



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.11441 of 2020
and WMP Nos.13955 and 13956 of 2020

1. Czarnikow Group Ltd
A company incorporated under the laws of
United kingdom paternoster Hose 65 st pauls
churchyard London EC 4 M 8AB united kingdom
represented by its power of Attorney holder
Yerramallu Venkateshwar Naresh Kumar

.... Petitioner

Vs.

1. The Additional Director General of Foreign Trade
The Directorate General of Foreign Trade
4th Floor Shastri Bhavan Annexe
26 Haddows Road Chennai
Tamil Nadu 6
2. The Commissioner of Customs
5 Williams Rd Melapudur Cantonment
Tiruchirappalli Tamil Nadu 620 001
3. M/s. Thiru Arooran Sugars Limited
112 Nungambakkam High Road Eldorado
5th Floor Nungambakkam Chennai Tamil Nadu
34 Represented by its Resolution Professional
4. M/s. Shri Ambika Sugars Ltd
Nungambakkam High Road Eldorado 5th Floor
Nungambakkam Chennai Tamil Nadu 600 034
Represented by its Resolution professional

.... Respondents

Prayer: Writ Petition filed under Article 226 of the
Constitution of India praying to issue Writ of Mandamus
directing respondent No. 1 and respondent No. 2 to consider the
representation of the petitioner dated 4.2.2020 and to permit
the re-export of sugar amounting to 11 899.21 MT currently in



KLM (Kollumangudi) Kottur and pennadum warehouses of Respondent Nos. 3 and 4 or whichever warehouse this Honble Court has permitted the sugar to be relocated to supplied under the Contract dated 26.10.2016.

WEB COPY

For Petitioner : Mr.J.Sivanandaraj
Mr.S.Kaushik Rramaswamy
and Ms.Ridhhima Shhama

For Respondents : Mr.Rabu Manohar,
SCGPC - R1
Mr.A.P.Srinivas
Senior Standing Counsel - R2
Mr.B.Dhanaraj - R3
Mr.Ajay K.Jain
for Mr.Raghav Rajeev Menon - R4

O R D E R

The petitioner is a company incorporated under the laws of United Kingdom and engaged in trading in sugar and other services.

2. The petitioner entered into a contract with R3, i.e., Thiru Arooran Sugars Limited on 20.10.2016 for supply of 27,169.50 Metric Tonnes (MT) of standard VHP cane raw sugar. Since R3 was unable to remit the entire consideration upfront or even open Letters of Credit (LC), a collateral tripartite agreement was entered into by and between the petitioner, Dr.Amin Controllers Pvt. Ltd., agent of the petitioner and Cooperative Rabobank U.A., the financier on 20.10.2016 followed by a subsequent contract on 26.10.2016. In terms of the contracts the sugar was to be stored in the warehouses of Thiru Arooran Sugars/R3 and Shri Ambika Sugars Ltd./R4.

3. Admittedly, payment has been effected by R3 for approximately 12,727.79 Mts of sugar, which has been released and handed over to R3. The remainder of approximately 14,671.698 MT of sugar was imported by R4 in 2017 under an Advance Authorisation Scheme which obliterated the necessity for payment of customs duty. From out of the same, 2902 MT was released to R3 for refining. The latter component does not form part of the subject matter of this Writ Petition, as litigation in respect of the same is said to be pending before a Division Bench of this Court. What concerns this Court is the request for release and re-export of sugar of an extent of approx. 11,899.21 MT (commodity/sugar in question).

4. Subsequent to import and the warehousing of the consignment in their warehouses, both R3 and R4 are before the



National Company Law Tribunal (NCLT) at the instance of corporate creditors, where Corporate Insolvency Resolution Process is on-going. Both R3 and R4 are represented before me by the Liquidator and Insolvency Resolution Professional respectively. One of the issues that had come up for discussion was the question of who would hold title to the goods, whether the petitioner, or R3 and R4, the importers.

5. Learned counsel for the petitioner has referred to the terms of the agreements inter se the parties as well as the terms of agreement dated 20.10.2016 entered into by the petitioner with Dr.Amin Controllers Private Limited, the agent of R3 and R4, to buttress its case that the title to the commodity in question stands in its name only. In any event, this question does not call for much deliberation as both R3 and R4 have executed memos, both dated 08.07.2021 to the effect that they have no objection to the release of the goods from their respective warehouses.

6. At this juncture, I may note that memos were filed even earlier by both R3 and R4 expressing their no-objection to the release, though stipulating certain conditions and disclaimers. The parties were directed to sort out the terms of release inter se and the memos filed subsequent to the negotiation, read as follows:

Memo by R3:

2. In compliance with the Order of the Hon'ble Court dated 07.07.2021 made in W.P.No.11441 of 2020, the Liquidator is filing this memo according his No Objection for removal of 8453 MT Sugar by the petitioner, stored in Kollumangudi Godown, of the Company in Liquidation, at the risk and cost of Petitioner.

Memo filed by R4:

2. In this regard, this Respondent submits that he has no-objection to the afore-mentioned prayer sought by the Petitioner in the present writ petition with respect to the re-export of sugar amounting to 3445.26 MT (out of 11,899.21 MT) belonging to M/s.Thiru Arooran Sugars Limited located in the warehouses of M/s.Shree Ambika Sugars Limited at Pennadum and Kottur subject to actual determination/quantification by the authorized representative on behalf of the 3rd respondent i.e., the Liquidator.'



7. In the light of there being no objection on the part of R3 and R4 to the release sought, the sugar in question is liable to be released forthwith.

8. What remains is the question of re-export. The petitioner has filed an application before the Customs authorities (R1 and R2) as early as on 04.02.2020 seeking permission to re-export the goods, upon their release, yet pending. It is the petitioner's case that, being the owner of the goods, it is entitled to re-export, though on payment of necessary re-export charges.

9. Learned Senior Standing counsel appearing for the Customs Department would argue that such right to re-export is not automatic or unconditional as there are liabilities that attach to re-export, that are to be ascertained and discharged prior to the re-export being permitted. He would state that the Advance Authorisation Licence pertaining to the sugar in question has been issued in the name of R3 and thus the conditions that attach to that licence will have to be satisfied by the petitioner in order to entitle it to re-export.

10. Both learned counsel in this regard have referred to the decision in the case of Union of India V. Sampat Raj Dugar ((1991) 56 ELT 739 (Bombay High Court) and ((1992) 2 Supreme Court Cases 66)) (Supreme Court).

11. Before the Bombay High Court, the Union had filed an appeal challenging an order of the learned single Judge confirming the order of the Collector confiscating certain consignments imported upon arrival. The consignments in that case were abandoned by the importer, whereas in this case, the importers have eschewed the same, admitting that they hold no title to the consignments and also for the reason that they are themselves before the NCLT undergoing Corporate Insolvency Resolution process.

12. The conclusions of the Bombay High Court at paragraph 11 are to the following effect:

11. We have gone through the impugned Order. We concur with the findings and conclusion of the learned Judges when it is held that the title in the said goods had not passed to the 2nd respondent. In view of the fact that the title in the said goods had not passed to the 2nd respondent, the question of confiscation of the said goods which were exported by the 1st respondent, a foreign party did not arise. The title in the said goods had remained with the foreign exporter and the foreign exporter was entitled to have the said goods



WEB COPY

re-exported on payment of requisite duty for exportation thereof. The importation of the said goods was made against Advance Licence which was validly subsisting at the time when the said goods arrived at the Port of Bombay. Merely because the said licence was subsequently cancelled for lapses on the part of the 2nd respondent, it cannot be said that the importation of the said four consignments was without a valid and subsisting licence.

In the circumstances, provisions of Section 111 (d) of the said Act under which the order was passed by the 2nd appellant confiscating the said goods were not attracted and the said order was rightly quashed by the learned Judge in the said writ petition. The re-export of the goods covered by the said four consignments has to be permitted subject, however, to payment of requisite export duty payable in respect thereof. The 1st respondent is entitled to detention certificate in respect of the goods covered by the said four consignments for the period the said goods were wrongfully detained rendering the 1st respondent liable to pay demurrage to Bombay Port Trust.

13. While dismissing the appeal filed by the Union of India and confirming the order of the learned single Judge, the Bench permits re-export subject to payment by the first respondent of requisite export duty. Consequently, the appellant, being the Customs Department was directed to issue a detention certificate in respect of the goods covered by the consignments in question. The first respondent in that case, the importer, was held liable to pay demurrage to the Bombay Port Trust.

14. The Union of India carried the matter in appeal before the Supreme Court and at paragraph 19, the issues that arose have been decided as follows:

19. We may first consider the question of title to the said goods. If we keep aside the provisions of law relied upon by the appellants viz., definition of 'importer' in Section 2(26) of the Customs Act, Clause 5(3) (ii) of the Imports (Control) Order as well as para 26 (iv) of the Import-Export Policy, the position is quite simple. Since the second respondent did not pay for and received the documents of the title she did not become the owner of the said goods, which means that the first respondent continued to be the owner. How do the aforesaid provisions make any difference to this position ? The definition of



WEB COPY

'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'. The first respondent does not claim to be the importer. The provision upon which strong reliance is placed by the appellants in this behalf is the one contained in Clause 5(3) (ii) of the Imports (Control) Order. Sub-clause (I) of Clause 5 specifies conditions which can be attached to an import licence at the time of its grant. Sub-clause (2) says that a licence granted under the Order shall be subject to the conditions specified in Fifth Schedule to the Order. Sub-clause (3) sets out three other conditions mentioned as (i), (ii), and (iii) which shall attach to every import licence granted under the Order. First of these conditions says that the import licence shall be non-transferable except under the written permission of the Licensing Authority or other Competent Authority. Condition (ii)-which is provision relevant herein-says that the goods for the import of which a licence is granted "shall be the property of the licensee at the time of import and thereafter upto the time of clearance through customs." This condition, however, does not apply to STC, MMTC and other similar institutions entrusted with canalisation of imports. It also does not apply to certain eligible export houses, trading houses and public sector agencies mentioned in the second proviso. Condition (iii) says that the goods for which the import licence is granted shall be new goods unless otherwise mentioned in the licence. Now coming back to Condition (ii), the question is what does it mean and what is the object underlying it when it says that the imported goods shall be the property of the licensee from the time of import till they are cleared through customs. It is necessary to notice the language of the sub-clause. It says "it shall be deemed to be a condition of every such licence that-the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through Customs." The Rule-making authority (Central Government), which issued the order, must be presumed to be aware of the fact that in many cases, the importer is not the owner of the goods imported at the time of their import and that he becomes their owner only at a later stage, i.e., when he pays for and obtains the relevant documents. Why did not Central Govt. yet declare that such goods shall be the property of the



WEB COPY

licensee from the time of import ? For appreciating this, one has to ascertain the object underlying the said provision. The interpretation to be placed upon the provision should be consistent with and should be designed to achieve such object. In this context, it should also be remembered that expressions like 'Property of' and 'Vest' do not have a single universal meaning. Their content varies with the context. The aphorism that a word is not a crystal and that it takes its colour from the context is no less true in the case of these words. In our opinion the object underlying condition (ii) in Clause 5(3) is to ensure a proper implementation of the Imports (control) Order and the Imports and Exports (Control) Act, 1947. The idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through Custom. The exporter is outside the country, while the importer, i.e. the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Import and Exports (Control) Act. The fiction however cannot be carried beyond that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, i.e. in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to



such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such situation.

WEB COPY

15. On the question of title, the Supreme Court holds unambiguously that the definition of the term 'importer' and other statutory definitions would hardly be relevant to decide the issue. They conclude by saying that, in a situation where the goods imported into India by an exporter outside the Country are unavailable to him for various reasons including abandoning of the consignment by the Indian importer, or as in the present case, the importers not being in a position to take possession and claim ownership of the goods, it would place the foreign exporter in an unenviable position. Having lost possession of the goods, he would also not be in a position to enforce payment for the same, which would be detrimental to international trade.

16. Statutory provisions and regulations cannot, the Bench holds, be interpreted in a manner so as to deprive the exporter of his title to the goods imported. The above conclusion of the Supreme Court would apply on all fours to the present matter, quite apart from the position that the importers have themselves expressed no-objection to the release of the goods to the petitioner. In that case, the Supreme Court holds that the importer would have to be heard by the Customs Department before any order is passed dealing with the goods in any way, including re-export. This question does not arise in the present case in view of their no-objection to the release.

17. On the question of confiscation of the goods, such a question did not arise in that case, in the light of a factual finding rendered to the effect that the licences issued were current and valid. The counter filed by the Customs Department in this case does not deal specifically with the validity of the licence. It only states that the licence stands in the name of the importer and thus the conditions that attach to the licence would have to be satisfied by any party wishing to deal with the goods.

18. In my view this is a matter to be examined by the authorities, bearing in mind the position that, all that is sought to be done by the foreign exporter/petitioner, is re-export of the goods. Conditions as may be specific to the importer, such as domestic manufacture, would, evidently, not be applicable to the petitioner. Re-export, once permitted, will be upon payment of applicable charges and duties, and in accordance with law.



19. Let a decision be taken in line with the observations made in this order within a period of four (4) weeks from today bearing in mind the position that the goods in question are perishable and stood in the warehouses, suffering the vagaries of nature and inclement weather, since 2017.

20. This Writ Petition is disposed as above. No costs. Connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS III)

***Corrected order to be issued as per
letter dated 13/09/2021
and made herein
Sub Assistant Registrar(CO-II)
13.09.2021**

//True Copy//

Sub Assistant Registrar

sl

To

1. The Additional Director General of Foreign Trade
The Directorate General of Foreign Trade
4th Floor Shastri Bhavan Annexe
26 Haddows Road Chennai
Tamil Nadu 6

2. The Commissioner of Customs
5 Williams Rd Melapudur Cantonment
Tiruchirappalli Tamil Nadu 620 001

**To be
Substituted to
the order
already
despatched on
25/08/2021**

+1CC to Mr.Adeeshanto, Advocate, Sr.No.32958
+1CC to Mr.**B.Dhanaraj**, Advocate, Sr.No.32448
+1CC to Mr.B.Rabu Manohar, Advocate, Sr.No.32445
+1CC to Mr.A.P.Srinivas, Senior Standing Counsel, Sr.No.32305

W.P. No.11441 of 2020
and WMP Nos.13955 and 13956 of 2020

GPL (CO)
K.RK. (24.08.2021)
CB(15/09/2021)