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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CUSAA 49/2014 & CM No. 19716/2015**

ALCHEMIST FOOD LTD. ..... Appellant

Through: Mr. Vishal Bhatnagar & Mr. Nitin Sharma, Advocates

versus

ADDITIONAL COMMISSIONER OF CUSTOMS..... Respondent

Through: Mr. Sanjeev Narula, Senior Standing Counsel with Mr. Abhishek Ghai & Ms. Anumita Chandra, Advocates

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

<u>O R D E R</u>

% **04.05.2017**

1. We have heard the learned counsel for the Appellant as well as learned Senior Standing Counsel for the Customs Department.

2. Allowing a review petition filed by the Appellant, this Court on 1st April 2016, recalled its earlier order dated 22nd December, 2014 dismissing the appeal. The Court was of the view that one of the grounds raised in the appeal i.e., whether the goods in question which had been re-exported were 'prohibited goods' within the meaning of Section 111 and Section 112(d) of the Customs Act, 1962 ('Act') read with Section 2(33) thereof had not been examined in the order dated 22nd December, 2014.

3. The facts in brief are that the Appellant filed a Bill of Entry dated 28th June, 2012 for the goods imported under invoice dated 27th March, 2012 of the value of USD 46,348.27 (C&F) under a Bill of Lading dated 4th June,

2012. The goods under import were declared as 'Food Items, Papers Cups and Straws' classified under the Customs Tariff Heading (1) 0902209, (2) 1805 0000, (3) 2106 9040, (4) 0813 4090, (5) 3924 1090, (6) 4823 6900, (7) 3926 9099.

4. The Customs Department confiscated the goods and determined that the duty payable as Rs. 29,48,887/-. On a second examination, it was ordered that a No Objection Certificate ('NOC') would be required from Food Safety and Standards Authority of India ('FSSAI').

5. The Appellant paid the duty of Rs. 29,48,887/- on 11th July, 2012. The goods were examined on 13th July, 2012. While tallying the description of the goods as stated in the invoice, they were marked for NOC from the FSSAI.

6. By the letter dated 31st July 2012 addressed to the Customs Department, the FSSAI declined to grant NOC. The said letter reads as under:

> "Sub: - Non-Compliance of labelling requirement of FSS Regulations, 2011 on imported food items vide B/E no.7236483 dated 28/06/2012 at ICD/TKD-reg.
>
> Sir,
>
> Please refer to the subject cited above regarding import of Food Items imported by M/S Alchemist Foods Ltd., from Taiwan vide bill of entry no. 7236483 dated 28/06/2012. The consignment was inspected on 26/07/2012 in the presence of CRA representative and as per the FSS (Packaging and Labeling) Regulations 2011, the following discrepancies were observed on the label:

1. Information printed on the original label was not mentioned in English or Hindi language.

2. The original label was overlapped by another label in which all information was mentioned in English language.

As per FSS (Packing & labeling Regulations 2011and the Extended Guidelines issued by FSSAI, the information mentioned in the original label should be mentioned in English or Hindi language and the mandatory labeling requirements are not al1owed to affix upon arrival of the consignment on Indian Shores. Hence, request for sampling and issue of NOC cannot be accepted."

7. Under Section 2 (33) of the Act, prohibited goods mean "any goods the import or export of which is subject to any prohibition." It is, therefore, plain that goods prohibited not only in terms of the Act but under "any other law for the time being in force" would be covered by the definition. Section 111(d) of the Act permits confiscation of such 'prohibited goods'. Section 112 permits levy of penalty on such imports.

8. The legal position in this regard was clarified by the Supreme Court in ***Om Prakash Bhatia v. Commissioner of Customs Delhi, (2003) 6 SCC 161***. The Court reiterated the earlier judgment in ***Sk. Mohd. Omer v. Collector of Customs (1970) 2 SCC 728*** as under:

> "What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to 'any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. 'Any prohibition' referred to in that section applies to every type of 'prohibition'. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression 'any prohibition' in Section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three

> different expressions 'prohibiting' 'restricting' or 'otherwise' controlling, we cannot cut down the amplitude of the word 'any prohibition' in Section 111(d) of the Act. 'Any prohibition' means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From Item (1) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions ire provided for. But nonetheless the prohibition continues."

9. Turning to the case in hand, it appears that after the aforementioned letter dated 31st July 2012, the Appellant did not question the refusal by the FSSAI to grant NOC. Instead, it wrote to the Customs Authority on 18th September, 2012, requesting for permission to re-export the consignment. In this letter, in paras 5 and 6, it is stated as under:

> "5. Due to refusal to clear the consignment by FSSAI, we request your good self to allow us to re-export the consignment to original supplier.
>
> 6. Since this is not a prohibited consignment under regulations issued by FSSAI, no penalty/fine should be imposed."

10. The Appellant was contradicting itself in the above letter. On the one hand, it acknowledged the refusal by FSSAI to grant NOC for import, meaning that the goods in question fell within the definition of 'prohibited goods' under Section 2(33) of the Act and were liable for confiscation under Section 111(d) thereof. At the same time, the Appellant was also contending that no penalty/fine should be imposed since "this is not prohibited consignment under the regulations issued by FSSAI." The fact of the matter is that the Appellant was permitted to re-export the consignment after payment of redemption fine as determined by the Customs Department. The

Appellant has after complying with the said condition re-exported the consignment.

11. Although it was contended by learned counsel for the Appellant that the defect pointed out by the FSSAI about the label not being in Hindi language was a curable one and that it could not have possibly rendered the entire consignment as ‘prohibited goods’, the fact remains that the Appellant reconciled itself to the refusal by the FSSAI to issue the NOC. This meant that the goods were in fact to be treated as 'prohibited' goods. Resultantly, the Appellant sought permission to re-export the consignment. Therefore, the question of the Court, at this stage, declaring that the goods that were allowed to be re-exported were not ‘prohibited goods’, does not arise.

12. Learned counsel for the Appellant sought to place reliance on the decision of the Division Bench of this Court in ***Food Safety & Standards Authority of India v. Danisco (India) Pvt. Ltd., 219(2015) DLT 752(DB)***. A perusal of the said judgment reveals that there was no discussion of the provisions of the Act. The decision discussed the relevant provisions of the Food Safety and Standards Act, 2006. In other words, the question whether non-compliance of the requirement under the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 would render the goods in question ‘prohibited goods’ within the meaning of Section 2(33) read with Section 111(d) of the Act was not gone into.

13. In view of the fact, that the Appellant accepted the decision of the FSSAI which rendered the goods in question as 'prohibited' and then sought and was

granted permission to re-export it on payment of redemption fine, the question urged in the Ground E has been rendered academic.

14. The appeal and the pending application are dismissed.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 04, 2017
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