

# Messrs Jet Gateway Express Shipping vs Union Of India on 25 February, 2022

**Author: Sonia Gokani**

**Bench: Sonia Gokani**

C/SCA/13312/2021

JUDGMENT DATED: 25/02/2022

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD  
R/SPECIAL CIVIL APPLICATION NO. 13312 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SONIA GOKANI  
and  
HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK

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|---|---|----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | NO |
| 2 | To be referred to the Reporter or not ?   | NO |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

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MESSRS JET GATEWAY EXPRESS SHIPPING  
Versus  
UNION OF INDIA

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Appearance:

AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2  
MR PARESH M DAVE(260) for the Petitioner(s) No. 1,2  
ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP for the  
Respondent(s) No. 1  
LD.ASG.MR DEVANG VYAS(2794) for the Respondent(s) No. 1  
MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 2

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CORAM:HONOURABLE MS. JUSTICE SONIA GOKANI  
and  
HONOURABLE MR. JUSTICE HEMANT M.

PRACHCHAK

Date : 25/02/2022  
ORAL JUDGMENT

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. The petitioner is a partnership firm comprising four partners and conducting C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 business activities at Dubai at United Arab Emirates. The petitioner is before this Court since the goods exported by the petitioner from Dubai have been ordered to be absolutely confiscated by the respondent No.2 representing Mundra Customs Commissionerate and the request of the petitioner to take back the goods as unpaid owner has not been considered by the authority. According to the petitioner, this action of the authority is without jurisdiction and hence, the present petition under Article 226 of the Constitution of India with the following prayers:

"16...

(A) That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction quashing and setting aside absolute confiscation of the goods in question vide OIO No.MCH/ADC/SK/41/2021-22 dated C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 27.07.2021 (Annexure-"C") with a direction to the 2 nd Respondent herein to give to the Petitioner an option to pay appropriate fine in lieu of confiscation of the goods in question in accordance with Section 125 of the Customs Act, 1962;

(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction directing release of the goods, namely 16,614 packages of Whey Protein and other dietary supplements and also 464 cartons of Wooden Laminated Flooring, in favour of the Petitioner on payment of fine in lieu of confiscation that may be determined by the Respondents or by this Hon'ble Court;

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the 2 nd Respondent herein to release 16,614 packages of whey protein and other dietary supplements and also 464 cartons of Wooden Laminated Flooring in favour of the Petitioner on the terms and conditions that may be deemed fit by this Hon'ble Court;

(D) An ex-parte ad-interim relief in terms of para 16 (C) above may be kindly be granted;

(E) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted."

2. The business activities of the petitioner is like cargo loading and C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 unloading services, cargo packaging, sea shipping line agents, general warehousing, etc. The petitioner has been indulging in trading activities of various commodities. The commodities, which the petitioner has been trading in, are laminated floor coverings and such wooden articles and also whey protein and other dietary supplements.

3. This petition concerns to two consignments of whey protein and food supplements brought to Mundra Port in two containers for which a Bill of Lading No.BMLJEAMUN1905896 has been issued. The goods were packed in 16,614 packages with 464 cartons of wooden laminated flooring.

4. According to the petitioner, these goods are not prohibited goods nor banned goods for import. Therefore, the respondent C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 No.2 has no jurisdiction to order absolute confiscation.

5. The petitioner received an order from the Malaysia based customer namely M/s.Muscle Shack SDN BHD, Kualalampur for supplying 20 commodities including whey protein and food supplements.

5.1 Another order for wooden laminated flooring was received by the petitioner from a New Delhi based customer namely M/s.S.V. Industries. The petitioner is a merchant trader procuring many commodities and goods from various sources, which are stocked and warehoused at Dubai for further sale and trading to various customers located in several Asian countries.

6. Two consignments of goods supplied by C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 the petitioner to M/s.S.V.Industries covered under Bill of Lading dated 02.06.2019 were transported on board in vessel MV Blandine from Jabel Ali Port. They were offloaded at Mundra Port for the importer M/s.S.V.Industries for clearance of goods from ICD, Patparganj. They were covered under the Bill of Entry No.3634298 dated 13.06.2019 which is the subject matter of the present petition.

7. It is the case of the petitioner that since many commodities are brought and stored in the godown, there is a possibility of mix-up. Such things also happened in case of the Bill of Entry No.3634298 dated 13.06.2019. The goods actually sold to M/s.Muscle Shack SDN BHD, Kualalampur had been erroneously shifted to C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 India for M/s.S.V.Industries. The documents for wooden laminated flooring were sent with two containers of whey protein because M/s.S.V. Industries had ordered such goods. The whey protein which was otherwise meant for Kuala Lumpur based customer, the Bill of Lading, export invoice issued to M/s.S.V.Industries for laminated floor covering at the description and quantity of the goods supplied to Malaysia based customer and therefore, the correct description and quantity of the goods, namely, whey protein and other dietary supplements were not mentioned in the documents accompanying the goods that actually arrived at Mundra Port.

8. The inquiry was conducted by the DRI authority in respect of consignment that C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 has been assessed to duties at ICD,

Patparganj and the inquiry extended to Mundra Port through the office of the respondent No.2 in respect of two containers covered under the aforementioned Bill of Lading dated 02.06.2019 which arrived at Mundra Port. These goods were seized at Mundra Port after the investigation by DRI Officers. The DRI also recorded statements of various persons including the petitioner's representative Shri Kshitij Sharma who appeared before the DRI on 04.10.2019, 14.11.2019 and 26.11.2019 to explain the correct facts about the trading business of the petitioner in general and mix up in regard to the goods sold to M/s.S.V.Industries particularly.

8.1 It is admitted that the description of C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 the goods was wrongly mentioned in the Bills of Lading and such errors were quite common in the business of warehousing- loading-trading-sourcing business. The DRI was pointed out the documents issued to Malaysian customers for explaining the mix up.

9. The original buyer M/s.S.V.Industries refused to make payment of the goods and hence, the petitioner made efforts to locate another buyer in India for the goods which had already arrived at Mundra and M/s.Marcus Trade Link Pvt.Ltd of New Delhi had shown interest in purchasing these goods. Accordingly, the investigating officer has been intimated the details of new buyer and thus the statement of Shri Kshitij Sharma was recorded on 26.11.2019. C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 The Custom Officers also were intimated of this details.

10. As per the inquiry and investigation of the DRI, the goods which were actually whey protein and other dietary supplements attracting higher rate of custom duties, were deliberately mis-declared as laminated floor covering for evading the custom duties. Upon due compliance of provision of the Food Safety and Standards Act, 2006 as well as Food Safety and Standards (import) Regulations, 2017 framed thereunder, the whey protein and other dietary supplements could be imported. Therefore, the DRI on 21.01.2020 called upon the petitioner to show cause as to why these 16,614 packages of whey protein and food supplements having assessable value of Rs.3,00,26,867/- should C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 not be confiscated under Section 111(d), 111(f), 111(g), 111(m) and 111(i) of the Customs Act, 1962 along with 464 cartons of wooden laminated flooring valued at Rs.9,79,040/- which were allegedly used for concealment of packages of whey protein and as to why the penalty be not imposed on the petitioner. The allegation in the show cause notice was that the customs duty aggregating to Rs.2,15,33,739/- was sought to be evaded by importing the goods on account of the mis-declaration and these were being brought in violation of the provisions of the Food Safety and Standards Act, 2006.

11. The reply has been given and two notes of written submissions also were filed on 28.01.2020 and 20.03.2020 and it had been C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 explained that there had been no deliberate mis-declaration, but the goods actually meant for Malaysia based customer i.e. M/s.Muscle Shack SDN BHD had been erroneously shipped to Mundra Port for M/s.S.V. Industries.

12. The respondents drew the samples from the goods seized at Mundra Port, they were tested and analyzed through the laboratory of M/s.Anaytical and Environmental Services, Vadodara. All the 28 samples tested conformed to the general provisions laid down under Regulation 6 of the Food Safety

and Standards Regulations, 2016. The samples were found to be of acceptable quality requirements in this country. They were neither substandard nor hazardous nor objectionable.

C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022

13. Eventually, the respondent No.2 has adjudicated and passed order in original on 27.07.2021 and directed absolute confiscation of the goods. It held that there was non-compliance of the provisions of Clause-IV of Chapter-1A of the General Notes regarding import policy given with the ITC (HS) Classification, 2017 and there was mis-declaration of description and quantity of the goods in the import documents with an intent to evade payment of customs duty and for smuggling these 16,614 packages of whey protein and food supplements having assessable value of Rs.3,00,26,867/- for evading the payment of duties. He has also further directed these goods and other 464 cartons of wooden laminated flooring used for concealment of 16,614 packages to be confiscated under C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Sections 111(d), 111(m), 111(f), 111(g) and 111(i) of the Customs Act. This petition has been preferred being without jurisdiction, as according to the petitioner, Section 125 of the Customs Act prohibits absolute confiscation of the goods. The petitioner is the owner of the goods and there are no other claimants. The petitioner ought to be given the option to pay appropriate fine in lieu of the confiscation of the goods in question.

14. On issuance of notice, the learned senior standing counsel, Mr.Utkarsh Sharma appeared and filed affidavit-in-reply. The Deputy Commissioner of the Customs Department ha stated on oath that based on the intelligence, a consignment of goods declared as "Laminated Floor Covering" was C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 imported by M/s.S.V.Industries at ICD Sonapat on 13.06.2019. It is further the say of the respondents that this consignment was examined and instead of declared goods, the concealment of Whey Protein and other dietary supplements was noticed, for which the case was booked by the jurisdictional Customs authorities after seizure of the goods under panchnama dated 14/15.06.2019 and investigation started.

14.1 It is further his say that further intelligence was received that two more consignments consigned in favour of M/s.SVI were lying at Mundra Port and there is also a concealment of goods other than the declared goods.

14.2 The DRI had examined the contents C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 of two containers at Mundra Port and found concealment of goods other than the declared goods and hence, they were placed for seizure on 23.07.2019 under the provisions of the Customs Act, 1962.

14.3 It is further contended that it was found during the investigation that previous consignment of M/s.SVI was taken up for examination by Customs at ICD, Sonapat, M/s.NHS(Dubai agent of Container Liner Company) sent request to stop sending by rail the two containers consigned to M/s.SVI for delivery at ICD, Sonapat and hold the shipment and when the reasons for such stoppage of shipment was inquired, it was informed by M/s.NHS that the petitioners M/s.Jet Gateway Express Shipping stated that buyers had not made C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 the payment as per the agreed terms, due to which the order stood cancelled and the containers were to be returned. 14.4 Upon being asked for further documents by Mundra agent of the container liner company vide email dated 20.06.2019, Ms/.NHS provided NOC letter dated

19.06.2019 of M/s.SVI. This was under the signature of proprietor of M/s.SVI without any mention of the name of such person. Hence, original NOC letter was requested.

14.5 The original NOC letter dated 19.06.2019 was received by M/s.USL and an application for re-export of containers was filed. In this regard, the DC, Customs, Mundra sought NOC from the Customs at ICD, Sonapat on 28.06.2019.

C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 14.6 Summons were issued to the importer M/s.SVI and partners of M/s.SVI, but the same were returned by the postal authorities, but in response to the summons by email, reply was received from Shri Vinod Sonpal Singh that someone has misused their IEC and imported the goods in their name, for which complaint had been filed by them with the police station. However, they avoided to make appearance in response to the summons.

14.7 M/s.Jet replied vide email message dated 24.08.2019 that they had exported certain goods to M/s.SVI, but after the goods were shipped, they had certain dispute with the consignee in respect of the payment issues. Therefore, container line agents were taking steps to find out C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 new buyer and in case it was not possible they were asked to recall the said consignment.

14.8 On 10.09.2019 the petitioner M/s.Jet informed that it was a case of wrong shipment.

14.9 It is further contended that on 04.10.2019, Shri Kshitiz Sharma appeared on behalf of M/s.Jet with authority letter dated 11.09.2019 without showing the name and designation of the signatory of the said letter. He also provided a packing list dated 30.09.2019 prepared by M/s.Jet and the details found in the said packing list were different from the details declared by the petitioner before customs authorities of load port authorities. Various other inconsistencies were also C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 observed in the documents provided by Shri Kshitiz, which were against the genuineness of the claim being made by Shri Kshitiz. He has also stated that M/s.Jet had not made any communication with M/s.SVI. 14.10 It is further the case of the respondents that as the partners of M/s.SVI were not responding to the summons issued to them under the provision of Section 108 of the Customs Act, 1962, complaints were filed against them in violation of the provisions of Section 174, 175 and 176 of the Indian Penal Code before the Chief Judicial Magistrate, Gandhidham. 14.11 On 14.11.2019, Shri Kshitiz Sharma appeared and his statement had been recorded. He provided the copy of purchase order and other documents to show that the C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 goods consigned on 28.05.2019 for the export of goods declared as "Nutritional supplement of US Origin" and other goods was "Laminated Wooden floor of CN Origin". There were apparent discrepancies in various kind between the export documents, which were provided by the Liner agent and the export documents. The details are also provided of the statement recorded of Shri Roshan Kishanchand Rohira, Director of M/s.Cargosol LLC, Dubai, in which he had stated that booking pertaining to the subject consignment was given to their Dubai branch office by Shri S.K.Gupta. Shri S.K.Gupta used trading license of the petitioner M/s.Jet to export the produces purchased from Dubai. Various certificates, licenses when inquired from them, they were not provided by either M/s.SVI or the

C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 petitioner M/s.Jet, however, M/s.Marcus provided a copy of FSSAI licence. 14.12 According to the respondents, there is a contravention of various enactments and statutory provisions for which the goods imported on account of M/s.SVI can be considered being in violation of the provisions of Section 11(1) of the Foreign Trade (Development and Regulation) Act, 1992 read with Rule 14 of the Foreign Trade (Regulation) Rules, 1993 and para 2.01(b), 2.03(a) of the Foreign Trade Policy 2015- 2020. Accordingly, the same can be liable for confiscation under Section 111(d) of the Customs Act, 1962. As the goods were not declared appropriately to evade the customs duty and policy restrictions, they are liable to be confiscated under Section C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 111(d), 111(f), 111(g), 111(i) and 111(m) of the Customs Act, 1962. For concealment of undeclared goods also confiscation under Section 119 of the Customs Act, 1962 is necessary.

14.13 Hence, the show cause notice was issued on 21.01.2020. It is further contended that the petitioner is not an entity which has been incorporated under any enactments made in India seeking the protection under Article 226 of the Constitution of India is impermissible and the petition itself is not maintainable. They have not disclosed full facts of the legal status of the petitioner. The copy of partnership deed and other details also have not been disclosed. The trading licence shows Shri Basheer Ahamed C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Thelapurth as the only person to represent the licence holder, other partners being Shri Gireesh Kumar and Shri Harminder Singh have no base.

14.14 Again, according to the respondents, appealable remedy is available statutorily against the order in original. Hence, this petition cannot be entertained. If the petitioner would have preferred appeal before the competent authority of Commissioner of Customs(Appeals), he was required to make pre-deposit of 7.5% of the total amount of penalty. It is apparent that the penalties of Rs.54,00,000/- have been imposed on M/s.Jet and penalties of Rs.37,00,000/- have been imposed on Shri Kshitiz Sharma, along with testing fees of Rs.1,65,200/- under Section 145 of the C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Customs Act, 1962. There are other amount of penalties imposed on the partners and bypassing all that, this petition cannot be permitted to be entertained.

14.15. According to the respondents, in case of M/S.UNISILK LTD vs COMMISSIONER OF CUSTOMS, reported 2012(284)ELT 646(Guj.) no notice was issued to the supplier after passage of six months as provided under Section 110 of the Customs Act, 1962, hence, the restoration of the goods had been permitted however, that ground is not existing here.

14.16 It is further contended by the respondents that the goods were seized in June, 2019, show cause notice was issued in January, 2020 and order in original has been passed in July, 2021. The petitioner C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 never claimed for release of the seized goods with the pleadings of shelf life etc. It is urged that if the goods reaches in the hands of the petitioner, they may replace the labels on the packing, making them easily marketable again or dump them illegally into market.

15. This Court has heard extensively the learned advocate, Mr.Paresh Dave appearing with learned advocate, Mr.Amal Paresh Dave, who has on the line of the petition has urged that the order of absolute confiscation of the goods is not legal nor authorized, but is without jurisdiction under Section 125 of the Customs Act. According to him, the petitioner being the owner of the goods in question and when there are no other claims C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 of ownership of these goods, the petitioner ought to be given an opportunity to pay appropriate fine in lieu of confiscation of such goods in question in accordance with Section 125 of the Customs Act. He claimed that the goods are taxable in nature and therefore, allowing the option to pay the fine in lieu of confiscation of such goods at the earliest would be in the interest of justice. He also claims that there is no alternative remedy and hence, he approached this Court for this limited purpose of order of absolute confiscation of the goods, however, he can always take recourse to other remedy available under the statute.

15.1 It is further his case that even it is assumed that the allegations in the show C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 cause notice are correct, however, the goods are not in the nature of prohibited goods or contraband food or banned goods for import. Therefore, the adjudicating authority has no jurisdiction to order absolute confiscation.

15.2 According to him, there was no prohibition as regard the import of goods in the nature of Whey Protein and other dietary supplements nor in respect of wooden laminated flooring and hence, the order of confiscation is ex-facie illegal and without jurisdiction.

15.3 According to him, reply to the show cause notice dated 21.01.2020 has been tendered. The other persons to whom the show cause notice was issued have also filed their replies. In the meantime, two C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Additional Commissioners were transferred.

The petitioner always requested to take  
back the goods with the specific

instructions that the goods are not to be marketed in India. He further has argued that 28 representatives samples were drawn from the alleged concealed consignment imported vide Bill of Lading dated 02.06.2019 which were forwarded for testing to M/s.Anaytical and Environmental Services, Vadodara and in response to the samples conformed to the general provisions laid down under Regulation 6 (Health Supplements) of the Food Safety and Standards (Health Supplements, Nutraceuticals, Food for Special dietary use, Food for Special Medical Purpose, Functional Foods and Novel Food) C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Regulations, 2016. Fees of Rs.1,65,200/- also were charged by M/s.Anaytical and Environmental Services, Vadodara, which was paid by the DRI. The test result is also forming the part of the order in original. 15.4 He has therefore, urged that the affidavit-in-reply, which questions and raises query with regard to the product containing steroid etc. has no basis. He also attempted to show the fallacy at the reply which says that the goods seized in June, 2019 had never been claimed for release by pointing out that in



order in original, there is a specific reference at para 6.1.24 that the submission had been made to allow re-export of all the goods found in container without imposing redemption fine and penalty and order of C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 release of containers or other relief in the nature of waiver of CFS charges, etc. to be granted. He also pointed out that the petitioner had contended that whey protein and food supplements inadvertently loaded in the containers had a short shelf line and would loose its commercial value completely if the same were not returned by way of re-export at the earliest.

16. This has been strongly resisted by the learned senior standing counsel, Mr.Utkarsh Sharma, who argued along the life of affidavit-in-reply. According to him, the authority is sought to be relied upon would have no bearing as in the instant case, there has been a concealment under the pretext of importing laminated wooden box. The whey protein had been concealed and C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 brought to this country, it is only to evade the payment of the customs duty. There is an efficacious remedy of Appeal which cannot be permitted to be bypassed.

17. Having thus heard the learned advocates on both the sides and also on having considered the controversy, it is quite clear that this is a case of mis-

declaration and hiding of the food articles under the pretext of mistaken export. It is said to be a mix-up of two products since the petitioner had been dealing with both these products and other products and the one to be sold to M/s.Muscle Shack SDN BHD, Kualalampur, is said to have been brought to India mistakenly.

18. Undoubtedly, this is an ostensible explanation of pretext used by the C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 petitioner for illegal entry of product, however, the manner in which whey protein containers were hidden in laminated wooden box, it is quite apparent that the intent was to surreptitiously bring the product, without payment of higher rate of custom duty. What all that is necessary to be decided is whether the order in original can be permitted to be challenged by way of present petition when alternative remedy is available in the form of Appeal and whether the petitioner can be permitted to invoke the jurisdiction under Article 226 of the Constitution of India and lastly, whether the confiscation is permitted without availing an option to the petitioner to pay fine, in lieu of confiscation.

19. Taking firstly the ground of maintainability of Article 226 of the C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 Constitution of India, the petitioner has shown his authority being the partner conducting business at Dubai at United Arab Emirates. His goods which are exported by him are ordered to be confiscated absolutely by Mundra Customs Commissionerate. His request for taking the goods back as unpaid owner/seller has been since denied, he challenges this action.

20. Any narrow interpretation of non- maintainability at the hands of unpaid owner who exported the goods to this country would artificially limit these powers.

21. Second issue is of availability of alternative remedy and challenge to this petition is also on that count.

Undisputedly, against the order in C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 original, the petitioner has approached this Court straight without going to the Commissioner (Appeals), essentially on the ground of illegality of the order passed in total disregard of statutory position. One of the three accepted grounds for entertaining the petition under Article 226 of the Constitution of India is a total disregard of statutory provisions, this petition is maintainable.

22. That brings this Court to the third and vital limb of merit.

23. It is quite apparent these goods are neither prohibited nor banned goods. The respondents had chosen to even send the samples of these goods for the purpose of laboratory testing, the charge of which also has been included and the reports C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 received clearly indicate that they do not figure into the category of either prohibited goods or banned goods for import. Therefore, as noted above, this does not appear to be a sheer mistake on the part of the persons and the manner of hiding of the goods and Wooden Laminated Flooring also is indicative of this being a design to evade the import duties. The defence of possibility of mix-up etc. even if it is to be discarded, the question that arise is as to whether the respondents should in that eventuality not follow the provision of the law.

24. It can be noticed that in the report of testing by M/s.Anaytical and Environmental Services, Vadodara, all 28 samples have conformed to the general provisions laid C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 down under Regulation 6 (Health Supplements) of the Food Safety and Standards (Health Supplements, Nutraceuticals, Food for Special dietary use, Food for Special Medical Purpose, Functional Foods and Novel Food) Regulations, 2016. It is also required to be noted that what has been emphasised all along by the petitioner is that it be allowed to re-export the entire consignment of the goods and boxes. The whey protein and food supplements also has its self life and therefore, there could be no plausible reason for the authority concerned not to allow his request when in case of prohibited and improperly imported goods, on payment of redemption fine under Section 111 of the Customs Act.

C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022

25. Apt would be to refer to Section 125 of the Customs Act which provides that authority before confiscation needs to avail an opportunity to the party concerned with the goods not being either banned or prohibited. This provision requires to be followed by imposing the necessary redemption fine and other imposeable charges.

"125.Option to pay fine in lieu of confiscation.

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and

shall, in the case of any other goods, give to the owner of the goods (or, where such owner is not known, the person from whose possession or custody such goods have been seized,) an option to pay in lieu of confiscation such fine as the said offer thinks fit:

[PROVIDED that, where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 section in respect of the goods which are not prohibited or restricted, [no such fine shall be imposed]:

PROVIDED FURTHER that], without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

[(2) Where any fine in lieu of confiscation of goods is imposed under sub-section(1), the owner of such goods or the person referred to in sub-section(1) shall, in addition, be liable to any duty and charges payable in respect of such goods.] [(3) Where the fine imposed under sub-section(1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Explanation: For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 which such assent is received.]"

25.1 The arguments on the part of the respondents that the concealment would also preclude the petitioner to avail this opportunity and allow it to re-export is not a sustainable defence.

26. Even if, there is an efficacious remedy of appeal which is available as also held hereinabove, the statute itself provides for grant of such a request once made by the petitioner and therefore, we are of the opinion that the respondents when has disregarded the provision of law which it ought to have followed let all 16,614 packages of whey protein and food supplements which have been assessed of the value of Rs.3,00,26,867/- are required to be permitted to be re-exported by imposing fine and other duties in accordance with C/SCA/13312/2021 JUDGMENT DATED: 25/02/2022 law.

27. Accordingly, this petition is allowed. The respondents to permit the petitioner an option to pay appropriate fine and other imposable duties in lieu of confiscation goods in question in accordance with law.

28. Let this process be completed by releasing the goods namely 16,614 packages of whey protein and dietary supplements and 464 cartons of wooden laminated flooring on petitioner's payment of

fine and other imposeable duties. Let the calculation be provided to the petitioner in a week's time from the date of receipt of a copy of this order and within one week of the payment the same shall be released by the respondent.

(SONIA GOKANI, J) (HEMANT M. PRACHCHHAK,J) M.M.MIRZA