IN THE HIGH COURT OF MADRAS

WP No.6927 of 2019
WMP No.7671 of 2019

RAGU ENTERPRISES
REP BY PROPRIETOR MR S NATARAJAN
NO 15/7, GANDHI NAGAR, 1ST STREET
SATHUMA NAGAR, THIRUVOTTIYUR
CHENNAI-600019, TAMIL NADU, INDIA

Vs

1) COMMISSIONER OF CUSTOMS
CHENNAI II COMMISSIONERATE CUSTOM HOUSE
60, RAJAJI SALAI, CHENNAI-600001

2) ASSISTANT/DEPUTY COMMISSIONER OF CUSTOMS
GROUP-I, CHENNAI II, COMMISSIONERATE, CUSTOM HOUSE
60, RAJAJI SALAI, CHENNAI-600001

Anita Sumanth, J

Dated: March 18, 2019

Appellant Rep by: Mr A Suresh
Respondent Rep by: Mr Pramod Kumar Chopda, Sr. Standing Counsel

Cus - The petitioners sought a Mandamus for release of consignments and a further direction to the respondents to issue a 'Detention Certificate' for waiver of Demurrage and Container Detention Charges in terms of Regulation 6(1)(l) of Handling of Cargo in Customs Areas Regulations, 2009 - The identical issue has been considered in case of *M/s.Royal Impex* - *2019-TIOL-596-HC-MAD-CUS* - The said order is applicable to the present case on all fours - The petitioners will remit the entire duty component of consignments imported by them in cases where such duty is leviable along with a bank guarantee for the 10% of invoice value - In cases where the duty impact is neutral, the petitioners shall furnish a bank guarantee for the 10% of the invoice value - Upon satisfaction of aforesaid conditions, the consignments shall be released forthwith - The authorities are at liberty to initiate proceedings in respect of transactions in question and if done, petitioners shall appear, be heard and file their submissions pursuant to which orders shall be passed by authorities in accordance with law - The petitioners have also prayed for waiver of demurrage charges incurred in respect of detained consignments - In the light of Rule 6(l) of Handling of Cargo in Customs Areas Regulations, 2009, which provides that Customs Cargo Provider shall not, subject to any other law for the time being in force, charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be, there shall be a waiver of demurrage charges: HC

Writ Petitions disposed of

Case law cited -

M/s.Royal Impex V. Commissioner of Customs - 2019-TIOL-596-HC-MAD-CUS.....Para 2

JUDGEMENT

Per: Anita Sumanth:

The Writ Petition has been filed by petitioner seeking a Mandamus for the release of consignments under Eighteen Bill of entry No.1.9973412 dated 07.02.2019, (2) 9973414 dated 07.02.2019, (3) 2047105 dated 13.02.2019, (4) 2047104 dated 13.02.2019 (5) 2061771 dated 14.02.2019 (6) 2061770 dated 14.02.2019 (7) 2062748 dated 14.02.2019 (8) 2061776 dated 14.02.2019 (9) 2061774 dated 14.02.2019 (10) 2062574 dated 14.02.2019 (11) 2200301 dated 25.02.2019 (12) 2200378 dated 25.02.2019 (13) 2200235 dated 25.02.2019 (14) 2200231 dated 25.02.2019 (15) 2213306 dated 26.02.2019 (16) 2213478 dated 26.02.2019 (17) 2213304 dated 26.02.2019 and (18) 2213309 dated 26.02.2019 in terms of the orders of the Court in W.P.No.136 of 2019 & WMP.No.147 dated 04.01.2019 containing "Black Matpe" and a further direction to the respondents to issue a 'Detention Certificate' for waiver of Demurrage and Container Detention Charges in terms of Regulation 6(1)(l) of Handling of Cargo in Customs Areas Regulations, 2009.

2. The identical issue as arising in these Writ Petitions has been considered by me vide my order dated 27.02.2019 in *W.P.No.4403 of 2019 (batch) in the case of M/s.Royal Impex V. Commissioner of Customs* = *2019-TIOL-596-HC-MAD-CUS*. The aforesaid order is applicable to the present cases on all fours. The entire order is extracted herein for the sake of clarity:

"Sixty Six (66) petitioners are before this Court seeking issuance of a writ of mandamus to the respondents to release consignments of 'Peas' and 'Dhall' imported by the petitioner under the Bills of Entry in terms of earlier orders of this Court and further direct the respondents to issue a 'Detention Certificate' for waiver of Demurrage and Container Detention Charges in terms of Regulation 6(1)(l) of Handling of Cargo in Customs Areas Regulations 2009.

2. Detailed submissions of Mr.Vijay Narayan, learned Advocate General appearing for Mr.R.Satish Sundar, Mr.P.Wilson, learned Senior Counsel appearing for Mr.A.Suresh, Mr.P.Sidharthan, Mr.C.Vigneshwaran, Mr.K.Mohanamurali and Mr.G.Ethirajulu, learned counsels appearing for the petitioners and Mr.S.R.Sundar, Ms.Aparna Nandakumar, Mr.Madhana Gopal Rao and Mr.K.Umesh Rao, learned standing counsels for the respondents have been heard. No counters have been filed till date though the earliest matter in the batch came up on 15.02.2019 when learned standing counsel for the Revenue took notice as well as time to file a counter. Be that as it may, both sides have addressed the Court by way

of detailed submissions, circulating relevant material as well as case-law in support of their contentions.

3. Mr.G.Rajagopalan, learned Assistant Solicitor General intervenes in the matter to urge that the Director General of Foreign Trade (DGFT), the entity that has issued certain relevant Notifications, be made a party to the Writ Petitions. However, since the Writ Petitioners seek only a mandamus and do not challenge the Notifications itself, I do not believe that the DGFT is a necessary party to the proceedings. In fact, these very petitioners before me have challenged Notification dated 25.04.2018 by way of Writ Petitions in W.P.Nos.15921 to 15924 of 2018; Notification dated 02.07.2018 in W.P.Nos.17387 to 17391, 19684 and 18840 of 2018; Notifications dated 05.08.2017, 21.08.2017 and 04.05.2018 in W.P.Nos.21454, 21455 and 26486 of 2018 and Notification dated 28.09.2018 in W.P.Nos.26440 and 26433 of 2018 wherein the DGFT has, rightly, been made a party.

4. The mandamus sought before me is based on the strength of the interim stay granted by this Court and admittedly in force at time when the consignments in question have been imported. The entire batch of Writ Petitions filed challenging Notification Nos.04/2015-20 dated 25.04.2018, 15/2015-2020 dated 02.07.2018, 19/2015-20 dated 05.08.2017, 22/2015-20 dated 21.08.2017, 06/2015-20 dated 04.05.2018 and 37/2015-20 dated 28.09.2018 has been heard by a learned single Judge of this Court and orders have been reserved on 09.01.2019.

5. The facts in relation to all the above Writ Petitions are more or less uniform and the defence put forth by the respondents is also the same in all cases. The petitioners are importers of two kinds of products (i) various varieties of peas such as Yellow Peas, Green Peas, Dun Peas, Kaspa Peas, Pigeon Peas (Cajanus Cajan), and (ii) dhalls, being Toor, Moong and Urad Dhall (Black Matpe) (Beans of the species Vigna mungo (L.) Hepper or Vigna radiata (L.) Wilczek.

6. The petitioners in W.P.Nos. 4721, 4726, 5107, 5079, 5167, 5137, 5088, 5091, 5102, 5098, 5117, 5108, 4826, 4830, 4932, 4990, 4993, 4956, 4961, 4964, 4908, 5323, 5335, 5340, 5344, 5348, 5357, 5359, 5388, 5400, 5390, 5390 and 4428 of 2019 = 2019-TIOL-596-HC-MAD-CUS are importers of dhalls and the petitioners in W.P.Nos.4403, 5041, 5043, 5046, 5048, 5084, 5093, 4985, 4432, 4417, 5112, 5119, 5101, 5113, 4712, 4719, 4722, 4838, 4941, 4926, 4923, 4916, 4912, 5332, 5339, 5342, 5345, 5379, 5385, 5383, 5370 and 5377 of 2019 = 2019-TIOL-596-HC-MAD-CUS are importers of different varieties of peas.

7. The import of both products has been subject to restriction placed by the Customs authorities under a series of notifications issued from April 2018 onwards in the case of peas and August 2017 onwards in the case of dhalls. As far as Toor, Moong and Urad Dhalls are concerned, the respondents have issued two notifications bearing numbers (i) No.22/2015-2020 dated

21.08.2017 and (ii) 06/2015-2020 dated 04.05.2018. The Notifications restrict the quantum of import of dhalls and the operation of the said notifications has been stayed by orders of this Court dated 31.08.2018 in W.P.Nos.21454 and 21455 of 2018 and WMP Nos.25197, 25198 and 25200 of 2018.

8. As far as peas are concerned, initially a notification was issued on 25th April 2018 for the period 01.04.2018 to 30.06.2018 that placed a restriction on the quantum of peas liable to be imported. The Policy condition was set out in paragraph 4 of the notification, extracted below:

'During the period from 01st April to 30th June 2018 total quantity of one lakh MT of yellow peas minus the quantity already imported from 01.04.2018 till date will be allowed against licence as per procedure to be notified by DGFT.

"Already Imported" will include shipment already arrived from 01.04.2016 till 25.04.2018 and those shipments backed by Irrevocable Commercial Letter of Credit (ICLC) and Advance Payment made through Banking Channel before 25.04.2018. Both these categories will be required to be registered with Jurisdictional Regional Authority as per Para 1.05 of Foreign Trade Policy, 2015-20.'
9. The second notification bearing No.15/2015-2020 was issued on 02.07.2018 for the period 1st July 2018 to 30th September, 2018 continuing the restriction for the subsequent three months as well. Again, vide Notification bearing No.37/2015-2020 dated 28.09.2018 the restriction was continued for the period 01.10.2018 to 31.12.2018.

10. The Writ Petitioners are concerned with imports effected during the period of Notification dated 28.09.2018, in the case of peas, and pursuant to Notification 04.05.2018, in the case of dhalls. The case of the petitioners is that the transactions of imports had crystallised even prior to the date of the relevant Notifications. The dates of shipment/date of bills of lading in all cases is between the period 01.10.2018 and 31.12.2018. Similar/identical consignments that had been shipped and imported during the period in question have been permitted to be cleared by the customs authorities. However, the authorities have illegally detained the present consignments in spite of there being a stay of operation of the Notifications in question having been granted by this Court. The petitioners rely on the following judgments of the Supreme Court in support of their arguments.

i. Union of India V. Asian Food Industries (2006 (204) ELT 8 (SC)) = 2006-TIOL-147-SC-CUS

ii. Priyanka Overseas Private Ltd. And another V. Union of India and others ((1991) SUPP 1 SCC 102) = 2002-TIOL-676-SC-CUS

iii. Rajkumar Dey and others V. Tarapada Dey and others ((1987) 4 SCC 398)

iv. Gursharan Singh and others V. New Delhi Municipal Committee and others ((1996) 2 SCC 459)

11. The respondents, for their part, draw support from the Policy of the Government to restrict imports of products available indigenously in order to encourage local farmers. The Notifications, according to them, echo the aforesaid Policy decision and have been issued only to advance the object and rationale of the policy itself. Accordingly, they would urge that this Court should take into account the fact that if clearance of the imported consignments is permitted, small farmers would be greatly prejudiced and negatively impacted.

12. Learned counsels also point out that the Notifications in question had been the subject of challenge in several High Courts. The challenge had been rejected by a Division Bench of the Gujarat High Court vide its order dated 19.12.2018 in the case of Premium Pulses Products V. Union of India (R/special Civil Application Nos.16765, 17290, 17573 and 17664 of 2018) = 2019-TIOL-61-HC-AHM-CUS. The importers had challenged the decision of the Gujarat High Court by way of a petition for Special Leave that had been rejected by the Supreme Court vide judgement dated 28.01.2019 in SLP (C) No.1922 of 2019 in the case of Kusum Agency V. Union of India and others. Accordingly, they would submit that goods in question assumed the character of prohibited goods and rightly not permitted to be cleared by the authorities.

13. The legal defence raised is that the imports would not be covered by the Notifications in question in so far as, for reckoning the date of import, it would be the date of Bill of Entry that would be relevant and not the date of Bill of Lading.

14. Learned counsels circulate an internal Instruction issued by the Directorate General of Foreign Trade dated 31.01.2019 referring to the dismissal of the Special Leave Petition (SLP) against the order of the Gujarat High Court and instructing all officers within India not to permit clearance of the goods. They also stress upon the fact that it was only by reason of the stay granted by the learned single Judge of this Court that several imported consignments have been permitted to be cleared. To this, learned counsels for the petitioners point out that the Calcutta High Court has accepted the challenge to the Notification in question vide its decision in the case of Sanmarg Pvt. Ltd. Vs. Union of India [2019 (365) E.L.T. 273 (Cal)] =2018-TIOL-2391-HC-KOL-CUS and the aforesaid decision have not been challenged by the Revenue. A copy of the aforesaid decision is placed on record.

15. Heard learned counsel. The relevant facts that are admitted before me are:

(i) In the case of import of peas, substantially all imports in question are covered by Bills of Lading drawn between the dates of 01.10.2018 and 31.12.2018. <u>There are however, a few instances where the Bills of Lading</u>

have been drawn after 01.01.2019 in which event this Order would not be applicable. This order will be applicable, in the case of imports of peas, only in respect of those consignments covered under Bills of Lading during the period 01.10.2018 to 31.12.2018. As far as import of consignments of dhalls are concerned, since the notification did not stipulate any time period, this restriction will not apply to the Writ Petitions filed in cases of imports of dhalls.

(ii) Some petitioners before me have challenged Notification bearing No.37/2015-2020 dated 28.09.2018 applicable for the period 01.10.2018 to 31.12.2018 by way of Writ Petitions in W.P.Nos.26433, 26440, 26495, 27056, 26464, 26471, 26475, 26479, 27319, 27327, 27336, 27370 of 2018. A learned Single Judge of this Court has stayed the operation of the Notification in question and such order of stay was valid and in subsistence at the time when the imports, have been made.

(iii) The liability to duty of the goods in question is as follows:

Yellow Peas, Green Peas, Dun Peas, Kaspa Peas: 50%

Pigeon Peas/Toor Dal : 10%

Urad Dal and Moong Dal : Nil

16. The limited questions that I am called upon to consider in the light of the admitted facts as above, are twofold:

(i) Whether the relevant date for the reckoning the date of the imports would be the date of Bill of Lading or Bill of Entry;

(ii) Whether there is any embargo on the import of the consignments of dhalls in the present cases;

(iii) Whether there is any embargo on the import of the consignments of peas imported during 01.10.2018 and 31.12.2018 and covered by Bills of Lading for the aforesaid period.

17. As regards the first issue, Regulation 9.11 of the Foreign Trade Policy specifically states that for the purpose of reckoning the date of import, the relevant date would be the date of Bill of Lading only. In the light of the aforesaid the Foreign Trade Policy being a complete code by itself, reference by the learned counsels for the Revenue to section 15 of the Customs Act, which fixes the date for determination of rate of duty and tariff for the purpose of valuation of imported goods as the date of Bill of Entry, may not be relevant.

18. The Supreme Court, in the case of Union of India V. Asian Food Industries (supra), considered the validity of exports of certain consignments of pulses. The admitted position was that the transactions for exports had been negotiated and finalised by the petitioner at a time when the exports was permitted. While this is so, the Central Government took the decision to ban export of pulses. The aforesaid decision was reported widely in the media. But the notification banning the export was

issued only later in exercise of power under section 5 of the Foreign Trade (Development and Regulation Act), 1992, under which the Government prohibited export of various goods for a period of six months from the date of notification. By the time the said notification came to the knowledge of the petitioner, the consignments were under shipment, but were detained upon arrival by the customs authorities, who were of the view that the consignments were prohibited in the light of the notification issued. In the aforesaid circumstances, the Delhi High Court had expressed a view in favour of the customer. The view was affirmed by Supreme Court holding that a vested or accrued right cannot be taken away by reason of a policy. The relevant portions of the judgment are extracted below:

33. The scheme of the Foreign Trade Policy postulates that when the policy provisions are amended which are disadvantageous to the exporters, the modification would not be attracted.....

36. Different stages for the purpose of the said Act would, therefore, be different. For interpretation of the provisions of the 1992 Act and the policy laid down as also the procedures framed thereunder vis-`-vis the provisions of the 1962 Act, the rate of custom duty has no relevance. What would be relevant for the said purpose would be actual permission of the proper officer granting clearance and loading of the goods for exportation. As soon as such permission is granted, the procedures laid down for export must be held to have been complied with.....

48. The Delhi High Court, however, in our view correctly opined that the notification dated 4.07.2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of Sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof.
18. In the case of Priyanka Overseas Private Ltd. And another V. Union of India and others, the Supreme Court held as follows:

31.We have given our careful consideration to the arguments advanced by the learned counsel for the parties and have thoroughly perused the record. We have to first consider whether 'Palm Kernel' and 'palm seed' were two different commodities or 'Palm Kernel' was included in 'Pal, seed' for the purposes of import. The difference between 'palm seed' and 'Palm Kernel' has been explained in the letter of the Central Plantation Crops Research Institute date January 21, 1987 (placed on record), it reads as under:

"The difference between Palm Kernel and palm seeds has also been pointed out in the aforesaid letter according to which palm seed is specially extracted from fruits while kernel is a product obtained after sterilisation,

digestion at 95 Celsius, pressing, decarping, shelling etc. The Palm Kernel will lose its viability due to the above processes and cannot be used for germination."

Under Appendix 5 Part (b) Item 5 of the Import Policy under the heading. Oils/seeds only Palm oil/Palm seeds have been mentioned. We agree with the view taken by the High Court in this regard that Palm Kernel cannot be included under the item palm seeds and the two commodities were different as understood in commerce or trade. We do not want to burden this judgment by citing those authorities which have already been considered for deciding this controversy by the High Court. We do not see any force in the contention of the learned Solicitor General in this regard that the government had only made a clarification vide Notification dated July 27, 1987 by introducing in Appendix 5 Part (b) Item No.5 "all other oils/seeds/any other material from which oil can be extracted". It is significant that in the aforesaid notification published in the Gazette of India Extraordinary para (1) Section 121, it was clearly mentioned that the same was issued as an amendment to the earlier Notice No.1-ITC (PN)/85-88 dated April 12, 1985. The notification stated that the following amendment shall be made in the Policy at proper places indicated below and then under the head amendment the new provision which included all other seeds from which oil can be extracted" was mentioned. It is therefore evident that the government of India itself, realised the difference in the two commodities therefore it amended its previous policy. We are therefore of the opinion that prior to July 27, 1987 'Palm Kernel"was not a canlised item and the High Court rightly held that 'Palm Kernel' was not included with in the entry of 'palm seed'.

Since 'Palm Kernel' was not included within 'palm seed' the customs authorities had no legal justification to confiscate or impose redemption fine, or penalty, as the goods had already been shipped on various dated i.e. On June 26, 1987 and July 25, 1987. It is no longer in dispute that if the Palm Kernel was not a canalised item before July 27, 1987 then it could have been imported under the OGL before that date. <u>The crucial dates in this regard are June 26, 1987 and July 25, 1987 when the goods were actually loaded in the ship and not the date of arrival of the ship in the territorial waters of India.</u>

(emphasis by underlining, mine)

21. In the light of the above, the relevant date for reckoning the import of the consignments of peas is the date of Bill of Lading.

22. Some submissions have been made on the merits of the challenge to the notifications itself. However, insofar as the Writ Petitions challenging notifications are, admittedly, pending decision before another learned single Judge of this Court, I consciously refrain from adverting to the same.

23. The grant of stay of operation of the relevant Notifications and the pendency of the said stay as on the date of import is admitted. Thus, and in conclusion, on the basis of the admitted position on facts as recorded by me in paragraph 15 of this order and bearing in mind the balance of convenience in the present case, the consignments in question are liable to be released, though conditionally."

3. In the light of the aforesaid, the conclusions as arrived at by me in my order above will equally apply in the present cases as well.

4. The petitioner will remit the entire duty component of the consignments imported by them in cases were such duty is leviable as per paragraph 15(iii) above along with a bank guarantee for the 10% of the invoice value. In cases where the duty impact is neutral, the petitioner shall furnish a bank guarantee for the 10% of the invoice value. Upon satisfaction of the aforesaid conditions, the consignments shall be released forthwith.

5. The authorities are at liberty to initiate proceedings in respect of the transactions in question and if done, the petitioner shall appear, be heard and file their submissions pursuant to which orders shall be passed by the authorities in accordance with law.

6. The petitioner has also prayed for waiver of demurrage charges incurred in respect of the detained consignments. In the light of Rule 6(l) of the Handling of Cargo in Customs Areas Regulations, 2009, which provides that the Customs Cargo Provider shall not, subject to any other law for the time being in force, charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be, there shall be a waiver of demurrage charges.

7. The Writ Petition is disposed of in the above terms. Consequently, connected Miscellaneous Petition is closed. No costs.