(1997) 09 MAD CK 0056

In the Madras High Court

Case No : Writ Petition No''s. 4152 and 4171 of 1988

Abheychand Bhanaji APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 26-09-1997

Acts Referred:
Customs Act, 1962 — Section 144

Citation : (1998) 98 ELT 17

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : Shri N. Thiagarajan, for M. Ranka, for the Appellant; Shri R.G. Rajan, for the Respondent

Judgement

1. These Writ Petitions coming on for hearing on Tuesday the 9th day of September, 1997 and Thursday the 11th day of September, 1997 upon

perusing the petitions and the affidavits filed in support thereof and the order of this Court dated 12-4-1988 and made herein and the records

relevant to the prayers aforesaid on the file of the Respondents in both the petitions herein to the Writs made by the High Court and upon hearing

the arguments of Mr. N. Thiagarajan, for Mr. M. Ranka, Advocate for the petitioner in each of the petitions and of Mr. R. G. Rajan, Advocate for

the 3rd Respondent in both the petitions and the Respondents 1 and 2 not appearing in person or by the Advocates, and having stood over for

consideration till this day, the Court made the following order :

In W.P. No. 4152 of 1988, the petitioner prays for the issue of a Writ of Mandamus to call upon the respondent herein to issue Customs

Detection Certificate in respect of the subject goods entered in the Bill of Entry Retention No. 306/86 Import Department S. No. 1229/8-4-1986 for a period commencing from the date of arrival of the Cargo till the date of receipt of customs duty and consequently a Writ of Certiorarified

Mandamus to call for the records from the third respondent, quash the communication No. L-2/15676/86/T(C)/dated 9th October 1986, and

direct the respondent No. 3 to refund the excess amount collected by way of demurrage to the tune of Rs. 5,400/- vide import application No.

1509/133, dated 29-4-1986 to the petitioner.

2. In W.P. No. 4171 of 1988 the petitioner prays for the issue of a Writ of Mandamus calling upon the respondent No. 2 herein to issue detention

certificate in respect of the subject goods entered in the Bill of Entry Retention No. 306/86, Import Department S. No. 1330/8-4-1986 for a

period commencing from the date of arrival of the Cargo till the date of receipt of customs duty and consequently a Writ of Certiorarified

Mandamus calling for the records from the third respondent, quash the communications No. L/2/51/15677/87/T(C), dated 9th October 1986, and

direct the respondent No. 3 to refund the excess amount collected by way of demurrage to the tune of Rs. 13,075/- vide import application No.

1509/134, dated 29-5-1986 to the petitioner.

3. Excepting there is difference with respect to the particulars of bill of lading and reference as to the impugned communications, there are no other

differences. It is sufficient to set out the facts relating to one of the two Writ petitions.

4. Heard Mr. Thiagarajan, Counsel for petitioner in both the Writ petitions and Mr. R. G. Rajan appearing for the third respondent in both the Writ

petitions for Respondents 1 and 2 in both the Writ Petitions, originally Mr. P. Narasimhan, S.C.G.S.C. entered appearance, subsequently, Mr. V.

T. Gopal Senior Central Government Standing Counsel entered appearance on 5-111992. Mr. Ramakrishna Reddy, Additional Central

Government Standing Counsel entered appearance. On 11-9-1997, after the matter was partly heard, a representation was made by the Mr.

Venkatesan, Junior attached to Mr. Ramakrishna Reddy, Additional Central Government Standing Counsel that Mr. Ramakrishna Reddy is no

longer appearing in the matter and that the respondents 1 and 2 have taken steps to appear through some other Counsel. In the circumstances, by

order dated 9-9-1997, this Court directed the matter to be listed on 11-9-1997 and also to print the name of respondents 1 and 2 in the cause list.

5. On 11-9-1997, the Writ petitions were listed and in the cause list dated 11-9-1997, the respondents 1 and 2 have been shown. Further

arguments were heard on 11-9-1997. As no one had appeared on behalf of the respondents 1 and 2 in both the Writ petitions, this Court ordered

that the respondents 1 and 2 be called, on 11-9-1997, the names of respondents 1 and 2 were called thrice and as there was no representation

and as no one had appeared, this Court proceeded further with the matter. It is also to be pointed out that till date, no counter has been filed on

behalf of respondents 1 and 2 in both the Writ petitions.

6. This Court, taking into consideration of the subsequent developments and the nature of relief prayed for, is inclined to mould the relief as may be

warranted on the facts of the case, though the learned Counsel for the petitioners made an endorsement confining the reliefs claimed in the Writ

petitions.

7. The petitioner alleges that he imported a consignment 18 bales of white card board of Japanese origin under Bill of Lading No. YHMD 055/28-

2-1986 under R.E.P. license issued against F13 of Appendix of the current import policy applicable for the year 1986-87, which cargo as valued

at Rs. 61,510/-, that the vessel SANTOS III consisting of the above cargo had arrived Madras on 31-3-1986 and the petitioner presented the Bill

of Entry for home consumption on 31-3-1986 itself, but the same was received by the Import Department on 8-4-1986 under S. No. 1229.

8. The petitioner further alleges that the subject goods, namely white card board was correctly imported as per the specifications under R.E.P.

license and in terms of the current import policy, that similar consignments belonging to other importers were earlier cleared by the Customs

House, Madras under the same Import Policy, while in respect of the petitioners in both the writ petitions, the Cargo was unnecessarily detained in

Board''s Transit Sheds at the instance of the second respondent herein for verification and for complying with the formalities prescribed under the

Import Trade Control Formalities and that the samples were drawn by the Customs Department and sent for analysis.

9. The petitioner also alleges that the test report was received by the Appraising Department on 28-4-1986 and nothing incriminating was found,

that the respondents delayed the clearance for over a month, that ultimately, the goods were assessed on 28-5-1986 and customs duty was paid

accordingly on 28-5-1986, that the third respondent Port Trust allowed the petitioner to remove the Cargo only after the remittance of Rs. 5,400/-

towards demurrage charges and took delivery of the Cargo from the Port Trust, that the petitioner applied for detention Certificate in respect of

the said consignment with the Customs Department on 17-7-1986 and followed it up with number of reminders with a copy to the third

respondent and that the second respondent had not responded any of the communications.

10. The petitioner further states that the third respondent had refused to entertain the claim of the petitioner for refund of demurrage by its letter

dated 9-10-1986 on the ground that a detention certificate from the Customs Department was not furnished within time and the demurrage

collected is in order, that it is the bounded duty of the second respondent to issue detention certificate and for no fault on the part of the petitioner,

the petitioner had been compelled to pay the demurrage charges, which the petitioner had remitted under protest.

11. The learned Counsel for the petitioners referred to various statutory provisions of Customs Act as well as Major Port Trust Act and had

submitted that the petitioner had come before this Court as no action had been taken by the respondents to refund the excess collection of

demurrage charges, which collection according to the petitioner is arbitrary, in excess of jurisdiction and violative of the statutory provisions.

12. On behalf of the third respondent, a counter has been filed in both the writ petitions. The third respondent contended that after the expiry of

free days, for the goods demurrage charges started accruing and the Customs Department had issued detention certificate for the entire quantity

detained for analytical test for the period from 11-4-1986 to 28-4-1986 and for which, remission has already been given by the third respondent,

that however, the goods were cleared only on 30-5-1986 and hence, the third respondent had collected the proportionate demurrage charges.

13. It is further contended that for the duration of detention of goods by the Customs, free period is allowed and waiver of demurrage is being

accorded as per regulations framed in this respect, that as the detention certificate had not been issued for the entire period, there is every justification for the third respondent to collect the demurrage. It is further stated in the counter that such claim for refund should have been made

within the stipulated period and with the necessary detention certificate issued by the second respondent, that the third respondent is not liable to

refund the demurrage charges collected by it and even if the detention certificate is issued as on date, it would be beyond the period of limitation

and that the third respondent is not liable to refund any portion of the demurrage charges.

14. Learned Counsel for the petitioners vehemently contended that the inaction on the part of the second respondent is inordinate and it is nothing

but an arbitrary refusal. Learned Counsel further pointed out that the second respondent had neither sent a reply nor filed the counter in these writ

petitions and there is no justification for the respondent No. 2 to keep silent since 1988 onwards.

15. Mr. R. G. Rajan, learned Counsel appearing for the third respondent contended that only with respect to the days for which the detention

certificate has been issued, demurrage charges had been waived and for the period for which no dention certificate has been issued, the third

respondent has collected the demurrage charges which is according to the regulations.

16. Learned Counsel for the petitioners contended that no detention certificate at all has been issued and the contention of the third respondent in

this respect is a factual misconception. On that score, this Court directed the Counsel for third respondent to produce the original, import

application submitted on behalf of the writ petitioners in both the writ petitions. The Bill of Entry was placed before this Court with the enclosure of

detention certificate issued by the Assistant Collector of Customs.

17. The detention certificate issued by the second respondent shows that a certificate of detention has been issued covering the period from 11-4-

1986 to 28-4-1986 and as seen from the clearance, no demurrage has been charged for the said period viz., 11-4-1986 to 28-4-1986 and also a

remission has been given by the third respondent.

18. Thus, in both the cases, it has been established by the third respondent that a detention certificate has been issued by the second respondent

for a limited period 11-4-1986 to 28-4-1986 and the contention raised by the learned Counsel for the petitioner in this respect has to be rejected.

19. However, for the remaining period, no detention certificate has been issued by the second respondent and hence the third respondent had

collected the demurrage charges. In the absence of issuance of any detention certificate by the second respondent, it cannot be held that the third

respondent had collected excess demurrage charges. Also, in the absence of issuance of any detention certificate the petitioner cannot compel the

third respondent either to waive the demurrage charges or to refund the same.

20. Learned Counsel for the third respondent referred to a Division Bench Judgment of this Court in W.A. No. 488 of 1994 and contended that

the demurrage charges have been collected as per the scales of rates after allowing the free period. The Division Bench in W.A. No. 488 of 1994

on the facts of the said case, held that the Port Trust is justified in refusing to exercise its powers under proviso to Section 55 of the Major Port

Trust Act.

21. In both the Writ petitions, the learned Counsel for the petitioner ultimately confined himself and bought for a direction directing the second

respondent to issue the detention certificate for the remaining period, as according to the Writ petitioners, the consignment had been detained

under the orders of the second respondent and not for any default on the part of the petitioners.

22. The learned Counsel for the petitioners further contended that there is no reason or rhyme for the second respondent to issue a detention

certificate for the limited period viz., 11-4-1986 to 28-4-1986 and that the detention certificate should have been issued for the entire period. As

already stated, the Cargo arrived at Madras Port on 31-3-1986. The free days allowed expired on 5-4-1986. Only for the period from 11-4-

1986 to 28-4-1986, detention certificate has been issued, while only on 29-5-1986 orders have been issued by the second respondent permitting

the petitioner to clear the goods from the Port Trust Godown.

23. On 29-5-1986, the petitioner had paid the customs duty payable on the consignment and the goods were cleared from the third respondent''s

godown only on 30-5-1986. It is pointed out that for the periods from 1-4-1986 to 10-4-1986 and 29-4-1986 to 30-5-1986, the second

respondent ought to have granted the detention certificate and no reason has been assigned for the failure or refusal on the part of the second respondent in issuing a valid detention certificate.

24. For the demands and representations made, the second respondent had not sent a reply and even in the present writ petitions, no counter has been filed by the second respondent. In the absence of a counter affidavit or reply, this Court has to necessarily drew adverse inference and conclude that without any justification, the second respondent failed to issue the detention certificate in respect of the consignments in question for the periods from 1-4-1986 to 10-4-1986 and 29-4-1986 to 30-5-1986.

25. The silence on the part of the second respondent as well as the first respondent is fatal and there is every justification for this Court to draw adverse inference. The material papers placed before this Court would show that only on 29-5-1986, the petitioner had been called upon to remit the customs duty and clear the goods after the receipt of test report, though the Bill of Entry had been submitted even on the date of arrival of consignment. There has been no explanation from the second respondent as to why he had confined the detention certificate for a portion of the period namely 11-4-1986 to 28-4-1986.

26. As seen from the detention certificate issued u/s 144 of the Customs Act, 1962; the goods have been detained for the period from 1-4-1986 to 10-4-1986 as well as from 29-4-1986 to 30-5-1986, but no detention certificate has been issued for the entire period, even though nothing incriminating or illegal been found in the consignments imported by the petitioner.

27. It is obvious that the second respondent had detained the consignments for verification and for analytical test, which has also been conducted on the orders of the second respondent. Only on 29-5-1986 the second respondent had issued the detention certificate and that too for a limited period. There is no justification to deny the detention certificate for the remaining period.

28. The points involved in both the Writ petitions are identical and both the petitioners are entitled to identical reliefs. The respondents 1 and 2 have failed to produce the records despite service of rule nisi and have also absented themselves despite grant of time for appearance.

29. Though different Counsels entered appearance for respondents 1 and 2, they have not chosen either to file counter affidavit or to place the filed

or to argue the matter.

30. In the circumstances, this Court has no other alternative except to compel the second respondent to issue the detention certificate by issue of a

Writ of Mandamus.

31. Learned Counsel for the respondent No. 3 contended that even if the detention certificate is issued, as on date pursuant to the orders of this

Court, the petitioners will not be entitled to the relief as it would be beyond the period of six months. I am afraid, such a contention cannot be

advanced as the provision in the Major Port Trust Act enables the third respondent to consider identical requests, and for no fault on the part of

the petitioners in the writ petitions, they are made to suffer or sustain loss.

32. In the circumstances, this Court. directs the third respondent to consider the claims of the petitioners for refund of excess demurrage charges

collected by it on production of detention certificate that may he issued by the second respondent in compliance with the Mandamus, which is

being issued by this Court.

33. Though the petitioner on both the writ petitions have prayed for a relief as detailed above, this Court taking into consideration of grant of

detention Certificate for a portion of period of detention, is inclined to mould the relief and issue the following directions.

34. Hence, the second respondent is directed to issue detention certificate for the period commenting from 1-4-1986 to 30-5-1986 less the

detention certificate already issued for the period from 11-4-1986 to 28-4-1986 in respect of the petitioners'' consignments within eight weeks

from the date of communication of this order. On the second respondent issuing the detention certificate, the petitioners shall make an application

to the third respondent enclosing the detention certificate that may be issued by the second respondent for the remaining period of detention and

the third respondent shall consider the same and pass orders for refund of excess demurrage charges paid by the respective writ petitioners within

eight weeks from the date of, filing the application before the third respondent.

35. The writ petitions are ordered on the above terms. No costs.

