(1992) 02 MAD CK 0034

In the Madras High Court

Case No : Writ Petition No. 9568 of 1989

Kothari Optical Industries — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 19-02-1992

Acts Referred:

Customs Act, 1962 — Section 144, 17, 2, 45, 46
PORTS ACT, 1908 — Section 42

Citation : (1993) 42 ECC 319

Hon'ble Judges : Bakthavatsalam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bakthavatsalam, J.—The prayer in the writ petition is as follows:

...to issue a writ of mandamus or any other appropriate writ or order or direction in the nature of a writ directing the third respondent to honour the

detention certificates produced by the petitioner and refund the demurrage charges collected on the 12 bills of entries filed by the petitioner and

pass such further or other orders....

2. The petitioner imported two consignments of 250 metric tonnes and 170 metric tonnes of electrolytic tinplate waste/waste soft and bright from

M/s. Euro Metal Ltd., United Kingdom. The petitioner filed bills of entries for the clearance of the consignments and the Assistant Collector of

Customs, Madras, passed an order enhancing the value of the imported goods stating that it was not known as to whether the goods conformed

strictly to the different specifications mentioned in the relevant indents except for the sizes and thickness. Hence the Assistant Collector of Customs

ordered assessment of the goods adopting the F.O.B. value as ï¿½ 204 per metric tonne (MT). The petitioner thereafter filed an appeal before the

Collector of Customs (Appeals), Madras, the second respondent herein. The appeal was allowed by an order dated 24.7.1987 holding that the

order of the lower authority enhancing the value of the goods is not correct in view of the decision reported in 1985 ECR 646 and in Babcock

Venkateswara Hatcheries (P) Ltd., v. Collector of Customs, Bombay and 1985 ECR 1307 and accordingly set aside the order of the Assistant

Collector of Customs. During the pendency of the proceedings before the Assistant Collector of Customs, the petitioner had to clear the goods to

avoid heavy demurrage and as such, the petitioner had paid Rs. 4,95,875/- and Rs. 1,63,476/-respectively as demurrage charges for the two

consignments and it was only subsequent to the clearance of the goods, the appeal was preferred to the Collector of Customs (Appeals) who

agreed with the invoice value and the customs had since granted refund of duty. It is alleged that the delay in the clearance of the consignments was

due to no fault of the petitioner and it was, in fact, beyond the control of the petitioner. The Customs Authorities after carefully examining the facts

had granted 12 detention certificates in respect of the consignments covering the period of detention. The detention certificates also made it clear

that the detention was due to no fault or negligence of the importer and that it was due to the ordinary process of appraisement. The petitioner

made a representation to the third respondent on 17.9.1987 for the return of the demurrage amount. The Port Trust, Madras, the third respondent,

by letter dated 25.11.1987 requested the petitioner to forward the detention certificates early and the petitioner delivered the detention certificates

relating to 12 bills of entries to the third respondent on 17.11.1988 with a request to waive the full demurrage charges as per the detention

certificates issued by the customs authorities. By letter dated 26.12.1988 the third respondent replied to the petitioner that there is no provision in

Madras Port Trust Scale of Rates for waiver of demurrage charges for the goods which were detained by the Customs for examination u/s 17(3)

and 17(4) of the Customs Act. As such, the third respondent-Port Trust informed the petitioner its inability to consider the request of the petitioner

for the waiver of the demurrage charges. Aggrieved by this order, the petitioner has come to this Court with the prayer stated supra.

3. The main allegations in the affidavit filed in support of the writ petition are that the detention of the goods has been done by the Customs

authorities for their own purposes of assessment and when all the documents and particulars necessary for assessing the bills of entries were made

available to the authorities and when there was no delay on the part of the petitioner in the matter of furnishing the details necessary for making the

assessment, the Customs authorities ought to have assessed it with due expedition. It is also alleged that the loading of value by the Assistant

Collector of Customs did not find favour with the Collector of Customs (Appeals) and that the Collector of Customs (Appeals) has directed the

assessment to be made as per the invoice value which would mean that there was no proceeding for loading the value. It is further alleged that the

detention of he goods cannot be attributed to any fault or negligence on the part of the importer/petitioner and in view of the judgment of a Full

Bench of this Court reported in National Industries v. Assistant Collector of Customs, Madras 1980 ELT 128 (Madras) the Customs authorities

are bound to issue a detention certificate for the entire period of detention and the third respondent-Madras Port Trust is equally bound by such a

certificate. Accordingly, it is alleged that the communication of the third respondent dated 26.12.1988 is one declining jurisdiction.

4. Notice of motion was ordered by me on 24,7.1989. Mr. P. Narasimhan, Senior Central Government Standing Counsel appears for

respondents 1 and 2. Mr. T.S. Subranianiam, learned Senior Counsel appears for the third respondent--Madras Port Trust.

5. The contesting third respondent-Port Trust has filed a counter-affidavit wherein it is stated that the detention certificates given by the second

respondent-Customs authorities, certified that the goods have been detained for examination u/s 17(3) and (4) of the Customs Act and that there is

no provision in the Scale of Rates of the Madras Port Trust for waiver of demurrage charges for the detention of the consignment under this clause.

It is further stated that the Scale of Rates is under authority of law and the validity of which cannot be questioned. It is pointed out in the counter-

affidavit that the alleged delay in the assessment of goods by the second respondent is totally extraneous so far as the third respondent is

concerned and the fact remains that the third respondent-Port Trust has rendered service to the consignments and hence it is entitled to the legitimate dues which has to be paid by the petitioner in full. It is further stated in the counter-affidavit that the second respondent has issued 12

detention certificates in respect of the consignments and the detention u/s 17(3) and (4) of the Customs Act relates to the appraisement of duty by

the Customs and there is no provision in the Scale of Rates for waiver or allowing concessional levy of demurrage. It is pointed out in the counter-

affidavit that even though the delay in clearing was not due to the negligence of the importer, yet, the importer cannot avoid payment of demurrage

when there is no evidence that the delay was due to any act of the third respondent or of persons for whom the respondent was responsible, and

therefore, the prayer of the petitioner for the issuance of a writ of mandamus is not maintainable inasmuch as it directs the third respondent to

honour the detention certificates issued by the second respondent.

6. I have heard the arguments of Mr. R. Thiagarajan, learned senior counsel appearing for the petitioner and of Mr. T.S. Subramaniam, learned

senior counsel appearing for the third respondent-Madras Port Trust.

7. Mr. R. Thiagarajan, learned senior counsel appearing for the petitioner contended that the customs area is defined in Section 7 of the Customs

Act and the Port Trust authorities function only as Customs Officers u/s 45 of the Customs Act and that when the Customs authorities issue the

detention certificates, that will bind the Port Trust and relied upon a Full Bench judgment of this Court in National Industries v. Assistant Collector

of Customs, Madras (1980) ELT 128 (Mad) in support of his contention that the petitioner is entitled to the refund of the demurrage charges.

Learned senior counsel further pointed out that according to the dicta laid down in Board of Trustees of the Port of Bombay Vs. Jai Hind Oil Mills

Co. and Others, and Trishul Impex Vs. Union of India, and Equipment Sales Corporation and Anr. v. The Assistant Collector of Customs and

Ors. [1990] 25 ECC 145, the third respondent-Port Trust has to return the demurrage charges paid by the petitioner. It is also pointed that there

is an agreement in 1930 between the Port Trust and the Customs authorities to abide by the detention certificates.

8. Mr. T.S. Subramaniam, learned senior counsel appearing for the third respondent-Madras Port Trust, contends that he is not able to understand

the relief asked for, i.e., to honour the detention certificates. Learned senior counsel expresses his surprise by putting the question to himself as to

what is the meaning of honouring a detention certificate and says that he is unable to understand it. Learned senior counsel points out that all the

certificates are issued u/s 17(3) and (4) of the Customs Act and brings to the notice of the Court a specimen of the detention certificate and

submits that Rule 13 has been amended after the Full Bench Judgment of this Court in National Industries v. Assistant Collector of Customs,

Madras 1980 ELT 128 (Mad) will not apply and the amended Rules had come into force from 13.7.1977 and according to the new Rules, the

petitioner is not entitled to any remedy (sic). Learned Senior Counsel further referred to the judgment in The Trustees of the Port of Madras Vs.

Aminchand Pyarelal and Others, and the judgment in Board of Trustees of the Port of Bombay Vs. Indian Goods Supplying Co., for the

proposition that there is no substance in the writ petition.

9. The short point that arises for consideration in this case is whether the petitioner is entitled to the return of the demurrage charges paid to the

Port Trust, the third respondent on the basis of the detention certificates issued by the Customs Authorities. For a proper appreciation of the facts,

it is necessary to refer to certain provisions of the Customs Act, 1962 (hereinafter referred to as the Act). Section 7 of the Act deals with the

appointment of Customs Ports, Airports, Warehousing Stations, etc., and it reads thus:

7. Appointment of Customs Ports, Airports, etc.-- The Central Government may, by notification in the Official Gazette, appoint--

(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export

goods or any class of such goods;

(aa) the places which alone shall be inland container depots for the unloading of imported goods and the loading of export goods or any class of

such goods;

(b) the places which alone shall be customs stations for the clearance of goods imported or to be exported by land or inland water or any class of

such goods;

(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India or to or from any land customs station from or to any land frontier;

(d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified

ports in India.

Under this Section, the Central Government has got the power to notify the Customs ports and airports. Section 2(11) of the Act defines ""customs

area"" as follows:

2(11) ''Customs area'' means any area of a customs station and includes any area in which imported goods or export goods are ordinarily kept

before clearance by customs authorities;

Section 2(12) of the Act defines ""Customs Port"" as under:

2(12) ''customs port'' means any port appointed under Clause (a) of Section 7 to be a customs port [and includes a place appointed under Clause

(aa) of that Section to be an inland container depot]:

Section 2(13) defines ""customs station"" and it reads thus:

2(13) ''customs station'' means any customs port, customs airport or land customs station;

10. u/s 45 of the Act, there are certain restrictions on custody and removal of imported goods. This is in pari materia of [with?] old Section 85 of

the Sea Customs Act which has been repealed. Section 45 of the Act reads as follows:

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 Collector of Customs until they are

cleared for home consumption or are warehoused or are transhipped 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 deal with, except under and in accordance with the permission in writing of the proper officer.

In the judgment reported in National Industries v. Assistant Collector of Customs, Madras 1980 ELT 128 (Mad), a Full Bench of this Court had

an occasion to consider whether the Customs authorities were under a public duty to issue detention certificate in the circumstances contemplated

under Rule G(a) and (b) of the Scale of Rates fixed by the Port Trust. The Full Bench held that the Customs authorises are under a public duty to

issue a detention certificate in the circumstances contemplated under Rule 13(a) and (b) or the Scale of Rates fixed by the Port Trust. The Rules

were framed by the Port Trust u/s 42 of the Port Trust Act. The rules which were in consideration before the Full Bench were Rule 13(a) and (b).

The Full Bench while considering the rules as they stood then extracted the rules as follows: (at page 132)

Rule 13(a) specifically says that periods during which goods are detained by the Collector of Customs for examination u/s 17(3) and (4) and for

chemical test u/s 144 of the Customs Act, 1962, other than the ordinary processes of appraisement and certified by the Collector of Customs to

be not attributable to any fault or negligence on the part of the importers, should be treated as a free period. Rule 13(b) says that where goods are

detained by the Collector of Customs on account of Import Trade Control formalities, or for compliance of formalities prescribed under the Drugs

Act and certified by the Collector of Customs to be not attributable to any fault or negligence on the part of the importers, demurrage shall be

recovered for that period at the rate of 20 per cent of the normal rates.

In the judgment reported in Board of Trustees of the Port of Bombay Vs. Jai Hind Oil Mills Co. and Others, , the Supreme Court while

considering the question of demurrage charges, held as under: (at page 639, paragraph 9) : page 216 of 12 ECC:

9. The power of a Port Trust to fix rates of demurrage and to recover the same from an importer or exporter (although the question of an exporter

paying demurrage arises rarely) under law and to show concession as regards demurrage charges in certain specified cases is recognised by this

Court in the The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others, and in Board of Trustees of the Port of Bombay Vs. Indian

Goods Supplying Co., . These decisions are no doubt based on the relevant laws which were in force at the material time. But the decisions are

still relevant insofar as cases arising under the Act because the Act also contains provisions more or less similar to the statutory provisions

considered in the said decisions. Demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour. They are always

fixed in such a way that they would make it unprofitable for importers to use the port premises as a warehouse. It is necessary to do so because

congestion in the ports affects the free movement of ships and the loading and unloading operations. As stated earlier, the Port Trust shows

concession to the party concerned in certain types of cases.

As rightly pointed by Mr. T. Subramaniam, learned senior counsel appearing for the third respondent-Port Trust, Rule 13(a) and (b) of the Scale

of Rates of the Madras Port Trust as it stands reads as follows:

13. The following free periods are allowed in addition to the free periods applicable as per description of goods:

(a) Periods during which goods are detained by the Collector of Customs for special examination involving analytical or technical tests other than

the ordinary process or appraisement and certified by the Collector of Customs to be not attributed to any fault or negligence on the part of

importers plus two working days. The Customs holidays will also be treated as free days in addition.

(b) Where goods are detained by the Collector of Customs, on account of Import Trade Control formalities and certified by the Collector of

Customs to be not attributable to any fault or negligence on the part of the importers, rent shall be recoverable at Rs.5.50 per unit for every 2 days

or part thereof subject to a minimum of Rs.11.00 per consignment against the normal demurrage. This concession in demurrage shall be limited to a

period of 150 days from the last free day of the vessel under Clause 1 above and demurrage shall be recovered at the full rate (i.e., third slab) for

detention beyond the above said period....

This Rule cannot be said to be applicable to the facts of this case. Rule 13(a) has undergone a change and it is applicable only if the goods were

detained by the Collector of Customs for special examination involving analytical or technical tests other than the ordinary processes of

appraisement.

11. Section 17 of the Act reads as under:

17. Assessment of duty.--(1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the

imported goods or the export goods as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and

tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.

(3) For the purpose of assessing duty under Sub-section (2), the proper officer may require the importer, exporter or any other person to produce

any contract, broker''s note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods,

as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or

furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section imported goods or export goods may, prior to the examination or testing thereof, be

permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents

produced and the information furnished under Sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise

that any statement in such entry or document or any information sp furnished is not true in respect of any matter relevant to the assessment, the

goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

All the certificates were issued u/s 17(3) and (4) of the Act as per the specimen showed by Mr. T.S. Subramaniam, learned senior counsel

appearing for the third respondent-Port Trust and as such no mandamus can issue when it will not come under Rule 13 of the Scale of Rates

framed by the Madras Port Trust as it stands to-day. In the judgment in Board of Trustees of the Port of Bombay Vs. Indian Goods Supplying

Co., the Supreme Court held thus:

A claim for demurrage by the Port Trust for the period during which the goods were detained by the Customs Authorities with the Port Trust for completing the Import Trade Control formalities is maintainable in law. Even though the delay in clearing the goods was not due to the negligence

of the importer for which he could be held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority

of law the validity of which cannot be questioned. The claim cannot be resisted as there is no evidence that the delay was due to any act of the Port

Trust or persons for whom the Port Trust is responsible.

As rightly pointed out by Mr. T.S. Subramaniam, learned Senior Counsel appearing for the Port Trust-third respondent, that the detention

certificates issued in this case will not help the petitioner since Rule 13(a) and (b) of the Scale of Rates of the Madras Port Trust has been

amended in 1977 and as per the amended Rules, the petitioner is not ntitled to the return of the demurrage charges paid. In the circumstances, I fail

to understand how a writ of mandamus can issue to the Port Trust to honour the detention certificates which have been issued u/s 17(3) and (4) of

the Act. I do not think the decision relied upon by Mr. R. Thiagarajan, learned Senior Counsel appearing for the petitioner, reported in Trishul

Impex v. Union of India 1991 (2) DL 1 will help the petitioner. In that case, the Division Bench held that the Customs authorities were liable to pay

demurrage charges and ground rent till the goods were released under the Customs Act, 1962. In view of the above discussions, it is clear that no

statutory duty is cast on the part of the third respondent-Port Trust to refund the demurrage charges and the petitioner has no right to insist upon

the refund of the demurrage charges, more so because of the rules framed under Rule 13 of the Scale of Rates of the Madras Port Trust which

came into force from 13.7.1977. If the rules had not been amended, probably the judgment of the Full Bench of this Court reported in National

Industries v. Assistant Collector of Customs, Madras 1980 ELT 128 (Mad) would have come to the aid of the petitioner, but it is not so. The writ

petition is devoid of merits and it is dismissed. No costs.

