

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2**

Customs Appeal No.75508 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AKR/214/2022 dated 31.03.2022 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Nakshatra Impex

(1st Near Hathi Khana Chowk, 1st Floor, Raipur, Dehradun, Uttrakhand-248008.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

.....Respondent

WITH

Customs Appeal No.75510 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AKR/215/2022 dated 31.03.2022 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Navya Enterprise

(3/4368, 1344/27 Damodarpuri, Bajoria Road, Saharanpur, Uttar Pradesh-247001.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

.....Respondent

AND

Customs Appeal No.75511 of 2022

(Arising out of Order-in-Appeal No.KOL/CUS(Port)/AKR/213/2022 dated 31.03.2022 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Balaji Impex

(6/6325, Room No.2, Garhi Malook No.2, Saharanpur, Uttar Pradesh.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(15/1, Strand Road, Custom House, Kolkata-700001.)

.....Respondent

APPEARANCE

Shri S.C.Ratho, Consultant for the Appellant (s)

Shri Sourav Chakraborty, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)**FINAL ORDER NO. 75045-75047/2023**

DATE OF HEARING : 11 January 2023

DATE OF DECISION : 09 February 2023

P.K.CHOUDHARY :**Appeal No.C/75508/2022, C/75510/2022 & C/75511/2022**

Appeal No.	B/E No. Date	Order-In-Appeal No. & Date	Order-In-Original No. & Date	Penalty	Appellant
Appeal No: C/75508/20 22	B/E No. 3989140 dated:18.05. 2021	KOL/CUS/(Port)/AKR/214/2 022 Date: 31.03.2022	KOL/CUS/AC/PORT/2742/2 021/Gr.V (A & B) Dated: 27.10.2021	2,16,000	Nakshatra Impex
Appeal No: C/75510/20 22	B/E No. 3988893 dated:18.05. 2021	KOL/CUS/(Port)/AKR/215/2 022 Date: 31.03.2022	KOL/CUS/AC/PORT/2741/2 021/Gr.V (A & B) Dated: 27.10.2021	2,18,000	Navya Enterprise
Appeal No: C/75511/20 22	B/E No. 3989552 dated:18.05. 2021	KOL/CUS/(Port)/AKR/213/2 022 Date: 31.03.2022	KOL/CUS/AC/PORT/2740/2 021/Gr.V (A & B) Dated: 27.10.2021	1,90,000	Balaji Impex

Being aggrieved with the above three (3) Orders-in-Appeal passed by the Ld. Commissioner of Customs (Appeals), Kolkata, whereby he rejected the Appeals before upholding the three (3) Orders-In-Original passed by the Ld.Adjudicating authority. Since the issue in dispute in all the three Appeals are common, they are taken up together for hearing .

2. The facts of the case in brief are that the importers, imported Mosquito swatter/bat in three (3) consignments, stuffed in three containers at a declared unit price of USD 0.34 per piece which works out to Rs.25.41 per piece. The goods were shipped on 26.04.2021 against three (3) different Bills of Lading from China all dated:

26.04.2021. Three Bills of Entry were filed on 18.05.2021 for clearance of the mosquito swatter/bat UTH (HS code) 85167920 claiming clearance under Open General License (OGL) since mosquito swatter/bat was freely importable as per Foreign Trade Policy in force.

3. Director General of Foreign Trade (DGFT) issued vide Notification No. 02/2015-20, New Delhi dated: 26.04.2021, amended the import policy and incorporated a policy condition under HS code 85167920 and 85167990 of chapter-85 of ITC (HS) 2017, schedule-I (Import Policy). The effect of the notification was, mosquito killer racket under HS code 85167920 and 85167990 in the import policy was revised from free to prohibited, if CIF value is below Rs. 121/- per racket.

4. In terms of para-9.11 of the Hand book of Procedure of the import policy, date of dispatch/shipment will be reckoned by sea from the date of dispatch/shipment i.e. the date fixed on the Bill of Lading. In view of the policy restriction taking the date of effect of the notification from the date of B/L, the item became restricted/prohibited in terms of para-1.02 and 1.05 of Foreign Trade Policy and para-2.17 and para-9.11 of Hand Book of Procedure.

5. Accordingly, the goods were detained for adjudication proceedings by the lower Authority. It is the case of the Appellants that the goods were delivered to the shipping agent by the overseas supplier for shipment to India on 21.04.2021. However after the final call on board on 26.04.2021 the Bills of Lading were issued. Since the placement of the order for import of the goods were placed much earlier and goods were out of control of the overseas supplier on 26.04.2021, incidentally on which date the DGFT Notification 02/2015-20 dated: 26.04.2021 was issued.

6. The Adjudicating authority, however, cited the case law of M/s. Raj Grow Impex LLP and Ors in civil appeal no. 2217-2218 of 2021 arising out of SLP(C) no. 14633-14634 of 2020, wherein absolute confiscation of restricted goods (beans, peas and pulses) has been found proper by the Hon'ble Supreme Court. Accordingly it was held by

the adjudicating authority that, from the DGFT notification it is clear that the prohibition came in force from 26.04.2021 and the Bill of Lading date is also 26.04.2021, so there is no doubt that on the import date (i.e. Bill of Lading date) the subject goods are prohibited as per DGFT notification no. 02/2015-20 dated: 26.04.2021. Accordingly, the subject goods were held liable for absolute confiscation u/s 111(d) of the Customs Act, 1962 and penalty was also imposed u/s 112(a)(i) of the Customs Act, 1962 for their acts of omission and commission rendering the goods liable for confiscation u/s 111(d) of the Act *ibid*.

7. The Appellants preferred separate Appeals before Ld. Commissioner (Appeals) against the adjudication orders. Ld. Commissioner (Appeals) vide the impugned common Orders-In-Appeal held that the imported goods are prohibited in nature since the DGFT notification was issued on 26.04.2021 and the Bill of Lading date was also 26.04.2021. Hence, on the import date (B/L date) the goods were prohibited. Therefore, in light of Hon'ble Supreme Court's judgement in *Raj Grow Impex LLP case and Pam Agro Industries VS. UOI, 2021(377) E.L.T. 815 (Guj.)*, the order passed by the adjudicating authority needs no intervention and upheld the order passed by the Adjudicating authority.

8. These three Appellants have filed separate Appeals before this Bench praying to set aside the orders passed by the Ld. Commissioner (Appeals) and to allow the release of goods on enhancement of value as per DGFT Notification. They also filed an early hearing application since live Bills of Entry are held up, which was heard and was allowed by this Bench on 02.08.2022.

9. The Ld. Authorised Representative appearing on behalf of the Appellants submitted that it will be evident from the container track report that goods were received in the origin port (China) on 21.04.2021, when the call on board was on 26.04.2021 and final boarding of the container was on that day itself. Due to delay on account of steamer agent and delay in last port of call, the goods could not be boarded for final departure to India and the B/L was issued on

26.04.2021. In the meantime when the goods were in the process of export, due to change in policy brought in by virtue of DGFT Notification No. 02/2015-20 dated: 26.04.2021, the goods became from freely importable to prohibited. It is his submission that the Appellants had no *mala fide* intention and their *bona fide* was well established. But goods were absolutely confiscated and penalty was imposed.

10. The order for supply of the goods was placed before the date of Notification bringing in the amendment to the import and export policy in force. Had the goods been shipped earlier to 26.04.2021 the prohibition would not have had any effect. Besides, if the order would have been backed by Letter of Credit they would have got the transitional benefit in terms of Para -1.05 (b) of the Foreign Trade Policy. It was submitted before the Ld. Commissioner (Appeals), that in the case of M/S. Gauri Enterprises Vs. Commissioner of Customs, Pune, [2002 (145) E.L.T 706 (Tri)] relying upon the case of Mafatlal Industries Ltd. v. U.O.I.— 1997 (89) [E.L.T.](#) 247 (S.C.), wherein it was held that, Absolute confiscation should be an exception rather than a rule, the goods should have been allowed to be redeemed. But without going into the submissions made before him or refuting the cases cited before him, he simply upheld the order of the lower authority replying upon the judgement of M/S. Raj Grow Impex LLP and M/S. Pam Agro Industries, supra which are completely distinguishable from the facts of the present case and rejected the appeals.

11. The Ld. Consultant further argued that in the case of Raj Grow Impex LLP, the restriction was already in force and peas/pulses were shipped subsequently, which has been appropriately viewed by the Hon'ble Supreme Court. Moreover import of peas dealt in that case was licensable, there was quantity restriction and import was subject to actual user condition. Whereas in this case the import of mosquito swatter was only prohibited if imported below the Minimum Import Price as per DGFT notification no: 02/2015-20 dated: 26.04.2021.

Therefore, the case laws relied upon by the lower Authorities is not applicable to the facts of the present case.

12. The Department all along is of the opinion that, prohibited goods cannot be redeemed. Contrary to the decision of the Supreme Court, that absolute confiscation should be an exception rather than a rule, but without exploring any other alternative they have held that goods are liable for absolute confiscation.

13. The Ld. Consultant on behalf of the Appellants also referred to the case of Jawed-Ul-Hasan Vs. Commissioner of Customs, Calcutta reported in 2001 (131) ELT 406 (Tri-Cal.) wherein it was held that; Redemption fine is reducible when assessee had already taken steps for import of goods before import policy changed.

14. Further in the case of Har Govind Das K. Joshi Vs. Collector 1992 [61] ELT 172 [S.C.] it was held that absolute confiscation of goods by Collector without question of redemption on payment of fine although having the discretion but omitted to consider such a discretion available with him and remanded the matter to Collector for consideration of an exercise of discretion for imposition of Redemption fine.

15. In the case of Sant Raj Vs. O.P. Singhla [1985] 2 SCC.39, in regard to discretion it was held that "*..... Whenever it is said that something has to be done within the discretion of the Adjudicating 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*".

16. The Tribunal in the case of Hussain Ali Mohammad, reported in [2010 (251) E.L.T 417 (Tri-Kolkata)] at para 4 upheld redemption of prohibited goods explaining implication of the provision of section 125 of CA'62 and upheld the order, where by the Commissioner (Appeals) exercises his discretion by imposing redemption fine.

17. In the same manner the issue has been elaborately discussed in the case of Alfred Menezes Vs. Commissioner of Cus, (C.S.I) Airport, Mumbai, [2009 (236) E.LT. 587 (Tri-Mumbai)] it was held that Section

125(1) of Customs Act, 1962 mandates that it is within the power of the Adjudicating authority to offer redemption of goods even in respect of prohibited goods. In the order at para 6 it was held that "..... It can be seen in both the cases i.e. GauriEnterprises also in the case of Universal Traders, the goods were prohibited and the authorities had absolutely confiscated them without giving an option to redeem the same. The ratio of the Tribunal's decision in both cases indicate that even if the goods are prohibited, the same can be redeemed on payment of redemption fine, by adjudicating authority, if that be so, the law is now squarely settled in favour of the appellant herein"

18. In view of the above citations, the goods imported in the instant case even though falling in the category of prohibited goods, are liable to be redeemed on imposition of redemption fine after ascertaining Margin of Profit (MOP) instead of absolute confiscation which has wrongly been held by the Ld. Commissioner (Appeals).

19. So far as invoking penal clause is concerned, the learned Consultant submitted that it is evident from the container track report that the Appellants had already taken steps for import of the said goods before 26.04.2021, though the goods were actually shipped on 24.06.2021 resulting in technical confiscation of the goods, penalty is not imposable as per the submission made in the appeal memorandum. Since there is no mala fide intention or mensrea establishing wilful disobedience of law but coincidentally the date of shipment and B/L was on the same date, penalty may please be waived. Ref Case law: R.M. Electronics Vs. Commissioner of Customs Jaipur, [2003 (160) ELT 896 at page 897 (Tri-Del)], Kuresh Laila Vs. Commissioner of Customs, Chennai reported in [2005 (189) ELT 45 at P-47 (Tri-Chennai)], Jain Export Pvt.Ltd Vs. Union of India [1993 (66) ELT 537 (SC)].

20. The Ld. Authorized Representative on behalf of the Revenue submitted that, there is no doubt about the fact that the imported goods (mosquito swatter/bat) are prohibited goods in terms of notification dated: 26.04.2021 issued by DGFT. The date of DGFT

notification coming into effect and the Bill of Lading being the same (26.04.2021), the Appellants cannot deny that the imported goods fall in the category of prohibited goods on the date of import. The DGFT Notification dated: 26.04.2021 has been issued by the Government keeping the national interest as supreme priority. On the date of filing of the Bill of Entry (18.05.2021) for clearance of the goods for home consumption, the importers/CHA were well aware that the goods are prohibited in nature.

21. Further the Learned DR relying upon the judgment of Hon'ble Supreme Court in UOI & Ors. VS. Raj Grow Impex LLP & Ors submitted that the order passed by the Appellate Commissioner upholding the Order-In-original absolutely confiscating the goods and imposing personal penalty is justified. The aforesaid judgment squarely covers the instant case since the aforementioned DGFT Notification issued on 26.04.2021 prohibits importation of mosquito swatter bats valued at less than Rs.121/- per piece. Hence, no relief can be granted to the Appellants.

22. Heard both sides and perused the Appeal records.

23. I have gone through the records and submissions made by the consultant on behalf of the Appellants and submissions made by the Ld. Authorized Representative on behalf of Revenue. I observe that both the Adjudicating authority and Ld. Commissioner (Appeals) are of the opinion that, prohibited goods cannot be redeemed which is contrary to the decision of the Hon'ble Supreme Court relied upon by the consultant, wherein it was held that Absolute confiscation should be an exception rather than a Rule. Without exploring any other alternative it has been held that goods are liable for confiscation. In the course of argument the Ld. Consultant submitted that the submissions made by him before the adjudicating authority and before the Ld. Commissioner (Appeals) were not considered by giving any reasoning neither the same was refuted which is violative of Principles of Natural Justice. In the case of M/S Sai Raj Enterprise VS. Additional Director of Foreign Trade, reported -2019 (365) E.L.T. 283 (Bom.) it

was observed that;

*"We find merits in the contentions raised on behalf of the petitioner that the order passed by the authority under the Act is not a speaking order. The impugned order merely rejects the submissions of the petitioner on the ground that the same is not acceptable. This indicates complete subjectivity in passing the impugned order. The authority is obliged to give reasons for its decision (the appellate order might not have elaborate reasons when it confirms the order of the original authority). Yet, the same must indicate application of mind to the submissions made by the parties and the **reason** why the **submission** is **not accepted** or accepted. This giving of reasons while dealing with the submissions alone injects objectivity in deciding the appeal/dispute. Moreover, this alone would let the parties know as to why its submissions are not accepted so as to effectively challenge it before the superior forum. Moreover, the superior forum would have the advantage of knowing the reasons which weighed with the authority in accepting or not accepting a particular submission. Thus reasons are the lifeblood of any adjudicating/appellate order. **6.** Therefore, without having examined the merits of the dispute, we set aside the impugned order dated August 11, 2017 and restore the petitioner's appeal to the file of the Additional Director of Foreign Trade for fresh disposal in accordance with the principles of natural justice."*

24. The case law relied upon by the Ld. Commissioner (Appeals) M/S. Pam Agro Industries, has got no application in the present case. In that case *ultra vires* of the DGFT Notification restricting and amending the policy was under challenge. Besides the amount of MIP fixed for cashew nuts was in dispute which is not the case here. Hence the case law relied upon by the Ld. Commissioner (Appeals) is completely distinguishable from the present case.

25. In the case of M/S. Raj Grow Impex LLP, in para 71.1 it was clearly held that;

"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."*

26. Further in para 79 in the above order (supra) the Hon'ble Supreme Court held that;

"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".*

27. The Ld. Commissioner (Appeals) relied upon the judgment of M/S. Raj Grow Impex LLP, but without going in to the observation at para-71.1 that 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, rejected the appeal. Moreover, Ld. Commissioner (Appeals) passed his order relying upon the case of Pam Grow Industries wherein, ultra vires of the DGFT Notification restricting and amending the policy was under challenge. Beside in that case the amount of MIP fixed for cashew nuts was in dispute which is not the case here. Hence the case law relied upon by the Ld. Commissioner (Appeals) is completely distinguishable from the present case.

28. In this context it was submitted that in the judgement of Raj Grow Impex LLP of the Apex Court, the *ultra vires* of the DGFT Notification issued amending the policy for import of peas was challenged, where on import of peas, there was quantity restriction and import was subject to actual user conditions. But this case law relied upon by the lower authority is absolutely distinguishable from the present case, where there is no such quantity restriction and actual user condition. Neither the appellants challenged the *ultra vires* of the present DGFT Notification No. 02/2015-20 issued on

26.04.2021, as was in the case of Raj Grow Impex LLP relied by the Adjudicating authority nor the case of Pam Agro Industries Vs. Union of India relied upon by the Ld. Commissioner (Appeals). It is pertinent to mention here that, even after the specific order of the Supreme Court, Peas are getting cleared by Customs on adjudication of the cases, but in this case absolute confiscation was ordered by the lower adjudicating authority by misconstruction of the Supreme Court's order.

29. Ld. Commissioner (Appeals), passed his order citing the case law of Pam Agro Industries, supra without refuting the submissions made before him for which this present appeal has been made, mainly on the ground that even if the goods in a technical sense becomes prohibited because incidentally the date of shipment and the date of DGFT notification was on the same date, when the appellant had taken all the steps for import of goods before import policy is changed the goods are not liable to absolute confiscation. Besides, the import goods are not banned for import by virtue of any Notification issued under section 11 of the Customs Act, 1962. For all purposes, keeping the legal aspect and the adjudication procedure in view, the goods may be redeemed after imposition of redemption fine, covering the value of the goods @ Rs.121/- per racket as per the condition of the DGFT Notification after adjustment of the demurrage charges incurred for detention of the goods.

30. The Hon'ble Supreme Court in the case of Atul Automations Pvt.Ltd. and Hargovind Das K. Joshi, granted redemption of prohibited goods which were ordered for absolute confiscation. However, in the case of Raj Grow Impex LLP, the Hon'ble Supreme Court distinguished these two cases from the case of import of green peas decided in the case of Raj Grow Impex LLP supra. The detail finding are given in para 65 of the order differentiating between prohibited and restricted goods, further in para 67.4(i) to 67.4(iii) it has been clarified that the decision of Atul Automations Pvt Ltd, will not apply in the case of import of peas because the underlying features for restricting the

import by quantum has been the availability of excessive stocks and adverse impact on the price obtainable by the farmers of the Country, which was not the case here. The items imported in those cases viz, photocopiers and printers in the case of Atul Automation and Zip fastener in the case of Hargovind Das K. Joshi are similar to the items imported in this case viz, mosquito swatter. The cases were distinguished so far as green peas import beyond their restricted quantity has got no application in the import of mosquito swatter with a minimum import price restriction only. Hence both the judgements of the Hon'ble Supreme Court, which were neither set aside nor overruled by the Hon'ble Supreme Court, are squarely applicable to the facts of the present case, for grant of redemption of the goods Viz, Mosquitoswatter/Bat, in lieu of absolute confiscation.

31. On the other hand the Ld. Authorized Representative for the Department is of the opinion that the present case is squarely covered by the judgment of three Judge Bench of Hon'ble Supreme Court in UOI & Ors Vs. Raj Grow Impex LLP & Ors delivered on 17.06.2021. The Ld. Consultant on behalf of the Appellant have taken two points strongly that in the case of Raj Grow Impex, wherein import of peas and pulses with quantity restrictions obviously with license cannot be equated with the present case where there was only restriction of Minimum Import Price. As per the container track report, the goods were processed for export but B/L was only issued on 26.04.2021, on which date the policy got amended by virtue of the restrictions brought in. From the facts it will be evident that they were not aware of the amendment in the policy, hence the case is completely distinguishable from the present case.

32. I find that the goods were ordered for shipment in 19.04.2021 and goods were shipped on 26.04.2021. So it is admitted that the items become prohibited since the declared value was much lower than Rs. 121/- per piece as per the DGFT notification dated: 26.04.2021. In terms of the policy para- 1.05, as transitional arrangement in case of export and import that is permitted freely

under FTP is subsequently subjected to any restriction or regulations, such export or import ordinarily be permitted, notwithstanding such restrictions or regulations, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restrictions..... Since the order for supply of the goods was not backed by any LC, no benefit of transitional arrangement can be extended.

33. So far as the items peas and pulses are concerned, the order of the Hon'ble Supreme Court is a Landmark decision of judicial pronouncements. But nowhere the Hon'ble Supreme Court observed in that order that prohibited goods cannot be redeemed. In para-71.1 of the order cited supra, it has been held *"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"*.

34. I find force in the submission of the Ld.Consultant that in the case of Har Govind Das K. Joshi Vs. Collector 1992 [61] ELT 172 [S.C.] the Hon'ble Supreme Court held that absolute confiscation of goods by Collector without question of redemption on payment of fine although having discretion but omitted to consider such a discretion available with him and remanded the matter to Collector for consideration of an exercise of discretion for imposition of Redemption fine. Besides, since the policy was amended when the shipment was in process their *mala fide* intention cannot be proved without any additional evidence to invoke penal clause under section 112 of the Customs Act 1962.

35. In the meantime the consultant produced documents and photographs stating that, the goods are suffering huge demurrage and partly some imported items stuffed in the container are damaged which were required to be verified maintaining the principles of natural justice.

36. In view of the above discussions, the impugned orders cannot be sustained and are accordingly set aside. The Appeals filed by the

Appellants are allowed by way of remand to the Adjudicating authority for denovo consideration and to decide the case using the discretion in a prospective manner.

(Order pronounced in the open court on 09 February 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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