(2002) 05 P&H CK 0129

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. No. 8807 of 2000

Patiala Castings Private Limited — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 01-05-2002

Acts Referred:
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 63

Citation : (2002) 84 ECC 256 : (2003) ECR 584 : (2003) 156 ELT 458

Hon'ble Judges : N.K. Sud, J;Jawahar Lal Gupta, J

Bench : Division Bench

Advocate : H.L. Sibal, V.K. Sibal, Sapan Dhir and Rita Kohli, for the Appellant; Rajesh Gumber, ACGSC, D.D. Sharma and Sanjeev Sharma, for the Respondent

Final Decision : Allowed

Judgement

Jawahar Lal Gupta, J.—Did the petitioner import serviceable pipes or scrap? Is the petitioner liable to pay demurrage and charges for containers? These two questions provide the core of the controversy in this case. A few facts as relevant for the decision of the dispute between the parties may be briefly noticed.

2. The petitioner is engaged in the manufacture of mild steel ingots. For this purpose it uses iron scrap. Part of the material is bought locally. The remaining requirements are met with by imports from the Middle East countries. On March 24, 2000 the petitioner filed a Bill of Entry No. 490 in respect of 25 containers. The material was examined by the Custom Authorities. Twenty one containers were released. Four were detained. Subsequently, even the four containers were released. In April 2000 the petitioner received another consignment of 51 containers. These were inspected by the Custom Authorities from April 22, 2000 to April 24, 2000. Initially, these were detained. However, on April 29, 2000 twenty four containers were released. On May 2, 2000 the competent authority passed an order u/s 110 of the Customs Act, 1962. The goods contained in 27 containers were ordered to be seized. The petitioner represented that the pipes

were old and used. These were rusted and pitted. These could not be used as pipes. Thus, it prayed that the goods be released. Despite repeated representations, the needful was not done

3. While the matter was pending with the authorities, the Shipping Corporation informed the petitioner that in case the containers were not released, recourse to Section 48 of the Customs Act shall be made and the goods may have to be sold. Despite that, neither the goods nor the containers were released. Ultimately, on July 10, 2000 the petitioner approached this Court with the prayer that the orders regarding levy of duty and payment of demurrage etc. passed by the respondents on June 1, 2000, June 6, 2000 and June 27, 2000, copies of which have been produced as Annexures P-22, P-27 and P-32 respectively, be quashed and the respondents be directed to release the goods on payment of duty leviable on scrap. Various other prayers were also made.

4. Notice of motion was issued. Reply was filed by the respondents. Even a replication was filed by the petitioner.

5. Since the continued detention of goods was resulting in avoidable loss, the petitioner made a prayer to the Bench that the containers may be destuffed and the goods be placed either in the godowns of the Central Warehousing Corporation or in any public bonded warehouse. Vide order dated July 26, 2000 a Bench of this Court (G.S. Singhvi and Nirmal Singh, JJ.) accepted this prayer. However, the petitioner was directed to indicate the space, if any, available with the Central Warehousing Corporation or any of the public bonded warehouse to the Deputy Commissioner of Customs, who shall then fix the time for destuffing of the goods in such warehouse. It was further directed that after destuffing, the goods shall remain under supervision and control of the Deputy Commissioner of Customs, Central Freight Station and charges for the warehouse shall be borne by the petitioner.

6. Thereafter, the petitioners filed Civil Miscellaneous No. 18593 of 2000. It prayed that a Local Commissioner be appointed to visit the Container Freight Station, Ludhiana and to verify the nature of pipes. The Bench (A.S. Gill and Nirmal Singh, JJ.) after examination of the matter felt that "it has become necessary to appoint the Local Commissioner to verify at the spot the nature of the pipes." In the circumstances, the Bench directed "the Principal of the Punjab Engineering College to depute Head of the Metallurgical department to visit the aforesaid site in the presence of the parties and their counsel and to make a report accordingly in respect of the pipes available ....". It was further directed that "the Commissioner shall visit the said station on Saturday i.e. 2-9-2000 at 10.00 AM. The parties (with) their counsel shall be present there". The Bench also appointed Mr. Amarjit Singh, Addl. Advocate General Haryana, to be the Observer during the inspection by the Local Commissioner. The Local Commissioner was directed to submit his report on or before September 11, 2000.

7. The Local Commissioner submitted his report in a sealed envelope. It was made available for inspection by the counsel for the parties. A specific order was passed by the Bench (G.S. Singhvi and Nirmal Singh, JJ.) on September 18, 2000. Thereafter, the goods were released after a few days.

8. The main controversy in the case relates to the nature of the goods. Mr. H.L. Sibal, learned counsel for the petitioner, contends that the goods were old and used pipes. These were imported as scrap for the purpose of being melted and made into mild steel ingots. The respondents had illegally detained the goods and demanded duty on the basis that these could be used as pipes. On the other hand, Mr. Rajesh Gumber, learned counsel for respondent Nos. 1, 5 and 6 has contended that the goods did not fall within the definition of "Waste and Scrap" as contained in Clause 8 of Section XV relating to "Base Metals and Articles of Base Metal" of the Customs Tariff Act, 1975. Thus, the action of the authorities in detaining the goods and ordering the seizure was legal and valid.

9. The short question that arises for consideration is - were the goods scrap or usable pipes?

10. In the normal course of events, the precise nature of goods has to be determined by the authority at the spot. A writ court does not have the expertise to do so. However, in the present case, a Bench of this Court had considered the matter and appointed a Local Commissioner to inspect the goods and to submit a report. He was to be an expert in the field. The order passed by the Bench was not challenged by the respondents. It has become final. In such a case, the report submitted by the Local Commissioner can form a good basis for decision of the dispute. This position has not been contested by the counsel for the respondents. Thus, we have examined the report.

11. The Inspection Report submitted by the Local Commissioner is the most vital piece of evidence. Dr. S.R. Prabhakar, Professor & Head, Metallurgical Engineering Department, Punjab Engineering College, Chandigarh, had been deputed by the Principal, Punjab Engineering College. He had inspected the goods in the presence of the Observer/the counsel for the petitioner and the officers of the department. He had also taken photographs. The inspection was carried out from September 2, 2000 to September 7, 2000. What are the findings?

12. According to the report the material was M.S. (mild steel) pipes with varying lengths, diameters and thickness etc. The destuffed material from the containers "was old and used mild steel, Seamless pipes of different cross-sections. These had been employed for several purposes and dismantled after use, were found to be all rusted from inside as well as outside". The pipes could be classified "into 3 different types with reference to the degree of corrosion/rust". Type ''A'' were Excessively corroded & Scaled Pipes. These were found to be approximately 20 to 25% of the total number. He observed that these pipes "are excessively corroded from both outside & inside with a thick scale grown everywhere. The

Outer as well as the inner surface bears loose scale protruding from the surface". In Type ''B'' were pipes which were "found to be corroded both inside & outside and may be described as old, rusty & pitted pipes. Sizable number of these pipes had their 15% of surface deteriorated of the total surface area of each pipe. A plastic coat on inner side with scale/rust underneath was clearly visible. These constituted approximately 30-40% of the total number of pipes". Regarding rest of the pipes, it was observed that these were "rusted both outside & inside and looked comparatively smooth as compared to types ''A'' & ''B''. These are also pitted all around. These constitute the rest 40-50% of the total number of pipes".

13. Even the ends of the pipes were examined. It was reported that these were "either machine cut or flame/weld cut". Some were found to have smooth ends while others were uneven and irregular. It was also reported that the "ends were totally corroded and showed loose scale, debris and peeled surface as seen in photograph nos. 3 & 4". The Local Commissioner had also noticed certain other features. He pointed out that "approximately 5% of the pipes possessed weld patches indicating repair during use. Some had even two patches on them". About 2 to 3% of the pipes "in some containers were fitted with reducers to lower the cross-section at one of their ends". 5 to 10% of pipes "mostly of type ''C'' had one side of these more rusted and pitted in comparison to remaining peripheral surface", 20 to 30% of the total pipes consisted of small pieces mostly varying from 2 feet to 10 feet in length. Some pipes had T-joints with varying cross-sectional area which is invariably provided for change of the direction of fluid flow. The pipes were perforated length-wise. Photographs 10 and 11 were the representative sample. Around 30% "of the pipes had weld joints near one end to make up for the required length." Even two joints were noticed. Some of the small pieces also had weld joints. Some of the pipes were oily inside while others had plastic coatings. On some of the pipes, weld cut could be noticed.

14. The Local Commissioner had taken pictures to substantiate his findings. He has also attached tables 1 and 2 giving details with regard to different categories of pipes taken out from different containers.

15. On an examination of the report submitted by the Local Commissioner and the photographs etc., we are satisfied that Prof. S.R. Prabhakar had done a thorough job. He had examined the pipes individually and noticed the minutest details. Even small perforations or repairs had not escaped his notice. The pictures were taken in such a way that the factual position was correctly depicted. The report appears to be absolutely accurate. It leaves no manner of doubt that the goods imported by the petitioner were not serviceable pipes. In any case, the petitioner had imported only ''scrap''. The exporter had described the goods as such.

16. Mr. Cumber submits that Mr. Rajesh Shori had also inspected the goods. He had submitted a report which is at Annexure R.3 (Pages 224 to 227 of the paper book). According to this report, 85% of the pipes were unused.

17. On an examination of the Local Commissioner''s report and photographs, we are satisfied that this report is not worth the paper it is written on. Even the respondents have not relied upon this report in the notice issued to the petitioner. In fact, in the show cause notice issued to the petitioner in February 2002, the pipes found were described as old and used. Not unused. This gives a clear lie to the report submitted by Mr. Rajesh Shori. The department itself has not accepted the report. It can derive no support from it.

18. Mr. Cumber has then submitted that a show cause notice had been issued to the petitioner vide letter dated February 5, 2002. The petitioner had been called upon to show cause as to why the goods be not treated as pipes and subjected to confiscation. The competent authority should be allowed to adjudicate.

19. The contention is misconceived. It is the admitted position that the goods had been mutilated and released by the Department in September 2000. The goods were actually mutilated in the presence of the authorities. The Local Commissioner had found that the goods were not serviceable pipes. Thus, the issue of show cause notice during the pendency of the petition is only a Device to delay the proceedings and to avoid the inevitable.

20. Mr. Cumber submits that even if the goods could not have been used as pipes, these still do not fall within the definition of ''waste and scrap'' as given in Clause 8 of Section XV of the Schedule. Thus, the orders for levy of duty were valid, Mr. Sibal controverts this claim.

21. Learned counsel for the petitioner appears to be right. The provision referred by the counsel for the respondents describes ''waste and scrap''. Clause 8 provides as under :-

"8. In this Section, the following expressions have the meanings hereby assigned to them :

(a) Waste and scrap Metal waste and scrap from the manufacture of mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons."

22. A perusal of the above provision shows that metal goods which cannot be used "as such because of breakage, cutting-up, wear or other reasons" fall within ''waste and scrap''. In the present case, the goods were not usable pipes as they had been used earlier. These were rusted, pitted and perforated and had even been repaired. Surely, a person who has to import pipes for being used in an industry shall not buy rusted or perforated pieces.

23. There is another aspect of the matter. Nothing has been pointed out from the record which may even remotely suggest that the petitioner had paid for the goods at a rate higher than that meant for scrap or that it had actually paid for second hand but usable pipes. In fact, it appears that the respondents had with-held the goods and later on even passed an order of seizure in a wholly arbitrary manner. The petitioner''s allegation is corroborated by the observations made by

Mr. Amarjit Singh who had been specially deputed as an ''observer'' by the Court. Mr. Amarjit Singh has stated that he had reached the Container Freight Station, Ludhiana on September 4, 2000 at 10 O''clock in the morning. He along with Dr. Prabhakar had kept sitting in the office of the Deputy Commissioner till 12 noon. No body from the Directorate of Revenue Intelligence had turned up to help him. In the meantime, he had "requested the Deputy Commissioner to open the containers so that the needful could be done. However, the Deputy Commissioner refused to open the Containers and resultantly both had to wait till 12 O''clock in the afternoon." Thereafter, he had taken a decision "to open the containers." At that time, Mr. Sanjay Surpal, Inspector, Directorate of Revenue Intelligence reached the spot. He was requested to open the containers so as to enable the Local Commissioner to inspect. Mr. Surpal informed him that the Deputy Director (Mr. Sankhla) had "categorically given orders to him not to open even a single container till the stuff which was deloaded earlier on 2nd of September 2000 was reloaded back in the said containers." He observes that this was not in conformity with the orders passed by the Court. Despite his requests to the Deputy Commissioner, Mr. Sanjay Surpal and other Custom officials, nothing was done. They had flatly refused to open the seals of the containers in his presence. Mr. Amarjit Singh records that it was "abundantly clear that all the above named officials tried to interfere with the process of the court and their act and conduct clearly amounts to disobeying the orders of the Hon''ble High Court and all of them have collectively rendered themselves liable for punishment for committing contempt of court. In a way, they put all impediments in my duty to carry on the work, which was assigned by Hon''ble Punjab and Haryana High Court and thus, tried to defeat the very purpose, for which I was appointed observer by the Hon''ble Punjab and Haryana High Court". He further observes that he had got the containers opened in his presence. The numbers were got noted by Mr. Chhatwal and Mr. Sanjay Surpal. These officials had remained present at the scene. Therefore, the "intention right from the beginning was to delay the process." It has been observed that "the officials should be hauled up for interfering with the process of the Court."

24. On a perusal of the report, we find that departmental officials had failed to render assistance to an officer of this Court. Their effort was only to delay the proceedings and the harass the persons. Why this reluctance? The sequence of events speaks.

25. On an examination of the material as placed before us, it is clear that the petitioner had not imported usable pipes for melting and making mild steel ingots. The action of the respondents in detaining the goods on the ground that there was misdescription is wholly untenable.

26. The matter can be looked at from another angle. It is possible that something may appear to be ''scrap'' to one but different to another person. It can happen that a stitched piece of cloth may appear as a garment to one and a rage to the other. Even in the case of pipes etc, the exporter may have sold the

material as scrap as the pipes had been used for a long time. These had got rusted. Some of these had even been repaired. Thus, the exporter may have thought that these were scrap. On receipt, the respondents took the view that these could be used as pipes by the Industry. In order to meet such a situation, periodic instructions have been issued by the Government of India and its officers. On the record of this case, two letters embodying relevant instructions have been produced. First of these were issued by the Central Board of Excise and Customs vide letter dated June 16, 1995. In these instructions, it was inter-alia observed that "whenever serviceable goods are noticed, they are ordered to be mutilated to such an extent to become steel scrap and benefit of end use notification is extended and the consignments are assessed as steel scrap." A copy of the letter embodying these instructions is on record as Annexure P. 15. The matter was again clarified by standing order dated May 12, 2000. In this letter, it was observed as under :

"It has been reported by Commissioner Customs, Amritsar that M/s. Datt Multi Metals Private Limited and M/s. Patiala Castings Pvt. Ltd. filled Bills of Entry at CFS (PSWC) Ludhiana for clearance of containers of heavy melting scrap. However, on physical examination of the goods, old and used steel pipes of varying lengths from 10 to 18" (approximately having diameter 6" to 12" and thickness of about were found instead of melting scrap. It is understood that such pipes have varied applications in the processing industry viz. High pressure application, chemical industry, Textile industry machine tools, manufacturing etc. and the goods under import can be used as such. Whereas the goods imported appear to be new material for re-melting purposes, in their industrial furnace, as a raw material for manufacturing of MS ingots and large portion of such consignments are still in serviceable condition.

The Board has earlier examined the issue of clearance of Steel scrap which also contained serviceable material and issued instructions that if serviceable goods are noticed, they should be mutilated to such an extent to become steel scrap for availing the benefit of end use notification and the consignments are assessed as steel scrap as held in the (case) of Sujana Steels Limited v. Commissioner."

27. A perusal of the above would show that the authority was dealing with the case of the petitioner and M/s. Datt Multi Metals Private Limited. It was clarified that the goods should be mutilated to such an extent that these become steel scrap so as to enable the party to avail the benefit of the "end use notification and the consignments are assessed as steel scrap...."

28. On a consideration of these instructions issued vide letter dated June 16, 1995, it is clear that whenever the authority entertains any doubt regarding the goods, it has the option to get them mutilated so that the importer is not put to any harassment and the Revenue does not suffer any loss. Thus, even if the authority had suspected any irregularity, it could have immediately got the goods mutilated and ordered the release thereof.

29. Why did the authority not do so? There is no explanation whatsoever on the record. Despite being asked, Mr. Gumber has not been able to advance any reason. In this behalf, it also deserves notice that even before the receipt of the goods, the petitioner had represented to the respondents that it was running Induction Furnace. It was importing raw material from Middle East countries. It was noticed that custom authorities at Container Fright Station, Ludhiana were raising objections. To avoid delay or "demurrage charges, you are requested to please instruct the customs authorities at CFS Ludhiana to mutilate the goods if in their opinion, the same can be serviceable due to their bigger size." A copy of the representation dated March 18, 2000 submitted by the petitioner to the Commissioner of Customs, Amritsar is at Annexure P.1 with the writ petition. A similar request was again made vide letter dated March 20, 2000, a copy of which is at Annexure P. 2. A reminder was sent on April 15, 2000, a copy of which is at Annexure P. 27A. Despite these repeated representations which were submitted even before the receipt of goods, nothing was done. The goods were detained. Even the containers were not released.

30. Mr. D.D. Sharma, who appears for respondent Nos. 2 to 4 and 7 submits that the Commissioner of Customs had issued necessary instructions vide letter dated April 18, 2000. A copy of this letter is at Annexure P. 3 with the writ petition. The instructions had been issued to the Deputy Commissioner, CFS, Ludhiana. It was observed that the "Commissioner of Customs has acceded to the request dated 15-4-2000 of the captioned importer and has allowed the provisional release of Iron and Steel pipes (old and used) found in consignment of HMS imported by M/s. Patiala Castings (P) Mandi Gobindgarh vide B/E No. 490, dated 24-3-2000 and subsequent consignments of HMS of the said importer subject to conditions laid down in the office letter of even No. 764 dated 23-3-2000." The Deputy Commissioner was directed to take necessary action. Despite this, when the goods were received in April 2000, all kinds of hurdles were placed in the petitioner''s way. The goods were released only in September 2000 when a Bench of this Court had passed an order for the release of goods after mutilation. Mr. Gumber has not been able to explain as to why the directions given by the Commissioner had not been complied with by the Deputy Commissioner of Customs.

31. D.D. Sharma, points out that the Directorate of Revenue Intelligence had issued instructions vide letter dated May 2, 2000. In fact, even the goods were ordered to be seized. Thus, the Deputy Commissioner of Customs is not to blame.

32. Indeed it is true that instructions had been issued. A perusal of the order shows that the Directorate of Revenue Intelligence, Amritsar had informed the Deputy Commissioner of Customs, Ludhiana (CFS, Ludhiana) that it had been decided to convert the Detention into seizure u/s 110 of the Customs Act, 1962. However, the question is - Did the Directorate of Revenue Intelligence have any evidence? Did it act arbitrarily or on the basis of some information? Despite being repeatedly asked, Mr. Gumber has not been able to refer to any material

on the record of this case or on the departmental file which may remotely show that there was any basis for the detention or seizure of the goods.

33. In view of the above, it is clear that the goods as imported by the petitioner were metallic scrap. These were not serviceable pipes. In any case, in view of the instructions issued by the Commissioner/ the authorities had the option to get the goods mutilated and then release them to the petitioner. Even this was not done. On the contrary and in violation of the instructions issued by the Department, the goods contained in 27 containers were ordered to be seized. In the process, even the containers in which the goods had been received, were not released. The petitioner was sought to be burdened with demurrage and the charges for delay in the release of containers.

34. Mr. Sibal points out that on account of the delay in the release of containers by the respondents, the Shipping company had raised a demand for Rs. 82 lacs. On account of long standing business contacts of the petitioner, the matter was settled at Rs. 35 lacs which the petitioner had to pay. This amount has already been deposited by the petitioner. Still further, the counsel points out that the Punjab State Warehousing Corporation has raised a demand for Rs. 26 lacs on account of demurrage. He submits that the respondents cannot punish the petitioner and burden it with this heavy liability for their fault. The burden should be borne entirely by the respondents.

35. The sequence of events as noticed above clearly shows that the petitioner was not at fault at any stage. There was no misdescription of the goods. Fearing that delay in the destuffing of containers and release of goods can result in heavy demands, the petitioner had requested the respondents to mutilate the goods even before the consignment had been received. It had approached the Commissioner of Customs with this prayer. The petitioner''s prayer had been accepted by the Commissioner. The communication is at Annexure P.3. Directions had been duly given to the concerned authority. Yet, the custom authorities had detained the goods. The Directorate of Revenue Intelligence had directed that the goods be seized. The delay in release had occurred on account of the action of the respondents. Even after the petitioner had approached this Court, the respondents had persisted in their claim that the goods were not metal scrap. A Local Commissioner was appointed. He had given a detailed report. Even after he had submitted the report, the petitioner had to seek a direction from this Court for the mutilation of the goods and their release. In the meantime, the respondents had raised heavy demand for payment of customs duty on the hypothesis that the goods were serviceable pipes. The petitioner had to furnish bank guarantee for Rs. 42 lacs at the time of release of the goods. It had also to furnish a bank guarantee for an amount of Rs. 6 1/2 lacs regarding the payment on account of demurrage to the Punjab State Warehousing Corporation. The petitioner had to furnish a surety bond also. As a result, a substantial amount of money had to be paid by the petitioner to the Bank on account of interest etc.

36. It is clear that the petitioner has been unduly harassed. If the petitioner had

imported goods different from those as described in the import documents, it may have been possible for the respondents to justify the demand for ''duty'' or even demurrage etc. However, in the present case, it is clear that the goods were scrap. These were not serviceable pipes. Thus, the department itself is responsible for the charges on account of the delay in release of ''containers'' and demurrage on account of the delay in the release of goods. The petitioner is not responsible in any manner whatsoever. Thus, the petitioner shall be entitled to the reimbursement of the amount deposited by it on account of payment of charges in respect of the containers. It shall not be liable to pay any demurrage. It shall be the responsibility of the custom authorities. The first respondent shall determine as to who out of the concerned authorities was responsible.

37. Mr. Gumber submits on the basis of the decision in Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others, that the respondents may be permitted to approach the Warehousing Corporation or any other concerned authority for the waiver of demurrage. Mr. Sibal has no objection. It is clarified that in case the appropriate authority considers proper, it may waive the demurrage. With regard to the demurrage, the facts of the present case are similar to those in case of Jain Woollen Mills. The directions which we are giving are in conformity with the rule enunciated by their Lordships in the said case.

38. Before parting with the case, it deserves notice that the petitioner has been put to a considerable harassment and inconvenience. In the process, the Government has also suffered loss, of foreign exchange in as much as payment of Rs. 35 lacs had to be made to the Shipper who had transported the goods to India. It is a fit case where the Government should fix the responsibility and lake appropriate action against the defaulting officer/s. On a perusal of the record, we are prima facie satisfied that Mr. R.C. Sankhla who has filed the affidavit has to explain his conduct in this case. We are informed by Mr. Gumber that he is now posted as Departmental Representative before the CEGAT. Notice shall issue to him to show cause as to why penal and compensatory costs be not awarded against him in the present proceedings by this Court.

39. In view of the above, the writ petition is allowed. The impugned orders are set aside. The bank guarantees furnished by the petitioner are ordered to be released. The charges for demurrage as may be determined by the competent authority shall be paid to the Punjab State Warehousing Corporation by the respondents within two months. Thereafter, it shall be open to the concerned authority to fix the responsibility and to order such recovery as may be deemed proper from the defaulting Officer. Mr. Sankhla would appear and show cause as ordered above on May 29, 2002.

