

(2001) 05 CAL CK 0039

Calcutta High Court

Case No: Writ Petition No. 2251 of 1999

Trisakti Electronics and
Industries Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision: May 18, 2001

Acts Referred:

- Central Excise Rules, 1944 - Rule 13, 9
- Central Excises and Salt Act, 1944 - Section 2, 3
- Customs Act, 1962 - Section 20, 25, 25(1), 57, 58

Citation: 107 CWN 397 : (2001) 78 ECC 342 : (2001) 133 ELT 288

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: P.K. Mallick, M. Ahmed, Jayanta Banerjee and A.B. Ghosh, for the Appellant; P. Mukherjee, I.P. Mukherjee and S. Chakroborty, for the Respondent

Judgement

Amitava Lala, J.

The case is unique one. The petitioner No. 1 is a public limited company. The petitioner No. 2 is a director and representative of such company. They are the merchant-exporters of eight diesel hydraulic truck mounted cranes (hereinafter called as the goods) to Bangladesh. The party respondents are basically (a) Central Excise Authorities; (b) Customs Authorities; (c) manufacturer; and (d) financiers of the goods. Financiers are not contesting the dispute. Therefore, there is existence of quadrangular dispute in between others which are inseparable in nature. A Division Bench of this Court is disposing an appeal from an interim order passed by a Single Bench of this Court also observed the same. Therefore, the dispute cannot be said to be dispute of a private nature which cannot be taken into account in the writ jurisdiction of this Court. Public law element is involved herein.

2. The short compass of the dispute is that the petitioners with the help of the financiers, purchased the aforesaid goods from the respondent No. 6, a manufacturing company of India. According to them, the price includes excise duties. Therefore, the respondent No. 6 is liable to pay excise duties, if any, to the Central Excise Authorities. The goods were registered under the appropriate motor vehicles, authority in India. The Oil and Natural Gas Commission Limited (hereinafter called as "ONGC Ltd.") a Government company made an agreement with the petitioners in India to deploy such goods for the completion of a project of M/s. Bangladesh Gas Fields Co. Ltd. (a company of Petro-Bangla) in Bangladesh, which will be brought back to India after completion of the contractual work. Necessary permission was sought from the Reserve Bank of India which was duly granted by them. Such type of movement of goods from India to a country and coming back is called "export-cum-reimport" as per technical nomenclature of the customs authorities. Such words in the nature of export-cum-reimportation will be available in every necessary documents for movement i.e. permission of Reserve Bank of India, proforma invoices for purchase, bills of export, etc.

3. The respondent No. 6, the manufacturer of the goods did not pay the excise duty before the removal of the goods from the factory but executed bonds in favour of the Central Excise Authority for a total sum of Rs. 75,00,000/- to secure the excise duty payable by them. Such respondent supposed to execute and submit and accordingly submitted necessary applications under prescribed forms known as AR 4 forms to be respondent No. 7 i.e. the Superintendent of Central Excise describing the petitioner company as merchant-exporter and themselves as manufacturer with particulars of goods and giving their appropriate Central Excise registration number. Such AR 4 forms prescribed certain modalities which are required to be fulfilled when the goods are to be taken to a different country for the purpose of doing the needful. Under AR forms there are two columns for the purpose of certification of the Central Excise authorities and the Customs authorities. The Central Excise authorities have certified that duty has been paid on the goods by furnishing bonds by them. The Customs authorities certified that such bonds are to be released on production of reimportation certificate from the Customs authorities or realisation of duty.

4. As per the Bill of Export, the petitioners being merchant-exporters obtained permission for export-cum-reimportation for the purpose of execution of overseas project by the petitioners. From the Bill of Export it appears that Central Excise duty will be paid on reimportation of goods from Bangladesh and export was allowed on AR 4 bond without payment of Central Excise duty. The Bill of Export also contained a declaration that the goods were exported to Bangladesh for execution of contract with ONGC Ltd., India on monthly hiring basis and the said goods will be brought back to India after completion of contract with the company in Bangladesh having approved by the Reserve Bank of India.

5. Even thereafter - surprisingly such bonds were released by the concerned Assistant Commissioner of Central Excise in favour of the respondent No. 6 immediately upon receiving information of export without waiting for reimportation or without giving any intimation to the petitioner-company. As a result whereof, when the petitioners wanted to bring back the goods to India, the same was disallowed by the Customs authorities without payment of customs duty equivalent to the Central Excise duty due to release of bonds in favour of the manufacturer/respondent No. 6 without waiting for reimportation.

6. Seeing no other alternative, the petitioners invoked the writ jurisdiction of this Court. At the initial stage a Division Bench was pleased to observe that customs duty may be paid which will be abide by the result of the writ petition. No compulsion was there but the petitioners paid the total amount of Rs. 75,00,000/- as an interim measure to prove the bonafide to before the Court and to bring back the goods at the earliest to fulfil the other commercial commitments elsewhere. Accordingly, the goods were allowed to reimport to India upon deposit of such amount.

7. At the time of final hearing, in effect, there are two contesting respondents. One is the Central Excise authorities being respondent numbers 1, 4 and 7 on whose behalf an affidavit was filed by the pen of the concerned Assistant Commissioner, Central Excise surprisingly leaving aside the Commissioner of Central Excise, respondent No. 2 herein being the appropriate authority of accepting and/or releasing the bonds as per paragraphs 2(4)(b) and (d) of the notification issued under Central Excise Act, 1944 and Rule 13 of the Central Excise Rules, 1944. The other one is the respondent number 6 being private respondent/manufacturer. Its affidavit is in the same line and tone with respondent Nos. 1, 4 and 7. Again, no affidavit has been filed by any of the Customs Authorities.

8. On enquiry, the learned Counsel appearing for the Central Excise authorities being respondent Nos. 1, 4 and 7 made a bold statement that he is representing all the State authorities, be it Central Excise or be it Customs. How such authority can be given by the appropriate office of the Union of India that too without any affidavit is best known to them. Therefore, it can be visualised that by such way different governmental authorities wanted to legalise a process of unjust enrichment. Such process is net outcome of unfair play, mala fide and total disregard to legal sanction.

9. From the affidavits of the Assistant Commissioner of Central Excise and the manufacturer it appear that both have taken an uniform stand that the bonds were rightly released having knowledge of the export was being made and they are not concerned about the reimportation. Whether price includes excise duty or not is in the nature of private dispute which cannot be taken into account by the Court having writ jurisdiction. Even assuming such claim of the respondent No. 6 manufacturer lies against the petitioner-company but respondent No. 6 cannot collide with governmental machinery before establishment of such right. Onus is

lying with the manufacturer/ respondent No. 6 to establish claim, if any, against the petitioner before an appropriate forum and recover. The Customs and Central Excise authorities cannot involve themselves in such dispute, if any.

10. There is a fallacy lies on the question whether bonds are made for export simpliciter or for export-cum-reimportation. Learned Counsel appearing for the private respondent i.e. the manufacturer himself relied upon following parts of the notification under Rule 13 of the Central Excise Rules, 1944:

"2(4)(b) that the exporter enters into a bond in the proper form, as the Commissioner of Central Excise (or as the case may be Maritime Commissioner of Central Excise) approves, in a sum equal at least to the duty chargeable on the goods for the due arrival thereof at the place of export therefrom under Customs or as the case may be post-supervision;

(d) such bonds shall not be discharged unless the goods are duly exported, to the satisfaction of the Commissioner of Central Excise (or Maritime Commissioner of Central Excise) within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, has been paid."

11. The above quoted portion of the notification under the Rule clearly speaks that the excise authority cannot mechanically behave in carrying out release order of bonds. Therefore, when the documents about export clearly says that the movement is to be counted as export-cum-reimportation and customs authority under the appropriate form certified that the bonds will exist till reimportation as to why" a hurried decision to release the bond was taken place by the Central Excise Authority without waiting till reimportation is best known to him.

12. "Export" and "Import" are the words provided in the Customs Act for the customs authorities. Customs Act also made provision for reimportation of goods u/s 20 of the Act and further made provision for granting exemption of customs duty u/s 25 of the Act. When a transaction said to be export-cum-reimportation by the customs authority, the same cannot be said to be export simpliciter irrespective of any certificate issued by the customs authority in this regard. When as per both the manufacturer and the Central Excise authorities the bonds are only existable up to export but not up to reimportation being out of the domain of the Central Excise authorities, then the export-cum-reimport of the goods by the merchant-exporter is unconnected with their right, if any. In such case the reimportation is based on no condition and absolute duty free. On the other hand the customs authorities can only withhold exemption on reimportation if the conditions of exemption are not fulfilled by the petitioners. But there is no such case herein. There is no change of goods taken out and brought back to India. The same merchant-exporter is involved on both the accounts. The permission was obtained from Reserve Bank of India. The customs authorities did not confront such facts even verbally through same

Counsel. No case made out by them that the petitioners sought for any permission from the Reserve Bank of India that they wanted to sell the goods abroad or outside the country so that the Court can hold that they are liable to pay customs duty. Therefore, it is established that the goods were proceeded on a job oriented journey from this country to a neighbouring country at the instance of the governmental instrumentality i.e. ONGC Ltd. and brought back to India after the job is over being a part of duty free merchant export.

13. This is an export-cum-reimport by name but not by action. On the other hand, if a manufacturer wants to export any goods either it has to pay excise duty or to furnish a bond in favour of the Central Excise authority to get release of the goods from the factory. The bonds are in the nature of guarantee for recovery of excise duty from such manufacturer. As soon as the guarantee under the bonds are lifted by the Central Excise authorities themselves in favour of the manufacturer it can be presumed that such authority is satisfied with the payment of excise duty. Moreover, when both of them emphasised that bonds have to be lifted on export being unconnected with reimportation it cannot be said that execution of bonds has any nexus or connection with the condition of customs duty, if any, by the merchant-exporter i.e. petitioner No. 1 herein. In other words, it can safely be said that furnishing of bonds to the Central Excise duty by the respondent No. 6/manufacturer cannot be regarded as guarantee on the part of third party i.e. merchant-exporter but on the part of the manufacturer itself till the goods being exported. It has made for the simple reason that a manufacturer cannot send any manufactured goods outside the country without payment of excise duty. This is the reason for which customs authorities did not want to file any affidavit and also with a wishful thought that it may lead to controversy between two authorities under same ministry before the court of law.

14. Against this background the only issue before this Court is whether the customs authorities can impose customs duties upon the petitioners or not. General Exemption Nos. 95 and 95A on account of import tariff in respect of imports by privileged persons, organizations, authorities and foreigners are required to be discussed in this respect. General Exemption No. 95 speaks about the exemption to reimport of goods sent for execution of approved projects. In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 the Central Government, being satisfied that it is necessary in the public interest so to do, thereby exempts the goods specified in column (1) of the Table annexed thereto, from the payment of such customs duty leviable thereon subject to certain limitations and conditions. Such Table is given hereunder :-

TABLE

Goods	Limitations and Conditions	Extent of Exemption
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(1)	(2)	(3)
Goods not produced or manufactured in India and on Which the duty of customs leviabale has been paid at the time of their im- portation into India and which are exported out of India for the exe- cution of a contract ap- proved by the Reserve Bank of India in connec- tion with any comer- cial and industrial (in- cluding constructional) activities.	Provided that the proper officer of Cus- toms is satisfied. (1) as to the identity of the goods, (2) that no draw- back of duty was claimed or paid on their export out of India prior to their present importation; (3) that the project has a specific ap- proval of the Reserve Bank of India; (4) that the own- ership of the goods has not changed between the time of export and re-import.	(1) In the case of go- on which any altera- tions, renovations, additions or rep- have been execut subsequent to export, so much of t duty of customs as i in excess of the dut customs which would be leviabale if the v of the goods w equal to the cost such alterations, re- vations, additions repairs while goods were abroad. (2) in other cases, th whole of the duty customs leviabale there under the First Schedu to the Customs Tariff Act, 1975 (51 of 1975) and the whole of the a dditional duty leviabale thereon u/s 3 of the said Customs Ta iff Act, 1975.

15. The respondent No. 6, manufacturer wanted to bring the matter under serial No. 1(d) of the General Exemption No. 95A which deals with the exemption to re-import of goods exported under duty drawback, rebate of duty or under bond. For the purpose of coming to a definite conclusion the Table of General Exemption No. 95A along with the provisions are given hereunder :-

TABLE

Sl. No.	Description of goods	Amount of duty
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(1)

(2)

(3)

1.

Goods exported -

- (a) under claim for drawback of any customs or excise duties levied by the union.
- (b) under claim for drawback of any excise duty levied by a State.
- (c) under claim for rebate of Central Excise duty.
- (d) under bond without payment of Central Excise duty.
- (e) under Duty Exemption Scheme (DEEC) or Export Promotion Capital Goods Scheme (EPCG).

Amount of drawback of customs or excise duties allowed at the time of export.

Amount of excise duty levied by State of the time and place of importation of the goods.

Amount of rebate of Central Excise duty availed at the time of export.

Amount of Central Excise duty paid.

Amount of excise duty levied at the time and place of importation of goods and subject to the following conditions applicable for such goods.

(I) DEEC book has not been cancelled or lost.

(II) In case of EPCG scheme, the period of full export performance has not expired and necessary endorsements required for reimport have been made.

(III) The importer had intimated the details of the consignments re-imported to the (Assistant) Commissioner of Central Excise or Deputy Commissioner of Central Excise in charge of the factory where the goods were manufactured and to the licensing authority regarding the details of reimportation and production of a dated acknowledgement of reimportation at the time of clearance of goods.

(IV) The manufacturer-exporter who are registered with Central Excise Department may be permitted clearance of such goods.

2. Goods other than those falling under SI. No. 1, exported for repairs abroad.

2A. Goods (exported) under Duty Entitlement Passbook (DEPB) Scheme.

3. Goods other than those falling under SI. Nos. 1 and 2.

without payment of Central Excise Duty under transit bond. To be executed with the customs authorities, such bond will be cancelled on the production of certificate issued by Central Excise authorities about re-export of re-imported goods into the country.

Duty of customs which would be leviable if the value of imported goods after repairs were made up of the fair cost of repairs carried out including cost of materials used in repairs (whether such costs are actually incurred or not), insurance charges, freight charges, both ways.

Amount of Central Excise duty leviable at the time and place of importation of goods plus amount of drawback of Excise Duties allowed at the time of exports, subject to the condition that the importer produces a Duty Entitlement Passbook before the proper officer of Customs for debit of an amount equal to the amount of Duty Entitlement Passbook Scheme (DEPB) credit which was permitted by the Government of India in the Ministry of Commerce for the products exported at the time of export of the consignment which is being re-imported.

Nil

Provided that the Assistant Commissioner of Customs is satisfied that-

(a) the goods (other than the goods exported under the Duty Exemption Scheme (DEEC) or the Export Promotion Capital Goods Scheme (EPCG) or Duty Entitlement Passbook Scheme (DEPB) are re-imported within three years after their exportation or within such extended period, not exceeding two years, as the Commissioner of Customs may on sufficient cause being shown for the delay, allow, and in the case of goods exported under the Duty Exemption Scheme (DEEC) or the Export Promotion Capital Goods Scheme (EPCG), or Duty Entitlement Passbook Scheme (DEPB), re-importation of such goods takes place within one year of exportation or such extended period not exceeding one more year as may be allowed by the Commissioner of Customs on sufficient cause being shown;

(b) the goods are the same which were exported;

(c) in the case of goods falling under Sr. No. 2 of the Table there has been no change in ownership of the goods between the time of export of such goods and re-import thereof:

Provided further nothing contained in this notification shall apply to re-imported goods which had been exported -

(a) by a hundred per cent export-oriented undertaking or a unit in a Free Trade Zone and defined u/s 3 of the Central Excise Act, 1944 (1 of 1944);

(b) from a public warehouse or a private warehouse appointed or licensed, as the case may be, u/s 57 or Section 58 of the Customs Act, 1962 (52 of 1962).

Explanation. - For the purposes of this modification, the goods shall not be deemed to be the same if these are reimported after being subjected to re-manufacturing or reprocessing through melting, recycling or recasting abroad.

16. Can it be said by whom it will be furnished ? Definitely not by the merchant-exporter but by the manufacturer on whose account it is payable.

17. In the instant case merchant-exporter is the one when manufacturer is the other. The manufacturer cannot get the benefits of exemption which are supposed to be given to the merchant-exporter. Similarly, the manufacturer cannot put an embargo in getting exemption by the merchant-exporter. Admittedly as per the manufacturer and the Central Excise authorities bonds on export are unconnected with the reimport of goods by the petitioner No. 1 being merchant-exporter. Therefore, the same has got nothing to do in connection with the benefits of exemption to be given to the petitioners either under the General Exemption No. 95 and/or 95A. The Central Excise authorities and the manufacturer, in the writ petition of the merchant-exporters, cannot be allowed to take double stand of defence that the bonds are rightly released on export because it is unconnected with the re-importation but the petitioners are liable to pay customs duty similar to amount of Central Excise duty as per Clause 1(d) of the General Exemption No. 95A.

18. Section 2(f) of the Central Excise Act, 1944 speaks "manufacturer" includes any process :-

(i) Incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture;

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

19. Admittedly Section 3 of such Act prescribes that duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied upon all excisable goods which are produced or manufactured in India at the rates set forth in the Schedule of the said Tariff Act. Rule 9 of the Central Excise Rules, 1944 prescribes time and manner of payment of duty. Rule 13 of the Rules provides for export of goods under bond on which duty has not been paid. Notification under Rule 13 provides export under bond without payment of duty. It appears from all the Rules and notifications that the "Commissioner" or the "Commissioner of Central Excise" as per substitution is the appropriate authority for approval of execution and discharge of bonds. Surprisingly, such Commissioner is not even party to the affidavit filed by the other Central Excise authorities. It is understandable that the affidavit of the Central Excise authorities may not be filed by the pen of Commissioner but when the Assistant Commissioner of Central Excise was in a position to obtain authority of the Secretary, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs why not from the Commissioner of Central Excise too. The Court is very much curious in observing the conduct of the deponent.

20. It is to be remembered in this connection that so far as the foreign exchange is concerned the Reserve Bank's permission is the prime consideration. Customs and Central Excise are only the regulating authorities. It is depending upon the policy of the policy makers how the foreign exchange of the country will be regulated through the Reserve Bank of India. It is desirable that the executive should follow the policy but not allow to frustrate the same which has exactly happened herein. In case of doubt about ownership it would have been appropriate to wait till reimportation was being caused as wanted by the certifying officer of the customs authority under AR 4 form. Such question was avoided by the respondent No. 6/manufacturer by saying the Certifying Officer of Customs had no authority to issue such certificate. I am surprised even such factual submission was not confronted by any affidavit on their behalf. I fail to understand if the act of such Central Excise authority is so clean why he did not choose to file an affidavit also on behalf of the Commissioner of Central Excise who is respondent No. 2 herein, an

appropriate authority of releasing the bond. Taking up the hurried stand in releasing the bonds without any intimation to the petitioners is also creating cloud in the mind of the Court. Balance of convenience surely favouring the petitioners in getting beneficial orders including release of amount deposited with the concerned customs authorities.

21. The learned Counsel appearing for the private respondent cited a decision reported in [Hindustan Petroleum Corporation Ltd. Vs. Collector of Central Excise](#), basically for implied establishment that bonds should be discharged on the goods being exported to the satisfaction of the authority. According to me if it is so why they and the authority are after the petitioners is a big question to this Court.

22. The learned Counsel appearing on behalf of the private respondent i.e. manufacturer contended by citing a judgment reported in [Tata Tea Ltd. Vs. The Commissioner of Customs, Chennai](#), that reimported goods are also leviable to customs duty in the same manner as if imported for the first time. It is true but applicability of the same will vary from case to case. The Supreme Court held that reimportation is parallel to fresh import when it has been found that the goods were sent out of India for the purpose of repairing there and reinstallation and when there is a change of materials attached to the goods. But definitely such judgment cannot govern the field where the goods, ownership of goods and permission of Reserve Bank of India applicable for absolute general exemption is subsisting before and after. In such circumstances whether importation is export-cum-reimportation or to be counted as importation for the first time will hardly make any difference.

23. Therefore, Court is inclined to draw lines on three prospectives. One is call back the order of release of excise duties made in favour of respondent No. 6. The other is to give full relief of exemption to the petitioner. The further is to take an effective result oriented step so that this type of dispute cannot cause any hindrance to any commercial people in doing similar business. It is to be remembered policy of globalisation is knocking at the door. The commercial footsteps are heart beat of the true globalisation. If the commercial activities are interfered in the manner how the commercial people will keep trust upon the governmental machineries. It is needless to mention that Court has a noble cause to give suggestion and it is entirely for the Government to accept and implement. In such case Court can only expect good senses. So far the first point is concerned I want to restore the position back by applying the principles of status quo anti because of the reason the appropriate Central Excise authority and the respondent No. 6/manufacturer proceeded with clandestine manner at the cost of the writ petitioner/merchant-exporter who's claim of exemption of customs duty is totally unconnected with the same admittedly.

24. So far the second point is concerned balance of convenience is totally supporting the petitioner/merchant-exporter and for the same, it is entitled to of the positive

relief. Such positive relief is regularisation of reimportation free from condition.

25. So far as the third point is concerned it is a legal necessity to issue clarificatory notification as regards applicability of Notification 13(2)(iv) of the Central Excise Rule vis-a-vis serial number 1(d) of the General Exemption No. 95A of the General Exemption of Import Tariff of the Customs to a person or group of persons in the light of the judgment and order passed by this Court irrespective of other parts of the positive orders and by holding the position of status quo anti to visualise the position from that stage.

26. Therefore, according to me, the writ petition should succeed on the basis of the facts and circumstances of this case. Accordingly, I declare that discharge of the bond being No. B-I(GEN)/18/KDH/98, dated 26th October, 1998 for Rs. 75,00,000/- as executed by the respondent No. 6 securing the amount of Central Excise duties on the said eight cranes is wrongful and therefore, the same is treated as cancelled. As a consequential effect the Central Excise authority is liable to take all necessary steps in accordance with law immediately in communication with the order for the purpose of recovery of the said amount from the respondent No. 6. Interim order of reimportation of the eight cranes to India by the petitioners stands confirmed. Conditions for such reimportation imposed by the Court under interim order stands vacated. Customs duty as deposited by the petitioners as a condition for reimportation of the cranes stands released in view of cancellation of discharge of bond securing the amount of Central Excise duties in respect of self same goods. Accordingly, the customs authority is directed to refund the said sum immediately upon communication of this order. In view of this unique situation the Secretary, Ministry of Finance, Department of Revenue, Government of India having his control over both the Central Excise and Customs authority, is hereby directed to adjudicate upon the dispute in between the petitioners and the respondent No. 6 and pass an appropriate reasoned order, upon giving fullest opportunity of hearing and verifying the policy and its true implementation and for practical difficulties facing by the people involved in the commercial field, within a period of two months from the date of communication of this order, so that such reasoned order can form a guideline in respect of similarly placed situations.

27. Thus, the writ petition stands disposed of. No order is passed as to costs.

28. Learned Counsel appearing for Union of India prays for stay of operation of this order. Such prayer is considered and refused.

29. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites.

30. All parties are to act on a signed copy minutes of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the Court in respect as above.