

IN THE HIGH COURT OF DELHI AT NEW DELHI

**W.P.(C) No. 8115 of 2002 & CM Nos. 1103, 1767 &
9757 of 2003 & CM No. 5340 of 2009**

Reserved on: September 23, 2010

Decision on : October 6, 2010

BRAHMA STEYR TRACTORS LTD. Petitioner

Through: Mr. R.S. Sharma, Advocate.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Jatan Singh, CGSC for UOI.

Mr. Buddy A. Rangnathan with

Mr. Gautam Talukdar, Advocates for R-3.

Mr. Mukesh Anand, Advocate for R-5.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether reporters of the local news papers | |
| be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

JUDGMENT

06.10.2010

1. The Petitioner which is a private limited company having its registered office at Chandigarh seeks a writ of mandamus directing the Director General of Foreign Trade ('DGFT') to pay the Mumbai Port Trust ('MPT') (Respondent No.3 herein) the demurrage charges claimed by MPT in respect of Lot No. 6747 belonging to the Petitioner. An alternate prayer is for a direction to the DGFT to reimburse the Petitioner the demurrage charges. The Petitioner also seeks the quashing of the auction held by the MPT on 7th November 2002 and for a direction to the MPT to decide the Petitioner's representation dated 14th March 2002 regarding the levy of the accumulated demurrage/port charges.

2. The Petitioner, a public limited company having its registered office at Chandigarh, is stated to have been incorporated with the main object of implementing a state of art technology project for manufacture of tractors of 48 HP. It is stated that on 5th November 1997, it entered into certain supply agreements with a company in Austria whereby the items to be imported by the Petitioner included two new machines and three second-hand machines. The Petitioner claims to have obtained permissions from the government for the import. The Petitioner imported 80% of the plant and machinery. However, the DGFT declined to grant the Petitioner an EPCG licence for two of the second-hand machines on the ground that under the new EXIM policy effective from 1st April 1999, ECPG licence could be issued only for new machines. The Petitioner was asked to submit an application for the grant of a special import licence ('SIL').

3. The case of the Petitioner is that it had entered into the supply agreement in 1997 itself and, therefore, the imports were not covered under the new EXIM policy, which became effective only from 1st April 1999.

4. The Petitioner filed a writ petition in the High Court of Punjab & Haryana for the grant of SIL. However, in the meanwhile SIL was granted to the Petitioner on 4th February 2001. Consequently the said the writ petition was disposed of as having become infructuous. As regards the demurrage charges that had accumulated, the High Court of Punjab & Haryana gave liberty to the Petitioner to challenge the same after it was communicated to the Petitioner.

5. According to the Petitioner, without any prior notice to it, MPT advertised the Petitioner's imported machinery for auction on 7th November 2002. The machinery was purchased by Pushp Holdings Ltd. (Respondent No.4 herein). The Petitioner states that MPT finally quantified the demurrage as Rs. 1,99,73,633/- and communicated it to the Petitioner on 29th November 2002. The Petitioner was given the time till 2nd December 2002 to pay the entire amount.

6. The case of the Petitioner is that the delay, if any, in Petitioner being allowed to clear the imported goods was not on account of any default committed by the Petitioner. At every stage it was the DGFT or the Customs Department which had caused unnecessary delay. The SIL which had been applied in January 2001 was finally granted to the Petitioner only on 4th December 2001. The DGFT had erred in seeking to apply the new EXIM policy although the imports were covered by agreements entered into with the foreign supplier in 1997 itself.

7. On 17th December 2002, this Court passed an interim order to the effect that if the Petitioner furnished on or before 8th January 2003 a bank guarantee for the sum of Rs. 1 crore then "the MPT shall not take steps pursuant to the auction held on 7th November 2002." The Petitioner could not furnish the bank guarantee but filed an application being CM No. 270 of 2003 pointing out that the auction itself had been cancelled. This application was disposed of on 14th January 2003 clarifying that there was no need to furnish any bank guarantee. In CM No. 13817 of 2002 it was clarified by this Court that it would be open to the MPT to take steps for a

fresh auction in accordance with law after giving the Petitioner notice of such auction. On 28th January 2003, this Court disposed of CM No. 1103 of 2003 issuing the following directions:

“1. Auction of the machinery belonging to the Petitioner which is lying with Respondent No.3 scheduled for 29th January 2003 may go on if Respondent No.3 so desires. However, it shall not be confirmed till the next date of hearing to ensure that no third party rights are created.

2. Without prejudice to the rights and contentions of the parties, Petitioner shall deposit a sum of Rs. 1 crore within two weeks from today with Respondent No.3.

3. Petitioner's application seeking remission of demurrage charges is pending with Respondent No.3. According to Respondent No. 3, Petitioner has not supplied certain documents because of which the same could not be considered although it is the case of the Petitioner that these documents were supplied. Without going into this dispute learned counsel for the Petitioner states that the documents as demanded by Respondent No.3 shall be supplied within seven days. On receiving these documents Respondent No.3 shall take decision about remission of the demurrage charges within two weeks thereafter.

List the application for hearing on 26th February 2003 along with the main Writ Petition.

Copy of the Order be given DASTI to all the parties.”

8. On 16th September 2005, by a detailed order this Court permitted the

Petitioner to amend the writ petition subject to payment of Rs. 25,000/- as costs. The purpose of the amendment was to incorporate facts arising out of the developments subsequent to the filing of the writ petition.

9. Mr. R.S. Sharma, learned counsel appearing for the Petitioner submitted that at every stage the delay in the Petitioner being permitted to clear the imported goods was on account of either the DGFT, the Customs Department or the MPT itself. In the circumstances to require the Petitioner to pay the entire demurrage was not justified. It is submitted that the MPT acted in violation of Section 62(1) of the Major Port Trusts Act, 1963 ('MPT Act') read with Section 61(3) thereof. The Petitioner had already deposited Rs. 1 crore with the MPT pursuant to the orders of this Court. It is submitted that the clearing agent of the Petitioner also approached the Customs with a letter dated 10th March 2003 for obtaining a no objection certificate ('NOC'). The Petitioner also submitted a bill of entry of the goods imported by it on 5th May 2003 for noting the same so that the Petitioner could clear the goods lying with the MPT. A reply was received from the Customs Department only on 30th May 2003 requiring the Petitioner to provide the lying position of the goods in order to note the bill of entry. The Petitioner's clearing agent wrote to the MPT on 3rd July 2003 to ascertain the lying position of goods and this was confirmed by the MPT on 10th October 2003 which was then forwarded to the Customs Department. It was submitted that the Customs Department failed to note the bill of entry earlier and therefore the Petitioner was unable to clear the goods.

10. Appearing for the MPT, Mr. Gautam Talukdar, learned counsel submitted that in terms of Section 58 of the MPT Act demurrage became payable immediately on the landing of the goods at the port. Under Section 59 the Board of the MPT had a lien in respect of the imported goods for the dues owing to the MPT on account of all charges including demurrage. Under Section 59(2) of the MPT Act such lien would have priority over all other liens. Section 61 of the MPT Act makes it clear that after the expiry of two months from the time when any goods have passed into its custody or during a shorter time where the goods are of perishable nature, the Board of the MPT could sell all or a portion of the goods by auction or, for reasons to be recorded in writing, by private agreement or so much thereof as in the opinion of the Board was necessary. Under Section 61(2) ten days' advance notice had to be given. It is submitted that the MPT had acted strictly as per the provisions of the MPT Act and had committed no illegality. Referring to the decisions of the Supreme Court in *International Airports Authority of India v. Grand Slam International* 1995 3 SCC 151, *Union of India v. Sanjeev Woolen Mills* (1998) 9 SCC 647 and *Om Shankar Biyani v. Board of Trustees, Port of Calcutta* (2002) 3 SCC 168 it is submitted that the payment of demurrage to the MPT was a separate liability which could not be linked up with any default that have been committed by the Customs Department.

11. Mr. Mukesh Anand, learned counsel appearing for the Customs points out that the bill of entry was not filed by the Petitioner with the Customs for nearly four years after the actual import which took place in 1999. In terms of Section 46 read with Section 48 of the Customs Act, 1962 no importer

could be permitted to clear the goods for import without filing a bill of entry. As an importer the Petitioner ought to have known this position as well as the requirement of obtaining an NOC. It is submitted that there was no delay on the part of the Customs Department and in that in any event no direction could be issued to it to pay demurrage charges.

12. The above submissions have been considered. In ***Grand Slam International*** which was decided by a majority of 2:1 it was clarified by the Supreme Court as follows:

“41. The purpose of the Customs Act on the one hand and the Major Port Trusts Act and the International Airports Authority Act on the other hand are different. The former deals with the collection of Customs duties on imported goods. The latter deals with the maintenance of sea-ports and airports, the facilities to be provided thereat and the charges to be recovered therefore. 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 sea-ports 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 sea-port 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.”

13. The above position was reiterated in ***Shipping Corporation of India***

Ltd. v. C.L. Jain Woolen Mills AIR 2001 SC 1806. However in the said judgment the Court in para 5 made it clear that the provisions of the MPT Act were not being discussed. The Court also noticed that there was no inconsistency between the judgment in *Grand Slam International* and the subsequent judgment in *Sanjeev Woolen Mills*. The position has been further crystallised in *Union of India v. R.C. Fabrics (P) Ltd. (2002) 1 SCC 718* where in para 16, the Supreme Court set aside a direction issued by the High Court for the Customs Department to pay the demurrage, container charges and ground rent and held the decision to be contrary to the settled position as explained in *Grand Slam International*.

14. In *Om Shankar Biyani*, the Supreme Court reiterated the position with reference to the MPT Act. In para 18 it was observed as under:

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

and he would have to then pursue the bailor for recovery of his charges. This could never be the law.”

15. In view of the clear position in law explained in the above decisions, it is not possible for this Court to accept the prayer of the Petitioner and issue a mandamus to the Customs Department to either reimburse the Petitioner the demurrage charges or to pay the demurrage charges directly to the MPT.

16. After adjusting the amount deposited with it by the Petitioner, it will be open to the MPT to recover the balance amount of demurrage from the Petitioner in accordance with law. As far as the Petitioner is concerned, it will have to avail of other remedies, if available in law, to seek reimbursement of the demurrage charges paid by it. The writ petition and pending applications are dismissed.

S. MURALIDHAR, J

**OCTOBER 6, 2010
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