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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 3rd February, 2020.

\+ W.P.(C) 9219/2019

M/S J. P. IMPEX ..... Petitioner

Through: Ms. Anjali Manish, Mr. Priyadarshani Manish & Ms. Shweta Dhaka, Advs

Versus

PRINCIPAL COMMISSIONER OF CUSTOMS, AIR CARGO COMPLEX & ORS. ..... Respondents

Through: Ms.K.Enatoli Sema, Adv for R-1, R-2 and R-4.
Mr. Aditya Singla, Sr. Standing Counsel with Mr.Ravi Pathak, Adv. for R-3
Mr. Alok Shukla, Adv. For R-5

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

JUDGMENT

: **D. N. Patel, Chief Justice** *(Oral)*

1. This writ petition has been preferred by the petitioner seeking an issuance of a writ of mandamus to prohibit the Delhi Cargo Service Centre Pvt. Ltd., Respondent No. 5, (hereinafter referred to as "DCSC"), from charging demurrage from the petitioners with respect to the goods seized by the Commissioner of Customs in reference of two bills of entry, viz. 2933826 and 2934936, dated 22nd April, 2019 in pursuance of the Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009 (hereinafter referred to as "the Handling of Cargo Regulations").

FACTS

2. The petitioner, M/s. J. P. Impex, is averred to be a sole proprietorship firm mainly engaging in the import of accessories for mobile phones. On 22nd April, 2019, two shipments of such alleged accessories for mobile phones were imported and the petitioner filed bills of entry no. 2933826 and 2934936, valued at Rs. 5,69,126.65 and Rs. 5,66,078.17, with duty payable assessable at Rs. 2,06,516 and Rs. 2,07,040 respectively.

3. Thereafter, on 27th April, 2019, since the goods were not cleared for home consumption, the petitioner wrote to the Deputy Commissioner of Customs – (SIIB), New Customs House, New Delhi, for grant of permission for warehousing of the goods under the bill of entry number 2934936, under Section 49 of the Customs Act,1962 (hereinafter, "the Customs Act").

4. On 1st May, 2019, post examination conducted by the Customs – (SIIB) officers, it was found that the goods were mis-declared and found to be watches and thus the goods were seized, and Show Cause Notice was issued.

5. On 3rd May, 2019, the Deputy Director, DRI, Jaipur, wrote to the Joint Commissioner (Customs), SIIB, stating the following:

> "Since SIIB has taken over the custody of the goods on account of their seizure, therefore these seized goods may be deposited in malkhana / stored / warehoused / provisionally released as per rules and procedures in place at Air Cargo Complex, New Delhi regarding goods placed under seizure. Following action may be taken at your end with regard to the same.
>
> 1. If it permitted for warehousing shifting of the seize goods may be done in the warehouse of the custodian i.e. DCSC and

not in a third party warehouse in the presence of customs official (at least one officer).

2. The same may be done under Panchnama.

3. The valuation of the goods and calculation of differential duty may be done as soon as possible.

4. Deposition of differential duty if any by the importer may also be intimated to this office."

6. Pursuant thereto, on 6th May, 2019, the Assistant Commissioner (SIIB), Air Cargo (import), New Delhi, wrote to the CEO (DCSC), Import shed, ACC, New Delhi, stating with respect to the bills of entry numbered 2933826 and 2934936 dated 22nd April, 2019, that as per the letter received from DRI, Jaipur, the consignments would remain in the custody of the DCSC, and no demurrage shall be charged till the 'finalization of the investigations as informed by competent authority of Customs'. The communication further stated that this direction was issued with the approval of the Joint Commissioner (SIIB). The said communication is reproduced hereunder:

"To
The CEO (DCSC),
Import Shed, ACC,
Near IGI Airport, New Delhi-110037.

Sir,

Sub: Investigation against M/S J P Impex, M/s Mint Logistics i.r.o Bills of Entry no. 2933826 dt 22.04.2019, 2934936 dt 22.04.2019 & 2963662 dt 24.04.2019 – Reg.

Please refer to DRI/ SIIB alerts wherein imported goods vide Bills of Entry no. 2933826 dt 22.04.2019, 2934936 dt 22.04.2019 & 2963662 dt 24.04.2019 were kept on hold for investigation from 22.04.2019 & 24.04.2019 resp.

As per letter received from DRI, Jaipur above said three consignments 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 consignments from the date of holding of these Bills of entry i.e. 22.04.2019 & 24.04.2019 resp. till the finalization of the investigation as informed by competent authority of Customs.

This issues with the approval of Joint Commissioner (SIIB).

Yours faithfully
Sd/-
Assistant Commissioner (SIIB)"

(Emphasis supplied)

7. Subsequently, on 8th August,2019, the Show Cause Notice was adjudicated by the Joint Commissioner, ACC Import (SIIB) with reference to the bill of entry No. 2934936, and the duty was calculated at Rs. 23,97,489/- on predetermined assessable value of Rs. 58,75,197/- and goods were directed to be confiscated under Section 111(1) and 111(m) of Customs Act and in lieu thereof redemption fine of Rs.6,00,000/- was provided and a penalty of Rs. 21,90,445/-was imposed and personal penalty of Rs. 2,00,000/- was imposed.

8. The petitioner avers that they, thereafter approached the cargo handler with a request to release the seized goods, which was, however, turned down by the cargo handler as the demurrage charges, averred to be in tune of Rs. 35,00,000/-, was not deposited, and since the goods were not provided to the petitioner, the writ petition avers that the petitioner, therefore, had not deposited the redemption fine and personal penalty.

9. The petitioner submits that since the respondent has failed to issue the detention certificate in terms of Regulation 6(1)(l) of the Handling of Cargo Regulations despite the letter dated 6th May, 2019 whereby the Customs authority has undertaken not to charge demurrage, the goods have not been released for no fault of the petitioner, and thus, the petitioner has sought to invoke the writ jurisdiction of this court praying for a prohibition from collecting demurrage charges with respect to the goods referenced by the bills of entry numbered 2933826 and 2934936, dated 22nd April, 2019.

RIVAL SUBMISSIONS

10. We have heard learned counsel, Ms. Anjali J. Manish, counsel for the petitioner, Ms. K. Enatoli Sema, counsel for the Customs authorities, Mr. Aditya Singla, Senior Standing counsel for the Directorate of Revenue Intelligence and Mr. Alok Shukla, counsel for the DCSC, at length.

11. Ms. Anjali J. Manish, places her firm reliance on the letter dated 6th May, 2019, written by the Assistant Commissioner (SIIB), to the DCSC, submitting that this communication entitles her client from waiver of any demurrage charged.

12. The pleadings of Respondents no. 1, 2 and 4, conform with the communication dated 6th May, 2019, by the Assistant Commissioner (SIIB), to the DCSC, that keeping in mind Regulation 6(1)(l) of the Handling of Cargo Regulations, demurrage should be not be charged until the investigation is complete.

13. To buttress the direction for waiver of demurrage by the Assistant Commissioner (SIIB), reliance is placed on the communication dated 15th March, 2019, whereby the Joint Commissioner of Customs, ACC Import,

New Delhi had renewed the custodianship of the Delhi International Airport Ltd, under the Handling of Cargo in Customs Areas Regulations, 2009 issued under Section 141 (2) of the Customs Act, and, that one of the conditions contained therein, was that the Custodian shall not claim any demurrage charges in compliance of Regulation 6 (1) (1) of Handling of Cargo Regulations and thus, as a consequence, the DCSC was bound by the same. The relevant portion of the said communication is reproduced hereunder:

> "3. **Demurrage Charges**:- The cases pending in judicial forum in respect of waiver of demurrage charges shall be settled as per the assurances given in your letter ref no.DIAL/2017-18/Comm-Cargo/2214 dated 13/03/2019 and in the meeting held on 13/03/2019. Further Custodian shall not claim any demurrage Charges, in compliance/of regulations 6(1) 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"

14. *Per contra*, Mr. Alok Shukla, counsel for the DCSC contends that the reliance placed by the Customs authorities as well as the petitioner on the communication dated 6th May, 2019, for waiving demurrage charges is completely misconceived.

15. Mr. Alok Shukla makes a pointed submission that the Regulation 6(1)(1) of Handling of Cargo Regulations is misconceived since, the regulation itself is subject to 'any other law for the time being in force'.

16. It is submitted that, the power of the DCSC to levy demurrage dwells from the Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 (hereinafter referred to as "the Regulations, 2003"), specifically Regulation 10.1.10 thereof, which is reproduced hereinunder:

> "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."

17. Further, Mr. Alok Shukla submits that the Regulations, 2003 have been framed in the exercise of powers conferred by clause (d) of subsection 2 of section 42 of the Airport Authority of India Act, 1994, and thus, the Regulations, 2003, have the force of law.

18. He contends, thus, 6 (1) (1) of Handling of Cargo Regulations, is subject to Regulation 10.10 of Regulations, 2003, and therefore, demurrage charges cannot be waived, especially, merely on the direction by the Customs authorities.

19. It is pleaded by the DCSC, that by virtue of section 12A of the Airport Authority of India Act, 1994, the Authority of India (AAI) has entered into a joint venture and granted the functions of the AAI as defined under Section 12 of the AAI Act to the Delhi International Airport Pvt. Ltd. (DIAL) under the Operation, management and Development Agreement (OMDA) dated 4th April, 2006. Thus, DIAL became the Cargo Handling Agency under

Regulation 2(i) of the Regulations, 2003 and was conferred with the rights, obligations and powers as that of AAI.

20. It has been further pleaded that, the DCSC by virtue of the of the Concession agreement dated 19th November, 2009, has been granted the right and the authority by DIAL while exercising its right granted to it by AAI under OMDA, thereby authorizing DCSC to discharge the function of upgradation, modernization, financing, operation, maintenance and management and for providing Services at the Cargo Terminal of the Indira Gandhi International Airport, New Delhi. To buttress this submission, reliance is placed on clauses 7.1.2 and 7.1.3 of the Concession agreement.

21. Mr. Alok Shukla, further places reliance on ***Trip Communication Pvt. Ltd. v. U.O.I.***[1] and ***Mumbai Port Trust v. Shri Laxmi Steels***[2], to contend the petitioner was not entitled to any waiver of the demurrage charges.

22. Moreover, it is contended by the counsel for DCSC, that the petitioner has made no effort to pay any demurrage, whatsoever, and without payment of which, the goods cannot be released.

23. Ms. Anjali J. Manish, at the very least, as a secondary argument, seeks waiver of demurrage during the period of delayed filling of the counter-affidavit by respondents.

ANALYSIS AND CONCLUSION

24. The issue at hand, is squarely covered by our judgement rendered on 20th December, 2019 in ***Global Impex v. Manager, CELBI Import Shed***[3].

25. The petitioner, therein, had filed a Bill of Entry, dated 3rd May, 2019, for import of unbranded ready-made garments. A request for first check of

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[1] (2014) SCC OnLine Del 1318
[2] 2017 (352) E.L.T. 401 (S.C.)

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). Thereafter it was found that the goods were mis-declared in quantity, and thus, *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 being of relevance to the case at hand, deems reproduction, as under:

> "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."

26. This communication is on the same footing as that of the communication dated 6th May, 2019, on which the petitioner bases its case, like the petitioner did in ***Global Impex***[3].

27. Therefore, in ***Global Impex***[3] the rationale as set out by us, after analyisng a catena of judgments, is as follows:

> "**104.** From the aforecited 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

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[3] ***MANU/DE/4351/2019***

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."

(Emphasis supplied)

28. The custodian in ***Global Impex***[3] was CELEBI, and it was observed by us, regarding its power to charge demurrage as follows:

> "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. <u>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</u>.
>
> 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 subsection (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 utilizing 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". Subregulation (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.

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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, @ Rs. 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. <u>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.</u>

128. <u>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</u>.

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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 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."

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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."

(Emphasis Supplied)

29. At this juncture, drawing from ***Global Impex***[3] there are four significant principles, we would like to reiterate:

a. Firstly, charging of demurrage by the CELEBI, being in terms of the concessionaire agreement, between the DIAL and CELEBI, was entered into, in terms of the OMDA.

b. Secondly, the agreement was in accordance with Article 2.1 of the OMDA which, again in turn, was authorised by Section 12A of the AAI Act.

c. Thirdly, this, therefore, clearly constituted, "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.

d. Fourthly, it is expected that the Customs authorities, shall take a reasonable amount of time while exercising their power of search, seizure and investigation, and merely this, thus, cannot lead to transference of liability to pay demurrage, to the Customs authorities.

30. *Pari materia*, to the CELEBI, DCSC contends, and rightly so, that the Concession agreement dated 19th November, 2009 between the DCSC and DIAL, is in pursuance of the OMDA, which is duly authorized by virtue of Section 12A of the AAI Act, and therefore, the Clause 10.10 of Regulations, 2003, 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.

31. The position of DCSC is, therefore, *mutatis mutandis* with that of CELEBI, and as a consequence, our conclusion in ***Global Impex***[3] is applicable, on all fours, to the present case.

32. Therefore, we confirm that DCSC is entitled, in light of the 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.

33. Keeping in view, clause (iii) of para 104 in ***Global Impex***[3], we reiterate that the Customs authorities cannot direct waiver of demurrage, which can only be done by the custodian (the DCSC here). Moreover, merely because the Customs authority expends a reasonable time in dispensation of their sovereign functions of search, seizure and

investigation, cannot lead to transference of liability to pay demurrage, to the Customs authorities.

34. At the cost of repetition, we would reiterate that, 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.

35. In light of the aforesaid facts, circumstances and judicial pronouncements, we find no merit in this writ petition, and is hereby, dismissed.

36. This shall not preclude the Petitioner, from pursuing any claim for damages, against any of the Respondents, if permissible by and in accordance with law, if so advised.

CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 03, 2020
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