

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**W.P. (C) 3976/2007 & CM APPL 7510/2007**

SUREN INTERNATIONAL LIMITED

..... Petitioner

Through: Mr. L.P. Dhir with  
Mr. Vikas Nautiyal, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Mukesh Anand with  
Mr. Shailesh Tiwari, Mr. R.C.S. Bhadoria and  
Mr. Sumit Batra, Advocates for R-2.  
Mr. R.K. Joshi with  
Mr. Jyotindera Kumar, Advocate for R-3.

**CORAM: JUSTICE S. MURALIDHAR**

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|-----------------------------------------------------------------------------|-----|
| 1. Whether Reporters of local papers may be<br>allowed to see the judgment? | No  |
| 2. To be referred to the Reporter or not?                                   | Yes |
| 3. Whether the judgment should be reported in Digest?                       | Yes |

**JUDGMENT**  
**20.10.2010**

1. The Petitioner is aggrieved by the levy of demurrage charges by the Container Corporation of India Ltd. ('CCI') Respondent No. 3 herein in respect of 40 containers. The prayer is for a direction to Respondent No.2, Commissioner of Customs to de-stuff the 13 containers remaining out of the 40 and release them without any further delay. Directions are also sought to Respondent No. 2 to pay the shipping line charges to the respective shipping lines.

2. In July 2001, on receiving a tip off about clandestine import of metal scrap, containers imported by the Petitioner purportedly containing aluminum scrap were seized by the Customs Department. The Petitioner was

alleged to have imported not just aluminum scrap but scrap of other metals like nickel and tin which were seized and taken control of by the Customs Department. The seized containers were transported to the Inland Container Depot, Tuglakabad, New Delhi and lodged at the warehouse of the CCI. The Petitioner states that the shipping line i.e. owners of the containers, began to pressurize the Petitioner into getting the containers released. On 20<sup>th</sup> August 2001, the Petitioner asked the Customs Department to inspect the containers at an early date so that they could be released. It was urged that any delay in the release of the containers would result in demurrage and detention charges owing to CCI accumulating. Further, reminders were sent on 26<sup>th</sup> and 28<sup>th</sup> August 2001. In its letter dated 7<sup>th</sup> September 2001, the Petitioner stated that it was ready to furnish any security or bond commensurate with the value of the goods. The Petitioner's case was that the Customs Department should bear the liability for the demurrage payable to CCI as they were responsible for the delay in the release of the goods from 4<sup>th</sup> August 2001 onwards. According to the Petitioner further reminders were sent on 26<sup>th</sup> September, 10<sup>th</sup> October, 18<sup>th</sup> October and 25<sup>th</sup> October 2001. The Petitioner states that the Customs Department deliberately delayed the release of the containers.

3. The Petitioner relied upon Circular Nos. 84 of 1995 dated 25<sup>th</sup> July 1995, Circular No. 83 of 1998 dated 5<sup>th</sup> November 1998 and Circular No. 42 of 2001 dated 31<sup>st</sup> July 2001 which mandated the de-stuffing of the containers and their release within six months of their importation. The Petitioner states that it sent reminders again on 16<sup>th</sup> February 2002, 26<sup>th</sup> August 2002 and 7<sup>th</sup> September 2002. Since nothing was done by the Customs Department, the

Petitioner sent letters dated 26<sup>th</sup> September, 17<sup>th</sup> October, 14<sup>th</sup> November and 6<sup>th</sup> December 2002. Thereafter, the goods contained in 40 containers were assessed and Petitioner paid the custom duty and penalty on the goods. It is stated that CCI was not inclined to release the goods without payment of the demurrage charges. The Petitioner paid ₹ 3,46,10,173.24 as demurrage charges for the 27 containers. According to the Petitioner, the said amount was liable to be paid by the Customs Department in the light of the circulars referred hereinbefore. The demurrage charges for the balance 13 containers had by the time of filing the present petition on 21<sup>st</sup> May 2007, mounted to ₹ 2,01,53,025/-.

4. In response to the notice issued to it, a counter affidavit was filed on behalf of CCI in which reliance was placed on the judgment of the Supreme Court in *International Airport Authority of India Ltd. v. Grand Slam International JT (1995) 2 SC 452*, which made it clear that CCI was entitled to recover demurrage charges from the importer or consignee even where there was a default on the part of the Customs Department or any other agency. Reliance was also placed on the judgments of the Supreme Court in *Trustees of Port of Madras v. Nagavedu Lungi & Co. (1995) 3 SCC 730*, *Shipping Corporation of India v. C.L. Jain Woolen Mills (2001) 5 SCC 345* and *Union of India v. R.C. Fabrics (P) Ltd (2002) 1 SCC 718*.

5. The Customs Department, in its reply, took a preliminary objection that the petition was bad for laches and that the petition should be dismissed in limine since the Petitioner had not stated the true and complete facts. It was stated by the Customs Department that on the basis of specific information

received by the Commissioner of Customs, 17 containers of metal scrap imported by the Petitioner were taken up for detailed examination. The information indicated that the Petitioner while importing aluminum scrap was indulging in the smuggling of high value metals such as nickel and tin. The imported goods were also found to have been misdeclared as regards weight and value. Six of the bills of entry filed by the Petitioner for the above said 17 containers, when taken up for scrutiny on 3<sup>rd</sup> August 2001 confirmed the misdeclaration of weight. In the presence of the Petitioner a detailed examination was conducted between 7<sup>th</sup> and 9<sup>th</sup> August 2001. This revealed that against declared quantity of 155.170 MT of aluminum scrap, 40.50 MT of aluminum scrap, 99.35 MT of copper scrap, 20 MT of tin ingots and 30.10 MT of prime nickel cathodes were found. These were accordingly seized. As regards goods contained in 6 containers covered by two bills of entry, the Petitioner refused to take delivery on the ground of wrong dispatches by the foreign supplier. The writ petition filed for re-export of these 6 containers was dismissed as withdrawn by this Court. The spot investigation revealed that the smuggled goods had been removed in two trucks. A combing operation was thus launched which resulted in the seizure of imported metal scrap including tin ingots, nickel cathodes and zinc valued over ₹ 5 crores from the two trucks. On the basis of further information, a search was conducted at another storage place at Ganga Nursery and prime metal belonging to the Petitioner was recovered and placed under seizure.

6. It is stated by the Customs Department that that during the course of investigation the involvement of a serving DIG posted in the National Crime

Records Bureau (whose wife and father-in-law were Directors of the Petitioner company) was revealed. The 23 containers imported in the name of the Petitioner arrived at JNPT Nhawa Shewa, having declared cargo of aluminum and copper scrap of which 13 containers were purportedly shipped by a Singapore company and 10 by a UAE Company. The containers were brought to the ICD for examination and they were found to have goods which were declared in same manner as in the case of 17 containers earlier seized. From these 23 containers, 191.368 MT of aluminum scrap, 200.712 MT of copper scrap, 20 MT of tin ingots and 11.99 MT of prime nickel cathodes were seized. The case was thereafter transferred to the Revenue Intelligence, Nepal Division. The provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 were invoked against the serving DIG and his wife. Searches were conducted and the statements of more than 50 persons at Delhi and Mumbai were recorded. Show cause notice was issued to the Petitioner and 10 others in regard to seizure. The Commissioner on 30<sup>th</sup> June 2003 passed an order levying duty and penalty. This was affirmed by the Central Excise and Service Tax Appellate Tribunal ('CESTAT') by its order dated 2<sup>nd</sup> September 2005. It is stated that the writ petition challenging the said order of the CESTAT was also dismissed by this Court. It is submitted that in the circumstances no liability for demurrage can attach to the Customs Department since the entire import was illegal.

7. It is pointed out by the Customs Department that by a letter dated 21<sup>st</sup> October 2002 the Petitioner was duly informed that the request for de-stuffing of the cargo could not be acceded to as the CCI had shown their

inability to provide space for the safe custody of the goods on the grounds of the cargo being scrap material in loose condition. The Petitioner was requested to get the seized goods released provisionally. However, the Petitioner did not come forward to clear the goods provisionally. Also after the final assessment the Petitioner did not opt to pay the redemption fine and penalty. Instead the Petitioner preferred to file an appeal against the order of the Commissioner to the CESTAT which was ultimately dismissed.

8. An affidavit was filed by CCI on 8<sup>th</sup> February 2008 stating that the goods in 13 containers were auctioned on 20/21<sup>st</sup> August 2007 and a sum of ₹ 1,21,13,286/- was realised on auction. The auction proceeds were utilized as under:

- (i) Auction expenses ₹ 1,22,590/-
- (ii) Customs duty ₹ 32,16,538/- paid to the Customs Department
- (iii) Demurrage charges to the extent of ₹ 2,47,10,600/-

It was further submitted by the CCI that the total demurrage charges worked out to ₹ 2,47,10,600/-. After adjusting ₹ 87,74,158/-, there was still an amount of ₹ 1,59,36,442/- recoverable from the Petitioner towards demurrage.

9. During the course of the hearing, the Petitioner pointed out that there was discrepancy in the amount stated to have been recovered by way of auction which took place earlier to the order dated 9<sup>th</sup> July 2007 passed by this Court. While CCI had indicated the realised auction proceeds as ₹ 1,21,13,286/-, the Customs Department had given the figure of ₹ 1,46,22,000/-. By an order dated 24<sup>th</sup> September 2010, this Court directed

the Customs Department to produce the records. The records were produced. It appears that there was a genuine mistake made by the Customs Department when it mentioned in its affidavit that ₹ 1,46,22,000/- had been recovered. Mr. Anand, on instructions, clarified that the realised auction amount as indicated in the affidavit dated 8<sup>th</sup> February 2008 of the CCI, i.e., ₹ 1,21,13,286/- is the correct figure.

10. Mr. L.P. Dhir, learned counsel for the Petitioner referred to the above circulars which mandates that the Customs Department should clear the imported goods without unreasonable delay. He submitted that the failure to comply with the said circulars would entail shifting of the burden of paying the demurrage charges to the Customs Department. He placed reliance on the decisions in *IMSA Shipping Agency v. Commissioner of Customs 2002 (145) E.L.T. 55 (Cal.)*, *Rajeev Woolen Mills v. Union of India (1988) 15 ECC 232*, *Kutch Shipping Agency P. Ltd. v. Board of Trustees, Kandla Port Trust 2001 (132) ELT 521 (SC)*, *Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli (2007) 6 SCC 81* and *R.C. Fabrics (P) Ltd. Union of India 1995 (76) E.L.T. (Del.)*. Mr. Dhir submitted that there was no justification for detaining the cargo without de-stuffing it from the containers for such a long period. Since this delay was not attributable to the Petitioner, the charges owing to the shipping line as well as the demurrage charges owing to CCI should be borne by the Customs Department. Reliance was placed upon the decision of this Court in *PIL Mumbai (India) Ltd. v. Union of India 2010 (254) E.L.T. 67 (Del.)*.

11. Appearing on behalf of CCI, Mr. R.K. Joshi, learned counsel pointed out

that the settled position in law as laid down by the Supreme Court in ***Grand Slam International*** was that the CCI was entitled to recover the demurrage charges from the importer irrespective of any illegality committed by the Customs Department. He pointed out that judgment of this Court ***R.C. Fabrics*** relied upon by Mr. Dhir was overruled by the Supreme Court in ***Union of India v. R.C. Fabrics (P) Ltd. (2002) 1 SCC 718***. He also relied upon the judgment of ***Om Shankar Biyani v. Board of Trustees (2002) 3 SCC 168***.

12. Mr. Mukesh Anand, learned counsel appearing for the Customs Department, pointed out that the entire import was illegal and assessment of the duty and penalty by the Customs Department was upheld by the CESTAT as well as by this Court. The duty and penalty had since been recovered from the Petitioner. Since the import was itself illegal and the Petitioner had failed to avail of the opportunity of getting the goods cleared either provisionally or, after assessment, by paying the duty, redemption fine and penalty, the delay and consequent accumulation of demurrage charges was entirely attributable to the Petitioner. The liability to pay the demurrage charges could not possibly be fastened on to the Customs Department.

13. The above submissions have been considered. The principal submission of learned counsel for the Petitioner that on account of its failure to allow the Petitioner to clear the goods for import in reasonable time in terms of the circulars, the Customs Department should bear the demurrage charges is without merit. The Petitioner does not deny that the imports were found to

be entirely illegal on account of misdescription of goods and misdeclaration of weight and value. The said orders holding the imports to be illegal have attained finality. During the period the imported goods were detained, investigations were in progress and this revealed that that the Petitioner was in the garb of importing aluminum scrap in fact also importing nickel, copper and tin ingots. The question of the circulars applying to the facts of the present case does not arise. The time limits set therein can be said to apply where the importer has made a valid import, has made no misdeclaration of any sort and the delay in effecting clearance is entirely on account of the Customs Department. Having sought to smuggle copper and nickel scrap and tin ingots, the Petitioner cannot insist that its imports should have been cleared in the same time frame as a normal import. The submission is rejected as misconceived.

14. The Customs Department is right in its contention that it was open to the Petitioner to have the goods cleared provisionally if it felt that the demurrage was mounting alarmingly. The Petitioner did not choose to do so. Even after the assessment by the Commissioner it did not choose to pay the differential duty assessed, the fine and penalty but challenged the order unsuccessfully before the CESTAT. In the circumstances, no liability can attach to the Customs Department for payment of demurrage charges.

15. The settled position in law is that the CCI can recover demurrage charges from the importer or consignee, as the case may be, irrespective of who may have been responsible for the accumulation of demurrage charges.

Also the Customs Department cannot be issued a mandamus to pay the demurrage charges. When a direction to this effect was issued by this Court in *R.C. Fabrics (P) Ltd.* it was reversed by the Supreme Court in *Union of India v. R.C. Fabrics (P) Ltd.* where in para 16 it was held as under:

“16. The High Court has directed that the Customs Department would pay the demurrage, container charges and ground rent to the Corporation from 16-1-1991. The said direction is contrary to the decision of this Court in *International Airports Authority of India v. Grand Slam International (1995) 3 SCC 151*. The Corporation is entitled to recover its charges from the importer. Therefore, the direction in the impugned judgment and order that the Customs Authorities shall pay those charges is set aside. Thus, the appeal filed by the importer (CA No. 7931 of 1995) deserves to be dismissed. In any event, no one has appeared in support of that appeal.”

16. The settled law as laid down by the Supreme Court in *Grand Slam International* is 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.”

17. This was reaffirmed in *Shipping Corporation of India Ltd. v. C.L. Jain Woolen Mills*. In the context of the Major Port Trusts Act, the position was reiterated by the Supreme Court in *Om Shankar Biyani*. In view of the settled position in law the plea of the Petitioner that it should be exempted from paying the demurrage charges and a mandamus should issue to the Customs Department to pay the demurrage charges has to be rejected.

18. This writ petition is dismissed with costs of ₹ 10,000/- out of which ₹ 5,000/- will be paid by the Petitioner to the Customs Department and ₹ 5,000/- by the Petitioner to the CCI within four weeks from today. The pending application is also dismissed.

**S. MURALIDHAR, J.**

**OCTOBER 20, 2010**

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