

**Sachdeva and Sons Vs. Collector of Customs**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Dec-31-1986

**Reported in :** (1987)(29)ELT917Tri(Mum.)bai

**Appellant :** Sachdeva and Sons

**Respondent :** Collector of Customs

**Advocate for Pet/Ap. :** Shri. Vittal

**Judgement :**

1. M/s. Sachdeva & Sons, Amritsar, have filed this present appeal Under Section 129-A(1) of the Customs Act against the Order No. S/16-186/85E, dated 12.6.1985 of the Additional Collector of Customs, Bombay, under which he confiscated two consignments said to contain Basmati rice valued at Rs. 11,60,207/- and Rs. 6,54,476/- and imposed redemption fines of Rs. 2,30,000/- and Rs. 1,20,000/- respectively Under Section 113 of the Customs Act, besides levying penalties of Rs. 23,000/- and Rs. 12,000/- respectively Under Section 114 of the Customs Act. Being aggrieved with the decision the Appellants have approached this Tribunal as mentioned above.

2. The facts of the case are that M/s. Sachdeva & Sons, Amritsar, through their custom agent Sirgiroh H.R. Khan and Sons filed two shipping bills No. 6555 dated 13.5.1985 and 7215 dated 14.5.1985 for shipment of 1950 and 1100 bags said to contain Basmati rice per s.s.

Tilia for export to Dubai. The exporters submitted certificate No. A 2035 S.No. 074 dated 8.5.1985 issued by the Deputy Senior Marketing Officer, Directorate of Marketing and Inspection, Government of India, Amritsar, certifying that the rice was of Basmati quality and the same had been graded with agmarking. The rice was said to be in 3 lots with destination meant as Dubai. The rice was inspected on 6.5.1985 and the period of validity was shown as 60 days. However, when the goods were brought in the docks for shipment they were examined by the Customs authorities and found to be other than Basmati. As a result the Customs Officers requested the Agmarking authorities of Bombay to draw fresh samples for determining the type of the rice under export. This was done by the Senior Marketing Officer, Western Region, Bombay, Directorate of Marketing and Inspection of the Ministry of Rural Reconstruction; and in his letter dated 4.6.1985 addressed to the exporters the officer stated that the consignment of Basmati rice containing 3050 bags was inspected and representative sample drawn from the consignment in presence of the Custom House Agent's representative and Customs Appraiser. The samples on analysis were found not conforming to the specifications for Basmati rice. The officer further asked the exporters not to ship the consignment and arrange for removal of the Agmark labels and lead seals from the bags and surrender the certificate dated 27.5.1985 issued to the exporter by the Agmark authorities of Amritsar. In view of the fact that the rice was not of Basmati quality the Collector drew up adjudication proceedings and passed the impugned order.

3. On behalf of the Appellants Advocate Shri V.N. Deshpande submitted that the 3050 bags of rice were brought from Amritsar by the exporters and two shipping bills were submitted for the export of these bags of rice to Dubai. The exporter was the biggest exporter of Basmati rice from India and the Advocate drew our attention to para 1 of the appeal which mentioned the figures for value of Basmati rice exported during the past six years. The Advocate further stated that the exporter had his own rice mill in Amritsar and was buying paddy, milling it and producing Basmati rice out of it. The Basmati rice was mainly meant for export. The 3050 bags of Basmati rice were examined in the Appellant's godown in Amritsar by the Agmark authorities who certified that the 3050 bags contained Basmati rice and were in accordance with the Basmati Rice Grading and

Marketing Rules, 1979. On the basis of the aforesaid certificate the exporters tendered the goods for shipment.

But the Customs authorities did not accept that the goods were Basmati rice and referred the matter to the local Agmark authorities. They merely examined two bags out of 3050 bags and gave their report that the rice was not of Basmati quality. The Advocate submitted that this report was not reliable as it did not conform to the procedure for Agmarking. On the other hand, the proper procedure had been followed by the Agmark authorities at Amritsar as shown in the certificate and each bag had been sealed and impressed with Agmark. Shri Deshpande further argued that the value of the rice was higher than the price fixed for export and in this behalf he drew our attention to S.No. 16 on page 86 of the April 1985-March 1988 Vol II Export Licensing Policy Book. The Advocate further contended that the Amritsar Agmark authorities had carried out the proper test while the Bombay Agmark authorities did not give the details of the test carried out by them for determining as to whether the rice was of Basmati quality. In particular the length/breadth ratio of the rice-grain was very much relevant in coming to the conclusion as to whether the rice was of Basmati variety. But this test did not appear to have been carried out by the Bombay authorities as their report was silent in this matter. Shri Deshpande read out the instructions for grading and Agmarking Basmati rice and referred to the procedure for Agmarking. The Advocate further explained that since the rice was not held to be falling under the Basmati category covered by Heading B. 20(2a) of the Policy which came under OGL 3, the export of the non-Basmati rice fell within the category of banned goods. Hence the Additional Collector took the penal action and did not permit the export. The Additional Collector had held that the exporters violated Section 50 of the Customs Act. But this was only a procedural section requiring subscription of a correct declaration regarding the nature of the goods exported. Its contravention did not merit such a heavy punishment. A mere caution should have sufficed with permission to take back the consignment out of the docks. Such a leniency was shown by the same Additional Collector with reference to the consignment of rice sought to be exported by another exporter M/s.

Empire Exports, Bombay whose consignment of rice was simultaneously examined by the Agmark authorities of Bombay. With reference to this consignment of M/s. Empire Exports, the Advocate argued that the treatment meted out to the present Appellants by the Additional Collector was highly discriminatory. Accordingly, he requested that the same benefit should be allowed to the present Appellants in the present case.

4. On behalf of the Collector, the learned SDR drew our attention to S.No. 20 on page 15 of the April 1985 - March 1988 Policy Book Vol. II. He stated that as per this Policy the export of Basmati rice was permitted freely under OGL 3, while the export of non-Basmati rice was banned. The Appellants had attempted to export non-Basmati rice in the guise of Basmati rice and accordingly they contravened the provisions of Section 50 of the Customs Act by the misdeclaration of the quality of the goods. The export of non-Basmati rice was prohibited in terms of Export (Control) Order 1977, dated 24.3.1977. In these circumstances Shri Pal pleaded that the Additional Collector's order of confiscation and levy of penalty was correct. In support of his contention, he relied on the Kerala High Court's judgment, I.L.R. 1979 (2) Kerala 293 (DB) as contained in Ray's Foreign Exchange Regulations act, 1973. He, therefore, submitted that the appeal should be dismissed.

5. We have examined the submissions made on both the sides. The question which falls for determination is whether the 3050 bags of rice tendered for export by the Appellants contained Basmati rice or other than Basmati rice. In support of the declaration in the shipping bills that the bags contained Basmati rice, the Appellants have relied on the certificate dated 8.5.1985 of the Deputy Senior Marketing Officer, Directorate of Marketing and Inspection, Amritsar. The bags of rice were, however, examined by the Customs Officers when they were brought in the docks for shipment and the Customs Officer's examination report on the reverse of the two shipping bills sets out the actual examination done by the Customs Officer. The report shows that 40 bags from each of the two consignments were taken up for consideration and samples were drawn and sent to the export department for verification of the description of the goods. As per the Additional Collector's order the samples were shown to reputed trade merchants

who gave opinion that they contained very high percentages of non-Basmati rice.

Accordingly the Agmarking authorities carried out the sampling and testing and as per their report the percentage of non-Basmati rice was found to be 91.05% as mentioned in the Additional Collector's order.

During the course of the arguments in the appeal the learned Advocate contended that whenever there was difference between the two Agmarking authorities, the procedure prescribed in the Basmati Rice Grading and Marking Rules, 1979 should have been followed for obtaining a third opinion. The learned Advocate contended that this was not done in the present case and therefore the first report of the officer at Amritsar should be accepted. It is seen that there is not much of substance in the aforesaid contention of the learned Advocate. When the exporter was aware of the provisions of the rules, he should have taken steps to make reference to a third authority as envisaged. There is no evidence on record to show that the Appellants made such an effort to get the revised opinion. On the other hand, the report of the officer at Amritsar was given when the rice bags were not brought for shipment. On the other hand, the report of the Agmark Officer, Bombay, is based on the samples drawn in the presence of the Customs Officers and tested by the Agmark authorities in Bombay. These samples were drawn when the rice bags were in the docks or under customs control. The samples were also drawn in the presence of the exporter's representative. If, therefore, there was any defect in sampling, the exporters could have protested against the same. No such protest appears to have been made.

It is further seen that the officer at Bombay, namely, the Senior Marketing Officer, Bombay, has given a direction to the exporters not to export the consignment and to remove the Agmark labels and lead seals from the rice bags and to surrender the certificate. It, therefore, appears that the Senior Marketing Officer, Bombay, had greater authority than the Deputy Senior Marketing Officer, Amritsar and hence the certificate issued by the former should carry more weight. Since the rice was not of Basmati quality, it does not fall within OGL 3 S.No. 16 of the Exports (Control) Order, 1977. The export of non-Basmati rice is not allowed in terms of Clause 3 of the order read with the policy statement in Part B of Schedule I to the

Exports (Control) Order, 1977, S.No. 20. This prohibition is deemed to have been made Under Section 11 of the Customs Act read with Section 3(2) of the Imports and Exports (Control) Act, 1947. Hence the export of non-Basmati rice is prohibited and its confiscation Under Section 113 is correct. Considering the value of the rice tendered for exports the redemption fines are not excessive. As regards the Appellants' request to give them the benefit of the treatment given by the same Additional Collector in respect of the consignment of rice exported by M/s. Empire Exports, Bombay, the facts of that case are not before the Tribunal and hence the Tribunal does not know why a different treatment was accorded to that exporter's consignment as contended by the Advocate of the Appellants. Excepting furnishing the file No. S-16/182/7685 and 1428 bags of rice under shipping bill number 12352 dated 23.5.1985 for FOB value of Rs. 8,49,660/- which were reported to have been released on caution, no particulars have been furnished by the Appellants in support of that consignment to merit comparison between the two exports. Therefore, so far as the present appeal is concerned, it is seen that the two shipments totally violated the provisions of the Customs Act and the Imports and Exports (Control) Act and Exports (Control) Order as above. In addition the Additional Collector has held the exporter as guilty of misdeclaration by furnishing a wrong statement in terms of Section 50 of the Customs Act. Therefore, if there is any discrimination in the treatment of the two exporters on the identical facts as contended by the Appellants, the discrimination needs to be removed by taking action against M/s. Empire Exports, Bombay, rather than setting aside the order of fines and penalties on the Appellants. Since, however, the matter relating to M/s. Empire Exports, Bombay, is not before us, no action in this behalf can be taken by the Tribunal. So far as the present appeal is concerned, it is seen that the orders of fine and penalty are quite appropriate in the circumstances of the case. Accordingly, we see no reason to set aside the Additional Collector's order. The same is confirmed and the appeal is accordingly rejected. Bombay, (K.S. Dilipsinhji) 29.9.1986.

Member (Technical) 6. I have carefully gone through" the order proposed to be issued by Brother Dilipsinhji. With great respect I am unable to persuade myself to agree with his findings.

7. In Appeal CD(BOM) 701/85, Brother Dilipsinhji had set out the facts as well as the contentions urged on behalf of the appellants as well as the respondent but in Appeal CD(BOM)482/85 he had not set out the full facts or the contentions raised by the appellants. He had observed that the arguments advanced by both the sides are identical to those advanced in Appeal No. CD(BOM)701/85. This observation does not reflect the correct position.

8. As the subject matter of challenge in both the appeals being the fine levied in lieu of confiscation as well as the penalty -imposed, I shall in the first instance refer to the orders of the Additional Collector against which these appeals were filed and thereafter refer to the necessary facts while considering the contentions urged on behalf of the appellants.

9. The operative portion of the order of the Additional Collector in M/s. Sachdeva & Sons, Amritsar reads :- "After receiving the sample from docks, the said sample was shown to well reputed grain merchants and as per their opinion, the said sample is having very high percentage of non-Basmati rice which is banned. To get the percentage of admixture, the sample was shown to Agmark authorities who in turn inspected the lot and drawn sample in presence of C.H.A.'s representative. Agmark authorities have confirmed that the sample is having 91.5% of other than Basmati rice including red grains.

The exporters have therefore attempted to export non-permissible items by misdeclaring thereby violating provisions of Section 50(2) of C.A. 62 and the restrictions of Export -Policy (B.20). The goods are liable to confiscation Under Section 113/114 of Customs Act, 1962. The show cause notice and personal hearing were waived by the exporter at their request.

I have gone through the facts of the case and since the Agmark authorities have categorically stated on test that the goods are not Basmati rice as per their standards, exports cannot be allowed. The goods are liable to confiscation for misdeclaration. The Agmark report says that there is 91.5% of non-Basmati grains. Thus, there is gross misdeclaration and a serious view is taken of this while adjudicating this case. The offending goods attempted to be exported against both S/Bills are confiscated...." 10. The operative portion of the order of the Additional

Collector in M/s. Kaliachand Devchand & Co. Pvt. Ltd. reads:- "After carting of the goods in the docks, representative sample was drawn from the consignment. On verification of the sample it was found to be predominantly non-Basmati variety of rice. The Agmark authorities in Bombay were also asked to inspect the consignment and draw samples, for verification. As per their report, the goods contained 83% non-basmati rice. As per serial No. B20 of the ETC policy 85-86 export of non-Basmati rice is not permitted.

The exporters have therefore attempted to export non-admissible items by misdeclaring thereby violating provisions of Section 50(2) of C.A.62 and the restrictions of Export policy (B.20). The goods are liable to confiscation Under Section 113/114 of C.A. 62. The show cause notice was waived by the exporter at his request. P1H. was granted on 28.6.1985 at 2.50 PM. I have gone through the facts of the case and since the Agmark authorities have categorically stated on test that the goods are not Basmati rice as per their standards. The goods are liable to confiscation for misdeclaration. The Agmark report says that there is 83.00% of non-Basmati. rice grades. Thus, there is gross misdeclaration and a serious view is taken of this while adjudicating the case. The offending goods attempted to be exported against the S/Bill No. 13361/25.5.1985 are confiscated...." 11. Undisputedly on behalf of the appellants, their clearing agents have produced certificates issued by the Agmark authorities. The certificate of Agmark authority produced on behalf of the appellants M/s. Sachdeva & Sons, Amritsar was issued by Deputy Senior Marketing Officer, Department of Marketing & Inspection, Government of India, Amritsar. This certificate relates to three consignments namely lot No.8, 9 and 10. The total number of bags is mentioned as 3050. The certificate was valid for 60 days from the date of issue i.e. from 8.5.1985. The officer had certified that the consignment is Basmati Raw Milled Rice of 'B' grade. He had mentioned the date of inspection as 6.5.1985. He has also mentioned the shipping numbers.

12. On behalf of the appellants M/s. Kailachand Devchand & Co. Pvt.

Ltd., the certificate of Agmark authorities dated 23.5.1985 was produced. This certificate was valid upto 21.7.1985. It was for 1025 bags; 1000 bags of 20 kgs.

each and 125 bags of 40 kgs. each. Party's shipping numbers co-related with Agmark's serial numbers were also mentioned in the certificate. The Agmark authority had certified that the consignment is of raw milled Basmati rice. This certificate as well as the certificate produced on behalf of the appellants M/s. Sachdeva & Sons also contains an endorsement that export of Basmati rice be allowed only after verification of the fumigation certificate and that the fumigation should not have been done more than 15 days prior to the date of actual users.

13. In the appeal of M/s. Sachdeva & Sons, Shri V.N. Deshpande inter alia contended that 3050 bags of Basmati rice were examined in the appellant's godown in Amritsar by the Agmark authorities who specified that the said 3050 bags contained Basmati rice and were in accordance with the Basmati rice Grading and Marketing Rules 1979. On the basis of the aforesaid certificate, the exporters tendered the goods for shipment. Shri Deshpande has further urged that the Agmark authorities had sealed each bag and impressed each bag with Agmark number. He also contended that the Amritsar Agmark authorities had carried out proper test for determination as to whether the, rice was Basmati or not. In particular, they had taken into consideration length/breadth ratio for grading Basmati rice. Shri Deshpande had urged that the certificate on which the Addl. Collector relied did not contain the length and breadth or ratio which determines the nature of the rice namely whether it is Basmati or other than Basmati. Shri Deshpande had placed reliance on "the Instructions for Grading and Marketing issued by the Agricultural Marketing Adviser to the Government of India Under Rules 2 and 4 of the General Grading and Marketing Rules 1937 and Rules 6, 7 and 8 of the Basmati Rice (Export) Grading and Marking Rules, 1979 (Appendix III).

14. In the appeal of M/s. Kailachand Devchand & Co. Pvt. Ltd., Shri B.P. Vittal had urged that they had an order for export of 25MT of Basmati Rice and therefore they placed an order with M/s. R.R.Engineering Corporation, Chandigarh and opened letter of credit through Central Bank of India. M/s. R.R. Engineering Corporation had delivered the goods along with Agmark certificate. They had cleared the goods directly from Carnac Bunder to Docks with the Agmark certificate. Shri Vittal had urged that they had no hand in packing of the goods or

in getting the Agmark certificate and therefore even if the goods brought for export was not of Basmati variety, the Addl. Collector should have allowed them to take back the goods and was not justified in ordering confiscation and imposing heavy fine and penalty. Shri Vittal had submitted that before the Additional Collector passed the order he had briefly met the Additional Collector on 28.5.1985 at 2.30 p.m. and in his presence the Additional Collector of Customs passed an order to take the consignment back to town. But then to their surprise the Additional Collector ordered confiscation and imposed fines and penalty. Shri Vittal had further contended that the sample was further inspected and then found to contain 42.5% Basmati rice. Thus there were three conflicting reports, one by the Delhi Agmark authorities certifying the entire quantity as 'B' grade Basmati. The other report relied upon by the Dept. issued by Bombay Agmark authorities certifying that the sample contains 83% of rice other than Basmati and the third analytical report showing other rice including red grains as 57.5%. In view of the conflicting reports, the Additional Collector was unjustified in ordering confiscation and he should have permitted them to take back the goods.

15. It was also urged by Shri Vittal that according to the Agmark certificate, the responsibility of the quality lies with the authorised packers namely M/s. Kundan Lal Ghanshyam Das and since the appellants being the bona fide purchasers and since they had only a trial order and the margin of profit being marginal, namely, 1%, the Additional Collector ought not to have ordered confiscation or imposed a heavy fine of Rs. 65,000/- and was also unjustified in imposing personal penalty of Rs. 6,500/-.

16. The contention urged by the SDR had been correctly set out by Brother Dilipsinhji in his order and therefore I do not consider it necessary to set them out again.

17. The points that fall for determination in these appeals are whether the Additional Collector was unjustified in ordering confiscation and imposing fine in lieu of confiscation in respect of the three consignments which are the subject matter of these two appeals, and (2) whether the Additional Collector was unjustified in imposing the penalties on the appellants.

18. Before proceeding to consider the points set out above, it would be necessary to refer to certain statutory provisions. The Agricultural Produce (Grading & Marketing Act, 1937) authorises the Government...

rules... to : (a) fixing grade designation to indicate the quality of any scheduled article, (c) specifying grade designation marks to represent particular grade designation, (d) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing, or label attached to any such article.

(e) specifying the conditions referred to in Clause (d) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used and the quantity by weight, number or otherwise to be included in each covering; (f) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the reproduction of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark (or with measures for the control of the quality of articles marked with grade designation marks including testing of samples and inspection of such articles or with any publicity work carried out to promote the sale of any class of such articles; (g) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

19. Section 4 of the Act provides for penalty for unauthorised marking with graded designation mark. Section 5 provides for penalty for counterfeiting grade designation mark.

21. In exercise of the power conferred under the said Act the Central Government made rules called the General Grading and Marking Rules, 1937. Among other things these rules provide that any person or body of persons desirous of being authorised to mark any article with a grade designation mark shall apply to the Agricultural Marketing Adviser to the Government of India, Nagpur. The rules further provided for issue of certificate by the Agricultural Marketing Adviser to any person or body of persons who had applied for being authorised to mark any

article with a grade designation mark. Certain powers were also conferred on the Agricultural Marketing Adviser.

22. The: Agricultural Marketing Adviser to the Government of India issued instructions for grading and marking of Basmati rice under Agmark for export. Among other things the instructions required any person or body of persons desirous of grading and marking of the Basmati rice in accordance with the relevant grading and marking rules should apply in duplicate for a certificate of authorisation to the Agricultural Marketing Adviser through the officers specified for different states for the Union Territory of Delhi and for the State of Punjab and Haryana the application was required to be sent through Senior Marketing Officer in charge DMI, Northern Region, 4/20 Asaf Ali Road, New Delhi. The officer who received the application was required to make necessary inquiries and after ascertaining the bona fides of the applicants should forward the application on his recommendation to the Joint Agricultural Adviser to the Government of India of Nagpur. As per the instructions of the Chief Agricultural Adviser on receipt of the party's application and the recommendation of the Regional Officer his certificate for authorisation to grade and mark Basmati rice under Agmark will be issued from the private head office, Nagpur. The certificate of authorisation will be valid for a period of one year. It was specifically provided in these instructions that no Agmark mark shall be done unless a letter of authorisation has been issued. It further provides that grading of Basmati rice shall have to be undertaken only at the premises included in the certificate of authorisation. The instructions also contain as to the period within which intimation has to be sent to the Inspecting Officer for sampling and design. It also provided procedure for drawing up samples, their analysis and determination of grade. It further provided scale of sampling for the purpose of drawing samples and the scale provided for are in respect of a lot of 50 bags, number of bags to be sampled was 5.

From 51 to 200 it is 10. From 201 to 500 it is 20, 501 to 1,000 it is 30 and above 1,001 5%. It also fixes the maximum limit for lot size which should not exceed 100 tonnes. The Inspecting Officer is required to select the bags for sampling at random and cover bags from various positions in the stock. In case of bulk, the Inspecting Officer is required to conduct a preliminary survey of the lot so as to

have a general assessment of the uniformity of the quality. An elaborate procedure has been prescribed for taking samples and mixing up of samples and a proforma of the sample ticket was also prescribed.

Similarly elaborate instructions are issued regarding determination of Grade and issue of labels. The Inspecting Officer is enjoined to get the sample analysed in the laboratory under code for various quality factors as laid down in the schedule for different grades, designations and based on the analytical results shall assign the appropriate grade designation to the lot offered for marketing. The instructions were also issued regarding matter of packing and marking. It was further provided in the instructions that in addition to the Agmark labels, each packages of grades of rice shall have the following particulars clearly printed, stencilled or stamped : It further provided that in addition to the grade designation on the label, each container shall have indelibly marked on it in plain letters or in code the following details :- As per the instructions of the Agricultural Marketing Adviser the consignment shall not be cleared for shipment unless it is covered by a Certificate of Grading issued by the officer authorised to do so by the Agricultural Marketing Adviser. The Certificate of Grading issued for a consignment of Basmati rice shall be stamped to the effect that "export of Basmati rice be allowed only after the verification of the fumigation certificate and that the fumigation should not have been done more than 15 days prior to the date of actual shipment. Further, the instructions provided for check/port inspection even after the lots have been checked, sampled and passed. The authorised officer could carry out check-inspection, i.e. re-check the lot at any stage, at the authorised premises, in transit, in a warehouse, at the port or the wharf or at any other place. If as a result of check inspection, a lot is found not to conform to the prescribed standards, the same will be rejected.

23. It may be stated here that the instructions issued by the Agricultural Marketing Adviser were in pursuance of the powers conferred on him under the Basmati Rice (Export) Grading and Marking Rules, 1979. The special characteristics as well as maximum limit of tolerance (by weight) of Basmati or milled rice for export only are set Out in Schedule II under the Heading General Characteristics. Several characteristics have been set out including the colour as well as the length and

breadth and the length breadth ratio.

Now coming back to the facts of the two appeals both the appellants have produced certificates issued by the Agmark authorities. The two certificates are in accordance with the instructions issued by the Agricultural Marketing Adviser to the Government of India. It was not contended before us that the certificates are not genuine or the authorities who issued the certificate did not have the authority to issue the certificates. It was not contended that there has been any substitution of the bags by either of the appellants. In both the certificates it was specifically stated that export should be allowed only after verification of the fumigation certificate and that the fumigation should not have been done more than 15 days prior to the date of actual shipment. In the case of appellants M/s. Sachdeva & Sons, the certificate related to three lots namely lot No. 8, 9 and 10.

24. As per the instructions of the Agricultural Marketing Adviser to the Government of India, the authorised officer is required to draw samples, get the samples analysed and attested and determine the grade and issue the labels. Further each package of graded rice in addition to Agmark label should also contain name of the packer, net weight of the contents, lot No., grade, place of packing, date of packing, serial number of the consignment/lot. It was not contended before us that these particulars were not found on the bags brought for export.

25. As per the instructions of the Agricultural Marketing Adviser to the Government of India, export of Basmati rice can be permitted only on production of the certificate of grading, export of Basmati rice can be permitted only on production of certificate of grading issued by the officer authorised to do so and only after the verification of the fumigation certificate and that fumigation should not have been done 15 days prior to the date of actual shipment.

26. The orders passed by the Additional Collector do not indicate whether the appellants have produced fumigation certificate and whether the certificate so produced disclose that the fumigations have been done not more than 15 days prior to the date of actual shipment.

27. The Additional Collector ordered confiscation because the Agmark authorities at Bombay who inspected the lot and drew samples opined that the rice brought are not Basmati variety since they contained 91.5% of non-Basmati grain in one case and 83% in another case.

28. Shri Deshpande who appeared for M/s. Sachdeva & Sons had contended that the Agmark authorities of Amritsar after following the instructions of the Agricultural Marketing Adviser and after taking samples and after analysing graded the Basmati rice and issued the certificate to be the Basmati rice in 'B' grade. There was no allegation of a collusion between the appellants and the Government of India officer. Therefore, due weight should have been attached to the certificate issued by the said authority. Shri Deshpande had also contended that no weight should have been attached on the certificate issued by the Bombay Agmark Marketing authorities. He had urged that one is required to follow the instructions of the Agricultural Marketing Adviser to issue a certificate. If one is to follow the elaborate instructions issued by the Agricultural Marketing Adviser, then a minimum of two to three days would be required to carry out the test but then the Agmark authorities at Bombay have informed the appellant on the very day on which they took that sample that it was not Basmati rice. Shri Deshpande further contended that pro-forma had been prescribed as to the issue of certificate. This proforma among other things provided for stating the length breadth as well as the average length and average breadth and length breadth ratio. But then the certificate issued by the Bombay Agmark authorities did not contain these particulars. Shri Deshpande further contended that only 20 gms.

was taken for analysis that would not correctly represent the contents.

Shri Deshpande further urged that the appellants had sought to export through lots. Each is a different lot. Therefore, each lot has to be test checked but no such procedure had been followed by the Bombay Agmark authorities and therefore no reliance should be placed on such a certificate. Shri Deshpande further contended that the appellants were not furnished with the copies of the traders opinion who were consulted by the Department and therefore they had no opportunity to make any representation.

29. Shri Vittal appearing for the appellants M/s. Kailachand Devchand & Co. Pvt. Ltd. had contended that in all there were three conflicting Agmark certificates. One issued by the Delhi Agmark authorities which was produced by the appellants and (2) two certificates issued by the Bombay Agmark authorities and all the three contradict each other. In the circumstances, the Additional Collector was not justified in placing reliance only one of the certificates issued by the Bombay Agmark authority and order confiscation.

30. There is considerable force in the contention urged on behalf of the appellants. When there are conflicting certificates which are not reconcilable, the adjudicating authority cannot accept any one and reject the others without assigning any reason. In the certificate of the Bombay Agmark authorities relied on by the - Additional Collector, the particulars regarding moisture, length, breadth, length breadth ratio, average length, average breadth were not given. The sample taken for analysis according to certificate- is 20 gms. The total quantity sought to be exported was 3050 bags. They were in three lots. As has been seen earlier, the Agricultural Marketing Adviser had issued instructions as to how samples should be taken, the quantum of sample to be taken and according to the instructions, if the number of bags exceeds 1000 then 5% sample is required to be taken. I have already set out the details of the instructions in the preceding paragraph. The Bombay Agmark authorities appears to have not followed the instructions. According to the letter dated 4th June, 1985 addressed to M/s. Sachdeva & Sons, the Senior Marketing Officer, Western Region, Bombay informed them that check inspection by the officer of the Department was made on 3.6.1985 at Bombay on request from the Collector of Customs, Bombay. But the actual certificate was issued by an Inspecting Officer and it was signed by the Chemist on 1.6.85. Thus a doubt is cast as to the test certificate issued by the Agmark authority Bombay. Brother Dilipsinhji in his order has stated that the certificate issued by Senior Marketing Officer, Bombay should carry more weight. The reason given by Brother Dilipsinhji reads :- "It is further seen that the officer at Bombay, namely, the Senior Marketing Officer, Bombay has given a direction to the exporters not to export the consignment and to remove the Agmark labels and lead seals from the rice bags and to surrender the certificate. It, therefore, appears that the Senior Marketing Officer, Bombay, had greater authority than the Deputy Senior Marketing Officer,

Amritsar and hence the certificate issued by the former should carry more weight." This reason appears not correct. Firstly, the certificate as such does not indicate that it was issued by the Senior Marketing Officer. It was signed by Chemist/Inspecting Officer. The names are not mentioned. In the letter addressed to M/s. Sachdeva & Sons dated 4th June, 1985 the Senior Marketing Officer does not state that he himself got the samples drawn or analysed. As a matter of fact the analysis has to be done in a laboratory and it is only the Chemist who does the analysis. The Senior Marketing Officer could only issue a certificate on the basis of the analysis carried by the Chemist. Further the Basmati rice (Export, Grade and Marketing Rules) nowhere states that the certificate issued by the Senior Marketing Adviser would over-ride the certificate issued by the Deputy Senior Marketing Officer. Under the General Grade and Marketing Rules, the marketing of any article with a grade designation mark is required to be done by a person who had been issued a certificate of authorisation. As per the instructions of the Agricultural Marketing Adviser to the Govt. of India the authorised packer is required to issue a certificate of grading after the consignment has been graded, packed and sealed. The Agricultural Marketing Adviser has to authorise an officer to issue certificate of grading. Without a certificate of grading issued by an officer authorised by the Agricultural Marketing Adviser, no consignment can be cleared for shipment. If the Agricultural Marketing Adviser had authorised a Deputy Senior Marketing Officer in Amritsar for issue of the certificate for grading and he had authorised a Senior Marketing Officer in Bombay both would stand in the same position. The certificate issued by both will have the same validity irrespective of their ranking.

31. Insofar as the export of M/s. Kailachand Devchand & Co. P. Ltd. are concerned, there is a certificate issued by the Delhi Agmark authority and two certificates issued by Bombay Agmark authorities. The Delhi Agmark authority certified the rice to be Basmati and also gave particulars regarding moisture contents, foreign matter, broken fragments, other rice, average length, the average breadth, length breadth ratio which is in conformity with the statutory prescriptions.

One of the certificates issued by the Bombay Agmark authorities also furnished all the above particulars but the two certificates differed regarding the percentage of

moisture, foreign matters, broken fragments, other rice including red grains, average length, average breadth as well as L/B ratio. In the certificate issued by the Bombay authorities relied on by the Collector, the weight of other rice including red grains is given as 16.6 gms which works out to 83%. But whereas in the other certificate the weight is given as 8 grams. In another certificate the percentage of other grains was given as 57.5%.

These two certificates issued by the Bombay Agmark authorities also do not tally. When such was the position, the Additional, Collector was not justified in relying only on one of the certificates in support of his finding that what was sought to be exported was non-Basmati.

32. M/s. Kailachand Devchand & Co. P. Ltd. are not the authorised packers. They are only merchant exporters. There was no allegation that they knew that the bags which they sought to export contained non-Basmatirice. They had relied upon the certificate issued by the Agmark authorities Delhi. There was no allegation of substitution of the bags or collusion between the Officer of the Government of India and the appellant. When the Additional Collector found that the rice sought to be exported are not Basmati rice he should have only prevented export and was not in my opinion justified in ordering confiscation or imposing a heavy fine and penalty. The price of Basmati rice would certainly be more than the price of non-Basmati. The appellants are required to account for the foreign exchange. Therefore, it would not be natural to expect them to export non-Basmati rice.

Further as has been seen earlier no export of Basmati rice can be permitted unless fumigation certificate is produced. Admittedly, such certificates were not produced. In the said circumstances the Additional Collector should have only ordered taking back the consignments and he was not justified in ordering confiscation and levying penalty. As a matter of fact on behalf of M/s. Kailachand Devchand & Co. P. Ltd. it was contended that originally the Additional Collector had passed an order directing them to return the consignment but later on he changed his order. The Additional Collector's order in this case shows that he had given a personal hearing to M/s. Kailachand Devchand & Co. P. Ltd. on 28.6.1985 at 2.30 p.m. But then, in his order he had not set out what were the submissions

made during the personal hearing. His order also does not indicate as to whether he had considered the submissions made by them.

33. In his orders, the Additional Collector has stated that the appellants have waived the issue of show cause notice. But then Section 124 of the C.A. does not provide for waiver of the show cause notice but it provides that at the request of the affected person, the show cause notice and the representation may be oral. In the orders passed by the Additional Collector, there is no indication that the appellants were informed of the charges levelled against them or that they were informed of the documents on which the department places reliance. Thus there is a legal infirmity in the order passed by the Additional Collector.

34. Though the Customs authorities have the right to examine or to test check the goods brought for export, the Customs authorities cannot order confiscation of the goods or penalty on the basis of the examination or on the certificate obtained without affording an opportunity to the affected persons of rebutting the certificates on which the Customs authorities rely. In the instant case, the exporters have produced certificates issued by the Agmark authorities. These certificates disclose that the bags which were brought for export contained Basmati variety of rice. As observed earlier, there was no allegation of collusion between the appellants and the Agmark authorities who issued the certificates. There was no charge of forgery or fabrication. Having regard to the penal provisions in the Agricultural Produce (Graded & Marketing Act) it is very unlikely that the Agmark authorities would venture to issue false certificates. The certificate issued by the Bombay authority has no overriding effect on the certificates issued by the Agmark authorities of Amritsar and Delhi. The least that could have been done by the Additional Collector who was to allow the exporters to take back the consignments and not to order confiscation or to impose penalty.

35. In view of the conflict between the certificates issued by the two Agmark authorities, and having regard to the infirmity contained in the order of the Additional Collector, the proper course for me is to remand the matter. But then, no purpose will be served by remand because the bags had been already cleared and no further testing is possible.

36. In the order of Brother Dilipsinhji he has referred to the decision of the Kerala High Court reported in ILR 1979 (2) Kerala 293 (DB). This ruling was relied on by Shri Pal, S.D.R. The judgment copy was not produced. S.D.R. relied on Roy's Foreign Exchange Regulation Act, 1973, 1985 edition. The above citation is found at page 98, para 10. From the reading of the above para it is clear that Kerala High Court Judgment is an authority for the proposition that the liability of the exporter for being subject to a penalty Under Section 114 of the Customs Act will not in anyway be affected by the fact that the goods have been allowed to be exported pursuant to an interim direction issued by the Court. The above ruling in my view has no relevance or application to the issues involves in these appeals.

37. On consideration of all the aspects and for the reasons stated, I allow both these appeals and set aside the orders of confiscation as well as the penalties levied on the appellants. The fine and penalty if paid shall be refunded to the appellants. Bombay, (K. Gopal Hegde) Dated 27.10.1986.

Member (Judicial) 38. As there is a difference of opinion between the two Members, the records are submitted to the President in terms of Section 129C(5) for referring the following question to one or more other Members of the Tribunal.

Whether on the facts and in the circumstances of the cases, the Additional Collector was unjustified in ordering confiscation of the three consignments (which are the subject matter of these two appeals) as well as in imposing the penalties on the appellants.

Sd/- Sd/- Member (Technical) Member (Judicial) 27.10.1986 27.10.1986 39. The matter has been assigned to me by the President Under Section 129-C(5) of the Customs Act, 1962 for hearing and disposal on the aforesaid point of difference. The judgments recorded by my learned brothers of the West Regional Bench were made available to both sides before the hearing. I have heard them at Bombay today. The Department was represented by Shri G.D. Pal, S.D.R. M/s. Sachdeva & Co. were represented by Shri V.N. Deshpande, Advocate and M/s. Kailachand Devchand by Shri L.G. Oza, Advocate.

40. I have given the matter my earnest consideration. There is no dispute that the local Agmark authorities at Bombay as well as the Customs were well within their rights to re-check the goods before shipment. Once the re-check revealed that the goods contained predominantly non-Basmati rice, they could not be expected to pass the shipment for export. But whether, in addition, the goods and the exporters ought to have been proceeded against for confiscation and penalty is quite another matter. This was not a simple case in which mis-declaration could be presumed on the ground that the goods were not found conforming to the description given in the shipping bill filed for export. The reason is that the goods were accompanied by an Agmark certificate issued at the source (Amritsar/Delhi) certifying the goods to be Basmati rice and the original labels and Agmark seals were found intact on the rice bags when examined at Bombay. What the exporters declared was the same thing as certified by the source Agmark authority. In the circumstances, it becomes difficult to hold them guilty of misdeclaration straightaway and subject them to heavy fine and penalty. Once it became a question of one Agmark certificate v. the other, the authorities ought to have investigated further, preferably through the Chief Agmark Adviser at Nagpur as to which of the two certificates was correct and what really had gone wrong in that the rice certified as Basmati at source became non-Basmati rice at Bombay.

Was it a case of negligence or collusion at the source Or, was it a case of forgery or substitution en-route Or, did either of the Agmark authorities follow incorrect sampling or testing procedure The record is totally silent on what went wrong and where and whether the exporters had a hand in it and, if so, to what extent The circumstances were such that investigations ought to have been conducted by the Department on its own to find an answer to the mystery, irrespective of the fact whether the exporters asked for a third opinion from senior Agmark authorities or not. Investigations would, no doubt, have taken some time. But that was no reason for rushing with the adjudication without the investigations. If the detention of the goods was the problem, the goods could have been provisionally released on an adjudication bond backed by acceptable security and after retaining a large enough representative sample drawn in the presence of Customs, exporters and local Agmark authorities.

41. On the state of the record as now before me, I find it difficult to hold the exporters guilty of mis-declaration and to justify the heavy fine and penalty adjudged against them. In the circumstances, I agree with the learned Member (Judicial) and allow both the appeals.

Sd/-Camp : Bombay (K.L. Rekhi) Dated : 29.12.1986.

Member (Technical) 42. In view of the difference of opinion between the two Members of this Bench, who first heard the appeal, the point of difference was referred by the President to the third Member, Shri K.L. Rekhi in terms of Section 129-C(5) of the Customs Act and Shri Rekhi has recorded his findings on the point of difference. This appeal, therefore, has to be decided on the basis of the majority opinion. In majority view, the appeal is allowed and the order of confiscation and penalty levied on the appellant is set aside. The fine and penalty, if paid, shall be refunded to the appellants.

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