

Madras High Court

M/S.A.D.Jeyaveerapandia Nadar vs The Government Of India on 17 June, 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.06.2009

CORAM

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

W.P.No.1442 of 2005

M/s.A.D.Jeyaveerapandia Nadar
& Bros., (Nagapattinam)
1st Floor, No.1, 5th Cross Street,
Dr.Radhakrishnan Salai,
Chennai 600 004. ... Petitioner

vs.

1. The Government of India,
rep. by the Joint Secretary,
Ministry of Finance,
(Department of Revenue),
4th Floor, Jeevandeep Buildings,
Sansadh Marg, Parliament Street,
New Delhi 110 001.
2. The Commissioner of Customs &
Central Excise (Appeals),
No.1, Williams Road,
Cantonment, Tiruchirapalli -1.
3. The Joint Commissioner of Customs,
No.1, Williams Road,
Cantonment, Tiruchirapalli 1. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of

For Petitioner : Mr.K.Bijai Sundar

For Respondents : Mr.S.Yashwanth,
Senior Panel Counsel

O R D E R

Challenging the order of the 1st respondent dated 29.10.2004 bearing No.F.No.380/14/S1/2003-RA passed in Order No.524/04, the petitioner has filed this writ petition.

2. The case of the petitioner is as under :

2.1 He is the steamer agent for the vessel m.v. "MEGA JAYA", which carried acid grade fluorspar to the port of Cuddalore on 06.09.1998 with a manifested quantity of 9612.650 MTs., packed in 8505 bags. The cargo was imported by a consignee, namely, M/s.TANFAC Industries Ltd., Cuddalore. The vessel, on arrival, encountered heavy tides at the outer anchorage where the cargo was discharged into barges provided by the consignees. Before the cargo was discharged from the vessel, a draft survey was conducted by the Port Officer, Captain S.Sainath, who issued a report dated 18.09.1998 (Document No.1) confirming the discharge of the entire quantity of 9612.650 M.Ts. After the cargo was completely discharged, a completion discharge certificate dated 18.09.1998 (Document No.2) was prepared. Based on the inspection conducted by the petitioner, the agent of the consignee, and the master indicated that whatever cargo was loaded had been discharged in full and that there was no cargo remaining on board in the vessel.

2.2. On arrival of the vessel, a joint draft-survey report (Document No.3) was prepared by all the interested parties, which disclosed that the quantity that was brought to the Port of Cuddalore, namely, 9,612.650 M.Ts. was discharged, as could be seen from the statement of facts (Document No.4). Moreover, the consignees who had received the cargo had not filed civil suit claiming shortage and, in any event, any such action not taken within one year should be assumed that the consignees had no claim against the carrier or their agents. The so called shortage arrived at is on an approximation and also subject to certain losses arising out of Loss of Board (LOB), Loss at Pier (LOP) and other handling losses at different places, which is the responsibility of the receivers of the cargo.

2.3. He received a show cause notice dated 31.08.1999 (Document No.5) from the Assistant Commissioner, Customs, wherein it was alleged that the vessel had short landed a quantity of 342.964 M.Ts, thereby calling upon him to explain for the said short landing. A detailed reply, dated 20.09.1999, (Document No.6) was sent by him. He also sought for certain documents and clarifications from the authorities for verification before proceeding further in the matter. However, the said documents were not furnished to him. The cargo, in its mineral form, has no commercial value and there was absolutely no reason for pilfering the cargo. While so, the third respondent passed an order dated 06.01.2000 (Document No.7) without taking into account certain losses due to moisture content and also not making applicable the total quantity brought by the vessel.

2.4. There is absolutely no revenue loss and there is also no evidence of the consignee having been refunded any duty on the basis of the alleged short-landing arrived at by the Customs Department. The alleged short landing of 342.964 M.Ts. is only notional and arbitrary and not realistic and that no consignee would admit such losses and therefore the so called shortage is only a paper shortage which is very common in bulk cargo, where weight cannot be properly ascertained at the time of

arrival of the vessel. The third respondent without considering their submissions had confirmed that there was a short landing and held that 265.681 M.Ts. was short landed and proceeded to impose a penalty of Rs.9,90,000/- at twice the amount of import duty payable on the cargo.

2.5. Aggrieved over the said order of the third respondent, the petitioner filed an appeal before the second respondent, who, after verifying the documents, was satisfied that the third respondent had committed an error by imposing penalty on the sole ground that the draft survey report was not countersigned by the customs authorities and, accordingly, by an order dated 23.05.2002 (Document No.8), had set aside the order of the third respondent holding that the fact that the survey report not being countersigned by the customs authorities would not make the document invalid in law.

2.6. Thereafter, the customs department, instead of filing a revision petition as provided under the Customs Act, filed an appeal to the Customs, Excise and Gold Control Tribunal (in short 'CEGAT'), that too, at the fag end of the limitation period of three months. The CEGAT, after verifying the rules, returned the appeal papers, stating that only a revision would lie and the said report was received by the customs department on 11.12.2002. Even after the receipt of the said report, the department chose to file a revision, only after 06.01.2003. Therefore, the Customs Department cannot plead ignorance of the provisions of the Customs Act and state that they had gone to a wrong Forum.

2.7. The Customs Department filed an application to condone the delay of 111 days before the first respondent along with the Revision application. The petitioner was called upon to file its objections and despite the objections made by him for the condonation, the first respondent condoned the delay without giving proper reasons as to how the laches could be justified and proceeded to adjudicate the dispute on merits. Despite the long and unexplained delay in filing the revision application, the first respondent, by the impugned order bearing F.No.380/14/SL/2003-RA dated 29.10.2004 (Document No.9), allowed the revision application only on the ground that the draft survey report was not signed by the customs official, with a modification of imposing penalty equivalent to the duty and thus confirmed the original order of the Joint Commissioner.

2.8. There was no reason for the first respondent to ignore the draft survey of the neutral surveyor, viz., Government of India surveyor and the Port Officer so also there is no justification in condoning the delay and there is no reason to discredit the neutral survey report given by the Port Officer, an employee of the Government of India, who confirmed that the entire quantity of the Bill of Lading had been accounted at the time of arrival of the vessel. Hence, having no other alternative, he has filed this Writ Petition.

3. The Joint Commissioner of Customs, third respondent, has filed a counter on behalf of all respondents, stating as follows :

3.1. The Vessel m.v. MEGA JAYA, which discharged a total quantity of 9239.916 M.Ts. of Acid Grade Flourspar on Cuddalore Port against the manifested quantity of 9612.650 M.Ts. resulted in short landing of goods to the tune of 342.964 M.Ts., after excluding the tare weight of the bags at 29.770

M.Ts. The customs duty, on the goods said to have been short landed, amounts to Rs.5,85,831/-. A show cause notice was issued to the petitioner on 31.08.1999 in terms of Section 116 r/w Section 148 of the Customs Act, 1962. After hearing the petitioner, the adjudicating authority came to a conclusion that the impugned goods were short landed to the extent of 265.681 M.Ts., after allowing the tolerance at the rate of 0.5% i.e. 48.063 M.Ts. and 8.52% of moisture content i.e. 29.220 M.Ts. for which the duty amount was Rs.4,95,000/-. The adjudicating authority imposed a penalty of Rs.9,90,000/- under Section 116 r/w Section 148 of the Act, which is equal to double the amount of duty.

3.2. The bill of lading issued at the port of loading is a prima facie document, which has been duly considered by the Department. The draft survey was conducted by the alleged independent surveyor at the time of unloading of cargo at the port of discharge. The Completion Certificate, Draft Survey Report and the statement of facts cannot be relied upon in this case, inasmuch as the same have not been countersigned by the Customs Officer.

3.3. Non-filing of civil suit by the consignee claiming the short landed quantity of cargo with the liner cannot be a valid reason to state that the goods are not short landed. No evidence has been submitted by the petitioner for the Loss on Board (LOB), Loss on Pier (LOP) and other handling losses and the short landed quantity is arrived at after a careful consideration and a tolerance limit of 0.5% was allowed while adjudicating the issue.

3.4. In addition, the petitioner is having total responsibility in discharging/accounting the cargo; therefore, he cannot turn around and say that the mode of discharge was not in their control. The petitioner has deviated from his responsibility and, as such, is liable for penal action under Section 116 of Customs Act.

3.5. The petitioner had preferred an appeal to the second respondent against the order of the third respondent and the appellate authority, without appreciating the legal and factual position, erroneously set aside the order of the third respondent and, therefore, the Department was constrained to file a revision before the first respondent. The first respondent, after appreciating the factual and legal position, has set aside the order of the second respondent and confirmed the order of the original authority.

4. Learned counsel for the petitioner would submit that 1st and 3rd respondents have not accepted the draft survey report relied upon by the petitioner only for the reason that the officer of the Customs Department has not countersigned the same. He has pointed out that the draft survey report issued by the Port Officer and Surveyor, Cuddalore, a neutral person and statutory authority, an officer authorized by the instrumentality of the State, cannot be totally ignored and that no reason has been whispered anywhere by 1st and 3rd respondents for disbelieving the same. He also contended that when the landing certificate relied upon by 1st and 3rd respondents had been issued long after the cargo was discharged and when the cargo suffered multiple handling in the hands of the labourers and when the same not being contemporaneous in nature, by no stretch of imagination, it can be construed that the said certificate is a conclusive evidence for short landing of cargo.

5. The bottomline of the learned counsel is that the characteristic of the cargo imported being Flourspar and since it contains moisture, it is weighed both as dry and wet quantity and for the purpose of calculation, 8.52% has been calculated as moisture content, but the respondents ought to have taken the entire manifested quantity and not the alleged discharged quantity. In support of his case, the learned counsel for the petitioner has relied on the following :

(i) A decision of this court in the case of Shoba Viswanathan vs. D.P.Kingsley (1995 (II) CTC 465) "2. ... It is settled law that unless the delay in filing the appeal is condoned, the same cannot be taken on file. Section 3 of the Limitation Act provides that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. The language of the Section is mandatory. Hence, the Court has a duty to consider whether the delay in preferring the appeal can be condoned under Section 5 of the Limitation Act. Only if the delay is condoned, the appeal could be entertained by the Court.

3. In Krishnasami Panikondar vs. S.R.M.A.R. Ramasami Chetty and others (34 MLJ 63), the Privy Council held that the question of limitation should not be left open till the hearing of the appeal, although it was till then the usage in India. The Privy Council categorically ruled that the Courts in this Country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal. It is pointed out that the admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour and where such an order is made ex parte, it is open to reconsideration at the respondent's instance."

(ii) A decision of the Bombay High Court in the case of Shaw Wallace & Co. Ltd. vs. Assistant Collector of Customs & others reported in 1986 (25) E.L.T. 948 "8 (C). Dry Bulk Cargo :

(1) In respect of dry bulk cargo, an independent survey report should be prepared by the carrier and the consignee and such report should be counter-signed by the Customs Officer before discharge of the cargo. Such report should be accepted for the purpose of ascertaining the actual cargo unloaded.

(2) The Bombay Port Trust authorities should not issue out turn report on the basis of actual weighment after landing in cases where the survey report is prepared and counter-signed by the Customs Officer, carrier and the consignee.

...

In case these guidelines are carried out by all the concerned parties both in its letter and spirit, then it is expected that much of the problems facing the Customs Officers, the Bombay Port Trust authorities, the ship owners and their Agents would be reduced, if not to tally eliminated.

...

It also cannot be overlooked that the Consignees, i.e. Indian Oil Corporation did not raise any complaint about short landing of the goods. It is required to be stated that 1% of the loss is allowed

and while ascertaining the short landing of Aviation Cesolene that shortage is treated within permissible limits. The Deputy Collector ignored all these facts and merely proceeded to levy penalty on the ground that out turn report given by the Port Trust authorities is conclusive evidence and that conclusion is clearly erroneous. The Deputy Collector also accepted that the owner had no control over the goods once it left its permanent hose, but inspite of it levied the penalty. In my judgment, the order of the Deputy Collector, Customs, cannot be sustained... "

6. With regard to the contention that the draft survey was conducted by the Port Officer and the report confirming the discharge of entire quantity of 9612.650 was issued, learned counsel for the respondents would submit that the bill of lading issued at the port of loading is a prima facie document and it has been duly considered by the Department. Further, with regard to the contention of the petitioner that the consignee had not filed any civil suit for claiming the short landing of the cargo with the liner, learned counsel would submit that it cannot be construed as a valid reason to state that the goods are not short landed. According to the learned Senior Panel Counsel, the petitioner, as a steamer agent, is solely responsible for any short landing of cargo at the time of discharge, as he is in-charge of conveyance.

7. I have heard the learned counsel on either side, perused the material available on record and also considered the rival submissions.

8. The issues that arise for consideration in this case are :

(i) Whether the vessel m.v. "MEGA JAYA", which carried acid grade fluorspar to the port of Cuddalore on 06.09.1998 with a manifested quantity of 9612.650 MTs., packed in 8505 bags, was discharged in full ?

(ii) If not, what are the consequences for such short landing?

9. Before proceeding to answer the above questions, it would be relevant to refer to the following provisions of the Customs Act, 1962 :

" 2 (34) : "Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs."

"32 : Imported goods not to be unloaded unless mentioned in import manifest or import report : No imported goods required to be mentioned under the regulations in an import manifest or import report shall, except with the permission of the proper officer, be unloaded at any customs station unless they are specified in such manifest or report for being unloaded at that customs station."

"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 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. "

"148. Liability of agent appointed by the person in charge of a conveyance :

(2) 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 fulfilment in respect of the matter in question of all obligations imposed on such person in charge by or under this Act or any law for the time being in force, and person in charge by or under this Act or any law for the time being in force, and to penalties and confiscations which may be incurred in respect of that matter."

"129DD. Revision by Central Government :

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128-A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order :

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

1(A) The Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order."

10. According to the petitioner, before the cargo was discharged from the vessel, a draft survey was conducted by the Port Officer and he had issued a report dated 18.09.1998, confirming the discharge of the entire quantity of 9612.650 M.Ts., and a completion discharge certificate was also prepared on the said date.

11. In this connection, it is to be seen, whether the Port Officer, who conducted the draft survey and issued a report dated 18.09.1998, confirming the discharge of the entire quantity of 9612.650 M.Ts. is a proper officer or not. As per the definition 2 (34) of the Act, "Proper Officer", in relation to any functions to be performed under the Act means, the officer of customs who is assigned those functions by the Board or the Commissioner of Customs.

12. With regard to the contention of the learned counsel for the petitioner that the draft survey report issued by the Port Officer and Surveyor, Cuddalore, is a neutral person and statutory authority, and he is an officer authorized by the instrumentality of the State, it is to be stated that

except the ipse dixit to that effect, the learned counsel has not proved before this Court that the said Port Officer is a Proper Officer. Further, the contention of the Department is that the person, who conducted draft-survey and prepared the report, is not the proper officer, who is assigned those functions by the Board or the Commissioner of Customs, but he is an independent surveyor of the petitioner and when the report is prepared by such a person, the same should be approved or countersigned by the Proper Officer. So, the contention of the learned counsel for the petitioner is untenable

13. As regards one more contention that no reason has been whispered anywhere by 1st and 3rd respondents for disbelieving the report, it is to be stated that the very contention of the Department is that the person who submitted the report is not the proper officer and, therefore, the report should be approved by the Proper Officer and since the report submitted by the independent surveyor is not approved by the Proper Officer, the same cannot be accepted. Further, the reason for not accepting the report was that there was a short landing of cargo.

14. As for short landing of cargo, Section 116 of the Act provides penalty, which speaks to the effect that if any goods loaded in a conveyance for importation or any goods transhipped are not unloaded at their place of destination, 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 Assistant Commissioner of Customs or Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods.

15. Section 148 provides for liability of agent, as per which, an agent appointed by the person in charge of a conveyance shall be liable for the fulfilment in respect of the matter in question of all obligations imposed on such person in charge and to penalties and confiscations which may be incurred in respect of that matter.

16. As per Section 32, no imported goods required to be mentioned under the regulations in an import manifest or import report shall, except with the permission of the proper officer, be unloaded at any customs station unless they are specified in such manifest or report for being unloaded at the customs station. In the case on hand, no permission of the proper officer has been obtained for unloading the goods. Had such permission been obtained, the controversy with regard to short landing would not have arisen at all, in which event, the proper officer would have been very much present at the time of unloading the goods.

17. As there was a short landing of cargo to the tune of 265.681 M.Ts., after allowing the tolerance at the rate of 0.5% i.e. 48.063 M.Ts. and 8.52% of moisture content i.e. 29.220 M.Ts. for which the duty amount was Rs.4,95,000/-, the adjudicating authority imposed a penalty of Rs.9,90,000/-, which is equal to double the amount of duty on the petitioner, he being the agent of the consignee, namely, M/s.TANFAC Industries Ltd., Cuddalore, under Section 116 r/w Section 148 of the Act.

18. Since I have held in the foregoing paragraphs that the independent surveyor is not the Proper Officer, the order of the second respondent, passed in the appeal preferred by the petitioner, to the

effect that the survey report not being countersigned by the customs authorities would not make the document invalid in law, cannot be countenanced.

19. Hence, the Department, by way of provision under Section 129 DD, preferred a revision against the order of the second respondent before the Central Government/first respondent, whereupon the first respondent, by the order impugned, dated 29.10.2004, confirmed the order passed by the third respondent with a modification of imposing penalty equivalent to duty.

20. If it is the contention of the petitioner that there is no justification in condoning the delay on the part of the first respondent in filing the revision by the Department, it is to be stated that it is the discretionary right of the competent revisional authority to assign reasons while condoning the delay. In the case on hand, the revisional authority/first respondent has exercised its discretion in condoning the delay, by justifying the reasons explained by the Department. Therefore, there is no perversity in condoning the delay.

21. Even in Shaw Wallace case, stated supra, relied upon by the learned counsel for the petitioner, in respect of bulk cargo, an independent survey report should be prepared by the carrier and the consignee and such report should be countersigned by the Customs Officer before discharge of the cargo and such report should be accepted for the purpose of ascertaining the actual cargo unloaded. Concedingly, in this case, the independent survey report, prepared by the carrier and the consignee, is not countersigned by the Customs Officer before discharge of the cargo. Hence, the decisions cited by the learned counsel for the petitioner are of no avail to his case.

22. In the light of the above discussion, I am of the considered opinion that this Writ Petition deserves no merit. Accordingly, the order of the first respondent is confirmed and the Writ Petition is dismissed. No costs. Consequently, connected W.P.M.P.No.1615 of 2005 is also dismissed.

abe/dixit To :

1. The Joint Secretary, Ministry of Finance, The Government of India, (Department of Revenue), 4th Floor, Jeevandeep Buildings, Sansadh Marg, Parliament Street, New Delhi 110 001.

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

3. The Joint Commissioner of Customs, No.1, Williams Road, Cantonment, Tiruchirapalli 1