

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
ALLAHABAD**

REGIONAL BENCH - COURT No.II  
**(E-Hearing)**

**(i) Customs Appeal No.70615 of 2025**

(Arising out of Order-in-Appeal No.NOI-CUSTOM-000-APP-199 to 203/24-25 dated 30/10/2024 passed by Commissioner (Appeals) Customs, Central Goods & Services Tax, Noida)

**M/s Golden Ripe International Pvt. Ltd., .....Appellant**

(150, Mayfair Estate, Baghpat Road, Meerut-250002)  
*VERSUS*

**Commissioner of Customs (Pre.), Noida ....Respondent**

(4<sup>th</sup> Floor, C-232A/2 to C232A/3,  
GST Bhawan, Sector-48, Noida-201301)

**WITH**

**(ii) Customs Appeal No.70616 of 2025 (Shri Ajay Agarwal)**

**(iii) Customs Appeal No.70617 of 2025 (Shri Aman Agarwal)**

**(iv) Customs Appeal No.70618 of 2025 (Shri Sheel Kumar Sethi)**

**(v) Customs Appeal No.70619 of 2025 (Shri Ravinder Kumar Nagpal)**

(Arising out of Order-in-Appeal No.NOI-CUSTOM-000-APP-199 to 203/24-25 dated 30/10/2024 passed by Commissioner (Appeals) Customs, Central Goods & Services Tax, Noida)

**APPEARANCE:**

Shri Priyadarshi Manish, Advocate &  
Ms Kratika Shaiyam, Advocate for the Appellants  
Smt Chitra Srivastava, Authorised Representative for the Respondents

**CORAM: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)  
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NOS.70861-70865/2025**

DATE OF HEARING : 21 August, 2025  
DATE OF PRONOUNCEMENT : 12 December, 2025

**SANJIV SRIVASTAVA:**

This appeal is directed against order in appeal No NOI-CUSTOM-000-APPL-199-203/24-25 dated 30.10.2024 of the

Commissioner (Appeal) Central Goods and Service Tax, Noida.  
By the impugned order following has been held:

*ORDER*

*6. The Order in Original no. 02/ADC/NOIDA-CUS/2024-25 dated 19.04.2024 passed by the Additional Commissioner, Noida Customs, ICD Dadri is upheld and appeal Nos. 93/CUS/NOIDA/ APPL/NCUS/2024-25, 94/CUS/NOIDA/APPL/NCUS/2024-25, 95/CUS/ NOIDA/ APPL/NCUS/ 2024-25, 96/CUS/NOIDA/APPL/NCUS/ 2024-25 & 97/CUS/NOIDA/APPL/NCUS/ 2024-25, all dated 22.05.2024 filed by the appellants are hereby rejected.*

2.1 Based on an intelligence that appellant 1 had

- imported "Ethephon", a pesticide which is restricted item and requires certificate of registration from Central Insecticide Board and Registration Committee (CIB & RC), by mis-declaring the same as "ethylene ripener" under CTH-38249990;
- they have filed Bill of Entry No 4477470 dated 28.06.2021 for import of another 23000 kgs of goods declared as "Ethylene Ripener 20%" imported in Container No OOLU1581421

a search was conducted on 24.06.2021 by officers of the Direct of Revenue Intelligence, at M/s Gold Ripe International Pvt. Ltd. Khasra No. 1310, Village Kashi, Gagol Road, Meerut, Uttar Pradesh. (Appellant 1)

2.2 At the time of search:

- 30576.16 Kgs of goods decalred as "ethylene ripener" was found in raw form and finished/ packed form;
- Some packing machines, bend sealer machine, strapping machine and lamination machine were found;
- On the finished goods following was mentioned;

"This contains ethepon along with fillers which liberates "ethylene gas" concentration and not more than 100 ppm as per FSSAI norms responsible for ripening the fruit."

Thus these goods were detained under the provisions of Customs Act, 1962 on a reasonable belief that they were imported without the requisite certificate of registration.

2.3 On examination, the goods declared as "Ethylene Ripener 20%" covered under Bill of Entry No, 4477470 dated 28.06.2021 were found to be "Ethephon" declared as "Ethylene Ripener 20%". These goods were also detained.

2.4 Samples were drawn and forwarded to CRCL and Central Insecticide laboratory. After testing by CRCL and Central Insecticide Laboratory, the said goods were found to be misclassified & mis-declared. Being restricted items, the impugned goods were seized.

2.5 A Show Cause Notice dated 21.12.2021 was issued by Joint Director, DRI, LZU, Lucknow for

- confiscation of restricted goods under Section 111(d),111(f) & 111(m) of the Customs Act, 1962.
  - weighing 30576.16 kgs valued at Rs.25,22,233/- seized at premises of the Appellant 1
  - goods weighing 23000 kgs valued at Rs. 18,86,115/- seized from the container at Star Track Terminals Pvt. Ltd. ICD Dadri.
- Imposition of penalties, under Section 112(a),112(b) & 114AA of the Customs Act, 1962 was proposed for the offence committed by appellants, i.e. the three Directors, Sh. Ravinder Kumar Nagpal (Appellant 2), Sh. Ajay Agarwal (Appellant 3), Sh. Aman Agarwal (Appellant 4) as well as on the Custom Broker Sh. Sheel Kumar Sethi (Appellant 5).

2.6 The appellants filed a writ petition in Hon'ble Allahabad High Court which was disposed of vide order dated 15.09.2023 wherein the Hon'ble High Court held that the dispute raised in the said appeal involves factual disputes and they may not be entertained in writ jurisdiction. The Hon'ble High Court directed the adjudicating authority that in case the appellant file their reply to the Show Cause Notice dated 21.12.2021 within a

period of 4 weeks from the date of judgement, the adjudicating authority may ensure expeditious conclusion of the adjudication proceedings, after due opportunity of hearing etc, to the appellant.

2.7 The show cause notice was then adjudicated as per Order in original dated 19.04.2024, holding as follows:

- (i) *I order to confiscate the goods weighing 30576.16 Kg valued at Rs.25,22,233/- seized at factory premises of M/s Goldripe International Pvt. Ltd Khasra No. 1310, Village Kashi, Gagol Road, Meerut, Uttar Pradesh and goods weighing 23000 Kg valued at Rs.18,86,115/- imported vide Bill of Entry No.4477470 dt. 28/6/2021 at CFS -Startrack Terminals, ICD Dadri under section 111 (d), 111( & 111(m) of the Customs Act, 1962. However, I give an option to redeem the said goods under section 125 of the Customs Act, 1962 on payment of redemption fine collectively Rs.5,00,000/- (Rupees five lakhs only) to re-export the said goods within 30 days from the date of receipt of this order. In an event of failure to re-export the impugned goods within the stipulated time period, the same shall be destructed at the cost of the importer.*
- (ii) *I impose penalty of Rs. 1,00,000/- (Rupees One lakh only) upon M/s Goldripe International Pvt. Ltd. addressed at Khasra No. 1310, Village Kashi, Gagol Road, Meerut, Uttar Pradesh under section 112(a)(i) of the Customs Act, 1962;*
- (iii) *I impose penalty of Rs. 1,00,000/- (Rupees One lakh only) upon Sh. Ravinder Kumar Nagpal, H.No.117, Sector-14, Vasundhara, Near Atlanta Hospital, Ghaziabad, Uttar Pradesh-201012 under section 112(a)(i) of the Customs Act, 1962;*
- (iv) *I impose penalty of Rs. 2,00,000/- (Rupees Two lakhs only) upon Sh. Ravinder Kumar Nagpal, H.No.117, Sector-14, Vasundhara, Near Atlanta Hospital,*

*Ghaziabad, Uttar Pradesh-201012 under section 114AA of the Customs Act, 1962;*

- (v) I impose penalty of Rs. 1,00,000/- (Rupees One lakh only) upon Sh. Ajay Kumar Agarwal, 150, Mayfair Estate, Baghpat Road, Meerut- Uttar Pradesh-250002 under section 112(a)(i) of the Customs Act, 1962;*
- (vi) I impose penalty of Rs. 1,00,000/- (Rupees One lakh only) upon Sh. Aman Agarwal, 150, Mayfair Estate, Baghpat Road, Meerut, Uttar Pradesh-250002 under section 112(a)(ij) of the Customs Act, 1962;*
- (vii) I impose penalty of Rs. 1,00,000/- (Rupees One lakh only) upon Sh. Sheel Kumar Sethi, CHA M/s King Travels, 68, First Floor, South Patel Nagar Market, New Delhi-110008 under section 112(a)(i) of the Customs Act, 1962; and*
- (viii) I impose penalty of Rs. 2,00,000/- (Rupees Two lakhs only) upon Sh. Sheel Kumar Sethi, CHA M/s King Travels, 68, First Floor, South Patel Nagar Market, New Delhi-110008 under section 114AA of the Customs Act, 1962.*

2.8 Aggrieved appellants filed appeal before the Commissioner (Appeal), which has been disposed of as per the impugned order, referred in para 1 above.

2.9 Aggrieved appellants have filed these appeal.

3.1 Hearing in the present case was done electronically on 21.08.2025

3.2 We have heard Shri Priyadarshi Manish and Ms Kratika Shaiyam, Advocate for the appellant, and Ms Chitra Srivastava, Authorized Representative for the revenue.

3.3 Arguing for the appellant learned counsel submits that the basic issue in the case is whether the goods imported by the appellant i.e. "ethylene ripener" containing ethephon were required to be registered under Section 9 (1) of the Insecticide Act, 1968 or were to be imported against import permit issued by CB&IC.

- The product imported by them is patented product of the Chinese manufacturer and is combination of Alkalies and Ethephon. In commercial parlance it is known as "ethylene ripener". Ethylene Ripener is Ethephon 39SL encapsulated in the cavities of Alkalies and the said composition is packed in 14-16 microns cellulose membrane paper to form small sachet containing 3 gms of ethylene ripener. After dipping the sachet in water for 5-10 secs, the sachet is placed in the box of fruits. The ethylene released help in ripening of fruit. The said mixture do not conduct any function as insecticide, herbicides or pesticides.
- Ethylene ripener is not a pesticide although it contains Ethephon which can only be 5-8% when extracted in lab.
- By virtue of section 38 (1) (b) the provision of Insecticide Act, 1968 are not applicable to them.
- Ethephon which was registered in CIB as plant growth regulator was used on plant (before harvesting) and the product imported by the appellant uses Ethephon as main chemical supported by other chemical and is used for generation of ethylene.
- The use of ethylene for ripening of Fruits have been approved by FSSAI in the Month of August 2018.
- FSSAI had by guidance note issued a direction under Section 16 (5) of Food Safety and Standard Act, 2006 and clarified that Ethephon with alkalis packed in sachets can be used for the purpose of generating ethylene gas. Thus there is no embargo in using Ethephon for ripening of fruits.
- Therefore appellant is not required any permission, registration for the manufacturing of the impugned good
- The sample test report of imported goods have not been produced by the revenue authorities at any time.
- Contrary finding have been recorded in the order in original in para 55.4.2 and 55.5.5

- Order in original also erroneously hold that appellant have deliberately misclassified and mis-declared the goods namely ethepho under CTH 3824 instead of 38089340.
- No market enquiry was conducted at any stage to verify the true nature of the goods.
- It is not humanly possible to segregate Ethephon from the said mixture and the same mixture is neither utilized as insecticide or plant growth regulator.
- Any attempt to put the condition for registration or import permit is in derogation of the provisions of Insecticides Act, 1968. DGFT Notification bearing No 106 (RE-2013)/ 2009-2014 dated 01.01.2015 is in derogation of the provisions of section 38 (1) (b) of Insecticide Act, 1968.
- The order in original is in contravention of the decision of Hon'ble Bombay High court in which they granted permission to import the goods without filing repetitive petitions.
- The order in original has been passed beyond the time limit set for adjudication of the show cause notice by the Hon'ble High Court hence bad in law.
- Reliance is placed on the following decisions:
  - M.M. Traders [2023 (383) E.L.T.439 (Del.)]
  - Additional District Magistrate (Rev.) Delhi Admn. V. Sri Ram [2000 (5) SCC 451]
  - Synergies Castings Ltd., [2014 (313) E.L.T. 50 (Mad.)]
  - Dhiren Chemical Industries [2002 (2) SCC 127]
  - Shri Gajanan B. Sudrik [2014 SCC Online CESTAT 1477]
  - Kerala State Electricity Board & Ors. Vs Thomas Joseph Alias Thomas M.J. & Ors. [Civil Appeal No.9252-9253/2022]
  - Kunal Travels (Cargo) [2017 SCC ONLINE Del 7683]

- Paper Products Ltd. [1999 (7) SCC 84]
- Sudarshan v. Biradar Vs State of Karnataka [2023 SCC Online Kar 178]

3.4 Authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows:

*5.4.1 Second issue raised by the appellant is that the Show Cause Notice has not provided the copy of the test report to them. It is seen that the Show Cause Notice has mentioned in para 4 that the samples were drawn during the search proceedings at factory premises and also from the goods covered under Bills of Entry filed at ICD Dadri. It is seen that the Show Cause Notice alleges that the Test-Report revealed that the goods imported by the appellant contain Ethephon. It is pertinent to mention that nowhere in the grounds of appeal the appellant has contested the said allegation of the Show Cause notice. The appellant has also not disputed the findings of the earlier Test Reports of the Bill of Entry No 3247444 dated 15.05.2019 and B.E No 3010158 dated 27.04.2019 wherein the goods were found to contain Ethephon. Further the appellant himself in the grounds have acknowledged that the goods contain 5% to 8 % of Ethephon.*

*5.4.2 Thus, in spite of not providing the copy of the Test Report as relied upon in the Show Cause Notice, the fact that the impugned goods contained Ethephon is undisputed. It is the only substantive finding of the Test Report which has been used as evidence against the Appellants and at the same time the findings of the Test Reports are not contested on merits. I also observe from the impugned order that the Appellant had not raised this issue before the Adjudicating Authority. The test reports were called from the investigating agency during the*

*Appeal proceedings, the said Reports have concluded that the samples being tested, contained approximately 20% Ethephon. Accordingly, I hold that no substantive lis is cast upon the adjudication proceedings or the Impugned order on this ground.*

*5.5.1 Another issue raised by the Applicant is that the order of the adjudicating authority is in contravention of the Hon'ble Bombay High Court in which the Court granted the permission to import the goods without filing the repetitive petitions, if the same is related to one contract. In the instant case all the products imported by the Appellant is covered with one purchase order and therefore, the order in original has been passed in contravention of the provisions of law and liable to be set-aside.*

*I find that this issue has been adequately dealt in para 55.7 of the impugned order.*

*5.5.2 The relevant paras of the Order of the Hon'ble High Court of Bombay in the W.P No 11198 of 2019 is reproduced herein below:*

*"5, We, therefore pass similar orders even in this matter [orders dated 3.05.2018 and 17.07.2018 3 in Writ Petition (L) No.1477 of 2018,*

*6. However, we clarify that the writ petitioner before this Court today need not file successive writ petitions merely because the consignment booked as an importer by the petitioner is being delivered or is to be delivered in lots or in partial consignments. Merely because the entire consignment is not delivered in one go or lot, but in the above matter does not mean that the successive writ petitions have to be brought. So long as the consignment of certain, specified quantity of the imported goods reaches the port in single consignment or in multiple consignment, the clearance shall be permitted on the*

*strength of the order passed in the present Writ petition.*

*7. Needless to clarify that as regards any further consignments sought to be imported, the petitioner will have to go through the process. We are not making any generalized order in regard to future imports, but only in regard to single or multiple consignments under the present Bills of Entry/Purchases/Purchase orders /Invoices mentioned in this Writ petition".*

*5.5.3 The Hon'ble Court in the W.P (L) No,1477 of 2018 has observed that*

*"5. Mr. Rustomjee, on instructions states that without prejudice to their rights and contentions particularly the grounds in this Petition, the Petitioner will make an application for the issuance of an import permit within one week from today. We take this statement as an undertaking to this Court.*

*6. On a Copy of the applications made being produced, the Respondents will allow the consignments to be cleared and which clearance will also be without the prejudice to their rights and contentions in this affidavit in Reply,*

*8, .. The above order will operate as a ad-interim order but strictly without prejudice to the Rights and contentions of both sides....."*

*5.5.4 From the above it is clear that the Hon'ble High Court had observed that once an application to CBI& RC has been made there is no need to come before the Hon'ble Court if there are multiple Bills of Entry filed by the petitioner (Applicant). It is seen from the Reply dated 08.07.2021 and 16.07.21 of CBI& RC, that the applicant has never approached CIB& RC. Thus, the Applicant has not fulfilled the undertaking made before the Hon'ble High*

*Court. Further the Court had categorically stated that the orders passed were in the nature of ad-interim relief and the rights and contentions of both the parties were not prejudiced by such interim order. Further, the Hon'ble Court had observed that the applicant would require to follow the process case the goods are not covered under any Purchases which are not mentioned in the Writ Petition. The appellant has not brought out any evidence to show that the goods under the impugned order were covered under the same Purchase order as was before the Hon'ble Court. Further it is pertinent to mention that the proceedings under the Impugned order were conducted in pursuance of the detailed order of the Hon'ble High Court of Allahabad in the W.P No 495 of 2021. Accordingly, I hold that this ground of appeal is baseless and devoid of any legality and/or merits.*

*5.6 Before proceeding further it is pertinent to reproduce the relevant findings of the Hon'ble High Court of the Allahabad in the W.P No 495 of 2021. In the said W.P the appellant was in Writ before the Hon'ble Court with a plea to set aside the search proceedings and the thereafter the seizure and the confiscation proceedings.*

*16. Section 9(1) of the Insecticides Act reads as under: "9. Registration of insecticides. (1) Any person desiring to import or manufacture any insecticide may apply to the Registration Committee for the registration of such insecticide and there shall be a separate application for each such insecticide: Provided that any person engaged in the business of import or manufacture of any insecticide immediately before the commencement of this section shall make an application to the Registration Committee within a period of [seventeen months] from the date of such commencement for the registration of any 6 insecticide which he has been importing or manufacturing before that date: [Provided further*

*that where any person referred to in the preceding proviso fails to make an application under the proviso within the period specified therein, he may make such application at any time thereafter on payment of a penalty of one hundred rupees for every month or part thereof after the expiry of such period for the registration of each such insecticide.]"*

*17. Then, Section 17(1)(c) of the Insecticides Act reads as below: "17. Prohibition of import and manufacture of certain insecticides. (1) No person shall, himself or by any person on his behalf, import or manufacture— (a) ..... (b) ..... (c) any insecticide except in accordance with the conditions on which it was registered;"*

*18. The term "insecticide" has been defined under Section 3(e) of the Insecticides Act. It reads as below:*

*"3. Definitions. In this Act, unless the context otherwise requires,*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) "Insecticide" means—*

*(i) any substance specified in the Schedule; or*

*(ii) such other substances (including fungicides and weedicides) as the Central Government may, after consultation with the Board, by notification in the Official Gazette, include in the Schedule from time to time; or*

*(iii) any preparation containing any one or more of such substances;"*

19. It is an admitted fact, Ethephon is a scheduled commodity under the Insecticides Act. Therefore, by virtue of the language of section 17(1)(c) read with Section 3(e)(i) of the Insecticides Act, a stipulation in law does arise on the import of Ethephon to allow its import only upon fulfillment of conditions of prior registration obtained under Section 9 of the Insecticides Act. To that extent, the second submission advanced by learned counsel for the petitioner that the requirement to obtain a prior registration under the Insecticides Act is only a regulatory measure not provided with any consequence (for its non-compliance), is misconceived.

20. Then, Section 2(33) of the Act defines the term "prohibited goods". It reads:

"2. Definitions. In this Act, unless the context otherwise requires,--

(1) .....

(2) ..... .....

(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;"

21. In view of the above, the existence of prior registration becomes a condition essential to be fulfilled before a Scheduled commodity may be imported into the country. By employing the words "no person shall ..... import or manufacture any insecticide except in accordance with the conditions

*on which it was registered", a prohibition in law has been set in place against import of an insecticide, in absence of registration under the Insecticides Act. Unless such registration pre-exists, the occasion to comply with the conditions of registration may never arise.*

*22. Consequently, a person holding a Registration Certificate under the Insecticides Act, particularly with respect to Ethephon alone may be eligible to import the same, for reason of that commodity being a Scheduled insecticide. Second, that person would earn the right to import Ethephon, upon fulfillment of the conditions of its registration.*

*23. On the converse, any person not holding such registration or not fulfilling the further conditions subject to which he may have been registered would remain ineligible to cause import of such goods. At his hands Ethephon would remain "prohibited goods", by virtue of the definition given to that term, under Section 2(33) of the Act.*

*24. As to the third submission advanced by learned counsel for the petitioner, that Ethephon is exempt from the operation of Insecticides Act, Section 38 of the Insecticides Act reads as below :*

*"38. Exemption. –*

*(1) Nothing in this Act shall apply to –*

- (a) the use of any insecticide by any person for his own household purposes or for kitchen garden or in respect of any land under his cultivation;*
- (b) any substance specified or included in the Schedule or any preparation containing any one or more such substances, if such substance or preparation is intended for purposes other than preventing, destroying,*

*repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant or animal life not useful to human beings.”*

25. *First, by virtue of Section 38(1)(a) the Insecticides Act does not apply to household insecticides or garden insecticides or such insecticides that may be used with respect to land under a persons' cultivation. Second, by virtue of Section 38(1)(b), the provisions of the Insecticides Act would not apply to any scheduled commodity or any other commodity containing the scheduled commodity if the same were intended for any purpose - other than (i) preventing, (ii) destroying, (iii) repelling and, (iv) mitigating insects, rodents, fungi and other forms of plant or animal life 'not useful to human beings'.*

26. *Thus, Section 38(1)(a) excludes the applicability of the Insecticides Act, directly, viz a viz types of insecticides that may be used for household purposes or for kitchen garden purposes or in respect of land under cultivation. Section 38(1)(b) excludes those insecticides from the operation of the Insecticides Act if they are not used for the purpose of (i) preventing, (ii) destroying, (iii) repelling and, (iv) mitigating various types of plant and animal life that may not be useful to human beings.*

27. *Thus, any insecticide that may be harmful to the occurrence, sustenance, growth, and propagation of various types of plant and animal life would continue to fall under the regulatory law and therefore the prohibitory umbrella of the Insecticides Act. Thus, an insecticide that may cause any of the above-described effects on any insect or rodent or fungus or weed or other form of plant or animal life, would*

*not be exempt from the applicability of the Insecticides Act.*

*28. In general terms, the Parliament has been extra careful. It has first excluded the goods that have limited/specific use such as household insecticides, kitchen garden insecticides and agricultural insecticides. Then, it has excluded from the applicability of the Act any insecticide that may not potentially harm either any insects or rodents or fungi or other forms of plant or animal life though such life form may not be perceived to be useful to human beings.*

*29. By employing the phrase "other forms of plant and animal life", the scope and stretch of the Insecticides Act has been extended to involve the widest possible inclusion – of protecting all or any life forms, whether plant or animal. Then, upon employment of the phrase "is intended for purposes other than" in conjunction with the phrase "not useful to human beings", the Parliament has included within the ambit of the Insecticides Act all insecticides that may have the effect of either preventing or destroying or repelling or mitigating, any type of plant and/or animal life form, notwithstanding the fact that such life form may itself be perceived to be useless or non-essential to human existence. The existence of such interaction, or the perception of its uselessness to human beings or its invisibility to the naked eye would not militate against its inclusion in the list of insecticides whose import and manufacture must be regulated under the Insecticides Act.*

*30. Though couched in a single sub-Section, Section 38(1)(b) of the Insecticides Act, beautifully encapsulates the ancient Indian tenet "Vasudhaiva*

*Kutumbakam". The world we live in, is shared and it belongs to one family i.e. human beings share it with all life forms – plant and animal. Just as one may never look to do anything, even inadvertently, that may unduly harm a member of his family howsoever far removed (in degree and distance) the latter may be located, so also human beings (as a species), may not employ insecticides that may cause specified harms to another species of either plant or animal life forms, since we share our wonderful planet with them, even though we may not perceive a direct or visible interaction or inter-dependency with them. So even a simple fungus or an algae, is an important member of our world. In the interest of each life form, any insecticide that may have the potential to cause a specified harm, through (its use), would remain regulated under the Insecticide Act.*

*31. In the context of potential vast devastation that may arise upon unregulated use of insecticides, Section 38 of the Insecticides Act consciously does not employ any word or phrase to restrict the operation of the Insecticides Act to only such insecticides as may be 'intended' to cause any of the four specified harmful effects. The correlation between intention and harm, does not exist. On the contrary, if an insecticide by nature of its properties and effect, has the potential to cause such harmful effect, then, even if such harmful effect may arise incidentally or as a by-product, either upon its use or in the process of its manufacture or import, it will remain regulated by that law.*

*32. Read in its entirety, Section 38(1)(b) of the Insecticides Act only seeks to exclude from its applicability such insecticides as may not have any deleterious effect to the survival and well-being of*

*various forms of plant and animal life, generally. While it is difficult to imagine, any man made insecticide that may not cause any harmful effect to any form of plant and/or animal life at an individual specimen/micro level, for that is the exact purpose of its manufacture and use, perhaps the legislature intends to exempt from the applicability of the Insecticides Act, only such insecticides as may not cause specified harm to any form of plant and / or animal life, at the existential/macro level.*

*33. Thus, Section 38(1)(a) of the Insecticides Act, seeks to exclude household insecticides, kitchen garden insecticides and such insecticides that may be used in the cultivation over land. Truly, it is an exception or a proviso to the main provision contained in Section 38(1)(b) of that Act. Thus, though an insecticide 'X' may cause an effect specified under Section 38(1) (b), on any form of plant or animal life and may therefore require its import and/or manufacture to be regulated yet, if 'X' were a household or kitchen garden or agricultural insecticide, having limited ability to influence other plant and / or animal life forms, both in the context of area to be covered by it and its long term and other reach/influence, it may still remain exempt from the operation of the Insecticides Act.*

*34. Seen in that light, it would be premature for the writ Court to reach a fact conclusion whether Ethephon is an insecticide that may not cause any of the specified harm to any form of plant or animal life, generally. Neither the Court is an expert in the science of chemistry or environment, nor it has any expert jurisprudential material available to it as may safely lead it to the conclusion that import and/or manufacture of Ethephon may not cause the effect of preventing or destroying or repelling or mitigating*

*any insect or rodent or fungi or weed or any other form of plant or animal life.*

*35. A fact enquiry would be required to be conducted before the contention being canvassed by the learned counsel for the petitioner may be accepted. That consideration has become necessary in the face of the claim of exemption set up by the petitioner. That claim must arise and be tested before the fact-finding authority i.e., the statutory authorities.*

*36. As early as in Commissioner of Income Tax, Madras vs. R. Venkataswamy Naidu, AIR 1956 SC 522, it came to be settled that the burden to establish an exemption rests on the person who claims its existence. That general principle or rule of evidence was equally applied to taxation laws. Relevant to our discussion, it was observed as under :*

*"12. This contention was rejected by the Income Tax Officer, the Appellate Assistant Commissioner as well as the Income Tax Appellate Tribunal. They were of the opinion that the assessee had failed to furnish proper materials and had failed to discharge the burden which lay on it to prove that the income derived by it from the sale of milk during the accounting year was agricultural income. They rightly placed the burden of proof on the assessee but the High Court erroneously framed the question in the negative form and placed the burden on the Income Tax Authorities of proving that the income from the sale of milk received by the assessee during the accounting year was not agricultural income. In order to claim an exemption from payment of income tax in*

*respect of what the assessee considered agricultural income, the assessee had to put before the Income Tax Authorities proper materials which would enable them to come to a conclusion that the income which was sought to be assessed was agricultural income. It was not for the Income Tax Authorities to prove that it was not agricultural income. It was this wrong approach to the question which vitiated the judgment of the High Court and led it to an erroneous conclusion.”*

5.7 *Hon’ble High Court further observed that:*

*37. Also, it may survive to the legislature and/or the executive to make an appropriate declaration in that regard, of course upon due consideration of relevant material yet, such action is not shown to exist, as on date. Thus, at present, Ethephon being a scheduled commodity under the Insecticides Act, it falls outside the scope of any fruitful discussion if it is an insecticide for the purpose of the Insecticide Act. Clearly, it is. In absence of any further fact proven to establish any exemption available to it under section 38 of the Insecticides Act, prima facie it stands made out that Ethephon is a regulated insecticide. It may not be imported or manufactured, except under a valid Registration Certificate etc. and upon fulfilment of the conditions thereto.*

*38. Therefore, in the absence of any further legislative and/or executive declaration expressed, at present, the only authority that may deal with the issue of claim of exemption being made by the petitioner would be the quasi-judicial authority under the Act. At present, the proceedings initiated under Section 124 of the Act are pending. Pending those proceedings, we leave the issue of exemption*

*completely open to be contested in those proceedings, solely on the strength of material that may be produced before that authority.*

*39. Here it may be noted, issuance of notification under other enactments such as the Order dated 20.07.2020 issued by the Food Safety and Standards Authority of India (FSSAI in short) is extraneous to test if Ethephon is exempt under the Insecticides Act or is not prohibited under the Act. Merely because Ethephon is a permitted ripening agent under the Food Safety and Standards Act, 2006 may only lead to an inference that per se, it is not harmful to human health, when used as a ripening agent. Many insecticides are not considered harmful to humans. Yet, they are harmful to other forms of plant and animal life. Precisely, for that reason, the general exemption granted under Section 38(1)(b) of the Insecticides Act is restricted to such insecticides only as may not cause any of the specified harm to any other plant or animal life.*

*40. The FSSAI established under the Food Safety and Standards Act, 2006 seeks to guard the health interests of the human species only. On the other hand, the Insecticides Act seeks to guard the minimum existential interest of all life forms, from the harmful effects that may be caused by use of an insecticide. To that extent and for that reason, the Insecticides Act is both a special Act and an enactment with wider outreach and spread than the Food Safety and Standards Act, 2006.*

*41. In the absence of any conflict between the two enactments, the Insecticides Act would play out to the full, in face of the FSSAI Act, such that the permission to use Ethephon as a permitted ripening agent for human beings does not ipso facto amount*

*a declaration that it is non-injurious to all other life forms. To that extent the notification issued under the FSSAI Act, remains extraneous to the issue at hand.*

*42. As to the fourth submission of the learned counsel for the petitioner, it is true that specific objection had been raised by the petitioner that Ethephon was exempt under Section 38 of the Insecticides Act. The same could have been dealt with at the stage of seizure. However, we also cannot overlook the fact that the detention memo was issued on 24.06.2021 and the seizure memorandum was prepared on 23.07.2021. More than two years have passed since then. Meanwhile the petitioner has been visited with a Show Cause Notice under Section 124 of the Act. That proceeding is still pending.*

*45. Plainly, that provision of law has not been enforced. Though inserted by Act No. 13 of 2018 vide Section 59 thereof, it's date of enforcement has yet not been notified. Hence, that provision of law is yet lifeless. At present, the provisions of Section 110 (1) read 16 with Section 111(d) read with Section 2(33) of the Act read with Sections 9 and 17 of the Insecticides Act continue to allow the Customs authorities to proceed under the Act against the import of Ethephon by the petitioner as it did not have the requisite Registration Certificate under the Insecticides Act. To that extent the impugned proceedings are not lacking in inherent jurisdiction."*

*(Emphasis supplied)*

*5.8 A plain reading of the observations of the Hon'ble Court would reveal that the issue to be decided by the adjudicating authority was whether the imported goods were exempted under Section 38(1)(b) of the Insecticide*

*Act 1968. As only an exemption under the said Act would take away the requirement of Registration under the Insecticide Act for the purposes of import, trade or manufacture the said Insecticide. In case any imports are being done in absence of the registration of the said insecticide which are required to be registered under the Insecticide Act 1968, the goods so imported would be prohibited for the purposes of the provisions of the Customs Act, 1962, read with the Insecticide Act, 1968. It has been also observed that the various orders issued by the FSSAI would remain extraneous to the dispute on hand.*

*5.9 It is seen that Show Cause Notice in para 5 has brought out that the administrative officer of CIB&RC and the section officer of CIB&RC vide their letter dtd. 08.07.21 and 16,07.2021 respectively have informed that the applicant has never applied for the Registration of any product to the secretariat of CIB&RC nor any certificate of Registration has been issued to them, Also CIB & RC letter dated 8.07.2021 had informed DRI that "No threshold limit is defined for import of pesticides in the schedule to the Insecticides Act, 1968" which lays at rest the appellant's contention of exemption. It was also informed that Certificate of Registration is also required from the Central Insecticide Board & Registration for the import of Ethephon or any substance containing Ethephon under the provisions envisaged under the Insecticide Act 1968.*

*5.10 It is seen that the applicant has never disputed and has rather agreed that the goods imported by them have 5 % to 8 % of Ethephon, accordingly the requirement of Registration is required to be compulsorily met. It is seen that the applicant at the adjudication stage, in the appeal proceedings or even before the Hon'ble High Court of Allahabad has not agitated the opinion of the CIB&RC. Having held by the administrative, Expert Body /Statutory Authority that the goods having Ethephon are required to*

*be Registered , there is no dispute left as far as the proceedings under the Customs Act 1962 is concerned. It therefore answers the question as framed by the Hon'ble High Court supra, which is required to be answered by the adjudicating authority i.e. whether the goods imported by the appellant are covered under the exemption as provided under Section 38(1)(b) of the Insecticide Act ibid.*

*5.11 It is seen that appellant in his grounds of appeal has stated "that in the instant case all the products imported by the appellant is covered with one purchase order as was for the earlier imports at Nhava Sheva Commissionerate in 2019." Thus by appellant's own assertions the goods imported at Nhava sheva Port vide Bills of Entry No 3010158 dated 27.04.2019 and 324744 dated 15.05.2019 were the same as imported in the present case under Bill of Entry filed at ICD Dadri and also the goods seized at the appellant's factory. Also in the Appeal book, in the Brief facts of the case, the appellant have themselves asserted in para 14 and para 15 that the impugned goods contain 20% Ethephon. In fact, there has not been any dispute raised with regard to the constitution/ composition of the imported goods under the various Bills of Entry and also the goods seized at the factory premises of the appellant. At this stage it is pertinent to also mention that the appellant had approached the Hon'ble High Court of Mumbai against the action of the Port officers in the case of imports done at Nhava Sheva Commissionerate, in the W.P No 11198 of 2019, wherein Hon'ble High Court was pleased to pronounce similar orders as in the W.P No. (L) No 1477 of 2018. In the said case the Hon'ble High Court had ordered the petitioner to make an application for issuance of the import permit within one week. The said order was issued on the basis of the submission of the Government Counsel that the no consignment will be allowed to be cleared without submission of the Registration Certificate or the import permit. Though as*

*discussed in foregoing paras no such registration or Import permit was ever applied by the Applicant.*

*5.12 In light of the above facts, the observation of the Adjudicating Authority in para 35 to 40 of the Impugned order gains significance wherein it is observed that the Appellant had intentionally and knowing mis-declared the goods imported by them. In light of the above legal and factual matrix, I find that the observations of the adjudicating authority are legal and proper and does not require to be interfered with and accordingly the goods are rightly held to be liable for confiscation under Section 111 of the Customs Act 1962.*

*5.13 I find that the appellant M/s Gold Ripe International Pvt. Limited is liable for penalty under Section 112(a)(i) of the Customs Act 1962 as the acts of omission and commission as discussed above of the appellant has rendered the goods liable for confiscation.*

*5.14 I find that the Appellant Shri Ravinder Kumar Nagpal has pleaded that penalty under Section 112(a) (i) and 114AA is not applicable to them as per the grounds on merits of the case contesting the confiscation of the goods. It has been pleaded that no specific role of the appellant has been brought out by the adjudicating authority. Section 114AA is applicable only for exports and not for imports and the Adjudicating Authority has failed to identify and specify the false documents etc. which have been knowingly presented or signed by the Appellant. Similar grounds have been raised in the Appeals against the imposition of penalty under Section 112 (a) (i) of the Act on Shri Aman Agrawal and Shri Ajay Kumar Agarwal.*

*5.15 I also find that no specific grounds have been raised to contest the findings of the adjudicating authority as detailed in para 59 of the Impugned order. I find that the Impugned order and the Show Cause Notice has brought out the role of these persons. In light of the factual matrix*

*as above I hold that the penalty under Section 112(a)(i) has been rightly imposed on the appellants.*

*5.16 I find that the argument of the appellant that the penalty under Section 114AA is imposable only on the cases of exports is not a correct interpretation and understanding of the Rule position. On the ground that the Adjudicating Authority has failed to bring out any document which is false and has been knowingly filed by Sh. Ravinder Kumar Nagpal, I observe that the Adjudicating Authority has painstakingly on the basis of the evidence brought on record in the Show Cause Notice has discussed how Sh. Nagpal was aware of the composition of the imported goods and how he was actively involved in the import process. The appellant in its grounds have not contested the factual findings in the impugned order and has sought to assail the imposition of penalty under Section 114AA on a simpliciter assertion that the adjudicating authority has not given any findings. Thus, I find that the appeal on this account is devoid of any merits and liable to be rejected.*

*5.17 Appellant Sh. Sheel Kumar Sethi CHA, M/s King Travels have contested the imposition of penalty under Section 112(a)(i) and 114AA of the Customs Act 1962 on the grounds of merits of free importability of the goods. They have further contended that the Appellant is a CHA and in absence of any finding that the importer was directly involved in the omission and commission of the any act which rendered the goods liable for confiscation, the penalty under section 112(a) (i) of the Act is misplaced. Further Section 114AA is applicable only for exports and not for imports and the adjudicating authority has failed to identify and specify the false documents etc., which have been knowingly presented or signed by the appellant.*

*5.18 I observe that the impugned order in para 59& 60 has discussed the statement dated 06.07.2021 of Sh. Sheel Kumar Sethi, which was recorded during investigation, wherein he has inter alia stated that he knew the composition of the goods sought to be imported, and had also informed to Shr. Nagpal that the said goods are restricted and cannot be imported. He was also aware that M/s Gold Ripe International had received a notice dated 21.06.2021 from CIB&RC. Thereafter taking into consideration the provisions of the Rule 10 of the CBLR 2018, the adjudicating authority concluded that how Sh, Sethi has failed to act as per law. It is seen that the above factual findings have not been contested by the Appellant, and only a bald assertion of non- application of mind by the adjudicating authority has been made. I hold that the Appeal proceedings require contesting the finding of the order on specific grounds, Accordingly I hold that the appeal against imposition of penalty under Section 112(a) (i) of the Customs Act 1962 is devoid of any merits.*

*5.19 The interpretation of the application of Section 114AA only for exports is not a correct interpretation of law. Further the para 60 of the Impugned order has brought out in detail as to how the appellant Sh. Sheel Kumar Sethi had knowingly connived with the importer for false declaration of the description and Classification of the goods. Accordingly, I am not inclined to interfere with the findings of the Adjudicating authority on this issue.*

4.3 Undisputedly the goods imported by the appellant and subsequently seized by the Custom Authorities have been declared by the appellant as ethylene ripener. Undisputedly the said goods contain "ethepon". We reproduce certain excerpts, from an research publication (article) "Ethepon, an organophosphorous, a Fruit and Vegetable Ripener: Has potential hepatotoxic effects?" by Bhadoria, Pooja; Nagar, Mahindra; Bharihoke, Veena; Bhadoria, Ajeet Singh published in Journal of Family Medicine and Primary Care 7(1):p 179-183,

Jan–Feb 2018. | DOI: 10.4103/jfmpc.jfmpc\_422\_16; (assessed at [https://journals.lww.com/jfmpc/fulltext/2018/07010/ethephon,\\_an\\_organophosphorous,\\_a\\_fruit\\_and.33.aspx](https://journals.lww.com/jfmpc/fulltext/2018/07010/ethephon,_an_organophosphorous,_a_fruit_and.33.aspx) on 13.11.2025 at 1600Hrs) to ascertain the nature of imported goods.

### **"Introduction**

*Nutritionists advise to include fruits and vegetables in our daily diet to improve our immune system. However, we do not know that these fruits, vegetables, and food products available in the market today, which we are consuming daily to boost our immune system, are really safe. We are aware about the artificial ripening of fruits and vegetables to meet consumer's demand, increasing their shelf lives, and other economic factors.*

*In the recent years, ethephon, 2-chloroethylphosphonic acid, is the most widely used plant growth regulator as it promotes fruit coloration, leaf, flower, or fruit abscission, fruit ripening, fruit yield, germination, and flower induction. The color of oranges, lemons, and grapefruits often remains green when they are ripe, but consumers do not buy them because of their external green appearance. The application of ethylene to these green citrus fruit results in the development of desirable citrus color.*

*The use of ethephon varies with plant species, chemical concentration, and time of application as it regulates the phases of plant growth and development by application to various growth sites. It is applied to plants in the form of a mist or spray. After application, ethephon penetrates through stomata and cuticles to the apoplast where, at pH of 5 and above, it decomposes to form ethylene, chloride, and phosphate. Ethylene is a naturally occurring plant hormone that is produced by many fruits and vegetables. It affects the physiological processes in plants and initiates the ripening process when internal concentrations increase from 0.1 to 1.0 ppm (parts per million). Externally applied*

*ethylene can also initiate the ripening process. According to the Ministry of Agriculture, ethylene is considered safe in the concentration varying from 0.001% to 0.01% depending on the crop, variety, and maturity.*

*Ethephon is widely being used throughout the world as an insecticide. It is an organophosphorus compound, and in experimental animals, it has been reported to get rapidly absorbed in the gut. Some of it is expected to convert to ethylene oxide, then to ethanediol and hydroxyethyl-glutathione and mercapturic acid. Ethephon is one of the few synthetic compounds, and perhaps, the only agrochemical that spontaneously reacts to generate phosphoproteins, and it is a much better inhibitor of butrylcholinestrace than acetylcholinestrace. The involvement of 2-chloroethylphosphonic acid in biogenesis of some antibiotics has been determined. It affects the growth of streptomycetes and antibiotic production.*

*Scientists have reported that regular consumption of artificial-ripened fruits may cause dizziness, weakness, skin ulcer, and heart- and liver-related diseases. Olson and Hinsdill have reported adverse health effects on mice after subchronic treatment with plant growth regulators. In recent studies, dose-related inhibition of brain, red blood cell, and plasma cholinesterase has been reported in rats and mice. A significant increase of <sup>14</sup>C-acetate incorporation into cholesterol and lipids of serum, liver, heart, and brain is reported. A significant decrease in body weight, food consumption, vocalizations, and motor activity in birds, rabbits, and dogs has been observed. Toxic effects of ethephon reported in human adults till date are salivation, lacrimation, diarrhea, urgency of bowel movement, stomach cramps, increased urgency, and frequency of urination with decreased appetite with inhibition of plasma cholinesterase activity. Despite the known toxicities, there are only few studies documenting*

*the effect of ethephon on of liver, where most of the chemicals undergo first pass metabolism.*

\*\*\*\*\*

### **Discussion**

*In the present study, a statistically significant decrease in the body weight gain ( $P < 0.001$ ) was observed in the ethephon-treated rats as compared to control group. The decrease in body weight gain in experimental group was in accordance with the findings of Henwood and El-Okazy.[1819] The body weight gain in contrast to our findings was reported by Xian-Hui et al., who found a significant increase in body weight gain after treating adolescent female rats with ethephon for a short period of 20 days.*

*The mean number of hepatocytes and Kupffer cells of control group in a unit area [Table 1] was in accordance with the findings of Gershbein and Elias and Hase and Brim. No study has commented on effect of ethephon on liver cells.*

*Areas around the portal triads and central vein showed shrunken hepatocytes with pyknotic nucleus and pale staining cytoplasm. At places, dying hepatocytes appeared to be what is known as the acidophilic bodies or the Councilman bodies. These observations are in consistent with the findings of Hussein et al.*

*At places, areas of hemorrhage were seen disrupting the normal parenchyma which was replaced by large blood-filled spaces. This is in consistent with findings of Yazar and Baydan who administered oral ethephon to mice for 45 days and demonstrated microscopic changes in terms of hyperemic areas.*

*According to Miller and Van and Troup, the only sign of toxicity in mice treated with ethephon was the inhibition in plasma and red blood cell cholinesterase. Similar*

*cholinergic effects were also noted by Berouty et al. along with other findings.*

*El-Okazy demonstrated that ethephon caused several signs of toxicity other than affecting cholinesterase. These signs included an increase in the weights of liver, kidney, and spleen in groups treated with ethephon together with gibberellic acid. Decreased hemoglobin and total erythrocyte count were recorded in addition to an increased total leukocyte count and blood urea. They postulated that a combination of ethephon and gibberellic acid exhibited an additive dose-dependent effect on these parameters.*

*According to Nada and Al-Twaty, ethephon reduce the DNA and RNA concentrations in liver and testis. He reported similar results with protein content and cholinesterase enzyme activity in blood plasma. The results showed that ethephon could be mutagenic in mice.*

### **Conclusions**

*The observed statistically significant decrease in the hepatocyte count per unit area may be attributed and correlated with the fact that ethephon caused a decrease in the metabolic activity of the hepatocytes thereby causing their atrophy, resulting in the decrease of cells in a unit area. The statistically significant increase in Kupffer cells, inflammatory infiltrations, and areas of hemorrhage suggest the ongoing damage. These observations after administration of the ethephon are suggestive of the alarming possibility of toxic poisoning that may result in human either by occupational exposure, lack of knowledge, unsafe attitudes, faulty sprayers, lack of protective equipment, or consumption of this plant growth promoter in our daily diet. The lack of information at all levels can be one of the most important causative factors of insecticides intoxications.*

### **Recommendations**

- *Health education to increase public awareness about the ill effects of the commonly used artificial fruit and vegetable ripeners on most of the body systems (central nervous system, pulmonary hepatic, and cardiac). Primary care physicians should be sensitized to spread this knowledge*
- *It is important to perform qualitative and quantitative analysis of the presence of ripening agents within the fruit skin and flesh to understand the relevant health hazard*
- *Need to promote healthy practices such as the fruits and vegetables with visible spots or necrosis (lesions) or any other abnormality should not be consumed. Wash fruits and vegetables thoroughly with water before consuming. Peeling of fruits before consumption and vegetables before cooking should be promoted*
- *Ensure the quality of fruits and vegetables by sending them to voluntary testing laboratories*
- *Efforts of policy makers are required to reduce the use of artificial ripeners. Residue data sheets of United States have summarized the residues found on a variety of commodities and their by-products in the USA. They have given the preharvest intervals, concentration factors, and application rates.[27] We should work on those fact sheets to limit the use of ethephon and other artificial ripening agents. Safe limit of residue data should be worked on according to the Indian environment and the use can be limited accordingly*
- *Organic farming is the best solution, so it should be adopted and promoted so that our immune boosters remain boosters not toxicants.”*

4.4 From the above it is evident that the goods under importation which have active ingredient “ethepon” is have noticeable harmful effects on the rats examined in the above

research paper. It has harmful effect on the humans also. We reproduce the relevant excerpts from the Insecticide Act, 1968 as follows:

***Insecticide Act, 1968***

*3. Definitions.—In this Act, unless the context otherwise requires,—*

*(e) "insecticide" means—*

*(iv) any substance specified in the Schedule; or*

*(v) such other substances (including fungicides and weedicides) as the Central Government may, after consultation with the Board, by notification in the Official Gazette, include in the Schedule from time to time; or*

*(vi) any preparation containing any one or more of such substances;*

*THE SCHEDULE [See Sec. 3(e)] LIST OF INSECTICIDES  
(UPDATED ON 30-10-2016)*

<i>Sl. No.</i>	<i>Common Name</i>	<i>Chemical/Scientific name</i>
<i>223</i>	<i>Ethephon (Ethrel)</i>	<i>2-chloroethylphosphonic acid</i>

***9. Registration of insecticides.—***

*(1) Any person desiring to import or manufacture any insecticide may apply to the Registration Committee for the registration of such insecticide and there shall be a separate application for each such insecticide:*

***38. Exemption.—***

*(1) Nothing in this Act shall apply to—*

*a. the use of any insecticide by any person for his own household purposes or for kitchen garden or in respect of any land under his cultivation;*

*b. any substance specified or included in the Schedule or any preparation containing any one or more such substances, if such substance or*

preparation is intended for purposes other than preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant or animal life not useful to human beings.

- (2) The Central Government may, by notification in the Official Gazette, and subject to such conditions, if any, as it may specify therein, exempt from all or any of the provisions of this Act or the rules made thereunder, any educational, scientific or research organisation engaged in carrying out experiments with insecticides.

4.5 DGFT has issued **Notification No. 106/(RE-2013)/2009-2014 Dated the 1 January, 2015**, stating as follows:

"Subject: Amendment in import policy conditions under ITC (HS) 4 digit code 3808.

S.O. (E): In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.3 and 2.1 of the Foreign Trade Policy, 2009-2014, the Central Government hereby inserts the following Policy condition as Policy Condition no. 3 under Chapter 38 of ITC (HS), 2012 – Schedule – 1 (Import Policy):

"3. Under Section [9] of the Insecticides Act, 1968 all chemicals intended to be used as insecticides, rodenticides, fungicides, herbicides etc. [referred to as 'insecticides' under the Act] require mandatory registration for import. In cases, where the 'insecticide' is imported for non-insecticidal purpose, an import permit is necessary from the Registration Committee under the Department of Agriculture and Cooperation. The Registration Committee while granting registration or a permit for import of an insecticide spells out the conditions for import which inter alia, may include reference to the source of import. No 'insecticide' can be imported from a

source other than that specified on the certificate of registration or the permit, as the case may be. In addition, the Registration Committee may issue regulatory guidelines from time to time with respect to safety, efficacy, quality etc. which warrant full compliance from importers.”

2. Effect of this Notification: The policy provisions under the Insecticides Act, 1968 for import of insecticides under EXIM code 3808 of Chapter 38 in ITC (HS), 2012 – Schedule – I (Import Policy) are being notified.”

4.6 The relevant provisions of Food Safety and Standard Act, 2006 are reproduced below:

**FOOD SAFETY AND STANDARDS ACT, 2006**

21. Pesticides, veterinary drugs residues, antibiotic residues and microbiological counts

- (1) No article of food shall contain insecticides or pesticides residues, veterinary drugs residues, antibiotic residues, solvent residues, pharmacological active substances and micro-biological counts in excess of such tolerance limit as may be specified by regulations.
- (2) No insecticide shall be used directly on article of food except fumigants registered and approved under the Insecticides Act, 1968 (46 of 1968).

Explanation. – For the purposes of this section, –

- (1) “pesticide residue” means any specified substance in food resulting from the use of a pesticide and includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products and impurities considered to be of toxicological significance and also includes such residues coming into food from environment;
- (2) “residues of veterinary drugs” include the parent compounds or their metabolites or both in any edible portion of any animal product and include residues of

associated impurities of the veterinary drugs concerned.

4.7 Hon'ble Delhi High Court has in case of M M Traders [2023 (383) E.L.T.

439 (Del.)] observed as follows:

*"10. Insofar as this notification is concerned, it is, inter alia, indicated that insecticides which are imported for "non-insecticidal" purpose would require an import permit to be issued by the registration committee working under the aegis of the Department of Agriculture and Cooperation.*

*11. Though it is the submission of Mr. Priyadarshi Manish, who appears on behalf of the petitioners, that DGFT could not have issued a direction, via the aforementioned notification, which trenches upon the provisions of the 1968 Act, he goes on to submit that in order to hasten the process of issuance of an import permit, the petitioners would supply the relevant information, as sought, to respondent No. 3/CIB&RC.*

*12. Mr. Manish says that the petitioners will furnish the information, as sought by respondent No. 3/CIB&RC, within the next three days.*

*12.1 It is made clear that once the information is furnished, respondent No. 3/CIB&RC will consider the same and issue the import permit to the petitioners.*

*12.2 Needless to state, the import permit will be issued at the earliest if the information furnished is found to be genuine.*

*13. We may also indicate that once the import permit is issued in favour of the petitioners, respondent Nos. 1 and 2, in effect, the customs authorities, will act on the same as per law.*

*14. We may also indicate that the product that the petitioners have imported goes by the name "ethephon",*

*which, even according to the petitioners, is also referred to as "ethrel". To be noted, the chemical and scientific name of ethephon is "2-chloroethylphosphonic acid". "Ethrel" finds mention in the schedule appended to the 1968 Act.*

*14.1 Thus, having regard to the provisions of Section 3(e)(i) of the 1968 Act, the imported product will fall within the definition of the term "insecticide".*

*15. The core issue before the Court was as to whether, having regard to the provisions of Section 38(1)(b) of the 1968 Act (which is an exemption provision), the other provisions of the 1968 Act would be applicable, given the fact that the petitioners are seeking to use the imported product only for "non-insecticidal" purpose i.e., as an artificial fruit ripener.*

*16. It is also not in dispute that respondent No. 4/Food Safety and Standards Authority of India [in short "FSSAI"] has taken the stand (albeit, after having the product examined by a panel of scientists), that ethephon is not carcinogenic i.e., it is fit for human use, as long as it does not come in direct contact with the food substance, which in this case is fruits. The panel constituted by respondent No. 4/FSSAI i.e., the Scientific Panel on Fruits and Vegetables and their Products (including dry fruits and nuts) in its 20th meeting held on 11-7-2020, has recorded the following :*

*"4. Ethephon was evaluated for toxicology by the Joint FAO/WHO Meeting on Pesticide Residues (JMPR) in 1977, 1978, 1993, 1995, 1997 and 2002. In 1993, the Meeting established an acceptable daily intake (ADI) of 0-0.05 mg/kg. body weight (bw) on the basis of a no observed-adverse-effect level (NOAEL) of 0.5 mg/kg. bw per day in studies in humans given repeated ethephon doses and application of a 10-fold safety factor. It was*

*concluded that it is unlikely to pose a carcinogenic risk to humans from the diet.*

*5. The Guidance note on **Artificial ripening mentions the use of Ethephon as one of the sources for generation of ethylene, a natural plant hormone used for ripening of fruits and the specified composition is found to generate ethylene up to a maximum concentration of 100 ppm. Further, the Guidance note mentions that the ethylene source should not come in contact of fruit at any point in time.** Scientific Panel reiterates that the Guidance note from FSSAI is very comprehensive and straight-forward and the information given in it, needs to be understood and followed in the perspective, as it is intended to be conveyed."*

*[Emphasis is ours]*

*17. The petitioners' grievance thus arose from the impediment caused to the clearance of their product for home consumption. It is averred that, even though respondent No. 4/FSSAI has indicated that ethylene gas can be used to ripen fruits, the customs authorities have refused to clear the imported product/ethephon on the ground that the petitioners did not have the requisite import permit.*

*18. Therefore, as indicated hereinabove, since the petitioners have agreed to furnish the necessary information, in this case the issue as to whether information was required to be given or not, has become academic.*

*19. Accordingly, once an import permit is issued by respondent No. 3/CIB&RC, the petitioners will be at liberty to approach the customs authorities. The customs authorities, as alluded to above, will, thereafter, act as per law.*

*20. Before we conclude, we would like that respondent No. 4/FSSAI to consider framing a regime whereby fruits and/or vegetables which are ripened artificially with the use of ethylene gas, which in turn is produced through use of ethephon powder, as in this case, or other artificial ripeners should have the necessary indication placed on it.*

*20.1 We would, thus, like respondent No. 4/FSSAI to draw up a broad framework which takes into account all kinds of artificial ripeners so that the consumer of the fruit and/or vegetable is made aware of the fact that the product in issue has been ripened artificially."*

4.8 Hon'ble Telangana High Court order dated 19.01.2022 in WP (PIL) No 176/2020 has held as follows:

*"10. The facts of the case reveal that earlier carbide gas was used for the purpose of ripening of fruits and the FSSAI after scientific study on the subject, has banned the use of carbide gas and Acetylene gas due to its potential health hazards. The FSSAI has thereafter issued a Notification after conducting scientific research to permit the use of Ethylene gas at a concentration upto 100 ppm for artificial ripening of the fruits and a Notification was issued on 23.08.2016. The Ethylene gas is used for the purpose of ripening of the fruits. It is nobody's case that the FSSAI has permitted spraying of Ethephon or the farmers/traders are spraying Ethephon over the fruits and on the contrary a very systematic activity is permitted for use of Ethephon in powder form to obtain Ethylene gas. Before the Delhi High Court, a writ petition was preferred in W.P.No.13025 of 2018 for quashment of Guideline Note No.04 of 2018 and the Delhi High Court while disposing of the aforesaid writ petition has directed the FSSAI to re-visit the guidelines with further discussion with experts and as a consequence, the matter was discussed by the 20th Panel on Scientific on 20.07.2020. The FSSAI in exercise of powers conferred under Section 16(5) of the Food Safety*

*and Standards Act has permitted use of Ethephon for artificial ripening of fruits vide Order dated 16.08.2018 and the same is reproduced as under:-*

*"File No: Stds/FVS/SP/13/FSSAI-2018  
Food Safety and Standards Authority of India  
(A Statutory Authority established under Food Safety  
and Standards Act, 2006)  
FDA Bhavan, Kotla Road, New Delhi-110002*

*Dated: 16th August, 2018*

*Subject: Direction under Section 16 (5) of Food Safety and Standards Act, 2006 regarding permission for use of ethephon for artificial ripening of fruits - reg.*

*In exercise of the powers conferred by section 92 of Food Safety and Standards Act, 2006 (34 of 2006), the Food Safety and Standards Authority of India has framed the Food Safety and Standards (Prohibition and Restrictions on Sales) Second Amendment Regulations, 2016 relating to use of ethylene gas for artificial ripening of fruits and the same was uploaded on website on 30.08.2016.*

*2. Several representations have been received at FSSAI regarding clarification on use of ethephon as source of ethylene gas for artificial ripening of fruits. The issue was examined and it is clarified that ethephon in powder form may also be used as a source of ethylene gas provided that it shall be packed in sachets and these sachets containing ethephon in powder form shall not come in direct contact with fruits.*

*3. A detailed guidance document on artificial ripening of fruits has also been prepared and is now available on FSSAI website.*

*4. This issues with the approval of Competent Authority in exercise of the power vested under*

*Section 16(5) of Food Safety and Standards Act, 2006.*

*(P.Karthikeyan)  
Assistant Director  
(Regulations/Codex)*

To

- 1. The Commissioners of Food Safety of all States/UTS*
- 2. All Authorized Officers, FSSAI*
- 3. All Central Designated Officers, FSSAI*

Copy to:

- 1. PPS to Chairperson, FSSAI*
- 2. PS to CEO, FSSAI*
- 3. CMSO, FSSAI*
- 4. Advisor (Regulations), FSSAI*
- 5. Advisor (QA/Labs), FSSAI*
- 6. IT Division, FSSAI with request to upload on website"*

*11. The Guideline Note No.4 of 2018 issued by the FSSAI has laid down 'Protocol' for use of Ethylene gas from various sources and clause (5) of the aforesaid Note reads as under:-*

*"5. Protocol for application of Ethylene gas from various sources*

*(i) Ethylene gas cylinders:*

- a. Maintain the temperature and RH inside the empty ripening chamber as per Table 1, depending upon the commodity.*
- b. Once desired temperature and RH is achieved, place the crates containing fruits into the ripening chamber. Temperature of fruits should be as close as possible to the temperature mentioned in Table 1, above.*
- c. Introduce ethylene gas into the chamber (upto 100 ppm) through the gas cylinders.*

- d. Monitor CO<sub>2</sub> inside the chamber and maintain it below 5000 ppm.
- e. Maintain the temperature, RH, concentration of ethylene gas and CO<sub>2</sub> levels as suggested above for 24-48 hours.
- f. Remove the fruits from the ripening chamber and store in another chamber at optimum storage temperature till further use.
- g. Avoid excess of ethylene accumulation in the chamber for desired results. ...

(iii) Sachet containing 2 chloroethylphosphonic acid (Ethephon) in powder form:

Ethephon in powder form may be used for artificial ripening of fruits. It shall be packed in 40-60 micron cellulose membrane paper or its equivalent in form of small sachets. The ripening mixture in the sachets should be as per the composition recommended below. This ripening method may be used where ripening chambers are not available or for in transit ripening. The sachet must generate ethylene gas only and should not contain any traces of calcium carbide or acetylene gas.

Composition: 2 chloroethylphosphonic acid (Ethephon), and combination of alkali (oxides and carbonates of magnesium and calcium, sodium and potassium carbonates and bicarbonates, magnesium silicates).

- a. Keep the fruit in air tight boxes or make the boxes air tight by paper etc.
- b. Take ethylene forming sachet [(500 mg containing 50 mg 2 chloroethyl phosphonic acid (Ethephon))] and dip it in water for 5-10 seconds.

- c. *Place the water soaked sachet in perforated plastic box (approximately 5cm x 5 cm x 5 cm size).*
- d. *Place this small plastic box containing the sachet into the fruit box/crate (approximately at the centre of box/crate) having volume of 2.7 m<sup>3</sup>, which should be sufficient for 10 kg fruits. The ethylene gas generated will not exceed 100 ppm.*
- e. *Remove the small plastic box containing the sachet after 24 hours."*

*12. Much has been argued before this Court that the Ethephon is a chemical substance and is used as an insecticide across the globe. It also finds place in the Schedule of the Insecticides Act read with Section 3(e) of the aforesaid Act. Reliance has also been placed upon the Rule 10C of the Insecticides Rules, which prohibits sale or storage of insecticides from the same building or place where any articles consumable by human beings are placed.*

*13. In the present case, Ethephon is not being sold along with fruits and vegetables nor is being stored at the same place along with the fruits, which are kept for ripening. In fact, it is being kept as per the Guidelines framed by FSSAI in small sachets in powder form. The specifications of packing Ethephon provide that it has to be packed in 40-60 micron cellulose membrane paper and it generates Ethylene gas only. Meaning thereby, Ethephon in small pouches are kept to generate Ethylene gas and there is no conflict of statutory provisions as contained in Insecticides Rules or the Food Safety and Standards Act. Similarly, regulated use of Ethephon only for the purpose of generating Ethylene gas also does not fall under Section 21(2) of the Food Safety and Standards Act, which prohibits the use of any insecticide on any article of food. By no stretch of imagination, it can be presumed that*

*insecticide is being used along with food for consumption or insecticide is being used directly on food article/food article has contained any insecticide. The sachets of Ethephon are kept as per the specifications only for the purpose of generating Ethylene gas and therefore, the question of quashing the Notification issued by the FSSAI does not arise.*

*14. In this context, it is relevant to extract Section 16(5) of the Food Safety and Standards Act, as under:-*

*"16. Duties and functions of Food Authority:-*

*(1) to (4) xxxxx*

*(5) The Food Authority may, from time to time give such directions, on matters relating to food safety and standards, to the Commissioner of Food Safety, who shall be bound by such directions while exercising his powers under this Act."*

*15. The aforesaid provision of law empowers the FSSAI to issue directions keeping in view the aim and object of the Food Safety and Standards Act, 2006 and in the present case, directions have rightly been issued and there is no conflict at all, as argued, with the statutory provisions as contained under the Insecticides Act.*

*16. This Court, in the light of the aforesaid, does not find any reason to interfere with the Order dated 18.08.2018 issued by the FSSAI nor with the Guideline Note No.04 of 2018 and therefore, the Public Interest Litigation deserves to be dismissed.*

4.9 Relying on various decisions referred in their submissions appellant have contended that the product imported by them namely "ethylene ripener" having active ingredient "ethepon" would be exempt from the provisions of Insecticide Act, 1968 in terms of Section 38 (b) of the Act *ibid* and would not be required to be registered in terms of Section 9 (1) *ibid*. Thus appellant contest the vires of Notification No 106/(RE-2013)/2009-2014

Dated the 1 January, 2015 issued by DGFT, imposing condition of import permit from registration committee when the insecticides are imported for non insecticidal use is ultra-vires, the provision of Act.

4.10 We do not find any merits in the submissions made by the appellant in this respect. In case of M M Trader, an undertaking was given by similarly placed importer that he will provide the information as required for getting the import permit to registration committee and obtain the same. Further we also observe that this argument based is based on the decision in case of Synergies Castings Ltd [2014 (313) ELT 50 (Mad)], wherein following was observed:

*3. We have gone through the entire order passed by the Tribunal. In fact, having considered the submission made on behalf of the appellant that as regards Copper Sulphate and Nickel Chloride under import, there was no such requirement to obtain registration certificate or import permit for their import as per EXIM policy, the Tribunal set aside the confiscation in respect of Nickel Chloride and Copper Sulphide as well as penalty imposed thereon. The Tribunal also relied on the Section 38(1)(b) of Insecticides Act, 1968 and held that import of insecticides for non-insecticidal use is not subject to the restrictions contained in the Act. Therefore, we do not find any irregularity in the order passed by the Tribunal in order to interfere with the same.*

We find that in subsequent decision in case of Shree Pharma [2017 (353) ELT 473 (Mad)], Hon'ble Madras High Court observed as follows after taking note of the decision in case of Synergies Castings Ltd.:

*2. The facts of the case as narrated in the appeal, is as follows :-*

*The appellant is a proprietary concern and is running the business of Import, Export and local sale of food supplements, food nutrients, chemicals and solvents. The*

*appellant possessed the Drug Licence in No. 1787/MZI/20B and 1733/MZI/21B issued by the Drug Control Authority, Chennai. The appellant entered into a sale contract in No. HC151111066SO1 with one M/s. Jiangsu Guotai International Group Winsun Import and Export Company Limited, Zhangjiagang City, China, for supply of 5000 kgs. of Bronopol. The price for Bronopol was fixed at USD 4.50 per kg CIF, Chennai. The said goods were packed and dispatched from Shanghai Seaport on 22-3-2015 to Chennai Seaport. Along with the consignment, the supplier sent the relevant import documents like packing list, cargo insurance policy, certificate of origin, quality inspector reports and certificate of analysis through its banker. After making the payments, the appellant retrieved the documents from its banker and thereafter filed Bill of Entry No. 8852905, dated 8-4-2015, with the office of the concerned authorities, for assessment and clearance of the subject goods. The subject goods were not released by the authorities, for the reason that the appellant has to put up technical literature with respect to the goods and its classification adopted in CTH 2930 90 99, besides submitting the other import documents, already furnished. While the same were furnished, the concerned authority again directed the appellant to furnish a Central Insecticide Board (CIB) Registration Certificate, with respect to the subject goods. The appellant contended before the concerned authority that the requirement of production of CIB Registration certificate for the said goods does not arise, as the goods under import has not been classified under EXIM code 3808 of Chapter 38 in ITC (HS) 2012-Schedule-I (Import policy). Further, the appellant had stated that the Notification No. 106/RE-2013/2009-2014, dated 1-1-2015 issued by the office of the Director General of Foreign Trade will have no application to the present import, as the goods will not fall under the aforesaid classification of goods mentioned in the notification. It was*

*also submitted before the concerned authority that the decision of the Kerala High Court reported in 2013 (290) E.L.T. 330 (Kerala) and the judgment of this Court reported in 2014 (313) E.L.T. 50 (Mad.), is squarely applicable to the facts of this case.*

*13. The appellant is a proprietary firm involved in the business of trading of pharmaceutical products, substances, organics etc. The appellant firm possessed the import export code, issued by the office of the Director General of Foreign Trade, in No. 040904283 and was also holding a licence under Drugs and Cosmetics Act, 1940. The appellant company imports pharmaceutical products, substances etc., from overseas suppliers like China. On 16-2-2015, the appellant company entered into a sales contract with a Chinese supplier namely, Jiangsu Guotai Intl. Group, for supply of 5000 kgs. of Bronopol 99% Min., under the contracted price of USD 22,500. The appellant company paid part payment for the consignment, to the tune of USD 6750, through his banker, on 5-3-2015. The certificate of analysis was issued by the supplier to the appellant. On 16-3-2015 commercial invoices were raised by the supplier and the goods were shipped from Shanghai Port, China to Chennai on 22-3-2015, under Bill of Lading No. WP1500904. While the appellant initiated to clear the subject goods, it was not permitted based on the query raised by the first respondent vide his letter dated 8-4-2015 with a direction to produce Central Insecticide Board Registration Certificate. To the query raised by the first respondent, stating that the Classification adopted in the Bill of Entry No. 29309099, has not been revised and the same has been accepted by the department itself, in imports of the same material, as the goods are intended for non-insecticidal use; Exemption with respect to licensing of the goods and obtaining registration certificate from Insecticides Board, is in terms of Section 38(1)(b) of the Insecticides Act, 1968; and that the Board Circular*

*dated 22-6-2011, with respect to requirement of import permit for registration with CIB and RC for import of substances registered in Schedule-III of the Insecticides Act, 1968 for non-insecticidal use, were all brought to the notice of the respondent, vide his reply dated 9-5-2015. But, the same was not considered by the department.*

*14. The Appellate Authority, Commissioner of Customs (Appeals) rejected the appeal filed by the appellant company. Aggrieved by the same, the appellant raised grounds of appeal before the Tribunal against the order passed by the Commissioner of Customs (Appeals), Chennai in Appeal No. C.Cus.II No. 585/2015, dated 30-6-2015. The grounds raised by the appellant company before the Tribunal in Appeal No. 41509/2015 was not considered and the same was dismissed by the Tribunal, vide its final order dated 30-10-2015. The following are the reasons stated by the Tribunal, for rejecting the appeal filed by the appellant firm :-*

- 1. The item imported is covered under Schedule to the Insecticides Act and therefore it is an insecticide.*
- 2. The DGFT Notification, dated 1-1-2015 is applicable to the appellant company.*
- 3. The case laws relied by the appellant company is not applicable to the facts of this case for the reason that the said decision was rendered prior to the issue of DGFT notification dated 1-1-2015.*

*15. In the letter dated 9-5-2015, the appellant has stated that since the subject goods, namely, Bronopol was imported by the company for non-insecticidal use, the provisions of Section 38(1)(b) of the Insecticides Act, 1968, would apply for granting exemption of the condition, of obtainment of import permit from Registration Committee Central Insecticide Board. Section 38 of the Insecticides Act, 1968, reads as follows :-*

"38. Exemption. - Nothing in this Act shall apply to  
-  
i. ....  
ii. ....  
(2) ....."

So, reading of the aforesaid provision would clearly show that if any substance is imported for non-insecticidal use, the provisions of the Insecticides Act, 1968 will have no application.

16. However, the Notification No. 106/2014/2009-2014, dated 1-1-2015 issued by the Director General of Foreign Trade, reads as follows :-

"Subject : Amendment in import policy conditions under ITC (HS) 4 digit code 3808. S.O.(E) : ....."

According to the appellant, the aforesaid notification issued by the Director General of Foreign Trade is without any authority of law, has no legal sanctity and therefore the said notification is not binding on the appellant. In support of his contention, he relied upon the order passed by the Kerala High Court in the case of Union of India v. Maliakkal Industrial Enterprises, in a batch of writ petitions, wherein the said notification was challenged. In the aforesaid case, the Hon'ble High Court of Kerala by its order dated 15-2-2012, has held that the authorities under the Foreign Trade (Development and Regulation) Act, 1992 do not have control over the authorities under the Insecticides Act, 1968 and cannot direct them to do something, which they are not permitted to do under the said Act and hence has held that the condition of obtaining Registration under the Insecticides Act, 1968 would be arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

17. The decision relied by the learned counsel for the appellant, challenging the said notification dated 1-1-2015

*before the Kerala High Court, in a similar issue, in the case of Union of India v. Maliakkal Industrial Enterprises, reported in 2013 (290) E.L.T. 330 (Kerala), has been subsequently reversed by the Hon'ble Division Bench of the Kerala High Court, reported in 2015 (330) E.L.T. 924 (Kerala). In paragraph 16 of the said judgment, it has been held as follows :-*

*"16. From the above cited decisions, we arrive at the following conclusions :*

*An executive instruction or a policy, which is not a statutory document, cannot form the basis for creation of an enforceable legal right. This obviously is based on the principle of law that executive instructions by themselves are ordinarily not enforceable. Such an executive instruction or policy, which could be amended at any time, could not form the basis to claim fundamental right under Article 19(1)(g) of the Act. As far as notification under Section 5 of the Foreign Trade Act is concerned, it is not mere executive instructions, but it is a subordinate legislation and it is law. It can form the basis of a legal right. A person carrying on trade or business in import can complain about the violation of fundamental right to carry on trade or business. After the Foreign Trade Act, the matter is governed on the basis of the notification issued under Section 3 or under Section 5."*

*Therefore, the contention of the appellant that the notification issued under Section 5 of the Foreign Trade Act, is a mere executive instructions and so the said notification would not apply to the appellant company cannot be accepted. In the light of the decision cited supra, rendered by the Division Bench of the Kerala High Court, it has been held that the aforesaid notification issued by the Director General*

*of Foreign Trade is a law and not an executive instruction and the import and export is governed under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992.*

18. *Section 2 of the Insecticides Act, 1968, reads as follows :-*

*"2. Application of other laws not barred. -*

*The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force."*

*Therefore, imports are governed by other Acts also and the contention of the appellant that Insecticides Act alone applicable, is not correct. The said contention has also been considered by the Division Bench of the Kerala High Court in the above cited judgment. The appellant, merely submitting a declaration to the end use that the Bronopol will be used for non-insecticidal purpose is not sufficient and therefore exemption under Section 38(1)(b) of the Insecticides Act cannot be applied automatically, to the appellant. The appellant has failed to produce evidence before the authority to establish that the Bronopol will be used for non-insecticidal purpose. In the absence of such evidence, it cannot be construed that the said Bronopol will be used only for non-insecticidal purpose. The notification dated 1-1-2015 issued by the Director General of Foreign Trade, clearly states that as per the policy decision even if the import is for non-insecticidal use, permission is necessary from the Registration Committee under the Department of Agriculture and Co-operation and that import cannot be allowed in the absence of the said permit. Hence, the Tribunal has rightly concluded that the appellant company is not entitled to the benefit of Section 38(1)(b) of the Insecticides Act, 1968 and the requirement of getting permission from the Registration Committee under the Department of Agriculture and Co-operation, as per the aforesaid notification has to be complied with, in*

*order to prevent illegal imports and insecticides, under the guise of non-insecticidal use. In view of the above, the contention of the appellant with regard to the notification dated 1-1-2015, cannot be countenanced.*

The review petition filed in the case of Maliakkal Industrial Enterprises [2015 (330) ELT 924 (Ker)] referred in the above order of Hon'ble Madras High Court was also dismissed as reported at [2017 (353) ELT 172 (Ker)] observing as follows:

*8. Mr. Sreelal K. Warriar, the learned counsel appearing for the Customs Department submits that, insofar as the Department of Customs is concerned, they have to go by the Circulars/Notifications issued by the Government. It is stated that the challenge raised by the review petitioners is not correct or sustainable either on facts or in law. It is also pointed out that another notification bearing No. 106/(RE-2013)/2009-2014, dated 1-1-2015 has been issued by the Ministry of Commerce and Industry, Department of Commerce, New Delhi, whereby further amendment in the import policy conditions under ITC (HS) 4 digit code 3808 has been brought about, whereby several other insecticides/chemicals have been brought within the purview of the Schedule to the Act. It is stated that, insofar as it is for the Government to consider the particular chemicals/insecticides which are to be brought within the purview of the Act and the manner in which import is to be done, it is purely a matter of 'policy', which cannot be questioned by the Traders like the petitioners.*

*9. After hearing both the sides, this Court finds that the limited scope of consideration is as to whether there exists any 'error apparent on the face of record', to invoke the power of review.*

*10. As pointed out already, interference of this Court is sought for with reference to the twin-folded plea of discrimination [with reference to the 'product' and also*

*with reference to the 'local manufacturers'] stated as omitted to be considered by the Bench while passing the common verdict on 3-6-2014. It is seen that the plea of discrimination with reference to the 'product' and other more toxic materials was taken note of by the Court in Paragraphs 46 to 53 and it was finally observed in paragraph 53 that the plea of discrimination, 'prima facie', appeared to be untenable. But the same was left open, to be raised in a properly constituted proceedings. The question raised and as dealt with in Paragraph 46 [with reference to Ground E of the Writ Petition No. 4168 of 2007 forming the subject matter of Writ Appeal 617 of 2012] and the relevant portion of Paragraph 53 are extracted below :*

*"Whether there is hostile discrimination and whether Article 14 is violated?"*

*46. The next question which arises for consideration is whether there is discrimination. A plea of discrimination is founded upon Article 14 of the Constitution. Article 14 of the Constitution is available to citizens and persons who are not citizens. In substance it provides for three principles. Equals must not be treated as unequals. Unequals must not be treated as equals. Last, but not the least, the action of the State must be free from arbitrariness as arbitrariness is a sworn enemy of equality. In this case, apparently the argument is that by the imposition of the impugned clause there is discrimination in so far as while restriction is imposed on imported boric acid on no other insecticide, it is imposed. Many insecticides are more dangerous than boric acid. The government does not display the same level of concern as is projected in the case of boric acid. In this regard, we may refer to the pleading in the writ petition from which W.A.*

*No. 617/2012 arises. What is stated in ground E is as follows:*

*"E. Ext. P5 is grossly discriminatory and not issued on the basis of any justifiable reasonable classification. The onerous policy condition of obtaining an import permit from the Central Insecticides Board & Registration Committee imposed vide Ext. P5 has not been extended to other technical grade inorganic chemicals falling under Chapter 28 of the ITC (HS) which also finds a place in the Schedule to the Insecticides Act, 1968. For example, technical grade inorganic chemicals like sodium cyanide (28 37 1100) Copper Sulphate (28 33 25 00) etc. That are registered insecticides continue to be freely importable without any such requirement of obtaining a prior import permit. Only the free importability of boric acid, which belongs to the aforesaid group has been arbitrarily modified much to the prejudice of bona fide traders in boric acid like the petitioner. Ext. P5 Notification in so far as it is discriminatory on this count is violative of the fundamental rights of the petitioner guaranteed under Article 14 of the Constitution of India and hence is liable to be quashed on this sole ground alone. The said condition is irrational and would result in procedural irregularity in view of the fact that the petitioner's application for registration has been pending before the Board for over a year now."*

*53. We would think that this is a case where the learned Single Judge has not pronounced on the case set up that there is violation of Article 14 based on the alleged discrimination. We find that there is no denial of the same by the appellants. But, at the same time, we noticed materials which are produced before us including the case based on the various*

*entries in Chapter 38. There are also the conditions which are attached to the policy. Even though prima facie we would think that, in view of the requirement attached to the import of the various insecticides and categories of 'other' as already noted that, the insecticides to be imported must be registered and therefore the plea of discrimination appears rather untenable, we would not like to pronounce on the same. We would rather leave it open so that, if advised, in a properly constituted proceedings this matter can be considered. Accordingly we leave it open."*

11. *Coming to the alleged discrimination with reference to the 'Importers and Local manufacturers', the observations as contained in Paragraph 45 are relevant, which read as follows :*

*"45. ....With regard to the plea of discrimination the attempt made by the learned counsel Sri. Gopinath Menon, and Sri. Paul learned counsel who appears for impleaded importers that discrimination is practised between the importers and local manufacturers of boric acid cannot be considered by us. There is no such case set up in the writ petitions such. The contention of the local manufacturers is that importers and the local manufacturers may not fall in the same category as such but we leave the issue open. We only would observe that in the matter of enforcement of law relating to taking out registration by local manufacturers and other requirements, they are certainly meant to be enforced with utmost strictness. The Act is aimed at controlling insecticides with a view to ensure the safety of the human beings and animals. It is an Act which therefore relates to the security of human beings as also the animals as*

*defined in the Act. We only would point out that it is bounden duty of the authorities if it is found that the Act is being the violated, they will take appropriate action. We make this observation, as it is pointed out by Shri Gopinath Menon, that none of the local manufacturers have got themselves registered under Section 9. In fact, the learned counsel for the appellant also does not appear to dispute that there is no registration by the local boric manufacturers under Section 9. Certainly this is a matter which must be looked into by the authorities and they are bound to take action if there is violation. Of course, it is a case of the local manufacturers that they applied for registration. But, the Act appears to prohibit carrying out the activities without getting registration if intended to be used as insecticides. According to us, no further investigation into this matter is necessary for by finding that there is illegality committed by the local manufactures which is being condoned by the authorities may not advance the case of the writ petitioners. The case of the writ petitioner is to quash the of condition in Ext. P5 relating to boric acid. We are of the view that there is no basis for the learned Single Judge to have quashed Ext. P5."*

12. *From the above, it is clear that there was no omission on the part of the Bench in considering the plea of 'discrimination' as well, but the same was left open, for the reasons mentioned therein. If such a course pursued by the Bench was not correct, for any reason whatsoever, it would become a matter to be agitated by way of 'appeal' and not by review petition. It has been made clear by the Apex Court on many an occasion, that the power of review is not to be misconstrued or misunderstood as a substitute for appeal. We find support from the ruling rendered by*

*the Apex Court in Meera Bhanja v. Nirmala Kumari Choudhary [AIR 1995 SC 455]. In view of the fact that rights and liberties of the review petitioners/importers is left open by the Bench, by way of appropriate proceedings, this Court does not intend to say anything more in this regard and it is open for them to pursue the exercise in accordance with law.*

*13. With regard to the maintainability of the review petition, the learned counsel for the review petitioners submits that, even though the verdict dated 3-6-2014 passed by the Bench was a common one, in five different appeals, the petitioners herein were parties only to three appeals [W.A. Nos. 617 and 648 of 2012 and 1653 of 2013]. The review petitions have been filed only in respect of the appeals in which the review petitioners were parties and since they were not parties to the proceedings in the other appeals, they need not challenge the verdicts in those cases and hence that the verdict passed by the Division Bench in 2016 (4) KHC 353 [cited supra] is not applicable. This Court finds it difficult to accept the said proposition, mainly for the reason that the finding in W.A. Nos. 630 and 649 of 2012 which stands against the petitioners [though they were not parties], stands intact and unless the said verdicts are also subjected to challenge, relief cannot be granted to the review petitioners, if at all they are entitled to have such relief. It may be true that the review petitioners were not parties to the Writ Appeal Nos. 630 and 649 of 2012, but, it was quite obligatory for them to have challenged the said verdicts as well, by obtaining the 'leave' of this Court by way of appropriate proceedings, which course has not been chosen to be done. The verdict passed by the Division Bench of this Court in 2016 (4) KHC 353 [cited supra] was rendered, following the dictum laid down by the Constitution Bench of the Apex Court in AIR 1962 SC*

338 [*Badri Narayan Singh v. Kamdeo Prasad Singh*] and the subsequent ruling in AIR 1976 SC 1645 [*Lonankutty v. Thomman*]. The observations with reference to the question of 'res judicata' as considered in Paragraphs 20 to 24 of the said verdict passed by the Division Bench are in the following terms :

"Res judicata :

20. *Res judicata* is a common law principle of preclusion, devised to deter endless cycles of litigation; it is animated by a public policy against repetitious recourse to judicial remedies. Also of not less importance is the economy of judicial time, which can be spent on worthier causes. Three maxims can be cited as forming the foundation for this rule aimed at efficiency and finality : (a) *Nemo debet lis vexari pro eadem causa* (no man should be vexed twice for the same cause); (b) *Interest republicae ut sit finis litium* (it is in the interest of the state that there should be an end to a litigation); and (c) *Re judicata pro veritate occipitur* (a judicial decision must be accepted as correct).

21. The four elements of *res judicata* - a black letter law-- are as follows : (a) the parties are identical or in privity; (b) the judgment in the prior action was rendered by a court of competent jurisdiction; (c) the prior action was concluded by a final judgment on the merits; and (d) the same claim or cause of action was involved in both actions.

22. Though Section 11 of the Code of Civil Procedure consecrates this common law principle as a statutory mandate, it incontrovertibly applies to public law remedies, too, apart from civil disputes. The Courts have held that even the public interest

*litigation falls within its mischief and its enforcement demands vigil.*

23. *In Sheoparsan Singh v. Ramnandan Prasad Singh, (1916) 3 LW 544 the Privy Council has observed that res judicata is an ancient doctrine of universal application and permeates every civilized system of jurisprudence. This doctrine encapsulates the basic principle in all judicial systems which provide that an earlier adjudication is conclusive on the same subject-matter between the same parties. Recently, quoting Sheoparsan Singh with approval, the Supreme Court in Sri Gangai Vinayagar Temple v. Meenakshi Ammal, (2015) 3 SCC 624, at page 648 has observed that the raison d'être and public policy on which res judicata is predicated is that the party who has raised any aspect in a litigation and has had an issue cast thereon, has lead evidence in that regard, and has argued on the point, remains bound by the curial conclusions once they attain finality. No party must be vexed twice for the same cause; it is in the interest of the State that there should be an end to litigation; a judicial decision must be accepted as correct absent a challenge.*

24. *Illustratively stated, on a common issue two rival contenders, let us assume, take out independent legal proceedings before a court of law. The court, we further assume, allows one and dismisses the other. The aggrieved party files one appeal. Though the initial adjudication was through one single judgment, it actually amounts to two decisions, notionally. As no appeal is filed against the other decision, the finding notionally attributable to it attains finality. In such an event, the single appeal arising out of a case dismissed or allowed, as the case may be, is hit by the principle of res judicata.*

*This is precisely the situation obtained in Badri Narayan Singh v. Kamdeo Prasad Singh, AIR 1962 SC 338, a decision rendered by a Constitution Bench of the Supreme Court. The same proposition of law stands affirmed in Lonankutty v. Thomman, (1976) 3 SCC 528, too."*

*14. After hearing, we are of the view, that the legal position made clear by this Court in 2016 (4) KHC 353 [cited supra] is squarely applicable to the cases herein as well. The review petitions are not maintainable, for not having challenged the finding in the common verdict in W.A. Nos. 630 and 649 of 2012, which stands intact.*

*15. Incidentally, it is worthwhile to note that the review petitioners initially did not have any idea to challenge the common verdict immediately on passing the same. As borne by Paragraph 5 of the Review Petition, the review petitioner was in fact taking steps to get an 'import permit' and 'end-use certificate' for the past imports of Boric acid, which was cited as the reason for not challenging the judgment either by seeking leave to appeal under Article 136 of the Constitution of India or by filing review petition. The immediate cause to file R.P. is stated as the issuance of 'Annexure A' to show cause notice by the Departmental Authorities, proposing to impose 'penalty', to the extent as specified therein. Admittedly, the petitioner was importing Boric acid, based on the interim orders passed by this Court, which was made subject to the result of the proceedings pending before this Court. Since the petitioner has lost the battle, by virtue of the interference made by the Division Bench, the petitioner is all the more liable to satisfy the liability, as the principle of "actus curiae neminem gravabit" (an act of the Court shall prejudice no man) is attracted.*

*16. The learned counsel for the review petitioners submits that though the liability initially mulcted upon by the Commissioner was to a nominal extent, it has now been sought to be enhanced by filing an appeal at the instance of the Department and hence the grievance. This Court does not intend to express any opinion with regard to the quantification of the liability, either towards the duty or the penalty, as it is open for the review petitioners to have the same challenged by way of appropriate proceedings in accordance with law."*

4.11 Hon'ble Gujarat High Court has in case of All India Ceramic Glaze And Glass Frit (Mixture) Manufacture [2019 (367) E.L.T. 107 (Guj.)] observed as follows:

*"20. Having noticed such statutory provisions, let us examine how they apply to the facts of the case. We may recall the petitioners have challenged the notification dated 7-4-2006 issued by the Government of India, Ministry of Commerce and Industry, under which, the import of boric acid is made subject to the condition that the same would be on an import permit issued by the Central Insecticides Board and Registration Committee under the Ministry of Agriculture. This notification is sought to be challenged principally on three grounds namely, that it is not within the purview of the Ministry of Agriculture under the Insecticides Act to regulate the import of pesticides for non-insecticidal purposes; that the condition is imposed at the behest of local manufacturers to benefit them and the same is therefore, wholly mala fide and lastly, that such condition was even otherwise arbitrary, unreasonable and not within the powers of the Government of India to impose.*

*21. We have noticed that the Insecticides Act, 1968, makes detailed provisions for controlling and regulating the use of insecticides. Application of these provisions however, has been by virtue of exemption clause*

*contained in Section 38, limited to the insecticides meant for insecticidal purposes and not for purposes other than insecticidal. Learned Counsel for the petitioners therefore, may be correct in contending that it is not within the purview of the Ministry of Agriculture to control or regulate the import of insecticides for non-insecticidal uses. However, we must appreciate that regulation has not been imposed by exercising power under the Insecticides Act, 1968 but in exercise of powers under the Act of 1992. Under the said Act of 1992, as noted, the import and export is regulated by the policy that the Government of India frames. It is only subject to such policy that a person can import any goods into India. As is well-known, the Government of India frames such Import-Export policy typically operating for a period of five years. It is in exercise of such powers that while amending the Import-Export policy by the said notification dated 7-4-2006, it was provided that the import of boric acid may be subject to the condition that same would be imported on a permit issued by the Central Insecticides Board and Registration Committee under the Ministry of Agriculture. It is therefore, a misconception to argue that the Ministry of Agriculture is seeking to regulate the import of boric acid in exercise of powers under the Insecticides Act, 1968. The Central Insecticides Board and Registration Committee under the Ministry of Agriculture is only assigned the task of processing applications by the prospective importers for granting the import permit. There is nothing either unreasonable in this Act or impermissible in the statute for the Government of India so to do. Under the Act of 1992, the Government of India has ample powers to regulate the import policy. While doing so, it is either open for the Government of India to prohibit or restrict import of a certain item or subject it to regulatory measures. In the present case, Government of India was of the opinion that looking to the toxic nature of the substance, it was*

*necessary to regulate its import. It may be that such regulation is provided for import of the substance for non-insecticidal purposes. However, the philosophy behind such regulatory measure cannot be faulted. We have taken detail note of Government affidavit filed before us to point out that boric acid has toxic property. Its misuse and/or mishandling can cause extensive damage to human beings, plants, animals and environment. Even when therefore, such boric acid is imported for non-insecticidal purposes, it is important that its handling, storage and usage is properly carried out. Further, uncontrolled or unregulated import of boric acid ostensibly for the purpose of non-insecticidal use may also lead to possible pilferage and diversion for insecticidal use. In this context, judgment of Central Insecticides Board and Registration Committee, as to the requirement of import of boric acid for its non-insecticidal purposes, would be crucial.*

*22. To reiterate, the Insecticides Act, 1968 makes detailed provisions for regulation and control of any insecticides including boric acid for the purposes of insecticidal uses. Its manufacture, trade, storage, etc., can be subject to control and supervision. Section 38 of the Act when exempts all uses of insecticides for non-insecticidal purposes from the provisions of the Act, would still leave the residual power in the Ministry of Agriculture to ensure that use of the substance is actually being made for non-insecticidal purposes and not for insecticidal purposes.*

*23. Looked from any angle, the impugned notification issued by the Government of India does not lack the authority nor specifications of Central Insecticides Board and Registration Committee under the Ministry of Agriculture as the permitting authority, is impermissible under the law.*

*24. Is the regulation unreasonable, arbitrary or otherwise not for the purposes of the Act? The answer has to be in*

*the negative. We have noticed the purpose and philosophy providing for such regulations. If the Government of India in its wisdom found that certain substance which is otherwise toxic in nature, the import thereof is required to be subjected to certain regulations and regulatory measures even for the non-insecticidal purposes where it is likely to cause damage to plants, animals or human beings, such policy decision cannot be faulted. The judicial review of a policy decision of Government of India is extremely limited. Ordinarily, this Court would not enter into the correctness or advisability of a certain policy and substitute its own opinion, understanding or wisdom over that of the policy making body. It is the Government of India which has necessary wherewithal, scientific and technical expert advise and more essentially, responsibility of taking policy decisions. Additionally, such policy decision has been given shape of statutory provisions albeit in exercise of powers of subordinate legislation. As is well-known, even subordinate legislation carries a presumption of constitutionality. It is for one who propounds the same as being arbitrary, unreasonable or in any other manner unconstitutional to establish the same through necessary facts. We have noted the provisions contained in the Act of 1992. We also noticed the provisions contained in the Insecticides Act, 1968. We do not find that the policy of the Government of India to ensure that imports of boric acid for non-insecticidal purposes also needs to be regulated, is in any manner unreasonable, arbitrary or discriminatory.*

25. We may recall that similar issue had come up before Kerala High Court in case of *Feroke Boards Ltd. and Others (supra)*, in which following observations were made :

"34. Under Section 38 of the Act what is provided is that when insecticides are intended to be used for non-insecticidal purposes, the provisions in the Act will not apply. It is certainly open to the Government

*to put in place sufficient safeguards to ensure that actually only insecticides which are genuinely intended for non-insecticidal purposes are taken out of the purview of the Act and the restrictions and controls are which are provided therein. It is in this context when the importer of boric acid is not able to establish the end use it is not open to the trader to say that he should be allowed to import boric acid ostensibly for non-insecticidal purposes. It is fraught with the danger that the imported quantity is diverted for insecticidal purposes. If such diversion happens, certainly it could lead to a situation where the purpose of the Act itself would be defeated as there could be large quantities of insecticides having multiple uses being imported in the guise of being employed for non-insecticidal purposes but falling into the hands of those who use it as insecticides. Insecticides being used as insecticides forms the subject matter of the Act. It is such insecticides which are sought to be brought under the control of the Act. As far as the multiple use of insecticides are concerned, since they are capable of being used both as insecticides and for other purposes, control over their import is found necessary by the Government. When such control is exercised and on the basis of such regulations, it is found that only genuine importers who intend to use boric acid for non-insecticidal purposes can import the boric acid, certainly it leads to a situation where the policy of the Government is fulfilled, high public purpose is subserved and infact the objective of, the Act itself is also fulfilled. The object is fulfilled for the reason that by providing for safeguard of a import permit whereby only boric acid genuinely intended for non-insecticidal purposes is allowed to be imported, possibility of boric acid being imported for non-*

*insecticidal purpose presumably but being diverted for insecticidal purposes is defeated. We find ourselves unable to accept that when a trader imports large quantities of boric acid it could be said to be a case where he intends to use it for non-insecticidal purposes. The intention to use boric acid for non-insecticidal purposes must be determined at a point of time when he actually carries out the import. It may transpire that when a trader imports, he may have the general intention to sell it to customers who may use it for non-insecticidal purposes. It may also be true that if, after the import of boric acid for non-insecticidal purposes, he uses it for insecticidal purposes either by himself or by sale to those who do not use it for non-insecticidal purposes the law may catch up with him. But that is not to say that if the Government thought it fit to put in place the safeguards that only those who are able to show that they have an intention to import boric acid for non-insecticidal purposes with certainty proved by objective criteria supported by documentary evidence and facts and figures should be allowed to import the court should strike it down.”*

26. *We are conscious that in the review petition filed by the importers, Kerala High Court had left the question of validity of the notification on the ground of discrimination open.*

27. *We have noticed that under Chapter [Heading] 2810 in Schedule-I to the Import policy also a policy condition is mentioned which requires that where insecticides is imported for non-insecticidal purposes and the import permit is necessary from Central Insecticides Board and Registration Committee under the department of Agriculture.*

*28. We also do not find any grounds to accept factual mala fide. It may be that in this particular case, the Government of India was activated into action on the representations made by the local manufacturers of boric acid. That by itself however, would not necessary imply mala fide. In a democratic form of governance, the administration is always open to representations from the various quarters. If a certain relevant fact is brought to the notice of the administration through representation from a particular quarter, and if such representation is taken into account even for framing the policy, such policy cannot be tainted as mala fide without there being anything more on record. The Government of India has pointed out that such import conditions are applied since year 1991. It is also pointed out that not only the boric acid but all other insecticides are subject to similar regulatory measures. There is nothing peculiar about import of boric acid."*

4.12 The impugned order heavily relies upon the decision of Hon'ble High Court of Allahabad in the appellant's own case wherein Hon'ble High Court has itself not agreed to the submissions made by the appellant in this regard. (refer to para 26 to 45 of the Hon'ble High Court, reproduced earlier while referring to impugned order in para 4.2).

4.13 The issue for consideration in the present case is not whether the impugned goods are exempt from the operation of Insecticide Act, 1968 or Whether these goods have been permitted for use as fruit ripening agent by the FSSAI in terms of the provisions of Food Standard and Safety Act, 2006. The only issue for consideration is whether the imported goods have been imported by fulfilling the conditions as prescribed by the Notification No. 106 (RE-2013)/2009-2014 dated 01.01.2015. The imported goods namely "ethylene ripener", undisputedly and admittedly have active ingredient "ethephon". Ethephon, is specified in the Schedule to Insecticide Act, 1968 and is thus covered by the definition of "insecticide" as per the Section 3 (e) *ibid*. Even if all the submissions of the appellant were to be

accepted, that the imported goods are meant for uses other than "insecticide", then also in terms of the Notification issued by the DGFT dated 01.01.2015, the same could be imported against an import permit issued by CB&IC.

4.14 Section 3 of Foreign Trade Development and Regulation Act, 1992 reads as follows:

**3. Powers to make provisions relating to imports and exports.—**

- (1) *The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.*
- (2) *The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology:  
Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.*
- (3) *All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.*
- (4) *Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.*

4.15 In case of Agricas LLP [2020 (373) ELT 752 (SC)] Hon'ble Supreme Court has held as follows:

**"B. Discussion on the challenge to the role and authority of the DGFT to issue the Notifications and Trade Notice and interpretation of the words "total quantity"**

**15.** *At the outset, we must record that the importers, and in our opinion rightly, have not raised the contention that the DGFT could not have notified the impugned notifications. The notifications themselves record that they were published by the Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade. The first paragraph of the notification states that they had been issued by the Central Government in exercise of powers conferred under Article 77 of the Constitution. Clearly, the notifications were issued by the Central Government, and not the DGFT that had performed the ministerial act of publication. The decision to amend and issue the notification was of the Central Government. Neither Section 3(2) nor Section 6(3) of the FTDR Act was violated. This Court in Delhi International Airport Limited v. International Lease Finance Corporation and Others [(2015) 8 SCC 446], had referred to Articles 77 and 166 of the Constitution and held that the Constitution stipulates that whenever executive action is taken by way of an order or instrument it shall be expressed to be taken in the name of the President and Governor in whose name the executive power of the Union and the States, respectively, are vested. Article 77 does not provide for delegation of any power, albeit under clause (3) of Article 77, the President is to make Rules for more convenient transaction of business and allocation of same amongst Ministers. Under the Government of India (Transaction of Business) Rules, 1961, the Government business is divided amongst Ministers and specific functions are allocated to different Ministries. The Director General of Foreign Trade is an ex*

*officio Additional Secretary in the Government of India and is appointed by the Central Government under sub-section (1) to Section 6 of the FTDR Act to advise the Central Government in formulation and carrying out the Foreign Trade Policy. Wherefore, even the website of the Ministry of Commerce and Industry, Department of Commerce, states that the DGFT is an agent of the Central Government and attached office to it. Further, clause (2) of Article 77 provides that validity of an order or instrument made or executed in the name of the President, authenticated in the manner specified in the Rules made by the President, shall not be called in question on the ground that it is not an order or an instrument made or executed by the President. Therefore, the contention of issuance of the impugned notification sans authority, cannot be sustained.*

**16.** *FTDR Act vide Section 3(2), as elucidated and examined below, authorises the Central Government to prohibit, restrict or otherwise regulate the import or export of goods, by an order published in the Official Gazette. FTDR Act vide Section 11(1) prohibits imports or exports of goods in contravention of the FTDR Act, the rules and orders made thereunder and the EXIM Policy. Section 5 of the FTDR Act authorizes the Central Government to formulate and announce the EXIM Policy by notification in the Official Gazette. Under Section 11(2) of the FTDR Act, when a person makes or abets or attempts to make any import or export in contravention of the FTDR Act, any rule or order made thereunder or the EXIM policy, he is liable to pay penalty up to Rs. 10,000/- or five times the value of the goods, services or technology, whichever is greater. Section 11 of the Customs Act, 1962 provides that the Central Government may by a notification in the Official Gazette prohibit, absolutely or subject to conditions as specified, import or export of any goods. The listed purposes are wide and range from conservation of foreign*

*exchange and safeguarding of balance of payments, avoiding shortage of goods, prevention of surplus of any agricultural or fisheries product, prevention of serious injury to domestic production, establishment of any industry and lastly compendiously includes "any other purpose conducive to the interest of the general public". Under clause (d) to Section 11 of the Customs Act goods imported or exported (or attempted to be imported or exported) contrary to any prohibition are liable to confiscation.*

**17. ....**

**C. Section 9A of the FTDR Act and it's interpretation**

.....

*vi) Discussion and interpretation of Sections 3 and 9A of the FTDR Act.*

**54.** *Section 3 of the FTDR Act, as enacted, had undergone amendments by addition of proviso to sub-section (2) and by insertion of sub-section (4) vide Act 25 of 2010 with effect from 25th August 2010. Sub-section (1) of Section 3 states that the Central Government may, by an order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. It is a general provision which has no reference to GATT-1994. It authorises the Central Government to publish an order in the Official Gazette for development and regulation of foreign trade, i.e. imports and exports. Sub-section (2) states that the Central Government can, by an order in the Official Gazette, make a provision for prohibiting or restricting or otherwise regulating, in all or specified cases and subject to such exceptions, if any, the import or export of goods and after the amendment vide Act 25 of 2010, services or technology. Sub-section (2) to Section 3, therefore, authorises the Central Government to, by an order published in the Official Gazette, make provisions*

*restricting the imports or exports. Imposition of quantitative restrictions on imports or exports would clearly fall within sub-section (2) to Section 3 of the FTDR Act. We are not concerned with the proviso to sub-section (2) in the present case. Sub-section (3) to Section 3 states that where an order is passed under sub-section (2) whereby the import or export of goods is prohibited, restricted or otherwise regulated, the goods in question would be deemed to be prohibited goods under Section 11 of the Customs Act, 1962 and accordingly the provisions of the latter Act would apply.*

**55.** *Sub-section (4) to Section 9A of the FTDR Act introduced by Act 25 of 2010 with effect from 27th August 2010, requires some elucidation. The sub-section on one hand states that no permit or licence shall be necessary for imports or exports of goods, nor any goods shall be prohibited from import or export, except as may be required under the FTDR Act, or the rules or orders made thereunder. At the same time, by using the phrase 'without prejudice to anything contained in any other law, rule, regulation, notification or order', it protects the operation of the other law, rule, regulation, notification or order to the extent that they do not directly or indirectly deal with the permit or licence necessary for import or export of goods or prohibit import or export of goods. Operation of such law, rule, regulation, notification or order not dealing with the permit or licence necessary for import or export on a prohibition of import of goods is, therefore, protected and not overridden. Sub-section (4) to Section 3 therefore gives limited primacy to the FTDR Act, restricting it to the scope and subject matter of the FTDR Act, and not to override other laws. This is also clear from Section 18A of the FTDR Act which was also enacted and inserted by Act 25 of 2010 with effect from 27th August 2010 and reads as under :*

**"18A. Application of other laws not barred. -** The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

The provisions of FTDR Act, therefore, are in addition to, and not in derogation of, the provisions of any other law for the time being in force. This would be the correct way to harmoniously read and interpret sub-section (4) to Section 3 and Section 18A of the FTDR Act. We may, at this stage, notice that the original amendment had used the phrase 'Notwithstanding anything contained in any other law, rule, regulation, notification or order', but the Standing Committee had noticed the contradiction and also the object and purpose behind enacting sub-rule (4) and had recommended that the said expression should be replaced with the expression 'Without prejudice to anything contained in any other law, rule, regulation, notification or order'. Sub-section (4) to Section 3 of the FTDR Act, therefore, in the context of import and exports or prohibition of imports or exports of goods states that no permit or licence shall be necessary or required except as may be required under the FTDR Act, rules or orders made thereunder. The expression 'order', as per clause (h) to Section (2) of the FTA means any order made by the Central Government under Section 3. It is, therefore, clear to us that there is no violation of Section 3 of the FTDR Act in the issuance of the impugned notifications or orders, which are *intra vires* and not *ultra vires*.

**56.** We have already reproduced and quoted Article XI [Paragraph 47 (*supra*)] of the GATT- 1994 and have to say that the same has not been statutorily made a subject of 'act of transformation' and incorporated in the domestic legislation, i.e. the FTDR Act. The FTDR Act does not legislate and transform Article XI of the GATT-1994. As noticed above, Section 3 of the FTDR Act empowers and authorises the Central Government, i.e. the Union of India

to frame policy, rules or regulations for import or export of goods. The policy is framed under Section 5 of the Act, which reads as under :

**"5. Foreign Trade Policy.** - The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy :

*Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette."*

Thus, the Central Government i.e. the Union of India has been given the necessary discretion and election with regard to framing of policies for import and export of goods, services and technology. Therefore, implementation of GATT-1994, including Article XI, is left to the Central Government by means of delegated legislation.

D. *Contention of the importers of bona fide imports under interim orders and prayer for partial relief.*

**65.** *Learned counsel for some of the importers had placed reliance on Raj Prakash Chemical v. Union of India [(1986) 2 SCC 297 = 1987 (30) E.L.T. 45 (S.C.)], which judgment, in our opinion, has no application. In Raj Prakash Chemical (supra), the petitioner had acted under a bona fide belief in view of judgments and orders of High Courts and the interpretation placed by the authorities. In this background, observations were made to giving benefit to the importers, despite the contrary legal interpretation. In the instant case, the importers rely upon the interim orders passed by the High Court's whereas on the date when they filed the writ petitions and had obtained interim orders, the Madras High Court had dismissed the writ*

*petition upholding the notification. Similarly, the High Court of adjudicature at Bombay, High Court of Gujarat and the High Court of Madhya Pradesh had dismissed the writ petitions filed before them and upheld the notifications and the trade notices. Notwithstanding the dismissals, the importers took their chance, obviously for personal gains and profits. They would accordingly face the consequences in law. In these circumstances, the importers it cannot be said had bona fide belief in the right pleaded.*

**F. Conclusion**

**67.** *Accordingly, we uphold the impugned notifications and the trade notices and reject the challenge made by the importers. The imports, if any, made relying on interim order(s) would be held to be contrary to the notifications and the trade notices issued under the FTDR Act and would be so dealt with under the provisions of the Customs Act, 1962. The writ petitions subject matter of the Transfer Petitions, subject to E above (What is not decided) are dismissed. Writ petitions filed by the intervenors before the respective High Courts shall stand dismissed in terms of this decision. Pending application(s), if any, also stand disposed of in the above terms. No order as to costs."*

4.16 In view of the discussions as above we do not find any support from the decisions relied upon by the appellant/appellant counsel during the course of hearing to argue that prescription of import permit by Notification No 106 9RE-2013)/ 2009-14 is in derogation of the provisions of Insecticide Act, 1968. We also observe that appellant have themselves undertaken to apply and obtain the import permit before the Hon'ble Bombay High Court. Impugned order returns a categorical finding that contrary to the undertaking given before the Hon'ble High Court, the appellants had never obtained any import permit. We also note that appellant have in their appeal sought to mislead in this regard by stating that Hon'ble Bombay High Court has directed that they need not file petition

at time of every importation to mean that condition of import permit was not required in respect of imports subsequently made under the same contract. Direction of High Court against filing of repetitive petition could not mean that condition to make imports against the import permit has been waived off. As goods have been imported contrary to the prescriptions as per this Notification, the goods have been rightly held liable to confiscation under Section 111 (d), (f) & (m) of the Customs Act, 1962.

4.17 In case of Raj Grow Impex LLP [2021 (377) E.L.T. 145 (S.C.)] Hon'ble Supreme court has held as follows:

**“Whether the goods in question are of ‘prohibited goods’ category?”**

*63. For dealing with the questions relating to the treatment of the goods in question, it shall be apposite to recapitulate that in the case of Agricas (supra), this Court, after dealing with a variety of issues relating to the validity of the notifications dated 29-3-2019 and the corresponding trade notice dated 16-4-2019, specifically referred to the purpose behind and the purport of the notifications; and it was noticed that the notifications were aimed at striking a balance between the farmers of the country on one hand and the importers on the other, particularly when large-scale imports were adversely impacting the interests of the farmers due to fall in prices in the local market. The repercussions of excessive imports under the cover of the interim orders in the past were taken note of and it was also noticed that the restrictions were imposed to prevent panic disposal in the local markets. As the notifications provided for quantitative restriction on import of various peas and pulses in the range of 1.5-2 lakh MTs against licence, a rather preposterous line of arguments was adopted by the importers before this Court that the total quantities specified in each of the notifications was ‘per licence’ and not for the ‘total imports’. Such contentions*

were rejected by this Court after finding no ambiguity in the notifications and holding clearly that the expression 'total quantity' did not refer to the 'quantity per licence'. This Court further held in no uncertain terms that the impugned notifications were valid for having been issued in accordance with the power conferred in the Central Government in terms of sub-section (2) of Section 3 of the FTDR Act. Yet further, this Court rejected the submissions that the importers had acted bona fide in importing the goods in question; and the imports, made under the cover of interim orders, were held to be contrary to the notifications and the trade notice issued under the FTDR Act but, were left to be dealt with under the provisions of the Customs Act.

64. In view of the findings and requirements aforesaid and in view of the contentions of the respective parties relating to the treatment of goods imported under the cover of interim orders, it is necessary to take note of the relevant statutory provisions, particularly those contained in Section 3 of the FTDR Act and Sections 2(33), 11(1) and 111(d) of the Customs Act. These relevant provisions read as under :-

*Section 3 of the Foreign Trade (Development and Regulation) Act, 1992*

*"3. Powers to make provisions relating to imports and exports. - (1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.*

*(2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under*

*the Order, the import or export of goods or services or technology :*

*Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.*

*(3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.*

*(4) without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder."*

*Section 2(33) of the Customs Act, 1962*

*"(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with;"*

*Section 11(1) of the Customs Act, 1962*

*"11. Power to prohibit importation or exportation of goods. - (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or*



*notifications in question placed quantitative restrictions and there had not been any other order or notification prohibiting the import of these goods. The contentions remain baseless and are required to be rejected.*

*66.1 A bare look at the notifications in question and the findings of this Court in Agricas (supra) make it clear that only the particular restricted quantity of the commodities covered by the said notifications could have been imported, like those upto 1.5 lakh MTs; and that too, under a licence. The Learned ASG has rightly pointed out with reference to the decision in PTR Exports (supra) that an applicant has no vested right to have export or import licence; and granting of licence depends upon the policy prevalent on the date. The Learned ASG has further rightly submitted, with reference to the decision in S.B. International (supra), that granting a licence to import is not a matter of formality; and the authorities have to satisfy themselves that the application satisfies all the requirements of the scheme and the applicable laws. In S.B. International, this Court observed, inter alia, as under :-*

*"9. It should be noticed that grant of licence is neither a mechanical exercise nor a formality. On receipt of the application, the authorities have to satisfy themselves about the correctness of the contents of the application. They also have to satisfy themselves that the application satisfies all the requirements of the scheme and the other applicable provisions of law, if any...."*

*66.2 As noticed, only the particular restricted quantity of the commodities covered by the said notifications could have been imported and that too, under a licence. Therefore, any import within the cap (like that of 1.5 lakh MTs) under a licence is the import of restricted goods but, every import of goods in excess of the cap so provided by*

*the notifications, is not that of restricted goods but is clearly an import of prohibited goods.*

*67. The applicable principles of law relating to the categorisation of goods as 'prohibited' or 'other than prohibited' have been clearly enunciated by this Court in the decisions referred by the Learned ASG.*

*67.1 In the case of Sheikh Mohd. Omer (supra), a particular mare was found to be not a 'pet animal' and, therefore, its import was found to be violative of the Imports Control Order. It was, however, an admitted position that the import of horses or mares was not prohibited as such. The question was as to whether by making such import, the appellant contravened Section 111(d) read with Section 125 of the Customs Act. While answering the question, this Court held that any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions. This Court further underscored that "any prohibition" means every prohibition; and restriction is also a type of prohibition. This Court, inter alia, said, -*

*"11.... While elaborating his argument the Learned Counsel invited our attention to the fact that while Section 111(d) of the Act uses the word "prohibition". Section 3 of the Imports and Exports (Control) Act, 1947, takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947, as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause (d) of Section 111 says is that any goods which are imported or attempted to*

*be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. **"Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions.** Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. **"Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition....."***

*(Emphasis in bold supplied)*

67.2. *In the case of Om Prakash Bhatia (supra), over-invoicing and fraudulent claim of drawback by the exporter was held to be that of exporting prohibited goods with reference to the requirements of Foreign Exchange Regulation Act, 1973, while rejecting the contention of the exporter that Section 113(d) of the Customs Act was not applicable as the goods were not prohibited as such. A line of argument has been suggested on behalf of one of the respondents that the order ultimately passed in the case of Om Prakash Bhatia operates against the stand of the appellants. It is true that in that case, redemption fine and penalty was imposed but, the exercise of discretion in a particular manner related to the facts of that case. These aspects relating to the exercise of discretion shall be considered a little later, while dealing with the question as to whether the goods in question are liable to absolute confiscation or could be released on redemption fine. Suffice it to notice for the present purpose that the export*

*attempted in violation of the conditions was held to be taking the goods in the category of 'prohibited' goods.*

*67.3 In the case of Brooks International (supra), the market value of goods under export was found to be less than the amount of drawback claimed. The question was whether such goods could be confiscated for violation of the provisions of the Customs Act? While considering the import of the definition of "prohibited goods" in Section 2(33) and of Section 11 of the Customs Act, this Court referred to the following exposition in the case of Om Prakash Bhatia (supra) :-*

*"10. From the aforesaid definition, it can be stated that : (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). **Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods...."** (Emphasis in bold supplied)*

67.4 *Learned Counsel for the importers have strongly relied upon a 3-Judge Bench decision of this Court in Atul Automations (supra) to submit that therein, the goods imported without authorisation were held to be 'restricted' goods; and the same principle applies to the subject goods when they have been imported without import licence and hence, they cannot be taken as prohibited goods. The submissions have been countered by the ASG that the said decision related to the matter under the FTDR Act and different facts and different regulations concerning the goods were involved therein.*

67.4.1 *In the case of Atul Automations (supra), the goods imported without authorisation were found to be not 'prohibited' but 'restricted' items for import and the orders for their release with payment of fine in lieu of confiscation were approved. However, a close look at the factual aspects puts it beyond the pale of doubt that therein, this Court has neither laid down the law that in every case of import without authorisation, the goods are to be treated as restricted and not prohibited nor that the goods so imported without authorisation are always to be released on payment of redemption fine.*

67.4.2 *The factual aspect of Atul Automations (supra) makes it clear that the imported Multi-Function Devices, Photocopiers and Printers (MFDs) involved in that case were restricted items, importable against authorisation under Clause 2.31 of the Foreign Trade Policy. Thus, the MFDs were found to be restricted items for import and not prohibited items. That had not been the case where import was restricted in terms of quantity in the manner that the goods were importable only up to a particular extent of quantity and that too against a licence. It was also found therein that the Central Government had permitted the import of used MFDs having utility for at least five years, keeping in mind that they were not being manufactured in the country.*

67.4.3 *The present case is of an entirely different restriction where import of the referred peas/pulses has been restricted to a particular quantity and could be made only against a licence. The letter and spirit of this restriction, as expounded by this Court earlier, is that, any import beyond the specified quantity is clearly impermissible and is prohibited. This Court has highlighted the adverse impact of excessive quantity of imports of these commodities on the agricultural market economy in the case of Agricas (supra) whereas, it had not been the case in Atul Automations (supra) that the import was otherwise likely to affect the domestic market economy. In contrast to the case of Atul Automations, where the goods were permitted to be imported (albeit with authorisation) for the reason that they were not manufactured in the country, in the present case, the underlying feature for restricting the imports by quantum has been the availability of excessive stocks and adverse impact on the price obtainable by the farmers of the country. The decision in Atul Automations (supra), by no stretch of imagination, could be considered having any application to the present case.*

68. *Thus, we have no hesitation in holding that the goods in question, having been imported in contravention of the notifications dated 29-3-2019 and trade notice dated 16-4-2019; and being of import beyond the permissible quantity and without licence, are 'prohibited goods' for the purpose of the Customs Act.*

68.1 *The unnecessary and baseless arguments raised on behalf of the importers that the goods in question are of 'restricted' category, with reference to the expression 'restricted' having been used for the purpose of the notifications in question or with reference to the general answers given by DGFT or other provisions of FTDR Act are, therefore, rejected. The goods in question fall in the category of 'prohibited goods'.*

*Whether the goods in question are liable to absolute confiscation?*

*69. Once it is clear that the goods in question are improperly imported and fall in the category of 'prohibited goods', the provisions contained in Chapter XIV of the Customs Act, 1962 come into operation and the subject goods are liable to confiscation apart from other consequences. Having regard to the contentions urged and the background features of these appeals, the root question is as to how the goods in question are to be dealt with under Section 125 of the Customs Act? The relevant part of Section 125 of the Customs Act reads as under :-*

*Section 125(1) of the Customs Act, 1962*

*"125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

*xxx*

*xxx*

*xxx"*

*69.1 A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibited goods' and 'other goods'. As has rightly been pointed out, the latter part of Section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of this provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this*

*provision that if the Adjudicating Authority does not choose to give such an option, the result would be of absolute confiscation. The Adjudicating Authority in the present matters had given such an option of payment of fine in lieu of confiscation with imposition of penalty whereas the Appellate Authority has found faults in such exercise of discretion and has ordered absolute confiscation with enhancement of the amount of penalty. This takes us to the principles to be applied for exercise of the discretion so available in the first part of Section 125(1) of the Customs Act.*

*70. The principles relating to the exercise of discretion by an authority are expounded in various decisions cited by the parties. We may take note of the relevant expositions as follows :*

*70.1 In the case of Sant Raj (supra), referred to and relied upon by both the sides, this Court dealt with the matter as regards the discretion of Labour Court to award compensation in lieu of reinstatement and observed as under :-*

***"4....Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humor. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself.... Discretion means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful....."***

*(emphasis in bold supplied)*

*70.2 In the case of Reliance Airport Developers (supra), this Court, with reference to various pronouncements*

*pertaining to the legal connotations of 'discretion' and governing principles for exercise of discretion observed, inter alia, as under :-*

*"30. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection : deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons."*

*70.3 In the case of U.P. State Road Transport Corporation (supra), while dealing with the case of non-exercise of discretion by the authority, this Court expounded on the contours of discretion as also on limitations on the powers of the Courts when the matter is of the discretion of the competent authority, in the following terms :-*

*"12. The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. **The court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law.** The court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the*

*competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the court.*

13. *In the instant case, the Corporation has denied itself the discretion to offer an alternative job which the regulation requires it to exercise in individual cases of retrenchment. ....It may be stated that the statutory discretion cannot be fettered by self-created rules or policy. Although it is open to an authority to which discretion has been entrusted to lay down the norms or rules to regulate exercise of discretion it cannot, however, deny itself the discretion which the statute requires it to exercise in individual cases. ....*

xxx

xxx

xxx”

**“15.....Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the power.** *The purpose of discretionary decision making under Regulation 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the abovesaid constraints. The Corporation therefore, cannot act mechanically. The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity..”*  
(Emphasis in bold supplied)

70.4 *In the case of Glaxo Smith Kline (supra), this Court expounded on the principles that the Constitutional Courts, even in exercise of their wide jurisdictions, cannot*

*disregard the substantive provisions of statute while observing, inter alia, as under :-*

*"12. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties.*

*Even while exercising that power, this Court is required to bear in mind the legislative intent and not to render the statutory provision otiose."*

*71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.*

*71.1 It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.*

*72. It is true that the statutory authority cannot be directed to exercise its discretion in a particular manner*

*but, as noticed in the present case, the exercise of discretion by the Adjudicating Authority has been questioned on various grounds and the Appellate Authority has, in fact, set aside the orders-in-original whereby the Adjudicating Authority had exercised the discretion to release the goods with redemption fine and penalty. Having found that the goods in question fall in the category of 'prohibited goods' coupled with the relevant background aspects, including the reasons behind issuance of the notifications in question and the findings of this Court in Agricas (supra), the question is as to whether the exercise of discretion by the Adjudicating Authority in these matters, giving option of payment of fine in lieu of confiscation, could be approved?*

*73. As regards the question at hand, we may usefully take note of the relevant decisions cited by Learned Counsel for the parties. However, it may be observed that the decision of the Punjab and Haryana High Court in Horizon Ferro Alloys (supra), dealing with a particular class of goods that were 'restricted' and not 'prohibited', needs no elaboration.*

*74. On behalf of the appellants, the Learned ASG has relied upon the decision in the case of Garg Woollen Mills to support the contention that the subject goods deserve to be confiscated absolutely. In that case, the Additional Collector of Customs had directed confiscation of goods when it was found that there had been an attempt of fraudulently importing huge quantity of raw material in the name of non-existent units; and serviceable garments were concealed against mutilated garments. That being a case where fraud was involved, the order of absolute confiscation was not interfered with. This Court, inter alia, observed and held as under :-*

*"5. Another contention that was urged by Shri Mahabir Singh was that the Additional Collector, as*

*also the Tribunal, have failed to take into consideration the provisions contained in Section 125 of the Act which prescribes that whenever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. We do not find any merit in this contention of Mr. Mahabir Singh. Under Section 125 a discretion has been conferred on the officer to give the option to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. In the present case, having regard to the facts and circumstances in which the goods were said to be imported and the patent fraud committed in importing the goods, the Additional Collector has found that the goods had been imported in violation of the provisions of the Import (Control) Order, 1955 read with Section 3(1) of the Import and Export (Control) Act, 1947. In the circumstances he considered it appropriate to direct absolute confiscation of the goods which indicates that he did not consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. **The Tribunal also felt that since this was a case in which fraud was involved, the order of the Additional Collector directing absolute confiscation of the goods did***

**not call for any interference. We do not find any reason to take a different view.”**

*(Emphasis in bold supplied)*

75. The Learned ASG has also referred to the decision in the case of *Shri Amman Dhall Mills (supra)* where the Kerala High Court has dealt with the imports made in violation of the subsequent notifications concerning the same commodities as are involved in the present case. Therein, on 22-4-2020, the importer applied for issuance of license for import of 200 MTs of green peas but, before actual grant of license to import, filed a bills of entry dated 23-6-2020 for clearance of goods declared as Canadian Green Peas. As per declaration in the bills of entry, the quantity declared was 210 MTs with declared assessable value of Rs. 79,28,444/-. The Commissioner of Customs, Kochi, by his order dated 16-10-2020, made on the request of the importer for release of goods, noted that DGFT notification dated 18-12-2019 had revised the policy for import of peas; further policy conditions as regards minimum import price and annual fiscal quota of Rs. 1.5 lakh MTs were incorporated and the imports were permitted through Calcutta seaport. The importer, who had imported the subject goods after the issue of notifications dated 18-12-2019 and 28-3-2020, filed a writ petition in the High Court seeking provisional release of the subject goods but this prayer for provisional release was declined. The importer filed an intra-Court appeal that was also dismissed. However, the High Court desired that the customs authorities proceed with the adjudication proceedings expeditiously. The Commissioner of Customs, in his order dated 16-10-2020, while considering the request of importer for provisional release, referred to three conditions in the notification dated 18-12-2019 as modified in the notification dated 28-3-2020; and ordered absolute confiscation of the goods for contravention of the provisions of Section 111(d) of the Customs Act read with

*Section 3(3) of the FTDR Act; and imposed a penalty of Rs. 4 lakhs. The importer challenged the order of Commissioner before the Appellate Tribunal. The Appellate Tribunal observed that the subject goods, having been imported in violation of the conditions of EXIM Policy, acquired the nature of prohibited goods in terms of Section 2(33) of the Customs Act and were liable to confiscation in terms of Section 111(d). Thereafter, the Tribunal formulated the question as to whether the Adjudicating Authority had an option to allow such goods to be redeemed on payment of fine in lieu of confiscation. After referring to the judgment of this Court in the case of Atul Automations (supra) and the order passed by the Bombay High Court in the case of M/s. Harihar Collections (impugned herein), the Tribunal directed redemption of impugned goods on payment of Rs. 12 lakhs as fine and confirmed the penalty of Rs. 4 lakhs imposed by the Commissioner.*

*75.1 In cross-appeals by the importer and by the revenue, the Kerala High Court consciously took note of the decision of this Court in Agricas (supra) and also the fact that the order so passed by the Bombay High Court in the case of M/s. Harihar Collections had been stayed by this Court in the present appeals. Thereafter, the High Court proceeded to disapprove the order passed by the Appellate Tribunal for release of goods, with the following amongst other findings and observations :-*

**"25. We hasten to add, that if in every case goods are released on payment of redemption fine, by the primary or appellate Tribunal, then such decisions are unsustainable in law and judicial review. In our considered view, exercise of power and discretion under Section 125 of Customs Act 1962, are specific and generally governed by the applicable policy, notification etc. Notification dated 18-4-2019**

*stipulates restriction on import of a quantity of 1.5 lakh MT only; stipulates minimum import price of Rs. 200/- and above CIF per kg and the import is allowed through Calcutta Sea Port only. These are the conditions which the licensee for import of the goods is expected to conform. The primary authority has noted that by keeping in view the stand taken by the Union of India before the Supreme Court in Agricas LLP case; the available stock position of green peas is treated as surplus, and declined release and ordered confiscation. The further import according to Customs Commissioner is not needed or alternatively detrimental to the interest of farmers. He has further noted that in his order dated 16-10-2020 that the importer does not conform to any of the conditions applicable for import of green peas. In our considered view the exercise of above discretion by Customs Commissioner is the question for consideration before the Appellate Tribunal. The Appellate Tribunal on the contrary, as already noted, considered matters not completely germane for appreciating the mode and manner of exercise of authority by the Commissioner of customs, but, however, recorded that the subject goods can be treated as restricted goods and can be released on payment of redemption fine. .... The Tribunal fell in clear error of law. By holding that release of goods is the only option to Customs Commissioner in the case on hand the language of Section 125 of Customs Act is fully liberalised. The reasoning of Tribunal is adopted both by other primary authority/Appellate Tribunal, then Exim policy, notifications are defeated and opens floodgates of the import Green Peas, and such contingencies are commented by Supreme Court in Agricas Case. We are of the view that the consideration of Appellate Tribunal in the case on*

*hand is illegal, ignored relevant notifications, the mandate of FTDR Act and Customs Act, 1962.”*

*(Emphasis in bold supplied)*

76. *On the other hand, the importers have placed heavy reliance upon the decision in the case of Hargovind Das K. Joshi (supra). Therein, a consignment of zip fasteners imported by the appellants was ordered for absolute confiscation by the Additional Collector of Customs and a penalty was also imposed. The order was confirmed by the Appellate Tribunal. In appeal to this Court, three questions were raised by the appellants, namely, on validity of the order confiscating the goods; on validity of the orders imposing penalty; and failure on the part of the customs authority to give an option to them for redeeming the goods on payment of fine in lieu of confiscation. This Court rejected the first two contentions after finding that the order directing confiscation was unassailable in facts or in law and that the order levying penalty was also justified. However, this Court found substance in the third part of the submissions because the Collector of Customs had passed the order for absolute confiscation without giving the appellants an option to redeem the goods on payment of fine. This Court observed that the said Adjudicating Authority, undoubtedly, had the discretion to give an option of payment of fine in lieu of confiscation but omitted to consider such a discretion available with him. In the given circumstances, this Court remitted the matter to the Adjudicating Authority to the limited extent as to whether or not to give an option to the importers to redeem the confiscated goods on payment of fine. In that regard, this Court left it open for the officer concerned to take a decision one way or the other in accordance with law, while observing in the last that the officer concerned will take into consideration all the relevant circumstances including the submission on behalf of the importers that*

*the free import of the goods in question had also been allowed, of whatever worth that was.*

*76.1 From the decision in Hargovind Das K. Joshi (supra), it is not borne out as to what was the reason for which the goods (zip fasteners) became subject to confiscation and it appears that at a later point of time, free import of the item had also been allowed. Be that as it may, what this Court found therein was that the Adjudicating Authority omitted to take into consideration one part of the discretion available for him i.e., of giving an option for redemption with payment of fine in lieu of confiscation and for that reason alone, the matter was remitted. The said decision cannot be read as an authority for the proposition that in every case of confiscation, invariably, the discretion has to be exercised by the Adjudicating Authority to give an option for redemption by payment of fine. In our view, the said decision does not make out any case in favour of the importers.*

*76.2 In fact, the observations made in Hargovind Das K. Joshi (supra) rather operate against the orders-in-original in the present appeals because therein, the Adjudicating Authority, after finding the goods liable to confiscation, straightaway proceeded as if the option for payment of fine in lieu of confiscation has to be given and did not consider the other part of discretion available with him that the goods could also be confiscated absolutely.*

*77. Thus, for what has been noticed above, the Kerala High Court has approved absolute confiscation of similar goods while following the decision of this Court in Agricas (supra) and after finding unsustainable the order of Tribunal for release of goods. In the case of Garg Woollen Mills (supra), this Court approved absolute confiscation when fraud was involved. In Hargovind Das K. Joshi (supra), when one part of discretion of Section 125(1) of*

*the Customs Act was not taken into account, this Court remitted the matter for proper exercise of discretion.*

*78. It is true that, ordinarily, when a statutory authority is invested with discretion, the same deserves to be left for exercise by that authority but the significant factors in the present case are that the Adjudicating Authority had exercised the discretion in a particular manner without regard to the other alternative available; and the Appellate Authority has found such exercise of discretion by the Adjudicating Authority wholly unjustified. In the given circumstances, even the course adopted in the case of Hargovind Das K. Joshi (of remitting the matter for consideration of omitted part of discretion) cannot be adopted in the present appeals; and it becomes inevitable that a final decision is taken herein as to how the subject goods are to be dealt with under Section 125 of the Customs Act.*

*79. As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods.*

*80. For what has been observed hereinabove, it is but evident that the orders-in-original dated 28-8-2020 cannot be said to have been passed in a proper exercise of discretion. The Adjudicating Authority did not even pause*

*to consider if the other alternative of absolute confiscation was available to it in its discretion as per the first part of Section 125(1) of the Customs Act and proceeded as if it has to give the option of payment of fine in lieu of confiscation. Such exercise of discretion by the Adjudicating Authority was more of assumptive and ritualistic nature rather than of a conscious as also cautious adherence to the applicable principles. The Appellate Authority, on the other hand, has stated various reasons as to why the option of absolute confiscation was the only proper exercise of discretion in the present matter. We find the reasons assigned by the Appellate Authority, particularly in paragraph 54.3 of the order-in-appeal dated 24-12-2020 (reproduced in point 'c' of paragraph 38.2 hereinabove) to be fully in accord with the principles of exercise of discretion, as indicated hereinabove and in view of the facts and peculiar circumstances of this case.*

*81. It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition simpliciter. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in Agricas (supra). This Court also held that the imports were not bona fide and were made by the importers only for their personal gains.*

*82. The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more*

*particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.*

83. *Before closing on this part of discussion, we may also refer to a decision of Bombay High Court in the case of Finesse Creation Inc. (supra), cited on behalf of one of the importers. In that case, the declared value of goods imported by the assessee in respect of 13 consignments over a period of about three years was rejected and the Commissioner ordered re-assessment of the value of goods; and after re-determination, differential duty was confirmed under Section 28(2) of the Customs Act with recovery of interest under Section 28AB thereof. Moreover, the imported goods were confiscated and redemption fine under Section 125 of the Customs Act was also imposed in lieu of confiscation. While confirming the differential duty and consequent penalty and interest, CESTAT quashed the imposition of redemption fine because the goods were not available for confiscation. In that context, the High Court*

*said that the concept of redemption fine would arise in the event the goods were available and were to be redeemed; and if the goods were not available, there was no question of redemption of goods. The said decision cannot be pressed into service in the present case merely because the said importer M/s. Harihar Collections has been able to obtain release of all the goods after passing of the order-in-original of the Adjudicating Authority dated 28-8-2020 when the same was under challenge. The present one is not a case where the subject goods were not available on the day of passing of the order by the Adjudicating Authority.*

***84. Hence, on the facts and in the circumstances of the present case as noticed and dilated hereinabove, the discretion could only be for absolute confiscation with levy of penalty. At the most, an option for re-export could be given to the importers and that too, on payment of redemption fine and upon discharging other statutory obligations. This option we had already left open in the order dated 18-3-2021, passed during the hearing of these matters."***

4.18 In view of above we find that the goods have been rightly held liable for confiscation and allowed only for re-export against the redemption fine. In case the appellant do not intend to exercise this option the confiscated goods are put under absolute confiscation and need to be destroyed at the cost of importer.

4.19 As we find that goods have been held liable for confiscation the penalty imposed upon appellant 1, appellant 2, appellant 3 and appellant 4 under Section 112 (a) is justified.

4.20 Appellant 1, Appellant 2, Appellant 3 & Appellant 4 have contested the penalty imposed under Section 114AA stating that penalty can be imposed under this section on in case of exports. We do not find any merits in the said submission. The argument advanced has been rejected by the Delhi Bench in the case

Prestige Polymers Pvt. Ltd. [2025 (393) E.L.T. 305 (Tri. - Del.)]  
observing as follows:

**"88.***Learned counsel for appellants assailed the personal penalties under Section 114AA imposed on Manish and Chirag on the following grounds :*

(a) .....

(b) *Penalty under Section 114AA would apply only to misdeclarations in exports and not in imports.*

**89.....**

**90.***We have considered the submissions advanced by both sides on this issue. Section 114AA reads as follows :*

**"Penalty for use of false and incorrect material.**

*- If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

**91.***Nothing in the section confines its application to only mis-declarations in exports. Evidently, it applies to both imports and exports. ...."*

4.21 Hon'ble Delhi High Court has in the case of Hughes Network Systems India Ltd. [2024 (388) E.L.T. 594 (Del.)] observed as follows:

*"25. We are informed that the Directors of ASL had impugned the said order before this court in CUSAA 155/2018 [2019 (365) E.L.T. 784 (Del.)]. This Court had dismissed the appeal filed by the said Directors.*

*26. Reference may also be had to Section 112 to the Customs Act which reads as under :-*

*"Section 112. Penalty for improper importation of goods, etc.*

- (a) *who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
- (b) *who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
- shall be liable,*
- (i) *in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees whichever is the greater.....”*

27. *Section 112(a) of the Customs Act lays down that any person who in relation to any goods inter alia does any act which would render such goods liable for confiscation is liable to penalty. Section 112(b) stipulates that any person who inter alia acquires possession of any goods or is in any way concerned in carrying, removing, depositing, harbouring or deals with any goods which he knows or has reason to believe are liable for confiscation under Section 111 of the Customs Act, is liable to a penalty. The penalty stipulated is not exceeding the value of good or rupees five thousand whichever is greater.*

28. *Section 112(a) of Customs Act also applies on a strict liability concept. It does not require any mens rea. Section 112(a) of the Customs Act may be contrasted with the provisions of Section 112(b) of the Customs Act. It is clear that for Section 112(a) to be applicable, no mens rea is required whereas for Section 112(b) to be applicable mens rea or knowledge is required. The expression used in Section 112(b) is "dealing with any goods which he knows*

*or has reason to believe are liable to confiscation under Section 111". Section 112(b) imposes an obligation on the authorities to establish mens rea and/or knowledge.*

*29. In the case of the appellants, Section 112(a) of Customs Act has been applied which really is in the nature of absolute liability. Section 112(a) of the Customs Act read with Section 111 clearly shows that the goods were liable to confiscation and for redemption thereof fine was to be imposed and further penalty liable to be imposed on the appellants.*

*30. Reference may also be held to provisions of Section 114AA of the Customs Act which reads as under :*

*"114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

*31. Section 114AA provides for penalty for use of false and incorrect material. Knowing and intentional use of false or incorrect material makes a person liable to penalty not exceeding five times the value of goods.*

*32. When Section 112(a)(i) of the Customs Act is contrasted with Section 114AA it further establishes that where mensrea is established for use of false and incorrect material, the penalty could be five times the value of the goods. On the other hand penalty for improper importation of goods under Section 112(a) is not to exceed the value of the goods.*

*33. In the instant case, had the authorities applied Section 114AA, the penalty could have been upto five times the value of the Goods.*

34. Reference may also be held to Section 125 of the Customs Act which provides for option to pay fine in lieu of confiscation and stipulates that the fine shall not exceed the market value of the goods confiscated less duty chargeable thereon.

35. In the instant case, the value of the goods imported were 3.13 crores and the redemption fine imposed is Rs. 60 Lakhs which is nearly 19% of the value of the goods and the fine imposed is Rs. 15 Lakhs on each of the appellants which translates to about 4.75% (totalling to 9.5%) of the value of the goods.

36. As we have held the confiscation of the goods under Section 111 and imposition of penalty under Section 112(a) of the Act are on a strict liability principal, the question of law

*"Did the Tribunal fall into error in concluding that the appellants/assesseees that the appellants/assesseees were culpable and/or were liable to the penalty imposed under Section 112 of the Customs Act and that the goods were liable for confiscation, in the circumstances of the case?"*

*is answered in favour of the department/respondent and against the assesseees.*

37. With regard to the submissions made by Learned Counsel for the appellants that the quantum of redemption fine and penalty imposed is harsh and excessive, we of the view that the same is within the discretionary powers of the authorities. Discretion has been exercised by the Commissioner of Customs of imposing penalty and fine and said discretion having been upheld by the Tribunal, does not give rise to a question of law, leave alone a substantial question of law and is a pure question of fact."

4.22 Appellant No 5 who is Custom Broker has contested the penalties imposed upon him under Section 112 (a) and 114AA

by relying on the decisions of tribunal in case of Gajana B Sudrik [2014 (304) ELT 159 (T-Mum)] and decision of Hon'ble Delhi High Court in the case of Kamal Travel (Cargo) [2017 (354) ELT 447 (Del)]. Order in original records the findings as follows for imposing penalty upon him:

*"60.Regarding imposition of penalty u/s 112(a) or 112(b) and 114AA of the Customs Act. 1962 upon Sh. Sheel Kumar Sethi, he has pleaded that Customs Broker (CB) does not decide classification of the impugned goods; that there is no evidence on record to show that he was aware of import restriction on impugned goods; that CB cannot scrutinize documents & examine nature of the goods before filing bill of entry; and that import of the seized ethylene ripener was already permitted by the Hon'ble Bombay High Court. He has also relied upon various case laws including M/s Kunal Travels Cargo VS CC(I&G), IGI Airport, New Delhi (2017(354)E.L.T 447 (De1)),M/s Poonia & Brothers Vs Commissioner of Customs (Preventive). Jaipur [2019 (370) E.L.T 1074 (Tri-Del)], Commissioner Vs Lewak Altair Shipping Pvt. Limited [2019 (367) E.L.T A328 (S.C)], M/s P.P Dutta Vs commr of Customs & C.Ex, Ghaziabad [2014 (313) E.L.T (351) (Tri-Del) etc..*

*As discussed in Para 59 above, it was in the knowledge of Sh. Sheel Kumar Sethi, CHA that the goods being imported by M/s Goldripe International Pvt.Ltd. was a restricted item and import of the same without any import permit from the Ministry of Agriculture and Farmers Welfare (Department of Agriculture, Cooperation & Farmers Welfare), Directorate of Plant protection, Quarantine & Storage N.H IV Faridabad (Haryana). I have gone through the provisions of the Customs Broker Licensing Regulations, 2018 (herein-after referred to as "CBLR, 2018")wherein duties of a Customs Broker have been laid down under rule 10. The relevant provisions are reproduced below-*

"Rule-10-

*d. advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;"*

*From the above provisions, it is ample clear that if he was in knowledge that the goods being imported by M/s Goldripe International Pvt. Limited under BOE No. 4477470 dated 28.06.2021 were restricted goods and the importer was not agreed with him, he should have reported the matter to the Deputy Commissioner of Customs or Assistant Commissioner of Customs. In my view, he not only failed to comply with his duties provided under CBLR, 2018 but also connived with M/s Goldripe International Pvt. Limited for importing restricted goods without having valid import permit. Therefore, I find that Sh. Sheel Kumar Sethi was actively involved in improper import of restricted item namely ethephon by declaring the same as ethylene ripener and he deliberately submitted false information under section 46(4) of the Customs Act, 1962 with regard to import of ethephon, a restricted item. I have gone through the case laws relied upon by Sh. Sheel Kumar Sethi and find that the issue involved in the present case is different to the issue involved in cases relied upon by him. In the Show Cause Notice dated 21.12.2021, penalty u/s 112(a) and/or 112(b) has been proposed in respect of noticee M/s King Travels (authorized Customs Broker). I find that Shri Sheel Kumar Sethi is proprietor of M/ s King Travels and has been found actively involved in improper import of restricted item namely 'ethephon' by declaring the same as 'ethylene ripener`. It is well settled that imposition of penalties on both proprietorship firm and proprietor amounts to imposition of penalty twice and the same is unsustainable in the eyes of law. Therefore, I find*

*that he is liable for penal action under section 112(a)(i) and 114AA of the Customs Act, 1962."*

From the above it is quite evident that appellant 5 was fully aware of the fact that he was filing the bill of entry by mis-declaring and mis-classifying the imported goods to bypass the restrictions imposed upon the importation of the impugned goods. He was well aware that the importation was being made without any valid import permit issued by the relevant authorities as required in terms of Notification No 106 (RE-2013)/ 2009-2014 dated 01.01.2015 and as directed by the Hon'ble Mumbai High Court. As the appellant 5 was fully aware and he never came forward to inform the concerned custom authorities in this respect we do not find any merits in the submissions made. In case of Gajanan B Sudrik relied upon by the appellant penalty was set aside on the CHA for the reason that tribunal found that penalty has been imposed upon him treating as agent of the exporter. The case of Kunal Travel (Cargo) was case in respect of the revocation of the Licence of the Custom Broker and not in respect of the penalties imposed under these sections of Custom Act, 1962.

4.23 In case of Bhalinder Singh Mann [2024 (389) E.L.T. 256 (Tri. - Del.)] following was observed:

*32. The facts of the case are clear Shri Atal Bhushan Bhatt was the Manager of Shri B.S. Mann during the relevant period and in that capacity he had obtained the documents pertaining to the importer of the disputed consignment and also saw the samples of the goods which are actually being imported. During cross-examination by Shri B.S. Mann, before the Commissioner he confirmed that he had received the samples of the goods imported through Shri Rohit Sharma and that he had shown them to Shri B.S. Mann. Under such circumstances, it cannot be said that either Shri Bhatt or Shri B.S. Mann was not aware of the goods which were being actually imported. On examination by the SIIB the goods which are imported*

were found to be the glass chatons while the Bill of Entry was filed for the importer glass beads was of the invoice and packing list all showed the glass beads. In fact, 90% of the imported goods were glass chatons. This is not a case where the CHA had, merely based on the documents produced by the importer, filed the Bill of Entry. Had such been the case then the CHA would have had no responsibility as to the actual contents of the goods. In this case, the importer is not in the business of importing the glass beads or glass chatons and was indeed a regular importer of radiators for tractors. This consignment was different and the importer had provided samples of the goods to be imported to Shri Bhatt who was the Manager of Shri B.S. Mann. In turn, Shri Bhatt had shown those samples to Shri Mann. In this factual matrix we find no reason to believe that Shri Mann had innocently filed the Bill of Entry with a wrong declaration. Both Shri Mann and his Manager were fully aware of actual goods being imported and had filed Bills of Entry with the wrong description.

33. Therefore, the goods were correctly held to be liable for confiscation under Section 111(l) and (n) of the Customs Act. However, before the goods could be confiscated they were pilfered after their seizure while in the custody of the CONCOR. The Commissioner had, therefore, not imposed any redemption fine. Penalty under Section 112(a) can be imposed on any person who, in relation to a goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act. In this case, the glass chatons were imported and having seen the samples even after the import Shri B.S. Mann and through his employees filed a Bill of Entry for glass beads. In fact, 90% of the goods were glass chatons. We, therefore, find that Shri B.S. Mann was correctly held liable to penalty under Section 112(a).

34. *Penalty under Section 114AA can be imposed if any person knowingly or intentionally makes, signs or uses or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material fact in the transaction of any business for the purpose of this Act. The maximum penalty imposable is five times the value of the goods. The value of the goods in this case was Rs. 5,92,25,481/-. Shri B.S. Mann, through his employees, filed the Bill of Entry misdeclaring the nature of goods having first obtained samples of the goods even before filing the Bill of Entry. As is clear from the cross-examination by Shri B.S. Mann, Manager of Shri Bhatt that not only he but also Shri B.S. Mann, himself had seen the samples before filing the Bill of Entry. We, therefore, have no hesitation in finding that the Bill of Entry filed knowingly misdeclaring the nature of goods.*

35. *In view of above, we find that the penalty under Section 114AA imposed on Shri B.S. Mann needs to be sustained. In view of above, we uphold the impugned order insofar as it pertains Shri B.S. Mann and reject his appeal.*

4.24 Appellants have raised a preliminary objection stating that the order in original has been passed beyond the time limit prescribed for adjudication of the show cause notice and hence is bad in law. We do not find any merits in the submission made. A constitutional bench (five judges) of Hon'ble Supreme Court has in case of High Court Bar Association Allahabad v. State Of Uttar Pradesh & Ors [2024 LiveLaw (SC) 177][Order dated 29.02.2024 in Criminal Appeal No.3589 OF 2023] observed as follows:

***"VIII. Directions issued by the constitutional Courts to decide pending cases in a time-bound manner***

27. *The net effect of the directions issued in paragraphs 36 and 37 of Asian Resurfacing<sup>1</sup> is that the petition in which the High Court has granted a stay of the proceedings of the trial, must be decided within a maximum period of six*

*months. If it is not decided within six months, the interim stay will be vacated automatically, virtually making the pending case infructuous. In fact, in paragraph 37, this Court directed that the challenge to the order of framing charge should be entertained in a rare case, and when the stay is granted, the case should be decided by the High Court on a day-to-day basis so that the stay does not operate for an unduly long period.*

*28. The Constitution Benches of this Court have considered the issue of fixing timelines for the disposal of cases in the cases of Abdul Rehman Antulay [1992 (1) SCC 225] and P. Ramachandra Rao [2002 (4)SCC 578]. In the case of Abdul Rehman Antulay, in paragraph 83, this Court held thus:*

*"83. But then speedy trial or other expressions conveying the said concept are necessarily relative in nature. One may ask speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind. For example, take the very case in which Ranjan Dwivedi (petitioner in Writ Petition No. 268 of 1987) is the accused. 151 witnesses have been examined by the prosecution over a period of five years. Examination of some of the witnesses runs into more than 100 typed pages each. The oral evidence adduced by the prosecution so far runs into, we are told, 4000 pages. Even though, it was proposed to go on with the case five days of a week and week after week, it was not possible for various reasons viz., non-availability of the counsel, non-availability of accused, interlocutory proceedings and other*

*systemic delays. A murder case may be a simple one involving say a dozen witnesses which can be concluded in a week while another case may involve a large number of witnesses, and may take several weeks. Some offences by their very nature e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public servants and high public officials take longer time for investigation and trial. Then again, the workload in each court, district, region and State varies. This fact is too well known to merit illustration at our hands. In many places, requisite number of courts are not available. In some places, frequent strikes by members of the bar interferes with the work schedules. In short, it is not possible in the very nature of things and present-day circumstances to draw a time-limit beyond which a criminal proceeding will not be allowed to go. Even in the USA, the Supreme Court has refused to draw such a line. Except for the Patna Full Bench decision under appeal, no other decision of any High Court in this country taking such a view has been brought to our notice. Nor, to our knowledge, in United Kingdom. Wherever a complaint of infringement of right to speedy trial is made the court has to consider all the circumstances of the case including those mentioned above and arrive at a decision whether in fact the proceedings have been pending for an unjustifiably long period. In many cases, the accused may himself have been responsible for the delay. In such cases, he cannot be allowed to take advantage of his own wrong. In some cases, delays may occur for which*

*neither the prosecution nor the accused can be blamed but the system itself. Such delays too cannot be treated as unjustifiable broadly speaking. Of course, if it is a minor offence not being an economic offence and the delay is too long, not caused by the accused, different considerations may arise. Each case must be left to be decided on its own facts having regard to the principles enunciated hereinafter. For all the above reasons, we are of the opinion that it is neither advisable nor feasible to draw or prescribe an outer time-limit for conclusion of all criminal proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory.” (Emphasis added)*

*In paragraph 27 of the decision in the case of P. Ramachandra Rao, this Court observed thus:*

*“27. Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution. The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time-limits or chalking out a calendar for proceedings to follow, to redeem the injustice done*

*or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of the court. This is permissible for the judiciary to do. But it may not, like the legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973.”*

*(Emphasis added)*

*The principles laid down in the decision will apply even to civil cases before the trial courts. The same principles will also apply to a direction issued to the High Courts to decide cases on a day-to-day basis or within a specific time. Thus, the directions of the Court that provide for automatic vacation of the order of stay and the disposal of all cases in which a stay has been granted on a day-to-day basis virtually amount to judicial legislation. The jurisdiction of this Court cannot be exercised to make such a judicial legislation. Only the legislature can provide that cases of a particular category should be decided within a specific time. There are many statutes which incorporate such provisions. However, all such provisions are usually held to be directory.*

*29. Ideally, the cases in which the stay of proceedings of the civil/criminal trials is granted should be disposed of expeditiously by the High Courts. However, we do not live in an ideal world. A judicial notice will have to be taken of the fact that except High Courts of smaller strength having jurisdiction over smaller States, each High Court is flooded with petitions under Article 227 of the Constitution of India for challenging the interim orders passed in civil and criminal proceedings, the petitions under Section 482 of the Cr.PC for challenging the orders passed in the criminal proceedings and petitions filed in the exercise of revisional jurisdiction under the CPC and the Cr. PC. A judicial notice will have to be taken of the fact that in all the High Courts of larger strength having jurisdiction over larger States, the daily cause lists of individual Benches of the cases of*

*the aforesaid categories are of more than a hundred matters. Therefore, once a case is entertained by the High Court and the stay is granted, the case has a long life.*

*30. There is a huge filing of regular appeals, both civil and criminal in High Courts. After all, the High Courts deal with many other important matters, such as criminal appeals against acquittal and conviction, bail petitions, writ petitions, and other proceedings that involve the issues of liberty under Article 21 of the Constitution of India. The High Courts deal with matrimonial disputes, old appeals against decrees of civil courts, and appeals against appellate decrees. There are cases where senior citizens or second or third-generation litigants are parties. The High Courts cannot be expected to decide, on a priority basis or a day-to-day basis, only those cases in which a stay of proceedings has been granted while ignoring several other categories of cases that may require more priority to be given.*

*31. The situation in Trial and district Courts is even worse. In 2002, in the case of All India Judges' Association & Ors. v. Union of India & Ors. [(2002) 4 SCC 247], this Court passed an order directing that the judge-to-population ratio within twenty years should be 50 per million. Even as of today, we are not able to reach the ratio of even 25 per million. The directions issued in the case of Imtiyaz Ahmed v. State of Uttar Pradesh & Ors. [(2017) 3 SCC 658] have not been complied with by the States by increasing the Judge strength of the Trial and District Courts. The figures of pendency of cases in our trial Courts are staggering. There are different categories of cases which, by their very nature, are required to be given utmost priority, such as the cases of the accused in jail and the cases of senior citizens. For example, there are many legislations like the Hindu Marriage Act, 1955, the Protection of Women from Domestic Violence Act, 2005, the Negotiable Instruments Act, 1881 etc which prescribe specific time limits for the*

*disposal of cases. However, due to the huge filing and pendency, our Courts cannot conclude the trials within the time provided by the statutes. There is a provision in the Code of Criminal Procedure, 1973, in the form of Section 309, which requires criminal cases to be heard on a day-to-day basis once the recording of evidence commences. The same Section provides that in case of certain serious offences against women, the cases must be decided within two months of filing the charge sheet. Unfortunately, our Criminal Courts are not in a position to implement the said provision. Apart from dealing with huge arrears, our Trial Courts face the challenge of dealing with a large number of cases made time-bound by our constitutional Courts. Therefore, in the ordinary course, the constitutional Courts should not exercise the power to direct the disposal of a case before any District or Trial Court within a time span. In many cases, while rejecting a bail petition, a time limit is fixed for disposal of trial on the ground that the petitioner has undergone incarceration for a long time without realising that the concerned trial Court may have many pending cases where the accused are in jail for a longer period. The same logic will apply to the cases pending before the High Courts. When we exercise such power of directing High Courts to decide cases in a time-bound manner, we are not aware of the exact position of pendency of old cases in the said Courts, which require priority to be given. Bail petitions remain pending for a long time. There are appeals against conviction pending where the appellants have been denied bail.*

*32. Therefore, constitutional Courts should not normally fix a time-bound schedule for disposal of cases pending in any Court. The pattern of pendency of various categories of cases pending in every Court, including High Courts, is different. The situation at the grassroots level is better known to the judges of the concerned Courts. Therefore, the issue of giving out-of-turn priority to certain cases*

*should be best left to the concerned Courts. The orders fixing the outer limit for the disposal of cases should be passed only in exceptional circumstances to meet extraordinary situations.*

*33. There is another important reason for adopting the said approach. Not every litigant can easily afford to file proceedings in the constitutional Courts. Those litigants who can afford to approach the constitutional Courts cannot be allowed to take undue advantage by getting an order directing out-of-turn disposal of their cases while all other litigants patiently wait in the queue for their turn to come. The Courts, superior in the judicial hierarchy, cannot interfere with the day-to-day functioning of the other Courts by directing that only certain cases should be decided out of turn within a time frame. In a sense, no Court of law is inferior to the other. This Court is not superior to the High Courts in the judicial hierarchy. Therefore, the Judges of the High Courts should be allowed to set their priorities on a rational basis. Thus, as far as setting the outer limit is concerned, it should be best left to the concerned Courts unless there are very extraordinary circumstances.”*

4.25 We do not find any infirmity in the impugned order.

5.1 Appeals of Appellant No.1, Appellant No.2, Appellant No.3, Appellant No.4 and Appellant No.5 are dismissed.

(Order pronounced in open court on-12 December, 2025)

**(S.K. MOHANTY)  
MEMBER (JUDICIAL)**

**(SANJIV SRIVASTAVA)  
MEMBER (TECHNICAL)**