IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2019

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THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition No.33275 of 2018

& W.M.P.No.38612 of 2018

M/s. Max Enterprises,
KEM R.No.713 Pakir Mohd.Lane,
Makran Mohalla, Joheswari (East), Mumbai 400 060,
By its Proprietor, Shaik Abdul Rasheed ... Petitioner

vs.

The Deputy Commissioner of Customs(GR.3)
No.60 Rajaji salai custom House
Chennai 600 001 ... Respondent

Prayer:- Writ Petition filed under Article 226 of the Constitution of India 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/- covering the differential duty for the provisional release of the good seized and covered under Bill of Entry Nos.7978920 and 7978888, both dated 10.9.2018, 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 Petitioner : Mr. S.Baskaran

For Respondent : Mrs. R.Hemalatha,
Sr. Standing Counsel

O R D E R

The petitioner is before this Court challenging the order of the Deputy Commissioner of Customs (Grade III), Customs House, dated 27.11.2018.

2. The admitted facts are that petitioner is an importer and had imported gift and stationery items covered under Bills of Entry Nos.7978920 and 7978888, both dated 10.09.2018. The goods are freely importable and constitute neither restricted nor prohibited goods. The goods were subject to examination and Examination Report confirms the classification and description of the goods as tallying with that set out in the invoices.

3. Notwithstanding the aforesaid position, the goods were detained at the Customs on 10.09.2018. The only basis for the seizure was that parallel sets of invoices were found in respect of the consignments, that clearly indicated under invoicing/under valuation of the goods. The petitioner filed a request on 01.10.2018 seeking release of the goods, to no avail. Thus, the petitioner had approached this Court in W.P.Nos.28692 and 28725 of 2018 seeking release of the two consignments and a learned Single Judge of this Court, by order dated 01.11.2018, had directed the authorities to consider the representation dated 01.10.2018 filed by the petitioner and to pass orders on merits and in accordance with law and to communicate the same to the petitioner.

4. Pursuant to the aforesaid order of this court, the respondent, after hearing the petitioner, passed impugned order dated 27.11.2018 stating thus:-

> 'With reference to the above and also as per your letter dated 5.11.2018 requesting for provisional release of the goods imported vide B/E No.7978920 and 7978888/10.9.2018, it is hereby informed that the request is considered by the complaint authority you are hereby informed that the simple Bond for 100% i.e., Rs.39,37,214/- and BG for Rs.43,00,000/- covering differential duty and probable fine and penalty has to be executed to the Customs Authorities for release of the said consignments.
> The proper Bond and BG (with auto renewal clause) referred for the above Bills of Entry have to be submitted to the undersigned at the earliest for provisional release of the consignments.'

5. It is as against the above order that the petitioner is before me arguing that the conditions imposed by the authorities are onerous, to say the least; the goods should be released

simpliciter or at best with the imposition of a more lenient condition, particularly, in view of the fact that the goods are freely importable; and that the allegations regarding under valuation would be disproved by the petitioner in the course of adjudication proceedings.

6. The learned counsel appearing for the petitioner relied upon a series of orders of this Court as well as the Delhi High Court, which had been confirmed by the Supreme Court to illustrate that the assessee in the respective cases were called upon to pay 30% of the differential value of the duty as a pre-condition for release of the goods. He refers to several decisions of the Delhi High Court in the case of Navshakti Industries Pvt. ltd. v. Commissioner of Customs, New Delhi ((2011) 267 ELT 483), Bhaiya Fibres Ltd. v. Additional Director General of Revenue Intelligence ((2012) 281 ELT 396) and Zest Aviation Pvt. Ltd. v. Union of India ((2013) 289 ELT 243) wherein the Court had directed the petitioners in the respective cases to furnish Bank Guarantees for 30% of the differential duty to the satisfaction of the Commissioner of Customs. The decision in the case of Navshakti Industries, was carried in special leave and confirmed by the Supreme Court in 2011 (269) E.L.T. A146 (S.C.) (Commissioner of Customs v. Navshakthi Industries Private Ltd). The relevant observations reads thus:-

> 'Leave Granted.
> The present appeal is directed against the judgment and order dated 11th May, 2010 passed by the Division Bench of the High Court of Delhi directing the appellants herein to clear the goods of the respondents on their furnishing a bond of 20% of the differential duty to the satisfaction of the concerned Commissioner of Customs.
> The appellants have filed the present appeal being aggrieved by the aforesaid order in respect of which it is being contended that the aforesaid order passed by the High Court is erroneous as the amount for which the bond is to be furnished by the respondents is on the lower side.
> Having considered the facts and circumstances of the case and also taking notice of the fact that the goods in question are newsprint which is perishable in nature, we issue a direction that the goods of the respondents shall be cleared by the appellants herein on the respondents' furnishing a bank guarantee of 30% of the differential duty to the satisfaction of the Commissioner of Customs. The goods shall be released in terms of this order immediately on furnishing of the aforesaid bank guarantee and satisfaction of the concerned Commissioner of Customs. We also direct the Commissioner of Customs

to hear the adjudication proceeding pending before him as early as possible, preferably within a period of three months, from the date of receipt of a copy of this order.

In terms of the aforesaid order, the appeal stands disposed of. We, however, make it clear that while passing the aforesaid order, we have not expressed any opinion or views on the merits of the dispute which shall be independently considered by the competent authority.'

7. The Division Bench of the Delhi High Court in the case of Bhaiya Fibres Ltd., (supra) had also arrived at the conclusion that there was no distinction between 'provisional release' and 'provisional assessment' of goods. This was since provisional release of goods, in terms of Section 110A of the Customs Act, 1962, ('Act') was also based on the rate adopted for the provisional assessment of goods and in the case of valuation, the worksheet prepared by the Department as against that prepared by the petitioner. The relevant observation reads thus:-

> '11. Learned Central Government Standing Counsel submits that there is a distinction between provisional release of goods and provisional assessment of goods. We find that both are the same in substance, because provisional release of goods cannot be effected without a provisional assessment of goods. Even if the Respondent is able to show that it has acted in accordance with law, it would really make no difference because the principles laid down by the Customs (Provisional Duty Assessment) Regulations, 1963 would nevertheless be binding for provisional clearance of the goods in the absence of any other method of safeguarding the interests of the Revenue. Learned Central Government Standing Counsel has not been able to show any other principle or parameter for adjudicating the method of safeguarding the interest of the Revenue when the goods are to be released provisionally in cases such as the present.'

8. The learned counsel appearing for the petitioner further relied upon a decision of this Court in the case of Commissioner of Customs, Tuticorin v. Empire Exports, ((2013) 287 ELT 41) where also, in the context of under valuation, this Court directed the petitioner, following the judgment of the Supreme Court in the case of Navshakti Industries (supra), to pay 30% of the differential duty and execute a personal bond for the balance of 70%. Then again, another Division Bench of this Court in the case of Assistant Commissioner of Customs, Chennai v. Kanishka Enterprises ((2018) 361 ELT 465), also in the context

of undervaluation, arrived at the same conclusion.

10. Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the Revenue does not dispute the facts in the matter. She however brings to the notice of the Court, orders passed in several other matters by this court directing the petitioner to deposit upto 50% of the enhanced duty. She also circulates a copy of Circular bearing No.35/2017-Customs, dated 16.08.2017, issued by the Central Board of Excise and Customs (Anti-Smuggling Unit), dated 16.08.2017, which sets out guidelines to be followed for grant of provisional release of imported goods pending adjudication under Section 110A of the Act. My attention is drawn to paragraph 5 of the circular that reads as follows:-

> '5. Where provisional release of seized imported goods is allowed, the bond referred to in Para 2.1 shall contain an undertaking that the importer shall pay the duty, fine and / or penalty as may be adjudged by the Adjudicating Authority, subject to appellate provisions under the Act. Further, where security is furnished by way of Bank Guarantee, the Bank Guarantee should contain a clause binding the issuing bank to keep it renewed and valid till final adjudication of the case, or in the event of non-renewal of Bank Guarantee as above, the guaranteed amount be credited to the Government account by the bank on its own.'

11. Thus, according to her, the categoric Instruction of the Board is for the Adjudicating Authority to collect security/bank guarantee for 100% of the duty, fine and/penalty as per adjudication order.

12. Having heard both learned counsel, my conclusion is that the facts of the present case do not warrant deviation from the consistent view that has been taken, not only by the Benches of this Court, but also by the decisions arrived at by the Delhi High Court as confirmed by the Supreme Court in the case of Navshakti Industries (supra).

13. In the present case, the items on hand constitute stationery and gift items and decorations to be used in children's parties. The Circular relied on by the revenue is one that would apply if the proceedings for adjudication had been completed and the liability quantified. This is not so in the present case where proceedings for adjudication are yet to be initiated.

14. The cases cited at the Bar indicate the consistent view that release of the consignments be permitted in terms of Section 110A of the Act upon condition that the petitioner directed to remit 30 to 50% of the enhanced duty. In the facts

and circumstances of the present case, it would suffice that the petitioner remit 30% of the differential duty and execute a personal bond for the remaining 70%, upon remittance and furnishing of which, the goods shall be released forthwith. On the aspect of under invoicing, the Department is at liberty to initiate proceedings for adjudication that will be concluded after hearing the petitioner and in accordance with law.

15. At this juncture, learned counsel for the petitioner cites the decisions of two Division Bench decisions of this Court in the cases of Commissioner of Customs v. M/s. Novel Impex (C.M.A.No.1913 of 2018), dated 24.09.2018 and Assistant Commissioner of Customs, Chennai v. Kanishka Enterprises where the request for waiver of demurrage and detention charges has been accepted by the court.

15. In the facts and circumstances of the present case, since the goods detained constitute stationery, gift and decorations for children's parties, and in the light of Regulation 6(l) of the Handling of Cargos in Customs Area Regulations, 1963, demurrage and detention charges for the entire period form date of detention to the date of clearance stand waived.

16. With the above directions, this writ petition and connected MPs stand disposed with no order as to costs.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

srk

To

The Deputy Commissioner of Customs(GR.3)
No.60 Rajaji salai custom House
Chennai 600 001

+1cc to Mr.R.Hemalatha, Advocate, S.R.No. 17035
+2cc to Mr.S.Baskaran, Advocate, S.R.No. 17158

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PA(CO)
GN(14/03/2019)