(2015) 04 MP CK 0135

In the Madhya Pradesh High Court

Case No : Writ Petition No. 8299 of 2014

L.G. Impex APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(d), 19(1)(e), 19(1)(g)
Customs Act, 1962 — Section 100, 110, 110 (2), 110-A, 111

Citation : (2015) 04 MP CK 0135

Hon'ble Judges : P.K. Jaiswal, J;Alok Verma, J

Bench : Division Bench

Advocate : Ajay Bagadiya, Learned Counsel, for the Appellant; Prasana Prasad, Learned Counsel, Advocates for the Respondent

Judgement

1. By this writ petition under Article 226 of the Constitution of India, the petitioner is challenging the letter C. No. VIII/ICD/10/TKD/SIIB/INV/LG. Impex/82/2014 dated 31.10.2014 (Annexure P/1), issued by the respondent No. 4 whereby the respondent No. 4 has allowed the provisional release of seized goods by imposing the conditions, which are harsh, onerous and contrary to the provisions of the Customs (Provisional Duty Assessment) Regulations, read with Section 110-A of the Customs Act, 1962.

2. After show cause notice by this court on 17.3.2013, the matter has been investigated by the office of the respondent No. 5 - Additional Director General, Directorate of Revenue Intelligence and during the course of the investigation, samples were sent for collective analysis and on the basis of the report, a letter was issued on 8.1.2015, from the office of the respondent No. 5 to Commissioner of Customs (Import) CID Tuglakabad, New Delhi, withdrawing the NOC given earlier on 8.10.2014 and requested to withdraw the provisional release of goods order issued by the respondent No. 4 on 31.10.2014. The respondent No. 4 vide letter 12.01.2015 has withdrawn the order of provisional release of goods with immediate effect. The petitioner by way of rejoinder, challenging the

communication dated 8.1.2015 and 12.1.2015.

3. Brief facts of the case are that the petitioner - M/s. L.G. Impex, a proprietorship firm and Mr. Neeraj Lingara is a sole proprietor of the said proprietorship firm. He is engaged in trading and import of Betel Nuts. Import of Betel Nuts from Pakistan is permitted under the agreement on South Asian Free Trade Area Agreement (SAFTA), which was entered into between the Government of SAARC (South Asian Association for Regional Cooperation) member states.

4. Under the provisions of SAFTA imports among the contracting States are eligible for duty concessions, subject to the conditions stipulated therein. Under Table II, at Serial 45, of Notification No. 68/2012-Cus dated 31.12.2012 all goods under Sub Heading 0802 80 of Customs Tariff Act, 1975 are allowed to be imported at a concessional rate of duty at 8%. Under Chapter 8 of Customs Tariff Act, 1975, Areca Nuts (Betal Nuts) are classified under Sub Heading 0802 80.

5. On the basis of an intelligence, a case of custom duty evasion by petitioner - M/s. L.G. Impex was booked by the respondent No. 5 - Directorate of Revenue (Intelligence) on 20.8.2014. The intelligence indicated that the firm had imported Areca Nuts from M/s. Bluemoon Industries Pvt. Ltd., Karachi, Pakistan by wrongly availing the benefit of Notification No. 68/2012-Customs dated 31.12.2012. On advice of respondent No. 5, 1520 bags of Areca nuts (Split) weighing 114 MT imported earlier by the firm at ICD, TKD, New Delhi vide Bill of Entry No. 6258874 dated 28.7.2014 were detained at Indore by the officers of Central Excise and Customs Commissionerate, Indore vide Panchanama dated 20.8.2014. One live consignment of Areca nuts imported by the firm at ICD, TKD, New Delhi vide Bill of Entry No. 6456463 dated 16.8.2014 was also examined and placed under seizure by DRI (Respondent No. 5) officers under panchanama dated 16/17.09.2014.

6. Notification No. 68/2012-Customs dated 31.12.2012 deals with exemption to specified goods imported under the South Asian Free Trade Area Agreement (SAFTA Agreement). Areca nuts fall under sub-heading 0802 80 of the First Schedule to the Customs Tariff Act, 1975 and attract tariff rate of 100% Basic Customs Duty (Standard). A concessional rate of 8% has been prescribed for all goods falling under sub-heading 0802 80 vide S. No. 45 of Table II of aforesaid notification. For the purpose of availing exemption under Notification No. 68/2012-Customs dated 31.12.2012 , the importer has to prove to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs that the goods in respect of which the benefit of this exemption is claimed, are of the origin of the country listed in the notification (Appendix to the notification) in accordance with the Rules of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA), 2006 notified under Notification No. 75/2006-Customs (NT) dated 30.6.2006.

7. Rule 8(a) of the Rules of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (hereinafter referred to as "SAFTA"

Rules of Origin") is relevant for the goods in question. Rule 8(a) of the SAFTA Rules of Origin is extracted below:--

"a) Products originating in the exporting Contracting State shall be considered to be sufficiently worked or processed for the purposes of granting originating status if they fulfill the following conditions:--

"(i) The final product is classified in a heading at the four digit level of the Harmonized Commodity Description and Coding System differently from those in which all the non-originating materials used in its manufacture are classified; and

(ii) Products worked on or processed as a result of which the total value of the materials, parts or produce originating from other countries or of undetermined origin used does not exceed 60% of the FOB value of the products produced or obtained and the final process of manufacture is performed within the territory of the exporting Contracting State."

From the aforesaid, it is clear that both the above conditions are to be specified to avail the benefit of concessional rate of duty provided under the notification No. 68/2012- Customs dated 31.12.2012.

8. One of the condition to be specified for availing the benefit of exemption as prescribed under Rule 8(a)(ii) is that total value of materials, parts or produce originating from other countries or of undetermined origin shall not exceed 60% FOB value of the goods in question, which means that the value addition in the contracting State (Pakistan in this Case) has to be more than 40%.

9. As per the stand of Directorate of Revenue, the Classification at the 4 digit level of the goods exported from Pakistan do not change from that of non-originating material, the betel nut of areca cannot be allowed the benefit of aforesaid SAFTA notification. Further the importer has stated that the following processes are carried out in Pakistan, which amount to a value addition of 60%:--

"(a) De-husking of the Areca nut,

(b) Cleaning of the Areca nut through blowers machine,

(c) Splitting of the Areca nut by employing a cutting machine,

(d) Washing of the Areca nut,

(e) Drying of Areca nut by employing a drying machine,

(f) Sorting and Segregation

(g) Fumigation process, (h) Packaging."

10. The Directorate in order to ascertain the nature of processes undertaken and the value addition made in Pakistan, the samples (6 in number - 5 from 5 containers of betel nuts (split) imported under bill of entry No. 6456463 dated 16.8.2014 seized at ICD, TKD, New Delhi and 1 from the goods seized at the

godown premises at Indore imported under bill of entry No. 6258874 dated 28.7.2014) were sent to the Central Areca Nuts and Cocoa Marketing and Processing Cooperative Ltd., Mangalore (CAMPCO in short), to decide the entitlement of the imported goods to the benefit of SAFTA notification Notification No. 68/2012-Customs .

11. As per Rule 8(a) of SAFTA Rules of Origin notified under Notification No. 75/2006-Customs (N.T.) dated 30.6.2006, the products are to be granted originating status if there is a change in classification at the 4 digit level (from the classification of the non-originating materials) and the total value of the materials, parts or produce originating from other countries or of undetermined origin used do not exceed 60% of the FOB value of the exports.

12. As per CAMPCO report the sample are not fit for human consumption as yeast and mould/gram and infestation are found in the samples. The CAMPCO has also intimated that the six samples which were sent for testing were not actually subjected to washing and drying processes and after excluding the value addition that could be made on account of these two processes, the value addition would be actually 14.05%. Thus value addition undertaken in Pakistan is 40%, the benefit of concessional rate is not permissible. As stipulated in SAFTA Rules of Origin, along with value addition, a change in tariff line is mandatory to qualify for country of Origin under SAFTA.

13. In the present case, as the classification at the 4 digit level of the goods exported from Pakistan do not change from that of non-originating material, even with value addition, the betel nuts cannot be allowed the benefit of SAFTA Notification No. 75/2006-Customs (NT) dated 30th June, 2006 . Due to the aforesaid reasons, the goods detained at the godown premises of the petitioner and were placed under seizure under Section 100 of the Customs Act, 1962. as the goods appeared liable for confiscation under the provisions of Customs Act, 1960.

14. The petitioner vide letter dated 29.9.2014 prayed for provisional release of seized goods. As the benefit of the exemption notification was not available to the goods in question, the condition for proverbial release goods ie., demand of differential of fine and penalty likely to be imposed, bond for the value of the goods has been imposed to protect Government revenue. It has also come on record that the petitioner firm has also imported Areca nuts in the past vide 26 Bills of Entry at ICD, TKD, New Delhi at 8% concessional rate of duty and the differential duty liability in respect of 26 Bills of Entry under which imports were made at ICD, TKD, New Delhi earlier is Rs. 44 Crore approximately. The stand of the Directorate of Revenue that these goods have been imported in contravention of Notification 68/2012 dated 31.12.2012 read with SAFTA Rules of Origin, these goods are liable for confiscation under Section 111 of the Customs Act, 1962 because the Act of import of such goods falls within the meaning of smuggling as defined under Section 2(39) of the Customs Act, 1962.

15. The amount lying in the bank accounts of the petitioner has been freezed on the ground that the sale proceeds of smuggled goods and the same are liable for confiscation under Section 121 of the Customs Act, 1962.

16. Further, in order to ascertain the nature of processes undertaken and the value addition made in Pakistan, the samples (6 in number - 5 from 5 containers of betel nuts (split) imported under bill of entry No. 6456463 dated 16.8.2014 seized at ICD, TKD, New Delhi and 1 from the goods seized at the godown premises at Indore imported under bill of entry No. 6258874 dated 28.7.2014) were sent to the Central Areca Nuts and Cocoa Marketing and processing Cooperative Ltd., Mangalore (CAMPCO in short), to decide the entitlement of the imported goods to the benefit of SAFTA notification Notification No. 68/2012-Customs.

17. The CAMPCO has also intimated that the six samples which were sent for testing were not actually subjected to washing and drying processes and after excluding the value addition on account of these two processes, the value addition would be actually 14.05%. However, even if it is presumed for the sake of arguments that the aforesaid two processes were also carried out on the samples, the value addition would have been 24%. In any case, as the value addition undertaken in Pakistan is below 40%, the benefit of concessional rate is not permissible on this ground too. Therefore, the benefit of exemption under Notification No. 68/2012-Customs dated 31.12.2012 is not available to the goods in question on more than one ground, which was wrongly claimed and availed by the petitioner.

18. The petitioner was given option of availing the benefit of Section 49 of the Customs Act, 1962 for warehousing the seized goods at ICD, TKD, New Delhi. The differential customs duty in respect of goods seized is Rs. 3,28,15,595/- and the accounts of the petitioner were freezed to protect the Government Revenue and Rs. 2.5 Crores (approx) are lying in the bank accounts of the petitioner.

19. The bank amount of the petitioner has been seized under the reasonable belief that the same are sale proceeds of smuggled goods and the same are liable for confiscation under Section 121 of the Customs Act.

20. The department has taken an objection that as per Section 129-A of the Customs Act, 1962, the petitioner has provided a sufficient efficacious remedy to challenge the impugned order by filing an appeal to the appellate tribunal. The petitioner without availing the same has filed the present writ petition under Article 226 of the Constitution of India. It is well settled that the statutory form created by law for redressal of grievance is available, the present writ petition is not maintainable.

21. The stand of the Director of Revenue Intelligence is that the benefit of exemption notification was not available to the goods in question, the condition for provisional release of goods cannot be considered excessive. The goods in question have been imported in contravention of Notification No. 68/2012 dated

31.12.2012 read with SAFTA Rules of Origin. Thus, goods are liable to be confiscated under Section 111 of the Customs Act, 1962. It is also contended that the Office of the Directorate of Revenue Intelligence vide letter dated 11.12.2014 has also sent two samples of Areca Nuts (split) from goods seized vide panchnama dated 20.08.2014 and 16.09.2014 drawn at Godown premises of petitioner and at ICD, TKD, New Delhi for seeking second opinion regarding the fitness of Areca Nuts (split) for human consumption to Central Food Laboratory, Kolkata. Central Food Laboratory, Kolkata, which is a Food Safely and Standards Authority of India notified laboratory has confirmed test report of CAMPCO, wherein the subjected samples were not found fit for human consumption and respondent No. 5 has relied upon both the test reports before withdrawing its no objection to respondent No. 4. Central Food Laboratory, Kolkata has given an independent opinion on the subjected samples that they are unsafe and unfit for human consumption.

22. As per the reply of the department, CFL, Ghaziabad was contacted first telephonically on 10.12.2014 and it was informed that the testing kit of Areca Nuts was not available in the laboratory, as is evident from letter No. FRSL/8152/2015/118 dated 03.02.2015. Due to the aforesaid reasons, the samples were sent to CFL, Kolkata for testing. The Director, CFL, Ghaziabad has further confirmed that DRI being a national intelligence agency, may get the subjected samples tested from any NABL Accredited Laboratory in the country. The Director, CFL, Kolkata in its report dated 02.01.2015 found that subjected samples were in a fit condition for analysis; the samples were properly stored by the DRI and fitness of samples were found with respect to its testing has been certified by the CFL, Kolkata. The test report of CAMPCO has clearly referred the container numbers from where the subjected samples were drawn and the report received from CFL, Kolkata has also referred to the Bills of Entry Numbers.

23. Regarding compatibility of CAMPCO to test the samples of Areca Nut and jurisdiction of CFL to test the samples so being sent to them, it is emphasized by the department that the investigating agency has absolute discretion to take appropriate steps within the ambit of law to detect the truth in course of an investigation and in the case in hand, best possible steps were taken to bring the truth on surface. CFL, Kolkata also confirmed the test report of CAMPCO wherein the subjected samples were not found fit for human consumption. The Directorate of Revenue Intelligence has relied upon both the test reports before withdrawing no objection to respondent No. 4.

24. The testing of samples were conducted by the CFL, Kolkata, which is a notified government laboratory under Food Safety and Standards Authority of India. In respect of the question regarding jurisdiction of CFL, Kolkata, the stand of the department is that CFL, Ghaziabad was contacted first telephonically on 10.12.2014 and it was informed that the testing kit of Areca Nuts was not available in the laboratory, and thus, the samples were sent to CFL, Kolkata for testing. The Director of CFL, Ghaziabad has further confirmed that DRI being a

national intelligence agency, may get the subjected samples tested from any NABL Accredited Laboratory in the country. As per the report of CAMPCO and CFL, Kolkata, samples were properly stored by the DRI and samples were fit for testing and the place/containers from where the samples were drawn and sent for test has well been indicated in the test reports.

25. The department has also raised an objection about the maintainability of the writ petition on the ground that Mr. Neeraj Linjhara, the sole proprietor of M/s. L.G. Impex has a Pakistani Nationality. He was born in Chaman, District Quila Abdulla, Pakistan on 16.10.1991 and was resigning at Linjhara Niwas, Khushi Mohammad Road, Pakistan. He is in India on a VISA. He holds a Pakistani Passport No. KH410075. The department has also enclosed copy of application submitted by him for long term VISA for a period of further two years on 23.11.2012. The respondents contended that a person, who is not a citizen of India, does not enjoy the fundamental rights guaranteed to an Indian Citizen and any writ petition filed invoking Article 19 of the Constitution of India, is not maintainable. In support of the aforesaid, learned counsel for the respondents has drawn our attention to the decision of the Apex Court in the case of State of Arunachal Pradesh Vs. Khudiram Chakma, AIR 1994 SC 1461 : (1993) 3 JT 546 : (1993) 2 SCALE 682 : (1994) 1 SCC 615 Supp : (1993) 3 SCR 401 ; paragraph No. 75 of the judgment is relevant, which reads, as under:--

"It is true that fundamental right is available to a foreigner as held in Louis De Raedt and Others Vs. Union of India and others, AIR 1991 SC 1886 : (1991) 3 JT 306 : (1991) 2 SCALE 127 : (1991) 3 SCC 554 : (1991) 3 SCR 149 .

"The next point taken on behalf of petitioners, that the foreigners also enjoy some fundamental rights under the Constitution of this country, is also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in Article 19(1)(e) which is applicable only to the citizens of this country."

As such Articles 19(1)(d) and (e) are unavailable to foreigners because those rights are conferred only on the citizens. Certainly, the machinery of Article 14 cannot be invoked to obtain that fundamental right. Rights under Article 19(1)(d) and (e) are expressly withheld to foreigners."

26. High Court of Allahabad in the case of Smt. Aisha Siddique Vs. Senior Terminal Manager, I.O.C. and Another, (2003) 2 AWC 1642 B in paragraphs No. 16 and 17 has held, as under:--

"16. In the present case, learned counsel for the petitioner claims violation of Article 14 in the matter of awarding bid by the respondent-corporation. In our view, violation of Article 14 is to be examined under the back-drop of the facts that the petitioner has applied for tender in respect of supply. Installation, testing and commissioning of 0.2S Accuracy Class Static Electronic Trivector Energy Meters but the Power Corporation, after making enquiry and the preference of the domestic company over the foreign company, took a decision to grant tender to respondent No. 5, In these circumstances, the petitioner cannot claim violation of Article 14 independently but the same is to be read with Article 19(1)(g) of the Constitution, which is confined to the citizens of the country alone. Article 14 of the Constitution cannot be pleaded independently and in seclusion to other fundamental rights. The equitable protection of laws as envisaged in Article 14 necessarily has to take into consideration that law in respect of which equitable protection is being claimed in the matter of award of tender.

17. In view of the above, we are of the considered opinion that the writ petition for the enforcement of protection available under Article 19(1)(g) in the garb of Article 14 is not maintainable."

27. Learned counsel for the petitioner has submitted that CAMPCO is not authorized to test the samples under customs law. He submitted that while the samples are to be tested by the Food Safety and Standards Authority of India notified laboratory. CAMPCO and its laboratory ARDF nowhere appears to be in the list. The respondents in gross violation of the law has performed illegality in sending the samples for its tests to CAMPCO, which is a private organization. The customs authorities are bound to get the samples tested from their own laboratory/notified laboratories or from the jurisdictional CFL laboratory, which is CFL, Ghaziabad. He submits that in the present case, the goods seized at Inland Container Depot, Tughlakabad, the customs authorities should have sent the goods to notified laboratories or to CFL, Ghaziabad, in terms of Regulation 2.1 of the Food Safety and Standards (Laboratory and Sample Analysis), Regulations, 2011. In respect of the goods lying at Indore godown, he submits that the same should be tested only by the jurisdictional CFL Authority, which is FDA, Bhopal. The testing of samples by CFL, Kolkata is in violation of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011. It is also submitted that DRI, on the basis of the report of CFL, Kolkata, withdrawn the order and due to the aforesaid reason, the order of provisional release of goods passed by the Commissioner of Customs has been withdrawn. His second contention that the appeal against the provisional order of release is not maintainable under Section 129-A of the Customs Act, 1962.

28. Learned counsel for the petitioner has drawn our attention on the decision of the Tribunal, Mumbai in the case of Akanksha Syntax Private Limited v. Commissioner of Customs (General), Mumbai reported in 2013 (289) ELT 186 in respect of the provisional release of goods passed under Section 110-A of the Customs Act, 1962 as an interim order pending adjudication, therefore, the appeal is not maintainable, as per Section 129-A of the Customs Act, 1962. With the aforesaid, he submitted that the condition imposed by the Deputy Commissioner (SIIB), ICD, Tughlakabad, New Delhi, whereby respondent No. 3 has allowed provisional release of seized goods by imposing the conditions are erroneous, onerous and arbitrary. The action of the respondents for withdrawing NOC dated 08.10.2014 on the basis of the report of CFL, Kolkata, is illegal and

the same be quashed and the goods of the petitioner be released provisionally subject to furnishing surety bond etc. and the order dated 12.01.2015 by which permission for provisional release of goods has been withdrawn with immediate effect be also quashed.

29. The matter regarding confiscation of the seized goods is still under consideration before the Director of Revenue Intelligence. Section 110 (2) of the Customs Act, 1962 allows a period of six months for issuance of a show cause notice where seized has been effected under sub-section (1) of Section 110 of the Customs Act, 1962. The goods were detained/seized on 20.08.2014 and according to the said provision, respondent No. 5 has to issue the show cause notice before 20.02.2015. The provision allows for a further period of six months for this purpose, if extended by the Commissioner of Customs under proviso to Section 110 of the Customs Act, 1962.

30. In the case of Apollo Cranes Private Limited v. Union of India, High Court of Bombay in Writ Petition No. 1243/2011 has clearly explained that the powers of the adjudicating authority to demand security or to impose the conditions cannot be restricted or curtailed by confining the exercise of that power along the lines of conditions imposed in Customs (Provisional Duty Assessment) Regulations, 1963.

31. In case of Banarasi Paper and Synthetics Private Limited v. Union of India, the High Court of Bombay in Writ Petition No. 5242/2011 has also felt that interest of revenue needed to be safeguarded in terms of Section 110-A of the Customs Act, 1962 in case of seizure of the goods where serious fraud has been alleged.

32. The High Court of Calcutta in the case of Sachin Bhupendra Desai v. Union of India (Writ Petition No. 1030/2007) has held that the provisional assessment of the goods cannot be claimed as a right if any of the conditions laid down in Section (1) of Section 18 contemplates conducting of investigation and denial of release on provisional assessment basis is not illegal.

33. In the case in hand, the imported goods are not satisfying the conditions prescribed under Notification No. 75/2006-Customs (NT) dated 30.06.2006 , which are required to be fulfilled for availing the benefit of exemption under Notification No. 68/2012-Customs dated 31.12.2012. The matter is under investigation. As per the stand of the department, the petitioner is not entitled for exemption. Earlier also, by taking similar exemption, the Department of Customs suffered loss of Rs. 44 crores by way of tax and penalty. From Annexure R/6 dated 03.02.2015, which is a letter issued by the Director of Food Research and Standardization Laboratory, Ghaziabad, earlier request was made by the Officer of the DRI Office, for testing of Areca Nut on 10.12.2014, telephonically, but it could not be accepted because of non-availability of testing kits required for the said sample, at that time. The said authority has further observed that DRI Office, being a national intelligence agency, may get tested the subject

sample from any NABL Accredited Laboratory in the country.

34. In view of the aforesaid, we are of the view that there is no violation of any of the conditions/regulations/instructions in referring the matter to the CFL, Kolkata.

35. For the above mentioned reasons, we are of the view that no case to issue writ of certiorari to quash the communication dated 08.01.2015 and 12.01.2015, as prayed for, is made out. The writ petition has no merit and the same is accordingly dismissed.

No costs.

