IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 17.09.2019

DELIVERED ON 24.09.2019

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.10610 of 2019

M/s.SA Trading Company,
C-20, 2nd Floor, Choksey Building,
Next to Gamdevi Telephone Exchange,
Nanachowk Road (W) Mumbai 400 007,
By its Proprietor Mr.Samir Ashok Sawant ...Petitioner

Vs

1.The Assistant Commissioner of Customs (ACIU),
Office of the Principal Commissioner of Customs,
Commissionerate VII, Air Cargo Complex,
Meenambakkam, Chennai 600 027.

2.The Assistant/Deputy Commissioner of Customs (Exports),
Customs House, Air Cargo Complex,
Meenambakkam, Chennai 600 027. ... Respondents

Prayer:Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorarified mandamus to call for records connected with the impugned communication of the first respondent herein comprised in S.Misc.06/2919-ACIU dated 15.03.2019 conveying the provisional release order passed by the competent Authority, in so far as, it related to the condition to execute a Bank Guarantee (BG) for Rs.25,00,000/- for the provisional release of the goods detained and covered under Shipping Bill Nos.2182201 and 2178314 both dated 20.02.2019 and to quash the same and consequently to modify the said condition of execution of Bank Guarantee for Rs.25,00,000/- for the provisional release of the goods for export and to consider the request of the petitioner for waiver of demurrage and detention charges of the subject goods covered under the above two shipping bills both dated 20.02.2019.

For Petitioner : Mr.S.Baskaran

For Respondents: Mr.G.M.Syed Nurullah Sheriff
Senior Standing Counsel

O R D E R

This writ petition is filed challenging the proceedings of the first respondent dated 15.03.2019, ordering the provisional release of the subject matter goods for export subject to certain conditions imposed therein. Consequently, the petitioner seeks for modifying the conditions stipulated therein only in respect of execution of bank guarantee for Rs.25,00,000/- and to waive demurrage and detention charges of the subject goods.

2.The case of the petitioner, in short, is as follows:

a) They are in the business of import and export. They have been granted the Importer Exporter Code, IEC No.03169789 by the jurisdictional Joint Director General of Foreign Trade Authorities. During the course of their business, they filed two free shipping Bill Nos.2182201 & 2178314 both dated 20.02.2019 for export of the goods declared as Multiple purpose Split Pin Top Quality with HSN Code 87089900 for a total quantity of 5,00,000 pieces with unit price as 0.26/USD with a total consideration of USD 130000 (FOB) for shipment to the overseas buyer, viz., MWI TRADING FZE, AJMAN, UAE, based on the purchase order dated 01.02.2019 placed on the petitioner by the above said overseas buyer, with the payment condition fixed as FOB Terms 180 days post shipment, which was accordingly agreed by the overseas buyer.

b) The petitioner, on receipt of the purchase order placed by the overseas buyer, locally procured the goods meant for export from one M/s.Radhika Trading Co., Delhi, on certain terms and conditions agreed upon between them towards the payment of sale consideration. Accordingly, the goods meant for export was dispatched from Delhi to Chennai with all the export documents along with the E-Way Bill dated 19.02.2019 and the same reached Chennai on 20.02.2019. After filing the said two free shipping bills, the subject goods meant for export was physically examined by the Officer of the customs and found the same to be as declared and accordingly, after satisfying all the aspects including the valuation and the contents of the consignment, the same was properly assessed and a Let Export Order dated 21.02.2019 was given by the Officer of customs. However the Officer of Air Cargo Intelligence Unit, on intelligence, had intercepted the export consignment and detained the cargo for further investigation. The Investigating Officers, after conducting the examination of the goods though found the same to be as declared and that the export consignment do not contain any prohibited or restricted goods, however did not allow the consignment for export. The petitioner was directed to produce all the documents pertaining to the export consignment. On 06.03.2019, the documents were submitted. One Mr.Deepak Joshi, the family friend of the deponent herein, being the proprietor of the petitioner company, helped the petitioner in the said export transaction and however, he does not have any other interest in the petitioner's business.

c) The Investigating Officials, however insisted the petitioner to depose that the said Deepak Joshi was the actual beneficiary and accordingly, he was forced to depose and sign the statement as if the said Deepak Joshi was the real owner and beneficiary of the export consignment. Since the export consignment has to be dispatched to the overseas buyer within a timeframe as agreed upon, the petitioner made a representation on 12.03.2019 to the Customs Authorities, seeking for the provisional release of the goods for export, pending further investigation. Based on their representation, the first respondent passed the impugned communication dated 15.03.2019, by stating that the request for provisional release is considered by the competent Authority subject to a condition that the petitioner furnishes a provisional duty bond for Rs.92,23,500/- and a bank guarantee for Rs.25 lakhs, towards redemption fine and penalty, in case, goods are found liable for confiscation. The condition imposed especially for providing the bank guarantee for Rs.25 laksh is onerous. Hence, the present writ petition.

3. The respondents 1 and 2 filed a counter affidavit. The crux of the contentions raised in the counter affidavit is as follows:

a) On a tip-off intelligence, ACIU Officers' team intercepted the subject matter shipping bill and found that the cargo declared therein was overvalued, when compared with similar item available in the market. The classification of the subject goods is incorrect. The subject goods are multipurpose split pin and should be classified under CTH 7318 (73182400). Hence, there is a misclassification of CTH. The value of the subject items were declared as at 0.26$ per piece but the estimated vlaue of the cargo as per the Indian market is found to be around Rs.75/- per Kg. On conversion of declared value of the said item from US dollar into Indian Rupees, it works out to Rs.46,11,750/- (per B/E) whereas the Indian market price for the same works out to Rs.10,125/- (per B/E). Hence, the cargo has been overvalued in both the shipping bills wherein it is also shown that IGST amount was paid by the exporter at Rs.12,91,290/- each. On reasonable suspicion, the above mentioned consignments were detained on 21.02.2019 for further investigation.

b) The subject matter shipping bills are free bills only and not eligible for drawback. Further, under CTH 7318, the IGST is 18% only whereas under CTH 8708, it is 28% and thus, the exporter is intending to claim higher rate of IGST refund. Summons were issued to the concerned, who are all involved in the above export. Voluntary statements were given by the Managing partner of M/s.TS India Logistic Solution, Manager of M/s.Concorde Zoom (CHA), R.Sivakumar, Ashok KeshavSawant. From their statements, it is evident that Ashok has mutual understanding with Deepak Joshi and Ashok does not know much about this export. Since the whereabouts of Deepak Joshi is not known to anybody, summon dated 06.03.2019 was issued to Deepak Joshi and handed over to Ashok with a request to serve the same to the said person. A letter dated 12.03.2019 was received from the petitioner with a request to release the goods for export covered under the above said two bills of entries.

c) As per the CBEC Circular No.01/2011-/Customs dated 04th January 2011, in respect of export goods, which are suspected of mis-declaration or where declaration is to be confirmed and further enquiry/confirmatory test or expert opinion is required, such goods should be allowed exportation provisionally and that the exporters in those cases are required to execute a bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty, in case the goods are found liable for confiscation. Accordingly, the competent Authority granted permission through the impugned communication for the provisional release of the goods for export subject to the conditions stipulated therein. The competent Authority has jurisdiction to impose such conditions for provisional release and therefore, the conditions imposed are not contrary to law.

4.Learned counsel for the petitioner contended that the dispute raised by the customs in respect of the subject matter shipping bills is in respect of the valuation of the goods. Therefore, when the Authority concerned has chosen to allow provisional release for export, ought not to have imposed such onerous condition even at the stage of investigation. He further contended that however in so far as the direction to execute a provisional duty bond for a sum of Rs.92,23,500/- is concerned, the petitioner has no issue and would readily execute such bond. However, in respect of the other requirement to furnish the bank guarantee for Rs.25,00,000/-, he contended that such condition is totally unwarranted since the petitioner purchased the goods from the sellers without payment of IGST with an understanding that the same will be paid only after realizing foreign exchange from the buyer. In support of his contention, the learned counsel relied on a decision of this Court made in 2017 (348) E.L.T. 612 (Mad), J.K.Exim vs Principal Commissioner of Customs.

5. On the other hand, the learned counsel for the respondents, after reiterating the contentions raised in the counter affidavit, submitted that the petitioner filed bogus bills and did not file any return showing the payment of IGST in respect of the purchase of goods from its sellers. Therefore, the petitioner, in order to claim higher rate of IGST refund, overvalued the cargo. Learned Standing Counsel relied on the Circular No.01/11-Customs dated 04.01.2011, in support of his contention that apart from executing a bond, the petitioner is also liable to furnish appropriate security in order to cover the redemption fine and penalty.

6. Heard both sides. Perused the materials placed before this Court.

7. The petitioner is engaged in the business of import and export. They filed two free shipping bill numbers 2182201 and 2178314 both dated 20.02.2019 for export of the goods declared as Multipurpose Split Pin Top Quality with HSN Code 87089900 for a total quantity of 5,00,000 pieces with unit price as 0.26 USD with a total sale consideration of USD 130000 (FOB) for shipment to its overseas buyer. According to the petitioner, they purchased the goods meant for export from the local seller at Delhi on 19.02.2019 and the same reached at Chennai on 20.02.2019. Based on the intelligence, the Air Cargo Intelligence Unit intercepted the export consignment and conducted investigation. According to the petitioner, the Investigating Officers, after investigation, found the goods as declared and therefore, they issued a Let export order. On the other hand, it is contended by the respondents that the said Let export order was granted on verification of documents only, since the shipping bills are under the category of Risk Management System.

8. It is the further case of the Revenue that on physical investigation, it was found that the subject matter cargo was overvalued, when compared with similar item available in the market. It is also the case of the customs that there is a misclassification of the goods under Customs Tariff Head. When the petitioner claimed and stated so in the shipping bills that the subject matter goods are classifiable under CTH 87089900, it is the case of the Revenue that the subject matter goods are multipurpose split pin classifiable under CTH 7318 (73182400). It is further seen that if the classification of the subject goods falls under CTH 7318 as claimed by the Revenue, the IGST

refundable to the petitioner is 18%, whereas if the subject matter goods is classifiable, as claimed by the petitioner, under CTH 8708, the IGST refundable is at the rate of 28%. Therefore, it is claimed by the Revenue that the exporter intended to claim higher rate of IGST refund and with such intention, the importer has not only misclassified the goods and also overvalued the same. According to the Revenue, the subject matter goods for export, as per the Indian market price, is valuable only at the rate of Rs.10,125/- per bill of entry, whereas the same was valued by the exporter at the rate of Rs.4611,750/- per bill of entry. It is also stated that in both shipping bills, it was shown that the IGST amount paid by the exporter is Rs.12,91,290/- each and that the same will be refunded to the exporter once the export is made.

9. According to the Revenue, the very classification of the subject matter goods itself is wrong and consequently, the rate of IGST refundable to the exporter also varies. As already stated supra, as per the claim made by the petitioner based on their classification, they are entitled to refund of 28% IGST whereas according to the Revenue, it is only 18%, as the subject matter goods are classified under different CTH. This Court, at this stage, is not going to express any view on the merits of the above contentions raised by the respective parties, since admittedly the adjudication proceedings is yet to take place. However, in the meantime, as the petitioner is intending to export the goods and consequently, sought for release of the same for export, only issue that is to be gone into and decided in this case as to whether the conditions imposed by the customs for releasing the goods for export are onerous or justifiable.

10. Circular No.1/2011-Customs dated 04th January 2011 issued by the Central Board of Excise and Customs contemplates at paragraph No.4(a) as follows:

> "In case the export goods are found to be mis-declared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be ordered to be released provisionally on execution of a Bond of an amount equivalent to the value of goods along with furnishing an appropriate security in order to cover the redemption fine and penalty."

11. Further, Customs Circular No.30/2013 dated 05.08.2013 regarding provisional release of export goods that are detained or seized reads as follows:

> "Attention is invited to the Board Circular No.01/2011-Customs dated 04.01.2011 regarding provisional release of export goods that are detained

or seized. The said Circular was issued with the objective of expediting the clearance of export goods and to ensure that where permissible by law, exports should not get unduly delayed, thereby causing congestion in ports as well as delays in fulfillment of export orders. Thus, it was instructed that provisional release of export goods that are suspected of being mis-declared or where declaration is to be confirmed by further enquiry/test or detained/seized for mis-declaration of quantity/value/description should be given on execution of Bond and suitable security to cover the redemption fine and penalty (para 4 of Board Circular No.01/2011-Customs dated 04.01.2011). Further, continued detention of export goods in excess of three days must be brought to the notice of the Commissioner of Customs."

12. Perusal of the above said Circulars would clearly indicate that the goods detained for investigation, are sought to be provisionally released for export, the exporter is bound to execute a bond of an amount equivalent to the value of the goods apart from furnishing an appropriate security in order to cover the redemption fine and penalty.

13. As already stated supra, in sofar as the execution of the bond is concerned, the petitioner is not having any issue. Their objection is only against the bank guarantee sought for a sum of Rs.25 lakhs. I find that the claim made by the customs for executing such bank guarantee is with some force and justification based on the above allegations made against the petitioner viz., misclassification of the goods, overvaluing the same and intended refund claim of IGST at the higher rate. The above referred circulars empower the customs to insist for such requirement. Those circulars are not under challenge.

14. There is no dispute to the fact that the goods were intercepted on specific intelligence and detained based on the allegation of misdeclaration, overvaluation and also on the reasonable apprehension that the exporter would claim higher rate of IGST refund, as discussed supra. In such circumstances, even before completing the adjudication process, if the exporter seeks for release of the goods for export, certainly it is for them to comply with the conditions imposed in the impugned order. In this case, in fact, the customs has not refused to release the goods. On the other hand, provisional release is ordered subject to the execution of bond and furnishing of bank guarantee.

15. Going by the facts and circumstances, I find that the conditions are not onerous and therefore, if the petitioner intends to export the goods, it is for them to safeguard the interest of the Revenue by providing the bond and appropriate security in order to cover the redemption fine and penalty as stated in the above circulars. Needless to say that if the petitioner furnishes bank guarantee and ultimately succeeds in the adjudication process, it is always open to them to get the bank guarantee released. After all, it is only to safeguard and secure the interest of the Revenue, the bank guarantee is sought to be executed. Hence, I find no arbitrariness or unreasonableness in such demand.

16. No doubt, the learned counsel for the petitioner sought to rely upon a decision made by the learned Single Judge of this Court (as he then was) reported in 2017 348 ELT 612, J.K.Exim vs. Principal Commissioner of Customs. I find that the facts and circumstances of the said case is slightly different, where the Customs refused to provisionally release the goods for export. The learned Judge, after taking note of the Circulars and finding that no duty element is involved therein, found that the goods can be released to the petitioner therein upon executing a personal bond. In the very same order, the learned Judge at paragraph 12.2, observed that in order secure the interest of the respondents, the petitioner therein will also disclose the details of immovable and movable assets to the respondents. Therefore, it is evident that the learned Judge wanted to secure the interest of the Revenue and thus, directed the petitioner to disclose the details of immovable and movable assets, apart from executing the personal bond. In this case, the customs seeks for executing a bank guarantee apart from executing the bond as stated supra. Therefore, I find that it is the duty of this Court to safeguard the interest of the Revenue as well, since the matter is still to be adjudicated upon, especially when the interest of the exporter is already care of by the revenue in ordering provisional release. Therefore, I find that the order impugned in this writ petition does not require any interference. However, if the petitioner finds it difficult to mobilize the bank guarantee for the said sum of Rs.25 lakhs as required by the first respondent, alternatively it is open to the petitioner to furnish immovable property security to the value of the said sum, to the satisfaction of the first respondent. If the petitioner so chooses to furnish immovable property security to the said sum instead of furnishing bank guarantee, the same shall be considered by the first respondent and appropriate orders shall be passed accordingly.

With the above observation, the writ petition is disposed of accordingly. No costs.

Sd/-
Assistant Registrar (Insp cell)

//True Copy//

Sub Assistant Registrar

vri

To

1.The Assistant Commissioner of Customs (ACIU),
Office of the Principal Commissioner of Customs,
Commissionerate VII, Air Cargo Complex,
Meenambakkam, Chennai 600 027.

2.The Assistant/Deputy Commissioner of Customs (Exports),
Customs House, Air Cargo Complex,
Meenambakkam, Chennai 600 027.

+1cc to Mr.S.Baskaran Advocate, S.R.No.81753
+1cc to Mr.G.M.Syed Nurullah Sheriff Advocate, S.R.No.81675

VBA(CO)
CB(26/09/2019)

ORDER IN
W.P.NO.10610 OF 2019