2024:BHC-OS:11180-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

PRACHI PRANESH NANDIWADEKAR
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WRIT PETITION NO.963 OF 2022

1. Hemant Surgical Industries Ltd.
A company incorporated under the
Companies Act, 1956 and having
its registered office at 502,
Escstasy, City of Joy,
Mulund (West), Mumbai 400 080.

2. Hanskumar Shah
Director of Petitioner No.1, adult
Indian inhabitant, aged 63 years,
residing at 1403 Shobha Suman,
M.M. Malviya Road, Mulund (West),
Mumbai 400 080. ….Petitioners

V/s.

1. Union of India
Through the Secretary,
Ministry of Finance, Dept. of Revenue,
New Delhi – 110 001.

2. Ministry of Environment,
Forests and Climate Change,
New Delhi – 110 001.

3. The Additional Commissioner of Customs
Group VB, NS-V, Jawaharlal Nehru
Customs House, Nhava Sheva,

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Tal. Uran, District Raigad,
Maharashtra – 400 707.

4. Dr. R. Venkatesh, MBBS
3B8, Odysis Apartment Navelim
Goa – 403 607.

5. Delhi Sikh Gurudwara Management
Committee,
Guru Gobind Singh Bhavan,
Gurudwara Rakab Ganj Sahib,
New Delhi – 110 001. ...Respondents

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Mr.Sharan Jagtiani, Senior Advocate a/w Mr. Tamanna Tavadia-Naik i/by Mr. Vikram Naik for petitioners.

Mr. Niranjan Shimpi for respondent nos.1 & 2.

Mr. Jitendra B. Mishra a/w Mr. Rupesh Dubey and Mr. Ashutosh Mishra for respondent no.3.

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**CORAM : K.R. SHRIRAM &**
**JITENDRA JAIN, JJ.**

**DATE : 26th JULY 2024**

***ORAL JUDGMENT (Per K. R. SHRIRAM, J.)*** **:**

1 Petitioner is impugning an order dated 21st April 2021 passed by respondent no.3.

2 Petitioner is engaged in import, manufacture and supply of medical equipments. In the course of business, petitioner also imports used haemodialysis machines into India since 2008.

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3 On or about 28th January 2021, petitioner imported "used haemodialysis machines" ("said Goods") vide Bill of Entry No.2537281 for supply to the dialysis centre at the hospital of respondent no.5, i.e., Delhi Sikh Gurudwara Management Committee, New Delhi. The Bill of Entry contained an examination order which states, inter alia, that the Customs Department shall get concerned goods certified by a Chartered Engineer that the imported goods were not hazardous waste or e-waste. Petitioner had also imported another consignment of identical haemodialysis machine vide Bill of Entry No.2536133 dated 28th January 2021. These have been cleared by the Custom Authorities and installed at the hospital of respondent no.5. Both consignments were examined by the empanelled Chartered Engineers at the Customs, who certified that "used haemodialysis machines" were not hazardous waste or e-waste. Petitioner paid duty of Rs.6,03,736/- on or about 10th February 2021.

4 By communication dated 15th February 2021, respondent no.3 raised an objection vide a query disallowing clearance of the said goods alleging violation of Hazardous and other Wastes (Management, Handling and Trans-Boundary Movement) Rules, 2016 ("the said Rules"). By its letter dated 22nd February 2021, petitioner replied and explained that the said Rules did not prohibit the clearance of the said goods. This was followed by virtual hearing granted on 5th March 2021 by Deputy Commissioner of

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Customs. On or about 8th March 2021, petitioner submitted a detailed representation to the Commissioner, Additional Commissioner of Customs and the Deputy Commissioner of Customs reiterating that "used haemodialysis machines" did not contain any hazardous or other waste as defined under the said Rules. Petitioner requested that the said goods be allowed to be cleared. Petitioner submitted various certificates in support of its case.

5 It is petitioner's case that notwithstanding the detailed representation given by petitioner as recorded above, respondent no.3 issued a show cause notice (SCN) dated 19th March 2021 under Section 124 of Customs Act, 1962 ("the Act"). In the show cause notice, the stand taken by respondent no.3 was that the import of "Used Critical Care Medical Equipment" has been prohibited under the policy condition and the provisions laid down for the import of "Old and Used Medical Equipment" under Rule 12(6) and 'Basel No. B-1110' of Schedule VI of the said Rules. According to respondent no.3, petitioner has therefore, violated the policy condition laid down under Schedule VI of the said Rules by importing the "used medical equipment". Petitioner was therefore, called upon to show cause as to why the said goods having declared assessable value of Rs.50,14,653/- and applicable duty of Rs.6,01,758/- should not be confiscated under Section 111 (d) of the Customs Act, 1962 ("the Act") and

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penalty under Section 112(a)(i) of the Act should not be imposed. Paras (4) to (6) of the SCN read as under :

> "*4) The import of "Used Critical Care Medical Equipment" has been prohibited under the policy condition and provisions laid down for the import of "Old and Used Medical Equipment" under Rule 12(6) and 'Basel No. B-1110' of Schedule -VI of Hazardous and other Wastes (Management, Handling and Trans-Boundary Movement) Rules, 2016 (F. No.23-4/2009-HSMD), MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE,*
>
> *5) Therefore, in view of the facts as stated above, the importer has violated the policy condition laid down under Schedule-VI of Hazardous and other Wastes (Management, Handling and Trans-Boundary Movement) Rules, 2016 by importing goods namely "Used Medical Equipment" which 'Prohibited' under above mentioned provisions.*
>
> *6) In view of the above, the importer, M/s Hemant Surgical Industries Limited (IEC:- 0390024945) is hereby called upon to show cause to the Additional Commissioner of Customs, Appraising Group VB, NS-V, JNCH as to why:*
>
> *i) The subjected goods having declared assessable value of Rs.50,14,653/- (Rupees Fifty Lakhs Fourteen Thousand Six Hundred Fifty Three only) and applicable duty of Rs.6,01,758/- (Rupees Six Lakhs One Thousand Seven Hundred Fifty Eight Only) should not be absolutely confiscated under Section 111 (d) of the Customs Act, 1962.*
>
> *ii) Penalty under Section 112 (a) (i) the Customs Act, 1962 should not be imposed on M/s. Hemant Surgical Industries Limited (IEC:-0390024945).*

6 Petitioner replied on 12th April 2021 followed by additional reply dated 15th April 2021. Petitioner submitted as to why "used haemodialysis machines" imported are not hazardous waste or other waste and the interpretation sought to be undertaken by respondent no.3 of the said Rules was erroneous. Respondent no.3 thereafter, issued the impugned order dated 21st April 2021 and this petition came to be filed.

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7 On 18th November 2022, this Court was pleased to pass an interim order as ad-hoc arrangement. Keeping open all rights and contentions, respondent no.3 was directed to release the said goods and petitioner was directed to pay additional basic customs and any other additional duty or surcharge or cess as may be applicable as per the Customs Tariff Act, 1975 and redemption fine of Rs.5,00,000/-. Respondent no.3 was directed to release the said goods upon petitioner paying the amounts mentioned in the order. These have been complied with and the imported goods are released.

8 Mr. Jagtiani for petitioner took us through the relevant provisions of the said Rules and submitted that respondent no.3 has erroneously and arbitrarily interpreted and applied the said Rules. Mr. Jagtiani, at the outset, submitted that the Rules only prohibit hazardous and other wastes but the said goods were not waste at all but finished product. It is also submitted that to fall under the said Rules, the said goods should fall under the definition of "hazardous waste" or "waste". Mr. Jagtiani submitted that under Rule 3(17), "hazardous waste" means 'any waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other waste or substances ………….' It was also submitted

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that Rule 3(38) defines "waste" to mean 'materials that are not products or by-products for which the generator has no further use for the purposes of production, transformation or consumption'. It was also submitted that Rule 3(23) defines "other wastes" to mean 'wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country'. Mr. Jagtiani therefore, submitted that for an imported product to be prohibited, the product first has to be a "waste". Since what is imported is "used haemodialysis machines", it cannot, by any stretch of imagination, be classified as "hazardous waste" or even "waste".

9 Mr. Mishra submitted that petitioner has the alternative remedy of filing an appeal before the Commissioner (Appeals) under Section 128 of the Act and that has to exhausted. He also submitted that Rule 12(6) of the said Rules prohibits importation of "Used Critical Care Medical Equipment" for re-use and hence same would be "hazardous waste" falling under the purview of Schedule VI of the said Rules. Mr. Mishra relying on the FOB value determined by the Chartered Engineer also submitted that petitioner mis-declared the value of the goods. He also relied upon the observations made by respondent no.3 in the impugned order.

10 Mr. Shimpi adopted the submissions of Mr. Mishra. Mr. Shimpi also wanted to go into the issue of vires raised by petitioner in the petition

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which, during the course of submissions, Mr. Jagtiani stated that petitioner will not press the issue of vires at this point of time. Mr. Jagtiani states that if petitioner's interpretation on what is "hazardous waste" is not accepted by the Court then vires will be raised. In our view, for the following reasons, we do not have to go that far to decide this petition.

11 As noted earlier, the show cause notice proceeds on the basis that what is imported was a prohibited item and it was prohibited because it was "used critical care medical equipment" which has been prohibited under policy condition and provisions laid down for the import of "old and used medical equipment" under Rule 12(6) and 'Basel No. B-1110' of Schedule VI of the said Rules. In the impugned order dated 21st April 2021, in our view, respondent no.3 has accepted petitioner's explanation that the said goods cannot be termed as "hazardous waste" which is a prohibited item. We say this because in the impugned order, respondent no.3 has copiously noted the submissions of petitioner as to why "used haemodialysis machines" are not "hazardous wastes" or "wastes". Submissions recorded runs into almost 6 pages in the impugned order. However, in the "discussions and the findings" in the impugned order, respondent no.3 is totally silent about labelling the said goods as "hazardous waste" or "waste". In the impugned order though there is a passing reference to importing prohibited goods, there is a absolutely no

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discussion or finding. Para 9 and 10 of the impugned order read as under :

*"9. I have carefully gone through the records of the case, the documents available on record and submissions made by the importer during PH and their written submissions dated 12.04.2021 & 15.04.2021. Therefore, I proceed with the adjudication of the case, on the basis of available evidence on record.*

*9.1 I also find that the Importer had submitted a certificate dated 29.09.2020 and 09.02.2021 from Chartered Engineer, according the said CE Certificate M/s Ace Global Tech examined/inspected the subject goods on 28.09.2020 and submitted their inspection Report 108-AGT-SKV-2020 on 29.09.2020, wherein the subject goods have been declared "Second Hand & Used Medical Equipment with Standard Accessories, suitable for use 05 to 07 years and year manufacturing as found on the goods appears to be in compliance to the condition of the said goods". In furtherance to the above CE Certificate the importer have also submitted latest CE Certificate vide Reference No. SAI-NS/HEMANT/206/20-21 dated 09.02.2021 issued by M/s Sai Siddhi Associates wherein the FOB value was re-determined by concerned CE to the tune of total FOB Value as EUR 63,000.00 or Rs.56,79,450/- (Rupees Fifty Six Lakhs Seventy Nine Thousand Four Hundred Fifty only) @ EUR 1.00 = Rs.90.15.*

*9.2 The issues for consideration before me to decide are:-*

*i. The subjected goods having declared assessable value of Rs.50,14,653/- (Rupees Fifty Lakhs Fourteen Thousand Six Hundred Fifty Three only) and applicable duty of Rs.6,01,758/- (Rupees Six Lakhs One Thousand Seven Hundred Fifty Eight Only) should not be absolutely confiscated under Section 111 (d) of the Customs Act, 1962.*

*ii. Penalty under Section 112 (a) (I), the Customs Act, 1962 should not be imposed on M/s Hemant Surgical Industries Limited (IEC:-0390024945).*

*iii. Re-determination of value as per assessment by the said Chartered Engineer Certificate Reference No. SAI-NS/HEMANT/206/20-21 dated 09.02.2021 issued by M/s Sai Siddhi Associates dated 09.02.2021 i.e. FOB Value of the subject as EUR 63,000.00 or Rs.56,79,450/- (Rupees Fifty Six Lakhs Seventy Nine Thousand Four Hundred Fifty only) @ EUR : 1.00 = Rs.90.15.*

*9.4 however, in view of the Chartered Engineer Certificate Reference No.*

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*SAI-NS/HEMANT/206/20-21 dated 09.02.2021 issued by M/s. Sai Siddhi Associates dated 09.02.2021 wherein FOB Value of the subject goods has been re-determined as Rs.56,79,450/- (Rupees Fifty Six Lakhs Seventy Nine Thousand Four Hundred Fifty only), it is noticed that the imported goods have been mis-declared in respect of Value. The subject mis-declaration in value on the part of importer has resulted in increase in leviable duty amount to the tune of Rs.6,85,688/- (Rupees Six Lakhs Eighty Five Thousand Six Hundred Eighty Eight only) and short levy of duty to the tune of Rs.83,930 (Rupees Eighty Three Thousand Nine Hundred Thirty only).*

*9.5. I find that the importer was asked to show cause why the subject impugned goods should not absolutely confiscated under the provisions of Section 111 (d) of the Customs Act, 1962.*

*9.6 I find that the importer contravened the provisions of Section 46 (4) of the Customs Act, 1962. I also find that the imposition of penalty under the provisions of Section 112 (a) of the Customs Act, 1962 has been proposed in the said SCN.*

*9.7 In view of the provisions of Section 112 (a) (i) of the Customs Act, 1962, I find that the importing firm M/s Hemant Surgical Industries Limited (IEC:-0390024945) contravened the provisions of Section 111 of the Customs Act, 1962 by importing prohibited goods at JNPT by. Therefore, I find that the importer M/s Hemant Surgical Industries Limited (IEC:-0390024945) by acts of omission and commission rendered themselves liable for penal action u/s. 112 (a) (i) the Customs Act, 1962.*

*10. In view of the facts above, I pass the following order.*

***ORDER***

*10. (i) I reject the total assessable value declared by the importer as Rs.50,14,653/- (Rupees Fifty Lakhs Fourteen Thousand Six Hundred Fifty Three only) and re-determine the value of the goods mentioned in Table-l as Rs.56,79,450/-(Rupees Fifty Six Thousand Seventy Nine Thousand Four Hundred Fifty only).*

*10. (ii) I hereby order to confiscate the goods mentioned in Table-l imported vide Bill of Entry no. 2537281 dated 28.01.2021 under Section 111 (d) of the Customs Act. However, I give an option to redeem the subject impugned goods on payment of Redemption Fine of Rs. 3,00,000/- (Rupees Three Lakhs only) under section 125 of the Customs Act, 1962 for the purpose of re-export only.*

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> *10. (iii) I hereby impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) on M/s Hemant, Surgical Industries Limited (IEC-0390024945) under Section 112 (a) (i) of the Customs Act, 1962.*

12 In our view, once the show cause notice is issued making certain allegations and petitioner is called upon to show cause as to why action should not be taken and petitioner has replied to it and attended the personal hearing, not giving a finding on that issue after recording copiously the submissions of petitioner would mean that respondent no.3 was satisfied with the explanation given by petitioner. We garner support for this view from a judgment of this Court in ***Aroni Commercials Limited Vs. The Deputy Commissioner of Income Tax-2 (1)***[1], where the Court, while dealing with the provisions of Section 148 of the Income Tax Act, 1961, held that once a query is raised during the assessment proceedings and assessee has replied to it, it follows that the query was subject matter of consideration of Assessing Officer while completing the assessment and same is deemed to have been accepted. The Court also held that it is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the each and every query raised. Therefore, since there is no discussion or finding on the issue of hazardous waste in the impugned order, respondent no.3 should be taken as having accepted petitioner's explanation.

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13 In the impugned order, respondent no.3 has strangely gone ahead and rejected the assessable value as Rs.50,14,653/- and re-determined the value of the said goods as Rs.56,79,450/-. Based on this finding, he has also ordered confiscation of the said goods under Section 111(d) of the Customs Act and given an option to petitioner to redeem the said goods on payment of redemption fine of Rs.3,00,000/- under Section 125 of the Act for the purpose of re-export only. Penalty of Rs.1,00,000/- also was imposed upon petitioner under Section 112(a)(i) of the Act. In the show cause notice dated 19th March 2021, that was issued to petitioner, petitioner has not been called upon to show cause as to why the total assessable value declared by petitioner should not be rejected or why the said goods should not be confiscated for mis-declaring the assessable value or why penalty should not be imposed upon petitioner under Section 112(a)(i) of the Act for mis-declaring the assessable value. Mr. Mishra submitted that in paragraph 6(i) & 6(ii) of the show cause notice dated 21st April 2021, petitioner has been called upon to show cause as to why the goods should not be confiscated or why penalty should not be imposed. But considering the entire show cause notice, the proposed confiscation and penalty was due to allegation that petitioner had imported the prohibited goods and not for mis-declaration of the assessable value.

14 In these circumstances, in our view, this is a fit case for us to

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exercise our jurisdiction under Article 226 of the Constitution of India and it is also a fit case to set aside the impugned order dated 21st April 2021. Ordered accordingly.

15 Petitioner may apply, should they wish to for refund of Rs.5,00,000/- that was deposited with Customs Department as redemption fine pursuant to this Court's order dated 18th November 2022.

16 Petition disposed. No order as to costs.

**(JITENDRA JAIN, J.)** **(K.R. SHRIRAM, J.)**

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