2023:BHC-NAG:13435-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4587/2022

M/s Mehar Enterprises, Rep. by its Proprietor, Rajnesh Malhotra,
100/3, HUL Godown, Fetari, Nagpur – 440 013. **PETITIONER**

.....VERSUS.....

The Joint Commissioner of Customs (Adj.)
Customs Commissionerate, Nagpur GST Bhawan,
Telankhedi Road, Civil Lines, Nagpur – 440 001. **RESPONDENT**

Shri A.K. Jayraj with H.N. Khandwani, counsel for the petitioner.
Shri S.N. Bhattad, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : JULY 20, 2023
DATE ON WHICH JUDGMENT IS PRONOUNCED : SEPTEMBER 11, 2023

JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The challenge raised in the present writ petition is to the order dated 21.06.2022 passed by the Joint Commissioner, Customs thereby directing confiscation of the goods imported by the petitioner by holding them to be kerosene oil valued at Rs.1,19,96,909/- under Section 111(d) and 111(m) of the Customs Act, 1962 (for short, 'the Act of 1962'). Option has been given to the petitioner to redeem the confiscated goods after paying redemption fine equivalent to the value of the goods. Penalty under Section 112(a) has also been imposed for a sum equal to the value of the goods imported. Further penalty under Section 114-AA also equivalent to the value of the goods has been imposed.

3. Brief facts giving rise to the present challenge are that the petitioner, a Proprietary Concern, is engaged in the import and trading of Petrochemicals as well as Oil products obtained from Bituminous Minerals. The petitioner holds requisite permissions and has been duly registered as required. Pursuant to Invoice dated 23.08.2021 the petitioner imported Mixed Mineral Hydrocarbon Oil from Kuwait. The description of the goods is "Mixed Mineral Hydrocarbon Oil" HS-Code 27101990. A Bill of Entry dated 11.09.2021 was accordingly filed by the petitioner at ICD Borkhedi, Nagpur. In the packing list it was stated that six containers of Mixed Mineral Hydrocarbon Oil under CTH 2710 had been imported. The Officers of the Directorate of Revenue Intelligence drew samples of the imported material from each container and the samples were sent to the Central Excise and Customs Laboratory, Vadodara - the Vadodara Laboratory on 16.09.2021. The laboratory report dated 23.09.2021 was accordingly received in which it was stated that the samples met the requirements of kerosene as per IS 1459-1974. According to the petitioner all requisite tests that are required to be conducted as well as the tests as directed by the Officers of the Directorate of Revenue Intelligence had not been conducted at the Vadodara Laboratory. On the basis of the aforesaid report the Officers of the Customs Department had a reasonable belief that the imported goods were liable for confiscation under Section 111 of the Act of 1962. Since the petitioner was of the view that what was imported was Mixed Mineral Hydrocarbon Oil, it made a request for re-testing of the samples. However, without undertaking such re-testing, show cause notice dated 22.03.2022

came to be issued under Section 124 of the Act of 1962. The petitioner was called upon to show cause on the basis of the Test Memo received from the Vadodara Laboratory as to why the seized goods which were 104650 Kilograms of kerosene oil should not be confiscated under Section 111(d) and 111(m) of the Act of 1962 followed by imposition of penalty. The petitioner replied to the said show cause notice and stated that the tests conducted at the Vadodara Laboratory were not undertaken by following the prescribed norms. It was asserted that the goods imported were in fact Mixed Mineral Hydrocarbon Oil and it was prayed that the show cause notice be dropped. Another request for re-testing of the samples was made vide communication dated 22.04.2022. The Joint Commissioner after considering the material before him held that as per the report of the Vadodara Laboratory the goods imported were found to kerosene oil as per IS..1459-1974. Since the petitioner was not a State Trading Enterprise that could import kerosene oil there was violation of the provisions of the Act of 1962. On that premise the goods were liable to be confiscated under Section 111(d) and 111(m) of the Act of 1962. The show cause notice was accordingly adjudicated by the order dated 21.06.2022. It is this order that is subjected to challenge in this writ petition.

4. Since it was the grievance of the petitioner that its request for re-testing of the samples had not been complied with and that there was breach of principles of natural justice, while issuing notice in the writ petition the petitioner was directed to deposit 7.5% of the value of the confiscated goods within a period of three weeks. The petitioner has accordingly deposited

Rs.8,99,770/-. During the course of consideration of the writ petition on 10.03.2023 an interim order came to be passed. By referring to Circular 30/2017-Custom as issued by the Central Board of Excise and Customs in the matter of guidelines for re-testing of samples, this Court directed the Customs Department to forward the remnant samples to the Chemical Examiner, New Customs House Laboratory, Mumbai – the Mumbai Laboratory. The report was directed to be submitted within a period of one week of the laboratory receiving the samples. Since the report could not be submitted within the time as directed, an application was filed for extension of such time which came to be accordingly granted. Accordingly, the test reports from the Mumbai Laboratory were received vide communication dated 03.04.2023. As per those reports, the samples were in the form of colourless viscous oily liquid composed of more than 70% mineral hydrocarbon oil having characteristics of Base Oil. The Directorate of Revenue Intelligence thus moved Civil Application (W) No.1320 of 2023 seeking time to submit a second test report in terms of Circular dated 18.07.2017. The said application was allowed on 24.04.2023. The samples were then sent to Central Revenues Control Laboratory, New Delhi - CRCL, New Delhi. Thereafter, the re-testing report dated 19.05.2023 received from CRCL, New Delhi has been placed on record. As per the said report each of the six samples is in the form of colourless vicious oily liquid that is mainly composed of Mineral Hydrocarbon Oil having mineral oil content more than 70% by weight. It was further stated that each of the six samples was base oil. It is in the aforesaid factual backdrop that the writ petition has been heard.

5. Shri A.K. Jayraj, learned counsel appearing for the petitioner after referring to the facts on record submitted that the Deputy Director, Directorate of Revenue Intelligence was not justified in refusing the request as made for re-testing. In the present proceedings, after considering all relevant aspects this request was granted in view of the interim order passed on 10.03.2023. In the report of the Mumbai Laboratory it had been opined that the sample tested was in the form of Colourless Vicious Oily Liquid being composed of more than 70% Mineral Hydrocarbon Oil having the characteristics of base oil. The Department was not satisfied with the said report and hence made a request for re-testing which was also granted in view of the order dated 24.04.2023. The re-testing report of CRCL, New Delhi reiterated what was found in the test report submitted by the Mumbai Laboratory. It was thus clear that in view of the report of the Mumbai Laboratory and CRCL, New Delhi, there was no substance in the ground raised in the show cause notice that the samples related to kerosene. By filing the affidavit in compliance the Intelligence Officer had now sought to change its stand by stating that it was a case of mis-classification and mis-declaration of the items imported. This was in contrast to what was stated in the show cause notice dated 22.03.2022. It was clear that what was imported was base oil under CTH 2710 and even the issue of alleged mis-classification and mis-declaration did not arise. The consignment as seized was liable to be released in the light of the initial declaration

especially when there was no financial loss being caused to the Authorities. Reference was made to the Customs Tariff Order with regard to Tariff item 2710 as well as the decision of the Kerala High Court in *Saithalavi s/o Ahammed Koya Versus State of Kerala* [**CRL.A. No. 465 of 1997(B)**] decided on 28.05.2015. It was thus submitted that the impugned order dated 21.06.2022 passed by the Joint Commissioner of Customs was liable to be set aside and the goods seized ought to be released.

6. Shri S.N. Bhattad, learned counsel for the respondent supported the impugned order and opposed the writ petition. At the outset, the maintainability of the writ petition was challenged on the ground that the order passed by the Joint Commissioner of Customs could be challenged in a statutory appeal under the Act of 1962. There was no exceptional case to permit the petitioner to bypass that statutory remedy and approach this Court in the present writ petition. Without prejudice to the aforesaid it was submitted that notwithstanding the subsequent test reports it was clear that the classification of the goods was in dispute. The petitioner was liable to pay the duty on the imported goods and it was not a case of complete waiver. Referring to the provisions of Section 122-A of the Act of 1962 it was submitted that this aspect would require adjudication. Since such adjudication was necessary the prayers made in the writ petition were not liable to be granted. He referred to the affidavits filed on record to substantiate his contentions. It was thus submitted that the writ petition was liable to be dismissed.

7. We have heard the learned counsel for the parties at length and with their assistance we have perused the relevant material on record.

We may at the outset indicate the reasons for entertaining the writ petition in the light of the objection raised by the learned counsel for the respondent based on availability of an alternate remedy. The principal grievance of the petitioner was the refusal on the part of the Directorate of Revenue Intelligence to permit re-testing in a manner contrary to Circular 30/2017-Customs. It is in that context that while entertaining the writ petition, the re-testing was permitted to be undertaken vide order dated 10.03.2023 with a further liberty to the Directorate of Revenue Intelligence to seek re-testing under Circular 30/2017-Customs. With receipt of these reports and the findings recorded therein it becomes clear that the prayer made by the petitioner for initial re-testing was justified and the same was liable to be granted. The refusal by the Joint Commissioner of Customs to permit re-testing was without any legal basis. In these facts therefore we have proceeded to entertain the writ petition since we find that the basis for issuing the show cause notice is legally flawed and the said aspect goes to the root of the matter.

8. The show cause notice issued to the petitioner on 22.03.2022 is entirely based on the report of the Vadodara Laboratory that states that the samples met the requirements of Kerosene as per IS:1459-1974. The show cause notice in clear terms states that the goods seized were containers of kerosene oil under the Bill of Entry dated 11.09.2021 and this was by virtue of

mis-declaring the same as Mixed Mineral Hydrocarbon Oil. After the test report from the Vadodara Laboratory was received, a request for re-testing was made by the petitioner on 30.09.2021. This request was not accepted and the show cause notice came to be issued on 22.03.2022. It was stated that the said goods had been imported in gross violation of the restriction/ prohibition imposed under the Import Policy. The petitioner did reply to the said show cause notice by asserting that what was imported was Mixed Mineral Hydrocarbon Oil. This led to passing of the order dated 21.06.2022 by the Joint Commissioner of Customs which is based solely on the report received from the Vadodara Laboratory.

We may also observe that in the reply to the show cause notice, a clear stand was taken by the petitioner that the specific tests required to be done as per directions of the Senior Intelligence Officer were not undertaken by the Vadodara Laboratory. This aspect is clear on perusing the Test Memo dated 16.09.2021 and the test report of the Vadodara Laboratory. The Joint Commissioner of Customs in his order dated 21.06.2022 has not considered this relevant aspect and without dealing with the specific stand of the petitioner has proceeded to accept the test reports of the Vadodara Laboratory.

9. The grievance of the petitioner based on Circular 30/2017-Customs in the context of the prayer for re-testing was considered by this Court on 10.03.2023 and the samples were directed to be sent to the Mumbai Laboratory for analysis. It is not in dispute that the report from the Mumbai

Laboratory dated 03.04.2023 indicates presence of more than 70% Mineral Hydrocarbon Oil in the samples having characteristics of Base Oil. Since the Customs Department was not satisfied with the said test report, its request for re-testing as made in Civil Application (W) No. 1320 of 2023 was granted on 24.04.2023. The re-testing report from CRCL, New Delhi dated 19.05.2023 reiterates the findings of the test report received from the Mumbai Laboratory.

10. Thus from the test report dated 03.04.2023 received from the Mumbai Laboratory as well as the re-testing report dated 19.05.2023 received from CRCL, New Delhi, we find that the entire basis for issuance of the show cause notice that was issued in view of the report of the Vadodara Laboratory indicating import of kerosene oil would not now survive. It is not in dispute that the report received from the Vadodara Laboratory is categorical in its finding that the samples met the requirement of kerosene. The subsequent testing and re-testing reports bely the initial report obtained from the Vadodara Laboratory. The Intelligence Officer, Directorate of Revenue Intelligence having exercised the option available under Clause (h) of the Circular dated 18.07.2017, the logical conclusion based on the report of CRCL, New Delhi ought to follow. On this premise, we find that the show cause notice in its present form cannot survive since the testing and re-testing of the samples has been undertaken in accordance with Circular 30/2017-Customs as issued by the Central Board of Excise and Customs on 18.07.2017. Consequentially, the

impugned order passed by the Joint Commissioner of Customs dated 21.06.2022 is liable to be set aside on this short ground.

11. Having held that the show cause notice dated 22.03.2022 would not now survive and as the order dated 21.06.2022 passed by the Joint Commissioner of Customs upholding the show cause notice has to be set aside, consequences of the same would follow. The Bill of Entry dated 11.09.2021 describes the goods as Mixed Mineral Hydrocarbon Oil – 27101971 for Base Oil is also chargeable with duty at 5%. The goods in question were confiscated on the premise that kerosene oil had been imported by the petitioner by declaring the same to be Mixed Mineral Hydrocarbon Oil. The test report from the Mumbai Laboratory as well as the re-testing report from CRCL, New Delhi clearly indicate the samples to contain more than 70% Mineral Hydrocarbon Oil having characteristics of Base Oil. In view of these two consistent reports it is clear that the goods imported were neither restricted nor prohibited. In this factual backdrop when the show cause notice now does not survive, the confiscation of the goods under Section 111(d) and (m) would not be now sustainable. The goods in question are thus liable to be released. However, since it is urged by the respondent that the aspect of mis-classification and mis-declaration is required to be considered, liberty to that extent can be reserved in favour of the Directorate of Revenue Intelligence. In the light of aforesaid discussion, the following order is passed:-

(A) The show cause notice dated 22.03.2022 as well as the order dated 21.06.2022 passed by the Joint Commissioner of Customs are set aside.

(B) In the light of the test report received from the Mumbai Laboratory dated 03.04.2023 and the re-testing report received from CRCL, New Delhi dated 19.05.2023, the seized goods shall stand released in favour of the petitioner subject to complying with the requisite procedure in that regard. It is however open for the Directorate of Revenue Intelligence, Mumbai to take further steps based on the aforesaid test reports in accordance with the Act of 1962.

(C) The amount of Rs.8,99,770/- deposited by the petitioner shall be returned to the petitioner with accrued interest, if any.

12. Rule is made absolute in aforesaid terms with no order as to costs.

(**MRS. VRUSHALI V. JOSHI, J.**) (**A.S. CHANDURKAR, J.**)

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