

(2005) 05 CAL CK 0029
In the Calcutta High Court
Case No : Matter No. 291 of 1994

Donald and Macarthy Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 03-05-2005

Acts Referred:

Customs Act, 1962 — Section 45

Citation : (2005) 103 ECC 88 : (2005) 126 ECR 262 : (2005) 186 ELT 393

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : P.K. Mullick, for the Appellant; Suhrit Roychowdhury, S.K. Kapoor, ASG and Biswanath Sammadar, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—The Court : This matter was once finally heard and disposed of by His Lordship Mr. Justice Kabir by a detailed judgment and order dated 24th July Donald and Macarthy (P) Ltd. Vs. Union of India (UOI),], whereby and whereunder His Lordship was pleased to direct the Customs authority, amongst other, to pay the demurrage and other dues of the Calcutta Port Trust in respect of the goods in question within 15 days from the date and thereafter to permit the petitioner-company to re-export the goods on payment of export duty, if any. Therefore, it appears that relief prayed for by the writ petitioner was granted. However, Union of India, here the Customs authority, preferred appeal against the aforesaid judgment and order and the Appeal Court by its judgment and order dated 6th January, 1997 set aside the judgment and order of the learned Trial Judge and remanded the matter for de novo hearing. Their Lordships in the Appeal Court found that the learned Trial Judge passed orders behind the back of the Union of India. The Appeal Court by its judgment and order pending hearing of the matter afresh, gave interim relief to the petitioner allowing to re-export the goods upon payment of 50 per cent of the demurrage charges with the Port authorities without prejudice to its rights and contention. The balance 50 per cent shall be paid by the Customs authorities again without prejudice to the rights and contentions of the parties.

2. On several occasions the fact of the case was recorded by the learned Trial Judge at the interlocutory stage and then the Appeal Court while dealing with appeal against the interim order and finally in the earlier conclusive decision by the learned Trial Judge followed by the Appeal Court and the same is also stated in gist as follows :

The petitioner is a Singapore based Company and in terms of the contract entered into by and between the petitioner-company and one M/s. M.K. Enterprises, the Respondent No. 8 herein, shipped consignments of 6 x 20 ft. containers of Electrolytic Copper Wire Rods and raised 6 invoices. The petitioner-company shipped the goods to be offloaded at the Port of Calcutta. Before arrival of the goods the Respondent No. 8 (now 9) informed the petitioner that they were not in a position to take delivery of the goods on being discharged from the vessel at port. At that stage the petitioner requested the shipping and its agents of India that is the Respondent No. 7 not to discharge the subject cargo at the Port of Calcutta and instead send back the same to Singapore. But it was too late to accede to the request of the writ petitioner because by that time the said consignment had already been included in the Import manifest filed with the Customs. Naturally the goods had to be offloaded at port. It was further intimated by the said respondent that after the same being discharged it could have re-exported with the Customs permission. Accordingly requests of re-shipping was made by the shipping line the original Respondent No. 8 on behalf of the petitioner and on 11th May, 1993 to the Customs authority. The Goods were discharged at the Port of Calcutta on 13th May, 1993 and the same are still lying there. On 29th June, 1993 the petitioner also by a letter requested the Collector of Customs to (Calcutta) grant permission to re-ship back the consignment to Singapore. By the said letter early action was sought for, as the goods were incurring heavy storage rent and detention charges. The importer did not release the goods. After protracting request and representation, in the Month of August 1993 the goods were examined by the Customs authority in presence of the Shed Appraiser, Superintendent (Rummaging), Superintendent (DIU), Metal Expert Appraiser and Assistant Collector of Dock as per the order of the Assistant Collector DIU (P). In spite of doing all thing as required by the Customs Authorities the permission of re-shipment was not granted. The said goods were never subjected to any investigation or enquiries. It was a simple case of re-shipment of the goods as the importer refused to accept delivery upon retiring of the bills.

3. On the aforesaid back ground the present petition was filed asking for reliefs for a writ of Mandamus directing the Customs authorities to act in accordance with law and allow the petitioner to take back the goods by way of re-shipment to Singapore or in the alternative the petitioner may be allowed to resell the goods in India if they can find any buyer and the demurrage charges demanded by the port authorities should be paid by the Customs Authorities. On 14th January this matter was moved before the learned Trial Judge. His Lordship Mr. Justice A.N. Ray (as His Lordship then was) was pleased to give direction for

filing affidavit. However, within the stipulated date no affidavit-in-opposition was filed by the Union of India but on the adjourned date His Lordship Mr. Justice Ray was pleased to give interim relief pending decision of the matter on affidavit again. By this interim order His Lordship allowed the writ petitioner upon giving an undertaking to indemnify the respondent against any claim to re-ship the goods in Singapore. The Customs authorities was also directed to issue detention Certificate so that the writ petitioner was made liable to pay demurrage either to the Calcutta Port or to any other authority. Such Detention Certificate shall be issued within 48 hours of the undertaking mentioned above. Union of India preferred an appeal against the aforesaid judgment and order of Justice Ray and such appeal was dismissed by the Appeal Court affirming the order of the learned Trial Judge on 25th August, 1994. After the decision of the Appeal Court on 27th October, 1994 a Detention Certificate was issued by the Collector of Customs in terms of the interim order passed by Justice Ray. In spite of that the writ petitioner could not take delivery as the Port authority on 23rd December, 1994 made an application for various reliefs including addition of party, though the port authority was also respondent in the original writ petition.

4. On 23rd December, 1994 Mr. Justice S.B. Sinha (as His Lordship then was) was pleased to allow the relief for addition of party and passed an order of status quo in respect of the goods in question. This order of addition of party and granting status quo was also affirmed because of the continuation of the aforesaid order of status quo the goods could not be re-shipped. By the aforesaid two orders passed by Justice Sinha and Justice Ray it was made clear that the question of payability of demurrage by the writ petitioner would be decided at the time of final hearing of the writ petition. Thereafter Justice Kabir was pleased to dispose of the writ petition finally by His Lordship Judgment and order dated 24th July, 1996. By this order His Lordship was pleased to give direction upon the Customs Authorities to pay the demurrage charges and other dues of the Calcutta Port Trust in respect of the goods in question within 15 days from date and thereafter permit the respondent-company to re-export the goods on payment of export duty if any.

5. It has now become the only issue on the aforesaid factual background is as to whether the writ petitioner is liable to pay any demurrage and detention charges as claimed by the port authority or the Customs Authority will pay and/or to reimburse, if it is paid by the writ petitioner.

6. By an order dated 18th February, 2004 I restrained the Port Authorities from disposing of and/or alienating and/or transferring the materials in question until disposal of the writ petition. It was made clear irrespective of the result of the writ petition the demurrage charges, which are accruing or to be calculated by the port authority from today and till the disposal of the writ petition shall be borne by the petitioner exclusively.

7. Mr. P.K. Mullick, Senior Advocate, appearing for the writ petitioner contends that his client/writ petitioner is not liable for accrual of this demurrage and

detention charges. It is the Customs authorities, who are solely responsible and/or liable for not allowing the writ petitioner to re-ship in spite of repeated representation and request being made. There has been no justification either lawful or otherwise for not taking steps timely by the Customs authorities it was their sheer negligence and such negligent act has helped demurrage charges to be accrued. Even after passing of the order by the learned Trial Judge at the interim stage and affirmed by the Appeal Court the respondent customs authority did not take prompt action to enable the writ petitioner to re-ship. Had it been allowed to be done, then this detention charges would not have accrued. The Port authority also cannot ask the writ petitioner to pay the demurrage charges as the same can be levied and realized if there has been any failure or laches or lapse on the part of the importer or exporter.

8. Alternatively, he submits that even if it is held by this Court that demurrage charges is to be paid the same must be paid or to be reimbursed by the Customs authorities.

9. He referred in support of his argument to a judgment of the learned Single Judge of this Court dated 17th June, 2002 rendered in case of Navneet Kumar Didwania Vs. Commissioner of Customs (Port) and Others, and two decisions of the Supreme Court reported in Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others, & Union of India and Others Vs. M/s. Sanjeev Woollen Mills, .

10. Mr. Mullick further submits that his client is not willing to sell the goods in India but to re-ship.

11. Mr. Suhrit Roychowdhury appearing for the Port authority submits that the importer or exporter cannot avoid its liability to pay demurrage charges except in case of failure or lapse on part of the Port authority. The Port authorities is not responsible for the detention or for holding on the goods for reason created by the Customs authorities or by any other authorities. The writ petitioner has no other alternative but to clear up the dues before the goods could be allowed to be re-shipped. In support of his submission he has relied on the decision of the Supreme Court reported in International Airports Authority of India and Others Vs. Grand Slam International and Others, rendered in a batch of matters.

12. Mr. S.K. Kapoor learned Additional Solicitor General appearing with Mr. Biswanath Sammadar, learned Advocate submits that the goods are not subjected to any duty and the same can be allowed to be re-exported as his client has no objection in this regard. However, he submits that under no circumstances the demurrage or detention charges as claimed by the port authority can be paid and/or reimbursed by the Customs authorities. His submission is that it is the exclusive liability of the importer or exporter to pay the detention charges which accrued for any reason whatsoever. He has stated relying on the same decision of the Supreme Court as cited by Mr. Roychowdhury that the Customs authorities cannot be asked to pay even if such goods are detained for any reason by the Customs authorities.

13. I have examined the claim and contention of all the parties and the records and considered the respective submission of the learned Counsels for the parties. Now it is to be examined who is to incur the demurrage charges. The contention of the writ petitioner is that it is not at fault for accrual of the demurrage charges. So, they are not liable to pay the same rather the Customs authority, which is at fault to incur these expenses. The contention of the Customs authority in substance that under the law it is the importer who is to pay off the Port authority who can waive this demurrage charges because the goods is under statutory scrutiny.

14. In the affidavit-in-opposition the Customs authority initially took stand that appropriate proceedings is contemplated to be initiated relating to the goods as it was suspected to have been misdeclared as to its value. For these reasons the goods were not allowed to be removed for re-shipment. It is now settled position of the law that if the goods are not removed from the port premises within free time then the demurrage and/or detention charges will automatically accrue and the owner or importer of the goods are liable to pay unless it is waived in exercise of power granted by the statute by the Port authority. The Port authority at no point of time was in a mood to waive the same.

15. Therefore, the payment of demurrage charges is sine qua non for removal of the goods as the Port authority can claim lien over the goods for its charges. There has been no dues on account of Customs nor there was any proceedings under the Customs Act or any other statutory provision. The Customs made various enquiries before they decide to allow re-shipment. Stand taken in the affidavit-in-opposition of the Customs authority appears to be totally baseless and to cover up its own laches. As the fact and sequence of events before filing of the writ petition do not lend any support to the stand taken in the affidavit-in-opposition of the Customs authority. The Customs authority in fact decide to allow the writ petitioner to re-ship upon fulfilling conditions namely furnishing undertaking, Indemnifying the Customs authorities against any loss or claim. These conditions were fulfilled, nonetheless goods were not allowed to be re-shipped by issuing necessary clearance certificate even after filing of the writ petition and passing appropriate interim order allowing the writ petitioner to re-ship, customs authority did not do any thing else and to justify their unwarranted statutory claim went on to prefer appeal against the interim order passed by this Court. The order of Justice Ray (as His Lordship then was) was affirmed by the appeal Court and thereafter Customs Authorities issued necessary clearance amongst others detention certificate to enable the writ petitioner to get the goods released. From the aforesaid facts and circumstances it is clear that the detention of the goods by the Customs authorities was wholly unjustified and unfounded if not negligent callousness. Had the goods been released within the time, the demurrage charges would not have accrued. Thereafter the port authority obtained the said order because of non-payment of their dues. It appears further that despite the judgment and order of the direction given by appeal Court dated 6th January, 1997 the Customs authority did not take any

step to make payment of 50 per cent of the demurrage. In this process as on today the demurrage charges has accumulated to mountainous volume and I am afraid that the value of the goods as on today perhaps may cover the said claim of the Board.

16. Initially there has been a dispute and disagreement on the position of the law that whether the Port authority is bound to forego the demurrage charges the moment detention certificate is issued by the Customs authority u/s 45 of the Customs Act. There was divergent judicial views, no doubt, but this view has now been settled by three Bench decision of Supreme Court in the case of Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others, on reference, because of difference of opinion of earlier two Benches of the same Court in Union of India and Others Vs. M/s. Sanjeev Woollen Mills, and International Airports Authority of India and Others Vs. Grand Slam International and Others, .

17. In view of the above pronouncement of the Supreme Court I think as rightly contended by Mr. Roychowdhury the port authority is entitled to legitimately the demand of payment of detention and demurrage charges.

18. The learned Additional Solicitor General Mr. Kapoor has rightly said under the provision of Major Port Act, 1963 and under Rules and Regulations framed thereunder it is the primary liability of the importer to pay the demurrage charges. But in this case the situation and circumstances is otherwise. The issue now has crystallized that in order to get the goods released, who is to pay the detention charges because all the parties are before me. Each and every day the demurrage charges is accruing and this could have been arrested had the parties accepted at least the direction of the later Appeal Court in 1997 itself. Under the provision of the Customs Act the Customs authorities are not immuned from incurring the demurrage charges in a case where it is found later on that detention of the Customs authorities are found to be illegal and unjustified. Therefore, ordinarily law relating to negligence will have to be applied. Under the provision of Section 45 of the Customs Act, the case remains in the legal custody of Customs authorities.

19. Therefore, unless it is cleared by the Customs authorities nobody can touch it. The Port authority here remains to be a physical custodian of the goods but this custody is subject to the paramount custody of the Customs authorities. Here the Customs authority did not allow re-shipment, they even before landing of the goods asked the importer for re-shipment obtaining necessary clearance. Accordingly I hold that the Customs authorities are liable to pay the detention and demurrage charges accrued thereon. It appears from an un-reported decision of the learned Single Judge of this Court rendered in case of Navaneet Kumar Didwania v. Commissioner of Customs, Calcutta (Port) and Ors. cited by Mr. Mullick in almost identical term situation the problem therein was dealt with by learned Single Judge. In this case the Customs authority detained the goods for confiscation proceeding and in fact confiscation order was passed. In lieu of confiscation the importer was given liberty to pay fine and personal penalty. This

order was set aside by the CEGAT and ultimately order of CEGAT was affirmed by the Supreme Court. Thereafter the petitioner prayed for payment of port dues of Rs. 9,64,85,167/-. The Custom's contention was that it was not the laches and negligence of the customs authority as the action was taken initially lawfully and though ultimately found to be illegal, under those circumstance no liability can be fastened with the Customs authorities for payment of port dues. The learned Single Judge having considered in great details has held that Customs authorities is liable to pay the port dues of the Port authorities.

20. The conduct of the writ petitioner is not also above Board particularly after the judgment and order of the later Appeal Court dated 6th January, 1997. It appears in terms of the aforesaid judgment and order of the Appeal Court the petitioner was asked to pay 50% of the demurrage charges and balance 50% of the dues was to be paid by the Customs authorities. The Customs authority did not take any step whatsoever but the writ petitioner merely asked the port authority to intimate about the total dues. When such intimation was given the writ petitioner adopted delaying tactics firstly asking for the particulars of the dues, then filing an application for clarification and then the matter was allowed to remain pending and ultimately the same was dismissed for non-prosecution. Had the writ petitioner tendered the 50 per cent of the demurrage charges then perhaps, he could have been relieved from payment of these dues. A person who complains of negligence of another person cannot be allowed to take advantage of his own negligent act. This Court has been called upon to decide the role played by the respective authorities in not clearing the goods negligently. So, I feel the writ petitioner is certainly liable to pay 50% of the demurrage charges from the date on and from 16th January, 1997 till 18th February, 2004. The balance demurrage charges from the date of accrual till 18th February, 2004 has to be shouldered by the Customs authorities. However, it would be open for the Customs authorities to make an application for waiver of the demurrage charges. In the event such application is made the Port authority shall consider the same in accordance with law as early as possible. If such waiver is not granted in any manner or partially granted then the Customs authority shall pay the entire amount due to be paid. Upon payment of 50% for the period as above and full amount for the period as above of the demurrage charges by the petitioner the Port authority shall release the goods to avoid further demurrage charges, as the Customs authority will not run away and they will remain.

21. I make it clear if goods are not cleared by the petitioner within one month from the date receipt of the copy of this order. The port authority shall sell the same in accordance with law and realize the demurrage and/or detention charges due to be paid by the petitioner and balance if any shall be paid to the petitioner after meeting all costs and charges on account of sale.

22. After delivery of my judgment learned Counsel for all the parties have drawn my attention to my interim order dated February 18, 2004, by this order I made it clear that the writ petitioner would be liable to pay in any event the full

demurrage charges from the date of passing of the said order till the date of release of the goods. Therefore, the liability to pay the demurrage charges for this period has to be borne by the writ petitioner. Accordingly, the Customs authority's liability in terms of my judgment will be till February 18, 2004.

23. All parties are to act on a signed copy of the operative portion of this judgment and order on the usual undertaking.

24. Let this order be incorporated in the judgment passed today.