HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-4108-2023
Reserved on:01.06.2023
Pronounced on: 06.06.2023

M/s. Shree Balaji Industries ....Petitioner

V/s.

Additional/Joint Commissioner of Customs ....Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Saurabh Kapoor, Advocate with
Mr. Abhishek Chaudhary, Advocate and
Mr. Gaurav Goyal, Advocate
for the petitioner.

Mr. Sunish Bindlish, Senior Standing Counsel with
Mr. Prashant Rana, Advocate and
Mr. Gagandeep Singh Malhotra, Advocate
for the respondent.

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Ritu Bahri, J.

1. The petitioner is seeking quashing of the order dated 23.02.2023 (Annexure P-1) issued by the respondent rejecting the request of the petitioner for grant of provisional release of the goods imported vide Bill of Entry No. 3440622 dated 24.11.2022 (Annexure P-4).

2. The facts of the case are that in October, 2022, the petitioner had placed an order for import of Roasted Seeds to its Exporter M/s. Sea Hawk Trading FZE LLC, UAE. The foreign supplier issued invoice alongwith other documents including test reports as well as fumigation certificate and country of origin evidencing classification as well as valuation of goods. The petitioner filed Bill of Entry No. 3440622 dated

24.11.2022. On 13.12.2022, the respondent examined the goods at the port of ICD CONCOR, Ludhiana and ordered for detention of goods on the ground that the same are not roasted and fall under CTH 12077090 which classifies seeds used for sowing.

3. Since the goods of the petitioner were not being released, the petitioner filed CWP-1345-2023 challenging the action of the respondent. The respondent made a statement that final decision on the application for release of goods will be taken in due course.

4. On 13.02.2023, personal hearing was granted to the petitioner. The representative of the petitioner requested for drawl of samples by the authorized officer of FSSAI as well as NOC from Plant and Quarantine Department and also requested for provisional release of the goods. The claim of the petitioner was rejected vide order dated 23.02.2023 (Annexure P-1) qua 550 bags containing "Water Melon Seeds" on the ground that they were misdeclared by the petitioner as "Roasted Seeds Kernels" being **prohibited goods.** The relevant portion of the order dated 23.02.2023 (Annexure P-1) is reproduced as under:-

> "19. Thus, having regard to the facts and circumstances of the case, I, in respect of Bill of Entry No. 3440622 dated 24.11.2022, order on the following conditions under Section 110A of the Customs Act, 1962:-
>
> > i. I order for the provisional release of 149 bags containing "Red Kidney Beans". The importer shall furnish a bond equal to declared value of goods Red Kidney Beans i.e. Rs.7,38,444/- (Rupees Seven Lakh Thirty Eight Thousand Four Hundred Forty Four only) to

> bind himself to pay in case of duty demand, fine, penalty or interest as may be leviable on such goods, subsequently in adjudication in the light of Para 2.1 of Board's circular No. 35/2017-Cus dated 16.08.2017 subject to production of fulfillment of compliance (NOC) of FSSAI and Plant & Quarantine Department by the importer.
>
> ii. The importer shall furnish a Bank Guarantee/Security (containing clause binding the issuing bank to keep it renewed and valid till final adjudicatioin of the case, or in the event of non-renewal of bank guarantee, the guaranteed amount be credited to Govt. Account by the bank on its own) for Rs.1,50,000/- (Rs. One Lakh Fifty Thousand only) as security covering payment of any possible future liabilities of penalties/fines against the goods in the light of Para 2.2 of Board's circular No. 35/2017-Cus dated 16.08.2017.
>
> iii. I reject the request of the importer for the provisional release of remaining 550 bags containing “Watermelon Seeds” mis-declared by them as “Roasted Seeds Kernels” being prohibited goods as discussed above.”

5. The petitioner is now aggrieved of the rejection with respect to 550 bags containing Water Melon Seeds which have been treated as prohibited goods vide order dated 23.03.2023 (Annexure P-1) .

6. On 28.02.2023, when this case was taken up, direction was given to the petitioner to approach the respondent and to produce the

receipts of purchase from the foreign country as well as NOC, if required, from the Foods Safety and Standards Authority of India and Plant and Quarantine Department. The respondent was also to assist as to how melon seeds can be released as was done in the case of M/s. Nakshatra Overseas, Ahata Banwarilal, Turab Nagar, Ghaziabad, UP-201001 vide order dated 30.09.2022 (Annexure P-10).

7. Subsequently on 10.03.2023, direction was given to the respondent to give samples of roasted seeds to the officials of Food Safety and Standards Authority of India and Plant and Quarantine Department and submit a report to this Court.

8. On 27.03.2023, an affidavit dated 25.03.2023 was filed by the respondent. In this affidavit, the respondent has placed on record notifications dated 10.02.2021 and 09.10.2019 (Annexure A-1) issued by Ministry of Commerce, Directorate General of Foreign Trade, which provide the list of 150 Port of entries (PoEs) as food import entry points and as per Schedule 1 of Import Policy Appendix V read with notifications issued by the FSSAI, a Superintendent/Appraiser/Inspector/Examiner is authorized to take samples at the time of import of food items at ICD Ludhiana.

9. Pursuant to order dated 10.03.2023, samples were drawn on 14.03.2023 from the consignment imported by the petitioner vide Bill of Entry No. 3440622 dated 24.11.2022 in terms of Food Safety and Standards (Import) Regulations, 2017 by the Inspector Customs under panchnama dated 14.03.2023 in the presence of two indepedent witnesses, DRI (Investigating Agency) and importer's representative i.e. Customs House Agent Sh. Harish Goyal. Copy of the panchnama dated 14.03.2023 is annexed as Annexure A-2. Further, samples of both the items i.e. Seed

Kernels and Red Kidney Beans were sent to FSSAI authorities/laboratory through special messengers and also to Plant Quarantine Department, Amritsar. Copy of the same including test memos are annexed as Annexure A-3. Samples have been sent to the FSSAI accredited laboratory at Mohali as per notification (Annexure A-4).

10. On 17.03.2023, FSSAI notified Foods Testing Laboratory i.e. Punjab Biotechnology Incubator has submitted their report dated 17.03.2023 (Annexure A-5) which shows that the imported seed kernels are unroasted and the report in respect of Red Kidney Beans is still awaited. The report of both Red Kidney Beans and Seed Kernels from the Plant and Quarantine Department, Amritsar is also awaited.

11. On 03.05.2023, learned counsel for the petitioner has handed over copy of report from Plant and Quarantine Department to learned counsel for the respondent to verify the same.

12. Learned counsel for the respondent has filed reply on behalf of the respondent dated 30.05.2023 in Court and same is taken on record. He, while referring to reply dated 30.05.2023, has argued that import of Watermelon Seeds was to be treated free till 30.09.2022 as per notification dated 21.06.2022 (Annexure R-1/1) and Bill of Entry was filed by the petitioner on 24.11.2022. Thereafter, import of unroasted watermelon seeds vide Bill of Entry dated 24.11.2022 is in violation of import policy restrictions w.e.f. 01.10.2022 as notified by DGFT as the same fall under 'restricted category' and the petitioner did not have valid permit to import the same. Hence, the petitioner cannot be given relaxation by treating the imported Watermelon Seeds as free upto 30.09.2022. In the case of M/s. Nakshatra Overseas (supra), the Bill of Entry had been filed prior to

30.09.2022 and it was squarely covered by notification dated 21.06.2022 (Annexure R-1/1).

13. On a specific query put to learned counsel for the respondent, he has not disputed the fact that Plant and Quarantine Department has given a report in favour of the petitioner which was handed over to him on 03.05.2023 by learned counsel for the petitioner. As regards FSSAI notified Foods Testing Laboratory i.e. Punjab Biotechnology Incubator report dated 17.03.2023 (Annexure A-5), Watermelon seeds are 96.22% unroasted. It is, however, not checked whether they are fit for human consumption or not. As regards, Red Kidney Beans, they have already been allowed to be provisionally released vide order dated 23.02.2023 (Annexure P-1) and they have been sent to FSSAI notified laboratory to check whether they are fit for human consumption or not. He further submitted that for provisional release of 149 bags containing "Red Kidney Beans", the importer has to furnish a bond equal to declared value of Red Kidney Beans subject to fulfillment of compliance (NOC) of FSSAI and Plant & Quarantine Department and has to furnish a Bank Guarantee/Security. Finally, he has argued that the order dated 23.02.2023 (Annexure P-1) is an appealable order under Section 128 of the Customs Act, 1962.

14. Learned counsel for the petitioner has referred to a notification dated 26.04.2021 issued by Directorate General of Foreign Trade whereby amendment in import policy of Melon seeds under HS Code 12077090 has been made which is reproduced as under:-

> "S.O.(E): In exercise of powers conferred by Section 3 read with Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as

amended from time to time, the Central Government hereby amends the import policy of Melon Seeds under EXIM Code 12077090 of chapter 12 of ITC (HS), 2017, Schedule-I (Import Policy)

HS Code	Description	Existing Import Policy	Revised Import Policy	Existing Policy Condition	Revised Policy Condition
12077090	Melon Seeds-Other	Free	**Restricted**	---	Imports subject to Policy Condition (4) of the Chapter

2. **Effect of the Notification:** Import policy of Melon Seeds falling under HS Code 12077090 has been revised from 'Free' to 'Restricted' subject to the revised policy condition."

15. Learned counsel for the petitioner contends that as per notification dated 26.04.2021, the Melon Seeds were brought in the category of "Restricted", however keeping in view that some of the importers have already filed their Bill of Entries by importing Melon Seeds under the policy being free, a clarificatory notification was issued on 21.06.2022 wherein it has been clarified that shipments of Water Melon Seeds made by 30.09.2022 from the exporting countries may be allowed for clearance at Indian Customs Port, provided that Bill of Entry is filed and such goods are handed over to the Customs Authority for examination by 31.10.2022 and the import policy of Water Melon Seeds was "Free" till 30.09.2022.

16. Learned counsel for the respondent has argued that in the present case, the Bill of Entry has been filed on 24.11.2022 (Annexure P-4) which is after 31.10.2022, and thus, import of WatermMelon Seeds are to be treated as "restricted" and they can be imported after getting valid permit in

Form PQ3. He further argued that no consignment can be permitted for import unless acommpanied by a phytosanitary Certificate issued by an authorized officer at the country of origin in the Form PQ21. The petitioner failed to produce phytosanitary certificate and the Watermelon Seeds are found to be unroasted as per FSSAI notified Foods Testing Laboratory i.e. Punjab Biotechnology Incubator report dated 17.03.2023 (Annexure A-5).

17. After hearing learned counsel for the parties and going through the contents of the writ petition as well as reply and notifications dated 26.04.2021 and 21.06.2022, one thing is clear that before notification dated 26.04.2021, the import of Melon Seeds was free and thereafter, they were treated to be as “restricted” as per revised import policy. Further, as per notification dated 21.06.2022, the Water Melon Seeds which were imported by 30.09.2022, they were allowed for clearance at Indian Customs port, provided that Bill of Entry is filed and such goods are handed over to the Customs authority for examination by 31.10.2022 and they were to be treated free till 30.09.2022. The intention of the notification dated 21.06.2022 was not to reject the import of Water Melon Seeds which were already before the Customs Authority for examination by 31.10.2022 on the ground that they were restricted. Prior to notification dated 26.04.2021, the import of Water Melon Seeds was free and the importers did not require any permit for importing to India. In this backdrop, the case of the petitioner is to be examined to ascertain as to whether the Water Melon Seeds which were imported by the petitioner vide Bill of Entry dated 24.11.2022 (Annexure P-4) and fall in the category of “restricted” having no valid permit to import, were liable to be seized and confiscated?

18. A perusal of provisional release order dated 23.02.2023

(Annexure P-1) shows that the importer did not possess any license for import of restricted Water Melon Seeds and on this ground they were held liable to be confiscated under Section 110A of the Customs Act. The case of the petitioner was examined keeping in view the case of ***M/s. Nakshatra Overseas Vs. Union of India and Others, CWP-27070-2022 decided on 11.01.2023***. It is observed therein that nature and facts involved in the present case and M/s. Nakshtra Overseas's case differ materially as under:-

1. In the case of M/s. Nakshatra Overseas, the Country of Origin certificate 21585751 issued by Dubai Chamber of Commerce & Industry was available but in the present case, proof of Country of Origin of watermelon seeds has not been submitted.
2. In the case of M/s. Nakshatra Overseas, the Bill of Lading No. MLJEANSA053138 dated 13.06.2022 issued by the shipping line M/s. Aneel Kumar Food Stuff Trading LLC carried the description of goods as HS Code: 200819, whereas in the present case, the Bill of Lading did not carry any entry relating to import of watermelon seeds.
3. In the case of M/s. Nakshatra Overseas, the watermelon seeds were declared before the Dubai Customs but in the present case, the Export Declaration 201-06448944-22 dated 15.10.2022 before the Federal Customs Authority, Dubai, Customs recorded that only 699 bags of Red Kidney Beans were loaded.
4. In the case of M/s. Nakshatra Overseas, Phytosanitary certificates No. DXB-APH-02415-1996587 issued by the Ministry of Climate Change & Environment, UAE were

available but in the present case, no such phytosanitary certificate for watermelon seeds has been produced.

5. In the case of M/s. Nakshatra Overseas, certificate of fumigation or Disinfestation/or Disinfection treatment dated 31.05.2022 No. DXB-APH-02415-1996587 issued by the Ministry of Climate Change & Environment, UAE was submitted but in the present case, no certificate of fumigation of watermon seeds has been produced.

19. Order dated 23.02.2023 (Annexure P-1) further shows that opportunity of personal hearing was granted via virtual mode and provisional release of 149 bags containing "Red Kidney Beans" was ordered subject to furnishing a bond, production of fulfillment of compliance (NOC) of FSSAI and Plant & Quarantine Department by the importer and a Bank Guarantee/Security as per conditions of Section 110A of the Customs Act, 1962.

20. With respect to 550 bags containing "Watermelon Seeds", since they were declared as "Roasted Seeds Kernels" being prohibited goods, provisional release was rejected by observing as under:-

> "iii. I reject the request of the importer for the provisional release of remaining 550 bags containing "Watermelon Seeds" mis-declared by them as "Roasted Seeds Kernels" being prohibited goods as discussed above."

In the present case, as per notification dated 26.04.2021 read with notification dated 21.06.2022, Watermelon Seeds fall in the category of "restricted" after 30.09.2022 and for importing the same, a valid permit is required to be issued by the competent authority which the petitioner did not have. The provisional release of Watermelon Seeds is rejected vide order dated 23.02.2023 (Annexure P-1) on the ground as "prohibited goods". The said observation in itself is not correct as per notifications dated 26.04.2021 and 21.06.2022. Moreover, in the present case, the report of Plant and Quarantine Department has already come in favour of the petitioner and the only ground available with the respondent now is that the Watermelon Seeds are "restricted" and the petitioner did not have valid permit to import the same.

21. In this regard, learned counsel for the petitioner has referred to a judgment passed by Hon'ble Supreme Court in ***Commissioner of Customs vs. Atul Automations Pvt. Ltd. 2019 (365) E.L.T. 465 (S.C)*** wherein the Hon'ble Supreme Court was examining a case of import of Multi-Function Devices (MFDs) which were the restricted items for import and could not be imported without authorization from DGFT. The authorization was not available with the importer. The Hon'ble Supreme Court held that there is a fundamental distinction between restricted and prohibited goods and the statutory provisions of Foreign Trade Act, 1992 and Section 125 of Customs Act, 1962, do not bar redemption of restricted goods imported without authorization. The relevant portion of the judgment is reproduced as under:-

> "4. In the appeal preferred by the Revenue, the High Court held that the MFD's correctly fell in the category of "other wastes" under Rule 3(1)(23) of the Waste Management Rules read with Part B and Part D of Schedule III Item B1110 dealing with used Multi-Function Printer and Copying Machines. Adverting to the provisions of the Foreign Trade Act and the Foreign Trade Policy framed thereunder, it was held that the MFDs were not

prohibited but restricted items for import. Section 11(8) and (9) of the Foreign Trade Act provided for confiscation and redemption of goods imported without authorization upon payment of market value. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value, with further liberty to the Directorate General of Foreign Trade (hereinafter referred to as "the DGFT") alongwith directions.

9. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore, find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the Customs authorities with fine under Section 112(a) of the Customs Act, 1962."

22. Learned counsel for the respondent has referred to a judgment passed by High Court of Madras in ***Malabar Diamond Gallery P. Ltd. vs. Addl. Dir. General, Directorate of Revenue Intelligence, Chennai 2016(341) E.L.T. 65 (Mad.)*** dealing with smuggling of gold. The High Court of Madras held that the word "Restriction" also means "Prohibition" under the Customs Act, 1962. This judgment is not applicable to the facts of

the present case.

23. In the present case, the Watermelon seeds are restricted goods but they cannot be treated as prohibited goods and in the absence of any permission/authorization for DGFT, provisional release can be done as per the judgment of Hon'ble Supreme Court passed in ***Commissioner of Customs's case (supra).*** Moreover, during the pendency of this writ petition, report from Plant and Quarantine Department has come in favour of the petitioner as regards Watermelon Seeds and in the case of Red Kidney Beans, they have been ordered to be released provisionally subject to conditions as per order dated 23.02.2023 (Annexure P-1). The order with the same conditions can be passed in this case as well as the Watermelon Seeds do not fall under the “prohibited” category and they fall under the “restricted” category as per notifications dated 26.04.2021 and 21.06.2022. The provisional release can be ordered subject to final decision taken by the Adjudicating Authority under Section 105 of the Customs Act, 1962.

24. Keeping in view the above observations, writ petition is allowed and order dated 23.02.2023 (Annexure P-1) is set aside qua Watermelon Seeds with direction to the respondent to pass provisional release order of Watermelon Seeds as per conditions imposed in the case of

"Red Kidney Beans" under order dated 23.02.2023, within a period of one week.

(RITU BAHRI)
JUDGE

06.06.2023 **(MANISHA BATRA)**
Divyanshi **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No