

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2021

Delivered on : 19.05.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.No.216 of 2021

Mr.S.U.Sirajdeen

...Applicant

Vs.

1.M/s.Well Trans Logistics India Pvt. Ltd.,
Flat No.306, 3rd floor, Real Enclave building,
No.43/22, Josier Street, Nungambakkam,
Chennai – 600034.

2.M/s.Cosco Shipping Lines (India) Private Limited,
No.60, (Old No.144/145),
Maalavika Centre, 4th Floor,
Kodambakkam High Road,
Nunambakkam, Chennai – 600 034.

...Respondents

Prayer: Judge's Summons Filed under Section 9 of the Arbitration and Conciliation Act, 1996, to issue direction to the 1st and 2nd respondent to release the imported goods covered under the House

Bill of Lading No.STT-HPH-2003001 dated 11.03.2020, and contained in container No.CBHU908337 after waiving the container detention charges applicable till the date of clearance of the goods in terms of the letter dated 03.10.2020 and 10.11.2020 of the Deputy Commissioner of Customs (Group 3), Chennai issued in F.No.S59/30/2020-Gr.3.

For Applicant : Mr.G.Derrick Sam

For Respondent 1 : No Appearance

For Respondents 2 : Dismissed vide order dated 24.03.2021

JUDGMENT

The applicant herein has moved this Court for the grant of interim measures under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter, for the sake of brevity, referred to as the Act.

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2. The applicant has sought for an interim measure in the form of a direction to the 1st and 2nd respondents to release the imported goods covered under the House Bill of Lading No.STT-

HPH-2003001 dated 11.03.2020 and contained in container No.CBHU9083374 after waiving the container detention charges applicable till the date of clearance of goods in terms of the letters dated 03.10.2020 and 10.11.2020 of the Deputy Commissioner of Customs (Group 3), Chennai in F.No.S59/30/2020-Gr.3.

3. The brief facts preceeding the filing of the application by the applicant are as follows:

The applicant herein had in the course of their business imported “non-woven interlining” from Vietnam. This is essentially non-woven textile material. The goods were imported under Bill of Entry dated 18.02.2020. They were shipped from Hai Phong Port, Vietnam to Chennai Port under a Bill of Lading dated 24.01.2020 issued by the 1st respondent. The goods had entered the Chennai Port and since the non-woven interlining embroidery paper was under classification CTH 5603 9200, the applicant had claimed the benefit of Customs Exemption and had attached all the relevant documents. However, the Customs took time to clear the

goods. Ultimately, the goods were cleared.

4. Meanwhile, the second consignment of goods had arrived at the Chennai Port under Bill of Entry dated 02.04.2020. These goods were also shipped from Hai Phong Port, Vietnam to the Chennai Port under the Bill of Lading dated 11.03.2020 issued by the 1st respondent herein. The goods were accompanied by a test report dated 19.03.2020 from the Textile Testing Centre, Vietnam Textile Research Institute, certifying the composition of the goods imported and the report was also presented to the Proper Officer of Customs. However, the Customs Authority refused to allow the applicant to clear the goods as a result of which demurrage and detention charges kept mounting.

5. The applicant was therefore constrained to file W.P.No.7677 and 7680 of 2020 before this Court for directing the Proper Officer of the Customs to assess and clear the goods and issue waiver certificate recommending waiver of demurrage and

detention charges.

6. By order dated 27.05.2020, this Court had directed the Assistant Commissioner of Customs to provisionally assess and clear the goods within a period of three weeks from the date of receipt of a copy of the order. By letter dated 25.06.2020, the Assistant Commissioner of Customs (DIU) had stated that the goods covered under the Bill of Entry No.6929147 dated 18.02.2020 was detained for investigation in respect of misclassification of cargo declared as non-woven interlining. In view of this, the CFS Manager was directed to take action for waiver of rent/demurrage.

7. Likewise in respect of the goods covered under the Bill of Entry No.7384974 dated 02.04.2020, the Deputy Commissioner of Customs (Group 3) by letter dated 03.10.2020 had directed the 1st respondent to waive the detention / demurrage charges. The goods covered under the Bill of Entry dated 18.02.2020 in the meantime

had been cleared.

8. The 1st respondent who was the freight forwarder, on receiving this letter requested the applicant to have the said letter addressed directly to the 2nd respondent stating that it is the 2nd respondent who is the actual carrier. In the said letter, they have referred to the Master Bill of Lading dated 11.03.2020 which refers to the 2nd respondent. By an e-mail dated 09.11.2020 the counsel for the applicant had requested the Customs Department to address the letter to the 2nd respondent. By an e-mail dated 10.11.2020, the Deputy Commissioner of Customs (Group 3) had issued the waiver letter to the 2nd respondent so that the Cargo covered under the Bill of Lading dated 11.03.2020 could be released.

9. By an e-mail dated 20.11.2020, the 2nd respondent directed the applicant to pay the detention and demurrage charges and take delivery without paying any heed to the communication dated 10.11.2020 issued by the Deputy Commissioner of Customs

(Group 3). The applicant would contend that as per Regulation (6) (1) (1) of the Handling of Cargo in Customs Areas Regulations, 2009, hereinafter referred to HCCAR, the Customs Cargo Service provider was not empowered to charge any rent or demurrage on the goods seized or detained or confiscated by the Customs department. Therefore, considering the fact that the goods had been detained by the customs the demand of the 2nd respondent was totally erroneous.

10. In fact the 2nd respondent had waived the detention charges in respect of the goods covered under the Bill of Entry dated 18.02.2020. However, for reasons best known to them the same has not been extended in respect of the goods covered under the Bill of Entry dated 11.03.2020. The case of the applicant is that the Bill of Entry issued by the 1st respondent contained an arbitration clause and the same is wide enough to include third parties and therefore the present application seeking the relief as stated supra.

11. The 1st respondent had entered appearance in person but had however chosen not to file their counter. They had no objections to the application being ordered.

12. The 2nd respondent had filed a counter affidavit, in which at the outset they would submit that this Court lacks jurisdiction since the Bill of Lading entered into between the 1st and 2nd respondents clearly stipulates that it is only the Courts at Shanghai, China which has jurisdiction. Further, the 2nd respondent is not a party to the Bill of Lading entered into between the applicant and the 1st respondent and it has been time and again held by the Hon'ble Supreme Court that a person who is not a party to the arbitral proceedings cannot be mulcted with liability nor can any relief be sought against them.

13. It is the case of the 2nd respondent that the application has been filed seeking unconditional release of the Cargo in terms of

the Regulations 6 (1) (l) of the HCCAR. The said regulation would not be applicable to the applicant. Further the order in W.P.No.7677 and 7680 of 2020 had directed the Customs Authority to issue a detention certificate. A fraudulent representation has been made to the Proper Officer of Customs when no such orders has been passed by this Court and this Court had only directed the respondent to consider the request of the petitioner. The Customs Department has also requested the respondent to consider the request of the petitioner for releasing the goods and there was no positive order in this regard.

14. The respondent would further submit that the Proper Officer of the Customs Department did not have authority or power to direct the container liner or the agent to waive detention charges. Further, the said Act does not also provide for a detention certificate to be issued in cases where the release of imported goods is withheld by the Customs department pursuant to certain investigation. They would therefore submit that by retaining goods

to date the 2nd respondent has incurred considerable expenditure for detaining the container liner and for storing it. Further in the Writ Petition there is no positive order directing the goods to be handed over and the applicant has totally misrepresented the orders passed by this Court in W.P.No.7677 and 7680 of 2020. He would therefore seek to have the application dismissed.

15. After the counter was filed a Memo dated 24.03.2021 was filed by the applicant giving up his prayer against the 2nd respondent and therefore, the application was dismissed against the 2nd respondent.

16. The learned counsel for the applicant would submit that the Bill of Lading constitutes the title of goods and the holder of the Bill was entitled to receive the goods mentioned in the Multimodal Transport Documents. Therefore, the minute the consignor receives the payment for the goods and endorses the Bill of Lading in favour of the consignee (the applicant in the instant

case) the consignee would immediately acquire title over the goods. Clause 16(2) of the terms and conditions of this Bill of Lading further provides that the 1st respondent's obligations would be discharged only on the delivery of the goods on the surrender of the original of the Bill of Lading. Therefore, it is incumbent upon the 1st respondent to ensure the deliver of the goods to the applicant. Further under the clause 21 the 1st respondent can exercise lien over the goods only if there is any amount due under the contract. Admittedly no amounts are due to the 1st respondent.

17. The learned counsel for the applicant would submit that they have no contract / agreement with the 2nd respondent and the Bill of Lading dated 11.03.2021 did not contain any stipulation that charges have to be paid by the applicant to the 2nd respondent. It is the 1st respondent who had engaged the service of the 2nd respondent for transporting the goods. The Proper Officer of the Customs had not assessed and cleared the goods covered under the Bill of Entry dated 02.04.2020 in time which constrained the

applicant to move a Writ Petition and despite orders of the Court the 2nd respondent has now refused to hand over the goods claiming detention charges. The detention was not on account of any fault on the part of the applicant.

18. The learned counsel would further submit that during the lock down several circulars had been issued by the Ministry of Shipping and the Directorate General of Shipping recommending the waiver of demurrage ground rent detention charges etc., He would submit that despite such circulars having been issued the 2nd respondent is refusing to hand over the goods and in their counter they have contended that they have a lien over the same by virtue of the Bill of Lading entered into between them and the 1st respondent herein. He would submit that it is the obligation of the 1st respondent to ensure delivery of the goods to the applicant.

19. The learned counsel for the applicant would submit that in the light of Regulation 6 (1) (l) of the HCCAR the Customs

Cargo Service Provider cannot charge any rent or demurrage in respect of goods detained by the Superintendent of Customs or Inspector of Customs etc., as the case may be.

20. He would submit that it was the Customs Authority who had taken considerable time to issue necessary orders for the release of the goods and therefore in the light of the above regulation the 2nd respondent was wrong in levying the charges and insisting on its payment for handing over the goods.

21. Heard the learned counsel appearing for the applicant and perused the papers.

22. The applicant herein has sought for a direction to the respondents to release the goods that are covered under the Bill of Lading dated 11.03.2020 and transported in Container no.CBHU9083374 after waiving the container detention charges in keeping with the letters dated 03.10.2020 and 10.11.2020 of the

Deputy Commissioner of Customs (Group 3), Chennai.

23. The letter dated 03.10.2020 is addressed to the 1st respondent by the Deputy Commissioner of Customs pursuant to the orders of this Court in W.P.No.7677 and 7680 of 2020, wherein they have directed the 1st respondent to accord waiver of detention and demurrage charges for the period till release dated 09.09.2020 in respect of the goods covered under the Bill of Entry dated 02.04.2020.

24. Likewise, the very same letter was thereafter addressed to the 2nd respondent on 10.11.2020 by the Deputy Commissioner of Customs (Group 3), Chennai. This letter was issued pursuant to the request of the 1st respondent to issue the letter directly to the 2nd respondent as they are the actual carrier of the goods. The 2nd respondent had addressed an mail dated 20.11.2020 informing the applicant that since the matter was pending with the headquarters the applicant could make the payment and clear the Cargo and if

the waiver is approved they would refund the same.

25. However, the applicant has not taken advantage of this request. Further the applicant has given up their claim against the 2nd respondent.

26. The question regarding the waiver of ground rent, detention charges etc during the pandemic had fallen for the consideration of the High Court Delhi in C.M.No.10546 of 2020 in W.P.(C).3029 of 2020. In the said Writ Petition, interlocutory application in C.M.No.10546 of 2020 was moved for a restraint order against the levy of these charges.

27. The Writ Petition was moved by an association comprising of persons involved in the business of importing plastic / polimer raw material from different countries through sea to supply it to manufacturers / companies engaged in the business of packaging of food, medicines and medical equipment etc. The

interim relief was strongly opposed by the Container Frieght Station (CFS), Inland Container Depot (ICD), who were the major port users. The learned Single Judge had in extenso extracted and considered the various guidelines, orders, etc., issued by the Government of India, Ministry of Shipping and DGS during the lockdown period.

28. The learned single Judge observed that these advisories, orders etc., were neither mandatory nor directory. They were advisories to shipping lines and Customs Stations of ICDs to adopt a sympathetic and humanitarian approach while levying container detention charges / ground rent charges of imported Cargo for the lockdown period. The learned Judge had considered the question as to whether the guidelines / letters which are only advisory in nature and contain no directions under a Statute would bind CFS and could direct them not to charge ground rent etc., The learned Judge observed as follows:

“As discussed earlier, the circulars/guidelines

and advisories issued by respondent no.1 and 2 are not binding upon respondent no. 3 to 6. Some of the advisories only contemplate that authorities concerned should adopt sympathetic and humanitarian approach and has advised them not to charge ground rent or penal charges. In these circumstances, there is no material on record which prima facie suggests that any right of the petitioner has been violated by the respondents. This Court is further of the opinion that since respondent no.3 to 6 are not bound by various guidelines/ letters/ advisories issued by respondent no.1 & 2, the balance of convenience also does not lie in favour of the petitioner”

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29. In the case on hand the container detention charges is demanded by the 2nd respondent since they have been compelled to detain the container as the Customs had not given their clearance

earlier and thereafter the applicant had been attempting to get a total waiver. During this period, the 2nd respondent was constrained to retain the Container. In fact by their e-mail dated 20.11.2020 they had requested the applicant to pay the detention charges and clear the Cargo and ultimately if the waiver was recommended by their Headquarters they had assured the amount would be refunded back to the applicant. The 2nd respondent had not turned down the request for waiver but had only stated that they required instructions from their Headquarters.

30. However, the same has not been taken advantage by the applicant. It is need less to state that if the 2nd respondent were to get any waiver from the CFS the same would be extended to the applicant. The 1st respondent is just a freight forwarding agent who assists the applicant to ship his consignment from the Port of loading to the Port of destination through shipping liners. The goods have safely reached the port of destination and there is no quarrel with regard to the same. The applicant is unable to obtain

release of the goods only on account of the non-payment of detention charges.

31. The reliance on various Circulars by the applicant, as held by the learned Judge of the Delhi High Court is misplaced since they are only advisories to the shipping liners / CFS / ICDs etc., and not directions having the force of law.

32. As regards the arguments of the learned counsel for the applicant with regard to Regulation 6 (1) (l), the same was the subject matter of consideration before the Bench of the Delhi High Court in the case of *M/s.Global Impex through its Partner Vs. Manager, Celebi Import Shed and another – W.P.(C).No.7577 of 2019 & C.M.No.47877 of 2019*, the petitioner therein had raised the very same defense as raised in the instant case. Ultimately, the Division Bench has held that the charging of demurrage by CELEBI was in terms of the agreement that they entered into. The charge being in terms of the agreement between CELEBI and the

Delhi International Airport Limited it should be understood that the charging and recovering of demurrage was only in accordance with “*law for the time being in force*”. Therefore, the bench had held as follows:

“The inevitable sequitur would be that the injunction, engrafted in Regulation 6(1)(l) of the Handling of Cargo Regulations, on the charging of demurrage in respect of goods detained/seized, or confiscated by the customs authorities, would not apply to, or affect, CELEBI.”

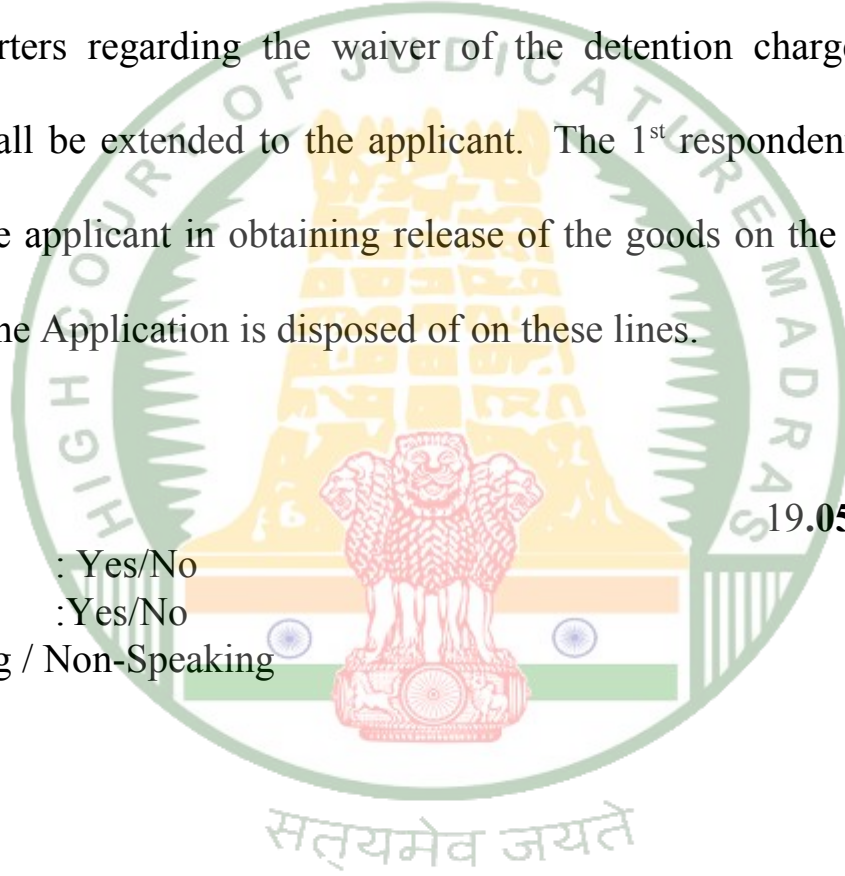
Therefore this argument will also not come to the rescue of the applicant.

33. However, taking into account the fact that the delay has been occasioned initially on account of the Customs not giving the clearance and thereafter, on account of the request for waiver of detention charges not being acceded to and also taking note of the 2nd respondent's response in their e-mail dated 20.11.2020, the

applicant shall be permitted to clear the goods contained in container no.CBHU908337 under the Bill of Entry dated 11.03.2020 on their paying the detention charges. In case the 2nd respondent has already received instructions from their headquarters regarding the waiver of the detention charges the same shall be extended to the applicant. The 1st respondent shall assist the applicant in obtaining release of the goods on the above lines. The Application is disposed of on these lines.

19.05.2021

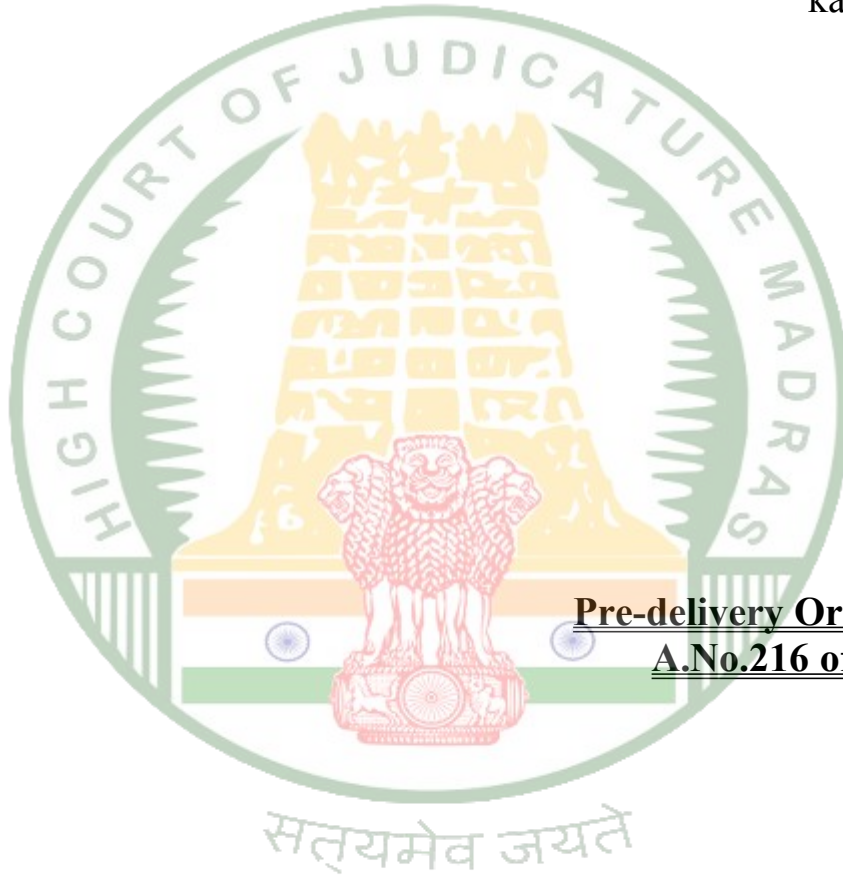
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Pre-delivery Order in
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