IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.5626 of 2018
and W.M.P.No.6954 of 2018

Orders reserved on	Orders pronounced on
28.06.2018	06.07.2018

K.A.Reclaim,
Proprietorship Mrs.Raiza K.R.
Rep. by its Authorized Person,
Mr.Anil Kumar PR,
B1, B2, Industrial Estate,
West Hill, Calicut,
Kerala-673 005. ... Petitioner

-vs-

1.The Commissioner of Customs,
Customs House,
No.60, Rajaji Salai, Chennai-600 001.

2.The Manager,
Container Freight Station,
M/s.Kailash Shipping Services Pvt. Ltd.,
No.43, Kadapakkam Village,
Vichur High Road, Manali New Town,
Chennai-600 104. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus to direct the respondents to release the cargo covered under the Bill of Entry Nos. (i) 5756429, (ii) 5756986, (iii) 5779219, (iv) 5848323, (v) 6028680 covered 36 containers i.e., Nos.PCIO8932182, PCIU8988514, TCNU7729622, CXDU1750314, PCIU8753485, PCIU8172182, PCIU8690181, PCIU8485567, PCIU8749546, ECMU9586456, TCNU5847502, CMAU5316064, CMAU4666601, FSCU9480620, CMAU4879910, CMAU5469675, SEGU4622974, CMAU588390, ECMU9783368, GESU6771000, TRLU7077125, ECMU9349201, TRLU6737646, CMAU5292213, MAGU5743765, CLHU8951749, ECMU9891568, ECMU9729855, TEMU6963087, TCNU9890831, CMAU5038699, CMAU4664764, ECMU9513022, CMAU5643540, ECMU9263005, CMAU5179845 imported by the petitioner and paid the entire customs duty and penalty but being held in the custody of the first respondent to and in favour of the petitioner.

For Petitioner	:	Mr.Kalyanasundaram, Senior Counsel assisted by Mr.R.Vasudevan
For R1	:	M/s.Geetha Shanmughasundaram for Mr.Rajnish Pathiyil Central Govt. Standing Counsel
For R2	:	Mr.P.R.Krishnaraj

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ORDER

The petitioner seeks for a Writ of Mandamus to direct the respondents to release the cargo covered under five bills of entry, which have been stuffed into 36 containers, which were imported by the petitioner. The petitioner claims that they have paid the entire customs duty and penalty, and the containers along with the cargo are being held in the custody of the first respondent and therefore, prays for direction.

2.Mr.Kalyanasundaram, learned Senior Counsel, assisted by Mr.R.Vasudevan, learned counsel for the petitioner, submitted that the petitioner imported used rubber tyres one cut in bead from Australia and filed five bills of entry to clear the cargo, which were stuffed into 36 containers. Due to financial crisis in the business of the petitioner, they were unable to pay the customs duty within the time stipulated. Consequently, the containers were kept in the custody of the second respondent on the orders passed by the first respondent.

3.The petitioner would state that it came to their knowledge through their Cstoms House Agent that the goods imported by them, in the custody of the second respondent, were scheduled to be brought for e-auction pursuance to a notification dated 12.02.2018. The petitioner would state that they had arranged for payment of the customs duty and requested for release of the containers. Further, the petitioner undertook to pay all the other charges, which are payable by them on account of not clearing the goods earlier.

4.The learned Senior Counsel for the petitioner would submit that the petitioner has paid a sum of Rs.5,18,642/- towards customs duty by way of online payment on 08.03.2018 and this payment includes penalty amount of Rs.5,000/-. In spite of these efforts, since the respondents had proceeded with the auction and at that stage, the present writ petition has been filed. The learned Senior Counsel reiterated the above factual position and pointed out that the petitioner has paid the customs duty by way of e-payment on 08.03.2018 being a sum of

Rs.5,18,642/- and in spite of the same, the respondents have brought the containers for auction without issuing any notice to the petitioner / importer.

5.By referring to Section 48 of the Customs Act, 1962 (hereinafter referred to as "the Act"), it is submitted that proper notice has to be issued to the petitioner, which procedure was not followed and therefore, the auction, which was conducted, stands vitiated and thus, prays for allowing the writ petition by permitting the petitioner to clear the consignments and they also expressed their readiness and willingness to pay all the charges payable to the second respondent.

6.It is further submitted that the auction is yet to be confirmed in favour of a third party and even if customs clearance has been granted, the same can be withdrawn at any time, especially when the respondents have failed to follow the mandatory procedure under Section 48 of the Act. In support of such contention, reliance was placed on the decision of the High Court of Delhi in the case of Ajanta Arts Company vs. Union of India and Others reported in 2011 STPL 2522 Delhi.

7.The first respondent has filed a counter affidavit inter alia stating that Chapter 20 of the Customs Manual, 2014 deals with the procedure for disposal of uncleared / unclaimed cargo. In terms of Section 48 of the Act, if any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within 30 days from the date of unloading thereof at a port, such goods shall be disposed of by the custodian after a notice is issued to the importer and permission is obtained from the Department and the sale proceeds thereof shall be shared as per the provisions of Section 150 of the Act.

8.It is submitted that the petitioner has filed bills of entry for the subject consignments and mere filing of bills of entry cannot be treated as 'Customs Cleared Cargo' and therefore, it is not a bar for the Department to proceed as per Section 48 of the Act. Furthermore, after the filing of the bills of entry, no further steps had taken place such as, assessment of bills of entry, examination, payment of duty etc., and the subject cargo become liable for disposal under Section 48 of the Act.

9.Further, it is submitted that the respondents have issued notices to the importer and the first notice in respect of lot no.27 was issued on 14.07.2016 and final notice on 09.08.2016; for lot no.28, first notice was issued on 21.07.2016 and final notice on 16.08.2016; for lot no.29, first notice was issued on 14.07.2016 and final notice on 09.08.2016; for lot no.30, first notice was issued on 16.08.2016 and final notice on 01.09.2016; and for lot no.34, first notice was issued on 25.07.2016 and final notice on 16.08.2016. Therefore, it is submitted that it is incorrect to state that no notice was issued to the petitioner before proceeding under Section 48 of the Act.

10.It is her further submission that the petitioner has approached the Commissioner of Customs only on 05.03.2018 requesting permission to clear the cargo. Though the petitioner had approached the Department at the eleventh hour after about one and half years, the Department had advised the petitioner to get the bills of entry reassessed and pay the duties, as the consignments cannot be cleared without payment of duty.

11.It is further submitted that it is incorrect to state that Rs.6,00,000/- was paid in respect of the entire duty and other charges and the amount of Rs.5,18,642/- was paid towards customs duty and penalty. It is submitted that the petitioner has paid the customs duty only on 08.03.2018 and by then, the auction proceedings were over and a third-party interest had been created.

12.Further, the Board's Circular No.50/2005-Cus states that "customs shall not withdraw any consignment at the last moment from the auction / tender except with the written approval of the Commissioner." Since the auction has been concluded and third-party interest has been accrued, the same cannot be set aside, more so when the third party is not a party to this writ petition. Further, it is submitted that the reserve price of the five lots is Rs.14,34,000/-, which fetched the highest bid amount of Rs.49,93,000/- and if the bid is awarded to the highest bidder, the expected customs duty is Rs.7,09,001/-.

13.Further, in the counter affidavit, it has been stated that the Customs does not have any objection in clearance of the five lots by the petitioner subject to the payment of all dues of customs duty and other charges and though the auction is over, the power to handover the subject cargo either to the highest bidder or to the actual importer is vested with the Customs Authorities, since the cargo is still under the Customs Custody, as an order of status quo had been granted in this writ petition.

14.The learned counsel appearing for the second respondent / Container Freight Station submitted that the petitioner has not cleared the goods for home consumption within 30 days from the unloading and hence, as a custodian of the goods, the second respondent sent notices by registered post to the petitioner in respect of all the goods, which are subject matter in this writ petition. Notices sent to the petitioner dated 14.07.2016, 21.07.2016, 25.07.2016 and 16.08.2016 are as prescribed under the Customs Act.

15.Further, the petitioner was specifically informed about the accumulation of ground rent / storage charges and was informed to clear the goods within 15 days of the receipt of the notices. Final notices were sent by registered post with copies marked to the first respondent. The petitioner has also been informed through e-mail communications to clear the goods as early as possible. However, the petitioner has been delaying the process thereby, causing huge loss of business opportunities to the second respondent. Taking into consideration all these facts, the first respondent has allowed the auction of the goods and e-auction was fixed on 08.03.2018 along with the other goods in the Container Freight Station and a wide publicity was given about the auction in the newspapers.

16.The second respondent would further state that they have accepted the offer given by the highest bidder and the bid has become final on 12.03.2018 and hence, the petitioner is not entitled for any relief. On the above grounds, the learned counsel prayed that the prayer sought for in the writ petition may be rejected.

17.Reply affidavit has been filed by the writ petitioner to the counter affidavit filed by the second respondent, wherein after reiterating the contentions raised earlier, with regard to violation of Section 48 of the Act, it is submitted that the petitioner brought 92 containers in one slot during June 2016 of which, they have cleared 41 containers at different intervals of time after paying necessary storage charges and the petitioner is ready and willing to pay the storage charges collected by the Container Freight Station at Rs.27,500/- per container, which was collected by them till 19.10.2017.

18.Further, it is submitted that the petitioner is ready and willing to pay the proportionate increase of storage charges at the rate of Rs.35,000/- per container and would state that after negotiation with the second respondent’s office at Delhi, they agreed to release the cargo after accepting the payment of Rs.12,60,000/- (Rs.35,000/- * 36). Further, it is submitted that even if auction has been conducted, the first respondent has discretion to withdraw the same upon the petitioner paying duty and all charges.

19.Heard the learned counsels for the parties and carefully perused the materials placed on record including the counter affidavit filed by the respondents and the reply affidavit to the counter affidavit filed by the writ petitioner.

20.The sheet anchor of the argument of the learned Senior Counsel for the petitioner is by referring to Section 48 of the Act. The said provision deals with procedure in case of goods not cleared to warehoused or transhipped within 30 days after unloading. If the goods are not cleared within the said time period, the title to the imported goods gets relinquished and such goods, may after notice to the importer and with the permission of the officer, be sold by the petitioner having custody thereof.

21.It is not in dispute that the goods were not cleared within the 30 days period and no attempts were made by the petitioner to clear the goods for over one and half years. Therefore, the respondents were fully justified in invoking Section 48 of the Act.

22.The learned Senior Counsel emphasised that power under Section 48 of the Act could be exercised, only after notice to the importer and this having not been done, the entire proceedings, which culminated in the sale, are vitiated.

23.The factual position as set out in the counter affidavit duly supported by documents annexed in the typed set of papers filed by the second respondent show that the petitioner was noticed by the second respondent about the proceedings they intend to initiate. It is seen that not only one notice was issued, but also more than three notices have been issued and e-mail communications have been sent, yet the petitioner took no efforts to clear the consignments. Therefore, the stand taken by the petitioner that the mandatory procedure under Section 48 of the Act by issuance of notice to the importer has been not followed is factually incorrect and the same stands rejected.

24.Having held so, it has to be seen as to what is the relief the petitioner would be entitled to in the writ petition. The facts disclose that the petitioner had imported goods in 96 containers of which, 41 have been cleared at different points of time for which, duty and all other charges have been paid by the petitioner. Therefore, it may not be a case where there is total lack of bona-fide on the part of the petitioner. It is no doubt true that one and half years had lapsed and the containers were lying in the Container Freight Station. Consequently, the second respondent lost other business opportunities. However, if the petitioner chooses to clear the cargo upon permission being granted by the first respondent, it goes without saying that the petitioner should not only pay the customs duty and other levies payable under the Act, but also is bound to clear the entire dues to the second respondent, which is all inclusive.

25.The second respondent has taken a stand that on and after 12.03.2018, the sale has been confirmed and a third-party interest has been accrued and nothing more can be done. I do not agree with the stand taken by the second respondent, because it is ultimately the Customs Department, which has to give clearance for the consignments to leave the Container Freight Station. This permission will be granted only after the payment of the customs duty and other levies and charges. Thus, the right of the Department stands preserved and the auction, which was conducted, is always subject to the power exercisable by the Customs Department and therefore, I do not agree with the stand taken by the second respondent that a finality has attained to the proceedings. Probably, the second respondent, as a custodian of the cargo and a person, who had been the cause for bringing the cargo for auction, may be justified in taking a stand that so far as they are concerned, the matter has attained finality, since the highest bidder has offered a sum of Rs.49,93,000/-. In any event, the auction conducted is subject to orders that may be passed by the first respondent Department.

26.In the counter affidavit filed on behalf of the first respondent, the Assistant Commissioner of Customs (Legal-Exports), a fair stand has been taken by stating that though the auction is over, the power to handover the subject cargo either to the highest bidder or to the actual importer is vested with the Customs Authorities, since the cargo is in the customs custody. Further, the Department has clearly stated that the customs does not have any objections in clearance of the subject five lots by the petitioner subject to the payment of all dues of customs duty and other charges. The stand taken by the second respondent is that the highest bidder having offered his bid and it was accepted by the second respondent and therefore, the petitioner cannot seek for orders from this Court in his absence. This contention is liable to be rejected for more than one reasons. Firstly, no vested right accrues in favour of the highest bidder unless and until, the Customs grant clearance to remove the cargo from the premises of the second respondent. Consequently, unless and until, the customs duty is received and all other charges are cleared in full, the question of granting permission to remove the cargo does not arise. Therefore, no finality has reached in the proceedings, insofar as the Customs Department is concerned and this fact is evident from the counter affidavit filed by the Assistant Commissioner of Customs.

27.In the light of the above, this writ petition is disposed of by permitting the petitioner to approach the first respondent Department within a period of one week from the date of receipt of a copy of this order and request to grant permission to pay the highest bid amount as realised in the auction, which was conducted and also pay all charges and levies payable to the second respondent and any other Department or Organization. The petitioner, on being permitted to effect such payment, shall be given reasonable time to clear all the dues and upon clearance, be permitted to remove the containers in one single lot and not in piecemeal. In other words, the petitioner should effect payment of the customs duty and all other charges and levies for all the 36 containers in one lot and the clearance shall also be done in a similar fashion. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Customs,
Customs House,
No.60, Rajaji Salai, Chennai-600 001.

+1cc to Mr.P.R.Krishnaraj, Advocate sr.no.44375
+1cc to Mr.Rajnish Pathiyil, Advocate sr.no.43996
+2cc to Mr.R.Vasudevan, Advocate sr.no.43747

W.P.No.5626 of 2018

nr 18/07/2018