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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 22ND DAY OF JANUARY 2021 / 2ND MAGHA, 1942

Cus.Appeal.No.13 OF 2020

AGAINST THE ORDER NO. 20845/2020 DATED 16-12-2020 OF CUSTOMS,EXCISE&SERVICE TAX APP.TRIBUNAL,BANGALORE

APPELLANT:

M/s SHRI AMMAN DHALL MILL, B-7/269/1,
2 BYE PASS ROAD, ANNANJI, THENI, TAMILNADU 6254 53, REP.BY ITS PROPRIETOR SOM SUNDARAM, AGED 56 YEARS, S/O S.SAKTHIVEL, R/O NO.46/2269 H, APSARA BUILDING, CHAKKARAPARAMBU, ERNAKULAM 682 032.

BY ADVS.
SRI.P.A.AUGUSTI N
SMT.SWATHY E S.

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RESPONDENT:

THE COMMISSIONER OF CUSTOMS,
CUSTOMS HOUSE, WILLINGTON
ISLAND, COCHIN 682 009.

OTHER PRESENT:

SR ADV . N VENKATARAMAN, ASG., SC SREELAL WARRIER

THIS CUSTOMS APPEAL HAVING BEEN FINALLY HEARD ON 15-01-2021, ALONG WITH CUS.APPEAL No.14/2020, THE COURT ON 22-01-2021 DELIVERED THE FOLLOWING:

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 22ND DAY OF JANUARY 2021 / 2ND MAGHA, 1942

Cus.Appeal.No.14 OF 2020

(Against the Final Order No.10845/2020 dated 16.12.2020 passed by CESTAT, Bangalore)

APPELLANT:

THE COMMISSIONER OF CUSTOMS,
CUSTOMS HOUSE, WILLINGTON ISLAND, COCHIN - 682 009.

BY ADVS.
N.VENKATARAMAN ADDITIONAL SOLICITOR GENERAL
SREELAL N. WARRIER, SC, CENTRAL BOARD OF EXCISE & CUSTOMS

RESPONDENT:

M/S. SHRI AMMAN DHALL MILL, B-7/269/1,2, BYE PASS ROAD, THENI, TAMIL NADU-625 453, REPRESENTED BY ITS SOLE PROPRIETOR SRI.SOMASUNDARAM, AGED 56 YEARS, S/O.SAKTHIVEL, R/O NO.46/2269H, APSARA BUILDING, CHAKARAPARAMBU, ERNAKULAM - 682 032.

R1 BY ADV. SRI.P.A.AUGUSTIAN
R1 BY ADV. SMT.SWATHY E.S.

THIS CUSTOMS APPEAL HAVING BEEN FINALLY HEARD ON 15-01-2021, ALONG WITH Cus.Appeal.13/2020, THE COURT ON 22-01-2021 DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 22nd day of January 2021

S.V.Bhatti, J.

Heard learned ASG N.Venkataraman and learned Adv.P.A.Augustine for parties.

2. The instant Customs Appeals are under Section 130 of the Customs Act, 1962 (for short 'Act 1962) and are at the instance of M/s Shree Amman Dhal Mill/Importer and the Commissioner of Customs, Kochi/Revenue. For convenience, the parties are referred to as 'Importer' and 'Revenue' respectively. The appeals are directed against final order No.20845/2020 dated 16.12.2020 of the CEST Appellate Tribunal, South Zonal Bench, Bangalore. The appellate Tribunal through the impugned order dated 16.12.2020 held and directed as follows:

> "In view of the above, the appeal is disposed of by allowing redemption of impugned goods on payment of fine of Rs.12,00,000/ - (Rupees Twelve Lakh only) in lieu of confiscation under Section 125 of the Customs Act, 1962. However, penalty of Rs.4,00,000/- (Rupees Four Lakhs only) imposed by the Commissioner is upheld."

3. Hence, Customs Appeal No.13 of 2020 is at the instance of

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Importer challenging the levy of penalty of Rs.4 lakhs and Customs Appeal No.14 of 2020 is at the instance of Revenue questioning the release of subject goods on payment of redemption fine of Rs.12 lakhs.

4. The undisputed circumstances leading to the filing of Customs Appeals are stated thus:-

The Union of India in exercise of power under Section 3 of Foreign Trade (Development and Regulation) Act, 1992 referred to as FTDR Act issued Notification No.37/2015-2020 dated 18.12.2019. The said notification is followed by Notification No.1225(E) dated 28.3.2020 The notifications have bearing on the submissions made by the counsel appearing for the parties and we find it useful to excerpt the respective notifications hereunder:

Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade

Notification No.37/2015-2020
New Delhi, dated: 18th December, 2019

Subject: Amendment in import policy and Policy condition under HS code 0713 1000 of Chapter 7 of ITC (HS), 2017, Schedule-I (Import Policy).

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S.O.(E): In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends import policy and policy conditions under HS code 0713 1000 of Chapter 7 of ITC (HS), 2017, Schedule-(Import Policy), as under:

Exim code	Item Description	Existing import policy	Revised policy	Existing Policy condition	Revised Policy condition
0713 10 00	Peas (Pisum sativum) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas	Restricted	Restricted and subject to Minimum Import Price (MIP) Rs.200/- CIF per kg.	Import of Peas shall be subject to an annual (fiscal year) quota of 1.5 lakh MT as epr procedure notified by DGFT. This Restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding	Import of Peas shall be subject to an annual (fiscal year) quota of 1.5 lakh MT as epr procedure notified by DGFT and it will be subject to Minimum Import Price (MIP) of Rs.200/- and above CIF per kilogram and import is allowed through Kolkata sea port only. This Restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding.

Effect of the Notification: Import of Peas (Pisum Sativum) including yellow peas, Green peas, Dun Peas and Kaspa Peas is restricted and import subject to MIP of Rs.200/- CIF per kilogram and import is allowed only through Kolkata sea port.

This issues with the approval of Minister of Commerce & Industry.

Sd/-
(DIWAKAR NATH MISRA)
Joint Secretary to the Government of India

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(F.No.14/3/2018-EP(Agri.III)

Note: The principal notification No.36/2015-2020, dated the 17th January 2017 was published in the gazette of India, Extraordinary vide number S.O.172(E) dated the 17th January, 2017 and last amended vide Notification S.O.6364(E) dated 28th December, 2018.

MINISTRY OF COMMERCE AND INDUSTRY
(Department of Commerce)
NOTIFICATION
New Delhi, the 28th March, 2020

S.O.1225(E).-In exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020 as amended from time to time, the Central Government hereby notifies the annual quota for the fiscal year 2020 -2021 for the items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-I (Import Policy) as under:

Exim Code	Item Description	Import Policy	Quota for fiscal year 2020-2021
0713 10 10	Yellow Peas	Restricted	1.5 lakh MT (the quantity of each category of peas will be notified shortly)
0713 10 20	Green Peas	Restricted	
0713 10 90	Other	Restricted	
0713 31 90	Moong (Beans of the SPP Vigna Radiata (L) ilezek).	Restricted	1.5 lakh MT
0713 60 00	Tur/Pigeon peas (Cajanus Cajan)	Restricted	4 lakh MT

2. The import policy conditions such as Minimum import price (MIP) of Rs.200/- and port restriction through Kolkata sea port only for all peas (07131010, 07131020 & 07131090) as notified vide Notification No.37, dated 18th December, 2019 remain unchanged.

3. The above quota restriction will not apply to Government's import commitments under any bilateral/regional Agreement/Memorandum of Understanding.

4. This notification shall come into force form the date of its publication in the official Gazette. The above mentioned quota for the fiscal year 2020-2021 shall be allotted only to millers/refiners as per detailed procedure to be notified by Directorate General of Foreign Trade.

(F.No.14/3/2018-EP (Agri.III) (pt.)

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DIWAKAR NATH MISRA, Jt.Secy.

Note: The principal notification No.36/2015- 2020, dated the 17th January , 2017 was published in the Gazette of India, Extraordinary vide S.O. 172(E), dated the 17th January, 2017 and last amended vide notification No.14/3/2018-EP (Agri.III) published in the Gazette of India, Extraordinary vide S.O.1122(E) dated the 17th March 2020.

5. Earlier in point of time, Union of India issued Notification dated 29.3.2019 bearing S.O.Nos.1478-E, 1479-E, 1480-E and 1481-E imposing restrictions on import of a few agricultural products/pulses. The Notification was challenged by a group of traders by filing Writ Petition in different High Courts. These Writ Petitions were transferred to Supreme Court in Transfer Petition(Civil) Nos.496-509 of 2020 dated 26.8.2020. The Hon'ble Supreme Court through its judgment dated 26.8.2020 in ***Union of India and others*** v ***Agricas LLP and others***[1] rejected the challenge to the notifications impugned in the batch of cases. At appropriate stage of this judgment a few of the circumstances leading to the filing of the Writ Petition or the consideration by the Apex Court would be considered to the extent required for disposing of the instant Customs Appeals. But for continuity of narration, at this juncture, we refer to the concluding portion in

1 2020 SCC Online SC 675

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the judgment dt. 26.8.2020 of the Apex Court in *Agricas LLP* case.

> "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 trades 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."

6. Thus the imports pursuant to interim orders made in different Writ Petitions were allowed to be dealt with under the Customs Act 1962. The subject import is not one of the instances covered by the judgment of Supreme Court in *Agricas LLP*. The Ministry of Commerce & Industries Department, Government of India issued notification dt.16.4.2020 specifying the quantity of import for each category of peas for fiscal year 2020-2021 which reads thus:

MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

NOTIFICATION

New Delhi, the 16th April, 2020

S.O.1260(E).-In exercise of powers conferred by Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), read with paragraphs 1.02 and 2.01 of the Foreign Trade

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Policy, 2015-2020, the central Government, in pursuance to the Notification S.O. 1225(E) dated 28th March, 2020, hereby notifies the quantity of each category of peas, for fiscal year 2020-2021, as under:

Exim Code	Item Description	Quota (in MTs)
0713 10 10	Yellow Peas	o(zero)
0713 10 20	Green Peas	75000
0713 10 90	Other	75000

2. This notification shall come into force from the date of its publication in the official Gazette."

7. On 21.4.2020 trade notice No.5 of 2020-2021 was issued by the Deputy Director General of Auditorate inviting applications for grant of Licence. On 22.4.2020 the importer applied for issue of licence for import of 200 metric tonnes of green peas through Cochin Port. The importer, before actual grant of licence imported goods and filed Bill of Entry dated 23.6.2020 for clearance of goods declared as Canadian Green Peas henceforth referred as the “subject goods”. As per the declaration in Bill of Entry the quantity declared is 210 metric tonnes with declared assessable value of Rs.79,28,444/-. The Bill of Lading is dated 27.4.2020. The subject goods is Green Peas and presently treated as 'restricted' by the Revenue and Union of India. The

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Commissioner of Customs, Kochi through Order dated 16.10.2020, made on the request of importer for release of goods noted that DGFT Notification No.37/2015-2020 dated 18.12.2019 revised the import policy for the import of Peas (Pisum sativum) including Yellow Peas, Green Peas, Dun peas and Kaspa peas. Further policy conditions such as minimum import price of Rs.200/- and above CIF per kg; with annual fiscal quota of Rs.1.5 lakh MT as per the procedure notified by DGFT and that the import is permitted through Calcutta Seaport are incorporated. The importer imported the subject goods after the issue of notification dated 18.12.2019 and 28.3.2020 The importer filed W.P.(C) No.15215 of 2020 in this Court praying for provisional release of the subject goods. Vide judgment dated 14.8.2020 the prayer of importer for provisional release was declined by this Court. The importer aggrieved thereby filed W.A.No.110 of 2020 and by the judgment dated 14.9.2020, the appeal was dismissed, however, this Court desired that the customs authorities proceed with the adjudication proceedings expeditiously. The Commissioner of Customs in his order dt.16.10.2020, while considering the request

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of importer for provisional release refers to the three conditions in the notification dated 18.12.2020 as modified in the notification dated 28.3.2020 which are:

I) Import subject to annual (fiscal) year quota of 1.5 lakh metric tonnes.

II) II) Imports subject to minimum import price of Rs.200/- and above CIF per kg.; And

III) Import is allowed through Calcutta Seaport only. The Commissioner of Customs takes note of the affidavit dt.20.6.2020 filed by the Union of India before the Supreme Court in Transfer Petition No.496-509 of 2020 and reasons for restriction on quantity, minimum import price and also entry port only as Calcutta Port; orders confiscation of subject goods and imposes penalty on importer. The operative portion of the order reads thus:

> "Under Section 125 of the Customs Act, 1962, releasing prohibited goods in lieu of fine is not obligatory and the stand of the Union Government before the Hon'ble Supreme Court cannot be ignored by this adjudicating authority. More so, when the supply of the peas and pulses in the domestic market would have an adverse impart on the economy and would defeat the purposes of

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the restrictions imposed. Therefore, I hold that peas imported against the policy restrictions are liable to penalty and confiscation.

ORDER

1. I order absolute confiscation of the goods covered under the Bill of Entry No.7978930 dated 23.0.6.2020 for contravention of the provisions of Section 111(d) of the customs Act, 1962, read with Section 3(3) of Foreign Trade (Development & Regulations) Act, 1992.

2. I impose a penalty of Rs.4,00,000/- (Rupees Four Lakhs only) on M/s Shri Amman Dhall Mill, B-7/269/1,2 Bye Pass Road, Annanji, Theni, Tamil Nadu 625 531, under Section 112(a) of Customs Act, 1962."

8. The importer challenged the order dated 16.10.2020 of Commissioner in Customs Appeal No.20380 of 2020 before the Appellate Tribunal, Bangalore. The Appellate Tribunal allowed Customs Appeal on 16.12.2020 and referred to the circumstances noted chronologically in the preceding paragraphs and in paragraph 15 of the impugned judgment observed that the subject goods have been imported in violation of the conditions of the Exim Policy Notifications cited above. By virtue of the same, i.e. import contrary to Exim Policy, the goods have acquired the nature of prohibited goods in terms of Section 2(33) of Customs Act, 1962 and have become liable for confiscation in

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terms of Section 111(d). Thereafter the Tribunal formulated the question in appeal as to whether the adjudicating authority has an option to allow such goods i.e. Prohibited Goods to be redeemed on payment of fine in lieu of confiscation. In the above background, after referring to the judgments of ***Commissioner of Customs*** v ***M/S. Atul Automations Pvt Ltd.***[2] and the judgment of Bombay High Court in ***M/s Harihar Collections*** v ***Union of India***[3] directed redemption of fine to impugned goods on payment of Rs.12 lakh and confirmed the penalty of Rs.4 lakhs imposed by the Commissioner. Hence the Customs Appeals by both the parties .

9. The learned Additional Solicitor General of India appearing for Revenue through his elaborate arguments canvasses that the order of Appellate Tribunal releasing subject goods on payment of redemption of fine, ignores the Notifications issued by the DGFT from time to time, including the latest Notifications dt. 18.12.2019 and 28.03.2020. The notifications applicable to the case on hand are the latest in

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2 *[2019 (365) DLT 465 (SC)]*

3 *(2020 (10 EMI 830)*

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sequence of notifications issued by the competent authority from time to time. The rigor and restrictions of Notification dt. 18.12.2019 read with 28.03.2020 are substantially same or similar to the notifications considered by the Apex Court in Transfer Petition (Civil) Nos.496-509/2020. The challenge at the instance of traders to the notification dated 29.03.2019 was rejected by the Apex Court. The DGFT and the Union of India being conscious of various factors concerning Pulses for import need necessity of protecting farmer's interest and subsisting stock, protection of price under FTDR Act from time to time. There is no fresh challenge to the Notification dated 18.12.2019 and 28.03.2020 by any stake holder. The Customs Commissioner, therefore, has rightly considered the circumstances leading to the judgment in *Agricas LLP* case(supra), the findings recorded therein and has taken comprehensive view ordering confiscation of subject goods. He argues that exercise of discretion by the Commissioner in any other manner would defeat the Exim Policy, Notification in vogue, the judgment of the Apex Court in *Agricas* case and would adversely affect the interest of farmers in the Country. It is also

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argued that the Tribunal, by ordering release of goods on payment of redemption fine has opened the floodgates and also opened a window for release of goods without complying with any of the conditions applicable for import of subject goods. According to him, these conditions operate in any matter concerning release of goods restriction on quantity, price, and port through which the goods could be imported. The Tribunal having treated the subject goods in para 15 of the judgment as acquiring the nature of prohibited goods, should have kept in perspective, the condition imposed by the subject notification and upheld the confiscation ordered by the commissioner of Customs. He contends that the Appellate Tribunal by ordering release of subject goods committed a serious error in law, particularly, by placing reliance on the judgment dated 18.12.2020 of the Bombay High Court, in ***Kishore Chandra Kalyanji Agri LLP and another*** v ***Union of India and others***[4] to record a finding that the denial of release of goods would be travesty of justice for imports or importers with similar violation are treated in a dissimilar manner to wit importers at Mumbai or

4 Writ Petition (Stamp) No.96109 of 2020

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Importers at Cochin cannot be treated differently. He argues that the considerations relevant in matters like the present are substantially guided by law and applicable notifications. The discretion in exercising the power is conditioned by circumstances and controlled by Exim Policy Notification etc. Incidentally for a very limited purpose, it is pointed out that the Bombay High Court, according to him, fell in error by releasing goods on redemption fine on the ground that denial of release would amount to travesty of justice. Therefore in imports/exports neither travesty of justice nor proverbial justice is the guiding principle, but the law and the valid notifications issued by competent authorities alone are relevant matters.

10.It is further argued that the very finding recorded by the Bombay High Court in judgment dated 18.12.2020 is distinguishable. Further all the issues are left open for consideration by the Commissioner of Customs (Appeals). Therefore, the judgment in *Kishore Chandra Kalyanji* case ought not to have persuasive guidance to this Court for any purpose and he hastens to add that the submissions made on *Kalyanji* case

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are not to assail or correct the errors, but to persuade that an inapplicable judgment is relied on by Tribunal and floodgates are opened for import of restricted/prohibited goods by ordering release of goods by the Appellate Tribunal.

11. It is next contended that the importers interested in import of subject goods must comply with the three conditions stated supra, in contrast an importer disregarding every condition on its own volition, imports the goods and by giving a very liberal approach, the release of goods is ordered by the Tribunal. As a matter of fact, it is stated that the competent authority, in response to the trade notice dated 21.04.2020, has not issued licence to any of the applicants. There is no discrimination in granting Licences to the applicants for import of green peas etc. and an informed decision is taken by the authority not to operate or grant licences in the restricted quantity of 1.5 lakh MT by keeping in perspective the available stocks in the country. He submits that these matters do not fall within the ambit of judicial review, much less, for the Appellate Tribunal to completely ignore relevant considerations and direct

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release of goods. The DGFT restricted import of subject goods. A restriction should be read as something which requires compliance of certain conditions and import in breach of such conditions could not be treated as restricted import but considered as prohibited import. The importer being an actual user for industrial purpose, is aware of the notifications issued by DGFT from time to time. The importer cannot claim a fundamental or vested right for releasing goods on payment of redemption fine. In other words, the importer does not have a vested statutory or fundamental right to import any goods. The import or export is is always subject to policies and procedures made applicable from time to time under Customs Act, 1962, FTDR Act, 1993. Hence lodging an application does not create any right to the importer. ***Garg Woolen Mills*** v ***Additional Collector of Customs***[5] , ***SB International Ltd and others*** *v* ***Assistant Directorate General of Foreign Trade and others***[6] , ***PTR Exports (Madras) Pvt. Ltd*** *v* ***Union of India***[7] . The totality of circumstances including the findings of fraud recorded by the apex court in *Agricas LLP* case,

5 *(1999 (9) SCC 175)*

6 *(1996 (2) SCC 439)*

7 *(1996 (5) SCC 268)*

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the Appellate Tribunal ought not to have directed release of goods. He also relies on ***Sheikh Mohamed Omar*** *v* ***Collector of Customs***[8] , Para 11 of ***Commissioner of Customs, New Delhi*** *v* ***Brook International and others***[9], ***Om Prakash Batia*** *v* ***Commissioner of customs***[10] **.**

12. Next legal argument refers to Section 3(2) of Import and Export Control Act 1947 and Section 3(3) of FTDR ACT 1992 are identical and *pari materia*. Therefore, the decisions rendered by the Apex Court considering Section 3 (2) of Import and Export Control Act 1947, are applicable to the disputes considered under Section 3 (3) of FTDR ACT 1992. He relies on ***Ambica Industries*** *v* ***Commissioner of Central Excise***[11], para 14 of ***Bangalore Tetra*** *v* ***Regional Director ESI***[12]. The subject goods according him are prohibited goods and commissioner of customs is justified in ordering confiscation and no exception could have been taken by the Appellate Tribunal. By operation of Section 3 (3) of FTDR Act 1992 read with Section 11 of Customs Act 1962, restricted goods

8 (1970 2SCC 728)

9 *(2007 10 SCC 396)*

10 *(2003 6 SCC 161)*

11 (2007 6 SCC 769)

12 (2014 9 SCC 657)

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could be deemed as prohibited goods and this position is admitted by Tribunal also. Reference is made to ***State of Karnataka*** *v* ***State of Tamil Nadu***[13]**.** It is finally argued that the judgment of Supreme Court in *Atul Automations Pvt Ltd.* (supra) is not applicable and each of the import/export conditions are case specific and distinguishable. He prays for allowing Customs Appeal No.13/2020.

13. Learned counsel P.A Augustine argues that Section 125 of Customs Act, 1962 provides that even if the goods are found liable for confiscation and the import is prohibited by law, still the adjudicating authority "may" allow redemption of the goods on payment of redemption fine. The distinction is that goods other than prohibited by law, if found liable for confiscation, it is mandatory to release goods. The Customs Act does not define restricted goods. The view of Apex Court in *Atul Automation Pvt.Ltd* (supra) is that option at the discretion of revenue is to redeem the goods and mandatory. Therefore, the Appellate Tribunal has given effect to the law declared by Apex Court in *Atul Automation Pvt.Ltd.* (supra). The judgment of Apex Court in

13 (2017 3 SCC 362)

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Agricas LLP was concerned with the notification issued by DGFT restricting import of pulses etc. But the said decision cannot be treated as in any way declaring that import of such goods is prohibited and liable for absolute confiscation under Section 125 of Customs Act 1962. The reliance placed by the Revenue on *Agricas LLP* (supra) is only to prejudice the mind of the court on the difficulties allegedly placed by farmers. The subject goods even if fall under the category of prohibited goods the reasoning of Tribunals in paras 12 to 18 of judgment under appeal notices the consistency followed by all the Appellate Tribunals in ordering release of goods and no exception could be taken to such finding by the Appellate Authority. Appeal before the Tribunal is continuation of original proceedings. The Appellate Authority enjoys the powers vested in the original authority by Sec.125 of Act 1962. The Tribunal, since is vested with the power of the original authority under Section 125 of Act 1962, ordered release of goods on payment of redemption fine. The Tribunal is well within its jurisdiction and discretion. The grounds raised by the appellant in Customs Appeal No.14/2020 do not fall within

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purview of Section 130 of Act 1962, hence appeal liable to be dismissed. The appellant/Union of India is projecting the cause of farmers, which according to his argument is a convenient plea without basis. The importer in the case on hand on 28.04.2020 has followed the procedure by applying for grant of license and filed bill of entry dated 23.06.2020. He argues that the Court keeps in mind the standing of petitioners in *Agricas LLP* (supra) i.e. Traders and the Importer in the case on hand is an actual user. The Apex Court in *Agricas LLP* (supra) finally directed the authorities to adjudicate under Customs Act 1962. Instant order is also on the lines directed by the Supreme Court. Therefore, the Tribunal, by virtue of power in Section 125 of Act 1962, ordered release.

14. He prays for dismissing Customs Appeal No.14/2020 and submits that the penalty imposed is without a reason. This Court ought to set aside the levy of penalty as well by allowing Customs Appeal No.13/2020.

15. Having heard the learned counsel appearing for the parties and perusing the record, we formulate the following

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substantial questions of law for decision.

1) Whether the order of Tribunal under appeal directing release of subject goods on payment of redemption fine conforms to the scheme of Sections 2(33), 111(d) and 135 of Customs Act, 1962, section 3 of FTDR Act, 1992 read with notification dated 18.12.2019 and 28.3.2020 issued by Union of India?

2) Whether the levy of penalty of Rs.4 lakhs is warranted in the circumstances of the case or the penalty is levied capriciously and arbitrarily?

Question: 1

16. The importer is actual user of subject goods. The importer is assumed to be familiar with the requirements of the law and the procedure followed for granting import licence. The goods are imported and Bill of Entry is filed for customs clearance.

17. This Court for the purpose of appreciating the case of importer must keep in perspective the judgment of Apex Court in *Agricas LLP* case. The judgment of Apex Court in *Agricas LLP* case considered the grounds raised against Notifications impugned therein, rejected the prayer. The following paras need to be

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excerpted hereunder :

> "The effect of Notifications, as noticed and beyond doubt, is to bring the specified commodities from free to the restricted category and therefore the imports in question would require a prior authorisation for import. The requirement of licence is nothing but authorisation. Therefore, in terms of paragraph 2.10, the imports of the specified commodities would only be by the 'actual user' unless the 'actual user' condition was specifically dispensed with or diluted by the DGFT. The Directorate by specifying that the licence would be issued to the miller or refiner has, therefore, just clarified that the 'actual user' alone will be permitted to import the restricted goods mentioned int he notification for which a prior authorisation or licence is required. The importers are traders and it is not the case of any of the importers that they are the 'actual users'. Further, none of the importers have applied for a licence or authorisation for import of the restricted commodities. Violation of clause 9 03 of the EXIM Policy defining the expression 'Actual user' is neither alleged or argued before us."

> ".....Learned Counsel for some of the importers had placed reliance on *Raj Prakash Chemical v. Union of India* , which judgment, in our opinion, has no application. In *Raj Prakash Chemical* (supra), the Petitioner had acted under a *bona fide* belief in view of judgments and orders of High Courts and the interpretation placed by the authorities. In this background, observations were made to giving benefit to the importers, despite the contrary legal interpretation. In the instant case, the importers rely upon the interim orders passed by the High Court's whereas on the date when they filed the Writ Petitions and had obtained interim orders, the Madras High Court

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had dismissed the Writ Petition upholding the notification. Similarly, the High Court of Adjudicature at Bombay, High Court of Gujarat and the High Court of Madhya Pradesh had dismissed the Writ Petitions filed before them and upheld the notifications and the trade notices. Notwithstanding the dismissals, the importers took their chance, obviously for personal gains and profits. They would accordingly face the consequences in law. In these circumstances, the importers it cannot be said had *bona fide* belief in the right pleaded.

E. What is not decided

Learned Counsel for some of the importers had submitted that they have preferred statutory appeals against orders suspending or terminating import export code. The said aspect has not been examined and decided and hence we make no comment and observation. The statutory appeals, if any, preferred by the importer(s) will be decided in accordance with law.

F. Conclusion

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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 trades 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."

18. Thereafter notifications dated 18.12.2019 and 28.3.2020

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stipulating further policy conditions were issued by the Government. As a sequel for operating policy, trade notice was issued on 21.4.2020, calling for application for grant of import licence. The importer on 22.4.2020 applied for licence, It filed the bill of entry on 30.6.2017 before Customs, Cochin Port. The importer claims release of goods on payment of redemption fine notwithstanding restriction/prohibition on import of goods. This Court before proceeding to consider the manner of exercise of discretion in different perspectives by the primary authority and the Tribunal, finds it useful to refer to a few judgments relied on by the revenue.

19. In S.B.International Limited case, it is held that grant of licence is neither a mechanical exercise nor a mere formality. The authorities, while discharging the function, have to satisfy themselves about the correctness of the contents of the application,that the requirements of the scheme are fulfilled and the **other applicable provisions of law** are satisfied. The grant of licence occasions only after due verification by the authority. The Supreme Court rejected the contention that the filing of an

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application creates a vested right in the applicant. In *PTR Exports*, it is held that the applicant has no vested right to claim Export or Import licences in terms of the policies on the date of his making application. For obvious reasons granting of licences depends upon policy prevailing on the date of granting of licence or permit but not on the date of making the application. The authority concerned is in better position to have over all picture of diverse factors either to grant permit or refuse to grant licence to import or export goods. A decision in this behalf therefore, would be taken by considering diverse economic perspectives, which the executive is informed in a better way. The decision of the authority unless as stated in the judgment is visited with *mala fide* reasons or on account of abuse of power judicial review is limited. In such an event of the decision of the authority is vitiated, the decision is subject to judicial review. The importer in the instant case on 28.04.2020 applied for licence however proceeded to undertake further step and does on individual's volition and risk.

20. The Supreme Court has in *Agricas LLP* case upheld the

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notification issued under Section 3(5) of FTDR Act. Imposition of selective restrictions and prohibition of import of crude oil through specified port is upheld by Apex court in the reported case, *Harrisons Agri Tech Pvt. Ltd. V Union of India.* In *Harrisons* case prohibition on import of palm oil from the port of Cochin was considered by the Apex court and dealing with the power under FTDR Act has held that the imposition of selective restriction/prohibition on a port is permissible and within the power of competent authority under Section 3(2) of FTDR Act. In the case on hand, the import of subject goods is operated through Calcutta Sea Port alone and in other words, import through other ports in the country is prohibited. The importer in this case intends to import through Cochin Port, which is a Port prohibited to import the subject goods.

21. The Appellate Tribunal, as already noted, appreciating Exim Policy notification dated 18.12.2019 and 28.3.2020, noted that the subject goods have acquired the nature of prohibited goods in terms of Section 2(33) of Customs Act, 1962. However in paragraph 18 of the judgment under appeal treated the subject

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goods in the nature of restricted goods and held that release can be allowed on payment of redemption fine in lieu of confiscation. In the considered view of this Court the Appellate Tribunal is not consistent in appreciating whether the subject goods should be treated as restricted goods or prohibited goods. Still the Tribunal proceeded to direct release of goods on payment of redemption fine. Be that as it may, the Appellate Tribunal as one of the supporting reasons relies on the judgment of the Bombay High Court in M/s. *Harihar Collections* case and recorded that denial of release to subject importer would be travesty of justice. With respect, after appreciating the circumstances leading to the filing of the writ petition before the Bombay High Court and issues considered and particularly, what is observed in paragraph-36 of the said judgment, we are of the considered view that *Harihar Collections* is distinguishable and cannot be treated as an authority or as laying down a principle permitting release of goods on collecting redemption fine either by the primary authority or Appellate Tribunal. Paragraph 36 of the said judgment has left open for consideration by the

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Commissioner (Appeals). We have more than one difficulty or reason for not adopting the reasoning of Bombay High court in our judgment for sustaining the order under appeal. As rightly pointed out by the learned ASG these objections or distinguishing circumstances pointed out by the Revenue, against the Bombay High Court judgment are for limited purpose of arguing that the Tribunal misdirected itself in relying on the judgment of the Bombay High Court. At the same time not with a view to examine the correctness of the judgment in *Harihar Collections* case by this Court. Alive to what constitutes a precedent and whether binding or persuasive on us; for the circumstances we are now proposing to consider, we are of the view that judgment in *Harihar* need not be followed by this Court.

22. On 18.01.2021 the appeals were reserved for judgment. By serving memo on the other side, learned ASG mentioned that the Apex Court has suspended the judgment of Bombay High Court in *Harihar* case in SLP No.14633-14634/2020. The subsequent development is taken note of and is yet another reason weighing with us not to follow the view taken by Bombay

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High Court in *Harihar* case.

23. Now adverting to the order under appeal, the Appellate Tribunal stated two main reasons they do not fit within the scope of appellate power or appear to be contradictory and not conforming to the scheme of the Acts/notifications referred to above.

24. Applicable provisions Section 2(3), 111(d), 125 of the Customs Act 1962 are adverted to in the order under appeal. We do not propose to once again burden our judgment by extracting these provisions of law. It can be briefly stated that Customs Act defines what is prohibited goods and effect of importing prohibited goods; consequence of goods imported contrary to Section 111(d) option to pay redemption fine in lieu of confiscation or confiscation. This Court is of the view that the exercise of discretion and jurisdiction either by the adjudicating authority or by the Appellate Tribunal ought not to be moulded by a cast. The jurisdiction under Sections 111 (d) and 125 of Customs Act, 1962 is read with the provisions of FTDR Act, 1992,

foreign trade policy and the notifications issued by the

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Government from time to time. The Supreme Court in *Agricas LLP* has upheld notification dated 29.3.2019 issued imposing restriction on import of pulses described therein. The notifications dated 18.12.2019 and 28.03.2020 which have bearing to the issue on hand are substantially same and similar, but operating for subsequent fiscal years with a few additional parameters. The combined exercise of authority and discretion by Customs Commissioner etc. in these matters, conform to the requirements of judicial discretion. The discretion or power is exercised combining the relevant provision in the Act, notification and facts prevailing on the date of consideration etc. The authorities are guided by the information available to them in a given case.

25. We hasten to add, that if in every case goods are released on payment of redemption fine, by the primary or appellate Tribunal, then such decisions are unsustainable in law and judicial review. In our considered view, exercise of power and discretion under Section 125 of Customs Act 1962, are specific and generally governed by the applicable policy,

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notification etc. Notification dated 18.4.2019 stipulates restriction on import of a quantity of 1.5 lakh M.T only; stipulates minimum import price of Rs.200/- and above CIF per kg and the import is allowed through Calcutta Sea Port only. These are the conditions which the licensee for import of the goods is expected to conform. The primary authority has noted that by keeping in view the stand taken by the Union of India before the Supreme Court in *Agricas LLP* case; the available stock position of green peas is treated as surplus, and declined release and ordered confiscation. The further import according to Customs Commissioner is not needed or alternatively detrimental to the interest of farmers. He has further noted that in his order dated 16.10.2020 that the importer does not conform to any of the conditions applicable for import of green peas. In our considered view the exercise of above discretion by Customs Commissioner is the question for consideration before the Appellate Tribunal. The Appellate Tribunal on the contrary, as already noted, considered matters not completely germane for appreciating the mode and manner of exercise of authority by the Commissioner

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of customs, but, however, recorded that the subject goods can be treated as restricted goods and can be released on payment of redemption fine. in Customs Appeal No.14/2020. We are concerned with correctness or otherwise of the findings recorded by the appellate Tribunal for ordering release on payment or redemption fine. The Tribunal fell in clear error of law. By holding that release of goods is the only option to Customs Commissioner in the case on hand the language of Section 125 of Customs Act is fully liberalised. The reasoning of Tribunal is adopted both by other primary authority/Appellate Tribunal, then Exim policy, notifications are defeated and opens floodgates of the import Green Peas, and such contingencies are commented by Supreme Court in *Agricas* Case. We are of the view that the consideration of Appellate Tribunal in the case on hand is illegal, ignored relevant notifications, the mandate of FTDR Act and Customs Act 1962. The adjudications of a dispute in these matters is neither on the pedestal of travesty of justice or we have so much discretion for doing proverbial justice to an importer. In matters of this nature, such approach would go

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contrary to the object sought to be implemented by the authorities, in whom power is conferred particularly in matters of import, export, price etc. In our considered view, the other question whether it is restricted, prohibited the decisions rendered under customs under import and export etc., need not be considered. By juxtaposing the order of Commissioner of Customs and the order under appeal we are fully convinced that the Appellate Tribunal committed serious error in law by ordering release of goods under Section 125. We answer the first question in favour of Revenue and against the Importer.

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Question:2

26. The importer, as noted by the Commissioner of Customs is familiar with the practices and procedures for import and export of goods. The chronological events in the matter are already noted in the preceding paragraph. The importer in the case on hand files an application for trade licence on 22.04.2020.

Bill of lading is dated 27.04.2020. Bill of entry is filed on 23.06.2020. The importer used its volition and choices for importing the subject goods. It is not the argument of importer

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that for contravention in any import the authorities does not power to levy the penalty. The argument on the other hand is that the circumstances the penalty imposed is not warranted. The Tribunal, to the limited extent, rejecting this contention, recorded its view.

We are in agreement with the view taken by the Appellate Tribunal for sustaining the levy of penalty on importer. The question is answered against the importer and in favour of Revenue. For the above reasons, ustoms Appeal No.13 of 2020 is dismissed. Custom Appeal No.14 of 2020 is allowed.

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S.V.BHATTI

JUDGE

BECHU KURIAN THOMAS

JUDGE

Css/JS