

(2016) 05 DEL CK 0221

In the Delhi High Court

Case No : Writ Petition (C) No. 6216 of 2001 and W.P. (C) Nos. 3440-3441 of 2005 and CM No. 6302 of 2005

S.K. Metal & Co.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Citation : (2016) 338 ELT 383

Hon'ble Judges : Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : S/Shri Shashwat Bajpai and Rajesh Rawal, Advocates, for the Petitioner; S/Shri Rahul Kaushik, Senior Standing Counsel with Bhavishya Sharma, K.K. Tyagi, Iftikhar Ahmed, C. Mukund and S.M. Vivek Anandh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—A common question that arises for consideration in both these writ petitions is about the liability of an importer to pay demurrage/godown rent and container charges under circumstances in which the importer is ultimately able to show that the import of the goods detained was validly made.

Facts concerning M/s. S.K. Metal & Co.

2. The facts in W.P. (C) No. 6216 of 2001 filed by M/s. S.K. Metal & Co. are that the petitioner is a proprietorship concern dealing in import and selling of scrap. The petitioner imported 18835 kgs and 18616 kgs of scrap from Germany under the Bill of Entry ("B/E") No. 324372, dated 24th January, 2001. Though the supplier was based in Germany the consignment was shipped from Los Angeles, USA. The B/E described the goods in the consignment as "Zinc Diecast Scrap Saves", classified under CTH 7902 00, the customs duty chargeable at 35%, 10% thereof as surcharge, 16% as countervailing duty and 4% as special additional duty.

3. On 29th January, 2001, the container containing 18616 kgs scrap was examined. The goods were found to be matching with declaration and were cleared. On 7th February, 2001, the other container containing 18835 kgs was weighed and the gross weight was found to be 19900 kgs. On 9th February, 2001 the said container was opened and the goods examined in the presence of the customs house agent ("CHA"), the customs officers and the officers of the Department of Revenue Intelligence. According to the customs department, the zip sliders found packed in original cardboard packing were of "YKK and BOYT" make. They appeared to be brand new and not scrap.

4. Representative samples of zip sliders were examined for further enquiry. An enquiry was conducted with M/s. YKK, New Delhi and by a letter dated 14th February, 2001 they conveyed that the zip sliders in question were in original packing of M/s. YKK Japan and that M/s. YKK Japan had identified the same to have been sold to M/s. YKK, USA. Further the said zip sliders appeared to be unused and of good quality. However, by a letter dated 20th February, 2001, addressed to the DRI, the petitioner stated that the importers had informed that the goods received were defective by a fax dated 9th February, 2001. Accordingly, they requested the Customs Department to mutilate the goods under customs supervision.

5. On 22nd February, 2001, the petitioner sought provisional release of the detained consignment pointing out that the quantity in dispute was 2.384 MT. The petitioner offered to furnish a bank guarantee for differential duty and get possession of the goods since it wanted to avoid demurrage charges. Another letter was sent to the DRI on 23rd February, 2001 to the same effect. On 9th April, 2001, the petitioner again wrote to the Additional Commissioner of Customs stating that, against the total weight of the container which was 18.835 MT, the weight of the disputed zinc zipper slider was 2.384 MT. It again requested for mutilation of the disputed quantity and undertook to furnish a bank guarantee to the differential amount of duty on the aforementioned disputed quantity while still keeping the said quantity under bond and releasing the balance cargo.

6. The petitioner further drew the attention of the Additional Commissioner of Customs to Public Notice No. 38/2001 issued on 22nd March, 2001 giving instructions regarding detention of the mutilated cargo. It was pointed out that once the DRI had classified 2.384 MT in a different chapter, the B/E should be finalized. Either the disputed quantity should be detained and the balance material be released or the bank guarantee should be accepted for the disputed quantity. Alternatively, the disputed quantity should be mutilated.

7. On 16th April, 2001, the consignment was re-examined and confiscated under Section 111 of the Customs Act 1962 ("Act"). A panchnama of the same date was drawn up.

8. According to the respondent, the petitioner waived the requirement of formal show cause notice ("SCN") under Section 110 of the Act and requested for

adjudication. This, however, has been denied by the petitioner in its rejoinder.

9. Nevertheless, on 1st May, 2001, an SCN was issued to the petitioner by the Deputy Commissioner, ICD Patparganj, Delhi. Thereafter by an order dated 2/4th June, 2001 passed by the Commissioner (ICD), the zip sliders valued at Rs. 4,05,484 (enhanced from declared value of Rs. 55,905) were confiscated under Section 111(i) and (m) of the Act with a redemption fine of Rs. 45,000 along with penalty of Rs. 25,000 under Section 112(a) of the Act.

10. The petitioner challenged the above order before the Customs, Excise and Gold (Control) Appellate Tribunal ("CEGAT"). By an order dated 23rd July, 2001 [2001 (138) E.L.T. 86 (Tribunal)], the CEGAT allowed the appeal filed by the petitioner holding that there was nothing on record to suggest that the petitioner had not entered into contract with German firm for supplying the scrap and further that M/s. YKK Japan had also confirmed that the goods were sold as scrap. Accordingly the CEGAT set aside the adjudication order dated 2/4th June, 2001 and directed that the goods be mutilated in the presence of the customs officers.

11. A letter dated 14th September, 2001 was written by the Additional Commissioner of Customs (Respondent No. 2) to the Central Warehousing Corporation (Respondent No. 3) ("CWC") communicating the recommendations of the Commissioner of Customs (ICD) for consideration of the request of the petitioner for waiving of the godown rent charges in respect of the period of investigation and adjudication, i.e., from 15th February to 22nd August, 2001.

12. On 19th September, 2001, the petitioner wrote letters to CWC and M/s. APL (India) Pvt. Ltd. (respondent No. 4), requesting to issue delivery order without levying any godown/demurrage charges as recommended by the letter dated 14th September, 2001 of the Additional Commissioner of Customs. A reminder was sent by the petitioner to the CWC on 24th September, 2001, requesting for issue of delivery order without any godown rent charges. A further reminder was sent on 28th September, 2001 to CWC, M/s. APL as well as Additional Commissioner of Customs. In the last mentioned letter to the Additional Commissioner of Customs, the petitioner pointed out that mutilation had been performed in the presence of the customs officers and a gate pass has been received, but the CEGAT's order for refund of the sum of Rs. 25,000/- deposited on 18th June, 2001 had not yet been complied with. The petitioner also pointed out that it had not received any reply from M/s. APL and CWC regarding waiver of the demurrage charges.

13. It is thereafter that the present petition [W.P. (C) No. 6216 of 2001] was filed for a direction to the customs authorities to pay/remit godown charges and the demurrage that had become payable by the petitioner for the period from 9th February, 2001 till the date of release. The second prayer was for a direction to the respondent Nos. 1 and 2 to refund the penalty of Rs. 25,000/- with interest in view of the order of the CEGAT. The petitioner also prays for compensation and

costs.

14. Pursuant to the notice issued in the writ petition, a counter affidavit has been filed by the Customs Department, in which the stand taken is that although the order of the CEGAT is erroneous, no further appeal was filed by the Customs Department to avoid litigation and also since the duty involved was not high. It is stated that penalty of Rs. 25,000/- has been refunded on 11th October, 2001. As regards the prayer for payment of the demurrage charges, the Customs Department referred to Section 155 of the Act, which states that no suit or other legal proceedings would be maintainable in respect of anything done in good faith in pursuance of the Act or the rules and regulations.

15. Reference is also made to the decision of the Supreme Court in *International Airport Authority of India v. Grandslam International* - (1995) 3 SCC 151 : 1995 (77) E.L.T. 753 (S.C.), in which it was held that the liability to pay the detention/demurrage charge is on the importer. It was further pointed out that there was admittedly a misdeclaration of the goods even if the CEGAT allowed conditional release on mutilation. According to the Customs Department, the CEGAT erred in holding the goods to be scrap. It was submitted that the manner of sale did not take away the identity of the goods. It was contended that the delay in release of the goods and the consequent demurrage charges was on account of the petitioner first seeking immediate adjudication by waiving formal SCN but later disputed the findings leading to the issuance of the SCN.

16. It is submitted that as a prudent businessman the petitioner could have sought release of the goods at any stage while still filing the petition and claiming the demurrage charges. It was submitted that on 19th September, 2001, the Customs gave an option to the petitioner to have the goods released after mutilation of the zip sliders but this option was not availed by the petitioner.

17. A separate counter affidavit has been filed by the CWC. It was pointed out that in response to the petitioner's letter dated 19th and 24th September, 2001 and the letter dated 14th September, 2001, from the Commissioner of Customs, the CWC on 1st October, 2001 immediately wrote to them stating that the request for waiving of godown rent charges could not be acceded to. It was further pointed out that 40 container which was detained was a "full container load" ("FCL") and as per the prevalent practise FCL cargo was not released in part but in one go.

18. The respondent No. 4, M/s. APL also filed a separate counter affidavit contending that qua M/s. APL, the petition was not maintainable since its relationship with the petitioner was purely contractual. In terms of the Contract Act, 1872 and the clauses in the Bill of Lading and Carrier's Applicable Tariff, APL was entitled to be paid demurrage. There was no provision in the Act or any other law to compel to APL to waive the container/retention charges.

Facts concerning M/s. Modern Overseas

19. W.P. (C) Nos. 3440-41 of 2005 has been filed by M/s. Modern Overseas, a partnership firm having its head office in Aligarh, Uttar Pradesh.

20. The petitioner is engaged in manufacture, export and import of various items of building hardware made of different metals such as brass, zinc and aluminium. The facts are that on 21st July, 2004, the petitioner filed B/E No. 368463, for the clearance of shipment of goods declared as "door locks" and "lock cylinders" which were imported from M/s. Shivalaya (Hong Kong) Ltd., Hong Kong. The door locks were classified in CTH 8301 40 90 and lock cylinder in CTH 8301.60. The total value declared of the shipment was US \$ 26227.16. According to the petitioner, on examination of the goods, the customs authority found it to be matching with the declaration.

21. On 25th June, 2004, the petitioner wrote to the Deputy Commissioner of Customs, Tughlakabad requesting release of the goods. On 11th August, 2004, a further representation was made to the Commissioner of Customs pointing out that for three weeks since import of goods no decision had been taken. It was pointed out that the method employed by the customs department to determine the value of the goods was defective.

22. Nevertheless, an SCN was issued to the petitioner on 13th August, 2004 stating that the goods were found to be undervalued and asking the petitioner to show cause as to why the value of the consignment should not be loaded on the basis of price of contemporary import to the extent of US \$ 1.16/- piece in the case of cylindrical locks and US \$ 0.35/- piece in the case of lock cylinders and why said goods should not be confiscated under Section 111(m) of the Act for misdeclaring the value and the penalty under Section 112(a) of the Act should not be levied.

23. On that date itself the petitioner replied to the SCN, pointing out that the value in NIDB data was not the imported price but one loaded by the Department and therefore, could not be taken to be final and authentic. The petitioner pointed out that damage had been caused to goods on account of open verification in rain and due to manhandling. The petitioner requested for compensation for damages and waiver of demurrage.

24. An Order-in-Original was passed by the Additional Commissioner on 17th August, 2004 holding that the value of the consignment should be loaded to US \$ 1.16 per piece for cylindrical locks and US \$ 0.35 per piece for the lock cylinder and computed the differential duty to be paid accordingly. The goods were confiscated under Section 111(m) of the Act with redemption fine of Rs. 3,50,000/-. Further, a penalty of Rs. 1,50,000/- was imposed under Section 112 of the Act.

25. An appeal against the Order-in-Original dated 17th August, 2004 was filed by the petitioner before the Commissioner of Customs (Appeals). By an order dated 13th October, 2004, the Commissioner of Customs (Appeals) set aside the Order-in-Original dated 17th August, 2004 on the basis that the evidence adduced by

the Customs Department to assail the transaction value "suffers from serious flaws and cannot be considered to be reasonable and cogent to reject the invoice value". A detention certificate was issued by the Deputy Commissioner of Customs for the period from 21st July to 3rd November, 2004, assigning the reasons for detention as "investigation for suspected under valuation".

26. The petitioner wrote to the Commissioner of Customs on 4th December, 2004, seeking unconditional release of the goods and offered to furnish a security bond. Thereafter on 24th December, 2014, the petitioner wrote to M/s. German Express Shipping Agency (India) Pvt. Ltd. (respondent No. 4) seeking release of the goods and further stating that the underlying liability to pay the damages and demurrage charges lies with the Commissioner of Customs for illegally withholding the goods. A request for waiver was also made to the Container Corporation of India Ltd. (respondent No. 3) ("CCI"). However, CCI was prepared to approve waiver of only Rs. 50,000/- out of the demurrage charges accrued up to 3rd January, 2005, subject to the condition that the delivery of the cargo was taken by 10th January, 2005.

27. Meanwhile on 10th January, 2005, a second detention order was issued by the Superintendent of Customs extending the period of the earlier detention certificate up to 3rd January, 2005, i.e., up to the date of "out of charge".

28. The petitioner then issued a legal notice on that date, calling upon the respondent Nos. 1 and 2 to release the goods immediately and also to pay Rs. 7 lakhs towards the demurrages suffered because of the delay caused.

29. On 7th February, 2005 [2005 (184) E.L.T. 65 (Tribunal)], the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT"), dismissed the Department's appeal against the order dated 13th October, 2004 of the Commissioner of Customs (Appeals).

30. The petitioner states that it did not have the financial means to get those goods released but to make payments under protest and therefore, approached this Court praying for directions to respondent Nos. 1 and 2 to unconditionally release the goods in favour of the petitioner without imposing any liability on it.

31. Pursuant to the order dated 28th April, 2006, the petitioner deposited a sum of Rs. 50,000/- for obtaining release of the goods and the said amount was directed by a further order dated 22nd September, 2006 to be paid over to CCI subject to the outcome of the writ petition.

The decision in *Grand Slam International*

32.1 The question whether an importer is liable to pay the demurrage charges, notwithstanding that he ultimately succeeded in demonstrating that the import was validly made, came up for consideration before the three Judge Bench of the Supreme Court in *International Airport Authority of India v. Grand Slam International* (supra).

32.2 The facts in that case were that the Customs Department had issued detention certificate and informed the International Airport Authority of India ("IAAI") and the Central Warehousing Corporation ("CWC"), where the goods were detained, that no demurrage may be charged for the period during which the goods were subject matter of adjudication.

32.3 However, instead of treating the entire period as a free period, the IAAI and the CWC granted rebate and calculated demurrage in accordance with the Rate Schedule framed by them. With the demurrage in each case being twice or thrice the value of the goods, the petitioners therein approached the High Courts, which allowed the writ petitions and held that the IAAI or the CWC being the custodians of the Customs Department could not ignore the Detention Certificate. Therefore, no demurrage could be charged for the period during which the proceedings were pending.

32.4 By majority of 2:1, the Supreme Court held that there was no power in the Collector of Customs, either under the Act or the Rules or the Regulations, to issue a Detention Certificate directing the IAAI or the CWC not to collect the custody charges in respect of the goods for which the Detention Certificate is issued. It was further held that no court could direct IAAI or the CWC to release the goods of the consignee without collecting from him demurrage charges levied in accordance with their respective regulations merely because there was a Detention Certificate issued by the Collector of Customs or his delegate to the IAAI or the CWC, which had been approved as custodians of such goods under Section 45(1) of the Act.

32.5 In arriving at the above conclusion, the Court took note of the fact that both the IAAI and the CWC were statutory corporations governed by their own sets of rules and regulations. The Court, however, recognised the power of the Central Government under Section 35 of the International Airports Authority Act and Section 111 of the Major Port Trust Act, 1963 to issue to the IAAI and the Board of Trustees respectively not to levy demurrage charges for period covered by Detention Certificates, after giving those authorities an opportunity, as far as practicable, of expressing their views. It was further clarified that what was stated in the Customs Public Notice No. 30 of 1986 would be effective against the IAAI "only if it were shown that the Authority had, expressly or impliedly, consented to such arrangement."

The decision in *Sanjeev Woollen Mills*

33.1 The issue was revisited by a two Judge Bench of the Supreme Court in *Union of India v. Sanjeev Woollen Mills* - (1998) 9 SCC 647 : 1998 (100) E.L.T. 323 (S.C.). There the importer had filed four bills of entry in respect of synthetic waste (soft quality). The Customs Department on testing the samples concluded that the goods imported were prime fibre and not soft waste and that the value did not commensurate with the quality of goods under import. Accordingly an SCN was issued.

33.2 The goods were not being released and the imported consignment was incurring heavy demurrage charges and container charges. An order was passed in an application in the writ petition filed before the High Court noting the statement of the counsel for the Department that, in case after the inspection, the goods are found to be synthetic waste, then the entire demurrage and container charges would be borne by the Customs Department. Thereafter, the Principal Collector was directed to adjudicate the issue within a time-bound programme. Ultimately, the Chief Commissioner by an adjudication order directed the unconditional release of goods under all the four bills of entry.

33.3 On account of delay in disposal of departmental proceedings, a fresh writ petition was filed before the High Court for release of the goods. The writ petition was allowed by the High Court holding that there was no justification for detaining the goods and directed the release of the goods without recovery of any demurrage or container charges. The Customs Department was directed to issue necessary certificate in terms of the undertaking already given to the High Court for that purpose. Nevertheless neither the CCI nor the Shipping Corporation of India (SCI) waived the entire demurrage although they did waive a substantial portion of the detention charges. This resulted in a contempt petition being filed. Now the High Court gave one more chance to CCI and SCI to comply with the earlier directions.

33.4 The above orders of the High Court directing release of the goods without recovery of any demurrage or container charges was challenged before the Supreme Court. The plea of the Customs Department was that it should not be asked to issue a certificate or to bear the container detention charges. The respondents maintained their stand that the Customs officers had acted mala fide in handling the four bills of entry and were demanding illegal gratification for releasing the goods which upon testing were confirmed to be synthetic waste of soft quality. The Supreme Court then directed the Department to file affidavits to explain what steps they had taken with respect to that complaint.

33.5 Thereafter the Supreme Court concluded as under :

"18. Looking to the totality of circumstances pertaining to the import of the consignments under the four Bills of Entry and the inordinate delay of about six years for their release, the High Court has passed the impugned orders directing the appellants to issue a detention certificate and bear the demurrage and container detention charges. They are obviously orders passed in the special circumstances of the present case, and particularly the conduct of the Customs authority in not releasing the goods even after the order of unconditional release dated 11-8-1995 passed by their own Chief Commissioner. The conduct of the Customs officers concerned is also under investigation. We do not think that this is a case where any investigation at our hands is required. The apprehension of the appellants that this will constitute a precedent is not justified because it is clearly an order which is meant to do justice to the respondent looking to the totality of circumstances and the conduct of the appellants. Obviously, for any

delay on the part of the respondent in taking delivery of the goods after 5-4-1997, the respondent will have to bear the consequences. For the period prior to 5-4-1997, however, the order of the High Court does not require any intervention from us. The appellants shall file a progress report relating to the departmental inquiry by 30th November, 1998.

19. The appeal is dismissed with no order as to costs."

The decision in C.L. Jain Woollen Mills

34.1 It is obvious that the decision in Union of India v. Sanjeev Woollen Mills (supra), came to be delivered in the peculiar circumstances detailed in the said judgment itself. Nevertheless there was a perceived conflict of the decisions in International Airports Authority of India v. Grandslam International (supra) and Union of India v. Sanjeev Woollen Mills (supra). This was sought to be resolved in the decision in Shipping Corporation of India Limited v. C.L. Jain Woollen Mills - (2001) 5 SCC 345 : 2001 (129) E.L.T. 561 (S.C.).

34.2 A three Judge Bench of the Supreme Court in Shipping Corporation of India Limited v. C.L. Jain Woollen Mills (supra), affirmed the decision in International Airport Authority of India v. Grandslam International (supra), and distinguished the decision in Union of India v. Sanjeev Woollen Mills (supra).

34.3 The facts in Shipping Corporation of India Limited v. C.L. Jain Woollen Mills (supra), were that the importer filed a petition challenging the action of the Customs Department in detaining the imported goods despite the import being valid. The adjudication proceedings ended in favour of the importer with the High Court disposing of the writ petition and directing the Collector of Customs to release the goods forthwith without payment of any detention or demurrage charges.

34.4 It was noticed that the SCI, which was the carrier, and which had a lien on goods until dues were not paid, was not made a party to the writ petition. The decision of the High Court was challenged by the Customs Department by filing a special leave petition, which, however, came to be dismissed. In the contempt petition, liberty was granted to the owner of the goods to move the Division Bench of the High Court for appropriate directions regarding payment of demurrage/detention charges and the contempt petition was dismissed.

34.5 Consequently, the owner filed an application before the Division Bench, which called upon the Customs Department as well as CCI and SCI to sort out the matter within a specified time period. It directed the carrier of the goods including the SCI to release the goods if the Customs Department paid the detention/demurrage charges. When the goods were still not released, a fresh contempt petition was filed and thereafter the SCI as well as the Customs Department approached the Supreme Court.

34.6 At the outset, the Supreme Court noted that the decision of the Delhi High Court in the writ petition challenging the legality of the order of the Customs

Authority in confiscating the goods and levying penalty having attained finality, the liability of the importer to pay the demurrage charges ceased and that issue could not be reopened. The Court then addressed the larger issue, namely, "if the customs authorities do not release the goods and initiate proceedings and finally pass an order of confiscation but that order is ultimately set aside in appeal and it is held by Court of law that the detention of the goods was illegal, then in such circumstances whether the carrier of the goods who had lien over the goods for non-payment of duty, can enforce the terms and conditions of the contract against the Customs Authorities, making the said authorities liable to pay the demurrage charges?"

34.7 The Supreme Court noted that while the customs authorities exercise their power under the provisions of the Act, the claim of the CWC or the SCI as the case may be, was based upon the terms and conditions of the contract between the importer and the carrier. The Court then examined the bill of lading, which pertained to the carrier in that case, namely, SCI. It was noted that the relationship between the importer and the carrier of goods in whose favour the bill of lading had been consigned and who has stored the goods in its custody is governed by the contract between the parties.

34.8 Reference was made to Section 170 of the Indian Contract Act, 1872, which engrafted the principles of bailee's lien, i.e., if somebody has received the articles on being delivered to him and is required to store the same until cleared for which he might have borne the expenses, he has a right to detain it until his dues are paid. It was noted that the bill of lading unequivocally conferred power on the SCI to retain the goods, until its dues were paid. The Supreme Court noted that it had not been shown any provision of the Act, which would enable the customs authorities to compel the carrier not to charge the demurrage charges, the moment a detention certificate is issued. The mere fact that the detention and the adjudication leading to confiscation of the goods may be held to be illegal would not clothe the customs authorities with the power to direct the carrier, which continues to retain a lien over the imported goods, as long as its dues are not paid, not to charge any demurrage/detention charges.

34.9 The Supreme Court specifically negated the plea advanced on behalf of the customs authorities that in terms of Section 45(2)(b) of the Act once the order of confiscation and levy of penalty was struck down and a detention certificate was issued, the said issuance of the detention certificate would come within the expression "otherwise dealt with" used in Section 45(2)(b) of the Act and, therefore, the proprietor of the space would be bound not to charge any demurrage charges.

34.10 The Supreme Court in *Shipping Corporation of India Limited v. C.L. Jain Woollen Mills* (supra), affirmed the earlier decision in *International Airport Authority of India v. Grandslam International* (supra). The Court also did not see any inconsistency between *International Airport Authority of India v. Grandslam International* (supra) and *Union of India v. Sanjeev Woollen Mills* (supra). It was

explained that the judgment in *Union of India v. Sanjeev Woollen Mills (supra)*, was in relation to the peculiar facts and circumstances of the case and the Court had clearly observed the "order in question is meant to do justice to the importer, looking to the totality of the circumstances and the conduct of customs authorities."

34.11 The conclusion of the three Judge Bench in *Shipping Corporation of India Limited v. C.L. Jain Woollen Mills (supra)* was as under :

"8In the absence of any provision in the Customs Act, entitling the customs officer to prohibit the owner of the space, where the imported goods have been stored from levying the demurrage charges, levy of demurrage charges for non-release of the goods is in accordance with the terms and conditions of the contract and as such would be a valid levy. The conclusion of the High Court to the effect that the detention of the goods by the customs authorities was illegal and such illegal detention prevented the importer from releasing the goods, the customs authorities would be bound to bear the demurrage charges in the absence of any provision in the Customs Act, absolving the customs authorities from that liability. Section 45(2)(b) of the Customs Act cannot be construed to have clothed the customs authorities with the necessary powers, so as to absolve them of the liability of paying the demurrage charges?.."

34.12 However, the ultimate relief granted by the Court was to direct that, with the goods having already been released without payment of demurrage charges, "it would be meet and proper for us to direct the Shipping Corporation and Container Corporation, if an application is filed by the Customs Authorities, to waive the demurrage charges."

Summary of the legal position

35. At this point it is necessary, therefore, to summarize the principles that can be culled out from the aforementioned decisions in *International Airport Authority of India v. Grandslam International (supra)* as well as *Shipping Corporation of India Limited v. C.L. Jain Woollen Mills (supra)*. The principles are set out as under :

- i. There is no provision in the Act that enables the customs authorities to direct a carrier of goods to waive demurrage charges or container charges even in terms of Section 45(2)(b) of the Act. That would be governed entirely by the contract between the importer and the carrier and the terms and conditions of the bill of lading, if any.
- ii. Where the carrier is a corporation incorporated by a statute like for instance, the CWC, or the CCI or SCI then it would be bound by the provisions of the Act as far as its right to recover demurrage or container charges is concerned.
- iii. Section 45(2)(b) of the Act, which enables the customs authorities to issue a detention certificate, cannot extend to directing the carrier or the owner of the container to waive the charges even where an order of confiscation or levy of

penalty is ultimately held to be illegal by the courts.

iv. The only option is for the Central Government to make a request to the owner of the container or the space where the goods were stored to waive demurrage charges and if it is so conceded then to that extent the importer would be able to get some relief.

Later case law

36. It may be noted at this stage that International Airport Authority of India v. Grandslam International (supra), has been consistently followed in a large number of cases. These include Trustees of Port of Madras v. Nagavedu Lungi & Co. - (1995) 3 SCC 730 : 1995 (80) E.L.T. (241) (S.C.) where the Supreme Court reiterated that the importer cannot avoid its liability to pay demurrage charges and other incidental charges in respect of the goods illegally detained under the customs area by the customs authorities under the Act.

37. Again in Union of India v. R.C. Fabrics (P) Ltd. - (2002) 1 SCC 718 : 2002 (139) E.L.T. 12 (S.C.), the decision in International Airport Authority of India v. Grandslam International (supra), was followed. There the direction issued by the High Court that the Customs Department should pay the demurrage, the container charges and the ground rent to the CWC was held to be contrary to the decision in the International Airport Authority of India v. Grandslam International (supra). It was held that the Corporation was entitled to recover the charges from the importer.

38. In Monika India v. Union of India - 2012 (283) E.L.T. 33 (Del.), the following legal positions were culled out after discussion of the entire case law :

"(1) The customs authorities are entitled to examine the goods and draw samples to verify and determine the duty liability.

(2) The customs authorities can issue detention certificate or for good reasons may be called upon and directed by the Courts to issue detention certificate in respect of imported goods.

(3) Detention certificate issued by the customs authorities is not a mandate on the shipping company or warehousing companies. These corporations/companies are entitled to claim demurrage/container charges. These corporations cannot be compelled and mandamus cannot be issued to waive demurrage on the ground that the importer/consignee was unable to clear the goods due to fault of the custom authorities.

(4) Whether and in what circumstances customs authorities can be compelled and asked to pay demurrage to the warehousing companies/shipping companies, is a matter of considerable debate. Decision in the case of Sanjeev Woollen Mills (supra), states that in some cases customs authorities can be asked to pay demurrage to the warehousing company or shipping company. However, for this exceptional relief, grounds are required to be made out and established."

39. In *Union of India v. Navshakti Industries P. Ltd.* - 2012 (286) E.L.T. 667 (Del.), and *Narayan International v. Union of India* - 2008 (225) E.L.T. 54 (Del.), a similar question was answered following the aforementioned decisions of the Supreme Court. Reference in the latter decision was also made to the decision of the Supreme Court in *Trustees of the Port of Madras through its Chairman v. K.P.V. Sheikh Mohd. Rowther & Co. Pvt. Ltd.* - (1997) 10 SCC 285 : 1996 (82) E.L.T. 174 (S.C.).

40.1 Recently in *Trip Communication Pvt. Ltd. v. Union of India* - 2014 (302) E.L.T. 321 (Del.), a Division Bench of this Court answered the very same issue concerning waiver of the demurrage/detention charges claimed by the Celebi Delhi Cargo Terminal Management India (Pvt.) Limited ("CELEBI") for the period the goods were in their warehouse pursuant to a seizure order issued by the customs authorities. The Court analysed the policy framed by the Airports Authority of India ("AAI"), which lays down that the specified authorities are authorised to sanction, in consultation with the Finance and Accounts Department, remission/waiver of demurrage charges regarding Cargo Operation. The said policy lays down that the demurrage charges shall not be waived where any fine/penalty/personal penalty/warning is imposed by the Customs Authority or delay by reason of dispute in the assessable value or for revalidating or correcting the license in ordinary course of appraisal. The Court also analysed the Handling of Cargo under Customs Area Regulations, 2009 ("HCCAR") which have been framed to provide for the manner in which the imported goods/export goods shall be received, stored, delivered or otherwise handled in a customs area.

40.2 The Court in *Trip Communication Pvt. Ltd. v. Union of India* (supra), harmoniously construed the policy for waiver framed by the AAI as well as HCCAR and summarised the legal position as under :

"(1) In cases where on conclusion of the adjudication proceedings there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities :

(i) the Policy for Waiver would be applicable; and

(ii) the importer would be entitled to be considered for its benefit when the goods were seized, detained or earlier confiscated; and

(iii) waiver would be granted subject to other compliance"s.

(2) In cases where pending the adjudication proceedings, provisional release order is issued and a certificate is issued by the customs authorities, the goods would be released subject to furnishing of bond and/or security as may be prescribed that in case any fine, penalty, personal penalty and/or warning is imposed by the customs authorities, the Importer would pay the demurrage charges."

40.3 In the facts of that case in one writ petition it was held that the petitioner should furnish a security bond and the bank guarantee securing the demurrage

charges and undertake to pay the demurrage charges in case on conclusion of the adjudication proceedings any fine, penalty, personal penalty and/or warning is imposed by the customs authorities. In the other writ petition since fine and penalty has been imposed, the petitioner was held not to be entitled to the benefit of the policy for waiver. It was held that the goods could be released only on payment of the demurrage charges.

Orders in the present petitions

41. However, there have been some decisions of this Court which are not consistent with the above settled position of the law as explained in *International Airport Authority of India v. Grandslam International* (supra), and reiterated in *Shipping Corporation of India Limited v. C.L. Jain Woollen Mills* (supra). One such judgment is *Om Petro Chemical v. Union of India* - 2002 (140) E.L.T. 353 (Del.). In fact this decision was also relied upon in WP (C) No. 6216/2001 on account of apparent conflict between the said judgment and the decision in *Union of India v. R.C. Fabrics (P) Ltd.* (supra). The matter was even referred to a Full Bench by an order dated 30th July, 2002.

42. During the pendency of the matter before the Full Bench, an attempt was made to explore the possibility of waiver of the demurrage charges. However, this did not succeed. By an order dated 27th February, 2004, it was agreed to between the parties that the goods lying with the custodian be de-stuffed and auctioned and the sale proceeds appropriated towards the cost of auction and the remaining to be deposited by the CWC in this Court. The container was directed to be returned to the shipper, i.e., Respondent No. 4. Ultimately on 4th March, 2005, the Full Bench noted that the decision in *Union of India v. R.C. Fabrics (P) Ltd.* (supra), is by the Supreme Court, whereas the decision in *Om Petro Chemicals v. Union of India* (supra), was by this Court and therefore, there was no question of conflict, which required to be resolved by the Full Bench and the matter was directed to be listed before the Regular Bench.

43. As regards W.P. (C) Nos. 3440-3441/2005 by Modern Overseas, the application for release of goods was heard and a judgment on the said application was delivered on 28th April, 2006, reported as 2006 (204) E.L.T. 218 (Del.), where reliance was placed by the Court on the decisions of this Court in *Om Petro Chemicals v. Union of India* (supra) and an order dated 31st May, 2002 by another Division Bench in W.P. (C) No. 2235 of 2002 [*Yang Ming Marine Transport Corporation v. Commissioner of Customs Inland Container Depot, Tughlakabad*]. The Division Bench in the Modern Overseas case further permitted the petitioners to deposit Rs. 50,000/- towards demurrage to the Customs Department, which would be subject to refund if the writ petition was allowed and the liability towards demurrage quashed. The petitioner was directed to furnish security as far as the remaining amount was concerned to the satisfaction of the Registrar of this Court. The petitioner was also directed to file an undertaking with the Registrar of this Court to pay the balance amount to the respondents. By a subsequent order dated 22nd September, 2006, a sum of Rs.

50,000/- paid by the petitioner was directed to be handed over to the Container Corporation to be appropriated towards its claim for demurrage charges subject to the result of the writ petition. The petitioner furnished the security bond ultimately on 27th September, 2006.

44. In view of the clear enunciation of law as has been settled and summarised herein above, the orders passed by this Court in *Om Petro Chemicals v. Union of India* (supra), *Yang Ming Marine Transport Corporation v. Commissioner of Customs Inland Container Depot, Tughlakabad* (supra) and even the interim order in *Modern Overseas* cannot be said to be good law.

45. An attempt was made by Mr. Rawal, learned Senior Advocate appearing on behalf of the petitioner in W.P. (C) Nos. 3440-3441/2005, to point out the unfair conduct of the customs authorities in continuing to retain the goods despite knowing that such detention was unjustified. It was alleged that the proper investigation was never made into the complaints given by the petitioner. Further, the offer of the petitioner *Modern Overseas* to furnish a bond for release of the goods in its favour was also unfairly not entertained.

46. In the present writ petitions under Article 226 of the Constitution of India, given the inadequacy of the pleadings and the scope of the jurisdiction, it is not possible to examine the male fides of the individual Customs officers in delaying the release of the goods in favour of the petitioner. In the absence of any clear determination of such allegations it would not be possible to even direct the waiver of the demurrage charges. In a given case, however, where it is able to be established that the officers acted mala fide and entirely without the authority of law, directions could be issued to the central government to direct the warehousing and/or shipping companies to waive the demurrage/detention and container charges as the case may be.

Conclusion

47. The Court, therefore, is unable to issue any direction to the customs authorities to direct the CWC or Respondent No. 4 in WP (C) Nos. 3440-3441/2005 or Respondent No. 4 in WP (C) No. 6216/2001 to waive the demurrage charges, detention and/or container charges.

48. As far as WP (C) No. 6216/2001, as already noticed, pursuant to the interim orders passed by the Court, the goods have already been destuffed from the containers and auctioned and some amount realised. Similarly, in WP (C) Nos. 3440-41/2005, as already noticed, the goods had been directed to be released on fulfilling specified conditions.

49. The main prayers in the writ petitions cannot be granted by the Court for the above reasons. The writ petitions and pending applications, if any, are accordingly dismissed but with no orders as to costs.