(2002) 02 CAL CK 0009

In the Calcutta High Court

Case No : C.O. No. 8230 (W) of 1986

Hindustan Lever Limited — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 27-02-2002

Acts Referred:

Customs Act, 1962 — Section 129B, 14(1), 45
Major Port Trusts Act, 1963 — Section 48

Citation : (2002) 3 CALLT 264 : (2002) 3 CHN 381 : (2003) 90 ECC 885 : (2002) 142 ELT 33 : (2002) 255 ITR 140

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Tapas Banerjee, Arijit Banerjee, Ananda Sen, Chanchal Saha and S.R. Saha, for the Appellant; N.C. Roy Chowdhury and Mitra Banerjee, Counsels, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Ashim Kumar Banerjee, J. - Short question involved in this writ petition is whether the demurrage paid by the consignee for delayed unloading can attract customs duty in accordance with the provisions of Customs Act, 1962.

2. The writ petitioner imported a consignment from abroad by M.V. Amastasi vide bill of lading appearing at pages 25-27 of the writ petition. The said vessel arrived at Calcutta. However, there had been delay in discharging the cargo at the port for which the writ petitioner had to pay demurrage to the Port Trust Authority. The customs authority, while assessing the duty, included the demurrage charged by the Port Trust Authority and paid by the writ petitioner. According to the customs department the demurrage was a part of the freight and was liable to be paid as additional value of the goods. Since the value of the goods attracted duty the writ petitioner was liable to pay duty in accordance with the assessment made by the authority.

3. Dr. Tapas Banerjee, learned Counsel appearing for the writ petitioner,

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submitted that the duty within the meaning of the Customs Act, 1962 includes freight. However, the demurrage is not included therein. According to Dr. Banerjee since goods were landed at the Calcutta Port the same attracted duty on the value of the goods and the freight, delay in effecting the actual delivery by unloading from the ship was really an act done within the port premises. Since there had been delay in unloading the port trust authorities were entitled to charge demurrage because of detaining the ship in its berth or using the port premises for unloading beyond the scheduled period. The same could not be included in the value of the goods for the purpose of assessment of customs duty. In support of his contention Dr. Banerjee cited three decisions reported in (i) 2000 Volume 122, Excise Law Times, Page 615; (ii) 2001 Volume 131. Eexcise Law Times, Page 207; (iii) 2001 Volume 133, Excise Law Times, Page 526.

4. In the last case cited by Dr. Banerjee the Apex Court recorded the submission of the learned Counsel appearing for the Customs Authority to the extent that the demurrage paid to the Port Trust Authority could not be included in the value of the goods for the purpose of assessing the customs duty. On the basis of such submission the Apex Court directed the Customs Authority to assess the value of the goods for the purpose of duty without taking into consideration the demurrage paid to the port authorities. Dr. Banerjee, relying on the said Apex Court decision submitted that since the learned Counsel for the customs authorities appearing before the Apex Court contended that the assessment of the customs duty was wrong by taking into consideration the demurrage paid to the Port Trust Authority the department was not entitled to take a contrary view and argue contrary to what they had said before the Apex Court. Dr. Banerjee further argued that in the other two cases before the Tribunal referred to supra this issue had now been res Integra and there was no reason why I should make a departure from the same.

5. Lastly he contended that following the aforesaid three decisions this Court should allow the writ petition by directing the customs authority to reassess the consignment for the purpose of duty and make refund of the additional duty, if any, paid by the writ petitioner on protest.

6. Mr. N.C. Roy Chowdhury, learned Counsel appearing for the customs department, submitted that the decision before the Apex Court was made on concession and could not be relied as precedence- He further submitted that such submission made by the learned Counsel before the Apex Court was not correct.

7. Mr. Roy Chowdhury submitted that the submission made by the Counsel for the revenue did not lay down the law as in that view of such concession the Apex Court did not go into that question as to whether the demurrage could be included in the value of the consignment for the purpose of assessment of customs duty. Mr. Roy Chowdhury further submitted thai the wrong submission on question of law made by the Counsel had no binding effect on the partv for whom the said Counsel was appearing. In support of such contention Mr. Roy

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Chowdhury relied upon the case of Uptron India Limited Vs. Shammi Bhan and Another, Lastly Mr. Roy Chowdhury contended that the point of demurrage is still pending for decision by the Apex Court in the case of 2001 (130) ELT 254

8. It appears from the said order placed by Mr. Roy Chowdhury that the Apex Court by an order dated 8th May, 2001 admitted the appeals. However, the application for stay was dismissed. It is, however, not clear from the said order whether the issue involved therein is identical with the issue involved herein.

9. Value of the goods for the purpose of assessment of Customs Duty has been defined u/s 14(1) of the Customs Act, 1962. According to Section 14(1) of the Customs Act value of the goods means price at which such goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation. When the goods are offered for sale at the place of importation it includes freight charges and as such the freight is included in the value of the said goods. Demurrage is an eventuality which causes not due to importation or exportation of the goods. The goods are imported as and when it arrives at the port. Unloading of such consignment is an event consequential to making of effective delivery. If there is any delay at the time of unloading for any reason the consignee will have to pay demurrage charges to the port authority in view of the fact that the berth is unnecessary blocked because of delay in unloading. This is an eventuality which has nothing to do with regard to importation of the goods for the purpose of assessment pf customs duty. Customs duty is charged on the basis of the value described in the bill of lading. If there is any under-invoicing made, the authority is entitled to take appropriate assessment to find the actual value. In no stretch of imagination the demurrage can be included in the value of the goods for the purpose of assessment of customs duty u/s 14(1) of the Customs Act, 1962 or any other provision of the said Act.

10. Let me now deal with the submission of Mr. Roy Chowdhury on the question of "concession" made by the Revenue Counsel before the Apex Court. Para 6 of the Apex Court judgment is relevant herein and is quoted below :-

"Thus, it is seen that the Appellate Commissioner and the Tribunal had divergent approaches vis-a-vis the wharfage charges and the stock losses. As regards demurrage charges, the learned Counsel for the revenue has fairly stated that they cannot in any case be included in the assessable value. Therefore, we have not referred to the findings to the Appellate Authorities in this regard."

11. In my view, concession made through Counsel on facts or on any relevant claim by any of the parties in a litigation is something on which the Court does not decide the issue as one party accepts the view of the other by way of concession to the said extent. On the abstract principle of law if a submission is made by a Counsel which might go against his client it cannot be termed as "concession". Every Counsel has a duty towards the Court. It is true that a Counsel is to place his client''s case before the Court of law from the angle that litigant wants to place the problem before the Court of law. At the same time the

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Counsel has a duty towards the Court. On an abstract proposition if an interpretation is made by a Counsel it is expected that interpretation would be logical and any prudent man would come to such conclusion. If that submission is made by any Counsel despite the fact that such interpretation goes against his client it cannot be termed as "concession". As has been recorded by the Apex Court in the instant case that the Counsel for the revenue "has fairly stated" that demurrage charges could not be included in the assessable value such submission has lessened the burden on the part of the Apex Court to give a decision in that regard. I wish to emphasize on the said Apex Court judgment particularly the word "fairly". This word had been used by the Apex Court as the Apex Court was satisfied with such submission of the Counsel. Hence, I am of the opinion that the said Apex Court judgment is valid and binding upon all including me and in any event cannot be termed as "concession" made by the Revenue Counsel

12. Considering the above, I hold that the demurrage could not be included in the value of the goods for the purpose of assessment of customs duty and as such the assessment made by the Customs Authority in respect of the subject consignment was not in accordance with Customs Act, 1962. The Customs Authority is directed to reassess the consignment in light of the observation made by me herein in accordance with law and after such assessment is done the Customs Authority would refund the excess amount realised from the petitioners for such consignment together with interest at the rate of 6% per annum on and from the date of payment of duty made by the writ petitioner until the amount is refunded to them.

13. Writ petition is disposed of accordingly.

14. There would be no order as to costs.

15. There would be a stay of operation of this judgment and order for a period of fortnight from date.

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