(2016) 02 MAD CK 0205

In the Madras High Court

Case No : Writ Appeal No. 2445 of 2011

J.M. Baxi & Co. APPELLANT

Vs

Government of India RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Citation : (2016) 336 ELT 285

Hon'ble Judges : V. Ramasubramanian and N. Kirubakaran, JJ.

Bench : Division Bench

Advocate : K. Bijai Sundar, Advocate, for the Appellant; V. Sundareswaran, Senior Panel Counsel, for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—This appeal arises out of the dismissal of a writ petition filed by a Steamer Agent, challenging the orders of three consecutive authorities eventually imposing a penalty under Section 116(a) read with Section 148(2) of the Customs Act, 1962.

2. Heard Mr. K. Bijai Sundar, learned counsel for the appellant and Mr. V. Sundareswaran, learned senior panel counsel for the respondent-Department.

3. The appellant is a Steamer Agent of the vessel M.V. Hargobind. The vessel in question arrived at the Port of Pondicherry on 17-5-1992, with the manifested quantity of about 6800 MT of Potassium Chloride under 5 Bill of Lading issued by the principals of the appellant. After discharge of the cargo, the vessel sailed on 31-7-1992. As per three draft survey reports dated 10-8-1992, the quantity discharged was 6801 MT.

4. However, on the basis of landing certificate issued on 30-9-1994, the Assistant Collector of Customs issued a show cause notice dated 2-3-1995 alleging that there was short landing of the cargo to the extent of 288.725 MT. The appellant sent a reply on 23-5-1995.

5. Though nothing happened after the appellant sent a reply, the appellant invited trouble for themselves by sending a letter in 1999, asking for an opportunity of personal hearing. The officials woke up from their slumber, granted an opportunity of hearing and thereafter, an order of adjudication was passed on 7-1-2000 by the Joint Commissioner holding that there was short landing and imposing a penalty of Rs. 25,93,000/- upon the appellants under Section 116(a) read with Section 148(2) of the Act.

6. As against the said order, the appellant filed an appeal. The Commissioner (Appeals) allowed the appeal of the appellant and set aside the order of adjudication, by an order dated 23-5-2002.

7. As against the said order of the Commissioner (Appeals), the Department filed appeals before CEGAT on 13-9-2002. Those appeals were not maintainable since the order of the Commissioner (Appeals) was only revisable by the Government, under Section 129BD of the Customs Act, 1962. Therefore, the papers were returned by CEGAT for presentation to the appropriate authority.

8. Therefore, the Revenue filed a revision before the Government, obviously with a delay of about 111 days.

9. By a final order dated 13-7--2004, the Government of India not only condoned the delay, but also allowed the revision of the Revenue on the ground that there was in fact short delivery and that therefore, a penalty was leviable. As a matter of solace for the appellant, the penalty was reduced only to the amount of duty that could have been chargeable on the goods short landed.

10. Aggrieved by the order passed by the Government on the aforesaid revision, the appellant filed a writ petition in W.P. No. 33341 of 2004. This petition was dismissed by the learned Judge by an order dated 19-10-2011, forcing the Steamer Agent to come up with the above writ appeal.

11. Apart from various other grounds, touching upon the method of weighing the quantity of goods discharged by a vessel, Mr. K. Bijai Sundar, learned counsel for the appellant raised three important legal grounds. They are (i) that the Government had no power to condone any delay beyond 90 days and that the provisions of Section 14 of the Limitation Act, 1963, would not apply, (ii) that in any case, the procedure adopted by the Government in condoning the delay and also allowing the appeal by a composite order is not in accordance with law, and (iii) the order of adjudication was passed after eight years of the discharge of the cargo and five years of the issue of show cause notice, which cannot be considered to be reasonable.

12. Insofar as the first issue is concerned, the same is already covered against the appellant by a decision of the Supreme Court in M.P. Steel Corporation v. Commissioner of Central Excise [2015 (319) E.L.T. 373 (S.C.)]. In the said case, the Supreme Court has concluded that Section 14 of the Limitation Act would apply to the proceedings under the Customs Act, 1962. Therefore, the period

during which the Revenue was prosecuting an appeal before a wrong forum, namely CEGAT, should be excluded while computing the period of limitation. Hence, we find the first question of law raised by the appellant to be answered against them.

13-14. Incidental to the first issue, Mr. K. Bijai Sundar, learned counsel for the appellant also raised a contention that the delay in filing the appeal has been condoned without any discussion by the Government. Though it appears to be so from Paragraph 4 of the order of the Government dated 13-7-2004, we do not think that on the said ground, the order can be said to be vitiated. This is in view of the fact that the entire period from 13-9-2002, the date of filing of an appeal before CEGAT up to 11-12-2002, the date on which the Tribunal returned the appeals, should be excluded. Therefore, the fact that the Government did not go into the question of sufficiency of cause for condonation of delay, would not really advance the cause of the appellant.

15. Insofar as the second question of law is concerned, the learned counsel for the appellant is right. It is seen from Paragraph 4 of the order of the Government, the Government condoned the delay and took up the revision itself on the same day and allowed it. It is needless to point out that if an appeal or revision is filed with a delay, a quasi judicial Tribunal would normally consider the question of delay first and it is only after the delay is condoned that the appeal could be taken up for disposal. But, in this case, the Government had passed a composite order. This is not the method of disposal of an appeal.

16. Insofar as the third ground is concerned, the learned counsel for the appellant is right in contending that a delay of about eight years from the date of discharge of the cargo has occurred and a delay of about just less than five years has occurred in passing the order of adjudication on the show cause notice. As we have indicated earlier, the discharge of the cargo took place on 31-7-1992, the show cause notice was issued on 2-3-1995, the reply was sent on 23-5-1995 and the order of adjudication was passed on 7-1-2000.

17. In the order of adjudication dated 7-1-2000, there is nothing to indicate as to what transpired from 23-5-1995 up to 7-1-2000, except for two dates. One is a letter dated 23-10-1999 where the appellant sought an injury to be inflicted upon them voluntarily, reminding the Department of the pendency of the show cause notice. The next date is 4-1-2000 when a personal hearing took place. Therefore, the order of adjudication certainly had not taken place within a reasonable period. Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the facts and circumstances of each case. In cases of this nature, where the weight of the cargo discharged by the vessel of a Steamer Agent is questioned, it is not possible for a Steamer Agent to defend themselves against the show cause notice long after the vessel had sailed. Therefore, the third question of law is also

be answered in favour of the appellant.

18. However, it is contended by Mr. V. Sundareswaran, learned senior panel counsel for the Department that the appellant merely relied upon a draft survey report for an indication of the quantity of cargo discharged. Under Section 116 of the Customs Act, 1962, the person in charge of the conveyance, is liable to account for the goods that are carried in a conveyance. Under Section 148, the Agent appointed by the person in charge of a conveyance, is liable for the fulfilment in respect of the matter in question of all obligations imposed upon such person. One of the obligations imposed upon such a person is to make a true declaration. Therefore, it is contended by the learned senior panel counsel that inasmuch as there was not a true declaration of the quantity of cargo discharged, the appellant being an Agent was obliged to suffer consequences in terms of the provisions.

19. We have carefully considered the above submissions.

20. But, unfortunately, in the case on hand, the Department had missed the bus. The original order of adjudication itself shows that the appellant claimed to have discharged more quantity than what was entrusted to them. But, after arrival, a landing certificate was issued only in 1994 to the effect that there was short delivery. At the time when the landing certificate was issued on 30-9-1994, the vessel had already gone and a period of more than two years had passed and the importer had also cleared the cargo by then. Therefore, the concession granted by the Department to the importer in the form of remission of duty, behind the back of the Steamer Agent, cannot now be taken advantage of by the Department. Therefore, even on merits, we find that the act of Department cannot be accepted.

21. Hence, the writ appeal is allowed, the order of the learned Judge is set aside and the order of the Government passed on revision is also set aside. The order of Commissioner (Appeals) shall stand restored. No costs. Consequently, M.P. No. 1 of 2011 is closed.

