IN THE HIGH COURT OF JUDCIATURE AT MADRAS

RESERVED ON : 08-03-2016

PRONOUCNED ON : 22.03.2016

CORAM :

The Honourable Mr.Justice R.SUBBIAH

Writ Petition No. 3445 of 2015

M/s. Orissa Stevedores Limited
rep. by its Authorised Signatory
New No.14, Old No.8
Rotary Lane, Krishnan Koil Street
Opp. Telephone Towers
Mannady, Chennai - 600 001 .. Petitioner

Versus

1. The Traffic Manager
   Chennai Port Trust
   No.1, Rajaji Salai
   Chennai - 600 001

2. The Deputy Traffic Manager (Commercial)
   Chennai Port Trust
   No.1, Rajaji Salai
   Chennai - 600 001

3. The Area Traffic Manager & SS Area-III
   Chennai Port Trust
   No.1, Rajaji Salai
   Chennai - 600 001

4. M/s. Sri Pavithra Enterprises
   No.17/35, Armenian Street
   1st Floor, Chennai - 600 001 .. Respondents

Writ Petition filed under Article 226 of The Constitution of India praying for issuing a Writ of Mandamus directing the first, second and third respondents to refund the sum of Rs.21,07,575/- paid by the petitioner to the Chennai Port Trust towards demurrage under protest on 24.11.2014 in respect of 24 pieces of Prime Coated Hot Rolled Non Alloy Steel Plates (237 M.T.) which arrived in the vessel M.V. Serpentine and covered under the Bill of Lading Nos. SERPANTINE 19 & SERPANTINE 20 both dated 10.07.2014, which was illegally detained by the first, second and third respondents on 19.08.2014 and released on 24.11.2014 for no fault of the petitioner.

For Petitioner : Mr. Abdul Quddhose

For Respondents : Mr. Arun Dhanapalan
for M/s. DILAW Associates for RR1 to 3

No appearance for R4

ORDER

The petitioner has come forward with this writ petition praying to issue a Writ of Mandamus directing the respondents 1 to 3 to refund the sum of Rs.21,07,575/- paid by them under protest towards demurrage for allegedly not clearing the imported goods and allowed it to be kept in the ware house of the Port Trust between 19.08.2014 and 24.11.2014.

2. The facts which led to the institution of this writ petition can briefly be stated as under:-

(i) The petitioner is a licensed customs broker, steamer agent and Stevedores having office at various places in India, including a branch office at Chennai. During the course of their business, they have acted as Custom broker for M/s. Shah Brothers Ispat Private Limited who imported 458 Nos. (2544.648 metric tonne) of steel plates. The goods reached the Port Trust by Vessel M.V. Serpentine on 07.08.2014. Further, one M/s. Suzlon Energy Limited also imported 919 Nos. (5142.75 Metric Tonnes) of steel plates which arrived in the same vessel for which the fourth respondent acted as custom broker. According to the petitioner, in respect of the cargo imported by the petitioner, the end user is M/s. Suzlon Limited, who purchased the steel plates from the petitioner. Thus, the entire cargo of steel plates arrived by the vessel M.V. Serpentine contains 458 pieces of steel plates imported in the name of M/s. Shah Brothers Ispat Pvt Ltd to which the petitioner is the customs broker and 919 pieces meant only for M/s. Suzlon Energy Limited. According to the petitioner, the bill of lading in respect of both the cargo clearly discloses the discription of the cargo meant for the petitioner and the fourth respondent and they can be easily segregated due to their distinct dimension. On 07.08.2014, the Vessel arrived Chennai and discharge of the cargo from the vessel commenced on 12.08.2014. As customers broker, the petitioner submitted the Bill of entry corresponding to 458 Nos. of steel plates and obtained customs and port clearance for taking delivery of cargo on 11.08.2014 and the petitioner commenced taking delivery of the cargo from 13.08.2014 onwards. The petitoiner took delivery of 434 pieces of steel plates out of 458 pieces of steel plates as early as on 19.08.2014. However, all of a sudden, after taking delivery of 95% of the goods, the third respondent orally informed the petitioner not to take any further delivery of the cargo as the goods meant for the petitioner and the fourth respondent have got mixed up. On such oral instructions, the petitioner stopped taking delivery of the remaining quantity of 24 pieces on 18.08.2014. On 19.08.2014, the petitioner written a letter to the Area Traffic Manager attached to the Chennai Port Trust and requested them to release the balance cargo so as to avoid payment of any demurrage by them. On receipt of the letter, the third respondent made an endorsement in the letter of the petitioner stating that "Suzlon and Shah Brother Plates were landed in mixed condition. Even though we have given delivery of 95% to Shah Brothers, 5% cargo was detained for checking other consignments, after checking, we will give delivery very soon". In view of the same, the petitioner could not take delivery of the goods. Subsequently, on 08.09.2014, 09.09.2014 and 22.09.2014 the petitioner made personal visits and met the respondents 1 to 3 in connection with releasing the balance 24 pieces of steel plates. In the meantime, M/s. Suzlon Energy Limited sent a letter dated 06.09.2014 stating that they have no objection for the release of the balance cargo in favour of the petitioner. Inspite of the same, the goods were not released to the petitioner.

(ii) While the facts are so as stated above, on 11.09.2014, the Senior Deputy Traffic Manager of Chennai Port Trust called upon the petitioner to pay Rs.21,07,575/- towards demurrage for the period from 21.08.2014 onwards as a condition precedent for releasing the goods. Even though the respondents 1 to 3 released the balance 24 pieces of steel plates on 24.11.2014, for non-payment of demurrage, the petitioner was not permitted to take delivery of the goods. Even though the petitioner is not required to pay the demurrage, having regard to the fact that the goods are required to meet urgent business commitments, the petitioner has taken delivery of the goods by paying the demurrage under protest. In fact, due to the unlawful detention of the balance 24 pieces of steel plates, M/s. Shah Brothers Ispat Pvt Ltd., to whom the petitioner acted as customs broker, suffered huge loss as they could not honour their commitment to the customers. In any event, the amount of Rs.21,07,575/- collected from the petitioner is unlawful and therefore the petitioner has filed this writ petition.

3. The learned counsel appearing for the petitioner would vehemently contend that demurrage can be levied only if it is shown that the delay in clearing the goods is attributable on the part of the importer or the customs broker engaged by the importer. In this case, the petitioner as well as the importer - M/s. Shah Brothers Ispat Pvt Ltd., have sent repeated letters seeking permission to release the balance goods, but the goods were not released to the petitioner on the ground that the cargo meant for the importer of the petitioner and the fourth

respondent got mixed up. It is not the case of the respondents 1 to 3 that the delay in clearing the goods is attributable either on the part of the petitioner or the importer to whom the petitioner is acting as a customs broker. In fact, even as early as on 19.08.2014, the petitioner sent a letter to the respondents 1 to 3 for which the third respondent made an endorsement clearly stating that the goods have landed in a mixed condition and therefore the cargo was detained for checking other consignments. It was further stated in the endorsement made by the third respondent that after thorough verification of the goods, delivery will be effected to the petitioner very soon. When such being the position, the respondents 1 to 3 are not justified in slapping demurrage as though the goods were unlawfully stored in the ware house of the Port Trust due to the negligence or any other reasons attributable on the part of the petitioner. In fact, the petitioner has cleared 95% of the cargo and while attempting to clear the remaining 5% of the goods, they were restrained by the respondents 1 to 3 from taking delivery purportedly on the ground that the cargo meant for the importer of the petitioner and the fourth respondent got mixed up. According to the counsel for the petitioner, the goods meant for the importers of the petitioner and the fourth respondent are easily distinguishable and identifiable and therefore the reasons for detaining the goods and the consequential collection of demurrage from the petitioner are unlawful, arbitrary and unreasonable. The learned counsel for the petitioner also invited the attention of this Court to the Manual of Instructions (Traffic Department) of the respondents Port Trust, particularly clause 4.8 to 4.17 and clause 4.22 to 4.36 to impress upon the fact that the petitioner has not been negligent in clearing the goods and the delay in effecting delivery is attributed only on the part of the respondents 1 to 3.

4. The learned counsel for the petitioner relied on the decision rendered by the Bombay High Court reported in (The Trustees of the Port of Bombay vs. Indian Goods Supplying Company) (1975) 77 Bombay LR 475 to contend that demurrage can be recovered only where the importer failed to clear the goods in time. When there is impediment created by the department themselves, it is impossible to clear the goods and hence the importer is not liable to pay any demurrage.

5. The learned counsel for the petitioner also relied on the decisions of the Honourable Supreme Court in (i) (Board of Trustees of the Fort of Bombay vs. Indian Goods Supplying Company) (1977) 2 Supreme Court Cases 649 (ii) (U.P. Pollution Control Board and others vs. Kanoria Industrial Limited and another) (2001) 2 Supreme Court Cases 549 and (iii) (Saloni Tea Co Ltd., and others vs. Superintendent of Taxes, Nowgong and others) (1988) 1 Supreme Court Cases 461 to contend that when

the levy of taxes or charges is held to be unconstitutional and arbitrary, High Court, in exercise of power under Article 226 of The Constitution of India can issue a Mandamus for refund of the amount. Merely because the amount has been paid to the Government or instrumentalities of the Government, it cannot be said that the Court cannot issue a direction for refund of the amount.

6. Per contra, the learned counsel appearing for the respondents 1 to 3, relying on the counter affidavit of the first respondent, would contend that the writ petition is not maintainable before this Court and the remedy available to the petitioner is only to file a civil suit before the Civil Forum inasmuch as there are disputed quesitons of fact involved in the case. It is further contended that the respondents 1 to 3, being a statutory body governed by the Ministry of Shipping, Government of India, is one of the major ports established as a custodian of cargo. Equally, the respondents 1 to 3 being the custodian of cargo are liable for any loss or damage caused to the goods between the period of landing and delivery or admittance and loading. According to the learned counsel for the respondents 1 to 3, as per the Scale of Rates, seven free days are allowed in case of imported cargo from the date of completion of landing and it is for the parties concerned to take delivery of the cargo within the time stipulated above. If the cargo is not taken delivery within the time or taken delivery beyond the time, demurrage is leviable as per the scales of rates. The port is a transit area where quick evacuation of landed cargo is essential so as to facilitate stocking and delivery of the arrival of subsequent cargo to be handled.

7. According to the learned counsel for the respondents 1 to 3, there are circumstances when similar different consignees are landed from the same vessel and they are stacked in the same area/shed. In such a situation, the ownership of the cargo is identified/verified with it's marks, numbers, specification, dimension etc., In the absence of the same, the responsibility of identifying and taking delivery of the cargo lies with the consignees or their agents. In this case, the petitioner was engaged as a customs broker by M/s. Shah Brothers Ispat Pvt Ltd.,for clearing the goods in question. Similarly, the fourth respondent acted as customs broker for M/s. Suzlon Energy Limited. Both the consignments landed with "Nil" mark and the unloading was completed on 12.08.2015. The free days viz., seven days for clearing the cargo expired on 20.08.2015. Both the cargos were stacked in mixed condition by using private equipment by the importers themselves and in that context, the goods could not be identified. Further, the petitioner as well as the fourth respondent have started to take delivery of the cargo at the same time and during that time, the fourth

respondent disputed 12 plates of cargo which were taken delivery by the petitioner. The petitioner thereafter obtained No Objection Certificate from the fourth respondent, but failed to adhere to the clearance of the cargo within the seven days and there was enormous delay. On 12.11.2014, the respondents 1 to 3 convened a meeting with the petitioner, fourth respondent and the importers. During the meeting, the parties were informed about their obligation to pay demurrage inasmuch as even the No Objection Certificate was produced by the petitioner at a much later date on 15.11.2014. According to the learned counsel for the respondents 1 to 3, the petitioner, being a customs broker is jointly liable to pay the demurage along with the principles for whom they are acting as agent. However, the principle has not come forward with any claim but only the petitioner, being a customs agent alone has filed this writ petition.

8. The learned counsel for respondents 1 to 3 would contend that the prime duty of the Port Trust is to deliver the cargo to the right owner as per documents produced for clearance of goods. The allegation of the petitioner that the goods imported by petitioner and fourth respondent are having distinctive feature and easily identifiable are incorrect. The fact remains that the consignment handled by the petitioner itself are of different dimensions and the fact of mixing up of the cargo had also been admitted by the petitioner in the letter dated 09.09.2014. It is further submitted that there was a dispute between the petitioner and the fourth respondent and therefore, the petitioner has obtained No Objection Certificate from the fourth respondent. The non-delivery of the consignment is attributable to the petitioner's inefficiency in understanding the complications involved in taking delivery of the goods and the negligence on their part to take steps to resolve the issue at the earliest point of time. As far as the respondents 1 to 3 are concerned, they did not wantonly stop the delivery of the consignment and it is attributable due to non-completion of formalities by the petitioner. The respondents 1 to 3 have issued an advance notice dated 11.09.2014 indicating that they are liable to pay demurrage, however, the petitioner remained silent till the date of taking delivery of goods on 24.11.2014. The demurrage claimed by the respondents 1 to 3 is not towards the charges incurred for segregation of the cargo handled due to mixing up of the cargo but towards non-taking of delivery of the cargo within the seven free days. Therefore, the learned counsel appearing for the respondents 1 to 3 would justify the slapping of demurrage by the respondents 1 to 3 and prayed for dismissal of the writ petition.

9. I heard the learned counsel for the petitioner as well as the learned counsel for the respondents 1 to 3 and perused the materials placed on record. The question arise for consideration in this writ petition is (i) whether the goods in

question are easily identifiable and distinguishable (ii) whether delay in clearing or taking delivery of the consignment is attributable on the part of the petitioner or the respondents 1 to 3 and (iii) whether the respondents 1 to 3 are justified in slapping demurrage charges payable by the petitioner.

10. It is an admitted fact that the petitioner has cleared 95% of the goods in question and the remaining 5% of the goods has not been cleared. There was delay in clearning the goods due to various factors. In other words, the petitoiner took delivery of 434 pieces of steel plates out of 458 pieces of steel places as early as on 19.08.2014. The balance 5% of the goods were cleared on 24.11.2014. As per the Regulations governing the respondents 1 to 3, whenever goods are arrived, it has to be taken delivery within seven free days and any delay in clearing the goods will attract payment of demurrage. In this context, the petitioner vehemently relied on an endorsement made in the letter dated 19.08.2014 sent by them and the endorsement was to the effect that there was a mix up of cargo imported by the importers of petitioner and fourth respondent. In other words, the petitioner was permitted to take 95% of the goods until 19.08.2014 and thereafter, they were restrained from clearing the remaining goods on the ground of purported mix-up of cargo. It is the case of the petitioner that though the goods of the petitioner as well as the fourth respondent are easily distinguishable, the official respondents restrained the petitioner from taking up the delivery of the goods on the ground that the goods have been mixed-up and therefore, they are not in any liable or responsible for the delay in clearing the goods. But this allegation of the petitioner is emphatically denied by the respondents 1 to 3. It appears that there is a dispute between the petitioner and the fourth respondent and therefore, the petitioner has obtained a No Objection letter from the fourth respondent 15.11.2014 and only thereafter the goods were released on 24.11.2014.

11. As far as the respondents 1 to 3 are concerned, they have issued a notice dated 24.10.2014 to the petitioner calling upon them to clear the cargo. The petitioner was also intimated in advance by a notice dated 11.09.2014 regarding their obligation to pay demurrage inasmuch as the goods were detained in the cargo area of the Port Trust beyond the period of seven days. Further, on 12.11.2014, the respondents 1 to 3 convened a meeting with the petitioner, fourth respondent and their respective importers and attempted to resolve the issue. In such circumstances, there was a delay in clearing the cargo and therefore the respondents 1 to 3 have collected the demurrage. Whether the delay is attributable on the part of the petitioner or respondents 1 to 3 cannot be gone into by this Court in this writ petition. They are disputed questions of fact. In fact,

the petitioner also paid the demurrage claimed by the respondents 1 to 3 under protest.

12. As far as the decisions relied on by the counsel for the petitioner are concerned, it was held by the Bombay High Court as well as the Honourable Supreme Court that the importer is not liable to pay demurrage charges unless it is shown that the delay is attributable on the part of the Port Trust. Therefore, first it has to be established that the delay in clearing the consignment is attributable on the part of the respondents 1 to 3. In this case, as mentioned above, prima facie, due to the internal dispute with the fourth respondent and in complying with various technically complicated formalities, the delay had occurred in clearing the goods which could be evident from the No Objection Certificate issued by the fourth respondent. In such circumstances, the decisions relied on by the counsel for the petitioner are not applicable to the facts of this case.

13. The petitioners would mainly contend that the goods imported by the importers, to whom the petitioner and fourth respondent are working as customs agent, are easily identifiable and having distinct feature with each other and therefore the question of mixing up of the cargo does not arise. This averment has been denied by the respondents 1 to 3 in the counter by contending that the consignment handled by the petitioner itself are of different dimensions as that of the fourth respondent and the fact of mixing up of the cargo had also been admitted by the petitioner in the letter dated 09.09.2014. In any event, such disputed questions of fact cannot be gone into by this Court by conducting a roving enquiry in exercise of jurisdiction conferred under Article 226 of The Constitution of India. However, the petitioner is given liberty to agitate their claim for refund of the demurrage amount before the appropriate Civil forum.

14. For all the reasons mentioned above, I do not find any reason to issue a Mandamus, as prayed for by the petitioner, to refund the amount paid by them towards demurrage charges. The writ petition is therefore dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Traffic Manager,
Chennai Port Trust,
No.1, Rajaji Salai,
Chennai - 600 001.

2. The Deputy Traffic Manager (Commercial),
Chennai Port Trust,
No.1, Rajaji Salai,
Chennai - 600 001.

3. The Area Traffic Manager & SS Area-III,
Chennai Port Trust,
No.1, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.S.Vasudevan, Advocate sr.18184
+1cc to M/S.Dilaw Associates, Advocate Sr.18946

WP No. 3445 of 2015

scd(CO)
srg(26/04/2016)