IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Customs Appeal (CAPL) No.01 of 2023

The Commissioner of Customs, Nagpur,
having office at Customs Commissionerate,
GST Bhawan, Telangkhedi Road,
Civil Lines, Nagpur. … **Appellant**
(Original Respondent
in Tribunal)

Versus

M/s. Excellent Betelnut Products Pvt. Ltd.,
a company incorporated under provisions
of Indian Companies Act,
having its office at C/o. Shah Premchand Damji
& Co., Shop No.13, Platinum Commercial
Premises CHS, Praful Jyoti Road No.7,
Jawahar Lane, Ghatkopar East,
Mumbai 400 077,
through its Director. … **Respondent**
(Original Appellant
before Tribunal)

Shri S.N. Bhattad, Counsel for Appellant.
Shri Prakash Shah and Shri A.M. Sudame, Counsel for Respondent.

CORAM : A.S. CHANDURKAR & MRS. VRUSHALI V. JOSHI, JJ.
Date when arguments were heard : 12th July, 2023
Date when the order was pronounced : 19th August, 2023

P. C. :

1. This appeal filed under Section 130(1) of the Customs Act, 1962 (for short, 'the Act of 1962') seeks to raise challenge to the order dated 10-5-2023 issued by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the CESTAT'), West Zone Bench,

Mumbai in Customs Appeal No.85048 of 2023. By the said order, the appeal preferred by the respondent has been allowed and provisional release of the goods in question has been directed under Section 110A of the Act of 1962.

2. Facts giving rise to the present proceedings are that vide Bill of Entry dated 28-10-2022, the respondent-Importer imported ten containers of Arecanut/Betelnut from an Indonesian supplier. On 4-11-2022, a panchanama was undertaken at the Inland Container Depot, MIHAN. Nagpur by SIIB, Customs, Nagpur drawing four samples from each container. In all forty samples were accordingly collected. On 14-11-2022, the Superintendent of Customs forwarded the samples to the Central Revenue Control Laboratory (CRCL), Mumbai and sought opinion of results on testing as under :

> *"...whether*
>
> *a) food starch is added, if yes, to what extent, and the nature of it.*
>
> *b) impurities are removed.*
>
> *c) any additives have been introduced, if yes, please share the details.*
>
> *d) boiled, if yes, to what extent.*
>
> *e) process of drying has happened, if yes, to what extent."*

3. On the same day, the Superintendent of Customs forwarded similar samples to Anacon Laboratory Private Limited, Nagpur, a FASSAI accredited Laboratory for seeking information of results on testing as under :

"...whether

a) sample is fit for Human Consumption.

b) food starch is added, if yes, to what extent, and the nature of it.

c) impurities are removed.

d) any additives have been introduced, if yes, please share the details.

e) boiled, if yes, to what extent."

On 16-11-02022, CRCL, Mumbai submitted its report to the Superintendent of Customs. As per that report, there was presence of some insect infestation in the samples. On 24-11-2022, report was also received from Anacon Laboratory certifying that the samples complied with Food Safety and Standards Authority of India (FSSAI) Specifications and that they were found fit for human consumption.

30-11-2022, the Superintendent, SIIB, Nagpur wrote to the Chemical Examiner, CRCL, Mumbai that as its report dated 16-11-2022 reported presence of some insect infestation, percentage of moisture and damaged nuts. Hence there was a mismatch between the test memo submitted and the test report obtained. A request was made to re-submit a detailed report and also to confirm whether the sample was fit for human consumption or not. In response, CRCL, Mumbai on 2-12-2022 stated that starch was negative in all samples and there were little visible impurities in the form of dust and pieces of peels. To answer query numbers c) to e) it was stated that the samples be forwarded to FSSAI or any other Government-approved Laboratory.

4. On 5-12-2022, the office of the Commissioner, Customs issued a communication to the respondent alongwith the copies of the test reports received from CRCL, Mumbai and Anacon Laboratory. The respondent was informed that if it intended to make a request for re-testing, the same should be done within a period of ten days of receiving the communication. This was in view of the Circular dated 18-7-2017. On 12-12-2022, the respondent informed the Assistant Commissioner of Customs that in view of Instruction No.1/2020 dated 12-2-2020 the samples of the imported *Supari* had been sent to Anacon Laboratory, a FSSAI accredited Laboratory and the report of the Customs Laboratory ought to be discarded. It appears that on 14-12-2022 the Superintendent of Customs had forwarded five samples to CRCL, New Delhi and sought its report. The said report was received on 21-12-2022 and it was stated that the said samples did not meet the requirement of Food Safety and Standards Regulation, 2011 (for short, 'the Regulation of 2011') in respect of moisture content and damaged nuts. The samples were stated to be not fit for human consumption. In this backdrop, the respondent approached this Court in Writ Petition No.8166 of 2022 **[***M/s. Excellent Betelnut Products Private Ltd.* Versus *The Union of India and another***]** seeking provisional release of the goods in question. By the judgment dated 22-12-2022, the writ petition was treated as an application made

under Section 110A of the Act of 1962 and that application was directed to be decided by the Commissioner of Customs.

Accordingly, on 11-1-2023, the Commissioner of Customs decided the said application and declined to release the said goods under Section 110A of the Act of 1962 on the ground that the said goods did not contain starch or other additives and did not fall under CTH2106. Shortly thereafter, the Superintendent (SIIB), Customs effected a seizure and issued a seizure memorandum on 18-1-2023. The respondent being aggrieved by the order passed by the Commissioner of Customs preferred an appeal under Section 129A of the Act of 1962. By its order dated 10-5-2023, the CESTAT proceeded to allow the said appeal and directed provisional release of the said goods under Section 110A of the Act of 1962. Being aggrieved, the appellant has challenged the said order.

5. Shri S.N. Bhattad, learned counsel for the appellant, referred to the test reports received from CRCL, Mumbai and Anacon Laboratory, to submit that since the same were contradictory in nature, the samples were sent to a Referral Laboratory at New Delhi. The report of the Referral Laboratory was clear which indicated that the said goods were not fit for human consumption. The Commissioner of Customs had rightly refused to provisionally release the goods under Section 110A of the Act of 1962. However, the CESTAT acted beyond jurisdiction and ordered provisional release. Referring to the provisions of Section 25 read with Section 47(5) of the Food Safety

and Standards Act, 2006 (for short, 'the Act of 2006'), it was submitted that reference was rightly made to the Referral Laboratory. Inviting attention to the Notification dated 9-10-2019 issued by the FSSAI, it was submitted that the Customs Officials at Airport/Port/Inland Container Depot (ICD), as mentioned in Annexure 1, had been notified as Authorised Officers under Section 25 read with Section 47(5) of the Act of 2006. In view of Regulation 13(1) of the Food Safety and Standards (Import) Regulation, 2017 (for short, 'the Regulation of 2017'), such reference was rightly made. Referring to the Notification dated 11-6-2021, it was pointed out that for food import clearance purposes, the customs official of the rank of Superintendent at ICD, MIHAN had been notified as the Authorised Officer. In view of this position, the CESTAT was justified in holding the reference made to the Referral Laboratory as unjustified. There was no reason to interfere with the order passed by the Commissioner of Customs in this regard. The learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in *Dineshchandra Jamnadas Gandhi* Versus *State of Gujarat and another* **[(1989) 1 SCC 420]** and the judgment of the Madras High Court in *M. Mohammed* Versus *Union of India* **[2016 (333) E.L.T. 39]**. It was thus submitted that the order passed by the CESTAT was liable to be set aside and the appeal ought to be allowed.

6. Shri Prakash Shah, learned counsel for the respondent, opposed the aforesaid submissions. It was submitted that in the test report

dated 16-11-2022 received from CRCL, Mumbai, there was no mention of the fact that the goods were not fit for human consumption. Inviting attention to the request made by the Superintendent for conducting test on the samples, it was submitted that insofar as the aspect of fitness for human consumption was concerned, such query was made to Anacon Laboratory since it was a Laboratory approved by the FSSAI. Such query was not made to CRCL, Mumbai in the request letter dated 14-11-2022. Hence no opinion in that regard was given by it. Referring to the communication dated 5-12-2022 issued by the Superintendent to the respondent, it was submitted that since the test report submitted by Anacon Laboratory was in favour of the respondent, there was no reason for seeking a re-test in that regard. Reference was further made to the communication dated 12-12-2022 issued by the respondent to the Assistant Commissioner of Customs to point out that the Customs Laboratories were not competent nor capable of testing food items. Such tests were required to be carried out by the FSSAI accredited Laboratory. It was only in the subsequent communication dated 14-12-2022 that was issued by the Superintendent to CRCL, New Delhi that its opinion with regard to fitness for human consumption was sought. No consent of the respondent as importer was sought before seeking such reference. Despite a clear report submitted by CRCL, Mumbai, further communication dated 30-11-2022 was issued to the Chemical Examiner and on that basis, reference was sought to be made in view of the reply filed by the Chemical Examiner on 2-12-2022. Inviting attention to the observations in Paragraph 12 of the order dated 11-1-2023 passed by the Commissioner of Customs, it was submitted that the same were based on the considerations relevant for classification of the goods and not with regard to fitness for human consumption. In fact in view of the Advance Ruling in favour of the respondent dated 7-8-2015, the Commissioner of Customs was not justified in refusing to provisionally release the goods. The respondent had by its communication dated 12-12-2022 protested in the said matter. The learned counsel invited attention to the Instruction No.1/2020 dated 12-2-2020 that testing of samples of imported food items was required to be carried out only in the FSSAI notified Laboratories. He also referred to Regulation 9 of the Regulation of 2017 and submitted that the course followed by the Superintendent in sending the samples for re-testing was flawed. Reliance was placed on the decisions of the Hon'ble Supreme Court in *Polyglass Acrylic Mfg. Co. Ltd.* Versus *Commr. Of Cus., Vishakhapatnam* **[2003 (153) E.L.T. 276]** and *Tata Chemicals Ltd.* Versus *Commissioner of Cus. (Preventive), Jamnagar* **[2015 (320) E.L.T. 45]** to urge that the CESTAT had rightly allowed the appeal preferred by the respondent. It was urged that the appeal did not give rise to any substantial question of law and hence there was no reason for this Court to interfere with the judgment of the CESTAT. Moreover, the CESTAT had refused to examine the validity of the seizure that was effected on 18-1-2023 after the Commissioner of Customs rejected the respondent's application. The order passed by the CESTAT was legal and proper and the same did not call for any interference.

7. We have heard the learned counsel for the parties and we have perused the documents on record. We have also given due consideration to the respective submissions. It may be noted that pursuant to the import of Arecanut/Betelnut, panchanama was conducted on 4-11-2022 by the Customs Department. Since the imported goods were Arecanut/Betelnut, the samples were sent to CRCL, Mumbai as well as Anacon Laboratory at Nagpur. The nature of the tests sought to be conducted by both the Laboratories were distinct in nature as can be seen on comparing the request made by the Superintendent, SIIB, Nagpur as under :

Central Revenue Control Laboratory (CRCL), Mumbai	**Anacon Laboratory Private Limited, Nagpur**
Whether - a) food starch is added, if yes, to what extent, and the nature of it. b) impurities are removed. c) any additives have been introduced, if yes, please share the details. d) boiled, if yes, to what extent. e) process of drying has happened, if yes, to what extent.	Whether - a) sample is fit for Human Consumption. b) food starch is added, if yes, to what extent, and the nature of it. c) impurities are removed. d) any additives have been introduced, if yes, please share the details. e) boiled, if yes, to what extent.

From the aforesaid, it is clear that the tests sought to be undertaken by CRCL, Mumbai was as to whether food starch was added to the samples, whether impurities were removed and any additives had been introduced. These queries have relevance with the aspect of classification of the goods in question. The tests sought from Anacon Laboratory were with regard to fitness of the samples for human consumption coupled with addition of food starch and removal of impurities. These tests being sought from a Laboratory that was approved by the FSSAI to gather as to whether the samples were fit for human consumption. This had relevance under the Act of 2006. The report dated 16-11-2022 received from CRCL, Mumbai indicated presence of some insect infestation in all the samples. On this basis, the Superintendent of Customs on 30-11-2022 proceeded to observe that there was a mismatch between the test memo submitted and the test report obtained. Anacon Laboratory in its report dated 16-11-2022 found the samples fit for human consumption as per FSSAI specifications. The Superintendent thereafter sought a fresh report from CRCL, Mumbai on all the parameters mentioned in his letter dated 14-11-2022. In the communication dated 30-11-2022, the words "It is also requested to confirm whether the sample is fit for human consumption or not" were added. In response thereto, on 2-12-2022, CRCL, Mumbai submitted para-wise reply of the queries stating that the starch content was negative and there were some visible impurities. For seeking answer to queries Nos.c) to e) that pertained to introduction of additives, boiling of the samples and process of drying, it was stated that the samples may be forwarded to the FSSAI or any other Government-approved Laboratory. After receiving this communication dated 2-12-2022, the Superintendent called upon the respondent as to whether it intended to request for a re-test in the light of the three test reports. The first two test reports were of CRCL, Mumbai and Anacon Laboratory, Nagpur dated 16-11-2022. The third test report was from CRCL, Mumbai dated 2-12-2022.

8. From the aforesaid, it is clear that despite receiving the test reports for the queries that were made to CRCL, Mumbai and Anacon Laboratory, the Superintendent by his communication dated 30-11-2022 further sought a test to be undertaken by CRCL, Mumbai as to whether the sample was fit for human consumption or not. When this test was not sought at an earlier point of time vide communication dated 14-11-2022 and the report of Anacon Laboratory, a FSSAI accredited Laboratory being clear that the sample was fit for human consumption, there does not appear to be any basis for the Superintendent on 30-11-2022 to again make a request for confirming whether the sample was fit for human consumption or not. In this regard, if Regulation 9 of the Regulation of 2017 is perused, it becomes clear that two parts of the food sample are required to be first taken. The Authorised Officer is required to forward one part of the sealed and labelled article to the Food Analyst at a notified

Laboratory under the Regulation of 2011. If the sample is found to be safe, the remaining sample is required to be returned to the importer. If the sample is found to be unsafe, on the request received from the food importer, the second sample can be forwarded to the Referral Laboratory for analysis. It thus indicates that only if the sample sent to the Food Analyst is found to be unsafe that such second sample be referred to the Referral Laboratory. The communication dated 30-11-2022 issued by the Superintendent therefore does not appear to be in consonance with Regulation 9 of the Regulation of 2017.

Though the learned counsel for the appellant sought to rely upon Regulation 10(9) of the Regulation of 2017 to urge that the Authorised Officer was empowered to seek re-testing by sending the second sample to the Referral Laboratory for re-testing, it is seen that this course is open only after satisfaction of the Authorised Officer that the imported articles of food consignment pose a serious hazard to the safety and health of the consumers. It is clear that Regulation 10(9) of the Regulation of 2017 can be invoked if the Authorised Officer has sufficient reason to believe so. The communication dated 30-11-2022 does not indicate any sufficient reason being assigned by the Superintendent in that regard as required by Regulation 10(9). A mere request has been made to confirm whether the sample was fit for human consumption or not.

9. The appellant has relied upon Notification dated 9-10-2019 issued by FSSAI which refers to notifying various Customs officials as Authorised Officers under Section 25 read with Section 47(5) of the Act of 2006 for food import clearance. In accordance therewith, Instruction No.1 of 2020 issued by the dated 12-2-2020 require the Custom Official notified as Authorised Officer to ensure that the FSSAI accredited Laboratories are being utilized for analysis of samples of imported food items. The communication dated 14-12-2020 issued by the Superintendent thus indicates that the reports submitted by CRCL, Mumbai and Anacon Laboratory, Nagpur were not contradictory in nature considering the tests directed to be carried out. Reference made to the Referral Laboratory, New Delhi seeking its report as regards fitness of the sample for human consumption does not appear to be supported by the Regulations applicable. The CESTAT while considering this aspect has noted that while the lack of validity of tests undertaken by CRCL, Mumbai was impliedly admitted, the basis for making a reference to the Referral Laboratory was the divergence of the tests conducted by CRCL, Mumbai with the tests conducted by Anacon Laboratory. The CESTAT has further found that the reasons for discarding the request for provisional release of the goods under Section 110A of the Act of 1962 was not legally tenable since the aspect of fitness for human consumption was beyond the scope of jurisdiction conferred by the Act of 1962 especially when such

determination was done by the Laboratory accredited to FSSAI under the Act of 2006.

10. The decision in *Dineshchandra Jamnadas Gandhi* (supra) refers to challenge to the order of conviction under the provisions of the Food Adulteration Act, 1954 and holds that offence of food adulteration is a socio-economic offence. The said decision has been referred to in *M. Mohammed* (supra) to hold that the expression 'food' defined under Section 3(j) of the Act of 2006 is all inclusive and pervasive. The ratio of these decisions are not attracted in the facts of the case in hand.

11. For the aforesaid reasons, we do not find that the appeal gives rise to any substantial question of law for consideration. The order passed by the CESTAT on 10-5-2023 does not call for any interference. The Customs Appeal is dismissed leaving the parties to bear their own costs. The pending civil application is also disposed of.

(MRS. VRUSHALI V. JOSHI, J.) **(A.S. CHANDURKAR, J.)**

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