IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6563 of 2019

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1. M/s Ramesh Kumar Baid and Sons (HUF) Babu Bazar Building Room No. C4A, S.S. Road, Fancy Bazar, Guwahati- 781001 (Assam) Through their Karta, Ramesh Rajendraprasad Baid, S/o Shri Rajendra Prasad Baid, Age about 34 years, Male, Resident of Plot No. 419/521, Gurukrupa, Near Lendra Park Ramdaspeth, Nagpur, Maharashtra- 440010.
2. M/s Shubham Logistics, 2nd Floor Kejriwal Complex, S.J. Road, Guwahati - 781001 (Assam).

... ... Petitioner/s

Versus

1. Union of India through The Commissioner of Customs (Prev), Patna 5th Floor, Kendriya Rajaswa Bhawan, Bir Chand Patel Path, Patna- 800001.
2. The Assistant Commissioner, Customs (Prev) Division, Forbesganj, Goryare Chawk, Forbesganj, Dist.- Araria (Bihar)- 854318.
3. The Superintendent (Prev), Customs (Prev) Division, Forbesganj, Goryare Chowk, Forbesganj, Dist.- Araria (Bihar) 854318.
4. The Inspector (Prev), Customs (Prev) Division, Forbesganj, Goryare Chawk, Forbesganj, Dist.- Araria (Bihar) 854318.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr.Amit Pandey, Advocate

For the Respondent/s : Mr.S.D. Sanjay (Addl. Solicitor General)

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

C.A.V. JUDGMENT

Date : 05-09-2019

Heard Mr. Amit Pandey, learned counsel for the petitioner and Mr. S. D. Sanjay, learned counsel for the Union of India.

2. The petitioner in the present writ application seeks the following reliefs:

> i) To issue a writ in the nature of mandamus commanding the authorities to release 20,650 kgs of Betel Nuts (Arecanuts) as evaluated at Rs. 58,76,577/- and a truck

bearing Registration No. TN 25 BC/5330 as evaluated at Rs. 23,64,000/- which was seized vide Seizure Memo dated 06.02.2019 unconditionally; Anr/or

ii) To direct the Respondent Authorities to upkeep the condition and safety of goods so as to prevent deterioration in it's value as the seized goods is a perishable goods; And/or

iii) To issue a writ in the nature of Certiorari for quashing the Seizure Order / Seizure Memo dated 06.02.2019 whereby and where under 20,650 Kgs. of Betel Nuts (Arecanuts) as evaluated at Rs 58,76,577/- and a truck bearing Registration No. TN 25 BC/5209 as evaluated at Rs. 23,64,000/- was seized on 06.02.2019 and all consequential proceedings in pursuance of same' And/or

iv) To grant any other relief or reliefs to which the petitioners are entitled in the facts and circumstances of the case."

3. The case of the petitioner is that the petitioner no. 1 is engaged in business of trade of Betel Nuts grown in North Eastern Region of the country and the petitioner no. 2 is Transporter of goods. On 06.02.2019 when a vehicle bearing Registration No. TN 25 BC / 5330 engaged by petitioner no. 2 for carrying the Betel Nuts of petitioner no. 1, it was detained by the officials of the Customs, Forbesganj under the office of the Commissioner of Customs (Prev), Patna near Bhabtiyahi towards Kosi Mahasetu and seized the Betel Nuts approximately 20,650 kg valued at Rs. 58,76,577/- and the truck in question. A seizure memo was prepared wherein it has been recorded that the origin of goods is that of a third country/foreign origin but according to the learned counsel for the petitioner, the seizure list nowhere discloses the name of the country from which the goods have been originated. Further that how the customs officials formed a belief that the goods were of foreign origin.

4. Learned counsel submits that the goods have been seized with reference to Notification No. 09 /1996-Cus (NT) dated 22.01.1996 issued under Section 11 of the Customs Act read with Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992. The notification prohibits the imports of goods from Nepal which has been exported to Nepal from other country in India.

5. Learned counsel assailed the seizure on the ground that seizure of goods and conveyance has been done without having any reason to believe that the conveyance was carrying on any smuggled goods or the impugned goods were in any way liable for confiscation under the Customs Act, 1962. He has referred Section 106 of the Customs Act, 1962 to show that the power for search of conveyance would be available only in case the proper officer has reason to believe that any vehicle is being used in the smuggling of any goods and in the carrying of any goods which has been smuggled. It is submitted that the respondent authorities have asserted that they had specific information received from their Additional Commissioner over telephone that the Betel Nuts of third country or origin were being transported from Gauhati to Karnataka and getting upon the said information the Truck was intercepted. It is submitted that there was no authentic information that the respondent authorities which could be deemed to be actionable and upon which they proceeded to search of truck in question. It is further submitted that the internal information, if any, was required to be recorded in Form DRI-1. It's authentication were required to be verified and then only action should have been taken.

6. Further learned counsel for the petitioner submits that the description given by the customs officials that the Areca Nuts are appearing as small and round shaped and light brown in colour which are the character of "Malasian" origin is not correct and has no basis. It is submitted that by seeing the shape and colour of Betel Nut their country of origin cannot be determined. Further it is submitted that even samples sent by the respondent authorities to 'ADRF' have failed to determine it's country of origin. In this regard learned counsel refers Annexure 'R/4' and 'R/5' to the counter affidavit.

7. Further relying upon the judgment of the Hon'ble Division Bench of this Court in the case of **Rara Brotheres Vs.M.L. Dey** reported under **[2000 (126) E.L.T. 425 (425)], Angou Golmei Vs Vizovolie Chakha Sang** reported under **[1996 (81) E.L.t. 440 (Pat.)]** and that by the Division Bench of Bombay High Court in the case of M**.G. Abrol, Additional Collector of Customs., Bombay Vs. Amichand Vallamji** reported under **[2002 (149) E.L.T. 32 (Bom.)]**. Learned counsel submits that when the respondents are not able to fulfil the legal requirement of valid search and seizure, having resorted to the contention that the sample of seized Areca Nuts were tested and found to be unsafe for food and human consumption and those are not confirming the standards under the Regulation No. 2.12 and 2.3.47 (5) of the Food Safety and Standards (Food Products Standards & Food Additives) Regulations, 2011.

8. Learned counsel relied upon Section 47 of the Foods Safety and Standards Act, 2006 read with Rule 2.4 of the Rule 2011 whereunder the Food Safety Officer has to give notice in writing about intention to take samples to get it analyzed to the person from whom the samples are being taken. It is submitted that the Officers of Customs have not been appointed as Food Safety Officer under the Act and also the procedures as regards taking the sample under the Said Act and Rules have not been followed. Thus, the entire procedure is without authority.

9. As regards the reliance placed upon Circular No. 03 of 2011 of the Customs dated 06.01.2011 and Circular No. 58/2011- Customs Dated 25.10.2001 it is contended that these circulars are applicable to imported goods prior to custom clearance. The submission is that in the instant case there is neither any belief to show that the impugned goods are smuggled or imported nor there is anything to show that the respondent authorities had any jurisdiction to cause "customs clearance" of the said goods.

10. Learned counsel further relied upon the judgment of this Court in the case of **Salsar Transport Company Vs. The Union of India** in M.J.C. No. 2185 of 2013 vide order dated 24.07.2013.

11. On the other hand learned counsel for the Union of India has contested the writ application on the various grounds which have been taken note of by this Court in detail while considering the connected writ application bearing C.W.J.C. No. 10109 of 2019. The contention of the learned counsel for the Union of India has been discussed in detail in the said judgment. The same are not being reiterated hereunder. Paragraph '8' and '9' of the counter affidavit are however, reproduced hereunder for a ready reference:

> "7. That to ascertain the country of origin of the seized Dried Areca Nuts, samples were sent to- (1.) Arecanut Research & Development Foundation, Varanashi Towers, Mission Street, Mangalore, Karnataka and (2.) Central Food Laboratory, Kolkata, Extension Centre Raxual, Bihar.
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> 8. That the Arecanut Research & Development Foundation, Mangalore vide their letter ARDF/CUS/FBG/18-19/ 1524 dated 14.02.2019 provided test report :
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> "The Arecanuts are of assorted in size, shape and harvested at tender stage with different age of maturity, dehusked, boiled, light to dark brought in colour. Smoky in taste. As the nuts are harvested in tender nut stage it is difficult to identity the country of origin".
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> *9.* That the final conclusion is that the sample of Arecanuts provided by the Assistant Commissioner, Office of the Assistant Commissioner, Customs (Prev.) Division, Goriyare Chowk, Forbesganj, Araria Bihar vide letter C.No. VIII(10) 319/Cus/Seiz/DPU/FBG/18-19/1524 dated 07.02.2019 under its seal has been tested and find that it is difficult to identify the country of origin.
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> 10. That Central Food Laboratory, Kolkata, Extension Centre Raxaul, Bihar in vide their Certificate No. INF/CFL/KOL/RXL/19/FEB-70 provided the test report:
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> "The sample of Betel Nut were tested as per Standard Food Safety norms falling under regulation No. 2.12 & 2.3.47 (5) of Food Safety Standards (Food Products Standards & Food Additives) Regulations, 2011 and found non-conforming to the standards due to presence of Damaged Betel Nuts and presence of Insects. Thus the sample is 'unsafe food' under Section 3(I)(ZZ)(ix) of Food

Safety and Standards (Food Products Standards & Food Additives (FSS) Act, 2006.”.

11. That to ascertain the country of origin of the seized goods, further investigation viz. verification of buyer/seller and their actual work profile from jurisdictional Commissionerate, verification of documents submitted by the truck driver at the time of interception of the tuck etc. are being done by the Division office, Forbesganj.”

12. After hearing the learned counsel for the petitioner and learned counsel representing the Union of India, this Court finds that the submissions of learned counsel for the parties are identical to the submissions raised in C.W.J.C. No. 10109 of 2019 which has been disposed of today itself. The consideration and operative part of the judgment in C.W.J.C. No. 10109 of 2019 are quoted hereunder:

“**20.**Having heard learned counsel for the petitioner as well as for the Union of India, this Court finds that the whole argument of the petitioner for purpose of quashing of the seizure list revolves around the provision of Section 110 of the Customs Act. Section 110 of the Customs Act is quoted hereunder for a ready reference:

“**110. Seizure of goods, documents and things**. -(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

[1][(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under sub-section (1-A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of -

(a)certifying the correctness of the inventory so prepared; or

(b)taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1-C) Where an application is made under sub-section (1-B), the Magistrate shall, as soon as may be, allow the application.]

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

1. Inserted by Act 80 of 1985, S. 8 (w.e.f. 27-2-1985)

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the [1][Principal Commissioner of Customs or Commissioner of Customs] for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs.

[2][**110-A. Provisional release of goods, documents and things seized pending adjudication.-** Any goods, documents, or things seized under section 110, pending the order of the [3][adjudicating authority], be released to the owner on taking a bond from him in the proper form with such security and conditions as the [3][adjudicating authority] may require.]"

21. In the facts of the present case, the counter affidavit of the respondents states that the Cut Dried Arecanuts is of dark pink colour which are not the characteristics of Indian origin Arecanuts because the Arecanuts of Indian origin are normally Oval in shape. In order to ascertain the country of origin of the seized cut dried Arecanuts, samples were sent to the two Laboratories. The test report of ARDF, Mangalore reads as under:

" The sample of areca nuts contain very small cut pieces (Chips), boiled, dried and coated with some colouring material. The colour is red and very shiny. It is not the natural colour of arecanut or its extract. They suspect that the arecanut pieces are coated with some artificial colouring materials".

22. Further the test report of the 'CFL' reported reads as under:

"The sample of Betel Nut were tested as per Standard Food Safety norms failing under regulation No. 2.12 &

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1. substituted by Act 25 of 2014,S. 78, for "Commissioner of Customs" (w.e.f. 1-10-2014).
2. Inserted by Act 29 of 2006 (w.e.f. 13-7-2006).
3. Substituted by Act 8 of 2011, S. 47, for "adjudicating officer" and "Commissioner of Customs".

> 2.3.47 (5) of Food Safety and Standards (Food Products Standard & Food Additives) Regulations, 2011 and found non-conforming to the standards due to presence of Damaged Betel Nuts and Added Colouring matter. Thus the sample is 'unsafe food' under section 3(I)(ZZ)(ix) of FSS Act, 2006".

23. The respondents have come out with a statement that in order to ascertain the country of origin of the seized goods further investigation is going on. So far as the two test reports are concerned, this Court finds that those are not saying about the country of origin of the Betel Nuts.

24. In the case of **M/s Ayesha Exports Vs. The Union of India** (C.W.J.C. No. 7589 of 2018), this Court has recorded the views of the learned co-ordinate Bench of this Court in M.J.C. No. 2185 of 2013 which had in fact been challenged before the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No. CC7331 of 2014 but the same was dismissed on 08.05.2014 keeping the question of law open.

25. This Court reiterated that in absence of there being any standardized laboratory test for tracing the country of origin, established under some statute and unless such Labs have been accredited by the competent authority and that the Labs could have the scientific method to come to a conclusion that the Betel Nut is of a particular country's origin, it would not be in the interest of justice to direct the petitioner to pay the custom's duty.

26. This Court finds that in the present case the request of the petitioner to release the Betel Nuts have been rejected on a totally different ground. In paragraph 26 of the counter affidavit respondents have come out with the following statements:

"26. That in the view of the statements made in paragraph no. 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68 of the writ petition under reply, it is humbly stated and submitted that it is pertinent to mention that facts and circumstance of the instant case are not identical to the facts and circumstances for the cases referred by the petitioner in his application. In the instant case respondent has placed reliance upon the test report given by the two test labs, in which it has been reported that "the sample is 'unsafe food' for human consumption; while in any of the cases referred by the petitioner no such report was available at that point of time. In view of the same it would not be appropriate to release the seized goods for human consumption."

27. Learned counsel for the Union of India has placed before this Court a Government of India's Circular No. 3 of 2011 issued by Ministry of Finance in the Department of Revenue, Central Board of Excise and Customs on 6th January, 2011. The Circular provides detailed guidelines for examination and testing of food items prior to its testing and clearance by Customs Officers under the provisions of Prevention of Food Adulteration Act, 1954 (in short 'PFA Act, 1954'). It is submitted that in terms of the said Circular dated 6th January, 2011, the Custom Officers are competent to get the samples tested from the nearest Central Food Laboratory or a Laboratory authorized for such testing by DGHS or FSSI. Circular No. 3 of 2011 is reproduced hereinbelow for ready reference:

"Circular No. 3/2011-Customs
F. No.450/115/2009-Cus.IV

Government of India

Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
North Block, New Delhi-1,

6th January, 2011.

To

All Chief Commissioners of Customs / Customs (Prev.).

All Chief Commissioners of Customs & Central Excise.

All Commissioners of Customs / Customs (Prev.).

All Commissioners of Customs (Appeals).

All Commissioners of Customs & Central Excise.

All Commissioners of Customs & Central Excise (Appeals).

Subject: Import of edible / food products - regarding.

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Sir / Madam,

Attention is invited to Board Circular No.58/2001-Cus dated 25.10.2001 which provides detailed guidelines for examination and testing of food item prior to its testing and clearance by Customs officers under the provisions of Prevention of Food Adulteration Act, 1954 (PFA Act, 1954).

2. Further, in terms of Para 8 of Chapter I A (General Notes Regarding Import Policy) of the ITC (HS) Classification of Export and Import items, import of all such edible/food products including tea, domestic sale and manufacture of which are governed by Prevention of Food Adulteration Act, 1954, shall be subject to all the conditions laid down in the aforesaid Act. Import of all these products will have to comply with the quality and packaging requirements as laid down in the Act. Compliance of these conditions is to be ensured before allowing customs clearance of the consignment.

3. To consolidate the laws relating to food and to provide for a systematic and scientific development of Food Processing Industries, the government has enacted The Food Safety and Standards Act, 2006 (FSS Act, 2006). Under the Act, the Food Safety and Standards Authority of India (FSSAI) has been established to lay down standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food. Section 97 of the FSS Act, 2006 provides that the existing Acts and Orders relating to food items such as PFA Act, 1954; Food Products Order, 1955; Meat Food Products Order, 1973;

Vegetable Oil Products (Control) Order, 1947; Edible Oils Packaging (Regulation) Order, 1988; Solvent Extracted Oil, Deoiled Meal, and Edible Flour Control (Order), 1967; Milk and Milk Products Order, 1992 etc shall be repealed from a date to be notified.

4. The FSSAI has taken over PHO functions at select ports such as Nava Sheva and Mumbai with effect from 13.09.2010 with the stipulation that the existing rule and procedures will continue to be followed without any change till FSSAI regulations are notified. Thus, FSSAI has replaced PHO with its authorized officers at abovementioned ports in terms of section 47 (5) of the FSS Act, 2006.

5. Difficulties have been reported to Board by certain importers regarding delay in testing of samples and clearance of goods consequent upon implementation of FSS Act, 2006 at select ports.

6. It is also noted that vide Policy Circular 25(RE-2003)/2002-007 dated 28.01.2004 and 37(RE-2003)/2002-2007 dated 14.06.2004, the DGFT has modified the procedure for sampling of imported edible/Food Products.

7. Accordingly, the procedure of clearance of food articles has been revisited by the Board, and following modified procedure has been prescribed:

(a) All consignments of high risk food items, as listed in DGFT Policy Circular No. 37(RE-2003)/2002-2007 dated 14.06.2004 (as may be modified from time to time), shall be referred to Authorised Representative of FSSAI or PHOs, as the case may be, for testing and clearance shall be allowed only after receipt of the test report as per the instructions contained in the Customs Circular No. 58/2001-Cus, dated 25.10.2001.

(b) All consignments of perishable items like fruits, vegetables, meat, fish, cheese, etc., will continue to be handled in terms of the guidelines contained in Para 2.3 of the Board's Circular No.58/2001-Customs dated 25.10.2001.

(c)In respect of food items not covered under (a) and (b) above, the following procedure would be adopted in addition to the general checks prescribed under Para 2.1 of the Circular No. 58/2001-Cus, dated 25.10.2001:

(i)Samples would be drawn from the first five consecutive consignments of each food item, imported by a particular importer and referred to Authorised Representative of FSSAI or

PHOs, as the case may be, for testing to ascertain the quality and health safety standards of the consignments.

(ii) In the event of the samples conforming to the prescribed standards, the Customs would switch to a system of checking 5% - 20% of the consignments of these food items on a random basis, for checking conformity to the prescribed standards. The selection of food items for random checking and testing would be done by the Customs taking into consideration factors like the nature of the food products, its source of origin as well as track record of the importers as well as information received from FSSAI from time to time.

(iii In case, a sample drawn from a food item in a particular consignment fails to meet the prescribed standards, the Customs would place the import of the said consignment on alert, discontinue random checking for import of such food items and revert to the procedure of compulsory checking. The system of random sampling for import of such food items would be restored only if the test results of the samples drawn from the 5 consecutive consignments re-establish that the food items are in conformity with the prescribed standards.

8.Authorised Officers of FSSAI will ascertain that for the imported pre-packaged good items, the language and other major requirements of the label like mention of best before date, nutrition information etc. should comply the labeling provisions under PFA Rules, failing which sample may not be drawn from such consignment for testing.

9.It is also clarified that Risk Management System (RMS) module for import consignments of edible / food items, presently does not provide for random sampling as it is one of its CCR (Compulsory Customs Requirements) targets. Accordingly, Risk Management System (RMS) shall take necessary steps to modify the RMS module to conform to the new requirements. Till such time, this modification is carried out, Customs shall take appropriate decision to waive the CCR requirements in respect of food items not covered under Para 7 (a) and 7 (b) above and to the extent mentioned under Para 7 (c) above. In terms of Circular No.43/2005-Cus dated 24th November, 2005 such a course of action shall, however, be taken only with the prior approval of the jurisdictional Commissioner of Customs or an officer authorized by him for this purpose, who shall not be below the rank of Addl./Joint Commissioner of Customs, and after recording the reasons for the same. A brief remark on the reasons and the particulars of Commissioner/ADC/JC authorization should be made by the officer examining the goods in the departmental comments in the EDI system.

10.Further, as per Para 13 of Chapter I A (General Notes Regarding Import Policy) of the ITC (HS) Classification of Export and Import items, import of all such edible/ food products, domestic sale and manufacture which are governed by PFA Act, 1954 shall also be subject to the condition that at the time of importation, the products are having a valid shelf life of not less than 60% of the original shelf life. Shelf life of the product is to be calculated based on the declaration given on the label of the product, regarding its date of manufacture and the due date for expiry. Therefore, Customs shall ensure that this condition is complied with before allowing clearance of such consignments.

11. It is clarified that at certain ports / airports / ICDs / CFSs where Port Health Officers (PHO) under PFA, 1954 or Authorised officers under FSS Act, 2006 are not available, the samples will be drawn by Customs and the same may be got tested from the nearest Central Food Laboratory or a laboratory authorized for such testing by DGHS or FSSAI.

12. RMD shall develop an application software that incorporates the stipulation of testing of imported foodstuff and alerts the Customs officer to the effect the number of past shipments already tested and found fit warrants future shipments need not ordinarily be tested. This should apply regardless of port of import so long as the importer, supplier and item of import do not change. In other words, if such a shipment is imported say, at Mumbai and the previous 5 shipments imported at, say, Delhi have passed the test, then the next shipment at Mumbai need not be tested. A suitable data base would also be prepared at each Custom House to indicate the compliance history of importers.

13. The Board Circular 58/2001-Cus dated 25.10.2001 stands modified to above extent.

14. These instructions may be brought to the notice of all concerned by way of issuance of suitable Public Notice / Standing Order.

15. Difficulties, if any, in implementation of these instructions may be brought to the notice of the Board

Yours faithfully,

(R. P. Singh)

Director (Customs)”

28. Learned counsel for the Union of India, Department of Customs and Excise placed before this Court a Circular No. 35 of 2017 dated 16th August, 2017 which provides guidelines for provisional release of seized imported goods pending adjudication under Section 110 A of the Customs Act, 1962. The relevant part of the guidelines as contained in paragraph 2, 2.1., 2.2, 2.3 and 3 are quoted hereunder for a ready reference:

"2. While provisional release of seized imported good is under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating authority upon a request made by the owner of the seized goods, provisional release shall not be allowed in the following cases -

(i) Goods prohibited under the Customs Act, 1962 or any other Act for the time being in force;

(ii) Goods that do not fulfill the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;

(iii) Goods specified in or notified under Section 123 of the Customs Act, 1962;

(iv) Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.

2.1. seized imported goods shall be released provisionally by the competent authority upon request of the owner of the seized goods, subject to executing a Bond for the full value/estimated value of the seized goods.

2.2 Further, in addition to the Bond mentioned at Para 2.1. above, the competent authority shall take a Bank Guarantee or Security Deposit to cover the following:

i. the entire amount of duty/differential duty leviable on the seized goods being provisionally released;

ii.amount of fine that may be levied in lieu of confiscation under Section 125 of he Customs Act, 1962, at the time of adjudication of the case. While securing the same, the competent authority shall take into account the nature of the seized goods, the duty and charges payable on the said goods, their market price and teh estimated margin of profit;

iii. Amount of penalties that may be levied under the Customs Act, 1962, as applicable, at the time of adjudication of the case.

2.3. Depending on the specific nature of a case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated above.

3. In this context, attention is invited to the judgment dated 28.07.2016 of the Hon'ble Madras High Court in Writ Appeal No. 377 of 2016 in the case of *Malabar Diamond Gallery Pvt. Ltd. Vs Additional Director General, DRI, Chennai & Ors.* Wherein the Hon'ble Court has given sufficient discretion to the adjudicating authority to deny provisional release of goods in any case where the goods are smuggled or import is treated as illegal and in violation of the statutory provisions. In terms of the said judgment, by specifying the relevance and reason, the adjudicating authority may deny provisional release of any goods which are liable to confiscation under Section 111 or Section 113 as they would fall under the definition of prohibited goods, in terms of Section 2(33) of the Customs Act, 1962."

29. Further learned counsel has placed before this Court the information issued by the Director (Imports) of the Food Safety Standards Authority of India (Statutory Authority established under the Food Safety and Standards Act, 2006) which reads as under :

"File No.1-1600/FSSAI/Imports/2016 (Part18)
Food Safety and Standards Authority of India
(A Statutory Authority established under the Food Safety and Standards Act, 2006)
FDA Bhawan, Kotla road, New Delhi-110002
20 November, 2018

Import of Betel Nut/Areca Nut

Standards of areca nuts are prescribed under sub-regulation 2.3.55 of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 and also in Chapter 2 of Food Safety & Standards (Contaminates, Toxins & Residues) Regulations 2011. Further, limits of aflatoxin as 15 ug/kg in areca nut is prescribed in the Food Safety and Standards (Contaminants, toxins and Residues) Regulation, 2011 through amendment dated 27.12.2017.

2. Areca nut, the fruit of the areca palm (Areca catechu), commonly referred to as betel nut is prone to the formation of fungal growth during various stages of its production, storage and transportation. Accordingly, it has been decided that the consignments of imported Betel/Areca Nut shall not be cleared through Risk Management System (RMS) and all the imported consignments shall be subjected to 100 % sampling and testing. Also, FSSAI's Authorised Officers and Customs officials notified as Authorised Officers by FSSAI are heareby advised to be vigilant and strictly ensure the compliance of above mentioned FSS Regulations before clearance of consignments of imported areeca/betel nuts.

(Suneeti Toteja)
Director (Imports)"

30. The Government of India, Ministry of Finance has issued Circular No. 30 of 2017-cus dated 18th July, 2017 which provides for a detail guidelines for re-testing of the samples, the same is produced hereunder:

"Circular No.fe /2017-Cus
F.No. 450/15/2017-Cus IV
Government of India
Ministry of Finance Department of Revenue
(Central Board of Excise & Custom)
****

New Delhi, dated the/18th July, 2017

To,
All Principal Chief Commissioners/Chief Commissioners of Customs / Customs(Preventive),
All Principal Chief Commissioners/Chief Commissioners of Customs and Central Excise,
All Directors General,
All Principal Commissioners/Commissioners of Customs / Customs (Preventive),
All Principal Commissioners/ Commissioners of Customs and Central Excise.
Sir/Madam,

Sub: Detailed guidelines for re-testing of samples- reg.

World Trade Organization (WTO) negotiated Trade Facilitation Agreement (TFA),which aims at simplifying the trade processes and bringing down barriers to trade has come into force w.e.f 22nd February, 2017. India is a signatory to this agreement.

2) India has placed a number of trade related measures negotiated under the TFA in Category A. Article 5.3.1 envisages granting an opportunity for a second test in case the first test result of a sampletaken upon arrival of goods declared for importation shows an adverse finding. Further Article 5.3.3makes it obligatory to consider the result of the second test, if any, for the release and clearance of goods, and, if appropriate, may accept the results of such test. The aforementioned Articles have been placed incategory A. In order to have uniformity in approach among the field formations with regard to re-testing of samples, the following procedure is prescribed:

a. Customs officers may draw the samples from import consignments for testing in case of consignments wherever needed. The results of all test reports, adverse or otherwise, shall be communicated to the importer or his authorized representative/ Customs Broker immediately on its receipt.

b. In case the importer or his agent intends to request the Additional/ Joint Commissioner of Customs for a re-rest, then the same shall be made in writing to the said officer within a period of ten days from the receipt of the communication of the test results of the first test. Customs officers may take a reasoned view in case the importer or his authorized representative Customs Broker is unable to do so for reasons beyond his control.

c. Where the Additional/Joint Commissioner of Customs grants an opportunity for a second test, he must clearly indicate in writing the name and address of the laboratory/institution where the second test can be carried out. Such referral for re-testing may be made only after being reasonably sure that the desired re-testing facilities exist at the laboratory/ institution.

d. Re-test should be made only on the remnants of the samples originally tested or on duplicate representative sealed samples in the custody of the Customs. Further, to avoid delays, samples for second tests shall be marked as "immediate" before sending to the laboratory. In a case it may so happen that fresh samples have to be drawn, then such sampling should be done in the presence of the importer or his representative/customs broker.

e. The requests for re-test of samples on the ground that the original sample was not representative should be entertained only if the consignment is still in Customs control. At the time of drawing the samples, the importer or his representative shall be present and certify that the samples drawn are representative.

f. The competent authority shall consider the results of the re-test without prejudice to the results of the first test. In case there is a variation in the results of the first test and the re-test,the competent authority shall take the decision relying upon either of the tests specifying the grounds in writing for the decision so taken. In case the competent authority is unable to decide whether to rely upon the first or the re-test results, then it may order a second re-test provided the consignment is still within the customs control. However, this option should not be resorted to in every case of variation between the first test and re-test results.

g. The facility of re-testing, is a trade facilitation measure, which should generally not be denied in the ordinary course. However, there might arise circumstances where the customs officer is constrained to deny the re-testing facility. Board expects that

such denial would be occasional and on reasonable grounds to be recorded in writing.
h. Where the re-testing procedure is done at the instance of the department instead of the importer, the above procedure shall be followed mutatis mutandis.3) Difficulties, if any, in implementation of this circular, should be brought to the notice of the Board.4) Hindi version of the circular will follow.

Yours faithfully
(Zubair Riaz)
Director (customs)

31. In the aforesaid background the latest development has come vide office Memorandum Dated 4th June, 2019 issued by the Government of India in its Ministry of Commerce and Industry, Department for Promotion and Industry and Internal Trade, the office Memorandum reads as under"

" No. 12013/14/2019/NPC-QCI
Government of India
Ministry of Commerce and Industry
Department of Promotion of Industry and Internal Trade
NPC-QCI Section
Udyog Bhawan, New Delhi
Dated 4th June, 2019

OFFICE MEMORANDUM

Subject: A letter from Chairman, Central Board of Indirect Taxes & Customs regarding matter related to import of Areca Nut / Betel Nut.

The undersigned is directed to refer to D.O. letter No. 451/24/2018 Cus.V dated 05.04.2019 [copy enclosed] received from Chairman, Central Board of Indirect Taxes & Customs (CBITC), Department of Revenue, M/o Finance addressed to Secretary, DPIIT regarding matter related to import of Areca nut /Betel nut.

2. In this regard, it is stated that the matter was referred to BABL and NABL vide email dated 16.05.2019 (copy enclosed) has stated that they have contacted ARDF Mangalore and ICAR-IISR, Calicut labs and discussed regarding NABL accreditation. NABL would follow up with them and ensure their accreditation status at the earliest. NABL has attached a list of few NABL accredited labs which have accreditation as on date (about 4-5 labs for testing Arecanut /Beetal nut and about 60 labs for testing black pepper). The list of NABL accredited lab for Pepper, Areca nut and Betel nut is enclosed at Annexure-I, Annexure-II and Annexure-III respectively.

This issues with the approval of Secretary, DPIIT.
Encl.: As above

(Gokul Chand)
Under Secretary to the Govt. of India
Tel no. 2306 2906

To
The Chairman,
Central Board of Indirect Taxes & Customs (CBITC),
Department of Revenue,
Ministry of Finance,
North Block,
New Delhi-110 001"

32. On perusal of the aforesaid materials at first instance, it would appear that these materials were not placed before the learned Writ Court in course of hearing of C.W.J.C. No. 3784 of 2013 and M.J.C. No. 2185 of 2013 whereunder the learned Writ Court took a view agreeing with the submissions of the writ petitioner and respondents that the Betel Nuts which were being sent from one place to another was not being offered for sale, at this stage, in which the samples could have been taken out and subjected to analysis under the provisions of the Food and Safety and Analysis Rules and Regulations. The learned Writ Court took a view that the Betel Nuts are raw materials which requires sufficient processing to be done and only thereafter, this would be packaged in terms of the provisions of the Food Safety and Standards (Packing and lebelling) Regulations 2011 for being put up for sale. The learned Writ Court took a view that the stage had not come into existence when the sample was sent by custom authorities to the 'CFL', Kolkata (Extension Center, Raxaul).

33. As is evident from the discussions made in the judgment dated 24.07.2013 passed in M.J.C. No. 2185 of 2013, learned Writ Court hearing the modification application was not apprised of the fact that all consignment of high risk food items are liable to be referred to authorized representative of FSSAI or PHOs as the case may be for testing and clearance for testing and clearance can be allowed only after testing report as per the instructions contained in the Custom Circular No. 58/2001 dated 25.10.2001 (referred the Circular No. 3/11). The Court was also not informed that the Custom authorities were authorized to take samples and get them tested from the nearest Central Food Laboratory. Further it appears that the guidelines for provisional release of the seized goods as contained in Circular No. 35 of 20017 was not placed before the learned Writ Court. The guidelines specifically provides in paragraph '2' that the request for provisional release of the seized food shall not be allowed in the given cases, one of the cases in which release shall not be allowed is where the goods do not fulfill the statutory compliance requirements /obligations in terms of any Act, Rule, Regulation or any other law for the time being enforced.

34. Further the information furnished by the Director (Imports) in the communication dated 20th November, 2018 with regard to merit of Betel/Areca Nut are also important to appreciate. It clearly provides that Areca Nuts, commonly known as Betel Nuts is capable of the formation of Fungal growth during various stages of its production, storage or transportation, therefore, the consignment of imported Betel /Areca Nut shall not be cleared through risk management system and all the imported consignments shall be subjected to 100% sampling and testing. The FSSAI's authorized officers and custom officers as authorized officers were therefore, advised to be vigilant and strictly ensure the compliance of the FSS regulations before clearance of consignments of imported Areca/Betel Nuts.

35. At this stage, this Court is getting a clarity as regards the stage of testing of the Areca Nuts / Betel Nuts. In terms of the views of the Food Safety and Standards

Authority of India as stated in the information dated 20th November, 2018, Areca Nuts / Betel Nuts is to be tested strictly and it cannot be said that the Betel Nuts being a raw material unless processed and packed for sale for consumption, cannot be subjected to the laboratory test. This Court is, therefore, of the considered opinion that the plea which is being taken by learned counsel for the petitioners citing the judgment of the learned Writ Court in C.W.J.C. No. 3784 of 2013 and M.J.C. No. 2185 of 2013 cannot be accepted. It is well settled law that a judgment of the Court is always rendered in the facts placed before the Court and the submissions made in the matter. Since this Court has found that the aforesaid materials were not brought before the learned Writ Court in the case of **Salsar Transport Company** (supra), the said decision cannot be applied on the face of the materials which have been placed before this Court in the present case. Nothing has been brought to show that the very sampling and testing of the Areca Nut was not in accordance with law.

36. The another submission of learned counsel for the petitioners that there cannot be a refusal to provisionally release the goods on the grounds stated in Annexure '4' to the writ application is also not acceptable to this Court. The Court has taken note of the detail guidelines issued by the Department of Customs to streamline the divergent procedures being followed for grant of provisional release of the goods which are seized under Section 110 of the Customs Act, 1962. The provisional release of the seized goods is to be refused when the goods do not fulfill the statutory compliance requirements of any Act, Rule, Regulation or any other law for the time being enforced.

37. In the present case, since the Food Laboratory Report has found that the Betel Nut are not fit for human consumption, in the opinion of this Court, no fault may be found with the rejection of the request of the petitioners for grant of release.

38. Now coming to the another question with regard to the sustainability of the seizure. This Court had earlier occasion to deal one mater being C.W.J.C. No. 7589 of 2018 (**M/s Ayesha Exports vs. The Union of India and Ors.**). In the said case the solitary question which was considered by this Court was as to whether the seizure report may be allowed to sustain when it is an admitted position that M/s Areca Nut Research and Development Foundation, Manglore is not accredited laboratory and it's report has been held to be of no legal sanctity by the learned Writ Court in **Salsar Transport Company** (supra). In the same case the seizure of Betel Nuts was sought to be done on the sole consideration that the report of ADRF, Manglore declared that the Betel Nuts seemed to be of Indonesian Origin. This Court held that because in the case of **Salsar Transport Company and Anr.** (supra) the report was not having any legal sanctity and there was not material to show that the said laboratory is an accredited laboratory by the competent authority, it's report cannot have a consequence of fastening of any legal liability. In the said case, the information received under the Right to Information Act by the petitioner were placed before this Court wherein the Directorate of Areca Nuts and Spics Development, Government of India in response to query as to whether a Betel Nut is indigenous grown or of foreign origin can be determined by means of any laboratory test, the information supplied by the Government: "No laboratory test has been standardized for tracing the country of origin".

39. It appears that after the aforesaid judgment passed by this Court on 24.01.2019, the respondents came in action and the matter was taken up at the level of the Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade. This Court has taken note of the office Memorandum dated 4th June, 2019 hereinabove which shows that about 4-5 labs have already been accredited for testing Areca Nuts / Betel Nuts and steps towards accreditation of ARDF and ICAR-IISR, Calicut Labs were under discussion and it was to be done at the earliest.

40. Learned counsel for the Union of India, Department of Customs has submitted that the developments so far may persuade this Court not to interfere with the seizure at this stage when the matter is still under investigation and a complete view may be taken as regards the foreign origin after obtaining a report from the accredited lab.

41. This Court is of the considered opinion that in the given facts and circumstances of the case, where the matter is still under investigation and even some accredited labs have come into existence, this Court need not interfere with the seizure of the Betel Nuts at this stage and this issue be kept open for consideration at appropriate stage after the investigation is over and the respondents receive a report as regards the country of origin from an accredited lab within a period of three months by following the established procedures.

42. In result, this Court finds no reason to interfere with the impugned orders. The writ application has no merit. It is dismissed accordingly."

13. The ratio of the above-quoted judgment would fully apply in the facts and circumstances of this case. This Court has taken note of the reports and other circumstances as stated in paragraph ‘7’ to ‘11’ of the counter affidavit of the respondents. The samples of Betel Nuts are in damaged condition with presence of insects. These are thus, unsafe for human consumption. Other unifications are still going on. The petitioner no. 1 is, thus, unable to make out a case for direction to release the Betel Nuts. For the reasons stated in paragraph ‘41’ of the judgment in C.W.J.C. No. 10109 of 2019, this Court would not interfere with the seizure at this stage.

14. As regards the release of vehicle in question, it will be open for petitioner no. 2 to make an appropriate application before the competent authority who will consider the same and pass an appropriate order thereon within a period of 30 days from the date of filing of the application.

(Rajeev Ranjan Prasad, J)

avin/-

AFR/NAFR	AFR
CAV DATE	04.07.2019
Uploading Date	05.09.2019
Transmission Date	