

(1988) 04 BOM CK 0066

In the Bombay High Court

Case No : Misc. Petition No. 746 of 1979

Ulhas Oil and Chemical Indus. P. Ltd.

APPELLANT

Vs

H.M. Singh

RESPONDENT

Date of Decision : 13-04-1988

Acts Referred:

Customs Act, 1962 — Section 12, 15, 16, 16(1), 2

Citation : (1988) 3 BomCR 41 : (1988) 18 ECC 316 : (1988) 36 ELT 462

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Judgement

1. The petition concerns export by the petitioners of Rape Seeds Extractions which are considered as animal food.

2. The petitioners desired to export two consignments of 250 tonnes each of Rape Seeds Extractions by vessel m.v. "Slobozia" from Bhavnagar. The vessel arrived at Bhavnagar on 25.4.1977. The petitioners submitted on 26.4.1977 the shipping bill for export of the first consignment and paid export duty of Rs. 31,250 to the Customs authorities under protest. On 27.4.1977 the petitioners submitted the shipping bill for export of the second consignments and paid export duty of Rs. 31,250 to the customs authorities under protest. The consignments were loaded on the vessel and the petitioners obtained Mate Receipts dated 28.4.1977 and 30.4.1977 in respect of the two consignments. These receipts indicate that on the said dates the consignments were loaded on the vessel.

3. Up to 30th April 1977 Rape Seed extract was exigible to export duty. On 20.4.1977 a notification was issued under Sec. 25(1) of the Customs Act, 1962 as a result of which Rape Seed extract was wholly exempted from the payment of any export duty.

4. On 2.5.1977 the vessel sailed from Bhavnagar for Bombay. On 9.5.1977 the vessel sailed from Bombay for overseas.

5. In view of the exemption notification of 30.4.1977 the petitioners made two applications, both dated 10.5.1977, for refund of export duty paid by them in respect of the two consignments. By his order dated 4.7.1977 the Assistant Collector rejected these applications.

6. The appeals preferred by the petitioners were also dismissed by the Appellate Collector by his order dated 7.2.1979. On 27.3.1979 the present petition has been filed by the petitioners challenging the levy of export duty on two consignments and asking for setting aside of the orders passed by the Assistant Collector and the Appellate Collector on their refund applications.

7. From these facts it is clear that on the date when the petitioner presented the shipping bills export duty was payable on the two consignments. On the date, however, when these consignments were actually exported, that is to say, when they left the territorial waters of India, the consignments were exempt from payment of export duty. Is any export duty payable in such circumstances ?

8. Under the Customs Act, 1962, Sec. 2, sub-section. (18) defines "export" to mean "taking out of India to a place outside India." Under Sec. 2, sub-sec. (27) "India" includes the territorial waters of India. Export, therefore, takes place when the goods are taken beyond the territorial waters of India to a place outside India.

9. Sec. 2, sub-sec. (19) of the Customs Act, 1962 defines "export goods" to mean "any goods which are to be taken out of India to place outside India. In contrast, Sec. 2, sub-sec. (25) of the Act defines "imported goods". "Imported goods" means any goods brought into India from a place outside India" etc. Sec. 12 of the Customs Act, 1962 is the charging section. It states as follows :-

12. (I) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from, India.

(2) ** ** *

Under Section 12, therefore, export duty is levied on goods actually exported from India. Sec. 16 prescribes the date for determination of rate of duty and tariff valuation of "export goods". It states as follows :-

16(1) The rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force, -

(a) in the case of goods entered for export u/s 50, on the date on which a shipping bill or a bill of export in respect of such goods is presented under that section.

(b) ** ** *

Therefore, the date of which the shipping bill in respect of export goods is

presented, is the relevant date for determining the rate of export duty payable. Since the export duty has to be assessed and paid before the goods are actually exported, the expression used in section 16(1) is "export goods", that is to say, goods which are to be exported. The taxable event however which invites the levy of export duty is the actual export of goods from India. Section 12 clearly sets out that duty is to be levied on such goods which are exported from India. If, therefore, on the date when the taxable event occurs, no export duty is leviable on such goods, the question of rate of such export duty becomes irrelevant. If the goods are duty free on the date of their actual export, no export duty can be levied simply because such duty was in existence on the date when a shipping bill in respect of the goods was presented. The petitioners, are, therefore, not liable to pay any export duty in the present case because the goods were exported after the coming into operation of the exemption notification of 30th April 1977.

10. There are several judgments which support such a conclusion. In the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, the Supreme Court has held that the charging section under the Customs Act, 1962 is section 12.

11. In the case of B.K. Wadeyar Vs. Daulatram Rameshwarlal, the Supreme Court was required to consider when an export takes place. It was required to consider the provisions of the Import & Export (Control) Act, 1947. The definition of export under this Act is "Taking out of India by land, sea or air". This definition is similar to the definition of export under the Customs Act, 1962. The Supreme Court has held that under the definition "the time of export is the time when the goods go out of the territorial limits of India. These territorial limits would include the territorial waters of India. Consequently the time of the export is when the ship with the goods goes beyond the territorial limits. At any rate, the export of the goods cannot be considered to have commenced before the ship carrying the goods leaves the port."

12. The taxing event, therefore, under Sec. 12 of the Customs Act would be the date when the ship either leaves the port or crosses the limits of the territorial limits of India. At either point of time in the present case the exemption notification was in operation.

13. The points at issue in this case are directly covered by a judgment of Division Bench of this Court at Goa in the case of V.M. Salgaocar and Brother Pvt. Ltd., Goa Vs. Union of India and another, . In that case the petitioners exported iron ore from Goa. The petitioners presented the shipping bill in respect of the goods to be exported on 8.3.1985 and paid duty of the customs. Under an exemption notification dated 17.3.1985 iron ore was, however, exempted from the whole duty of customs leviable thereon. The iron ore was loaded on the vessel only on 25th March and the vessel left Goa on 25.3.1985. The petitioners' application for refund of export duty was rejected by the Customs authorities. The Division Bench held that the petitioners were entitled to refund. It observed that there

was a difference between export goods and exported the goods. It stated that Section 12 of the Act deals with the leviable duty on imported or exported the goods, while Section 16 deals only with the rate of duty and tariff valuation on export the goods. There was a clear difference between the concept of chargeability and the concept of assessment. It held that duty on exported the goods is payable only when the export is complete. Since no duty was payable on the date when the export was made, the petitioner were entitled to a refund.

14. The same principle, in the case of imports, was applied by a Division bench of the this Court in the case of *Shawhney v. Sylvania & Laxman* reported in 77 Bom. L.R. 380.

15. This judgment has been upheld by the decision of a Full Bench of this Court (to which I was a party) in the case of *Apar Private Ltd. and others Vs. Union of India and others*, .

16. Mr. Devdhar, learned Counsel for the respondents, however, relies upon certain observations of another Division Bench of this Court in the case of *Union of India Vs. Central Provinces Manganese Ore Co. Ltd., Nagpur*, . In that case the petitioners had submitted two shipping bills in respect of the goods which were to be exported. After the submission of these two bills, the goods in question were exempted from payment of export duty. That was, however, before the goods were actually loaded. The petitioners thereupon withdrew the two earlier shipping bills and submitted afresh two shipping bills in respect of these goods. The goods were thereafter loaded on the vessel and were exported. The Division Bench held that the two earlier earlier shipping bills had been cancelled and hence the demand for payment of duty on cancelled shipping bills was without substance. When two subsequent bills were submitted, no export duty was payable. The Division Bench was therefore not required to consider the question whether the duty became leviable on the date when the bills were presented or on the date when the goods were actually exported. On either date no export duty was payable. It, however, observed : "The submission of Mr. Advani that relevant date to ascertain whether the goods are liable for payment of customs duty is the date of presentation of the Shipping Bills seems to be correct." The observation is an obiter dictum. Moreover, the Division Bench was led to make the observation because it felt a doubt about the correctness of the decision in *Shawhney v. Sylvania and Laxman* reported in 77 Bom. L.R. 380. The doubt is dispelled by the Full Bench decision in the case of *Apar Pvt. Ltd. v. Union of India*. As against this obiter dictum there is a direct decision of a Division Bench of the this Court in the case of *V.M. Salgaocar Brothers Pvt. Ltd., Goa v. Union of India* (supra) which has applied the principles in *Sylvania and Laxman*'s case to exports and has expressly laid down that Sec. 16 merely deals with the assessment of rate of duty and tariff valuation of export goods. This decision binds me.

17. Mr. Devdhar also cited a decision of the Supreme Court in the case of the *Gangadhar Narsingdas Agarwal Vs. P.S. Thrivikraman and Another*, . In that case

no duty was leviable on the date when the shipping bills were presented. On that date, however, of entry outwards of the vessel export duty was levied. The Supreme Court held that since the rate of duty has to be determined with reference to the provisions of Sec. 16, the rate applicable is on the date when the shipping bills were presented. Since no duty was levied on that date, no duty could be charged. This case does not assist the respondents in any manner because the case deals with a situation exactly converse to the present case.

18. Mr. Devdhar also drew my attention to certain observations in the Full Bench decision of this Court in *Apar Private Ltd. and others Vs. Union of India and others*, in paragraph 50. In this paragraph the decision in the case of *Prabhat Cotton and Silk Mills Ltd. v. Union of India* 1982 E.L.T. 203 which was a decision of the Gujarat High Court, was sought to be distinguished because that decision laid down that the word "India" in Sec. 12 referred to the landmass and not the Indian territorial waters. The Court while discussing the Gujarat judgment casually observed : "Under the Customs Act, while "import" goods do not attract duty until they are "imported the goods", goods sought to be exported attract duty when they are "export" the goods and are sought to be taken across the customs barrier." These observations are not germane to the ratio of the decision. The Court was not required to consider the point of time when export duty becomes leviable on goods which are exported. The observations do not relate to any point which was at issue before the Court in the that case. Hence they are merely passing observations which cannot even be considered as obiter dicta.

19. Chagla C.J. in the case of *Mohandas Isserdas v. A.M. Sattanathan* reported in 56 Bom. L.R. 1156 said : "An obiter dictum is an expression of opinion on a point which is not necessary for the decision of the case. This definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of a case. But in both cases points must arise for the determination of the Tribunal." If the point does not arise at all the observations pertaining to such a point are casual observations which cannot have any effect as a precedent. The observations in paragraph 50 of the *Apar* judgment, therefore, do not assist the respondents.

20. In the premises, the petitioners are entitled to succeed. The petitioners have made payments under protest as far back as April 1977. These amounts have been recovered without any authority of law. Interest of justice therefore requires that the respondents should pay interest at the rate of 12% p.a. on the amounts retained by them without any authority of law from the date the amounts were paid to the respondents.

21. Rule is, therefore, made absolute in terms of prayers (a) and (b).

22. Respondents to refund the amount forthwith together with interest thereon at the rate of 12% p.a.

23. Respondents to pay to the petitioners costs of the petition.