

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.06.2022

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Writ Appeal No. 891 of 2016 against W.P.No.34581 of 2015
and
CMP. No. 11371 of 2016

1. The Commissioner of Customs
Group-6, Custom House
No.60, Rajaji Salai
Chennai - 600 001
 2. The Deputy Commissioner of Customs (SIIB)
Customs House
No.60, Rajaji Salai
Chennai - 600 001
 3. The Assistant/Deputy Commissioner of Customs (Group-6)
Customs House
No.60, Rajaji Salai
Chennai - 600 001
- .. Appellants

Versus

M/s. A.S. Enterprises
rep. by its Proprietor
V.A. Sahul Hameed
No.3/5, Sulthan Street
Mannady
Chennai - 600 001

.. Respondent

Appeal filed under Clause 15 of Letters Patent against the order of this court dated 02.06.2016 passed in W.P. No. 34581 of 2015.

Prayer in W.P.No.34581 of 2015 : Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus to direct the respondents to relase the imported goods viz. LED Spare parts for Lighting Fixtures Spare Parts for Lighting Fixtures and Capacitor for Lighting Fixtures covered under Bill of Entry No.8915658 dated 15.04.2015 in terms of section 110(2) of Custom Act 1962.

For Appellants : Mr. R. Sankara Narayanan
Additional Solicitor General of India
assisted by Mr. A.P. Srinivas
Senior Standing Counsel

For Respondent : Mr. B. Sathish Sundar

JUDGMENT

R. MAHADEVAN, J.

This intra-court appeal is filed by the appellants / Revenue, assailing the order dated 02.06.2016 passed in W.P. No. 34581 of 2015, in and by which, the learned Judge has allowed the said writ petition filed by the respondent herein with a direction to the appellants to release the imported goods covered under the Bill of Entry No.8915658 dated 15.04.2015, within a week's time.

2. The necessary facts leading to the filing of this appeal are as follows:

2.1. The respondent/writ petitioner is engaged in the business of trading various commodities including electronic goods and spare parts, for which purpose, they import goods from abroad, besides purchasing locally. They obtained Import Export Code No. 0413045153 from the office of the Director General of Foreign Trade. They also registered themselves with Commercial Taxes Department under the Tamil Nadu Value Added Tax Act, 2006 and were allotted TIN No.33761243844.

2.2. During the course of their business, the respondent/writ petitioner sought to import "LED spare parts for lighting fixtures, spare parts for lighting fixtures and capacitor for lighting fixtures" from M/s.Zhongshan Zeda Lighting Co. Ltd., China and the said goods were loaded vide Bill of Lading dated 04.04.2015, duly covered by Invoice No.ZEDA20150318 dated 02.04.2015 for a value of US\$ 10153.92. On arrival of such goods, the respondent/writ petitioner filed Bill of Entry No.8915658 dated 15.04.2015 with the office of the third appellant for assessment and clearance of the goods. After examining the same, the second appellant opined that the goods were found to be in order and as declared.

2.3. However, after a period of two months, the Appraiser attached to the office of the second appellant issued summons dated 26.06.2015 under Section 108 of the Customs Act, 1962 (in short, "the Act") for appearance of the Director of the respondent/writ petitioner company for enquiry on 04.07.2015, which was a Saturday. Immediately, the respondent /writ petitioner by a communication dated 07.07.2015, sought for

provisional release of the goods under Section 110A of the Act r/w Customs (Provisional Duty Assessment) Regulations, 1963, pointing out that the goods are likely to be diminished of its value, but the said requisition was not considered. Therefore, the respondent / writ petitioner filed a writ petition in WP No.22173 of 2015 for a Mandamus directing the appellants herein to assess and clear the imported goods. By order dated 17.08.2015, the aforesaid writ petition was disposed of, directing the respondent/writ petitioner to submit a fresh application within one week and on receipt of the same, the appellants herein were directed to decide the claim of the respondent/writ petitioner for release of the goods within a period of three weeks thereafter.

2.4. Pursuant to the aforesaid order dated 17.08.2015 made in WP.No.22173/2015, the respondent/writ petitioner approached the third appellant for provisional release of the goods. Following the same, they were issued with a communication dated 07.10.2015 in F.No.S.Misc.165/2015-Gr.6, informing that the Adjudicating Authority accepted for provisional release of the goods in terms of Section 110A of the Act, subject to the conditions that the respondent would execute a bond for full value of the goods viz., Rs.96,12,271/-, besides furnishing a bank guarantee for Rs.28,61,358/- representing 110% of estimated duty evasion amount. Stating that the conditions so imposed by the appellants were onerous and unreasonable, the respondent/writ petitioner filed another writ petition bearing No.34581 of 2015 praying to issue a Writ of Mandamus directing the appellants to release the subject goods covered under Bill of Entry No. 8915658 dated 15.04.2015 in terms of Section 110 (2) of the Act. By order dated 02.06.2016 the learned Judge allowed the said writ petition as prayed for, on the premise that no action was initiated by way of issuance of show cause notice under section 124(a) of the Act, within six months or extended period stipulated under section 110(2) of the Act and hence, the person from whose possession the goods were seized, becomes entitled to their return. Aggrieved over the same, the appellants / Revenue are before this court with this intra-court appeal.

3.1. The learned Additional Solicitor General appearing for the appellants would contend that the imported goods were arrived on 15.04.2015. While so, based on a specific intelligence received to the effect that the importer was resorting for undervaluation of the goods whereby the value declared was only 10% of the actual value, the consignment was taken up by Special Intelligence and Investigation Branch (SIIB), Customs House, Chennai for investigation. Upon investigation conducted on 21.05.2015 in the presence of the importer's representative and the customs broker, it was found

that there were 990 cartons as against the declared 972 cartons; and the parts of LED bulb plastic Housing set - bottom and top, bulb holder and screws, LED PCB, Capacitor and wire sets, as declared goods. Further, a carton box containing base machine, Foot Valve Model No.VF200-08 with compressor 0.75KW Model No.YL80L2 JB/T95421999, which was undeclared, was also found. Therefore, permission was granted to warehouse the said goods on 01.06.2015 as contemplated under Section 49 of the Act. Adding further, the learned counsel would contend that summons dated 04.06.2015 under Section 108 of the Act, was issued, calling upon the Director of the respondent company to appear for enquiry on 04.07.2015. Following the same, two more summons dated 16.07.2015 and 27.07.2015 were issued, as the date (04/07/2015) given was inadvertently a Saturday, to which, the respondent by communication dated 31.07.2015 replied that they had filed a writ petition and hence, they were unable to appear before the authorities on 31.07.2015. Thus, according to the learned counsel, the observation of the learned Judge that non-issuance of show cause notice within a period of six months as per section 124(a) of the Act, would vitiate the provisional order passed by the third appellant on 07.10.2015 for release of the imported goods, cannot be allowed to be sustained. The learned counsel also placed reliance on the following decisions:

(i)Chaganlal Gainmull v. Collector of Central Excise [1999 (109) E.L.T. 21 (SC)] wherein it was held by the Hon'ble Supreme Court that "the delay beyond six months in the issue of the show cause notice goes to and affects the power to detain the seized goods beyond six months and does not denude the adjudicating authority of the power to initiate proceedings even thereafter".

(ii)Jayant Hansraj Shah v. Union of India [2008 (229) E.L.T. 339 (Bom)], in which, it was categorically observed by the Bombay High Court that "it is only in the case where no provisional order is passed for release of seized goods and if no notice is issued under section 124(a) of the Customs Act, 1962, for confiscation of goods, then only would section 110(2) ibid apply and Department would be bound to release goods".

3.2. The learned Additional Solicitor General appearing for the appellants also contended that while passing an order for provisional release of the goods, it is open to the appellants to impose any condition as may be necessary for protecting the interest of the revenue. Even Section 110 (2) of the Act does not stipulate that the goods can be released unconditionally without imposing any condition. Further, as per the guidelines contained in para 2.2 (c) of Chapter 15 of the Customs Manual, the provisional clearance of the goods shall be considered upon furnishing a bond for full value of the goods supported by adequate bank guarantee as may be determined by the proper

officer. Therefore, based on the report of SIIB, the third appellant passed the order dated 07.10.2015 to provisionally release the goods, subject to execution of bond for full value of goods of Rs.96,12,271/- and bank guarantee for Rs.28,61,359/- i.e., 110% of the estimated duty evasion by the respondent / writ petitioner. Thus, according to the learned counsel, such a provisional order passed by the third appellant cannot be found fault with.

3.3. It is further contended by the learned Additional Solicitor General appearing for the appellants that the respondent / writ petitioner had already invoked the writ jurisdiction by filing WP.No.22173 of 2015 seeking a mandamus directing the appellants to release the goods imported, which was disposed of, by order dated 17.08.2015. Pursuant to the said direction, the third appellant passed the provisional order of release of the goods on 07.10.2015 imposing certain conditions, in terms of section 110A of the Act. However, the respondent / writ petitioner did not comply with the said provisional order of release of the subject goods nor challenged the same, but they made a second attempt by filing the instant writ petition viz., WP.No.34581 of 2015, for the very same prayer of issuance of a Writ of Mandamus to release the imported goods, which cannot be maintainable and the question of further release of the goods as contemplated under section 110(2) of the Act will not arise. Without considering the said fact, the learned Judge allowed the second writ petition and directed the appellants to release the goods unconditionally, by the order impugned herein, which is per se illegal and contrary to the provisions of law. Stating so, the learned counsel sought to quash the order passed by the learned Judge in the second writ petition.

4.1. Per contra, the learned counsel for the respondent/writ petitioner would contend that the subject goods reached Chennai during April 2015 and the bill of entry along with other documentary details were immediately submitted by the respondent and the goods, upon examination by the second appellant, were found to be in order and as declared, but the same were not permitted to be cleared by the appellants. While so, the Appraiser attached to the office of the second appellant issued summons on 26.06.2015 for appearance of the Director of respondent/writ petitioner company on 04.07.2015, which was a Saturday. Thereafter, no show cause notice was issued by the appellants under the relevant provisions of the Act. Since there was enormous delay on the part of the appellants in clearing the goods in question and the same had caused prejudice to the respondent / writ petitioner in honouring their business commitments, they filed WP.No.22173/2015 for a mandamus directing the appellants to release the goods and the said writ petition was disposed of on 17.08.2015, based on which, the

respondent / writ petitioner made repeated requests for release of the goods. Ultimately, the third appellant by communication dated 07.10.2015, informed that the Adjudicating Authority agreed for provisional release of the goods subject to execution of bond and bank guarantee, which were onerous and could not be executable and hence, the respondent / writ petitioner again approached this court under Article 226 of the Constitution of India for a mandamus to the appellants for release of the goods imported in terms of section 110(2). The said writ petition was rightly considered by the learned Judge and a direction was issued to the appellants for absolute release of the goods, for want of issuance of show cause notice under section 124(a) of the Act.

4.2. Referring to a decision of the Bombay High Court rendered on 29.10.2021 in WP.No.5593 of 2021 [Indosheel Mould Limited v. Union of India], the learned counsel for the respondent/writ petitioner pointed out that the goods have been detained for more than a year without there being any show cause notice as contemplated under section 124(a) of the Act and hence, the same ought to have been released by the appellants unconditionally. Taking note of the same, the learned Judge passed the order impugned herein, directing the appellants to release the goods without any condition. For better appreciation, the relevant portion of the said Bombay High Court decision is extracted below:

"19. No doubt, the amendment to sub-section 2 of Section 110 of the said Act gives power to the appropriate authority to extend the period for issuing show cause notice in the case of seized goods by a further period of six months and also to provide exemption from application of time limit of six months to cases in respect whereof an order of provisional release of seized goods has been passed. We have already observed that within a period of six months from the date of seizure, no notice is given under clause (a) of section 124. In view of the submissions of learned Senior Advocate, we now consider the effect of the order passed by the competent authority provisionally releasing the goods under Section 110-A of the said Act on the release of goods under sub-section (2) of Section 110 of the said Act. The second proviso to sub-section (2) of Section 110 provides exemption from application of time limit of six months to cases in which an order of provisional release of seized goods has been passed. Factually, in view of the onerous conditions, the petitioner did not avail the release of the goods pursuant to the passing of the order of provisional release. The consequence is that the goods remain under

seizure. This being the position, in our opinion, the rigors of sub-section (2) of section 110 of the said Act will continue to apply as the character of the goods continue to be goods seized under sub-section (1). The proper officer then is obliged to follow the procedure prescribed in sub-section (2) of section 110 of the said Act, in that he has to issue notice under clause (a) of section 124 of the said Act within six months of the seizure of the goods. We have already observed that the notice under clause (a) of section 124 within six months of the seizure is not issued and therefore the consequence of release must follow.

20. Assuming that the competent authority in exercise of the powers conferred by the first proviso extends period so specified by sub-section (2) of section 110 by a further period of six months, the maximum period during which the goods shall remain under seizure is 12 months from the date of seizure. The effect of non compliance of the provisions of sub-section (2) of section 110 would only be that the seized goods are to be returned to the persons from whose possession they were seized. It would not render the initial seizure of the goods illegal. Thus, under sub-section (2) of section 110, time limit is fixed for retaining the goods seized by the customs authority. In case the confiscatory proceedings are not initiated, custody of the goods to the persons from whom they were seized are to be handed over."

Therefore, according to the learned counsel, in the absence of any show cause notice as mandated under the Act, the learned Judge is wholly justified in allowing the writ petition thereby directing the appellants to release the goods and such a well considered order need not be interfered with by this court.

5. We have heard both sides and also perused the materials available on record.

6. It could be seen that in the course of business, the respondent / writ petitioner imported the subject goods viz., LED spare parts for lighting fixtures, spare parts for lighting fixtures and capacitor for lighting fixtures by Bill of Entry No.8915658 dated 15.04.2015. The said goods were not permitted to be cleared by the appellants alleging that the respondent / writ petitioner undervalued the same in order to evade from the payment of customs duty and that, the declared value was only 10% of the actual value. Admittedly, permission to ware house

the said goods imported under section 49 of the Act, was given on 01.06.2015 and summons dated 04.06.2015 under section 108 of the Act, came to be issued, calling upon the Director of the respondent / writ petitioner to appear for enquiry on 04.07.2015, which was a Saturday. Thereafter, no communication / show cause notice was issued nor the goods detained were released, according to the respondent / writ petitioner and therefore, they preferred WP.No.22173 of 2015 seeking a mandamus to the appellants to release the subject goods in terms of section 110A of the Act. This Court by order dated 17.08.2015, disposed of the said writ petition bearing no.22173 of 2015, in the following terms:

"4. ...the petitioner is permitted to file an application within one week from the date of receipt of a copy of this order and also directed to appear before the respondent on the date and time so specified so as to assess as provided by law. The matter shall be decided within 3 weeks from the date of receipt of the application submitted by the petitioner."

Consequent to the aforesaid order, by a communication dated 07.10.2015 sent by the third appellant / Assistant Commissioner of Customs, Group-6, Chennai, the respondent / writ petitioner was informed as follows:

"Please refer to your letter dated 17.08.2015 on the above subject.

In this regard, the Adjudicating Authority has accepted your request for provisional release of goods in terms of section 110A of the Customs Act subject to following conditions:

(i) Execution of bond for full value of goods i.e., for Rs.96,12,271/-

(ii) Execution of Bank Guarantee for Rs.28,61,359/- i.e., 110% of estimated duty evasion amount."

Concededly, the aforesaid order dated 07.10.2015 was neither complied with nor challenged by the respondent / writ petitioner, till date. Without doing so, they came forward with another writ petition, viz., WP.No.34581 of 2015 to issue a writ of mandamus for the release of the subject goods in terms of section 110(2) of the Act. By order dated 02.06.2016, which is impugned herein, the learned Judge allowed the aforesaid writ petition and directed the appellants to release the imported goods within one week from the date of receipt of the copy of the order, with the following findings:

"17. It can be gathered from the above that the provisions of Section 110(2) in so far as the prescription of a time limit for holding seized goods is deemed mandatory and the consequence of not

issuing a show cause notice within the period or extended period specified is clearly spelt out to be that the "goods shall be returned to the person from whose possession they were seized", which is apparent from the combined reading of Section 110(2) and its proviso. The corollary is not that the Customs authorities lose jurisdiction to issue show cause notice. The object of enacting Section 110(2) of the Act is that the Officer of the Customs Department may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under Sub-section (1) thereof. Sub-section (2) strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice has been issued under Section 124(a) for confiscation of the goods. Proviso to Section 110 (2) provides for extended period of limitation to validate the detention of the goods for another period of six months on grant of extension by the Commissioner of Customs. Section 110 (2) of the Act nowhere envisages the period of limitation for issuing show cause notice. Therefore, a plain and combined reading of Sections 110(2), 124 and 110-A spells out that any order of provisional release shall not take away the right of the assessee under Section 110(2) read with Section 124 of the Act. When no action is initiated by way of issuance of show cause notice under Section 124(a) of the Act within six months or extended period stipulated under Section 110(2) of the Act, the person from whose possession the goods were seized, becomes entitled to their return. The remedy of provisional release is independent of remedy of claiming unconditional release in the absence of issuance of any valid show cause notice during the period of limitation or extended limitation prescribed under Section 110(2) of the Act. Therefore, merely because a request has been made for provisional release of goods under Section 110-A of the Customs Act and the same has been acceded to by the respondent, the same would not take away the right of the petitioner for unconditional release of the goods under Section 110 (2) of the Customs Act. The right under Section 110 (2) of the Customs Act is absolute and cannot be curtailed or prevented by the Department. That apart, the Circular issued by the Ministry of Finance dated 19.02.2013 also supports the case of

the petitioner."

Questioning the aforesaid order passed by the learned Judge in WP.No.34581 of 2015, the instant intra-court appeal came to be filed by the appellants/ revenue.

7. During the course of hearing, the learned counsel appearing for both sides made elaborate arguments, citing case laws, for and against the impugned order passed by the learned Judge, in directing the appellants to release the subject goods unconditionally. Ultimately, they fairly submitted that the same were raised only for academic interest and the Act was subsequently, amended and the subject matter in issue is pending consideration before the Hon'ble Supreme Court. It is also submitted that the subject goods lying in the custody of the Department, which are perishable in nature, have now, become obsolete and therefore, the same are of negligible value.

8. In view of the aforesaid submissions made on both sides, this court is of the opinion that no further orders need be passed with respect to release of the subject goods at this stage, except directing the appellants to complete the adjudication proceedings, if not completed earlier, and pass appropriate orders, on merits and in accordance with law, as expeditiously as possible. This writ appeal stands disposed of accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-IX)

//True copy//

Sub Assistant Registrar

rsh/rk

To

1. The Commissioner of Customs
Group-6, Custom House
No.60, Rajaji Salai, Chennai - 600 001
2. The Deputy Commissioner of Customs (SIIB)
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+1cc to Mr.A.P.Srinivas, Advocate SR.No.33805

WA No. 891 of 2016

AD(CO)

GMV(12/07/2022)