IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	18.02.2020
Pronounced On	09.03.2020

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.31139 of 2005
and
W.M.P.No.34118 of 2005

M/s.South India Corporation (Agencies) Ltd.,
rep. by its Business Manager
A.N.S.Moorthy,
4th Floor, Leelavathi Building,
No.98, Armenian Street,
Chennai - 600 001. ... Petitioner

Vs.

1.The Government of India,
rep. by the Joint Secretary,
Ministry of Finance (Dept. of Revenue),
IV Floor, Jeevandeep Buildings,
Sansadh Marg, Parliament Street,
New Delhi - 110 001.

2.The Commissioner of Customs &
Central Excise (Appeals),
No.1, Williams Road,
Cantonment, Tiruchirapalli - 1.

3.The Joint Commissioner of Customs,
Office of the Customs House,
No.1, William Road,
Cantonment, Tiruchirapalli - 1.

4.The Deputy Commissioner of Customs
Customs House, No.60,
Mohan Singh Street,
Cuddalore - 607 003. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling upon the records leading to the passing of the impugned order bearing No. F.No.373/51-61/SL/2003-RA in Order No.78-88/04 dated 18.3.2004 passed by the first respondent and the 11 consequential demands dated 03.06.2005 and 06.06.2005 passed by the second respondent and to quash the same.

For Petitioner : Mr.K.Bijai Sundar

For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

O R D E R

The petitioner is aggrieved by the impugned order dated 18.03.2004 passed by the 1st respondent and the consequential orders of the 3rd respondent on 03.06.2005 and 06.06.2005.

2. By the impugned order dated 18.03.2004, the 1st respondent has disposed 11 different Revision Applications filed by the petitioner under Section 129DD of the Customs Act, 1962, against the common order in Appeal of the 2nd respondent Commissioner of Customs and Central Excise (Appeals) all dated 21.02.2003.

3. The operative portion of the impugned order of the 1st respondent reads as under:-

> It is admitted fact that no survey report has been prepared as per guideline given in the above said judgment. Secondly there is nothing on record show that the Customs authorities refused to sign the said survey report despite them being present when the survey was conducted and the report prepared. Hence order of the lower authorities cannot be assailed on this ground.
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> 5.3. The applicant's have further pleaded that lower authorities have resorted to impose a penalty twice the amount of duty that would have been chargeable on the goods said to be short landed without any malafide intention on the part of the applicants. On this contention Govt.would observe that as per above finding short landing in the goods is established and the applicants failed to account satisfactorily for the said short landing in the impugned goods

in terms of provisions of Section 116 r/w 148 of the Customs Act, 1962. Hence the applicants are liable for penalty under Section 116 of the Customs Act. At the same Govt.would observe that there is nothing on record that the applicants are intentionally or actively responsible to the said short landing in goods. Hence in interest of justie Govt.would reduced the penalty equivalent the amount of duty that would have been chargeable on the goods short landed or the deficient goods had such good been imported. Govt. Accordingly orders the original authority to re-calculate the amount of penalty in all the above eleven cases mentioned in the Annexure.

5.4. Regarding other pleadings Govt.would observe that other pleadings have already been examined by the Commissioner (Appeals) in the impugned order in Appeal Govt.agrees with the findings and order of the Commissioner (Appeals), in this regard and accordingly upholds the same.

4. Pursuant to the impugned order of the 1st respondent, the 3rd respondent has passed 11 separate orders giving effect to the order of the 1st respondent. The penalty imposed has been reduced.

5. The petitioner a steamer agent was issued with 11 different Show Cause Notices on various dates under Section 116 of the Customs Act, 1962 to show cause as to why penalty should not be imposed for short landing of the consignment transported through vessels. The vessels in question had transported ten consignments of propane and one consignment of acid grade fluorspar and discharged the cargo at the Port.

6. The copies of the Show Cause Notices and the respective orders in the original confirming the penalty under Section 116 of the Customs Act, 1962 have not been filed.

7. Be that as it may, the details of the Show Cause Notices, date of arrival, date of adjudication of the 4th respondent and the 3rd respondent and the penalty imposed have been summarised below based on the documents filed by the petitioner in the typedset of paper.

8. Details of the Show Cause Notices and penalty imposed under Section 116 of the Customs Act, 1962 are detailed as under:-

Sl. No	Name of the Vessal	Date of Arrival	Nature of Cargo	Nature issuance of Show Cause Notice	Date of Ad-judication	Penalty imposed as per 6 and upheld by Commissioner of Customs and Central Excise (Appeals) (Rs.)	Appeal No. before the Appellate Authority	Date and Amount of Penalty imposed as per consequential demand	Period within which the Show Cause Notice from the date of arrival of ship (in Months)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	M.T.Lady Pauline	31.12.95	Propene	08.02.96	22.2.99	2,00,000	C24/28/99	6.6.05 Rs.1,02,581	2 ¼
2	M.T.Coral Star	31.12.93	Propene	27.12.96	24.2.99	25,000	C24/29/99	6.6.05 Rs.12,724	35 ¾
3	M.T.Coral Star	13.6.95	Propene	14.3.96	3.3.99	7,20,000	C24/30/99	6.6.05 Rs.3,61,537	9
4	M.T.Coral Star	30.04.95	Propene	15.3.96	3.3.99	3,35,000	C24/31/99	3.6.05 Rs.1,68,707	8 ½
5	M.R.Coral Star	30.1.95	Propene	14.5.96	3.3.99	10,75,000	C24/32/99	6.6.05 Rs.5,39,668	15 ½
6	M.T.LPG/C Lady Elena	08.9.98	Propene	13.5.99	22.6.99	6,00,000	C24/58/99	6.6.05 Rs..3,13,320	17

7	M.T.Virgo Gas	2.3.96	Propene	1.5.96	22.6.99	1,75,000	C24/59/99	6.6.05 Rs.88,321	2
8	M.T.Venus Gas	9.4.98	Propene	14.1.99	22.6.99	1,35,000	C24/60/99	6.6.05 Rs.70,308	9 ¼
9	M.T.Spica Gas	19.8.97	Propene	28.1.98	22.6.99	1,75,000	C24/61/99	6.6.05 Rs.88,393	5 ½
10	M.T.Venus Gas	6.2.98	Propene	14.1.99	22.6.99	2,00,000	C24/62/99	6.6.05 Rs.1,01,959	11 ¼
11	M.V.Oravitta	11.10.93	Acid grade Flourspar	24.4.95	30.11.99	6,75,000	C24/78/2000	3.6.05 Rs.4,08,666	23 ½

9. Most of the cases, the Show Cause Notices were issued within a period of one year and in 2 cases within a few months little over 3 years from the date of arrival of the vessels. Penalty imposed were partially reduced by the 3rd respondent pursuant to the order of the 1st respondent which are also captured in the same chart.

10. The 2nd respondent Appellate Commissioner had originally upheld the order of the 4th respondent original Authority. Against the order of the 2nd respondent Appellate Commissioner, the petitioner had filed 11 different Revision Applications before the 1st respondent under Section 129DD of the Customs Act, 1962. These Revision Applications were disposed vide the impugned common order dated 18.03.2004 by the 1st respondent.

11. It is the contention of the petitioner that the original Authority had wrongly calculated the discharge quantity to arrive at the short landed quantity for the purpose of imposition of penalty under Section 116 of the Customs Act, 1962. It is submitted that though the 1st respondent while passing the impugned order has considered the tolerance limit of 1% to .5%, has proceeded on an erroneous assumption of fact to justify the imposition of penalty under Section 116 read with Section 148 of the Customs Act, 1962.

12. The 1st respondent has held that no survey report was prepared which was countersigned by the officer of the customs as per the guidelines of the Bombay High Court in Shaw Wallace and Co. Vs. The Assistant Collector of Customs, 1986 (25) ELT 948 and therefore penalty under Section 116 of Customs Act, 1982 was justified. However, the 1st respondent ordered reduction of penalty.

13. It is submitted that the orders of the 3rd respondent gives no reason while re-quantifying penalty except for the calculations.

14. It is the contention of the learned counsel for the petitioner that adjudication orders were passed beyond five years from the date of discharge of the cargo in Sl.Nos.2 and 11 of the Chart/Table to impose penalty under Section 116 of the Customs Act, 1962 and therefore they are liable to be quashed in the light of the decision /order dated 12.06.1995 of the Bombay High Court in Parekh Shipping Corporation Vs. The Asst Collector of Customs, (1995) 80 ELT 781.

15. The court further held that the bond should not be kept alive for all time to come and must be limited for a duration of five years from the date of execution. The court therefore held that the Show Cause Notices issued by the Asst Collector of Customs, Manifest Clearance Department could not be sustained.

16. The learned counsel for the petitioner submits that the view of the Bombay High Court has been followed by this court in its order dated 12.08.2002 in M/s.Wilco & Co. Vs. Union of India and Others, in W.P.Nos.9817 & 9818 of 1995 and another decision of this Court in J.M. Baxi Vs. The Government of India, in its order dated 08.02.2016 in Writ Appeal No.2445 of 2011, wherein, the Division Bench of this court observed as follows:-

> 16. Insofar as the third ground is concerned, the learned counsel for the appellant is right in contending that a delay of about eight years from the date of discharge of the cargo has occurred and a delay of about just less than five years has occurred in passing the order of adjudication on the show cause notice. As we have indicated earlier, the discharge of the cargo took place on 31.7.1992, the show cause notice was issued on 02.3.1995, the reply was sent on 23.5.1995 and the order of adjudication was passed on 07.01.2000.
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> 17. In the order of adjudication dated 07.01.2000, there is nothing to indicate as to what transpired from 23.5.1995 up to

07.01.2000, except for two dates. One is a letter dated 23.10.1999 where the appellant sought an injury to be inflicted upon them voluntarily, reminding the Department of the pendency of the show cause notice. The next date is 04.01.2000 when a personal hearing took place. Therefore, the order of adjudication certainly had not taken place within a reasonable period. Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the facts and circumstances of each case. In cases of this nature, where the weight of the cargo discharged by the vessel of a Steamer Agent is questioned, it is not possible for a Steamer Agent to defend themselves against the show cause notice long after the vessel had sailed. Therefore, the third question of law is also be answered in favour of the appellant.

17. The learned counsel also placed reliance on a recent decision of this court rendered in the case of M/S. Transworld Shipping Services Private Limited Vs. Government of India, Represented by the Joint Secretary in W.P.No. 33139 of 2004, dated 10.1.2018, wherein after considering the decisions cited above and few other decisions where Show Cause Notices were issued beyond six years, orders were set aside by this court. The Court observed as under:-

> 31. Thus, the Revenue cannot seek to distinguish the decisions referred to by the learned counsel for the petitioner, by contending that the show cause notice was issued well within the period of five years from the date of discharge. In my considered view, the time taken for adjudication is what important to be noted, and if the said time is reckoned, it has taken six years for the Authorities to complete the adjudication from the date of discharge, which is found to be unreasonable in all the decisions referred to above. The penalty, which was imposed by the Adjudicating Authority and confirmed by the Appellate Authority was twice the shortage. On revision, the first respondent/Government of India noted that, there is nothing on record to show that the petitioner is intentionally or actively

responsible to the said short landing in goods, and having rendered such a finding, the first respondent ought to have exercised its powers, and deleted the entire penalty. In other words, the first respondent was satisfied that there is no mens rea on the part of the petitioner. The nature of cargo, Bills of Lading, time taken for completing the discharge, where all reckoned by the first respondent/Government of India and was convinced to hold that the petitioner was not intentionally or actively responsible for the short landing.

32.Therefore, I have no hesitation to hold that the inordinate delay in concluding the adjudication proceedings is unreasonable. Further, the Revisional Authority, Government of India, having found that, no blame can be fastened on the petitioner for intentionally being the cause for the short landing, this is a fit case, where, the entire penalty imposed on the petitioner requires to be vacated.

18. The learned counsel for the petitioner also placed reliance on yet another decision of this court rendered in W.P.No.24969 of 2004 on 30.07.2019 in the case of Inter-Ocean Shipping (I) Private Limited Vs. Government of India, Represented by the Joint Secretary and Others.

19. In all these cases, the view taken by the Bombay High Court in Parekh Shipping Corporation Vs. the Asst Collector of Customs in W.P.No. 528 of 1995 (1995 (80) ELT 781) have been followed with few modifications. The learned counsel also referred to few other decisions of the Appellate Commissioner's and that of the Government of India wherein the penalty was dropped.

20. The learned counsel for the petitioner also submitted that under Section 6 of the Indian Carriage of Goods by Sea Act, 1925 in case of bulk cargo, where the quantity loaded is determined by a 3rd party other than the carrier or the shipper, the quantity mentioned in the bill of leading is not a prima facie evidence against the carrier and therefore the petitioner as agent of the respective vessel cannot be held liable of short landing of the liquid cargo. He placed reliance in Union of India Vs. Tatvani Shipping Company and another, 1998 (1) LW 16.

21. Per contra, the learned counsel for the respondent submits that the impugned order of the 1st respondent and the consequential 11 orders of the 3rd respondent were well reasoned and require no interference. He submits that short landing stands concluded as per the yardsticks/procedure prescribed by the Honourable Bombay High Court in Shaw Wallace and Co. Vs. Asst. Collector of Customs, 1986 (25) ELT 948 and the circular of the Central Board of Excise and Customs dated 27.12.2002, wherein, the view taken in the above case has been accepted by the Board and was followed.

22. I have considered the submissions of the learned counsel for the petitioner and the respondents. I have also perused the documents produced by the petitioner, affidavit filed in support of the writ petition and the couter affidavit filed by the respondents and the provisions of the Customs Act, 1962 and the case laws filed by the learned counsel for the petitioner.

23. In J.M. Baxi Vs. Govt. of India and Others in W.P.No.24059 of 2009 vide order dated 04.12.2019, this Court has observed as under:

> 31.It may be useful to refer to Chapter VI of the Customs Act, 1962 which deals with provisions relating to conveyances carrying imported goods.
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> 32.As per Section 29 of the Customs Act, the person-in-charge of any vessel or any aircraft entering India shall not permit the vessel or aircraft to call or land at any place other than the customs port or customs Airport.
>
> 33.Under Section 30(1) of the Act, the person-in-charge of aconveyance carrying imported goods shall within twenty-four hours afterarrival at the Customs Station, deliver to the customs officer an importmanifest making and subscribing a declaration as to the truth of its contents.
>
> 34.The imported goods are not permitted to be unloaded until an order has been passed by the proper officer granting entry inwards to suchvessel under Section 31 of the Act. Section 32 of the Act provide that no imported goods required to be mentioned under the regulation of an import manifest shall be unloaded at any Customs Station except the permission of the Officer.

35.Under Section 34 of the Act, the imported goods shall not be unloaded from any conveyance except under the supervision of the proper officer. As per the proviso, the Board may give general permission for any goods or class of goods to be unloaded or loaded without the supervision of the proper officer.

36.Under Section 42 of the Act, the person-in-charge of a conveyance which has brought any imported goods shall not cause or permit the conveyance to depart from that custom station until a written order to that effect has been given by the proper officer.

37.Chapter VII deals with the subject of the clearance of imported goods. Under Section 45 of the Act, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused in accordance with the provisions of Chapter VIII.

38.Vessel carrying imported goods requires permission for landing at the Port and imported goods are required to be unloaded and given to the custody of the Port before the importer can clear the imported consignment. Report generated under Section 45(2)(a) of the Customs Act, 1962, is to be forward to the Customs authorities. Section 43 of the Major Port Trust Act,1963, fixes responsibility or the board for loss of Goods as a bailee.

39. Port Trust authorities cannot permit removal except under and in accordance with the permission given by the Customs Officer

51.The short landing was to be ascertained then and there as and when the imported goods were discharged from the vessel and were transferred to the Port Trust.

52.Therefore, unless there was a report of the surveyors or any other report of the custodian of the goods namely the Tuticorin Port Trust certifying that there were short landing, a steamer or its agent cannot be held liable merely because remission of customs duty was allowed to the importers under Section 23 of the Act.

54.Where as, Section 116 of the Act applies only if any goods loaded in a conveyance for importation into India are not unloaded at the place of destination in India or where there is a failure to unload and the goods are not accounted for to the satisfaction of the Assistant Collector of Customs. Only under those circumstances, the person in charge of the conveyance shall be liable to a penalty.

24. Before dealing with the penalty imposed under the above provision, I shall deal with the provisions of Indian Carriage of Goods by Sea Act, 1925. The Indian Carriage of Goods by Sea Act, 1925 was enacted in the back ground of International conference on Maritime law held at Brussels. The Statement of object to the said Act states that it recognise a long standing demand. Section 6 of the Act reads as under:-

6. Modification of rules 4 and 5 of Article III in relation to bulk cargoes.—Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

25. It modifies the Rules 4 and 5 of Article III, which is reproduced below:-

Article III

Responsibilities and Liabilities

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to-
(a) make the ship seaworthy;
(b) properly man, equip and supply the ship,
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in

which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things -
(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
(b) Either the number of package or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper;
(c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.
5. The Shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of

the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen; Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the court.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspection and tallying the goods.

7. After the goods are loaded the bill of lading, to be issued by the carrier, master or agent of the carrier to the shipper, shall, if the shipper so demands, be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same against the issue of the "shipped" bill of lading but at the option of the carrier, such document of

title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage, relieving the carrier or the ship from liability, for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules,
shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

26. In East and West Steamship & co. George Vs. S.K.R, (1960) 3 SCC 82, the Hon'ble Supreme Court held as follows:-

12. It is helpful to remember in this connection the caution uttered by Lord Atkin inStag Line Ltd. v. Foscold [1932 Appeal Cases 328] about the importance of giving words in these rules their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. After stating that this caution would be well founded if the Act merely purported to codify the law, he went on to observe:

" But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For

> the purpose of uniformity it is therefore important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law…."
>
> 13. The House of Lords was in that case interpreting certain provisions of the English Carriage of Goods by Sea Act, 1924. Our own Act applies to contracts of carriage of goods outwards from the ports of India. Section 2 states that the rules set out in the Schedule shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India. Though in the appeals before us we are concerned with only contracts of carriage of goods from one Indian port to another Indian port, it is necessary to remember that these rules will often have to be interpreted in the courts of the foreign consignees. That is an additional reason why we should be careful not to attach to the words used in the rules set out in the Schedule to the Act anything more or less than their normal meaning consistent with the context in which they appear and consistent with the scheme of the legislation.

27. Though the provision of the Indian Carriage of Goods by Sea Act, 1925, codifies the Hague Rules, Protocol of Signature, (Brussels, 25 August 1925), it has no application for discharge of imported cargo within India from vessels coming from the outside the country.

28. The Hon'ble Supreme Court in East and West Steamship & Co. George Vs. S.K.R, (1990) 3 SCC 82, has also noted the Section 2 of the Indian Carriage of Goods by Sea Act, 1925, states that rules set out in the Schedule shall have effect only in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India.

29. Thus, the said Act is not relevant for considering whether the person-in-charge of the conveyance can state that the bill of lading quantities are not binding of vessels / conveyance or its master. Therefore, the arguments of the learned counsel for the petitioner on this ground cannot be entertained.

30. Provisions of the Customs Act, 1962 contemplates an elaborate procedure for unloading of the cargo and in case of short landing, the person-in-charge shall be liable to penalty. Section 116 of the Customs Act, 1962 reads as under:-

> Section 116. Penalty for not accounting for goods.—If any goods loaded in a conveyance for importation into India, or any goods transshipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the 1 [Assistant Commissioner of Customs or Deputy Commissioner of Customs], the person-in-charge of the conveyance shall be liable,—
>
> (a) in the case of goods loaded in a conveyance for importation into India or goods transshipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;
> (b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.

31. The Bombay High Court in Shaw Wallace and Co.'s case (supra) had devised a procedure to be adopted in the case of unloading of liquid cargo. As per the decision, the methods to be followed are as follows:-

> (A) Liquid Cargo in bulk:
>
> (1) The quantity shown in the Bill of lading reflected in the Import General Manifest should be prima facie accepted as the cargo on board the vessel brought for unloading at the port of Bombay.
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> (2) In case, the person-in-charge of the ship or his Agent produces the ullage survey report prepared at the Port of loading and certified by

an independent Surveyor, then the quantity mentioned in the ullage survey report should be accepted as the current quantity brought by the vessel for unloading.

(3) The vessel should be permitted to discharge liquid cargo only after a ullage survey is carried out under the supervision of the Customs Officer and such survey report is signed by the Customs Officer, by the ship owner and the consignee.

(4) After the discharge of the liquid cargo from the vessel, a fresh survey should be carried out in the presence of the Customs Officer and this discharge completion survey report should be signed by the Customs Officer, the ship-owner and the consignee.

(5) In case of any differences between the bill of landing, quantity or the ullage survey report of the Port of loading quantity and the discharge port ullage survey report quantity, then such difference shall be considered as short landed quantity and for which the ship owner should be held responsible.

32. As per the decision of the Bombay High Court in Shaw Wallace and Co. Ltd. Vs. Assistant Collector of Customs, Oil Unit, and Others, supra quantity shown in the Bill of lading reflects the imported quantity. It is considered as a prima facie evidence of cargo imports on board the vessels brought for unloading at the port. However, if the person-in-charge of the conveyance produes ullage survey report prepared at the Port of loading duly certified by an independent Surveyor, then quantity mentioned in the ullage survey report has to be accepted as the quantity brought by the vessel for unloading.

33. Vessel is permitted to discharge liquid cargo only after a ullage survey is carried out under supervision of the Customs Officer and such survey report is signed not only by the Customs officer, but also by the ship owner or/an the consignee and its agent.

34. After the discharge of the liquid cargo from the vessel, a fresh survey is to be carried out in presence of the Customs Officer. The discharge completion survey report is to be signed by the Customs officer, ship owner and the consignee or its agent.

35. The difference in the Bill of Landing Quantity or the ullage Survey Report at the Port of loading with the ullage Survey Report at discharge port is to be treated as short landed quantity for the purpose of Section 116 of the Customs Act, 1962.

36. The person-in-charge of the conveyance or its agent is responsible for short landing under Section 116 of the Customs Act, 1962. From the facts and circumstances of the present case, it is noticed that there is no survey report prepared as per the guidelines given in the above judgment of the Bombay High Court. It therefore appears that while allowing the unloading of the import cargo, the Customs officer had failed to follow the above procedure.

37. The method prescribed therein has also been later incorporated by the Central Board of Indirect Tax in their circular No.96/2002 dated 27.12.2002. It has been clarified that in the case of all bulk liquid cargo imports, whether for home consumption or for warehousing, the show tank receipt quantity should be taken as the basis for levy of Customs duty pending provisional assessments while may be finalised accordingly.

38. In this case, the import had taken place between 1993 to 1995 as per the chart. There is considerable delay in so far as the determination of short landing. It is not clear that the facts of the present case how the short landing was determined. In so far as the cargo covered by the Show Cause Notices at serial Nos.2, 5, 6, 8, 10 & 11 are concerned, there is considerable delay in not only issuing notice but also in adjudication.

39. Further, from the reading of the judgment of this Court in CAG Shipping (India) Pvt. Ltd. Vs. The Government of India and Others, 2016 SCC OnLine Mad 23645, Fluorspar contains moisture to facilitate handling and to reduce dust and therefore presence of high moisture content was recognised. There, the Adjudicating Authority had allowed only 0.5% which is universal accepted principle in Maritime law for all the import cargo. However, considering the nature of the import cargo, there the court had allowed the tolerance limit at 6.47% according to the parameters published by Mr.Michael Miller, an internationally renowned expert on chemicals who had opined that Acid Grade Fluorspar is shipped routinely in the form of damp Filtercake containing 7% to 10 % moisture.

40. Therefore, the following decision of the Bombay High Court in Parekh Shipping Corporation Vs. The Asst. Collector of Customs and Others, (1995) 80 ELT 781 and decision of this

Court in CAG Shipping (India) Pvt. Ltd. Vs. The Government of India and Others, 2016 SCC OnLine Mad 23645, I am inclined to interfere with the penalty imposed under Section 116 of the Act.

41. Therefore, the imposition of penalty on the cargo covered by Show Cause Notices at Serial Nos.2, 5, 6, 8, 10 & 11, cannot therefore be sustained. As far as the imposition of penalty in rest of cargo covered by other Show Cause Notices are concerned, I am unable to interfere as the Show Cause Notices were issued within a reasonable period of time, but the 3rd respondent has also reduced the penalty by 50%.

42. In the light of the above discussion, the petitioner is directed to remit the penalty re-determined by the 3rd respondent in respect of the following Show Cause Notices within a period of thirty days from the date of receipt of a copy of this order.

Sl. No	Name of the Vessal	Date of Arrival	Nature of Cargo	Nature issuance of Show Cause Notice	Date of Ad-judication	Penalty imposed as per 6 and upheld by Commissioner of Customs and Central Excise (Appeals) (Rs.)	Appeal No. before the Appellate Authority	Date and Amount of Penalty imposed as per consequential demand	Period within which the Show Cause Notice from the date of arrival of ship (in Months)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1	M.T.Lady Pauline	31.12.95	Propene	08.02.96	22.2.99	2,00,000	C24/28/99	6.6.05 Rs.1,02,581	2 ¼
3	M.T.Coral Star	13.6.95	Propene	14.3.96	3.3.99	7,20,000	C24/30/99	6.6.05 Rs.3,61,537	9

4	M.T.Coral Star	30.04.95	Propene	15.3.96	3.3.99	3,35,000	C24/31/99	3.6.05 Rs.1,68,707	8 ½
7	M.T.Virgo Gas	2.3.96	Propene	1.5.96	22.6.99	1,75,000	C24/59/99	6.6.05 Rs.88,321	2
9	M.T.Spica Gas	19.8.97	Propene	28.1.98	22.6.99	1,75,000	C24/61/99	6.6.05 Rs.88,393	5 ½

43. Accordingly, the Writ Petition is partly allowed. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
1.The Government of India,
rep. by the Joint Secretary,
Ministry of Finance (Dept. of Revenue),
IV Floor, Jeevandeep Buildings,
Sansadh Marg, Parliament Street,
New Delhi - 110 001.
2.The Commissioner of Customs & Central Excise (Appeals),
No.1, Williams Road,
Cantonment, Tiruchirapalli - 1.
3.The Joint Commissioner of Customs,
Office of the Customs House,
No.1, William Road,
Cantonment, Tiruchirapalli - 1.
4.The Deputy Commissioner of Customs
Customs House, No.60,
Mohan Singh Street,
Cuddalore - 607 003.
+ 1 CC to Mr. K. Bijai Sundar, Advocate, SR 20559

Pre-Delivery Order in
W.P.No.31139 of 2005
and W.M.P.No.34118 of 2005

MRP 29/05/2020