BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	22.07.2024
Pronounced on	08.08.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.13155 of 2024
and
W.M.P.(MD) No.11666 of 2024

M/s.Shimla Fruit Agency
Rep. by its Authorised Signatory
Shri S.K.Mohammed Saffiullah,
Old No.51, New No.67,
Rajaji Road, Ram Nagar,
Coimbatore - 641 009. ... Petitioner

Vs.

1.The Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House, Tuticorin - 628 004.

2.The Additional Commissioner of
Customs (Imports),
Office of the Commissioner of Customs,
Custom House, Tuticorin - 628 004.

3.The Joint Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House, Tuticorin - 628 004. ... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari to call for the records of the impugned order passed by the third respondent in Order-in-Original No.TUT-CUSTM-PRV-JC-24/2024, in C.No.VIII/10/69/2022-Adjn., dated 27.03.2024 and quash the same as it has been passed without giving reasonable opportunity being in violations of statutory provisions and principles of natural justice.

For Petitioner : Mr.B.Satish Sundar

For Respondents : Mr.N.Dilip Kumar
Senior Standing Counsel

O R D E R

In this Writ Petition, the petitioner has challenged the impugned Order-in-Original No.TUT-CUSTM-PRV-JC-24/2024 dated 27.03.2024 passed by the third respondent Joint Commissioner of Customs.

2. By the impugned order, the third respondent has confirmed the demands proposed in the Show Cause No.226/2022 [C.No.VIII/10/69/2022-ADJN.] dated 24.11.2022. The operative portion of the impugned order reads as under:-

ORDER

i. I hereby reject the declared description of "Betel nut product (known as Supari Unflavoured)" filed in the Bill of Entry No.785049 dated 23.03.2022 and hold the description as "Areca nut split".

ii. I hereby reject the classification of the imported cargo under CTH 21069030 filed in the Bill of Entry no.7985049 dated 23.03.2022 and order reclassification of the impugned imported goods under CTH 08028020.

iii. I hereby reject the declared assessable value of Rs. 71,94,380/- filed in the Bill of Entry No.7985049 dated 23.03.2022 and hold the redetermined assessable value of Rs.3,48,13,322/- as mentioned in column 4 of table 3 of Para No.46.

iv. I hereby order confiscation of the goods imported vide Bill of Entry No.7985049 dated 23.03.2022 under section 111(d) and 111(m) of the Customs Act, 1962 read with Section 3 of Foreign Trade (Development and Regulation) Act, 1992 with re-determined assessable value of Rs.3,48,13,322/- as mentioned in column 4 of Table 3 of Para No.46.

v. Consequent to above, I impose a Redemption fine of Rs.50,00,000/- (Rupees Fifty lakhs only) in lieu of the option to pay fine /confiscation in terms of section 125 of the Customs Act, 1962.

vi. I hereby hold re-assessed duty payable on the said goods at Rs.3,82,94,654/- as per the value mentioned in column 4 of table 3 of Para No.46 under section 17 of the Customs Act, 1962.

vii. I impose a penalty of Rs.3,48,13,322/- (Rupees Three Crore Forty Eight Lakhs Thirteen Thousand and Three Hundred and Twenty Two Only) imposed on M/s. Shimla Fruit Agency, Coimbatore under Section 112(a) of the Customs Act, 1962 and Rs. 2,00,00,000/- (Rupees Two Crore only) under section 114AA of the Customs Act, 1962 for their acts of omission or commission, which rendered the goods liable for confiscation under Section 111(m) and 111(d) of the Customs Act, 1962.

viii.I impose a penalty of Rs.4,00,000/- (Rupees Four Lakhs Only) under section 117 of the Customs Act, 1962 for dishonouring summonses issued under section 108 of the Customs Act, 1962.

3. The petitioner had not participated in the Show Cause Proceedings either by filing reply to the aforesaid Show Cause Notice or by attending the personal hearings. By an E-mail dated 30.01.2024, the petitioner had requested the third respondent to keep the adjudication proceedings in abeyance pending dispose of W.A.(MD) No.1285 of 2023 filed against the order dated 28.06.2023 passed by the learned Single Judge of this Court in W.P.(MD) No.1391 of 2023. Along with the said Writ Petition in W.P.(MD) No.1391 of 2023, two other Writ Petition were disposed of. As far as the petitioner was concerned, the said Writ Petition was dismissed with the following observations:-

> "*30.In the case of W.P.(MD) No.1391 of 2023 the order clearly states that the petitioner is a habitual offender, which allegation has not been emphatically denied by the petitioner. The order does not contain any details about the basis for the conclusion. It is only in the counter that there is an explanation given as to why bank guarantee is sought.*

31.In the case of ***Union of India and others Vs. Raj Grow Impex LLP and others*** *reported in* ***2021 SCC Online SC 429****, the Hon'ble Supreme Court after discussing the earlier case laws on the exercise of discretion has observed as follows in para 164 and 165 therein:-*

> *"**164.** Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.*
>
> ***165.** It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken."*

32.Therefore, it is evident that on a reading of the order one must be able to infer the exercise of discretion which in the case of W.P.(MD) Nos.1250 and 1252 of 2023 is absent. 33.In the case of the petitioners *in W.P.(MD) Nos.1250 and 1252 of 2023 there is no adverse comments as in the case of the petitioner in W.P. (MD) No.1391 of 2023, who is alleged to be a habitual offender violating the provisions of the Customs Act by removing the confiscated goods on an earlier occasion. The petitioners in the other two writ petitioners have been importing the very same product on earlier occasions and it is also not the case of the Department that they are "fly by night operator".*

***ISSUE NO.2**:-*

*34.Since the detention is on the orders of the Department applying the ratio laid in **Balaji Dekors Vs. Commissioner of Customs, Commissionerate-III, Chennai** reported in **2017 (356) E.L.t. 219 (Mad)**, detention certificate should be issued to the petitioners in W.P.(MD) Nos. 1250 and 1252 of 2023. The argument of the Department against its issue is the Central Government Notification No.20/2015-2020 dated 25.07.2018. This notification, as already stated, is stayed by the Karnataka High Court. The 2nd issue is therefore to be answered in favour of the above referred petitioners viz; W.P.(MD) Nos.1250 and 1252 of 2023.*

In fine;

i) W.P.(MD) Nos.1250 and 1252 of 2023 are allowed and the petitioners shall be permitted to re-export upon executing a bond to the full value of the goods that are sought to be exported without prejudice to the rights or authority of the appellants to proceed with the adjudication and impose or collect whatever charges/fine/penalty that are permissible under laws; and they shall be issued with the detention certificate for demurrage and container detention charges.

ii) W.P.(MD) No.1391 of 2023 is dismissed

However, there shall be no order as to costs."

4. The petitioner had earlier filed Bill of Entry No.7985049 before the Tuticorin Port, on 23.03.2022 and had attempted to clear the consignment of 'Arecanut' by classifying the goods under CTH 21069030. This clearance was based on the approval of a similar consignment at Chennai Port under Bill of Entry No.5176713 dated 24.08.2021.

5. The Department has questioned the classification and therefore, the petitioner had earlier approached this Court in W.P.(MD) No.22341 of 2022 for provisional release of the imported consignment covered by the Bill of Entry No.7985049 dated 23.03.2022. The said Writ Petition was disposed of by this Court on 18.11.2022 with the following observations:-

> *"7. Heard the learned counsel for the parties and perused the materials placed before this Court.*
>
> *8. In the light of consistent view taken by this Court and considering the submissions of the learned counsel on either sides and also taking into consideration the judgments of the Apex Court as well as the earlier judgments of this Court, the Respondents are directed to consider the application of the Petitioner for provisional release under Section*

110-A of the Customs Act and the same shall be disposed of by the Adjudicating Authority on merits and in accordance with law, within a period of one (1) week from the date of receipt of a copy of this order.

9. With the above direction, this Writ Petition is disposed of. No costs."

6. After the aforesaid order was passed, the Department has issued the aforesaid Show Cause No.226/2022 dated 24.11.2022. Meanwhile, the petitioner sent a request for re-export of the consignment on 11.12.2022 which was received by the Department on 13.12.2022. The said request was disposed of by the Department with following observations *vide* order dated 19.12.2022:-

ORDER

Hence, I allow re-export of Imported goods Imported vide BE No dated 23.03.2022 on execution of a bond for an amount of Rs.3.41 (Rupees Three Crores Forty eight Lakhs Thirteen thousand Three hundrec two only) and on execution of Bank guarantee equal to Rs.94,00,000, Ninety four Lakhs only).

7. It is in this background, the petitioner had filed W.P.(MD) No. 1391 of 2023 which came to be dismissed by an order 28.06.2023, content of which has been extracted above.

8. The case of the petitioner is that the petitioner was not heard before the impugned order was passed and therefore, there is gross violation of principles of natural justice. It is submitted that the respondent ought not to have passed the impugned order dated 27.03.2024. It is submitted that although the petitioner has an alternate remedy by way of appeal under Section 128 of the Customs Act, 1962, before the Commissioner (Appeals), since the issue deals with the classification of the imported consignment of 'Arecanut' as to whether it is classifiable under CTH 21069030 as was claimed by the petitioner or under CTH 08028020 as was ordered by the third respondent, it cannot be decided in the appeal.

9. It is further submitted that no statement was recorded from the petitioner in view of the peculiar case. It is submitted that statement was recorded from the petitioner's Custom House Broker namely, Mr.Amaldas Thomas Eugin, based on the earlier Bill of Entry No.5176713 dated 24.08.2021. Hence, the learned counsel for the petitioner prays for one more opportunity for giving proper reply.

10. The learned counsel for the petitioner has placed reliance on the following decisions of the Hon'ble Supreme Court, Gujarat High Court, and Tribunals, to buttress the position:-

i. **Akbar Badruddin Jiwani** Vs. **Collector of Customs**, 1990 (47) E.L.T. 161 (SC).
ii. **Regent Overseas Pvt. Ltd.** Vs. **Union of India**, 2017 (6) G.S.T.L. 15 (Guj.)
iii. **Imtiyaz Ahmed** Vs. **Commissioner of Customs, Mangalore**, 2014 (308) E.L.T. 625 (Tri. - Bang.)
iv. **Afloat Textiles (P) Ltd.** Vs. **Commissioner of Central Excise, Vapi**, 2007 (215) E.L.T. 198 (Tri. - Ahmd.)

11. On the other hand, the learned Senior Standing Counsel for the respondents would submit that the petitioner is a regular importer of consignment of 'Arecanut' by classifying goods under CTH 21069030 to evade the tax lability. It is submitted that earlier also, in respect of the consignment covered by the Bill of Entry No.5176713 dated 24.08.2021, the petitioner had mis-declared the classification by violating DGFT's Notification No.20/2015-2020 dated 25.07.2018 and that based on the request of the petitioner, the Show Cause Notice was dispensed with and adjudication order was passed, wherein, the classification adopted by the

petitioner and the value declared in the Bill of Entry were rejected and the consignment covered by the aforesaid Bill of Entry was held confiscable under Sections 111(d) and 111(m) of the Customs Act, 1962 by giving option to redeem the goods for re-export on payment of fine of Rs. 15,00,000/- by sustaining a penalty of Rs.20,00,000/- under Sections 125 & 112(a)(i) of the Customs Act, 1962.

12. It is submitted that the importer had got permission to move and store the said goods to a public bonded warehouse under Section 49 of the Customs Act, 1962. However, the petitioner had diverted the goods to a private warehouse, where they removed the imported goods clandestinely and substituted sawdust in the place of imported goods, thereby clearing the consignments once again in the market. At the same time, the petitioner was caught red-handed by the officers of the DRI Chennai Zonal Unit.

13. It is submitted that the petitioner also filed Anticipatory Bail Petition before this Court to evade the arrest in Crl.O.P.No.16291 of 2022 and an conditional bail was granted on 27.07.2022 subject to the payment of fine and penalty amounting to Rs.35,00,000/-.

14. It is further submitted that despite summons being issued on 11.08.2022, 22.08.2022, 30.08.2022 and 09.09.2022 fixing the date of personal hearings, the petitioner failed to appear. It is submitted that it is in this background, the statement was recorded from Mr.Amaldas Thomas Eugin, Manager of M/s.Unique Logistics. It is submitted that the said Mr.Amaldas Thomas Eugin, Customs Broker, in his statement has stated that on instructions of the petitioner, the wrong classification was adopted by the Customs Broker while filing the subject Bill of Entry No.7985049 dated 23.03.2022.

15. It is submitted that since the petitioner has neither complied with the conditional order dated 19.12.2022 nor participated in the personal hearings, the present Writ Petition is liable to be dismissed as the petitioner purportedly declined to participate in the adjudication proceedings. It is submitted that the impugned order does not call for any interference in the hands of the court under Article 226 of the Constitution of India.

16. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

17. I have perused the impugned Order-in-Original No.TUT-CUSTM-PRV-JC-24/2024 dated 27.03.2024 passed by the third respondent Joint Commissioner of Customs and the Show Cause No. 226/2022 [C.No.VIII/10/69/2022-ADJN.] dated 24.11.2022 issued under Section 124 of the Customs Act, 1962.

18. I have also perused the re-export order dated 19.12.2022 passed by the Additional Commissioner, the second respondent herein, pursuant to the directions of this Court dated 18.11.2022 in W.P.(MD) No.22341 of 2022. I have also perused the order of this Court dated 28.06.2023 in W.P.(MD) No.1391 of 2023 disposing of two other Writ Petitions in W.P.(MD) Nos.1250 & 1252 of 2023 filed by M/s.Genuine Spices and M/s.Sri Shunmuga Traders.

19. The conduct of the petitioner does not inspire confidence as the antecedents of the petitioner in the context of 34 Metric Tons of imported

'Arecanut' vide Bill of Entry No. 5176713 dated 24.08.2021 was diverted after the adjudication order was passed for re-export on payment of fine of Rs.15,00,000/- by sustaining a penalty of Rs.20,00,000/- under Sections 125 & 112(a)(i) of the Customs Act, 1962. This matter has been captured in paragraph 6 of the impugned order.

> **6. Antecedents of the Importer**:
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> The subject case is not the first time for the importer, as the importer had already involved in an offence pertaining to the import of similar goods. The said importer had imported 34 MTs of similar goods i.e. 'Unflavoured Supari (Betel Nut Product)' in two containers vide bill of entry no. 5176713 dated 24.08.2021 last year by similar modus of mis-declaration/mis-classification violating the said DGFT Notification No. 20/2015- 2020 dated 25.07.2018 and to evade payment of appropriate Customs duty. For the above said violation a case had been booked on the importer by the Special Intelligence and Investigation Branch (SIIB), Custom House, Chennai. Further, based on the request of the importer, the case was adjudicated without issue of Show Cause notice. The Additional Commissioner of Customs (Group 1) in his adjudication order had rejected the declared classification and value, confiscating the goods under Sections 111(d) and 111(m) of the Customs Act, 1962, giving option to redeem the goods for re-export on payment of fine of Rs.15,00,000/- and sustaining a penalty of Rs.20,00,000/ under Sections 125, 112(a)(i) of the Customs Act, 1962. The importer had got permission to move and store the said goods to a public bonded warehouse under Section 49 of the

> Customs Act, 1962. However, the importer while moving the goods under Section 49 to a public bonded warehouse had diverted the goods to a private warehouse for removing the imported goods clandestinely and substitute saw dust in place of imported goods. The clandestinely removed import goods were planned to be diverted to domestic market without payment of Customs duty in violation of the provisions under Section 33, 34 and 49 of the Customs Act, 1962. During the removal of goods, the petitioner was caught red handed by the officers of DRI, Chennai Zonal Unit and the import goods were seized under the provisions of the Customs Act, 1962 by DRI officers. Immediately the importer got himself admitted to a private hospital in Chennai and absconded from there. In the meantime, the importer had filed anticipatory bail to evade arrest and the Hon'ble High Court of Madras in Crl.O.P.No.16291 of 2022 dated 27.07.2022 had granted conditional bail after payment of fine and penalty amounting to Rs. 35,00,000/-. In view of the above, it appears that the importer had repeatedly violated the provisions of the Customs Act, 1962 and appears to a repeated offender.

20. As far as the present case is concerned, the petitioner has also not co-operated with the respondents as the petitioner neither filed a reply nor participated in the personal hearing. The impugned order is otherwise appealable in terms of Section 128 of the Customs Act, 1962 before the Commissioner (Appeals). If the appeal has to be filed, the petitioner has to deposit 7.5% of the duty demanded or the penalty levied therein and

produce the proof of such payment. Therefore, to balance the interest of the Customs Department and the petitioner, I am inclined to set aside the impugned order and remit the case back to the third respondent to pass fresh order on merits and in accordance with law.

21. The impugned order which stands quashed in this order shall be treated as Addendum to the Show Cause Notice No.226/2022 dated 24.11.2022 issued under Section 124 of the Customs Act, 1962.

22. The petitioner shall deposit 7.5% of the disputed tax amount to secure the interest of the Customs Department. The deposit to be made pursuant to this order shall be without prejudice to the rights of the petitioner in W.A.(MD) No.1285 of 2023 pending before the Hon'ble Division Bench of this Court against the order dated 28.06.2023 in W.P.(MD) No.1391 of 2023 and without prejudice to the rights of the petitioner in the remand proceedings.

23. Subject to the petitioner complying with the above requirements, all recovery proceedings shall be kept in abeyance pending further orders in the remand proceedings. All the issues relating to the

classification, value and the amount of fine and penalty to be imposed is left open to be decided afresh in the remand proceedings.

24. It is expected that the petitioner will file reply within a period of 30 days from the date of receipt of a copy of this order and the orders will be passed by the third respondent within a period of 2 months thereafter. The petitioner shall co-operate with the remand proceedings.

25. In case, the petitioner fails to file reply or deposit the amount as ordered above, this order shall stand revoked *sine die* without further reference to this Court, in which case, the respondents are at liberty to proceed against the petitioner in the manner know to law.

26. In the result, this Writ Petition stands disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

08.08.2024

Index: Yes / No
Neutral Citation: Yes / No
Speaking Order / Non-Speaking Order

JEN

Copy To:

1.The Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House,
Tuticorin - 628 004.

2.The Additional Commissioner of Customs (Imports),
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3.The Joint Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House,
Tuticorin - 628 004.

C.SARAVANAN, J.

JEN

Pre-Delivery Order made
in
W.P.(MD) No.13155 of 2024
and
W.M.P.(MD) No.11666 of 2024

08.08.2024