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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.05.2024

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THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

C.M.A. No. 157 of 2024
and
C.M.P. No. 1559 of 2024

The Principal Commissioner of Customs Chennai VII
Airport and Air Cargo Complex
New Custom House
Meenambakkam
Chennai-600 027.

.. Appellant

Versus

M/s. Sree Venkateshwara Bullion
No.116/224, Taurs Tower
NSC Bose Road, Sowcarpet
Chennai-600 079.

.. Respondent

Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, against the Final Order No. FO/C/A/40965/2023 CU/(DB) dated 31.10.2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For appellant : Mr. Mohanamurali Krishnaswami
For respondent : Mr. B. Sathish Sundar

JUDGMENT



R. MAHADEVAN, J

WEB COPY This Civil Miscellaneous Appeal is preferred by the Revenue against the order dated 31.10.2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, (in short, "the CESTAT"), by raising the following substantial questions of law:

"(i) Whether CESTAT erred in setting aside the Order in F.No.GEN/ADJ/COMM/295/2022-ADJN dated 25.10.2022 passed by the appellant by applying section 110 A of the Customs Act, 1962 and when the Section itself used the word, "may" and not "shall"?

(ii) Whether CESTAT has not properly applied clause (i) of Para 2 of Circular No.35/2017-Customs dated 16.08.2017 issued from F.No.394/13/2016-Cus (AS) which states that the provisional release shall not be allowed for prohibited goods as defined under section 2(33) of Customs Act, 1962?"

2. The necessary facts leading to the filing of this appeal would run thus:

2.1. On the basis of specific intelligence, the DRT, Chennai Zonal Unit, initiated investigation into diversion of duty free imported gold procured from nominated agencies and subsequently, exporting fake gold jewellery in order to fulfil the obligation as mandated under Notification No.57/2000-Cus read with Circular No.27/2016-Customs of the Central Board of Excise & Customs, Government of India. The investigation revealed that fake jewellerys were exported by certain jewellers under the guise of 22 Carat plain gold jewellery. Such jewellerys were examined under mahazars and it was found that there is wider conspiracy to defraud the exchequer by unscrupulous



exporters in connivance with local jewellers and bullion traders, such as, the respondent, based in Chennai with an intent to divert the duty free gold and to export fake jewellery under the guise of 22 Carat plain gold jewellery to fulfil the export obligation. The further follow-up searches made at the manufacturing places of fake jewellery at Rajkot and Kolkata revealed that the exported jewellery contained only about 15% to 20% of gold.

2.2. As regards the case on hand, investigation revealed that the respondent, as one of the buyers, procured the diverted duty free gold bullion on cash basis through a broker named Jitendra Kumar Jain @ Jitu, who is a business-friend of the respondent and who mediates between the respondent and one Deepak Siroya. It was also found that crude gold found in the premises of the respondent was not satisfactorily accounted for in his books of accounts. Further, the respondent was sending huge quantities of foreign currency to Dubai through non-banking channels in collusion with others. After completion of investigation, show cause notice was issued to several noticees, including the respondent as the investigation revealed the omission and commission of offences under the Customs Act, 1962 by them. Thereafter, the gold items were seized from the respondent's premises on 02.02.2022.

2.3. Aggrieved by the seizure of gold, the respondent made a representation dated 20.08.2022 for provisional release of the gold seized and



the same was rejected by the Principal Commissioner of Customs, Chennai, by way of passing an order in F.No.GEN/ADJ/COMM/295/2022-ADJN dated 25.10.2022. Challenging the same, the respondent preferred an appeal before the CESTAT. The Tribunal, *vide* order dated 31.10.2023, has set aside the order dated 25.10.2022 passed by the appellant and ordered release of the seized goods on condition that the respondent has to furnish a bond for the full value of the seized goods, along with a Bank Guarantee containing an auto renewal clause for an amount of 30% of the value of the seized goods, subject to the condition that the premises of the appellant would be kept open for inspection by the Revenue, at all reasonable hours and all utilization / sale of the gold / gold jewellery shall be duly accounted for.

2.4. Challenging the above said order passed by the CESTAT, the present appeal has been filed by the Revenue.

3. The main point put forth on the side of the Revenue is that the Central Board of Indirect Taxes and Customs (CBIC) has issued guidelines to the adjudicating authorities under Circular No.35/2017-Customs dated 16.08.2017 issued in F.No.394/13/2016-Cus(AS), to ensure uniformity and to streamline the divergent procedures being followed for grant of provisional release of imported goods, which are seized under Section 110 of the Customs Act, 1962. As per Section 110A, provisional release will not be allowed for



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prohibited goods. In the present case, the seized gold are prohibited goods which could be evident from the statements recorded from the individuals.

The statements also reveal the fraudulent activities of the respondent for evasion of tax. It was the further contention of the Revenue that the conditions in the above Circular were only followed in breach. Thus, the seized gold is aptly covered under clause (ii) of para 2 of the Circular due to the reason that the goods had not fulfilled the statutory obligations / compliance requirements. It was also submitted that the respondent had miserably failed to satisfy the burden that the seized gold was not a smuggled one in terms of Section 123 of the Customs Act, 1962. Further, the CESTAT has failed to note that even though Section 110A provides provisional release of seized goods, the Rules, Circular and Instructions issued by the Department from time to time provide the categories of goods that can be released provisionally. As far as the present case is concerned, the respondent had purchased the duty free gold, which was clandestinely cleared through fraudulent exporters and the investigation conducted so far had revealed that the seized gold at the respondent's premises was the diverted gold. Thus, according to the Revenue, the provisional release of seized gold under Section 110A of the Customs Act, 1962 is, therefore, not applicable to the case of the respondent. It is emphatically submitted that Section 110A of the Customs Act, 1962, itself uses the word “may” and not “shall” and hence, release of seized goods is a discretionary power vested with



the adjudicating authority and not a mandatory power. In this context, the learned counsel for the appellant placed reliance on the decision of the Honourable Supreme Court in **Sheikh Mohd. Omer vs. Collector of Customs, Calcutta and others** reported in **1970 (2) Supreme Court Cases 728**, wherein it was held as follows:

"11.What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression 'any prohibition' in Section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions 'prohibiting', 'restricting', or 'otherwise controlling', we cannot cut down the amplitude of the word 'any prohibition' in Section 111 (d) of the Act. 'Any prohibition' means every prohibition. In other words, all types of 'prohibitions'. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

3.1. Reliance was also placed in the decision in **Om Prakash Bhatia vs. Commissioner of Customs, Delhi** reported in **(2003) 6 Supreme Court Cases, 161**, in which it was held as follows:

"20. Hence, in cases where the export value is not correctly stated, but there is an intentional overinvoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, overinvoicing of the export goods would result in illegal/irregular transactions in foreign currency."

"24. Considering the aforesaid facts and also the fact that this was the second case belonging to the same exporter, the authorities



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arrived at the conclusion that it was an organized racket to claim fraudulent drawback or an act of deliberate overinvoicing of the readymade garments. Hence, the authority imposed redemption fine as well as levied penalty. In our view, this finding arrived at by the authorities below cannot be said to be, in any way, unreasonable which would call for interference by this Court in this appeal."

3.2. That apart, reference was made to the decision of the Honourable Supreme Court in the case of **Union of India and others vs. Raj Grow Impex LLP and others** reported in **(2021) 18 Supreme Court Cases 601** in which it was held as follows:-

"140. It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition simpliciter. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in Union of India vs. Agricas LLP (2021) 14 SCC 341. This Court also held that the imports were not bona fide and were made by the importers only for their personal gains.

141. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interest of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released, is obviously



warranted."

3.3. By referring to the above decisions, the learned counsel for the appellant submitted that the Tribunal ought to have exercised the discretion conferred upon it in accordance with the guidelines issued from time to time and not mechanically in all cases. Stating so, the learned counsel appearing for the Revenue sought to allow this appeal by setting aside the order passed by the CESTAT.

4. Per contra, the learned counsel appearing for the respondent at the outset, submitted that the Tribunal after analysing the facts and circumstances of the case and also in the light of the legal position, passed the order impugned herein, which does not require any interference at the hands of this court.

4.1. That apart, the learned counsel for the respondent placed reliance on the decision of the Delhi High Court in the case of **Additional Director General (Adjudication) vs. Its my name pvt Ltd.**, reported in **2021 (375) E.L.T. 545 (Delhi)** wherein it was held as under:

"83. Adverting, now, to the terms of provisional release, the impugned Final order does not set out any precise reasoning for having permitted provisional release on furnishing of a bond with bank guarantee for Rs.1.25 crores. A Division Bench of this Court had, in Navshakti Industries Ltd., vs. Commissioner of Customs, ICD (2011) (267) E.L.T. 483 (Del.) permitted provisional release of the goods in issue in that case on furnishing of a bond covering 20% of the differential duty payable on the goods, with no other condition. The said condition was modified by the Supreme Court, in appeal (as reported in 2011 (269) E.L.T. A146 (SC)



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by directing furnishing of a bank guarantee for 30% of the differential duty payable on the goods. *Zest Aviation Pvt Ltd., vs. U.O.I. (2013 (289) E.L.T. 243 Del.)* and *Aban Exim Pvt Ltd., vs. Principal Commissioner of Customs (2015 (319) E.L.T. 430 (Del)* too followed the same standard by allowing provisional release on furnishing of a bank guarantee covering 30% of the differential duty payable on the goods in issue. Furnishing of a bond, for the value of the goods, along with a bank guarantee covering 30% of differential duty, was the standard followed, subsequently, while permitting provisional release, in *G.S. Nuts vs. Commissioner of Customs (2016 (335) E.L.T. 397 (Del.)*, *Daya Enterprises vs. Commissioner of Customs (Export) (2016 (336) E.L.T. 73 (Del.)* and *Spirotech Heat Exchangers Pvt Ltd., vs. U.O.I. (2016 (341) E.L.T. (Del.)*

84. In the present case, however, the gold was imported seeking exemption from payment of duty under the Advance Authorisation Scheme and the Exhibition Export Scheme. The show cause notice dated 26th September 2019, issued to the respondent by the ADG, DRI, to, does not propose any duty demand, but seeks, instead, to confiscate the seized gold, gold jewellery and silver. The total value of the said gold, gold jewellery and silver has been reckoned in the show cause notice, to be Rs.28,23,82,357/-.

85. The learned ASG submits that given the value of the gold seized, the condition of furnishing of bank guarantee for Rs.1.25 crore, is woefully inadequate.

86. There appears, *prima facie* substance in the grievance voiced by the learned ASG. In our view, therefore, the interest of justice would justify modification, of the terms fixed by the learned Tribunal for provisional release of the seized gold, gold jewellery and silver, by requiring the respondent to furnish a bond, for the full value of the seized goods, along with a Bank Guarantee containing an auto renewal clause, for Rs.10 crores, which works out to over 30% of the value of the seized gold (including the gold of which provisional release is not being permitted). This, in our opinion, would sufficiently safeguard the interests of the Revenue."

4.2. The learned counsel for the respondent further submitted that as against the aforesaid order passed by the Delhi High Court, the Additional Director General (Adjudication) filed a Special Leave Petition before the Honourable Supreme Court. By an order dated 01.10.2020, the Honourable Supreme Court modified the order passed by the Division Bench of the Delhi High Court as follows:



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Bench of the Delhi High Court dated 28 February 2020 in an appeal from an order of the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal set aside the direction of the competent authority declining to provisionally release the goods under Section 110A of the Customs Act, 1962 and while doing so, imposed certain conditions.

2. *In appeal, the High Court by its order dated 28 February 2020 noted that the total value of the goods was Rs.28.23 Crores. The High Court has directed provisional release subject to the respondent furnishing a bank guarantee quantified at Rs.10 crores, besides other incidental conditions.*

3. *During the course of the hearing, we have heard Mr. S.V. Raju, Additional Solicitor General in support of the Special Leave Petition and Mr. Harish N. Salve, Senior counsel on behalf of the respondent.*

4. *We are of the considered view that the quantum of the Bank guarantee which has been directed to be furnished by the High Court, should be enhanced from Rs.10 crores to Rs.15 crores. Mr. Salve has stated on instructions that he has no objection to an enhancement of the quantum of the bank guarantee. We accordingly modify the order of the High Court by directing that the quantum of the bank guarantee shall stand enhanced to Rs.15 crores. The other conditions which have been imposed by the High Court shall continue to govern.*

5. *The Special Leave Petition is accordingly disposed of.*

6. *Pending applications, if any, stand disposed of."*

4.3. Therefore, the learned counsel for the respondent submitted that the Tribunal is right in directing the appellant to provisionally release the goods as per Section 110-A of the Customs Act and thus, he prayed for dismissal of the appeal.

5. We have considered the rival submissions and also perused the records.

6. On perusal of the order dated 25.10.2022 passed by the appellant,

which was impugned before the Tribunal, it was stated that the evidence



gathered by the investigating agency indicates that the gold had been imported by certain persons without payment of customs duty subject to the condition that the imported gold will be used for manufacture of jewellery to be exported. However, it was diverted to the domestic market where it was purchased by third parties, contrary to the conditions and restrictions imposed by the Government of India. Further, it was observed by the appellant that the scale of fraud perpetrated by certain persons in import of gold for the purpose of manufacturing jewellery for export and diverting it into domestic market calls for confiscation of the gold seized from the premises of the respondent. Therefore, it was observed that the provisional release of the seized gold will defeat the purpose of confiscation. Such prohibited goods cannot be allowed to enter the domestic market in contravention to the policy objectives of the Government. Therefore, the appellant refused to exercise the discretion conferred under the provisions of the Customs Act to release the goods provisionally.

7. However, the Tribunal, by placing reliance on the decision of the Delhi High Court in the case of **Additional Director General (Adjudication) vs. Its my name pvt Ltd.** mentioned supra held that the power and jurisdiction of the Tribunal is coequal with the powers exercised by the adjudicating authority and accordingly directed provisional release of the goods subject to



certain conditions. While so, it was held that the gold seized from the respondent's premises, were part of investigation. As regards the allegation that the crude gold found in the premises of the respondent was not satisfactorily accounted for in the books of accounts, it was held that it could be considered only during investigation.

8. No doubt, the Tribunal has got powers to interfere with the order passed by the appellant. At the same time, given the nature of violation committed by the respondent in importing gold for manufacturing jewellery for export but diverting it into domestic market, we are of the view that this is not a fit case where the Tribunal is justified in exercising the discretion conferred upon Section 110-A of the Customs Act to provisionally release the goods. The Tribunal also ignored clause (i) of part 2 of Circular No.35/2017-Customs dated 16.08.2017 wherein it was stated that provisional release of goods shall not be allowed in respect of prohibited goods as has been defined under Section 2 (33) of Customs Act, 1962. In this case, it is clear that the goods which are sought to be provisionally released, is a prohibited goods and therefore, the Tribunal ought not to have passed the order, which is impugned in this appeal. Furthermore, the judgment of the High Court of Delhi in the case of ***Additional Director General (Adjudication) vs. Its My Name P.Ltd.***, reported in ***2020 SCC OnLine Del 2760***, relied upon by the CESTAT for



passing such order is not applicable to the facts and circumstance of the present case. We find that the matter has not been dealt with in detail without taking note of the irregularities and illegalities committed by the respondent. The investigation carried out by the appellant reveals that the respondent has colluded with unscrupulous exporters, who procured duty free gold from a nominated agency and diverted the same without having exported gold jewellery manufactured out of the duty free gold. In such circumstances, we are of the view that the order of the CESTAT is bad in law and it is liable to be set aside. Accordingly, the substantial questions of law are answered in favour of the Revenue and against the assessee.

9. At this juncture, the learned counsel for the respondent submitted that the respondent is inclined to deposit the current value of the subject goods for provisional release of the goods.

10. In view of the above, liberty is given to the respondent to deposit the value of the seized gold as on date / as claimed by the appellant and in the event of the respondent making such payment, the appellant shall provisionally release the seized goods to them, upon imposing any other condition(s) as may be deemed fit and necessary, if the seized gold has not been sold out or auctioned. The respondent also undertakes to comply with his export obligation of exporting gold jewellery and it is open to the appellant to take



appropriate action in the event of breach of any condition of Notification

WEB C No.57/2000-Cus read with Circular No.27/2016 including export obligation.

11. With the above observations and directions, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D, J.] [M.S.Q, J.]
10.05.2024

Neutral Citation : Yes/No
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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
Chennai.

2.The Principal Commissioner of Customs Chennai VII
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