Arjun Sahlot Vs. Uoi and ors

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Court : Delhi

Decided On : Dec-08-2011

Judge : Vipin Sanghi, J.

Acts : Constitution of India - Article 226; Valuation Rules, 2007 - Rule 12; Customs Act - Section 112 (a); Foreign Trade (Development and Regulation) Act, 1992 - Section 5

Appeal No. : W.P.(C.) No. 1137/2011 & C.M. No. 7613/2011

Appellant : Arjun Sahlot

Respondent : Uoi and ors

Advocate for Def. : Mr. A.S. Chandhiok; Mr.Jatan Singh; Mr.Ritesh Kumar; Mr. Piyush Sanghi; Mr.Sumit Goyal; Mr. Prashant Ghai, Advs.

Advocate for Pet/Ap. : Mr. Rohit Priya Ranjan, Adv.

Judgement :

1. The petitioner has preferred the present writ petition under Article 226 of the Constitution of India to seek the quashing of the communication dated 20.01.2011 issued by the Director General of Foreign Trade (DGFT) in the Ministry of Commerce & Industry, Government of India impleaded as respondent No. 1 herein, whereby the petitioner's request to include Austria/Germany as country of origin in the import license No. 0550001294 dated 25.11.2008 has been rejected

on the ground that the request for amendment had been filed with the DGFT on 09.12.2010, whereas the validity of the import license aforesaid had expired on 25.11.2010.

2. The petitioner-Master Arjun Sahlot claims to be a Child National Champion of India of Equestrian Sports. The petitioner has placed on record certificates of various awards won by him in Equestrian Championships held in India. The case of the petitioner is that to build his career in the said sport, the petitioner intended to import three sport horses. The petitioner approached the DGFT for grant of import license. The petitioner was, accordingly, granted an import license dated 25.11.2008 for import of three horses of CIF/FOB value in Rs.3,12,280/-. The import license described the name of the item as "3 Nos. of Horse (Hanoverian) from Australia subject to fulfillment of the conditions laid down in D/C AHD&F Notification No. 522(E) dt. 24.7.2002 and fulfillment of quarantine regulations in force and subject to actual user condition besides other applicable conditions of import licence". The import license was valid for a period of twenty four months. (emphasis supplied)

3. It appears that the petitioner imported three horses from Germany/Austria on 08.09.2010 at New Delhi Airport. These horses arrived in India on 08.09.2010 and remained in Isolation Animal Shed at Indira Gandhi International (IGI) Airport till 28.12.2010 without showing any sign of disease and they were shifted to the Quarantine Station of respondent No. 2, i.e. the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture, Government of India on 28.12.2010. Since then they are at the Quarantine Station or respondent No. 2.

4. On 09.09.2010, the Quarantine Officer (NR) issued a communication to the Assistant Commissioner Import (Cargo), IGI Airport stating that the three horses imported by the petitioner from Germany on 08.09.2010 are not having import license. It was also stated that the health documents are not proper and not issued by competent authority. The health status of these horses was doubted as pre-import requirements were not properly certified and lacked authenticity. It was stated that keeping in view the national health security, the consignment cannot be allowed to enter the country. He stated that the same be deported to the country of

origin immediately without any further delay.

5. The petitioner, aggrieved by the said communication, preferred W.P.(C.) No. 6603/2010 before this Court. The said writ petition was dismissed by the learned Single-Judge of this Court vide order dated 08.10.2010. The Court held that as long as the place of origin of the three horses imported by the petitioner is Austria, the essential condition of the import license, that the three imported horses should be from Australia, cannot be said to be satisfied. The Court held that this fact cannot be changed merely because the horses had been registered with the Australian Warmblood Horse Association Limited. Since the aforesaid essential condition of the license, namely, the place of origin of the horses was not satisfied, it was held that the Court could not issue a direction to the respondents to allow the three horses in question to enter the country. The Court further held that the quarantine requirements were strict and not negotiable. The Court accepted the respondents' submission that the geographical place of origin of an animal is very critical in determining the kind of diseases that are likely to be transmitted when such horses are brought to a different location. The diseases peculiar to a region may not immediately manifest when a horse is brought to a different geographical location. It was also observed that merely because the horses had not attracted any diseases while they were kept in quarantine under the orders of the Court, and merely because they were in perfect health, would not come to the aid of the petitioner since the essential conditions of the license are not satisfied.

6. The petitioner preferred a Letters Patent Appeal (LPA) against the judgment of the learned Single-Judge, which was registered as LPA No. 851/2010. It appears that, after some arguments, the petitioner withdrew the said appeal to approach the licensing authority for amendment of the license. Consequently, the said appeal was dismissed as withdrawn on the said statement of the petitioner through his counsel on 03.12.2010.

7. Immediately after the withdrawing of the LPA No. 851/2010, on 04.12.2010 itself the petitioner applied for amendment of the import license. The petitioner sought amendment of the license to include the place of origin as Austria and sought urgent action on the ground that the horses are suffering cruelty, standing in

confinement at the Animal Shed of the Cargo Terminal of the IGI Airport, Delhi. However, no action was taken on the petitioner's application for amendment of import license. Vide letter dated 29.12.2010, the petitioner sent a reminder. Since the petitioner still did not hear from the respondents, he preferred W.P.(C.) No. 410/2011 to seek a direction to the DGFT to decide the petitioner's application to seek amendment of the import license. During the pendency of the said petition, the DGFT issued the impugned communication dated 20.01.2011, whereby the application for amendment of import license was rejected. The petitioner, consequently, withdrew W.P.(C.) No. 410/2011 with liberty to file a fresh petition to challenge the said rejection. That is how the present writ petition has come to be filed.

8. A few more developments took place in the meantime, which need to be taken note of. The Additional Commissioner of Customs passed the order in Original No. 17/2010 on 27.10.2010. By this order, the declared value of the goods was rejected under Rule 12 of the Valuation Rules, 2007. The value of the horses were re-assessed as US$ 10,000/- each (FOB). The total assessable value of goods was assessed as Rs.16,73,560/-. The Additional Commissioner of Customs ordered the confiscation of the three horses under Section 111 (d) & (m) of the Customs Act, 1962. Since the goods could not be allowed clearance for home consumption, the petitioner was allowed to re- export the same on payment of redemption fine of Rs.3,00,000/-. A penalty of Rs.50,000/- was imposed on the petitioner's mother considering that he was a minor, under Section 112 (a) of the Customs Act. A further penalty of Rs.1,00,000/- was imposed on one Sh. Kapil Modi under Section 112 (a) of the Customs Act.

9. The Celebi Delhi Cargo Terminal Management India Private Limited (hereinafter referred to as the CELEBI) to whom the three horses were handed over, filed W.P.(C.) No. 7998/2010 with the grievance that the respondents namely the Department of Animal Husbandry, Dairying and Fisheries, the Customs Department and the petitioner herein should take steps for deportation of the three horses to their country of origin. CELEBI also prayed that the three horses be taken into custody by respondents No. 1 & 2, namely the Department of Animal Husbandry, Dairying and Fisheries and the Quarantine Officer for their expert

medical care and maintenance till they are deported back to their country of origin. CELEBI also sought a direction against the petitioner herein to clear the demurrage charges incurred by CELEBI on account of maintenance of the horses in terms of the order dated 08.10.2010 passed by this Court in the petitioner's earlier writ petition. During these proceedings, the Court was informed that the three horses in question could not be re-exported to their country of origin, namely Austria/Germany, as export of horses from India to Europe had been banned. Vide an order dated 24.12.2010, the Court directed that the horses in question be shifted from the custody of CELEBI to the Quarantine Station under the control of the Quarantine Officer.

10. The petitioner preferred an appeal before the Commissioner of Customs (Appeals) to assail the adjudication order dated 27.10.2010, as aforesaid. The said appeal was disposed of by the Commissioner of Customs (Appeals) vide his order dated 29.04.2011, i.e. during the pendency of this petition and the appellate order has been brought on record by the petitioner. The Commissioner of Customs (Appeals) has directed the adjudicating authority to explore the possibility whether the said horses can be released for home consumption in the event the same cannot be re-exported, as claimed by the appellants, and, accordingly, release the imported horses for home consumption on payment of fine and penalty imposed and payment of duty, if any, subject to fulfillment of conditions as per law and on obtaining the No Objection Certificate (NOC) from Animal Quarantine (AQ), Department of Animal Husbandry, Dairying and Fisheries, New Delhi or any other relevant provisions of law applicable in the instant case. The Commissioner of Customs (Appeals) noted that the petitioner had not contested the claim of fine and penalty imposed and he did not find any reason to interfere with the same in the light of the facts of the case.

11. The submission of the learned counsel for the petitioner is that the order of rejection of the petitioner's application for amendment of the import license has been passed without application of mind. The petitioner contends that the respondents are hell bent, not to allow the petitioner to take the horses. Reliance is placed on the Handbook of Procedure of Foreign Trade Policy 2009-14, clause 2.13 whereof provides that the RA concerned may re-validate an import

authorization on merits, for six months from the date of expiry of validity.

12. Learned counsel for the petitioner submits that clause 2.12.2 of the said handbook provides that the validity of an import authorization is decided with reference to the date of shipment/despatch of goods from supplying country as given in para 9.11A, and not the date of arrival of the goods at the Indian port. The date of shipment/despatch when the mode of transportation is by air, like in the present case, is the date of relevant airway bill. He submits that since the airway bill in the present case represents the date on which the goods, namely, the horses, left the last airport in the country from which the import was effected, the date of shipment in the present case would be 08.09.2010. Learned counsel submits that the validity of the import license was 24 months. Consequently, the validity of the said license would continue till 08.09.2012. He submits that the stand of the DGFT that the license could not be amended on the ground that the same had expired is, therefore, patently incorrect.

13. Learned counsel for the petitioner further submits that the three horses have been shifted to the quarantine station of respondent no.2 on 28.12.2010. Ever since their arrival on 08.09.2010, till date, they have not been found to be suffering from any disease whatsoever. He submits import of horses from Austria/Germany is not banned as there are any number of instances where horses have been imported from these countries. The petitioner has placed on record the documents to show that import of horses has been allowed to various persons from Germany, Denmark and Australia.

14. Learned counsel submits that the import license issued to the petitioner, though mentions the place of origin of the horses as Australia, it also mentioned "all countries excluding Iraq". The submission of learned counsel for the petitioner is that the import of horses is, therefore, permitted from all countries excluding Iraq, and the mere mention of Australia as the place of origin of the horses has to be read in conjunction with the notation "all countries excluding Iraq".

15. Learned counsel for the petitioner has also drawn my attention to the order dated 21.03.2011 passed in W.P.(C.) No.7998/2010 preferred by CELEBI. By this order, the Court had, inter alia, directed that the horses in question be tested for

re-export by drawing blood samples. For this purpose, a scientist from the National Research Centre on Equines, Hissar was required to be called to be present when the blood samples are drawn. Learned counsel submits that these blood samples have been tested and the samples have been found to be negative for EIA (Coggins test), Glanders (CFT), Japenese Encephalitis, EHV-1 (VNT), Equine Viral Arteritis (VNT), Equine Piroplasmosis (Theiieria equi and Babesia cabelli) and Dourine (CFT). The test report dated 19.04.2011 prepared by National Research Centre on Equines in its report, inter alia, states "In case the animals have not been tested for EIA during the last three months, retesting should be done after one month. The swab samples collected and submitted by you from the above listed horses are presently negative for Contagious Equine Metritis (CEM)".

16. The petitioner further submits that respondent no.2, i.e. Department of Animal Husbandry, Diaries and Fisheries has issued a notification dated 07.05.2010, whereunder the import of horses from CEM infected country is allowed/permitted. On the basis of this recommendation of respondent no.2 contained in the said notification, respondent no.1 DGFT has issued import license to number of importers to import horses from CEM infected countries, such as Germany, USA etc. A copy of the said notification has been placed on record. This notification, inter alia, provides:

> "(c) If the horses come from the Contagious Equine Metritis infected country, import is allowed on the following conditions;
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> (i) males up to seven years and female up to five years of age which have not been mated, or
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> (ii) the breeding horses that have mated and pregnant mares comes from an establishment which has been free from Contagious Equine Metritis for at least three years':

17. It further provides:

> "4. Post Import Quarantine:

> After import in India, the animal shall be kept in quarantine for a minimum period of thirty days at the Government Quarantine Station. During the quarantine period, the animal shall be subject to standard culture and serological examination for any disease as deemed necessary. In case of Contagious Equine Metritis (CEM), three consecutive samples drawn at seven days interval should be tested negative. In the event of any animal being found positive for any exotic disease, the animal shall be deported back to the country of origin/destroyed at the quarantine station at the cost of the importer".

18. Learned counsel submits that as per the test report dated 19.04.2011, the three horses have been found to be negative for CEM.

19. The petitioner also submits that the Embassy of India had floated a notice inviting tender addressed to various European Union countries for procuring 400 mountain artillery mule breeding brood mares, 4 horses stallions and 10 donkey stallions in the year 2007. According to the petitioner, horses from Austria were then imported on the recommendation of respondent no.2 by Major J.S. Ahluwalia and M/s. Sapphire Realtors in January 2010. The averments in this regard is made in para 23 of the writ petition. I may note that in their counter- affidavit, the respondents do not deny this averment of the petitioner. On the contrary, there is an admission of the fact that horses and mules from Austria/Germany have indeed been imported by the Indian Army.

20. Learned counsel for the petitioner submits that the Commissioner of Customs (Appeals) has taken a pragmatic and legal view of the matter in the light of the fact that the re-export of the horses in question to Europe is banned. The horses in question are not contraband articles. It is not that their import from Germany/Austria is completely banned. If at all, there is a technical error, and that too only if import license is read to permit import only from Australia, inasmuch, as, the place of origin of the horses in question is Austria/Germany and not Australia. Learned counsel submits that, as noted by the Commissioner of Customs (Appeals) in his order, the petitioner did not challenge the quantum of fine and penalty imposed by the Commissioner. He submits that the petitioner has been

incurring tremendous amount of expenditure on regular basis to meet the cost of maintaining the horses in quarantine. He submits that the amendment sought by the petitioner in the import license is a mere formality, and there is no reason to deny the same since horses have regularly been imported from Austria/Germany in the recent past as well.

21. So far as the allegation of the respondent that the certificate issued by Dr. Erdmann is not valid, as he is not the official veteranian, learned counsel submits that the same doctor has been issuing certificates in the past for import of horses into India, and such certificates have been accepted by the respondents. He submits that there was no way that the petitioner could have known whether Dr. Erdmann had been authorized to issue the certificates, or not. He submits that, in any event, the horses have been repeatedly been tested for presence of various diseases including CEM, and they do not have any such disease.

22. On the other hand, the submission of learned counsel for the respondent DGFT is that, the validity of the license having expired on 25.11.2010, the application for amendment could not even be considered as it was filed after the said expiry on 09.12.2010. It is also argued that the petitioner is merely a facade and the real importer is someone else who is carrying on a commercial activity by importing such live stock. It is argued that the petitioner deliberately imported the horses from Austria/Germany even though the import license was valid only for import from Australia. It is submitted that upon enquiry from the German authorities, the Federal Ministry of Health, Germany has clarified vide letter dated 22.09.2010 that the certificate of fitness issued by Dr. Erdmann is not valid. In fact, Dr. Erdmann has stated that he has not issued certificates for any export to India. It is argued that though the horses in question cannot be re-exported to the place of origin as such export is banned, they could be exported to a couple of islands in France.

23. In his rejoinder, learned counsel for the petitioner submits that the petitioner is not obliged to re-export the horses in question, much less to some remote islands in France. The petitioner does not know any importer of horses on those islands and it is not possible for the petitioner to do so.

24. Reliance placed by the petitioner on clause 2.12.2 readwith 9.11A of the handbook of procedure to contend that the import license shall be reckoned as valid for a period of two years, not from the date of its issue, but from the date of the relevant airway bill, which represents the date on which the goods left the last airport in the country from which the import is effected, cannot be accepted. The import license itself bears the date of its issue, and states the period of shipment as 24 months. The shipment under the said import license could, therefore, have been made only within 24 months. The purport of clause 2.12.2 readwith clause 9.11A is only to say that the import made under an import license shall be construed as valid with reference to the date of shipment/despatch of goods from the supplying country as given in clause 9.11A of the handbook of procedures, and not by reference to the date of arrival of the goods at the Indian port. For example, if the validity of the import license expires on the 30th of a month, and the goods are shipped from the last port in the country from the import is effected on 29th of the month, but arrive at the Indian port on the 1st of the next month, the import would be considered as valid under the said license.

25. Clause 2.12.2 read with clause 9.11A of the handbook of procedure cannot be understood to mean that the validity of the import license shall be reckoned from the date of the actual import, even though the license may have been issued nearly two years prior to the actual date of import, and even though the import license explicitly gives the period of its validity as 24 months. It is, therefore, clear that the petitioners case did require extension of the validity of the import license.

26. However, there is no reason given by the respondents as to why the petitioner's case did not warrant favorable consideration for extension of the validity of the import license and its amendment. Pertinently, the petitioner had been litigating for the release of the horses since September 2010. The application of amendment of import license was made by the petitioner after making a statement before the Division Bench in LPA No.851/2010 that the petitioner would seek an amendment. This statement was made on 03.12.2010, and the application appears to have been made on 04.12.2010 itself. Even if the license originally issued expired on 25.11.2010, there was hardly a delay of about ten days in making of the application.

27. Clause 2.13 of handbook of procedure clearly permits the revalidation of the import license for upto six months from the date of expiry of its validity. In this case, the horses had already been imported. They were kept waiting with the quarantine officer since 28.12.2010. The power to extend the validity of the import license has to be exercised reasonably and for germane consideration. It cannot be exercised capriciously or arbitrarily as appears to be the case in hand. There seems to have been absolutely no application of mind to even consider the request for extension of the validity of the license much less for amendment of the license.

28. The Foreign Trade (Development and Regulation) Act, 1992, whereunder the import license in question has been issued, in section 9(2) provides that the Director General or an officer authorized by him may, on an application and after making such enquiry as he may think fit, grant or renew or refuse to grant or renew a license of import or export, after recording in writing his reasons for such refusal. Consequently, the power to renew an import license is clearly vested in the Director General or an officer authorized by him.

29. As noted above, clause 2.13 of the Handbook of Procedure Vol.I framed by the DGFT provided for revalidation of the import authorization on merits for six months from the date of expiry of its validity. Clause 9.3 of the said handbook provides that wherever any application is received after expiry of last date for submission of such application, the application may be considered after imposing "late cut" in the manner provided in the said provision. It would be seen that applications which are received upto two years late from the prescribed date of submission can be entertained by imposing a "late cut" of 10 percent.

30. I may also make a reference to Foreign Trade Policy, 2009-2014 framed by the Central Govt. under section 5 of the Foreign Trade (Development and Regulation) Act, 1992, vide notification dated 27.08.2009 bearing No.1/2009-2014. In Chapter II, which deals with general provisions regarding imports and exports, clause 2.26 provides "goods already imported/shipped/arrived, in advance, but not cleared from customs may also be cleared against authorization issued subsequently". The aforesaid provision shows that there is no bar to the issuance

of even a fresh import license to the petitioner for the import of the horses in question. As noted above, the said import is not in relation to a banned item. The DGFT ought to have been aware of the aforesaid position while considering the petitioners application to seek amendment of the original import license by inclusion of Austria/Germany as the country of origin.

31. Reliance placed by learned counsel for the respondent on the communication dated 22.09.2010 issued by the Federal Ministry of Health, Austria, no doubt, shows that Dr. Erdmann was not officially approved to issue certificates on behalf of the Republic of Austria. However, this certificate also shows that Dr. Erdmann, who denied having issued the certificates for export of the horses to India, as a matter of fact, accompanied the said horses while they were being transferred from Frankfurt, Germany to India. His statement that he has not issued the certificate has to be taken with a pinch of salt, and appears to be an attempt on his part to save his skin from the German Authorities.

32. The Commissioner of Customs (Appeals) has already held in his order dated 29.04.2011 that the adjudicating authority should explore the possibility whether the horses can be released for home consumption, on payment of fine, penalty and duty, and subject to fulfillment of conditions as per law, and on a no objection certificate from the Animal Quarantine Department of Animal Husbandry, Diaries and Fisheries, New Delhi.

33. The respondents have not disclosed any cogent reasons for not extending the validity of the import license, which could have been extended for a period of six months from 25.11.2010, and amending the same, when import of horses from Austria/Germany is not prohibited/banned. The petitioners application to seek amendment of the license had been made on 04.12.2010. The petitioner was not informed about the fate of his said application, and the petitioner had to send reminders, and even file a writ petition before this court, before the respondents chose to issue the impugned communication dated 20.01.2011. Even on the date on which the impugned communication was issued, the period of six months from the date of the expiry of initial import license was not over. The reason for which the amendment of the import license was rejected is completely untenable. The

petitioner is entitled to issuance of a fresh import license in respect of the horses in question even today, as provided for in clause 2.26 of the Foreign Trade Policy, 2009-2014.

34. The view taken by the Commissioner of Customs (Appeals), in my view, is a fair and pragmatic view. If the petitioner were not to pursue the case any further, what would the respondents do? Would they destroy these horses which have been imported by spending valuable foreign exchange running into lakhs of rupees, even though they appear to be perfectly healthy?

35. It should always be present to the mind of the respondents that procedures are evolved only in aid of, and to implement the substantive rights and obligations of parties. The procedural requirements cannot become an excuse to deny the substantive rights of a party, particularly when the prescribed procedure itself provides for the same. The petitioner under the substantive law of import is entitled to import horses even from Germany/Austria. The mere lack of a prior import license, to import horses from Austria/Germany cannot come in the way of the petitioner in now procuring an amended or a fresh import license under the relevant rules. In the light of the aforesaid discussion, the writ petition is allowed. The impugned communication/order dated 20.01.2011 is quashed. It is held that the petitioner is entitled to clear the horses in question for home consumption, subject to the various conditions detailed hereinafter.

36. The petitioner must take full responsibility for irregularly importing the horses from Austria/Germany. The import license was valid for import from Australia. For this irregularity, the petitioner has already been subjected to fine and penalty by the customs authorities. The petitioner has not been able to undertake delivery of the horses while, at the same time, he has had to maintain the same in quarantine.

37. These horses have been tested and have been found to be perfectly healthy. I fully agree with the view of S. Muralidhar, J. in W.P.(C.) No.6603/2010 that the requirement of quarantine department is not negotiable. However, the petitioner has shown that the import of horses from Austria/Germany has been undertaken and permitted in the past. Not only civilians, even the Army has imported horses and mules from these countries. Import is permitted even from countries which are

CEM positive, subject to tests and conditions. There is no reason, not to permit the import of these horses if they satisfy the tests and conditions laid down para-4 in the notification dated 07.05.2010 referred to above.

38. In normal circumstances, I may have required the respondents to pass a fresh order for granting extension and for amendment of the import license. However, in the peculiar facts of this case, I am not inclined to do so. The peculiarity lies in the fact that the import in this case is that of livestock, i.e. horses meant for equestrian sports. These horses arrived on 08.09.2010, i.e. over 14 months ago. There is, therefore, a sense of urgency to deal with the situation.

39. Considering the fact that these horses were imported for the purpose of equestrian sports, there can be no denying the fact that they need regular and proper care and exercise. With the passage of each day, their potential to render service in equestrian sports would diminish. I, therefore, direct the respondents to release the said horses to the petitioner at the earliest, subject to the following conditions:

> i) The horses being subjected to tests and satisfying the conditions and tests prescribed in para-4 of the notification dated 07.05.2010. For this purpose, if not already done, the tests be conducted by the National Research Centre on Equines, the costs whereof shall be borne by the petitioner.
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> ii) The petitioner paying the customs duty, fine and penalty imposed upon the petitioner;
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> iii) The petitioner paying the entire quarantine charges upto the date of taking of delivery;
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> iv) The petitioner paying the charges towards revalidation of the import license and towards amendment thereof to include Austria/Germany as the countries of origin of the horses, and towards medical examination of the horses earlier as well. The amount already paid by the petitioner shall be given credit.

40. The respondents shall communicate the charges, not already communicated, positively within three days hereof.

41. Petition stands disposed of in the aforesaid terms, leaving the parties to bear their respective costs. Copy be given Dasti to the parties for immediate compliance.