
(2015) 10 AHC CK 0156

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 205 of 2015

Continental Carbon India Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Contract Act, 1872 — Section 170

Customs Act, 1962 — Section 2(11), 2(43), 30, 33, 34

International Airports Authority Act, 1971 — Section 37

Citation : (2016) 2 ADJ 173 : (2016) 36 GSTR 302

Hon'ble Judges : Tarun Agarwala and Surya Prakash Kesarwani, JJ.

Bench : Division Bench

Final Decision : Disposed Off

Judgement

Tarun Agarwala, J.—The petitioner is a company engaged in the manufacture and sale of "Carbon Black" from its unit situate at Ghaziabad. The raw material for manufacturing carbon is "Carbon Black Feed Stock" (CBFC), which is classifiable under the Customs Tariff Act, 1975. The petitioner imported 2296.50 metric tonnes of CBFC from M/s. Koppers Carbon and Chemical Ltd. from China through three invoice bills. These goods were imported in 91 ISO containers belonging to M/s. Fourcee Infrastructure Equipment Pvt. Ltd. of Mumbai. In accordance with the provision of Section 46 of the Customs Act, 1962 (hereinafter referred to as the Act) the consignment arrived at Inland Container Division (ICD) at Dadri on 28th June, 2014, 6th September, 2014, 8th September, 2014 and 9th September, 2014. The petitioner alleges that the Deputy Commissioner of Customs, Noida-respondent No. 3 detained the goods and did not clear them nor levied any customs duty and, on the other hand, sent the sample for a live test to Central Revenue Control Laboratory, New Delhi (CRCL) on 6th September, 2014. Since the testing of the sample was expected to take some time, the petitioner vide letters dated 16th September, 2014 and 19th September, 2014 requested the Commissioner of Customs, Noida and the Deputy Commissioner of Customs, Noida-respondent Nos. 2 and 3 respectively praying for clearance of

the goods on provisional assessment against test bonds as per the instructions issued by the Central Board of Customs. The petitioner alleges that no orders were passed on these applications nor goods were released on provisional assessment. The petitioner, thereafter, filed an application dated 22nd September, 2014 under Section 49 of the Act for storage of imported goods in a warehouse pending clearance. No orders was passed by respondent No. 3 on this application. In the meanwhile, CRCL submitted its report indicating that the goods, which was sought to be imported were hazardous in nature as it contained waste constituents. Based on this report, respondent No. 3 directed the petitioner to obtain a no objection certificate from the Ministry of Environment and Forest (MOEF). The petitioner accordingly, approached the MOEF and eventually the MOEF issued a letter dated 15th December, 2014 indicating that the goods does not come under the category of hazardous under the Hazardous Waste (Management, Handling and Trans boundary Movement) Rules, 2008 (hereinafter referred to as the Rules of 2008). In spite of this letter being issued, respondent No. 3 sought further clarification with regard to the goods being hazardous in nature. The MOEF vide their letter dated 29th December, 2014 again informed respondent No. 3 that the goods imported by the petitioner was not hazardous and that the provisions of the Rules of 2008 were not attracted.

2. Based on the aforesaid instructions issued by the MOEF dated 29th December, 2014, the custom authorities assessed the imported the goods of the petitioner on 6th January, 2015. On the basis of this assessment, the petitioner deposited the customs duty at the appropriate rate on 7th January, 2015 and 9th January, 2015. On 15th January, 2015 the customs authorities permitted clearance of the goods by putting a seal on the invoice bill as "imported detached" meaning thereby that the goods could be cleared by the importer. According to the petitioner, this was a delivery order issued by the custom authorities. However, based on this, the petitioner approached respondent No. 4-Albatross Inland Ports Pvt. Ltd., which is the "customs cargo service provider" contemplated under Section 45 of the Act read with Handling of Cargo in Customs Areas Regulations, 2009 (hereinafter referred to as the Regulations of 2009) for release of the goods. The said respondent demanded demurrage charges amounting to Rs. 7,67,04,408/-. The petitioner applied for waiver of the demurrage charges. The customs authorities directed respondent No. 4 to consider the request of the importer, namely, the petitioner favourably citing that as the consignment was held up for clarification from the MOEF. Based on the petitioner's application, respondent No. 4 sent an email on 27th January, 2015 to the petitioner indicating that they have agreed to waive 60% of the demurrage charges subject to the condition that the payment should be made within 15 days. However, the said respondent issued an invoice on 28th January, 2015 formally raising a demand of Rs. 7.60 crores. Since the petitioner refused to pay demurrage charges contending that the same was not payable as there was no fault on their part, the petitioner, accordingly, filed the present writ petition in March, 2015

praying for the following reliefs:

"A. Issue a writ, order or direction in the nature of mandamus commanding Respondents No. 2 & 3 to ensure release of imported goods namely Carbon Black Feed Stock imported against Bill of Entry No. 6572055 dated 27.8.2014, 6595305 dated 30.8.2014 and 6595308 dated 30.8.2014, without demand/ payment of any amount by the Petitioner towards demurrage charges demanded by Respondent No. 4 for the period during which the imported goods remained under detention pending examination by Respondent No. 3, the custody of goods having been given to Respondent No. 4, solely for the convenience of Respondent No. 3 without any agreement with the Petitioner;

B. Issue an appropriate writ, order or direction directing the Respondents No. 2 & 3 to compensate the Petitioner with an amount of Rs. 2,02,05,640/- which is quantified on the basis of container detention charges of Rs. 2,02,05,640/- demanded by the owner of the 91 ISO containers i.e. M/s. Fourcee Infrastructure Equipments Pvt. Ltd., 431, Laxmi Mall, Laxmi Industrial Estate, New Link Road, Andheri West, Mumbai, on account of detention of 91 ISO containers containing the impugned goods by Respondent No. 3;

C. In the event, this Hon"ble Court is pleased, not to grant Relief A, then an appropriate writ, order or direction be issued directing the Respondents No. 2 & 3 to additionally compensate the Petitioner with an amount of Rs. 7,67,04,408/-, which is quantified on the basis of demurrage charges of Rs. 7,67,04,408/- demanded by Respondent No. 4 for the period during which the imported goods were detained for examination by Respondent No. 3;

D. Issue any other writ, order or direction, which this Hon"ble Court deems fit in the facts and circumstances of the case;

E. Award costs to the Petitioner."

3. At the time of hearing the petitioner has confined his relief to prayer A and C and submitted that he does not wish to press relief B. The petitioner in a nutshell has prayed that he is not liable to pay demurrage charges to respondent No. 4 and in the alternative, if demurrage charges has to be paid to respondent No. 4, the same should be paid by the customs authorities and not by the petitioner.

4. In this backdrop, we have heard Sri S.D. Singh, the learned Senior Counsel assisted by Sri Nishant Mishra, the learned counsel for the petitioner, Sri B.K.S. Raghuvanshi, the learned counsel for the Custom Department and Sri A.K. Verma, the learned counsel along with Sri Rajiv Joshi and Sri Siddharth Yadav, the learned counsels for respondent No. 4.

5. The learned Senior Counsel contended that the demand of demurrage charges is completely without authority of law, inasmuch as the Customs Act or the Rules and Regulations framed therein does not provide any provision for payment of demurrage by the importer for the period during which the imported goods were detained for examination by the custom authorities in the custom area. It was

contended that Regulation 6(1) of the Regulations of 2009 bars respondent No. 4 from demanding demurrage charges on the goods that was detained by the customs authorities. It was also contended in the alternative that in view of the provision of Section 49 , no demurrage is payable by the petitioner.

6. On the other hand, Sri B.K.S. Raghuvanshi, the learned counsel for the customs department contended that the goods in question were neither seized nor detained nor confiscated by the custom authorities and that before clearance they only sought clarification from the MOEF as to whether the goods were hazardous in nature. It was submitted that immediately upon receiving the clarification, the duty was assessed and the goods were detached and the importer was permitted to remove the goods. The learned counsel contended that they have no concern with the matter with regard to levy of demurrage charges and that the matter is between the petitioner and respondent No. 4.

7. Sri A.K. Verma, the learned counsel for the respondent No. 4 contended that respondent No. 4 is entitled to charge demurrage from the importer, namely, the petitioner and the charging section is Section 45 of the Act. It was contended that the respondent is the Customs Cargo Service Provider and under clause 5 of the Regulations of 2009, the respondents has provided various facilities. The learned counsel contended that the moment the goods lands in their customs area, the same is under their supervision till the goods are cleared and, consequently, demurrage charges are payable after the expiry of free period, which in the instant case is, 7 days from the date of the landing of the goods in the customs area. The learned counsel contended that after paying the duty, the importer, namely, the petitioner has to take the delivery order from the shipping line or get the invoices bill endorsed in their favour and only then the goods could be cleared. So long as the delivery order is not taken from the shipping line, the relationship of the said respondent with the shipping line is one of bailor and bailee, which relationship continues till the delivery order is given to the importer or the invoice bills are endorsed in favour of the importer. The learned counsel contended that in the instant case, the delivery order or the endorsed invoices have not been placed before the said respondent till date and, consequently, the goods cannot be delivered to the petitioner, quite apart from the fact that the goods can only be cleared upon payment of handling charges, other charges and demurrage charges.

8. Before proceeding, it would be appropriate to refer to a few provisions of the Customs Act. The custom authorities exercise their powers under the provisions of the Customs Act. Section 2(11) of the Act defines a "customs area", namely, the area of a customs station and includes any area in which imported goods or exported goods are ordinarily kept before clearance by the customs authorities. Section 8 of the Act empowers the Collector of Customs to approve a proper place in any customs port or customs airport or coastal port for the unloading and loading of goods and specify the limits of the customs area. Section 33 of the Act prohibits unloading of imported goods at any place other than the place

approved under Section 8(a) of the Act. Section 34 of the Act provides that the imported goods shall not be unloaded from any conveyance except under the supervision of the proper Officer.

9. Section 45 of the Act provides for clearance of imported goods. The said provision is extracted hereunder:

"45. Restrictions on custody and removal of imported goods. (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the [Commissioner of Customs] until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,-

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

[(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.]"

10. Under the aforesaid provision the imported goods would remain in the custody of the person approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII.

11. Section 49 of the Act provides for storage of imported goods in warehouse pending clearance. For facility, Section 49 of the Act is extracted hereunder:

"49. Storage of imported goods in warehouse pending clearance. - Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of

Chapter IX shall not apply to such goods."

12. "Warehouse" has been defined under Section 2(43) of the Act which means a public warehouse appointed under Section 57 or private warehouse licensed under Section 58 . Such appointments of public warehouse under Section 57 of the Act and licence of private warehouse under Section 58 of the Act is granted by the Commissioner of Customs.

13. Section 63 of the Act provides for payment of warehouse charges at rates fixed under any law by the Commissioner of Customs. For facility, the said provision is also extracted hereunder:-

"63. Payment of rent and warehouse charges. - (1) The owner of any warehoused goods shall pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Commissioner of Customs.

(2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse-keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select."

14. From the aforesaid, it is apparent that the customs authorities have full power and control over the imported goods and without the permission of the customs authorities, the goods cannot be cleared. At the same time, we find that there is no provision in the Act, which restrains the custodian from charging demurrage charges for the services rendered for storing the imported goods. The word "demurrage" has not been defined under the Act but the same has been defined under Regulation 2(g) of the International Airports Authority (Storage and Processing of Goods) Regulation, 1980, which has been issued in exercise of the powers conferred to sub-Section (1) of Section 37 of the International Airports Authority Act as the rate or amount payable to the airport by a shipper or consignee or carrier for not removing the cargo within the time allowed. Similar definition has also been given in the Port Trust of Madras Act, 1905, wherein the Supreme Court in *The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others*, held that the word demurrage merely signifies a charge, which may be levied on goods after expiration of free days. The Supreme Court in *Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others*, held that demurrage charges are levied for the place the goods occupy and for the period they remain not released on account of lack of customs clearance.

15. Section 45(2) of the Act has been interpreted in *International Airports Authority of India and Others Vs. Grand Slam International and Others*, . The Supreme Court held that the authority created under a statute would be entitled to charge demurrage charges and an importer would be liable to pay the demurrage charges. The Supreme Court found that Section 45 of the Act does

not provide that such person, namely, the custodian would not be entitled to recover charges from the importer for the period the goods remain in their custody. The Supreme Court held that sub-section (2) of Section 45 of the Act does not in any way impose an obligation on the custodian approved under sub-section (1) thereof not to collect charges leviable on the consignee.

16. Similar view was again given by the Supreme Court in *M/s Monika India and Another Vs. Union of India and Others*, by the Delhi High Court and by the Supreme Court in *Trustees of Port of Madras M/s. K.P.V. Sheikh of Mohd. Rowther and Co. Pvt. Ltd.*, AIR 1999 SC 1922.

17. In the light of the aforesaid, it is clear that demurrage charges can be levied by the custodian under Section 45 of the Act.

18. Inland Container Depot at Dadri has been notified under Section 8(a) of the Act by means of Notification No. 13 of 2003 dated 9th December, 2003 as the area for loading of export goods and for unloading of imported goods. The limits of the customs area for Inland Container Depot at Dadri measuring 43,335.11 sq. mts. has also been specified under Section 8(b) of the Act. Respondent No. 4 was initially appointed as a custodian of import and export cargo at ICD, Dadri by an order dated 19th April, 2006, which was issued in exercise of the powers conferred under Section 45 of the Act. The appointment was subject to certain terms and conditions. Relevant condition Nos. (i) and (xvii) are extracted hereunder:-

"(i) Custodian of the goods meant for import and export would be required to comply with the provisions of section 45(2) of the Customs Act, 1962 as well as Rules and regulations and instructions issued from time to time in this regard.

(xvii) The custodian shall not charge any rent/demurrage on the goods detained by the Customs department under the Customs Act, 1962 or any other Act for the time being in force."

19. The said respondent while being appointed as a custodian was required to comply with the provisions of Section 45(2) of the Act as well as the Rules and Regulations and instructions issued from time to time. Clause (xvii) clearly stipulated that the custodian would not charge any rent/demurrage charge on the goods detained by the customs department under the Act. The appointment of respondent No. 4 was renewed by an order dated 18th May, 2011 as a customs cargo service provider again in the exercise of the power conferred under Section 45 of the Act read with Handling of Cargo in Customs Area Regulation, 2009. Clause (2), (3), (4) and (6) are relevant for the purpose of the case, which are extracted hereunder:

"(2) The Customs Cargo service provider (Custodian) shall abide by all the conditions as mentioned in the earlier Public Notice No. 07/2006-Cus. Dated 19.04.2006 and shall observe all the rules and regulations prescribed under Customs Act, 1962.

(3) The applicant shall undertake to comply with the provisions and abide by all the provisions of the Act and the rules, regulations, notifications and orders issued there under.

(4) The Customs Cargo Service Provider shall abide and shall carry and discharge all the responsibilities assigned under Regulation 6 of the Handling of Cargo in Customs Areas Regulations-2009 as amended vide Notification No. 96/10-cus(NT) dated 12.11.2010.

(6) The Customs Cargo Service Provider shall publish a schedule of charges associated with various services in relation to imported/export goods in the customs area and its display at prominent places including web page or website of the custodian in terms of Regulation 6(3) of the Handling of Cargo in Customs Areas Regulations-2009 as amended vide Notification No. 96/10-cus.(NT) dated 12.11.2010."

20. Clause 2 indicates that conditions mentioned in the order dated 19th April, 2006 would be applicable and one such condition is, that the custodian would not charge any demurrage charge on the goods detained by the customs department. Clause 4 of the renewal order dated 18th May, 2011 provides that the custodian will discharge all the responsibilities assigned under regulation 6 of the Regulation of 2009. Regulation 6 of the Regulations of 2009 provides various responsibilities, which are required to be carried out by the customs cargo service provider, namely, by respondent No. 4. Regulation 6(1)(I) is extracted hereunder:

"6(1). The customs cargo service provider shall:-

(I) subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer."

21. The aforesaid provision indicates that subject to any other law for the time being in force, the custom cargo service provider shall not charge any rent or demurrage on the goods assessed or detained or confiscated by the customs department.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. Even though, no mala fides 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.

28. 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.

29. 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 bona fide. 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.

30. 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.

31. 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.

32. 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.

33. In the circumstances of the case, parties shall bear their own cost.