IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

215 **CWP-12251-2021(O&M)**
Decided on : 13.08.2021

M/s Modern Insecticides Limited ....Petitioner

VS

Commissioner of Customs and others ....Respondents

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE VIKAS BAHL

Present :- Mr. Sanjay Kaushal, Senior Advocate with
Mr. Saurabh Kapoor, Advocate
for the petitioner.

Mr. Tajender Joshi, Advocate
for the respondents.

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AJAY TEWARI, J.

This petition has been filed against the alleged act of omission by the Customs Department in not giving effect to the order passed by the Appellate Authority whereby it has been directed that the goods be released provisionally for re-export, subject to furnishing a bond equal to the value of the goods imported and after representative samples of such items, as deemed fit by the investigating agency are drawn for further investigation/examination. The petitioner prays for the provisional release for re-export of the goods in question, in accordance with the order passed by the Appellate Authority.

Brief facts of the case are that the petitioner had exported what it termed to be 'Sulphur Formulation' to a Sister Concern in Dubai; however by the time they reached there they could not be sold because there was no demand at that time and consequently, those goods were sent back to the petitioner. On checking those goods it was found that some of the goods which were returned were actually different from the ones that had been exported and consequently, the goods were detained. The petitioner moved an application for provisional release of goods for re-export but it was declined and as mentioned above in appeal, the Appellate Authority allowed the plea of the petitioner in the terms mentioned above. The grievance is that despite that order, goods are not being released.

In response, the stand of the respondents is that it is suspected that by receiving goods different from those which had been exported, the petitioner had mis-declared the returned goods and had consequently tried to evade the customs duty and it was asserted that the actual value of the goods which were returned was about eight times the value of those goods which had been sent abroad. It was further asserted that the respondents were considering the action of filing an appeal against the order of the Appellate Authority, the limitation of which is still available and further that all the samples drawn had not yet been tested and that the Insecticides Board had also initiated investigation into the matter. It was further asserted that in law, the penalty of up to five times (on the real value of the goods) could be imposed for this act on the petitioner and criminal proceedings could and have been actually initiated against the petitioner and it was consequently prayed that provisional release even for the purpose of re-export should not be permitted.

Learned Senior counsel appearing for the petitioner has argued that the goods were detained almost eight months ago and till date even no notice had been issued to the petitioner. That, however, may not be of much avail because further time for issuing notice is still available to the respondent. However, the second argument of the learned Senior counsel for the petitioner is that the petitioner is willing to give a bond for what it terms to be the exaggerated value of the goods which the respondents are trying to put on them, but also to the extent of the entire penalty which as per the respondents can be leviable viz., 500% value of the goods. Further, the prosecution of the petitioner is already underway and if the petitioner is permitted to secure the interest of the revenue and face prosecution the balance of convenience is in favour of the petitioner because if tomorrow it is found that the petitioner is actually not guilty, it would be saddled with a disproportionate prejudice.

Learned Senior counsel further submitted that petitioner has already deposited Rs.1 crore (though under pressure) and it has been prayed that the goods be released to the petitioner and he be permitted to re-export the same.

Learned counsel for the respondents has argued that this is a *modus operandi* whereby goods are sent to a Sister concern and are received back after being substituted. He has further stated that even for the purpose of re-export the petitioner has again given the same nomenclature viz. 'Sulphur Formulation' and if now the respondents permit the petitioner to re-dispatch the goods under that nomenclature it would mean that the respondents have accepted the same.

Learned Senior counsel for the petitioner has very fairly stated that he is ready to make a statement that the nomenclature used for re-dispatching the goods would not bind the department and in case it is found that the goods are actually different, then the mere fact that the petitioner has been allowed to re-dispatch them under the same nomenclature will not bind the respondents. The learned Senior Counsel has brought to the notice of this Court, an order dated 15.01.2021 (P-37) vide which the Commissioner of Customs had in another matter permitted re-export of the goods after ordering confiscation on the grounds of suppression, misdeclaration, misclassification and import of prohibited goods.

On a consideration of the entire aspect, we find that it has been specifically noticed by the learned Commissioner (Appeals) in the order dated 09.06.2021 (Annexure P-30) that on an earlier occasion also, an identical issue had arisen and the goods of the petitioner were permitted to be cleared *vide* release order dated 20.06.2018 and further that the adjudicating authority *vide* the said order while granting provisional release of the goods had specifically held that no duty is leviable on the goods ordered to be cleared to an export oriented unit and that the said release order had been accepted by the Department. It has further been noticed that the goods in the instant case are in powder form and have limited shelf life and shall get deteriorated if exposed to extreme weather conditions and lose their utility as well as monetary value. Reliance in the order dated 9.06.2021 has also been placed on the judgment of the Supreme Court in the matter of ***CIVIL APPEAL NO(s). 2217- 2218 of 2021*** titled as ***Union of India and others Vs. Raj Grow Impex LLP and others,*** in which, even after holding that the goods were liable to absolute confiscation, an option was given to the Respondent therein to re-export the goods.

In the present case, it has come on record that the samples with respect to the goods in question have already been taken by the Authorities. Moreover, the petitioner is a 100% export-oriented unit and thus, any difference in the declaration of the value of the goods to be exported by the petitioner would not make much difference, as the petitioner would be entitled to seek 100% refund of the duty paid. However, while balancing the rights of the petitioner with the interest of the revenue, we dispose of the present writ petition in the following terms: -

(i) The petitioner is directed to furnish a bond amounting to Rs. 15 crores.

(ii) That within seven days of the petitioner submitting the said bond and complying with the other formalities as per law, the respondents are directed to provisionally release the goods in question for re-export.

(iii) The petitioner be permitted to re-export the goods by using the nomenclature “Sulphur Formulation” and it is observed that using of the said nomenclature would not bind the Department and would not entitle the petitioner to raise a plea of estoppel in the pending proceedings or in any proceedings to be initiated by the respondents.

Any observation made in the present order would not be taken as an expression on the merits of the main issue which is yet to be adjudicated and the observations made are only for the purpose of provisional release of the goods for re-export. Liberty is granted to the petitioner to agitate his prayer for issuance of detention memos, in accordance with law, as in the present writ petition since only the plea with respect to provisional release for the purpose of re-export has been considered.

Since the writ petition has been disposed of, the pending Civil Miscellaneous Application, if any, shall also stand disposed of.

(AJAY TEWARI)
JUDGE

(VIKAS BAHL)
JUDGE

August 13, 2021.
anuradha

Whether speaking/reasoned	-	Yes/No
Whether reportable	-	Yes/No