IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved : 29.07.2016

Orders Pronounced: 18.04.2017

C O R A M :

The Honourable Mr.Justice S.Manikumar
and
The Honourable Mr.Justice D.Krishnakumar

Civil Miscellaneous Appeal No.2847 of 2015
and
M.P. No. 1 of 2015

M/s. Shree Pharma,
Rep. By its Proprietor
P. Arvind Kumar ... Appellant

Vs.

1. The Commissioner of Customs
(Chennai-II) Custom House
No.60, Rajaji Salai
Chennai-600 001.

2. Customs, Excise & Service Tax
Appellate Tribunal
South Zonal Bench
Shastri Bhavan, 26, Haddows Road
Chennai - 600 006. ... Respondents

Prayer: Appeal filed under Section 130 of Customs Act, 1962 against the final order No.41509/2015 in Appeal No.C/41616/2015-DB dated 30.10.2015 passed by the 2nd respondent.

For appellant : Mr. B. Sathish Sundar

For respondents : Mr. A.P. Srinivas,
SSC for Customs for R1

J U D G M E N T

(Judgment of the Court was made by D. Krishnakumar,J)

M/s. Shree Pharma, represented by its Proprietor, has filed this Appeal against the final order of Customs, Excise and Service Tax Appellate Tribunal, Chennai dated 30.10.2015 in No.41509/2015.

2. The facts of the case as narrated in the appeal, is as follows :-

The appellant is a proprietary concern and is running the business of Import, Export and local sale of food supplements, food nutrients, chemicals and solvents. The appellant possessed the Drug Licence in No.1787/MZI/20B and 1733/MZI/21B issued by the Drug Control Authority, Chennai. The appellant entered into a sale contract in No. HC151111066SO1 with one M/s. Jiangsu Guotai International Group Winsun Import and Export Company Limited, Zhangjiagang City, China, for supply of 5000 kgs. of Bronopol. The price for Bronopol was fixed at USD 4.50 per kg CIF, Chennai. The said goods were packed and despatched from Shanghai Seaport on 22.03.2015 to Chennai Seaport. Along with the consignment, the supplier sent the relevant import documents like packing list, cargo insurance policy, certificate of origin, quality inspector reports and certificate of analysis through its banker. After making the payments, the appellant retrieved the documents from its banker and thereafter filed Bill of Entry No. 8852905 dated 08.04.2015, with the office of the concerned authorities, for assessment and clearance of the subject goods. The subject goods were not released by the authorities, for the reason that the appellant has to put up technical literature with respect to the goods and its classification adopted in CTH 2930 9099, besides submitting the other import documents, already furnished. While the same were furnished, the concerned authority again directed the appellant to furnish a Central Insecticide Board (CIB) Registration Certificate, with respect to the subject goods. The appellant contended before the concerned authority that the requirement of production of CIB Registration certificate for the said goods does not arise, as the goods under import has not been classified under EXIM code 3808 of Chapter 38 in ITC (HS) 2012-Schedule-I (Import policy). Further, the appellant had stated that the Notification No.106/RE-2013/2009-2014 dated 01.01.2015 issued by the office of the Director General of Foreign Trade will have no application to the present import, as the goods will not fall under the aforesaid classification of goods mentioned in the notification. It was also submitted before the concerned authority that the decision of the Kerala High Court reported in 2013 (290) ELT 330 (Kerala) and the judgment of this Court reported in 2014 (313) ELT 50 (Mad.), is squarely applicable to the facts of this case.

3. Learned counsel for the appellant submitted that vide their letter dated 09.05.2015 the appellant informed that Bronopol is used as non-insecticidal and so the subject goods are exempted from the Insecticides Act, 1968, in terms of Section 38(1)(b) of the said Act. However, the appellant applied for grant of 'No Objection Certificate' to the Central Insecticide Board and the Registration Committee, wherein the same is pending. The appellant was also directed to submit Import permit/ Registration Certificate for necessary action and also avail Bonding option under Section 49 of the Customs Act, 1962, to avoid demurrage.

4. Against the communication dated 20.05.2015 of the Assessing Authority, the appellant preferred an appeal under Section 128 of the Customs Act, 1962, before the Commissioner of Customs (Appeals-II), Chennai, mainly on the following grounds:-

1) That the Notification No. 106/2014/2009-2014 dated 01.01.2015 issued by the Director General of Foreign Trade is wholly unsustainable, besides being arbitrary, unreasonable and in violation to Article 14 of the Constitution of India.
2) In view of Section 6(3) of the Foreign Trade (Development and Regulation) Act, 1992, there is an express bar for Director General of Foreign Trade from exercising power under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992. Hence, the notification issued by the Director General of Foreign Trade is without any authority of law and there is no legal sanctity. Hence, the said notification is not binding on the appellant.

3) Further, based on the decision of the Kerala High Court in the case of Maliakkal Industrial Enterprises vs. Union of India, in a batch of writ petitions, reported in 2013 (290) ELT 330 (Kerala), vide its order dated 15.02.2012, it has been held that the authorities under the Foreign Trade (Development and Regulation) Act, 1992 do not have control over the authorities under the Insecticide Act, 1968 and cannot direct them to do something, which they are not permitted to do under the Insecticide Act and hence has held that the condition of obtaining Registration under the Insecticides Act 1968 would be arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

4) The appellant also raised a ground that the classification for the subject goods are adopted under CTH 2930 9099 and the appellant are entitled to import the subject goods, mainly under the Circular No. 401/101/2011-Cus III dated 26.02.2011, issued on the basis of Section 38 of the Insecticides Act, 1968.

5. The aforesaid appeal filed by the appellant was rejected by the Commissioner of Customs (Appeals II) on 30.06.2015, holding that the plea of the appellant cannot be accepted, as the decisions relied by the appellant relates to import made prior to the issuance of the DGFT Notification No.106/2013/2009-2014 dated 01.01.2015, which has envisaged that import permit is necessary from the Registration Committee under the Department of Agriculture and Co-operation for all insecticides, even if they are imported for non-insecticidal purposes.

6. The appellant challenging the order of the Commissioner of Customs (Appeal-II) dated 30.06.2015, filed an appeal in C/41616/2015-DB before the Customs, Excise and Service Tax Appellate Tribunal, under Section 129A of the Customs Act, 1962. After considering the grounds raised therein by the appellant and perusing the material filed, the Tribunal by its order dated 30.10.2015 in No. 41509/2015 dismissed the appeal, on the reasoning that there is no evidence to show that the said Bronopol insecticide is used for non-insecticidal purpose. It is further stated that as per the DGFT Notification dated 01.01.2015, even if any insecticide is imported for non-insecticidal purposes, permission is necessary from the Registration Committee under the Department of Agriculture and Co-operation. Being aggrieved by the order passed by the Tribunal, the appellant has come up with the instant appeal.

7. Mr. A.P. Srinivas, learned Senior Standing Counsel for Customs would submit that the department in letter F.No. S.Misc-45/2015-Gr-II dated 20.05.2015 had stated that exemption under Section 38(1)(b) of the Insecticides Act, 1968 is applicable, if the substance is intended for purposes other than preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plants or animal life not useful to human beings, but here the substance is used as a preservative and the purpose of preventing growth of any such insects, fungi etc., and therefore Section 38(1)(b) of Insecticides Act is not applicable.

8. He further submitted that the Appellate Authority as well as the Tribunal has rightly rejected the claim of the appellant by stating that the registration certificate under the Central Insecticide Board is required and the exemption as claimed by the appellant is not applicable. Further, he

submitted that an amendment has been issued in import policy conditions under ITC (HS) 4 digit code 3808 by Director General of Foreign Trade vide notification No.106/2013/2009-2014 dated 01.01.2015, by stating that even for non-insecticidal purposes, an import permit from the registration committee under the department of Agriculture and Co-operation is mandatory. Therefore, for the reasons stated above, the authority had rejected the request for release of consignment and had informed the appellant company, to submit the import permit/ registration certificate.

9. Further, learned counsel for the appellant had submitted that the Tribunal has not considered the declaration made by the appellant company, to the effect that the subject goods are used only for non insecticidal purpose, as sufficient and there is no necessity to produce evidence to prove the usage of the goods for the said purpose and if the appellant company violates the conditions for the usage of the goods, the department can take action under the Customs Act, 1962. However, with evidence it is proved that the said substance is used for non-insecticidal purpose and the burden is to be discharged by the appellant. The self declaration stating that he will use the substance for non-insecticidal is not sufficient and he must satisfactorily explain the method of usage. While it is the allegation of the department against the appellant that if the substance is used as a preservative and also for non-insecticidal purposes, the appellant must prove the non-incidental usage and produce necessary evidences before the authorities. In respect of the other contention of the appellant that if the appellant company violates any of the condition, it is for the authority to take action against the appellant company under the Customs Act, 1962, is not correct. There is no provision under the Customs Act 1962 and the Insecticide Act 1968, to supervise the usage of Bronopol by the appellant company. Therefore, the contention of the appellant company is totally incorrect and the same is liable to be rejected. As per Section 38 (1)(b) of the Insecticides Act 1968, grant of exemption cannot be applied automatically and the consignment cannot be released, as submitted by the appellant. In order to prevent the illegal imports and insecticides, it would only be proper with registration and import permits. Therefore, the authorities have rightly rejected the claim of the appellant company and there is no warrant to interfere with the orders passed by the appellate authority as well as the Tribunal.

10. The decision relied by the appellant company in the case of Union of India vs. Maliakkal Industrial Enterprises, reported in 2013 (290) ELT 330 (Kerala), has been subsequently reversed by the Hon'ble Division Bench of the Kerala High Court, reported in 2015 (330) ELT 924 [Kerala].

Hence, there is no substance in the instant appeal and the same is liable to be dismissed.

11. Heard Mr. B. Sathish Sundar, learned counsel for the appellant and Mr. A.P. Srinivas, learned Senior Standing Counsel for Customs and perused the material available on record.

12. While admitting the instant appeal the following substantial questions of law, was considered :-

1. Is the 2nd respondent Tribunal right in holding that the subject import of the appellant is governed by the restriction, issued under DGFT Notification No.106 (RE-2013)/2009-2014 dated 01.01.2015, which mandates obtainment of import permit from Registration Committee Central Insecticide Board ?

2. Has the 2nd respondent Tribunal erred materially in not even referring are going into the provisions of Section 38 of the Insecticide Act, which exempts, the provisions of the Act including licensing/ obtaining import permit from the Central Insecticide Board under Section 9 of the said Act, when the goods under import are admittedly for non-insecticidal use.

13. The appellant is a proprietary firm involved in the business of trading of pharmaceutical products, substances, organics etc. The appellant firm possessed the import export code, issued by the office of the Director General of Foreign Trade, in No. 040904283 and was also holding a licence under Drugs and Cosmetics Act, 1940. The appellant company imports pharmaceutical products, substances etc., from overseas suppliers like China. On 16.02.2015, the appellant company entered into a sales contract with a Chinese supplier namely, Jiangsu Guotai Intl. Group, for supply of 5000 kgs. of Bronopol 99% Min., under the contracted price of USD 22,500. The appellant company paid part payment for the consignment, to the tune of USD 6750, through his banker, on 05.03.2015. The certificate of analysis was issued by the supplier to the appellant. On 16.03.2015 commercial invoices were raised by the supplier and the goods were shipped from Shanghai Port, China to Chennai on 22.03.2015, under Bill of lading No. WP1500904. While the appellant initiated to clear the subject goods, it was not permitted based on the query raised by the first respondent vide his letter dated 08.04.2015 with a direction to produce Central Insecticide Board Registration Certificate. To the query raised by the first respondent, stating that the Classification adopted in the Bill of Entry No.29309099, has not been revised and the same has been accepted by the department itself, in imports of the same material, as the goods are intended for non-

insecticidal use; Exemption with respect to licensing of the goods and obtaining registration certificate from Insecticides Board, is in terms of Section 38(1) (b) of the Insecticide Act, 1968; and that the Board Circular dated 22.06.2011, with respect to requirement of import permit for registration with CIB and RC for import of substances registered in Schedule -III of the Insecticide Act, 1968 for non-insecticidal use, were all brought to the notice of the respondent, vide his reply dated 09.05.2015. But, the same was not considered by the department .

14. The Appellate Authority, Commissioner of Customs (Appeals) rejected the appeal filed by the appellant company. Aggrieved by the same, the appellant raised grounds of appeal before the Tribunal against the order passed by the Commissioner of Customs (Appeals), Chennai in Appeal No. C.Cus.II No.585/2015 dated 30.06.2015. The grounds raised by the appellant company before the Tribunal in Appeal No. 41509/2015 was not considered and the same was dismissed by the Tribunal, vide its final order dated 30.10.2015. The following are the reasons stated by the Tribunal, for rejecting the appeal filed by the appellant firm :-

1. The item imported is covered under Schedule to the Insecticide Act and therefore it is an insecticide.
2. The DGFT Notification dated 01.01.2015 is applicable to the appellant company.
3. The case laws relied by the appellant company is not applicable to the facts of this case for the reason that the said decision was rendered prior to the issue of DGFT notification dated 01.01.2015.

15. In the letter dated 09.05.2015, the appellant has stated that since the subject goods, namely, Bronopol was imported by the company for non-insecticidal use, the provisions of Section 38(1)(b) of the Insecticides Act 1968, would apply for granting exemption of the condition, of obtainment of import permit from Registration Committee Central Insecticide Board. Section 38 of the Insecticides Act, 1968, reads as follows :-

> "38. Exemption (1) Nothing in this Act shall apply to --
>
> i. The use of any Insecticide by any person for his own households purposes or for kitchen garden or in respect of any land under his cultivation.
> ii. Any substance specified or included in the Schedule or any preparation containing any one or more such substances, if such substance or preparation is intended for

purposes other than preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant of animal life not useful to human beings.

(2) The Central Government may by notification in the official gazette and subject to such conditions, if any, as it may specify therein, exempt from all or any of the provisions of this Act or the rules made thereunder, any educational, scientific or research organisation engaged in carrying out experiments with insecticide. ”

So, reading of the aforesaid provision would clearly show that if any substance is imported for non-insecticidal use, the provisions of the Insecticides Act, 1968 will have no application.

16. However, the Notification No. 106/2014/2009-2014 dated 01.01.2015 issued by the Director General of Foreign Trade, reads as follows :-

“ Subject :Amendment in import policy conditions under ITC (HS) 4 digit code 3808.

S.O.(E) : In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.3 and 2.1 of the Foreign Trade Policy, 2009-2014, the Central Government hereby inserts the following policy condition as Policy Condition No.3 under Chapter 38 of ITC (HS) 2012 – Schedule – 1 (Import Policy).

“3. Under Section (9) of the Insecticides Act, 1968 all chemicals intended to be used as insecticides, rodenticides, fungicides, herbicides etc. [referred to as 'insecticides' under the Act] require mandatory registration for import. In cases, where the 'insecticide' is imported for non-insecticidal purpose, an import permit is necessary from the Registration Committee under the Department of Agriculture and Cooperation. The Registration Committee while granting registration or a permit for import of an insecticide spells out the conditions for import which inter alia, may include reference to the source of import. No 'insecticide' can be imported from a source other than that specified on the certificate of registration or the permit, as the case may be. In addition, the Registration Committee may issue regulatory guidelines from time to time with respect to safety, efficacy, quality etc. which warrant full compliance from importers ".

2. Effect of this Notification : The policy provisions under the Insecticides Act, 1968 for import of insecticides under EXIM code 3808 of Chapter 38 in ITC (HS) 2012- Schedule -I (Import Policy) are being notified. "

According to the appellant, the aforesaid notification issued by the Director General of Foreign Trade is without any authority of law, has no legal sanction and therefore the said notification is not binding on the appellant. In support of his contention, he relied upon the order passed by the Kerala High Court in the case of Union of India vs. Maliakkal Industrial Enterprises, in a batch of writ petitions, wherein the said notification was challenged. In the aforesaid case, the Hon'ble High Court of Kerala by its order dated 15.02.2012, has held that the authorities under the Foreign Trade (Development and Regulation) Act,1992 do not have control over the authorities under the Insecticide Act, 1968 and cannot direct them to do something, which they are not permitted to do under the said Act and hence has held that the condition of obtaining Registration under the Insecticides Act 1968 would be arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

17. The decision relied by the learned counsel for the appellant, challenging the said notification dated 01.01.2015 before the Kerala High Court, in a similar issue, in the case of Union of India vs. Maliakkal Industrial Enterprises, reported in 2013 (290) ELT 330 (Kerala), has been subsequently reversed by the Hon'ble Division Bench of the Kerala High Court, reported in 2015 (330) ELT 924 [Kerala]. In paragraph 16 of the said judgment, it has been held as follows :-

"16. From the above cited decisions, we arrive at the following conclusions :

An executive instruction or a policy, which is not a statutory document, cannot form the basis for creation of an enforceable legal right. This obviously is based on the principle of law that executive instructions by themselves are ordinarily not enforceable. Such an executive instruction or policy, which could be amended at any time, could not form the basis to claim fundamental right under Article 19(1)(g) of the Act. As far as notification under Section 5 of the Foreign Trade Act is concerned, it is not mere executive instructions, but it is a subordinate legislation and it is law. It can form the basis of a legal right. A person carrying on trade or business in import can complain about the violation of fundamental right to carry on trade or business. After the Foreign Trade Act, the matter is governed on the basis of the

> notification issued under Section 3 or under Section 5."

Therefore, the contention of the appellant that the notification issued under Section 5 of the Foreign Trade Act, is a mere executive instructions and so the said notification would not apply to the appellant company cannot be accepted. In the light of the decision cited supra, rendered by the Division Bench of the Kerala High Court, it has been held that the aforesaid notification issued by the Director General of Foreign Trade is a law and not an executive instruction and the import and export is governed under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992.

18. Section 2 of the Insecticides Act, 1968, reads as follows :-

> " 2. Application of other laws not barred :- The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force."

Therefore, imports are governed by other Acts also and the contention of the appellant that Insecticides Act alone applicable, is not correct. The said contention has also been considered by the Division Bench of the Kerala High Court in the above cited judgment. The appellant, merely submitting a declaration to the end use that the Bronopol will be used for non-insecticidal purpose is not sufficient and therefore exemption under Section 38(1)(b) of the Insecticides Act cannot be applied automatically, to the appellant. The appellant has failed to produce evidence before the authority to establish that the Bronopol will be used for non-insecticidal purpose. In the absence of such evidence, it cannot be construed that the said Bronopol will be used only for non-insecticidal purpose. The notification dated 01.01.2015 issued by the Director General of Foreign Trade, clearly states that as per the policy decision even if the import is for non-insecticidal use, permission is necessary from the Registration Committee under the Department of Agriculture and Co-operation and that import cannot be allowed in the absence of the said permit. Hence, the Tribunal has rightly concluded that the appellant company is not entitled to the benefit of Section 38(1)(b) of the Insecticides Act, 1968 and the requirement of getting permission from the Registration Committee under the Department of Agriculture and Co-operation, as per the aforesaid notification has to be complied with, in order to prevent illegal imports and insecticides, under the guise of non-insecticidal use. In view of the above, the contention of the appellant with regard to the notification dated 01.01.2015, cannot be countenanced.

19. In view of the aforesaid decisions and submissions, we are not inclined to interfere with the final order No.41509/2015 passed in Appeal No.C/41616/2015-DB dated 30.10.2015 by the Customs, Excise and Service Tax Appellate Tribunal. Hence, the substantial questions of law is answered against the appellant company.

20. Therefore, the Civil Miscellaneous Appeal is dismissed. Consequently, the connected M.P is closed. No order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To
1. The Commissioner of Customs
(Chennai-II) Custom House
No.60, Rajaji Salai
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2. Customs, Excise & Service Tax
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