(2005) 01 CAL CK 0007

In the Calcutta High Court

Case No : Writ Petition No. 53 of 2005

Satish Kumar Jaiswal APPELLANT

Vs

Commissioner of Customs (Port) RESPONDENT

Date of Decision : 25-01-2005

Acts Referred:

Citation : (2005) 1 ILR (Cal) 173

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—A short question is involved in this writ petition. It is whether the Petitioner should get an opportunity to retest the representative samples of the betel nuts imported by him, since he is dissatisfied with the test report already submitted by the port health officer.

2. The betel nuts arrived at Kolkata port on December 20, 2004. On December 21, 2004 the relevant bill of entry was filed. Since the goods imported needed test report from the competent authority, before clearance was given by the customs, steps were taken for collecting representative samples through the port health officer.

3. The steps were taken, I am told, in compliance with the directions given by the Government of India by a circular No. 58/2001 -Cus., dated October 25, 2001, by which it was directed that all consignments of edible or food products imported through ports must be referred to port health officer for testing and that clearance should be allowed only after receipt of test report.

4. The samples were collected on December 24, 2004. The test certificate was supplied to the assessing authority on December 31, 2004. Copy of the test report was made available to the Petitioner on January 11, 2005. Feeling aggrieved by the findings of the testing authorities, he filed an application dated January 12, 2005, contents whereof are:

We imported 18 Mts of Betel Nuts (Split) Assorted from Thailand. On December 24, 2004, the goods were appraised and Port Health Officer and P.Q. were requested to take samples for examination. On December 24, 2004, the container was opened and samples were taken. The samples by PHO were not taken in accordance with the Rules and it was also not kept as required under Food Adulteration Rules. After samples were taken Nuts were kept for a long time in open before it were sealed in a bag. It is feared that during the said time it could be contaminated because of fumigation work was going nearly. Though our Clearing Agent objected to the manner of taking samples but it was not considered. It has been opined by the Central Food Laboratory, Kolkata that our samples have been found to be adulterated to the standard specification.

We state that our goods are not adulterated. The goods were imported only after thorough examination of goods from the Port of Loading. Inasmuch as sample was taken and/or preserved and/or sent in accordance with the Rules, we request you to take a fresh sample for re-examination or re-test. Necessary costs and expenses for re-examination and retesting shall be borne by us.

As the goods are incurring container rent and demurrage, we request you to allow retesting of the goods without any delay.

5. Since the assessing authority did not give any decision regarding the Petitioner''s prayer for retesting the samples of the imported betel nuts, he has taken out the present writ petition.

6. Counsel submits that since the Petitioner has a reasonable basis to say that the samples previously collected had not been duly preserved, before being sent for testing by the appropriate laboratory, he must get on opportunity of retesting the samples collected afresh. He contends that if the samples are retested, none of the Respondents would suffer any prejudice whatsoever, particularly when the Petitioner wants to get the samples retested at his own expenses.

7. He proposes that though the relevant circular (the one noted before) did not mention anything about re-testing, if needed, the importer is free to approach the authority for retesting; for this he refers me to the decision in Bombay Oil Industries Pvt. Ltd. v. Union of India 1995 (77) E.L.T. 32 (S.C.).

8. Before I refer to the other decision cited by counsel for the Petitioner, I must say that his argument has great force; and I am minded to agree with him.

9. I think, it will be appropriate, at this stage, to note that counsel for the customs neither opposes nor supports the contentions of counsel for the Petitioner; he has rather left the matter to the discretion of the court saying that if an order for retesting is made, then his clients would comply with it.

10. Counsel for the port health officer has, however, strongly opposed the prayer for retesting. He drew my attention to the test certificate and the pleas raised by the Petitioner in his application seeking retesting. His comments are that if on the unfounded and speculative pleas, as raised, I permit retesting of the

samples, my order will set a bad precedent.

11. With due respect, I am unable to agree wih him that an order for retesting if made by me will be against any provisions of law and hence a bad precedent. I so think because of the observations made by the Supreme Court in Bombay Oil Industries Supra case. There their Lordships specifically observed that the Appellants in that case, if felt dissatisfied with the findings of the customs should have taken steps for cross testing of the samples through their experts. In my view, here the case is far better, because the Petitioner does not want to engage his own expert, but wants to get the samples retested through the experts to be engaged by the assessing authority, though the cost for such retesting is to be borne by the Petitioner. I also do not agree that no acceptable ground was disclosed by the Petitioner for retesting of the samples. To my mind, the stage at which the prayer was made did not warrant any stronger ground for making it, since a favourable order would not have made the existing test certificate either non est or useless.

12. The other authority cited to me by counsel for the Petitioner is the division bench decision of the Madras High Court in. P. Seenakamalam v. Government of India, Min. of Finance 2000 (123) E.L.T. 103 (Mad.). I think, that decision given in the context of provisions of the Central Excise Act and Rules will not require detailed discussion (I should not be thought of disrespectful to it for saying so) for the reason that, in my view, the Supreme Court decision (given in the context of the Customs Act, 1962) cited to me is enough to accept the contention of the counsel for the Petitioner.

13. For these reasons I allow the writ petition. I direct the assessing authority to obtain fresh representative samples of the imported betel nuts and send such samples to the appropriate laboratory for retesting. Costs for the entire process shall be borne by the Petitioner. The entire exercise shall be completed within a fortnight from the date of receipt of a copy of this order by the authorities.

14. In the facts and circumstances of the case, I am not inclined to make any order for costs in the writ petition.

15. All parties and authorities shall act on a signed xerox copy of this dictated order on the usual undertakings.