

CASE NO.:
Appeal (civil) 1356 of 2008

PETITIONER:
Union of India & Ors

RESPONDENT:
Shakti LPG Ltd. & Anr

DATE OF JUDGMENT: 18/02/2008

BENCH:
TARUN CHATTERJEE & HARJIT SINGH BEDI

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO 1356 / 2008
(arising out of S.L.P.(C) No. 15278/2006)
WITH C.A No 1357 / 2008
(arising out of SLP) NO.18978/2007)

HARJIT SINGH BEDI, J.

1. Leave granted.
2. The facts have been taken from SLP) No. 15278/2006.
3. These appeals filed by the Union of India arise out of the following facts : On 6.3.1996 the respondent Shakti LPG Ltd. imported 1714.5 MT of boiler steel plates worth Rs. 4.79 crores claiming that the said goods would be utilized for the extension of their storage terminal at Kakinada. As the said import could be entitled to a concessional rate of duty on the production of the appropriate certificates which were then not available with the importer, the goods were warehoused in one of the bonded godowns of the Central Warehousing Corporation on 30th May 1996 for an initial period of one year. The respondent thereafter applied for the extension of the warehousing period which was allowed by the Commissioner, Customs on 5th September 1997 upto 31st March 1998. A security deposit of about Rs.10, 00,000/- and an advance customs duty of about Rs.98, 00,000/- were deposited with the department on 31st March 1998 but the goods were still not cleared. From 1998 till 31st January 2001, several notices were sent to the respondent to clear the goods or to pay the duty and during this period the warehousing period was extended six times with the last extension expiring on 31st January 2001. As the respondent sought no further extension thereafter, the aforesaid period came to an end. Several notices were thereafter issued to the respondent under Section 72(1) of the Customs Act, 1962 (hereinafter called the "Act") raising a demand of duty etc. As no reply was forthcoming, a notice under section 72(2) of the Act was issued to the respondent on 3rd December 2001 for sale of the goods by auction so as to recover of the outstanding dues. Interestingly, however, the respondent vide his letter dated 31st December 2004 also surrendered the goods with the result that it ceased to have any claim over them. The auction of the goods was duly advertised and it was actually held on the 28th of September 2005 and on the same day the respondent made a request for permission to re-export the

goods under section 69(1) of the Act and for the cancellation of the auction sale. The respondent also filed Writ Petition No. 6907 of 2005 before the Bombay High Court for permission to re-export the goods. This petition was disposed of by the Bombay High Court on 19th October 2005 directing the Commissioner to dispose of the respondent's application for re-export of the goods by a reasoned order after hearing the petitioner. The personal hearing was given to the respondent on 28th November 2005 wherein it was proposed to export the goods to a unit operating in the special economic zone (SEZ) Pithampur in Madhya Pradesh. The Chief Commissioner by his order dated 3rd January 2006 rejected the request of the respondent to clear the goods for export to the SEZ without payment of the duty on the plea that such an export was not envisaged as it was within the country. This order was challenged by the respondent in Writ Petition No.60 of 2006 before the Bombay High Court once again praying that it be permitted to export the goods outside India. This petition was dismissed as being devoid of merit vide order dated 13th January 2006 and a Special Leave Petition against the said order was dismissed by this Court on 3rd February 2006. Undeterred the respondent then moved an application before the Bombay High Court seeking a review of the order dated 13th January 2006. This application too was dismissed on the 22nd February 2006. The respondent then approached the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) by way of an appeal challenging the order of the Chief Commissioner dated 3rd January 2006. This appeal too was dismissed as withdrawn on the request of the respondent. The department thereupon initiated proceedings for the re-auction of the goods on which the respondent submitted a letter dated 8th June 2006 for permission to re-export the goods to the UAE though without any supporting documents. The re-auction was held on 14th July 2006 and the petitioner received a bid of Rs.3.78 crores which was sufficient to meet only a part of the demand. On 18th July 2006 the respondent filed yet another Writ Petition No. 4655 of 2006 before the Bombay High Court for a direction to re-export the goods. This Writ Petition came up for hearing before the High Court on 26th July 2006 and the High Court directed the department to file a statement as to the expenses that had been incurred by it till date. The department thereupon filed a detailed affidavit in the Bombay High Court pointing out the repeated defaults on the part of the respondent and that the protracted proceedings in one forum or the other had resulted in a revenue loss of Rs.8.55 crores. This Writ Petition was disposed of by the order dated 9th August 2006 by accepting the undertaking of the respondent to re-export the goods by 14th September 2006 without calling upon the respondent to pay any duty. This order has been impugned in the present Special Leave Petition. The respondent thereafter moved an application in CWP No. 4655 of 2006 before the Bombay High Court seeking a clarification that the order passed on 9th August 2006 was with consent of both parties. The Division Bench in its order dated 14th February 2007 observed that though the order dated 9th August 2006 did not specifically say that it was an order by consent but the understanding was that it was in fact so. This order has been impugned by the Union of India in the connected Special Leave Petition No. 18978/2007 on the ground that no consent had even been given by it at the time when the order dated 9th August 2006 had been made by the High

Court.

4. Mr. Gaurav Agrawal, the learned counsel for the appellants has raised several arguments before us during the course of hearing. He has pointed out that the Act itself did not visualize the extension of the bond period beyond one year as per Section 61(1)(b) of the Act and that the repeated extensions given to the respondent were, therefore, not authorized by law. He has pleaded that once the maximum period of the bond had expired, the goods vested in the Union of India under Section 72 and the importers were divested of all rights therein. He has, in addition, pointed out that vide letter dated 31st December 2004 the respondent had in fact surrendered all rights in the goods. He has also submitted that the High Court was not justified in interfering in the present litigation in favour of the respondent as all the legal and factual issues raised by the respondent in the series of the earlier litigation it had initiated, had been decided against it. In this connection, the learned counsel has placed primary reliance on the order of the Chief Commissioner dated 3rd January 2006. It has finally been pleaded that the respondent was not entitled to claim any relief, either in law or in equity as its conduct had been absolutely undesirable.

5. Mr. Sunil Kumar, the learned senior counsel for the respondent No.1 has, however, argued that the main order impugned in SLP No.15278/2006 was indeed a consent order and it had been so clarified by the High Court itself and as such the question of any interference therein was to be ruled out. He has in this situation placed reliance on the judgment of this Court in *Roop Kumar vs. Mohan Thedani* (2003) 6 SCC 595. It has also been urged by the learned counsel that several circulars had been issued by the department of Customs itself under section 151-A of the Act which authorized the Commissioner or the Chief Commissioner to extend the bonding period fixed by section 61 and as these circulars were of binding force, as held by this Court in *Commissioner of Customs, Calcutta & Ors. V. Indian Oil Corpn. Ltd. & Anr.* (2004) 3 SCC 488, the primary argument raised by the learned appellant's counsel with regard to the maximum period of warehousing, had no substance. It has also pointed out that the surrender document dated 31st December 2004 had been withdrawn by the respondent vide letter dated 21st September 2005 on the plea that it wanted to clear the goods and that an application for this purpose had also been made under section 69 of the Act. In answer to Mr. Agrawal's plea it has been submitted that it was not open to the Union of India to contend that a circular issued by one of its officers was contrary to the Statute in the light of the judgment in the case of *Commissioner of Customs, Calcutta (supra)*.

6. We have heard the learned counsel for the parties and have gone through the record very carefully. The matter would turn on an examination of the various provisions of the Act. Section 46 of the Act deals with entry of goods on importation and warehousing of the goods in certain circumstances. Section 47 deals with clearance of goods for home consumption. Section 48 postulates that in case any goods imported into India are not cleared for home consumption or warehoused within thirty days from the date of unloading, they may be sold by the proper officer. Sections 61 and 72 in so far as relevant for our purpose are reproduced below:

"Sec.61. Period for which goods may remain warehoused. \026 (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 capital goods intended for use in any hundred per cent export oriented undertaking, till the expiry of five years;

(aa) in the case of goods other than capital goods intended for use in any hundred per cent, export-oriented undertaking, till the expiry of three years; and

(b) in the case of any other goods, till the expiry of one year,

after the date on which the proper officer has made an order under section 60 permitting the deposit of the goods in a warehouse:

Provided that \026

(i) \005\005\005\005\005\005\005\005\005\005\005\005\005\005\005.
(A) \005\005\005\005\005\005\005\005\005\005\005\005\005\005.
(B) \005\005\005\005\005\005\005\005\005\005\005\005\005\005.

(ii) in the case of any goods referred to in clause (b), if they are likely to deteriorate, the aforesaid period of one year may be reduced by the [Commissioner of Customs] to such shorter period as he may deem fit:

Sec.72.Goods improperly removed from warehouse, etc. \026 (1) In any of the following cases, that is to say, -

(a) xxx xxx xxx xxx

(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) xxx xxx xxx xxx

(d) xxx xxx xxx xxx

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."

7. Concededly the present case would fall within the scope of Section 61(1)(b). The facts show that the goods imported by the respondent had been warehoused on 30th of May 1996 initially for a period of one year i.e. the maximum permissible period but which had nevertheless been extended time and again on the request of the respondent upto 31st January 2001 whereafter no application for extension had been made. It is also clear to us from the letter dated 31st December 2004 that the respondent had intimated that he was surrendering the goods as the purpose for which they had been imported could not be implemented. We are of the opinion that merely because the respondent thereafter withdrew the offer of surrender would not make any difference to its cause. Mr. Sunil Kumar, the learned senior counsel has, however, submitted that though the Statute did indeed fix the maximum period of warehousing to be of one year, yet the various circulars issued by the Board under section 151 (A) of the Act had made a clear departure from the aforesaid provisions. He has in particular placed reliance on circulars dated 14th January 2003 and 29th July 2002 which dealt with the special grant of the warehousing period by the Chief Commissioner under Section 61. The circular dated 14th January 2003 is pre-faced by referring to the circular dated 29th July 2002 and the remarks that clarifications had been sought whether goods imported and bonded in a warehouse could be permitted to be cleared for export under section 69 of the Act even though demand notices under section 72 had been issued upon expiry of the initial or the extended period of warehousing.

The circular then goes on to read:

"The matter has been examined in the Board. It has been decided that in case an Importer makes a request to permit re-export of the goods under Section 69 of the Customs Act, 1962, such a request may be allowed even if the permitted period for bonding has expired and demand notice has been issued, or it has been decided to put the goods under auction. Before permitting re-export in each such case, however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the Importer to export the goods within the permitted period of warehousing."

8. The circular dated 29th July 2002 is, however, a general circular advising the Chief Commissioner to be liberal in granting extension under section 61 of the Act. Relying on the aforequoted paragraph of the Circular of 14th January 2003, Mr. Sunil Kumar has argued that the maximum period visualized under section 61 of the Act could, therefore, have been exceeded. Mr. Gaurav Agrawal has raised a larger issue - whether the circulars aforesaid could authorize a deviation from the Statute itself but in the light of the peculiar facts of the case we are not called upon to answer this question. We note from the perusal of the circular dated 14th January 2003 that the request for re-export of the goods could be allowed

even if the maximum period of warehousing had expired and demand notices had been issued and even if it had been decided to put the goods to auction. This circular obviously would not apply to a situation where the goods had already been put to auction. It is clear from the record that the first auction of the goods had been fixed on the 28th September 2005. However, vide letter dated 22nd September 2005 the respondent had requested the department to stop the auction and to allow it to clear the goods on payment of all charges and promised to file the various documents in one day but did not do so and on the contrary once again vide letter dated 28th September 2005 moved another application for re-export of the goods. The auction of 28th September 2005 was also challenged by the respondent in CWP No.6907/2005. This petition was dismissed on 19th October 2005 with a direction that the application for re-export filed by the respondent be disposed of by the Chief Commissioner by a reasoned order. As already mentioned above, the Chief Commissioner vide his order dated 3rd January 2006 rejected the prayer of the petitioner for re-import of the goods as being legally untenable and observing thus :

"From the peculiar facts and circumstances of the case as detailed above, it is clear that the Importer have no intention, whatsoever to clear the goods. Their sole aim throughout there almost a 'decade' long period has been to 'stall' the disposal of these un-cleared time-expired bonded goods. It is also surprising to note that they have been taking self-contradictory grounds to hamper the disposal of the goods. Once, they surrender their title to the goods, then they come up with a proposal to clear the same on payment of duty + interest leviable thereon and again they plead that they want to re-export the goods to a SEZ Unit in Pitampur. All these prevaricating and ever shifting stands taken by them have resulted in non-disposal of the time-expired bonded goods and non-realization of valuable government revenue. These documented facts also clearly indicate that the petitioner Importers have not come with clean hands and their sole objective has been merely to stop the disposal of valuable goods and a huge amount of Revenue involved in it."

9. The Chief Commissioner finally concluded that there was no merit in the request of the petitioner dated 28th September 2005 to allow him any further extension of the warehousing period for re-export of the goods. This order was challenged by the respondent in CWP No. 60 of 2006 which too was dismissed and the Special Leave Petition filed thereafter was also dismissed. It is therefore clear from the record that the circular dated 14th January 2003 would not be applicable in the present case as the application for extension of time had been made on 22nd /28th September 2005 when the auction was to be held on 28th September, 2005 but had been stalled on account of the efforts of the respondent and that the respondent cannot be permitted to take advantage of its own wrong and to say that though the auction could not be finalized due its stalling efforts yet it was entitled to fall back on the circular and to argue that the first auction had not been held on 28th September 2005 but on 14th July 2006. We are also of the opinion that the respondent

having surrendered its title in the goods vide letter dated 31st December 2004 it was not open to it to contend that this surrender had been withdrawn subsequently. In the light of the present circumstances the observations made in Commissioner of Customs, Calcutta (supra) can have no applicability.

10. We also note that as the respondents' plea for re-export had been rejected upto the Supreme Court on 3rd February 2006 in culmination of the proceedings in CWP No.60 of 2006 in which all issues had been raised, no interference is called for on this score as well.

11. We have also considered the case of the respondent with regard to the consensual nature of the order of the High Court dated 9th August, 2006. Notwithstanding the clarification given by the High Court on 14th February, 2007, we can see no consent on the part of the Union of India or its counsel.

12. We accordingly allow both appeals without any order as to costs.