

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Order	Date of Pronouncing the Order
10.01.2018	21.02.2018

Coram

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

Writ Petition No.33139 of 2004
and
W.P.M.P.No.40069 of 2004

M/s. Transworld Shipping Services
Pvt. Ltd.,
Transworld House, No.2 (Old No.33)
9th Lane, Dr. Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

...Petitioner

Vs.

1. The Government of India,
rep. by the Joint Secretary,
Ministry of Finance, (Department of Revenue)
4th Floor, Jeevandeep Buildings,
Sansadh Marg, Parliament Street,
New Delhi - 110 001.
2. The Commissioner of Customs,
and Central Excise (Appeals)
No.1, Williams Road,
Cantonment, Tiruchirapalli - 1.
3. The Joint Commissioner of Customs,
No.1, Williams Road,
Cantonment, Tiruchirapalli - 1.

...Respondents

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records, leading to the passing of the impugned order, bearing No. F.No.373/65/SL/2003-RA, Cus, passed in Order No.133/04, dated 31.03.2004, passed by the first respondent and the consequential order C.No.VIII/10/3/95-Cus.Adj in Order No.5/2004-JC (Denovo) dated 27.08.2004 of the third respondent and to quash the same.

For Petitioner : Mr. K. Bijai Sundar
For Respondents : Mr.V. Sundareswaran
Senior Panel Counsel

O R D E R

Heard Mr.K.Bijai Sundar, the learned counsel appearing for the petitioner and Mr.V. Sundareswaran, the learned Senior Panel Counsel for the respondents.

2. The petitioner is a Steamer Agent for the Ship, named 'M.V. Merini', (hereinafter, referred to as 'Vessel'), which arrived at the Port of Cuddalore on 13.11.1992. The vessel carried urea in bulk, weighing 30,000 metric tonnes (MTs), under two Bills of Lading. On arrival, a notice of readiness was issued to the consignee, and two draft survey reports were issued, indicating that the vessel had brought the quantity, weighing 29,483.5 MTs and 29.963.5 MTs respectively, as against the quantity mentioned in the Manifest and Bills of Lading. Landing Certificate, dated 19.03.1993, was issued by the Superintendent of Customs, indicating a shortage of 483.739 MTs. This shortage has resulted in imposing penalty of Rs.30,00,000/- on the petitioner under Section 116 (a) read with Section 148 (2) of the Customs Act, 1962 (hereinafter, referred to as 'the Act') by order, dated 04.08.1999 by the third respondent. On Appeal, this Order was confirmed by the second respondent/Commissioner of Customs, by Order-in-Appeal, dated 31.01.2003. The petitioner, feeling aggrieved, filed a Revision Application under Section 129 DD of the Customs Act, 1962 before the first respondent, Government of India. The Revisional Authority/first respondent, while affirming the order passed by the Original Authority, as confirmed by the Appellate Authority, granted a partial relief by reducing the penalty. This order, dated 31.03.2004, is impugned in this Writ Petition.

3. Mr.K.Bijai Sundar, the learned counsel appearing for the petitioner submitted that the vessel arrived at the Port of Cuddalore on 13.11.1992, which is an anchorage Port, and no berthing facility is available in Cuddalore. The vessel commenced discharge of the cargo on 23.11.1992, and the same was completed on 19.02.1993. On behalf of the petitioner, a draft Survey Report was issued on 22.02.1993, indicating discharge of 29,483 MTs of cargo. On behalf of the Shipper, a draft Survey Report was issued on the very same date, indicating discharge of 29.963.50 MTs of cargo. The Landing Certificate issued by the Superintendent of Customs Department, dated 19.03.1993, confirms the Survey Reports, indicating short landing of 483.739 MTs of cargo.

4. It is submitted that, discharge of the cargo was completed during February, 1993, however, a show cause notice was issued after a period of two years, i.e. on 09.03.1995, proposing to impose penalty on the petitioner for the shortage of cargo. The petitioner submitted their reply, dated

15.04.1995, and the show cause notice was not adjudicated immediately, and Order-in-Original was passed by the third respondent/Joint Commissioner on 04.08.1999, i.e. four years after the date of issuance of the show cause notice. The petitioner preferred an Appeal to the second respondent/Commissioner of Customs, who, by Order-in-Appeal, dated 31.01.2003, confirmed the Order-in-Original passed by the third respondent, dated 04.08.1999. On Revision, the first respondent/Revisional Authority, by the impugned order, dated 31.03.2004, while confirming the orders passed by the third and second respondents, granted a partial relief with regard to penalty alone.

5. The main grounds on which, the orders are under challenge are i) delay in adjudication process; ii) The quantity mentioned in the Bills of Lading is not prima facie evidence for the quantity loaded on board the vessel.

6. The learned counsel virtually took me to the Cuddalore Port, and he made a detailed narration of various events, which had taken place after the vessel had anchored in the Port. It is submitted that the vessel was carrying the cargo under Charter Party Terms, in which, loading and discharge was the responsibility of the receivers of the cargo, and if there was any loss/damage, the Carrier or Steamer Agent cannot be held liable. In the instant case, the discharge/delivery operations was conducted by the consignee. It is further submitted that, in terms of Section 5 of Carriage of Goods by Sea Act, the quantity mentioned in the Bills of Lading is not even a prima facie evidence of the cargo loaded in the vessel, and thus, any orders passed in this respect, relying upon the quantity mentioned in the Bills of Lading and the quantity arrived at the weighment point, off the shore, cannot be considered as the correct quantity, discharged by the vessel.

7. It is further submitted that the Cuddalore Port, being an Anchorage Port, without berthing facilities, the cargo, which is discharged by slings in non-standardized and the minimum stitched bags into the barges, would result in loss of cargo, and further loss will occur at the pier point, where, the labourers use hooks to carry the goods, and further loss will occur at the time of storing, which is not the petitioner's responsibility, and therefore, cannot be held liable for such loss.

8. It is further submitted that the vessel commenced its discharge on 23.11.1992, and took 2 1/2 months for the entire cargo to be discharged upto the end of February, 1993. It is further submitted that the Landing Certificate issued by the Superintendent of Customs Department, cannot be a basis for coming to a conclusion that there was shortage, as there are

various other factors, which would lead to shortage.

9. By referring to the decision of the Hon'ble Division Bench of this Court, in (Union of India Vs. Tatvani Shipping Co.) reported in (1998) Law Weekly 16, it is submitted that, in case of short landing, the period of sailing of the vessel, the date of completion of discharge of the cargo, etc., have to be immediately looked into, and in such case, the draft survey report must be the relevant document to fix the quantity discharged, and not the Landing Certificate. It is further submitted that, there is a huge delay in passing the adjudication order by the first respondent/Revisoinal Authority, viz., period of six years, and such a long delay will vitiate the entire proceedings. In support of such contention, reliance was placed on the following decisions:-

i) (Parekh Shipping Corporation Vs. The Assistant Collector of Customs, Bombay and another) in W.P.No.528 of 1985;

ii) (Shaw Wallace and Co. Ltd., Vs. Assistant Collector of Customs and others) reported in (1986) 25 E.L.T. 948.

iii) [Collector of Central Excise, Jaipur Vs. Raghuvar (India) Ltd.,] reported in (2000) 118 E.L.T. 311 (SC).

iv) (M/s.Wilco & Company Vs. Union of India) in W.P.Nos.9817 and 9818 of 1995) reported in CDJ (2002) MHC 126;

v) (M/s. United Spirits Ltd., Vs. Government of India) in W.P.No.33945 of 2007, dated 22.03.2010.

vi) (J.M. Baxi and Co. Vs. Government of India) reported in (2016) 340 E.L.T. 316 (Mad), dated 08.02.2016.

10. The learned counsel has referred to the Bill of Lading, and submitted that the condition in the Bill of Lading is clear with all particulars, i.e., weight, measure, marks, numbers, quantity, contents, value etc., as stated by the merchants, but, unknown to the carrier, who undertakes to deliver the goods, as they were actually loaded. Further, neither the weight nor the measure of goods carried in bulk are checked by the Carrier on loading. Therefore, it is submitted that no liability can be fastened on the petitioner, who is a Steamer Agent of the vessel (M.V. Merinee).

11. Further, it is submitted that, in the Landing Certificate issued by the Superintendent of Customs, dated 19.03.1993, it is mentioned that the discharge was by non-standardized bags from the vessel, as per the Boat, and the other factors were not considered by the respondents 2 and 3, in a proper perspective before affirming the penalty. So far as the first respondent is concerned, though he came to the conclusion that there is nothing on record that the petitioner has intentionally or actively responsible to the said short landing of the goods, did not grant full relief, but only reduced the penalty equivalent to the amount of duty, that would have been chargeable on the goods not landed or the deficient goods on such goods been imported. Further, there is no specific allegation made in the impugned order that the petitioner's carrier was aware of the weight of the cargo.

12. Mr.V. Sundareswaran, the learned Senior Panel Counsel for the respondents submitted that, in terms of Section 30 of the Act, a person in charge of the vessel, includes the agent of the vessel, who is responsible to deliver the goods to the proper Officer, an import manifest prior to the arrival of the Vessel. The Import Manifest (Vessels) Regulations, 1971 stipulates certain duties and Form 'C' to be submitted, and it is an obligation cast upon the person in charge of the vessel to declare the gross weight. Section 116 prescribes penalty for non-observance of these statutory duties and responsibilities on the part of the Carrier or the Agent. Therefore, the petitioner cannot be wriggled out of their responsibilities. Any contract, which is contrary to the statutory provisions, is not enforceable. The impugned orders have been passed after affording opportunity to the petitioner, including the opportunity of being heard in person.

13. It is further submitted that the contention of the learned counsel for the petitioner that the adjudication should have been completed within a period of five years from the date of discharge of the cargo is not tenable, as there is no period of limitation, prescribed under the provisions of the Act. In the instant case, the import took place in November, 1992 (23.11.1992) and the show cause notice for short landing was issued in March, 1995 (09.03.1995) and the same is well within time. Section 5 of the Carriage of Goods by Sea Act cannot be pressed into service, as, only the provisions of the Customs Act would govern the Authorities.

14. It is further submitted that, this Court will not normally interfere with the questions of fact, as to whether there was really short landing of goods or not, etc. The Officials of the Customs Department did not counter sign the draft survey report submitted by the Surveyor of the consignor or consignee, as it did not reflect the true position. The

third respondent, while passing the Order-in-Original, dated 04.08.1999, rightly granted 1% tolerance limit, which is 300 MTs, and therefore, the short landing has been reckoned only as 216.5 MTs. Further, the visible shortage occurred on account of pilferage, loss on board, loss on pier, spillage/handling loss due to cyclone etc., have been carefully taken into consideration while issuing the Landing Certificate by the Superintendent of Customs, Cuddalore.

15. The learned Senior Panel Counsel placed reliance on the decision of Hon'ble Division Bench of this Court, in (Chowgule Brothers Vs. Deputy Collector of Customs, Bangalore) reported in (1996) 82 E.L.T. 204 (Mad), in support of the contention that, if, according to the petitioner, the Import Manifest is incorrect, then, they should have sought for amendment of the same, which, the petitioner did not do, and therefore, the contention raised by the petitioner does not merit consideration. Reliance was placed on the decision of the Hon'ble Division Bench in (Caraval Logistice Pvt. Ltd., Vs. Jt. Secretary) reported in (2016) 338 E.L.T. 266 (DB) Mad with regard to, who is the person in charge, as defined under Section 2 (3) of the Act and the effect of the Import Manifest. On the above grounds, the learned Senior Panel Counsel seeks for dismissal of the Writ Petition.

16 Heard the learned counsel appearing for the parties and perused the materials placed on record.

17. The undisputed facts are that the vessel, 'M.V. Merini', carrying urea in bulk, weighing 30,000 MTs under two Bills of Lading arrived at the Port of Cuddalore on 13.11.1992. The vessel commenced discharge of the cargo on 23.11.1992 and completed the discharge after 2 1/2 months, i.e., on 19.02.1993. A draft survey report was prepared on behalf of the petitioner, dated 22.02.1993, indicating discharge of 29,483 mts of cargo. The draft survey report prepared on the same day on behalf of the shipper, indicates discharge of 29,963.50 mts. The survey reports confirms full discharge of the cargo, as per the Bills of Lading and the Import Manifest filed with customs. On 19.03.1993, landing certificate was issued by Superintendent of Customs, confirming the survey reports of the petitioner and shipper, indicating short landing of 483.739 mts of cargo. On 09.03.1995, the Assistant Collector, Cuddalore, issued a show cause notice, proposing to impose penalty of Rs.34,05,093/- for the short landing. The petitioner submitted a reply on 15.04.1995, after which, the order-in-original was passed by the third respondent, dated 04.08.1999, imposing penalty of Rs.30,00,000/-. The petitioner preferred an Appeal before the second respondent within the period of limitation and the Appeal was dismissed, by order, dated 31.01.2003. Immediately thereafter, the petitioner filed Revision before the first

respondent, which was disposed of, by order, dated 31.03.2004, granting partial relief to the petitioner, by reducing the penalty to Rs.14,55,556.56.

18. The sheet anchor of the submission made by the learned counsel for the petitioner is by contending that, the enormous unexplained delay in concluding the proceedings will vitiate the same and the impugned orders are liable to be set aside. In the preceding para, the relevant dates have been noted, from which, it is seen that after two years from the date of discharge of the cargo completely, i.e. 19.02.1993, the show cause notice, dated 09.03.1995 was issued. Though the petitioner submitted reply on 15.04.1995, the order-in-original was passed by the third respondent after nearly four years, i.e., on 04.08.1999. The petitioner preferred Appeal within the period of limitation, but the Appellate Authority/second respondent took four years to pass final orders, i.e., 31.01.2003. Are these proceedings are vitiated on account of unexplained and enormous delay would be the question to be answered.

19. In Parekh Shipping Corporation (supra), the steamer agent contended before the High Court of Bombay that, it is impossible for them to show cause as to which of the goods were short landed 12 years before the date of the show cause notice. The Hon'ble Division Bench pointed out that, the exercise of powers under Section 116 of the Customs Act must be undertaken within a reasonable time, and in the said case, the show cause notice was issued beyond the period of limitation of five years from the date of vessel leaving the Port, which was held to be arbitrary and unreasonable. Further, it was pointed out that the period of five years is more than reasonable, as the bond executed by the Agents is for a period of five years. Accordingly, the writ petitioner succeeded before the Court.

20. In Raghuvar (India) Ltd., (supra), the Court pointed out that, any law or stipulation, prescribing a period of limitation to do or not to do a thing after the expiry of period, so stipulated, has the consequence of creation and destruction of rights, and, therefore, must be specifically enacted and prescribed therefor. It is not for the Courts to import any specific period of limitation by implication, where, there is really none, though Courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period.

21. In M/s.Wilco & Company (supra), a show cause notice was issued towards short landing after a period of six years, and the petitioner contended that, eventhough Section 116 of the Act does not provide any minimum period of limitation, the Courts have repeatedly interpreted the provision to the effect that the levy should be made within a reasonable period and in

accordance with the rulings, a maximum period could be only five years and not more. This contention was accepted by the Court and it was held that the Authority has to exercise powers within a reasonable period, and, what would be the reasonable, would depend upon the facts of each case and whenever question regarding the inordinate delay was in issue, it would be open to the assessee to contend that it was bad on the ground of delay.

22. In M/s. United Spirits Ltd., (supra), a show cause notice was issued after a gap of 8 1/2 years. The Court, taking note of the earlier decision, allowed the Writ Petition and quashed the proceeding on the ground of unreasonable delay.

23. The first respondent/Revisional Authority, in exercise of his powers under Section 129 (D) (D) of the Act, in M/s. Shipping Corporation of India, in Order No.501 to 504 of 2000, dated 27.09.2000, allowed the Revisions, as the proceedings were delayed for more than a period of five years and relied upon the earlier decision passed by the Government, wherein, it had been held that, adjudication proceedings would have to be completed within the five years from the date, the Ocean going vessel called at the Port or that the bond binding the agents should be current while imposing the penalty under Section 116 of the Customs Act.

24. In J.M. Baxi and Co. Vs. The Government of India, New Delhi and others), in W.A.No.2445 of 2011, dated 08.02.2016, the vessel completed the offloading on 31.07.1992, and the landing certificate was issued after a period of more than two years had passed and the importer had cleared the cargo i.e., on 30.09.1994, and the Court upheld the claim made by the Steamer Agent in the said case.

25. As pointed out in the aforementioned decisions, the respondents, while exercising the powers under Section 116 of the Customs Act, have to exercise the same within the reasonable period, though the Act does not provide for a limitation, within which, the said power should be exercised. The Courts have consistently held that the period of five years to complete the adjudication proceedings should be reasonable period, as the bond executed by the agent is required to be kept alive for a period of five years. The Government of India, in exercise of its revisional powers, followed the decision of various Court and held to the same effect. In the preceding para, the relevant dates have been noted and the time taken between two stages have also been mentioned.

26. The learned Senior Standing Counsel for the Revenue would contend that the show cause notice was issued well within the period of five years from the date of discharge, and therefore, the decisions referred to by the petitioner are

distinguishable. One more contention being that, if the steamer agent was of the view that, Import Manifest or Import Report is in any way incorrect or incomplete, they should have taken steps to amend the same. They having not done so, the petitioner should be made to pay penalty. In this regard, the decisions of the Hon'ble Division Bench, in i) Chowgule Brothers (supra) and ii) Caraval Logistice Pvt. Ltd., (supra) were referred to.

27. The underlying principle in all the decisions is that, though an Authority, exercising power under the statute can do so, and if such an action has the effect of disturbing rights of a citizen, it should be done within a reasonable time, even if period of limitation is not stipulated under the relevant statute. What is required time would depend upon the facts and circumstances of each case. Thus, bearing the legal principle in mind, it is absolutely necessary to examine the factual matrix of the case.

28. As mentioned earlier, the cargo was a bulk urea, weighing 30,000 MTs and the vessel came to the Port at Cuddalore, which is an anchorage port. The discharge of the cargo commenced on 23.11.1992 and it has taken 2 1/2 months for the vessel to be completely discharged, i.e., 19.02.1993. The landing certificate was issued after nearly 1 month, 19.03.1993, indicating short landing of 483.739 mts. The petitioner, being the steamer agent, was required to execute a bond and the bond to be kept alive for a period of five years. The Courts have held that, if adjudication process is completed within the period of five years, it would be reasonable, as the Agent cannot be directed to endlessly keep the bond alive.

29. In the cases on hand, though cargo was completely discharged on 19.02.1993, it took two years for the Department to issue show cause notice, (i.e. on 19.03.1995). The petitioner appears to have been prompt in responding to the show cause notice by submitting reply, dated 15.04.1995, and nothing happened thereafter for four years and the order-in-original was passed on 04.08.1999. Immediately thereafter, the petitioner preferred Appeal to the second respondent/Appellate Authority, which was rejected only after four years, i.e., 31.01.2003. The petitioner's Revision Petition, which was filed within the limitation, took one year, to be disposed of by the first respondent, by order, dated 31.03.2004. Only saving grace being that the penalty was reduced.

30. Thus, from the date of discharge, it has taken 11 years for the matter to attain finality. However, it is yet to attain finality since this Writ Petition has been pending since 2004. The time taken by the first respondent/Revisional Authority cannot be stated to be either unreasonable or suffers

from inordinate delay and laches, as it is little over one year only. However, the Court cannot shut its eyes to the delay in adjudication of the show cause notice and the delay in disposing the Appeal Petition. This has taken 10 years from the date of discharge. The facts clearly disclose that the delay is inordinate and arbitrary.

31. Thus, the Revenue cannot seek to distinguish the decisions referred to by the learned counsel for the petitioner, by contending that the show cause notice was issued well within the period of five years from the date of discharge. In my considered view, the time taken for adjudication is what important to be noted, and if the said time is reckoned, it has taken six years for the Authorities to complete the adjudication from the date of discharge, which is found to be unreasonable in all the decisions referred to above. The penalty, which was imposed by the Adjudicating Authority and confirmed by the Appellate Authority was twice the shortage. On revision, the first respondent/Government of India noted that, there is nothing on record to show that the petitioner is intentionally or actively responsible to the said short landing in goods, and having rendered such a finding, the first respondent ought to have exercised its powers, and deleted the entire penalty. In other words, the first respondent was satisfied that there is no mens rea on the part of the petitioner. The nature of cargo, Bills of Lading, time taken for completing the discharge, where all reckoned by the first respondent/Government of India and was convinced to hold that the petitioner was not intentionally or actively responsible for the short landing.

32. Therefore, I have no hesitation to hold that the inordinate delay in concluding the adjudication proceedings is unreasonable. Further, the Revisional Authority, Government of India, having found that, no blame can be fastened on the petitioner for intentionally being the cause for the short landing, this is a fit case, where, the entire penalty imposed on the petitioner requires to be vacated.

33. Accordingly, the Writ Petition is allowed, and the impugned order and the consequential order, dated 27.08.2004, passed by the third respondent, in compliance of the order passed by the first respondent, with regard to the reduction of penalty are quashed. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

sd
To

1. The Joint Secretary,
Ministry of Finance, (Department of Revenue)
4th Floor, Jeevandeep Buildings,
Sansadh Marg, Parliament Street,
New Delhi - 110 001.
2. The Commissioner of Customs,
and Central Excise (Appeals)
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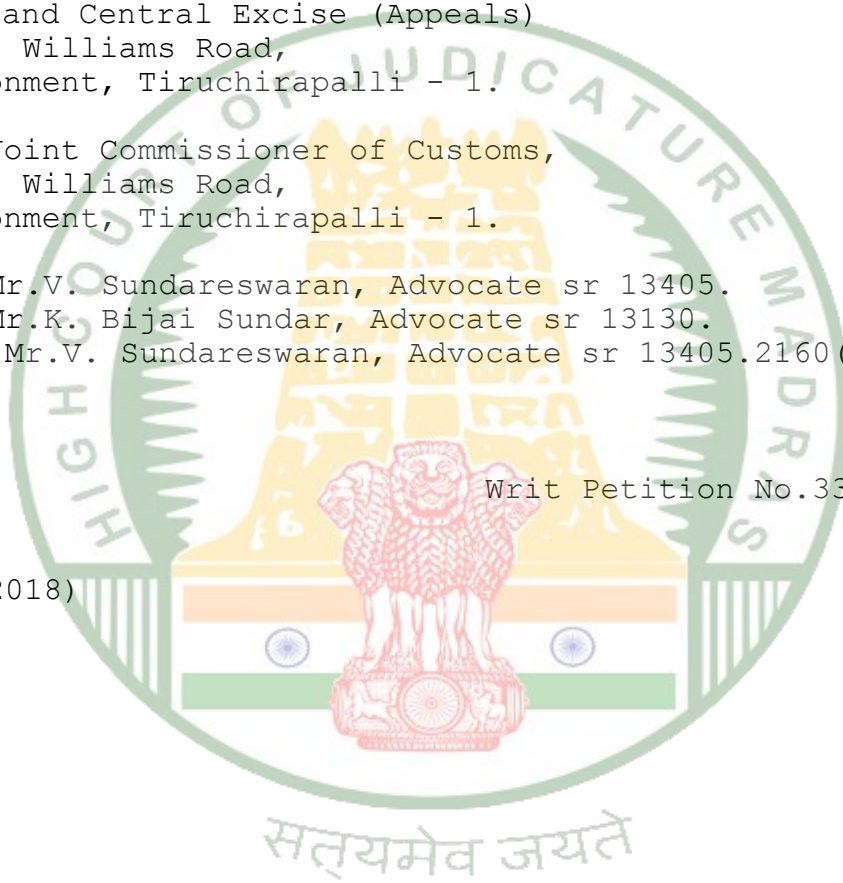
+1 CC to Mr.V. Sundareswaran, Advocate sr 13405.

+1 Cc to Mr.K. Bijai Sundar, Advocate sr 13130.

+1 CC to Mr.V. Sundareswaran, Advocate sr 13405.2160 (07/06/2018)

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SP (07/03/2018)



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