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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11178 OF 2024

Dow Chemical International Pvt. Ltd. ...Petitioner

Versus

Commissioner of Customs NS-II Special
Investigation and Intelligence Branch (X)
and anr. ...Respondents

Mr Amit Singh, a/w Ms Anasamah Sayed, i/b. Abhay Nevagi
& Associates, for the Petitioner.

Mr Subir Kumar, a/w Ms Kavita Shukla, Mr Abhinav Palsikar,
for Respondent No.1.

CORAM **M.S. Sonak &
Jitendra Jain, JJ.**
DATED: **21 October 2024**

PC:-

1. On mentioning, this matter was taken up for consideration in the afternoon session on the production board.
2. Heard learned counsel for the parties.
3. This Petition was initially instituted to seek a declaration that the Petitioner is not required to obtain NOC from the Narcotics Commissioner (Respondent No.2) for exporting its product, namely ADCOTE 545S containing Methyl Ethyl

Ketone (MEK) as according to the Petitioner, the same was not covered in Schedule-B of the Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances) Order, 2013 (“2013 Order”). The consequential relief to quash the seizure memo was also applied for.

4. During the pendency of this Petition, the first Respondent issued the Petitioner a show cause notice dated 5 August 2024 requiring the Petitioner to show cause as to why its products should not be confiscated and the penalty be imposed. Accordingly, the Petitioner amended this Petition to challenge the show cause notice dated 5 August 2024.

5. Mr Amit Singh learned counsel for the Petitioner, submitted that in terms of Clause 10 of the 2013 Order, there is a bar on exporting any controlled substance in Schedule-B except in accordance with the conditions of the No Objection Certificate issued by the Narcotics Commissioner. He referred us to Schedule-B and submitted that though there is a reference to MEK at Entry 10, the Petitioner’s product ADCOTE 545S cannot be styled as MEK, though MEK may be one of the components of ADCOTE 545S. He referred us to Entries 4, 5, 6 and 16 to submit that where any product and its salts and preparations or only salts were intended to be included, Schedule-B says so in specific terms. He submitted that it was only when MEK was sought to be exported and not some product containing MEK that the NOC from the Narcotics Commissioner would be necessary.

6. Mr Singh submitted that the issuance of show cause notice in the above circumstances is an exercise without

jurisdiction. Therefore, a rule must be issued in this Petition, and the Respondents must be restrained from proceeding with the show cause notice pending its final disposal.

7. Mr Singh submitted that the Narcotics Commissioner or the Assistant Narcotics Commissioner has already opined that ADCOTE 545S requires a NOC before it is exported. He also referred to the order made by a Co-ordinate Bench of this Court on 13 October 2017 in Writ Petition No.10730 of 2017 in the context of the seizure of specific goods that may have contained the items specified under Schedule-B. He submitted that the present Petition should be entertained for all these reasons rather than requiring the Petitioner to face the show cause notice.

8. Mr Subir Kumar learned counsel for Respondent No.1 submitted that the issue in this case was whether Schedule-B covered the Petitioner's product. He submitted that such an issue would contemplate investigation into factual aspects like the product's components and involve interpretation of the various entries in Schedule-B. He submitted that this was not a case of any inherent lack of jurisdiction to issue the show cause notice and, consequently, the rule of exhaustion of statutorily provided remedies should not be deviated from.

9. Mr Kumar also referred to the provisions of Section 9-A of the Narcotics Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") to submit that the Central Government has the power to control and regulate the controlled substances. He pointed out that if the Central Government was of the opinion that, having regard to the use of any controlled substance in

the production or manufacture of any narcotic drug or psychotropic substance, it was necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein. He submitted that the 2013 Order was made under the powers conferred by Section 9-A of the NDPS Act.

10. Mr Kumar accordingly submitted that since ADCOTE 545S admittedly contains MEK and such MEK could be distilled or extracted from there, the argument about the item not being covered under Schedule-B was fallacious. On these grounds, Mr Kumar submitted that this Petition may be dismissed, or the Petitioner may be relegated to the adjudicatory mechanism under the statute.

11. The rival contentions now fall for our determination.

12. The Petitioner has pleaded that it manufactures a product, namely ADCOTE 545S, which is the solvent-based adhesive suitable for lamination of plastic and aluminium foil structure, used in food packaging, non-food packaging, soap and cosmetic packaging, etc. and that it is *“Homogeneous mixture of several chemicals including Methyl Ethyl Ketone (MEK)”*.

13. One issue in this matter is whether the petitioner’s product is included in Schedule-B appended to the 2013 Order made under Section 9A of the NDPS Act. A decision on this issue will essentially involve a factual investigation, and it

cannot be easily resolved only by interpreting the various entries in Schedule-B, as Mr Singh urged.

14. Since the 2013 Order was made under Section 9-A of the NDPS Act, we transcribe it for the convenience of reference:

“9-A. Power to control and regulate controlled substances.

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(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by sub-section (1), an order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance.

15. The Central Government made the 2013 Order by exercising its powers under Section 9-A of the NDPS Act. Sub-Section (1) of Section 9A requires the Central Government to have regard “ *to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance.....*”. Thus, it is at least arguable that the “use” of a narcotic drug or a psychotropic substance is not entirely alien to the 2013 Order made under Section 9A of the NDPS Act.

16. Clause 10 of the 2013 order reads as follows: -

“10. Export of controlled substance in Schedule-B. -

(1) No person shall export any controlled substance in Schedule-B except in accordance with the conditions of the No Objection Certificate issued by the Narcotics Commissioner.

(2) Anyone who intends to export a controlled substance in Schedule-B shall apply to the Narcotics Commissioner in Form-J for a No Objection Certificate.

(3) The Narcotics Commissioner shall issue or deny the No Objection Certificate within a period of twenty one working days from the date of receipt of application and in case the No Objection Certificate is not issued within the stipulated time period or denied, the Narcotics Commissioner or any other officer authorised by him in this regard shall inform the applicant the reasons thereof.

(4) The No Objection Certificate for export issued by Narcotics Commissioner shall be valid for a single consignment only.

(5) Every exporter shall submit the details and documents relating to the export, such as invoice, cargo manifests, customs, transport and shipping documents relating to the export of the controlled substance in Schedule-B which shall contain the details such as name of the controlled substance, quantity, name and address of the consignee, exporter and the importer, to the Narcotics Commissioner within a period of seven days of export.”

17. Since Clause 10 of the 2013 Order refers to Schedule-B and the entire thrust of the Petitioner’s arguments is based upon the interpretation of the various entries in Schedule-B, we transcribe Schedule-B for the convenience of reference.

“**SCHEDULE-B** (Schedule-B substances are those controlled substance whose export from India is subject to controls as specified in this Order.)

1. Acetic anhydride
2. N-Acetylanthranilic acid
3. Anthranilic acid

4. Ephedrine, its salts and preparations thereof
5. Ergometrine and its salts
6. Ergotamine and its salts
7. Isosafrole
8. Lysergic acid and its salts
9. 3, 4-methylenedioxyphenyl-2-propanone
- 10. Methyl ethyl ketone**
11. Norephedrine (Phenylpropanolamine), its salts and preparations thereof
12. 1-phenyl-2-propanone
13. Phenylacetic acid and its salts
14. Piperonal
15. Potassium permanganate
16. Pseudoephedrine, its salts and preparations thereof
17. Safrole and any essential oil containing 4% or more safrole.”

18. Entry 10 refers to “Methyl Ethyl Ketone”. Therefore, the Petitioner contends that as long as the Petitioner is not exporting MEK, no NOC is required from the Narcotics Commissioner. Mr Singh has argued that ADCOTE 545S may contain MEK, but it is not itself MEK. He also claimed that where a particular product is only one of the components of its salts or preparations, entries 4, 5, 6, 8, 11, 13 and 16 have said so in clear terms. According to him, the fact that there is no such reference in Entry 10 shows a clear intention to exclude any salts or preparations of MEK or any products containing MEK, irrespective of whether MEK was readily severable.

19. On the other hand, Mr Kumar contended that Section 9-A of the NDPS Act was intended to cover “uses” of narcotics and controlled substances. He also argued that factual aspects need to be investigated because, according to the logic suggested by Mr Singh, even if a significant portion of the product comprises MEK, it would not be covered under Schedule-B. He submitted that MEK was easily severable according to expert opinion, which could not be ignored.

20. At this stage, all that we can say is that both the rival versions raise arguable issues. Still, such issues cannot be readily or effectively decided without investigation into factual aspects. The expressions like “Salts”, “Preparation”, or “Mixtures” have particular connotations in chemistry. A salt is a compound, while a mixture is a physical combination of two or more substances where each component retains its own identity and qualities. There are no clear pleadings that ADCOTE 545S is a salt or a preparation of MEK. The only statement in the pleadings is that MEK is one of the components of ADCOTE 545S.

21. Mr Singh referred to the communication dated 26 June 2024 issued by the Assistant Narcotics Commissioner to the Deputy Commissioner of Customs on the applicability of the Narcotics Commissioner’s NOC for the export of Chemical ADCOTE 545S containing Methyl, Ethyl, Ketone (30%-40%). This communication does say that in light of the laboratory remarks, it is clear that the substance contains Methyl, Ethyl, and Ketone, *“which can be distilled/extracted out from the chemical ADCOTE 545S.”*

22. The above communication further states that as MEK is a Precursor Chemical covered under the list of Schedule-B of Precursor Chemicals of the NDPS Act, 1985, for the purpose of Exporting/importing MEK or a chemical containing MEK in extractable form, a No-Objection Certificate from the Narcotics Commissioner is required. Again, this communication buttresses our reasoning that this is a matter that would require factual investigation and that this is not a matter that a Writ Court can decide on when examining the validity of a show cause notice.

23. The argument that the Assistant Narcotics Commissioner's communication discloses bias or a closed mind cannot be accepted. The Customs authorities issued the Show-cause notice. The Assistant Narcotics Commissioner's communication only conveys the Commissioner's opinion to the Deputy Commissioner of Customs. When adjudicating the show cause notice, the Petitioner will have full opportunity to comment upon such opinion or its correctness. However, insisting that this Court carry out this exercise while examining the validity of a show cause notice would not be appropriate.

24. At this stage, we do not wish to go into all such intricate issues that, in our opinion, would be involved in this matter. All that we want to indicate is that this is not a matter where we should interdict the entire process when it is always open to the petitioners to show cause and convince the customs authorities of the merits of the matter. We are satisfied that

this matter would require an investigation into factual aspects. Some interpretative exercise regarding Schedule-B in the context of the statutory provisions may also be necessary. This Court must not carry out such exercise in a challenge to the show cause notice itself.

25. The order made by a Co-ordinate Bench of this Court on 13 October 2017 in Writ Petition No.10730 of 2017 was in the context of the seizure of specific goods that may have contained the items specified under Schedule-B. However, nothing in the said interim order discusses or suggests that such matters can be or must be decided no sooner a show cause notice is issued rather than await the decision of the fact-finding authorities. Based on the order or the interim order cited, no case is made out to deviate from the rule or convention of exhaustion of the alternate remedies.

26. Several decisions take the view that unless the lack of jurisdiction is absolutely apparent, the Writ Court should not deviate from the usual rule of exhaustion of alternate remedies provided under the statute itself. In the present case, no exceptional grounds exist to deviate from this rule of exhaustion of alternate remedies.

27. The circumstance that this Petition was instituted before the issue of show cause notice is entirely irrelevant. Based on the pleadings, we are doubtful whether we could have granted the relief of declaration that no NOC from the Narcotics Commissioner was required. In all probabilities, we would have relegated the Petitioner to respond to the eventual show cause notice that would have to be issued to the

Petitioner. Now that a show cause notice has been issued, we do not think there is any case made out to deviate from the usual rule of exhaustion of alternate remedies.

28. In paragraph 17 of the Petition, the Petitioner has made an omnibus statement that it has no alternative and/or equally efficacious remedy for securing the reliefs prayed for in the present Petition. Apart from this statement, no exceptional circumstances have been pleaded to justify departure from the rule of exhaustion of alternate remedies. *In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others*¹ the Hon'ble Supreme Court has explained that writ petitions may be entertained against the show cause notices where the Petitioner seeks enforcement of any of the fundamental rights, where there is a violation of the principles of natural justice; where the order or proceedings are wholly without jurisdiction, or vires of the Act is challenged.

29. Of late, almost as a matter of routine, Petitions are filed to challenge show cause notices by trying to portray that the case falls within one of the parameters prescribed by the Hon'ble Supreme Court when, most often, that is not the case. Several times, non-serious challenges are thrown to the constitutionality of the provisions, only to avoid exhausting the alternate remedies provided by the statute. The alternate remedies very often involve a pre-deposit of the demanded tax amount. Therefore, very frequently, such Petitions are filed to avoid pre-deposit. Such an approach is neither to be encouraged nor approved.

¹ (1998) 8 SCC 1

30. In *Special Director and Another Vs. Mohd. Ghulam Ghouse and another*² the Hon'ble Supreme Court has held that *unless the High Court is satisfied that the show-cause notice was totally non-est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine. The writ petitioner should invariably be directed to respond to the show cause notice and take all the grounds that may now be highlighted in the writ petition.* Whether the show cause notice was founded on any legal premises is a jurisdictional issue which the recipient of the notice can even urge, and such issues also can be initially adjudicated by the authority issuing the very notice, before the aggrieved party approaches the Court.

31. In *Union of India and others Vs. Coastal Container Transporters Association and others*³ the Hon'ble Supreme Court held that where the case was neither of lack of jurisdiction nor any violation of principles of natural justice, the High Court ought not to have entertained the writ petition at the stage of notice, more so, when against the final orders, appeal lies to the Supreme Court. *Further, the Court held that when there is a serious dispute concerning the classification of service, the respondents ought to have responded to the show cause notices by placing material in support of their stand.* Accordingly, the appeals against the quashing of the show cause notices were allowed.

² (2004) 3 SCC 440

³ (2019) 20 SCC 446

32. In *Mahanagar Telephone Nigam Ltd. Vs. Chairman Central Board, Direct Taxes and another*⁴, the Hon'ble Supreme Court held that *it was settled law that the litigation against show cause notices should not be encouraged*. The Court approved the decision of the High Powered Committee, which was eminently fair and aimed at preventing frivolous litigation. The Court held that the appellant's right was not affected. It was clarified that the appellant could move a court of law against an appealable order. By not maintaining discipline and abiding by the decision, the appellant had wasted the public money and time of the courts.

33. In *Malladi Drugs and Pharma Limited vs. Union of India and another*⁵, the Hon'ble Supreme Court held that the High Court was absolutely correct in dismissing the writ petition against the mere show cause notice. The High Court, by the impugned judgment, held that the appellant should first raise all the objections before the authority that issued the show cause notice. If any adverse order was passed against the appellant, liberty was granted to approach the High Court.

34. For all the above reasons, we decline to entertain this Petition. However, if the deadline to file a reply to the show cause notice dated 5 August 2024 has already expired, we grant the Petitioner liberty to file a reply to such show cause notice within four weeks from today. Besides, we clarify that all parties' contentions are left open, and none of the

⁴ (2004) 6 SCC 431

⁵ (2020) 12 SCC 808

observations in this order should be construed as we have examined the matter on merits one way or the other.

35. Learned counsel for the Petitioner requests for continuation of ad-interim relief about no coercive steps being taken for the next four weeks. Now that we have granted the Petitioner four weeks to file a reply, it is obvious that no coercive steps will be taken for four weeks. Therefore, there is no necessity to grant any further extension.

36. This Petition is dismissed with the liberty to reply to the show cause notice and face the adjudication proceedings. All contentions of all parties on merits are, however, left open. There shall be no order for costs. The interim order granted earlier is vacated.

(Jitendra Jain, J)

(M.S. Sonak, J)