

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	07.02.2020
Pronounced On	19.05.2020

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.6225 of 2010

and

M.P.No.1 of 2010

M/s.Qatar Airways,
Represented by its
Senior Cargo Operations Agent,
Mr.Suhas Shariff,
Integrated Cargo Complex,
Phase I, Room No.29,
Cargo Complex, Meenambakkam,
Chennai - 600 027. ... Petitioner

Vs.

- 1.Commissioner of Customs (Air),
Air Cargo Complex,
Meenambakkam, Chennai - 600 027.
- 2.The Asst. Commissioner of
Customs (Transshipment),
Air Cargo Complex, Meenambakkam,
Chennai - 600 027.
- 3.The Deputy General Manager - Cargo,
Airport Authority of India,
Integrated Air Cargo Complex,
Meenambakkam, Chennai - 600 027.
- 4.Asst. General Manager (F&A),
Airport Authority of India,
Air Cargo Complex,
Meenambakkam, Chennai - 600 027. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to quash the order of the 1st respondent dated 10.03.2010 issued in F.No.S.Misc.22/2009-(T.S) ACC and to direct the 1st respondent to bear the said transshipment charges payable to the 3rd respondent.

For Petitioner : Mr.Hari Radhakrishnan

For R1 & R2 : Mr.S.R.Sundar

For R3 & R4 : Mr.R.Parthiban

O R D E R

In this Writ Petition, the petitioner has challenged the impugned communication dated 10.03.2010 bearing reference F.No.S.Misc.22/2009-(T.S.) ACC, passed by the 1st respondent Commissioner of Customs (Air).

2. By the impugned communication, the 1st respondent Commissioner of Customs has rejected the application filed for issue of "Detention Certificate" to the petitioner to claim waiver of Transshipment Charges billed by the Integrated Air Cargo Complex, Airport Authority of India, Meenambakkam, Chennai 600027 (Air Cargo Complex for brevity), represented by the 3rd/4th respondent.

3. Petitioner an international airlines company engaged in transportation of goods and passengers has been issued with Demurrages and Transshipment charges by the 3rd/4th respondent for delay in transshipping the cargo brought by them for being transshipped to Trivandrum International Airport during the period between 26.11.2009 and 13.12.2009.

4. It is the case of the petitioner that since it has wide-bodied cargo aircrafts and since there is no facility for landing of such aircrafts in Trivandrum, the petitioner brought the cargo in these aircrafts to the Chennai International Airport for being transshipped to Trivandrum/Calicut by road.

5. The cargos meant for being discharged at the Trivandrum Air Cargo Complex were transshipped from Chennai Air Cargo Complex by road in its bonded vehicles after some delay.

6. Since there was delay in transshipment as a result of which the petitioner has been asked to pay transshipment and the demurrage by the Air Port Authority of India, Air Cargo Complex, Chennai.

7. The Chennai International Air Cargo Complex represented by 3rd / 4th respondent is the custodian of imported goods within the customs area under Section 45 of the Customs Act, 1962 had demanded a sum of Rs.82,89,226/- vide its bills from the petitioner. After adjustments of the amount paid by the petitioner, the final amount payable by the petitioner was quantified as Rs.65,46,830/-.

8. The case of the petitioner is that the petitioner attempted to file application for transshipment of cargo to Trivandrum which had arrived by Flight Nos.QR.6270, 6272 and 6274 between 26.11.2009 and 13.12.2009. However, the Customs Department delayed in receiving transshipment application and in completing the transshipment formalities and as a result of which there was delay and therefore the petitioner has been visited with additional burden of transshipment and demurrage charges by the Airport Authority of India (hereinafter referred as AAI) represented by 3rd / 4th respondent.

9. It is stated that the Customs Department refused to take applications pending and the goods were allowed to be transshipped only from 30.11.2009 to 05.01.2010.

10. The petitioner therefore requested the 1st and 2nd respondents to issue of "Detention Certificate" to claim waiver / remission from payment of demurrage charges from the 3rd/4th respondent at the earliest.

11. The petitioner submits that it sent a representation dated 11.12.2009 to the 2nd respondent, to permit transshipment of the imported cargo. In the said letter, the petitioner had specifically complained that it transshipment cargo has been stopped and that they are incurring huge demurrage charges in the hands of the 4th respondent.

12. The 2nd respondent by its letter dated 14.12.2009 merely queried the reasons for bringing the subject cargo to Chennai Airport instead of taking directly to Trivandrum.

13. The petitioner submits that the 2nd respondent's letter dated 14.12.2009 clearly brings out the fact that the Customs Department has not denied difficulty experienced by it in processing the transshipment applications of the petitioner. It is further submitted that by not permitting the petitioner to transship the cargo amounted to detention of the goods and therefore, the least the Customs Department could do was to issue "Detention Certificate" to the petitioner for it to claim waiver/remission of such amount from the 3rd and the 4th respondent.

14. It is further submitted that it is not an unusual practices of the petitioner and it has been transshipping the cargo for quite some time through the Chennai Port.

15. It is submitted that query raised in letter dated 14.12.2009 by the 2nd respondent was also not bonafide and intended to deflect the in-house problem faced by the Customs Department at that point of time.

16. The petitioner replied to the letter dated 14.12.2009 of the 2nd respondent and stated that the reasons for bringing the goods to Chennai. Subsequently, the 2nd respondent accorded

transshipment permission for the goods after an inordinate delay of more than three days and in some cases the delay has been extended to twenty eight days.

17. It is submitted that there was a clear inaction by the 1st and 2nd respondents in not facilitating free movement of imported cargo expeditiously by granting transshipment permission.

18. Since the 4th respondent issued a demand notice dated 08.02.2010 and called upon the petitioner to settle the dues accumulated due to the delay in transshipment, the petitioner submitted a letter dated 12.02.2010 to the 1st respondent and requested for issue a "Detention Certificate" to recommend waiver of extra transshipment and demurrage charges incurred since the delay in transshipment was not due to the fault or negligence of the petitioner. The petitioner has also requested the 3rd respondent to waive the demurrage charges.

19. Since the petitioner was unable to elicit any positive response from the respondents, the petitioner filed W.P.No.3317 of 2010 to consider and dispose its representation for issue of "Detention Certificate" and to recommend for waiver of demurrage charges by the 3rd / 4th respondent.

20. Meanwhile, by the impugned communication/order dated 10.03.2010, the 1st respondent rejected the request of the petitioner for issue of "Detention Certificate". Under these circumstances, W.P.No.3317 of 2010 was withdrawn and thereafter, the present Writ Petition was filed.

21. The 3rd respondent vide separate letter dated 19.03.2010 also rejected the request of the petitioner to waiver of demurrage charges on the ground that the Customs Department had not informed that the consignment was detained by them. The petitioner has not challenged the said order.

22. During the course of the hearing, for the 1st time, the learned counsel for the petitioner submitted that during the same period, 9 out of 11 customs officers who were serving at the Chennai Air Cargo Complex and handling transshipment of cargo were arrested and 8 of them were middle level officials and there was a complete disruption of the activities on account of arrest.

23. It is further submitted that couple of dealers were also arrested who were allegedly in cohorts with some of the arrested officers who had facilitated evasion of Customs duty and that the CBI had raided the residence of some of these officials and recovered a sum of Rs.17 lakhs of unaccounted cash and 25 lakhs worth jewellery apart from recovery of a sum of Rs.59,000/- in cash from the office premises.

24. To this effect the learned counsel for the petitioner also filed news papers clipping to state that there was a complete breakdown of the system and practically there were no officers available to receive the application and process the transshipment application by the 1st respondent.

25. The learned counsel for the petitioner further submitted that majority of the officers stationed at the Air Port were also remanded to judicial custody and therefore neither the transshipment applications were received nor processed which resulted in the late clearance of the imported cargo. It is therefore submitted that the petitioner cannot be saddled with liability.

26. These allegations regarding arrest of the customs officials of the Air Cargo were not the basis of the writ petition. These were highlighted for the Court to take judicial notice of the prevailing ground reality then which had totally crippled and disrupted the transshipment operation.

27. However, in the affidavit filed in support of the present writ petition, the petitioner has merely stated that the customs department did not permit them to file transshipment application on time and therefore request was sent to the 1st respondent on 11.12.2009 to permit transshipment of the subject goods. The learned counsel for the petitioner relied on the following judgments:

- i. Shipping Corporation of India Limited Vs. C.L.JainWoolen Mills, 2001 (129) ELT 561 (SC).
- ii. AgrimSampada Limited Vs. UOI, 2004 (168) ELT 15 (Del.)
- iii. R.K.Enterpries Vs. Board of Trustees, Chennai Port Trust, 2010 (257) ELT 67 (Mad.).
- iv. Mumbai Port Trust Vs. Shri Lakshmi Steels, 2017 (352) ELT 401 (SC).
- v. Trip Communication Pvt. Ltd. Vs. Union of India & Others, order dated 28.03.2014 passed by the Delhi High Court in W.P.(C).No.7438 of 2018.

28. The respondents have filed their counter affidavits. According to the 1st and 2nd respondents, the imported cargos were allowed to be transhipped as and when the applications were filed. The applications were processed without delay and therefore there is no question of issue of any "Detention Certificate" to recommend waiver of transshipment charges and the demurrages. He further submitted that the petitioner has suppressed material fact regarding the rejection of the request by the 3rd and the 4th respondents.

29. The learned counsel for the 1st and the 2nd respondents submitted that even if there was a delay on the part of the

Customs Authority, though which is not the case here, the petitioner was guilty of not filing the transshipment application in time and there is no evidence to substantiate the delay and therefore the petitioner cannot claim any waiver from payment of demurrage and detention charges.

30. It was further submitted that it was however open for the petitioner to approach the 3rd and the 4th respondents for waiver in accordance with provisions of the Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003. The said application was also rejected by the 3rd / 4th respondent which fact has been suppressed in this Writ Petition.

31. He drew my attention to paragraph 37 of the decision in Mumbai Port Trust Vs. Shri Lakshmi Steels, 2017 (352) E.L.T.401 (S.C), wherein, the Hon'ble Supreme Court held that it is the importer alone is liable to pay the demurrage charges. It is submitted that Regulation 6 of the Handling of Cargo in Customs Area Regulations, 2009 is not applicable.

32. He further submits that the 3rd and the 4th respondents are entitled to collect the charges under the provision of the Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003. Further, the request for "Detention Certificate" was belated and not bonafide and such certificate cannot be granted as a matter of right.

33. The learned counsel also submitted that the news paper report which were circulated during hearing in the additional typed-set of documents were intended to prejudice the mind of the Court. It is further submitted that the news items that there were arrests has to be examined from the prism of Section 81 of the Evidence Act. News items from newspaper cannot be treated as proof of the facts stated therein. It is submitted that the content of newspaper are hearsay and are not genuine. The learned counsels for the respondents relied on the following decisions:-

- i. Mumbai Port Trust Vs. Shri Lakshmi Steels and Others, (2018) 14 SCC 317.
- ii. Ravinder Kumar Sharma Vs. State of Assam and Others, (1999) 7 SCC 435.
- iii. Kunjikoya Vallana Kunnummal Vot House Vs. Chairman, Cochin Port Trust, 2019 (344) E.L.T. 810 (Ker.)
- iv. Jindal Drugs Limited Vs. Union of India, 2018 (361) E.L.T. 769 (S.C.)

34. The 3rd and the 4th respondents have stated that the petitioner is not entitled to any waiver in absence of any "Detention Certificate" and that the goods were allowed to be transhipped on credit basis even though the Port Authority

has lien over the goods until payment of charges.

35. I have heard learned counsel for the petitioner and the respondent.

36. The dispute herein pertains to collection of Transshipment and other charges such as demurrage for storage of containers by the custodian of the goods.

37. Demurrage is collected by the Custodian of the import or export goods for the delay in removal and for occupying the space within its space beyond the time given.

38. Detention charges on the other hand are collected by the liner or the carrier as the case may be when the consignee holds onto the carrier's container outside of the port, terminal, or depot beyond the free time that is allotted. Detention amount is charged when import containers have been picked up and continues to be in the possession of the consignee and is not been returned within the allotted time. It is a private arrangement/ contract between the liner and the consignee.

39. For instance, if a period of 3 days is provided for return of an empty import container to the steamship liner or carrier as the case may be and the consignee takes more than three days to return this container, the steamship/carrier may charge for such Detention.

40. As far as transshipment of imported cargo is concerned, it is governed by Chapter VIII of the Customs Act, 1952. As per Section 54(3) of the said Act, a proper officer may allow the goods to be transshipped, without payment of duty, subject to such condition as may be prescribed for the new arrival of such goods at the Customs station to which transshipment is allowed.

41. The Airport Authority of India and Port Authorities have been appointed as custodians of imported goods under Section 45 of the Customs Act, 1962. Over a period of time, private operators have been allowed to be operated as custodians to decongest the ports and airports.

42. An elaborate procedure has been prescribed for being followed by custodians of the goods appointed under Section 45 of the Customs Act, 1962.

43. As far as imported cargoes which are to be transshipped by a motor vehicle, such transshipment shall be made only on the permission in writing of the Commissioner of Customs as is evident from a reading of proviso to Regulation 3 of the Goods Imported (Conditions of Transshipment) Regulations, 1995.

44. The procedure for transshipment of imported cargo in containers/trucks from the airports/ACCs to ICDs/CFSSs/Airports/ACCs to the ICDs/CFSSs/Airports/ACCs was explained in CircularNo.69/99-Cus dated 6/10/1999 from F.No. 450/33/94-Cus. IV was issued by the Central Board of Excise and Customs. Same is reproduced below.

Circular No. 69/99-Cus
dated 6/10/1999

F.No. 450/33/94-Cus. IV
Government of India
Ministry of Finance
Department of Revenue, New Delhi

Subject : Movement of Imported Cargo by
Containers/Trucks from Airport/ACCs to
ICDs/CFSSs/Airports/ACCs - reg.

I am directed to invite your attention to the subject mentioned above and to say that a number of references have been received from the trade and the Ministry of Commerce for allowing movement of imported cargo in containers/trucks from the airports/ ACCs to ICDs/CFSSs/Airports/ACCs to the ICDs/CFSSs/Airports/ACCs is required in view in the fact that the number of flights at most of the airports other than the gateway airports are restricted and there is loss of time involved in waiting for the cargo / passenger flights as per available schedule.

2. The matter has been examined. With a view to supplementing the existing flights and providing adequate flexibility to the trade in the choice of modes of transport, it has been felt that movement of imported cargo in containers/trucks should be allowed between airports/ACCs and airports/ACCs/CFSSs/ICDs. Accordingly the following procedure is laid down for transshipment of imported cargo under bonded trucking facility from airports/ACCs to ICDs/CFSSs/Airports/ACCs.

(i) On the basis of the request made by the trade and in pursuance of powers vested under Section 45 (1) of the Customs Act, 1962 the Commissioner of Customs will appoint the Airlines or their duty approved agents or the custodians of gateway Airport / ACCs or the custodian of destination ICDs/ CFSSs/ Airports/ ACCs as the custodian of all cargoes to be transshipped under bonded cargo trucking facility from Airport / ACCs to ICDs/ CFSSs / Airports / ACCs in hinterland by road. The permit will be valid for one year from the date of

issue initially and shall be renewed every three years subsequently.

(The Paragraph No.2(i) was amended vide Central Board of Excise & Customs' Circular dated 13.07.2000.)

(ii) The transshipment of import cargo will be governed by the provisions of Chapter VIII of the Customs Act, 1962 and the Goods Imported (Conditions of Transshipment) Regulations, 1995.

(iii) The cargo to be transshipped should have been manifested as for transshipment in the incoming international carrier who has landed the cargo. In respect of console cargo where the Master Airway Bill does not show the final destination, the Airlines filing transshipment application should keep a copy of both Master Airway Bill and House Airway Bill to indicate that the particular consignment sought for transshipment is for other inland customs Airport/ICD/CFS/ACC.

(iv) The custodian should execute a suitable running bond with a bank guarantee for an amount approved by Commissioner of Customs concerned for proper accountal of cargo. The amount will be debited from this bond when the transshipment cargo is taken by the custodian and it will be credited when the proof of handing over of the cargo to customs at final destination is produced. The custodian will be responsible for any shortage or pilferage of the cargo. The custodian will insure such goods for full value as well as the customs duty involved.

(v) The Custodian will submit a list of trucks together with registration numbers to be used for movement of each transshipment cargo. The trucks so deployed for transport should be specially secured to avoid pilferage of cargo and there should be a provision of affixing of Customs "Bottle Seals" on these trucks.

(vi) The airlines/custodian should have a transshipment warehouse within the Airport Apron area so that the goods on unloading can be shifted to the transshipment warehouse without having to be moved outside the Airport area. The concerned Airlines/Custodian warehouse should have double locking arrangement, one key of which will be with the Airlines/custodian and the other with Customs, for storage of transshipment cargo. Preventive

Officers will be posted at the Airlines/custodian warehouse on cost recovery basis.

(vii) If the Airlines/custodian does not have a transshipment warehouse, the import cargo for transshipment duly passed with transshipment application will be received by them from the Airport Authority of India"s (AAI) custody to their make-up area specially earmarked for the purpose of palletisation/containerisation on the same day under customs supervision and if for any reason the goods cannot be transshipped immediately, the same should be handed over to AAI.

(viii) The custodian so appointed and deciding to transship the cargo will present transshipment application (5 copies) alongwith the copy of Airway Bill (both Master copy and House Airway Bill wherever applicable) to the Customs officer incharge of transshipment clearance. The original transshipment copy must be affixed with Rs. 20 stamp as T.P fees. The transshipment application should contain details such as (a) name and address of the imported (b) name and address of the exporter; (c) country of origin; (d) Airport of destinations; (e) flight No. and date; (f) Import Manifest No. and date; (g) description of goods (h) value of the goods; (i) Nos of packages; (j) weight gross/net; and (k) details of container/palletised vehicle on which the cargo consignment is to be carried.

(ix) After scrutiny of T.P. application the T.P. Officer will issue Customs Bottle Seal and hand it over to the Customs Officer supervising the loading of the cargo in container/truck T.P. Officer will mention Sl.No. of Customs Bottle Seal on all copies of transshipment applications.

(x) On getting the transshipment permission the custodian/airlines will shift the goods from AAI warehouse to the make-up area earmarked for the purpose of palletisation/containerisation or shift the goods from their warehouse into the container/truck within the premises of the warehouse under the supervision of the Customs Officer posted for the purpose. After loading of the goods, the Customs Officer will seal the container/truck with Customs Bottle Seal and endorse all T.P. copies as : Supervised the loading ofNo. of packages on container/truck No. destined to airport/ACC/CFS/ICD and sealed with Customs Bottle

Seal No. on (date) covered by
Transshipment Permit No.
Name and Signature of Customs Officer

(xi) Original copy of T.P. application will be forwarded to the Import Freight Officer (IFO) of Customs at the Inland Airport/ACC/CFS of destination. Duplicate copy will be retained by T.P. Officer. Triplicate copy of T.P. application will be handed over to the Airlines/custodian. The 4th copy will remain with the Customs Officer posted in the Airlines/custodian warehouse and supervising the loading of cargo. The 5th copy will be sent in sealed cover along with the truck/container to IFO of Customs at the Airport/ACC/CFS/ICD of destination who will retain it after verification of cargo.

(xii) The Import Freight Officer of Customs at the inland airport/ACC/CFS/ICD of destination will check the Customs Bottle Seals and description of packages as per T.P. copy. He will tally the packages with the copies of the manifest received and will ensure that the packages are in good condition. The safety and security of the packages is the responsibility of the custodian. In case of any damage at the time of in transit, it should be clearly indicated in all copies of manifest and attested by custodian. The IFO at the airport/ACC/CFS/ICD of destination after receiving the cargo shall give a suitable endorsement on the original T.P. copy. Checked Customs Bottle Seal and packages as per T.P. application No. dated arrived on Container/Truck No. on (date).

Name and Signature of IFO Customs

The IFO will retain the T.P. copy sent with the truck for record.

(xiii) The endorsed original T.P. copy will be presented by the Airlines custodian as evidence of handling over of the cargo to the transshipment officer at the Air Cargo Complex/Airport from where the transshipment permission was granted.

On receiving such endorsed T.P. copy the transshipment officer will close the entry in the register. (xiv) The Airlines/custodian shall make necessary arrangements at the airport/ACC/ICD/CFS of destination to remove the cargo and deposit the same with custodians appointed under Section 45 of the Customs Act, 1962, under Customs supervision.

(xv) The Airlines/custodian shall produce the evidence of handling over of the cargo at the

inland airport/ACC/CFS/ICD of destination within 30 days from the dispatch of goods/failing which suitable action will be taken.

(xvi) The Airlines/custodian will be required to bear the expenditure on cost recovery basis over the preventive staff to be provided exclusively for this purpose. 3. You are requested to issue a suitable Public Notice incorporating the above provisions. Difficulties, if any, in implementing the above procedure may kindly be brought to the notice of the Board at an early date.

Sd/-

(C.P.Goyal)

Sr. Technical Officer (TU)

45. Transshipment is allowed subject to the condition that the declarant, i.e the person in charge of the conveyance of the imported cargo or his agent makes an application with the "proper officer" of the custom for permission to transship the imported goods. However, permission has to be granted by the 1st respondent.

46. Airlines or the carrier or its agent is required to pay application fee for transshipment of imported goods under the aforesaid Rules. Such transshipment is subject to permission in writing of the Commissioner of Customs.

47. Certificate for waiver of demurrage referred to as "Detention Certificate" is being now issued by the customs authorities to an importer to claim waiver from demurrage for the Port.

48. Only after appropriate permissions are granted by the 1st respondent, the imported cargo can be moved to the bonded trucks/designated vehicles of the petitioner for being transhipped. At that stage the petitioner as a transshipper also becomes the custodian of the imported cargo and it bound by the bond.

49. By not filing the application, the petitioner would not have gained any advantage. There is no explanation as to why the officers refused to receive the application for transshipment and clear the cargo immediately when the petitioner addressed letter dated 11.12.2009 to the 2nd respondent.

50. It is not as if the petitioner was transshipping such cargo for the 1st time through Chennai airport to Airports in Trivandrum and Calicut. If indeed there were no officers available to receive and scrutinise the application for transshipment for the reasons stated by the petitioner, obviously there will be delay in filing of transshipment

application. The imported cargo therefore cannot be transhipped and would stagnate in the premises of the Airport authority of India.

51. Therefore, the query dated 14.12.2009 of the 2nd respondent asking why cargo meant for Trivandrum were routed through Chennai instead of carrying them directly to Trivandrum indicates the request of the petitioner for immediate processing of Transshipment application was perhaps intended to deflect the problem phased by the Customs. No reasons was given by the 2nd respondent.

52. Therefore, in the background of the facts which have emerged, prima facie it appears the petitioner may not have been guilty of any delay in filing transshipment application.

53. However, this would require proper verification and presentation of facts before the 1st respondent. On this score, I am inclined to set aside the impugned communication and remit the case back to the 1st respondent to clearly state whether there was indeed mass arrest of officer who were manning the transshipment operation at the custom hold area at the Chennai Kamaraj International Air Cargo Complex during the material period.

54. As far as levy and collection of transshipment, demurrage and other charges by Airport authority of India are concerned, the Central Government under the provisions of the Airports Authority of India Act, 1994 has issued Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003.

55. The Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 fixes the charges for processing of the Cargo and also formulates policy for waiver of such demurrage charges.

56. The expression "Terminal Storage and Processing Charges" has been defined in Regulation 2(zc). It means the charges to be levied or collected by the authority or any authorised cargo handling agency for use of cargo terminal facilities, audit services and other expenses incurred including loading and unloading, storage and warehouse or processing cargo goods etc. and includes electricity charges, insurance premium, security charges, terminal charges electronic data interchange and electronic data interchange service centre charges, Value-Added Network service charges, charges for heavy cargo, and cargo requiring special care such as hazardous, perishable, live animals, valuable and express cargoes et cetera and license fee.

57. The expression "Transshipment Cargo" has been defined in Regulation 2(zd), to mean cargo which is unloaded from one

carrier and loaded or intended to be loaded on the same or another carrier or vehicle for on-carriage to its final destination.

58. The expression "demurrage" also has been defined in Regulation 2(2) of the aforesaid Regulation. It means the rate or amount of charges payable to the authority by the shipper or consigning or carrier or agent or passenger for utilising storage facility at the Cargo Terminal, for storage of cargo, goods, unaccompanied baggage, stores, Courier bags, express parcels, postal mail etc. for extended period beyond the stipulated period for clearance or removal from the Cargo Terminal or of the Customs at the Cargo Terminal.

59. During the relevant period, the cargo had to be cleared within 72 hours of its arrival. By order an dated 02.12.2016, this time has been now reduced to 48 hours by the Director, Ministry of Civil Aviation (ER Division).

60. For the purpose of Transshipment, the authority under the aforesaid Regulations relies on the relevant airlines and customs document upon its admission, handing over and delivery as the case may be for levy and collection of applicable charges.

61. Under Rule 4, the authority shall levy charges which may include unitisation and de-stuffing charges, facilitation charges, terminal storage and processing charges etc.

62. Under Regulation 6 of the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003, the Airport Authority can lay down procedure and policy for grant of waiver demurrages charges under the regulation. Though such scheme/policy exists for grant a waiver, neither the petitioner nor the 3rd/4th respondent have filed the same before this court.

63. Under the aforesaid Regulation 6, demurrage can be waived by the AAI represented by 3rd/4th respondent if no fine/penalty/personal penalty stroke/ warning was imposed by the customs authorities and where delay was on account of dispute in the assessable value or for re-validating or correcting the license in ordinary course of appraisal.

64. The Delhi High Court has dealt with the same in Trip Communication Private Limited Vs. Union of India in its order dated 28.03.2014 in W.P.(C.No).7438 of 2014. It has extracted relevant portion of the aforesaid policy relating to waiver of demurrage charges. It reads as under:-

"10.1 GENERAL

10.1.1 Subject to such policy, rules and procedures as may be described the authorities specified hereunder are authorised to sanction, in consultation with the Finance and Accounts

Department, remission/waiver of demurrage charges regarding Cargo Operation.
10.1.2 ...

...
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 licence in ordinary course of appraisal."

65. The authority namely AAI can thus grant waiver/remission of demurrage charges in consultation with the Finance and Accounts Department and grant regarding cargo operation. However, to grant such relief it relies on customs documents.

66. The procedure for issue of "Detention Certificate" was contained in Public Notice No. 111 of 1985 dated 29.07.1985 of the Bombay Custom House. Issue of "Detention Certificate" was an innovation by the Customs Authorities. This was introduced much prior to Handling of Cargo in Custom Areas Regulations, 2009. Though a copy of the Public Notice No.111 of 1985 is not traceable, para 2 of the said Public has been reproduced by the Hon'ble Supreme Court in BOARD OF TRUSTEES OF THE PORT OF BOMBAY Vs. JAI HIND OIL MILLS COMPANY, (1987) 1 SCC 648. Same extracted here under from the said judgment:-

Paragraph 2 of the said notice sets out the circumstances under which a regular detention certificate could be issued by the Customs House for facilitating the importers to get remission of demurrage charges. They are as under:-

"(a) Where the goods are detained by Customs House for bona fide operation of import control formalities without any default on the part of the importers.

(b) Where the goods have been released on caution (a regular detention certificate and not a recommendatory letter).

(c) Where the goods are detained [by] the Custom House pending test report and the facility of clearance against provisional assessment has not been allowed. Such detention certificates will be issued on merits for the period for which the goods were detained for the purpose.

(d) Where the goods are detained for PHO formalities, the certificate will cover the period stretching between the date of drawal of

the sample by the PHO and the date of his test results, and

(e) In cases where samples have been drawn from the imported consignments by the Assistant Drugs Controller for ensuring compliance with the provisions of Drugs and Cosmetics Act, 1940 and where the Assistant Drugs Controller is of the opinion that release cannot be allowed against a letter of guarantee pending tests."

8. The said public notice also states that detention certificates will not be issued in the following types of cases:-

"(a) Time taken by the Custom House Laboratory for analytical/chemical testing of samples drawn from the consignments, since the facility of clearing the goods on bond in terms of Section 18 already exists.

(b) Samples drawn from the imported consignments by the Assistant Drugs Controller for ensuring compliance with the provisions of Drugs and Cosmetics Act, 1940 and for being forwarded to the Central Drugs Laboratory, Calcutta, as the importers can avail of the facility of clearing the goods against letters of guarantee and need not wait till the receipt of the test report.

(c) The period taken for mutilation of woollen rags in the docks.

(d) Cases where goods are detained in the ordinary course of appraisement such as for determination of the tariff classification of goods or their assessable value in terms of Section 14 of the Customs Act."

67. Regulation 6(1)(1) of the Handling of Cargo in Customs Area Regulations, 2009 mandates that the Customs Cargo Service provider shall 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.

68. As per Regulation 6(1)(1) of the Handling of Cargo in Customs Area Regulations, 2009, a Customs Cargo Service Provider which includes the Air Port Authority of India cannot charge any rent or demurrage on the seized or detained or confiscated goods by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be. This was perhaps framed

in line with Public Notice No.111 of 1985 dated 29.07.1985 of Bombay Customs House.

69. The petitioner is insisting for the "detention certificate" from the 1st respondent so that the 3rd and the 4th respondents can be persuaded to not to charge any rent or demurrage on the imported goods which transshipment from the Chennai Airport.

70. The Superintendent of Customs or the Appraiser or the Inspector of Customs or the preventive officer or examining officer as the case may be can exercise the power to recommend waiver of demurrage and other charges that are chargeable by the custodian of the goods in whose place/premises the goods are stored before being transshipped.

71. In Trustees of the Port of Madras Vs. M/s. Aminchand Pyarelal, (1976) 3 SCC 167, the Hon'ble Supreme Court has held that the Port Trusts were under a statutory obligation to render services of various kinds in the larger public and national interest.

72. The Hon'ble Supreme Court also observed that the demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour and the rates are fixed in such a way that they would make it unprofitable for the importer to use the port premises as a warehouse. In case there is congestion in the port it would affect the free movement of ships and of essential goods. Therefore, the scale of rates had to be framed in such a manner that it worked both as an incentive to the importers to remove the goods as expeditiously as possible from the transit areas and also acted as a disincentive to keep the goods in the premises of the Board for a long time, thereby increasing the demurrage charges substantially with passage of time.

73. The Court further held that the High Court there was in error in holding that the Board's power to charge demurrage was limited to cases where the goods were not removed from its premises due to some fault or negligence on the part of the importer.

74. The Court thus held that it was the duty of the Board to recover rates; the Board had a lien on the goods and the right to seize and detain the goods, until the rates were fully paid and to sell the goods if the rates were not paid and recover the same. It was held that certain concessions may be given taking into account the hardship of the importers, but the legality of the rates cannot be questioned.

75. The Court further went on to hold that the importer of the goods was liable to pay the demurrage charges even if the importer was not responsible for any delay, or any fault could be attributed to the importer.

76. In International Airports Authority Vs. Grand Slam International, (1995) 3 SCC 151, the Hon'ble Supreme Court took note of Section 45 of the Customs Act and held as follows:-

"41. None of these provisions entitles the Collector of Customs to debar the collection of demurrage for the storage of imported goods. They do not entitle him to impose conditions upon the proprietors of ports or airports before they can be approved as customs ports or customs airports. Section 45 provides that all imported goods imported in a customs area must remain in the custody of the person who has been approved by the Collector of Customs until they are cleared and such person is obliged not to permit them to be removed from the customs area or otherwise dealt with except under and in accordance with the permission of the Customs Officer. Section 45 does not state that such person shall not be entitled to recover charges from the importer for such period as the Customs Authorities direct.

42. 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 seaports and airports, the facilities to be provided thereat and the charges to be recovered therefore. An importer must land the imported goods at a seaport or airport. He can clear them only after completion of Customs formalities. For this purpose, the seaports 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 seaport 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.

44. It cannot be gainsaid that, by reason of unjustified detention of his goods by the Customs Authorities, the importer is put to loss by having to pay demurrage charges for the periods of such detention. The Central

Government is empowered by Section 35 of the International Airports Authority Act, 1971 and Section 111 of the Major Port Trusts Act, 1963 to issue to the Authority and the Board 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 Board 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."

80. Hon'ble Venkatachala, J. as he was then in his concurring judgment, after referring to the various judgments of the Court cited held as follows:-

"66. 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, 1961, 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.

69. Therefore, my answer to the question considered by me is in the negative i.e. the Collector of Customs 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."

This Court clearly held that Section 45 of the Customs Act did not, in any manner, affect the rights of the International Airport Authority to collect charges from the importer.

77. In *Mumbai Port Trust Vs. Shri Lakshmi Steels*, 2017 (352) E.L.T.401 (S.C) : (2018) 14 SCC 317, the Hon'ble Supreme Court held as follows:-

32. Assuming for the purpose of the decision of this case that Mumbai Port Trust is a custodian or cargo service provider, the question that arises is whether these Regulations apply to the Mumbai Port Trust. These Regulations have been framed under Section 157 of the Customs Act. Section 160(9) of the Customs Act clearly lays down that nothing in the Act shall affect the power of the Port Authority in a major port, as defined in the Indian Major Port Trusts Act, 1963. It is not disputed before us that the Mumbai Port Trust is a major port.

33. As already explained hereinabove, the Mumbai Port Trust has the power and authority to levy rates including demurrage as fixed by the Tariff Authority under Section 47-A of the Act. This right of the Port Trust is not affected either by the provisions of the Customs Act or by the 2009 Regulations. Section 160(9) of the Customs Act clearly lays down that the provisions of the Customs Act shall not in any manner affect the constitution and powers of any Port Authority in a major port. This will include the right of the Major Port Authority that is a Major Port Trust to levy and charge rates and demurrage.

34. [Ed.: Para 34 corrected vide Official Corrigendum No. F.3/Ed.B.J./123/2017 dated 23-3-2018.] As far as the 2009* Regulations are concerned, these are the Regulations framed under the Customs Act. Regulations are in the nature of subordinate legislation. There can be no manner of doubt that subordinate legislation that too a legislation framed by a Board under the Customs Act cannot in any manner affect the power and authority of the Major Port Trust statutorily vested in it.

35. Neither the Regulations nor can the provisions of the Customs Act impinge or in any manner affect the statutory power of the Major Port Trusts to levy rates under the Act. In fact, the Authority that framed the Regulations was itself aware of this because Regulation 6(1) (1) itself begins with the words "subject to any other law for the time being in force". It is, therefore, obvious that the Regulations are subject to any other law including the Major Port Trusts Act. Therefore, these Regulations cannot in any manner affect the right of the Port Trust. We are, therefore, of the view that the High Court erred in holding that the law settled by this Court in a catena of judgments referred to above was no longer applicable in view of the 2009 Regulations. Reliance placed by the Union of India on Section 128 of the Major Port Trusts Act is totally misplaced. This provision only deals with the right of the Central Government to collect customs duties. It does not deal with the rights of the Port Trust to collect rates including demurrage.

36. The next issue which arises is whether any direction could be issued to the DRI/Customs Authorities to pay the demurrage charges to the Port Trust and the detention charges to the shipping line.

37. We have already referred to a number of decisions wherein the law has been clearly laid down that even if the importer is not at fault, it is the importer alone who is liable to pay the demurrage charges. As far as detention charges are concerned, this is a private contract between the importer and the carrier i.e. shipping line. The DRI/Customs Authorities can be directed to pay the demurrage/detention charges only when it has 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 if an importer feels that it has been unjustly dealt with, it must clear the goods by paying the charges due and then claim reimbursement from the Customs Authority.

* Handling of Cargo in Customs Areas Regulation, 2009.

78. The Hon'ble Supreme Court while giving the above decision has however not considered the provisions of the Airport Authority of India (Storage and Processing of Cargo,

Courier and Express Goods and Postal Mail) Regulations, 2003. Perhaps the Hon'ble Supreme Court may have come to a different conclusion if it had considered the 2003 Regulation.

79. Para 34 of the above decision has practically rendered Regulation 6 of the Handling of Cargo in Customs Area Regulations, 2009 otiose by holding that the said Regulation framed under the Customs Act was in the nature of subordinate legislation and there can be no manner of doubt that such subordinate legislation framed by the Board under the Customs Act cannot in any manner affect the power and authority of the Major Port Trust statutorily vested in it.

80. The Court thus followed its earlier decision in International Airport Authority of India vs. Grand Slam International [1995 (77) ELT 753 SC] and Trustees of Port of Madras vs. Nagavedu Lungi & Co., [1995 (80) ELT 241 SC].

81. If one were to go by the decision of the Hon'ble Supreme Court in Mubai Port Trust (cited supra) strictly in the question of issue of "Detention Certificate" which was in vogue prior to Handling of Cargo in Customs Area Regulations, 2009 is of no significance any longer. However, that interpretation would militate in the light of Regulation 6 of the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003. Therefore, this Court is not inclined to hold that such certificate can be issued at all.

82. The authorities under the Airport Authority Act, 1994 require certificate from the Customs for granting waiver from payment of demurrage under the policy framed under Regulation 6 of the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003.

83. In fact, such certificate need not be confined to the circumstances specified in Public Notice No.111 of 1985 dated 29.07.1985 of the Bombay Custom House alone. It can be issued in appropriate case to cover the circumstances specified in the Policy of the Airport Authority as per Regulation 6 of the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 as was noted in Trip Communication Pvt. Ltd. (cited supra) by the Delhi High Court.

84. As far as the present case is concerned, since none of the circumstances noted by the Delhi High Court in Trip Communication Private Limited Vs. Union of India are attracted, the question of the 1st respondent issuing such certificate to the petitioner for the petitioner to claim waiver does not arise. Therefore, to that extent the 1st respondent was justified in denying "Detention Certificate" to the petitioner.

85. Though, it is not the case of the abuse by the officers of the Customs, there are sufficient indications to show that there was a complete disruption of service at the Air Cargo Complex during the relevant period due to alleged arrest of the officers. In absence of the officers to receive the transshipment application, there could have been total disruption and no application was received which perhaps may have led to the delay.

86. If there were no proper officers or there were only few officers to handle the workload due to alleged arrest and the delay in receiving the transshipment application for being processed by the 1st respondent should not be at the cost of the petitioner. If indeed there was a complete breakdown due to alleged arrest and resulted in disruption of the operations at the Air Cargo Complex, the petitioner should be compensated as such delay cannot be attributed by the petitioner. This would require proper facts being established by the petitioner.

87. Therefore, this aspect would require proper verification. Issue is therefore left open for the petitioner to establish that Customs Department is liable to compensate the petitioner in the light of the observation of the Hon'ble Supreme Court in Mumbai Port Trust Vs. Shri Lakshmi Steels, 2017 (352) E.L.T.401 (S.C) : (2018) 14 SCC 317.

88. The petitioner may therefore establish before the 1st respondent that there was total or near total disruption of work due to alleged arrest of the customs officers and therefore, there was delay in receiving and processing of transshipment application and therefore the petitioner is entitled to compensation.

89. The 1st respondent also will have all the official information and details on this aspect. I am therefore inclined to remit the case back to the 1st respondent to pass appropriate orders after taking all the factors into account. The petitioner may independently substantiate the allegations before the 1st respondent with necessary documents.

90. The 1st respondent may clearly state whether indeed any of its officers stationed at the Air Cargo Complex for the purpose of processing the transshipment application were arrested as was claimed by the petitioner and whether such arrest resulted in disruption of operation at the Air Cargo Complex. If so, the petitioner shall be compensated.

91. The 1st respondent is therefore directed to pass appropriate orders within a period of three months from the date of receipt of a copy of this order. Meanwhile, the petitioner is directed to pay the amounts that are due to the 3rd and the 4th respondents.

92. This Writ Petition stands disposed with the above directions. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

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To

1. Commissioner of Customs (Air),
Air Cargo Complex,
Meenambakkam, Chennai - 600 027.
2. The Asst. Commissioner of Customs (Transshipment),
Air Cargo Complex, Meenambakkam,
Chennai - 600 027.
3. The Deputy General Manager - Cargo,
Airport Authority of India,
Integrated Air Cargo Complex,
Meenambakkam, Chennai - 600 027.
4. Asst. General Manager (F&A),
Airport Authority of India,
Air Cargo Complex,
Meenambakkam, Chennai - 600 027.

W.P.No.6225 of 2010
and M.P.No.1 of 2010
सत्यमेव जयते

AD(CO)
GMY(11/06/2020)

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