



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 247 OF 2024

M/s. SCK International through its Proprietor ... Petitioner
Abhishek Khurana

Versus

Commissioner of Customs (Nhava Sheva-V) & Ors. ... Respondents

Mr. Kashish Gupta i/b Ms. Nikita Sheth, for the Petitioner.
Mr. Advait Sethna a/w Ms. Sangeeta Yadav, for Respondent.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 6 February, 2024

Oral Judgment :- (Per G. S. Kulkarni, J.)

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.
2. The petitioner is a proprietorship stated to be regularly importing, what is described as “premium cold coffee”. These imports subject matter of the present proceedings are from Vietnam. The contents of such product inter alia are water, Coffee Bean, Coffee Extract, Sugar, Whole Milk powder, Non Dairy Creamer, Stabilizer and Cappuccino Flavor etc. The petitioner seeks provisional release of two consignments which are subject matter of bills of entry No.8219403 dated 9 October 2023 and second bill of entry No.8362251 dated 15 October 2023, which are assessable value of Rs.12,36,082/-and Rs. 24,98,333/- respectively.

3. The case of the petitioner is that these goods are not released and in fact which are now incurring demurrage, and in so far as the second bill of entry is concerned it is stated that as on date the detention charges itself have gone up to Rs.6,00,000/-.

4. Learned counsel for the petitioner has contended that the department's action to detain the goods is wholly arbitrary and illegal, inasmuch as, in the past i.e. between the period 26 August 2022 to 13 July 2023, about seven consignments of the same products were released on provisional assessment. The details of which reads thus:

Consignment Released

| As per SCK International | | | | | As per Customs Department | | | | Difference | | | Bank Guarantee submitted for | |
|--------------------------|---------------|---------|------------------|--------------------------------------|---------------------------|---------------------------------------|---------------------------------|-------------|--------------|-------------------|---------------|------------------------------|--------------|
| S. No. | Bill of Entry | Date | Assessable Value | IGST | Assessable Value | IGST | Compensation Cess | Total | IGST | Compensation Cess | Total | | |
| | | | | [Not. No. 01/2017-CT (Rate) 50 (II)] | | [Not. No. 01/2017-CT (Rate) 12A (IV)] | [Not. No. 01/2017-CC (Rate) 56] | | | | | | |
| | 1 | 2 | 3 | 5 | 7 | 9 | 10 | 11=(8+9+10) | 13 | 14 | 15=(12+13+14) | 16 | |
| | 1 | 2179570 | 26.08.2022 | 31,27,130.00 | 3,75,255.60 | 31,27,130.00 | 8,75,596.40 | - | 8,75,596.40 | 5,00,340.80 | - | 5,00,340.80 | 5,01,341.00 |
| | 2 | 2199195 | 27.08.2022 | 58,57,872.00 | 7,02,944.64 | 58,57,872.00 | 16,40,204.16 | - | 16,40,204.16 | 9,37,259.52 | - | 9,37,259.52 | 9,37,260.00 |
| | 3 | 3779061 | 16.12.2022 | 37,32,554.00 | 4,47,906.48 | 37,32,554.00 | 10,45,115.12 | - | 10,45,115.12 | 5,97,208.64 | - | 5,97,208.64 | 5,97,208.00 |
| | 4 | 5289897 | 29.03.2023 | 15,39,986.00 | 1,84,798.32 | 15,39,986.00 | 4,31,196.08 | - | 4,31,196.08 | 2,46,397.76 | - | 2,46,397.76 | 3,27,709.00 |
| | 5 | 6294651 | 06.06.2023 | 12,01,770.00 | 1,44,212.40 | 12,01,770.00 | 3,36,495.60 | 1,44,212.40 | 4,80,708.00 | 1,92,283.20 | 1,44,212.40 | 3,36,495.60 | 2,60,000.00 |
| | 6 | 6552029 | 23.06.2023 | 11,77,329.41 | 1,41,279.53 | 11,77,329.41 | 3,29,652.23 | 1,41,279.53 | 4,70,931.76 | 1,88,372.71 | 1,41,279.53 | 3,29,652.23 | 3,30,652.00 |
| | 7 | 6855226 | 13.07.2023 | 12,37,463.18 | 1,48,495.58 | 12,37,463.18 | 3,46,489.69 | 1,48,495.58 | 4,94,985.27 | 1,97,994.11 | 1,48,495.58 | 3,46,489.69 | 3,50,000.00 |
| | 1 to 7 | | | 1,78,74,104.59 | 21,44,892.55 | 1,78,74,104.59 | 50,04,749.29 | 4,33,987.51 | 54,38,736.79 | 28,59,856.73 | 4,33,987.51 | 32,93,844.25 | 33,04,170.00 |

Consignment detained as informed

| As per SCK International | | | | | As per Customs Department | | | | Difference | | | |
|--------------------------|---------------|------------|------------------|--------------------------------------|---------------------------|---------------------------------------|---------------------------------|--------------|-------------|-------------------|---------------|------------------------------|
| S. No. | Bill of Entry | Date | Assessable Value | IGST | Assessable Value | IGST | Compensation Cess | Total | IGST | Compensation Cess | Total | Bank Guarantee submitted for |
| | | | | [Not. No. 01/2017-CT (Rate) 50 (II)] | | [Not. No. 01/2017-CT (Rate) 12A (IV)] | [Not. No. 01/2017-CC (Rate) 56] | | | | | |
| | 1 | 2 | 3 | 5 | 7 | 9 | 10 | 11=(8+9+10) | 13 | 14 | 15=(12+13+14) | 16 |
| 8 | 8219403 | 09.10.2023 | 12,36,082.00 | 148329.84 | 12,36,082.00 | 3,46,102.96 | 1,48,329.84 | 4,94,432.80 | 1,97,773.12 | 1,48,329.84 | 3,46,102.96 | 3,49,000.00 |
| 9 | 8362251 | 18.10.2023 | 24,98,333.00 | 2,99,799.96 | 24,98,333.00 | 6,99,533.24 | 2,99,799.96 | 9,99,333.20 | 3,99,733.28 | 2,99,799.96 | 6,99,533.24 | - |
| 8 to 9 | | | 37,34,415.00 | 4,84,129.80 | 37,34,415.00 | 10,45,636.20 | 4,48,129.80 | 14,93,766.00 | 5,97,506.40 | 4,48,129.80 | 10,45,636.20 | 3,49,000.00 |

5. It is contended that as set out in column 16 the bank guarantee in regard to each of these consignment was furnished by the petitioner, however, till date no action whatsoever has been taken and the bank guarantee is also retained by the respondents. The contention is also that any further action on such consignment as released itself is by now time barred. Hence a prayer is made in the petition that the said bank guarantee be released to the petitioner.

6. The grievance of the petitioner is in regard to the two bills of entry dated 19 October 2023 and 18 October 2023 as noted by us above, that the said consignments subject matter of these bills of entries being detained, needs to be provisionally released.

7. We had heard the present proceedings initially on 9 January 2024 when the following orders came to be passed:

“We have heard learned counsel for the petitioner for some time on the issue of provisional release of goods and the petitioner's grievance in regard to the letter dated 15 November, 2023 (Exhibit-T to the petition) namely 100% bank guarantee of Rs. 25 Lakh being insisted on behalf of the respondents. Mr. Mishra, learned counsel for the respondents intends to take instructions. He would support the impugned condition. The petitioner is, however, insisting for provisional release of the goods in question as they are perishable commodities, only on furnishing bond by the petitioner.

2. We have also been pointed out that the dispute is on classification in regard to the appropriate duty, which would be required to be levied. Let a short reply affidavit be served on the advocate for the petitioner well in advance.

3. List the proceedings on **22 January, 2024 (H.O.B.)**.

4. In the meantime, the concerned officer/Commissioner of Customs can also take a decision as to whether the insistence on 100% bank guarantee in the facts of the case and applying the circular, as usually applied, can be either waived or reduced.”

8. Thereafter, on 22 January 2024 again the proceeding was required to be adjourned, when the Court passed the following order:

“1. As a last chance, at the request of Mr. Mishra, learned counsel for Respondent Nos.1 to 5, stand over to **5 February 2024. High On Board.**

2. A request of the petitioner is that a copy of the letter dated 3 November 2023 referred in paragraph 1 of the letter dated 15 November 2023 of Ms. Shweta Suman, Assistant Commissioner of Customs, Appearing Gr.I & IA, NS-I, JNCH, be furnished to the petitioner.

3. Let the department furnish a copy of such letter to the petitioner or on before the adjourned date of hearing.”

9. Thereafter, on 5 February 2024 when the proceedings were listed, while adjourning the proceeding the Court passed the following order :

“1. We had heard the proceedings on 9th January 2024 and therefore, on 22nd January 2024. On both these dates, we had passed the Orders. In these circumstances, we expected the Revenue to inform the Court their stand on

the contention of the Petitioner in regard to the provisional release of the goods in question, which are perishable commodities.

2. Today, we are informed by Mr. Mishra that Mr. Advait Sethna and Ms. Sangeeta Yadav are appointed to appear on behalf of the Respondents. However, both the learned counsel appointed by the Respondents are not present.

3. We accordingly, as a matter of last chance, would hear the proceedings tomorrow and consider the interim prayers made in the Petition.

4. Stand over to **6th February 2024 on the Supplementary Board.**”

10. It is on the above backdrop, we have heard learned counsel for the parties. Learned counsel for the petitioner would submit that the petitioner is a bonafide importer, there have been imports in the past which were subject matter of provisional release and /or bank guarantor at 16% and / or 28% which were required to be furnished by the petitioner at the insistence of the department. He submits that on furnishing of the bank guarantee the goods were provisionally released, the details of which are already noted by us in the chart as extracted hereinabove. It is his submission that there is no reason whatsoever that the same product is required to be differently treated in so far as the two bills of entries in questions are concerned.

11. Our attention has also been drawn to an order dated 15 November 2023 passed by Mr. Shweta Suman, Assistant Commissioner of Customs, whereby provisional release of the goods under the said two bills of entries were permitted to the petitioner, however on the condition that the petitioner

furnishes bonds of full value of the goods that is Rs.33,34,416/- and the petitioner executing 100% bank guarantee of Rs. 25,00,000/- and further a NOC from the PGA. Thus, a decision is already taken by the designated officer for provisional release of the goods under the said two bills of entry, however, the petitioner contends that on an arbitrary and/or an onerous condition of 100% bank guarantee of Rs.25 lakhs the goods are not being released. The learned counsel for the petitioner would submit that there is *ex facie* no reason for a different yardstick to be applied in demanding a bank guarantee of Rs. 25 Lacks from the petitioner, when earlier, seven consignments were released on bank guarantee which were variable between to 16 % to 28 %. It is therefore his submission that the petitioners are entitled to provisional release of the goods on bank guarantee at 28% which is already furnished in respect of the first bill of entry (Bill of Entry No. 8219403) which is of Rs.3,49,000/-. Insofar as the second bill of entry is concerned the learned counsel for the petitioner has submitted that it would be harsh that the petitioner is subjected to 28% bank guarantee in as much as the goods have already incurred demurrage of Rs. 6 lakhs when the value of the goods itself being Rs.28,888/-. It is therefore his submission that a reasonable view is required to be taken and the petitioner be permitted to furnish a bank guarantee of Rs.2 lakhs.

12. On the other hand Mr. Sethna, learned counsel for the department would submit that the action of the department granting provisional release of the goods vide communication dated 15 November 2023 of the Assistant Commissioner Ms. Shweta Suman on the conditions as prescribed is appropriate and reasonable. He submits that the goods under the two bills of entry are subject matter of investigation by SIIB and it is for such reason the conditions as imposed are required to be held to be justified. However, there is nothing on record as to why the goods are subjected to such investigation.

13. Responding to the contentions as urged on behalf of the learned counsel for the petitioner would submit that the goods are already approved for clearance by the FSSAI and the NOCs in that regard was already submitted by the FSSAI to the department, and which was also the course of action which was undertaken in respect of the prior seven bills of entry.

14. We have heard learned counsel for the parties and with their assistance we have perused the record.

15. Considering the facts and circumstances of the case as noted by us above, in our opinion, it would be in the interest of justice that the petitioner is permitted to have the provisional release of goods on the department being directed to accept bank guarantee of Rs.3,49,000/-, insofar as bills of entry No. 8219403 is concerned and a bank guarantee of Rs.2,00,000/- in respect of the

second bill of entry. In passing such order what would weigh with us is the consistent position taken by the department in respect of the earlier release of the goods, subject matter of seven bills of entry during the period 26 August 2022 to 13 July 2023, which we have noted above, and in respect of such similar consignments the department had admittedly granted provisional release by accepting from the petitioners the bank guarantee at 16% to 28% which itself was variable. We are not pointed out anything on affidavit although substantial time has lapsed considering the adjournments of the present proceedings, as to why different yardstick is required to be given to the present two consignments. In the absence of any acceptable material, we are not persuaded to accept Mr. Sethna's contention that the goods in question should be released on onerous condition as set out in the communication dated 15 November 2023 issued by the Assistant Commissioner Ms. Shweta Suman of the petitioner requiring to furnish 100% of bank guarantee at Rs.25,00,000/-.

16. The contention of the petitioner is that the FSSAI has approved the goods for domestic consumption is also required to be accepted which was a situation also in respect of the earlier seven consignments, hence, now new condition of a 100% bank guarantee cannot be foisted on the petitioner, if there is no difference whatsoever in the goods which are subject matter of the bills of entries.

17. We may also observe that the petitioner is a proprietorship and a small importer, the pattern of imports have also been quite consistent. The goods in question are certainly edible goods which are perishable. The petitioner ought not to have been meted out such discriminatory treatment of denying clearance. Also it is imperative that harsh and unreasonable conditions cannot be imposed and more so when there is not an iota of material on the part of the department, as placed before the Court indicating as to why a different yardstick would be required to be applied to the present consignments when earlier seven consignments were released at 16% to 28% bank guarantee.

18. It is these circumstances, we find that it is in the interest of justice that the petitioners be permitted provisional release of the two consignments, hence the following order:

ORDER

i) Respondents are directed to grant provisional release of the goods to the petitioners, subject matter of bills of entry No. 8219403 and 8362251, by accepting the bank guarantee from the petitioner of Rs. 3,49,000/- in respect of the first bill of entry and bank guarantee of Rs.2,00,000/- in respect of the second bill of entry. Necessary action in that regard be taken within 10 days from today.

ii) In addition to the said bank guarantees, the petitioner shall furnish a bond as per the conditions as incorporated in the letter of Assistant Commissioner, of Custom dated 15 November 2023 for the full of the goods which is of Rs.37,34416/-.

iii) The goods be released within one week from the petitioners furnishing the bank guarantee and the bond, as directed hereinabove.

19. In so far as the other reliefs, on return of the bank guarantee are concerned the petitioner is at liberty to make a representation to the respondents for return of the bank guarantee which be made within a period of two weeks from today. If such a representation is made the same shall be considered by the designated officer on its merits and in accordance with law and communicate its decision within a period of four week from the submission on such representation.

20. Rule is made absolute in the above terms. No costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI, J.)