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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 28th November, 2019
Pronounced on: 20th December, 2019

+ W.P.(C) 7577/2019 & C.M. No.47877/2019

M/S GLOBAL IMPEX THROUGH ITS PARTNER

..... Petitioner

Through: Mr. Priydarshi Manish, Ms. Anjali Jha
Manish, Ms. Astha Chetan &
Ms. Jasmeet Kaur, Advocates.

Versus

MANAGER, CELEBI IMPORT SHED AND ANR.

..... Respondents

Through: Mr. Rakesh Tikku, Sr. Advocate with
Ms. Sarul Jain, Advocate for R-1.
Mr. Amit Bansal, SSC with Mr. Aman
Rewaria, Advocate for R-2/Customs.

+ W.P.(C) 11264/2019 & C.M. No.46424/2019

SHREE SHYAM ENTERPRISES

..... Petitioner

Through: Ms. Anjali Jha Manish,
Mr. Priyadarshi Manish & Ms. Astha
Chetan, Advocates.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Thakur Virender Pratap Singh Charak,
Ms. Shubhra Parashar, Mr. Pushpender
Singh Charak, Mr. Shreyans Jain &
Mr. Satender Tiwari, Advocates for
R-1/UOI.
Ms. Sonu Bhatnagar, Sr. SC with
Mr. Vaibhav Joshi & Ms. Anushree

Narain, Advocates for R-2, 3 & 4.
Mr. Rakesh Tiku, Sr. Advocate with
Ms. Sarul Jain, Advocate for R-5.

+ W.P.(C) 8659/2017

SURENDER KUMAR JAIN THROUGH ITS
PROPRIETOR Petitioner
Through: Ms. Anjali Gupta, Advocate.

Versus

THE MANAGER, CELEBI, IMPORT SHED,
AIR CARGO COMPLEX, NEW DELHI & ANR. ... Respondents
Through: Mr. Rakesh Tiku, Sr. Advocate with
Ms. Sarul Jain, Advocate for R-1.

+ W.P.(C) 8668/2017

BISHT INTERNATIONAL THROUGH ITS PROPRIETOR
..... Petitioner
Through: Ms. Anjali Gupta, Advocate.

Versus

THE MANAGER, CELEBI, IMPORT SHED, AIR CARGO
COMPLEX, NEW DELHI & ANR. Respondents
Through: Mr. Rakesh Tiku, Sr. Advocate with
Ms. Sarul Jain, Advocate for R-1.

+ W.P.(C) 8734/2017

ROOP SINGH ENTERPRISES THROUGH
ITS PROPRIETOR Petitioner
Through: Ms. Anjali Gupta, Advocate.

Versus

THE MANAGER, CELEBI, IMPORT SHED, AIR CARGO
COMPLEX, NEW DELHI & ANR. Respondents

Through: Mr. Rakesh Tiku, Sr. Advocate
with Ms. Sarul Jain, Advocate for
R-1.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

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J U D G M E N T

C.HARI SHANKAR, J.

1. We are, in these writ petitions, required to decide whether Respondent No.1 (hereinafter referred to as “CELEBI”) could charge demurrage, on the goods imported by the petitioners, which have been stored in the premises of CELEBI. The petitioners assert that no demurrage could have been charged by CELEBI and rely, for the purpose, on Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009 (hereinafter referred to as “the Handling of Cargo Regulations”). The dispute pivots, essentially, on the interpretation of the said clause.

Applicable legal provisions

2. At the very outset, therefore, we may set out in clause (l) of Regulation 6(1) of the 2009 Regulations, thus:

“6. Responsibilities of Customs Cargo Service provider. –

(1) The Customs Cargo Service provider shall –

(l) Subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be;”

3. “Customs Cargo Services provider” is defined, in clause (b) of Regulation 2 of the 2009 Regulations, in the following terms:

“(b) “Customs Cargo Services provider” means 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 the Act and persons as referred to in sub- section (2) of section 141 of the said Act;”

4. “Act” is defined, in clause (a) of Regulation 2(1) of the 2009 Regulations, as meaning the Customs Act, 1962 (hereinafter referred to as “the Customs Act”). Section 45 of the Customs Act, which deals with restrictions on custody and removal of imported goods, reads thus:

45. Restrictions on custody and removal of imported goods. —

(1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, –

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer or in such manner as may be prescribed.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an arrival manifest or import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.”

5. Section 141(2) of the Customs Act reads thus:

“141. Conveyances and goods in a Customs areas subject to control of officers of Customs. –

(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a Customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.”

Facts

6. The facts, in all these writ petitions, are similar. For ease of reference, the facts, in WP (C) 7577/2019 may be cited, by way of example.

7. The petitioner, Global Impex, filed a Bill of Entry, dated 3rd May, 2019, for import of unbranded ready-made garments. A request for first

check of the consignment was also made. Consequent thereupon, the consignment was, purportedly, subjected to 100% examination. However, on 6th May, 2019, the consignment was put on hold, for further examination, by the Commissioner of Customs (Preventive) (hereinafter referred to as “the Commissioner”).

8. On subsequent examination of the consignment, it was felt that there had been misdeclaration of quantity. Pursuant thereto, *vide* Panchnama dated 9th May, 2019, the Commissioner seized the consignment and handed it over, to CELEBI for safe custody, *vide* letter dated 10th May, 2019. The said letter stated, *inter alia*, thus:

“The said consignment will remain in your custody till the completion of investigation. As investigation will take some time, *there shall not be any demurrage charges on the above said consignment is from the date of holding of these Bills of Entry i.e. 06.05.2019 till the finalisation of the investigation* as informed by the competent authority of Customs.”

(Emphasis supplied)

9. In response, CELEBI wrote, to the Deputy Commissioner of Customs (Preventive), stating that charging of demurrage was subject to the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mails) Regulations, 2003, or any other law for the time being in force. Accordingly, it was opined that, if the investigation was likely to take time, the petitioner would be well advised to seek warehousing of the goods, under Section 49 of the Customs Act. The petitioner, accordingly, represented, to the Commissioner, on 14th May, 2019, requesting that the aforesaid goods be permitted to be warehoused, so that further demurrage charges could be avoided. Apparently, there is no response, to the said communication.

10. In the interregnum, on the request of the petitioner, who waived issuance of Show Cause Notice, Order-in-Original, dated 17th May, 2019, was passed by the Joint Commissioner of Customs (Preventive) (hereinafter referred to as “the Joint Commissioner”), holding that the goods suffered from misdeclaration of description as well as quantity. The assessable value of ₹ 11,74,219/–, declared by the importer, was rejected and the value of the goods was redetermined as ₹ 22,49,206/–. Duty demand of ₹ 4,80,403/–, allegedly evaded, by the petitioner, thereby, was, accordingly, confirmed, and recovery, thereof, directed, under Section 28 of the Customs Act. The goods were also confiscated, under clauses (l) and (m) of Section 111 of the Customs Act, with option, to the petitioner, to redeem the goods on payment of redemption fine of ₹ 50,000/–, under Section 125(1) thereof. Additionally, penalty of ₹ 4,80,403/– was imposed, on the petitioner, under Section 114A of the Customs Act.

11. The writ petition avers that the petitioner is in the process of appealing against the aforesaid Order-in-Original, dated 17th May, 2019, passed by the Joint Commissioner, to the Commissioner of Customs (Appeals).

12. In order to ensure release of the seized goods, the petitioner deposited the entire amount of duty, penalty and redemption fine, as confirmed by the aforesaid Order-in-Original of the Joint Commissioner, on 21st May, 2019. Thereupon, the Deputy Commissioner of Customs (Preventive) (hereinafter referred to as “the Deputy Commissioner

(Preventive)”), *vide* letter of the same date, i.e. 21st May, 2019, wrote to the Deputy Commissioner of Customs, Import Shed, informing him that the entire amount of duty, penalty and redemption fine stood deposited by the petitioner and that, therefore, the Customs was lifting its hold on the imported goods. Accordingly, it was stated, the Commissioner (Preventive) had no objection for release of the goods imported by the petitioner.

13. The petitioner, thereupon, approached CELEBI, seeking release of the aforesaid goods, imported by it. CELEBI, however, refused to release the goods, till the petitioner paid the demurrage that had accumulated on the goods till then.

14. The petitioner assails the said demand, as raised by CELEBI. Reliance has been placed, by the petitioner, on the letter, dated 10th May, 2019 *supra*, from the Deputy Commissioner (Preventive) to CELEBI, as well as on clause (l) of Regulation 6(1) of the 2009 Regulations. It is emphasised, in this regard, that clause (q) of Regulation 6(1) obliges the custodian to abide by all the provisions of the Customs Act, as well as the Rules, Regulations, notifications and orders issued thereunder. In view of this mandate, the petitioner seeks to contend that CELEBI could not have disobeyed the direction, contained in the letter, dated 10th May, 2019, of the Deputy Commissioner (Preventive), not to charge demurrage from the petitioner. The petitioner has also drawn attention to the fact that the quantum of demurrage is so excessive, as to render the release, of the goods, practically unviable.

Analysis

*Trustees of the Port of Madras v. Aminchand Pyarelal*¹, *Indian Goods Supplying Co.*² and *Board of Trustees of the Port of Bombay v. Jai Hind Oil Mills Co.*³

15. Resisting the temptation to commence the narrative with the oft-cited decision in *International Airports Authority v. Grand Slam International of India*⁴, we deem it appropriate to refer, at the outset, to the aforesaid three decisions, which are of significance.

16. In *Trustees of the Port of Madras v. Aminchand Pyarelal*¹, black plain sheets were imported, by the respondent Aminchand Pyarelal (referred to, hereinafter, as “Aminchand”) on 10th April, 1963. The goods were detained, by the Customs authorities, as the specifications, in the import licence held by Aminchand, whereunder the goods were imported, did not tally with the description of the imported goods. Consequent to issuance of a show cause notice, an adjudication order, dated 12th November, 1963, was passed, confiscating the goods, under Section 111(a) of the Customs Act. Aminchand appealed to the Central Board of Excise and Customs (being the competent appellate authority, at that point of time and referred to, hereinafter, as “the CBEC”). The appeal was allowed, by the CBEC, *vide* order dated 27th July, 1964.

17. Consequent thereupon, Aminchand requested the Customs authorities to issue a certificate, for revision of the transit dues which had

¹ (1976) 3 SCC 167

² (1977) 2 SCC 649

³ 1987 (30) ELT 633 (SC)

⁴ 1995 (77) ELT 753 (SC)

accumulated during the period of detention of the goods. A certificate was, accordingly, issued by the Customs authorities, certifying that the goods had been detained by them, from 24th April, 1963 till 21st August, 1964, for examination and that the detention was not owing to any fault or negligence on the part of Aminchand. Acting on the basis of the said certificate, the Board of Trustees of the Madras Port (the appellant before the Supreme Court and referred to, hereinafter, as “the Board of Trustees”) waived the demurrage, otherwise payable on the goods, during the period of the detention. Aminchand, accordingly, cleared the consignment, on 25th and 27th August, 1964, on payment of harbour dues, crantage charges and demurrage, for the period not covered by the certificate.

18. The Board of Trustees, subsequently wrote, on 27th January, 1965, to the Customs authorities, opining that the detention certificate had been issued, by the Customs authorities erroneously, and requiring that the matter be reconsidered.

19. *Vide* letter dated 12th April, 1965, the Customs authorities admitted that they had mistakenly issued the detention certificate, as the goods had been detained to examine the issue of compliance with import trade control formalities, and not for examination and assessment.

20. In this scenario, the Board of Trustees contended that, owing to the negligence, on the part of the Customs authorities in issuing the detention certificate, demurrage, of ₹ 1963.60, alone, had been charged from Aminchand, whereas it was actually liable to pay demurrage of ₹

3,20,951.64. Asserting thus, the Board of Trustees directed the Customs authorities to remit the balance demurrage, due to it. The Customs authorities, however, denied any liability, contending that the Union of India could not be held liable for negligent, or even tortious, acts, committed by its officers in good faith.

21. The Board of Trustees, thereupon, sued Aminchand, as well as the Customs authorities, for recovery of the differential amount of demurrage, stated to be due to it.

22. It is clear, therefore, that, in this case, the Board of Trustees was not denying its liability to waive demurrage charges, consequent to the issuance of detention certificate by the Customs authorities. The case, as set up by the Board of Trustees, was that the detention certificate had been issued in an erroneous and negligent fashion and that, therefore, it was entitled to be paid the differential amount of demurrage.

23. Aminchand disputed its liability to pay demurrage, on the ground that it could not be penalised for the delay, on the part of the Customs authorities, in clearing its goods, or for the issuance of an erroneous detention certificate by the said authorities. Similarly, liability was also denied by the Union of India as well as by the Customs authorities.

24. The High Court held that, as the goods had been detained by the Customs authorities for no fault of Aminchand, levy of demurrage was unreasonable. As such, the Board of Trustees was held not to be entitled to recover any differential demurrage, from any of the respondents.

25. Of the issues, framed by the Supreme Court – before whom the matter was carried in appeal – as arising for its consideration, was the issue of whether Aminchand was liable to pay differential demurrage, as claimed by the Board of Trustees. In fact, before the Supreme Court, the Board of Trustees gave up its claim, against the Union of India, as well as against the Customs authorities, and asserted its claim, only qua Aminchand.

26. The affairs of the Madras Port Trust were governed by the Madras Port Trust Act, 1905. The Supreme Court noted that Section 42 of the Madras Port Trust Act empowered the Board of Trustees to frame the scale of rates, and the statement of the conditions under which the services, stipulated thereunder, would be performed by the Board of Trustees. Section 50 of the Madras Port Trusts Act required the rates, in respect of goods to be landed, to be paid immediately on landing of the goods, and the rates, in respect of goods to be removed from the premises of the Port Trust, to be paid before the goods were removed. Section 51 conferred a lien, on the Board of Trustees, on the goods, till payment was made thereon, and empowered the Board of Trustees to seize and detain the goods, till that time. This lien was, by Section 52 of the Madras Port Trusts Act, accorded priority over all other liens and claims, except for general average and the shipowners' lien for freight and other charges. Section 56 empowered the Board of Trustees to, in the event of non-payment of its dues, sell the goods by public auction.

27. Section 109 of the Madras Port Trusts Act provided that nothing, in the said Act, would affect any power vested in the Chief Officer of Customs under any law for the time being in force. The Supreme Court observed that Section 49 of the Customs Act provided that, where, in the case of imported goods, the Assistant Collector of Customs was satisfied that the goods could not be cleared within a reasonable time, the goods could, pending clearance, be permitted to be stored in the public warehouse or in private warehouse, if facilities for depositing public warehouse were not available.

28. Having thus adverted to the relevant provisions, the Supreme Court went on to hold, unequivocally, in para 22 of the report, that services, provided by the Board of Trustees, were subject to payment, at the rates stipulated in the Act, and that those who desired to avail of the services of the Board of Trustees were liable to pay for the said services, at the prescribed rates, and to comply with the requisite conditions, stipulated in that regard. It was observed that, “in such matters, where services are offered by a public authority on payment of a price, the conditions governing the offer and acceptance of services are not in the nature of the by-laws”, but reflected, or represented “an agreement between the parties, one offering its services at prescribed rates and the other accepting the services at those rates.” In the circumstances, it was held that “if the services (were) not paid for, the Board (could) exercise its statutory lien on the goods under Section 55 and enforce that lien under Section 56 of the Act; or else, the Board may take recourse to the alternative remedy of the suit provided for by Section 62.” It was observed that the Board was also required, statutorily, to undertake

certain obligations, and that “the rates which the Board levies are a consolidated charge for the various services it renders and the liability which it is compelled by statute to undertake.”

29. Significantly, the Supreme Court also justified the high rates of demurrage, charged by custodians, to whose custody imported goods were consigned, as necessary, “to make it unprofitable for importers to use the port premises as a warehouse”, in view of the prevalent situation of rampant congestion at ports, which affected free movement of ships and of essential goods. It was observed that “ships, like wagons, had to be kept moving and that can happen only if there is pressure on the importer to remove the goods from the Board’s premises with the utmost expedition.”

30. Though the Board of Trustees had, before the Supreme Court, given up its claim against the Union of India and the Customs authorities, the Supreme Court, nevertheless, went on, in para 33 of the report, to opine, in that regard, thus:

“The appellants’ claim against Respondents 2 and 3 has no foundation in law and was rightly not pressed by the appellants’ counsel. Respondent 3 is the Collector of Customs who, obviously, cannot be made personally liable to pay the demurrage. Respondent 2 is the Union of India against whom and Respondent 3, the appellant’s claim is said to reside partly in the region of “contract or quasi-contract”. We are unable to spell out any such basis on which the claim of the appellants could rest. The issuance of an incorrect “detention certificate” by the third respondent cannot also help the appellants to fasten the liability for demurrage on Respondents 2 and 3 on the ground of their negligence. As observed by the High Court, all the relevant facts were before the appellants who could, with reasonable care, have avoided the consequences flowing from the certificate issued by the third respondent.”

(Emphasis supplied)

31. Despite thus holding that the Board of Trustees was entitled to the demurrage claimed by it, the Supreme Court, nevertheless, went on to discountenance the claim of the Board of Trustees, as against Aminchand, on the ground that the goods were imported, by Aminchand, only on behalf of the State Trading Corporation of India (hereinafter referred to as “STC”), in whose name Import Licence had been issued. It was noted that STC had issued an authorisation in favour of Aminchand, which was liable to deliver the consignment to the nominees of the STC, and was only entitled to a commission, for the work done by it in pursuance of the said authorisation. Aminchand, it was observed, had neither title nor interest in the goods, and was only concerned with delivery of the goods in accordance with the instructions of the STC. In the circumstances it was held that “if the appellants were to enforce their statutory lien, the incidence of the demurrage would have fallen on the Corporation in whom the title to the goods was vested”. The Supreme Court further observed that, by allowing the goods to be cleared without levying demurrage, which the Board of Trustees claimed at a later point of time, Aminchand was deprived of the opportunity to reject the goods. In these circumstances, the Supreme Court held that it was impossible to accept the claim of the Board of Trustees against Aminchand. Resultantly, the decision of the High Court was upheld, albeit for different reasons.

32. In this decision, therefore, the Supreme Court upheld, unequivocally, the right of the Board of Trustees of the Madras Port

Trust to recover demurrage, irrespective of whether the importer was, or was not, at fault. If the claim, as against Aminchand, was rejected, that was only because Aminchand was merely working for commission, and was not the *de facto* importer, which was STC.

33. The facts, in *Board of Trustees of the Port of Bombay v. Indian Goods Supplying Co.*² were, to a large extent, similar to those in *Aminchand Pyarelal*¹. Three consignments of Chinese newsprint were imported, by the respondent Indian Goods Supplying Co. (hereinafter referred to as “IGSC”). The goods were detained, by the Customs authorities, for the purposes of analytical testing, as well as completion of Import Trade Control formalities. The Board of Trustees claimed demurrage, for the period during which the goods were so detained. However, it was conceded, by the Board of Trustees, that no demurrage could be charged for the period of detention, which was attributable to analytical testing. The Board of Trustees, nevertheless, pressed its claim for demurrage, for the period of detention, attributable to completion of Import Trade Control formalities.

34. Demurrage, as claimed, was paid by IGSC which, subsequently, sued for return of the said amount, on the ground that it was not liable to pay the same. The City Civil Court decreed the suit. The appeal, preferred thereagainst to the High Court, by the Board of Trustees, was also dismissed, thereby confirming the decree passed by the City Civil Court. The matter was carried, by the Board of Trustees, to the Supreme Court.

35. During the pendency of proceedings before the High Court, the differential amount was deposited by the Board of Trustees. Before the Supreme Court, the Board of Trustees submitted that it was not seeking repayment of the said amount, but was concerned with a proper determination of the question of law, relating to its entitlement to claim demurrage. The question arising before it for consideration was framed by the Supreme Court as “whether the claim of demurrage by the Port Trust for the period during which the goods were detained with the Port Trust in respect of Import Trade Control formalities is maintainable”.

36. As in the case of *Aminchand Pyarelal*¹, the Supreme Court referred to the various provisions of the Bombay Port Trust Act, 1879, which governed the appellant before it, and which were largely *in pari materia* to the provisions of the Madras Port Trust Act. It was noted that Section 43B(1) of the Bombay Port Trusts Act required that every scale of rates, framed by the Board of Trustees, was required to be sanctioned and gazetted by the Central Government, whereupon it would acquire the force of law. The scale of rates, on the basis of which demurrage was being claimed, by the Board of Trustees, it was observed, had been so sanctioned and gazetted, as a result whereof the said scale of rates had acquired the force of law.

37. The Supreme Court observed (in para 9 of the report), thus:

“It is the duty of the Board to recover the rates, to have a lien on the goods and seize and detain the goods until such rates are fully paid ... The Port clearance shall not be granted in the rates are paid. It is thus a statutory duty of the Board to collect the rates prescribed.”

While the observation, of the Supreme Court, that the Port Trust could “seize and detain” the goods, may not constitute a binding enunciation of the law, the Supreme Court has held, in the afore-extracted passage, that the responsibility, of the Board of Trustees, to collect demurrage, at the prescribed rates, and to retain hold of the goods till then, was in the nature of a statutory duty. The Supreme Court went on to observe, in para 10 of the report, that the scale of rates was graded, with a view to mitigate the hardship that could result, were the goods unjustifiably detained by the Customs authorities, or where there was unconscionable delay in the assessment thereof.

38. In law, the Supreme Court went on to hold that the issue before it stood concluded by the earlier decision in *Aminchand Pyarelal*¹. The position, in law, was enunciated, thus, in para 14 of the report:

“The position therefore is that even though the delay in clearing the goods was not due to the negligence of the importer for which he could be held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law the validity of which cannot be questioned. The claim cannot be resisted as there is no evidence that the delay was due to any act of the Port Trust or persons for whom the Port Trust is responsible.”

(Emphasis supplied)

39. The Supreme Court, therefore, reiterated the legal position, enunciated earlier in *Aminchand Pyarelal*¹, that, save and except for cases in which the delay was attributable to the Board of Trustees, the liability, of the importer, to pay demurrage, to the Board of Trustees, as per the prescribed scale of rates, for the period during which the goods, imported by it, were consigned to the custody of the Port Trust, could not

be gainsaid. The decision, of the High Court, that the importer could not be held responsible for the delay not attributable to its own default, and that demurrage could not be imposed for the period during which the goods were detained for operation of the Import Trade Control Regulations was, therefore, held to be erroneous. Owing to the concession, made by the Board of Trustees before the Supreme Court, however, no recovery was directed.

40. The third pre-*Grand Slam*⁴ decision, to which reference is required to be made, is *Board of Trustees of the Port of Bombay v. Jai Hind Oil Mills Company*³. The respondent Jai Hind Oil Mills Co. (hereinafter referred to as “Jai Hind”) imported five consignments of propylene in January, 1986. Disputes arose, between Jai Hind and the Customs authorities, who alleged undervaluation. Jai Hind directly approached the High Court of Bombay, by way of WP No. 122 of 1986. The goods, which were in the custody of the Board of Trustees, were incurring demurrage. *Vide* order dated 2nd April, 1986, a learned Single Judge of the High Court of Bombay allowed Jai Hind to clear the consignments on furnishing of an Import Trade Control bond for the value of the goods, along with a Bank guarantee for the differential value, as alleged by the Customs authorities. As clearance of the goods were delayed, and demurrage was mounting, Jai Hind wrote to the Collector of Customs, requesting him to issue a detention certificate, clarifying that the goods had been detained for *bona fide* Import Trade Control formalities, so as to enable Jai Hind to claim remission of the demurrage payable to the Port Trust. This was followed up, by Jai Hind, by filing another writ petition, before the Bombay High Court, in which, on 24th April, 1986,

the learned Single Judge passed a final order, directing the Customs authorities to issue a detention certificate to Jai Hind, subject to an undertaking, by Jai Hind, to pay the differential duty, in case it ultimately failed. The Port Trust received two detention certificates, issued by the Assistant Collector of Customs, covering two of the five detained consignments, imported *vide* Bills of Entry No. 3133/219 and 3133/220. Simultaneously, Jai Hind also addressed a representation, to the Port Trust, requesting for remission of demurrage, in view of the detention certificates issued by the Customs authorities.

41. The Port Trust wrote, on 30th May, 1986, to Jai Hind, requiring Jai Hind to submit a bank guarantee, to the effect that, in the event of Jai Hind losing before the High Court, it would pay, to the Port Trust, the entire remitted demurrage along with interest @ 15% per annum. This letter was challenged, by Jai Hind, before the High Court of Bombay, by way of a writ petition, i.e. WP 1424 of 1986. In the said writ petition, a mandamus was sought, to the Port Trust, directing it to honour the detention certificates issued by the Customs authorities, and to permit release of the imported goods without payment of demurrage and without insisting of furnishing of a Bank Guarantee or Demand Draft. An interim order, in the same terms, was also sought, which was granted, *vide* order dated 17th June, 1986.

42. The Port Trust preferred a writ appeal against the order, dated 2nd April, 1986, passed by the learned Single Judge in WP No. 519 of 1986, which was dismissed *vide* order dated 26th June, 1986. Appeal No. 535 of 1986, preferred by the Port Trust against the order, dated 17th June, 1986

supra, in WP No. No 1424 of 1986, was also summarily dismissed on 26th June, 1986.

43. Detention certificates, covering the remaining three consignments imported by Jai Hind, *vide* Bills of Entry No 3133/221, 3133/222 and 3133/223, were received by the Port Trust from the customs authorities, on 3rd July, 1986. As a result, in accordance with the order, dated 17th June, 1986 *supra*, passed by the High Court, two of the five consignments were cleared, by Jai Hind, on 3rd July, 1986 and the remaining three consignments were cleared on 5th July, 1986, on payment of an aggregate amount of ₹ 49,510.50, towards demurrage charges levied by the Port Trust. As against the amount paid by Jai Hind, the demurrage charges claimed by the Port Trust were to the tune of ₹ 3,53,514.75. As such, an amount of ₹ 3,04,004.25, claimed by the Port Trust towards demurrage, remained to be paid.

44. Against the orders, dated 26th June, 1986, passed in Appeal No 512 of 1986 and Appeal No 535 of 1986, the Port Trust approached the Supreme Court. The two primary contentions advanced by the appellant-Port Trust, before the Supreme Court, were that (i) the High Court should not have directed the Customs authorities to issue detention certificates, without impleading the Port Trust and, in any event, without securing payment of the wharfage and demurrage charges due to the Port Trust, in the event of WP No. 122 of 1986 failing and (ii) the High Court erred in directing Jai Hind to furnish a bank guarantee only in respect of the Customs duty payable by it, in the event of dismissal of WP No. 122

of 1986, thereby failing to secure the wharfage and demurrage charges payable to the Port Trust, by way of a similar bank guarantee.

45. The Supreme Court, after referring to the various provisions of the Major Port Trusts Act, 1963, noted that Section 53 thereof empowered the Board of Trustees, in special cases, to exempt, either wholly or partially, any goods or vessels, or class of goods or vessels, from the payment of any charge leviable in respect thereof, or to remit the whole or any portion of the charge so levied. It was further observed that a booklet, containing the rates charged by the Port Trust, had been issued by it wherein, in consultation with Customs authorities, the Port Trust had provided for concession, in the matter of payment of demurrage charges, on the issue of detention certificate by the Customs authorities. Section III-A(c) of the said booklet dealt with demurrage charges payable to the Port Trust, and proviso (d), to the said clause provided that goods, detained by the Customs authorities for special examination “involving analytical or technical tests other than the ordinary process of appraisalment” would be exempted from demurrage charges during the period of detention, subject to certification, by the Customs authorities, that the detention of the goods was not attributable to any fault or negligence on the part of the importer. The procedure for issue of detention certificates, by the Customs authorities, on the basis whereof the Port Trust could exempt the importer from the requirement of paying demurrage, was contained in Public Notice No 111, dated 29th July, 1985, issued by the Bombay Customs House. It was agreed, between the Customs authorities and the Port Trust, that no detention certificate would be issued by the Customs Department if there was a default on the

part of the importer or exporter. Consequently, a defaulting importer, or exporter, would stand disentitled to any concession in the matter of demurrage charges, and would be bound to pay demurrage in accordance with the scale of rates charged at the docks, as fixed by the Port Trust.

46. Noting that, in its order passed in the writ petition filed by Jai Hind, the High Court had, while directing the Customs authorities to issue detention certificates, safeguarded the interests of the Customs authorities, by directing furnishing of a bank guarantee, by Jai Hind, in respect of the duty payable by it, the High Court had, insofar as the demurrage charges payable to the Port Trust were concerned, merely directed an undertaking to be provided by Jai Hind, in favour of the High Court. The Supreme Court opined that the High Court ought, appropriately, to have safeguarded, not only the differential duty allegedly payable to the Customs authorities, but also the demurrage charges payable to the Port Trust, in the event of the importer being found to have been in default.

47. In so observing, the Supreme Court noted the fact that issuance of the detention certificate by the Customs authorities, vitally affected the interests of the Port Trust, as, by virtue of the booklet issued by the Port Trust, the issuance of such a detention certificate, by the Customs authorities, obliged the Port Trust to allow clearance of the goods without payment of full demurrage charges. Inasmuch as issuance of the detention certificate thus affected the interests of the Port Trust, the Supreme Court held that, before directing the Customs authorities to issue such detention certificates, the Port Trust was required to have been

heard. Else, the order of the High Court would not be binding on the Port Trust. While safeguarding the interests of the Customs authorities, it was held that the High Court had erred in failing to safeguard the interests of the Port Trust.

48. In the circumstances, the Supreme Court disposed of the appeal by making the interim order, passed by it in the said proceedings, absolute, whereby and whereunder Jai Hind had been directed to furnish a bank guarantee, in favour of the Port Trust, for ₹ 3,04,004.25. In default of furnishing of bank guarantee for the said amount, Jai Hind was directed to pay the said amount in cash.

49. The entitlement and eligibility, of the Port Trust, to recover demurrage, on the goods consigned to it, once again stands emphasised by this decision. It is significant to note, in this context, that the Booklet issued by the Bombay Port Trust contained a specific covenant, obligating the Bombay Port Trust to provide concession, in the matter of demurrage, where detention certificate was issued by the Customs authorities. No similar covenant, in the present case, has been brought to our notice, despite repeated queries, by us, in that regard.

Grand Slam⁴ and its sequelae

50. *Grand Slam⁴*, as the decision has popularly come to be known, had S. P. Bharucha, J. (as he then was) and N. Venkatachala, J. recording concurring opinions, with R. M. Sahai, J., dissenting.

51. Three Civil Appeals were decided, in *Grand Slam*⁴. In all the cases, the goods, imported by the concerned respondent, were consigned with the appellant-custodian (the International Airports Authority of India, referred to, hereinafter, as “the IAAI” in two of the appeals and the Central Warehousing Corporation, referred to, hereinafter, as “the CWC”, in the third), and the orders, passed by the adjudicating authorities, confiscating the goods, were set aside by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as “the Tribunal”) in appeal. Detention certificates had been issued, by the Customs authorities, in these cases, effectively directing the IAAI and the CWC not to charge demurrage, for the period during which the goods were in their custody. On the IAAI, and the CWC, refusing to abide by the said directions, the concerned importers approached the High Court, by way of writ petitions. The writ petitions were allowed by the High Court, which held that the IAAI and the CWC, being custodians of the Customs authorities, could not ignore the detention certificate issued by the Customs authorities, and were not entitled to recover any demurrage for the periods covered by the detention certificates.

52. The correctness of the said decisions, of the High Court, were assailed, by the IAAI and the CWC, by way of Civil Appeals, which were decided by the Supreme Court *vide* a common judgement.

53. Bharucha, J. observes, at the very outset of his opinion, thus:

“The judgments and orders under appeal are contrary to the judgment of the Delhi High Court in the case of *M/s. Trishul Impex*⁵ (*ibid*) as also the decisions of this Court in the cases of

⁵ *Trishul Impex v. U.O.I.*, 1992 (58) ELT 192 (Del)

*Trustees of the Port of Madras v. M/s. Aminchand Pyarelal & Ors.*¹, *Board of Trustee of the Port of Bombay v. Indian Goods Supplying Co.*² and *Board of Trustees of the Port of Bombay v. Jai Hind Oil Mills Company & Ors.*³”

54. Bharucha, J. proceeds, thereafter, in his opinion, to distil, in *précis*, as it were, the decisions in *Aminchand Pyarelal*¹, *Indian Goods Supplying Co.*² and *Jai Hind Oil Mills*³, and observe, in respect of the law laid down in the said decisions, thus (in para 31 of the report in ELT):

“This Court in the cases aforementioned, therefore, held that the Board of Trustees of a port was, under the statute that created it, entitled to charge demurrage *even in respect of periods during which the importer was unable to clear goods from its premises for no fault or negligence on his part*. It was held that *the Boards were entitled to charge demurrage even in respect of periods during which the importer was unable to clear goods because of the detention thereof by the Customs Authorities or the Authorities under the Import Trade Control Regulations, which detentions were thereafter found to be unjustified*. This Court also recognised that *the Boards were entities in their own right so that the courts could not direct the Customs Authorities to issue a detention certificate without hearing the Board concerned*. This was because the issuance of a detention certificate had the effect of reducing the amount of demurrage that the Board would otherwise have charged.”

(Emphasis supplied)

55. Adverting, thereafter, to the statutory provisions governing the IAAI, Bharucha, J. noted that Section 17 of the International Airports Authority Act, 1971 (hereinafter referred to as “the IAA Act”) empowered the IAAI to charge, with the previous approval of the Central Government, fees or rent for the use and enjoyment, by persons, of its facilities and other services at any airport. Section 37 of the said Act empowered the IAAI to make regulations, to give effect to the provisions

of the Act, and sub-section (2)(d), thereof, specifically empowered the IAAI to make regulations for the storage of processing of goods in any warehouse established by it, and to charge fees for such storage or processing.

56. In exercise of the powers conferred by Section 37, the IAAI framed the International Airports Authority (Storage and Processing of Goods) Regulations, 1980 (hereinafter referred to as “the IAA Regulations”). Regulation 4 of the IAA Regulations empowered the IAAI to levy charges, including storage charges and demurrage, whereas Regulation 6 empowered the Chairman of the IAAI to, in his discretion, and for reasons to be recorded, waive demurrage in deserving cases. A separate policy, governing waiver of demurrage, had been framed by the IAAI. Inasmuch as the provisions of the IAA Act were similar to the provisions of the Major Port Trusts Act, 1963, as well as other Port Trusts Acts, Bharucha, J. observed, in para 34 of the report, that the ratio of the decisions in *Aminchand Pyarelal*¹, *Indian Goods Supplying Co.*² and *Jai Hind Oil Mills*³ would apply, *mutatis mutandis*, to the IAAI.

57. The various respondents, before the Supreme Court, sought to distinguish the decisions in *Aminchand Pyarelal*¹, *Indian Goods Supplying Co.*² and *Jai Hind Oil Mills*³ by contending that these decisions only held that an importer had to pay demurrage even if the delay, in clearing its goods, was not due to his default or negligence, whereas the contention of the respondents, before the Supreme Court, was different, i.e., that the IAAI was the custodian of the Customs authorities and was obligated, therefore, to abide by the directions

contained in the detention certificates, and not to charge demurrage for the periods covered thereby. This contention was negated, by Bharucha, J., in the following terms (from para 35 of the ELT report):

“The judgments aforementioned do not only hold that an importer is liable to pay demurrage though he is not responsible for the delay in clearing his goods. The judgments deal with detention certificates issued by the Customs Authorities and hold that the importer is liable to pay demurrage at the reduced rate prescribed by the policy framed in that behalf by the Boards even for the period for which a detention certificate has been issued. The judgments recognise that the Boards are entities in their own right and that even the courts cannot compel the Customs Authorities to issue detention certificates without first hearing the Board concerned, because detention certificates have the effect of reducing the revenues of the Boards. The Boards and the Authority being similarly placed, the judgments determine the questions raised in these appeals.”

(Emphasis supplied)

58. Reliance was also placed, by the respondents before the Supreme Court, on Customs Public Notice No 30/86, dated 30th April, 1986, clause (vii) whereof read thus:

“In case of goods detained/seized etc. by Customs, the warehousing/storage charges shall be calculated by IAAI for the period due minus the charge for the period of detention at the instance of Customs as certified by the Assistant Collector of Customs.”

(Emphasis supplied)

59. Bharucha, J. rejected the aforesaid reliance, by the respondents before him, on the above-extracted clause in the Public Notice, dated 30th April, 1986, by holding, unequivocally, that the provisions, whereunder the Public Notice purported to have been issued, i.e. sections 8, 33, 34 and 45 of the Customs Act, did not empower the Collector of Customs to issue such a Public Notice. It was held that these provisions did not

entitle the Collector of Customs “to debar the collection of demurrage for the storage of imported goods”; neither did they “entitle him to impose conditions upon the proprietors of ports or airports before they can be approved as Customs ports or Customs airports”. It was noted that Section 45 of the Customs Act, too, did not state that the person, to whose custody the imported goods were consigned, would not be entitled to recover charges from the importer, for such period as the Customs authorities directed. Paras 41 and 42 of the opinion of Bharucha, J, went on to hold thus:

“41. The purpose of the Customs Act on the one hand and the Major Port Trusts Act and the International Airports Authority Act on the other hand are different. The former deals with the collection of Customs duties on imported goods. The latter deals with the maintenance of sea-ports and airports, the facilities to be provided thereat and the charges to be recovered therefor. An importer must land the imported goods at a sea-port or airport. He can clear them only after completion of Customs formalities. For this purpose, the sea-ports and airports are approved and provide storage facilities and Customs Officers are accommodated therein to facilitate clearance. For the occupation by the imported goods of space in the sea-port or airport, the Board or the Authority which is its proprietor is entitled to charge the importer. That until Customs clearance, the Board or the Authority may not permit the importer to remove his goods from its premises does not imply that it may not charge the importer for the space his goods have occupied until their clearance.

42. What is stated in the quoted clause of the said Customs Public Notice would be effective against the Authority only if it were shown that the Authority had, expressly or impliedly, consented to such arrangement; that is not even pleaded.”

(Emphasis supplied)

60. Expressing complete agreement with the views of Bharucha, J., Venkatachala, J., in a detailed concurring opinion, echoed the view of

Bharucha, J. that Section 45 of the Customs Act did not, in any way, impose an obligation, on the approved custodian, not to collect charges statutorily leviable on the consignee, by it, for keeping the imported goods in its custody. Paras 58 to 60, of the opinion of Venkatachala, J., read thus:

“58. Learned counsel appearing for respondents were not able to invite Court’s attention to any provision either in the Act or the Rules or the Regulations made thereunder which empowered the Collector of Customs to impose by issue of Public Notice the above condition (vii) in clause (d) thereof denying the IAAI which is approved as the custodian of imported goods in Customs area, the right to collect the charges from the consignee for keeping his imported goods detained or seized by the Customs Authorities nor my effort to find any provision in the Act or its Rules or its Regulations enabled me to find any provision which conferred such power of imposing such condition upon the IAAI merely because it is approved as the custodian of imported goods on behalf of Customs Department. However, as to whether the Parliament in enacting the Act intended that custodians to be approved thereunder to keep the goods coming into customs areas should relieve the owners (consignees) of such goods of their liability for payment of charges for such keeping or otherwise could be gathered from the provision in Section 63 of the Act, it is excerpted :

“63. Payment of rent and warehouse charges. - (1)

The owner of any warehoused goods shall pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Collector of Customs.

(2) If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse-keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select.”

59. *When sub-section (1) above, does not relieve the owner of any warehoused goods to pay to the warehouse-keeper rent and warehouse charges at the rates fixed under any law for the time being in force or where no rates are so fixed, at such rates as may be fixed by the Collector of Customs, although such goods were kept by the warehouse-keeper for and on behalf of the Customs Department and again when sub-section (2) enables the warehouse-keeper even to sell the warehouse goods with the permission of the proper officer for unpaid rent or warehouse charges, it is difficult to think that there could be any provision in the Act or the Rules or the Regulations made thereunder which confers on the Collector of Customs power to direct the release of the goods kept in the custody, as custodian of the Customs Department without demanding payment of keeping charges from the consignee of goods because of detention certificates issued in that regard by the Customs authorities, inasmuch as, the said provision shows the legislative intendment to be to the contrary.*

60. *In fact, when the IAAI in exercise of its powers conferred by sub-section (1) of Section 37 of the International Airports Authority Act, 1971 - "the IAA Act", and with the prior approval of the Central Government have made regulations called the International Airport Authority (Storage and Preservation of Goods) Regulations, 1980, regulating levy of charges or surcharges, scale of charges and waiver of charges payable by the owner in case of warehoused goods with the IAAI, those Regulations not only do not come in conflict with the Act or its Regulations or its Rules but conform to the requirement of the provision of Section 63 of the Act. When in pursuance of the said Regulations policy directions are issued by the IAAI in supersession of earlier instructions on the subject of waiver of demurrage charges on production of detention certificate issued by the Customs Authorities showing that detention of goods was for no fault of consignees it can be safely concluded that any directions issued by Customs Collector contrary to such Regulations and the policy directions as those issued without authority in law are ultra vires his powers. Therefore, I have no hesitation in holding that the aforesaid condition (vii) in clause (d) of the Customs Public Notice No. 30/86 directing the IAAI not to collect the custody charges in respect of the goods for which detention certificates may be issued by the Collector of Customs or his delegatee, has to be regarded as a condition imposed by the Collector of Customs without being conferred any power in that regard either in the Act or the Rules or the Regulations. If*

condition (vii) of clause (d) of the Customs Public Notice No. 30/86 is regarded as that imposed by the Collector of Customs without authority of law, it having been imposed *ultra vires* his powers under the Act or Rules or Regulations, *no Court can direct the IAAI to release the goods of the consignee without collecting from him demurrage charges levied according to its Regulations in respect of the goods, which it had taken care of as the custodian merely because there was a detention certificate of the Collector of Customs or his delegatee issued to the IAAI which had been approved as the custodian of such goods by the Collector of Customs under sub-section (1) of Section 45 of the Act.*”

(Emphasis supplied)

61. Venkatachala, J., proceeds to conclude, in para 65, 66 and 68 of his concurring opinion, thus:

“**65.** From the above decisions of this Court it becomes clear that an authority created under a statute even if is the custodian of the imported goods because of the provisions of the Customs Act, 1962, would be entitled to charge demurrages for the imported goods in its custody and make the importer or consignee liable for the same even for periods during which he/it was unable to clear the goods from the Customs area, due to fault on the part of the Customs Authorities or of other authorities who might have issued detention certificates owing such fault.

66. Thus, the above decisions of this Court which uphold the power of Ports Trusts created under Ports Act to levy and collect demurrage charges for goods they keep as Custodians for Customs Department from the consignees *notwithstanding the detention certificates issued by the Customs Department* clearly support the view I have taken that the IAAI, an authority constituted under the International Airports Authority Act, 1971, when is entitled to collect charges for keeping custody of the imported goods by regulations made thereunder and according to its policy, *the Collector of Customs or his delegatee could not direct the IAAI by issuance of a detention certificate to release the goods of the importer without collection of the charges liable to be paid in respect thereof, inasmuch as the Collector of Customs or his delegatee has not been empowered under the*

provisions of the Act or its Rules or its Regulations to direct release of the imported goods without collection of keeping charges, for the keeping of which by the IAAI, charges are to be paid under the Rules made under the International Airports Authority Act, 1971.

68. Therefore, my answer to the question considered by me is in the negative i.e. the Collector of Customs is empowered under sub-section (1) of section 45 of the Customs Act, 1962 to approve persons to be custodians of imported goods in customs areas until they are cleared as provided for therein, while approving the International Airports Authority of India to be the custodian of such imported goods in the customs area of Indira Gandhi International Airport, New Delhi and Central Warehousing Corporation to be the custodians of such imported goods received at the customs area - the Container Freight Station, CWC Complex, Pragati Maidan, New Delhi, by issue of public notice or otherwise in that regard, *if by such notice or otherwise directs such custodians not to collect custody charges from the consignees of such goods - “the Cargo”, because of detention certificates issued by him or his delegatee, will not be acting within the powers conferred upon him under the Act, its Rules or its Regulations and hence directions given by the Customs Collector or his delegates to release the goods of importers or consignees without collecting demurrage charges from them cannot be enforced by Courts either against IAAI or CWC.”*

(Emphasis and underscoring supplied)

62. Relying on ***Grand Slam***⁴, the Supreme Court held, in ***Trustees of Port of Madras v. K. P. V. Sheikh Mohd Rowther & Co. Pvt Ltd***⁶, that the liability to pay demurrage charges, to the Port Trust, lay on the consignee of the goods, and not on the steamer agent. ***Trustees of Port of Madras v. Nagavedu Lungi***⁷ reiterated the position that the importer-

⁶ 1996 (82) ELT 174 (SC)

⁷ 1995 (18) ELT 241 (SC)

consignee, or exporter-consignor, of goods could not avoid his liability to pay demurrage charges and other incidental charges, even if the goods were illegally detained by the Customs authorities.

63. *U.O.I. v. Sanjeev Woollen Mills*⁸ is a decision, rendered by two Hon'ble Judges, which assumes importance, not so much for its own precedential value, as for the fact that it led to the subsequent judgement in *Shipping Corporation of India Ltd v. C. L. Jain Woollen Mills*⁹. The respondent, in *Sanjeev Woollen Mills*⁸, imported goods, under five Bills of Entry, declaring them to be synthetic waste. The Customs authorities were of the view, *per contra*, that the goods were prime fibre, which fetched a much higher price. This resulted in the issuance of a Show Cause Notice to Sanjeev Woollen Mills (referred to, hereinafter, as "SWM").

64. As, owing to their continued detention, the goods were incurring demurrage, SWM filed CWP 802/1991, before this Court, in respect of two of the four Bills of Entry. In the said proceedings, on 3rd April, 1991, the learned Counsel appearing for the Union of India stated that, in case, after inspection, the goods were found to be synthetic waste, as declared by SWM, the entire demurrage and container charges would be borne by the Customs Department, which would also issue the necessary detention certificate.

65. Pursuant to further directions issued by this Court in the said proceedings, the Collector, *vide* two separate adjudication orders dated

⁸ 1998 (100) ELT 323 (SC)

⁹ 2001 (129) ELT 561 (SC)

28th June, 1991, confiscated the goods, with option to redeem. In each case, the value of the goods was enhanced to ₹ 28.14 per kg. Personal penalty was also imposed. Consequent on the passing of the said adjudication orders, this Court, *vide* order dated 24th July, 1991, dismissed CWP 802/1991, relegating SWM to the remedy of statutory appeal, before the Tribunal. The Tribunal remanded the case, qua all four Bills of Entry, to the Chief Commissioner of Customs, for *de novo* adjudication. *Vide* order, dated 11th August, 1995, the Chief Commissioner ordered unconditional release of all the goods.

66. In the interregnum, SWM filed a second writ petition, being CWP 3469/1994, before this Court, seeking the release of the goods covered by all the aforesaid four Bills of Entry. *Vide* judgement and order dated 15th July, 1996, this Court allowed CWP 3469/1994, holding that there was no justification for detaining the consignments covered by the aforesaid four Bills of Entry, especially in view of the order of unconditional release, passed by the Chief Commissioner on 11th August, 1995. In view of the statement, made by learned Counsel for the Customs authorities, before this Court on 3rd April, 1991, in CWP 802/1991, the goods were directed to be released without recovery of any demurrage, and the Customs authorities were directed to issue the requisite certificate, as undertaken by this Court on 3rd April, 1991, for the said purpose. Detention certificate was, accordingly, issued by the Customs authorities on 15th October, 1996.

67. The Shipping Corporation of India (hereinafter referred to as “the Shipping Corporation”), being the custodian in respect of part of the

goods, waived 96% of the charges claimed by it, but insisted, nevertheless, on payment of ₹ 56,43,470/-. This provoked SWM to file Contempt Petition 340/1996, before this Court. *Vide* order dated 19th March, 1997, this Court granted one more opportunity, to the Union of India, to comply with the directions contained in the order dated 15th July, 1996 *supra*, further directing release of the goods, to SWM, within three weeks, and resolution, of the issue of payment of charges, by the Container Corporation of India and the Shipping Corporation, between themselves.

68. Though, pursuant to the aforesaid order, dated 19th March, 1997, the Union of India reported that the matter stood resolved with the Shipping Corporation, and delivery of the goods was also allowed by the Container Corporation of India, without payment of any demurrage charges, SWM did not take delivery of the goods, owing to an inter-se dispute among its partners, which resulted in the filing of Civil Suit No 748/1997, in this Court, in which an injunction, restraining the defendant-partners from taking delivery of the goods, was passed by this Court on 27th January, 1998.

69. Be that as it may, the judgement, dated 15th July, 1996, as well as the subsequent order, dated 19th March, 1997, passed by this Court in CWP 3469/1994, were carried, in appeal, to the Supreme Court, by the Union of India. It was contended, by the Union of India, that this Court erred in directing it to issue a detention certificate, or to bear the demurrage and container detention charges.

70. The Supreme Court dismissed the appeal. It was observed, by the Supreme Court, that the orders, under challenge before it, had been passed by this Court in the special facts of the particular case before it, in which the test reports confirmed the contention, of SWM, that there had been no misdeclaration on its part, despite which the goods were not being released by the Customs authorities. This had resulted in the Supreme Court directing the Customs authorities to file a detailed affidavit, in which the erring officers were claimed to have been located, and their explanation, in the matter, sought. The Supreme Court held that it was keeping in mind the totality of the circumstances, and the inordinate delay of about six years that had been occasioned in the release of the goods, that this Court had passed orders, directing the Customs authorities to issue detention certificate and bear the demurrage and container detention charges. These, it was held, were “obviously orders passed in the special circumstances of the present case, and particularly the conduct of the Customs authority in not releasing the goods even after the order of unconditional release dated 11-8-1995 passed by their own Chief Commissioner”. As the conduct of the Customs officers were also under investigation, the Supreme Court opined that no interference, at the hands of the Supreme Court, was warranted. It also allayed the apprehension, voiced by the Union of India, that the case would constitute a precedent, as “not justified because it is clearly an order which is meant to do justice to the respondent looking to the totality of circumstances and the conduct of the appellants”.

71. Though the Supreme Court itself clarified that the judgement, in *Sanjeev Woollen Mills*⁸ was passed in the peculiar circumstances of the

case, and would not constitute a precedent, a subsequent appeal, preferred by the Shipping Corporation against M/s C. L. Jain Woollen Mills, was referred, by a bench of two Hon'ble Judges of the Supreme Court, to a bench of three Hon'ble Judges, under the impression that there was inconsistency between the decisions in *Sanjeev Woollen Mills*⁸ and *Grand Slam*⁴. As the three-Judge bench, which was constituted to resolve the issue, went on to hold, unexceptionably, in *Shipping Corporation of India Ltd v. C. L. Jain Woollen Mills*⁹, there was, actually, no such inconsistency, inasmuch as *Sanjeev Woollen Mills*⁸ was decided on its own peculiar facts, with the express clarification that the judgement would not constitute a precedent.

72. *C. L. Jain Woollen Mills*⁹ is, however, an important decision, not for that reason, but because it is erroneously cited, on numerous occasions, as an authority for the proposition that, where the detention of the goods, by the Customs authorities, is illegal, the burden, to bear the demurrage charges, would fall on the Customs authorities. As would become apparent from the recital that follows hereinafter, the Supreme Court never held so. The direction to the Customs authorities to bear the detention and demurrage charges, as issued in the said case, was attributable solely to an order, dated 9th September, 1994, passed by this Court, the Special Leave Petition, preferred whereagainst, was also dismissed, by the Supreme Court, on 13th November, 1995. Else, a holistic reading of *C. L. Jain Woollen Mills*⁹ makes it apparent that the burden, to pay demurrage charges, is on the importer, and cannot be waived by the Customs authorities, by issuance of a detention certificate. It is also important to note, in the context of *C. L. Jain Woollen Mills*⁹,

that the decision was rendered, not in the context of any statutory enactment, authorising collection of demurrage charges, but in terms of the contract between M/s C. L. Jain Woollen Mills (hereinafter referred to as “CLJ”) and the Shipping Corporation.

73. Adverting, now, to the facts of *C. L. Jain Woollen Mills*⁹, the case involved a consignment of polyester filament, imported by CLJ at Bombay, with the port of delivery being ICD, Delhi. As such, there was no Customs clearance at Bombay, and the sealed container was transshipped to ICD, Delhi, where it remained in the custody of the Container Corporation of India (CONCOR). Carriage, of the goods, had been effected by the Shipping Corporation.

74. While the goods were in the custody of the Shipping Corporation, the Customs authorities, by an order, confiscated the goods, alleging their import to be unauthorised, with option to redeem on payment of redemption fine of ₹ 7 lakhs. The said decision was assailed, by CLJ, by way of appeal to the Tribunal, which adjourned the appeal, directing amendment of the Advance Licence held by CLJ. This decision was challenged, by CLJ, before this Court, by way of CWP 1604/1991, which was disposed of, *vide* judgement dated 9th September, 1994, quashing the decision of the adjudicating authority as well as of the Tribunal and directing the Collector of Customs to release the goods forthwith. The said order further held that, as the action of the Customs authorities was illegal, the goods would have to be released to CLJ without requiring payment of any detention or demurrage charges *by CLJ*. The Shipping Corporation was not made a party to the writ petition. *The said order,*

*dated 9th September, 1994, of this Court, was challenged, by way of SLP 5671/1995, which was dismissed, by the Supreme Court, vide order dated 13th November, 1995. As such, the order, dated 9th September, 1994, of this Court, became final, resulting in the liability of CLJ, if it ever existed, to pay demurrage charges, being completely extinguished. This has been clearly noted, by the Supreme Court, in para 4 of the report in **C. L. Jain Woollen Mills**⁹ thus:*

“But in view of the specific directions of the Delhi High Court in the writ petition filed by the importer of the goods, challenging the legality of the order of the Customs authorities in confiscating the goods and levying the penalty and that order having reached finality by dismissal of the special leave petition against the same filed by the Union of India, the liability of the importer to pay the demurrage charges ceases and that question cannot be reopened.”

75. It needs to be noted, even at this stage, therefore, that the Supreme Court, in **C. L. Jain Woollen Mills**⁹ did not direct CLJ to pay demurrage charges, as it felt its discretion, in that regard, to be constrained by the dismissal of SLP 5671/1995 on 13th November, 1995. As the recital hereinafter – as well as a holistic reading of the decision in **C. L. Jain Woollen Mills**⁹ – would, however, disclose, the liability of the importer, in law, to pay the demurrage charges, was upheld by the Supreme Court.

76. To return to the recital of facts in **C. L. Jain Woollen Mills**⁹, despite the judgement, dated 9th September, 1994 *supra*, passed by this Court, CLJ was unsuccessful in getting the goods released, resulting in the filing, by CLJ, of CCP 120/1995, before this Court, for initiation of contempt proceedings. The said contempt petition was, however, dismissed, by this Court, reserving liberty, with CLJ, to move the

Division Bench of this Court, for appropriate directions regarding payment of demurrage/detention charges. An application, to the said effect was, therefore, filed by CLJ, which was disposed of, by the Division Bench of this Court, *vide* order dated 18th January, 1999, holding that the entitlement of Shipping Corporation to charge demurrage charges and, if such entitlement existed, whether the charges would be required to be paid by the Customs authorities, or not, were matters which would have to be sorted out between the Shipping Corporation and the Customs authorities. Insofar as the liability of CLJ was concerned, the Division Bench held that, in view of the judgement, dated 9th September, 1994, of this Court in CWP 1604/1991, CLJ was entitled to secure release of the goods without payment of detention and demurrage charges. In these circumstances, the Customs authorities, as well as Shipping Corporation and CONCOR, were directed to sort out the matter within a specified period, further directing that, if any detention or demurrage charges were payable, they would be borne by the Customs authorities, which would discharge the said liability within three weeks. The Shipping Corporation and the CONCOR were directed to release the goods, after payment of the said detention/demurrage charges by the Customs authorities.

77. The entire issue was carried, in appeal, to the Supreme Court, where a bench of two Hon'ble Judges, as already noted hereinabove, referred the matter to a bench of three Hon'ble Judges, under the impression that there was inconsistency, *inter se*, between the decisions in *Grand Slam*⁴ and *Sanjeev Woollen Mills*⁸.

78. Having observed that, in view of the judgement and order, dated 9th September, 1994, of this Court in CWP 1604/1991, and the dismissal of SLP 5671/1995, preferred thereagainst, by the Supreme Court, on 13th November, 1995, there could be no question of CLJ being made liable to pay any demurrage charges, the Supreme Court delineated the larger question, arising before it, thus:

“The next question that arises for consideration which is a larger issue, namely if the customs authorities do not release the goods and initiates proceedings and finally passes order of confiscation but that order was ultimately set aside in appeal and it is held by Court of law that the detention of the goods was illegal, then in such circumstances whether the carrier of the goods who had a contract over the goods for non-payment of duty, can enforce the terms and conditions of the contract against the customs authorities, making the said authorities liable to pay the demurrage charges.”

79. The Supreme Court went on to reproduce Section 45 of the Customs Act and, after referring to the said Section, in juxtaposition with other provisions of the said Act, held that it was apparent, from the said provisions, that the Customs Authorities had full power and control over the imported goods and that, without their permission, the goods could not be cleared.

80. At the same time, it was held, *“there is no provision in the Customs Act, conferring power on the Customs Authorities to prohibit or injunct any other authority where the imported goods are stored from charging the demurrage charges for the services rendered for storing the imported goods”*. The Supreme Court also clarified that it was not concerned with a situation in which any statute, such as the Major Ports Trust Act, or the IAA Act, applied.

81. Before the Supreme Court, it was sought to be contended, on behalf of the Shipping Corporation, that the right of the Shipping Corporation, to claim demurrage, flowed from the terms and conditions of the contract between CLJ and the Shipping Corporation, and that the said right could not be divested by issuance of a detention certificate by the Customs Authorities. As such, it was sought to be contended, even if the court directed that the importer was not liable to pay demurrage, the Shipping Corporation would not be bound by the said direction, especially as it was not a party to the proceedings between the Customs Authorities and CLJ.

82. On behalf of the Union of India, it was contended, *per contra*, that the expression “or otherwise dealt with”, as contained in Section 45(2)(b) of the Customs Act restrained the custodian – in that case, the Shipping Corporation – and operated as a complete embargo on the goods being released. If, therefore, the outcome of the adjudication proceedings was nullified by a competent court, and detention certificate was issued by the Customs Authorities, it was contended that the importer would not be liable to pay demurrage charges, notwithstanding the contract between the Shipping Corporation and the importer. In any case, it was contended, demurrage charges could not be fastened on the Customs Authorities and that, therefore, in so directing, *vide* its order dated 18th January, 1999, this Court had erred.

83. Dealing with the said issue, the Supreme Court held, in para 7 of the report, that the terms of the contract between the Shipping Corporation and the CLJ, and the provisions of the Bills of Lading,

permitted the Shipping Corporation to retain the goods, till all its dues were paid. *This right, it was clarified, could not be nullified by issuance of a detention certificate by the Customs Authorities, in the absence of any provision, in the Customs Act, authorizing issuance of such detention certificate.* No such provision, it was observed, had been brought to the notice of the Supreme Court, as would enable the Custom Authorities to compel the carrier i.e. the Shipping Corporation, not to charge demurrage charges, the moment a detention certificate was issued. Inasmuch as the Shipping Corporation continued to retain a lien over the imported goods, so long as its dues were not paid, *the Supreme Court held that the Customs Authorities had no power to restrain the Shipping Corporation from charging demurrage charges, and no such injunction would flow from the issuance, by the Customs Authorities, of a detention certificate.* The right, of the Shipping Corporation, to charge demurrage charges, it was held, was owing to the occupation, by the imported goods, of the space of the Shipping Corporation.

84. The following words, of the Supreme Court, as occurring in para 7 of the report, merit reproduction:

“7..... But that by itself, would not clothe the customs authorities with the power to direct the carrier who continues to retain a lien over the imported goods, so long as his dues are not paid, not to charge any demurrage charges nor the so- called issuance of detention certificate would also prohibit the carrier from raising any demand towards demurrage charges, for the occupation of the imported goods of the space, *which the proprietor of the space is entitled to charge from the importer.* The importer also will not be entitled to remove his goods from the premises unless customs clearance is given. But that would not mean that demurrage charges *could not be levied on importer* for the space his goods have occupied, since the contract between the importer and the proprietor of the space is in no way altered because of the

orders issued by the customs authorities.....We are unable to accept this contention inasmuch as the expression otherwise dealt with used in Section 45(2)(b), in the context in which it has been used, cannot be construed to mean, it authorises the customs officer to issue a detention certificate in respect of the imported goods, *which would absolve the importer from paying the demurrage charges* and which would prevent the proprietor of the space from levying any demurrage charges. Having scrutinized the provisions of the Customs Act, we are unable to find out any provision which can be remotely construed to have conferred power on the customs authorities to prevent the proprietor of the space from levying the demurrage charges and, *thereby absolving the importer of the goods from payment of the same*. In fact the majority decision in ***Grand Slam Internationals case***⁴ clearly comes to the aforesaid conclusion with which we respectfully agree.

(Emphasis supplied)

85. Apropos its earlier decision in ***Sanjeev Woolen Mills***⁸, the Supreme Court clarified that there was no inconsistency between the said decision and ***Grand Slam***⁴, as ***Sanjeev Woolen Mills***⁸ turned on its peculiar facts (to which detailed allusion has already been made hereinabove) and was, expressly, declared not to constitute a precedent.

86. Even while, therefore, refraining from interfering with the orders, of this Court, under challenge before it – in view of the dismissal, by the Supreme Court, of the SLP preferred against the judgement, dated 9th September, 1994 – the decision in ***C. L. Jain Woollen Mills***⁹ also confirms the position, in law, that (i) the responsibility, to pay demurrage, was on the importer, and (ii) the Customs authorities were not possessed of jurisdiction or competence to issue directions, restraining charging of such demurrage.

87. *Grand Slam*⁴ was relied upon, yet again, by the Supreme Court, in *U.O.I. v. R. C. Fabrics (P) Ltd*¹⁰, though the main issue in controversy, in the said case, was different. *Vide* the said judgement, the Supreme Court decided three Civil Appeals. The respondent R. C. Fabrics (P) Ltd (hereinafter referred to as “RC Fabrics”) imported a consignment, declared as 100% polyester fabric, *vide* Bill of Entry dated 16th August, 1990. The consignment was found to be misdeclared, with respect to dimensions as well as quantity. At the request of RC Fabrics, show cause notice was waived, and a formal adjudication order was passed, by the Assistant Collector, on 15th January, 1991, allowing release, to RC Fabrics, of the excess goods, on payment of redemption fine of ₹ 25,000/- and personal penalty of ₹ 5000/-. The said amounts, along with Customs duty of ₹ 43,657/-, on the quantity of goods allegedly in excess, were deposited, by RC Fabrics on 22nd September, 1990. On the same day, however, officers of the Directorate of Revenue Intelligence (DRI) detained the consignment which was, subsequently, seized, by the DRI, on 15th November, 1990.

88. RC Fabrics petitioned this Court, seeking issuance of a mandamus, to the Customs authorities, to release the aforesaid consignment. The DRI contested the writ petition, alleging invasion of Customs duty, by RC Fabrics, of over ₹ 60 lakhs. This Court allowed completion of investigation, by the DRI, as well as issuance, to RC Fabrics, of Show Cause Notice, with directions, to RC Fabrics, to respond, thereto, within 48 hours of the receipt thereof. Adjudication was directed to be

¹⁰ 2002 (139) ELT 12 (SC)

completed and concluded within one week of completion of the investigation.

89. Show Cause Notice was issued, to RC Fabrics on 18th February, 1991, which culminated in the passing, by the Additional Collector of Customs, of an order, dated 25th February, 1991, directing confiscation of the aforesaid goods, with option to redeem, on payment of redemption filed of ₹ 4 lakhs and duty, of over ₹ 60 lakhs. Penalty of ₹ 5 lakhs was also imposed on RC Fabrics. This order was, however, set aside, by this Court, on the ground of violation of the principles of natural justice, and the matter was remanded to the adjudicating authority for decision afresh. In the said *de novo* adjudication, the Collector, *vide* order dated 22nd October, 1993, dropped the proceedings, on the ground that, the matter having been adjudicated once, *vide* order dated 15th January, 1991, passed by the Assistant Collector, there could be no second adjudication order in respect of the same consignment. The Collector refrained, therefore, from entering into the merits of the case. An appeal, preferred against the said order, dated 22nd October, 1993, of the Collector, was dismissed, by the Tribunal, on 13th September, 1999, against which SLP (C) 1663 of 2000 was preferred by the Collector.

90. In the interregnum, *vide* judgement dated 17th October, 1994¹¹, this Court directed release of the aforesaid imported goods to RC Fabrics, and also directed the Collector to pay the demurrage, container charges and ground rent to the CWC, for the period from 16th January, 1991 till the date of release of the goods, limiting the liability, to pay demurrage, of RC Fabrics, to the period prior thereto, i.e. from the date of storage of the

¹¹ R. C. Fabrics (P) Ltd v U.O.I., 1995 (76) ELT 9 (Del)

goods till 15th January, 1991. This decision was also assailed, by the Union of India, before the Supreme Court, and decided by the judgement presently under discussion.

91. The Supreme Court set aside the decision, of the authorities below, that, in view of the order, dated 15th January, 1991, of the Assistant Collector, the imported goods could not be adjudicated upon, by the Collector, once again. For the purposes of the present controversy, it is not necessary to go into the reasoning, adopted by the Supreme Court, in that regard. What is relevant is that the Supreme Court also set aside the direction, of this Court, rendering the Customs authorities liable to pay demurrage, container charges and ground rent, to the CWC, for the period after 16th January, 1991, on the ground that the said direction was contrary to the judgement in *Grand Slam*⁴. *Grand Slam*⁴ was, thereby, reiterated and reinforced.

92. The next judgement of significance, chronologically, is *Om Shankar Biyani v. Board of Trustees, Port of Calcutta*¹². The appellant Om Shankar Biyani (hereinafter referred to as “Biyani”) imported a consignment of bearings, *vide* Bill of Entry dated 13th July, 1989. The goods were seized on 1st August, 1989. Biyani filed a writ petition in the High Court of Calcutta. *Vide* order dated 27th September, 1989, the High Court permitted Biyani to clear the goods on payment of duty, as assessed, on the basis of the CIF value as appearing in the invoice. Biyani was, however, directed to furnish a bank guarantee, for the difference between the duty found payable on proper assessment, and the duty being

¹² 2002 (140) ELT 321 (SC)

paid by it. The order did not, however, allow removal, by Biyani, of the goods, without payment of the charges due to the Board of Trustees. The order dated 27th September, 1989 was, however, modified, by the High Court, *vide* order dated 15th December, 1989, directing that the goods be stored in a Customs bonded warehouse. Till this stage, the Board of Trustees was not impleaded as a party in the proceedings.

93. When, on the basis of the order, dated 15th December, 1989, Biyani attempted to remove the goods and shift them to the bonded warehouse, without paying demurrage, the Board of Trustees resisted. Biyani, thereupon, impleaded the Board of Trustees as a party in the writ petition. *Vide* order dated 2nd February, 1990, the High Court permitted Biyani to remove the goods to the bonded warehouse, without payment of port charges to the Board of Trustees, and also directed the Board of Trustees not to object. Biyani was merely directed to furnish an undertaking to pay all charges, as well as Custom duty, consequent on the issue being adjudicated. This order was assailed, by the Board of Trustees, before the Division Bench, which stayed the order.

94. In the interregnum, the Customs authorities lifted the seizure of the goods, on 19th December, 1989. Biyani, nevertheless, made no effort to clear the goods, but allowed them to remain with the Board of Trustees, despite the mounting demurrage.

95. The aforesaid writ petition, filed by Biyani, was disposed of, by a learned Single Judge of the High Court, *vide* order dated 16th September, 1991, by directing the Customs authorities to complete adjudication in a

time bound manner. It was further directed, by the learned Single Judge, that, were the adjudication proceedings to end in favour of Biyani, demurrage would be borne by the Customs authorities. It was further held that the Board of Trustees could claim demurrage only till 2nd February, 1990, i.e. the date of order, of the High Court, permitting Biyani to remove the goods without payment of port charges.

96. The Board of Trustees appealed. In the appeal, *vide* interim order dated 16th November, 1991, Biyani was permitted to clear the goods on payment of demurrage till 2nd February, 1990, subject to furnishing of Bank Guarantee in the name of the Chairman of the Board of Trustees, covering the charges of the Board of Trustees from 3rd February, 1990, till the date of the Bank Guarantee. Biyani, however, neither paid demurrage till 2nd February, 1990, nor furnished the Bank Guarantee. The appeal was disposed of, by the Division Bench of the High Court, *vide* order dated 27th July, 2000, whereby the directions, of the learned Single Judge, permitting recovery of demurrage, by the Board of Trustees only till 2nd February, 1990, was set aside, and the Board of Trustees was held entitled to recover demurrage for the entire period during which the goods remained with it.

97. This order, dated 27th July, 2000, was challenged, by Biyani, before the Supreme Court.

98. The Supreme Court first extracted Section 58 of the Major Port Trusts Act, 1963, which clearly provides that, in respect of goods to be removed from the premises of the Board of Trustees, demurrage would

be payable before the goods are so removed. In view of this categorical statutory position, the Supreme Court held that the High Court had seriously erred in permitting removal of the goods without payment of port charges. It was observed that the Board of Trustees was not concerned with the question of the person who would have to bear the said charges. Biyani being interested in clearance of the goods, it was the responsibility of Biyani to pay the charges and clear the goods. The Supreme Court went on to hold that, even if Biyani were to contend that demurrage was required to be borne by the Customs authorities, Biyani ought to, first, have cleared the goods by paying demurrage to the Board of Trustees and, thereafter, claimed reimbursement from the Customs authorities.

99. The Supreme Court further noticed that Section 59 of the Major Port Trusts Act conferred statutory lien, on the Board of Trustees, over the goods consigned to its custody, whereunder it was entitled to retain the goods until all amounts, payable to it, were paid. The direction, of the High Court, permitting removal of the goods, from the custody of the Board of Trustees, without payment of the charges due to the Board, it was held, resulted in setting at naught this statutory lien.

100. The Supreme Court also discountenanced the observation, of the High Court, that, having exercised its lien over the goods, the Board of Trustees was estopped from claiming demurrage. The Supreme Court opined that the proposition that a bailee, who exercises a lien, is not entitled to charge rent for storage of goods, could never apply to a case where the lien was invoked for non-payment of rent, or storage charges.

The Supreme Court provided an involved reasoning, to support this finding, with which we need not concern ourselves. Suffice it to state that the Supreme Court endorsed, entirely, the insistence, of the Board of Trustees, on payment of demurrage, to it, before allowing clearance of the goods of Biyani. It also endorsed the conclusion, of the Division Bench of the High Court, that the Board of Trustees was entitled to recover all charges till the date the goods remained with it.

101. On facts, thereafter, the Supreme Court held that, as the Board of Trustees had applied, to the Division Bench of the High Court, for permission to sell the goods, and that, *vide* order dated 10th January, 1992, passed on the said application, the Division Bench had held that the cause of action had to be decided by the Board of Trustees itself, the Board of Trustees ought to have sold the goods at that stage, especially as it was aware, by then, that Biyani was not paying demurrage. Inasmuch as the High Court had permitted the Board of Trustees to take recourse to actions permissible in law, and sale was one of the courses of action permitted by the Major Port Trusts Act, the Supreme Court held that the Board of Trustees ought not to be allowed to charge demurrage charges after 10th January, 1992. This decision, however, obviously turns on the peculiar facts before the Supreme Court, and cannot be treated as constituting part of the *ratio decidendi* of the judgement in ***Om Shanker Biyani***¹² which, otherwise, reiterated and reinforced the principle that the Board of Trustees/custodian was entitled to charge demurrage for the period over which the goods were consigned to its custody.

102. The last judgement of the Supreme Court, in this list, would be *Jindal Drugs Ltd v. U. O. I.*¹³. The appellant Jindal Drugs Ltd (hereinafter referred to as “Jindal”) moved the Supreme Court, challenging the decision, of the High Court of Bombay, whereby, even while holding Jindal to be entitled to issuance of a detention certificate and refund of detention charges paid to the Customs authorities, it was directed to move the Port Trust authorities, insofar as its claim for payment/refund of demurrage/Port Trust charges, was concerned. The Supreme Court noted that the reluctance, of the Customs authorities, to permitting clearance of the goods imported by Jindal, was owing to a dispute regarding the meaning and import of clause (iv) of the second proviso to Condition (2) of Notification 100/1995-Cus, dated 30th May, 1995, whereunder credit had been availed by Jindal. It was also noticed that the CBEC had issued directions, on 19th February, 1996, which virtually prohibited the Commissioner of Customs from clearing the goods. The goods were ultimately cleared on the basis of interim directions, passed by the High Court on 15th April, 1996. Subsequently, on 14th May, 1996, the Revenue conceded that Jindal was entitled to the benefit of credit. Before the High Court, as well as before the Supreme Court, Jindal contended that, as the subsequent reneging, by the Customs, on the stance originally adopted by it, regarding the entitlement, of Jindal, to credit, disclosed, the detention of the goods, by the Customs authorities, was completely unlawful. In this scenario, contended Jindal, the liability to pay demurrage had necessarily to fall on the Customs authorities. Having failed to succeed in convincing the High Court in that regard, Jindal appealed to the Supreme Court.

¹³ 2018 (361) ELT 769 (SC)

103. The Supreme Court rejected the submission. Observing that the facts did not disclose existence of any *mala fide* intent, or extraneous consideration, attributable to the Revenue, in detaining, and refusing to clear, the goods of Jindal, and that the reluctance, of the Revenue, in that regard, was owing to a possible understanding of the provisions of Notification 100/95-Cus *supra*, the Supreme Court held that no case, to mulct the Revenue with the liability to pay demurrage, could be said to have been made out. The decision of the High Court was, consequently, affirmed.

104. From the afore-cited decisions, the following clear principles emerge:

(i) The custodian has a lien over the imported goods, consigned to its custody. This lien may be statutory, as provided under the IAA Act, all the Major Port Trusts Acts, or contractual. It may also be relatable to Sections 170 and 171 of the Indian Contract Act, 1872.

(ii) This lien entitles the custodian to retain hold of the goods, consigned to its custody, till all its dues, including ground rent and demurrage, are paid.

(iii) The Customs authorities have no power, or the jurisdiction, to issue any instruction, to the custodian, requiring the custodian to waive, in whole or in part, the demurrage chargeable by it. Of course, this would be subject to any stipulation, in the statutory or

other instrument governing the affairs of the custodian, to the effect that, where the detention certificate was issued by the Customs authorities, the importer would be entitled to waiver of demurrage, in whole or in part. In the absence of any such stipulation, statutory or otherwise, the Customs authorities could not, by issuance of the detention certificate, or by any other communication, direct the custodian not to charge demurrage, or to waive the whole, or part, of the demurrage chargeable by it.

(iv) In applying the above principles, the issue of whether the goods in question had been licitly, or illicitly, imported, as also the detention of the goods, by the Customs authorities, was justified or unjustified, *bona fide* or *mala fide*, are entirely irrelevant.

(v) The liability to pay the demurrage is on the importer, irrespective of the justifiability, or unjustifiability, of the seizure and detention of the goods by the Customs authorities. Even in a case in which the seizure is entirely unjustified, the importer would, in the first instance, have to pay demurrage, to the custodian and, thereafter, pursue, with the Customs authorities, for obtaining reimbursement of the amount.

(vi) The only exception, to the application of the above principles, is in a case in which the custodian himself is guilty of unconscionable delay, or of continuing to hold onto the goods without good reason or authority.

(vii) Rates of demurrage were deliberately made prohibitive, so as to discourage importers from consigning goods to the custody of the Port Trust or other custodian, and to avoid congestion at the port.

Does Regulation 6(1)(l) of the Handling of Cargo Regulations change this position?

105. The Handling of Cargo Regulations were notified *vide* Notification 26/2009-Cus (NT), dated 17th March, 2009, issued in exercise of the powers conferred by Section 141(2), read with Section 157 of the Customs Act. Regulation 6(1)(l), which stands extracted in para 2 hereinabove, stipulates that the Customs Cargo Service provider shall, subject to any other law for the time being in force, not charge any rent or demurrage on goods seized, detained, or confiscated by the Customs authorities. To our mind, it appears a trifle incongruous that, even in a case where the goods are confiscated, i.e. where the import is illicit and in contravention of the provisions of the Customs Act, the importer should escape demurrage. As the legality of Regulation 6(1)(l) is, however, not in question in these proceedings, we refrain from opining further in that regard.

106. Regulation 6(1)(l) makes for fairly plain reading. It completely injuncts the Customs Cargo Services provider from charging demurrage or rent, on the seized, detained, or confiscated goods, subject, however, *to any other law for the time being in force.*

107. There is no dispute about the fact that CELEBI is a “Customs Cargo Services provider”, as defined in clause (b) of Regulation 2 of the Handling of Cargo Regulations.

108. Given the law, relating to the charging of demurrage, as it emerges from the decisions cited hereinabove, the highest that the petitioner could contend, therefore, is that there is no “other law for the time being in force”, as would mitigate the effect of Regulation 6(1)(l) of the Handling of Cargo Regulations.

109. *Per contra*, in order to escape the rigour of Regulation 6(1)(l), the Customs Cargo Service provider – in the present case, CELEBI – would have to establish that its entitlement, to charge demurrage, is relatable to “any other law for the time being in force”.

110. At this juncture, we may refer, profitably, to the judgment of the Supreme Court in *Mumbai Port Trust v. Shri Lakshmi Steels*¹⁴, in which note, of Regulation 6(1)(l), has been taken. The respondent, before the Supreme Court, imported cold rolled sheets and coils. The DRI directed the consignment to be placed on hold, on 14th December, 2015. On 28th December, 2015, the DRI wrote, again, to the Customs authorities, stating that specific intelligence had been received, that Shri Lakshmi Steels (hereinafter referred to as “SLS”), and its associated firms, had been importing consignments in violation of notifications issued by the Customs authorities. The Customs authorities were, therefore, requested to have the goods subjected to 100% examination. In the meantime, on

¹⁴ 2017 (352) ELT 401 (SC)

18th December, 2015, SLS requested that the goods, covered by Bills of Entry dated 4th December, 2015 and 11th December, 2015, be provisionally assessed and released, so as to avoid mounting demurrage the detention charges. Three reminders followed. Thereafter, samples of the goods were drawn and tested, whereupon they were found to conform to the description, as proposed by SLS. It appears that, thereafter, the goods were retested and that, this time, the test report was in favour of the Customs authorities.

111. On 1st February, 2016, SLS wrote to the Commissioner, seeking issuance of detention certificates, so that they could secure waiver of demurrage and detention charges. On 23rd February, 2016, the goods were seized, and SLS was directed to approach the concerned authority, for provisional release thereof. The request, of SLS, for issuance of detention certificate, was rejected, by the DRI, on 5th February, 2016. As it happened, for one reason or the other, the goods were not released.

112. On 22nd April, 2016, the Shipping Line issued a notice, to SLS, intimating that it proposed to auction the goods, to recover the detention charges. Fresh writ petitions were, thereafter, filed by SLS and other similarly situated importers. *Vide* order dated 12th July, 2016, the High Court directed that the goods be released on payment of duty due thereon, the issue of detention and demurrage charges being deferred for decision later. This order was challenged, before the Supreme Court, by way of SLP (C) 23479/80 of 2016, which was allowed on 15 September, 2016, with a direction, to the High Court, to dispose of the writ petition at

an early date. In the interregnum, release/auction of the imported goods was stayed.

113. This resulted in the passing, by the High Court, of judgement, dated 23rd December, 2016, whereagainst the matter was carried, in appeal to, the Supreme Court. The High Court found that SLS had been harassed by the DRI and, therefore, ordered that SLS was not liable to pay any demurrage, which the Port Trust was directed to waive. Detention charges were directed to be borne by the DRI, or the Customs authorities.

114. The Supreme Court delineated the two issues, arising before it for consideration, as “(1) whether any direction could be given to the Mumbai Port Trust to waive the demurrage charges and (2) whether the liability to pay the demurrage/detention charges in respect of the imported goods could be fastened upon the DRI/Customs Authorities.”

115. Noting that the Mumbai Port Trust was a statutory authority, functioning under the aegis of the Major Port Trusts Act, 1963, the Supreme Court, at the outset of its reasoning, extracted various provisions of the Major Port Trusts Act and the Customs Act and proceeded, thereafter, to refer to the various judgements, rendered by it earlier, to which allusion already stands made hereinabove. On issue (1) *supra*, as framed by it, the Supreme Court went on to answer the issue in the negative, i.e. by holding that the Mumbai Port Trust was entitled to charge demurrage, for the following reasons:

(i) Section 160(9) of the Customs Act clearly laid down that nothing, in the said Act, shall affect the power of the Port Authority in a Major Port, as defined in the Major Port Trusts Act. There was no dispute about the fact that the Mumbai Port Trust was a Major Port.

(ii) The Mumbai Port Trust had power and authority to levy rates, including demurrage, under Section 47A of the Major Port Trusts Act. This right of the Port Trust was not affected either by the provisions of the Customs Act, or by the Handling of Cargo Regulations. Besides, the Regulations were in the nature of subordinate legislation. Subordinate legislation, especially when framed by the CBEC under the Customs Act, could not affect, in any manner, the power and authority of the Major Port Trust, statutorily vested in it.

(iii) This was made manifest in the Handling of Cargo Regulations, by the use of the words “subject to any other law for the time being in force”, at the start of Regulation 6(1)(l). “Any other law for the time being in force” would include the Major Port Trusts Act. The right of the Port Trust, to charge demurrage, which emanated from the Major Port Trusts Act could not, therefore, be defeated by Regulation 6(1)(l).

For the above reasons, it was held that “*the High Court erred in holding that the law settled by this court in a catena of judgements referred to above was no longer applicable in view of the 2009 Regulations*”.

116. The Supreme Court addressed, next, the issue of whether the DRI, or the Customs authorities, could be saddled with the demurrage charges, payable to the Port Trust, and the detention charges payable to the Shipping Line. This issue, it was held, was no longer *res integra*, the judgements, cited hereinabove, having clearly held that, even if the importer were not at fault, the liability to pay demurrage would fall on him. It was held, further, that “the DRI/Customs authorities can be directed to pay the demurrage/detention charges *only when it is proved that the action of the DRI/Customs authorities is absolutely mala fide or is such a gross abuse of power* that the officials of the DRI/Customs should be asked to compensate the importer for the extra burden which he has to bear”. Even in such cases, the Supreme Court hastened to clarify, the importer had, necessarily, to, in the first instance, to “*clear the goods by paying the charges due and then claim reimbursement* from the Customs authority”. In this context, the Supreme Court also observed that charges of *mala fide* were serious, and required a high degree of proof.

117. In these circumstances, the Supreme Court effectively answered both the issues, framed by it, against the importer, holding that (i) the Mumbai Port Trust was entitled to charge demurrage and (ii) the liability, to pay the said demurrage, was on the importer. On facts, the Supreme Court also held that no such factors could be said to exist, which would justify transference, of the said liability, on to the Customs authorities. It was observed that, even if there was some delay on the part of the Customs authorities, equally, there was delay on the part of the importer as well. The Supreme Court, however, clarified that the importers were

free to approach the Port Trust, under Section 53 of the Major Port Trusts Act, seeking extension and revision of demurrage and other charges, and opined that the Board of Trustees could take a sympathetic view in the matter.

118. The Supreme Court also held – though this may not be strictly relevant for the present proceedings – that, insofar as the detention charges, payable to the Shipping Line, were concerned, the issue being one of contract, this Court could not, in writ proceedings, have directed the DRI, or the Customs authorities, to pay the said charges to the Shipping Line.

119. In any event, insofar as the right of the Mumbai Port Trust, to charge demurrage, was concerned, therefore, the Supreme Court has held, clearly and unequivocally, that *the law, as laid down from **Aminchand Pyarelal**¹ downwards, through **Grand Slam**⁴ and the judgements which followed it, continues to apply, despite Regulation 6(1)(l) of the Handling of Cargo Regulations having come into force.* It has also been clarified, yet again, that the liability to pay demurrage was on the importer, for ensuring clearance of the goods. *In a case in which the Customs authorities were found to have acted in a manner which was grossly mala fide, the importer could seek reimbursement, of the said amount, from the Customs authorities; even in such a case, however, the importer would, in the first instance, have himself to pay demurrage and clear the goods.*

120. Is the position in any different, in respect of CELEBI, and its right to charge demurrage?

121. We do not think so.

122. Insofar as the right of CELEBI, to charge demurrage, is concerned, we are of the opinion that, legally speaking, the position, qua the said right, is the same as that which obtained in respect of the Mumbai Port Trust, even though CELEBI is, admittedly, not covered by the Major Port Trusts Act. We say so because, even in the case of CELEBI, demurrage is charged on the basis of Regulations which are statutory by nature and which, therefore, partake of the character of “any other law for the time being in force”, for the purposes of Regulation 6(1)(l) of the Handling of Cargo Regulations.

123. Mr. Rakesh Tiku, learned Senior Counsel appearing on behalf of CELEBI, has demonstrated this, by explaining the statutory basis, for the charging of demurrage, by CELEBI, thus:

(i) The AAI was constituted by the Airports Authority of India Act, 1994 (hereinafter referred to as “the AAI Act”). The preamble, to the AAI Act, recited that the Act was meant to provide for the Constitution of the AAI, and for the transfer and vesting of the undertakings, of the IAAI and National Airports Authority, in the AAI.

(ii) Section 3 (1) of the AAI Act declared that the AAI stood constituted *vide* Notification, in the Official Gazette, issued by the Central Government. Section 13(1) transferred to, and vested in,

the AAI, the undertakings of the IAAI and National Airports Authority. All rights, powers, authorities and privileges, earlier vested in the IAAI, stood transferred, by sub-section (2) of Section 13, in the AAI.

(iii) Section 12 of the AAI Act stipulates that it shall be the function of the AAI, to manage the airports. Clause (g) of sub-section (3) of Section 12 specifically empowers the AAI to establish warehouses and cargo complexes, at airports, for the storage and processing of goods.

(iv) Section 42 of the AAI Act empowers the AAI to make regulations, specifically for the storage of and processing of goods in any warehouse established by the AAI under Section 12(3)(g), and for charging of fees for such storage and processing. In exercise of the said power, the AAI notified the Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 (hereinafter referred to as “the AAI Regulations”), which came into effect on 13th June, 2003.

(v) “Cargo Handling Agency” is defined, in clause (i) of Regulation 2 of the AAI Regulations, as meaning “a person, firm or company handling cargo as an agent of the Authority or the licensee and may include the Authority”. As such, Mr. Tiku points out, the AAI Regulations permitted licensing/delegation, of the function of handling of the cargo, by the AAI, to its agent.

(vi) “Demurrage” is defined, in clause (n) of Regulation 2 of the AAI Regulations, as meaning “the rate or amount of charges payable to the Authority by the shipper or consignee or carrier or agent or passenger for utilising storage facility at Cargo Terminal, for storage of cargo, goods, unaccompanied baggage, stores, courier bags, express parcels, Postal mail, etc. for extended period beyond the stipulated free storage period for clearance or removal from the Cargo Terminal of the Authority or for the Customs at the Cargo Terminal”.

(vii) Regulation 3 of the AAI Regulations sets out the “Procedure and documents required for storage, processing and handling of cargo”. Sub- regulation (b), thereof, stipulates that the AAI shall deliver the consignment to the consignee or the authorised agent “*after collecting applicable charges* and obtaining a valid receipt from the consignee or the authorised agent of having received the goods”.

(viii) The same sub-Regulation also stipulates that, till the said charges are paid, the AAI “shall have a lien on cargo or goods”.

(ix) The authority to levy demurrage charges stems from Regulation 4 of the AAI Regulations, which reads as under:

“4. Levy of Charges. – The Authority shall levy charges, which may include Terminal handling including ‘unitization’ and ‘destuffing’ charges, facilitation charges, Terminal Storage and Processing Charges, security screening charges, Electronic Data Interchange or Value Added Network service charges, demurrage and special charges for live animals, hazardous cargo, radioactive cargo, express cargo, courier and cargo requiring strong

room facilities. The Authority may levy any other charges for which services are provided by it to its users under the provision of these regulations, which may include the operations of Brake-bulk or consolidation of cargo and handling of Postal Mail, etc.”

(x) Regulation 6 of the AAI Regulations provides for “Waiver of Charges”, and empowers the AAI to, “from time to time, lay down the procedure and policy for waiver of demurrage charges” under the said Regulations.

(xi) Section 12A of the AAI Act empowers the AAI to, in public interest or the interest of better management of airports, “make a lease of the premises of an airport (including buildings and structures thereon and pertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit”. The proviso, to the said sub-section (1), however, clarifies that the said lease “shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports in civil enclaves”. Functions, other than air traffic, and watch and ward services can, therefore, be leased, by the AAI.

(xii) Sub-section (4), of Section 12A, of the AAI Act, reads thus:

“(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such functions in terms of the lease.”

(xiii) In exercise of the powers conferred by Section 12A of the AAI Act *supra*, the AAI entered into an Operation, Management

and Development Agreement (hereinafter referred to as “OMDA”), on 4th April, 2006, with the Delhi International Airport Pvt Ltd (hereinafter referred to as “DIAL”). The said agreement has been placed on record. The agreement recites that the AAI “in the interest of the better management of the Airport ... and/or overall public interest, is desirous of granting some of its functions, being the functions of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport to the JVC and for this purpose to lease the premises constituting the Airport Site ... in accordance with the terms and conditions set forth herein”. “JVC”, it may be noted, is the acronym employed, in the OMDA, to refer to the DIAL.

(xiv) Chapter II of the OMDA deals with the “Scope of Grant”, thereunder. Article 2.1 (the OMDA refers to its various Clauses as “Articles”), in Chapter II, reads thus:

“2.1 Grant of Function

2.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Airport and to perform services and activities constituting Aeronautical services, and Non-Aeronautical Services (but excluding Reserve the Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical suit Services and Non-Aeronautical Services (but excluding

Research Activities) at the Airport, in accordance with the terms and conditions of this Agreement (the “**Grant**”).

2.1.2 Without prejudice to the aforesaid, AAI recognises the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:

(i) develop, finance, design, construct, modernise, operate, maintain, use and regulate the use by 3rd parties of the Airport;

(ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of providing Aeronautical Services and Non-Aeronautical Services;

(iii) *determine, demand, collect, retain an appropriate charges from the users of the Airport in accordance with Article 12 hereto; and*

(iv) *Contract and/or sub contract with 3rd parties to undertake functions on behalf of the JVC, and sub- lease and/or license the Demise Premises in accordance with Article 8.5.7.”*

(Emphasis supplied)

(xv) It was, Mr. Tiku points out, in exercise of the power conferred by Article 2.1 of the OMDA, that CELEBI was assigned the function of managing cargo, *vide* Concession Agreement dated 24th August, 2009, executed between the DIAL and CELEBI. The introductory paras of the said Agreement contained, *inter alia*, the following recitals:

“WHEREAS

A. The Airport Authority of India and DIAL have entered into an Operation, Management and Development

Agreement dated April 4, 2006 (“**OMDA**”) whereby AAI has granted to DIAL the exclusive right and authority during the term of the OMDA (including any renewal thereof) to operate, maintain, develop, design, construct, upgrade, modernise, finance and manage the Airport.

B. Pursuant to the terms of the OMDA, DIAL is, inter alia, entitled to grant concession to 3rd parties for the purpose of upgradation, modernisation, finance, operation, maintenance and management of the Cargo Terminal at the Airport.

E. After evaluating all the Proposals received by DIAL, DIAL accepted the proposal submitted by Celebi and issued a Letter of Award to Celebi for award of the Concession.”

(xvi) Chapter 2 of the Concession Agreement dealt with the exact terms of the “Grant of Concession”, and Clause 2.1, thereunder, reads thus:

“In consideration of the Concession Fee, License Fee, Utility Charges and other payments as specified under this Agreement and the Concessionaire’s governance hereinafter reserved and contained in this Agreement, DIAL hereby grants to the Concessionaire and the Concessionaire hereby accepts from DIAL, the right to upgrade, modernise and finance the Cargo Terminal and operate, maintain and manage the Cargo Terminal and provide Services at the Airport from the Cargo Terminal during the Concession Period, in accordance with Good Industry Practice, Applicable Laws and terms and conditions of this Agreement.”

(xvii) Clause 3.1.1 of the Concession Agreement requires CELEBI to pay, to DIAL, commencing from the date of handing over, a

Concession Fee for every month, equal to 36% of the Gross Revenue, as was agreed to, by CELEBI, in its tender proposal.” Clause 3.4, titled “License Fee”, similarly, requires “CELEBI to pay, to DIAL, till the date of expiry or termination of the Concession Agreement, an annual License Fee for the user right to the Cargo Terminal, which shall be calculated on the basis of the floor area of the warehouse (approximately 70,000 square metres), and shall be payable in advance for each year, within 7 days of the commencement of the year. The said annual License Fee is subject to upward revision on year to year basis at the rate of 7.5% per annum. At the time of entering into the Concession Agreement, the licensee, payable w.e.f. 1st April, 2009, was ₹ 2098/–, per square metre.” Mr. Tiku informs us that the License Fee has, since, been periodically enhanced and is, presently, ₹ 5000/–, per square metre. This, therefore, would require CELEBI to pay, to DIAL, presently, License Fee, @ ₹ 35,00,00,000/- per year. This being the financial outlay, on CELEBI, Mr. Tiku voices his undisguised chagrin at the Customs authorities directing CELEBI not to charge any demurrage from the petitioner.

124. Mr. Tiku also draws our attention to clauses 6.1.2 and 6.1.3 of the Concession Agreement, regarding development and up-gradation of the cargo terminal, which read thus:

“6.1.2 The Concessionaire shall at its own cost and responsibility upgrade, modernize, finance, operate, maintain and manage the Cargo Terminal including but not limited to providing; maintaining and upgrading all such equipments and materials necessary for operating, maintaining and managing the same for rendering the Services.

6.1.3 The Concessionaire shall, while upgrading, modernizing, financing, operating, maintaining and managing the Cargo Terminal, take into consideration and be responsible for compliance with all relevant provisions of the Applicable Laws, parameters set out in the Business Plan and obtain all such Approvals as may be necessary for the implementation of the Concession including but not limited to complying with the relevant development standards as stipulated under the OMDA.”

For all the aforesaid reasons, Mr. Tiku submits that the entitlement, of CELEBI, to recover demurrage charges, from the petitioner, cannot be gainsaid.

125. Mr. Tiku has also endeavoured to submit, before us, that no case, meriting waiver of demurrage, can be said to exist, in view of the waiver policy of CELEBI. He draws our attention, in this context, to clause 10.1.10 of the waiver policy, which reads thus:

“10.1.10 Demurrage charges shall not be waived where:

- (a) Any fine/penalty/personal penalty/warning is imposed by the Customs Authority
- (b) Delay arose by reason of dispute in the assessable value or for revalidating or correcting the license in ordinary course of appraisal.”

126. Mr. Tiku points out that cases, in which fine/penalty/personal penalty, is imposed by the Customs authorities, stand, *ipso facto*, disentitled to waiver from demurrage. Even on merits, therefore, Mr. Tiku would seek to submit that no case exists to exempt, or waive, payment of demurrage, in the case of the petitioner.

127. We have no manner of doubt, whatsoever, in our mind, that in view of the above factual and legal position, the charging of demurrage, by CELEBI, is by authority of statute, or contract sanctified by statute. CELEBI charges demurrage as per the clauses of the agreement between CELEBI and DIAL which, in turn, was entered into, in accordance with Article 2.1 of the OMDA which, again in turn, was authorised by Section 12A of the AAI Act.

128. This, in our view, clearly constitutes, “law for the time being in force, within the meaning of the expression, as employed in Regulation 6(1)(l) of the Handling of Cargo Regulations.

129. In *Shrimani Sugar Mills v. Governor General In Council*¹⁵, it has been held that the expression “law for the time being in force”, concerning any particular matter, “whether it be the collection of revenue or anything else, is a comprehensive expression which includes, not one particular statute, but the whole body of law, whether in one or more statutes or outside a statute altogether, which for the time being governs that particular matter”. An administrative order, which has no authority of statute, however, is not law, as held in *Dwarka Nath Tiwari v. State of Bihar*¹⁶.

130. The expression “law” has also been, from time to time, expansively interpreted.

¹⁵ AIR 1954 All 354

¹⁶ AIR 1959 SC 249

131. In *Rashid Ahmed v. Municipal Board, Kairana*¹⁷, it was held that, “law” includes bye-laws made by local authorities. A resolution of the government, fixing dearness allowance was held, in *State of Madhya Pradesh v. G.C. Mandawar*¹⁸, to constitute “law”. As employed in Article 13 of the Constitution of India, it stands authoritatively held, in *Ram Krishna Dalmia v. Justice S.R. Tendolkar*¹⁹, that the expression “law” includes any notification or order. To the same effect, is *Narender Kumar v. U.O.I.*²⁰. A scheme, drawn for running motor carriages, was held to constitute “law”, in *H.C.Narayanappa v. State of Mysore*²¹. In *Sant Ram v. Labh Singh*²² it was held that the expression “law” means any ordinance, order, bye-law, rules, regulations, notification, custom or usage, having, in the territory, the force of law. In *Raj Kumar Narsingh Pratap Singh Deo v. State of Orissa*²³, the Supreme Court held that “law generally is a body of rules which had been laid down for determining legal rights and regulations which are recognised by courts”.

132. The expression “law” and, consequently, the expression “any other law for the time being in force” are, therefore, required to be compendiously interpreted, rather than infusing, into the said expression, any unwarranted restrictions.

133. The charging of demurrage by the CELEBI, being in terms of the concessionaire agreement, between the DIAL and CELEBI, which was entered into, by them, in terms of the OMDA, which, in turn, stands

¹⁷ AIR 1950 SC 163

¹⁸ AIR 1954 SC 493

¹⁹ AIR 1958 SC 538

²⁰ AIR 1960 SC 430

²¹ AIR 1960 SC 10730

²² AIR 1965 SC 3314

²³ AIR 1964 SC 1793

sanctified by Section 12A of the AAI Act, in our opinion, the CELEBI must be treated as charging, and recovering, demurrage, in accordance with “law for the time being in force”.

134. The inevitable sequitur would be that the injunction, engrafted in Regulation 6(1)(l) of the Handling of Cargo Regulations, on the charging of demurrage in respect of goods detained/seized, or confiscated by the customs authorities, would not apply to, or affect, CELEBI. It has to be remembered, in this context, that CELEBI is required to pay a colossal sum of ₹ 35,00,00,000/-, every year (which is subject to further upward revision) to the DIAL. There is, therefore, substance in Mr. Tiku’s protestation, that the CELEBI cannot be expected to cede its right to charge demurrage, solely on the basis of a “direction” by the Customs authorities.

135. It is also settled, by the decisions cited hereinabove, that the liability, to pay demurrage to the CELEBI, was of the petitioner. In view of the facts recited in paras 7 to 13 *supra*, we are unable to hold that the Customs authorities have acted *mala fide* or have contributed, in any manner, to delay in release of the consignment imported by the petitioner.

136. We deem it appropriate to add, here, that the Customs authorities, while exercising their power of search, seizure and investigation, are essentially discharging sovereign functions. A reasonable amount of time is expected to be expended in this process, and the mere fact that, by reason of the investigative exercise conducted by the Customs authorities, it has not been possible for the importer to clear its goods, cannot, *ipso*

facto, lead to transference of liability to pay demurrage, to the Customs authorities.

137. It is only where a clear case of unquestionable delay, bordering on *mala fides* and demonstrative of unreasonable harassment of an importer, is made out, that the customs authorities can be mulcted with the liability to pay demurrage or detention charges.

138. Such is the law, as enunciated by the Supreme Court in a plethora of decisions cited hereinabove and, with the same, we express our respectful concurrence.

139. Responding to the aforesaid submissions of Mr. Tiku, Mr. Priydarshi Manish, learned counsel for the petitioner draws our attention to a communication, dated 16th May, 2019, addressed by the Deputy Commissioner of Customs to CELEBI, informing CELEBI that the case in issue, covered by Bills of Entry, dated 3rd May, 2019, were required to be shifted to the office of the Commissioner of Customs. Having carefully read the said communication, we are, however, of the opinion that it can be of no substantial assistance, insofar as the petitioner's case is concerned. The said communication merely conveys, to CELEBI, the fact that the seized goods were to be shifted to the office of the Commissioner. Such a communication cannot, in our view, result in compulsory abandonment, by CELEBI, of its right to recover demurrage. Indeed, as held by the Supreme Court in the authorities already cited hereinabove, the Customs authorities have no jurisdiction, whatsoever, to injunct CELEBI from recovering the demurrage charges, otherwise recoverable by it in law.

140. Mr. Manish also referred us to communications, dated 13th March, 2019, from the Chief Commercial Officer of DIAL to the Chief Commissioner of Customs, and dated 15th March, 2019, from the Joint Commissioner of Customs to DIAL, by way of response thereto.

141. The submission of Mr. Manish is that, in the letter dated, 13th March, 2019, there is a categorical undertaking, by DIAL, to the Chief Commissioner of Customs, to the effect that no demurrage would be charged, by the custodian, i.e. CELEBI, in the present case, for the period for which detention certificate was issued by the customs authorities, and that, in fact, it was subject to this undertaking, that the request, of DIAL, for renewal of its license to continue as a cargo service provider, under the Handling of Cargo Regulations, was accepted and allowed.

142. On a reading of the aforesaid communication dated 13th March, 2019, from DIAL to the Chief Commissioner, and dated 15th March, 2019 from the Chief Commissioner to the DIAL, we find this submission of Mr. Manish to be utterly misconceived. This is apparent from a bare reading of para 3 of the communication dated 13th March, 2019, and the corresponding paragraph of the reply, dated 15th March, 2019, thereto. The said paragraphs may be reproduced thus:

Para 3 of Communication dated 13th March, 2019

“3. Cases pertaining to Demurrage charges on Customs detailed goods: As mentioned in your letter no.F. No. Viii(12)Import/Tech/193/2018/2285 dated 19th Feb 19, the matter regarding following cases have been discussed with Cargo Terminal Operator-1 (CELEBI):

- a) M/s. Md.Salim Chaiwala
- b) M/s. Nanda Gum House
- c) M/s.Overseas
- d) M/s. Afzal Khan (Note: CELEBI is not party in this matter)

As you are aware, *the above cases (a, b & c) are sub-judice before Hon'ble High Court at Delhi to decide on the issue of payments/wavier of demurrage charges. CELEBI has however assured to provide all support in early settlement of these cases as per the requirements of Customs. Further as instructed by your good self, the Custodian will not charge any demurrage for the particular period for which detention certificate for detention of goods has been given to the Operators at least by the rank of the Joint Commissioner of Customs, until any further development on this matter.*

(Emphasis supplied)

Para 3 of Communication dated 15th March, 2019

“3. Demurrage charges:- *The cases pending in judicial forum in respect of waiver of demurrage charges shall be settled as per the assurance given in your letter no. DIAL/2017-18/Comm Cargo/2014 dated 13/03/2019 and in the meeting held on 13/3/2013. Further Custodian shall not claim any demurrage charges in compliance of regulations 6(l) of Handling of Cargo in Customs Areas Regulations, 2009 which read as follows:-*

“subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be”

It is clear that the aforesaid “undertaking” by DIAL, to the effect that no demurrage would be charged by the custodian, for the period covered by the detention certificate, was with respect to four specific cases, relating to (i) Md. Salim Chaiwala, (ii) M/s. Nanda Gum House, (iii) M/s. Overseas and (iv) M/s. Afzal Khan. The undertaking, therefore, has no

application, whatsoever, to the petitioner before us and we are not, therefore, required to express any opinion regarding the said undertaking, or the effect, in law, thereof.

143. Mr. Manish next pointed out, to us, that the AAI Regulations of 2003 specifically stated that they superseded the earlier existing International Airport Authority of India (Storage and Processing of Goods) Regulations, 1993 (hereinafter referred to as “the IAAI Regulations”). The waiver policy, to which Mr. Tiku had drawn our attention, it is sought to be pointed out, was issued under the IAAI Regulations of 1993 Act, therefore, had no application to the AAI Regulation of 2003.

144. We do not propose to enter into this controversy, as there is no prayer in the writ petition, by the petitioner, for being allowed the benefit of the waiver policy of CELEBI. It would be open to the petitioner to approach CELEBI, seeking waiver of demurrage charges, and it would be equally open to CELEBI, to take a call thereon. We express no opinion on that matter.

145. Mr. Manish also sought to rely on the Airports Economic Regulatory Authority of India Act, 2008 (hereinafter referred to as “the AERA Act, 2008”). He took us through various provisions of the AERA Act, 2008 and referred us, especially, to Section 2(A)(i)(iv) and (v), and Section 13 of the said Act. He submits that, in view of the coming into force of the AERA Act, 2008, the AAI Regulations 2003 would cease to apply.

146. This submission, too, in our view, is entirely bereft of substance.

147. The AERA Act, 2008 does not expressly or by necessary implication supersede the AAI Act. The very preamble of the AERA Act discloses that it is intended to provide for establishment of the AERA to regulate tariff and other charges for aeronautical services and monitor performance standards of airports, as well as for incidental matters.

148. We do not see the functions of AERA as overlapping, in any manner, with the duties of CELEBI, under the Concessionaire Agreement. In this context, we may usefully reproduce Section 13 (i) of the AERA Act, which delineates the functions of the AERA, thus:

“13. Functions of Authority—

(1) The Authority shall perform the following functions in respect of major airports, namely:—

(a) to determine the tariff for the aeronautical services taking into consideration—

(i) the capital expenditure incurred and timely investment in improvement of airport facilities;

(ii) the service provided, its quality and other relevant factors;

(iii) the cost for improving efficiency;

(iv) economic and viable operation of major airports;

(v) revenue received from services other than the aeronautical services;

(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;

(vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to all or any of the above considerations specified at sub-clauses (i) to (vii);

(b) to determine the amount of the development fees in respect of major air ports;

(c) to determine the amount of the passengers service fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934(22 of 1934);

(d) to monitor the set performance standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorised by it in this behalf;

(e) to call for such information as may be necessary to determine the tariff under clause (a);

(f) to perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.”

149. A reading of the aforesaid sub-section (1) of Section 13 of the AERA Act makes it abundantly clear that the AERA is basically concerned with fixing tariff, and not with other airport services, including actual collection of demurrage, for continued storage of the goods. The reliance, by Mr Manish, on the AERA Act is, therefore, misplaced.

150. Mr. Manish also relied on the judgment of the Supreme Court in *Continental Carbon India Ltd. v. U.O.I.*²⁴, the judgment of this Court in *Trip Communication Private Ltd. v. U.O.I.*²⁵, *Delhi International Airport Private Ltd. v. U.O.I.*²⁶ and of the High Court of Allahabad in *Paswara Chemicals Ltd. v. U.O.I.*²⁷.

151. In our view, none of these judgments can come to the aid of the petitioners.

152. *Continental Carbon India Ltd.*²⁴ dealt with import of Carbon Black Feed Stock, by M/s Continental Carbon India Private Ltd. (hereinafter referred to as “CCIL”). The goods landed at ICD, Dadri, between June and September, 2014, and were detained on 6th September, 2014, by the Customs authorities, on the ground that the goods appeared to be hazardous in nature. Requests, for provisional clearance of the goods, were not acceded to. In November, 2014, the Central Revenue Control Laboratory (CRCL) reported that the goods were hazardous and directed CCIL to obtain No Objection Certificate (NOC) of the Ministry of Environment and Forest (MoEF). The MoEF examined the goods and opined that they were not hazardous. Consequent thereupon, the Customs authorities assessed the goods and permitted clearance thereof, by CCIL. The CCIL, thereafter, approached the Customs Cargo Service Provider, to obtain clearance of the goods.

²⁴ 2018 (361) ELT 193 (SC)

²⁵ 2013 (302) ELT 321 (Del)

²⁶ 2016 (234) DLT 445 (DB)

²⁷ 2016 (335) ELT 408 (All).

153. The service provider, however, refused to release the goods till its demurrage charges were paid. This demand, of the service provider, was assailed, by the CCIL, by way of a writ petition filed before the High Court of Allahabad.

154. *Vide* judgment dated 14th October, 2015, the High Court held the seizure of the goods, by the Customs authorities, to be unjust.

155. Thereafter, relying on Regulation 6(1)(l) of the Handling of Cargo Regulations, the High Court held that the service provider was not entitled to charge any demurrage, for release of the goods. However, the High Court limited the immunity, to CCIL, from the requirement of paying the demurrage for the period till 15th January, 2015. It was the Civil Appeal of CCIL, against the limiting of the relief, granted to it by the High Court, for the period till 15th January, 2015, which came to be decided by the judgment under discussion.

156. Having noted these facts, the judgment of the Supreme Court records, in para 5 of the report, thus:

“5. We may record that insofar as the respondents are concerned, they have accepted the judgment and, thus, there is no challenge to the findings of the High Court that the goods were wrongly detained/seized by the Customs Authorities. It is in this backdrop that the question is to be decided as to whether relief of non-payment of charges should have been restricted till 15-1-2015.”

157. It is clear that that the Supreme Court was not concerned with the entitlement, or otherwise, of the service provider, to charge demurrage. The High Court had held, on this issue, in the negative, and the service provider had not chosen to challenge it.

158. The only issue, on which the Supreme Court deliberated and delivered judgment, was as to whether the High Court was justified in restricting the relief, granted to the CCIL, for the period till 15th January, 2015. Neither of the issues which arise before us in these writ petitions, i.e. regarding the entitlement of CELEBI to demurrage charges, or the issue of whether the petitioner would be liable to pay the said charges, therefore, arose for consideration before the Supreme Court. The Supreme Court examined, and pronounced upon, an issue with which the present proceedings are not concerned, in any manner.

159. The reliance by Mr. Manish on the decision in *Continental Carbon India Ltd.*²⁴, has, therefore, to be characterized as inapt.

160. *Trip Communication Private Ltd.*²⁵, if anything, supports CELEBI, rather than the petitioner. Demurrage charges, in the said case, too, were, demanded by CELEBI, and the Supreme Court was seized with the issue of the entitlement of CELEBI to the said charges, in the light of Regulation 6(1)(l) of the Handling of Cargo Regulations (referred to, in the judgment, as “HACCR”). On the said issue, however, this Court concerned itself more with the issuance of detention certificate by the Customs authorities, and with the waiver policy of CELEBI.

161. This Court deprecated the policy of the Customs authorities to recklessly issue detention certificates, even in respect of cases of mis-declaration, undervaluation and concealment, thereby equating honest, with dishonest, importers. In case the importer was found innocent, and no fine, penalty or personal penalty was confirmed against him, it was

held that the importer could apply for waiver, as per the waiver policy of CELEBI. Para 47 of the judgment may be reproduced, to advantage, thus:

“In cases where the importer is found innocent and there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities, the Policy for Waiver would be applicable and the importer would be entitled to be considered for its benefit provided a certificate entitling him to be so considered is issued by the custom authorities. The importer would not be automatically exempt but would be covered under the Policy for Waiver and eligible for waiver which would be granted subject to other compliances.”

162. Clearly, therefore, *Trip Communication Private Ltd.*²⁵, if anything, underscores the position that, where the importer has suffered an order of confiscation, fine and penalty, it would not be entitled to waiver from demurrage, as per the waiver policy of CELEBI.

163. Inasmuch as Mr. Manish has sought to contend that the waiver policy, on which Mr. Tiku relied, and to which reference is contained in *Trip Communication Private Ltd.*²⁵, was relatable to the IAAI Regulations, 1993, we do not propose to opine, any further, on this aspect.

164. The reliance, by Mr. Manish, on the decision in *Delhi International Airport Private Ltd.*²⁶ is also, in our view, counter-productive, as is apparent from paras 17 to 20 of the report, which may be reproduced thus:

“**17.** In the present case, the Court notices that the power to frame regulations is located in Section 42(1) and (2) of the Airports Authority of India Act, 1994, which, by clause (d) (of sub-section [2]) provides the following specific regulation making power:

“(d) the storage or processing of goods in any warehouse established by the Authority under clause (g) of sub-section (3) of section 12 and the charging of fees for such storage or processing”

18. Section 141(2), - of the Customs Act, inserted by Finance Act 18 of 2008 provides as follows:

“(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as maybe prescribed.”

19. This court has, in its preceding discussion, held that the above power cannot be questioned, as wide and that as long as Parliamentary intent is discernable, subordinate legislation, which broadly conforms to its objectives, cannot be impeached. In exercise of its powers, Regulation 6(1) was framed; it specifically obliges service providers not to charge demurrage in certain cases if directed not to do so (“subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be.”). Interestingly, the duty not to charge - when imposed by any customs official authorized to do so, is specifically subordinated to other laws (“subject to any other law for the time being in force”). Thus the powers under the Airports Authority Act, 1994 (like in the case of the International Airports Authority in *Grand Slam*)- specifically, Section 42(2)(d)- discussed above are available for prescribing the rate(s) for storage charges. In *Grand Slam* (supra), the court had commented on the power of the Central Government to issue directions to the IAAI with respect to demurrage charges:

“The Central Government is empowered by section 35 of the International Airports Authority Act, 1971, and section III of the Major Port Trusts Act, 1963, to issue to the Authority and the Boards of Trustees, respectively, directions on questions of policy after giving them an opportunity, as far as practicable, of expressing their views. -the Central Government can, if so advised, after giving to the Authority and the Boards of Trustees the

opportunity of expressing their views, direct them, under the aforementioned provisions, not to levy demurrage charges for periods covered by detention certificates.”

20. Identical power vests with the Central Government under the AAI Act to issue directions (Section 40). In the event DIAL is of the view that customs authorities' directions to it to not charge demurrage are unwarranted, it can seek guidance and directions in that regard, from the Central Government. In these circumstances, the grievance that Regulation 6 can potentially render DIAL's functioning unviable and result in losses to it, has to fail.”

165. In the afore-extracted paragraphs, this Court has, in its judgment in *Delhi International Airport Private Ltd.*²⁶, confirmed that

- (i) the AAI was empowered, under Section 42(2)(a) of the AAI Act, to frame regulations for the storage of processing of goods in any warehouse, established by the AAI and for charging of fees by AAI for such processing, and
- (ii) the duty, not to charge demurrage, as contained in Regulation 6(1)(l) stood statutorily subordinated to any other law for the time being in force.

166. It was for these reasons that the challenge to Regulation 6(1)(l), by DIAL, was repealed.

167. The contention, of Mr. Manish, that, by virtue of Regulation 6(1)(l) of the Handling of Cargo Regulations, CELEBI is not entitled to charge any demurrage from the petitioner, would, in fact, do disservice to the decision of this Court in *Delhi International Airport Private Ltd.*²⁶, and the *raison d'être* thereof.

168. The above reasoning would apply, *mutatis mutandis*, to all the writ petitions before us, i.e. WP (C) 7577/2019, WP (C) 11264/2019, WP (C) 8659/2017, WP (C) 8668/2017 and WP (C) 8734/2017.

Conclusion

169. For the aforesaid reasons, we are of the view that the prayer, of the petitioner, for issuance of directions to the respondents, not to collect any demurrage, in respect of the goods, imported by the petitioner and in the custody of CELEBI, is bereft of merit.

170. We confirm that CELEBI is entitled, despite Regulation 6(1)(l) of the Handling of Cargo Regulations, to charge demurrage in respect of the goods consigned to its custody, and to retain custody over such goods till the demurrage is paid. We also confirm that demurrage, to CELEBI, would be payable by the petitioners-importers in these writ petitions, and not by the Customs authorities.

171. We do not express any view regarding the entitlement, or otherwise, of the petitioner, to claim waiver of demurrage charges from CELEBI. It would be for the petitioner to prefer an appropriate application in that regard, and for CELEBI to take a call thereon, keeping in view its policy, and assessing the entitlement of the petitioner to waiver in terms thereof.

172. Subject to the observations contained in para 171 *supra*, these writ petitions are dismissed, albeit with no orders as to costs.

C. HARI SHANKAR, J.

CHIEF JUSTICE

DECEMBER 20, 2019/ HJ

