Petro Chemicals

v.

Union of India

Writ Petition No. 4082/2001

S.B. Sinha, A.K. Sikri JJ.

20-12-2001

Judgment

1. How far and to what extent equity between the parties in the facts and circumstances of the case can be adjusted is the principal question involved in this writ petition.

2. Before adverting to issues involved in this matter a brief overview of facts may be noticed. 468 MTs of fuel oil was imported by the petitioner in the second week of September, 1999. The consignment was discharged in 26 containers and value thereof is estimated at 44974.80 US$. It is not in dispute that guidelines issued by the Union of India as was existing on the date of issuance of the bills of lading and date of testing of the imported goods was different. Bills of entries were filed seeking clearance of goods for home consumption in September, 1999. Samples of goods were tested. They were again tested at the instance of the petitioner by Sri Ram Institute. Tests at the instance of the department were carried out by CRCL on 24.8.99 and report submitted thereafter indicated that the sample contained impurities which were indicative of the nature of used oil containing dry organic matter.

3. On the request of petitioner fresh samples were drawn and a report dated 13.2.2001 was issued from a perusal whereof it would appear that it contains some amount of acid only. Other impurities which were said to be existing in the sample were not found in his sample. Demurrage was being charged @ Rs.13000/- per day. Admittedly, although the goods were worth Rs. 20 lakhs the amount of demurrage has been charged @ Rs.4 lakhs per month and the container charges to the tune of Rs.70 lacs are also being demanded from the petitioner. It is not in dispute that goods are not still cleared and are still lying in containers. A question was mooted at the bar as to whether having regard to the fact that the furnace oil being a hazardous substance should be re-exported at the cost of the petitioner or not.

4. Mr Rawal, learned counsel appearing for the petitioner, inter alia, submitted that having regard to the facts that the goods were earlier cleared in terms of the guidelines dated 12.11.1997, the same could not be declared to be hazardous substance purported to be in terms of new guidelines. He would urge that the plea taken by the respondent in this behalf is self-contradictory, inasmuch as, it had never been the contention of the department that goods are hazardous substance nor the said contention has been agitated earlier. Learned counsel would submit that the fresh guidelines have been issued only by way of resolution adopted by the officers of some department, and thus the same cannot supersede the guidelines issued by the Board which has statutory flavour. In any event, the said guidelines are prospective in nature. Counsel would contend that although in a public interest litigation the Supreme Court has directed that the hazardous goods should not be cleared but it was never the intention of the Hon'ble Supreme Court that the goods which were not considered to be hazardous at one point of time should be declared to be hazardous by reason of subsequent guidelines. Action on the part of the respondent, learned counsel for the respondent would contend, is an abuse of the process of Court. Mr Rawal submitted that even in terms of the fresh guidelines, the samples test only shows presence of acidity ranging from 0.5% to 0.15% which being nominal cannot be said to be hazardous. .

Learned counsel therefore would submit that this court may issue a writ in the nature of mandamus directing the respondents not only to clear the goods but also direct demurrage to be paid by the customs for whose fault the goods could not be cleared for more than ten months. In support of the said contention reliance has been placed on Priyanka Overseas Pvt.Ltd. v. Union of India (1991) 51 ELT 185, Shipping Corporation of India v. CK Jain Woolen Mills 2001 (3) SCALE 279

5. Mr Jayant Bhushan, learned counsel appearing for the revenue on the other hand, would submit that import of the used oil was not legal and thus the question of clearance of the goods did not arise. He would further submit that having regard to the fact that import of the goods was itself not legal, the Customs department cannot be directed to pay the demurrage charges.

Payment of demurrage charges, learned counsel would contend, is mandatory in nature and thus the petitioner in the peculiar facts and circumstances of the case can neither be absolved from such payment but also should be directed to re-export the same. Mr. Jayant Bhushan would urge that developed countries have been selling the used oil at a throw away price as they could not destroy the same, and the oil should be directed to be re-exported at the cost of the petitioner. In view of the rival submissions of the parties as noticed above, the questions which arise for consideration are :- (a) whether the import of oil by the petitioner was legal? (b) Who would be liable to pay the demurrage charges. (c) Whether in the facts and circumstances of the case, a direction for re-export of the oil should be issued?

6. Re: Question No.1. It is not in dispute that bills of lading disclose that the petitioner imported furnace oil. The question herein as to whether the said furnace

oil in truth and substance is waste oil within the meaning of the provisions of the Hazardous Wastes (Management and Handling) Rules, 1989 and the Manufacture, storage and import of Hazardous Chemicals Rules, 1989 is essentially a question of fact.

7. The report of the test carried out in terms of the guidelines issued by the Board in 1997 carried out by Sri Ram Institute for Industrial Research is in the following terms:-

TEST RESULTS

Test	Test Value
Acidity, inorganic mgKOH/gm	Nil
Ash content % by mass	0.07
Gross calorific value cals/gm	10,390
Relative density at 15 o C /15 o C	0.943
Flash point o C pensky Martens Closed cup	105
Kinematic viscosity at 50 o C cst	85.09
Sediments, % by mass	0.38
Sulphur % by mass	2.87
Water content % by volume	0.4

In terms of the said report, the imported oil meets the requirement of law.

8. One sample was also tested by the Oil Lab & Marine Surveyors Co. The test result thereof also showed that the same met with the requirement of law. The goods were however not cleared as would appear from letter dated 4.5.2000 issued by the Commissioner of Customs, on the ground that as some investigation was being conducted by the Department as to whether the said goods could be imported with or without licence.

9. The guidelines dated 12.11.1997 which were prevailing at the relevant time are in the following terms " In respect of waste oil, if on sampling, the concentration of Poly-Chlorinated Biphenyl, Poly-Chlorinated Triphneyl And Poly-Brominated Biphenyl is more than 5mg/1, Chlorinated Solvents benzene total Poly Aromatic Hydrocarbons more than 100 mg/1, and heavy metals (arsenic, barium, chromium, copper, cadmium, nickel, lead, zinc) each more than 100 mg/1, waste oil can be released to importers on submission of requisite details in Form-6".

10. The new guidelines have been issued by way of resolution adopted in a meeting held on 9.3.2001 in the Ministry of Environment and Forests regarding parameters and facilities for testing waste oil in the country which are in the following terms :- "After deliberations the following procedure was decided as screening and testing requirements to classify products/furnace oil as furnace oil, off specification furnace oil, waste oil and hazardous waste

Sl.No.	Test	Prescribed Limit (Max)
1.	Acidity (inorganic)	Nil
2.	Ash content	0.1%
3.	Sediment	0.25%
4.	Water	1%

11. The said guidelines do not have statutory status, as the same had not been issued by any statutory authority pursuant to or in furtherance of any statutory provision. The guidelines of 1977 framed by the Board could not thus have been amended by a resolution adopted by some officers in a meeting. The guidelines issued by the Board are binding on all authorities.

12. The legal position in this regard is no longer res integra. In Poulose and Mathen v. Collector of Central Excise (1999) 90 ELT 264 law has been stated in the following terms "15. One aspect deserves to be noticed in this context. The earlier tariff advice No,. 83/81 on the basis of which trade notice No. 220/81 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to. There is no material on record to show that this has been rescinded or departed from, and even so, to what extent. Even assuming that the later tariff advice No. 6/85 has taken a different view- about which there is no positive material- the facts point out that the concerned department itself was having considerable doubts about the matter. The position was not free from doubt. It was far from clear. In such a case, where two opinion are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits"

13. In Collector of Central Excise v. Usha Martin Industries (1997) 94 ELT 460 the law has been stated in the following terms "Though a catena of decisions this Court has pronounced that Revenue cannot be permitted to take a stand contrary to the instructions issued by the Board. It is different matter that an assessee can contest the validity or legality of a departmental instruction. But that right cannot be conceded to the department, more so when others have acted according to such instructions, vide Collector of Central Excise Bombay v. Jayant Dalal Private Ltd, (1996 (88) ELT 638), Ranadey Micronutrients v. Collector of Central Excise [1996 (87) ELT 19] Poulose and Mathen v Collector of Central Excise [1997 (90) 264] British Machinery Supplies Co. v UOI, [1996 (86) ELT 449]. Of course the appellate authority is also not bound by the interpretation given by the Board but the assessing officer cannot take a view contrary to the Board's interpretation." Recently in relation to the binding nature of the circular issued by the Central Board of Direct Taxes the Supreme Court in CIT v. Anjum MH Ghaswala JT 2001(9) SC 61, opined " It is true that by this press release the board had interpreted the provisions of the Act in a particular manner. Be that as it may, we would like to make it clear that every clarificatory note or press release issued by the board does not have the statutory force like the circulars issued by the Board under Section 119 of the Act. It is only those circulars issued by the board under the provisions of Section 119

of the Act will have the statutory force and will be binding on every income-tax authorities. Therefore, the press release relied upon by Shri Ramamurti not being a circular issued under Section 119 of the Act will not be of any assistance to the respondents in support of their contentions."

14. Standard as regards the quality of furnace oil must be fixed by the statutory authority in terms of provisions of statute. Such standard must either be fixed by the Ministry in terms of the provisions in the Customs Act or by the appropriate authority under Environment Protection Act.

15. Mr Jayant Bhushan, very fairly submitted that Central Government had no well equipped laboratory to carry out tests laid down by the Board and thus the new standards have been laid down having regard to the fact that such tests could be carried on in the laboratories in India.

16. A person is bound to act in terms of the law as it exists. Import of furnace oil had been made by the petitioner having regard to the standard thereof as fixed by the statutory authority. The goods imported by the petitioner satisfy the said norms.

It is thus indeed a matter of great surprise that the statutory authorities laid down the standard which are not verifiable by tests carried out in any lab. Standards subsequently laid down would not be applicable to the goods which were imported prior to laying down thereof. Only in one of the reports it was opined that the product was not found homogenous in nature. It was further opined that it did have characteristic of furnace oil but on the second list at the instance of the importer, to which it was entitled to the same was found to be falling within the prescribed standard.

17. It is pertinent to note that in the letter dated 2.5.2000 of the Director Revenue Laboratories, Central Revenues Control Laboratory, it was mentioned :- "In this regard it is important to note that there are about 209 polychlorinated biphenyls (PCBs)/ polychlorinated triphenyls (PCTs), several hundreds of chlorinated solvents and a good number of polyaromatic hydrocarbons (PAHs), the names of particular PCBs, PCTs, chlorinated solvents and PAHs have not been specified in the said circular. Thus, the scope of the Board's circular No. 60/97 dated 12.11.1997 is quite wide. I wonder quantitatively determined in ppm level as mentioned therein at any of the government laboratories in India including those of State Pollution control Boards.

18. In the said letter a doubt was raised as regards efficacy of earlier circular. It was pointed out that the matter is pending before the Apex Court. It was pointed out that there is no laboratory where tests can be carried out so as to give effect to the Board's circular in letter and spirit. In these circumstances, the Director Revenue Laboratories was of the opinion that " the scope of Board's circular No. 60/97 dated 12.11.1997 is quite wide and its execution in letter and spirit, appears to be technically impractical in view of the present scenario of Government chemical testing laboratories, including those of pollution control Board's scientifically and thus, its review would be necessary by the competent authorities. Aforementioned view was reiterated in the affidavit of the

respondent. However, the petitioner denied and disputed the same as would appear from the affidavit of Shri Ashu Jain, a partner of the petitioner firm filed on 7.5.2001, wherein it has been contended that all facilities for said testing are available in India. Tests of similarly imported goods, according to the petitioner, have been conducted and in the said affidavit it had clearly been averred that the goods imported by persons similarly situated had been cleared.

19. The legality of import must be determined having regard to the date of bill of lading as has been held by the Apex Court in Priyanka Overseas Pvt Ltd v. UOI 1991 (51) ELT 185 which are in the following terms "30.Since Palm Kernel was not included within Palm seed the Customs authorities had no legal justification to confiscate or impose redemption fine, or penalty, as the goods had already been shipped on various dates i.e. on 26-5-1987 and 25-7-1987. It is no longer in dispute that if the Palm Kernal was not a canalized item before 27-7-1987 then it could have been imported under the OGL before that date. The crucial dates in this regard are 26-5-1987 and 25-7-1987 when the goods were actually loaded in the shop and not the date of arrival of the ship in the territorial waters of India." It is well settled that a penal and exproprietory legislation must be strictly construed.

20. In the instant case, having regard to the legal position as noticed above it must be held that the import of the goods in question was legal. It was even legal when the goods reached the port. Re: Question N o.2

21. The Apex Court held that payment of demurrage is mandatory in International Airports Authority v. Grand Slam International JT 1995(2) SC 452 in the following terms. "66. From the above decisions of this Court, it becomes clear that an authority created under a statute even if is the custodian of the imported goods because of the provisions of the Customs Act, 1961, would be entitled to charge demurrages for the imported goods in its custody and make the importer or consignee liable for the same even for periods during which he/it was unable to clear the goods from the Customs area, due to fault on the part of the Customs authorities or of other authorities who might have issued detention certificates owning such fault"

However, in Union of India v. M/S Sanjeev Woollen Mills, 1998(4) JT 124, it has been held "16. Looking to the totality of circumstances pertaining to the import of the consignments under the four Bills of Entry and the inordinate delay of about six years for their release, the High Court has passed the impugned orders directing the appellants to issue a detention certificate and bear the demurrage and container detention charges. They are obviously orders passed in the special circumstances of the present case and particularly the conduct of the customs authority in not releasing the goods even after the order of unconditional release dated 11.8.1995 passed by their own Chief Commissioner. The conduct of the Customs Officers concerned is also under investigation. We do not think that this is a case where any intervention at our hands is required.

22. The apparent conflict in the aforementioned two decisions was sought to be resolved by the Apex Court in Shipping Corporation of India Ltd v. CL Jain Woollen Mills & Ors JT 2001 (4) SC 507 wherein it was observed

"8. We have also examined the decision of this Court in UOI v.Sanjeev Woollen Mills, [JT 1998 (4) SC 124= 1998(9) SCC 647] and we do not find any apparent inconsistency between the decision of this Court in Grand Slam and that of Sanjeev Woollen Mills . In Sanjeev Woollen Mills, the imported goods were synthetic waste (soft quality), though the customs authorities detained the same, being of the opinion that they were prime fiber of higher value and not soft waste. On account of non-release, the imported goods incurred heavy demurrage charges but the customs authorities themselves gave an undertaking before the High Court that in the event the goods are found to be synthetic waste, then the Revenue itself would bear the entire demurrage and container charges. Further the Chief commissioner of Customs, later had ordered unconditional release of goods and yet the goods had not been released. It is under these circumstances and in view of the specific undertaking given by the customs authorities, this Court held that from the date of detention of the goods till the customs authority, intimated the importer, the importer would not be required to pay the demurrage charges. But in that case even subsequent to the orders of the customs authorities on a suit being filed by one of the partners of the importer firm, an order of injunction was issued and therefore it was held that for that period the importer would be liable for paying the demurrage and container charges. The judgment of this court in Sanjeev Woollen Mills, therefore was in relation to the peculiar facts and circumstances of the case and the Court had clearly observed that the order in question is meant to do justice to the importer looking to the totality of the circumstances and the conduct of customs authorities. Thus, we see no inconsistency between the ratio in Sanjeev Woollen Mills and the judgment of this court in Grand Slam. That apart, the judgment in Grand Slam was a Three Judge Bench judgment. In the case in hand, as has already been stated earlier, the earlier judgment of Delhi High Court dated 9.9.94 in CWP No. 1604/91 has become final which entitles the importer to get the goods released without payment of the detention and demurrage charges .."

23. Would that however mean that the petitioner must pay demurrage charges even though it is not at fault. Answer to the question must be rendered in negative. The decisions of the Apex Court therefore are authorities for the proposition in certain situation, the court may direct the customs authorities to bear the demurrage charges. In the instant case the customs authorities still insisted that the goods were illegally imported. It sought to justify its stand even before this Court. This Court is not only a court of law but also a court of equity. In a situation of this nature we are of the opinion that this court may find that in place of the importer or the consignee, the customs authorities should bear the charges. Once it is held that the petitioner herein has not committed any illegality in importing the goods in question, in our opinion, it cannot ordinarily be saddled with the liability of payment of demurrage. The petitioner in the fact situation of this case must be held to have been sinned against than sinning. In UOI v. Sanjeev Woollen Mills 1998(9) SCC 647, the Apex Court in the fact situation obtaining therein held that demurrage may not be paid by the importer.

24. It is true that the scheme of Customs Act provide for payment of demurrage. Section 8 empowers the Collector to approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods and to specify the limits of any customs area. Section 33 provides for unloading and loading of goods at approved places only and except with the permission of proper officer, no imported goods shall be unloaded and no export goods shall be loaded at any places approved under clause (a) of Section 8 for the unloading or loading of such goods. Section 34 provides for goods not to be unloaded or loaded except under supervision of customs officer. Section 45 of the Customs Act reads as under:-

"Restrictions on custody and removal of imported goods -1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII

2. The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force- (a) shall keep a record of such goods and send a copy thereof to the proper officer. (b) Shall not permit such goods to be removed from the customs area or otherwise dealt with except under and in accordance with the permission in writing of the proper officer."

25. In these circumstances, Section 155 of the Customs Act to which reference has been made by Shri Jayant Bhushan is of no relevance, inasmuch as, by reason thereof only the officers who have taken action in good faith are required to be protected. The said provision either expressly or by necessary implication does not provide that a party will have to pay the penalty, although he has not violated the provisions of the law. We, therefore, are of the opinion that in the case of this nature Customs Department should be directed to bear the demurrage charges particularly having regard to the fact that whereas the value of the goods was only Rs. 22 lakhs, demurrage charges have mounted to Rs. 600 lakhs Re: Question No.3

26. Although in law, the petitioner may be held to be entitled to certain reliefs, the relief prayed for by it in the present case may not be granted in exercise of our jurisdiction under Article 226 of the Constitution of India. Although the commodity has been mentioned as furnace oil in the certificate of origin dated 19.6.1999, it has been noticed from the letter of the Director of Revenue Laboratories dated 2.5.2000 that the goods in question was not found homogenous in nature. Although the guidelines issued by the officers of various departments in their meeting dated 9.3.2000 are not statutory in nature it appears that the same was attended to by two scientists from Indian Institute of Petrochemical, Director of Revenue Lab of Central Govt and a Director of Ministry of

Environment and Forest. In terms of Manufacture, storage and import of Hazardous Chemicals Rules, 1989 and Hazardous Waste (Management and Handling) Rules, 1989, import of hazardous substance is permitted for processing and reuse. Clause (Q) of para 2 of Hazardous Chemicals and Hazardous Waste contain off specification and discarded

products. In a case of this nature when there exists some apprehension that goods if allowed to be used may cause pollution problem the court may not return the goods although it is lawful to do so. In the aforesaid situation, we are of the opinion that it may not be proper for us to direct release of goods in favour of the petitioner.

27. Question which now arises for consideration is as to whether its re-export would be necessary. To us it does not seem to be so for more than one reason. Firstly, even assuming that goods are hazardous substance, then such import is permissible in terms of a licence . Import of such goods was thus not prohibited altogether. From the tests carried out in different laboratories it is evident that the same does not contain any hazardous substance which even cannot be destroyed. Only acid contents in the imported goods varies from 0.25% to 0.15%. Thus, we are of the opinion that the goods in question are not one of such substance which cannot be subject matter of destruction or cannot be used for any purpose whatsoever. It is not for this court to suggest how these goods should be used, as we feel that the authorities of Central Pollution Control Board would be able to do so.

28 We, therefore, are of the opinion that the interest of justice would be met, if the Central Govt is directed to take possession of the goods for which the clearance shall be given by the Customs Authorities forthwith and in case any necessity arises the same may be used or destroyed in any manner they like, or as may be advised by the Central Pollution Control Board Demurrage, if any, would be paid by the Customs Authorities to the concerned department. The petitioner herein shall not claim the price of the said goods or any damage from the respondents.

29 These directions are being issued having regard to the possible effect of hazardous substance on public health and in the interest of justice. This Court is not only court of law but is a Court of equity and thus in the given situation it can, in it considered view, give such direction which would do complete justice to the parties.

The writ petition is disposed of with the said directions.