

(2012) 08 GUJ CK 0080

In the Gujarat High Court

Case No : Special Civil Application No. 11336 of 2001

Raj Exports

APPELLANT

Vs

Central Warehousing Corp.

RESPONDENT

Date of Decision : 08-08-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 3
Customs Act, 1962 — Section 13, 15, 23, 28, 47

Citation : (2013) 196 ECR 206 : (2013) 287 ELT 166 : (2013) 19 GSTR 324

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Rakesh Gupta with Uday Joshi for M/s. Trivedi Gupta, for the Appellant; R.K. Mishra, S.P. Singh, Vibhuti Nanavati and Ms. Ameer Yajnik, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—This petition was previously disposed of by an order dated 1-3-2011 in view of the fact that substantial grievance of the petitioners came to be resolved during the pendency of the petition. With respect to the petitioners' grievance against the Customs Department regarding non-issuance of duty remission certificate, the court noticed that the Customs Department had not raised any demand of duty on goods destroyed during cyclone. On such basis, the petition was disposed of. While so doing, the court granted liberty to the petitioners to approach the court in case any difficulty arises in future in respect of any demand of customs duty that may be raised by the Customs Department in relation to the goods destroyed during the cyclone. After disposal of the petition, the Customs Department issued a show-cause notice dated 12-4-2011 demanding customs duty, interest and penalty upon which the petitioners filed MCA No. 1635/2011 and sought revival of the petition. Such prayer was granted by an order dated 9-9-2011. That is how the petition came up for hearing before us once again. The counsel for the petitioners pressed for the following reliefs:-

(c) Your Lordships may be pleased to issue a writ of certiorari or writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the letter dated 24-3-2000 (Annexure "M") of the Customs, i.e. respondent No. 3 and be further pleased to direct the respondent No. 3 Customs to issue Certificate u/s 23 of the Customs Act in favour of the petitioner company;

(d) Your Lordships may be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction prohibiting the respondent No. 3 Customs from demanding duty in respect of the said goods destroyed by the cyclone prior to clearance while in custody of respondent No. 1 CWC;

(dd) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction, quashing impugned Show Cause Notice Bearing F. No. S/20-381/2009-Bond dated 12-4-2011 (Annexure-AQ hereto).

(e) In the alternative, Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondent CWC to further pay the Customs Duty on the goods destroyed by the cyclone while in custody of CWC;

2. Such prayers arise in following factual background. The petitioner No. 1 is a registered partnership firm. The petitioner No. 2 is one of its partners. The petitioners had imported 4400 Metric Tonnes of caustic soda flakes in the year 1995. Such goods were warehoused in the godowns maintained by respondent No. 1 - Central Warehousing Corporation ("CWC, for short). There were disputes between the petitioners and the Customs Department - respondent No. 3 due to which clearance of goods was not permitted. With respect to details of such disputes, we are not directly concerned. Suffice it to note that the petitioners succeeded in such legal battle before the Apex Court when by an order dated 21-1-1997, the Apex Court granted permission to clear the goods in following terms:-

A request is made on behalf of Raj Exports that in view of the aforesaid developments the imports made by them should be allowed to be cleared without payment of any duty. An equally important submission made is that the Customs Authorities be directed to issue a detention certificate which may help the importers in having the warehouse charges reduced or waived, as the case may be. On this question, we would like to hear the Revenue. List these matters on 22-1-1997.

3. It is not in dispute that under such order of the Supreme Court, the petitioners cleared a part of the consignment. However, a part thereof could not be cleared due to the petitioners' own difficulties. It is the case of the petitioners that due to adverse market conditions, part of the goods could not be cleared by the petitioners after payment of customs duty and other charges. It is also not in dispute that when such remaining part of the goods was still in custody of the

CWC, a cyclone hit the coastal areas of the State on 9-6-1998 and completely destroyed the goods of the petitioners.

4. On the premise that the CWC had insured the goods for its value as well as the duty, the petitioners demanded the value of the goods from CWC upon its destruction. CWC though had received the full payment of Rs. 2,14,04,621/- from the respondent No. 2 - insurance company on the basis of the surveyor's report, did not release such amount on the premise that the Corporation had to recover its warehousing dues of a sum of Rs. 22,41,990/-. The petitioners, therefore, filed the present petition and made multiple prayers. Prayer (a) was with respect to the direction to the CWC to make good the loss suffered by the petitioners upon destruction of the goods during cyclone. Under an interim order dated 15-1-2002, the respondent No. 1 - CWC was directed to pay to the petitioners the amount received from the insurance company after adjustment of Rs. 22,41,990/- towards their claim. This issue, therefore, was sorted out.

5. The case of the petitioners now surviving is that upon destruction of the goods, the petitioners were entitled to duty remission certificate from the customs authorities. In any case, the Customs Department cannot recover any duty after a long period of time. On such basis, the petitioners seek to press prayers (c) and (d) noted above. After this petition was previously disposed of by this court on 1-3-2011, the Customs Department issued a show-cause notice dated 12-4-2011. In such show-cause notice, the Customs Department had demanded duty, interest and penalties from the petitioners on the goods which came to be destroyed during cyclone. Prayer 15(dd) added by amending the petition, therefore, relates to the petitioners' challenge to such show-cause notice.

6. The case of the petitioners also is that the CWC had insured the goods for value as well as duty. Any duty liability that the petitioners may have to discharge, should be paid by the CWC through the insurance company. Prayer (e) noted above relates to this aspect of the matter.

7. On basis of such facts, the counsel for the petitioners raised following three contentions:-

(a) that the goods have been destroyed before clearance. In terms of Section 23 of the Customs Act, 1962 ("the Act", for short), there would be no duty liability. The customs authorities, therefore, grievously erred in raising such duty demand. In support of this contention, the counsel placed reliance on the decision in case of Swil Ltd. Vs. Union of India and Another, wherein a Division Bench of this court found that upon re-export of the goods, no duty demand arose. In that view of the matter, the court held that when duty was not payable, the question of payment of interest u/s 61(2) of the Act would not arise.

(b) The impugned show-cause notice dated 12-4-2011 is bad-in-law because (a) the notice is vague and in specific, the duty demand is not computed and, the reasons why such demand is raised is not stated and (b) there is gross delay in

issuing the notice. Counsel submitted that u/s 28 of the Act, the authorities can recover unpaid duty within a period of one year from the date the same becomes payable in absence of any clandestine removal or concealment on part of the petitioners. He submitted that even if such limitation is not to be made applicable to duty demand raised u/s 72 of the Act, the same must be within a reasonable period of time. In support of his contentions, the counsel relied on the following decisions:-

(i) In case of Commissioner of Customs Vs. i2 Technologies Software Pvt. Ltd., , wherein a Division Bench of Karnataka High Court held that when the importer had relinquished his title in the goods, the customs authorities could not demand duty u/s 72 of the Act.

(ii) In case of Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum, wherein the Apex Court held that for the purpose of Section 11A of the Central Excise Act, period of limitation would be saved only upon the order of stay passed by the High Court. In the said case, the Karnataka High Court had merely stayed the collection of excise duty. The Apex Court held that this was a stage following the levy under the Central Excise Act and, therefore, there was no interim direction of the High Court for issuance of notice for levy of the duty. The notice was also, therefore, time-barred.

(iii) In case of Government of India Vs. Citedal Fine Pharmaceuticals, Madras and Others, wherein the Apex Court observed that in absence of any period of limitation, it is settled that every authority is to exercise the power within a reasonable period.

(iv) In case of Ani Elastic Industries Vs. Union of India (UOI) and Others, wherein a Division Bench of this court made similar observations.

(v) In case of State of Punjab and Others Vs. Bhatinda District Coop. Milk P. Union Ltd., , the Apex Court also reiterated this position.

(c) He contended that the CWC had insured the goods for value as well as duty. When the goods were admittedly destroyed while still in possession of CWC, the petitioners must be reimbursed the duty. The CWC as well as insurance company, therefore, are required to discharge such duty liability.

8. On the other hand, learned counsel Ms. Amee Yajnik for the Customs Department opposed the petition contending that in terms of Section 72 of the Act, the petitioners were liable to pay the duty when the goods kept in the warehouse were not cleared within the time envisaged in Section 61 of the Act. She further submitted that the show-cause notice was issued soon after the petition was disposed of and the same, therefore, cannot be treated as belated since, till then the entire issue was pending before this Court.

9. The counsel appearing for the CWC and insurance company opposed the prayer for payment of customs duty. In particular, counsel for the insurance company submitted that the petitioners did not clear the goods due to their own

difficulties. The insurance company cannot be held liable for any interest, penalty and other charges under such circumstances. He submitted that a writ petition would not be maintainable for entertaining such a prayer. In any case, there was no privity of contract between the petitioners and the insurance company.

10. Having thus heard learned counsel for the parties and having perused the documents on record, we may examine the three contentions raised by the petitioners one after another. Insofar as the first contention is concerned, the facts are not in dispute at all. To reiterate, the petitioners imported soda ash in the year 1995. They were allowed to clear such goods by the Supreme Court by the order dated 21-1-1997. Despite such order, the petitioners could not clear part of the consignment. On 9-6-1998, the goods were destroyed during cyclone. The petitioners, therefore, requested for duty remission u/s 23 of the Act. The customs authorities, however, insisted on collecting the duty u/s 72.

11. We may, therefore, notice relevant statutory provisions. Section 23 of the Act pertains to remission of duty on lost destroyed or abandoned goods and 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.

[(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption u/s 47 or an order for permitting the deposit of goods in a warehouse u/s 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon:]

[Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.]

11.1 Section 60 pertains to permission for deposit of goods in a warehouse and provides that when a warehousing bond has been provided as required u/s 59, the proper officer may make an order permitting the deposit of goods in a warehouse. Section 61 pertains to period for which goods may remain warehoused and reads as under:-

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 per cent, 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:

Provided that-

(i) in the case of any goods which are not likely to deteriorate, the period specified in [clause (a) or clause (aa) or clause (b)] may, on sufficient cause being shown, be extended-

(A) in the case of such goods intended for use in any hundred per cent, export-oriented undertaking, by the Commissioner of Customs, for such period as he may deem fit; and

(B) in any other case, by the Commissioner of Customs, for a period not exceeding six months and by the Chief Commissioner of Customs for such further period as he may deem fit;]

(ii) in the case of any goods referred to in clause (b), if they are likely to deteriorate, the aforesaid period of one year may be reduced by the [Commissioner of Customs] to such shorter period as he may deem fit:

Provided further that when the licence for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another warehouse or clear them for home consumption or exportation.

(2) [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 warehoused 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 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:

Provided further that the Board may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section.

Explanation- For the purposes of this section, "hundred per cent, export-oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of section 3 of the Central Excises and Salt Act, 1944 (1 of 1944).]

11.2 Section 68 pertains to clearance of warehoused goods for home consumption and reads as under:-

68. Clearance of warehoused goods for home consumption.- The importer of any warehoused goods may clear them for home consumption if-

- (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;
- (b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and
- (c) an order for clearance of such goods for home consumption has been made by the proper officer:

[Provided that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.]

[Provided further that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.]

11.3 Section 72 pertains to goods improperly removed from warehouse etc. and reads as under:-

72. Goods improperly removed from warehouse, etc. - (1) In any of the following case, that is to say,-

- (a) where any warehoused goods are removed from a warehouse in contravention of section 71,
- (b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted u/s 61 to remain in a warehouse;

(c) where any warehoused goods have been taken u/s 64 as samples without payment of duty;

(d) where any goods in respect of which a bond has been executed under [section 59] and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer,

the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under subsection (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select.

12. From the above statutory provisions, it can be seen that under subsection (1) of Section 23 of the Act where it is shown to the competent officer that any imported goods have been lost or destroyed before clearance for home consumption, he shall remit the duty on such goods. Under sub-section (2) of section 23, it is open for the owner of the goods before the order of clearance of goods for home consumption or an order for permitting the deposit of goods in a warehouse u/s 60 of the Act to relinquish his title to the goods upon which he would not be liable to pay any duty thereon. Section 23 thus provides for cases where and under circumstances in which duty remission would be available. Under sub-section (1) thereof, it is of course true that if the imported goods are lost or destroyed before clearance for home consumption, the appropriate authority has to remit the duty on such goods.

13. Such provision, however, cannot be seen in isolation and must be read subject to other provisions contained in the Act. In this respect, we may examine other relevant provisions. As noted earlier, Section 61 pertains to period for which goods may remain warehoused. Sub-section (1) of Section 61 provides for different time frame up to which the goods may remain warehoused. The present case falls under clause (b) thereof namely, in case of other goods wherein the time-limit provided is one year. Section 72, as noted, pertains to goods improperly removed from warehouse etc. Sub-section (1) thereof provides for instances where the proper officer may demand the full amount of duty chargeable on account of such goods together with penalties, rent, interest and other charges payable in respect of such goods. Such instances are-

(a) where any warehoused goods are removed in contravention of section 71;

(b) where such goods have not been removed from a warehouse at the expiration of period provided in section 61;

(c) where any warehoused goods have been taken u/s 64 as samples without payment of duty, and

(d) where any goods in respect of which a bond has been executed and such goods are not duly accounted for to the satisfaction of the proper officer.

14. Section 72 thus provides for the power to collect duty under circumstances other than regular clearance of goods for home consumption. Under clause (b) of sub-section (1), the authorities have power to collect duty when it is found that the goods warehoused have not been removed even after the period permitted u/s 61 has expired. In the present case, admittedly, this clause would apply. By virtue of the Supreme Court order dated 21-1-1997, the petitioners had the permission to clear the goods for home consumption. Therefore, even if we accept this date as the starting point for the purpose of Section 61(1), for a full period of one year thereafter, the petitioners did not lift the goods. u/s 61(1) of the Act, therefore, the maximum period for which such goods could have been warehoused expired. Upon completion of such period, therefore, the liability of the petitioners to pay the duty in terms of clause (b) of sub-section (1) of Section 72 thus arose. We may recall that the cyclone destroyed such goods on 9-6-1998. Therefore, in our opinion, it would emerge that the goods were destroyed after the petitioners' liability to pay duty thereon in terms of section 72(1) crystallized. Once the duty liability was crystallized, the destruction of the goods thereafter would make no difference. Sub-section (1) of Section 23 pertains to duty remission when the goods have been lost or destroyed before clearance for home consumption. As noted, Section 72 of the Act governs cases of collection of duty upon the events other than clearance of goods for home consumption. Once, therefore, we find that upon happening of the events envisaged under clause (b) of sub-section (1) of Section 72 of the Act, the liability of the petitioners to pay duty on the goods arose, any subsequent event such as loss or destruction of the goods thereafter would not alter the situation.

15. Counsel for the petitioners, however, submitted that no notice for collection of such duty was issued by the Customs Department till the goods were destroyed. In our view, this would be of no consequence. Notice would be issued for collection of duty when the importer does not pay the same despite the liability having arisen. This, therefore, is merely an act in furtherance of collecting unpaid duty and cannot be equated with the event which crystallizes the importer's liability to pay the customs duty.

16. The decision of this court in case of *Swil Ltd. v. Union of India* (supra) was rendered in a different factual background. It was a case wherein warehoused goods were re-exported and, therefore, had no duty liability despite which the authorities demanded interest for warehousing the goods beyond a period of six months in terms of sub-clause (ii) of sub-section (2) of Section 61. It was in this background the court held that when the duty liability does not arise, the question of interest which was payable at the specified rate on the amount of duty payable would not arise.

17. The decision of Karnataka High Court in the case of *Commr. of Cus., Bangalore v. i2 Technologies Software Pvt. Ltd.* (supra) was rendered in the

background of relinquishment of title to the goods and the question of the importers' continued liability to pay customs duty on such goods even after relinquishment. In any case, in the present case, we have given our interpretation to the provisions contained in Sections 72 and 23 of the Act.

18. We would, at this stage, like to deal with the third contention ahead of the second contention of the petitioners. This is in respect to the petitioners' insistence that whatever the duty liability, must be paid over by the CWC and the insurance company. We are not inclined to give any such direction for the following reasons:-

(1) that such liability has still not yet been worked out. The Customs Department has only issued a show-cause notice. The question of payment of duty is still not decided. The amount is not ascertained. Such prayer is, therefore, premature.

(2) Such claim of the petitioners arise out of contractual relationship between the petitioners and CWC. There is no privity of contract between the petitioners and the insurance company. For enforcement of such contractual liability, this writ petition would not be maintainable.

(3) Even the insurance company is entitled to raise all its objections and defences, if ultimately the question of its liability arises. For example, the insurance company could contend that the terms of the insurance policy does not require the company to discharge the liability of the petitioners towards interest, penalties etc. The insurance company could also canvass that the petitioners did not clear the goods due to their own internal reasons for which the insurance company cannot be asked to carry the burden of duty with interest and penalties. These and many other contentions may come up for consideration if ultimately the question of payment of duty and other charges to the petitioners by the respondents No. 1 and 2 arise. Such questions may have to be examined on the basis of terms of the insurance policy. Such questions cannot be decided in a writ petition that too, in the absence of full-fledged hearing.

19. This brings us to the sole surviving question namely, the demand of the customs authorities for payment of duty after a long period of time. To reiterate the relevant facts, the maximum period for which the petitioners could have warehoused the goods got over by 21-1-1998 even if we take the date of the order of Supreme Court as the starting point. The present petition was filed on or around 29-11-2001. The first notice on the petition was issued by the High Court on 14-12-2001. On 28-12-2001, the court issued fresh notice. The same would have been served on the respondents particularly the Customs Department sometime thereafter. Thus, nearly four years passed after the period envisaged in Section 61(1) of the Act was over before the respondents were served with a copy of the present petition. Admittedly, during this entire period of four years, the Customs authorities raised no demand for payment of duty. It is true that in the meantime, the petitioners' request for remission of the customs duty was rejected. The Customs Department also conveyed to the CWC that its unpaid

customs duty is recoverable. However, no notice or any other formal demand for payment of customs duty was raised by the respondent No. 3 against the petitioners.

20. During the pendency of this petition, no stay was granted against collection of such duty despite which for over ten years, the Customs Department did not issue any notice nor demanded the customs duty in any other manner. The impugned notice came to be issued in April, 2011 shortly after the petition came to be disposed of.

21. We are of the opinion that the notice for recovery of the customs duty is hopelessly belated. Nothing has been brought on record to suggest that due to pendency of the petition and out of due deference to the court in view of pending disputes, the Department did not issue the show-cause notice. In any case, there was no stay against issuance of show-cause notice or even against recovery of the duty. Quite apart from total inaction on part of the respondents to issue such a notice during the pendency of the petition, four years had passed before the petition was filed. During such period no steps were taken at all.

22. Section 28 of the Customs Act provides for the limitation of one year for collection of unpaid duty unless it is occasioned due to reasons of collusion or wilful mis-statement or suppression of facts in which case extended period of limitation of five years would be available. In this case, even if we may not pin down the customs authorities with such statutory time-limit, as held by series of decisions cited by the counsel for the petitioners and noted by us, such action cannot be initiated after an indefinite period of time. In absence of any statutory time-limit for recovery of duty, action should be initiated within reasonable time. What is reasonable time must depend on facts and circumstances of each case. In the present case, initial inaction on part of the customs authorities for four years before the petition was filed by itself must be seen as unreasonable delay on their part. Even after filing of the petition, total inaction on part of the customs authorities would preclude them from raising the demand for duty now. The impugned show-cause notice, therefore, must fail on this ground for being belated.

23. Quite apart from this, we also find that the notice is rather vague and general. No specific details have been given as to why such duty is payable in terms of Section 72(1)(b) and (d) of the Act. We may recall that clause (d) of sub-section (1) of Section 72 pertains to a case where bond has been executed and the goods are not accounted for to the satisfaction of the proper officer. We fail to see how such clause can be invoked in view of the admitted fact that the goods were destroyed. Further, the notice also does not compute the amount of unpaid duty that the Department wishes to recover. Principally on the ground that the demand has been raised after inordinately long period of time, the impugned show-cause notice is quashed. The petition is allowed to the said extent. Rule made absolute. No costs.