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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 08.12.2023*

\+ **W.P.(C) 15729/2023 and CM No. 63176/2023**

M/S. SHANUS IMPEX ..... Petitioner

Through: Mrs Anjali Jha Manish, Mr Priyadarshi Manish and Mr Saksham Garg, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr Harpreet Singh, Senior Standign Counsel with Ms Suhani Mathur and Mr Jatin Kumar Gaur, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning a Circular bearing No.35/2017-Cus dated 16.08.2017 (hereafter '**the impugned Circular**') as ultra vires the provisions of the Customs Act, 1962 (hereafter '**the Customs Act**'). The petitioner also impugns an order dated 02.12.2023 (hereafter '**the impugned order**') passed by respondent no.6 directing provisional release of the goods imported by the petitioner albeit on furnishing a bond equivalent to the value of seized goods of ₹3,70,24,887/- and a bank guarantee/security deposit

equivalent to 120% of the said amount, amounting to ₹4,44,29,864/-.

2. According to the petitioner, paragraph 2 of the impugned Circular runs contrary to the provisions of Section 110A of the Customs Act, which confers the discretion on the adjudicating authority to impose such conditions and demand such security as the adjudicating authority may require.

3. It is contended that the discretion granted by the statute to the adjudicating authority is curtailed by the impugned Circular. It is also contended that the said issue is covered by the decision of the Coordinate Bench of this Court in ***Additional Director General (Adjudication) v. M/s Its My Name Pvt. Ltd.: Neutral Citation No.2020: DHC:2014-DB***.

4. This petition was listed yesterday (that is, on 07.12.2023) and this Court had passed the following order:

> "1. The petitioner has filed the present petition, *inter alia*, praying as under:
>
> > *"(a) Issue the writ of certiorari or any other appropriate writ, order or direction in the nature of declaration, declaring that the impugned Circular No.35/2017-Cus dated 16.08.2017 as ultra vires and violative of Section 151A of the Customs Act, 1962; and/or*
> >
> > *(b) Issue a writ order or direction in the nature of certiorari to set-aside the order bearing No. GEN / INV / OTH / 360 / 2023-ICP-ATR-Cus-Prev-Amritsar dated*

02.12.2023 (DIN No. 20231275NH000041944C) passed by the Learned Deputy Commissioner of Customs, Land Customs Station, ICP, Attari, Amritsar;

(c) Grant the cost of the petition; and

(d) Pass such and further order(s) as may deem fit and necessary in the facts and circumstances of the present case."

2. In particular, the petitioner challenges paragraph 2 of the Circular No.35/2017-Cus dated 16.08.2017 (hereafter '**impugned circular**) on the ground that it curtails the discretion of the Adjudicating authority to impose such conditions as it may require. Section 110A of the Customs Act, 1962 (hereafter '**the Act**') reads as under:

> ***"110A. Provisional release of goods, documents and things seized or bank account provisionally attached pending adjudication.****—Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, 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."*

3. It is apparent from a plain reading of Section 110A of the Act that the Adjudicating authority has been granted the discretion to provisionally release the goods, on a bond in the proper form with such security and conditions as the adjudicating authority may require.

4. The impugned circular seeks to curtail the said discretion inasmuch as it now sets out the conditions in which provisional release of the goods may be granted

and further also sets out the security required to be insisted upon by the adjudicating authority for such provisional release. Paragraph 2 of the impugned circular, which clearly indicates the above, is set out below:

> *"2. While provisional release of seized imported goods under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating authority upon a request made by the owner of the seized goods, provisional release shall not be allowed in the following cases -*
>
> *(i) Goods prohibited under the Customs Act, 1962 or any other Act for the time being in force;*
>
> *(ii) Goods that do not fulfill the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;*
>
> *(iii) Goods specified in or notified under Section 123 of the Customs Act, 1962;*
>
> *(iv) Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.*
>
> *2.1 Seized imported goods shall be released provisionally by the competent authority upon request of the owner of the seized goods, subject to executing a Bond for the full value/estimated value of the seized goods.*
>
> *2.2 Further, in addition to the Bond mentioned at Para 2.1 above, the competent authority shall take a Bank Guarantee or Security Deposit to cover the following :*

> *i. the entire amount of duty/differential duty leviable on the seized goods being provisionally released;*
>
> *ii. amount of fine that may be levied in lieu of confiscation under Section 125 of the Customs Act, 1962 at the time of adjudication of the case. While securing the same, the competent authority shall take into account the nature of the seized goods, the duty and charges payable on the said goods, their market price and the estimated margin of profit;*
>
> *iii. amount of penalties that may be levied under the Customs Act, 1962, as applicable, at the time of adjudication of the case.*
>
> *2.3 Depending on the specific nature of a case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated above."*

5. The question as to whether the provisions of paragraph 2 of the impugned circular are contrary to Section 110A of the Act, is no longer *res integra.*

6. A coordinate Bench of this Court, in ***Additional Director General (Adjudication) v. M/s Its My Name Pvt. Ltd.*** **: 2020:DHC:2014-DB** expressly held as under:

> *"**51.** ……According to us, para 2 of Circular 35/2017-Cus is clearly contrary to Section 110A and is, consequently, void and unenforceable at law. It is not permissible for the CBEC, by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place in the parent statutory provision, i.e. Section 110A of the Act.*

Executive instructions may, it is trite, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision.[29]([29]Lok Prahari v State of U.P., (2016) 8 SCC 389, which digests several earlier decisions.) By excluding, altogether, certain categories of goods, from the facility of provisional release, para 2 of Circular 35/2017- Cus supra clearly violates Section 110A, whereunder all goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the "eligibility" of the goods for provisional release, as distinct from the "entitlement" thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him, by Section 110A.) Para 2 of Circular 35/2017-Cus, therefore, effectively seeks to supplant Section 110A, to that extent, and has, therefore, to be regarded as void and unenforceable at law."

7. This Court is informed that the SLP preferred against the said decision has been rejected.

8. *Prima facie*, the petitioner's prayer that the impugned circular is required to be declared as *ultra vires* the provisions of the Act is liable to be allowed.

9. The petitioner also impugns an order dated 02.12.2023 (hereafter '**impugned order**'), directing provisional release of the goods in question on the petitioner furnishing a bond equivalent to the value of the seized goods: ₹3,70,24,887/- (Rupees Three Crores Seventy Lakhs Twenty Four Thousand Eight Hundred and Eighty Seven Only), and further a bank guarantee /

security deposit equivalent to 120% of the said amount: ₹4,44,29,864/- (Rupees Four Crores Forty Four Lakhs Twenty Nine Thousand Eight Hundred and Sixty Four Only) to cover the payment of any possible future liabilities of penalties / fines.

10. The impugned order indicates that the value of the security bond and the security deposit has been fixed in the light of paragraphs 2.1 and 2.2 of the impugned circular. Thus, *prima facie*, the impugned order is also liable to be set aside.

11. Although we are inclined to allow the present petition in the aforesaid terms, as Mr. Harpreet Singh, learned counsel appearing for the respondents, has been unable to counter the submissions made today. However, in view of the fact that he requests for some time to take instructions, we consider it apposite to adjourn the proceedings to tomorrow.

12. The present petition has been taken up urgently as the goods in question are perishable in nature.

13. List on 08.12.2023.

14. *Dasti* under the signature of the Court Master."

5. Mr. Harpreet Singh, learned senior standing counsel appearing for the respondents submit that the challenge to paragraph 2 of the impugned Circular is covered by the decision of ***Additional Director General (Adjudication) v. M/s Its My Name Pvt. Ltd.*** (*supra*). He submits that the impugned order be set aside and the matter be remanded to respondent no.6 to decide afresh.

6. In view of the above, the present petition is allowed.

7. Paragraph 2 of the impugned Circular to the extent it curtails the

discretion accorded to the adjudicating authority is set aside as being contrary to the Customs Act.

8. The impugned order is set aside and the petitioner’s application for the provisional release of the goods is restored before respondent no.6.

9. Considering that the goods involved are perishable, respondent no.6 is directed to decide the matter afresh and pass a speaking order within a period of four working days from date after hearing the petitioner.

10. The petitioner shall appear before respondent no.6 on 11.12.2023 at 10:30 a.m.

11. The pending application is also disposed of.

12. Order *dasti* under signature of Court Master.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 8, 2023
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