CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPLICATION (EH) NO: 85486 OF 2022
(on behalf of appellant)
IN
CUSTOMS APPEAL NO: 86035 OF 2022

[Arising out of Order-in-Original F.No. S/26-Misc-411/2022-23/Gr.IV/JNCH dated 6th May 2022 passed by the Commissioner of Customs (NS-III), Nhava Sheva.]

Amglo Resources Pvt Ltd
301- Elphinstone House, 17 Murzban Road, Fort
Mumbai - 400001 … ***Appellant***

versus

Commissioner of Custom (NS-III)
Nhava Sheva, Jawaharlal Nehru Custom House
Tal: Uran, Dist: Raigad – 400 707 ***…Respondent***

APPEARANCE:

Shri Jitendra Motwani with Shri Rizwan Khatri, Advocates for the appellant

Shri Manoj Das, Assistant Commissioner (AR), for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85566 /2022

DATE OF HEARING: 19/05/2022
DATE OF DECISION: 17/06/2022

PER: C J MATHEW

Sometime earlier in the year, M/s Amglo Resources Pvt Ltd

entered into negotiations with M/s NBJ International FZ-LLC, Dubai for supply of ‘copper cathode’ conforming to LME Grade “A” and, in pursuance thereof, imported four consignments at ICD, Tumb and one at Jawahar Custom House, Nhava Sheva for which bill of entry no. 7043797/11.01.2022 was filed for assessment and clearance along with supporting documents such as invoice, bill of lading and certificate of origin. The claim of the importer was that, though not concerned with source of the goods, they had been intimated by the supplier that these were of Zambian origin and, in due course, had been furnished with certificate no. N 2741/08.11.2021 which was, in turn, produced at the two places of import.

2. The conclusion by the investigators at Tumb that goods of Iranian origin had been misdeclared sufficed for them to seize the consignments on 2nd February 2022 under section 110 of Customs Act, 1962 and which in exercise of powers vested under section 110A of Customs Act, 1962, was allowed by the presumptive adjudicating authority, *vide* letter dated 6th April 2022, to be released provisionally upon execution of bond for five times the value of the goods and furnishing of bank guarantee for 15 per cent of the value of the goods. On appeal before the Tribunal against the terms of provisional release, it was held that bond for value of the goods and bank guarantee for ₹1,00,00,000 should suffice for the importers to regain possession of the goods.

3. While those proceedings were, as yet, underway, the lone consignment imported at Nhava Sheva was also seized, under the authority of section 110 of Customs Act, 1962, on 1st March 2022 in the reasonable belief of being liable to confiscation under section 111 (m) of Customs Act, 1962 for consequential misdeclaration of value to the extent of ₹ 9,19,79,886.72 and, on request of importer, *vide* letter dated 27th April 2022, allowed to be released, in exercise of powers conferred by section 110A of Customs Act, 1962, upon furnishing bond for the revised value of the goods along with bank guarantee covering estimated differential duty of ₹ 1,90,67,802, probable redemption fine of ₹ 6,70,34,552 under section 125 of Customs Act, 1962 and bank guarantee of ₹ 2,00,00,000 covering penalty likely to be imposed under Customs Act, 1962.

4. It is in these circumstances of requiring that bond for ₹ 44,68,97,008 backed by bank guarantee totaling ₹ 10,61,02,354 that the order of provisional release has come under challenge before us with the plea that the terms therein be modified to be in proportion with that found fit and reasonable by the coordinate bench of the Tribunal for release of the four consignments referred *supra*. Two submissions have been especially impressed upon us by Learned Counsel for appellant during the hearing of this appeal against the terms of release communicated from F no. S/26-Misc-411/2022-23/GR. IV/JNCH by letter dated 6th May 2022. The first, according to

him, is that the value of such goods have little to do with the place of origin inasmuch as the price of the metal, as traded on the London Metal Exchange (LME), is the basis for invoicing of the impugned product and misdeclaration of the country of origin, even if it did happen, has no bearing whatsoever on the value of the goods. The second submission is that it is not their responsibility, but that of the supplier, to secure and furnish certificate of origin and the intended proceedings under Customs Act, 1962 is fraught with danger of erroneous construction and trappings of misadventure.

5. Learned Authorized Representative, with his reference to the approval accorded to the observation of the Hon'ble Income Tax Appellate Tribunal (ITAT) by the Hon'ble High Court of Delhi, while disposing off application for early hearing of the dispute in *Dr Pranay Roy v. Deputy Commissioner of Income Tax*, appears to suggest that we would be rendering disservice to the cause of justice in considering the plea of the appellant for disposal of their grievance ahead of others whose matters would remain pending for a good while more in the foreseeable future. We are, indeed, grateful for this unsolicited reminder of our obligation to the cause that we did swear to further, with fairness and impartiality, awhile back. However, it would be no less appropriate for the bar – both sides – to bear in mind that this Tribunal has close to five centuries of experiential existence in discharging functions in the public eye and has evolved its own

conventions, publicly declared, that permit such ‘out of turn’ disposals.

6. The expression ‘seize’, and its grammatical variations and cognate expressions, is not defined in Customs Act, 1962; however, the Hon’ble Supreme Court, *in Gian Chand and others v. The State of Punjab [1962 AIR 496]*, noticing the necessity of elaboration, in the context of submissions relevant to the issue in dispute and in response to the reliance on the meaning assigned in a law lexicon, observed that

> *‘… This however might be the meaning in particular contexts when used in the sense of the cognate Latin expression “Seized” while in the context in which it is used in the Act in s. 178 A it means ‘take possession of contrary to the wishes of the owner of the property’. No doubt, in cases where a delivery is effected by an owner of the goods in pursuance of a demand under legal right, whether oral or back by a warrant, it would certainly be a case of seizure by the idea that it is the unilateral act of the person seizing is the very essence of the concept.’*

In the light of this elucidation, it can surely be conjectured that every adjudication, and every consequent appeal, need not necessarily have been preceded by such ‘unilateral act’ which, as a curtain raiser in any proceedings for permanent deprivation either of the goods or of a determined monetary equivalent, is also a detriment of itself. Hence, there could be appeals in which the impugned goods had never been seized or had been restored after temporary deprivation without any

major inconvenience or could not, by any stretch, be permitted to be cleared for justifiable reasons. This is an appeal against an 'unilateral' act seeking relief within the facilitative statutory enablement of conditional restoration that is claimed to have been effectively denied to them. It is the factual matrix pertaining to each, and the relative immediacy urged in consequence, that warrants the Tribunal, in the interests of justice, to dispose off any appeal out of turn. There can be no cause for grievance to Revenue when the course of justice is consummated by disposal of one of the many appeals pending before the Tribunal. It certainly cannot be the case of the Authorized Representative that such disposal, which has had the effect of resolving the situation of effective denial of recourse to provisional release, is of personal detriment to any officer of customs either. Hence, the application for early hearing is allowed.

7. At this stage, we are not concerned with the correctness of the seizure and we do not pre-empt adjudicatory jurisdiction for the Hon'ble Supreme Court, in *Union of India v. Manju Goel [2015 (321) ELT 19 (SC)]*, has held that

> *'4. It is this judgement which is the subject matter of the present appeal. It is clear from the aforesaid direction that the respondent was allowed to get the goods released on provisional basis with certain conditions. We are informed that after the passing of this aforesaid direction by the High Court, the Respondent had even got the goods released after complying with the directions of the High Court. In these*

> *circumstances, nothing survives in the present appeal. Otherwise also, there is no reason to interfere with the order in question, when the arrangement made by the High Court in the said order was only provisional one by way of interim arrangement.'*

which sums of the scope of the proceedings before us. The appellant is in business and cannot be denied the cavil of the fiscal detriment arising from the terms offered by the adjudicating authority; the notice issuing authority cannot but be expected to incorporate the utmost detriment permissible by law, or even without, in the framework of adjudicatory outcome. Between commercial objectivity on the one hand and administrative caution on the other, the operation of section 110 A of Customs Act, 1962 appears to have been rendered inoperable and, hence, our intervention sought to subject the terms to the test of the golden mean of responsible and responsive discharge of statutory mandate with the merit of the seizure temporarily obliviated till the notice is disposed off under appropriate provisions of Customs Act, 1962. Our determination herein has no bearing on the adjudication proceedings.

8. Though the grievance is not about denial of access to the goods through the mechanism of section 110A of Customs Act, 1962, effective denial is attributed to the terms by the appellant. In such circumstances, we are obliged to revisit the totality of the statutory provision that, as alleged by appellant, has been invoked to their

irreparable detriment and contrary to legislative intent. Reliance has been placed by Learned Counsel for the appellant on the decision of the Hon'ble High Court of Bombay in *Global Ace Shipping Lines Inc v. Principal Commissioner of Customs, (Import) [2020 (12) TMI 379 – Bombay High Court]* to contend that Iranian origin of goods does not, of itself, render the imports to be prohibited.

9. The power to seize goods, and, that too, only in the reasonable belief of liability to confiscation under section 111 of Customs Act, 1962, is accorded by section 110 of Customs Act, 1962. It must necessarily be followed by proceedings initiated in show cause notice as provided for in section 124 of Customs Act, 1962 to culminate as decision to confiscate, or otherwise, under section 125 of Customs Act, 1962 and including the option to redeem confiscated goods on payment of fine or the imposition of fine in *lieu* of confiscation. Computation of redemption fine is within the discretionary compass of the adjudicating authority but it is considered fair and reasonable only to the extent that the commercial advantage derived from the improprieties in import stand erased; anything beyond would be in excess of jurisdiction.

10. Learned Authorized Representative rests his case for retention of the terms of provisional release upon undesirability of intervention in an administrative decision which attains finality only upon adjudication of show cause notice and that, in relation to exercise of

such discretionary power, circular no. 35/2017-Customs dated 16th August 2017 of Central Board of Excise & Customs (CBEC) binds the Commissioner of Customs concerned. He, after elaborating at length on the implication of the origin on valuation of the imported goods and on evasion of the regulatory oversight of 'non-ferrous metal import monitoring system (NFMIMS)', submitted also that our findings in the present appeal should not jeopardize adjudicatory closure of the show cause notice.

11. As far as the maintainability of this appeal is concerned, the contention raised by Learned Authorized Representative is dated as Commissioner of Customs (Import-I), Mumbai had raised this very ground for setting aside the decision of the Tribunal dated 31st October 2017 disposing off appeal against terms of order for provisional release by remand to the adjudicating authority and, after taking note of the decision of the five member Larger Bench of the Tribunal in *Commissioner of Central Excise and Service Tax v. Gaurav Pharma Ltd [2015 (326) ELT 561]* which reversed the decision of the Tribunal in *Akansha Syntax Pvt Ltd v. Commissioner of Customs (General), Mumbai [2013 (289) ELT 186 (Tri-Mum)]* , it was observed by the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Mumbai v. SS Offshore Pvt Ltd [2018 (361) ELT 51(Bom)]*, that

> *'10. Before dealing with the rival submissions, we must*

make it clear that no fault can be found in the Tribunal entertaining the appeal from the letter dated 25 September 2017 directing provisional release of the vessel. This is for the reason that at the time the division bench of the Tribunal entertain the appeal and passed the impugned order dated 31 October 2017, it was bound to do so, as the issue was concluded by the decision of its larger Bench in Gaurav Pharma (supra). The decision of the larger bench continues to be binding in the absence of any stay from a higher forum, although the appeal filed therefrom is awaiting admission. The doctrine of precedents oblige the Tribunal to entertain the appeal…

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14. Thus for the purposes of the Tribunal entertaining the appeal from the letter dated 25th September 2017, it would make no difference if it is an administrative or a quasi-judicial order/decision. However for the purpose of completeness we would like to refer to the test laid down by the Supreme Court in the ***Automotive Tyre Manufacturers Association v. Designated Authority and Others*** *to draw a distinction between administrative and quasi-judicial order…*

15. On application of the above five tests to the present case, the nature of the power conferred under Section 110 read with Section 110A of the Act is to deprive a owner of the goods the use of his property till the final adjudication of the proposed confiscation or allowing the provisional release of the goods subject to certain conditions to safeguard the interest of the Revenue till the final decision is taken. It is undisputed that the exercise of power which is conferred under Section 110A of the Act would have civil consequences. The power when exercised could lead to either the State being left without security by the time the adjudication order is

passed or the conditions for provisional release could be so onerous that it would be impossible for the imported comply with them and use the goods till adjudication is over. The person vested with the power to allow provisional release of the seized goods is the adjudicating authority under the Act. The Act itself deals with import of goods into the country. All of the above, would suggest that the order/decision given for provisional release would be in the nature of quasi-judicial decision/order.

16. We are conscious of the fact that the right of appeal has to be bestowed by a statute and no person can claim it as of a right, de hors the statute. However having found that there is a right of appeal conferred from the orders of the Commissioner of Customs in terms of Section 129 A (1) (a) of the Act, it must be construed liberally (see ***CIT vs. Ashoka Engineering 194 ITR 645****). This is particularly so as sub clause (a) unlike other sub clauses to subsection 1 of Section 129 A of the Act does not restrict the right of appeal to the sections of the Act under which the order is passed and/or decision taken. Moreover an appeal from a decision of provisional release under Section 110A of the Act, would cause no prejudice to the Revenue. The goods which have been seized continue to be seized until the imported satisfies the conditions of provisional release and the adjudication proceedings are not in any manner halted /adjourned, merely because the importer is not satisfied with the terms of provisional release. Therefore we hold that the order/direction given under Section 110A of the Act is an appealable order under Section 129 A (1) (a) of the Act.*

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18 We are in complete agreement with the analysis done by the larger bench of the Tribunal in ***Gaurav Pharma***

(supra) *as reproduced in the extracts herein above.*

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20. We also noted that the Delhi High Court in the cases of ***Gurdeep Kaur (supra)*** *and* ***Candex Chemical (supra)*** *has also taken a view similar to ours. Further before the Rajasthan High Court in the cases of* ***Shiv Mahal Textiles (supra)*** *and* ***Gentleman Suitings (supra)*** *the Revenue has successfully urged before the court that an appeal from an order passed under Section 110A of the Act is available. No reason has been shown for urging differently before us from that urged by the Revenue before the Rajasthan High Court.*

The order under section 110A of Customs Act, 1962 is not administrative in nature but, for the limited sphere therein, adjudicatory. We perceive no impediment in proceeding further to decide on the conformity of the impugned terms with legislative intent.

12. Though power to seize has inhered, and as it should, in Customs Act, 1962 from the very beginning, and, indeed, as legacy carried over from section 178 of Sea Customs Act, 1878, for close to a century and half, it was only by section 26 of Taxation Laws (Amendment) Act, 2006, incorporating section 110A in Customs Act, 1962, that ‘provisional release’ of seized goods by Commissioner of Customs pending order of the adjudicating officer found acknowledgment in law. The transition from statutorily mandated continuation of ‘unilateral’ deprivation of custody till conclusion of

adjudication to that of reverting custody can only be described as facilitating. Undoubtedly, it was intended to benefit the importer but it was not at the cost of advantage to the State. The composition of consumer goods in the product portfolio had dwindled; with increased codification, procedural breaches came to demonstrate offence statistics and, with unfettering of industrial oversight, raw materials and inputs took centre stage. The cost of holding such goods under seizure for eventual redemption on payment of fine after confiscation far outweighed the economic detriment of delayed availability. The facilitative enactment in public interest may well suffice to suggest that declining to release – direct or effective – is at the cost of the public except of goods whose import is prohibited and consequently to be destroyed in public interest. The law does not intend that the State is enriched by fines arising from breach of the law or by substituting for the importer to trade in goods seized or even confiscated.

13. The novelty of this facilitation did not appear to have had the effect of disengaging the gears designed to perpetuate continuity of ‘unilateral’ deprivation of custody and every impediment was brought to bear on the exercise of powers under section 110A of Customs Act, 1962. Not the least of these was the refusal to submit to appellate oversight. The inevitable judicial intervention that followed prompted two significant changes therein, *viz.*, substitution of ‘adjudicating

officer' and 'Commissioner of Customs' therein with 'adjudicating authority' through Finance Act, 2011 with provisional release governed, as of now, by

> *'110 A. Provisional release of goods, documents and things seized pending adjudication. -*
>
> *Any goods, documents or things seized under section 110 may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.'*

and, with the Hon'ble High Court of Madras in *AS Enterprises v. Commissioner of Customs [2016 (337) ELT 321(Mad)]*, on the plea for suspension of section 110(2) of Customs Act, 1962 owing to the provisional release, enabled by section 110A of Customs Act, 1962, having held that, notwithstanding the order of provisional release, breach of the stipulation for issue of notice under section 124 of Customs Act, 1962 would have the effect of discharge from all conditions imposed for provisional release, the amended *proviso* to section 110(2) of Customs Act, 1962 through Finance Act, 2018, rendered release within six months, extendable by another six months under notice of intendment, and provisional release to be mutually exclusive.

14. The stage was, in the meanwhile, firmly set for issue of circular no. 35/2017-Cus dated 16th August 2017 of Central Board of Excise &

Customs (CBEC), seemingly drawing support from the decision of the Hon'ble High Court of Madras in *Malabar Diamond Gallery Pvt Ltd v. The Additional Director General [2016 (341) ELT65 (Mad)]* holding that breach of policy restrictions justifies continuation of seizure and from the decision of Hon'ble High Court of Delhi in *Mala Petrochemicals & Polymers v. The Additional Director General of, Directorate of Revenue Intelligence [2017 (353) ELT 446 (Del)]* distinguishing provisional assessment under section 18 of Customs Act, 1962 and provisional release under section 110A of Customs Act, 1962, to curtail and regiment the exercise of discretion even as it was noted in *re Mala Petrochemicals & Polymers*, that

> *'22. Ultimately, each case turns on its peculiar facts. There can never be a blanket rule that in all cases of misdeclaration 100% of the duty must be asked to be deposited or that if the importer is asked to do so then he cannot be asked to furnish a BG. ….*
>
> *23. The power under Section 110A of the Act involves exercise of discretion…. That is perhaps why Section 110A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognized legal limits.'*

and which Learned Authorized Representative adduced with fervor. The Hon'ble High Court of Delhi, upon being presented with the inexorable mandate of the very same circular in *Additional Director General (Adjudication) v. Its My Name Pvt Ltd [2021 (375) ELT 545 (Del.)]*, was compelled to observe that

'51.….Mr Ganesh relied on Agya Import Ltd: 2018 (362) DLT 1037 (Del), which holds that para 2 of the said Circular was merely in the nature of a "general guideline", and did not incorporate any mandate. We, having perused para 2 of Circular 35/2017-Cus supra, vis-à-vis Section 110 A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular 35/2017-Cus is clearly contrary to Section 110 A and is, consequently, void and unenforceable at law. It is not permissible for the CBEC, by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place in the parent statutory provision, i.e. Section 110 A of the Act. Executive instructions may, it is trite, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision. By excluding, altogether, certain categories of goods from the facility of provisional release, para 2 of Circular 35/2017-Cus supra clearly violates Section 110A, whereunder all goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the "eligibility" of the goods for provisional release, as distinct from "entitlement" thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him by Section 110 A.) Para 2 of Circular 35/2017-Cus, therefore, effectively seeks to supplant Section 110 A, to that extent, and has, therefore, to be regarded as void and unenforceable at law.

15. Furthermore, the said circular has been issued, not under any authority of empowerment under section 110A of Customs Act, 1962 but, presumably, under

> ***SECTION 151A. Instructions to officers of customs.*** *- The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, or for the implementation of any other provision of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:*
>
> ***Provided*** *that no such orders, instructions or directions shall be issued –*
>
> *(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or*
>
> *(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.'*

and the continued justification for such existence of admonitory instructions, in what has been held judicially to be adjudication proceedings, is itself questionable. The power under section 151A of Customs Act, 1962 is circumscribed by precluding disposal of a particular case in a particular manner. Considering that the exercise of power to permit provisional release has been held to be 'adjudicatory', and subject to appellate oversight, the prescriptions therein are tantamount to directions on disposal of particular cases in a particular

manner. The impugned circular, relied upon by Learned Authorized Representative, as the fount of the impugned decision traverses the boundaries envisaged in the delegated authority to issue such instructions by interfering in the exercise of discretion which must, after all, assign sufficient weightage to the facts peculiar to each case. Hence, for the purposes of this dispute, it is *non est*.

16. There is yet another, intended or unintended, consequence of the said circular. It is inevitable that investigations do foray into estimate of duty liability arising from non-payment or short-payment of duties of customs. The circular requires, in addition, that an estimate of fine, which should have been a consequence of confiscation by lawfully constituted authority in statutorily acknowledged proceedings, and of a penalty must be undertaken as a prelude to provisional release. It is not anybody's guess as to the scope for exercise of uninfluenced assessment of facts and law in adjudication proceedings thereafter. It is not just the bar on release of some category of goods but also this guided outcome of adjudication that jeopardizes the continued authority of the circular.

17. The Hon'ble High Court of Delhi was, in *Spirotech Heat Exchangers Pvt Ltd v. Union of India [2016 (341) ELT 110 (Del)]*, compelled to note that

> *'6. The Court notices that despite the aforementioned orders of this Court and the Supreme Court, the respondents*

> *are continuing to impose harsh conditions for provisional release of goods. In the present case, apart from the exporter having to pay 100% of the differential duty it has to furnish a bank guarantee equivalent to 25% of the differential duty and execute a bond for 100% of the value of the goods. Since the respondents do not appear inclined to follow the aforementioned order binding order of the Supreme Court, and are compelling exporters and importers to approach this Court everytime for relaxation of the conditions for the provisional release of the goods, the Court is of the view that relegating the petitioner to a statutory remedy would not be efficacious.'*

Viewed through this prism of judicial interpretation of legislative intent, the circular does not appear to be relevant.

18. In *re Its My Name Pvt Ltd*, the Hon'ble High Court of Delhi had, before it, a challenge from the customs authorities against order of the Tribunal permitting release, subject to terms, under section 110A of Customs Act, 1962 upon denial of such by the adjudicating authority in which the response of the adjudicating authority thus

> *'In view of the above mentioned citations on restricted and prohibited goods, it appears that it would be premature to arrive at any conclusion, about provisional release of seize goods, before completion of adjudication proceedings.'*

to the earlier directions of the Hon'ble High Court was met with the observation that

> *'57….To us, this finding is completely inscrutable, and is, on*

> *the face of it contradictory in terms. There can be no question of provisional release of season goods, after completion of adjudication proceedings. Section 110 A of the Act specifically empowers provisional release "pending the order of the adjudicating authority". It is impossible, therefore, to conceive provisional release consequent on adjudication, or to understand how the ADG chose to opine that it would be "premature" to arrive at any conclusion about provisional release, before completion of adjudication proceedings. As, after conclusion of adjudication proceedings, the question of provisional release of the goods would be rendered infructuous, and, in fact, the adjudicating authority would become functus officio in that regard, in view of the specific words used in Section 110A, the only conclusion, that can follow from the afore-extracted inexplicable finding of the ADG, is that he had made up his mind not to release the seized gold, gold jewellery and silver, provisionally, at any cost. We, therefore, find ourselves is an agreement with Mr Ganesh that any remand, of the matter, to the ADG to fix the terms of provisional release, would have been an exercise in futility interest. For this reason, too, we are unable to hold that, in directing provisional release of the gold, gold jewellery and silver, and fixing the terms thereof, the learned Tribunal exceeded the jurisdiction vested in it.'*

from which we reasonably conclude that the Tribunal may, in its appellate jurisdiction, consider effective denial of provisional release by imposition of impossibly harsh conditions of compliance to be of no less justification for interference than outright denial and, thereafter, take it upon itself to remedy the dispossession.

19. Hence, it would appear that judicial approval was not

forthcoming for the several strands of deployment of section 110A of Customs Act, 1962 that was manifested in ways and means of retention of seized goods till adjudication and beyond, upon confiscation, till appellate remedy was exhausted. The implementation of the incorporation for provisional release appeared to be founded on the belief that the said mechanism for conditional restoration of possession to the owner was restrictive and a measure to safeguard revenue. That appears to have guided the contents of circular no. 35/2017 dated 16th August 2017 of Central Board of Excise & Customs (CBIC) banning the exercise of such authority for certain categories of imports and establishing the floor limits of bond and bank guarantee to be prescribed for allowing provisional release. Doubtlessly, even if these are non-discriminatory in the strict legal sense and cannot be faulted in an administrative order for compliance by administrative authorities, the same cannot be said for adjudicatory disposal.

20. In the present instance, we are not concerned with such authority having been sought in the impugned order. Nonetheless, the emphasis placed by the judgement on exercise of discretion conferred by section 110 A of Customs Act, 1962 is not to be lost sight of; it is the propriety in the exercise of discretion that falls to us to examine in the appellate jurisdiction. Such exercise of discretion must not only demonstrate itself to be fair and equitable but must also be in accord

with the spirit of the legislation that customs authorities have come to regard as one more weapon handed over for the purpose of safeguarding revenue. We are now in a position to subject the exercise of discretion to scrutiny.

21. Before doing so, it would be apposite for us to take note of the decision of the Tribunal in *Pushpak Lakhani v. Commissioner of Customs (Preventive), New Delhi [final order no. 50001/2022 disposing of appeal no. 50253 of 2021 against order-in-original no. VIII (Cus Prev)/Adj/Commr/JWC/27/2013/9900 dated 11th September 2020 of Principal Commissioner of Customs (Preventive), New Delhi]* which has elaborately dealt with the legal provisions of seizure, confiscation, adjudication and redemption as well as the several judicial decisions that, put together, established the framework within which adjudicating authorities may exercise discretion after seizure. All these aspects were summarized thus:

> *'42. The following position emerges from the aforesaid decision of the Delhi High Court in Its My Name :*
>
> *i. The Tribunal is not required to adjudicate either finally or tentatively at the time of provisional release as to whether the alleged infractions committed or the consequent liability, if any, of the seized goods to confiscation under the Customs Act;*
>
> *ii. The order of provisional release is an interlocutory exercise and does not finally adjudicate on any liability;*

iii. *The exercise of power under section 110A of the Customs Act to release imported goods on a provisional basis is essentially and fundamentally discretionary in nature;*

iv. *Section 110A of the Customs Act contemplates release of any goods. Thus, both prohibited goods and non-prohibited goods can be released;*

v. *If the goods are not per se prohibited, question of going into prohibited goods as per Om Prakash Bhatia case does not arise at the stage of provisional release;*

vi. *A Circular which absolutely proscribed provisional release of prohibited goods or where any provisions are contravened, is void;*

vii. *The Tribunal is competent to order provisional release and fix terms and there is no need for remand;*

viii. *While passing an order for provisional release, there is no adjudication of competing rights and liabilities;*

ix. *High Courts would interfere with an order passed by the Tribunal for provisional release of the goods only on grounds of perversity;*

x. *Allowing provisional release of the seized goods does not interfere with the adjudication of the show cause notice or with the jurisdiction of the adjudicating authority to hold that the goods were liable to confiscation and the mere fact that the goods may possibly be held liable to confiscation at a later stage cannot be a ground to refuse provisional release because in that case section 110A of the Customs Act would be rendered otiose;*

xi. *The reliance on the allegations made in the show*

cause notice for denying provisional release is improper as in every case there would be allegations of contravention and section 110A of the Customs Act would be rendered otiose; and

xii. Statements, before being admitted by following procedure under section 138B of the Customs Act, cannot be used straightaway.'

22. Before section 110A was incorporated in Customs Act, 1962, seized goods, upon confiscation, were offered for redemption on payment of fine and goods, subject to confiscation proceedings without the preliminary of retention by operation of 'common practice', could be saddled with fine in *lieu* thereof. Over the years, the quantification of fine has been placed within the practical framework of offsetting the potential for windfall deriving from the breach for which the goods are confiscated. Rarely would it be the value of goods; some proportion thereof suffices. There can be no golden formula for it and it is here that the discretion of the authority is called for. Moreover, appeal against adjudication orders no longer require deposit of the full extent of the detriment laid at the door of the importer; section 129E prescribes the extent of pre-deposit. It is interesting to note that this was legislatively considered to suffice as security against confirmed demand. It is moot if a tentative estimation prior to adjudication can hold a candle to the assured accrual to the State after adjudication, subject, of course, to appellate determination. We are of the opinion that the extent of mandatory pre-deposit should, in most cases, be the benchmark for

quantification of reasonable security. At least, as far as the impugned goods are concerned.

23. Considering the estimation adopted by the adjudicating authority and by application of the principles *supra*, provisional release of the seized goods is permitted subject to furnishing of bond for the value of the goods and execution of bank guarantee of ₹ 50,00,000.

24. Appeal is, accordingly, disposed off.

(Order pronounced in the open court on 17/06/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*