

(1988) 09 CAL CK 0019
In the Calcutta High Court
Case No : Matter No. 1284 of 1986

Mackinnon Mackenzie and Co. Ltd.

APPELLANT

Vs

Collr. of Customs (Appeals)

RESPONDENT

Date of Decision : 28-09-1988

Acts Referred:

Customs Act, 1962 — Section 116

Citation : (1989) 43 ELT 36

Hon'ble Judges : Manoranjan Mallick, J

Bench : Single Bench

Advocate : Roy Mukherjee, for the Appellant; Debal Banerjee, for the Respondent

Judgement

Manoranjan Mallick, J.—This writ petition is directed against the order passed by the Deputy Collector Customs the Respondent No. 2 on 17th September 1985 imposing a penalty of a sum of Rs. 48,621/- for the alleged short-landing of 69.847 metric tons of the inedible bleachable fancy tallow in bulk. The writ petitioner Mackinnon Mackenzie and Co. Ltd. is a Steamer Agent and as agent imported to the Calcutta port through the vessel Botany Trust a consignment of bleachable fancy tallow in bulk.

2. The writ petitioner states as follows:

The bill of lading relating to the said shipment of tallow issued by or on behalf of the shipowner acknowledged arrangement of a quantity "said to be 3044.198 tons of inedible bleachable fancy tallow in bulk". It was further stated in the said bill of lading that the quantity measurement weight of the cargo was unknown to the vessel and the Master. The weight of tallow shipped under the said bill of lading was 3027.997 metric tonnes as will appear from the loading parts Time Sheet issued by the Master of the vessel and countersigned by the shipper. After completion of the loading the said vessel proceeded to port of Calcutta and reached the said port on or about 24th March, 1982 where she was berthed at "C" Netaji Subhas Docks for discharging her cargo. The cargo was pumped out of

the vessel's tanks and was carried by means of flexible hoses supplied by the consignees and poured into the shore tank of Indian Molasses Co. Pvt. Ltd., the respondent No. 3 at Ramnagar. After the tallow having been discharged from the said vessel had been poured into the said shore tank, the measurement of the quantity received in the said shore tank was taken by the petitioner's surveyor and also by the surveyor appointed by the consignees. The result of such measurement taken by the petitioner's surveyor was 2967.314 metric tonnes whereas according to the measurement of the consignee's surveyors it was 2961.931 metric tonnes. It is to be noted that the said shore tank was partially filled with tallow from other sources before tallow from the said vessel was inducted therein. According to the petitioner the difference in the measurement of the liquid cargo taken on board a vessel and in a shore tank wherein the cargo was received after discharge is only too common and results from the practical impossibility of obtaining absolutely accurate measurements of dips, temperature readings and specific gravity of samples taken. The difficulty becomes greater in the case of commodities like tallow the specific gravity of which may vary. A slight difference in dip readings or in the reading of temperature or in the measurement a specific gravity may result in substantial differences in the measurement of weight causing paper shortages, or paper excesses. There were in the instant case additional reasons for the difference in the weight in the said Cargo as measured on board the vessel and as measured inside the shore tank. The condition of the shore tank was such that it was not possible to determine the weight of the said Cargo after it was discharged therein within the reasonable precision. Firstly, the shore tank was partially filled with tallow from a different source before the said cargo was inducted resulting in admixture of tallow from two different sources. Secondly, in endorsements made by the Central Public Works Department in the said shore tank and appearing at the relevant time thereon indicated that its calibration chart lacked reliability.

On or about 22nd September 1984 the petitioner received a show cause notice from the Assistant Collector of customs Manifest Clearance Department (Oil) Calcutta alleging that out of the manifested quantity of 3044.198 metric tonnes of the tallow the said vessel had discharged 2943.910 metric tonnes resulting in a shortage of 100.288 metric tonnes which was 69.40 metric tonnes in excess of the permissible shortage of 1%. By the said notice the petitioner was called upon to explain why penalty u/s 116 of the Customs Act, 1962 should not be imposed upon the petitioner for the alleged shortage. A true copy of the said show cause notice, is annexed as annexure "E".

The petitioner by a letter dated 6th November 1984 replied to the said show cause notice and gave in details the explanation which resulted the apparent shortage but indicated that the alleged shortage did not correctly represent the quantity of tallow discharged from the vessel and that shortage recorded by the measurement was a paper shortage only. But the Deputy Collector of Customs the Respondent No. 2 arbitrarily rejected the petitioner's contention and imposed of penalty of Rs. 48,621 for the alleged short landing of 69.847 metric

tonnes of the said Cargo.

Being aggrieved by and dissatisfied with the said action the petitioner preferred an appeal before the Collector of Customs (Appeal) but by the order dated 1st May 1986 the Respondent No. 1 rejected the said appeal and affirmed the said order of the Respondent No. 2.

It appears from the said appellate order that the Respondent No. 1 did not at all consider the petitioner's contention that the measurement of the cargo made on board the said vessel before the cargo was pumped out was a relevant evidence as to the quantity discharged from the ship and in the circumstances of the instant case was better evidence than the measurement taken after the cargo had been discharged into the shore tank of the Indian Molasses Co. Ltd. The respondent No.1 erroneously held that the shipper's weight inserted in the bill of lading was conclusive as regards the weight of the cargo shipped. It would appear that the Respondent No. 1 not seriously apply his mind to any of the contentions of the petitioner and merely dittoed the decision of the Respondent No. 2. The Respondent No. 1 failed to consider that section 116 of the Customs Act, 1962 is a penal measure and no penalty, could be imposed except on the basis of clear and convincing evidence. The said decision of the Respondent No 1 is clearly visited by misconceptions of law, disregard of relevant evidence and arbitrary findings of the facts.

2. Being aggrieved by the said order of the respondent No. 1 the petitioner moves this court in its writ jurisdiction challenging that the order of both the Respondent Nos. 1 and 2 are arbitrary, illegal and liable to be set aside. The Respondent Nos. 1,2 and 5 contest the writ petition by filing an affidavit-in-opposition through the Deputy Collector of Customs. Customs House Calcutta being the Respondent No. 2. It is contended that correct quantity shipped appeared from the Bill of Lading on the basis of which freight insurance and all other charges were paid and as such the total quantity shipped was 3044.198 metric tonnes and the contention of the petitioner that the weight of the tallow shipped was 3027.997 is not correct. The Respondents do not have any knowledge as to the purported survey report of M/s. Norman Stewart & Co. and make no admission with regard thereof. The Respondents contend that the measurement of the shipped cargo while inside the ship was not reliable for the reasons made in paragraph 9 of the said affidavit-in-opposition. It is contended that the tallow was correctly measured in the shore tank and short landing is of 69.847 metric tonnes being the excess of the permissible shortage of 1% per metric tonnes. The Deputy Collector of customs was justified in imposing a penalty u/s 116 of the Customs Act and the Collector in appeal also did not commit any illegality in affirming that order. It is also contended that the contention raised by the petitioner was considered both by the Deputy Collector of Customs as well as by the Collector of Customs in appeal and the said contentions not being acceptable by both the authorities the same was rejected and the penalty was imposed by the Deputy Collector of Customs and affirmed

by the Collector of Customs in appeal and the present petition is therefore not maintainable.

3. I have carefully considered the contentions raised by Mr. Ajit Ray Mukherjee the learned Advocate appearing for the petitioner and Mr. Debal Banerjee the learned Advocate for the contesting respondents. On behalf of the petitioner the decision of the Calcutta High Court reported in Eastern Law Reports Vol-I page 93 *Scindia Navigation Company Ltd. v. Joint Secretary, Govt of India* has been cited. It has been submitted that Sabyasachi Mukherji J., as his Lordship then was, in a similar proceeding u/s 116 of the Customs Act has observed that in considering as to whether the petitioner has sufficiently explained the short landing it is necessary to consider the whole evidence on record. It has also been observed that the outturn report and manifest are the relevant pieces of evidence and are to be taken in conjunction with other pieces of evidence, such as surveyors report the conduct of the parties, the chemical analysis report and also the fact that there are any other types of goods in the ship. As according to the learned Judge, the respondent authorities proceeded on erroneous view of law and if on such erroneous view of law, a fact finding body comes to a conclusion then the concerned authority commits an error of law. It is apparent on the face of the record and the writ court is therefore justified in interfering with such order. Mr; Ajit Roy Mukherjee urges that both the Deputy Collector of Customs and the Collector of Customs in appeal came to the finding of fact without considering all the relevant evidence. It is also contended that the three survey reports of the tallow discharged in the shore tank indicated that the measurement varied. It is submitted that the quantity measured in shore tank by the Norman Steward & Co. showed 2969.314 metric tons. The measurement by the consignee's surveyor showed the same to be 2961.931 metric tons and that measured by the customs showed it to be 2943.910 metric tons.

4. It is urged by Mr. Roy Mukherjee that difference in the measurement of liquid cargo taken on the vessel and in any shore tank wherein the cargo is received after discharge is only too common resulting from the practical impossibility of obtaining absolutely accurate measurements of dips, temperature readings and specific gravity of samples taken. The difficulty becomes greater in the case of commodities like tallow the specific gravity of which may vary and a slight difference in dip readings or in the reading of temperature of a gravity may result in substantial difference in the measurement of weight causing paper shortages or paper excesses. Moreover, it is urged that there were in the instant case the additional reasons for the difficulties in the weight of the cargo as measured on board the vessel and as measured inside the shore tank and the condition of the shore tank was such that it was not possible to determine the weight of the said cargo after it was discharged therein with reasonable precision.

5. Mr. Roy Mukherjee has given two reasons for the said differences in measurement namely (i) shore tank was partially filled with tallow from different sources before the said cargo was inducted resulting in admixture of tallow from

two different, sources, (ii) the endorsements made by the Central Public Works Department in the said shore tank and appearing at the relevant time thereon indicated that its calibrations chart lacked reliability.

6. It is therefore urged that the Deputy Collector of Customs without considering all these relevant materials mechanically passed the order of penalty u/s 116 of the Customs Act only on the basis of the difference in weight in between the measurement given in the Bill of Lading and the measurement made by the surveyor of the Customs Department in the shore tank. It is submitted that u/s 116 of the Customs Act, 1962 the liability of the Steamer Agent for the shortlanding of goods is penal in nature and it is therefore incumbent upon the Collector to record a finding on considering all the circumstances as to whether the petitioner failed to account for the deficiencies to his satisfaction.

7. I have considered the order passed by the Deputy Collector of Customs and that by Collector of Customs in appeal. The Deputy Collector of Customs does not appear to have given any consideration to all the relevant materials produced before him.

I am of the view that only because the shortlanding was recorded by the surveyor of the customs in the shore tank, the Deputy Collector could not mechanically impose the penalty on the basis of the alleged shortlanding. Mr. Roy Mukherjee submits that the consignee who had taken delivery of the imported tallow never had any grievance against the petitioner for the alleged shortlanding. The shortlanding according to him was not real shortlanding, and nothing but a paper shortlanding, and if the Deputy Collector of Customs could have taken into consideration all the relevant materials on record he could have come to the clear finding that the shortlanding was not real in nature and has been satisfactorily explained. He also submits that if all the reports were taken into consideration and if the Deputy Collector of Customs would also have taken into consideration the points which the petitioner raised before him and the points which the petitioner is raising before this court, namely, the reason why there was a possibility of not having a correct measurement of the tallow in the shore tank as there was tallow from other sources inside the tank when the cargo was discharged therein there is definite scope for considering either that the petitioner explained the shortlanding or that the quantum of penalty to be awarded would be much less than awarded. It is therefore urged that the penalty that has been imposed was nothing but mechanical one and this court in its writ jurisdiction should quash the same and direct the concerned authority to hear the matter again on giving proper opportunity of hearing to the writ petitioner to urge all the points and not to impose the penalty only on the basis of the shortlanding noticed in the surveyor's report of the customs department taking measurement of the tallow inside the shore tank.

8. Mr. Debal Banerjee appearing on behalf of the Respondents has urged that both the Deputy Collector of Customs as well as the Collector of Customs in appeal considered all the submissions of the writ petitioner and their finding

being the findings of the fact having proper basis should not be disturbed by this writ court.

9. However, on considering the impugned orders of the Respondent Nos. 1 and

2 and on considering all the documents annexed before me and on considering the fact" that there were inside the shore tank the tallow from other sources when the cargo was discharged therein, the Deputy Collector of customs in the instant case should not have mechanically awarded the penalty only on the basis of the difference of the measurement in the Bill of lading and that in the report of surveyor of the Customs. It is also a fact that even regarding the measurement of the cargo in the shore tank, there were differences in measurement which is gathered from the report of the customs surveyor and those of the surveyors of the petitioner and of the consignee. Provisions u/s 116 of the Customs Act are penal in nature. From the decision of our High Court referred to me, I am satisfied that all the relevant evidence have to be considered by the customs authority before imposing a penalty u/s 116 and if the customs authorities are found to impose the penalty mechanically only on the basis of the difference in measurement given in the Bill of lading and that in the survey report of the customs then I am of the view regard being had to the facts and circumstances of the case, the order passed by the Respondent Nos. 1 and 2 should be interfered with by this court and the authority concerned should be directed to consider afresh the all contentions raised by the writ petitioner and on considering all the evidence produced before the concerned authority, the concerned authority will be at liberty to pass appropriate order. The writ petition is thus allowed. The impugned orders passed by the Respondent Nos. 1 and 2 are hereby quashed. The Respondent No. 2 being the Deputy Collector of Customs shall again give a personal hearing to the petitioner and considering all the relevant evidence already produced before him by the petitioner and if further produced before him at the time of such hearing decide as to whether the petitioner satisfactorily explained the shortlanding or not and on considering of such evidence the Deputy Collector of Customs shall pass appropriate orders in accordance with law.

There will be no order as to costs