IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.07.2017

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The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition Nos.25677 and 25690 of 2004
and
W.P.M.P.Nos.31207 and 31224 of 2004

Chennai Port Trust,
rep. by its Chairman. ...Petitioner in both W.Ps.

Vs.

1. Union Government of India,
rep. by its Secretary,
Ministry of Finance,
New Delhi.

R-1. in both W.Ps.

2. The Joint Secretary to Govt.
Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

..R-2 in W.P.No.25677 of 2004

3. The Commissioner of Customs (Appeals)
Customs House,
33, Rajaji Salai,
Chennai - 600 001.

R.3 in W.P.No.25677
and R-2 in W.P.No.25690 of 2004

4. The Additional Commissioner of Customs,
Customs House, 33 Rajaji Salai,
Chennai.

R.4 in W.P.No.25677
and R-3 in W.P.No.25690 of 2004

5. The Assistant Commissioner of Customs (MDC)
Customs House,
33, Rajaji Salai,
Chennai - 600 001.

...R.5 in W.P.No.25677
and R-4 in W.P.No.25690 of 2004

Prayer in W.P.No.25677 of 2004:-

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus to call for records, comprised in order in original No.1148 of 2001 - MCD, dated 23.11.2001, on the file of the Additional Commissioner of Customs, Chennai, fourth respondent and as confirmed by the Appellate Authority in proceeding C.Cus.16402, dated 29.04.2002, on the file of the Commissioner of Appeals, Chennai, third respondent and reaffirmed in Revision in R.A.Cus, in Order No.68 of 2003, dated 28.02.2003, on the file of the Joint Secretary to Government, Ministry of Finance, Government of India, New Delhi, second respondent, and to quash the same and consequently, to forbear the respondents from initiating any action such as to issue show cause notice or to levy in customs duty upon the petitioner/Madras Port Trust on the score pilferage of the imported goods by invoking power under sub-section 3 of Section 45 of the Customs Act, 1962.

Prayer in W.P.No.25690 of 2004:-

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Declaration, declaring that sub-section 3 of Section 45 of the Customs Act, 1962 as introduced by virtue of the Finance Act, 22 of 1995 as ultravires, unconstitutional, and arbitrary and is unenforceable in law so far as this petitioner is concerned.

In both W.Ps.

For Petitioner : Mr. R. Karthikeyan

For Respondents : Mr. K. Magesh
Senior Standing Counsel

COMMON O R D E R

Heard Mr. R. Karthikeyan, the learned counsel appearing for the petitioner and Mr. K. Magesh, the learned Senior Standing Counsel for the respondents.

2. The petitioner, in both the Writ Petitions is Chennai Port Trust. In W.P.No.25677 of 2004, the petitioner has sought for issuance of a Writ of Certiorarified Mandamus to quash the order in original, dated 23.11.2001, as confirmed by the Appellate Authority, by order, dated 29.04.2002, and affirmed in Revision by the Revisional Authority by order dated 28.02.2003, and to forbear the respondents from initiating any action against the petitioner/Port Trust, or proposing to levy customs duty upon them on the score of pilferage of imported goods by invoking power under sub-section 3 of Section 45 of the

Customs Act, 1962.

3. In W.P.No.25690 of 2004, the petitioner/Port Trust has sought for declaration, to declare sub-section 3 of Section 45 of the Customs Act, 1962 as ultra vires, unconstitutional and unenforceable against the petitioner/Port Trust.

4. Some what an identical issue arose for consideration before the Hon'ble Division Bench of Bombay High Court, in the case of (Board of Trustees of the Port of Bombay Vs. Union of India) reported in (2009) 241 E.L.T. 513 (Bombay). The issue, which fell for consideration before the Division Bench was, Is Port Trust liable to pay duty on goods pilfered while in their possession? This question was answered in favour of the petitioner/Port Trust, and the operative portion of the judgment reads as follows:-

> " 12. The liability to pay duty is on the importer of the goods. We have already referred to the provisions whereby an importer of the goods is exempted from payment of duty either on account of pilferage or on account of loss or damage in situations set out in the provisions. The Port Trust being a body corporate set up under the statute is a local body whereas the person approved will have the powers conferred under sections 9 and 10 of the Customs Act. Was it the intention of the Legislature by introducing section 45(3) of the Customs Act to fasten liability of duty on a local body like the Port Trust? The responsibility to pay for loss, destruction or deterioration of the goods while in possession of the Port Trust considering section 43(1) of the Port Trust Act, is of the Port Trust. Considering section 43(1) of the Port Trust Act, the responsibility for the loss, destruction and deterioration of the goods which are taken charge is that of a bailee under sections 151, 152 and 161 of the Contract Act subject to what is set out therein.
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> 13. Thus, considering the scheme of the Customs Act and the Port Trust Act, can the Port Trust, which is a body corporate under the Port Trust Act and a local body, be saddled with the liability of duty in respect of pilfered goods, for which in law it is liable to the importer as a bailee under section 43 of the Port Trust Act. An importer, if the pilfered goods are

recovered, has to pay the duty. In the case of a Port Trust, if the goods are pilfered, the Port Trust as a bailee of the goods has to pay the value to the importer. Is it possible to contend on the one hand that the Port Trust is liable to pay the value of the goods lost to the importer and, at the same time, considering the provisions of section 13 of the Customs Act, also the liability to pay duty. The importer receives from the Port Trust compensation by way damages and not the goods and that after paying such compensation to the importer, is the Port Trust, apart from that, also liable for payment of duty to the Government of India. Though the Port Trust is a statutory body nonetheless it is under the control of the Government of India.

> In our opinion, considering the language of section 45(3) of the Customs Act, the liability to pay duty is of the person who remains in custody of the goods as an approved person under section 45 of the Customs Act. Considering that possession of the goods by the Port Trust is by virtue of powers conferred on the Port Trust under the Port Trust Act, it will not be possible to hold that the Port Trust is an approved person or can be notified as an approved person. To that extent, section 45 (3) of the Customs Act will have to be restricted to mean to the second category of person, namely such persons approved who have approved warehouses in terms of sections 9 and 10 of the Customs Act.

14. We may now refer to the judgments adverted to at the Bar on behalf of the respondents' counsel. In the case of International Airport Authority of India (supra), it is clear that what the Supreme Court was considering was merely the scheme of the Port Trust Act. There, the issue was in the matter of payment of demurrage when goods were lost while in the custody of the

International Airport Authority. The issue therefore in that case is different from what has been considered in the instant case. Similar is the case of Vinod Selvextracts (P) Ltd. (supra)., the learned Division Bench of the Madras High Court was considering the liability of the Port Trust under sub-section (1) of section 43 of the Port Trust Act. It is in that context that reference was made to section 45 of the Customs Act. The learned Division Bench of the Madras High Court held that once the goods are warehoused, the custody of the goods is only with the Port Trust and liability for loss and damages according to the provisions of the Major Port Trust Act is passed on the Port Trust. The issue, which is under consideration before us, was not under consideration before the learned Division Bench of the Madras High Court.

15. We are therefore of the opinion that under section 45 of the Customs Act, the person referred to in sub-section (1) thereof can only be the person approved by the Commissioner of Customs. It excludes a body of persons who by virtue of a law for the time being in force is entrusted with the custody of goods by incorporation of law under another enactment, i.e. the Port Trust Act. We see no reason what mischief Parliament sought to undo by sub-section (3) of section 45 of the Customs Act. At the highest, it has to be read in the context that pilferage may take place from a private warehouse or a customs warehouse run by a private party. The negligence on such private parties should not cause loss to the exchequer. No purpose would be served by one arm of the Government imposing a duty on another arm of the Government which is discharging statutory duties. The impugned orders are therefore without jurisdiction and liable to be struck down.

16. Once we hold that under section 45 (1) of the Customs Act the recovery of duty in respect of pilfered goods is only from the approved person, then the notification dated 11th October 2000 would be clearly without jurisdiction and ultra vires section

45(1) of the Customs Act, and consequently will have to be declared as null and void. 17. For all the aforesaid reasons, we are clearly of the opinion that this petition will have to be allowed and consequently the Rule is made absolute in terms of prayer clauses (a) and (b). There shall be no order as to costs. "

5. The above decision would be squarely applicable to the case on hand, as the petitioner in the instant case is also a Port Trust. Therefore, the Writ Petition in W.P.No.25690 of 2004 stands disposed of, in the light of the decision of the Bombay High Court, in the case Board of Trustees of the Port of Bombay Vs. Union of India reported in (2009) 241 E.L.T. 513 (Bombay). It would be worthwhile to point out that Customs, Excise Service Tax Appellate Tribunal (CESTAT), in the case of (Mumbai Vs. The Board of Trustees of the Port of Mumbai) in Appeal No.C/755/2011, DATED 23.07.2013 has followed the decision of the Hon'ble Bombay High Court, in the case of Board of Trustees of the Port of Bombay (supra) and rejected the Appeal filed by the Revenue.

6. In the light of the fact that, it has been held that Section 45 (3) of the Customs Act will have to be restricted to mean to the second category of persons, viz., such persons approved, who have approved warehouses in terms of sections 9 and 10 of the Customs Act, the demand raised against the petitioner has to be necessarily set aside. The Bombay High Court has also granted such relief and set aside the demand. In the light of the same, the impugned demand, which has been challenged in W.P.No.25677 of 2004 has to be set aside.

7. In the result, the Writ Petition in W.P.No.25677 of 2004 is allowed and W.P.No.25690 of 2004 is disposed of, as stated above. In the light of the above conclusion, the petitioner is entitled for refund of the amount, which was deposited by them, pursuant to the interim orders granted by the Court, dated 09.09.2004. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. Union Government of India,
rep. by its Secretary,
Ministry of Finance,
New Delhi.

2. The Joint Secretary to Govt.
Government of India,
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Department of Revenue,
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3. The Commissioner of Customs (Appeals)
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Customs House,
33, Rajaji Salai,
Chennai - 600 001.

+2cc to Mr.K.Magesh, Advocate, S.R.No.52877, 52828
+2cc to Mr.R.Karthikeyan, Advocate, S.R.No.52798,52799

Writ Petition Nos.25677
and 25690 of 2004

SKS(CO)
GN(12/10/2017)