(2013) 08 KL CK 0062

In the High Court Of Kerala

Case No : W.P. (C) No. 15093 of 2013 (J)

Covai Raja Metals (India) Pvt. Ltd. APPELLANT

Vs

Commissioner of Cus., Kochi RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2014) 302 ELT 221

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Judgement

P.R. Ramachandra Menon, J.—Detention of the consignment of ''Construction Sand'' imported by the petitioner, for want of ''Plant Quarantine Clearance'' from the fourth respondent and the proposal for proceeding with the confiscation of the same, is under challenge in this writ petition. The petitioner, who is a company registered under the relevant provisions of the Companies Act, is engaged in the manufacture and sale of Mild Steel Ingots and in the trading of such other items and has of late started trading in ''Construction Sand'' as well, in view of the setback felt in the steel industry. Such a course was pursued by the petitioner, in view of the better prospects in the field, which resulted as a consequence of the ban imposed on mining of sand in several parts of the State, which was adversely affecting the construction field and the development sector, as a result of which, the Government of Kerala took a policy decision as early as in the year 2009 to promote the import of sand from abroad. It is stated that the petitioner is holding Import and Export Code (IEC) 3210016810.

2. In his maiden attempt, the petitioner imported ''Construction Sand'' (nearly 31, 333.71 MT) extracted from the river Koh Kong in Cambodia, which was brought to the Cochin Port by the vessel Hongxin Blue Sea. According to the petitioner, ''Construction Sand'' falls under EXIM Code - 2505 as per the Foreign Trade Policy 2009-14 and as per the Import Policy, it has been declared as a ''free'' item, by virtue of which, no condition is to be satisfied for importing the material to India. The Import General Manifest (IGM) No. 205861, dated

11-4-2013 declaring "construction sand in bulk", was delivered from the vessel to the Cochin Customs prior to entry. The vessel arrived at the Port on 19-4-2013 and the consignment was unloaded and is lying at ''Q8 and Q9'' open storage space allotted at the Cochin Port Trust.

3. The petitioner submitted two Bills of Entry No. 98863 and No. 98864 dated 18-4-2013 at the Customs House, Cochin for clearance of 973 MT each of "construction sand in bulk". The draft survey of the total consignment was carried out on 22-4-2013, fixing assessable value for each Bill of Entry at Rs. 12,09,075.40. The consignment covered by Bill of Entry No. 98864 was cleared for delivery as per Out of Charge Order dated 26-4-2013 and the petitioner satisfied the entire duty payable, whereas the second Bill of Entry was still to be cleared.

4. While so, the petitioner was served with Ext. P1 restraint order dated 9-5-2013 issued by the third respondent, virtually mentioning no reason at all, and as per Ext. P2 letter, dated 13-5-2013, the petitioner was required to produce Plant Quarantine Clearance as per the Plant Quarantine (Regulation of Import into India) Order, 2003. The petitioner submitted Ext. P3 reply dated 17-5-2013 pointing out that the consignment of ''Construction Sand'' was classified under the Customs Tariff Heading (CTH) 2505 and as per the provisions of the Foreign Trade Policy 2009-14, import of goods which fall under the Head 2505 was "free". It was also pointed out that ''Plant Quarantine Clearance'' is not attracted, to the case in hand and that the restriction on import of sand, applies only in respect of sand imported for purposes specified in Clause 4 of the Plant Quarantine Order (Ext. P10). It was also mentioned that there have been several instances of import of ''Construction Sand'' to India through various Ports (about 1800 consignments) and about 25 consignments have been imported through Cochin Port without insisting for any ''Plant Quarantine Clearance'', the particulars of which are given vide Ext. P4 list. However, so as to solve the situation and to have the goods cleared forthwith and thereby avoid incurring additional expenses towards storage/demurrage charges, likely to be levied by the Port, the petitioner tried to obtain the Plant Quarantine Certificate from the Plant Quarantine Head Office at Faridabad, as instructed. But the said office maintained that, no Certificate could be given as the Customs had already permitted import. The factual position was brought to the notice of the first respondent, vide Ext. P5.

5. The petitioner further pointed out the necessity to have the goods released at the earliest, as it was extremely essential, for being utilized in the construction field in the State, particularly at Cochin, in connection with the Metro Rail Project and such other projects, which was appreciated and certified by the District Collector, Ernakulam as well, vide Ext. P6, dated 25-8-2013 addressed to the first respondent. Thereafter, the second respondent issued Ext. P7 letter dated 31-5-2013 to the petitioner annexing a copy of Ext. P8 letter dated 30-5-2013 of the fourth respondent, as to the alleged violation on import of the ''Construction

Sand'' and the petitioner was required to satisfy ''five times'' the inspection/ fumigation fees, to have the consignment released, as pointed out by the fourth respondent.

6. The petitioner contends that, in spite of the absence of any objection by the Customs Department as reflected from Ext. P7, but for the satisfaction of the requirements as pointed out by the fourth respondent in Ext. P8 to satisfy ''five times'' the inspection/fumigation fees, the petitioner was served with Ext. P9 show cause notice, proposing confiscation proceedings u/s 111(d) of the Customs Act, read with the relevant provisions of other enactments, including the Plant Quarantine Order and realisation of duty and penalty u/s 112(a) of the Customs Act. This made the petitioner to approach this Court by filing the writ petition for immediate interference, pointing out that, the commodity imported is ''Construction Sand'' mined from a river in Cambodia, which stands treated and fumigated and has cleared Internationally Accredited Tests by an accredited Construction Material Laboratory (SGS); that it is not an organic medium that supports plant life; that the consignment has also cleared the Radio Activity Test from the Centre for Nuclear Techniques, Vietnam Atomic Energy Commission and that, all these documents were produced along with the Bills of Entry.

7. When the matter came up for consideration on 14-6-2013, the learned Assistant Solicitor General/Standing Counsel for the respondents entered appearance and sought for time to get instructions, particularly as to the scope of the entries under the Customs Tariff Heading 2505, which could be freely imported and as to the application of the Plant Quarantine Order, to the import of ''Construction Sand'' and as to the various earlier imports enlisted under Ext. P4, which was cleared without any Plant Quarantine Certificate. The matter was listed on different dates, such as on 19-6-2013, 24-6-2013 and 25-6-2013 and on all these occasions, further adjournments were sought for, from the part of the respondents. The matter came up again on 26-6-2013, when the Assistant Solicitor General of India sought for time to get instructions as to the formalities to be completed by the petitioner to have the goods released and as to the amount to be deposited, pursuant to Ext. P8. The matter was listed again on 1-7-2013. Since instruction was still to be obtained, it was adjourned to the next day. On 2-7-2013, the Court passed the following order:

Despite the several adjournments, no proper instruction is forthcoming from the part of the fourth respondent, that too, in spite of the specific order passed on 26-6-2013. In the said circumstances, the writ petition will stand admitted. Urgent notice to the respondents. There will be an interim order as prayed for, which shall be subject to appropriate conditions to be imposed so as to safeguard the Revenue. This shall be subject to the result of the writ petition.

8. It is stated that the said interim order was taken up in appeal by way of W.A. No. 1030/2013, wherein no interference was made, relegating the respondents to approach the Single Bench. Thereafter, the respondents filed I.A. No. 9572/2013 to vacate the interim order.

9. A counter affidavit has been filed from the part of respondents 1 to 3 seeking to sustain their action and asserting the applicability of ''Plant Quarantine Order'' and the alleged illegal import under the Customs Act, with reference to Section 11A necessitating further proceedings u/s 111(d) and the course of action u/s 112.

10. Heard both the sides in detail.

11. At the very outset, it is to be noted that, the only case of the Customs Department for detaining the consignment is for want of ''Plant Quarantine Certificate''. There is no allegation with regard to any infringement of the Customs Act as to the mis-declaration or otherwise or as to the absence of any valid licence for the import, but for branding the import as illegal u/s 11A of the Customs Act, in view of the alleged violation of the Plant Quarantine Order.

12. The Plant Quarantine (Regulation of Import into India) Order, 2003 was framed by the Union Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Destructive Insects and Pests Act, 1914, for prohibiting and regulating the import into India of "agricultural articles mentioned" in the Order. It was issued as per notification bearing No. S.O. 1322(E), dated 18-11-2003, published in the Gazette of India, Extraordinary, dated the same date. The provisions which are relevant in the context, are extracted herein below:

2(iii) "consignment" - means a quantity of seeds, plants and plant products or any regulated article consigned from one party to other at any one time shipment and covered by a phytosanitary certificate, bill of entry of customs, shipping/airway bill or invoice;

2(ix) "Import" means an act of bringing into any part or place of territory of Republic of India any kind of seed, plant or plant product and other regulated article from a place outside India either by sea, land, air or across any customs frontier;

2(xix) "Plant" means a living plant or a part thereof including seed and germplasm;

2(xx) "Plant Product" means un-manufactured material of plant origin including grain and those manufactured products that, by their nature or that of their processing, may create risk for the introduction and spread of a pest;

2(xxv) "Regulated article" means any article the import of which is regulated by this order;

2(xxviii) "Soil" means earth, sand, clay, silt, loam, compost, manure, peat or sphagnum moss, litter, leaf waste or any organic media that supports plant life and also include ship ballast or any organic medium used for growing plants.

13. Chapter II deals with the general conditions of import and Clause (3) therein permits import of plants, plant products, etc. Clause 3(1) clearly stipulates that,

no consignment of plants and plant products and other regulated articles shall be imported into India, without a valid permit issued under the said Order. Clause 4 deals with the import of soil, etc., while Clause 5 deals with the fees for inspection/fumigation, etc., which are extracted below:

4. Import of soil, etc. - No import of soil, earth, compost, sand, plant debris along with plants, fruits and seeds shall be permitted except under the following conditions:-

(i) The consignments of soil, earth, clay and similar material for any microbiological, soil-mechanics, or mineralogical investigations and peat for horticultural purposes may be permitted through specified air or sea ports or land custom station, on applications made for that purpose;

(ii) The application for the purpose referred to in (i) above shall be made to the Plant Protection Adviser, at least one month in advance, in form PQ 06 along with a registration fee of Rs. 200/- by a bank draft drawn in favour of Accounts Officer, Directorate of Plant Protection, Quarantine & Storage, N.H.IV., Faridabad-121001.

(iii) The Plant Protection Adviser may, after scrutiny of the application, and if satisfied of the purpose, for which such consignment is being imported, issue special permit in Form PQ 07.

(iv) The consignments soil, peat or sphagnum moss etc., shall be inspected, fumigated, disinfected or disinfested by the importer from an agency approved by the Plant Protection Adviser under the supervision of an officer duly authorized by Plant Protection Adviser.

5. Fees for inspection, fumigation, etc. - The importer of the consignment or his agent shall pay to the Plant Protection Adviser or any other officer duly authorised by him in this behalf, the fees prescribed in Schedule IX towards inspection, fumigation, disinfestation, disinfection of consignment.

14. Chapter VI deals with the power of relaxation to be exercised by the joint Secretary in charge of plant product in the Department of Agriculture & Cooperation, in public interest and the enabling provision to have the consignment released after charging the fees for import permit and fee for Plant Quarantine inspection at ''five times'' of normal rates, as set forth under Clause 14. Clause 15 deals with Repeals and savings under Chapter VII.

15. Going by the scheme of the statute, particularly the purpose for which the ''Plant Quarantine Order'' was formulated and brought into force, as discernible from the ''preamble'' of the Order, it was evidently to prohibit and regulate the import of ''agricultural articles'' mentioned therein. The term ''agricultural articles'' has not been defined as such and what is contemplated is discernible from the various terms defined under Clause 2 of the General Conditions of import as given in Chapter II, ''Post-entry Quarantine'', as dealt with, in Chapter IV etc. ''Construction Sand'' prima facie does not come within the purview of the

said Order, unless it gets characterised as ''soil'' as defined under Clause 2(xxviii), which supports plant life or promotes as a medium for growing plants. It is true that the Customs Department is not much concerned with the ''purpose'' for which the sand is imported, which however may be the look out of the fourth respondent, and the analysis has to be made with reference to such ''purpose'', as clearly discernible from Clause 4(i to iv) of the Plant Quarantine Order dealing with import of soil. This Court however does not propose to express anything in this regard, as the matter is still to be adjudicated by the Customs Department, who has already issued Ext. P9 show cause notice.

16. The fact remains that ''Construction Sand'' is an item which has been enlisted under ''EXIM Code 2505'' of the Foreign Trade Policy 2009-14, wherein it has been declared as a "free" commodity (but for the necessity to have Plant Quarantine Clearance, if it is applicable). The specific case of the petitioner as sought to be projected by the learned senior counsel for the petitioner during the course of hearing is that, in the case of ''restricted entry'', care has been taken by the Central Government to make it specific, as discernible from various other items as given in Chapter XXV/XXVI of the Import Policy. Under EXIM Code 2505, different kinds of sand are stated as of ''free import'' and as such, no Plant Quarantine Clearance Certificate can be imposed or is required, to have the goods released. Unlike this, in the case of several other entries like 2514 00 00 or 2515 11 00, it is clearly shown in the Policy as ''restricted''. It is on the basis of the EXIM policy of the Government, that the petitioner chose to import ''Construction Sand'', being a ''free import'' item and as such, the goods are not any more liable to be detained by the respondents under any circumstances. In the absence of any restriction under any provisions of the Customs Tariff Act or the Foreign Trade Policy, there was no primary requirement for the petitioner to have produced any Plant Quarantine Clearance.

17. There is a specific case for the petitioner that, the ''Construction Sand'' imported by the petitioner is not ''soil'' as defined under Clause 2(xxviii) of Chapter I of Ext. PIO Plant Quarantine Order, in order to attract Clause 3(14) of the Order. It is also the case of the petitioner that, if the sand is only of such type to be used for the ''purpose'', so as to be an organic media that supports plant life or to support growing plants, can it be intercepted for want of Plant Quarantine Certificate. Paragraph 16 of the writ petition reveals the stand and hence it is extracted below:

16. A plain reading of Chapter II Clause 4 of the Plant Quarantine Order makes it clear that the order applies to agricultural articles alone. Soil import is prohibited for agricultural purpose but import is permitted for specified purposes mentioned under clause 4 following procedure for clearance as laid down therein. Import of construction sand is free and not covered by the Plant Quarantine Order. Unless the Customs authorities have valid reasons to believe that the sand imported is for agricultural purpose or for the specified purposes under clause 4, they have no jurisdiction to impose any restriction or require for Plant Quarantine

Clearance. Ext. P1 restraint order, Ext. P2 demand for Plant Quarantine Clearance and Ext. PS are therefore clearly illegal. Consequently, Ext. P9 show cause notice is also issued without jurisdiction.

18. The nature of contention raised by the petitioner however suggests that, if the sand attains the colour and characteristic of ''soil'' as defined under Clause 2(xxviii) of the Order, it may require Plant Quarantine Certificate, which in the instant case is not attracted, for the reason that, it is ''Construction Sand'', to be subjected to own use in the State. But it has to be noted that the petitioner Company is not engaged in any construction activity utilising the ''Construction Sand'' that is imported and no case has been built up, nor has any document been produced, in this regard. The petitioner admittedly is a trader and the purpose of the import is to sell the sand to prospective customers in the State. This naturally means that, the petitioner is at liberty to sell the sand after taking delivery from the Port, to anybody of the choice of the petitioner and once the sand is sold out, the petitioner cannot have any further control over the same and he cannot vouch as to how the sand will be put to use by prospective purchasers. At the same time, it has to be noted that, no sand filling exercise is possible in the State by virtue of the relevant provisions of Act 28 of 2008 (Kerala Conservation of Paddy and Wet Land Act) and by virtue of the relevant provisions of the Kerala Minor Mineral Concession Rules, 1967, as amended in the year 2012, unless necessary NOC and permit are obtained from the statutory authorities. Whether the material imported is actually ''Construction Sand'', is a matter to be ascertained from the materials produced by the petitioner in the course of adjudication proceedings. There is nothing wrong in making use of the same for construction purpose, more so, when there is scarcity of river sand in the State of Kerala, by virtue of the restrictive/regulatory measures in extracting sand as stipulated under the Kerala Protection of River Bank and Regulation of Removal of Sand Act. It is also to be seen that the construction and development activities in the State involving various projects, such as ''Kochi Metro Rail Project'' and such other ventures are not stalled in any manner, for non-availability of raw materials/construction sand, especially when the State is not in a position to meet the growing demand, for ''Construction Sand''. It is with this intent, that the State has also taken a policy decision, as pointed out by the petitioner in paragraph ''2'' of the writ petition, which has not been controverted from the part of the respondents. This aspect is also evident from Ext. P6 letter written by the District Collector requesting the first respondent to cause the sand to be released at the earliest.

19. Yet another important aspect to be noted is that, various instances (as many as 1800) of imports have been pointed out by the petitioner, as enlisted in Ext. P4, whereby ''Construction Sand'' has been imported from abroad without any Plant Quarantine Certificate. Of such imports, about 25 imports are of instances pertaining to Cochin Port itself, well within the area and jurisdiction of respondents 1 to 3 herein. Absolutely no explanation is forth coming from any of the respondents as to the above fact and the respondents have not controverted

the same. There is no case for the respondents that all such imports have been facilitated/permitted only on the strength of valid Plant Quarantine Certificate issued by the fourth respondent. Further detention of the materials at the Cochin Port is of no help to anybody and the goods have to be cleared at the earliest, to facilitate the construction sector at large and also to avoid the probable loss, by way of demurrage or charges under other heads payable to the Cochin Port.

20. It is relevant to note that, as per the interim order dated 2-7-2013, this Court had directed the respondents to release the goods, subject to appropriate conditions to be imposed to safeguard the Revenue. But in the counter affidavit filed on behalf of respondents 1 to 3, it has been conceded that, there is no loss of revenue in the instant case and that the petitioner had satisfied the customs duty payable in respect of the consignment. There is also no dispute with regard to the value of the consignment assessed and the duty payable. Further, even the Plant Quarantine Order enables relaxation of the conditions of the Import Permit under Chapter VI. Sub-clause (1) of Clause 14 enables the Central Government to relax any of the conditions of the Order relating to the import permit, which is to be exercised, in public interest, by the Joint Secretary in charge of the Plant production in the Department of Agriculture & Cooperation, who has been designated as the Competent Authority. Sub-clause (2) of Clause 14 stipulates that, in the event of grant of relaxation by the competent authority, the consignment shall be released, after charging fee for import permit and the fee for Plant Quarantine inspection at ''five times'' of normal rates. The fee and such other particulars are given under Schedule IX. Whether this Clause will be applicable itself, is a matter to be looked into and decided in the course of adjudication proceedings and as such, no opinion is being expressed by this Court for the time being. Since it is admitted that, there is no loss of revenue, further liability of the petitioner, if any, can be finalised in the course of adjudication proceedings. But for that matter, this Court finds that the goods need not be detained any longer. Accordingly, there will be a direction to the respondents to release the goods to the petitioner forthwith, at any rate within ''two weeks'' from the date of receipt of a copy of this judgment. Since the quantum payable to have the goods released as mentioned in Ext. P8 issued by the fourth respondent is not brought on record, this Court reckons the same as five times of the amount payable as given in Schedule IX to the Plant Quarantine Order. The goods shall be released to the petitioner as above on payment of the requisite amount and also on executing a ''Bond'' for meeting the balance liability, if any, subject to adjudication proceedings.

21. The learned Standing Counsel for the respondents submit that the respondents are ready to finalise the adjudication proceedings within one month. The petitioner is permitted to file a detailed explanation to Ext. P9 show cause notice, if not submitted so far, which shall be done within ''two weeks'' hereafter. On receipt of the same, adjudication proceedings shall be finalised by the first respondent in accordance with law, as expeditiously as possible, at any rate within ''one month'' thereafter. Writ petition is disposed of.