

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD
REGIONAL BENCH - COURT NO. 3**

CUSTOMS Appeal No. 12982 of 2018-DB

[Arising out of Order-in-Original/Appeal No MUN-CUSTOM-000-COM-16-18-19 dated 29.08.2018 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA]

Divya Novelty

403, Jivdaya Lane, Lbs Marg,
Ghatkopar West, MUMBAI
MAHARASTRA -400086

.... Appellant

VERSUS

Commissioner of Customs, Mundra

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat -370421

.... Respondent

WITH

(i) CUSTOMS Appeal No. 12979 of 2018 (Bharat Patel)

(ii) CUSTOMS Appeal No. 12980 of 2018 (Kishore Bhanushali Proprietor of Om Logistics)

(iii) CUSTOMS Appeal No. 12981 of 2018 (Mahesh Issariya)

[Arising out of Order-in-Original/Appeal No MUN-CUSTOM-000-COM-16-18-19 dated 29.08.2018 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA]

APPEARANCE :

Shri Naresh Satwani, Consultant for the Applicants
Shri Prashant Tripathi, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 02.12.2024

DATE OF DECISION: 03.12.2024

F.O. No. 12968-12971/2024

RAMESH NAIR :

These appeals are directed against order-in-original No. MUN-CUSTOM-000-COM-16-18-19 dated 29.08.2018 whereby the imported counterfeit goods namely shoes bearing trade mark like NIKE, ADIDAS, PUMA, REEBOK, ASICS and VANS have been absolutely confiscated and penalties under Section 112(a) and 114AA were imposed against the present appellants.

2. The brief facts are that the appellant M/s. Divya Novelty imported goods declared as unbranded men's and women's shoes and slippers and

filed bills of entry No. 3870698 dated 04.11.2017. Upon examination by the Customs officials, it is found that the goods bearing trade mark of brand name NIKE, ADIDAS, PUMA, REEBOK, ASICS and VANS. The goods were seized on the ground of misdeclaration and alleged infringement of Intellectual Property Rights (IPR). Show cause notice proposing confiscation and imposing penalties was issued. The Adjudicating Authority confirmed the proposal in the show cause notice leading to absolute confiscation and imposition of penalties under Section 112(a) and 114AA of the Customs Act, 1962. Therefore the present appeals filed by the appellants.

3. Shri Naresh Satwani, learned Consultant appearing on behalf of the appellants submits that the goods were absolutely confiscated on the charge of misdeclaration of goods as well as value of the goods. As regards the misdeclaration of the goods, there is charge of the department that the goods are counterfeit bearing the brand name of right holder therefore, there is violation of Intellectual Property Rights Rules, 2007. In this regard he submits that to hold the counterfeit goods as prohibited, it is necessary that the original brand name owner must participate before the customs and the procedure as prescribed should be followed. However, in the present case, the brand owners were abstained from participating in the proceeding before the customs and the procedure as prescribed has not been followed therefore, the goods cannot be held prohibited for absolute confiscation. As regards the valuation of the goods, he submits that the department has taken the value of the similar goods from the E. Commerce site whereas the charge of the department itself is that the goods are counterfeit. In such case, the valuation of the original branded goods cannot be taken therefore, the basis of enhancing the value is incorrect. In support of above submission, he placed reliance on the judgment of this Tribunal in the case of Commissioner of Customs, Chennai vs. Himachal Exim – 2017 (352) ELT 34 (Tri. Chennai).

4. On the other hand, Shri Prashant Tripathi, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that even if the brand owners have not participated and merely for that reason the absolute confiscation cannot be avoided as neither of the counterfeit goods are under dispute. As regards the valuation of the goods, he submits that even though the price of the

similar brands were taken from the E. Commerce site, the deductible method was adopted which is in order. Hence the valuation is also in order and in accordance of law which cannot be disputed. In support of his submission, he placed reliance on the following judgments:-

- (a) M/s. Sheikh & Mahajan LLP vs. CC (Preventive) New Delhi – 2021 (12) TMI 290- CESTAT New Delhi
- (b) M/s. Shri Gorakh Bhandar vs. The Commissioner of Customs (Appeals), New Delhi – 2024 (3) TMI 464 CESTAT New Delhi.

5. We have carefully considered the submissions made by both the sides and perused the record. We find that the goods i.e. shoes bearing the brand name of NIKE, ADIDAS, PUMA, REEBOK, ASICS and VANS imported by the appellant is admittedly counterfeit goods therefore, the Adjudicating Authority has ordered for absolute confiscation considering the same as prohibited goods. In this regard, the relevant Notification No. 51/2010-Cus (NT) dated 30.06.2010 is reproduced below:-

Intellectual Property Rights — Imports prohibitions expanded

In exercise of the powers conferred by section 11 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification No. 49/2007-Customs (N.T.), of the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, dated the 8th May, 2007 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 333(E), dated the 8th May, 2007, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in clauses (n) and (u) of sub-section (2) of that section, hereby prohibits the import of the following goods intended for sale or use in India, subject to following conditions and procedures as specified in the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, namely :-

- (i) goods having applied thereto a false trade mark as specified in section 102 of the Trade Marks Act, 1999 (47 of 1999);
- (ii) goods having applied there to a false trade description within the meaning of clause (i) of sub-section (1) of section 2 of the Trade Marks Act, 1999 (47 of 1999), otherwise than in relation to any of the matters specified in sub-clauses (ii) and (iii) of clause (za) of that sub-section;
- (iii) goods made or produced beyond the limits of India and having applied thereto a design in which copyright exists under the Designs Act, 2000 (16 of 2000), in respect of the class to which the goods belong or any fraudulent or obvious imitation of such design except when the application of such design has been made with the licence or written consent of the registered proprietor of the design or where such importation or use is allowed under the Designs Act, 2000 (16 of 2000);

(iv) the product made or produced beyond the limits of India for which a patent is in force under the Patents Act, 1970 (39 of 1970), except in cases where the consent from the patentee in India has been obtained provided that such prohibition is not applicable to the cases where such importation is allowed under the Patents Act, 1970 (39 of 1970);

(v) the product obtained directly by the process made or produced beyond the limits of India where patent for such process is in force under the Patents Act, 1970 (39 of 1970), except in cases where the consent from the patentee in India has been obtained provided that such prohibition is not applicable to the case where such importation is allowed under the Patents Act, 1970 (39 of 1970);

(vi) goods having applied thereto a false Geographical Indication within the meaning of section 38 of the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(vii) goods which are prohibited to be imported by issuance of an order issued by the Registrar of Copyrights under section 53 of the Copyright Act, 1957 (14 of 1957).

Explanation - For the purposes of this notification, the terms and expressions used in various clauses of the notification shall have the meanings assigned to them in the respective Acts, namely, the Trade Marks Act, 1999 (47 of 1999), the Designs Act, 2000 (16 of 2000), the Patents Act, 1970 (39 of 1970), the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999) and the Copyright Act, 1957 (14 of 1957).

2. This notification shall come into force on the date of its publication in the Official Gazette.

[Notification No. 51/2010-Cus. (N.T.), dated 30-6-2010]

From the above notification, it is provided that if any imported goods having false trade description within the meaning of Trade Mark Act, 1999 are prohibited goods in terms of clause (n) and (u) of sub-Section 2 of Section 11 of Customs Act, 1962.

6. The learned Consultant has vehemently argued that to hold the goods as prohibited, particularly with reference to false brand names, he referred to Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 which is reproduced below:-

Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007

In exercise of the powers conferred by sub-section (1) of section 156 of the Customs Act, 1962 (52 of 1962), read with clauses (n) and (u) of sub-section (2) of section 11 of the said Act, the Central Government hereby makes the following rules, namely :-

1. Short title, commencement and application. -

(i) These may be called the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.

- (ii) They shall come into force on the date of their publication in the Official Gazette.
- (iii) They shall apply to imported goods.

2. Definitions. -

- (a) “goods infringing intellectual property rights” means any goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws in India or outside India and without the consent of the right holder or a person duly authorized to do so by the right holder;
- (b) “intellectual property” means a copyright as defined in the Copyright Act, 1957, trade mark as defined in the Trade Marks Act, 1999, patent as defined in the Patents Act, 1970, design as defined in the Designs Act, 2000 and geographical indications as defined in the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- (c) “Intellectual property law” means the Copyright Act, 1957, the Trade Marks Act, 1999, the Patents Act, 1970, the Designs Act, 2000 or the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- (d) “right holder” means a natural person or a legal entity, which according to the laws in force is to be regarded as the owner of protected intellectual property right, its successors in title, or its duly authorized exclusive licensee as well as an individual, a corporation or an association authorized by any of the aforesaid persons to protect its rights.

3. Notice by the right holder. - (1) A right holder may give notice in writing to the Commissioner of Customs or any Customs officer authorised in this behalf by the Commissioner, at the port of import of goods infringing intellectual property rights in accordance with the procedures and under the conditions as set out in these Rules, requesting for suspension of clearance of goods suspected to be infringing intellectual property right.

(2) The notice in respect of goods infringing intellectual property rights shall be given in the format prescribed in the Annexure to these Rules.

(3) Every such notice shall be accompanied by a document as specified by the Commissioner, evidencing payment of application fee of Rs. 2000 (two thousand rupees only).

(4) If any of the information as required in the format under sub-rule (2) is not provided, the Deputy Commissioner of Customs or Assistant Commissioner of Customs may, as the case may be, ask the right holder or his authorised representative to provide the same within 15 days, which may be extended on sufficient reasons being shown.

(5) The right holder shall inform customs authority when his intellectual property ceases to be valid or if he ceases to be the owner of such intellectual property right.

4. Registration of notice by the Commissioner. - (1) Within 30 working days from the date of receipt of the notice under sub-rule (1) of Rule 3, or from the date of expiry of the extended time as contemplated in sub-rule (4) of Rule 3, as the case may be, the Commissioner shall notify the applicant whether the notice has been registered or rejected.

(2) In a case where the notice has been registered, the Commissioner shall indicate the validity period of the registration during which assistance by Customs shall be rendered. The minimum validity period shall be one year unless the noticee or right holder requests for a shorter period for customs assistance or action.

(3) The Commissioner granting the registration of the notice under sub-rule (2) shall inform, immediately through a letter by speed post or through electronic mode, all Custom offices covered by the notice of the details of the notice.

5. **Conditions for registration.** - The grant of registration under rule 4 shall be subject to following conditions, namely :-

(a) the right holder or his authorised representative shall execute a bond with the Commissioner of Customs for such amount with such surety and security as deemed appropriate by the Commissioner, undertaking to protect the importer, consignee and the owner of the goods and the competent authorities against all liabilities and to bear the costs towards destruction, demurrage and detention charges incurred till the time of destruction or disposal, as the case may be;

(b) the right holder shall execute an indemnity bond with the Commissioner of Customs indemnifying the Customs authorities against all liabilities and expenses on account of suspension of the release of allegedly infringing goods.

6. **Prohibition for import of goods infringing intellectual property rights.** - After the grant of the registration of the notice by the Commissioner on due examination, the import of allegedly infringing goods into India shall be deemed as prohibited within the meaning of Section 11 of the Customs Act, 1962.

7. **Suspension of clearance of imported goods.** -

(1) (a) Where the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, based on the notice given by the right holder has a reason to believe that the imported goods are suspected to be goods infringing intellectual property rights, he shall suspend the clearance of the goods.

(b) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may, on his own initiative, suspend the clearance of goods, in respect of which he has *prima facie* evidence or reasonable grounds to believe that the imported goods are goods infringing intellectual property rights.

(2) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall immediately inform the importer and the right holder or their respective authorised representatives through a letter issued by speed post or through electronic mode of the suspension of clearance of the goods and shall state the reasons for such suspension.

(3) Where clearance of the goods suspected to be infringing intellectual property has been suspended and the right holder or his authorised representative does not join the proceedings within a period of ten working days from the date of suspension of clearance leading to a decision on the merits of the case, the goods shall be released provided that all other conditions of import of such goods under the Customs Act, 1962, have been complied with :

Provided that the above time-limit of ten working days may be extended by another ten days in appropriate cases by the Commissioner or an officer authorized by him in this behalf.

(4) Where the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, has suspended clearance of goods on his own initiative and right holder does not give notice under rule 3 of the Rules or does not fulfill the obligation under Rule 5, within five days from the date of suspension of clearance, the goods shall be released provided that all other conditions of import of such goods under the Customs Act, 1962, have been complied with.

(5) Where the clearance of goods has been suspended, customs may, where it acts on its own initiative, seek from the right holder any information or assistance, including technical expertise and facilities for the purpose of determining whether the suspect goods are counterfeit or pirated or otherwise infringe an intellectual property right.

(6) Where the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, has suspended clearance of goods on his own initiative and right holder has given notice under rule 3 of the Rules and fulfilled the obligations under Rule 5, but, the right holder or his authorised representative does not join the proceedings within a period of ten working days from the date of suspension of clearance leading to a decision on the merits of the case, the goods shall be released provided that all other conditions of their import under the Customs Act, 1962, have been complied with :

Provided that the above time-limit of ten working days may be extended by another ten working days in appropriate cases by the Commissioner or an officer authorized by him in this behalf.

(7) In the case of perishable goods suspected of infringing intellectual property rights, the period of suspension of release shall be three working days which may be extended by another four days subject to the satisfaction of the Commissioner or the officer authorized by him in this behalf that such extension shall not affect the goods.

(8) Notwithstanding anything contained in these Rules, in the case of suspension of clearance of perishable goods on the basis of notice of the right holder or his authorized representative, the right holder or his authorized representative shall join the proceedings as required under these Rules within three working days or the extended period as provided in sub-rule (7) and in case of suspension of clearance of perishable good by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, on his own initiative, the right holder shall give notice, execute a bond and join the proceedings as required under these Rules within three working days or the extended period as provided in sub-rule (7), as the case may be, failing which the goods shall be released.

(9) If within ten working days or the extended period under sub-rule (6), as the case may be, and within three working days or the extended period as provided in sub-rule (7) of this rule in the case of perishable goods, the right-holder or his authorized representative joins the proceedings, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, having reasons to believe that the goods are goods infringing intellectual property rights and liable to confiscation under Section 111(d) of the Customs Act, may seize the same under Section 110 of the Customs Act.

8. Examination of goods by right holder. - The Commissioner or the officer duly authorized in this behalf shall allow a right holder and the importer or their duly

authorized representatives to examine the goods, the clearance of which has been suspended, and may provide representative samples for examination, testing and analysis to assist in determining whether the goods are pirated, counterfeit or otherwise infringe an intellectual property right, without prejudice to the protection of confidential information.

9. Supply of information to the right holder. - At the request of the right holder, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall inform the name and address of the importer and without prejudice to the protection of confidential information the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may also provide additional relevant information relating to the consignment which has been suspended from clearance.

10. Supply of information to the importer. - At the request of the importer or his duly authorized representative, Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall inform the name and address of the right holder and without prejudice to the protection of confidential information the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may also provide additional relevant information relating to the consignment which has been suspended from clearance.

11. Disposal of infringing goods. - (1). Where upon determination by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, it is found that the goods detained or seized have infringed intellectual property rights, and have been confiscated under Section 111(d) of the Customs Act, 1962 and no legal proceedings are pending in relation to such determination, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall, destroy the goods under official supervision or dispose them outside the normal channels of commerce after obtaining 'no objection' or concurrence of the right holder or his authorized representative :

Provided that if the right holder or his authorized representative does not oppose or react to the mode of disposal as proposed by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within twenty working days after having been informed, or within such extended period as may have been granted by the Commissioner at the request of the right holder, not exceeding another twenty working days, he shall be deemed to have concurred with the mode of disposal as proposed by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be :

Provided further that the costs toward destruction, demurrage and detention charges incurred till the time of destruction or disposal, as the case may be, shall be borne by the right holder.

(2) There shall not be allowed the re-exportation of the goods infringing intellectual property rights in an unaltered state.

(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may on his own, or at the request of the right holder, retain samples of goods infringing intellectual property rights prior to their destruction or disposal and provide the same to the right holder or importer if such samples are needed as evidence in pending or future litigations.

12. Exclusion of baggage and De-minimis Imports. - Goods of a non-commercial nature contained in personal baggage or sent in small consignments intended for personal use of the importer are not subject to the above Rules.

13. Protection of action taken under the Rules. - Customs officers when acting in good faith and having followed the procedures set out in these Rules shall not be liable for :

(a) any failure to detect goods infringing intellectual property rights,

- (b) the inadvertent release of such goods, and
- (c) any other action in respect of such goods.”

From the above Rules, it is mandatory on the part of the right holder i.e. brand name owners to follow the procedure as prescribed in the above Rules and only thereafter the goods can be held as prohibited goods. However, as per Rule 7 (3) of the Rules, it is provided that if the right holder or his authorised representative does not join the proceedings within a period of ten working days from the date of suspension of clearance leading to a decision on the merits of the case, the goods shall be released provided that all the other conditions of import of such goods under the Customs Act, 1962 have been complied with. In the present case, admittedly none of the condition of above Rules was followed such as giving notice, execution of bond etc. Thus, the right holder has not participated in the proceeding as prescribed in the Rules. In absence of compliance of the above Rules, the goods cannot be held prohibited goods and consequently the same cannot be absolutely confiscated. Therefore, we are of the view that since the right holder have not effectively participated in the proceeding inasmuch as not followed any procedure laid down in the above Rules, the goods cannot be held liable for absolute confiscation being not prohibited goods. In exactly identical issue, this Tribunal in the case of Himachal Exim (supra) has passed the following order:-

“[Order per : Justice Satish Chandra, President]. - The present appeal is filed against Order-in-Appeal No. 3/2014 dated 24-10-2014.

2. The brief facts of the case are that :-

“M/s. Himachal Exim filed two bills of entry viz. 8960783 and 8960784 both dated 7-1-2013 declaring the goods as “toys; shoes of various sizes with brand names “NIKE” & “ADIDAS” and “glimmer stick/eye liner for eyes/lips (assorted).

In respect of the eye liners/eye brow pencils the lower adjudicating authority has held that the classification by the appellants under CTH 96099090 under the self-assessment is not right and that CTH 33042000 under which the CVD is leviable on MRP basis, is appropriate. It was also found that a part of the consignment. - viz. 5760 pieces of eye liners were branded and of Germany origin whereas the appellants declared them to be of Chinese origin. The LAA rejected the declared value of the goods due to the misdeclaration and redetermined the value at Rs. 86,630/- in terms of Rule 9 of the Customs Valuation Rules, 2007. The CVD was quantified on the basis of the Maximum Retail Price The eye brow pencils totally valued at Rs. 2,37,136/- were confiscated under Section 111(m) of the Customs Act, 1962 and allowed redemption under Section 125 of the Customs Act, 1962 on payment of redemption fine of Rs. 1 lakh. The LAA has stated that the appellant has accepted the value.

Regarding the Shoes, the Shri Nagaraj (Importer) was summoned and he has given a voluntary statement admitting that the shoes imported by him were duplicate and not original. The impugned order has stated that M/s. Adidas have joined the Customs proceedings under provisions of Intellectual Property Rights (Imported goods) Enforcement Rules, 2007 and have submitted a bond for Rs. 4,62,303/- and a bank guarantee for Rs. 1,15,576/-. It is seen that M/s. Nike did not join the proceedings nor has fulfilled the conditions of registration as provided under Rule 5 of the IPR Enforcement Rules, 2007. The LAA has held that in the case of Adidas brand, there will be a concurrent application of Notification No. 47/2007-Cus. (N.T.), dated 8-5-2007 and Notification No. 51/2010-Cus. (N.T.) since they have joined the proceedings and in the case of Nike brand the Notification No. 51/2010-Cus. (N.T.), dated 30-6-2010 shall apply independently. Based on that the LAA has held that all the shoes bearing Adidas brand and Nike Brand totally valued at Rs. 13,52,785/- are prohibited and has confiscated them under Section 111(d)(111 (i) and 111(m) of the Customs Act, 19962. Regarding the shoes bearing "Adidas" brand valued at Rs. 7,00,541/- the LAA has ordered for its disposal as per the provision of Rule 11 of the IPR Enforcement Rule, 2007. He has allowed redemption of shoes bearing the brand name "Nike" valued at Rs. 6,52,243/- under Section 125 of the Customs Act, 1962 on a payment of a fine of Rs. 2,00,000/-. Penalties of Rs. 5 lakhs and Rs. 2,50,000/- were imposed on the appellants under Section 112(a) of the Customs Act, 1926 and Section 114AA of the Customs Act, 1962 respectively."

3. The above order was challenged by the importer before the Commissioner (Appeals) and the same was set aside by the Commissioner (Appeals) in appeal. Being aggrieved, the department has filed the present appeal.

4. With this background, we have heard learned Authorized Representative Shri K. Veerabhadra Reddy and learned counsel Shri B. Satish Sundar for the parties.

5. After hearing both sides and on perusal of the records, it appears that the respondent assessee had imported shoes declaring it to be "Adidas" and "Nike" vide Bill of Entry No. 8960783, dated 7-1-2013 and Bill of Entry No. 8960784, dated 7-1-2013. The goods were examined by officers of SIIB on 17-1-2013 and 18-1-2013. The goods on examination under the Bill of Entry No. 8960783, dated 7-1-2013 were found to contain toys and shoes with brand name "Nike" and "Adidas". The goods under Bill of Entry No. 8960784, dated 7-1-2013 were examined on 18-1-2013 and were found to contain toys and shoes with brand name "Nike" and "Adidas". Moreover, this consignment also contained cosmetics like glimmer sticks for eyes, eye liner pencils, eye liner pens, etc.

6. The matter had reached to the Hon'ble High Court of Madras in W.P. No. 32237 of 2014 filed by respondent herein. Hon'ble High Court vide its order dated 3-2-2015 observed as follows :-

"It is not in dispute that the order has become final and no further appeal has been filed against the said order by the department. Since the order has become final, the respondents are directed to release the goods covered under Bills of Entry No. 8960783 and 8960784 both dated 7-1-2013 in terms of the order of Commissioner (Appeals-II), Chennai vide Order in Appeal in C. Cus. II No. 3/2014, dated 24-10-2014, within a period of four weeks from the date of receipt of copy of this order. The writ petition is ordered accordingly. No costs. The connected miscellaneous petition is closed."

7. Against this order, department preferred Review Petition No. 58/2015 and the respondent herein also preferred a Contempt Petition No. 844/2015 in the same matter. Vide a common order dated 8-10-2015, both the petitions were disposed by the Hon'ble High Court *inter alia* with the following directions :-

“13. As regards the review, though there is no apparent error on record since the order does not suffer from any infirmity, however, taking note of the fact that it has been passed solely with the observation that there was no appeal preferred by the department on the date of the order under review and there by the impugned order has become final, which as rightly contended by the learned counsel for the customs department, is virtually misconceived and cannot be sustained. Further, it is to be noted that even the statute has prescribed time limit for preferring the appeal, which admittedly, is available to the customs department till 17-2-2015, however, the order under review has been passed as if the order impugned in the writ petition has become final since there was no appeal by that time, which is factually incorrect and further, the period prescribed for filing appeal in the statute is still available to the customs department. It is to be noted that on several occasions, taking note of the fact that the writ petitions are pending without exhausting the appeal remedy, this court has passed orders directing the Tribunal to consider the appeal even after expiry of appeal time without insisting upon limitation aspect. But the issue in these matters is different, where the appeal time is still available to the customs department, which this Court cannot curtail the same and prevent the customs department to agitate the matter before the appellate authority.

14. In view of the above discussion and also considering the fact that as on date, the statutory appeal preferred by the customs department as against the order impugned in the writ petition, is pending before the Tribunal and the matter requires to be disposed of on merits, this court feels it appropriate to pass the following :

15. The parties are directed to participate in the appeal proceedings pending before the Tribunal and workout their remedy. The Tribunal is directed to dispose of the appeal as expeditiously as possible after affording opportunity to both sides.”

8. From the record it also appears that goods are alleged to have been imported in violation of Section 111(d), (i) and (m) of Customs Act, 1962 and prohibited for import under Section 11 of Customs Act, 1962. But the fact remains that the proceedings in this case was declared illegal, null and void by the first appellate authority finding that the adjudication proceedings have not fulfilled the requirements of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Confiscation and penalties were vacated by Commissioner (Appeals) and the goods were allowed to be released. We find no reason to interfere the impugned order passed by the Commissioner (Appeals). The same is upheld.

9. In the result, appeal filed by Revenue is dismissed and the miscellaneous application praying for stay also gets dismissed.”

From the above decision it can be seen that since the requirement of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 was not fulfilled, goods are not liable for confiscation and the same should be allowed to be released. Therefore, the ratio of the above decision is directly applicable in the facts of the present case. However, in the present case as submitted by the learned Consultant, the appellant is not interested to take release of the goods.

7. As regards the judgments relied upon by the learned AR, on going through the same we find that facts in those judgments are different from the present case. Therefore, the ratio of the judgments cannot be applied in the present case.

8. As regards the enhancement of valuation of the goods, we find that Revenue has adopted the price of the similar brand available on E.Commerce site which means the price of the original branded goods and not the price of counterfeit goods were taken and the deducting method was adopted. We find that deducting method can be applied on the relevant price. In the present case, the department's case is that the goods are counterfeit which is not disputed by either side, therefore the price of the original branded goods cannot be comparable to value the counterfeit goods. Therefore, the entire basis of the Revenue to take the price of the original branded goods from the E.Commerce site is absolutely illegal and arbitrarily and not sustainable. Therefore, on this ground the valuation adopted by the Revenue is incorrect and the same cannot be accepted.

9. As per our above discussion and findings, we are of the view that since it is not established that the goods are prohibited for the reason that Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 are admittedly not followed, the absolute confiscation of the goods was not warranted. However, the appellants are not interested to get the goods released. Since the goods are not liable for absolute confiscation and enhancement of value by the department was not acceptable to us, the entire penalties imposed against all the appellants are not sustainable and the penalties are set-aside. All the appeals are allowed with consequential relief.

(Pronounced in the open court on 03.12.2024)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)