

(2002) 08 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 1644 of 1988

South India Corporation (Agencies) Ltd.

APPELLANT

Vs

Additional Collector of Customs and Another

RESPONDENT

Date of Decision : 06-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226(2)
Customs Act, 1962 — Section 116

Citation : (2002) 6 BomCR 707 : (2002) 4 BOMLR 348 : (2003) 2 CivCC 52 :
(2003) 1 MhLj 393

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : D.C. Gomes, for the Appellant; K.R. Chaudhary, for the Respondent

Judgement

J.P. Devadhar, J.—In this petition, the petitioners have challenged the orders passed by the Customs Authorities, wherein penalty u/s 116 of the Customs Act, 1962 has been levied upon the petitioners for the alleged short landing of the cargo.

2. The brief facts having bearing of the subject matter of the present petition, are as under:

The petitioners at the relevant time were the agents of the Foreign Flag Vessel namely "SCHELPWIJK" which had called at the Port of Kandla on 7th January, 1974 for discharging 16,048.509 m.t. of superior Kerosene and 2182.475 m.t. of Aviation Gasolene. On filing Import General Manifest (IGM), the vessel started discharging the cargo under the supervision of the concerned authorities. After completing discharge of the cargo, the ship sailed from Kandla Port. As per Ullage measurement, the quantity of Aviation Gasolene on board the vessel was 2149.00 m.t. indicating an alleged shortage of 32.992 m.t.

3. By a show cause notice dated 18th December, 1975, the Assistant Collector of Customs, Preventive Department, alleged that as per the outturn report of the

vessel based on the shore tank measurement there was shortage of 50.291 m.t. of Aviation Gasolene and by the said show cause notice called upon the petitioners to show cause as to why penalty should not be imposed upon them u/s 116 of the Customs Act, 1962. The petitioners replied to the said show cause notice contending that the shortage based on the outturn report of the shore tank measurement cannot be the basis for ascertaining the short landing and the quantity of shortage has to be determined on the basis of the quantity measured as per the ullage report. However, by an order dated 20th November, 1982 penalty of Rs. 1,46,769/- was levied upon the petitioners by taking the short landed quantity at 50.291 m.t. as per shore tank measurement set out in the outturn report. Against the said order, the petitioners filed an appeal before the Collector of Customs (Appeals) which was subsequently transferred/refilled with the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Bombay. During the pendency of the appeal, the petitioners had deposited the amount of penalty of Rs. 1,46,769/- under protest. After the matter was heard the CEGAT gave its judgment wherein both the members differed. In view of the difference of opinion between the Member (Technical) and the Member (Judicial), the matter was referred to the third Member who agreed with the Member (Technical). Thus, in view of the majority decision the penalty determined on the basis of shore tank measurement was upheld and the appeal was rejected in toto. Being aggrieved by the aforesaid order, the present Writ Petition has been filed.

3-A. The issue as to whether the shortlanding of the cargo from the vessel is to be determined on the basis of the ullage report or on the basis of the shore tank measurement has been settled by the following decisions of this Court.

1) Shaw Wallace and Co. Ltd. v. Assistant Collector of Customs reported in 1986 (25) E.L.T. 968 (Bom) Forbes Forbes Campbell and Co. Ltd. Vs. Deputy Collector of Customs, Manifest Clearance Dept. and Another, Division Bench decision of this Court in case of J.M. Baxi and Co. Vs. Deputy Collector of Customs and Others, .

In all these cases it has been held that the measurement of the cargo in the vessel at the time of discharge by the ullage measurement is a scientific method and the shortage if any from the manifested cargo is to be determined on the basis of ullage measurement and not on the basis of shore tank measurement. In view of the aforesaid decisions of this Court, with which we concur it has to be held that the penalty levied upon the petitioner by determining the shortage on the basis of shore tank measurement taken at the shore tank which is situated at a distance of 14 kilometers away from the Kandla Port is erroneous.

4. The contention of the revenue that this Court has no jurisdiction to decide the matter is also without any merit. As held in the case of J.M. Bakshi and Co. (supra) the appellate order impugned in this petition is passed by CEGAT at Mumbai and since a part of the cause of action has arisen at Mumbai, this Court will have jurisdiction to entertain and dispose of the petition. The decision of the

Apex Court in the case of British Airways Plc. Vs. Union of India and ors, which has been relied upon by the revenue, is distinguishable on facts inasmuch as the issue as to whether ullage measurement or the shore tank measurement should be taken into account for levying penalty u/s 116 of the Customs Act was not an issue before the Apex Court.

5. In the result, the order of penalty passed by the adjudicating authority as well as the appellate order are quashed and set aside. The respondents are at liberty to pass fresh order of penalty by determining the short landing of cargo based on ullage report and after giving credit for the shortage permissible under the law. The respondents shall pass fresh penalty order after giving personal hearing to the petitioners on or before 31st December, 2002. The penalty so determined be adjusted against the amount deposited by the petitioners and the balance if any remaining be refunded to the petitioners with interest @ 12% per annum from 9th March, 1983 till payment.

6. The petition is disposed of in the above terms. However, in the facts and circumstances of the case, there will be no order as to costs.