

(1999) 02 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 7538 of 1998

Munna Scrap Traders

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-02-1999

Acts Referred:

Customs Act, 1962 — Section 150, 48

Citation : AIR 1999 Guj 240 : (2000) 69 ECC 60 : (2000) 116 ELT 453

Hon'ble Judges : B.C. Patel, J;A.L. Dave, J

Bench : Division Bench

Advocate : Mihir H. Joshi, for the Appellant; Jayant Patel, for the Respondent

Judgement

B.C. Patel, J.—The petitioner was required to approach this Court under unusual and peculiar circumstances, by invoking the provisions of

Article 226 of the Constitution of India, under following circumstances which are broadly admitted.

2. The petitioner under an agreement dated 20-7-1998, purchased a Liquefied Gas Tanker, ""M. J. Manuel Belgrano"". This vessel was purchased

by the petitioner for the purpose of breaking. Prior thereto, the vessel arrived within the territorial waters of customs at Alang Port. On or about

27-5-1998, the vessel arrived on its own steam on Alang Anchorage. On 28-5-1998, rummaging clearance was granted as nothing objectionable

was found. On 29-5-1998 ""beaching permission was also granted to M/s. Kathiawar Steels. Bill of Entry for home consumption which was for the

purpose of breaking ship was filed by M/s. Kathiawar Steels on 29-5-1995 which was accepted by the concerned authority.

3. From the record, it appears that it is the case of the petitioner and accepted by the respondents that on account of extremely high current, at the

time of beaching activity, the ship broke anchor and started drifting southward. All attempts made by the crew to restart the engine failed as a result

of which, it continued to drift and went out of control. Ultimately, it drifted towards the Bay of Cambay and got grounded in the sea at Tankaria

point. The vessel was badly damaged and, almost broken half and started to sink. It was not possible to make the vessel again float in the water

and, therefore, the members of the crew abandoned the vessel. M/s. Kathiawar Steels informed the Authorities that it was not interested any more

in the vessel and requested to treat the Bill of Entry as cancelled. M/s. Kathiawar Steels also cancelled the transaction with the seller. A note

known as sea protest setting out the aforesaid facts was filed by the master of the vessel on 2-6-1998, stating the vessel abandoned.

4. The ship actually belonged to M/s. Antares Naviera. Beunous Aires who had taken full insurance claim of the said vessel from the insurance

company, viz. Britannia P & I Club which ultimately passed on the vessel to M/s. A1 Mignas General Trading, LLC Dubai and it appears that in

turn, it was sold to the petitioner by the said Dubai party. These facts are not disputed (para 2.2 of the affidavit in reply).

5. It appears that the petitioner purchased the vessel on "as is where is" basis and also paid the amount to the seller and to show that the

documents were submitted before the customs authorities along with Bill of Entry. We are not referring to pilferage as referred to in para 2.6 and

2.7 but suffice it to say that, the vessel was lying at the place known as Danda opposite Devjagan Light House situated in the vicinity of Magdulla

port at a distance of 3 to 4 kms. Ghogha customs house. The vessel bent to the extent of 75 to 80 degree.

6. On 10-9-1998, after hearing the Counsel, this Court (coram : C. K. Thakker and A. M. Kapadia, JJ.) passed the following order :

In the facts and circumstances of the case, without prejudice to the rights and contentions of the parties, as the vessel has started sinking,

permission to break the vessel on site under the supervision of customs authorities and to remove the scarp and dismantled pieces and store it

under the supervision of customs authorities at Ghogha port is granted. It is, however, directed that no clearance be made without prior permission

of customs authorities at Ghogha. The petitioner will not raise any issue disputing dutiability, of the vessel and competence of the customs

authority.

7. The above order is passed in view of the fact that the vessel has started sinking and if it sinks, public interest will be adversely affected inasmuch

as petitioner as also the customs authorities will suffer.

8. Notice returnable on 21-9-1998. Mr. Jayant Patel, learned Counsel waives service on behalf of respondent No. I. Direct service to rest is

permitted.

9. The Court pointed out that the vessel has started sinking and if it sinks, public interest will be adversely affected inasmuch as the petitioner as

also the customs authorities will suffer.

10. On behalf of the respondents, affidavits are filed. Mr. Patel, learned Counsel for the Union of India submitted that the seller has resold the

goods in Indian territory which is contrary to the provisions of the Customs Act and as M/s. Kathiawar Steels, the original importer relinquished all

the rights over the vessel, the rights vest in the Central Government and, therefore, the Central Government being the owner, there is no question of

resale.

11. It is further mentioned in the affidavit-in-reply that the foreign seller has got his full claim from the insurance company; in the affidavit, there is a

reference in para 2.1 to MOA entered into between M/s. Kathiawar Steels and M/s. Eckhardt Marine GNMH, Germany. As per clause 18, the

said vessel was to be delivered on "as is where is" basis at safe anchorage at Alang port. Mr. Patel submitted that as per clause 37 of the said

agreement, the title of the vessel has passed after delivery of the vessel. In the affidavit, the agreement is referred to but the same is not produced

on record. However, Mr. Patel has read clause 37 which reads as under :

The title shall pass after delivery" of the vessel and letter of credit released to seller subject to seller fulfilling their obligation"".

12. M/s. Kathiawar Steels produced before respondents bill of entry and other relevant documents. Respondent referred in the affidavit an

agreement executed by and between the owner of the vessel and M/s. Kathiawar Steels. Whether that was an agreement to sell or not is the

crucial question. That document being not produced before the Court, though reliance is placed on certain clauses of the agreement, the only

inference that can be drawn is that it was merely an agreement to sell. There is clear distinction between "sale" and "agreement to sell" both under the common law and statute law. A sale can be constituted where there has been an agreement, express or implied, relating to goods, to be completed by passing of title therein. Before a sale comes into existence, there has to be a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. Such a contract may either be absolute or conditional where under the contract of sale, the property in goods is passed immediately the contract is called sale. However, if the contract contemplates that the property in goods shall pass on a future date or on happening of some contingency or on fulfilling certain conditions, it would become a sale when the future contingency happens or the conditions are fulfilled or on the date so specified. Till then, the contract of sale is designated as an agreement to sell. It was, therefore, necessary to produce the document before the Court if at all the respondents wanted to establish that there was a sale between the owner of the vessel and M/s. Kathiawar Steels. As pointed out earlier, the document or copy of the document is in the custody of the respondent and though certain clauses are referred to in the affidavit, the document is not produced, and, therefore, it would be just and proper to draw an inference that the document was nothing but an agreement to sell.

13. Clause 18 refers to "at safe anchorage at Alang Port". As explained in Random House Dictionary of English Language, Anchor is any of various devices for dropping by a chain, cable or rope to the bottom of a body of vessel to prevent or restrict the motion of a vessel or other floating object. Thus, the act of anchorage would be complete if by any device vessel is prevented from making any motion or is restricted and not allowed to move. From the facts it is clear that there was no anchorage. Vessel while anchoring, drifted on account of high water current. Therefore, it cannot be said that there was safe anchorage at Alang Port as referred in clause 18 of the agreement. We are of the view that as the clause No. 18 contemplates "at safe anchorage" at Alang Port and that would not necessarily mean the arrival of the vessel at the customs water but would mean safe anchorage at Alang Port. The intention clearly indicates that the act must be completed to such an extent that the vessel is

anchored so as not to move from that place. If the condition of safe anchorage at Alang Port is not fulfilled, it would not mean that the vessel was delivered at safe anchorage at Alang Port.

Again, delivery itself does not contemplate the passing of the title.

14. Property in goods, i.e. vessel, reading clause 37, was to vest in M/s. Kathiawar Steels not only at safe anchorage at Alang Port but title was to

pass only after delivery of the vessel and also after letter of credit was released in favour of seller. From the record it is clear that there was no

delivery of the ship. Before vessel could be anchored safely, it drifted and grounded in the bay of Cambay. Master of the ship did not deliver the

ship under these circumstances. Merely arrival of the vessel for anchoring at the port or lodging the bill of entry would not contemplated safe

anchorage or delivery. Again, delivery of the vessel alone was not sufficient after safe anchorage at Alang Port to say that the property in goods

passed to a buyer. Considering clauses 18 and 57 of the agreement M/s. Kathiawar Steels would have become the owner if there was (i) safe

anchorage of vessel at Alang Port; (ii) delivery of the vessel; and (iii) release of letter of credit to seller.

15. Delivery of vessel and release of letter of credit were to be completed simultaneously and there was no question of differing. Clause 37 makes

it clear. From the discussion, it is clear that conditions were not fulfilled and hence there is no question of M/s. Kathiawar Steels becoming the

owner of the vessel.

16. There is nothing to show that there was delivery and/or there was release of letter of credit by the buyer to the seller, viz. by M/s. Kathiawar

Steels. If the letter of credit was released in favour of the seller, the respondents would not have stated in their affidavit that :

Subsequently, the owner of the vessel M/s. Antares Naviera, Beunos Aires have taken full insurance claim of the said vessel from the insurance

company and sold the vessel to M/s. Al Mignas General Trading, LLC Dubai who in turn sold the vessel to Munna Traders, the present

petitioner.

17. Mr. Patel submitted that in view of Section 48 of the Customs Act, read with Section 150 of the said Act, the matter is required to be

considered. According to his submission, if the title in any imported goods is

relinquished, then, after notice to the importer and with the permission of proper officer, such imported goods are to be sold by the person having interest therein. He further submitted that Section 150 of the Customs Act points out that in case, the goods other than the confiscated goods are to be sold, then in that case, after notice to the owner thereof, the same has to be sold by public auction or by tender or with consent of the owner or in any other manner. As per sub-clause (2), after adjustment if any balance is there, the same is to be paid to the owner of the goods. According to his submission, as the owner of the vessel viz. M/s. Kathiawar Steels imported the vessel and subsequently relinquished the vessel, then, it is for the department to proceed in accordance with Section 48 of the said Act. It is admitted fact that the vessel in question arrived on its own steam.

18. Sub-section (2) of Section 2 of the Merchant Shipping Act, 1958, (hereinafter referred to as "the Act") reads as the provisions of the Act

which apply ""Unless otherwise expressly provided to vessels other than those referred in sub-section (1) shall so apply only while such vessel is

within India, including the territorial waters thereof"". Sub-section (55) of Section 3 defines, ""vessel"" which includes any ship, boat, sailing vessel, or

other description of vessel used in navigation. Part XII of the Act refers to investigation and inquiries : A shipping casualty shall be deemed to

occur when on or near the coasts of India, any ship is lost, abandoned, shrouded or materially damaged. The master pilot, harbour master or

other person in charge of the ship shall on arriving in India give immediate notice of the shipping casualty to the officer appointed in this behalf by

the Central Government. As per Section 359 of the Act, report of casualty is to be submitted to the Government. In the instant case, no procedure

seems to have been followed as laid down under the Act. We say so because the Union of India has not placed any material in this behalf.

19. In the instant case, as the vessel was abandoned by the master of the ship without hope or intention of recovery, provisions contained in Part

XIII of the Act would apply. No material is placed before us indicating that a receiver of wreck was appointed and he took possession of wreck in

accordance with law. As per provisions contained in Section 399 of the Act, the owner of any wreck in the possession of the receiver upon

establishing his claim to the same to the satisfaction of the receiver within one

year from the time at which wreck came into the possession of the receiver, shall upon paying the salvage and other charges, be entitled to have the wreck or the proceeds thereof delivered to him. Sub-section (2) of Section 399 makes it clear that even in case of foreign vessel, the consulate officer of the country in which the vessel is registered in absence of the owner and of the master or other agent of the owner be deemed to be the agent of the owner, with respect to the custody and disposal of articles. Thus, when the vessel arrived and got damaged and became useless as a vessel, the wreck automatically does not vest in the Union of India. Procedure is to be followed as contemplated in Part XIII of the Act. The receiver is merely a custodian. As a custodian, he has to discharge his duties including that of protecting the wreck. Looking to the scheme of the Act, wreck does not vest in the Central Government automatically but the receiver has to deliver the wreck to the owner. In case of sale of article as provided in Section 398, the proceeds thereof is to be delivered to the owner. Owner has to pay salvage and other charges to custodian. In the instant case, despite the note filed by the master of vessel on 2-6-1998, setting out the facts and abandonment of the vessel, no receiver is appointed. Nothing is placed before us by the respondent-Union of India indicating anything to show that procedure as contemplated under Chapter XII or XIII of the Act was followed. This provision makes it clear that the wreck does not vest in the Central Government. Hence, contention raised by Mr. Patel has no merit.

20. We have pointed out that as per Clauses 37 and 18, there was no safe anchorage and a letter of credit was not released in favour of the seller.

There is no whisper that letter of credit has been discharged in favour of the seller by M/s. Kathiawar Steels. Mere importing vessel, as contended by Mr. Joshi, it cannot be said that property in goods passed, on in favour of M/s. Kathiawar Steels.

21. Mr. Joshi, appearing for the petitioner drew our attention to the judgment of the Apex Court in case of Union of India and another Vs. Sampat Raj Dugar and another, .

22. The Apex Court pointed out that :

It is necessary to notice the language of the sub-clause. It says "it shall be deemed to be a condition of every such licence that the goods for

the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through customs". The rule making authority (Central Government), which issued the order, must be presumed to be aware of the fact that in many cases, the importer is not the owner of the goods imported at the time of their import and that he becomes their owner only at a later stage, i.e. when he pays for and obtains the relevant documents. Why did the Central Government yet declare that such goods shall be the property of the licensee from the time of import ? For appreciating this, one has to ascertain the object underlying the said provision.

23. The Apex Court, after pointing out the provisions contained in Imports (Control) Order and Imports and Exports (Control) Act, 1947, pointed out that -

The idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through customs.

The exporter is outside the country while the importer, i.e. the licensee is in India. It is at the instance of the licensee that the goods are imported

into this country. Whether or not, he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be

the owner of such goods from the time of their import till they are cleared through customs. This fiction is created for the proper and effective

implementation of the said order and the Imports and Exports (Control) Act. The fiction, however, cannot be carried beyond that. It cannot be

employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he

does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for

suspension/cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner

of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the

payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be

conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take

delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law.)

It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation.

24. It is required to be noted that the vessel could be brought on "as is where is" basis. Earlier M/s. Kathiawar Steels took necessary steps to

beach the vessel. It is also a fact that M/s. Kathiawar Steels, lost interest of any kind in the vessel as the vessel was not safely anchored and went

out of control which was ultimately broken in the bay of Cambay. There is nothing to show that the ownership passed on to M/s. Kathiawar

Steels. It is in these peculiar circumstances that M/s. Kathiawar Steels must have relinquished whatever right might have accrued in view of

agreement including that of safe anchoring by the master of the ship. Had it been the owner, it would have claimed the amount from insurance

company or would have taken all reasonable steps including approaching the court for protecting his rights. As pointed out earlier, on these

conditions being fulfilled, title was to vest in M/s. Kathiawar Steels. First steps of safe anchorage at Alang Port being missing. M/s. Kathiawar

Steels rightly withdrew the bill of entry. A person who is not an owner can import the goods and therefore, the fiction of ownership in Control

Orders. If M/s. Kathiawar Steels became the owner when it produced the bill of entry, it would have produced the documents to claim the

ownership as well. And, if that be so, the respondents would have relied on the same and would have produced before the Court to show that title

in the goods passed from seller to the buyer. The fact remains that the owner claimed the amount from the insurance company and ultimately it was

paid by the insurance company which sold the vessel to another party at Dubai and in turn the petitioner purchased the vessel or "as is where is"

basis. In view of the decision of the Apex Court, the submissions made by Mr. Patel cannot be accepted.

25. We had pointed out that in extraordinary circumstances, a situation has arisen, i.e. by the act of God, the vessel drifted and despite the efforts

put in by the crew members, the vessel could not be controlled. As there is nothing to show that M/s. Kathiawar Steels was the absolute owner of

the vessel at the time when it was sought to be beached first, we are not able to accept the contention raised by Mr. Patel for the Union of India.

Mr. Joshi for the petitioner submitted that the petitioner paid before the concerned authorities along with the Bill of Entry and the same ought to

have been accepted and ought not to have been rejected. He further submitted that with a view to see that there is no injustice, the Court should,

by following decision in the case of Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and

Another, , issue appropriate directions.

26. Mr. Patel rightly submitted that question would arise if M/s. Kaithiawar Steels is the owner of the vessel and not otherwise. No material is

placed before us pointing out that before the respondents there was any material to show that M/s. Kathiawar Steels became the owner of the

vessel, but on the contrary, in view of the averments made in the affidavit filed on behalf of the respondents, the only inference which can be drawn

is that M/s. Kathiawar Steels was not the owner of vessel and if that be the position, appropriate directions must be given. In para 20 of the

judgment in K. S. Jagannathan case (supra), the Apex Court has observed that :

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a

writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise

or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such

discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the

object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit

and proper case, a High Court can, in exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus

or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a

public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give

directions, which the Government or the public authority should have, passed or given had it properly and lawfully exercised its discretion.

27. In view of the facts and circumstances of the present case we issue a writ of

mandamus directing the respondents to accept Bill of Entry presented by the petitioner and permit clearance of the goods on payment of full customs duty in accordance with law. In the instant case, the goods are stored at Ghogha and, therefore, the authority in control of Ghogha port shall accept the Bill of Entry and other relevant documents and shall clear the goods.

28. Learned Counsel Mr. Patel for the Union of India requested that the order passed by this Court should be stayed for six weeks. In this connection, it may be noted that the vessel arrived in the month of May 1998. Under the orders of Court, parts of the vessel after breaking, are stored at Ghogha since September 1998. Mr. Joshi submitted that huge amount is invested and if the goods are permitted to be kept, the petitioner would suffer a lot and there would be serious prejudice to the petitioner if directions are carried out. In the aforesaid circumstances, we reject the request made by Mr. Patel.

29. The petition stands allowed accordingly. There will be no order as to costs.

30. In view of the order passed by us in the petition, no orders on Civil Applications Nos. 8601 of 1998 and 9903 of 1998.