
(1994) 03 RAJ CK 0025

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1122 of 1993

Shree Pipes Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-03-1994

Acts Referred:

Constitution of India, 1950 — Article 14
Customs (Fees for Rendering Services by Customs Officers) Regulations, 1968 —
Regulation 2, 3
Customs Act, 1962 — Section 124, 128, 57, 65

Citation : (1994) 46 ECC 304 : (1995) 79 ELT 405 : (1994) 1 RLW 439 : (1994)
3 WLC 36 : (1994) 2 WLN 553

Hon'ble Judges : Magh Raj Calla, J

Bench : Single Bench

Advocate : Paras Kuhad, for the Appellant; Sudhir Gupta, for the Respondent

Final Decision : Allowed

Judgement

Magh Raj Calla, J.—This writ petition is directed against the order dated 13th July, 1992/7th October, 1992 passed by the Assistant Collector, Central Excise and Customs Division, Ajmer, which has been filed with the writ petition as Annexure-35, whereby the petitioner's claim for refund of a sum of Rs. 2,86,379.55 has been rejected.

2. A licence of the Public Bonded Warehouse was granted on 11th February, 1986 as per Annexure-1 in the premises of M/s. Shree Pipes Limited, Village Ojhada, Bhilwara, the owner of such Bonded Warehouse was M/s. Central Warehousing Corporation, Ojhada, Bhilwara. On 12th February, 1986 a letter was sent to M/s. Shree Pipes Limited, i.e., the petitioner by the Superintendent, Central Excise Customs Range, Bhilwara to deposit the amount of Rs. 77,422.80. It is the case of the petitioner that the aforesaid amount was deposited "under protest" and further amounts in this regard was also deposited by the petitioner as and when required and according to the petitioner, he has deposited a total sum of Rs. 3,07,074.80 for the period February 1986 to June 1989. There is no dispute that

this amount has been paid for and on behalf of the Central Warehousing Corporation, by the petitioner hereinabove. It has been submitted that the respondents had claimed this amount with reference to condition No. 2 of the licence Annexure-1, which reads as under :-

"2. The licensee shall apply for the renewal of the licence in the prescribed proforma not later than the last day of November of the year preceding to which the renewal relates. He should also deposit the cost of establishment and pension in advance in respect of Officer of Customs deployed in the warehouse for the whole year. In the event of the failure to do so, clearance shall not be permissible between the period after the expiry of the licence and the renewal."

While the petitioner went on paying the amount against the item of cost of establishment and pension in advance for the salary of one Inspector and one Class IV employee, who remained present at warehouse for the purpose of recovering the custom duty because the dutiable goods are stored in this warehouse, the petitioner also went on protesting that this amount could not be recovered from the petitioner and if at all any amount is to be recovered, it must be recovered on hourly basis, i.e., for the actual number of hours, for which, the employees of the Customs Department actually worked at the warehouse for the purpose of recovering the customs duty.

Mr. Paras Kuhad, learned counsel for the petitioner has invited my attention to the document Anx.17, which is a letter sent by the Central Excise & Customs Collectorate, Jaipur under the signatures of the Superintendent, Customs to the Assistant Collector way back on December 18, 1987, wherein, the Assistant Collector, Central Excise & Customs Department, Division Ajmer was requested to examine the petitioner's representations in the matter of the refund of the supervision charges in the light of the observations made in this letter dated December 18, 1987 and that he may also consider disposal of the party's refund claim in the light of clarification issued by the Director of Customs, New Delhi's D.O.E No. 473/235/87-Cus. VII dated 21-9-1987 issued vide letter C. No. VIII(H) 40/5/86/75 dated 21-9-1987. Not only this, in the letter it was also mentioned to the Assistant Collector that if he has any further doubts in the matter, he may report with full facts and his comments. It appears from the record that the decision in this regard was not taken, the petitioner deposited the amounts "under protest" and filed claims for refund and made representations but as late as on 7th March, 1989, the Assistant Collector conveyed to the Superintendent, Central Excise & Customs Department vide document Annexure-32 in the matter of recovery of overtime charges, directing to recover the overtime charges on hourly basis from the party unless and until the post is separately created on cost recovery basis. Thus, there is no dispute for the period beyond 7th March, 1989 and it appears that the Assistant Collector while passing the impugned order Annexure-35 dated 13th July, 1992/7th October, 1992 has taken into consideration the amount deposited by the petitioner for the period beyond 7th March, 1989 until June 1989 and has, therefore, rejected the petitioner's refund

claim in a sum of Rs. 2,86,379.55 instead of Rs. 3,07,074.80. Thus, the refund claim of the petitioner for the period February 1986 to 7th March, 1989 has been rejected by the impugned order Annexure-35 and against this order the present writ petition has been preferred.

3. Mr. Sudhir Gupta, learned counsel for respondents Nos. 1 and 2 has raised following preliminary objections :

(i) that the petitioner had no locus standi to file and maintain this writ petition because the demand has been raised against the Central Warehousing Corporation and the amount had been paid for and on behalf of the Central Warehousing Corporation and, therefore, if at all any writ petition was to be filed, it was the Central Warehousing Corporation, which should have preferred the writ petition.

This objection of the petitioner (sic respondent?) may not detain me from proceeding further for the simple reason that admittedly the amount in question had been paid by the petitioner and it is the petitioner's claim for refund, which has been rejected and the petitioner is the directly concerned party because, it is the petitioner, who has in fact parted with the money in question. This preliminary objection of Mr. Gupta is, therefore, rejected.

(ii) that the impugned order Annexure-35 dated 13th July, 1992/7th October, 1992 passed by the Assistant Collector, Customs is appealable u/s 128 of the Customs Act, 1962 (for brevity "the Act") and although he started with the argument with reference to Section 128 of the Act that the impugned order has been passed by the Assistant Collector u/s 124 of the Act, he then submitted that the impugned order has not been passed under any specific provisions of the Act, but it has been passed in pursuance of the condition No. 2 of the licence and that this is a condition which is covered u/s 65 of the Act, as the licence for the warehouse has been granted u/s 57 of the Act.

I have gone through the provisions contained in Sections 57,65,124 and 128 of the Act. No doubt an appeal has been provided u/s 128 of the Act, but such appeal lies against any order passed under the Act by the Assistant Collector and only such orders, which were passed under the Act are appealable u/s 128 of the Act before the Collector, Customs. The provisions of Section 124 of the Act relate to the issue of a show cause notice before the confiscation of goods, etc., and it has been provided therein that no order confiscating any goods or imposing any penalty on any person shall be made under this chapter unless the owner of the goods or such person is given a notice, etc. It is nobody's case that there was any confiscation of goods or that any penalty has been imposed and, therefore, even if in the show cause notice as was given in the instant case, the reference was made to Section 124 of the Act such reference is obviously erroneous and it would not give any statutory status to the controversy involved in this case with reference to Section 124 of the Act. The licence for the warehouse is of course granted u/s 57 of the Act and the Assistant Collector may appoint public

warehouses wherein dutiable goods may be deposited, but Section 65 deals with the manufacture and other operations in relation to goods in a warehouse and it has been provided therein that with the sanction of the Assistant Collector of Customs and subject to such conditions and on payment of such fees as may be prescribed, the owner of any warehoused goods, may carry on any manufacturing process or other operations in the warehouse in relation to such goods. Besides the fact that Mr. Gupta failed to point out that any manufacturing process or other operations were carried out, in the present case, I find from condition No. 1 of the licence of the public bonded warehouse, i.e. Annexure-1 that the licence itself has been granted u/s 57 of the Act for deposit of dutiable goods, namely, industrial raw material or component parts (not for manufacture-in-bond and other operations u/s 65). In this view of the matter, I have no hesitation to say that there is no question of invoking Section 65 so as to say that the impugned order is an order under any condition u/s 65 of the Act, passed by the Assistant Collector and, therefore, the remedy of appeal u/s 128 of the Act could have been availed by the petitioner. Mr. Gupta has placed reliance on Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, In this judgment the Supreme Court has laid down the well known principle that as and when any effective statutory remedy is available the writ jurisdiction cannot be invoked. There cannot be any quarrel with the aforesaid proposition of law laid down by the Supreme Court, but in the instant case, I do not find that there was any effective statutory remedy for the simple reason that according to the language of Section 128 of the Act itself only such orders are appealable, which are passed under the Act. It appears that in the instant case the impugned order, which has been passed, rejecting the claim of the refund is an order, which has been in the executive powers dealing with a case of deposit made "under protest" and a decision has been taken by the Assistant Collector, as to whether this amount was to be allowed to be refunded or not. The second preliminary objection, raised by Shri Gupta, is also rejected accordingly.

4. Coming to the merits of the case, Mr. Paras Kuhad has argued that the condition No. 2 itself does not permit the realisation of the amount, which the petitioner was made to deposit. According to this condition, the parties have to deposit the cost of establishment and pension in advance in respect of officer of Customs deployed in the warehouse for the whole year. Mr. Kuhad has submitted that in the instant case no employee of the Custom Department was deployed in the warehouse for the whole year and throughout in his representations he has protested that when no such staff was deployed for the whole year and no employee of the Customs Department was working thereon wholetime basis in relation to the working at this warehouse. The document Annexure-17, which has been issued by the Central Excise & Customs Collec-torate, Jaipur also shows that such controversy was raised by the petitioner and in this letter it has been mentioned as under:-

"If the Customs Inspector was not deployed on wholetime basis, how could it be

said that the officer has rendered the service to the warehouse keeper on cost recovery basis."

The document Annexure-32 dated 7th March, 1989, which is a document under the signature of none else, but the Assistant Collector shows that the recovery is to be made on hourly basis from the party, unless and until the post is separately created on cost recovery basis. This document under the signatures of Assistant Collector himself furnishes a clinching evidence of the factual position that there was no staff of the Customs Department on wholetime basis working in the Corporation in this regard and therefore, I am of the opinion that in terms of condition No. 2 in the licence itself there is no question of recovery of the entire amount of the salary of the Inspector and Class IV employee of the Customs Department, who are working in the Corporation for the purpose of collecting the customs duty, nay, in the impugned order Annexure-35, the Assistant Collector has further observed in the end while rejecting the petitioner's claim for refund that the plea taken by the party that the staff, for which, cost of establishment charges deposited and claimed for refund were not utilised by them on wholetime basis, is not acceptable as the staff was made available as and when required by them. Thus, the services of the Customs Department were utilised as and when required and there was no person on wholetime basis for the whole year.

5. Mr. Gupta has submitted that the respondents have not admitted in the reply that there was no staff of the Customs Department on wholetime basis. That may be so, but it is clearly discernible from the correspondence in the order referred to hereinabove that wholetime staff had not been deployed and, therefore, the argument of Shri Gupta that this amount could be recovered under Condition No. 2 of the licence is not tenable.

6. In para 31 sub-para (vi) of the writ petition the petitioner has stated as under :-

"(vi) That in respect of public warehouses at Udaipur, Kota, Alwar, etc. the respondents have recovered supervision charges on actual hourly basis in terms of circular dated 20-2-1968 as amended from time to time whereas in the present case they have demanded and collected the entire amount payable towards salary, pension contribution, etc. in the form of cost establishment. The impugned action is therefore, discriminatory hence violative of Article 14 of the Constitution."

No parawise reply has been filed and the reply to the show cause notice has been filed by the petitioner, in which, this factual position has not been controverted. This plea has been taken notice of by the Assistant Collector in the impugned order, but the same has not been adjudicated and there is no reason to disbelieve that the Central Warehousing Corporation, which are operating at Udaipur, Kota, Alwar, etc., are charging the supervision charges in terms of the order dated 20th February, 1968 amended from time to time. In this view of the

matter, the plea of the discrimination and the violation of Article 14 raised by the petitioner is not without basis or without force.

7. Although, Mr. Paras Kuhad had submitted that the services of the two employees of the Customs Department were utilised only for a period of 20 hours in a month, this position has not been admitted by Shri Gupta, but, he has stated that it is a matter of record. That may be a matter of record, as to for how many hours, the services of the employees of the Customs Department were actually utilised, but the question before me is of entitlement as to whether the respondents were entitled to recover the entire amount of the salary of the two personnel of the Customs Department without deploying them on wholetime basis for the whole year or it must be for hourly basis for the period February 1986 to 7th March, 1989 in terms of the Customs (Fees for Rendering Services by Customs Officers) Regulations, 1968 (for brevity "the Regulations, 1968"). According to the table under Regulations 2(c) and 3, once the authorities of the customs department, i.e., the Assistant Collector, Customs has himself come to the conclusion that the parties be charged on hourly basis in this regard, merely because, he came to this decision on 7th March, 1989, the petitioner cannot be made to suffer for the period prior to 7th March, 1989. The fairness and lack of arbitrariness is the very foundation of the rights of equality under Article 14 of the Constitution of India and every party is entitled to a fair treatment. Once the respondents have come to the conclusion that it is reasonable to charge on hourly basis, how the party can be made to suffer for the period in past merely because the concerned authorities took the decision on 7th March, 1989. It was for the authorities concerned to take the decision on the representations which had been filed by the petitioner. That would be rather unfair and would militate against the principle of fairness interpreted as a facet of equality enshrined in Article 14 of the Constitution of India and, therefore, without going into the controversy as to for how many hours, the services were actually utilised during the period February 1986 to 7th March, 1989. In my opinion it would be reasonable for the concerned authorities to examine on the basis of the record available with them as to for how many hours the two employees of the Customs Department had worked in the Warehousing Corporation. The Central Warehousing Corporation has been impleaded as party, as respondent No. 3 and its Manager has also been im-pleaded as respondent No. 4, but they have not cared to appear despite service and it is for the respondents No. 1 & 2 to examine such record and return such amount to the petitioner after deducting the amount, which they could have recovered only on hourly basis with reference to the actual number of hours, for which two employees of the Customs Department may have worked at warehouse during the period February 1986 to 7th March, 1989 in terms of the Regulations, 1968.

8. The upshot of the aforesaid discussion is that this writ petition succeeds and the same is allowed. The impugned order Annexure-35 dated 13th July, 1992/7th October, 1992 is hereby quashed and set aside and the respondent Nos. 1 and 2 are directed to work out the amount, which they could have recovered for and on

behalf of Central Warehousing Corporation from the present petitioner in terms of the Regulations of 1968 on hourly basis for the period February 1986 to 7th March, 1989 and to refund the rest of the amount to the petitioner. This exercise including the refund of the due amount shall be completed by respondent Nos. 1 & 2 without any delay, but in no case later than a period of two months from today. Should the respondent Nos. 1 & 2 fail to refund the due amount to the petitioner within a period of two months, the petitioner shall be entitled to interest on the refundable amount at the rate of 12% per annum, after the expiry of two months.