THE HIGH COURT OF SINDH AT KARACHI

Suit No. 474 of 2022

[All Pakistan Solvent Extractors Association & others v. Federation of Pakistan & others]

Plaintiffs	:	All Pakistan Solvent Extractors Association & 09 others through M/s. Abid S. Zuberi, Ayan Mustafa Memon and Hassan Nadeem Qamar, Advocates
Defendants 1-3	:	Federation of Pakistan & 02 others through Mr. Khilji Bilal, Assistant Attorney General for Pakistan, along with Shahid Abdullah, Director Technical Quarantine, Islamabad, Dr. M. Ishfaque, Deputy Director, Mr. Muhammad Faisal Shahzad, Muhammad Shoaib, Muzamil Shahzad and Umar Masaab, Entomologists, Department of Plant Protection, Government of Pakistan.
Defendant No.4	:	The Collector of Customs through Mr. Aamir Raza, Advocate.
Date of hearings	:	13-04-2022 & 19-04-2022
Date of decision	:	11-05-2022

O R D E R

Adnan Iqbal Chaudhry J. - This order is to decide CMA No. 5344/2022 whereby the Plaintiffs pray that :

> *"…… this Honourable Court may be pleased to suspend the operation of the Impugned Order bearing reference No. KSP (IMPORT)-1562/20-21 dated 22.03.2022 issued by the Defendant No.3 and direct the Defendant No.3 and 4 to release the Plaintiff's consignment of 55636.55 metric tons of Soybean on YANGZE 6 currently at FAP Terminal Port Qasim, Karachi, after fumigation with methyl bromide;*
>
> *It is further prayed that this Honorable Court may be pleased to restrain the Defendants, their officers, agents and/or assigns from deporting, destroying or re-exporting the subject consignment consisting of 55636.55 metric tons of Soybean on YANGZE 6 docked at FAP Terminal Port Qasim, Karachi and/or from taking any coercive action against the Plaintiff's and/or the subject consignment."*

2. Soya-bean, botanical name '*glycine max*', is importable under Serial No. 328, Part III, Appendix 'B' of the Import Policy Order, 2020, which prescribes the following conditions for its import:

> "Importable subject to valid import permit, valid phytosanitary certificate and plant protection release order of Department of Plant Protection, MNFSR"

The aforesaid conditions are with reference to the Pakistan Plant Quarantine Rules, 2019 [PPQR], notified by the Federal Government under the Pakistan Plant Quarantine Act, 1976, a legislation to give effect 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. The power to issue import permits for plants and plant products, 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 PPQR where such action is referred to as 'phytosanitory action', 'phytosanitory measures' and 'phytosanitory procedure' [Rules 2(lxix), 2(lxxii) and 2(lxxiii)]. Under the PPQR, the authority vested with the power to take phytosanitory action, measures and procedure are the 'Plant Protection Adviser' and the 'Authorized Officer' (Rules 45, 46, 54 and 96 to 99).

3. The Plaintiffs 2 to 10 have imported a consignment of 55,636.55 metric tons of soya bean which arrived at FAP Port Qasim Terminal aboard the vessel 'MV Yangze 6' from Santos, Brazil on 19-03-2022. Per the Plaintiffs, such soya bean is intended for extraction of oil for human consumption, and the left over bean is intended for use in animal feed. The consignment has been imported under a valid import permit issued by the Department of Plant Protection [DPP], and is accompanied *inter alia* by a phytosanitary

certificate dated 22-02-2022 issued by the Plant Protection Organization, Brazil, certifying as follows:

> *"This is to certify that the plant, 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."*

It was further certified that the goods had been treated for disinfestation and disinfection by way of fumigation with *aluminum phosphide*.

4. Upon arrival of the consignment, it was inspected by the DPP (Defendant No.3), under Rule 45 of the PPQR, whose officers detected the presence of plant pests in the consignment. Samples were drawn from the consignment by the DPP and dispatched for laboratory tests. As per the report received by the DPP from the Industrial Analytical Center, HEJ Research Institute of Chemistry, Karachi, dated 22-03-2022, the *aflatoxin* level found in the sample was 25 ppb. The report further opined that *"Standard Specification of Aflatoxin as per United States Food & Drug Administration in all food maximum limits for total Aflatoxin is 20 ppb"*.

5. On 22-03-2022, the Authorized Officer of the DPP passed the impugned order under Rule 46 of the PPQR for the confiscation or destruction or deportation or re-export of the consignment to the country of origin within seven days. Per the impugned order:

(a) *"Consignment on inspection found to be infested or infected or both with a quarantine pest notified under Schedule I, II, III"*;
(b) *"Aflatoxin limit exceeding the permissible limit (lab report copy attached). In case of re-export disinfestation required under Rule 46(2) of PPQR 2019."*

6. Subsequent to the impugned order, the DPP received laboratory reports from the Institute of Plant Protection MNS, University of Agriculture, Multan with regards to the samples sent

to it on 21-03-2022 to determine whether the pests found in the consignment were quarantine pests. Per the report issued by said Institute on 24-03-2022 :

> *"….. It is stated that 03 samples containing adult insects were received for identification. After careful examining, the samples are identified and its nomenclatural hierarchy is presented as below:*

Sample	***Order***	***Family***	***Genus***	***Species***
1.	*Coleoptera*	*Anthicidae*	*Anthicus*	*cervinus*
2.		*Curculionidae*	*Hypera*	*Postica*
3.		*Broken specimen of small beetle which could not be identified.*		

Per the report issued by said Institute on 28-03-2022, the samples also revealed the growth of pathogens as follows:

> *"With reference to letter No. KSP(Insect Pest) – 1566/20-21 dated 21-03-2022, the soybean seed sample was processed for the identification and detection of pathogens. For the diagnosis of plant pathogens the scientific protocols were follows. The seeds were placed on the artificial growth media for the possible isolation of fungal and bacterial pathogens. For the diagnosis of virus the trial is under process. The results of fungal and bacterial pathogens are as following*

Sr. No.	***Method***	***Pathogen***	***Pathogen name***	***Remarks***
1.	*Visual Observation*	*-*	*-*	*Presence of distorted, discolored, unhealthy seeds with the possibility of seed-borne pathogens (Pic.1)*
2.	*Inoculation of seeds (healthy & unhealthy) on artificial growth media*	*Yes*	*Rhizopus spp.*	*Seed-borne pathogen. (Pic. 2-5)*
3.	*Inoculation of seeds (healthy & unhealthy) on artificial bacterial growth media*	*Yes*	*Pseudomonas spp.*	*Seed-borne pathogen. Gram negative & rod shaped (Pic. 6-7)*

7. On receipt of the above mentioned laboratory reports, the DPP issued a notification of non-compliance to the Ministry of Agricultural Livestock and Food Supply, Brazil, to inform it, as required by the PPQR, that the DPP has intercepted a consignment

of soya bean from Brazil which did not comply with Pakistani phytosanitary import requirements.

8. Heard the learned counsel, the officers of the DPP, and perused the record with their assistance.

9. 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."*

From the above it appears that while *aflatoxin* may appear naturally in food crops, a higher level of *aflatoxin* poses a threat to human health.

10. As narrated above, the DPP relies on the report of the Industrial Analytical Center, HEJ Research Institute of Chemistry, Karachi, dated 22-03-2022 to contend that the *aflatoxin* level found in the consignment at 25 ppb is in excess of the permissible limit. Per the Plaintiffs, at the same time they too had been permitted by the DPP to draw a sample from the consignment which they had sent to the laboratory of SGS. As per the report of SGS dated 21-03-2022, the *aflatoxin* level in the sample was only 3.80 ppb. The Plaintiffs also relied upon a letter of quality dated 24-03-2022 issued by the Bureau Vertias Do Brasil Inspecoes, the surveying company at Brazil that

had inspected the consignment at the loading port, which states that it had performed a test on the sample retained by it, and the *aflatoxin* level was in the range of <3 to 4.6 ppb. Per the Plaintiffs, they had taken further samples on 24-03-2022 from different hatches of the consignment for another test by SGS, and those reports dated 28-03-2022 found the *aflatoxin* level in the range of 3.80 to 5.73 ppb. With regards to the acceptable limit of *aflatoxin* in food crops, learned counsel for the Plaintiffs further submitted that the standard of 20 ppb laid down by the United States Food & Drug Administration, as relied upon by the DPP, was not a standard prescribed in Pakistan.

11. At the hearing of the case on 31-03-2022, the officers of the DPP did not deny that the Plaintiffs too had drawn samples from the consignment to test the same for *aflatoxin*, *albeit* the DPP disputed the authenticity of the reports of SGS. In view of the varying laboratory reports as to the level of *aflatoxin* found in the consignment, this Court vide order dated 31-03-2022 directed the DPP to take another sample from the consignment for a chemical analysis. By consent of the parties, the sample was directed to be sent to the National Institute of Biotechnology and Genetics Engineering [NIBGE], Faisalabad, a laboratory approved by the DPP. As per the report of NIBGE, the *aflatoxin* level in the sample was at 8.22 ug/kg (same in ppb). Thus, *prima facie*, majority of the laboratory reports on the record find the *aflatoxin* level in the consignment well below 20 ppb, a level that is recognized by the DPP as acceptable. In this view of the matter, I do not see the need to examine whether the *aflatoxin* standard cited by the DPP, i.e. of the United States Food & Drug Administration, is a standard recognized under the PPQR.

12. The controversy that now remains is with regards to pests including pathogens detected in the consignment by the DPP and affirmed by the laboratory reports dated 24-03-2022 and 28-03-2022

issued by the Institute of Plant Protection MNS, University of Agriculture, Multan.

13. It is a fact, as contended by learned counsel for the Plaintiffs, that when the impugned order was passed on 22-03-2022 citing quarantine pests in the consignment, by that time the Institute of Plant Protection MNS, University of Agriculture, Multan had not issued its laboratory reports dated 24-03-2022 and 28-03-2022 to identify the pests detected in the consignment. It was therefore contended by learned counsel for the Plaintiffs that the finding in the impugned order was a determination without any basis and with *malafides*. However, under the scheme of the PPQR, the Authorized Officer of the DPP is empowered to make a determination of quarantine pest with or without a laboratory test. Under sub-rule (6) of Rule 45 of the PPQR, the Authorized Officer may take a sample "if he deems it necessary". The determination made under sub-rule (1) of Rule 46 of the PPQR is without a laboratory test, while the determination made under sub-rule (2) of Rule 46 is with a laboratory test. That appears to be so because Rule 57(3) of the PPQR envisages that the consignment has already undergone mandatory inspection, lab testing and phytosanitary treatment at the exporting country, and therefore, Rule 2(cxiv) of the PPQR recognizes 'visual examination' as a mode for detecting pests and contaminants in a consignment. As explained by Mr. Shahid Abdullah, Director Technical Quarantine of the DPP, the inspecting team of the DPP comprises of qualified entomologists who have the expertise to identify quarantine pests on a visual examination. Therefore, the fact that the impugned order was passed without waiting for the laboratory reports, does not make it unlawful. However, since it is being contended by the Plaintiffs that the pests detected in the consignment are not quarantine pests, those laboratory reports become crucial.

14. It is to be noted that while the laboratory reports issued by the Institute of Plant Protection MNS, University of Agriculture, Multan

are evidence of pests in the consignment, those reports do not go on to state that such pests are quarantine pests. That determination is to be made by the Authorized Officer also keeping in view the provisions of the PPQR.

15. Rule 2(lxxv) of the PPQR defines a 'plant pest' to include fungi, bacteria and virus growing on a plant product as follows:

> "2(lxxv) – 'plant pest' means any biotic agent in any stage of its development including any form or stage of insects, mites, snails, slugs, worms, nematodes, algae, fungi, protozoa, bacteria, actinomycetes, viruses, viroids and molecutes and also include genetically engineered or modified organisms and weeds species known, suspected or liable to be harmful to the existence or growth of economic plants or to plant materials or to the plant product, whether by direct infestation or attach or by causing or spreading diseases in economic plants and known to infest land or waster, thereby preventing or obstructing its possible agricultural uses."

'Quarantine pest' and other relevant definitions in Rule 2 are as follows:

> "(xci) – "quarantine pest" means a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled;
>
> (xxvi) – "disease" means any pathological abnormal condition of a plant caused by insects, mites, nematodes, protozoa, fungi, bacteria and viruses, recognizable by the presence of symptoms or of the organism inciting it;
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> (xcviii) – "regulated non quarantine pest" means a non-quarantine pest whose presence in plants for planting affects the intended use of those plants with an economically unacceptable impact and which is therefore regulated within the territory of the importing contracting party;
>
> (xcix) – "regulated pest" means a quarantine pest or a regulated nonquarantine pest;"

16. Schedule-I to the PPQR lists goods or articles from designated countries that are prohibited from being imported into Pakistan (except as provided in Schedule II) due to quarantine pests and

regulated non-quarantine pests associated with such articles, which pests are described in the last column of that Schedule. Column 3 of Schedule II to the PPQR lists the pests that are regulated pests in Pakistan in relation to specified articles imported into Pakistan. Said Schedules are of course subject to an update from time to time as also clarified by the notes appended thereto. Under Rule 97(b)(xxi) of the PPQR it is duty of the Plant Protection Advisor to "maintain and revise list of quarantine pests, diseases, weed species or contamination tolerances or food safety risks limits regularly based on guidelines of Convention". The guidelines on preparing lists of regulated pests have been published by the International Plant Protection Convention as 'International Standard for Psytosanitary Measures 19' [ISPM 19].

17. If the Authorized Officer finds a quarantine pest in the imported articles, then the phytosanitary action mandated by sub-rules (1) and (2) of Rule 46 of the PPQR is that of "an order of confiscation and destruction or deportation or re-export to its country of origin in DPPQ Form 21 after necessary treatment at the expense of the importer." However, if the pest is a regulated non-quarantine pest, then Rules 47 and 54 of the PPQR provide the following procedure:

> "**47. Emergency disinfestation or disinfection notification.—**If authorized officer finds regulated non-quarantine pest, or regulated nonquarantine weeds species or signs of regulated non-quarantine diseases on or in the plant, plant product or regulated article or finds that the plant, plant product or regulated article may have been associated with other goods or articles associated with regulated non-quarantine pests, or regulated non-quarantine weeds species or regulated non-quarantine diseases, he shall make emergency disinfestation or disinfection notification to the importer in DPPQ-Form 22, if appropriate measures are available, otherwise, he will order to destroy or deport such consignment in DPPQ-Form 21.
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> **54. Biosecurity clearance or plant protection release order.—**The authorized officer shall issue biosecurity clearance or plant protection release order to consignment in DPPQ-Form 23 for entry into Pakistan or for provisional clearance to grow plant, plant product or other regulated article at duly approved post-entry

quarantine facility by the Department as the case may be if he determines that the consignment is free from invasive quarantine and regulated non-quarantine pests and fulfills phytosanitary conditions under these rules."

"Disinfestation or disinfection" means any scientific treatment applied for the purpose of destroying or reducing any infection or infestation that may occur in or amongst plant materials" [Rule 2(xxvii)]. "Treatment" means procedures administratively approved by the Plant Protection Adviser for destroying infestations or infections of insect pests or plant diseases, such as fumigation, application of chemicals, dry or moist heat, processing, utilization, or storage" [Rule 2(cx)].

18. It was contended by learned counsel for the Plaintiffs that the pests mentioned in the laboratory reports dated 24-03-2022 and 28-03-2022 are not quarantine pests as those were not included in Schedules I and II to the PPQR; that as per the data published by CABI, the pest *hypera postica*, and the pathogen *Pseudomonas spp* were already present in Pakistan; that the pathogen *Rhizophus spp* was a common mold and air-borne fungus found everywhere; that as per a research published by the Zoological Society of Pakistan, the pest *anthicus cervinus* was also not alien to Pakistan; that said pests could be treated/disinfected by fumigating the consignment with *methyl bromide* which was the course prescribed by the DPP itself.

19. During the course of arguments, Dr. Muhammad Ashfaq, Deputy Director Quarantine of the DPP acknowledged that out of the two species mentioned in the laboratory report dated 24-03-2022, *hypera postica* was not a quarantine pest. As regards the laboratory report dated 28-03-2022 with regards to pathogens found in the consignment, Dr. Muhammad Ashfaq candidly stated that such report identified only the genus of the pathogens and not its species, and therefore it could not be determined from that report whether those pathogens were quarantine pests or not. Resultantly, the thrust of the contentions of the DPP was that the pest *anthicus cervinus*

found in the consignment was a quarantine pest requiring confiscation and destruction or deportation of the consignment. However, the fact of the matter remained that the pest *anthicus cervinus* does not find mention amongst the plant pests presently covered by Schedules I and II to the PPQR, nor did the officers of the DPP bring on record the list of quarantine pests that is required to be maintained by the Plant Protection Advisor under Rule 97(b)(xxi) of the PPQR to show that *anthicus cervinus* was a quarantine pest. If *anthicus cervinus* was a quarantine pest associated with the import of soya bean from Brazil, which import is admittedly being made for many years now, then under Rule 97(b)(xxi) of the PPQR it was duty of the Plant Protection Advisor to include it in the list of quarantine pests and to take steps for its inclusion in Schedule I to the PPQR. Such aspect of the matter remained unexplained by the DPP.

20. Given the aforesaid, the Plaintiffs have *prima facie* established that *anthicus cervinus* is at best a regulated non quarantine pest that does not in the first instance attract confiscation and destruction or deportation of the consignment under Rule 46 of the PPQR, but attracts Rule 47 of the PPQR for steps to disinfest or disinfect the consignment. To that end, learned counsel for the Plaintiffs had drawn attention to release orders issued by the DPP in respect of other consignments of soya bean to show that fumigation by *methyl bromide,* and that too on the arrival of the goods in Pakistan, was the treatment approved by the DPP in similar cases. In reply, officers of the DPP had attempted to argue that as per the terms and conditions of the import permit issued to the Plaintiffs the treatment by *methyl bromide* had to undertaken at the port of export at Brazil. But then, the letter dated 12-03-2020 filed with the Plaintiffs' rejoinder shows that the DPP itself had waived such condition for the Brazilian Department pending a reassessment of phytosanitary import conditions, and in the interim the DPP had approved treatment by *methyl bromide* on arrival of the consignment in Pakistan before according biosecurity clearance. Here, I may also note that fumigation of infected articles by *methyl bromide* is a recognized

treatment under Rule 81 of the PPQR; and that clause 10 of the import permit issued to the Plaintiffs, and sub-rule (2) of Rule 82 of the PPQR envisages that a consignment infested with pests can also be treated for disinfection or disinfestation on arrival in Pakistan.

21. In view of the foregoing, where *aflatoxin* level in the consignment appears to be within admissible limits, and where there is nothing to show that pests detected in the consignment are quarantine pests, the Plaintiffs have made out a case for injunction. However, since the infestation may have multiplied since the goods were last inspected, a concern expressed by the officers of the DPP at the hearing, CMA No. 5344/2022 is allowed in the following terms. The impugned order dated 22-03-2022, bearing No. KSP (IMPORT)-1562/20-21, passed by the Authorized Officer against the Plaintiffs is set aside. The Authorized Officer shall take action under Rule 47 read with Rule 98(6) of the Pakistan Plant Quarantine Rules, 2019 for disinfestation or disinfection of the subject soya bean consignment by appropriate treatment, including but not limited to, fumigation by *methyl bromide*. Thereafter, the consignment shall be inspected again by the DPP, and if it fulfills the requirements of Rule 54 of the Pakistan Plant Quarantine Rules, 2019, the Authorized Officer shall release the consignment in accordance with law.

JUDGE

Karachi
Dated: 11-05-2022