
(2022) 09 BOM CK 0021

In the Bombay High Court

Case No : Custom Appeal (L) No. 20820 Of 2022, Interim Application (L) No. 20862 Of 2022

Commissioner Of Customs (Import)

APPELLANT

Vs

Dinesh Bhabootmal Salecha

RESPONDENT

Date of Decision : 08-09-2022

Acts Referred:

Customs Act, 1962 — Section 2, 2(26), 50, 51, 110, 110A, 124, 125, 130

Citation : (2022) 09 BOM CK 0021

Hon'ble Judges : Dhiraj Singh Thakur, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Advait Sethna, Rangan Majumdar, ??Ruju Thakker, Prakash Shah

Final Decision : Disposed Of

Judgement

Dhiraj Singh Thakur, J

1. This is an appeal under Section 130 of the Customs Act, 1962 (for short "the Act") against the order dated 23rd June, 2022 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (CESTAT), whereby the CESTAT has ordered the provisional release of the seized goods in the shape of iPhones in purported exercise of powers under Section 110A of the Act.

2. As against the six questions proposed, we admit the present appeal on the following substantial question of law:

A. Whether the Hon'ble CESTAT misread, misinterpreted and grossly erred in allowing the provisional release of the goods in favour of the the Respondent in contravention of Section 110 A of the Customs Act, 1962 when the Respondent's ownership of such goods itself is seriously disputed?

3. The appeal is taken for final disposal.

4. Briefly stated material facts are as under:

Based upon the intelligence input, the Directorate of revenue put on hold two consignments under the bills of entry, which were imported in the name of M/s. Salecha Electronics Inc. and M/s. 2000 Semiconductor, which arrived from Hong Kong at Air Cargo Complex (ACC), International Airport, Mumbai, which were otherwise supposed to contain Memory Module of 4GB, 8GB and 32GB D-RAM valuing Rs.80 Lakhs approximately. On inspection by the Directorate of Revenue Intelligence the consignment was found to contain 3800 iPhones valuing approximately Rs.42 Crores. Since the goods were misdeclared, the goods were seized under Section 110A of the Act.

5. An application for release of goods was filed under Section 110A of the Act, which was rejected by the adjudicating authority, which held that the Respondent had not brought any evidence on record regarding ownership of the goods in question. What was held by the adjudicating authority, is reproduced hereunder:

"24.1 I find that the iPhones seized vide Seizure Memorandum dated 27th November, 2021 were concealed, un-manifested and undeclared and M/s. Salecha Electronics Inc. and M/s. 2000 Semiconductor are not the owner of the seized goods. It is also a fact that the no evidence has been submitted by these companies to prove that they are the owners for these goods. I find that Shri Devendra Gosalia, Proprietor, M/s. D. Systems' (HK), Hong Kong SAR admitted that seized iPhones were smuggled goods and that none of the buyers from Dubai had ever put order on M/s. D System's (HK), Hong Kong SAR as falsely claimed by Shri Dinesh Salecha. Therefore, I agree that the question for provisional release of seized goods does not arise."

At this stage it becomes relevant to reproduce Section 110A of the Act, which reads as under:

"110A. 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.]"

6. An appeal was preferred by the Respondent before the CESTAT, which was allowed by virtue of the order dated 23rd June, 2022 impugned in the present appeal. The Tribunal held that even when an 'owner' had not been defined in the Customs Act yet, the term owner was deployed in the definition of an importer under Section 2(26) of the Act and by default, ownership could be claimed by an importer.

7. Proceeding on that premise the Tribunal held that it was not open to the customs authorities to hold that there was lack of ownership for the purposes of provisional release under Section 110A of the Act. What was held by the Tribunal is reproduced hereunder:

"29. Ownership of the goods, denied by the adjudicating authority and contested

by Learned Authorized Representative, is also of relevance here. The goods were seized from consignments claimed by the importer; non-inclusion in the bill of entry, out of ignorance or deliberate, cannot supplant custodial ownership with responsibility and accountability to the shipper of the goods; it is surely not the case of the respondent that goods can be 'orphaned' and, therefore, ownership is merely a matter of claim along with all the liabilities and consequences attached to ownership. Even the Disposal Manual of the Central Board of Excise & Customs (CBEC), with the same legal status as the circular referred supra, acknowledges that owners may affirm their claim and makes provision for delayed disposal in such cases. 'Owner' is not defined in Customs Act, 1962 but the expression has been deployed in definition of 'importer' in section 2 of the Customs Act, 1962. The implication is clear: ownership is claimable at any stage and is, by default, attached to 'importer' which may be alienated by declaration but does not foreclose reassertion of ownership. It is not open to customs authorities to determine lack of ownership except in circumstances of rival claim and, that too, for the limited purpose of clearance of goods.

30. The goods have been seized under Section 110 of Customs Act, 1962 and the seizure itself is not in dispute before us. Therefore, it does not lie in our jurisdiction to set aside the seizure. However, appellant has claimed that the goods were wrongly dispatched to the importers and must, therefore, be returned to the owners. It is on record that the goods are not configured for use in India. In any case, no harm would be caused to the interests of Revenue by export of goods that have not been cleared for home consumption or even after such clearance. Provisional release under Section 110A of Customs Act, 1962, by adjudicatory determination or on appellate intervention, does not stand in the way of disposition as the owner deems fit. Shipping bills, filed for declaration of intent to export, is to be dealt in accordance with section 51 of Customs Act, 1962 for which responsibility vests with the supervisory establishment of the customs administration. This advisory is enunciated as a reminder that legislative intent must be adhered to at all times.

31. In accordance with the findings supra, the impugned order declining provisional release is modified to allow provisional release upon execution of bond for value of impugned goods and furnishing revenue deposit of Rs.5,00,00,000 not later than seven days of service of this order. Entry for export under section 50 of Customs Act, 1962, as and when filed, shall be disposed off expeditiously in accordance with Section 51 of Customs Act, 1962. Appeals are disposed off thus."

8. Learned Counsel for the Appellant urged that the stand of the Respondent always was that he was not the owner of the goods, which were seized, that a similar stand had been taken by him in the Writ Petition filed by him in this Court bearing No. 8751 of 2021, which was eventually withdrawn. It was also urged that in the said writ petition, it was submitted before the Court that the said seized consignment was mistakenly sent to India instead of Dubai by the

Supplier based in Hong Kong. It was thus urged that the Respondent having denied ownership of the seized goods could not in law, seek the release of the seized goods provisionally, which could otherwise be released only in favour of the owner. It was vehemently urged that the Respondent was a master mind for smuggling iPhones in India and had created a syndicate for smuggling iPhones and the delivery through imports made by M/s Salecha Electronics Inc and M/s 2000 Semiconductor. It was urged that allowing the release of smuggled iPhones in favour of the Respondent, ownership whereof had all along been denied, especially before this Court in writ proceedings, would amount to placing a premium on the illegal activities being conducted by the Respondent, which was being carried out in an organized and systematic manner.

9. On the other hand, learned Counsel for the Respondent urged that it was only because the authorities had considered the Respondent to be an owner, that the show cause notice was issued to him in terms of Section 124 of the Act. For facility of reference Section 124 envisages thus:

"124. Issue of show cause notice before confiscation of goods, etc.

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in [writing with the prior approval of the officer of customs not below the rank of [an Assistant Commissioner of Customs], informing] him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

PROVIDED that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral:

[PROVIDED FURTHER that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed.]

10. On a perusal of the provision (supra) it can be seen that issuance of a show cause notice in terms of Section 124 does not necessarily establish that the person in whose name it is issued, is necessarily the owner. The phrases 'penalty on any person' and 'the owner of goods or such person' suggests that before an order of confiscation is passed, an owner or any other person shall have to be given a notice of the proposed confiscation of goods. Therefore, the mere fact that a show cause notice has been issued in the name of the Respondent does not necessarily imply that he is to be treated as an owner of the goods seized, which are sought to be confiscated.

11. A reading of Section 110 A makes it abundantly clear that goods seized may be released to the owner. The said section does not include or envisage release of goods provisionally in favour of an importer of goods much less does it envisage, a release in favour of 'any person', in addition to the owner as mentioned in Section 124 of the Act, who has been served a notice under the said section. In our opinion the Tribunal has in fact committed an error in importing the definition of an 'importer' as defined under Section 2(26) of the Act and reading the same in Section 110A of the Act.

Section 2(26) of the Act defines an importer as under :

"2(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes [any owner, beneficial owner] or any person holding himself out to be the importer;

Nothing could prevent the legislature from specifically incorporating a provision in Section 110A, which would also entitle, besides an owner, an importer, a beneficial owner or any person holding himself to be an importer to claim a right to seek provisional release of goods in terms of Section 110A of the Act. If one were to read the provisions of Section 125 of the Act, it would make things a bit clearer. The said Section envisages that when confiscation of any goods is authorized by the Act, the officer adjudging may give to the owner of the goods or where such owner is not known, the person from whose custody such goods have been seized, an option to pay in lieu of such goods, such fine as the said officer thinks fit. It thus goes to show that goods can be got released by a person other than an owner, in the circumstances as envisaged in Section 125 of the Act at a time when confiscation is authorised, which right of release of goods is not available to any other person except an owner as envisaged under Section 110A of the Act at any preliminary or intermediate stage.

In our opinion, in view of the specific and clear mandate of Section 110A, goods could have been permitted to be released only in favour of an owner and since the Respondent had failed to prove ownership over the goods in question, as held by the adjudicating authority inasmuch as no evidence had been submitted to prove such ownership, which finding of fact has not been unsettled by the Tribunal, except to the extent that the Respondent has been held to be the owner by an erroneous legal interpretative process of the provisions of the Act.

We, therefore, are of the opinion that the order passed by the Tribunal is unsustainable in law and hold that the goods could have been released provisionally under Section 110A of the Act, only in favour of an owner, which status the Respondent had failed to establish.

12. We, therefore, answer the question in favour of the Appellant and allow the appeal accordingly.

13. In view of the disposal of the appeal, Interim Application (L) No. 20862 of 2022 also stands disposed of.