

(1983) 12 BOM CK 0036

In the Bombay High Court

Case No : Spl. Civil Application (Writ Petition) No. 18/B of 1980

Salgaocar Engineers Private Ltd.

APPELLANT

Vs

Shri O.J.F. Gomes, Asst. Collector of Customs

RESPONDENT

Date of Decision : 06-12-1983

Acts Referred:

Customs Act, 1962 — Section 2, 87

Citation : (1984) 86 BOMLR 127

Hon'ble Judges : Kamat, J;Bharucha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bharucha, J.—A great deal of mineral ore is exported from the port of Marmagoa. The draught at this port is not sufficient for bulk carriers to be fully loaded at the quay-side. Ore exporters have, therefore, resorted to the expedient of employing what are called transhippers. These are vessels which are anchored mid-stream. To them barges bring mineral ore. Bulk carriers which have already been loaded as far as the draught permits at the quay-side are brought alongside the transhippers. The equipment of the transhippers, cranes and conveyor belts and such, tops up the bulk carriers with the ore brought by the barges. The "Gosalia Prospect" is one such transhipper.

2. Certain spare parts arrived at Marmagoa on October 23, 1979. They were imported for the "Gosalia Prospect". At this point of time the petitioners were Receivers of the "Gosalia Prospect", having been appointed in certain court proceedings. The petitioners applied for clearance of the spares without payment of customs duty on the basis that the "Gosalia Prospect" was a foreign-going vessel and that they were entitled to such clearance without payment of duty by reason of Section 87 of the Customs Act, 1962. By letters dated November 17, 1979 and November 24, 1979 the Customs authorities required the petitioners to make payment of customs duty prior to clearance of the spares contending that the "Gosalia-Prospect" was used only for up topping operations within the port.

On February 21, 1980 this petition was filed impugning the requirement of the letters of 17th and 24th November 1979.

3. It is contended in the petition that the "Gosalia Prospect" is fitted with all the equipment required for foreign-going vessels under law and is capable of carrying any goods outside India and it is, therefore, a foreign-going vessel within the* meaning of the Customs Act. Mr. Kakodkar, learned Counsel for the petitioners, fairly stated that it was not open to the petitioners now to so contend, because in a judgment delivered by the Judicial Commissioner on December 30, 1980 in Special Civil Application No. 2 of 1972 (and other petitions) it was held that transhippers were not foreign-going vessels because they were not engaged in carrying goods or passengers between any port in India and any port outside.

4. What is urged by Mr. Kakodkar is that a transhipper, while engaged in up-topping operations, is engaged in the carriage of mineral ore between the port of Marmagoa and a port outside India and is, therefore, a foreign-going vessel within the meaning of Section 2(21) of the Customs Act. Section 2(21) of the Customs Act reads as follows:

"Foreign-going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes:

- (i) any naval vessel of a foreign Government taking part in any naval exercises;
- (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India;
- (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

Emphasis is laid by Mr. Kakodkar upon the words used in the definition, "engaged in carriage of goods". He submits that it is not necessary that a vessel must itself carry the goods between a port in India and a port outside. It is enough if that vessel is an intermediary in the process for it is then engaged in the carriage of goods between a port in India and a port outside. In his submission, a transhipper is an intermediary in the process of the carriage of mineral ore from Marmagoa to a foreign port and is, thus, a foreign-going vessel.

5. Mr. Kakodkar finds support for his submission in the judgment of a Division Bench of the Calcutta High Court in *Turner Morrison & Co. Ltd. v. The Assistant Collector of Customs for Exports (II)* [1976] Tax. L.R. 2108. This case concerned a vessel called "Nancy Dee" which transported wheat imported under PL-480 aid from supertankers anchored within Indian territorial waters to Indian ports such as Paradip and Calcutta. It was contended that the Nancy Dee was actually engaged in the carriage of goods which the super-tankers should have carried to the Indian ports and was, therefore, a foreign-going vessel within the meaning of

Section 2(21) of the Customs Act. The Division Bench came to the conclusion that Section 2(21) required the fulfilment of two conditions. One was that there must be carriage of goods or passengers between a foreign port and an Indian port and the second was that the vessel in question must be engaged in the carriage of such goods or passengers. The Division Bench observed that there was no requirement that only one vessel must undertake the entire length of the journey from the foreign port to the Indian port for such carriage of goods or passengers. Upon this basis the Division Bench concluded that the Nancy Dee was a foreign-going vessel within the meaning of Section 2(21).

6. With great respect to the learned Judges of the Division Bench of the Calcutta High Court, we are unable to agree. In our view by reason Section 2(21) only that vessel that is actually carrying at a given point of time goods or passengers between a port in India and a port outside India is a foreign-going vessel. A plurality of vessels for such carriage is not contemplated by Section 2(21).

7. We have with advantage been referred to the judgment of Sabyasachi Mukharji, J., the learned single Judge from whose judgment the owners of the Nancy Dee went in appeal. The learned Judge has taken a view akin to ours. He has quite rightly pointed out that the interpretation suggested by the owners of the Nancy Dee would lead to the unacceptable conclusion that any country boat which helped transshipment from the port to the ship would be a foreign-going vessel.

8. We may add that even if we were in agreement with the judgment of the division Bench of the Calcutta High Court, the petitioner would not succeed. A transhipper like the "Gosalia Prospect" is no more than a floating quay or pier over which mineral ore brought by barges is loaded on to bulk carriers. It cannot be said to be engaged in the carriage of goods.

9. In the result, the petition is dismissed with costs.

10. Rule discharged.