be fulfilled by the importer individually and independently and they had fulfilled only one of the three conditions and the remaining two are yet to be fulfilled and it is the respondent/writ petitioner, who had requested time and based on such request, warehousing was permitted. Thus, in our considered view, the decision in the case of E.S.I. Ltd. (supra) is clearly distinguishable on facts.

18.The learned Single Bench had disposed of the the writ petitions by directing clearance of the goods subject to the condition that the importer furnishes a bond for 90% of the enhanced valuation and the remaining 10% by way of security to mean that the security should be way of bank guarantee. This direction was in terms of the decision of the Hon'ble Supreme Court in Athul Automations Private Limited (supra).

19.Before us, the Revenue would strenuously contend that the decision of the Hon'ble Supreme Court in Athul Automations Private Limited (supra) would not be applicable to the facts of the present case. We test the stand of the Revenue for its correctness. Before we proceed to go into the said decision, we may at the very outset point out that the decision in Athul Automations Private Limited (supra) was rendered by the Hon'ble Supreme Court while testing the correctness of the order passed by the Tribunal. In other words, the case proceeded through a normal route of adjudicatory process culminated in an order of the Tribunal which was challenged before the High Court and which order was challenged before the Hon'ble Supreme Court. In the said case, the respondents/importers during October-November 2019 imported certain consignments of MultiFunction Devices (Digital Photocopiers and Printers) (MFDs). The Commissioner of Customs held that the imports were in violation of the Foreign Trade Policy and Rule 15(1) (2) of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016. Redemption fine was imposed under Section 125 of the Act and consignment was released for re-export only; penalty was also imposed under Section 112(a) along with penalty under Section 114AA of the Act; and personal penalty on the Directors. Before the Tribunal, the importers did not contest that the import was in violation of the Foreign Trade Policy having been made without the necessary prior authorisation. The Tribunal held that MFDs imported by them did not constitute "waste" under Rule 3(1)(23) of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and had a utility life of 5 to 7 years, as certified by the Chartered Engineer. Release of the consignment was directed under Section 125 of the Act, as the importers therein were held to have substantially complied with the requirements of Rule 13 of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 read with Schedule VIII Entry 4(j) except for the country of origin certificate. The Tribunal further noticed that earlier, similar consignments of the importers and others have been released at Calcutta, Chennai and Cochin Ports upon payment of redemption fine.

20.The Revenue preferred appeal to the High Court which held that the MFDs correctly fell in the category of "other wastes"

under Rule 3(1)(23) of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 read with Part B and Part D of Schedule II Item B1110 dealing with used MultiFunction Printer and Copying Machines. Further, the High Court held that MFDs were not prohibited but restricted items for import. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value with further liberty to the DGFT along with directions. The Revenue argued before the Hon'ble Supreme Court to sustain the order of the adjudicating authority and contended that the goods were rightly permitted to be cleared for re-export. The importers sought to sustain the order and direction issued by the High Court.

21. It was argued that the consignment was not prohibited, but a restricted item. Section 125 of the Act vests discretion in the authority to levy fine in lieu of confiscation and the Department has in the past permitted release of MFDs on levy of redemption fine and the discriminatory treatment with regard to the present consignment is unjustified. The Hon'ble Supreme Court pointed out that the importer did not possess the necessary authorisation for their import and the customs authorities therefore, prima facie cannot be said to be unjustified in detaining the consignment. It further held that merely because earlier on more than one occasion, similar consignments of the importer and others have been cleared by the customs authorities at Calcutta, Chennai or Cochin ports on payment of redemption fine cannot be a justification simpliciter to demand a parity of treatment for the present consignment also. Further, the defence that the DGFT had declined to issue authorisation did not appeal to the Hon'ble Supreme Court.

22. The Hon'ble Supreme Court held that harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value and accordingly, held that there is no error with the conclusion of the Tribunal affirmed by the High Court. Thus, the importer was entitled to redemption of the consignment on payment of the market price at the reassessed value by the customs authorities with fine under Section 112(a) of the Act. Further, the Hon'ble Supreme Court noted that the Chartered Engineer who inspected the consignment had certified that MFDs were capable of utility for the next 5 to 7 years without any major repairs. Thus, it approved the finding of the High Court that the goods are classifiable as "other wastes" under Rule 3(1)(23) of the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016.

23. Further, it was pointed out that Rule 13(2) provides procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule mentions MFDs and under Entry 4 (j), a list of five documents required for import of used MFDs have been mentioned and the respondents therein were found to be substantially compliant in this regard and the requirement for the country of origin certificate was found to be vague by the High Court. Further, the Hon'ble Supreme Court noted that the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 certificate has been issued to the respondents/importers therein by the Central Pollution Control Board before the goods have been cleared. Ultimately, the Hon'ble Supreme Court held that in the statutory scheme of the Foreign Trade Act as discussed in the judgment, there is no error in the penultimate direction to the importers for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release to be granted on redemption at market value in which event, the respondents therein shall be entitled to set off.

24. As discussed in the earlier part of this judgment, there are three conditions to be fulfilled by an importer of which it was found that the respondent/writ petitioner has complied with only one of the conditions viz, with regard to the compliance of procedures as per the provisions of Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and E-Waste Management Rules, 2016. In the case of Athul Automations Private Limited (supra), two things which were put against those importers were non compliance of the conditions in the Foreign Trade Policy, that is, in not obtaining prior authorisation/licence and not obtaining appropriate clearance/permission under the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016.

25. So far as the cases on hand is concerned, the appellants have contended that the respondents have complied to a certain extent with regard to the Hazardous and other Wastes (Management & Transboundary Movement) Rules, 2016 and E-Waste Management Rules, 2016 which we take it as due compliance. The other common feature in the case of Athul Automations Private Limited (supra) and the cases before us is in not obtaining prior authorisation/licence from the DGFT authorities. The case of Athul Automations Private Limited (supra) went through the adjudicatory process resulting in an order being passed by the Commissioner granting permission for re-export which order was tested by the Tribunal for its correctness and further tested by the High Court which order was subject matter of appeal before the Hon'ble Supreme Court. However, in the case on hand, the goods are still in warehouse at the option of the

respondent/importer and the present controversy has arisen only because the respondent approached this Court and sought for a direction for provisional clearance.

26. Considering the factual position, the respondent would not be entitled to make a prayer for provisional clearance, as there is non compliance of the vital requirement regarding BIS certificate as required under Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order 2012 dated 07.09.2012 and subsequent orders dated 25.06.2013 and 07.11.2014 issued by MeitY. We find that this issue did not arise in the case of Athul Automations Private Limited (supra) and the only common feature was non production of advance authorisation/import licence. Thus, in our considered view, the decision in the case of Athul Automations Private Limited (supra) is factually distinguishable apart from the fact that the said case arose out of an adjudicatory process in which the factual position was threadbare analysed by two fact finding authorities. That apart, the Hon'ble Supreme Court left the ultimate decision to be taken by DGFT.

27. As pointed out earlier, none of the provisions of the Foreign Trade Policy or the notification/orders were challenged by the respondents before the learned Writ Court and therefore, the respondent cannot risile from complying with the conditions which have been imposed under the notification and orders which have been issued in public interest. As pointed out by the Hon'ble Supreme Court that merely because a few consignments have been permitted to be cleared in different ports can have no bearing on the case on hand, as each case has to be decided on its own facts. The learned Single Bench had directed furnishing of bond for 90% of the enhanced valuation of the goods and security for the remaining 10%. To be noted that the stage is yet to come for arriving at a valuation as the case is yet to be adjudicated and even much prior to that, the respondent have rushed to this Court and filed writ petitions, after on their own volition warehoused the goods in terms of Section 49 of the Act.

28. In the light of the above discussion, we are of the clear view that the order passed in the writ petitions calls for interference.

29. In the result, the writ appeals are allowed and the order passed in the writ petitions is set aside. The facts clearly disclose that the respondents would not be in a position to either produce authorisation or licence from the authorities of DGFT, nor they would be able to produce any certificate as required under the orders dated 07.09.2012, 25.06.2013 and 07.11.2014 issued by MeitY. Therefore, we direct the appellants to commence adjudication process and show cause notice be issued

to the respondents within a period of four weeks from the date of receipt of a copy of this judgment. After affording reasonable time to the respondents to submit their reply to the show cause notice, the case be adjudicated on merits in accordance with law after affording an opportunity of personal hearing to the Authorized Representative of the respondents. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(INSP CELL)

//True Copy//

Sub Assistant Registrar

(abr)

TO:

- 1.THE COMMISSIONER OF CUSTOMS,
CHENNAI-II COMMISSIONERATE,
NO.60, RAJAJI SALAI,
CUSTOMS HOUSE, CHENNAI-600 001.
- 2.THE JOINT/ADDL COMMISSIONER OF
CUSTOMS (GR-5),
NO.60, RAJAJI SALAI, CUSTOMS HOUSE,
CHENNAI-600 001.
- 3.THE ASSISTANT/DEPUTY COMMISSIONER OF
CUSTOMS (GR-5),
NO.60, RAJAJI SALAI,
CUSTOMS HOUSE, CHENNAI-600 001.
4. THE REGIONAL JONIT DIRECTOR,
SHASTRI BHAVAN, NUNGAMBAKKAM, CHENNAI-6

+10ccs to Mr.Viswanathan, Advocate sr.39599
+1cc to Mr.T.L.Thirumalaisamy, Advocate sr.39792
+1cc to Mr.K.S.Ramasamy, Advocate sr.39660
+2ccs to M/s.R.Hemalatha, Advocate sr.40260 & 40258
+1cc to Mr.V.Chandrasekaran, Advocate sr.40019
+1cc to M/s.Hemamurali krishnan, Advocate sr.40153

W.A.Nos.1215 of 2019 and
938, 941, 943, 984, 1022, 1023,
1025, 1026 and 1027 of 2019

rv(co)
nr 24/06/2019