Union Of India vs M/S Raj Grow Impex Llp on 17 June, 2021

Equivalent citations: AIR 2021 SUPREME COURT 2993, AIRONLINE 2021 SC 292

Author: Dinesh Maheshwari

Bench: A.M. Khanwilkar, Dinesh Maheshwari

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 2217-2218 of 2021
(Arising out of SLP(C) Nos. 14633-14634 of 2020)

UNION OF INDIA & ORS. ….APPELLANT(S)

VERSUS

M/S. RAJ GROW IMPEX LLP & ORS. ….RESPONDENT(S)

WITH

Civil Appeal No. 2219 of 2021 @ SLP(C) No. 1037 of 2021

JUDGMENT

Dinesh Maheshwari, J.

 Preliminary and brief outline Leave granted.

2. In this set of appeals, the Union of India and the authorities related with customs have questioned the orders dated 15.10.2020 and 05.01.2021, passed by the High Court of Judicature at Bombay in Writ Petition (L) Nos. 3502-3503 of 2020 and Writ Petition (ST) No. 24 of 2021 respectively1. The appellants are essentially aggrieved of the directions issued by the High Court for compliance of the orders-in-original dated 28.08.2020 passed by the Additional Commissioner of Customs, Group-I, Mumbai and consequently, for release of the goods imported by the 1 The order dated 15.10.2020 is to be read with the modification order dated 09.12.2020 in I.A. (L) No. 5735 of 2020 in Writ Petition (L) No. 3502 of 2020. private respondents though the goods in question are, according to the appellants, liable to absolute confiscation.

2.1. Looking to the subject-matter of the present appeals involving a multitude of issues and several of the background aspects, we may profitably draw a brief outline and sketch of the matter at the outset.

3. The genesis of the present litigation lies in the notifications issued by the Central Government under the Foreign Trade (Development and Regulation) Act, 19922 as also the consequential trade notices issued by the Directorate General of Foreign Trade3, making provisions for restricting the import of certain beans, peas and pulses. 3.1. In the preceding years, such notifications and trade notices were put to challenge in different High Courts by way of writ petitions wherein, different interim orders were passed and the importers effected various imports on the strength of such interim orders. However, the said writ petitions were ultimately dismissed by the High Courts and one petition seeking special leave to appeal was also dismissed by this Court. Similar notifications and trade notice issued in the subsequent year, on restriction of import of certain beans, peas and pulses, were again challenged in different High Courts and, notwithstanding the rejection of a similar challenge in the past by other High Courts, various interim orders were again passed; and the importers again proceeded to effect various imports under the cover of such interim orders.

2 Hereinafter also referred to as 'the FTDR Act'.

3 Hereinafter also referred to as 'the DGFT' for short. 3.2. Faced with such challenges and interim orders in different High Courts, the Union of India filed various transfer petitions, seeking transfer of the cases relating to the same subject-matter to this Court. Having regard to the nature of

controversy and surrounding factors, this Court heard the matters on merits so as to finally deal with the challenge to the notifications and the trade notice in question. This led to the judgment dated 26.08.2020 by this Court in the case of Union of India and Ors. v. Agricas LLP and Ors.4 upholding such notifications dated 29.03.2019, issued by the Central Government as also the consequential trade notice dated 16.04.2019, issued by the DGFT.

3.3. In the said judgment dated 26.08.2020, this Court, apart from other findings, held that the importers cannot be said to be under any bona fide belief in effecting the imports under the cover of interim orders; and they would face the consequences in law. While dismissing the writ petitions, this Court held that the imports made while relying on the interim orders were contrary to the said notifications and trade notice issued under the FTDR Act; and would be so dealt with under the provisions of the Customs Act, 1962 5. However, this judgment has also not given a quietus to the litigation and the events taking place after this decision have given rise to the present appeals.

4. Immediately after the decision of this Court dated 26.08.2020, the private respondents of these appeals, M/s. Raj Grow Impex LLP and M/s. 4 Since reported as 2020 SCC OnLine SC 675; hereinafter also referred to as the case of 'Agricas'.

5 Hereinafter also referred to as 'the Customs Act'.

Harihar Collections, whose imported goods covered by the said notifications had not been released, addressed respective communications to the Additional Commissioner of Customs, Group-I, Mumbai6, on the very day of judgment i.e., 26.08.2020, requesting for waiver of show cause notices and for urgent personal hearing. The Adjudicating Authority took up their cases in priority and, by his almost identical orders-in-original dated 28.08.2020, while ordering confiscation, gave an option to the importers to redeem the goods in question on payment of fine in lieu of confiscation under Section 125(1) of the Customs Act. While acting upon the orders so passed by the Adjudicating Authority, the importers made certain payments towards customs duty, redemption fine and penalty and obtained out of charge7; and some of the consignments were released. However, the DGFT took exception against release of the goods in question as the same were restricted items and stated in its letter dated 01.09.2020 that such release would be contrary to the import policy. Consequent to this and other communications, the customs authorities requested Mumbai Port Trust not to issue delivery order of the consignments in question and hence, the other consignments were not released.

5. Feeling aggrieved by such communications and stoppage of release of the goods in question, the importers (private respondents herein) approached the High Court by way of separate writ petitions, 6 Hereinafter also referred to as the 'Adjudicating Authority'. 7 'OOC' for short.

essentially seeking mandamus for clearance of the goods in question. While the said writ petitions were pending, the Commissioner of Customs (Import-II) passed an order dated 01.10.2020 in exercise of his powers under Section 129D(2) of the Customs Act, pointing out the alleged deficiencies in the adjudication orders; and directed filing of appeals before the Commissioner (Appeals)8. The appeals so filed were ultimately allowed by the Appellate Authority on 24.12.2020.

However, before such decision in appeals, the High Court heard the said writ petitions of the importers on 06.10.2020 and proceeded to decide the same by the common order dated 15.10.2020.

5.1. In its order dated 15.10.2020, the High Court took the view that, prima facie, the grounds stated in the order dated 01.10.2020 did not make out any such case of illegality or impropriety as to call for exercise of suo motu revisional powers by the Commissioner under Section 129D(2) of the Customs Act. Having said that, the High Court left the matter to be decided by the Commissioner (Appeals). However, thereafter, the High Court proceeded to examine the question as to the justification or otherwise for not releasing the goods in question. In this regard, the High Court was of the view that when the orders-in-original were holding the field and the importers had complied with the terms and conditions thereof; and where the importers were incurring expenditure because of warehousing, any further withholding of the imported goods was not justified. Thus, the High Court issued directions to the 8 Hereinafter also referred to as 'the Appellate Authority'. respondents to forthwith release the goods of the importers covered by the bills of entry mentioned in paragraph 38 of the order.

6. Seeking to challenge the aforesaid order dated 15.10.2020, the Union of India and its authorities related with customs approached this Court on 26.11.2020 but, before their SLPs were taken up for consideration, three major events took place in these matters. First such event related to an application made by one of the importers M/s. Raj Grow Impex to the High Court for modification of the order dated 15.10.2020 because some of its bills of entry had not been included therein. The High Court accepted this application and issued modification order dated 09.12.2020 accordingly. The second relevant event had been that by the orders-in-appeal dated 24.12.2020, the Commissioner (Appeals) proceeded to allow the appeals preferred by the Department against the aforesaid orders-in-original dated 28.08.2020 and ordered absolute confiscation of the goods in question while enhancing the amount of penalty; of course, the Appellate Authority found that some of the goods in question had since been released and treated that part of the matter a fait accompli. In the third major event, the said importer M/s. Raj Grow Impex challenged the order-in-appeal dated 24.12.2020 by way of another writ petition in the High Court. While considering this fresh writ petition on 05.01.2021, the High Court took exception against the observations made and directions issued by the Appellate Authority which, according to the High Court, were running contrary to its decision dated 15.10.2020. Accordingly, the High Court stayed the operation of the order-in-appeal and directed the authorities concerned to comply with the directions of the orders dated 15.10.2020 and 09.12.2020. An ancillary part of the third event was that the said importer also moved a contempt petition stating willful disobedience of the aforesaid order dated 09.12.2020 whereupon, by a separate order dated 05.01.2021, the High Court issued show cause notice to the authorities concerned and directed them to remain personally present in the Court on 21.01.2021. Again aggrieved, the Union of India and its authorities concerned approached this Court against these orders dated 05.01.2021, as passed by the High Court, respectively in the fresh writ petition and in the contempt petition.

7. The aforementioned SLPs against the orders so passed by the High Court were considered analogously on 20.01.2021 and, while issuing notice, this Court stayed the operation of the order impugned. Later on, these matters were taken up for hearing in priority looking to the nature of

controversy and the goods involved. During the course of hearing, on 18.03.2021, this Court found no reason for continuation of contempt proceedings in the High Court and closed the same. On 18.03.2021, yet another observation was made by this Court with reference to the submission of learned ASG appearing for the appellants, that it was open to the private respondents to opt for re-export of perishable imported goods lying in the customs warehouse to outside India.

8. The outline foregoing makes it clear that in the case of Agricas (supra), while deciding on the validity of the notifications and the trade notice, this Court did not accept that the imports in question, as made on the basis or under the cover of the interim orders passed by the High Courts, could be regarded as bona fide; but, in the given circumstances and the issues raised, this Court left those goods to be dealt with under the Customs Act. Now, dealing of the goods in question under the Customs Act has given rise to this litigation. On one hand, the appellants maintain that the subject goods are required to be confiscated absolutely or else, the entire purpose of the said notifications and trade notice shall be frustrated; and hence, they question the legality and validity of the orders passed by the Adjudicating Authority and the High Court whereby and whereunder, the goods in question are required to be released with payment of fine in lieu of confiscation. On the other hand, the importers maintain that the goods in question are not falling in the category of banned or totally prohibited goods and hence, they have rightly been ordered to be released with payment of fine in lieu of confiscation and other charges. They, thus, support the impugned orders passed by the Adjudicating Authority and the High Court.

8.1. Apart from the said two importers who had filed their respective writ petitions in the High Court and who are directly related with the orders in question before us, two more importers have moved impleadment/intervention applications while asserting that they have also imported under the cover of the interim orders of the High Court and their matters were pending at different stages with the authorities but, they are also likely to be affected by the decision in this set of appeals. They also support the stand that the goods in question are available for release and are not liable to absolute confiscation.

The parties and their respective interests in the matter

9. Having drawn a brief sketch indicating the salient features of this case and the issues involved, we may narrate, in brief, the relevant particulars of the parties before us in these appeals9. The appellants

10. The Union of India through the Secretary, Ministry of Commerce and the Secretary, Department of Revenue, Ministry of Finance is the appellant before us; and is joined by the Commissioner of Customs (Import-I), Mumbai and other authorities related with customs. The Commissioner of Customs (Appeal), Mumbai (Zone-I), who had passed the order dated 24.12.2020 as Appellate Authority, has joined as a party only in the appeal against the order dated 05.01.2021 10. These appellants are aggrieved of the respective orders passed by the High Court of Judicature at Bombay in the respective writ petitions; and 9 This introduction of persons/entities is to broadly co-relate the parties with the points to be taken up for determination; and is not intended to be an exhaustive list of the parties involved. 10 The Director General of Foreign Trade, the Zonal Additional Director

General of Foreign Trade, and the Mumbai Port Trust are proforma respondents in the appeals against the common order passed by the High Court on 15.10.2020.

maintain that the goods in question could not have been released and are liable to absolute confiscation.

The contesting respondents

11. The two importers, in whose relation the impugned orders have been passed by the authorities concerned and the High Court are the contesting respondents of these appeals. Their relevant particulars are as under:

> 11.1. M/s. Raj Grow Impex LLP This importer is said to be a partnership firm having its registered office at Jaipur in the State of Rajasthan. This firm had filed ten bills of entry dated 01.11.2019 for clearance of 24,815 MTs of yellow peas, said to have been imported under the cover of interim order dated 20.07.2019, as passed by the Rajasthan High Court, Bench at Jaipur in WP No. 11974 of 2019. Its efforts to get the goods released with payment of fine led to the order-in-original dated 28.08.2020. This importer had obtained OOC for three bills of entry and got released 7,500 MTs of the goods in question but the remaining were not released. This importer had filed WP (L) No. 3502 of 2020 before the High Court of Judicature at Bombay seeking mandamus which was decided by the common order dated 15.10.2020. This importer has also filed WP (ST) No. 24 of 2021 questioning the order-in-appeal dated 24.12.2020 wherein, the High Court of Judicature at Bombay passed the interim order dated 05.01.2021.

11.2. M/s. Harihar Collections This importer is said to be a proprietorship concern having its registered office at Jaipur in the State of Rajasthan. This importer had filed eight bills of entry dated 18.11.2019 for clearance of 38,500 MTs of yellow peas, said to have been imported under the cover of interim order dated 10.07.2019, as passed by the Rajasthan High Court, Bench at Jaipur in WP No. 11752 of 2019. Similar to the above, the efforts of this importer to get the goods released with payment of fine in lieu of confiscation led to another order-in-original dated 28.08.2020. This importer had filed WP (L) No. 3503 of 2020 before the High Court of Judicature at Bombay seeking mandamus which was decided by the common order dated 15.10.2020. In relation to this importer, the Appellate Authority passed another order-in-appeal dated 24.12.2020, which has not been challenged but, the importer has stated its desire to do so in due course.

The intervenors

12. Apart from the above, two other importers have filed impleadment applications with the submissions that they have also imported a substantial quantity of goods pursuant to the interim orders passed by the Rajasthan High Court in their respective writ petitions; and that they have substantial interest in the present proceedings because any final judgment herein shall have impact on their interests. Their relevant particulars are as under:-

Nikhil Pulses Pvt. Ltd.

12.1. This importer is said to be a private limited company having its registered office at Jaipur in the State of Rajasthan. This company is said to have imported 1,02,550 MTs of yellow peas under the cover of interim order dated 02.08.2019, as passed by the Rajasthan High Court, Bench at Jaipur in WP No. 12283 of 2019. This company had received a notice dated 20.11.2020 from the Principal Commissioner of Customs, Mundra requiring to show cause as to why the goods in question are not liable to confiscation.

Agricas LLP 12.2. This importer is said to be a partnership firm having its registered office at Jaipur in the State of Rajasthan. This firm is said to have imported, inter alia, 27,775 MTs of black mapte under the cover of interim order dated 14.08.2019, as passed by the Rajasthan High Court, Bench at Jaipur in WP No. 13392 of 2019; and out of the quantity imported, 14,366 MTs of goods got released but not the remaining. It is stated by this importer that pursuant to the show cause notice dated 05.10.2020, the Commissioner of Customs, Nhava Sheva found the goods to be prohibited and liable to confiscation whereafter it had filed a writ petition bearing No. 525 of 2021 before the High Court of Judicature at Bombay against the non-clearance of the goods but in the meantime, the main issue has been taken up by this Court in these appeals.

Relevant factual aspects and background

13. Having taken note of the salient features of the case, the relevant particulars of the parties before us with their respective interests, we may now enter into the relevant factual aspects and background in necessary details but while avoiding the facts which may not have bearing on determination of the real issues involved.

14. The relevant background aspects of the matter are that the Central Government had issued notifications dated 05.08.2017 and 21.08.2017, revising the policy for import of urad/moong and pigeon peas/toor dal from “free” to “restricted” with a stipulation as to annual quota and requirement of a prior licence from DGFT. Then, by the notification dated 25.04.2018, import of the said beans/pulses was to remain restricted requiring a prior licence and with a stipulation as to annual quota for the fiscal year 2018-2019. One of the importers, M/s. Hira Traders, preferred a writ petition before the Madras High Court, challenging the notification dated 25.04.2018 and trade notices issued on 9th, 16th and 18th May, 2018 respectively. The said petitioner also prayed for interim relief, of permission to import peas as per the contracts. By the interim order dated 28.06.2018, the said High Court stayed the operation of the notification dated 25.04.2018 and thereby, permitted imports without the requisite licence. Several other writ petitions were filed before different High Courts challenging the restrictions on import of these beans/peas/pulses and various interim orders were passed, staying the notifications; and leading to the effect of permitting imports without any restrictions as to quota or licence.

14.1. The main plank of submissions in the said writ petitions was that DGFT, the statutory authority under the FTDR Act, was not authorised to issue an order amending the EXIM policy and such a power vested only in the Central Government in terms of Section 3(2) read with Section 6(3) of the FTDR Act.

14.2. The writ petitions so filed in challenge to the said and akin notifications and trade notices were dismissed by different High Courts. The writ petition by M/s. Hira Traders was dismissed by the Madras High Court on 04.04.2019. The Bombay High Court had dismissed similar writ petitions on 03.07.2018. Similarly, the Madhya Pradesh High Court had dismissed such petitions on 25.10.2018; and the Gujarat High Court had also dismissed similar writ petitions on 19.12.2018. The order passed by the Gujarat High Court was sought to be challenged in this Court in Special Leave Petition (C) No. 1922 of 2019 but, the same was also dismissed by the order dated 28.01.2019.

14.3. Thus, to put in a nutshell, it is evident that even though the High Courts initially took up the challenge to the said notifications and trade notices and granted interim orders but, ultimately, the writ petitions were dismissed. An attempt to challenge one of the decisions in this Court also failed with dismissal of the special leave petition.

15. Thereafter, in the month of March, 2019, the Central Government, in exercise of its power under Section 3 of the FTDR Act read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy 2015-2020, amended the import policy conditions relating to various items of Chapter 7 of the Indian Trade Classifications (Harmonized System) 2017, Schedule I by way of S.O. Nos. 1478(E), 1479(E), 1480(E) and 1481(E) dated 29.03.2019. These were followed by the trade notice dated 16.04.2019 by the DGFT. These notifications are at the core of controversy involved in these matters and hence, it would be just and appropriate to reproduce the same as under: -

> “S.O. 1478(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 Import Policy of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-1 (Import Policy), as under-

Exim Code Item Description Existing Policy Revised Policy condition condition 0713 31 10 Beans of the Restricted. Import of Moong shall SPP Vigna be subject an annual Mungo (L.) (fiscal year) quota of 1.5 Hepper. lakh MT as per 0713 90 10 Split procedure to be notified 0713 90 90 Other by Directorate General of Foreign Trade:-

Provided that this restriction shall not apply to Government’s import commitments under any bilateral or Regional Agreement or Memorandum of Understanding.

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

xxx xxx xxx S.O. 1479(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 amends the Import Policy Conditions of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-1 (Import Policy), as under -

Exim Code	Item Description	Existing Policy	Existing Policy condition	Revised Policy condition
0713 1000	Peans (Pisum Sativum) including Yellow peas, Green peas, Dun peas and Kaspa peas	Restricted	Restricted for the period from 1st January, 2019 to 31st March, 2019	During the period from 1st April, 2019 to 31st March, 2020, total quantity of 1.5 Lakh MT of Peas shall be allowed against license as per the procedure to be notified by Directorate General of Foreign Trade.
0713 90 10	Split			
0713 90 90	Other			

2. This notification shall come into force with effect from the 1 st April, 2019.

xxx xxx xxx S.O. 1480(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 Import Policy of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-1 (Import Policy), as under-

Exim Code	Item Description	Existing Policy condition	Revised Policy condition
0713 31 90	Beans of the SPP Vigna Radiata (L.) Wilezek	Restricted.	Import of Urad shall be subject to an annual (fiscal year) quota of 1.5 lakh MT as per procedure to be notified by Directorate General of Foreign Trade: -
0713 90 10	Split		
0713 90 90	Other		

			Provided that this restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding.

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

xxx xxx xxx S.O. 1481(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 Import Policy of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-1 (Import Policy), as under -

Exim Code	Item Description	Existing Policy condition	Revised Policy condition
0713 60 00	Pigeon Peas (Cajanus Cajan)/ Toor Dal.	Restricted.	Import of Pigeon Peas (Cajanus Cajan)/Toor Dal shall be subject to an annual (fiscal year) quota of 02 lakh MT as per procedure to be notified by Directorate General of Foreign Trade: Provided that this restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding.
0713 90 10	Split		
0713 90 90	Other		

2. This notification shall come into force from the 1 st April, 2019." 15.1. The trade notice dated 16.04.2019 issued by the DGFT laid down the modalities for making the applications for import of the commodities in question and carried the following amongst other stipulations: -

> "a. Applications are invited online from the intending millers/refiners (having own refining/processing capacity) of pulses/peas for its import as per ANF-2M of FTP 2015-20 to DGFT, at policy2-dgft@nic.in besides the concerned jurisdictional Regional Authorities ....."

16. Seeking to challenge the said notifications dated 29.03.2019 and the trade notice dated 16.04.2019, about 90 writ petitions were filed before the Rajasthan High Court, Bench at Jaipur. Various akin writ petitions were filed before the High Courts of Delhi, Punjab and Haryana, Andhra Pradesh, Bombay and Calcutta. In several such writ petitions, interim orders were passed, permitting the importers to import the said peas/pulses, notwithstanding the fact that they had not been issued the import licences, as also the fact that the total imports with such interim orders would exceed the maximum quantity fixed by way of the impugned notifications.

17. In the given set of circumstances, Union of India approached this Court with several transfer petitions. Having regard to the circumstances and submissions sought to be made, such writ petitions concerning the notifications in question were withdrawn to this Court and were ultimately dismissed by the said judgment dated 26.08.2020, in the case of Agricas (supra).

Judgment dated 26.08.2020 of this Court in Agricas

18. In the case of Agricas (supra), a variety of issues, essentially relating to the validity of notifications and the corresponding trade notices imposing restrictions on import of peas and pulses, were dealt with by this Court on the anvil of the FTDR Act, particularly Sections 3 and 9A thereof. We need not dilate on all the issues examined and dealt with by this Court in Agricas but, a few salient features of the said decision need to be accentuated, for the purpose of the issues involved in these appeals. 18.1. In Agricas (supra), this Court specifically took note of the stand of the Union of India, as regards the purpose and purport of the notifications in question, which could be usefully reproduced as under: -

> "53. The Union of India, in their affidavit filed on 26th June 2020, have pleaded that they were required to strike a balance between the farmers and the importers as largescale imports would adversely impact the interests of the farmers due to fall in prices in the local market. Reference was made to the Minimum Support Price (MSP) for Moong, Urad and Toor dal and Gram fixed on the recommendation of the Commission for Agricultural Costs and Prices. Further, the Central Government under the schemes being run had procured 85 lakh MT of pulses directly from 53 lakh farmers by paying them MSP in the last five years. There was also increase in production of pulses from 25.42 Million MTs in 2017-18 to 26.66 Million MTs in 2020-21. Imported Yellow Peas are the perfect substitute for Gram in making of Besan which is primarily used in preparation of Indian savouries. As the price of imported Yellow Peas in India is cheaper than the domestic price of Gram, a huge shift in industry usage from Gram to Yellow Peas has taken place. In these circumstances that the government has imposed restrictions from April, 2018 onwards with a small window of annual quota for permitted imports. However, in

> view of the interim orders passed by the various High Courts, the actual imports of peas were to the tune of 8,51,408 MT and 6,52,607 MTs in 2018-2019 and 2019-2020 respectively, though the annual quota for these two years was 1/1.50 lakh MTs. The Government is presently holding a buffer stock of 26.94 lakh MT of Gram, against the target quantity of 3 lakh MTs. The Gram is being sold at Rs.4,000 - 4,200 per quintal, which is below the MSP of Rs.4,875/- per quintal. Imported CIF value of Yellow Peas is Rs.2,028/- per quintal. Due to the pandemic, the farmers could be compelled to make panic disposal at much lower prices. In the further affidavit filed on 1 st July 2020, the Union of India has stated that they had not issued any quota for Peas, Yellow Peas etc. as inspite of restricted quota of 1 lakh and 1.5 lakh MTs for Peas in the Financial Years 2018-19 and 2019-20, due to interim orders passed by the various High Courts, the actual import was 8.51 lakh MTs and 6.67 lakh MTs during the Financial Years 2018-

19 and 2019-20, respectively. Consequently, it has been decided not to import Yellow Peas in the current Financial Year 2020-21. In the affidavit filed on 6 th July 2020, with reference to Section 9A of the FTDR Act, the Union of India has stated that the said section is attracted only when the goods are imported into India in increased quantity and under such conditions as to cause or threaten to cause serious injury to domestic industry. Section 9A is enacted as a safeguard mechanism in terms of Article XIX of the GATT-1994 and Article II of the WTO Agreement on Safeguards vide the Amendment Act, 2010. The notifications under challenge have been issued within the express terms of Section 3 of the FTDR Act which permits the Central Government to impose restrictions without any qualification of the nature specified in Section 9A. Power of the Central Government to restrict imports to limited quantities under Section 3 and quantitative restrictions under Section 9A of the FTDR Act are completely distinct and have no connection or interplay. The power under Section 3(2) of the FTDR Act is of a wide amplitude. Reference is also made to Rule 5(2) to assert that there is necessity of evidence that the imports had increased as a result of 'unforeseen developments' in addition to the necessity for evidence disclosing serious injury or threat of serious injury to domestic industry and a causal link between imports and serious injury. The restrictions have been imposed not due to increased quantities of imports but to prevent panic disposal by farmers as the prices of Gram would come down. It is submitted that special provisions like 9A of the FTDR Act would be limited to areas within its scope leaving the general provision free to operate in other areas." (emphasis in bold supplied) 18.2. Another line of over-ambitious but rather misconceived arguments on the interpretation of the impugned notification was suggested on behalf of the importers as if each licencee could import the quantity mentioned in the notification. Such a baseless contention had, in fact, been rejected at the outset by this Court. The relevant finding in that regard may also be usefully noticed as follows:

> "17. We would also without any hesitation reject the contention raised by some of the importers that the impugned notification is illegal because of vagueness or allows restricted quantity of 1/1.5 lakh MT of Peas (Pisum Sativum) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas as against a licence, meaning thereby each licensee is allowed to import the maximum quantity specified in the notification. In other words, the total quantity specified in the notification is per licensee and not for

the total imports of the commodity specified in the notification. The submission has no merit as the notification expressly uses the expression 'total quantity' of the commodity specified which could be imported. There is no ambiguity or vagueness in the notifications, relevant portions of which have been quoted above. Even otherwise the expression 'total quantity' cannot be construed as quantity per licence issued as the number of licences issued concerning the subject goods could be numerable (as per the Union of India 2248, 1016 and 2915 licences were issued in 2019- 20 for import of Tur, Moong and Urad dals against restricted quota of 4, 1.5 and 4 lakh MT, respectively). If each licence holder is allowed to import 1/1.5 lakh MT of Peas, the total import would well exceed the total annual consumption after we account for the production within India. In our opinion, the plea and interpretation of the importers if accepted will not only be contrary to the express language of the notification but would frustrate the intent and object of restricting the imports of the stated goods by prescribing a quota. We decline and would not accept this farfetched and somewhat drivel interpretation of simple and straight forward words." 18.3. After dealing with the interpretation of Section 9A of the FTDR Act and its co-relation with Article XI and Article XIX of GATT-1994 as also Section 3 of the FTDR Act, this Court held the notifications in question to be valid, for having been issued in accordance with the powers conferred on the Central Government in terms of sub-section (2) of Section 3 of the FTDR Act. This Court, inter alia, observed and held as under: -

"61. This being the position, Section 9A has to be interpreted as an escape provision when the Central Government i.e. the Union of India may escape the rigours of paragraph (1) of Article XIX of GATT-1994. Section 9A is not a provision which incorporates or transposes paragraph (1) of Article XI into the domestic law either expressly or by necessary implication. To hold to the contrary, we would be holding that the Central Government has no right and power to impose 'quantitative restrictions' except under Section 9A of the FTDR Act. This would be contrary to the legislative intent and objective. Section 9A of the FTDR Act does not elide or negate the power of the Central Government to impose restrictions on imports under sub-section (2) to Section 3 of the FTDR Act.

62. In other words, the impugned notifications would be valid as they have been issued in accordance with the power conferred in the Central Government in terms of sub-section (2) to Section 3 of the FTDR Act. The powers of the Central Government by an order imposing restriction on imports under sub-section (2) to Section 3 is, therefore, not entirely curtailed by Section 9A of the FTDR Act." (emphasis in bold supplied) 18.4. As noticed, before the said writ petitions were withdrawn to this Court, various interim orders had been passed by the High Courts. It was stated before this Court that, relying upon such interim orders, the importers had imported various quantities of peas and pulses; and it was contended on behalf of the importers that those had been bona fide imports under the interim orders of the Courts. This Court specifically rejected such contentions and held that despite the High Courts of Madras, Bombay, Gujarat and Madhya Pradesh having dismissed the

writ petitions of similar nature while upholding the notifications and trade notices, the importers took their chance, obviously for personal gains and they would, accordingly, face the consequences in law. This Court, in no uncertain terms, rejected the submissions that the importers had acted in bona fide belief. The relevant observations and findings of this Court in Agricas (supra) in this regard could be usefully extracted as under: -

"D. Contention of the importers of bona fide imports under interim orders and prayer for partial relief.

65. 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 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." 18.5. Only one aspect of the matter was not decided by this Court and that related to the pending appeals against the orders suspending or terminating the import-export code11 of some of the parties. This Court left the statutory appeals in that regard to be decided in accordance with law.

19. Having upheld the validity of the notifications and trade notice and also having held that the importers, while effecting the imports by relying upon the interim orders, cannot be said to have acted bona fide, this Court concluded on the writ petitions with the observations and directions that the imports in question would be held to be contrary to the notifications and trade notices issued under the FTDR Act; and would be so dealt with under the provisions of the Customs Act. This Court dismissed all the writ petitions which were subject of the transfer petitions 11 'IEC' for short.

as also the writ petitions filed by the intervenors. The concluding part of the decision of this Court in Agricas (supra) reads as under: -

"F. Conclusion

> 67. 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."
>
> 20. Therefore, it is beyond a shadow of doubt that in Agricas (supra), this Court took note of raison d'être that the notifications were fundamentally intended to protect the domestic agriculture market and also pronounced on the true meaning and import of these notifications;

and while rejecting the far-stretched interpretation suggested on behalf of the importers that each licencee was entitled to import the quantity mentioned in the notifications, this Court not only upheld the notifications and the trade notice in question but also held that any import made under the cover of the interim order cannot be regarded as bona fide; and being contrary to the applicable notifications and trade notice, would be so dealt with under the provisions of the Customs Act. However, what has happened after the aforesaid decision of this Court dated 26.08.2020 in Agricas has given rise to the present round of litigation. Orders-in-original dated 28.08.2020: The Adjudicating Authority allows release of goods on payment of redemption fine

21. As noticed, within no time after the decision of this Court dated 26.08.2020 in Agricas (supra), the private respondents of these appeals, M/s. Raj Grow Impex LLP and M/s. Harihar Collections, who had made certain imports of the goods covered by the said notifications but their imported goods had not been released, took up the proceedings in the manner that the eventuality of absolute confiscation could be obviated and they could get the goods released by payment of fine. In this regard, they addressed respective communications on 26.08.2020, requesting for waiver of show cause notices under Section 124 of the Customs Act and for urgent personal hearing. The Adjudicating Authority took up their cases in priority and, by his almost identical orders-in-original dated 28.08.2020, while ordering confiscation under Section 111(d) of the Customs Act, gave an option to the importers to redeem the goods in question on payment of fine in lieu of confiscation under Section 125(1) thereof. Having regard to the questions involved, the relevant features of the said orders-in-original dated 28.08.2020, in relation to the individual importer may be taken note of.

M/s. Raj Grow Impex LLP

22. On 01.11.2019, the importer M/s Raj Grow Impex LLP filed ten bills of entry bearing numbers 5520536, 5520537, 5520538, 5520539, 5520540, 5520541, 5520732, 5520871, 5520872 and 5521191, for clearance of 24,815 MTs of yellow peas, said to have been imported under the cover of interim order passed by the Rajasthan High Court on 20.07.2019 in WP No. 11974 of 2019.

However, the goods were not released, particularly for the objections against their release by the officers of DGFT. The goods were stored in a warehouse under Section 49 of the Customs Act.

22.1. On the very day of the decision of this Court in the case of Agricas (supra) on 26.08.2020, this importer sent a letter to the Adjudicating Authority with the request that show cause notice under Section 124 of the Customs Act be waived and personal hearing may be provided expeditiously. Accepting this request, the Adjudicating Authority granted expedited hearing because of perishable nature of the goods; and proceeded to pass the order-in-original on 28.08.2020 (which was issued on 03.09.2020).

22.2. The Adjudicating Authority observed in its order-in-original dated 28.08.2020 that the goods were imported by the importer in the month of November 2019 under the protection of the interim order granted by the Rajasthan High Court but, when held to have been imported in contravention of the applicable notifications, they became prohibited goods under Section 11 of the Customs Act read with Section 3 of the FTDR Act; and hence, the goods were liable to confiscation under Section 111(d) of the Customs Act. Further, the importer was also held liable for penalty under Section 112(a)(i) of the Customs Act. The relevant findings of the Adjudicating Authority could be usefully extracted as under: -

> "9. The impugned goods were imported in contravention of the DGFT notifications No. S.O. 1478(E), 1479(E), 1480(E) and 1481(E) dated 29.03.2019 and subsequent trade notice No. 06/2019-2020 Dated 16.04.2019. Thereby, the impugned goods became prohibited under section 11 of the Customs Act, 1962 read with section 3 of the FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992. Hence, I hold that the goods are liable for confiscation u/s. 111(d) for the Customs Act, 1962.
>
> 10. For the above acts of omission and commission which render the impugned goods liable for confiscation u/s. 111(d) of the Customs Act, 1962, I hold that the importer is liable for penalty u/s.

112(a)(i) of the Customs Act, 1962." 22.3. However, after having held that the goods were liable to confiscation and the importer was liable for penalty, the Adjudicating Authority proceeded to determine the quantum of redemption fine and penalty to be levied on the importer. In this regard, the Adjudicating Authority took into account the alleged margin of profit of the importer, market price of the goods, and the expenditure incurred on storage and transportation etc. The Adjudicating Authority also took into account various other factors for which the quality of goods, being perishable in nature, had deteriorated, like poor condition of warehouses, excessive rainfall, humidity, exposure and pest attacks. It was, however, observed by the Adjudicating Authority that the goods in question, though having lost much of their market value, were still fit for human consumption, as per the certificate from the accredited laboratory. On these considerations, the Adjudicating Authority considered it appropriate to impose fine and penalty while calculating the margin of profit @ Re. 1 per Kg; and concluded on the matter with the following order: -

> "12. In view of the above discussion and findings, I pass the following order:-

> Order i. I confiscate the impugned goods u/s. 111(d) of the Customs act, 1962. Whereas I give an option to the importer to redeem the impugned goods on payment of the redemption fine of Rs. 1.0 crores (Rupees One Crores only) in lieu of confiscation u/s 125(1) of the Customs Act, 1962. ii. I, also impose a penalty of Rs. 1.485 crores (Rupees One Crore Forty Eight Lakhs Fifty Thousand only) on M/s. Raj Grow Impex LLP, Jaipur u/s. 112(a)(i) of the Customs Act, 1962.
>
> 13. This order is passed without prejudice to any other action that may be contemplated against the importer or any other person in terms of any provision of the Customs Act, 1962 and/or any other law for the time being in force." M/s. Harihar Collections

23. The case of the other importer M/s. Harihar Collections is not materially different except for a few individual facts. This importer had, on 18.11.2019, filed eight bills of entry on 18.11.2019 bearing numbers 5720040, 5720192, 5720693, 5722458, 5722730, 5719772, 5722243 and 5722456 for clearance of 38,500 MTs of yellow peas, said to have been imported under the cover of interim order passed by the Rajasthan High Court on 10.07.2019 in WP No. 11752 of 2019. In this case too, the goods were not released in view of objections and were stored in a warehouse.

23.1. Soon after the decision of this Court in the case of Agricas (supra) on 26.08.2020, this importer also sent a similar communication on the same day to the Adjudicating Authority, seeking waiver of show cause notice under Section 124 of the Customs Act and for expeditious personal hearing. This case was also considered expeditiously and another order- in-original of similar nature was passed by the Adjudicating Authority on 28.08.2020 (issued on 03.09.2020).

23.2. Almost on the similar considerations as noticed above in the case of M/s. Raj Grow Impex, the Adjudicating Authority held that the goods in question became prohibited goods under Section 11 of the Customs Act read with Section 3 of the FTDR Act; and hence, were liable to confiscation under Section 111(d) of the Customs Act; and the importer was also liable for penalty under Section 112(a)(i) of the Customs Act. Again, on similar lines, the Adjudicating Authority proceeded to determine the quantum of redemption fine and penalty to be levied on the importer; and, on similar considerations as above, proceeded to impose fine and penalty while calculating the margin of profit @ Re. 1 per Kg and concluded on the matter with the following order: -

> "13. In view of the above discussions and findings, I pass the following order: -
>
> Order i. I confiscate the impugned goods u/s. 111(d) of the Customs act, 1962. Whereas I give an option to the importer to redeem the impugned goods on payment of the redemption fine of Rs. 1.5 crores (Rupees One Crores Fifty Lakhs Only) in lieu of confiscation u/s 125(1) of the Customs Act, 1962.
>
> ii. I, also impose a penalty of Rs. 2.35 crores (Rupees Two Crores Thirty Five Lakhs only) on M/s. Harihar Collections, Jaipur u/s. 112(a)(i) of the Customs Act, 1962.

> 14. This order is passed without prejudice to any other action that may be contemplated against the importer or any other person in terms of any provision of the Customs Act, 1962 and/ or any other law for the time being in force." Immediate sequels to the orders-in-original

24. The aforesaid orders-in-original dated 28.08.2020 instantly led to several actions and reactions. Acting swiftly on the orders-in-original, the respondent-importers took immediate steps for payment of redemption fine and penalty. On 29.08.2020, the respondent M/s. Raj Grow Impex made such payment in relation to three bills of entry bearing Nos. 5520732, 5520871 & 5520536 and obtained OOC. On the other hand, the respondent M/s. Harihar Collections made payment of redemption fine and penalty in respect of all its eight bills of entry on 29.08.2020 and obtained OOC. When the respondent M/s. Raj Grow Impex was in the process of making payment for the remaining seven bills of entry and when the goods for which OOC had been issued were in the process of unloading and release, the DGFT addressed its letter dated 01.09.2020 to the Chairman, Central Board of Indirect Taxes and Customs, referring to the import policy and restrictions over import of peas as also to the judgment of this Court in Agricas (supra). The DGFT stated that any release of imported peas would be contrary to the import policy; that they were in the process of obtaining legal opinion from the ASG; and till then, the field formations under the Customs may be directed not to release the consignments of peas and, if any such consignments had been released, the details may be provided. It appears that acting on this communication from DGFT, the Zonal Additional Director General of Foreign Trade at Mumbai issued necessary instructions and thereupon, the Deputy Commissioner of Customs, Import Docs (Import-I), Mumbai, issued a letter dated 02.09.2020, instructing the Mumbai Port Trust authorities to stop the release of the goods in question. This led to the stoppage of unloading and release of the goods whereupon, the respondent-importers made a request to the Commissioner of Customs (Import-I), Mumbai on 03.09.2020 to release the cargo when the requisite fine and penalty had already been paid. However, the respondent-importers received the communication from Mumbai Port Trust authorities that the cargo stored in the port trust premises will not be released on account of the directions received from the customs authorities. Thereafter, they received one more letter from the Mumbai Port Trust on 11.09.2020 stating that the goods could be cleared subject to fulfilment of the Customs and Port Trust formalities. However, despite all their efforts, the importers could not secure the desired release of goods.

25. Being aggrieved by the said communications and denial of release of the goods, the respondent-importers approached the High Court of Judicature at Bombay on 15.09.2020, seeking mandamus for clearance of the goods imported by them while also questioning the communications denying them the release of the goods in question. The writ petitions so filed by the importers, being Writ Petition (L) No. 3502 of 2020 (M/s. Raj Grow Impex LLP v. Union of India and Ors.) and Writ Petition (L) No. 3503 of 2020 (M/s. Harihar Collections v. Union of India and Ors.), were decided by the impugned common order dated 15.10.2020. We shall be dilating on the relevant features of the order dated 15.10.2020 a little later but, at this juncture, we may take note of the reliefs claimed in the respective writ petitions which read as under: -

In Writ Petition (L) No. 3502 of 2020 by M/s. Raj Grow Impex "36. The Petitioner therefore prays that:

(a) This Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction for calling for the records of the present case and after going through the legality and validity thereof be pleased to quash and set aside the Letters issued by Respondent Nos.5 and 6 on 02.09.2020 ("Exhibits O & P");

(b) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writor order or direction under Article 226 of the Constitution of India ordering and directing the Respondents and in particular the Respondent No.7and Respondent No. 4 itself, its officers, subordinates, servants and agents to clear the goods imported by the Petitioner vide Bills of Entry Nos. 5520732, 5520871 and 5520536 all dated 01.11.2019;

(c) this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writor order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No. 4 itself, its officers, subordinates, servants and agents torelease the goods imported vide 7 Bills of Entry bearing Nos. 5520537, 5520538, 5520539, 5520540, 5520541, 5520872 and 5521191 on payment of Redemption Fine and Penalty;

(d) that pending the hearing and final disposal of this Petition, that this Hon'ble Court be pleased to-

i. restrain the Respondent Nos.3 and 4 itself, its officers, subordinates, servants and agents from taking any further action to stop the clearance of the goods imported by the Petitioner vide Bills of Entry Nos. 5520732, 5520871 and 5520536 all dated 01.11.2019;

ii. direct the Respondent No.4 ,itself, its officers, subordinates, servants and agents to clear the goods imported by the Petitioner vide Bills of Entry Nos. 5520732, 5520871 and 5520536 all dated 01.11.2019;

iii. direct the Respondent No.7 and Respondent No. 4 itself, its officers, subordinates, servants and agents to release the goods imported vide 7 Bills of Entry bearing Nos. 5520537, 5520538, 5520539, 5520540,5520541, 5520872 and 5521191 on payment of Redemption Fine and Penalty;

(e) for ad-interim reliefs in terms of prayer clause (d) above;

(f) for costs of this Petition and the Orders made thereon, and

(g) for such further and other reliefs as this Hon'ble Court may deem fit in the facts and circumstance of the case." In Writ Petition (L) No. 3503 of 2020 by M/s. Harihar Collections "33. The Petitioner therefore prays that:

(a) This Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction for calling for the records of the present case and after going through the legality and validity thereof be pleased to quash and set aside the Directions / Letter issued by Respondent No.5 and 6 on 02.09.2020 ("Exhibit K & L");

(b) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writor order or direction under Article 226 of the Constitution of India ordering and directing the Respondents and in particular Respondent No. 7 and Respondent No.4 itself, its officers, subordinates, servants and agents to clear the goods imported by the Petitioner vide Bills of Entry bearing Nos. 5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019;

(c) that pending the hearing and final disposal of this Petition, that this Hon'ble Court be pleased to-

i. restrain the Respondent No.3 itself, its officers, subordinates, servants and agents from taking any further action to stop the clearance of the goods imported by the Petitioner vide Bills of Entry bearing Nos. 5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019;

ii. direct the Respondent No.4,itself, its officers, subordinates, servants and agents to clear the goods imported by the Petitioner vide Bills of Entry bearing Nos. 5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019;

(d) for ad-interim reliefs in terms of prayer clause (d) above;

(e) for costs of this Petition and the Orders made thereon, and

(f) for such further and other reliefs as this Hon'ble Court may deem fit in the facts and circumstances of the case." 25.1. In the writ petitions so filed by the importers, the High Court issued notice and directed the respondents to file an affidavit within 10 days while fixing the matter for consideration on 06.10.2020.

26. While the aforesaid writ petitions remained pending with the High Court, the Commissioner of Customs (Import-II), Mumbai, in exercise of his powers under Section 129D(2) of the Customs Act, proceeded to issue separate orders dated 01.10.202012, stating various grounds on which the said orders-in-original were questionable on legality and propriety; and directed the authority concerned to apply to the Commissioner (Appeals) for setting aside the said orders and for passing a suitable order as deemed fit. The grounds stated in the aforesaid orders dated 01.10.2020 carry their own relevance for the issues arising in these appeals and the same may also be noticed in the requisite details. 26.1 In the case of M/s. Raj Grow Impex, the Commissioner found the following shortcomings: -

a. Non-issuance of show cause notice 12 Being Review Order No. 1/2020-21 in the case of M/s. Raj Grow Impex and Review Order No. 2/2020-21 in the case of M/s. Harihar Collections. With reference to Section 124 of the Customs Act, the Commissioner opined that the order-in-original suffered from a legal infirmity for want of serving a detailed show cause notice incorporating all the relevant grounds of confiscation. The Commissioner observed as follows: -

> "In the present case, the oral submissions as recorded in the subject OIO do not have any mention of grounds of confiscation being communicated to the importer and their submissions regarding the same, The recordings of personal hearing are largely with respect to importers contention that as per the Hon'ble Supreme Court order Customs Authorities to deal with the goods imported under provisions of Customs Act, and with regards to deterioration in the quality of goods. No detailed Show cause was issued incorporating all relevant ground of prohibitions in the matter viz suspension of IEC etc. Therefore, the subject order of ADC suffers from legal infirmities." b. Non-addressal of the issue of suspension of IEC of the Importer In regard to this aspect, the Commissioner referred to the fact that there was a question-mark about the very existence of the firm in question; and also referred to the statutory appeals concerning suspension or termination of IEC. The Commissioner observed as follows: -
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> "In the subject OIO issued by the Adjudicating Authority, mention has been made in brief facts regarding receipt of complaints by Jt. DGFT doubting financial status of the importer that it could be a shell firm and the same had to be verified at Customs Level. In this regard, it has been mentioned in the brief facts that the bank statement of 3 accounts of importer M/s Raj Grow Impex was scrutinized and financial credentials were forwarded to the Jt. DGFT, Jaipur vide letter dated 22.11.2019. That despite advisor from Jt. DGFT that the facts can be verified and put before Hon'ble court, ADC adjudicated the matter.
>
> There is no discussion regarding cancellation of IEC or otherwise by DGFT in respect of the said importer. The order is therefore not a speaking order and in terms of Hon'ble Supreme Court order, the issue of suspension of IEC has to be examined in this case. Therefore, in order to follow due process of law, the order merits review." c. The order having been passed on the assumption that the goods were to be released against redemption fine The Commissioner further observed that the order in question was passed on the assumption that the goods were required to be released against redemption fine though various issues including those of quantitative restrictions were to be taken into consideration. In this regard, the Commissioner referred, inter alia, to Section 2(33) of the Customs Act defining prohibited goods as also Sections 111 and 113 thereof. The Commissioner further reproduced the findings of this Court in the case of Agricas (supra) on the implication and meaning of the quantitative restrictions in the subject notifications and observed as under: -

"The adjudicating authority failed to consider the same in this order. The adjudication authority while addressing the question of allowing redemption of impugned goods on payment of fine, did not apply his mind on the legislative intent for imposing restrictions on the import of Green peas. Redemption has been allowed mechanically without going into the merits or demerits of allowing such an option, thus circumventing the legislative intent behind the restrictions." (emphasis in bold supplied) d. No reasons were given as to why absolute confiscation or re-

export was not taken into consideration The Commissioner further referred to the fact that the goods became prohibited under Section 11 of the Customs Act read with Section 3 of the FTDR Act and found omission on the part of the Adjudicating Authority to take into account the relevant considerations while observing as under: -

"19. The goods became prohibited under section 11 of the Customs Act, 1962 read with section 3 of Foreign Trade (Development and Regulation) Act, 1992. Thus, the option of re- export of the said goods to the original supplier should also have been taken into consideration. It is now settled law that power of discretion by the authority is to be exercised based on well- founded principles and should not be done in a mechanical way. It is the Adjudicating authority's bounden duty to give cogent reasons while exercising discretion as to why goods are being released on redemption fine which he grossly failed to do. He had an obligation to Revenue and the State, as much as he did towards the appellant while considering the question of redemption. The adjudicating authority did not give reasons as to why absolution confiscation or re-export is not taken into consideration in view of the facts of the case as listed above." (emphasis in bold supplied) e. Apart from the above, the Commissioner also found the shortcomings that the Adjudicating Authority, (i) chose to rely on the accredited laboratory certificate rather than referring the matter to the designated government agency; (ii) did not conduct an inquiry for ascertaining market price and margin of profit; and (iii) did not assess the duty payable on the consignment.

26.2. As regards the matter of M/s. Harihar Collections, the Commissioner passed an almost identical order on 01.10.2020 with one basic difference concerning the issue of IEC. Not much of the observations were made on this issue as were made in the other case of M/s. Raj Grow Impex but, it was observed that the licence of this importer was shown as cancelled and this fact was not taken into consideration by the Adjudicating Authority. Besides this, the order-in-original concerning this importer was also found suffering from the same shortcomings as noticed hereinabove.

27. The aforesaid orders dated 01.10.2020 led the Additional Commissioner of Customs, Group-I, Mumbai to apply to the Commissioner (Appeals) and on that basis, the matters were examined in appeal; and came to be decided by the Appellate Authority in its orders-in-

appeal dated 24.12.2020. However, before such decision by the Appellate Authority, the aforementioned writ petitions filed by the importers were taken up for consideration by the High Court and were decided by the common order dated 15.10.2020. This common order has been challenged in the appeal arising out of SLP(C) Nos. 14633-34 of 2020. Therefore, before dilating on the orders-in-appeal dated 24.12.2020, it is necessary to examine the impugned order dated 15.10.2020 in requisite details with the relevant particulars. The order dated 15.10.2020 and its modification dated 09.12.2020:

> The High Court issues mandamus for release of goods.
>
> 28. As noticed, the respondent-importers, before passing of the said order dated 01.10.2020, had already approached the High Court on 15.09.2020 seeking mandamus for clearance of the goods imported by them while also questioning the communications denying them the release of the goods in question. In these writ petitions, the High Court had issued notice and directed the respondents to file an affidavit within 10 days while fixing the matter for consideration on 06.10.2020 but, in the interregnum, the Commissioner of Customs (Import-I), Mumbai passed the aforesaid orders dated 01.10.2020 under Section 129D(2) of the Customs Act.
>
> 29. When the writ petitions were heard on 06.10.2020, a submission was made on behalf of the respondents that after passing of the said order dated 01.10.2020 by the Commissioner, the writ petitions were rendered infructuous and were also liable to be dismissed for the writ petitioners having not challenged the order so passed by the Commissioner. It was also pointed out that pursuant to the said order dated 01.10.2020, the appeals had already been filed before the Commissioner (Appeals) against the orders-in-original. Per contra, it was submitted on behalf of the writ petitioners that the stand so taken was not only unfair but was untenable too. It was submitted that the respondents of the writ petitions had attempted to materially alter the subject matter of the petitions without taking leave of the Court. This apart, it was also contended that the grounds stated by the Commissioner while directing the Additional Commissioner to apply for appeal were totally frivolous;

and all the grounds given in the order dated 01.10.2020 were also countered. It was also submitted that the orders-in-original dated 28.08.2020, issued on 03.09.2020, were holding the field and had neither been set aside nor stayed by any appellate authority or higher authority; that the writ petitioners had complied with all the conditions of the orders and had made the payments; that there was no justifiable reason not to release the goods in question; and that because of storage of goods in the customs warehouse, the writ petitioners were suffering huge expenditure.

30. In its impugned common order dated 15.10.2020, the High Court took up the petition of M/s. Harihar Collections as the lead case and after taking note of all the background aspects, first of all took up the issues related with propriety in passing the order dated 01.10.2020 by the Commissioner when the writ petitions were pending in the High Court. In this regard, a serious exception was taken that the Commissioner at all chose to pass the order when the High Court was

in seisin of the matter. The High Court also observed that the suggestion for dismissing the writ petitions because of the subsequent development or relegating the writ petitioners to appellate forum amounted to interference with the administration of justice. The High Court strongly expressed its views in the following terms: -

> "26. When this Court had taken cognizance of the grievance made by the petitioner and was in seisin of the matter fixing 06.10.2020 for consideration, it was highly improper on the part of Commissioner of Customs (Import-II) to have passed the order dated 01.10.2020 without any intimation to or taking leave of the Court. It needs no reiteration that when the court, that too the High Court, is in seisin of a matter, an administrative or executive authority cannot start a parallel proceeding on the very same subject matter at its own ipse dixit and record a finding. It would amount to interfering with the dispensation of justice by the courts. In the instant case, when the Court was set to examine the grievance of the petitioner regarding non-release of the goods despite the order-in-original, what was sought to be done was to present the Court with an order passed in the midst of such examination keeping the Court totally in the dark saying that the order-in-original suffers from illegality or impropriety directing the subordinate authority to apply to the Commissioner (Appeals) to set aside the order-in-original and then contending that the writ petition should be dismissed because of the subsequent development or that the petitioner should be relegated to the appellate forum to contest the subsequent order. As pointed out above, this amounts to interfering with the administration of justice and is thus not at all acceptable. A view may be taken that such an order should be ignored as it is contumacious."

31. Having said that, the High Court proceeded to examine the scope and purport of the powers under Section 129D(2) of the Customs Act and held that those powers were in the very narrow compass, being essentially of revision and not of review. The High Court also observed that the Commissioner had three months' time to pass the said order which was further extendable by thirty days; and yet, 'he chose to pass the order most hastily in the midst of the court proceeding keeping the court completely in the dark'. Proceeding further, the High Court summarised the reasons given by the Commissioner of Customs for taking the view against the orders-in-original in the following terms: -

> "29…….. After narrating the facts of the case and the order-in- original passed by the adjudicating authority, Commissioner of Customs took the view that the said order is not legal and proper for the following reasons (mentioned as grounds):-
>
> 1. non-issuance of show cause notice by the adjudicating authority;
>
> 2. non-addressal of the issue of suspension of import export code of the importer;
>
> 3. adjudication order was issued proceeding on the basis that the goods were required to be released against redemption fine whereas there were number of issues which

were required to be taken into consideration, such as, suspension of import export code etc.;

4. adjudicating authority did not give reasons as to why absolute confiscation or re-export was not considered as an option;

5. adjudicating authority did not discuss as to why he relied upon the certificate of accredited laboratory rather than referring the matter to the designated government agency;

6. enquiry not conducted for ascertaining market price and margin of profit for imposition of redemption fine and penalty."

32. Thereafter, the High Court dealt with the aforesaid grounds of the order dated 01.10.2020.

32.1. The High Court observed, as regards the first ground relating to non-issuance of show cause notice, as follows: -

"32.2. In the instant case, petitioner made a request not to issue show cause notice but to give him personal hearing. This was accepted by the adjudicating authority which power admittedly he has under the first proviso to section 124 and he has given reasons for the same i.e., long pendency and perishable nature of the consignments." 32.2. As regards the second ground of non-addressal of the issue of suspension of import export code of the importer, the High Court referred to the observations of this Court in Agricas (supra) that such issue was left open to be decided in the pending statutory appeal; and even otherwise, the order of suspension dated 06.12.2019 had barred the importer prospectively and such suspension in no way impacted the imports in question. The High Court said: -

"33.2. In view of what the Supreme Court had observed the adjudicating authority could not have taken up and examined such order of suspension. Besides, from a perusal of the order of suspension dated 16.12.2019 it is evident that the said order has barred the petitioner from conducting any further import and export meaning thereby that it is prospective and in no way impacted the import made prior to that date which was the subject matter of adjudication in the order-in-original." 32.3. The third, fourth and sixth grounds aforesaid were examined together and the High Court took the view that taking exception to the order-in-original on the basis of these grounds appeared to be questionable. The High Court, inter alia, observed as under: -

"34.3. The power under sub-section (1) of section 125 regarding giving option to the owner or person concerned to pay fine in lieu of confiscation is discretionary in respect of goods the importation or exportation whereof is prohibited but in respect of other goods it is mandatory. Therefore, such a power is available to the adjudicating authority and he has exercised that power. That apart, when fine is

imposed in lieu of confiscation, sub-section (2) makes it abundantly clear that the owner or the person concerned would have to pay in addition to the fine, the customs duty and other charges. Non-mentioning of the duty payable in the order-in-

original is therefore immaterial, as payment of the same is statutorily mandated under sub-section (2) of section 125.

xxx xxx xxx "34.6. In such circumstances, taking exception to the order-in- original on the above grounds appears to be questionable. As already discussed, adjudicating authority had the power to give option to the owner or person concerned to pay fine in lieu of confiscation which power he exercised and the quantum of fine was determined after considering various aspects including the margin of profit suggested by the assessing officer." 32.4. As regards the fifth ground, the High Court observed that the laboratory in question was accredited to the customs department and no fault could be found in the Adjudicating Authority placing reliance on its report.

33. For what has been noticed in the preceding paragraphs, it would appear that the High Court not only questioned the propriety in passing of the order dated 01.10.2020 by the Commissioner of Customs but also examined the grounds stated therein, for directions to challenge the orders passed by the Adjudicating Authority; and expressed its views against tenability of the grounds so suggested by the Commissioner.

However, even after such detailed discussions and observations, the High Court consciously stopped short of pronouncing finally on the said grounds because the matter had already been taken in appeal pursuant to the said order dated 01.10.2020. The High Court, however, observed that the manner of passing of the said order dated 01.10.2020 was definitely questionable and further observed that the contents of the said order and the grounds given, as examined prima facie, did not make out that the order passed by the Adjudicating Authority was suffering from any such illegality and impropriety that suo motu revisional powers under Section 129D(2) should have been exercised. The High Court iterated that on prima facie examination of the stated grounds, the orders-in- original could not be said to be unlawful or inappropriate or unjust or beyond the bounds of the Adjudicating Authority. However, it was reiterated that since application had been filed which would be decided as an appeal, the High Court was limiting its examination to the justification or otherwise of not releasing the goods on the strength of the order dated 01.10.2020. These observations of the High Court, occurring in paragraph 36 of the impugned order read as under: -

"36. We have examined the grounds given in the order dated 01.10.2020 not as an appellate authority over the Commissioner but only to satisfy ourselves as to whether on such grounds a bona fide satisfaction can be arrived at that the order-in-original suffers from illegality or impropriety. Even on that aspect also, we refrain from expressing our final views since it is stated that application has been filed pursuant to the order dated 01.10.2020 which shall now be treated as an appeal, but the manner in which the order has been passed is definitely questionable and the contents of the

order dated 01.10.2020 particularly the grounds given as examined prima facie do not make out a case that the order-in-original suffers from such illegality and impropriety that suo-motu revisional power under section 129 D(2) should be exercised. Prima-facie, on examination of the grounds as above, we cannot say that the order-in-original is unlawful or inappropriate or unjust or that the adjudicating authority acted beyond the bounds of his authority. However, since application has been filed which will now be decided by the Commissioner (Appeals) as an appeal, we only limit our examination to the justification or otherwise of not releasing the goods of the petitioner on the strength of the order dated 01.10.2020." (emphasis in bold supplied)

34. Thereafter, the High Court recounted the factors that the order-in-

original was already holding the field; the respondents admitted that redemption fine and personal fine were levied proportionately to the quantity declared; the petitioner had complied with the terms and conditions of the order-in-original and had made the necessary payments; out of charge had been issued; and the petitioner was incurring substantial expenditure because of warehousing of the goods. Taking note of these factors, the High Court expressed its views that withholding of imported goods of the petitioner would not be just and proper; and their release could not be denied on the basis of the order dated 01.10.2020. Having said that, the High Court concluded on the writ petitions with the findings and conclusions occurring in paragraph 37 to 39 of the impugned order, which read as under: -

"37. We have already discussed and noted that the order-in- original is holding the field. The same has neither been set aside nor stayed. Interestingly, respondent Nos.4 to 6 in para 16 of their affidavit have themselves admitted that the redemption fine and personal fine were levied proportionately to the quantity declared in the bills of entry. Petitioner has complied with the terms and conditions of the order-in-original and made the necessary payments. Out of charge has been issued. Because of warehousing of the goods under section 49 of the Customs Act, petitioner is required to pay a substantial amount to the customs authority. In the above context and after thorough consideration of all aspects of the matter, we are of the view that non-release or withholding of the imported goods of the petitioner any further would not be just and proper. At least the grounds given in the order dated 01.10.2020, which order itself was passed in a highly improper manner, do not justify that the goods should be withheld or denied release notwithstanding the order-in-original and compliance thereto.

Conclusion

38. Consequently, we direct the respondents more particularly respondent Nos.4 to 7 to forthwith release the goods of the petitioner covered by bills of entry bearing Nos.5720040, 5720192, 572069, 5722458, 5722730, 5719772, 5722243 and 5722456, all dated 18.11.2019. Similar direction also follows in Writ Petition No.3502 of 2020

> in respect of bills of entry bearing Nos.5520732, 5520871 and 5520536, all dated 01.11.2019.
>
> 39. Both the writ petitions are accordingly allowed. We thought of imposing cost in this case but we have refrained ourselves from doing so."
>
> 35. As noticed, the appellants had approached this Court against the aforesaid order dated 15.10.2020 on 26.11.2020 by way of SLP(C) Nos.

14633-34 of 2020 but the SLPs did not come up for consideration and, in the meantime, the importer M/s. Raj Grow Impex moved an application before the High Court for modification of the order dated 15.10.2020 and for incorporating the left-over bills of entry, which did not occur in paragraph 38 of the original order dated 15.10.2020. Though it was pointed out before the High Court that SLPs had already been filed in this Court against the order dated 15.10.2020 but it was also an admitted position that until then, no stay had been granted by this Court. Having noticed the submissions, the High Court deemed it just and proper to issue the modification order on 09.12.2020 in the following terms: -

> "10. Having heard learned Counsel for the parties and on due consideration, we modify our judgment and order dated 15th October, 2020 by insertion/addition of the following sentence in paragraph 4.1 as well as in paragraph 38 thereof. The last line in paragraph 38 would thus read as under:-
>
> "In addition, respondent Nos.4 to 7 are also directed to forthwith release the goods of the petitioner covered by seven Bills of Entry bearing Nos. 5520537, 5520538, 5520539, 5520540, 5520541, 5520872 and 5521191 on payment of redemption fine, penalty, customs duty and any other dues that may be payable as per law."
>
> 36. As noticed, the High Court, even while making several observations and comments that the Commissioner had acted wholly improper in issuing the order dated 01.10.2020; and even while indicating its views that the grounds stated by the Commissioner may not be tenable, did not return final findings on such grounds and made this aspect repeatedly clear in paragraph 36 of the order dated 15.10.2020 that the matter (on merits) would be examined in appeal by the Commissioner (Appeals).
>
> 37. The Appellate Authority i.e., the Commissioner of Customs (Appeals), dealt with the matter in separate appeals registered in the individual cases of the private respondents and decided the same by way of separate orders-in-appeal dated 24.12.2020. Having regard to the questions involved, it would also be appropriate to take note of the salient features of the orders so passed by the Appellate Authority on 24.12.2020.

Orders dated 24.12.2020 by the Appellate Authority: Orders-in-original set aside with enhancement of penalty

38. In the order-in-appeal dated 24.12.2020 in relation to the case of M/s. Raj Grow Impex, the Appellate Authority thoroughly examined the contents of the order-in-original dated 28.08.2020 and the grounds of appeal as also the submissions and counter submissions of the parties; and thereafter, formulated the issues requiring determination as follows: -

> "52.2. From the plain reading of the submissions dated 16.12.2020 made by the Respondents, I have observed that there has been some technical/peripheral issues raised by them, which includes maintainability of the present appeal on the grounds like Additional Commissioner being equivalent to the Commissioner of Customs and hence, the appeal, if any, will not lie with Commissioner(Appeals) and the issue of Review Vs Revision as dealt by Hon'ble High Court in its order. Further, from the grounds of appeal, the major issues which needs to be decided are (i) whether Additional Commissioner of Customs was correct in going ahead with the adjudication despite non issue of show cause notice, cancellation of IEC, etc. (ii) whether the impugned goods is liable for absolute confiscation or redemption under Section 125(1) of the Act should have been considered or should have been redeemed for the purpose of re-export to the original supplier and
>
> (iii) whether Redemption Fine and Penalty imposed is adequate looking into the gravity of the offense. In my discussions below, I will deal with these issues." 38.1. After rejecting the peripheral/technical issues raised by the importer, as regards maintainability of the appeal and his jurisdiction to deal with the same, the Appellate Authority entered into the determination of major issues involved in the matter. It would be relevant to notice that one of the arguments urged before the Appellate Authority in opposition to the appeal was that all the grounds of appeal had been examined by the High Court in its order dated 15.10.2020 and, therefore, the appeal merited rejection. This contention was countered on behalf of the appellant with the submission that only the implementation of the order dated 28.08.2020 was the issue for consideration before the High Court;

and any prima facie observation by the High Court on the grounds stated in the order dated 01.10.2020 cannot be treated as final views of the High Court, particularly when the entire matter was left open for adjudication by the Appellate Authority. The Commissioner (Appeals) rejected this objection of the importer while observing as under: -

> "52.7. I agree with the above submissions of the Appellant and it has forcefully rebutted the contentions of the Respondent that since the Hon'ble High Court has already examined all the grounds of appeal, the same may not be open for examination again. What basically is pleaded by the respondent is that the order dated 15.10.2020 of Hon'ble Bombay High Court has shut down appellate mechanism and consequently, would bar Revenue from pursuing the present appeal before Commissioner (Appeals). This plea is both incorrect, misdirected and misconceived for the following reasons:

a) What is before the present Appellate Authority is the review of the Adjudication order dated 28.08.2020, purely on merits.

Whereas what was decided by the order dated 15.10.2020 of Hon'ble High Court of Bombay is one relating to the release of the goods and not the merits of the adjudication order, which was not even assailed before Hon'ble Court.

b) The Hon'ble High Court of Bombay had ordered release of goods by virtue of the Adjudication Order dated 28.08.2020 but has vide para 36 of the very same order allowed this Appellate Authority to hear the appeal on merits and pass appropriate orders.

c) Hon'ble High Court of Bombay having allowed this Appellate Authority to decide the appeal, this authority had provided adequate opportunities of hearing, exchange of written submission and receiving the rejoinder submissions and therefore now can proceed to pass final orders and once final order gets passed, the Order of Adjudication would merge into the same. The said process has not been barred by the Hon'ble High Court. Considering the above facts, I have decided to exercise my appellate jurisdiction in this matter and therefore, the contentions of the Respondent in this regard is not acceptable." 38.2. After taking note of the findings of this Court in Agricas (supra), the Appellate Authority proceeded to deal with the grounds of appeal in the following manner: -

a. As regards non-issuance of show cause notice, the Appellate Authority observed that the respondent-importer had expressly waived the right to show cause notice and though the Adjudicating Authority was entitled to proceed with adjudication, the order passed by him ought to be in sync with the law in terms of Sections 111 and 125 of the Customs Act read with the ratio in Agricas (supra).

b. As regards non-addressal of the issue of suspension of IEC, the Appellate Authority observed that by an order dated 05/06.12.2019, the IEC of the said importer was suspended and the ASG, Rajasthan by his letter dated 06.12.2019, had informed the appellant that the firm was non-

existent and some other firm dealing with the aviation business was running its office as tenant for last 10 years. The Appellate Authority observed that as per the directions of this Court in Agricas (supra), the statutory appeal, if any, preferred against suspension or termination of IEC, was to be decided in accordance with law. The Appellate Authority took note of the fact that proceedings having been taken up rather at a brisk pace after the decision of this Court in Agricas (supra) and the material aspects having been omitted from consideration but, left this aspect of the matter at that, while observing as under: -

54.2. Non-addressal of the issue of suspension of IEC of the importer .....In this regard, I observe that there has been a tearing hurry to adjudicate the matter as the time lines of the case suggests. Though what the Respondent says has merits at the same time the reasons of cancellation of IEC by the order of DGFT as contended vide

> Para 6 of their order should have raised concerns in the minds of the adjudicating authority. If there has been a mis-declaration whereby the bonafide of the importer has been in question, the same should have been considered in the right earnest and to say the least, the OIO should not have been passed in a tearing hurry. So on one side there has been waiver of show cause notice and on the other side, there has been a hurry to adjudicate the matter despite the fact that there has been mis-

declaration on the part of the importer as brought out in the order of DGFT. If a full-fledged investigation by the Customs authorities would have been launched it may have brought out the facts like mis-declaration, etc., but since it is not a subject matter of this appeal, hence refrain to discuss about it any further." c. After the aforesaid, the Appellate Authority dealt with the core questions, as regards operation of Section 125 of the Customs Act and exercise of discretion by the Adjudicating Authority in this case. The Appellate Authority took note of the ratio in the decisions of this Court in the cases of Garg Woollen Mills (P) Ltd. v. Addl. Collector of Customs, New Delhi: (1999) 9 SCC 175, Sant Raj and Anr. v. O.P. Singla and Anr.: (1985) 2 SCC 349 and Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Ors.: (2006) 10 SCC 1 as also the relevant provisions of the Customs Act and the FTDR Act and stated its findings against the proposition of the release of goods and in favour of their absolute confiscation, inter alia, in the following words: -

> "54.3. Non-consideration of various issues in allowing redemption of goods xxx xxx xxx e. The Revenue seems to have made a strong case of absolute confiscation which is in sync with the decision of the Hon'ble Supreme Court dated 26.08.2020 on the grounds that on one hand the Hon'ble Supreme Court upholds the vires of the Notfn. imposing a restriction on import quantities while on the other hand the adjudicating authority defeats the objective of constitutionally valid Notifications by allowing the goods to mingle in the Indian markets on payment of a Redemption Fine and Penalty. In the above submissions of the Appellant, they have countered the submissions of the Respondent in detail and on the basis of Case Laws. Section 125 of the Act makes clear distinction between prohibited goods and other goods and obligates release of other goods on payment of Redemption Fine.....
>
> f) Hence the law is settled that restricted goods under the Act are deemed to be prohibited goods if the conditions subject to these goods have not been complied with. The Hon'ble Supreme Court in the case of M/s Agrica's LLP & others has already held that the steps can be initiated as per the Customs Act 1962 and the subject goods should be dealt with under the provision of FT (D&R) Act, 1992. Since the DGFT notification dated 29.02.2019 has been issued under section 3(2) of FT(D&R) Act, 1992, has imposed restriction upon the import of the goods, the subject goods under section 3(3) of FT(D&R) Act,1992 goods deemed to be prohibited under section 11 of the Customs Act, 1962. Although under Section 125 of the Customs Act, 1962 in the case goods imported a discretion is conferred on the Customs authorities to release the goods which are even prohibited on payment on fine in lieu of confiscation the same provision mandates reasonable exercise thereof and requires taking into consideration circumstances relevant of such exercises of

> discretion. Therefore, in these cases the adjudicating authority needs to exercise his discretion diligently and free from arbitrariness and unfairness.....
>
> g) Further, the Hon'ble Supreme Court in its judgment dated 26.08.2020, in Para 34 has given quantitative details that "However, in view of the interim orders by various High Courts where the actual imports were to the tune of 8.51 Lakh MT and 6.52 Lakh MT in 2018-19 and 2019-20, though the annual quota for these two years was 1/1.5MT only. Gram is being sold at Rs.

4000-4200 per quintal which is below the MSP which is Rs. 4875 per quintal, whereas the imported CIF value of yellow peas is 2028 per quintal". Further in Para 48 the Hon'ble Supreme Court has held that imports, if any made, relying on interim orders would be contrary to the notifications and the trade notices issued under the FTDR Act, 1992. And in Para 46 the Hon'ble Court held that the importers cannot be said to have had bonafide belief and took their chance for personal gains and profits importing under interim orders and accordingly have to face the consequences in law. So the Hon'ble Supreme Court has noted that quantities much more than annual quota have already been imported by the importers on the strength of interim orders and I agree with the contention of the Appellant that under these circumstances allowing any import inside the country, even if against fine and penalty, is patently perverse. Further, as detailed earlier, the domestic production of pulses and therefore, the Govt. has imposed restrictions giving only a small window of annual import under defined quota prices. The Govt. has also procured peas and pulses under various schemes at Minimum Support Price. Consequently, the buffer stock with the Govt. is very high. Therefore, any additional supply of peas and pulses would be against the interest of the farmers and it would have an adverse impact on the economy and would defeat the very purposes of import restrictions. Based on these findings I observe that the impugned goods merited absolute confiscation." (emphasis in bold supplied) d. The Appellate Authority also found the assessment of margin of profit and quantum of penalty in the order-in-original wanting in the requisite analysis and assessment; and observed as under: -

> "h. Further, the Revenue has raised objection in the manner of calculating the quantum of margin of profit and the way the same has been divided between fine and penalty and has contended that the order stands on flimsy grounds and beyond the accepted principles of law. The Revenue explained that how the Redemption Fine and Penalty serves the mutually exclusive purposes i.e. while the Redemption Fine nullifies the margin of profit, the penalty acts as a deterrent. But the manner in which the adjudicating authority has conveniently divided the margin of profit between Redemption Fine and Penalty is questionable and is bad in law. Further, Revenue has also objected on quantum of Redemption Fine and Penalty and pleads that the same is abysmally low. On a plain reading of Para 12 of the order of the adjudicating authority, any person of average intelligence can notice that how perfunctorily the margin of profit has been decided in this case. The adjudicating authority places complete reliance on the submissions made by the importer and takes them as gospel truth forgetting the fact that he is also obligated to look into the interests of revenue. The adjudicating authority should have been much more diligent, cautious, vigilant,

> meticulous and should have been more circumspect in his approach in understanding the letter and spirit of the judgment of the Hon'ble Supreme Court. Looking into the gravity of the offence, I observe that the quantum of penalty imposed in the OIO under Section 112(a)(i) of the Customs Act, 1962, is on a much lower side and it is needed to be enhanced substantially." 38.3. In view of the above, the Appellate Authority allowed the appeal, ordered absolute confiscation of the goods covered by seven bills of entry that had not been released while observing that the goods covered by other three bills of entry (which had already been released) were not available for absolute confiscation and accepted that as fait accompli while directing appropriation of the redemption fine paid in this regard.

The Appellate Authority also enhanced the penalty from Rs. 1.485 crores to a sum of Rs. 5 crores under Section 112(a)(i) of the Customs Act and passed the final order in the following terms: -

> "57. Accordingly, I pass the following order :
>
> ORDER i. I order absolute confiscation of the goods covered in Bill of Entry Nos.5520537, 5521191, 5520538, 5520539, 5520540, 5520541 and 5520872 all dated 01.11.2019 under Section 111(d) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development & Regulations) Act, 1992.
>
> ii. I order absolute confiscation of the goods covered under Bills of Entry Nos.5520732, 5520871 and 5520536 all dated 01.11.2019 under Section 111(d) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development & Regulations) Act,1992. But, since the goods covered under these 03 Bills of Entry have already been cleared and not available for absolute confiscation, I am constrained to accept it as fait accompli and Redemption Fine already paid, if any, in this regard, is ordered to be appropriated.

iii. I set aside the Penalty of Rs.1.485 Crores imposed by the lower authority and impose a Penalty of Rs.5,00,00,000/- (Rupees Five Crores only) on M/s Raj Grow Impex LLP, 114, First Floor, Jaipur Tower, MI Road, Jaipur, under Section 112(a)(i) of Customs Act 1962, and any Penalty paid, if any, against the impugned Order-in-Original is ordered to be appropriated towards this new enhanced Penalty."

39. From the submissions made and the material placed on record, it is noticed that a similar order-in-appeal in relation to the other importer M/s. Harihar Collections was also passed by the Appellate Authority on 24.12.202013. On the facts of that case, the Appellate Authority found that the goods covered by the said eight bills of entry had already been cleared and were not available for absolute confiscation. This was also accepted by the Appellate Authority as fait accompli while directing appropriation of the redemption fine paid in this regard but the penalty of Rs. 2.35 crores in that case, as imposed by the Adjudicating Authority, 13 Placed on record as Annexure R-1 (p. 255) in the counter affidavit on behalf of this importer. was enhanced to a sum of Rs. 10 crores under Section 112(a)(i) of the Customs Act. The operative portion of the order-in-appeal concerning the

importer M/s. Harihar Collections reads as under: -

> "ORDER i. I order absolute confiscation of the goods covered under Bills of Entry Nos. 5720040, 5720192, 5720693, 5722458, 5722730, 5719772, 5722243 and 5722456 all dated 18.11.2019 under Section 111(d) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development & Regulation) Act, 1992. But, since the goods covered under these 08 Bills of Entry have already been cleared and not available for absolute confiscation, I am constrained to accept it as fait accompli and Redemption Fine already paid, if any, in this regard, is ordered to be appropriated. ii. I set aside the Penalty of Rs.2.35 Crores imposed by the lower authority and impose a Penalty of Rs.10,00,00,000/- (Rupees Ten Crores only) on M/s Harihar Collections, 47, Hathi Babu Ka Baug, Bani Park, Jaipur, Rajasthan – 302016, under Section 112(a)(i) of Customs Act 1962, and any Penalty paid, if any, against the impugned Order-in-Original is ordered to be appropriated towards this new enhanced Penalty.
>
> iii. The order of the lower authority dated 28.08.2020 is modified to the above extent and the Appeal filed by the Revenue stands disposed off accordingly." Another round in High Court: Challenge to the order-in-appeal dated 24.12.2020 and stay order by the High Court dated 05.01.2021
>
> 40. Though the person aggrieved by the said orders-in-appeal could have preferred statutory appeal under Section 129A of the Customs Act before the Customs, Excise and Service Tax Appellate Tribunal14 but, the respondent-importer M/s. Raj Grow Impex approached the High Court against the order-in-appeal by way of Writ Petition (ST) No. 24 of 2021 and also filed a contempt petition stating willful disobedience of the High Court's (modification) order dated 09.12.2020 because the goods covered by the said order had not been released.

14 'CESTAT' for short.

41. Taking up the writ petition so filed by the importer, the High Court referred to its previous orders dated 15.10.2020 and 09.12.2020 and took exception against the impugned order-in-appeal dated 24.12.2020 while observing that the observations made and the directions issued by the Appellate Authority were not correct and were running contrary to its directions. The High Court stayed the operation of the order-in-appeal dated 24.12.2020 and also directed the authorities concerned to comply with the directions contained in the orders dated 15.10.2020 and 09.12.2020; and while placing the matter on 27.01.2021, the High Court required the counsel for the Department to state compliance. The relevant part of the order dated 05.01.2021 in the fresh writ petition so filed by the importer M/s. Raj Grow Impex reads as under: -

> "6. Prima facie the above directions of respondent No.2 are totally in contravention to the order of this court. That apart, view taken by respondent No.2 that the decision of this court while directing release of the goods was prima facie is not correct. When the High Court had directed release of the goods forthwith, it is beyond

comprehension as to how a lower appellate authority can nullify such direction by ordering absolute confiscation of such goods. It is not only unacceptable but contumacious as well which aspect we may deal with at a later stage.

7. In view of the above, we stay operation of the order dated 24 th December, 2020 until further orders.

8. Respondent Nos.3 and 4 shall comply with the directions of this court dated 15th October, 2020 and 9th December, 2020.

9. List on 27th January, 2021, on which date Mr. Jetly shall inform the court about compliance of today's order." 41.1. This order dated 05.01.2021 is challenged by the appellants in the appeal arising out of SLP(C) No. 1037 of 2021.

42. The High Court also entertained the contempt petition, being Contempt Petition (L) No. 9351 of 2020 by a separate order dated 05.01.2021 and while issuing notice therein, directed the authorities concerned to remain personally present in the Court on 21.01.2021. The order so passed by the High Court in contempt petition was challenged in separate appeal by the appellants; and, as noticed, on 18.03.2021, this Court found no reason for continuation of contempt proceedings in the High Court and closed the same while allowing the appeal so filed by the appellants15.

43. After the narration of all the material factual and background aspects as also the orders passed at different stages by different authorities and Courts, we may now refer to the rival submissions to specify the stand of the respective parties in these appeals.

Rival submissions

44. The learned ASG appearing for the appellants has forcefully argued against the orders so passed by the High Court while asserting that the goods in question are liable to absolute confiscation.

44.1. Assailing the orders passed by the High Court, the learned ASG would submit that the High Court has erred in entertaining the writ petitions and in passing the order dated 15.10.2020 for implementing the orders-in-original dated 28.08.2020 and thereby, for release of the subject goods though the orders so passed by the Adjudicating Authority were not 15 Being C.A. No. 985 of 2021 arising out of SLP(C) No. 1097 of 2021.

final and were subject to appeal; and, in fact, the appeals had indeed been filed pursuant to the review orders dated 01.10.2020. With reference to the observations and directions of the High Court in the order dated 15.10.2020, the learned ASG has pointed out that on one hand, the High Court permitted the Commissioner (Appeals) to proceed with the appeals filed by the Department but, at

the same time, also directed that the goods be released. According to the learned ASG, the directions for release of the goods rather defeated the purpose of adjudication before the Commissioner (Appeals) on the question as to whether or not the goods were liable to be confiscated absolutely. On the same lines, it has also been contended that when the Appellate Authority passed the orders-in-appeal on 24.12.2020 and one of the importers preferred another writ petition, the High Court entertained the same and granted stay but, omitted to consider that the order-in-appeal could have been challenged in regular statutory appeal before CESTAT under Section 129A of the Customs Act.

44.1.1. As regards the power under Section 129D of the Customs Act, the learned ASG has submitted that thereunder, the higher authority only performs the function of reviewing on grounds relating to legality or propriety and directs the lower authority to file an application for appeal; and exactly that was done in the orders dated 01.10.2020. 44.2. As regards the question as to whether the subject goods are to be treated as 'restricted' or 'prohibited', the learned ASG has referred to sub- sections (2) and (3) of Section 3 of the FTDR Act and Sections 2(33) and 11 of the Customs Act and has submitted that the notifications in question, placing a quantitative restriction on the import of certain pulses, which were upheld by this Court by the judgment dated 26.08.2020 in Agricas (supra), had been issued under sub-section (2) of Section 3 of the FTDR Act; and since the goods imported by the respondent are covered by the said notification, they are deemed to be 'prohibited' goods under Section 11 of the Customs Act, by virtue of sub-section (3) of Section 3 of the FTDR Act. While emphasizing on Section 2(33) of the Customs Act, the learned ASG has also submitted that through the notifications in question, an upper limit of 1.5 lakh MTs of import quantity was placed and, therefore, any import within the cap of 1.5 lakh MTs will be the import of restricted goods but, in excess of the cap of 1.5 lakh MTs, the goods would lose the character as restricted goods and would become prohibited goods. The learned ASG has particularly relied upon the enunciation on the amplitude of the words 'any prohibition' in Section 111(d) of the Customs Act in the case of Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Ors: (1970) 2 SCC 728 holding, inter alia, that the wide words 'any prohibition' mean 'every prohibition'; and restriction is also a type of prohibition. The learned ASG has further referred to the decision in the case Commissioner of Customs, New Delhi v. Brooks International & Ors: (2007) 10 SCC 396 to submit that if the conditions for import and export of goods are not complied with, it would be considered to be the case of prohibited goods. Another decision of this Court in Om Prakash Bhatia v. Commissioner of Customs, Delhi: (2003) 6 SCC 161 has also been referred.

44.3. The learned ASG has also addressed the issue pertaining to the mode of monitoring the limit specified in the notifications and has submitted that every importer has to apply and obtain a licence for importing restricted goods; and the goods could be cleared from the port only upon obtaining such a licence. Every importer is allotted a quota to be imported; the approving authority has to apply his mind and approve the licence; and only upon such satisfaction of the approving authority and issuance of licence that an importer gets a right to import and else, right to import is not a vested right, as held in P.T.R. Exports (Madras) Pvt. Ltd. and Ors. v. Union of India and Ors.: (1996) 5 SCC 268. It has been argued that obtaining the licence being a condition precedent for importing restricted goods, any violation of this condition would render the goods as prohibited goods. On the importance of obtaining a valid licence wherever required in the context of import/export related

transactions, the learned ASG has referred to the decision in S.B. International Ltd. and Ors. v. Asstt. Director General of Foreign Trade and Ors.: (1996) 2 SCC 439.

44.4. On the question regarding treatment of the subject goods, the learned ASG has made elaborate submissions on the scope of Section 125 of the Customs Act and has contended that thereunder, a clear distinction is made between 'prohibited goods' and 'other goods' inasmuch as in the case of 'other goods', Section 125 obligates release of the same against redemption fine, whereas there is no such compulsion when it comes to the 'prohibited goods'. The Adjudicating Authority under the Customs Act can absolutely confiscate the prohibited goods using its judicial discretion. The learned ASG would argue that both, in terms of provisions of the Customs Act and the decisions rendered, restricted goods under the Customs Act are deemed to be prohibited goods, if the conditions attached to restricted goods are breached, as in the present case. The learned ASG has strongly relied upon the decision of this Court in the case of Garg Woollen Mills (supra) and has contended that while deciding a similar customs matter with presence of the elements of breach of law, trade violations and lack of bona fide, this Court approved the directions for absolute confiscation. The learned ASG has also submitted that the orders passed by the Adjudicating Authority, as directed to be implemented by the High Court, in fact, defeat the purpose of the notifications in question as also the findings and effort of this Court in rendering the judgment dated 26.08.2020 in the case of Agricas (supra).

44.5. While dealing with the question of exercise of judicial discretion, the learned ASG has referred to the decisions in Sant Raj and Reliance Airport Developers Pvt. Ltd. (supra) to submit that the imports in question, being patently illegal and against the object of the constitutionally valid notifications, cannot be allowed to be cleared in any manner into India for further sale in the Indian market even after the imposition of duty and redemption fine. While maintaining that the goods in question deserve to be confiscated absolutely, the learned ASG has submitted that the notifications have put an embargo on the quantity of pulses that can be imported into the country and allowing any import over and above the restriction would be against the very purpose of the restriction. The learned ASG has referred to the observations made by this Court in Agricas (supra), as regards the excessive quantity having been imported under the cover of the interim orders in the past, much beyond the annual quota fixed as also the observations that the present importers had worked only for personal gains and had not acted bona fide. Thus, the exercise of discretion by the Adjudicating Authority being not in accord with law, cannot be approved.

44.6. As regards the decision in the case of Commissioner of Customs v. Atul Automations Private Limited: (2019) 3 SCC 539, strongly relied upon by the importers, the learned ASG has argued that therein, this Court upheld the decision for release of the goods for the same being not prohibited goods and for the reasons, inter alia, that: (i) the goods in question were MFDs (Multi-Function Devices, Photocopiers and Printers) and they had a utility/shelf life for 5-7 years; and (ii) the Central Government permitted the import of used MFD's that had utility for 5 years because MFDs were not manufactured locally in India. It has been argued that in contrast to the fact situation in the case of Atul Automations (supra), in the present case, this Court had held that excess imports will not be in the interest of the farmers, and the excess imports made in contravention of the notifications but under the cover of the interim orders were not bona fide; and further that such imports were made

with the motive to earn profits and gains and therefore, the importers should suffer the consequences. Thus, according to the learned ASG, the judgment in Atul Automations (supra), proceeding on its own facts, will not have a bearing on the facts and circumstances of the present case.

44.7. The learned ASG has also referred to a decision of the Kerala High Court in the case of Shri Amman Dhall Mill v. Commissioner of Customs: (2021) SCC OnLine Ker 362 to submit that the said High Court, as regards similar imports, has upheld the orders for absolute confiscation; and the goods imported by the respondent deserve the same treatment.

44.8. The learned ASG would, therefore, submit that the fine and penalty imposed by the Commissioner (Appeals) may be upheld; the importers may be allowed to re-export the goods out of India on payment of redemption fine of 5%; and the appellants may be permitted to absolutely confiscate the goods, of such of the importers who do not opt for re-export within the time stipulated by this Court.

45. Per contra, the learned senior counsel appearing for the respondent-importer M/s. Raj Grow Impex has strenuously argued in support of the orders-in-original and the orders passed by the High Court while asserting that release of goods with payment of redemption fine is in accord with law.

45.1. The learned senior counsel has referred to the material background aspects as noticed hereinbefore and has pointed out that ultimately, after the order dated 15.10.2020 of the High Court of Judicature at Bombay, the appellants permitted the release of goods covered by three bills of entry for which, redemption fine and penalty had been paid and OOC had been issued but, the goods covered by other seven bills of entry, for which payment of duty, fine and penalty was made later, were not released. The learned counsel has also referred to the proceedings relating to appeal before the Commissioner (Appeals) and the objections taken by the respondent against jurisdiction of the said Appellate Authority but, according to the learned counsel, the Appellate Authority, within three days of hearing, hurriedly proceeded to pass the order-in-appeal dated 24.12.2020, setting aside the order-in-original dated 28.08.2020 and ordering absolute confiscation of the goods while enhancing the penalty.

45.2. While supporting the order-in-original dated 28.08.2020 as also the orders passed by the High Court on 15.10.2020, 09.12.2020 and 05.01.2021, the learned senior counsel would argue that in true operation of the provisions of the Customs Act and the FTDR Act read with the pronouncement of this Court in Agricas (supra), the goods in question were not liable to be confiscated absolutely and had rightly been ordered to be released on payment of redemption fine.

45.3. With reference to the decision of this Court in Agricas (supra), the learned counsel has strenuously argued that once this Court has held, in unequivocal terms, that the notifications in question were issued imposing restrictions, may be not under Section 9A of the FTDR Act but under Section 3(3) thereof, the question does not arise to interpret the same as prohibition on import of the subject goods.

45.4. Again, with reference to the notifications in question, the learned counsel would argue that the contentions of the appellants are very much against the spirit of the said notifications dated 29.03.2019 and the trade notice inasmuch as under the said notifications, the policy conditions qua the goods in question were not revised and they were not placed in the 'prohibited' category. The DGFT's interpretation on its own website has also been referred where, in answer to a query as to 'what is a restricted item', the DGFT stated that all goods, import of which is permitted only with an Authorisation/ Permission/ License or in accordance with the procedure prescribed in a notification/ public notice are 'Restricted' goods. It has, thus, been contended that whenever a licence is required for import of certain goods, the same is a 'restricted' item and not a 'prohibited' one; and that the appellants are not right in their contentions that the peas were a 'prohibited' item.

45.5. The learned senior counsel has elaborated on his submissions with reference to the connotation of the terms 'prohibited' and 'restricted', particularly with reference to Section 2(33) of the Customs Act and Clause 9.47 of the Trade Policy as also Schedule I thereof. Further, while placing strong reliance on the decision of this Court in Atul Automations (supra), the learned counsel has submitted that this Court has clearly underscored the difference between what is 'prohibited' and what is 'restricted'. It is submitted that in Atul Automations, the goods imported without authorisation were found to be restricted goods; and redemption of the consignment on payment of the re-assessed market price with fine was upheld. The learned counsel would submit that the restricted goods have the option of being redeemed and do not deserve the treatment of absolute confiscation, which could be applied only to absolutely prohibited goods.

45.6. In the alternative line of submissions, it has been contended that even if the goods in question are treated to be 'prohibited', the discretion to allow their redemption/release on fine had been with the Adjudicating Authority and such a discretion, as exercised in the present case, calls for no interference. The contentions have been elaborated with reference to the use of the expression 'may' in regard to the prohibited goods in Section 125 of the Customs Act; and it has been argued that it is not the expression that the Adjudication Authority 'shall not' give an option to pay fine in lieu of confiscation. It is submitted that Adjudicating Authority is to exercise the discretion provided to him under Section 125 of the Customs Act objectively and this discretion cannot be taken away through a judicial proceeding. In regard to this line of argument, strong reliance has been placed on the decision of this Court in the case of Hargovind Das K. Joshi and Ors. v. Collector of Customs and Ors.: (1987) 2 SCC 230. Further, with reference to the decision of this Court in the case of Sant Raj (supra), it has been argued that whenever something has to be done within the discretion of the authority then, that thing has to be done according to the rules of reasons and justice and not according to private opinion. In other words, discretion means sound discretion guided by law. 45.7. It has also been contended that only 17,000 MTs of yellow peas imported by this respondent are to be released out of the total imported quantity of 24,815 MTs. This respondent is ready and willing to pay duty and redemption fine as deemed fit and proper by this Court but the option of re-export may not be a feasible option at this stage for, it is a time- consuming process with logistical and transportation issues and more particularly, in the present pandemic situation; and the respondent has already suffered huge losses by way of detention, demurrage, rent, interest, insurance and other related costs. With these submissions, the fervent plea on behalf of this respondent-importer has been to allow the redemption of remaining goods.

46. The learned counsel appearing for the other respondent-importer M/s. Harihar Collections, while arguing in tandem with the aforesaid contentions of the senior counsel, has made yet further submissions against the proposition of absolute confiscation16. 46.1. With reference to sub-sections (2) and (3) of Section 3 of the FTDR Act and Section 11 of the Customs Act, it is submitted that all goods to which an order under sub-section (2) of Section 3 applies shall be deemed to be the goods of which import has been 'prohibited' under Section 11 of the Customs Act but in the present case, no such order under sub-section (2) prohibiting the subject goods having been issued, sub-section (3) of Section 3, creating the deeming fiction is not attracted in the present case. It has been contended that although there is specific power to prohibit specified classes of goods by an order to be published in the official gazette but no such gazette has been placed by the appellants before this Court. Equally, no such notification under Section 11 of the Customs Act prohibiting the subject goods, either absolutely or subject to any condition, has been placed on record; and no notification in terms of Sections 11A and 11B of the Customs Act, notifying the subject goods, has been shown. Further, with reference to the decision of this 16 During the course of submissions, a line of argument was sought to be adopted with reference to sub-section (3) of Section 11 of the Customs Act that any prohibition or restriction or obligation relating to import of goods provided in any other law for the time being in force shall be executed only if such prohibition or restriction or obligation is notified under the provisions of this Act and no such notification having been made, the contentions of the appellants were required to be rejected. However, the learned ASG pointed out that the said sub-section (3) of Section 11 of the Customs Act, as proposed to be inserted by the Finance Act, 2018, was to come into force from a date to be notified but the same has not been notified as yet. Accepting this position, the said argument has been withdrawn on behalf of the respondent with apology. Having regard to the circumstances, we would leave this aspect of the matter at that only.

Court in Agricas (supra), it has been submitted that by the notifications in question, the import of peas was revised from 'free' to 'restricted' category; and the goods were clearly mentioned as 'restricted'. Yet further, it has been pointed out that such restriction was not applicable to the Government of India's import commitments under any treaty, agreement or MoU. With reference to these factors, the contention has been that the goods in question, meant for human consumption, were not absolutely prohibited for import, unlike specifically notified prohibited goods. Simply put, according to the learned counsel, goods in question were not of 'absolutely prohibited' category from any point of view. 46.2. It has further been submitted that since the imports in question were not covered by the import licence, the goods in question were to be dealt with under Section 125 of the Customs Act; and had rightly been so dealt with by the Adjudicating Authority, who held them liable to confiscation and to be redeemed on payment of redemption fine and duty, which the Adjudicating Authority indeed levied apart from personal penalty. It has been pointed out that pursuant to the payment of the entire duty, fine and penalty, aggregating to a sum of about Rs. 44.21 crores, OOC was given and the goods were allowed clearance after the authority was satisfied that they were fit for human consumption. The order-in- appeal dated 24.12.2020 in relation to this importer has also been referred with the submissions that therein, the Commissioner of Customs (Appeals) has enhanced the penalty to Rs. 10 crores from Rs. 2.35 crores and the importer is desirous of availing statutory remedy of challenging this enhancement of penalty before the CESTAT; and it is prayed that the opportunity to avail the appropriate remedy may not be curtailed for this importer. In this

regard, it has also been submitted that the High Court, in its order dated 15.10.2020, never injuncted the Department from proceeding with their statutory appeal and, following the same thread, the respondent-importer may also be allowed to exercise its right of appeal before the CESTAT; and, for that matter, any observation made in the present matter may not prejudice such right of appeal. 46.3. It has further been argued that the entire quantity of 38,500 MTs, as imported by this respondent-importer, was finally allowed to be cleared by the authorities concerned after the order of the Bombay High Court dated 15.10.2020 and hence, when the goods are not available for confiscation, no redemption fine could be imposed. A decision of Bombay High Court in the case of Commissioner of Customs (Import), Mumbai v. Finesse Creation Inc.: (2009) 248 ELT 122 has been referred and it has also been pointed out that an SLP against the said decision was dismissed by this Court on 12.05.2010.

46.4. With reference to the provisions of the FTDR Act and the Customs Act as also the decisions of this Court in Hargovind Das K. Joshi and Atul Automations (supra) and that of Punjab and Haryana High Court in Horizon Ferro Alloys Pvt. Ltd. and Ors. v. Union of India and Ors.:

> (2016) 340 ELT 27, it has been argued that the subject goods are not falling under the category of absolutely prohibited goods, as they are not having tainted character such as fake currency, pornographic material etc.; and only the quantity restrictions having been violated, they were rightly taken by the Adjudicating Authority as acquiring the tag of being deemed to be prohibited; and hence, the discretion of 'may' as given in Section 125 of the Customs Act was rightly applied. It is submitted that even the order ultimately passed in the case of Om Prakash Bhatia (supra) rather operates against the stand of the appellants.

47. As noticed, two of the other importers have moved the applications for intervention. These importers are said to be similarly placed as the private respondents of these appeals inasmuch as they too have imported various quantities of peas/pulses pursuant to the interim orders in their respective writ petitions by the High Court of Rajasthan but clearance of the goods remains stalled, particularly because of the present litigation. Having regard to the circumstances, we may also take note of the submissions made on their behalf.

47.1. It has been submitted on behalf of the intervener Nikhil Pulses Pvt. Ltd. that it had similarly filed WP No. 12283 of 2019, wherein the High Court passed an interim order dated 02.08.2019 in its favour; and pursuant to the interim order, it had imported 1,02,550 MTs of yellow peas at Adani SEZ, Mundra, Gujarat under fifty-nine bills of lading of the month of September 2019 and had filed bills of entry for home consumption but, such bills have remained unassessed.

47.1.1. Similar arguments have been advanced on behalf of this importer as regards difference between 'restricted' goods and 'prohibited' goods and their treatment under the Customs Act, the FTDR Act and the Trade Policy; and it is submitted that the goods in question are only 'restricted' items and not 'prohibited'. Again, with reference to the decision of this Court in Atul Automations (supra), it has been submitted that 'restricted' goods have the option of being redeemed on payment of market value and do not deserve the treatment of 'prohibited' goods under Section 125 of the

Customs Act. Countering the submissions of the ASG, it has been contended that the definition of restricted or prohibited does not apply to a specific quantity but to a product and accordingly, the entire quantity should be treated as restricted and be released on payment of fine and penalty.

47.1.2. It has further been submitted that even if the goods in question are prohibited, the discretion could be exercised by the Adjudicating Authority under Section 125 of the Customs Act to allow redemption/release on fine. The decisions in Hargovind Das K. Joshi and Sant Raj (supra) have been referred. Further, it has been submitted with reference to the decision in the case of U.P. State Road Transport Corporation and Anr. v. Mohd. Ismail and Ors.: (1991) 3 SCC 239 that the Court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law; and with reference to the decision in Assistant Commissioner (CT) LTU, Kakinada and Ors. v. Glaxo Smith Kline Consumer Health Care Limited: 2020 SCC OnLine SC 440 that even under Article 142 of the Constitution, the Court cannot render the statutory provision otiose.

47.1.3. While invoking equity, it has also been submitted that during April 2019 to November 2019, approximately 8.5 lakh MTs of similar goods were imported under the interim orders out of which about 6 lakh MTs were released by the customs; and even after the decision in Agricas (supra), the customs has allowed release of about 50,000 MTs of peas/pulses during September-October 2020 and a balance quantity of about 2 lakh MTs remains. It has been argued that demand and supply of these pulses is dynamic and not static in nature and what may have been in abundance 18 months ago may not be so easily available now. According to the applicant, there is a short supply of pulses which is evident from the fact that the Union of India has recently issued import licences for a quantity of 9 Lakh MTs. The applicant would submit that releasing the confiscated goods will help in meeting the excess demand and the effect of releasing the goods will not be adverse. 47.1.4. The applicant would further submit that the goods are perishable commodities and have been lying at the port for long and now, their re- export is not feasible anymore for a variety of factors, including the present times of pandemic. It has, therefore, been prayed that the cargo in question may be allowed to be released for the domestic market on payment of redemption fine and penalty.

47.2. It has been submitted on behalf of the other intervener Agricas LLP that it had earlier filed WP No. 9321 of 2019, wherein the High Court passed an interim order dated 24.05.2019 in its favour; and pursuant to the interim order it had imported 480.54 MTs of black mapte/urad in July 2019 that were released on execution of bond. Further, this importer filed another writ petition bearing No. 13392 of 2019 wherein, the High Court passed interim order dated 14.08.2019 and thereafter, it had imported a quantity of 27,775 MTs of black mapte that arrived in November 2019 from which, 14,366 MTs were released and cleared on payment of requisite charges but the balance has not been released. It is stated by this importer that pursuant to the show cause notice dated 05.10.2020, the Commissioner of Customs, Nhava Sheva found the goods to be prohibited and liable to confiscation whereafter, it had filed WP No. 525 of 2021 before the High Court of Judicature at Bombay against non- clearance of the goods but in the meantime, the main issue has been taken up in these appeals.

47.2.1. Almost identical arguments have been raised on behalf of this importer that the goods in question are not prohibited and, in any case, they could be released upon payment of redemption charges with reference to Section 11(9) of the FTDR Act and/or Section 125 of the Customs Act.

Similar grounds of equity have also been urged, as noticed in the case of the other applicant which need not be repeated.

48. Before proceeding further, we may usefully summarise the principal submissions of the parties.

48.1. To put it in a nutshell, the principal submissions on behalf of the appellants are: that the High Court has erred in entertaining the writ petitions and the directions by the High Court for release of goods were not compatible with the purpose of adjudication by the Appellate Authority; that the subject goods, being covered by Section 3(2) of the FTDR Act and having been imported without licence as also in excess of the cap of 1.5 lakh MTs, became prohibited goods under Section 11 of the Customs Act by virtue of the deeming fiction in Section 3(3) of the FTDR Act; that in view of the purpose of notifications and the observations of this Court in Agricas, such prohibited goods were liable to be confiscated absolutely and could not have been released to mingle in the Indian market; and that the case of Atul Automations has no application to the facts of the present case.

48.2. On the other hand, the principal submissions on behalf of the importers are: that the notifications in question placed quantitative restrictions and there had not been any order or notification prohibiting the subject goods and hence, they could not have been treated as absolutely prohibited goods but were only restricted goods; that in Atul Automations, the goods imported without authorisation were held by this Court to be restricted goods and the same principle applies to the subject goods when they have been imported without import licence; that even if the subject goods are to be treated as prohibited, discretion was nevertheless available with the Adjudicating Authority to allow their redemption on payment of fine and such discretion has rightly been exercised in the orders-in-original; that the discretion cannot be ordered to be exercised in any particular manner; that re-export of the subject goods is not a feasible option and the demand and supply of the pulses in question being dynamic in nature, the release of the subject goods will not be adverse to the economy; that the orders-in-appeal could be challenged in further statutory appeal.

49. We have given anxious consideration to the rival submissions and have perused the material placed on record with reference to the law applicable.

Points for determination

50. The narration and the recounts foregoing make it evident that the root question in these matters is as to whether the goods in question are liable to absolute confiscation or they could be released with payment of fine in lieu of confiscation?

50.1. With intervention of the High Court of Judicature at Bombay in the writ jurisdiction and by way of the impugned orders dated 15.10.2020 (read with the modification order dated 09.12.2020) and 05.01.2021, the issues concerning legality and validity of the orders so passed by the High Court are, obviously, interlaced with the core issues, as regards treatment of the goods in question. In the given circumstances, and looking to the nature of orders involved in the matter, it would be appropriate to examine the validity of the orders so passed by the High Court before dealing with other issues.

Legality and validity of the orders passed by the High Court

51. As noticed, the respondent-importers approached the High Court with the grievance that the goods were not being released despite the orders-in-original dated 28.08.2020 having been passed in their favour; and they having made the payments (in whole in the case of M/s. Harihar Collections and partially in the case of M/s. Raj Grow Impex) and having obtained OOC. During the pendency of matters in the High Court, the Commissioner passed the orders dated 01.10.2020 in exercise of his power under Section 129D(2) and then, it was suggested before the High Court on behalf of the Department that the writ petitions were rendered infructuous because of the said orders dated 01.10.2020.

52. A close look at the impugned order dated 15.10.2020 makes it clear that the High Court dealt with the issues before it in three major segments: (i) as regards the nature of jurisdiction under Section 129D(2) of the Customs Act; (ii) as regards the propriety in passing of the orders dated 01.10.2020 by the Commissioner and tenability of the grounds stated therein; and (iii) as regards the prayer for release of the goods.

53. Much has been said in these matters regarding the exercise of power by the Commissioner under Section 129D(2) of the Customs Act. The High Court proceeded to observe in the impugned order dated 15.10.2020 that the Commissioner's orders dated 01.10.2020 were termed as review orders but the jurisdiction conferred by Section 129D(2) was that of suo motu revision and not that of review; and in that regard, the High Court particularly referred to the expressions "legality or propriety" occurring in the provision.

53.1. Section 129D of the Customs Act reads as under: -

> "129D. Power of Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders.—(1) The Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs in its order:
>
> Provided that where the Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs differs in its opinion as to the legality or propriety of the decision or order of the Principal Commissioner of Customs or Commissioner of Customs, it shall state the point or points on which it differs and make a reference to the Board which, after considering the facts of the decision or order passed by the

Principal Commissioner of Customs or Commissioner of Customs, if is of the opinion that the decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs is not legal or proper, may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.

(2) The Principal Commissioner of Customs or Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any officer of customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order.

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority:

Provided that the Board may, on sufficient cause being shown, extend the said period by another thirty days.

(4) Where in pursuance of an order under sub-section (1) or sub-

section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Principal Commissioner of Customs or Commissioner of Customs makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of one month from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as the case may be, as if such applications were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to such application." 53.2. For clarification, we deem it appropriate to observe that such enactments dealing with several areas of commerce and fiscal implications, like the Customs Act, 1962 and the Central Excise Act, 194417, do carry akin provisions reserving a residual power in the highest controlling authority of the Department, apart from the appellate powers of the departmental Appellate Authority or the Appellate Tribunal and apart from the powers of revision of the Central Government. Such residual power, as conferred by Section 129D of the Customs Act or Section 35E of Central Excise Act, is essentially to serve the purpose that the highest controlling authority of the Department (or a Committee of such highest authorities) satisfies itself as to the legality and propriety of any decision 17 Hereinafter also referred to as 'the Central Excise Act'. taken by the subordinate authority and, in case it finds any points arising from the decision in question, to direct the authority passing such order or any other subordinate authority to apply to the appellate forum for determination of such points/questions. In

the scheme of the Customs Act, the power of revision is reserved for the Central Government, as per Section 129DD thereof. Similar power of revision in the Central Government could be seen in Section 35EE of the Central Excise Act. Thus, in the scheme and on the purpose of these enactments, it cannot be said that such residual power, of requiring the matter to be taken up before the appellate forum, is that of revision stricto sensu. However, it does not appear necessary to delve further on this aspect in this judgement because, as noticed, it is not in dispute that the Commissioner could have exercised such power under Section 129D of the Customs Act. In fact, we are unable to comprehend as to what precisely was the outcome of the detailed discussion by the High Court concerning the nature of power under Section 129D(2) because it had not been the finding that the orders dated 01.10.2020 were suffering from any want of jurisdiction or if the Commissioner, while passing the said orders, transgressed the bounds of his authority.

54. The other aspect commented upon by the High Court had been about the manner and time of passing of the said order when the matter was sub judice in the High Court.

54.1. Coming to the question of propriety in passing of the orders dated 01.10.2020 by the said Commissioner despite being aware of the pendency of the writ petitions in the High Court, in our view, the comments of the High Court, even when not incorrect in general application, do not appear apt and apposite to the facts and in the circumstances of the present case. In other words, though we are at one with the High Court that, ordinarily, when the matter is sub judice in the higher forum and that too before the Constitutional Court, the executive authorities should not attempt to bring about a new state of affairs without taking permission from the Court and/or bringing the relevant facts to the notice of the Court. However, even in this regard, before pronouncing on the impropriety on the part of an executive authority who had done anything without prior information to the Court or without taking Court's permission, all the relevant surroundings factors are also required to be examined so as to find as to whether such an action was calculated at interference with the administration of justice or was a bona fide exercise of power in the given circumstances.

54.2. In the present case, though the High Court had issued notice in the writ petitions on 25.09.2020 and placed the petitions on 06.10.2020 but, it was clear on the face of record that the DGFT was taking serious exception to the orders-in-original dated 28.08.2020 and it was being asserted that the said orders were in the teeth of the pronouncement of this Court in the case of Agricas (supra). Indisputably, the Commissioner had available with him three months' time to pass the order under Section 129D(2) and thereby to ensure taking up of the matter against the orders-in-original dated 28.08.2020 by the Appellate Authority but, the importers preferred the writ petitions questioning the communication of DGFT and the denial of release of goods; and sought mandamus for such release. Such a prayer for mandamus was effectively a prayer for execution of the orders-in-original dated 28.08.2020. The High Court found it unjustified on the part of the Department to suggest that the writ petitions were rendered infructuous because of the orders dated 01.10.2020; and to this extent, we are again at one with the High Court because, on the strength of any order passed by the Commissioner during the pendency of the writ petitions, it could not have been claimed that the Department, by its own actions, made the writ petitions meaningless. However, such a submission on the part of the respondents of the writ petition, even if unwarranted,

could not have taken the worth and value out of orders dated 01.10.2020; and, at the same time, the High Court could not have ignored the other material circumstances.

54.3. One of the fundamental and material circumstance, which the High Court totally omitted to consider, was that the writ petitions were filed as if seeking execution of the orders-in-original and that if the writ, as prayed for, was to be issued and the goods were to be released, nothing much on merits was to be left for examination by the Appellate Authority; and if, for any reason, the orders-in-original were to be interfered with at a later stage in the appellate forum, irreparable damage would have been done because the goods would have been released for the domestic market. (As noticed, it has indeed happened to a large extent in present cases, with release of a substantial quantity of goods of the respondent- importers).

54.4. The purpose of our comments foregoing is that even while the High Court was right in questioning the fact that the Commissioner chose to pass the order when the matter was sub judice, the High Court missed out the relevant feature that the importers had preferred the writ petitions essentially to pre-empt any further proceedings by the statutory authority concerned under the Customs Act. In other words, the invocation of writ jurisdiction by the importers was itself questionable.

55. Noticeable it is that the High Court, even after making some scathing comments on the question of propriety against the Commissioner, took up the points stated in the orders dated 01.10.2020 one by one and indicated its views that the points so raised were baseless and/or untenable. However, the High Court was also conscious of the fact that the said orders dated 01.10.2020 were not in challenge before it and the appeals preferred pursuant to those orders shall have to be examined by the Appellate Authority. Thus, the High Court qualified all its findings in paragraph 36 of the impugned order as being of its prima facie impression and specifically left the matter open for examination by the Appellate Authority.

55.1. However, when the Appellate Authority ultimately passed the orders in setting aside the orders-in-original, one of the importers, despite being aware of the remedy of further appeal being available, chose to invoke, again, the writ jurisdiction of the High Court. This time the High Court, in its impugned interim order dated 05.01.2021, made the observations that the decision by the Appellate Authority was at loggerheads with its earlier findings and directions. The High Court even observed that its findings in the order dated 15.10.2020 could not have been regarded as prima facie finding only; and when the goods were directed to be released forthwith, it was beyond comprehension as to how a lower Appellate Authority could have nullified such directions by ordering absolute confiscation.

56. We find it very difficult to reconcile the observations of the High Court in these matters. Paragraph 36 of the order dated 15.10.2020 left nothing for a doubt with anyone that whatever the High Court had observed in that order as regards the orders dated 01.10.2020 was not of final determination; and the matter was left open, to be decided by the Commissioner (Appeals). Significantly, if the purport of the order dated 15.10.2020 had been that even if Commissioner (Appeals) would be deciding the matter in appeal, he could not order absolute confiscation of the

goods because the High Court had ordered their release, it would immediately lead to the position that the order dated 15.10.2020 of the High Court carried inherent contradictions. In other words, if release of goods was the only option available with the authorities, the material part of consideration of the Appellate Authority had already been rendered redundant.

57. For what has been discussed hereinabove, it is at once clear that when the matter was left for decision by the Commissioner (Appeals), there was neither any occasion nor any justification for the High Court to pass the order for release of the goods for the simple reason that any order for release of goods was to render the material part of the matter a fait accompli. This, simply, could not have been done. Putting it differently, a little pause after paragraph 36 of the impugned order 15.10.2020 and before the directions in the next paragraph would make it clear that for what had been observed in the said paragraph 36 of the impugned order (as regards leaving of the matter for decision by the Appellate Authority), any direction for release of goods pursuant to the order-in-original could not have been issued. To put it in yet other words, despite making several observations so as to indicate that the review orders dated 01.10.2020 were unjustified and the points stated therein were baseless or untenable, the High Court stopped short of setting aside the orders dated 01.10.2020 and also did not pronounce finally on the validity of the orders-in-original dated 28.08.2020 because the said orders-in-original were the subject matter of appeal. Having rightly left the matter for decision in appeal, the High Court committed a serious error in yet issuing such a writ as if the orders-in-original dated 28.08.2020 had become rule of the Court and as if the Court was ensuring its due execution. It gets, perforce, reiterated that if the orders-in-original dated 28.08.2020 were to be executed under the mandate of the High Court, the appeals were going to be practically redundant after release of the goods and nothing material was to remain for decision by the Appellate Authority on the main subject matter of the appeal.

58. What has been indicated from different angles hereinabove leads only to one conclusion that the order dated 15.10.2020 passed by the High Court suffers from inherent contradictions and inconsistencies; and cannot be approved.

59. Apart from the fundamental flaws of contradictions, the order passed by the High Court on 15.10.2020 further suffers from the shortcomings that while issuing mandamus for release of goods, the High Court omitted to take into account the relevant facts as also the material factors concerning the imports in question, including the reasons for issuance of the notifications in question that the same were to safeguard the agriculture market economy of India; and the observations and findings of this Court in the case of Agricas (supra). An examination of the impugned order dated 15.10.2020 in its entirety makes it clear that the reasons for directing release of goods in favour of the importers are to be found only in paragraph 37 thereof. Therein, the High Court has taken into account a few factors standing in favour of the importers like the orders-in-original holding the field; the importers having made the necessary payments; and the importers incurring expenditure because of warehousing. An additional factor had been the High Court's dissatisfaction that the orders dated 01.10.2020 were passed in an improper manner and grounds given therein were not justifying the withholding of the goods. While proceeding on these reasons and considerations, it appears that the other overriding factors like the interest of domestic agriculture market economy as also the findings and observations of this Court in Agricas (supra) totally escaped the attention of the High

Court. Thus, the impugned order dated 15.10.2020, having been passed while ignoring the relevant considerations, cannot be approved.

60. For what has been observed hereinabove, the other order dated 05.01.2021 passed by the High Court in the second writ petition filed by the importer M/s. Raj Grow Impex also deserves to be disapproved. 60.1. As noticed, in the said order dated 05.01.2021, the High Court even observed that the Appellate Authority wrongly construed that its earlier decision for release of goods has been prima facie; and further questioned as to how a lower Appellate Authority could have nullified its directions for release of goods by ordering confiscation. The construction of its own order dated 15.10.2020, as put by the High Court in its later order dated 05.01.2021, only fortifies the inconsistencies we have indicated hereinabove. This apart, the expression 'prima facie' in regard to the order of the High Court dated 15.10.2020 had not been a creation of the Appellate Authority but had been stated in unequivocal terms, twice over, in paragraph 36 of the order dated 15.10.2020, where the High Court also made it clear that final views were not being expressed because the matter was to be examined in appeal.

60.2. Apart from the above, while entertaining the said second writ petition, the High Court seems to have also omitted to consider that the said writ petition was filed against the order-in-appeal passed by the Appellate Authority and the alternative remedy of regular statutory appeal to CESTAT was available to the importer. In our view, on consideration of the relevant facts and circumstances in their correct perspective, the High Court would not have entertained the writ petitions so filed in these matters.

61. We are, therefore, clearly of the view that the impugned orders dated 15.10.2020 (read with the modification order dated 09.12.2020) and 05.01.2021 remain unsustainable and are required to be set aside.

62. However, merely setting aside the orders passed by the High Court does not bring finality to these appeals because, as noticed, the core issues still remain as to whether the goods in question are or were liable to absolute confiscation or could be or could have been released by recovery of fine in lieu of confiscation?

62.1. For dealing with the core issues, we need to examine in the first place as to whether the goods in question fall in the category of prohibited goods, as argued on behalf of the appellants or in the category of restricted goods, as argued on behalf of the importers. Whether the goods in question are of 'prohibited goods' category?

63. For dealing with the questions relating to the treatment of the goods in question, it shall be apposite to recapitulate that in the case of Agricas (supra), this Court, after dealing with a variety of issues relating to the validity of the notifications dated 29.03.2019 and the corresponding trade notice dated 16.04.2019, specifically referred to the purpose behind and the purport of the notifications; and it was noticed that the notifications were aimed at striking a balance between the farmers of the country on one hand and the importers on the other, particularly when large-scale imports were adversely impacting the interests of the farmers due to fall in prices in the local

market. The repercussions of excessive imports under the cover of the interim orders in the past were taken note of and it was also noticed that the restrictions were imposed to prevent panic disposal in the local markets. As the notifications provided for quantitative restriction on import of various peas and pulses in the range of 1.5-2 lakh MTs against licence, a rather preposterous line of arguments was adopted by the importers before this Court that the total quantities specified in each of the notifications was 'per licence' and not for the 'total imports'. Such contentions were rejected by this Court after finding no ambiguity in the notifications and holding clearly that the expression 'total quantity' did not refer to the 'quantity per licence'. This Court further held in no uncertain terms that the impugned notifications were valid for having been issued in accordance with the power conferred in the Central Government in terms of sub-section (2) of Section 3 of the FTDR Act. Yet further, this Court rejected the submissions that the importers had acted bona fide in importing the goods in question; and the imports, made under the cover of interim orders, were held to be contrary to the notifications and the trade notice issued under the FTDR Act but, were left to be dealt with under the provisions of the Customs Act.

64. In view of the findings and requirements aforesaid and in view of the contentions of the respective parties relating to the treatment of goods imported under the cover of interim orders, it is necessary to take note of the relevant statutory provisions, particularly those contained in Section 3 of the FTDR Act and Sections 2(33), 11(1) and 111(d) of the Customs Act. These relevant provisions read as under: -

> Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 "3. Powers to make provisions relating to imports and exports.- (1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
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> (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology:
>
> Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.
>
> (3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.
>
> (4) without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be

required under this Act, or rules or orders made thereunder." Section 2 (33) of the Customs Act, 1962:

"(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;" Section 11(1) of the Customs Act, 1962:

"11. Power to prohibit importation or exportation of goods.– (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

xxx xxx xxx" Section 111(d) of the Customs Act, 1962 "111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:-

xxx xxx xxx

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

xxx xxx xxx"

65. The categorical findings in the case of Agricas (supra) by this Court, read with the provisions above-quoted, hardly leave anything to doubt that sub-section (3) of Section 3 of the FTDR Act applies to the goods in question and, for having been imported under the cover of the interim orders but, contrary to the notifications and the trade notice issued under the FTDR Act and without the requisite licence, these goods shall be deemed to be prohibited goods under Section 11 of the Customs Act;

and all the provisions of the Customs Act shall have effect over these goods and their import accordingly. However, a long deal of arguments has been advanced before us as regards the category in which these goods are to be placed, i.e., whether they are of 'restricted' category or 'prohibited' category.

66. The gravamen of the contentions on the part of the importers, that the subject goods fall in 'restricted' category and not 'prohibited' category, is that the notifications in question placed quantitative restrictions and there had not been any other order or notification prohibiting the import of these goods. The contentions remain baseless and are required to be rejected.

66.1. A bare look at the notifications in question and the findings of this Court in Agricas (supra) make it clear that only the particular restricted quantity of the commodities covered by the said notifications could have been imported, like those upto 1.5 lakh MTs; and that too, under a licence. The learned ASG has rightly pointed out with reference to the decision in PTR Exports (supra) that an applicant has no vested right to have export or import licence; and granting of licence depends upon the policy prevalent on the date. The learned ASG has further rightly submitted, with reference to the decision in S.B. International (supra), that granting a licence to import is not a matter of formality; and the authorities have to satisfy themselves that the application satisfies all the requirements of the scheme and the applicable laws. In S.B. International, this Court observed, inter alia, as under: -

> "9. It should be noticed that grant of licence is neither a mechanical exercise nor a formality. On receipt of the application, the authorities have to satisfy themselves about the correctness of the contents of the application. They also have to satisfy themselves that the application satisfies all the requirements of the scheme and the other applicable provisions of law, if any...." 66.2. As noticed, only the particular restricted quantity of the commodities covered by the said notifications could have been imported and that too, under a licence. Therefore, any import within the cap (like that of 1.5 lakh MTs) under a licence is the import of restricted goods but, every import of goods in excess of the cap so provided by the notifications, is not that of restricted goods but is clearly an import of prohibited goods.
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> 67. The applicable principles of law relating to the categorisation of goods as 'prohibited' or 'other than prohibited' have been clearly enunciated by this Court in the decisions referred by the learned ASG.

67.1. In the case of Sheikh Mohd. Omer (supra), a particular mare was found to be not a 'pet animal' and, therefore, its import was found to be violative of the Imports Control Order. It was, however, an admitted position that the import of horses or mares was not prohibited as such. The question was as to whether by making such import, the appellant contravened Section 111(d) read with Section 125 of the Customs Act. While answering the question, this Court held that any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions. This Court further underscored that "any prohibition" means every prohibition; and restriction is also a type of prohibition. This Court, inter alia, said, -

"11.... While elaborating his argument the learned counsel invited our attention to the fact that while Section 111(d) of the Act uses the word "prohibition". Section 3 of the Imports and Exports (Control) Act, 1947, takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947, as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time

being in force in this country" is liable to be confiscated. “Any prohibition” referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression “any prohibition” in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions “prohibiting”, “restricting” or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition.....” (emphasis in bold supplied) 67.2. In the case of Om Prakash Bhatia (supra), over-invoicing and fraudulent claim of drawback by the exporter was held to be that of exporting prohibited goods with reference to the requirements of Foreign Exchange Regulation Act, 1973, while rejecting the contention of the exporter that Section 113(d) of the Customs Act was not applicable as the goods were not prohibited as such. A line of argument has been suggested on behalf of one of the respondents that the order ultimately passed in the case of Om Prakash Bhatia operates against the stand of the appellants. It is true that in that case, redemption fine and penalty was imposed but, the exercise of discretion in a particular manner related to the facts of that case. These aspects relating to the exercise of discretion shall be considered a little later, while dealing with the question as to whether the goods in question are liable to absolute confiscation or could be released on redemption fine. Suffice it to notice for the present purpose that the export attempted in violation of the conditions was held to be taking the goods in the category of ‘prohibited’ goods. 67.3. In the case of Brooks International (supra), the market value of goods under export was found to be less than the amount of drawback claimed. The question was whether such goods could be confiscated for violation of the provisions of the Customs Act? While considering the import of the definition of “prohibited goods” in Section 2(33) and of Section 11 of the Customs Act, this Court referred to the following exposition in the case of Om Prakash Bhatia (supra): -

> “10. From the aforesaid definition, it can be stated that: (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either ‘absolutely’ or ‘subject to such conditions’ to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods....” (emphasis in bold supplied) 67.4. Learned counsel for the importers have strongly relied upon a 3-

Judge Bench decision of this Court in Atul Automations (supra) to submit that therein, the goods imported without authorisation were held to be ‘restricted’ goods; and the same principle applies to

the subject goods when they have been imported without import licence and hence, they cannot be taken as prohibited goods. The submissions have been countered by the ASG that the said decision related to the matter under the FTDR Act and different facts and different regulations concerning the goods were involved therein.

67.4.1. In the case of Atul Automations (supra), the goods imported without authorisation were found to be not 'prohibited' but 'restricted' items for import and the orders for their release with payment of fine in lieu of confiscation were approved. However, a close look at the factual aspects puts it beyond the pale of doubt that therein, this Court has neither laid down the law that in every case of import without authorisation, the goods are to be treated as restricted and not prohibited nor that the goods so imported without authorisation are always to be released on payment of redemption fine.

67.4.2. The factual aspect of Atul Automations (supra) makes it clear that the imported Multi-Function Devices, Photocopiers and Printers (MFDs) involved in that case were restricted items, importable against authorisation under Clause 2.31 of the Foreign Trade Policy. Thus, the MFDs were found to be restricted items for import and not prohibited items. That had not been the case where import was restricted in terms of quantity in the manner that the goods were importable only up to a particular extent of quantity and that too against a licence. It was also found therein that the Central Government had permitted the import of used MFDs having utility for at least five years, keeping in mind that they were not being manufactured in the country.

67.4.3. The present case is of an entirely different restriction where import of the referred peas/pulses has been restricted to a particular quantity and could be made only against a licence. The letter and spirit of this restriction, as expounded by this Court earlier, is that, any import beyond the specified quantity is clearly impermissible and is prohibited. This Court has highlighted the adverse impact of excessive quantity of imports of these commodities on the agricultural market economy in the case of Agricas (supra) whereas, it had not been the case in Atul Automations (supra) that the import was otherwise likely to affect the domestic market economy. In contrast to the case of Atul Automations, where the goods were permitted to be imported (albeit with authorisation) for the reason that they were not manufactured in the country, in the present case, the underlying feature for restricting the imports by quantum has been the availability of excessive stocks and adverse impact on the price obtainable by the farmers of the country. The decision in Atul Automations (supra), by no stretch of imagination, could be considered having any application to the present case.

68. Thus, we have no hesitation in holding that the goods in question, having been imported in contravention of the notifications dated 29.03.2019 and trade notice dated 16.04.2019; and being of import beyond the permissible quantity and without licence, are 'prohibited goods' for the purpose of the Customs Act18.

68.1. The unnecessary and baseless arguments raised on behalf of the importers that the goods in question are of 'restricted' category, with reference to the expression 'restricted' having been used for the purpose of the notifications in question or with reference to the general answers given by

DGFT or other provisions of FTDR Act are, therefore, rejected. The goods in question fall in the category of 'prohibited goods'. Whether the goods in question are liable to absolute confiscation?

69. Once it is clear that the goods in question are improperly imported and fall in the category of 'prohibited goods', the provisions contained in Chapter XIV of the Customs Act, 1962 come into operation and the subject goods are liable to confiscation apart from other consequences. Having regard to the contentions urged and the background features of these appeals, the root question is as to how the goods in question are to 18 In the passing, we may observe that even in the orders-in-original dated 28.08.2020 by the Adjudicating Authority, it was clearly held that the goods in question were prohibited goods (vide the findings reproduced hereinbefore in paragraph 22.2). be dealt with under Section 125 of the Customs Act? The relevant part of Section 125 of the Customs Act reads as under: -

> Section 125(1) of the Customs Act, 1962 "125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:
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> xxx xxx xxx" 69.1. A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibited goods' and 'other goods'. As has rightly been pointed out, the latter part of Section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of this provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such an option, the result would be of absolute confiscation. The Adjudicating Authority in the present matters had given such an option of payment of fine in lieu of confiscation with imposition of penalty whereas the Appellate Authority has found faults in such exercise of discretion and has ordered absolute confiscation with enhancement of the amount of penalty. This takes us to the principles to be applied for exercise of the discretion so available in the first part of Section 125(1) of the Customs Act.
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> 70. The principles relating to the exercise of discretion by an authority are expounded in various decisions cited by the parties. We may take note of the relevant expositions as follows:
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> 70.1. In the case of Sant Raj (supra), referred to and relied upon by both the sides, this Court dealt with the matter as regards the discretion of Labour Court to award compensation in lieu of reinstatement and observed as under: -

"4.....Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humor. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself..... Discretion means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful....." (emphasis in bold supplied) 70.2. In the case of Reliance Airport Developers (supra), this Court, with reference to various pronouncements pertaining to the legal connotations of 'discretion' and governing principles for exercise of discretion observed, inter alia, as under: -

"30. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection: deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons." 70.3. In the case of U.P. State Road Transport Corporation (supra), while dealing with the case of non-exercise of discretion by the authority, this Court expounded on the contours of discretion as also on limitations on the powers of the Courts when the matter is of the discretion of the competent authority, in the following terms: -

"12. The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. The court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the court.

13. In the instant case, the Corporation has denied itself the discretion to offer an alternative job which the regulation requires it to exercise in individual cases of retrenchment. .....It may be stated that the statutory discretion cannot be fettered by self-

created rules or policy. Although it is open to an authority to which discretion has been entrusted to lay down the norms or rules to regulate exercise of discretion it cannot, however, deny itself the

discretion which the statute requires it to exercise in individual cases. ..... xxx xxx xxx "15.....Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the power. The purpose of discretionary decision making under Regulation 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the abovesaid constraints. The Corporation therefore, cannot act mechanically. The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity....." (emphasis in bold supplied) 70.4. In the case of Glaxo Smith Kline (supra), this Court expounded on the principles that the Constitutional Courts, even in exercise of their wide jurisdictions, cannot disregard the substantive provisions of statute while observing, inter alia, as under: -

> "12. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties.
>
> Even while exercising that power, this Court is required to bear in mind the legislative intent and not to render the statutory provision otiose."

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion. 71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

72. It is true that the statutory authority cannot be directed to exercise its discretion in a particular manner but, as noticed in the present case, the exercise of discretion by the Adjudicating Authority has been questioned on various grounds and the Appellate Authority has, in fact, set aside the orders-in-original whereby the Adjudicating Authority had exercised the discretion to release the goods with redemption fine and penalty. Having found that the goods in question fall in the category of 'prohibited goods' coupled with the relevant background aspects, including the reasons behind issuance of the notifications in question and the findings of this Court in Agricas (supra), the question is as to whether the exercise of discretion by the Adjudicating Authority in these matters, giving option of payment of fine in lieu of confiscation, could be approved?

73. As regards the question at hand, we may usefully take note of the relevant decisions cited by learned counsel for the parties. However, it may be observed that the decision of the Punjab and Haryana High Court in Horizon Ferro Alloys (supra), dealing with a particular class of goods that were 'restricted' and not 'prohibited', needs no elaboration.

74. On behalf of the appellants, the learned ASG has relied upon the decision in the case of Garg Woollen Mills to support the contention that the subject goods deserve to be confiscated absolutely. In that case, the Additional Collector of Customs had directed confiscation of goods when it was found that there had been an attempt of fraudulently importing huge quantity of raw material in the name of non-existent units; and serviceable garments were concealed against mutilated garments. That being a case where fraud was involved, the order of absolute confiscation was not interfered with. This Court, inter alia, observed and held as under: -

> "5. Another contention that was urged by Shri Mahabir Singh was that the Additional Collector, as also the Tribunal, have failed to take into consideration the provisions contained in Section 125 of the Act which prescribes that whenever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. We do not find any merit in this contention of Mr Mahabir Singh. Under Section 125 a discretion has been conferred on the officer to give the option to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. In the present case, having regard to the facts and circumstances in which the goods were said to be imported and the patent fraud committed in importing the goods, the Additional Collector has found that the goods had been imported in violation of the provisions of the Import (Control) Order, 1955 read with Section 3(1) of the Import and Export (Control) Act, 1947. In the circumstances he considered it appropriate to direct absolute confiscation of the goods which indicates that he did not consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. The Tribunal also felt that since this was a case in which fraud was involved, the order of the Additional Collector directing absolute confiscation of the goods did not call for any interference. We do not find any reason to take a different view." (emphasis in bold supplied)

75. The learned ASG has also referred to the decision in the case of Shri Amman Dhall Mills (supra) where the Kerala High Court has dealt with the imports made in violation of the subsequent notifications concerning the same commodities as are involved in the present case. Therein, on 22.04.2020, the importer applied for issuance of license for import of 200 MTs of green peas but, before actual grant of license to import, filed a bill of entry dated 23.06.2020 for clearance of goods

declared as Canadian Green Peas. As per declaration in the bill of entry, the quantity declared was 210 MTs with declared assessable value of Rs. 79,28,444/-. The Commissioner of Customs, Kochi, by his order dated 16.10.2020, made on the request of the importer for release of goods, noted that DGFT notification dated 18.12.2019 had revised the policy for import of peas; further policy conditions as regards minimum import price and annual fiscal quota of Rs. 1.5 lakh MTs were incorporated and the imports were permitted through Calcutta seaport. The importer, who had imported the subject goods after the issue of notifications dated 18.12.2019 and 28.03.2020, filed a writ petition in the High Court seeking provisional release of the subject goods but this prayer for provisional release was declined. The importer filed an intra-court appeal that was also dismissed. However, the High Court desired that the customs authorities proceed with the adjudication proceedings expeditiously. The Commissioner of Customs, in his order dated 16.10.2020, while considering the request of importer for provisional release, referred to three conditions in the notification dated 18.12.2019 as modified in the notification dated 28.03.2020; and ordered absolute confiscation of the goods for contravention of the provisions of Section 111(d) of the Customs Act read with Section 3(3) of the FTDR Act; and imposed a penalty of Rs. 4 lakhs. The importer challenged the order of Commissioner before the Appellate Tribunal. The Appellate Tribunal observed that the subject goods, having been imported in violation of the conditions of EXIM Policy, acquired the nature of prohibited goods in terms of Section 2(33) of the Customs Act and were liable to confiscation in terms of Section 111(d). Thereafter, the Tribunal formulated the question as to whether the Adjudicating Authority had an option to allow such goods to be redeemed on payment of fine in lieu of confiscation. After referring to the judgment of this Court in the case of Atul Automations (supra) and the order passed by the Bombay High Court in the case of M/s. Harihar Collections (impugned herein), the Tribunal directed redemption of impugned goods on payment of Rs. 12 lakhs as fine and confirmed the penalty of Rs. 4 lakhs imposed by the Commissioner.

75.1. In cross-appeals by the importer and by the revenue, the Kerala High Court consciously took note of the decision of this Court in Agricas (supra) and also the fact that the order so passed by the Bombay High Court in the case of M/s. Harihar Collections had been stayed by this Court in the present appeals. Thereafter, the High Court proceeded to disapprove the order passed by the Appellate Tribunal for release of goods, with the following amongst other findings and observations: -

> "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, notification etc. Notification dated 18.4.2019 stipulates restriction on import of a quantity of 1.5 lakh MT 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 of customs, but, however, recorded that the subject goods can be treated as restricted goods and can be released on payment of 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." (emphasis in bold supplied)

76. On the other hand, the importers have placed heavy reliance upon the decision in the case of Hargovind Das K. Joshi (supra). Therein, a consignment of zip fasteners imported by the appellants was ordered for absolute confiscation by the Additional Collector of Customs and a penalty was also imposed. The order was confirmed by the Appellate Tribunal. In appeal to this Court, three questions were raised by the appellants, namely, on validity of the order confiscating the goods; on validity of the orders imposing penalty; and failure on the part of the customs authority to give an option to them for redeeming the goods on payment of fine in lieu of confiscation. This Court rejected the first two contentions after finding that the order directing confiscation was unassailable in facts or in law and that the order levying penalty was also justified. However, this Court found substance in the third part of the submissions because the Collector of Customs had passed the order for absolute confiscation without giving the appellants an option to redeem the goods on payment of fine. This Court observed that the said Adjudicating Authority, undoubtedly, had the discretion to give an option of payment of fine in lieu of confiscation but omitted to consider such a discretion available with him. In the given circumstances, this Court remitted the matter to the Adjudicating Authority to the limited extent as to whether or not to give an option to the importers to redeem the confiscated goods on payment of fine. In that regard, this Court left it open for the officer concerned to take a decision one way or the other in accordance with law, while observing in the last that the officer concerned will take into consideration all the relevant circumstances including the submission on behalf of the importers that the free import of the goods in question had also been allowed, of whatever worth that was. 76.1. From the decision in Hargovind Das K. Joshi (supra), it is not borne out as to what was the reason for which the goods (zip fasteners) became subject to confiscation and it appears that at a later point of time, free import of the item had also been allowed. Be that as it may, what this Court found therein was that the Adjudicating Authority omitted to take into consideration one part of the discretion available for him i.e., of giving an option for redemption with payment of fine in lieu of confiscation and for that reason

alone, the matter was remitted. The said decision cannot be read as an authority for the proposition that in every case of confiscation, invariably, the discretion has to be exercised by the Adjudicating Authority to give an option for redemption by payment of fine. In our view, the said decision does not make out any case in favour of the importers.

76.2. In fact, the observations made in Hargovind Das K. Joshi (supra) rather operate against the orders-in-original in the present appeals because therein, the Adjudicating Authority, after finding the goods liable to confiscation, straightaway proceeded as if the option for payment of fine in lieu of confiscation has to be given and did not consider the other part of discretion available with him that the goods could also be confiscated absolutely.

77. Thus, for what has been noticed above, the Kerala High Court has approved absolute confiscation of similar goods while following the decision of this Court in Agricas (supra) and after finding unsustainable the order of Tribunal for release of goods. In the case of Garg Woollen Mills (supra), this Court approved absolute confiscation when fraud was involved. In Hargovind Das K. Joshi (supra), when one part of discretion of Section 125(1) of the Customs Act was not taken into account, this Court remitted the matter for proper exercise of discretion.

78. It is true that, ordinarily, when a statutory authority is invested with discretion, the same deserves to be left for exercise by that authority but the significant factors in the present case are that the Adjudicating Authority had exercised the discretion in a particular manner without regard to the other alternative available; and the Appellate Authority has found such exercise of discretion by the Adjudicating Authority wholly unjustified. In the given circumstances, even the course adopted in the case of Hargovind Das K. Joshi (of remitting the matter for consideration of omitted part of discretion) cannot be adopted in the present appeals; and it becomes inevitable that a final decision is taken herein as to how the subject goods are to be dealt with under Section 125 of the Customs Act.

79. As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods.

80. For what has been observed hereinabove, it is but evident that the orders-in-original dated 28.08.2020 cannot be said to have been passed in a proper exercise of discretion. The Adjudicating Authority did not even pause to consider if the other alternative of absolute confiscation was available to it in its discretion as per the first part of Section 125(1) of the Customs Act and proceeded as if it has to give the option of payment of fine in lieu of confiscation. Such exercise of discretion by the Adjudicating Authority was more of assumptive and ritualistic nature rather than of a conscious as also cautious adherence to the applicable principles. The Appellate Authority, on

the other hand, has stated various reasons as to why the option of absolute confiscation was the only proper exercise of discretion in the present matter. We find the reasons assigned by the Appellate Authority, particularly in paragraph 54.3 of the order-in-appeal dated 24.12.2020 (reproduced in point 'c' of paragraph 38.2 hereinabove) to be fully in accord with the principles of exercise of discretion, as indicated hereinabove and in view of the facts and peculiar circumstances of this case.

81. It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition simpliciter. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in Agricas (supra). This Court also held that the imports were not bona fide and were made by the importers only for their personal gains.

82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.

83. Before closing on this part of discussion, we may also refer to a decision of Bombay High Court in the case of Finesse Creation Inc. (supra), cited on behalf of one of the importers. In that case, the declared value of goods imported by the assessee in respect of 13 consignments over a period of about three years was rejected and the Commissioner ordered re-assessment of the value of goods; and after re-determination, differential duty was confirmed under Section 28(2) of the Customs Act with recovery of interest under Section 28AB thereof. Moreover, the imported goods were confiscated and redemption fine under Section 125 of the Customs Act was also imposed in lieu of confiscation. While confirming the differential duty and consequent penalty and interest, CESTAT quashed the imposition of redemption fine because the goods were not available for confiscation. In that context, the High Court said that the concept of redemption fine would arise in the event the goods were available and were to be redeemed; and if the goods were not available, there was no question of redemption of goods. The said decision cannot be pressed into service in the present case merely because the said importer M/s. Harihar Collections has been able to obtain release of all the goods after passing of the order-in-original of the Adjudicating Authority dated 28.08.2020

when the same was under

> challenge. The present one is not a case where the subject goods were not available on the day of passing of the order by the Adjudicating Authority.

84. Hence, on the facts and in the circumstances of the present case as noticed and dilated hereinabove, the discretion could only be for absolute confiscation with levy of penalty. At the most, an option for re- export could be given to the importers and that too, on payment of redemption fine and upon discharging other statutory obligations. This option we had already left open in the order dated 18.03.2021, passed during the hearing of these matters.

85. For what we have observed hereinabove, the orders-in-original dated 28.08.2020 cannot be approved. As a necessary corollary, the orders-in-appeal dated 24.12.2020 deserve to be approved. However, before final conclusion in that regard, a few more aspects need to be dealt with.

Invocation of equity by the importers

86. Various submissions invoking equity have been made on behalf of the importers while submitting that they have already suffered huge losses and that even re-export of subject goods is not a feasible option. 86.1. In regard to the submissions invoking equity, noticeable it is that various such features of equity were taken into consideration by the Adjudicating Authority, in the orders-in-original dated 28.08.2020 and by the High Court, in the impugned order dated 15.10.2020 while directing release of goods. We have already disapproved the orders so passed by the Adjudicating Authority and the High Court. Therefore, no leniency in the name of equity can be claimed by these importers. In fact, any invocation of equity in these matters is even otherwise ruled out in view of specific rejection of the claim of bona fide imports by this Court in Agricas (supra). Once this Court has reached to the conclusion that a particular action is wanting in bona fide, the perpetrator cannot claim any relief in equity in relation to the same action. Absence of bona fide in a claimant and his claim of equity remain incompatible and cannot stand together.

86.2. The overt suggestions on behalf of the interveners that demand and supply of pulses is dynamic and not static in nature have only been noted to be rejected. In our view, meeting with the requirements of demand and supply is essentially a matter for policy decision of the Government. No equity could be claimed with such submissions by the importers. Similarly, if, for whatever reason, any consignment of the subject goods has been released, such release had not been in accord with law and no equity could be claimed on that basis.

86.3. Therefore, all the submissions seeking relief in equity are required to be, and are, rejected.

Prayer for keeping issues open for statutory appeal

87. We have also pondered over the prayer for keeping the opportunity of further statutory appeal to CESTAT open for the importers. Though in ordinary circumstances, such a prayer might have been of no difficulty but, we are of the view that having regard to the background and the relevant

circumstances, any liberty for further rounds of litigation, at least in relation to the respondents before us, is not called for; and the matters ought to be given a finality.

88. As regards the importer M/s. Raj Grow Impex, as noticed, the order-in-appeal was consciously challenged by it by way of a fresh writ petition in the High Court despite being aware of the availability of statutory remedy of appeal before CESTAT. No cogent and plausible reason is forthcoming as to why it had chosen to avoid the regular remedy of appeal except that it had the keen desire to get the remaining goods (under seven bills of entry) released after it had obtained release of goods under three bills of entry; and in that attempt, filed a fresh writ petition challenging the order-in-appeal and also filed a contempt petition in the High Court.

88.1. So far as the question of release of goods is concerned, the matter stands concluded once we have found that the goods covered by the notifications in question and by the judgment of this Court in Agricas (supra) are liable to absolute confiscation. Therefore, any prayer for release of any of such goods becomes redundant and cannot be granted by any authority or Court. Of course, it is true that the Appellate Authority has enhanced penalty from Rs. 1.485 crores to Rs. 5 crores but, the fact that this importer had taken release of the goods covered by three bills of entry and that aspect of the matter was required to taken as fait accompli by the Appellate Authority, in our view, effectively operates against any claim for reduction of the amount of penalty. Putting it differently, once we have approved the order-in-appeal, any attempt for further appeal by this importer shall remain an exercise in futility.

89. So far as the other importer M/s. Harihar Collections is concerned, it had obtained release of goods covered by all its eight bills of entry and, therefore, the matter was taken as fait accompli by the Appellate Authority with appropriation of redemption fine and enhancement of penalty. As noticed, this importer has even attempted to argue before us against redemption fine with the submissions that the goods were not available for confiscation. Neither the redemption fine nor even the enhancement of penalty from Rs. 2.34 crores to Rs. 10 crores could fully set off the damage caused by the actions of this importer. Needless to repeat that with our approval of the order-in-appeal, any attempt for further appeal by this importer shall also remain an exercise in futility.

90. In view of above, we find no reason to allow any prayer for filing appeal against the orders-in-appeal dated 24.12.2020. Incidentally: principles relating to the grant or refusal of interim relief

91. While closing on these matters, we are constrained to observe that the root cause of the present controversy had not been that much in the notifications in question as it had been in the interim orders passed by the High Court of Rajasthan, Bench at Jaipur. It needs hardly any elaboration that only under the cover of such interim orders that the importers ventured into the import transactions which resulted in excessive quantities of peas/pulses than those permitted by the notifications reaching the Indian ports. As has been noticed in the present cases, some of the goods so imported got released and the Commissioner (Appeals) had to take that aspect as fait accompli. For what has been held by this Court in Agricas (supra), and further for what has been held in this judgment, the

goods in question were not to mingle in the Indian market. Such mingling, obviously, has an adverse impact on the agricultural market economy and defeats the policy of the Government of India. This state of affairs was an avoidable one; and would have been avoided if, before passing interim orders, the respective Courts would have paused to consider the implications and impact of such interim orders, which were, for all practical purposes, going to operate as mandatory injunction, whereby the appellants were bound to allow the goods to reach the Indian ports, even if the notifications were prohibiting any such import.

91.1. Having regard to the scenario that has unfolded in the present cases, we are impelled to re-state that even though granting of an interim relief is a matter of discretion, such a discretion needs to be exercised judiciously and with due regard to the relevant factors.

92. In addition to the general principles for exercise of discretion, as discussed hereinbefore, a few features specific to the matters of interim relief need special mention. It is rather elementary that in the matters of grant of interim relief, satisfaction of the Court only about existence of prima facie case in favour of the suitor is not enough. The other elements i.e., balance of convenience and likelihood of irreparable injury, are not of empty formality and carry their own relevance; and while exercising its discretion in the matter of interim relief and adopting a particular course, the Court needs to weigh the risk of injustice, if ultimately the decision of main matter runs counter to the course being adopted at the time of granting or refusing the interim relief. We may usefully refer to the relevant principle stated in the decision of Chancery Division in Films Rover International Ltd. and Ors. v. Cannon Film Sales Ltd.: [1986] 3 All ER 772 as under: -

> "....The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle." (emphasis in bold supplied) 92.1. While referring to various expositions in the said decision, this Court, in the case of Dorab Cawasji Warden v. Coomi Sorab Warden and Ors.: (1990) 2 SCC 117 observed as under: -
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> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed

> may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are: (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
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> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion." (emphasis in bold supplied)

93. In keeping with the principles aforesaid, one of the simple questions to be adverted to at the threshold stage in the present cases was, as to whether the importers (writ petitioners) were likely to suffer irreparable injury in case the interim relief was denied and they were to ultimately succeed in the writ petitions. A direct answer to this question would have made it clear that their injury, if at all, would have been of some amount of loss of profit, which could always be measured in monetary terms and, usually, cannot be regarded as an irreparable one. Another simple but pertinent question would have been concerning the element of balance of convenience; and a simple answer to the same would have further shown that the inconvenience which the importers were going to suffer because of the notifications in question was far lesser than the inconvenience which the appellants were going to suffer (with ultimate impact on national interest) in case operation of the notifications was stayed and thereby, the markets of India were allowed to be flooded with excessive quantity of the said imported peas/pulses.

94. In fact, the repercussion of the stay orders passed in the earlier years were duly noticed by this Court in Agricas (supra); and unfortunately, more or less same adverse consequences had been hovering over the markets because of the imports made under the cover of the interim orders passed in relation to the notifications dated 29.03.2019. This, in our view, was not likely to happen if the material factors relating to balance of convenience and irreparable injury were taken into account while dealing with the prayers for interim relief in the writ petitions. As noticed, this Court had, in unequivocal terms, declared in Agricas (supra), that the importers cannot be said to be under any bona fide belief in effecting the imports under the cover of interim orders; and they would face the consequences in law. It gets, perforce, reiterated that all this was avoidable if the implications were taken into account before granting any interim relief in these matters.

95. We need not expand the comments in regard to the matters relating to the grant or refusal of interim relief and would close this discussion while reiterating the principles noticed above. Summation

96. For what has been discussed hereinabove, these appeals deserve to be allowed and, while setting aside the orders passed by the High Court and approving the orders-in-appeal, the goods in question are to be held liable to absolute confiscation but with a relaxation of allowing re- export, on payment of the necessary redemption fine and subject to the importer discharging other statutory obligations. The respondent- importers being responsible for the improper imports as also for the present litigation, apart from other consequences, also deserve to be saddled with heavier costs.

Conclusions and directions

97. Accordingly, and in view of the above:

(a) these appeals are allowed;

(b) the impugned order dated 15.10.2020 (read with modification order dated 09.12.2020), as passed by the High Court in Writ Petition (L) Nos. 3502-3503 of 2020, is set aside and the writ petitions so filed by the respondent-importers are dismissed;

(c) the impugned interim order dated 05.01.2021, as passed by the High Court in Writ Petition (ST) No. 24 of 2021 is also set aside and the said writ petition shall be governed by this judgment;

(d) the orders-in-appeal dated 24.12.2020, as passed by the Appellate Authority in the respective appeals, are approved and consequently, the orders-in-original dated 28.08.2020 in the respective cases of the respondent-importers stand quashed;

(e) the orders-in-appeal having been approved by this Court, the questions of release of goods as also the quantum of penalty stand concluded with this judgment and hence, the prayer for keeping open the option of further statutory appeal stands rejected; and

(f) the subject goods are held liable to absolute confiscation but, in continuity with the order dated 18.03.2021 in these appeals, it is provided that if the importer concerned opts for re-export, within another period of two weeks from today, such a prayer for re-

export may be granted by the authorities after recovery of the necessary redemption fine and subject to the importer discharging other statutory obligations. If no such option is exercised within two weeks from today, the goods shall stand confiscated absolutely.

98. The matters relating to the interveners shall also be governed by the findings of this judgment and appropriate orders in their regard shall be passed by the authorities/Courts, wherever their matters relating to the subject goods are pending but, their options of further appeal, only in relation to the quantum of amount payable, including that of penalty, is left open.

99. The respondent-importers shall pay costs of this litigation to the appellants, quantified at Rs. 2,00,000/- (Rupees two lakhs) each.

100. All pending applications stand disposed of.

.....J. (A.M. KHANWILKAR) 1 .....J. (DINESH MAHESHWARI) .....J. (KRISHNA MURARI) 1 New Delhi June 17, 2021