
(2020) 10 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition (L) No. 3502, 3503 Of 2020

Harihar Collections And Ors

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 15-10-2020

Acts Referred:

Foreign Trade (Development And Regulation) Act, 1992 — Section 3, 11, 13
Customs Act, 1962 — Section 49, 111(d), 112(a)(i), 124, 125, 125(1), 129(D)(2)
Constitution Of India, 1950 — Article 226

Citation : (2020) 10 BOM CK 0031

Hon'ble Judges : Ujjal Bhuyan, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Sujay Kantawala, P. Choudhari, Samsher Garud, Juhi Valia, Anil C. Singh, Pradeep S. Jetly, J. B. Mishra, Faranaaz Karbhari, Ishwar Ahuja, Khushboo Rupani

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J

1. Facts and reliefs sought for being identical in the two writ petitions, those were heard together on 06.10.2020 and are being disposed off by this common judgment and order.

2. We have heard Dr. Sujay Kantawala, learned counsel for the petitioners; Mr. Anil Singh, learned Additional Solicitor General along with Mr. Pradeep Jetly, learned senior counsel for respondent Nos.4 to 6. We have also heard Ms. Faranaaz Karbhari, learned counsel for respondent No.7.

3. Writ Petition (L) No.3503 of 2020 was argued by learned counsel for the parties as the lead case. Therefore, all facts and pleadings mentioned would be in reference to the said writ petition.

4. By filing this petition under Article 226 of the Constitution of India, petitioner has sought for the following reliefs:-

1) To set aside and quash communications dated 02.09.2020 of respondent Nos.5 and 6;

2) To direct the respondents, more particularly respondent Nos.4 and 7, to clear the goods imported by the petitioner vide bills of entry bearing Nos.5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019.

4.1. In the other writ petition i.e., Writ Petition No.3502 of 2020, in addition to relief No.1, petitioner seeks direction to the respondents, more particularly respondent Nos.4 and 7, to clear the goods imported by the petitioner vide bills of entry bearing Nos.5520732, 5520871 and 5520536, all dated 01.11.2019.

Case of the Petitioner

5. Petitioner is a proprietorship firm having its registered office at Jaipur, in the State of Rajasthan. It is engaged in the business of exports and imports of agricultural commodities.

6. Government of India in the Ministry of Commerce and Industry (Department of Commerce) had issued a notification dated 29.03.2019 in exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-20 amending the import policy in respect of peas (*pisum sativum*) including yellow peas, green peas, dun peas and kasper peas having Exim code 0713 1000. By the said notification, the said items have been put under restricted category allowing import upto total quantity of 1.5 lakh MT. This was followed by trade notice No.6 of 2019-2020 dated 16.04.2019 laying down the modalities for import of peas.

7. M/s. Raj Grow Impex LLP moved the Rajasthan High Court at Jaipur by filing writ petition bearing Writ Petition No.11974 of 2019 challenging the above notification and trade notice. Rajasthan High Court by order dated 20.07.2019 issued notice and stayed the operation and effect of the aforesaid notification and trade notice qua the petitioner (M/s. Raj Grow Impex LLP).

8. Similar writ petitions were filed by different importers in different High Courts of the country.

9. In view of the aforesaid development, petitioner placed orders for import of yellow peas, consignments of which were received in several batches in the month of November, 2019. The said consignments were covered by eight bills of entry bearing Nos.5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019, for total quantity of 38,500 MT.

9.1. However, customs authorities did not permit clearance of the above goods. As a result, petitioner was forced to shift the entire consignment of yellow peas to customs warehouse under section 49 of the Customs Act, 1962 (briefly 'the Customs Act' hereinafter). It is stated that in order to ensure that the yellow peas were not damaged, fumigation had to be carried out regularly to prevent

insect contamination. This resulted in incurring of further expenditure by the petitioner in addition to rent paid to the customs warehouse.

10. Government of India, Ministry of Commerce and Industry, Department of Commerce (Directorate General of Foreign Trade) issued notification No.37/2015-20 dated 18.12.2019 whereby it was notified that import of peas (*pisum sativum*) including yellow peas, green peas, dun peas and kaspa peas having Exim code 0713 1000 was restricted and subject to minimum import price of Rs.200.00 CIF per kilogram and annual quota of 1.5 lakh MT; besides import was allowed only through Kolkata sea port.

11. It appears that Union of India filed number of transfer petitions in the Supreme Court for hearing of different writ petitions which were filed in different High Courts challenging the notification dated 29.03.2019 and trade notice dated 16.04.2019. Thus, transfer petitions were registered as Transfer Petition (Civil) Nos.496-509 of 2020 (Union of India Vs. Agricas LLP). By judgment and order dated 26.08.2020, Supreme Court upheld the said notification and trade notice and rejected the challenge made by the importers. It was held as under:

"48. Accordingly, we uphold the impugned notifications and the trade notices and reject the challenge made by the importers. The imports, if any, made relying on interim order(s) would be held to be contrary to the notifications and the trade notices issued under the FTDR Act and would be so dealt with under the provisions of the Customs Act 1962. The Writ Petitions subject matter of the Transfer Petitions, subject to E above (What is not decided) are dismissed. Writ Petitions filed by the intervenors before the respective High Courts shall stand dismissed in terms of this decision. Pending application(s), if any, also stand disposed of in the above terms. No order as to costs."

12. Immediately thereafter petitioner approached the adjudicating authority with a copy of the judgment of the Supreme Court and requested for early adjudication in view of the mounting expenditures and perishable nature of the goods. Petitioner requested the adjudicating authority for waiver of show cause notice but sought for personal hearing.

12.1. On request of the importer, show cause notice was waived but personal hearing was granted. Thereafter, the adjudicating authority passed the order-in-original on 28.08.2020 which was issued on 03.09.2020. Operative portion of the aforesaid order is extracted hereunder:

"Order

i. I confiscate the impugned goods u/s. 111(d) of the Customs Act, 1962. Whereas I give an option to the importer to redeem the impugned goods on payment of the redemption fine of Rs.1.5 crores (Rupees One Crore Fifty Lakhs only) in lieu of confiscation u/s.125(1) of the Customs Act, 1962.

ii. I, also impose a penalty of Rs.2.35 crores (Rupees Two Crores Thirty Five Lakhs only) on M/s. Harihar Collections, Jaipur u/s.112(a)(i) of the Customs Act,

1962."

13. It is stated that pursuant to the order-in-original, petitioner paid the customs duty, redemption fine and the penalty, details of which have been furnished in paragraphs 17 and 18 of the writ petition. Total amount paid by the petitioner covering all the above three heads is Rs.44,21,31,298.00. This amount covered all the bills of entry.

13.1. On payment of the aforesaid amount, petitioner received out of charge from the customs department for all the bills of entry.

14. Notwithstanding the above, goods of the petitioners were not released. On enquiry, petitioner came to know that on 02.09.2020, separate letters were written by respondent Nos.5 and 6. In his letter by respondent No.6 addressed to respondent No.5, he requested to put the consignments on hold making a reference to letter of Directorate General of Foreign Trade dated 01.09.2020. Respondent No.5 in turn requested Mumbai Port Trust i.e., respondent No.7 not to issue delivery order of the consignments of the petitioner. The above letter was received by respondent No.7 in the midst of unloading of the goods of the petitioner. Thereafter petitioner received a letter dated 09.09.2020 from respondent No.7 stating that the cargo stored in its premises would not be released in view of directions received from the customs authorities.

15. Aggrieved, the present writ petition has been filed.

Stand of the Respondents

16. Respondent Nos.4 to 6 have filed a common affidavit. In paragraph 16 of the affidavit it is stated that all the bills of entry filed by the importer were assessed on 29.08.2020. Redemption fine and personal penalty were levied proportionately as per quantity declared in the respective bills of entry. In paragraph 17, it is admitted that the importer i.e., the petitioner has paid duty, proportionate redemption fine and personal penalty in respect of all bills of entry and have obtained out of charge.

16.1. Thereafter it is stated that a letter dated 01.09.2020 was received from the Directorate General of Foreign Trade, New Delhi addressed to the Central Board of Indirect Taxes and Customs wherein it was mentioned that as per present policy, peas is a restricted item. It was further stated that customs authorities were releasing imported peas which were lying at the ports for last number of months based on the Supreme Court judgment, such action being contrary to the import policy on peas. It was further directed that till legal opinion from Additional Solicitor General was obtained field formations should not release consignments of peas and in those cases where consignments have been released to provide the details. Answering respondents have stated that on the basis of the aforesaid letter, consignments of peas of the petitioners have not been released. However, consequent upon out of charge, total quantity of 1206 MTs got cleared against total quantity of 38500 MTs.

16.2. Referring to the order-in-original it is stated that Commissioner of Customs (Import-II) has passed review order dated 01.10.2020 under section 129 D(2) of the Customs Act whereby several deficiencies in the adjudication order were pointed out. Following the same Additional Commissioner of Customs, Group-I, Import-II, Mumbai has been directed to apply to the Commissioner (Appeals) to set aside the order-in-original and to pass suitable order as deemed fit.

Submissions

17. Dr. Kantawala, learned counsel for the petitioner submits that the above action of the respondents is wholly illegal. This Court had taken cognizance of the two writ petitions on 25.09.2020 when counsel for the respondents sought for four weeks' time to file affidavit in reply. It was after hearing counsel for the petitioner who had submitted that petitioner was being compelled to pay substantial amount of money to the authorities for warehousing of the goods, who were not releasing the goods in question despite making payment in terms of the order-in-original that this Court directed respondents to file the affidavit within ten days fixing the case for consideration on 06.10.2020. When this Court was in seisin of the matter Commissioner of Customs (Import-I), Mumbai despite being a respondent in the proceeding, purported to have passed the order dated 01.10.2020 under section 129 D(2) of the Customs Act without informing or taking the leave of the Court. This amounts to over-reaching the proceedings of the Court and is an act of contempt.

17.1. Adverting to the order dated 01.10.2020, he submits that all the grounds given by the Commissioner directing the Additional Commissioner of Customs to apply to the Commissioner (Appeals) for setting aside of the order-in-original are totally frivolous and are no grounds at all in the eye of law. One by one he has taken us to the various grounds given in the order dated 01.10.2020 for review of the order-in-original.

17.2. He has also placed before the Court a copy of the order-in-original passed by the Joint Director General of Foreign Trade, Jaipur dated 16.12.2019 suspending the import export code of the petitioner prospectively. On a query by the Court he submits that against this order petitioner has preferred appeal and this fact was also brought to the notice of the Supreme Court while hearing the transfer petitions. Supreme Court indicated in paragraph 47 of the judgment that the statutory appeals preferred by the importers against suspension or termination of import export code will be decided in accordance with law. That aspect of the matter was not examined and therefore, no comment was made thereon by the Supreme Court.

17.3. He finally submits that there can be no justifiable reason for not releasing the goods of the petitioner despite petitioner complying with all the terms and conditions of the order-in-original and receiving out of charge.

18. On the other hand, Mr. Singh, learned Additional Solicitor General submits that after passing of the order dated 01.10.2020 the writ petition has become

infructuous. Petitioner has not amended the writ petition to incorporate challenge to the order dated 01.10.2020. Therefore, the writ petition should be dismissed. Referring to the order dated 01.10.2020, Mr. Singh submits that under section 129 D(2) of the Customs Act, Principal Commissioner of Customs or Commissioner of Customs has the power to examine any decision or order passed by a subordinate authority and if satisfied that such decision or order is not legal or proper, direct such authority to apply to the Commissioner (Appeals) for determination of such points as may be specified by the Principal Commissioner of Customs or Commissioner of Customs. Therefore, Commissioner has exercised the power conferred upon him by sub-section (2) of section 129-D. No final decision has been taken by the Commissioner. All that has been done is to direct the subordinate authority to apply to the Commissioner (Appeals) for determination of the points arising out of the order-in-original as specified by the Commissioner. No adverse decision as such has been taken against the petitioner. Commissioner (Appeals) will pass the appropriate order which may even be in favour of the petitioner. He submits that following the order dated 01.10.2020, Additional Commissioner of Customs has in fact filed the appeal before the Commissioner (Appeals) against the order-in-original. He, therefore, submits that there is no merit in the writ petition. Writ petition should be dismissed.

19. In reply, Dr. Kantawala submits that such submission on behalf of the respondents is not only unfair but is also wholly untenable. It is not the petitioner but the respondents who had sought to materially alter the subject matter of the writ petition and thereafter have contended that the writ petition should be dismissed since petitioner has not challenged the subsequent order dated 01.10.2020. This is most unfair, he submits. The order-in-original dated 03.09.2020 is holding the field. The said order has neither been set aside nor stayed by any appellate or higher authority. Petitioner has complied with all the conditions of the said order and made all the payments. Thereafter out of charge has been issued. Therefore, there cannot be any justifiable reason not to release the imported goods of the petitioner. Because of storage of the goods in customs warehouse, petitioner is having to incur more than Rs.60 lakhs per day. Viewed in that context action of the respondents is extremely high-handed and oppressive, besides being contemptuous. He, therefore, submits that writ petition may be allowed with costs.

Discussions

20. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record.

21. We have already seen that challenge to the notification dated 29.03.2019 and trade notice dated 16.04.2019 whereby the item peas (*pisum sativum*) including yellow peas, green peas, dun peas and kaspas peas having Exim code 0713 1000 was placed in the restricted category with further restrictive conditions for import were upheld and challenge thereto made by the importers

was rejected by the Supreme Court. While dismissing the writ petitions, Supreme Court observed that the imports made by relying on interim orders would be contrary to the notification and the trade notice. Such imports would have to be dealt with under the provisions of the Customs Act.

22. Petitioner forwarded a copy of the said judgment of the Supreme Court to the adjudicating authority and requested expeditious adjudication by waiver of show cause notice under section 124 of the Customs Act but sought for a personal hearing. On request of the petitioner, personal hearing was granted. Petitioner also furnished written submissions. Adjudicating authority took up adjudication on priority considering that the consignments were long pending and perishable in nature. After holding that the goods were imported in contravention of the notification and the trade notice thus becoming prohibited, adjudicating authority held that goods were liable for confiscation under section 111(d) of the Customs Act; besides the importer being liable to penalty under section 112(a)(i) of the Customs Act. Having held so the adjudicating authority took the view that an option could be given to the petitioner to redeem the goods on payment of redemption fine. After considering various aspects, the quantum of redemption fine and penalty leviable on the importer (petitioner) was determined. Thereafter by the order-in-original issued on 03.09.2020, the adjudicating authority confiscated the goods but at the same time gave an option to the petitioner to redeem the impugned goods on payment of redemption fine of Rs.1.5 crores in lieu of confiscation; besides imposing penalty of Rs.2.35 crores on the petitioner.

23. Petitioner has stated and that has been admitted by the respondents that it has paid the customs duty, redemption fine and penalty in terms of the order-in-original, total payment being Rs.44,21,31,298.00 covering all the bills of entry. Thereafter out of charge was given.

24. In spite of making the requisite payments in terms of the order-in-original, the goods were not released on the strength of the impugned letters dated 02.09.2020 which compelled the petitioner to approach this Court.

25. The two writ petitions were listed before this Court on 25.09.2020 on which date, this Court granted ten days' time to the respondents to file their affidavit making it clear that the case would be taken up on 6.10.2020. When the two writ petitions were taken up on 06.10.2020, the affidavit in reply filed on behalf of respondent Nos.4 to 6 mentioned that Commissioner of Customs (Import-II) had passed review order on 1.10.2020 under section 129 D(2) of the Customs Act pointing out various deficiencies in the order-in-original whereafter Additional Commissioner of Customs was directed to apply to the Commissioner (Appeals) to set aside the order-in-original. Copy of the order dated 1.10.2020 has been annexed to the affidavit in reply.

26. When this Court had taken cognizance of the grievance made by the petitioner and was in seisin of the matter fixing 06.10.2020 for consideration, it

was highly improper on the part of Commissioner of Customs (Import-II) to have passed the order dated 01.10.2020 without any intimation to or taking leave of the Court. It needs no reiteration that when the court, that too the High Court, is in seisin of a matter, an administrative or executive authority cannot start a parallel proceeding on the very same subject matter at its own ipse dixit and record a finding. It would amount to interfering with the dispensation of justice by the courts. In the instant case, when the Court was set to examine the grievance of the petitioner regarding non-release of the goods despite the order-in-original, what was sought to be done was to present the Court with an order passed in the midst of such examination keeping the Court totally in the dark saying that the order-in-original suffers from illegality or impropriety directing the subordinate authority to apply to the Commissioner (Appeals) to set aside the order-in-original and then contending that the writ petition should be dismissed because of the subsequent development or that the petitioner should be relegated to the appellate forum to contest the subsequent order. As pointed out above, this amounts to interfering with the administration of justice and is thus not at all acceptable. A view may be taken that such an order should be ignored as it is contumacious.

27. This brings us to the order dated 01.10.2020 styled as a review order passed under section 129 D(2) of the Customs Act. But before proceeding further, it would be apposite to advert to sub-section (2) of section 129 D of the Customs Act. Section 129 D deals with the power of committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders. Since sub-section (2) is relevant, the same is extracted hereunder:-

"(2) The Principal Commissioner of Customs or Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any officer of customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order."

27.1. From a careful analysis of sub-section (2) of section 129 D, the following features can be culled out:-

- (i) the said sub-section has conferred power on the Principal Commissioner of Customs or Commissioner of Customs to call for and examine the record of any proceeding suo-motu;
- (ii) the proceeding must be before an adjudicating authority subordinate to the Principal Commissioner of Customs or Commissioner of Customs and that subordinate adjudicating authority has passed any decision or order in such

proceeding under the Customs Act;

(iii) either of the two higher authorities may call for and examine the record of such proceeding for the purpose of satisfying himself as to the legality or propriety of any such decision or order;

(iv) if the higher authority is satisfied that such decision or order is not legal or proper, he may by order direct such authority (subordinate adjudicating authority) or any officer of customs subordinate to him to apply to the Commissioner (Appeals) for determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order.

27.2. From an examination of the aforesaid provision and the salient features as culled out above, it is quite evident that the jurisdiction conferred on the Principal Commissioner of Customs or Commissioner of Customs under sub-section (2) of section 129 D is revisional and not review; it is a suo-motu revisional jurisdiction which is exercised by either of the above two officers for the purpose of satisfying himself as to the legality or propriety of any decision or order of an adjudicating authority subordinate to him.

27.3. The time limit for passing an order under sub-section (2) of section 129D is three months which is provided in sub-section (3) though the said period can be extended by another thirty days by the Central Board of Indirect Taxes and Customs. Sub-section (4) clarifies that if pursuant to an order passed under sub-section (2), the adjudicating authority or any officer of customs authorized in this behalf by the Principal Commissioner of Customs or Commissioner of Customs makes an application to the Commissioner (Appeals) within the time specified, such application shall be heard by the Commissioner (Appeals) as if it were an appeal made against the decision or order of the adjudicating authority and the provisions relating to appeals shall be applicable to such application.

27.4. Reverting back to sub-section (2) of section 129 D, the crucial words in the said provision are legality or propriety of the decision or order of the subordinate adjudicating authority. If either of the two higher authorities is satisfied upon examination of the record that such decision or order is not legal or proper, he may direct the subordinate adjudicating authority or such other authorized officer to make an application before the Commissioner (Appeals) which when filed will be treated as an appeal.

28. A Constitution Bench of the Supreme Court in Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh, (2014) 9 SCC 78 had examined the scope and ambit of revisional jurisdiction vis-a-vis appellate jurisdiction. Though the examination was in the context of Rent Control Acts of different states, nonetheless the Constitution Bench examined the scope and ambit of revisional jurisdiction from a jurisprudential point of view. In that context, Supreme Court examined the extent, scope, ambit and meaning of the terms 'legality' or 'propriety' amongst others which form the fulcrum of revisional jurisdiction.

Referring to its decision in *Sri Raja Lakshmi Dyeing Works Vs. Rangaswamy Chettiar*, (1980) 4 SCC 259, it was held that ordinarily revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without it being invoked by a party [like sub-section (2) of section 129D of the Customs Act]. The extent of revisional jurisdiction is defined by the statute conferring such jurisdiction. Conferment of revisional jurisdiction is generally for the purpose of keeping the tribunals subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and accordingly to well-defined principles of justice. Revisional jurisdiction as ordinarily understood is always included in appellate jurisdiction but not vice versa.

28.1. Following therefrom Supreme Court observed that conceptually, revisional jurisdiction which is a creature of statute is a part of appellate jurisdiction but it is not vice versa. Ordinarily, revisional jurisdiction cannot be equated with that of a full-fledged appeal. When the aid of revisional jurisdiction is invoked, the revisional authority can interfere within the permissible parameters provided in the statute. In so far the word legality is concerned, it was held as under:-

"29.1. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal."

Referring to the term propriety, it was held as under:-

"29.2. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy."

28.2. Juxtaposing the two expressions, it was observed that the terms 'correctness' and 'propriety' ordinarily convey the same meaning, i.e., something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.

28.3. Summing up the debate, the Constitution Bench expressed full agreement with the view expressed in *Sri Raja Lakshmi Dyeing Works* (supra) that the expression 'revision' is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression 'appeal'.

29. Having noticed and discussed the legal provisions as above, we may now revert back to the order dated 01.10.2020 passed by the Commissioner of Customs (Import-II) which is the sheet-anchor of the respondents. Though the said order has been termed as a review order, we have already discussed above that the jurisdiction conferred upon the Principal Commissioner of Customs and Commissioner of Customs under section 129 D(2) of the Customs Act is revisional. In fact it is an order passed in exercise of the suo-motu power of revision. Before dealing with the contents of the order, it needs to be mentioned that the Commissioner had three months time to pass the said order, further

extendable by another thirty days. Yet he chose to pass the order most hastily in the midst of the court proceeding keeping the Court completely in the dark. After narrating the facts of the case and the order-in-original passed by the adjudicating authority, Commissioner of Customs took the view that the said order is not legal and proper for the following reasons (mentioned as grounds):-

1. non-issuance of show cause notice by the adjudicating authority;
2. non-addressal of the issue of suspension of import export code of the importer;
3. adjudication order was issued proceeding on the basis that the goods were required to be released against redemption fine whereas there were number of issues which were required to be taken into consideration, such as, suspension of import export code etc.;
4. adjudicating authority did not give reasons as to why absolute confiscation or re-export was not considered as an option;
5. adjudicating authority did not discuss as to why he relied upon the certificate of accredited laboratory rather than referring the matter to the designated government agency;
6. enquiry not conducted for ascertaining market price and margin of profit for imposition of redemption fine and penalty.

30. On the above basis, the order-in-original was found to be not legal and proper, and therefore, the Additional Commissioner of Customs was directed to apply to the Commissioner (Appeals) to set aside the said order and pass suitable order as may be deemed fit.

31. As we have discussed above, the suo-motu revisional power under sub-section (2) of section 129 D is within a very narrow compass; to ensure that the subordinate authorities are kept within the bounds of their authority to make them act according to law; according to the procedure established by law; and according to well defined principles of justice; thus conforming to the requirement of legality or propriety, the connotations of which we have noted. We have also seen that consequent upon exercise of power under sub-section (2) of section 129 D, the application filed before the Commissioner (Appeals) would be treated as if it is an appeal against the decision or order of the adjudicating authority and all provisions regarding appeal shall apply to such an application.

32. Now coming to the order dated 01.10.2020, we find that the first ground given to justify as to why the order-in-original is not legal and proper is non-issuance of show cause notice. In this connection, we may refer to the relevant portion of the adjudicating order dealing with this aspect:-

"7. The importer M/s. Harihar collections, Jaipur submitted letter dated 26.08.2020 wherein they informed about the above judgment of the Hon'ble Supreme Court and requested not to issue show cause notices. The importer requested to give him personal hearing as soon as possible to put forth their

case to enable the Adjudicating Authority to take decision for clearance at the earliest so that their loss would be minimized. On the request of the importer, they were allowed to appear for Personal Hearing on any working day. The importer appeared for Personal Hearing on 28.08.2020 represented by Advocate Shri Kamlesh R. Tiwari.

8. An email from the departmental Counsel Sh. Kinshuk Jain was received on 26.08.2020 wherein he forwarded the copy of the above decision of the Hon'ble Supreme Court and advised to take necessary action.

9. Considering the long pending and perishable nature of the consignment of yellow peas rotting in the open yard of the Mumbai Port Trust and facing the fury of the monsoons, I decided to take up the adjudication on priority."

32.1. Section 124 of the Customs Act deals with issuance of show cause notice before confiscation of goods etc. It says that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing containing the grounds for the proposed action, and thereafter giving him an opportunity of making a representation in writing within reasonable time. However, the first proviso is relevant and it says that the show cause notice and the representation may at the request of the person concerned be oral. Therefore, under section 124 of the Customs Act at the request of the owner or person concerned, the show cause notice and the representation in writing may be waived and thus may be oral.

32.2. In the instant case, petitioner made a request not to issue show cause notice but to give him personal hearing. This was accepted by the adjudicating authority which power admittedly he has under the first proviso to section 124 and he has given reasons for the same i.e., long pendency and perishable nature of the consignments.

33. The next ground given is non-addressal of the issue of suspension of import export code of the petitioner. In the course of hearing, learned counsel for the petitioner had placed before the Court a copy of order-in-original dated 16.12.2019 issued by the Joint Director General of Foreign Trade, Jaipur whereby fiscal penalty of Rs.25,000.00 was imposed on the petitioner under sections 11 and 13 of the Foreign Trade (Development and Regulation) Act, 1992; besides, he also ordered for suspension of the import export code of the petitioner barring the petitioner from conducting any further import and export as per section 8(1) of the Foreign Trade (Development and Regulation) Act, 1992.

33.1. On this aspect Supreme Court in Union of India Vs. Agricas LLP (supra) noted that it had not examined the matter as statutory appeals have been filed against orders suspending or terminating import export code. Thus, Supreme Court declined to make any comment and observed that the statutory appeals preferred by the importers will be decided in accordance with law.

33.2. In view of what the Supreme Court had observed the adjudicating

authority could not have taken up and examined such order of suspension. Besides, from a perusal of the order of suspension dated 16.12.2019 it is evident that the said order has barred the petitioner from conducting any further import and export meaning thereby that it is prospective and in no way impacted the import made prior to that date which was the subject matter of adjudication in the order-in-original.

34. This brings us to the third ground given by the Commissioner which is that the adjudication order ordered redemption of the goods on the basis of the assumption that the goods should be released against redemption fine without considering other issues, such as, suspension of import export code, restrictive nature of import, etc. This ground can be examined together with the fourth and the sixth grounds given by the Commissioner. As per the fourth ground, the adjudicating authority did not give reasons as to why absolute confiscation or re-export was not considered as an option and as per the sixth ground, enquiry was not conducted for ascertaining the market price and margin of profit for imposition of redemption fine and penalty.

34.1. From a perusal of the order-in-original, we find that when the goods were not cleared, those were allowed to be warehoused under section 49 of the Customs Act and the goods remained warehoused for about nine months. Considering the long pendency of the consignment besides its perishable nature and the fact that the consignments were rotting in the open yard of the Mumbai Port Trust facing the fury of the monsoons, the adjudication was taken up on priority. Adjudicating authority noted that the imports were made in contravention of the notification dated 29.03.2019 and trade notice dated 16.04.2019. Thus, the goods became prohibited, liable for confiscation.

34.2. Section 125 of the Customs Act gives an option to pay fine in lieu of confiscation. Sub-section (1) provides that whenever confiscation of any goods is authorized by the Customs Act, the officer adjudicating it in the case of any goods the importation or exportation whereof is prohibited for the time being in force, may and in the case of other goods, shall give to the owner of the goods or the person concerned, an option to pay in lieu of confiscation, such fine as the said officer thinks fit. The second proviso clarifies that such fine shall not exceed the market price of the goods confiscated and in the case of imported goods, minus the duty chargeable thereon. As per sub-section (2) where any fine in lieu of confiscation of goods is imposed, the owner of such goods or the person concerned shall in addition be liable to any duty and charges payable in respect of such goods.

34.3. The power under sub-section (1) of section 125 regarding giving option to the owner or person concerned to pay fine in lieu of confiscation is discretionary in respect of goods the importation or exportation whereof is prohibited but in respect of other goods it is mandatory. Therefore, such a power is available to the adjudicating authority and he has exercised that power. That apart, when fine is imposed in lieu of confiscation, sub-section (2) makes it abundantly clear that

the owner or the person concerned would have to pay in addition to the fine, the customs duty and other charges. Non-mentioning of the duty payable in the order-in-original is therefore immaterial, as payment of the same is statutorily mandated under sub-section (2) of section 125.

34.4. Regarding the quantum of redemption fine and penalty, the adjudicating authority held as under:-

"12. Now I proceed to determine the quantum of redemption fine and penalty to be levied on the importer. I find that the importer in the case of (M/s Raj Grow LLP) initially, submitted a calculation sheet of margin of profit of Rs.3 per kg in the month of November, 2019 seeking provisional release. The market price, as claimed, was verified at that point of time. This was the basis of determining the quantum of bank guarantee for provisional release of the consignment of approximately 25000 MT. Now the market price has been further looked into as reported by the assessment group and the same has been found in the same price band. The importer further, submitted the details of the expenditures incurred on the storage, transportation and labour charges. Thereby, the big part of the profit of the importer has been nullified due to above expenses. Moreover, the goods, being perishable in nature, has deteriorated due to poor condition of the warehouses and a lot of rainfall as depicted by the importer from time to time with the help of the photographs. The letter from Mumbai Port Trust and another public warehouse reveals that the cargo was submerged upto 4th level of stacked bags on the day of storm in Mumbai on 5th August 2020 as high tides from the seas entered the port area. Report from analytical test laboratory revealed quality of the pulses had deteriorated on account of humidity, exposure and pest attacks. The documents submitted by the importer from time to time during the interregnum also goes on to lend credence to the deterioration in the quality of the goods. Thus, I am inclined to believe that goods have lost much of their market value though they are still fit for human consumption as per accredited laboratory certificate. Hence, I consider it appropriate to impose fine and penalty calculating the margin of profit @ Rs.1 per Kg as suggested by the assessing officer despite the importer showing a profit of only Rs.5 paise per kg."

34.5. Thus for the reasons given, the adjudicating authority calculated the margin of profit @ Re.1 per kg as suggested by the assessing officer and on that basis worked out the redemption fine in terms of the second proviso to sub-section (1) of section 125.

34.6. In such circumstances, taking exception to the order-in-original on the above grounds appears to be questionable. As already discussed, adjudicating authority had the power to give option to the owner or person concerned to pay fine in lieu of confiscation which power he exercised and the quantum of fine was determined after considering various aspects including the margin of profit suggested by the assessing officer.

35. The final ground given by the Commissioner is that the adjudicating authority

did not discuss why he chose to rely upon the certificate of the accredited laboratory rather than referring the matter to the designated government agency. The ground itself indicates that the laboratory from which the related report was obtained and which was considered is a laboratory which is accredited to the customs department. Accredited means giving official authorization or recognition. Therefore, no fault can be found in the adjudicating authority placing reliance on such report. Besides, no technical or any other fault in such report has been pointed out by the Commissioner.

36. We have examined the grounds given in the order dated 1.10.2020 not as an appellate authority over the Commissioner but only to satisfy ourselves as to whether on such grounds a bona fide satisfaction can be arrived at that the order-in-original suffers from illegality or impropriety. Even on that aspect also, we refrain from expressing our final views since it is stated that application has been filed pursuant to the order dated 01.10.2020 which shall now be treated as an appeal, but the manner in which the order has been passed is definitely questionable and the contents of the order dated 01.10.2020 particularly the grounds given as examined prima facie do not make out a case that the order-in-original suffers from such illegality and impropriety that suo-motu revisional power under section 129 D(2) should be exercised. Prima-facie, on examination of the grounds as above, we cannot say that the order-in-original is unlawful or inappropriate or unjust or that the adjudicating authority acted beyond the bounds of his authority. However, since application has been filed which will now be decided by the Commissioner (Appeals) as an appeal, we only limit our examination to the justification or otherwise of not releasing the goods of the petitioner on the strength of the order dated 1.10.2020.

37. We have already discussed and noted that the order-in-original is holding the field. The same has neither been set aside nor stayed. Interestingly, respondent Nos.4 to 6 in para 16 of their affidavit have themselves admitted that the redemption fine and personal fine were levied proportionately to the quantity declared in the bills of entry. Petitioner has complied with the terms and conditions of the order-in-original and made the necessary payments. Out of charge has been issued. Because of warehousing of the goods under section 49 of the Customs Act, petitioner is required to pay a substantial amount to the customs authority. In the above context and after thorough consideration of all aspects of the matter, we are of the view that non-release or withholding of the imported goods of the petitioner any further would not be just and proper. At least the grounds given in the order dated 01.10.2020, which order itself was passed in a highly improper manner, do not justify that the goods should be withheld or denied release notwithstanding the order-in-original and compliance thereto.

Conclusion

38. Consequently, we direct the respondents more particularly respondent Nos.4 to 7 to forthwith release the goods of the petitioner covered by bills of entry

bearing Nos.5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019. Similar direction also follows in Writ Petition No.3502 of 2020 in respect of bills of entry bearing Nos.5520732, 5520871 and 5520536, all dated 01.11.2019.

39. Both the writ petitions are accordingly allowed. We thought of imposing cost in this case but we have refrained ourselves from doing so.

40. While the judgment was pronounced, Mr. Singh, learned Additional Solicitor General made an oral prayer that the effect of the judgment should be kept in abeyance for a reasonable period to enable the contesting respondents to move the Supreme Court.

41. Having delivered the judgment, we find no good reason to keep the same in abeyance. Consequently, prayer made is rejected.

42. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.