

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.11.2019

DELIVERED ON : 20.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

W.P.NO.12813 OF 2014

Global United Shipping India Private Limited,
(formerly known as Jalhansa Enterprises Pvt Ltd.)
Represented by its Director Mr.Prem Kumar Menon
4th Floor, AKDR Tower,
3/381, Rajiv Gandhi Salai (OMR),
Mettukuppam, Chennai - 600 097.

.. Petitioner

Vs.

Traffic Manager,
Chennai Port Trust,
Rajaji Salai,
Chennai - 600 001.

.. Respondent

Prayer:

Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records of the respondent in Letter No.GL/529/2012/TC, dated 17.08.2012 and quash the same as arbitrary and illegal and directing the respondent to refund Rs.29,08,476/- illegally collected as "wharfage" along with interest to the petitioner.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.P.M.Subramaniam

O R D E R

The writ petition has been filed challenging the order passed by the respondent Chennai Port Trust rejecting the petitioner's claim for refund of "wharfage" paid by them.

2. The brief facts leading to filing of this petition is as follows:

(i) The petitioner purchased a merchant vessel known as m.v.Jal Vahini, from China and the vessel came to respondent Port on 01.07.2011, discharged cargo and sailed out on 08.07.2011.

(ii) On arrival of the vessel, respondent charged wharfage on the assessed value of the vessel at Rs.29,08,476/- which included basic cost of the vessel, freight and insurance. The said amount has also been paid by the petitioner on 07.07.2011.

(iii) After paying the wharfage, the petitioner realised that respondent has charged wharfage erroneously since wharfage would apply only for import or export of cargo and not for a vessel carrying cargo. Hence, the petitioner wrote a letter to the respondent on 02.09.2011, seeking for a clarification as to how the wharfage is applicable to the vessel and also sought for details of the relevant provisions in the Chennai Port Trust Act, under which wharfage was charged.

(iv) In response to the said letter of the petitioner, the respondent in their reply dated 22.09.2011, informed the petitioner that as per Sl.No.36 A of para VI under Chapter 1.1. of Scales of Rates (SOR), wharfage would be applicable for a vessel as imported cargo.

(v) Thereafter, on 02.07.2012, the petitioner sent a letter seeking refund of wharfage amount paid by the petitioner, which came to be rejected by the respondent by order dated 17.08.2012, which is under challenge in this writ petition.

3. According to the petitioner, the vessel would not fall within the definition of 'cargo' and the vessel has been erroneously categorised as 'cargo' by the respondent. That apart, the respondent charged wharfage classifying the vessel under Sl.No.36A of the tariff under the Chennai Port Trust scale of rates, which is a residuary item i.e. "item not otherwise specified-other than bulk".

4. According to the petitioner, as the vessel was not specifically brought under the definition of 'cargo' under the tariff rates, the respondents cannot collect wharfage on the vessel and hence the very demand and collection of wharfage is illegal and not authorised by law and hence the petitioner is entitled for refund.

5. The respondent filed counter affidavit stating that the vessel has entered the port area as "imported cargo" and wharfage was charged under Sl.No.36A of para VI under Chapter 1.1 on ad-valorem basis of 0.57% as per the scale of rates approved by the Tariff Authority for Major Ports (in short "TAMP"). The above vessel was imported under Bill of Entry for home consumption and customs duty paid for entering the Port as imported cargo. Therefore, the respondent has rightly collected wharfage as per the provisions of the Major Port Trust Act, 1963 (hereinafter referred to as the 'Act'). When a vessel is

imported and manifested as a cargo in the Import General Manifest, the same has to be treated as cargo and all charges applicable for cargo is payable by the petitioner as per the procedure adopted by all other Major Ports in India.

6. It is also further stated that the wharfage charges have been paid and the demand for refund is barred under Section 55 of the Act. Any claim for refund should be made within a period of six month from the date of payment, whereas, the petitioner paid the amount on 07.07.2011, thereafter on 02.09.2011, the petitioner only sought for a clarification and for which an appropriate reply was sent on 22.09.2011, by the respondent. Thereafter, ten months later, the petitioner sought for refund of the amount which was rightly rejected by the respondent as barred by limitation.

7. That apart, under Section 120 of the Act, no suit or proceedings shall be commenced against the Board after six months after the accrual of the cause of action and the writ petition was filed after two years of the order passed by the respondent and therefore the petitioner cannot maintain the writ petition.

8. Mr. Joseph Prabakar, learned counsel appearing for the petitioner would vehemently contend that the very collection of wharfage is illegal and the respondent cannot collect wharfage by treating the vessel as cargo. The vessel and the tariff rates are approved by the TAMP and it does not authorise the respondent to collect wharfage on vessels treating it as cargo and the respondent cannot invoke residuary clause in the above tariff charges and collect wharfage.

9. He further contended that the respondent after realising their mistake sought for legal opinion as to whether the vessels which are being imported and/or exported and mentioned, either in the Import General Manifest (IGM) or Export General Manifest (EGM), as cargo, or as conveyance and whether they can levy wharfage thereon. Legal opinion was given to the effect that vessels which call at the Major Ports, for which IGMs and/or EGMs are filed for the purposes of the Customs Act, 1962 cannot be treated as 'cargo' and they are conveyance only; and Major Ports should not charge wharfage on such vessels.

10. Accepting the said legal opinion, the TAMP also amended the tariff rates and included a new clause in the category 'Cargo Related Charges' stating that vessels calling the Port on her first Voyage, which are declared as 'cargo' in the Import General Manifest or Export General Manifest for the purpose of Customs Act, 1962, shall not be treated as cargo and no wharfage shall be levied on such vessels.

11. Learned counsel for the petitioner further contended that the respondent has now accepted that the vessels which are calling the Port cannot be treated as a cargo and no wharfage can be levied on it and also amended the tariff charges subsequently, therefore, the very collection of wharfage from the petitioner is illegal and wharfage has been collected mistakenly and hence they are entitled for refund.

12. So far as limitation is concerned, according to the learned counsel for the petitioner, when the amount has been mistakenly collected by the authorities, they cannot rely upon the limitation clause and refuse to refund the amount.

13. Per contra, the learned counsel appearing for the respondent would contend that the very refund claim is barred by limitation, as the petitioner did not make any claim for refund within a period of six months as contemplated under Section 55 of the Act. That apart, the writ petition is filed belatedly after two years after the orders passed by the respondent rejecting the petitioner's claim for refund and therefore the writ petition is barred by limitation under Section 120 of the Act.

14. Learned counsel for the respondent further contended that the wharfage collected by the Port Trust as per tariff charges approved by TAMP treating the vessel as cargo and the tariff rate has been amended only in the year 2015, the amendment came into force w.e.f 25.03.2015, and hence it is only a prospective amendment and the petitioner cannot claim relief upon the same seeking for refund.

15. Learned counsel for the respondent further contended that under Section 2(22) of the Customs Act, petitioner himself has filed import manifest to the Customs authorities treating the vessel as a cargo and paid duties and now it is not open to them to contest that the vessel cannot be treated as a cargo and no wharfage can be levied on it.

16. Learned counsel for the respondent also relied upon a recent judgement of this Court in Alcatel Submarine Networks UK Ltd., Vs. Union of India in W.P.No.15248 of 2017 dated 25.04.2019, where, in similar circumstances, this Court has held that wharfage can be levied treating the vessel as cargo.

17. I have considered the rival submissions and also perused the records carefully.

18. The primordial contention of the petitioner is that a vessel which is sailing into a Port on its own steam and sail out of the Port limits cannot be treated as a cargo and no

wharfage can be levied on such vessel. In support of the above contention, the learned counsel appearing for the petitioner mainly relied upon the subsequent amendment made to the tariff rates based on the legal opinion obtained by the Major Port Trusts that a vessel which called at a Major Port Trust cannot be treated as a cargo merely because they filed import manifest for the purpose of Customs Act and Port should not charge wharfage on such vessel.

19. That the above amendment has been made in the tariff rate only in May, 2015, and the notification proposing the amendment came into effect from 25.03.2015, which is only prospective in nature and therefore the petitioner cannot rely upon on the above amendment and contend that the very levy and collection of wharfage is illegal.

20. On the date of levying and collecting wharfage on the petitioner, there is no specific provision under the tariff rates exempting the vessel from payment of wharfage charges. The Port Trust has levied wharfage treating the vessel under a residuary clause under Sl.No.36A of Para VI under 1.1. of Chapter I of the tariff rates. According to the respondent, the said tariff has been invoked by all the Major Ports and has also gave particulars of payment of wharfage charges paid by many vessels. In these circumstances, petitioner cannot deny the liability to pay the wharfage charges.

21. So far as limitation for claim of refund is concerned, under Section 55 of the Act, any refund claim should be made within a period of six months from the date of payment of amount, whereas, in the instant case, wharfage charges were collected from the petitioner on 07.07.2011 and the refund claim was made only on 02.07.2012, beyond the period of six months. Even though the petitioner submitted that they made a claim on 02.09.2011 itself, a perusal of the said letter, sent by the petitioner, would show that they have not sought for any refund, but they have only sought for some clarification regarding levy of wharfage charges, for which, the Port Trust have replied on 22.09.2011 itself. Actually the claim for refund was made only on 02.07.2012, which was rejected by the respondent on 17.08.2012.

22. Mr. Joseph Prabakar, learned counsel appearing for the petitioner would contend that since wharfage has been levied without any authority of law and collected mistakenly, limitation is not applicable for claiming refund. In support of the said contention, learned counsel relied upon the following judgements:

“(i) Madras Port Trust Vs. Hymanshu International reported

in 1979 (4) E.L.T. (J 396) (S.C.).

(ii) Mahabir Kishore Vs. State of Madhya Pradesh reported in 1989 (43) E.L.T. 205 (S.C.).

(iii) Hind Agro Industries Limited Vs. Commissioner of Customs reported in 2008 (221) E.L.T. 336 (Del.).

(iv) Commr. Of C.Ex. (Appeals), Bangalore Vs. KVR Construction reported in 2012 (26) S.T.R. 195 (Kar.)

(v) Abdul Samad Vs. Commr. of C.Ex. & Service Tax, Mangaluru reported in 2019 (367) E.L.T. 189 (Kar).

(vi) 3E Infotech Vs. CESTAT, Chennai reported in 2018 (18) G.S.T.L. 410 (Mad.)"

23. On a perusal of all the above cases relied upon by the learned counsel appearing for the petitioner it could be seen that the amount has been collected by the authorities mistakenly, which was sought to be refunded, the Courts have held that payment itself was mistake and the authorities cannot raise a technical plea and they are bound to refund the amount.

24. In the judgement in Mahabir Kishore Vs. State of Madhya Pradesh reported in 1989 (43) E.L.T. 205 (S.C.) the respondent therein have collected the amount from the petitioner therein over and above his liability and the same was sought to be refunded. The Hon'ble Supreme Court held that the money was paid by mistake of law and the respondent cannot rely upon limitation and the provisions of Limitation Act is not applicable and ordered refund.

25. The judgement in Hind Agro Industries Limited Vs. Commissioner of Customs reported in 2008 (221) E.L.T. 336 (Del.) is also a similar case where the Customs authorities collected duties rightly but cess was paid mistakenly. Hence, it was held that the authorities cannot rely on the provisions under Section 27 of the Customs Act as it is not applicable.

26. Likewise, in Commr. of C.Ex.(Appeals), Bangalore Vs. KVR Construction reported in 2012 (26) S.T.R. 195 (Kar.) service tax has been mistakenly paid, for which, petitioner has no liability, that amount was directed to be refunded.

27. The other judgements relied on by the learned counsel appearing for the petitioner, are relating to payments made mistakenly and the Courts have directed the authorities to refund the same. Therefore, the judgements relied on by the learned counsel appearing for the petitioner are not factually applicable to the case on hand.

28. In the above circumstances, I find that the very claim for refund is barred by limitation under Section 55 of the Act and the respondent has rightly rejected the petitioner's claim

for refund. I do not find any illegality or irregularity in the order passed by the respondent warranting interference. There is no merit in the writ petition and the same is liable to be dismissed.

29. In the result, the writ petition is dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

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

+lcc to Mr.P.M.Subramaniam, Advocate, S.R.No.106487
+lcc to Mr.Joseph Prabakar, Advocate, S.R.No.106121

W.P.No.12813 of 2014

MP(CO)
CS/04/02/2020