

THE HIGH COURT OF SINDH, KARACHI

Suit No. 85 of 2022

[M/s. Tahir Food Products versus Federation of Pakistan & 06 others]

Plaintiff : M/s. Tahir Food Products through Mr. Ahmed Ali Hussain, Advocate.

Defendants 1, 2 & 5 : Nemo.

Defendants 3 & 4 : The Director General, Customs Intelligence & Investigations and another through Mr. Khalid Rajpar, Advocate.

Defendant 6 : The Collector of Customs, Model Customs Collectorate, Appraisement West, through Mr. Muhammad Khalil Dogar, Advocate.

Defendant 7 : Advisor and Director General, Department of Plant Protection through Mr. S. Muzamil Hussain, Entomologists, Department of Plant Protection, present in person.

Dates of hearing : 24-01-2022 & 31-01-2022

Date of Decision : 14-02-2022

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 397/2022 whereby the Plaintiff prays for a direction to the Defendants 3 and 4 (Directorate General, Intelligence & Investigation-Customs) to release the consignment of betel-nuts detained by the latter at a godown rented by the Plaintiffs outside the Port after the consignment had been cleared by the Customs.

2. The facts in brief are that the Plaintiff imported a consignment of 1200 bags of betel-nuts (areca nuts) from Indonesia, weighing 72,200 kgs, classified under PCT Code 0802.8000. After payment of duties and taxes the consignment was cleared from the Port for gate-out on 28.12.2021 (page-119) and was stored by the Plaintiff at a

godown near the Karachi University. On 29.12.2021, officers of the Directorate General, Intelligence & Investigation-Customs [DG I&I] conducted a search at the said godown, allegedly on a suspicion that the betel-nuts were smuggled goods, and on the inability of the Manager of the godown to furnish import documents, the betel-nuts were detained thereat by way of a detention memo delivering superdari to the Manager of the godown until production of import documents and laboratory reports to verify that the betel-nuts were fit for human consumption. On 04-01-2022, the Intelligence Officer, DG I&I claims to have drawn samples from the detained goods for laboratory tests.

3. The suit was filed on 11.01.2022 along with the following:
 - (i) Bill of Lading (page-73);
 - (ii) Goods Declaration (page-95);
 - (iii) Import permit dated 04.11.2021 issued by the Department of Plant Protection, Government of Pakistan (page-191);
 - (iv) a health certificate dated 09-11-2021 issued by the Provincial Health Laboratory, Ministry of Health, Indonesia, certifying that the betel-nuts were fit for human consumption (page-79);
 - (v) a phytosanitary certificate dated 11-11-2021 issued by the Plant Protection Organization of Indonesia, certifying that the betel-nuts were free from quarantine pests (page-83);
 - (vi) Release order dated 18.11.2021 issued by the Department of Plant Protection certifying that the betel-nuts were free from injurious disease and within the admissible level of aflatoxin (page-193).

The Plaintiff therefore prays for a declaration that the detention of the betel-nuts by the DG I&I is *malafide* and unlawful; for a declaration that the DG I&I have no lawful authority to take any sample for testing the betel-nuts; and for an injunction to release the said goods from detention.

4. Along with their counter-affidavit, the Defendants 3 and 4 (DG I&I) have filed laboratory reports of the samples drawn by them from the detained betel-nuts.

As per the report of the PCSIR Laboratories Complex dated 10-01-2022, the aflatoxin level in the betel-nuts was '116.78 ug/kg (ppb)'; insects/pests were not seen; and the opinion was that:

"Food Safety and Standards Authority of India (Third Amendment Regulations, 2017) notified fixation of limits of aflatoxin as 15 ug/ks 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".

As per the report of the Industrial Analytical Center dated 15-01-2022, the aflatoxin level in betel-nuts was '24.1 ppb' with the opinion that given the high microbial load found in the sample, it was unfit for human consumption. It is therefore contended by the Defendants 3 and 4 (DG I&I) that the betel-nuts under detention were unfit for human consumption and liable for confiscation.

5. Mr. Ahmed Ali Hussain, learned counsel for the Plaintiff submitted that the search and detention of the goods by the DG I&I on the pretext that those were smuggled goods, was clearly *malafide* in view of the import documents filed by the Plaintiff; that such detention was made solely to extract illegal gratification from the Plaintiff; that the search and detention of the goods without any warrant was in violation of sections 162 and 163 of the Customs Act, 1969 and the law laid down by the Supreme Court in *Collector of Customs v. Muhammad Mahfooz* (PLD 1991 SC 630). Learned counsel further submitted that under the Import Policy Order, 2020, it was the Department of Plant Protection that was authorized to test the betel-nuts for fitness, which it did, and only thereafter were those released by the Customs; that the laboratory reports surreptitiously obtained by the DG I&I are unreliable and have no evidentiary value; that in similar circumstances identical laboratory reports relied upon by the DG I&I to detain betel-nuts were rejected by a learned Division Bench of this Court in the case of *Kiran Food Products v. Federation of Pakistan* (C.P. No. D-3468/2021 and other petitions decided on 23-06-2021).

On the other hand, Mr. Khalid Rajpar, learned counsel for the Defendants 3 and 4 (DG I&I) submitted that none of the certificates produced by the Plaintiff specify the level of aflatoxin in the betel-nuts imported; whereas the laboratory reports produced by the DG I&I specify the level of aflatoxin found in the betel-nuts and opine that those are unfit for human consumption. Thus, learned counsel submitted that the betel-nuts had been imported contrary to the conditions prescribed at serial No. 5 of Part I, and serial No. 155 of Part-III, Appendix-B to the Import Policy Order, 2020; and therefore such goods are liable to confiscation under section 17 of the Customs Act, 1969.

6. Heard the learned counsel and perused the record.

7. Per the Detention Memo dated 29-12-2021 of the DG I&I, the search of the Plaintiff's godown was undertaken "*..... in pursuance of information on 29-01-2021 regarding secret dumping/storage of huge quantity of goods suspected to be smuggled / non-duty paid.....*". Further, the betel-nuts were said to be detained for the following reason:

"Due to non production of any relevant documents on the spot, the said recovered suspected smuggled / non-duty paid foreign origin betel nuts hereby detained for submission of relevant import documents i.e. copy of GD, Packing list, Invoice, Bill of lading, proof of payment of duty / taxes and aflatoxin report for verification of import status and fit for human consumption thereof, within 03 days of the receipt of detention notice."

However, in their defense to this suit, it is no longer being contended by the DG I&I that the said betel-nuts are smuggled goods or non-duty paid goods, presumably because the Plaintiff has produced the import and customs documents. It was submitted by learned counsel for the DG I&I that the betel-nuts were detained under section 17 of the Customs Act, 1969 for having been imported in violation of the conditions prescribed in Appendix-B to the Import Policy Order, 2020, which in turn constituted a violation of section 16 of the Customs Act, 1969 making the betel-nuts liable to confiscation.

8. It is not disputed that betel-nuts (areca nuts) classifiable under PCT Code 0802.8000 fall under Appendix-B to the Import Policy Order, 2020, i.e. these are importable subject to certain conditions. Part-I and Part-III of Appendix-B then lists those conditions as follows:

Part-I, Appendix-B

Sr. No.	PCT Codes	Commodity Description	Conditions
1	2	3	4
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.

Part-III, Appendix-B

Sr. No.	PCT Codes	Commodity Description	Conditions	
1	2	3	4	5
155.	0802.8000	Areca nuts	Importable subject to production of aflatoxin report to the effect that the consignment is free from any pests / disease, to be certified by Department of Plant 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.

The aforesaid conditions are with reference to the Pakistan Plant Quarantine Rules, 2019, notified by the Federal Government under the Pakistan Plant Quarantine Act, 1976, a legislation to give effect in Pakistan to the International Plant Protection Convention, 1951. The purpose of the legislation is to protect indigenous plants and crops from pests and disease that may accompany plants and plant products imported into Pakistan and ultimately effect public health. Under section 3(1) of the Pakistan Plant Quarantine Act, 1976,

the Federal Government may by notification prohibit, restrict or otherwise regulate import of any article likely to cause infection to any crop or plant, or of any pest. Section 3(4) of the Act then provides that a notification issued under section 3 thereof shall operate as if it has been issued under section 16 of the Customs Act, 1969, and the officers of the Customs shall have the same powers as they have in respect of any article, the importation of which is prohibited or restricted under the Customs Act, and all provisions of the Customs Act shall have affect accordingly. Therefore, the conditions for importing betel-nuts at serial No.5 of Part-I and serial No.155 of Part-III, Appendix B to the Import Policy Order, 2020 have been incorporated by the Federal Government in exercise of powers under section 3(1) of the Pakistan Plant Quarantine Act, 1976 read with section 16 of the Customs Act, 1969.

9. The power to issue import permits for plants and plant products including betel-nuts, to inspect them on import for pests and infection, to take samples for laboratory tests, to take action for preventing the spread of pests and infection from such goods, and to issue biosecurity clearance and release orders for such goods, is regulated under the Pakistan Plant Quarantine Rules, 2019 where such action is referred to as 'phytosanitary action', 'phytosanitary measures' and 'phytosanitary procedure' [Rules 2(lxix), 2(lxxii) and 2(lxxiii)]. Under the said Rules, the authority vested with the power to undertake phytosanitary action, measures and procedure is the Plant Protection Adviser or the Authorized Officer (Rules 45, 46, 54 and 96 to 99). The Plant Protection Adviser is the Director General of Department of Plant Protection [Rule 2(lxxviii)]. The Authorized Officer is defined to mean the technical person authorized by a national plant protection organization to discharge its functions [Rule 2(iv)]. The Authorized Officers of the Plant Protection Department are designated in Schedule-VIII to the Rules. In other words, while Customs officers may exercise powers under the Customs Act, 1969 to detain, seize and confiscate plants and plant products imported in

violation of the Import Policy Order, the power to certify that such plant or plant products imported into Pakistan meet the required phytosanitary standards, lies with the Department of Plant Protection, not the DG I&I.

10. Coming back to the conditions of import of betel-nuts under the Import Policy Order, 2020, the Plaintiff has filed copies of the following:

- * Health certificate dated 09-11-2021 issued by the country of origin of the goods, i.e. the Provincial Health Laboratory, Ministry of Health, Indonesia, stating that since the cargo carries minimal quantity of bacteria and fungi, it is certified as fit for human consumption;
- * Phytosanitary certificate dated 11-11-2021 issued by the country of origin i.e. the Plant Protection Organization of Indonesia certifying that the cargo is free from quarantine pests and conform to the phytosanitary requirements of Pakistan;
- * Import permit dated 04.11.2021 issued to the Plaintiff by the Department of Plant Protection, Pakistan for importing the betel-nuts.

Prima facie, out of the conditions prescribed in Appendix-B to the Import Policy Order, 2020 for importing betel-nuts, the above documents fulfil the conditions at serial No.5, Part-I, and the conditions in column 5, serial No. 155, Part-III. It is the condition in column 4, at serial No. 155, Part-III that is in issue, which stipulates that betel-nuts are “importable subject to production of aflatoxin report to the effect that the consignment is free from any pests / disease, to be certified by Department of Plant Protection.”

11. To contend that even the condition in column 4, serial No. 155, Part-III, Appendix-B has been fulfilled, the Plaintiff relies on the release order dated 18.11.2021 issued by the Department of Plant Protection which certifies that:

“Plants and plant products specified below were examined by a duly authorized officer of this Department and were found apparently free from injurious insects and diseases. The consignment may now be released to the consignee:-

FUMIGATION COMPLETED ON DATED 18-12-2021 WITH METHYL BROMIDE. THE GOODS ARE TESTED FOR AFLATOXIN AND ITS LEVEL HAS BEEN FOUND AS PER ADMISSIBLE LIMIT.”

On the other hand, Mr. Khalid Rajpar, learned counsel for the DG I&I argued that the above certification in the release order does not fulfil the prescribed condition in that, it does not disclose what level of aflatoxin was found in the betel-nuts. He relied on laboratory reports obtained by the DG I&I from two different laboratories, apparently of separate samples, one of which found the aflatoxin level at 116.78 ppb and the other found it at 24.1 ppb, and both reports opine that such betel-nuts were not fit for human consumption.

12. For a basic understanding of ‘aflatoxin’, the Food Safety Digest of the World Health Organization (2018) explains that:

“Aflatoxins are poisonous substances produced by certain kinds of fungi (moulds) that are found naturally all over the world; they can contaminate food crops and pose a serious health threat to humans and livestock. Aflatoxins also pose a significant economic burden, causing an estimated 25% or more of the world’s food crops to be destroyed annually.”

*Two closely related species of fungi are mainly responsible for producing the aflatoxins of public health significance: *Aspergillus flavus* and *A. parasiticus*. Under favourable conditions typically found in tropical and subtropical regions, including high temperatures and high humidity, these moulds, normally found on dead and decaying vegetation, can invade food crops. Drought stress, insect damage and poor storage can also contribute to higher occurrence of the moulds including in more temperate regions. Several types of aflatoxin (14 or more) occur in nature, but four – aflatoxins B1, B2, G1 and G2 are particularly dangerous to humans and animals as they have been found in all major food crops; but most human exposure comes from contaminated nuts, grains and their derived products.”*

13. From the above it appears that while aflatoxin appears naturally in betel-nuts, a higher level of aflatoxin contamination poses a threat to human health. Therefore, when column 4 of serial No.155, Part-III, Appendix-B of the Import Policy Order, 2020 prescribes the condition of an aflatoxin report, that is with the aim of determining

the level or degree of aflatoxin contamination in the betel-nuts imported so as to assess whether those are fit for human consumption. That being the intent of the law, there is force in the submission of Mr. Khalid Rajpar that a certification simpliciter by the Department of Plant Protection that the aflatoxin level is within 'admissible limits', does not suffice in the absence of a laboratory report to back it up; the more so when it is also not disclosed what that admissible limit is.

14. Though none of the parties have placed on record any document to show whether the Department of Plant Protection has prescribed any national standard for the admissible limit of aflatoxin in betel-nuts, both learned counsel represented that the admissible level is 30 ppb as has been observed in the cases of *Naeem Ali Muhammad Munshi v. Federation of Pakistan* (C.P. No.D-5087/2019 decided on 10-10-2019) and *Kiran Food Products v. Federation of Pakistan* (C.P. No. D-3468/2021 decided on 23-06-2021). Since there is no other report or representation to the contrary before me, for the present purposes (only) I take 30 ppb to be the acceptable limit of aflatoxin in betel-nuts imported into Pakistan.

15. Of the laboratory reports obtained by the DG I&I in respect of samples drawn by it from the betel-nuts under detention, the report of PCSIR shows the aflatoxin level at 116.78 ppb, i.e. in excess of the admissible limit, whereas the report of the IAC shows the aflatoxin level at 24.1 ppb i.e. within the admissible limit. Learned counsel for the Plaintiff disputed the report of PCSIR (116.78 ppb) by submitting that there is no way of verifying that such sample was in fact taken by the DG I&I from the detained betel-nuts. That apprehension is not without force, inasmuch as the report of PCSIR does not make any reference to the Plaintiff or the consignment in question; it only mentions the DG I&I as the source of the sample; and the method of testing the sample is also stated to be only by way of 'direct microscopy' as opposed to the use of a chemical agent necessary to determine the level of aflatoxin. In contrast, the report of IAC, also

obtained by the DG I&I, which shows the aflatoxin level at 24.1 ppb; that does make a reference to the Plaintiff's consignment, and identifies the chemical agent used to determine the aflatoxin level. The report of IAC was obtained by the DG I&I after the report of PCSIR. That appears to be so as the DG I&I was wary that the report of PCSIR may not hold up. In such circumstances, the report of PCSIR cannot be relied upon.

16. Apart from the above, having discussed in para 9 *supra* that under the Pakistan Plant Quarantine Rules, 2019, it is the Department of Plant Protection, and not the DG I&I, that is vested with the authority to undertake phytosanitary action, including sampling and then testing from an approved laboratory, learned counsel were queried whether a laboratory report was obtained by the Plant Protection Department before certifying the aflatoxin level in the betel-nuts in question. Mr. Rajpar accepted that it did, and he placed on record the laboratory report dated 17-12-2021 that had been issued by the Industrial Analytical Center to the Department of Plant Protection in respect of the betel-nuts in question. That report shows that the aflatoxin level found in the betel-nuts was 21.5 ppb, i.e. within the admissible limit. That being the case, i.e. the certification of the Department of Plant Protection that aflatoxin in the betel-nuts was within the admissible limit, was duly based on a laboratory report obtained by it, the remaining condition to the import of betel-nuts in column 4 of serial No.155, Part-III, Appendix-B of the Import Policy Order, 2020, is also satisfied. Those being the only conditions prescribed for importing the betel-nuts, the other arguments advanced by Mr. Rajpar with regards to the fitness of betel-nuts for human consumption are beyond the domain of the DG I&I, and are not relevant to section 17 of the Customs Act, 1969 under which the goods have been detained. On a *prima facie* view of the matter, the detention of the goods by the DG I&I appears to be a fishing expedition.

17. Having seen that the betel-nuts imported by the Plaintiff fulfilled all conditions of import as prescribed in serial No.5 of Part-I and serial No.155 of Part-III, Appendix B to the Import Policy Order, 2020, the detention of such goods by the Directorate General, Intelligence & Investigation-Customs is without any legal basis. The case of the Plaintiff meets all conditions to the grant of an injunction. Resultantly, CMA No. 397/2022 is allowed by setting-aside the impugned detention memo dated 29.12.2021 and by directing the Defendants 2 to 4 to release the said goods forthwith.

JUDGE