

IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Irfan Saadat Khan

Mr. Justice Zulfiqar Ahmad Khan

C.P. No.D-4335 of 2022

[Muhammad Amir v. Department of Plant Protection & others]

Date of Hearing : 16.09.2022

Respondents through : Mr. Pervez Iqbal, Advocate
Ms. Falak Naz Fatima, Advocate.

Mr. Rashid Arfi, Advocate for the
Respondent/Department.

Mr. G.M. Bhutto, DAG. Mr. M.
Ishaque Pirzada, Advocate.

Mr. Allah Ditta Abid, Plant
Protection Adviser & Director
General of respondent No.1

J U D G M E N T

Zulfiqar Ahmad Khan, J.:- The petitioner has assailed the actions of the respondent No.1 whereby the petitioner was directed to furnish certain documents (details of which are mentioned in para-6 of the memo of petition) terming call for such documents to be patently abuse of process, manifestly unjust and prejudicial to petitioner's interest.

2. It manifests from the memo of petition that the petitioner participated in auction proceedings conducted by the Custom Department for the disposal of Dark Red Kidney Beans ("goods") and that the petitioner's bid was accepted being the highest one, and having fulfilled the procedural auctioneering formalities, the petitioner approached to the Customs Authorities for the delivery of

the auctioned goods, whereupon, the petitioner was directed to submit a “No Objection Certificate” from respondent No.1 i.e. Department of Plant Protection, Government of Pakistan. It further manifests that Customs through a letter dated 07.06.2022 addressed to the respondent No.1, requested examination of the goods in order to issue appropriate Plant Protection Release Order (PPRO). Following the said communication, the petitioner approached the respondent No.1, who instead of issuing such a release order, instead directed the Petitioner to *inter alia* provide Phytosanitary Certificate issued by the concerned authority of the exporting country, invoice and packing list issued by the exporter and the bill of lading including goods declaration. Being posed with the challenge of providing these documents which, per learned counsel were never given to the Petitioner at the time of the auction by the Customs Department, the petitioner has approached this court for the issuance of PPRO as well as seeks declaration that the demand for numerous documents by the respondent No.1 is unreasonable and without jurisdiction.

3. Mr. Parvez Iqbal, learned counsel for the petitioner argued that the impugned demand is untenable in law, *inter alia*, having been issued contrary to the provisions of the Customs Act, 1969 and Customs Rules, 2001. His next stance was that the petitioner is merely an auction purchaser, not importer of the subject goods, hence demand of numerous documents by the respondent No.1 is untenable. While summing up his submissions, learned counsel argued that the subject goods has limited shelf-life, therefore, directions be issued to the respondent No.1 for immediate examination of the

subject auctioned goods for forthwith issuance of PPRO so that goods could be handed out to the Petitioner, being the auction purchaser.

4. The department's counsel with the assistance of official of respondent No.1 present in Court argued that as phytosanitary security and integrity of the goods could not be ascertained due to the absence of phytosanitary certificate from the exporting country, its feared that release of goods would lead to the biosecurity risks, therefore, the official of the respondent No.1 did not entertain the request of the custom authorities. He further submits that the demand of documents raised by the respondent No.1 is statutory prescription vide Rules 8, 44, 46(4) and 56 of Pakistan Quarantine Rules, 2019. He lastly submitted that mere provision of the requisite documentation would take the matter to its logical conclusion, hence, there was no occasion to consider the Impugned demand as unreasonable or without jurisdiction. Mr. G.M. Bhutto, learned DAG supported views of the counsel.

5. We have appreciated the arguments of the respective learned counsel and have also considered the record and the applicable laws to which our attention was solicited. It is settled law that a departmental demand or such a notice does not ordinarily merit interference unless it is seen to suffer from the want of jurisdiction; or it is an abuse of process; or otherwise is mala fide, unjust or patently prejudicial. Therefore, the moot question for our determination is whether the said demand of various documents suffers from any infirmity, meriting interference of this Court or could a phytosanitary certificate could be given to the petitioner for

the issuance of PPRO at this stage, and lastly what should be the fate of these goods.

6. Principally, laws that govern the controversy at hand is Pakistan Plant Quarantine Act, 1976 (“the Act, 1976”) and the Rules framed thereunder i.e. Pakistan Plant Quarantine Rules, 2019 (“the Rules, 2019”). Also to keep in mind are the facts that Pakistan is a signatory of the International Plant Protection Convention (IPPC) since 1954 and Department of Plant Protection (DPP) has been mandated to function as the National Plant Protection Organization (NPPO) under the provisions of IPPC. Pakistan is also a signatory to the Agreement on the Application of Sanitary and Phytosanitary Measures also known as “WTO-SPS” Agreement. By way of background its worth recording that The “Destructive Insects and Pests Act, 1914” was the very first of such laws enacted to prevent the introduction and spread of exotic pests and diseases in our part of the world which could be destructive to crops, horticulture, floriculture and forests. After the independence, the said Act was adapted through the Governor General Order No.4 of March 1949 and in exercise of the powers conferred by sub-section (1) Section 3, 4A and 4D of the said Act, Plant Quarantine Rules, 1967 were adapted through S.R.O. 29(K)/67 after bringing the old rules in conformity with the recommendations of the Food and Agriculture Organization (FAO) of the United Nations (joined by Pakistan on 7 September 1947) and those of the IPPC. The Act of 1976 is moulded on the earlier 1914 Act that badly needed revision and modifications in the light of advances in the field of plant protection and plant quarantine whereas the Rule, 2019 have been framed in exercise of powers

conferred under Section 3 read with Sections 5 and 10 of the Act, 1976. The purpose of these legislations is to protect indigenous plants and crops from pests and diseases that may accompany plants and plant products imported into Pakistan and may ultimately effect public health and the eco-balance. The power to issue import permits for plants and plant products, to inspect those at import stage 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 Rules, 2019 where such action are referred to as “phytosanitary action”, “phytosanitary measures” and “phytosanitary procedure” [Rules 2(lxix), 2(lxxii) and 2(lxxiii)].

7. International Standards for Phytosanitary Measures (ISPMs) have long been established through IPPC to protect world’s plant resources from the spread and introduction of pests, and promoting safe trade. As stated earlier Department of Plant Protection (DPP) is mandated to function as the National Plant Protection Organization (NPPO) under Article IV of IPPC, thus responsibility of preventing entry and spread of invasive and exotic biosecurity risk in the country and to safeguard domestic agriculture and natural resources rests with the said Department i.e. the respondent No.1.

8. Beginning with the issue of phytosanitary certificate, which petitioner needs to be handed out for issuance of a Plant Protection Release Order paving his way towards release of the goods. To understand importance of this certificate one has to understand its vitality and as to why such a certificate cannot be issued solely by inspecting the consignment for which no such certificate is available

from the exporting country. Phytosanitary in fact is a “status” regarding which certificate is required from its place of origin. It is an official document issued by a Plant Protection Organization of an exporting country to the Plant Protection Organization of an importing country to certify that the plant or plant product covered by the certificate have been inspected according to the established procedures and that such goods are considered to be free from quarantine pests and (practically) free from other injurious pests and that they as to why such goods are to be considered in conformity with the current phytosanitary regulation of the importing country. It must be kept in mind that while this certificate facilitates trade, it is not a trade document as it indicates that the consignment of plant and plant product or other regulated articles which need specified phytosanitary certificate, import requirements thereof are in conformity with the certifying statement of the appropriate model certificate. For National Plant Protection Organization (NPPO) of importing and exporting country (under the Convention) any certificates issued by an entity other than NPPO are considered to be nullity. The fact is the importing countries specify requirement that should be observed with respect to the preparation and issuance of a phytosanitary certificate though a model certificate and format whereof is to be provided under legislature at the export stage.

9. Purpose and responsibility attached to a phytosanitary certificate are defined in “Article I” of International Plant Protection Convention, 1951 (IPPC). The relevant constituent of the said Article is delineated hereunder for ready reference:-

“1. With the purpose of securing common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control, the contracting parties undertake to adopt the legislative, technical and administrative measures specified in this Convention and in supplementary agreements pursuant to Article XVI.

2. Each contracting party shall assume responsibility, without prejudice to obligations assumed under other international agreements, for the fulfillment within its territories of all requirements under this Convention.

3. The division of responsibilities for the fulfillment of the requirements of this Convention between member organization of FAO and their member states that are contracting parties shall be in accordance with their respective competencies.

4. Where appropriate, the provisions of this Convention may be deemed by contracting parties to extend, in addition to plants and plant products, to storage places, packaging, conveyances, containers, soil and any other organism, object or material capable of harbouring or spreading plant pests, particularly where international transportation is involved.”

10. The present consignment of kidney beans, having botanical name "Phaseolus vulgaris" is importable under Serial No. 78, PART-IV Import of Plant and Plant Products of the Import Policy Order, 2022, which prescribes the following conditions for its import:

- (i) Valid Import Permit issued by DPP
- (ii) Phytosanitary Certificate from National Plant Protection Organization (NPPO) of country of origin and Phytosanitary Certificate for re-export (if the country of export is other than the country of origin)
- (iii) Compliance with Food Safety requirements, and
- (iv) Plant Protection Release Order by DPP

11. The conditions mentioned above arise from the Act, 1971 and Rules, 2019 where Plant Protection Adviser and Authorized Officer

(Rules 45, 46, 54, 57 and 96 to 99) are empowered 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 to prevent the spread of pests and infection from such goods, and to issue biosecurity clearance and release orders for such goods. Chapter X of the Rule, 2019 deals with “Inspection, Biosecurity Clearance and issuance of Plant Protection Release Orders” where Rule 44 requires that every application for biosecurity clearance or plant protection release order is to include a valid original permit issued by the Department (except plant or plant products or regulated goods or articles given in Schedule IV of these rules); valid original phytosanitary certificate issued by NPPO of exporting or re-export country bearing phytosanitary measures, per conditions specified by the Department; invoice issued by exporter; packing list issued by exporter; bill of lading, shipping or airway bill, bill of entry; and a treatment certificate approved by NPPO of the exporting country wherever so requested by these rules or conditions prescribed in the relevant permit. If an authorized officer determines that application and documents are correct, he under Rule 45 may make inspection of the plant, plant products or regulated article (“bio-goods”) and if during inspection he finds bulk of the shipment is free from quarantine pests or quarantine weed species specified in Schedule-V or signs of quarantine diseases specified in Schedule-I and Schedule-II or contaminations specified in national standards of the Department or standards of Convention where it is not available in national standard, he may grant permission to off-load the goods at the notified port of entry where the authorized officer is to mandatorily inspect the container carrying out the bio-goods

whereupon if the authorized officer finds that quarantine pest or signs of quarantine diseases do exist on or in the bio-goods, or finds that the bio-goods may have been associated with other plants, plant products or regulated goods or articles infested with quarantine pests, or symptoms of quarantine diseases or food borne risks, he has to refuse entry of the bio-goods in the country by making an order of confiscation and destruction or deportation or re-export to its country of origin after necessary treatment at the expense of the importer. Even if the authorized officer finds that laboratory test and reports show quarantine pests or signs of quarantine diseases, or contamination or food safety risks on or in the bio-goods, or finds that the bio-goods may have been associated with other regulated goods or articles infested with quarantine pests or quarantine diseases specified in Schedule-I and Schedule-II, he has to mandatorily refuse entry of such bio-goods in the country by making an order of confiscation and destruction and deportation or re-export of goods to their country of origin after necessary treatment at the expense of the importer. Sub Rule (3) of Rule 46 provides that if the authorized officer finds that the consignment arrived in Pakistan is prohibited under any applicable law or found contaminated with soil and other contaminants above tolerance level of national standard (or above international standards of IPPC where national standards are not available), or found packed against standard specified in the permit, he must not permit entry of such consignment into Pakistan by making an order of confiscation or destruction and deportation or re-export to its country of origin if cleaning of the consignment is not possible. Per sub-rule (4) if the authorized officer finds that the consignment of bio-goods arrived in Pakistan without a valid import

permit or without valid phytosanitary certificate or without both, he has to order either to have such goods confiscated and destroyed or deported or re-exported to its country of origin after necessary treatment at the expense of the importer.

12. Rule 57 is of vital significance in the present controversy which deals with phytosanitary requirements for Import. Full text of the said Rule is reproduced in the following:-

(57) Foreign inspection and certification requirement.—(1) Any permitted plant, plant product or other regulated article shall be accompanied by a valid and original phytosanitary certificate issued by NPPO of country of origin.

(2) Any permitted plant and plant product and other regulated article shall be accompanied by valid and original phytosanitary certificate for re-export issued by NPPO of re-exporting country along with copy of phytosanitary certificate of country of origin duly attested by NPPO of re-exporting country.

(3) Any consignment of plant, plant products or regulated article shall undergo inspection, lab testing and phytosanitary treatment where and as prescribed by the Department at the exporting country in the permit under supervision of authorized officer of National Plant Protection Organization of exporting country.

(4) Shipments of plants, plant products or regulated goods or articles accompanying phytosanitary certificate for export or re-export shall however not preclude inspection, sampling, testing by the authorized officer of the Department if deemed necessary.

(5) General phytosanitary conditions shall apply to all consignments of plant, plant products or regulated article. (6) The phytosanitary certificate or phytosanitary certificate of reexport issued by NPPO of exporting or re-exporting country respectively for accompanying a consignment of plant, plant products and other regulated goods or articles destined to Pakistan without considering valid import permit of the Department and without formal market access granted by the Department based on standards of the Convention shall be invalid.

(7) Phytosanitary certificate for export or for re-export issued by NPPO of exporting or re-exporting country respectively for accompanying a consignment of

plants, plant products or regulated goods or articles shall certify all phytosanitary measures and requirements specified by the Department in the permit under these rules otherwise, it shall be invalid.

13. Perusal of the above rule in the circumstances at hand make it clear that import of bio-goods must accompany a valid and original phytosanitary certificate issued by NPPO of the country of origin and if it is a case of re-export, it must be accompanied by a valid and original phytosanitary certificate for re-export issued by NPPO of re-exporting country along with copy of phytosanitary certificate of country of origin duly attested by NPPO of the re-exporting country. The rule further provides that at the time of export, such product must undergo inspection, lab testing and phytosanitary treatment, where and as prescribed by the Department at the exporting country in the permit under supervision of authorized officer of National PPO of the exporting country. The said rule whilst makes an exception that if shipments accompany phytosanitary certificate for export or re-export, it still empowers the authorized officer to inspect, sample or testing goods if deemed necessary.

14. We have been informed that the subject consignment at the time of its import did not accompany the required phytosanitary certificate, neither any document showing the validity period nor information that the subject consignment was fit for human consumption was provided by the importer, which led to abandonment of goods and instead of deportation or re-export of the goods to their country of origin after necessary treatment at the expense of the importer, customs authorities chose to auction the goods. In their para-wise comments, respondent 2/3 have admitted

that *“in the absence of PPRO/NOC from DPP, the auctioned goods cannot be released because of environmental and public health issues involved”*. In this regard it becomes pivotal to see what are the requirements imposed by the Customs Rules, 2001 as to auction of bio-hazardious goods.

15. Chapter V of the Custom Rules deals with “Auctions” and under Rule 58 provides a mechanism for approval of goods for auction. It states that as soon as the goods have reached the stage of being sold/auctioned under the Act, such a fact is to be brought to the notice of the Deputy Collector or the Assistant Collector of the area concerned and the Collector on receipt of such information or on his own motion, is to pass orders directing the sale of such goods after giving due notice to the owner under relevant provisions of the Act (Section 201 of the Customs Act), by public auction either departmentally or through an auctioneer and to cause the reserved price to be determined in accordance with the provisions of section 25 of the Act. The rule itself restricts public auction/sale of (a) arms and ammunition; (b) liquor/narcotics and like goods; (c) confiscated books, written material which is obscene, subversive, anti-state or anti-religion; (d) transit goods excluding confiscated goods and (e) diplomatic cargo excluding confiscated goods. The said rules also provides that no goods shall be withheld from auction unless (a) a court of law issues a specified stay order against such auction; (b) the Collector of Customs or the Additional Collector of Customs incharge of auctions orders withholding such auction; or (c) the Deputy Collector or the Assistant Collector incharge of auctions orders withholding of such auction, for reasons to be recorded in writing.

With regards perishable or hazardous goods, Rule 71 permits auction of such goods through private offers or open auction. However strangely enough Customs Authorities after having auctioned the present consignment of bio-goods and pocketing the money are now seeking appropriate phytosanitary and allied approvals to be acquired by the auction purchaser.

16. What is left for us to consider now is the fate of such bio-goods imported into Pakistan in violation of the stringent requirements of plant protection laws and rules and what should be role of customs authorities in dealing with such goods as customs laws and rules seemingly so far have not been sensitized for such important issue that could lead to environmental and biologicals catastrophes. The very first piece of legislations that arms us in this regard is Rule 46 of the Rule, 2019 which at three occasions compels authorities to refuse entry of such plants, plant products and other regulated goods or articles in the country by making an order of confiscation and destruction and deportation or re-export to its country of origin after necessary phytosanitary treatment at the expense of the importer. International Standards for Phytosanitary Measures (ISPMs) No. 20¹ sets out guidelines for a phytosanitary import regulatory system and provides for structure and operation of a phytosanitary import regulatory system and the rights, obligations and responsibilities which should be considered in establishing, operating and revising such systems. It states that the administration of the phytosanitary import regulatory system by an NPPO (i.e. PPD in Pakistan) should ensure the effective and consistent application of phytosanitary legislation and regulations and compliance with international

¹ <https://www.fao.org/3/y5721e/y5721e.pdf>

obligations that may require operational coordination with other government services or government agencies involved with imports, e.g. Customs and administration of the phytosanitary import regulatory system be coordinated at national level.

17. At this juncture it would also be pertinent to look at the global approach towards goods rejected on account of phytosanitary concerns and whether there exist any global guidelines in this regard. Harmonization of global customs laws and rules fell in the ambit of the World Customs Organization (WCO) which was established in the year 1952 as Customs Co-operation Council being an independent intergovernmental body with the mission to enhance the effectiveness and efficiency of Customs administrations. With regards phytosanitary and plant protection, Chapter 3 of Annexure to Kyoto Convention sets out Clearance and Other Customs Formalities which are treated as WCO guidelines. Paragraph 8.3. thereof mandates examination of goods by “other competent authorities” *inter alia* for phytosanitary compliances. Paragraph 10.2. of the Convention titled “Prior permission for release of the goods” provides that Customs may also make it a condition for prior release that the essential supporting documents be produced and that any other required inspections (veterinary, health, phytosanitary, etc.) be carried out by the competent authorities. With regards WTO, Protocol Amending the Marrakesh Agreement with regards Trade Facilitation through Article 8 while dealing with the treatment to be meted out to Rejected Goods mandates that “*Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary*

regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter”. Last but not least, the Agreement on the Application of Sanitary and Phytosanitary Measures (earlier defined as WTO-SPS Agreement) also entered into force with the establishment of the WTO to deal with matters concerning food safety and animal and plant health amongst member countries (including Pakistan).

18. From the above discussion it could be safely concluded that the present consignment of red kidney beans could only have been imported under Serial No. 78, PART-IV titled Import of Plant and Plant Products of the Import Policy Order, 2022, alongwith (i) Valid Import Permit issued by DPP (ii) Phytosanitary Certificate from National Plant Protection Organization (NPPO) of country of origin and Phytosanitary Certificate for re-export if the country of export was other than the country of origin, and (iii) Compliance with Food Safety requirements and in the absence of these essential requisites, Respondent Nos.1 could not be compelled to provide Plant Protection Release Order-PPRO, nor an order for conducting phytosanitary inspection of the consignment at this stage could be passed as it would frustrate the entire scheme of law posing serious bio hazards. The plant protection and phytosanitary laws, rules, conventions and guidelines have been put into place globally to protect indigenous plants and crops from pests and diseases that may accompany plants and plant products imported into the country of import, which would have ultimate effect on public health and could danger the eco-

balance. This regime ensures local plants, flora and fauna's protection and aims to save the crops from pests and diseases. It is for these public purpose that stringent border controls have been created, and phytosanitary standards are made compulsory at the highest levels in WTO. It seems that the Respondent Nos.2/3 by auctioning of the consignment has attempted to do what these were mandated to refrain from i.e., to avoid these goods pouring onto Pakistani soil. By auctioning the subject goods, the said respondents have chosen to show a complete indifference towards national ecosystem. Specifically not applicable in the facts of the case at hand, but still the legal maxim *Quando aliquid prohibetur ex directo, prohibetur et per obliquum* meaning that "when anything is prohibited directly, it is prohibited also indirectly" is still applicable to the case at hand and the Respondent Nos.2/3 has indirectly attempted to cause the damage to nation which laws restricted through an airtight set of laws and rules. It stems from the foregoing analysis that only option available to custom authorities in respect of such phytosanitary-offensive consignment is that such consignments be confiscated, destroyed, or returned to the port of origin at the expense of the importer. Such goods can never be permitted to be let out to reach national soil or waters, resultantly the exercise to have to goods auctioned was not only illegal but also without any application of sound mind exhibiting complete lack of coordination between different organs of the customs authorities.

19. Resultantly the petition is dismissed by issuing directions to the Respondent Nos.2/3 to have the consignment returned to the port of origin at the expense of the importer or in alternate, to have the

complete consignment destroyed and return the auction amounts submitted by the Petitioner to him alongwith all taxes paid by him in this pursuit.

20. Let a copy of this order be sent to Chairman FBR who to circulate the same amongst all Custom Collectrates across the country and file a compliance report trough MIT-II of this court for our examination in chambers.

Karachi
12/10/2022

JUDGE

JUDGE