

PMB

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5593 OF 2021

Indosheel Mould Limited
A-9, SIDCO Industrial Estate,
Coimbatore,
Tamil Nadu – 641021.

.. Petitioner

Vs.

1. Union of India
Notice to be served through
Ministry of Finance,
Department of Revenue,
New Delhi.
2. Commissioner of Customs, Nhava Sheva-V
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal-Uran,
Dist – Raigad
3. Commissioner of Customs, Nhava Sheva-I
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal-Uran,
Dist – Raigad
4. Deputy/Assistant Commissioner of Customs,
Special Investigation and Intelligence
Branch (Import), Nhava Sheva-V
Jawaharlal Nehru Custom House,
Nhava Sheva, Tal-Uran,
Dist – Raigad

.. Respondents

Mr. Prasannan S. Namboodiri a/w Mr. Virendra Pandey and
Mr. Steve J. Pulikkoden i/b. Hasika Prasad for the petitioner.
Mr. P.S. Jetly, Senior Advocate a/w Mr. J.B. Mishra for
respondents.

**CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

**HEARD ON : OCTOBER 27, 2021
JUDGMENT ON : OCTOBER 29, 2021**

JUDGMENT : (PER M.S. KARNIK, J.) :

1. The petitioner-Indoshell Mould Limited invokes the jurisdiction of this Court under Article 226 of the Constitution of India inter alia seeking relief and protection from unjustified investigation being carried out by respondent No.4 into import of Mercedes-Benz Engine Oil on alleged grounds of undervaluation; vacating of the seizure of two consignments of Mercedes-Benz Engine Oil by respondent No.4; unconditional release of the said two consignments of Mercedes-Benz Engine Oil without furnishing bank guarantee of Rs.2 Crores as directed by respondent No.3 and closure of investigation into alleged undervaluation by respondent No.4 against the petitioner.

2. It is the respondents' case that the petitioner imported Mercedes-Benz Engine Oil ('engine oil' for short) in retail packs of one litre and 5 litres from Sinopec Lubricant (Singapore) Pte Ltd through Shanfari and Partners, Oman

by payment of Customs duty on a very nominal price as compared to the price declared on the MRP label affixed on the retail packs, which in turn was supplied by the petitioner to Mercedes-Benz India Private Limited and sold by them at a very high price to authorised service centre/dealer. It is the case of the respondents that the said import is from related parties and that the restriction on sale of the imported engine oil only to Mercedes-Benz India Private Limited is a situation covered by the proviso to sub-rule (2) of Rule 3 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred to as 'the Customs Valuation Rules' for short).

3. It is the petitioner's case that they imported the engine oil in terms of framework contract for the supply of Mercedes-Benz labelled lubricants (hereinafter referred to as 'the framework contract' for short) entered into between Daimler AG and Sinopec Lubricant Company Limited on January 26, 2018. As per the framework contract, Sinopec Lubricant Company Limited is required to supply private label products to the Daimler Group in the countries set

forth in the contract. The price at which Sinopec Lubricant Company Limited would supply the goods to Daimler AG or another Daimler AG Group member is set out in the framework contract. The framework contract allows Sinopec Lubricant Company Limited to appoint agents/distributors for supply of the engine oil. It also permits other members of Daimler Group to enter into an individual contract with Sinopec Lubricant Company Limited or a member of their group. Since Sinopec Lubricant (Singapore) Pte Limited is not registered in India and Salalah Overseas Company LLC/ Shanfari and Partners LLC (Oman based companies) were authorised to supply Sinopec products for the Indian market, Sinopec Lubricant authorised Salalah Overseas Company LLC/Shanfari and Partners to handle this business. Hence, a framework distribution agreement between Sinopec Lubricant, Salalah Overseas and the petitioner was executed in November, 2017 (hereinafter referred to as the 'Tri-Partite Agreement'). The Tri-Partite Agreement was amended vide Addendum 1 to include the name of Shanfari and Partners LLC, Oman in place of Salalah Overseas

Company LLC Oman. As per the Tri-Partite Agreement the Mercedes-Benz Oil was to be supplied by Sinopec Lubricant to Salalah Overseas/Shanfari and Partners and which in turn was to be shipped to India to the petitioner for final supply to Mercedes-Benz India Private Limited. In terms of the agreement Salalah Overseas/Shanfari and Partners would receive purchase order for supply of Mercedes-Benz Oil from the petitioner and in turn place purchase order on Sinopec Lubricant. The petitioner on receipt of the purchase order from Mercedes-Benz India Private Limited would supply Mercedes-Benz Oil to them. The petitioner has to pay Salalah Overseas/Shanfari and Partners after receipt of payment from Mercedes-Benz India Private Limited.

4. The petitioner imported a consignment of engine oil vide Bill of Entry No.7801383 dated June 1, 2020. This consignment was kept on hold by the officers of Group I/IA of Customs at Nhava Sheva on the ground that there is mis-declaration of value. The petitioner vide their letter dated September 16, 2020 informed the officers of Customs that the MRP value cannot be compared with the transaction

value. The matter was referred to respondent No.4- Deputy/Assistant Commissioner of Customs, Special Investigation and Intelligence Branch (Import), Nhava Sheva-V for investigation into alleged undervaluation of price. During the course of investigation, the petitioner imported another consignment of Mercedes-Benz Engine Oil for which Bill of Entry No.9094841 dated October 7, 2020 was filed. Both these consignments were placed under seizure by the respondent No.4 but allowed to be warehoused under Section 49 of the Customs Act, 1962 (hereinafter referred to as 'the said Act' for short).

5. At the request of the petitioner vide their letter dated September 24, 2020 and November 4, 2020, provisional release was granted of the consignments vide letter dated November 11, 2020 of the Assistant Commissioner of Customs. As per this letter the petitioner was required to execute a bond equivalent to the re-determined value of Rs.6.7 Crores and furnish security/bank guarantee of Rs.2 Crores towards differential duty, redemption fine and personal penalty that may be levied at the time of

adjudication. However, in view of the steep conditions of provisional release, the petitioner could not avail provisional release of the seized consignments which continue to remain under seizure.

6. The respondent No.4 proceeded with the investigation. A summons was received by the petitioner from the office of respondent No.4 which was replied vide their letters dated September 24, 2020 and September 25, 2020. This action of respondent No.4 by way of seizure of the two consignments is the subject matter of challenge which, according to the petitioner, is untenable and completely contrary to the provisions of the said Act. It is the petitioner's case that the consignments were imported and Customs duty thereon self-assessed on transaction value which was payable to the supplier thereof as per Import Invoice received from Shanfari and Partners Oman. Hence, the price declared on the MRP label cannot be relied upon for alleging undervaluation. Learned counsel for the petitioner submitted that the Customs duty is required to be discharged on transaction value alone since there is no

scope or reason to doubt the correctness of the same. According to him, the transaction value has been arrived at purely on commercial considerations based on contracts. He submits that Sinopec Lubricant, in order to honour the contracts, supplied the goods at the contracted price to Mercedes-Benz India Private Limited through Shanfari and Partners and the petitioner. It is his submission that there is no allegation that the petitioner paid to Sinopec Lubricant or Shanfari and Partners more than the contracted value. He therefore submits that under these circumstances, there are actually no grounds to reject the transaction value. He further submits that as regards the difference in the transaction value of the said consignment vis-a-vis MRP/RSP value declared on the same in the label affixed on the retail packs, the products are bearing the brand name of Mercedes-Benz and hence commands huge premium in the hands of Mercedes-Benz India Private Limited alone on which appropriate GST is being discharged at the time of sale by them. Learned counsel pointed out that only after the goods are imported and sold to Mercedes-Benz India

Private Limited the brand value thereof would be available for exploitation and that too for Mercedes-Benz India Private Limited being from the Daimler Group. He therefore submits that this reason alone is not sufficient enough for rejection of the transaction value. Learned counsel invited our attention to the various provisions of the said Act, the Customs Tariff Act, 1975, the Central Excise Act, 1962, the Integrated Goods and Services Tax Act, 2017, the Customs Valuation Rules, 2007 to contend that the Customs authorities are bound to assess the duty on the transaction value alone. Learned counsel submits that the continued seizure of the goods is contrary to the provisions of Section 110(2) of the said Act and the petitioner is entitled to the release of the goods seized.

7. Mr. Jetly, learned Senior Advocate for the Revenue defended the initiation of the investigation and the continued seizure of the goods. Learned Senior Advocate submitted that the petitioner has approached this Court at the stage of initiation of investigation. In his submission there is a serious dispute with regard to the duty payable

and therefore the gross undervaluation which is a subject matter of investigation ought not to be interfered at this stage. Mr. Jetly further submitted that if at all the petitioner is aggrieved by the action of the respondents pertaining to seizure of goods, statutory remedy to challenge the action is available to the petitioner under the said Act. Mr. Jetly therefore submitted that the present writ petition is not only pre-mature, but in his submission, the writ jurisdiction can hardly be a substitute for the hierarchical statutory remedies provided under the said Act. He submits that Article 226 of the Constitution of India is not meant to short circuit or circumvent statutory procedures except where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations. Mr. Jetly then relied upon the provisions of Section 110 of the said Act which gives power to the appropriate authority to extend the period for issuing show cause notice in the case of seized goods by a further period of six months and also to provide exemption from application of time limit of six months to cases in which an order of a provisional release of seized

goods has been passed. Mr. Jetly therefore submits that the issue is under investigation and any interdiction by this Court at this stage may not be warranted. In his submission proper procedure has been followed in the course of seizure of the consignment and the petitioner failed to avail the provisional release. The petitioner has an alternate efficacious remedy and therefore for all these reasons, the present writ petition need not be entertained in his submission.

8. We have gone through the petition, the annexures thereto and heard the submissions of learned counsel for the parties. At the outset we may indicate that so far as the relief claimed by the petitioner as regards the investigation carried out by respondent No.4, which according to the petitioner is unjustified, we refrain from interfering with the investigation at this juncture as it is for the petitioner to co-operate with the investigation. As for the aspect of undervaluation it is for the petitioner to make out a case before the adjudicating authority in the first instance in support of the contention that the duty has been correctly

paid by them on the transaction value. We do not find it appropriate or any reason to interdict with the investigation being carried out by the respondent No.4 into the aspect of undervaluation at this stage, as it is always open for the petitioner to resort to appropriate remedies under the Act, for satisfying the authorities that the duty has to be paid on the transaction value and not on the basis of the MRP label affixed on the retail packs. It is for the petitioner to place all the materials including the Tri-Partite Agreement, invoices before the respondent No.4, in support of its case.

9. Let us now consider the next point, i.e., whether the continuance of the seizure is in accordance with the provisions of the said Act and whether the petitioner is entitled to a direction to the respondent No.4 for release of the consignments seized. To put the controversy in perspective, it would be appropriate to reiterate a couple of relevant facts. The first consignment which is seized was imported vide Bill of Entry dated June 1, 2020. The other consignment was imported vide Bill of Entry dated October 7, 2020. Both these consignments were placed under

seizure by respondent No.4. The seizure memo dated October 19, 2020 in respect of goods imported vide Bill of Entry dated June 1, 2020 records that "based on the examination and investigation initiated, it appeared that goods were mis-declared with respect to value. Therefore, under the reasonable belief that the above mentioned goods have been imported into India in contravention of Customs Act, 1962, and appear to be liable for confiscation under 111(m) of the Customs Act, 1962, in exercise of the powers conferred on me under section 110(1) of the Customs Act, 1962, I, the undersigned, place the above mentioned impugned goods under seizure and hereby direct the custodian of the cargo not to remove, part with or otherwise deal with the above said goods in any manner except with the written permission of this office".

10. A request was made by the petitioner for provisional release of the goods imported by Bill of Entry dated June 1, 2020 and October 7, 2020. By an order dated November 11, 2020 at Exhibit 'M', provisional release of the seized goods was granted under Section 110-A of the said Act

subject to conditions. The conditions being onerous the petitioner did not avail of the provisional release.

11. We proceed on the undisputed facts that the two consignments are admittedly seized by an order signed on October 19, 2020. It is not disputed that the seizure under Section 110 of the said Act in respect of both the consignments is effected on or before October 19, 2020.

12. Let us examine the contention of learned counsel for the petitioner that they are entitled to unconditional release of the two consignments as a period of more than one year has elapsed since the date of seizure in view of the provisions of Section 110(2) of the said Act. Sub-Section (1) of Section 110 of the said Act contemplates that if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods. In the present case accordingly, the seizure is effected. Sub-section (2) of Section 110 of the said Act is then relevant which reads thus :-

"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 Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

Provided further that where any order for provisional release of the seized goods has been passed under section 110-A, the specified period of six months shall not apply."

13. It is pertinent to mention that the first proviso to sub-section (2) of Section 110 of the said Act was substituted by the Finance Act, 2018 (Act of 2018), dated August 29, 2018 with effect from August 29, 2018. Prior to substitution the proviso read as under :-

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

14. It is also relevant to refer to clause (a) of Section 124 which reads thus :-

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

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

15. We find that in respect of the goods which are seized under sub-section (1) of Section 110 of the said Act, no notice in respect thereof is given under clause (a) of Section 124 of the said Act within six months of seizure of the goods. Though an order has been passed under Section 110-A of the said Act for provisional release of the goods, the petitioner has not availed of the provisional release pleading onerous conditions precluding them from availing the release. Therefore, the goods continue to remain under seizure. Sub-section (2) of Section 110 of the said Act provides that 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. In the present case, admittedly, the goods are seized under sub-section (1) and

furthermore there is no notice in respect of the goods seized given under clause (a) of Section 124 of the said Act within six months of the seizure. The consequence therefore in such a case is that the goods shall be returned to the person from whose possession they were seized. The first proviso to sub-section (2) of Section 110 of the said Act, however, provides that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend the six months' period by a period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified. The proviso therefore contemplates that the period of six months mentioned in sub-section (2) of Section 110 of the said Act can be extended by the higher authority for a further period not exceeding six months, for reasons to be recorded in writing. The proviso also requires the higher authority to inform this to the person from whom such goods were seized before the expiry of the period of six months mentioned in sub-section (2) of Section 110. We find that in respect of the seized goods, there is neither

any notice under clause (a) of Section 124 issued to the petitioner within six months of the seizure nor has the period of six months been extended for a further period of six months. In the absence of there being any notice as required by the first proviso even within the extended period upto one year, the consequence that ought to follow is release of the seized consignments.

16. We however must make a reference to the second proviso to sub-section 2 of Section 110 of the said Act. As narrated earlier, the first and second proviso was substituted with effect from March 29, 2018. Learned counsel referred to Finance Bill 2018 as introduced in Lok Sabha pursuant where to the provisos are substituted. The Finance Bill, 2018 reads thus :

`THE FINANCE BILL, 2018
(AS INTRODUCED IN LOK SABHA)

CHAPTER IV
INDIRECT TAXES

Customs

NOTES ON CLAUSES

Clause 90 of the Bill seeks to amend section 110 of the Customs Act so as to give power to extend the period for issuing show cause notice in the case of seized goods by

a further period of six months and also to provide exemption from application of time limit of six months to cases in which an order for provisional release of seized goods has been passed.

MEMORANDUM EXPLAINING PROVISIONS

Section 110 of the Customs Act, 1962 is being amended so as to :

- (a) substitute the existing proviso to sub-section (2) to provide that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend the six months period by a period not exceeding six months and inform the person from whom such goods have been seized before the expiry of the time mentioned in the said sub-section;
- (b) insert second proviso to sub-section (2) providing that where any order for provisional release of the seized goods has been passed under Section 110A, the aforesaid period of six months, mentioned in sub-section (2), shall not apply.'

17. In the context of the Finance Bill and the provisos as amended, a reference to the decision of this court in **Haresh S. Bhanushali vs. Union of India and others**¹ is relevant. In Paragraph 26, Their Lordships have referred to the instructions issued dated February 8, 2017 of the

¹ (2021) 376 ELT 232

Central Board of Indirect Taxes and Customs. Paragraphs 26

& 27 read thus :-

'26. Central Board of Indirect Taxes and Customs has issued Instruction No.01/2017-Cus dated 08.02.2017 wherein paragraph Nos.4 and 5 are relevant and are quoted hereunder :-

"4. In view of the above, in all future cases, the following may be adhered to :

Whenever goods are being seized, in addition to panchnama, the proper officer must also pass an appropriate order (seizure memo/order/etc.) clearly mentioning the reasons to believe that the goods are liable for confiscation. Where it is not practicable to seize any 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 the previous permission of such officer. In such cases, investigations should be fast-tracked to expeditiously decide whether to place the goods under seizure or to release the same to their owner.

5. Further, it has been brought to the notice of the Board that cases where Provisional Release of seized goods is allowed under Section 110A of the Act *ibid*, show cause notices are not being issued within the stipulated time period on the ground that the goods have been released to the owner of the goods. The provisions of the Customs Act, 1962 are clear that

irrespective of the fact whether goods remain seized or are provisionally released, once goods are seized, the time period (including extended time period) stipulated under Section 110(2) of the Act shall remain applicable and has to be strictly followed."

27. A conjoint reading of the above provisions along with the above instructions dated 08.02.2017 issued by the Central Board of Indirect Taxes and Customs would go to show that the concerned authority is required to issue show cause notice within six months of seizure failing which the seized goods shall be returned to the person from whose possession those were seized. In the instant case vehicle of the petitioner was seized on 04.11.2019. Respondents issued show cause notice dated 29.09.2020 to the importer and Clearing House Agent (CHA) but failed to issue show cause notice to the petitioner. Petitioner has been issued letter dated 21.12.2020 being corrigendum to the show cause notice issued to the importer, calling upon the petitioner to show cause as to why the vehicle should not be confiscated. Therefore, the show-cause notice was not only not issued to the petitioner within six months but also within the extended period of six months.'

Though the amendment is of the year 2018, the dictum in the case of **Haresh S. Bhanushali** (*supra*) will have an application in the present facts.

18. We may also usefully refer to the decision of this Court in the case of **Exim Incorporation Through its Proprietor-Gaurav Gupta vs. Union of India and ors.**², more particularly para 41 which reads thus :-

'41. Upshot of the above discussion is that firstly, there is no provision in the Customs Act authorizing detention of goods. Secondly, even if the understanding of the customs department as discussed in Ramnarain Bishwanath (supra) is accepted, then also detention would be at a stage after seizure. Detention and seizure therefore cannot be used interchangeably meaning one and the same thing. Detention cannot be taken resort to or the customs authorities cannot take the plea of detention to avoid consequences of seizure under sub section (2) of section 110 of the Customs Act. If no show-cause notice under section 124(a) is issued, customs authorities cannot retain the seized goods for more than six months though the aforesaid period of six months can at best be extended for a further period not exceeding six months. Therefore beyond the period of one year at the maximum, there cannot be any detention of goods even in the case of seizure without issuing show-cause notice under section 124(a) of the Customs Act.'

2 2020 SCC OnLine Bom 3593

19. No doubt, the amendment to sub-section 2 of Section 110 of the said Act gives power to the appropriate authority to extend the period for issuing show cause notice in the case of seized goods by a further period of six months and also to provide exemption from application of time limit of six months to cases in respect whereof an order of provisional release of seized goods has been passed. We have already observed that within a period of six months from the date of seizure, no notice is given under clause (a) of Section 124. In view of the submissions of learned Senior Advocate, we now consider the effect of the order passed by the competent authority provisionally releasing the goods under Section 110-A of the said Act on the release of goods under sub-section (2) of Section 110 of the said Act. The second proviso to sub-section (2) of Section 110 provides exemption from application of time limit of six months to cases in which an order of provisional release of seized goods has been passed. Factually, in view of the onerous conditions, the petitioner did not avail the release of the goods pursuant to the passing of the order of

provisional release. The consequence is that the goods remain under seizure. This being the position, in our opinion, the rigors of sub-section (2) of Section 110 of the said Act will continue to apply as the character of the goods continue to be goods seized under sub-section (1). The proper officer then is obliged to follow the procedure prescribed in sub-section (2) of Section 110 of the said Act, in that he has to issue notice under clause (a) of section 124 of the said Act within six months of the seizure of the goods. We have already observed that the notice under clause (a) of Section 124 within six months of the seizure is not issued and therefore the consequence of release must follow.

20. Assuming that the competent authority in exercise of the powers conferred by the first proviso extends period so specified by sub-section (2) of Section 110 by a further period of six months, the maximum period during which the goods shall remain under seizure is 12 months from the date of seizure. The effect of non compliance of the provisions of sub-section (2) of Section 110 would only be

that the seized goods are to be returned to the persons from whose possession they were seized. It would not render the initial seizure of the goods illegal. Thus, under sub-section (2) of Section 110, time limit is fixed for retaining the goods seized by the customs authority. In case the confiscatory proceedings are not initiated, custody of the goods to the persons from whom they were seized are to be handed over.

21. The contention of learned Senior Advocate for the revenue that the period for which the petition remained pending in this Court should be excluded while computing the period under Section 110(2) of the said Act and other relevant provisions can only be stated to be rejected. This is not a case where orders of stay/interim orders have been passed at any point of time thereby precluding the Customs authorities from proceeding with the matter.

22. Further, learned Senior Advocate relied upon the decision of the Hon'ble Supreme Court in **Union of India vs. Coastal Container Transporters Association**³ and the decision of this Court in **Garware Plastics & Polyester**

³ 2019 (22) G.S.T.L. 481 (S.C.)

Ltd. and another and vs. Union of India and others⁴ to contend that Article 226 of the Constitution of India is not meant to short circuit or circumvent statutory procedures. Learned Senior Advocate submits that the petitioner has an alternate efficacious remedy under the said Act to seek release of the goods and hence the present petition under Article 226 of the Constitution of India should not be entertained.

23. Considering the legal position discussed herein above, ex-facie it is obvious that the respondents have exceeded the time limit to keep the consignments under seizure and are not entitled to detain the goods any further, hence we have no hesitation in entertaining the present petition under Article 226 of the Constitution of India despite availability of alternate remedy.

24. Consequently, the respondents are directed to forthwith release the two consignments of Mercedes-Benz Engine Oil imported vide Bill of Entry No.7801383 dated June 1, 2020 and Bill of Entry No.9094841 dated October 7, 2020 on completion of necessary legal formalities and in

⁴ 1986 (24) E.L.T. 449 (Bom.)

any case within the period of two weeks from date of compliance of all legal formalities. The writ petition is partly allowed. No costs.

25. We make it clear that this order shall not preclude the competent authority to proceed against the petitioner in accordance with law.

(M.S. KARNIK, J.)

(CHIEF JUSTICE)