

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment dated 16.4.2010

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WP(C)No.4552/2008

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M/S AJANTA ARTS COMPANY

..... Petitioner

Through : Mr. C. Hari Shankar and Mr. Tushar Kr.,
Adv.

versus

UNION OF INDIA & ORS.

..... Respondents

Through : Mr. Satish Aggarwala, Adv. for
respondents no.1 and 4.
Mr. D.D. Singh, Adv. for respondent no.2.
Mr. M.Devnath, Adv. for respondent no.3

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

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

G.S. SISTANI, J. (ORAL)

1. The present petition has been filed under Article 226 of the Constitution of India for issuance of a writ of mandamus directing respondent no.2 (Container Corporation of India Ltd.) to hand over the delivery of a consignment of Pig Bristles (imported in Container No. HDMU 2368478 (LOT No. – 106)) to the petitioner as well as a writ of prohibition, restraining respondent no.2 from handing over the delivery of the said goods to any other person.

2. The facts leading to the filing of this writ petition are that a consignment of 'pig bristles' arrived at Inland Container Depot (ICD), Tuglakhabad on 11.08.07, in Container No. HDMU 2368478. Learned counsel for the petitioner submits that under Section 46 of the Customs Act, 1962 (hereinafter referred to as "the Customs Act") the importer of any goods is required to file a Bill of Entry and present it to the officer concerned in the prescribed format. Once such Bill of Entry is filed, if the goods are imported, and duty payable has been paid thereon, clearance may be given thereof under Section 47 of the Customs Act.
3. Learned counsel for the petitioner submits that, no Bill of Entry (hereinafter referred to as "B/E") was filed in respect of the said consignment of 'pig bristles' that had arrived in the Container No. HDMU 2368478, by any person, neither was the said consignment claimed by any importer and it remained un-cleared in the warehouse of respondent no.2, who was the custodian of the said goods. It is submitted that Section 48 of the Customs Act deals with procedure in cases where goods are not cleared from the warehouse or transit within 30 days after they are unloaded. Section 48 reads as under:

"Procedure in case of goods not cleared, warehoused, or transhipped within [thirty days] after unloading. – If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within [thirty days] from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof :
Provided that -

- (a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;
- (b) *****”

4. Section 150 of the Customs Act deals with the procedure for sale of goods, the same reads as under:

“Procedure for sale of goods and application of sale proceeds. – (1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner.

(2) The proceeds of any such sale shall be applied -

- (a) firstly to the payment of the expenses of the sale,
- (b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods,
- (c) next to the payment of the duty, if any, on the goods sold,
- (d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,
- (e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods.”

5. Counsel for the petitioner submits that respondent no.2 auctioned several consignments lying uncleared with it, to tender-cum-online auction sale, which included the goods under consignment of ‘pig bristles’ imported under container No. HDMU 2368478 as described in the notice of auction as “General Cargo”. The terms and conditions of the auction were contained in the Notice issued by respondent no.2 in this regard.

6. It is the case of the petitioner that petitioner had offered a tender amount of Rs.41,42,435 for the consignment of ‘pig bristles’ which had arrived in container No. HDMU 2368478, in response to the

above auction notice issued by respondent no.2, a part of tender money was paid by the petitioner along with the tender itself. As the petitioner was the highest bidder for the said consignment, and the same being manifest from the final result of the auction notified by respondent no.2 on 10.4.08 which specifically approved the petitioner's bid, the petitioner applied for further necessary clearance, as per Circular No.13/2007-Cus dated 02.03.07 issued by the Central Board of Excise and Customs (hereinafter referred to as "CBEC") and the same required that all consignments of live stock products be cleared by the Animal and Quarantine Departments. Learned counsel for the petitioner submits that vide letter dated 25.04.2008, the sample was forwarded by respondent no.2 to the Animal and Quarantine Departments and a bare reading of the said letter itself discloses that respondent no.4 had acknowledged the fact that the goods even on that date stood sold to the petitioner.

7. It is submitted by the counsel for the petitioner that even otherwise, in accordance with the Bill of Entry Regulations, a consolidated Bill of Entry prepared by respondent no.2 and submitted to Customs Authorities, by virtue of Regulation 3 the said Bill of Entry filed by the custodian of the goods was deemed to be a Bill of Entry filed under Section 46(1) of the Customs Act.
8. It is the case of the petitioner that on 29.05.2008, respondent no.3, the original importer of the goods, illegally filed a Bill of Entry for clearance, for home consumption in respect of the goods imported in container No. HDMU 2368478. As Bill of Entry in respect of the goods imported vide consignment No. HDMU 2368478, has already

been filed by respondent no.2 as per Section 46 of the Customs Act, there is no question of any Bill of Entry being filed by any other party in respect of the same goods, and any such Bill of Entry filed by respondent no.3 would be null and void.

9. It is contended by counsel for the petitioner that it is undisputed that respondent no. 3 was given a notice regarding the auction of the said consignment of 'pig bristles' and despite notice having been served, the petitioner decided not to participate in the auction. Learned counsel for the petitioner submits that the petitioner has not only participated in the auction but has been officially declared as the highest bidder. The petitioner has also paid the requisite payment as stipulated in the terms and conditions relating thereto, and after having secured the necessary certification in accordance with Circular No.13/2007 dated 02.03.07 issued by the CBEC, petitioner is entitled as of right to the delivery of the goods imported under Consignment No. HDMU 2368478, LOT No. 106. It is further submitted that on 11.06.08 and 13.06.08, the petitioner had also addressed a representation to respondent no. 4, *inter alia* stating that petitioner was entitled to the delivery of the goods, however no response was received from the department.
10. It is further contended by counsel for the petitioner that the title in the goods in question has already passed to the petitioner. The petitioner's bid has been finally accepted and the petitioner has also submitted the requisite certification, as required vide Circular No.13/2007 issued by the CBEC. Thus counsel contends that it is not open to any of the respondents to take a stand that the final

confirmation is yet to take place. Once the payment has been made by the petitioner and the requisite certificates produced, the petitioner is entitled to receive the goods released in its favour. The only exercise remaining to be carried out was the grant of the final confirmation by the custom authorities and the payment of the balance amount by the petitioner thereafter, which petitioner undertakes to pay. It is next submitted by counsel for the petitioner that the petitioner cannot be divested of its right to the possession and delivery of the goods in issue. It is submitted that *ex facie*, the filing of the 'Bill of Entry' by respondent no.3 is not *bonafide*, especially keeping in view the period of almost one year which has elapsed between the arrival of goods and the filing of the Bill of Entry. Counsel for the petitioner submits that it appears that officials of respondents no.2 and 4 are permitting such belated filing of the Bill of Entry to suit their own ends. Learned counsel for the petitioner submits that it is not permissible, in the present circumstances, for respondents no.2 and 4 to even delay the delivery let alone deny the delivery of the goods to the petitioner for which the petitioner has submitted the highest bid and fulfilled all requisite formalities.

11. While opposing the present petition, learned counsel for respondent no. 2 submits at the outset that the present petition is not maintainable since it involves disputed question of facts which cannot be adjudicated upon by this Court exercising its jurisdiction under Article 226 of the Constitution of India and thus the petition is liable to be dismissed with costs.

12. Learned counsel for respondent no. 2 submits that even otherwise, there is no merit in the case of the petitioner, as the original importer-respondent no.3 had approached the Custom Authority for release of the Cargo/consignment and the Custom Authority had allowed respondent no.3 to file its Bill of Entry on 29.05.2008 to facilitate the clearance of the same. Respondent no.3 was allowed to submit his Bill of Entry on the basis of the policy of the Government to encourage importers and to safeguards their interest by allowing the said cargo to be lifted by the importer himself, instead of it being sold in auction to a third party to the detriment of the importer, in case the importer is ready and willing to pay the Customs Duty, terminal service charges and other miscellaneous charges. Learned counsel submits that the importer has a right in law to file a Bill of Entry in case the consignment has not been sold and goods physically not handed over to the bidder, subject to the importer paying the various dues and custom duties as contemplated under the law. It is submitted that in this case, the importer-respondent no.3, has paid Rs.2,29,000.00 as ground rent and Rs.28,500/- as terminal service charges as on 17.06.2008. In addition, respondent no.3 has also paid Customs Duty on the consignment. The consignment being in possession of respondent no. 2 and the importer-respondent no.3 having deposited the ground rent, terminal service charges customs duty and also having deposited Rs.4,14,243.00 on 18.06.2008 i.e. auction expenses which are 10% of the auction bid amount as contemplated by the circular issued by respondent no.3 vide notification bearing

no.CON/CT/2/V12AUCTION/2005/17 dated 20.09.2005, the said respondent no. 3 therefore became entitled to the delivery of the said consignment of pig bristles. Counsel for respondent no. 2 has denied that the petitioner has addressed any representation dated 11.6.2008 and 13.6.2008 to respondent no.4.

13. It is further submitted by learned counsel for respondent no. 2 that moreover as per Clause 3 (ix) of the terms and conditions of the tender-cum-online-auction sale, respondent has the discretion to withdraw from the sale, a lot or part thereof at any time before the goods are actually, physically delivered out of the campus and without disclosing any reasons for such withdrawal. Learned counsel for respondent no. 2 submits that respondent no.4 vide letter dated 13.06.08 withdrew the lot of 'pig bristles' in question, in accordance with Clause 3 (ix) of the terms and conditions of the auction and in view of the said withdrawal, respondent no. 2 could not have given delivery of the shipment to the bidder/petitioner inasmuch as the instructions of the Customs Authorities are binding on respondent no.2. Therefore, the petitioner lost its right to take delivery of the lot/consignment in question.

14. Learned counsel for respondent no. 2 has further vehemently submitted that even otherwise, mere confirmation of a bid does not cloth the petitioner with the title of the consignment, till the physical possession of the consignment is handed over to the bidder i.e. the present petitioner in the case. It is submitted that the petitioner has not even exhausted the alternative remedies as provided for within the meaning of Clause 12 of the terms and conditions of the tender-

cum-online auction sale and that the present petition is premature since no cause of action has arisen in favour of the petitioner inasmuch as the petitioner has no lien on the said consignment.

15. Learned counsel for respondent no.3 submits that, the writ petition filed by the petitioner is not maintainable as per the terms and conditions agreed upon between the petitioner and respondent no.4, at the time of the tender-cum-auction sale, inasmuch as, any dispute that arises under the contract has to be placed before an arbitrator. In other words, if the petitioner is aggrieved by any clause of the contract entered with respondent no.4, the petitioner being bound by the contract cannot ignore the arbitration clause. In support of this contention, learned counsel relies upon **Prasanna Kumar & Others Vs. The Deputy Commissioner**, reported at **2006 (203) ELT 375**, more particularly paras 7 and 8, which are reproduced below:-

“7. The learned counsel further submitted that though the impugned order refers to condition No.11 of the general conditions of sale, which reads as follows: “Any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. However, if any payment has been made it would be refunded without any interest”, that will not entitle the respondents to refrain from disclosing the reasons for such withdrawal.

8. I am unable to accept the said contention of the learned counsel for the petitioner. The impugned order cannot be said to be arbitrary or opposed to the principles of natural justice. It is categorically stated in condition No.11 that any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. It is not the case of the petitioner that the goods were actually physically delivered out of the campus.

Further, the petitioner has been advised to approach Sanco CFS to get the amount paid by him refunded, which is strictly in accordance with the above said condition. The petitioner may not be put to any financial loss. The petitioner had taken part in the E-Auction only after fully knowing about the general conditions of sale including condition No.11 of the general conditions of sale. Having accepted the conditions of sale and having taken part in the E Auction, accepting to abide by the general conditions of sale, it is not open to the petitioner to question the right of the respondents to withdraw the auctioned goods from the sale. In the impugned order, it is clearly stated that due to administrative reasons, the auctioned goods have been withdrawn from the sale. Condition No.11, as extracted above, clearly shows that the respondents are entitled to withdraw the auctioned goods from sale without disclosing the reasons for such withdrawal.”

16. Learned counsel for respondent no.3 further submits that the petitioner has not presented the correct factual position before this court. Learned counsel submits that correct facts of the case are that respondent no.3 entered into a sales contract with M/s CHONG QING SHENGCHENG ANIMAL BY-PRODUCTS (hereinafter referred to as “M/s CHONG QING”) for a consignment of ‘white boiled bristles’ with certain specifications. Accordingly, the sales invoice and a Bill of Lading was drawn. M/s CHONG QING confirmed the receipt of an advance payment of US \$ 2000 from respondent no.3 and in pursuance of the said agreement, respondent no.3 received pig bristles from M/s CHONG QING in the month of August, 2007. The consignment consisting of pig bristles arrived at ICD, Tughlakabad, New Delhi in August 2007 in container No.HDMU 2368478. Prior to the arrival of the container in June, 2007, and 1.8.2007, the import of pig bristles was prohibited as per Notification dated 2.2.2007 of the Department of Animal Husbandry as well as the Government of

India, Ministry of Commerce, further vide Notification dated 13.3.2007 issued a similar notification prohibiting the entry of live pig and pig meat products. Learned counsel for respondent no.3 further submits that, however, there was an embargo on the import of processed pig bristles which embargo was removed only in November, 2007 and notified on 23.5.2008, subject to a No Objection Certificate being granted by the Department of Animal Husbandry as well as the Quarantine Department.

17. Mr. M.P. Devnath, learned counsel for respondent no.3, submits that Department of Animal Husbandry has been issuing notifications from time to time starting from 2.2.2007; June, 2007; and August, 2007, onwards. Simultaneously, Ministry of Commerce has also been issuing the notification Codes. As per the notification issued, originally the prohibition for import was with respect to live pig and pig meat. Subsequently in June, 2007, pig bristles were included. By a subsequent notification issued in November, 2007, pig bristles were excluded from the order of prohibition subject to the condition that they would require a passage by the Department of Animal Husbandry as also by the Quarantine Department. Counsel further submits that in view of the above notifications, the consignment could not be cleared on arrival and remained with the Customs. The notification of November, 2007, would not have been applicable to the consignment, in question, as the import, had been carried out earlier. Meanwhile, the Custom authorities initiated auction proceedings under Section 48 of the Act. Counsel for respondent no.3 also submits that the auction *per se* is bad in law and the goods

could not have been auctioned nor auction proceedings could have been initiated as per the Customs Manual read with CBEC clarifications as the prohibited goods can only be absolutely confiscated and thereafter would either have been re-exported or destroyed. Counsel for respondent no.3 next submits that in similar circumstances a letter was addressed to M/s Seiko Bristle Corporation, by the Ministry of Agriculture, a copy of which has been placed on record, wherein the Regional Officer, Department of Animal Husbandry, had informed the Assistant Commissioner, Customs, that the products may either be deported back to the port of origin or destroyed at the owners cost.

18. Counsel for respondent no.3 submits that when the auction was initiated in March, 2008, respondent no.3 did not participate because Sh. Deepak Gaba, the concerned person, was unwell for a long time and even otherwise respondent no.3 was under the impression that the goods could not have been auctioned being prohibited goods. It is next contended by counsel for respondent no.3 that it is only by a notification dated 23.5.2008 that the earlier notification was amended and the terms thereof relaxed by allowing import of pig bristles subject to clearance by Quarantine and goods free from any virus infection by the Animal Husbandry Department, subject to the condition that the relaxation would follow for imports made post 5.6.2007 but prior to 11.11.2007 in a situation where either advance payment has been made, LC opened and shipment is prior to 5.6.2007. Despite the fact that prohibited goods could not have been put to auction the same were auctioned in March, 2008,

through the instrumentality of the Container Corporation of India, subject to the condition of final approval of the Custom of the auction proceedings. The consignment was put to auction and a bid for Rs.41.0 lakhs was made inclusive of Custom Duty of Rs.19.66 lakhs, Rs.3.37 lakhs payable to respondent no.2 and de-auction charges of Rs.4.00 lakhs. Counsel for respondent no.3 further submits that keeping the aforesaid calculations in mind, respondent no.3 would only receive approximately Rs.14.00 lakhs. Counsel for respondent no.3 also submits that petitioner has only deposited a sum of Rs.8.00 lakhs and the balance payment has to be made only after the Custom Authorities finally approve the auction and allow the clearance.

19. It has been strongly urged by learned counsel for respondent no.3 that the goods could have not been auctioned being prohibited goods, however, due to prevalent situation of Bird Flu, etc., after the auction, a condition was put for seeking clearance from the Animal Husbandry Department, Ministry of Agriculture and Quarantine Department. Learned counsel for respondent no.3 submits that if the goods could be released to the petitioner based on this criteria, then respondent no.3, who was original importer, could also have cleared the goods unaffected by the notifications. Subsequently, in the end of May, 2008, the Certification was given by the Ministry of Agriculture as also by the Wildlife Authorities with regard to consignment. More so when the certificate was issued, the notification had already come into effect on 23.5.2008 providing relaxation to consignments paid for and imported by respondent

no.3. Consequently, Custom Authorities did not approve the delivery of auction to the petitioner as the consignment had been paid for and imported by respondent no.3 from China and due to intervening spread of Bird Flu, the consignment could not be cleared either by respondent no.3 or by the auction purchasers. The Custom Authorities took into consideration the fact that the advance payment had been made by respondent no.3 to the seller, respondent no.3 would be covered by notification dated 23.5.2008, and took a conscious decision in the interest of justice, equity and fair play in favour of respondent no.3, the original importer, by permitting him to file Bill of Entry and allowing clearance of goods. Counsel for respondent no.3 further submits that respondent no.3 has paid Custom Duty of Rs.19.66 lakhs with interest accrued thereon; the land retention charges of CONCOR, respondent no.2, of Rs.3.37 lakhs; paid auction / de-auction charges of Rs.4.00 lakhs to the Container Corporation, as also Rs.1.77 lakhs to the Shipping Line, besides roughly Rs.52.00 lakhs to the foreign supplier, totaling approximately Rs.81.00 lakhs, as against which the petitioner has only paid a sum of Rs.8.00 lakhs i.e. the 20% of the auction amount. Counsel for respondent no.3 also submits that respondent no.3, the original owner of the Cargo, had never abandoned or relinquished title of the goods, which could only have been acquired after the Ministry of Agriculture took a conscious decision that imports which had been made after 5.6.2007 should also be entitled to be cleared subject to the conditions.

20. Counsel for respondent no.3 has relied upon Clause 3.0 (ix) of the Terms of Auction, in support of his plea that the Custom Department, respondent no.4, was well within their right to withdraw any lot or part thereof from the sale at any time before actual delivery. Clause 3.0 (ix) of the Terms of Auction which is reproduced below:

3.0 CONDITIONS OF SALE.

- ix) Any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. However, if any payment has been made it would be refunded without interest.

21. Learned counsel for respondent no.3 has also relied upon Clause 12.0 of the conditions of auction, in support of his contention, that the present petition would not be maintainable as dispute between the parties are to be resolved through Arbitration. Clause 12.0 reads as under:

12.0 DISPUTES

- i) In case of any dispute, the same shall be referred to a single arbitrator, to be appointed by the Container Corporation of India Ltd. and the Arbitration proceedings would be governed by 'Arbitration and Conciliation Act' 1996.
- ii) The fees and expenses towards arbitration proceedings shall be shared, equally, by the parties to the dispute and shall be paid in advance to the auctioneer. The jurisdiction for appealing against the award in a court, or any other proceedings under the Arbitration Act, shall be that of courts in Delhi / New Delhi only.

22. Learned counsel for the respondents has relied upon **B. Prasanna Kumar and others Vs. Deputy Commissioner of Customs, Chennai**, W.P.No.6379/2006, and more particularly paras 16 and

17, wherein in similar circumstances the Court had dismissed the writ petition, as disputes had to be resolved through Arbitration.

Paras 16 and 17 read as under:

16. When condition No.28 of the general conditions of auction provides for arbitration, the petitioner is bound by the same and the petitioner cannot ignore the arbitration clause and approach this Court under Article 226 of the Constitution of India.
17. It is settled law that if a right has been claimed in terms of the contract, such a right cannot be enforced in a writ petition filed under Article 226 of the Constitution of India. In other words, the extraordinary remedy cannot be invoked for the enforcement of contractual obligations, since the same can be resorted to on the basis of the agreement executed between the parties, i.e. by invoking the arbitration clause. It is also a settled law that a party to a contract is bound by the arbitration clause contained in the contract and he has to seek for arbitration in terms of the stipulations contained in the agreement. Hence, having agreed to abide by the conditions contained in general conditions of the auction, which contain as above said an arbitration clause in condition No.28, the petitioner cannot invoke the writ jurisdiction of this Court.

23. Learned counsel for respondents no.1 and 4 while supporting the case argued by counsel for respondents no.2 and 3 submits that the case of the petitioner is devoid of any merit.

24. Learned counsel for respondent no.4 submits that in the auction held on 26/27.03.2008 (as per the petitioner it was held on 27/28.03.2008), the consignment comprising of pig bristles in container No.HDMU 2368478, was sold at the highest bid price of Rs.41,42,435/- to the petitioner. Samples were drawn and sent to the wild life as well as to the quarantine department for obtaining

the requisite No Objection Certificate (NOC). The test reports from both the departments were received and both had given the NOC. The NOC dated 29.05.08 issued by the Animal Quarantine and Certification Service, Ministry of Agriculture, Government of India, was submitted to the respondent no. 4 on 30.05.08 (as per the petitioner the correct date is 29.05.08) by CONCOR (respondent no. 2).

25. However, counsel for respondents no.1 and 4, submits that before the NOC could be issued so as to release the consignment to the petitioner, a representation dated 02.06.08 was received from the importer (respondent no.3) as it had filed the Bill of Entry No.698971 dated 29.05.08 and it had sought permission for clearance of goods. And in view of the Departmental Circular bearing No.50/2005 dated 01.12.05, which lays down the procedure for disposal of unclaimed/uncleared cargo and wherein it is clearly mentioned that the reserve price and bids would have to be first approved by the customs authority and that it is mandatory on the part of the bidder participating in the auction to seek confirmation from the Customs, therefore in the present scenario, the Department (respondent no. 4) vide letter dated 09.04.08 specifically directed CONCOR (respondent no. 2) to stop the delivery of the consignment of pig bristles with immediate effect. Vide letter dated 13.06.08, the Department further directed CONCOR that respondent no.3, being the original importer, had the first right to the consignment of pig bristles and thus the consignment was asked to be withdrawn from the auction held on 27/28.3.08. Learned counsel further submits that

merely because respondent no.3 has filed a delayed Bill of Entry, the same does not imply that it had thereby relinquished its title to the goods. It is further pointed out that pig bristles, subject matter of the case herein, were a prohibited item, which prohibition was lifted only on 23.05.08, subject to the fulfillment of certain conditions. The Ministry of Agriculture, Government of India, had vide notification dated 23.05.08 published in the Gazette on 26.05.08, allowed clearances of imported processed bristles subject to fulfillment of conditions laid down therein. Thus, all the importers who had imported these goods were not able to get clearances and it is quite probable that respondent no.3 was unable to get his goods cleared from the Department, at an earlier point of time. Mr. Aggarwal submits that even otherwise, the Department is getting a higher revenue from respondent no.3 than it will be getting through the auction. Accordingly for cogent reasons, the Department gave a No Objection Certificate to respondent no.3 vide letter dated 13.06.08. It is submitted that the importer has the legitimate right to the goods till the time the goods are lying with the custodian and that the petitioner's claim on the consignment of Pig Bristles (imported in Container No. HDMU 2368478 (LOT No. – 106)), is null and void.

26. In the rejoinder filed by the petitioner to the counter affidavit of respondent no.1 and 4, it has been stated that the reliance placed upon by respondent no.1 and 4 on circular no.50/2005 in support of the contention that the goods can be withdrawn from the auction, is entirely misplaced. It is contended that the said circular is totally inapplicable in the facts of the present case as the said circular

clearly states that the liberalised procedure would not apply to goods which have been lying uncleared for a period of less than one year from the date of their import. Even assuming, without admitting the fact that the said circular is applicable, the said circular supports the case of the petitioner by clearly stating that the customs shall not withdraw any consignment at the last moment from the auction except with the written approval of the Commissioner of Customs. Such a procedure has been prescribed to prohibit unreasonable withdrawing of any consignment. It is further stated that respondent no.3 had failed to exercise its right during the period the goods were lying with the custodian i.e. within thirty days after the date of unloading. Now after a considerable lapse of time, when the petitioner has obtained the necessary documents, required for the sale of goods, the claim of respondent no.3 to the goods is clearly impermissible.

27. I have heard learned counsel for the parties and given my thoughtful consideration to the matter. The basic facts are not in dispute that respondent no.3 entered into a sales contract with M/s CHONG QING SHENGCHENG ANIMAL BY-PRODUCTS for a consignment of white boiled bristles in April, 2007. A copy of sales invoice has been placed on record. Respondent no.3 also made an advance payment of US \$2000 to the seller. The consignment of pig bristles arrived at ICD, Tughlakabad, New Delhi, in August, 2007 in Container No.HDMU 2368478. As the consignment remained uncleared, the same was put to auction on 27/28.3.2008. The final result of the auction held on 27/28.3.2008 was declared on

10.4.2008 and petitioner was declared as the successful bidder. In the final list it was mentioned that the Lot was subject to Customs clearance.

28. A preliminary objection has been raised by counsel for the respondents with regard to maintainability of the writ petition on the ground that there is an arbitration clause, which binds the petitioner and respondent no.4. Copy of the terms and conditions of auction have been placed on record. Clause 12.0 of the conditions of auction has been reproduced above. Counsel for respondent no.3 has placed reliance on **B. Prasanna Kumar and others Vs. Deputy Commissioner of Customs, Chennai**, W.P.No.6379/2006, and more particularly paras 16 and 17, which are reproduced above, wherein a Single Judge of the Madras High Court has held that parties are bound by the terms of the Contract. I see no reason to take a different view than the view taken by the Madras High Court in the case of **B. Prasanna Kumar and Others** (supra). However, taking into consideration that the matter has been heard at length on merits, I consider it appropriate to decide the matter on merits as well.

29. At this stage, it would be useful to recall that under Article 226 of the Constitution of India, while exercising the power of judicial review, the High Court does not sit as a Court of appeal and it is not to examine the merits of the decision but only the decision making process. The Court must take into account whether a public authority has exercised its jurisdiction in a *malafide* manner and ensure that the administrative authority has followed the norms and

standards of procedure laid down. Courts must examine and protect individuals against arbitrary action even in contractual matters and the decision taken by the authority is to be examined on the basis of the Wednesbury's Principle of reasonableness. Further it can be safely said that the practice of judicial review of administrative action, ordinarily, constitutes the exception and not the rule. Unless a decision is coloured in *mala fide* exercise of discretionary power or is demonstrably capricious or arbitrary and not informed by any reason or otherwise purports to create an unreasonable classification, Courts should restrain from finding too many loopholes therein.

30. The exceptional circumstances warranting the application of judicial review in administrative matters were for the first time postulated by Lord Greene in ***Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corporation***,¹ famously remembered as “the Wednesbury Case”. In the said case, the plaintiffs, who were the proprietors of a cinematograph theatre, had been granted license by the defendants, the Wednesbury Corporation, to operate their theatre on the condition that children under the age of fifteen would not be allowed entry into the theatre on Sundays. Counsel for the plaintiffs argued that the Wednesbury Corporation was not entitled to impose any such condition. It was further argued that if at all the Wednesbury Corporation was entitled to a condition prohibiting the admission of children, it should have limited it to cases where the children were not accompanied by their

¹ (1948) 1 KB 223

parents or a guardian or some adult. The thrust of the plaintiff's argument thus was that the condition put by the defendants restricting the access of children below fifteen to the theatre on Sundays was unreasonable, and that, in consequence, it was *ultra vires* the power of the Wednesbury Corporation. Dismissing the claim of the plaintiffs, Lord Greene unequivocally opined that the Court could not intervene to overturn the decision of a local authority (the Wednesbury Corporation) simply because the Court disagreed with it. It was observed that to have the right to intervene, the Court would have to form the conclusion that:

- (i) the corporation, in making that decision, took into account factors that ought not to have been taken into account, or
- (ii) the corporation failed to take into account factors that ought to have been taken into account, or
- (iii) the decision was so unreasonable that no reasonable person would ever consider imposing it.

31. The aforesaid exceptional circumstances, as envisaged by Lord Greene in the Wednesbury Case, were crystallised by Lord Diplock in ***Council of Civil Service Unions and Others Vs. Minister for the Civil Service*** (“the GCHQ case”)², under the following heads:

- i. Illegality;
- ii. Irrationality; and
- iii. Procedural Impropriety

32. The aforementioned principles, famously reckoned as the Wednesbury Principles, have stood the test of time by their

² (1984) 3 All ER 935

consistent and extensive application by courts in reviewing administrative policies and decisions.

33. Applying the settled position of law to the facts of the present case, it is the case of the petitioner that there was collusion between CONCOR and respondent no.3 to defeat the legitimate right of the petitioner. It is submitted that Respondent no.3 never cleared the goods at the first instance and, therefore, the goods were put to auction. It is further contended that Respondent no.3 did not participate in the auction and since the petitioner was the highest bidder, initial payment having been deposited by the petitioner and besides having submitted the requisite certificates from the Quarantine and Wildlife Authority, procured on 11.4.2008 and 25.4.2008, the goods, in question, should have been released to the petitioner. It has been contended by counsel for the petitioner that the goods could not have been withdrawn by CONCOR or the Customs Authorities as there was no justification for the same. Neither any instruction for withdrawal has been placed on record.

34. The question which thus arises for my consideration is whether the respondents no.1 and 4 could withdraw the goods after the petitioner was declared the highest bidder? And if yes, whether the same were withdrawn for cogent reasons or the action was arbitrary, whimsical and *malafide* with a view to cause prejudice to the rights of the petitioner.

35. Learned counsel for the respondents has justified withdrawal of the goods from the auction and submitted that while the petitioner had participated in the auction and was also declared successful,

being the highest bidder, this by itself cannot be a ground to hand over the goods to the petitioner as the goods had not been cleared by the Customs. As per Clause 3.0 (ix) of the tender-cum-online auction sale, any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered, without assigning any reasons. The said Clause 3.0 (ix) of the tender-cum-online auction sale is reproduced as under:

3.0 CONDITIONS OF SALE.

ix) Any lot or part thereof may be withdrawn from the sale at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal. However, if any payment has been made it would be refunded without interest.

36. Further as per Clause 4.0 of the tender-cum-online auction sale, the pre-results of successful bidder/tenderer is to be displayed, however, the final result is to be declared after clearance from the customs. Clause 4.0 of the tender-cum-online auction sale, reads as under:

“4.0 OPENING OF SEALED TENDER AND DECLARATION OF AUCTION RESULTS

The sealed tenders shall be opened at respective ICD's from 11:30 hrs. on 29.03.2008 in presence of the Tenderers / highest bidders of online auction who wish to be present at the time of opening. The pre-results of successful bidder / tenderer will be displayed on the website www.matexnet.com on 13.02.2008 or later and the final result will be declared after clearance from Customs of respective ICDs. The results will be displayed in the following manner.

CODE	STATUS
OK	Accepted Bid.
STA	Subject to approval / Provisional

	acceptance
--	------------

However, final confirmation of Bid acceptance will be done only after clearance by Customs.

The CMD /EMD in respect of the rejected lots will be returned to the bidders immediately by returning the draft or by issuance of cheque.

37. Taking into consideration that the petitioner was aware of the terms and conditions of the tender and he participated in the tender with open eyes and also reading of the Terms and Conditions of the tender would show that the respondent would be well within its right to withdraw a lot or any part thereof at any time before it is actually physically delivered out of the campus without disclosing the reasons for such withdrawal.
38. I further find that Lot no.106 was withdrawn by respondent no.2, CONCOR, based on the communication dated 13.6.2008 received on 16.6.2008 from the Assistant Commissioner (Customs).
39. It has been strongly urged before this Court by learned counsel for the respondents that Lot no. 106 was withdrawn by the Customs Department before the No Objection Certificate could be issued in favour of the petitioner for release of goods on account of the fact that a representation dated 2.6.2008 was received from the importer, respondent no.3, as they had filed the Bill of Entry no.698971 dated 29.5.2008. The importer of goods, respondent no.3, also informed the Customs Authorities that it had deposited the duty of Rs.19,66,448/- along with interest of Rs.5,657/- vide Challan No.160 dated 11.6.2008 and sought No Objection Certificate to get their consignment cleared.

40. Learned counsel for the Customs Department has further justified its action, *inter alia*, on the ground that the Department is getting a much higher revenue, which it would have got by way of auction as the total duty payable by the custodian comes to Rs.10,99,570/- only. Counsel for the Customs Department has relied upon a Departmental Circular No.50/2005 dated 1.12.2005, which lays down procedure for disposal of unclaimed/uncleared cargo, wherein it has been clearly mentioned that reserve price and bids would be approved by the Customs and goods can be withdrawn from the auction on the written approval by the Commissioner of Customs. Mr. Aggarwala, counsel for the Customs Department, contends that respondent no.3, being the importer, had the first right to clear the goods. Therefore, vide letter dated 9.4.2008, the Department had directed CONCOR that delivery of goods be stopped with immediate effect and further vide letter dated 13.6.2008 Customs Department further directed CONCOR that respondent no.3 being the importer, he had the first right to clear the goods. The Customs Department also took into consideration that the importer had filed the Bill of Entry after delay but mere delay by itself does not mean that he had relinquished the title of the goods. Considering that the importer has a much larger financial stake in the goods, in question, and further at the time when the goods were imported, "Processed Pig Bristles" were a prohibited item and at that stage in any case the goods could not have been released in favour of the respondent no.3 and the prohibition was lifted subject to fulfillment of certain conditions only on 23.5.2008, concomitantly, respondent no.3 had the first right.

41. The respondents no.1 and 4 as well as no.2 have given detailed reasons as to why the shipment Lot no. 106, subject matter of the writ petition, has been withdrawn from the auction. Respondent no.2 had amply made it clear to the petitioner at the very outset that the auction held in March, 2008, was subject to final clearance by the Customs Authorities. As per letter dated 10.4.2008, no final clearance was ever accorded to the auction purchaser, however, on the contrary the Customs Authorities issued letters dated 12.6.2008 and 13.6.2008 that the Customs had no objection if the goods were released to the importer, respondent no.3, and vide letter dated 13.6.2008 respondent no.2 was directed to withdraw Lot No. 106 from the auction. Letters dated 12.6.2008 and 13.6.2008 read as under:

“ OFFICE OF THE COMMISSIONER OF CUSTOMS
ICD, TKD, NEW DELHI
(DISPOSAL)

C.No.VIII(ICD)6/TKD/Disp./01/08/Pt.8751
12.06.2008

Dated

To

The Chief Manager,
CONCOR,
ICD, TKD,
New Delhi.

Sir,

**Subject:- Lot No.106 - Auction held on
27/28.03.2008 - reg.**

It is to inform your that M/s Shine Enterprises have filed B/E No.698971 dated 29.05.2008 to clear their consignment of 'Bristles' and have deposited duty of Rs.19,66,448/- along with interest of Rs.5,657/- vide TR-6 Challan No.160 dated 11.06.2008. They have requested to give NOC for the release of their

consignment and willing to comply with all the remaining formalities for clearance of their goods.

This office has no objection if the goods contained in container No.HDMU 2368478 are released to the importer M/s Shine Enterprises.

Yours faithfully,

ASSISTANT COMMISSIONER (Disp.)

Copy to: M/s Shine Enterprises, C-27, Double Story, Ramesh Nagar, New Delhi-15 to complete the formalities of clearance of their goods vide B/E No.698971 dated 29.05.2008.

ASSISTANT COMMISSIONER (Disp.)”

**“OFFICE OF THE COMMISSIONER OF CUSTOMS
ICD, TKD, NEW DELHI**

**C.No.VIII(ICD)6/TKD/1/Disp./08/Pt.8925_026 Dated
13.06.2008**

To

**The Chief Manager,
CONCOR,
ICD, TKD,
New Delhi.**

Sir,

**Subject:- Lot No.106 – Auction held on
27/28.03.2008 – reg.**

This is in continuation to this office letter of even No.8750 dated 13.06.2008 wherein permission to the importer M/s Shine Enterprises to clear his consignment as they have the first right to clear their goods. The party have already filed the Bill of Entry No.698971 dated 29.05.2008 and have paid duty on the same and willing to comply with the formalities of clearance.

Thus in view of the above you are, hereby, directed to withdraw the lot No.106 from the auction held on 27/28.03.2008.

Yours faithfully,

ASSISTANT COMMISSIONER (Disp.)

**Copy to: The Deputy Commissioner of Customs
(Import-Shed), ICD, TKD, New Delhi
for information please.**

ASSISTANT COMMISSIONER (Disp.)”

42. A reading of Clause 3.0 (ix) of the terms of auction as well as the communication dated 10.4.2008, copy of which has been filed by the petitioner, makes it abundantly clear that the goods could only be cleared, subject to Customs clearance, and the goods could be withdrawn at any time before they were actually physically delivered out of the campus. While, it is not in dispute that respondent no.3, importer, did not participate in the auction but respondent no.3 could not have filed the Bill of Entry on the arrival of the goods in view of the fact that the import of ‘pig bristles’ was prohibited as per the notification dated 2.2.2007 issued by the Department of Animal Husbandry, as also the notification dated 13.4.2007, which embargo was removed in November, 2007 and duly notified on 23.5.2008, subject to furnishing of a No Objection Certificate from the Department of Animal Husbandry and also from the Quarantine Department. No doubt the petitioner had participated in the auction and was declared as the highest bidder and he has paid a sum of Rs.8.00 lacs being 20% of the auction amount, however, in comparison thereto, respondent no.3 has paid Customs Duty of Rs.19.66 lacs with interest accrued thereon, land retention charges of CONCOR to the tune of Rs.3.37 lacs, auction/deauction charges of Rs.4.00 lacs to the Container Corporation, as also Rs.1.77 lacs to the

shipping line, besides paying the foreign supplier approximately Rs.52 lacs, totaling approximately Rs.81.00 lacs. After the embargo was lifted, respondent no.3 has also submitted the necessary NOCs from the Animal Quarantine and certificates from the Ministry of Agriculture before the No Objection Certificate could be issued by respondent no.4 so as to release the consignment in favour of the petitioner. Respondent no.3 also made a representation dated 2.6.2008 and also filed the Bill of Entry dated 29.5.2008 and sought permission for clearance of goods. Relying on Circular no.50/2005 dated 1.12.2005, which lays down the procedure for disposal of unclaimed/uncleared cargo wherein it has been mentioned that reserved price and bids would first have to be approved by the Custom Authorities, Respondent no.4 vide letter dated 9.4.2008 specifically directed CONCOR to stop delivery of the consignment of pig bristles and by a subsequent letter dated 13.6.2008 respondent no.4 further informed CONCOR that respondent no.3 being the original importer had the first right to consignment of pig bristles and directed the consignment to be withdrawn. The Customs Department has also justified its action on the ground that allowing the original importer would financially benefit the Department. In view of what has been stated above, I am satisfied that there is no infirmity with the action taken by respondents no.1, 2 and 4 and consequently no relief can be granted to the petitioner, and I find that the decision taken by the respondents is based on sound and cogent reasons and does not amount to colourable exercise of the power vested in them. However, I am not satisfied with the

explanation rendered by counsel for respondent no.3 as to why respondent no.3 did not participate in the auction nor took steps to bring to the notice of respondents no.1, 2 and 4 that goods could not have been auctioned as they were banned items and that due to the embargo, respondent no.3 also could not have filed the bill of entry and eventually the auction was conducted. Accordingly, in the interest of justice, respondent no.3 is liable to pay costs to the petitioner to the tune of Rs. 50,000/- (fifty thousand) for the hardship caused to the petitioner.

43. Petition stands dismissed.

G.S. SISTANI, J.

APRIL 16, 2010
'msr'