

**Abc India Ltd. Vs. Union of India**

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**Court :** Delhi

**Decided On :** Aug-09-1991

**Reported in :** 1991CriLJ996; 1992(61)ELT205(Del); ILR1992Delhi261

**Judge :** Mahinder Narain and; P.N. Nag, JJ.

**Appeal No. :** Civil Writ Petition No. 187 of 1990

**Appellant :** Abc India Ltd.

**Respondent :** Union of India

**Advocate for Def. :** Mr. K.K., Manan, ; Mr. V. Bhushan Arya and ; Mr. Kamal Nijh

**Advocate for Pet/Ap. :** Mr V.K. Jain and; Mr. Baldev Atrey, Advs

**Judgement :**

**Mahinder Narain, J.**

1. ABC India Ltd., the petitioner in this writ petition, was carrying on business of public carriers, transportation and erection work.

2. Apparently the Government of Andhra Pradesh floated a tender of enquiry in connection with the transportation of a Monolithic Buddha statue. This was situated in the hillock where a granite rock was separated and rough-dressed in the quarry at Raigir, Nalgonda District, Andhra Pradesh. The Monolithic Buddha

statue was to be transported to the foreshore of Hussain Sagar Lake, behind Secretariat, Hyderabad. The statue was a large one having dimension of 8.3 M. x 3.66 M x 2.44 M. and approximately weighing 450 M.T. The said rough dressed Monolithic Buddha statue was to be transported to a distance of 60 Kms.

3. Tender enquiry also related to the transporting the finished Monolithic Buddha statue from the foreshore of Hussain Sagar lake behind the Secretariat, Hyderabad to the Gibraltar rock in the Hussain Sagar Lake and was to be erected on the Gibraltar rock. The petitioner responded to the tender enquiry and submitted a tender which was accepted by the Government of Andhra Pradesh by their Memorandum dated 15th October, 1987.

4. The petitioner says that the work of transportation of the Monolithic Buddha statue from Raigir to the Gibraltar rock was a highly technical work, and they need special equipment for transportation of the Monolithic Buddha statue from Raigir to Gibraltar rock behind the Secretariat, in the form of trailer specially designed to carry the statue of such weight to a distance of about 60 kms. Besides that, for the purpose of ensuring that the finished Monolithic Buddha statue, which was to be placed on the Gibraltar rock, special lifting and erection equipment, which was called 'Hydra-jack', was needed. According to the petitioner, the Hydra-jack was procured from M/s. Mammoet Transport, Holland, on hire, who provided not only the Hydra-jack, but also experts to handle the said equipment, and so manpower was given also on hire to the petitioner.

5. In connection with the said work awarded to the petitioner, the petitioner sought the aid of the Andhra Pradesh Government to obtain necessary permission for importing Hydra-jack equipment on hire basis. The assistance of the Government of India was also sought for that purpose enabling remittance of funds to M/s. Mammoet Transport Company in foreign exchange.

6. The petitioner says that the Chief Controller of Imports and Exports issued customs clearance permit for a period of two years. Permission was also required for re-exportation of equipment.

7. The period of two years initially granted was reduced to four months. The petitioner contended in the petition that erection Monolithic Buddha statue at Gibraltar rock was in public interest and, therefore, covered by Section 25 of the Customs Act, and on that account the petitioner was entitled to exemption from payment of customs duty. However, this point has not been pressed at the time of arguments. The petitioner stated that in the event of other contentions of the petitioner regarding 98% of the drawback allowance on the customs duty being accepted, he would not press this contention based upon Section 25 of the Customs Act.

8. It may be mentioned here that the Hydra-jack, for which permission to import was sought, and was actually imported, could not be used for the purpose of erection of Monolithic Buddha statue on the Gibraltar rock for the reason that the finished Monolithic Buddha statue could not reach Gibraltar rock as it sank in the Hussain Sagar Lake while it was being transported from the foreshore of Hussain Sagar Lake to the Gibraltar rock. The sinking of the Monolithic Buddha statue was widely reported in the National newspapers, there being no report to the contrary.

9. In the initial stages when this writ petition was filed, the petitioner wanted to have a complete exemption from payment of import duty and in that connection this Court restrained the respondents from recovering import duty. However, by orders of this court dated 25-1-1990, 22-2-1990 and 1-3-1990, monies were deposited by the petitioner with the Customs Authorities to make up the total amount of import duty claimed. The total amount which was deposited was Rs. 58,71,288. This deposit related to one of the two Bills of Entry submitted by the petitioner.

The case of the petitioner in that inasmuch as the Monolithic Buddha statue has sunk in Hussain Sagar Lake and could not, therefore, be put on the Gibraltar rock for being erected by using the Hydra-jack, and inasmuch as even today the said Monolithic Buddha statue is still in the waters of Hussain Sagar Lake, the petitioner having hired the Hydra-jack, had no option but to return the Hydra-jack by re-exporting back by shipping bill No. 85 dated 17-3-1990. This shipping bill was endorsed by the authorities concerned on 26-4-1990. A copy of the said

shipping bill has been filed in this court.

10. Once the Hydra-jack has been shipped back to M/s. Mammoet Transport, Holland, from whom it was hired, the petitioner made a claim for drawback to the Assistant Collector of Customs. Customs House, Kandla, vide their letter dated 7th May, 1990. The amount of drawback, which was claimed, was with respect of one bill whereas the duty was paid against two bills. The amount of drawback claimed was 98% of the total duty paid in respect of one bill, which was for a sum of Rs. 52,62,484. As there was some delay in the processing of the application for drawback made by the petitioner, the petitioner moved this court by way of C.M.P. 2279/90 seeking directions that the respondents should process the application for drawback. Vide order dated 10-5-1990, this Court directed that the application for drawback made by the petitioner be processed in accordance with the law. As a consequence of these directions of this Court, after processing the application for drawback, a sum of Rs. 44,72,407/- was paid back to the petitioner being 85% of the total import duty against one bill.

11. This petition, however, could not be disposed of on payment of the said 85% of drawback as the petitioner was seeking total exemption under Section 25(2) of the Customs Act, and in any case, if the contention regarding public interest postulated by Section 25 of the Customs Act failing, then its claim of 98% of the drawback on the single bill still remained to be adjudicated upon.

12. The question which needs to be determined at this stage is what is the amount of drawback which the petitioner is entitled to. For this purpose, it is necessary to refer to the provisions of Sections 74 and 75 of the Customs Act, which read as under :

'74. Drawback allowable on re-export of duty-paid goods. - (1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, are entered for export and the proper officer makes an order permitting clearance and loading of the goods for the exportation under Section 51 ninety eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback. If -

(a) the goods are identified to the satisfaction of the Assistant Collector of Customs as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof :

Provided that in any particular case of aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the official Gazette, fix.

(3) The Board may make regulations for the purpose of carrying out the provisions of this section and, in particular, such regulation may -

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established :

(b) specify the goods which shall be deemed to be not capable of being easily identified.

(4) For the purposes of this section -

(a) goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under Section 16;

(b) in the case of goods assessed to duty provisionally under Section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty.'

'75. Drawback on imported materials used in the manufacture of goods which are exported. - (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured in India being goods which have

been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under Section 51 by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act or any imported materials, of a class or description used in the manufacture of such goods, the Central Government may, by notification in the official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to the rules made under sub-section (2).

(1-A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured in India and exported outside India, then the Central Government may, by notification in the official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of sub-section (1), be deemed to be imported material.

(2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide -

(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture of the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture of export goods of that class or description either by manufacturers generally or by any particular manufacturer;

(b) for the production of such certificates, documents and other evidence in support of each claim of drawback may be necessary;

(c) for requiring the manufacturer to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Asstt. Collector of Customs to enable such authorised officer to inspect the process of manufacture and to verify by actual check or otherwise the statements made in support of the claim for drawback.'

13. There is a distinction between Section 74 and Section 75 of the Customs Act. Section 74 of the Customs Act comes into operation when articles are imported,

and thereafter re-exported, such articles being easily identifiable; and Section 75 comes into operation when 'imported materials are used in the manufacture of goods which are exported.'

14. Inasmuch as the Hydra-jack was an article, already manufactured, and was not material which was used in the manufacture of goods, in the instant case, there is no question of application of Section 75 of the Customs Act to the articles imported.

15. That would apply to this case is Section 74 of the Customs Act, which deals with the drawback of duty paid upon easily identifiable article upon re-export of duty paid goods.

16. In view of what has been set out above, it is clear that the Hydra-jack, which is identifiable as distinct goods, being special equipment to be used for the purpose of erection of different types of super-heavy articles, including an article like the Monolithic Buddha statue weighing 480 Metric Tons, was an easily identifiable goods within the meaning of Section 74 of the Customs Act, as such and the drawback of customs duty, allowable by the authorities concerned, had to be allowed in accordance with the provisions of Section 74 of the Customs Act.

17. In the counter-affidavit, the respondents have taken the stand that 85% of the customs duty was permissible as drawback, and was permitted in accordance with the law as the goods, i.e., Hydra-jack had been used in India. In that connection, during the course of arguments, reliance was placed by the respondents on the Notification No. 19-Customs dated 6th February, 1965, as amended by Notification No. 154-Customs dated 8 November 1969 and the Notification No. 45-Customs dated 2nd May, 1970. Reliance was placed on Entry No. 1 in the Table in which it was stated that where the length of period between the date of clearance for home consumption and the date when the goods are placed under customs control for export was not more than six months then the percentage of import duty to be paid as drawback was 85%.

18. The notifications relied upon by the respondents appear to be covered by sub-section (2) of Section 74 of the Customs Act. Admittedly, the Board has not framed

any Regulations postulated by Section 74(3) of the Customs Act.

19. As there was no regulations framed by the Board on record, counsel for the respondents has been asked to make inquiries as to whether any such regulations made by the Board in exercise of the powers conferred under Section 74 exist. Counsel for the respondents, after making inquiries, has stated before us that there were no regulations which have been framed by the Board.

20. In this situation, the respondents can rely upon the notification which permits them to pay drawback of 85% of customs duty paid only if they establish that the Hydra-jack has been used in India, as the said notification itself postulates use of goods in India, after their import.

21. At this stage it is necessary to state that the Hydra-jack has in fact not been used after its import. The respondents have not shown as anything on the basis of which we can say that the Hydra-jack had been used after its import into India. A brochure relating to Hydra-jack has been placed on record. The Hydra-jack appears to be a steel-frame structure which rises above the ground. It has also a steel frame horizontal beam which enables movements of article lifted in a horizontal plane, after or during the lifting of the article in the vertical plane. The lifting in the vertical plane is done by a number of lifting hydraulic jacks. This structure could not be used for lifting or erecting Monolithic Buddha statue as the Monolithic Buddha statue had sunk in the Hussain Sagar Lake before it reached Gibraltar rock where the Hydra-jack was to be used. This needs to be mentioned here because the respondents in counter-affidavit have stated the reason why the petitioner was not entitled to drawback of 98% being that the Hydra-jack had been used, and that in the shipping bill the petitioner had not declared that the Hydra-jack had not been used in India as required by law. In our view in the facts and circumstances of this case this requirement for declaration on the shipping bills is substantially complied with when the respondents (?) stated in the shipping bill that Hydra-jack 'was to be used'. These words to our mind clearly indicate that the Hydra-jack was not used in India.

22. The respondents have also relied upon the Rule 11 of Customs & Central Excise Duties Drawback Rules, 1971. These Rules do not have any application to

the present case inasmuch as they have been made by the Central Government in exercise of the powers under Section 75 of the Customs Act. The relevant applicable rules would be the ones made by the Board under Section 74 of the Customs Act and not by the Central Government. thereforee the said Rule 11 which requires that a statement of non-use of article in India be made on the shipping bill of export has no application to the instant case as Hydra-jack is an article covered under Section 74 of the Customs Act.

23. The petitioner has clearly stated in the petition that the Hydra-jack was not used at all. In this view of the matter, in the facts and circumstances of the case we also take notice of the truth of the fact of sinking of the Monolithic Buddha statue, on which account the Hydra-jack could not be used in India, and in view of the declaration in the shipping bill, through the Hydra-jack was to be used in India, we think there is substantial compliance with the requirements of the Notification 6-2-1965. Accordingly we hold that the petitioner is entitled to drawback at the rate of 98% in accordance with Section 74(1) of the Customs Act.

24. In this view of the matter, this petition partly succeeds as the petitioner has confined its claim before us to recover of 98% of the customs duty paid as drawback. Since 85% of the duty has already been received back as drawback only the balance 13% of the duty as drawback is payable. The balance 13% of the unpaid duty drawback amounts to Rs. 6,84,123/-. This amount be paid to the petitioner within one and a half month from today.

25. In the facts and circumstances of the case, we do not award any costs.