
(2004) 03 BOM CK 0133
In the Bombay High Court
Case No : Writ Petition No. 704 of 2003

B.K. Industrial Corpn.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 19-03-2004

Acts Referred:

Customs Act, 1962 — Section 127F, 28, 85, 86, 87

Citation : (2004) 4 BomCR 865 : (2005) 101 ECC 365 : (2004) 169 ELT 13

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : V.S. Nankani, N.S. Thakkar and H.P. Modh, for the Appellant; A.J. Rana and K.R. Chaudhari, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—The petitioners have challenged the order of the Settlement Commission dated 3rd December, 2002, wherein it is held that the goods imported and allegedly supplied by the petitioners to the Director General of Naval Project, Vishakhapatnam ("DGNP" for short), are not ship stores for the use of ship of the Indian Navy and, hence not eligible for exemption from payment of customs duty u/s 90 of the Customs Act, 1962. By the said order, the Settlement Commission has called upon the petitioners to pay the duty with interest and has also levied nominal penalty upon the petitioners.

2. The petitioners are a partnership firm registered under the Indian Partnership Act, 1932. The petitioners are engaged in the business of supply of ship stores to the Indian Navy, Coast Guard etc,

3. It is the case of the petitioners that against purchase order issued by the DGNP, the petitioners had imported and two consignments of Skimmer/Pump unit/Spares BOOM and spares accessories, generator, etc. and warehoused the same vide warehousing Bill of Entry Nos. 4827 and 4828 both dated 13th July, 1993. These goods were components of collapsible barge which was to be

installed/fitted on the tug and used for cleaning the water which is polluted on account of oil leakage/spillage. The said Bills of Entries were assessed to duty at Rs. 37,12,508/- and Rs. 47,03,345/- respectively and permitted to be warehoused without payment of duty. Thereafter, on 26th July, 1993 the petitioners filed two shipping bills bearing Nos. 459721 and 459722 in terms of Section 69 read with Section 90(2) of the Customs Act, 1962 (hereinafter referred to as "the Act" for short). In the said shipping bills the consignee was shown as "S.S.K. Controller of Procurement, Naval Dockyard, Lion Gate, Bombay". The said shipping bills also contained an endorsement "certified that stores meant for Indian Naval Ship only" duly signed by P.R. Seshadri, Incharge Stores, Local Purchase, Naval Dockyard, Mumbai. In view of these endorsements made on the shipping bills, the goods were assessed and cleared without payment of duty u/s 90 of the Customs Act.

4. Subsequently, on receiving information that the above goods which were cleared duty free u/s 90 of the Act have not been supplied to the Indian Navy, but the same have been diverted to the local market, the case was investigated by the DRI, Bombay. During the course of investigation the DRI recorded statement of several persons including partners of the petitioners. Mr. P.R. Sashadri at Naval Dockyard, Mumbai, Controller of Procurement, Indian Navy etc.

5. On the basis of the investigation conducted, the Commissioner of Customs, Air Cargo Complex, Sahar Air Port, Bombay issued a show cause notice dated 8th July, 1998 u/s 124 and Section 28 of the said Act calling upon the petitioners to show cause as to why the goods covered under shipping bill Nos. 459721 and 459722 both dated 26th July, 1993 and well as the goods covered under shipping bill Nos. 10179, dated 28th July, 1993 should not be confiscated u/s III(o)/ Section 133 of the Customs Act, why duty of Rs. 93,88,432/- (Rs. 37,12,508/- + Rs. 47,03,345/- + Rs. 9,72,579 - Rs. 93,88,432/-) should not be demanded and recovered u/s 72 and Section 28 of the Customs Act and penalty u/s 112(a) and Section 114(ii) should not be imposed upon them. It is not in dispute that during the course of investigation the petitioners have voluntarily deposited Rs. 59,35,445/- towards the duty liability.

6. Before the said show cause notice dated 8th July, 1998 could be adjudicated upon, the petitioners on 14th December, 2000 made an application before the Settlement Commission u/s 127B of the Customs Act admitting duty liability of Rs. 9,72,579/- in respect of Shipping Bill No. 10179, dated 28th June, 1993. In respect of shipping bill Nos. 459721 and 459722, it was contended that the goods mentioned therein have been duly supplied and delivered to the DGNP and ship stores and, therefore, no duty is payable in respect of the said goods. By an interim order dated 6th June, 2001 the Settlement Commission was pleased to allow the application to be proceeded with on adjustment of admitted duty liability from the voluntary deposit of Rs. 59,35,445/- made by the petitioners. Thereafter, pursuant to the directions issued by the Commission, the Commissioner of Customs (Investigation) as well as the DRI filed their report

before the Commission opposing the claim of the petitioners. After hearing the parties, the Settlement Commission by its order dated 3rd December, 2002 held that the supply of the goods covered under Shipping Bill Nos. 459721 and 459722 both dated 26th July, 1993 did not qualify for duty free clearance u/s 90 of the Customs Act read with Exemption Notification No. 195/76-Cusv dated 2nd August, 1976. The Commission settled the case for duty amount of Rs. 93,88,432/- (Rs. 8445,853/- for goods covered under 2 shipping bills + Rs. 9,72,579/- admitted liability under the 3rd shipping bill) and after appropriating the amount deposited by the petitioners, directed the petitioners to pay the balance sum of Rs. 34,52,987/- within 30 days from the date of receipt of the said order. The Commission directed the petitioners to pay interest at the rate of 10% from the date of clearance of the goods from the warehouse till the date of deposit of Rs. 59,35,445/- and on the balance amount till the date of payment. The Commission also imposed nominal penalty of Rs. 9,00,000/-. Challenging the aforesaid order of the Settlement Commission, the present petition is filed.

7. Mr. Nankani, learned Advocate appearing on behalf of the petitioner submitted that the findings of the Settlement Commission that the tug is not a ship, and hence, the goods supplied by the petitioners for use on a tug of the DGNP does not qualify for duty free clearance u/s 90 of the Customs Act is erroneous. Relying upon the decision of the Apex Court in the case of Commissioner of Income Tax Vs. Digvijay Cement Co. Ltd., , it was submitted that the tug is a ship and the goods fitted on the tug would be ship stores for the use of the ship. It was submitted that the tug of the DGNP belongs to the Indian Navy and hence supply of goods which are to be fitted on the tug of the Indian Navy constitutes supply of stores and, therefore, in terms of Section 90 of the Customs Act no customs duty is payable on the said goods.

8. Mr. Nankani further submitted that the tug is also a "foreign going vessel" as defined in Section 2(21) of the Customs Act and hence on account of use of the said goods in operation outside India, no duty is chargeable having regard to the provisions of Sections 85 and 88 of the said Act. It was submitted that the collapsible barges fall within the meaning of the term "stores" as defined in Section 2(38) of the Customs Act inasmuch as the same are installed/fitted on the tug and used for cleaning the water pollution on account of oil leakage/spillage. Accordingly, it was submitted that the imported goods were eligible for duty exemption. It was further submitted that the scheme relating to supply of ship stores under the provisions of the Customs Act does not contemplate appropriation of stores for supply to a particular vessel or a ship at the time of import. It was submitted that the scheme provides that the stores are allowed to be deposited in the warehouse with a declaration in the Bills of Entry for warehousing that the same are meant to be cleared as ship stores. The ship stores are kept in stock in the warehouse and thereafter supplied from the bonded warehouse by following the procedure prescribed under Chapter X which includes filing of shipping bills for export u/s 69 of the Customs Act. Accordingly, it was submitted that the ship stores supplied by the petitioners to the DGNP

from the bonded warehouse, are eligible for exemption under Sections 85 to 88 of the Customs Act.

9. Mr. Nankani further submitted that the Settlement Commission was in error in holding that the duty on the goods is recoverable with interest at 10%. It was submitted that since the goods were cleared from the warehouse before the expiry of the warehousing period, no interest was payable on the said goods. It was submitted that the interest u/s 61(2) of the Customs Act as it stood at the relevant time was payable only in cases where the goods remained in the warehouse beyond the warehousing period. In the present case, the goods were cleared within the warehousing period, and therefore, the Settlement Commission could not have ordered for payment of interest. It was submitted that Section 127C(7) of the Customs Act provides that the Settlement Commission shall pass an order in accordance with the provisions of the Act. It was submitted that since Section 61(2) of the Customs Act relating to the interest is not applicable in the present case the order of the Settlement Commission levying interest is illegal and is liable to be quashed and set aside.

10. Mr. Rana, learned Senior Advocate appearing on behalf of the respondents submitted that to be eligible for exemption from payment of customs duty u/s 90 of the Customs Act, stores must be for consumption or board the ship. It was submitted that if the stores are not going to be consumed in the ship, benefit of Section 90 of the Customs Act is not available. Mr. Rana submitted that in the present case in view of the false declaration made in the shipping bills the goods were allowed to be cleared u/s 90 of the Customs Act without payment of duty. Once it is established that the endorsements made on the shipping bills were false and the same were made in connivance with the Storekeeper of the Naval Dockyard and that the goods have not been supplied to the consignee set out in the shipping bills, the clearance of the goods becomes unauthorised and the duty payable on the said goods becomes recoverable with interest under the provisions of the Customs Act. It was submitted that if the goods were to be supplied to DGNP, Vizag, then in the shipping bills the consignee should have been mentioned as "DGNP, Vizag or the tug for which the goods were meant for and ought not to have mentioned as "S.S.K. Controller of Procurement, Naval Dockyard, Bombay". It was submitted that neither the goods were received by the Naval Dockyard at Bombay nor the said goods were forwarded by the Naval Dockyard, Bombay to DGNP, Vizag. It was submitted that except for the fraudulent endorsement made by Mr. P.N. Seshadri, Storekeeper at the Naval Dockyard, Bombay there is no other document to show that the goods have been delivered to the Naval Dockyard at Bombay. It was submitted that whenever the ship stores are purchased, they are received by the captain/master of the vessel or member of crew on board the ship who has been authorised by the master of the vessel to sign the export related documents. In the present case, it is established that neither the captain/master of the vessel nor any crew on board the ship had received the stores. It was submitted that Mr. P.N. Seshadri, Storekeeper at the Naval Dockyard, Bombay was not authorised to make

endorsement on the shipping bills. It is thus clear that the goods have been improperly cleared by making false declaration on shipping bills and, therefore, the duty payable on the goods is recoverable with interest.

11. Mr. Rana submitted that in the present case, the procedure prescribed for transshipment have not been followed. It was submitted that in the ordinary course if the goods were to be transhipped to Vizag then the same would be transhipped under the escort of the Customs Preventive Officers of the jurisdictional customs house. In the present case, the petitioners did not follow the said procedure deliberately, because after obtaining the signature from the storekeeper at the Naval Dockyard, the petitioners were to get absolute custody of the goods with a view to divert the same in the open market. It was submitted that once it is held that the goods are clandestinely removed from the warehouse, then the duty is payable with interest u/s 61(2) of the Customs Act, 1962. It was submitted that in the light of the decision of this Court in the case of Hitech Engineers v. Union of India reported in 2004 (1) BCR 776 which is squarely applicable to the present case, the petition deserves to be dismissed with costs.

12. We have heard Counsel on both sides and we have perused records placed before us. Admittedly, the petitioners herein i.e. M/s. B.K. Industrial Corporation and M/s. Hitech Engineers are sister concerns. The partners of the petitioner firm are also partners in Hitech Engineers. The modus operandi adopted by both these firms was to import various items from time to time and clear the same without payment of duty by making false declaration on the shipping bills to the effect that the goods are to be delivered to "S.S.K. Controller of Procurement, Naval Dockyard, Lion Gate, Bombay". The said shipping bills would also contain an endorsement "certified that stores meant for Indian Naval Ship only" duly signed by Mr. P.R. Seshadri, Storekeeper at the Naval Dockyard, Lion Gate, Bombay". On clearance the goods used to be taken from the warehouse under the escort of the Preventive Officer of Customs to the Naval Dockyard, Lion Gate, Bombay, where Mr. P.R. Seshadri, Storekeeper used to make an endorsement on the shipping bills signifying receipt of the goods by him on behalf of Indian Navy. Thereupon, the escorting Preventing Officer would return to the Customs House and the petitioners in connivance with the said Seshadri, Storekeeper would take custody of the goods on the pretext of delivering the same to some Government agencies. The goods so cleared would then be sold by the petitioners in the open market for cash consideration. Thus, the goods cleared from the warehouse in connivance with the storekeeper of the Naval Dockyard, Bombay were never factually delivered to the Naval Dockyard at Bombay.

13. In the case of Hitech Engineers a sister concern of the petitioners, wherein similar issues were involved, this Court held that the duty is recoverable with interest. However, it is contended on behalf of the petitioners that the decision of this Court in the case of Hitech Engineers is distinguishable on facts, because in that case admittedly the goods were not supplied to the Indian Navy but were

supplied to the Indian Coast Guard, whereas in the present case the goods have been supplied to the Indian Navy and, therefore, u/s 90 of the Customs Act no duty is leviable on the said goods. Alternatively, it is contended that no duty is payable under Sections 85 to 88 of the Customs Act, 1962. Thus, the issue required to be considered in the present petition is, whether the goods covered under Shipping Bills Nos. 459721 and 459722 are eligible for duty free clearance within the meaning of Section 90 or Sections 85 to 88 of the Customs Act, 1962.

14. From the order passed by the Settlement Commission, the following important facts are noticed :

(a) In the two Bills of Entries seeking warehousing of the imported goods the petitioners had not declared that the said goods are to be supplied to the Indian Navy without payment of duty. In fact, it was stated that the goods are liable to duty amounting to Rs. 47,03,345/- and Rs. 37,12,508/- respectively. Accordingly the goods were assessed to duty and were permitted to be warehoused without payment of duty. Thus, it is clear that while warehousing the goods there was no declaration such as "stores to be supplied without payment of duty" as contemplated u/s 85 of the Customs Act.

(b) While seeking clearance of the said goods from the warehouse, two shipping Bills were filed by the petitioners showing the consignee as "S.S.K. Controller of Procurement, Naval Dockyard, Lion Gate, Bombay". The Controller of Procurement, Indian Navy, in his statement recorded u/s 108 of the Customs Act has stated that there is no person having designation as "S.S.K. Controller of Procurement, Naval Dockyard, Lion Gate, Bombay". Thus, the name of the consignee shown by the petitioners in the shipping bills were totally false and non-existent.

(c) The two shipping bills filed by the petitioners in respect of the goods in question also contained an endorsement - "certified that stores meant for Indian Naval Ship only" duly signed by Mr. P.R. Seshadri, Storekeeper, Naval Dockyard, Lion Gate, Bombay". The said shipping bills also contained the endorsement "recd" duly signed by the said Mr. P.R. Seshadri. The Controller of Procurement, Indian Navy in his statement recorded u/s 108 of Customs Act has stated that the shipping bills are always signed by the Controller personally and that the storekeeper in the Naval Dockyard who is a civilian staff below the rank of an officer is not authorised to sign any of the documents except giving receipt of items. No documents were produced to show that Mr. Seshadri had any authority to make endorsements on the shipping bills. Thus, the endorsements made by Mr. P.R. Seshadri, Storekeeper on the shipping bills were totally unauthorised and without any sanctity.

(d) The endorsements made by Mr. Seshadri on the shipping bills - "reed" is also with mala fide intentions. The Controller of Procurement, Indian Navy in his statement recorded u/s 108 of the Customs Act has stated that the storekeeper could make endorsement "received" only when the goods are to be physically

warehoused inside the dockyard. In the present case, the goods were not stored inside the dockyard and Mr. Seshadri after making unauthorised endorsements on the shipping bills had handed over the goods to the petitioners. Although it is contended that the goods were handed back by Mr. Seshadri to the petitioners for being delivered to DGNP, Vizag, neither Mr. Seshadri was authorised to hand over the goods to the petitioners nor the procedure prescribed for such transshipment was followed. Thus, it is clear that instead of delivering the goods to the Indian Navy, in fact, the goods were delivered to the petitioners.

(e) There is nothing on record to show that under the tender conditions issued by the DGNP, Vizag, the petitioners were required to deliver the goods to "S.S.K. Controller of Procurement, Naval Dockyard, Lion Gate, Bombay" and thereafter to DGNP, Vizag. Thus, the modus operandi adopted by the petitioners in connivance with Mr. Seshadri was to obtain delivery of goods in the guise of supplying it to "S.S.K. Controller of Procurement, Naval Dockyard, Mumbai" with a view to defraud the revenue of customs duty.

(f) After taking delivery of the goods from Mr. Seshadri at the Lion Gate at Bombay, the petitioners were in the absolute custody of the goods. Shri Kirit Kamdar, partner of the petitioner in his statement recorded u/s 108 of Customs Act, 1962 has admitted that the goods cleared by them u/s 90 of the Customs Act showing the Indian Navy as consignee have been sold by them in the open market for cash consideration; In these circumstances, even if the goods are ultimately supplied to DGNP, Vizag, it cannot be said that at the time of clearance the goods were meant to be supplied to DGNP, Vizag and it cannot be said that the goods supplied by the petitioners to the DGNP, Vizag are the same goods covered under the two shipping bills which are subject-matter of the present petition.

(g) The evidence brought on record clearly show that the ship stores are always received by the captain/master of the vessel or by a person authorised by them. It is also brought on record that whenever the goods are to be supplied to the Indian Naval Ships at the Naval Dockyard at Bombay, the Gate Officer at the Naval Dockyard, Bombay simply endorses on the shipping bill by putting remark as "goods passed in" on the respective shipping bill and the escorting Customs Officer is issued one day temporary pass by the concerned gate officer so to enable the Customs Officer to escort the ship stores right up to its delivery to the captain/master of the vessel. This procedure is invariably followed in each and every case. In the present case no such procedure was followed and by a fraudulent method, custody of the goods was received by the petitioners in the guise of supplying it to the Indian Navy.

(h) If the ship stores were to be transhipped from Bombay to Vizag the normal procedure followed was to sent the said ship stores to the concerned jurisdictional Commissioner at Vizag under the Railway Receipt (R.R.) or Lorry Receipt (L.R.) or any other prescribed mode of transport. From there, the said ship stores would have been delivered on board the concerned ship under escort

of Customs Preventive Officers of the jurisdictional Customs House. In the present case, no such procedure was followed deliberately because if the goods were to be escorted by the Customs Officers then it would have been difficult for the petitioners to divert the goods to the local market. Thus, from the facts on record it is clearly seen that on clearance, the petitioners were in absolute custody of the goods in question.

15. With these facts on record, assuming that the petitioners are right in their submission that the tug is a ship and the goods required for use on the tug are ship stores within the meaning of Section 90 of the Customs Act, even then, the goods in question are not eligible for duty free clearance, because, at the time of clearance though the goods were consigned to S.S.K. Controller of Naval Dockyard, Bombay, there was no such authority in existence and in fact the goods were not supplied to Naval Dockyard at Bombay. When the goods in question have not been delivered to the consignee shown in the shipping bills and the custody of the goods have been taken by the petitioners by fraudulent means and in connivance with the storekeeper of the Naval Dockyard at Bombay, it cannot be said that the goods have been supplied to Indian Navy. It is a matter of record that Mr. Seshadri, Storekeeper at the Naval Dockyard, Bombay was neither authorised to make endorsement on the shipping bills nor he had actually taken custody of the goods inside the dockyard. The said storekeeper had no authority to handover the goods to the petitioners for being delivered to DGNP at Vizag. Once the petitioner had exclusive custody of the goods without any Customs supervision any subsequent supply of the said goods to the DGNP, Vizag Navy will not qualify for duty free clearance, because it cannot be said that the same goods which are the subject-matter of the shipping bills in question have been supplied by the petitioners to the DGNP, Vizag. The fact that the partner of the petitioners has admitted that some of the consignments cleared by them duty free by showing the Indian Navy as consignee have in fact been sold in the open market for cash consideration clearly shows that at the time of clearance the goods were not intended for supply to the Indian Navy. Thus, it cannot be said that the goods covered under the two shipping bills which are subject-matter of the present petition have been supplied to the Indian Navy within the meaning of Section 90 of Customs Act.

16. Assuming that the goods covered under the two shipping bills have been ultimately supplied to DGNP, Vizag, still, the benefit of Section 90 would not be available because it would be a case of supply of goods after the clearance from the warehouse and not directly from the warehouse. To avail the benefit of Section 90 of the Customs Act, the goods must be properly removed from the warehouse for supply to the Indian Navy directly as per the prescribed procedure. Subsequent to the clearance, even if the goods are supplied to the Indian Navy, the benefit of Section 90 would not be available. In other words, where the goods are supplied to the Indian Navy after clearance it will be a local supply and not clearance from the warehouse to the Indian Navy as contemplated u/s 90 of the Customs Act. In the present case, the goods have

been improperly cleared from the warehouse by making a false declaration that the goods are to be supplied to Naval Dockyard, Bombay and instead of delivering the goods to the Naval Dockyard at Bombay, absolute custody of the goods has been received by the petitioners in connivance with an employee of the Indian Navy. Even if the said improperly cleared goods were subsequently supplied by the petitioners to DGNP, Vizag it being supply after clearance from the warehouse, the benefit of Section 90 of the Customs Act will not be available for the said goods.

17. If the petitioners wanted to deliver the goods from the warehouse to DGNP, Vizag, then nothing prevented the petitioners from showing the consignee in the shipping bills as DGNP, Vizag or mentioning the particular tug on which these goods were to be fitted as the consignee. The very fact that the petitioners have adopted a dubious method in connivance with the storekeeper of the Naval Dockyard, Lion Gate at Bombay, clearly shows that the entire *modus operandi* was to obtain clandestine clearance of the goods by making false declaration. After having taken absolute custody of the goods without any Customs supervision the petitioners have sold some of the goods in the open market. Merely because, some of the goods so cleared have been subsequently supplied to DGNP will not make the case falling u/s 90 of the Customs Act, 1962.

18. The contention of the petitioner that the goods in question were imported by them on the orders of the DGNP, Vizag, cannot be accepted because there is no material on record to show that the DGNP, Vizag had authorised the petitioners to import the goods duty free. In fact the tenders invited by the DGNP, Vizag were local tenders and not the tenders for import. Like the ship chandlers, if the petitioners wanted to supply the goods from the warehouse to the tug of the DGNP, Vizag as stores, then the petitioners should have followed the requisite procedure prescribed for clearance of the goods from the warehouse to the concerned destination at DGNP, Vizag. If the goods were imported for being supplied to DGNP, then while seeking order for warehousing the goods, the petitioners should have declared that the goods are to be supplied to DGNP duty free. Similarly, while seeking delivery of the goods from the warehouse, if the petitioners wanted to supply the goods to DGNP, then the petitioners should have so declared in the shipping bills so that appropriate procedure for delivery of goods at Vizag could be followed. Neither at the time of storing the goods in the warehouse nor while seeking clearance from the warehouse the requisite procedure has been followed by the petitioners. In these circumstances, the benefit under Sections 85 to 88 of the Customs Act is also not available to the petitioners.

19. The contention of the petitioners that the Settlement Commission had no power to levy interest is also without any merit. This Court in the case of Hitech Engineers (*supra*) relying upon the decision of the Apex Court in the case of Pratibha Processors and others Vs. Union of India and others, has held that where the duty was payable on the goods at the time of removal of the goods

from the warehouse, but because of the false declaration made by the petitioners the goods were improperly cleared without payment of duty, then u/s 72 read with Section 61 of the Customs Act, the duty is recoverable with interest. It was held that if the adjudicating authority was entitled to recover the duty with interest, then the Settlement Commission exercising very same powers was entitled to levy interest on the duty payable. Following the said decision, we uphold the order of the Settlement Commission in levying interest on the duty amount payable by the petitioners.

20. For all the aforesaid reasons, we do not find any merit in the petition. Accordingly, Writ Petition fails and the same is dismissed, with costs.