IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: **17.02.2020**

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Contempt Petition No.2138 of 2019
&
Sub-Application No.605 of 2019

M/s.Carenow Medical Prviate Limited
Rep. by its Director
& the auth. Rep.T.Rajkumar
Aged 42 year
3/272-5, Neelambur Road
Muthugounder Pudhur
Coimbatore – 641 406 .. Petitioner in Contempt Petition and Sub Application

Vs.

Mr.Rajesh Sodhi
The Principal Commissioner of GST & Central Excise
6/7 ATD Street
Race Course Road
Coimbatore .. Respondent in Contempt Petition and Sub Application

Contempt petition filed under Section 11 of Contempt of Courts Act, 1971 to punish the respondent for his wilful disobedience to the order passed by this Court in W.P.No.9570 of 2019 dated 06.06.2019.

Sub Application No.605 of 2019

To stay all the proceedings pertaining to the show cause Notice No.1/2018 dated 02.11.2018 on the file of the respondent herein and thus render Justice.

For Petitioner : Mr.J.V.Niranjan

ORDER

Mr.J.V.Niranjan, learned counsel for writ petitioner is before this Court. Instant contempt petition has been filed complaining of willful disobedience of order dated 06.06.2019 made by this Court in W.P.No.9570 of 2019 and W.M.P.Nos.10187 and 10188 of 2019 therein.

2.The crux and gravamen of the issue in the writ petition has been captured in Paragraphs 6 and 7 of the order in the writ petition and WMPs therein, which reads as follows:

'6. The petitioner manufactures goods which are known as 'Eco Bath Wipes'. It is submitted that this is essentially a hospital product, which is used for patients, who have difficulty in going through regular bathing exercise. Be that as it may, the central theme of the controversy is classification

of this product under the Central Excise Act, 1944, ('CE Act' for brevity).

7. To be precise, the central controversy is whether the aforesaid product i.e., Eco Bath Wipes has to be classified under CETH 34029091- 'washing preparations (including auxiliary washing preparations) and cleaning preparations, having a basis of soap or other organic surface active agents' or under CETH33073090-'Other bath preparations – others'.

3. Instant contempt petition is predicated on the allegation that retest has not been done in accordance with the Basic Excise Manual, which according to learned counsel, is relevant. This is articulated in Paragraph 16 of the affidavit filed in support of instant contempt petition, which reads as follows:

'16. I state that the Extract of the Basic Excise Manual with the regard to the above is as follows:

Procedure for testing and re-testing of samples drawn by the Department

8.1. Except where there are special instructions for particular kind of samples, the representatives samples from such or any lot must be drawn in quadruplicate in the presence of the owner / manager of the factory or his representatives.

8.2. The quantities of excisable goods or materials taken for testing should be the minimum necessary for testing and *the Commissioner will, in consultation with the Chemical Examiner concerned, specify for each kind of excisable goods or materials the size of samples for this purpose.*

8.3. The samples should be sealed with Excise seals and a declaration obtained from the owners (manufactures) to the effect that the samples drawn are representative of the lot. The assessee, if he so desires, may also be permitted to affix his seal on the samples.

8.4. The four samples drawn for test should be clearly marked as: 'Original for Chemical Examiner' (to be despatched to him along with the declaration and the relative test memorandum under intimation to the Assistant/Deputy Commissioner concerned).

Duplicate to be sent to the Deputy /Assistant Commissioner of Central Excise (to be forwarded to him for safe custody for further use in case a dispute arises)

Triplicate for Range Officer (to be retained for any future reference or to cover loss by post or other emergency)

Quadruplicate to be given to the manufacturer (for his own record)

8.5.Before despatch of sample to the Deputy/Assistant Commissioner of Central Excise and the Chemical Engineer, the samples should be packed properly, sealed and marked in such a way that they suffer no loss or deterioration in transit or subsequent storage.

8.6. The Chemical Examiner after test, will return the *remnant sample, if fit for re-test and not in other cases, together with his test report, to the Assistant Commissioner concerned. The Chemical Examiner will be in position to indicate whether or not a remnant is fit for re-test and the Deputy/Assistant Commissioner of Central Excise or other adjudicating authority will in most cases be able to anticipate whether the assessee will demand a re-test or not. The test results should be speedily communicated to the Assessee.*

8.7. The Department shall carefully preserve the remnant sample.

8.8. Whenever the assessee is dissatisfied with the test carried out by the Chemical Examiner he can apply to the Deputy/Assistant Commissioner of Central Excise concerned, after payment of the prescribed test fees, for a retest within 90 days from the date on which the test result was communicated to the him.'

4. Specific attention of this Court was drawn to Clause 8.4 of the aforementioned manual. It was submitted that the writ petitioner has stopped manufacturing Eco-bath Towlettes and therefore, the retest ought not to have been conducted by drawing new samples, but should have been conducted in the samples that have already been drawn.

5. In the instant case, there are two aspects of the matter. One is, there is a shelf-life for the product and from letter dated 20.09.2019 bearing reference C.No.V/30/15/10/2018 from the Deputy Commissioner of GST

and Central Excise, it is clear that the shelf-life expired on 14.10.2018. This factual aspect is not disputed. Therefore, new sample was drawn on 20.06.2019. There is no disputation before this Court that the Basic Excise Manual does not contain any specific directive with regard to such situation. This is the first aspect of the matter.

6. The second aspect of the matter is, when the new sample was drawn on 20.06.2019 under a Mahazer, the Director of the Company (who has sworn to the affidavit filed in support of instant Contempt Petition) has signed an endorsement in the Mahazer, which reads as follows:

> *"You have stopped manufacturing Eco-bath Towlettes from November 2018 onwards; that four packs of Eco-bath Towlettes of two different batches in their laboratory kept back to comply with the mandatory requirements of Drug Authorities and that these samples are identical and representative of all their earlier production of Eco-bath Towlettes'*

7. Therefore, even according to the typed-set of papers filed by the petitioner and the contents thereof, it is clear that the new sample drawn on 20.06.2019 are identical and representative of the earlier products. This is the second aspect of the matter.

8. Owing to the aforesaid two aspects of the matter, this Court is unable to countenance the submission that retest has not been done in

accordance with Basic Excise Manual and this Court is not able to countenance the submission that retest carried out in the newly drawn samples has led to different results, as products are purportedly different.

9. To be noted, the petitioner. by his own volition (deponent of the affidavit filed in support of instant contempt petition) has signed the endorsement in the fresh sample that they are identical and representative of earlier products for which shelf-life had expired/elapsed.

10. This Court, therefore, is not inclined to issue notice in instant contempt petition.

In the light of the narrative thus far, instant contempt petition is dismissed. Consequently, connected sub-application is also dismissed. No costs.

SD/-

ASSISTANT REGISTRAR(COMM.CASES)

gpa

//Certified to be true copy//

Dated at Madras this the day of 2020.

COURT OFFICER(O.S.)

from 25th day of September 2008 the Registry is issuing Certified copies of the Orders/Judgments/Decrees in this format.

SMI/09.03.2020

To

The Principal Commissioner of GST & Central Excise
6/7 ATD Street
Race Course Road
Coimbatore