IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.04.2019

CORAM :

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.1374 of 2019
and C.M.P.No.9448 of 2019

The Deputy Commissioner of Customs (Gr.3),
No.60, Rajaji Salai, Customs House,
Chennai - 600 001. .. Appellant/Respondent

vs.

M/s.Max Enterprises,
KEM R.No.713, Fakir Mohd Lane,
Makran Mohalla Joheshwari [East],
Mumbai - 400 060.
Rep. by its Proprietor Shaik Abdul Rasheed.
.. Respondent/Petitioner

Writ Appeal filed under Clause 15 of Letters Patent Act against the order dated 25.02.2019 passed in W.P.No.33275 of 2018.

Prayer in WP.33275 of 2018:

Writ Petitioner file under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus to call for the records connected with the impugned communication of the respondent herein comprised in S59/344/2018 Gr.3 dated 27.11.2018 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.43,00,000/- convering the differential duty for the provisional release of the good seized and convered under Bill of Entry Nos.7978920 and 7978888, both dated 10.09.2018, to quash the same and consequently to modify the said condition of execution of Bank Guarantee for Rs.43,00,000/- covering the differential duty of the impugned communication dated 27.11.2018 imposed for the provisional release of the goods, in terms of the ruling of the Hon'ble Apex Court in the case of M/s.Navshakthi Industries Pvt.Ltd., dated 04.05.2011 and the Customs (Provisional Duty Assessment) Regulations, 1963 as amended and also to consider the request of the Petitioner to waive the demurrage and detention charges of the subject goods covered under the said two Bills of Entry, both dated 10.09.2018.

For Appellant : M/s.R.Hemalatha

For Respondent : Mr.S.Baskaran

JUDGMENT

(Judgment of this Court made by T.S.Sivagnanam,J.)

Heard M/s.R.Hemalatha, learned counsel for the appellant and Mr.S.Baskaran, learned counsel for the respondent writ petitioner. With the consent on either side, the writ appeal itself is heard and taken up for disposal.

2.The respondent writ petitioner challenged the order passed by the appellant dated 27.11.2018 by which the appellant granted provisional release of the goods imported by the appellant vide Bill of Entry dated 10.09.2018 subject to the condition that the respondent writ petitioner furnishes a simple bond for 100%, i.e. Rs.39,37,214/- and a Bank Guarantee for Rs.43,00,000/- covering differential duty and probable fine and penalty. The respondent came before this Court challenging the said order by contending that the imposition of a condition to furnish Bank Guarantee for a sum of Rs.43,00,000/- is onerous and excessive and against various pronouncements of the Hon'ble Supreme Court and this Court. Further, it was contended that the only dispute concerning the goods covered under the bills of entries was with regard to correctness of the value for the purpose of assessment of the goods and in such circumstances, the appellant could not have imposed a condition that the respondent should furnish a Bank Guarantee for a sum of Rs.43,00,000. In support of his contention, the learned counsel for the respondent writ petitioner relied upon the decision in the case of Navshakti Industries Pvt. Ltd. vs. Commissioner of Customs, ICD, TKD, New Delhi [2011 (267) ELT 483 (Del.)], the decision of the Delhi High Court in the case of Zest Aviation Pvt. Ltd. vs. Union of India [2013 (289) ELT 243 (Del.)] and the decision of the Division Bench of this Court [to which one of us (V.Bhavani Subbaroyan,J.) was a party] in the case of Assistant Commissioner of Customs, Chennai vs. Kanishka Enterprises [2018 (361) ELT 465 (Mad.)]. Further, it was contended that the subject issue pertain to only valuation dispute and the appellant Department without conducting any market enquiry or referring to the contemporaneous imports effected has imposed such an onerous condition. The Department/appellant resisted that the prayer sought for by contending that there are several cases where the Court directed the importers to deposit 50% of the enhanced duty and relied on certain decisions of this Court to support their contention. Further, reliance was placed on the Circular bearing No.35/2017-Customs, dated 16.08.2017 issued by the Central Board of Excise and Customs (Anti-Smuggling Unit) which lays down the guidelines to be followed for grant of provisional release of imported goods pending adjudication.

3.The learned Single Bench was of the view that the goods which were imported constitute stationery and gift items and decoration materials and the Circular relied on by the appellant revenue was one that would apply if the proceedings for adjudication had been completed and the liability is quantified and the same not being the case of the respondent writ petitioner since the adjudication is yet to be over. Further by referring various decisions cited at the Bar, the learned Single Bench was of the view that it would suffice that the respondent writ petitioner deposit 30% of the differential duty and execute a personal bond for the remaining 70% and upon remittance, they would be entitled for release of the goods imported forthwith. Further, the learned Writ Court held that the respondent writ petitioner was entitled to issuance of certificate for waiver of demurrages and detention charges for the entire period, i.e. from the date of detention to the date of clearance.

4.After elaborately hearing the learned counsels for the parties and perusing the materials on record, we are of the view that there is no error in the discretion exercised by the learned Writ Court in granting release of goods subject to the conditions imposed in the impugned order. However it is to be pointed out that Circular No.35/2017-Customs dated 16.08.2017 applies to the case of provisional release where the goods were seized and import is not allowed. Therefore, we do not agree with the finding rendered by the learned Single Bench that the Circular will not be applicable to the case relating to provisional release.

5.Be that as it may, it has to be seen that as to whether there is any error in exercise of discretion by the learned Writ Court. M/s.R.Hemalatha, learned counsel for the appellant is right in her submission by contending that the decision in the case of Navshakti Industries Pvt. Ltd. (supra) cannot be uniformly applied in all cases, since the matter concerns provisional release of the cargo, the nature of cargo, the allegation against the importer, alleged violation and other relevant factors have to be borne in mind before the order of provisional release is granted. The apprehension of the revenue is that the appellant is a trader carrying on business in Mumbai and has no permanent establishment in Chennai and there is every livelihood that he will go untraceable after release of the cargo.

6.In our considered view, the revenue need not have any apprehension that as the respondent writ petitioner has a import and export code and even assuming that he does not co-operate with the adjudication by the appellant in Chennai, he can be traced anywhere in the Country and proper legal action can be initiated against him. It is needless to state that the respondent writ petitioner should co-operate in the adjudication process. Thus, considering the peculiar facts and circumstances of the case, we find that there is no error in the discretion exercised by the learned Writ Court and the direction issued therein. We reiterate that an uniform yardstick cannot be laid down in these sort of matters where the importer approaches the Court for granting provisional release of the imports cargo. Thus, considering the peculiar facts and circumstances of the case, we decline to interfere with the order and direction issued by the learned Writ Court. Accordingly, the writ appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

7.The appellant is directed to release the goods forthwith upon the respondent writ petitioner remitting 30% of the differential duty and executing a personal bond for the remaining 70%. The respondent writ petitioner shall be entitled to a certificate for waiver of demurrages and detention charges for the entire period, i.e. from the date of detention to the date on which the goods are cleared. Further, the appellant is directed to issue show cause notice to the respondent within a period of three weeks from the date of receipt of a copy of this order and the respondent writ petitioner is directed to participate in the adjudication process without default.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

cse

To

The Deputy Commissioner of Customs(GR.3)
No.60, Rajaji Salai, Custom House, Chennai-1.

+2ccs to Mr.S.Baskaran, Advocate, S.R.No.37437

W.A.No.1374 of 2019
and
.M.P.No.9448 of 2019

RV(CO)

RRS(08/05/2019)