(1986) 07 BOM CK 0024

In the Bombay High Court

Case No : Writ Petitions No''s. 2441 and 461 of 1982

Hong Kong Island Shipping Co. Ltd. — APPELLANT

Vs

Additional Collector of Customs (Preventive) Bombay and others — RESPONDENT

Date of Decision : 23-07-1986

Acts Referred:

Customs Act, 1962 — Section 111, 115, 115(2)

Citation : (1986) 10 ECC 232 : (1986) 26 ELT 35

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

Pendse, J.—The petitioners are a Company incorporated under the laws of Panama and are owners of a motor vessel known as "Lamma Island". The petitioners appointed M/s New India Maritime Agencies Private Limited as the Agents in respect of this vessel. The vessel came to the port of Bombay on February 9, 1982 for loading the export cargo and was ready to sail on February 10, 1982, after the cargo was loaded. The Customs Intelligence Officer attached to Dock Intelligence Unit of Customs Preventive Collectorate, in pursuance of the secret information, boarded the ship and searched the cabins of the crew members. During the search, the cabin of sailor Marcellus Lumenpouw, five brown paper wrapped cartons were found hidden in a cupboard. The sailor produced the keys of the cupboard. Five cartons contained 600 pieces of Sharp ingeniously EL-220 Calculators made in Japan and valued at Rs. 1,80,000/- local price. The calculators were not declared by the crew member, in the private property declaration form, as required under the provisions of the Customs Act. The calculators were seized by the Customs Officer under panchnama. The customs authorities also seized the vessel under the belief that the same was used in carriage and transportation of smuggled goods and rendered liable for confiscation u/s 115 of the Customs Act. The vessel was released on bond guarantee executed on behalf of the petitioners and the bond, inter-alia, contained a clause that the obliger shall pay the fine and/or other incidental charges imposed and/or due from them or any crew member under the order of adjudication passed by the Assistant Collector of Customs in the proceedings to be adopted.

2. The petitioners filed Writ Petition No. 461 of 1982 on March 5, 1982 complaining that the Customs authorities were not justified in compelling the petitioners to execute a bond containing a clause undertaking the liability to pay fine or penalty imposed on the crew member in the adjudication proceedings.

3. The adjudication proceedings commenced after serving show cause notice to the petitioners and the concerned crew member and the Master of the ship. By an order dated July 31, 1982 passed by the Additional Collector of Customs, 600 calculators were confiscated u/s 111(d) and (f) of the Customs Act. The vessel was confiscated u/s 115 of the Customs Act, but the petitioners were given option to redeem the vessel on payment of fine of Rs. 50,000/-. The Additional Collector imposed personal penalty of Rs. 25,000/- on the crew member from whom 600 calculators were recovered and Rs. 5,000/- on the Captain and Master of the ship. The Additional Collector came to the conclusion that the Master of the Ship was aware and had knowledge that the crew member was smuggling the calculators. The order of adjudicating Officer is under challenge in Writ Petition No. 2441 of 1982 filed under Article 226 of the Constitution of India on October 26, 1982.

4. Shri Venkiteswaran, learned counsel appearing on behalf of the petitioners, while challenging the order of adjudication providing for confiscation of the vessel, submitted that the conclusion reached by the Additional Collector that the sailor smuggled the calculators with the knowledge and connivance of the Master of the ship is not correct. Before examining the submission of the learned counsel, it is necessary to state that neither the crew member, nor the Master had filed any petition to challenge the order of adjudication imposing personal penalty. Sub-section (2) of the Section 115 of the Customs Act prescribes that when any conveyance is used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods, then such conveyance shall be liable to confiscation, unless the owner of the conveyance establishes that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance and that each of them had taken all such precautions against such use. The plain reading of this sub-section makes it clear that the burden is upon the owner of the vessel or the Agent or the Master of the ship to establish that all requisite precautions were taken and inspite of that without the knowledge and connivance, the vessel was used for the purpose of smuggling. The order under challenge states that the calculators were hidden in a cupboard in the cabin of the crew member and were wrapped in brown paper cartons. The Master of the ship deposed before the adjudicating authority that he had checked the cupboard but did not notice the smuggled articles. Shri Venkiteswaran is right in his submission that the adjudicating authority did not disbelieve the word of the Captain of the ship but proceeded to

hold that the Master had knowledge of the fact of smuggling on assumptions which are not warranted. The adjudicating authority observed that the Master of the ship is presumed to have knowledge of the Customs law prevailing in this country. It was further observed that the vessel had come from Singapore and it is unlikely that the goods would have come on board without Master''s knowledge, and, in any event, it is unlikely that the discerning master could not detect the goods. It is difficult to proceed on such assumption in an enquiry which is quasi criminal in nature. The adjudicating authorities noticed that the contraband articles were ingeniously concealed and could not be seen by opening the cupboard and if this finding is correct, it is difficult to held that the Captain would have detected it by taking reasonable precaution. There is no material on record to indicate that the Captain had knowledge of the contraband articles and, in my judgment, on the facts and circumstances of the case, it is not possible to conclude that the Captain of the ship had not taken any sufficient precaution to prevent the user of the vessel for the purpose of smuggling. The order passed by the adjudicating authority u/s 115 of the Customs Act confiscating the vessel, therefore, cannot be sustained and that part of the order is required to be set aside.

5. Turning to Writ Petition No. 461 of 1982, Shri Venkiteswaran submits that the Customs authorities are not justified in securing a bond from the ship owners undertaking the liability to pay the fine or penalty imposed or due form any crew member under the orders of adjudication passed by the Assistant Collector of Customs before permitting the vessel to leave Port of Bombay. Shri Venkiteswaran submits that imposition of such undertaking on the ship-owners is not correct. It is not possible to accept the submission of the learned counsel because once the ship leaves the shore, then the Customs authorities would not be able to recover the fine or the penalty imposed on the crew member or the captain or the owner even if it is found during the adjudication proceedings that the contraband articles were brought by the vessel with the knowledge and/or connivance of the Master of the ship or the owner of the vessel. It would be extremely harsh to force the Customs authorities not to secure the bond from the ship owner including the clause whereby undertaking is given to pay the fine which is likely to be imposed on the crew member. Shri Venkiteswaran then submits that in case, in the adjudication proceedings, the authority comes to the conclusion that neither the ship-owner, nor the Master of the ship had connived in the act of smuggling with the crew member or had any knowledge of such act of smuggling, then in that event bond should not be enforced against the ship owners in respect of penalty imposed on the crew member. In my judgment, the submission is correct and it is necessary that the Customs authorities while securing the bond of the ship owners should add rider in the clause whereby the undertaking is secured for payment of fine or penalty to be imposed on any crew members under adjudication proceedings, providing that liability will not be enforced if contraband articles are brought on the ship without knowledge or connivance of Master of ship or owner of ship and inspite of reasonable

precaution taken by them.

Accordingly, rule in Writ Petition No. 2441 of 1982 is partially made absolute and the order of the Additional Collector of Customs confiscating the vessel is set aside. The rest of the order passed by the Additional Collector is upheld. In the circumstances of the case, there will be no order as to costs.

In Writ Petition No. 461 of 1982, no order is required to be passed save and except the directions given hereinabove directing the Customs authorities to add a rider to the clause securing undertaking to pay fine or penalty imposed on the crew member in the adjudication proceedings. Rule is accordingly disposed of without any order as to costs. The Bank guarantee furnished by the petitioners to stand discharged.

