BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.09.2020

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

AND

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

W.A.(MD)Nos.863, 864, 867 to 869, 871, 873, 875 and 877 of 2020
and
C.M.P.(MD)No.4778 of 2020 in W.A.(MD) No.863 of 2020,
C.M.P.(MD)No.4782 of 2020 in W.A.(MD) No.864 of 2020,
C.M.P.(MD)No.4785 of 2020 in W.A.(MD) No.867 of 2020,
C.M.P.(MD)No.4786 of 2020 in W.A.(MD) No.868 of 2020,
C.M.P.(MD)No.4788 of 2020 in W.A.(MD) No.869 of 2020,
C.M.P.(MD)No.4790 of 2020 in W.A.(MD) No.871 of 2020,
C.M.P.(MD)No.4799 of 2020 in W.A.(MD) No.873 of 2020,
C.M.P.(MD)No.4807 of 2020 in W.A.(MD) No.875 of 2020,
C.M.P.(MD)No.4817 of 2020 in W.A.(MD) No.877 of 2020,

1.Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.
2.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.
3.The Assistant Commissioner of Customs (SIIB),
Custom House, New Harbour Estate,
Tuticorin - 628 004. ... Appellants/Respondents in all the Writ Appeals

Vs.

M/s.Black Gold Technologies,
Rep. by its Proprietor Mr.Anuj Bansal,
UP-58, Maurya Enclave, Pitam Pura,
Delhi - 110 034. ... Respondent/Petitioner in all the Writ Appeals

Common Prayer : Appeals filed under Clause 15 of the Letters Patent Appeal against the order passed by this Court in W.P.(MD) Nos.2355, 4040, 1242, 4076, 3042, 1295, 4080 and 2377 of 2020, dated 25.08.2020 and W.P.(MD) No.10822 of 2020, dated 03.09.2020.

Prayer in WP(MD). 2355 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 124 Tons Viz., 5

Containers of Used Rubber Tyres Cut in Two Pieces(Used Rubber Tyres with one Cut in bead wire) imported vide Bill of Entry No.6635092, dated 25.01.2020, totally valued at USD 3720

Prayer in WP(MD). 4040 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 201.409 Tons viz 9 Containers of Used Rubber Tyers Baled with one cut in Bead Wire (Used Rubber Tyres with one cut in bead wire) imported vide Bill of Entry No.6795909 dated 7.2.2020 totally valued at USD 6042.27

Prayer in WP(MD). 1242 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 824.900 MT viz, 33x40 containers of Used Rubber Tyre Cut in Two Pieces (Used Rubber Tyre with one cut in bead wire) imported vide Bill of Entry No.6099943, dated 16-12-2019 totally valued at USD-24747.

Prayer in WP(MD). 4076 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 269.402 Tons Viz., 10 Containers of Used Rubber Tyres Baled with one cut in Bead Wire (used Rubber Tyres with one cut in bead wire) imported vide Bill of Entry No.6635238, dated 25/01/2020 , totally valued at USD 8082.06

Prayer in WP(MD). 3042 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 404.942 Tons Viz., 16 Containers of Used Rubber Tyres Baled with one cut in Bead Wire (used Rubber Tyres with one cut in bead wire) imported vide bill of Entry No.6635093, dated 25.1.2020 totally valued at USD 12148.26

Prayer in WP(MD). 1295 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 159 MTS Viz 6 Containers of Used Rubber Tyre Cut in Two Pieces (Used Rubber Tyre with one cut in bead wire) imported vide Bill of Entry No.6249836, dated 26.12.2019 totally valued at USD 4770 .

Prayer in WP(MD). 4080 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court directing the respondents herein to release the goods 238.747 Tons Viz., 10 Containers of Used Rubber Tyres Baled with one cut in Bead Wire (used Rubber Tyres with one cut in bead wire) imported vide Bill of Entry No.6795906, dated 07.02.2020, totally valued at USD 7162.41

Prayer in WP(MD). 2377 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to directing the respondents herein to release the goods 272 Tons viz 11 Containers of Used Rubber Tyres Cut in Two Pieces (used Rubber Tyres with one cut in bead wire) imported vide Bill of Entry no.6681746 dated 29.1.2020 totally valued at USD 8160

Prayer in WP(MD). 10822 of 2020 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus or any other appropriate Writ or order or direction most specifically in the nature of a Writ of Mandamus directing the respondents herein to release the goods 260-393 Tons viz., 10 containers of Used Rubber Tyres Baled with one cut in Bead Wire (Used Rubber Tyres with one cut in bear Wire) imported vide Bill of Entry No.6635466 dated 25.1.2020 totally valued at USD 7811.79

For Appellants 2 & 3 in all the Writ Appeals	:	Mr.V.Vijaykarthikeyan Standing Counsel
For Respondent in all the Writ Appeals	:	Mr.A.K.Jayaraj

* * * * *

COMMON JUDGMENT

(Judgment of the Court was delivered by M.SATHYANARAYANAN,J)

The official respondents in W.P.(MD) Nos.2355, 4040, 1242, 4076, 3042, 1295, 4080, 2377 and 10822 of 2020 had preferred these Writ Appeals, while making a challenge to the common orders dated 25.08.2020 and 03.09.2020 passed in those Writ Petitions.

2.The facts leading to the filing of the present Writ Appeals have been narrated in the impugned common orders passed in the Writ Petitions and for the sake of brevity, the facts are not repeated.

3.In sum and substance, it is the case of the respondent/writ petitioner in the Writ Petitions that they had imported huge tonnes of "Used Rubber Tyre Cut into Two Pieces" (used Rubber Tyre with one cut in bead wire) in containers, shipped from M/s.Primary Resources Lnc., USA and claimed for clearance of the goods for home consumption. It is the specific case of the respondent/writ petitioner that the said goods are freely importable under policy conditions and also under CTH 40040000 and they had satisfied the conditions of the Exim Policy and they are one of the actual user of the said goods imported. The respondent/writ petitioner would further state that the said goods are used for the manufacture of 'Rubber Crumb' at the petitioner's factory located at RIICO Industrial Area, Tehsil Tilara, Alwar District, Rajasthan and they are undertaking manufacturing activities after obtaining necessary consent and also authorization from Rajasthan State Pollution Control Board, Jaipur.

4.It is also the claim of the respondent/writ petitioner that on the earlier occasions also they imported identical goods in the same Custom House and after full and proper examination of the goods, they were assessed and released. The grievance of the petitioner is that despite very many request for release of the goods, which are berthed at Tuticorin Port, the goods have not been released and therefore, came forward to file the Writ Petitions praying for directing the appellants/ respondents to release the goods Containers of "Used Rubber Tyre Cut in Two Pieces" (used Rubber Tyre with one cut in bead wire) imported.

5.The Writ Petition was entertained and on behalf of the appellants/respondents counter affidavits have been filed. It is the stand of the appellants/respondents that the 'Used rubber tyres with one cut in bread wire' is free under the Foreign Trade Policy, however, in the present case the cargo imported by the petitioner is 'Used rubber tyres, but there was no cut in the bead wire', which is a restricted item importable only under valid authorization of Director General of Foreign Trade and that apart, the respondent/writ petitioner had not obtained valid License from the Director General of Foreign Trade for the import of 'Used Rubber Tyres' and therefore, the cargo imported were seized by the Customs Officers of SIIB for further investigation under the Customs Act, 1962 in the presence of Customs Broker of the Importer/ respondent. Thus, it is the specific stand of the appellants that since the respondent has imported the goods violating the Import Policy conditions, the goods cannot be released at this stage.

6.In sum and substance, it is the specific stand of the appellants that since 'Used rubber Tyres' falls under CTH 4004 0000 is restricted as per Para 2.31 of Foreign Trade Policy and that apart, the respondent has imported the goods under the guise of 'used tyres cut in two pieces' and that apart, 'used rubber tyres' are restricted under Foreign Trade Policy and without valid authorization from the Director General of Foreign Trade, the respondent/writ petitioner has imported the goods and hence, the same cannot be released and therefore, prayed for dismissal of the Writ Petition.

7.The learned Single Judge, after taking note of the factual aspects, relevant legal provisions and the various decisions rendered by the Hon'ble Supreme Court of India as well as this Court has allowed the Writ Petitions by directing the appellants/respondents to assess and permit the provisional release of the goods in question, upon payment of applicable duties of customs subject. A further direction was also issued to the appellants/respondents to release the goods after assessing and collecting the customs duty and other charges provisionally within a period of three weeks from the date of receipt of a copy of this order and further that the adjudication can go on with certain other directions. The official respondents aggrieved by the allowing of the Writ Petitions with certain directions had filed these Writ Appeals.

8.The learned counsel for the appellants by drawing the attention of this Court to the Mahazars, which were prepared in the presence of the authorised representative of the respondent/importer, would submit that the respondent/writ petitioner under the garb of importing used rubber tyres with one cut in bead wire had actually imported used rubber tyre without any cut in bead wire, which is a restricted item, importable only under valid authorization of the Director General of Foreign Trade.

9.It is the further submission of the learned counsel for the appellants that the imported tyre wastes have been listed under Part B of Schedule III to Hazardous Waste Management Rules and in terms or Rule 12(4) of Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, no waste listed under Part B of Schedule III can be imported without permission from Ministry of Environment and Climate Change and also pointed out that in terms of Rule 15 of Hazardous Waste Management Rule all the import of waste without permission of Central Government is deemed to be illegal and Rule 15(2) mandates that the imports made without permission should be directed to be re-exported.

10.The learned counsel for the appellants/respondents in support of his submissions has placed reliance on the judgment rendered by a Division Bench of this Court reported in ***2019 (367) E.L.T. 920 (Mad.) [Commissioner of Customs, Chennai - II v. City Office Equipment]***.

11.Mr.A.K.Jayaraj, learned counsel accepts notice on behalf of the respondent and would submit that subsequent to the filing of the Writ Petitions, the Joint Commissioner, Office of the Commissioner of Customs, Custom House, New Harbour Estate, Thoothukudi has issued show cause notice under Section 124 of the Customs Act, 1962 and the said proceedings will be defended in an appropriate manner.

12.The learned counsel for the respondent/writ petitioner meeting the submissions of the learned counsel for the appellants/ respondents has drawn the attention of this Court to the counter affidavits and would submit that as to the alleged infraction of Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, no such stand has been taken in the counter affidavits and only during the course of argument such a stand has been taken and that apart, in the Show Cause Notice, the said Rule has not been invoked and also brought to the notice of this Court the Office Memorandum dated 01.07.2016 of Department of Industrial Policy and Promotion, LR Section, Ministry of Commerce and Industry dated 01.07.2016, which says about the Revision of Import Policy for Import of Items under Exim Code 40040000 under ITC(HS), 2012 Schedule - I (Import Policy) and in paragraph No.2, it is opined as follows:

> "2. If Directorate General of Foreign Trade (DGFT) feels that making policy as "impact of used rubber tyres/tubes cut into two separate pieces, however, is free" will prevent its misuse, then this Department has no objection for the same subject to condition that it should not be used for extracting oil."

13.The learned counsel appearing for the respondent/writ petitioner, on factual aspects also disputes the stand of the appellants/ Revenue by submitting that what was imported is tyres cut into two pieces (used tyres with cut in bead wire) and even for the sake of convenience, admits the stand of the appellants/respondents, it can only be construed as a restrictive item.

14.The learned counsel appearing for the respondent/writ petitioner by drawing the attention of this Court to the judgment rendered by the Hon'ble Supreme Court reported in ***2019 (365) E.L.T. 465 (S.C.) [Commissioner of Customs v. Atul Automations Pvt. Ltd.]*** and would submit that on similar facts and circumstances, the provisional release of goods was put to challenge by the Revenue by filing appeal before the Hon'ble Supreme Court and in the said decision, the Apex Court has sustained the order of provisional release even in respect of the restricted goods and as such the impugned order passed by the learned Single Judge with certains directions is sustainable in law and on facts and prays for dismissal of these Writ Appeals.

15.This Court has considered the rival submissions and also perused the materials placed before it.

16.It is the stand of the appellants/respondents that there was mis-declaraton of imported items, though it is claimed by the respondent/writ petitioner/importer that all the years they are importing used rubber tyre with one cut in bead wire (that will be freely importable), the inspection done revealed that what was imported was used rubber tyres and there was no cut in the bead wire and therefore, it is a restricted item, which violates the import policy and therefore, the same has not been released.

17.As already pointed out, as regards the invocation of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, no stand has been taken in the counter affidavits as to application of the said Rules. Be that as it may, during the course of argument the said stand was taken.

18.The learned Judge had dealt with the merits of the rival claims in paragraph 7 of the impugned common order and after taking note of the various decisions in paragraph 10 has recorded a finding that no proceedings have been initiated by the authorities in terms of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 for directing the petitioners to re-export the goods. Now, coming to the issue relating to the provisional release, the learned Single Judge placed reliance on the decision of a Division Bench of this Court reported in ***2016 (336) ELT 199 (Mad) [Commissioner of Customs (Sea Port-Imports), Chennai v. City Office Equipments]*** and also the decision of the Hon'ble Apex Court reported in ***Atul Automations Pvt. Ltd.*** (supra) and has ordered the provisional release.

19.The learned counsel for the appellants/respondents has drawn the attention of this Court to the Mahazars, wherein, it has been recorded that except a few containers in which the bead wires were found to be cut into many pieces, in many containers used rubber tyres were found to be cut into many horizontal pieces without any cut in the beat wires and in the light of the Foreign Trade Policy 2015-2020, only the import of used rubber tyres with one cut in the bead wire is free, otherwise, the same is restricted and having come to know about the same, have handed over the possession of the cargo to the custodian, M/s.ASSA CFS, Tuticorin for safe custody.

20.The learned counsel for the appellants/respondents has drawn the attention of this Court to Schedule III of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, especially, the entry B3140 as well as entry B3140 of Schedule VI and would submit that if the imported waste, namely, waste pnecumatic and other tyres, excluding those which do not lead to reasonable recovery, recycling, reclamation but nor for direct reuse and waste pnecumatic tyres for direct reuse respectively, at best it can be considered as restricted item in the light of ***Atul Automations Pvt. Ltd.*** case rendered by the Hon'ble Apex Court .

21.It is also brought to the notice of this Court by the learned counsel for the respondent/writ petitioner that in compliance of the common order passed in the Writ Petitions, the third appellant/third respondent has also sent a communication dated 24.09.2020 as to the provisional release of the cargo imported, subject to execution of bonds and getting security and imposed few conditions and over and above, the applicability to the customs provisions and in the light of the said proceedings relating to provisional release, nothing remains for further adjudication in these Writ Appeals.

22.The learned counsel appearing for the respondent/writ petitioner also disputes the contents of the Mahazars and would add that the said Mahazars are relied upon by the appellants in the Show Cause Notice, which leads to the adjudication proceedings, and as such, there cannot be any positive finding as it may affect his case in the adjudication proceedings.

23.A perusal of the Office Memorandum dated 01.07.2016, issued by the Department of Industrial Police and Promotion, Ministry of Commerce & Industry, Government of India would disclose that the Directorate General of Foreign Trade was granted opportunity as to the making policy as to the used rubber tyres/tubes cut into two separate pieces and it is further clarified that it prevents misuse, then the Department has no objection for the same, subject to the condition, it should not be used for extracting oil.

24.The learned counsel for the respondent/writ petitioner has also drawn the attention of this Court to the averments made in the writ petitions in this regard that they will not misuse the imported items and it is also subject to the outcome of the adjudication proceedings, which are under contemplation. The said submission is also placed on record.

25.The learned counsel for the appellant/revenue has drawn the attention of this Court to pages 19 to 21 of the typed set of documents, which contain the de-stuffed items of the imported goods and made an attempt to point out that those imported items are without cut either on the bead wire or no two cuts are available. However, this Court is not inclined to go into the said aspect for the reason that it involves factual adjudication and any finding rendered in this regard may affect the Revenue or the respondent/importer.

26.The Hon'ble Apex Court in ***Atul Automations Pvt. Ltd.*** case (supra) had dealt with the aspect relating to prohibition/restriction of goods and in paragraph No.9 observed as follows:

> "9.Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made Under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore find no error with the conclusion of the Tribunal affirmed by the High Court that the Respondent 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 Customs Act, 1962."

27.The decision relied on by the learned counsel for the appellants/respondent reported in ***2019 (367) E.L.T. 920 (Mad.)*** (supra) is distinguishable on facts, for the reason that the said goods imported have not complied with the provisions of the

Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 as well as E-Waste Management Rules, 2016 and it is also noted in determined terms that two things were put against the importers i.e., 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 and Transboundary Movement) Rules, 2016 and accordingly decided the case in favour of the appellants/respondents.

28.In the considered opinion of this Court, in the light of the non taking of stand by the appellants/responds as to the applicability of Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 and in the light of the stand taken in the Writ Petitions, it cannot be concluded as a restricted item, for which, provisional release is not prohibited. It is also to be pointed out at this juncture that the third appellant/third respondent in compliance of the order passed in the Writ Petitions has also ordered the provisional release, subject to various conditions.

29.Therefore, this Court, in the light of the above facts and circumstances and also upon consideration of the rival submissions and indepedent application of mind to the entire materials placed, is of the view that there is no error apparent in the impugned orders passed and it also protected the interests of both parties. It is also made clear that the claim or otherwise of the Writ Petitioner/Importer is also subject to the out come of the adjudication proceedings, which came to be initiated subsequent to the filing of the Writ Petitions.

30.In the result, the Writ Appeals are dismissed, confirming the common orders dated 25.08.2020 and 03.09.2020 made in W.P.(MD) Nos.2355, 4040, 1242, 4076, 3042, 1295, 4080, 2377 and 10822 of 2020. Consequently, connected Miscellaneous Petitions are also dismissed. However, in the circumstances of the case, there shall be no order as to the costs.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

sj

To

1.The Secretary,
Ministry of Finance,
Department of Revenue,
Union of India,
New Delhi.

2.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.

3.The Assistant Commissioner of Customs (SIIB),
Custom House, New Harbour Estate,
Tuticorin - 628 004.

+1 CC to M/s.B. VIJAY KARTHIKEYAN, Advocate (SR-18661[F] dated 01/10/2020)

+2 CC to M/s.A.K. JEYARAJ, Advocate (SR-18838[F] dated 01/10/2020)

W.A.(MD)Nos.863, 864, 867 to 869, 871, 873, 875 and 877 of 2020
29.09.2020

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