

(2008) 02 KAR CK 0053

In the Karnataka High Court

Case No : Writ Petition No's. 27521, 27522 and 46244 of 2004

The Great Eastern Shipping Co. Ltd. and J.M. Baxi and Co.

APPELLANT

Vs

New Mangalore Port Trust, Tariff Authority for Major Ports and
Union of India (UOI)
 GAC Shipping (I) Pvt. Ltd Vs
Tariff Authority for Major Ports
 GAC Shipping (I) Pvt.
Ltd Vs New Mangalore Port Trust

RESPONDENT

Date of Decision : 27-02-2008

Acts Referred:

Major Port Trusts Act, 1963 — Section 42, 47 A

Citation : (2011) 269 ELT 173 : (2009) 3 KarLJ 612

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : G.K.V. Murthy, in Writ Petition No. 46244/2004, Bijai Sundar, for H. Nagesh and Shevgoor Law Assts. in W.P. Nos. 27521 and 27522 of 2004, for the Appellant; Kesvy and Co. in W.P. Nos. 27522/2004 and 46244/2004 for Respondent No. 1, Aravind Kumar, ASG for Respondent Nos. 2 and 3 in Writ Petition No. 46244/2004, Aravind Kumar, AGA in W.P. No. 27521/2004, for the Respondent

Judgement

A.S. Bopanna, J.—Common questions of fact and law arise in all these petitions. As such, they are heard together and disposed of by this common order.

2. In W.P. No. 46244/04, the first petitioner claims to be a public limited company engaged in the business of carrying Cargo from various ports in the country including New Mangalore Port The second petitioner is a registered steamship agent who acts on behalf of the first petitioner before the first respondent in matters relating to various ships and oil tankers operated in New Mangalore Port In W.P. No. 27521/04 and 27522/04. the petitioner claims to be a company involved in the business as a steamer agent for various shipping tines and ship operators in handling vessels which carry cargo from different ports in the world.

3. The first respondent is constituted under the Major Port Trusts Act, 1963 (MPT

Act for short) to administer New Mangalore Port Trust, which renders various types of services to the ship owners and other port users as contemplated u/s 42 of the MPT Act The second respondent Tariff Authority for major ports is the authority constituted u/s 47A of the MPT Act and the authority has the power vested in it to impose and recover the rates at ports as contemplated under Chapter VI of the MPT Act The category of charges that arise for consideration in these petitions is only with regard to port dues, pilotage and berth hire charges, more particularly the latter two types of charges since the process to recover the same as short-levied earlier has lead to the dispute between the parties.

4. The said service charges are linked to the capacity of the vessels and was being expressed in terms of Gross Registered Tonnage (GRT). In so far as oil tankers are concerned, after the oil was offloaded, to ensure maneuverability in sea on return journey, water was pumped into oil tankers and on arrival at port of destination, the same was pumped out into the sea which resulted in marine pollution. To avoid this, "Segregated ballast tanks" (SBT for short) were built only to fill in water, which resulted in decreasing the capacity of Cargo tank which had consequent effect on freight earning. This being world wide phenomenon, the International Maritime Organisation (IMO for short) adapted a resolution bearing No. 747(18) on 4.11.1993 recommending exclusion of tonnage of the segregated ballast tanks from GRT to Reduced Gross Tonnage (RGT). Some of the ports including the first respondent herein while levying the service charges to the port users recovered the same on RGT basis in respect of port dues as well as pilotage and berth hire charges during the periods October 2001 to February 2003. However, in view of the clarification dated 5.10.2002 issued by the second respondent (TAMP), revised bills were issued to the petitioners seeking to recover the short levy in respect of pilotage and berth hire charges since according to the first respondent the same was to be levied on GRT and not on RGT. Only in respect of port dues, the levy was maintained on RGT basis. The petitioners at that stage were before this Court in W.P. Nos. 49676/03, 11486-11549/2004 and 49513-49566/03 respectively. In the said petitions, apart from the question of RGT being applicable to all levies, the petitioners had also questioned the non-compliance of Section 56 of the MPT Act in view of non-issue of notice prior to imposing the short levy. On that short ground, the petitions were allowed by setting aside the bills and permitting the second respondent to take appropriate proceedings in accordance with law and in accordance with the provisions of Section 56 of the MPT Act Thereafter the notices as contemplated u/s 56 of the MPT Act was issued and contentions of the petitioners in reply were rejected and the demand has been reaffirmed. The petitioners are therefore before this Court in addition to the earlier contention that RGT should apply to all levies, the petitioners alternatively contend regarding a portion of the demand being time barred in view of the proviso contained to Section 56 which prohibits issue of notice after two years.

5. The respondents seek to justify their action stating that RGT is available only in respect of Port dues, while other service charges to be levied in respect of

pilotage and berth hire charges is on ORT. It is contended that port dues does not encompass all charges but it relates to only the fee for the vessels to enter the port and is separately indicated in Section 49B and 50A of the MPT Act, while pilotage and other services are indicated in Section 49A of the said Act and as such they are different classes of levy. The benefit of levy on RGT basis is limited only to port-dues as per the tariff fixed by the authority. This is said to be clearly indicated in the earlier order of TAMP dated 15.3.2000 itself, but, due to doubts raised by certain port authorities, it has been clarified in detail by order dated 5.10.2002. Prior to the said clarification, the first respondent herein also erroneously implemented the order dated 15.3.2000 as being applicable to all types of levy. Therefore, on noticing this error, the short levy in respect of pilotage and berth hire charges are being recovered. Though at the earlier instance, notice u/s 56 of the MPT Act was not issued, this Court had reserved liberty and as such notice has been issued and after considering the cause shown the demand has been made. With regard to the contention on limitation, the respondents contend that the interim order passed in the earlier writ petition had remained in operation till the earlier writ petitions were disposed of on 17.3.2004 and 2.6.2004 respectively. On disposal, the notice has been issued within time. Therefore, according to the respondents, the petitions should fail on both the contentions.

6. In support of the rival contentions of the parties, I have heard Sri O.K.V. Murthy and Sri K. Bijai Sunder, learned Counsel appearing for the respective petitioners. Sri G.V. Shantharaju, learned senior counsel for respondent No. 1 and Sri Aravind Kumar, learned Assistant Solicitor General of India for respondent No. 2.

7. Having heard the respective learned counsel, I have perused the writ papers, the relevant provisions of the MPT Act and the decisions relied on by the respective learned Counsel for the parties.

8. The contention at the outset is that the order dated 15.3.2000 of the Tariff Authority for Ports in case No. TAMP/ 15/2000-PPT refers to "Port dues" and as such all tariff chargeable should be on RGT basis and this has been done accordingly at the first instance. Sri Bijai Sunder, learned counsel, would therefore refer to the Marine Encyclopaedic Dictionary to indicate the meaning of "Port dues" contained therein which includes all charges.

9. The decision of the Hon'ble Supreme Court, in the case of *Dunlop India Ltd v. Union of India* AIR 1977 SC 597 was relied to contend that while interpreting the meaning of words in a taxing statute, the popular meaning of a particular word as understood by people in that trade is to be accepted. In the instant case, I am of the view that this course need not be adopted since Chapter VI of the MPT Act contains regarding the different levies provided, wherein Section 49A prescribes regarding pilotage etc as a separate class of tariff, while Section 49B, 50A and 50B provide only regarding port-dues as a separate class of tariff being for the vessels entering the port Further Section 49B(2) provides regarding taking effect

of an order increasing or altering the fees for pilotage and certain other services or port dues. The word "Or" used between "pilotage" and certain other dues" and "port dues" would clearly indicate that port dues does not include all other charges but it is a class of levy by itself. Therefore, the use of the expression "port dues" in the order dated 15.3.2000 will relate only to "port dues" as a category of levy and would not include pilotage charges and berth hire charges. This would have been so only if it was specifically indicated by the TAMP itself. On the other hand, the TAMP by its order dated 5.10.2002 has clarified that it is port dues only, which would make it clear that the levy on RGT basis is only in respect the entry fees and for all other levies, it would be ORT basis.

10. This being the position, the next question would be regarding the contention of Sri O.K.V. Murthy and Sri Bijai Sunder, learned Counsel regarding the correctness or otherwise of the clarificatory order dated 5.10.2002 that levy on RGT basis applies only to port dues despite noticing in the earlier portion of the discussions that DO (Shipping) has clarified that it will apply to all fees levied on the basis of tonnage, in order to appreciate the said contention, a perusal of the clarificatory order would indicate that the clarification by DO (shipping) is issued to the CVPT and not to TAMP as evident from the discussion of the TAMP in para 10(i) of the order dated 5.10.2002. In fact going further, the TAMP has emphasised that the MPT Act empowers only the Tariff Authority and not any other organisation. The TAMP has also noticed that the clarification of DO (Shipping) and IMO resolution is only a recommendation. Sri Aravind Kumar, learned Assistant Solicitor General would point out that Section 49A(3) of the MPT Act at best provides the power for remission by the Central Government in special cases and not the tariff deciding power and as such any clarification by DG (Shipping) would have no bearing. Even otherwise, the earlier communication which is at Annexure-R1 refers only to port dues. With reference to the objection statement, the learned Assistant Solicitor General contends that in any event, the clarificatory order is issued by the TAMP after consulting the Major Port Trusts, Indian National Shipping Owner's Association and Shipping Corporation of India and as such the petitioners cannot have any grievance.

11. Further Sri Shantharaju, learned senior counsel clarifies that all port users including the petitioners have paid as per the said clarification for the subsequent periods and the dispute is raised only with regard to the demand which has been made towards short levy. On analysing the rival contentions, I am of the view that TAMP which is an authority constituted u/s 47A of the MPT Act and being vested with the power has taken into consideration all the aspects of the matter and after due consultation has come to its conclusion by exercising its statutory power. No arbitrariness or perversity is indicated so as to call for interference in the limited scope of judicial review under Article 226 of the Constitution of India. That being so, neither the order dated 15.03.2000 nor the clarificatory order dated 5.10.2002 call for interference.

12. Therefore, the next question that would arise for consideration is with regard

to the nature of the proceedings held by the first respondent - NMPT prior to and pursuant to the issue of notice as contemplated u/s 56 of the MPT Act and in terms of the leave granted by this Court in W.P. Nos. 49676/03 and 49513-566/03. In this regard, the contention with regard to certain short levied bills being time barred in view of the proviso to Section 56 contained in the MPT Act is also raised. Before considering the question with regard to limitation, certain contentions raised by Sri Bijai Sunder, learned Counsel for one of the petitioners is to be noticed.

13. It is the contention of the learned Counsel that the show cause notice issued itself is not sustainable for the reason that it has been issued by the Financial Adviser and Chief Accounts Officer while Section 56 of the MPT Act provides that such a notice could be issued when the Board is satisfied that any charge leviable under the Chapter has been short-levied. Hence it is contended that the show cause notice itself is without competence. Even the delegation is not as contemplated u/s 21 of the Act. It is further contended that even the resolution passed is not signed. It is also contended that no personal hearing was provided to the petitioner. Sri. Shantha Raju, learned senior counsel however sought to justify this aspect by contending that the MPT Act does not provide for any personal hearing. Secondly it is contended that it is the Board which has resolved to issue show cause notice with regard to the earlier short levied bills and had authorised the Chairman to take further action in the matter and only subsequently the Financial Advisor and Chief Accounts Officer has issued the communication on behalf of the Chairman. As such there is no infirmity. In this regard a perusal of the papers would indicate that resolution No. 111/05 states the agenda for the Board was regarding short levy of vessel related charges in respect of oil tankers with "Segregated Ballast", handled at NMPT and the show cause notice to be issued u/s 56 of the MPT Act. The resolution has thereafter been passed to issue notices to the petitioners herein and the same was approved by the Board. Subsequently the communication had been issued on behalf of the Chairman. Pursuant thereto, the show cause notices dated 22.4.2004 and 26.6.2004 respectively have been issued to the petitioners. The notice issued indicates that it has approval of the Board of trustees.

14. Therefore, in so far as the process initiated for issue of the show cause notice, it is not by delegating the power, but after passing the resolution, the same has been intimated and as such on this aspect, there can be no grievance whatsoever. Even the contention that the tariff could not be applied retrospectively does not call for detailed discussion since the said contention is not well-founded and the facts are clear that the order impugned is only a clarification of the nature of levy and therefore the short levy only is being recovered and not a fresh levy of tariff.

15. The other question therefore is with regard to a portion of the short levy claim being time barred. In this regard, it is necessary to notice Section 56 of the MPT Act which reads as hereunder:

"56. Notice of payment of charges short levied or erroneously refunded.- (J) when any Board is satisfied that any charge leviable under this Chapter has been short-levied or erroneously refunded, it may issue a notice to the person who is liable to pay such charge or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that no such notice shall be issued after the expiry of two years,-

a) When the charge is short-levied, from the date of the payment of the charge;

Where a charge has been, erroneously refunded, from the date of the refund.

(2) The Board may, after considering the representation, if any, made by the person to whom notice is issued under Sub-section (1), determine the amount due from such person and thereupon such person shall pay the amount so determined."

Sub-section (1) of Section 56 of the MPT Act provides with regard to issue of notice to the person who is liable to pay such charge which was short-levied. Further the proviso to the said section states that no such notice shall be issued after expiry of two years when the charge is short-levied from the date of payment of the charge. Since several bills pertaining to the petitioners herein has been issued in both these cases, I do not propose to examine each of the bills to find out as to whether the notice has been issued within time with reference to each of the bills, but it is necessary to examine the legal position regarding applicability of the two years period in the present case, keeping in view that the parties were before this Court in the earlier round of litigation. The first respondent is attempting to take shelter under the order passed by this Court in the earlier Writ Petition to contend that the show cause notice in respect of the bills has been issued within the period of two years as provided under the Act. In this regard, it is contended that if the two years period is computed from 17.3.2004 i.e., the date on which W.P. No. 49676/03 was disposed of, reserving liberty and also from 2.6.2004 when W.R. No. 49513-49566/03 was disposed of, the show cause notice is within time. But the question is, whether the first respondent could claim the benefit of exclusion of the time during which the earlier Writ Petitions were pending before this Court. The relevant portion of the order passed in the earlier Writ Petition reads as hereunder.

The second respondent is permitted to take appropriate proceedings, if it so desires, against the petitioner company for recovery of short levy only in accordance with law and in accordance with the provisions of Section 56 of the Act.

16. Sri G.V. Shantharaju, learned senior counsel would contend that at the first instance, no doubt the bills short-levied were issued without compliance of issuing the show cause notice and as against the same, the petitioners were before this Court. This Court had granted an interim order which was in operation

till the disposal of the Writ Petition and as such the first respondent could not have taken any further proceedings during the pendency of the Writ Petition, in this regard reliance is placed on the decision of the Hon'ble Supreme Court in the case of State of Gujarat and Others Vs. Dilipbhai Shaligram Patil, to contend that an order of stay granted pending disposal of a Writ Petition/ suit or other proceedings comes to an end with the disposal of the substantive proceedings and that it is the duty of the Court in such a case to put the parties in the same position, they would have been but for the interim orders of the Court. Any other view would result in the act or order of the Court prejudicing the party for no fault of his and would also mean rewarding the writ petitioner in spite of his failure.

17. On noticing the said decision, I am of the view that the same would not render any assistance to the first respondent since what is relevant is, in such a circumstance, it was for the Court in the earlier Writ Petition to grant such relaxation of the limitation to the respondent and no benefit can be granted in this proceedings. But, as already noticed from the extracted portion of the order, this Court was very specific in stating that it would be open to the respondents to issue such notices in accordance with law and in compliance with Sections 56 of the MPT Act and no other right was reserved. In any event, in the Writ Petition the petitioners had ultimately succeeded in having the bills which were issued contrary to the provisions of Section 56 of the MPT Act quashed. In fact, on this question, the decision relied on by Sri G.K.V. Murthy, learned Counsel for the petitioner in the case of Metal Forgings and Another Vs. Union of India (UOI) and Others, has staled as follows:

Based on this interim order, learned Counsel for the revenue contended that the revenue could not have issued a show cause notice during the currency of the said interim order, therefore, by virtue of the Explanation to Section 11A, the period of limitation gets frozen during the said stay order. We cannot accept this argument either. It is a settled position in law that unless and until there is a specific injunction/stay granted by a competent court which restrains an authority from issuing the required notice, merely because some interim order is made, the authorities empowered to issue such notice cannot refrain from issuing the required notice within the period of limitation nor can they plead the existence of such interim order as a defence against the plea of limitation. This Court in Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum, has held where by an interim order the High Court merely stay the collection of excise duty which, the benefit of Explanation to Section 11A excludes the period of stay order is not available to the revenue. The said judgment also holds that the issuance of notice u/s 11A is a condition precedent to issue a demand notice. In that case, the interim order issued was in the following terms:

Pending disposal of the aforesaid writ petition, it is ordered by this Court that collection of custom duty as a fabric he and the name is hereby stayed....

18. If the said observation of the Hon'ble Supreme Court is kept in view, in the

present case also, mince the petition was filed in the earlier instance by the petitioners herein urging a specific ground that notice as contemplated u/s 56 of the MPT Act had not been issued, it was open for the first respondent herein to concede to the same before this Hon"ble Court and issue appropriate notice and thereafter determine the amount or in the alternative, such notice could have been issued even at any stage prior to disposal of the Writ Petition. The third alternative was that, this aspect ought to have been brought to the notice of the Court and leave should have been obtained in this regard during the pendency of the petition, but before expiry of the period of two years. On the other hand, the respondents were very much aware of the position of law that such notice would have to be issued within a period of two yearn, when the said leave was granted by this Court to be complied m terms of Section 56 of the MPT Act. Therefore, so for as the bills which do not fall within the period of two years as contemplated u/ s 56 of the MPT Act as on the date of issue of show cause notice, the amount thereunder would not be recoverable and in that extent, the first respondent cannot claim the same. As already noticed above, since this Court would not he in a position to refer to each of the hills, this exercise would have to be done by the first respondent and as such in so far as the demand made, the first respondent will have to rework excluding such of those bills claiming short levy and included in the show cause notice which are beyond two years.

19. Though the petitioners also contend that they would have to bear the burden at thin stage since it would be difficult to recover from the vessel owners, no relief could he granted to the petitioners in so far as that aspect as against the first respondent in this petition. As already noticed, the tariff is fixed by the TAMP and the first respondent is only enforcing and recovering the same. However, all that can be noticed is that as per Sub-Section (3) to Section 49A the Central Government has the authority in special cases to remit in whole or portion of any amount that is payable in respect of pilotage and other services. Hence after paying the amount due to the first respondent, the petitioner may make an appropriate representation to the Central Government who shall consider the same in accordance with law and take an appropriate decision on its merits if such special circumstance is made out.

In the result the following:

ORDER

- i) The Writ Petitions in W.P. No. 46244/04 and 27522/04 are allowed in part. W.P. No. 27521/04 stands disposed of.
- ii) The first respondent is directed to issue a revised demand to the petitioners after excluding the amounts demanded vide bills which were beyond two years as on the date of the respective show cause notice dated 26.6.2004.
- iii) The petitioner shall thereafter pay such amount demanded after appropriate adjustment of the amounts paid pursuant to the interim order.

iv) Liberty is reserved to the petitioners to thereafter make appropriate representation to the Central Government seeking remission of the amount in the manner stated above. If such representation is made by the petitioners, the same shall be considered by the Central Government in accordance with law depending on the merit of such representation within two months from the date of receipt of the same.

v) In the facts and circumstances, there shall be no order as to costs.