IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2129 OF 2021

B.K. Rekhatex (H.K.) Limited .. Petitioner

vs.

Union of India and ors. .. Respondents

Mr. Prakash Shah a/w. Anagh Pradhan and Abraham Ferandes i/b. Divya Shah Associates for petitioner.

Mr. J.B. Mishra i/b. Ms. Maya Majumdar for respondent nos. 1 and 2.

Mr. Hiten S. Venegaonkar for respondent no.3.

Mr. S.K. Hande for respondent no.4.

Ms. Aditi Bhat and Ms. Sheetal Chavan i/b. Ashok Purohit and company for respondent no.5.

CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

HEARD ON : DECEMBER 21, 2021

JUDGMENT ON : MARCH 25, 2022

JUDGMENT : (PER M. S. KARNIK, J.) :

1. This writ petition under Article 226 of the Constitution of India seeks the following reliefs: -

> "(a) this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order and/or direction under Article 226 of the Constitution of India calling for the

record of the impugned Seizure Memo dated 9th January, 2020 of the Respondent No. 3, to go into the legality thereof and to quash/set aside the impugned Seizure Memorandum and Punchnama both dated 9th January, 2020 issued by Respondent No. 3 (being Exhibits "A" and "B" hereto);

(b) this Hon'ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus, or any other appropriate Writ, Order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.2 (their servants, agents and successor in office) to forthwith (i) allow the amendment of the IGM. Nos. 2239803, 2240493, 2240974 and 2241062 filed on 25th November, 2019, 7th December, 2019, 9th December, 2019 and 14th December, 2019 respectively to substitute the name of the Respondent No. 5 as the importer in place of the Respondent No.4; (ii) to cancel Bill of Entry Nos. 5862748 dated 28th November, 2019, 5987411 dated 7th December, 2019, 6005868 dated 9th December, 2019 and 6021988 dated 10th December, 2019 filed by the Respondent No.4; and (iii) permit the Respondent No.5 to file bills for entry in respect of consignments covered by Bill of Lading Nos. AGNJEANSA00465 dated 20th November, 2019, ASCOKHLNSA1900054 dated 10th March, 2020, MSLJEANSA2521 dated 15th June, 2020 and ASCOKHLNSA1900063 dated 10th March, 2020 respectively and to assess them in accordance with law;

(c) that pending the final hearing and disposal of the present Writ Petition, this Hon'ble Court be pleased to pass an order directing the Respondent No.3 (their servants, agents and successor in office) to forthwith release the said consignments, on such terms and conditions as the Hon'ble Court may in its discretion deem fit to grant in the circumstances of the case;

(d) this Hon'ble Court be pleased to grant costs of the Petition and orders thereon; and

(e) this Hon'ble Court be pleased to grant such other and further reliefs in favour of the Petition as may be deemed necessary."

2. To appreciate the controversy, it would be apposite to set out the facts of this case in brief. The petitioner ('Rekhatex' for short) claims to be the owner of the consignment shipped to India from United Arab Emirates. The consignment comprises Electrolytic Tough Pitch (hereafter 'ETP' for short) copper wire rods. The Bills of Entry (hereafter 'BOEs' for short), invoices of purchase, Bills of Lading (hereafter 'BOLs' for short) are in the name of the respondent no.4-importer ('Shine Metal' for short). Shine Metal submitted the BOEs for clearing the consignment for home consumption sometime in December, 2019. The respondent no.3 ('DRI' for short) was informed that Shine Metal is importing such consignment after availing concessions in customs duty and selling it in open market in breach of the 1999 Notification issued by the Customs Department. The goods are seized by DRI on January 9, 2020 and a panchanama is drawn.

3. On account of such willful mis-declaration, loss caused to the Government Exchequer is to the tune of Rs.13,79,61,991/- by way of not paying differential customs duty. Pursuant to the seizure, a request is then made by Rekhatex to the Customs Department to amend the BOEs, BOLs, the IGM and other related documents for substituting the name of the respondent no.5 ('Sagun Copper' for short) in place of Shine Metal, claiming that it sold the consignment to Sagun Copper. Rekhatex files this writ petition challenging the seizure and for further reliefs afore-stated.

4. According to Rekhatex, the manipulation is at the instance of Shine Metal with which it has no concern. As Shine Metal failed to make the payment and "retire" (Sic, collect) the BOLs and other documents from the Bankers, it is Rekhatex who continues to be the owner of the consignment. The claim of ownership is made by Rekhatex on the strength of the original BOLs which are still in its possession. According to Rekhatex, mere filing of BOEs will not confer ownership on Shine Metal, but the possession of the BOLs determines ownership. Shine Metal abandoned the goods as they failed to make the payment, resultantly, Rekhatex continues to be the owner.

5. The department disputed the claim of ownership of Rekhatex on the consignment. According to them, Shine Metal being the importer, is the owner of the goods. Considering the rival claims, the grant of relief in this writ petition depends on the answer to the question whether Rekhatex undisputedly is the owner of the goods and in the event of a dispute as to the title of the goods, is it open for us to decide this disputed question considering the law laid down by the Supreme Court and in view of the materials placed before us.

6. **<u>SUBMISSIONS ON BEHALF OF THE PETITIONER: -</u>**

In order to establish the claim of ownership in respect of the consignment, learned counsel Mr. Shah for Rekhatex submitted as under: -

(a) The seized goods are freely importable and import thereof is not in any manner in contravention of the Customs Act, 1962 (hereafter 'the Customs Act' for short). Neither the Commissioner of Customs nor DRI claims that the said consignments are prohibited goods.

(b) Rekhatex is the owner of the seized goods and is alone entitled to it. The seized goods are under the custody/ control of Customs. They are not seized from Shine Metal. Shine Metal has no title to the seized goods. Shine Metal has admittedly not retired the documents sent by Rekhatex through its bankers.

(c) The original BOLs are with Rekhatex. The BOLs represent the title to the consignments.

(d) Shine Metal is not named as the consignee in the BOLs. Shine Metal is only a notified party. Rekhatex has paid for the seized goods. It has produced a complete chain of documents showing payment of the price of the seized goods to the consignor. Reliance is also placed on the additional affidavit dated August 30, 2021.

(e) The following facts clearly establish that Rekhatex is only entitled to the goods:

i. Rekhatex's original contract with the shipper/supplier of goods viz. Union Copper Rod LLC (hereafter 'UCR' for short) had materialized upon payment of the amounts as per invoice under the Letter/s of Credit issued by Rekhatex's bank in favour of UCR. Rekhatex is in custody of the original BOLs.

ii Shine Metal failed to retire the documents for the subject consignment from its bank by failing to pay its value and did not clear the subject consignment.

iii. Shine Metal has been represented in the present proceedings and has not claimed any title to the goods.

iv. The established shipping practice as well as law in this regard recognizes title to be with the holder of the original BOLs.

v. The initial BOLs issued by the shipping lines shows consignee 'To Order' and 'notified party' as Shine Metal. There is a distinction between 'consignee' and 'notified party'. 'Notified party' does not have the entitlement to the goods.

vi. Further, even as per the definition of an 'importer' defined in the Customs Act, the owner has precedence over the importer of the goods.

vii. Rekhatex has entered into a contract with Sagun Copper for the subject consignment. The BOLs have been amended by the shipper in the name of Sagun Copper. Sagun Copper has agreed to purchase the goods on payment of fair value.

(f) No reply is filed by either of the respondent nos. 2 to 4 disputing the correctness of the documents produced by Rekhatex in its additional affidavit dated August 30, 2021.

(g) Without prejudice and in any event, Shine Metal claimed the goods through Rekhatex. This is evident from the purported BOEs filed by Shine Metal. Shine Metal has given details of the commercial invoices of Rekhatex in the purported BOEs filed by Shine Metal.

(h) The DRI's reliance on the claim for exemption under the 1999 Notification in the BOEs filed by Shine Metal does not advance the case of the Commissioner of Customs and the DRI, as Shine Metal could not have filed BOEs without possessing the originals of BOLs and other documents. In any event, the claim of Shine Metal for exemption is not allowed by the respondents.

(i) No disputed questions of facts are involved in the present proceedings. The so-called dispute on the title to the goods by the Commissioner of Customs and the DRI in their respective affidavits is based on the assumption that Shine Metal has the original BOLs. This assumption is factually incorrect and contrary to the documents on record.

(j) The question as to who can claim title over the consignment is squarely covered by the decision of the Supreme Court in the case of **Union of India and another vs. Sampat Raj Dugar[1]**.

(k) Neither the order permitting clearance for home consumption nor deposit in the warehouse is passed by the proper officer. The goods are pending assessment.

(l) The seizure is illegal. No notice under section 124 of the Customs Act is admittedly issued to Rekhatex either within one year from the purported seizure or otherwise. Having

[1] 1992 (58) ELT 163

regard to the decision of the Apex Court in the case of **Canon India Private Limited vs. Commissioner of Customs[2],** the DRI officers, who purportedly seized the goods, are not the proper officers. The impugned seizure of goods is *non-est* and *per se* without jurisdiction.

(m) The present case is squarely covered by the decision of this Court dated December 3, 2020 in **M/s. Nikom Copper Conductors Private Limited vs. Union of India and others[3]**. This Court set aside the simultaneous seizure of identical goods vide identically worded seizure memo by the very officers of the Customs. The respondents have accepted the decision of this Court in **M/s. Nikom Copper Conductors Private Limited** (*supra*) and complied with the same by allowing the clearance of the goods.

Learned counsel therefore prayed that the writ petition deserves to be allowed and the reliefs prayed for be granted.

SUBMISSIONS ON BEHALF OF THE REVENUE: -

7. Countering the submissions of learned counsel for the petitioner, learned counsel appearing for the Revenue, invited our attention to the affidavit-in-reply filed on behalf of the Commissioner of Customs, affirmed by Mr. Kapil Prajapati, Deputy Commissioner of Customs (NS III). The stand in the affidavit-in-reply is as under: -

(i) An intelligence report was received by the DRI, that three proprietorship firms namely (i) M/s. Chandrashekhar

2 2021 SCC OnLine SC 200

3 Writ Petition No. 3834 of 2020.

Industries, Nashik, (ii) Shine Metal and (iii) M/s. S. R. Enterprises, Katraj, Pune, were involved in diversion of ETP Copper Wire Rod 8 MM, which had been imported at concessional rate of duty under the 1999 Notification as amended and the said imported materials had not been used for manufacturing of lead wire for electronic parts as required under the Notification.

(ii) Intelligence was also gathered that out of these three firms, M/s. Chandrashekhar Industries and Shine Metal Industries were working under the control of Shri Jayant Shantilal Mirani, owner of M/s. Nikom Copper & Conductors Private Limited who had also done most of the high sea sales of most of the firms.

(iii) Searches were carried out at the registered premises of the said firms, residential premises of the proprietors, residential and their office premises on December 16, 2019. During the search operations, it was noticed that all these firms did not have any facilities/machineries to manufacture 'lead wires for electronic parts' in their respective factory premises which were required to be manufactured as per the 1999 Notification.

(iv) The statement of Shri Kuldeep Ramesh Kshirsagar, proprietor of Shine Metal was recorded. He confessed that he had never manufactured Lead Wire for Electronic Parts (LWEP) in the factory premises of Shine Metal. He also admitted that most of the imported ETP Copper Wire Rods had been sold in the open market and the factory was not having any facility to manufacture LWEP. Shri Kuldeep Kshirsagar also admitted that Shine Metal was working under the control of Shri Jayant Shantilal Mirani, owner of Nikom Group. Shri Kuldeep Kshirsagar further stated that he was working as proprietor of said firm only on paper and was made a dummy proprietor by Shri Jayant S. Mirani. All the controls, viz. sales, finance, imports, etc. were handled by Shri Jayant S. Mirani or by his employees.

(v) The statement of the General Manager of M/s. Nikom Copper & Conductors Pvt. Ltd., namely, Shri Mukesh Balchand Jain was also recorded wherein he had admitted that they were controlling the financial, manufacturing and sales operations of the firms namely M/s. Shine Metal Industries and M/s. Chandrashekhar Industries. He too admitted that these two firms were not having any facilities to manufacture lead wires for electronic parts in their factory premises.

(vi) Shine Metal was supposed to manufacture lead wire for electronic parts from the imported ETP copper wire rod. Fraudulently availing the benefit of the 1999 Notification as amended, 4000.0 metric ton of copper rods having value Rs.188.0 crores (approx.) was imported by Shine Metal at concessional rate of duty wherein duty foregone amounts to Rs.12 crores (approx.).

(vii) The evidence on record indicates that Shine Metal was the original owner of the goods. The available documents namely, invoices, BOLs and BOEs all were originally in the name of Shine Metal raised by Rekhatex. Rekhatex and Shine Metal were in a business contract when the goods were seized. That the amendments to invoices, BOLs, BOEs were made subsequent to the seizure of goods demonstrate *mala fide* intention of Rekhatex to get over illegalities.

(viii) The reason to believe was not mere pretence as there is direct evidence available of offence committed by Shine Metal which was involved in illegal imports which were liable to be confiscated under Section 111(o) of the Act after following all procedures.

(ix) BOEs had been filed by Shine Metal. It is only after the investigation that Shine Metal submitted the report wherein they expressed their inability to bear the said consignments. Rekhatex, who is the supplier, submitted a letter dated March 1, 2020, amended the importers name in the BOLs for the goods, which were seized by DRI vide their seizure memo dated January 9, 2020.

(x) The seizure of the said consignment imported by Shine Metal under various BOLs, was on the basis that it was not eligible to claim benefit of the 1999 Notification. The goods could be released provisionally under section 110 of the Customs Act.

(xi) The show cause notice dated **December 1, 2020** issued by the Principal Additional Director General, DRI, Zonal Unit Ahmedabad is yet to be adjudicated.

STAND OF SHINE METAL: -

8. An affidavit-in-reply is filed on behalf of Shine Metal through its proprietor Shri Kuldeep Ramesh Kshirsagar. The gist of the affidavit is that Shri Kshirsagar was asked to incorporate a proprietorship firm in his name by Shri Jayant Mirani and Shri Mukesh Jain as they were having technical difficulties to form a new firm. Shri Jayant Mirani and Shri Mukesh Jain informed Shri Kshirsagar that he would be a name sake proprietor of the firm and they would be looking after day-to-day activities of the said firm in ordering materials, machinery, maintenance, transport, office rent, factory rent, salary and wages including all bank account transactions. The necessary charges for incorporating the company were borne by Shri Mukesh Jain. The entire business was handled by Shri Jayant Mirani through Shri Mukesh Jain and Shri Anil Satpute. Shri Anil Satpute is the mastermind and involved in Shine Metal business. Shri Kshirsagar relied upon various e-mail correspondence exchanged in support of this stand. It is further averred that Shri Kshirsagar was getting a monthly salary of Rs.72,000/-. To contend that he was merely an employee, it is averred that he was getting a house rent allowance. He was following instructions of Shri Mukesh Jain. All the operations of the Shine Metal were controlled by Shri Jayant Mirani. The modus for import of ETP copper rods 8 mm at concessional rate of duty and diversion of the same without manufacturing lead wire was hatched, implemented and supervised by Shri

Jayant Mirani. So far as transfer of consignments to Sagun Copper, the NOC for the same was signed by Shri Kshirsagar in his capacity as a proprietor of Shine Metal because Shri Jayant Mirani and Mukesh Jain assured that they will clear all the dues and statutory requirements of Shine Metal and they would take further steps to find a way out of the situation. In these circumstances, the NOC was issued.

CONSIDERATIONS: -

9. We have heard learned counsel at length. We have perused the exhaustive pleadings and the documents annexed thereto. We have also gone through the various decisions of the Supreme Court as well as the High Courts.

10. Before we proceed to deal with the contentions advanced by the contesting parties on merits, we seek guidance from the decision of the Supreme Court in the case of **Union of India versus J.P. Electronics Pvt.Ltd.**[4]. Their Lordships have spelt out the approach to be adopted by the High Court in exercise of its writ jurisdiction when the issue of title which is an issue of fact is under consideration. To expound this proposition, it would be apposite to refer to paragraphs 4, 5 and 6 of the decision of the Supreme Court in **J. P. Electronics Pvt.Ltd.** (*supra*) which read thus: -

> "4. It is clear that the decision turned on the question whether property in the goods brought into the country had passed on to the importer or not. It was recognised

[4] 2004 (167) E.L.T. 129 (S.C.)

that in certain cases, for example when an irrevocable letter of credit is issued by the importer in favour of the foreign exporter, property in the goods could be taken to have passed on to the importer. Where the title to the goods has not passed from the exporter to the importer clearly the exporter may be permitted to re-export the goods. But if the title has passed to the importer, there is no question of the goods being re-exported at the instance of the foreign exporter.

5. The High Court appears to have proceeded on the erroneous assumption that in ail cases an exporter continues to be owner of the goods merely because the importer does not choose to clear them and in effect abandons them. The issue regarding title to the goods had been squarely raised by the appellants in their counter affidavit filed before the High Court wherein they said that the title in the goods had passed on to M/s. Rahul Associates. The appellants have also drawn our attention to the invoice whereby the goods have been stated to have been sold to M/s. Rahul Associates. It is also claimed that the allegations contained in the counter affidavit have not been refuted by the respondent. According to the appellants the respondent and M/s. Rahul Associates were conspiring together to evade payment of duty in respect of an earlier consignment of identical goods which had arrived two weeks prior to the shipment in question and which had also been shipped by the respondent to M/s. Rahul Associates. It was found by the appellants that the first consignment was grossly undervalued. Proceedings had been commenced under the Customs Act, 1962 in respect of the first consignment and ultimately by an order of adjudication dated 31st May, 2001 it was found that M/s. Rahul Associates was liable to pay customs duty of more than Rs. 9 lakhs of which the customs duty of only about Rs. 4 lakhs had been paid. After adjusting this amount the difference is, according to the appellants, recoverable by the appellants from M/s. Rahul Associates by sale of the second consignment

being the goods in question under Section 142(1)(b) of the Customs Act.

6. Section 142(1)(b) of the Act would come into operation provided that goods in question belong to M/s. Rahul Associates. Dependent upon the question of title is also the relief which the respondent would be entitled to namely, re-export. The issue of title was an issue of fact which the High Court should have left to the Department to consider. As we have noted, the High Court did not consider this vital aspect of the matter at all. Despite the submissions made by the parties, we do not propose to assess the evidence ourselves. We accordingly, set aside the decision of the High Court and remand the matter back to the appropriate authorities in the Customs Department for the purpose of determining the issue whether the title to the goods in question had passed from the respondent to M/s. Rahul Associates. In the event it is found that the title had not passed, the respondent will be entitled to re-export the same subject to payment of such charges etc. which are rightfully leviable in respect of the goods. If the goods are found to belong to M/s. Rahul Associates, the respondent's claim for re-export must be rejected and it will be open to the Department to take appropriate action in respect thereof under the Act as they may be entitled to under the Act."

(emphasis supplied by us)

11. The Supreme Court has, thus, clearly held that whenever a relief is dependent on the question of title, the issue of title being an issue of fact, the High Court should leave it to the Department to consider. In the present case, the Department had disputed the title and has taken a categoric stand that it is not Rekhatex but Shine Metal, being the importer, is the owner of the goods, placing

reliance on several documents. Let us now proceed to find out the answer in the light of the dictum laid down by Their Lordships in **J. P. Electronics Pvt. Ltd.** (*supra*).

12. Rekhatex claims to be the owner of the consignment on the strength of the original BOLs which it claims to be in possession and custody. According to Rekhatex, Shine Metal never had the custody of these original documents of title and could not have filed the BOEs for the said consignments. It is then the stand of Rekhatex that assuming without admitting that the particulars of Shine Metal were entered as the importer in the BOEs, Shine Metal does not become the owner of and/or entitled to the said consignment.

13. It is the case of the Department that on the basis of willful mis-declaration and after getting permission of import of goods as per details mentioned in the IEC of Shine Metal, they would sell the goods in open market without manufacturing lead wire for electronic parts in breach of the 1999 Notification. The goods were seized at M/s. Kerry Indev Logistics CFS at Navi Mumbai, under seizure memo dated January 9, 2020. On the basis of the available records, the department claims Shine Metal was the original owner of the goods and there was no evidence of there being business difficulties or financial constraints leading to the question of collapsing the business terms between Rekhatex and Shine Metal.

14. From the record, we find that four BOEs dated November 28, 2019, December 7, 2019, December 9, 2019 and December 10, 2019 indicate the name of Shine Metal as the importer. The seizure memo of the DRI is dated January 9, 2020. The copy of the original BOLs at Exhibit 'C-1' indicates the shipper to be 'UCR LLC' and Shine Metal is shown as a 'notified party'. The invoices dated November 20, 2019, December 1, 2019, December 3, 2019, December 7, 2019 drawn by Rekhatex at page 38 indicate Shine Metal as the buyer of the imported goods. The BOEs for home consumption at Exhibit 'E-1', 'E-2', E-3' and 'E-4' reflects that Shine Metal is the importer of the said goods.

15. It is the case of Rekhatex that in view of the failure on the part of Shine Metal to "retire" (Sic, collect) the original documents in view of the agreed terms between Rekhatex and Shine Metal, Rekhatex instructed its banks to hold the original documents and return the same to them. BOLs and other documents were returned to Rekhatex by the banks. It is in March/April, 2020 that on maturity of L/Cs issued by Rekhatex's banks in favour of UCR that the amounts were paid by Rekhatex to UCR. Thereafter, Rekhatex started looking for other prospective purchasers in the Indian Market. Sagun Copper expressed its interest to purchase the subject consignment. Fresh invoices came to be issued in the name of Sagun Copper for the said consignment and the original BOLs were amended by the shipping line to name Sagun Copper as 'consignee'. At this stage, it is

pertinent to mention that Rekhatex raised three invoices dated March 10, 2020 and one dated June 15, 2020 in the name of the buyer Sagun Copper Conductors.

16. Rekhatex inturn informed the Customs authorities for amendment in the IGM, which was earlier in the name of Shine Metal as 'notified party', be substituted by the name of Sagun Copper as 'consignee'. Due to non receipt of payment from Shine Metal, a request was made to amend the BOLs in the name of Sagun Copper. Rekhatex as well as Sagun Copper made requests for carrying out necessary amendments in the documents to indicate the 'consignee' as Sagun Copper.

17. It is material to note that there is no affidavit-in-reply on behalf of Sagun Copper. A reference, however, needs to be made to a communication dated November 24, 2020 made by Sagun Copper to the Customs Department. The said communication is brought on record by Rekhatex. In paragraph 5 of such communication, it is clearly stated that "Rekhatex, on or about 9/10-3-2020 and thereafter, sold the said goods to Sagun Copper and that original import documents and original BOLs are in the name of Sagun Copper." A request was, therefore, made for change of name in the IGM from Shine Metal Industries to Sagun Copper and to allow substitution/filing fresh BOEs in the name of Sagun Copper for clearance of the goods for home consumption. It is then stated that Sagun Copper will be clearing the goods on payment of full duty on merit for home consumption.

18. In the advocate's notice dated January 8, 2021 (almost one year after the seizure) issued to the Customs Department on behalf of Sagun Copper, it is mentioned that the goods are abandoned by original importer Shine Metal and as the goods are now transferred in favour of Sagun Copper along with the documents of title, Sagun Copper has to be regarded as importer and entitled for BOEs for clearing the goods for home consumption. Thus, on one hand Rekhatex claims that it continues to be the owner, whereas, on its own showing, the consignment has been sold by them to Sagun Copper. Sagun Copper has represented itself to be the owner which fact is brought on record by Rekhatex itself. After this transaction, there is nothing on record to indicate on what basis Rekhatex now claims to be the owner.

19. Another circumstance which we cannot ignore is a document at Exhibit 'K-1' which is the copy of the BOL indicating 'the shipper' to be UCR and the 'consignee' to be Sagun Copper. The place and date of issue of this BOL is indicated Dubai-20th November, 2019. The other BOLs in favour of Sagun Copper bear the dates on or after March, 2020. The document at Exhibit K-1 raises a doubt and appears to be backdated. In November, 2019, Sagun Copper was never in the picture. Document at Exhibit K-1 and C-1 are carbon copies except that name of Shine Metal is replaced with Sagun Copper. The possibility of backdating the BOL to show that the high sea purchase was effected prior to the seizure cannot be ruled out.

20. This is not a case where the application for amendment to the IGM or the BOLs in favour of Sagun Copper is made prior to the search or seizure. The invoices drawn by Rekhatex in favour of Shine Metal, the BOEs indicating the name of Shine Metal as ‘importer’, the application made by Sagun Copper for substitution of their name for filing fresh BOEs in place of Shine Metal, for clearing the goods for home consumption, indicates that Shine Metal is the importer. The record reveals that Shine Metal filed the BOEs for home consumption.

21. Furthermore, the affidavit-in-reply filed on behalf of Shine Metal cannot be glossed over. A specific stand is taken in the affidavit that the proprietor of Shine Metal was only on paper and that it was Shri Jayant Mirani and Shri Mukesh Jain, who were looking after all the business transactions. There are documents on record to indicate that the proprietor was paid a monthly salary and house rent allowance. A specific averment is made in paragraph 23 of the affidavit-in-reply of Shine Metal about the modus for import of ETP copper rods 8 mm at concessional rate of duty and that the diversion of the same without manufacturing lead wire was hatched, implemented and supervised by Shri Jayant Mirani. It is the case of the Customs that Shine Metals do not have any infrastructure to manufacture lead wire and hence, Shine Metal was instrumental in diverting the said consignment in open market in breach of the 1999 Notification.

22. It is also pertinent to note that neither any proceedings are initiated by Sagun Copper to clear the goods though they claim to be the purchasers, nor have they filed any response to this writ petition. This writ petition was filed by Rekhatex on February 3, 2021. Even on such date, Rekhatex claims to have title over the goods. However, the record indicates that the goods were sold by Rekhatex to Sagun Copper in March, 2020 itself. Nothing has been placed on record by Rekhatex clarifying how the title in the goods have again passed on to Rekhatex. We also note here, at the cost of repetition, the request made by Sagun Copper through their advocate's letter dated January 8, 2021 for change of name of importer in the IGM and substitution of the BOEs in its name was not entertained by the Customs on the ground that a show cause notice has been issued by DRI which is required to be adjudicated. It was further informed that action against the consignments will depend upon the outcome of the adjudication order. Sagun Copper, surprisingly, has not initiated any proceedings even after being informed by the Customs that further action against the consignments will depend upon the outcome of the adjudication order.

23. It is also the stand of Rekhatex that on December 4, 2020 Shine Metal has issued a NOC in its favour stating that due to financial problems, Shine Metal was not able to pay duty and cost of the goods to the supplier. Even this NOC was issued as late as on December 4, 2020, much after the

seizure. Furthermore, we do not feel that any credence should be given to such NOC in the light of the stand taken by the proprietor of Shine Metal in its affidavit-in-reply to the writ petition. In this context, it is necessary to reproduce paragraph 29 of the affidavit-in-reply filed on behalf of Shine Metal through its proprietor Shri Kuldeep Ramesh Kshirsagar:

> "29. I say and submit that, now the Petitioner filed present petition seeking relief to transfer the goods to Respondent No.5 and they also filed NOC letter of Respondent No.4 and the same signed by me as proprietor because Shri Mirani and Jain assured me that they would clear all the dues, and statutory requirements of M/s. Shine Metal Industries and they would take further steps to find a way out of the situation and considering the facts and circumstances I issued the above said NOC to the Petitioner and for that effect we also exchanged the emails. Hereto annexed and marked Exhibit J copies of the emails."

24. Is it possible for us to conclude that Rekhatex continues to have title over the goods in the light of what we have discussed above? The answer is 'No'. The circumstances on record dissuades us from rendering a factual finding in favour of Rekhatex as regards title over the goods. In the facts of this case, it is not possible for us to conclude that Rekhatex has title over the goods only because it is in possession of the original BOLs. *Dehors* the materials on record and the manner in which the transactions have taken place pursuant to the seizure, leaves us with no manner of doubt that the claim of Rekhatex of

ownership of the goods on the basis of the documents of title, BOLs, cannot be said to be undisputed. We cannot turn a blind eye to the attending circumstances which necessitate an in-depth inquiry before rendering a factual finding regarding ownership of the consignment which may not be possible for us to do so in this writ petition under Article 226 of the Constitution of India.

25. The illegality or otherwise of seizing the goods could be gone into only if Rekhatex were in position to demonstrate that its title over the goods is undisputed.

26. We may also deal with the contention of learned counsel for Rekhatex that it continues to be the owner as Shine Metal abandoned the consignments. Rekhatex and Shine Metal had a business transaction. The DRI realized that Shine Metal is evading payment of customs duty by unlawfully availing the benefit of exemption under 1999 Notification. Shine Metal had submitted the Bills of Entry for home consumption. After the seizure of the consignment, Rekhatex alleged that Shine Metal failed to pay the purchase price. The show cause notice was issued by DRI in respect of the seized consignment which is required to be adjudicated. We therefore do not find force in the contention of Rekhatex that this is a case of abandonment of goods.

27. The stand of the Department that the documents viz. BOEs, BOLs and invoices in the name of Shine Metal are sufficient indicator to suggest that there exists a dispute of

title cannot be brushed aside. The stand of the Department, of there being a failed business contract between Rekhatex and Shine Metal upon seizure of the goods, cannot be ruled out altogether. From the materials on record, it is obvious that Rekhatex took steps to effect changes in the documents only after seizure of the goods. We are not impressed with the submission of learned counsel for Rekhatex that the process for effecting the sale of the consignments, started before seizure of the goods. Except for the oral submissions made by learned counsel for Rekhatex, there is nothing on record to indicate that the process for sale of the consignment commenced before the seizure. On one hand, Rekhatex has taken a plea that Shine Metal abandoned the goods after submitting the BOEs, whereas on the other hand, it relies upon the NOC issued by Shine Metal for sale of the goods much later in distance of time from the date of seizure, which is self-contradictory.

28. As indicated earlier, for Rekhatex to succeed in this writ petition, it has to establish that the consignments are undisputedly owned by them. Rekhatex claims title on the basis of the original Bills of Lading. Having regard to the materials on record, we have no manner of doubt that the issue 'whether Rekhatex is the owner of the consignment' is a disputed question of fact.

29. Coming to the provisions of the Customs Act relied by Rekhatex, section 110 of the Customs Act provides for seizure of goods. The consignment is seized in exercise of

power under section 110 of the Customs Act. Section 110-A provides for provisional release of goods, provisionally attached under section 110, pending the order of the adjudicating authority to be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require. Rekhatex has not applied for provisional release. Section 110(2) contemplates that where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Section 124 envisages that no order confiscating any goods or imposing any penalty on any person shall be made under Chapter XIV unless the owner of the goods or such person is noticed. Even otherwise, the goods are seized upon Shine Metal submitting the BOEs and not from Rekhatex.

30. We may now deal with the decisions relied upon by Rekhatex in support of its case. Strong reliance is placed on the decision of the Supreme Court in **Sampat Raj Dugar** (*supra*) to contend that the definition of 'importer' in the Customs Act only indicates person who is in possession of the goods at the time of filing of the Bills of Entry but does not indicate the title to the goods. **Sampat Raj Dugar** (*supra*) was relied by the Supreme Court **in Vellanki Frame Works**

versus Commercial Tax Officer, Visakhapatnam[5]. For guidance, we borrow paragraphs 34, 35, 36 and 37 from the decision in **Vellanki Frame Works** (*supra*) which reads thus: -

> "34. To get over the aforesaid findings of the High Court, learned counsel for the appellant has argued, with strong reliance on the decision of this Court in the case of Sampat Raj Dugar (supra), that the definition of importer in the Customs Act only indicates the person who is in possession of goods at the time of filing of bill of entry but does not indicate the title to the goods; and that the questions as to when does the sale take place and who is the owner of goods would be determined only under the Sale of Goods Act and not under the Customs Act.
>
> 35. For dealing with this part of submissions, we may usefully take note of the relevant definitions in Clauses (23), (24), (25) and (26) of Section 2 as also the other provisions in Sections 30 and 47 (1) of the Customs Act, as applicable and effective at the relevant point of time, as follows: -
>
>> "(23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;
>> (24) "import manifest"16 or "import report" means the manifest or report required to be delivered under section 30;
>> (25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;
>> (26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner 17 or any person holding himself out to be the importer;

[5] (2021) 3 SCC 39

30. Delivery of import manifest or import report.- (1) The person-in-charge of-
(i) a vessel; or
(ii) an aircraft; or
(iii) a vehicle, carrying imported goods or any other person as may be specified by the Central Government, by notification in the Official Gazette, in this behalf shall, in the case of a vessel or an aircraft, deliver to the proper officer an import manifest prior to arrival of the vessel or the aircraft, as the case may be, and in the case of a vehicle, an import report within twelve hours after its arrival in the customs station, in the prescribed form and if the import manifest or the import report or any part thereof, is not delivered to the proper officer within the time specified in this sub-section and if the proper officer is satisfied that there was no sufficient cause for such delay, the person-in-charge or any other person referred to in this sub- section, who caused such delay, shall be liable to a penalty not exceeding fifty thousand rupees.
(2) The person delivering the import manifest or import report shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.
(3) If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete, and that there was no fraudulent intention, he may permit it to be amended or supplemented.

47. Clearance of goods for home consumption.- (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

36. It is but apparent that that while bringing anything into India from a place outside India is generally regarded as "import" and the imported goods

are those goods which are brought into India from a place outside but, when the goods are cleared for home consumption, they are no longer imported goods for the purpose of the Customs Act. Significantly, in the process of importation, the importer, in relation to any goods, includes any owner or any other person holding himself to be the importer but, only between the time of their importation and their clearance for home consumption. In other words, the net result of the expanded definition of the expression "importer" is that while any person who imports goods into India would be an importer but, the owner of the goods or a person holding himself to be an importer would also be regarded as an importer during the period between importation of goods and their clearance for home consumption. This crucial period would generally be that period when the goods have been warehoused after importation and are cleared from warehouse by a person other than the person who actually imported the goods. <u>That being the position, in our view, the High Court has rightly said that this definition of importer cannot be used to usurp the identity of an importer from the person who filed the bill of entry. In other words, the person in whose name the bill of entry is filed does not cease to be an importer and, if that person claims to be not the owner or importer, the onus would be heavy on him to establish that someone else is the owner or importer of goods</u>.

37. As noticed, on the connotation of the term "importer" for the purpose of the Customs Act, learned counsel for the appellant has placed reliance upon the decision in Sampat Raj Dugar (supra). We may examine the facts and the ratio of the case of Sampat Raj Dugar, to appreciate the implication, if any, of the observations occurring therein on the questions involved in the present case."

(emphasis supplied by us)

31. We are afraid the decision in **Sampat Raj Dugar** (*supra*) does not assist the case of Rekhatex. In **Sampat Raj Dugar** (*supra*) it was held by the Supreme Court that since respondent no.2 did not pay for and receive the documents of the title, she did not become the owner of the said goods, which means that respondent no.1 continued to be the owner. The case set up was of abandonment of the goods. There was no dispute as regards ownership as the goods were abandoned and hence it was held that the respondent no.1 continued to be the owner. Such is not the case here as the present case turns on a different fact situation altogether. Rekhatex could not establish that the goods are abandoned. The decision in **Sampat Raj Dugar** (*supra*) does not advance the cause of Rekhatex in any manner.

32. Reliance is then placed by learned counsel for Rekhatx on a decision of the Supreme Court in the case of **Canon India Private Limited** (*supra*). The main issue for consideration in **Canon India Private Limited** (*supra*) was whether after clearance of the cameras on the basis that they were exempted from levy of basic Customs duty under Notification No.15/2012, the proceedings initiated by the Directorate of Revenue Intelligence for recovery of duty not paid under Section 28(4) of the Customs Act, 1962 are valid in law. In **Canon India Private Limited** (*supra*), there was no dispute of ownership, the decision therefore does not assist Rekhatex in any manner.

33. Reliance is then placed on the decision of the Supreme Court in the case of **ITC Limited versus Commissioner of Central Excise, Kolkata IV**[6]. Even this decision does not support the case of Rekhatex. The question involved in **ITC Limited** (*supra*) was whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained? The ratio of the said decision, therefore, has no bearing on the present case.

34. Reliance is then placed on the decision of this Court in **M/s. Nikom Copper Conductors Private Limited** (*supra*). Learned counsel for Rekhatex submitted that the present case is squarely covered by the decision rendered in **M/s. Nikom Copper Conductors Private Limited** (*supra*) as the issue involved is the same. The petitioner in M/s. Nikom's case, imported copper wire rods. In the course of import, the petitioner contemplated high seas sale of the imported goods to M/s. Chandrashekhar Industries, subsequently added as respondent no.4. The respondent no.4 was required to pay the agreed amount for the high seas sale by entering into a written agreement. The consignments were seized vide seizure memo dated January 9, 2020. **M/s. Nikom Copper Conductors Private Limited** (*supra*) questioned the legality and validity of such seizure by contending that the impugned seizure memo does not comply with the requirements of section 110 of the Customs Act. A reading of

[6] (2019) 17 SCC 46

this decision would reveal that there was no dispute raised as to the title of the goods. In such circumstances, the challenge to the seizure was entertained. Furthermore, on both the Bills of Entry, the name of the original importer was **M/s. Nikom Copper Conductors Private Limited** which has been mentioned in the IGM and the Bills of Lading. The writ petition was at the behest of the importer. The decision in **M/s. Nikom Copper Conductors Private Limited** (*supra*), therefore, was in a completely different fact situation and can have no application in the present case.

35. Learned counsel for Rekhatex then relied upon the decision of Gujarat High Court in the case of **State of Gujarat and others versus Reliance Industries Ltd.**[7]. The questions involved for consideration before the Gujarat High Court were (i) whether stamp duty is liable to be paid on the basis of 'bill of entry' and such 'bill of entry' is a delivery order in respect of goods, i.e. an instrument entitling any person to the delivery of any goods; and (ii) whether 'bill of entry' constitutes 'an instrument' and/or "document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded" qua entitlement of delivery of goods, within the meaning of Sec.2[I] read with Entry 24 of Schedule-I of the Bombay Stamp Act, 1958 as applicable to Gujarat? We are of the opinion that the said decision has no application to the present facts.

[7] 2011 SCC OnLine Guj 5032.

36. Having come to the conclusion that present writ petition involves a disputed question of fact regarding ownership of Rekhatex over the goods, it is not open for us to assess the evidence ourselves. The reliefs claimed in the writ petition are dependent on the decision of the issue of title of the goods which we leave it for the Department to consider.

37. Consequently, the writ petition stands dismissed with no order as to costs.

38. We make it clear that this order will not preclude Rekhatex from taking recourse to all such remedies available in law seeking the relief prayed for in this writ petition including a decision on the question of title.

39. Observations made by us above are only for a limited purpose to find out whether there exists a dispute of title, and we may not be understood to have formed any opinion on the merits of the contentions. All contentions are left open.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**