

HIGH COURT OF GUJARAT (D.B.)

FMC INDIA PVT LTD THRO SHALESH MADIRATTA

Versus

UNION OF INDIA

Date of Decision: 21 December 2023

Citation: 2023 LawSuit(Guj) 2465

Hon'ble Judges: [Bhargav D Karia](#), [Niral R Mehta](#)

Case Type: Special Civil Application

Case No: 20135 of 2023

Subject: Constitution, Customs

Acts Referred:

[Constitution Of India Art 226](#)

[Customs Act, 1962 Sec 111](#), [Sec 111\(d\)](#), [Sec 125](#), [Sec 112](#), [Sec 112\(i\)](#).

[Insecticides Act, 1968 Sec 9\(3\)](#), Sec 45

[Insecticides Rules, 1971 R 45](#)

Final Decision: Petition allowed

Advocates: [Nanavati Associates](#), [Nikunt K Raval](#), [Mihir Joshi\(Senior Advocate\)](#), [Rohan Lavkumar](#), [Aaditya Dave](#), [Vikram Naik](#), [Nikunt Raval](#)

Cases Referred in (+): 1

Bhargav D. Karia, J.

[1] Heard learned Senior Advocate Mr.Mihir Joshi with learned advocate Mr.Rohan Lavkumar, learned advocate Mr.Aaditya Dave and learned advocate Mr.Vikram Naik for Nanavati Associates for the petitioner and learned Senior Standing Counsel Mr.Nikunt Raval for the respondent nos.2 and 3.

[2] Rule returnable forthwith. Learned advocates for the respective respondents waives service of notice of rule for respective respondents.

[3] By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

"A) This Hon'ble Court be pleased to issue a writ order or direction in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the Impugned Order dated 12.09.2023 bearing Order in Original No. 09/ADJ/ADC- AB/Hazira Port/2023-24.

B) This Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction permitting home clearance to the impugned goods or transship the impugned goods to a permitted customs port;

C) Strictly in the alternative and without prejudice to the prayers A to D, this Hon'ble Court be pleased to direct the Respondent Authorities to forthwith refund the entire duty paid by the Petitioner of Rs. 9,90,65,737/- under Challan No. 2045346537 to the Petitioner, with applicable interest and further direct the Respondent Authorities to allow re-export to any destination, without application of redemption fine or penalty;"

[4] The brief facts of the case are as under:

4.1. It is the case that the Petitioner is engaged in the manufacture and import of insecticides, pesticides and other agrochemicals including technical such as "Cyantraniliprole Technical" (the "Impugned Goods") into India.

4.2. The Petitioner is a registered entity with the Ministry of Agriculture and Farmers Welfare, whereof the Central Insecticides Board and Registration Committee has issued a Registration Certification under Section 9(3) of the Insecticides Act, 1963 in favour of the Petitioner for import of several insecticides including Cynatraniliprole Technical 93% w/w min.

4.3. That, the Petitioner imported a total of 10,000 Kgs. Net weight [Gross Wt. 11340 Kgs (40 CTN)] of the impugned goods described as "Cyantraniliprole Technical 93 w/w Min" falling under CTH 38089199 valued at Rs. 31,97,73,200/- involving total customs duty to the tune of Rs. 9,90,65,737/- from overseas supplier M/s. FMC Agro Singapore Pte. Ltd., originating from China.

4.4. That, the Petitioner filed the Bill of Entry through the CHA, M/s. Tulsi Logistics, at Hazira Adani Port, after duly declaring the import of impugned goods under CTH 38089199 along with mandatory authorization from the Central Insecticides Board, as required under the provisions of Insecticides Act, 1968, and paid the total customs duty Rs. 9,90,65,737/- including basic customs duty, cess and other applicable taxes.

4.5. That, thereafter the Bill of Entry was facilitated through Risk Management System (RMS) and the impugned goods were imported on CIF basis from the overseas supplier M/s. FMC Agro Singapore Pte. Ltd, who inadvertently booked the consignment to Hazira Adani Port, Surat as the port of destination instead of Nhava Sheva.

4.6. During the Out of Charge ("OOC"), a query was raised in the system regarding port restriction as per Rule 45 of the Insecticides Rules, 1971. It is pertinent to note that Import Permit bearing No. CIR1472/2013(343)- Cyantraniliprole(T)- 01, issued by the Additional Plant Protection Adviser & Secretary (CIB&RC), Directorate of Plant Protection, Quarantine & Storage, N.H. IV, Faridabad-121001 in favour of the Importer was placed on record and was also submitted as a part of the import documents. The Petitioner responded to the aforementioned Query on 24th August 2028.

4.7. Additionally, it is not the case of any of the authorities that there is violation regarding valuation, classification, duty revenue compliance, CIB license, etc. The only allegation was regarding the inadvertent error on account of the overseas supplier - M/s. FMC Agro Singapore Pte. Ltd., having booked Port of Discharge as "Hazira Adani Port" in place of "Nhava Sheva". It is pertinent to note that the Petitioner has been importing the impugned goods into India since 2020 and manufacturing insecticides and mixtures ever since 2020 and has not effected import clearance at Hazira Port.

4.8. That, the Petitioner categorically requested for clearance of the impugned goods as there was no intentional misdeclaration, suppression or collusion to unlawfully clear the goods and also because the entire duty amount had also been paid and there was merely a procedural restriction on the release of the impugned goods at the Hazira Adani Port.

4.9. The petitioner by letter dated 06.09.2023 clarified to the proper Officer that the goods be released having met all valid requirements and, in the alternative, the Petitioner may accept transshipment to permissible port of entry upon payment of redemption fine.

4.10. Thereafter, the Respondent No. 3 passed the impugned order on 12.09.2023, holding that the goods imported by the Petitioner were "prohibited" as the same were in violation of the prohibition under Insecticide Rules and was mandatorily liable for "re-export".

[5] Learned Senior Advocate Mr.Joshi submitted that pursuant to the impugned order in original passed by the respondent the petitioner has already paid Rs.5,00,000/-

towards redemption fine under Section 125 of the Customs Act, 1962, in lieu of the confiscation of the subject goods.

5.1. It was submitted that the petitioner is aggrieved by the direction issued by the respondent in the order to the effect that "the importer may redeem the goods only for the back to origin purpose".

5.2. It was submitted that because of such direction, the respondent authority is not permitting the petitioner to clear the goods for home consumption inspite of payment of duty of Rs.9,90,65,737/- at the time of filing of bill of entry by the petitioner on the ground that the goods are prohibited goods as they were imported at the port which is not recognized under Rule 45 of the Insecticides Rules, 1971.

5.3. Learned Senior Advocate Mr.Joshi referred to and relied upon the averments in the affidavit-in-reply filed on behalf of the respondent authorities to submit that the respondent authorities have admitted in the affidavit-in-reply that the petitioner has not committed any violation regarding the valuation, classification, duty revenue compliance, CIB license, etc. It was therefore submitted that the goods are imported in accordance with law except the breach of Rule 45 of the Insecticides Rules, 1971.

5.4.The Petitioner paid the alleged redemption fine as prescribed under the Impugned Order under protest. A communication dated 12.10.2023 was addressed to the Respondents apprising them of such payment and giving details of the Demand Drafts.

5.5. That the entire consignment is presently lying at the port since 17.08.2023 under seal and is incurring heavy detention and demurrage charges. The Order-in-Original has arbitrarily ordered that the impugned goods be re-exported "back to origin" without any basis or justification while imposing redemption fine in lieu of confiscation and penalty The impugned goods though being originating in China have been exported to the Petitioner by FMC Corporation, Singapore and not the manufacturer in China. The Petitioner has no privity with the manufacturer in the China ie, the Country of Origin and it is likely that the manufacturer in the country of origin will not accept or reject the re-export from the Petitioner and the re-export itself may not be likely to be complied with at the Country of Origin.

5.6. Since, the impugned goods are lying at the port the detention, demurrages and other charges are mounting and vide communication dated 21.10.2023, the Shipping Line has also threatened to dispose the impugned goods and charge heavy charges and interest which is causing further losses to the Petitioner. It is

stated that the container is incurring demurrage approximately at the rate of Rs.25,000 per day and has already incurred huge demurrage costs of Rs. 25 Lakhs as on date.

5.7. That the Petitioner vide letter dated 27.10.2023 requested permission to warehouse/ store the goods in a customs bonded warehouse and also be permitted to de-stuff the container and arrange for return of the empty container no. DRYU9187765 to the Shipping Line so that further mounting charges and demurrages and penalties may be avoided, however, such permission is not yet granted and the Petitioner is suffering grave economic harm.

5.8. The Petitioner herein raised the aforesaid concerns vide communication dated 1st November 2023 and requested for personal hearing from the Respondent Authorities. However, the said Authorities have neither responded to the said communication nor permitted the Petitioner to clear the goods.

5.9. Despite the Petitioner's request/representation for warehousing the goods, the Respondent Authorities by their communication dated 20th November 2023 only permitted the Petitioner to de-stuff the goods and not warehouse them.

[6] On the other hand learned senior standing counsel Mr.Nikunt Raval for the respondents submitted that the petitioner has an alternative efficacious remedy under Section 128 of the Customs Act,1962 to challenge the impugned order and in view of the alternative remedy, this petition may not be entertained.

6.1. It was further submitted that as per the Rule 45 of the Insecticides Rules, 1971, the goods imported by the petitioner at Hajira Port has become prohibited goods and therefore the respondent-authority was justified in directing the petitioner to redeem the goods only for back to the origin purpose, meaning thereby that the petitioner is required to re-export the goods to the place from where it was imported. In support of his submissions reliance was placed on the following averments made in the affidavit-inreply:

"a. With respect to Para A, it is submitted that Insecticide can arrive at any port of India. However, bill of Entry for home consumption can only be filed at specified port. In the instant case the goods arrived at Hazira Adani Port and can be transhipped to the specified port if the Petitioner wanted but the Petitioner had filed bill of entry instead of applying for transhipment.

b. With respect to Para B, it is submitted that the Petitioner has intentionally filed the bill of entry at Hazira port in spite of knowing the fact that insecticides cannot be cleared for home consumption from Hazira port and never applied for

transshipment of the consignment to a specified port. Further, when the query was raised in the system, the Petitioner admitted their mistake and requested to clear the consignment from Hazira port only.

c. With respect to Para C, it is submitted that as per ITC-HS policy, there is no restriction or prohibition for import of insecticides. However, import of insecticide is permitted subject to the license issued under the insecticides Act, 1968 and rules made thereunder. Further, places of Import of Insecticide into India is governed by Insecticides Rules, 1971 whereby the consignment can not be cleared from Hazira port.

d. With respect to Para D, it is submitted that the Petitioner has intentionally tried to clear the consignment by filing the Bill of Entry at Hazira Port which is not a specified port Import of insecticide are prohibited at Hazira port as per Insecticides Rules, 1971. Further, this act of the Petitioner tendered the goods liable for confiscation under Section 111 (d) of the Customs Act Accordingly, the Petitioner was given an option to pay fine in lieu of confiscation to redeem goods under section 125 of the Customs Act, 1962

e. With respect to Para E, it is submitted that the Petitioner on his own paid the applicable duty to clear the consignment for home consumption despite the facts that the goods being insecticide cannot be cleared from Hazira Adani Port. Further, they consistently claimed that they have not violated any law or policy. However, rule 45 of the Insecticide Rules, 1971 which governs the places of Import of Insecticide into India being amended by the Insecticides (Fourth Amendment) Rule 2017, as notified by the Ministry of Agriculture and Farmer Welfare. the places at which the insecticides may be imported -

"No insecticides shall be imported into India except through one of the following places namely:

- i) Inland Container Depot, Gurugram (Gurgaon), Haryana,
- ii) Chennai Port, Jawaharlal Nehru Port and Mumbai Port (Mumbai), in respect of insecticides imported by sea into India,
- ii) Chennai International Airport (Chennai), Chhatrapati Shivaji International Airport (Mumbai), Indira Gandhi International Airport (New Delhi), in respect of insecticides imported by air into India."

From the above, it is crystal clear that the goods viz 'Cyantraniliprole' is an insecticide covered under Insecticides / Pesticides Registered under section 9(3) of

the Insecticides Act, 1968 and the same has been imported at Adani Hazira Port, in violation of Rule 45 of Insecticides Rules, 1971 (framed under the provisions of the Section 36 of the Insecticide Act, 1968), as amended.

Further, the Hon'ble Apex Court in the case of M/S Om Prakash Bhatia vs Commissioner of Customs had an occasion to examine the scope of term "prohibited goods" and confiscation of such goods under the provisions of section 113 and held as follows: -

"113. Confiscation of goods attempted to be improperly exported etc. The following export goods shall be liable to confiscation:-

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

The aforesaid Section empowers the authority to confiscate any goods attempted to be exported contrary to any prohibition' imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force. Further, Section 2(33) of the Act defines "prohibited goods" as under "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with." From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods, and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in [Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Others](#), 1970 2 SCC 728 wherein it was contended that the

expression 'prohibition' used in section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:- "... What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962 includes restrictions." Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act "Any prohibition" means every prohibition. In other words, all types of prohibitions. Restriction is one type of prohibition.

If we apply the ratio of the above decision to the facts of the case before us, Insecticide can be imported at specified port only as per rule 45 of the Insecticide Rules, 1971. Further, insecticide imported at other than specified ports become "prohibited goods" as defined in Section 2(33) and 11 of the Customs Act. Consequently, they were liable to confiscation under Section 111(d).

f. With respect to Para A, it is submitted that Section 111 (Confiscation of improperly imported goods, etc.) of the Customs Act, 1962 reads as under:

"The following goods brought from a place outside India shall be liable to confiscation. (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;"

As elaborated in Para-E above, Insecticides imported at other than specified ports become "prohibited goods" as per the Customs Act read with Insecticides Rules, 1971. As the imported goods become prohibited goods, confiscated under section 111(d) of the Customs Act, 1962.

g. With respect to Para G, it is submitted that Import of insecticides is not permitted at Hazira Port as per Insecticide Rules, 1971. However, in the instant case, Petitioner has intentionally tried to clear the goods at Hazira port in violation of the Insecticide Rules. This act of the Petitioner rendered the goods liable for confiscation under the Customs Act. Accordingly, the case was adjudicated and re-

export of the goods was allowed subject to payment of redemption fine and penalty by the proper officer.

h. With respect to Para H, it is submitted that the goods has been confiscated for violation of the provisions of the Customs Act read with Insecticide rules, 1971. Further, the goods were allowed for re- export on payment of redemption fine and penalty, as the same cannot be cleared from Hazira port.

i. With respect to Para I, it is submitted that the goods were confiscated under Section 111(d) of Customs Act for violation of the provisions of the Customs Act and Insecticide rules. Further, the Petitioner can redeem the goods on payment of redemption fine imposed. However, imported goods being insecticide can not be cleared for home consumption from Hazira port on payment of redemption fine and it is pertinent to mention that the Petitioner had never applied for transshipment of the goods to a specified port. Therefore, only one option of re -export was left. Accordingly, the Petitioner was allowed to re-export the goods.

j. With respect to Para J, it is submitted that the Petitioner had committed an offence by trying to clear the prohibited goods from Hazira port. It is on record that Petitioner had never approached until the customs detected the offence. In the foregoing paras, it is well explained that import of insecticides is prohibited at Hazira Port. The Petitioner has been therefore penalised under section 112 of the Customs Act for the offence committed on their part.

k. With respect to Para K, it is submitted that as per ITC-HS policy, there is no restriction or prohibition for import of insecticides. However, import of insecticide is permitted subject to the license issued under the insecticides Act, 1968 and rules made thereunder. Further, places of Import of Insecticide into India is governed by Insecticides Rules, 1971 whereby the consignment cannot be cleared from Hazira port. In the instant case, the Petitioner had intentionally tried to clear the Insecticide from Hazira Port in violation of the Insecticide Rules, resulting the goods liable for confiscation under Section 111(d) of the Customs Act.

l. With respect to para L it is submitted that as discussed in para-H & K above, it is crystal clear that Insecticide can be cleared from specified ports only as per Insecticide Rules, 1971. The Petitioner has filed the bill of Entry and paid the applicable Customs Duty for clearance of the goods for home consumption. The case was detected at the stage of out of charge and the Petitioner had justified their act by submitting that they had a valid CIB Registration Certificate for import of Insecticide as per the Insecticide Act and paid the applicable duty. However, on the other hand they were violating the very same insecticide rules. Further, it is

Petitioner's responsibility to comply with all the rules and regulation which are mandatory for importing insecticide in to India. It is not at the Petitioner's will that they will comply some rules and violate some rules as per their comfort.

m. With respect to Para M, it is submitted that the Petitioner has paid the duty as per self-assessment under section 17 of the Customs Act and tried to clear the goods at Hazira Port. However, the case was detected at the time of out of charge and query was raised in the system. Subsequently, the case was adjudicated on merits and Petitioner had paid the redemption fine and penalty imposed. Further, once the condition of the order in original were met, Petitioner can apply for refund of already paid duty and the same will be decided on merit as per the Customs Act.

n. With respect to Para N, it is submitted that Customs have to enforce Customs Act or any other allied act for the time being in force for goods imported into India..

o. With respect to Para O, it is submitted that the Bill of Entry can not be cleared for home consumption from Hazira Port as per Insecticide Rules, 1971. However, Petitioner has been given an option to re- export the goods.

p. With respect to Para P, it is submitted that it is onus of the Petitioner as well Custom Broker to check all the compliance for the goods to be imported as per section 17 of the customs Act read with Bill of Entry (Electronic Integrated Declaration and Paperless Processing) Regulations, 2018.

q. With respect to Para Q, it is submitted that as claimed by the Petitioner, due to supplier's mistake goods had arrived at Hazira Port and therefore Petitioner should have applied for transshipment of the consignment to the specified port instead of filing of Bill of Entry at Hazira Port. The Petitioner had never applied for transshipment and tried to clear the goods in violation of the Customs Act."

[7] Referring to the above averments it was submitted that the petition is liable to be dismissed as the petitioners have not made out any ground for the prayers made in the petition.

[8] Having heard the learned advocates for the respective parties it appears that the respondent authority has passed the following order:

"(i) I confiscate the goods "Cyantraniliprole Technical 93 w/w Min " valued at Rs. 31,97,73,200/- imported vide Bill of Entry No. 7332010 dtd 12.08.2023 under Section 111(d) of the Customs Act, 1962. I hereby impose Redemption Fine of Rs. 5,00,000/- (Rupees Five Lakh) under Section 125 of the Customs Act, 1962 in lieu

of confiscation of subject goods. The importer may redeem the goods only for back to origin purpose.

(ii) I impose penalty of Rs.5,00,000/- (Rupees Five Lakh Only) on the importer M/s FMC India Pvt. Ltd. under Section 112(i) of the Customs Act, 1962.

(iii) I impose penalty of Rs.50,000/- (Rupees Fifty Thousand Only) on the CHA, M/s. Tulsi Logistics under Section 112(i) of the Customs Act, 1962."

[9] On perusal of the aforesaid order it is clear that the petitioner has accepted the mistake on importing the goods contrary to the provision of Section 45 of the Insecticide Act, 1968 which is already reproduced in the averments quoted herein above from the affidavit-in-reply of the respondents and therefore the same are not repeated herein.

[10] The petitioner has also paid Rs.5,00,000/- toward redemption fine as imposed vide the impugned order. In such circumstances, the respondent authority has committed an error by directing the petitioner to redeem the goods only for back to the origin purpose inspite of the fact that the petitioner has paid the required duty under the Act. It is also not the case of the respondent authority that the goods are imported in violation of any provisions of the Customs Act, but in view of the Rule 45 of the Rules the petitioner could not have imported the goods at part which is not specified in the said Rule, the goods therefore have been confiscated as per Section 111 and 112 of the Customs Act, 1962. In such circumstances, the respondent authority ought to have permitted the clearance of the goods to the petitioner on payment of the redemption fine for home consumption. At this juncture learned Senior Advocate Mr.Joshi submitted that in similar cases, the respondent authorities have passed an order of permitting the clearance of the goods for home consumption on payment of redemption fine after passing an order of confiscation of the goods for breach of the Rule 45 of the Insecticides Rules, 1971.

[11] Learned senior standing counsel Mr.Nikunt Raval could not controvert such direction issued by the respondent authority for similar cases where the goods have been imported in contravention of the Rule 45 of the Insecticides Rules, 1971 and was permitted the clearance of such goods for home consumption on payment of redemption.

[12] Considering the facts of the case, we are of the opinion that as the petitioner has imported such goods at the place other than the places specified in Rule 45 of the Insecticides Rules, 1971, the petitioner is penalized and redemption fine is imposed for committing such mistake for which the petitioner has already paid Rs.5,00,000/- towards redemption fine imposed by the respondent authority. In such circumstances

the respondent authority ought to have permitted the petitioner for clearance of the goods on payment of redemption fine for home consumption. As the breach of Rule 45 of the Insecticides Rules, 1971 is remedied by imposition of the redemption fine towards confiscation of the goods, the goods would be required to be cleared for home consumption and could not have been ordered to be deported.

[13] In view of foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order is modified to the extent that the petitioner be permitted to clearance of goods for home consumption, as payment of the redemption fine of Rs.5,00,000/- is already been paid. Rule is made absolute to the aforesaid extent. No order as to costs.

