

(2012) 01 MAD CK 0262

In the Madras High Court

Case No : Writ Petition No. 24495 of 2011

M/S. Supra Bio-Tech No. 5-5-35/M 113

APPELLANT

Vs

The Chief Commissioner of Customs, Custom House No. 60
Rajaji Salai, Chennai 1, The Commissioner of Customs,
(Seaport-Export), Custom House, No. 60 Rajaji Salai,
Chennai 1 and The Additional Commissioner of Customs
(Depb), Office of The Commissioner of Customs, Custom
House, No. 60, Rajaji Salai Chennai 1

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 112, 114A, 125, 128
Customs Tariff Act, 1975 — Section 111
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(3)
Handling of Cargo and Customs Areas Regulations, 2009 — Regulation 6(1)
Insecticides Act, 1968 — Section 17, 9

Citation : (2012) 282 ELT 380

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : B. Satish Sundar, for the Appellant; P. Mahadevan, SCCG, for the Respondent

Judgement

M. Jaichandren

1. Heard the learned counsel for the petitioner and the learned counsel for the respondents. It has been stated that the petitioner is partnership firm, established in the year, 2005. It is engaged in the production of beneficial micro organisms used in agriculture, as bio-fertiliser. For the production of the beneficial micro organisms, the petitioner has been procuring Stains from Chandigarh and Biological Growth Medium from various states, including Pune and Mumbai. It has been procuring peptone, beef and yeast extracts from Hyderabad and Mumbai.

2. It has been further stated that the petitioner also produces Herbal extracts

from Karanjin seeds and custard apples for the agriculture purposes. The alkaloids extracted from the Herbs are added to the plant leaf extract imported from foreign countries. The extracts are used in agricultural operations for enhancing the growth of plants and for developing immunity in plants, against pests. A major portion of such imports are from China. The formulated extracts are sold locally, at Hyderabad and in other places, after repacking and by affixing the petitioner's brand name.

3. It has been submitted that the petitioner has been registered with the statutory authorities concerned for carrying on business of manufacture and sale of such products. The petitioner has also been granted an import and export code, by the office of the Joint Director General of Foreign Trade, Ministry of Commerce, Government of India, Hyderabad, for the import of the products.

4. It has been submitted that, in the course of its business, the petitioner had imported 15000 kilograms of plant leaf extract from M/s.Zhejiang Topc Chemical Industry Company Limited, China, under the Bills of Entry No. 607283, 607285 and 608204, dated 25.8.2010. The imports of plant leaf extract has been made through the Chennai Seaport. The goods supplied by the foreign supplier, valued at US\$78,000 had arrived at Chennai Seaport in the month of August, 2010. The bills of entry for the goods concerned had been filed and the said goods had been assessed to duty at the hands of the second and the third respondents. The total duty payable, in respect of the goods, amounted to Rs. 6,45,438/-. The said amount had been paid using DEPB scripts and credits, on the strength of the transferrable licences purchased in the open market. The debits of the scripts for the duty amount had been made. However, the goods had not been released. Further, the imported items had been taken up for investigation, by the office of the Directorate of Revenue Intelligence, Zonal unit, Chennai. Pursuant to the said investigation, the goods had been detained and had been taken up for examination. The goods were de-stuffed and kept in the custody of the container freight station. Samples had been drawn from the consignments of the imported goods, by the officers of the Directorate of Revenue Intelligence. However, the investigating agency had alleged that there has been a mis-declaration of the cargo, as it has been declared as plant leaf extract, (Bio-fertilizers). As the goods imported are insecticides, the importation of such goods requires registration from the Central Insecticide Board, in terms of Section 9 of the Insecticides Act, 1968, read with the relevant provisions of the Foreign Trade Policy, 2010.

5. It has been further stated that the samples drawn from the imported goods were tested by the Department of Agriculture and Cooperation, Regional Centre of Organic Farming, Bangalore, to test as to whether the items imported by the petitioner was Bio-fertilizer, as claimed by the petitioner, or as to whether the said samples contained Biocide in general and oxymoron in particular. Vide its test report, dated 14.12.2010, the agency had found that the supplied samples were not Bio-fertilizers. Further, testing of the samples were undertaken by the National Centre for Mass Spectrometry, Indian Institute of Technology,

Hyderabad, at the instance of the investigating agency.

6. Under the communication dated 9.12.2010, the testing agency had opined that the samples did not show the presence of pesticides or oxymoron. However, it had stated that the analysis showed the presence of matrine. On receipt of the reports, the detained goods had been seized under a mahazar proceedings. Summons had been issued to the deponent, by the investigating agency and the statements had been recorded. On completion of the investigation, the investigating agency had issued a show cause notice, dated 6.4.2011, proposing re-classification of the imported goods, from Tariff Heading 1302 1990, as declared by the petitioner, to one under Tariff Heading 3808 9199 of the Customs Tariff Act, 1975.

7. A further proposal had been made to confiscate the goods, in terms of Section 111(d) (m) and (o) of the Customs Act, 1962, read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992, and Section 17 of the Insecticides Act, 1968. Consequently, a show cause notice had also been issued proposing to levy penalties on the petitioner, in terms of Section 112(a) and 114AA of the Customs Act, 1962. The said proposal had been contested. However, vide order, dated 1.8.2011, the third respondent had confirmed the allegations made in the show cause notice and had held that the goods are matrine compound insecticides, classifiable under tariff heading 3808 9199 of the Customs Tariff Act, 1975.

8. It had also been held that the goods were liable for confiscation. The petitioner had been given an option to redeem the goods, on payment of a fine of Rs. 2,00,000/-, in terms of Section 125 of the Customs Act, 1962, and a sum of Rs. 5 lakhs had been imposed on the petitioner and a sum of Rs. 1 lakh had been imposed on the deponent. It had also been stated that the option of redemption should be exercised, within a period of 30 days from the date of receipt of the order or within the extended period, as maybe granted.

9. Challenging the said orders the petitioner, swell as the deponent filed separate appeals, before the Office of the Commissioner of Customs (Appeals), Chennai, the appellate authority, u/s 128 of the Customs Act, 1962. The appellate authority had come to a clear conclusion that the goods imported are Plant Leaf Extracts, as declared by the petitioner, and that the goods ought tube classified only under the Customs Tariff Heading 13021990. It had categorically rejected the claim of the investigating agency that the imported goods are Insecticides/ Pesticides, classifiable under the Customs Tariff Heading 3808 9199.

10. The order of the appellate authority was made available to the petitioner, on 21.9.2011. On receipt of the same, the petitioner had furnished a copy of the said order, to the second respondent therein, under letter, dated 23.9.2011, received and acknowledged by the second respondent, on 26.9.2011. Thereafter, the petitioner had sent a further communication, dated 10.10.2011, requesting the respondents to act, as per the order of the appellate authority and to cause

the release of the imported consignments and to issue the Detention Certificate, for the waiver of rent and demurrage charges, in terms of Regulation 6(1) of Handling of Cargo and Customs Areas Regulations, 2009, as the goods were pending clearance, for more than a year, for no fault of the petitioner. However, as no action had been taken by the respondents, on the requests made by the petitioner, the petitioner had been constrained to prefer the present writ petition before this Court, under Article 226 of the Constitution of India.

11. The learned counsel appearing on behalf of the petitioner had submitted that the Department concerned should give effect to the orders of the higher appellate authorities, which are binding on them, by paying utmost regard to judicial discipline, unless such orders are suspended by a competent Court. It had been further stated that the mere fact of the filing of an appeal against such orders and the pendency of such an appeal cannot be shown as a sufficient reason for not following the orders of the higher appellate authorities.

12. The learned counsel appearing for the petitioner had relied on the following decisions in support of his contentions:

1. Union of India and others Vs. Kamlakshi Finance Corporation Ltd.,
- 2 Mahendra Engineering Works Vs. Collector of Central Excise,
3. Veena Commercial Corporation Vs. Union of India,
4. Grasim Industries Ltd. Vs. Collector Of Central Excise, Madras,

13. In the counter affidavit filed on behalf of the respondents, it has been stated that the order passed by the Commissioner of Customs (Appeals), Chennai, the appellate authority, dated 16.9.2011, in AppealC.Cus.Nos.655 and 656 of 2011, is erroneous and unsustainable in the eye of law. The appellate authority had failed to take into consideration the misdeclaration made by the petitioner, as the importer had declared the goods, as "Plant Leaf Extract", in the bills of entry and in the accompanying invoices the goods had been described as "Plant Leaf Extract (Bio-Fertilizer)."

14. The appellate authority had not taken into consideration the report of the Department of Agriculture & Cooperation, Regional Centre of Organic Farming, Bangalore, dated 14.12.2010, wherein it has been stated that the supplied samples were not bio-fertilizers. Further, from the communication, dated 5.1.2011, issued by the National Centre for Mass Spectrometry, Indian Institute of Chemical Technology, Hyderabad, it could be seen that traces of "Matrine" had been found in the samples sent for testing. The information available regarding "Matrine" reveals that it is an insecticide and that it is highly potent, even in very small concentrations. Thus, it is seen that the importer had attempted to import unregistered pesticides/insecticides in the guise of "Plant Leave Extract (Bio-fertilizer)" by misdeclaration of the goods. In such circumstances, an appeal had been filed before the Customs, Excise and Service Tax Appellate Tribunal, against the order of the appellate authority, with an application for stay of the impugned

order of the said authority.

15. In view of the rival contentions, made on behalf of the parties concerned, and on a perusal of the documents available, this Court is of the considered view that the respondent Department ought to have given effect to the order of the Commissioner of Customs (Appeals), Chennai, the appellate authority, dated 16.9.2011, made in C. Cus. No. 655 and 656 of 2011, in order to maintain judicial discipline, as held in the decision cited supra.

16. The mere filing of an appeal against the order of the appellate authority, and the pendency of the said appeal, cannot be shown as sufficient grounds for not giving effect to the order of the Commissioner of Customs(Appeals), dated 16.9.2011. Even though the National Centre for Mass Spectrometry, Indian Institute of Chemical Technology, Hyderabad, had by its communication, dated 9.12.2010, had opined that the samples of the goods imported sent to it, did not show any presence of pesticides or Oxymoron, the refusal of the respondents to release the goods in question cannot be held to be valid in the law.

17. It cannot be said that the mere filing of an appeal, against the order of the appellate authority, wouldn't empower the respondents to deny the release of the goods in question. No proper explanation had been given by the respondents, as to why no stay order had been obtained against the order of the Commissioner of Customs (Appeals),Chennai, dated 16.9.2011, even though the said order is said to have been challenged by way of a further appeal. Further, the petitioner cannot be made to suffer due to the detention of the goods in question, which had been imported by the petitioner, under Tariff Heading 1302 1990 of the Customs Tariff Act, 1975, without having proper reasons to-do so.

18. The long delay in the release of the goods would, no doubt, reduce its potency, as pointed out by the learned counsel for the petitioner, and its market value would deteriorate to the detriment of the petitioner. The respondents ought to have taken urgent steps to obtain a stay order against the order of the Commissioner of Customs (Appeals), Chennai, dated 16.9.2011, if they had intended to detain the goods in question. However, in the present case, nothing has been shown on behalf of the respondents to substantiate their claim that necessary steps had been taken to obtain the interim order of stay against the order of the appellate authority, dated 16.9.2011. As such, the prolonged detention of the goods in question can only be held to be arbitrary and illegal. It's also noted that an amount of Rs. 12,00,000 had already been paid by the petitioner, as duty, in respect of the goods in question. In such circumstances, the respondents are directed to release the goods in question, by following the necessary procedures, in view of the order of the Commissioner of Customs (Appeals), Chennai, the appellate authority, dated 16.9.2011, made in Appeal C.Cus. No. 655 and 656 of 2011, as expeditiously as possible, not later than ten days from the date of receipt of a copy of this order. It is also made clear that it would be open to the petitioner to make a representation to the appropriate authority, with regard to the issuance of a Detention Certificate, for the waiver of

the demurrage and detention charges relating to the detained goods and on such request the eye of law. being made, the authority concerned is expected to consider the same and to pass appropriate orders thereon, as per law. The writ petition is ordered accordingly. No costs. Connected M.P.Nos.1 and 2 of 2011 are closed.