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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve : 20.02.2009

Pronounced on : 13.03.2009

W.P. (C) 11282/2006

SHRI SIDHI VINAYAK ENTERPRISES Petitioner
Through: Mr. H.L. Tiku, Sr. Advocate with
Mr. Sanjay Goel & Ms. Naina Kejriwal, Advocates.

versus

COMMISSIONER OF CUSTOMS & ORS. Respondents
Through: Mr. Baldev Malik with
Mr. Aakash Pratap, Advocates for Resp-1&4.
Mr. I.S. Alag with Mr. J.S. Lamba, Advocates
for Resp-2.
Mr.R.K. Joshi, Advocate for Resp-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

S.RAVINDRA BHAT, J.

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1. In these proceedings, under Article 226 of the Constitution of India, directions to the Respondent Nos. 2 and 3 (APL (India) Pvt. Ltd. –hereafter called “APL”- and the Container Corporation of India –hereafter called CCI) to waive detention and demurrage charges in respect of goods imported by Bill of Entry Number 429285 dated 30th May, 2005 are sought. Another direction to Respondent Nos. 1 to 4 to bear demurrage charges has also been sought.

2. Briefly the facts of the case are that the petitioner is a partnership firm engaged in import of power tools such as Angel grinder, circular saw blade, drill bits, cutter machines etc from China. Such goods, on their importation are cleared after payment of customs duty. The petitioner contends that the fourth respondent's officers visited its premises and seized certain goods on 07-06-2005. The petitioner contends having made several representations for the release of goods on provisional basis, in order to save them from deterioration and imposition of detention as well as demurrage charges. When these proved to be of no avail, a W.P(C) 17452- 53/2005 was filed before this court, seeking a direction for provisional release of the goods seized in June 2005, under Section 18 of the Customs Act, 1962. When the writ petition was pending, a show cause notice was issued on 17-11-2005, by the DRI to the Petitioner. On 09-12-2005, the Department of Revenue Intelligence (DRI) issued a letter stating that 2000 pieces of Hot Air Gun imported in terms of a Bill of entry dated 30-05-2005, seized on 27-07-2005, for investigation were not covered by the show cause notice. Accordingly those goods were released, in terms of Section 110 (2) of the Customs Act. The said letter of 9th December, 2005, *inter alia* reads as follows:

" Subject:- Release of imported goods seized vide Panchnama dated 27-07-2005 in R/O M/s Shri Siddhi Vinayak Enterprises, New Delhi

During the investigation against the various power tools imported by M/s Shri Siddhi Vinayak Enterprises, New Delhi, this directorate seized goods covered by the Bill of entry No. 429285 dated 30-05-2005 vide Panchnama dated 27-07-2005. After completion of investigation a Show

Cause Notice No. DRI F. No. 23/60/2005 – DZU/Pt. dated 17-11-2005 has been issued which among other power tools, covers 1500 planners imported vide this Bill of entry.

Since, the other items, namely, 2000 Pcs of Hot Air Gun imported under the said Bill of entry number 429285 dated 30-05-2005 which were seized under the said Panchnama dated 27-07-2005 for investigation, do not covered by the Show Cause Notice no. 23/60/2005 – DZU/Pt. dated 17-11-2005, hence the same are released in terms of Section 110 (2) of the Customs Act, 1962.”

3. On 13th of December, 2005, DRI issued the detention certificate to the following effect:

“To Whomsoever it may concern

It is to certify that the goods imported by M/s Shri Siddi Vinayak Enterprises, New Delhi involved in Bill of Entry 429285 dated 30-05-2005 stuffed in container No NOSU-246 6406 were seized by the officers of the Directorate of Revenue Intelligence, Delhi Zonal Unit, New Delhi on 27-07-2005. These goods were detained on 10-06-2005 at ICD Tughlakabad, New Delhi for investigation.

A certificate is being issued as per the request of CONCOR, New Delhi.”

4. Taking note of the above developments, a Division Bench of this court disposed of the pending Writ Petition, Nos.17452-53 of 2005 by an order dated 16-12-2005. The court directed that the goods seized by the respondents should be provisionally released to the petitioners, upon payment of differential duty determined on the goods. The authorities were directed to determine the differential duty and convey the amount within a week from the date of the order. The petitioners were required to furnish a bond favouring the competent authority in regard to the differential duty, if any payable for the imports made over the past five years apart from the

penalty in fine, if any that could be levied upon it. The adjudicating authority was required to expedite the adjudication process to ensure that final orders on the subject were passed by it expeditiously but not later than three months from the date the petitioners filed their reply to the show cause notice.

5. In the meanwhile, the petitioners wrote to the APL on 12-12-2005 requesting for waiver of demurrage charges for the period the container was detained by DRI. A similar request was made on the same day to the CONCOR. Apparently Concor granted waiver to the extent of Rs.20,000 as against the total payment of approximately RS 200,000. The petitioner represented against this and sought for full waiver through its letter is dated 27th December 2005 and 10th January 2006. The petitioners also rely upon copies of further letters written on 24 January 2006 and again in March 2006, asking for complete waiver of the demurrage charges in the peculiar circumstances of the case. In this background the petitioner approached this court and filed another writ proceeding i.e. WP 1700-01/2006. This petition was however withdrawn on 03-05-2006; the petitioner was given liberty to seek “appropriate redress before the appropriate authority in appropriate proceedings” in the following order (of 3-5-2006):

“WP 1700-01/2006

After arguing the matter at some length, learned Counsel for the Petitioner seeks leave to withdraw this writ petition reserving liberty for the petitioner to seek appropriate redress before the Appropriate Authority in appropriate proceedings.

Dismissed as withdrawn with liberty as prayed for.

Sd/- T.S. Thakur, J

Sd/- Shiv Narayan Dhingra, J”

6. The petitioner contends having approached the respondents again through another series of letters claiming waiver of Demurrage charges; it states that the DRI detained the goods without any fault on its part, and that the detention certificate authorising release of the goods was issued in December 2005. As a consequence, it contends that no liability towards payment of so-called demurrage charges can be cast on it. The petitioner contends that with the issuance of the DRI letter on 09-12-2005, it is amply clear that of the 3500 pieces, only 1500 were the subject matter of detention and 2000 pieces were never subject matter of proceedings. As a consequence, it would be unjust to require payment of demurrage for the entire quantity.

7. CONCOR disputes the petitioner's contentions and states that it has no locus standi to file these proceedings since it does not possess any right, title or interest to demand release of the goods as it has not disclosed any valid delivery order nor was the Customs 'out of charge' ever produced before it i.e. CONCOR. It is contended that on arrival of the vessel at Port, containers are offloaded and stacked in the port area. Permission for transshipment of the containers meant for ICD, New Delhi, is then obtained by respective shipping lines from the Mumbai customs office. After completion of this formality, containers are shifted from Port to railhead; thereafter a

forwarding note is executed by the Shipping Line booking the containers by Rail Ex-Mumbai ports to ICD, Delhi and the Inland Way Bills issued to the shipping lines. On arrival of the containers at ICD, New Delhi, they are offloaded and stacked in the container yard; free time of three working days are given to the importer or the consignee for completion of customs formalities and clearance of the goods from ICD yard. After expiry of the free time, CONCOR charges demurrage. The tariff fixed at the relevant time for the demurrage has also been disclosed. Apparently it is on an increasing scale up to the 15th day after which the same rate is charged for the goods which are not cleared. Concor contends that the petitioner till date has not approached it with customs out of charge, valid delivery orders from the shipping line and the charges of the said respondent, for taking delivery of the goods.

7. It is contended on behalf of the petitioner that having regard to the circumstances in fact in this case, the respondents are needlessly and unjustifiably insisting on their pound of flesh. Once it was established that the detention of the entire goods was not in accordance with law, and there was no justification in the initial detention itself, the respondents should have taken that into consideration and demanded only reasonable charges in respect of the goods that had been really detained. Instead Concor is obdurately demanding full demurrage charges, and steadfastly sticking to its position of not granting any rebate. Counsel submitted that having regard to the decisions of the Supreme Court, reported as *International Airports*

Authority –vs- Grand Slam International 1995 (3) SCC 151 and *Union of India –vs Sanjeev Woollen Mills* 1998 (9) SCC 647, the present case is eminently one where the DRI or the Customs authorities should be saddled with the responsibility of bearing demurrage charges.

8. CONCOR refutes the petitioner's submissions and states that *Grand Slam* (supra) is authority for the proposition that port, warehouse and charges of statutory authorities and agencies entrusted with the duty of custody of the goods, have to be paid; in appropriate cases, the court may consider asking such authorities to take into account individual facts and examine whether some relief by way of waiver can be granted. In this case, the petitioner's request had concededly been granted by CONCOR to the extent possible under its policies. However, the petitioner never paid even the charges for the quantity which according to it is the subject matter of adjudication proceedings. Further, it never produced the relevant documents entitling it to release of goods. In the circumstances, there can be no question of the issuance of directions sought for, as it would unwarrantedly deprive valuable commercial revenue to CONCOR.

9. The preceding narrative would disclose that on essential facts, such as the import of goods, their detention by DRI, the petitioner approaching this court on a previous occasion; DRI issuing a detention certificate acknowledging that a portion of the goods were not subject matter of the show cause notice issued on 17-11-2005; the previous writ petition being

disposed of directing the authorities to complete adjudication in a time bound manner and also to consider the petitioner's request for release of the goods, provisionally, there are no dispute between the parties. The petitioner's grievance however is that Concor is unjustifiably insisting on payment of Demurrage charges, despite there being no fault or wrongdoing by it (i.e the petitioner).

10. It is evident that the petitioners had approached this court on two previous occasions; both the writ petitions were heard by a Division Bench. While the first petition was disposed of at a time when the detention order had not yet been issued, there is no gainsaying that the subject matter of the second writ proceeding was precisely the same as in the present case. In the second writ proceeding i.e. WP 1700-01/2006, a similar relief appears to have been claimed for waiver of demurrage. Yet, the petitioner was constrained to withdraw the Writ proceeding and approach the authorities. The latter did not change their position with regard to claiming of dues towards detention and demurrage. The question is whether this refusal to scale down or waive demurrage charges, is arbitrary and unreasonable.

11. In *Grand Slam International & Ors*, in para 36, of Justice Bharucha's judgment, (who delivered the main judgment for the majority), stated:

"The judgments aforementioned do not only hold that the importer is liable to pay demurrage though he is not responsible for any delay in clearing his goods."

Venkatachala, J concurred with this in para 66 of his judgment.

12. *Grand Slam International's* case was followed by the Supreme Court in *Trustees of Port of Madras v. Nagavedu Lungi & Co.* [1995 (3) SCC 241]. In para 4 of the judgment, the court referred to the *Grand Slam International* case and stated that:

".....that the importer-consignee of goods cannot avoid liability to pay demurrage charges and other incidental charges in respect of its goods illegally detained in the customs area of the Airport by the Customs Authorities under the Customs Act. The said ruling of this Court as regards liability for demurrage charges and other incidental charges by the importer-consignee of goods illegally detained in the customs area of the airport by the Customs Authority applies to the liability to pay demurrage charges or incidental charges by the exporter-consignor of the goods illegally detained in the customs area."

13. In *Sun Export Corporation & Anr. v. Board of Trustees of the Port of Bombay* [1998 (1) SCC 142], the Supreme Court construed the definition of 'owner' in Section 3(5) of the Bombay Port Trust Act and S. 2(o) of the Major Port Trust Act to include a 'consignee'. There, the consignment had to be cleared from the warehouse of docks at the Port of Bombay, which was not done. The Customs authorities confiscated the goods. The Port Trust demanded demurrage charges till the date of confiscation. The right of the Port Trust to recover the demurrage charges was upheld. The submission that since the goods stood already confiscated they could have been sold to offset the demurrage charges were rejected.

14. The above judgments of the Supreme Court reveal that port, airport authorities and warehousing corporations are entitled to demurrage or detention charges for the imported goods placed or directed to be kept in their custody. The importer/consignee is liable for those charges even for

periods during which it is unable to clear the goods due to fault of the Customs authorities and even when goods have been confiscated by the Customs authorities.

15. *Grand Slam International's* case, was in the context of a bunch of appeals. In those cases, the Customs department had issued detention certificate (which in effect certifies the period of detention and directing that no demurrage may be charged for the specified period goods were subject-matter of adjudication proceedings). Such detention certificate had been issued to IAAI, and Central Warehousing Corporation (for short CWC) where the goods had been in their custody. The IAAI or the CWC, instead of treating the entire period as 'free' period granted rebate and calculated demurrage in accordance with the tariff schedule framed by them. The amount of demurrage in each case amounted to several times more than the value of the goods. The respondent-importer/consignee in that bunch of cases thereupon approached this Court through writ petitions. The petitions were allowed and it was held by this High Court that the IAAI or the CWC, being custodian of the Customs department could not ignore the detention certificate, therefore, no demurrage could be charged for the period the proceedings were pending with the Customs authorities. This Court relied upon *Trishul Impex v. Union of India* [1992 (58) E.L.T. 182 (Del.)]. That decision had relied on an earlier ruling in *Trans Asia Carpets v. Union of India*, where the basis was that Airport Authority being an agent of the Collector of Customs was bound by the detention certificate granted by the

Collector of Customs. In *Trishul Impex* it was held that the container depot where the goods were deposited, being custodian for the Customs authorities, was bound by the certificate and was therefore liable to release the goods without any demurrage.

16. The judgments of this Court were subject-matter of the appeals before the Supreme Court. In the leading majority judgment of Bhargava, J, after referring to and considering previous judgments of the Court in the *Board of Trustees of the Port of Bombay v. Indian Goods Supplying Company* (1977) 2 SCC 649 and *Trustees of the Port of Madras v. Aminchand Pyarelal* (1976) 3 SCC 167 held as follows:

*"32. This Court in the cases aforementioned, therefore, held that the Board of Trustees of a port was, under the statute that created it, entitled to charge demurrage even in respect of periods during which the importer was unable to clear goods from its premises for no fault or negligence on his part. **It was held that the Boards were entitled to charge demurrage even in respect of periods during which the importer was unable to clear goods because of the detention thereof by the Customs Authorities or the authorities under the Import Trade Control Regulations, which detention were thereafter found to be unjustified. This Court also recognized that the Boards were entities in their own right so that the courts could not direct the Customs Authorities to issue a detention certificate without hearing the Board concerned. This was because the issuance of a detention certificate had the effect of reducing the amount of demurrage that the Board would otherwise have charged.**"*

17. The judgment, after considering the various contentions including the policy for the waiver of demurrage declared as follows :

"..... An importer must land the imported goods at a seaport or airport. He can clear them only after completion of

customs formalities. For this purpose, the seaports and airports are approved and provide storage facilities and Customs officers are accommodated therein to facilitate clearance. For the occupation by the imported goods of space in the seaport or airport, the Board or the Authority which is its proprietor is entitled to charge the importer. That until customs clearance the Board or the Authority may not permit the importer to remove his goods from its premises does not imply that it may not charge the importer for the space his goods have occupied until their clearance."

further in para 44 (SCC), it was held it was held that:

"44. It cannot be gainsaid that, by reason of unjustified detention of his goods by the Customs Authorities, the importer is put to loss by having to pay demurrage charges for the periods of such detention. The Central Government is empowered by Section 35 of the International Airports Authority Act, 1971 and Section 111 of the Major Port Trusts Act, 1963 to issue to the Authority and Board of Trustees, respectively, directions on questions of policy after giving them an opportunity, as far as practicable, of expressing their views. The Central Government can, if so advised, after giving to the Authority and the Board of Trustees the opportunity of expressing their views, direct them, under the aforementioned provisions, not to levy demurrage charges for periods covered by detention certificates."

24. Justice Venkatachala, in his concurring judgment held that the importer or consignee is liable to pay demurrage for the imported goods even for the periods during which he was unable to clear the goods from the customs area, due to fault on the part of the Customs Authorities or of other authorities who might have issued detention certificates owing such default. The judgments of this Court were not sustained, including the judgment in the case of *Trishul Impex*.

18. In *Shipping Corporation of India –vs- C.L. Jain Woollen Mills* (2001) 5 SCC345 a three Judge Bench observed that there was no apparent inconsistency between the decision of the Supreme Court in *Grand Slam*

International case and that of *Sanjeev Woollen Mills'* case [1998 (9) SCC 647]. It was observed that "in view of the specific undertaking given by the Customs Authorities" the Supreme Court had held (*in Sanjeev Woollen Mills'* case) that from the date of detention of the goods till the Customs Authorities intimated the importer, importer would not be required to pay the demurrage charges.

19. The Supreme Court in *Shipping Corporation of India* did not interfere with the order of the High Court absolving the importer of the liability to pay demurrage charges. The reasons for that are as stated in para 4 of the judgment namely, that there was a specific direction of this Court in that regard and that decision having reached finality by the dismissal of the special leave petition, the liability of the importer to pay the demurrage charged ceased and that question, it was held, cannot be reopened. In *Union of India –vs- R.C. Fabrics* (2002) 1 SCC 718, the Supreme Court, through a three member decision, applying *Grand Slam*, set aside the directions of a Division Bench of this court, which had directed the customs authorities to pay demurrage charges.

20. Thus, on the authority of *Grand Slam International*, *Sun Export Corporation*, and *Shipping Corporation*, it can be stated that the law laid down by the Supreme Court is that the importer/consignee of goods cannot avoid liability to pay demurrage charges to the warehousing/ port or airport authorities even though the goods may have been illegally detained in the Customs Area/Bonded Warehouse by the Customs authority. There cannot be

an invariable assumption of customs' departments – in this case, DRI's liability to pay such demurrage or charges, in every case where the detained goods are eventually cleared, upon the importer succeeding. The contentions of the respondents have, therefore, to be upheld in so far as the liability of the petitioner to pay demurrage charges are concerned for the period up to adjudication process, the petitioner can have no cause of action.

21. Here, the petitioner was aware about a possibility of demurrage charges payable by it—even by its assessment in respect of the goods which *are the subject matter of the pending show cause notice*. Yet it did not evince the desire to pay such amounts, and instead initially sought complete exemption, and on being given part of it, changed its position and started blaming the DRI. It is not known whether the goods were ultimately directed to be released after adjudication by the authorities. What however, is apparent from the record is that the petitioner approached this court with another writ petitions, W.P.Nos.1700-01/06, for waiver of demurrage charges; the petition was withdrawn. No new facts were pleaded or urged, entitling the petitioner to claim that demurrage charges could and should have been completely waived. The court is also of the opinion that having agitated the same issue, in the previous proceeding, and being aware that full waiver is not permissible, the writ petitioner could not have approached the court again, having withdrawn the previous petition, on the same cause of action. Besides, the petitioner has neither attacked any policy on which waiver is granted or refused; not does it voice a grievance based on *mala fides*. For

these reasons, the reliefs claimed by it cannot be granted.

22. The writ petitions have to, for the above reasons fail; they are accordingly dismissed, without any order on costs.

March 13, 2009

**S.RAVINDRA BHAT,
(JUDGE)**