IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.10.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.3802/2007
MP.No.1/2007

M/s.Caravel Shipping Services P Limited
represented by its Director Saju Chako
Chennai-8 ... Petitioner

Vs

1.Government of India
represented by its Joint Secretary
(Revision Authority), Ministry of Finance,
Department of Revenue, New Delhi

2.The Commissioner of Customs (Appeals)
Customs House, Chennai-1

3.The Deputy Commissioner of Customs
Manifest Clearance Department,
Customs House
Chennai-1 ... Respondents

Prayer:- This Writ Petition is filed under Article 226 of the Constitution of India, to issue a writ of certiorari calling for the records of the 1st respondent in order No.614/2006, dt. 31.10.2006 and quash the same

For Petitioner : Mr.M.Balagopal
For Respondents : Mr.S.Xavier Felix, SCGSC

ORDER

This Writ Petition is filed to issue a Writ of Certiorari, calling for the records of the 1st Respondent in Order No.614/2006, dated 31.10.2006 and to quash the same.

2. The case of the Petitioner is as follows:-

a. The Petitioner Company is a registered multimodal transport operator under the Multimodal Transportation of Goods Act, 1993. The agent of the Petitioner Company M/s.Golden Sparrow Shipping (M) Sdn Bhd, Malaysia allotted one empty 20 feet container to the freight forwarder M/s.Straits Express (M) Sdn Bhd, Malaysia, on

FCL/FCL basis, for loading of goods. The Petitioner Company, in the capacity of a carrier under the said Act, received a container bearing No.CRXU 2116467, at the container yard (CY) in Port Klang, Malaysia from the said freight forwarder. The said container was consigned to M/s.Semex Impex and M/s.Uni Pharm (I), Chennai under the two Bills of Lading Nos.GS/CHE/03/074 and GS/CHE/03/074A respectively. The said container was stuffed and sealed with a container seal bearing No.661273 at the shipper's premises and noted in the Bills of Lading and the said container was loaded on to ocean going vessel m.v. Tiger Bridge Voyage-059 for carriage to Chennai Port. The Petitioner Company, in the capacity of a carrier under the said Act, filed import manifest as per Section 30 of the Customs Act, 1962 for the goods arrived per Tiger Bridge V.059 from Port Klang, under B.L.No.GS/CHE/03/074, dated 27.2.2003. The container was destuffed by Chennai Container Terminal Limited and on tally, it was found that 436 cartons were short landed, out of the manifested quantity of 872 cartons consigned to M/s.Semex Impex, Chennai. The 3rd Respondent, based on the short landing report issued by the Chennai Container Terminal Limited, Chennai, issued an order bearing No.3886/2005 MCD dated 19.5.2005, imposing a penalty of Rs.3,37,777/- under Section 116 of the Customs Act, 1962. The Petitioner Company preferred an appeal before the 2nd Respondent, who confirmed the order of the 3rd Respondent and set aside the appeal. As against the same, the Petitioner filed a revision before the 1st Respondent, who by the impugned order, confirmed the order of the 2nd Respondent.

b. The Hague Visby Rules, which are followed universally for carriage of goods by sea, provides a carrier to enter into any agreement, stipulation, condition, reservation or exemption, with respect to loss or damage of goods. The relevant clause of the Article VII of the said Rules viz. "Shippers Load and Count Container Sealed by Shipper" and "Said to Contain", incorporated in the Bill of Lading protects the Petitioner from liability with respect to disputes arising out of quantity loaded and quantity discharged.

c. The carriers or carrier agents on request from the freight forwarders allot containers for loading of cargo at shippers' premises or forwarders premises. On allotment, the containers are moved to desired locations for stuffing of cargo and sealing. Once the cargo is stuffed into the container and sealed, they are moved to the container yard of the Port and handed over to the Carrier or his agent for putting on board the vessel, after necessary customs formalities are completed. The freight forwarder M/s.Straits express (M) Sdn. Bhd, booked on 20 feet container on FCL/FCL (Full Container Load) basis with M/s.Golden Sparrow Shipping (M) Sdn. Bhd. who is an agent of the Petitioner Company in

Malaysia to load two consignments destined to Chennai. This fact is affirmed by M/s.Straits Express (M) Sdn. Bhd. in their letter dated 21.6.2005. The Respondents 1 and 2 has not given any weightage to the clarification given by M/s.Straits Express (M) Sdn. Bhd. in letter dated 21.6.2005 that one 20 feet container on FCL/FCL basis was booked with M/s.Golden Sparrow Shipping (M) Sdn. Bhd. who is an agent of the Petitioner Company in Malaysia. Carrier will neither measure the cargo nor count the packages, when the clause "Shippers Load and Count Container Sealed by shipper" is incorporated in the Bill of Lading. The shipper measures the cargo and forwards the details to the freight forwarder who then furnishes the details to the carrier or his agent. The carrier, based on the details furnished by the forwarders, incorporates the weight, measurement of cargo, description of goods, quantity and freight details in the Bill of Lading. The Respondents 1 and 2 erred in understanding the terms CY (Container Yard) Port Klang and CY (Container Yard) Chennai, which broadly means that the whole container received by the carrier at Port Klang is packed at the shipper's or the forwarder's premises and the delivery of container to the consignee at the container yard of the carrier. The definition clearly states that stuffing of cargo takes place at the shippers place and handed over at the CY (Container Yard) of the carrier for loading. On receipt of the sealed container by the Petitioner Company at CY Port Klang, the subject container is loaded on board the vessel for carriage to Chennai. By the impugned order, the 1st Respondent has upheld the order the 2nd Respondent without addressing the question of law raised in the revision. Hence, this Writ Petition has been filed.

3. The Respondents filed a counter affidavit, contending as follows:-

a. The container loaded in the vessel tiger bridge VO59 at Port Klang, Malaysia is only the "LCL" container and not an "FCL" container, which is evident from the narration set out in the order of the Commissioner (A) in C.Cus.911/05 dated 23.12.2005 and in the impugned order, which is not disputed by the Petitioner in the affidavit, without any cross objections and counter arguments.

b. There are two bills of lading viz GS/CHE/03/074 and GS/CHE/03/074A for the container CRXU 2116467, which is not the feature of an FCL container. There are two parties/Importers in India, for these two Bills of Lading viz. M/s.Semex Impex, Chennai-83 and M/s.Unipham (India) Chennai. Therefore, at the port of loading (itself), the said container had attained the characteristics of LCL container. Hence, there is no veracity in the statement of the Petitioner that the above container is an FCL container, at the point of loading at load port and it was not an FCL, but it was only LCL container.

c. The factual position in the present case is that the Petitioner/ their agent has chosen to declare in the bills of lading as "shipper's load and count containers sealed by shipper' to absolve themselves of their responsibility on the container accepted by them. The volume of the cargo, mentioned as 21.00M3, which refers to the complete space occupied for the cargo mentioned in the Bill of lading, do not tally for both the bills of lading referred to above, which together works out to 25.74 cbm. Therefore, CBM declared viz. 21.00m3 pertains to a part of the consignment in the container and not the other part also. The container destuffing tally sheet no.5351 of the Chennai Container Terminal Limited bears clear evidence for the two consignees, which is detailed below, to evidence that the container is a LCL and not FCL:-

L.No	Bills of Lading	Packages	Weight	Importer	Remarks
314	GSCHE 03074 dated 27.2.2003	827 units	4567 Kgs	Semex Impex, Chennai	438 Cartons of used monitors short landed
315	CSCHE 0374ADT 27.2.2003	51 cartons	800 Kgs	UNT Parma India ch-33	

The bill of lading reference numbers are same with distinguishing letter 'A', which appeared to be a deliberate attempt to mislead customs that it is an FCL container. The fact that there is no mention as 'FCL' in the bills of lading and the declaration as 'shipper load' and also 'c/y' (container yard) (i.e. at the shippers site) are all confusing declarations with the sole object of shifting the responsibility on the shipper and/or the freight forwarder. The term 'cy' means containers packed by shipper at place other than carriers: (cy) and accepted by consignee at carrier's cy, and unpacked by consignee off carrier's premises, all at the risk and expense of cargo as per the trade technologies, reveals, that purposely the provisions of transport agreements with the freight forwarders (M/s.Straits Express (M) Sdn. Bhd.) are not to bring to the notice of customs, so that they can recover the losses/damages from the freight forwarders, while at the same time, to escape from the clutches of customs.

d. The Rules quoted by the Petitioner, viz. The Hague Visby Rules, have no binding effect on customs, as the agreements are entered into by the carrier with others and not customs. The Petitioner, who had filed the manifest under Section 30 of the Customs Act, 1962 is responsible for its accountability to the satisfaction of the customs. Thus, the declaration/exhibiting details in their documents (bills of lading and their correspondence) reveals several infirmities/discrepancies which are detailed above and confirmed by the Government.

e. It is a settled law that the liability under Section 116 of the Customs Act, 1962 is on the person who files the manifest. In this connection, this Court has already held in WP.No.15601/1997 and WP.No.374 of 1998 that with regard to liability of "Main Line Operator" and 'Feeder Line Operator" for FCL container, the liability was fixed on the person who filed the manifest and that liability to penalty under Section 116 of the Customs Act, 1962, has to be fixed on the person, who filed the manifest and the customs should not be deprived of the penalty amount due to customs. The Hague Vibsy Rules itself is the evidence for sorting out the liability created on the carrier under Section 116 of the Customs Act, 1962 with the other persons with whom they entered into any agreement, in this case the freight forwarders. In the light of the above said facts and circumstances, the Petitioner shall be responsible for the shortage of goods under Section 116 of the Customs Act, 1962 and therefore, they have to discharge their liabilities to the penalty imposed on them under Section 116 of Customs Act, 1962 and hence, the Writ Petition is liable to be dismissed.

4. The learned counsel for the Petitioner contended that the relevant clause of Article VIII of the Hague Visby Rules, viz. "Shippers Load and Count Container Sealed by Shipper" and "Said to Contain" incorporated in the Bill of Lading, provides protection to the Petitioner from liability with respect to disputes arising out of quantity loaded and the quantity discharged and that the Carrier will neither measure the cargo nor count the packages, when the said clause is incorporated in the Bill of Lading and that the liability of carrier cannot be decided on the basis of status of the container, namely, "Full Container Load" (FCL) or "Less Container Load" (LCL). The learned counsel further submitted that the Respondents erred in understanding the terms CY (Container Yard) Port Klang and CY (Container Yard) Chennai and that the seal of the container is crucial in deciding the liability of a carrier for non accountal of goods under Section 116 of the Customs Act, 1962 and that the container has been sealed at the shipper's premises and handed over to the Petitioner Company at the container yard in Port Klang and therefore, the Petitioner Company cannot be held responsible for any shortage or non-accountal of goods and hence, prayed for quashing of the impugned order.

5. The learned Senior Standing Counsel for the Respondent submitted that the container loaded in the vessel tiger bridge VO59 at Port Klang, Malaysia is only the "LCL" container and not an "FCL" container, which is evident from the narration set out in the order of the Commissioner (A) in

C.Cus.911/05 dated 23.12.2005 and in the impugned order, which is not disputed by the Petitioner in the affidavit, without any cross objections and counter arguments and that as there are two parties/Importers in India, for these two Bills of Lading viz. M/s.Semex Impex, Chennai-83 and M/s.Unipham (India) Chennai, at the port of loading (itself), the said container had attained the characteristics of LCL container and inasmuch as the volume of the cargo, mentioned as 21.00M3, which refers to the complete space occupied for the cargo mentioned in the Bill of lading, do not tally for both the bills of lading referred to above, which together works out to 25.74 cbm, the CBM declared viz. 21.00m3 pertains to only a part of the consignment in the container and not the other part also and hence, it cannot be said that the above container is an FCL container at the point of loading at load port and the Petitioner Company is responsible for shortage of goods and they have to discharge their liabilities to the penalty imposed on them under Section 116 of Customs Act, 1962.

6. This court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

7. The admitted facts are that the Petitioner Company/Carrier Agent received a container at the container yard (CY) in Port Klang, Malaysia from the freight forwarder and the said container was consigned to M/s.Semex Impex and M/s.Uni Pharm (I), Chennai under the two Bills of Lading Nos.GS/CHE/03/074 and GS/CHE/03/074A respectively. The Petitioner Company, in the capacity of a carrier, filed import manifest as per Section 30 of the Customs Act, 1962. When the container was destuffed by Chennai Container Terminal Limited, on tally, it was found that 436 cartons were short landed, out of the manifested quantity of 872 cartons. The 3rd Respondent, based on the short landing report issued by the Chennai Container Terminal Limited, Chennai, issued an order, dated 19.5.2005, imposing a penalty of Rs.3,37,777/- under Section 116 of the Customs Act, 1962. The appeal and revision filed by the Petitioner Company before the Respondents 2 and 1 were also dismissed, confirming the penalty.

8. The issues to be considered are as to whether there had been any short landing of the goods and whether penalty can be imposed on the Petitioner for short landing of the goods and whether the Petitioner can be held responsible for short landing of the goods. The said issues had been considered in detail and answered in favour of the Customs Department in the decisions of this Court reported in 2006-206-ELT-151-Mad (Marine Container Services Vs. Deputy Commissioner of Customs and 2013-2930ELT-342-Madras (Caravel Logistics Pvt Limited Vs. Joint Secretary (RA).

9. The contention of the Respondents that the container is only a LCL container and not an FCL container raised in the orders of the authorities below is not disputed by the Petitioner in the affidavit and counter arguments. Further, the shortage of goods has also not been explained by the Petitioner in the reply to the show cause notice issued by the Department. Since the cargo mentioned in the two bills of lading do not tally, it cannot be said that the container is an FCL container at the point of loading at load port. Therefore, the Petitioner Company is responsible for shortage of goods and they have to discharge their liabilities to the penalty imposed on them under Section 116 of Customs Act, 1962.

10. In the case of short landing of the goods, Section 116 of the Act provides for penalty for not accounting of goods and it reads as follows:-

Section 116: Penalty for not accounting for goods:- If any goods loaded in a conveyance for importation into India, or any goods transshipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, the person-in-charge of the conveyance shall be liable,

(a) in the case of goods loaded in a conveyance for importation into India or goods transshipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;

(b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.

11. Section 116 of the Act imposes a liability for penalty on the person-in-charge of the conveyance. The person-in-charge is defined under Section 2(31) of the Act as follows:-

"2(31) "person-in-charge" means,-

(a) in relation to a vessel, the master of the vessel;

(b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;

(c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;

(d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance."

and in this case, we are concerned with the vessel.

12. Section 148 of the Act reads as under:-

148. Liability of agent provided by the person-in-charge of a conveyance:-

(1) Where this Act requires anything to be done by the person-in-charge of a conveyance, it may be done on his behalf by his agent.

(2) An agent appointed by the person-in-charge of a conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge, and is accepted as such by that officer, shall be liable for the fulfilment in respect of the matter in question of all obligations imposed on such person-in-charge by or under this Act or any law for the time being in force, and to penalties and confiscations which may be incurred in respect of that matter.

13. Section 148 of the Act imposes a liability on the agent appointed by the person-in-charge of the conveyance and Section 148(2) of the Act provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment of all obligations imposed on such person in charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.

14. A conjoint reading of Sections 116, 2(31) and 148 of the Act makes it clear that in a case of short landing of goods, if penalty is to be imposed on the person-in-charge of the conveyance, it can also be imposed on the agent so appointed by the person-in-charge of the vessel. There is no dispute that the petitioner in this case is an agent duly appointed. It has to be noticed that the authorities below have on facts come to the conclusion that the agent had affixed the seal on the containers after stuffing and the agent took charge of the sealed containers. If this is the fact, then the customs authorities are justified in taking appropriate action for levying of penalty for the short shipment.

15. Section 42 of the Act reads as follows:-

"Section 42. No conveyance to leave without written order:-

(1) The person-in-charge of a conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart

from that customs station until a written order to that effect has been given by the proper officer.

(2) No such order shall be given until -

(a) the person-in-charge of the conveyance has answered the questions put to him under section 38;

(b) the provisions of section 41 have been complied with;

(c) the shipping bills or bills of export, the bills of transhipment, if any, and such other documents as the proper officer may require have been delivered to him;

(d) all duties leviable on any stores consumed in such conveyance, and all charges and penalties due in respect of such conveyance or from the person-in-charge thereof have been paid or the payment secured by such guarantee or deposit of such amount as the proper officer may direct;

(e) the person-in-charge of the conveyance has satisfied the proper officer that no penalty is leviable on him under section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct;

(f)in any case where any export goods have been loaded without payment of export duty or in contravention of any provision of this Act or any other law for the time being in force relating to export of goods, -

(i)such goods have been unloaded, or

(ii)where the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that it is not practicable to unload such goods, the person-in-charge of the conveyance has given an undertaking, secured by such guarantee or deposit of such amount as the proper officer may direct, for bringing back the goods to India."

16. The language of Section 116 of the Act is clear on penalty if there is violation as stated therein. As per Section 116 of the Customs Act penalty is leviable on the person in charge of the conveyance and not on any other person and the agent is considered as the person in charge of the conveyance, and therefore, the agent is liable.

17. In British Airways Plc. v. Union of India, (2002) 2 SCC 95, the Supreme Court has categorically held that penalty under Section 116 of the Act is leviable for not accounting of goods. It also dealt with the liability of the agent and any person-in-charge of the conveyance, his agent or

person representing the person-in-charge, who deals with the cargo on behalf of the person-in-charge and held that they are liable for penal consequences.

18. It is a settled law that the liability under Section 116 of the Customs Act, 1962 is on the person, who files the import manifest and the customs should not be deprived of the penalty amount due to customs. The petitioner herein, who is an agent of the person-in-charge of the vessel and who is also the author of the Manifest and who has affixed the seal on the container, as is recorded by the Original Authority and confirmed by the Appellate Authority, is liable to be levied penalty in terms of Section 116 of the Act. When the Petitioner as carrier agent filed Manifest for goods, which have been shipped, the customs Department had rightly dealt and passed orders, imposing penalty. In the light of the above said facts and circumstances, the Petitioner shall be responsible for the shortage of goods under Section 116 of the Customs Act, 1962 and therefore, they have to discharge their liabilities to the penalty imposed on them under Section 116 of Customs Act, 1962.

19. As far as the customs department is concerned, when the petitioner as an agent files Manifest and represents before the customs authorities as an agent of the shipper and conducts all affairs in compliance with the provisions of the Act, then the provisions of Section 116 read with Section 148 of the Act get attracted automatically and as a result penalty becomes leviable. The authorities below were justified in imposing penalty as contemplated under Section 116 of the Act, which warrants no interference by this Court.

20. In view of the above discussions and reasons and in the light of the decisions of this Court cited supra, this Writ Petition is liable to be dismissed and accordingly, it is dismissed. No costs. Consequently, the connected MP is closed. However, it is open to the Petitioner to sort out the loss or penalty paid to Customs with the person with whom they had entered into a contract.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Srcm

To:

1.The Joint Secretary, (Revision Authority),
Ministry of Finance, Department of Revenue,
New Delhi.

2.The Commissioner of Customs (Appeals),
Customs House, Chennai-1

3. The Deputy Commissioner of Customs,
Manifest Clearance Department,
Customs House, Chennai-1.

+ 1 cc to Mr.S. Xavier Felix, Advocate SR.54290
+ 1 cc to Mr.M Balagopal, Advocate Sr.54442

WP.No.3802/2007

kji(co)
eu 20.10.15