

PETITIONER:
KESORAM REYON (A UNIT OFM/S KESORAM INDUSTRIES LTD.)

Vs.

RESPONDENT:
THE COLLECTOR OF CUSTOMS, CALCUTTA

DATE OF JUDGMENT: 23/08/1996

BENCH:
BHARUCHA S.P. (J)
BENCH:
BHARUCHA S.P. (J)
SEN, S.C. (J)

CITATION:
JT 1996 (7) 519 1996 SCALE (6)123

ACT:

HEADNOTE:

JUDGMENT:
THE 23RD DAY OF AUGUST, 1996

Present:

Hon'ble Mr. Justice S.P. Bharucha
Hon'ble Mr. Justice S.C. Sen

Mr. Dushyant Dave, Sr. Advocate, Mr. Shahid Rizvi, Mr. Aseem Malhotra Mr. Darshan Singh, Advocates with him for the appellants.

Mr. M.G. Shanker Murthy and Mr. V.K. Verma, Advocates for the respondent.

J U D G M E N T

The following Judgment of the Court was delivered:

Kesoram Rayon (a unit of
M/s Kesoram Industries Ltd.)

V.

The Collector of Customs,
Calcutta.

J U D G M E N T

BHARUCHA, J:

This is an appeal against an order of the Customs, Excise & Gold (Control) Appellate Tribunal. It raises a question of some importance relating to the rate at which Customs duty is to be levied on goods that remain in a bonded warehouse beyond the permitted period.

The appellants imported and, on 25th May, 1984, filed a bill of entry for 4832 bales of rayon grade wood pulp for warehousing. The 4832 bales were warehoused on 16th June, 1984, in a private bonded warehouse of the appellants. Of these, 4000 were cleared and we are concerned only with the remaining 832 bales (now referred to as 'the said bales'). The period of three months for which the said bales were warehoused under the provisions of Section 61(1)(b) of the Customs Act, 1962 (hereinafter referred to as 'the Act') came to an end on 15th September, 1984. On 8th May, 1985, the Assistant Collector of Customs issued to the appellants a demand notice under Section 72(1) of the Act. It recorded that the said bales remained in the bonded warehouse

although the period of warehousing had not been extended beyond 15th September, 1984. The appellants had, therefore, become liable to pay in respect of the said bales Customs duty in the sum of Rs.6,73,885.80, countervailing duty in the sum of Rs.1,63,657.98 and interest at the rate of 12 per cent per annum in the sum of Rs.67,003.52 for the period 16th September, 1984, to 15th May, 1985, under the provisions of Section 72(1)(b). Giving credit for the amount of Rs.8,03,458.32 which had been deposited by the appellants, the appellants were called upon to pay Rs. 1,01,88.98 plus interest after 15th May, 1985, till the date of removal of the said bales from the bonded warehouse. If the amount was not paid within 7 days of receipt of the demand notice, it was recoverable in terms of the provisions of Section 72(2), without prejudice to any other mode of recovery. On 30th May, 1985, the appellants filed a bill of entry for ex-bond clearance of the said bales for home consumption. On 25th June, 1985, the appellants were served with an order in respect of the bonded warehouse within which the said bales were stored. The order recalled the demand notice dated 8th May, 1985, and the deposit made by the appellants thereunder. It directed the Superintendent of the bonded warehouse to allow clearance of the said bales after realisation of such amount as was due. It stated that the bonded warehouse would be treated as de-licensed from the date on which the said bales were cleared and action regarding cancellation of the bond given by the appellant was completed. The order concluded :

"It is clarified for removal of doubts that the warehoused goods which will be cleared on the basis of the instant order will not be cleared on ex-bond Bill of Entry as this is not a case of clearance under Section 68 of Customs Act, '62 but on realisation of charges under Section 72 *ibid*."

Between 29th June and 2nd July, 1985, the said bales were removed from the bonded warehouse.

On 25th May, 1984, when the bill of entry for warehousing the said bales was filed, they were liable to Customs duty. By virtue of an exemption notification dated 17th March, 1985, pulp derived from vegetable fibre was exempted from the payment of Customs and additional duties.

The contention of the appellants before the authorities below and the Tribunal was that the rate of Customs duty in force on the date of removal of the said bales from the bonded warehouses was the applicable rate, having regard to the provisions of the Section 15(1)(b), and, by virtue of the exemption notification aforementioned, no duty was payable thereon. The Tribunal noted that the said bales were removed from the bonded warehouse after the expiry of the bonding period. They had not been cleared from the warehouse under Section 68 but had been removed on the basis of the order under Section 72. No ex-bond bill of entry for home consumption had been filed by the appellants and no order for clearance for home consumption had been made. Section 15(1)(b) became applicable when goods were cleared from a warehouse under Section 68. After the expiry of the warehousing period the said bales ceased to be warehoused goods and were removed under the order passed under Section 72. In such a case, the applicable rate of duty was the rate in force on the date of filing of the into-bond bill of entry, as provided in Section 15(i)(b) read with the proviso to Section 15(1) and Section 46. The Customs authorities had

charged duty on the said bales at this rate under the provisions of Section 72. Interest was also recoverable from the appellants for storage of the said bales after expiry of the bonding period. There was, therefore, no illegality in the order of the Customs authorities and the appeal was dismissed.

Section 2 of the said Act is its definition section. Under sub-section (43), "warehouse" means a public warehouse appointed under Section 57 or a private warehouse licensed under Section 58. Under sub-section (44), "warehouse goods" means goods deposited in a warehouse. Section 12 requires that Customs duty shall be levied, at such rates as are specified in the Customs Tariff Act or any other law for the time being in force, on goods imported into India. Section 15, insofar as is relevant, reads thus :

"SECTION 15. Date for determination of rate of duty and tariff valuation of imported goods. - (1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,

- (a)
- (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;

....."

Section 18 deals with the provisional assessment of duty. Sub-section (2), so far as is relevant, reads thus :

" SECTION 18. Provisional assessment of duty, -

(1).....

2).....

(a).....

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in the excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty."

Section 46 requires the importer of goods other than goods intended for transit or transshipment, to make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form.

Section 47, sub-section (1) reads thus :

"47. Clearance of goods for home consumption. - (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption."

Chapter IX deals with warehousing. Under the terms of Section 59 therein, the importer of goods entered for warehousing and assessed to duty under Section 17 or Section 18 is required to execute a bond binding himself in the sum

equal to twice the amount of the duty assessed on such goods to observe all the provisions of the Act and the rules and regulations in respect of such goods and to pay on or before the date specified in the notice of demand all duties and interest payable under Section 61 and rent and charges claimable on account of such goods under the Act.

Section 61 reads thus :

"SECTION 61, Period for which goods may 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 stores; 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;

(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 subclause (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 (t 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 warehouse;

Provided that :

(i) in the case of any goods which are likely to deteriorate, the aforesaid period of one year or three months, as the case may be, may be reduced by the Collector of Customs to such shorter period as he may deem fit;

(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;

Provided further that when the licence for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another warehouse or clear them for home consumption or exportation.

(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 subsection (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 subsection in respect of any warehoused goods."

Section 62 states that all warehoused goods shall be subject to the control of the proper officer and that no person shall enter a warehouse or remove any good therefrom without his permission. Section 68 reads thus :

"SECTION 68. Clearance of warehoused goods for home consumption. - The importer of any warehoused goods may clear them 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."

Section 71 requires that 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. Section 72 reads thus :-

"SECTION 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 duty 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."

Learned counsel for the appellants submitted that the said bales were liable to the rate of duty under the provisions of Section 15(1)(b) : they had been actually removed from a bonded warehouse and it was the date of such actual removal which was determinative of the rate of duty applicable to them. He drew support for his submission from the decision of this Court in D.C.M. and Another vs. Union of India and another, 1995 Supp.(3) SCC 223, where it was held that a reading of Sections 15, 46 and 68 made it clear that they provided an option to the importer either to file a bill of entry for home consumption straightaway (in which case he had to pay the duty determined with reference to that date) or to file a bill of entry for warehousing. In the latter case, the goods were warehoused. Import duty would be levied at the rate and on the basis of the valuation determined in accordance with the provisions prevailing on the date of clearance from the warehouse for which purpose the importer had to file a fresh bill of entry for home consumption. In other words, it was the date of filing the bill of entry for home consumption which determined the rate of duty in clauses (s) and (b) of Section 15. Inasmuch

as the matter was left to the option of the importer and also because a uniform principle was adopted by the Act, there was no room for any legitimate grievance of discrimination. There was no presumption that the rate of duty always went up. It could also go down, in which case the importer stood to gain.

Learned counsel for the appellants submitted, in the alternative, that the rate of duty applicable to the said bales was the rate in force on 8th May, 1985, being the date on which the demand notice under Section 72 was issued to the appellants.

Learned counsel for the Customs authorities submitted that the permissible period of warehousing of the said bales being over, Section 15(1)(b) had no application, nor was the date of the demand notice under Section 72 relevant.

The Tribunal proceeded on the basis that no ex-bond bill of entry for home consumption had been filed by the appellants in the prescribed form and no order for clearance for home consumption has been made by the proper officer on the bill of entry. Learned counsel for the appellants however, drew our attention to a letter dated 2nd July, 1988, written by the Customs authorities in reply to an inquiry by the appellants about their ex-bond bill of entry for home consumption filed on 30th May, 1988, in respect of the said bales. The letter state that the bill of entry could not be traced in the Customs records but, "As per our record, the said Bill of Entry for ex-Bond clearance for home consumption for clearing 832 of Wood Pulp from the Private Bonded Warehouse at Mogra was filed by you on 30.5.1985." By reason of this letter of the Customs authorities, we proceed upon the basis that the appellants had filed a bill of entry for home consumption on 30th May, 1985, in respect of the said bales, but there is nothing to indicate that an order for clearance thereon had been made.

Section 61 prescribes the period for which goods may be warehoused. They may be left in the warehouse in which they are deposited for the period of one year if they are such goods as are referred to in clause (a) of sub-section (1), and for the period of three months counted from the date of the order permitting warehousing if they are not such goods. The first proviso to sub-section (1) contemplates the reduction of the periods aforementioned, of one year and three months respectively (now referred to as "the permitted periods"), if the goods are likely to deteriorate. It also permits, if the goods are not likely to deteriorate, an extension of the permitted periods on sufficient cause being shown; the Collector of Customs can extend the permitted periods by six months and the Central Board of Excise and Customs can do so for as long as it deems fit. By reason of sub-section (2), interest is payable on the amount of duty on the warehoused goods for the period from the expiry of the permitted periods till the date of their clearance from the warehouse, regardless of whether the goods have remained in the warehouse beyond the permitted periods by reason of extension of such periods otherwise.

Put briefly, so far as it is relevant for our purpose, warehousing is permissible for only a stated period; the period is extendible if cause for doing so is shown; and, whether or not the permissible period has been extended, interest on the amount of duty on the warehoused goods is payable for the period subsequent to the permissible period upto their clearance.

Section 72 deals with goods improperly removed from a warehouse. Goods are improperly removed from a warehouse under the terms of sub section (1) if they are removed

without clearance under Section 71 (clause (a) ; if they are taken as samples but without payment of duty (clause (c) ; if a warehousing bond has been executed in respect of the goods under Section 59 but they are not satisfactorily accounted for (clause (d)); and if they have not been removed from the warehouse on the expiration of the permitted period or its permitted extension (Clause (b)). In all such cases the Customs officer is empowered to demand, and the importer shall pay, the full amount of duty chargeable on the goods and interest, penalties, rent and other charges thereon. If payment as demanded is not made, it is recoverable by sale of other goods of the importer in the warehouse.

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.

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.

The decision in the case of D.C.M. and another vs. Union of India and another cited by learned counsel for the appellants dealt with, and upheld, the constitutionality of Section 15(1)(b). It did not deal with a situation where goods continued to remain in a bonded warehouse beyond the permitted period. It does not assist the appellants case.

The permitted period for warehousing the said bales came to an end on 15th September, 1984, but the said bales remained in the bonded warehouse thereafter. The said bales, by reason of the provisions of Section 72, were deemed to have been improperly removed from the bonded warehouse on that day and subject to duty at the rate then in force. The demand notice dated 8th May, 1985, called upon the appellants to pay such duty. The order dated 25th June, 1985, pertaining to the appellants' private bonded warehouse, rightly made it clear that the said bales had not been cleared therefrom on an ex-bond bill of entry under Section 68 but under Section 72. While the appellants may have filed an ex-bond bill of entry pertaining to the said bales on 30th May, 1985, there is nothing on record that suggests that clearance thereon under Section 68 was ordered. Section 15(1)(b) has, therefore, no application.

The consequence of non-removal of warehoused goods within the permitted period or the permitted extension is, by virtue of the terms of Section 72, certain. The date on which it comes to end is the date relevant for determining the rate of duty. When the duty is in fact demanded is not relevant. The alternative submission on behalf of the appellants must, therefore, also be rejected.

The tribunal took the view that the rate applicable to the said bales was the rate applicable on the date the into-

bond bill of entry in respect thereof was filed. This view does not take into account the fact that the said bales were permitted to be warehoused and that during the permitted period of three months the appellants could have sought an extension. It also does not take note of the terms of Section 72(1)(b) : the said bales would be treated as having been improperly removed from the bonded warehouse only when they were not removed therefrom on the expiration of the permitted period of three months. Since there was no change in the rate of duty during those three months, there is no alteration of the appellants' liability.

The appeal is dismissed with costs.