(2004) 10 CAL CK 0005

Calcutta High Court

Case No: Writ Petition No. 1999 of 1998

POL India Agencies Ltd. and Another		APPELLANT
	Vs	
Addl. Commissioner of Customs and Others		RESPONDENT

Date of Decision: Oct. 15, 2004

Acts Referred:

- Customs Act, 1962 - Section 116

Citation: (2005) 3 CHN 249

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: J.P. Khaitan, for the Appellant; D.C. Bhattacharjee, for the Respondent

Final Decision: Dismissed

Judgement

Soumitra Pal, J.

The petitioners have challenged the order dated 6.10.95 passed by the Joint Secretary to the Government of India dismissing the revisional application and upholding the order passed by the Collector of Customs (Appeals), Calcutta wherein it has been held there was short-landing of cargo.

2. The short point is whether there was short-landing of cargo which warranted imposition of penalty u/s 116 of the Customs Act.

3. Mr. J. P. Khaitan, learned Advocate appearing on behalf of the petitioner submitted that the burden of proof regarding short-landing lies with the customs authorities. If doubts persists penalty cannot be imposed. Submission was made that tally sheets showed that 28 packets landed but the consignee declared that he received 43 packets. Outturn report revealed that there was delivery of 43 packets. In the same outturn report, Calcutta Port Trust declared that there was excess of one carton and one packet. The consignee was offered one carton and one packet

but he refused to accept it after verification. According to the ship owner there was no shortage at all. If anything happened after unloading, it was not the responsibility of the ship owner. It was contended that there could not be any short-landing when there were two excess landings. Submission was made that from a perusal of paragraph 5 of the order it is clear that doubts about short-landing persisted with the respondent No. 3. Moreover, in paragraph 5(b) of the affidavit-in-opposition it has been admitted that there was excess landing of unmanifested cargo. Relying on the judgment of Union of India and Ors. v. Raja Agencies, reported in 1993(42) ECC 166 (Madras) submission was made that since doubts persisted with the customs authorities penalty should not have been imposed u/s 116 of the Customs Act, 1962. It was argued that the customs authorities should establish the fact of short-landing before penalizing the petitioner. Relying on the judgment of the Calcutta High Court in Scindia Steam Navigation Co. Ltd. Vs. Collector of Customs, it was submitted Section 116 cannot be attracted that unless and until it is conclusively proved with evidence that there was short-landing of goods.

4. Mr. D. C. Bhattacharjee, learned Advocate appearing on behalf of the customs authorities, submitted that Section 116 does not speak of excess landing that has to be explained to the customs authorities. There is no mention that the entire consignee was without marks. Since the importer refused to take delivery of the excess packages there was one shortage. Distinguishing the judgment of Scindia Steam Navigation Co. Ltd. (supra), it was submitted that in the said case there was no other cargo. As there was short-landing of 821 bags of fertilizer, the ship owner and the consignee carried out a survey. In the case in hand, the petitioner did not ask for any survey. However, it was conceded that the language of the order under challenge should have been couched in a better manner. However, facts have to be taken into consideration. Facts were taken into consideration while rejecting the revisional application of the petitioner.

5. Mr. Khaitan, in reply, submitted that u/s 116 of the Act it has to be established that there was shortage in the quantity unloaded. When the petitioner did not complain of any short-landing, customs authorities have to prove it. It is an admitted fact that there were goods belonging to other consignees. In paragraph 5 of the order under challenge, the case of the petitioner was considered. It appears from the said paragraph doubts persisted. The petitioners have to be given the benefit of doubt.

6. After hearing the learned Advocates for the parties, I am of the view that in order to appreciate whether the respondent No. 3 was justified in passing the order, it is appropriate to refer to the relevant portion of the said order, which is as under :

"5. Quite independently, even the applicants during the personal hearing could not identify and co-relate the cargo that has landed with no marks since one carton and one package under nil marks were offered to the clearing agents for inspection and

which were lying at 29 KPD lockfast. Hence, merely because some quantities short-landed vis-a-vis some quantities landed without marks and numbers, it cannot with certainty be said that the goods landed with no marks and numbers did relate to the short-landed quantity in respect of line No. 60. Unless the identity of the goods are established to the specific line entry it cannot be said with certainty that the same belongs to the said line number, when more than one items are being transported."

7. Two aspects emerge from a perusal of the said paragraph - firstly, the respondent No. 3 was not certain about short-landing doubts persisted with the said respondent. Secondly, admittedly there were other goods. I accept the submission of Mr. Khaitan that in order to establish an offence u/s 116, the basic fact of short-landing has to be established. In the instant case, in view of the observation and findings in paragraph 5 of the order under challenge, the allegation regarding short-landing was not beyond doubt since imposition of penalty involves proceedings which are quasi-criminal in nature. The principles laid down in the judgment of Union of India and Ors. v. Raja Agencies (supra) are clearly applicable in the facts and circumstances of the case. The relevant portion of the judgment is as under :

"Levy of penalty involves proceedings which are quasi-criminal in nature. It is now settled law that to establish the charge it is not only necessary to prove the existence of mens rea, but also that the allegations must be proved beyond all reasonable doubt. On the basis of the materials on record, the allegations against the respondents could not be said to have been proved much less beyond any reasonable doubt. The learned Single Judge therefore rightly allowed W. P. No. 1767 of 1982 and as a consequence thereof, dismissed W. P. No. 1768 of 1982 as not pressed. We do not find any cause to interfere. The writ appeals fail and they are dismissed."

8. In the instant case, the respondent No. 3 while passing the order was not beyond doubt whether there was short-landing. In case of imposition of penalty, the allegations must be proved beyond and reasonable doubt. Since doubts persisted, penalty could not be imposed. Hence, the respondent No. 3 erred in passing the order under challenge. Thus, the order dated 6.10.95 is set aside and quashed.

9. However, in the facts and circumstances of the case, there will be no order as to costs.

10. Urgent xerox certified copy of this judgment and order, if applied for, be given to the appearing parties on priority basis.