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

\+ W.P.(C) 9453/2024

M/S RAMAKRISHNA ELECTRO COMPONENTS PVT. LTD. .....Petitioner

Through: Mr. Saurabh Kapoor, Mr. Alankar Narula, Mr. Niteen Kumar Sinha, Mr. Nachiketa Vijay Suri, Advocates.

versus

UNION OF INDIA AND OTHERS .....Respondents

Through: Ms. Pratima N Lakra, CGSC with Mr. Chandan Prajapati and Ms. Yashika Garg, Advocates for R-1.
Ms. Anushree Narain, Standing Counsel for Respondents No. 2 and 3.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **12.07.2024**

CM APPL. 38763/2024 (Exemption)

Allowed, subject to all just exceptions.

This application stands disposed of.

W.P.(C) 9453/2024 & CM APPL. 38764/2024 (Interim Relief)

1. This writ petition impugns the conditions which have been imposed in terms of an order dated 01 July 2024 and which disposes of an application of the writ petitioner for provisional release of goods. Although, the prayer for provisional release has been granted, the respondent authority has provided that the release of goods would

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be subject to the furnishing of a bond as well as a bank guarantee equivalent to the amount payable as penalty and other charges.

2. Undisputedly, the differential duty has already been paid by the writ petitioner. It is in the aforesaid context that the petitioner questions the reliance placed by the respondent upon Central Board of Indirect Taxes and Customs **["CBIC"]** Circular No. 35/2017 as well as the condition of furnishing a bank guarantee, as imposed. We note that while dealing with the validity of the aforesaid Circular, this Court in **M/s. Shanus Impex vs. Union of India & Ors.** [2023 SCC OnLine Del 7827], had observed as follows:-

> "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***

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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*

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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 SCC OnLine Del 2760, 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. Lok Prahari v*

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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

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> 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.
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> 12. The present petition has been taken up urgently as the goods in question are perishable in nature.
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> 13. List on 08.12.2023.
>
> 14. Dasti under the signature of the Court Master."
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> 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.
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> 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."

3. We find that the opinion as expressed by the Court clearly merits affirmation bearing in mind the undisputed fact that the discretion to impose an appropriate condition for provisional release is one which stands conferred upon the competent authority by virtue of Section 110A of The Customs Act, 1962 ['**Act**']. That discretion cannot be eclipsed by a directive which the CBIC may choose to issue. We also bear in mind the pertinent observations appearing in **Additional Director General (Adjudication) v. M/s Its My Name Pvt. Ltd. [2023 SCC Online Del 3147]**, and where this Court had pertinently taken note of the distinction which must be kept in mind between the *"eligibility"* for seeking release of goods and the *"entitlement"* for provisional release. We further find that the order impugned fails to record or assign any reasons for a bank guarantee being required and which would cover redemption fine, interest and

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penalty.

4. We accordingly allow the instant writ petition and quash the impugned order dated 01 July 2024, insofar as it requires the writ petitioner to furnish a bank guarantee. We direct the concerned authority to consider provisional release subject to the submission of an appropriate bond and such other security as may be warranted in the facts and circumstances of the case.

5. The application for provisional release may be examined afresh bearing in mind the observations appearing above and be disposed of expeditiously.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 12, 2024/*vp*

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