

(2016) 01 AHC CK 0166

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 75 of 2014

Paswara Chemicals Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Contract Act, 1872 — Section 148, Section 170
Customs Act, 1962 — Section 110, Section 111(d), Section 111(m), Section 112(a),
Section 129-A, Section 141(2), Section 157, Section 2(43), Section 30, Section 45,
Section 45(2), Section 49, Section

Citation : (2016) 3 ADJ 97 : (2016) 2 AllWC 1928 : (2016) 335 ELT 408

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—1. The petitioner is a Company duly registered under the Companies Act, 1956 and is engaged in the manufacture of petroleum products. The petitioner imported Heavy Cut Oil in five containers through a bill of lading. On arrival, the goods were detained on 21.12.2011, on a specific intelligence report being received by the Customs Department on the ground that the petitioner has mis-declared the description of the goods in the bill of lading. Samples of the product were taken and were sent for testing to the Central Revenues Control Laboratory (CRCL), Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India, New Delhi. A report was submitted on 10.2.2012 indicating that the goods that were imported by the petitioner was a "waste Oil" and was covered by the Hazardous Waste Management Rules, 2008 (hereinafter referred to as the Rules of 2008). Based on this report, the Customs authority confiscated the goods on 27.2.2012 under Section 111(d) and 111(m) of the Customs Act, 1962 (hereinafter referred to as the Act) and seized the goods under Section 110 of the Act. A show-cause notice dated 12.6.2012 followed the said seizure directing the petitioner to show-cause as to why the goods should not be confiscated and penalty should not be

imposed under Section 112(a) of the Act. The petitioner submitted a reply giving detailed evidence to show that the goods imported was not a "Waste Oil" but "Heavy Cut Oil". It transpires that the Customs Department sought clarification from the Ministry of Environment and Forest, Government of India, New Delhi with regard to the product in question. The Ministry of Environment and Forest issued a clarification dated 31.8.2012 indicating that the goods imported by the petitioner was not "Waste Oil".

2. The competent authority, namely, the Additional Commissioner, Customs, Excise and Service Tax, Ghaziabad after considering all aspects of the matter and, after considering the report of Ministry of Environment and Forest, issued an order dated 3.1.2014 holding that the consignment imported by the petitioner under the bill of entry dated 23.11.2011 was not a "Waste Oil" and, accordingly, directed the consignment to be released at appropriate value at the time of import of the said goods and, accordingly, dropped the show-cause notice.

3. Based on the said order, the petitioner paid appropriate rate of duty and asked for release of the goods. The Assistant Commissioner, Customs, Excise and Service Tax issued an order dated 3.1.2014 to the Manager, Central Warehousing Corporation, who was Incharge of the goods to waive the warehousing charges in view of the Handling of Cargo in Customs Area Regulations, 2009. A reminder was again issued on 29.1.2014 for release of the goods after waiving the warehouse charges. In spite of a specific order from the Customs authorities to release the goods and to waive the warehousing charges and in spite of letters being written by the petitioner dated 27.1.2014 and 28.1.2014, the goods were not released by the Central Warehousing Corporation or by its service provider World Window Infrastructure Logistics Pvt. Ltd., respondent No. 5. The petitioner was left with no choice but to file the present writ petition seeking a writ of mandamus commanding the respondents to release the consignment of "Heavy Cut Oil" in five containers pursuant to the bill entry dated 23.11.2011 without payment of any warehousing charges.

4. This Court while entertaining the writ petition after considering the matter and considering the urgency of the situation passed an interim order dated 7.2.2014 directing the respondent Nos. 3, 4 and 5, i.e., Central Warehousing Corporation and its service provider to release the goods or show-cause by filing a counter-affidavit. For facility the interim order dated 7.2.2014 is extracted hereunder:

"We have heard Shri C.L. Pandey, Sr. Advocate assisted by Shri Ashish Dubey for the petitioner. Shri Krishna Agrawal has accepted notice on behalf of respondent No. 1. Shri Amit Mahajan appears for respondent No. 2. Issue notice to respondent Nos. 3, 4 and 5. Steps within a week. In addition to normal mode of service, the petitioner will serve respondent Nos. 3, 4 and 5 with dasti summons.

It is submitted that the subject goods were detained by the Custom Department. On adjudication by the Additional Commissioner, Customs, Excise and Service Tax Commissionerate, Ghaziabad dated 3.1.2014, the consignment under bill of

entry dated 23.11.2011 was ordered to be released at appropriate value at the time of import of said goods. It is submitted that despite the directions to release of goods issued by the adjudicating authority, the respondent No. 5 has not permitted release of the goods.

The respondent Nos. 3, 4 and 5 will either release the goods in accordance with law after taking requisite charges, if any, payable by the petitioner, or show-cause by filing counter-affidavit within six weeks.

List on 20th March, 2014."

5. The Central Warehousing Corporation, respondent Nos. 3 and 4 filed their counter-affidavit on 11.4.2014 indicating that the Inland Container Depot, Loni District Ghaziabad has been notified as the ICD Loni for unloading of the imported goods and for loading of the export goods under Section 7 of the Customs Act. The said respondents further indicated that they were appointed as the custodian of the goods, which are unloaded in the customs area under Section 45 of the Act, which would remain in their custody till it is approved by the Commissioner of Customs in accordance with the Act. The said respondent contended that that under Section 45 of the Act they are responsible for safe custody of the goods till it is cleared by the Commissioner of Customs and that under Sections 63 and 68 of the Act, the owner of the goods is liable to pay warehousing charges pursuant to the clearance of the goods. It was also contended that under Section 141(2) of the Act, the imported goods may be received, handled etc. as may be prescribed and that under Section 157 of the Act regulations can be framed. It was contended that based on the aforesaid provisions, the Regulations of 2009 has been framed. It was contended that under Section 141(2) of the Act since there was no such provision to make Regulations in respect of waiver of charges and, therefore, in the absence of any such provision not enumerated under Section 141(2) read with Section 157 of the Act, the Regulations could not be framed. It was also contended that as per Section 148 read with Section 170 of the Contract Act, 1872, the said respondents had a lien on the goods till remuneration were not received and therefore there was a bailor and bailee relationship, which continues till adequate remuneration is not paid. It was, therefore, contended that the respondents were justified in demanding warehousing charges and the goods would only be released after receiving the payment.

6. Respondent No. 5 contends that he was appointed as strategic alliance management partner and operator by the Central Warehousing Corporation under an agreement executed between the parties. The stand taken by the service provider is the same as taken by the Central Warehousing Corporation with the additional fact that pursuant to the order of the High Court dated 7.2.2014, a letter dated 13.3.2014 was issued to the petitioner to take delivery of goods on payment of Rs. 36,13,160.52 calculated towards warehousing charges upto 14.3.2014. The stand of the respondent No. 5 was that in view of Section 45 of the Act read with Section 63 of the Act coupled with Sections

148 and 170 of the Contract Act the respondents have a lien on the goods in question and the same would be released only upon receiving the warehousing charges. The said respondents further contended that the words "subject to" indicated in Regulation 6(1) of the Regulations of 2009 contemplated the law existing for the time being in force, namely, Section 63 of the Act. It was contended that since Section 63 of the Act provides for payment of warehousing charges, required warehouse charges could not be waived.

7. The Deputy Commissioner of Customs, respondent No. 2 has not filed any counter-affidavit but the learned counsel appearing on its behalf contended that the goods were neither detained nor seized and only an enquiry was made which after proper investigation the proceedings were dropped and an order was passed for releasing the goods. The learned counsel for the respondents contended that a direction was also issued to the Central Warehousing Corporation as well as to respondent No. 5 to release the goods without payment of warehouse charges in view of the Regulation 6(1) of the Regulations of 2009. The learned counsel contended that if the Central Warehousing Corporation and its service provider were not agreeable to the order issued by the Customs Department for release of the goods without payment of warehouse charges, the remedy available to them was to file an appeal under Section 129-A of the Customs Act.

8. In the light of the aforesaid stand taken by the parties, we have heard at length Sri C.L. Pandey, the learned Senior Counsel alongwith Sri Ashish Dube, the learned counsel for the petitioner, Sri V.V. Gautam alongwith Sri Sambhu Chopra and Sri Ashutosh Shukla, the learned counsel for the respondent No. 5, Sri Ravi Prakash Pandey, the learned counsel holding brief of Sri M.C. Chaturvedi, the learned counsel for the respondent Nos. 3 and 4, Sri Amit Mahajan, the learned counsel for the respondent No. 2 and Sri Krishna Agrawal, the learned counsel for the respondent No. 1.

9. After having heard the learned counsel for the parties at some length, we are of the opinion that the controversy involved in the present case is squarely covered by a decision of this Court in Civil Misc. Writ Petition (Tax) No. 205 of 2015, M/s. Continental Carbon India Ltd. v. Union of India and another, decided on 14th October, 2015. Since the learned counsel for the respondent No. 5 insisted that the said decision is distinguishable, we allowed the learned counsel to argue the matter at length.

10. Section 45 of the Act provides for clearance of imported goods. The said provision is extracted hereunder:

"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 Commissioner 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 dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under Section 30 for the arrival of the conveyance in which the said goods were carried."

11. Under the aforesaid provision the imported goods would remain in the custody of the person approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

12. Section 49 of the Act provides for storage of imported goods in warehouse pending clearance. For facility, Section 49 of the Act is extracted hereunder:

"49. Storage of imported goods in warehouse pending clearance.--Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods."

13. "Warehouse" has been defined under Section 2(43) of the Act which means a public warehouse appointed under Section 57 or private warehouse licensed under Section 58. Such appointments of public warehouse under Section 57 of the Act and licence of private warehouse under Section 58 of the Act is granted by the Commissioner of Customs.

14. Section 63 of the Act provides for payment of warehouse charges at rates fixed under any law by the Commissioner of Customs. For facility, the said provision is also extracted hereunder:

"63. Payment of rent and warehouse charges.--(1) The owner of any warehoused

goods shall pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Commissioner of Customs.

(2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse-keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select."

15. From the aforesaid, it is apparent that the customs authorities have full power and control over the imported goods and without the permission of the customs authorities, the goods cannot be cleared. At the same time, we find that there is no provision in the Act, which restrains the custodian from charging demurrage charges for the services rendered for storing the imported goods. The word "demurrage" has not been defined under the Act but the same has been defined under Regulation 2(g) of the International Airports Authority (Storage and Processing of Goods) Regulation, 1980, which has been issued in exercise of the powers conferred to sub-Section (1) of Section 37 of the International Airports Authority Act as the rate or amount payable to the airport by a shipper or consignee or carrier for not removing the cargo within the time allowed. Similar definition has also been given in the Port Trust of Madras Act, 1905, wherein the Supreme Court in *Trustees of Port of Madras v. M/s. Aminchand Pyarelal and others*, , 1976 (1) SCR 72, held that the word demurrage merely signifies a charge, which may be levied on goods after expiration of free days. The Supreme Court in *Shipping Corporation of India Ltd. v. C.L. Jain Woolen Mills and others*, , 2002 (5) SCC 345, held that demurrage charges are levied for the place the goods occupy and for the period they remain not released on account of lack of customs clearance.

16. Section 45(2) of the Act has been interpreted in *International Airports Authority of India v. M/s. Grand Slam International and others*, , 1995 (77) ELT 753. The Supreme Court held that the authority created under a statute would be entitled to charge demurrage charges and an importer would be liable to pay the demurrage charges. The Supreme Court found that Section 45 of the Act does not provide that such person, namely, the custodian would not be entitled to recover charges from the importer for the period the goods remain in their custody. The Supreme Court held that sub-section (2) of Section 45 of the Act does not in any way impose an obligation on the custodian approved under sub-section (1) thereof not to collect charges leviable on the consignee.

17. Similar view was again given by the Supreme Court in *Shipping Corporation of India* (supra) as well as in *Monika India v. Union of India*, , 2012 (283) ELT 33, by the Delhi High Court and by the Supreme Court in *Trustees of Port of Madras v. K.P.V. Sheikh of Mohd. Rowther and Co. Put. Ltd.*, , AIR 1999 SC 1922.

18. In the light of the aforesaid, it is clear that demurrage charges can be levied

by the custodian under Section 45 of the Act.

19. The Inland Container Depot (ICD) at Loni has been notified under Section 8 of the Act as the area for loading of goods for export and for unloading of imported goods. The Central Warehouse Corporation has been appointed under Section 45 of the Act by a public notice dated 22.3.2007 as the custodian of imported and exported cargo of this Depot. The appointment is subject to certain terms and conditions. Clause 12 (VII) of the terms and conditions of licence is extracted hereunder:

"12. The Custodian shall also take steps to bring about necessary improvement in the infrastructural facilities and other amenities required to be provided to the trade and also to the Customs Staff, as may be necessitated from time to time, consequent upon the growth in the volume of Import and Export Trade handled at the Inland Container Depot. It is further emphasized that the Custodian shall-

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VII. Not charge any rent/demurrage on the goods detained by the Customs Department under the Customs Act or any other Act for the time being in force. However, the Customs department shall pay the rent to the custodian after the ownership of the goods vests in the Government after confiscation. The rate of rent for such goods shall be fixed by the Commissioner in consultation with CPWD or local Revenue or Rent Control Authorities."

20. The aforesaid terms and conditions indicate that the custodian shall not charge any rent on the goods detained by the Customs Department under the Act. The aforesaid appointment was renewed by the Customs Department by means of notification dated 21.3.2012 under Section 45 of the Act. Clause (2) and (4) of the said appointment order is extracted hereunder:

"(2) The Customs Cargo Service Provider (Custodian) shall abide by all the conditions as mentioned in the earlier Public Notice No. 02-Cus./2007 dt. 22.3.07 and shall observe all the rules and regulations prescribed under Customs Act, 1962.

(4) The Customs Cargo Service Provider 4 shall abide and shall carry and discharge all the responsibilities assigned under Regulation 6 of the Handling of Cargo in Customs Areas Regulations-2009 as attended vide Notification No. 96/10-Cus.(NT) dated 12.11.2010."

21. The aforesaid terms indicate that the Central Warehouse Corporation shall abide by all the conditions as mentioned in the earlier notification dated 22.3.2007 and will also observe all the Rules and Regulations prescribed under the Customs Act, 1962. Further, the Customs Cargo Service Provider shall abide and shall discharge all the responsibilities assigned under the Regulation 6(1) of the Regulations of 2009.

22. From the aforesaid, it is apparently clear that the Central Warehouse Corporation or its partner, respondent No. 5 could not demand any warehouse charge on the goods, which were detained by the Customs Authority. They were bound to comply with the terms and conditions of their appointment letter read with clause 6(1) of the Regulations of 2009. The contention of the respondents that clause 6(1) is not applicable in view of the word "subject to" given in clause 6(1) and, therefore, Section 63 of the Act would prevail, is patently erroneous. The right to collect warehouse charges has already been upheld by the Supreme Court in *Shipping Corporation of India v. Jain Woolen Mills*, , 2001 (129) ELT 561 (SC), under Section 45(2) of the Act but when a specific term and condition is imposed upon Cargo Service Provider not to realize the charges of goods detained by the Customs Department, it is no longer open to respondent Nos. 3, 4 and 5 to realize warehouse charges and insist that Section 63 of the Act would prevail over Regulation 6(1) of the Regulations, 2009.

23. Reliance placed by the learned counsel for the respondents on the decision of the Supreme Court given in Appeal (Civil) 4593 of 1999. *The Printers (Mysore) Ltd. v. M.A. Rasheed and others*, decided on 5.4.2003 is of no avail. It only explains the meaning of the words "subject to". We are of the opinion that so long as the specific terms and conditions as mentioned in the licence of Respondent Nos. 3 and 4 exists, the same is binding upon them as well as upon respondent No. 5. It was no longer open for the respondent Nos. 3, 4 or 5 to insist on warehouse charges pursuant to release of the goods. We are of the opinion that the action of respondents in not releasing the goods and insisting upon warehouse charges was not only illegal but was also in violation of the terms and conditions of their licence and also in violation of Regulation 6(1) of the Regulations of 2009. Reliance by the respondents on the decisions in the case of *International Airport Authority of India v. Grand Slam International of India*, , 1995 (77) ELT 753 (SC), *Shipping Corporation of India (Supra)* and *Trustees of Port of Madras v. M/s. Aminchand Pyarelal and others*, , 1976 (1) SCR 721, is misplaced inasmuch as the said decisions are distinguishable and not applicable in the instant case. In the said decision of *International Airport Authority of India (Supra)* and *Trustees of Port of Madras (Supra)*, the demurrage was being realized on the basis of the Rules and Regulations framed under the Act by which they were being covered. The Supreme Court on that basis held that there was no embargo upon the custodian, namely *International Airport Authority (Supra)* and *Trustees of Port of Madras (Supra)* to recover demurrage charges under Regulation 2(g) of the Regulations framed under the Regulations of 1980 and the bye-laws framed under the Port Trust Act respectively. In the instant case, Central Warehouse Corporation has been appointed as the custodian under Section 45 of the Act read with Regulations of 2009.

24. At this stage Clause 6(1) of the Regulations, 2009 is extracted hereunder:

"subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent

of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be;"

25. The aforesaid provision read with Clause 12 of the terms and conditions of the licence clearly prohibits the service provider to demand warehouse charges on the goods seized, detained or confiscated by the Customs department. We are, therefore, of the opinion that the respondent Nos. 3, 4 and 5 had no authority of law to demand warehouse charges on the goods seized or detained by the Customs Department.

26. In view of the aforesaid, we are of the opinion that the petitioner was entitled for release of the goods without payment of warehouse charges. We are, however, of the opinion that once a stand was taken by the respondents to release the goods on payment of charges, the petitioner should have got the goods released upon payment of the charges, as demanded by the respondents, by depositing the same under protest and thereafter should have contested the matter. By not getting the goods released, the containers are still in the custody of respondent No. 5. The said respondents are still ensuring safe custody of the consignment. Such continuation of the goods remaining with the respondent Nos. 3, 4 and 5 is unwarranted and unjustified and consequently, we are of the opinion that once the stand of the respondents became known to the petitioner pursuant to the filing of the counter-affidavit on 20.3.2014 by respondent No. 5 and on 11.4.2014 by respondent Nos. 3 and 4, further retention of the goods by the said respondents was totally at the risk and peril of the petitioner.

27. It is common knowledge that the warehouse charges are exorbitantly high. Warehouse charges are necessarily kept high in order to ensure quick clearance of the cargo from the customs area and make it unprofitable for exporters or importers to use the Customs area as a warehouse. Thus, it is necessary to levy high rates of warehouse charges to avoid congestion of free movement of loading and unloading of the goods in the Customs area. Consequently, allowing the goods to remain in the custody of respondent Nos. 3, 4 and 5 after 11.4.2014 on the pretext that the petitioner is not liable to pay demurrage charges becomes arbitrary and unjustified especially when the respondents had made their stand clear insisting upon payment of warehouse charges, even though such stand of respondent Nos. 3, 4 and 5 was unjustified. In the light of the aforesaid, the writ petition is allowed and a writ of mandamus is issued holding that the respondent Nos. 3, 4 and 5 are not entitled to demand warehouse charges on the goods that was initially detained but subsequently released by the Customs authority till 11.4.2014, i.e., the date when the counter-affidavit of respondent Nos. 3 and 4 was filed before the High Court and their stand became clear. For the period 12.4.2014 onwards till the date of actual clearance, the petitioner would be liable to pay warehouse charges.