

(1993) 05 CAL CK 0035
In the Calcutta High Court
Case No : Matter No. ... of 1993

Sanjay Dhanuka

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 11-05-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37(B)
Customs (Amendment) Act, 1983 — Section 50
Customs Act, 1962 — Section 15(1), 17, 18, 25(1), 47

Citation : (1993) 66 ELT 361

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : Bhaskar Sen, Dipak Deb, P.K. Das and Hashmukh Kundalia, for the Appellant; Ashutosh Law and Samir Sengupta, for the Respondent

Judgement

Ruma Pal, J.—The subject matter of controversy in this writ application is the liability of the petitioner to pay interest on goods warehoused by the petitioner u/s 59 of the Customs Act, 1962.

2. The goods in question being 207.601 LDPE Granules, arrived on 28 November 1990 from Hongkong by SS Vishwa Prafulla. On 4th December 1990 the Bill of Entry for warehousing was filed u/s 59 of the Act. A separate portion of the goods arrived subsequently by another ship. However the facts relating to the separate portion are immaterial for the purposes of this case.

3. On 2nd November 1989 a public notice No. 406/89 was issued by the Collector of Customs to the following effect:

"Representation had been received by the Central Board of Excise & Customs from the trade against the levy of interest on the amount of Customs Duty on warehoused goods cleared from warehouse without payment of duty either for export or for home consumption. The importers have been disputing the levy of interest on the plea that when the goods are not at all levied to Customs duty on clearance, they should not also be liable to the interest.

The matter has been carefully considered by the Board and it has been decided that the interest shall be levied in cases where goods are cleared without payment of duty and such interest shall be calculated with reference to the rate of duty assessed, at the time of initial warehousing of the goods. Subsequent exemption of any kind shall not be regarded as automatically exempting such goods from interest liability.

This is for the information and guidance of the trade."

4. 34.10 MTs. of the 207.601 LDPE Granules were released after the petitioner paid a sum of Rs. 5,77,6707- as assessed duty. According to the documents, the Ex-Bond Bill of Entry in respect of the 34.10 MTs. is dated 2-2-1991. No interest was charged from the petitioner. The balance 173.50 MTs. remained in the warehouse.

5. According to the respondents, on 30th April 1991 a notice u/s 72(1) of the Act was issued to the petitioner and on 11th October 1991 a Notice u/s 72(2) was also issued in respect of the goods in question. Although repeated opportunities were given to the respondents to produce any proof of despatch of the Notices to the petitioner, no such proof was forthcoming.

6. On 27-11-1992 the petitioner purchased a duty free Advance Import Licence No. P/W/3327748/C/XX/25/0/92 dated 26-8-1992 of Rs. 30,00,000/-and DEEC No. 030593/CAL dated 26-8-1992. By virtue of being a holder of the duty free licence the petitioner became entitled to clear the goods already imported and kept in a Customs Bonded Warehouse without payment of duty (vide para 65 of Export and Import Policy 1-4-1992 - 31-3-1997). On 15th December 1992 the petitioner submitted the licence for clearance of the balance of 173.50 MTs of the goods to the Customs Authorities. Ten separate Ex-Bond Bills of Entry were also filed. The Bills of Entry were assessed as Tree" and an endorsement was made on each of the Bills of Entry by the concerned officer to that effect, who directed release of the goods.

7. The Assistant Collector of Customs however did not release the goods on the ground that the petitioner was liable to pay interest on duty in terms of the provisions of Section 47(2) read with Section 61(2) of the Customs Act, 1962.

8. This writ application was moved on 5th March 1993 challenging the refusal of the respondents to allow the clearance of 173.50 MTs. of LDPE Granules without payment of interest. The application was moved upon notice of the respondents. As it appeared to the Court that the only dispute was whether indeed the goods were duty free or not, the matter was adjourned till 12th March 1993 to enable the respondent authorities to obtain necessary instructions.

9. On 12th March 1993 the respondents sought directions for filing of affidavits. No affidavits were filed within the time specified. On 16th March 1992 by consent, the time was extended to file affidavits. No affidavit was however filed within the time specified.

10. The matter was thereafter heard on 31st January 1993; 5th April 1993 and 6th April 1993. The respondents were directed to produce the records relating to the case at the hearing.

11. The petitioner has argued that the liability to pay interest was linked with the liability to pay duty and since the goods were exempted from payment of duty there was no question of payment of interest. Reliance has been placed on the decision of a Learned Single Judge of the Kerala High Court in *Thungabhadra Fibres Ltd. Vs. Union of India (UOI)*, ; a decision of the 1992 (62) ELT 206 and on the decision of the Supreme Court in *Prakash Cotton Mills (P) Ltd. Vs. B. Sen and Others*, .

12. The petitioner then relied upon the decision of the Supreme Court in *N.K. Bapna Vs. Union of India (UOI) and Others*, and the decision of a Learned Judge of this court in *Shewbuxrai Onkar Mall v. Assistant Collector of Customs and Ors.* 1981 CHN 369 to contend that where goods were warehoused u/s 59 the import was a continuing process which commenced with the crossing of the Customs barrier till actual clearance from the bonded warehouse. The goods were provisionally assessed to duty when warehoused u/s 59 but the rate was fixed only when clearance took place. Interest, according to the petitioner, was to be calculated on the duty assessed at the time of clearance and not on the duty which may have been applicable when the goods were warehoused.

13. The petitioner then challenged the public notice dated 2nd November 1989 and contended that it has no statutory force. He relied upon the decision of this Court in *Birla Jute and Industries Ltd. Vs. Assistant Collector of C. Ex.*, as also the decision of the Supreme Court in *East India Commercial Co. Ltd. Calcutta v. Collector of Customs AIR 1992 SC 1893* in this context.

14. It is argued that the petitioner had purchased the licence on the basis that he would be able to remove the goods duty free. A right had been acquired by the petitioner which could not be taken away by a public notice which was mere executive action without foundation either in the Customs Act or any statutory order. The petitioner has relied upon the decision of a Learned Single Judge of the Bombay High Court in *Lokash Chemical Works Vs. M.S. Mehta, Collector of Customs (Preventive) Bombay and others*, in support of this contention.

15. As far as the right of the Customs Authorities to have proceeded against the petitioner u/s 72 of the Act, it was submitted that the right, if any, had been abandoned by making of the assessment on 15-12-1992.

16. The respondents have contended that the goods continued to be dutiable even when cleared. By virtue of the Duty Exemption Entitlement Certificate (DEEC) all that had happened was that the holder of the licence was exempted from making payment of duty. It is stated that the goods themselves continued to remain dutiable. It is contended that the petitioner was liable to pay interest on the duty payable when they were warehoused u/s 61(2) of the Act. Notice had been issued u/s 72(1) even before the DEEC was purchased by the

petitioner. The right of the Customs Authorities to recover the interest became absolute when the notice u/s 72(2) was issued. It is submitted that the petitioner must pay the demand as raised u/s 72(2), particularly when he had executed a bond undertaking to clear the goods only upon payment of all demands. It is submitted that even assuming that the petitioner was entitled to the benefit of the DEEC nevertheless he was liable to pay interest on the duty assessed at the time of warehousing after the expiry of the period specified u/s 61(2) of the Act. The cases relied upon by the petitioner have been distinguished on the ground that the facts were not similar to the facts of this case.

17. The first submission of the respondents that the goods continued to be liable to duty although the petitioner as the holder of the licence was not required to pay duty does not stand scrutiny. The DEEC scheme is a general exemption which has been granted under Sub-section (1) of the Section 25 of the Customs Act, 1962 by the Central Government by Notification No. 159/90-Cus. dated 30th March 1990. By that notification the goods themselves have been exempted from payment of duty subject to the fulfilment of certain conditions including inter alia that the materials imported are covered by a DEEC. It is the materials themselves which are exempted.

18. In view of the decision of the Supreme Court in *M/s. Prakash Cotton Mills (P) Ltd.* (supra) that the rate of Customs Duty will be that in force on the date of actual removal of the warehoused goods from the warehouse, u/s 15(1)(b) read with Section 59 of the Act, there can, be no doubt that the petitioner is entitled to duty free clearance of the balance of the goods.

19. But the respondents say that the petitioner is not entitled to the benefit of the exemption because admittedly the petitioner had retained the goods in the warehouse beyond the period prescribed u/s 61 of the Act and that the petitioner's liability to pay duty had crystallised u/s 72(1) of the Act when the demand under that section had been made. The relevant date according to the respondents, was therefore not the date of clearance but the date of the demand.

20. Before considering the decisions on the question it is necessary to clearly understand the statutory provisions. The relevant sections which call for consideration are Section 59 (under which the goods were warehoused), Section 61 (which provides for the period of warehousing), Section 68 (which provides for the clearance of goods for home consumption) and Section 72 (which empowers the customs authorities to raise a demand in respect of the warehoused goods and to sell the goods in default of such demand being met).

21. Section 59 (insofar as it is relevant) provides:

"Section 59. Warehousing bond.

(1) The importer of any goods specified in clause (a) of Sub-section (1) of Section 61, which have been entered for warehousing and assessed to duty u/s 17 or Section 18 shall execute a bond binding himself in a sum equal to twice the

amount of the duty assessed on such goods -

(a) to observe all the provisions of this Act and the rules and regulations in respect of such goods;

(b) to pay on or before a date specified in a notice of demand,

(i) all duties, and interest, if any, payable under Sub-section (2) of Section 61;"

22. Section 61 provides inter alia :

"Section 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 -

(i) non-consumable stores till the expiry of one year

Explanation. -

Provided that --

(ii) In the case of any goods which are not likely to deteriorate, the aforesaid period of (one year) may, on sufficient cause being shown be extended by the Collector of Customs for a period not exceeding (six months) and by the Board for such further period as it may deem fit:

(2) Where any warehoused goods, specified in clause (a) of Sub-section (1), remain in a warehouse beyond a period of one year, by reason of extension of the aforesaid period or otherwise, interest at such rate as specified in Section 47 shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year till the date of the clearance of the goods from the warehouse :

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

23. Section 68 provides :

"Section 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."

24. Section 72 in so far as it is relevant provides :

"Section 72. Goods improperly removed from warehouse, etc.

(1) In any of the following cases, that is to say,-

(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;

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 Sub-section (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."

25. Prior to 23-12-1991 Section 59 cast an obligation on the importer to execute a bond -

"...to pay on or before a date specified in a notice of demand all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at the rate of six per cent, per annum or such other rate as is for the time being fixed by the Board."

26. Section 61(2) was introduced in the Act by way of amendment with effect from 13-5-1983 by Section 50 Act 11 of 1983. This was substituted by Act 55 of 1991 with effect from 23-12-1991. Prior to its substitution in 1991, Section 61(2) read as follows :

"Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of Sub-section (1) by reason of the extension of the aforesaid period or otherwise, interest at such rate not exceeding eighteen per cent, per annum as is for the time being fixed by the Board, shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year or, as the case may be, three months, till the date of the clearance of the goods from the warehouse."

27. On a plain reading of the statute therefore for action to be taken u/s 72(1) a notice of demand must be given. I have already said that there was no proof of despatch of any notice let alone service on the petitioner. Because there was no effective demand there was no question of the petitioner's liability to pay duty being crystallised on that date. Nor could any action be taken against the goods u/s 72(2) for any default as there was no opportunity to comply.

28. The period for which the petitioner could have warehoused the goods expired

on 5-12-1991. The idea behind fixing a time limit is to compel the importer to clear the goods after the statutory "free period". Notionally therefore the importer becomes liable to pay duty and to remove the goods on the expiry of the period.

29. A Division Bench of the Karnataka High Court in the case of Bangalore Wire Rod Mills Vs. Union of India, had to consider a situation where the goods had been warehoused on 11-11-1982. Section 61(2) was introduced with effect from 13-4-1983 as already noted. Act 11 of 83 also amended the provisions of Section 61(1) of the Act. The Court held that goods which had been permitted to be warehoused u/s 61(1) of the Act as it stood prior to its amendment in 1983 were not affected by the provisions of Section 61(2) which only related to cases covered by Section 61(1), as amended. In that context Rama Jois, J., (as his Lordship then was) who delivered the judgment held that:

"Obviously, in order to avoid loss to the Central Government on account of delay in issuing notice u/s 59 of the Act by the officers concerned, the Parliament inserted Sub-section (2) of Section 61. According to this sub-section even if the goods were allowed to remain in the warehouse beyond the period specified in Section 61(1), by virtue of the permission granted by the competent authority or otherwise, as far as the interest is concerned, the importer would become liable to pay interest at the prescribed rate with effect from the date of expiry of the period specified in Sub-section (1) of Section 61 i.e., for a period of one year in the case of non-consumable stores and after the expiry of 3 months in the case of other goods."

... .. "The resultant position is that the liability of the petitioner to pay interest arises u/s 59 of the Act, i.e., from the date specified in demand notice. In fact it is because of this, the legislature inserted Section 61(2) which created the liability to pay interest from the date of expiry of the period specified in Section 61(1)."

30. The liability is fixed on that date and continues till the date of clearance. In my view the phrase "amount of duty". In Section 61(2) refers to the duty payable during this period. The date of clearance is the terminal point for computation of interest. Therefore the rate of duty at the terminal point, that is the date of clearance, is not relevant for the purpose of fixing of liability. If the interest is to be calculated on the duty at the point of clearance, apart from being contrary to the wording of Section 61(2), this would mean that an importer who has imported goods at a lower rate of duty which then became subject to a higher rate of duty at clearance, would be liable to pay interest on such higher rate of duty for the period of warehousing after the expiry of the period specified u/s 61(1). This would be unjust.

31. In fact, a similar situation came up for consideration in the case of Bangalore Wire Rod Mills (supra). In that case at the time of import the rate of duty was 40%. The Customs Authorities sought to levy interest at the rate of 90% which

was the rate at the time of clearance for the entire "back period". The Court held that the amount of interest could be computed only on the basis of rates of duty which came into force from time to time during the period of warehousing and not at the rate prevalent at the time of clearance.

32. By the same reasoning in this case also the petitioner would be liable to pay interest at the rate of duty applicable after the expiry of the "free" period. The public notice issued by the Collector is in keeping with this exposition of the law.

33. In the case of Thungabhadra Fibre Ltd. (supra), the goods were warehoused in March and September 1984. In March 1985 the goods were exempted from duty. Subsequently, the importer apply for clearance of goods. He was asked to pay the duty. The Court held :

"A reading of the relevant provisions of the Act would show that the liability to pay interest cannot be delinked or divorced from the liability to pay duty. Both are conjunctive and must go together. The words "together with interest" in Section 59(b) are sufficient to indicate that the interest is linked with duty. In other words, an importer has no liability to pay interest is an adjunct to a debt or liability. It has no separate existence. It is one of the incidents of a debt which in the absence of the latter has no sanction for enforcement. The importer's liability to pay duty is at the time of clearance of the goods from a warehouse. He has no obligation to pay duty as long as goods remained in the warehouse. When the goods are exempted from duty before they are removed from the warehouse, the natural as well as legal corollary is that none can be mulcted with the burden to pay interest on a non-existing duty."

34. Neither the Learned Judge in Thungabhadra Fibre Ltd. nor the Tribunal in Shriram Needle Bearing Industries Ltd. (supra) (the Tribunal merely followed the decision of Thungabhadra Fibre Ltd. (supra)) considered the impact of Section 61(2) on the question of interest. With respect I am unable to accept the views expressed in both the cases.

35. Most of the cases cited by the petitioner relate to the right of the petitioner to remove the goods duty free.

In the case of Lokash Chemical Works, it was said :

"a right was acquired, and it is beyond dispute that once the licence is granted the person acquires a right, which cannot be taken away by mere executive action but such action must necessarily have its foundation either in the said Act or Order."

36. The question in this case is what was the right which was acquired by the purchase of the DEEC. The right as expressed in the relevant notification was to clear the goods duty free. Duty by itself does not include interest. Therefore there was no question of the public notice taking away any accrued right of the petitioner.

37. It is then said by the petitioner that the proper officer having released the goods u/s 47 of the Act, the respondent No. 3 had no authority to hold up the release. I cannot accept this submission. The liability is on the petitioner to pay interest, it is a statutory duty. He could not remove the goods u/s 68 without paying interest. Being a statutory liability, it could not be waived except in the manner provided under statutes. The proviso u/s 61 shows that only the Board is competent to waive interest. No application appears to have been made by the petitioner to the Board for such waiver.

38. In the decision of Birla Jute and Industries Ltd. (supra), I had held in connection with instructions issued u/s 37(B) of the Central Excises and Salt Act that the instructions were binding on the Central Excise Officers but not on the assessee nor on any quasi-judicial or judicial authority. The Respondent No. 3 therefore was bound to obey the public notice and could not act otherwise.

39. For the reasons aforesaid the writ application is disposed of by directing the Customs Authorities to release the balance LDPE Granules to the petitioner subject to the petitioner making payment of interest at the rates of duty as applicable from time to time after the expiry of the statutory period u/s 61 under the unamended provisions of Section 61(2) of the Act.

40. There will be no order as to costs.