M/S Bisco Limited Through Its Managing ... vs Commissioner Of Customs And Central ... on 20 March, 2024

Author: B. V. Nagarathna

Bench: B. V. Nagarathna

2024 INSC 231

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4663 OF 2009

M/S. BISCO LIMITED APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS
AND CENTRAL EXCISE RESPONDENT(S)

JUDGMENT

UJJAL BHUYAN, J.

Heard learned counsel for the parties.

2. This is a statutory appeal under Section 130E of the Customs Act, 1962 (briefly the 'Customs Act' hereinafter) against the final order dated 30.04.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short 'CESTAT' hereinafter) in Customs Appeal No.441 of 2005 dismissing the appeal filed by the appellant against the order dated 28.04.2005 passed by the Commissioner of Customs and Central Excise, Indore (for short 'the Commissioner' hereinafter).

2.1 By the aforesaid order dated 28.04.2005, the Commissioner had confirmed the duty demand of Rs.3,99,255.00 in respect of 27 cases not found in the warehouse and imposed penalty of Rs.1 lakh on the appellant under Section 112 of the Customs Act. That apart, the appellant was directed to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty. The Commissioner had also confiscated 264 cases of imported goods valued at Rs.48,79,776.00 seized from within the factory premises of the appellant but outside the approved warehouse under Section 111 of the Customs Act.

However, the confiscated goods were permitted to be redeemed on payment of fine of Rs. 2 lakhs. Thirty days' time was granted to the appellant to exercise the option for redeeming the goods. Further, the Commissioner had confirmed customs duty amounting to Rs.39,03,821.00 in terms of Section 71 read with the proviso to Section 28A of the Customs Act. The appellant was also required to pay interest amounting to Rs.18,88,425.00 on the customs duty confirmed on the 264 packages from the date of warehousing till the date of detection of the shortage in the warehouse; in addition, appellant was also required to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty confirmed on the 264 cases.

3. Appellant before us is M/s Bhanu Iron and Steel Company Limited, Plot No. 801, Sector III, Industrial Estate, Pithampur, District Dhar in the State of Madhya Pradesh ('BISCO' for short).

4. This appeal has a chequered history. Before finally landing in this Court, the appellant had gone through several rounds of appeal and remand. For a proper perspective, it would be apposite to briefly narrate the factual trajectory of the case.

5. Appellant had imported second hand steel mill machinery and parts thereof under Project Import Facility covered by Chapter Heading No.98.01 of the Schedule to the Customs Tariff Act, 1975.

6. A warehouse within the precincts of the industrial/factory premises of the appellant was notified as a public bonded warehouse on management basis with M/s Central Warehousing Corporation as warehouse keeper by the then Collector of Customs and Central Excise, Indore vide the notification dated 03.05.1989 for storage of the imported second hand steel mill machinery and parts thereof without payment of customs duty. According to the respondent, the appellant had imported in all 595 cases of machinery parts which were required to be warehoused in the notified public bonded warehouse. The breakup of the 595 cases of the machinery parts as provided by the respondent is as under:

Sl. No.	Transit Bond No. & Date	No. of cases actually received in the customs bonded warehouse.
1.	T-1592 dated 31.05.89	172
2.	T-7012 dated 04.12.89	146
3.	T-2014 dated 30.05.90	277
	Total	595

7. Acting on the basis of information received that the appellant had misused the warehousing facility, officials of the respondent had searched the industrial premises of the appellant including the notified public bonded warehouse on 07.08.1992. In the course of the search, the stock lying

within the notified public bonded warehouse were verified. On such verification, only 304 cases were found lying inside the warehouse; 264 cases were found outside the warehouse but within the industrial/factory premises of the appellant; remaining 27 cases were not found either inside the warehouse or outside the warehouse within the industrial/factory premises.

8. As no documents showing clearance of the goods contained in the 264 cases from within the warehouse but lying outside the warehouse on payment of duty and interest as required under Section 71 of the Customs Act could be produced, the said goods were seized in terms of Section 110 of the Customs Act. The value of the goods seized was estimated at Rs.48,79,776.00.

9. In his statement recorded under Section 108 of the Customs Act on 07.08.1992, Sh. Yashwant Singh Bisht, Project Officer (Commercial) of the appellant stated that the 264 cases of imported goods were kept outside the bond under a shed as the trailers transporting the goods could not enter the notified warehouse in view of the soil becoming very sluggish on account of heavy rains and also because of paucity of space. The Collector, therefore, opined that the appellant had removed the 264 cases of warehoused goods valued at Rs.48,79,776.00 attracting duty of Rs.39,03,821.00 and interest of Rs.18,88,425.00 in violation of Section 71 read with Section 111(j) of the Customs Act. The seized goods were thus held liable for confiscation.

10. It was further alleged that appellant had unauthorisedly cleared 27 cases of the imported goods valued at Rs.4,99,068.00 attracting duty of Rs.3,99,255.00 with interest of Rs.2,41,326.00 which were liable to be recovered under Section 71 read with the proviso to Section 28(1) of the Customs Act.

11. That apart, it was alleged that M/s. Central Warehousing Corporation, Pithampur had abetted the appellant in clearing the warehoused goods without payment of duty and interest.

12. In the above circumstances, a show cause notice dated 22.01.1993 was issued to the appellant as well as to the warehouse keeper by the Collector (now the Commissioner) to explain and show cause as to why:

> (i) the seized quantity of 264 cases of goods valued at Rs.48,79,776.00 and attracting duty of Rs.39,03,821.00 plus Rs.18,88,425.00 due to interest should not be confiscated in terms of Section 71 read with Section 111(j) of the Customs Act.
>
> (ii) the amount of duty of Rs.3,99,255.00 plus interest of Rs.2,41,326.00 payable on 27 cases of goods valued at Rs.4,99,068.00 cleared and utilized by the appellant, should not be demanded from the appellant in terms of Section 71 read with the proviso to Section 28 (1) of the Customs Act.

(iii) a penalty under Section 112 of the Customs Act should not be imposed for violation of Section 71 and Section 111(j) of the Customs Act.

13. Appellant submitted reply dated 02.04.1994. In its reply, appellant stated that there was heavy rain in the month of August 1989 and the soil outside the notified warehouse had become very sluggish. As a result, the trailers carrying the consignment could not enter the notified warehouse. The goods were downloaded in the open outside the notified warehouse but within the factory premises. To prevent the goods from getting damaged, appellant had requested the concerned Superintendent of Customs and Central Excise to shift the machineries to under a shed within the factory premises under Section 64 of the Customs Act. Permission was granted by the Superintendent. In terms of such permission of the Superintendent, who was the proper officer, appellant had shifted the goods to under the shed to prevent further damage of the goods. It was contended that the goods were still under the bonded warehouse and could not be said to have been cleared. In this connection, reference to and reliance was placed on Section 15 of the Customs Act. This position was clarified by Sh. Yashwant Singh Bisht in his statement recorded on 07.08.1992. The appellant, therefore, requested the authority to drop the proceedings.

14. It may be mentioned that the Central Warehousing Corporation (for short 'the Corporation' hereinafter) had also submitted its reply dated 19.12.1993. In the reply it was stated that an open area of 2,000 sq. meters in the premises of the appellant having fencing and a gate with locking arrangement was approved by the customs and central excise authorities as a public bonded warehouse. Appellant vide letter dated 30.08.1989 sought permission from the Superintendent, Customs and Central Excise, Range-III, Pithampur for unloading the cargo covered by Bond No.T-1592 dated 31.05.1989 outside the said warehouse on account of heavy rains, etc. It was pointed out that the trailers carrying the consignment could not enter the said warehouse because those got stuck in the soil outside the said warehouse as the soil had got sluggish due to heavy rains. The Superintendent gave permission for unloading the cargo outside the warehouse but within the factory premises on the body of the letter itself. The machinery parts had to be shifted to a shed outside the bonded warehouse but within the factory premises to protect those parts from further rusting and corrosion.

15. Commissioner by his adjudication order dated 28.08.1996 did not accept the reply of the appellant and confirmed the demand and interest. It was ordered as under:

> (i) demand for duty of Rs.3,99,255.00 plus Rs.2,41,326.00 leviable on 27 cases cleared in a clandestine manner was confirmed for recovery from the appellant in terms of Section 71 read with the proviso to Section 28(1) of the Customs Act.

(ii) 264 cases of imported goods valued at Rs.48,79,776.00 seized from the premises other than the approved warehouse were confiscated under Section 111 of the Customs Act but permitted to be redeemed on payment of fine of Rs.12,00,000.00 (Rs. twelve lakhs only). Appellant would also suffer duty of Rs.39,03,821.00 plus interest at the time of their ultimate clearance.

(iii) penalty of Rs.5,00,000.00 (Rs. five lakhs only) was imposed on the appellant under Section 112 of the Customs Act.

(iv) penalty of Rs.25,000.00 (Rs. twenty five thousand only) was imposed on the Central Warehousing Corporation under Section 112 of the Customs Act.

16. Aggrieved by the aforesaid order of the Commissioner, appellant preferred an appeal before the then Central Excise and Gold Appellate Tribunal (CEGAT). By order dated 18.02.1999, CEGAT disposed of the appeal by setting aside the order of the Commissioner and remanding the matter back to the Commissioner for fresh adjudication. The Commissioner was directed to look into the new facts and documents brought on record by the appellant and thereafter decide the case de novo in accordance with the principles of natural justice.

17. Following the remand, a fresh adjudication order was passed by the Commissioner on 31.12.2002. In this order, the Commissioner recorded that the warehoused goods were removed to a place outside the approved warehouse without following the procedure set out under Sections 67, 68 and 69 of the Customs Act. The Commissioner, thereafter, reiterated the first adjudication order dated 28.08.1996.

18. Assailing the aforesaid order of the Commissioner dated 31.12.2002, appellant preferred appeal before the CESTAT. In its order dated 08.10.2003, CESTAT observed that the Commissioner had not looked into the additional documents which were part of the record. CESTAT, therefore, opined that the matter should be remanded back to the adjudicating authority for fresh adjudication after taking into consideration the documents produced by the appellant, including those produced before the CESTAT. Thus, by the order dated 08.10.2003, CESTAT allowed the appeal of the appellant by remanding the matter back to the Commissioner for re-adjudication after affording an opportunity of hearing to the appellant.

19. The matter was taken up by the Commissioner afresh on remand. By a detailed order dated 28.04.2005, the Commissioner directed as under:

> (i) demand of Rs.3,99,255.00 leviable on the 27 cases found not warehoused was confirmed for recovery from the appellant in terms of the conditions of transit bond.

(ii) appellant should pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section till the date of actual payment of duty. The interest amount was directed to be worked out and communicated to the appellant by the Assistant Commissioner, Central Excise Division, Pithampur.

(iii) 264 cases of imported goods valued at Rs.48,79,776.00 seized from the premises of the appellant outside the approved warehouse were confiscated under Section 111 of the Customs Act. As the goods were within the factory premises but outside the bonded warehouse, a lenient view was taken; the goods were permitted to be redeemed on payment of fine of Rs.2,00,000.00 (Rupees two lakhs only). The option for redeeming the goods was to be exercised by the appellant within 30 days from the date of receipt of the order.

(iv) customs duty amounting to Rs.39,03,821.00 for recovery from the appellant in terms of Section 71 read with the proviso to Section 28A of the Customs Act was confirmed.

(v) appellant was required to pay interest amounting to Rs.18,88,425.00 on the customs duty confirmed on the 264 packages from the date of warehousing till the date of detection of the shortage in the warehouse, i.e. from 04.02.1989 to 07.08.1992, in terms of Section 71 of the Customs Act.

(vi) appellant was also required to pay interest on the duty confirmed in terms of Section 28AB of the Customs Act from the date of enforcement of the said section to till the date of actual payment of duty confirmed on the 264 packages. The interest amount was directed to be worked out and communicated to the appellant by the Assistant Commissioner, Central Excise Division, Pithampur.

(vii) penalty of Rs.1,00,000.00 (Rupees one lakh only) was imposed on the appellant under Section 112 of the Customs Act.

20. It was against this order that the related appeal was filed by the appellant before the CESTAT. By the impugned order dated 30.04.2009, CESTAT dismissed the appeal.

21. Hence the present appeal. This Court by order dated 21.08.2009 had issued notice.

22. Respondent has filed counter affidavit. It is stated that during the visit of the officials of the Preventive Branch of the Commissionerate on 07.08.1992, the impugned goods were found outside the notified warehouse. That apart, there was no explanation for the imported goods contained in the 27 cases which were neither found within the bonded warehouse nor outside the bonded warehouse within the factory premises. In such circumstances, the respondent has justified the order dated 28.04.2005 which was affirmed by the CESTAT vide order dated 30.04.2009.

23. It may be mentioned that appellant has brought on record two additional documents. Appellant had sought for information from the Central Warehousing Corporation under the Right to Information Act, 2005 vide letter dated 22.09.2009 regarding payment of custom establishment charges by the Corporation. Appellant was informed by the Central Warehousing Corporation vide letter dated 18.12.2009 that the Corporation had deposited a sum of Rs.56,10.294.00 under the head of 'Pithampur Warehousing (Bhanu Iron and Steel Company Limited along with wind up Warehouse) custom establishment charges' for the financial year 1992-1993 to 2007-2008.

24. Learned counsel for the appellant submits that CESTAT had failed to consider the fact that it was on the basis of specific permission granted to the appellant by the proper officer that the impugned goods were found outside the warehouse but within the industrial/factory premises of the appellant. Therefore, in terms Section 64(d) of the Customs Act respondent could not have treated the said goods as having been removed from the warehouse. He submits that since the appellant had not cleared the warehoused goods, Section 64 of the Customs Act would come into play. Therefore, CESTAT was clearly in error in upholding the order of the respondent applying Section 15(1)(b) of the Customs Act for determining the rate of duty in respect of those goods. According to him, in the

facts of the present case the only provision that would be applicable is the residuary provision i.e., Section 15 (1) (c) of the Customs Act.

24.1. Learned counsel has also placed reliance on the circular dated 12.07.1989 of the Central Board of Excise and Customs which was fully applicable to the case of the appellant. Though this circular was subsequently superseded by circular dated 14.08.1997, it would be the former circular which would be applicable to the facts of the present case. 24.2. Learned counsel further submits that CESTAT was not justified for upholding the order of the respondent applying Section 71 of the Customs Act read with Section 28AB of the said Act while imposing interest on the confiscated goods. Confiscation itself was not justified.

24.3. Finally, it is contended that both the respondent as well as CESTAT had overlooked the fact that the goods in question were denied to the appellant for a long time. Therefore, a lenient view ought to have been taken.

25. Learned counsel for the respondent, on the other hand, submits that on the basis of reliable information received about suspected misuse of the warehousing facility by the appellant, officers of the Preventive Branch of the Collectorate of Central Excise and Customs, Indore had searched the premises of the appellant on 07.08.1992 and physically verified the stock. On verification, it was found that 304 cases were stocked inside the warehouse while 264 cases were found outside the warehouse but within the factory premises. Remaining 27 cases were found neither inside the warehouse nor within the factory premises. It was thereafter that action was taken under the relevant provisions of the Customs Act following which show cause notice was issued to the appellant. 25.1. Learned counsel has justified the ultimate adjudication order as well as the impugned order of the CESTAT confirming the said adjudication order.

25.2. In such circumstances, he submits that there is no merit in the appeal and, therefore, the same should be dismissed.

26. Submissions made have been duly considered.

27. We may now refer to some of the relevant provisions of the Customs Act. Section 2(43) defines a ‘warehouse’ to mean a public warehouse licensed under Section 57 or a private warehouse licensed under Section 58 or a special warehouse licensed under Section 58A of the Customs Act. ‘Warehoused goods’ has been defined under Section 2(44) to mean goods deposited in a warehouse.

28. Section 12 of the Customs Act deals with dutiable goods. Sub-Section(1) thereof says that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 on goods imported into or exported from India.

29. Date for determination of rate of duty and tariff valuation of imported goods is dealt with in Section 15. Sub- Section(1) of Section 15 says that the rate of duty and tariff valuation, if any, applicable to any imported goods shall be the rate and valuation in force-

(a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under Section 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty.

30. While Section 28 provides for recovery of duties not levied or short levied, Section 28AA deals with interest on delayed payment of duty. On the other hand, Section 28AB provided for interest on delayed payment of duty in special cases. Substance of Section 28AB (since deleted) was that where any duty was not levied or paid or short levied etc., the person who was liable to pay the duty would also be liable to pay interest in addition to duty at such rate not below 10% and not exceeding 36% per annum as may be fixed by the central government by notification in the official gazette.

31. Chapter IX of the Customs Act comprising of Sections 57 to 73A deal with warehousing. Section 57 provides for licensing of public warehouses where dutiable goods may be warehoused. As per Section 58, as it stood at the relevant time, the proper officer may license a private warehouse where dutiable goods imported by or on behalf of the licensee or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited. Sub-Section(2) provides for cancellation of license so granted by giving a month's written notice in advance if the licensee had contravened any of the provisions of the Customs Act or committed breach of any of the conditions of the license. However, before such cancellation, the licensee was required to be given a reasonable opportunity of being heard.

32. 'Warehousing bond' is provided for in Section 59. As per sub-Section(1), the importer of any goods specified in Section 61(1) which had been entered for warehousing and assessed to duty under Sections 17 or 18 shall execute a bond binding himself in a sum equal to thrice the amount of the duty assessed on such goods.

33. As per Section 60, as it stood at the relevant point of time, when the provisions of Section 59 have been complied with in respect of any goods, the proper officer may make an order permitting the deposit of goods in a warehouse.

34. Section 61 mentions the period for which the goods may remain warehoused. Sub-Section (1) says that any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed-

(a) in the case of capital goods intended for use in any hundred percent export-oriented undertaking, till the expiry of five years; (aa) in the case of goods other than capital goods intended for use in any hundred percent export-oriented undertaking, till the expiry of three years; and

(b) in the case of any other goods, till the expiry of one year;

after the date on which the proper officer has made an order under Section 60 permitting the deposit of the goods in a warehouse. However, proviso (i) (B) says that in the case of any goods which are not likely to deteriorate and which are not intended for use in any hundred percent export oriented undertaking, the period specified in clauses (a), (aa) or (b) may, on sufficient cause being shown, be extended by the Principal Commissioner or Commissioner of Customs for a period not exceeding six months and by the Principal Chief Commissioner or Chief Commissioner of Customs for further period as he may deem fit.

35. Section 64 deals with owner's right to deal with warehoused goods. Section 64, as it stood at the relevant point of time, read as under:

> 64. Owner's right to deal with warehoused goods.- With the sanction of the proper officer and on payment of the prescribed fees, the owner of any goods may either before or after warehousing the same-
>
> (a) inspect the goods;
>
> (b) separate damaged or deteriorated goods from the rest;
>
> (c) sort the goods or change their containers for the purpose of preservation, sale, export or disposal of the goods;
>
> (d) deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods;
>
> (e) show the goods for sale; or
>
> (f) take samples of goods without entry for home consumption, and if the proper officer so permits, without payment of duty on such samples.

35.1. Thus, this section provided that the owner of any goods with the sanction of the proper officer and on payment of the prescribed fees may either before or after warehousing the same, deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods.

36. Section 67 deals with removal of goods from one warehouse to another. It says that the owner of any warehoused goods may with the permission of the proper officer, remove them from one warehouse to another subject to such conditions as may be prescribed for the due arrival of the warehoused goods at the warehouse to which removal is permitted.

37. Heading of Section 68 is 'Clearance of warehoused goods for home consumption'. This section, as it stood at the relevant point of time, provided that the importer of any warehoused goods may clear those goods from the warehouse for home consumption if –

(a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;

(b) the import duty leviable on such goods and all penalties rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for home consumption has been made by the proper officer.

38. There is an embargo provided in Section 71 from taking out goods from a warehouse. As per Section 71, no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation or for removal to another warehouse or as otherwise provided by the Customs Act.

39. Section 71 is followed by Section 72 which deals with goods improperly removed from warehouse, etc. As per sub- Section(1)(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under Section 61 to remain in a warehouse, the proper officer may demand and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

40. Once the goods covered by any bond executed under Section 59 have been cleared for home consumption or exported or transferred or are otherwise duly accounted for, and when all amounts due on account of such goods have been paid, the proper officer shall cancel the bond as discharged in full and deliver the same after cancellation to the person who has executed or is entitled to receive it.

41. Section 110(1) of the Customs Act empowers the proper officer to seize any goods if he has reason to believe that such goods are liable to confiscation under the Customs Act.

42. As per Section 111(j), any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission, shall be liable for confiscation.

43. In the event of such an act, the concerned person shall be liable to pay penalty under Section 112.

44. Central Board of Excise and Customs had issued Circular No.98/95-Cus. dated 12.07.1989. Subject matter of this circular was what would be the relevant date for calculation of customs duty in cases where warehoused goods were cleared after expiry of the warehousing period. Reference was made to the instructions of the Board dated 17.03.1987 where it was clarified that in cases where warehoused goods were cleared from a warehouse after expiry of the bond period, the rate of duty would be the one which was prevalent on the date of expiry of the bond. The issue was reconsidered in the tripartite meeting held between the Ministry of Law, Department of Revenue and the Comptroller and Auditor General. It was observed in the meeting that on expiry of the warehousing period, the goods kept in a warehouse ceased to be warehoused goods and, therefore, their removal

from the warehouse could not be regarded as covered by the provisions of Section 15(1)(b) of the Customs Act. After noting that there was no specific legal provision to determine the rate of duty in such cases of warehoused goods where the bond period had expired, it was concluded that the residual clause of Section 15(1)(c) of the Customs Act could apply to cases where the goods were removed from the warehouse after expiry of the warehousing period and that the rate of duty in such cases would be the rate prevalent on the date of payment of duty. It was further clarified that provisions of Section 15(1)(b) of the Customs Act would continue to apply in cases where goods were cleared from the warehouse after extension of the warehousing period but before expiry of the extended period for which applications from the importers for extension of the warehousing period should be received before expiry of the permitted period of warehousing. These conclusions reached in the tripartite meeting were accepted by the Board and by the aforesaid circular dated 12.07.1989, direction was issued for their immediate implementation superseding the instructions dated 17.03.1987.

45. The above provision continued to hold the field till the decision of this Court in Kesoram Rayon versus Collector of Customs, Calcutta, (1996) 5 SCC 576. The question for consideration in Kesoram was the rate at which customs duty was to be levied on goods that remained in a bonded warehouse beyond the permitted period. A two judge bench of this Court after referring to various provisions of the Customs Act held that Section 15(1)(b) would apply to the case of goods cleared under Section 68 from a warehouse upon presentation of a bill of entry for home consumption; payment of duty, interest, penalty, rent and other charges; and an order for home clearance. This Court clarified that provisions of Section 68 and consequently Section 15(1)(b) would apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when by reason of their remaining in the warehouse beyond the permitted period or its permitted extension, the goods would be deemed to have been improperly removed from the warehouse under Section 72. In the facts of that case, it was found that there was nothing on record to suggest that clearance of the goods in question under Section 68 was ordered and, therefore, Section 15(1)(b) had no application. Finally, this Court held that the consequence of non-removal of the warehoused goods within the permitted period or the permitted extension by virtue of Section 72 is certain. The date on which it comes to an end is the date relevant for determining the rate of duty; when the duty is in fact demanded is not relevant.

46. Following the decision of this Court in Kesoram, the Central Board of Excise and Customs issued Circular No.31/97-Cus. dated 14.08.1997. The Board held that in view of this Court's judgment, the date of payment of duty in the case of warehoused goods removed after expiry of the permissible or extended period would be the date of expiry of the warehousing period or such other extended period, as the case may be, and not the date of payment of duty. Goods not removed from a warehouse within the permissible period or the extended period are to be treated as goods improperly removed from the warehouse.

47. In Simplex Castings Ltd. versus Commissioner of Customs, Vishakhapatnam, (2003) 5 SCC 528, the appellant had questioned filing of appeal by the Commissioner before the CEGAT in view of the circular dated 12.07.1989 issued by the Central Board of Excise and Customs. It was argued that it was not open to the Commissioner to take the stand that non- removal of the goods from the

warehouse after the period of warehousing was over would be deemed removal from the warehouse and that the rate of duty would be leviable from the date the period of warehousing was over. The Commissioner had appealed against the decision of the Collector of Customs (Appeals) in which the circular dated 12.07.1989 was followed. The appeal filed by the Commissioner was allowed by the CEGAT by relying upon the decision of this Court in Kesoram. This Court referred to its earlier decision in Paper Products Ltd. versus Commissioner of Central Excise, (1999) 7 SCC 84, and held that the circular dated 12.07.1989 was binding on the Department and, therefore, it was not open to the Department to prefer appeal before CEGAT contrary to what was laid down in the circular dated 12.07.1989 in which it was specifically provided that the residual Section 15(1)(c) of the Customs Act would apply to cases where the goods were removed from a warehouse after expiry of the warehousing period and that the rate of duty in such cases would be the rate prevalent on the date of payment of duty. This Court noted that the aforesaid circular dated 12.07.1989 was withdrawn by the subsequent circular dated 14.08.1997. But, at the relevant point of time, the circular dated 12.07.1989 was holding the field. Thus, the appellate order passed by the Collector of Customs (Appeal) could not be said to be in anyway illegal or erroneous and, therefore, it was not open to the Department to challenge the said order before the CEGAT in contravention of the circular dated 12.07.1989.

48. The decision in Kesoram was approved and applied by a coordinate bench of this Court in SBEC Sugar Ltd versus Union of India, (2011) 4 SCC 668. This Court held that Section 15(1)(b) would be applicable only when the goods are cleared from the warehouse under Section 68 of the Customs Act i.e. within the initially permitted period or during the permitted extended period. When the goods are cleared from the warehouse after expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed under Section 72(1)(b) of the Customs Act with the consequence that the rate of duty has to be computed according to the rate applicable on the date of expiry of the permitted period under Section 61.

49. Let us now briefly recap the facts. Appellant had imported second hand steel mill machinery and parts covered by three transit bonds totalling 595 cases. The customs authority had notified an open area of 2000 square meters within the industrial/factory premises of the appellant as a public bonded warehouse. This open area was fenced and had gate with locking arrangement. The imported goods covered by the 595 cases were required to be warehoused in the said notified public bonded warehouse without payment of customs duty. Appellant had written a letter dated 30.08.1989 to the concerned Superintendent seeking permission to unload a portion of the cargo outside the warehouse but within the factory premises. It was pointed out that the trailers carrying the consignment could not enter the said warehouse as because those trailers had got stuck in the soil outside the warehouse but within the factory premises as the soil had become very sluggish due to heavy rain and also because of paucity of space within the notified open area. The Superintendent gave permission on the body of the letter itself for unloading the cargo outside the warehouse but within the factory premises. The machinery parts which were thus unloaded were shifted to a shed outside the bonded warehouse but within the factory premises of the appellant so that those machinery parts did not get damaged, lying in the open and getting exposed to the elements.

49.1. Officials of the Preventive Branch of the Commissionerate searched the industrial premises of the appellant, including the notified public bonded warehouse, on 07.08.1992 and physically verified the stock in the notified public bonded warehouse as well as outside but within the industrial/factory premises of the appellant. On such verification, it was found that only 304 cases were stocked inside the warehouse, whereas 264 cases were found outside the warehouse but within the industrial/factory premises of the appellant. Remaining 27 cases were neither found inside the warehouse nor outside the warehouse but within the industrial/factory premises of the appellant.
49.2. After issuance of show cause notice and hearing, respondent passed adjudication order dated 28.08.1996 which suffered several rounds of appeals and remand. Ultimately, the Commissioner passed the final adjudication order dated 28.04.2005 whereby demand of Rs.3,99,255.00 leviable on the 27 cases found not warehoused was confirmed. Appellant was also directed to pay interest on the said duty in terms of Section 28AB of the Customs Act. The 264 cases of imported goods found outside the notified warehouse were confiscated but option of redemption was given to the appellant on payment of fine of Rs.2,00,000.00. For the goods covered by the 264 cases, customs duty amounting to Rs.39,03,821.00 was directed to be recovered from the appellant in terms of Section 71 read with the proviso to Section 28A of the Customs Act. That apart, appellant was directed to pay interest of Rs.18,88,425.00 on the aforesaid quantum of customs duty in respect of the 264 cases from the date of warehousing till the date of detection of the shortage in the warehouse. Further, appellant was directed to pay interest under Section 28AB in respect of the 264 cases from the date of enforcement of the said section to till the date of actual payment of the duty. Penalty of Rs.1,00,000.00 was also imposed on the appellant under Section 112 of the Customs Act.

49.3. In appeal, CESTAT by the impugned order affirmed the aforesaid decision of the Commissioner.

50. We may mention that the permission granted by the Superintendent to the appellant on 30.08.1989 to unload a portion of the cargo outside the open space which was notified as public bonded warehouse but within the factory premises of the appellant was neither cancelled nor revoked by the Superintendent or even by the Commissioner. Infact, a view can reasonably be taken that the appellant as the owner of the goods had exercised its right under Section 64(d) which was endorsed by the Superintendent. Therefore, it would not be correct to say that the 264 cases found outside the notified warehouse but within the factory premises of the appellant were improperly or unauthorisedly removed from the notified public bonded warehouse.

51. It has also come on record that Central Warehousing Corporation had deposited a sum of Rs.56,10,294.00 with the respondent as custom establishment charges in respect of the aforesaid notified public bonded warehouse for the period 1992- 1993 to 2007-2008. This would mean that the warehousing in the aforesaid notified public bonded warehouse continued during the said period. Thus, the period of warehousing had not expired and continued to remain operational in terms of the proviso to Section 61 of the Customs Act.

52. This would further be borne out from the fact that it is not the case of the respondent that the 304 cases found inside the notified warehouse were kept there beyond the warehousing period. In fact, the allegation of the respondent is that 264 cases were improperly or unauthorisedly removed

from the notified warehouse as those were found lying outside the notified area but within the industrial/factory premises of the appellant. That apart, 27 cases were neither found inside the notified warehouse nor outside the said warehouse but within the factory premises of the appellant.

53. In such a scenario, the provisions of Sections 71 and 72 would not be applicable. Therefore, the decision of the respondent to invoke Section 71 and thereafter levy interest on the goods covered by the 264 cases under Section 28AB of the Customs Act was not justified. Since the imported goods covered by the 264 cases were never warehoused inside the notified public bonded warehouse but were unloaded outside the notified area but within the factory premises of the appellant and kept under a shed on permission granted by the Superintendent which permission was neither cancelled nor revoked, question of warehousing the goods covered by the 264 cases within the notified public bonded warehouse did not arise. As a corollary, the further question of improperly or unauthorisedly removing the 264 cases from the notified warehouse to outside the said area but within the factory premises of the appellant attracting Section 71 and the consequences following the same did not arise. Inference drawn by the respondent that the permission granted by the Superintendent was only temporary and therefore, the rigor of Section 71 would be attracted, in our view, would not be a correct understanding of the situation and the law.

54. Having said that, we find that there is no explanation on the part of the appellant qua the missing 27 cases. Therefore, the view taken by the respondent and affirmed by the CESTAT that those 27 cases were improperly or unauthorisedly removed from the notified public bonded warehouse is correct and requires no interference.

55. Reverting back to the 264 cases, we are of the view that in a case of this nature, Section 15(1)(b) would have no application. Rather, Section 15(1)(c) would be attracted.

56. In so far the Board's circular dated 12.07.1989 is concerned, the subject matter of the said circular was what would be the relevant date for calculation of customs duty in cases where warehoused goods were cleared after expiry of the warehousing period. In that context, it was clarified that provisions of Section 15(1)(b) of the Customs Act would apply to cases where the goods were cleared from the warehouse after extension of the warehousing period but before expiry of such extended period. On the other hand, in respect of cases where the goods were removed after expiry of the warehousing period, the residual clause of Section 15(1)(c) of the Customs Act would apply. Evidently, this circular dated 12.7.1989 would not be applicable to the facts of the present case in as much as it is not the case of the respondent that either the warehousing period had expired or that the warehousing period was extended. As we have seen, the warehousing in the notified public bonded warehouse continued as the Corporation had deposited with the respondent a sum of Rs. 56,10,294.00 in respect of the notified warehouse as custom establishment charges for the period from 1992-1993 to 2007-2008. That apart, we can refer to the fact that respondent had not levied any customs duty on the 304 cases found within the notified area which would mean that the notified warehousing continued. Therefore, this is not a case where Section 15(1)(b) could have been invoked.

57. As regards, the decision of this Court in Kesoram is concerned, the question for consideration in that case was the rate at which customs duty could be levied on goods that remained in a bonded warehouse beyond the permitted period. It was in that context that this Court held that Section 68 would not be applicable since Section 68 operates in a different context. On the contrary, Section 72 would apply. Thus, this Court clarified that the date on which the warehousing period comes to an end, would be the date relevant for determining the rate of duty and when the duty is actually demanded would not be relevant. It was further clarified that Section 15(1)(b) would apply to goods cleared under Section 68. Goods which remain in the bonded warehouse beyond the permitted period would be deemed to have been improperly removed from the warehouse under Section 72. It is quite evident that this decision would not be applicable to the facts of the present case.

58. Thus, having regard to the discussions made above, we are of the view that the demand raised by the respondent against the appellant and affirmed by the CESTAT qua the 264 cases including levy of customs duty and interest cannot be sustained. Those are accordingly set aside and quashed. Parties are directed to work out their remedies in respect of the 264 cases of goods under Section 15(1)(c) of the Customs Act within a period of eight weeks from the date of receipt of a copy of this order. In so far the demand of customs duty and interest on the 27 cases is concerned, the same is hereby sustained. The decision imposing penalty of rupees one lakh on the appellant under Section 112 of the Customs Act is also not disturbed in view of the conduct of the appellant in unauthorisedly removing the 27 cases of imported goods not only from the notified public bonded warehouse but also from the industrial/factory premises of the appellant.

59. Impugned order of CESTAT would stand modified accordingly.

60. Appeal is allowed in part in the above terms. No costs.

……J. [B. V. NAGARATHNA] ……J. [UJJAL BHUYAN] NEW DELHI;

20.03.2024