(2014) 03 DEL CK 0321

In the Delhi High Court

Case No : Writ Petition (C) 7438 of 2012

Trip Communication Pvt. Ltd. — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:
Customs Act, 1962 — Section 111 141 156 157 2

Citation : (2014) 302 ELT 321 : (2014) 25 GSTR 611

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Priyadarshi Munish in both Appeals, for the Appellant; Sweety Manchanda, CGSC and Mr. Debashis Mukherjee, Advocate, Ms. Anjana Gosain, Advocate for AAI, Mr. Satish Aggarwala, Advocate for R-6 in W.P.(C) 7438/2012, Mr. Sunil Kumar, Advocate for UOI in W.P.(C) 2200/2013, Mr. Satish Kumar, Senior Standing Counsel for R-2 and 3, Ms. Sarul Jain, Advocate for R-4, Mr. Atul Sharma, Milanka Chaudhury, Sarojanand Jha and Ms. Satakshi Sood, Advocates for DIAL in both Appeals, for the Respondent

Judgement

Sanjeev Sachdeva, J.—The petitioners in these petitions have sought waiver of the demurrage/detention charges claimed by the Celebi Delhi Cargo Terminal Management India (Pvt.) Limited (hereinafter referred to as ''CELEBI'') for the period the goods were in their warehouse pursuant to a seizure order issued by the customs authorities. Factually the two petitions are different, however as a common legal issue arises in both the matters, both the writ petitions were heard together and are being disposed of by a common order. The question that arises for consideration is whether the CELEBI is entitled to charge demurrage/ detention charges for the period the goods were detained by the customs authorities and for which the customs authorities have issued a certificate advising CELEBI to waive off demurrage charges in terms of Section 6(1)(I) of the Handling of Cargo under Customs Area Regulations, 2009 (hereinafter referred to as the ''HCCAR'')? To answer the above question what needs to be determined is whether CELEBI is bound by the HCCAR or by the Policy for Waiver of Demurrage Charges notified by the Airports Authority of India in 1999 (hereinafter referred to as the Policy for Waiver) and further whether the two can be harmoniously construed?

2. For the purposes of clarity and for understanding the controversy we may briefly refer to the factual matrix of both the cases.

WP (C) No. 7438/2012

3. The petitioner in the present petition was engaged in the business of trading of mobile phones. The petitioner imported mobile phones "Made in China" of different brands of Chinese origin through various bills of entries dated 06.04.2012. On 17.04.2012, the Director of Directorate of Revenue Intelligence, Delhi Zonal Unit, seized the goods on the ground of mis-declaration. During investigation, it was found that the address given in the import documents of the petitioner was incorrect and 2000 pieces of memory cards of 4GB capacity were concealed in the mobile phones.

4. The petitioner challenged the aforesaid seizure and filed a writ petition in this Court bearing WP(C) No. 2548/2012. By order dated 30.04.2012, this Court disposed of the said writ petition with a direction to the respondents to consider the said writ petition as a representation and to decide the same expeditiously.

5. The Deputy Director of Directorate of Revenue Intelligence by communication dated 18.07.2012 requested the Commissioner of Customs (Import & General) to release the goods provisionally on terms and conditions to be decided at their end. The office of Commissioner of Customs by its letter dated 05.10.2012 communicated to the petitioner the decision of the competent authority which had directed the release of the goods provisionally on execution of a provisional duty bond guarantee of Rs. 15,00,000/-. Pursuant to the direction for release of the goods, the petitioner approached the Deputy Director of Directorate of Revenue Intelligence for issuance of directions to CELEBI to waive off demurrage charges on the detained goods. By letter dated 06.11.2012, the Commissioner of Customs advised CELEBI to waive of the detention charges in terms of Regulation 6(1)(I) of HCCAR.

6. Despite the letter dated 6.11.2012, CELEBI refused to waive off the demurrage/detention charges and thus, the petitioner filed the present petition seeking waiver of the said charges in terms of the direction/advise issued by the customs authorities by letter dated 06.11.2012.

WP(C) No. 2200/2013

7. The petitioner in this petition is engaged in the business of import and trading of perfumes and other brand accessories. The petitioner imported branded perfumes and accessories and filed the bill of entry for home consumption dated 08.05.2012. The consignment was intercepted and examined by the office of Special Intelligence and Investigation Branch of the customs authorities and panchnama was drawn on 15.05.2012.

8. After the examination, the consignment was handed over to CELEBI under superdginama dated 15.05.2012. The Superdginama was executed by one Mr. Anand Prasad working as Cargo Agent in CELEBI (the custodian). The superdginama records that "I shall not claim any storage charges for the safe custody of the goods".

9. The customs authorities confiscated the said goods u/s 111 of the Custom Act under a seizure memo dated 11.07.2012 on the ground of under valuation. The adjudicating authority by order dated 19.07.2012 confirmed the duty of Rs. 10,48,803/- and imposed penalty of Rs. 2,00,000/- on the partner of the petitioner firm. The petitioner was given an option to redeem the goods on payment of redemption fine of Rs. 5,00,000/-. Penalty of Rs. 2,00,000/- was also imposed on the customs house agent of the petitioner firm.

10. The petitioner appealed against the said order before Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) by order dated 25.09.2012 reduced the redemption fine to Rs. 75,000/- and penalty to Rs. 35,000/-. The petitioner accepted the order of the Commissioner of Customs (Appeals) and deposited the penalty as well as the redemption fine on 01.12.2012. The petitioner further sought to deposit the customs duty, however, it is contended that the Customs Authorities delayed the process and prevented the petitioner from depositing the same. It is contended that the customs authorities delayed the deposit of the customs duty on the ground that amended bill of entry was not ready. On 08.03.2013, i.e. after five months of the deposit of the penalty and redemption fine, the petitioner was directed to deposit Rs. 12,86,196/- under the heading "Customs Duty" which duty is stated to have been deposited on the same day.

11. On 11.03.2013, the petitioner requested the customs authorities to direct CELEBI to release the said consignment without payment of any demurrage charges. By order dated 12.03.2013, the Commissioner of Customs, directed CELEBI not to charge any rent or demurrage in terms of its HCCAR, 2009.

12. The CELEBI did not accede to the request of the petitioner and the direction of the customs authorities and directed the petitioner to pay charges amounting to Rs. 71,14,065/- vide their "Receipt of Processing Charges" dated 15.03.2013. The petitioner protested against the said demand and on failure of the respondents to waive of the demurrage charges filed the present writ petition.

13. The stand of the respondent CELEBI is that it is bound by the policies, instructions, guidelines, circulars, notifications and regulations formulated by Ministry of Civil Aviation or Airport Authority of India or AERA and it is not bound by any contrary regulations of the Customs department with respect to waiver of any charges levied by CELEBI. As per the policy formulated by AAI no waiver of any charges has to be granted in cases any fine/penalty/personal penalty/ warning is imposed by the customs authorities.

14. The respondent DIAL has further contended that the regulations framed by

the customs authorities stipulate that the same are subjected to any other law for the time being in force and such are subject to the policy framed by the AAI which policy was framed in 2003 and Regulations came into force in 2009 and as such in terms of said policy, no waiver can be granted.

15. The respondent, customs authorities, have relied on regulation 6(1)(I) of HCCAR and supported the case of the petitioners and has contended that in a case covered by the said regulations no detention/demurrage charges are leviable and more so in view of the fact that there is a direction issued by any customs authorities to CELEBI to waive of the said charges.

16. Learned counsel for the petitioner has contented that in similar circumstances, CELEBI and AAI have waived of the charges where customs authorities have so directed in terms of the regulations. Learned Counsel for the respondent CELEBI has contended that the waiver has been granted on case to case basis.

17. In WP(C) No. 2200/2013, respondent customs authorities filed an affidavit and stated that DIAL was appointed as custodian of import/export cargo in place of AAI vide customs public notice dated 02.05.2006. DIAL entrusted CELEBI the custody of the said area. The respondent, customs authorities, further stated that DIAL and CELEBI were allowed to carry on cargo handling service on a specific undertaking that they would abide by the conditions of HCCAR, 2009. The affidavit further states as under:-

10. That it is evident from the facts and legal provisions sated above that Respondent No. 4 (CELEBI) has acted contrary to the provisions of law in as much as demurrage incurred for the period of detention/seizure by Customs should have been waived off by respondent No. 4 as directed by the answering respondent vide letter C. No. VIII/SIIB/CUS/I&G/40/2012 dated 14.3.2013. Therefore the action of Respondent No. 4 (CELEBI) to not to allow the clearance of the shipment without the payment of demurrage charges is contrary to the provisions of Notification No. 26/2009-Cus (N.T.) dated 17.03.2009 named as Handling of Cargo in Customs Area Regulation 2009 who has undertaken to comply with the provisions of Regulations 2009 under condition 5 & 6 of the said regulation.

11. It is further submitted that the Customs Department inserted condition of not charging demurrage on detained/seizure goods on Superdginama while handing over the goods to Respondent No. 4 (CELEBI) for safe keeping till adjudication of the case or produce the goods whenever called upon by the Customs in exercise its powers under the Handling of Cargo in Customs Area Regulation 2009.

18. For the purposes of elucidation and understanding the real controversy, it is necessary to examine various statutory provisions, regulations and policies briefly.

19. Section 2 Sub Section 11 of the Customs Act, 1962 defines Customs Area as

under:

customs area" means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.

20. Section 2 Sub Section 43 of the Customs Act, 1962 defines Warehouses as under:

"warehouse" means a public warehouse appointed u/s 57 or a private warehouse licensed u/s 58

21. Section 2 Sub Section 44 of the Customs Act, 1962 defines Warehoused goods as under:

"warehoused goods" means goods deposited in a warehouse;

22. Section 45 of the Customs Act, 1962 dealing with restrictions on custody and removal of imported goods reads as under:

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 u/s 30 for the arrival of the conveyance in which the said goods were carried.

23. Section 45 of the Customs Act, 1962 stipulates that all imported goods unloaded in the customs area shall remain in the custody of a person approved by the Commissioner of Customs till the time they are cleared for home consumption or warehoused or transhipped in accordance with Chapter VIII which deals with goods in transit. The person to whom the custody of such goods is handed over by the Commissioner of Customs is liable to keep record of the

same and keep the same in the customs area and not to permit removal of the same except with prior permission and in case of any pilferage etc. the said person is liable to pay duty on the said goods.

24. Section 49 of the Customs Act, 1962 lays down as under:

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 or Deputy 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 for a period not exceeding thirty days 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:

Provided that the Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.

25. Section 57 and 58 of the Customs Act, 1962 lay down as under:

SECTION 57. Appointing of public warehouses.-At any warehousing station, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may appoint public warehouses wherein dutiable goods may be deposited.

SECTION 58. Licensing of private warehouses.-(1) At any warehousing station, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited.

(2) The Assistant Commissioner of Customs or Deputy Commissioner of Customs may cancel a licence granted under sub-section (1)-

(a) by giving one month''s notice in writing to the licensee; or

(b) if the licensee has contravened any provision of this Act or the rules or regulations or committed breach of any of the conditions of the licence :

Provided that before any licence is cancelled under clause (b), the licensee shall be given a reasonable opportunity of being heard.

(3) Pending an enquiry whether a licence granted under sub-section (1) should be cancelled under clause (b) of subsection (2), the Assistant Commissioner of Customs or Deputy Commissioner of Customs may suspend the licence.

26. u/s 49, the Customs Authorities on an application of the importer, if satisfied, that the goods entered for home consumption cannot be cleared within a reasonable time, permit the importer to deposit the goods in a public area or a private warehouse for a specified period. The period may be extended from time

to time by the Commissioner of Customs. Section 49 further stipulates that goods so warehoused on an application by the importer shall not be deemed to be warehoused goods for the purposes of this Act and provisions of Chapter IX shall not apply. Section 57 lays down that the Assistant Commissioner/Deputy Commission of Customs may appoint public warehouses wherein dutiable goods may be deposited. Section 58 empowers the Assistant/Deputy Commissioner of Customs to licence private warehouses wherein dutiable goods imported may be deposited where the facilities for deposit in a public warehouse are not available. Section 59 to 73 of Chapter IX deal with the general provisions under which an importer may warehouse the imported goods and stipulates the period for which the goods may be warehoused and general conditions for removal/clearance of the goods.

27. Section 141 of the Customs Act, 1962 lays down as under:

SECTION 141. Conveyances and goods in a customs area subject to control of officers of customs.-(1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

(2) The imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

28. Section 141 of the Customs Act, 1962 stipulates that the conveyances and goods in a customs area are subjected to the control of the officers of customs and are to be handled in a customs area in such a manner as may be prescribed and responsibilities of a person engaged in the receiving, storing, delivering, dispatching and otherwise handling import or export goods in customs area shall be such as may be prescribed by the customs authorities.

29. The above noted sections of the Customs Act postulate a scheme or a procedure whereby goods which are imported into a customs area immediately come into the control and power of the officers of the customs. The customs authorities are empowered under the Act to appoint persons or officers who are responsible for receiving, storing, delivering, despatching and handling goods in the customs areas. Under certain circumstances, the customs authorities may permit storage of imported goods in a warehouse pending clearance on a application by the importer, where goods cannot be cleared within a reasonable time (Section 49) or warehoused in a public or private warehouse (Section 60, 61).

30. The Regulation 6(1)(I) of HCCAR lays down as under:

8. Responsibilities of Custom Cargo Service provider:

(1) The Custom Cargo Service provider shall:-

(a)....

....

(I) subject to any other law for the time being in force, shall not charge any rent, demurrage on the goods seized or detained or confiscated by the proper officer.

31. The Airports Authority of India, is an authority established under the Airports Authority of India Act, 1994 (hereinafter referred to as, ''the AAI Act''). In terms of the said Act, all rights, powers, authorities, privileges and ownership in respect of all property movable or immovable airports of India. The functions and powers of AAI include establishment of warehouses and cargo complex at the airports for storage and processing of the goods at the terminals.

32. Under the provision of the AAI Act, AAI is empowered to make lease of premises of Airport to carry out some of functions under the Act. AAI, for overall public interest granted some of its functions, being the functions of operating, maintaining, developing, designing, construction, upgradation, modernisation, finances and managing the airport to the Delhi International Airport Private Limited, (DIAL for short) under the operation, management and developing agreements (OMDA) dated 4.4.2006 which agreement further empowers DIAL to sub contract any activity covered by OMDA.

33. The Government of India formulated Airports Economic Regulatory Authority of India (AERA for short) under the Airport Economic Regulatory Authority of India Act, 2008. The AERA was given the responsibility of providing and fixing demurrage charges in respect of storage, processing and handling of Cargo at the terminal.

34. By concession agreement dated 24.8.2009, CELEBI has been grated sub-contract by DIAL for the purposes of upgradation, modernisation, finances, operation and maintenance and management and for providing service at the Cargo Terminal of the said airport. CELEBI handles Cargo at the terminal and provide service relating to processing, storage and follows the instructions, guidelines, circulars and notifications formulated by Ministry of Civil Aviation. CELEBI collects charges as per the orders, directions, policies, guidelines and regulations formulated by Ministry of Civil Aviation, AERA, AAI, and pays the same to DIAL and DIAL in turn pays the same to AAI.

35. The AAI has framed regulations in exercise of powers conferred under the AAI Act. The regulations relied upon by the respondent CELEBI as applicable to the present case are the Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 (hereinafter referred to as, ''the Regulation''). As per the said Regulation, the Airport Authority fixes the charges for processing of the Cargo and also formulates Policy for Waiver of such demurrage charges. The relevant portion of the policy relating to waiver of demurrage charges (Cargo) lays down as under:

10.1 GENERAL

10.1.1 Subject to such policy, rules and procedures as may be described the authorities specified hereunder are authorised to sanction, in consultation with the Finance and Accounts Department, remission/waiver of demurrage charges regarding Cargo Operation.

10.1.2....

....

10.1.10 Demurrage charges shall not be waived where:

(a) Any fine/penalty/personal penalty/warning is imposed by the Customs Authority.

(b) Delay arose by reason of dispute in the assessable value or for revalidating or correcting the license in ordinary course of appraisal.

36. The Policy farmed by the AAI lays down that the authorities specified are authorised to sanction, in consultation with the Finance and Accounts Department, remission/waiver of demurrage charges regarding Cargo Operation. It further lays down that Demurrage charges shall not be waived where any fine/ penalty/personal penalty/warning is imposed by the Customs Authority or where the delay arose by reason of dispute in the assessable value or for revalidating or correcting the license in ordinary course of appraisal.

37. Section 156 of the Customs Act lays down the general rule making power of the central government to make rules to carry out the purposes of the Act and Section 157 lays down the power of the Board to make regulations to carry out the purposes of the Act. Under the customs Act, the custom authorities are concerned with the setting up of public or private warehouses and for storage, removal and handling of imported goods in a customs area.

38. The Handling of Cargo under Customs Area Regulations, 2009 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. The regulations also prescribe the responsibilities of the persons engaged in aforesaid activities.

39. The custom authorities are concerned with the receiving, storing, delivering and handling of cargo in a custom area. The custom authorities are not concerned with the upgradation, modernisation, finances, operation and maintenance and management and provision of services at the Cargo Terminal of the Airport, which is the function of the AAI. The custom authorities are also not concerned with the responsibility of providing and fixing demurrage charges in respect of storage, processing and handling of Cargo at the terminal, which responsibility is of the AERA."

40. The Regulations of the AAI of which the Policy for Waiver of demurrage charges is a part specifically deals with the Storage and Processing of Cargo, Courier and Express Goods and Postal Mail. The Airport Authority fixes the

charges for processing of the Cargo and has thus formulated the Policy for Waiver of such demurrage charges.

41. The custom authorities it appears issues certificate for waiver in every type of case irrespective of the fact whether the importer is at fault or not. The custom authorities have issued certificate for waiver of the demurrage charges in both the cases at hand. In one case the release of the goods are on provisional basis pending adjudication and in the other there is imposition of both fine and penalty. These are not cases where the importer has been held to be not at fault. In one case the Importer has been found to be at fault and penalty and fine imposed. The importer has accepted the said order. In the other case adjudication proceedings are pending and are yet to be finalised.

42. There is an overlap in the Policy for Waiver framed by AAI and the HCCAR. Though initially there appears to be a conflict between the policy and the regulations but on closer scrutiny it is apparent that they can both be harmoniously construed and coexist.

43. The policy makes a distinction between the cases where the importer is innocent but his imported goods are seized and detained pending an enquiry and adjudication and the cases where the importers have indulged in mis-declaration, mis-description, under valuation or concealment and fine, penalty, personal penalty and/or warning is imposed by the customs authorities. Importers who are innocent cannot be equated with the importers who violate the law and be given the same treatment. The AAI policy makes a distinction between the two and in our view rightly so.

44. The regulations frames in 2009 themselves stipulate that they are subject to any law for the time being in force and as such the regulations would be applicable in terms of the Policy for Waiver framed by the AAI in 2003.

45. In case the HCCAR were to be made applicable in all cases then the result would be that in no case where there is a fine, penalty, personal penalty and/or warning imposed by the customs authorities CELEBI would be able to charge demurrage charges. Custom authorities are issuing waiver directions even in cases where the importers are clearly at fault and fine, penalty, personal penalty and/or warning has been imposed by the customs authorities. Even in cases of mis-declaration, undervaluation and concealment, the certificates are being issued. This is clearly giving premium to dishonesty. The waiver should be granted in genuine cases where the importers are ultimately found not at fault. It cannot be that all importers honest and dishonest are treated equally.

46. In cases where the importer is found innocent and there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities, the Policy for Waiver would be applicable and the importer would be entitled to be considered for its benefit provided a certificate entitling him to be so considered is issued by the custom authorities. The importer would not be automatically exempt but would be covered under the Policy for Waiver and

eligible for waiver which would be granted subject to other compliances.

47. The execution of the superdginama by CELEBI that it would not claim any storage charges for the safe custody of the goods charge would also not be in conflict with the Policy for Waiver. The Policy has been framed by the Airports Authority of India and the execution of the Superdginama by an employee would not override the policy. It would be applicable in cases where no fine, penalty, personal penalty and/or warning is imposed by the customs authorities. In cases where the importer is found eligible for the benefit of the Policy, the Superdginama would automatically become applicable.

48. Where the importer is clearly at fault and fine, penalty, personal penalty and/or warning is imposed by the customs authorities, making the regulations applicable and granting the benefits of waiver would be clearly unreasonable and would grant benefit of waiver, with the person who has provided space suffering. This was and is not the intention and purpose behind HCCAR. Regulation recognises and accepts that any other law in force is not abrogated or repealed. The existing provision applicable stands protected.

49. To sum up:

(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 compliances.

(2) In cases where pending the adjudication proceedings, provisional release order is issued and a certificate is issued by the custom 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.

50. In WP (C) No. 7438/2012 since the goods have been directed to be released on provisional basis pending the adjudication proceedings, the petitioner shall be entitled to release of the goods by furnishing a security bond and a Bank Guarantee securing the demurrage charges and undertaking that the Petitioner would 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.

51. In WP(C) No. 2200/2013 since fine and penalty has been imposed, the Petitioner is not entitled to the benefit of the Policy for Waiver and the goods can only be released on payment of the demurrage charges. The Writ Petitions are

disposed of in the above terms. No costs.

