Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 164 OF 2007

M/s. Peekay International Pvt. Ltd.	]	
having Office at 470, Peekay Mansion,	]	
1st Floor, J.S.S. Road, Chira Bazar,	]	
Mumbai – 400 002	]	.. Petitioner

Vs.

1. Union of India,	]	
Through the Secretary,	]	
Department of Legal Affair,	]	
Ministry of Law & Justice,	]	
Branch Secretariat,	]	
Aaykar Bhavan, Marine Lines,	]	
Mumbai	]	
2. Jt. Secretary.	]	
To the Government of India,	]	
Ministry of Finance,	]	
Department of Revenue,	]	
14, Hudco Vishala Building,	]	
B-Wing, 6th Floor, Bhickhaji Cama Place	]	
New Delhi – 110 066	]	
3. Dy. / Asst. Commissioner of Central	]	
Excise Bond Section, Mumbai – I,	]	
Meher Bldg; Dadi Sheth Lane,	]	
Chowpaty, Mumbai – 400 007	]	
4. Commissioner of Central Excise,	]	
Mumbai – I, Central Excise Bldg.,	]	
Churchgate, Mumbai – 400 001	]	.. Respondents

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Mr. Anil Balani for petitioner
Mr. Satyaprakash Sharma a/w Mr. Amit Singh for respondents

.....

CORAM : K. R. SHRIRAM &
PRITHVIRAJ K. CHAVAN, J.J.

DATED : 23rd JUNE, 2022

Judgement : (Per K.R. Shriram, J.)

1. Petition came to be admitted on 15th February, 2007 and interim relief in terms of prayer clause (c) was granted.

2. Petitioner is impugning an order dated 17th October, 2006 passed by respondent no.2 rejecting petitioner's application for remission of excise duty in the sum of Rs.1,56,900/- in respect of export goods that got destroyed in fire at the Container Warehousing Corporation Ltd. (CWC) warehouse at Jawaharlal Nehru Port, Nhava Sheva. The facts are as under:

3. Petitioner was engaged in the business of export of Textile Fabrics and was registered dealer under the Central Excise Act, 1944 and Rules made thereunder. Petitioner was holding a valid Central Excise Registration bearing No. AAHFM 4869 QXD001 issued by the jurisdictional Central Excise Authority.

4. During its course of business, petitioner had purchased four consignments of cotton / polyester fabrics (subject matter of this petition) from the manufacturers against Form CT-1 and ARE-1's for export. The details of the four consignments are as under :

Sr. No.	CT-1	ARE-1 No. & Date	Amount of C.Ex.Duty	Manufact-urer	Description
1	52/02-03	7/1.6.02	20,915/-	Tata Mills	Cotton fabrics
2	53/02-03	9/1.6.02	83,017/-	Tata Mills	Cotton fabrics
3	54/02-03	8/4.6.02	20,124/-	Ridham	Cotton fabrics

					Synthetics
4	55/02-03	81/5.6.02	32,844/-	Sharda	Polyester / Synthetics Viscose fabrics

5. Thereafter, petitioner filed three shipping bills for export of the above referred goods through Jawaharlal Nehru Port, Nhava Sheva. The details of the three shipping bills are as under:

Sr. No.	Shipping Bill No.	ARE-1	FOB Value
1	815844/4.6.02	7&9/1.06.02	2,99,631/-
2	815619/3.6.02	8/4.6.02	5,81,208/-
3	816256/4.6.02	81/5.6.02	2,63,276/-

6. The goods covered by the above mentioned shipping bills were carted at Shed No.4, CFS, Dronagiri Node of CWC, which is part of the Jawaharlal Nehru Port and also an Inland Container Depot of J.N. Port appointed under Section 7(AA) of the Customs Act, 1962. Thus, it is an approved place for holding of export goods. The goods were examined by the Proper Officer of Customs. After satisfying himself that the goods are not prohibited and the exporter had complied with all the provisions of Customs Act, the Custom Officer passed an order under Section 51 of the Customs Act, known as Let Export order (LEO), permitting clearance and loading of the goods for export.

7. Unfortunately, there was a devastating fire on 7th June, 2002 in Shed No.4 at CWC, CFS, Dronagiri Node. The entire shed was gutted in the fire and all the goods covered under three shipping bills and four ARE-1's, which were stored in the shed at the time of fire, were totally destroyed / lost along with goods of other exporters. The CWS, CFS has issued certificate of loss of cargo in fire on 7th June, 2002. The police and fire brigade also issued appropriate certificate.

Petitioner, by a letter dated 19th August 2002 submitted all the certificates from CWC, Police and the fire brigade to respondent no.3 and requested for issuance of duty remission certificate and / or proof of export certificate. The fact that the goods were destroyed by fire at CWC, CFS or within the customs area as notified under the Customs Act, 1962 is not in dispute. In fact, petitioner had also submitted copies of Insurance Claim along with panchanama and other documents to explain that duty amount was not covered under the Insurance Policy.

8. Notwithstanding submission of all the documents, instead of issuing the certificate as requested, petitioner was served with a show-cause notice dated 26th November, 2002 calling upon petitioner to show cause as to why the Central Excise Duty amounting to Rs.1,56,900/- should not be demanded / recovered under Section 11A of the Central Excise Act, 1944 read with Rule 19 of the Central Excise Rule, 2001 and Notification No.42/01-CE dated 26th June, 2001 along with interest @ 24% per annum from the date of removal of the goods for export from the place of procurement till payment of duty in terms of the bond and the aforesaid Notification. Petitioner filed reply dated 30th December, 2002 which was rejected and an adjudication order dated 16th March 2005 against petitioner was passed. Petitioner impugned the said order by preferring an appeal before the Commissioner of Central Excise (Appeals), Mumbai. The appeal came to be rejected by an order dated 16th November, 2005. Petitioner filed an appeal before respondent no.2 as provided under Section 35EE of the Central Excise Act, 1944, which appeal also came to be rejected by an order dated 17th October, 2006 that is impugned in this petition. Petitioner is also seeking a writ to direct respondents to issue the certificate for remission of duty.

9. Section 3 of the Central Excise Act 1944 (Excise Act) provides for levy and collection of a duty of excise on all excisable goods (excluding goods procured or manufactured in Special Economic Zone), which are produced and manufactured in India.

10. Rule 19 of the Central Excise No.2 Rules 2001 which was published vide Notification No.30/2001 – Central Excise (NT) dated 21st June, 2001 provides that any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or warehouse or any other premises, as may be approved by the Commissioner. It also provides that any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner. The export under these rules was also subject to such conditions, safeguards and procedure to be notified by the Board.

The conditions and procedure was prescribed in Notification No.42/2001 – Central Excise (N.T.) dated 26th June, 2001. The conditions and procedure for export of all excisable goods, except to Nepal and Bhutan, without payment of duty provided that the exporter shall furnish a general bond in the specified form specified in Annexure-I to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction in a sum equal at least to the duty chargeable on the goods, with such surety or sufficient security, as such officers may approve for the due arrival thereof at the place of export and their export therefrom under Customs or as the case may be postal supervision. The condition also provide for the goods to be exported within six months from the date on which these goods were cleared from the factory of production or manufacture or warehouse or other approved premises. The procedure also provides that the general bond or letter of undertaking given by the exporter shall not be discharged unless the goods are duly exported to the satisfaction of the Assistant or Deputy Commissioner within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted for, and interest, if any, has been paid.

It is also provided in the Notification that on arrival at the place of export, the goods shall be presented together copies of the application to the Commissioner of Customs or other duly appointed officer, who shall examine the goods and if he finds that the same are correct and exportable, shall allow export thereof and certify that the goods have been exported. If the goods are in sealed packages at the place of despatch, the Officer of Customs after satisfying himself about the exportability thereof and if the seals are found intact, he shall allow export.

Such a Let Export Order had been issued in the case at hand before the goods were destroyed in fire. The conditions and procedure read as under :

"1. ***Conditions :***
(i) that the exporter shall furnish a general bond in the Form specified in Annexure-I to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory, warehouse or such approved premises, as the case may be, or the Maritime Commissioner or such other officer as authorised by the Board on this behalf in a sum equal at least to the duty chargeable on the goods, with such surety or sufficient security, as such officers may approve for the due arrival thereof at the place of export and their export

therefrom under Customs or as the case may be postal supervision. The manufacturer-exporter may furnish a letter of undertaking in the Form specified in Annexure-II in lieu of a bond.

(ii) that goods shall be exported within six months from the date on which these were cleared for export from the factory of the production or the manufacture or warehouse or other approved premises within such extended period as the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or Maritime Commissioner may in any particular case allow;

(iii) that when the export is from a place other than registered factory or warehouse, the excisable goods are in original packed condition and identifiable as to their origin;

(iv) that exports of mineral oil products falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as stores for consumption on board of any aircraft on foreign run shall be subject to conditions and limitations, to be applied mutatis mutandis, as notified in the Ministry of Finance (Department of Revenue), Notification No.40/2001-Central Excise (N.T.), dated 26th June, 2001 issued under rule 18 of Central Excise (No.2) Rules, 2001.

*2. **Procedure:***

*(i) **Procedure for removal without payment of duty under this notification**. – (a) After furnishing bond, a merchant-exporter shall obtain certificates in Form CT-1 specified in Annexure-III issued by the Superintendent of Central Excise having jurisdiction over the factory or warehouse or approved premises or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf and on the basis of such certificate he may procure excisable goods without payment of duty for export by indicating the quantity, value and duty involved therein;*

(b) the exporter who has furnished bond shall ensure that the debit in bond account does not exceed the credit available therein at any point of time;

(c) the manufacturer-exporter may remove the goods without payment of duty after furnishing the letter of undertaking as specified under condition (i);

(d) such General bond or letter of undertaking shall not be discharged unless the goods are duly exported, to the satisfaction of the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf within the time allowed for such export or

are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid."

(iv) ***Examination of goods at the place of export –*** *(a) On arrival at the place of export, the goods shall be presented together with original, duplicate and quintuplicate (optional) copies of the application to the Commissioner of Customs or other duly appointed officer;*

(b) The Commissioner of Customs or other duly appointed officer shall examine the goods with the particulars as specified in the application and if he finds that the same are correct and exportable in accordance with the laws for the time being in force, shall allow export thereof and certify on the copies of the application that the goods have been duly exported citing the shipping bill number and date and other particulars of export;

Provided that if the Superintendent or Inspector of Central Excise sealed packages or container at the place of despatch, the officer of customs shall inspect the packages or container with reference to declarations in the application to satisfy himself about the exportability thereof and if the seals are found intact, he shall allow export.

(c) The Commissioner of Customs or the other duly appointed officer shall return the original and quadruplicate (optional copy for exporter) copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application, with whom the exporter has furnished bond or a letter of undertaking.

(d) The exporter shall use the quintuplicate copy for the purposes of claiming any other export incentive.

(v) ***Cancellation of applications :*** *(a) if the excisable goods are not exported, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise or Maritime Commissioner or such other officer as authorised by the Board on this behalf, as the case may be, to whom the bond or letter of understanding has been furnished, may, on written request for cancellation of application, cancel said application and allow diversion of goods for consumption in India subject to the sub-para (b);*

(b) The exporter shall pay the duty as specified in the application along with interest at the rate of twenty four percent per annum on such duty from the date of removal for export from the factory or warehouse or any other approved premises till the date of payment of duty."

11. Rule 4 of the Central Excise Rules also provides that every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided.

12. Rule 21 provides for remission of duty in some cases and it reads as under :-

> *"21. Remission of duty.-*
> *<u>Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by</u> natural causes or <u>by unavoidable accident</u> or are claimed by the manufacturer as unfit for consumption or for marketing, <u>at any time before removal, he may remit the duty payable on such goods,</u> subject to such conditions as may be imposed by him by order in writing:*
>
> *Provided that where such duty does not exceed one thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Superintendent of Central Excise" has been substituted:*
>
> *Provided further that where such duty exceeds one thousand rupees but does not exceed two thousand five hundred rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be," has been substituted.*
>
> *Provided further that where such duty exceeds two thousand five hundred rupees but does not exceed five thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Joint Commissioner of Central Excise or Additional Commissioner of Central Excise, as the case may be," has been substituted.*
>
> *(emphasis supplied)*

13. Therefore, where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes

or by unavoidable accident or claimed by manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing. The admitted position is that goods in this case have been destroyed by fire and it is not respondent's case that the destruction has happened not by an unavoidable accident. The respondent's only case as stated in the impugned order (paragraph 6.3) is that goods did not get destroyed before removal. Para 6.3 reads as under :

> *"6.3. Govt. further notes that the applicants have not produced any remission certificate in terms of rule 21 of the Central Excise rules, 2002, Gov. also notes that there is no provision in the Central Excise Rules for remission of duty in case goods is lost or destroyed after clearance from the manufacturing place or warehouse. In the instant case the applicants have cleared the impugned goods under bond without payment of duty for export and in terms of rule 19 of the Central Excise Rules 2002 r/w Notification issued thereunder the applicants should have furnished proof of export before the proper authority. However, admittedly in the case as discussed above the applicants have not furnished proof of export before the proper authority in terms of rule 19 of the Central Excise Rules, 2002. Hence, order of demanding duty cannot be assailed."*

14. Section 4 (3)(c) of the Central Excise Act defines "place of removal", which (as it was then in force, prior to amendment by Act 32 of 2003) reads as under :-

> *"Sec. 4 (3)(c) "place of removal" means–*
> *(i) a factory or any other place or premises of production or manufacture of the excisable goods;*
>
> *(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without [payment of duty;]*

15. Therefore, if the goods are destroyed or lost due to unavoidable accident at any time before removal, the Commissioner may grant remission of duty. In this case, the goods were destroyed in fire in CFS, CWC warehouse where it was permitted to be deposited without payment of duty and after Customs inspection, and therefore, CWS CFS is a warehouse or place permitted under Section 4(3)(c)(ii) of the Act. Hence, the goods have been destroyed before removal.

16. Moreover, as per the Notification No.42 of 2001 – Central Excise (N.T.) quoted above, in the case of export of all excisable goods, the condition is to furnish a general bond to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction over the factory or warehouse for the due arrival of the goods at the place of export and their export therefrom under Customs or as the case may be postal supervision. The fact is that goods have arrived at the place of export in view of the Let Expert Order received from the Custom Authorities. Therefore, the first condition for permitting removal of goods from the factory or place of manufacture of the general bond has been met. What is relevant is whether the goods got destroyed before it was removed. According to respondent no.2, there is no provision in Central Excise Rules for remission of duty in case goods are lost or destroyed after clearance from manufacturing place or warehouse. What is a warehouse we have to see. Since the condition of the general bond also states that the exporter shall ensure that the goods arrived at the place of export, CWC CFS should also be considered to be the 'warehouse' as prescribed under the Rules. Moreover, the procedure prescribed under the Notification also says that the general bond or letter of undertaking shall not be discharged unless the goods are duly exported to the satisfaction of the Assistant Commissioner of Central Excise or Deputy Commissioner of Central

Excise or otherwise accounted for to the satisfaction of such officer. There is no discussion in the impugned order as to how the goods have not been accounted for, when admittedly goods have been lost in fire within the custom notified area and under customs supervision after Let Export Order has been issued. The bond cannot be discharged only for goods not accounted for and in this case, in our view, the goods have been accounted for since there are certificates issued by CWC, CFS, the police as well as fire brigade that the goods covered under the four ARE-1's and three shipping bills have been destroyed by fire. Further, it is not respondent's case either that goods have been diverted by petitioner.

17. Mr. Sharma appearing for respondents states that the duty was on the manufacturer, which is fastened as soon as the goods are manufactured, payable at the time of removal from factory or warehouse of manufacturer. Mr. Sharma in fairness also agreed that the duty is on manufacturer but collected on removal and that would apply to place from where the sale takes place or the ownership of goods is transferred by seller to buyer at the time of removal from such place. Since the bond given by the exporter also gives an undertaking for the due arrival of the goods at the place of export and the export therefrom under customs supervision, the place from where the sale would take or the ownership of the goods will be transferred from seller to buyer, in the facts and circumstances of this case, will be the CWC, CFS warehouse. Admittedly, the fire took place and the goods got destroyed in the CWC, CFS and, therefore, the goods were destroyed before removal from the place where it was stored. We are of the opinion that the goods cleared for export under bond were destroyed before the same could be exported and, therefore, should be treated as having been destroyed before removal. This would be the fair

interpretation of Rule 21 and, therefore, the primary condition of eligibility for remission of duty on the exported goods is fulfilled as required under Rule 21 of the Central Excise Rules, 2001.

18. Mr. Sharma also submitted that petitioner was not the manufacturer and, therefore, he could not claim remission. There is a primary fallacy in this argument inasmuch as petitioner otherwise would not have been able to export goods from the manufacturer's premises by submitting a general bond.

Mr. Sharma relied upon an order of Rajasthan High Court in the matter of **Union of India Vs. M/s. Hindustan Zinc Ltd. & Anr.**[1] to submit that to claim remission, the destruction should have happened within the place of manufacture. We have considered the said judgment and in that case the loss happened due to storage and handling and of course that happened within the place of manufacturer but the said judgment is not an authority to assert that loss ought to happen only in the premises of the manufacturer. In fact, in the said judgment the Court went on to suggest that practical view of things is required to be taken and in the absence of anything to show any clandestine removal, a reasonable approach has to be taken. In our view, this judgment actually would be to the benefit of appellant.

19. There was nothing to prevent the Central legislation from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to that afterwards whether it will be consumed, destroyed or given away. That is not the case. Excise duty is collected when the commodity leaves the factory for the first time and also because the duty is intended to be an indirect duty, which the

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1 Central Excise Appeal No.42 of 2006 dated 13th October, 2008.

manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example upon destroyed in the factory itself. It is for that reason, the Act and the Rules framed thereunder provide for satisfactorily accounting for, in case the goods are not exported etc. and the goods are also allowed to be removed under a bond. If we have to accept what Mr. Mishra submits, the Act and the Rules would not have provided for such eventualities in case goods are destroyed before its removal from the place of manufacturer or provide for place of removal to mean a warehouse or any other place where the goods are permitted to be deposited without payment of duty or the bond would not provide for due arrival of the goods at the place of export and their export therefrom under custom supervision.

20. In the circumstances, in our view, the goods have been satisfactorily accounted for and petitioner is entitled to the Certificate granting remission of excise duty for the goods, destroyed in the fire. Therefore, we allow the petition in terms of prayer clauses (a) and (b), which read as under :

> *"(a) That this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ, or order or direction in the nature of Certiorari calling for the records and papers in the Petitioners' case relating to the subject matter of this Petition and after probing into the legality and propriety of the impugned action of Respondents of failing to consider that the remission of duty of Rs.1,56,900/- is required to be granted and thus therefore this Hon'ble Court may further quash and set aside the said impugned orders being Exhibits-A, J & K hereto.*
>
> *(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ, order or direction in the nature of Mandamus directing the respondents to grant remission of duty and set aside the Order-in-Original and Order-in-Appeal and Revision Order passed by the Respondents being exhibits-A J & K hereto."*

21. Rule made absolute. Petition disposed.

(PRITHVIRAJ K. CHAVAN, J.) **(K.R. SHRIRAM, J.)**