

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86527 OF 2016

[Arising out of Order-in-Original No: CC/JPS/03/2015-16 ACC/ADHI(SA) dated 23rd March 2016 passed by the Commissioner of Customs (General), Mumbai – III.]

Anshu Sahay

Smt Singapore Pte Ltd
23,Gul Road, Singapore- 629 356

... Appellant

versus

Commissioner of Customs (General)

Air Cargo Complex, Mumbai – III
Sahar, Andheri (E), Mumbai- 400099

...Respondent

WITH

CUSTOMS APPEAL NO: 86528 OF 2016

[Arising out of Order-in-Original No: CC/JPS/03/2015-16 ACC/ADHI(SA) dated 23rd March 2016 passed by the Commissioner of Customs (General), Mumbai – III.]

Vijayan Chrysostom D’Souza

Godrej Coliseum,801,8th Floor, “C” Wing
Everard Nagar, Sion (East), Mumbai- 400 022

... Appellant

versus

Commissioner of Customs (General)

Air Cargo Complex, Mumbai – III
Sahar, Andheri (E), Mumbai- 400099

...Respondent

WITH

CUSTOMS APPEAL NO: 86529 OF 2016

[Arising out of Order-in-Original No: CC/JPS/03/2015-16 ACC/ADHI(SA) dated 23rd March 2016 passed by the Commissioner of Customs (General), Mumbai – III.]

JM Baxi & Co
Godrej Coliseum, 801 C Wing, Everad Nagar
Sion (E), Mumbai 400022 *... Appellant*

versus

Commissioner of Customs (General)
Air Cargo Complex, Mumbai – III
Sahar, Andheri (E), Mumbai- 400099 *...Respondent*

WITH

CUSTOMS APPEAL NO: 85156 OF 2023

[Arising out of Order-in-Original No: 48/2022-23/CC/NS-GEN/CAC/JNCH dated 1st November 2022 passed by the Commissioner of Customs (NS-GEN), Nhava Sheva.]

Anshu Sahay
Smt Singapore Pte. Ltd.
23,Gul Road, Singapore- 629 356 *... Appellant*

versus

Commissioner of Customs (NS-General)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 *...Respondent*

WITH

CUSTOMS APPEAL NO: 85157 OF 2023

[Arising out of Order-in-Original No: 48/2022-23/CC/NS-GEN/CAC/JNCH dated 1st November 2022 passed by the Commissioner of Customs (NS-GEN), Nhava Sheva.]

Vijayan Chrysostom D’Souza
Godrej Coliseum,801,8th Floor, “C” Wing
Everard Nagar, Sion (East), Mumbai- 400 022 *... Appellant*

versus

Commissioner of Customs (NS-General)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 *...Respondent*

AND

CUSTOMS APPEAL NO: 85880 OF 2023

[Arising out of Order-in-Original No: 48/2022-23/CC/NS-GEN/CAC/JNCH dated 1st November 2022 passed by the Commissioner of Customs (NS-GEN), Nhava Sheva.]

JM Baxi & Co

Godrej Coliseum, 801 C Wing, Everad Nagar
Sion (E), Mumbai 400022

... Appellant

versus

Commissioner of Customs (NS-General)

Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707

...Respondent

APPEARANCE:

Shri Vipin Jain, Shri Krishna Kumaran and Shri Kartik Dedhia, Advocates for the appellant

Shri Deepak Sharma, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87479-87484/2024

DATE OF HEARING:	25/06/2024
DATE OF DECISION:	13/12/2024

PER: C J MATHEW

A container vessel, MSC Chitra, collided with MV Khalijia-II, a bulk carrier, while departing and entering Jawaharlal Nehru Port respectively on 7th August 2010, causing environmental distress of

historical significance from a huge oil spill and potentially toxic chemical reaction from containers on the former that was grounded on the shoals about eight kilometres beyond the coast of Mumbai. It was the response to this calamity – stabilizing of the vessel and recovery of the containers – that turned out to be cause for controversy. Her salvage is entrusted to M/s Smit Salvage BV, Netherlands and M/s Smit Singapore Pte Ltd and, for re-floating, it was but natural for several consignments of ‘salvage’ equipment to be delivered to consignee who, in the present circumstances, was none other than ‘Master of MSC Chitra’, c/o M/s JM Baxi & Co, Mumbai, for deployment through M/s MSC Mediterranean Shipping Company SA, bareboat charterer, acting for the salvors. It is common ground that these goods were transferred under escort from airport, and port, of arrival to the vessels – both of Indian flag and foreign flag – that were involved in adjusting the centre of gravity of the listed vessel and its restoration as conveyance.

2. Ship ‘stores’ for ‘foreign going vessel’, which is nothing but those not being ‘coastal vessel’, are ‘zero rated’ for duty liability, by special law of chapter XI ensconced in Customs Act, 1962 with specific substitutions of the normal under the authority of section 88 of Customs Act, 1962, to the extent conforming to

‘2. Definitions. – In this Act, unless the context otherwise requires

(38) “stores” means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting;’

xxxxx’

of Customs Act, 1962. There is no statutory controversy over goods landed in India being cleared for home consumption under section 47 of Customs Act, 1962, being warehoused under chapter IX of Customs Act, 1962 for clearance as such, or after manufacture, as provided for in section 68 of Customs Act, 1962, export as such, or after manufacture, as provided for in section 69 of Customs Act, 1962 and for ‘transit’ or ‘transshipment’, as provided for in section 86 of Customs Act, 1962, of stores. There is no factual controverting that the impugned goods did leave the shores of India or that these had literally ‘vanished’ by the time that the notices leading to the impugned orders came to be issued. Customs authorities were of the view that the ‘salvage equipment’, even as being beyond the sphere of chapter XI of Customs Act, had neither been exempt from duty nor exported and, therefore, liable to duty.

3. The detriments in the first of appeals¹ that are under challenge pertain to import of 27 consignments between August 2010 and

¹ [customs appeal nos. C/86527/2016, C/86528/2016, /86528/2016]

February 2011 through Air Cargo Complex (ACC), Chattrapati Shivaji Maharaj International Airport (CSMIA) on which the order² of Commissioner of Customs (General), Mumbai Zone-III fastened duty liability of ₹ 2,26,10,697 under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, directed confiscation of goods valued at ₹ 9,24,91,810.41 under section 111(n) and 111(o) of Customs Act, 1962 while offering redemption thereof under section 125 of Customs Act, 1962 on payment of fine of ₹1,00,00,000 and imposed penalty of like amount under section 114A of Customs Act, 1962 with penalty of ₹ 50,00,000 under section 112 of Customs Act, 1962 on M/s JM Baxi & Co besides penalties under section 112 and section 114AA of Customs Act, 1962 on S/Shri Vijayan Chrisostem D'souza and Anshu Sahai.

4. In the second set of appeals³, pertaining to nine consignments that landed at Jawaharlal Nehru Customs House (JNCH), Nhava Sheva between August 2010 and February 2011, impugned is order⁴ of Commissioner of Customs (NS- General), Jawaharlal Nehru Customs House, Nhava Sheva confirming demand of ₹ 2,50,68,363 under section 28 of Customs Act, 1962, along with applicable interest under section 28AA of Customs Act, 1962, confiscation of the goods valued at ₹ 10,26,09,460 under section 111(n) and 111(o) of Customs Act,

² [order-in-original no. CC/JPC/03/2015-16 ACC/ADHI (SA) dated 23rd March 2016]

³ [customs appeal nos. C/85880/2023, C/85156/2023, /85156/2023]

⁴ [order-in-original no. 48/2022-23/CC/NS-GEN/CAC/JNCH dated 1st November 2022]

1962 which were offered for redemption on payment of fine of ₹1,02,00,000 under section 125 of Customs Act, 1962, while imposing penalty of like amount under section 114A of Customs Act, 1962 on M/s JM Baxi & Co besides penalties under section 112 and section 114AA of Customs Act, 1962 on S/Shri Vijayan Chrisostem D'souza and Anshu Sahai.

5. Strangely, we note that both orders have sanctified recovery under section 28 of Customs Act, 1962 by recourse to

'12. Dutiable goods. -

(1) Except as 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.

xxxxx'

which, pertaining, as it does, to one of the two limbs of assessment under section 17/section 18 of Customs Act, 1962 – the other being valuation in terms of section 14 of Customs Act, 1962 – and, thereby offering recourse to section 28 of Customs Act, 1962 with section 47 of Customs Act, 1962 as the catalyst, implies that the dispute is about 'rate of duty' only. We also note that the first of the orders has invoked two penalising provisions against M/s JM Baxi & Co while the latter has declined to invoke section 112 of Customs Act, 1962 owing to

exclusion thereby in section 114A of Customs Act, 1962 which may have stemmed from amendment therein.

6. The contours of the controversy rest upon the proposition of Revenue that presumption of duty liability under Customs Act, 1962, subject to exemptions, inheres in goods landed in India and not exported therefrom. The appellants, *per contra*, suggest that the circumscribing effect of section 116 of Customs Act, 1962, along with section 21, section 22 and section 23 of Customs Act, 1962 invalidates the proposition to place the onus on customs authorities to evidence that goods were not taken out of India for duty liability to crystallise on goods originating from outside India. And it is between the thesis and antithesis that must look to placement of established facts on known law to resolve the dispute.

7. Learned Counsel for appellants submitted that transhipment was permitted against appropriate authorisations and that conditions stipulated had been conformed to as evident from cancellation of bonds. It was further submitted that the grounds marshalled in the impugned orders were mere speculation, assumption and presumption. Our attention was drawn to the certificate dated 1st March 2011 issued by the Salvage Master declaring receipt of goods in board MSC Chitra. Reliance was placed on the decision of the Tribunal in *Bharatkumar Jain v. Commissioner of Customs* [2007 (217) ELT 42 (T)] and in *Sedco*

Forex International Drilling Inc [2001 (135) ELT 625 (Tri-Mumbai)].

8. According to Learned Authorized Representative, the impugned goods did not conform to 'stores' for not having been declared as 'ship stores' but as 'salvage equipment' which do not find use in a vessel and that the title to section 86 of Customs Act, 1962 is restricted to 'transit and transshipment' which, in the context of 'stores', is to be deemed as those on board only. He further contended that MSC Chitra was not 'foreign going vessel' but 'wreck' only which, in terms of section 21 of Customs Act, 1962, is to be accorded treatment as goods and not as vessels. He placed reliance on the decision of the Hon'ble High Court of Bombay in *Khanbhai Essofbhai v. Union of India [1989 (41) ELT 239 (Bom)]*. He contended the impugned goods were deployed on vessels other than the distressed ship and that these were not 'foreign going vessels' entitled to exemption from duty on 'ship stores' in chapter XI of Customs Act, 1962 and that certificate of 'some captain', in his words, did not suffice for evincing placement on board MSC Chitra. Reliance was placed on statements recorded from the individual appellant and e-mail communications to submit that transshipment permits had been erroneously sought for and had been at the insistence of the other individual appellant.

9. We are constrained to note that the submissions of Learned Authorized Representative are on specific aspects of specific provisions

of Customs Act, 1962 such as ‘transhipment’ and ‘stores’ – both of which are compartmentalized in the context of reference – without taking into consideration that a vessel may, during voyage, require replenishment of ‘stores’ which, to the extent of carriage by another conveyance for whom it will not be ‘stores’, are goods till arrival and movement to the consuming vessel. These are procedural provisions subsidiary to the principal object of the statute, viz., levy and collection of duties of customs and to be deployed towards that end. To suggest that ‘stores’ are to be used only in a vessel is too simplistic a perspective of navigation and engineering required to keep a craft afloat and mobile on the oceans. The decision in *re Khanbhai Essofbhai* had nothing to do with Customs Act, 1962, except insofar as Bombay Port Trust (as it then was) had indicated the petitioner therein to be liable to discharge such duties of customs as may be levied from Bombay Port Trust on the vessel that once was having turned into a wreck, or the dispute before us inasmuch as the decision referred to section 21 of Customs Act, 1962 for lack of distinction between voluntary import of wreck *et al* and wreck occurring in the port of arrival. The reliance placed on the decision of the Tribunal in *Seamec Ltd v. Commissioner of Customs, Mumbai [2018 (364) ELT 440 (Tri-Mumbai)]* is misconstrued owing to subsequent developments therein having altered the contours of the outcome.

10. If the impugned goods were, indeed, exported, the dispute

evaporates with those, either through operation of section 51 of Customs Act, 1962 and subject to assessment under section 17 of Customs Act, 1962, having been placed beyond the liability jurisdiction or, by the legislated fiction of section 88 of Customs Act, 1962 deeming 'taken on board' to be at par with the other exception from liability jurisdiction. The case of Revenue is that neither eventuality arises as the impugned goods were used by other, including those ineligible for the privilege accorded to 'stores', vessels and had not been taken to a place outside India. One of the conditions subject to which goods are cleared, viz., prohibitions on import or export, is not in issue here. The impugned goods were neither subjected to duty liability under section 17 of Customs Act, 1962 as prelude to clearance for home nor warehoused, as afforded by chapter IX of Customs Act, 1962, for subsequent removal. On behalf of appellants, it was argued that neither were requisite inasmuch as the impugned goods, with appropriate permissions, had been moved beyond taxable jurisdiction by licit entry coupled with deployment on vessels whose entitlement to 'duty less' placement had neither been the subject of adjudicatory notice nor examined to place the confirmation of demand, on goods that had not been cleared for home consumption, beyond the pale of section 28 of Customs Act, 1962.

11. That the goods had not been subjected to duty liability is not in controversy. That the goods had been escorted out of respective

customs stations to place beyond is not in question even as their not being intended for foreign shores and, thereby, required to conform with

‘(18) “export”, with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(19) “export goods” means any goods which are to be taken out of India to a place outside India; ’

of section 2 of Customs Act, 1962 is not disputed. According to the adjudicating authority, acknowledgement of receipt by consignee and placement on board was necessary to qualify as ‘stores’ with lack thereof requiring process initiated by section 50 of Customs Act, 1962 to be taken to its logical conclusion to avoid the detriments proposed in the show cause notice.

12. This is not a case of goods manufactured in India and, as intended for export, not discharged liability to duties of central excise but, owing to inability to evince proof of export, now obliging the manufacturer to make good the foregone revenue; that emerges from a liability to levy attaching to the goods which stands assessed but, owing to intent of cross-border movement, not paid. This is not a case of importer having warehoused the goods and, thereby, not immediately obliged to discharge liability but, being unable to establish either availability of goods or evidence of export thereof, liable to make good the foregone amount on expiry of warehousing period which flows from assessment

effected on import. Contrarily, the consignments were not imported but transshipped, and though not landed as 'stores' for transfer as 'stores', with alteration of character from 'goods' to 'stores' which is not precluded by chapter XI of Customs Act, 1962. Moreover, though 'stores' are not excluded from the purview of assessment under section 17 of Customs Act, 1962, the special provision in chapter VIII of Customs Act, 1962.

13. The arrival of the impugned goods by conveyance from outside India with declared intent of movement by vessel to the site of grounding of MSC Chitra from the nearest port and the sanction of customs authority for the delivery thereof under escort renders that as 'transshipment' which, in terms of section 54 of Customs Act, 1962, affords 'zero rating' of duties and, therefore, not required to be processed in accordance with chapter VII of Customs Act, 1962. This raises the question of compliance with the procedure prescribed in section 54(1) of Customs Act, 1962. It is on record that the goods were, indeed, moved upon application presented to, and the permission granted by, the competent authority. The failure to file bill of transshipment may, therefore, be considered as mere technical neglect. Here, we are inclined to that view as the proposals in the show cause notice are not founded on a shred of evidence that the impugned goods found their way into the domestic territory of India and by intent of 'transshipment', made manifest from the consignee on record,

rendering coverage by the even more special provisioning in section 54(3) of Customs Act, 1962. Customs Act, 1962 does not envisage operation of levy of duty therein except on goods cleared for home consumption or statutorily deemed to have been removed for home consumption.

14. The shipment of the impugned goods from ‘customs station’ of arrival under escort, to the ‘accident site’ is not in dispute. Furthermore, by placement on board the transferring vessel, the acceptance thereof by the consignee, or by M/s JM Baxi & Co, for placement on board, and not as ‘export goods’, suffices, in the circumstances of salvage, for acknowledgement as ‘stores’ at that point in time. The case of Revenue turns on the factual matrix of grounded vessel not being bound for any place outside India, deployment of equipment on salvage craft that, too, were not bound for any place outside India and of not having been received the master of MSC Chitra as exclusion of purview of ‘stores’ and, therefore, liable to be charged to duties of customs. We note a fatal flaw in the first of the considerations that actuated the adjudicating authority inasmuch as ‘sauce for the goose is sauce for the gander’; discard of privilege of ‘stores’ owing to immobility of the vessel should have extended to discard of privilege of ‘export’ for all containers on board and no evidence of such rescinding of ‘let export order’ is before us. That a stranded vessel ceases to be conveyance of goods is a proposition supported by any legal authority and it is only on reversion

of conveyance to ‘goods’, and by the registration authority, that the cargo and ‘stores’ on board cease to be ‘exports’ with consequent retraction of clearance under section 51 of Customs Act, 1962. In any case, as far as ‘stores’ are concerned, application of section 88 of Customs Act, 1962 relegates territorial destination to irrelevance.

15. The other two of the considerations *supra* are linked. The destination of the impugned goods was, and as ‘stores’ for, MSC Chitra to be deployed for ‘refloating’ her. The consignee was ‘Master of MSC Chitra’; it appears that the adjudicating authorities considered that to be the person employed by the ship owner to traverse the seas which, in normal circumstances, would have been correct. However, under the laws of salvage, it is the salvage master who assumes command and all craft involved in the salvage are deemed to be extensions of the vessel under salvage. The receipt of the impugned goods and deployment thereof by the salvage master is not in dispute. Consequently, the positioning of the impugned goods on salvage crafts by the salvage master is not in breach of the prescriptions fastened on ‘stores’ by chapter XI of Customs Act, 1962.

16. It is not conducive for proper administration of the machinery and procedural provisions of Customs Act, 1962 to be carried out to the exclusion of the laws governing transit of the seas and, more so, as the bulk of engagement of customs authorities with international trade and

commerce is of sea cargo. Customs law has been, and continues to be, moulded within maritime laws which are of such hoary eminence as to predate ‘time immemorial’ even. Salvage and vessels in distress are a reality but it is only the rarity of occurrence that precluded inclusion in national legislation. To submit the re-floating of a stranded vessel to ‘hair splitting’ over enforced procedural pauses in a continuum of activity stretching from procurement of goods outside national jurisdiction to deployment outside national jurisdiction, with no evidence of prejudice to revenue, is to create a law to feed the insatiable appetite of tax monster. Such legislation is outside the competence of customs authorities who are entrusted with assessment and levy of duties on goods cleared for home consumption or deemed, by specific provision in law, to have been. Procedural prescriptions do not empower levy of duty on goods that pass through the national territory.

17. Notice for recovery of duty under section 28 of Customs Act, 1962 has been issued to M/s JM Baxi & Co, and by recourse to ingredients that are founded on alleged complicity on the part of importer. An importer, in circumstances of non-discharge, or short-payment, of duty liability is the ‘person chargeable to duty or interest’, the intended noticee under the empowerment of Customs Act, 1962. The records do not suggest that M/s JM Baxi & Co are so liable within the meaning of

‘(26) “importer”, in relation to any goods between their

importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be importer;”

in section 2 of Customs Act, 1962. The expression ‘person chargeable to duty’ is not defined in the statute and, even

‘Section 148. Liability of agent appointed by the person in charge of a conveyance.-

(1) Where this Act requires anything to be done by the person in charge of a conveyance, it may be done on his behalf by his agent.

(2) An agent appointed by the person in charge of a conveyance and any person who represents himself to any officer of customs as an agent of any such person in charge, and is accepted as such by that officer, shall be liable for the fulfilment in respect of the matter in question of all obligations imposed on such person in charge by or under this Act or any law for the time being in force, and to penalties and confiscations which may be incurred in respect of that matter.’

of Customs Act, 1962 does not enlarge the scope of the said expression to incorporate an agent, responsible only for fulfilling obligations imposed on the ‘person in charge of conveyance’, including confiscation and penalties thereof. In the absence of any fastening of obligations of levy or fiscal consequences on the principal, through empowerment under section 28 of Customs Act, 1962, it cannot be held that the noticee intended by law is the agent.

18. In the absence of any evidence that the impugned goods have

remained behind for domestic use, and without any reason to discard the transformation, by delivery and use thereof in salvage of ‘foreign going vessel’, of goods transshipped from aircrafts and vessels as ‘stores’ of MSC Chitra, as well as the authority under which the impugned goods traversed the national territory, the fastening of duty liability under section 28 of Customs Act, 1962 has no merit. There is, consequently, no cause for confiscation of the impugned goods under section 111(n) and section 111 (o) of Customs Act, 1962 in the light of all movements having been effected under the approval of customs authorities. With lack of empowerment to invoke section 28 of Customs Act, 1962, penalties under section 114A and section 114AA of Customs Act, 1962 are without authority of law. Appeals are allowed by setting aside the impugned orders.

(Order pronounced in the open court on 13/12/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)