

(1975) 10 KL CK 0009

In the High Court Of Kerala

Case No : O.P. No. 883 of 1973 and O.P. No. 2363 of 1975

THE MALABAR STEAMSHIP CO. LTD.

APPELLANT

Vs

ASSISTANT COLLECTOR OF CUSTOMS AND ANOTHER.

RESPONDENT

Date of Decision : 15-10-1975

Acts Referred:

Customs Act, 1962 — Section 69, 87, 88, 89

Citation : (1976) 5 CTR 110

Hon'ble Judges : P. Subramaninan Poti, J

Bench : Division Bench

Judgement

P. Subramaninan Poti, J. - The question that arises in these two petitions is the same and therefore it is sufficient to refer in detail to the facts of the case in O.P. No. 883 of 1973.

2. Messrs. Malabar Steamship Company Limited, is a shipping Company owing shipping vessels generally used for coastal runs. "M. V. Janaki" is one such vessel. She is permitted to carry cargo to and from Colombo, a foreign port. On 5-3-1971 M. V. Janaki sailed from the port of Calcutta with cargo to Colombo, to Cochin and Bombay. The ship arrived at Cochin on 21-3-1971 after discharging cargo at Colombo. The vessel was thus a foreign going vessel from 5-3-1971 when the ship was at Calcutta port there were 37,764 litres of light diesel oil bunkers on board (32,400 long tons). On 3-3-1971 she took ex-bond bunkers of 29,058 litres (24,936 long tons.) At the time the customs authorities at Cochin took inventory of the ship stores it was found that there was a balance of 27,119 litres (24 long tons) of light diesel oil bunkers on board. The difference was consumed by the vessel when it was on its foreign run and before it reverted to coastal trade. Taking the view that what would have been consumed on the foreign run must be taken as duty paid diesel oil which the ship had at Calcutta, the ex-bond diesel taken by the ship on 3-2-1971 at Calcutta was assumed to be still in the ship when it touched the Cochin port and duty thereon was imposed by the Customs authorities at Cochin. Such duty came to Rs. 5,148.54. This duty

and another sum to cover duty on the personal properties of crew members of the ship were demanded. About the latter there is no dispute though the petitioner refers in the objection to Exts. P2, P4 and P11 as the orders to be quashed. These orders mention the amount of Rs. 6,595.64 which is inclusive of the duty on the personal property of crew members, but it is agreed that the dispute concerns only a sum of Rs. 5,148.64, that being the duty on the quantity of the light diesel oil found on board the ship at the time it reverted to coastal trade on touching Cochin. The petitioner disputed the liability to pay duty on the stock of diesel oil found on board the ship at Cochin for, according to the petitioner, more than the quantity of ex-bond light diesel oil taken on 3-2-1971 at Calcutta had been consumed in the foreign run and for the purpose of such foreign run if ex-bond diesel oil was consumed that was not liable for payment of customs duty and therefore no duty was leviable on the balance of the diesel oil found in the ship. In other words, when there were duty paid oil as well as ex-bond non duty paid oil, it should be assumed, according to the petitioner, that the non duty paid fuel had been so consumed and in fact more, there is no scope for imposing duty on the quantity that was found at the time the ship reverted to coastal run. That is so because the quantity so found at Cochin was less than the quantity of duty paid diesel oil in the ship on 3-2-1971. The stand taken by the petitioner was not accepted by the Customs authorities. In fact, in Ext. P10 the petitioner went to the extent of conceding that the diesel oil consumed during the foreign run may be taken as both from the duty paid as well as non duty paid diesel oil, in proportion to the quantity of these available in the ship at the time the vessel commenced its foreign run. Before me counsel only prays for relief to that extent. In other words irrespective of the manner in which the prayer has been made in the Original Petition, namely to seek quashing of Exts. P2, P4 and P11, the orders of the customs authorities insisting on payment of duty on the entire stock of diesel oil found at Cochin on 21-3-1971, he limits his prayer to exemption from payment of duty on the ex-bond diesel oil that would have been consumed that being based on the proportion of the duty paid and non duty paid diesel oil available on board the ship at the time it left the Calcutta Port.

3. The controversy between the parties is not on a matter covered by any statutory provision. That non duty paid fuel may be taken on board the ship for the purpose of consumption as fuel for foreign run is agreed. Non duty paid diesel oil actually used as fuel during such foreign run is not liable to duty, If any balance out of such non duty paid diesel oil is available at the time of completion of the foreign run and reversion to coastal run that will be liable to duty, for the exemption does not extend to consumption during coastal run. Since these are admitted I need not make any specific mention of the provisions made in this regard, namely sections 69 87 88 and 89 of the Customs Act. If at the time the vessel was bound for foreign voyage it had on board for the purpose of use as fuel both duty paid and non duty paid diesel oil and these were kept separate and consumption was made only from non duty paid diesel oil that such of diesel out of the non duty paid stock that was consumed will not be liable to duty,. If,

notwithstanding holding such non duty paid diesel oil, duty paid diesel oil is consumed as fuel, on reversion to coastal trade the non duty paid diesel oil that remains will have to be subjected to duty. In these cases decision is easy as the exemption is permissible when it is shown that non duty paid diesel oil was available at the commencement of the foreign run and has been consumed for the purpose of the foreign run. But the difficulty would arise when the duty paid and non duty paid oil are not kept separate, and that is normally the case. When they are mixed there is no statutory rule which gives rise to an assumption that is what is consumed first is what has one in first. In other words, if there was duty paid diesel oil and later on duty paid diesel oil is also taken into the tank was utilised first, is not an assumption supported by any legal rule. As a fact that cannot be the case, for it is well-known that liquids when mixed do not retain their identity. A reasonable way of looking at the phenomena is that every part of the resultant mixture contains portions of the components in direct proportion to the quantity of components that had gone into the mixture. In that view whenever a particular quantity of the diesel oil out of a mixture of duty paid and non duty paid oil is seen to be consumed the logical assumption would be that they have been consumed in the same proportion as that in the mixture. It that be the case then whenever quantity had been consumed in the foreign run will be taken as consumed out of the duty paid as well as non duty paid diesel oil and the proportion will be the same as the proportion in which these oils were present in the resultant mixture. The quantity of non duty paid diesel oil still remaining in the vessel should be worked out and duty should be imposed on it. This must be the case in the absence of a specific rule as to how to deal with the matter. In fact there is no rule. But the counter-affidavit relies in support of the stand taken by the Customs authorities upon some administrative direction or order of the Government of India. The order itself is not produced, and not being a statutory order it is not easily available too. My attention has been drawn to the Central Manual of Import and Bond Department in which the relevant instruction of the Government of India finds a place. Reference is made to a principle. First in First out, and it is this principle that is applied. No doubt, the rule sounds good. But it is far from the rational, for, in the case of goods, in liquid form taken into a common receptacle the principle "First in First out" can never be assumed as a reality and therefore unless supported by any legislative basis such a rule will have to be given the go-by. The courts should refused to enforce any such a rule however convenient it may appear to the Customs authorities. In this view, Ext. P2, P4 and P11 call for interference. There shall be no demand pursuant thereto. The customs duties payable will be recomputed in accordance with the principle indicated in the judgment. The total consumption of diesel oil in the foreign run is known. The quantum of diesel oil paid and non duty paid available in the ship at the time it started its foreign run is also known. Therefore, the proportion between the duty paid and non duty paid diesel oil in the ship as at the commencement of the journey could be worked out. That proportion on the diesel oil consumed will be worked out. Out of the non duty paid diesel oil the balance after deducting what is determined as consumed alone

will be liable to duty at Cochin Port when it reverted to coastal trade. Fresh demand, working out on this bases, may be made on the petitioner Company.

4. In O.P. No. 2363 of 1973, a similar claim was made in regard to "S. S. Jyoti". Once she had left Cochin for Colombo. At the time she left Cochin she had 67 long tons of furnace oil on board which was duty paid. She took on 19-10-1971, 68.448 long tons of Indian Furnace Oil non duty paid. Then the ship actually commenced her foreign voyage to Colombo there were 120 long tons of furnace oil duty paid as well as excise bonded. At Colombo when she arrived she had 93 long tons of furnace oil on board. She took 60.67 long tons of furnace oil from Colombo on 25-10-1971, and when she reached Cochin she had 73 long tons of furnace oil. The total consumption on her voyage from Cochin to Colombo and back was 107.67 long tons of furnace oil. Duty was demanded on the entire quantity of furnace oil that was found on board the ship on return to Cochin. The claim was similar to the claim made and the same petitioner challenged the other case, O.P. No. 833 of 1973. The parties took the same stand that they took in that case. It is sufficient to find that what has been said in regard to O.P. No. 833 of 1973 will equally well apply in O.P. No. 2363 of 1973 also.

5. Though it was brought to the notice of the Customs authorities that there is guidance in the decision of the Madras High Court reported in *Scindia Steam Navigation Co., Ltd. Vs. Union of India and Others*, , the Customs Authorities seemed to think that the decision will not be applicable to the case for there the question concerned duty when a foreign going vessel had taken fuel in some foreign port. I do not think that distinction on facts is relevant, for the principle is the same. The view I have expressed in the judgment agrees with that of the Madras High Court.

The Original Petitions are allowed as above. The parties will however suffer costs in the circumstances.