

IN THE HIGH COURT OF SINDH, KARACHI

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Justice Mrs. Rashida Asad

C. P. No. D-3468 of 2021

M/s. Kiran Food Products VS Federation of Pakistan & others

C. P. No. D-3469 of 2021

M/s. Ansa Food Products VS Federation of Pakistan & others

C. P. No. D-3470 of 2021

M/s. Jaker Products VS Federation of Pakistan & others

For the Petitioners : M/s. Abdul Sattar Pirzada, Mamoon N. Choudhry & Qazi Umair Ali Advocates.

For the Respondents : Dr. Shahab Imam Advocate.
No. 2, 5, 7 & 9

For the Respondent : Mrs. Masooda Siraj, Advocate.
No. 6.

Mr. Muhammad Nishat Warsi, Deputy Attorney General.
M/s. Shakir Muhammad, Additional Collector & Asad Aleem,
Assistant Collector, MCC East, Custom House, Karachi.

Mr. Muhammad Sohail Shahzad, Director Technical Quarantine
Department of Plants, Protection, Jinnah Avenue, Malir Halt.
Karachi.

Mr. S. Muzammil Hussain Entomologist.

Date of hearing : 23.06.2021

Date of Judgment : 23.06.2021

JUDGMENT

Muhammad Junaid Ghaffar, J. All Petitioners before us have imported consignments of Areca nuts / betel nuts classifiable under HS Code 0802.8000. They are aggrieved by two Letters dated 20.05.2021 and 24.05.2021 issued by the office of Collector of Customs (East). Their consignments are withheld at Port and according to them, all formalities stands completed pursuant to Import Policy Order; hence, these Petitions.

2. Learned Counsel for the Petitioners has contended that time and again the import of betel nuts has remained a matter of dispute between Petitioners / Importers and the Customs Department; that earlier in various Petitions including C.P.No.D-2017/2018 various directions were given and orders were passed after which SRO 1067(I)/2017 dated 20.10.2017 was issued, whereby, the Import Policy Order was amended; that as of today, the said SRO is now part of the current Import Policy Order 2020; that in terms of Serial No 5 of Appendix-B--Part-I of the said Policy, the goods in question are importable subject to production of Phytosanitary certificate issued by the competent authority of the country of origin / export, confirming that the goods are free from infestation and so also fit for human consumption; that such certificate has been produced by the Petitioners but on one pretext or the other, it is not being accepted; that under Serial No.155 of Appendix-B--Part-III, there are two further conditions regarding safety and health as well as procedural, which require issuance of certification by the Department of Plants Protection, Ministry of National Food Security & Research, Government of Pakistan (**Plant Protection Department**) which has also been produced; but still is not being accepted; that the Customs Authorities are no more authorized or competent to ask for any further test or certification as to the goods in question after amendment in the Import Policy; that now it is only the Plants Protection Department which is authorized and competent to accept and issue appropriate import permit and certificate. In view of such position, he has prayed for granting the relief sought in these Petitions.

3. On the other hand, Dr. Shahab Imam Advocate for Respondent Collectorate along with Additional Collector in attendance has opposed the contention as according to him, Customs Authorities by virtue of Section 199 of the Customs Act, 1969 (**Act**) are authorized to take samples and test goods; that under Appendix-A of the Import Policy the Customs Authorities are still competent to see whether the goods in question are fit for human consumption or not; that even otherwise, the certificate purportedly issued from the country of origin is not exactly in conformity with Serial No. 5 of the Appendix-B--Part-I of the Import Policy; hence, the Petitioners are not entitled for any relief. In support

he has relied upon ***Adeel ur Rehman and Others V. Federation of Pakistan and others (2005 SCMR 1)***.

4. The representative of Plant Protection Department Mr. Muhammad Sohail Shahzad has supported the Petitioners case and submits that SRO 1067 is now part of the Import Policy and was issued pursuant to observations and or directions of this Court in certain petitions and a procedure has been evolved which authorizes this Department to monitor all such imports of betel nuts; that the Petitioners have fulfilled all requisite conditions; that the objection regarding certification from the country of origin is also fulfilled as in terms of International Convention the two conditions i.e. the goods are free from infestation and fit for human consumption cannot be incorporated in a Phytosanitary certificate as it is not part of the format of such certificate prescribed and approved under the Convention and for that the Ministry concerned has issued a separate endorsement; that the Customs Authorities have referred the matter to another laboratory which has always been disputed by the Petitioners and therefore, the Plant Protection Department refers the matter to another reputable laboratory; that the Plant Protection Department has already issued requisite permission and letters dated 10.5.2021 and 24.5.2021 to the Petitioners and Customs respectively; hence the Customs Authorities are not authorized to interfere in the certification of the goods in question.

5. Learned DAG has also supported the case of the Petitioners and submits that in view of the Import Policy in vogue, it is the Plant Protection Department which is the competent authority to inspect, monitor and issue necessary release instructions.

6. We have heard all the learned Counsel, DAG, Additional Collector of Customs as well as Representative of the Plant Protection Department and perused the record. It appears that earlier the Rules as well as the Import Policy was unclear as to the certification of the goods in question including the test methods and the manner in which the goods in question could be checked as to they being fit for human consumption and free from any infestation. This lack of legislation had resulted in numerous litigation before the Courts and at times the

Court had shown reluctance in accepting the contention of the Petitioners and so also for the reason that it involved safety of human life. The case of *Adeel-Ur-Rehman (Supra)* also originated in this perspective. Though, the product in question, generally is regarded as the one which leads to multiple diseases including various types of cancers, just like tobacco; however, their use in our Country has never been prohibited like any other drug or contrabands; but from time to time has been regulated by various departments under different laws on the statute book, including Provincial as well as Federal. It appears that insofar as the present issue is concerned in CP No. D2017 & 2053 of 2018 orders were passed on several occasions and finally the Federal Government came up with an amending SRO 1067 whereby the then existing Import Policy was amended. The said SRO provided a completely new procedure and mechanism to deal with the importability and testing and certification of the product in hand. The said SRO and the procedure notified through it is now part of the current Import Policy Order 2020 in Part-I and Part-III of Appendix- B of the Import Policy. The relevant part reads as under:-

“Appendix-B-Part-I

Sr. No.	PCT Codes	Commodity Description	Conditions
5.	0802.8000	Betel nuts (Areca)	Importable subject to production of Phytosanitary certificate issued by the competent authorities of the country of origin / export confirming that the exported goods are free from infestation; and are fit for human consumption.

Appendix-B-Part-III

Sr. No.	PCT Codes	Commodity Description	Conditions	
155.	0802.8000	Areca nuts	Importable subject to production of aflatoxin report to the effect that the consignment is free from any pests / diseases, to be certified by Department of Plants Protection, Ministry of National Food Security & Research, Government of Pakistan.	Importable subject to valid import permit, valid phytosanitary certificate and plant protection release order of Department of Plant Protection, MNSFR.

7. Serial No. 5 of Appendix-B--Part-I of the Import Policy provides that betel nuts are importable subject to production of Phytosanitary certificate issued by the competent authorities of the country of origin /

export confirming that the exported goods are free from infestation; and are fit for human consumption. The Petitioners have admittedly produced a Phytosanitary Certificate¹ dated 16.4.2021 in CP No. D-3468 of 2021 issued by the country of export; however, an objection has been raised by the Respondent Collectorate that the said certificate neither certifies that the goods are free from infestation nor that they are fit for human consumption. In this regard representative of the Plant Protection Department has assisted us that insofar as the Phytosanitary certificate is concerned, the same has been arrived at and approved after consensus by various signatory and member Countries through an International Convention. According to him, the said certificate has a fixed prescribed format which is used by all Countries. According to him even for goods being exported from Pakistan, the Plant Protection Department issues a same certificate with same contents. He submits that words “free from infestation and fit for human consumption” which are part of our Import Policy cannot be incorporated or mentioned in a Phytosanitary certificate by the Country of origin and or export. To this extent his contention appears to be justified, as any Country including Pakistan, being a signatory of such Convention cannot deviate or ask a member country of the Convention to issue any such certificate which is prepared in violation of the prescribed format issued pursuant to an International Convention. In this case to overcome this objection, the Petitioners have placed on record a Health Certificate of the Ministry of Health, Republic of Indonesia Provincial Health Laboratory dated 12.4.2021 (pg:305 in CP No.D-3468/2021) which specifically certifies this condition that the consignment in question is free from infestation and is fit for human consumption. This in our view, in the given facts and circumstances, suffices the requirement as above. Therefore, the objection of the Respondent Collectorate that there is no certification of this nature as required against Serial No. 5 *ibid*, is misconceived and is hereby repelled. Not only this the competent authority in this matter i.e. the Plant Protection Department has accepted both these certificates as according them requisite compliance for specific certification has been

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This is to certify that the plants or plant products or other regulated articles described herein: have been inspected and/or tested according to appropriate official procedures and are considered to be free from the quarantine pests specified by the importing contracting party and to conform with the current phytosanitary requirements of the importing contracting party, including those for regulated non-quarantine pests.

made through certificates of the Ministry of Health of the exporting Country.

8. Insofar as Appendix-B--Part-III of the Import Policy is concerned, at serial No. 155 as to safety and health measures, it has been provided that betel nuts are importable subject to production of aflatoxin report to the effect that the consignment is free from any pests / diseases, which has to be certified by Department of Plant Protection. The law in field requires that limit of aflatoxin must not be more than 30ppb. To this effect there isn't any dispute that such certificate has been issued in favor of the Petitioner. This certificate has been issued after drawing of samples and its test from an approved laboratory. As to procedural requirements, it is provided that the goods in question are importable subject to valid import permit, valid phytosanitary certificate and plant protection release order of Department concerned. Again it is not a matter of dispute that after fulfillment of all such formalities, the Plant Protection Department has issued a valid import permit and a phytosanitary certificate along with a release order. Therefore, we do not see as to how and in what manner the Respondent Collectorate can now object to the release of the consignment.

9. Another objection which has been raised in the comments of the Respondent Collectorate is regarding Appendix A (Banned Items or Negative List) which at Serial No.5 in column 3 *specifies any edible product not fit for human consumption* falling in respective headings. This according to them empowers the Respondent to see that whether the goods in question are fit for human consumption. However, we are not impressed with this submission as Appendix A is for banned or negative items which under any circumstances cannot be imported. Whereas, Appendix B deals with items importable subject to certain restrictions and their fulfillment if any. The items specified in Appendix B are not banned and are importable; however, subject to certain conditions, which in the instant case have been fulfilled by the Petitioners. Therefore, reliance on Serial No.5 of Appendix A by the Respondent Collectorate is misconceived and if permitted then it would defeat the purpose of Appendix-B and the procedure prescribed therein for import of the item in question. The item in question is not banned nor on the negative list. Appendix-A and the condition of it being fit for human consumption is

general and would apply to all such items which are not covered by Appendix-B, import of which is linked with procedural conditions. In short Appendix-A would not apply to items notified or mentioned in Appendix-B. Therefore, this contentions is also misconceived and is hereby repelled as well.

10. Lastly, reliance has been placed on some laboratory report of goods got tested by the Respondent Collectorate without associating the Petitioner as well as the Plant Protection Department. The said report of PCSIR Laboratory dated 19.05.2021 has given the following opinion:-

"8. Opinion/Interpretation:

Food safety and Standards Authority of India (Third Amendment Regulations, 2017) notified fixation of limits of aflatoxin as 15 pg/kg in areca or betel nuts. In addition, the betel nut is included in Group-1 Carcinogens declared by International Agency for Research on Cancer (IARC) Monographs Programme of World Health Organization (WHO), therefore, it is not recommended for the Human consumption."

11. Persual of the aforesaid opinion reflects that it is not based on any guidelines prescribed in any law presently as available and in force in Pakistan. It has made reference to the Food Safety and Standards Authority of India wherein, the prescribed limit of aflatoxin is different as compared to Pakistan, whereas, even otherwise, a Pakistani Laboratory giving its opinion on the basis of some law which is enforceable in another country does not seems to be justified or valid at least in law. It may be a case for general information of the people consuming such items; but when examined in the perspective of law, it cannot be sustained. It can only be appreciated when it renders its opinion on the basis of the law in vogue. Not only this the report has made further reference to inclusion of betel nuts in Group-1 Carcinogens declared by International Agency for Research on Cancer (IARC) Monographs Program of World Health Organization (WHO), whereby, it is not recommended for human consumption. We are afraid we cannot accept this kind of report when, neither the limit of aflatoxin is the same as applicable in Pakistan; nor, the recommendation of the World Health Organization is part of any law for the time being. If that be the case, then the Federal Government can always exercise its powers and put a complete ban on the import of betel butts and so also amend the limit of aflatoxin; however, this is not the case. A procedure

has been prescribed which now at least to the extent of certification and infestation of the goods in question excludes interference by the Customs Authorities at import stage and only authorizes the Plant Protection Department to do all such exercise. In that case, we do not see as to how the Respondent Collectorate can be allowed to get the goods tested on its own and get the report of the same from another laboratory. They, at least to the extent of terms of Serial No. 5 of Part-I of Appendix-B of the Import Policy Order and Serial No. 155 of Part-III of Appendix-B of the Import Policy Order have no role. It is not a case wherein, the testing is being carried out either for the purposes of valuation of goods; or for determining an exact HS Code and as to the rate of duty applicable thereon; hence, reliance on Section 199 of the Customs Act is also misconceived.

12. In view of hereinabove facts and circumstances of this case, in our considered view, the Petitioners had made out a case for indulgence, and therefore, by means of a short order dated 23.6.2021 we had allowed these petitions directing release of the consignments in question and above are the reasons thereof.

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Arshad/