BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.07.2022

CORAM

THE HONOURABLE MR. JUSTICE M.NIRMAL KUMAR

W.P.(MD).No.12888 of 2022
and
W.M.P.(MD).No.9146 of 2022

M/s.Sri Shunmuga Traders,
Represented by its Partner,
T.Manoharan. ... Petitioner

Vs.

1.The Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin – 628 004.

2.The Joint/Additional Commissioner of Customs (Imports),
Custom House,
New Harbour Estate,
Tuticorin – 628 004.

3.The Deputy Director,
Directorate of Revenue Intelligence,
No.22/14, Celin Garden,
Roche Colony,
South Beach Road,
Tuticorin – 628 001. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the respondents herein to release the goods viz., 1400 Bags viz., 84 MTs., of Unflavoured

Supari (Betel Nut Product) of Myanmar Origin Unflavoured Supari imported from the Republic of the Union of Myanmar imported vide Bill of Entry No.7200431, dated 23.01.2022, classifiable under CTH 21069030 and which was also assessed and totally valued at USD 126000/- (C&F) for 84 MTs and further direct the respondents to issue Waiver Certificate for Detention and Demurrage charges under Regulation of Handling of Cargo in Customs Area Regulations, 2009.

For Petitioner	:	Mr.A.K.Jayaraj
For Respondents	:	Mr.R.Aravindan, Senior Standing Counsel.

ORDER

The petitioner was registered in the trade of import of Betel Nuts and they have been allotted with Import-Export Code issued by the office of the JDGFT. The petitioner has also registered under GST and also assessed to Income Tax. The petitioner had also registered with the Food Safety and Standards Authority of India.

2. The learned counsel for the petitioner submits that they have imported 84 Metric Tons, 1400 bags of Betel Nut product known as Supari (Unflavoured Supari) from Myanmar vide Invoice No.RT/009/2021, dated 21.12.2021, from M/s.Royal Tharcho International Company limited, Myanmar. The petitioner

had declared the value of the goods at USD 1,500.00 per Metric Ton and totally USD 126000/- (C&F) for 84 Metric Tons. The above goods were supplied by M/s.Royal Tharcho International Company Limited, Myanmar. The petitioner had filed Bill of Entry No.7200431, dated 23.01.2022, for clearance of the above said goods through Tuticorin Port. They declared that the above goods are classifiable under 2106 9030. The goods are from Myanmar Origin.

3. The petitioner submitted all the necessary documents such as Commercial Invoice, Packing List, Bill of Lading, Certificate of Origin, Combined Declaration and Certificate issued in Myanmar under Duty Free Tariff Preference Scheme by India for Least Developed Countries vide Certificate Reference No.eYGNDFTP-00111/2022, Fumigation Certificate and Phytosanitary Certificate issued by the Republic of the Union of Myanmar, Department of Agriculture, to the Customs.

4. The learned counsel for the petitioner submitted that the petitioner has filed Bill of Entry for Home Consumption and sought for clearance of the goods. They also claim the release of the goods under CTH 2106 9030 at Nil rate of duty and on payment of IGST at 18% and also furnished Least

Developed Countries Certificate issued by Ministry of Commerce. They had also enclosed the Insurance Certificate and Certificate of Origin issued by the Republic of Union of Myanmar, Federation of Chambers of Commerce and Industry (UMFCCI), confirming that the goods are of Myanmar origin and also Least Developed Countries Certificate.

5. The learned counsel for the petitioner submits that, after filing Bill of Entry, assessment was done on 24.01.2022 and the goods were examined on 07.02.2022. Thereafter, the samples were taken from the containers and sent to FSSAI for giving report. The FSSAI report confirmed that the goods imported were fit for human consumption and issued No Objection for release of the goods. The samples were also sent for testing to the Customs House Laboratory, Tuticorin and vide lab report, dated 18.02.2022, it confirmed that the goods imported are Betel Nut Supari only and further, it had also recorded that it is free from lime Katha (Catechu), Tobacco, Cardamom, Copra and Menthol. The classification is yet to be approved and hence, the goods are being detained from 23.01.2022.

6. After the report, if the Customs Authority felt that the goods have to be detained under Section 110-A of the Customs Act, it could have been given to

the petitioner allowing them to clear the goods on payment of such security. In this case, the FSSAI report as well as the Customs Lab report confirmed that the goods are Betel Nut Supari and fit for human consumption and it is not a prohibited or a banned item. In view of the same, the further detention of the goods is improper.

7. The learned counsel for the petitioner submits that the Betel Nut would fall under Customs Tariff Heading 2106 and Sub-Heading 21069030. He further submitted that in identical situations, the goods have been released in all major ports and ICDs, namely, Bangalore, Mundra, Nhavaseva and other places. He further submitted that even in the month of February 2022, many containers were released in Chennai on the same issue with regard to Betel Nut. The petitioner's goods were not released from 18.02.2022, which had caused great loss not only to the petitioner to pay demurrage charges but also to other sources from whom he had received money for trade and the interest rate is also mounting.

8. The learned counsel for the petitioner submitted that already CBEC, Ministry of Finance has also issued Circular in Circular No.22/2004-Customs, dated 03.03.2004, directing the authorities that in the matter of classification

disputes, the consignment should be allowed to be cleared on provisional basis as a matter of right, unless the goods intended for clearance is totally prohibited or banned under any law for the time being in force or where prosecution is contemplated. In this case, the goods are Betel Nuts and there is no such prohibition or contemplation.

9. The learned counsel for the petitioner further submitted that the issue had started due to the letter issued by the DRI, dated 27.01.2022, wherein, eight of the traders who had imported Betel Nuts awaiting clearance through Chennai Port were given a direction as follows:

> *"2. In this regard, the said import consignments have been kept on hold/detained for further examination keeping in view of the import policy provisions with respect to import of betel nuts/areca nuts:*
>
> *(i) The import of Areca Nuts over and above CIF Rs.251 per Kg is free and import below CIF Rs.251 per Kg is prohibited in terms of DGFT Notification No.20/2015-2020 dt. 25.07.2018.*
>
> *(ii) Supplementary note 4 to Chapter 21 of the Customs Tariff Act, 1975 states as under:*
>
>> *"Betel Nut product known as supari means any preparations containing betel nuts, but not containing any one or more of the following ingredients, namely: lime, katha and tobacco whether or not containing any*

other ingredients, such as cardamom, copra or menthol"

In view of the above, it is clear that only the "Preparations of Betel Nuts" fall under Chapter 21 and not the whole nut.

(iii) Chapter Note 3 to Chapter 8 stipulates that "Dried fruit or dried nuts of this Chapter may be partially rehydrated or treated for the following purposes-

(a) For additional preservation or stabalisation (or example, by moderated heat, treatment, sulphuring, the addition of sorbic acid or potassium sorbate).

(b) To improve or maintain their appearance (for example, by the addition of vegetable oil or small quantities of glucose syrup). Provided that they retain the character of dried fruit or dried nuts."

3. In view of the above, Areca Nut whole, even if partially rehydrated or treated by way of moderate heat for additional preservation or stabilization, falls under CTH 08028010. Thus, Processed Boiled Supari/Areca Nut is classifiable under CTH 08028020, and not under 21069030."

10. That was the reason as to why the betel nuts were not classified and cleared. Thereafter, on 08.02.2022, the DRI, Delhi Zonal Unit had instructed the Chennai DRI to hand over the files to the concerned Commissionerate for necessary action. Thereafter, the goods have been released as regards to the

eight importers on provisional assessment. Thereafter, the subsequent consignments not cleared citing that it is mis-declaration and wrong classification.

11. He further submitted that the Principal Bench of this Court in batch of cases decided in W.P.No.11942 of 2022 and batch etc., W.P.Nos.16260 and 16267 of 2022 as well as in W.P.Nos.16263 and 16266 of 2022, have consistently held that,

> *" Upon a comparison of the language of Chapter-8 and Chapter-21, I note that Chapter-21 is a chapter dealing with residuary food products and includes Supari. In my understanding, 'Supari', refers to coarsely cut pieces of areca nut that are edible/ingestible. The product featured in the picture extracted above, comprises split areca nuts that have not been softened for consumption. It is thus, prima facie, moot as to whether the above product could be categorized/utilized/understood to be 'supari'."*

12. The learned counsel for the petitioner further submitted that in one of the cases pertaining to M/s.Unik Traders for a subsequent clearance, the Commissioner of Customs (Appeals-II), Chennai had passed the following order:

"7. From the above discussions, I find that the adjudicating authority has denied the re-testing of the impugned goods to avoid delay in order to comply the Hon'ble High Court of Madras direction. However, in the present circumstances where the FSSAI, Mumbai test report is in contradiction to the CRCL Lab and the request made by the appellant in view of grounds of appeal cited above I find it is necessary to re-test the impugned goods in the jurisdictional FSSAI. Therefore, I remand the case to the adjudicating authority for retesting of the impugned goods in the jurisdictional FSSAI lab. Since, the principles of natural justice has not been followed, the adjudicating authority may re-examine the matter afresh and pass appropriate orders as deemed fit. As the cargo is perishable in nature and since the cargo is already provisionally assessed under Sec 18 of Customs Act, 1962 by the proper officer the cargo may be released immediately subject to the outcome of FSSAI report. To protect the interest of revenue, the adjudicating authority is directed to decide the case within 60 days after following the principles of natural justice.

Ordered accordingly."

13. Thereafter, the Commissioner of Customs had passed an order releasing the detained goods and had given permission to clear the goods subject to furnishing of provisional bond and bank guarantee at the rate of 50%

of differential duty considering the LDC benefit is given and the same benefit may be extended to the petitioner and the petitioner shall comply with the same.

14. He further relied on the following citations to buttress his submissions:

The order of this Court passed in ***W.A.(MD).Nos.398 to 400 of 2012*** dated 24.05.2012 and ***W.P.(MD).No.10457 of 2013*** dated 03.07.2013, the judgments reported in ***2011 (267) E.L.T. 483 (Del.) [Navshakthi Industries Private Limited Vs. Commissioner of Cus., ICD, TKD, New Delhi]*** and ***2012 (281) E.L.T. 396 (Del.) [Bhaiya Fibres Limited Vs. Additional Director General of Revenue Intelligence]***, the order passed by this Court reported in ***2013 (287) E.L.T. 41 (Mad.) [Commissioner of Customs, Tuticorin Vs. Empire Exports]***, the order passed by the Delhi High Court in ***W.P.(C) 10538 of 2015*** dated 06.11.2015, the judgment reported in ***2013 (297) E.L.T. 4 (P & H) [Kuber Casting (P) Limited Vs. Union of India]***, the order passed by this Court in ***W.A.(MD).No.758 of 2014*** dated 20.06.2014, the orders passed by the Principal Seat of this Court reported in, ***2016 (340) E.L.T. 140 (Mad.) [Green Line Vs. Commissioner of Customs, Chennai-IV]***, ***2015 (316) E.L.T. 199 (Mad.) [City Office Equipments Vs. Commissioner of Customs (Seaport-Import),***

Chennai-I] and ***2020 (374) E.L.T. 507 (Mad.) [Black Gold Technologies Vs. Union of India]***.

15. Mr.R.Aravindan, learned Senior Standing Counsel appearing for the respondents had filed a counter on behalf of the third respondent, which is adopted by the respondents 1 and 2. The primary consideration of the respondents is that the classification dispute cannot be decided by way of a Writ. It is an exclusive domain of the authority to arrive at the final conclusion on his assessment. The petitioner has given a mis-declaration and is insisting on the same for getting benefits. The invoice value has been over valued to avail the benefits of the scheme. Pending classification, the release of goods cannot be made. Further under Section 110-A of the Customs Act, the quantum of security is at the discretion of the authority.

16. He submitted that the Hon'ble Supreme Court in the case of ***Raj Grow Impex LLP*** reported in ***2021 (377) E.L.T. 145 (S.C.)***, had held that when a statutory authority is invested with discretion, the same deserves to be left for exercise by that authority. He further placed reliance in the case of ***S.T. Enterprises Vs. Commissioner of Customs (Chennai) [2021 (378) E.L.T. 514]***, affirmed by the Hon'ble Supreme Court ***[2021 (378) E.L.T. A142]*** with

regard to “betel nuts whole” merits classification under Chapter 8 specifically under Chapter 0802 80 10 as classified by the department and on ***Crane Betel Nut Powder Works Vs. CCE, Tirupati, [2007 (210) E.L.T. 171]***, for the proposition, crushing betel nuts into smaller pieces and sweetening the same with essential/non-essential oils, menthols, sweetening agents, etc., did not result in manufacture of a new and distinct product.

17. He has also stated his objections in the counter-affidavit as follows:

“25. With reference to Para 18h, 18j, 18k, 18l and 18v of the petition, the following are submitted:

a. During examination of the goods, it was found that the labels found on the bags had the particulars such as packing date and best before date and best before date was 20.12.2023 for the goods of Bill of Entry No.7200431 dated 23.01.2022, and best before date was 18.01.2024 for the goods of Bill of Entry 7556557 dated 18.02.2022, which indicated that the seized goods had a residuary life time of more than one and a half years as on date. Moreover, as the goods have already been destuffed from the containers and safely stored in bonded warehouses the claim of the petitioner that the impugned goods are perishable and also gets funguses and damaged due to climatic conditions and also by the high humidity inside the container is contrary to truth. The impugned goods have been seized as the same were found to be mis-declared and imported in violation of the DGFT Notification

No.20/2015-2020 dated 25.07.2018. Due procedure has been followed during the seizure of the impugned goods. Hence, the petitioner's claim that the detention of the consignment was arbitrary, illegal and bad in law, is not correct.

b. Government of India, in exercise of powers conferred upon it under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, vide its Directorate General of Foreign Trade (DGFT) Notification No.20/2015-2020 dated 25.07.2018, amended the import policy of 'Areca Nut' under the tariff item 0802 80, and had prohibited the import of Areca Nuts where the Cost, Insurance, and Freight (CIF) value is less that Rs.251/- per kg, and had explicitly stated that "Import of Areca Nut over and above CIF Rs.251/ per kilogram is free and import below CIF Rs.251/ is prohibited". The CIF value of the imported goods, in the instant case, is approximately Rs.114/- per kg, which is less than Rs.251/- per kg, and hence the same appears to be prohibited for import. Therefore, in view of the abovesaid notification of DGFT, it appears that the Petitioner herein had intentionally mis-declared the imported goods as "BETEL NUT PRODUCT KNOWN AS SUPARI (UNFLAVOURED SUPARI)", and had classified the same under CTH 2106 90 30, instead of rightly classifying under tariff item 0802 8020, in order to evade / circumvent the prohibition imposed by the Government of India on the import of Areca Nut below a specific value.

c. With respect to the prayer of the petitioner for the provisional release of the subject seized goods, it is submitted that the subject consignment has been seized under Section 110 of the

Customs Act 1962. The manner of dealing with seized goods is enshrined in Section 110A of the Customs Act. Section 110A permits provisional release of the seized goods pending adjudication. However, CBIC, vide Circular No.35/2017-Cus, dated 16.08.2017 issued guidelines to the Adjudicating Authorities for dealing with provisional release of the seized goods under Section 110A of the Customs Act 1962. The said relevant para of the said Circular No.35/2017 is reproduced below:

> *" The following guidelines are being issued for guidance of the adjudicating authorities in order to ensure uniformity and to streamline the divergent procedures being followed for grant of provisional release of imported goods which are seized under Section 110 of the Customs Act, 1962. Section 110A of the Customs Act, 1962 states that "Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.*
>
> *2. While provisional release of seized imported goods 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 fulfil the statutory compliance requirements / obligations in terms of any Act, Rule, Regulation or any other law for the time being in forece;

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."

The para 2 of the aforementioned Circular therein directs the Adjudicating Authority, with respect to the goods which are 'prohibited goods', that prior to adjudication the such goods shall not be provisionally released. In the instant case, the seized goods under the subject consignment are prohibited goods in terms of DGFT Notification No.20/ 2015-2020 dated 25.07.2018 and therefore, provisional release of the seized goods can be decided upon only after the completion of the Adjudication proceedings under Section 122 of the Customs Act, 1962, in terms of Board Circular No.35/2017-Cus."

18. Thus, on considering the submissions made by the learned counsels and on perusing all the materials, following plethora judgments referred, it is the consistent view of this Court that in case of provisional assessment, provisional release is permissible, in fine the direction given in the aforesaid batch of Writ Petitions is extended to the present matter as well. Hence, this Court permits the petitioner to make an application for provisional release under Section 110-A, on such application, when received, shall be disposed of by the Adjudicating Authority, after hearing the petitioner and simultaneous with a *prima facie* determination of the classification of the commodity, within a period of two (2) weeks from the date of receipt of the application. The Commissioner of Customs (Imports) is hereby directed to release the cargo covered under Bill of Entry No.7200431, dated 23.01.2022, provisionally subject to furnishing of PD bond for full value of the goods and furnishing of bank guarantee at 50% of the differential duty considering, Duty Free Tariff Preference Scheme for Least Developed Countries (LDC) benefit. The Department shall continue their adjudication process and conclude the same without delay. The entire exercise shall be completed within a period of three (3) weeks from the date of receipt of a copy of this order.

19. Accordingly, this Writ Petition is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

07.07.2022

Index : Yes / No
Internet : Yes/ No
Lm

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M.NIRMAL KUMAR, J.

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