IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2451 OF 2020

Jaymco Polymers P. Ltd. … Petitioner
Vs.
Union of India and others … Respondents

WITH
WRIT PETITION NO.2499 OF 2020

M. M. Trading Co. … Petitioner
Vs.
Union of India and others … Respondents

WITH
WRIT PETITION NO.2501 OF 2020

M. V. B. Enterprises … Petitioner
Vs.
Union of India & Ors. … Respondents

Dr. Sujay Kantawala a/w Mr. Anupam Dighe, Ms. Chandani Tanna & Ms. Shrushti Relekar i/by India Law Alliance, Advocates for the petitioners in all matters.

Mr. Pradeep Jetly a/w Mr. J. B. Mishra, Advocates for the respondents in all matters.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.

DATE : SEPTEMBER 22, 2020

ORDER : (*Per Ujjal Bhuyan, J.*)

This order will dispose off all the above three writ petitions.

2. Heard Dr. Sujay Kantawala, learned counsel for the petitioners and Mr. Jetly, learned senior counsel with Mr. J. B. Mishra, learned counsel for the respondents.

3. In Writ Petition No.2451 of 2020, petitioner is Jaymco Polymers Private Limited, a private limited company having its corporate office at

Anand Nagar, MIDC, Ambernath. By filing this petition under Article 226 of the Constitution of India, petitioner seeks to set aside and quash the following:-

1) seizure memo dated 30.12.2019 seizing the mobile phone of the petitioner;
2) test report No.231 dated 17.12.2019 and seizure memo dated 30.12.2019 in respect of bill of entry dated 10.12.2019;
3) test report No.232 dated 17.12.2019 and seizure memo dated 30.12.2019 in respect of bill of entry dated 10.12.2019;
4) test report No.18 dated 07.01.2020 in respect of bill of entry dated 17.12.2019;
5) test report No.19 dated 07.01.2020 and seizure memo dated 15.01.2020 in respect of bill of entry dated 25.12.2019;
6) to allow re-testing of the goods in another approved laboratory;
7) to allow release of the goods covered by all the bills of entry;
8) to allow presence of a lawyer during interrogation / investigation of the petitioner; and
9) to issue a detention certificate in respect of the goods covered by all the bills of entry which have been seized till release of the goods for waiver of demurrage charges.

4. In Writ Petition No.2499 of 2020, M. M. Trading Company, a proprietary concern of the proprietor, Murtuza M. Bhimani is the petitioner. By this petition under Article 226 of the Constitution of India, petitioner has sought for the following reliefs:-

1) to quash and set aside test report dated 10.01.2020 and seizure memo dated 15.01.2020 in respect of bill of entry dated 04.01.2020;
2) to allow re-testing of the goods by another government recognized laboratory;
3) to allow release of goods under bill of entry dated 04.01.2020;
4) to allow presence of an advocate in the course of interrogation

/ investigation of the petitioner in connection with bill of entry dated 04.01.2020; and

5) to issue a detention certificate in respect of the goods seized *vide* seizure memo dated 15.01.2020 for the purpose of waiver of demurrage charges incurred till release of the goods.

5. In Writ Petition No.2501 of 2020, M. V. B. Enterprises, a proprietary concern of Jethanand B. Rohra, the proprietor is the petitioner and he has filed the writ petition seeking the following reliefs:-

1) to set aside and quash test report dated 07.01.2020 and seizure memo dated 16.01.2020 in connection with bill of entry dated 04.01.2020;
2) to allow re-testing of the goods by another government recognized laboratory;
3) to allow release of the goods under bill of entry dated 04.01.2020;
4) to allow presence of an advocate in the course of interrogation / investigation of the petitioner; and
5) to issue a detention certificate in respect of the goods seized *vide* seizure memo dated 16.01.2020 for the purpose of waiver of demurrage charges incurred till release of the said goods.

6. Subject matter of the three writ petitions being identical, those were heard together and are being disposed off by this common order. However, learned counsel for the parties had argued Writ Petition No.2451 of 2020 i.e., *Jaymco Polymers Private Limited Vs. Union of India* as the lead case. In that view of the matter, facts and pleadings of the said case are being referred to in the judgment.

7. By the various bills of entry, petitioner had imported several containers of mineral hydrocarbon oil. It is stated that on reaching the port of destination, the goods were assessed and thereafter customs duty

was levied and paid. However, petitioner was informed by respondent Nos.3 and 4 that the containers were kept on hold to carry out inspection. It appears that samples were drawn from various containers and forwarded for testing to approved laboratory. Reports in respect of the samples drawn were received from the approved laboratory which showed that the goods declared as mineral hydrocarbon oil were in fact kerosene. In view of the said development, petitioner requested for re-testing. However, the goods were seized on the ground that those were liable for confiscation under section 111(m) of the Customs Act, 1962 (briefly the 'Customs Act').

8. Petitioner has alleged that because of such detention and seizure, it has been compelled to pay heavy detention and demurrage charges. It is further alleged that in the course of interrogation, managing director of the petitioner Shri. Jethanand B. Rohra was subjected to coercion and his confessional statement was recorded under duress. His mobile phone was seized. It is stated that the managing director subsequently retracted his confessional statement.

9. Petitioner by letters dated 20.01.2020 and 21.01.2020 requested respondent Nos.2 and 3 for re-testing of the samples and for provisional release of the goods. Both the requests for re-testing and provisional release of the goods were rejected.

10. It is under such circumstances that the present writ petition has been filed seeking the reliefs as indicated above.

11. Respondents have filed affidavit in reply. Stand taken in the affidavit is that on the basis of intelligence / information regarding large scale mis-declaration of goods as mineral hydrocarbon oil with a view to smuggle in kerosene / diesel by some importers, investigation was taken up by the Special Investigation & Intelligence Branch (Imports) on 15.11.2019. Suspected containers were thereafter put on hold for

drawing of samples for testing in approved laboratory as per parameters prescribed by the Bureau of Indian Standard. It is stated that test report of the samples of various bills of entry did not match with the product description and accordingly those were seized. It is further stated that five bills of entry of the petitioner, viz, 10.12.2019, 10.12.2019, 17.12.2019, 25.12.2019 and 04.01.2020 were put on hold. The samples were drawn in presence of representatives of the petitioner and two independent witnesses and forwarded to DYCC, an approved laboratory. On the basis of the test reports which stated that the goods met the specifications of kerosene and diesel, the offending goods were seized. However, permission for warehousing was granted on 07.02.2020. Statement of the petitioner was recorded on 31.12.2019 where he admitted that the goods imported was kerosene and not mineral hydrocarbon oil. On examination, mobile phone of Mr. Jethanand B. Rohra who had appeared for the petitioner was seized *vide* seizure memo dated 31.12.2019 / 01.01.2020. Customs broker was also summoned but he failed to appear.

11.1. It is further stated that kerosene and high speed diesel are goods which are restricted for import only by State Trading Enterprises under the relevant import policy. Therefore, such goods being imported by other entities would be classified as prohibited goods under section 2(33) of the Customs Act. Being prohibited goods, those were seized under section 110 of the Customs Act. That apart, being prohibited goods those could not be provisionally released in view of internal circular of the department dated 16.08.2017 to the effect that provisional release shall not be allowed in case of prohibited goods. Allegation of the petitioner regarding extraction of confessional statement under coercion or duress has been denied. Retraction of the confessional statement by Mr. Jethanand B. Rohra has been rejected as the same was made voluntarily in his own handwriting. Petitioner’s request for re-testing has also been denied on the basis of evidence recovered during investigation and conduct of the importer being not bonafide.

12. This Court by order dated 03.07.2020 noted the submission of learned counsel for the petitioner that the goods are fire hazardous and posed imminent danger because of the manner in which those were stored at present. This Court granted liberty to the petitioner to file an affidavit on the above aspect while making it clear that hearing of the petition would be restricted to apprehension of the petitioner that the goods are a fire hazard to the general public.

13. Thereafter petitioner filed additional affidavit pointing out the hazardness of the goods seized.

14. On 03.08.2020, this Court had passed the following order:-

> "2. On a query by the court learned counsel for the petitioner makes a statement that the goods presently stored are in danger of being damaged in which event serious prejudice will be caused to the petitioner. He therefore, makes a submission that under the supervision of the respondent authorities petitioner may be permitted to shift the goods to a safer place.
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> 3. Learned counsel for the respondents seeks time to obtain instructions in this regard.
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> 4. Stand over to 6th August, 2020."

15. Mr. Gaurav Kumar Jain, Deputy Commissioner of Customs has filed an affidavit responding to the additional affidavit of the petitioner. In the said affidavit it is stated that petitioner had imported goods in flexi tanks / bags. As per test report the goods were found to meet the standard specification of kerosene which is a restricted item for import. Petitioner's request to keep the goods in customs bonded warehouse under section 49 of the Customs Act was allowed. However, it was submitted that the Court may consider allowing transfer of goods to drums under customs escort in any customs bonded warehouse.

16. On 10.08.2020, the following order was passed by this Court:-

> "4. Learned counsel for the Petitioner submits that going by the stand of respondents, it is not feasible for the Petitioner to

shift the inflammable goods (kerosene oil according to the Respondents) for dispatch by the Petitioner from flexi tanks / bags to drums. However, he has circulated an order dated 12/07/2019 passed by the Joint Commissioner of Customs, Nhava Sheva, Raigad, which is an order in original in the case of M/s. Amit Petroleum Pvt. Ltd. and submits that Petitioner would be agreeable to the conditions imposed in that order for release of the goods. Dr. Kantawala, learned counsel for the petitioners further submits that Petitioner may be given liberty to approach Respondent No.2, Commissioner of Customs (NS-V), Nhava Sheva, Raigad to make his submissions in this regard.

5. Mr. Jetley, learned senior counsel has no objection to the prayer made.

6. In view of the above, we grant liberty to the Petitioner to approach Respondent No.2, Commissioner of Customs (NS-V), Nhava Sheva, Raigad for making necessary submissions for release of the seized goods. Without expressing any opinion on merit, we make it clear that Respondent No.2 may take a decision in the matter and pass an appropriate order notwithstanding pendency of the present Writ Petition. Such decision shall be taken within a period of 2 (two) weeks from the date of appearance of the Petitioner and communicated to the petitioner.

7. Stand over to 03/09/2020."

17. In the meanwhile, an affidavit was filed by one Taranjeet Singh Rathore, an employee of the customs broker M/s. IOCC Shipping Private Limited wherein he alleged that the investigating officer of the case Mr. Nirmal Jharwal had forcefully taken him to his office without giving him any summons. Thereafter his statement was recorded by a team of officers headed by Mr. Jharwal. He has made various statements alleging mistreatment and duress. According to him, there was no mis-declaration of the goods covered by the bills of entry.

18. When the matter was taken up on 08.09.2020, it was recorded that the adjudicating authority had passed three separate orders dated 31.08.2020 allowing provisional release of the goods subject to the conditions mentioned therein. In the course of the hearing when learned counsel for the petitioner raised grievance as to the conditions imposed for provisional release, it was mentioned on behalf of the respondents

that if the petitioner is aggrieved by the conditions imposed for provisional release of the goods, the remedy is by way of appeal. When it was pointed out that the statute does not provide for any appeal against an order of provisional release passed under section 110-A of the Customs Act, it was submitted at the bar that this Court had passed judgments to that effect. Hearing of the case was deferred giving liberty to learned counsel for the parties to circulate such judgments.

19. On the next date i.e., on 10.09.2020, the judgments were circulated and the matter was heard. In the course of hearing, we had looked into the order dated 31.08.2020 passed by the Commissioner of Customs under section 110-A of the Customs Act. Our attention was drawn to the amount in clauses (i) and (ii) of paragraph 18 of the said order. Thereafter respondents were directed to file a signed statement explaining as to how the said figures were arrived at.

20. A signed statement was filed by the Commissioner of Customs explaining as to how the figures were arrived at whereafter the matter was finally heard and closed for orders to be delivered today.

21. Dr. Kantawala, learned counsel for the petitioner submits that the manner in which Commissioner of Customs has passed the order dated 31.08.2020 under section 110-A of the Customs Act is against the letter and spirit of the order of this Court dated 10.08.2020. This Court had directed the Commissioner to pass an appropriate order regarding provisional release of the goods after considering the order-in-original passed in the case of M/s. Amit Petroleum Private Limited. Instead of passing an order similar to one passed in M/s. Amit Petroleum Private Limited, Commissioner has passed the order dated 31.08.2020 declining to maintain parity and imposing unreasonably harsh conditions. Such action is extremely high-handed and arbitrary, he submits. Conditions imposed are not at all capable of compliance. He contends that the conditions imposed by the Commissioner are contrary to and even

beyond the circular dated 16.08.2017 of the Central Board of Excise and Customs. Besides, Commissioner has levied excise duty on the estimated market value of the goods thus leading to double levy of customs duty. Petitioner has been penalized for approaching the Court. It is nothing but an abuse of power and authority.

21.1. Dr. Kantawala has referred to section 125 of the Customs Act to contend that whenever confiscation is authorized in respect of prohibited goods, the adjudicating officer may give to the owner of the goods an option to pay fine in lieu of confiscation. Referring to the inflammable and hazardous nature of the seized goods, he submits that under section 48 of the Customs Act such goods may be sold by the person having custody at any time. In this connection, he has referred to clause 2.3 of Chapter 2 of the Disposal Manual, 2019 of the Central Board of Indirect Taxes and Customs. He has also referred to instructions dated 22.07.2010 issued by the Central Board of Excise and Customs regarding expeditious disposal of hazardous goods.

21.2. He submits that the conditions imposed by the Commissioner are so absurd and abnormal that it would be better if the goods are sold by the department which will also reflect the true market value of the goods which can thereafter be retained by the department till the proceedings are over. In this connection, he makes an alternative prayer that he may be given liberty to approach the Commissioner or such other authority for sale of the seized goods.

21.3. Finally, Dr. Kantawala has referred to a decision of the Delhi High Court in *Shilp Impex Vs. Union of India*, **128 ELT 54**, which was affirmed by the Supreme Court in **140 ELT 3**. He has also relied upon a decision of the Calcutta High Court in *Ratan Lal Jain Vs. Union of India*, **349 ELT 468**.

22. *Per contra*, Mr. Jetly submits that this Court in the order dated

10.08.2020 had directed the Commissioner to take a decision one way or the other on the prayer of the petitioner for release of the goods seized. Thereafter, he has passed a reasoned order dated 31.08.2020 granting provisional release of the seized goods with conditions. If the petitioner is aggrieved by the conditions, he may prefer appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

23. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

24. Following the order of this Court dated 10.08.2020 and passing of order dated 31.08.2020 by the Commissioner under section 110-A of the Customs Act, the controversy has narrowed down considerably.

25. This Court in **Customs Appeal (L) No.51 of 2017** [*Commissioner of Customs (Import-I) Vs. S. S. Offshore Pvt. Ltd.*] was considering the question as to whether Customs, Excise and Service Tax Appellate Tribunal i.e., CESTAT has the jurisdiction to entertain an appeal against a letter allowing provisional release of vessel under section 110-A of the Customs Act. After threadbare discussion on various provisions of the Customs Act and judicial pronouncements, this Court held that such a letter / communication given is a decision within the meaning of section 110-A of the Customs Act and would be appealable under section 129A(1)(a) of the Customs Act. This Court noted that similar view has been taken by the Delhi High Court as well as by the Rajasthan High Court.

26. The said decision in **S. S. Offshore Private Limited** (*supra*) has been consistently followed by this Court thereafter.

27. At this stage, we may advert to the order dated 31.08.2020 and the explanation given thereto by the Commissioner. Commissioner referred to the board circular dated 16.08.2017 as well as to the decision in M/s.

Amit Petroleum Private Limited.

27.1. Central Board of Excise and Customs *vide* circular No.35/2017 dated 16.08.2017 has issued guidelines for the provisional release of seized imported goods under section 110A pending adjudication on the following conditions:-

i) Execution of bond of full value / estimated value of the seized goods;

ii) Bank guarantee or security deposit to cover the entire amount of duty / differential duty on seized goods being provisionally released;

iii) Fine that may be levied in lieu of confiscation of the goods and amount of penalty that may be levied.

27.2. In so far the decision in M/s. Amit Petroleum Pvt. Ltd. is concerned, we find that it is an order in original dated 12.07.2019 passed by the Joint Commissioner of Customs, NS-I. In that case, the importer had sought clearance for low aromatic white spirit which was imported from overseas supplier. The goods were examined and thereafter samples were drawn. Samples were sent to approved laboratory. As per the test report, it was found that the samples met the standard specification of superior kerosene oil and not low aromatic white spirit. Following adjudication, the adjudicating authority held that the said importation was liable for confiscation under sections 111(d) and (m) of the Customs Act but took the view that the goods could be redeemed on payment of redemption fine, penalty etc. While rejecting the declared classification of the imported goods, he ordered confiscation of the imported goods but gave an option to the importer to redeem the same on payment of redemption fine of Rs.3,00,000.00 and penalty of Rs.1,00,000.00.

27.3. While passing the order dated 31.08.2020, Commissioner has not discussed about the conditions laid down in the circular of the board but he has commented on the decision in Amit Petroleum Pvt. Ltd. According to the Commissioner, the said decision is not applicable to the case of the petitioner because presently investigation is still in progress and the case is not ripe for adjudication. Department has not accepted the said decision as well as that of Commissioner of Appeals and is filing appeal before CESTAT.

28. While we do not want to comment on the above stand taken by the Commissioner at this stage, it may be mentioned that the Commissioner ultimately granted provisional release of the goods on the following conditions:-

> "18. In view of the above and considering the facts, the provisional release of the goods covered under the five Bills of Entry (i) 6024354 dated 10.12.2019 (ii) 6025517 dated 10.12.2019 (iii) 6227454 dated 25.12.2019 (iv) 6356219 dated 04.1.2010 and (v) 6110507 dated 17.12.2019 is offered subject to following conditions:
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> (i) Execution of Bond of Rs.29036082/- being the market value of the goods;
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> (ii) Security deposit of Rs.37732753/- on account of differential duty, Redemption Fine and Penalty that may be levied at the time of adjudication; and
>
> (iii) Payment of self-assessed duty in respect of Bills of Entry No. 6227454 dated 25.12.2019 and 6356219 dated 04.1.2020 where self-assessed duty is not paid."

29. When this Court called upon the respondents to explain the figures mentioned in clauses (i) and (ii) of paragraph 18 as extracted above, the Commissioner has given an explanation by way of a signed statement.

29.1. We have already noted the contention of learned counsel for the petitioner that the conditions imposed by the Commissioner while granting provisional release is extremely unreasonable and incapable of any compliance.

30. Though respondents in their affidavits had taken the stand that

provisional release of the goods could not be made as the goods were categorized under prohibited category, it may not be necessary to delve into this aspect of the matter as the Commissioner has already passed order under section 110-A of the Customs Act offering provisional release. However, it needs to be mentioned that this Court in the case of *Sidharth Vijay Shah Vs. Union of India* decided on **08.09.2020** had examined the provisions of section 110-A of the Customs Act, whereafter it has been held that no limitation has been imposed in section 110-A that goods which may be categorized as prohibited goods under section 2(33) of the Act cannot be provisionally released. No restriction or restrictive meaning can be read into the said provision. In the said case, this Court interpreted section 110-A and took the view that the aforesaid section provides a pragmatic mechanism to facilitate provisional release of seized goods etc. to the owner pending adjudication but at the same time protecting the interest of the revenue. Keeping the above in mind, the provision is required to be understood and applied.

31. The goods in question have been seized under section 110 of the Customs Act. From a reading of sub-section (1) of section 110, it is evident that seizure of a good is not an end in itself. It is a means to an end. The end is confiscation, if justified and warranted. From the pleadings it is seen that the goods were put on hold and thereafter seized in the first week of January, 2020. Considering that the goods in question, be it mineral hydrocarbon oil as claimed by the petitioner or kerosene / high speed diesel as claimed by the respondents, are highly inflammable and hazardous, a proceeding related thereto is required to be decided expeditiously. The adjudicating authority is required to decide whether goods are liable for confiscation or not; adjudication cannot be kept pending. He may also have to decide whether the goods should be sold or not having regard to the hazardous and inflammable nature of the goods.

32. Thus, having regard to the above and after due consideration we are of the view that the following directions will meet the ends of justice:-

1) Petitioner is granted liberty to file appeal before the CESTAT under section 129-A(1)(a) of the Customs Act against the order dated 31.08.2020;
2) If such appeal is filed within a period of four weeks from today and an application is made for early hearing, CESTAT shall decide the appeal within a period of four weeks thereafter considering the limited nature of the grievance of the petitioner;
3) In so far adjudication process is concerned, let the adjudicating authority initiate the adjudication process by issuance of show cause notice under section 124 of the Customs Act and take the proceeding to its logical conclusion one way or the other by following the due procedure and principles of natural justice within a period of four weeks from the date of receipt of a copy of this order;
4) Petitioner is also granted liberty to file application before the respondents for sale of the seized goods and if such application is filed, respondents shall take a considered decision thereon in accordance with law within a period of two weeks from the date of receipt of the application with due intimation to the petitioner;
5) All contentions are kept open and we have not expressed any opinion on merit or otherwise.

33. Above directions will also be applicable in Writ Petition Nos.2499 of 2020 and 2501 of 2020.

34. All the writ petitions are accordingly disposed off but without any order as to costs.

35. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(ABHAY AHUJA , J.) **(UJJAL BHUYAN, J.)**

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