

HIGH COURT OF GUJARAT (D.B.)

**M/S MKS GLOCOMM LLP
V/S
UNION OF INDIA**

Date of Decision: 30 September 2022

Citation: 2022 LawSuit(Guj) 7729

Hon'ble Judges: [N V Anjaria](#), [Bhargav D Karia](#)

Eq. Citations: 2023 (383) ELT 518

Case Type: Special Civil Application

Case No: 17109 of 2022, 17831 of 2022

Subject: Civil

Final Decision: Petition disposed

Advocates: [Mihir Joshi \(Senior Advocate\)](#), [Rohan Lavkumar](#), [Vikram Naik](#), Nanavati Associates, [Priyank Lodha](#), [Kamal Trivedi \(Senior Advocate\)](#), [Unmesh Shukla \(Senior Advocate\)](#), [Manav A Mehta](#), [Bulbul Singh Rajpurohit](#), [Prashant Asher](#), [Ankeeta Raput](#)

Reference Cases:

[Cases Referred in \(+\): 2](#)

Judgement Text:-

N V Anjaria, J

[1] Both the petitions arise out of same controversy and are interactive.

[2] Heard learned senior advocate Mr.Mihir Joshi with learned advocate Mr.Rohan Lavkumar for Nanavati Associates for the petitioner in Special Civil Application No.17109 of 2022, learned senior advocate Mr.Kamal Trivedi with learned advocate Mr.Manav Mehta for the petitioner in the other petition and learned advocate Mr.Priyank Lodha for the respondent authorities, in both.

[3] The two petitioners of the first petition are the importers and its agent respectively who imported at Mundra Port cargo of Soyabean which were allegedly genetically modified and prohibited good, as were another cargo of Pigeon peas, both of Mozambique Origin. Both the cargo travelled through the sea in the vessel MV Polaris Z (IMO 9109512), the owner of which is the petitioner of the Special Civil Application No.17831 of 2022.

3.1 The petitioners of the first captioned petitions- the importers, made the following prayers.

"(i) to set aside the illegal and arbitrary Seizure vide Memo dated 1st July 2022 comprising of Pigeon Peas consignment of 3363.5 MT detailed in Bill of Entry Nos. 1007108 and 1007106 and the Soybean consignment weighing 13,289.50 MT detailed in Bill of Entry Nos. 1007101, 1007098, 1007096, 1007105 and 1007104;

(ii) to set aside the seizure vide Memo dated 1st July 2022 insofar as the same relates to the cargo of Pigeon Peas and be further pleased to direct the Respondents to assess and permit due clearance of Bill of Entry Nos. 1007108 and 1007106;

(iii) to assess the bills of entry Nos. 1007101, 1007098, 1007096, 1007105 and 1007104 for the provisional release for re-export of the soyabean cargo after necessary bagging and processing.

(iv) to permit unloading the cargo containing Pigeon Peas consignment weighing 3363.5 MT detailed in Bill of Entry Nos. 1007108 and 1007106 and permit the same to be warehoused in the Free Trade Warehouse Zone;

(v) to issue any order or direction to the Respondent Authorities permitting the clearance of the cargo containing Pigeon Peas consignment weighing 3363.5 MT detailed in Bill of Entry Nos. 1007108 and 1007106 for warehousing and subsequent home consumption;

(vi) to permit unloading the cargo containing Soybean consignment weighing 13,289.50 MT detailed in Bill of Entry for warehousing Nos.1007101, 1007098, 1007096, 1007105 and 1007104 and permit the same be warehoused in the Free Trade Warehouse Zone;

(vii) to issue any order or direction to the Respondent Authorities permitting the provisional release and re-export of the said soybean consignment weighing 13,289.50 MT as detailed in Bill of Entry Nos. 1007101, 1007098, 1007096, 1007105 and 1007104 subject to such terms and conditions as required in law and as the Court deems appropriate;

(viii) to issue any order or direction to the Respondents and its officers to refrain from taking any coercive actions against the Petitioners."

3.1.1 The goods namely the genetically modified Soyabean, the cargo of which also arrived in the vessel are allegedly prohibited goods not permitted to be imported. In that view, the custom authorities seized the cargo comprising of the allegedly genetically modified Soyabean as well as the cargo of Pigeon peas loaded in the vessel. The vessel was also seized on the very ground of carrying to import the allegedly prohibited goods.

3.1.2 In the second petition, therefore the following prayers came to be made.

"(a) Calling upon Respondent No. 2 & 3 to produce all the papers and documents relating to the issuance of the Seizure Memo dated 1st July 2022 and Order in Original dated 30th August 2022 and after examining the same, this Court be pleased to quash and set aside the said Seizure Memo dated

1st July 2022 and Order in Original dated 30th August 2022;

(b) direction to the Respondents to release of the Vessel MV Polaris Z (Imo 9109512) from its seizure vide Seizure Memo dated 1st July 2022."

3.1.3 Following interim prayer was made.

"To provisionally release the Vessel upon such terms and conditions as this Court may deem fit."

3.2 As observed in the first order while issuing notice on 1.9.2022, learned advocate for the petitioner was permitted to furnish copy of the petition in advance to the office of learned Additional Solicitor General and it was further observed that he shall assist the court on the next date as to how the goods genetically modified Soyabean, which are stated to be not permitted to be imported to India, could be treated, pending consideration of the controversy of the petition.

3.2.1 On 8.9.2022 following order was passed.

"The grievance in this petition is directed against the seizure by customs authorities by memo dated 1.7.2022, the goods identified as pigeon-peas, which is the consignment of 3363.5 MT, detailed in bill of entry No.1007108 and 1007106. The grievance and the prayer also relates to the other cargo of soya-bean being the consignment weighing 13,289.50 MT detailed in the bill of entry No.1007101 and four others, as reflected in the prayer.

2. The cargo of the above two sets of goods having been arrived at Mundra Port, the two cargo consignments alongwith the vessel have been seized by custom authorities. The ground of seizure is stated to be that the soya-bean brought in vessel are the genetically modified goods. They are the goods not permitted to be imported in the country or exported. The goods are presently lying inside the vessel which is stationed within the territorial waters of India.

3. It was stated by learned senior advocate Mr.Mihir Joshi for the petitioner that the cargo was to be brought inside the area of Special Economic Zone. As far as the seizure is concerned, both the cargo are seized. Admittedly, there is no prohibition for import of pigeon-peas, the consignment of which is seized by the authorities.

4. Learned advocate Mr.Priyank Lodha who appears for the respondents shall file affidavit explaining the stand of the authorities as to in what way and manner the authorities are going to treat the cargo containing soya-bean- the genetically modified goods as well as also the cargo of pigeon-peas which are not prohibited goods.

5. The affidavit shall also state the reasons for detaining the cargo of pigeon-peas along with the other cargo."

3.2.2 The petitions were further considered on 15.9.2022 noticing the prayers in both the petitions, and having regard to the fact that the affidavit dated 15.9.2022 was filed on behalf of the owner of the vessel- the petitioners in Special Civil Application No.17831 of 2022, it was recorded thus,

"On behalf of the petitioner- vessel owner, additional affidavit dated 15.9.2022 was tendered today. In the said affidavit, following detail is brought out. The copy of the Hull and Machinery Insurance Policy in support of the above averments is produced. The said affidavit, taken on record, extracted in its relevant part.

"The present affidavit only for the limited purpose of bringing on record the approximate value of the vessel MV POLARIS-Z (IMO 9109512). Summary of insurance dated 05.09.2022 issued by Deepblue Insurance Broker would go to show the vessel (Hull & Machinery) is insured for a value of USD 3,500,000 and is nowhere near the insured value as stated by the Respondents."

3.2.3 The previous order dated 8.9.2022 was referred to and it was further observed in order dated 15.9.2022.

"4. As there was no prohibition for import of Pigeon Peas, the consignment of which was also seized by the custom authorities, and which fact learned advocate for the parties also could not dispute, he was asked by the court to get instructions about the release of the said part of the cargo. In response, learned advocate for the respondents, in course of the hearing today, stated that since Pigeon Peas are the goods which could be permitted to be imported and unloaded, there would be no inhibition in law in permitting the said cargo to be unloaded.

4.1 In support of his submission, learned advocate for the authorities produced copy of email communication dated 15.9.2022 issued by him from one Shri Shrikant Mantri, Deputy Commissioner, SIIB, Mundra Customs.

4.2 The instructions contained in the said communication from the authority reads as under.

"Respected sir,

With respect to the pigeon peas it is to be submitted that A total 3363.5 MT of Pigeon Peas were seized vide Seizure Memo dated 01.07.2022 which were brought along with the Genetically Modified Soyabean. The petitioner has filed an additional affidavit on 14.09.2022 wherein it is submitted that as per annexure B of the affidavit which is the stowage plan, consignment of pigeon peas and soybean are stored in independent holds which are structurally independent and secure and therefore, the petitioner submitted that there cannot be any mixing or cross exposure between soyabean and pigeon peas. The Petitioner also stated that cargo is deteriorating due to humidity. The pigeon peas were not released because of the apprehension that unloading the same may carry a risk of spillage. However, if the same are to be released, it is to submit that Pigeon Pea, which were tested and found Non Genetically Modified, may be released in the presence of the

representative of Plant and Quarantine Station, Mundra and FSSAI. Also, it may generally take around 24 hours time in berthing of the vessel and to shift the cargo in Agree Park situated at Mundra, subject to availability of berthing at the port. Shifting of the cargo may be done in the presence of Custom Authorities and the same shall be under Videography.

Regards Shrikant Mantri

Deputy Commissioner,

SIIB Munda Customs."

4.3. In the above communication, the authorities has stated that the cargo of Pigeon Peas can be released in the presence of representative of Plant and Quarantine Station, Mundra and FSSAI. The quantity of Pigeon Peas in the cargo which is 3363.5 MT were tested by taking sample and found non-generically modified, as reflected in the above instruction.

4.4 It is relevant to notice the additional affidavit dated 14.9.2022 filed by the petitioner of the Special Civil Application No.17109 of 2022, in which, in addition to mentioning that the cargo of Soyabean as well as cargo of Pigeon Peas on board the vessel MV Polaris are reported to be in degrading condition and that they are prone to climatic conditions to get rapidly deteriorated. It was also unequivocally stated in para 2 that both the cargos are in independent holds and are separate by themselves. Following is stated on oath.

"I state that the consignment of Pigeon pea and the consignments of Soya bean are stored in independent holds on the vessel M.V. Polaris. Hold no. 1 contains about 3663 MT of Pigeon Pea alone, while the remaining Holds 2, 3 and 4 contain Soyabean. All the holds are structurally independent and secure. Thus, there is no mixing, comingling, pilferage whatsoever between cargo in each of the Holds. Goods sorted and stored into each hold is separate and distinct. Hence, Pigeon Peas are at no point mixed with the

Soyabean and therefore there is no basis to claim mixing or cross-exposure between soyabean and pigeon peas which are stored in distinct and different holds on board the vessel M V Polaris."

4.5 Learned advocates for the parties in view of the above factual position, agreed to submit that both the cargos are segregated cargos in independent hold and one could be unloaded without touching or affecting the other.

5. What is obtained from the above set of facts is that it is not in dispute between the parties that the cargo of Pigeon Peas, having tested through sample method and found nongenetically modified are the goods the import of which is permissible to this country. The cargo thereof therefore could be allowed to be unloaded by the importer pending the controversy relating to another cargo, alleged to have been genetically modified Soya Bean."

3.2.4 The following directions were issued in the said order.

"6. At this stage therefore, the court is inclined to pass and passes the following direction delimited to the cargo of Pigeon Peas.

(i) The respondent- Custom authorities shall permit the release and unloading of cargo of Pigeon Peas of the total 3363.5 MT lying on board the vessel MV Polaris.

(ii) For the above purpose, the vessel in question shall be allowed berth at the port of Mundra, which is presently stationed at a distance, for which the space is available at the Mundra Port. The berth of the vessel shall be for the above purpose only.

(iii) The unloading of cargo shall be in the presence of representatives of the petitioner and under strict supervision of the representatives of the custom authorities. The petitioner shall communicate to the competent custom authority the name of its representative who would remain present

throughout the unloading of cargo. In addition to the above two representatives, the representative of Plant and Quarantine Station, Mundra and FSSAI shall also remain present.

(iv) The release of the cargo to be done in the presence of representative of custom authorities as above and entire unloading shall be videographed.

(v) While and after unloading the cargo of Pigeon Peas the respondent authorities shall undertake the process of granting clearance to the cargo by finally assessing the nature of goods which are detailed in bill of Entry Nos.1007108 and No.1007106.

(vi) The process of clearance report shall be produced before the court on the next date.

(vii) On the next date, the authorities shall file an affidavit stating about the procedure in law they would require to undertake and giving details of such legal procedure for the purpose of treating the alleged genetically modified Soyabean. "

3.3 Additional affidavit in reply dated 1.9.2022 was filed on behalf of the respondent No.3 which was taken on record and following further order was passed on 22.9.2022, reproducing the relevant paragraphs of the said additional affidavit.

"2. Paragraph 7 of the affidavit reads as under, "7. It is submitted that an opinion was also sought from the Plant Quarantine Station, Mundra vide letter dated 25.08.2022. In response of which the Plant Quarantine Station, vide their letter dated 26.08.2022, informed the present respondent that destruction and deportation of the goods are two options, however, destruction through incineration of such huge quantity i.e. 13,500 MTS may not be feasible as well as environment friendly. Therefore, the deportation of the impugned goods is the feasible way if the law permits. Copy of the response from the Plant Quarantine Station dated 26.08.2022 is annexed

herewith and marked as Annexure R1."

2.1 Further mentioned in paragraph 9 is thus,

"9. In view of the above typical circumstances, wherein the Genetically modified goods, can neither be cleared in India nor destruction of the same is preferable, the impugned goods may be deported as suggested by the Plant Quarantine Station, Mundar pending completion of the investigation and subject to the provisions of the Customs Act, 1962 more specifically the provisions pertaining to provisional release and provided that the concerned parties including the importer co-operate in the investigation. The concerned parties with respect to the Goods as well as the vessel, may apply for provisional release as per section 110A and the concerned authority shall consider the same subject to the terms and conditions as may be imposed including furnishing Bank Guarantee and Bond of appropriate value. Further, in order to ensure that the goods do not come back to India after re-routing the importer must submit the proof regarding offloading of the subject goods at the exporting country i.e. Mozambique.

2.2 The affidavit proceeds to state,

10. It is most respectfully submitted that deportation in the present set of facts and circumstances may be the preferred route, however, the same may not be treated as a binding precedent in every case where after initiation of proceedings against illegal imports the concerned importer/other such party requests for reexport/deportation."

3. On the basis of the aforesaid affidavit, learned advocate for respondent no.3 submitted that the authorities have stated that it is feasible to permit deportation of the goods. He further submitted that the same will have to be done in accordance with law and after considering the applications for provisional release of the goods pending at the instance of both the petitioners.

3.1 It is to be recollected that first captioned Special Civil Application No. 17109 of 2022 is filed by the importer of goods, Genetically Modified Soybean, whereas the other petition is by the owner of the vessel in which the goods travel to reach the Port of Mundra.

4. Learned Senior Advocate Mr. Mihir Joshi for the petitioner in Special Civil Application No. 17109 of 2022 stated that the petitioner has already filed application dated 27.07.2022 (copy figuring at page 214 of the petition), dated 03.08.2022 (page 217 in the petition) and dated 16.08.2022 (at page 219), whereby the authorities have been forwarded the request to provisionally release the goods in question. It was further submitted that once the appropriate decision is arrived at by the authorities, the petitioner is willing to deport the goods back to the country of origin as they are considered prohibited goods.

4.1 Learned senior advocate Mr. Kamal B. Trivedi, appearing for the petitioner in the other petition where the petitioner is the owner of the vessel, stated that this petitioner has also filed his application dated 15.07.2022 seeking provisional release of vessel. He submitted that the decision deserves to be taken by the competent authority in his case also.

5. Responding to the above factum of pending applications by both the petitioners for provisional release of the goods as well as the vessel, learned advocate for respondent no.3 stated that the said applications which have remained undecided, shall be decided by the competent authority. He further stated that the order which may be passed by the competent authority would be placed on record of the petition on the next date."

3.4 When the petitions came up for consideration on 29.9.2022, respondent No.3 filed additional affidavit in response to what was observed by the court in order dated 22.9.2022. On behalf of the petitioner Nos.1 and 2 also additional affidavit was filed, they were taken on record. It may be stated that learned advocate for the respondent No.3 produced copy of communication dated 27.9.2022 received by e-mail from the Deputy Commissioner SIIB, Mundra Customs, instructing his learned advocate about the aspect of

provisional release of the goods allegedly genetically modified Soyabean and the conditions proposed to be imposed. The copy of the said communication is also kept on record.

3.4.1 On the basis of the instructions, in the additional affidavit dated 28.9.2022, following was stated by respondent No.3.

"In furtherance to the order dated 22.09.2022 and proceedings in the matter, an Order for provisional release of Genetically Modified Soyabean vide F. No. VIII /48-322/M K S GLOCOMM/Gr-I/MCH/22-23 dated 27.09.2022 has been passed by the competent adjudicating authority, wherein the provisional release is accorded of the GM Soybeans and directed to produce the following documents:

- a) Bond of the entire value of the cargo ie. 84 cores in rupees.
- b) Bank Guarantee of 25% of the value of the cargo i.e. 21 Crores in rupees.
- c) Undertaking of unloading of the goods at Mozambique Port will be submitted once the goods are offloaded at Mozambique Port.

A copy of the said order is annexed herewith and marked as Annexure R1."

3.4.2 Thus, as per the stand revealed in the aforementioned additional affidavit, the respondent authorities have proposed imposition of three conditions namely the bond for entire value of cargo of allegedly prohibited genetically modified Soyabean, that is 84 crores in rupees. Second condition sought to be imposed is the bank guarantee of 25% of the value of the cargo that is 21 crores in rupees. The last was to give undertaking of unloading of the goods at Mozambique Port and to submit the same once the goods are offloaded at Mosambique Port. It was stated that the cargo of the said allegedly prohibited goods could be provisional release for the purpose of deportation back to the country of origin, on compliance of such condition.

3.5 While on one hand, authorities have proposed the aforesaid preconditions for the purpose of provisional release of cargo, learned advocate for the respondent submitted that in the normal circumstances, the prohibited goods were liable to be destroyed, still however the authorities have thought it appropriate to provisionally release on aforesaid conditions in view of the facts operating in the case. We take notice of this solution-oriented stand and the submission accordingly made on the basis of instructions while passing the present order.

3.6 The petitioner Nos.1 and 2 in their aforementioned additional affidavit dated 29.9.2022 have responded to the said three conditions mentioned above proposed by authorities for provisional release. The petitioner has stated in para 5 of the affidavit that they are agreeable in respect of the condition Nos. (i) and (iii), however the petitioners find that the condition No. (ii) as harsh. It was further contended that the amount of penalty etc. would be finalized only at the time of adjudication, therefore requiring the petitioners at this stage to furnish bank guarantee to the tune of Rs.21 crores is not justified.

[4] Today further affidavit dated 30.9.2022 came to be tendered by respondent No.3 in which it was inter alia contended that the conditions were required to be imposed on the petitioner for the provisional release of genetically modified Soyabean, that the said conditions were in nature of security to protect the interests of the revenue, therefore they were justifiably proposed. Reference to Section 112 of the Customs Act was made by learned advocate for the respondents to submit that once the goods were found to be liable for confiscation, penalty action under Section 112 (a)(i) mandated about the penalty which may vary up to the value of the goods. Giving of bank guarantee was justified with reference to the said aspect. Also relied on provisions of Section 114(AA) of the Act. It was sought to be highlighted that the allegedly genetically modified Soyabean were prohibited goods not permitted to be imported and since they were brought within the port by the petitioners/importers, they were liable to be treated even for provisional release in accordance with law.

4.1 At this stage, the court notices two decisions relied on by learned senior advocates for the petitioners in [Commissioner of Customs, Tuticorin Vs.](#)

[Shree Venkateshwara Paper Boards](#), 2022 379 ELT 310, the High Court of Madras held as under;

"33. We find nothing unreasonable about conditions (a) and (c), however condition (b) is concerned directing the Importer to furnish Bank guarantee/cash security towards redemption fine and penalty would be harsh as the show-cause notice is yet to be adjudicated. Therefore, we modify the condition (b) alone by directing the Importer to execute the bond for Rs. 12,12,867/-.

4.1.1 Similarly in [Gold Processors Vs. Commissioner of Customs, Tuticorin](#), 2022 379 ELT 69, again in Madras High Court decision it was observed,

"Admittedly, now the petitioner is not in a position to export the goods due to the cancellation of the export order. The goods are berthed in Tuticorin Port and kept idle and because of that, the demurrage and container charges has been mounting heavily. Since the export order has been cancelled, the petitioner wants to take back the cargo to their premises, but the 3rd Respondent insisting the petitioner for bank guarantee for 25% of the value as security for provisional release of the goods. In the considered opinion of this court, the question of providing bank guarantee does not arise, when the petitioner take back the goods, due to cancellation of the export order."

[5] In the facts of the case cumulatively obtained, this court finds, having regard to the principles stated by the High Court of Madras in the above decisions which we endorsed to, that even as the adjudication is pending, seeking bank guarantee to the tune of 25% towards the value of the goods would mount heavy and would operate harsh on the petitioners. The bank guarantee may be obtained for Rs.10 crores which will balance the rights of the parties in the facts of the case. The court is of the view that the conditions of furnishing of bond to the extent of 100% that is for 84 crores towards the entire value of cargo is justified. Also justified is to put the petitioner to condition that they would unload the cargo of goods of allegedly genetically modified Soyabean at Mosambique Port taking back the same to the said port and shall produce the certificate of unloading to the competent customs authorities of the Mundra port.

5.1 As noted above, the petitioners have fairly agreed to abide by the conditions. In the above view, for the purpose of provisional release of the goods - allegedly genetically modified Soyabean, in order to deport the said goods, the petitioners would comply with the following conditions.

(i) The petitioners importers shall furnish the bond to the tune of Rs.84 crores being entire value of the cargo of genetically modified Soyabean.

(ii) The petitioner shall file undertaking before this court that the cargo will be taken back to the Mosambique port and it will be unloaded there. After unloading the same, the certificate shall be obtained from the authorities of the Mosambique port about unloading the entire cargo thereat and the same shall be submitted to the customs authorities at Mundra Port, which shall be done within four weeks from today.

(iii) Instead of soliciting the bank guarantee of 25% of the value of the goods, it would be appropriate that the petitioner furnishes bank guarantee to the extent of Rs.10 crores.

5.2 It evident from the record and it is an admitted position that in detaining the vessel MV Polaris Z (IMO 9109512), what weighed with the authorities was the only reason that it carried the cargo allegedly prohibited goods of genetically modified Soyabean.

5.3 In that view and since the cargo will have to travel back to the Mosambique port in the same vessel, and further that the custom authorities have permitted the provisional release of the cargo on the conditions imposed by the court as above, the vessel will have to be necessarily allowed to be released. At the same time, it would be in the fitness of things that the owner of the vessel- the petitioners shall comply with the identical conditions provided for the release of the goods in paragraph No.5.1 above for release of cargo of Soyabean.

5.4 It is provided that neither the cargo of allegedly prohibited genetically

modified Soyabean, nor the vessel MV Polaris Z (IMO 9109512) shall be released by the respondent custom authority unless the conditions of furnishing of bond, bank guarantee and giving of undertaking before this court as directed above are satisfied. Satisfaction of those terms shall be operated as preconditions for permitting the cargo in question as well as the vessel to be permitted to leave. As far as the conditions of production of certification of unloading at the Mozambique Port, the time of four weeks is granted from the date of sailing of the vessel.

5.5 It is further directed that the petitioners in both the petitions shall file undertaking giving name, address and contact details of the authorized representatives of the petitioners in India who will be participating in the adjudication proceedings. Such authorized representatives shall also file an undertaking that they will co-operate in the adjudication proceedings. Such undertaking shall be filed within one week from today before this court.

[6] Learned advocate for the respondents further stated that the authorities will not while away the time in initiating and completing the adjudication proceedings.

[7] Both the petitions stand disposed of in the terms of the above observations and directions.

