

(2005) 04 GUJ CK 0084

In the Gujarat High Court

Case No : Special Civil Application No. 4062 of 2004

Parsan Brothers

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-04-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 100, 112, 114A, 122(1), 13

Citation : (2005) 102 ECC 333 : (2005) 3 GLR 2456

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

Bench : Division Bench

Advocate : Paresh M. Dave, for Petitioner Nos. 1-2, for the Appellant;
Dharmishta Raval and Jitendra Malkan, for the Respondent

Judgement

D.A. Mehta, J.—This petition under Article 226 of the Constitution of India has been preferred praying for following reliefs :

"(1) That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, directing the respondents herein to remit duties on 823 cases of beer u/s 23 of the Customs Act, 1962;

(2) That Your Lordships may be pleased to issue a Writ of Prohibition or any other appropriate writ, direction or order, completely and permanently prohibiting the respondents herein from recovering any amounts as duty or interest from the petitioners for 823 cases of beer lying in the petitioners" bonded warehouse;

(3) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to restrain the respondents, their servants and agents from recovering any amount of duty or interest from the petitioner firm on 823 cases of beer lying in the petitioners" bonded warehouse, by restraining the respondents, their servants and agents from taking any action against the petitioners in pursuance of letter dated 3-2-2004 (Annexure "L");

(4) An ex-parte ad-interim relief in terms of Para 12(C) above may kindly be granted;

(5) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted."

2. Having heard Mr. Paresh M.Dave, the learned advocate for the petitioner and Mr. Jitendra Malkan for the respondents, it is apparent that, considering the nature of goods involved, the petition is required to be heard and disposed of finally. Hence, rule. Mr. Malkan waives service of rule.

3. The petitioner, a partnership firm, is trading in Marine Stores and in course of conducting the said business, imports various goods including Beer, Whisky, Cigarettes etc. for supplying such goods to foreign going vessels. Such goods are allowed to be imported free of duty on the condition that they are to be supplied as stores to outward bound vessels. u/s 58 of the Customs Act, 1962 (the Act), an assessee is entitled to deposit dutiable imported goods in a licensed private bonded warehouse. The petitioner firm accordingly imported 2250 cases of Orange Boom Beer and 2256 cases of Amstel Beer, and the said goods were cleared and stored in the licensed private bonded warehouse vide in-bond Bills of Entry Nos. F-911 dated 12-2-1998 and F-5621 dated 16-7-1998. It appears that 382 cases of Orange Boom Beer and 441 cases of Amstel Beer were lying in the private bonded warehouse.

4. In the meantime, on 19th April 1999, the warehousing license bearing No. 39 of 1995 dated 18th September 1995 came to be suspended. The Commissioner of Customs, on 5-8-2000, passed Order in Original whereby the warehousing license came to be cancelled and penalty was imposed on the petitioner along with others. The matter was carried in appeal before the Customs, Excise & Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai. The Tribunal vide its order dated 25th September 2002 set aside the order of respondent No. 2 Commissioner and held that the cancellation of license and levy of penalty qua the petitioner was bad in law.

5. The petitioner moved an application on 14th May 2003 before respondent No. 3 stating that the 823 cases of Beer which were lying in the warehouse since April 1999, had become useless and unfit for human consumption and therefore, permission was sought for destroying such expired goods. In response thereto, on 12-11-2003, respondent No. 3 called upon the petitioner to submit the Bills of Entry duly certified "so that further action for destruction of beer can be taken". The petitioner responded immediately on 13th November 2003 and furnished the copies of Bills of Entry and reiterated its request for permission to destroy the goods. The respondent No. 3 wrote to the petitioner on 14th November 2003 to intimate details of expiry date of the beer (brand-wise), which were required to be destroyed. It is an admitted position that the said expiry dates and the details were duly supplied. On 5th December 2003, respondent No. 3 called upon the petitioner to pay duty to the tune of Rs. 3,20,501/- along with interest upto

November 2003 of Rs. 3,77,224/-, totalling to Rs. 6,97,725/-. The petitioner wrote on 10th December 2003 stating that it was not required to pay any duty and also requested to depute proper officer in whose presence the goods can be destroyed. On the same day, respondent No. 3 communicated to the petitioner that the request for deputing an officer for destruction of stock of expired beer cannot be granted and called upon the petitioner to pay the duty and interest as mentioned in earlier letter.

6. It appears that the petitioner once again approached respondent No. 3 and vide communication dated 3rd February 2004, respondent No. 3 informed that the request to destroy the bonded goods and remission of duty could not be considered as there was no specific order in this regard by the Tribunal. In response, on 10th February 2004, the petitioner once again wrote to respondent No. 3 inviting attention to provision of Section 23(1) of the Act and reiterated its request, as according to the petitioner, it was entitled to destroy the said goods and seek remission of the duty in the circumstances.

7. Mr. Dave, the learned advocate appearing on behalf of the petitioner submitted that the aforesaid facts went to show that not only no case is made out for seeking any duty, but assuming any such duty was leviable, the petitioner was entitled to have the same remitted along with permission to destroy the goods. That the respondent authorities were acting contrary to the provisions of law with special reference to Section 23 of the Act. He submitted that Section 23(1) of the Act permitted remission of duty for every case where any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, and the Assistant Commissioner of Customs or the Deputy Commissioner of Customs was mandated by the statute to remit the duty on such goods. Therefore, the stand of the respondent No. 3 that goods could not be permitted to be destroyed and in absence of any order of the Tribunal, the duty could not be remitted was contrary to the legal provision and was required to be struck down.

8. Mr. Malkan appearing on behalf of the respondents invited attention to the Tribunal's order dated 12th September 2002 and read in detail from the said order to contend that the Tribunal had held one Shri Kishor Chavda and Rajendra Bansal as being responsible for violation of various provisions of the Act and had upheld the personal penalties levied on the said persons. He, therefore, submitted that as the penalties had been sustained in hands of the employees, the petitioner firm was vicariously liable and could not escape the liability. It was, therefore, urged that the petitioner had become liable to pay duty on the imported goods in accordance with provisions of the Act. That respondent No. 3 had accordingly raised the demand and the petition was required to be rejected, permitting the revenue to effect the recovery.

9. Taking up last contention first, it is required to be noted that, on behalf of the respondents, no provision of the Act has been pointed out on the basis of which any such duty could have been demanded considering the facts and

circumstances of the case. The reference to the personal penalties levied on employees of the petitioner firm is also besides the point, inasmuch as admittedly the Tribunal in its impugned order vide paragraph No. 4(1) has specifically held that the finding of the Commissioner that omission and commission on part of M/s Parsan Brothers has led to violation of Sections 62(2), 69, 71, 72(1)(a) and (d) of the Act, is not sustainable. The Tribunal has further set aside the penalty imposed on the petitioner under Sections 112 and 114A of the Act. The Tribunal has further set aside the cancellation of the private bonded warehouse license issued to the petitioner as the petitioner has not contravened any provisions of the Act, Rules or Regulations or not committed any breach of the conditions of the license, so as to attract provisions of section 58(2)(b) of the Act. Once the Tribunal had recorded the aforesaid findings, and they have become final, it is apparent that the reason for which the goods could not be removed from the licensed private bonded warehouse, did not survive. However, by passage of time, in the interregnum i.e. between the time when the license was cancelled by the Commissioner and the cancellation was set aside by the Tribunal, the goods, by their very nature, had become unfit for human consumption. The petitioner was, therefore, entitled to make a claim under the provisions of Section 23(1) of the Act, which reads as under :

"23. Remission of duty on lost, destroyed or abandoned goods -

(1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods."

10. The material terms as can be seen on a bare reading of the provision are "lost or destroyed". Bearing in mind that the provision pertains to remission of duty which is otherwise payable on any imported goods, it becomes clear that when one talks of any imported goods having been lost or destroyed, it would take within its sweep all such events or contingencies which would be the basis for occurring of the loss or the destruction. In other words, the goods could be lost or destroyed by an act of omission or commission by a human agency, and it would also take within its sweep a situation where the goods are lost or destroyed without an act of omission or commission by a human agency.

11. In the case of Corporation Vs. Union of India and Another, the High Court was called upon to decide the meaning of the aforesaid phrase as occurring in Section 23(1) of the Act before the bracketed portion (otherwise than as a result of pilferage) was introduced w.e.f. 13th May 1983. The High Court expressed its opinion in the following terms after taking into consideration the dictionary meanings of the terms "loss" and "lost" as well as the notes on clauses when Section 23 of the present Act was introduced on the statute :

"10. What is the meaning of the word "Lost"?

According to the Webster's Third New International Dictionary, the word "loss" means "the act or fact of losing, failure to keep possession, deprivation, theft of property". In the same dictionary, the word "lost" is defined as meaning "not made use of, ruined or destroyed physically or morally, parted with, no longer possessed, taken away or beyond reach or attainment". According to Law Lexicon, Vol.2, page 44, the word "loss" has no precise hard and fast meaning. It is a generic and a comprehensive term covering different situations. Loss results when a thing is destroyed. But it also is caused when the owner has been made to part with it although the thing remains in tact. In this sense, loss means and implies "a deprivation". It is synonymous with damage resulting either in consequence of destruction, deprivation or even depreciation and when a party is dispossessed of a thing, either when it can never be recovered or when it is withheld from him he is deemed to suffer the loss."

"13. The corresponding provision in the old Customs Act, 1878 was sub-section (1) of Section 122, which reads as follows :

"If any goods in respect of which a bond has been executed u/s 92 and which have been cleared for home consumption are lost or destroyed by unavoidable accident or delay, the Chief Customs Officer may in his discretion remit the duties due thereon:

Provided that, if any such goods be sold or destroyed in a private warehouse, notice thereof be given to the Customs Collector within forty-eight hours after the discovery of such loss or destruction".

In the Bill proposing the present Act, clause 23 dealt with the subject and the note on the same read as follows :

"Sub-clause (1) replaces existing Section 122. Under the existing section remission of duty is permissible only if goods are lost or destroyed by unavoidable accident or delay. Under the revised provision remission of duty may be allowed in all cases where goods are lost or destroyed whatever may be the reason. Since cases of total loss or destruction cause considerable hardship, a generic approach is being made. Further, the new provision will specifically permit remission of duty not only in respect of warehoused goods as at present but also in respect of other goods which are cleared direct for home consumption. Importers will welcome this relief. Sub-clause (2) replaces the last para of existing Section 100 and lay down that the proper officer may require that the abandoned goods should be surrendered to the Customs Department. Again, the concession in the proposed provision will specifically cover not only warehoused goods which alone enjoy the concession at present but also goods cleared direct for home consumption. This would be an additional relief to importers whose goods have completely deteriorated".

The note on the clause, therefore, lends support to the view that the expression

"lost or destroyed" in the relevant provision of the Act is not used in any narrow or a particular sense but in a broader sense and includes the loss or destruction caused by whatsoever reason. From the language used and the departure from the previous provision of law, it is obvious that the Parliament intended to give relief to the party for remission of the duty on the goods which had been imported and which were lying stored in a public place and which have been lost to the owner for no fault of his whether the goods have been lost or destroyed on account of theft, fire, accident or any other circumstances or cause whatsoever."

12. Applying the aforesaid legal position to the facts of the case, it is apparent that the imported goods have been lost so far as petitioner is concerned. The imported goods i.e. 823 cases of beer have deteriorated to such an extent they cannot be recovered. There is deprivation, namely, the petitioner is totally deprived of goods; though the containers may or may not have any scrap value, the contents have become unfit for human consumption: they cannot be either exported or cleared for home consumption for this purpose. The loss has been occasioned due to circumstances and is not disputed. In other words, the petitioner has incurred a loss to the extent of the value of goods by virtue of the goods having become unfit for human consumption. The petitioner is, therefore, entitled to seek remission of duty u/s 23(1) of the Act, the petitioner having shown that the requirement of the said provision stands satisfied in facts of the case.

13. The respondent authorities have not disputed that the goods have deteriorated to such an extent that they have become unfit for human consumption. In fact, respondent No. 3, after having called for the details as to expiry date, lot-wise and brand-wise, has remained silent and has assigned no reason why the petitioner should not be permitted to destroy the goods physically under supervision of a proper officer. To the contrary, after obtaining those details on record, respondent No. 3 has called upon the petitioner to make payment of duty with interest without specifying under which provision the duty is being demanded. It is necessary to reiterate and take note of the fact that the imported goods were stored in a licensed bonded warehouse and in case the goods were exported, no duty was payable on the same; duty would become payable only in the event of the goods being taken out of the warehouse for the purposes of human consumption. The petitioner has not even sought to take the goods out of the warehouse for the purposes of home consumption. In these circumstances, the respondent authorities could not have demanded any duty. In the affidavit in reply, applicability of Section 23 of the Act is contested on the ground that no permission has been granted for home consumption and according to respondent No. 3, that being the requirement of Section 23(1) of the Act, the petitioner cannot seek remission of duty under the said provisions. The revenue cannot be permitted to blow hot and cold in the same breath: approbation and reprobation is not permissible. If the duty is demanded on the basis that the goods are being cleared for home consumption, provisions of Section 23 would become applicable and the petitioner would be entitled to seek

remission of duty considering the undisputed fact that the goods have been lost due to deterioration which has occurred due to passage of time. On the other hand, if revenue states that the goods are not meant for home consumption, there would be no occasion for the revenue to raise the duty demand.

14. In the aforesaid facts and circumstances of the case as well as legal position, the petition is required to be allowed. The imported goods in question having been lost due to deterioration by passage of time, the respondent authorities are directed to permit the petitioner to physically destroy the goods in presence of a proper officer. This direction shall be carried out within a period of two weeks from today. The petitioner shall ensure that, in the process of destruction of the goods, no environmental pollution or degradation occurs and is carried out in accordance with law.

15. The respondent authorities primarily cannot levy any duty, not having established that any taxing event has taken place. However, in case the respondent authorities insist on levying duty, the petitioner is entitled to seek remission of duty u/s 23(1) of the Act on facts and circumstances of the case, and the respondents are directed accordingly.

16. The petition is accordingly allowed to the aforesaid extent. Rule made absolute. There shall be no order as to costs.