THE HIGH COURT FOR THE STATE OF TELANGANA

*** THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

<u>+ WRIT PETITION No.43511 of 2018</u>

% Date: 18.04.2019

Between:

M/s.L.N.S. IMPEX, Registered office at: Plot No.17-791,
First Floor, Dhulapally, IDA Jeedimetla, Medchal, Hyderabad
represented by its Authorized Signatory.

… Petitioner

v.

$ Officer of the Principal Commissioner of Customs,
GST Bhavan, L.B. Stadium Road, Basheerbagh,
Hyderabad and another.

... Respondents

! For Petitioner : Ms. V. Deepti Anand for
Mr. P. Vikram

^ For Respondents : Smt. Sundari S. Pisupati

< Gist :

> Head Note :

? Cases Referred :

1. MANU/SC/0067/2019
2. 2003 (155) E.L.T. 423 (S.C.)
3. (2009) 10 SCC 396
4. 2008 (224) ELT 497 (SC)
5. 2006 (203) ELT 353(SC)
6. 2011 (5) SCC 114

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THE HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

WRIT PETITION No.43511 of 2018

ORDER: ***(Per Hon'ble Sri Justice V. Ramasubramanian)***

Aggrieved by an order in original passed by the 1st respondent, directing the confiscation of a product imported by the petitioner and giving an option to the petitioner alternatively to redeem the goods for the limited purpose of re-export to the supplier, the importer has come up with the above writ petition.

2. Heard Ms. V. Deepthi Anand, learned counsel for the petitioner and Smt. Sundari R. Pisupati, learned Senior Standing Counsel for the respondent.

3. Under a bill of entry dated 31.10.2017, the petitioner imported 8000 kgs., of a product, by name, "MOREKING", which is described to be a plant growth regulator, along with 2500 kgs., of another product, purportedly for home consumption. The petitioner also applied for a no objection certificate from the Central Insecticides Board, for the clearance of the goods. But, till date no order has been passed on the same.

4. Therefore, the respondents did not clear the goods. The letter sent by the 2nd respondent seeking clarification from the Central Insecticides Board also did not evoke any response.

5. Since demurrage was increasing, the petitioner made a request on 13.12.2017 at least to grant permission to re-export the product back to the supplier.

6. But an order dated 29.01.2018 was passed by the 1st respondent directing the confiscation of the goods, with an option to the petitioner to redeem the goods on payment of a fine of Rs.1,50,000/- for the limited purpose of re-export to the supplier.

7. The petitioner paid redemption fine on 30.01.2018. But, when the petitioner wanted to re-export, the supplier refused to take it back unless they received orders from some other purchaser.

8. Finding themselves at their wit's ends, the petitioner requested the Principal Commissioner to allow them to redeem the goods for home consumption upon payment of duty. But, the same was also rejected. Therefore, the petitioner is before this Court.

9. The main grounds on which the impugned order is assailed are (1) that a direction for re-export is beyond the purview of Section 125(1) of the Customs Act, 1962 and (2) that so long as the imported goods do not fall under the category of prohibited goods, there cannot be a direction to re-export.

10. The respondents have filed a counter affidavit contending *inter alia* that the petitioner originally accepted to re-export the goods and paid the fine and hence, they cannot go back on the same; that the goods in question cannot be imported by a person who is not registered and hence, the import by an unregistered person will tantamount to the import of prohibited goods.

11. We have carefully considered the above submissions.

12. It is no doubt true that the petitioner offered to re-export the goods, in view of the circumstances in which they were placed. By the time an order was passed giving them an option to pay fine and re-export the goods, the supplier seems to have taken a different position. It is seen from the papers that the petitioner also made attempts to re-export the goods. This is why they sought extension of time by three months. But, the supplier seems to have rejected the request. Therefore, after having invited an order for re-export, it is not open to the petitioner to contend that section 125 (1) does not entitle the respondent to order the re-export

13. That takes us to the next question as to whether the goods in question are prohibited goods or not.

14. The Customs Act, 1962 defines the expression "prohibited goods" under Section 2 (33) as follows:

> "**2 Definitions.** —In this Act, unless the context otherwise requires **--**
> **(33)** "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;"

15. It may be seen from the above definition that it is only those goods which are subjected to any prohibition under the Customs Act or any other law, that are taken to be prohibited goods. It is not the case of the respondents that the goods in question are prohibited for

import under the Customs Act. The only contention of the learned Senior Standing Counsel for the Department is that plant growth regulators can be imported only if the importer is registered under the Insecticides Act, 1968. Since the petitioner is not registered, under the Insecticides Act, 1968, it is contended that the goods will fall within the definition of the expression “prohibited goods” under Section 2(33) of the Customs Act, 1962.

16. Chapter 38 in Schedule – I – Import Policy 2017 deals with “Miscellaneous Chemical Products.” The Table under Schedule – I in Chapter 38 of the Import Policy contains four columns, the first giving the Exim Code, the second column giving the description of goods, the third column indicating the policy and the fourth column indicating the policy conditions. Plant growth regulators are found under Exim Code No.3808 93 40. The policy with regard to plant growth regulators is indicated as “free” in column No.3, showing thereby that they are freely importable. But, column No.4 as against plant growth regulators reads as follows:

> “If registered and not prohibited for import under Insecticides Act 1968 and formulations thereof.”

17. From the above it is clear that the import of plant growth regulators is not prohibited absolutely. They may actually fall under the category of “restricted goods”, and the restriction is with regard to registration.

18. In fact, the Supreme Court had an occasion to distinguish between prohibited items and restricted items, in **Commissioner of**

Customs v. M/S. Atul Automations Pvt. Ltd.[1]. Paragraph No.9 of the said decision may be usefully extracted as follows:

> "**9**. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made Under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorization upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore, find no error with the conclusion of the Tribunal affirmed by the High Court that the Respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the customs authorities with fine Under Section 112(a) of the Customs Act, 1962."

19. In fact, the entry in the Table under Schedule – I of Chapter 38 of the Import Policy, 2017, relating to Exim Code 3808 93 40 dealing with plant growth regulators, makes the goods freely importable subject to registration. Therefore, the question that should be addressed is as to whether the condition regarding registration will make the goods prohibited goods.

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[1] **MANU/SC/0067/2019**

20. It is interesting to see that even goods which are prohibited for import under the Customs Act or any other law for the time being in force, will not automatically become prohibited goods within the meaning of Section 2 (33) of the Customs Act, 1962, if such goods are imported after complying with the conditions for their import. In other words, even goods which are prohibited for import will shed the character of being prohibited goods, if they are imported after complying with the conditions for such import.

21. Reliance was placed by the learned Senior Standing Counsel for the Department on the decision of the Supreme Court in **Om Prakash Bhatia v. Commissioner of Customs, Delhi**[2], in support of her contention that the non-fulfillment of conditions for import would make the goods prohibited goods. A careful look at the said decision would show that the appellant in the case before the Supreme Court was an exporter, who claimed duty drawback on a consignment which was found to be of lesser quantity than what was claimed to have been exported. It was also found by the authorities that the goods were over invoiced and there was an attempt to claim duty drawback fraudulently. Therefore, the goods were ordered to be confiscated under Section 113 (D). The question before the Supreme Court was whether they were "prohibited goods" since the export was contrary to restrictions imposed under the Act. The Supreme Court held that if the conditions are not fulfilled the goods may be branded as prohibited goods.

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[2] **2003 (155) E.L.T. 423 (S.C.)**

22. The decision in **Om Prakash Bhatia** was followed by the Supreme Court in **Commissioner of Customs, New Delhi v. Brooks International**[3]. In fact, the issue that arose in the said case was whether goods whose market value is much less than the amount of duty drawback claimed, could be confiscated for violation of the provisions of the Customs Act, 1962. The Court followed the decision in **Om Prakash Bhatia**.

23. In **Gurucharan Singh v. Directorate of Revenue Intelligence**[4], the Supreme Court was concerned with a prosecution for offences punishable under Sections 132 and 135 of the Customs Act, 1962. After analyzing the provisions of Section 2 (33), Section 11, Section 50 and Section 113 (d), the Supreme Court took note of the opinion rendered in **Om Prakash Bhatia**. The Court also noted that **Om Prakash Bhatia** was followed in **Commissioner of Central Excise v. Suresh Jhunjhunwala**[5].

24. In **Siddachalam Exports Private Limited v. Commissioner of Central Excise**[6], the Supreme Court quoted with approval the decision in **Om Prakash Bhatia** and also noted that the opinion expressed in **Om Prakash Bhatia** was reiterated in **Suresh Jhunjhunwala**. Therefore, it is clear that the decision in **Om Prakash Bhatia** has been holding the field as on date. These decisions were not taken note of in M/S A**tul Automations Pvt. Ltd.**, relied upon by the learned counsel for the petitioner. In any case, the

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[3]. (2009) 10 SCC 396
[4]. 2008 (224) ELT 497 (SC)
[5]. 2006 (203) ELT 353 (SC)
[6]. 2011 (5) SCC 114

Supreme Court considered in that case, the impact of Foreign Trade Policy framed under the Foreign Trade (Development and Regulation) Act, 1992, on the question whether the goods could be termed as "prohibited goods" or not. Therefore, let us test the case on hand even with respect to the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade Policy. We have already indicated that under Chapter 38 of Schedule I of the Foreign Trade Policy, plant growth regulators are freely importable, subject however to registration. Therefore, the requirement of registration becomes a restriction on the free import, as held in **Brooks International**.

25. Under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (for short 'Foreign Trade Act') the Central Government is entitled to pass orders making provisions for prohibiting, restricting or otherwise regulating the import or export of goods. Section 3 (3) of the Foreign Trade Act declares that once an order is passed under Section 3 (2) prohibiting, restricting or otherwise regulating the import or export of goods, the goods would be deemed to be prohibited under Section 11 of the Customs Act, 1962.

26. Under Section 11 (1) of the Foreign Trade Act, the import or export of goods except in accordance with the provisions of the Act and the Foreign Trade Policy, is prohibited. If goods are imported in contravention, they are liable for confiscation under Section 11 (8) of the Act. But, the confiscated goods can be released under Section 11 (9) of the Foreign Trade Act, upon payment of redemption charges.

This Section 11 (9) of the Foreign Trade Act is similar to Section 125 (1) of the Customs Act, 1962.

27. In **Brooks International**, the Supreme Court held that "restriction" is one type of prohibition. If restriction is one type of prohibition, then the goods become prohibited goods. Therefore, we cannot find fault with the respondents in treating the requirement of registration as a restriction on the free import and consequently treating the goods, imported without registration, as prohibited goods.

28. Therefore, the Writ Petition is liable to be dismissed and accordingly it is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

As a sequel, Miscellaneous Petitions, if any, pending in the writ petition shall stand closed.

V. RAMASUBRAMANIAN, J

ABHINAND KUMAR SHAVILI, J

April 18, 2019
KTL/Mgr