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IN THE HIGH COURT OF ORISSA AT CUTTACK

OTAPL No.7 of 2016

Paradip Port Trust, Jagatsinghpur

Appellant

Mr. Rudra Prasad Kar, Advocate

-versus-

***Commissioner of Central Excise,
Customs and Service Tax,
Bhubaneswar and another***

Respondents

Mr. Choudhury Satyajit Mishra,
Senior Standing for Revenue Department

**CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN**

**ORDER
13.12.2022**

Order No.

Dr. S. Muralidhar, CJ.

05. 1. The present appeal by the Paradip Port Trust (PPT) is directed against an order dated 29th April, 2016 of the Customs, Excise & Service Tax Appellate Tribunal, Kolkata Bench (CESTAT) dismissing the Appellant's appeal against an order dated 27th July, 2006 passed by the Commissioner (Appeals), Bhubaneswar upholding an order dated 17th February, 2005 passed by the Commissioner of Central Excise and Customs, Bhubaneswar thereby a demand of Rs.17,41,843/- was conformed along with interest and an equivalent penalty was also imposed under Section 114A read with Section 117 of the Customs Act, 1962 (Act).

2. The present appeal was admitted by this Court by an order dated 7th October, 2016 and an interim order was passed to the effect that with the Appellant already having deposited 50% of the impugned demand, no further amount need be deposited during the pendency of the present appeal.

3. The following questions of law are framed for consideration by this Court:

“I. Whether on the facts and in the circumstances of the case, PPT is liable to pay customs duty on cargo covered by Bills of Entry (B/E) but not cleared by M/s. MESCO Steel?

II. If the answer to ‘I’ is in the affirmative, is the Appellant-PPT liable to pay penalty as assessed in terms of Section 114A read with Section 117 of the Act?”

4. The PPT is a Government of India undertaking and is also governed by the Major Port Trust Act, 1963 (MPT Act). M/s. MESCO Steel (MESCO) imported 28502.1 MT of LAM Coke of Chinese origin. The said consignment was discharged at the Paradip Port by a ship that berthed on 19th June, 1999. The vessel completed the discharge of the cargo on 27th June, 1999 and sailed away.

5. MESCO cleared 25,500.6 MT of LAM Coke under 8 B/Es after complying with the provisions of the Act. As regards the balance cargo of 3001.5 MT, including 1.5 MT of excess discharged cargo, MESCO neither submitted B/E nor applied for further extension of

time for doing the same despite repeated reminders. When the proper officer on 8th December 1999 asked the PPT to initiate the auction process for disposal of the aforementioned cargo, MESCO on the following day i.e. 9th December 1999, requested the Assistant Commissioner, Customs to extend time under Section 48 of the Act to file B/E for the balance cargo. The delay by the MESCO in filing B/E was waived and 4 B/Es were noted and processed action. PPT was informed on 16th December, 1999 not to put the goods to public auction. The 4 B/Es filed by MESCO were assessed provisionally to duty on 17th December, 1999.

6. MESCO paid the duty only in respect of 1B/E for 1000 MT of LAM Coke on 18th December, 1999 and in respect of another B/E for 1000 MT of LAM Coke on 7th January, 2000 along with interest under Section 47 of the Act. On the remaining 1001.5 MT of LAM Coke assessed under the remaining 2 B/Es, MESCO failed to pay the assessed customs duty of Rs.17,41,843/-. The reason given was that the goods were not in existence.

7. On 1st April 2000, MESCO informed the Customs Department that the entire quantity of goods under the above B/Es had been washed away due to the super cyclone which occurred on 29th October, 1999 and which hit the Paradip area with severity. For about three years thereafter, no steps were taken by the Customs Department. However, all of a sudden on 18th July, 2003 a Show Cause Notice

(SCN) was issued to the Appellant PPT (with a corrigendum dated 14th August, 2003) requiring it to show-cause why the aforementioned import duty amounting to Rs.17,41,843/- shall not be recovered from it under Section 45(3) of the Act for contravention of Section 48(1) and (2) read with Circular dated 1st February, 1998 issued under Section 48 of the Act read with the uncleared goods (B/E) Regulations, 1972; and why interest and penalty should not be recovered thereon.

8. On 16th September 2003, the Appellant replied to the SCN *inter alia* pointing out that MESCO was leased out an open stock yard for storage of the LAM Coke in question. The condition 5 of the lease permit stated as under:

“Goods stored in the open spaces, stocking yards, sheds of other places shall remain at owner’s risk and port will not responsible for any pilferage, theft, damage or loss.”

9. PPT pointed out that under Section 42(2) of the MPT Act, PPT was not a bailee in respect of bulk cargo. In the severe super cyclone of 29th October, 1999 many importers and exporters lost substantial quantity of the cargo on account of flooding of the stock yard. PPT pointed out that it had no communication from MESCO and PPT was not even aware of the letter dated 1st April, 2000 sent by the MESCO to the Customs Authorities.

10. PPT pointed out that Section 45(3) of the Act would have no application (i) since the goods were not pilfered in the customs bonded area; (ii) the port was not in-charge/custody of the goods; (iii) the goods had been lost due to natural events like super cyclone which was not in the control of the PPT. Further, as regards the liability under Section 48 of the Act, it was pointed out by PPT that the goods in question were not warehoused under the port and, therefore, no responsibility thereunder attached to the PPT.

11. On 30th July 2004, the Joint Commissioner (Customs), Bhubaneswar gave PPT a personal hearing. The hearings continued on 8th and 15th October, 2004. Written submissions were also filed by the PPT. In the adjudication order dated 17th February 2005, the Joint Commissioner concluded that the PPT had failed to account for the 1001.5 MT of LAM Coke in respect of which MESCO had filed B/Es. It was observed that in the absence of any information from the PPT regarding loss/destruction of the said quantity of LAM Coke by natural calamity and since PPT belatedly asked MESCO to account for the said cargo, it appeared that “the said goods have been pilfered from the port premises after discharge from the vessels.” Accordingly, the demand was confirmed, and interest and penalty were also levied.

12. PPT then carried the matter in appeal to the Commissioner (Appeals). In the order dated 27th July, 2006 dismissing the appeal, it

was held that PPT was the custodian of the aforementioned imported goods and it had not established that the said goods had been lost or destroyed. Accordingly, the adjudication order was upheld.

13. The PPT then went in appeal before the CESTAT which has by the impugned order dated 29th April, 2016 concurred with the Joint Commissioner and Commissioner (Appeals). It was held that “imported goods lying in the Customs area in the custody of the Appellant can only be cleared on payment of duty and cannot be handed over to an importer by taking shelter of Sections 42 and 43 of the MPT Act.” It was further held that the quantity not accounted for by the custodian had to be treated as pilfered and, therefore, PPT was liable under Section 45(3) of the Act.

14. This Court has heard the submissions of Mr. Rudra Prasad Kar, learned counsel for the Appellant and Mr. Choudhury Satyajit Mishra, learned Senior Standing Counsel for the Revenue Department.

15. Sections 45(3) and 48 of the Act read as under:

“45 Restrictions on custody and removal of imported goods—xxx

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the

date of delivery of an [arrival manifest or import manifest] or, as the case may be, an import report to the proper officer under Section 30 for the arrival of the conveyance in which the said goods were carried.

“48. Procedure in case of goods not cleared, warehoused, or transhipped within [thirty days] after unloading.— If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within (thirty days) from the date of the unloading thereof at a Customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof.”

16. It must be noticed that in terms of Section 48 of the Act, there was no statutory obligation on PPT to inform the Customs Authorities about the loss of goods stocked in the customs bonded area. Further, it was within the knowledge of the Customs Authorities that the goods had been washed away in the super cyclone since the MESCO had informed them of that occurrence by letter dated 1st April, 2000. With MESCO not being traceable, the Customs Authorities appear to have turned to PPT to recover the customs duty, which was otherwise the liability of MESCO.

17. It has not been able to be disputed by the Customs Authorities that goods stored in open spaces, stocking yards remained at owner's risk. Section 42(2) of the MPT Act clearly states that the Port Authority would not be responsible for any pilferage or damage or

loss. This was also incorporated in the license issued to MESCO as a condition.

18. The Customs Authorities, also have not been able to dispute the fact that although MESCO sent a letter on 1st April, 2000 informing them of the loss of cargo in the super cyclone, no action was taken till the issuance of SCN three years later on 18th July, 2003. This delay has not been explained. If the goods themselves were not available on account of the super cyclone, it is inconceivable how the PPT could be made liable to pay customs duty on such goods under Section 45(3) of the Act which applies only in a situation where imported goods are “pilfered after unloading”. There is absolutely no material to come to the conclusion that the aforementioned goods not cleared by MESCO were ‘pilfered’. There cannot be any presumption on this score as has been done in the adjudication order and the appellate orders. The three orders run contrary to the factual position regarding loss of the cargo on account of the super cyclone as informed by MESCO to the Customs Authorities on 1st April, 2000 itself.

19. In ***Board of Trustees of the Port of Bombay v. Union of India, 2009 (241) ELT 513 (Bom.)***, the facts were that the liability for payment of customs duty was sought to be fastened on the Bombay Port Trust under Section 45(3) of the Act on the ground that goods in

question had been pilfered or lost. It was concluded by the Bombay High Court on an analysis of the Act as well as the MPT Act that

“considering the language of Section 45(3) of the Customs Act, the liability to pay duty is of the person who remains in custody of the goods as an approved person under Section 45 of the Customs Act. Considering that possession of the goods by the Port Trust is by virtue of powers conferred on the Port Trust under the Port Trust Act, it will not be possible to hold that the Port Trust is an approved person or can be notified as an approved person. To that extent, Section 45(3) of the Customs Act will have to be restricted to mean to the second category of person, namely such persons approved who have approved warehouses in terms of Sections 9 and 10 of the Customs Act.”

20. The Bombay High Court further concluded that

“under Section 45 of the Customs Act, the person referred to in sub section (1) thereof can only be the person approved by the Commissioner of Customs. It excludes a body of persons who by virtue of a law for the time being in force is entrusted with the custody of goods by incorporation of law under another enactment, i.e. the Port Trust Act. We see no reason what mischief Parliament sought to undo by sub-section (3) of Section 45 of the Customs Act. At the highest, it has to be read in the context that pilferage may take place from a private warehouse or a customs warehouse run by a private party. The negligence on such private parties should not cause loss to the exchequer. No purpose would be served by one arm of the Government imposing a duty on another arm of the Government which is discharging statutory duties.”

21. The above observations and findings were rendered in a case which proceeded on the basis that the goods were pilfered. The Court

has been informed that the aforementioned decision of the Bombay High Court is pending consideration before the Supreme Court of India in Civil Appeal No.4477 of 2010 but there has been no stay of the operation of the said judgment.

22. The case on hand is on an even better footing. As far as the present case is concerned, there is sufficient material available on record to show that the goods in question were in fact lost in the super cyclone. Therefore, any attempt to fasten liability on PPT i.e. the Port Authority under Section 45(3) of the Act would not only be misconceived but legally unsustainable.

23. Consequently, this Court has no hesitation in setting aside the adjudication order, and the Appellate Orders of the Commissioner (Appeals) and CESTAT affirming such order has been entirely without legal basis. Question No. I is answered in the negative i.e. in favour of the Appellant and against the Customs Department. Consequently, there is no need to consider question No. II.

24. The appeal is accordingly allowed.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge