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W.P.Nos.21506 and 21510 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2023

CORAM

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

W.P.Nos.21506 and 21510 of 2023

and

W.M.P.Nos.20873, 20879 and 20880 of 2023

M.R.J.Trading,
Represented by its Proprietor,
Mr.Abdulla Jasim M.P.,
1/85-A, Kunnathkavu Temple,
Kollanur, Palakkad Ponnani Road,
Eravakkad Post, Kappur,
Palakkad, Kerala – 679 552.

... Petitioner in both W.Ps.

Vs

The Additional Commissioner of Customs (Group 1),
Customs House,
No.60, Rajaji Salai,
Chennai – 600 001.

... Respondent in both W.Ps.

Prayer in WP.No.21506 of 2023 : Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned Provisional release Order No.56/2023 – Gr1 dated 10.06.2023 issued by the respondent in F.No.CUS/APR/BE/MISC/625/2023-GR 1 and quash the same and consequentially direct the respondent to provisionally release the goods



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covered by Bill of Entry No.4558512, dated 08.02.2023 in terms of Section 110A of the Customs Act, 1962.

Prayer in WP.No.21510 of 2023 : Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records pertaining to the impugned Show Cause Notice No.27/2023, dated 08.06.2023 issued by the respondent in F.No.CUS/APR/MISC/4167/2023 – GR 1 and quash the same.

For Petitioner : Mr.Hari Radhakrishnan
(in both W.Ps)

For Respondent : Mr.K.S.Ramasamy
(in both W.Ps) Senior Standing Counsel

COMMON ORDER

The petitioner has filed these writ petitions on the strength of a pending writ petition before the Kerala High Court in W.P.(C).No.19351 of 2021, wherein, vires of the Notification No.21/2015-2020 dated 25.07.2018 issued by the Directorate General of Foreign Trade under the provisions of the Foreign Trade (Development and Regulation) Act, 1992 was challenged.



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2. Independently, the petitioner has challenged the same Notification before this Court in W.P.No.5561 of 2023. In W.P.No.5561 of 2023 is pending before the Hon'ble Division Bench of this Court. No orders have been passed as on date in W.P.No.5561 of 2023.

3. The petitioner has imported consignments of black pepper from Srilanka and had filed a Bill of Entry on 08.02.2023. The petitioner has declared the value of the black peper imported by the petitioner as Rs.435/- per kg. As per the aforesaid Notification No.21/2015-2020 dated 25.07.2018 issued by the Directorate General of Foreign Trade, the black pepper below the import value of Rs.500/- per kg is prohibited. The petitioner has declared the classified of the imported black pepper as under Tariff Heading 0904 11 90 which is admittedly prohibited in terms of the above Notification.

4. The learned counsel for the petitioner submits that although the validity of the above Notification No.21/2015-2020 dated 25.07.2018 has been upheld by the Kerala High Court by its order dated 22.09.2021, the fact remains that the clearance of the imported black pepper can be



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allowed. It is submitted that even if it is eventually concluded that import is prohibited in terms of Section 125 of the Customs Act, 1962, discretion is vested to allow the goods on payment of redemption fine. It is further submitted that the impugned order placing reliance on the Circular No.35/2017-Cus., dated 16.08.2017 bearing reference F.No.394/13/2016-Cus(AS) is not sustainable as it takes away the discretion to impose redemption fine under Section 125 of the Customs Act, 1962.

5. It is therefore submitted that discretion is to be exercised by the proper Officer as to whether the goods has to be provisionally released or liable for absolute confiscation and destroyed or allowed to re-exported. According to the petitioner, if the imported consignment of black pepper is of sub-standard grade there can be direction to destroy or re-export. However, it cannot be determined unless a sample of the imported consignment is sent for testing to lab. It is submitted that even if the goods are prohibited under Notification No.21/2015-2020 dated 25.07.2018 issued by the Directorate General of Foreign Trade under the provisions of the Foreign Trade (Development and Regulation) Act,



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1992, powers are vested with the proper Officer under Section 125 of the Customs Act to allow provisional clearance under section 110A by imposing redemption fine after adjudication.

6. The learned Standing Counsel for the respondent on the other hand would submit that the impugned order is well reasoned and does not requires any interference. It is submitted that the impugned order is appealable order under Section 128(1) of the Customs Act, 1961. Therefore, it is submitted that at best, the petitioner can be relegated to work out an alternate remedy before the Appellate Commissioner. It is further submitted that none of the circumstances warrant interference under Article 226 of the Consitution of India. Therefore, it is submitted that on this count also writ petitions are liable to be dismissed.

7. That apart, the learned Standing Counsel for the respondent has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Sheikh Mohammed Omer Vs. Collector of Customs* reported in 1971 AIR 293. A specific reference is made to the discussion of the Hon'ble Supreme Court in the context of Section 111(d) of the Customs Act,



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1962 read with Section 3 of the Imports and Exports (Control) Act, 1947, which was replaced by the Foreign Trade (Development and Regulation) Act, 1992, wherein, the Hon'ble Supreme Court held as under:-

This takes us to the question whether by importing the mare “Jury Maid” the appellant contravened Section 111(d) read with Section 125 of the Act. It was urged on behalf of the appellant that expression "prohibition" in Section 111(d) must be considered as a total prohibition and that expression does not bring within its fold the restrictions imposed by clause(3) of the Imports Control Order, 1955. According to the learned Counsel for the appellant clause(3) of that order deals with the restrictions of import of certain goods. Such a restriction cannot be considered as a prohibition under Section 111 (d) I of the Act. While elaborating his argument the learned Counsel invited our attention to the fact that while Section 111 (d) of the Act uses the word "prohibition", Section 3 of the Imports and Exports (Control) Act, 1947 takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947. It is that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause(d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of prohibition". That prohibition may be complete or partial. Any restriction on import or export



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is to an extent a prohibition. The expression "any prohibition" in Section III (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting" "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (1) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But none the less the prohibition continues. In the result this appeal is dismissed with costs. Y. P. Appeal dismissed.

8. That apart, the learned Standing Counsel for the respondent has also referred to the decision of the Hon'ble Division Bench of this Court in the case of *Malabar Diamond Gallery Pvt.Ltd Vs. Additional Director General, Directorate of Revenue Intelligence, Chennai* rendered in 2016 (341) E.L.T. 65 (Mad). A specific reference is made to para 94 which reads as under:

94. Though the argument of the learned counsel for the appellant is that since gold is not notified, as one of the prohibited goods, by way of any notification, in the official gazette and therefore, provisional release can be ordered, we are inclined to accept the said contention, as prohibition/restriction, is inbuilt in the Customs Act, 1962. While considering the objections, on the notification and other provisions, relied on and pressed into service, we



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cannot reject the objections of the Revenue. Sub-section (d) of Section 111 of the Customs Act, 1962, clearly states that any goods which are imported or attempted to be imported contrary to any provision imposed by any law, for the time being in force, in this country, are liable to be confiscated. Therefore, when prohibitions/restrictions are inbuilt in the statute, or by notifications, relied on by the department, subject to which, goods are to imported and when there is a failure to comply with the conditions, they are liable for confiscation, for which, in the instant case, a show cause notice has been issued.

9. It is therefore submitted that on this count also, these writ petitions are liable to be dismissed.

10. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Standing Counsel for the respondent.

11. The petitioner has an alternate remedy by way of an Appeal before the Appellate Commissioner. However, the Appellate Commissioner as a Statutory Authority, will be guided by Board in Circular No.35/2017-Cus., dated 16.08.2017 bearing reference F.No.394/13/2016-Cus(AS) which leaves no discretion with the



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Appellate Commissioner. The said circular *prima facie* is contrary to proviso to Section 151A of the Customs Act, 1962. Therefore, no useful purpose will be served by releging the petitioner to work out the remedy before the Appellate Commissioner, unless, the Circular is itself put to testing before this Court.

12. Circulars of the Board are not binding on the Courts as held by the Hon'ble Supreme Court in the case of ***M/s.Ratan Melting and Wire Industries Vs. Commissioner of Central Excise, Bolpur*** in 2008 (231) E.L.T. 22 (SC).

13. The Hon'ble Madurai Bench of this Court in W.A(MD).No.1782 of 2021 in ***M/s.AI Qahir International Vs. The Commissioner of Customs and other***, has allowed clearance of goods on higher import value declared to get over prohibition under the notification. Taking note of the above situation, the Hon'ble Madurai Bench of this Court held as under:-

“9. The respondents have refused to release the goods as the appellant had overvalued the import of Black Pepper to overcome the notification. The overvaluing of



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the goods has been done by the appellant in order to render the Black Pepper freely importable. Now, the only question arises for consideration is whether the release of goods provisionally in terms of 110A of the Customs Act in respect of the said goods can be issued. It is only valuation of the goods is in question as import of the goods valuing less than Rs.500/- per kg., is prohibited.

10. The learned counsel for the respondents pointed out that totally the value declared by the importer in respect of imported Black Pepper as per the Bills of Entry was Rs.6,44,80,013/- with unit price in the range of Rs.525/- to Rs.523/- per kg(CIF). The re-determined value in respect of the above Bills of Entry by the Department worked out to Rs.3,60,74,557/- with the unit price in the range of Rs.287/- to Rs.304/- per kg. Therefore, it was argued that provisional release of the goods can be made under Section 110(A) of the Customs Act 1962 and the guidelines issued by CBIC circular, as per the value declared by the importer for execution of bond and furnishing of bank guarantee since the case has not been adjudicated and hence, the value re-determined in the show-cause notice cannot be taken.

11. In the light of the above submissions made by the respective counsels and even the fact that the final adjudication is yet to be done, we are of the opinion that the respondents are directed to quantify the duty and bond amount and communicate the same to the appellant and release the goods within a week on such remittance by the appellant. The appellant would remit the entire duty if not remitted already and furnish the bond to the satisfaction of the respondents in regard to the interest payable, penalty or charges that may be deemed necessary.”



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14. Thus, there is no mandate that the goods shall be absolutely confiscated and vested with the Government. They can be released provisionally under Section 110-A of the Act pending adjudication. Taking note of the above view of the Madurai Bench of this Court, Court is inclined to order a provisional release of the imported consignment of black pepper subject to petitioner furnishing suitable securities in the form of guarantee and subject to the meeting standards prescribed by the Food Safety Authority under the provisions of the Food Safety and Standards Act, 2006. The petitioner shall also pay Customs duty provisionally at Rs.500/- per kg. The value of Rs.500/- per kg shall be provisional. The value may be enhanced if the imported consignment of black pepper is actually of higher value.

15. The Respondent shall send the sample for testing to the approved testing laboratories recognised by the Food Safety Authorities under the said Act. If the imported consignment of black pepper meets the safety requirement under the said Act, the imported consignment shall be allowed to be cleared provisionally on at Rs.500/- per kg and payment of Customs duty, after obtaining necessary security from the



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petitioner for any redemption fine that may be imposed on the petitioner under Section 125 of the Customs Act, 1962, after proper adjudication. This exercise shall be carried out by the respondent within a period of thirty days from the date of receipt of a copy of this order.

16. The respondent shall issue suitable notice under the provisions of the Customs Act, 1962 for enforcing redemption fine on the petitioner on the consignment of imported black pepper that is proposed to be released pursuant to order of this Court subject to petitioner complying with the above.

17. These writ petitions stand disposed of. No costs. Consequently, connected writ miscellaneous petitions are closed.

04.09.2023

Index: Yes/ No
Internet : Yes/No
Speaking/Non-speaking Order
Neutral Citation : Yes/No
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Note: Issue Order Copy on 08.09.2023



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To

The Additional Commissioner of Customs (Group 1),
Customs House, No.60, Rajaji Salai,
Chennai – 600 001.



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C.SARAVANAN,J.

Today, this writ petition is listed under the caption “for being mentioned” at the instance of learned counsel for the petitioner.

2. The learned counsel for the petitioner submits that there are minor typographical errors in the order passed by this Court on 04.09.2023 in these writ petitions and that may be corrected.

3. Accepting the submission of the learned counsel for the petitioner, in para 16 of the order dated 04.09.2023 may be substituted to read as follows.:-

16. The petitioner has already been issued with



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show cause notice No.27/2023 dated 08.06.2023 bearing Ref.F.No.CUS/APR/ MISC/ 4167/2023-GR 1 which is impugned in W.P.No.21506 of 2023. Therefore, the respondent may issue suitable corrigendum show cause notice

C.SARAVANAN,J.

kkd

No.27/2023 dated 08.06.2023 to the petitioner for imposing redemption fine, if any on the imported consignment of black pepper proposed to be released pursuant to this order subject to the petitioner complying with the above conditions.

Registry is directed to carry out the aforesaid corrections and issue fresh copy of the order to the parties.

15.09.2023

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