

(2002) 08 BOM CK 0128

In the Bombay High Court

Case No : Writ Petition No. 1451 of 1988

G.P. Dave and Sons (Shipping)

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 06-08-2002

Acts Referred:

Customs Act, 1962 — Section 116

Citation : (2002) 4 ALLMR 668 : (2002) 6 BomCR 693 : (2002) 4 BOMLR 832 : (2003) 156 ELT 824 : (2002) 4 MhLj 906

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

Bench : Division Bench

Advocate : D.C. Gomes, for the Appellant; K.R. Chaudhary, for the Respondent

Judgement

J.P. Devadhar, J.—In this petition, the petitioners have challenged the validity of the orders passed by the Customs Authority u/s 116 of the Customs Act, 1962, levying penalty amounting to Rs. 6,51,298.26 on account of the short landing of the cargo.

2. The facts having bearing of the subject matter of the present petition, are as follows :

At the relevant time, the petitioners were the agents of a Foreign Flag Vessel "FUJIHARU MARU". The said vessel arrived at the Port of Kandla in November 1985 to discharge cargo of raw Naphtha consigned to Indian Oil Corporation Limited. As per the bill of lading, the quantity of raw Naphtha loaded at Iraq Port was 4325 m.t. After loading the cargo, independent surveyors had measured the quantity on board the vessel at the load port of Basra, Iraq by Ullages and certified that the quantity on board was only 4201 m.t. The Master of the vessel, therefore, had lodged a formal protest with the Iraqi Government, being the consignor stating therein that the quantity actually received on board the vessel was 4201 m.t. and not 4325 m.t.

3. On arrival of the vessel at the Port of Kandla for discharging the cargo, the

Government licensed surveyors carried out survey by ullages and certified that the quantity on board was 4213.780 m.t. After the discharge operation was completed, tanks of the vessel in which cargo was carried were also inspected by the representatives of the consignees, and all the tanks were certified to be dry and empty.

4. On 10th October, 1974 the Assistant Collector of Customs, Kandla issued a show cause notice alleging that the outturn report disclosed a shortage of 207.350 m.t. and accordingly called upon the petitioners to explain the shortage failing which penalty will be levied as per Section 116 of the Customs Act, 1962. The petitioners replied the said show cause notice by explaining the facts and circumstances resulting in the alleged shortage.

5. By an order dated 25th July, 1975 the Collector of Customs, Central Excise, Ahmedabad levied penalty of Rs. 6,51,298.26 against the petitioners.

6. Being aggrieved by the aforesaid order, the petitioners filed an appeal before the Central Board of Excise and Customs, New Delhi, which was dismissed. Against the said order, the petitioners filed revision application before the Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi. The said application was transferred to the Customs, Excise and Gold (Control) Appellate Tribunal, Western Regional Bench, Mumbai to be heard and disposed of as an appeal. After hearing both the parties, by a judgment and order dated 29th October, 1986 the Member (Judicial) of the Tribunal allowed the Appeal and held that the quantity in respect of penalty leviable is only 67.970 m.t. and not 207.350 m.t. as held by the first respondent. However, the learned Member (Technical) differed with the learned Member (Judicial) and held that the quantity not accounted for by the petitioners is 97.242 m.t. Since, there was difference of opinion between the two learned Members, the matter was referred to the President of the Tribunal to determine the point as to whether the shortage in the quantity unloaded at Kandla should be treated as 67.970 m.t. as held by the learned Member (Judicial) or as 97.242 m.t. as held by the learned Member (Technical). The third Member (Technical) to whom the matter was assigned by the President of the Tribunal agreed with the learned Member (Technical) that quantity of shortage was 97.242 m.t. by holding that the outturn report is more authentic than the ullage report for the purpose of levying penalty u/s 116 of the Customs Act. Thus, by the final order dated 30th July, 1987 the appeal of the petitioners was decided on the basis of the majority view and the penalty was upheld on the basis outturn report. Being aggrieved by the aforesaid order, the present petition has been filed.

7. We have heard the Counsel on both sides and perused the records placed before us. The basic issue raised in this petition is as to whether the shortage of cargo discharged from the vessel is to be determined on the basis of ullage measurement or on the basis of shore tank measurement. In the instant case, both the authorities below and the majority decision of the Tribunal have proceeded on the footing that the shore tank measurement is more scientific and

shore tank measurement should be taken as quantity discharged by the vessel and not the quantity determined by the ullage report. The Tribunal has held that the decision of this Court in the case of Shaw Wallace and Co. Ltd. v. Assistant Collector of Customs reported in 1986(25) E.L.T. 968 is not applicable. In our opinion, the Tribunal has wrongly construed the ratio laid down by this Court in the case of Shaw Wallace and Co. Ltd. (supra). In that case, it was held that ullage measurement is a scientific measurement which is taken before the discharge of the cargo. All these years, although the cargo was discharged at the port of destination in the presence of the Customs Authorities and the ullage measurement was taken in their presence, the Customs Authorities were disregarding the said measurement on the ground that the same is not certified by the Customs Authorities. Under these circumstances, this Court in the case of Shaw Wallace and Co. (supra) made it mandatory for the Customs Authorities to sign the Ullage report so that no such grievance of the Customs Authorities can be entertained. The said decision of this Court in the case of Shaw Wallace and Co. Ltd. (supra) has been subsequently followed in the cases of J.M. Baxi and Co. Vs. Deputy Collector of Customs and Others, Varun Shipping Co. Ltd. v. Dy. Collector of Customs and Ors., in Writ Petition No. 3042 of 1987 and South India Corporation (Agencies) Ltd. v. The Additional Collector of Customs in Writ Petition No. 1644 of 1988 all decided on 6-8-2002, wherein it has been held that ullage measurement is a scientific measurement and the same is to be taken into account for determining the quantity available for discharge from the vessel. It has been held that the measurement taken at the shore tank of the consignee which is several Kilometres away from the Port of discharge, cannot be taken into account for the purpose of penalising the ship owners/agents u/s 116 of the Customs Act. In the light of the aforesaid decisions, the orders impugned in the petition levying penalty upon the petitioner based on the shore tank measurement is required to be held to be erroneous. Accordingly, the orders impugned in the petition are quashed and set aside. The Customs Authorities are directed to pass fresh order u/s 116 of the Customs Act, 1962 by taking into account the shortage noticed on the basis of the ullage measurement and not shore tank measurement and after giving personal hearing to the petitioners.

8. The contention of the revenue that this Court has no jurisdiction to decide the matter is also without any merit. As held in the case of J.M. Bakshi and Co. (supra) the appellate order impugned in this petition is passed by CEGAT at Mumbai and since a part of the cause of action has arisen at Mumbai, this Court will have jurisdiction to entertain and dispose of the petition. The decision of the Apex Court in the case of British Airways British Airways Plc. Vs. Union of India and ors, which has been relied upon by the revenue, is distinguishable on facts inasmuch as the issue as to whether ullage measurement or the shore tank measurement should be taken into account for levying penalty u/s 116 of the Customs Act was not an issue before the Apex Court.

9. Rule is accordingly made absolute in terms of prayer Clause (a) of the petition. However, in the facts and circumstances of the case, there will be no

order as to costs.