

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 399 OF 2009**

1. M/s Kundil Sponge Iron Limited  
having its registered office at  
610, Shiv Towers, Patto Plaza,  
Panaji Goa. 403 001.
2. Mr. Vijay Kashyap,  
Shareholder and  
Director of the Petitioner No.1  
Company, having office at 610  
Shiv Towers, Patto Plaza,  
Panaji Goa. - 403 001. ... Petitioners

***Versus***

1. Board of Trustees of the  
Mormugao Port Trust,  
through its Secretary,  
having its office at Mormugao Harbour  
Mormugao, Goa.
2. The Traffic Manager,  
Traffic Department of the  
Mormugao Port Trust,  
having office at Mormugao Harbour  
Mormugao, Goa. .... Respondents

Mr. Nitin Sardesai, Senior Advocate with Mr. H. D. Naik, Advocate  
for the Petitioners.

Mr. Y. V. Nadkarni and Ms. D. Shirgam, Advocates for the  
Respondents.

**Coram:- M. S. SONAK &  
NUTAN D. SARDESSAI, JJ.  
Date:- 25th September, 2019**

**Oral Judgment ( Per M. S. Sonak, J)**

Heard Mr. N. Sardesai, learned Senior Advocate alongwith Mr. H. D. Naik for the Petitioners.

2. Heard Mr. Y. V. Nadkarni, learned counsel for the Respondents.

3. The Petitioners, by instituting this petition under Article 226 of the Constitution of India seek the following substantive reliefs:-

*“(I) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of a Certiorari or an appropriate writ, order or direction or declaration calling for the records from the Respondents and after having examined the legality, reasonability and propriety of the impugned Circular dated 11/06/2009 be pleased to quash and set aside the said Circular dated 11/06/2009.*

*(II) That this Hon'ble Court be pleased to issue a writ of Mandamus, or a writ in the nature of a mandamus or any other appropriate writ, order or direction commanding the Respondents to allow the Petitioners to lift the coal which is presently lying at the yard in the Port next to Berth Nos.10 and 11 of the Port of the Respondent.”*

4. The impugned Circular dated 11.06.2009, which is the subject matter of the present petition provides that the demurrage shall be payable, *inter alia* by the Petitioners and other coal/coke importers at the rates specified in the Circular, effective from the first shift on

15.06.2009 prospectively.

5. Mr. Sardesai, learned Senior Advocate for the Petitioners submits that the Respondents have absolutely no powers either under any law, rules or regulations to issue the impugned Circular, charging the demurrage in addition to the normal rent which the Respondents are charging for handling the coal/coke. He submits that the power or the jurisdiction to prescribe any scale or rates for services to be performed by the Board or other persons under the Major Port Trusts Act, 1963 ( the said Act ) is exclusively vested in the Traffic Authority for Major Ports (TAMP) constituted under Section 47-A of the said Act. He submits that the Traffic Officer i.e. the Respondent No.2 who has issued the impugned Circular lacks any power or authority to issue the same. On this ground, Mr. Sardesai submits that the impugned Circular is liable to be quashed and set aside.

6. Mr. Sardesai submits that the demurrage is basically in a nature of penalty upon the importers of coal and coke. He submits that the demurrage has no co-relation with the services performed by the Board or any other person under the said Act. He therefore submits that the Traffic Inspector has absolutely no jurisdiction or power to issue the impugned Circular. In any case, he submits that the demurrage which is in the nature of a penal provision, is clearly unenforceable except upon proof of actual damages by the Respondents. He submits that in the

present case, there is no proof of actual damages and therefore, the levy of demurrage, which is penal in nature is clearly *ultra vires* the general principles of contract as also the provision of the said Act. He submits that the levy of demurrage is in fact arbitrary and constitutes unreasonable restriction on the Petitioners' fundamental right guaranteed by Article 19(1)(g) of the Constitution. He submits that since such levy is arbitrary, the impugned Circular violates Article 14 of the Constitution of India as well.

7. Mr. Sardesai without prejudice to the aforesaid submits that the impugned Circular incorrectly records that the demurrage scheme was discussed with the coal/coke importers in the meeting held on 05.06.2009 and the consensus was arrived at for implementation of the demurrage scheme. He points out that the Petitioners' representative who was present at the meeting held on 05.06.2009 never consented to the proposed demurrage scheme. He points out that there is no written consent produced on record by the Respondents. He points out that the sheet annexed to the minutes is only an attendance sheet and on the basis of the same, it cannot be said that any consensus was arrived at in the meeting held on 05.06.2009. He therefore submits that the impugned Circular dated 11.06.2009, which is purportedly based upon the consent or consensus, which was never given or arrived at, is liable to be set aside.

8. Mr. Sardesai submits that for all the aforesaid reasons, the impugned Circular dated 11.06.2009 is required to be set aside and consequential reliefs be granted to the Petitioners.

9. Mr. Nadkarni, learned counsel for the Respondents contests each of the contentions raised by Mr. Sardesai on behalf of the Petitioners. He points out that the Petitioners import miniscule percentage of coal/coke at the Port. He points out that all other importers have stood by consensus arrived at in the meeting held on 05.06.2009. He points out that even on 07.01.2008, the Mormugao Port Users Association had agreed to levy demurrage charges, in the interest of not just the Port but importers themselves and cause of prevention of environmental pollution. He submits that it is only in the petition the Petitioners have disputed their consent to the decision in the meeting held on 05.06.2009.

10. Mr. Nadkarni submits that the MPT on 18.02.2008 has already submitted a proposal to the TAMP for approval of the scale of rates for demurrage and storage charges. He submits that the impugned Circular is entirely consistent with the guidelines for Regulation of Tariff, which clearly empower the Respondents to levy demurrage charges on ad-hoc basis till the rate is finally notified by TAMP. He submits that the TAMP in the present case has finally notified the very same rates for demurrage by its order dated 14.05.2010. He submits

that the issuance of the impugned Circular is entirely consistent with the Notification dated 28.03.2005 issued by the TAMP itself. For all these reasons, Mr. Nadkarni submits that this petition may be dismissed.

11. The rival contentions now fall for our determination.

12. The record in the present case indicates that the Respondents resolved to set up new berths 5A and 6A to handle dry bulk cargo of all kinds including in particular dirty cargo i.e. coal/coke. In the affidavit filed on behalf of the Respondents, it is stated that this decision was taken in the larger interest of both the public as also the Port users, keeping in mind the mandate to minimize pollution, if not totally eliminating the same.

13. The importers and regular port users who had been operating the Port since many years instituted a Writ Petition No.151 of 2005 in this Court questioning the decision of the Respondents to transfer handling of coal/coke from the existing berths No.10 and 11 to new berth Nos.5A and 6A on various grounds *inter alia* related to logistics, road transport etc.

14. This petition was disposed of by this Court directing the Secretary, MoS, Government of India to look into the grievances of the

importers and port users in consultation with Goa State Pollution Control Board (GSPCB) and to take appropriate decision, which, the parties shall abide by the directions.

15. In terms of the directions of this Court, the Secretary made an order dated 15.12.2005 for continuance of handing coal/coke at berth nos.10 and 11 by taking necessary environmental measures in consultation with GSPCB. The order also made it clear that the responsibility to provide and operate the pollution control system for environmental protection should be of the users. The users were also directed to ensure speedy evacuation of cargo by road surface transport and attempts should be made to maximize the evacuation of cargo by rail transport. The port was directed to work out the modalities for evacuating the cargo in consultation with the port users, with a view to ensure control of pollution.

16. The return filed on behalf of the Respondents states that pursuant to the order dated 15.12.2005, the port users formed a Special Purpose Vehicle (SPV) under the name and style of Mormugao Port Users Association for effective implementation, *inter alia* of the pollution control measures pursuant to the continued use of berth nos.10 and 11 for handling of coal/coke. Certain norms were prescribed and were expected to be complied with by all the users. However, it was noticed that there was laxity in compliance and the issue was time and

again taken up with the port users and importers.

17. The return filed by the Respondents further states that the prolonged discussions were held in the meetings held on 02.07.2007 and 18.07.2007, in which a consensus was arrived at to formulate and implement a scheme for levy of demurrage/storage charges to deter the importers from using the transit area as storage yard and also to adhere to the evacuation rate of cargo and thereby reduce the dwell time. All this was expected to contribute to the cause of reduction or minimization of the pollution issue which invariably resulted on account of handling and storage of coal/coke in the transit area.

18. The record indicates that consistent with the consensus so arrived at, a proposal was formulated by the MPT and forwarded to TAMP for fixing of rates towards such demurrage/storage charges. This proposal was forwarded on 18.02.2008 and the same is part of paper book in this petition at page 55.

19. The record indicates that the purpose for such levy was not strictly speaking the penal in nature. However, the object was basically to disincentivize the importers from continuing to store coal/coke in transit area for some excessive period. Such storage obviously, caused serious inconvenience to the functioning of the Port and contributed immensely the environmental pollution. The record indicates that the

proposal forwarded by the MPT to TAMP vide communication dated 18.02.2008 was quite consistent with the consensus arrived at between the MPT and Port users as represented by the Mormugao Port Users Association.

20. Pending the approval from the TAMP, the Respondents issued the impugned Circular dated 11.06.2009, which was made effective from 15.06.2009 prospectively.

21. According to us, there is no good ground made out to quash and set aside the impugned Circular dated 11.06.2009 on the ground that the Respondents had no power or jurisdiction to issue the same. The impugned Circular, determines and levies rates on ad-hoc basis until the rates proposed by the Respondents in its proposal dated 18.02.2008 are finally approved and notified by the TAMP. The power to determine and levy on ad-hoc basis, such rates can be traced from the Notification dated 28.03.2005 issued by the TAMP itself and therefore, the impugned Circular cannot be said to be *ultra vires*.

22. The Notification dated 28.03.2005 issued by the TAMP makes the following provisions which are relevant to the issues raised in the present petition.

*“2.17.1. Whenever a specific tariff for a service/cargo is not available in the notified Scale of Rates, the port can submit a suitable proposal.*

*2.17.2. Simultaneously with the submission of proposal, the proposed rate can be levied on an ad hoc basis till the rate is finally notified.*

*2.17.3. The ad hoc rate to be operated in the interim period must be derived based on existing notified tariffs for comparable services/cargo; and, it must be mutually agreed upon by the Port/Terminal and the concerned User(s).*

*2.17.4. The final rate fixed by the TAMP will ordinarily be effective only prospectively. The interim rate adopted in an ad hoc manner will be recognised as such unless it is found to be excessive requiring some moderation retrospectively.*

*2.18.1. Users shall pay interest on delayed payments and the port shall pay interest on delayed refunds at the same rate.”*

23. From the aforesaid, it is quite clear that whenever a specific tariff for service is notified the scale of rates, the Port can submit a suitable proposal to the TAMP in terms of clause 2.17.1 of the Notification dated 28.03.2005. Further, simultaneous with the submission of such proposal, the proposed rate can be levied on an ad hoc basis till the rate is finally notified by the TAMP. This is clear from the provision in clause 2.17.2 of the Notification dated 28.03.2005.

24. Further, clause 2.17.3 of the Notification dated 28.03.2005 provides that the ad hoc rate to be operated in the interim period must be derived based upon the existing notified tariffs for comparable services/cargo; and, it must be mutually agreed upon by the Port/Terminal and the concerned user(s).

25. Therefore, in the context of provisions in clause 2.17.3 of the Notification dated 28.03.2005, the issue of mutual agreement between the Port/Terminal and the concerned users, assumes significance. It is in the context of clause 2.17.3 of the Notification dated 28.03.2005 that Mr. Sardessai urges that there was no consent granted by the Petitioners or that there was no mutual agreement between the MPT and Port users or importers including in particular the Petitioners in the present petition.

26. In response, the Respondents have categorically stated that the consensus was arrived at in the meeting held on 02.07.2007 and 18.07.2007 and consistent with such consensus the MPT, forwarded the proposal dated 18.02.2008 to the TAMP. According to us, there is no reason to disbelieve this statement made in the affidavit filed on behalf of the Respondents. In any case, the Respondents along with their affidavit have placed on record the minutes of the meeting held on 05.06.2009, which was attended by the officials of the Respondents and coal/coke members and their representatives precisely to discuss the issue of slow evacuation and implementation of demurrage scheme.

27. The minutes of the meeting held on 05.06.2009 which are part of the paper book in this petition very clearly indicate the nature of consensus arrived at for the purpose of implementation of demurrage scheme prospectively from the first shift of 15.06.2009. To the minutes

is attached the attendance sheet. At serial No.14 of the attendance sheet, the representative of the Petitioners has put his signature.

28. It is not possible to accept the contention of Mr. Sardesai that the representative of the Petitioners never consented to the implementation of the demurrage scheme. In the affidavit in rejoinder filed by Mr. Vijay Kashap, Petitioner No.2, all that is stated in paragraph 12, in relation to the meeting held on 05.06.2009 is as follows :-

*“12. I deny that the Petitioners Representative who was present at the said Meeting held on 05.06.2009 did not object to the levy of Demurrage Charges as agreed by the consensus at the said meeting. I state that assuming but without in any way admitting that the Petitioners' representative did not object to the levy of Demurrage Charges or that the Circular levying Demurrage Charges has been issued with the consensus of the parties, the same will not give any power to the Respondents to issue such a circular levying Demurrage in the nature of a penalty. I state that even otherwise, the said levy of demurrage charges as prescribed in the Circular is exorbitant and penalises the Users who are handling the coal and coke at the berths of the Respondent Port Trust. I state that as has been stated in the petition, the delay caused in evacuating the cargo is for bona fide reasons and therefore under the garb of controlling pollution, the Respondents have no powers to levy such demurrage in the manner in which it has been done.”*

*(Emphasis supplied )*

29. According to us, on the basis of the aforesaid statement, the

Petitioners cannot urge that there was no mutual agreement between the Port and the importers or for that matter between the Port and the Petitioners. In fact, the aforesaid statement, does not even specifically deny that there was no consensus but rather, the aforesaid statements concedes that there was consensus at the said meeting. The representative who actually attended the meeting held on 05.06.2009 has not bothered to file any affidavit but the affidavit is filed by the Petitioner No.2 who did not even attend the meeting held on 05.06.2009. Therefore, we are unable to accept the contention of the Petitioners that there was no compliance with the provisions in clause 2.17.3 of the Notification dated 28.03.2005 in the present case.

30. Besides, we find that the provisions of clause 2.17.3 contemplate a mutual agreement between the Port/Terminal and the concerned user(s). This does not mean or cannot be interpreted as mutual agreement between the Port/Terminal on one hand and each and every users of the services of the Port. The provision only means that there should be a broad consensus amongst the parties. The consensus does not mean and imply that every single user must agree and in the absence of agreement by every single user the Port is disabled from operating any ad hoc rate in the interim period when the proposal for approval of rate is pending before the TAMP. In the present case, it is necessary to note that besides the Petitioners, none of the other coal/coke importers have objected to the levy on the ground of any

alleged absence of mutual agreement. The SPV has also not objected to such levy on the ground that there was no consensus. These are additional reasons to reject the contention based upon clause 2.17.3 of the Notification dated 28.03.2005.

31. The contention that the demurrage is only a penalty and therefore not relatable to any services performed by the Board, cannot be accepted, taking into consideration the provisions in Section 48 of the said Act. The provisions in Section 48 *inter alia* provide that the TAMP shall from time to time by Notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified in sub clause (1) of Section 48 shall be performed by the Board or any other person authorised under Section 42 at or in relation to the port or port approaches. One of the services specified in sub clause (d) of Section 48(1) is as follows :

*“(d) wharfage, storage or demurrage of goods on any such place.”*

32. Thus, there is direct reference to demurrage in Section 48(1) of the said Act. Taking into consideration such direct reference, we are unable to accept the contention of the Petitioners that the demurrage is only penal in nature and therefore, has no co-relation whatsoever with the services provided by the Board or any other person authorised under Section 42 of the said Act.

33. The issue of power of the Port Trust to levy demurrage came up for consideration before the Apex Court in the case of ***Board of Trustees of the Port of Bombay Vs Jai Hind Oil Mills Co., and others***<sup>1</sup>. In this context this is what the Hon'ble Apex Court has observed at paragraph 10 :

*“10. The power of a Port Trust to fix rates of demurrage and to recover the same from an importer or exporter (although the question of an exporter paying demurrage arises rarely) under law and to show concession as regards demurrage charges in certain specified cases is recognised by this Court in the Trustees of the Port of Madras v. M/s. Aminchand Pyarelal & Others, [1976] 1 SCR 721 and in the Board of Trustees of the Port of Bombay versus Indian Goods Supplying Co., [1977] 3 SCR 343. These decisions are no doubt based on the relevant laws which were in force at the material time. But the decisions are still relevant insofar as cases arising under the Act because the Act also contains provisions more or less similar to the statutory provisions considered in the said decisions. Demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour. They are always fixed in such a way that they would make it unprofitable for importers to use the port premises as a warehouse. It is necessary to do so because congestion in the ports affects the free movement of ships and the loading and unloading operations. As stated earlier. the Port Trust shows concession to the party concerned in certain types of cases”.*

*( Emphasis supplied )*

34. Thus, it is clear that the demurrage charges are levied in

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<sup>1</sup> (1987) 1 SCC 648

order to ensure quick clearance of the cargo from the harbour. They are always fixed in such a way that they would make it unprofitable for importers to use the port premises as a warehouse. It is necessary to do so because congestion in the ports affects the free movement of ships and the loading and unloading operations.

35. In the present case, levy of such demurrage was further necessitated on account of issue of pollution which was generated by long storage of coal/coke at the berth or in the designated plot or transit area. Accordingly, there is no good ground to interfere with the impugned Circular on the grounds alleged by the Petitioners. The record indicates that the TAMP has ultimately, vide Notification dated 10.06.2010 approved the rates of demurrage. The impugned Circular therefore really operated in the interim period i.e. between 15.06.2009 and 10.06.2010. As noted earlier, the Respondents had ample power to levy on ad hoc basis the demurrage until the rate was finally notified by the TAMP in terms of Notification dated 28.03.2005 issued by the TAMP itself. Accordingly, it cannot be said that the impugned Circular is either *ultra vires* or *usurps* the jurisdiction vested exclusively in the TAMP.

36. According to us, there is also no merit in the contention that the demurrage is penal in nature and therefore, could never have been enforced without actual proof of damages. In the first place, it is

not correct to say that the demurrages are *per se* penal in nature. The object for levy of demurrage has been explained by the Apex Court in *Jai Hind* ( *supra* ). Besides, in this case, there is no ample material on record which establishes that there was mutual agreement between the Port/Terminal and the users which would include the Petitioners herein. Finally the rates have been approved by the TAMP w.e.f. 10.06.2010. Even the Petitioners have not challenged this approved rates as being exorbitant or arbitrary. In these circumstances, the challenge based upon Article 19(1)(g) of the Constitution or Article 14 of the Constitution is devoid of any serious substance.

37. The Petitioners have not pressed any other grounds or applied for any other reliefs other than for setting aside the impugned Circular dated 11.06.2009 *inter alia* on the ground that the issuance of the said Circular was *ultra vires* power of the Respondents. For the reasons which we have indicated above, we find that there is nothing illegal or *ultra vires* in the issuance of the impugned Circular dated 11.06.2009 which, in any case was only an interim measure. Even this interim measure was very much consistent with the Notification dated 28.03.2005 issued by the TAMP itself. Even the recitals in the impugned Circular dated 11.06.2009 clearly spell out the reason for issuance of the same. There is material on record which backs the reason reflected in the impugned Circular. Upon overall consideration of the material on record, we are satisfied that there is no arbitrariness in the

levy of demurrage or in the rates of demurrage.

38. For all the aforesaid reasons, we discharge the rule and dismiss this petition. There shall be however no order as to costs.

**NUTAN D. SARDESSAI, J**

**M. S. SONAK, J**

**at\***