IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

MONDAY, THE 9TH DAY OF MARCH 2015/18TH PHALGUNA, 1936

WP(C).No. 6722 of 2015 (M)
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PETITIONER(S):
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1. M/S. CHALISSERY KIRANA MERCHANT,
   XII/163/A, CHALISSERY (P.O.), PALAKKAD DISTRICT,
   REPRESENTED BY ITS MANANGING PARTNER SRI. BASHEER M.A.

2. M/S. KAY KAY ENTERPRISES, DOOR NO. X/78-A,
   KUNNATH COMPLEX, VARAVOOR PO, WADAKANCHERY
   THRISSUR - 680 585, REPRESENTED BY POWER
   OF ATTORNEY HOLDER MR.K.M.GAFOOR.

3. M/S. ALI-SHABIB TRADING COMPANY,
   AYYAPPA ARCADE, NEAR RAILWAY GATE, WADAKANCHERY,
   THRISSUR - 680 582, REPRESENTED BY ITS
   PROPRIETOR MR. ABDUL SATTAR

   BY ADVS.SRI.DEVAN RAMACHANDRAN
   SRI.T.RAJASEKHARAN NAIR
   SRI.ADARSH KUMAR

RESPONDENT(S):
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1. UNION OF INDIA,
   REPRESENTED BY THE SECRETARY, DEPARTMENT OF REVENUE,
   MINISTRY OF FINANCE, GOVERNMENT OF INDIA,
   NORTH BLOCK, NEW DELHI-110 001.

2. THE COMMISSIONER OF CUSTOMS (SISB),
   SPECIAL INTELLIGENCE AND INVESTIGATION BRANCH,
   CUSTOM HOUSE, WILLINGDON ISLAND, COCHIN-682 009.

3. DEPUTY COMMISSIONER OF CUSTOMS (IMPORT),
   OFFICE OF THE COMMISSIONER OF CUSTOMS, CUSTOMS HOUSE,
   COCHIN-682 009.

   R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
   R2 & R3 BY SRI.THOMAS MATHEW NELLIMOOTTIL, SC

   THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
   09-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

**WP(C).No. 6722 of 2015 (M)**
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**APPENDIX**

**PETITIONER(S)' EXHIBITS**
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**EXHIBIT P1:** TRUE COPY OF THE COMMERCIAL INVOICE DATED 27.1.2015 FOR SUPPLY OF 1800 KGS OF ARECA NUT ISSUED TO THE 1ST PETITIONER BY M/S. AKAN LANKA (PVT) LTD.

**EXHIBIT P2:** TRUE COPY OF THE COMMERCIAL INVOICE DATED 29.1.2015 FOR SUPPLY OF 16 METRIC TONNES OF ARECA NUT ISSUED TO THE 2ND PETITIONER BY M/S. GLOBAL TRADERS, SRI LANKA

**EXHIBIT P3:** TRUE COPY OF THE COMMERCIAL INVOICE FOR SUPPLY OF 29.120 METRIC TONNES OF ARECA NUT ISSUED TO THE 3RD PETITIONER BY M/S. AGRO INDUSTRIES (PVT) LTD., SRI LANKA DATED 31.1.2015.

**EXHIBIT P4:** TRUE COPY OF THE PACKING LIST ISSUED BY THE BY M/S. AKAN LANKA (PVT )LTD TO THE 1ST PETITIONER DATED 27.1.2015.

**EXHIBIT P5:** TRUE COPY OF THE PACKING LIST ISSUED BY THE M/S. GLOBAL TRADERS, SRI LANKA TO THE 2ND PETITIONER DATED 5.2.2015.

**EXHIBIT P6:** TRUE COPY OF THE PACKING LIST ISSUED BY THE M/S AGRO INDUSTRIES (PVT) LTD., SRI LANKA TO THE 3RD PETITIONER.

**EXHIBIT P7:** TRUE COPY OF THE BILL OF LADING ISSUED BY THE BSI SHIPPING LINES TO THE 1ST PETITIONER BEARING NO. CMB/COK/FCL/20155128.

**EXHIBIT P8:** TRUE COPY OF THE BILL OF LADING ISSUED BY THE BALAJI SHIPPING LINES TO THE 2ND PETITIONER BEARING NO.CMB/ COK/FCL/20155127.

**EXHIBIT P9:** TRUE COPY OF THE BILL OF LADING ISSUED BY THE TRANS ASIA LINES TO THE 3RD PETITIONER BEARING NO. TALTSO 01839200.

**EXHIBIT P10:** TRUE COPY OF THE CERTIFICATE OF ORIGIN ISSUED TO THE 1ST PETITIONER BY THE AKEN LANKA (PVT) LTD, DATED 30.1.2015.

**EXHIBIT P10 A:** TRUE COPY OF THE CERTIFICATE OF ORIGIN IN RELATION TO THE RESPECTIVE CONSIGNMENT OF THE 1ST PETITIONER ISSUED BY THE CHAMBER OF COMMERCE IN SRI LANKA.

**EXHIBIT P11:** TRUE COPY OF THE CERTIFICATE OF ORIGIN IN RELARTION TO THE 2ND PETITIONER BY THE M/S.GLOBAL TRADERS, SRI LANKA DATED 5.2.2015.

**EXHIBIT P12:** TRUE COPY OF THE CERTIFICATE OF ORIGIN ISSUED TO THE 3RD PETITIONER BY THE M/S AGRO INDUSTRIES (PVT) LTD, SRI LANKA, DATED 5.2.2015.

**msv/**

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EXHIBIT P13: TRUE COPY OF THE BILL OF ENTRY FOR HOME CONSUMPTION OF THE 1ST PETITIONER.

EXHIBIT P14: TRUE COPY OF THE BILL OF ENTRY FOR HOME CONSUMPTION OF THE 2ND PETITIONER.

EXHIBIT P15: TRUE COPY OF THE BILL OF ENTRY FOR HOME CONSUMPTION OF THE 3RD PETITIONER.

EXHIBIT P16: TRUE COPY OF THE EXAMINATION ORDER ISSUED BY THE COCHIN CUSTOMS HOUSE, WILLINGTON ISLAND TO THE 1ST PETITIONER DATED 12.2.2015.

EXHIBIT P17: TRUE COPY OF THE EXAMINATION ORDER ISSUED BY THE COCHIN CUSTOMS HOUSE, WILLINGTON ISLAND TO THE 2ND PETITIONER DATED 12.2.2015.

EXHIBIT P18: TRUE COPY OF THE EXAMINATION ORDER ISSUED BY THE COCHIN CUSTOMS HOUSE, WILLINGTON ISLAND TO THE 3RD PETITIONER DATED 12.2.2015.

EXHIBIT P19: TRUE COPY OF THE PHYTOSANITARY CERTIFICATE ISSUED BY THE DEPARTMENT OF AGRIUCLTURE, SRI LANKA, TO THE 1ST PETITIONER DATED 29.1.2015.

EXHIBIT P20: TRUE COPY OF THE PHYTOSANITARY CERTIFICATE ISSUED BY THE DEPARTMENT OF AGRIUCLTURE, SRI LANKA, TO THE 2ND PETITIONER DATED 29.1.2015.

EXHIBIT P21: TRUE COPY OF THE IMPORT LEASE ORDER ISSUED BY THE MINISTRY OF AGRICULTURE, GOVT OF INDIA TO THE 1ST PETITIONER DATED 16.2.2015.

EXHIBIT P22: TRUE COPY OF THE IMPORT LEASE ORDER ISSUED BY THE MINISTRY OF AGRICULTURE, GOVT OF INDIA TO THE 2ND PETITIONER, DATED 16.2.2015.

EXHIBIT P23: TRUE COPY OF THE IMPORT LEASE ORDER ISSUED BY THE MINISTRY OF AGRICULTURE, GOVT OF INDIA TO THE 3RD PETITIONER, DATED 19.2.2015.

EXHIBIT P24: TRUE COPY OF THE QUERY RAISED BY THE CUSTOMS AUTHORITY REGARDING CONSIGNMENT OF THE 1ST PETITIONER.

EXHIBIT P25: TRUE COPY OF THE QUERY RAISED BY THE CUSTOMS AUTHORITY REGARDING CONSIGNMENT OF THE 2ND PETITIONER.

EXHIBIT P26: TRUE COPY OF THE QUERY RAISED BY THE CUSTOMS AUTHORITY REGARDING CONSIGNMENT OF THE 3RD PETITIONER.

Msv/

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**EXHIBIT P27: TRUE COPY OF THE REPLY ISSUED BY THE 1ST PETITIONER TO THE COMMISSIONER OF CUSTOMS, DATED 25.2.2015.**

**EXHIBIT P28: TRUE COPY OF THE REPLY ISSUED BY THE 2ND PETITIONER TO THE COMMISSIONER OF CUTOMS, DATED 25.2.2015.**

**EXHIBIT P29: TRUE COPY OF THE REPLY ISSUED BY THE 3RD PETITIONER TO THE COMMISSIONER OF CUTOMS, DATED 25.2.2015.**

**EXHIBIT P30: TRUE COPY OF THE ORDER DATED 2.3.2015 ISSUED BY THE 3RD RESPONDENT TO THE 1ST PETITIONER.**

**EXHIBIT P31: TRUE COPY OF THE ORDER DATED 2.3.2015 ISSUED BY THE 3RD RESPONDENT TO THE 2ND PETITIONER.**

**EXHIBIT P32: TRUE COPY OF THE ORDER DATED 2.3.2015 ISSUED BY THE 3RD RESPONDENT TO THE 3RD PETITIONER.**

**RESPONDENT(S)' EXHIBITS:**
**-----------------------------------------**

**NIL**

**//TRUE COPY//**

**P.S.TO JUDGE**

Msv/

**P.R. RAMACHANDRA MENON J.**

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W.P.(C) No. 6722 of 2015

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Dated, this the 9th day of March, 2015

## JUDGMENT

The petitioners are merchants engaged in the business of trading in agricultural produce like areca nut falling under tariff entry 0802 80 90 of the Customs Tariff Act 1975. The first and second petitioners are partnership firms, whereas the 3rd petitioner is a proprietary concern. The petitioners claim to have been importing areca nuts from different countries for more than a decade and have proven credentials and unblemished track records. All the petitioners have obtained necessary licenses and have Importers and Exporters Code [IEC].

2. The grievance is mainly with regard to the course pursued by the authorities of the Customs Department of Cochin, detaining the goods imported by the petitioners from Sri Lanka satisfying concessional rate of duty; and proceeding to have provisional assessment under Section 18 of the Customs Act, with liberty to have

the goods released, on satisfaction of 35% of the differential duty as cash deposit. The ground of challenge is that, absolutely no insinuating circumstance, doubt or reason to believe is expressed anywhere in the impugned orders, but for the reference made to some enquiry going on with regard to the import made by some other trader from Sri Lanka.

3. With regard to the factual position, it is to be noted that areca nuts are normally leviable to duty @ 108%. But by virtue of the notification No. 26/2000 dated 01.03.2000, only 4% duty is leviable; if the areca nut is of 'Sri Lankan origin' and if the same is supported/substantiated on the basis of certificate of origin issued by the India-Sri Lanka Free Trade Agreement (ISFTA Agreement)

4. The petitioners herein purchased areca nuts of Sri Lankan origin from different traders in Sri Lanka as per Exts. P1 to P3 invoices issued in the last week of January 2015. Exts. P4 to P6 are the packing lists issued by the said dealers in Sri Lanka and Exts. P7 to P9 are the bills of lading. True copies of the certificates of origin have been produced by the petitioners as Exts. P10 to P12, besides a certificate issued by the Chamber of Commerce of Sri Lanka, in the case of the first petitioner, as Ext. P10A. Pursuant to submission of Exts. P13 to P15 bills of entries by the

petitioners, the position was verified by the competent authority of the Customs, who issued Exts. P16 to P18 Examination Orders dated 12.02.2015. The quality of the goods stands covered by Exts. P19 and P20 phytosanitary certificates issued by the Department of Agriculture, Sri Lanka in the case of the first and second petitioners. Copies of the import lease orders issued by the Ministry of Agriculture, Government of India to the petitioners also have been produced as Exts. P21 to P23.

5. On raising some query as to the consignment by the Customs, vide Exts. P24 to P26, they were replied by the petitioners vide Exts. P27 to P29. But the third respondent chose to pass Exts. P30 to P32 orders on 02.03.2015 intending to proceed with provisional assessment under Section 18 of the Act, requiring the petitioners to satisfy 35% of the differential duty, as against the vested right of the petitioners to have the import by satisfying duty only @ 4%. This unconscionable burden made the petitioners to approach this Court challenging the said proceedings, raising many a ground.

6. Heard the learned counsel for the petitioners as well as the learned standing counsel appearing for the Department of Customs.

7. Mr. Devan Ramachandran, the learned counsel appearing for the petitioners points out that no provisional assessment is warranted in the instant case, as there is no reason to suspect the consignment in any manner and that no genuine doubt/ground is raised to have had such a course. In the instant case, the reason to have issued the provisional orders, is with reference to some investigation being carried out by 'DRI' in relation to some import made by other traders, which is stated as going on. It is stated that the department, in the said circumstances requires some more verification and make further enquiry as to the origin of the goods and the eligibility for the benefit of notification No. 26/2000 dated 01.03.2000. Hence the provisional assessment had to be made under Section 18 (1) (c) of the Customs Act, also imposing a condition to satisfy the amount to an extent of 35% of the differential duty. Such a course, according to the petitioners, is possible only in the case of persons/transactions involving some doubt as to the consignment and that the ongoing enquiry against some other trader is not a ground to have similar course, in the case of the petitioners as well; which otherwise is liable to be termed only as an abuse to the provisions of law. The circumstances under which the provisional assessments can be

made under Section 18 (1) (c) are sought to be explained with reference to the guidelines issued by a Division Bench of this Court, as per the judgment in W.A. No. 107 of 2011. The position is sought to be further explained with reference to the verdict passed by a learned Judge of this Court in W.P.(C) Nos. 2803 of 2015 and 5585 of 2013.

8. The learned standing counsel for the respondents/Customs Department submits that the course pursued by the respondents as per Sections 30 to 32 is very much in conformity with the observation made by the Division Bench of this Court in W.A. No. 107 of 2011 and that different circumstances are contemplated, under which such a course can be pursued. It is also pointed out that there is genuine doubt on the part of the Customs Officials as to the place of origin of the imported commodity, which came to be crystallized by virtue of the instances covered by the enquiry stated as going on, in the case of another trader and also in view of some past transactions of the petitioners 1 and 2 herein. The learned standing counsel further points out that, as per the materials collected by the Department, Sri Lanka is not an areca nut producing county and that India stands in the forefront with a production of 330000 metric tons for the year

'2003', with an area of cultivation of 290000 hectares. The factual particulars stated as downloaded from the Internet are placed for consideration of this Court, which reads as follows :

> "**Areca nut producing countries :** Areca nut has been cultivated as a cash crop in the Asian continent for quite a long time now. Even today, the regions that produce maximum quantity of nut are the same areas where the areca nut came into existence i.e. the Southeast Asia, The world production of areca nut sums up to around 0.64 million tons, Asian contribution being the maximum. India is the leading country in context of production contributing to around 51 % of world's total production followed by China with 25 % share. The list depicts the major producers of the nut with their respective production figures for the year 2003.
>
> India (330000 metric tons)
> China (162253 metric tons)
> Myanmar (57000 metric tons)
> Bangladesh (51000 metric tons)
> Indonesia (41000 metric tons)
> Thailand (26000 metric tons)
> Malaysia (1300 metric tons)
>
> Regarding the area under the cultivation of betel nut, the world figures have reached an approximate of around 0.476 million hectares. India again stands tall in

> the list of the countries having the maximum area under betel nut cultivation with around 60% of the total area covered around the world. The countries having a significant impact on the total area covered under areca nut cultivation are
>
> India (290000 hectares)
> Indonesia (88000 hectares)
> Bangladesh (77296 hectares)
> China (50700 hectares)
> Myanmar (36000 hectares)
> Thailand (17000 hectares)
> Malaysia (800 hectares)
>
> China producing its annual output with comparatively less area covered suggests that the country leads way ahead in context if productivity of nuts is considered and produce nuts @ 3.752 tons/hectare with world productivity of 1.287 tons/hectare."

9. The aforesaid data (that too, of the year 2003) however cannot lead to an inference that Sri Lanka is not an areca nut producing country. The particulars furnished by the learned standing counsel only reflect the position with reference to the major areca nut producers of world, where India is standing in the forefront among the seven named countries. No material is produced before this Court to hold that Sri Lanka does not produce

any areca nut and hence that it cannot be termed as a place of origin, in so far as the import is concerned.

10. Coming to the scope of the provisional assessment under Section 18 (1) (c) of the Customs Act, it reads as follows :

> **"18. Provisional assessment of duty.- (1)**
> Notwithstanding anything contained in this Act but without prejudice to the provisions contained section 46
>
> (a) *******
>
> (b)******
>
> (c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty,
>
> the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed."

11. The case projected by the learned counsel for the

petitioner is that, the circumstances contemplated by the Division Bench of this Court in **W.A. No. 107 of 2011** are not prevailing in the instant case. The situation dealt with by the Division Bench in the said case was with reference to the large number of importers from North and East India, who were importing massive quantity from abroad, making the department to face the risk of losing huge revenue because of not turning up for final assessment. In the case of the petitioners herein, they are having proper identity, doing business in Kerala for several years with unblemished track record and that they cannot be branded as "fly by night traders". Section 18 is only an exception to Section 17 of the Act, which provision stipulates that, if final assessment is possible, whether it is import or for export, the goods should be released after the final assessment and collection of duty. Section 18 (1) (c) covers the situation, where the importer/exporter has produced all the necessary documents and furnished full information for assessment of duty, but the officer finds it necessary to make further enquiry for assessing the duty, when the authorised officer can make provisional assessment in terms of the said provision. The observation of the Bench in paragraph 13 is relevant, which is extracted below:

"13. What is clear from Section 18(1) read with the above Regulations is that the Officer could make provisional assessment and release goods under Section 18 of the Act pending finaladjudication only after ensuring that the actual duty that could belevied later will be recoverable from the party. For this purpose, the provisions of the Act and the Regulations above referred provide for determination of duty based on available documents, evidence and claim made by the party and also estimation of duty which according to the Officer is likely to be levied finally. So much of the duty determined based on the documents and claim of the party is the admitted duty which the party has to straightly remit. The duty provisionally determined is nothing but the duty which the Officer estimates over the duty admitted by the party as payable based on his estimation on the value, classification or the rate applicable, which is essentially a matter to be determined by the Officer. Regulation 2 makes it clear that besides remittance of the admitted duty in terms of the claim of the importer / exporter the officer can demand payment of duty up to 20% of the duty provisionally determined by him which is over and above the admitted duty payable in accordance with the claim of the party and assessed by the Officer. After remitting the duty in terms of the claim made by the party (admitted duty) and up to 20% of the provisional duty demanded by the Officer, the Officer is bound to collect security for the balance of the provisional duty which under Regulation 4 is through execution of bond supported by surety or security or both as the Officer deems fit. But we feel from the past follies of the Department stated by the learned Standing Counsel that the proper Officers provisionally assessing duty are under misunderstanding on the scope of Regulation (4) which requires surety or security in support of the bond executed which is noting but an undertaking to pay duty on demand. However, a surety bond should be valid only when it is supported by proper security, which may be by way of mortgage of immovable property or Bank Guarantee in favour of the Department or otherwise, and bond executed without proper security would serve only as a document to claim the amount. The Officer should realise that the best and safest course open to the Department is to demand Bank Guarantee from the local branch of a Nationalised Bank for balance provisional duty determined, so that recovery is ensured without any necessity for the Department to chase the parties and looking for their assets. In fact, credentials of the importer / exporter and such other

> matters should weigh with the Department in relaxing the condition for security, which in thenormal course should be Bank Guarantee."

Considering the factual position that some gunny bags were located in the container doubting the country of origin, the Division Bench felt the necessity to impose condition.

12. In W.P.(C) No. 2803 of 2015, the suspicion felt by the authorities of the Customs Department was on finding gunny bags in the containers. It was doubted, whether it was of Pakistan origin as claimed or was it of Indonesian origin. The commodity, if of Pakistan origin, was to have a tax only at a concessional rate; whereas in the case of Indonesian origin, it was 108 %. Referring to the materials produced, it was observed by a learned Judge of this Court in paragraph 3 of the judgment that, the relevant documents, such as a certificate of origin issued by Karachi Chamber of Commerce and Industry/Trade Development Authority of Pakistan and the invoice accompanying the consignment, clearly indicated that the goods were of 'Pakistan origin'. However in view of the doubt expressed, because of the detection of gunny bags in the containers, the condition imposed was reduced to an extent of 35%.

13. Similarly, in the case of W.P.(C) No. 5585 of 2015 referring to the import of areca nuts from Sri Lanka, some gunny bags were found out in the containers, by virtue of which, the origin of the commodity was doubted. It was accordingly that a condition was imposed for causing release by way of provisional assessment, subject to satisfaction of 20 % in lieu of 35 % of the differential duty. Such reduction was made by the learned Judge observing that, as per the relevant document issued by the High Commission of the Democratic Socialistic Republic of Sri Lanka and addressed to the Commissioner of Customs, Cochin, confirming the issuance of certificate of origin in respect of the goods that were imported by the petitioner therein. However, because of the incriminating circumstances, the matter was let to be enquired into, imposing 20% of the differential duty.

14. Coming to the instant case, particularly with reference to the contention that no incriminating circumstances are there to have doubted the transaction of the petitioners, it is to be noted that the respondents were proceeding with steps, to find out the origin of import with reference to the documents produced by the parties concerned, at different points of time, claiming it to be of Sri Lankan origin, in turn claiming the benefit of notification. It is

to be borne in mind that the first petitioner herein was the petitioner in W.P.(C) No. 2803 of 2015, in whose case, a condition has already been imposed. The learned Judge of this Court directed to satisfy 35% of the differential duty. Similarly in W.A. No. 107 of 2011, the case considered by the Division Bench, the second petitioner herein was arrayed as the 4th appellant. The antecedents of the said petitioners, with reference to the above case, show that there was every reason for the respondent Customs Department to have doubted or raised some suspicion as to the place of origin and the transaction concerned. As such, it is not merely with reference to the ongoing enquiry with reference to some other trader, that provisional assessment is ordered imposing condition, but also with reference to the ongoing enquiry, pertaining to to the transaction/import done by the petitioners 1 and 2. This being the position, the matter requires to be considered in detail and there is absolutely nothing wrong on the part of the respondents in having pursued the course under Section 18 (1) (c), ordering provisional assessment.

15. Coming to the quantum of liability to be satisfied, after hearing both the sides and going through the verdicts passed by the Division Bench and the Single Judge at different points of time,

as mentioned above and also other relevant factors brought to the notice of this Court, this Court finds it fit and proper to modify the condition as 20% of the differential duty, which will be sufficient so as to meet the ends of justice, instead of 35 % ordered as per Exts.P30 to P32. It is ordered accordingly.

With the above observations, the writ petition stands disposed of.

Sd/-

**P. R. RAMACHANDRA MENON,**
**(JUDGE)**

kmd