**(2016) 08 MAD CK 0113**

**In the Madras High Court**

**Case No :** Writ Petition No. 2340 of 2005

CAG Shipping (India) Pvt. Ltd. — APPELLANT

Vs

Government of India — RESPONDENT

**Date of Decision :** 31-08-2016

**Acts Referred:**

**Citation :** (2016) 340 ELT 318

**Hon'ble Judges :** T.S. Sivagnanam, J.

**Bench :** Single Bench

**Advocate :** Shri Dominic S. David, Counsel, for the Petitioner; Shri A.P. Srinivas, SPC, for the Respondent

**Final Decision :** Allowed

# Judgement

T.S. Sivagnanam, J. - Heard Mr. Dominic S. David, learned counsel for the petitioner and Mr. A.P. Srinivas, learned Senior Central Government Standing Counsel for the respondents and with their consent, the writ petition itself is taken up for disposal.

2. In this writ petition, correctness of the order passed by the Adjudicating Authority as confirmed by the Appellate Authority as slightly modified by the Revisional Authority involving short landing of goods is questioned. Though the facts of the case appear to be complicated, the controversy involved lies in a very narrow campus.

3. The petitioner is a steamer agent and they acted on behalf of a Company who had imported Acid Grade Fluorspar from China through the port at Cuddalore for the importer M/s. TANFAC Industries Limited, Cuddalore. The total quantity of the discharged cargo as per the landing certificate dated 30-4-1994 issued by the Superintendent of Central Excise, Custom House, Cuddalore, was 6110.376 M.T. and the quantity short landed was ascertained to be 237.684 M.T. The import duty which would have been chargeable on the deficient goods was calculated at Rs. 5,15,366/-. Therefore, a show cause came to be issued to the

petitioner on 11-3-1996 under Section 124 of the Customs Act, stating that the petitioner has not accounted for the short landed quantity of 237.684 W.M.T. of Acid Grade Fluorspar as per Section 116(a) read with Section 148(2) of the Customs Act, 1962. Therefore, they were called upon to show cause as to why the penalty should not be imposed not exceeding twice the amount of import duty, and along with the show cause notice, a work sheet for the short landed quantity was issued. For better appreciation, the same is extracted below :

Work sheet for shortlanded quantity of 237.648 W.M.T. of acide grade fluorspar from the vessel M.V. mercurea ciuc arrived at cuddalore port on 5-4-1994.

1

Quantity manifested

6348.060 WMT

2

Quantity accounted for as per landing certificate

6110.38

3

Quantity short-landed

237.684 WMT

4

Less Moisture @ 6.47%

15.21

5

Quantity short-landed in DMT

222.472 DMT

6

CIF Value of 222.472 DTM @ U.S. $ 81.00 Per DMT

U.S. $ 18020.23

7

Exchange Rate @ U.S. $ 31.55 for U.S. $ 18020.23

Rs. 5,68,538.25

8

Landing charges @ 1% of CIF Value

 

Rs. 5,685.38

9

Total Assessable value

Rs. 5,74,223.63

10

Basic customs duty @ 65% on assessable value

Rs. 3,73,245.35

11

C.V.D. @ 15% on Assessable value

Rs. 1,42,120.34

12

Total Customs duty

Rs. 5,15,365.69

OR

Rs. 5,15,366/-

(Rupees Five Lakh Fifteen Thousand three hundred and sixty-six only)

Assistant Commissioner, Customs division : Cuddalore.

4. Thus, as per the working sheet, it is seen that moisture allowance was calculated at 6.47%, but, this was calculated only on the short landed quantity and allowance was given at 15.212 M.T. The petitioner submitted their objections and the Adjudicating Authority, by order dated 29-11-1999, after considering the facts, was convinced that the allowance for moisture should have been calculated on the total manifested cargo. Though such was his view, while adopting the tolerance limit, the Adjudicating Authority applied the percentage of 0.5% of the manifested quantified as quantity lost. This, according to the Adjudicating Authority, is universal accepted principle in Maritime Law, for which, the Authority has also referred to the order passed by the Government of India. The petitioner preferred an appeal before the Commissioner of Customs and Central Excise (Appeals), Trichy, who had concurred with the Adjudicating Authority. As against that, the petitioner preferred Revision to the first respondent. The Revisional Authority, though was of the opinion that the findings rendered by the Adjudicating Authority as well as the Appellate Authority were correct, yet noted that the petitioner was not acting intentionally or actively in the short landing and therefore, he reduced the penalty which was imposed and directed the authority to issue a demand. Accordingly, the revised demand was issued and a sum of Rs. 1,26,761/- was collected as penalty by issuing detention notices. The

 

correctness of the impugned orders are assailed in the present writ petition.

5. I have heard the submissions made by the learned counsel appearing on either side carefully and perused the materials available on record.

6. Learned counsel placed reliance on an article published by Mr. M. Michael Miller, who said to be an internationally renowned expert on chemicals. This article has been relied upon to show the nature of the material "Fluorspar" and it is stated that Acid Grade is shipped routinely in the form of damp Filtercake containing 7% to 10% moisture to facilitate handling and to reduce dust. Thus, the high moisture content cannot be disputed by the authorities nor disbelieved by the Court and therefore, it would be safe to rely upon the opinion of the expert in the said field. Thus, it appears that the percentage of moisture adopted by the Adjudicating Authority while issuing show cause notice at 6.47% was perfectly within the parameters as mentioned by Mr. Michael Miller. However, while adjudicating the show cause notice after receiving the reply, the Adjudicating Authority adopted a percentage of 0.5% and stated that it is an universal accepted principle in Maritime law.

7. Learned senior standing counsel for the respondent department relied on the order passed by the Revisional Authority in the case of In Re : Spanoceanic Services Pvt. Ltd. [2014 (313) E.L.T. 848 (G.O.I.)]. However, the material, which was subject matter of consideration in the said case, was Ammonium Nitrate. Therefore, in my view, the uniform percentage of tolerance limit cannot be adopted, but, it should be cargo specific.

8. Thus, if the Adjudicating Authority was of the opinion that the adoption of tolerance limit at 6.47% in the show cause notice was incorrect, he should have given reasons as to why such percentage should not have been applied, rather, without doing so, he has straightaway adopted the tolerance limit at 0.5% which is incorrect.

9. The Revisional Authority found that the petitioner was not intentionally involved in the short landing, therefore, exercised his discretion and reduced the penalty. While doing so, the Revisional Authority ought to have seen that the mistake committed by the Adjudicating Authority in calculating the tolerance limit only for the short landed quantity in the show cause notice. This error ought to have been rectified. Though the Adjudicating Authority accepted the mistake and rectified the error, he committed a mistake in adopting a lesser percentage of tolerance limit, that too without any reason by relying upon the order passed by the Government of India, which related to different product.

10. One more interesting feature is that the master of the vessel has certified that the entire quantity of the manifested cargo was discharged as oversized delivery into consignee''s barges by their stevedores and no cargo left on board. Therefore, the vessel is no way responsible for shore out-turn. Two things are clear, that is there was no cargo left in the vessel. Secondly, the vessel did not berth in the port and the cargo was discharged into the barges and from the

 

barges, it has come to the port area, where the quantity of the cargo has been measured. Therefore, even going by the order in Spanoceanic Services (supra), there are several types of losses, that is loss of Board, Loss of Pier and other handling losses at different places. Thus, this cargo has been handled in two places and this also ought to have been accounted for.

11. At this juncture, it would be relevant to take note of the decision of the Hon''ble Division Bench of this Court in the case of M/s. A.D. Jeyaveerapandiya Nadar & Bros. v. The Government of India (W.A. No. 1101 of 2009, dated 12-4-2010), in which also, this issue as to on which quantity the tolerance limit has to be calculated came up for consideration and the Hon''ble Division Bench held as follows :

"4..... It is thereafter on 31-8-1999 that the show cause notice has been issued. The original authority refers to the deduction of moisture content and the tolerance limit of 0.5% of manifested quantity as the quantity lost and revised the short landed quantity as 265.681 metric tonnes. The submission of the learned counsel is that if the deduction of moisture content is made for the manifested quantity then there won''t be any short landing. The Commissioner of Customs and Central Excise (Appeals) had said that the quantity shown in the bill of lading and the draft survey would show that the entire quantity had been discharged and he also recorded the fact that since no Customs Officer had signed in the report, need not be considered as disqualification since the agent had accepted the draft survey report ...."

12. These aspects could have been considered by the Revisional Authority and these very relevant factors were not taken note by the Revisional Authority. If this Court comes to such a conclusion, then the only option available for the Court is to send back the matter to the authority for reconsideration. However, this Court does not propose to do the same, since the show cause notice itself was issued after a lapse of two years from the date on which the cargo landed at the Cuddalore port and it has taken over 10 years for the conclusion of the proceedings at different levels culminating in the order passed by the Revisional Authority during March, 2004, which has been challenged in this writ petition filed in the year 2005 and it has come up for final disposal after a period of 10 years. Thus, this Court is of the view that the matter need not be remanded and this Court would be justified in exercising its power conferred under Article 226 of the Constitution of India.

13. Accordingly, as observed earlier, the error is committed by the Adjudicating Authority in not accepting the tolerance limit of 6.47% on the entire manifested quantity and no reasons have been assigned as to why this tolerance limit should not be accepted and why ad hoc tolerance limit should be accepted. The experts say the Acid Grade, which shipped routinely in the form of damp filtercake, contains 7% to 10% moisture. Therefore, the Adjudicating Authority, while issuing show cause notice, rightly adopted the tolerance limit at 6.47%.

 

14. Accordingly, the writ petition is allowed and the impugned orders are set aside. The respondents are directed to adopt the tolerance limit of 6.47% on the entire manifested quantity and redo the assessment to ascertain as to whether there is any penalty leviable on the petitioner. According to the petitioner, if 6.47% is adopted as tolerance limit on the entire manifested cargo, then there will be no short landing. If that be the case, then appropriate orders should be passed by the third respondent for refund of the amount, which has already been collected. The above direction shall be complied with within a period of three months from the date of receipt of a copy of this order. No costs.

 