IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :06.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.No.29847 of 2018

M/s.P.Perichi Gounder Memorial
Charitable Trust, 545, BKR Nagar,
Coimbatore - 641 012,
Represented by its Trustee
Dr.L.P.Thangavelu ..Petitioner

vs

1.The Commissioner of Customs,
(Appeals-II), Custom House
No.60, Rajaji Salai,
Chennai - 600 001.

2.The Additional Commissioner of Customs
(Group-5A)
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

3.The Assistant Commissioner of Customs
(Group-5A), Custom House
No.60, Rajaji Salai,
Chennai - 600 001. ..Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the Respondents, jointly and severally to ensure, clearance of cargo imported vide Bill of Entry No.8668059 dated 24.02.2017, without payment of demurrage and container detention charges in terms of the detention certificate issued from F.No.S.59/50/2017-Group-5B dated 25.04.2018.

For Petitioner : Dr.S.Krishnanandh

For Respondents : Mr.T.Pramod Kumar Chopda
Senior standing counsel

O R D E R

Dr.S.Krishnanandh, learned counsel on record for writ petitioner and Mr.T.Pramod Kumar Chopda, learned Senior standing counsel for Central Board of Indirect Taxes and Customs (CBIC) on behalf of all the three respondents are before this Court.

2. With consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

3. Writ petitioner, is a Charitable Trust engaged inter-alia in providing medical treatment to the poor and downtrodden, who cannot afford expensive medical treatment. It is the case of the writ petitioner that for providing medical treatment for economically weak / poor patients, who avail the hospital / medical facility of the petitioner Trust, the petitioner had placed an order for purchase of a Used Dialysis Machine with supplies and accessories, the details of which read as follows:

Quantity	DESCRIPTION	Unit Price in $ CAD	Total in $ CAD
	Used Dialysis Machines with supplies and accessories		
12 only	BAXTER Aurora Dialysis Machines	75	900
3 only	FRESENIUS Dialysis Machines	100	300
10 cases	Baxter Dialysis Machine Accessories	included	---
22 cases	Assorted Dialysis supplies	included	---
114 cases	Bellco Phylter Dialyzers	included	---
12 cases	Fresenius Optiflux Dialyzers	included	---
10 cases	B-D syringes	included	---
7 cases	JMS Harmony A-V Fistula Needle sets	included	---
1 Large Case	JMS Harmony A-V Fistula Needle set	included	---
20 cases	TORAY Hollow Fiber Dialyzers	included	---
18 cases	FRESENIUS combi blood tubing sets	included	---
	TOTAL DUE	---------	$CAD1200

4. This Court is informed by learned counsel for writ petitioner that the writ petitioner Charitable Trust is running a 50 Bedded Hospital and it is not being run with profit motive and that medical treatment is being provided by collecting only actual cost of some disposable items. In other words, a hospital which provides virtually free treatment to the poor and needy, is run by the petitioner Trust and it is a 50 Bedded hospital, is learned writ petitioner counsel's say. In the aforesaid backdrop, suffice to say that the aforesaid import made by writ petitioner ran into rough weather qua importability issue. Adjudication proceeded and the Joint Commissioner of Customs passed an adjudication order dated 23.03.2018 being order-in-original No.62373 of 2018 and operative portion of the said order reads as follows:

> '15. In the light of the aforesaid discussions and findings, I take lenient view and pass the following order and this order should not be taken as procedende for future import consignments.
>
> ORDER
>
> a. I order for confiscation of the impugned goods namely 'Used Baxter Aurora Dialysis Machine with Supplies and Accessories (C&F) valued at Rs.19,07,686/- under Section 111(d) of Customs Act, 1962.
>
> b. However, I give an option to re-deem the goods to the importer payment of Fine amounting to Rs.1,00,000/-(Rupees One Lakh only) under Section 125 (1) of the Customs Act, 1962.
>
> c. I impose a penalty of Rs.20,000/-(Rupees Twenty Thousand Only) on the importer M/s.P.Perichi Memorial Charitable Trust, Coimbatore under Sec.112(a) of the Customs Act, 1962.'

5. To be noted, the aforesaid order passed post remand after adjudication at the first instance was carried via the First Appellate Authority to the Tribunal, which remanded the matter back to Joint Commissioner of Customs. In other words, suffice to say that the aforesaid order-in-original being order dated 23.03.2018 was passed post remand by the Tribunal after the trajectory which has been set out here.

6. Be that as it may, there is no disputation or disagreement before this Court that writ petitioner had paid the redemption fine of Rs.1,00,000/- besides the penalty of Rs.20,000/- as per aforementioned order-in-original dated 23.03.2018.

7. To be noted, operative portion of the order-in-original extracted / reproduced supra, mentions about redemption Fine amounting to Rs.1,00,000/-(Rupees One Lakh only) under Section 125(1) of 'Customs Act, 1962' [hereinafter 'said Act' for brevity], but learned counsel for writ petitioner submits that

this is dovetailed with or intertwined with duty under 125(2) and that appropriate duty has also been paid. Payment of duty details is as follows:

6

Indian Customs EDI System - Imports V1.58001
CUSTOMS HOUSE 60,RAJAJISALAI,CHENNAI-600001
BILL OF ENTRY FOR HOME CONSUMPTION

For First Check

Custom Stn: INMAA1 CHA : AAREB9923LCH001 (R S ARUNACHALAM 1
BE No/Dt./cc/Typ:6668559/24/02/2017/N/H
Importer Details :3202099460 PAN : AAATP2872FFT001 AD Code : 6250223
P SKRICHI GOUNDER MEMORIAL CHARITABLE TRUST,
Inv No & Dt. : 001/2017/DST 02/01/2017 AHITEC SERVICES

Item Details

Slno / Qty / Unit	RITC	Description / Unit Price / Ass Val	CTH / CETH	C.Notn C.PSNO / E.Notn E.NSNO	RSP / Cus Dty Rt / Exc Dty Rt	Load PROV / BCD amt(Rs.) / CVD amt(Rs.)
2	90189031	USED FRESENIUS DIALYSIS MACHINE WITH SUPPLIES AND ACCESSORIES				
1.00		100.300000	90189031		7.50 %	1197.30
UNT		15963.90	90189031	C12/2012 310	6.00 %	1029.70
		Educational Cess on CVDs :			0.00 %	0.00
		Sec & Higher Edu. Cess on CVD :			0.00 %	0.00
		Customs Educational Cess :			2.00 %	44.50
		Customs Sec & Higher Edu. Cess :			1.00 %	22.30
		Addl Duty - (Imports) :		019/2006	4.00 %	730.30

Rs.	63855.59		Page Total	Rs.	12096.30
	Rs.	63855.59	BE Gross Total	Rs.	12096.30
BCD	Rs.	4789.20	NCD Duty	Rs.	0.00
ANTID	Rs.	0.00	SAFEGUARD Duty	Rs.	0.00
CVD	Rs.	4118.70	Sch 2 Spl Excise Duty	Rs.	0.00
CESS	Rs.	0.00	GSIA	Rs.	0.00
TTA	Rs.	0.00			
Edu. Cess CVD	Rs.	0.00	Customs Edu. Cess	Rs.	178.10
Health CVD	Rs.	0.00	Addl Duty - (Imports)	Rs.	2921.20
SHE. Cess CVD	Rs.	0.00	SH Cust Edu. Cess	Rs.	89.10

Duty Payable: Rs. 12096
Rs. Twelve Thousand and Ninety Six only

Container Details

1 2158469 F IPXU3770345

Declaration
1. I/We Certify that the above entries are correct.
2. I/We further declare that wherever the RSP is applicable same has been truthfully declared

CHA
R S ARUNACHALAM
Signature

Importer
P SKRICHI GOUNDER MEMORIAL CHARITABLE TRUST,
Signature

(NCD)

2/ 2

8. To be noted, there is also no disputation or disagreement that the aforesaid order-in-original dated 23.03.2018 made by the Joint Commissioner of Customs has been

given legal quietus or in other words, it has attained finality.

9. Under such circumstances, post above mentioned order-in-original made by the Joint Commissioner of Customs, 3rd respondent before this Court issued a communication bearing File No.S59/50/2017-Group-5B. This is an undated communication. Only the Month and Year have been mentioned. Month is April and the Year is 2018. However, this communication has been signed on 25.04.2018. Vide this communication, it was held that the custodian shall not charge rent or demurrage for consignment which is subject matter of instant writ petition. Learned counsel for writ petitioner very fairly submits that this communication from the 3rd respondent has been received by the writ petitioner on 28.04.2018.

10. Saying so, learned counsel for writ petitioner submitted that the consignment i.e., Used Dialysis Machine with accessories which was imported is lying in the 'Container Freight Station' ['CFS' for brevity] and that demurrage and detention charges for CFS and Steamer Agent (owner of the container) are being demanded notwithstanding the aforesaid undated communication signed on 25.04.2018.

11. Learned Revenue counsel, adverting to the counter affidavit, submitted that the aforesaid communication has been issued under 6(1)(l) of 'Handling of Cargo Customs Areas Regulations, 2009' ['said Regulations' for brevity]. To be noted, this Court is informed that said Regulations were notified vide Notification No.26/2009(NT) Cus. dated 24.02.2017.

12. A perusal of the said regulations reveals that it has been made by the 'Central Board of Excise and Customs' ['CBEC' for brevity] in exercise of regulation making powers under Section 141(2) read with 147 of said Act. Therefore, said regulations clearly have the character of subordinate legislation. To be noted, it has been averred in the counter affidavit of the Revenue that the aforesaid communication signed on 25.04.2018 was issued under 6(1)(l) of the said Regulations. Therefore, it follows as a sequitur that the said regulations apply to the instant case in all force.

13. In this scenario, learned counsel for Revenue contended that after issue of the communication signed on 25.04.2018, it is for the writ petitioner to have pursued the matter and the writ petitioner now cannot be heard to contend that he is entitled to take delivery of the container without paying demurrage and detention charges. When such a scenario unfurled in the earlier hearing, proceedings dated 10.06.2018 were recorded, which reads as follows:

'Dr.S.Krishnanandh, learned counsel on record for writ petitioner and Mr.T.Pramod Kumar Chopda, learned Senior standing counsel for Central Board of Indirect Taxes and Customs(CBIC) on behalf of all the three respondents are before this Court.

2. As the hearing in the matter progressed, it came to light that the entire matter pertains to payment of Demurrage and Container Detention Charges. It is not in dispute that the respondents sent a communication dated 25.04.2018 to the writ petitioner's Steamer Agent with a copy marked to the Container Freight Station(CFS), where the consignment is now lying.

3. Learned counsel for writ petitioner fairly submits that copy of this communication was received by the writ petitioner on 28.04.2018.

4. Learned Revenue counsel submits that post 28.04.2018, nothing prevented the writ petitioner from taking delivery of the consignment and therefore, the writ petitioner cannot be heard to contend that the benefit of non payment of Demurrage and Container Detention Charges will enure to the benefit of writ petitioner upto the date on which the writ petitioner takes delivery of the consignment.

5. Responding to this, learned counsel for writ petitioner submitted that the writ petitioner could not take delivery owing to refusal on the part of the respondents in giving effect to the aforesaid communication dated 25.04.2018.
6. As of today, going by the case file placed before this Court, there is nothing on record to show that the respondents are responsible for writ petitioner not being able to clear the consignment post 28.04.2018.

7. Faced with the above situation, learned counsel for writ petitioner submits that writ petitioner had sent repeated correspondence to the respondents post 28.04.2018 and seeks time to produce copies of the same and acknowledgements thereto.

Adjourned by a fortnight. List on 27.06.2019.'

14. Today, pursuant to 10.06.2019 proceedings, an additional typed set of papers has been filed by the writ petitioner being additional typed set of papers dated 25.07.2019. This contains two communications, both dated 22.09.2018 addressed to the Commissioner of Customs and Deputy

Commissioner of Customs.

15. What is of utmost relevance is the aforesaid communication signed on 25.04.2018 has been sent to the CFS and the Steamer agent, who this Court is informed owns the container.

16. Addressee is the Steamer Agent and copy has been marked to The Manager, M/s.All Cargo Global Logistics Ltd., Thiruvottiyur High Road, Thiruvottiyur, Chennai - 600 019, whom this Court is informed is CFS.

17. In this factual setting, as it is undisputed obtaining position that said Regulations apply, learned counsel for writ petitioner drew the attention of this Court to the definition of 'Customs Cargo Services Provider' contained in Section 2(b) of the said Regulations.

18. Section 2(b), which defines "Customs Cargo Services Provider" says any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in section 45 of said Act and persons as referred to in sub-section (2) of Section 141 of the said Act.

19. A perusal of Section 2(b), read in conjunction with Sections 45 and 141(2) of said Act leaves no doubt in the mind of this Court that both CFS and the Steamer Agent would qualify as Customs Cargo Services Provider. There is also no disputation that they function under the control of the Customs Department.

20. In this regard, it is submitted by learned counsel for writ petitioner that the respondents have to ensure that their communication signed on 25.04.2018 is adhered to and implemented in letter and spirit. In support of his contention, learned counsel pressed into service two orders made by another Hon'ble Single Judge of this Court. One is reported in 2018 (13) G.S.T.L.273(Mad.) in the case of Isha Exim Vs. A.D.G., Directorate of Revenue Intelligence, Chennai [hereinafter 'Isha Exim case' for brevity] and the other is 2018 (361) E.L.T.463 (Mad.) in the case of Giridhari Homes Pvt. Ltd., Vs. Principal Commissioner of Customs, Chennai - III [hereinafter 'Giridhari case' for brevity]. Relevant paragraphs in Isha Exim case are paragraphs 15 to 18 and the same read as follows:

> '15. The learned counsel appearing for the petitioner submitted that, since the goods were detained at the instance of the D.R.I., they are entitled for Demurrage and Detention Certificate for waiver of the warehousing and demurrages from the date of detention till the date of release of the goods. It is pointed out that, on an earlier occasion, the petitioner has approached this Court, by way of

W.P.No.22114 of 2017, seeking for release of the same product, which was imported vide Bill of Entry No.2696680, dated 02.08.2017 and detained vide Mahazar, dated 10.08.2017. The said Writ Petition was disposed of, by this Court, by order, dated 12.09.2017, directing the Authority to provisionally assess the Bill of Entry and release the goods and a direction was issued to the Commissioner of Customs to issue Detention Certificate. It appears that, though the Detention and Demurrage Certificate was issued, yet, the Steamer Agent did not honour the certificate and the petitioner has paid demurrages and container detention charges, without prejudice to their rights to contest the same in other legal proceedings.

16. It is not known, as to why, action was not initiated against the Steamer Agent for not complying with the order qua certificate passed/issued by the Customs Department, and therefore, this Court is inclined to observe that the Customs Department should also ensure that whether the Detention Certificate issued for waiver of the warehousing and demurrages has been complied with in letter and spirit and should not be reduced into a paper order. In the decision rendered by the Hon'ble Division Bench of High Court of Delhi, in the case of Worldline Tradex Pvt (supra), it was held that D.R.I was responsible to bear the charges.

17. Considering the facts of the present case, the respondents 2 to 4 are directed to issue Demurrage and Detention Certificate for Waiver of Warehousing, Demurrage and Container Charges and ensure that such order is complied with by the Steamer Agent and Container Terminal, as it was held by the High Court of Delhi, in the case of Worldline Tradex Pvt (supra) that, detention having occurred due to illegal action of D.R.I., they have to bear responsibility in that regard.

18. In the result, W.P.No.765 of 2018 is disposed of and W.P. No.1114 of 2018 is allowed on the aforesaid terms. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.'

21. A perusal of Giridhari case also reiterates the same principle i.e., that the CFS and Steamer Agent have to necessarily implement the orders of Customs Department.

22. From the narrative thus far, it comes to light that import of the petitioner is for a hospital which is being run for economically less privileged strata of the society and it provides medical help by charging only actual cost of basic disposable products alone. In other words, for all practical purposes, writ petitioner is providing free medical treatment

with a 50 bedded hospital and in instant case, consignment imported itself is a Used Dialysis Machine. This leaves this Court with the considered view that there are unique and peculiar facts and circumstances in this case.

23. In the light of the unique and peculiar facts and circumstances of this case, viewed in the light of context of the aforesaid two reported orders (alluded to supra), by another Hon'ble Single Judge, this Court is of the considered view that it is appropriate to direct the respondents to ensure that the CFS namely Manager, All Cargo Global Logistics Ltd., Thiruvottiyur High Road, Thiruvottiyur, Chennai - 600 019 (CFS) and M.S.C.Agency (India) P Ltd., 1st floor, KGN Tower, No.62, Ethiraj Salai, Egmore, Chennai - 600 105 (Steamer Agent who owns the container) to whom signed communication dated 25.04.2018 has been sent, implement the same in letter and spirit. In other words, respondents are directed to ensure that the addressees in the communication, signed on 25.04.2018 give effect to the same and ensure that the consignment namely Used Dialysis Machine, which is subject matter of instant writ petition is given delivery to the writ petitioner without insisting on demurrage and detention charges even post 23.03.2018. The above direction shall be complied with by the respondents as expeditiously as possible and in any event, with a period of four(4) weeks from the date of receipt of a copy of this order.

24. This writ petition is disposed of with the above directions. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

kak

To

1.The Commissioner of Customs,
(Appeals-II),
Custom House
No.60, Rajaji Salai,
Chennai - 600 001.

2.The Additional Commissioner of Customs
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No.60, Rajaji Salai,
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3.The Assistant Commissioner of Customs
(Group-5A), Custom House
No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.T.Pramodkumar Chopda, Advocate, S.R.No.67269
+1cc to Mr.B.Sathish Sunder, Advocate, S.R.No.67528

W.P.No.29847 of 2018

GJ II(CO)

RRS(29/08/2019)