IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10537 OF 2023

RKZB International .. Petitioner
v/s.
The Union of India Thr. its Joint Secretary
Ministry of Finance of Revenue And Anr. .. Respondents

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Mr. Prakash Shah, a/w. Mr. Durgesh Nadkarni and Mr. Jas Sanghavi, i/b. Mr. Ashok Singh, for the Petitioner.

Mr. Karan Adik, a/w. Ms. Kavita Shukla, for the Respondents.

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CORAM: G.S. KULKARNI &
JITENDRA JAIN, JJ.

DATE : 30th AUGUST, 2023

ORAL JUDGMENT (Per G. S. Kulkarni, J.):-

The only relief as prayed for in this petition filed under Article 226 of the Constitution of India is for issuance of a writ of mandamus against the Respondents to permit provisional release of the goods in question, namely, ball-bearings, being subject matter of Bill of Entry No.5681804 dated 2nd October 2021, under the provisions of Section 110A of the Customs Act, 1962, pending adjudication of the show cause notice dated 22nd April 2022.

2. The Petitioner is a proprietorship concern of Smt. Rizu Kalra. On 2nd October 2021, under the Bill of Entry as noted above, the Petitioner had imported ball-bearings. On the basis of information, an enquiry/investigation was initiated by the Respondents in regard to the import of such goods. Statements of certain persons were recorded and the goods in question were seized. On 22nd April 2022, a show cause notice was issued to the Petitioner *inter alia* alleging that the Petitioner has undervalued the imported goods, subject matter of the abovereferred bill of entry as also in respect of past 13 bills of entry. It was opined that the declared value of the goods was liable to be rejected in terms of Explanation 2(iii)(a) to Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

3. In the above circumstances, the Petitioner addressed letters on 17th December 2021, 13th May 2022, 6th June 2022, and thereafter, five more letters dated 14th June 2022, 17th August 2022, 9th February 2023, 22nd February 2023 and 21st July 2023 to the concerned officer requesting that the Petitioner be granted provisional release of the goods. Also, the Petitioner filed an interim reply to the show cause notice. We may observe that despite the Petitioner repeatedly knocking the doors of Respondent No.2 (Commissioner of Customs) by such several letters, not a single letter was replied by Respondent No.2. The Petitioner, in her letters, had categorically stated that the

Petitioner was willing to secure the revenue in demanding provisional release. However, as none of the request/applications were responded, and that the Respondents having failed to discharge their statutory duty in responding to the Petitioner's applications/representations, for the release of the goods on provisional basis, as a last resort, the Petitioner has filed the present petition on 7th August 2023 praying for the following substantial reliefs:

> *a. That this Hon'ble Court may be pleased to issue a writ of Mandamus or any other appropriate writ or order directing the Respondents to allow clearance of the ball-bearings on provisional basis under Section 110A of the Customs Act, 1962 pending adjudication of Show cause notice dated 22-4-2022.*
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> *b. Pending the hearing and final disposal of the petition, the Respondents may be directed to release the goods imported vide Bill of Entry No.5681804 dated 2-10-2021 on provisional basis pending adjudication."*

4. We had heard the parties on 28th August 2023 when at the request of Mr. Adik, learned Counsel for the Revenue, considering the peculiar facts to enable him to take instructions, the proceedings were adjourned for today. Our order dated 28th August 2023 has some relevance, it is, hence, required to be noted, which reads thus:

> *"1. In the present proceedings the seizure is dated 21st December, 2021 of a consignment of ball bearings by the Customs. Show cause notice came to be issued to the Petitioner on 22nd April, 2020 under Section 124 r/w Section 28 of the Customs Act. A reply to the show cause notice was submitted on*

27th June, 2022. However, till date the same has not been adjudicated. In such circumstances, Mr. Shah, learned counsel for the Petitioner would submit that the provisions of sub-section (9) of Section 28 stands clearly triggered. He submits that the show cause notice itself has become inoperative and/or cannot be adjudicated by virtue of the bar as created by sub-section (9) of Section 28.

2. It is in these circumstances, the Petitioner has prayed for provisional release of the goods which is the only prayer as made in the Petition, on the backdrop of several letters addressed by the Petitioner to the Respondents from December-2021 till the filing of this Petition requesting the Respondents for provisional release of the goods.

3. In our prima facie opinion, the reliefs has prayed for in the petition would be required to be granted, if the case of the Petitioner is correct.

4. Before we proceed to pass any order, we accept the request of Mr. Adik, learned counsel for the Respondents for adjournment of one day to enable him to take instructions. We are hopeful that the Customs Authorities will take an appropriate view of the matter considering the clear position in law.

5. At the request of Mr. Adik, stand over to ***30th August, 2023*** *to be listed on the supplementary board."*

5. It is on the above backdrop, Mr. Shah, learned Counsel for the Petitioner, has taken us through the memo of the petition as also the correspondence as annexed to the petition. His submission is that this is clearly a case where Respondent No.2 has abdicated his statutory duty and, more particularly, by not responding to eight letters/applications addressed by the Petitioner to Respondent No.2 right from 17th December 2021 to 21st July 2023. It is his submission that even an interim reply to the show cause notice was filed. Mr. Shah

points out that neither the show cause notice is being adjudicated nor provisional release of the goods is being granted and which is not a practice very conducive to the trade and is seriously affecting the business interest of the Petitioner and the imports of goods. It is, therefore, his submission that this is a fit case where considering the provisions of Section 110A of the Customs Act, the Petitioner would become legitimately entitled to the reliefs as prayed for.

6. On the other hand, Mr. Adik, learned Counsel for the Respondents in opposing the petition has very limited submission on merits of the Petitioner's case, He would submit that the adjudication of the show cause notice is pending. Insofar as the provisional release of the consignment is concerned, Mr. Adik, on instructions, would submit that in the event provisional release of the goods is to be permitted, this Court needs to apply the guidelines issued in the Revenue Circular dated 16th August 2017, which was issued to all the Principal Chief Commissioners/Chief Commissioners of Customs under the subject "*Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962*".

7. We note from such circular, as referred by Mr. Adik, that it makes a reference to certain decisions, which are decisions of the Madras High Court as also the Delhi High Court in relation to the powers to be exercised by the Officers of the Revenue in granting

provisional release. In such decisions, the Courts have observed that there is a sufficient discretion, which is available with the Adjudicating Authority in relation to the provisional release of goods depending on the category of goods. A reference is made to the decision of the Delhi High Court in *Mala Petrochemical & Polymers vs. Additional Director General, DRI & Anr.*[1], in which the Court observed that the power under Section 110A of the Act involves exercise of discretion, and that the scope of judicial review in such cases was to examine if the discretion has been rightly exercised. The circular emphasizes that such observations as made by the High Courts be kept in mind by the concerned officers, while allowing provisional release of goods. Further what is pertinent are the contents of paragraph 5 of the said circular, providing that when provisional release of seized imported goods is to be allowed, a bond, may be called upon to be furnished, 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 the appellate provisions under the Act. Mr. Adik's contention referring to the circular is that a discretion is available with the competent authority to call upon the importer to furnish bank guarantee or security deposit to cover the interim amount of leviable duty on seized goods, which are sought to be provisionally released. Mr. Adik submits that, in the present case, the Petitioner, therefore, be directed to furnish bank guarantee or security deposit as also other conditions as set out in para 2.2 of the said circular.

1 W.P. (C) No.3965/2017 dtd. 19.05.2017.

8. Having heard learned Counsel for the parties and having perused the record, as also the circular dated 16th August 2017, as referred by Mr. Adik, at the outset, we may observe, that no doubt the circular contains guidelines for provisional release of the seized imported goods pending adjudication under Section 110A of the Customs Act, the same is issued to the Principal Chief Commissioners. Thus, the circular would be required to be taken into consideration by the concerned officers, who are exercising powers to permit provisional release of the goods. Certainly, there cannot be an argument that the Circular would, in any manner, bind this Court to pass orders, only in terms of the circular. We are, thus, not impressed with Mr. Adik's contention that any orders passed on the petition ought to be as per the provisions of the circular. In fact, such contention also cannot be fully supported from the contents of the circular as the circular *inter alia* provides for different avenues recognizing the discretion of the Revenue Authorities, as to in which of the cases bank guarantee or security deposit can be insisted upon. The circular in no manner takes away such discretion available with the Customs Authorities under Section 110A of the Act to apply appropriate parameters depending on the facts and circumstances before such authority.

9. Now coming to the facts of the case, we are quite surprised with the approach of Respondent No.2 that despite the representations having been made by the Petitioner over a span of almost two years,

Respondent No.2 did not bother even to respond to the applications/representations of the Petitioner for provisional release. It may be that a case show cause notice is issued to the Petitioner, which is pending adjudication, however, that would not mean that it would prohibit Respondent No.2 from not responding and/or not considering the repeated applications and representations made by the Petitioner for provisional release of the goods. Respondent No.2 ought to have been conscious that being an authority conferred with substantive powers under the Customs Act, in the capacity as a public official, he was answerable to private parties dealing with the department, when it concerned the issues in respect of which powers were conferred on him in law. Thus, it was the duty of Respondent No.2 to attend/respond to the grievances of a person like the Petitioner, who was making repeated requests for the release of goods. Respondent No.2 ought to have been sensitive to the fact that persons like the Petitioner would not make repeated representations without a reason, cause and a purpose. What is most relevant is a consciousness of such officers, to the fact that, when such enormous powers were conferred under law, there was equally an overwhelming corresponding public duty to be discharged, following the principles of fairness, non-arbitrariness and non-discrimination. Respondent No.2 hence could not have taken a position, that he would not even respond to such representations/applications of the petitioner. This was certainly not, what would be expected from a public official.

10. It is clear that in the present case, Respondent No.2 has not only failed to take cognizance of the repeated applications of the Petitioner, when powers were conferred on him to exercise discretion either to release the goods provisionally or impose conditions and grant provisional release or reject the provisional release of the goods. However, he appears to have acted in complete disregard of his powers and duties. In our opinion, such approach of Respondent No.2 is certainly not conducive either to the position he wields under the legislation or the public trust he would repose in discharging his statutory duties. This could not have been the approach of Respondent No.2 even acting under the Circular, as pointed out by Mr. Adik, in requiring Respondent No.2 to consider any application for release of goods provisionally.

11. It is in the light of the above discussion, we are required to consider the prayers as made by the Petitioner. We are of the clear opinion that the goods in question are subject matter of one bill of entry. Show cause notice itself, although is issued on 22nd April 2022 for almost one year has not been adjudicated and in fact, appears to have not progressed at all. We cannot permit a situation where the Petitioner would suffer on both the counts at the hands of Respondent No.2. There is no acceptable reason that the petitioner in law should be denied provisional release on conditions. We are, accordingly, of the clear opinion that this is a fit case where the prayers as made by the

Petitioner for provisional release of the goods need to be granted.

12. We, accordingly, allow the petition, by directing that goods, subject matter of Bill of Entry No.5681804 dated 2nd October 2021, be provisionally released on the Petitioner furnishing a bond containing an undertaking that the Petitioner shall pay the duty, fine and/or penalty as may be adjudged by the Adjudicating Authority, subject to the appellate provisions under the Act. At this stage, Mr. Shah, learned Counsel for the Petitioner, would submit that the Petitioner intends to deposit the admitted duty and that the Petitioner shall furnish a bond for the differential duty. We accept the submission of Mr. Shah. The bond and undertaking be appropriately furnished accordingly.

13. Ordered accordingly.

14. Before passing, we would be failing in our duty, if we do not observe that when the Customs Officers are in receipt of any application for provisional release, such applications are required to be decided with utmost expediency and without any delay considering the facts and circumstances of the case. We would, thus, expect the concerned officials to expeditiously decide the provisional release applications and, in the event for some reason the concerned officer is unable to grant/decide the provisional release application, reasons in that regard ought to be communicated to the importer so that the

importer becomes aware as to why the provisional release application is not being decided and/or provisional release not granted. This would add to more transparency and effective working of the department and which would also be in the interest of the Revenue and conducive to the trade and ease of doing business. We, therefore, request that the Principal Chief Commissioner of Customs shall issue necessary directions to the Customs Officers in the light of our observations.

15. Disposed of in the above terms. No costs.

16. Parties to act on the authenticated copy of the order.

(JITENDRA JAIN, J.) **(G.S. KULKARNI, J.)**