

(2011) 02 MAD CK 0127

In the Madras High Court

Case No : Writ Petition (MD) No's. 2634 to 2636 of 2009 and M.P. (MD) No's. 1, 1, 1, 2, 2 and 2 of 2009, 1, 1 and 1 of 2010

Hari CFS, SEC CFS A Division of SEC Services Ltd. and St.
John ICD, A Division of St. John Freight Systems Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 265
Customs Act, 1962 — Section 12, 141(2), 45, 8
Customs Areas Regulations, 2009 — Regulation 3
General Financial Rules, 1966 — Rule 112, 113, 17(12), 17(43)
General Financial Rules, 1973 — Rule 6(12), 6(36)
Prohibition Act — Section 11, 143(2), 49, 58A

Citation : (2011) 267 ELT 319

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S. Murugappan, for the Appellant; B. Vijay Karthikeyan, for RR1, 3 and 4 and P. Krishnasamy, for R2, for the Respondent

Judgement

K. Chandru, J.—In the first writ petition, the Petitioner who had established a Container Freight Station (CFS) at Thoothukudi, filed the writ

petition challenging an order, dated 29.1.2009 passed by the Administrative Officer, (Establishment), Customs house at Thoothukudi. By the

impugned demand notice, the Petitioner was directed to pay a sum of Rs. 67,81,209/- towards arrears of establishment charges of Customs

Officers posted at the station from January, 2006 to September, 2008.

2. In the second writ petition, an another handler of CFS filed the writ petition challenging the demand notice, dated 19.12.2008 demanding a sum

of Rs. 3,51,010/- towards establishment charges of Customs Officers posted at CFS for the period from January, 2006 to May, 2006. In the third

writ petition, a person who had established an ICD at Thoothukudi challenged the demand notice, dated 19.12.2008 for a sum of Rs. 9,95,975/-

towards establishment charges of Customs Offices posted at Inland Container Depot (ICD).

3. When these matters came up on 2.4.2009, notices were directed to be served on the Respondents. An interim stay of the demand notices in

respect of all the three writ petitions was initially granted for two weeks . Subsequently, the interim orders came to be extended until further orders

by a common order, dated 16.4.2009. Aggrieved by the interim order, the Union of India has filed M.P.(MD) No. 1 of 2010 in all the three writ

petitions seeking to vacate the interim order together with a supporting affidavit, dated 22.6.2010. A regular counter affidavit, dated Nil (June,

2009) was filed by the third Respondent. They have also filed an additional counter affidavit, dated Nil (May, 2010).

4. Heard the arguments of Mr. S. Murugappan, learned Counsel for the Petitioners, Mr. B. Vijay Karthikeyan, learned Counsel appearing for

Respondents 3 and 4 and Mr. P. Krishnasamy, learned Counsel for the second Respondent.

5. The contentions of the Petitioners in all the three writ petitions were identical. The Petitioners had stated that appropriate permissions were

obtained from the second Respondent for establishing CFS/ICD. By a public notice, the Petitioners were appointed as Custodians of goods meant

for Import/Export and after specifying the areas of CFS and that area was also declared as Customs area for the purpose of the Customs Act. The

Petitioners' companies were required to comply with the Customs Act provisions with regard to establishment of CFS/ICD and to execute a bond

together with bank guarantees in favour of the third Respondent. Accordingly, bonds were executed together with appropriate bank guarantees.

The bond and bank guarantee were primarily to ensure compliance with the provisions of the Customs Act and for indemnifying the customs

authorities for any loss of duty suffered due to any negligence on the part of the Petitioner's companies. The establishment of CFS was to facilitate

import and export of cargo. The Cargo which are to be exported will be brought to CFS and will be examined by the Customs Officials and

thereafter, stuffed into the containers. After completion of customs formalities, they will be allowed for export. Thereafter, the containers will be

taken to the gateway port and loaded into ships. Similar reverse exercise will be done in the case of imported cargos. The containers will be

brought from the ship to CFS and after unloading it in the specified port, it will be unpacked or de-stuffed. The cargos will be examined by the

deputed Customs officials. After verification, they will be released to the importers.

6. By the establishment of CFS and ICD, the exporters / importers will be saving money and time. For providing such facilities, the Petitioner

companies used to charge certain amount per container. The Petitioner in turn was also bound to make payment as cost recovery charge. The cost

recovery charges will have to be paid in advance. Normally, the Petitioner companies were directed to pay 185% as cost recovery charges. It is

claimed that for every Rs. 100/- spent by the Government, the Petitioners are paying Rs. 185/- towards charges for the Customs personnel

deputed to CFS/ICD. By the impugned communication, the Petitioners were directed to pay some extra amount on the plea that the Government

was implementing the 6th Pay Commission scales of pay for their employees including the Superintendents, Appraisers, Inspectors, Tax Assistants

and Sepoys. The 6th Pay Commission scale of pay was adopted by the Central Government with effect from 1.1.2006. Therefore, the cost

recovery charges were reworked on the basis of enhanced pay and the Petitioners were fixed with additional liability. Challenging the same, the

Petitioners filed all the three writ petitions.

7. The contention of the Petitioners were that the Officers of the Customs department are performing their statutory duties under the Customs Act.

Their function is a sovereign function. No fee can be levied for the discharge of statutory or sovereign function. The Government is empowered to

levy Customs Duty u/s 12 of the Customs Act. Therefore, further cost recovery is void ab initio and violative of Articles 14 and 265 of the

Constitution of India. The cost recovery made by the Respondents is nothing but a fee. Charging at the rate of 185% of total salary of the Customs

Officers is extravagant and exorbitant. Even in other ports, writ petitions have been filed questioning the recovery of charges for payment to the

Customs Officers. Any revision of pay scale by the Central Government will apply to payment of salary by the Union Government to its

employees. If any retrospective effect were to give on such revision of scales of pay, that cannot be passed on to the handlers of Export and

Import. It is also stated that the Kerala High Court in similar circumstances had upheld the case of the Petitioners.

8. In the counter affidavit filed on behalf of the Respondents, it was stated that due to liberalization of Indian economy, considerable growth was

found in volume of exports and imports. Since customers felt difficulties each time to come to the Gateway port for clearing their goods, it was

decided to set up CFS/ICD and operate them as dry ports. These stations will have to function as common user facilities offering all services for

customs clearance like any other port. They were equipped with fixed installations and offering services for handling temporary storage or import

and export laden and empty containers carried under Customs transit by any applicable mode of transit placed under Customs transit. The

proposal for setting up CFS either by way of private sector or public sector will be cleared by the Inter Ministerial Committee on the

recommendations of the Jurisdictional Commissioner and on the basis of prescribed guidelines. On a letter of intent being granted, an application

was required to set up the infrastructures within one year from the date of approval. On being satisfied that there are required infrastructures, a

notification u/s 8 of the Customs Act will be issued by the Jurisdictional Commissioner of Customs. The operator of the said CFS are appointed as

Custodians u/s 45 of the Customs Act provided they satisfy all conditions and provided an undertaking as required by the circular, dated

14.12.1995 issued by the Central Board of Excise and Customs. Only on fulfillment of these obligations, the Commissioner of Customs,

Tiruchirappalli, who is the jurisdictional Commissioner in these cases will issue a notification u/s 8(b) of the Customs Act. The notification will

stipulate procedures for the purpose of export and import u/s 45 of the Customs Act.

9. At the CFS and ICDs, the Customs personnel are provided on a cost recovery basis. The sanction of postings of officers will be issued by the

administrative wing of the Central Board of Excise and Customs. The custodians are required to pay 185% of total salary of the officers actually

posted at the CFS. Normally one CFS will have 13 officers of various ranks. As per the guideline, dated 14.12.1995, more particularly guideline

No. 10, it is the Custodian who shall bear the cost of the Customs personnel posted for various duties at ICD/CFS/EPZ. Further by a notification

No. 26/2009, the Government by the exercise of its power u/s 141(2) of the Customs Act had issued new regulations known as Handling of

Cargo in Customs Areas Regulations, 2009. Regulation 3 has made its regulations to come into effect with retrospective operations. Under

Regulation 5, it is clearly stipulated that the Custodian shall bear the cost of Customs staff posted in the station. The Commissioner of Customs

shall decide the number of staff required to be posted in the facility. It is also provided under condition No. (o) that the Customs Cargo provider

shall bear the cost of customs officers posted at the Commissioner of Customs on cost recovery basis and in the manner specified by the

Government of India, Ministry of Finance unless specifically exempted by an order of the Ministry.

10. It was also further stated in the same regulation that the customs service providers already approved on or before the date of coming into force

its regulations shall comply with the conditions of requirement within a period of three months or such period not exceeding the period of one year

as the Commissioner of Customs may allow. Under Regulation 10, the Customs Cargo service provider already approved on or before the coming

into force of these regulations, shall be deemed to be approved as customs cargo service provider under the new regulations for a period of five

years from the date of compliance with the conditions of these regulations as stipulated in regulation No. 4. It is also stated that the Petitioners were

complying with these regulations on cost recovery basis. Whenever there was revision of dearness allowance for the Central Government

employees, that was also carried out by them. It is only when a pay revision was made by the Central Government for its employees with

retrospective effect, the Petitioners have come forward to challenge the demand. It is not as if the salaries paid to the Government servants are

static. They are liable to be revised from time to time. Therefore, recovery charges will have to be made by them.

11. Mr. S. Murugappan, learned Counsel appearing for the Petitioners apart from contending that the demand of 185% was exorbitant and not

supported by law, further contended that the further demand is also unwarranted. Reliance was also placed upon a judgment of the Kerala Division

Bench in W.A. No. 891 of 2005, dated 19.1.2006 in Union of India and Anr. v. National Tyre and Rubber Company of India and Anr. The

Division Bench of Kerala High Court in paragraph 2 of its order had observed as follows:

2. The only question to be considered is whether the Petitioner is liable to pay the amounts due to the customs staff because of the pay revision. In

the Bond executed there is no clause obliging the Petitioner to meet the additional burden due to revision of pay. In such circumstances, the learned

single Judge took the view that the Petitioner is not obliged to meet the revision of pay on the basis of Vth Pay Commission report. We find no

infirmity in the view taken by the learned single Judge. In these circumstances, we find no reason to interfere with the judgment of the learned single

Judge.

12. In the additional counter affidavit filed by the Respondents, it was further contended that the demand for cost recovery charges have the

statutory force of law. In normal circumstances, the officers of the Customs department perform their duty only in the Customs House located in

the Gateway Port and they discharge different functions. When ICD and CFS are running by Custodians for their own commercial gains and

located in the hinterland, the cost recovery charges will have to be paid for the posting of customs officials who are additionally sanctioned for

these ICDs and CFS over and above the regular posts. Running an ICD or CFS is a commercial proposition. The Government cannot bear the

costs of additional manpower sanction. The services of the Customs officials are required throughout year during working hours. The cost recovery

charges are in the nature of fees. The recovery at the rate of 185% of total salary is directly relatable to the additional creation of posts. Apart from

the normal salaries, additional dearness allowance and notional HRA will have to be paid. Therefore, 1.85 times of the monthly average are

collected as per the Government of India's letter, dated 1.4.1991. This 1.85 times was worked out by the Department of Revenue on the basis of

principles laid down under the General Financial Rules. In terms of Rules 112 and 113 of the Financial Rules, recoveries of expenditures of the

services rendered to both Government and Non Government parties are to be classified as receipts and the entire cost shall be recovered from the

public or private bodies so that net expenditure of the Government is nil. Further, while calculating the cost recovery charges, apart from the cost

of the staff includes the component of pay and allowances, contribution of pension will have to be recovered from their salaries. Therefore, there

was no exorbitant claim in demanding 1.85 times. The obligations of Custodians are not merely flowing from the bonds executed by them, but the

requirements of Customs Act will have to be followed. The judgment of Kerala High Court may not have any relevance, as it did not decide the

issue relating to cost recovery charges to be met by the Custodians.

13. Per contra, Mr. B. Vijay Karthikeyan, learned Counsel for the Customs and Central Excise had stated that the contentions raised by the

Petitioners cannot be accepted. In the CBEC's Customs Manual of instructions, it has been clearly stipulated as follows:

Posting of Customs officers on cost recovery basis:

7. For the purpose of Customs clearance at the ICDs/CFSSs, Customs staff is provided at the ICD/CFS on cost recovery basis. The sanction for

posting of officers is issued by the Administrative Wing of the Central Board of Excise and Customs. The custodians are required to pay @185%

of total salary of officers actually posted at the ICD/CFS. Normally, 13 officers (1 Assistant/Deputy Commissioner, 2 Appraisers, 2 Inspectors, 2

UDCs, 2 LDCs, 4 Sepoys) are posted at an ICD/CFS having both import and export. The ICD/CFS having only export is given 7 officers (1

Assistant/Deputy Commissioner, 1 Appraiser, 1 Inspector, 1 UDC, 1 LDC, 2 Sepoys).

8. In the initial stages of operations of an ICD/CFS, due to less volume of trade, full strength of the officers may not be required. In such a

situation, if the custodian requests, the Commissioner of Customs may, after due consideration post the officers in less than the sanctioned strength

in the said ICD/CFS. Gradually, when the business picks up at the ICD, the full contingent of staff may be posted. The Commissioner of Customs

also would accept the deposit of advance cost recovery charges for three months for the number of staff which will be actually posted in an

ICD/CFS.

14. The Petitioners were also paying the recovery charges all these years. They cannot turn back and resale from their earlier undertakings by

referring to the judgment of the division bench of Kerala High Court, which did not decide the issue relating to cost recovery charges. On the other hand, the collection is in the nature of fee for the services rendered by the department. The amounts collected will directly go towards the expenditure involved. 185% of recovery charges is highlighted only to make it appear that there was extra income for the department. On the other hand, it takes into account the other components attached to pay and other service conditions of such Customs personnel who are posted in the CFSs/ICDs.

15. In this context, reliance was placed upon a judgment of the Supreme Court in *Government of Maharashtra and Others Vs. Deokar's Distillery*, in respect of the collection made for deputed excise officials in various Distilleries. Similar objections were made by the Distilleries. The same was repelled by the Supreme Court. The following passages found in paragraphs 26, 27, 29, 30 and 31 of the said judgment, may be usefully reproduced below:

26. In the background of the above decided cases, we shall now consider the case on hand. We have already extracted the relevant provisions, the rules, the regulations and the circular letters issued by the State Government. As per the well-settled rule of interpretation that the words in a provision are to be given their normal meaning as understood by the common man or by the trade as well as the widest meaning unless there is any limitation in that provision itself. The words "the cost of such staff shall be paid to the State Government" used in Section 58-A of the Prohibition Act, in our view, would include in their meaning all the costs incurred by the State Government for the purpose of disbursing pay and other allowances to the government employees posted for supervision, whether recovered in advance or in due course the additional amounts which become recoverable on account of upward revision of pay scales with retrospective effect, because there is no limitation of any kind in Section 58-A of the Prohibition Act to the effect that the costs are to be recovered only in advance, and that too only such costs as could be worked out on the date of demand or to the effect that the burden of additional amounts on account of revision of pay scales with retrospective effect should not be recovered from the liquor licensee. In our view, there exists full power u/s 58-

A of the Prohibition Act itself to levy and recover all costs of supervision and, therefore, no limitation can be read into the power to recover all costs present, future and past which are or were actually incurred by the State Government in view of payments made/to be made to its employees posted for excise supervision, in spite of provisions of Sub-rule (12) of Rule 17 of the Rules of 1966 and Sub-rule (12) of Rule 6 of the Rules of 1973.

27. It was submitted on behalf of the Appellants that for administrative convenience only the costs are calculated and recovered in advance from the licensee and therefore, Sub-rule (12) of Rule 17 of the Rules of 1966 or Sub-rule (12) of Rule 6 of the Rules of 1973 could not be construed as an effective representation that no further cost would be recovered when provision u/s 58-A of the Prohibition Act is clearly to the effect that the licensee has to bear the entire cost of the supervisory staff and, therefore, the question of application of the principle of promissory estoppels, as argued by the learned Counsel for the Respondents, would not arise. The Full Bench of the Bombay High Court also ruled accordingly. Further, Rule 17(12) of the Rules of 1966 and Rule 6(12) of the Rules of 1973 providing for recovery of supervision charges in advance, do not direct that differential amounts are not to be recovered, if pay scales are revised. On the other hand, the aforesaid Rules are to be read with other provisions giving residuary powers in both the sets of Rules viz. Rule 17(43) of the Rules of 1966 and Rule 6(36) of the Rules of 1973, which direct that the licensee shall comply with all orders issued under the Prohibition Act and Section 11 of the Prohibition Act clearly provides that the State Government may permit business in liquor subject to the manner and to the extent provided by the provisions of this Act or any rules, regulations or orders made or in accordance with the terms and conditions of the license, permit, pass or authorization granted there under.

29. In the case on hand, the licensees gave an undertaking at the time of obtaining grant or renewal of the license in the application form itself, both under the Rules of 1966 and the Rules of 1973, that they would abide by all orders made under the Prohibition Act and the Rules. Under Rule 17(43) of the Rules of 1966 and under Rule 6(36) of the Rules of 1973, there are residuary powers of making a demand in special circumstances

not foreseen in Rule 17(12) of the Rules of 1966 or Rule 6(12) of the Rules of 1973. It is seen from Rule 17(43) of the Rules of 1966 that the

licensee shall abide by all the rules, regulations and orders made from time to time under the Act. A similar provision also exists under Rule 6(36)

of the Rules of 1973. The object of Section 58-A of the Prohibition Act and the intention of the legislature, in our opinion, could not be anything

other than that the entire cost incurred by the Government on account of pay scales paid to the government employees posted for supervision

should be paid by the licensee and that this cost should not be met from the government exchequer.

30. We have already extracted the relevant undertaking that the Respondents had given in the application in Form PLA prescribed under the Rules

of 1966 and application in Form CLA prescribed under the Rules of 1973. Apart from the undertaking under Condition 17 of the license in Form

CLI for grant or renewal of license that the orders made from time to time under the Act shall be complied with, Sub-rule (43) of Rule 17 of the

Rules of 1966 and Sub-rule (36) of Rule 6 of the Rules of 1973 also prescribed that the licensee shall abide by the orders made from time to time

under the Prohibition Act and these are the provisions which give residuary powers to the Petitioners, inter alia, direct to pay the supervision

charges.

31. The legal (sic liquor) licensee does not have a fundamental right to deal in liquor. Under Entry 8 List II in the Seventh Schedule to the

Constitution of India and thereby under Sections 49 and 143(2)(u) of the Prohibition Act, the State has the exclusive right/privilege in respect of

potable liquor and the State, in our opinion, can charge any reasonable expenses or even consideration for permitting such activity by grant of

license and that the Respondents ought to comply with all reasonable orders, as undertaken by them while obtaining the license. This factor, the

High Court has not appreciated. Once the liquor licensee has undertaken to abide by all reasonable orders under the Prohibition Act while

obtaining the license, they cannot wriggle out of the contractual liability voluntarily incurred by them.

16. Therefore, the objections raised by the Petitioners do not stand the scrutiny of law. In the light of the above legal precedent and the factual

matrix, there is no case made out to interfere with the impugned demand notices. Hence all the three writ petitions will stand dismissed. However, there will be no order as to costs. Consequently, miscellaneous petitions seeking for grant of stay and injunction will stand dismissed and the vacate stay petitions stand dismissed as unnecessary.