HIGH COURT OF BOMBAY
Bench: Justice Jitendra Jain and Justice G. S. Kulkarni
Date of Decision: 02 November 2023

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10943 OF 2023
Chetak Technology Ltd. …….Petitioner

Versus

1. **Union of India (Through the Secretary) Ministry of Law and Justice,**
2. **Commissioner of Customs (NS-V),**
3. **The Additional Commissioner of Customs,**
4. **The Deputy Commissioner of Customs**

……Respondents

Legislation:
Section 110, 110A, 124 of the Customs Act
Bureau of Indian Standards (Conformity Assessment) Regulations, 2018

Subject: Release of goods "Lithium Ion Cell," and the dispute surrounding the compliance with BIS (Bureau of Indian Standards) marking and labeling requirements. Unjustified detention of goods by customs authorities and the issuance of a show cause notice.

Headnotes:
Customs Clearance - Import of "Lithium Ion Cell" - Challenge to detention and non-clearance of goods under specific bills of entries - Compliance with Bureau of Indian Standards (BIS) marking requirements - Violation of principles of natural justice - Issuance of show cause notice - Confiscation and penalty imposed - Customs Act, 1962, Section 124 - BIS Regulations, 2018 - Public Notices No. 136/2008 and 157/2018 - Interpretation of labeling requirements - Promotion of electric vehicles and environmental considerations - Clearance of goods - Consumer safety concerns - Circular No. 35/2017 - Jurisdiction of Customs Authorities. [Para 1-13]
Release of Goods - Application for release of goods in question - Examination of the facts and circumstances - Admitted facts regarding the consignment of "Lithium Ion Cell" - Similarity with other consignments released for home consumption - Justification for not releasing the goods by the respondents examined. [Para 14-16]

Compliance with BIS Standards - Dispute regarding the affixing of BIS mark on the product - Manufacturer's role in affixing the mark - Examination of the 2018 Regulation, Schedule II, and relevant provisions - Application of Public Notice No. 136 of 2018 - Departure from the requirements of the 2018 Regulation by the respondents - Clarification through Public Notice No. 157/2018 - Affixing of the standard mark on the package. [Para 17-22]

Decision - Unjustified Detention of Goods - Evaluation of the department's stand - Misapplication of regulations - High-handed approach of customs

officers - Inconsistent treatment of goods compared to other consignments - Absence of seizure or physical possession of goods - Show cause notice issued - Need for independent proceedings on the show cause notice - Conclusion regarding the illegal detention of goods and partial allowance of the petition. [Para 23-31]

Referred Cases:

- Gajanan Visheshwar Birjur V. Union of India & Ors. (1994)5 SCC 550
- Metal Forgings and Anr. Vs. Union of India & Ors (2003)2 SCC 36
- Visheshwar Birjur V. Union of India and Others (1994) 5 SCC 550
- Metal Forgings and Another V. Union of India and Others (2003) 2 SCC 36

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JUDGMENT (Per G.S.Kulkarni, J.):

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. The petitioner, a wholly owned subsidiary of Bajaj Auto Ltd., is inter alia engaged in manufacture and sale of electric Scooters. This petition concerns a relief in regard to the clearance of imports as undertaken by the petitioner, of goods described as “Lithium Ion Cell”. Such imports were subject matter of various bills of entries, out of which, the consignments under seven bills of entries were cleared for home consumption. Such clearance was granted after the Customs Officer undertook assessment of these seven bills of entries on physical examination of each and every consignment. The consignments under the following bills of entries were cleared for home consumption:-

Sr. No.	Bill of Entry No.	Date
1	4019963	03.01.2023
2	4019965	03.01.2023
3	4020344	03.01.2023
4	4019034	03.01.2023
5	4021424	03.01.2023
6	4557264	08.02.2023
7	4556787	08.02.2023

3. However, in respect of two companion bills of entries both dated 8 February 2023 (for short ‘the subject bills of entries’) the Customs Authorities / respondents have detained the goods and/ or have not permitted the petitioner to clear the same. The details of which are as under:-

Sr. No.	Bill of Entry No.	Date
8	4557146	08.02.2023
9	4558082	08.02.2023

4. It is the petitioner's case that in respect of the seven consignments which were granted clearance, the packages of these imported goods, contained the standard mark, registration number and model number etc. affixed on the package in compliance of the labelling requirements as per the Bureau of Indian Standards (Conformity Assessment) Regulations, 2018 (for short '2018 Regulation').

5. It appears that earlier the petitioner was issued a show cause notice in respect of the imports in question, alleging that the consignment in question was not in compliance with the requirement of BIS marking. On such show cause notice, an order-in-original dated 23 May 2023 was passed inter alia confiscating the goods in question. The petitioner in such circumstances had approached this Court in the proceedings of Writ Petition No. 8768 of 2023 and 8769 of 2023 wherein a common challenge was raised, namely to the order-in-original dated 23 May 2023 in respect of the very consignment of the "Lithium Ion Cell" and subject matter of bills of entry in question. The principal challenge to the order(s)-in-original was to the effect without the petitioner being heard on the show cause notice, the order-in-original was passed ordering confiscation of the goods under the bills of entries in question. As noted above, such show cause notice was issued by the department on the premise that the goods as imported by the petitioner were not complying with the requirements prescribed by the Bureau of Indian Standards, in as much as it was observed that BIS markings / stickers were not found on the imported goods, and that such marking/labels were fixed on the cartoons / packages. The Customs Officer in passing the order(s)-inoriginal, was of the opinion that paragraph 6 of the Public Notice No.136/2008 dated 8 October 2018 was not complied by the petitioner. On such writ petition, this Court by an order dated 17 July 2023 referring to the decisions of the Supreme Court in Gajanan Visheshwar Birjur V. Union of

India & Ors.[1] and Metal Forgings and Anr. Vs. Union of India & Ors.[2], allowed the writ petitions on the ground that the order(s)-inoriginal as impugned in the said proceedings, were passed in breach of the principles of natural justice. In so far as the petitioner's contention that the petitioner be permitted release of the goods, the Court observed that if the law so permits, the petitioner was at liberty to apply for release of the goods and if such an application is made, such application be decided by the concerned Customs Authorities in accordance with law. The order dated 17 July 2023 passed by this Court on the said writ petitions filed by the petitioner, is required to be noted, which reads thus:-

1. There is common challenge in both these petitions, namely to an order-in-original dated 23 May 2023, although, in relation to batch of goods subject matter of distinct bills of entry. The prayers in the petitions are that the impugned orders be quashed and set aside.

2. The basic premise on which such prayers are made, is to the effect that the impugned order(s)-in-original are ex facie in violation of the principle of natural justice inasmuch as no show cause notice was issued to the petitioners before passing the impugned orders.

3. The case of the petitioners in both these petitions is that the petitioner is a subsidiary of Bajaj Auto Limited. The petitioner is inter alia engaged in the manufacture and sale of Electric Scooters and parts thereof. Earlier on 3 January 2023 petitioners had imported "Lithium Ion Cell" vide various Bills of Entries. The assessment of all these Bills of Entry were finalized after physical examination and analysis of each and every consignment, by the Customs Authorities. However, in respect of a subsequent import, subject matter of both the present proceedings and the Bills of Entries, the details of which are set out in the memo of the petition, the Customs Officer in undertaking inspection of the said goods which were similar to the goods earlier imported, was of the view that the imported goods were not compliant with the Bureau of Indian Standards (BIS). I t was observed that the BIS marking / sticker was not found on the imported goods and that a sticker was only pasted on the cartons / packages where in BIS registration number was mentioned. Thus, the Customs Officer was of the opinion that the petitioners have not complied with paragraph 6 of Public Notice dated No.136/2018 dated 8 October 2018. In this regard there was correspondence between the petitioners and the Customs Officials. T he petitioners had approached the concerned O fficer who had heard the petitioner's representative. However, before the regular procedure, as known to law, could be set into motion, on the basis of the impressions as formed by

[1] (1994)5 SCC 550
[2] (2003)2 SCC 36

the Customs Officer and also considering the representation which the petitioner had made before such Officer, the Additional Commissioner of Customs, Appraising Group- V
A, JNCH, NS-V, straight away proceed to pass the impugned Order-in Original directing confiscation of the goods covered under B ills of Entry in question, however, with an option to redeem the goods for the limited purpose of Re-Export on payment of Redemption of Fine and imposing a penalty.

4. We have heard Mr. Hidayatullah, learned Senior counsel for the petitioners on this petition and Mr. Kumar, learned counsel for the respondents.

5. As noted above, the primary grievance of the petitioners is that such an approach on the part of the Additional Commissioner to pass an order without issuing a show cause notice could not have been adopted by the Additional Commissioner of Customs.

6. It is submitted by Mr. Hidayatullah, learned Senior counsel for the petitioner that the principles of natural justice would require a show cause notice be issued and after considering any response to the show cause notice and only after an opportunity of a hearing being accorded to the petitioner, such an order, which attracts a civil consequences could have been passed.

7. We find merit in such contentions as urged by Mr. Hidayatullah. The nature of the order is quite drastic. When such an order was to be passed certainly, the law would require strict adherence of the principles of natural justice and by prior issuance of a show cause notice. The petitioner ought to have been put to notice of all the grounds on which the goods would be liable for confiscation and of any other consequential orders which would be attracted.

8. We may observe that in passing the impugned order-in-original Additional Commissioner of Customs has exercised powers of confiscation and has imposed penalty Section 124 of the Customs Act 1962 which mandates issuance of a show cause notice, before confiscation of goods. Such provision stipulates that no order confiscating any goods for imposing any penalty on any person shall be made under Chapter-XV of the Customs Act, unless owners of the goods or such person is given notice in writing with prior approval of the Officer of the Customs not below the rank of an Assistant Commissioner of Customs, informing the owner or such person, on the ground on which the goods are proposed to be confiscated or penalty imposed. Such person is required to be given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice, against the grounds of confiscation and imposition of penalty mentioned therewith and thereafter of a reasonable opportunity be given to such person. We note Section 124 which reads thus:

“124. Issue of show cause notice before confiscation of goods, etc.
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 an Assistant Commissioner of

Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

PROVIDED that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral:

PROVIDED FURTHER that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and such manner as may be prescribed."

9. In Gajanan Visheshwar Birjur V. Union of India and Others[3]the Court was dealing with the validity of confiscation of books imported by the petitioner from People's Republic of China. In the context of the authority to confiscate the Supreme Court observed that an order of confiscation affects fundamental rights of the petitioner to carry on his occupation and business referring to the observations of Hegde, J. in Oudh Sugar Mills Ltd. V. Union of India, the Supreme Court observed thus:-
"To the same effect are the observations of Hegde, J. In Ough Sugar Mills Ltd. v. Union of India. The learned Judge said : It must be remembered that right to trade is a guaranteed freedom. That right can be restricted only by law, considered by the Courts as reasonable in the circumstances. Not only the law restricting the freedom should be reasonable, the orders made on the basis of that law should also be reasonable."

10. In Metal Forgings and Another V. Union of India and Others [4]in dealing with a case of a demand under Section 11-A of the Central Excise Act, the Court had observed that in the said case show-cause notice as required in law was not issued by the Revenue. The contention of the Revenue was to the effect that since necessary information which was required to given in the show-cause notice was made available to the appellants therein in the form of various letters and orders etc., issuance of such demand notice in a specified manner was not required in law. The Supreme Court repelled such contention of the Revenue. While upholding the orders of the Tribunal the Supreme Court has observed that the Tribunal had rightly come to the conclusion that such material could not be treated as show-cause notice, which was inadequately treated as show-cause notice as contemplated under the rules as applicable. It was also observed that issuance of show-cause notice in a particular form is a mandatory requirement of law.

11. Adverting to the above principles of law, we have no manner of doubt that the impugned orders as assailed in the present proceedings deserve to be

[3] (1994) 5 SCC 550
[4] (2003) 2 SCC 36

quashed set aside. We accordingly set aside the impugned orders. Order accordingly.

12. At this stage Mr. Kumar, learned counsel for the respondents would submits that the respondents would intend to issue a show cause notice. If that be so, they are free to take recourse to the appropriate procedure known to law.

13. At this stage Mr.Hidayatullah prays that the petitioners be granted provisional release the goods. We may observe that if law so permits, the petitioners are always at liberty to apply for provisional release of the goods and if such an application is made, the same be decided by the concerned Customs Authorities in accordance with law.

14. All contentions of the parties are expressly kept open.

15. Writ Petitions are disposed of in the above terms. No costs."

(emphasis supplied)

6. On the backdrop of the above order passed by this Court, the petitioner approached respondent No.4 – Deputy Commissioner of Customs by a letter dated 24 July 2023 requesting for release of the goods. The request for such release was again reiterated by the petitioner by letters dated 16 August 2023 and 23 August 2023. As the request of the petitioner for release of the goods was not being considered, the present petition has been filed by the petitioner on 31 August 2023 praying for the following reliefs:-

"a. this Hon'ble Court may be pleased to issue a Writ of Mandamus or an appropriate direction or order directing Respondent No.2 to 4 to permit clearance of imported goods covered by Bill of Entry No.4557146 and 4558082 both dated
8th February 2023;

b. this Hon'ble Court may be pleased to issue a Writ of Mandamus or an appropriate direction or order directing the Respondents to issue a Detention and Demurrage Waiver Certificate in respect to goods imported vide Bill of Entry No.4557146 and 4558082 both dated 8th February 2023, till the date of clearance of the goods;

c. for costs;

d. that such further and other reliefs in the nature and circumstances of the case may require,"

7. The primary contention as urged by the petitioner in the present proceedings is to the effect that the consignment of “Lithium Ion Cell” as imported by the petitioner and subject matter of the bills of entries in question complies with all the norms prescribed by the Bureau of Indian Standards (BIS), as are necessary in law and more particularly, as required by the 2018 Regulations. It is hence contended that the detention and/or the respondents not permitting the release of the goods, is patently illegal. The petitioner contends that it is not in dispute that the packages of the consignment are affixed with the standard mark, which is in conformity with the Regulation 6 of the 2018 Regulations. It is also in conformity of the public notice No. 157 of 2018 dated 13 December 2018, issued by the respondents.

8. The petitioner has contended that in fact the Custom Authorities have breached the conditions under Regulation 6, inasmuch in issuing an earlier public notice, namely Public Notice No.136 of 2018 dated 8 October 2018 in paragraph (6) thereof, the requirements of Regulation 6 have been completely misapplied and / or erroneously set out. It is contended that such condition as contained in the said public notice is being illegally foisted by the respondents, on the petitioner’s consignment, by asserting that the requisite BIS marks are required to be affixed on the product as imported, and not on the packages.

9. It is the petitioner’s case that goods in question (“Lithium Ion Cell”) are required in the manufacturing of “electric vehicles”, which are being manufactured by the petitioner in the light of the policy of the Government of India, to promote electric vehicles which would reduce the environmental pollution. It is thus submitted that the Customs Authorities on ex facie illegal considerations and improper interpretation of the 2018 Regulation, are not clearing the petitioner’s goods. It is submitted that such arbitrary position

being taken by the respondents is also ex facie contrary to the earlier stand taken by the respondents whereunder the consignment of the same goods under seven companion bills of entries was cleared, without any objection whosoever on the compliance of the BIS norms. It is thus contended that there is no justification whatsoever to detain the present consignment.

10. The petitioner has next contended that knowing well that the present petition is pending adjudication surprisingly, respondent No.3 issued to the petitioner a show cause notice dated 1 September 2023 under Section 124 of the Customs Act, which is not on a different premise namely that the consignments are not complying the labelling requirement as per the BIS standards. By such notice, the petitioner was called upon to show cause as to why the goods be not confiscated for the said reason. In view of this development, the petitioner was permitted to amend the petition to incorporate a challenge to the show cause notice, as also urge additional grounds and consequential prayers in the petition. In the amended petition, the petitioner has contended that import of "Lithium Ion Cell" is in conformity with the 2018 Assessment Regulations as the packages bear the standard mark on the product. The petitioner has reiterated that Public Notice No. 136 of 2018 dated 8 October 2018 is contrary to the 2018 Regulation. It is contended that, in fact, by a public notice No. 157 of 2018 dated 13 December 2018, public notice No. 136 of 2018 has been clarified and such clarification was completely ignored by respondents in taking the impugned stand, that the goods ought not to be cleared and / or a decision be taken to confiscate the goods. The petitioner has accordingly, prayed for the following additional reliefs in the amended petition:-

"27.This Hon'ble Court be pleased to issue a Writ of

Certiorari or an appropriate direction or order calling for record of the case and after going into legality and propriety thereof and to quash the impugned Notice dated 1st September 2023;

28.This Hon'ble Court be pleased to stay the operation of
impugned Notice dated 1st September 2023 and injunct the Respondent No.3 and / or his subordinate Officers from taking any steps in furtherance thereof;"

11. The petition is opposed on behalf of the Department. Two reply affidavits are filed. The first reply affidavit as filed, is of Itha Ramalingeswara Rao, Assistant Commissioner of Customs, dated 8 August 2023. There is second affidavit also of Itha Ramalingeswara Rao dated 11 October 2023. On a perusal of the reply affidavits, the stand of the respondents appear to be that the clearance of the imports in question cannot be permitted for want of conformity with the BIS standard and more particularly, the same being hit by the Public Notice No. 136 of 2018 dated 8 October 2018. It is contended that the product in question "Lithium Ion Cell" is supplied by a supplier in China and imported from Hong Kong which requires appropriate labelling and packaging under the 2018 Regulations, and in the absence of marks on the product and the packaging, its distribution in the domestic market cannot be permitted. For the first time in the second reply affidavit, it is being contended that the clearance of the goods would be a serious threat to consumer safety, as the goods are prohibited goods. However, as to how the goods can be categorized as not safe and prohibited goods, is not explained and / or no material in that regard is provided in the reply affidavits. It is next contended that if the goods are allowed to be released pending adjudication of the show cause notice dated 1 September 2023, the respondents would not have the goods available to be confiscated, as the present case is not of payment of short duty or less duty, which would require assessment of value of goods or payment of customs duty.

12. It is next contended that the petitioner's contention on the interpretation of the 2018 Regulation and the public notice, is misconceived inasmuch as it would not be permissible for the product to be labelled on the packaging, as labeling and standard mark was required to be affixed on the product even by a sticker. It is contended that the petitioner's reading of the subsequent Public Notice No.157 of 2018 dated 13 December 2018 is also not correct. It is next contended that the petitioner's reliance on Circular No.35 of 2017 dated 16 August 2017 to contend that the petitioner would be entitled to release of the goods ought not to be accepted, as the purport of such circular operates when there is no applicability of the prohibited goods.

13. It is on the above contentions as urged before us, we have heard learned Counsel for the parties.

Analysis:-

14. The question which falls for our consideration is as to whether in the facts and circumstances of the case, the prayer of the petitioner for release of the goods can be granted.

15. At the outset, some of the admitted facts are required to be noted. It is not in dispute that the consignment in question subject matter of the two bills of entries is "Lithium Ion Cell". It is also not in dispute that during the period from 3 January 2023 to 8 February 2023 apart from these two bills of entries, which are also dated 8 February 2023, there were consignments in relation to seven bills of entries, as noted by us above, which were similar goods and identically situated which were released to the petitioner for home consumption, after the said bills of entries were assessed, on physical examination of the goods, more particularly, on the similar BIS compliances. The consignments in question, subject matter of the two bills of entries not

being cleared by the respondents, are not differently placed from the goods under other seven bills of entries which stand cleared.

16. The respondents in not permitting release of the goods, whether at all are justified in doing so, can now be considered.

17. As noted above, the basic contention as urged on behalf of the respondents is of the consignment in question as sought to be cleared by the petitioner not being in conformity with the BIS standards, inasmuch as the "actual product" as sought to be imported has not been affixed with the BIS mark and which, according to the respondents, ought to have been undertaken by the manufacturer. In this regard, one of the admitted facts is to the effect that the product is manufactured by a foreign manufacturer known as "Panasonic", which has obtained a registration licence / under the 2018 Regulation. Also that Panasonic has affixed the BIS mark on the package of the product.

18. As to whether the contention of the respondents that the BIS mark as affixed on the package would not suffice the requirement of labelling of the BIS mark, and whether the mark should have been actually fixed on the product, would be required to be tested. The answer to this would clearly depend on the requirements as stipulated by the 2018 Regulation, and primarily the purport of Regulation 6 of the 2018 Regulation. The relevant extracts of the 2018 Regulation read thus:-

"Schedule – II

Scheme – I … .. … …

. .. .

Labelling and Marking requirements

6.(1) Each product or the package, as the case may be, shall be marked with the Standard Mark, as specified in Annexure-II.

… … … . …

Annexure-I

(Refer sub-paragraph (1) of paragraph 6 of Scheme II)

Guidelines for use of Standard Mark

The monogram of the 'Standard Mark' consists of the pictorial representation, drawn in the exact style as indicated in the figure in Annexure II and III and its photographic reduction and enlargement is permitted.

(i) The 'Standard Mark' can be displayed in single colour or multicolour as per the detials given below. The colour scheme for the Standard Mark to be used in multi-colour shall be used as indicated below.

(ii) The license shall display the 'Standard Mark' on the article or the packaging, as the case may be, in a manner so as to be easily visible.

(iii) The Standard Mark shall be legible, indelible and non-removable and the durability of marking shall be as per the provisions of the relevant Indian Standard, wherever applicable.

(iv) The display as IS number, registration number and words shall not be less than arial font size 6.

(v) Any device with an integrated display screen may present the Standard Mark electronically (e-labelling) in lieu of a physical presentation on the product."
(emphasis supplied)

19. Thus, the requirement of labelling and marking under paragraph 6 under Schedule II of the Regulation is clear to the effect that each "product" or the "package", "as the case may be", shall be marked with the Standard Mark, as specified in Annexure-II i.e. the sample illustrative mark. Thus, under the said regulations, it is clearly permissible to have a mark on the package, which requirement is met by the petitioner, in respect of the consignment in question of the two bills of entries.

20. The respondents despite the clear provisions of paragraph 6 of the Schedule II Scheme I of the 2018 Regulation (supra), in our opinion, have chosen not to apply the requirement as it stands, however, they are applying Public Notice No.136 of 2018 dated 8 October 2018 issued by the Office of the Commissioner of Customs, NS-III, Mumbai Customs Zone-II. The

relevant paragraph in regard to the labelling requirement, as set out in the said Public Notice and which is being applied to the consignment in question is also required to be noted, which reads thus:-

"Public Notice 136 of 2018
Dated: 08.10.2018
…. .. ..
.. ..

LABELLING REQUIREMENT:

6. It has been the legal requirement under the said "RCR Order" that the Standard Mark shall be placed on the product & the packaging both. However, if it is not feasible to place the same on the product for size constraints, it can be put on the packaging only. For the products with display screen, provisions of e-labelling of products also exist. Lable should display the Standard mark as notified vide Gazette No.2559 dated 01st
December 2015. http://bis.org.in/cert/GN CRS 04122015.pdf.
BIS does not permit the use of stickers for display of BIS Standard Mark on any of the products under its product certification scheme.

……."

21. On a plain reading of paragraph 6 of the above public notice, it appears that the Commissioner of Customs providing for such requirement under paragraph 6 has actually deviated from the requirements of the 2018 Regulations, and more particularly paragraph 6 of the labelling and marking requirements as contained in Schedule II of the Scheme I, under the said Regulations, as noted by us hereinabove. In taking the position as assailed, the respondents also could not have taken recourse to the applicability of "RCR orders" (Requirement For Compulsory Registration) inasmuch as the RCR order was wholly irrelevant, in so far as the present goods are concerned. This inasmuch as the RCR order was applicable only to the "electronic and information and technology goods", subject matter of Electronics and Information Technology Goods (Requirement For Compulsory Registration) Order 2012, which provides that the standard mark shall be placed on the product and packaging both. We have not been

informed by the respondent / Revenue that the consignment in question is a consignment falling under “RCR Order”. In any event, even in respect of RCR order it is clarified in paragraph 6 of the Public Notice No.136/2018 dated 8 October 2018, that if it is not feasible to place the same on the product for size constraints, it can be put on the packaging only. Thus, we are at a loss to understand as to how the labelling requirement as provided for in Public Notice No.136/2018 could be applied by the respondents to the consignment in question. This apart, Public Notice No.136/2018 in any case was clarified by the subsequent Public Notice No.157/2018 dated 13 December 2018 which reads thus :-

“Dated: 13.12.2018 PUBLIC NOTICE NO. 157/2018

Subject- Provisions related to display of labelling to be displayed

Attention of the Importers, Exporters, General Trade and all other stakeholders is invited to PN 136/2018, issued on 08.10.2018.

2. Para 6 thereof provided that, “BIS does not permit the use of stickers for display of BIS Standard Mark on any of the products under its product certification scheme,” This sentence is deleted with immediate effect. Consequently, the clearance of goods covered by the RCR Order should not be disallowed merely because stickers have been affixed to the goods to display the Standard Mark.

3. Further, it is directed that the provisions of Electronics and Information Technology Goods (Requirements for Compulsory Registration) Amendment Order 2016 under F.No. 37(I)/2013-IPHW/ (Pt.2) dated 10.02.2016 issued by Department of Electronics and Information and Technology (Deity)/ Ministry of Electronics and Information Technology (Meity) may be followed. This Order provides inter alia that where the Standard Mark has not been affixed on the imported goods already having unique registration number from the BIS, such mark may be affixed by representative of the manufacturing unit having liaison office or branch office located in India, for clearance of goods from Customs.

4. In case of any difficulty, the specific issue may be brought to the notice of Deputy/Assistant Commissioner in charge of DC/AC Group.

5. Action to be taken in terms of decisions taken in this Public Notice should be considered as standing order for the purpose of officers and staff.

6. This issues with the approval of the Chief Commissioner, Zone-II, Mumbai Customs.

(R. K. Mishra)
Commissioner of Customs,
NS-V, JNCH"

(emphasis supplied)

22. It is thus clear from the reading of paragraph 3 of the aforesaid notice that where the standard mark has not been affixed on the imported goods already having unique registration number from the BIS, such mark may be affixed by representative of the manufacturing unit having liaison office or branch office located in India, for clearance of goods from Customs. This is permitted, even to the goods which are covered by RCR. As insisted by the respondents and in our opinion, quite erroneously, even if such notice is applied to the goods in question, it cannot be the stand of the department that the 2018 Regulations and more particularly, paragraph 6 of Scheme I of Schedule II, is not relevant, when it mandates that the standard mark can be affixed on the package. It is not in dispute that in the present case, the standard mark is affixed on the package as evidenced from the photograph of the same (Exhibit E) as annexed to the petition at page 38A which is not in dispute.

23. In the above circumstances, we are of the clear opinion that there is no justification whatsoever on the part of the respondents, in not permitting to the petitioner, release of the consignments in question. In fact, we are quite surprised by the stand taken by the department and that too on complete misapplication of the provisions of the 2018 Regulations, as also the Circulars in question. Mr. Hidaytullah, in our opinion, would

be correct in his contention that such approach as adopted by the concerned officers of the customs is in fact high handed, unknown to law and the same being counter productive to the green initiatives of the Government of India, to promote electric vehicles.

24. We also find substance in the petitioner's contention that there is no justification whatsoever as to how a different yardstick could be applied by the respondents to the goods in question, when similar goods under seven bills of entries were released and only two bills of entries were subjected to an illegal detention by the respondents.

25. We have also heard learned counsel for the parties on the issue, as to what is the actual legal status of the goods in question, as on date. Mr. Subir Kumar, learned counsel for the respondents has fairly stated that there is no seizure memo issued and physical possession of the goods has not been taken over by the customs. There is nothing on record to indicate that the goods are actually seized under any seizure memo or physical possession of the goods are taken by the customs. If this is the situation, then certainly it is a case of a simplicitor detention of the goods without exercising powers under section 110, which was available to the Customs to seize the goods. It would not be in dispute that any seizure of the goods or physically taking over of the goods brings about legal consequences and the entire complexion of the proceedings insofar as the goods are concerned in the event of an act of seizure and/or the act of physically taking over the possession of the goods would undergo a change. The present proceedings are, therefore, in a peculiar situation that neither there is a seizure nor taking over of the possession of the goods as noted by us above.

26. We have also noted that there is a show cause notice issued to the petitioner under section 124 of the Act, by which the petitioner was called upon to show cause as to why the goods should not be confiscated. However, mere issuance of show cause notice under section 124 would not change the status of the goods, as they are lying today, which is simplicitor detention and

without seizure or any physical taking over of the goods as the law would mandate. If that be so, then there is no question of the provisions of Section 110A of the Customs Act being attracted, which inter alia provides for provisional release of goods "seized" under section 110 in the manner as prescribed by the said provision.

27. Although, we have discussed the basic reasons which would entitle the petitioner for release of the goods, we also note that the concerned officers of the respondents have now issued a show cause notice. We are of the opinion that although the show cause notice is challenged in the present proceedings, the proceedings of the show cause notice are required to be independently taken forward. We accordingly, permit the petitioner to reply to the show cause notice and the same be decided as expeditiously as possible in any event within a period of two months from the date, a reply to the show cause notice is filed.

28. In this view of the matter, in our opinion, the goods are illegally detained and without any powers being exercised by the customs authorities under section 110 of the Act and that too for such a long period. We are thus of the clear opinion that the petition needs to succeed. We, accordingly, are inclined to allow the petition in terms of prayer clauses (a) and (b).

29. Insofar as the show cause notice is concerned, we have already observed that the show cause notice needs to proceed independently. Let the same be proceeded in accordance with law and as observed by us hereinabove.

30. In view of the above discussion, we partly allow the petition by the following order:

ORDER

(i) The petition is allowed in terms of prayer clauses (a) and (b).

(ii) The show cause notice dated 01 September, 2023 be adjudicated in accordance with law, within a period of two months from the date a reply to the show cause notice is filed. All contentions of the parties on the adjudication of the show cause notice are expressly kept open.

31. Rule is made absolute in the above terms. No costs.