(2010) 06 BOM CK 0185

In the Bombay High Court

Case No : Writ Petition No. 942 of 2006 with W.P. No. 2396 of 2006

Damini Shipping Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 15-06-2010

Acts Referred:

Citation : (2017) 345 ELT 512

Hon'ble Judges : V.C. Daga and S.J. Kathawalla, JJ.

Bench : Division Bench

Advocate : Ms. Aarti P. Bhide, Advocate, for the Petitioner; Shri P.S. Jetly with J.B. Mishra, K.R. Sriram and Ms. Subra Karmarkar, Advocates, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J. - Both these petitions are directed against the order passed by the Joint Secretary to the Government of India whereby and where under the revision applications filed by the petitioners were dismissed and the order of the lower appellate authority as well as adjudicating authority were confirmed. Both these petitions involve identical facts, common issues and the similar challenges as such they are being decided by this common judgment. The facts are borrowed from Writ Petition No. 2396/2006.

Brief Facts :

2. The petitioners are Ship and Forwarding Agents. M/s. Sea Bridge Maritime Agencies Pvt. Ltd. filed IGM No. 867, dated 23rd March, 1988 of motor vessel "JESILENA", The Mumbai Port Trust by their out turn report dated 27th January, 1999 reported short-landing of Item No. 39, 41, 106 and TP 150. The bill of entry was filed by the Customs House Agent/importer. Major part of the cargo was covered under Duty Entitlement Exemption Certificate (DEEC) Scheme as it was brought for home consumption and only cess was liable to be paid. Accordingly, the amount of cess was paid on the short landed cargo. Since cargo was short landed, a show cause notice was issued to the person in-charge of the

conveyance i.e. M/s. Sea Bridge Maritime Agencies Pvt. Ltd. to explain the short landing in view of the judgment of this Court in the case of Shaw Wallace & Co. Ltd. v. Assistant Collector of Customs, 1986 (25) E.L.T. 948 (Bom.); wherein this Court has set out certain guidelines for the benefit of the Customs authorities, Bombay Port Trust authorities and the persons-in-charge of the conveyance and their agents for smooth exercise of functions under the provisions of the Customs Act as well as to ensure that no injustice is caused to any of the authorities or persons in-charge of the conveyance, the relevant part of which reads as under :

"(B)(b) L.I.C. Container (Less Container Load)

(1) At the time of unloading of the L.C.L. container, if the seals are intact and again at the time of de-stuffing of the container, the seals are found intact, then the carrier should be responsible to account for the difference between the manifested quantity and the de-stuffing tally."

In conformity with the above guideline, a show cause notice dated 16th February, 1999 was issued to M/s. Sea Bridge Maritime Agencies Pvt. Ltd. The said noticee vide their letter dated 21st May, 2002 filed their reply and submitted that container for Item No. 106 was manifested as FCL and landed with seal intact condition as such they as Carriers are not liable for penalty for any short landing. During the course of adjudication, they also submitted written submission on 20th June, 2002 and disowned their liability. The personal hearing was granted by the adjudicating authority to the noticee. The present petitioner also took part in the adjudicating proceeding for the reasons best known to it. The adjudicating authority after having heard did not find favour with the submissions made by the noticee and did not accept the contention with respect to the container covered by Item No. 39 that it was consolidated FCL Container since it was shown as LCL Container in the extract of IGM. Similar finding was recorded in respect of Item No. 41. So far as penal actions vis-?-vis Item Nos. TP150 and 106 are concerned, the proceedings were dropped. In the result, the penalty was imposed vis-?-vis Item No. 39 in the sum of Rs. 1,128 and Item No. 41 in the sum of Rs. 5,93,274/ under Section 116 of the Customs Act. The copy of the said adjudication order was forwarded to M/s. Sea Bridge Maritime Agencies Pvt. Ltd. only.

3. The factual matrix further reveal that the noticee M/s. Sea Bridge Maritime Agencies Pvt. Ltd. did not file any appeal against the said adverse order, with the result, the order became final and conclusive against them. However, the present petitioner M/s. Unimarine Agencies Pvt. Ltd., as cargo agent of the vessel, chose to prefer appeal before the Commissioner of Customs (Appeals) and raised various factual as well as legal contentions including that based on Section 116 of the Customs Act contending that the penalty imposed for short landing of cargo under Section 116 was not sustainable as the goods imported were exempt from duty. However, none of the contentions found favour with the appellate authority. The appellate authority vide its order dated 29th July, 2004 was pleased to reject the appeal.

4. The petitioner, not satisfied with the above order, invoked revisional jurisdiction of the Government of India under Section 129DD of the Customs Act without any success.

5. Being aggrieved by the aforesaid order, the petitioner have invoked writ jurisdiction of this Court under Article 226 of the Constitution of India contending that the impugned orders are in breach of principles of natural justice and that the petitioner being the Cargo agent could not have been held liable to pay penalty under Section 116 of the Customs Act in view of law laid down by this Court in the case of Shaw Wallace & Co. Ltd. (supra). In addition to this, one more challenge was set up to the impugned order contending that no duty was involved since the cargo involved was under exemption scheme as such no penalty under Section 116 of the Customs Act could be imposed since the measure of penalty is the amount of duty chargeable on the goods imported.

6. This Court, prima facie; satisfied with the aforesaid submissions, issued rule. On being noticed, the respondents appeared. Without filing any counter, they tried to support the impugned orders.

7. Ms. Aarti Bhide representing petitioners, Mr. Jetly representing Revenue and Mr. Sriram representing Respondent No. 5 were heard.

Consideration :

8. Having heard rival views, it is not in dispute that so far as the petitioners are concerned, they were never served with the show cause notice by the Assistant Commissioner of Customs. They were never called upon to explain short landings. The show cause notices were issued to M/s. Sea Bridge Maritime Agencies Pvt. Ltd. (Respondent No. 5 in W.P. No. 2396/2006) and M/s. Orient Express Lines Ltd. (in W.P. No. 942/2006). They filed their replies to the show cause notices and contested in the adjudication proceedings and suffered adverse adjudication orders; wherein penalties of Rs. 1,128/ in respect of Item No. 39 and Rs. 5,93,274/ in respect of Item No. 41 were imposed on M/s. Sea Bridge Maritime Agencies Pvt. Ltd. and penalty of Rs. 4,68,871/ was imposed on M/s. Orient Express Lines Ltd. in respect of Item No. 146 under Section 116 of the Customs Act. It appears that the petitioners were ill-advised to file appeals against the orders of adjudication which were not suffered by them but were suffered by noticees i.e. Respondent No. 5 in W.P. No. 2397/2006 and M/s. Orient Express Lines Ltd. in W.P. No. 94/2006. It was expected on the part of first appellate authority as well as [revisionary] authority i.e. Government of India to examine whether the petitioners had any locus to challenge the orders of adjudication; whether appeals filed at their instance were maintainable. None of these aspects was examined either by the appellate authority or the revisional authority. They erroneously confirmed the liability against the petitioners. Even as per the guidelines laid down by this Court in the case of Shaw Wallace & Co. Ltd. (supra) the liability for short landing was that of the Carrier and not of the Cargo Agents, the petitioners herein. The petitioners were never served with the

show cause notice since they were under no liability to account for short landing. The impugned orders are in breach of principles of natural justice.

9. In the above backdrop, we have no alternative but to quash and set aside the impugned orders against the petitioners, passed by the first appellate authority and impugned order of the [revisionary] authority, namely, Commissioner of Customs (Appeals) and the Government of India, Ministry of Finance respectively holding petitioners liable for penalty being erroneous besides being in breach of the natural justice.

10. In the result, both petitions are allowed. Rule is made absolute in terms of this order with no order as to costs.

