(2010) 10 DEL CK 0274

In the Delhi High Court

Case No : Writ Petition (C) No. 5457 of 2001

Puneet Expo		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 19-10-2010

Acts Referred:

Airports Authority of India Act, 1994 — Section 12(3), 42, 46(1)
Contract Act, 1872 — Section 152, 161
General Clauses Act, 1897 — Section 24
International Airports Authority Act, 1971 — Section 37

Citation : (2010) 181 ECR 299 : (2011) 263 ELT 63

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : G.L. Rawal and Rajesh Rawal, for the Appellant; Aruneshwar Gupta and Manish Raghav for AAI, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The prayers in this writ petition filed by M/s Puneet Expo, a proprietorship concern of which Shri Dinesh Kapoor is the proprietor, are for a direction to the Airports Authority of India (''AAI'') Respondent No. 3 herein, not to charge any demurrage charges or in the alternative direct the Customs Department, Respondent No. 2 herein, to pay the demurrage charges accrued on the goods of the Petitioner to the AAI. A further prayer is for a direction to the AAI to realise the demurrage charges accrued on the consignment in question kept in the custody of the AAI from the Customs Department.

2. The Petitioner sought to export readymade garments to Russia by way of four shipping bills through M/s SAM Aviation Pvt. Ltd. on 6th June 2001. It is stated that the shipping bills were cleared on the same date. While the said consignments were lying for shipment on, 11th June 2001 the officers of the Department of Revenue Intelligence (''DRI'') detained the consignments for some investigation. On 4th July 2001, the DRI referred the investigation to the Commissioner of Customs (Preventive). On 6th July 2001 SAM Aviation

requested the AAI for waiver of demurrage charges. On 11th July 2001 the Petitioner was summoned by the Commissioner of Customs (Air Cargo Preventive) for giving evidence and producing documents in respect of the enquiry being conducted with regard to the consignments.

3. By a letter dated 20th July 2001 the AAI directed SAM Aviation to produce certain documents for considering their request for waiver of demurrage charges. In the meanwhile, the DRI completed its investigation and referred the matter again to the Customs (Preventive). Subsequently the investigation with regard to the market value was also completed by the Customs (Preventive).

4. On 14th August 2001 SAM Aviation submitted relevant documents and requested for consideration of their case on a priority basis as the export had been held up since 11th June 2001. It is stated that the Petitioner by a letter dated 18th August 2001 requested the Customs Department to assess and finalise the consignment for issuance of the detention certificate.

5. On 21st August 2001 the Deputy Commissioner (Preventive) of the Customs Department wrote to the Deputy Commissioner (Export/DBK), Air Cargo Unit, New Delhi stating as under:

Sir,

Subject: Detention Of The Goods By Dri On 11.6.2001 In Respect Of Exporters/M/S National Cargo Service-Cha

Please refer to the detention order of the DRI in respect of the following exporters

1. M/s Puneet Exports

2. M/s Sherwood Overseas

3. M/s Nam Global

4. M/s AVG Enterprises

The case was referred back by DRI vide their letter dated 4.7.2001. After conducting investigations/market inquiry and permission from DRI dated 6.8.2001; the consignment in respect of the above said exporters are released for further necessary action subject to the condition that FOB value for the DBK/DEPB benefit should be restricted to 30% above the market value as determined by the cargo R&I. Copy of the note sheet Page No. 10 of this office file giving market value of the goods ascertained by this office is enclosed. No case is being made out after due consultation with the D.R.T.

Yours faithfully,

Sd/-

Deputy Commissioner (Preventive)

Encl. As above

6. On 22nd August 2001 the AAI directed SAM Aviation to forward the detention certificate issued by the Customs for individual shipment and further directed that in order to avoid further accrual of demurrage charges they should pay the applicable demurrage charges and clear the cargo. On the same date, the Deputy Commissioner (Preventive) informed the Deputy Manager (Export) of the AAI that the consignments were being allowed for shipment when the said letter was enclosed with the detention certificate.

7. On 27th August 2001 the Petitioner wrote to the General Manager (Cargo) AAI to the following effect:

Sir,

This is with reference to letter No. VIII(2) Aircus/Cru/Detention/1279/01/816 Dated 22 August 2001 from Dy. Commissioner (Preventive) Air Cargo Unit Authorizing shipment of detained cargo.

As no penalty/fine has been imposed on our cargo we request that the cargo be released and demurrage charges waived off as the cargo is being lying here since a long time your humble and kind initiative will be highly obliging to us for upliftment of cargo from here at the earliest.

Awaiting for an early response from your side.

(Emphasis supplied)

8. It is stated that by this time, the goods in question had accrued a demurrage of Rs. 46 lakhs. In these circumstances, the present petition was filed on 4th September 2001 seeking the reliefs mentioned hereinbefore.

9. By an interim order dated 20th December 2001, this Court permitted the Petitioner to shift the goods to the Customs Department Bonded Warehouse but further directed that the goods will not be removed without the permission of the Court. It was clarified that the AAI will continue to have a lien over the goods for the amount which may be due to it towards demurrage. The Petitioner was asked to pay the required charges to the Customs Department for storage of the goods in the bonded warehouse.

10. Two principal contentions were advanced by Mr. G.L. Rawal, learned Senior counsel appearing for the Petitioner. The first is that to justify retaining lien over the goods AAI has relied upon Regulation 3 of the International Airports Authority (Storage and Processing of Goods) Regulations, 1993 (''1993 Regulations'') framed u/s 37 of the International Airports Authority Act, 1971 (IAAI Act) which has since been repealed, and replaced by the Airports Authority of India Act, 1994 (''AAI Act''). With the repeal of the IAAI Act, the 1993 Regulations also stood repealed and could not be invoked to justify the retention of lien. Section 42 of the AAI Act makes it obligatory for regulations to be framed afresh with the prior approval of the Central Government. Such Regulations were ultimately framed only in 2003. Therefore, at the time of their detention, AAI''s

retention of lien was without the authority of law. Mr. Rawal submitted that Section 24 of the General Clauses Act, 1897 (''GCA'') is available only when there is no savings clause in the repealing AAI Act. He relied upon the decisions in State of Madhya Pradesh Vs. A.K. Jain and Others, ; Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others, ; Harishchandra Vs. State of Madhya Pradesh, and Air India Vs. Union of India and others,

11. The second contention is that it was incumbent on the Customs Department to have issued a detention certificate at the earliest particularly after they were informed that there was no case made out for further detention of the goods for investigation. For the unconscionable delay in the Customs Department issuing a detention certificate, the Petitioner should not be held responsible and therefore for no fault of its the Petitioner should not be required to pay AAI the demurrage charge. Reliance is placed on the decision of this Court in Gaurisons and another Vs. International Airport Authority of India and another, . In addition, Mr. Rawal placed reliance on certain circulars of the AAI which make it incumbent on the AAI to give the Petitioner 80% waiver of the demurrage charges, which according to him was not done in the present case. He submitted that it was the insistence of the AAI on the payment of the complete demurrage charges that compelled the Petitioner to approach this Court. Alternatively it is submitted that the Petitioner cannot be made to bear the burden of the laxity on the part of the Department of Customs to clear the consignment. Therefore it is the Customs Department which should bear the liability of the paying demurrage charges. Reliance is placed on the decisions of the Supreme Court in M/s. Priyanka Overseas Pvt. Ltd. and another Vs. Union of India and others, ; Kuil Fireworks Industries Vs. Collector of Central Excise and another, and the decision of a Division Bench of Andhra Pradesh High Court in Commissioner of Customs and Central Excise (Appeals), Hyd. and others Vs. Sujana Steels Ltd., Hyd. and another,

12. Appearing for the AAI, Mr. Aruneshwar Gupta, learned Counsel points out that the Customs Department has no powers and cannot regulate the activities of the AAI. The AAI acts as bailee vis-r-vis the consignee, and is governed by the provisions of Sections 152 and 161 of the Contract Act, 1872 (''CA''). The power of the AAI to levy demurrage charges flows from the IAAI Act read with the 1993 Regulations. He placed reliance on the decisions of the Supreme Court in Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others, , International Airports Authority of India and Others Vs. Grand Slam International and Others, and M/s. P.V. Mohammad Barmay Sons Vs. Director of Enforcement, . As regards the repeal of the IAAI Act, it is submitted that it did not result in the automatic repeal of the 1993 Regulations. According to Mr. Gupta, Section 24 of the GCA is a complete answer. He placed reliance on the judgments in Poonjabhai Varmalidas Vs. Commissioner of Income Tax, Ahmedabad, ; Neel alias Niranjan Majumdar Vs. The State of West Bengal, ; Jayantilal Amrathlal Vs. The Union of India (UOI), and T. Barai Vs. Henry Ah Hoe and Another, Since the 1993 Regulations were not inconsistent with the provisions of the AAI Act, they must

be held to be enacted u/s 42 of the AAI Act by reading Section 46(1) of the 1994 Act with Section 24 of the GCA. Till new regulations were framed in the year 2003, the 1993 Regulations must be deemed to have been enacted u/s 42(d) read with Section 12(3)(g) of the AAI Act.

13. It is submitted by Mr. Gupta that demurrage charges have to be paid by the consignee to the AAI and not the Customs Department. Reliance was placed on the decisions in Tej Kiran Jain and Others Vs. N. Sanjiva Reddy and Others, and Om Shankar Biyani Vs. Board of Trustees, Port of Calcutta and Others, to contend that the payment of demurrage was a separate liability which could not be linked up with any default committed by the Customs Department. It would be open to the exporter to seek to recover such demurrage charges which it has to pay mandatorily to the AAI by filing separate proceedings against the Customs Department, if so permissible in law.

14. The above submissions have been considered. As regards the plea of the Petitioner that it was incumbent on the AAI to have offered 80% waiver of the demurrage charges, the narration of facts shows that on 27th August 2001, the Petitioner wrote to the AAI claiming complete waiver of the demurrage charges. There was no demand even at that stage that the Petitioner should be given a 80% waiver. Although it is urged that it was incumbent on the AAI to have indicated to the Petitioner what demurrage charges were, the normal practice as explained by Mr. Gupta, learned Counsel for the AAI, is that since the exporters are fully aware what the prevailing demurrage charges are, they usually go to the office of the AAI to ascertain what demurrage charges are and pay them. Even if an exporter is aggrieved by having to pay demurrage charges which it feels is unjustified, the course available is to make payment under protest and later seek appropriate remedies. In the instant case, there is nothing to show that the Petitioner ever offered to the AAI that it would pay the demurrage charges, or for that matter even 20 per cent of the demurrage charges. In the circumstances, the Petitioner was not justified in waiting for the AAI to communicate the demurrage charges. On the other hand it does appear that the Petitioner was never prepared to pay any demurrage charges as is evident from its letter dated 27th August 2001. One possible reason may have been that since the demurrage charges had already accumulated to Rs. 46 lakhs, the Petitioner decided to contest the demand and therefore, filed this petition in early September 2001. In the circumstances this Court is unable to conclude that AAI was under an obligation to communicate to the Petitioner the exact demurrage charges and that the failure to do so would exempt the Petitioner from paying the demurrage charges.

15. As regards the applicability of the 1993 Regulations, this Court is inclined to accept the submission of the learned Counsel for the AAI that in view of Section 24 of the GCA, the 1993 Regulations continued to be applicable and ought to be treated as having been enacted u/s 42 of the 1994 Act read with Section 46(1) thereof till such time the 2003 Regulations came into force. In The Chief

Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc., a more or less similar situation arose. In para 20 it was explained as under (AIR @ p. 845):

20. The true position appears to be that the Rules and regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as subordinate rule is not lost. Therefore, with regard to the effect of a repeal of the Act, they continue to be subject to the operation of Section 24 of the General Clauses Act.

16. As regards the submission that it is the Customs Department that should be asked to pay the demurrage charges, this Court finds that each of the decisions relied upon by the learned Senior counsel for the Petitioner turned on their own peculiar facts. In none of them was there a situation where the Petitioner had completely refused to pay any demurrage charges and the Court directed the Department of Customs to pay the demurrage charges. On the contrary, the decisions in Shipping Corporation of India v. C.L. Jain Woolen Mills and International Airport Authority v. Grand Slam International answer the question against the Petitioner. The decision in Union of India and ors Vs. R.C. Fabrics (P) Ltd. and anr, reiterates that the liability of the importer or exporter, as the case may be, of the goods to pay the demurrage charges does not get shifted to any other authority whatever may be the reasons for the accumulation of such demurrage charges. In Om Shankar Biyani Vs. Board of Trustees, Port of Calcutta and Others, the Supreme Court explained the position with reference to the Major Port Trusts Act. The reasoning in the decision applies on all fours to the case on hand. In para 18 it was held:

18. In our view the proposition that the bailee, who exercises a lien, is not entitled to charge rent for storage of goods can never apply to a case where the lien is exercised for non-payment of rent or storage charges. If such a proposition were to be accepted it would lead to catastrophic results. It is well known that in most cities, particularly port cities like Calcutta and Bombay, storage space is at a premium. If such a proposition were accepted then all that a person need to do is to make a demand for removal of the goods without offering to pay the storage charges. If the bailee were to refuse to allow clearance and exercise his right of lien, as he is bound to do, the bailor''s purpose would be served. He would thereafter have rent free storage space. He could then continue to store the goods free of rent. On the other hand, if the bailee were to permit clearance, in almost all cases, his charges would not be subsequently paid and he would have to then pursue the bailor for recovery of his charges. This could never be the law.

17. In the circumstances, it is not possible for this Court to grant the reliefs prayed for in the writ petition. It is for the Petitioner to pay the demurrage charges to the AAI. It is clarified that if the Petitioner, within a period of two weeks from today, requests the AAI for waiver of 80% of the demurrage charges

in terms of any applicable rules, regulations or circulars, such request should be considered by the AAI on merits and a decision thereon communicated to the Petitioner within two weeks thereafter. If the Petitioner''s grievance is that the demurrage charges accrued only on account of the failure of the Customs department, it would be open to the Petitioner thereafter to seek appropriate remedies as may be available to it in accordance with law.

18. The writ petition is dismissed in the above terms.

