

PETITIONER:
THE PRINCIPAL APPRAISER (EXPORTS) COLLECTORATE OF CUSTOMS & C

Vs.

RESPONDENT:
ESAJEE TAYABALLY KAPASI, CALICUT

DATE OF JUDGMENT 11/10/1995

BENCH:
MAJMUDAR S.B. (J)
BENCH:
MAJMUDAR S.B. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1995 SCC (6) 536 JT 1995 (7) 260
1995 SCALE (5) 683

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.B. Majmudar. J.

The Principal Appraiser (Exports), Collectorate of Customs & Central Excise, Customs House, Cochin-3, the Appellate Collector of Customs, Customs & Central Excise House, Madras and the Union of India represented by the Joint Secretary, Ministry of Finance, Department of Revenue and Insurance, New Delhi have preferred this appeal by special leave against the judgment and order of a Division Bench of the Kerala High Court allowing writ petition of the respondent on 24th November 1972. A few relevant facts to highlight the grievance of the appellants are required to be mentioned at the outset.

Respondent at the relevant time carried on the business of export of coir yarn and ropes at Calicut in the State of Kerala. In July 1966 the respondent presented before the customs authorities at the port of Cochin, shipping bills for three lots of coir yarn booked to be shipped on board the S.S. Neils Maersk. The said shipping bills were for getting entry outwards for the said ship destined for the port of Basrah. The duty payable on the export of the said goods at the then prevailing rate was assessed by the customs authorities. The same was paid by the respondent. The "entry outwards" as envisaged under Section 39 of the Customs Act, 1962 (hereinafter referred to as the Act') was issued and an order permitting the clearance of the loading of the goods for exports as envisaged under Section 51 of the Act was made.

For want of space in the said vessel the goods were "shut out". The respondent, however, secured necessary space for exporting these goods by another vessel named S.S. p.Xilas. Respondent accordingly submitted fresh shipping bills on 9th August 1966 for 'entry outwards' for S.S. P'Xilas. On the basis of a petition made on behalf of the respondent the earlier shipping bills were allowed to be

amended enabling the respondent to ship the goods on board the said vessel S.S. P'Xilas.

In the meanwhile and before the necessary amendment of the shipping bills the export duty payable on coir yarn was enhanced from 10% to 25%. The first appellant accordingly demanded from the respondent an additional amount of Rs.4,444.96. The respondent paid the same under protest.

Thereafter the respondent by his letter dated 21st May 1968/6th July 1968 applied for refund of the aforesaid amount as per Section 27 of the Act. On 13th June 1968 the Assistant Collector (Customs), Cochin rejected the application of the respondent on the ground that the total amount of export duty paid by respondent did not exceed the duty leviable on the goods to be exported at the relevant date of issuing the 'entry outwards' for the ship S.S. P'Xilas. Respondent unsuccessfully carried the matter in appeal before the Appellate Collector of Customs, Madras who dismissed the appeal on 16th September 1969. Thereafter the respondent moved the Commissioner of Revision Applications to the Government of India, Ministry of Finance, New Delhi under Section 131 of the Act by filing three applications. The Commissioner rejected all the three applications.

Under these circumstances the respondent moved the High Court of Kerala at Ernakulam in the aforesaid writ petition. A Division Bench of the High Court allowed the writ petition by its order dated 30th July 1975 and directed the appellant no.1 to refund the amount of Rs.4,444.96 to the respondent. It is this order of the High Court which is challenged by the appellants in this appeal.

Learned counsel for the appellants vehemently submitted that on a conjoint reading of Sections 16(1) with the proviso, 17(1) and 50 of the Act it has to be held that the proper export duty chargeable on any goods sought to be exported would be duty payable on the date when 'entry outwards' for the concerned vessel through which the goods are exported was issued. That in the present case the goods in question got exported through vessel S.S. P'Xilas and 'entry outwards' for the said vessel was issued only on 9th August 1966. That the export duty payable on that day was 25% ad valorem and consequently the earlier 'entry outwards' for the vessel the S.S. Neils Maersk which never resulted in the export of the goods was totally redundant and of no legal effect. That the High Court had patently erred in taking the view that once the duty was assessed and 'entry outwards' was issued for the vessel S.S. Neils Maersk the authorities could not demand any further duty on the same goods even though they got actually exported by the second vessel S.S. P'Xilas. No one has appeared for the respondent to contest these proceedings.

Having given our anxious consideration to the contentions canvassed by the learned counsel for the appellants we have reached the conclusion that the order under appeal cannot be sustained.

A few relevant provisions of the Act are required to be noted for appreciating the contentions canvassed on behalf of the appellants. Section 2(18) of the Act defines 'export' to mean, 'taking out of India to a place outside India'. Section 2(15) defines 'duty' to mean, 'duty of customs leviable under this Act'. Section 12 which is the charging Section lays down by sub-section (1) thereof that except otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from India.

It becomes, therefore, clear that under the Act customs duty will have to be paid by way of export duty on goods which are exported from India and the taxing event will occur when the goods are taken out of India to the destination of a place outside India. Section 16(1) as applicable at the relevant time read as under:

"16(1). The rate of duty and tariff valuation, if any applicable to any export goods, shall be the rate and valuation in force,

(a) in the case of goods entered for export under section 50, on the date on which a shipping bill or a bill of export in respect of such goods is presented under that section:

(b) in the case of any other goods, on the date of payment of duty:

Provided that if the shipping bill has been presented before the date of entry outwards of the vessel by which the goods are to be exported, the shipping bill shall be deemed to have been presented on the date of such entry outwards."

Section 50 deals with entry of goods for exportation. It reads as under :

"50. Entry of goods for exportation.-

(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration to the truth of its contents."

Once the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the 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 and loading of the goods for exportation. Section 39 of the Act provides that the master of the vessel shall not permit the loading of any export goods, other than baggage and mail bags, until an order has been given by the proper officer granting entry-outwards to such vessel. The aforesaid statutory provisions clearly indicate that various steps have to be taken by an exporter before his goods actually get exported meaning thereby they go out of Indian territorial waters. In the facts of the present case it is not in dispute that the respondent had entered his goods for exportation as per Section 50, assessment was also made by the proper officer under Section 51 and the officer had permitted clearance and loading of the goods in vessel S.S. Neils Maersk. But these goods could not be exported as there was no room in the said vessel with the result that they were brought back to the warehouse and had to await the arrival of the next vessel which could carry them. That event happened on 9th August 1966 when another vessel S.S. P'Xilas was available and amended shipping bills were again presented by the respondent under Section 50 read with Section 51 and Section 39 of the Act. The 'entry outwards' for the said vessel S.S.

P'Xilas, therefore, became effective on and from 9th August 1966. Once that happened Section 16 got squarely attracted to the facts of the case. The rate of export duty on these goods had to be the rate in force as prevalent on the day on which the amended shipping bill or a bill on export in respect of such goods was presented under Section 50. As the earlier shipping bills were rectified and amended for permitting the export of the goods in the second ship S.S. P'Xilas only on 9th August 1966 the rate of duty would be the one that prevailed on 9th August 1966. The proviso to Section 16(1) makes the position clear. It lays down that if the shipping bill has been presented before the date of entry outwards of the vessel by which the goods are to be exported, the shipping bill shall be deemed to have been presented on the date of such entry outwards. Thus the date of 'entry outwards' would be the relevant date with reference to which the rate of customs duty on the exported good is to be worked out. 'Entry outwards' for vessel S.S. P'Xilas was of 9th August 1966. On that day the rate of export duty prevalent was 25% and valorem and not 10% and valorem which prevailed earlier. It is obvious that 'entry outwards' has to be effected in connection with a given vessel and unless that is done the master of the ship would not permit loading of such goods for export in his vessel as laid down by Section 39. Even the High Court has noted this position but according to the High Court once there was already an 'entry outwards' granted with reference to the vessel S.S. Neils Maersk and duty was assessed, in the absence of there being any provision of reassessment of the duty under the Act the assessed duty could not change. The said reasoning is not well sustained. On the scheme of the Act the customs duty by way of export duty is levied when the goods are exported or taken out of India. In the present case the goods never left the territorial limits of India on any day prior to 9th August 1966. Earlier was an incomplete or inchoate attempt on the part of respondent to export these goods through vessel S.S. Neils Maersk. For that vessel even though 'entry outwards' was obtained it could not result into any export as per Section 39 of the Act as that ship had no room to carry these goods. Consequently the goods remained unexported through that vessel. The effective export of these goods took place only by the next vessel S.S. P'Xilas. For that purpose the shipping bills were duly amended, procedure of Section 50 read with Section 51 was, therefore, followed afresh by the respondent and when he got 'entry outwards' for vessel S.S. P'Xilas which permitted him to get these goods loaded in that ship as per Section 39, the prevalent rate of duty which the respondent had to bear on the exported goods would be the duty at the rate prevalent when 'entry outwards' for ship S.S. P'Xilas was obtained by the respondent. That is, the clear effect of the combined operation of Section 16(1) proviso read with Sections 39, 50 and 51 of the Act. There is no question of any re-assessment of the export duty as erroneously assumed by the High Court. The assessment of effective export duty was only done once the goods got cleared for effective export via vessel S.S. P'Xilas. The earlier inchoate exercise of an attempt to export them through vessel S.S. Neils Maersk remained an exercise in futility. Consequently the earlier assessment of duty being an ineffective exercise created no binding obligation either on the part of the assessing authorities or on the part of the respondent-exporter. Learned counsel for the appellants was, therefore, right when he contended that the High Court had erred in taking the view that the export duty payable on the goods in

question was as per the rate that prevailed at the time when first 'entry outwards' was obtained in July 1966 for exporting the goods through vessel S.S. Neils Maersk and not the 'entry outwards' as per the amended shipping bills for vessel S.S. P'Xilas in August 1966. It is not in dispute between the parties that if the effective rate of export duty was as prevalent on 9th August 1966 the respondent will not be entitled to claim any refund of the additional duty of customs paid by him for exporting these goods through the second vessel S.S. P'Xilas.

It may also be noticed at this stage that when the Customs Act 1962 came into force no regulations under the Act were framed at the relevant time. But these regulations came to be framed only in 1976 being Shipping Bill & Bill of Export (Form) Regulations, 1976. However, in the absence of any such regulations prior to 1976 it could be presumed that the earlier forms prescribed for exporting goods under the Sea Customs Act, 1878 which came to be repealed and replaced by the Customs Act, 1962 with effect from 1st February 1963 continued to remain in force. The position of law under the Sea Customs Act, 1878 was that under Section 137 thereof the Chief Customs Officer was authorised to prescribe the form of the shipping bill. 1934 edition of the Bombay Supplement to the Indian Sea Customs Manual compiled by the erstwhile Central Board of Revenue under Section 204 of the Sea Customs Act contains the proforma of a shipping bill. Form No.34 which prescribes the format of a shipping bill clearly indicates that the name of the vessel through which the goods are to be exported is one of the essential requisites of such a shipping bill. It becomes thus clear that the shipping bill as well as the ultimate 'entry outwards' for the concerned goods sought to be exported must have reference to the vessel through which such goods are to be exported. Therefore, before any goods are exported out of Indian territorial waters which vessel is to be utilised for exporting them, becomes a relevant consideration. The concerned shipping bill has to be lodged with reference to a given vessel which is to carry these goods out of the Indian territorial waters and in connection with such a vessel the 'entry outwards' has to be obtained and only thereafter the master of the vessel should allow the loading of the goods for being exported out of India. The rate of duty payable on such exported goods would, therefore, be the rate of duty that was prevalent at the time when 'entry outwards' through a given vessel is obtained. There cannot be an 'entry outwards' in connection with a vessel which does not actually carry such goods for the purpose of export. In the facts of the present case, therefore, conclusion is inevitable that earlier 'entry outwards' for the vessel S.S. Neils Maersk was an ineffective 'entry outwards' for the purpose of computing the rate of customs duty of export on the goods in question. Only the subsequent 'entry outwards' for vessel S.S. P'Xilas which actually carried these goods out of Indian territorial waters and effected the export of these goods was the only relevant and operative 'entry outwards' and the rate of duty prevalent on the date of the said 'entry outwards' for vessel S.S. P'Xilas was the only effective rate of duty payable on the export of these goods. Consequently it must be held that the respondent has made out no case for refund of Rs.4,444.96 for which he lodged the claim.

Before parting with this discussion we may refer to a decision of a Constitution Bench of this Court in Gangadhar Narsinghdas Agarwal v. P.S. Thrivikraman & Anr. (AIR 1973 SC 350) wherein proviso to Section 16 of the Act fell for

consideration of the Bench. The question before the Bench was whether the rate of customs duty prevalent at the date of entry outwards of the vessel was to be operative or whether the change in the rate of duty by any notification subsequent to the date of entry outwards of the vessel but before the actual arrival of the vessel in the port was to be operative. The Constitution Bench held that the operative rate of duty would be the duty that was chargeable on the date of 'entry outwards' of the vessel and if there was any change in the duty before the actual arrival of the vessel such change was of no legal consequence. For arriving at this conclusion Ray, J., speaking for the Constitution Bench made the following pertinent observations in paragraphs 15 to 17 of the Report:

"15. Entry outwards of a vessel is dealt with in Section 39 of the Act. Section 39 is as follows:-

39. The master of a vessel shall not permit the loading of any export goods, other than baggage and mail bags, until an order has been given by the proper officer granting entry outwards to such vessel'. Proper officer mentioned in Section 39 of the Act is defined in Section 2(34) of the Act in relation to any functions to be performed under this Act to mean the officer of Customs who is assigned those functions by the Board or the Collector of Customs. Section 39 contemplates an order by the proper officer granting entry outwards to such vessel. In the present case, the agents of the ship made an application on 30 July, 1966 for entry outwards of the vessel. The Assistant Collector of Customs, Marmagao granted permission on 30 July, 1966 to ship cargo on board the vessel. Under Section 39 of the Act loading of goods is not permissible until an order is made granting entry outwards to the vessel. In the present case, the Customs Authorities on 30 July, 1966 made an order granting entry outwards to the vessel.

16. Under Section 16 of the Act the date of presentation of a shipping bill is the relevant date for determination of rate of duty and tariff valuation applicable to export goods. Under the proviso to Section 16 of the Act however there is a fictional date for determination of such duty. The fiction is introduced by providing for the date of entry outwards of the vessel to be relevant date in case where the shipping bill has been presented before the date of entry outwards of the vessel. The date of entry outwards of the vessel is the order made under Section 39 of the Act.

17. Section 38 of the Sea Customs Act 1878 was the counter-part of Sec. 16 of the Customs Act, 1962. Section 61 of the Sea Customs Act, 1878 was the counter-part of Section 39 of the Customs Act,

1962. Under Section 38 of the 1878 Act the rate of duty was the rate in force when the shipping bill was delivered under Section 137 of the 1878 Act. Section 137 of the 1878 Act provided for clearance of goods for shipment by delivery of shipping bill, payment of duties and the passing of the shipping bill by the Customs Authorities. Section 38 of the 1878 Act had two provisos. Under the first proviso to that old section where the shipment was permitted without a shipping bill, or in anticipation of the delivery of a shipping bill, the rate of duty was to be the rate in force at the time when the shipment of goods commenced. Under the second proviso to Section 38 of the 1878 Act where the shipping bill was in anticipation of the arrival of any vessel or before an order was given for entry outwards of the vessel the shipping bill must be deemed to have been delivered on the date on which that vessel arrived or entry outwards was given whichever was later. Under the provisions of Section 38 of the 1878 Act the Customs Authorities had power to apply the rate in force on the date of the arrival of the vessel. Under Section 16 of the 1962 Act it is not permissible to do so. The statute does not contain such a provision. Section 16 of the 1962 Act speaks of the fictional date only in relation to the order of date of entry outwards of the vessel. In the present case, the order of entry outwards of the vessel was made prior to 2 August, 1966. Therefore, the Customs Authorities in the impugned order acted without jurisdiction in imposing duty on the export by holding that the date of entry outwards of the vessel was the date "when the vessel arrived".

It is, therefore, well settled that the relevant rate of customs duty in connection with the export of goods would be the rate which prevailed when the 'entry outwards' for the vessel which ultimately exported the goods, was effected and subsequent changes in the rate of duty before the actual arrival of the vessel would be irrelevant. In the present case the situation is slightly different. The earlier 'entry outwards' for vessel S.S. Neils Maersk remained inoperative and ineffective. For that vessel Section 39 of the Act never operated. It is only for the second vessel S.S. P'Xilas that an effective 'entry outwards' became operative and under Section 39 of the Act as per the said 'entry outwards' the goods could be loaded on the ship and could be exported. It is this 'entry outwards', therefore, which would be the relevant entry qua which the rate of customs duty for export had to be worked out.

Respondent's writ petition was, therefore, liable to be dismissed and was erroneously allowed by the High Court.

In the result this appeal succeeds and is allowed. The judgment and order of the High Court are set aside. The writ petition filed by the respondent will stand dismissed.

However, in the circumstances of the case there shall be no order as to costs all throughout.

JUDIS