

M/S. A And A Shipping Services vs Union Of India on 29 November, 2022

Author: Sonia Gokani

Bench: Sonia Gokani

C/SCA/23784/2022

ORDER DATED: 29/11/2022

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 23784 of 2022

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M/S. A AND A SHIPPING SERVICES
Versus
UNION OF INDIA

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Appearance:

MR HARDIK P MODH(5344) for the Petitioner(s) No. 1

MR PRIYANK LODHA for the Respondent(s) No. 1,2,3,4

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CORAM:HONOURABLE MS. JUSTICE SONIA GOKANI

and

HONOURABLE MRS. JUSTICE MAUNA M. BHATT

Date : 29/11/2022

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. This Writ Petition under Article 226 of the Constitution of India is preferred by the proprietary concern, who is importing the goods from across the world and is presently aggrieved by the action of the respondent authority in relation to the Fresh Kiwi Fruits. The petitioner challenges the seizure memo dated 15.11.2022 issued by the respondent No.4 C/SCA/23784/2022 ORDER DATED: 29/11/2022 under four bills of entries where these Fresh Kiwi Fruits have been imported are seized on the alleged premise that the Country-of-Origin certificates submitted by the petitioner are of suspicious nature and they are not co-relating with the documents submitted with the bill of entry. Respondent Nos.2 and 3 have not permitted the petitioner to clear Fresh Kiwi Fruits for home consumption imported from Dubai (Having the Country-of-Origin "Chile") even though the Foreign Trade (Development and Regulation) Act, 1992 read with Foreign Trade Policy 2015-20 have not put any restriction or prohibition on import of Fresh Kiwi Fruits.

2. It is the say of the petitioner that C/SCA/23784/2022 ORDER DATED: 29/11/2022 the National Plant Protection Organization in India which works under the Agriculture Department suspended the import of Fresh Kiwi Fruits from Iran w.e.f. 07.12.2021. However, for the import from Chile and Dubai, there are no such restrictions.

3. On an application being made by the petitioner, the Deputy Director, Regional Plant Quarantine Station, Kandla had issued No Objection Certificate for permitting the petitioner for clearance of imported Fresh Kiwi Fruits by observing that the same were found free from any live pest infestation. 3.1 The petitioner had communicated on 01.11.2022 requesting the respondent Nos.3 and 4 to allow the clearance of fruits for home consumption. All requisite documents C/SCA/23784/2022 ORDER DATED: 29/11/2022 including Phytosanitary certificate showing the imported goods were originated from Chile were tendered with a request for the release and when no heed was paid, he has approached this Court with the following reliefs:

"21...

(a) This Hon'ble Court may be pleased to issue writ of Mandamus or a writ in the nature of Mandamus, or any other appropriate writ, directing the Respondents to allow the Petitioner to clear the goods imported through four Bills of entry filed with the office of Respondent No.3 (Annexure H);

(b) That the Hon'ble Court may be pleased to issue writ of certiorari or nature of certiorari or any other appropriate writ, order or direction leading to issuance of seizure memo dated 15.11.2022 issued by Respondent No.4 and after going into legality and validity thereof, to quash and set aside the seizure memo dated 15.11.2022 issued by Respondent no.4 (Annexure K).

(c) That this Hon'ble Court may be pleased to issue a Writ of Prohibition, or a writ in the nature of prohibition, or C/SCA/23784/2022 ORDER DATED: 29/11/2022 any other appropriate writ, order or direction, directing the Respondent No.2 and 3 their officers, employees not to initiate any actions for disposal of the goods imported through four Bills of entry filed with the office of Respondent No.3 (Annexure K);

(d) That pending and final disposal of this petition, this Hon'ble Court may be pleased to permit the Petitioner to allow clearance of goods imported through four Bills of entry filed with the office of Respondent No.3 (Annexure K) with such terms and conditions as deemed fit and proper by this Hon'ble Court.

(e) Grant ad-interim relief in terms of the prayers above;

(f) Grant costs of the Petition and orders thereon; and

(g) Grant such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

4. It is the say of the petitioner that import of Fresh Kiwi is classified at HSN 08105000 which is freely importable as per import policy 2015-20. The import of the C/SCA/23784/2022 ORDER DATED: 29/11/2022 edible fruit into India is regulated by the provisions of Food Safety and Standards Act, 2006. Chapter V of FSSAI deals with the provisions relating to import. No person is permitted to import any article or food into India in contravention of the Act and Rules and Regulations. Chapter VII of the FSSAI provides the authority for enforcement of the act. Section 29 provides that the Food Authority and the State Food Safety Authorities shall be responsible for enforcement. The Food Safety Officer and the Commissioner of Food Safety under Section 29(6) exercise the powers and follow the procedure specified therein.
5. The Customs Officer has been delegated powers to perform the function under the C/SCA/23784/2022 ORDER DATED: 29/11/2022 Food Safety Law for the customs stations where FSSAI does not have any officer.
6. It appears that the petitioner imported the consignment of Fresh Kiwi Fruits from UAE through M/s.Shahrukh & Sons Trading Company & M/s.Barka Food Stuff Trading LLC having country of origin Chile. The four inward bills of entries classifying the imported Kiwi Fruits under Chapter Heading No.08105000 of Customs Tarrif Act and the final bills of entries for clearance of goods for home consumption had been filed.
7. The request was made to a supplier of UAE to provide Country of Origin Certificate issued by Chile, so that they could be produced before the Customs Authority to establish that the goods were C/SCA/23784/2022 ORDER DATED: 29/11/2022 the origin of Chile and can be compared with the certificate of Phytosanitary issued by UAE.
8. The petitioner also approached the Office of Deputy Director of Regional Plant Quarantine Station, Gandhidham seeking permission for issuance of "No Objection"

Certificate. As per Standard Operating System, it inspected the consignments and the authority found that the same were free from live infestation. They have no objection for clearance of the goods and they certified that the final release of the consignments would be subject to the clearance of Customs Department. 8.1 It is the say of the petitioner that the Seizure Memo dated 15.11.2022 says that C/SCA/23784/2022 ORDER DATED: 29/11/2022 the consignment of Fresh Kiwi Fruits imported vide four bills have been seized under Section 110 of the Customs Act on the alleged premises that the Country of Origin Certificate is of suspicious nature. 8.2 The consignments have been handed over to M/s.Kerry Indev Logistics Pvt. Ltd., SEZ Unit, Mundra with an undertaking to keep the said goods in safe custody and not to be removed in any mode or manner.

9. On issuance of notice, affidavit-in- reply is filed by the department, where the Deputy Commissioner at Mundra, has denied all allegations. It has agreed to the authority having issued the Seizure Memo in relation to the consignments brought under the four bills of entries. According to C/SCA/23784/2022 ORDER DATED:

29/11/2022 this affidavit, the National Custom Targeting Centre ('the NCTC' hereinafter) alert was received indicating the various dis-parameters in respect of these bills of entries. It is responsible for the application of nationally coordinated approach to Risk Analysis, Assessment and Targeting of risky cargo crossing the borders through sea, air and land. It was indicated that the cargo may be of Iran Origin which is prohibited in India from December 2021 by the nodal body National Plant Protection Organization (NPPO) under the Agricultural Ministry as per No.18-23/2015-PP, II(e-16587) dated 07.12.2021.

9.1 The preliminary examination by SIIB Officer vide Examination Report dated C/SCA/23784/2022 ORDER DATED: 29/11/2022 21.10.2022, these bills of entries were directed to be put on hold. The NCTC on its analysis had questioned these goods to be of Iranian Origin. It also was wondering as to why such perishable goods from Chile is being imported and as to why such goods are being cleared via SEZ. Routing it through the Chilean Cargo through Dubai also is not making any sense economically and the supplier had previously supplied the Iranian Kiwi.

9.2 On perusal of the documents submitted by the importer and it was noticed that the same Phytosanitary Certificate issued by the Chilean authorities were being used for different consignments by different importers. It is given a detail as to how C/SCA/23784/2022 ORDER DATED: 29/11/2022 the two Phytosanitary certificates issued by the Chile are mentioned in the other certificates and therefore, according to the respondent, the documents could be the forged documents showing the Country-of- Origin of Chile. Another importer M/s.Saify Enterprise also has used the said Phytosanitary certificate. They are also suspicious about the Phytosanitary certificate bearing Nos.2158830 dated 26.04.2022, 2171104 dated 17.05.2022 & 2167596 dated 11.05.2022. The vessel has reached at Mundra Port on 05.10.2022, it takes about 04 to 05 days from Jabel Ali Port, Dubai to Mundra Port. Therefore, also it has suspected the certificates.

10. Relying on the decision of the Madras C/SCA/23784/2022 ORDER DATED: 29/11/2022 High Court in Writ Appeal No.377 of 2016 in Malabar Diamond Gallery Pvt. Ltd. vs. Additional Director, DRI Chennai & Ors it has urged that the discretion is given to the concerned officer. The import of Iranian Kiwi since is prohibited in India from December 2021, by no means, the same can be permitted.

11. We have heard extensively the learned advocate, Mr.Hardik Modh for the petitioner and learned standing counsel Mr.Priyank Lodha for the department.

12. We had taken up the matter for final hearing at the admission stage considering the nature of the consignment which is of the fruits. Noticing the fact through four bills of entries the consignments have C/SCA/23784/2022 ORDER DATED: 29/11/2022 arrived in the month of October and almost two months have passed, there can be no bar to the officers inquiring into the details and also satisfying themselves with regard to the Phytosanitary certificates, not only it is their right, but it is their duty to so do it. Phytosanitary certificates for the purpose of Country-of-Origin when there is a specific bar to the Iranian Kiwi being imported by virtue of the directions issued by the National Plant Protection Organization under the Agricultural Ministry from 07.12.2021. Their examination

is within their jurisdiction.

13. Apt would be to refer to Section 110 of the Customs Act, which provides for seizure of goods, documents and things.

C/SCA/23784/2022 ORDER DATED: 29/11/2022 "(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods: Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. [(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings C/SCA/23784/2022 ORDER DATED: 29/11/2022 under this Act and shall make an application to a Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn. (1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.] (2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

[Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom C/SCA/23784/2022 ORDER DATED: 29/11/2022 such goods were seized before the expiry of the period so specified:

Provided further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply.]

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs."

13.1 Section 1A of Section 110 of the Customs Act provides that the Central Government may, having regard to the perishable or hazardous nature of any goods, shall, as soon as may be after its seizure under sub-section (1), dispose of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure C/SCA/23784/2022 ORDER DATED: 29/11/2022 prescribed in the said provision. 13.2 Sub-section (2) of Section 110 of the Customs Act provides that any goods which are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within shall be returned to the person from whose possession they were seized within six months of the seizure of the goods and the principal commissioner also has power to extend such period of further time not exceeding six months.

13.3 The second proviso also provides that where any order for provisional release of the seized goods has been passed under section 110A of the Customs Act, the specified period of six months shall not C/SCA/23784/2022 ORDER DATED: 29/11/2022 apply.

14. Admittedly, this is perishable nature of the goods and therefore, Sub-section (1A) of Section 110 of the Customs Act obligates upon the officer concerned to decide in this relation as soon as possible after its seizure.

15. We have noticed from the chronology of events that the consignments have though come on 05.10.2022 and 07.10.2022, nothing has happened and no heed was paid at any point of time, however, on 15.11.2022 there has been a seizure, nearly two months have passed from the time the consignments have been brought.

16. Noticing the right of the authority C/SCA/23784/2022 ORDER DATED: 29/11/2022 concerned as also the balancing it from the point of view of the perishable goods which are required to be decided earliest possible, we deem it appropriate to provisionally release the same.

17. At this stage, our attention is drawn to Section 112 of the Customs Act which is a penalty for improper importation of goods if ultimately the inquiry which has been undertaken by the respondent authority culminates into the certificate being found to be bogus. According to the learned senior standing counsel, Mr. Priyank Lodha the inquiry may not get concluded before one month still.

18. Noticing the hierarchy through which it may pass and bearing in mind, the C/SCA/23784/2022 ORDER DATED: 29/11/2022 perishable nature of the goods, we do not deem it appropriate to continue the stage when the consignment imported is seized. Therefore, taking a balanced view, since the decision of this Court in case of Besto Tradeling Limited vs. Principal Commissioner of

Customs in Special Civil Application No.1796 of 2022 this consignment is to be returned. This Court in a similar such matter where consignment had come from Pakistan and there was a requirement for release of the same, directed the provisional release of the goods upon furnishing the Bank Guarantee, bond and undertaking subject to certain terms and conditions. This decision had not been challenged further by the department. C/SCA/23784/2022 ORDER DATED: 29/11/2022

19. It is to be noted that Rs.21 Lakh has been already secured, by way of the tax, which has been already paid by the petitioner, in such circumstances, we are of the view that the order of provisional release of the goods upon furnishing of the Bank Guarantee, bond and the undertaking deserves to be passed subject to the following terms and conditions:

(a) The petitioner shall submit a Bank Guarantee of Rs.10 Lakh (Rupees Ten Lakh Only) for a period of twelve weeks of any Nationalized Bank or a Private Bank in favour of the respondent No.2.

(b) The Managing Director of the petitioner company shall file an undertaking with the respondents authorities and before this Court that he possess sufficient assets and in the event the consignment is found to C/SCA/23784/2022 ORDER DATED: 29/11/2022 have origin from Iran, he shall pay the differential duty if the petitioner is not in a position to pay the differential amount as may be adjudicated.

(c) Additionally, the petitioner shall file a bond for the differential duty as per the Customs Act, 1962 and the rules made thereunder, before the authority.

20. Once the Bank Guarantee is furnished of the requisite amount as above, the goods shall be provisionally released in favour of the petitioner. We would like to direct at this stage that the respondent No.2 shall ensure that the inquiry is concluded within a period of twelve weeks from today.

If for any good reason or if the
respondent No.2 has some information as

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regards the origin of the goods and need some more time, then it shall be open for the respondent No.2 to file an appropriate application seeking extension of time period to complete the inquiry. If such extension is granted by the Court concerned, then the Bank Guarantee may also stand

extended accordingly. However, if it is still not concluded after a period of twelve weeks, the respondent No.2 shall not request for further time as the same is not to be allowed.

21. With the above directions and observations, this petition is disposed of accordingly.

22. Over and above the regular mode of service, direct service through e-mode on official email address is also permitted.

(SONIA GOKANI, J) (MAUNA M. BHATT,J) M.M.MIRZA