IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10512 OF 2023

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 – 700053 } ...Petitioner

Versus

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

2. Commissioner of Customs (NS-I), }
Mumbai Zone II, JNCH }
Having his office at Jawaharlal Nehru }
Customs House, Nhava Sheva }
Dist– Raigad }
Maharashtra. PIN – 400707 }

3. Deputy Commissioner of Customs (NS-I) }
Gr.I&IA, Jawaharlal Nehru Customs House }
Having his office at Jawaharlal Nehru }
Customs House, Nhava Sheva, }
Dist– Raigad }
Maharashtra. PIN – 400707 } ...Respondents

Mr. Prakash Shah, Mr. Aansh Desai i/b. Pythagoras, for the Petitioner.
Mr. Jitendra B. Mishra i/b. Ms. Maya Majumdar, for the Respondents.

CORAM : G.S. KULKARNI & JITENDRA JAIN, JJ.
RESERVED ON : 23rd October 2023
PRONOUNCED ON : 18th December 2023

Judgment (per Jitendra Jain, J.) :-

. Rule, made returnable forthwith. Respondents waive service. By consent of parties, heard finally.

2. This petition under Article 226 of the Constitution of India mounts a challenge to an Order-in-Original (O-I-O) dated 11th November 2022 passed by the Deputy Commissioner of Customs, Jawaharlal Nehru Customs House, Nhava Sheva, District Raigad. The challenge to such order is primarily on the ground that the said order is in complete defiance of an order dated 31 March 2017 passed by the Authority for Advance Rulings (AAR) under the Chapter V B of the Customs Act, 1962 (the Act) containing Sections 28E to 28M.

3. **Briefly the facts are :-** The petitioner is primarily engaged in the business of import of various edible products including products of betel nut (processed supari). The petitioner has been importing various forms of supari stated to be unflavoured betel nuts (supari) and API betel nuts (supari). The petitioner is importing the said goods from only two

suppliers namely Asian Import & Export Co. Ltd., Thailand and Maung Maung Soe Family Co. Ltd., Myanmar. Such imports are received at Chennai and JNPT port.

(i) On 31st March, 2017, on an application made by the petitioner, the Authority for Advance Ruling (AAR) ruling made the following observations:-

> *"12. In view of the above, we rule as under :-*
>
> *The goods sought to be imported, namely;* ***'unflavoured supari', 'flavoured supari', 'API supari' and 'Chikni supari'*** *being processed Betelnut products which do not contain specified ingredients, namely; lime, kath and tobacco but containing other flavouring material / additives are classifiable under Customs Tariff Heading 2106 90 30."*
>
> (emphasis supplied)

(ii) On 25th November, 2017, the petitioner imported betel nuts from Indonesia at the Chennai port and classified the same as 'unflavoured supari'. These goods were assessed under the Custom Tariff Heading (CTH) 21069030 as 'unflavoured supari'. However, the officer of DRI did not permit the cargo to be cleared on the ground that the petitioner has mis-classified the goods. The petitioner challenged the said action by filing a writ petition before the Madras High Court inter alia contending that classification issue is resolved by the AAR vide order dated 31st March, 2017 wherein the AAR has given a ruling that 'unflavoured supari' is to be

classified under CTH 21069030. The Madras High Court in its judgment reported in ***2018 (13) GSTL 273*** observed that the seizure memo is contrary to the ruling passed by the AAR as well as the stand taken by the Commissioner of Customs before the said authority and, therefore, the detention of the cargo by the revenue authority was wholly unjustified. This order has attained finality.

(iii) Subsequently, the petitioner imported unflavoured supari from Myanmar by classifying the same under CTH 21069030 vide Bill of Entry No.8077228 dated 30th March, 2022. Respondent no.3 passed an O-I-O dated 11th November, 2022 rejecting the classification of the goods imported on 30th March, 2022 under CTH 21069030 and ordered the same to be classified under heading 0802 on the ground that the CESTAT Chennai Bench in the case of ***S.T. Enterprises vs. Commissioner of Customs***[1] and in the case of ***Ayush Business Overseas vs. Commissioner***[2] has taken a view that the betel nuts imported by these parties fall under Chapter 8 and not under Chapter 21 of CTH. Furthermore, an appeal filed by Ayush Business Overseas to the Supreme Court against the said order of the CESTAT, Chennai Bench was dismissed and, therefore, would result

1 2021 (378) E.L.T. 514 (Tri. - Chennai)
2 2021 (378) E.L.T. A 142 (SC)

into change of law for not following the decision of the AAR in the case of the petitioner. It is on this backdrop that the present petition is filed challenging the O-I-O dated 11th November, 2022 passed by respondent no.3.

4. ***Submissions of the Petitioner :-*** The petitioner would contend that the classification issue in its own case has been decided by the AAR vide order dated 31st March, 2017 which has attained finality since the same was not challenged before the higher forum and, therefore, relying upon Section 28J(1) of the Act would contend that the said ruling is binding on the respondents. The petitioner would further contend that mere dismissal of the appeal filed by parties before the Supreme Court against the orders passed by Chennai Bench of the Tribunal cannot be considered as a change of law so as to contend that the advance ruling is not binding under Sub-section (2) of Section 28J of the Act. The petitioner would further contend that the respondents are mis-reading Chapter 3 which does not apply to the product imported by the petitioner and the correct classification has to be under Chapter 21 of CTH which defines betel nut product and which reads thus :-

> *"Betel nut product as supari" means any preparation containing betel nuts, but not containing any one or more of the following ingredients, namely : lime, katha (catechu), and tobacco, whether or not containing any other ingredients, such as cardamom, copra and menthol."*

5. The petitioner would, therefore, contend that the O-I-O passed on 11th November, 2022 which is impugned in the present petition is wholly without jurisdiction and, therefore, the relief sought in the petition be granted.

6. **Submissions of the Respondents:-** The respondents would contend that the O-I-O is an appealable order and, therefore, the petitioner should be relegated to an alternate remedy. The respondents have relied on various decisions, for the said proposition, refusing to entertain writ jurisdiction. Alternatively, the respondents would contend that on account of decision rendered by the CESTAT Chennai Bench in case of ***S.T. Enterprises (supra)*** and ***Ayush Business Overseas (supra)*** and the appeal against the said order having been dismissed by the Supreme Court, the ruling given by the AAR is not binding as per Sub-section (2) of Section 28J of the Customs Act and, therefore, the respondents were justified in passing the impugned order. The respondents, therefore, prayed for dismissal of present petition on the ground of an alternate remedy and also on merit.

7. We have heard learned counsel for the petitioner and the respondents and with their assistance. We have perused the records of the present petition.

Analysis and Conclusion :-

8. It is a well settled in law that the assessee can invoke writ jurisdiction under Article 226 of the Constitution of India, despite an alternate statutory remedy of an appeal interalia on the ground that there is a breach of fundamental rights, breach of natural justice, order passed is without jurisdiction or there is a challenge to the vires of the statute. In these circumstances, the Court can exercise writ jurisdiction inspite of appeal remedy being available to the petitioner.

9. Section 28J of the Customs Act, 1962 reads thus:-

> **" 28J. Applicability of advance ruling -**
> (1) The advance ruling pronounced by the authority under section 28-I shall be binding only,-
> (a) on the applicant who had sought it;
> (b) in respect of any matter referred to in sub-section (2) of section 28H;
> (c) on the [Principal Commissioner of Customs or Commissioner of Customs], and the customs authorities subordinate to him, in respect of the applicant.
> (2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

10. Section 28J (1) provides that the advance ruling pronounced by the authority shall be binding not only on the applicant who had sought it but also on the Principal Commissioner of Customs or Commissioner of Customs and the customs authorities subordinate to him, in respect of the applicant. However, Section 28J (2) provides that

the advance ruling shall be binding unless there is a change of law or facts on the basis of which the advance ruling has been pronounced. In the present proceedings, the only contention raised by the respondents is that because of change in law on account of dismissal of appeal by the Supreme Court against the order passed by CESTAT in case of other assessees, advance ruling is not binding.

11. We do not agree with the contentions as urged by the Respondents for more than one reason. The decision of the CESTAT, Chennai Bench in case of ***S.T. Enterprises and Ayush Business Overseas*** certainly cannot be a binding precedent on High Court nor can it be binding on all the authorities/assessees throughout the country. The decision of the Chennai Bench of CESTAT is binding interse between the parties before the Tribunal and not the petitioner or the authorities having jurisdiction over the petitioner. The dismissal by the Supreme Court without going into merits of the case acts only as *res judicata* between the parties before the Court and same cannot be said that CESTAT bench decision amounts to a declaration of law. Therefore dismissal of appeal by the assessees before the Chennai Bench of CESTAT, by the Suprme Court does not attract provisions of Section 28 J(2) of the Act for not following decision of the advance ruling rendered in the petitioner's own case.

12. Even otherwise, the facts of S.T. Enterprises' case (supra) as stated in paras 2 and 3 of the said decision are also different and therefore even on facts same is distinguishable from the facts of the petitioner. In the case of ***S.T. Enterprises*** the revenue's case was that Areca nuts is a prohibited item for import as the CIF value of the goods was lesser than Rs.251/- per Kg. Furthermore, in the case of ***S.T. Enterprises***, there was a finding that as per report, "process" stated by the importer have not been undertaken to make the betel nut "product of betel nut" to merit classification under CTH 2106 which is not the case in the impugned proceedings before us. The CESTAT, Chennai Bench in para 11 observed that based on chemical examiner's report the betel nuts were not subjected to any processes. However, on the contrary report in the case of the petitioner before us certifies that processes were carried out on betel nut and therefore even on this count decision in the case of ***S.T. Enterprises*** is not applicable.

13. The Chennai Bench in the above referred decision in the case of ***S.T. Enterprises (supra)*** in in paragraph 20 observed in relation to reliance on the ruling in case of ***M/s.Excellent Betelnut*** (which was cited by the assessee therein) that said ruling would apply only to the parties therein, and is not binding precedent for other cases. If it is the contention

of the respondents before us that the decision of the Chennai Bench by virtue of dismissal of the appeal by the Supreme Court has become the law, then the finding of the Chennai Bench that the advance ruling in case of ***M/s.Excellent Betelnut (supra)*** is not binding precedent for other cases but it is binding to the parties to the litigation only, then by the very same logic the advance ruling in the case of the petitioner is binding on the respondents and not the decision of CESTAT Chennai Bench and same gets confirmed by the Supreme Court. Therefore by their own showing the reliance placed by the respondents on the decision of the Chennai Bench of CESTAT is misconceived to invoke provisions of section 28 J(2) of the Act.

14. It is also important to note that the decision of the AAR dated 31st March 2017 in the case of petitioner's own case has not been challenged by the respondents before the higher forum. The respondents did make an attempt for review of the said ruling by filing an application before the AAR which came to be dismissed on 30th March 2022 wherein the respondents have once again raised an issue of classification. The said rejection by the AAR dated 30th March 2022 is also not challenged before the higher forum. It is also important to note that this rejection was on 30th March 2022 which is post the decision of the CESTAT

Chennai Bench in case of ***S.T. Enterprises (supra)*** and also dismissal of the appeal by the Supreme Court in case of ***Ayush Business Overseas (supra),*** both being dated 26th February 2021 and 19th March 2021 respectively. Therefore, the respondents have accepted the ruling in the case of the petitioner dated 31st March 2017 now they cannot be heard to contend that the ruling is not binding.

15. The decision of the Madras High Court in the petitioner's own case referred to hereinabove dated 18th January 2018 also holds that the seizure memo of the respondents therein is contrary to the ruling pronounced by the AAR in case of the petitioner. This observation has also not been challenged before any higher judicial forum which also amounts to the respondents having accepted the ruling pronounced by the AAR in case of the petitioner.

16. In the ruling pronounced by the AAR dated 31st March 2017, respondents have accepted in paragraph 7, the classification under Chapter Heading 21. The said paragraph 7 reads thus :-

> "7. It is noticed that the comments in respect of said application were called for from Principal Commissioner of Customs, Chennai-II and Commissioner of Customs (Nhava Sheva-II). Commissioner of Customs, Chennai-II agreed with the applicant that the subject items are classifiable under Chapter Heading 21069030 as "Betelnut Product as Supari."

Therefore, even on this count, the said respondents cannot contend otherwise.

17. Therefore, looked from any angle, the ruling dated 31st March 2017 passed by the AAR in the petitioner's own case is binding under Section 28 J (1) on the petitioner and the respondents as there being no change in law post the said decision and the said decision having been accepted by the respondents in the absence of any further challenge before the higher forum.

18. Now coming to the contention of the respondent on alternate remedy, the respondents have relied on various decisions, which in our view, are not applicable to the facts of the present petition. The decision relied upon by the respondents pertains to the challenge at the show cause notice stage where the jurisdiction was not under challenge. On the contrary, the decision relied upon by the respondents in case of ***Assistant Commissioner of State Tax & Ors. Vs. M/s. Commercial Steel Ltd.***[3] holds that an assessee can invoke writ jurisdiction if the action is in excess of jurisdiction. In the instant case, as observed by us, the respondents have passed the O-I-O contrary to the provisions of Section 28J of the Act and, therefore, the same is without jurisdiction. In view of

3 2021 (52) GSTL 385 (SC)

the above discussion that the impugned order is passed without jurisdiction, writ petition is maintainable. The petitioner hence ought not to be relegated to take recourse to an appellate remedy.

19. For the reasons stated above, the impugned O-I-O dated 11th November 2022 is hereby quashed and set aside. Rule is made absolute in terms of prayer clause (a). No costs.

JITENDRA JAIN, J. ***G. S. KULKARNI, J.***