

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :30.09.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.11039 and 21016 of 2013
and M.P.Nos.2 and 3 of 2013

M/s.AGIL Freight Logistics Pvt. Ltd.

Rep. by its Director,

Ground Floor, Sooraj Towers,

No.128, L.B. Road,

Thiruvannamiyur,

Chennai - 600 041.

... Petitioner in both WPs

Vs

1. Chennai Port Trust

having its office at

Rajaji Salai, Chennai-600 001

Rep. by its Chairman

2. The Traffic Manager,

Chennai Port Trust,

Rajaji Salai,

Chennai - 600 001.

... Respondents in both WPs

Prayer in W.P.No.11039 of 2013 : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records relating to the order of the second respondent herein dated 05.01.2013 and 02.02.2013 in ref.No.C2(a)/1199/2012/T of the 2nd Respondent herein and quash the same.

Prayer in W.P.No.21016 of 2013 : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records relating to the order of the second respondent herein dated 25.07.2013 in ref.No.C2(a)/1199/2012/T of the 2nd Respondent herein and quash the same.

For Petitioner in : Mr.AR.L.Sundaresan,

Senior Counsel

both WPs

for M/s.AL.Gandhimathi

For Respondents : Mr.Haja Mohideen Gisthi
in both WPs

C O M M O N O R D E R

In these two writ petitions, the petitioner assailed the orders of the second respondent dated 05.01.2013, 02.02.2013 and 25.07.2013 in ref.No.C2(a)/1199/2012/T.

2. The petitioner, who is the Clearing and Forwarding Agent, has been carrying on business as Customs House Agent (CHA), Handling, Transport Contractor. For the said business purpose, storage space is needed and it had been applying from time to time to the respondents for grant of licence for storing the cargo discharged from the shipment inside the Port area. Accordingly, covered space measuring 4744 square metres (Sq. Mts.) at Heavy Workshop Eastern Shed BTC Shop and Machine Shop (1 to 11 Bays) near the Tenth Gate in III Section was allotted to the petitioner as Licensee under Customs Bond for occupation for a period of six months from October 2012 to March 2013 on monthly license basis for the purpose of storage of Raw Sugar subject to the condition that the petitioner should produce the certificate by the Customs for Private Bonded Warehouse.

3. The monthly license fee for the above space was fixed at Rs.5,97,265/- per month at the rate of Rs.6,287/- per 50 Sq. Mts. or part thereof per calendar month or part thereof as prescribed in the Scale of Rates (SoR) for the Chennai Port Trust, as amended from time to time. A further sum of Rs.31,33,969/-, inclusive of Service Tax, towards security deposit equivalent to three months license fees was also demanded by the respondents and has been paid by the petitioner. Accordingly, an allotment order was issued on 06.11.2012.

4. The petitioner stated that a quantity of 11500 Metric Tonnes (MTs) of raw sugar arrived at the Chennai Port by vessel V.M.Sector on 17.10.2012 and the discharge was completed on 28.10.2012 and was stored by the petitioner in the covered space allotted to it. The said cargo was from Brazil and the same belonged to Renuka Sugars and had to be re-exported to the Dar-Elsalam, Tanzania. As there was some problem at that time for re-export of raw sugar, the same could not be moved or stored anywhere else and there was a delay. However, the second respondent herein had issued a notice dated 05.01.2013 stating that the raw sugar bags discharged from the vessel stacked at the covered space measuring 4744 square meter are lying beyond 60 days from the date of discharge and the same attract three times penalty on normal license fee amounting to Rs.17,91,795/- for the month of December 2012 and the petitioner was advised to remit the same within 10 days and any delay beyond 10 days will attract penal interest @ 14.25% as per SoR.

5. On receipt of the above said letter, the petitioner started to remove the raw sugar and it was permitted to take delivery of 300 MTs of raw sugar and only 200 MTs of Raw sugar was still lying. On 02.02.2013, the second respondent had issued a letter observing that the license fee for the month of December 2012 and January 2013 for the above allotment and the penalty imposed for non-clearance of cargo beyond 60 days was still due from the petitioner and only upon payment of the same, the balance of 200 MTs of raw sugar stored in the allotted space will be delivered.

6. Immediately, the petitioner made a representation on 18.02.2013 and pointed out that the SoRs did not contain any clause levying three times penalty for the reasons that the cargo was lying beyond 60 days and is not justifiable. The said notice dated 05.01.2013 and 02.02.2013 are impugned in W.P.No.11039 of 2013 on the ground that the said demands were made by the second respondent without prior notice to the petitioner or even without issuing any Show Cause Notice.

7. After the above writ petition was filed and an order of interim stay was obtained from this court on 18.04.2013, the second respondent also served a calculation on the petitioner alleging that the outstanding dues payable as on 31.07.2013 was Rs.16,47,029/- towards license fee and Rs.46,70,475/- towards penal interest including service tax. The said demand dated 25.07.2013 is challenged in W.P.No.21016 of 2013.

8. In both the writ petitions, the petitioner has taken the ground that there is violation of principles of natural justice, as the demands are made without even issuing Show Cause Notice or enquiry being conducted. Secondly, the delay in movement of the cargo from the shed was beyond the control of the petitioner and it is only Customs Bonded raw sugar and customs bond was given for a period of one year and the cargo can be kept for 90 days, without payment of duty and it is bonded for delivery for 90 days. The demand for penalty for 200 square meters area occupied by 200 MTs of sugar is unsustainable, as the storage of the same beyond the stipulated period is not intentional and it was due to various other reasons beyond the control of the petitioner.

9. Both the writ petitions were resisted by the respondents by filing a common counter affidavit. It is stated by the respondents that the Chennai Port Trust is a statutory body governed under the provisions of the Major Port Trust's Act, 1963. Further, in exercise of powers vested with the Ministry of Shipping, Government of India under Section 111 of Major Port Trust's Act, 1963, the Land Policy Guidelines issued from time to time for the optimum utilization of the Port's lands. It is

stated that at the request of the petitioner dated 03.10.2012 for allotment of the BTC godown for storage of raw sugar, the second respondent issued Allotment Order No.205/2012 dated 06.11.2012 allotting the Covered Space measuring 4744 sq. mts. on monthly license basis to the petitioner. The said allotment order contains the relevant clauses with respect to measurement of the covered space and also the license fees. The allotment order was valid till 31.03.2013 as per clause 7. The Clauses governing the allotted space are stated in the allotment order dated 06.11.2012 and the subject allotment is subject to the clauses set out therein.

10. It is also admitted by the respondents that the partial surrender of the allotted area by the petitioner on 31.01.2013 was also accepted by the respondents and was communicated to the petitioner on 21.02.2013 as per the said letter the extent of 4744 sq. Mts. was reduced to 200 square meters from 01.02.2013. Consequently, the licence fee as well as penal license fee had also been reduced. According to the second respondent, the cargo was cleared from the allotted area on 05.09.2013 and the shed in vacant position was handed over only on 06.09.2013 and the total outstanding due payable by the petitioner was Rs.72,27,363/- upto February 2016. Therefore, when the petitioner is bound by the allotment order and the claim of the second respondent was based on SoR, the same cannot be challenged by way of writ petitions. Hence, the respondents sought for dismissal of these writ petitions.

11. The question that arises for consideration in the both the writ petitions is "whether the demand imposed by the respondent is arbitrary and violative of principles of natural justice and the levy of penalty for the entire area by the second respondent is unjust?"

12. The entire dispute is based on the allotment order for covered space of license issued by the respondents dated 06.11.2012. Clause 2 of the said order provides for the monthly licence fees for the period of six months, for which the petitioner has taken out the lease. Clause 7 provides for extension of the licence on certain conditions. Clause 10 lays down the conditions on the discharge of the cargo from the covered space. Clause 10 of the allotment order reads as follows :

"10. The Licensee who has been allotted covered cargo storage space shall vacate the cargo stored in it on or before 60 days from the date of completion of the discharge of cargo from the vessel. Prolonged storage of cargo beyond 60 days shall attract a penal license fee of three times the normal license fee for the period beyond 60 days from the date of completion

of discharge of cargo till the date of clearance of the said cargo from the allotted covered space. In respect of other cargoes stored in the covered space, for the prolonged storage beyond the normal allowed time the penalty as per the Scale of Rates and as amended from time to time will be applicable for the period for which it has been stored beyond the normal allowed time."

13. The above clause is incorporated for allotment of covered space only for quick evacuation of the cargo from the port, otherwise, it will be difficult for the ports to handle more volume at any point of time with the available space. It is argued by the learned counsel for the respondents that the said 60 days of period for clearance of single vessel's cargo was incorporated in the above clauses, only after a detailed analysis with the port users and the concerned associations. The said period is more than sufficient for clearing a single vessel's cargo from the port premises.

14. The allotment that was taken by the petitioner is based on a monthly licence for a maximum period of 6 months. In the instant case, the import started at 05.45 hours on 17.10.2012 and completed at 01.30 hours on 28.10.2012. Out of the above said quantity of 20,133 MTs, the petitioner had stacked 8725 of MTs in 4355 jumbo bags of raw sugar at the allotted BTC godown. The petitioner had started clearing the cargo from 23.10.2012 onwards. As per the stipulated condition of the allotment order, the entire cargo ought to have been cleared by 27.12.2012. Admittedly, the petitioner had not cleared the cargo within 60 days as per Clause 10 of the allotment order and hence, the same attracts penalty as per the SoR. Therefore, there is no question of surprise or issuing of show Cause Notice. When the petitioner is bound by the allotment order and the conditions contained therein, the same cannot be challenged now.

15. The complaint of the petitioner that the cargo could not be cleared within the stipulated time was beyond its control and there was a problem at that time for re-export of raw sugar is not the concern of the respondents. The time period specified in the allotment order itself is only to ease out the congestion inside the port and the place like the covered area allotted to the petitioner could be used as a transit area and the cargo loaded/unloaded therein have to be cleared at the earliest point of time in order to accommodate new arrival of cargo, whereas, the petitioner had utilised the said area as their godown till re-export of the cargo, which is not permissible.

16. It is pointedly submitted that as per private bonded warehouse terms, if the Port Trust apprehend any service

congestion in its transit areas to the detriment of the rapid transit of goods through the port, it may direct the owner/consignee of any specified goods to remove the goods within a time and on default, charge demurrage till the goods are removed. On the other hand, the Chennai Port itself can remove them from transit area at the expenses of the owners and stack them in any space within its premises. However, the perusal of the allotment order dated 06.11.2012 does not contain such a clause, but only levies three times penalty on a cargo being in private bonded warehouse.

17. The argument that the SoR does not contain any such clause permitting the respondent to levy three times penalty also cannot be sustained, as clause 10 of the allotment order very categorically provided that penalty as per SoR, as amended from time to time will be applicable for the period for which it has been stored beyond the normal allowed time.

18. The contention of the petitioner that it was responsible in bringing raw sugar to Chennai Port and unless the three times penalty is withdrawn, the other port users would be hesitant to use Chennai Port is unacceptable, as it is the concern of the respondent.

19. Admittedly, the petitioner had paid the license fees from December, 2012 to July, 2013, only upon the direction of this Court on 30.07.2013, as a condition for releasing the raw sugar.

20. The allotment order itself is specific about the number of days for the clearance of the cargo and the petitioner is well aware of the fact that the cargo has to be lifted within the stipulated time, but having failed to do so, it is liable to pay penalty. Therefore, there is no necessity for the respondents to issue any show Cause Notice for the levy of the penalty or penal interest.

21. It is pointed out by the learned counsel for the respondents that the letter dated 05.01.2013 is not a demand notice, but it is information of the respondent cautioning the petitioner with respect to imposition of three times penalty on the normal licence fees. Besides, the respondent had already issued a notice dated 21.02.2013, while accepting the partial surrender of space intimating the license fees for the space retained by the petitioner. In the same communication, it was specifically pointed out that the cargo was lying in the allotted area beyond 60 days from the date of completion of discharge and that the occupation is treated as unauthorized attracting three times penalty on the normal license fees as per condition No.10 of the allotment order. The penalty was levied at Rs.75,444/- for the month of February, 2013. The said notice

was not challenged by the petitioner. Instead, the petitioner had sent a letter dated 14.03.2013 requesting "WAIVER" of penalty and release of cargo for exports.

22. The learned counsel further submitted that while complying with the interim order granted by the Court, the petitioner had furnished an indemnity bond dated 19.08.2013. The cargo was cleared from the allotted area thereafter on 05.09.2013 and the vacant possession was given to the respondent on 06.09.2013.

23. The counter-affidavit specifically mentioned that the order impugned dated 05.01.2013 is only a communication and not a demand notice. As mentioned above, the license fees has already been remitted, the cargo has been removed on 05.09.2013 and vacant possession has also been delivered on 06.09.2013. It is only the penalty, that is payable, is outstanding.

24. As the penalty levied is for breach of contract, whether Section 74 of the Indian Contract Act, 1872, will be attracted. Section 74 provides for the measure of damages in two classes of cases : (i) where the contract fixes an amount to be paid in case of its breach ; and (ii) where the contract provides for any other stipulation by way of penalty. The instant case may fall under the second category, where a stipulation for increased interest from the date of default is fixed by way of penalty. The very purpose of genuine pre-estimate is to avoid litigation and the stipulated amount will be the liquidated damages.

25. However, the learned Senior Counsel argued that this stipulation in the allotment order is in a contract "in terrorem", which is a penalty and it cannot be enforced. The clause in the Scale of Rates for levy of three times the penalty is regarded in equity as a penalty but when the petitioner is given further time to lift the cargo the penalty cannot be intended to be in terrorem. The petitioner willingly had agreed to take on lease the covered space for a specific period and there is nothing to show that it was intended to be by way of terrorem. Nonetheless, on the above stated admitted facts, there is a breach on the part of the petitioner. Section 74 also says that a stipulation for increased interest from the date of default may be by way of penalty. But the burden is on the respondent herein to prove the extent of damages to levy three times the penalty and whether the pre-estimated levy of penalty as per the allotment order is bona fide.

26. Therefore, in the light of the above discussions, this Court is of the view that the impugned notice should be set aside and matter be remitted back to the respondent for

reconsideration. The petitioner may approach the respondent with a reasonable offer and the respondent shall consider the same in the light of stipulation in terrorem and amicably settle the issue, within a period of three months. Hopefully the petitioner will not come back to the court to show him any more indulgence.

27. In the result, the impugned order dated 25.07.2013 is set aside and the matter is remitted back to the respondent for reconsideration, in the light of the directions issued hereinabove. Accordingly, W.P.No.21016 of 2013 is allowed. Consequently, no further order is necessary in W.P.No.11039 of 2013 and the same is closed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

+1cc to M/s.S.Haja Mohideen Gisthi, Advocate, sr no.32197
+2cc to M/s.AL.Gandhimathi, Advocate, Sr no.32044 & 32043

W.P.Nos.11039 and 21016 of 2013
and M.P.Nos.2 and 3 of 2013

RP (CO)
RMP (19/11/2020)

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