(2010) 02 DEL CK 0191

In the Delhi High Court

Case No : Writ Petition (C) 1340 of 2008 and CMs 2605, 4286, 17301 of 2008

Appollo Paper Mills Ltd. APPELLANT

Vs

Central Warehousing Corporation and Others RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Citation : (2010) 174 ECR 259 : (2010) 257 ELT 331

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : P.S. Patwalia, Rudreshwar Singh, Amit Pawan, Anand Nandan and Kaushik Poddar, for the Appellant; Arun Bhardwaj K.K. Tyagi and Iftakhar Ahmed for R-1 to 3, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The Petitioner Appollo Paper Mills Ltd. (A PML) seeks the quashing of letters dated 29th November 2007 and 4th January 2008 issued by the Respondent No. 1 Central Warehousing Corporation (CWC) determining the storage charges payable by the A PM L till 30th November 2007 to be Rs. 3,00,88,800/-, and the charges as on 31st December 2007 as Rs. 3,54,55,561 /-

2. APML decided to set up a paper mill in Jhagadia, Gujarat and for that purpose imported a used paper mill plant and machinery. The consignment comprising 50 containers worth Rs. 1.67 crores reached the Navi Mumbai port on 18th January 1996. At that time there was a strike of stevedore agents, and therefore, the consignment could not be cleared. It was shifted to the warehouse of CWC gradually from 23rd January 1996 to 11th March 1996.

3. APML filed a Bill of Entry for the import with the customs authorities only on 25th March 1996 for bonded warehousing since storage at the port, where the ground rent was prohibitively high, was not a viable option. It is stated that nevertheless the consignment was stored at the warehouse of the CWC at CFS, Dronagiri where the ground rent was high, i.e., Rs. 9 lakhs per month as

compared to the rate of Rs. 30,000/- per month at the nearby warehouses. Since the customs authorities were delaying the assessment of the consignment, APML requested CWC to waive the demurrage charges in terms of Clause 59 of the General Terms & Conditions of storage.

4. The assessment was finally made by the customs authorities on 18th /19th June 1997. APML paid the entire duty as assessed on the same day. According to the Petitioner, the delay of 15 months in making the assessment was not on account of the Petitioner. The delay by the customs authorities had unnecessarily caused the demurrage to rise to exorbitant levels. The Petitioner sent another letter dated 21st July 1997 to CWC to waive of the demurrage with the further request that the consignment be shifted to a nearby warehouse where the charges were 30 times lower. These requests were not heeded to. Consequently the demurrage charges exceeded the value of the consignment and that too for no fault of APML. Consequently, APML filed Writ Petition (Civil) No. 5788 of 1997 in the High Court of Bombay. On 28th December 1997 while admitting the writ petition, the Bombay High Court directed the CWC to shift the 50 containers to the general warehouse at Ambernath on A PM L paying the necessary transportation charges. A PM L complied with this direction. Nevertheless the CWC shifted the 50 containers to the CWC at Kalamboli instead of the warehouse at Ambernath.

5. The above writ petition was finally disposed of by the Bombay High Court by a detailed judgment dated 28th October 2005. The Bombay High Court found that A PM L had not made out a case of shifting the liability for the warehouse charges to the central government. However, as regards the delay on the part of the CWC, the High Court expressed the opinion that it was "totally dissatisfied with the manner in which the CWC authorities have handled the present case". It noted that although the writ petition had been filed seven years earlier "till date the C.W.C. has not chosen to file its reply to the petition". This was the position even when the petition was heard on 14th October 2005. In the application filed by the CWC to enforce its demand, it did not deal with the allegations made against the CWC in the writ petition. It was accordingly observed that there was "total negligence on the part of the officials of the C.W.C." and that the conduct of its officers "in taking the matter so casually is highly deplorable".

6. The Bombay High Court found that the order dated 21st July 1997 passed by the CWC rejecting the application made by the APML for waiver of the demurrage charges "has been passed casually and in gross violation of the principles of natural justice". It was held that the failure on the part of the CWC to disclose reasons for declining the request for waiver was a gross abuse of the process of law and in contravention of the principles of natural justice. It was accordingly quashed and set aside. The High Court observed that the CWC had at the time of the admission of the writ petition voluntarily agreed to shift the goods at their warehouse at Ambernath subject to the Petitioner bearing the transportation charges. However, in breach of that order, CWC had shifted the goods to

Kalamboli and not Ambernath. Taking a serious view of the above act of the CWC in unilaterally and in breach of the order of the court shifting the goods to the Kalamboli where the charges were higher than the charges in Ambernath, the Bombay High Court passed the following order:

(a) The Customs authorities shall issue a detention certificate in respect of the goods imported by the petitioner for the period from the date of filing of bill of entry on May 25, 1996 till the assessment of the goods on June 9, 1997, within a period of two weeks from today.

(b) The order passed by the C.W.C. dated July 21, 1997 declining to waive the warehousing charges is quashed and set aside and the C.W.C. is directed to dispose of the waiver application of the petitioner by passing a fresh reasoned order in accordance with law after giving an opportunity of hearing to the petitioner as expeditiously as possible and in any event within a period of six weeks from today.

(c) In the event of the C.W.C. declining to waive the warehouse charges, then the C.W.C. shall compute the warehousing charges payable on the consignment upto December 22, 1997 after taking into consideration the detention certificate to be issued by the Customs authorities.

(d) As regards the warehousing charges for the period from December 23, 1997 till clearance of the goods, the C.W.C. shall compute the same at the rate applicable to the goods stored at the warehouse at Ambernath and not at the rate prevailing at the warehouse at Kalamboli.

(e) It is made clear that in the event of the C.W.C. declining to waive the warehousing charges, the liability to pay the above charges as computed by the C.W.C. shall be on the petitioner and not on the Customs authorities.

7. Following the above order, on 12th December 2005 the Customs authorities issued a detention certificate. Meanwhile with a view to correcting certain errors in the order dated 28th October 2005, the Petitioner filed a review petition which was disposed of by the Bombay High Court on 20th December 2005 in which it was clarified that the date on which the detention certificate was to be issued from should read as "25th March 1996 and not from 25th May 1996". The date of assessment was changed from June 9, 1997 to June 18 1997.

8. Aggrieved by the order to the extent that the High Court had not accepted the plea of APM L that the customs authorities should be made liable for the demurrage charges, APML filed SLP (Civil) Nos. 1881-82 of 2006 in the Supreme Court. That was ultimately dismissed on 7th November 2006. Soon thereafter on 10th November 2006 the APML through its counsel requested the CWC to hear the Petitioner so that necessary orders can be passed in compliance with the order dated 28th October 2005 of the Bombay High Court. The CWC informed APML that it would be heard on 19th February 2007. That was ultimately postponed to 2nd April 2007.

9. It is stated that the CWC thereafter took more than seven months to take a decision. By the letter dated 29th November 2007 it informed APML that the competent authority had decided to grant a waiver of the 50% and the total charges have been computed at Rs. 3,00,88,800/- provided the payment was made before 30th November 2007. It was clarified that there would be no waiver of insurance charges and service tax etc. The Petitioner states that this letter dated 29th November 2007 was dispatched only on 3rd December 2007 and received by APML on 7th December 2007 and therefore it was impossible to meet the deadline of 30th November 2007 as stipulated in the said letter. Moreover, APML disputed the calculation on the basis of which the total demurrage charges were computed as Rs. 3,00,88,800/-. It accordingly requested for a detailed computation. In reply more than a month letter on 4th January 2008, the CWC enclosed the basis of the computation. The Petitioner sent a letter dated 11th January 2008 to the CWC highlighting the errors in the computation. APML also sent a corrigendum to its letter dated 11th January 2008 on 21st January 2008. It was clarified that the CWC was liable to claim service tax from 16th August 2002 and not 11th May 2007.

10. When APML did not get any response, it filed the present petition on 18th February 2008. The prayers in this writ petition are for quashing of the aforementioned letters dated 29th November 2007 and 4th January 2008 and for a direction to the CWC to release the consignment of the APML upon payment of any legitimate amount.

11. While directing notice to issue in the present petition on 3rd March 2008, this Court directed, subject to the Petitioner depositing a sum of Rs. 50 lakhs with the CWC within a period of two weeks, there shall be a stay of the remaining demand raised in the letter dated 29th November 2007. The said amount has since been deposited by A PML with the Court.

12. On 18th August 2008 a detailed order was passed by the learned Single Judge of this Court in CM No. 2606 of 2008 filed by the Petitioner seeking interim relief. After perusing the counter affidavit filed by the CWC, and also setting out the facts and submissions, this Court issued the following directions:

I. The Petitioner shall furnish an unconditional bank guarantee of Rs. 1.00 crore in favour of the respondent. The said amount shall be kept alive until further orders of this Court in the present petition.

II. Within ten days from today, the petitioner shall also give an undertaking that upon deposit of the bank guarantee, it shall not sell its plant and machinery so released by the respondent.

III. Upon filing of the undertaking, the respondent shall release the plant and machinery of the petitioner.

IV. Upon release of its plant and machinery, the petitioner shall file an affidavit clearly stating the condition of the plant and machinery.

13. It is stated that the Petitioner did not furnish the bank guarantee of Rs. 1 crore as the value of the consignment itself was less as on that date. After hearing the case for some time on 11th January 2010, this Court passed the following order:

1. There was a positive direction in the judgment dated 28th October 2005 of a Division Bench of the Bombay High Court in Writ Petition (Civil) No. 5788 of 1997 inter alia to the following effect:

29....

(a)....

(b)....

(c)....

(d) As regards the warehousing charges for the period from December 23, 1997 till clearance of the goods, the C.W.C. shall compute the same at the rate applicable to the goods stored at the warehouse at Ambernath and not at the rate prevailing at the warehouse at Kalamboli.

2. Mr. Bhardwaj, the learned Senior Counsel appearing for the CWC seeks and is granted three days time to file an affidavit explaining how the amount now sought to be recovered from the Petitioner, has been calculated in compliance with the above directions.

3. List on 18th January, 2010. Order be given dasti to the counsel for the parties.

14. Consequent to the above order, the CWC filed an additional affidavit dated 15th January 2010.

15. This Court has heard the arguments of Mr. P.S. Patwalia, learned Senior counsel for the Petitioner and Mr. Arun Bhardwaj, learned Senior counsel appearing for the Respondent CWC.

16. At the outset, it is submitted that the bank guarantee was sought to be furnished on 5th December 2008 beyond the time limit fixed by this Court in its interim order dated 1 8th August 2008 and accordingly not accepted by CWC. The resultant position is that the consignment still remains in the warehouse of the CWC at Kalamboli.

17. Mr. Patwalia states that the industrial policy of the State of Himachal Pradesh where the proposed paper mill was to be set up is expiring in 2010 and therefore if the consignment cannot be made available now, the entire effort of the APML would be rendered futile. Therefore, the Petitioner has come forward to pay any legitimate amount that may be demanded by the CWC. It is submitted that the manner of computation was made clear by the order dated 28th October 2005 read with order dated 20th December 2005 passed by the Bombay High Court. For the detention period as specified by the Customs authorities, no demurrage charges would be payable. The CWC was required to pass a fresh order on

APML''s application for waiver. In the event of CWC declining to waive the warehousing charges, it was to compute the warehouse charges payable on the consignment "upto December 1997 after taking into consideration the detention certificate issued by the customs authorities". Therefore the period of waiver was in effect to be for the period 18th June 1997 till 22nd December 1997. As regards the warehouse charges for the period thereafter, i.e., from 23rd December 1997 till the clearance of the goods, the CWC was to compute the warehouse charges "as already applicable to the goods stored at the warehouse at A mbernath and not at the rate prevailing at the warehouse in Kalamboli". It was made clear that in the event of CWC declining to waive the warehouse charges, the liability to pay the above charges as computed by the CWC shall be on the Petitioner and not on the customs authorities". It is submitted that there are obvious errors in the calculations of the CWC since the manner of the computation of the charges payable by the Petitioner is at variance with the actual charges leviable for storage of goods at Ambernath,

18. Mr. Patwalia submits that one Hemant Overseas Pvt. Ltd. (HOPL) had written to the CWC asking it to submit a formal quotation for storage of 40 feet containers. By a further letter dated 3rd October 2007, the HOPL again asked the CWC to submit a formal quotation for storage of 40 ft. containers. On the same date, the CWC wrote to the Director, HOPL stating as under:

The Director

M/s.Hemant Overseas Private Ltd.

Emerald Isle-I, Flat No. 2002.

Royal Palms Aarey Milk Colony

Goregaon (East)

MUMBAI-400 066.

Sub: Storage of 40- Containers at CW, Ambernath - reg.

Sir,

We have for reference your letter dt. 3.10.2007 asking for the tariff in the open area for storage of 150 Nos. 40? containers. We feel that it may not be possible to carry out storage operations at 150 sq mtrs space as proposed by you to store 150 X 40? containers. However, the storage charges required for open space at CW, Ambernath for storage of 40? containers in the open will be @ Rs. 48/- + 5% per sq mtr per month if the open space available at the centre is taken on a continuous reservation basis for the actual carpet area of the selected storage space including operation of space, internal roads etc. as required for providing linkage to the storage site. The above rate is not inclusive of handling rates, insurance for the container and cargo and service tax and other government levies which will be payable extra. As per our calculations, the storage area required for the 150 X 40? containers will be roughly 6,000 sq mtrs.

The insurance charges are applicable at the rate of 5 paise per Rs. 100/- value of the stocks per month or part thereof. Service tax and education cess applicable as on date is 12.36% of the storage charges.

We are looking forward to your confirmation of your requirements.

19. A further letter was written on 4th October 2007 by the HOPL to the CWC stating that it was interested in finalizing the contract for storage of 40 ft. containers at Ambernath at Rs. 48/- + 5% per sq. m per month. Further the following clarifications were sought:

Clarifications Required:

1. We will be storing a single kind of material in all our containers and thus the movement of containers will not be much.

2. We are interested in stacking the containers one over the other and thus we will be stacking 3(three) containers in a column one over the other. Thus in total 3(three) containers will only occupy 30 sq mtr of ground area.

3. We will be storing the containers for three months fixed without any movement of containers and thus the extra area for movement is not at all required.

Thus I request you to kindly reconsider the area calculation of 6000 sq mtr in your above mentioned letter and advice the same on an urgent basis to facilitate us to confirm the requirement and looking for a long term business relationship.

Further I request you to further confirm if we will be allowed to stack containers one over the other (in total 3) and what will be the ground rent charges in case of stacking. Please confirm if the ground rate for one container will apply in case of stacking containers one over the other.

20. On the above letter, CWC''s official gave the following clarification:

(1) The ground rent mentioned in for the land area, irrespective of number of tiers of containers stacked.

(2) The total carpet area of the open space earmarked, including movement space is charges.

21. It is submitted that the above clarification makes it clear that the ground rent for the land area at Ambernath was applicable irrespective of the number of tiers of containers stacked.

22. According to the calculation sheet submitted by APML, the following amounts are payable by it:

For the period Days Particulars Amount (Rs.) 11.3.1996 to 3 Free period of 3 days NIL 18.6.1997 counted after the arrival of the full consignment under one Bill of Lading and Under One Invoice

15.3.1996 to 10 Rent of the Container 1,33,333.33 24.3.1996 Freight Station at the rate of Rs. 8,000 per month per container for 10 days for 50 containers

25.31 996 to 452 Period of Detention NIL 18.6.1996 Certificate- thus noamount payable

19.6.1996 to 186 Calculation of Warehousing 1,50,460.60 22.12.1997 charges in the rates in Ambernath Warehouse at the rate of Rs. 48.00 per square metres per month

2312.1997 18.1 .2010 4,409 Calculation of Warehousing 35,66,563.55 charges in the rates in Ambernath Warehouse at the rate of Rs. 48.00 per square metres per month

Waiver at rate of 50% as 17,83,281.78 per the order dated 29th November 2007 Insurance Charges 13,11,519.00 Service Tax Charges (Rounded up) 2,00,000.00

Grand Total 35,78,594.71

23. Mr. Arun Bhardwaj, the learned Senior counsel for the CWC in explaining the CWC''s calculation sheets (according to which APML has to pay Rs. 2.03 crores) refers to the CWC''s additional affidavit where it is first contended that the waiver was conditional upon the payment being made on or before 30th November 2007 which decision was informed telephonically to the Petitioner on 12th November 2007. Since this deadline was crossed, the A PML was required to pay the storage charges. Further it is stated that worldwide, containers are always charged on per container basis and that the amount of storage charges as far as CFS is concerned, have been calculated in terms of the prevailing circulars. Since the Petitioner had itself prayed before the Bombay High Court [in prayer Clause (d) (ii) of its writ petition] for shifting of the consignment to the warehouse at Ambernath at Rs. 100/- per container per day, the calculation was made on that basis. It is submitted that Kalamboli was a Container Freight Station (CFS) meant for handling of containers, and for handling the containers, Reach Stackers worth Rs. 2 to 4 crores were required and therefore it had been decided to shift the containers to Kalamboli instead of Ambernath. It is stated that general warehouses are not designed and meant for storage and handling of containers. It is stated that by the circular dated 2nd April 1996 the storage charges at Kalamboli after 30 days, was Rs. 660/- per 40? container per day. This was revised to Rs. 500/- per 40? container per day by its letter dated 29th January 2004. By a further letter dated 17th September 2008 it was revised to Rs. 600/- per day. It is maintained that the charges were calculated correctly. Further the charges are calculated on per sq. m. basis in terms of other circulars. Consequently it is maintained that as far as the period post-31st December 2007 is concerned, the CWC was entitled to storage charges "at the prevailing rates of CFS, Kalamboli where Rs. 600 per 40? container per day are being charged".

24. With particular reference to Circular dated 3rd March 2005 written by the

CWC to all its regional offices, it is stated that storages charges for open warehousing spaces had to be calculated by using the following formula:

1) 60% of the covered area rates in general warehousing segment and export warehouses attached to CFSs/ICDs and;

2) 75% of the covered area rates in respect of public bonded open public bonded (although this office has also fixed storage charges for open public bonded warehouses on net area basis which could be applied to avoid calculation errors).

On the above basis it is submitted that the demand raised by the CWC in the aforementioned letters is perfectly justified.

25. This Court has considered the above submissions. It is not in dispute that the basis for the calculations for storage charges payable by the APML has to be the order dated 28th October 2005 of the Bombay High Court as further corrected by the order dated 20th December 2005. It is not open to the CWC to deviate from the specific directions issued in para 29 of the judgment dated 20th December 2005 passed by the Bombay High Court, since that judgment has attained finality with the dismissal by the Supreme Court of the SLP filed against the judgment by APML.

26. Although it is sought to be contended by the CWC that it has not deviated from that order, it appears to this Court that what the CWC has calculated now as being due as storage charges from APM L is not consistent with that order. The calculations by the CWC includes storage charges for the period from 23.1.1996 till 24.3.1996 whereas the computation in terms of the judgment of the Bombay High Court was to begin from 15th March 1996 (after giving three days? "free period" after the complete consignment was shifted from Navi Mumbai port to CWC''s warehouse). APML filed its Bill of Entry on 25th March 1996 and therefore till then it was required to pay rent. However for the period from 25th March 1996 till 18th June 1997 when the assessment was made, APML was not liable to pay storage charges as this was the period, which according to the judgment of the Bombay High Court was to be covered by the detention certificate. However, CWC has in its calculations computed storage charges for the period from 25th March to 24th May 2006 and again from 10th to 18th June 1997.

27. The next phase is from 18th June 1997 till 22nd December 1997 for which period the Petitioner''s request for grant of waiver had to be considered. Strangely the decision to grant waiver of 50% was given and communicated to APML only by a letter dated 29th November 2007 which was received by it on 7th December 2007. There is merit in the contention of the learned Senior counsel for the Petitioner that the said letter set an impossible time target of payment having made by 30th November 2007 when in fact the letter was itself dispatched only on 3rd December 2007. In any event the CWC has decided to grant 50% waiver. That cannot now sought to be rescinded only because the Petitioner did not make the payment by 30th November 2007 since the letter

itself was dispatched later and received by the APML on 7th December 2007. However, in its calculation, the CWC has not accounted for the waiver and this has further inflated its figures.

28. We come to now third aspect of the charges payable from December 1997 till the time of clearance. CWC does not deny that it has not strictly applied the prevailing rates at Ambernath notwithstanding that the Bombay High Court left this matter in no manner of doubt in its judgment dated 28th October 2005. It is, therefore, not open to the CWC to now argue that it is justified in levying the rates as applicable in CWC''s warehouse at Kalamboli. As regards the contention of CWC that the APML itself had agreed to the charging of Rs. 100/- per container, it is pointed out by the learned Senior counsel for the petitioner that it had filed an application seeking an amendment to the main writ petition filed in the Bombay High Court on this aspect. Be that as it may, it is the operative portion of the order dated 28th October 2005 of the Bombay High Court that really matters. That order is very clear that the rates will be those charged at Ambernath and not Kalamboli.

29. The next issue concerns the manner in which the CWC has applied and calculated the storage charges by purportedly applying the Ambernath rates. Incidentally, this came about during the hearing and in the form of the additional affidavit of the CWC. There is no answer by the CWC to the correspondence exchanged between HOPL and the CWC which brings out the applicable rates at Ambernath. The CWC cannot be heard to treat the case of the Petitioner differently from those whose goods are stored at Ambernath particularly when the Bombay High Court directed it to pay the storage charges payable on the basis of the rates prevailing at Ambernath.

30. The Petitioner has placed on record the relevant circulars which show the revised rates of storage charges. Going by this it appears to this Court that the calculations given by the CWC are far beyond what was permitted by the Bombay High Court. Instead of applying its own circulars and in light of the judgment of the Bombay High Court, the CWC has added all kinds of charges to justify its demand. If the CWC had any further clarification to seek in this regard, it could have easily applied to the Bombay High Court. This it did not choose to do.

31. Mr. Bhardwaj referred to the judgments of the Supreme Court in Board of Trustees of the Port of Bombay Vs. Indian Goods Supplying Co., ; International Airports Authority of India and Others Vs. Grand Slam International and Others, and Trustees of the Port of Madras through its Chairman Vs. M/s. K.P.V. Sheikh of Mohd. Rowther and Co. Pvt. Ltd. and another, and urged that even if the unjustified detention of the imported goods resulted in incurring demurrage, the liability to pay the warehousing charges would be only on the consignee. This Court finds that the above decisions turned on their own facts. As far as the present case is concerned, the Bombay High Court has considered the issues concerning liability of the respective parties and its judgment is final and binding on the parties. It is not open for the CWC now to seek to fasten a liability on

APML which is beyond the scope of the judgment of the Bombay High Court.

32. There is no satisfactory explanation given by the CWC for the delay in complying with the directions of the Bombay High Court. The CWC perhaps knows best that the longer the goods remain in its warehouse, the higher the opportunity costs lost to it. The longer the CWC takes to compute and communicate the storage charges to the consignee, the longer the space in its warehouse remains occupied and is unavailable for the other consignments. CWC''s inaction in the instant case has resulted in severely prejudicing not only APML but CWC itself. The adverse remarks of the Bombay High Court consequent upon its finding of the conduct of the officers of the CWC has obviously not spurred them to act any quicker thereafter.

33. In the considered view of this Court, the calculation as submitted by APML of the storage charges due (as enclosed with its written synopsis dated 25th January 2010) is consistent with the judgment of the Bombay High Court and merits acceptance. Accordingly the impugned letters dated 29th November 2007 and 4th January 2008 of the CWC are hereby quashed. However, APML will update the figures as calculated by it till 28th February 2010 and submit those calculations to the CWC within one week from today. APML has already deposited with the CWC a sum of Rs. 50 lakhs pursuant to the interim order dated 3rd March 2008. After deducting the amount due to the CWC as calculated by APML, CWC will refund the balance to APML within two weeks thereafter. The CWC will simultaneously without delay release the consignment to the Petitioner.

34. The writ petition is allowed with the above directions with costs of Rs. 25,000/- which will be paid by CWC to APML within three weeks. All pending applications stand disposed of.