(1992) 06 CAL CK 0018

In the Calcutta High Court

Case No : Matter No. 2416 of 1991

Scindia Steam Navigation Co. Ltd. APPELLANT

Vs

Collector of Customs RESPONDENT

Date of Decision : 08-06-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 116
Evidence Act, 1872 — Section 105

Citation : (1993) 63 ELT 34

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Judgement

Shyamal Kumar Sen, J.—Pursuant to the order passed by this Court the Tribunal has referred the following questions to this Court for determination:

"1. Whether on the facts and in the circumstances of the case and on the basis of the evidence on record the findings of the Tribunal that the sweeping emanating have no relation to the relevant consignment is perverse and arrived at without considering all material evidence.

2. Whether on the facts and on the circumstances of the case and in view of the penal provisions of the Customs Act, the Tribunal should have held that the onus of proof was on the Customs authorities and that the appellant was entitled to the benefit of any doubt."

2. The facts, inter alia, are that the Port Trust of Calcutta reported shortlanding of 821 Bags Ammonia Nitrate Phosphate in respect of Line No. 1 (Breman) Ex. S/S Jalagirija under Rot No. 698/73. The concerned Steamer Agents, M/s. The Scindia Steam Navigation Co. Ltd. Cal. 16 were accordingly called upon to account for and explain as to why penal action u/s 116 Customs Act, ''62 should not be taken against them for the cargo landed short. The Steamer Agent in their explanation stated that according to Port Trust O.T.R. of 13-11-1973, 630 Bags Am monium Nitrate Phosphate were landed from the vessel as sweepings and

those were cleared by M/s. The Food Corpn. of India Ltd. In support of their contention they also submitted a photostat copy of the consignees letter dated 23-8-1976.

3. Considering the Steamer Agents'' explanation the Dy. Collector of Customs observed as follows :

"that even after several correspondences and enjoying all reasonable time and opportunity the Steamer Agents have failed to explain the shortlanded cargo to the extent of 821 bags satisfactorily. I also observe from the records that the consignee was granted refund against the shortlanding. The shortlanding is, therefore, established and Steamer Agents are liable to penal action u/s 116 of Customs Act, ''62."

4. The Deputy Collector of Customs also imposed on the Steamer Agents, the appellant a penalty of Rs. 11,960/- only u/s 116 of Customs Act, ''62. The amount of penalty should be deposited in the Customs House Treasury within ten days from the date of receipt of this order.

5. The appeal was preferred against the said order passed by the Deputy Collector of Customs wherein the appellate Collector of Customs, Calcutta, held as follows :

"I have gone through the records of the case carefully. There is no substance in appellants contentions that all the sweepings have been cleared by the Food Corporation of India. Food Corporation of India''s letter dated 23-8-1976 was also considered by the Adjudicating officer, this letter merely states that some 630 bags of A.N.P. have been merely removed to JJP. No evidence has been submitted by the appellant to show that the sweepings were cleared subsequently by the consignee. It will also be seen from the KLC report that the appellants contentions about clearance of the sweepings under particular Bill of Entry was found to be untrue. It was ascertained that the original landed goods was cleared against the Bill of Entry quoted by the appellant.

Considering that (a) the sweepings have not been connected with the relevant Bill of Entry (in other words there is no evidence that the sweepings have emanated from the particular consignment) and (b) there is no evidence to indicate that sweepings have been cleared, the appeal is rejected."

6. Against the said order of the Appellate Collector of Customs the revision application was preferred before the Customs, Excise & Gold (Control) Appellate Tribunal, East Regional Bench. The Tribunal after hearing both the parties held, inter alia, as follows :

"After hearing both the sides and going through the facts and circumstances of the case, I hold that the appellant has not been able to correlate the sweepings from the relevant bill of entry and has also not been able to establish that the sweepings have emanated from the particular consignment. There is also no evidence on record that the sweepings have been cleared. I confirm the order

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passed by the lower authorities. The appeal is dismissed."

7. The same contentions have been reiterated before us by the parties as made before authorities below.

8. It appears from the letter dated 23rd August, 1976, from Food Corporation of India to M/s. Scindia Steam Navigation Co. Ltd. that the Deputy Manager, Food Corporation of India, specifically stated that 630 bags of A.N.P. sweepings have been removed to JJP and weight of these bags is 52 MT.

9. Further by letter dated 20th May, 1980 from Food Corporation of India to M/s. Scindia Steam Navigation Co. Ltd. that the District Manager, (Docks) stated that "630 bags of sweepings excaptioned vessel against Rot No. 698/73 Bill of Entry No. GSI-55 of 20-11-1973 Line No. 1 weighing 52 MT were cleared to our JJP Dept. on 30-11-1973 against landing of the cargo ex vessel. No shortlanding claim in respect of ANP was filed against the owner since there was no shortlanding."

10. The Survey Report dated 14th February, 1974 is set out herein below

REPORT OF SURVEYS held on 12th Feb. 1974. Line No. 1 Rot No. 698/73 Landed Ex. On Goods Sod 27-11-1973 No. 1243 SS. "Jalagirija" Ard 18-10-1973 Surveyed at ''B'' NSD Marks & Nos. Contents and result of Survey. Nil 630 gunny bags stated to contain Ammonium Nitrate Phosphate Sweepings were passed over the Port Commissioners'' Weigh Bridge and Weight recorded 52,000.00 kg. "Surveyed without prejudice". This report is not intended for Insurance Purposes. This Survey Report is issued as per Scindia''s letter Ref. IMP/HMB/B9 dated 28th Nov. 1973. Original Signed by D.J. Antia Norman Stewart & Co. Marine Surveyors. W/TPS: GG Calcutta The 14th Feb, 1974

11. In terms of Section 116 of the Customs Act, 1962 the ship owner''s liability is completely discharged after landing of the goods and it is a matter between the Calcutta Port Trust and the importer after such landing. If after landing there is pilferage or theft, there is no liability of the steamer agent. We may in this connection take note of Section 116 of the Customs Act, 1962, which is set out herein below :

"116. Penalty for accounting for goods - if any goods loaded in a conveyance for importation into India, or any goods transhipped under the provision of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant Collector of Customs, the person in charge of the conveyance shall be liable -

(a) In the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of goods not would have been chargeable on the goods not unloaded or the deficient goods, as the case may be had such goods been

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imported.

(b) In the case of coastal goods, to a penalty exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported."

12. It may be noted in this connection that the vessel Jalagirija arrived in the Calcutta Port with only one consignment of Calcium Ammonium Nitrate Phosphate aboard for discharging at this and on account of Messrs Food Corporation of India.

13. On completion of discharge of the cargo on the vessel the Port Trust issued the outturn report recording shortlanding of 821 bags out of the manifested quantity of 1,20,380 bags. Calcium Ammonium Nitrate Phosphate. The Outturn Report at the same time also recorded landing of 630 bags Sweepings of Ammonia Nitrate Phosphate ex there vessel.

14. Since the vessel carried only one consignment on account of Messrs. Food Corporation of India it was clear that the sweepings were a part of the cargo carried by the vessel and the same belonged to Messrs. Food Corporation of India. Messrs. Food Corporation of India had actually carried the sweepings as usual after necessary survey of the sweepings being carried out by the surveyors Messrs. Norman Stewart & Co.

15. Messrs. Food, Corporation of India had duly confirmed vide their letter No. FCI/Dock/OP/GENL/76 dated 23-8-1976 addressed to the Steamer Agents that a total of 630 bags sweepings equivalent to 52 m. tonnes were cleared by them in this connection.

16. The Port Trust Outturn Report has clearly recorded landing of 630 bags Ammonium Nitrate Phosphate Sweepings from the vessel and the consignees letter indicate that the sweepings were surveyed, weighed and cleared from the Port premises by the consignees and hence with a view to arrive at nett shortlanding, if any, the quantity of said sweepings bags are to be adjusted against the shortlanding quantity of 821 bags. In this case the position of adjustment would appear as under :

Weight of Sweepings landed & Cleared = 52,000 Kgs. 50 Kgs. = 1 Bag. 52,000 Kgs = 1,040 Bags. No. of bags of sweepings = 1,040 bags, cleared No. of bags shortlanded = 821 bags. Excess bags cleared = 219 bags

17. From the position given above it is evident that there was no shortlanding in respect of the consignment manifested under the subject Line No. On the other hand an excess quantity was received by the consignees in this respect.

18. It appears to us that whereas the Dy. Collector of Customs has relied upon the Port Trust Outturn Report for the number of bags shortlanded in the matter of adjudicating the case, he had totally ignored the landing of 630 bags (52 m. tonnes 1040 bags) Calcium Ammonium Nitrate Phosphate Sweepings as recorded

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in the same Outturn Report. He has also failed to take note of the survey carried out for the sweepings and also confirmation by the consignee of its clearance and despatching the same to their Godown. It is an established practice at all levels of Customs to adjust the Sweepings with the shortlanding of such bagged cargoes for the purpose of arriving at net shortlanding if any and the authority has erred in adjudicating the case without adjusting the sweepings landed from the vessel.

19. As this entire quantity of shortlanding has been offset by the landing and clearance of the Sweepings, it appears to us that the petitioner has duly accounted for the cargo in full.

20. The finding of the Appellate Tribunal that "there is no evidence on record that the sweepings have been cleared" is perverse and arbitrary one especially in view of the letters of the Food Corporation of India dated 23rd August 1976 and 20th May 1980 admitting that they had cleared the goods.

21. This aspect of the evidence was ignored by the Tribunal.

22. It is well-settled that if two views are possible benefit of doubt should be given to the applicant.

23. Our attention has been drawn to the judgment and decision in the case of... reported in 1982 Eastern Law Reports 93. In that decision the petitioner at all material times carried on business as shipowners and carriers of goods by sea. The Deputy Collector of Customs imposed penalty on the petitioner for shortlanding of 151 sacks cellulose acetate manifested against line No. 16 ex S.S. Jalakrishna. The petitioner preferred an appeal against the said order of penalty before the Appellate Collector of Customs who confirmed the previous order. The petitioner thereupon moved a revision application to the Central Government which rejected it. Thereafter the petitioner moved the High Court under Article 226 of the Constitution challenging the orders passed by the authorities aforesaid.

24. In the aforesaid decision Section 116 of the Customs Act, 1962 was considered and Sabyasachi Mukharji J. as his lordship then was in paragraph 8 at page 98 of the said Report observed as follows :

"An Analysis of this section would make it clear that the liability of the section would be attracted if any goods loaded in a conveyance for importation into India or any goods transhipped under the provisions of that Act or coastal goods carried in a conveyance were not unloaded at their place of destination in India or, if the quantity unloaded was short of the quantity to be unloaded at that destination. Therefore, the ingredient to attract the provisions of this section is that the quantity unloaded must be short of the quantity. Therefore, shortlanding is the very basis of attracting the provisions of this section. That fact has to be established like any other fact. In this case it was contended that the outturn report indicated that 151 bags of the consignment which were manifested under

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line No. 16 had been landed. The outturn report which would be relevant for this purpose contains as follows :

But the outturn report also contains a column entitled "cargo land with marks & no marks not appearing in the manifest" and in that column under nil mark the following has been mentioned :

"Cargo landed with marks & no marks not appearing in the manifest Marks :

Nil = 210 bags

Therefore, while on the other hand the quantity discharged seems to indicate that 1849 bags had been landed, there were also 210 bags which were without any marks. But it is a common case that the said goods contained only 2000 bags of cellulose acetate flakes pulverised for carriage. Therefore, from the entirety of these two basic facts it is not evident that there was any shortlanding as alleged, but in appropriate case that fact has to be established in considering the evidence of the entirety of the facts. Here, the survey report and chemical analysis report were produced before the authority concerned. The authority concerned has proceeded on the basis that until the consignee accepted the goods it cannot be established that the goods which were shown with the Nil Mark as 210 bags contained the same quantity of goods which are shortlanded."

Now, the question is, not doing so did the respondent authorities concerned act in violation of principles of law. On behalf of the respondent reliance was placed on Section 105 of the Evidence Act. In aid of the proposition that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence was open to him and the Court should presume the absence of such circumstances. Here, the offence under which the provision of Section 116 is attracted is dependent upon the basic fact of shortlanding being established. Now, that short landing is not established ex facie by the out-turn report itself. The outturn report is certainly a piece of evidence which should be taken into consideration. But that by itself is not conclusive evidence which throws the burden of proof on the other side that the goods in question were shortlanded. It appears to me that in proceeding on that basis, that is to say, as if the outturn report established prima fade that the goods in question were shortlanded and in judging the question from that point of view the authorities concerned proceeded on an erroneous basis u/s 116 of the Act. It is true, as I have emphasised before, the outturn report and manifest are the relevant pieces of evidence and are to be taken in conjunction and with other piece of evidence viz. the survey report the conduct of the parties, the chemical analysis report and also the fact that there is any other types of goods in the ship. It is nobody''s case that there were any other types of goods in the said ship. Therefore, in not so doing, it appears to me that the respondent authorities proceeded on an erroneous view of law and on such an erroneous

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view of law, if a fact finding body comes to a conclusion then concerned authority commits an error of law which is apparent on the face of it. It is true, as learned advocate for the respondent contended that the finding of fact on appraisal of serious factors should not be disturbed by a Writ Court merely because the Court was inclined to take a different view of the matter. But, if a fact finding body has proceeded on an erroneous view of law, then the conclusion arrived at by that body becomes amenable to correction because there would be an error apparent on the face of the record. In this connection reliance was placed on certain observations of the Supreme Court in the case of Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, . My attention was specially drawn to the observations of the Court in paragraphs 5 and 6 of the said report in view of the ingredients of Section 116 of the Customs Act. It is not necessary, in my opinion, to discuss the principles laid down in the said decision in great detail in the instant case."

25. Considering the facts and circumstances of the case and the principles decided in the aforesaid decision in our view the Tribunal was not correct in holding that the sweeping emanating have no relation to the relevant consignment. On the basis of evidence on record we are of opinion that on proper interpretation of the relevant provision of the Customs Act the Tribunal should have held that the onus of proof was on the Customs authorities and that the appellant was entitled to the benefit of doubt.

26. Both the questions are answered in the affirmative and in favour of the petitioner.

27. There will be no order as to cost.

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