IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2023

CORAM

THE HON'BLE Mr.JUSTICE **M.SUNDAR**

W.P.Nos.34159 & 34007 of 2022

M/s.North and South Trading Company,
No.15/1 Second Floor, Narayanasamy Street,
Pulianthope, Chennai-600 012
Rep. by its Proprietor M.D.Ifteahar
... Petitioner in WP.No.34159/2022

M/s.Alams Mobiles,
No.9A, Mohammed Hussain Sahib Road,
Mount Road, Chennai-600 002
by its Authorised Signatory Mr.Aftab Alam
... Petitioner in WP.No.34007/2022

-Vs.-

1. The Additional Commissioner of Customs (Gr.5A)
   New Customs House, Meenambakkam,
   Chennai-600 027.
2. The Deputy Commissioner of Customs (Gr.5A),
   New Customs House, Meenambakkam,
   Chennai-600 027.

... Respondents in both WPs

Prayer in WP.34159/2022: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for records connected with the impugned communication of the 2nd respondent herein comprised in F.No.ACC/ASST/BE/ORDER/45/2022-Gr-5A dated 06.12.2022, conveying the provisional release approved by the adjudicating authority and to quash the same, in so far as, it relates to *condition* *no.2 and 3(a)* of the impugned communication dated 06.12.2022 and consequently to modify the said condition, for the purpose of provision release of the goods, covered under Bill of Entry No.9584135 dated 16.07.2022, 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 above said Bill of Entry No.9584135 dated 16.07.2022.

Prayer in WP.34007/2022: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for records connected with the impugned communication of the 2nd respondent herein comprised in F.No.ACC/ASST/MISC/899/2022-Gr-5A-ACC dated 02.12.2022, conveying the provisional release approved by the adjudicating authority and to quash the same, in so far as, it relates to *condition no.2 and 3(a)* of the impugned communication dated 02.12.2022 and consequently to modify the said condition, for the purpose of provision release of the goods, covered under Bill of Entry No.9603335 dated 18.07.2022, in terms of the ruling of the Hon'ble Apex Court in the case of M/s.Navshakthi Industries Pvt. Ltd – 2011 (269) ELT A146 (SC) r/w the Customs (Provisional Duty Assessment) Regulations, 1963 and sec.18 r/w 110A of the Customs Act, 1962 and also to consider the request of the petitioner to waive the demurrage and detention charges of the subject goods covered under the above said Bill of Entry No.9603335 dated 18.07.2022.

For Petitioners : Mr.S.Baskaran
along with Mr.R.Yuvaraj

For Respondents : Mr.AR.L.Sundaresan,
Additional Solicitor General of India
instructed by Mr.M.Santhanaraman,
Senior standing counsel for Customs

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COMMON ORDER

This common order will now govern/dispose of the captioned two writ petitions.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made by this Court in the previous listing on 23.12.2022, which reads as follows:

> *'Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 21.12.2022, which reads as follows:*
>
> > *'Captioned writ petition has been filed inter alia assailing a 'Provisional Release Order dated 06.12.2022 bearing reference DIN:20221273MU0000414314' [hereinafter 'impugned order' for the sake of brevity, convenience and clarity].*
> >
> > *2. Mr.S.Baskaran, learned counsel for writ petitioner submits that the petitioner in the course of its business, imported a consignment of mobile parts, the same*

arrived at Chennai Airport vide an Airway Bill and that a bill of entry was filed by Customs broker for home consumption; that the bill of entry is dated 16.07.2022 and it was assessed vide the Faceless Assessment Scheme on 18.07.2022; that on an alert 'Department of Revenue Intelligence' ['DRI'] made an examination and in the course of examination found that there is a difference in the description and quantity of consignment. This is captured in paragraph 8 of writ affidavit and the same reads as follows:

> *'8.The petitioner submits that during such examination carried out, the investigating authorities had informed that as against the declared quantity of (i) 4010 dozens – 48120 numbers of Mini LCD, packed in 248 cartons and (ii) 810 dozens-9720 numbers of Plastic Touch Glass, packed in 13 cartons, the following goods were also found, viz., (a) "Complete Touch + Display Assembly was found in 249 cartons, with a total quantity of 42630 pieces (ii) Touch Glass for Mobile was found in 8 cartons, with a total quantity of 6880 pieces and (iii) Feature Phone Display Screen with PCB was found in 4 cartons, with a total quantity of 1980 pieces, while confirming that, there was 261 boxes, that was tallying with documents.'*

3. Learned counsel submits that writ petition in WP.No.32634 of 2022 seeking provisional release was filed earlier but by that time, impugned order came to be made by second respondent and therefore, the writ petition was *withdrawn but all the rights of the writ petitioner to assail the conditions for provisional release qua the impugned order were preserved. It is submitted that captioned writ petition is a continuation of this trajectory.*

4. Adverting to the impugned order, learned counsel submits that there are four conditions and his complaint pertains only to two of the four conditions namely condition No.2 and (a) of 3, which read as follows:

'2.Goods are provisionally assessed at value determined by DRI and duty is paid on this re-determined value.

3. ....

(a) 25% of differential duty (15% of penalty and 10% of Redemption fine) i.e., Rs.14,59,021/- leviable on the goods being provisionally released.'

5. Mr.M.Santhanaraman, learned Senior standing counsel for customs accepts notice for both the respondents.

6. The pivotal point on which the submission of learned counsel for writ petitioner is predicated is that aforementioned conditions are contrary to ratio in ***Navshakti Industries Pvt. Ltd. Vs. Commr. Of Cus.ICD, TKD, New Delhi*** *reported in* ***2011 (267) E.L.T. 483 (Del.)*** *[Delhi High Court order dated 11.05.2010] and* ***2011 (269) E.L.T. A144 (SC)*** *[Hon'ble Supreme Court order dated 04.05.2011 in appeal arising out of Delhi High Court order]***.***

7. Learned Revenue counsel submitted that the writ petitioner has an alternate remedy vide Section 128 of 'The

Customs Act, 1962' {'said Act' for the sake of convenience}.

8. To be noted, ***Navshakti*** *ratio is to the effect that there are no separate set of conditions qua provisional release and therefore, parameters codified for provisional assessment of release qua Section 18 of said Act shall be applied in cases of this nature.*

9. As regards alternate remedy, learned counsel for writ petitioner submits that impugned order is contrary to Customs (Provisional Duty Assessment) Regulations, 2011 and warrants interference in writ jurisdiction.

10. Of the aforementioned two conditions which writ petitioner is complaining of, condition no.2 is not clear, learned Revenue counsel appears need the assistance of second respondent and therefore the second respondent, who shall remain present in this Courtthe next listing.

11. Registry to show the name of learned Revenue counsel in the next listing. List in the Admission Board day-after-tomorrow. List on 23.12.2022.'

2. In continuation of / pursuant to earlier proceedings more particularly paragraph 10 thereat, second respondent was present in Court instructing learned Revenue counsel Mr.M.Santhanaraman (Senior Standing counsel for Customs).

3. Learned Revenue counsel, on instructions submitted that what was hitherto being referred to as 'impugned order' is not an order and it is only a communication of approval of provisional release by adjudicating authority. To be noted, communication from *second respondent to writ petitioner. Learned Revenue counsel goes on to submit that first respondent is the adjudicating authority. To be noted, adjudicating authority is defined in sub-section (1) of Section 2 of said Act and the same reads as follows:*

*'**2.Definitions,-** In this Act, unless the context otherwise requires, -*

(1) "adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Board, [Commissioner (Appeals) or Appellate Tribunal;'

4. Therefore, on instructions, it is submitted that 06.12.2022 communication bearing reference DIN:20221273MU0000414314 is only a communication regarding approval said to have been given for provisional release by the adjudicating authority. Therefore, the decision or order of adjudicating authority (first respondent) has not been communicated to the writ petitioner until today. Learned Revenue counsel attempted to say that this is a covering letter. This is the obtaining position. If this 06.12.2022 communication from the second respondent to the importer has to be treated as communication under cover of which this decision or order of the adjudicating authority has been communicated to the writ petitioner, the decision or order of the adjudicating authority should have been annexed or enclosed to the same. Admittedly, there is no annexure or enclosure.

5. This takes this Court to alternate remedy argument to which learned Revenue counsel drew the attention of this Court, i.e., alternate remedy by way an appeal under Section 128 of said Act. As already alluded to supra, sub-section (1) of Section 2 of said Act *which defines adjudicating authority excludes Board, Commissioner (Appeals) and Tribunal. Be that as it may, an appeal to the Commissioner (Appeals) will lie as against a decision or order passed under said Act but the decision or order under Section 110A qua provisional release has not been communicated to the importer/writ petitioner as of today. Therefore, obviously learned Revenue counsel cannot be heard to contend that alternate remedy is available to the importer. It is also to be noted that in the eye of law, a decision or order which has not been communicated is no order qua the person / entity concerned.*

6. Learned Revenue counsel placed before this Court what has been described as Circular No.35/2017. This generic communication says it pertains to Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of Customs Act, 1962. Unfortunately, this is of no use or avail to the learned Revenue counsel in explaining condition no.2 of what is now said to be only a communication. To be noted, condition no.2 of the letter dated 06.12.2022 reads as follows:

> *'2.Goods are provisionally assessed at value determined by DRI and duty is paid on this re-determined value.'*

7. Faced with the above situation, learned Revenue counsel expressed regret and submitted that an error has occurred qua condition No.2 of the communication. Learned Revenue counsel went on to request for time to produce the decision or order of first respondent under Section 110A. Interestingly and intriguingly, the date of order or any reference has not been mentioned in the

06.12.2022 communication. On instructions, it is submitted that it is Note No.3 dated 01.12.2022 and the order is said to have been made at 12.47.p.m.

8. Let the order/decision of first respondent said to have been made under Section 110A of said Act be placed before this Court. Further order and further trajectory will depend on the order/decision being placed before this Court.

9. List on 03.01.2023 in the Admission Board. From the next listing, the presence of second respondent is not imperative.'

3. To be noted, aforementioned 23.12.2022 proceedings extracts and reproduces proceedings made in the listing on 21.12.2022. As the aforementioned proceedings are now to be read as an integral part and parcel of this order, short forms, abbreviations and short references used in the earlier proceedings will continue to be used in the instant order also obviously for the sake of convenience and clarity.

4. Before proceeding further, it is necessary to make it clear that captioned 'WP.No.34159 of 2022' shall be referred to as 'II WP' and 'WP.No.34007 of 2022' shall be referred to as 'I WP' for the sake of convenience and clarity. It is further to be noted, this is based on the sequence of numbers assigned to the writ petitions. In I WP, impugned communication is dated 02.12.2022 and it bears reference F.No:ACC/ASST/MISC/899/2022-GR-

5A ACC, which shall be referred to as 'I impugned communication'. In II WP, impugned communication is dated 06.12.2022, which bears reference F.No.ACC/ASST/BE/ORDER/45/2022-Gr-5A and the same shall be referred to as 'II impugned communication'.

5. Today, Mr.S.Baskaran along with Mr.R.Yuvaraj for writ petitioners in the captioned two writ petitions and Mr.AR.L.Sundaresan, learned Solicitor [Additional Solicitor General of India] instructed by Mr.M.Santhanaraman, learned Senior Standing counsel for Customs on behalf of respondents in both the captioned writ petitions are before this Court.

6. Adverting to aforementioned earlier proceedings, learned Solicitor on instructions [to be noted, Mr.C.Thiyagarajan, Additional Commissioner of Customs, Air Cargo Complex, Meenambakkam, Chennai-600 027 is present in Court instructing the Revenue counsel, who in turn instructing counsel qua learned Solicitor] submits that I impugned communication and II impugned communication will now stand withdrawn. This submission is recorded.

7. Be that as it may, on instructions learned Solicitor goes on to submit that Additional Commissioner of Customs, Air Cargo Complex, Meenambakkam, Chennai-600 027 is the 'Adjudicating Authority' for the purposes of Section 110A read with Section 2 (1) of said Act, he would pass

orders afresh qua provisional release sought for by the writ petitioners under Section 110A and the orders would be served under due acknowledgement in an acceptable mode to writ petitioners within two working days from today i.e., on or before 06.01.2023. This submission is also recorded.

8. Though obvious it is made clear that this Court has not expressed any view or opinion on the merits of the matter and as regards orders to be made by aforementioned officer i.e., 'Adjudicating Authority', all rights and contentions of both sides including the prayers made in the captioned writ petitions are preserved.

9. Captioned writ petitions disposed of recording the aforesaid stated position of both sides. There shall be no order as to costs.

03.01.2023

Index : Yes/No

Speaking Order : Yes/No

Neutral Citation Case: Yes/No

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To

1. The Additional Commissioner of Customs (Gr.5A)
   New Customs House, Meenambakkam,
   Chennai-600 027.

2. The Deputy Commissioner of Customs (Gr.5A),
   New Customs House, Meenambakkam,

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M.SUNDAR, J

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