

(2007) 11 DEL CK 0223
In the Delhi High Court
Case No : Writ Petition (C) 27 of 1994

J.M. Baxi and Co.

APPELLANT

Vs

S.S. Khosla and Others

RESPONDENT

Date of Decision : 29-11-2007

Acts Referred:

Customs Act, 1962 — Section 116, 129D, 129DD, 25

Citation : (2008) 224 ELT 210

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Shekhar Vyas and N.K. Kantawala, for the Appellant; Sanjay Katyal, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The petitioner claims quashing of an order of the Central Government acting as reviewing authority in terms of Section 129-D of the Customs Act, 1962 dated 20.8.1993.

2. Briefly the facts are that the petitioner, a firm, carrying on business at the port of Kandla at the material times was agent of the vessel M.V. ?Southern Ace? (hereinafter referred to as ?the vessel). It filed a bill of landing for 3,296.801 MTs of Phosphoric Acid, landed at the Port. The vessel could not be berthed at port on account of its size and having regard to draft restrictions. The imported material had to be thus pumped into the shore tanks of the concerned agency namely the importer IFFCO. A certificate was issued on 20.11.1982 by M/s Ericson & Richards as to the quantities. According to this report (hereinafter referred to as ? the Ullage Report?), the quantity ultimately pumped into the shore tanks were 3103 MT. Though the bill of lading or the manifest of the vessel showed 3296.801 MT of phosphoric acid, the bill declared affirmed 3262 MT and ultimately 3103.152 MT was found as the correct figure in the Ullage report.

3. The customs authorities issued a show cause notice calling upon the petitioner

to satisfy it as to why penalty in terms of Section 116 of the Act ought not be imposed for the short landed goods. The proceedings were resisted; eventually an order was made by imposing a penalty of Rs. 4,30,000/- upon the petitioner, on 30.9.1998. This order was appealed against; the Collector of Customs (Appeals) by order dated 1.9.1989 reversed the Adjudicatory order and remitted the matter for fresh consideration, to the adjudicating authority i.e. Deputy Collector of Customs at Kandla. The Deputy Collector confirmed the previous findings regarding penalty of Rs. 4,30,000/- rejecting the Ullage report and holding that only an allowance of 2% could be accepted by way of ocean loss, since that was the permissible limit prescribed by executive instructions. He however noticed the peculiar nature of the goods and the tendency of sludge formation during long voyage.

4. The petitioner appealed to the Collector of Customs (Appeals). The appeal was allowed on 4.12.1991.

5. The appellate order took into consideration technical materials including an Encyclopedia of Chemical Technology and discussed the peculiar nature of phosphoric acid, its manner of treatment and the impurities which lead to sludge formation. It was noticed that the strength of acid (P205) had been indicated. Phosphoric acid was an impure product containing minerals like compounds of iron, calcium and sodium, and there was a tendency to solidify due to precipitation during a long voyage. On considering these, the Appellate Authority concluded that sludge formation was an inherent characteristic of phosphoric acid during storage particularly if it is shipped, without being allowed to settle down for a sufficient period. The Appellate Authority found that the quantity of sludge left on board of the ship and which could not be pumped out due to its sticky nature was imported in the presence of its chief officers by ullage measurement. This quantity of sludge was found on board and was allowed to be carried with permission of the Customs and port authorities.

6. After noticing the above facts and also taking into consideration that the ullage measurement carried by the Surveyors before discharge of the cargo from the vessels, were not taken into account, though that was an important piece of evidence as held by the Bombay High Court, ultimately allowed the appeal of the petitioner in terms of the following findings.

11. Thus, keeping in view the nature of the product, viz., phosphoric Acid, which undergoes a qualitative and quantitative change during its storage in the long voyage, the established shipping practice regarding ullage measurement, and the fact that the suppliers are compensating consignees by issue of credit notes for the shortage in quantity in excess of 0.9%, by treating it as short shipment, and also the fact that the unpumpable quantity of the sludge worked-out by the independent surveyors had been allowed to be over- carried on the board, it is evident that the steamer agents cannot be held responsible for such type of shortages. Thus, the fact of issue of the credit note in the case and the quantity of unpumpable sludge left on board the five vessels, cannot be ignored, which

should be considered while working out the short landings. This quantity of sludge is the required to be allowed over and above the ocean loss allowing of 2%, while working out the quantity of short landings,

12. It is also noticed that the rate of duty taken by the adjudicating authority in the first three cases (Sl. No. 1 to 3) for working out the quantum of penalty as not correct, as the concessional rate of duty charged on the consignments in question, has not been taken into account. Section 116 of Customs Act, 1962 provides that in case of shortage in the quantity unloaded, penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded, had such goods been imported, can be imposed on the person in-charge of the vessel. Thus, the amount of penalty that can be imposed u/s 116 is directly related to the rate of duty livable of the goods in question at the time of importation. In other work if a particular cargo has been cleared on payment of concession rate of duty, the same rates are to be taken for determining the quantum of penalty and not the tariff rate.

12.1 In view of this matter, the adjudicating Authority has clearly erred in adopting the effective rate of duty (70% back 30% A.D. & 8% C.V.D.) instead of concessional rate of 15% duty, while working out the quantum of penalty vide his impugned orders. Accordingly, the penalty imposed vide impugned order, will automatically get reduced on this account alone.

13. It is also pertinent to point-out here that the method plan adopted by the Adjudicating authority in working out the short landed quantity of Phosphoric acid by taking the P₂O₅ content i.e. Anhydric Phosphoric Acid and that too on different concentrations of the acid, is not correct. Likewise, the ocean loss allowance should be allowed on the entire quantity shown in Bill of Lading and not on the P-2 O₅ content worked out. As such, even if the quantities of Phosphoric Acid actually received in consignee's shore tanks are considered to be the quantity of cargo discharged, the short landing should be worked-out with reference to the actual quantity shown in the bill of lading or then subtracting there from the quantity of unpumpable sludge remaining on board the ship. Only thereafter the ocean loan allowance worked out on Bill of lading quantity should be allowed in respect of shortage, if any. Moreover, the rate of duty has on wrongly applied while working out the quantum of penalty u/s 116 ibid. In view of this matter, the first three cases need re-examination both with regard to the quantity of short lading as well as the quantum of penalty.

14. In the case of two appeals of M/s. J.M. Bax & Co., (Sl. No. 4 & 5), it is noticed that the impugned orders have been passed in remand proceedings, on the basis of the earlier order-in- Appeal directing that the ocean loss allowance need not necessarily be 2% in each and every case. However, the demand notices issued earlier have again been confirmed without taking into consideration the various factors peculiar to the commodity in question, particularly, the quantity of unpumpable sludge due to sedimentation of Phosphoric Acid during long storage. Thus, taking into consideration the quantity

of sludge, with the permission of custom, the balance short landed quantity of 2.570 MT and 34.449 MT respectively, in the two cases, is within the permissible ocean loss allowance. In view of this matter, there has been no short landing in respect of these two cases. As such, the two impugned orders are set aside and the two appeals are allowed.

7. The Government of India was apparently moved u/s 129-D of the Customs Act for review of the appellate order dated 25.11.1991. It issued a show cause notice to the petitioner and after considering the materials set aside the appellate order. The relevant part of the discussion of the revisional authority is as follows:

Taking up the second ground first, Government is of the considered view that notification 166/76 is a conditional exemption based on fulfillment of end use condition. The impugned short landed quantities were not utilised for the end-use prescribed in the said notification and, Therefore, the concessional rate of duty prescribed therein cannot be applied for purpose of calculating the quantum of penalty. To that extent the review proposal succeeds.

Regarding the first point relating to sludge formation, following discussions are relevant.

As stated by applicant collector phosphoric acid is not a volatile liquid. Further the quantity delivered (as also loaded) is calculated in terms of concentration of acid (P₂O₅ content). It is also well established by party's own pleading that sludge is formed of impurities, whereby P₂O₅ content would go up (admitted by the learned advocate during hearing). Hence neither evaporation loss nor sludge formation should adversely effect quantity. There may be other factors which may lead to losses during transit such as handling, minor errors in measurement gauges and in temperature and density readings. The respondent company's contention that the sludge is formed as a result of sedimentation of impurities together with some occluded acid is acceptable. It is observed that the 2% ocean allowance which is normally given for losses on that account is sufficient to cover such unavoidable and natural losses. In the circumstances, it would not be correct to allow condensation of the short landing in respect of the sludge over and above the general 2% allowance.

In view of the above discussions, Government hold that there is no reason to allow the amount of sludge over and above the 2% ocean loss allowance. In the result, the review proceedings succeed, the impugned order-in-appeal is set aside and the orders-in-original restored.

8. Learned Counsel for the petitioner contended that the Central Government could not have upset the findings of the Appellate Authority which were based on some reasoning and after consideration of all the relevant materials. It was submitted that the rule of accepting the experts report (in this case the ullage report) has been commended positively in several judgments and has wide acceptance. Learned Counsel relied upon the judgments of the Bombay High Court reported as 1999 (66) ECC 502 J.M. Baxi and Co. Vs. Deputy Collector of

Customs and Others, , Shaw Wallace and Co. Ltd. Vs. Assistant Collector of Customs and others, , G.P. Dave and Sons (Shipping) Vs. Collector of Customs and Others, besides other judgments.

9. Learned Counsel submitted that the revisional authority did not discuss the applicability of any of the judgments even though the desirability of accepting the ullage report to determine the extent of ocean allowance for penalty u/s 116 in such cases, was relevant.

10. Learned Counsel submitted that the second issue decided by the revisional authority i.e. regarding the inapplicability of concessional rate of duty, in case the action against Section 116 was to be sustained was erroneous. It was submitted that even in case of short landings the authorities were duty bound to give the petitioner the benefit of the rate of duty notified u/s 25 of the Customs Act which was 15% whereas what was actually taken into consideration while reckoning the penalty was the amount enacted in the schedule. Learned Counsel relied upon the judgment of the Calcutta High Court in Estate Shipping v. Deputy Collector of Customs Civil Order No. 8696/12 decided on 10.7.1992.

11. Mr. Katyal, learned Counsel for the respondent resisted the petition and submitted that the revisional order impugned in these proceedings was justified in the circumstances. He submitted that at an intervening stage the Collector of Appeals had remanded the matter for re-consideration to the adjudicating authority. Counsel relied on the observations made and during the course of that order and submitted that the Appellate Authority, at that stage had drawn adverse inferences against the petitioner for misreporting the quantity of sludge formation as 159MT whereas what was ultimately found was much more. In these circumstances the order of the adjudicating authority was justified and all the reviewing authority did was to restore it.

12. Learned Counsel further relied upon the decision of Shaw Wallace (supra) to submit that samples for forming the sludge report had to be drawn in the presence of the customs authority. Specific reliance was placed upon guideline 5 in that judgment. It was submitted that such procedure has not been adopted in the present case.

13. Section 116 of the Customs act reads as follows:

Penalty for not accounting for goods.-If any goods loaded in a conveyance for importation into India, or any goods transhipped 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 Commissioner of Customs or Deputy Commissioner 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 transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not 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.

14. It is evident that parliamentary intention was that in case goods are not unloaded at the destination in India or short quantities or deficiency in unloading is not accounted for to the satisfaction of the Assistant Commissioner of Customs/ Deputy Commissioner of Customs, the concerned person in charge of the conveyance would be liable to a penalty not exceeding twice the amount of duty which would be chargeable on the goods are unloaded. It can be seen that is a penal provision and presumptive in that once the opinion is formed that the short delivery is not satisfactorily accounted for, the levy is attracted.

15. The question which arises here is whether the decision of the Central Government to reverse the Appellate order is justified. The Appellate order considered the peculiar characteristics of the goods i.e. phosphoric acid and concluded that it had propensity for sludge formation. It was not disputed that none of the significant characteristics i.e. the real possibility of sludge formation, having regard to the climate and the other variables on account of a long voyage, exist. The reasoning of the adjudicating authority was that allowance only to the extent of 2% was permissible and any sludge formation beyond that was not permissible as there was no authority for him to permit such allowance. The adjudicating authority did not go into the nuances of merits of the acceptance or the veracity of the ullage report. However, the Appellate Authority not only considered the peculiar characteristics of the goods but also the law on the aspect and apparently took into account the judgment of the Bombay High Court. It further noted that there is some material that the ullage measurement was worked out of the in the presence of the shipping officer, consignee and customs as well as port officers and the quantity of sludge was found on board. After a detailed reasoning the Appellate Authority accepted the ullage report taking into consideration the quantity of sludge allowed to be carried on board of the ship with the permission of the customs, the balance short landed quantities were 2.05 MT and 34.449 MT. It was Therefore concluded that these short landed quantities were within the permissible limits.

16. The revisional authority has, as is evident from the relevant part of its findings, merely gone by its opinion that sludge formation beyond 2% of the ocean allowances was not permissible. It did not in any manner adversely comment on the ullage report or the justification for the same. In any event the determination of the Appellate Authority that such a report is appropriate material and it merited consideration, was not upset.

17. The judgments cited on behalf of the petitioner, particularly the Division Bench ruling in Varun Shipping Co. Ltd. Vs. Deputy Collector of Customs and Others, , held that ullage measurements are a scientific method of determining the quantities in such cases and that they should be taken in to consideration for determining actual quantity discharged by the vessels. It was held that the shore tank measurements, drawn on the basis of the quantities available on the shore at a considerable distance from the vessel would not be an accurate method of determining shortage of the discharged cargo. The Division Bench in Varun Shipping (supra) had considered the previous rulings in South India Agencies as well as Shaw Wallace (supra)

18. The above opinion of Bombay High court was re-affirmed in J.M. Baxi (supra). The court after reiterating that the ullage report is a method of measuring short landed goods for purpose of penalty u/s 116, negated the contention that the mere circumstance that such a report was not signed by the customs officers cannot be the basis for its blanket rejection.

19. In view of the above analysis, I am in agreement with the Judgments of the Bombay High Court. The Court is Therefore of the opinion that the reviewing authority erred in upsetting the findings of the Appellate Collector. As regards the contentions of the respondent's counsel that ullage report cannot be relied upon since the customs officials were not present at site, the argument has to be negated in view of the Division Bench decision of the Bombay High Court in J.M. Baxi (supra).

20. In view of the above findings I am of the opinion that this petition is entitled to succeed. Accordingly, the impugned order of the Central Government u/s 129DD of the Customs Act dated 20.8.1993 is hereby quashed. In view of the findings a further direction is issued to the respondents to refund the penalty amount deposited by the petitioner (in compliance with the impugned order) to it within ten weeks from today.

21. Rule made absolute in the above terms. No costs.