

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P(C) No. 7734/2009

Reserved on : 23rd September, 2009

Pronounced on: 25th September, 2009

KEJRIWAL ENTERPRISES & ORS

...Petitioners

Through: Mr. Jayant Bhushan, Sr. Advocate with
Mr. Abhishek Saket, Advocate

VERSUS

UNION OF INDIA & ors.

....Respondents

Through: Dr. Ashwani Bhardwaj, Advocate for
respondents No.1 to 3.

CORAM:

HON'BLE MR. JUSTICE A. K. SIKRI

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? ✓
3. Whether the judgment should be reported in the Digest? ✓

%

VALMIKI J. MEHTA, J

1 The present writ petition has been filed by the petitioner under Article 226 of the Constitution of India seeking inter alia, the relief against the respondent No.2/Commissioner of Customs to release the goods in question, namely, Honey without any PFA (Prevention of Food Adulteration) check and health check. Further relief is prayed for quashing of CSL Test conducted by

W.P.(C) 7734/2009

Page 1

Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

9

the respondent No.3/Director of Central Food Laboratory and under which test the consignment of Honey has been found to be adulterated/contaminated with an antibiotic, Chloramphenicol.

2 The facts of the case are that the petitioner No.1 is engaged in the business of export of Agri Food Commodities and the petitioner No.2 is in the business of processing Honey and exporting the same out of India. The petitioners state that in the course of its export business, the petitioner No.1 got an export order from a US Company namely, LAMEX. The petitioner No.1, through petitioner no.2 supplied Honey to the said US buyer. As per the contentions of the petitioner, after the shipment was sent, the buyer LAMEX returned a part of the consignment on the ground that the same was found to be containing moisture beyond their requirement and acceptable limit. On return of the said shipment, the customs official sent a sample of Honey to the respondent No.3 and which sample when tested was found to be adulterated containing the antibiotic Chloramphenicol. The petitioners further contend that in terms of the Custom Circular No.1/02 dated 8.1.2002, it has been clarified by the respondent No.1 that the Prevention of Food Adulteration Act, 1954. (hereafter PFA Act) is not applicable for food items meant for export on re-export. The petitioners further contend that since the Commissioner of Customs/respondent No.2 has identified the re-imported Honey as that, which was exported i.e meant for export on re-export, the goods should be released as

10
it is recorded in the customs report that the foreign buyer had sent the goods back due to quality issue of moisture content.

3. At this stage, it would be relevant to refer to the circular No.1/02 dated 8.1.2002.

“Circular
No.1/2002-Cus.
8th January, 2002.

F.No.450/21/98-Cus. IV (Vol. II)
Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs

Subject: Application of PFA Act, 1954 for clearance of consignments of food articles-reg.-

I am directed to refer to Board's Circular No.58/2001-Cus., dated 25.10.2001 on the above mentioned subject. In the said Circular, it has been provided that all the consignments of imported food items are to be referred to Port Health Officers for testing under the PFA Act, 1954. A reference has been received from the trade stating that the food items imported by EOUs for subsequent export after processing should be exempted from the mandatory testing under the said Act.

2. The matter has been examined in consultation with the Ministry of Health & Family Welfare. It is observed that there is no provision in the PFA Act to *exempt food items imported by EOUs or units in EPZ/SEZ from testing under the said Act. It has, however, been clarified by the Ministry of Health & Family Welfare that the PFA Act is not applicable for food meant for export. Therefore, in case the Commissioner of Customs is satisfied that imported food items, after their processing in EOUs or units in EPZ/SEZ, shall be exported and no part thereof shall be sold in India, he may allow clearance of such food items without mandatory testing under the said Act. The Commissioners may take an undertaking from the EOUs or units in EPZ/SEZ importing the food items to the effect that the imported food item or any product manufactured therefrom would not be sold in the Domestic Tariff Area under any circumstances.*

3. These instructions may be brought to the notice of all concerned for compliance.

4. Difficulties, if any, faced in the implementation of above instructions may be brought to the notice of the Board. Kindly acknowledge receipt.”

4. The learned counsel for the petitioner has laid stress on the italicised portion of the circular to contend that the said line in the circular is wholly independent of the other portions of the circular and that the circular is not to be interpreted so as to be applicable only to imports by EOUs (Export Oriented Units) or units in EPZ/SEZ (Export Processing Zone/Special Economic Zone).

5 The counsel for the petitioner has finally contended that since the writ petition is entitled to succeed, the respondent No.2 is liable to pay the demurrage charges incurred during this period when the Honey is lying at the instance of the respondent No.2.

6. The counsel for the respondents on the other hand has strenuously urged that the circular dated 8.1.2002, is an exception to the general circular dated 25.10.2001 which specifically provides that "it has been provided that no food item would be allowed clearance unless it is tested under the Prevention of Food Adulteration Act, 1954 and other allied laws". This circular is of the Central Board of Excise and Customs and the relevant portion of this Circular reads as under:-

"Customs Circular No.58-2001

Circular
No.58/2001-CUS
25th October, 2001

F.No.450/21/98-CUS.IV
Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs

12

Subject: Application of PFA Act, 1954 and other Acts for the clearance of consignments of food articles-instructions-regarding-

I am directed to refer to the Board's Circular No.36/2001-CUS., dated 15th June, 2001 on above-mentioned subject. The said Circular provides detailed guidelines for examination and testing of good items prior to Customs clearance. It has been provided that no food item would be allowed clearance unless it is tested under the Prevention of Food Adulteration Act, 1954 and other allied laws. In this connection, a number of representations has been received from the hotel industry stating that they are facing difficulties in clearance of perishable food items due to mandatory testing of all consignments. The Federation of Hotel and Restaurant Association of India has requested for restoration of the exemption granted earlier to hotels from 100% testing under Circular No.103/2000-Cus., dated 15th December, 2000 (which was superseded by Circular No.36/2001-Cus., dated 15/6/2001)."

7. The counsel for the respondents has, therefore, contended that the exception provided by means of the circular dated 8.1.2002, is therefore confined only to import by EOUs or Units in EPZ/SEZ. The learned counsel has further contended that it is clearly shown by the report of the Central Food Laboratory that the sample of Honey was adulterated because it contained the antibiotic Chloramphenicol. The counsel has placed their reliance upon the circular dated 16.10.2003 issued by the Director General of Health Services which showed that Chinese Honey containing the Antibiotic Chloramphenicol which causes cancer or anaemia is being dumped into India as the said goods are being stopped from being imported in U.K, Canada and Germany. This circular is relevant and the same is reproduced herein.

"No. P-15011/3/2002-PH (F)
DTE. GENERAL OF HEALTH SERVICES

Nirman Bhavan, New Delhi
Dated the 16.10.2003

To

- 
1. All ports/Airports Health Officers.
 2. All Customs Collectors.

Subject:- Import of Chinese Honey.

Madam/Sir,

It has been brought to the notice of this Dte. By M/o Agriculture that Export Inspection Council of India informed them that U.K. Food standards Agency, the Canadian Food inspection Agency and the German Agriculture & Consumer protection Ministry have through a series of sample tests found that Chinese Honey had contained traces of an antibiotic, chloramphenicol, which can cause cancer or a plastic anaemia if consumed over a long period. The U.K. Canada and Germany have stopped imports of Chinese honey due to the reason of contamination. The Export Inspection Council of India further informed that Chinese honey, which is being rejected in Europe and North American countries, is being dumped into India through both legal and illegal channel. The import of Chinese honey jumped to 1,381.03 tons (worth Rs.583.14 lakhs) in the first nine months of 2002/03 as compared to only 0.16 tons (at Rs.0.09 lakhs) during 2001-02. It is also alleged that Nepalese exporters are re-exporting Chinese Honey.

You are therefore, requested to keep a strict vigil on the quality of such consignments of honey before the same is released for human consumption.

Yours faithfully,

Sd/=(Dr. S.K. Gupta)
ASSTT. DIRECTION GENERAL

(PFAO

Copy forwarded for information and necessary action to:-

1. All Directors of C.F. Labs.
2. Public Analysts of States/U.T.s, who are authorised for analysis of samples of imported food.
3. The Director Customs, Central Board of Excise & Customs, Deptt. Of Revenue, M/O. Finance, North Block, New Delhi.

Sd/=(Dr. S.R. Gupta)
Assistant Director General (PFA)

8. The counsel for the respondents has further contended that a reading of the relevant requirement of the PFA Rules pertaining to the food item Honey shows that it should be free from foreign matter and any other extraneous matter

M

which surely would include any form of harmful substance such as an antibiotic Chloramphenicol.

9. We feel that the contentions of the counsel for the respondent are well founded and the writ petition is liable to be dismissed. The circular dated 8.1.2002, when read in its entirety makes it clear that the same only applies to imports by EOUs or units in EPZ/SEZ. This becomes clear from the underlined portion of the circular reproduced above.

10. This issue also becomes clear from para 1 of the circular which specifies that the same is with respect to reference received from trade with respect to food items imported by EOUs for subsequent export after processing. Even on general principles one fails to understand as to how it can be contended by the petitioners that without any testing of the goods, the same can be brought into the country. For example, the food item may contain ingredients of contagious disease or many other harmful and dangerous diseases and which goods if allowed to be imported in the country, may cause grave harm to the denizens of the country. Surely, the customs officials are entitled to ensure that harmful goods do not cross the customs barriers of the country so as to come within the domestic tariff area. If this power is not given to the customs authorities, grave harm, prejudice and havoc can be caused. The goods with respect to which no testing is claimed as a matter of right can in many circumstances find their way illegally into the domestic market and cause untold harm and misery. We, therefore, even on first principles cannot agree with the contentions of the

15

petitioners that simply because the goods would be re-exported, there is no requirement at all of goods to be inspected by any authority including the authorities under the PFA Act.

11. At this stage, it is also relevant to mention that in the writ petition, the petitioners admit that they themselves do not manufacture honey in their own farms but they source the same from outside bee-hive keepers, and thus the chance of adulterated honey coming into their possession cannot be ruled out.

Also, in para 6 of the counter-affidavit filed by the respondents No.1 and 2, it has been clearly stated that the petitioner had filed a bill of entry of home consumption and which is not disputed by the petitioners in the rejoinder filed.

Merely because on a first check by the customs authorities, the oral statement of the petitioner was accepted that the goods had been sent back due to moisture content cannot be conclusive of the matter. We may note that in fact it has not even been argued and canvassed during the course of hearing that the antibiotic Chloramphenicol has not been found in the consignment of Honey in question.

What is only sought to be urged is that in the relevant rule with respect to the food item Honey, there is no standard prescribed with respect to non-existence of the antibiotic Chloramphenicol. This argument is clearly mis-conceived on the face of it because the said relevant article in the PFA Rules not only prescribes certain standards with respect to moisture Sucrose etc but on reading the same, it clearly states as under:-

16

“[A.07.03-“HONEY” means the natural sweet substance produced by honey bees from the nectar of blossoms or from secretions of plants which honey bees collect, transform store in honey combs for ripening.

When visually inspected, the honey shall be free from any foreign matter such as mould dirt, scum, pieces of beeswax, the fragments of bees and other insects and from any other extraneous matter.”

12. We also feel that the explanation of the petitioner that the consignment in question was sent back by the US buyer merely because there was excess moisture content does not seem to be too believable not only no report of US authorities is filed to this effect and also because in the letter dated 6.11.2008 which is filed by the petitioner itself, there is no mention of rejection because of any moisture content. This letter simply reads as under:

“November 06, 2008

Kejriwal Enterprises
W-42 Greater Kailash-2
New Delhi-110048
India

Dear Kejriwal Enterprises,

The product in this container OOLU 1505972 is being returned since it did not meet the specifications of the intended buyer. This product was originally shipped in FCL FCIU 3261311.

Best Regards,

Sd/-
Gregory Olsen
LAMEX Foods, Inc.”

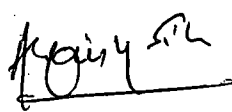
13. No doubt, subsequently an additional affidavit was filed by the petitioner, along with the letter dated 19.3.2008 of LAMEX, which appears to be on the letter head of the LAMEX, but the same is an unsigned letter. This letter appears as annexure 4 to the additional affidavit dated 4/8/April/2009. We would hasten to add that our final conclusions are not based upon this

17

aspect but we found this issue a bit perplexing and therefore have referred to the same.

14. In view of the above, since we are dismissing the writ petition itself, there arises no question of claim of demurrage to be paid by the respondent No.2 as has been prayed in the writ petition. In the peculiar facts of this case, when the honey in question has been found to be contaminated with a dangerous substance which can cause cancer and anaemia and only for which the circular dated 16.10.2003 was issued by the Director General of Health Services and as reproduced above in the body of the order, and the petitioner has filed this misconceived petition claiming its release on grounds which are wholly unacceptable we dismiss the writ petition with costs quantified at Rs.25,000/-.


VALMIKI J. MEHTA, J


A.K. SIKRI, J

September 25, 2009