IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7898 OF 2021
WITH
WRIT PETITION NO. 2284 OF 2021
WITH
WRIT PETITION NO. 7355 OF 2021

M/s. Isha Exim]
carrying on business through]
Mr.Prabal Kumar Kundu of]
Kolkata inhabitant and having its]
office at P-586, Block-N, New Alipore,]
Kolkata – 700 053.] … Petitioner

Versus

1. Union Of India]
Though The Secretary,]
Department of Revenue]
Ministry of Finance having its office]
North Block, New Delhi – 110 001.]

2. Commissioner of Customs (NS-V)]
Jawaharlal Nehru Customs House]
Having his office at Jawaharlal Nehru]
Customs House, Nhava Sheva,]
District : Raigad – 400 707]
Maharashtra.]

3. Additional Commissioner of Customs (NS-V)]
Special Intelligence & Investigation Branch]
(Import) Jawaharlal Nehru Customs House]
Having his office at Jawaharlal Nehru]
Customs House, Nhava Sheva,]
District : Raigad – 400 707]
Maharashtra.]

4. Deputy Commissioner of Customs (NS-V)]

Special Intelligence & Investigation Branch]
(Import) Jawaharlal Nehru Customs House]
Having his office at Jawaharlal Nehru]
Customs House, Nhava Sheva,]
District : Raigad – 400 707]
Maharashtra.]

5. Principal Commissioner of Customs (NS-I)]
Jawaharlal Nehru Customs House]
Having his office at Jawaharlal Nehru]
Customs House, Nhava Sheva,]
District : Raigad – 400 707]
Maharashtra.]

6. Additional Commissioner of Customs (NS-I),]
Gr. I & IA]
Jawaharlal Nehru Customs House]
Having his office at Jawaharlal Nehru]
Customs House, Nhava Sheva,]
District : Raigad – 400 707]
Maharashtra.] … Respondents

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Mr.Prakash Shah i/b. Mr.Aansh Desai for Petitioner.
Mr.P.S. Jetley, Senior Advocate a/w. Mr.J.B. Mishra and Smt. Maya Mujumdar for Respondents.

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CORAM : R. D. DHANUKA &
S. M. MODAK, JJ.

DATE : 18th JANUARY 2022.
(Through Video Conference)

ORAL JUDGMENT (PER : R. D. DHANUKA, J.) :-

1. Rule.

2. Mr.P.S. Jetley, learned counsel for Respondents waives service of notice. By consent of parties, Petitions are heard finally.

3. In Writ Petition No. 7898 of 2021, the petitioner has prayed for a writ of certiorari for quashing and setting aside the impugned Provisional Release Order dated 22nd October, 2021 and further seeks a writ of mandamus to clear the goods imported by the petitioner covered by Bill of Entry No. 2784973 dated 16th February, 2021 on payment of applicable duty under Chapter 21. In the Writ Petition No. 7355 of 2021, the petitioner has prayed for a writ of certiorari for quashing and setting aside the impugned Seizure Memo dated 3rd August, 2021 and the DYCC JNCH, Laboratory Test Reports. The petitioner also seeks a writ of mandamus to forthwith assess and clear the goods imported by the petitioner and covered by Bill of Entry No. 2784973 dated 16th February, 2021 on payment of applicable duty under Chapter 21.

4. By Writ Petition No. 2284 of 2021, the petitioner seeks a declaration that the Officers of the respondent no.2 in charge of Special Intelligence and Investigation Branch (Import) are not 'proper officers' for the purpose of Section 110 of the Customs Act and seeks further declaration that the decision of the Authority for Advance Rulings dated 31st March, 2017 is

binding on the respondents. The petitioner has also prayed for writ of certiorari for quashing and setting aside the impugned Seizure Memo dated 24th March, 2021 and also the impugned order dated 13th May, 2021. The petitioner has prayed for an order and direction against the respondents to clear the goods imported by the petitioner vide Bill of Entry No. 9936145 dated 12th December, 2020 and Bill of Entry No. 2784973 dated 16th February, 2021 on execution and furnishing of a Provisional Duty Bond in terms of Section 18 of the Customs Act.

5. The petitioner is engaged in the business of import of various edible products including products of betel nut (processed supari). According to the petitioner, the said products of betel nut is classified under Chapter Head 21069030 of the First Schedule in the Customs Tariff Act, 1975. Sometime in the year 2016, the petitioner filed an application bearing no. AAR/44/CVS-1-14-2016 before the Authority for Advance Ruling, New Delhi ('AAR') in terms of Section 28H of the Customs Act. The said Authority decided the said application on 31st March, 2017, wherein the classification of the said products was confirmed under CTH – 21069030. The respondent no.5 did not prefer any appeal against the said ruling dated 31st March, 2017 under Section 28KA of the Customs Act.

6. It is the case of the petitioner that on 12th December, 2020, the petitioner imported a consignment in Unflavoured Processed supari from JNPT Port vide Bill of Entry No. 9936145 dated 12th December, 2020. On 16th December, 2020, the petitioner imported the same products vide Bill of Entry No. 9980277 dated 16th December, 2020. The said Bill of Entry was provisionally assessed and cleared by the respondent no.6 on payment of custom duty and filing of Provisional Duty Bond.

7. On 16th December, 2021, the petitioner imported another consignment vide Bill of Entry No. 2784973. On 24th March, 2021, the respondents issued a Seizure Memorandum seizing goods imported vide Bill of Entry No. 9936945 dated 12th December, 2020. On 6th May, 2021, the petitioner filed a Writ Petition bearing Stamp No.9836 of 2021 challenging the said Seizure Memo dated 24th March, 2021. On 6th May, 2021, this Court disposed of the said Writ Petition bearing Stamp No. 9836 of 2021 filed by the petitioner in view of the statement made by the learned counsel for the respondents that SIIB had recommended provisional release of goods and that adjudicating authority would pass an order for provisional release of goods under Section 110A of the Customs Act within a week's time.

8. On 13th May, 2021, the respondent no.6 passed a Provisional Release Order directing release of goods imported vide Bill of Entry No. 9936145 dated 12th December, 2020 on the condition of the petitioner executing a P. D. Bond for Rs.2,01,61,575/- along with bank guarantee of Rs.1,70,00,000/- towards differential custom duty, fine and penalty. The petitioner impugned the said Provisional Release Order by filing a Writ Petition before this Court (2284 of 2021).

9. It is the case of the petitioner that the respondent no.4 neither completed the assessment of the goods nor made any communication with the petitioner regarding those goods assessed for a period of 5.5 months from the date of filing of Bill of Entry. However, on 3rd August, 2021, the respondent no.3 issued a seizure memo *inter-alia* stating that the goods covered vide Bill of Entry No. 2784973 dated 16th February, 2021 were liable for confiscation.

10. The petitioner filed Writ Petition bearing No. 7355 of 2021 in this Court challenging the seizure memo dated 3rd August, 2021 on 21st October, 2021. It is the case of the petitioner that on 22nd October, 2021, the respondents during the pendency of the said writ petition passed an *ex-parte* provisional release order in respect of the goods covered vide Bill of Entry No. 2284973 dated 16th February, 2021. The petitioner filed Writ Petition No.

7898 of 2021 *inter-alia* praying for writ of certiorari for quashing and setting the impugned Provisional Release Order dated 22nd October, 2021 and prayed for a writ of mandamus to assess and clear the goods imported by the petitioner and covered by Bill of Entry No. 2284973 dated 16th February, 2021 on payment of applicable duty under Chapter 21.

11. Mr.Shah, learned counsel for the Petitioner invited our attention to the Seizure Memo dated 3rd August 2021 issued by Respondent No.3 stating that the goods covered vide Bill of Entry No. 2784973 dated 16th February 2021 were examined and respective samples of goods were drawn. He submits that only after the said Seizure Memo was served upon the Petitioner, the Petitioner came to know about samples drawn by the Respondent No.3 and forwarded to DYCC for testing. He invited our attention to the Public Notices dated 23rd October 2019 and 16th June 2021, thereby issuing a list of goods under various chapters which cannot be analyzed/tested at DYCC, JNCH Laboratory due to non availability of facility. He submits that in both the Public Notices clearly indicates that the samples of the goods covered under Chapter 1 to 14 and Chapter 21 cannot be analyzed/tested at DYCC, NJCH Laboratory.

12. Mr.Shah, learned counsel for the Petitioner also invited our

attention to the averments made by the Respondents in the Affidavit-in-Reply and more particular paragraph Nos.12 and 13 and would submit that the Respondents have admitted in the said affidavit that the goods mentioned under Chapter 8 and 21 could not be analyzed / tested by DYCC according to both the public notices. He submits that the Respondents have erroneously contended that the Petitioner did not approach the Respondents to make a request for retesting of the samples in another Government approved Lab or in FSSAI to the reason best known to them. He submits that since even according to the Respondents, the said goods which fell under Chapter 8 and 21 could not have tested by DYCC, the impugned Order of Seizure of the goods issued by the Respondents falls on the ground. He submits that the Seizure based on the report of the DYCC is thus untenable and contrary to the Public Notices issued by the Respondents.

13. In his alternate submission Mr.Shah, learned counsel for the Petitioner invited our attention to the Order passed by the Authority for Advance Rulings dated 31st March 2017 and would submit that pursuant to an application preferred by the Petitioner, in relation to the dispute of classification of imported supari goods, which is one of the issue involved in this Petition, the Authority had categorically held that the products sought to be imported by the Petitioner namely ‘unflavoured supari’, ‘flavoured supari’,

'API supari' and 'chikani supari' being processed betel nut products which do not contain specified ingredients, namely, lime, katha and tobacco but containing other flavouring material/additives are classified under Customs Tariff Headings 21069030. He submits that the said ruling given by the said Authority under Section 28 J of the Customs Act is binding not only on the Petitioner but also on the Principal Commissioner of the Customs or Commissioner of Customs and the Customs Authorities subordinate to him in respect of the Applicant. He submits that the goods in question were the subject matter of the said Advance Ruling given by the Authority classifying the said goods under Customs Tariff Heading 21069030. The Custom Authority thus ought to have cleared the goods on the basis of the said Advance Ruling under the same classification in view of the said Order of the Authority having attained finality. The Respondents have not challenged the said Advance Ruling.

14. It is submitted by Mr.Shah, learned counsel for the Petitioner that the Order passed by the Respondents issuing Seizure Memo is contrary to the Advance Ruling issued by the Authority.

15. Mr.Shah, learned counsel for the Petitioner placed reliance on the Judgment of the Madras High Court in the case of Isha Exmin V/s. Addl.

Director General, Directorate of Revenue Intelligence (D.R.I.), Chennai[1], filed by the Petitioner herein and would submit that similar goods were seized by the D.R.I., which are the subject matter of the present Petitions filed by the Petitioner. He relied upon paragraph Nos.10 to 14 of the said said Judgment and would submit that after adverting to the Judgment of the Hon'ble Supreme Court in the case of *Columbia Sportwear Co. Vs. Director of Income Tax, Bangalore*[2] and a Judgment of the Delhi High Court in the case of *Worldline Tradex Pvt. Ltd. Vs. Commissioner of Customs (Import)*[3], *Madras High Court* in the case of the Petitioner itself dealing with the same goods and the same Advance Ruling has held that the said Advance Ruling was binding on the Respondents and quashed and set-aside the Seizure Memo. Madras High Court directed the Respondents to release the cargo in-question forthwith. He submits that the Respondents cannot be allowed to take a different view than the view taken by the Madras High Court accepting the binding effect of the said Advance Ruling dated 31st March 2017 on the parties.

16. Learned counsel for the Petitioner submits that SIIB had initiated simultaneous investigation in respect of the imports made by the Petitioner

1 2018 (13) G.S.T.L. 273 (Mad.)
2 2012 (283) E.L.T. 321 (S.C.)
3 2016 (340 E.L.T. 174 (Delhi)

from Chennai Port in March 2021. The said consignment was also detained by the Custom Authority. The samples were drawn for testing. During the course of investigation, the Chennai Customs Authority considered the binding effect of the same Advance Ruling given by the Authority and granted no objection for the Petitioner for the goods under Chapter Heading 21069030. He submits that the Authorities who are the Respondents in this case cannot be allow to take a different view in the matter.

17. Mr.Shah, learned counsel for the Petitioner also invited our attention to the ground-T raised in the Petition in support of his submission that the Petitioner who imported consignments of the same goods as in the present case from the same supplier through Chennai Port were allowed clearance under Chapter Heading 21069030 and the bills of entry were finally assessed.

18. Learned counsel for the Petitioner lastly submitted that the goods imported by the Petitioner are perishable in nature and are illegally seized by the Respondents for quite some time. If this Court comes to the conclusion that the sample of the goods has to be drawn again for retesting to be carried out by the Government Laboratory, only in that event this Court shall allow release of the goods by accepting P. D. bond from the Petitioner.

19. Mr.Jetley, learned senior counsel for the Respondents on the other hand vehemently urged that since the Respondents have taken further steps by passing an Order of provisional release, at this stage, Order of Seizure Memo cannot be set aside. He submits that the Respondents have no dispute that the DYCC could not have analyzed or carried out any testing of the goods in-question. The Petitioner however did not approach the Respondents for retesting of the samples in another Government Laboratory or FSSAI.

20. It is submitted by the learned counsel for the Respondents that the samples can be redrawn and can be sent to the Government Laboratory or FSSAI even at this stage. The Respondents have no objection if the entire process is expedited. He prayed that the goods shall not be directed to be released till a fresh test report is submitted by the Government Laboratory or by FSSAI, as the case may be after testing the samples.

21. In so far as the submission of Mr.Shah, learned counsel for the Petitioner on the decision of the Authority for Advance Ruling in this case in favour of the Petitioner is concerned, learned senior counsel for the Respondents submits that though the decision of the Authority for Advance Ruling is binding on the department, in this case the process relating to the

goods declared in the Advance Ruling dated 31st March 2017 is different from the process relating to the imported goods in-question and thus no reliance on the said Advance Ruling dated 31st March 2017 can be placed by the Petitioner. He submits that in several other Advance Rulings given by the Authority in respect of the same goods opposite view is taken classifying the goods under Customs Tariff Headings.

22. Mr.Shah, learned counsel for the Petitioner in his rejoinder argument invited our attention to the impugned Order dated 13th May 2021 passed by the Respondents for provisional release of the goods, which were subject matter of the said Order under Section 110 of the Customs Act 1962 and more particularly paragraph 6 thereof. He submits that though the learned Additional Commissioner of Customs had rendered a prima-facie finding in favour of the Petitioner in paragraph 6, on the basis of advise received from the investigating unit, the Additional Commissioner of Customs passed a drastic Order for release of goods on execution of Bond for estimated value of seized goods which was Rs.2,01,61,575/- along with adequte security/BG to cover differential duty of Rs.1,61,41,504/-.

23. A perusal of the Affidavit-in-Reply filed by the Respondents clearly indicate that both the parties are ad-idem that the Public Notices dated

23rd October 2019 and 16th June 2021, had issued a list of goods mentioned under Chapter 8 and 21 which could not be analyzed/tested by DYCC. It is admitted by the Respondents that the goods in-question however were tested by the said DYCC Lab, which had no facility to carryout such testing. The only explanation sought to be rendered by the Petitioner in the Affidavit-in-Reply is that the Petitioner did not make any request of retesting the samples by Government Laboratory or by FSSAI. On the other hand the Petitioner has rightly contended that the Petitioner came to know about such testing by DYCC only when the Order of Seizure Memo was served upon the Petitioner.

24. However, since after issuance of the impugned Seizure Memo, which is the subject matter of one of the Writ Petition, the Respondents passed an Order for provisional release and since the Petitioner could not get any interim Order in these Petitions till date though they are pending for quite some time, we do not propose to quash the Order of Seizure Memo unconditionally. We have not expressed any views in this matter at this stage whether the Advance Ruling relied upon by the Petitioner would cover the goods in-question or not in view of the rival contentions raised by the Respondents in respect of the process followed relating to the said goods. It is a specific case of the Respondents that there are several other Advance Rulings in respect of the same goods taking a contrary view. Whether the

Judgment of Madras High Court in case of the Petitioner itself reported in 2018 (13) G.S.T.L. 273 (Mad.), would apply to the facts of this case or not can be considered after submission of the report by a Government Laboratory or FSSAI classifying the goods in-question under an applicable entry.

25. In view of the Order for fresh testing of the said goods, we have not expressed any views, whether the goods cleared by Madras Custom Authorities or by any other Authority were same as claimed by the Petitioner in this case at this stage.

26. In our view since it is an admitted position that the said DYCC could not have carried out such testing at the first instance, we are inclined to direct the Respondents to draw samples of the goods imported by the Petitioner which are subject matter of these Petitions and to send to the Government Laboratory or FSSAI within one week from today.

27. Since the Authorities have admitted that the earlier samples drawn and tested by DYCC could not have been drawn contrary to the two public notices and the said report being the basis for issuance of Seizure Memo, we are inclined to direct the Respondents to release the goods in-question on the Petitioner submitting P.D. bond.

28. Mr.Shah, learned counsel for the Petitioner, on instructions, states that the P.D. bond will be submitted within three days from today. The statement is accepted. Upon submission of the P.D. bond by the Petitioner, the the Respondents shall release the goods in-question at the earliest and not later than one week from the date of receipt of P.D. bond. It is made clear that the release as directed by this Court would be subject to the testing report to be submitted by the Government Laboratory or by FSSAI and subject to the final assessment. The impugned Order of Seizure stands set-aside, subject to final assessment depending upon the fresh test report.

29. All the Writ Petitions are allowed in the aforesaid terms. Rule is made absolute accordingly.

30. Parties to act upon the authenticated copy of this Order.

31. It is made clear that all the contentions of both the parties not decided by this Order are kept open.

[S. M. MODAK, J.] **[R. D. DHANUKA, J.]**

OMKAR SHIVAHAR KUMBHAKARN

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