

Court No. - 5

Case :- WRIT TAX No. - 399 of 2021

Petitioner :- M/S Global International And Another

Respondent :- Union Of India And 3 Others

Counsel for Petitioner :- Anurag Mishra,Pragya Pandey

Counsel for Respondent :- A.S.G.I.,Ashok Singh,Pawan Kumar
Rao,Rajshekhar Srivastava

Hon'ble Piyush Agrawal,J.

1. Heard Ms. Pragya Pandey for the petitioner and Mr. Pawan Kumar Rao for respondent no. 4.

2. The present writ petition has been filed for the following relief:

“1. Issue an appropriate Writ / Order / Direction or a suitable direction to M/s Container Corporation of India Limited to immediately release the goods without charging any demurrage or rent charges.

2. To issue an appropriate Writ / Order / Direction to the respondent to not take any coercive action of sale or E- auction of the goods of the petitioner lying with them.”

3. Brief facts of the case as stated, are that the petitioner is a registered firm engaged in the business of import of goods. The petitioner has filed two self assessed bills of entry dated 26.6.2018 bearing No. 696529 and 6965298 at ICD Moradabad for import of goods i.e. General Air Conditioners Split. The petitioner has declared the value of the goods in question as 2,08,4861.36/- each and total value of Rs. 41,69,722.72/-. Thereafter the custom authorities re-assessed both the bills and redetermined the assemble value including the insurance of identical goods as Rs. 30,93,953/- each, total value of Rs. 61,87,905/-. On 13.11.2018 a show cause notice was issued to the petitioner demanding confiscation under the provisions of Section 111 (d) and 111(m) read with Section 118 of Customs Act, 1962 and also proposed penalty under the provisions of 112 (a) of the Customs Act,

1962. Thereafter the Joint Commissioner of Customs vide order dated 11.12.2018 has ordered for confiscation of the goods in question and imposed penalty of Rs. 4 lakhs. Feeling aggrieved to the said order, the petitioner has preferred an appeal before the Commissioner CGST (Appeals), NOIDA, who by the order dated 23.5.2019 has accepted the claim of the petitioner and set aside the order dated 11.12.2018. Thereafter a letter dated 16.9.2020 was issued to Terminal Manager for implementation of Notification No. 26/2009-CUS(NT) dated 17.3.2009 with regard to wave the terminal charges / detention charges and in pursuance thereof detention certificate was issued by the Superintendent of Custom on 17.9.2020 directing the Cargo Service Provider not to charge any rent or demurrage for the period of detention. However despite depositing duty as well as detention certified for waiver of rent/ demurrage charges and various letter / emails were also sent by the petitioner for a period from 30.9.2019 to 27.1.2020 to the Container Corporation of India Limited for waiver of detention charges, the Container Corporation of India Limited has rejected the waiver request vide email dated 1.12.2020 and intimated the petitioner on 25.1.2021 to pay the said charges in order to release the goods, failing which the goods will be sold through E-auction without any further notice to the petitioner. Hence the present writ petition.

4. Learned counsel for the petitioner has submitted that goods were imported after due declaration of its value but the custom authorities had re-determined the value of two bill of entries and same has been confirmed by the original order dated 11.12.2018. He submits that the petitioner has challenged the said order before the Commissioner, who has allowed the appeal by order dated 23.5.2019 and found that there is no reason for rejection of transaction value as declared by the petitioner and said order has attained finality. He submits that since the goods in question was detained by the custom authorities which was beyond his control the goods cannot be cleared therefore, the authorities cannot legally be charged any demurrage upon the petitioner.

5. In support of his contention, learned counsel for the petitioner has relied upon the Division Bench judgement of this Court in the case of **M/s**

Continental Carbon India Ltd. Vs. Union of India and others (Writ Tax No. 205 of 2015) decided on 14.0.2015. He further relied upon the judgement of Gujrat High Court in the case of **Special Civil Application NO. 10082 of 2020 Green Gold Timbers Pvt. Ltd. Vs. Commissioner of Customs, decided on 12.1.2022.** He further relied upon the decision of Madras High Court in the case of **Balaji Dekors Vs. Commr. Of Customs Commissionerate III 2017 SCC online Mad 37818 :(2017) 356 ELT 219.** He prays for allowing the writ petition.

6. *Per contra*, Mr. Rishi Kumar, learned A.C.S.C. has supported the impugned orders and submitted that until and unless the demurrage charges is paid by the petitioner, the goods cannot be released. He submits that goods imported by the petitioner were directed to be detained and merely issuance of certificate dated 17.6.2019 against both the bills of entries, the goods were not released as the petitioner did not paid the demurrage charges. He further submits that notification no. 26/2009 dated 17.3.2009 is of no aid to the petitioner as in view of the judgment of Supreme Court in the case of **Internation Airports Authority of India Vs. Grand Slam Internation and others, 1995 (77) ELT, 753**, the benefit cannot be given. He further relied upon the judgement of Apex Court in **Shipping Corporation of India Ltd. Vs. C.L. Jain Woolen Mills and others, AIR 2001 SC 1806** and **Trustee of Port of Madrass Vs. Nagavedu Lungi and Company 1995(3) SCC 730.** He further relied upon the latest judgement of Delhi High Court in the case of **Bhavik S. Thakkar Vs. Union of India and others, (W.P. C No. 982 of 2015 and C.M. No. 1736 of 2015 decided on 14.2.2023).** He prays for dismissing the writ petition.

7. After hearing learned counsel for the parties, the Court has perused the records.

8. It is not in dispute that petitioner has submitted two bill of entries bearing No. 696529 and 6965298 dated 26.6.2018 at ICD Moradabad for import of goods i.e. General Air Conditioners Split and has declared the value of the goods in question as Rs. 2,08,4861.36/- each and total value of Rs. 41,69,722.72/- which was revalued by the custom authorities as Rs. 30,93,953/- each and total

value of Rs. 61,87,905/-. Notices were issued on 13.11.2018 and thereafter order in original was passed imposing penalty of Rs. 4 lakh upon the petitioner against which the petitioner has filed an appeal before the Commissioner Custom and CGST (Appeal) NOIDA, which was allowed vide order dated 23.5.2019. The order of appellate authority has attained finality as the respondent authority did not challenge the said order. Thereafter detention certificate was issued on 17.9.2019 directing the authorities not to charge the rent or demurrage charge for the said period but vide e-mail dated 1.12.2020 rejected the waiver request of the petitioner.

9. It is not in dispute that goods were detained and re-valuation was done and after re-valuation the petitioner preferred an appeal which was decided in favour of the petitioner by the order dated 23.5.2019. This order has become final by which the disclosure made by the petitioner was treated to be correct and thereafter the petitioner deposited custom duty on the declared transaction value and to take release the goods. After deposit of the custom duty, the custom authorities issued detention certificate dated 17.9.2019 for both the bill of entries and directed the Container Corporation of India not to take any rent on the goods, a copy of the said detention certificate has been filed as Annexure no. 7 of the writ petition.

10. Since the issue in hand is not *res judicata* and the same has already been decided by the Division Bench of this Court in the case of **M/s Continental Carbon India Ltd. (*supra*)**, relevant paras of the same are quoted hereunder:-

“In the light of the aforesaid provisions, the contention of the learned counsel for the petitioner that the Customs Act does not provide any provision to levy any demurrage charges and, therefore, custodian, namely, respondent no.4 has no authority of law to levy demurrage charges under Section 45(2) of the Act is patently misconceived. We are of the opinion that in view of the provision of Section 45 of the Act read with the Regulation 2(b), 5 and 6 of the Regulations of 2009 the customs cargo service provider is responsible for providing storage facilities for the purpose of unloading imported goods and, consequently, is entitled to charge demurrage charges.

However, we are of the opinion that the custodian, namely, the service provider-respondent no.4 is not entitled to charge demurrage charges where the goods have been detained, seized or confiscated by the customs department, in view of the terms of condition of the appointment order of respondent no.4 read with Regulation 6(l) of the Regulations of 2009. Reliance by respondent no.4 on the

decision in the case of International Airports Authority of India (supra), Shipping Corporation of India (supra), Trustees of Port of Madras (supra) is misplaced, inasmuch as the said decisions are not applicable. At this stage, we may state that the International Airport Authority of India and Trustees of Port of Madras were charging demurrage charges on the basis of Rules and Regulations framed under the Act by which they were being governed. The Supreme Court in that scenario held that there was no embargo upon the custodian, namely International Airport Authority and Trustees of Port of Madras to recover demurrage charges under Regulation 2(g) of the Regulations framed under the Regulations of 1980 and the bye-laws framed under the Port Trust Act.

In the instant case, respondent no.4 has been appointed as the custodian under Section 45 of the Act read with Regulations of 2009. Clause 6(l) of the Regulations of 2009 prohibits the service provider, namely, respondent no.4 to charge demurrage charges on the goods seized or detained or confiscated by the customs department. We are, therefore, of the opinion that respondent no.4 had no authority of law to charge demurrage charges on the goods seized or detained or confiscated by the customs department.

The question which now arises is, whether the customs department had seized or detained or confiscated the imported goods which landed in the customs area. According to the stand of the custom department, they had neither seized nor detained nor confiscated the goods and had only referred the matter to the MOEF to seek clarification as to whether the goods so imported were hazardous or not. Upon receiving the clarification from the MOEF, the duty was assessed at the earliest opportune moment and, therefore, they are not responsible for any delay.

On the other hand, we find that the petitioner issued letters dated 16th September, 2014 and 19th September, 2014 requesting the Commissioner of Customs for clearance of the goods on provisional assessment against test bonds. No orders were passed by the customs authorities on these applications nor the goods were released on provisional assessment. The petitioner thereafter, filed an application under Section 49 of the Act for storage of the goods in the warehouse pending clearance. No orders were passed by the customs authorities on this application. The stand of the customs department is that provisional assessment is allowed only when classification of the goods or the valuation of the goods are under investigation but when there was a fear as to whether the goods are hazardous waste or otherwise, provisional assessment order could not be passed. The customs department also contended that on account of the bulk of liquid cargo, it was not feasible to exercise the option under Section 49 of the Act and permit the petitioner to store their goods in warehouse. Such reasonings given in paragraph 14 and 15 of the counter affidavit clearly appears to be an afterthought. In any case, it does not appear to be fair.

Even though, no malafides have been alleged and the petitioner has also not alleged that the goods were detained without any authority of law, we are of the opinion that there is always a presumption in favour of the authorities that it exercises its power in good faith and for public benefit. Admittedly, an application for provisional assessment or for storage of the goods in a warehouse was moved by the petitioner. If the request of the petitioner was not permissible, the said application should have been rejected.

Since no orders were passed on the petitioners application, the contention of the respondents as depicted in paragraph 14 and 15 of the counter affidavit clearly appears to be a afterthought.

By not passing an order, the competent authority was refusing to exercise its powers which has been granted to him under the Act. By not passing any order, the authority may not have acted malafidely but definitely, his action was not bonafide. It is common knowledge that demurrage charges are exorbitantly high as compared to the rates fixed under Section 63 of the Act where charges of public warehouse is far less. Demurrage charges are levied and are high in order to ensure quick clearance of the cargo from the customs area. They are always fixed in such a way that they would make it unprofitable for exporters/importers to use the customs area as a warehouse. It is further necessary to levy high rates of demurrage charges to avoid congestion of free movement of loading and unloading of the goods in the customs area. Consequently, permitting the cargo to remain in the customs area for months on the pretext of seeking a clarification from the MOEF with regard to the nature of the goods being hazardous or not appears to unjustified and arbitrary, especially when the petitioner made a specific application for shifting the goods to a warehouse in terms of Section 49 of the Act.

We are, therefore, of the opinion that by not passing any orders on the petitioners application for provisional assessment or by not passing any orders on the application of the petitioner under Section 49 of the Act for storage of the imported goods in a warehouse pending clearance would amount to detention of the goods. Goods unloaded in the customs area are kept under the direct control of the customs department and no goods can be removed either by the custodian or by the importer until the goods are cleared of customs duty. Section 34 of the Act clearly debars the importer from unloading goods in any other area except under the supervision of the customs authorities.

In the light of the aforesaid, it is not necessary to dwell upon the provisions of Section 49 of the Act and the impact of Section 63 of the Act. It is also not necessary for us to go into the question of bailor and bailee relationship between respondent no.4 with the shipping line in terms of Section 48 of the Act or the lien of goods by respondent no.4 in terms of Section 170 of the Contract Act.

We find that the goods were finally cleared by the custom authorities on 15th January, 2015. Consequently, we are of the opinion that respondent no.4 was not entitled to charge demurrage charges on the goods so detained by the customs authorities till 15th January, 2015. The petitioner is accordingly, granted relief to that extent and it would be open to the petitioner to clear the goods without payment of demurrage charges upto the period 15th January, 2015 subject to payment of other charges such as handling or demurrage charges leviable, if any, subsequent to the period 15th January, 2015 till the actual clearance. The writ petition is disposed of.

(emphasis supplied by this Court)

In the aforesaid case, the Court was of the opinion that the respondent was not entitled to charge any demurrage charge from the goods so detained by the custom authorities.

11. Further in the case of Green Gold Timbers Pvt. Ltd (supra) the Gujrat High Court has held as under:-

“5. Thus, the observations made by the Bombay High Court in paragraph-19 clinches the issue. The respondent no.3, as the customs cargo service provider as defined in regulation No.2(1)(b) of the Regulations, is not entitled in law to charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or any other authority as referred to above.

6. This position seems to have been further clarified by the Commissioner of Customs (Export) by way of a public notice No.26/2010 with the further clarification that the customs cargo service providers shall allow the goods on production of a certificate issued from the proper officer certifying such period of seizure or detention or confiscation without charging and collecting any rent or demurrage for such period.

7. On account of the contractual relationship if the respondent no.3 wants to recover any other dues from the writ applicant, it is open for the respondent no.3 to approach the appropriate forum for obtaining appropriate relief.

8. In view of the aforesaid, this writ-application succeeds and is hereby allowed.

9. The amount of Rs.7,64,934=00 recovered by the respondent no.3 towards the demurrage of the goods of the writ applicant shall be refunded within a period of four weeks from the date of receipt of the writ of this order.”

12. Further Madras High Court in the case of **Balaji Dekors (supra)** has held as under:-

“8. The second respondent, in no uncertain terms, has certified that the goods were detained by the SIIB from 2-12-2016 to 27-12-2016 and issued an order on 28-12-2016 that the custodian (third respondent) shall not charge rent or demurrage for goods under detention. Thus, the third respondent cannot interpret the said communication, as the Regulations clearly provide that the custodian cannot charge any rent or demurrage on the goods detained by the second respondent. However in the case of W.P. No. 6452 of 2017, which concerns, M/s. Calyx Container Terminals, goods in question have been removed on 6-1-2017. Therefore, a levy is sought to be made for the period from 28-12-2016 to 6-1-2017. In my considered view this is unreasonable because after the order was passed on 28-12-2016, effective steps have been taken by the petitioner to clear the cargo and it has been done in the shortest possible time on 6-1-2017. Therefore, the third respondent should waive the rent or demurrage on the goods for the entire period i.e., from 2-12-2016 till it was cleared on 6-1-2017. With regard to the Container Terminal, the third respondent in W.P. No. 6453 of 2017, namely, M/s. K. Steamship Agencies, it appears that they have given only 25% waiver. This action of the third respondent is contrary to the statutory regulation namely, Regulation No. 6(1) (1). The third respondent M/s. K. Steamship Agencies Pvt. Ltd., having not questioned the order passed by the second respondent, dated 28-12-2016, are bound by the order and they have to proceed in letter and spirit as per the said order. The question of now interpreting the order are extending partial relief is not permissible as the Regulation uses the expression “shall not charge any rent

or demurrage". This, man dates that the third respondent is prohibited from charging any rent or demur rage during the period of detention. This having been certified by the second re spondent, there is no escape from the rigour of Regulation No. 6(1)(1). Thus, the matter is not contractual, but it involves the implementation of a statutory regulation. Therefore, the writ petition filed by the petitioner is maintainable.

9. Insofar as M/s. K. Steamship Agencies Pvt. Ltd., is concerned, the cargo in two containers, have been cleared on 7-1-2017 and remaining two containers on 13-1-2017. As observed in respect of the other matters, after 28-12-2016, within a reasonable time, the containers have been removed. Admittedly, the petitioner is not responsible for detention of the container for the period from 2-12-2016. Therefore, the third respondent shall not be entitled to charge rent or demurrage on the said four containers till it was removed i.e., on 7-1-2017/13-1-2017.

10. For all the above reasons, the writ petitions are disposed of with a direction to the third respondent namely, M/s. Calyx Container Terminals, to waive the rent/demurrage on the goods which were detained at the instance of second respondent from 2-12-2016 till it was cleared on 6-1-2017. The third respondent in W.P. No. 6353 of 2017 is directed to waive the rent or demurrage on the goods detained by the second respondent from 2-12-2016 till 7-1-2017/13-1-2017, when the containers were cleared. The above direction shall be complied with within a period of two weeks from the date of receipt of a copy of this order and the respective third respondent shall ensure full and faithful compliance of the above direction. No costs."

13. Learned counsel for the respondent heavily relied upon the recent judgement of Delhi High Court in the case of **Bhavik S. Thakkar (supra)**. The case is of no help to the respondent as in the aforesaid case, the goods were seized and detained and at the time of confiscating the goods, time was granted to pay the dues but the same was not paid thereafter order was passed by the Settlement Commissioner imposing the penalty of Rs. 2 lakh and fine of Rs. 1 lakh in lieu of confiscation of imported goods. On the said premise, it was held that Settlement Commissioner is not the Court and the order was passed holding that the waiver cannot be granted to the parties therein.

14. However in the case in hand, the appellate court specifically passed the order in favour of the petitioner holding that the disclosed value was correct. The Supreme Court judgements are relied upon by the counsel for the respondents have already been considered in the case of M/s Continental Carbon India Limited (supra), wherein the Court has already distinguished the judgements as the same was not applicable in the facts of the case. Thus in the case in hand, the said judgements of the Apex Court are of no help to the

respondents. In view of the forgoing discussion as well as the law laid down by the Division Bench of this Court in the case of **M/s Continental Carbon India Ltd. (supra)**, the respondent authority cannot charge the demurrage charges, therefore, no demurrage charges can be charged or demanded from the petitioner.

15. Accordingly the petitioner is granted relief to the extent that it would be open for the petitioner to clear off the goods without payment of demurrage charges subject to payment of other charges subsequent to the period of 17.9.2020 till the date of actual clearing off the goods in question.

16. With the aforesaid observation, the writ petition is **disposed of**.

Order Date :- 22.12.2023

Rahul Dwivedi/-