(1989) 05 DEL CK 0027

In the Delhi High Court

Case No : Civil Writ Petition No. 2782 of 1986

Great Eastern Shipping Co. Ltd. and Another APPELLANT

Vs

Union of India and Another RESPONDENT

Date of Decision : 25-05-1989

Acts Referred:

Citation : AIR 1989 Delhi 289 : (1994) 52 ECR 679 : (1992) 58 ELT 374 : (1989) 2 ILR Delhi 1

Hon'ble Judges : Rabindranath Pyne, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : H.N. Salve, Rajiv Shakdhan, Ruby Anand, Tarun Banga, R.K. Anand, S.P. Sharma and Harsh Patney, for the Appellant;

Judgement

Rabindra Nath Pyne, J.

(1) The petitioner No. 1 is the owner of a fleet of ships, namely, Dry Cargo Bulk Carriers, Product Tankers, Oil Bulk Ore Carriers and Offshore Supply Vessels and carries on business of operating such fleet of ships. The petitioner No. 2 is the Vice Chairman, Managing Director and a shareholder of petitioner No. 1. The petitioners have filed the instant writ petition under Article 226 of the Constitution challenging the notification No. 390 dated 29th September 1984 issued by the Ministry of Shipping and Transport (Port Wing) whereby the basis of charging port dues as well as basic rate per ton of ships calling at Paradip Port have been changed from ''Net Register Tonnage (for short ''N.R.T.'') as stipulated under Indian Ports Act 1908 (for short the ''Act'') to ''Gross Register Tonnage (for short ''G.R.T.''). According to the petitioners, the change so effected by the said notification is contrary to the express mandate of the Act and as such the said notification is illegal. It is further stated by the petitioners that the impugned notification which levies unreasonably exorbitant and arbitrary port dues contrary to the specific stipulations in the Act violates their fundamental rights under Articles 14 and 19(l)(g) of the Constitution. It is also stated by the petitioners that u/s 33 of the Act read with first schedule thereof, port dues are to be levied

''per ton'' which expression is defined u/s 3(6) of the Act to mean a ton as determined or determinable by the rules for the time being in force for regulating the measurement of the net tonnage of British Ships. It is, Therefore, abundantly clear that the Act contemplates the basis of levy of port dues to be on the basis of N.R.T. of a ship and not on its G.R.T. According to the petitioners, inasmuch as the impugned notification fails to take into account N.R.T. which is expressly required to be taken note of while levying of the port dues, it should be quashed. Further, the petitioners claim refund of all excess amount paid by them pursuant to the above notification under protest since 1984.

(2) In the counter filed on behalf of respondent No. 1 Union of India, it is stated that the definition of ''ton'' contained in Section 3(6) of the Act is not relevant at all for the purpose of payment of port dues. The payment of port dues is governed by Section 41 of the Act. The reference to ''ton'' in Section 3(6) is only a sort of standard of measurement for which purpose, rules regulating the measurement of tonnage of British Ships have to be referred. It is further stated that Section 41 of the Act lays down the procedure for ascertaining the tonnage of any vessel liable to pay port dues. It is the true tonnage of the vessel, which is to be calculated and not the net tonnage for the purpose of levy of port dues. The Legislature has deliberately not used the world ''rules for regulating the measurement of net tonnage of British Vessels'' in Section 41(l)(b) of the Act. It is further stated that as the Act has not prescribed anywhere that the port dues shall be charged only on the net registered tonnage of the ship, the Government is competent to prescribed port dues either on the net registered tonnage or gross registered tonnage of the ship. Further, u/s 33(1) of the Act, the Government is also competent to increase the port dues up to the extent specified in the third column of the first schedule to the Act, 1908 and this limit has not been exceeded by the impugned notification. Section 33 lead with the first schedule only says that the port dues not exceeding Rs. 5.00 per tonne can be levied. It never refers to the net tonnage. Nowhere has it been defined that port dues are to be levied on N.R.T. and not on G.R.T. The Government is empowered to change the rates per Section 34 of the Act.

(3) In the counter filed on behalf of the respondent No. 2. Paradip Port Trust, it is alleged that the Act was enacted in the year 1908 and reference to the ''ton'' in Section 3(6) means a unit of ton or standard of measurement which has to be determined or is determinable for regulating the measurement of net tonnages of British Ship. The definition ''ton'' contained in Section 3(6) is not relevant at all for the purpose of payment of port dues. The payment of port dues governed by Section 41 of the Indian. Ports Act. It is further stated that Part I regarding Major Ports in the first schedule to the Act uses the world ''ton'' in second column in entry of ''Paradip'' as ''vessels of ten tons and upwards''. It denotes in itself that ''tons'' expression mean gross tons. ''Rate of Port due per ton'' shown at the top of column (3) denotes port dues to be charged on tons used in the second column. It shows that the port dues are to be charged at rates notified by the Act within the maximum limit prescribed in column (3) per ton on the gross volume

of the vessels in tons.

(4) The short question that arises for determination in this application is as to what is the correct meaning and interpretation of the expression ''ton'' in the heading of the third column of the first schedule to the effect that ''rate of port dues per ton''. Does the expression ''ton'' mean N.R.T. or it includes both N.R.T. and G.R.T. If the expression ton'' means N.R.T. only then the impugned notification fixing the rate of port dues on the basis of G.R.T. is bad being in excess of the power conferred by the Act.

(5) To appreciate the rival contentions, it will be appropriate to set out some of the relevant provisions of the Act and the impugned notification. The impugned notification is as follows : The Gazette Of India Extraordinary Part II-SECTION 3-SUB Section (1) No. 390, New Delhi, Saturday, September 29, 1984/ASVINA 7, 1906 Ministry of Shipping and Transport (Ports Wing) Notification New Delhi, the 29th September 1984. G.S.R. 700(E).-In exercise of the powers conferred by Sub Section (1) of Section 33, (read with Section 34 of Indian Ports Act, 1908) and in suppression of Notification of Government of India in the Ministry of Shipping and Transport (Ports Wing) No. GSR-692(E) dated 9th November 1977, the Central Government hereby directs that with effect from the day the following the expiration of 60 days from the date of publication of Notification in the Official Gazette, Ports Dues shall be levied on each of the vessel entering the port of Paradip as given in the Schedule.

Schedule Grt of Vessel Port dues in Rt. entry 1. up to 200 2.50 / Grt 2. 201-499 2.50 /GRT 3 500-2999 2.50/ Grt 4. 3000-6999 2.50/GRT 5. 7000-14999 3.00/ GRT 6. 15000-24999 3.00/GRT 7. 25000-39999 3.00/GRT 8. 40000 to above 3.50/GRT

Note 1. Definition :-

(I)Coastal coasting with reference to vessels will mean vessel plying between one Indian Port to another.

(II)Foreign Vessel means a Vessel other than a Coasting Vessel.

2.Port dues as above ,would be payable only one in thirty days in respect of Coastal vessel.''

(6) By the impugned notification, port dues shall be levied on the vessel entering into the port of Paradip on the basis of G.R.T. The question is whether in view of the provisions of the Act, it is open to Government to change the basis of changing the port dues livable on the ships entering the port of Paradip from N.R.T. to G.R.T. For determination of the question, the scope and effect of the relevant provisions of the Act and the first schedule thereof will have to be looked into and considered.

(7) Relevant portion of the First Schedule to the Act is set out hereunder : The First Schedule Ports, vessels chargeable, rate of port-dues and Frequency of

payment. (See sections 1 and 33)

Part I-Major Ports Name of vessels chargeable Rate of Port Due how often Port dues per ton chargeable in respect of same vessel 1 2 3 4 xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx Paradip Sea-going vessels often tons and upwards: (a) Foreign Not exceeding Whenever the vessels Rupees five vessel enters the Port (b) Coasting vessels (i) Steamers Not exceed ing Once in thirty Rupees five days (ii) Sailing Not exceeding Once in sixty vessels Rupees five days xxxx xxxx xxxx-xxxx xxxx xxxx xxxx xxxx 7

The expression ''ton'' is defined in Section 3(6) of the Act as ''Ton means a ton as determined or determinable by the rules for the lime being in force for regulating the measurement of the net tonnage of British ships''.

(8) Section 33 deals with levy of port dues. Relevant portion of Section 33 is set out hereunder :

33.

(L)Subject to the provisions of sub-section (2), in each of the port mentioned in the first schedule such port dues, nor exceeding the amount specified for the port in the third column of the schedule as the (Government) directs, shall bo levied on vessels entering the port and described in the second column of the schedule, but not oftener than the time fixed for the port in the fourth column of the schedule.

(2)The Government may, by notification in the Official Gazette, alter or add to any entry in the first schedule relating to ports in any State or, as the case may bs, in the State, and this power shall include the power to regroup any such ports.

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(4)All port-dues now livable in any port shall continue to be so livable until it is otherwise declared in exercise of the powers conferred by this section.

Section 34 deals with variation of port dues by Government, and it is in the following terms :

'' THE Government may after consulting the authority appointed u/s 36 exempt, subject to such conditions, if any, as it thinks fit to impose, any vessel or class of vessels entering a port subject to this Act from payment of port- dues and cancel the exemption, or may vary the rates at which port-dues are to be levied in the port, in such manner as. having regard to the . receipts and charges on account of the port. it thinks expedient, by reducing or raising the dues. or any of them or may extend the periods for which any vessel or class of vessels entering a port shall be exempt from liability to pay port- dues : Provided that the rates shall not in any case exceed the amount authorized to the be taken by or under this Act.''

Under Section 41 of the Act, which provides for ascertainment of tonnage of vessel liable to port dues, power conferred upon the conservator broadly is as under :

(A)where the vessel is registered in Britain or under any Indian law relating to registration of ships, the conservator may demand the production of her register so as to satisfy himself as regard the true tonnage. Where the owner or the master refuses to produce the register to demand the conservator may cause the vessel to be measured as per the British Rules, apart from levying a fine upon the owner or Master [Section 41(1)].

(B)where the vessel is not British registered or Indian registered, then the owner or the master may satisfy the conservator as to the true tonnage of the vessel, failing which the conservator may have the vessel measured in accordance with British Rules [Section 41(2)].

(C)where the tonnage cannot be determined as per the British rules, then the conservator may estimate the tonnage in such manner as may seem to him to be fair and just [Section 41(3)].

(9) Mr. Harish Salve, learned counsel for the petitioners has submitted that Section 33 of the Act provides for levy of port dues. Such port dues as mentioned in the first schedule shall believed .According to him, the above Section provides that port dues shall be levied in each port mentioned in the first schedule not exceeding the amount specified for the port in the third column of the schedule on the rates fixed by the Government on the vessel entering the port. The amount specified in the first schedule Part 1 (qua major ports) is on the basis of rate ''per ton''. The expression ''ton'' is defined in Section 3(6) of the Act as meaning ten as determined or determinable by the rules for the time being in force for regulating the measurement of net tonnage of British ships. According to Mr. Salve, the rules in force for measuring the net tonnage of British ships are the Merchant Shipping (Tonnage) Regulations, 1967 framed under the British Merchant Shipping Act, 1965 read together with British Merchant Shipping Act, 1894. Part II-B of these rules deals with the determination of the net tonnage of British ships. Rule 8 states that the Registered Tonnage (which, according to Mr. Salve, is the same thing as net tonnage) of a ship shall be the tonnage obtained by deducting from its gross tonnage the tonnage of various spaces referred to in Regulations 9 and 10. Thus the necessary consequence of interpreting the first schedule in the light of Section 3(6) read together with 1967 regulations is that port dues can be levied only on the basis of determination in accordance with the ''net tonnage'' of the ships.

(10) According to Mr. Salve, the expression ''net tonnage'' has acquired in maritime law and practice a definite meaning as implying the cargo carrying capacity of the vessel determined by deducting from the gross tonnage the prescribed allowances. Further, the expression ''net tonnage" is also interchangeable with the expression ''registered tonnage'' or the expression

''burden''. Therefore, the expression ''net tonnage'' wherever it occurs, has to be given its full meaning in the sense in which it is understood in maritime law and practice.

(11) It has also been submitted that there is nothing repugnant in the scheme of the schedule which would require disregarding or ignoring the definition of ton in Section 3(6) while construing the schedule. On the contrary, it would bring the law in accord with well established maritime practice particularly as prevalent in India and Britain. It is submitted that the Indian Ports Act was originally enacted as a necessary cognate legislation together with the British Acts dealing with the same subject. It is undisputable that the well-accepted British practice since the very beginning is to recover port dues on the basis of ''registered tonnage'' or ''net tonnage'' (Oxford Dictionary. Encyclopedia of Britannica relied upon). Even the Indian practice has always been to levy port dues on the net tonnage and continues in regard to all the other major ports.

(12) Mr. R.K. Anand, appearing for the respondents Nos. 1 and 2, has submitted that the Indian Ports Act. 1908, in its Chapter V, prescribes for port dues, fees and charges. Section 33(1), (2) and (4) read with Section 34 gives the power to the Government to levy port dues, increasing and imposing port dues. vary the rates and the manner of calculation or grant exemption in certain circumstances with a limitation that the rates of port dues would not exceed the quarter limit prescribed in the first schedule of the Act. He has further submitted that the Act or the first schedule does not say anything as to what would be the rate of port dues and whether it would be on N.R.T. or G.R.T. or Dead Weight of the ship/ vessel. All these are left to be considered and decided by the Government. The Government can prescribe one rate or different rates in different ports or make uniform basis of collection or may adopt different basis. Section 37 of the Act has given to the Government to put different ports in different groups for all purposes. All these things are being regulated/done by Government through the notifications/orders. It is further submitted that the concept of N.R.T. for levy of port dues is pot based on Act but based on previous notification. By the impugned notification the Government has changed the basis or charge of port dues from N.R.T. to G.R.T.

(13) Mr. Anand has further submitted that the heading of the first schedule of the Act shows that it is concerned only with the ports, vessel chargeable, rate of port dues and frequency of payment with reference to the provisions of Sections 1 and 33 of the Act Reading of these three provisions. i.e. Sections 1 and 33 and first schedule will show that it is for the Government to decide as to what will be the quantum, i.e. N.R.T. or G.R.T.. on which part dress are livable at the rates prescribed by the schedule. There is no indication in and Part of schedule which refers to N.R.T. or G.R.T. or Dead Weight. This has been left by the legislature to be decided by the Government under the powers and jurisdiction given by Section 33 read with Section 34 of the Act The definition of the unit so prescribed in the first schedule, irrespective of the fact that it is to or otherwise would not

make and difference .The definition in the Act will not control the scope of the schedule.

(14) Mr. Anand has further submitted that ''ton'' is only a unit of measurement. The significance of the term ''ton'' is limited only to the extent of finding out the capacity of the vessel in terms of the Gross tonnage or Net tonnage. The definition of "ton" as given under "Section 3(6) of the Act shall be considered for a specific section keeping in view that unless there is anything repugnant to the subject or context, ton means a ton is clear from the rules regulating the measurement of tonnage. The significance of the term ''ton'' is limited only to the extent of finding out the capacity of the vessel in terms of Gross tonnage or Net tonnage. On the basis of the definition given u/s 3(6) of the Act which has a reference to the rules related to the measurement of Net tonnage of the British ship it cannot be said that the term ''ton'' refers to Net tonnage only and it can be used only for calculation of Net tonnage and not for Gross tonnage.

(15) Mr. Anand has further submitted that the modes of ascertainment of tonnage of vessel liable to port dues are contained in Section 41 of the Act. Port dues are levied and recovered on the basis of tonnage as ascertained as per different modes contained in the above section. Section 41 does not say about the net tonnage of a vessel. u/s 41(a) in order to ascertain the tonnage of any vessel liable to pay port dues the conservator may be required to produce the register of the vessel for inspection and apply the Government orders/ notifications prescribing the rates and basis of N.R.T. or G.R.T. In case register is not available, then the tonnage of the vessel is to be ascertained in the manner as provided in Section 41(1) or 41(2) or 41(3) of the Act. The provisions of Section 3(6) or Section 33 or Section 34 or the first schedule will not be at all relevant on the point of ascertainment or recovery of port dues.

(16) Mr. Harish Salve countered these arguments and submitted that Section 41 of the Act only provides for ascertainment of tonnage of the vessel liable to port dues. Such ascertainment is to be made according to various sub-sections of The above section. According to Mr. Salve, Section 41 is a machinery provision which confers certain powers on the conservator to enable him to assess the port dues. In conferring this power, there was no question of referring to ''gross'' or ''net'' tonnage. The purpose of Section 41 is to ascertain the true tonnage, and what is ascertained in Section 41 is both the gross and net tonnage since net tonnage cannot be ascertained without ascertaining the gross tonnage The levy, however, will thereafter be in accordance with the charging provisions, i.e. Section 33 of the Act read with the first schedule upon the net tonnage.

(17) According to Mr. Salve, the opening words of Section 41 do not imply that it is a charging provision. It is not that all vessels that enter the port which are liable to port dues. The Section 34 contemplates the grant of exemption to certain vessels. Section 48 grants statutory exemption to certain vessels. Where a vessel which is exempt from port dues enters the port, the conservator would have no power to demand the register u/s 41. The opening words of Section 41

are to emphasise that the power thereof are only for ascertaining the tonnage of vessels liable to passport dues.

(18) We may note that ''ton'' is a unit of volume in shipping parlance and is not to be taken as ''weight'' as may be commonly understood. If reference is made to the Rules framed under the Merchant Shipping Act, 1958, ''ton'' means. a unit of volume equal to 2.83 cu. metres which is equal to 100 cu. feet. u/s 3(6) of the Act. ''ton'' is to be determined by the rules for the time being in force for regulating the measurement of the net tonnage of British ships. The use of the words ''British ships'' is deliberate and it is not that the word ''British'' has been used in the Act by mistake as it was earlier thought of during the course of arguments. The Act has been amended many times after the independence and there has been the Adaptation of Laws Order 1950 and yet the word ''British'' in sub-section (6) of Section 3 remains, and this word is also use in Section 41 of the Act. There is a history behind it and though it is not necessary for us to set out the same, reference may usefully be made to the Statement of Objects and Reasons at the time of enactment of the Act. And. that is why it. is relevant to refer to the law presently prevalent in England regulating the measurement of the net tonnage of ships there.

(19) According to Section 33(1) such port does not exceeding the amount specified for the port in the third column of the schedule as the Government directs shall be levied. Third column of first schedule provides the rate of levy. The heading of the third column is ''Rate of port dues per ton'', Therefore, according to third column the levy of duty at the rates mentioned therein shall be on the basis of ''per ton''. Now, the question is what is the true meaning of the expression ''ton'' appearing in the heading of the third column of the first schedule. The dispute is whether the expression ''ton'' means only ''N.R.T.'' under the Act or it covers both N.R.T. and G.R.T.

(20) The term ''ton'' is defined in Section 3(6) of the Act as-''ton means a ton as determined or determinable by the rules for the time being in force for regulating the measurement of net tonnage of British ships'' . The rules in force for measuring the net tonnage of British ships are Merchant Shipping (Tonnage) Regulations 1967 thereinafter referred to as ''1967 Regulations'') framed under the British Merchant Shipping Act 1965 read together with British Merchant Shipping Act 1894. Part II-B of 1967 Regulations deal with determination of Registered Tonnage. Regulation 8 states that the registered tonnage of a ship shall be the tonnage obtained by deducting from its gross tonnage the tonnage of various spaces referred to in Regulations 9 and 10. It appears that registered tonnage and net tonnage are same thing. Rule 2(b) of The Merchant Shipping(Ton page Measurement of Ships) Rules. 1960, framed under The Merchant Shipping Act, 1958, defines gross tonnage. According to Rule 2(j) the ''registered tonnage'' or ''net tonnage'' means the tonnage arrived at after making from the gross tonnage of a ship the allowances and deductions under the roles,. Hence, registered tonnage and net tonnage is same thing However,

there is no dispute regarding this matter between the parties.

(21) Therefore, the expression ''ton'' in the heading of the third column of the first schedule is necessarily to be interpreted according to the definition of that expression as stated in Section 3(6) of the Act and so interpreted it means ''Net Registered Ton''. Therefore, the Government without first changing the existing definition of ''ton'' cannot fix levy of port dues on the basis of G.R.T.

(22) In the light of what is stated hereinbefore, port dues will have to be levied and varied under Sections 33 an 34 of the Act. Section 34 of the Act confers power on the Government to vary the rate of duty but not the basis or calculation or the basis of the port dues. The matter of levy, variation or change of port dues will have to be made keeping in view of the various provisions of the Act and the schedule thereto. Such power cannot be exercised de horse the provisions of the Act and the schedule. Inasmuch as in our view the expression ''ton'' in the heading of the third column of the first schedule, as defined u/s 3(6), means ''net registered tonnage'', the impugned notification fixing the levy of duty in respect of Paradip port on the basis of G.R.T. is beyond the power conferred by the Act and contrary to first schedule thereto. That being so, the impugned notification is bad and ultra virus the Act.

(23) Further, in our view. Section 41 of the Act does not help the respondents. Section 41 of the Act deals with the ascertainment of the tonnage vessel liable to port dues but it does not deal with the levy of duty or the variation thereof. The section provides that for ascertaining of the tonnage of a vessel liable to port dues the conservator may require the production of ship''s register and in case of non- production the conservator will determine the tonnage in the manner as provided in the section. Tonnage of ship includes both ''net tonnage'' and ''gross tonnage''. In the ship''s register, both ''net tonnage'' and ''gross tonnage'' are mentioned. For ascertaining the net tonnage, it is necessary first to determine its gross tonnage. If it is construed that u/s 41 of the Act the Government is empowered to determine and levy duty on the basis of ''gross tonnage'', then such construction will be against the provisions of Sections 3(6) and 33(1) as well as the first schedule of the Act and would make the said provisions nugatory. Further, Section 41 is a procedural section and not in section where under levy of port dues is made. It provides for the mode of ascertainment of tonnage of vessel for port dues. Levy of port dues is on the basis of ''ton'' and such tonnage is to be ascertained in the manner as provided in Section 41 of the Act. Ascertainment of tonnage of vessel liable to duty is quite different from the levy of duty which is made under charging provisions of the Act, i.e. Section 33. In our view, Section 41 of the Act does not confer or control the power of levy of duty which is provided for in Section 33 of the Act read with the first schedule thereof.

(24) For all the reasons stated hereinbefore, the petition succeeds. The impugned Notification No. 390 dated 29th September 1984 is, Therefore, quashed to the extent that the notification levies port dues on the basis of G.R.T.

(25) The only remaining question is refund of excess amount of port dues paid by the petitioners on the basis of G.R.T. under protest. On this question in view of various decisions of the Supreme Court in the cases of (1) Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , (2) Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, , (3) Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, , and (4) Salonah Tea Co. Ltd. vs. Superintendent of Taxes (1981) 1 S.C.C. 401, the petitioners are entitled to refund of the excess amount paid. We order accordingly. The respondents will refund to the petitioners all excess amount of port dues levied and paid on the basis of G.R.T. of the petitioners'' ships under the impugned notification.

