

(2017) 01 MAD CK 0163

In the Madras High Court

Case No : Writ Appeal Nos. 821 and 822 of 2016 in Writ Petition Nos. 30789 and 30790 of 2016

M/s. ALM Enterprises

APPELLANT

Vs

The Commissioner of Customs (Imports)

RESPONDENT

Date of Decision : 31-01-2017

Acts Referred:

Customs Act, 1962 — Section 110, Section 125, Section 45
Drugs and Cosmetics Rules, 1945 — Rule 129

Citation : (2017) 2 MLJ 385

Hon'ble Judges : Mr. Nooty Ramamohana Rao and Anita Sumanth, JJ.

Bench : Division Bench

Advocate : Mrs. Hemalatha, Standing Counsel, for the Respondent; Mr. Vijay Narayanan, Sr. Counsel, for Mr. N. Viswanathan, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Nooty. Ramamohana Rao, J. - Both these Writ Appeals are preferred under Clause 15 of the Letters Patent, calling in question the correctness of the common order dated 02.06.2016 rendered by the learned Single Judge dismissing the two Writ Petitions instituted by the appellant herein in W.P. Nos.30789 and 30790 of 2016.

2. Writ Appeal No.821 of 2016 arises out of W.P.No.30789 of 2016, which is directed against the Order in Original dated 02.06.2014, passed by the Commissioner of Customs (Imports), Customs House, Chennai, with a prayer for quashing it and a consequential direction was also sought for to the Respondents to unconditionally release the goods covered under the Bill of Entry No.3611465 dated 22.10.2013. Whereas Writ Appeal No.822 of 2016 arises out of W.P.No.30790 of 2016, which in turn is directed against the order passed on 09.09.2015 by the Additional Commissioner of Customs (Gr.2), Customs House, Chennai, with a direction to provisionally release the goods covered by the Bill of Entry No.3611465 dated 22.10.2013.

3. Since the issue raised in both the writ petitions arise out of the same Bill of Entry and also the same set of facts are involved in both the cases, they were heard together and dismissed by the common order which is under appeal.

4. As it is convenient in all respects, both these writ appeals are heard together by us and they now stand decided by this common Judgment.

5. The case, as is set up by the writ petitioner firm, is that it is a proprietary concern of Shri Mahesh Kumar Singh and that it is engaged in the business of import and trading of various cosmetics and other goods. The said proprietary concern had been granted the Import-Export Code bearing No.0412028522. It is the further case that the said proprietary concern has executed necessary power of attorney in favour of Shri L.Ibrahim, son of Shri Liaquath Ali, to conduct the affairs of the said firm. It is the case of the writ petitioner that after due negotiations the overseas supplier was requested to supply 2070 cartons of "Loomy Tunes Room Air Fresheners" for a total value of USD 10350 and accordingly, the overseas supplier raised invoice bearing No.0022113 dated 13.10.2013 and upon arrival of the consignment Bill of Entry bearing No.3611465 was filed on 22.10.2013 with the Customs House Chennai, declaring therein the import of 2070 cartons of Air-fresheners for a value of Rs.6,50,208/-. This valuation of the goods was not accepted by the Customs House and the value of goods were assessed by enhancing it to Rs.12,09,386/- and the Duty payable thereon was assessed as Rs.4,26,981/-. The writ petitioner, has paid this amount of Duty.

6. Thereupon, instead of clearing the goods, the Customs Department has taken up the Bill of Entry for second check appraisalment and examination. During the said course, certain difference in the weight of the consignment was noticed and accordingly the cargo was detained on 28.10.2013. Necessary entry is made in the discrepancy register. On 06.11.2013, a communication was lodged by the writ petitioner with the Customs House that due to an inadvertent mistake the overseas supplier has despatched the entire quantity of supplies which were initially negotiated by the importer, though he asked for only room fresheners to be despatched for the present. Hence, a revised invoice dated 29.10.2013 was filed showing the total value of goods at USD 52339 for 3463 cartons, out of which 749 cartons were declared to contain air fresheners while the rest of the cartons have contained toiletries and cosmetics like deodorants, sprays, perfumes, shampoos etc.

7. The Intelligence Wing of the Customs House has examined the goods on 11.11.2013 and drawn a detailed mahazar proceedings for ascertaining the true quantity and description of goods found imported and lying in the container. After drawing the detailed mahazar on 12.11.2013, the container was sealed using one time Customs Seal bearing No. UCWN16194. On 18.11.2013 necessary permission was accorded to the writ petitioner for bonding the goods under Section 49 of the Customs Act. The Customs Authorities have once again drawn a mahazar on 03.12.2013 this time around effecting seizure of the goods. On

19.05.2014, the writ petitioner sought for unconditional release of goods, as the show cause notice under Section 124 of the Act, had not been issued to him, as mandated under Section 102 (2) of the Customs Act.

8. It is thereafter, on 20.05.2014, the Commissioner of Customs House, Chennai, invoking the proviso to Section 110 (2) of the Act, has proposed to extend the period for issuance of show cause notice under Section 124 of the Act, by a further period of six months, in the process, reckoning the date of seizure of the consignment as 03.12.2013. Time was granted up to 28.05.2014 for filing the objections. Accordingly, objections were lodged on 27.05.2014 pointing out that no show cause notice having emanated within a period of six months reckoned from the date of detaining the goods on 28.10.2013 or even 11.11.2013, the goods are liable to be released unconditionally. The petitioner has at that stage instituted W.P.No.9678 of 2014 in this Court, seeking a writ of mandamus to complete the adjudication proceedings immediately. This Court has disposed of the said writ petition by its order dated 12.06.2014 directing the respondents therein to complete the adjudication proceedings as expeditiously as possible preferably within a period of three months.

9. It is during the pendency of the said writ petition No. 9678 of 2014, the Commissioner of Customs has drawn the show cause notice dated 20.05.2014, proposing to extend the time to draw the "show cause notice for adjudication" by a further period of six months. The Commissioner of Customs has also passed orders on 02.06.2014, extending the time for issuance of show cause notice for adjudication, till 03.12.2014. It is this order dated 02.06.2014, which is challenged in W.P.No.30789 of 2015. The entire case of the petitioner in this writ petition revolves around the fact that the consignment having been detained on 28.10.2013 and was sealed by drawing the necessary mahazar nama on 11.11.2013 and thus access and possession of the goods having effectively been denied to the writ petitioner effective from the said dates and hence such an act of the Customs House, Chennai, amounts to "seizure". And time has to be reckoned latest from the date 11.11.2013, for purposes of application of Section 110 of the Act. The writ petitioner derives support for the above plea from a Judgment rendered by the Calcutta High Court, to which we would advert to in detail a little later on.

10. A show cause notice dated 02.12.2014, under Section 124 of the Act, came to be issued as to why the value declared as well as the value mentioned in the revised invoice dated 29.10.2013, should not be rejected and the value of the goods imported be not redetermined at Rs.1,00,04,680/- in terms of Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, based upon the market enquiries conducted for ascertaining the MRP value of the goods. The show cause notice also called for an explanation as to why the goods should not be confiscated under Section 111 Clauses (d), (f), (i), (l) and (m) of the Act. The show cause notice has also proposed to impose penalties under Section 112 and 114 of the Customs Act.

11. The writ petitioner has filed its detailed objections on 25.01.2015 to the said show cause notice, raising several contentions both on law and fact. The Additional Commissioner of Customs finalized the proceedings and passed a detailed order on 09.09.2015 confirming the proposals contained in the show cause notice. In that view of the matter, W.P.No.30790 of 2015 is instituted challenging the legality and validity of the order dated 09.09.2015.

12. As already noticed supra, both these writ petitions came to be dismissed by the common order rendered by our learned brother M.Duraiswamy,J on the ground that the Appellate remedy available under Section 128 of the Act, has not been availed. Hence, these appeals.

13. Heard Shri Vijay Narayanan, learned Senior Counsel for the appellant and Mrs. R. Hemalatha, learned Standing Counsel for the Customs Department.

14. At the very outset, Sri Vijay Narayanan, learned Senior Counsel would contend that the rule requiring exhaustion of statutory remedies before the writ will be issued is a rule of policy, convenience and discretion rather than a rule of law. Availability of other adequate remedies was not an absolute bar for grant of a writ when patent illegality was committed. Since the said proposition of law was laid down by the Supreme Court in the State of Uttar Pradesh v. Mohammed Nooh (AIR 1958 SC 86), A.V. Venkateswaran, Collector of Customs, Bombay v. Ramachand Sobharaj Wadhvani (AIR 1961 SC 1506), Calcutta Discount Co. Ltd., v. Income Tax Officer (AIR 1961 SC 372) and Whirlpool Corporation v. Registrar of Trade Marks (1998 (8) SCC 1) we, proceeded to hear and consider the matter on merits.

15. Shri Vijay Narayanan, learned Senior Counsel would submit that after the value of the imported goods has been enhanced to Rs.12,09,386/-, the Duty of Rs.4,26,981/- as assessed had been paid by the petitioner. However, the goods have been detained on 28.10.2013. The SIIB officials of the Customs House have undertaken a detailed examination of the container by de-stuffing the cartons contained therein and prepared a detailed mahazarnama on 11.11.2013 and the container was once again sealed. Thus, the writ petitioner/appellant has been successfully and effectively prevented from gaining access, control and or possession of the goods imported in spite of payment of necessary Duty thereon. Therefore, the "act of detention of goods" by the customs amounts to seizure of the goods. When once the goods are seized and if no show cause notice was drawn within a period of six months thereafter, such goods become liable to be released unconditionally. In spite of making such a specific request on 19.05.2014, the Commissioner of Customs has drawn necessary show cause notice the next day on 20.05.2014 proposing to extend the time limit to commence the adjudication proceedings by a further period of six months. It is contended that when once the six months period has elapsed, the question of invoking the proviso to sub-section (2) of Section 110 of the Act would not arise. The goods ought to have been unconditionally released. Learned Senior Counsel places strong reliance in this regard upon the Judgment rendered by the Calcutta

16. Before we deal with these submissions it would be appropriate to notice various provisions of the Customs Act, 1962, which was enacted with a view to consolidate and amend the law relating to Customs as the experience has shown that the provisions of Sea Customs Act, though were substantially amended by the Sea Customs (Amendment Act) 1955 could not effectively provide for dealing with all aspects relating to imports of goods. Further, the increased smuggling activity has also presented new variety of dimension of the problem. The Land Customs Act 1924 was found to be not comprehensive enough and hence Customs Act 1962 (henceforth called the Act) has been enacted. Various expressions found in the Act have been defined in Section 2 thereof. Clause (2) defines expression "assessment" as "(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any order of assessment in which the duty assessed is nil;" Clause (4) defines "Bill of Entry" as "bill of entry" means a bill of entry referred to in section 46;" and Customs area in Clause (11) as "customs area" means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;"; "Entry" in Clause (16) as "entry" in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in section 82 or the entry made under the regulations made under section 84" and "imported goods" in Clause (25) as "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;"; "importer" in Clause (26) as "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 or any person holding himself out to be the importer;". Under Section 11 of the Act power is conferred upon the Central Government which may by Notification in the Official Gazette prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance as may be specified in the Notification, the import or export of goods of any specified description. Section 12 is the charging section for levy of Duties of Customs on goods imported into India. Sub-section (1) of Section 17 obliges an importer to self assess the Duty leviable on such goods. Whereas sub-section (2) thereof authorised any proper officer to verify self assessment of such goods and for that purpose examine or test any imported goods as may be necessary. Sub-section (4) thereof empowers, where it is found on verification, examination or testing of the goods imported that the self assessment is not done correctly but re-assess the Duty leviable on such goods without prejudice to any other action which may be taken under the Act. Subsection (5) enables the proper Officer to pass a speaking order of reassessment within 15 days from the date of reassessment of the Bill of Entry. Where reassessment has not been done or a speaking order has not been passed, the proper Officer may audit the assessment of the Duty of the imported goods. Section 18 provides for revisional assessment of Duty in certain

contingent circumstances.

17. Chapter VII of the Act dealt exhaustively with clearance of imported goods and export of goods. Section 45 of the Act has some relevance for our enquiry and hence it is extracted below:-

"SECTION 45. Restrictions on custody and removal of imported goods. - (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, -

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in subsection (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried."

18. It is, thus, abundantly clear from Section 45 of the Act that all imported goods, unloaded in a Customs area, shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or warehoused or transshipped in accordance with the provisions of Chapter VIII. Sub-section (2) thereof further makes it clear that the person having custody of any imported goods in a Customs area shall keep a record of such goods and shall not permit such goods to be removed from the Customs Area or otherwise dealt with except by any permission granted by proper Officer. Thus, the imported goods, till such time they are either cleared for home consumption or warehoused or transshipped, remain in the custody of the person approved by the Commissioner of Customs for that purpose and that person shall not permit such goods to be removed from the Customs Area or allow to deal with the same otherwise by any third parties. Section 46 obliges the importer of goods, other than goods intended for transit or transshipment, to make an entry thereof by presenting electronically to the proper Officer a Bill of Entry for home consumption or warehousing in a prescribed form. Sub-section

(2) thereof further mandates that the Bill of Entry shall include all the goods mentioned in the Bill of Lading or other receipt given by the carrier to the consignor. Sub-section (4) makes it clear that the Importer while presenting a Bill of Entry shall make and subscribe to a declaration as to the truth of the contents of such Bill of Entry and in support of such declaration produce the invoice, if any, relating to the imported goods. Section 47 deals with clearance of goods for home consumption. Sub-section (1) empowers a proper Officer, upon being satisfied that the goods entered for home consumption are not prohibited goods and that the importer has paid the import Duty, if any leviable thereon may make an order permitting clearance of the goods for home consumption. Sub-section (1) of Section 47 also, thus allows examination/inspection of the goods for being satisfied that the goods imported are not prohibited under the Act or by any other law. Payment of Import Duty is an incidence to be taken note of by the Proper Officer, when all other conditions relevant to import are complied with/satisfied, for purposes of passing an order clearing the goods for home consumption. Thus, mere payment of Duty, even if any, assessed does not amount to clearance of goods for home consumption. The proper Officer shall make an order under Section 47 of the Act, permitting clearance of goods for home consumption and until such clearance is accorded the goods are liable to be construed to have remained in custody of the proper Officer in terms and in accordance with Section 45. In other words, the authority of the Customs over the goods imported till they are cleared by the "Proper Officer" under Section 47, is recognised as absolute. Thus the authorities of the Customs have every right to exercise full power and control over the imported goods under Section 45 of the Act, till such time they are properly cleared.

19. Section 110 of the Act has provided for seizure of goods, documents and other things. It has set out that if the Proper Officer has reason to believe that any goods are liable to confiscation under the Act, he may seize such goods and where it is not practicable to seize any such goods, the Proper Officer may serve on the owner of the goods an order that he shall not remove, part with or otherwise deal with the goods except with previous permission of such Officer. Sub-section (2) of Section 110 reads as under:-

" (2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months."

The above provision makes it clear that if no notice under Section 124 of the Act is issued within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were thus seized. The computation of six months period is thus to commence, obviously, only from the

date the goods are seized by the Proper Officer under sub-section (1) of Section 110; but not from the date of their detention as urged. It is wholly proper to note that in law there is a well marked distinction between "Detention" and "Seizure".

While every detention does not amount to seizure, but every seizure automatically encompasses detention. Further, while seizure can lead to the consequential confiscation, every detention need not necessarily lead to any such inevitable result. (See. *Gian Chand v. State of Punjab* 1983 (13) ELT 1365 SC.)

20. It is also to be noticed that under the proviso to subsection (2), the Commissioner of Customs has been empowered to extend the aforesaid period of six months if there is sufficient cause shown for not issuing the show cause notice under Section 124.

21. Learned Senior Counsel placing reliance upon sub-section (2) of Section 110, has contended that the goods have been seized in the instant case on 11.11.2013 and the show cause notice has not been drawn under Section 124 of the Act within the period of six months reckoned therefrom and hence the goods are liable to be returned to the importer. For the failure of the Customs Officials to adhere to this requirement of law, compelled the importer to institute the first writ petition.

22. Before answering the above contention, it is only apt to remind that the importer has filed the Bill of Entry No.3611465 on 22.10.2013. Whereas Goods are detained on 28.10.2013 and the revised Bill of Entry was lodged on the next date i.e. on 29.10.2013 and on 11.11.2013, at 14.30 hours examination proceedings of the consignment was carried out. The examination details have been recorded in a tabulated form in the report drawn on 12.11.2013. After de-stuffing the Carton Boxes, the examination revealed that a total number of 3470 cartons covering a total number of 17 different items of goods were found imported in the container. All the carton boxes were stuffed back into the container and the said container was sealed with Customs One Time Seal No. UCWN 16194 and the proceedings have been completed by 1.30 hours on 12.11.2013. The examination proceedings were drawn by the Inspectors (Preventive - SIIB) in the presence of two witnesses and before the Superintendent of Customs SIIB and the importer was given a copy thereof. The examination report, is noted as under:-

" Thereafter, all the carton boxes were stuffed back into the same container and the said container was sealed with the Customs One Time Seal No. UCN16194....."

From the above statement, the learned Senior Counsel would draw an inference that the importer has been effectively denied access to the imported goods and their usage and hence such act of the Customs Inspector in sealing the container would amount to seizure of the imported goods. Any such denial of control and usage of the imported goods would amount to seizure of the goods itself. In

principle, there is no distinction in between the seizure of goods and sealing of the container containing the imported goods. Learned Senior Counsel places reliance upon the Judgment of the Calcutta High Court in ESI Limited v. Union of India 2003 (156) ELT 344 in support of this plea.

23. The contention canvassed in this regard is not liable to be accepted, for, separate proceedings have been drawn on 03.12.2013 at 15 hours. During the course of the said proceedings a mahazar has been prepared in the presence of two witnesses and the importer and his authorised person. It is noted therein that the Customs Officers verified the Customs Seal on the container which were found intact and thereafter only the Customs Seal UCWN 16194 was cut open and the container was de-stuffed. The carton boxes were found serially numbered as mentioned in the mahazar drawn on 12.11.2013. It was also recorded that Shri Mahesh Kumar Singh and Shri C.S.Ibrahim have vouched that the goods were the same that were examined and inventoried on 12.11.2013. Since the importer had imported goods which were not declared in the Bill of Entry, and thus attempted to smuggle the undeclared goods by way of concealment behind some of the declared goods at the rear portion of the container, the consignment was seized for further action under the provisions of the Act. At the end of the mahazar so drawn, it is clearly recorded before applying the seal once again, as under "mahazar drawn & seizure effected by me". Thus the seizure of the imported goods in the instant case has been effected only on 03.12.2013 at 15 hours. What was really undertaken on 11.11.2013 and 12.11.2013 is mere examination of the imported goods and inventorisation of the entire goods imported, by de-stuffing of the cartons contained in the container, to verify that they tally exactly with the disclosure made in the Bill of Entry.

24. We are clearly of the opinion that the examination and inventorisation of goods finalized by the Customs on 12.11.2013 is essentially required to be undertaken before a prima facie opinion can be formed as to whether there is any illegal attempt of importation of undeclared goods. Unless the seals of the container are broken open and the cartons contained therein are de-stuffed and then inventorised, it would not be clear as to whether or not the importer has attempted to import only such goods which are declared by him in the Bill of Entry or otherwise.

25. Therefore, what has been undertaken on 11.11.2013 and 12.11.2013 is nothing but examination of the imported goods and their inventories. It is thereafter, the container has been restuffed back with all the cartons containing the imported goods. The container cannot be left open and unattended to and hence the container was sealed using a Customs One Time Seal. It is therefore, a case of sealing the container with a view to preserve the integrity of the imported goods contained in various cartons loaded therein, till the necessary follow up action under the Act is taken up. If the container were not to be sealed, the imported goods would get exposed to the grave risk of being pilfered. In

which event, it is the Customs Officer to whom the custody of the goods are entrusted becomes liable to pay duty on such goods as per the provisions contained in sub-section (3) of Section 45 of the Act, but not the importer. It is with a view to prevent any such ill effects flowing on to the authorities of the Customs, the container has been sealed using the One Time Seal of the Customs on 12.11.2013. Whereas actual seizure of the goods has taken place only on 03.12.2013, based upon the factual finding that an attempt has been made to smuggle certain goods. The fundamental requirements for effecting seizure of goods is the reason to believe that the goods are liable to be confiscated under the Act. Hence, only upon there being a reason to believe that the goods are liable to be confiscated under the Act, any such goods then can be seized. Under Clause (f) of Section 111 of the Act, any dutiable or prohibited goods required to be mentioned under the Regulations, any import manifest or import report which are not so mentioned, such goods are liable to be confiscated. The examination that was concluded on 12.11.2013 having revealed the presence of large number of goods undisclosed and concealed in the container as many as 2741 cartons which are not declared did the occasion arise for consideration as to whether the goods are liable to be confiscated or not. Under Clause (i) of Section 111, goods found concealed in any manner in any package either before or after unloading are liable for confiscation. Unless the goods become liable for confiscation, they cannot be seized. Hence, the exercise carried on 11th and 12th November, 2013 is only an ascertainment exercise as to whether the goods imported tally with the details found mentioned in the import manifest delivered or in that guise any clandestine import of undeclared goods is attempted at. Unless a correct factual finding is arrived at, the occasion for application of mind as to whether such goods are liable to be cleared for Home Consumption or liable to be confiscated under Section 111 of the Act, would not arise. Hence, the examination and inventorisation undertaken on 12.11.2013, does not amount to effecting seizure of such goods.

26. It will be relevant to notice in this context that the Commissioner of Customs has drawn a show cause notice under the provisio to sub-section (2) of Section 110 of the Act, on 02.06.2014, proposing to extend the period for issuance of show cause notice under Section 124 of the Act, by another six months, i.e., up to 03.12.2014 in respect of the seized goods under mahazar drawn on 03.12.2013. In our opinion, this order passed by the Commissioner of Customs on 02.06.2014 is in accordance with the provisions contained under sub-section (2) of Section 110 of the Act, and it is well within the time limit set out therein, when the time limit of six months is so reckoned from 03.12.2013. Further, this time limit of six months, was mentioned in Section 110 of the Act but importantly not in Section 124 of the Act. The proposed extension of the time limit of six months is only to prevent the consequences contemplated by Sub-Section (2) of Section 110 from flowing.

27. The contention canvassed by the learned Senior Counsel that with effect from 12.11.2013, the importer has been denied effective control over the goods

and hence the same amounts to seizure of the goods itself, is inspired by the reasons contained in the judgment rendered by the Division Bench of Calcutta High Court, in *E.S.I. Ltd. v. Union Of India (Uoi)* (2003 (158) E.L.T. 344 (Cal.)), which is to the following effect:-

" 7. Appearing in support of the appeal, Mr. Ajit Kumar Panja submitted that the decision of the learned Single Judge was based on an erroneous finding that the detention of the goods on 9th November, 2000, did not amount to seizure within the meaning of Section 110(1) of the Customs Act, 1962, and that actual seizure of the goods took place on 1st March, 2001, Mr. Panja submitted that although the proviso to Sub-section (1) of Section 110 of the said Act provides that where it is not practicable to seize the goods, the owner of the said goods could be directed by an order not to remove, part with, or otherwise deal with the goods except with the previous permission of the concerned officer, in the instant case the dominion over the goods went out of the hands of the appellants as soon as on 22nd November, 2000, the rooms in which the detained and/or seized goods were kept were sealed by the Customs Officers (P), Varanasi Division. Mr. Panja submitted that the fact relating to the sealing of the rooms by the said Customs authorities would be evident from the Supurdnama executed by the person in whose custody, the said goods were kept and which has been made Annexure "X" collectively to the affidavit-in-reply affirmed on behalf of the appellants.

8. In support of his submission Mr. Panja firstly referred to a Bench decision of this court in *Collector of Customs and Central Excise, West Bengal and Ors. v. Hindustan Motors Ltd. and Anr.*, 1979 (4) E.L.T. Page J 313, where the same question as to the distinction between seizure of goods and prohibitory order within the meaning of Section 110(1) of the Customs Act and the proviso thereto, fell for consideration. Mr. Panja submitted that, as in the instant case, in the said case also, the goods in question were sealed by the Customs authorities. In such context, the court observed that if the goods were sealed with the seal of the Assistant Collector of Customs, such an overt act of sealing the packed and re-packed drums amount to exercise of dominion over the goods. In other words, it is an act of seizure of the goods within the meaning of Section 110(1) of the Customs Act, 1962 and not a prohibitory order in terms of the proviso thereto.

20. Having considered the submissions made on behalf of the respective parties we are inclined to accept Mr. Panja's submission that dominion over the goods initially detained on 9th November, 2000, went out of the hands of the appellant-company when on 22nd November, 2000, the rooms in which the goods had been kept were sealed by the Customs Officers, Varanasi Division. The facts of this case are squarely covered by the facts of the *Hindustan Motors* case (*supra*). Once the dominion over the goods passed out of the hands of the appellant-company it tantamounted to seizure for all practical purposes. It is one thing for the goods to be kept detained in a manner where the owner thereof has access to the same but is prevented by a prohibitory order from dealing with the same. The situation is radically altered when the owner of the goods no longer has

access thereto and has no control over the same."

28. It will be appropriate to notice that the Division Bench of the Calcutta High Court has not considered, in the course of their judgment, the salutary provisions contained in sub-section (1) of Section 45 of the Act. Wherein it is clearly set out that all imported goods unloaded in a Customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or transshipped in accordance with the provisions contained in Chapter VIII of the Act. Similarly, under sub-section (2) of Section 17 of the Act, the Proper Officer is empowered to verify the self-assessment of the imported goods and for that purpose examine or test any imported goods as may be necessary. It is thereafter, the Proper Officer may reassess the duty leviable on such goods if he is satisfied that the self assessment made by the importer is not correctly done.

29. Therefore, the examination of the imported goods undertaken on 11.11.2013 and completed on 12.11.2013 by the Customs Authorities is in accordance with the power conferred on them under sub-section (2) of Section 17 of the Act and without undertaking any such examination, perhaps the correctness or otherwise of the self-assessment made by the importer could not have been approved or accepted. Again, if one bears in mind the provision contained under sub-section (2) of Section 45 it becomes clear that the person to whom the custody of imported goods unloaded in the Customs area has been entrusted was required not to permit such goods to be removed from the Customs area or otherwise deal with them except and in accordance with the permission obtained in writing from the Proper Officer, it becomes clear that the goods imported shall continue to remain in control and custody of the Customs Officer and they remain to be so till they are cleared. Any such retention of custody of the goods and their control does not, in law, amount to passing of dominion over the same from the owner to the Customs. Hence, the goods are merely subjected to examination first in this case on 11.11.2013 before contemplating their seizure.

30. It is manifestly clear that the imported goods which have been unloaded in a Customs area shall remain in the custody of the Officer to whom their custody was entrusted under Section 45 of the Act and they continue to be remain under his custody till they are cleared for home consumption under Section 47 of the Act. There is no doubt that no such order clearing the goods has been passed in the present case. Consequently, the access or control or right of usage of the imported goods is not available at all to the importer, except under an express permission granted by the Proper Officer and no such permission has been granted either. Therefore, the contention canvassed by the learned Senior Counsel on behalf of the writ petitioner/appellant that the denial of access, control or usage of the imported goods amounts to seizure is not liable to be accepted in view of the provisions contained in Section 17 read with Sections 45 and 47 of the Act. With all humility and great respect, we record our inability to subscribe to the reasoning assigned by the Division Bench of the Calcutta High

Court in *E.S.I. Ltd. v. Union Of India (Uoi)* (2003 (158) E.L.T. 344 (Cal.)). In our opinion, the judgment of the Calcutta High Court is required to be understood in a different context but not in the backdrop of Section 17 and Section 45 of the Customs Act.

31. Once the goods get cleared for home consumption, the importer is entitled to remove the same from the Customs area subject of course to payment of duty. It would be a different matter that such goods are still liable for reassessment or even confiscation proceedings subsequently. But in such a case, if the person from whose custody the goods have been seized, if he is not issued with the show cause notice under Section 124 of the Act within the period of six months prescribed by sub-section (2) of Section 110, such a person can seek release of such goods, but certainly not in cases where the goods have not yet been cleared for home consumption. Hence, the action of the Customs in not releasing the goods unconditionally can not be faulted. The writ petition seeking unconditional release of goods, hence lacks merit.

32. The other writ appeal arises out of writ petition 30790 of 2016, which is directed against the Order in Original dated 09.09.2015, passed by the Additional Commissioner of Customs, confiscating the cosmetics which have been imported unauthorisedly, which are valued at more than one Crore of rupees. Even those Air fresheners/goods which are imported as per import manifest are also ordered to be confiscated both under Clause (m) of Section 111 and Section 119 of the Act. However, an option has been provided to redeem the said goods (Air Fresheners) on payment of redemption fine of Rs.1,50,000/- under Section 125 of the Act. A penalty of Rs.25,00,000/- is also imposed on the individual found responsible under Section 112 of the Act. Others involved were also penalized suitably under Section 114 of the Act.

33. At the outset, it will be appropriate to notice that under Clause (m) of Section 111 of the Act, any goods which do not correspond in respect of value or in any other particular with the entry made under the Act, are also liable to be confiscated. Whereas Section 119 renders any goods used for concealing the smuggled goods also liable for confiscation. The finding of fact recorded by the Commissioner of Customs in the course of his order, is that the cosmetic items which have not been disclosed in the import manifest delivered to the Customs, were found concealed behind the Cartons containing the declared goods (air fresheners). He therefore, observed that it negates the importers argument that the shipper had sent these cosmetics without their knowledge and that the mistake was unintended. The subsequent filing of revised invoice on 06.11.2013 has been found as a clear after thought, having been lodged after the goods were detained on 28.10.2013. Therefore, the Commissioner of Customs has arrived at a finding of fact that the importer with wilful intent attempted to clear the consignment by smuggling cosmetics in the guise of importing air fresheners. These findings of fact cannot be described as unreasonable findings of fact or perverse findings, in the sense that no reasonable body of men would have

arrived at a such conclusion, for us to interfere. Realizing these difficulties and also the fact that the Order in Original is an appealable one under Section 128 of the Act, which appeal has not been preferred and thus the facility of getting such erroneous findings of fact, if any, corrected not having been utilized, the learned Senior Counsel Shri Vijay Narayanan has mainly concentrated on the absence of not providing to the importer an option of payment of redemption fine in lieu of confiscation of the goods imported. The learned Senior Counsel had contended that sub-section (1) of Section 125 of the Act has contained two distinct limbs, the first limb vests the Adjudicating Authority with a discretion to provide for redemption fine in case of importation of the goods which are prohibited under the Act or any other law for the time being in force while the second limb sets out that in case of any other goods he shall provide an option to pay redemption fine. Section 125 of the Customs Act reads as under:-

"125. Option to pay fine in lieu of confiscation.-

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods 1[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:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."

The Legislature has clearly used two different expressions " may" and "shall" in sub-section (1) thereof, to take care of two different events.

34. As is commonly understood, the expression "may" clearly indicates vesting of discretion while the expression "shall" has the ring of the mandate to do a particular thing provided thereunder. The first part of sub-section (1) of Section 125 clearly dealt with the situation arising out of confiscation of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force. Thus, in cases the importation or exportation of goods is prohibited, a discretion is vested in the competent authority to provide for an option to pay a fine in lieu of such confiscation. Whereas the latter part of sub-section (1) of Section 125 dealt with importation or exportation of other goods obviously meaning those which are not prohibited from being imported or exported. In such a case, the option for payment of redemption fine has to be necessarily extended by the adjudicating officer. It is only appropriate to remind that the adjudication process under both Sections 124

and 111 is only in relation to the goods, the object of the Customs Act primarily being to ensure that there is no illegal importation of goods. The expressions "prohibited under this Act or under any other law for the time being in force", found mentioned in Section 125 encompass not only the importation of such goods which has been prohibited absolutely from getting imported under Section 11 of this Act or the importation of goods is either restricted or regulated as well. Section 11 of the Act clearly brings out that if the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2) thereof, it may by notification in the Official Gazette prohibit absolutely or subject to such conditions to be fulfilled before or after clearance as may be specified in the notification, the import or export of goods of any specified description. The provision contained in Section 125 has therefore, got to be read conjointly along with Section 11 of the Act and when so read the prohibition of import which was contemplated by Section 125 clearly encompasses both such types of goods which are prohibited absolutely and also such goods which are prohibited or restricted or regulated subject to such conditions to be fulfilled either before or after their clearance.

35. The above view point also requires us to examine the legal regime prevailing as of now pursuant to the introduction of Foreign Trade (Development and Regulation) Act, 1992, repealing the Imports and Exports (Control) Act, 1947. The Foreign Trade (Development and Regulation) Act, 1992, authorised under Section 3 thereof the Central Government to make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. Similarly under sub-section (2) of Section 3 of the said Act, the Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods. Under Section 5 of the said Act, the Central Government was also empowered to formulate and announce by notification in the Official Gazette, the "export and import policy" and to amend suitably that policy from time to time. Under Section 6 of the said Act, the Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of the said Act, who shall also advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy. Under Section 7 of the said Act, no person shall make any import or export except under an Importer-exporter Code Number granted by the Director General or the officers authorised by the Director General in that behalf, in accordance with the procedure specified. There is no denying the fact such an Import Code Number was obtained in the present case. Under Section 11(1) of the said Act, no export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the export and import policy for the time being in force. Under subsection (2) of Section 11, where any person makes or abets or attempts to make any export or import in contravention of any provision of this

Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty, which can be five times the value of the goods in respect of which any contravention is occurred. Under sub-section (5) of Section 11, in contravention of any provision of this Act and its rules or orders made thereunder or the export and import policy, if any import is made, such goods are liable to be confiscated.

36. In the light of the above provisions, it is appropriate to notice the Foreign Trade Policy (FTP) also, announced for the period between 27th August 2009 and 31st March 2014. Chapter-2 thereof contained General Provisions Regarding Imports and Exports. In para 2.1 (a) it is made clear that Exports and Imports shall be "Free", except when regulated as per FTP or ITC (HS). Sub-paragraph (b) thereof sets out that ITC (HS) contained item wise Export and Import Policy regimes. While Schedule 1 of ITC (HS) gives the Import Policy Regime, Schedule-2 of ITC (HS) gives the Export Policy Regime. Under paragraph 2.7 of the FTP, any goods/service, the export or import of which is "Restricted" may be exported or imported only in accordance with an Authorization/ Permission/ License or in accordance with the procedure prescribed in a notification/public notice issued in this regard. ITC (HS) Chapter 33 dealt with Essential Oils and Resinoids, Perfumery, Cosmetic or Toilet Preparations. At the very outset, in the notes appended thereto, it is made clear that this Chapter does not cover soaps or other products of heading 3401. The expression "perfumery, cosmetic or toilet preparations" in Heading 3307 applies inter alia to the products which are listed therein. The goods (products) with which we are concerned in this case have not been demonstrated to fall within this Chapter 33.

37. It also takes us to the notification G.S.R.426(E) dated 19.05.2010 published by the Ministry of Health and Family Welfare Department, Government of India. Through this notification, the Drugs and Cosmetics (4th Amendment) Rules 2010, framed in exercise of powers conferred by Sections 12 and 33 of the Drugs and Cosmetics Act, 1945 have been notified. By this amendment, Rule 129 has been substituted and the new Rule 129 which was brought into force with effect from 1st April, 2011 reads as under:-

" 129. Registration of cosmetic products imported into the country. - No cosmetic shall be imported into India unless the product is registered under the rules by the licensing authority appointed by the Central Government under rule 21 or by any person to whom such powers may be delegated under rule 22."

Thus, no cosmetic, shall be imported into India unless that product is registered under the rules by the licensing authority. Rule 129A dealt with the Form and manner of application for Registration Certificate for importing cosmetics referred to above. Such application shall be made for Registration of cosmetics intended to be imported into India in Form 42 by every importer and shall be accompanied by a fee of 250/- US dollars or its equivalent to Indian rupees for each brand of cosmetics. Under Rule 129(C), the licensing authority was required to issue a Registration Certificate in Form 43 subject to the conditions contained therein.

There is no material available on record to vouch for any such Registration Certificate in Form 43 has been obtained by or on behalf of the importer. Under Rule 129(D), the Registration Certificate so issued shall be valid for a period of three years from the date of its issue unless it is sooner suspended or cancelled. Under Rule 129(G), no cosmetic shall be imported unless it complies with the specifications prescribed under Schedule S and Schedule Q or any other standards of quality and safety applicable to it and other provisions under the rules. Under Rule 129(H), no cosmetic shall be imported unless it is packed and labeled in conformity with the Rules in Parts XV. When we spare a look at Form 43, the Registration Certificate, from para 2 thereof the following becomes clear:-

"2. Name(s) of cosmetics, along with their brand names and pack size(s) and variants which may be imported under this Registration Certificate.

(1)

(2)

(3)"

The import of Cosmetics made without obtaining the Registration Certificate (Form 43) is in clear violation of the above provisions. Thus, every importer of cosmetics was required to comply with the above regulatory regime prescribed by the Drugs and Cosmetics (4th Amendment) Rule, 2010. The finding of fact recorded by the adjudicating Commissioner of Customs in the present case, is that this legal regime has not been complied with by the importer.

38. The necessary implication is that the restricted/ regulated prohibition of importation contemplated and provided for by Section 11 of the Customs Act, has not been complied with. In such an event, the discretion vested with the adjudicating authority is required to be exercised in a reasonable manner. If the restriction or regulation relating to import of goods is a condonable restriction, perhaps, the discretion vested under Section 125 of the Act can be exercised by offering an option for payment of redemption fine in lieu of confiscation of the goods. If on the other hand, the restriction is not liable to be condoned or waived by the Commissioner of Customs, the adjudicating authority, but any such restriction or regulation can only be dealt with by some other agency such as for example the Director General of Foreign Trade or the competent authority under the Drugs and Cosmetics Act, there is no way that the adjudicating authority under Section 125 of the Act can effectively waive or condone such restrictions / regulatory regime and then provide for an option for payment of redemption fine. We are therefore, of the opinion that the discretion has been properly and carefully exercised by the Commissioner in the instant case.

39. In the instant case, it is recorded in para 49 of the Order in Original that all cosmetic products including air fresheners and other toiletries which are imported for sale in India need to be registered with the licensing authority as defined under Rule 21 of Drugs and Cosmetics Rules 1945. In the instant case,

the goods are found imported without obtaining the registration certificate from the Central Drug Standard Control Organization and therefore, it is found that the importer did not possess necessary permission/registration certificate from the competent authority under the Drugs and Cosmetics Rules, 1945. In other words, goods which are liable to be imported subject to fulfilment of certain conditions, when so imported without fulfilling or satisfying such conditions amount to importing prohibited goods in terms of Section 11 read with Section 125 of the Act. Therefore, we find no merit in the contention canvassed that such of those clandestinely imported cosmetics and toiletries goods should also be permitted to be redeemed by the Commissioner of Customs and failure to do so vitiates the order is without any merit or substance. The Commissioner of Customs has no power to waive the conditions subject to which such cosmetic products can be imported as he is not the Competent Authority but someone else. Hence, the exercise of discretion has been properly carried out by the Commissioner of Customs.

40. Further, in the present case there are no valid mitigating factors or compelling circumstances warranting the exercise of discretion to offer payment of redemption fine in lieu of confiscation. Neither are there any special equities calling for such an exercise.

41. In view of our findings, we have considered it unnecessary to advert to various cases cited at the Bar, as they do not have any application for the point in issue in this case. Besides, it would unnecessarily burden this judgment.

42. We have, therefore, no hesitation to dismiss both the appeals. Accordingly, both the appeals stand dismissed. Costs would follow the event.