IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.40757 of 2014

(Arising out of Order-in-Appeal C. Cus. No.184/2014 dated 6.2.2014 passed by the Commissioner of Customs (Appeals), Chennai)

M/s. Ingram Micro India Ltd. **Appellant**
No. 7, CIPET Hostel Road
Guindy, Chennai – 600 032.

Vs.

Commissioner of Customs (Imports – Air) **Respondent**
New Custom House, Meenambakkam
Chennai – 600 027.

APPEARANCE:

Shri S. Murugappan, Advocate for the Appellant
Smt. Anandalakshmi Ganeshram, Superintendent (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40341/2023

Date of Hearing: 28.04.2023
Date of Decision: 26.05.2023

Per M. Ajit Kumar,

1. This is an appeal filed by M/s.Ingram Micro India Limited, Chennai (the appellants herein) against the Order-in-Appeal C.Cus. No. 184/2014 dated 06.02.2014 passed by the Commissioner of Customs (Appeals), Chennai.

2. The facts of the case stated briefly are that the appellant filed a claim for refund of Special Additional Duty (SAD) under Notification No.102/2007-Cus. dated 14.09.2007. The claim covered the period from 01/10/2007 to 31/10/2007, involving 178 Bills of Entry. Although as per department, the claims should have been filed within one year from the payment of duty, they were filed after one year. The Order in

Original notes the date of filing the claim to be 22/01/2009. The same was hence rejected by the Original Authority as time-barred. The appeal filed by them against the said order before the learned Commissioner (Appeals), Chennai also did not succeed. Aggrieved by the impugned order the appellant is before us.

2.1 No cross objection has been filed by the respondent.

3. We have heard Shri Murugappan learned advocate on behalf of the appellant. He submitted that, in the matter of application of one year time limit for refund of SAD, the Hon'ble Delhi High Court in the case of ***Sony India Pvt Ltd Vs Commissioner of Customs, New Delhi [2014 (304) ELT 660 (Del)]*** and the Hon'ble Bombay High Court in ***CMS Info Systems Ltd Vs UOI [2017 (349) ELT 236 (Bom)]*** have taken different views. The appeal filed by CMS Info Systems is pending before the Hon'ble Supreme Court. The Chennai Bench of the Tribunal in the case of ***Honda Siel Power Products Ltd. Vs C.C. (Port-Exports), Chennai [2019 (369) ELT 1773 (Tri-Chennai)***, has followed the CMS Info Systems judgment of the Mumbai High Court, while the Delhi High Court judgment in Sony India Pvt Ltd is being followed by various benches of the Tribunal. A Civil Miscellaneous Appeal has been filed against the Chennai Tribunal judgment in Honda Siel Power Products Ltd. before the Hon'ble High Court of Madras and is pending. He further added that the judgement of the Hon'ble Tribunal in CMS Info Systems pertains to a period after the amendment of notification No.102/2007-Cus. dated 14.09.2007 by notification 93/2008 dated 01/08/2008, that introduced a time limit of one year from the date of payment of SAD for filing refund claims. It should hence be distinguished from the present case which pertains to

the period prior to the amendment. The decision by the single Member Delhi Bench of the Tribunal recently in November 2021 in the case of **Thermoking vs Commissioner of Customs (ICD, TKD), New Delhi**, Customs Appeal No 50711 of 2021-SM dated 24/11/2021, as reported in MANU/CE/0228/2021 clearly shows why the Hon'ble Delhi High Court judgement in the case of *Sony India* is to be preferred. Without prejudice to all the above, in the present case, the appellants submit that the issue involves refund of duty paid at a time when there was no stipulation with regard to time limit. In the following two decisions, single Member Benches at Mumbai and Delhi of the Tribunal have held that the subsequent amendment cannot be made applicable to imports made and duty paid prior to the amendment.

1) ***Audio plus Vs Commissioner of Customs (imports) Raigad*** **reported in 2011 (264) ELT 516 (Tri-Mumbai)**

2) ***United Chemicals Industries Vs Commissioner of Central Excise, Kanpur*** **reported in 2013 (289) ELT 333 (Tri-Delhi)**

He prayed that the impugned order be set aside with consequential relief.

4. Ms. Anandalakshmi Ganeshram, Superintendent (AR), appeared on behalf of Revenue. She stated that the issue has been decided in favour of Revenue by the Coordinate Bench of the Hon'ble Tribunal at Chennai in Honda Siel Power Products Ltd. (supra). The said judgment has not been reversed, modified, set aside or stayed and hence would be squarely applicable to the facts of this case. Moreover, even for the period when the notification did not specify a time limit for filing the refund claim the time limit imposed under section 27 of the Customs

Act, 1962 needs to be applied. She hence prayed that the impugned order may be upheld.

5. The issues that arise from the dispute and require our consideration are;

(a) whether the time limit for filing a refund claim within one year of payment of additional duty of customs would apply to the appellant's claim. The duty was paid as per notification No. 102/2007 dated 14/09/2007 before it was amended by notification No. 93/2008 dated 01/08/2008, when there was no stipulation about time limit, although the claim was filed after the amendment came into force.

(b) whether the time limit as specified in Section 27 of the Customs Act 1962 would apply to refund claims filed as per the provisions of notification 102/2007 dated 14/09/2007

6. We begin by examining point (b) at para 5 above. ***Boards Circular No.6 /2008-Customs dated 28.4.2008*** has clarified this issue. The relevant para of the circular is reproduced below.

> "4. Time - Limit:
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> 4.1. In the Notification No.102/2007-Customs dated 14.9.2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in section 27 of the Customs Act, would apply. **In the absence of specific provision of section 27 being made applicable in the said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification.** Further, it was also represented that the goods imported may have to be despatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. **Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time limit of one year from the date of payment of duty, within which the refund could be filed by any person.** It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available

> and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds.
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> 4.2. It is also clarified that only a single claim against a particular Bill of Entry should be permitted to be filed within the maximum time period of one year. Filing of refund claim for a part quantity in a bill of entry shall not be allowed except when this is necessary at the end of the one year period. Further, since the Sales Tax (ST) / Value Added Tax (VAT) is being paid on periodical or monthly basis, even in case of bills of entry where the entire quantity of goods are sold within a month, all such cases shall be consolidated in a single refund claim and filed with the Customs authorities on a monthly basis. In other words, there would be a single refund claim in respect of one importer in a month irrespective of the number of Bills of Entry (B/Es) processed by the respective Commissionerate.
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> 4.3. With the extension of time limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. **Further, in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims.** However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt.
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> (emphasis added)

It is seen that in the absence of section 27 of the Customs Act being made applicable to notification No.102/2007-Customs dated 14.9.2007, the said provisions would not automatically apply to a claim of refund under the notification. On the same lines a clarification has also been given for the payment of interest in the circular. This being so in the absence of section 27 being made applicable in the said notification, the time limit prescribed in the section would not be automatically applicable to refunds under the notification.

7. We now answer the main issue at para 5 (a) above. At the outset an examination of sub-para (c) of para 2 as it originally stood in notification No. 102/2007-Cus. dated 14.09.2007 and after its amendment by notification No. 93/2008 dated 01/08/2008, will help us understand the issue better. The same are reproduced below:-

> "Notification No. 102/2007-Cus. dated 14.9.2007

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled :

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, *inter alia*, provide copies of the following documents along with the refund claim :

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

Notification No. 93/2008 dated 1.8.2008

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 102/2007-Customs, dated the 14th September, 2007 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 598 (E), dated the 14th September, 2007, namely :-

In the said notification, in paragraph 2, for sub-paragraph (c), the following shall be substituted, namely, -

"(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs;".

(emphasis added)

It is clear by a plain reading of the amendment that it did not bring about any change in the rate of duty. The amendment tweaked a

condition in the original notification to introduce a time limit for filing refunds under the said notification. We find that it is not disputed that the appellants have filed the refund claim after one year of payment of duty. The order-in-original notes the date of filing the refund claim to be 22/01/2009 for 178 Bills of Entry cleared during the period from 01/10/2007 to 31/10/2007. It is also noted that the amending Notification No. 93/2008 is dated and came into effect from 01/08/2008. Hence this is case where the claim has been filed not only one year after the payment of additional duty but also after the amendment came into force bringing in a time limit of one year. We have gone through the judgment of the Coordinate Bench of the Hon'ble Tribunal at Chennai, in the case of Honda Siel Power Products Ltd. (supra), to examine the facts of the said case and come to a conclusion whether the facts of the impugned order are the same as in the said judgment, for it to be applicable here. The relevant portion of the judgment is reproduced below;

> "2. The appellants herein had imported goods and paid Special Additional Duty @ 4% as applicable to the goods. In terms of Notification No. 102/2007-Cus., dated 14-9-2007 read with Notification No. 93/2008, dated 1-8-2008, the assessees are entitled to refund of Special Additional Duty (SAD) paid if the imported goods are thereafter sold by them on payment of VAT subject to the conditions mentioned in the notification. One of the conditions mentioned in the notification as applicable during the relevant time was that the refund claim must be filed within one year. Undisputedly, the appellants have filed all these refund claims after the period of one year. Therefore, all the refund claims were rejected by the original authorities and such rejections were upheld by the first appellate authority vide the impugned orders. Hence these appeals.
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> 16. We have considered the arguments on both sides and perused the records. The provisions for refund of Customs duty available under the Customs Act is under Section 27. The Hon'ble High Court of Delhi in the case of *Sony India Pvt. Ltd.* (supra) held that this section should not apply to refund of SAD because the refund is as per the notification. The Hon'ble High Court of Delhi was dealing with

a situation where there was no limitation in the exemption notifications for filing the refund claim at the time of import but which was introduced by the time refund claim was filed. The Hon'ble High Court of Bombay, on the other hand, was dealing with a case such as the present one, where the imports have taken place after the amending notification. The Hon'ble High Court of Bombay also held that the limitation under Section 27 also applies. We find that the Hon'ble High Court of Delhi framed the question of law only with respect to retrospective application of the amendment but also held that the amending notification must be read down to the extent it imposes a time limit for filing the refund claim. Evidently, if an importer resells the goods and files the refund claim within the period, they will be put to loss as he will be bearing both the burden of SAD and the VAT which he would pay while selling the goods. The Hon'ble High Court of Bombay on the other hand held that it is not open for the importer to pick and choose parts of the exemption notification that suits while ignoring those that don't. The Hon'ble High Court of Bombay also held that Special Additional Duty of Customs is also in the nature of Customs duty and it is not a duty on sale of goods. It further held that the importer does not have any vested, let alone absolute right, for refund of the SAD. We also note that the Hon'ble High Court of Bombay has considered the judgment of the Hon'ble Delhi High Court in the case of *Sony India Pvt. Ltd.* (supra) and differed from it. Further, in the case of *Gulati Sales Corporation* [2018 (360) E.L.T. 277 (Del.)] decided by the Hon'ble High Court of Delhi on 7-11-2017, the ratio of *Sony India* (supra) was followed even when the imports were made after amendment to the notification. Nevertheless the undisputed position is that this is a case of a refund arising out of a conditional notification.

17. To sum up, we find that the Hon'ble High Court of Delhi has taken a liberal view on interpreting the exemption notification and held that since the purpose of availing the SAD is to provide level playing field between the imported goods and the domestic goods, when the imported goods are resold on payment of VAT to the State Government, the exemption notification provides for refund of SAD. It may or may not be always possible for the importer to resell the goods and file the refund claim within time depending on his market conditions. Taking a liberal view, the Hon'ble High Court held that refund is available without the limitation of one year indicated in the exemption Notification 102/97 after amendment. On the other hand, the Hon'ble Bombay High Court has constructed the exemption notification strictly and held that all conditions including the time limit within which the refund claim has to be filed must be fulfilled. We also find that there is no order of the jurisdictional High Court of Madras. However, the question of strict versus liberal interpretations of the exemption notifications has now finally been settled by the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July, 2018 in the case of *Dilip Kumar & Company* (supra), any exemption notification must be strictly interpreted and any benefit of doubt must go in favour of the Revenue and against the assessee. Contrary decisions such as those in the case of *Sun Export Corporation* v. *Collector* [1997 (93) E.L.T. 641 (S.C.)] have been overruled by the aforesaid Five-Judge Constitutional Bench. Judicial discipline requires us to follow the judgment of the Apex Court and interpret the exemption notification strictly as it has been drafted including the time limit within which refund applications have to be filed. We find

> that the judgment of the Hon'ble High Court of Bombay in the case of *CMS Info System* (supra) is consistent and appropriate, syncs well with the ratio of *Dilip Kumar's* case (supra), which is required to be followed.
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> 18. Consequently, the refund applications of the importer beyond the time limit have been correctly rejected by the lower authorities. The impugned orders rejecting such refund claims are correct in law and call for no interference. The appeals are rejected and impugned orders are upheld.

We find that the above judgment pertains to the period after the amendment of Notification No.102/2007-Cus. dated 14.09.2007 by notification 93/2008 dated 01/08/2008. The time limit in sub para (c) of para 2 of the amended notification will apply to all refund claims filed under the notification from the date of amendment. The refund claim in the present case was also filed after the amendment to Notification No.102/2007-Cus came into force. Moreover, the importers including the appellant were made aware of the changes going to brought about in Notification 102/2007-Cus. by introducing a time limit for filing a refund claim, vide Boards Circular No.6 /2008-Customs dated 28.4.2008 and the appellants cannot state to have been taken by surprise by the amending Notification No. 93/2008 dated 01/08/2008. It has been consistently held by superior courts of law that there cannot be a blanket right to claim an exemption and that there is neither a constitutional guarantee nor a statutory entitlement to refund.

8. The Hon'ble Tribunal in its judgment in Honda Siel Power Products Ltd. has examined both the judgements of the Hon'ble High Courts of Delhi and Mumbai in Sony India Pvt Ltd Vs Commissioner of Customs, New Delhi (supra) and in CMS Info Systems Ltd Vs UOI (supra), in detail and found that the judgment in CMS Info Systems Ltd needs to be followed. The relevant paras of the Hon'ble Chennai Tribunals

judgment have been extracted above. In the circumstances we do not repeat the discussions and find that the judgment of the co-ordinate Bench of this Tribunal in Honda Siel Power Products Ltd. (supra), will squarely apply to the impugned order. We concur with the same by upholding the impugned order and answering the query at para 5(a) above accordingly.

9. The Single Member Bench judgments of the Tribunal at New Delhi and Mumbai cited by the appellant, have only persuasive value, we however examine the same. At para 10 of the Tribunals judgment in 'Thermoking' (supra) it was held that the right to claim refund of duty in terms of the notification has accrued only when the sale took place after import. In ***Commissioner of Central Excise, Chandigarh vs. Bhalla Enterprises [2004 (173) ELT 225 (SC)]***, it was held;

> "The basic rule in interpretation of any statutory provision is that the plain words of the statute must be given effect to"

Since the words 'one year from the date of payment of the said additional duty of customs' in sub paragraph (c) of paragraph 2 of Notification No. 102/2007 as amended by Notification No. 93/2008 is plain and clear allowing for no ambiguity, it should be given affect to without going into as to when the right to claim refund of duty in terms of the notification has accrued. As state at para 7 above, there is neither a constitutional guarantee nor a statutory entitlement to refund. The said Tribunal order also relies on an interpretation of section 27. We had earlier found that the notification must be understood on its own terms and is not anchored to section 27 of the Customs Act 1962. In its landmark judgment in ***Rohitash Kumar & Ors. v Om Prakash Sharma & Ors [(2013) 11 SCC 451],*** covering the interpretation of statutes the Hon'ble Supreme Court held that

inconvenience or hardship is not a ground for the court to interpret the plain language of the statute differently, to give relief.

> "19. In Bengal Immunity Co. Ltd. v. State of Bihar & Ors., AIR 1955 SC 661 it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, 'dura lex sed lex' which mean 'the law is hard but it is the law.' may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. **A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.**
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> 20. In Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors., AIR 1963 SC 1128 a Constitution Bench of this Court held that, 'inconvenience is not' a decisive factor to be considered while interpreting a statute.
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> 21. In Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529, this Court, while dealing with the same issue observed as under:-
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> **'A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not.'**
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> (See also: The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd., AIR 1973 SC 927; and Tata Power Company Ltd. v. Reliance Energy Limited & Ors., (2009) 16 SCC 659).
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> **Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal."**
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> (emphasis added)

In the Tribunals judgment in the case of 'Audioplus' the refund claim was filed prior to the amendment. As stated at para 8 of the order, any payment of duty made after 01/08/2008 (ie after the amendment), refund of the same shall be entitled, if the same is filed within one year. It is felt that the Hon'ble Tribunal has not appreciated that post amendment it is the twin dates of payment of additional duty of customs read with the date of filing the refund claim that is relevant

for the purpose of limitation. An amended notification cannot be read in a manner that will render the amendment otiose. The judgment of the Hon'ble Tribunal in 'United Chemical Industries' (supra) follows the Tribunal judgment in the 'Audioplus' case which has not found favour with us. We are hence not persuaded to change our views by the decisions of the Single Bench orders cited by the appellant.

10. In fact, our views are strengthened by the recent decision of the Hon'ble Supreme Court in ***UOI Vs Cosmo Films Ltd [Civil Appeal no(s) 290 of 2023]***, dated 28/04/2023. Revenue was in appeals against a judgment and order of the Hon'ble Gujarat High Court in M/s Shri Jagdamba Polymers Ltd. & Ors. v Union of India & Ors., [Special Civil Application No. 19324 of 2018] wherein mandatory fulfilment of a 'pre-import condition' incorporated in the Foreign Trade Policy of 2015-2020 (FTP) and Handbook of Procedures 2015-2020 (HBP) by Notification No. 33 / 2015-20 and Notification No. 79 / 2015-Customs, both dated 13.10.2017, was set aside. By the said changes, upfront exemption granted to exporters through advance authorization (AA) in the erstwhile FTP regime were rescinded and through the amendment exemption from levy of IGST under Section 3 (7) and compensation cess leviable under Section 3 (9) of Customs Tariff Act, 1975 were made subject to the conditions that the export obligation shall be fulfilled by physical exports only and shall also be subject to 'pre-import condition'. By this a major change was brought into the policy not to allow exemption from payment of IGST directly at the time of import under AA. Such exemption was allowed indirectly by allowing refund of IGST paid at the time of imports under AA within a specified time. One of the submissions made by the appellants in that case was that

exporters who have to import inputs would face impossibility in fulfilling the 'pre-import condition' because the normal cycle of import inputs and export of finished products would be for a period of six months, whereas the period, which the regime permits, would work out to three months. The Hon'ble High Court held that the amendments do not meet with the test of reasonableness and are also not in consonance with the scheme of Advance Authorisation. The Hon'ble Supreme Court in its judgement while setting aside the orders of the Hon'ble Gujarat High Court and deciding in favour of Revenue, held;

> "73. In this court's opinion, what applies to refunds, (the right to which can be curtailed legitimately) applies equally to exemptions. It has been held in Bannari Amman Sugars Ltd. vs. Commercial Tax Officer & Ors [2004 (6) Suppl. SCR 264] that if there is any tax concession, it "can be withdrawn at any time and no time limit should be insisted upon before it was withdrawn".

The Supreme Court in its above judgment has under scored the legislative power to amend an exemption notification mid-stream.

11. To sum up, we find that in the absence of specific provision of section 27 being made applicable in Notification No.102/2007-Customs dated 14.9.2007 as amended, the time limit prescribed in this section would not be automatically applicable to refunds under the said notification. Further the refund claim in the present case has been filed after the amendment to Notification No.102/2007-Cus. came into force. Conditions of a notification should be strictly construed. This being so, as per sub para (c) of para 2 of the amended notification, which was effective on the date of the appellant filing the claim, the importer should have filed his claim before the expiry of one year from the date of payment of the said additional duty of customs. This has not been complied with and hence the claim has been correctly rejected by the impugned order.

12. Based on the discussions above, we find that the impugned order is correct and is upheld. The appeal stands rejected.

(Pronounced in open court on 26.5.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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