IN THE HIGH COURT OF JUDICATURE AT MADRAS

D A T E D : 26.02.2021

C O R A M

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

WRIT PETITION NO.29329 OF 2005
AND
WPMP NO.32135 OF 2005

Poompuhar Shipping Corporation Ltd.
Rep. by its Chairman and Managing Director,
IV Floor, No.692, Anna Salai,
Nandanam, Chennai - 600 035. ... Petitioner

Vs

1. Union of India
   Rep.by Secretary to Government,
   Ministry of Surface Transport,
   Transport Bhawan, No.1,Parliament Street,
   New Delghi - 110 001.

2. The Board of Trustees of the Port of Chennai
   Rep. by its Chairman,
   No.1, Rajaji Salai,
   Chennai - 600 001. ... Respondents

PRAYER :

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the Second Respondent in its file barring Ref No.F1/6471/2004/T issued by the Second Respondent to the Petitioners and quash the order dated 18.01.2005 and consequently direct the Second Respondent to refund to the Petitioner the sum of Rs.2,54,57,601/ unlawfully levied and collected from the Petitioner towards priority berthing hire charges for the period from 01.03.2000 to September 2002 in contravention of the decision of the First Respondent communicated through its Director (Port Traffic) vide D.O. Letter No. PT.11033/2/98-PT dated 28.02.2000, together with interest thereon at 18% per annum within a time limit to be fixed by this Court.

For Petitioner : Mr.Abishek Jenasenan

For Respondents : Mr.S.Janarthanan for R-1
Mr.R.Karthikeyan for R-2

O R D E R

The Petitioner challenges the order of 18.01.2005 - whereby the Petitioner's claim for a refund of priority berthing charges was rejected, and seeks a consequential direction for the refund of amounts paid towards priority berthing charges with interest thereon.

2. The Petitioner is a Government of Tamil Nadu undertaking, which functioned as an operating agent for the Tamil Nadu Electricity Board (the TNEB) and undertook transportation of coal by sea to thermal power plants in Tamil Nadu. For this purpose, the berths at various ports, including the Chennai Port, were used. According to the Petitioner, the Ministry of Surface Transport, Government of India, exempted coastal vessels, which are accorded priority berthing, from the obligation or liability of paying priority berthing charges. Consequently, the second Respondent should not have collected priority berthing charges from the Petitioner. On account of the insistence by the second Respondent to pay priority berthing charges, the Petitioner was constrained to pay the same so as to utilize the berths at the second Respondent Port. Thereafter, repeated representations were submitting seeking a refund of amounts paid as priority berthing charges. Eventually, by impugned order dated 18.01.2005, the request for refund was rejected on two grounds. The writ petition has been filed in the said facts and circumstances.

3. Mr.Abishek Jinasenan, the learned counsel for the Petitioner, relied heavily on the communication dated 28.02.2000 from the Ministry of Surface Transport (the MoST) to all the major ports(except Calcutta). In particular, he pointed out that paragraph 2 of the said communication called upon major ports to accord priority berthing to coastal vessels. Significantly, paragraph 3 thereof directed the major ports not to levy priority berthing charges on coastal vessels. According to Mr.Abhishek Jenasenan, the impugned order of 18.01.2005 flies in the face of the communication of 28.02.2000. Indeed, he contends that it is stated in the impugned order dated 18.01.2005 that the communication of 28.02.2000 is in the context of cargo movement to the Andaman and Nicobar Islands, whereas the communication of 28.02.2000 clearly does not refer to cargo movement to Andaman and Nicobar Islands. Therefore, he contends that the impugned order is liable to be quashed.

4. With regard to the second reason cited in the impugned order, namely, that exclusive berthing facilities were extended to the TNEB at the Chennai Port, he submits that the communication of 28.02.2000 does not exclude or contain a carve-out from the exemption as regards priority berthing charges for

those with exclusive berths. He further points out that the earlier communication of 20.02.1995 which permitted the levy of priority berthing charges on coastal vessels with exclusive berths was superseded by the subsequent communication of 28.02.2000. On a demurrer, he contends that exclusive berths were not offered; and that the berths were shared with persons handling phosporic acid and molasses, as would be evident from the communication of 10.06.2010 from the MoST to the Chennai Port Trust. For all these reasons, he submits that the Petitioner is entitled to succeed.

5. Mr.R.Karthikeyan, the learned counsel for the Chennai Port Trust, on the other hand, contends that the exemption provided by the communication of 28.02.2000 does not apply to users with exclusive berthing facilities. According to him, the communication of 20.02.1995 applies to persons such as the TNEB, which have access to exclusive berthing facilities. In effect, he contends that the communication of 20.02.1995 is specific to persons with exclusive berthing facilities and this communication clearly permits the levy of priority berthing charges. More importantly, he contends that this communication was not superseded by the subsequent communication dated 28.02.2000 which expressly supersedes only the communication issued on 05.01.2000. He refutes the contention that the berths were provided on non-exclusive basis by pointing out that the communication of 10.06.2000 indicates that other berths would be provided to TNEB if the allotted berths are used by those handling phosphoric acid and molasses. Therefore, he submits that the impugned order does not call for interference.

6. Upon considering the rival contentions, the first issue that arises for determination is whether the impugned order of 18.01.2005 is sustainable. Upon perusal of said impugned order, it is clear that reference has been made therein to the communication of the MoST dated 28.02.2000. However, it is evident that paragraph 3 of the said communication which was relied upon, with great emphasis, by the learned counsel for the Petitioner, has not been adverted to in the impugned order. Consequently, the implications of paragraph 3 have not been considered. Instead, an inference was drawn that the communication of 28.02.2000 pertains to cargo movement to Andaman and Nicobar Islands. Upon examining the communication of 28.02.2000, I find that there is absolutely no basis for the inference that the communication of 28.02.2000 pertains to cargo movement to Andaman and Nicobar Islands. Thus, in this respect, the impugned communication is undoubtedly flawed.

7. I now turn to the second reason cited therein, namely, that priority berthing charges have been accorded to the TNEB on an exclusive basis as regards three deep drafted berths at

Jawahar Dock. Once again, it is noticeable that the Chennai Port Trust has not adverted to the two communications of 20.02.1995 and 28.02.2000 and examined the interplay of the two communications before drawing conclusions.

8. For all these reasons, the impugned order of 18.01.2005 is not sustainable and is liable to be quashed. Nevertheless, it is clear from the documents on record that the question as to whether priority berthing charges are payable in respect of exclusive berthing facilities has not been examined in the impugned order or otherwise. Indeed, it was brought to my notice that in spite of the TNEB raising this issue with the Tariff Authority of Major Ports (the TAMP), the TAMP declined to exercise jurisdiction on the ground that the Government of India had issued instructions not to entertain a request for clarification as regards individual disputes.

9. From the documents on record, it is unclear as to whether the berths were used by TNEB, through the Petitioner, on an exclusive or non-exclusive basis. The rival contentions also indicate that this is a disputed fact. While learned counsel for the Petitioner contends that the Petitioner was entitled to the exemption even on the assumption that exclusive berth facilities were provided, the impugned order does not expressly address this issue and it is unclear whether there are any other communications from the MoST on this issue. Moreover, it is the admitted position that the TNEB is the licensee of the Chennai Port Trust but TNEB is not a party to the present proceedings. Consequently, in order to adjudicate the claim for refund, certain disputed questions of fact would be required to be determined, and TNEB would also have to be heard. It is also elementary that such disputed questions of fact are, ordinarily, not adjudicated in summary proceedings under Article 226 of the Constitution because it is not appropriate to do so on affidavit evidence. Therefore, I am not inclined to grant the consequential remedy of refund.

10. Based on the foregoing discussion and analysis, the impugned order of 18.01.2005 is quashed. Consequently, the Chennai Port Trust is directed to reconsider the representation of the Petitioner for refund of priority berthing charges after providing a reasonable opportunity to all parties concerned, including the TNEB. In light of the lapse of considerable time in the prosecution of this writ petition, the Chennai Port Trust is directed to consider and dispose of such representation by a speaking order, after taking into account the observations contained herein, within a period of two months from the date of receipt of a copy of this order.

11. This writ petition is disposed of on the above terms. Consequently, connected WPMP is closed. There will be no order as to costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
   Union of India
   Ministry of Surface Transport,
   Transport Bhawan,
   No.1,Parliament Street,
   New Delghi - 110 001.

2. The Chairman,
   The Board of Trustees of the Port of Chennai
   No.1, Rajaji Salai,
   Chennai - 600 001.

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.11818
+1cc to Mr.S.Janarthanan, Advocate, S.R.No.11822
+1cc to Mr.A.Jenasenan, Advocate, S.R.No.11843

W.P.No.29329 of 2005

PMK(CO)
CS/12/03/2021