
(1997) 02 CAL CK 0046
In the Calcutta High Court
Case No : Writ Petition No. 2047 of 1996

H.M. Brothers (Pvt.) Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-02-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Customs Act, 1962 — Section 59
Major Port Trusts Act, 1963 — Section 111

Citation : (1999) 65 ECC 847 : (1999) 112 ELT 36

Hon'ble Judges : Satya Brata Sinha, J

Bench : Single Bench

Advocate : Bhaskar Sen and Hasmukh Kundalia, for the Appellant; S.P. Mazumder and R. Sikdar, for the Respondent

Judgement

Satya Brata Sinha, J.—The petitioner in this writ application has, inter alia, prayed for the following reliefs :-

"(A) A writ of and/or order and/or direction in the nature of Mandamus commanding the respondents, each one of them, their servants, agents and subordinates to act in accordance with law and grant remission of demurrage charges in respect of ZVL-ZKL Brand Bearings consignment having C.I.F. Value Rs. 1,75,722/- which was lying in the custody of the Calcutta Port Trust at Calcutta Port to the same extent as were given by the Board of Trustees, respondent No. 3 herein in respect of 39 other identical consignments imported by Bombay based importers;

(B) A Writ of and/or order and/or direction in the nature of Mandamus do issue commanding the respondents, each one of them, their servants, agents and subordinates and particularly the Respondent No. 4 herein not to include the subject consignment for Sale and/or auction, till the question of remission of demurrage is finally considered by the respondent authorities and/or till the disposal of this application;

(C) A writ of and/or order and/or direction in the nature of Certiorari do issue commanding the respondents, each one of them, their servants, agents and subordinates to certify and transmit all records relating to the decision to refuse granting remission of demurrage in respect of the consignment imported by the petitioners in terms of Circular dated 1st August, 1995, being Annexure "G" herein."

2. The fact of the matter is not in dispute. On 24-1-1992, the Ministry of Surface Transport laid down guidelines as regards waiver of demurrage charges payable to the Calcutta Port Trust. On 16-11-1992 a vessel "Andra Mache" arrived at Calcutta Port. With the consignment of petitioner with two containers, consignments of several other persons also were brought by the said ship. The containers carrying Cargo were stuffed like the consignment of other consignees. On or about 17-5-1993 the Customs authorities allegedly informed the petitioners and other importers similarly associated that "bearings" exported by them would be assessed on Invoice Value. The petitioners submitted Bill of Entry in terms of Section 59 of the Customs Act allegedly when "dispute valuation" was over on 26-7-1994. On 12-9-1994 the petitioners made a representation before the Calcutta Port Trust authorities for remission of demurrage whereafter a reminder was also sent on 9-1-1995. By a letter dated 24-1-1995 the Port Trust authorities considered the representation and asked for payment of demurrage at 150% of GIF Value or 50% of demurrage accrued up to the date of delivery provided goods were cleared by 28-2-1995. However, in the meantime the Ministry of Surface Transport issued another circular on the guideline dated 24-1-1992 which reads thus :

"In all the cases mentioned in para 2(i) above or where the Board of Trustees have reasons to believe that the detention of goods is not due to the fault of the importer/consignee may consider such cases and give remission ordinarily up to 80% of the demurrage accrued or release the goods on payment of all amount equivalent to the GIF value of the goods, whichever amount is higher."

3. The said instructions were issued in terms of Section 111 of the Major Port Trust Act and thus necessary resolution was required to be passed by the Calcutta Port Trust adopting the same. On 30-8-1995 a resolution was passed by the Trustees of the Calcutta Port Trust in a meeting, in terms whereof it was resolved :-

"The Trustees thereafter considered the cases in respect of which applications had already been received from the importers concerned for grant of remission of demurrage charges according to the new guidelines details of which were furnished in Appendix-IV. The views of the FA & CAO, CPT and Manager, Finance, HDC were also considered by the Trustees. They agreed after discussion to grant a one time concession in respect of the cases placed before them by allowing delivery of the cargo on recovery of 20% demurrage charges actually accrued up to the date of delivery or re-assessed GIF value finally accepted by the Customs, whichever would be more, provided the consignments were cleared within a

period of one month.

Resolved after discussion to adopt the guidelines forwarded by the Ministry vide their letter dated 24th January, 1992 together with subsequent modifications vide letter dated 1st August, 1992, w.e.f. 1st August, 1995, in supersession of the previous guidelines adopted vide Resolution No. 30, dated 27th February, 1976 and with the stipulation that these guidelines would not be treated as instructions u/s 111 of the MPT Act.

Resolved further that the consignments placed for consideration in the meeting be granted a one-time concession in accordance with the new guidelines and these consignments be allowed delivery on recovery of 20% of demurrage charges actually accrued up to the date of delivery or re-assessed GIF value of the consignments finally accepted by the Customs, whichever would be more, provided the consignments were cleared within a period of one month."

4. In view of the aforementioned resolution, the petitioner made another application on 7-9-1995. On 12-9-1995 the Traffic Manager of the Calcutta Port Trust issued a circular in terms of the resolution dated 30-8-1995 and cleared the name of other consignees granting such concession on demurrage. On 14-9-1995 the petitioners made another representation. On or about 28-9-1995 by resolution No. 143 time for taking delivery was extended till after 45 days from 28-9-1995. The petitioners made a further representation on 11-11-1995 and sent letters on 5-2-1996, 17-4-1996, 18-4-1996 and on 11-5-1996 another representations was made.

5. By reason of the impugned order dated 31-7-1996 as contained in Annexure "D" to the affidavit-in-opposition, the appeal and the representation of the petitioner was rejected.

6. Mr. Bhaskar Sen, the learned Counsel appearing on behalf of the petitioner has raised a short question in support of this application. The learned Counsel submits that the reasons assigned for denying the privilege to the petitioner on the ground that said remission of demurrage charges would be granted only to the persons who had paid therefore must be held to be bad in law as an application could be filed only upon adoption of the resolution dated 30th August, 1995. The learned Counsel submits that the condition imposed is a new condition which does not find place in the guideline or the resolution of the Trustee. According to the learned Counsel if the case of other 39 importers could be considered only because they had applied before 30th August, 1995, there was absolutely no reason as to why the petitioners' application could not be considered only because he filed the same on 7th September, 1996. Alternatively it was submitted that the petitioner had also applied for remission of such demurrage charges on 12th September, 1994 (Annexure "D") and 9th January, 1995 (Annexure "?") and in that view of the matter the petitioners must be held to have been discriminated against. It has been pointed out that many importers even could not lift the goods within the time granted and even in their case the

time had been extended.

7. Mr. Mazumder appearing on behalf of the Calcutta Port Trust inter alia submitted that the petitioner did not fulfil the conditions for obtaining such concession relating to waiver of demurrage charges. It has been submitted that the petitioner neither took delivery of goods on recovery of 20% of demurrage charges actually accrued nor did they submit any documents or clearance and thus their representations could not be considered. The learned Counsel submitted relying on the decisions reported in Board of Trustees of the Port of Bombay Vs. Indian Goods Supplying Co., that payment of demurrage charges cannot be avoided for any default of any other authority like Customs Authority. The learned Counsel further relied upon a decision in Trustees of Port of Madras Vs. Nagavedu Lungi and Co. and Others, on the aforementioned point as also a decision of the Apex Court in the International Airports Authority of India and Others Vs. Grand Slam International and Others, . It was further submitted that there is no question of any discrimination in this matter inasmuch as the petitioner did not avail the one-time benefit granted to the other consignees who were similarly situated.

8. The impugned order shows that the demurrage is charged @ Rs. 1,5467- and up to 30th April, 1996 and, thus, an amount of Rs. 17,48,014/- has already accrued in that regard. It has been taken note of the fact that the petitioner could not take delivery of the consignment owing to delay in assessment of customs duty. While passing the said order, it appears that the opinion of the financial adviser and Chief Accounts Officer and Traffic Manager had been taken into consideration. It was further noticed :

"It may be mentioned that the consignment of bearing of M/s. H.M. Brothers Pvt. Ltd. was also lying at Calcutta Dock System on 30th August, 1995 when the Trustees had granted the aforesaid one-time concession in respect of 83 other similar consignments lying at CDS and HDC. The consignees in respect of these 83 consignments had actually applied for consideration of their case as per the fresh guidelines of the Ministry within 30th August, 1995, attaching a copy of the guidelines dated 1st August, 1995. But M/s. H.M. Brothers Pvt. Ltd. submitted a similar application on 7th September, 1995 and, therefore, they could not be granted the benefit of the Trustees" Resolution No. 138, dated 30th August, 1995."

9. The Trustees merely adopted a resolution rejecting the appeal on the ground that the petitioners have failed to apply within 30th August, 1995.

10. It is not in dispute that the impugned order could be passed by the Trustees of the Calcutta Port Trust in exercise of their jurisdiction conferred upon them on the basis of the guidelines issued by the Ministry of Surface Transport and adopted by them in terms of its resolution dated 30th August, 1995. The respondent therefore could not rely on a ground which is inconsistent with the said resolution.

11. As indicated hereinbefore, the only ground upon which the petitioners' appeal had been rejected, was they had filed an application after 30th August, 1995 which, in my opinion, cannot be said to be valid in law inasmuch as it is not a case where the petitioners did not have any right at all. The right of the petitioners" had flowed from the said resolution and such right is enforceable in a court of law. The submission of Mr. Mazumder to the effect that the petitioners do not have any legal right and thus the writ petition is not maintainable, thus, cannot be accepted.

12. In Chaitnya Charan Das Vs. State of West Bengal and others, , this Court had held :-

"A legal right does not mean the right flowing from a statute. A citizen is entitled to maintain a Writ application questioning inaction on the part of the State to implement its policy decision,

It may also question the validity and/or legality of an action on the part of the State which according to the petitioner is unfair, unreasonable, arbitrary, or discriminatory. Even a deviation or a departure from a policy decision attracts Article 14 of the Constitution of India. Any unfair or unreasonable state of Action can be questioned by filing a writ application in terms of Article 226 of the Constitution of India."

It is evident that the Port authorities failed to implement its own policy decision so far as the writ petitioners are concerned. In Union of India (UOI) Vs. K.P. Joseph and Others, the Apex Court observed :-

"To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties."

In the instant case, the policy decision of granting waiver/remission of demurrage charges after adoption of the said resolution by the Trustees conferred a right on the writ petitioners as also other importers/consignees who are qualified therefore and impose a corresponding duty on the Board to grant such remission/waiver to eligible applicants. When such a right is violated and such a duty is infringed the Writ Court can certainly come in aid of the sufferer. In the instant case the concerned respondents took a policy decision of granting waiver of demurrage charges on 30th August, 1995 and application therefore could be filed only thereafter. In any event, it is not disputed that the petitioners filed such applications even earlier and as the said representations had not been considered, the impugned order cannot be sustained.

13. There is absolute no dispute with regard to the proposition of law as enunciated by the Supreme Court of India in Board of Trustees of the Port of Bombay Vs. Indian Goods Supplying Co., , in Trustees of Port of Madras Vs. Nagavedu Lungi and Co. and Others, and in International Airports Authority of India and Others Vs. Grand Slam International and Others, . However, it is not a

case where the petitioners dispute the right of the Calcutta Port Trust to charge demurrages because of any order passed by the Customs authority or any other authority. There cannot be any doubt whatsoever that pendency of an application for assessment before the Custom authority by itself cannot entitle the plaintiff from claiming waiver of demurrage charges. But, as indicated hereinbefore, the said right flows from the policy decision adopted by the Calcutta Port Trust itself.

14. In *State of Mysore and Another Vs. H. Srinivasmurthy*, , the Apex Court clearly held that a deviation or departure from a policy decision would attract the wrath of Article 14 of the Constitution of India.

15. Furthermore no discrimination could have been made only on the ground that 39 other applicants filed their applications prior to 30th August, 1995. No such cut off date has been fixed either in the guideline or in the resolution adopted by the respondent authorities in its meeting held in 30th August, 1995. The petitioner, therefore, was entitled to be treated alike.

16. This Court in exercise of its power [under] Article 226 of the Constitution of India has a limited role to play but it does not hesitate to strike down an order if the same contain an error apparent on the face of the record, as stated in *De Smith's Judicial Review of Administrative Action* (4th Edn.) at page 136 in the following terms :

"The concept of error of law includes the giving of reasons that are bad in law of (if there is a duty to give reasons) inconsistent, unintelligible or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence."

As the respondents in passing the impugned order have failed to take into consideration the relevant facts and have based the impugned decision on irrelevant ground, the said order cannot be sustained. In *Mediwell Hospital and Health Care Pvt. Ltd. Vs. Union of India and others*, , the Apex Court while considering the exemption notification under the Customs Act, 1962 held that an importer cannot have a claim for absolute exemption from payment of customs duty as of right and therefore the contention that the writ petitioners were not entitled to seek *Mandamus* may not be held to be incorrect but since the benefit of the exemption notification has been given to all other importers similarly situated, its claim to the petitioner was in violation of Article 14 of the Constitution of India.

17. It is now well settled that in a given case this court has the power to give such direction as could be issued by the respondents themselves.

18. This application is, therefore, allowed, the order dated 31-7-1995 as

contained in Annexure "D" to the affidavit-in-opposition is set aside and the matter is remitted back to, the concerned respondents who are directed to pass a similar order as has been done in the case of other consignees who are similarly situated to that of the petitioner.

19. In the facts and circumstances of this case, there will be no order as to costs.