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W.A.No.2626 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2023

CORAM :

**THE HON'BLE MR. JUSTICE R. MAHADEVAN
AND
THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ**

**W.A.No.2626 of 2023
and
C.M.P.No.22137 of 2023**

The Additional Commissioner of Customs,
(Group 1), Office of the Commissioner of Customs,
Chennai II (Imports), No.60, Rajaji Salai,
Chennai - 600 001.

... Appellant

Vs.

M/s.N.C.Alexander

... Respondent

Writ Appeal filed under Clause 15 of the Letters Patent, against the order dated 17.08.2023 passed by the learned Judge in W.M.P.No.23791 of 2023 in W.P.No.24343 of 2023.

For Appellant : Mr.K.Umesh Rao

For Respondent : Mr.Sathish Sundar
for Mr.S.Krishnanand

JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J.)

This writ appeal is directed against the interim order passed by the learned Judge in WP.No.24343 of 2023 on 17.08.2023. For the sake of clarity and specificity, the relevant paragraphs of the same are extracted below:



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"2. In a similar case, this Court has granted interim relief in WP(MD)Nos.5564 to 5566 of 2022. Incidentally, the vires of Notification No.5/2023 dated 08.05.2023 has been questioned before the Kerala High Court and interim stay has been granted by the Kerala High Court in WP(C)No.22281 of 2023(I). A similar order has also been passed by this court in the petitioner's own case in WP.No.22392 of 2023 vide order dated 31.07.2023.

3. Consequently, there shall be an interim direction, directing the Office of the respondent to assess and release the goods covered by Bill of Entry No.6592170 dated 26.06.2023 as the imported good in question namely, "fresh apples" are prone to deterioration.'

2. The respondent herein had imported "fresh apples" originating from New Zealand via Bill of Entry No. 6592170, dated 26.06.2023, pursuant to the contract entered earlier, the details of which read as follows:

Sl.Nos.	Total No. of Kgs	Price per kg
1	4917.5 Kgs	47.99 kg
2	962.5 Kgs	43.17 kg
3	980.0 Kgs	57.59 kg
4	21367.5 Kgs	47.99 kg
5	12932.5 Kgs	43.20 kg

According to the appellant, the apples imported could be broadly classified into two categories viz., (i) Cost Insurance Freight (in short, "CIF") price above Rs.50/- per kg. (ii) CIF price below Rs.50/- per kg. As per DGFT Notification No.5 of 2023, dated 08.05.2023, when the CIF value is below Rs.50/- per kg, then, the import of "fresh apples" shall be treated as "prohibited". Based on the same, the authority passed the order dated 14.07.2023, confiscating the goods viz., fresh apples imported under Bill of Entry No.6592170, dated 26.06.2023 at Sl. Nos. 1,



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2, 4 and 5, whose value was below Rs.50/- per kg, and assessing the same at Rs.18,61,610.02 under section 111(d) of the Customs Act, 1962. While so, the authority permitted the clearance of imported fresh apples comprised in Sl. No. 3 of the said Bill of Entry, with assessable value at Rs.56,437.43, on the premise that the CIF value of those apples was above Rs. 50/- per kg.

3. Aggrieved by the above order, the respondent herein filed W.P.No. 24343 of 2023 along with miscellaneous petitions, seeking issuance of writ of certiorarified mandamus, to call for the records in connection with order-in-original No.102796/2023 dated 14.07.2023 passed by the appellant authority, quash the same and to further direct the appellant to release the imported goods and to issue detention certificate for waiver of demurrage and container detention charges in terms of Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009.

4. When the writ petition came up for hearing on 17.08.2023, following the earlier order of this Court and in view of the stay order against the notification no.5/2023 dated 08.05.2023 passed by the Kerala High Court as well by this Court, the learned Judge has granted an order of interim direction to the appellant to assess and release of the goods covered under the bill of entry No.6592170 dated 26.06.2023, as the imported goods are prone to deterioration. Challenging the same, the appellant is before this court with the present appeal.



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5. The main contention of Mr.K.Umesh Rao, learned standing counsel appearing for the appellant is that by notification no.5/2023 dated 08.05.2023, the fresh apples, whose CIF value is below Rs.50/- per kg, stood prohibited from import. Knowing fully well about the same, the respondent had imported the subject goods in violation of the said notification. Elaborating further, the learned counsel submitted that as on the date of Bill of Entry (i.e.) dated 26.06.2023, the said notification has been in force and the same was stayed by Kerala High Court only on 11.07.2023. Without properly appreciating the same, the learned Judge has issued the interim direction to the appellant for release of the subject goods. It is also submitted that such an interim order was passed at the time of admission itself, without even issuing any notice to the appellant and providing an opportunity to the learned standing counsel to get instructions from the department and therefore, the interim order so passed by the learned Judge is in flagrant violation of the principles of natural justice. The learned counsel further submitted that the grant of interim relief in the form of releasing the subject goods is a consequential aspect of the main relief sought in the writ petition and hence, the same will have to be set aside. The learned standing counsel also submitted that as against the order-in-original dated 14.07.2023 passed by the appellant, appeal remedy is available under Section 128 of the Customs Act, and without exhausting the same, the respondent has preferred the writ petition, in



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which, the learned Judge erred in passing the impugned order of release of the subject goods and therefore, the same needs to be interfered with by this court.

6. On the other hand, the learned counsel for the respondent would submit that as of now, the notification prohibiting the import of fresh apples on the ground that the CIF value is less than Rs. 50/- per kg, is stayed by two High Courts and it is trite law that when the notification is stayed by one High Court, the operation of the stay order is not confined to the territorial limit of that High Court alone, but has pan India effect. In support of the same, the learned counsel relied on the Judgment of the Hon'ble Apex Court in *Kusum Ingots & Alloys Ltd.*

Vs. Union Of India [2004 (168) E.L.T. 3 (S.C.)], wherein, it was held as follows:

"21. A parliamentary legislation when receives the assent of the President of India and published in an Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled would not determine a constitutional question in vacuum.

22. The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether Interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act."

Thus, according to the learned counsel, the order of confiscation passed by the appellant lacks legal sanctity due to the operation of the stay order. The learned counsel further submitted that considering the fact that the subject goods are



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perishable in nature and are meant for human consumption, the respondent, without prejudice to his contention, is ready and willing to execute bank guarantee for the differential duty determined by the appellant, apart from the payment of duty component, for release of the subject goods.

7. Heard both sides and perused the documents enclosed in the typed set of papers.

8. The challenge made in the writ petition was to the order-in-original dated 14.07.2023 passed by the appellant, as far as confiscating the imported goods declared as fresh apples, on the ground of minimum import price, *vide* Bill of Entry No.6592170 dated 26.06.2023 at item nos.1,2,4 and 5, with assessable value of Rs.18,61,610.02 under section 111(d) of the Customs Act, 1962. The said order was passed by the authority based on notification no.5/2023 dated 08.05.2023 issued by the DGFT, Govt. of India. The effect of the said notification is quoted below for ready reference:

"Import of Apples under ITC (HC) 08081000 is 'prohibited' wherever the CIF Import Price is less than equal to Rs.50/- per kilogram. Minimum Import Price (MIP) conditions shall not be applicable for imports from Bhutan".

9. The learned Judge by the order impugned herein, has directed the appellant authority to assess and release the subject goods, in the light of the



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earlier order passed by the Madurai Bench of Madras High Court in W.P.(MD) Nos. 5564 to 5566 of 2022 and also in view of the fact that the Kerala High Court in W.P.(C) No. 22281 of 2023 (I), as well as this court in W.P. No. 22392 of 2023 have granted an order of interim stay in respect of the notification no.5/2023 dated 08.05.2023.

10. Assailing the aforesaid interim order, the learned standing counsel appearing for the appellant *inter alia* submitted that at the time of importing the goods by the respondent, which are prohibited as per the aforesaid notification, there was no stay order in operation and hence, the question of release of the goods does not arise for consideration.

11. This court is not inclined to accept the aforesaid submission made on the side of the appellant, having regard to the fact that the order-in-original dated 14.07.2023 came to be passed by the authority with reference to the goods imported by the respondent, when the order of stay granted by the Kerala High Court has been in force [WP(C) No.22281 of 2023 (I) dated 11.07.2023]. Subsequently, in an identical case in WP.No.22392 of 2023, by order dated 31.07.2023, this court has also granted an order of interim stay, in respect of the notification no.5/2023 dated 08.05.2023 dealing with minimum pricing for import of apple. Further, in similar circumstances in *M/s.Delhi Photocopiers v.*



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Commissioner of Customs, Chennai and others in SLP.(C) No.7565 of 2021 by order dated 11.08.2021, the Hon'ble Supreme Court has ordered for provisional release of the goods, on terms, and complete the process of adjudication within a fixed time frame. For better appreciation, the said order is reproduced below:

"We have heard the learned senior counsel appearing for the petitioner(s) and Mr. N. Venkataraman, learned Additional Solicitor General appearing for the respondent(s) at length.

On 05.07.2021, this Court had issued notice in these matters. Despite the fact that the matter was pending before this Court, the Department went ahead and confiscated the goods which are the subject matter of these petitions on 17.07.2021. Mr. N. Venkataraman, learned ASG, realizing the difficulty in his way, has asked the Department to stay its hands so far as the confiscation is concerned. We see no reason to differ from a number of orders that have been passed by this Court in the past for provisional release of goods. However, it has been pointed out to us that at least on and from 01.04.2020, the goods, according to the Department, are clearly prohibited goods and on and from this date, unless an order is made under Section 125, the goods must stand confiscated.

We stay the confiscation of these goods. The Notification dated 01.04.2020 is the subject matter of controversy before this Court, particularly in view of a subsequent Notification dated 18.03.2021 that has been pointed out by Mr. Arvind Datar, learned senior counsel. We, therefore, allow the goods involved in these petitions, to be provisionally released on the same terms that have been indicated in all the other cases. The order dated 18.09.2020 may, in particular, be looked at for this purpose.

In view of above, the Special Leave Petitions are disposed of.

Pending interlocutory application(s), if any, is/are disposed of."

12. Therefore, having considered the fact that the stay of operation of the notification is in force till date and the same is yet to attain finality and also taking note of the nature of the subject goods viz., fresh apples, which are perishable in nature and are meant for human consumption and also in the light of the order of



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the supreme court as referred to above, this court finds it appropriate to order release of the goods to the respondent, however, subject to the condition that the respondent shall furnish bank guarantee to the value of differential duty to be determined by the authority, in order to safeguard the interest of the Department.

13. At this juncture, the learned standing counsel appearing for the appellant submitted a memo of calculation with respect to differential duty payable by the respondent, which reads as follows:

(A) Bill of Entry No.6592170 dated 26.06.2023

Duty on fresh apples is 50% of the tariff value

(i)4917.5 kg x Rs.47.99	=	Rs. 2,35,990.8
(ii)962.5 kg x Rs.43.17	=	Rs. 4,155.1
(iii)980 kg x Rs.57.59	=	Rs. 56,438.2
(iv)21367.5 kg x Rs.47.99	=	Rs.10,25,426.3
(v)12932.5 kg x Rs.43.20	=	Rs. 5,58,684.0

.....
= Rs.19,18,090.4
.....

Value as per Bill of Entry is Rs.19,18,090.40

50% duty on Rs.19,18,090.40 = Rs.9,59,045.20

(B) Value of goods if minimum import price is Rs.50/-

47460.5 kg x Rs.50/- = Rs.23,73,025.00

Duty payable at 50% on Rs.23,73,025.00 = Rs.11,86,512.50

(c) Total differential duty payable is (B) - (A) (i.e.) Rs.2,27,467.30



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14. In the light of the above, the appellant is directed to release the subject goods on furnishing of bank guarantee to the tune of Rs.2,25,000/- towards differential duty, by the respondent. It is made clear that this interim arrangement would be made only to safeguard the interest of both parties; and the bank guarantee to be furnished by the respondent is kept alive, till the decision is arrived at with regard to validity of the notification no.5/2023 dated 08.05.2023.

15. With the aforesaid directions, the order of the learned Judge is modified and this writ appeal stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D,J.] [M.S.Q, J.]
18.10.2023

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Index: Yes / No.
Speaking order/ Non-speaking order
Neutral Citation: Yes / No.

To

The Additional Commissioner of Customs,
(Group 1), Office of the Commissioner of Customs,
Chennai II (Imports), No.60, Rajaji Salai,
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