

SUPREME COURT OF INDIA

SBEC Sugar Limited & Anr.

Vs.

Union of India & Ors.

C.A.No.2899 of 2006

(D.K.Jain and H.L.Dattu,JJ.,)

07.02.2011

JUDGMENT

D.K.Jain,J.,

1. These appeals, by grant of leave, are directed against the judgments and orders dated 3rd April, 2006 delivered by the High Court of Bombay, whereby the High Court has dismissed the two writ petitions (Nos.775 and 4173 of 1998) filed by the appellants herein, and has directed the Assistant Commissioner of Customs, Bond Department to finally assess the customs duty and other charges payable by the appellants in respect of the goods covered under the subject bills of entry. The High Court has further directed that if the payment of customs duty, interest and other charges is not made by the appellant company within two weeks from the date of such determination and communication thereof, the customs authorities shall enforce the bond executed by the company, pursuant to the interim order passed by the Court.

2. As a common question of law is involved in the appeals and in fact the latter order is based on the former, these are being disposed of by this common judgment. However, in order to appreciate the controversy involved, for the sake of convenience, the facts emerging from C.A. No.2899/2006 are being adverted to. These are:

“Appellant No. 1 (hereinafter referred to as "the importer") a body corporate, is engaged in the manufacture of sugar. Appellant No.2 is the Vice-President of the first appellant. With a view to set up a sugar manufacturing unit, the importer imported certain capital goods. Instead of getting the goods released for home consumption, the importer opted for getting these goods warehoused under Bond. The present appeal is confined to three consignments under Bond No. CW-20-4732 dated 26th December, 1995; CW-20-4733 dated 26th December, 1995 and CW-20-4842 dated 2nd January, 1996, which were to expire respectively on 25th December, 1996, 25th December, 1996 and 1st January, 1997. It is pertinent to note that on the original bonds and the

bills of entry, the Assistant Commissioner of Customs made an endorsement for payment of interest @ 20% per annum from the date of expiry of the bond.

3. On 19th December, 1996, the importer made an application for extension of the bond period by six months in respect of all the afore-mentioned consignments. However, the said request was rejected by the Assistant Commissioner of Customs vide letter dated 13th January, 1997 on the ground that the application was not received in the Bond department at least 15 days before the expiry of the current period of bond and was also not accompanied by an examination certificate by the Customs Officer/staff of the warehouse, the mandatory terms and conditions stipulated in para 2(i)(iii) of the Public Notice No.102/96 dated 5th June, 1996. Notwithstanding, rejection of prayer for extension of Bond period, the importer continued making representations dated 21st January, 1997; 21st April, 1997; 20th May, 1997, 26th May, 1997 and 27th May, 1997 to the respondents, requesting for re-consideration of their request for extension of bond period and not to issue notice for auction of the goods.

4. In the meantime, vide notification No.29/97 dated 1st April, 1997, issued under Section 25(1) of the Customs Act, 1962 (for short "the Act"), the Central Government extended the Export Promotion Capital Goods Scheme (for short "the EPCG Scheme") for the period 1997-2002 to Agro based Industries. The effect of the notification was that the capital goods used in the manufacture of agro-products, like sugar and covered under EPCG licence, were exempted from the payment of whole of the customs duty, and additional duty leviable in terms of Section 3 of the Act, w.e.f. 1st April, 1997. Para 6.6 of Chapter 6 of the Exim Policy, containing the EPCG Scheme provided that:

"The licence issued under this scheme shall be valid for the goods already shipped/arrived provided customs duty has not been paid and the goods have not been cleared from Customs."

5. On 22nd August, 1997, a licence under the EPCG Scheme, allowing concessional duty at the rate of 10% was issued to the importer. On an application by the importer, the said licence was rectified and endorsed as "zero duty."

6. Vide order dated 26th September, 1997, issued under Section 72(1) of the Act, the Superintendent of Customs directed the importer to clear the goods covered under Bond No. CW-20-4842 dated 2nd January, 1996 on payment of full duty of customs and other charges within a period of 15 days.

7. On 14th January, 1998, the importer executed a bond and furnished a bank guarantee for 100% of the duty saved as required under Notification No. 29/97 dated 1st April, 1997. Having acquired licence under the EPCG Scheme, on 21st January, 1998, the importer filed three bills of entry for ex-bond clearance for home consumption of the goods lying in the warehouse. As afore-stated, by that time the bond period in respect of the three consignments had expired and demand for payment of full amount of customs duty chargeable on account of goods lying in the warehouse, along with interest, penalty etc. had already been raised

against the importer. On 5th and 9th February, 1998, the importer made a representation to the Chief Commissioner of Customs stating that since zero duty was chargeable on the goods under the EPCG licence, there was no question of levy of interest thereon.

8. Vide letter dated 17th March, 1998, the Deputy Commissioner of Customs informed the importer that its request for waiver of interest had been rejected. Being aggrieved, on 3rd April, 1998, the importer preferred a writ petition (Writ Petition No. 775/1998) before the High Court questioning the demand for interest in respect of the three consignments.

9. On 30th March, 1998, the Assistant Commissioner of Customs issued an order, confirming the levy of duty and interest amounting to `1,01,03,535/-, together with interest at 20% p.a., which order, according to the appellants, was received by them on 7th April, 1998.

10. On 29th April, 1998, the High Court passed an interim order directing the respondents to permit the importer to remove the consignments on their executing a bond without payment of interest but on payment of other charges.

11. On receiving the confirmation letter dated 30th March, 1998, the importer sought to impugn the said confirmation order by amending the Writ Petition by filing Chamber Summons No. 72/1998 on 5th August, 1998.

12. As afore-mentioned, the High Court has dismissed the writ petition, inter alia, observing:

"19. In the backdrop of the aforesaid legal position expounded by the Supreme Court in Kesoram Rayon, when we turn to the facts of the present case, it would be seen that the bond period expired in respect of two bonds on 25th December, 1996 and with regard to third bond on 1st January, 1997. Undisputedly, the application for extension of bond period made on 19th December, 1996 by the company was rejected on 13th January, 1997. That the demand under Section 72 was raised by the Proper Officer on 26th June, 1997 to pay amount of duty chargeable on account of the subject goods lying in the bonded warehouse after expiry of bonded period is not in dispute. As a matter of fact, the petitioners have not challenged the said demand made under Section 72 of the Customs Act vide notice dated 26th January, 1997. On expiry of bond period, as aforesaid, the subject goods are treated to have been improperly removed under Section 72 from the warehouse. That improper removal took place even when the goods remained in the warehouse beyond the permitted period of permitted extension. Thus, at the time the bills of entry were filed by the company on 21st January, 1998, the Proper Officer was justified in computing the duty from the date of expiry of the bond period and the interest payable thereon. As a matter of fact the company was aware that the duty has been calculated by the concerned Officer along with interest on the reverse of the bill of entry but this fact has been suppressed.

20. The edifice has been built on erroneous premise in the writ petition that no duty was payable on the goods and since no duty was payable on the goods no interest could be levied or demanded as interest is only the accessory to the principal and if

the principal is not payable the interest is not payable. In challenging the demand of interest, the petitioners has misrepresented that the duty was not payable by virtue of notification dated 1st April, 1997 and the licence issued to the company under EPCG scheme and endorsement made thereon of zero duty.

21. Having noticed the facts above, we have no hesitation in holding that the provisions of Section 68 and consequently of Section 15(1)(b) have no application since the goods were not cleared from the warehouse within the bond period. Admittedly, no extension was granted. By reason of goods having remained in the warehouse beyond 25th December, 1996 insofar as two consignments were concerned and beyond 1st January, 1997 with regard to the third consignment, the goods shall be deemed to have been improperly removed from the warehouse under Section 72 and the Proper Officer was justified in calling upon the company to pay the customs duty on them as may be payable at the rate applicable at the rate on the date on which the bond period expired. As a matter of fact, there is no challenge to the demand made under Section 72 on 26th September, 1997 calling upon the company to pay full amount of duty chargeable on account of the subject goods together with penalties, rent, interest and other charges. We are surprised that the respondents permitted the company to remove the goods on execution of bond alone though by the order dated 29th April, 1998 what the Court permitted the petitioners was to remove the goods on their executing bond without payment of interest but on payment of other charges. In other words, as per the interim order dated 29th April, 1998 passed by this Court, save and except, demand of interest, the company was liable to pay all other charges including the full amount of duty together with other charges as demanded vide notice dated 26th September, 1997."

13. As stated above, following this order, the second writ petition was also dismissed.

14. Hence, the present appeals.

15. Mr. S. Ganesh, learned senior counsel appearing on behalf of the appellants, strenuously urged that the impugned judgments are clearly erroneous in light of the judgment of this Court in *Pratibha Processors & Ors. Vs. Union of India & Ors.*¹ wherein this Court had observed that if by operation of an exemption, the goods cleared were duty free and if no duty was recoverable on the imported goods at the time of clearance, no interest was payable thereon under Section 61(2) of the Act. It was strenuously argued that in the instant case the goods were cleared from the warehouse under Section 68 and had not been removed on the basis of an order under Section 72 of the Act and, therefore, having regard to the provisions of Section 15(1)(b) of the Act, by virtue of the exemption notification No.29/97, on the date of removal of the goods, no duty was payable thereon. It was asserted that reliance on the decision of this Court in *Kesoram Rayon Vs. Collector of Customs, Calcutta*² by the High Court was clearly misplaced because unlike in the present case, the goods in that case had been removed on the basis of the order under Section 72 of the Act.

16. Per contra, Mr. Harish Chander, learned senior counsel appearing on behalf of the respondents, while supporting the impugned judgments contended that the benefit of exemption from payment of duty in terms of the EPCG Scheme was not available to the importer because after the expiry of the warehousing period, the goods had been removed under Section 72 and not under Section 68 of the Act and therefore, Section 15(1)(b) of the Act had no application. It was stressed that the removal of all the consignments in question was by virtue of demand notice dated 26th September, 1997, which was admittedly not questioned in the writ petition filed on 3rd April, 1998 and therefore, the dictum laid down in Kesoram Rayon (supra) was squarely applicable on the facts of the present case.

17. Having considered the matters in the light of the statutory provisions, we are of the considered opinion that there is no merit in these appeals.

18. Section 61 of the Act prescribes the period for which goods may remain warehoused. In so far as is relevant, it reads as follows: "61. Period for which goods may remain warehoused.--(1) 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--

(i) non-consumable store; or

(ii) goods intended for supply to a foreign diplomatic mission; or

(iii) goods intended for use in any manufacturing process or other operations in accordance with the provisions of Section 65; or

(iv) goods intended for use in any hundred per cent export-oriented undertaking; or

(v) goods which the Central Government may, if it is satisfied that it is necessary or expedient so to do, by notification in the Official Gazette, specify for the purposes of this clause, till the expiry of one year.

Explanation.--For the purposes of sub-clause (iv), 'hundred per cent export-oriented undertaking' has the same meaning as in Explanation 2 to sub-section (1) of Section 3 of the Central Excises and Salt Act, 1944 (1 of 1944);

(b) in the case of any other goods, till the expiry of three months, after the date on which the proper officer made an order under Section 60 permitting the deposit of the goods in a warehouse:

Provided that--

(ii) in the case of any goods which are not likely to deteriorate, the aforesaid period of one year or three months, as the case may be, may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months and by the Board for such further period as it may deem fit:

(2) Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of sub-section (1) by reason of the extension of the aforesaid period or otherwise, interest at such rate, not exceeding eighteen per cent per annum as is for the time being fixed by the Board, shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year or, as the case may be, three months, till the date of the clearance of the goods from the warehouse: Provided that the Board may, if it considers it necessary so to do in the public interest, waive, by special order and under circumstances of an exceptional nature to be specified in such order, the whole or part of any interest payable under this sub-section in respect of any warehoused goods."

19. From a bare reading of the afore-extracted Section, it is manifest that warehousing is permissible for a limited period, as contemplated under sub-sections (1)(a) and (1)(b) of Section 61; and such period is extendable on showing sufficient cause for the same. However, by operation of sub-section (2), interest on the amount of duty is payable from the period of expiry of the permissible period till the date of clearance from the warehouse, regardless of whether the goods have remained in the warehouse beyond the permitted periods by reasons of extension or otherwise. [See: Kesoram Rayon (supra)]

20. Section 68 deals with the clearance of warehoused goods for home consumption and provides that an importer of any warehoused goods may clear the goods for home consumption if : (i) a bill of entry for home consumption of the said goods has been presented in the prescribed form,

(ii) the import duty leviable on such goods, all penalties, rent, interest and other charges payable in respect of such goods have been paid, and (iii) the proper officer has made an order for the clearance of such goods. In relation to goods cleared under Section 68, Section 15(1)(b) of the Act provides that the rate of duty shall be computed according to the rate and valuation applicable on the date on which goods are actually removed from the warehouse. (See: *D.C.M & Anr. Vs. Union of India & Anr.*³).

21. Section 72 of the Act, which is relevant for our purpose, provides for the consequences for improper removal of goods from warehouse. It reads thus:

"72. Goods improperly removed from warehouse, etc.--(1) In any of the following cases, that is to say,--

(a) where any warehoused goods are removed from a warehouse in contravention of Section 71;

(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;

(c) where any warehoused goods have been taken under Section 64 as samples without payment of duty;

(d) where any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer, 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. (2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select."

22. The scope and purport of Section 72 was examined by this Court in *Kesoram Rayon* (supra). It was held that:

"13. Goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end.

14. Section 15(1)(b) applies 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. The provisions of Section 68 and, consequently, of Section 15(1)(b) 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 have been deemed to have been improperly removed from the warehouse under Section 72."

23. We respectfully concur with the enunciation of law on the point. It is plain that Section 15(1)(b) would be applicable only when the goods are cleared from the warehouse under Section 68 of the Act, i.e., within the initially permitted period or during the permitted extended period. It is trite to say that when the goods are cleared from the warehouse after the 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 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.

24. While it is true that Condition 6 of the licence granted under the EPCG Scheme was valid against goods which had already been shipped but not cleared, but, we have no hesitation in holding that the benefit of exemption granted under the Scheme to the already imported goods would be available only in respect of those goods which are cleared under Section 68 of the Act. In our opinion, any other interpretation of the said clause would render Section 72 of the Act otiose, and would result in the said Scheme operating as an amnesty scheme, granting an unintended and undue advantage to the importer, which is ordinarily to be avoided. (See: *State of Maharashtra & Ors. Vs. Swanstone Multiplex Cinema Private Limited*)⁴. It is also a cardinal principle of construction that the provisions of a notification have to be harmoniously construed as to prevent any conflict with the provisions of the Statute. (See: *Gudur Kishan Rao & Ors. Vs. Sutirtha Bhattacharya & Ors.*⁵.)

25. We are, therefore, of the opinion that the decision in Pratibha Processors (supra) on which heavy reliance is placed by learned counsel for the appellants, is clearly distinguishable on facts inasmuch as apart from the fact that in that case the clearance of goods was under Section 68 of the Act, the import of Section 72(1)(b) of the Act was not considered. On the contrary, the dictum laid down in Kesoram Rayon (supra) is on all fours on facts at hand, and therefore, the decision of the High Court cannot be faulted with.

26. For the fore-going reasons, the appeals, being devoid of any merit, are dismissed with costs quantified at `25,000/-.

ORDER

In the judgment pronounced in C.A. No. 2899 of 2006 and connected matter, the date of the judgment shall be read as February 07, 2011 instead of February 07, 2010.

Judgment Referred.

¹(1996) 11 SCC 0101

²(1996) 5 SCC 0576

³(1995) Supp. 3 SCC 0223

⁴(2009) 8 SCC 0235

⁵(1998) 4 SCC 0189