BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 11.04.2022
CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Writ Petition (MD) Nos.13225 & 13226 of 2021
and
W.M.P.(MD)No.10215 of 2021 in W.P.(MD)No.13225 of 2021

M/s.Black Gold Technologies,
Rep. by its Proprietor,
Mr.Anuj Bansal,
H.No.58, UP Block, Maurya Enclage,
Pitampura, Delhi - 110 034.
.. Petitioner in both the W.Ps.

Versus

The Joint Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House,
Thoothukudi - 628 004. .. Respondents in both the W.Ps.

Prayer in W.P.(MD)No.13225/2021:- Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records pertaining to the Impugned Order-in-Original No.5 to 11/2021, DIN 20210681OH0000621146, C.No.VIII/10/10, 14, 15, 13, 16, 17, 18/2020-ADJN, dated 29.06.2021, passed by the respondent herein, insofar as the petitioner is concerned, quash the same as illegal, arbitrary, unfair, unreasonable and violation of principles of natural justice and further direct the respondent herein to re-hear and dispose off the same considering the documents furnished by the petitioner on merits after allowing the cross-examination of the persons requested by the petitioner and after affording an opportunity of personal hearing.

Prayer in W.P.(MD)No.13226/2021:- Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records pertaining to the Impugned Order made in C.No.VIII/10/11, 10, 14, 15, 13, 16, 17, 18/2020-ADJN, DIN:20210681OH0000999EDO, dated 23.06.2021, on the file of the respondent and quash the same.

For Petitioner (in both the W.Ps.)	:	Mr.A.K.Jayaraj
For Respondent (in both the W.Ps.)	:	Mr.B.Vijay Karthikeyan Senior Standing Counsel

COMMON ORDER

After hearing the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent, these Writ Petitions are disposed of by this common order.

2.The petitioner had imported consignments of Tyres, which were ostensibly in contravention with the Foreign Trade Policy [FTP] 2015-2020. According to the respondent, it was a restricted item and therefore, the same could not be cleared without a proper licence. As the petitioner was unable to clear the same immediately, the rushed to this Court and obtained interim orders for clearing the same.

3.The petitioner had earlier filed a batch of Writ Petitions in **W.P.(MD)No.1242 of 2020 etc. batch** before this Court [Black Gold Technologies vs. Union of India] reported in **2020 (374) ELT 507 (Mad.)** and the same were disposed of with the following observations:-

> *''9.The 2016 Rules contain as many as 8 schedules. Schedule 3 is in two parts. Part A contains a list of hazardous wastes applicable for import and export with prior informed consent. Part B contains the list of other wastes applicable for import and export and not requiring prior informed consent. Schedule VI sets out hazardous and other wastes prohibited for import. It is not the case of the respondents that the imported goods in the case on hand fall under Schedule VI. Once the application of the Schedule VI of the 2016 Rules is ruled out, the only question is whether the import of the goods is free or restricted. Under either case, in view of the decision of the Hon'ble Supreme Court in Atul Automations, provisional release is very much permissible. The respondents have seized the goods under Section 110 of the Customs Act, 1962. Therefore, Section 110A of the Customs Act, 1962 will automatically kick in. Section 110A of the Act reads as under :*
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> > ***''110A.Provisional release of goods, documents and things seized pending adjudication -*** *Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.''*
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> *10.Of course, the contention urged by the learned standing counsel with reference to Rule 12 (4) r/w.Rule 15 has to be answered. Interestingly, this point has also been considered in Atul Automations decision. The Hon'ble Supreme Court after referring to Rule 15 points out that the Customs Act, 1962 does not provide for re-export. There is another*

decision reported in 2015 (316) E.L.T 199 (Mad) (City Office Equipments vs. Commissioner of Customs) in favour of the petitioners. The learned Judge after elaborate discussion of the statutory scheme obtaining in the Customs Act, 1962, the Foreign Trade Development and Regulation Act, 1992, Foreign Trade (Regulation) Rules, 1993 and the earlier Hazardous Wastes Rules concluded that despite the fact that the goods, whose import is restricted in terms of the Foreign Trade Policy, should be construed to be prohibited goods, there is no bar for the release of the goods. The learned Judge also noted that it is not open to the customs authorities to insist on re-export. This was to be done only by the authorities specified in Schedule VII of the Hazardous and Other Wastes (Management and Transboundary) Rules, 2016. As in that case, in the present case also, no proceedings have been initiated by the authorities in terms of the Hazardous Wastes Rules for directing the petitioners to re-export the goods. This decision of the learned single Judge was also confirmed by the Hon'ble Division Bench in the decision reported in 2016 (336) E.L.T 199 (Mad) (Commissioner of Customs (Sea Port-Import), Chennai vs. City Office Equipments).

11.I am therefore of the view that the petitioners are entitled to provisional release of the goods under Section 110A of the Customs Act, 1962. Since several decisions have been cited on either side, I make it clear that I have chosen to follow the decision of the Madras High Court reported in 2015 (316) E.L.T 199 (Mad) (City Office Equipments vs. Commissioner of Customs) which was confirmed by the Hon'ble Division Bench in the decision reported in 2016 (336) E.L.T 199 (Mad) (Commissioner of Customs (Sea Port-Import), Chennai vs. City Office Equipments) and the decision of the Hon'ble Supreme Court in Atul Automations case. Of course, the adjudication proceedings will go on. The respondents 2 and 3 are directed to provisionally release the goods of the petitioners by taking a bond from them in proper form with such security and conditions as the adjudicating authority may require. The petitioners' counsel also prayed that they should not be levied with any demurrage and container detention charges. The learned counsel for the petitioners pointed out that they are entitled to waiver in view of the Handling of Cargo in Customs Areas Regulations 2009. They would also point out that the Union Government has also instructed that in view of the lock down declared by the Government of India, demurrage and detention charges ought not to be levied.

12.The learned counsel for the petitioners placed reliance on the decision reported in 2018 (361) E.L.T 463 (Mad) (Giridhari Homes Pvt. ltd vs. Principal Commissioner of

Customs, Chennai-III) and 2019 (367) E.L.T 972 (Mad.) (Agro 1 Stop vs. Commissioner of Customs, Chennai-II). The said decisions are squarely applicable to the case on hand. Therefore, the respondents are directed to assess and permit the provisional release of the goods in question upon payment of applicable duties of customs subject however to the eventual adjudication. The respondents shall 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. The adjudication proceedings can go on. The respondents will bear in mind the usual approach adopted in the case of provisional release of goods in terms of 110A of the Customs Act. It is further declared that the petitioners are entitled to waiver in view of the handling of cargo in Customs Areas Regulations 2009. No demurrage and detention charges shall be levied on the petitioners herein.

13.These writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.''

4.A similar order was passed again in respect of subsequent consignments in **W.P.(MD)Nos.10513 and 10519 of 2020** [Black Gold Technologies vs. Union of India] reported in **2020 (374) ELT 529 (Mad.).** Meanwhile, the respondent also preferred Writ Appeals in **W.A.(MD)Nos.863 of 2020 etc. batch**, which came to be dismissed by a Division Bench of this Court, by a common judgment **dated 29.09.2020**, with the following observations:-

''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 independent 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.''

5.The petitioner was thereafter issued with the impugned order in respect of the following show cause notices:-

Show Cause Notice No.	Date	F.No.C.No.
07/2020	06.07.2020	VIII/48/04/2020-SIIB
08/2020	07.07.2020	VIII/48/06/2020-SIIB
09/2020	21.07.2020	VIII/48/07/2020-SIIB
10/2020	21.07.2020	VIII/48/08/2020-SIIB
11/2020	21.07.2020	VIII/48/10/2020-SIIB
12/2020	21.07.2020	VIII/48/12/2020-SIIB
13/2020	21.07.2020	VIII/48/14/2020-SIIB
14/2020	21.07.2020	VIII/48/15/2020-SIIB

6.In support of his submissions, the learned counsel for the petitioner relied on the following judgments:-

(i) **Lakshman Exports Limited vs. Collector of Central Excise [2002 (143) E.L.T. 21 (SC)]**

(ii) **Arya Abhushan Bhandar vs. Union of India [2002 (143) ELT 25 (SC)]**

(iii) **Silicon Graphics System (India) Private Limited vs. Union of India [2006 (204) ELT 247 (Bom)]**

(iv) **Commissioner of Cus. (Imports), Chennai - 1 vs. Sainul Abideen Neelam [2014 (300) ELT 342 (Mad.)]**

(v) **Black Gold Technologies vs. Union of India [2020 (374) ELT 507 (Mad.)]**

(vi) **Black Gold Technologies vs. Union of India [2020 (374) ELT 529 (Mad.)]**

7.The learned Senior Standing Counsel for the respondent submits that the Writ Petitions are devoid of merits and placed reliance on a decision of this Court in **Jet Unipex vs. Commissioner of Customs, Chennai** reported in **2020 (373) E.L.T. 649 (Mad.).** He submits that it is not mandatory to extend the benefit of cross-examination of Mahazar Witness or the Officers, who investigated the case.

8.The learned Senior Standing Counsel for the respondent further submits that the petitioner has imported cut Tyres at Tuticorin Port for setting up a factory in Tamil Nadu at Tuticorin. However, till date, no factory has been set up. It is submitted that during the course of investigation, the petitioner had stated that the imported Tyres were meant for the manufacture of Rubber Crumb and Granules and that a factory had been set up in Rajasthan.

9.The learned Senior Standing Counsel for the respondent further submits that the jurisdictional authorities were requested to search the premises of the importer at Delhi and Jaipur at Rajasthan. The Joint Commissioner, Jaipur, vide Letter F.No.VIII (48)/27/Inv./Prev./2020/1004, dated 03.03.2020, informed that there was no factory named 'M/s.Black Gold Technologies' functioning at the above said address. On enquiry with Shri Subhash Chand, Proprietor of M/s.Anju Plastics, it revealed that they never imported Tyres till date. The search was conducted as per Section 105 of the Customs Act, 1962. The object of Section 105 of the Customs Act, 1962 is to search for the goods liable to be confiscated or recovery of documents secreted in any place, which are relevant to any proceedings under the Customs Act. During search proceedings, search Panchanama was drawn by the Customs Officers in the presence of two independent witnesses. The person of the authorized officials and witnesses may be offered for search before initiating the search so as to avoid suspicion that any member has surreptitiously planted the things recovered in the search. The Officers of Customs Department must call upon two or more witnesses, who are respectable inhabitant of the locality, wherein the premise is situated. The list of all the things recovered during search must be inventorized as to wherefrom they were recovered and must be signed by the witnesses. The Officers have found that M/s.Anju Plastics, is a Proprietorship Firm and registered at No.H-943, Khushkhera Industrial Area, Tijara Alwar, Rajasthan and they have never imported Tyres till date and they have purchased the aforesaid land from Shri Pawan Chauhan in November 2019. The above facts have been elaborated in the show cause notice. Instead of producing evidences for their ownership and existence of their factory in the given address, the importer has contested that various Government Agencies, who have issued certificates such as, MSME Certificate, GST Registration Certificate, dated 29.09.2017, Certificate dated 03.05.2017 and authorization issued by Rajasthan State Pollution Control Board for functioning of their Company at the said premises.

10.The learned Senior Standing Counsel for the respondent further submits that the Proprietor of the petitioner named, Shri Anuj Bansal was also summoned and required to appear before the Superintendent of Customs [SIIB] on 05.03.2020 and he tendered a voluntary statement to the effect that M/s.Black Gold Technologies, New Delhi, was started only during the year 2017 and that they are in the business of manufacturing Rubber Crumbs and Granules in their factory named, 'M/s.Black Gold Technologies' and that they have planned to set up a Unit in Tuticorin, for manufacturing of Rubber Crumbs and Granules and that they have collected the details of the Customs Broker namely, M/s.Indian Shipping and Logistics Facility Pvt. Limited, Tuticorin, through online and UK forwarders M/s.Amdip Traders Limited specifically recommended M/s.Indian Shipping and Logistics Facility Private Ltd., Tuticorin. It is submitted that the goods were imported from the United States of America.

11.The learned Senior Standing Counsel for the respondent further submits that the documents, which were produced by the petitioner, were relating to the permission granted by the Rajasthan State Pollution Control Board. All the documentary evidences produced by the importer for existence of their Company have been issued prior to November 2019, *i.e.,* date of registration of M/s.Anju Plastics in the above said address. The import of used rubber tyres has taken place during January and February 2020. Hence, the onus is on the importer to substantiate that their factory has been functioning in the address mentioned above till now and the imported goods would be processed further in their factory itself.

12.In support of his submissions, the learned Senior Standing Counsel for the respondent also relied on the following decisions:-

(i) **Stalin Joseph, S/o.Sebastian, 9A, BB Road, Perambur, Chennai -39 vs. The Commissioner of Customs (Airport), New Customs House, All Cargo Complex, Meenambakkam, Chennai – 600027 [2021-TIOL-587-HC-MAD-CUS]**

(ii) **Roshan Overseas, Rep. by its Proprietor, Usman Abdul Noble vs. Commissioner of Customs, Customs House, Tuticorin and another [2018 (2) CWC 588]**

13.By way of rejoinder, the learned counsel for the petitioner submits that the impugned order has been passed without giving breathing time to the petitioner to give response to the earlier order rejecting the request for cross-examination. It is submitted that the order rejecting the request for cross-examination was made on 23.06.2021 and thereafter, the impugned order has been passed on 29.06.2021. It is submitted that thus the impugned orders have been passed in gross violation of principles of natural justice.

14.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent and perused the impugned order dated 23.06.2021, passed by the respondent rejecting the request of the petitioner for cross-examination.

15.The said order has been passed on the strength of the decision of the Hon'ble Supreme Court in the case of **Surjeet Singh Chhbra vs. Union of India and others** reported in **1997 (89) ELT 646 (SC) : 1997 (1) SCC 508.** The impugned order dated 29.06.2021, has been passed within six days from the date of the above said order. The information that is gathered by the respondent during investigation is meant only for ascertaining the facts. It is not necessary for the Department to inform the sources of the information. It is required for the Department to issue show cause notice articulating the proposal in the show cause notice for imposing the penalty. If the Department relies on any statement of any Officer or a Mahazar witness, then, it is for the Department to produce such Officers or Mahazar witness for cross-examination.

This is the summation of **Jet Unipex's case [supra]**, where the decision of the Hon'ble Supreme Court in **Andaman Timber Industries vs. Commissioner** reported in **2015 (324) ELT 641 (SC)** was also considered. The Department has to decide the case on preponderance of probability as to whether the petitioner had a probable case for justifying the import as freely imported goods under Chapter 4004 [Sub Head:- 4004 00 00].

16.In this case, the import is from the United States of America. It is not clear why the import has been made through Tuticorin Port, in the tip of the Peninsula in the Bay of Bengal. If the petitioner's case is that the import was made for their factory in Rajasthan, the petitioner would have chosen other Ports, which are nearer to Rajasthan either in Gujarat or in Maharashtra or in Goa or in Kerala on the Western Coasts. This needs to be properly explained by the petitioner. If the petitioner indeed operates a factory in Rajasthan, it is open for the petitioner to file a copy of the GST Registration of the factory and details of documents to substantiate that the petitioner had indeed manufactured the Rubber Crumbs and Granules and sold to various Contractors/statutory authorities engaged in laying of roads. These are the documents which the petitioner is required to produce before the authorities to substantiate that the imported goods do not fall within the purview of restrictions in the Foreign Trade Policy 2015-2020. This exercise has not been carried out. Under these circumstances, the impugned orders are quashed and the cases are remitted back to the respondent to pass a fresh order within a period of three months from the date of receipt of a copy of this order. The petitioner is entitled to rely on any of the documents and collateral evidence, which may be available with it. The respondent shall proceed to pass orders by applying the principles of preponderance of probability. It is made clear that the respondent is not required to rely on any of the Mahazar witness or officials of the counterparts in Rajasthan before passing order. If the petitioner is unable to discharge the burden of proof, that is required, the respondent can proceed to pass appropriate orders based on the available materials. Admission of the petitioner in the statement would be a relevant factor available for the Department while passing such orders.

17.These Writ Petitions stand disposed of in terms of the above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (Writs)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Smn

To

The Joint Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House,
Thoothukudi - 628 004.

+1 CC to M/s.A.K. JAYARAJ, Advocate (SR-18338[F] dated 12/04/2022)

+1 CC to M/s.B. VIJAY KARTHIKEYAN, Advocate (SR-18451[F] dated 13/04/2022)

WP (MD) Nos.13225 & 13226 of 2021
11.04.2022

MGJ(28.04.2022) 9P 4C