IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.10.2017

Delivered on: 10-11-2017

Coram
The Honourable Mr.Justice V.PARTHIBAN

W.P.No.3265 of 2012

M/s.Hari & Co.,
rep. by its Partner Mr.A.Hariharan
by its Power of Attorney Holder
Mr.R.Arul Murugan .. Petitioner

Versus

1. Chennai Port Trust,
rep. by its Chairman,
Port Trust, Rajaji Salai,
Chennai-600 001.

2. The Traffic Manager,
Chennai Port Trust,
Administrative Office,
Rajaji Salai, Chennai-600 001.

3. M/s.STCL Ltd.,
rep. by its Managing Director,
No.176/314, 4th Floor, Shahs Tower,
Thambu Chetty Street,
Chennai-600 001. .. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari, to call for the records relating to the demand order bearing No.GL/275/2009/TC dated 24.01.2012 on the file of the second respondent and quash the same.

For Petitioner : Mr. Manisundar Gopal for M/s.t.Sathiyamoorthy
For Respondent : Mr.P.M.Subramaniam for for R1 and R2
Mr.Mukundan for R3

ORDER

The present writ petition has been filed, seeking for the following relief:

"Issue Writ of Certiorari, to call for the records relating to the demand order bearing No.GL/275/2009/TC dated 24.01.2012 on the file of the second respondent and quash the same. to call for the records

2. The petitioner firm is a registered partnership, which was established in the year 1985. The firm was engaged in the business of stevedoring, acting as shipping agent apart from other activities. The third respondent is a Government of India undertaking, functioning under the Ministry of Commerce and Industry. The third respondent company was engaged in trading of agricultural and non-agricultural commodities in domestic and international markets. In the course of business, 3rd respondent appointed the petitioner as their Clearing and Forwarding Agency (C&F Agent) for export of 8000 metric tons of Indian Yello Corn (Maize) to its overseas buyer, by order dated 6.10.2007. The appointment of the petitioner firm as Clearing and Forwarding Agent was made by stipulating certain conditions as disclosed in 3rd respondent letter dated 13.10.2007. Pursuant to the said appointment of the petitioner as C&F Agent, initially 5660 metric tones of Indian Yellow Corn (Maize) was sent by 3rd respondent company to be transported to foreign buyers through the petitioner firm. The said consignment was stored in the transit shed of the Chennai Port Trust from 16.10.2007 to 3.11.2007 for the purpose of uploading the cargo into the ship. According to the Port conditions, the cargo can be stored in the transit shed of the Port for the purpose of export only for a period of 30 days without any storage charges and thereafter, the cargo would attract storage charges by the Port Trust.

3. According to the petitioner, it is the responsibility of the 3rd respondent company being the principal of the Cargo to find a ship to upload the cargo and to inform the same to the petitioner. Unfortunately, initially, the ship appointed by the 3rd respondent company, Mv.Luck Fortune was found not suitable for food grain loading by the Mercantile Marine Department. Likewise two other ships were also found not suitable for shipment of cargo due to unloading problem at the receiving end. In the said circumstances, there was delay in finding a suitable and proper ship to load the cargo entrusted to the petitioner firm within the stipulated 30 days.

4. In view of the storage of the Cargo beyond 30 days, there occurred delay, which cannot be attributable to the petitioner firm. On behalf of the Port Trust, a letter was addressed on 9.11.2007 to the petitioner, intimating that the storage of consignment without charges would expire on 14.11.2007 and 15.12.2007 (30 days time) and requested the petitioner to remove the cargo, failing which demurrage charges

would be imposed.

5. On receipt of the said letter, the same was forwarded to the third respondent company and in response to the same, the third respondent company sent a reply on 15.11.2007 to the Traffic Manager of the Chennai Port Trust inter alia informing that despite their best efforts, they were not able to get vessel for shipment and therefore, they had planned to export the cargo in containers and sought for permission to load the cargo into containers from the transit shed itself. In the said letter, the third respondent had requested the Port Trust authorities to levy normal demurrage applicable charges and not to levy any penal charges since the third respondent was also a Government of India undertaking.

6. Thereafter, the Port Trust sent another letter dated 22.11.2007 requesting the petitioner to clear the cargo contained various quantities of Maize stored in the transit shed at the Port Trust since the storage period without storage charges is coming to end. It was also intimated that failure to remove the cargo, would attract penal charges.

7. This communication was also forwarded to the third respondent and in response to the same, the 3rd respondent once again sent a letter on 26.11.2007 reiterating the earlier position vide their letter dated 15.11.2007 and requested the Port Trust authorities for waiver of penal demurrage charges. Thereafter, the third respondent company requested the Port Trust authorities to load the cargo in containers and moved the same. In consideration of the request of the third respondent company, the Port Trust by letter dated 5.12.2007 informed the third respondent that their request for waiver was considered favourably and the cargo which was stored in the transit shed was allotted in the containers and dispatched to the respective destinations. Thereafter, the Chennai Port Trust sent a letter dated 21.4.2008 to the third respondent, intimating that the request for waiver of penal demurrage charges was under consideration and in the meantime, they requested them to pay normal demurrage charges. At this, the third respondent vide their reply dated8.5.2008, requested the Port Trust to work out normal demurrage charges and informed about it. Subsequently, on 27.5.2008, the Port Trust informed the petitioner about normal demurrage charges accrued at Rs.5,29,088/- and the same was also informed to the 3rd respondent company.

8. The demand of normal demurrage charges was also complied with by the petitioner on 1.7.2008. According to the petitioner, they were given to understand that in view of the payment of normal demurrage charges, the request for waiver of penal charges was accepted. The decision of the waiver of penal

charges was confirmed to the petitioner which decision was taken in the Port Trust Board Meeting on 30.08.2008.

9. While matters stood thus, the petitioner was issued with the demand order bearing No.GL/275/2009/TC dated 24.01.2012 demanding a sum of Rs.77,81,479/- towards penal demurrage charges on the subject consignment. The said amount was directed to pay within 15 days. The said demand notice is impugned in the writ petition.

10. Shri Mani Sundargopal, learned counsel appearing for the petitioner would assail the order of the demand on various grounds inter alia contending that it was ultimate responsibility of the third respondent to find proper ship for shipment of the cargo and the failure on the part of the third respondent in finding a proper ship cannot result in fastening the entire liability on the petitioner firm towards payment of penal charges. According to the learned counsel for the petitioner as per the agreement between the petitioner and the third respondent, it was the responsibility of the third respondent to find a proper ship in order to transport the cargo to the foreign buyers. Moreover, he would contend that the third respondent being Government of India undertaking has specifically requested the Port Trust to waive the penal charges which was accepted by the Port Trust in their Board Meeting on 30.8.2008. According to the learned counsel, the Board has taken a conscious decision to waive the penal demurrage charges on consideration of the fact that the 3rd respondent was a Government of undertaking and was the owner of the cargo, the impugned demand notice by the Port Trust, subsequently after a period of more than three years, cannot be justified under any circumstances. According to the learned counsel, except saying that the waiver by the Board cannot be justified, no other reasons were spelt out as to what was the basis for over turning the decision taken by the Board in its meeting dated 30.08.2008.

11. The learned counsel for the petitioner would in any event contend that earlier when the demand was made by the Port Trust, the communications were forwarded to the 3rd respondent company and the 3rd respondent company alone had submitted their replies to the Port Trust and the Port Trust thought it fit to entertain the request of the 3rd respondent for levying normal demurrage charges and for waiver of penal demurrage charges. When such was the decision, the demand as against the petitioner firm for payment of penal demurrage charges cannot be countenanced both in law and on facts.

12. Upon notice, P.MSubramaniam, learned counsel entered appearance for the Chennai Port Trust and Mr.Mukudan learned

counsel also entered appearance for third respondent.

13. As far as third respondent is concerned, learned counsel would submit that the company is being wound up, he has no instructions to make any submissions before this Court. Learned counsel appearing for the Chennai Port Trust would strongly contend that being a Clearing and Forwarding Agent, the petitioner is also liable for payment of penal demurrage charges jointly and severally. According to the learned counsel, the Port Trust was also proceeding against other business associates of the third respondent company and therefore, the petitioner cannot be heard to complain that they were alone being proceeded against.

14. A detailed counter affidavit has been filed by the Port Trust stating that Section 2(o) of the Major Port Trusts Act, 1963, defines "owner" as follows:

> (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods;
>
> (ii) in relation to any vessel or any aircraft making use of any port, includes any part-owner, charterer, consignee, or mortgagee in possession thereof"

and therefore, it is stated that being an agent of the principal, the petitioner comes within the definition of "owner" for the purpose of discharging the liability as demanded by the Port Trust. Therefore, it is not open to the petitioner firm to absolve itself from the liability by contending that it was only third respondent liable for payment of demurrage charges as demanded by the Port Trust.

15. Learned counsel appearing for the Port Trust would also submit that the consignment which was sought to be shipped was only a private arrangement between the third respondent and the petitioner and the intending purchaser at oversees was a private company, therefore, this fact was weighed with the Ministry of Shipping for refusing resolution granting waiver of penal demurrage charges. However, it could be seen that such reasons which formed basis for the decision taken by the Ministry, have not been disclosed in the communication. As stated above, the impugned communication merely states that the waiver granted earlier by the Board was not justified.

16. Although the fact remains that waiver was granted as early as on 30.8.2008, the impugned notice was issued after more than 3 1/2 years that too without spelling out any reason. Moreover, it appears from the records that no prior notice was issued either to the petitioner or to the third respondent before refusing earlier decision of waiver by the Board.

17. As rightly contended by the petitioner firm that a conscious decision was taken by the Board for grant of waiver on the ground that the owner of Cargo was the third respondent which was the Government of Undertaking, such a decision cannot be refused that too after a period of 3 1/2 years without any strong and compelling reasons. The reasons as set forth by the learned counsel for the Port Trust hardly carry conviction for reversal of decision of the Board by the Ministry. In any event, it has to be seen that the third respondent who was the owner of the Cargo, is also a Government of Undertaking and for the reasons beyond its control, the shipment could not take place within the stipulated time by the Port Trust officials. In any event, it is an admitted fact that normal demurrage charges have been paid. That being the case, the sudden reversal of decision by the authorities concerned, that too after a long period without disclosing the basis and without giving any prior notice to the parties concerned, cannot be justified under any circumstances and therefore, the same is liable to be interfered with.

18. In the above circumstances, this Court has no hesitation in allowing the Writ Petition.

19. Accordingly, the Writ Petition is allowed and the impugned demand order bearing No.GL/275/2009/TC dated 24.1.2012 demanding Rs.77,81,479/0 towrds penal demurrage charges, is set aside. Since the very demand of the Port Trust is now set aside, this Court would therefore, refrain from making any observation whether the petitioner was liable for any penal demurrage charges. No costs.

Sd/-
Deputy Registrar

//True copy//

Sub Assistant Registrar

suk

To
1. Chennai Port Trust,
rep. by its Chairman,
Port Trust, Rajaji Salai,
Chennai-600 001.

+1cc to Mr.T.Sathiyamoorthy, Advocate SR.No.79729
+1cc to Mr.P.M.Subramaniam, Advocate SR.No.99944

W.P.No.3265 of 2012

GN(21/12/2017)