IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 315 OF 2023

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh

And

IN THE MATTER OF:

PHP ship Breaking & Re-cycling Industries Ltd.

-Petitioner

-vs.-

National Board of Revenue (NBR), Dhaka-1000 and others.

-Respondents.

Mr. Mohammed Enam, with
Mr. Md. Mamun, with
Mr. Md. Sabbir Ibne Azam, advocates.
..... for the Petitioner.

Mr. Md. Mohaddes-Ul-Islam, DAG with
Mr. Monjur Elahi (Porag), A.A.G.
..... For the respondent No. 02.

Heard on: 12.11.2024 and 19.11.2024.
Judgment on: 26.11.2024.

Present:

Mr. Justice Md. Bazlur Rahman
and
Mr. Justice Syed Mohammed Tazrul Hossain

Md. Bazlur Rahman, J:

In this writ, initially a Rule Nisi in the form of certiorari was issued on 16.01.2023 in the following terms;

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order dated 01.11.2022 issued by the respondent No. 02 under Noti No. S-7-2020/R/15/38480 (Cus) under the signature of respondent No. 03, rejecting the application so made by the petitioner on 13.01.2022 for refund of customs duty amounting to Tk. 2,96,94,877.87 paid against the imported Scrap Vessel namely MTALCON, Rot No. 2013/720 vide LC No. 249413020815 dated

26.12.2013, Bill of Entry No. 31111 dated 30.12.2013 (Annexure-J), shall not be declared have been passed without any lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper".

2. Thereafter, on 06.06.2023, a Supplementary Rule was issued in mandamus form calling upon the respondents to show cause as to why they shall not be directed to refund the said customs duty and/or to pass such *other or further order or orders as to this Court may seem fit and proper.*

3. **Admitted Facts**:

3.1. Petitioner-PHP Ship Breaking & Recycling Industries Limited and a company, named Nadella Corporation, executed a memorandum of agreement on 17.12.2013 for sale and purchase of M.T ALCOON ex FALCON CARRIER ex UNITED WILL built in 1992 in China for scraping the same in Chittagong. Thereafter, petitioner-PHP Ship Breaking and Recycling Industries Limited opened L/C bearing No. 249413020815 dated 26.12.2013 through Standard Bank of Chittagong. The vessel arrived at Bangladesh territorial waters on 28.12.2013 and the petitioner submitted Bill of Entry bearing No. C-31111 dated 30.12.2013 before the customs authority, Chittagong for assessment of customs duty and release of the vessel. The duty was assessed at Tk. 2,96,94,877.87 and the Yard VAT at Tk. 28,66,752.00 which was accordingly deposited on 02.01.2014. The petitioner complied with other relevant legal procedures for release of the ship. However, one Dubai based company namely Samchira DMCC raising some claims, against the imported vessel instituted an Admiralty Suit bearing No. 67 of 2013 before the High Court Division of the Supreme Court of Bangladesh demanding recovery of US$ 368,563,566.00. Upon application

by the plaintiff of the suit, the ship was first arrested and subsequently on 31.05.2015 the vessel was released vide Civil Petition for Leave to Appeal No. 946 of 2014 upon furnishing bank guarantee. The petitioner-company finding no other alternative filed Admiralty Suit bearing No. 12 of 20104 against the vessel for declaration of ownership thereof or in the alternative a decree for a total sum of Tk. 120373177.95. The ship was arrested vide this petitioner's application dated 13.03.2014. Due to the pendency of Admiralty Suit No. 67 of 2013, Nadella Corporation could not deliver the vessel in favour of the PHP Ship Breaking and Recycling Industries Limited. At this juncture, Nadella Corporation was constrained to exercise its option of cancellation of the agreement on 04.03.2014. However, during pendency of Admiralty Suit No. 12 of 2014, a settlement agreement was executed between this petitioner and the Nadella Corporation on 15.06.2015 for withdrawal of the Admiralty Suit No. 12 of 2014. According to the terms of the settlement agreement, this petitioner consented to withdraw/dismiss/non-prosecute the admiralty suit and accordingly, the suit was dismissed for non-prosecution at the instance of this petitioner. After the admiralty suit was disposed of in the above manner, the ship in question was ordered to be released from arrest by Court vide order dated 18.06.2015 and the Commissioner of Customs, Chittagong on 24.06.2015 withdrew prohibition against the vessel to leave the port. Upon obtaining such permission from the customs authority, the vessel finally sailed out from Chittagong Port. Respondent No. 01, the National Board of Revenue, extended time for final assessment till 31.01.2022 and subsequently final assessment was made on 11.01.2022. After such final assessment, the petitioner submitted an application to

respondent No. 02, Commissioner of Customs (Refund), Customs House, Chittagong on 13.01.2022, for refund of the customs duty amounting to Tk. 2, 96, 94,877.87+yard vat Tk. 28, 66,752.00 paid by the petitioner for release of the vessel as detailed earlier. Respondent No. 03, Deputy Commissioner of Customs, on behalf of respondent No. 02, rejected the said refund application dated 01.11.2022 (Annexure-J) whereupon the petitioner became disgruntled and felt constrained to file this writ petition and obtained the aforesaid Rule.

4. **Petitioner's Case:**

4.1. Nadella Corporation due to pendency of Admiralty Suit No. 67 of 2013 filed by one Samchira DMCC, a Dubai based company, could not handover the possession of the vessel to the petitioner in time. Consequently the seller, Nadella Corporation, exercised its option as per terms and conditions of the Memorandum of Agreement to rescind the contract (Annexure-E). The petitioner never re-exported the vessel to anywhere since it never had possession and ownership of the vessel. The petitioner played no role in the least in the departure of the vessel from Chittagong Port and hence the petitioner in order to get refund of his paid up duties as demanded above was under no obligation to comply with the re-exportation requirements as laid down in Section 138 (1A) of the Customs Act, 1969. After termination of agreement executed between Nadella Corporation and petitioner-company, the vessel was subsequently sold to another Bangladeshi Company named Jamuna Ship Breaking Limited and the sale agreement was consequently signed on 04.07.2015 which deposited also customs duties and taxes to release the vessel. Ministry of Industry accorded permission to the Jamuna Ship Breaking Limited to cut and scrap the vessel. Hence, taking

customs duties and taxes twice over the same imported goods is contrary to the principal of natural justice. The petitioner is entitled to the refund of his paid up customs duties. The Rule and the Supplementary-Rule, therefore, deserve to be made absolute.

5. **Respondent's (No. 02) Case**:

5.1. In order to get refund of the paid up customs duty, the petitioner-importer ought to have followed the re-exportation procedures like procuring Bangladesh Bank Certificate, No Objection from Ministry of Commerce. Permission from National Board of Revenue and so on. Moreover, the order of the Admiralty Suit No. 12 of 2014 instituted by the petitioner contains no instruction to the customs authority to grant the refund application. It is further contended that the order being passed on behalf of the Commissioner of Customs is remediable by way of appeal under section 196A of the Customs Act, 1969 and hence this writ is not maintainable at all.

6. **Submissions**:

6.1. Learned counsel Mr. Mohammed Mamun appearing along with Mr. Mohammed Enam on behalf of the petitioner submits at the outset that due to lack of ownership of the imported vessel arising out of termination of the Memorandum of Agreement (MOA), the petitioner-company never had the possession of the vessel and the departure thereof from the port of Chittagong to that of Singapore never took place at the instance or initiative of the petitioner or according to his desire. Rather, the customs authority allowed port clearance which in no way tentamounts to the re-exportation of the vessel as laid down in Section 138 (1A) of the Customs Act, 1969. Referring to the provisions of the Frustrated Cargo Export Rules, 1984, the learned counsel reiterates that the formalities incorporated therein do not attract to petitioner's case

as he has never re-exported the vessel to the consigner upon his wish on the matter. Before parting with, the learned counsel adds that no finding or observation whatsoever has been expressed in the order of Admiralty Suit No. 12 of 2014 impeding in any way the refund of petitioner's paid up customs duty. Therefore, the Rules find substance and deserve to be made absolute.

6.2. Per contra, learned Deputy Attorney General Mr. Md. Mohaddes-Ul-Islam appearing along with Mr. Monjur Elahi (Porag), learned Assistant Attorney General on behalf of the respondent No. 02 assails the status of the alleged refund and submits that the provision enumerated in Section 138 (1A) of the Customs Act, 1969 applies to the re-exportation of imported goods and the absence of any positive instruction in Admiralty Suit No. 12 of 2014 create manifest embargo to grant the alleged refund in petitioner's favour. He wrapped up his submission that the writ petitioner having alternative and efficacious remedy in the forum of appeal under Section 196A of the said Act, 1969, the writ is not maintainable and the Rule and Supplementary Rule issued are liable to be discharged.

7. **Deliberations and Decision**:

7.1. We have extensively gone through the writ application and the affidavit-in-opposition and also have examined the documents annexed therewith.

7.2. In view of the above rival arguments of both the learned counsels, we, however, realize that the thrust point in the writ is to decide (i) whether or not the petitioner is entitled to an order of mandamus to get refund of his deposited customs duties without complying with the formalities as enumerated in Section 138 (1A) of the Customs Act, 1969 read with the rules laid down in the

Frustrated Cargo Export Rules, 1984 and in the absence of any affirmative direction being given in petitioner's Admiralty Suit No. 12 of 2014 and (ii) whether or not the writ is maintainable without forum of appeal being exhausted as laid down in Section 196A of the said Act, 1969.

7.3. Let us first examine the relevant legal provisions relating to the propriety of the impugned letter pertaining to Nothi No. S-7-220/R/15/38480 (Cus) dated 01.11.2022 (Annexure-J), rejecting petitioner's application dated 13.01.2022 (Annexure-I2), for refund of customs duty amounting to Tk. 2, 96, 94,877.87 paid up against the said imported scrap vessel. The application (Annexure-I2) admittedly demonstrates that final assessment of the imported vessel was made on 11.01.2022 (Annexure-I2) and the refund application was immediately submitted before the Commissioner of Customs (respondent No. 02), on 13.01.2022 which was rejected. For better comprehension of the rejection order, we consider pertinent to reproduce para-3 thereof as under;

> "৩। রিফান্ড সভায় নিম্মোক্ত সিদ্ধান্ত গৃহীত হয়-আমদানিকৃত স্ক্র্যাপ জাহাজ *MTALCON (IMO 9007776)* স্বয়ং *Goods* হওয়ায় আমদানিকারক *PHP Ship Breaking Industries Ltd.* কর্তৃক পুনরায় উক্ত পণ্য তথা জাহাজ রপ্তানিকারক বরাবর ফেরত প্রদানের ক্ষেত্রে *Export Procedure* অনুরসণ করা উচিত ছিল। আলোচ্য ক্ষেত্রে তা অনুসরণ করা হয়নি কেননা, আমদানিকৃত পণ্য ফেরত প্রদানের ক্ষেত্রে বাংলাদেশ ব্যাংকের প্রত্যয়ন পত্র, বাণিজ্য মন্ত্রণালয়ের অনাপত্তি, জাতীয় রাজস্ব বোর্ডের অনুমতিপত্র ইত্যাদি প্রতিপালনের প্রয়োজনীয়তা থাকলেও যথাযথভা-ব প্রতিপালন করা হয়নি। মাননীয় সুপ্রীম কো-র্টর হাই-কার্ট ডিভিশন এর *Admiralty Suit No. 12 of 2014, Memo No. 1471-O.S, Date-19/03/2014* এর রায় পর্যা-লাচনায় দেখা যায় জাহাজটি মূলত আটক অবস্থা থে-ক অব্যাহতি দেওয়া হয়েছে এবং উক্ত মামলার বাদী কিংবা বিবাদী কেউই কাস্টম হাউস, চট্টগ্রাম এর প্রতিনিধি নয়। প্রদত্ত রায়ে আরও উল্লেখ রয়েছে যে,
>
> *"At the same time Mr. Hannan (Learned Advocate for PHP Ship Breaking and Recycling Industries Limited) submits that*

one of the terms of the said settlement between the parties is that the customs duty as already been paid by the plaintiff amounting to Tk. 2, 96, 94,877.87 in order to import the vessel M.T ALCON ex FALCON CARRIER (IMO NO. 9007776), would be reimbursed by the defendant No. 4 upon taking the said amount from the prospective buyers of the said vessel and as such, Mr. Hannan submits that, a direction should be given by this Court on the defendant No. 4 to reimburse the said amount once the said vessel is sold subsequently.

Since the parties have reached an amicable settlement out of Court, this Court is not in a position to pass any order in respect of any terms of that settlement. However, parties are at liberty to take appropriate legal steps for enforcement of the said terms in accordance with law. Since this is a mere application for non-prosecution of the suit on the ground of settlement out of Court, this Court cannot go beyond the terms of the application itself".

এছাড়াও উক্ত রায়ে সংশ্লিষ্ট জাহাজ রপ্তানি কিংবা রিফান্ড সম্প-র্ক বর্ণিত প্রেক্ষাপ-ট কাস্টমস কর্তৃপক্ষ-ক কোন নি-র্দশনা দেওয়া হয়নি। এমতাবস্থায়, মাননীয় সুপ্রীম কো-র্টর হাই-কার্ট ডিভিশন এর উপর উ-ল্লখিত Admiralty Suit No. 12/2014 এর রা-য় আ-লাচ্য রিফান্ড সম্প-র্ক কাস্টমস কর্তৃপক্ষ-ক কোন নি-র্দশনা প্রদান না করায় এবং জাহাজটি (পণ্য) Customs Act, 1969 এর Section 138 এর Subsection 1A অনুযায়ী Re export এর জন্য জাতীয় রাজস্ব বোর্ডের অনুমতি ব্যতিরেকে দেশ ত্যাগ ও কাস্টমস এ্যাক্ট লংঘন করায় আমদানিকার-কর রিফান্ড আদেনটি মঞ্জুর করার আইনগত সুযোগ নেই।"

7.4. On plain reading of the order of rejection, we find respondent No. 02, turned down the refund application mainly on two grounds, for example; (1) the Admiralty Court in its judgment recorded no direction to customs authority connecting refund issue, and (2) the importer in defince of Customs Act's provision and without also obtaining any permission from National Board of Revenue

(respondent No. 01) made the re-exportation of the vessel as contemplated in sub-section (1A) of Section 138 of the Customs Act. The above section, by the way, speaks as follows:-

> *"**138. Frustrated cargo how dealt with-(1)** Where any goods are bought into a customs station by reason of inadvertence, mis-direction or untraceability of the consignee, the [Commissioner of Customs] may, on application by the person in charge of the conveyance which brought such goods or of the consignor of such goods and subject to rules, allow export of such goods without payment of any duties (whether of import or export) chargeable thereon provided that such goods have remained and are exported under the custody of an officer of customs.*
>
> *[(1A) The Commissioner of Customs in exceptional case other than the cases mentioned in sub-section (1) may allow such re-exportation with the prior approval of the Board.]*
>
> *(2) All expenses attending to such custody shall be borne by the applicant."*

Rule 2 and 3 of the Frustrated Cargo Export Rules, 1984 provide as under:

> *"**The Frustrated Cargo Export Rules, 1984-**2. Frustrated Cargo will be such cargo as has been imported in any customs-station by reason of inadvertance or mis-direction or where the consignee is untraceable and the consignor wishes to have it re-shipped to him.*
>
> *3. The master of the vessel or his authorized agent or the consignor of the goods himself or through his authorized agent shall apply in writing to the Commissioner of Customs concerned for permission to re-export the frustrated cargo."*

7.5. Sub-section (1A) read with sub-section (1) of Section 138 of the Customs Act thus implies that on the application by the consignor made for re-exportation of the goods imported, the Commissioner of Customs, subject to the approval of the Board, may allow such re-exportation without payment of any duties chargeable thereon. It, therefore, appears that in case of frustrated cargo being brought into a station the consignor may upon application to the Commissioner of Customs and with

permission being obtained from National Board of Revenue, re-export the vessel without any duties. We are unable to discover any such application being submitted to the customs authority seeking permission to re-export the instant vessel. Rather, it was the Customs House, Chittagong which issued port clearance on 24.06.2015 (Annexure-H) for the vessel to leave Chittagong Port for Singapore for sailing validity upto 27.06.2015. After the Admiralty Suit No. 12 of 2014 was dismissed on 18.06.2015 for non-prosecution, the petitioner vide letter dated 22.06.2015 (Annexure-F-2, page 80 of the writ petition) informed his "No Objection" to the Deputy Commissioner of Customs, Chittagong about the sale of the vessel by its seller since the petitioner did not have possession of the vessel for unavoidable circumstances. Therefore, Jamuna Ship Breaking vide Memorandum of Agreement for sale dated 04.07.2015 (Annexure-K) purchased the vessel from Nadella Corporation. Record shows the Jamuna Ship Breaking, vide Annexure-K3 dated 31.08.2015, to have already procured approval from Ministry of Industry to cut and scrap the vessel. In the above circumstances, we are of the view that the petitioner in no way is connected with the re-exportation of the imported scrap vessel and hence the provisions of re-exportation as laid down in sub-section (1A) of Section 138 of the Customs Act appear to have no manner of application to the petitioner respecting issue of refund in question.

7.6. The order of Admiralty Suit No. 12 of 2014 dated 18.06.2015, (Annexure-F-1), upon plain reading thereof, indicates that the Court dismissed the suit for non-prosecution without any interference with the terms of the settlement, Annexure-F,

reached between this petitioner and Nadella Corporation. Notable, the suit was dismissed in view of the said Settlement. Pertinently, para-5 of the Settlement was as under;

> "*As PHP has already paid the Customs duties, taxes and other charges of Tk. 2,96,94,877.87 as assessed by the Customs authority of the Customs House, Chittagong and the other charges to Chittagong Port Authority and now will not delivery of the vessel, NADELLA or it's agent or any buyer through it will co-operate, assist PHP in getting return or refund of the said duties, taxes and other charges as paid on the Vessel M.T. ALCON ex FALCON CARRIER ex UNITED WILL by issuing all necessary papers, documents and certificates with proper signature and seal on it. If any assignment or transfer or in any other mode, the Customs Authority permits NADELLA or it's agent or its buyer through it may have an arrangement with PHP to avoid payment of duties, taxes and other charges twice on the same scrap vessel.*"

7.7. It is now abundantly clear upon examination of the said order of the Court passed in the said Admiralty Suit No. 12 of 2014 read with the wordings as appeared in para-5 of the Settlement that neither the Court nor the settlement imposed any restriction to get refund of the money in question, particularly when the vessel has already been sold to a third party, the Jamuna Ship Breakers. Moreso, the order of the Admiralty Court leaves the parties to the Settlement at liberty to take appropriate legal steps for enforcement of any of the terms in accordance with law. Since the vessel has been sold for the second time to a third party afresh and requisite duties, charges etc. have been further

realized from that fresh party buyer acquiring full title therein with all subsequent opportunities to cut and scrap the vessel and to consume the benefits of transactions, we are quite unable to understand as to why and how the order of the Admiralty Court (Annexure-F1) becomes a bar to the questioned refund of petitioner's deposit the very purpose of which has been settled successfully in due course of law. Rather, we are of the view that realizing double customs duties over the same imported vessel is arbitrary and malafide.

7.8. Let us now dwell upon and decide the issue of maintainability. Resisting the submission of the learned DAG the learned counsel for the petitioner, referring to the decision held in the **Commissioner of Customs vs. Cab Express (BD) Limited, 64 DLR (AD) (2012)-103** submits that the writ is quite maintainable. However, it was held in the said case as under;

> *"It is now established principle of law that since no disputed question of fact need be gone into and that only interpretation of certain provision of law as to the applicability of the same in a admitted given situation being the efficacious remedy, the importer could avail the writ jurisdiction for speedy and adequate remedy in order to release their goods instead of resorting to Section 193 of the Customs Act."*

7.9. In the case in hand, the customs authority rejected the refund application citing several provisions of Customs Law and the order of the Admiralty Court in a way which we have already adjudicated for and on behalf of the petitioner and against the understanding and interpretation held by the respondent concerned.

8. The upshot of the preceding discussion of facts and analysis of law, we, however, find that the writ is maintainable and we also

find substance in the submission of the learned counsel for the petitioner. The Rule and Supplementary Rule, therefore, deserve to be made absolute.

9. **Order of this Court**:

9.1. Accordingly, the Rule and the Supplementary Rule are made absolute without any order as to costs.

9.2. The impugned order dated 01.11.2022 issued by respondent No. 02 pertaining to Noti No. S-7-2020/R/15/38480 (Cus) under the signature of respondent No. 03 rejecting the application so made by the petitioner on 13.01.2022 for refund of customs duty amounting to Tk. 2, 96, 94,877.87 paid against the imported Scrap Vessel namely MT ALCON, Rot No. 2013/720 vide LC No. 249413020815 dated 26.12.2013, Bill of Entry No. 31111 dated 30.12.2013 (Annexure-J) is hereby declared to have been passed without lawful authority and to be of no legal effect.

9.3. The respondents are directed by an order of mandamus to refund to the petitioner customs duty amounting to Tk. 2, 96, 94,877.87 (Two crores ninety six lakhs ninety four thousands eight hundred seventy seven and eighty seven paisa) paid against the imported Scrap Vessel namely MT ALCON, Rot No. 2013/720 vide LC No. 249413020815 dated 26.12.2013 for releasing the vessel vide Bill of Entry No. 31111 dated 30.12.2013 within a period of 60 (sixty) days from the date of receiving a copy of this judgment and order.

9.4. Communicate the order at once.

.....
(Md. Bazlur Rahman, J)

I agree

.....
(Syed Mohammed Tazrul Hossain, J)

M/Hasan. A.B.O