IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.03.2019

Coram

The Honourable Mr.Justice V.PARTHIBAN

WP. No.8200 of 2019
and
WMP. No.8761 of 2019

M/s.Pritesh Trading Co.,
rep.by its Proprietor
Mr.Pritesh Nandu ... Petitioner

/Vs/

1. The Commissioner of Customs,
Chennai II Commissionerate,
Custom House, 60 Rajaji Salai,
Chennai 600 001.

2. The Assistant/Deputy commissioner of
Customs, Group-I,
Chennai II Commissionerate,
Custom House, 60 Rajaji Salai,
Chennai 600 001. ...Respondents

Prayer: Petition filed under Article 226 of the Constitution praying to issue a writ of Mandamus to direct the respondent to cause release of "Yellow Peas" imported by the petitioner under Bill of entry 1.2426518, dated 14.03.2019 covered under Sales contract No.1/PT-IN dated 17.10.2018, in terms of orders of this Court in W.P.No.28912 of 2018 and W.M.P. No.33781 dated 01.11.2018 and further direct the respondents to issue a "Detention Certificate" for waiver of Demurrage and Container Detention Charges in terms of Regulation 6 (1) (I) of Handling of Cargo in Customs Areas Regulations 2009.

For Petitioner : Mr.P.Sidharthan

O R D E R

This Writ Petition has been filed seeking a Mandamus for release of consignments under Bill of entry 1.2426518, dated

14.03.2019 covered under Sales contract No.1/PT-IN dated 17.10.2018, and for a further direction to the respondents to issue a 'Detention Certificate' for waiver of Demurrage and Container Detention Charges in terms of Regulation 6(1)(l) of Handling of Cargo in Customs Areas Regulations.

2.In identical circumstances in respect of similarly situated petitioners, this Court has already passed orders in several writ petitions and one such order is in W.P.No.4403 of 2019 (batch) dated 27.02.2019, in the case of M/s.Royal Impex V. Commissioner of Customs. The aforesaid order is applicable to the present case in all aspects. The relevant portion of the order is reproduced hereunder for the sake of clarity:

> 15. Heard learned counsel. The relevant facts that are admitted before me are:
>
> (i) In the case of import of peas, substantially all imports in question are covered by Bills of Lading drawn between the dates of 01.10.2018 and 31.12.2019. There are however, a few instances where the Bills of Lading have been drawn after 01.01.2019 in which event this Order would not be applicable. This order will be applicable, in the case of imports of peas, only in respect of those consignments covered under Bills of Lading during the period 01.10.2018 to 31.12.2018. As far as import of consignments of dhalls are concerned, since the notification did not stipulate any time period, this restriction will not apply to the Writ Petitions filed in cases of imports of dhalls.
>
> (ii) Some petitioners before me have challenged Notification bearing No.37/2015-2020 dated 28.09.2018 applicable for the period 01.10.2018 to 31.12.2018 by way of Writ Petitions in W.P.Nos.26433, 26440, 26495, 27056, 26464, 26471, 26475, 26479, 27319, 27327, 27336, 27370 of 2018. A learned Single Judge of this Court has stayed the operation of the Notification in question and such order of stay was valid and in subsistence at the time when the imports, have been made.
>
> (iii) The liability to duty of the goods in question is as follows:
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> Yellow Peas, Green Peas, Dun Peas, Kaspa Peas: 50%
>
> Pigeon Peas/ Toor Dal : 10%
>
> Urad Dal and Moong Dal : Nil

16. The limited questions that I am called upon to consider in the light of the admitted facts as above, are twofold:

(i) Whether the relevant date for the reckoning the date of the imports would be the date of Bill of Lading or Bill of Entry;

(ii) Whether there is any embargo on the import of the consignments of dhalls in the present cases;

(iii) Whether there is any embargo on the import of the consignments of peas imported during 01.10.2018 and 31.12.2018 and covered by Bills of Lading for the aforesaid period.

17. As regards the first issue, Regulation 9.11 of the Foreign Trade Policy specifically states that for the purpose of reckoning the date of import, the relevant date would be the date of Bill of Lading only. In the light of the aforesaid the Foreign Trade Policy being a complete code by itself, reference by the learned counsels for the Revenue to section 15 of the Customs Act, which fixes the date for determination of rate of duty and tariff for the purpose of valuation of imported goods as the date of Bill of Entry, may not be relevant.

18.The Supreme Court, in the case of Union of India V. Asian Food Industries (supra), considered the validity of exports of certain consignments of pulses. The admitted position was that the transactions for exports had been negotiated and finalised by the petitioner at a time when the exports was permitted. While this is so, the Central Government took the decision to ban export of pulses. The aforesaid decision was reported widely in the media. But the notification banning the export was issued only later in exercise of power under section 5 of the Foreign Trade (Development and Regulation Act), 1992, under which the Government prohibited export of various goods for a period of six months from the date of notification. By the time the said notification came to the knowledge of the petitioner, the consignments were under shipment, but were detained upon arrival by the customs authorities, who were of the view that the consignments were prohibited in the light of the notification issued. In the aforesaid circumstances, the Delhi High Court had expressed a view in favour of the customer. The view was affirmed by Supreme Court holding that a vested or accrued right cannot be taken away by reason of a policy. The relevant portions of the judgment are extracted below:

> 33. The scheme of the Foreign Trade Policy postulates that when the policy provisions are amended which are disadvantageous to the exporters, the modification would not be attracted..........
>
> 36. Different stages for the purpose of the said Act would, therefore, be different. For interpretation of the provisions of the 1992 Act and the policy laid down as also the procedures framed thereunder vis-`-vis the provisions of the 1962 Act, the rate of custom duty has no relevance. What would be relevant for the said purpose would be actual permission of the proper officer granting clearance and loading of the goods for exportation. As soon as such permission is granted, the procedures laid down for export must be held to have been complied with...........
>
> 48. The Delhi High Court, however, in our view correctly opined that the notification dated 4.07.2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of Sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof.

19.In the case of Priyanka Overseas Private Ltd. And another V. Union of India and others, the Supreme Court held as follows:

> 31.We have given our careful consideration to the arguments advanced by the learned counsel for the parties and have thoroughly perused the record. We have to first consider whether 'Palm Kernel' and 'palm seed' were two different commodities or 'Palm Kernel' was included in 'Pal, seed' for the purposes of import. The difference between 'palm seed' and 'Palm Kernel' has been explained in the letter

of the Central Plantation Crops Research Institute date January 21, 1987 (placed on record), it reads as under:

“The difference between Palm Kernel and palm seeds has also been pointed out in the aforesaid letter according to which palm seed is specially extracted from fruits while kernel is a product obtained after sterilisation, digestion at 95 Celsius, pressing, decarping, shelling etc. The Palm Kernel will lose its viability due to the above processes and cannot be used for germination.”

Under Appendix 5 Part (b) Item 5 of the Import Policy under the heading. Oils/seeds only Palm oil/Palm seeds have been mentioned. We agree with the view taken by the High Court in this regard that Palm Kernel cannot be included under the item palm seeds and the two commodities were different as understood in commerce or trade. We do not want to burden this judgment by citing those authorities which have already been considered for deciding this controversy by the High Court. We do not see any force in the contention of the learned Solicitor General in this regard that the government had only made a clarification vide Notification dated July 27, 1987 by introducing in Appendix 5 Part (b) Item No.5 “all other oils/seeds/any other material from which oil can be extracted”. It is significant that in the aforesaid notification published in the Gazette of India Extraordinary para (1) Section 121, it was clearly mentioned that the same was issued as an amendment to the earlier Notice No.1-ITC (PN)/85-88 dated April 12, 1985. The notification stated that the following amendment shall be made in the Policy at proper places indicated below and then under the head amendment the new provision which included all other seeds from which oil can be extracted”was mentioned. It is therefore evident that the government of India itself, realised the difference in the two commodities therefore it amended its previous policy. We are therefore of the opinion that prior to July 27, 1987 'Palm Kernel”was not a canlised

> item and the High Court rightly held that 'Palm Kernel' was not included with in the entry of 'palm seed'.
>
> Since 'Palm Kernel' was not included within 'palm seed' the customs authorities had no legal justification to confiscate or impose redemption fine, or penalty, as the goods had already been shipped on various dated i.e. On June 26, 1987 and July 25, 1987. It is no longer in dispute that if the Palm Kernel was not a canalised item before July 27, 1987 then it could have been imported under the OGL before that date. The crucial dates in this regard are June 26, 1987 and July 25, 1987 when the goods were actually loaded in the ship and not the date of arrival of the ship in the territorial waters of India.

(emphasis by underlining, mine)

20.In the light of the above, the relevant date for reckoning the import of the consignments of peas is the date of Bill of Lading.

21.Some submissions have been made on the merits of the challenge to the notifications itself. However, insofar as the Writ Petitions challenging notifications are, admittedly, pending decision before another learned single Judge of this Court, I consciously refrain from adverting to the same.

22.The grant of stay of operation of the relevant Notifications and the pendency of the said stay as on the date of import is admitted. Thus, and in conclusion, on the basis of the admitted position on facts as recorded by me in paragraph 15 of this order and bearing in mind the balance of convenience in the present case, the consignments in question are liable to be released, though conditionally.

23.The petitioners will remit the entire duty component of the consignments imported by them in cases where such duty is leviable as per paragraph 15 (iii) above along with a bank guarantee for the 10% of the invoice value. In cases where the duty impact is neutral, the petitioners shall furnish a bank guarantee for the 10% of the invoice value. Upon satisfaction of the aforesaid conditions, the consignments shall be released forthwith.

24.The authorities are at liberty to initiate proceedings in respect of the transactions in question and if done, the petitioners shall appear, be heard and file their submissions pursuant to which orders shall be passed by the authorities in accordance with law.

25.The petitioners have also prayed for waiver of demurrage charges incurred in respect of the detained consignments. In the light of Rule 6(l) of the Handling of Cargo in Customs Areas Regulations, 2009, which provides that the Customs Cargo Provider shall not, subject to any other law for the time being in force, charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be, there shall be a waiver of demurrage charges."

3.Thus, by following the above said order passed by this Court earlier, this Writ Petition is disposed of on the above terms. No costs. Consequently, connected miscellaneous petition is closed.

msk

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
1. The Commissioner of Customs,
Chennai II Commissionerate,
Custom House, 60 Rajaji Salai,
Chennai 600 001.

2. The Assistant/Deputy commissioner of
Customs, Group-I,
Chennai II Commissionerate,
Custom House, 60 Rajaji Salai,
Chennai 600 001.

+1cc to M/s.Hema Muralikrishnan, Advocate, SR.No.27323
+1cc to M/s.P.Sidharthan, Advocate, SR.No.27355

WP. No.8200 of 2019

Kak(25/03/2019)