

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM APPEAL NO. 4 OF 2021

The Principal Commissioner of Customs
Pune Commissionerate, having office at
41-A, GST Bhavan, Sassoon Road,
Pune - 411 001.

... Appellant

V/s.

JSW Steel Ltd.,
JSW Centre, Bandra Kurla Complex,
Bandra (E), Mumbai - 400 051.

... Respondent

Mr.Karan Adik a/w Ms.Maya Majumdar for Appellant.
Ms.Shareen Gupta a/w Mr.Tanay Vyas i/b. J.Sagar Associates for
Respondent.

**CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.**

RESERVED ON : 15th JULY 2022

PRONOUNCED ON : 26th JULY 2022

JUDGMENT : (PER ABHAY AHUJA, J.)

1. This is an Appeal by the Principal Commissioner of Customs, Pune, impugning the final order No.A/86867/2019 dated 17th September, 2019 passed by the Customs, Excise & Service Tax

Appellate Tribunal, Mumbai (“CESTAT”) holding that the late fees charged in the adjudication order is unwarranted.

2. Brief facts are that the Respondent-Company JSW Steel Ltd., and its subsidiary M/s.Amba River Coke Ltd. (“ARCL”) both imported a total 1,10,000 metric tons Coking Coal from M/s. JSW International Pty Ltd., Singapore by the same vessel MV CAPE IOANNA. An Import General Manifest (IGM No.2161880) was filed on 6th April, 2017. ARCL imported 11,550 metric tons of Peak Down North Coking Coal under Bill of Entry No.9214268 dated 7th April, 2017 filed at Jaigad Port and was assessed provisionally. The Respondent – M/s. JSW Steel Ltd., imported 98,450 metric tons of Goonyella C Coking Coal for discharge at Marmagao Port which arrived on 14th April, 2017 and Bill of Entry No. 9375854 dated 20th April, 2017 was filed at Marmagao Port for clearance which was provisionally assessed and allowed clearance on payment of duty of Rs.9,32,79,393/-.

3. At the time of clearance of import, goods of a quantity of 1,341 metric tons was found short at Marmagao Port as the same was landed at Jaigad Port. This quantity was not assessed at

Marmagao Port and left uncleared at Jaigad Port. The Respondent-Company came to know of this fact from ARCL. After detailed scrutiny, the Respondent-Company ascertained that the excess cargo that was unloaded at Jaigad Port was in fact Goonyella C Coking Coal and not Peak Down North Coking Coal. The Respondent-Company, therefore, vide its letter dated 5th December, 2017, informed the Customs Authorities of the same and that the said 1,341 metric tons of Goonyella C Coking Coal which was to be discharged at Marmagao Port, Goa had been wrongly discharged at Jaigad Port for which the Respondent-Company had paid duty at Marmagao Customs, presuming that full quantity of import would be cleared at Marmagao Port. The Company also requested that they may be allowed to file a Bill of Entry for a differential quantity and that the said cargo may be allowed clearance. The Customs House Agent (“CHA”) and Shipping Agent were instructed for processing of filing of Bill of Entry after necessary re-amendment to the IGM. The Customs Authority after considering the request made by the Shipping Agent changed the IGM from Peak Down North Coking Coal to Goonyella C Coking Coal, but the same was kept in the name of ARCL. Therefore, a request was made vide letter dated 15th February, 2018 by the Shipping Agent for the necessary

amendments in the IGM. However, despite the amendment in the IGM, the Bill of Entry could not be filed by the CHA through “ICEGATE System” as there was an error shown. Finally, the amendments to the IGM were approved by the Customs Authorities on 14th March, 2018 and on the same day, the Respondent-Company filed the Bill of Entry to clear the goods.

4. The Electronic Data Interchange (“EDI System”) of filing the Bill of Entry calculated the total amount payable as Rs.50,46,182/- which included Customs duty as well as the charges for late filing of Bill of Entry amounting to Rs.33,45,000/-. The Respondent-Company thereafter, made a request in March-2018 to waive off this fine / late fee charge calculated by the EDI stating that the delay in filing the Bill of Entry to clear the differential quantity at Jaigad was not on account of their fault. The Customs Authorities vide communication dated 5th April, 2018 rejected the request of the Respondent-Company. Paragraph 5 of the said communication is pertinent and is quoted as under:

“5. You have done the scrutiny of the facts and ascertained that the excess cargo belonged to M/s JSW Steel Ltd. and confirmed the same vide your letter dated 05.12.2017 that the goods in excess of 1341Mts is Goonyella C Coking coal. Thus from 14.04.2017 to

05.12.2017, you were unable to ascertain the ownership of the excess discharged cargo and the request to allow to file B/E for this excess cargo came only on 05.12.2017 even though you were aware that the same goods are short landed at Mormugao port and excess discharged at JSW Port. You have also mentioned in your letter dated 30.3.2018 that M/s JSW Steel Ltd. thereafter instructed the CHA and Shipping Agent to file the Bill of Entry after necessary amendment to the IGM, which shows that you have yourself delayed the process of amendment of IGM / filing B/E. The said instructions could have been given well in time by you. Therefore the entire responsibility for late filing of B/E lies on the importer i.e. M/s JSW Steel Ltd.”

5. Aggrieved by the same, the Respondent-Company filed an Appeal before the Commissioner (Appeals-II), Central Tax, Pune, urging that the delay in filing the Bill of Entry was in genuine and *bona fide* circumstances. It was submitted that in terms of Section 46(3) of the Customs Act, 1962, the Importer is supposed to present the Bill of Entry before the end of the next day following the day of which the vessel carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing. It is submitted that accordingly, Bill of Entry for home consumption was filed within a time at Marmagao. However, at the time of clearance, a quantity of 1,341 metric tons was found short as also confirmed under the Draught Survey Report and that, on enquiry, it was found that the subject goods were wrongly

manifested as Peak Down North Coking Coal instead of Goonyella C Coking Coal in the name of ARCL and only on 14th March, 2018, an amended IGM and the Bill of Lading in the name of the Respondent-Company, describing the goods as Goonyella C Coking Coal were issued by the Shipping Line after obtaining permission from the Customs. The Bill of Entry was filed by the Importer immediately on 14th March, 2018 for clearance at Jaigad Port, that therefore no late fee was payable.

6. After considering the submissions, the Commissioner (Appeals) while allowing the Appeal of the Respondent-Company set aside the demand of late fees made by the Assistant Commissioner – Customs, *inter alia* observing that the Respondent Company's assessment for full quantity of 98450 metric tons in respect of Goonyella C Coking Coal at the Marmagao Port against the Bill of Entry No.9375854 dated 20th April, 2017 within the prescribed time limit clearly shows the Respondent-Company's *bona fide* and that the Bill of Entry filed later on 14th March, 2018 was nothing but the requirement of a system for the clearance of the short landed goods which was required to be cleared at Marmagao Port, but was cleared from Jaigad Port. The Commissioner (Appeals) also records

that the Customs Authorities finally approved all the amendments in the IGM on 14th March, 2018 and the Respondent-Company filed the Bill of Entry on that very same day. The Commissioner (Appeals) held that therefore this was not a fit case to charge late fee and the Respondent-Company should not be penalized.

7. The following Paragraphs of the said decision by the Commissioner (Appeals) are pertinent and are quoted as under:

*“6.1 In the instant case, Coking Coal weighing 1,10,000 MT was imported, per vessel “MV CAPE IOANNA”, out of which 11,550 MT was imported by Amba River Coke Ltd. (in short **ARCL**, a subsidiary company of the Appellant) for discharging at Jaigad Port and the balance 98,450 MT was imported by JSW Steel Ltd. for discharging at Marmagao Port as summarized hereunder:*

<i>Importer</i>	<i>Quantity (MT)</i>	<i>B/e No. and date</i>	<i>Port</i>	<i>Remark</i>
<i>Amba River Coke Ltd.</i>	<i>11550</i>	<i>9214628 dated 07-04-2017</i>	<i>Jaigad Port</i>	<i>1,341 MT excess landed at Jaigad Port</i>
<i>JSW Steel Ltd.</i>	<i>98450</i>	<i>9375854 dated 20-04-2017</i>	<i>Marmagao Port</i>	<i>1,341 MT short landed at Marmagao Port</i>
<i>Total</i>	<i>110000</i>			

After the arrival of the vessel at Marmagao Port, Bill of Entry No.9375854 dated 20-04-2017 was filed at Marmagao by the Appellant and the same was assessed provisionally for entire quantity and allowed clearance on

payment of duty but 1341 MT of import goods could not be cleared as the same was short landed at Marmugao Port, Goa. Subsequently, the Appellant came to know from ARCL that a qty. of 1,341 MT of imported goods left un-cleared at Jaigad Port. On detailed enquiry, the Appellant came to know that during the course of discharge of Cargo, the Stevedores at Jaigad Port did not follow the approved discharge sequence plan prepared by the Chief Officer of the vessel and over landed 1,341 MT of "Goonyella C Coking Coal" at Jaigad Port as per the report of the Master of Vessel. The Vessel reached Marmagao Port on 14-04-2017 and discharged the balance quantity of 97,109 MT of "Goonyella C Coking Coal" as against 98,450 MT which is evident as per Statement of Facts dated 25-04-2017 of the Vessel at Marmagao Port duly signed by Port Authorities, Agent and Master of the Vessel. The Appellant on learning that short landed goods are at Jaigad Port, instructed their CHA and the Shipping agent for processing of filing of Bill of Entry after necessary amendment in the IGM as the cargo was in the name of ARCL at Jaigad Port and the details therein of material imported was shown as "Peak downs North Coking Coal" in B/L No.5. The Respondent considering the request made by the Shipping Agent changed the IGM from "Peak Downs North Coking Coal" to "Goonyella C Coking Coal", however the same still remained in the name of ARCL only. As a result, the Shipping agent further requested for necessary amendment vide its letter dated 15-02-2018. Even after the amendment in the IGM, the bill of entry could not be filed by the CHA through ICEGATE system as error code 150 appeared on the screen as "job submitted for section 48 Approval." When the Respondent finally approved the amendments in the IGM on 14-03-2018, the Appellant filed the Bill of Entry on that day itself and cleared the goods on payment of duty again. The EDI system on filing the Bill of Entry calculated the total amount payable by the Appellant as Rs.50,46,182/- including the charges for late filing of Bill of Entry of Rs.33,45,000/-. The Appellant made request to waive fine/ late fee of Rs.33,45,000/- calculated by the EDI. However, the Respondent vide letter dated 05-04-2018 rejected the request of the Appellant.

6.4 In this regard, I find that the Appellant filed the Bill of Entry No. 9375854 dated 20-04-2017 at Marmugao

Port within the prescribed time limit as there is no objection in this regard on record. It is worthwhile to mention here that the Bill of Entry was filed for the total quantity of 98,450 MT of “Goonyella C Coking Coal” by the Appellant at Marmagao port. It is an admitted fact that the Bill of Entry was assessed for full quantity i.e. 98,450 MT as the Respondent while submitting his cross objection, has stated in Para 8 as under:

“The Appellant’s say that the duty has already been paid at Marmugao Port on the excess landed quantity at JSW Port. The Customs has not denied the said fact.”

Thus, the total quantity was assessed against the aforesaid Bill of Entry filed within the prescribed time limit. It clearly shows bonafide of the importer to clear the entire quantity of import on duty payment of the Customs Duty.

6.4.1 Further, MASTER’S REMARKS column of “Statement of Facts” dated 25-04-2017 clearly states that “BL No.1: 1,341 MT GOONYELLA LANDED AT JAIGAD PORT FROM BL NO.1 DUE TO STEVEDORES DID NOT FOLLOW THE APPROVED DISCHARGING SEQUENCE PLAN.” The DRAUGHT SURVEY REPORT of the vessel M.V. “CAPE IOANNA” also clearly bears a remark “1341 MT OVERLANDED AT JAIGAD PORT”. After getting knowledge of the same the Appellant after requesting for required amendments in the IGM and in the System, which was finally carried out by the Customs authorities on 14-03-2018, filed Bill of Entry for 1,341 MT on 14-03-2018 itself. Here a question arises whether the Bill of Entry filed for the short landed quantity 1,341 MT should be treated as a fresh one when the same quantity had already been assessed under the Bill of Entry no.93758545 dated 20-04-2017. I am of the considered view that the Bill of Entry filed on 14-03-2018 cannot be treated as a fresh Bill of Entry for invoking the provision of Section 46(3) of the Customs Act, 1962 in the present situation when the said quantity was already covered in the earlier Bill of Entry dated 20-04-2017 assessed earlier. The Bill of Entry filed on 14-03-2018 was nothing but requirement of the System for clearance of the short landed goods, which was required to be cleared at Marmagao port but in the present scenario

was cleared from Jaigad Port.

6.4.2 Even otherwise as the Respondent finally approved all the amendments in the IGM on 14-03-2018 and the Appellant filed the Bill of Entry on that very day, establishes the bonafide of the Appellant in ensuring that no untoward delay is caused at their end to clear 1,341 MT of goods short landed at Marmugao Port. Keeping in mind the entire facts of the case, I find that it is not a fit case to charge late fee. Delay, if any, were beyond the realm of the Appellant for which they should not be penalized.

6.4.3 The Respondent has heavily supported his action with the Standing Order no. 16/2017 dated 23/04/2017 issued by the Commissioner of Customs (Imports), Mumbai Zone-III. I find that the instructions issued by the Commissioners are administrative in nature, not having any binding precedence on the officers of the other commissionerate and certainly not on Commissioner (Appeals), who are bound by decisions of the higher appellate Tribunal & Courts, Customs Act and Rules etc. These are issued for smooth functioning of the Customs administration within their respective jurisdiction only.

6.5 In view of the discussion above and keeping the entire facts of the case in mind, I hold that the late fee charged of Rs. 33,45,000/- is totally unwarranted in the present circumstances.”

8. Mr.Karan Adik, learned Counsel for the Appellant relies upon the communication dated 5th April, 2018 of the Customs Authorities. He submits that there has been a delay in the filing of the Bill of Entry by the Respondent-Company from 14th April, 2017 to 5th December, 2017 and as such, there is a breach of Section 46(3) of the Customs Act, 1962 inviting levy of late filing charges and submits that the same has therefore been correctly levied.

Learned Standing Counsel for Revenue refers to Instruction No.12/2017-Customs, dated 31st August, 2017 regarding clarification on difficulties related to recent amendments in Customs Act, 1962 and submits that the said Instruction of the Board has elaborated on the scope of sufficient cause to the satisfaction of the Officer, but the same relates only to system related faults. He submits that even though the said Instruction clarifies that the Importer should not be penalized for delay happening due to system related fault, Petitioner could not get the benefit of such Instruction inasmuch as the delay in filing the Bill of Entry is not due to system fault, but due to the omission by Petitioner. He submits that the said Instruction is available only in *bona fide* cases and submits that which is not the case here. He submits that therefore the late filing charges are justified. Learned Standing Counsel also submits that the order of the Appellate Authority as well as the Tribunal ought to be set aside. He submits that even otherwise, since the Tribunal has merely relied on the order of the Appellate Authority, it is a non-speaking order and ought to be set aside as being without application of mind. He submits that this Court, therefore, admit the Appeal on the following substantial questions of law as proposed in the Appeal:

- “a. Whether the Hon’ble CESTAT, Mumbai, has erred in not taking cognizance of relevant provisions of Section 46 of the Customs Act, 1962 read with the Board’s Circular No.12/2007-Cus dated 31.03.2017 wherein it has been clearly stipulated that the late fees charges will be applicable on the Importer in case of delay in filing of Bill of Entry for import of goods except in the case of inability to file Bill of Entry due to system related faults?*
- b. Whether the Hon’ble CESTAT has erred in upholding the Order in-Appeal and thereby wrongly presuming that the delay/inability of the Importer/Agent in not amending the concerned Bill of Lading/IGM in time are a system related fault beyond their control.*
- c. Whether the Hon’ble CESTAT, Mumbai has erred in upholding the Order in-Appeal that the Bill of Entry filed for the excess quantity at Jaigad port was not a fresh one and holding the Assistant Commissioner of Mormugao Port as a Proper Officer for the Assessment of cargo discharged at Jaigad Port under Section 2(34) of the Customs Act, 1962?*
- d. Whether the Hon’ble CESTAT, Mumbai, has erred in not appreciating and not taking cognizance of Bill of Entry (Electronic Integrated Declaration) Regulations, 2011 (as substituted vide Notification No.26/2017-Cus (NT) dated 31.03.2017 which was further clarified by Board’s Instructions No.12/2017-Cus dated 31.08.2017?”*

9. Ms.Shareen Gupta, learned Counsel for the Respondent-Company would submit that the lower authorities ought to have considered that the Respondent-Company had already paid the payable Customs duty on the entire quantity of goods at Marmagao

Port and for no fault of the Shipping Line, the Company had to pay the additional duty for the same goods at Jaigad Port also and is now being forced to incur other collateral expenses in the form of late fee at Jaigad Port. She would submit that there were sufficient genuine and *bona fide* causes for waiver of late filing fee.

10. We have heard Mr.Karan Adik, learned Counsel for the Appellant-Revenue and Ms.Shareen Gupta, learned Counsel for the Respondent-Company and with their able assistance, we have perused the papers and proceedings in the matter.

11. The facts are undisputed. The vessel MV CAPE IOANNA arrived at Marmagao Port and Bill of Entry No.9375854 dated 20th April, 2017 for 98,450 metric tons in respect of Goonyella Coking Coal was filed at Marmagao Port by the Respondent-Company and the same was also assessed provisionally for the entire quantity and allowed clearance on payment of duty of the said goods although, 1,341 metric tons at Jaigad Port discharged by the same vessel remained uncleared though the entire duty had been paid at Marmagao Port. It is also undisputed that after getting the knowledge, the Respondent-Company requested for the required

amendments to the IGM which was finally carried out by the Customs Authorities on 14th March, 2018 after which, the Bill of Entry for 1,341 metric tons was filed on 14th March, 2018 itself undisputedly without any delay.

12. At this stage, it would be pertinent to refer to Section 46 of the Customs Act, 1962 which is quoted as under:

“46. Entry of goods on importation

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed.

PROVIDED that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner:

PROVIDED FURTHER that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or

vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

PROVIDED that a bill of entry may be presented at any time not exceeding thirty days prior to the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

PROVIDED FURTHER that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely:-

- (a) the accuracy and completeness of the information given therein;*
- (b) the authenticity and validity of any document supporting it; and*
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.*

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.”

(Emphasis supplied)

13. We observe from Section 46(3) of the Act that an Importer is to present a Bill of Entry for home consumption or

for warehousing in the prescribed form before the end of the next day following the day on which, the vessel carrying the goods arrives at a customs station at which such goods are to be cleared. There is a proviso which allows a period of thirty days for presentation of an advance bill of entry. The second proviso is the one we are concerned with which provides that where the Bill of Entry is not presented within the time, and the proper officer is satisfied that there was no sufficient cause for such delay, the Importer shall pay such charges for late presentation of the Bill of Entry as may be prescribed.

14. In the present case, we observe that the Respondent-Company had filed the Bill of Entry No.9375854 for the entire quantity on 20th April, 2017 within the prescribed time limit and as such, there was no objection to the same. It had also paid the entire duty for 98450 metric tons of Goonyella C Coking Coal, even though, 1,341 metric tons had not landed in Marmagao but had landed in Jaigad and as soon as the amendments to the IGM were approved by the Appellant on 14th March, 2018, again the Respondent-Company filed the Bill of Entry on the very same day in respect of 1,341 metric tons. The

Commissioner of Customs in its order which has been upheld by the Tribunal has observed that the Respondent-Company has demonstrated its *bona fides* and we agree with the same. The second proviso clearly invests a discretion on the Authorities while considering levy of late payment charges as imposed on the Respondent-Company. The satisfaction for sufficiency of cause is a subjective satisfaction which has to be exercised judiciously. The Assessing Officer has based on technicalities and without any judicious application of mind, levied the late payment charges which have been rightly set aside by the Appellate Authority and the Tribunal. By no stretch of imagination, it can be said that the Respondent-Company has not acted *bona fide*. The entire confusion was due to the short landing of 1,341 metric tons of Goonyella C Coking Coal at Marmagao though full duty in respect of which has been paid by the Respondent-Company and even after it was found out that 1,341 metric tons was landed in Jaigad, the Respondent-Company has taken efforts to get the IGM amended and no sooner the the IGM was amended, the Bill of Entry in respect thereof was filed on the same day within time. This shows the Respondent Company's eagerness to be on the right side of the

law. We are satisfied that the Respondent-Company has shown its *bona fides* by all these actions.

15. We, therefore, do not find any fault with the order of the Appellate Authority or the Tribunal. In our view, the Appeal does not raise any substantial question of law and is accordingly dismissed.

16. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR J.)