

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

Reserved on: 29.08.2016

Pronounced on: 27.10.2016

+ **W.P.(C) 374/2014**

DELHI INTERNATIONAL AIRPORT PRIVATE LIMITED

.....Appellant

Through: Sh. Atul Sharma and Sh. Sarojanand Jha,
Advocates.

Versus

**UNION OF INDIA, DEPARTMENT OF REVENUE, MINISTRY OF
FINANCE AND ORS.**

.....Respondents

Through: Ms. Geeta Malhotra, Advocate, for
Respondent No.4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner ("DIAL" hereafter) challenges Regulation 6(1)(1) of the Handling of Cargo in Customs Areas Regulations, 2009 [hereafter "Cargo Regulations"] as *ultra-vires* the provisions of Customs Act, 1962 and furthermore on the ground of arbitrariness and unconstitutionality (as violative of Articles 14 and 19 (1)(g) of the Constitution of India.

2. The Operation, Maintenance and Development Agreement ("the Agreement") was signed on 04-04-2006, between the Airports Authority of India (AAI) and DIAL, pursuant to Section 12A of the Airports Authority of India Act ("the AAI Act") whereby the latter was granted exclusive right and authority for performing the functions of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing of the Indira Gandhi International Airport, New Delhi ("IGI Airport"). DIAL took over the

operations of the IGI Airport from AAI and therefore was empowered under the provisions of the agreement to exercise powers under Section 12A(4) of the AAI Act to exercise AAI's statutory powers under the Regulations framed in 2003, with regard to levy of demurrages charges at the IGI Airport.

3. On 17.03.2009, the Central Board of Excise and Custom ("CBEC"), exercising its powers under Section 141(2) read with Section 157 of the Customs Act, notified the Cargo Regulations, which contained the impugned regulation. The petitioner executed a Concession Agreement dated 24.08.2009 with Celibi Delhi Cargo Terminal Management India Pvt. Ltd. (Proforma fourth respondent, hereafter "Celibi"), which enabled it to upgrade, modernize, finance, operate, maintain and manage the cargo terminal at IGI Airport. Thereafter, the Commissioner of Customs started issuing directions to DIAL and Celibi, to waive demurrage charges in accordance with the impugned regulation. These directions were not complied with; consequently the third respondent issued show cause notices as to why the impugned regulations were not complied with and as to why action should not be initiated against the petitioner and Celibi.

4. DIAL urges that the demurrage is charged under the provisions of AAI Act and that the impugned regulation framed under the Customs Act cannot be extended so as to waive the demurrage charged under the AAI Act. It is submitted that the second respondent has exceeded its powers delegated to it by the Customs Act which contain no provision authorizing the impugned regulation nor can the second respondent decide which norm should apply for waiver of demurrage charges. It is argued that neither the provisions of the Customs Act, nor any provision of the AAI Act, authorize the framing of regulations empowering customs authorities to unilaterally

direct waiver of demurrage charges. It is submitted that such power would seriously undermine the commercial and economic viability of operations under the Agreement because in each case, where consignments are disputed or questioned and involve decision on disputes as to valuation and payment of duty, the customs officials can potentially use their powers and direct DIAL not to recover any demurrage charges.

5. Reliance is placed on the decisions of the Supreme Court in *International Airports Authority of India & Ors. V. Grand Slam International & Ors.*, (1995) 3 SCC 151 and *Shipping Corporation of India Ltd. V. C.L. Jain Woolen Mills*, 2001 (129) ELT 561 (SC), where it was observed that no provision existed in the Customs Act, empowering the customs department to direct the custodian of goods to waive demurrage charges on the goods. The petitioner also pointed out that this court in *M/s Monika India & Anr. V. Union of India & Ors.*, 2012 (190) ECR 196 (Delhi) laid down that the custodian cannot be compelled nor can mandamus be issued to waive demurrage on the ground that the goods were left with the custodian due to the fault of the custom authorities.

6. DIAL also argues that in accordance with Section 157 of the Customs Act, the second respondent is authorized to make regulations consistent with the Act to carry out the purposes of the Act, and Section 141(2) of the Customs Act merely empowers the board to prescribe regulations providing for the manner in which the goods are received, stored, delivered, dispatched or otherwise handled in a customs area and the responsibilities of persons engaged in the said activities. The said provisions do not, in any way, empower respondent no.2 to frame regulations for waiver of demurrage

charges by the custodian of goods. It is alleged that the impugned regulation has no nexus with the object the Act seeks to achieve and is hence violative of Article 14 of the Constitution of India. It is argued that Article 19(1)(g) too is violated as the impugned regulation places a blanket ban, on the charge of demurrage by the custodian of goods in case of detention, confiscation or seizure of goods by customs.

7. The respondents argue that the impugned regulations are silent as to what is the nature of directions that can be issued by customs authorities; they were framed in terms of the undoubted powers conferred by Section 142 (2) and cannot be said to be *ultra vires*. It is submitted that as far as direction to waive charges in individual cases is concerned, in case of any difficulty, the DIAL can approach the authorities and eventually, if it is not resolved satisfactorily, even seek the guidance and directions of the Central Government.

8. The third respondent, i.e. Commissioner of Customs submits that the obligations of the service provider are governed by the Cargo Regulations and the petitioner's custodianship was regularized under Regulation 10(1) of the said Regulations by letter, dated 07.02.2012 issued by the third respondent. It is also submitted that the permission to give effect to the Concession Agreement (*supra*) was granted by the third respondent in terms of Regulation 6(2) of the Cargo Regulations and therefore the custodian, while operating under the Regulations, cannot take a stand that they are liable to follow only part of regulations and not follow those regulations which do not fit into their business model. The third respondent further points out that Regulation 6 of the Cargo Regulations provides for the

responsibilities of Customs Cargo Service Provider and Regulation 6(1)(l) places an obligation upon the petitioners or their sub-contractors being proforma fourth respondent and/or Delhi Cargo Service Centre to not charge any rent or demurrage on goods seized or detained or confiscated. It is further stated by the third respondent that to ensure compliance of the provisions of the Customs Act and the provisions of allied legislations, consignments need to be investigated and those consignments detained by the customs or other investigating agencies, cannot be cleared during investigation particularly if such cases involve trade policy, human safety and security, security of state etc. and hence the impugned regulation was incorporated in the Cargo Regulations.

Analysis and conclusions

9. Regulation 6(1)(l) of the Cargo Regulations is reproduced below for ease of reference:

“6(1) The Customs Cargo Service provider shall-

(a)-(o) -----

(l) subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer.”

10. Regulation 6 of the Cargo Regulations fixes the responsibilities of a “Customs Cargo Service provider”, defined under Regulation 2(1)(b) of the Cargo Regulations. The proforma fourth respondent, by virtue of the concession agreement (supra), comes within the purview of “Customs Cargo Service provider” and is therefore bound by such responsibilities. The Cargo Regulations, which contain the impugned regulation, derives its existence

from Section 141(2) read with Section 157 of the Customs Act. Those provisions show that the Central Board of Excise and Customs, the second respondent, is empowered to prescribe the responsibilities of persons engaged in the activities of receiving, storing, delivering dispatching or otherwise handling of imported or export goods in a customs area.

11. Undoubtedly DIAL's functions in relation to operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing of the IGI Airport as conferred by the Agreement, except those functions pertaining to the cargo terminal which have been sub-contracted to the proforma fourth respondent by virtue of the concession agreement (*supra*), are governed by the AAI Act, as was argued by it. Nevertheless, the obligations of the "Customs Cargo Service provider"/proforma fourth respondent is governed by the Cargo Regulations. This court is aware that the Supreme Court has, in *Grand Slam International* and *C.L. Jain Woolen Mills (Supra)*, observed that there was no provision in the Customs Act empowering the customs authorities to direct the custodian of goods to waive the demurrage charges on the goods. However, these decisions were pronounced before introduction of sub-section (2) to Section 141, which later gave way to the notification of the Cargo Regulations. Therefore, the petitioner's argument that the second respondent exceeded the power delegated to it by the Customs Act must fail.

12. The contention that the impugned regulation violates Article 14 of the Constitution of India, as it has no nexus with the object sought to be achieved, is insubstantial because the cargo regulations were enacted for the purpose of prescribing the responsibilities of persons engaged in the

activities of receiving, storing, delivering, dispatching or otherwise handling of imported or export goods in a customs area, and the impugned regulation is as such an obligation cast upon the persons involved in the said activities. DIAL also urged that the regulations contravene Article 19(1)(g) inasmuch as it places a blanket ban on the charge of demurrage by the custodian of goods in case of detention, confiscation or seizure of goods by customs. However, such restriction is covered under the premise of Article 19 (6), by which reasonable restrictions in the interest of general public may be imposed on the right under Article 19(1)(g). Investigation being an integral part of working of the Customs Department, the consignments detained by the customs authorities or other investigating agencies, cannot be cleared during investigation particularly if such cases involve trade policy, human safety and security, security of state etc. It is with these considerations that the impugned regulation was included in the Cargo Regulations and it should be viewed in the light of the object with which it has been framed. To this extent, the court is in agreement with the third respondent. Therefore, the allegation that the impugned regulation violates Article 19(1)(g) does not survive.

13. When the subordinate legislation made under a power to carry out the provisions of the Act has reasonable nexus with the object and purpose of the enabling statute, the court is not to concern itself with the wisdom or efficacy of the subordinate legislation or of its underlying policy: (Ref. *Maharashtra State Board of Secondary and Higher Secondary Education v Paritosh Bhupesh Kumar* (1984) 4 SCC 27 where the court upheld the validity of a Regulation made 'to carry out the provisions of the Act'. It was held in that

case that the Regulations had to be judged on a three-fold test namely: (1) whether the provisions of the regulations fall within the scope and ambit of the power conferred on the delegate; (2) whether the Regulations made are to any extent inconsistent with the provisions of the enabling Act; and (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution. In the present case, the first test is answered in the affirmative and the second and third tests are answered in the negative, which would imply that the Cargo Regulations is well within the scope and ambit of its parent Act i.e the Customs Act, and is also consistent with the same, and does not, in any way, violate constitutional provisions.

14. This court acknowledges that Section 151A of the Customs Act places an obligation upon the officers of customs to follow the orders, instructions and directions of the Central Board of Excise and Customs/Respondent no.2, as far as they relate to any prohibition, restriction or procedure for import or export of goods. The said provision is reproduced below for ease of reference:

“151A. Instructions to officers of customs. – The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, or for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board...”

15. The Commissioner of Customs (Import & General)/ third respondent a customs officer is bound by Section 151A of the Customs Act and hence, this court cannot issue directions restraining him from following the orders of the Central Board of Excise and Customs/second respondent i.e. constraining the former or any other officer on his behalf from issuing any letter/order/direction/advice/recommendation to the petitioner or its agents or concessionaire to waive the demurrage charges or not to charge the same under the impugned regulation.

16. DIAL's further argument was that in the event of directions under the regulations, compliance would result in commercial unviability, because its autonomy to charge fully or in part might eventually result in losses. In *Grand Slam (supra)*, the Supreme Court had to deal with the same issue, but in the context of absence of Regulation 6 (1) and un-amended Section 142. The court observed as follows:

“40. None of these provisions entitles the Collector of Customs to debar the collections of demurrage for the storage of imported goods. They do not entitle him to impose conditions upon the properties of ports or airports before they can be approved as Customs ports or Customs air- ports. Section 45 provides that all imported goods imported in a Customs area must remain in the custody of the person who has been approved by the Collector of Customs until they are cleared and such person is obliged not to permit them to be removed from the Customs area or otherwise dealt with except under and in accordance with the permission of the Customs Officer. Section 45 does not state that such person not be entitled to recover charges from the importer for such period as the Customs authorities direct.

41. The purpose of the Customs Act on the one hand and the Major Ports Act and the International Airports Authority Act on

the other hand are different. The former deals with the collection of Customs duties on imported goods. The latter deals with the maintenance of seaports and airports, the facilities to be provided thereat and the charges to be recovered therefor. An importer must land the imported goods at a sea-port or airport. He can clear them only after completion of Customs formalities. For this purpose, the sea-ports and airports are approved and provide storage facilities and Customs officers are accommodated therein to facilitate clearance. For the occupation by the goods of space in the sea-port or airport, the Board or the Authority which is its proprietor is entitled to charge the importer. That until Customs clearance the Board or the Authority may not permit the importer to remove his goods from its premises does not imply that it may not charge the importer for the space his goods have occupied until their clearance.

42. *What is stated in the quoted clause of the said customs public notice would be effective against the Authority only if it were shown that the Authority had, expressly or impliedly, consented to such arrangement; that is not even pleaded.*

43. *It can not be gain said that, by reason of unjustified detention of his goods by the Customs authorities, the importer is put to loss by having to pay demurrage charges for the periods of such detention. The Central Government is empowered by section 35 of the International Airports Authority Act, 1971, and section III of the Major Port Trusts Act, 1963, to issue to the Authority and the Boards of Trustees, respectively, directions on questions of policy after giving them an opportunity, as far as practicable, of expressing their views. -Me Central Government can, if so advised, after giving to the Authority and the Boards of Trustees the opportunity of expressing their views, direct them, under the aforementioned provisions, not to levy demurrage charges for periods covered by detention certificates.*

44. *The goods of the first respondent in this appeal were stored, pending their clearance by the Customs authorities, at the*

Container Freight Station of the appellant, the Central Warehousing Corporation at Patparganj, Delhi. The Central Warehousing Corporation is established under the provisions of the Warehousing Corporations Act, 1962. The provisions of the Warehousing Corporations Act, are substantially similar to those of the International Airports Authority, 1971, and the Major Port Trusts Act, 1963. What has been said above in regard to the International Airports Authority applies as well to the Central Warehousing Corporation.”

17. In the present case, the Court notices that the power to frame regulations is located in Section 42 (1) and (2) of the Airports Authority of India Act, 1994, which, by clause (d) (of sub-section [2]) provides the following specific regulation making power:

“(d) the storage or processing of goods in any warehouse established by the Authority under clause (g) of sub-section (3) of section 12 and the charging of fees for such storage or processing”

Section 141 (2), - of the Customs Act, inserted by Finance Act 18 of 2008 provides as follows:

"(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as maybe prescribed."

This court has, in its preceding discussion, held that the above power cannot be questioned, as wide and that as long as Parliamentary intent is discernable, subordinate legislation, which broadly conforms to its objectives, cannot be impeached. In exercise of its powers, Regulation 6 (1) was framed; it specifically obliges service providers not to charge demurrage in certain cases if directed not to do so (“*subject to any other law for the*

time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be."). Interestingly, the duty not to charge – when imposed by any customs official authorized to do so, is specifically subordinated to other laws (*"subject to any other law for the time being in force"*). Thus the powers under the Airports Authority Act, 1994 (like in the case of the International Airports Authority in *Grand Slam*)- specifically, Section 42 (2) (d)- discussed above are available for prescribing the rate(s) for storage charges. In *Grand Slam (supra)*, the court had commented on the power of the Central Government to issue directions to the IAAI with respect to demurrage charges:

"The Central Government is empowered by section 35 of the International Airports Authority Act, 1971, and section III of the Major Port Trusts Act, 1963, to issue to the Authority and the Boards of Trustees, respectively, directions on questions of policy after giving them an opportunity, as far as practicable, of expressing their views. -the Central Government can, if so advised, after giving to the Authority and the Boards of Trustees the opportunity of expressing their views, direct them, under the aforementioned provisions, not to levy demurrage charges for periods covered by detention certificates."

18. Identical power vests with the Central Government under the AAI Act to issue directions (Section 40). In the event DIAL is of the view that customs authorities' directions to it to not charge demurrage are unwarranted, it can seek guidance and directions in that regard, from the Central Government. In these circumstances, the grievance that Regulation 6

can potentially render DIAL's functioning unviable and result in losses to it, has to fail.

19. In the light of the foregoing discussion, the challenge to impugned regulation fails. Consequently, the writ petition is dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

OCTOBER 27, 2016

