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

WRIT PETITION NO. 1927 OF 2012

James Mackintosh & Co. Pvt. Ltd.,
a Company incorporated under the
Companies Act, 1956, having its
office at Darabshaw House, Shoorji
Vallabhdas Marg, Ballard Estate,
Mumbai – 400 038 … Petitioner

V/s.

1. Joint Secretary, Revisional Authority
under Customs Act, 1962, having its
office at 14, Hudco Vishala Bldg.,
B-Wing, 6^{th} Floor, Bhikaji Cama Place
New Delhi – 110 066

2. The Union of India, Aayakar Bhavan,
Maharshi Karve Road, Mumbai – 400 020 ... Respondents

Mr. Prashant Pratap, Senior Advocate with Mr. Nishaan Shetty for the Petitioner

Mr. Pradeep Jetly, Senior Advocate with Mr. Siddharth Chandrashekhar for the Respondents

CORAM : NITIN JAMDAR &
GAURI GODSE, JJ.

DATE : 19 DECEMBER 2022

JUDGMENT (Per Nitin Jamdar, J.) :-

The Petitioner has challenged the order passed by the Joint Secretary, Revisional Authority under the Customs Act, 1962, dismissing the Revision filed by the Petitioner and confirming the orders under challenge before the Revisional Authority. The Petitioner has sought a direction to the Respondents not to take steps for recovery of any penalty imposed on the Petitioner pursuant to the impugned order.

2. The Petitioner is a private limited company carrying on business as an agent for foreign ship owners in various ports in India. The Respondent No.1 is the Joint Secretary, a Revisional Authority empowered under Section 129DD of the Customs Act, 1962 to hear the Revision from the orders passed in the appeal by the Commissioner of Customs (Appeals) imposing penalty under Section 116 of the Customs Act, 1962. The Petition arises from the penalty imposed on the Petitioner on the short-landing of goods loaded in a conveyance for importation into India.

3. At the relevant time, the Petitioner was the agent of one Pacific International Lines (Pte) Ltd. Singapore who owned vessel 'M.V. Kota Raja'. The Petitioner filed an Import General Manifest (IGM) as an agent of the M.V. Kota Raja upon arrival of the vessel at the Mumbai, Port with a cargo of containers. The IGM No. 8808,

dated 15 March 2001, containing Item No. L-27,31,38,39,40 and 199 is the subject matter of controversy.

4. The Petitioner received notice on 20 August 2001 from the Assistant Commissioner of Customs, Manifest Clearance Department, Mumbai. The notice stated that the Mumbai Port Trust reported that certain items stated in the schedule appended to the notice and which were entered in the IGM of vessel M.V. Kota Raja, which arrived on 15 March 2001, were short-landed. The Petitioner was called upon to state why action should not be initiated against the Petitioner under Section 116 of the Act of 1962. The Petitioner received another notice dated 7 November 2001 referring to the earlier notice dated 20 August 2001 calling upon the Petitioner to appear for a personal hearing. The reference was also made to the letter of the Petitioner dated 6 November 2001 and that the Petitioner was asked to attend a personal hearing with Slot Agents, i.e. Liberty Marine Syndicate Pvt. Ltd., Globe Link W. W. India Pvt. Ltd. and M/s. Schenker India Ltd.

5. The Petitioner submitted an explanation to the Assistant Commissioner on 20 November 2001 without prejudice to the grievance that the show cause notice did not give adequate details. The Petitioner stated that the Petitioner's principal, Pacific International Lines, had only provided containers and the stuffing

was done by their shippers and was meant to be discharged at the warehouse; therefore, the Petitioner's principal issued a Bill of Lading to the shippers with the consolidators, principal as the shipper and the Agent as the consignee. The Petitioner accordingly requested that the penalty under Section 116 of the Act of 1962 be dropped against the Petitioner, and action, if any, should be against the consolidators.

6. The Assistant Commissioner of Customs Manifest Clearance Department gave the opportunity to the Petitioner. The Petitioner presented its case, so also the slot agents that is the Liberty Marine Syndicate Pvt. Ltd., Globe Link W.W. India Pvt. Ltd. and M/s. Schenker India Ltd. The Assistant Commissioner, after going through the facts on record and the submissions made, concluded as regards Manifest Item Nos. 27, 31, 38, 39 and 40, the steamer agents are not able to furnish any satisfactory evidence, and the short landing was established as per MbPT tally sheets. A penalty was accordingly imposed of Rs.67,46,000/- for item 27, Rs.17,79,000/- for item 31, Rs.13,25,000/- for item 38, Rs.13,25,000/- for item 39 and Rs.8600/- for item 40 and dropped action for item 199 against Steamer Agent, under Section 116 of the Customs Act, 1962. A copy of the order was sent to the Petitioner, the Liberty Marines Syndicate Pvt. Ltd., M/s. Globe Link W.W. India Pvt. Ltd. and M/s. Schenker India Ltd.

7. The Petitioner filed Writ Petition Nos. 782 of 2002 and 936 of 2002, which were disposed of by order dated 3 April 2002, whereby the Petitioner withdrew the Writ Petitions to file an Appeal. The Petitioner filed an Appeal before the Commissioner of Customs (Appeal). Before the Appellate Authority, the Petitioner contended that there were several intermediaries like the slot steamer agents, and the persons responsible for any shortage should be the agents who have done stuffing of the containers, especially when the container is received with the seals intact. The Petitioner contended that the Petitioner was the main line agent who had received the container in a sealed condition. The Petitioner submitted that though short-landing is not denied, there was no justification for penalizing the Petitioner when it has nothing to do with the stuffing of the containers. The Petitioner reiterated the stand that the slot agents, were called for a hearing but there is no findings in the impugned order regarding their liability. The Appellate Authority considered these contentions and observed that as per Section 116 of the Act of 1962, the Person-In-Charge of the conveyance is responsible for the short-landing; therefore, there was no error in the impugned order. The contention of the Petitioner that a flat 200% fine was imposed, which is the maximum limit, was rejected on the ground that the fine was within the statutory limit. The Appeal was dismissed on 29 August 2002.

8. The Petitioner filed the Writ Petition No. 3185 of 2002 and Writ Petition No. 6 of 2003. The Petitions were disposed of, setting aside the order passed by the Appellate Authority on the ground that the same was without finding out whether the penalty was imposed on all steamer agents jointly or it was only one steamer agent. Accordingly, the Appeals were restored before the Commissioner.

9. The Commissioner (Appeals), upon remand, considered the contentions of the Petitioner. The Commissioner (Appeals) held that as per Section 116 read with Section 2(31) of the Customs Act, 1962, the Person-In-Charge of the conveyance is the master of the vessel, and as per Section 30 of the Act, it is the person in charge of the vessel who has to deliver the proper officer and IGM making a declaration of the truth of the contents. The Commissioner (Appeals) held that the Petitioner had admitted that the Petitioner was an agent appointed in terms of Section 148 of the Act of 1962 and it was the Petitioner who was responsible for short-landing and therefore, there was no error in imposition of penalties. Accordingly, the Appeal was dismissed by order dated 3 May 2010.

10. The Petitioner filed Writ Petition in this Court challenging the order in Appeal, which was disposed of by order dated 25 November 2010 on the ground that an alternative remedy

of revision is available. Thereafter, the Petitioner filed a Revision Application to the Revisional Authority, which was heard by the Joint Secretary to the Government of India. The Revisional Authority opined that there was no error in the order passed by the Appellate Authority and the Order-in-Original, however, found that the penalty imposed on the higher side and reduced the penalty. The Revision Application was accordingly disposed of. Challenging this order, the Petitioner is before us.

11. We have heard Mr. Prashant Pratap, learned Senior Advocate for the Petitioner and Mr. Pradeep Jetly, learned Senior Advocate for the Respondents.

12. The fact that there was a short-landing of goods is not in dispute.

13. Mr. Pratap, the learned Senior Advocate for the Petitioner, sought to rely on the order passed by the learned Single Judge of this Court in *M/s. Shaw Wallace Company & Co. Ltd. v/s The Assistant Collector of Customs, Oil Unit and Ors.*[1] whereby certain guidelines were laid down for the benefit of Customs Authorities, Bombay Port Trust Authorities and the person in charge of conveyance and their agents in the case of levy of penalty on short-landing of goods. The learned Counsel for the Petitioner

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submitted that the Authorities have not properly appreciated the guidelines laid down in the decision of *M/s. Shaw Wallace.* The learned Counsel submitted that the relevant provisions regarding the steamer agent's liability in case of short-landing have to be meaningfully read. The learned Counsel submitted that merely because the Petitioner had submitted the IGM, the Petitioner could not have been straightway held liable without considering that the IMG was prepared based on Bills of Lading issued by the slot agents who are actual consignees. The learned Counsel submitted that it is an admitted position that the containers were in sealed condition, and the Petitioner had no access to the goods in the said containers and had gone by the Bills of Lading of the slot agents. The learned Counsel submitted that the provisions of the Act relied upon by the Customs Authorities are on the statute books since the year 1962, and it does not take into consideration the various complexities that have entered into the shipping business after the advent of containers and different layers of transactions. The learned Counsel submitted that the Petitioner had repeatedly pointed out the role of the slot agents who were given notice and were also heard, but no action was taken against the slot agents. The Petitioner has filed an additional affidavit placing on record that in other cases, the Respondents have enquired into the role of slot agents and have fixed the responsibility on the slot agents and not only on the marine agents. The learned Counsel for the Petitioner submitted that there is no reason why a similar approach could not have been adopted in this case of the Petitioner. Mr. Jetly, the learned Senior Advocate for the Respondents supported the impugned order and submitted that as per the provisions of Section 116 read with Section 2(31) of the Customs Act, 1962, the Petitioner is rightly held to be liable.

15. The provisions of the Customs Act, 1962 deal with the liability of the short-landing of goods and consequent action. Section 30 of the Act obligates the Person-In-Charge carrying the goods for import to submit an IGM, which contains a signature and statement on verification. The person signing the IGM undertakes the responsibility for the truthfulness of the contents. Section 116 prescribes a penalty for not accounting for goods It reads thus:-

> ***"116. Penalty for not accounting for goods.***
>
> *If any goods loaded in a conveyance for importation into India, or any goods transhipped 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 transhipped 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."*
>
> (emphasis supplied)

Section 116 of the Act refers to the Person-In-Charge. Section 2(31) of the Customs Act, 1962 defines Person-In-Charge thus :-

> "*(a)* <u>*in relation to a vessel, the master of the vessel;*</u>
> *(b)* *in relation to an aircraft, the commander or pilot-in-charge of the aircraft;*
> *(c)* *in relation to a railway train, the conductor, guard or other person having the chief direction of the train;*
> *(d)* *in relation to any other conveyance, the driver or other person-in-charge of the conveyance".*
>
> (emphasis supplied)

Thus as per Section 116 of the Customs Act, the person in charge of the conveyance is responsible for short-landing. This has to be read with Section 148, which deals with the liability of an agent appointed by the person in charge of a conveyance. It lays down that where the Act requires anything to be done by the person in charge of a conveyance, it may be done on his behalf by his agent. An agent appointed by the person in charge of a conveyance and any person who represents himself to any officer of customs as an agent of any such person in charge, and is accepted as such by that officer, shall be liable for the fulfillment in respect of the matter in question of all obligations imposed on such person in charge including penalties and confiscations which may be incurred. In the decision of *Shaw Wallace*, the learned Single Judge has laid down guidelines for liability for short-landing, and the ones which are relevant are:-

> ***"(B)(a) Cargo brought in container, F.C.L. Container (Full Container Load).***
>
> *(a) A full container load when unloaded from the vessel and the seals are found intact, then the vessel owner shall not be held responsible for any short landing or be made liable to pay penalty.*
>
> *(b) In cases where the seal is found broken, the Survey report will be prepared of the contents of such container in the presence of Customs Officer and this survey should be carried out within 72 hours after the container is landed and seal is found broken. The Customs Officer and the Port Trust authorities should ensure that the container is re-sealed after completion of the survey reports of the contents. Any shortage noticed in such Survey report will have to be accounted for by the carrier and the liability for such shortage will be solely of the carrier.*
>
> ***(B)(b) L.C.L., Container (Less Container Load)*** *:-*
> *(1) At the time of unloading of the L.C.L. container, if the seals are intact and again at the time of de-stuffing of*

the container, the seals are found intact, then the carrier should be responsible to account for the difference between the manifested quantity and the de-stuffing tally.

(2) In case, the seals of the L.C.L. containers at the time of unloading are found to be intact, but are broken or tampered with at the time of de-stuffing, then the responsibility for difference between the manifested quantity and de-stuffing quantity would be that of the Port Trust authorities and not of the carrier."

16. According to the Petitioner, since the seals of the containers (LCL) were intact, the guidelines laid down in the case of *Shaw Wallace* would apply as to the liability of the "Carrier". The case of the Petitioner is also that an enquiry is not impermissible when there are slot agents involved, and the defence is taken that IGM is based on the Bill of Lading submitted by the slot agents, especially when the container arrives in sealed condition. This has been Petitioner's consistent case. The Petitioner in response to the show cause notice has taken this defence and had even given the details of the slot agents M/s. Liberty Marines Syndicate Pvt. Ltd., Globe Link W.W. India Pvt. Ltd. and M/s. Schenker India Ltd. These slot agents were directed to remain present for the hearing before the Assistant Commissioner, and the Assistant Commissioner (Customs) had given them the opportunity and heard the slot agents as well. Thereafter, the Commissioner (Customs) passed an order wherein there was no bifurcation of liability though the order was sent to the

Petitioner and these three slot agents. It is the Petitioner who took up the challenge to the order, as according to the Petitioner, since the Petitioner is a reputed firm, it did not want the stigma of the order of penalty. The factual aspect as to the role of enquiry thereafter was not undertaken, and by the order in Appeal and the Revisional orders, the Order-in-Original was confirmed. According to the Petitioner, provisions of the Act regarding the liability of the Agents for penalty and confiscation should be meaningfully read so as to include the slot agents.

17. It has to be kept in mind that Section 116 imposes a penalty and, in that sense, is a penal provision and not a beneficial provision to be construed liberally and widely. However, apart from the legal issue raised by the Petitioner based on the interpretation of Section 116 of the Act, we do not deem it necessary to conclude the issue at present, in view of the additional affidavit filed by the Petitioner. In the additional affidavit, the Petitioner has stated as under:-

> *"(1) I am personally aware of the facts of the case and am well versed with the issues in connection with the above Petition. I am making this affidavit in support of the submissions made on 9 December 2022 to place on record copies of three orders passed by the Customs Authorities wherein penalties for shortlanding of cargo under Section 116 of the Customs Act were imposed on the slot agents who are shown as the steamer agents for the relevant items that were shortlanded. These item numbers correspond to the entry in the Import General*

Manifest (IGM) which is filed by the vessel owners' agent. Both the vessel owners' agent and the slot agents are called 'steamer agents' by the Customs Authorities and covered by Section 148 of the Customs Act, 1962.

(2) In all these cases the initial Show Cause Notice was issued to the vessel owners' agents to explain the shortlanding. Since the shortlanded items were manifested in the IGM by the vessel owners' agent on behalf of the slot agents (also referred to as steamer agents), it was these agents who appeared before the adjudicating authority to explain the shortlanding as only they could have done so. Penalties were accordingly imposed on these steamer agents and not on the vessel owners' agent who had filed the IGM.

(3) In the order dated 5 October 1999 the vessel owners' agents who had filed the IGM was Parikh Marine Agencies Ltd. Mumbai. The shorlanded Item No.64 in the IGM was manifested by steamer agent M/s. Lucky Maritime Agency Pvt. Ltd. Mumbai. Accordingly, show cause notice for shortlanding was issued to M/s. Lucky Maritime Agency Pvt. Ltd. Mumbai and eventually penalty was imposed on the said steamer agent for shortlanding of Item No.64 in the IGM.

(4) In order dated 21 January 2000 IGM was filed by James Mackintosh & Co. Pvt. Ltd. as vessel owners' agent. Shortlanding was in respect of Item No. 107 which was manifested by slot steamer agent Supreme Maritime Agencies Pvt. Ltd. Since the said steamer agent did not explain the shortlanding to the satisfaction of the adjudicating authority, the penalty was imposed on them and not on the vessel owners' agent James Mackintosh & Co. Pvt. Ltd. who had filed the IGM.

(5) In the third order dated 6 September 2002 passed in the revision application filed under Section 129DD of the Customs Act, once again James Mackintosh & Co. Pvt. Ltd. had filed IGM as vessel owners' agents. However the shortlanded Item Nos.22,25 and 87 of the said IGM were manifested by different steamer agents. The said steamer agents appeared before the adjudicating authority and penalty for shortlanding was imposed on these and not on the vessel agent who had filed the IGM. In the revision application filed by one of the steamer agents, the penalty was set aside on facts. However it can be seen from this order that the revisional authority noted the guidelines set out in Public Notice No.50 dated 20 March 1992 which are the guidelines set out in the judgment in Shaw Wallace & Co. Ltd. vs. Asst. Collector of Customs & Anr. 1986 SCC OnLine Bom. 180 and incorporated by the Customs Authorities in the Public Notice as guidelines for the purpose of dealing with steamer agents liability under Section 116 of the Customs Act.

(6) There is yet another order dated 21 August 2000 where the main agent James Mackintosh & Co. Pvt. Ltd. (vessel owners' agent) who had filed the IGM, applied for amendment of IGM as one of the consolidating agents (slot agents) had omitted to include one of the items appearing on the Bill of Lading in the IGM filed by James Mackintosh & Co. Pvt. Ltd. The adjudicating authority held the consolidating agent liable for failure to manifest the goods covered by the Bill of Lading and imposed a penalty on the said agent under Section 112(c) of the Customs Act and not the vessel owners' agent who had filed the IGM."

x x x x

18. The abovementioned incidences cited by the Petitioner are supported by the orders, which are annexed. The orders annexed to the additional affidavit show that the Respondents have carried out an enquiry into the role of slot agents and have not necessarily held that the steamer agent who filed the IGM alone is responsible. Therefore, *prima facie* there appears to be a practice of holding an enquiry to ascertain whether it is the steamer agent who has filed the IGM should be held liable for the penalty in the case of short-landing or the liability should be fixed on the slot agent. We find no reason on record why this course of action is adopted in this case when the Petitioner has been consistently demanding the same. Thus, the appropriate course of action would be to set aside the impugned order and restore the Revision. The Revisional Authority will deal with the contention of the Petitioner raised in the additional affidavit. If the cases cited in the additional affidavit are similar on facts and no justifiable reason exists to take a different stand, the Respondent–Revisional Authority will proceed as per law accordingly.

19 The learned Counsel for the Petitioner submitted that the Petitioner has deposited an amount of Rs. 60 Lakhs in this Court pursuant to an order dated 6 January 2003 in Writ Petition No. 3185 of 2002 which has remained in this Court and depending on the outcome of the revision, the amount is to be permitted to be withdrawn.

20. Accordingly, the impugned order dated 9 May 2012 passed by the Joint Secretary, Revisional Authority, is quashed and set aside, and the revision filed by the Petitioner is restored to the file. The Revisional Authority will take the necessary decision in the revision in light of what is stated above. The decision should be taken within four months from the date this order is uploaded, subject to earlier time-bound directions and other urgent public duties of the Revisional Authority. Liberty to apply to the successful party in the revision for withdrawal of the amount of Rs.60 lakhs deposited in this Court.

21. Rule is made absolute in the above terms. No costs.

GAURI GODSE, J. ***NITIN JAMDAR, J.***