(2010) 06 GUJ CK 0026

In the Gujarat High Court

Case No : Special Civil Application No. 2082 of 2007

Panchshil Exim Pvt. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 23-06-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 15, 47, 47(1), 60, 61

Citation : (2011) 265 ELT 324

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Dhaval Shah, for the Appellant; Harin P. Raval and Amee Yajnik, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—Learned advocate for the Petitioner has tendered draft amendment. However, considering the fact that by way of the amendment, the Petitioner seeks to enlarge the scope of the original petition, the amendment is rejected.

2. By this petition under Article 226 of the Constitution of India, the Petitioner seeks the following reliefs:

(1) Your Lordship be pleased to issue a writ of or in the nature of mandamus quashing and setting aside the order of the Respondent No. 2 rejecting the application of the Petitioner for extension of the warehousing period and for waiver of interest as communicated vide letter dated 3-11-06 at ANNEXURE, K.

(2) Your Lordship be pleased to issue a writ of or in the nature of mandamus restraining the Respondent No. 4 from proceeding further with the show cause notices dated 5-9-06 and 13-11-06 at ANNEXURE J and ANNEXURE L hereto.

(BB) Your Lordships be pleased to issue a writ of or in the nature of mandamus quashing and setting aside the order of the Respondent No. 2 rejecting the representation of the Petitioner for extension of the warehousing period and for waiver of interest after 17-3-2006 vide its order No. 01/Panchshil/07-08 dated 7-3-2008/8-3-2008 at ANNEXURE ''N'' hereto.

(3) Pending admission, hearing and final disposal of this petition, your Lordships be pleased to:

i. Stay and suspend operation and implementation of the order passed by the Respondent No. 2 rejecting the application of the Petitioner for extension of the warehousing period and waiver of interest as communicated by letter dated 3-11-06 at ANNEXURE K hereto and the further pleased to direct the Respondents to permit clearance of cargo on such items and conditions as deemed just and proper by the Hon''ble Court.

ii. Restrain Respondent No. 4 from proceeding further with the show cause notices dated 5-9-06 and 13-11-06 at ANNEXURE J and ANNEXURE L hereto.

iii. Your Lordships be pleased to stay the suspend operation and implementation of the order passed by the Respondent No. 2 rejecting the application of the Petitioner for extension of the warehousing period and waiver of interest vide its order dated 7-3-2008/8-3-2008 at ANNEXURE ''N'' hereto.

(4) Ex-parte ad interim relief in terms of prayer C above be granted.

(5) Such other and further reliefs as may be deemed just and proper in the facts and circumstances of the present case may kindly be granted.

3. The facts of the case stated in the petition briefly are that a cargo of 7000 MTs of HSD and 15000 MTs of Naphtha was imported per vessel MT Filomena Lembo at Kandla Port in September, 2004. During the course of discharge, the cargo got mixed up and was contaminated. Subsequently, there was a dispute regarding ownership and distribution of the goods imported which came to be carried before this High Court in an Admiralty Suit. The High Court in the proceedings of the Admiralty Suit allotted 2955.216 MTs of the contaminated cargo to M/s. BGH Exim Limited.

4. M/s. BGH Exim Limited had filed a warehousing bill of entry No. 14983 dated 21st September, 2004 for 2955.216 MTs of the contaminated goods classifying the same as "other petroleum products" under CTH 27101990. The said bill of entry was assessed provisionally on 4th March, 2005. Thereafter, the goods came to be purchased by the Petitioner, Panchshil Exim Private Limited, and subsequently an amendment was made in the warehousing bill of entry on 18th November, 2005. The Petitioner thereafter identified buyers who submitted bills of entry for clearing the respective quantity of cargo from the warehouse but for one reason or the other, clearance got delayed. The Petitioner, therefore, approached this High Court by way of a writ petition being Special Civil Application No. 1046 of 2006 seeking a direction against the Customs authorities to permit clearance of cargo as requested for by the purchasers. In the meantime, the warehousing period expired and the Petitioner requested the

Commissioner of Customs, Kandla for extension of warehousing period and the Commissioner granted an extension for six months. Even during the extended period of warehousing, the Petitioner could not remove the goods. The Petitioner, therefore, made an application dated 20th March, 2006 requesting for waiver of interest and another application dated 26th March, 2006 requesting for extension of warehousing period for three months. Vide show-cause notice dated 5th September, 2006, the Petitioner was called up to show cause as to why interest amounting to Rs. 41,74,758/- should not be recovered from it u/s 61(2)(ii) of the Customs Act, 1962. The Petitioner submitted its reply to the said show-cause notice stating that its application for waiver was pending. Vide communication dated 3rd November, 2006, the Petitioner was informed that its application for waiver of interest payable on clearance of the contaminated cargo as well as application for re-extension of warehousing period has been rejected. Being aggrieved, the Petitioner filed the present petition challenging the aforesaid communication

5. On 12th February, 2008, the Court made an order in the following terms in the present petition:

Having heard Mr. Mihir Joshi with Mr. Dhaval Shah for the Petitioner and Mr. R.M. Chhaya, learned Standing Counsel for the Revenue, we are of the view that, in the facts and circumstances of the case, and in order to ensure that no further time is wasted which results into the Petitioner''s goods remaining in the warehouse for any period longer than necessary, the following interim order is passed in the interests of justice:

The Petitioner shall make a fresh application for extension of the warehousing period and for waiver of interest u/s 61 of the Customs Act, 1962. Such application shall be made within one week from today. The Chief Commissioner of Customs, Ahmedabad shall decide the same within three weeks thereafter, after giving the Petitioner an opportunity of personal hearing through the Petitioner''s representative. The Chief Commissioner of Customs shall pass appropriate orders on such application without being inhibited by the previous communications/decisions rejecting the applications dated 20th and 27th March, 2006.

It is clarified that it will also be open to the parties to work out any appropriate formula for resolving the disputes which are the subject matter of this petition. If the disputes are not so resolved, the Chief Commissioner of Customs shall pass a speaking order on the Petitioner''s application and such decision shall be placed on the record of this petition within one month from today.

S.O. to 11th March 2008

Direct service is permitted.

6. Pursuant to the said order, the Petitioner moved an application dated 16th February, 2008 before the Chief Commissioner for extension of warehousing

period and waiver of interest u/s 61 of the Act. The Chief Commissioner vide a detailed order dated 7th March 2008/8th March, 2008 rejected the request for extension of warehousing period. Insofar as waiver of interest is concerned, the same was granted from the period 11th November, 2005 to 17th March, 2006 whereas the request for waiver of interest for further period came to be rejected.

7. Subsequently, the Petitioner moved an amendment in the present petition seeking to challenge the aforesaid order made by the Chief Commissioner which came to be granted vide order dated, 1st July, 2008.

8. Mr. Dhaval Shah, learned advocate for the Petitioner has vehemently assailed the impugned order dated 7th March, 2008/8th March, 2008 made by the Chief Commissioner. Reiterating the facts stated in the petition, it was submitted that in the light of the facts and circumstances pointed out by the Petitioner indicating compelling reasons beyond its control, the Chief Commissioner was not justified in rejecting the application of the Petitioner for further extension. It was urged that considering the fact that delay in clearance of the goods has been occasioned on account of the default on the part of the Customs authorities, the Chief Commissioner was not justified in not granting waiver of interest till the goods were finally cleared. Referring to the contents of the impugned order, it was pointed out that the Chief Commissioner has placed reliance upon a report made by the Commissioner of Customs, Kandla as well as a report of the Additional Commissioner of Customs, Kandla, copies of which had not been supplied to the Petitioner and as such, the impugned order stands vitiated on the ground of breach of principles of natural justice. It was accordingly submitted that the impugned order be quashed and set aside and the relief prayed for in the petition, be granted.

9. As can be seen from the impugned order made by the Chief Commissioner, the Chief Commissioner has placed reliance upon the provisions of Section 61 of the Act as well as on Board Circular No. 47/2002 -Cus. dated 29th July, 2002 and after considering the submissions made by the Petitioner in the representation/ application dated 16th February, 2008 as well as those made at the time of personal hearing found that the Petitioner has not been in a position to bring out any specific reason for further extension which can be said to be beyond its control. The reasons given by the Petitioner were only general in nature and were related to business, which according to the Chief Commissioner could not be held as valid for the purpose of granting extension of warehousing period u/s 61 of the Act.

10. In the impugned order the Commissioner has also discussed and dealt with all the contentions raised in the application dated 16th February, 2008 in detail. Dealing with the contention that Ex-Bond Bills of entry were filed by some purchasers in November, 2005 but it was the Department which did not permit clearances for a longer period, and that it was only after this Court in Special Civil Application No. 1046 of 2006 directed the Department to permit the clearance of cargo as "other petroleum products" that clearance was permitted

for Ex bond bills in May/June, 2006, the Chief Commissioner has placed reliance upon a report of the Commissioner of Customs, Kandla wherein it has been stated that vide interim order dated 7th March, 2006, this High Court had ordered assessment and clearance of goods as "mother petroleum products" under CTH No. 2710 19 90 subject to the importer procuring end use bond and end use certificate. The import of Naphtha being regulated under the Naphtha (Acquisition, Sale, Storage and Prevention of Use in Automobiles) Order, 2000, the No-Objection from the District Supply Officer, who is the statutory authority under the said order was essential for clearance of Naphtha/product contaminated with Naphtha. The necessary no-objection certificate issued by the District Supply Officer, Kutch came to be forwarded vide letter dated 5th June, 2006 from the Office of Collector, Kutch and was received on 12th June, 2006. The Ex-Bond Bill of Entry was assessed on receipt of the said No Objection Certificate and submission of end use Bond. Thus, there was nothing to substantiate the allegation that it was on account of default on the part of the Department that the goods could not be removed within the extended warehousing period, which was up to 17th March, 2006.

11. On the question of waiver of interest, the Chief Commissioner noted that for the period up to 17th March, 2006 there was a dispute regarding the classification of the goods, which was pending for want of chemical test report; on 9th March, 2006, BPCL Laboratory sent the final test report; and that the warehousing period was extended up to 17th March, 2006 by the Commissioner of Customs, Kandla. The Chief Commissioner was accordingly of the view that the Petitioner had a good case for waiver of interest only up to 17th March, 2006.

11.1 The Chief Commissioner further noted that the warehousing period had expired on 18th March, 2006, whereas applications dated 20th March, 2006 and 27th March, 2006 had been made for waiver of interest and for extension of the warehousing period after the expiry of the warehousing period. As regards the contention that the Petitioner had requested for retention of cargo of 30% as security for interest which may finally be payable and release of 70% of the cargo, reliance was placed upon the report made by the Additional Commissioner of Customs, Kandla wherein it was stated thus: there is no letter of the party dated 23rd May, 2006 for clearance of cargo retaining 30% to protect the interest. "They have written to the A.C. for release of 70% cargo vide letter dated 5th May, 2006 received in the office on 8th May, 2006 and the office replied the party vide letter dated 23rd May, 2006 with reference to Ex Bond B/E No. 7218 dated 18th November, 2005 to the effect that clearance of the goods covered under into B/E No. 14983 dated 21st September, 2004 is allowed holding back the part of the cargo to cover up the interest amount, till a decision is taken on waiver of interest by the concerned authority. Accordingly, the party has taken the out-of-charge of the cargo on the same day i.e. on 23rd May, 2006." Considering the record of the case the Commissioner was of the opinion that the Petitioner could not point out any compelling reasons beyond its control nor could it make out any exceptional circumstances so as to merit extension in terms of

Para 6 of Board''s Circular No. 47/2002 -Cus., dated 29th July, 2002. The Chief Commissioner also noted that neither in the Application dated 16th February, 2008 nor at the time of personal hearing, had the party proposed any formula for resolving the issue as was discussed in the order dated 12th February, 2008 passed by this High Court. In the light of the aforesaid, the Chief Commissioner turned down the request for extension of warehousing period and granted waiver of interest only up to 17th March, 2006.

12. The facts as emerging from the record are that BGH Exim Ltd. had imported cargo of high-speed diesel (HSD). On account of contamination of the goods while unloading there was a dispute between the importer and the owner of the vessel resulting into admiralty proceedings. The Petitioner purchased the said contaminated cargo in an auction. On account of contamination of the cargo, there was a classification dispute as to whether the goods in question were required to be classified as HSD or "other petroleum products". Vide order dated 7th March, 2006 made in Special Civil Application No. 1046 of 2006, by way of interim relief, this High Court directed that the cargo be treated as "other petro leum product". The Court further directed that the Petitioner shall give the following details to the Respondent No. 4, that is, the Assistant Commissioner (Bond) Custom House, Kandla:

(i) The details of the persons to whom the cargo is to be sold.

(ii) End use bond along with the bill of entry shall be procured from the buyer and that shall be submitted to Respondent No. 4 and thereafter end use certificate shall be submitted for discharging the bond to the Respondent No. 4.

At this stage, two bills of entry were pending clearance. On 20th March, 2006, the Petitioner made an application for waiver of interest leviable u/s 61 of the Customs Act. On 27th March, 2006, an application came to be made for extension of warehousing period. For clearance of the goods the Respondents insisted on payment of interest. However, since the Petitioner did not pay the same the goods were not cleared. The Petitioner thereafter made a request to clear 70% of the cargo and retain 30% of the cargo as security towards interest liability which request was accepted by the Respondents vide letter dated 23rd May, 2006 and the pending bills of entry were cleared in May/June 2006. Thereafter on 5th September, 2006 show cause notice came to be issued claiming interest of Rs. 41.74 lacs. However, the said show cause notice and subsequent show cause notice issued on 13th November, 2006 claiming duty, penalty and interest are not subject matter of this petition.

13. Section 61 of the Act insofar as the same is relevant for the present purpose reads thus:

61. Period for which goods may remain warehoused. - (1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed;

(a) in the case of capital goods intended for use in any hundred percent export-oriented undertaking, till the expiry of five years;

(aa) in the case of goods other than capital goods intended for use in any hundred per cent, export- oriented undertaking, till the expiry of three years; and]

(b) in the case of any other goods, till the expiry of one year, after the date on which the proper officer has made an order u/s 60 permitting the deposit of the goods in a warehouse:

xxxx

Where any warehoused goods

i. specified in Sub-clause (a) or Sub-clause (aa) of Sub-section (1), remain in a warehouse beyond the period specified in that Sub-section by reason of extension of the aforesaid period or otherwise, interest at such rate as is specified in Section 47 shall be payable, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of Section 15 on the warehouse goods, for the period from the expiry of the said warehousing period till the date of payment of duty on the warehoused goods;

ii. specified in Sub-clause (b) of Sub-section (1), remain in a warehouse beyond a period of ninety days interest shall be payable at such rate or rates not exceeding the rate specified in Section 47, as may be fixed by the Board, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of Section 15 on the warehoused goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods.

Provided that the Board may, if it considers it necessary so to do in the public interest, by order and under circumstances of an exceptional nature, to be specified in such order, waive the whole or part of any interest payable under this section in respect of any warehoused goods:

14. On a plain reading of the aforesaid provision, it is clear that if goods remain in the warehouse beyond the specified period, the owner of the goods would be liable to pay interest at the specified rate. However, by virtue of the proviso thereto, the Board is empowered to waive the whole or any part of the interest payable under the Section by order and under circumstances of exceptional nature, to be specified in such order. Thus, while considering the application for waiver of interest, the authority concerned is required to examine as to whether any exceptional circumstances have been made out so as to waive interest payable by such person and is also required to specify such reasons in the order granting waiver of interest. In the facts of the present case, as is apparent from the facts noted hereinabove, after the order made by this Court on 7th March, 2006, the only reason advanced by the Petitioner is that the Respondents were not permitting clearance of goods without payment of interest. Nonpayment of

interest on the part of the Petitioner to facilitate the clearance of goods can at best be said to be a financial difficulty. It can in no manner be termed to be a circumstance of exceptional nature as contemplated under the proviso to Section 61. The Chief Commissioner after considering the facts of the case has granted waiver of interest till 17th March, 2006, which appears to be sufficient for compliance of the order dated 17th March, 2006 made by the High Court. Non-clearance of goods in terms of the said order can in no manner be attributed to the Respondents. In the circumstances, no fault can be found in the impugned order for not granting waiver of interest beyond 17th March, 2006.

15. As regards rejection of the application for extension of warehousing period, as noted hereinabove, vide the interim order dated 7th March, 2006, this High Court had ordered assessment and clearance of goods as "other petroleum products" subject to the importer procuring end use bond and end use certificate. In view of the provisions of the Naphtha (Acquisition, Sale, Storage and Prevention of Use in Automobiles) Order, 2000, the No-Objection under the said order was essential for clearance of Naphtha/product contaminated with Naphtha. The necessary no-objection certificate issued by the District Supply Officer, Kutch was received by the Department on 12th June, 2006. The Ex-Bond Bills of Entry were assessed on receipt of the said No Objection Certificate and submission of end use Bond. Thus, no fault can be laid at the door of the Respondent authorities for non-removal of the goods within the extended warehousing period, which was up to 17th March, 2006. As per Board''s Circular No. 47/02 -Cus. dated 29th July, 2002 further extension of warehousing period may be considered only in respect of those cases where it is really warranted that goods have to be kept in the warehouse under circumstances beyond the control of the importer. In the background of the aforesaid facts, when the Petitioner had not been able to show reasons and circumstances beyond its control for seeking re-extension, no infirmity can be found in the impugned order of the Chief Commissioner in not extending the warehousing period.

16. Insofar as non-supply of the reports of the Commissioner of Customs, Kandla and Additional Commissioner of Customs, Kandla which find reference in the impugned order, the Chief Commissioner has placed reliance on the same for coming to the conclusion that the delay in clearance of the goods was not occasioned on account of default on the part of the Respondents. The Chief Commissioner in the impugned order has specifically referred to the facts stated in the said report to the extent he has placed reliance upon the same. While challenging the impugned order of the Chief Commissioner, it is not the case of the Petitioner in the petition that the findings recorded therein are incorrect. Except for stating that the delay had been caused by the Respondents, no specific averments have been made to point out as to how the Respondents are responsible for delay, or as to how the factual findings recorded by the Chief Commissioner are erroneous. In the circumstances, the Petitioner has not been able to point out any prejudice on account of non-supply of the said reports.

17. Thus, from the aforesaid facts, it is apparent that after the order dated 7th March, 2006 made by this High Court, in Special Civil Application No. 1046 of 2006 directing the Department to permit the clearance of cargo as other "petroleum products, clearance was permitted qua pending bills of entry in May/ June. The fact that the Respondents were insisting on payment of interest for clearance of the cargo cannot be said to be an exceptional circumstance as contemplated under the proviso to Section 61 of the Act. Moreover, it is apparent that the Petitioner had purchased the goods in question knowing full well that there was a dispute regarding classification. The delay in clearance of goods was occasioned on account of the classification dispute and the same does not appear to be attributable to the customs authorities. If for one reason or the other the Petitioner was not in a position to clear the goods, the Petitioner does not become entitled to extension of warehousing period or waiver of interest. The Petitioner is required to make out a case indicating reasons beyond its control, which prevented it from clearing the goods. The reasons stated by the Petitioner in the petition and those urged by the learned advocate during the course of hearing, viz. the fact that the purchasers had lost interest on account of delay in delivery of the goods and the Petitioner was forced to find other customers, having no alternative the Petitioner accepted to deposit the interest in respect of the cargo which was ultimately permitted to be cleared on Ex-Bond Bills of Entry filed in December, cannot be said to be exceptional circumstances, or reasons beyond the control of the Petitioner so as to fall within the purview of the proviso to Section 61 or Board''s Circular dated 29th July, 2002. The Petitioner having failed to show that it was prevented from clearing the goods under circumstances of exceptional nature and/or for reasons beyond its control cannot still claim entitlement to the benefit of waiver or interest and extension of warehousing period.

18. In the light of the aforesaid discussion, the Petitioner is not entitled to the relief prayed for in the petition. The petition, therefore, fails and is accordingly rejected. Interim relief granted earlier stands vacated. Notice is discharged.

