(2012) 02 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition (LOD) No''s. 104 and 105 of 2012

Great Offshore Ltd. APPELLANT

Vs

Commissioner of Customs (Import), Mumbai RESPONDENT

Date of Decision : 13-02-2012

Acts Referred:

Customs Act, 1962 — Section 110A, 2(22), 30, 46

Citation : (2013) 289 ELT 267

Hon'ble Judges : J.P. Devadhar, J;A.R. Joshi, J

Bench : Division Bench

Advocate : J.J. Bhat with S. Venkateswaran and Ms. S. Priya, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

J.P. Devadhar, J.—These two Writ Petitions are filed to challenge the Public Notice No. 81/2011-12, dated 22-9-2011 as also seizure of the vessel M.V. Sangita & M.V. Ocean Garnet belonging to the petitioners under a seizure panchanama dated 12-1-2012 and 20-12-2011 respectively. Both the Writ Petitions are admitted and taken up for final hearing with the consent of both the parties.

2. Both the petitioners companies are engaged in the business of providing marine services. Great offshore Ltd. was originally a offshore division of Great Eastern Shipping Co. Ltd. which Offshore Division was demerged from the parent company on 16-10-2006 pursuant to a Scheme of arrangement sanctioned by the Bombay High Court. As per the scheme of arrangement all the assets of the offshore division of the then parent company including the vessel M.V. Sangita came to vest in Great Offshore Ltd. M/s. Samson Maritime Ltd. the second petitioner, was formed on 27-7-1985 by the amalgamation of ''Goa Towage & Salvage Co. Pvt. Ltd.'' and ''Underwater Services Co. Pvt. Ltd.'' along with all assets including the vessel ''Ocean Garnet''.

3. ''M.V. Ocean Garnet'' was initially imported on 6-11-1997 and ''M.V. Sangita'' was initially imported in December, 1999. These vessels being ''goods'' covered u/s 2(22) of the Customs Act, 1962 (''the 1962 Act'' for short), it was obligatory to

declare these vessels as goods in the ''Import General Manifest'' (''IGM'' for short) u/s 30 of the 1962 Act and file ''Bill of Entry for home consumption'' (''B/E'' for short) u/s 46 of the 1962 Act for clearance.

4. However, in view of the fact that the customs duty on the ocean going vessels were wholly exempt by Notification No. 262 of 1958, dated 11-10-1958 as replaced by Notification No. 133 of 1987, dated 19-3-1987 and in view of the fact that the Import-Manifest (Vessels) Regulations, 1971 required filing of the Import General Manifest in respect of the goods carried in the vessel, the petitioners neither filed the B/E nor the vessel was declared as goods in the IGM. It is not in dispute that after importation, the vessels in question have been regularly taken out of the country and brought back with requisite permission from the customs authorities.

5. From the judgment of the Apex Court in the case of Chowgule and Co. Pvt. Ltd. Vs. Union of India (UOI) and Others, it is seen that at the material time, it was the consistent practice followed by the customs authorities not to insist on filing of B/E for clearance of the imported Ocean going vessels as they were covered by the Exemption Notification. Accordingly, hundreds of Ocean going vessels were imported into India by various shipowners in respect of which no B/E were filed.

6. However, in spite of the consistent practice, it appears that in some cases, the Customs authorities were insisting on filing of B/E on importation of the ocean going vessels even though no customs duty was payable on such vessels. In the case of Union of India (UOI) and Another Vs. V.M. Salgaoncar and Bros. (P) Ltd. and Others, , the dispute was whether the customs authorities were justified in holding that on importation of transhippers the importer was liable to file B/E and whether the transhippers are ocean going vessels exempt from payment of customs under the then prevailing exemption notification. The Apex Court accepted the contention of the petitioners therein and held that the transhippers were ocean going vessels covered by the Exemption Notification and disposed of the appeal without recording any specific finding as to whether it was mandatory to file B/E on importation of the ocean going vessels.

7. In the case of 1999 (66) ECC 497 the dispute was, whether on initial importation of the "oil rig", the importer was liable to file B/E and failure to do so would render the vessel liable for confiscation. The Tribunal held that the rig imported in that case was liable for confiscation, because, firstly, no B/E was filed on initial importation of the rig and secondly, the rig was, moved out of the customs area without proper permission. The Tribunal while upholding the confiscation, permitted the importer to redeem the rig on payment of fine in lieu of confiscation in addition to any duty or charges payable in respect thereof. The said decision of the Tribunal has been upheld by the Apex Court as reported in 2005 (179) E.L.T. A39 (S.C).

8. From the aforesaid decisions, it is clear that under the provisions of the 1962

Act filing of B/E in respect of the goods which include vessels is mandatory even if the customs duty payable on such goods is wholly exempt. However, it appears that prior to the withdrawal of the exemption in the year 2001, the consistent practice followed by the Customs authorities was not to insist on filing of B/E in respect of Ocean going vessels in view of the total exemption.

9. The question, therefore, to be considered is, in respect of the ocean going vessels imported into India prior to 2001 where no B/E is filed, whether the Customs authorities are justified in directing the importers to file B/E at this belated stage and if so, in view of the withdrawal of the Exemption Notification in the year 2000, whether the importers can be saddled with the duty liability in respect of those ocean going vessels imported prior to 2001?

10. In the present case, admittedly the two vessels in question were imported prior to 2001 without filing. In the year, 2011, that is, after more than a decade since the Customs authorities threatened to take action for not filing the B/E, the Indian National Shipowners Association made representation to the Central Board of Excise & Customs on 12-10-2011 to take a uniform policy decision in the matter. The petitioner had also filed a Writ Petition in the Delhi High Court seeking a direction to the Customs authorities to decide the issue by appointing a common adjudicating authority. By an order dated 13-5-2011 [Great Offshore Ltd. Vs. Chairman, Central Board of Excise and Customs,], the Delhi High Court disposed of that Writ Petition with a direction to the Customs authorities to decide the representation regarding the appointment of a common adjudicating authority in respect of all the vessels owned by the petitioners, within six weeks with liberty to the petitioners to revive the Writ Petition, if the order is adverse to them.

11. Admittedly, no order has been passed on the representation made regarding the appointment of a common adjudication authority. Instead, the vessels in question have been seized on 12-1-2012 and 20-12-2011 respectively on the ground that the said vessels have been imported without filing B/E for home consumption and in spite of the public notices issued from time to time, the petitioners have not taken any step in that behalf. Challenging the public notice as also the seizure action, the present petitioners are filed.

12. Mr. Bhat and Mr. M. Venkateshwaran, learned Senior Advocates appearing on behalf of the petitioners submitted that in the present case, the vessels in question as also other vessels were imported more than a decade ago for the purpose of using the said vessels as oceangoing vessels. Since the customs duty on the ocean going vessels were exempted, the customs authorities had not insisted on filing Bills of entry on importation of those vessels. As the genuine belief formed by the petitioners as also the Customs authorities at the relevant time is found to be incorrect, the petitioners are now ready and willing to file B/E in respect of those vessels, however the Customs authorities cannot seek to recover customs duty on those vessels on the ground that the exemption on ocean going vessels are not available on those vessels on the date of the filing of

B/E. He submitted that at the stage of initial import as also at every time the said vessels were taken out or brought back into India as a ocean going vessel, requisite permissions have been obtained from the Customs authorities and, therefore, at this belated stage the Customs authorities are neither justified in seizing the vessels nor justified in demanding the duty on those vessels.

13. Mr. Jetly, learned counsel appearing on behalf of the revenue, on the other hand, submitted that at no stage the petitioners had declared the vessels in question as goods and since the vessels were declared as ''conveyance'', the customs authorities were misled in the matter. Moreover, in spite of the public notices issued from time to time, the petitioners have failed and neglected to file the B/E and, therefore, the Customs authorities were justified in seizing the vehicles in question.

14. Since the seized vessels could be released provisionally subject to terms u/s 110A of the 1962 Act, we had directed the Customs authorities to consider release of the seized vessels on provisional basis. Accordingly, by two orders-in-original both dated 9-2-2012, the Commissioner of Customs has permitted provisional release of the vessels subject to:

(a) filing of B/E for home consumption of the vessel with payment of duty as quantified therein.

(b) Bank guarantee of 10% of the assessable value of the goods.

(c) bond of 100% of the assessable value of the goods.

(d) Unconditional undertaking not to dispute the identity of the goods seized in the proceedings or any other proceedings that may be initiated by the department and not to remove or sail out the vessel from Indian territorial waters without specific permission of authorities of Customs department.

The petitions have been amended to challenge the above orders passed by the Customs authorities for provisional release of the seized vessels.

15. The grievance of the petitioners against the provisional release order is restricted to the demand for payment of duty and submission of bank guarantee.

16. In our opinion, in the facts of the present case, the demand for duty even before adjudication is unwarranted. The fact that at the time of initial import as also at every time the vessels were taken out and brought back to India, the petitioners have complied with all the Customs formalities save and except the filing of the B/E at the time of initial import. It is also not in dispute that at the relevant time the Customs authorities were also under the belief that it is not necessary to file B/E, where there is total exemption.

17. Though the Exemption Notification issued on 11-10-1958 was replaced by the Exemption Notification issued in the year 1987, it is not in dispute that ocean-going vessels were exempt from payment of customs duty till 2000. No doubt that the Notification issued in 1987 is restricted to the goods specified in sub-

heads of Chapter 89 of the Customs Tariff Act, however, the fact remains that even under the 1987 Notification, exemption on ocean going vessels continued till 2000. Since the seized vessels were imported prior to 2000, prima facie, it appears that the customs duty on the said vessels were not payable. If the duty was not payable on the date of import and Customs authorities have permitted user of the vessels all these years as imported goods, in our opinion, the customs authorities are not justified in abruptly seizing the vessels in question.

18. In the case of SEAMEC Limited v. Union of India being Writ Petition (L) No. 2921 of 2011, decided on 11-1-2012, this Court was called upon to consider similar provisional release order passed by the Customs authorities. In that case also, no B/E was filed when the vessel in question therein was initially imported in the year 1988. The said vessel was sent out of the territorial waters for the purposes of repairs in the year 2011. On its return after repairs, the vessel was seized. For the provisional release of the vessel, the custom authorities demanded duty on the total value of the vessel i.e. original value of the vessel as also the value on account of modifications carried out. Challenging the aforesaid order, the above Writ Petition was filed.

19. The argument of the petitioners therein before this Court was that no duty was payable on the component representing the value of the vessel, because when the vessel was originally imported it was exempt from payment of duty. Accepting the contention of the assessee therein, this Court held that the revenue would not be justified in including the value of the vessel for the purpose of provisional duty demand. Similarly this Court held that no bank guarantee be furnished on the amount representing the value of the vessel.

20. Even in the present case, in our opinion, the revenue is not justified in demanding the duty for provisional release of the vessels when, prima facie, it is not in dispute that on the date of initial import of these ocean going vessels, there was total exemption from payment of duty.

21. The grievance of the revenue is that the provisions of law must prevail and it is immaterial as to what was the belief formed by the Customs authorities. Since the issue is yet to be adjudicated and the representation made by the Association is still pending consideration by the Board, in our opinion, the interest of justice would be met by passing the following order:-

(a) The petitioners shall file a B/E for home clearance of each of the vessels in question without payment of any duty.

(b) Submit a Bank Guarantee for Rs. 10 lakhs each in each of the Writ Petitions.

(c) Submit a Bond for 100% of the assessable value of each of the vessels.

(d) Give an unconditional undertaking not to dispute the identity of the goods seized in the proceedings or any other proceedings that may be initiated by the department, and not to remove or sail out the vessel from Indian territorial waters without specific permission of authorities of Customs Department;

22. It is expressly made clear that we have not expressed any opinion on the merits of the case and it would be open to the Customs authorities to investigate the matter and pass appropriate orders in accordance with law, as expeditiously as possible and in any event within a period of six months from today.

23. On compliance of the aforesaid conditions set out hereinabove, the customs authorities shall forthwith release the seized vessels and shall not arrest or take any coercive steps in respect of all other vessels belonging to the petitioners till the adjudication order is passed in respect of the said seized vessels. However, the petitioners are at liberty to file B/E in respect of other vessels imported prior to 2001 in respect of which no B/E was filed.

24. In the meantime, we hope that the C.B.E. & C. would take appropriate decision on the representation made by the Indian National Shipowners Association on 12-10-2011 expeditiously so that the decade old controversy is resolved without any further delay. Both the Writ Petitions are disposed off in the above terms with no order as to costs.

