(1998) 07 MAD CK 0023

In the Madras High Court

Case No : Writ Petition No''s. 12413 to 12419 of 1990

Amar Ferro Metals (P) Ltd. APPELLANT

Vs

Madras Port Trust RESPONDENT

Date of Decision : 15-07-1998

Acts Referred:

Customs Act, 1962 — Section 111, 144, 17(3), 17(4)
Madras Port Trust Act, 1905 — Section 42
Madras Port Trust Rules — Rule 13, 15

Citation : (1999) 114 ELT 8

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : P.S. Raman, for the Appellant; R.G. Rajan and S. Sethuraman, A.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

K. Govindarajan, J.—In all these cases, the issue involved is one and the same and so it is dealt with in the common order.

2. The petitioners are doing business in various metal items and other allied products. In the course of their business they imported Brass Ash

Dross. On arrival of the vessel at Madras Port, the petitioners furnished all the necessary papers for clearance of the goods. The Officers of the

second respondent refused to permit the petitioners to clear the goods alleging that they are undervalued in the invoice. They opened the

consignment and inspected the contents. They took samples and forwarded the same for testing. They further directed to detain the goods. Show

Cause Notice was issued to the petitioners on various dates as to why the price should not be enhanced as determined, and why the goods should

not be confiscated u/s 111(m) of the Customs Act, 1962 and also subject the petitioners for penalty under the Customs Act. Except the petitioner

in W.P. No. 12414 of 1939, the other petitioners sent a detailed reply to the show cause notice. In the said reply the petitioners have stated that

there was not invoice.

3. Pursuant to the show cause notice a personal hearing was held and ultimately on 10-7-1989 the adjudication order was passed by the second

respondent and the same was signed by the proper officer on 24-8-1989, on which date the petitioners received the same. In the said order, the

second respondent accepting the case of the petitioners held that the department had made a mistake in taking the prime copper price at the time

of the shipment instead of going price of copper at the time of the petitioners contract and the calculation sheet relied on by the department is

mistake, and in view of the above findings, the second respondent dropped the proceedings regarding mis-declaration as well as penal action.

However, the second respondent enhanced the value of the goods marginally by adopting certain violation procedures. On receipt of the copy of

the adjudication order, the petitioners approached the second respondent to issue detention certificate so as to enable them to get waiver from levy

of demurrage by the first respondent. After appreciating the fact that the non-clearance of the goods from the Port is not due to the negligence of

the petitioners, the second respondent issued detention certificates to the effect that the goods were detained for the purpose of evaluating the

same u/s 17(3) and (4) of the Customs Act, during the period mentioned in the respective detention certificates.

4. It is not in dispute that the first respondent permitted waiver from payment of demurrage for the period during which the goods were under the

custody of the department for the purpose of analytical test. But, unfortunately, when the petitioners produced the detention certificates and sought

for waiver of demurrage for the period mentioned in the said certificates, the first respondent rejected the same in the order dated 23-3-1989. In

the said order it is stated as follows :-

No waiver is permissible for the period of detention u/s 17(3) and (4) of the Customs Act.

No other reason is given in the said order. Aggrieved against the same, the petitioners have filed the above writ petitions.

5. The learned counsel appearing for the petitioners has submitted that the goods were detained by the second respondent for the purpose of

evaluating the same u/s 17(3) and (4) of the Customs Act, during the relevant period. It is not due to the negligence of the petitioners but at the

instance of the second respondent. After appreciating the said position the second respondent issued detention certificates. The learned counsel on

this basis has submitted that once the detention certificate is issued, the obligation is on the part of the first respondent to give waiver of demurrage

of the said period especially Rule 13(a) of the Act provides such power.

6. The learned counsel appearing for the second respondent relying ion the decision in Board of Trustees of the Port of Bombay Vs. Indian Goods

Supplying Co., has submitted that even if the delay in clearing the goods, is not due to the negligence of the petitioners, they are liable to pay

demurrage, and so they cannot rely on the detention certificates issued by the second respondent for the purpose of claiming waiver.

7. Before going into the rival content that has been raised by the learned counsel on both sides, it is necessary to set out the relevant provisions

relating to the issue in question.

8. Rule 13(a) of the Scale of Rates of Madras Port Trust Board empowers the Port Trust to give waiver with respect to the waiver of demurrage,

which reads as follows :-

13. The following free periods are allowed in addition to the free periods applicable as per description of goods :-

(a) Periods during which goods are detained by the Collector of Customs for examination u/s 17(3) and (4) and for chemical test u/s 144 of the

Customs Act, 1962 other than the ordinary processes of appraisement and certified by the Collector of Customs to be not attributable to any fault

or negligence on the part of the Importers plus one working day. The Customs holidays will also be treated as free days in addition.

From the above-said rules, dealing with the Scales of Rates of demurrage charges specifically provides for payment of demurrage at a

concessional rate if the goods detained by the Customs Authorities for customs purposes. The said rule specifically says that periods during which

goods are detained by the Collector of Customs for examination u/s 17(3) and (4) of the Customs Act, 1975 and for chemical test and if detention certificate is issued by the Collector of Customs, no demurrage need be payable during that period treating the said period as free period. In the

present case, the detention certificates has been issued which will clearly prove that the goods were not cleared not due to the negligence of the

petitioners but only at the instance of the second respondent. That being the case, the case of the petitioners will squarely comes under Rule 15(a)

of the Scale of Rates of Madras Port Trust, framed u/s 42 of the Madras Port Trust Act.

9. The learned counsel appearing for the second respondent has relied on the decision of the Apex Court reported in Board of Trustees of the Port

of Bombay Vs. Indian Goods Supplying Co., , on the basis of the facts of that case, wherein it is held as follows :-

The position, therefore, is that even though the delay in clearing the goods was not due to the negligence of the importer for which he could be

held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law the validity of which cannot be

questioned. The claim cannot be resisted as there is no evidence that the delay was due to any act of the Port Trust or persons from whom the

Port Trust is responsible.

In that case, the waiver was claimed for the period during which the goods were detained for completing the Import Trade Control formalities by

the Customs Authorities. From the facts narrated in the above said decision, I am able to see that there is no provision in the Scale of Rates of

Bombay Port Trust to permit waiver for the period during which the goods were detained for the completing of the Trade Control formalities by

the Customs Authorities. In that circumstances the Apex Court held that even though there is no negligence on the part of the importer in not

clearing the goods, he cannot claim waiver. So, that decision cannot be made applicable to the facts of the present case. As stated earlier, in the

present case the waiver that has been claimed by the petitioners is contemplated under Rule 13(a)(b) of the Scale of Rates of the Madras Port

Trust.

10. The procedure of issuing detention certificate itself is formulated only to enable the importer to get waiver on the basis that the goods were

detained only at the instance of the Customs Authorities. The Apex Court in

Board of Trustees of the Port of Bombay Vs. Jai Hind Oil Mills Co.

and Others, , while dealing with the scope of detention certificate and the binding force of the same against the Port Trust has held as follows :-

It is, however, to be observed that before compelling the Customs Authorities to issue a detention certificate, the High Court should have issued

notice to the Port Trust which was vitally interested in securing its own interests as regards the demurrage charges recoverable by it under law. This

was necessary because on the production of the detention certificate issued by the Customs Authorities the Port Trust was under an obligation to

permit the clearance of the goods without payment of full demurrage charges.

In view of the above, the stand taken by the first respondent that the petitioners are not entitled for waiver of demurrage during the period the

goods were detained for examination u/s 17(3) and (4) of the Customs Act cannot be sustained.

11. In view of the above discussions, the petitioners are entitled for waiver of demurrage for the period mentioned in the detention certificates.

These Writ Petitions are accordingly allowed to that extent. No costs.

