S.R.JOSHI

SMITA RAJNIKANT JOSHI
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDITION

WRIT PETITION NO. 2091 OF 2024

Hemant Subhas Teke, aged 51 years
Indian Inhabitant, carrying on business
in the name and style of M/s. Hemant Trading Company as a sole proprietor thereof
having his office at S. S. No.1991 Teke Wada, A/P. Akluj, Tal. Malshirash Solapur, Maharashtra-413101 … Petitioner

Versus

1.The Union of India
Through the Secretary,
Department of Revenue,
Ministry of Finance,
Government of India,
New Delhi-110 001.

2. The Commissioner of Customs,
NSPU, Rummaging and Intelligence
Having his office at
New Custom House, Ballard Estate,
Mumbai-400 001.

3. The Assistant Commissioner of
Customs, NSPU, Rummaging and Intelligence,
Having his office at New Custom House, Ballard
Estate, Mumbai-400 001.

4.The Senior Intelligence Officer
NSPU, Rummaging and Intelligence
Having his office at
New Custom House, Ballard Estate,
Mumbai- 400 001.

5. The Commissioner of Customs
(Import), NS-V, ,
having his office at JNCH, Nhava Sheva, Uran,
Raigad, Maharashtra – 400 707.

6. The Deputy Commissioner of Customs

(Import), Group VI, NS-V,
having his office at JNCH,
Nhava Sheva, Uran,
Raigad, Maharashtra-400 707. …Respondents

Mr. Prakash Shah a/w. Mr. Jas Sanghavi i/b. PDS Legal for the Petitioner.

Mr. Jitendra B. Mishra a/w. Ms. Sangeeta Yadav for Respondents.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 21st FEBRUARY 2024

ORAL JUDGMENT (per Firdosh P. Pooniwalla J.):-

RULE. Rule made returnable forthwith. Heard finally by consent of the parties.

2 The Petitioner, who is the sole proprietor of M/s. Hemant Trading Company, has filed the present Petition, under Article 226 of the Constitution of India challenging the legality and validity of the seizure memo dated 28th September 2023 issued by Respondent No.4 in respect of Ethyl Alcohol Absolute imported by the Petitioner vide Bill of Entry No.7568895, dated 28th August 2023, on the purported belief of mis-classification of the goods, despite an out of charge being ordered by the proper officer by the Customs.

3 The Petitioner is, *inter alia,* engaged in the business of import of laboratory chemicals for the last more than twenty years and has been registered under Import Export Code No.3108009451. The Petitioner, for the last more than twenty years, has been importing Ethyl Alcohol Absolute having purity (Ethyl Alcohol Content) of 99.9% and above, in bottles of 500 ml, from various countries. The said Ethyl Alcohol Absolute carries markings indicating that the same is meant for use solely as Laboratory Chemicals.

4 The said Ethyl Alcohol Absolute has been assessed by the Respondents as *"Laboratory Chemical"* under Customs Tariff Heading 98.02 (CTH98.02) of the First Schedule to the Customs Tariff Act, 1975, since the past twenty years. Further, note 3 of Chapter 98 covers all chemicals, organic or inorganic, whether or not chemically defined, imported in packing not exceeding 500 gms or 500 millilitres and which can be identified with reference to the purity, marking or other features to show them to be meant for use solely as laboratory chemicals. Note 1 of Chapter 98 provides that Chapter 98 is to be taken to apply to all goods which satisfy the conditions prescribed in Chapter 98, even though they may be covered by a most specific heading elsewhere in the Schedule. The said notes 1 to 3 of Chapter 98 read as under:-

> *"Project import; laboratory chemicals; passengers' baggage, personal importation by air or post; ship stores*
>
> *Notes:*
>
> *1. This Chapter is to be taken to apply to all goods which satisfy the conditions prescribed therein, even though they may be covered by a more specific heading elsewhere in the schedule.*
>
> *2. Heading 9801 is to be taken to apply to all goods which are imported in accordance with the regulation made under section 157 of the Custom Act, 1962 (52 of 1962) and expressions used in this heading shall have the meaning assigned to them in the said regulations.*
>
> *3. Heading 9802 covers all chemicals, organic or inorganic, whether or not chemically defined, imported in packings not exceeding 500 gms or 500 milliliters and which can be identified with reference to the purity, markings or other features to show them to be meant for use solely as laboratory chemicals.*
>
> *4. ………."*

5 It is the case of the Petitioner that, since, the Ethyl Alcohol Absolute imported by the Petitioner is in packing of 500 ml, and, since, by virtue of its purity of 99.9% and markings, it is identified as meant for use solely as laboratory chemical, it satisfies the requirements of Note 3 to Chapter 98, and, therefore, by virtue of Note 1 to Chapter 98, it has to be classified under heading 98.02 in preference to any other Chapter of the Customs Tariff.

6 In August 2023, the Petitioner imported a consignment of Ethyl Alcohol Absolute and sought clearance thereof by filing Bill of Entry No.7568895 dated 28th August 2023. The said Ethyl Alcohol Absolute is in bottles of 500 ml. It also carries the marking indicating that the same is meant to be used solely as a laboratory chemical.

7 Accordingly, the Petitioner assessed the Ethyl Alcohol Absolute under CTH 98.02 and paid appropriate duty on the same. After due verification and examination of the Ethyl Alcohol Absolute, including examination regarding the classification of the goods, the proper officer of Customs passed an Order under Section 47 of the Customs Act, 1962 (the Act) permitting the clearance of the goods for home consumption i.e., granted out of charge to the Ethyl Alcohol Absolute on 1st September 2023.

8 However, before the Petitioner could take delivery of the Ethyl Alcohol Absolute, the Petitioner received a letter dated 5th September 2023 from Respondent No.4, *inter alia*, informing the Petitioner that the goods were put on hold.

9 Accordingly, the Ethyl Alcohol Absolute was examined by the Respondents on 5th September 2023 in the presence of the Customs House Agent of the Petitioner and were sent for testing to DYCC Lab. at JNCH. The said DYCC Lab provided its Test Report on 10th October, 2023, which was provided to the Petitioner along with the Show Cause Notice.

10 Subsequent to the aforementioned examination, the Superintendent of Customs (Preventive) called upon the Petitioner to appear before Respondent No.3 on 13th September 2023, to give oral evidence and to submit the required documents. Accordingly, on 13th September 2023, the Petitioner appeared before Respondent No.4, gave his oral evidence and submitted the documents in respect of Bills of Entry dated 28th August 2023.

11 Since the Petitioner was incurring huge demurrage and detention charges pending the investigation by the Respondents, the Petitioner, by his letter dated 27th September 2023, requested Respondent no.3 to permit warehousing of the Ethyl Alcohol Absolute under Section 49 of the Act. By his letter dated 27th September 2023, Respondent No.3 accepted the said request made by the Petitioner and directed the Deputy Commissioner of Customs, Import Docks, M/s Distiparks Ltd. to permit warehousing of the Ethyl Alcohol Absolute under Section 49 of the Act for a period of 30 days from the issuance of the letter.

12 Further, Respondent No.4, by his seizure memo dated 28th September 2023, has seized the Ethyl Alcohol Absolute on the belief that the same was classifiable under CTH 22.07, and not under CTH 98.02, and that the Petitioner was evading customs duty.

13 On 27th November, 2023, the Petitioner received a copy of the Show Cause Notice dated 26th November, 2023 issued by Respondent No.5. By the said show cause notice, the Petitioner was called upon to show cause as to why (i) the goods imported by him and covered under Bill of Entry No.7568895 dated 28.08.2023 should not be classified under CTH 22071090, (ii) differential duty should not be demanded and recovered from the Petitioner along with interest, (iii) goods in question should not be confiscated in terms of Section 111(d) and (m) of the Act read with relevant

provisions of the Bombay Prohibition Act and (iv) penalty under Section 112(a) and/or 114A of the Act shall not be imposed upon him.

14 By his letter dated 29th January, 2024, the Petitioner has filed a detailed reply to the said show cause notice and denied the allegations made therein.

15 The said show cause notice is pending for adjudication before Respondent No.5.

16 In the meantime, by a Judgement dated 4th November 2023 passed in Writ Petition No. 12757 of 2023, this Court was pleased to provisionally release Ethanol AR imported by M/s. K. Raj and Company on execution of a bond. In view of the said Judgement dated 4th November 2023, the Petitioner met the concerned officer at JNCH and requested him to permit provisional release of Ethyl Alcohol Absolute on furnishing of a bond. However, the Respondents refused to release the Ethyl Alcohol Absolute provisionally.

17 Further, this Court, by its Order dated 24th January 2024, had also permitted provisional release of Ethanol AR imported by M/s. K. Raj and Company on execution of a bond.

18 It is the submission of the Petitioner that the action of the Respondents in seizing and withholding the Ethanol Absolute covered under Bill of Entry No.7568895 dated 28th August 2023, despite an Order for clearance of the same for home consumption having been granted under Section 47 of the Act by the proper officer of customs, is *ex-facie,* arbitrary, without jurisdiction, without authority of law and contrary to the orders passed by this Court.

19 The Petitioner submits that the purported seizure is arbitrary and no reasonable person can have a belief that the goods are liable to confiscation by invoking Section 110 of the Act.

20 The Petitioner submits, relying upon the Judgement dated 4th November 2023 and Order dated 24th January 2024 passed by this Court in the case of M/s. K Raj and Co., that the Respondents ought to have allowed provisional release of the goods upon execution and submission of a bond by the Petitioner.

21 The Petitioner submits that the Ethyl Alcohol Absolute has been seized on the purported belief that it is classifiable under CTH 22.07, which is *ex-facie* erroneous and without any basis. The Petitioner submits that the goods have been imported by the Petitioner and have always been classified and assessed by him under CTH 98.02 as laboratory chemical and 10% basic customs duty has been paid on the same. The said assessments have become final and have not been set aside by any authority. Thus, there was no justification on the part of the Respondents in seizing the Ethyl Alcohol Absolute on the ground that the same is classifiable under CTH 22.07, when, admittedly, the same had been regularly assessed under CTH 98.02 by the custom authorities themselves.

22 Further, the Petitioner submits that the imported goods satisfy the requirements of Note 3 of Chapter 98. Therefore, by virtue of Note 1 of Chapter 98, the said Ethyl Alcohol Absolute had to be classified under CTH 98.02 even assuming, without admitting, that they were covered by CTH 22.07.

23 The Petitioner submits that the clearance under Section 47 of the Act had been ordered by the proper officer of customs upon satisfaction that the Mandatory Compliance Requirements Examination Instructions for CTH

98020000 appearing in the Bill of entry were fulfilled. As per Chapter Notes, CTH 98.02 covers all chemicals, organic or inorganic, whether or not chemically defined, imported in packings not exceeding 500 gms or 500 millilitres and which can be identified with reference to the purity, marking or other features to show them to be meant for use solely as laboratory chemicals.

24 The Petitioner submits that, as per the said Compulsory Compliance Requirements, for classification of the goods under CTH 98.02, the proper officer of customs has ascertained that the goods are in packing not exceeding 500 gms or 500 millilitres and are identified as being meant solely for use as laboratory chemicals based on the purity and markings.

25 The Petitioner further submits that, in any event, the Ethyl Alcohol Absolute in question is correctly classifiable under CTH 98.02. It is packed in 500 ml bottles, which clearly bear a marking *"For Laboratory use only"*. As per the Certificate of Analysis, it is clear that the Ethyl Alcohol Absolute imported by the Petitioner has purity of 99.9 % and above. Further, the Ethyl Alcohol Absolute has been classified as HPLC, which can be used only in Laboratories. The Petitioner submits that, on the basis of purity, packing and marking the said Ethyl Alcohol Absolute is meant for laboratory use only and is rightly classifiable under CTH 98.02.

26 The Petitioner further submits that a mere claim for classification or exemption cannot be the basis for seizure of goods. In these circumstances, the Petitioner submits that there is no justification on the part of the Respondents in seizing the goods in question and, therefore, he is entitled for the reliefs sought by him in the present Petition.

27 Having heard learned Counsel for the parties and having perused the documents on record, we are of the view that the Petitioner would be justified in seeking provisional release of the Ethyl Alcohol Absolute.

Admittedly, there is no dispute that the Petitioner has been importing Ethyl Alcohol Absolute for the last many years and the classification under CTH 98.02 has been accepted by the Respondents, except in respect of Bill of Entry No.7568895, which is the subject matter of the present Petition.

28 The Petitioner is a regular importer of Ethyl Alcohol Absolute and not a fly by night operator. The Ethyl Alcohol Absolute is in bottles of 500 ml and confirms to the marking requirement as per Chapter 98 of the Customs Tariff Act.

29 In our view, the Respondents would not be justified in not permitting provisional release of Ethyl Alcohol Absolute on the basis that some investigation is being conducted. The classification has to be seen at the time of import by the Petitioner and not the use to which it is put by the buyers of the goods from the Petitioner. There is no condition in the Customs Tariff under chapter 98, which imposes such an obligation on the Petitioner. In our view, in the light of these facts, the Respondents are not justified in refusing to release the Ethyl Alcohol Absolute provisionally.

30 The Ethyl Alcohol Absolute under consideration is not prohibited goods but the only dispute between the Petitioner and the Respondents relates to classification, which, as observed above, has been permitted to be cleared since last many years under CTH 98.02 by the Respondents.

31 As correctly submitted by the Petitioner, in similar circumstances, this Court, by its Judgement dated 4th November 2023 in **M/s. K. Raj and Co. Vs. the Union of India** (Writ Petition No.12757 of 2023) and by its Order dated 24th January 2024 in **M/s. K. Raj and Co. Vs. the Union of India** (Writ Petition No.391 of 2024) has ordered provisional release of the seized goods

on execution of a bond. We see no reason as to why similar orders ought not to be passed in the present matter.

32 For the aforesaid reasons, we pass the following orders:-

a) The Petitioner is entitled for provisional release of the Ethyl Alcohol Absolute under Bill of Entry No.7568895 dated 28th August 2023 on execution of a bond by the Petitioner to secure the differential duty and consequential amount, if any.

b) The Respondents are directed to release the goods within a period of two weeks from the execution of such a bond by the Petitioner.

c) All contentions of the parties with regard to classification are kept open to be considered in appropriate proceedings.

d) Rule is made absolute in the aforesaid terms.

e) The Writ Petition is disposed of.

f) In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI, J.)**