

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO.93074 OF 2020

Horticulture Produce Exporters Association and
another ... Petitioners
Vs.
Union of India and others ... Respondents

Mr. Darius Shroff, Senior Advocate with Dr. Sujay Kantawala, Mr. Anupam Dighe, Ms. Chandni Tanna and Ms. Shrushti Relekar i/b. India Law Alliance for Petitioners.

Mr. Anil C. Singh, ASG with Mr. Aditya Thakkar and Mr. Anil D. Yadav for Respondent Nos.1 and 3.

Smt. Neha Bhide, 'B' Panel AGP for Respondent No.2-State.

Mr. Anil C. Singh, ASG with Mr. Pradeep S. Jetly, Senior Advocate and Mr. J. B. Mishra for Respondent Nos.4 to 6.

**CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.**

Reserved on: OCTOBER 13, 2020

Pronounced on: OCTOBER 20, 2020

P.C. : (Per Ujjal Bhuyan, J.)

Heard Mr. Darius Shroff, learned senior counsel along with Dr. Sujay Kantawala, learned counsel for the petitioners; Mr. Aditya Thakkar, learned counsel for respondent Nos.1 and 3; Ms. Neha Bhide, learned AGP for respondent No.2; and Mr. Anil Singh, learned Additional Solicitor General along with Mr. Pradeep S. Jetly, learned senior counsel instructed by Mr. J. B. Mishra, learned counsel for respondent Nos.4 to 6.

2. Petitioner No.1 before us is the registered association of exporters of onions whereas petitioner No.2 is a member of petitioner No.1 being proprietor of Fair Agro Enterprises.

3. Challenge made in this writ petition filed under Article 226 of the Constitution of India is to the notification No.31/2015-20 dated 14.09.2020 issued by Director General of Foreign Trade, Department of

Commerce, Ministry of Commerce and Industry, Government of India prohibiting the export of all varieties of onions with immediate effect; further, petitioners seek a direction to the respondents to release the goods (onions) for export where shipping bills of export were filed and generated with respondent Nos.4, 5 and 6 before issuance of the impugned notification.

4. When the case was taken up on 25.09.2020, the following order was passed:-

“ Heard learned Counsel for the parties.

2 Basic grievance of the Petitioners are that their bills for export of onions were prior to issuance of notification dated 14th September, 2020 whereby export of onions has been prohibited; yet those are not being permitted to be exported.

3 Mr. Jetly, learned Sr. Counsel submits on instructions that a decision has been taken by the Respondents to the effect that those consignments of onions which were loaded prior to issuance of the said notification will be allowed to be exported.

4 At this stage, Mr. Shroff, learned Sr. Counsel for the Petitioners submits that the goods of the Petitioners are yet to be loaded. In the meantime, validity of shipping bills will lapse on 26th September, 2020.

5 It appears that the consignments of the Petitioners were with the customs authority prior to issuance of the impugned notification. While we appreciate the decision taken by the Respondents to mitigate the hardship of those exporters where consignments were already loaded for export, we believe that it would be in the interest of justice if the same benefit is extended to the goods of the Petitioners because according to them their consignments were with the customs authority prior to issuance of the notification.

5.1 We expect a decision to be taken expeditiously as admittedly the goods are perishable.

6 Since the matter is before us, we make it clear that the shipping bills prior to issuance of the impugned notification shall not be construed to have lapsed till we decide the matter.

7 Mr. Jetly, learned Sr. Counsel shall obtain instructions from the Respondents and thereafter appraise the Court on the next date.

8 Stand over to 29th September, 2020.”

4.1. Thus by the said order this Court directed that the shipping bills filed prior to issuance of the impugned notification would not be

construed to have lapsed till a decision is taken by the Court. Thereafter, the case was taken up on a couple of occasions. On 06.10.2020, petitioners were directed to produce relevant records / documents relating to entry and exit of 68 containers from the parking plaza of Nhava Sheva Port Trust. Authorities of the parking plaza were directed to extend co-operation to the petitioners for production of the above documents.

5. On 08.10.2020, learned counsel for the petitioners submitted a list of 26 containers. It was stated that because of the present situation, petitioners could not collect details of the remaining containers. At that stage, Mr. Singh, learned Additional Solicitor General made a submission that he would verify the list submitted by the petitioners with the customs authorities and if it was found that those containers were parked in the parking plaza and subsequently made their exit, those would be allowed to be exported. While deferring the matter to 13.10.2020, it was observed that if the petitioners received details of the balance containers, those should be furnished to the office of Mr. Singh for verification as well.

6. On 13.10.2020, respondent Nos.4 to 6 filed additional affidavit. It may be mentioned that prior to that the said respondents had filed two affidavits. Thus, respondent Nos.4 to 6 have filed three affidavits in all. On a query by the Court, learned senior counsel for the petitioners, Mr. Shroff submitted that petitioners' assailment to the legality and validity of the impugned notification dated 14.09.2020 would stand and they would like to press the same as and when Court decides to finally hear the matter. After hearing learned counsel for the parties, the matter was reserved for orders.

7. While challenge to the impugned notification is on the ground that the same is arbitrary and unreasonable besides being contrary to the Foreign Trade Policy, 2015-20, in so far the second prayer is concerned,

it has been alleged in paragraphs 8(b) and 18 of the writ petition that even before the impugned notification was published for information of the trade and public, the customs authorities acting upon some inside information kept on hold the consignments where Let Export Orders were not issued from the morning of 14.09.2020. It is alleged that some information was internally communicated to the customs authorities that there would be some policy changes regarding export of onions and on that basis, the customs authorities did not allow entry of trucks carrying consignments (onions) inside the gates of the customs area. The allegation is that during the whole day of 14.09.2020, Let Export Orders were not issued despite filing and generation of shipping bills for export of onions.

7.1. It is specifically alleged that approximately 68 containers of exportable onions were brought to the parking plaza outside the customs area but respondent Nos.4, 5 and 6 during the entire day on 14.09.2020 did not process the Let Export Orders of those containers despite filing and generation of shipping bills.

7.2. The above grievance was immediately raised by the petitioners by sending e-mail to respondent No.3 on 14.09.2020 at 4:11 p.m. Thereafter prayer was made before the Commissioner, Nashik on 17.09.2020 to take up the matter with respondent No.3.

8. In the first affidavit of respondent Nos.4, 5 and 6 dated 30.09.2020, it is stated that impugned notification bearing No.31/2020 dated 14.09.2020 was received by the office of the answering respondents at 07:59 p.m. on 14.09.2020. It is stated that all the containers which were handed over to the customs authorities upto 24 hours on 13.09.2020 were allowed for export. An undertaking has been given that as directed by this Court, shipping bills filed prior to issuance of the impugned notification would not be construed to have lapsed till the matter is decided by the High Court. It is further stated that 15

containers were handed over to the customs authorities on 14.09.2020 which were allowed to be taken back to town. Answering respondents have assured that the benefit as extended to the goods already loaded for export would be extended to these 15 containers on completion of procedural formalities, further stating that if the petitioners' present details of containers other than the said 15 containers which were handed over to the customs authorities prior to issuance of the impugned notification, the same benefit would be extended to those containers as well. In para 8 of this affidavit, it is stated that customs authorities processed Let Export Orders for containers parked inside the parking plaza after completion of gate-in procedures and registration formalities. It is admitted that petitioners' submission that Let Export Orders of 68 containers which were kept outside the parking plaza were not processed is quite possible as the containers were not brought inside the parking plaza nor documents relating to the containers were registered; at the same time there is an evasive denial by the said respondents to the allegation that customs authorities acted arbitrarily on 14.09.2020 by not processing Let Export Orders for the 68 containers.

8.1. In the second affidavit filed on 05.10.2020, the procedure for export has been explained. While sections 50 and 51 of the Customs Act, 1962 lay down the basic framework of procedure for export of goods, it is however stated that only at the stage when the exporter approaches the customs officer with the relevant documents after parking the goods in the parking plaza that handing over of goods to the customs for verification takes place. Let Export Order is issued if everything is found in order after examination of goods and scrutiny of documents. Regarding the contention of the petitioners about parking of 68 containers in the parking plaza, it is stated that no documents have been placed on record to show that the containers were parked in the parking plaza, including any gate slip issued to show entry of the containers into the parking plaza. It has been clarified that those containers which were gated in the customs area and registered in the Electronic Data

Interchange system upto the date of the notification would be allowed to be exported.

8.2. In the third affidavit filed on 12.10.2020, it is stated that the two lists submitted by the petitioners providing details of the shipping bills along with container numbers were verified. First list included 24 shipping bills for 26 containers in which case it was contended by the petitioners that those containers were brought inside the parking plaza before issuance of the notification. It is admitted that 19 containers covered by 18 shipping bills had entered the parking plaza on or before 14.09.2020 before issuance of the notification. Out of the remaining containers, three were gated before issuance of the notification. Regarding the second list covering 26 shipping bills the said respondents have denied the contention of the petitioners that the related containers could not be taken inside the parking plaza due to restrictions imposed by the customs authorities. It is stated that such contention is hypothetical and an after-thought. Customs authorities have no role regarding entry and exit into the parking plaza. Their role come into play only when the goods are presented to the customs. Even then, after verification it has been found that containers covered by 6 shipping bills were gated in the parking plaza on or before issuance of the impugned notification. A specific stand has been taken that mere filing of shipping bills on or before the date of prohibition i.e., 14.09.2020 would not entitle the petitioners to claim exportability of the goods until and unless the goods were presented before the customs authorities for examination and issuance of Let Export Order.

9. Though petitioners have made a specific and serious allegation of insider knowledge of the customs authorities during the morning hours of 14.09.2020 about a notification to be issued prohibiting export of onions and acting upon such insider information did not accept any container of onions during the whole day of 14.09.2020, the same has not been specifically denied by respondent Nos.4, 5 and 6 in the three affidavits.

10. Be that as it may, Chapter VII of the Customs Act, 1962 (briefly 'the Customs Act') deals with clearance of imported goods and export goods. Sections 50 and 51 forming part of the said Chapter under the heading "Clearance of Export Goods" deals with entry and clearance of goods for exportation. As the heading itself suggests, section 50 deals with entry of goods for exportation. As per sub-section (1), the exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill and in the case of goods to be exported by land, a bill of export in the prescribed form and manner. As per sub-section (2), the exporter of any goods while presenting a shipping bill or bill of export shall make and subscribe to a declaration as to the truth of its contents. Sub-section (3) is more specific. It says that the exporter who presents a shipping bill or bill of export under section 50 shall ensure the following:-

- a. accuracy and completeness of the information given therein;
- b. authenticity and validity of any document supporting it; and
- c. compliance with the restriction or prohibition, if any, relating to the goods.

10.1. Section 51 deals with clearance of goods for exportation. As per sub-section (1), where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty assessed thereon and any charges payable, the proper officer may make an order permitting clearance and loading of the goods for exportation.

10.2. A conjoint reading of sections 50 and 51 of the Customs Act would *prima facie* indicate that a great deal of sanctity is attached to a shipping bill and a bill of export, shipping bill in the present case. While presenting a shipping bill the exporter has to disclose all the relevant information pertaining to the export and has to make a declaration as to

the truthfulness of the contents of the shipping bill.

10.3. In exercise of the powers conferred by section 157 (general power to make regulations) read with section 50 of the Customs Act, the Central Board of Indirect Taxes and Customs have made a set of regulations called “the Shipping Bill (Electronic Integrated Declaration and Paperless Processing) Regulations, 2019” (2019 Regulations). ‘Authorized person’ has been defined to mean an exporter or a person authorized by him under regulation 2(b). ‘Electronic integrated declaration’ has been defined under regulation 2(c) to mean particulars relating to the export goods that are entered in the Indian Customs Electronic Data Interchange System. Under regulation 2(d), ‘ICEGATE’ has been defined to mean the customs automated system of Central Board of Indirect Taxes and Customs. ‘Shipping bill’ has been defined under regulation 2(g) to mean an electronic integrated declaration accepted and assigned a unique number by the Indian Customs Electronic Data Interchange System, and includes its electronic records or print outs.

10.4. As per regulation 3, the authorized person shall enter the electronic integrated declaration and upload the supporting documents on the ICEGATE by affixing his digital signature on the ICEGATE or get the electronic integrated declaration made on the ICEGATE along with the supporting documents by availing the services at the service centre.

10.5. Regulation 4 provides for a situation when shipping bills are deemed to be filed and self-assessment completed. It says that the shipping bill shall be deemed to have been filed and self-assessment completed when after entry of the electronic integrated declaration on the ICEGATE or by way of data entry through the service centre, a shipping bill number is generated by the Indian Customs Electronic Data Interchange System for the said declaration.

10.6. Regulation 8 provides for imposition of penalty on any authorized person who contravenes or fails to comply with any of the provisions contained in the 2019 Regulations.

10.7. Thus, filing and generation of shipping bill is not an empty formality. It has a definite meaning assigned to it under the 2019 Regulations. It sets in motion the process of exportation of goods. The 2019 Regulations only reinforces the sanctity attached to a shipping bill under section 50 of the Customs Act.

11. In this connection, we may also usefully refer to internal communication of the Central Board of Indirect Taxes and Customs dated 18.09.2020 whereby clarification has been issued on date of shipment / dispatch in respect of exports having regard to the provisions contained in paragraph 9.12(B) of handbook of procedure. It says that wherever procedural / policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to consignments already handed over to the customs for examination and subsequent exports upto public notice / notification date. It has been clarified by the Central Board of Indirect Taxes and Customs that this provision would remain applicable wherever the conditions are met.

12. We have also considered the recent decision of the Supreme Court in *Union of India Vs. M/s. G. S. Chatha Rice Mills*, **Civil Appeal No.3249 of 2020** decided on **23.09.2020**. In this case, Supreme Court considered the starting point for enforceability of a notification published electronically. Following the Pulwama terrorist attack on 14.02.2019, Government of India had issued a notification on 16.02.2019 under section 8A of the Customs Tariff Act, 1975 whereby enhanced customs duty of 200% was imposed on all goods originating in or exported from the Islamic Republic of Pakistan. The precise time of uploading of the notification in the e-gazette was 20:46:58 hours of 16.02.2019. Customs authorities at the land customs station at Attari

border sought to enforce the enhanced rate of duty on the importers who had already presented bills of entry for home consumption as well as in those cases where assessments were made before the enhanced rate was notified in the e-gazette. This was challenged before the Punjab & Haryana High Court in a series of writ petitions. Punjab & Haryana High Court held amongst others that the relevant date and time for determination of duty would be the date and time of presentation of the bills of entry; bills of entry were presented on 16.02.2019 before issuance of the notification. Therefore, the amended rate of duty was not applicable on those bills of entry. Punjab & Haryana High Court also held that the said notification having been released after working hours, it would apply from the next day in terms of the decision of the Supreme Court in *Union of India Vs. Param Industries Limited*, (2016) 16 SCC 692.

13. Against this decision, Union of India approached the Supreme Court by filing Special Leave Petitions which on leave being granted were registered as civil appeals. In a categorical finding it has been held by the Supreme Court that the revised rate of import duty in terms of the notification would apply to bills of entry presented for home consumption after the notification was uploaded in the e-gazette at 20:46:58 hours on 16.02.2019. All the civil appeals were dismissed.

14. Our attention has also been drawn to the gazette notification dated 14.09.2020. Though respondents have stated in their first affidavit that they received copy of the same at 7:59 p.m. of 14.09.2020, from a perusal of the notification we find that the same was uploaded digitally on 14.09.2020 at 22:28:11 hours.

15. Thus having regard to the above and considering all aspects of the matter, we are of the view that a case for admission and interim relief is made out. Accordingly, we pass the following orders:-

1. Let Rule be issued;

2. Since the parties are already represented, issuance of further notice stands obviated;
 3. In continuation of our order dated 25.09.2020, export of onions in respect of the shipping bills which were presented and generated prior to 22:28:11 hours on 14.09.2020 shall be allowed subject to the clarification given by the Central Board of Indirect Taxes and Customs in its communication dated 18.09.2020;
 4. List this matter in the first week of December, 2020 for fixing a date of hearing.
16. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(ABHAY AHUJA, J.)

(UJJAL BHUYAN, J.)

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