(1971) 09 CAL CK 0002

In the Calcutta High Court

Case No : Matter No. 93 of 1971

Turner Morrison and Co. Ltd. — APPELLANT

Vs

The Assistant Collector of Customs for Export (II) and Another — RESPONDENT

Date of Decision : 03-09-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 2(21), 87, 90

Citation : 76 CWN 357

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—The petitioner acted as shipping agents of Red Anchor Lines incorporated in Hong Kong, who at all material times was and still is the owner of the motorship "Nancy Dee". The said vessel is registered at Hong Kong and sails under the British Flag. During the period from the 4th January, 1970, to the 23rd February, 1970, one Transworld Marine Corporation was the Charterers of the motorship "Nancy Dee" under the Charterparty Agreement between the said Corporation and its disponent owner Redfern Shipping Co. Ltd. for grain lightening operation. According to the petitioner the said vessel "Nancy Dee" arrived at the Port of Paradip on January 4, 1970. The said vessel was engaged by Everett Steamship Corporation, agents of the Charterers, Transworld Marine Corporation. The said vessel was redelivered to the owners by or on behalf of the Charterers on the 23rd February, 1970. On the 27th February, 1970, the said vessel was taken on charter by Yamashita Shinnion Steamship Co. Ltd., whose Calcutta agent was Great Eastern Shipping Co. Ltd., Their Paradip agent was International Clearing and Shipping Agency. The said vessel was ready for delivery to the next Charterers. The agents could not, according to the petitioner get clearance from the Port from the Customs Authorities. In those circumstances, the petitioner gave a bank guarantee for Rs. 50,000/- as security for payment of duty on stores and fuel if levied by the Customs Authorities. On giving the said bank guarantee the Port Clearance was issued and the said vessel was delivered on the 27th February, 1970. According to the petitioner since 1966 the Government of India has been chartering Super-Tankers with a draft of about 45 feet which the petitioner has chosen to call as ''Mother Vessel'' for transporting massive quantities of wheat under PL-480 Aid as it was economical in terms of freight to arrange for the transport of food grains by the Super Tankers. It has been further stated that these Super Tankers due to their deep draft requirements could not enter the ports for landing cargo directly on the wharf and as such they worked in moorings outside or within the harbour and discharged their grains into a number of small vessels for carriage of the grains to the destination ports which included the Port of Calcutta. The cargo carried by the ''Mother Vessel'' was then transferred within the territorial waters into lightening vessels. These lightening vessels then either discharged a part of the cargo at the port where the lightening took place and proceeded to Calcutta or proceeded directly to Calcutta or such other destination as directed by the Government of India. The cargo carried by ''daughter vessels'' is import cargo and the ''daughter vessels'' do the duty to their ''Mother Vessels''. It has been further stated that under the charterparty it was provided that the vessel ''Nancy Dee'' was to load cargo from the ''Mother Vessel'' to its maximum safe draft and then at the instructions of the charterers it would proceed to discharge the cargo or the lighter sufficient cargo so that it might proceed to port of discharge to discharge the balance of the cargo. During the period from 4th January 1970 to 23rd February, 1970 when the said motorship ''Nancy Dee'' was under charter as mentioned herein, she loaded cargo being grain and wheat front three supertankers, "Overseas Joyce", "National Defender" and "Western Hunter," being the mother vessel in Paradip and in Sandheads and proceeded to Calcutta in the port of Kiddorpore where it discharged the cargo. In these circumstances the motorship "Nancy Dee" was engaged as the daughter vessel in the lightening operation from the said mother vessels being the said Supertankers during the said period and was actually engaged in the carriage of goods. In these circumstances the petitioner contends that during the period between 4th January and 23rd February, 1970, the said "Nancy Dee" was a foreign vessel within the meaning of Customs Act and as such was exempt from payment of customs duties on fuel and stores, received or consumed by the ship. By two letters?one dated 15th of October, 1970, being Annexure ''A'' and another dated 26th December, 1970 being Annexure ''B'' the respondents Customs authorities demanded payment of duty in respect of the stores consumed by ''Nancy Dee'' during the aforesaid period and claimed Rs. 36,090.09 paise on that account. It is the propriety and the validity of this claim made in the aforesaid two letters that are under challenge in this application under Article 226 of the Constitution. u/s 87 of the Customs Act, 1962, it has been provided as follows :

87. Any imported stores on board a vessel or aircraft (other than stores to which section 90 applies may, without payment of duty, be consumed thereon as stores

during the period if such vessel or aircraft is a foreign-going vessel or aircraft.

It, is not disputed before me that the stores in respect of which the duty had been claimed were imported stores. What is in dispute in this application is whether "Nancy Dee" was a foreign going vessel or not. For this it is necessary to refer to the definition of the foreign-going vessel or aircraft as provided in section 2(21) of the Customs Act, 1962, The said definition provides as follows "2 (21) "foreign-going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes?

(i) any naval vessel of a foreign Government taking part in any naval exercises;

(ii) any vessel engaged in fishing or any other operations outside the territorial waters of India;

(iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever;

2. The main question in this application is whether during the time mentioned hereinbefore "Nancy Dee" was engaged in the carriage of goods from any port of India to outside India. It is important to remember that in this definition the description attaches to the vessel, i.e. the vessel must be engaged in the act mentioned in the definition. The act mentioned is carriage of goods or passengers between any port or airport in India and any port or airport outside India. So the vessel must satisfy these two tests, that is to say that it must be engaged in the carriage of goods and it must be so engaged in carrying goods from one port in India to any port outside India. "Nancy Dee" was not carrying goods from any port of India to another port outside India. "Nancy Dee" being a daughter vessel was carrying goods from a port in India to the vessel which was carrying goods to the port outside India. The petitioner contended that the "Nancy Dee" was engaged in the work of carriage of goods. "Nancy Dee" was engaged undoubtedly in the work of carriage of goods, because as a daughter vessel she helped the carriage of goods which were ultimately carried from India to a port or ports outside India, but she was not the vessel which carried goods to the ports outside India and the description mentioned in the definition, in my opinion, is restricted only to the vessel and not to anything which is done by the other vessel or aircraft. This, in my opinion, is the correct reading of the definition. It may be mentioned that the interpretation suggested by Counsel for the petitioner will lead to the conclusion that any country boat which helps transhipment from the port to the ship would be regarded as foreign going vessel. Such a construction should not be made, in my opinion, unless compelled by the clear expression of the statute. Such expression is not here. The expression in the statute on the other hand, in my opinion, is clear and it is restricted only to the vessels which themselves must carry the goods. In the aforesaid view of the, matter though the goods were carried, the vessel was not

a foreign going vessel and as such was not exempt from duty u/s 87 of the Customs Act, 1962. In the above view of the matter the imposition of duty, in my opinion, was not unjustified.

3. Counsel for the petitioner, further contended that the Customs Authorities did not properly consider the question and had not applied the true test in arriving at their decision. My attention was drawn to the two letters mentioned hereinbefore. In the letter of 2nd February, 1970 it was stated as follows :

Your contention that the subject vessel is a foreign going vessel within the meaning of section 2(21) of the Customs Act, 1962 is not correct. Since this particular vessel on her arrival at Paradip from Chalna in water-ballest on 4.1.70 remained engaged as a daughter vessel for all practical purposes, she definitely lost her foreign charter from that date till the date of her proceeding to foreign port and hence, cannot be brought under the provisions of the aforesaid section of the Act. The vessel has therefore, been rightly charged to Store-duty in this case in accordance with the existing rules on the subject.

4. Counsel for the petitioner contended that the respondent erroneously came to the conclusion that "Nancy Dee" had lost her foreign character. In my opinion, the petitioner''s contention as to the nationality of the ship, is wholly irrelevant for the determination of the question, as to whether the vessel is a foreign going vessel or not. An Indian vessel can be a foreign going vessel. So the question of nationality is irrelevant fact. Counsel for the petitioner further contended that the appropriate authority has decided the question without applying the test or mis-applying the test, and as such the court should set aside the order and for this purpose reliance was placed on the division bench judgment on the case of Asstt. Collector v. Mercantile Express Co., reported in AIR 1961 Cal. p. 363. It is undoubtedly true that if a quasi-judicial authority reaches a decision by applying wrong test or by mis-applying the test, then such a decision cannot be sustained. The question is whether the respondents have considered this question in the proper light. It is true to a very large extent that the order of the respondents is not very explicit. But the letter dated 22nd February, 1971 in my opinion cannot and should not read in isolation. It should be read in conjunction with the letter dated 26th September, 1970 in which the petitioner was raising the contention about the "Nancy Dee" as being a foreign going vessel. In that letter the petitioner had stated its reason in respect of its contention and by the letter of the 2nd February, 1970, the said contentions were rejected. Further, prior thereto there was a letter of the 15th October, 1970. In that letter it has been stated by the Customs Authorities that a sum of Rs. 36,000/- was due as customs duty for stores consumed for "Nancy Dee". That sentence taken in conjunction with the entirety of the letter of the 2nd February in the background of the facts of this case makes it clear that the letter of 2nd February was being written as a reply to the letter of the 26th December, 1970. In my opinion, it cannot be said that the respondents did not apply the correct test in determining the question whether the "Nancy Dee" was a foreign going vessel or not,

according to the definition.

5. In the aforesaid view of the matter, it cannot be accepted that there was no application of mind or misapplication of mind by the respondents on the relevant question. Facts of this case and in the case of the Asstt. Collector of Customs v. Mercantile Express Co. are entirely different. There the Division Bench came to the conclusion that the appellate authority did not properly consider the material and relevant matters, necessary to come to a decision. In the aforesaid view of the matter, this application fails and is accordingly dismissed. Rule Nisi is discharged. Interim order is vacated. There will be no order as to costs.

Operation of this order is stayed till fortnight after the re-opening.

