
(1986) 04 DEL CK 0019
In the Delhi High Court
Case No : C.W.C. No. 630/72

India Steamship Co. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-04-1986

Acts Referred:

Citation : (1987) 11 ECC 59 : (1987) 12 ECR 833 : (1989) 42 ELT 543

Hon'ble Judges : N.N. Goswamy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Goswamy, J.—This petition under Article 226 of the Constitution of India is directed against the order dated 19-2-1972 passed by the Central Government whereby the revision filed by the petitioner against the order passed by the Board confirmed the imposition of penalty to the extent of Rs. 45,007.00, was dismissed.

2. The petitioner is a shipping company registered under the Indian Companies Act, 1913 and is carrying on the business of common carriers at sea. The petitioner-company's ship s.s. "Indian Reliance" arrived in Bombay in October, 1963. It was carrying certain packages intended for defense purpose and those packages were unloaded at the Bombay Port. The petitioner-company received a show cause notice No. 1352, dated 13-4-1966 on 15-4-1966 from the Assistant Collector of Customs, Manifest Clearance Department, Bombay in respect of alleged short landing under various items including Items No. G-116, G-117, G-28, G-77, G-151 and G-10. The notice was duly replied and the same resulted into adjudication by the Assistant Collector of Customs. By a short order dated 8-8-1966, the Assistant Collector of Customs imposed a penalty of Rs. 92,307.26 u/s 116 of the Customs Act, 1962 for short landing of the goods covered by the items mentioned above.

3. Dissatisfied with the aforesaid order, the petitioner-company preferred an

appeal before the Central Board of Excise and Customs, New Delhi. Before the hearing of the appeal, the petitioner-company had been able to clarify with the Commandant regarding the clearance of certain items for which the penalty was imposed. As a consequence out-turn report prepared by the Bombay port Trust had also been amended. Considering the amended out-turn report, the Central Board of Excise and Customs partly allowed the appeal and reduced the penalty from Rs. 92,307.26 to Rs. 45007/- and remitted the balance. The petitioner-company preferred a further revision petition to the Central Government. The Central Government kept the revision petition pending for a sufficient time in order to enable the petitioner-company to have the out-turn report further amended by the Port Trust but the said report was not amended and as a consequence the revision petition was dismissed by order dated 19th February, 1972.

4. The case of the petitioner-company in the petition is that according to the practice and bye-laws of the Bombay Port Trust when a ship arrives at Bombay, her agents file with the Customs and the Port Trust, the import manifest. The manifest contains a list of packages which are to be discharged at Bombay. The list gives the individual marks of the packages. When the packages are discharged from the ship, the Port Trust takes a tally thereof through their tally clerks. As soon as a sling containing packages is placed on the wharf, the Port Trust Tally Clerks write down on tally sheets, particulars of the packages discharge. The tally sheets have columns for nothing down the individual marks of packages, the number of packages etc. which are otherwise blank. As a result at the time of taking tally, no reference at all is made to the import manifest. In the present case, following armed conflicts with China and Pakistan in 1962 and 1965 respectively, the Bombay Port Trust and the Customs Authorities, pursuant to some instructions from the Government of India, allowed the Embarkation Commandant to clear defense cargoes unauthorisedly without going through the usual Customs and Port Trust formalities. The Embarkation Commandant, Bombay is the authority concerned in charge of clearance and dispatch of cargoes for defense establishments. The normal Procedure and bye-laws and other provisions of the Bombay Port Trust were not followed. Between the year 1962-65 a large number of consignments of defense goods and stores imported from abroad were cleared by the Embarkation Commandant, Bombay from the Custody of the Bombay Port Trust without proper documentation and customs formalities. Even the tally reports had not been prepared by the Bombay Port Trust. These packages were initially reported by the Bombay Port Trust as short landed in their out-turn reports. Subsequently when the Embarkation Commandant gave details of clearance certain out-turn reports were duly amended wherever possible by the Bombay Trust. In spite of these amendments there were still a large number of package which the Embarkation Commandant could not connect or link up with any particular manifest. The out-turn reports of the Bombay Port Trust, Therefore, continued to show these as short landed. In certain cases, the Commandant had specifically intimated the linking of certain

items but in spite of that the Port Trust Authorities insisted on proper documents from the Commandant which the Commandant was unable to provide and as a result the out-turn reports were not amended. The carriers had, Therefore, to face the penalty imposed on them. Respondents Nos. 1 to 3 were bound by the provisions of Section 116 of the Customs Act, 1962 which is to the following effect :-

"116. Penalty for not accounting for goods. If any goods loaded in a conveyance for importation into India or any goods transshipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant Collector of Customs, the person in-charge of the conveyance shall be liable.

(a) in the case of goods loaded in a conveyance for importation into India or goods transshipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods unloaded or the deficient goods as the case may be had such goods been imported.

(b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods as the case may be, had such goods been exported."

5. Various meetings of high level took place between the shippers, the Collector of Customs, the Embarkation Commandant and the trustees of the Bombay Port Trust wherein efforts were made to resolve the matter. It is not necessary to reproduce the minutes of those meetings and in my opinion it would be sufficient to reproduce the relevant minutes of the last meeting, held on 19th November, 1971 in the Board Room of the Bombay Port Trust. After recording the full facts in the minute, it was mentioned :-

"The Embarkation Commandant say that they have no documents to confirm or deny the receipt of the packages. The Customs are calling upon lines to prove the negative especially something which the other parties involved are unable to prove what they in fact"

"The Embarkation Commandant did his best to link the unconnected packages but a state has more or less been reached when the possibility of further linking appeared remote"

"The process of linking has proved beyond doubt that Lines were not entirely responsible for the shortages reported in the out-turn statement. During the period of two years when the joint exercise of linking was in progress Lines were able to connect 650 packages and they have good grounds to presume that the entire number of 1800 packages had in fact been received by the Embarkation Commandant"

"On enquiry by the Collector of Customs whether there was any scope for further linking, Commandant Burli replied that the efforts had by and large tapered off and he did not entertain any hope of being able to connect any more packages. He continued that the process had not been discontinued but the results were not encouraging. He further stated that since last meeting 198 packages had been linked and the number of unconnected packages now left with him was 963 which included 152 packages without any marks which the BPT maintains have been delivered"

"In fact no convoy notes have been prepared while dispatching to depots as was normally done. The Embarkation Commandant had absolutely no records of the number of packages cleared without any documents and the shortages were arrived at following a process of reconciliation which was attempted after 2/3 years of clearance"

"The Docks Manager also conceded that the Port Trust had not maintained a ship wise and mark wise record of what was delivered to the Embarkation Commandant"

"In view of the aforesaid minutes and other meetings, it was decided by the Central Government to reduce the penalty to the extent of 25%. During the course of arguments another memorandum was placed before me wherein the Government had decided to reduce the penalty by further 25% over and above the 25% already allowed."

6. From the facts aforesaid it is obvious that the respondents have taken the view that once the out-turn report filed by the Port Trust indicates any short landing, it is mandatory to impose the penalty u/s 116 of the Customs Act on the carrier.

7. The petition has been contested by the respondents but no counter-affidavit has been filed by respondents 1 to 3 in spite of the fact that the petition has remained pending in this Court for over 13 years and various opportunities were given to respondents to file their counter-affidavit. Respondent No. 5 i.e. The Port Trust have filed their counter-affidavit. In the said counter-affidavit, it has specifically been admitted that the goods were allowed to be cleared without proper documentation and without preparing the tally reports. It is, however, stated that the Port Trust had no option in the matter inasmuch as orders have been issued by the Government under Rule 6 of the defense of India Rules to allow the Embarkation Commandant to remove the cargo the moment it arrives. In view of that order it was neither possible for the Port Trust nor for the petitioner to resist the removal of cargo by the Embarkation Commandant. From the various meetings mentioned above, it is also clear that no proper documentation was done and the packages were removed immediately on their landing and without there being any tally report. In fact it transpires from the minutes reproduced above that in that 1717 packages initially were not accounted for. Later 650 packages were connected with various vessels and 963

packages out of the same lot are available with the Commandant but the Commandant is unable to link the same with the vessels in the absence of proper marking on the said packages. It has further been admitted that besides these 963 packages, there is a chance of recovering other packages for which the efforts were still being made. These packages were obviously cleared after paying the customs duty and thus I am only concerned with penalty imposed on the petitioner and other carriers.

8. In order to decide the liability of the carriers, it would be useful to refer to Section 45 of the Customs Act, 1962 which was introduced in the Act by way of amendment to Section 85 of the Sea Customs Act. Section 45 is, as follows :-

"Restrictions on custody and removal of imported goods. (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provision of sub-section (1) or under any law for the time being in force, -

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer."

9. The aforesaid section provides that all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption and a complete record of the goods has to be maintained by the said person. The removal can be permitted in accordance with the permission in writing of the proper officer. The proper authority and the proper officer obviously means the Port authority in the circumstances of the present case. It was in fact the responsibility of the Port Authority to maintain proper records and not to allow the removal of the goods except after proper documentation. However, in the circumstances of this case probably it was not possible even for the Port Authority to comply with the provisions of Section 45 of the Act. The Authorities seem to have taken the view that in the absence of goods being accounted for in the out-turn report of the Port Authority it was obligatory u/s 116 of the Act to impose penalty on the carrier. This has been done in spite of the fact that the Commandant had informed that he had been able to tally certain goods but no benefit of the same was given to the carrier in the absence of the amendment of the out-turn report which, according to the Port Authority could not be done unless the proper documents were received from the Commandant. The

Commandant was unable to supply the documents as he stated that he did not have any such document. This approach, in my opinion, is legally incorrect. In *M/s. Hindustan Steel Ltd. v. State of Orissa*, AIR 1970 Supreme Court 243, the Supreme Court was dealing with the question of penalty to be imposed for failure to register as a dealer under the Sales Tax Act. It was observed in Paragraph 7 of the report :-

"But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

10. Relying on the principles laid down in the said case, it is clear that in the present case, the carrier acted bona fide and after the goods landed and were entrusted to the Port Authority they had no hand, particularly, in view of the orders having been issued under the defense of India Rules and it was if, at all, for the Port Authority to prepare the necessary documents and permit the goods to be removed only after the said documents were prepared in accordance with their Rules and bye-laws.

11. For the reasons recorded above, the rule is made absolute and consequently the impugned orders imposing the penalty including the orders in appeal and revision are hereby quashed. In the circumstances, the parties are left to bear their own cost.