BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 01.08.2023

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THE HONOURABLE MRS.JUSTICE **S.SRIMATHY**

W.P.(MD)No.17259 of 2023
and
W.M.P.(MD)No.14453 of 2023

Musthafa ... Petitioner

vs.

1.The Commissioner of Customs,
Office of the Principal Commissioner
of Customs,
Commissionerate I, Chennai Airport,
New Customs House,
Meenambakkam, Chennai-600 027.

2.The Joint Commissioner of Customs,
(Adjudication-AIR),
Office of the Principal Commissioner
of Customs,
Commissionerate I, Chennai Airport,
New Customs House,
Meenambakkam, Chennai-600 027. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order passed by the 2nd respondent in F.No.O.S.No.139/2020-AIU, DIN-202103573MW000000C52D, dated 31.07.2021 and to quash the same and consequently, to direct the respondents to return the seized 03 numbers of crude gold chain 24 Karat purity totally weighing 348 grams to the petitioner.

For Petitioner : Mr.V.Malaiyendran

For Respondents : Mr.R.Nandakumar
Senior Standing Counsel
assisted by M/s.S.Ragaventhre
Junior Standing Counsel

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O R D E R

This writ petition is filed for writ of Certiorarified Mandamus, to quash the impugned order dated 31.07.2021 passed by the 2nd respondent and consequently, to direct the respondents to return the seized 03 numbers of crude gold chain 24 Karat purity totally weighing 348 grams to the petitioner.

2. The respondents have declined to return the jewels through the impugned order. Challenging the same, the present writ petition is filed.

3. Heard Mr.V.Malaiyendran, the Learned Counsel appearing for the petitioner and Mr.R.Nandakumar, Senior Standing Counsel assisted by M/s.S.Ragaventhre, Junior Standing Counsel appearing for the

respondents and perused the records.

4. The learned counsel appearing for the petitioner submitted that the petitioner is working at Dubai for the past one year. The petitioner arrived in Chennai Airport on 09.02.2020. The petitioner was possessing gold chains, but the Customs Officers seized the gold under threat and coercion. The contention of the petitioner is that he had purchased the jewellery from his own income. The respondents have exercised their power under Section 110 of the Customs Act. As per Section 110A the provisional release of goods can be handed over even though the adjudication is pending. Further as per Section 125 option to pay fine in lieu of confiscation is available to the petitioner. The High Courts have repeatedly held that gold is not prohibited item, but only restricted item.

Bringing the restricted item by violating certain conditions would not give right for the respondents to detain and confiscate gold articles. Since it is only a restricted item and it can be handed over to the owner or to the passenger from whom the same has been seized. In support of his submission, the learned counsel appearing for the petitioner relied on various judgments.

5. In the case of ***Vaibhav Sampat More vs. National Investigation Agency, through its Chief Investigation Officer [Crl.A.No.115 of 2022, dated 03.06.2022]*** the Hon'ble Delhi High Court has held that import of gold is not prohibited, but restricted subject to prescribed quantity on payment of duty.

6. In W.P.No.1421 of 2011 ***filed by T.Elavarasan vs. The Commissioner of Customs (Airport), Anna International Terminal, Chennai and others*** wherein a direction has been sought to direct the second respondent therein to release 350 grams of assorted gold jewels viz., 7 gold chains on payment of duty as applicable for the passenger staying abroad for more than six months and passport. A learned Single Judge of this Court vide order dated 28.02.2021 after considering the rival submissions and the decisions relied upon by the petitioner therein, directed the respondents therein to release the gold jewels in question, provisionally, to the petitioner therein, forthwith, on payment of customs duty and the redemption fine, as per the Notification dated 01.03.2003 and as per Section 125 of the Customs Act, 1962, subject to the adjudication proceedings to be conducted by the authorities concerned

and also directed the petitioner therein to cooperate fully in the said proceedings. Against the said order, the Department had filed a Writ Appeal in W.A.No.582 of 2011 before the First Bench of this Court. The First Bench of this Court, after hearing the parties, vide judgment dated 01.04.2011, disposed the Writ Appeal with a slight modification to the order of the learned Single Judge that instead of depositing the entire customs duty and redemption fine, directed the petitioner therein to deposit 50% of the duty for the value of the gold jewels and on such deposit being made, the gold jewels in question shall be released forthwith. Thereafter, the Department filed Rev.Appl.No.89 of 2011 before the First Bench of this Court. The First Bench of this Court, finding that there is no error apparent on the face of the record, vide order dated 25.04.2011, dismissed the said Review Application.

Aggrieved over the same, the Department filed S.L.P.(Civil)Nos.13870 and 13871 of 2011 before the Hon'ble Apex Court. Since the Hon'ble Apex Court was not inclined to entertain the S.L.Ps., the same were permitted to be withdrawn and accordingly, vide order dated 12.05.2011, the Hon'ble Apex Court dismissed the Special Leave Petitions as not pressed.

7. Further, following the above said decision of the Hon'ble Division Bench, a Learned Single Judge of this Court, in

i.W.P.No.2968 of 2016 filed by Palaniappan vs. the Principal Commissioner of Customs, Chennai and another vide order dated 29.02.2016

ii. W.P.(MD)Nos.2985 and 3124 of 2018 filed by Tajudeen vs. the Commissioner of Customs, Trichy and others vide order dated 21.02.2018

iii. W.P.No.5148 of 2018 filed by Barakathnisa vs. The Principal Commissioner of Customs, Chennai and others vide order dated 20.04.2018

granted relief to the petitioners therein. Thus, the consistent view of the Division Bench of this Court as well as the learned Single Judges of this Court is to return the seized gold to the passenger/owner on payment of 50% of the duty. It was also further clarified that if the petitioners therein are found guilty, it is always open to the authorities to proceed further in the manner known to law.

8. Once the gold is seized by the proper officers under Section 110 of the Customs Act, 1962, the petitioner is entitled to release of the gold, which are detained pending adjudication proceedings, in terms of Section 110-A of the Customs Act, 1962. As per Section 110-A of the Customs Act, 1962, any goods, documents or things seized or bank account provisionally attached, pending the order of the adjudicating authority, may be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require. Thereafter, even in the case of option to pay fine in lieu of confiscation, Section 125 of the Customs Act, 1962 will come into play. As per Section 125 of the Customs Act, 1962, whenever confiscation of any goods is authorized by the Act, the Officer adjudging finds that the importation or exportation of any goods

is prohibited under the Act or under any other law for the time being in force, shall, in the case of any other goods, give to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said Officer thinks fit. In case of prohibited items, an option to pay in lieu of confiscation such fine would arise. In the present case, the gold chains, which have been seized from the petitioner, is not a prohibited item. Hence, the Adjudication Officer ultimately, shall give an option to redeem the confiscated gold jewels. In the present case, the petitioner is ready and willing to give a bank guarantee for 50% of the duty involved.

9. The learned Senior Standing Counsel relied on a judgment of this Court in ***A.Krishnamoorthy vs. Commissioner of Customs, Trichy***

[2022 (381) ELT 59 (Mad)] and submitted that in a similar circumstance, this Court in the aforesaid decision directed the petitioner therein to pay 50% of customs duty in cash and furnish 50% security in the form of bank guarantee for the balance 50% of the customs duty and on production of such bank guarantee and payment of duty, the seized gold chains are directed to be released forthwith. Hence, the same condition may be imposed, so that, the revenue of the Nation would be saved.

10. Considering the rival submissions and on perusal of the materials this Court has giving its anxious consideration. It is seen that the respondents have treated the gold as prohibited items. But the Hon'ble Apex Court in the case of C***ommissioner of Customs vs. Atul Automations Pvt. Ltd. [2019 (365) ELT 465 (SC)]*** distinguished the prohibited item from restricted item. It would be apposite to extract

below paragraph 9 of the said judgment,

> *"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 authorization 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."

Further, the Delhi High Court in ***Vaibhav Sampat More vs. National Investigation Agency, through its Chief Investigation Officer [supra]*** held that import of gold is not prohibited, but restricted subject to prescribed quantity on payment of duty. Thus, import of gold is not prohibited, but restricted subject to prescribed quantity on payment of duty.

11. Section 125 of the Customs Act, 1962, gives rights to the owner or from whom the goods have been seized to redeem such goods on payment of fine. Further, the Courts consistently held that goods can be handed over on executing 50% of the Bank guarantee on the duty amount. In view of the same, the impugned order is quashed and the petitioner is directed to pay 50% customs duty and also execute 50% of the Bank guarantee in lieu of customs duty. And on such payment / execution of the Bank guarantee, the respondents are directed to hand over the gold chains to the petitioner within two weeks from thereon.

12. With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Index : Yes / No **01.08.2023**
Internet : Yes
NCC : Yes / No
Tmg

<u>S.SRIMATHY, J</u>

Tmg

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