IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2017

CORAM

THE HONOURABLE MR.JUSTICE **T.S.SIVAGNANAM**

W.P.No.26795 of 2017 & W.M.P.No.28519 of 2017

M/s.Kawarlal & Co., rep. by its
Proprietor, K.Ramlal Jain,
Old No.166, New No.112,
GNT Road, Madhavaram,
Chennai-600 060. ... Petitioner

Vs.

1.The Joint Commissioner of
Customs (Gr.2), Custom House,
No.60, Rajaji Salai, Chennai-600 001.

2.The Commissioner of Customs
(Appeals-II), Custom House,
No.60, Rajaji Salai, Chennai-600 001. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling upon the records connected with Order-IN-Appeal SEA.C.Cus II No.631/2017 dated 25.09.2017, passed by the second respondent herein approving the order of the original authority, the first respondent herein, confiscating the consignment absolutely, covered under Bill of Entry No.6812982 dated 22.09.2016, without allowing its redemption and to quash the same, in so far as, the same has been passed without jurisdiction, excessive of authority of law and in clear violation to the principles of natural justice and consequently to direct the first respondent to release the goods covered under Bill of Entry No.6812982 dated 22.09.2016, viz., 6000 kgs of Tranexamic Acid BP2013 for re-export.

For Petitioner : Mr.Vijayanarayanan
Senior Counsel
for Mr.S.Baskaran

For Respondents : Mrs.R.Hemalatha,
Senior Panel Counsel

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O R D E R

Heard Mr.Vijayanarayanan, learned Senior Counsel representing Mr.S.Baskaran, learned counsel for the petitioner and Mrs.R.Hemalatha, learned Panel Counsel for the respondents. With the consent on either side, this writ petition itself is taken up for final disposal.

2.The petitioner is before this Court challenging an order passed by the second respondent, the Commissioner of Customs (Appeals-II) dated 25.09.2017.

3.The learned Senior Panel Counsel would submit that the petitioner has remedy of appeal as against the impugned order before the CESTAT and the writ petition is liable to be dismissed as not maintainable.

4.The learned Senior Counsel for the petitioner submits that in this writ petition the petitioner seeks for direction to permit them to re-export the cargo and the CESTAT does not exercise jurisdiction to pass interim orders for permitting re-export of the cargo imported by the petitioner and hence the writ petition is maintainable.

5.Considering the facts and circumstances of the case and as the issue involved lies in a very narrow compass, this Court entertained the writ petition and passed an order on 13.10.2017 to the following effect.

> *"Heard Mr. Vijayanarayan, the learned Senior Counsel appearing for M/s. S.Baskaran, the learned counsel for the petitioner.*
>
> *2.The petitioner is before this Court, challenging the order-in-original, passed by the first respondent, as affirmed by the second respondent, by order, dated 25.09.2017.*
>
> *3.The petitioner imported certain drugs from Chennai, and the Chinese suppliers stated to have issued a Certificate of Analysis. The petitioner's case is that, while mentioning the batch number, there is a difference in one of the alphabets in the batch number. This led to a dispute, as to whether the*

drugs can be allowed to be imported. The Drug Inspector of the Office of the Assistant, Drugs Controller (India), Customs House, Chennai, referred the sample drawn for testing with an Authorized Laboratory, vide letter, dated 28.09.2016. Referring to the test report, submitted by the Laboratory, the learned Senior Counsel pointed out that the Drug, which has been imported, complies with a pharmacopoeia requirement. However, the imported goods were not permitted to be cleared, on account that, it is not fit for human consumption, and therefore, the petitioner requested for re-export. At that juncture, a show cause notice, dated 30.12.2016 was issued, proposing to confiscate the drugs under Section 111 (m) of the Customs Act, 1962, and impose penalty. The petitioner submitted their objections. The first respondent, by order, dated 12.09.2017, which is after more than one year after the Bill of Entry was filed, rejected the reply/objections given by the petitioner, and ordered absolute confiscation of the goods and imposed penalty of Rs.50,00,000/-and rejected the claim for re-export. As against which, the petitioner preferred an Appeal to the second respondent. The second respondent, while granting partial relief to the petitioner, by reducing the penalty from Rs.50,00,000/- to Rs.23,00,000/- observed that the

Original Authority was wrong in invoking Section 111 (m) of the Customs Act, and the correct provision would be, Section 111 (d) of the Customs Act.

4.It is submitted by the learned Senior Counsel that the Appellate Authority/second respondent has accepted the submission of the petitioner that, in terms of Rule 41 of the Drugs and Cosmetics Act, 1940, the option for re-export is with the petitioner, and therefore, both the Authorities could not have rejected the request made by the petitioner for re-export. That apart, the Authorized Laboratory has certified that the sample drawn confirms to the standards. In such circumstances, it cannot be stated that the Drugs are spurious, because, Certificate of Analysis is given by Chinese Suppliers, and the respondents are not entitled to invoke Section 9 (D) (d) of the Drugs and Cosmetics Act, 1940.

5.The learned Senior Counsel further submits that, it is no doubt true that the petitioner has an Appellate remedy by filing further Appeal before the Customs, Excise Service Tax Appellate Tribunal (CESTAT), and the CESTAT has jurisdiction to grant an order of re-export, but the said remedy is not efficacious, for, by the time, Appeal is heard and disposed of by CESTAT, potency of the drugs would *be lost, and the petitioner would be put to irreparable hardship. Therefore, it is submitted that the Writ Petition can be entertained.*

6.I find from the show cause notice, dated 30.12.2016, there is a reference to a letter certified by the Assistant Drug Controller (India) Customs, Chennai, dated 23.11.2016. This appears to have formed the basis for issuance of the show cause notice. In the order-in-original passed by the first respondent, there is a reference to the direction issued by the Directorate General of Heath Services, New Delhi, vide letter, dated 18.07.2017, stating that the import relates to spurious drugs, as affirmed by the Assistant Drug Controller (I) Port Office, Chennai, and authorized Indian Agent, M/s. Eastern Chemicals (Mumbai) Private Ltd., and it would not be appropriate to allow the re-export. This appears to have been one another reason for rejection of the petitioner's request for re-export. Notice.

7.Mrs. R.Hemalatha, the learned Senior Panel Counsel, accepts notice on behalf of the respondents. The Senior Panel Counsel is directed to get instructions and also produce a copy of the letters written by the Assistant Drug Controller (India) Customs, Chennai, dated 23.11.2016 and the Directorate General of Heath Services, New Delhi, vide letter, dated 18.07.2017.

List the matter on 26.10.2017."

6.On a reading of the above order, it is seen that the cargo imported by the petitioner has been defined as "spurious", which is not on account of the fact that it is unfit for human consumption and is on account of the fact that there is a mis-match in the batch number of the products, which consists of four alphabets and six numericals. For illustration, the batch number as per the commercial invoice is TFHG 160401, in the certificate of analysis issued at China, the sample batch number has been shown as YFHG 106410. Thus, the mistake appears to in the first alphabet of the batch number. This, according to the petitioner cannot be taken to term the goods to be spurious in nature as it is a typographical mistake. Further, the authorised lab has certified vide certificate dated 30.09.2015, that the sample is in compliance as per the British Pharmocopia (BP). The petitioner had attempted to obtain clarification from the Chinese suppliers and they were unable to secure any information, but ultimately a show cause notice was issued to the petitioner stating that the batch number mentioned in the certificate of analysis did not match with the batch number in the commercial invoice. The petitioner submitted their explanation and the adjudicating authority confirmed the proposal in the show cause notice and ordered absolute confiscation of the goods, imposed penalty and rejected the request for re-export of consignment. This was confirmed by the Appellate Authority. In order to ascertain as to whether the product was spurious or not, this Court issued an interim direction on 26.10.2017 to the following effect:

> *"Heard Mr.Vijaynarayan, learned Senior Counsel appearing for Mr.S.Baskaran, learned counsel on record for the petitioner.*
>
> *2. On 13.10.2017, this Court, after hearing the arguments of the learned counsel on either side, formulated issues, which would fall for consideration in the writ petition. The learned Senior Panel Counsel appearing for the respondents was directed to get instructions and produce copies of three letters, which the learned counsel has produced before this Court. On a perusal of those letters, which emanate from the office of the Drugs Controller General of India/Assistant Drugs Controller of India, it is seen that the imported material has been mentioned as 'spurious drug' as defined under the provisions of the Drugs and Cosmetics Act, 1940 and the Rules framed thereunder.*
>
> *3. Those communications, which are placed before this Court, emanate from the Drugs Controller and at the same time, appear to have not suggested that the product is either adulterated or spurious drug and unfit for human consumption or other usage. It is*

relevant to note that at the instance of the Assistant Controller of Drugs, Chennai, representative samples were drawn and sent to an approved laboratory for testing on 28.9.2016. The laboratory concerned, by report dated 30.9.2016, clarified that it complies as per "B.P". Thus, the laboratory report appears to be the sheet anchor of the case of the petitioner.

4. In the light of these facts, this Court is of the view that pending disposal of the writ petition, the respondents can be directed to draw a sample and get the same tested with the Central Laboratory. It is made clear that such testing of the sample is without prejudice to the rights of the Department and is only with a view to assist this Court in the decision to be taken in the writ petition.

5. Accordingly, there will be an interim direction directing the first respondent to draw samples from the consignment imported by the petitioner, which are stated to have been stored in a warehouse at Numbal, Chennai-77, in the presence of the importer. The samples shall be sent to the Central Laboratory mentioning the date, on which, the sample is drawn as well as the date, on which, the goods were imported. On the next hearing date, along with the counter, the respondents shall submit the test report from the Central Laboratory.

6. List on 27.11.2017."

7.Pursuant to the above direction, the samples were drawn in six batches and forwarded to the Central Drugs Testing Laboratory, Chennai and a certificate has been issued by the Director of the said Laboratory dated 22.11.2017, certifying that the samples referred are all standard quality as defined in the Drugs and Cosmetics Act, 1940 and Rules thereunder and it conforms the IP specification with regard to the test performance. Thus, this Court is satisfied that the samples are not spurious, in the sense that it is not unfit for human consumption etc.

8.However, the learned Senior Panel Counsel would contend that in view of the definition of "spurious drugs" as defined under Section 9B of the Drugs and Cosmetics Act, since there is a mismatch in the batch number of the product, the respondents were justified in passing the impugned orders. At this juncture, it would be worthwhile to refer to Rule 41 of the Drugs and Cosmetics Rules, which would take care of the situation as arising in the instant case. For better understanding, the Rule is quoted hereunder:

> *"41.(1) If the Director of the laboratory appointed for the purpose by the Central Government*

or any other officer empowered by him on this behalf,

subject to the approval of the Central Government, reports to the Customs Collector that the samples of any drug in a consignment are not of standard quality, or that the drug contravenes in any other respect the provisions of Chapter III of the Act or the Rules thereunder and that the contravention is such that it cannot be remedied by the importer, the Customs Collector shall communicate the report forthwith to the importer who shall, within two months of his receiving the communication either export all the drugs of that description in the consignment, to the country in which they were manufactured or forfeit them to the Central Government which shall cause them to be destroyed."

9.In terms of the above Rule, if the drug contravenes in any other respect, the provisions of Chapter III of the Drugs and Cosmetics Act or the Rules thereunder and that the contravention is such that it cannot be remedied by the importer, the Customs Collector shall communicate the report forthwith to the importer, who shall, within two months of his receiving the communication either export all the drugs of that description in the consignment, to the country in which they were manufactured or forfeit them to the Central Government which shall cause them to be destroyed. Thus, the allegation against the petitioner is that is contravened in respect of the other provisions of Chapter III of the Drugs and Cosmetics Act and as on date, the petitioner has obtained an amended certificate of analysis with correct batch number. In such circumstances, the first option to be given to the petitioner/importer is for re-export of the product and it is only thereafter the respondent could exercise the power to order for confiscation of the consignment. This option has not been given to the petitioner. This Court is of the view that such option should be extended to the petitioner, as otherwise, it may lead to civil consequences. Therefore, to that extent, this Court is inclined to interfere with the impugned order.

10.Accordingly, this writ petition is partly allowed, the finding rendered by the respondents rejecting the petitioner's request for re-export of the cargo is set aside and the respondents are directed to permit the petitioner to re-export the cargo within a period of one month from the date of receipt of a copy of this order. With regard to the other aspects viz., levy of penalty, the petitioner is granted liberty to file an appeal before the CESTAT. If the appeal is presented before the CESTAT, the CESTAT shall exclude the period from 11.10.2017, till the date of receipt of the certified copy of this order for the purpose of computing limitation. No costs. Consequently, connected miscellaneous petition is closed.

12.12.2017

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Index:Yes
Note : Registry is directed to return
the original impugned order

To

1.The Joint Commissioner of
Customs (Gr.2), Custom House,
No.60, Rajaji Salai, Chennai-600 001.

2.The Commissioner of Customs
(Appeals-II), Custom House,
No.60, Rajaji Salai, Chennai-600 001.

T.S.SIVAGNANAM, J.
abr

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