

(2020) 11 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition (ST) No. 92733 Of 2020

Mumbai Fabrics P. Ltd

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 05-11-2020

Acts Referred:

Customs Act, 1962 — Section 110, 110(A), 110(1), 110(2), 111(d), 124, 124(a), 135
Constitution Of India, 1950 — Article 226

Citation : (2020) 11 BOM CK 0009

Hon'ble Judges : Ujjal Bhuyan, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Vikram Nankani, Sujay Kantawala, Anupam Dighe, Chandni Tanna, Shrushti Relekar, Anil C. Singh, P. S. Jetly, J. B. Mishra, S. D. Vyas

Final Decision : Disposed Of

Judgement

Ujjal Bhuyan, J

1. Heard Mr. Vikram Nankani, learned senior counsel alongwith Dr. Sujay Kantawala, learned counsel for the petitioner; and Mr. Anil C. Singh, learned Additional Solicitor General alongwith Mr. Pradeep Jetly, learned senior counsel for the respondents.
2. By fling this petition under Article 226 of the Constitution of India petitioner seeks quashing of the seizure memos dated 26th August, 2020 and further seeks a direction to the respondents for release of the seized goods.
3. Question for consideration is whether the seized goods imported by the petitioner are old and used rubber tyres reusable as tyres or are old and used rubber tyres scrap being in pressed baled form ?
4. Case of the petitioner is that it is a company incorporated under the Companies Act, 1956 and is engaged in recycling of "waste tyres scrap" into "rubber crumbs granulation" at its factory. The process is a green category industry and is environmentally friendly for which petitioner has been granted

consent by the Maharashtra Pollution Control Board, Navi Mumbai on 11th February, 2019. Petitioner has also been granted permission/no objection certificate dated 29th November, 2019 by the Ministry of Environment, Forest and Climate Change, Government of India for import of old and used rubber tyres scrap (multiple cuts/pressed baled/ shredded) for manufacture of crumb rubber.

5. Petitioner has been granted import license dated 27th December, 2019 by the Directorate of Foreign Trade, Government of India for the import of old and used rubber tyres scrap (multiple cuts/pressed baled/shredded). As per the import license such imported goods have been classified under the customs tariff heading 4004000 which covers waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom.

6. On the basis of the consent of the Maharashtra Pollution Control Board, permission/ no objection certificate of the Ministry of Environment, Forest and Climate Change, Government of India and import license issued by the Directorate of Foreign Trade, Government of India, petitioner imported seven consignments of old and used scrap tyres in pressed baled form at Nhava Sheva Port during the period July-August, 2020 whereafter clearance of the consignments were sought for by filing the following bills of entry:-

Bill of Entry No.

Date

8252961

23.07.2020

8293747

27.07.2020

8288347

27.07.2020

8319380

29.07.2020

8325968

30.07.2020

8327426

30.07.2020

8325900

30.07.2020

7. It is stated that the imported goods were procured from suppliers who deal in

scrap and the source of procurement is scrap yards. Invoices of the suppliers described the imported goods as old and used scrap tyres in pressed baled form.

8. Respondent No.4 who it is stated is the proper officer under the Customs Act, 1962 (briefly "the Customs Act" hereinafter) for examination, assessment and clearance of imported goods at Nhava Sheva Port, ordered that the imported goods be subjected to 100% examination under docks supervision. Accordingly, the goods imported by the petitioner were subjected to 100% examination and on such examination it was found that those were tyres scrap in pressed bale. After such examination respondent No. 4 assessed the imported goods to duty under the customs tariff heading 4004000 as waste and scrap of rubber. After the assessment was made, petitioner paid the assessed duty. Thereafter, respondent No.4 passed orders for clearance of the imported goods i.e., out of charge.

9. However, before the imported goods could be cleared from the Container Freight Station (CFS), respondent No.3 directed the authorities at the CFS to put on hold the seven consignments. This was followed by examination of the goods by a customs approved Chartered Accountant. Based on his report, five seizure memos were issued from the office of respondent Nos.2 and 3 dated 26th August, 2020 in respect of the consignments covered by five bills of entry. As per the seizure memos the imported goods detained were grossly misdeclared and undervalued, thus, contravening provisions of the Customs Act rendering those goods liable for confiscation. Accordingly, the goods were seized under section 110(1) of the Customs Act. Such putting on hold and thereafter seizure of the goods has been questioned by the petitioner on the ground that when the proper officer i.e., respondent No.4 had subjected the goods to 100% examination under docks supervision, thereafter assessed the goods and levied duty, and upon payment of duty by the petitioner had issued out of charge, respondent No.3 could not have put on hold and seized the goods.

10. Respondent No.3 on 26th August, 2020 also called upon the petitioner for submission of appropriate bond and bank guarantee as decided by the adjudicating authority for provisional release of the seized goods.

11. According to the petitioner, the imported goods are used scrap tyres in pressed bale; however, as per the seizure memos which were on the basis of inspection report of the Chartered Engineer respondent No.3 took the view that a portion of the imported goods (30%) were found in usable condition and those could be reused.

12. By letters dated 24th August, 2020 and 27th August, 2020, both prior to and post seizure, petitioner requested respondent No.3 that representative samples from the disputed portion of the imported goods be drawn and sent to the Indian Rubber Manufacturers Research Association (IRMRA) for testing. It is stated that IRMRA is an accredited laboratory of the Ministry of Commerce and Industry, Government of India. When it was found that respondent Nos.2 and 3 were not

willing to draw such samples for testing, petitioner requested IRMRA to depute their technical officials for inspection of the goods. Following such request IRMRA officials visited the place where the seized goods were kept and carried out detailed inspection, whereafter inspection report dated 31st August, 2020 was issued. The inspection report confirmed that the imported goods which have been seized are scrap tyres and cannot be reused in any vehicle.

13. It is further stated that respondent No.3 had summoned and recorded the statements of Mr.Vishesh Agarwal, Chief Executive Officer of the petitioner several times. In all his statements Mr.Agarwal maintained that the imported goods are used rubber tyres scrap only.

14. It is submitted that unless representative samples are drawn from the disputed portion of the imported goods and sent for testing, petitioner would not be in a position to seek provisional release of the imported goods because once the imported goods are out of customs control and become unavailable, it would not be possible to decide whether the imported goods are reusable as tyres or are scrap in the absence of the test report. In this connection petitioner had submitted representation dated 2nd September, 2020 before the Chief Commissioner of Customs (Preventive). However, there has been no response to the said representation.

15. On 9th September, 2020 officials working under the third respondent drew up a panchnama wherein it was recorded that as per petitioner's request respondent No.3 had permitted handing over of samples to the petitioner. Accordingly, five tyres, one each from the containers covered by the five bills of entry which according to the Chartered Engineer are usable, were handed over to the petitioner for testing purpose. However, it was mentioned that customs department has nothing to do with the testing and that the above exercise has been facilitated only on the request of the petitioner.

16. It is under such circumstances that the present writ petition has been filed by the petitioner seeking the following reliefs:-

(a) to set aside and quash the five seizure memos dated 26th August, 2020 and the panchnama dated 9th September, 2020 to the extent it refuses to recognize the samples drawn for testing;

(b) for a direction to the respondents to draw samples jointly with the petitioner from the disputed portion of the imported goods and to send such samples to the IRMRA for testing to ascertain whether those are usable in as is condition as tyres; or in the alternative,

(c) to abide by the test report that may be received in respect of the samples drawn on 9th September, 2020.

A further prayer has been made for a direction to the respondents not to take any coercive action against the petitioner and its officials.

17. An additional affidavit on behalf of the petitioner has been filed by Mr. Vishesh Agarwal, Chief Executive Officer of the petitioner. He has stated that pursuant to summons issued by the customs authorities, he had attended office of the customs authorities and his statement was recorded on three occasions spanning several hours. According to him, he had submitted all the records/documents which were asked for and had fully co-operated with the customs authorities. On one occasion, he was summoned by the customs authorities at 8.30 p.m. However, when he reported, he found the office to be closed. On another occasion, he was asked to read section 135 of the Customs Act and was threatened.

17.1. It is stated that identical goods i.e. tyres scrap in pressed baled form are being cleared by the customs authorities. In this connection, petitioner has annexed a copy of invoice of an importer by the name of Pragati Rubber.

17.2. Respondents had carried out search operations /inspection in the factory premises of the petitioner on 8th August, 2020 and on 4th September, 2020. The inspecting team verified the plant and machinery used for manufacture of crumb rubber and found that those were in operation. Nothing incriminating was found in the factory premises of the petitioner, though all the documents and computers were taken away.

17.3. It is asserted that the goods imported are scrap tyres and cannot be reused as such, which has been verified by the proper officer.

17.4. However, an offer has been made on behalf of the petitioner that since the preventive wing of the customs department has some doubt about the nature of the imports, petitioner is willing to mutilate the goods alleged to be reusable scrap tyres for which petitioner would bear the cost.

18. On 17th September, 2020 this court directed the respondents to file affidavit.

19. Respondent Nos.1 to 4 have filed a common affidavit. It is stated that specific intelligence input was received that M/s. Mumbai Fabrics Private Limited i.e. the petitioner is importing used tyres declaring the same as waste and scrap of rubber falling under CTH 4004000. According to the respondents, tyres can be declared as scrap under the said CTH if and only if the bead wires are cut. This heading allows import of used rubber tyres with one cut in bead wire and import of used tubes cut in two pieces free from policy restriction. On the basis of such intelligence input, the containers corresponding to the seven bills of entry lying in Dronagiri Rail Terminal, CFS were put on hold on 4th August, 2020 for examination purpose. Examination was carried out by the departmental officials and customs approved Chartered Engineer. During examination, it was found that the imported tyres covered by the bills of entry were in pressed baled form. However, about 25% to 40% of the tyres were found in good and in reusable condition with intact bead wires and not completely worn out. Based on the above observations, the consignments were detained for further investigation.

19.1. Thereafter, the customs approved Chartered Engineer submitted his report

opining that 25% to 40% of the tyres appeared to be reusable as such. Beads of the tyres were intact and were found to be in good condition.

19.2. Based on the report of the Chartered Engineer, the examined goods imported under five bills of entry i.e. Bill of Entry Nos.8319380 dated 29th July, 2020, 8325968 dated 30th July, 2020, 8327426 dated 30th July, 2020, 8252961 dated 23rd July, 2020 and 8293747 dated 27th July, 2020 were seized under section 110(1) of the Customs Act.

19.3. Referring to CTH 4012, it is stated that the said heading deals with retreaded or used pneumatic tyres of rubber, solid or cushion tyres, tyre treads and tyre faps of rubber-retreaded tyres. All old and used tyres without bead cut would fall under CTH 4012. Therefore, the contention is that around 25% to 40% of the tyres in the import consignment do not merit classification under CTH 4004000 as the important condition of the bead wire having one cut has not been fulfilled; those would fall under CTH 4012.

19.4. It is therefore contended that petitioner has misinterpreted the description of import items by saying that pressed baled would mean that the tyres are scrap. Again referring to the report of the Chartered Engineer, it is stated that he has certified that 25% to 40% of the tyres are not scrap and are reusable. Importer has not fulfilled the condition of single cut or multiple cuts in the imported tyre bead, thus rendering the reusable tyres liable to confiscation under section 111(d) of the Customs Act.

19.5. It is also stated that respondents have no objection to provisional release of the goods under section 110A of the Customs Act on furnishing of appropriate bond and bank guarantee.

19.6. On the contention of the petitioner that since respondent No.4 being the proper officer had examined, assessed, cleared the goods and given out of charge it was not open to respondent No.3 to further investigate and seize the goods, it has been explained that the case was booked by the preventive wing on specific intelligence received. Subsequent examination confirmed the intelligence input. Adverting to various notifications and circulars, it is stated that officers of Mumbai Customs Preventive wing are declared as 'proper officer' having overriding jurisdiction for preventive functions.

19.7. Referring to the additional affidavit filed by the petitioner, it is stated that respondents have been following all the laid down procedure of investigation. Allegation of harassment has been denied. It is reiterated that action was initiated on specific intelligence input that the importer was engaged in importing old and used tyres which are reusable under the guise of rubber tyre scrap. Since the imported goods are not rubber tyre scrap, they cannot be classified under CTH 4004000 even if they are in pressed baled form.

19.8. Referring to the report of the customs approved Chartered Engineer, it is stated that he has not certified that pressing of bales has rendered the tyres unfit

for re-use. Further, since he has certified about the status of the imported goods, there is no need for the customs department to send the goods for testing. Acceptance of customs approved Chartered Engineer's certificate is an established practice of the department.

19.9. Customs Preventive Commissionerate is investigating the petitioner as a case of misclassification of goods that are imported in concealed manner as scrap tyres.

20. Another additional affidavit was filed on behalf the petitioner on 12th October, 2020 contesting certain statements made in the course of investigation by one Mr.Sabirali Roshanali Shah, further reiterating that petitioner only imports scrap tyres which are not reusable. It is stated that use of scrap tyres as a raw material for production of rubber crumb in the factory of the petitioner is being continuously monitored by the Maharashtra Pollution Control Board. In this connection letter dated 15th September, 2020 of the Maharashtra Pollution Control Board has been annexed.

21. On 14th October, 2020 an additional affidavit on behalf of respondents was filed. It is stated that in the course of investigation, it was revealed that petitioner had issued invoices to M/s Raza Tyre Services with description of goods declared as 'used tyre crumb'. On discreet inquiry it was found that M/s Raza Tyre Services is a dealer in old, used and scrap tyres. Search operation was carried out in the premises of M/s Raza Tyre Services on 3rd October, 2020. During the search, invoices of the petitioner were recovered. Statement of the proprietor of M/s Raza Tyre Services, Mr.Sabirali Roshanali Shah was recorded on 3rd October, 2020 and 5th October, 2020 in which he stated that he had received tyres from the petitioner in scrap as well as in usable condition. It is stated that presently investigation is going on whereafter appropriate show-cause notice would be issued.

22. When the case was heard next on 25th September, 2020 court observed that petitioner should cooperate with the investigation of the case and provide the necessary details. It was directed that since the court was in the midst of hearing the matter, parties should maintain status-quo as on 25th September, 2020. Case was thereafter finally heard on 20th October, 2020 when judgment was reserved.

23. Mr. Nankani, learned senior counsel for the petitioner has referred to page 51 of the writ petition which is an extract of the import policy containing schedule (1) thereof. Under the heading 4004000 the items are expressed as waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained therefrom. These are restricted items for import of which permission or license would be required. However, as per the remarks made in the remarks column, import of used rubber tyres with one cut in bead wire and import of used rubber tubes cut in two pieces however is free; no license is required for such import. Referring to page 54 he submits that for the purpose of the heading

4004000 the expression "waste, parings and scrap" would mean rubber waste, parings and scrap from the manufacture or working of rubber and rubber goods definitely not usable as such because of cutting up, wear or for other reason.

23.1. Mr. Nankani has referred to the ofce memo dated 29th November, 2019 of the Ministry of Environment , Forest and Climate Change, Government of India whereby permission for import of old and used rubber tyres scrap (multiple cuts/pressed baled/shredded) to the petitioner has been granted. He submits that on an application by the petitioner Ministry has issued no objection certfcate to the petitioner for import of 10,000 MT of old and used rubber tyres scrap (multiple cuts/pressed baled/shredded) for manufacturing of crumb rubber by the petitioner. According to him, said permission was granted on the basis of site visit report submitted by the Central Pollution Control Board and after thread-bare discussion by the expert committee. For rubber tyres to be treated as scrap it can be either having multiple cuts or pressed baled or shredded i.e. in either of the three forms. In the present case, it is pressed baled. He has explained the process of baling stating that about 100 tyres are pressed into a bale at a time and then high pressure of about 200 tonnes are applied by a hydraulic baling machine rendering the tyres as waste and scrap; totally unft for reuse. He has also referred to the import export license (authorization) dated 28th November, 2019 issued to the petitioner by the Directorate General of Foreign Trade, Government of India for importing old and used tyres scrap (multiple cuts/pressed baled/shredded) for 10,000 MT.

23.2. Referring to the seizure memos he submits that respondents acting on the report of the customs approved Chartered Accountant have proceeded on the 'reasonable belief' that the imported old and used scrap tyres in pressed baled form contains usable tyres and therefore, there is misdeclaration of the imported goods. He strenuously argues that it is not open to the customs authorities to take a view diferent from the licensing authority as to the definition of rubber tyre scrap. Such definition given by the licensing authority is binding on the customs authorities. In such a case, it would not be a question of reasonable belief, he submits. Going beyond such a definition would be a jurisdictional issue. In this connection, he has referred to a decision of the Supreme Court in M G Abrol Vs. Shantilal Chhotelal and Company, AIR 1966 SC 197 in support of his contention that the view of the licensing authority would be binding and the customs authorities would have no jurisdiction to take a diferent view and then proceed on the basis that there is misdescription of the goods.

23.3. According to Mr. Nankani, what the customs authorities are insisting upon, that is, the used tyres should be bead cut or should have multiple cuts to be considered as scrap is self contradictory because in such a situation it would be a free importable item for which no license or permission would be required.

23.4. Mr. Nankani has referred to a letter dated 5th October, 2020 of the Ministry of Environment, Forest and Climate Change, Government of India addressed to the petitioner on a clarification sought for by the petitioner on the permission

granted that old and used scrap tyres in pressed baled form may be imported even without a cut in the bead wire. In this letter Government of India has clarified that old and used rubber tyres scrap (multiple cuts/pressed baled/shredded) for manufacturing of crumb rubber can be imported and any one of the three conditions will make the tyres unfit for reuse. He submits that Government of India has clarified that petitioner can import used tyres scrap either with multiple cuts or pressed baled or shredded for manufacture of crumb rubber as per permission issued.

23.5. Mr. Nankani has also taken us to the report of the Chartered Engineer and contends that the said report suffers from several lacunas. The report was prepared most perfunctorily without proper examination of the goods. In such circumstances, it is beyond comprehension as to why respondents should not accede to the prayer of the petitioner for drawing samples of the seized goods and to get the samples tested in an accredited laboratory like the IRMRA. This is a very reasonable prayer of the petitioner, he submits

23.6. Finally, he submits that there is no justification at all for seizure of the imported goods which should therefore be released forthwith.

24. On the other hand, Mr. Anil C. Singh learned Additional Solicitor General has referred to the prayer portion of the writ petition and submits that the reliefs claimed besides being vague do not make out an actionable cause of action for institution of a legal proceeding. He submits that viewed in the above context the writ petition is premature. Referring to the seizure memos he submits that there is a reasonable belief formed on the basis of specific information and from the report of the Chartered Engineer that in the guise of old and used scrap tyres in pressed baled form petitioner is actually importing usable tyres. There is clear misdeclaration of the goods which may warrant confiscation. Therefore, the customs authorities rightly invoked the provisions under section 110(1) of the Customs Act for seizure of the goods.

24.1. Mr. Singh submits that the report of the Chartered Engineer clearly indicates that approximately 25% to 40% of the imported tyres were found to be in good and in reusable condition. Reiterating the contentions of the respondents as pleaded in the affidavit in reply he submits that all old and used tyres without bead cut would clearly fall under CTH 4012. He has also drawn the attention of the court to photographs of the tyres annexed to the affidavit in reply and submits that the photographs clearly reveal the reusable condition of the imported tyres.

24.2. On the prayer for mutilation of the tyres he submits that the same is not acceptable at all at this stage. In this connection, he has referred to a decision of the Supreme Court in the Collector of Customs Vs. M/s Hardik International Corporation, AIR 1998 SC 823, wherein the Supreme Court observed that the point of time at which the respondents made the offer of mutilation is relevant. If at the very outset such offer was made that could have been a different matter but after the mischief is detected if the offer is made the same cannot be

accepted.

24.3. He submits that petitioner will have all the opportunity to defend itself and to prove its claim during the stage of investigation and in the adjudicatory process that would follow. No case for intervention at this stage is made out. Writ petition should, therefore, be dismissed.

25. In his reply, Mr. Nankani submits that offer of mutilation was made only to show the bonafides of the petitioner which otherwise has a good case. It is a pragmatic offer and should be construed as such. Customs authorities themselves and many courts are allowing mutilation at a later stage.

26. Submissions made by learned counsel for the parties have received the due consideration of the court. Also perused the materials on record and the judgments cited at the bar.

27. From an analysis of the above, the following facts can be culled out. Ministry of Environment, Forest and Climate Change, Government of India had issued office memorandum dated 29th November, 2019 granting permission/no objection to the petitioner for import of 10,000 MT of old and used rubber tyres scrap (multiple cuts/pressed baled/shredded) for manufacturing of crumb rubber. We also find that Directorate General of Foreign Trade, Government of India had issued import/export licence (authorisation) dated 28th November, 2019 to the petitioner for importing certain restricted items which has been described as old and used tyres scrap (multiple cuts/pressed baled/shredded). In terms of such license, petitioner imported old and used scrap tyres in pressed baled form covered by seven bills of entry which were initially examined, assessed, duty paid and issued out of charge by respondent No.4. However, on the basis of information received that in the guise of old and used scrap tyres pressed baled petitioner was importing reusable tyres, respondent No.3 put on hold the consignments. Thereafter, on the basis of report submitted by the Chartered Engineer the imported goods covered by five out of the seven bills of entry were seized vide separate seizure memorandum dated 26th August, 2020.

28. Evidently there is a dispute between the petitioner and the respondents regarding classification of the goods imported. While according to the petitioner the goods imported are old and used scrap tyres in pressed baled form which being a restricted item is covered by the import license, it is the stand of the respondents that 25% to 40% of the imported goods were found to be tyres in good shape and in reusable condition. Differing from the petitioner, it is contended that old and used tyres without any bead cut would fall under CTH 4012 which deals with retreaded or used pneumatic tyres of rubber, solid or cushion tyres, tyre treads and tyre faps of rubber retreaded tyres. However, petitioner has contended and which has not been denied by the respondents that respondent No.4 had carried out 100% examination of the goods on arrival and thereafter levied duty following which petitioner paid the assessed duty. Thereafter out of charge was issued by respondent No.4.

29. Respondents have placed heavy reliance on the report of the Chartered Engineer which has been severely criticized by Mr. Nankani by pointing out what he termed as grave flaws in the report rendering it unfit for any reliance. However, we are of the view that when the matter is at a very preliminary stage with investigation still on going, it would not be proper to make any comment on the report of the Chartered Engineer one way or the other. On the other hand, it has been the consistent prayer of the petitioner that samples should be drawn from the seized goods which should thereafter be sent for testing to the IRMRA which is a laboratory accredited to the Ministry of Commerce and Industry, Government of India.

30. Having said so, we may refer to the panchnama dated 9th September, 2020 drawn by the Inspector of Customs (Prevention), Marine and Preventive Wing, Mumbai. Relevant portion of the panchnama is extracted hereunder :-

"Then the officer allowed them to draw the three samples from each of the containers, to which he stated that they require only three tyres per Bill of Entry for testing. Accordingly, fifteen tyres (three from each Bill of Entry) which appears to be reusable, were drawn in presence of Chartered Engineer, out of which finally five tyres (Sr No 1, 4, 7, 10 and 13 of Annexure) were sorted by Shri. Vishesh Agarwal, as detailed in Annexure of this Panchnama for testing purpose and the same handed over to Shri. Vishesh Agrawal and it is once again clarified that the department has nothing to do with the testing and this has been facilitated on the request of M/s. Mumbai Fabrics Pvt. Ltd."

31. From the above, it is seen that three samples from each of the five seized containers were drawn, totalling fifteen tyres which appeared to be reusable. This was done in the presence of the Chartered Engineer. Out of the above, five tyres were finally sorted by Mr. Vishesh Agarwal, Chief Executive Officer of the petitioner for the purpose of testing and which were handed over to Mr. Vishesh Agarwal. However, the panchnama clarified that customs department has nothing to do with the testing and the above exercise has been facilitated on the request of the petitioner.

32. Before dilating on this aspect, we also find that by letter dated 26th August, 2020, Deputy Commissioner of Customs (Prevention), Marine and Preventive, Mumbai had written to the petitioner offering provisional release of the seized goods on submission of appropriate bond and bank guarantee which has been reiterated by the respondents in the affidavit in reply. Petitioner has averred in the writ petition that it is hesitant to accept the said offer of provisional release because once the seized goods are out of customs control without there being a test report, the question as to whether the imported goods seized are reusable as tyres or are scrap would not be possible to be decided.

33. At this stage, we may advert to the provisions contained in section 110 of the Customs Act. It deals with seizure of goods, documents and things. Sub section (1) says that if the proper officer has reason to believe that any goods are liable

to confiscation under the Customs Act, he may seize such goods. As per sub section (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 those were seized. As per the first proviso, the said period of six months can be extended to a further period not extending six months. The second proviso however says that in case of provisional release of the seized goods, the specified period of six months shall not apply.

34. Section 110A deals with provisional release of goods, documents and things seized (or bank account provisionally attached) pending adjudication on taking a bond with such security and conditions as the adjudicating authority may require.

35. Confiscation of improperly imported goods etc. is dealt with in section 111 and as per clause (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force shall be liable to confiscation.

36. However, section 124 mandates that there can be no confiscation or imposition of penalty without issuance of show-cause notice and without giving a reasonable opportunity of hearing to the owner of the goods or to the person concerned.

37. From a conjoint reading of the aforesaid provisions it is evident that seizure of goods is not an end in itself. Goods can only be seized if the proper officer has reason to believe that such goods are liable to confiscation. Further more, seizure cannot also be for an indefinite period. Timeline is provided in sub section (2) of section 110. In case of confiscation, the statute has provided for the requisite procedural safeguards in section 124. As a pragmatic measure, provisional release of seized goods pending adjudication is provided in section 110A.

38. Thus having regard to the dispute raised and the statutory framework in place, we feel that it may not be proper for the writ court to step in at this stage to render a finding as to whether the seized goods are old and used rubber tyres scrap in pressed baled form or rubber tyre in reusable form; in other words, whether the imported goods fall under the customs tariff heading of 4004000 or under the heading of 4012, which will basically be a finding of fact. Therefore, we are of the view that this aspect should be best left to the adjudicating authority to decide, if it requires adjudication. Preempting an adjudication on this issue by the writ court by taking a view one way or the other may not be justified. Moreover, having regard to the provisions of section 110, it may also not be proper for the writ court to fix a timeline for winding up of the investigation and for commencement and completion of adjudication at a stage when notice under section 124(a) of the Customs Act has not yet been issued.

39. Having said so, it needs no reiteration that the writ court is primarily concerned with the decision making process and not with the correctness of the

decision per se. The decision making process and by extension the investigation process has to be fair and reasonable, adhering to the due process consistent with the principles of natural justice.

40. While respondents may place reliance on the report of the Chartered Engineer, petitioner would have the right to question the said report. Furthermore, request of the petitioner to draw samples from the seized containers and thereafter to send the samples for testing before an accredited laboratory, in this case IRMRA, cannot be brushed aside as being of no consequence. As a matter of fact, respondents themselves have allowed the same vide panchnama dated 9th September, 2020 though with the rider that customs department would have nothing to do with the testing; and that the drawing of samples for the purpose of testing has been facilitated on the request of the petitioner.

41. We fail to understand the rationale behind such a stand taken by the respondents. While respondents have stated that getting the goods examined by a Chartered Engineer is a well established departmental procedure, it is also a well established departmental procedure that in the case of seizure samples are drawn and then sent for testing in accredited laboratory/laboratories. We see no harm in acceding to such a request of the petitioner. Rather it will only facilitate a fair investigation and consequently fair adjudication. Test report from a laboratory which is accredited to the Ministry of Commerce and Industry, Government of India would certainly merit consideration being a relevant document and should be considered alongwith all other relevant documents including the report of the Chartered Engineer by the investigating/adjudicating authority. After all the procedure, be it investigation or adjudication, must not only be fair but must also be seen to be fair.

42. That being the position, we are of the view that the following directions will meet the ends of justice :-

I) Petitioner shall submit the samples in terms of panchnama dated 9th September, 2020 to an accredited laboratory, if not already submitted, for testing and report of such testing should be placed before the respondents.

II) Such report in terms of direction (I) shall be considered by the respondents and authorities of the customs department alongwith other relevant materials while deciding the claim of the petitioner.

III) In view of directions (I) and (II) above, petitioner may avail the offer of provisional release of the seized goods under section 110A of the Customs Act as per offer letter dated 26th August, 2020, which shall be without prejudice to the claim of the petitioner.

IV) Investigation and consequential steps, including adjudication, if necessary, shall be expedited.

43. Ordered accordingly.

44. We make it clear that we have not expressed any opinion on merit. All contentions are kept open.

45. With the above directions, Writ Petition is disposed of. However, there shall be no order as to costs.

46. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.