(2020) 09 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition (ST) No. 5739 Of 2020

Sidharth Vijay Shah APPELLANT

Vs

Union Of India And Ors RESPONDENT

Date of Decision : 08-09-2020

Acts Referred:

Customs Act, 1962 — Section 2(33), 110, 110(A), 110(d), 111, 111(d)
Constitution Of India, 1950 — Article 226

Citation : (2020) 09 BOM CK 0010

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

Bench : Division Bench

Advocate : Sujay Kantawala, Brijesh Pathak, Aishwarya Kantalala, Pradeep Jetly, J. B. Mishra

Final Decision : Disposed Of

Judgement

Ujjal Bhuyan, J

1. Heard Dr. Sujay Kantawala, learned counsel for the petitioner and Mr. Jetly, learned senior counsel along with Mr. Mishra, learned counsel for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks a direction to respondent Nos.2 and 3 to provisionally release the car imported by the petitioner and which has been seized by the said respondents vide seizure memo dated 20.03.2020 (Exhibit-B to the writ petition).

3. Case of the petitioner is that he has imported one brand new 2019 RHD Ford Mustang GT Coupe four passenger sports car for an amount of USD 46,730 vide bill of entry dated 11.01.2020.

4. The imported car was detained by the customs authorities and was ultimately seized on 20.03.2020. Presently it is under the custody of the Customs Department. According to the petitioner, he has deposited the customs duty on account of import of the said vehicle amounting to Rs.72,48,875.00. The declared assessable value of the vehicle is Rs.33,71,569.00. Petitioner requested

the authority for provisional release of the vehicle. However, no decision was taken on such request of the petitioner. In such circumstances, it is submitted that petitioner preferred appeal along with miscellaneous application before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Mumbai on 22.06.2020. Petitioner was informed by the CESTAT Registry that it was non-functional till 31.07.2020. Faced with such a situation, the present writ petition came to be filed seeking the relief as indicated above.

4. Respondents have filed affidavit through Mr. Rajesh Kumar Mishra, Commissioner of Customs, NS-V, Nhava Sheva, Raigad. Stand taken is that on import of the vehicle vide bill of entry No.6434271 dated 11. 01.2020, the assessable value was declared at Rs.33,71,569.50 and the duty of Rs.72,48,875.00 was paid. It is stated that the vehicle was examined by the customs officer on 15.01.2020 for clearance. On scrutiny of the documents and on physical examination of the vehicle amongst others by chartered engineer, it was found that there are certain modifications carried out in the vehicle wherefrom it appeared to be a second hand model. Petitioner was also unable to respond to certain queries of the customs officer. According to the customs officer, the vehicle appeared to be of the year 1967 make and thus around 50 to 60 years old. Therefore, view was taken that the car was imported by violating the relevant import policy and was thus categorized as a prohibited good.

4.1. Considering the above, the vehicle was seized on 20.03.2020 under section 111(d) of the Customs Act, 1962 (briefly 'the Act' hereinafter). Petitioner made a request for provisional release of the vehicle on 20.04.2020 followed by email dated 06.05.2020. In this connection, summons were issued on 08.07.2020 for appearance of the petitioner and production of documents. In response to the summons, petitioner submitted that he had filed appeal before the CESTAT on 22.06.2020 and because of the lockdown, he was unable to appear on the date fixed. In such circumstances, respondents have contended that as the vehicle was imported to India in violation of the relevant import policy thus a prohibited good and since petitioner did not respond to the summons, question of provisional release of the imported vehicle did not arise.

5. Petitioner has filed rejoinder affidavit wherein petitioner has disputed the contention of the respondents that the vehicle in question is a second hand one. Stand taken by the respondents that the vehicle is 50 to 60 years old has been disputed and denied. Examination of the vehicle by the customs officer and by others like chartered engineer has also been questioned. It is therefore contended that there is no justification for not allowing provisional release of the imported vehicle. Since 11. 01.2020 the car is under detention and seizure for more than six months. The car is simply parked idle under the custody of the Customs Department which is not to the interest of anybody.

6. Dr. Kantawala, learned counsel for the petitioner submits that the Customs Act confers a right on persons like the petitioner to seek provisional release of the vehicle and correspondingly, discretion has been vested on the respondents to

consider provisional release of seized vehicle under section 110-A of the Act. Respondents are required to exercise the discretion in a fair and judicious manner. Merely on the ground that imported vehicle is a prohibited good, respondents cannot sit over the request of the petitioner without taking any decision under section 110-A. He has also referred to a decision of this Court in Ashish Puravankara Vs. Commissioner of Customs (Import), (253) E.L.T. 186 and submits that present case is identical to the aforesaid case. Therefore, a similar order as the one passed in Ashish Puravankara (supra) may be passed. In that case, this Court had directed provisional release of the imported Ferrari F 430 car on certain conditions. In fact, in the course of his arguments, he submitted that petitioner is willing to give 100% bank guarantee of the actual value of the car.

7. Per contra, Mr. Jetly submits that there was no reason for the petitioner not co-operating with the adjudicating authority and had he done so, consequential order under section 110-A would have been passed. In any case, when petitioner has already filed appeal before the CESTAT, Court may await decision by the CESTAT.

8. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record.

9. As noted above, facts are not in dispute. The only area of dispute is that according to the petitioner, the imported vehicle is a brand new one whereas according to the respondents, it is a second hand model. This would have a bearing on the duty to be levied. However, it is admitted that petitioner has paid the entire duty of Rs.72,48,875.00 on the declared assessable value of the imported car of Rs.33,71,569.00. It is also an admitted position that the vehicle is under seizure, seizure being made on 20.03.2020 though under detention since 11.01.2020 and that it has neither been confiscated nor adjudication has commenced.

10. Section 110 of the Act 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. While we are not called upon to adjudicate on the correctness of the decision to seize the imported vehicle in the present proceeding, what is relevant to note is that the condition precedent for seizure of any goods is that the proper officer must have reason to believe that such goods are liable to confiscation under the Customs Act. Confiscation is provided under section 111. Therefore, contention of the respondents that the vehicle was seized under section 111(d) is not correct. Seizure was made under section 110 perhaps on the belief that the vehicle is liable to confiscation under section 111(d). Be that as it may, since the matter is still at the stage of seizure, we would not like to venture into aspects related to confiscation, etc.

11. By the Taxation Laws (Amendment) Act, 2006, section 110-A was inserted in the Customs Act with effect from 13.07.2006. Since this provision is relevant, the

same as it stands today is extracted hereunder:-

"110A. Provisional release of goods, documents and things seized [or bank account provisionally attached] pending adjudication. - Any goods, documents or things seized [or bank account provisionally attached] under section 110, may, pending the order of the [adjudicating authority], be released to the owner [or the bank account holder] on taking a bond from him in the proper form with such security and conditions as the [adjudicating authority] may require."

12. From a reading of section 110-A, as extracted above, it is evident that any goods, documents or things seized or bank account provisionally attached under section 110 may, pending the order of adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require. Thus, this provision confers a right on the owner to seek provisional release of seized goods etc., while at the same time a corresponding discretionary power is vested on the adjudicating authority who may release the seized goods etc. upon a bond with such security and conditions pending order of the adjudicating authority. Though much emphasis has been placed by the respondents on categorization of the imported vehicle as a prohibited good as defined under sub-section (33) of section 2, we do not find any limitation imposed in section 110-A that a good which is categorized as a prohibited good under section 2(33) cannot be subjected to provisional release under section 110-A. The words "goods, documents and things seized" are expressions of general import without any qualifications and / or are not accompanied by any qualifying words. Therefore, no restriction or restrictive meaning can be read into the said expressions which is not contemplated by the statute.

13. As a matter of fact, section 110A provides a pragmatic mechanism to facilitate provisional release of seized goods etc. to the owner pending adjudication but at the same time protecting the interest of the revenue. Keeping the above in mind, the provision is required to be understood and applied.

14. Having discussed the above, let us examine the decision of this Court in Ashish Puravankara (supra). Relevant portion of the said order reads as under:

"12. Having heard both the sides at length, the adjudication proceedings are still pending as such the petition is premature so far as challenge to the order of seizure is concerned. So far as the provisional order dated 23-2-2010 is concerned, the Respondents are claiming payment of differential duty of Rs.15,02,239/- plus interest with execution of the bond for the full value together with bank guarantee for 35% of the re-determined value. As stated the adjudicating proceedings are still pending. Final adjudication order is yet to be passed, however, till then the Petitioner's car is required to be provisionally released protecting the interest of the Revenue.

13. The Petitioner has already executed an undertaking dated 6-11-2009 stating that he will not move or remove, transfer, lease, sell, dispose of, tamper, part

with or in any manner deal with the said car without the prior permission of the Director of Revenue (Intelligence), Bangalore. The copy of undertaking is annexed at Exhibit-S to the petition. Even the tentative calculation stated herein above shows that the Petitioner paid excess amount of Rs.36,92,121/-.

14. Taking overall view of the matter and considering the fact that the Petitioner has already given an undertaking dated 6-11-2009 to the Revenue and as the adjudication proceedings are still pending for final disposal before the competent authority and that the car is hypothecated to the financer; the order of provisional release dated 23-2-2010 under challenge needs slight modification in the interest of justice since the conditions put therein are somewhat harsh.

15. Hence the following order:-

(a) The Respondents are directed to provisionally release the Ferrari F 430 car imported vide Bill of Entry No.698519 dated 6th February, 2008 subject to the Petitioner executing the bond for full value and furnishing the Bank guarantee of any nationalized Bank for Rs.15 Lacs. The Petitioner shall not create any third party right, title or interest in the said imported car hereinafter till the adjudication proceedings achieve finality.

(b) Subject to compliance of the above conditions, the Respondents shall handover all original documents pertaining to the subject car within two weeks thereafter.

(c) The provisional order of release dated 23-2-2010 stands modified to the extent mentioned herein above.

16. Rule is made absolute in terms of this order with no order as to costs."

14.1 From the above, it is seen that in that case also stand taken by the respondents was that the imported Ferrari F 430 vehicle was a second hand car which would attract customs duty at a much higher rate, at that point of time 167% in addition to penalty and interest. Adjudication proceedings were still pending. In that case, order for provisional release was passed with conditions which were found to be somewhat harsh. In such circumstances, this Court modified the order of provisional release by directing provisional release of the Ferrari F 430 car subject to petitioner executing a bond for full value and furnishing bank guarantee of any nationalized bank for Rs.15 lakhs. Further condition imposed was that petitioner should not create any third party right, title or interest in the said imported car till adjudication proceedings reached finality.

15. Upon thorough consideration of the matter and having regard to the discussions made above, we are of the view that the decision of this Court in Ashish Puravankara (supra) is eminently applicable to the facts and circumstances of the present case. When the statute itself provides for provisional release of seized goods, merely on the ground that the good in question is a prohibited one or that the aggrieved person has filed appeal before

the CESTAT cannot be the reason not to exercise the statutory discretion conferred by section 110-A. That being the position, we issue the following directions:-

(1) Petitioner to execute a bond for the assessable value of the vehicle RHD Ford Mustang GT Coupe four passenger sports car imported vide bill of entry No.6434271 dated 11.01.2020;

(2) In addition to the above, petitioner shall furnish bank guarantee of any nationalized bank to the extent of 50% of the assessable value of the imported car;

(3) Petitioner shall not create any third party right, title or interest in the said imported car till adjudication proceeding reaches finality; and

(4) Subject to compliance of the above conditions, respondent Nos.2 and 3 shall provisionally release the imported vehicle of the petitioner i.e. RHD Ford Mustang GT Coupe four passenger sports car imported vide bill of entry No.6434271 dated 11.01.2020 along with all the original documents within two weeks.

16. With the above directions, writ petition is disposed of.

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

